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May 26, 2023

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City of San Antonio

Mr. Logan Sparrow
Policy Administrator - Land Development
Development Services Department
City of San Antonio

Ms. Valerie Rodriguez
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RE: **Submittal of Additional Justification and Documentation** in Response to – and/or **Appeal of** – Development Services Department’s Decision Regarding Statutory Rights as Requested in **Rights Determination Application No. 23-12500016**; *Our File No. 1463.001*

Dear Ms. Ramirez, Mr. Sparrow and Ms. Rodriguez:

The purpose of this correspondence and attached documentation is to provide additional justification for the recognition of statutory rights by the City of San Antonio (*the “City”*) Development Services Department (*the “DSD”*) as requested in Rights Determination Application No. 23-12500016 (*the “2023 RD”*) for an 11.089-acre tract of land generally located at the northeast corner of Canyon Golf Road and Stone Oak Parkway (*the “Property”*). In particular, the additional documentation and justification described herein is provided in response to the DSD’s decision, dated May 11, 2023, to the 2023 RD as requested in our application (*see Exhibit “1”*). We are confident that the additional justification and documentation provided herein will allow for the DSD to amend their decision on the 2023 RD to acknowledge statutory rights as requested; ***however, in the event that such does not occur and that our Firm and the DSD cannot reach an agreement on the rights as requested in the 2023 RD, this correspondence shall serve as a formal appeal pursuant to the City’s Unified Development Code (the “UDC”) § 35-712(d).***

In short, the 2023 RD application submitted to the DSD requested the re-acknowledgement of statutory rights as of June 5, 1985 for a commercial/office project, pursuant to Preliminary Overall Area Development Plan (“POADP”) No. 48, on the entire 11.089-acre Property (*see Exhibit “2”*). However, in the decision letter provided on May 11, 2023, the DSD acknowledged statutory rights as of June 5, 1985 for 6 acres of commercial/office development and rights as of June 23, 2006, the acceptance date of POADP No. 48-A, for commercial/office development on

the remaining 5.089 acres. We respectfully disagree with the DSD's determination that statutory rights do not exist for a commercial/office project as of June 5, 1985 for the entire 11.089-acre Property. As explained in greater detail below, our response to the DSD's initial determination – including additional justification for the re-acknowledgement of statutory rights as requested in the 2023 RD application – is summarized as follows:

1. Pursuant to UDC Section 35-712(j), statutory rights remain current and valid pursuant to the previously issued Development Rights Permit Nos. 064 and 243.
2. Statutory rights, as requested in the 2023 RD application, have been previously confirmed and acknowledged by the City on multiple occasions and the owner of the Property has incurred significant expenses in reliance on the City's acknowledgements of statutory rights.
3. The DSD is incorrectly interpreting the boundaries, descriptions and other identifications of the land use designations (projects) in POADP No. 48 for the Property. In particular, the DSD is erroneously viewing the land uses illustrated on POADP No. 48 as "P" (Public) for a portion of the Property instead of "C2/O" (Commercial and Office) for the entire Property.
 - a. "P" was not the designation for the portion of the Property or, even if so, it was a secondary designation pursuant to the development documents/permits (the primary designation for the entire Property was "C2/O" in POADP No. 48);
 - b. POADP No. 48-A only specifically described amended land use designations for three tracts – many other land uses were revised between 48 and 48-A and not addressed. Moreover, POADP No. 48-A only added multifamily ("MFC") land use designation to the Property – the C2/O designation was not added at this time because it had been there since POADP No. 48.
4. Permits, plans, documents and zoning designations approved by the City after POADP No. 48 – and prior to POADP No. 48-A – are consistent with the commercial and office designation for the Property.
5. The DSD is incorrectly applying – or disregarding – the provisions of the UDC and Chapter 245 of the Texas Local Government Code ("Chapter 245") regarding the definition of a "project" as identified in POADP No. 48. In particular, the DSD failed to recognize that, pursuant to Chapter 245 (and supported by caselaw):
 - a. The "project" is the entire endeavor described in POADP No. 48 and not solely the portion of the illustration contained in POADP No. 48 for the specific area of the Property.
 - b. The "project" identified in POADP No. 48 must be defined under the then-applicable orders, regulations, ordinances, rules, etc., in effect on the date POADP No. 48 was filed.

