

Case Number: BOA-22-10300226  
Applicant: Killen, Griffin & Farrimond, PLLC  
Owner: 281/Overlook Partners, L.P.  
Council District: 9  
Location: 2440 Celebration Drive (Overlook Town Center)  
Legal Description: P-19D and P-19E, CB 4865, P-4B and P-4E, CB 4900, and P-3A, CB 4926  
Zoning: "MXD GC-3 MLOD-1 MLR-2 ERZD" Mixed Use US 281 North Gateway Corridor Camp Bullis Military Lighting Overlay Military Lighting Region 2 Edwards Recharge Overlay District  
Case Manager: Mirko Maravi, Principal Planner

### **Request**

Appeal of Development Staff's denial of Nonconforming Use Continuation of Land Use Rights Notification of Decision for Overlook Town Center, NCU-APP-2022-11200106.

### **Applicable Code References**

***Unified Development Code Section 35-703, Newly Annexed Territories.*** Nonconforming rights may be granted to newly annexed areas in accordance with the following provisions and upon payment of the fees specified in Appendix "C." All applications for nonconforming rights must be filed within sixty (60) days of the effective date of annexation.

***Unified Development Code Section 35-703 (c) Master Development Plans.*** Newly annexed areas may be entitled to nonconforming rights for a master development plan upon favorable consideration by the zoning commission. The property owner must submit an application as prescribed by Appendix "B" of this chapter. The zoning commission shall conduct a public hearing on the nonconforming rights master development plan after giving notice to the owners of property within two hundred (200) feet in the manner provided in Section 35-403 of the City Code. The purpose of the public hearing shall be to ascertain (1) the extent to which development of the master development plan had progressed prior to annexation and (2) the extent to which the master development plan complies with the policies and objectives of the city's land use plan. If the zoning commission approves the master development plan, construction in conformance with the plan must begin within one (1) year, with all portions of the plan either completed or under construction within five (5) years from the date of annexation. After that time, the nonconforming rights shall expire.

***Texas Local Government Code Sec. 43.002. Continuation of Land Use.*** (a) A municipality may not, after annexing an area, prohibit a person from: (1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time; or (2) beginning to use land in the area in the manner that was planned for the land before the 90th day before the effective date of the annexation if: (A) one or more licenses, certificates, permits, approvals, or other forms of authorization by a governmental entity were required by law for the planned land use; and (B) a completed application for the initial authorization was filed with the governmental entity before the date the annexation proceedings were instituted.

### **Executive Summary**

Staff acknowledges and recognizes Master Development Plan MPD 14-00023 is valid and was filed as per Code for Newly Annexed Territories as a “completed application” under Section 43.002 of the Texas Local Government Code and Section 35-703 of the City Code.

Staff utilized Section 43.002 and Section 35-703(c) to review and interpret the request for Nonconforming Use for Continuation of Land Use rights. Staff finds that Applicant did not “begin to use the land in the manner that was planned for the land” at least 90 days before the property’s annexation date as required to obtain Section 43.002 land use rights. Therefore, the applicant would not qualify for the protections available under Section 43.002. Staff also finds that the property is currently vacant, that no construction had occurred within one year of the established MDP, and that the MDP was not under construction or completed within five (5) years of the annexation date. Because construction on the property did not begin within the first year and there are portions of the MDP that are neither completed nor under construction, the applicant’s land use rights obtained under Section 35-703 of the City Code expired on December 31, 2021.

Other evidence indicates that the scope and plan for the original project changed with the applicant’s zoning request. The MDP and subsequent grant of land use rights in this matter was for a commercial project. The approval of applicant’s voluntary zoning change to that of a Mixed Use Development (MXD) Plan demonstrates a change to the planned use of this project. This change of zoning of the subject property by Ordinance 2022-05-19-0382 is dated May 19, 2022. The uses approved as part of the MXD Plan have increased the types of uses allowed on the property and therefore reflects a change in plan due to the residential component that was added for multi-family to allow for a maximum density of 18 units per acre.

The applicant is utilizing the Texas Local Government Code, Section 43.002 to claim that a municipality may not, after annexing an area, prohibit a person from beginning to use land in the manner that was planned for the land before annexation through a “completed application” which is the existing MDP 14-00023. While this is correct, Section 43.002 also requires the applicant to begin to use their land in the way it was planned for “before the 90<sup>th</sup> day before the effective date of annexation. While applicant does not qualify for rights for the continuing use of the land (Section 43.002(a)(1)) or planned for use rights for the land (Section 43.002(a)(2)), San Antonio City Code allows developers to preserve newly annexed properties continuation of land use rights when complying with Section 35-703.

The requirements for a Nonconforming Use Continuation of Land Use rights application is found in Section 35-703(c) of City Code, which speaks to Newly Annexed Territory and procedure for consideration of potential continuation of land use rights. Applicant claims that because Section 35-703 of the City Code mentions similar subject matter as that which can be found in Section 43.002 of the Texas Local Government Code, Section 35-703 is void and therefore inapplicable. The Texas Supreme Court has long held that introduction of a subject in state law (such as land use concerning annexed territories in Section 43.002) does not preempt or invalidate home-rule city regulations on the subject unless the state law expresses a clear intent to do so. Staff has determined that based on state law, the applicant did not begin to use the land in a way that would afford them 43.002 nonconforming use rights. Staff has determined that based on the City Code, the 35-703 nonconforming use rights have expired. Additionally, the current MDP 14-00023 will need to be amended with the commercial and multi-family uses proposed in Zoning Case

Ordinance 2022-05-19-0382 prior to proceeding with the project. Per Section 35-412(h), Master Development Plan Amendments, a major amendment will be required for the change of the scope of the initial MDP. Thus, once the MDP is amended, it will demonstrate that the continuation of land use rights previously obtained by the MDP will have expired.