Development Rights Permit Nos. 064 and 243 Include the Property and Commercial/Office Project

Section 35-712(j) of the UDC states “Nothing herein shall affect the validity of any right that was recognized pursuant to section 35-1027 inserted into the UDC by Ordinance No. 86715, passed and approved September 25, 1997 provided such project has not lost such rights by operation of law.” Pursuant to Ordinance No. 86715, Development Rights Permits were approved by the City in DRP No. 064 and DRP No. 243 (*see Exhibits “3” and “4”*). These two DRPs included the Property, acknowledged the commercial/office project for the Property as of June 5, 1985 and such project has not lost such rights by operation of law. Therefore, the City must continue to acknowledge rights for the project on the Property accordingly.

DSD has Repeatedly Acknowledged Statutory Rights as of June 5, 1985 for a Commercial/Office Project on the Property

On multiple occasions, applications have been submitted to the DSD requesting the acknowledgement of statutory rights as of June 5, 1985 for commercial/office development on the Property (*the June 5, 1985 vesting date and commercial/office project for the entire Property are hereinafter described as the “Acknowledged Rights”*). Every such application submitted to the DSD has resulted in an approval of the Acknowledged Rights by the DSD and significant expenditures and decisions have been made in reliance on such. In addition to the reliance made on such previous approvals by the DSD, these previous approvals provide further evidence of the DSD’s current errors/incorrect analysis related to the 2023 RD. Stated differently, on multiple occasions the DSD has reviewed, analyzed and scrutinized applications (including supporting documentation, permit validity and project descriptions) requesting the Acknowledged Rights, including confirmation that requirements of the UDC and Chapter 245 have been met, and on each occasion the DSD has determined that the Acknowledged Rights should be recognized. These prior requests and approvals, which were specific to the Property and commercial/office project thereon, include:

- Vested Rights Permit (“VRP”) No. 02-01-059, issued by the City on February 6, 2002, acknowledged rights for the entire 4,300-acre area included in POADP No. 48 as of June 5, 1985 (*see Exhibit “5”*).
- VRP No. 06-01-022, issued by the City on February 1, 2006, acknowledged rights for approximately 2 acres out of the Property for commercial development as of June 5, 1985 (*see Exhibit “6”*).
- VRP No. 06-08-064, issued by the City on September 28, 2006, acknowledged rights for 6.12-acres out of the Property for commercial development as of June 5, 1985 (*see Exhibit “7”*). Note that this 6.12-acres wholly included the 5.089 acres subject to this appeal (that the City is now, for the first time, claiming was designated “P” – or something other than “C2/O” – until acceptance of POADP No. 48-A in 2006).

- RD No. 11-10-010, issued by the City on March 8, 2011, acknowledged rights for the Property for commercial/office development as of June 5, 1985 (*see Exhibit “8”*).¹
- RD No. 14-00082, issued by the City on February 4, 2015, acknowledged rights for the Property for commercial/office development as of June 5, 1985 (*see Exhibit “9”*).² The 2023 RD application requested a re-acknowledgement of statutory rights as recognized in this recently-expired RD.

Furthermore, in reliance on the City’s numerous approvals/recognitions of the Acknowledged Rights, the owner of the Property has incurred significant expenses and, more importantly, provided benefits to the City pursuant to such. These expenses incurred, and benefits provided, include the payment of fees to the City related to a Utility Service Agreement, ongoing utility service fees paid to the City, taxes paid to the City and other entities (with such taxes being assessed pursuant to a commercial/office valuation for the Property) and other significant expenditures and actions made in furtherance of the project on the Property as initiated in June of 1985. These actions were made in reliance on the City’s repeated approvals and many of these actions provided benefits to the City. As established in *City of Austin v. Garza*³, the rule of Equitable Estoppel comes into play in this situation and, pursuant to such, the City should be estopped from denying rights when it has received benefits related to the same. While the Court recognized that applying the rule of equitable estoppel against a municipality is rare, it concluded that it would be “manifestly unjust” for a municipality to accept the benefits of a particular development, while simultaneously avoiding its own obligations in connection with that same development. The City’s previous actions, and the owner of the Property’s expenditures and actions in reliance on the same, suggest that the doctrine of Equitable Estoppel applies and the City should be estopped from denying rights at this stage. More importantly, the DSD should not contradict or disregard the significant time, effort, scrutiny and diligence conducted by its own staff by making a drastically different determination now than it had previously on multiple occasions (and under the same set of facts).

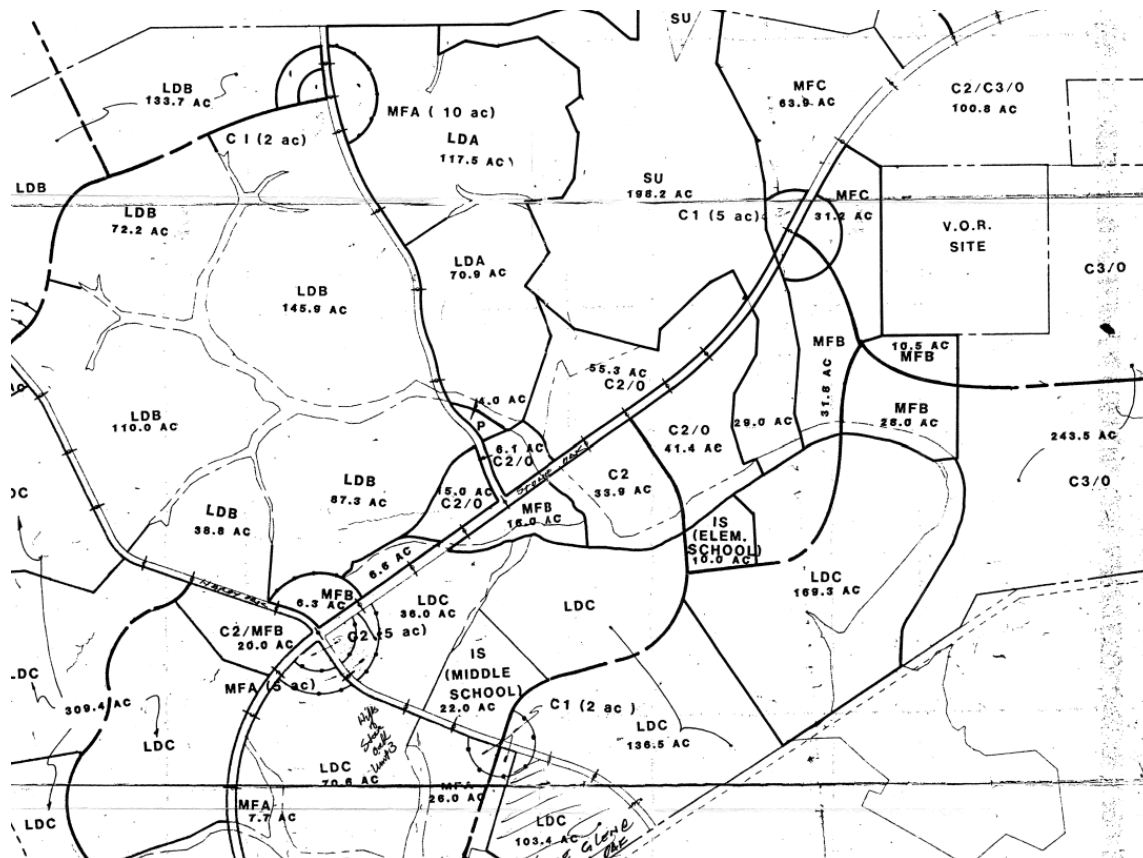
Incorrect Interpretation of Boundaries, Descriptions and Identifications of Land Use Designations to Determine the Project

DSD is basing their determination on the 2023 RD on an interpretation that 5.089 acres out of the Property were not labeled as “C2/O” and/or were labeled as “P” land uses. However, given that the land use designation exhibit associated with POADP No. 48 was created in the early 1980’s, almost by hand, and without a legend or much identifying markers, it can easily be misread. See, for example, the use of similar lines to illustrate roads, floodplain boundaries and land use areas but also different lines and markers to seemingly illustrate land use areas (particularly when compared to later versions of the POADP):

¹ RD No. 11-10-010 acknowledged rights for a 12.81-acre tract of land, of which the 11.089-acre Property is wholly included within (approximately 1.7 acres out of the 12.81 acres have since been conveyed to others).

² RD No. 14-00082 acknowledged rights for the 11.08-acre Property for both a multifamily and commercial Project as of June 5, 1985 pursuant to POADP No. 48.