Further, until the rezoning case in 2022, documents submitted by the applicant to the city (including the MDP) reference only “non-residential” and “general commercial” uses. There is no mention or evidence of a “plan” to use the property for residential (mixed use) until 2022. “Commercial” and “Mixed Use” are different uses/categories under the UDC with different requirements. Therefore, the applicant cannot rely on Sec. 43.002 for a continuation of use that was changed in 2022 to include residential.

#### **Permit History**

- MDP 14-0023
- LAND - PLAT - 18-900078 – Major Plat
- PLAT- IMEEXT-22-12000008 - 281 Overlook Partners Unit 1 – Plat extension granted 6/22/2022
- LAND-TIA-20-12800006 - TIA pending Additional Information Required since 11/10/2020
- TRE-APP-APP21-38800129 - Tree Removal – Overlook Town Center – expired 9/27/2021

#### **Certificate of Occupancy History**

- No Certificate of Occupancy on file. Property is vacant.

#### **Zoning History**

The subject property was annexed into the City of San Antonio by Ordinance 2016-12-01-0899, dated November 30, 2016, and zoned “C-2 CD” Commercial District with a Conditional Use for a Home Improvement Center with Outside Storage and Grocery Store and “C- 3” General Commercial District.

The property was recently rezoned by Ordinance 2022-05-19-0382, dated May 19, 2022, to the current “MXD” Mixed Use District with commercial uses and a maximum density of 18 units per acre for multi-family development.

#### **Subject Property Zoning/Land Use**

Existing Zoning	Existing Use
“MXD GC-3 MLOD-1 MLR-2 ERZD” Mixed Use US 281 North Gateway Corridor Camp Bullis Military Lighting Overlay Military Lighting Region 2 Edwards Recharge Overlay District	Vacant

### **Surrounding Zoning/Land Use**

<b>Orientation</b>	<b>Existing Zoning District(s)</b>	<b>Existing Use</b>
North	“MXD GC-3 MLOD-1 MLR-2 ERZD” Mixed Use US 281 North Gateway Corridor Camp Bullis Military Lighting Overlay Military Lighting Region 2 Edwards Recharge Overlay District	Vacant
South	“C-2 GC-3 MLOD-1 MLR-2 ERZD” Commercial US 281 North Gateway Corridor Camp Bullis Military Lighting Overlay Military Lighting Region 2 Edwards Recharge Overlay District	Commercial / Vacant
East	“RE GC-3 MLOD-1 MLR-2 ERZD” Residential Estate US 281 North Gateway Corridor Camp Bullis Military Lighting Overlay Military Lighting Region 2 Edwards Recharge Overlay District and “OCL” Outside City Limits	Single-Family Dwellings and Vacant
West	ROW	US-281

### **Letters Issued**

- July 6, 2016 – Rights Determination Letter RD 16-00034 (issued based on MDP14-00023)
- August 29, 2017 – Nonconforming Use Notification of Decision – Approved with various specified commercial uses
- August 22, 2022 – Nonconforming Use Notification of Decision (renewal) – Denied

### **Board of Adjustment**

The Board of Adjustment is asked to determine if the issuance of the Denial of Nonconforming Use Rights stands as interpreted by Texas Local Government Code, Section 43.002 and Unified Development Code, Section 35-703(c) or if the Nonconforming Rights granted for the subject property remain in perpetuity because of the initial submittal and approval of MDP 14-00023. The Board must also determine if the change of zoning on the property to now include residential uses (Mixed Use) negates recognition of the continuation of the planned land use under Section 43.002.

### **Conclusion**

Staff concludes that the decision to deny the nonconforming use was correct based on the following findings of fact:

- 1) Section 43.002 acknowledges that nonconforming rights may be acquired for newly annexed territory if certain conditions are met; and
- 2) Section 43.002 rights were not acquired because the applicant did not begin to use the land in the manner which was planned for the land; and
- 3) Section 35-703 provides a way for newly annexed property to retain nonconforming use rights past what is allowed for under Section 43.002; and

- 4) Section 35-703(c) acknowledges that nonconforming rights do expire under certain circumstances; and
- 5) Section 35-703(c) allows staff to evaluate and interpret nonconforming uses and continuance of such proposed uses and staff found that the subject property is currently vacant, that construction did not occur within one year of the established MDP, and that the plan was not under construction or completed within five (5) years of the annexation date which resulted in expiration of nonconforming rights; and
- 6) Section 35-412(h), Master Development Plan, Amendments, will require a major amendment of the initial Master Development Plan (MDP) also resulting in the expiration of nonconforming use rights; and
- 7) There is no mention or evidence of a “plan” to use the property for residential (mixed use) until 2022. “Commercial” and “Mixed Use” are different uses/categories under the UDC with different requirements. Therefore, the applicant cannot rely on Sec. 43.002 for a continuation of use for a planned use that was changed in 2022 to include residential.