³ *City of Austin v. Garza*, 124 S.W.3d 867 (Tex.App.-Austin 2003), *no pet.*



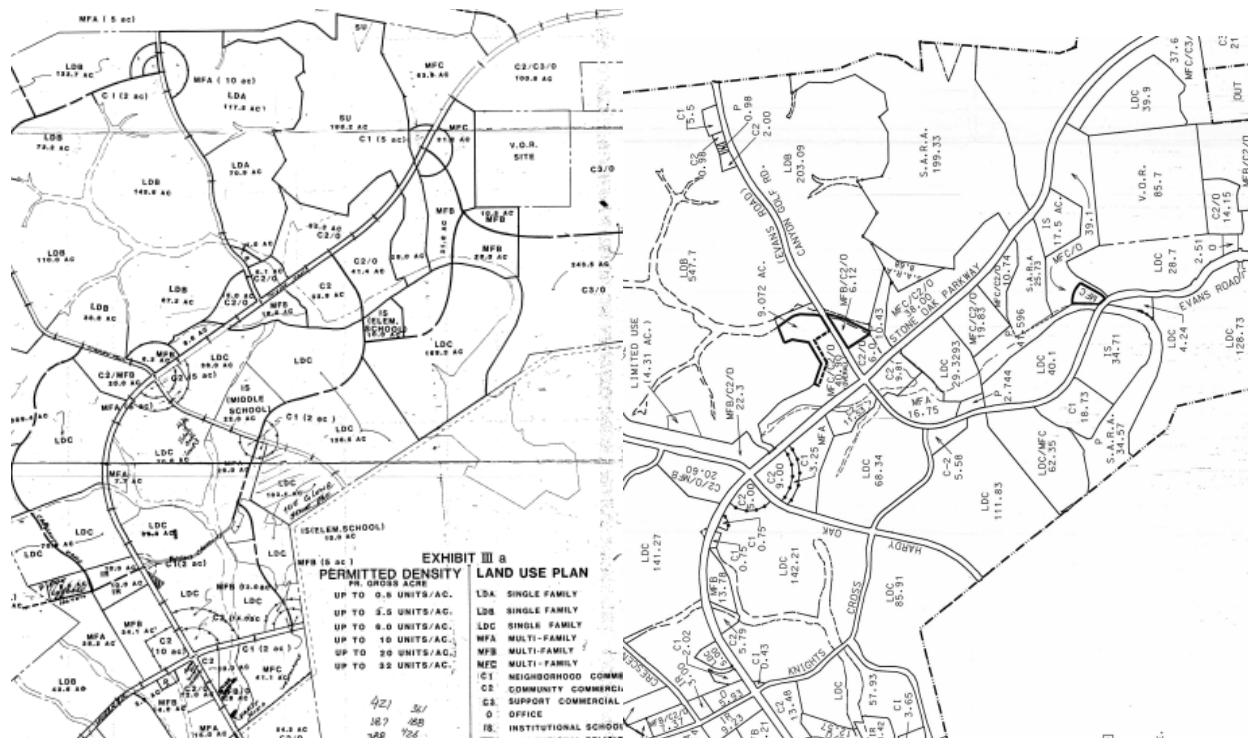
Additionally, the underlying/associated development documents for the Stone Oak project and POADP No. 48. – specifically the Stone Oak Master Plan and related amendments – describe what the “P” (Public) designation was intended for:

- XI. USE IN P DESIGNATED AREAS: Any area may be designated for public use if (i) such area is developed, constructed and/or operated by a valid public entity of the State of Texas, and (ii) such use is approved in writing by the Project Planning Committee.

Any such use shall be secondary to the primary use category assigned to the site on the “Land Use Plan” (Exhibit IIIA), and as such must comply with the General Development Controls and the General Deed Restrictions applicable to the primary use category assigned to the site set forth in the foregoing articles for the specified use category.

As described above/in the corresponding development documents, the “P” designation was intended to be a “secondary” use and serve more as an overlay, with a primary use assigned to the site that dictated development and design regulations for the site. Here, the underlying – i.e. primary – use given was the C2/O designation that appears, at first glance, to apply to neighboring parcels (however, this is the underlying/primary – if not only – land use designation for the entire Property).

It is also important to point out that many of these areas/lines and – even more importantly – the site-specific land use designations contained within POADP No. 48 changed drastically⁴ from those shown in POADP No. 48-A even though only three (3) specific parcels were noted in POADP No. 48-A as subject to amendment:



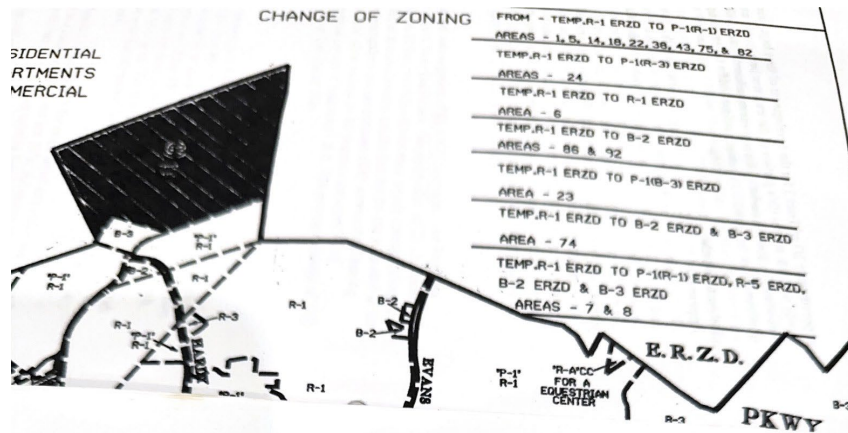
This also provides further evidence that the land use designation for the entire Property – C2/O – was included in POADP No. 48, although not perfectly clear, and the only change made by POADP No. 48-A was the addition of “MFB” as a land use for the Property. Again, the C2/O was the primary use for the Property, initiated by POADP No. 48, and has remained there through today. POADP No. 48, 48-A and 48-B are attached hereto as **Exhibits 10, 11 and 12**.

City Actions/Zoning are Consistent with Establishment of C2/O Designation in POADP No. 48

Multiple public and private permits, plans and zoning designations created/approved concurrently with, or subsequent to the acceptance of POADP No. 48 (yet prior to the acceptance of POADP No. 48-A) are consistent with the commercial/office designation initially applied to the Property in POADP No. 48. For example, upon annexation of the entire Stone Oak development, the City Council, on September 24, 1998, approved rezoning of the Property from “Temporary R-1” to “B-2”, which is consistent with the commercial/office designation initiated by POADP No. 48 (see City Ordinance No. 88539 attached hereto as **Exhibit 13**). It is also worth noting that the

⁴ See POADPs 48 and 48-A attached hereto as well as the clips above – land use designations were added, changed and otherwise vary greatly between POADP 48 and POADP 48-A, while POADP 48-A only formally and specifically addressed the addition of multifamily (MFB and MFC) to three specific tracts. The same situation occurred with the acceptance of POADP 48-B and its illustration of one tract having multifamily use added as a designation.

size and general shape of the Property as shown in the 1998 rezoning is the same as it is today. In short, this overall 12-acre parcel of which the Property is included was always designated and intended for commercial and office use.



The “Project” is the Entire Endeavor and also Must be Defined Under the Rules, Regulations, Ordinances and Orders in Effect on the Date POADP No. 48 was Filed

There is dispute or question regarding fulfillment of Chapter 245 and UDC requirements related to “permit” validity, “progress towards completion of the project” and dormancy. The only issue at hand is the specific definition of “project” at the time POADP No. 48 was filed. As described above, we firmly believe that the project was narrowly defined for the entire Property as of June 5, 1985 as “C2/O” (commercial/office) and “P” was not applicable at all or, if it was, it was merely a secondary use/label on top of the commercial/office use designation. Regardless of all this, Chapter 245 defines a “project” as the entire “endeavor” and further defines a project pursuant to the terms contained in the then-applicable rules, regulations, orders and ordinances in effect at the time (i.e. in effect on June 5, 1985). Specifically, Chapter 245 includes the following language (emphasis added):

Sec. 245.001. DEFINITIONS. In this chapter:

- (1) "Permit" means a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.
- (2) "Political subdivision" means a political subdivision of the state, including a county, a school district, or a municipality.
- (3) ***"Project" means an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.***
- (4) "Regulatory agency" means the governing body of, or a bureau, department, division, board, commission, or other agency of, a political subdivision acting in its capacity of processing, approving, or issuing a permit.

Sec. 245.002. UNIFORMITY OF REQUIREMENTS. (a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit ***solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:***

- (1) ***the original application for the permit is filed for review for any purpose***, including review for administrative completeness; or
- (2) a plan for development of real property or plat application is filed with a regulatory agency.

The language and intent of Chapter 245 (*see Exhibit “14”*) is further defined by the legislative intent in drafting such statute as well as by interpretations of the Texas Courts, most notably, and recently, in Harper Park Two, LP v. City of Austin (“Harper Park;” *see Exhibit “15”*). The facts surrounding Harper Park and the ruling by the Courts are almost identical to those at issue here; therefore, rather than describe them separately, the following excerpt from the Court’s ruling is included to illustrate Chapter 245, legislative intent in drafting such, and the Court’s ruling as applied to this situation (emphasis added):

The parties’ dispute centers on the meaning of “project” as used in chapter 245. Chapter 245 defines “project” as “an endeavor over

which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.” [Tex. Loc. Gov’t Code Ann. § 245.001\(3\)](#). The “endeavor” that characterizes a “project,” the parties agree, would necessarily be reflected in the contents of the initial permit application, here the 1985 preliminary plan application. However, the parties differ, as a threshold matter, as to whether we are to look to the entirety of the endeavor contemplated in the application or solely to the portion of the plan relating specifically to the six-acre lot at issue. Harper Park Two urges the former interpretation, while the City, insisting that the preliminary plan application identified multiple, separate “projects” applicable to individual lots, asserts the latter view. ***Only Harper Park Two’s construction finds support in the statutory text.***

256** The Legislature defined “project” in chapter 245 in terms of a single “endeavor” that may require a “series” of permits to complete. *Id.*; see *id.* [§ 245.002\(b\)](#). It further provided that “[a]ll permits required for the project,” including “[p]reliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats[,] are considered collectively to be one series of permits for a project.” *Id.* ***It is the filing of “the original application for the first permit in that series,” furthermore, that triggers the vested rights under the statute. Id. From these interrelated provisions, it is evident that the relevant “project” is, as Harper Park Two contends, the single “endeavor” reflected in the “original application for the first permit in th[e] series”—not, as the City suggests, individual components of the larger, original “project”/“endeavor” that may subsequently require separate permits. See [Hartsell](#), 130 S.W.3d at 328 (rejecting Town’s argument that subdivision “project” should be divided into an infrastructure planning project and a home-construction project, and noting that “the definition of ‘project’ contemplates ‘one or more permits’ may be ‘required to initiate, continue, or complete the endeavor’ ”); see also [BMTP Holdings, L.P. v. City of Lorena](#), 359 S.W.3d 239, 245 (Tex.App.-Waco 2011, no pet. h.) (op. on reh’g; mem. op.) (“[c]hapter 245 has been held to encompass the entire development process from the preliminary plat to the construction of a structure within the subdivision, which does not change unless the scope of the ‘project’ changes, regardless of changes in ownership” and “the project includes the entire process, not the discrete components”); see also [DeQueen](#), 325 S.W.3d at 635 (we presume that the Legislature selected statutory language deliberately and purposefully); [Jones v. Fowler](#), 969 S.W.2d 429, 432 (Tex.1998) (“legislative intent should be determined from the entire

act, and not simply from isolated portions” so “we must read the statute as a whole and interpret it to give effect to every part”). Consequently, the relevant “project” under chapter 245 is the Harper Park subdivision as a whole, as reflected in the 1985 preliminary plan application, not the six-acre lot viewed in isolation.

...

*We agree with Harper Park that the “project” identified in the 1985 preliminary *257 plan application was—with respect to both the six-acre lot and the entire property—“commercial” development, as defined under the then-applicable Barton Creek Watershed ordinances, and was not limited to an office building or any other specific type of “commercial” development. To hold otherwise would amount to retroactive imposition of limitations and distinctions that did not exist in the City’s “orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect” on June 30, 1985, the date when “the original application for the first permit in th[e] series” of permits required for the project was filed. [Tex. Loc. Gov’t Code Ann. § 245.002\(b\)](#). Such retroactive “changing of the rules” governing a development project squarely violates chapter 245. See *id.* In other words, what matters under chapter 245, as Harper Park Two suggests, is that the 1985 preliminary plan application, viewed in the context of the applicable land-use regulations at the time, gave notice to the City that the Harper Park Two subdivision would be a mixed-use “commercial” development subject to the corresponding requirements of the Barton Creek Watershed ordinances. It is this identification of the contemplated development as “commercial” in nature that defines the nature and scope of the “project,” not narrower descriptive terms or labels that all parties agree had no legal effect at the time.*

Specifically, as applied to the current situation, the “project” is the overall residential, commercial and office development described overall in POADP No. 48 and not a site-specific designation. Additionally, at the time of POADP No. 48’s acceptance, the Property was outside of the City limits and subject only to those rules in effect at the time and as applicable to the ETJ. “P” or “Public” use was not a defined or regulated term applicable to the permit, project or Property. One of many illustrations of this is the land use descriptions available for, and specifically included within, the City’s POADP applications and approvals (“Business” – i.e. commercial, and “Office” being two of these and “Public” not being listed at all):

| | | |
|--|---|---|
| NAME OF DEVELOPER/SUBDIVIDER <u>HALLENBERGER TELECORD INC.</u> | ADDRESS <u></u> | PHONE NO. <u>349 6571</u> |
| NAME OF CONSULTANT <u></u> | ADDRESS <u></u> | PHONE NO. <u></u> |
| GENERAL LOCATION OF SITE <u>N.E. CORNER OF THE INTERSECTION</u> <u>OF BLANCO RD & LOOP 1604</u> | | |
| EXISTING ZONING (If Applicable) <u>O.C.C.</u> | | |
| PROPOSED WATER SERVICE <input checked="" type="checkbox"/> City Water Board <input type="checkbox"/> Other District Name <u></u> <input type="checkbox"/> Water Wells | PROPOSED LAND USE <input checked="" type="checkbox"/> Single Family <input type="checkbox"/> Duplex <input checked="" type="checkbox"/> Multi-Family <input checked="" type="checkbox"/> Business <u>OFFICES</u> <input type="checkbox"/> Industrial | PROPOSED SEWER SERVICE <input checked="" type="checkbox"/> City of San Antonio <input type="checkbox"/> Other System Name <u></u> <input type="checkbox"/> Septic Tank(s) |
| DATE FILED <u>June 27, 1983</u> | REVISIONS FILED (if applicable) DATE OF RESPONSE <u></u> (within 15 working days of receipt) | |
| DUE DATE OF RESPONSE <u>July 25, 1983</u> (within 20 working days of receipt) | | |
| (Date of expiration of plan, if no plats are received within 18 months of the plan filing) <u>Jan 1985</u> | | |
| NEEDED INFORMATION: INFORMATION REQUESTED. The POADP as an overview of the developer's projected land shall include, at least the following information: <input checked="" type="checkbox"/> (a) perimeter property lines; <input checked="" type="checkbox"/> (b) name of the plan and the subdivisions; <input checked="" type="checkbox"/> (c) scale; <input checked="" type="checkbox"/> (d) proposed land use(s) by location and type; | | |

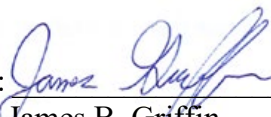
In conclusion, POADP No. 48 defined and established the project as "C2/O" (commercial/office) for the entire Property and any designation of "P" in POADP 48 – or that "C2/O" was only added as a use in POADP No. 48-A – is incorrect. Regardless, pursuant to Chapter 245 and associated caselaw, a label of "P" on the area of the Property in POADP No. 48 – if any – does not establish or define the "project" for the Property. Rather, such can only be defined as the entire "endeavor", i.e. all of the uses listed in POADP No. 48 and, furthermore, any label of "P" is not applicable given that such was not defined or included in the applicable rules, regulations, orders or Ordinances in effect at the time – the project for the Property initiated by POADP No. 48 can only be commercial (business), office, single-family or multi-family. Additionally, the designation and description of the project for the entire Property was consistently commercial and office as evidenced by the 1998 zoning, subsequent POADPs and other documents, permits and approvals to follow. This has been consistently and repeatedly confirmed and acknowledged by the City over the past 20+ years, most recently in 2015 as described herein. ***Therefore, we respectfully request that the City revise the 2023 RD approval letter to acknowledge statutory vested rights for commercial/office development on the entire 11.089-acre Property as of June 5, 1985. Should the DSD not accept the above justification for such***

and refuse to acknowledge rights as such, please accept this correspondence and attached exhibits as a formal appeal of the DSD's decision pursuant to Section 35-712(d) of the UDC.

Please do not hesitate to contact me should you have any questions or need additional information regarding this request for re-acknowledgement of rights as described herein.

Sincerely,

KILLEN, GRIFFIN & FARRIMOND, PLLC

BY: _____
James B. Griffin