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December 21, 2007

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Re: Cause No. D-1-GN-07-001957: *Responsible Growth for Northcross, Inc. vs. The City of Austin, Lincoln Property Company Commercial, Inc. and Lincoln Northcross, Ltd.*, In the 200th Judicial District, Travis County, Texas

Dear Counsel:

This is the Court's ruling on the Trial on the Merits held on November 16, 2007. This correspondence is not to be considered Findings of Fact and Conclusions of Law, nor is it intended to preclude other findings and conclusions that would support my decision. The Court has reviewed the pleadings, evidence, caselaw, briefs and submissions provided by Counsel.

The first issue for the Court is to determine the standard of review that applies in this case. The rules that apply to the construction of statutes apply as well to the construction of municipal ordinances. Bd. of Adjustment of San Antonio v. Wende, 92 S.W.3d 424, 429 (Tex. 2000). The construction of an ordinance is a question of law. In Re: Hecht, 213 S.W.3d 547, 564 (Tex. 2006). The cardinal rule of statutory construction is to determine and give effect to the intent of the enacting body. In order to determine intent, the Court must

first review the plain language of the ordinance. If a legislative body does not define words or phrases the Court shall apply their ordinary meaning and will not enlarge the meanings of the words or phrases beyond their ordinary meaning. City of Austin v. Hyde Park Baptist Church, 152 S.W.3d 162, 166 (Tex. App.—Austin 2004, no pet.). If the meaning of the ordinance is doubtful or ambiguous, then the Court will give serious consideration to the longstanding construction given to it by the governmental body charged with enforcement or administration. Id.; Seawall East Twp. Ass'n Inc. v. City of Galveston, 879 S.W.2d 363 (Tex. App.—Houston, [14th Dist.] 1994, no writ). Texas Courts have universally adopted the "clear and unambiguous" meaning test, under which Courts interpret the ordinance only if the language's meaning is not clear and plain on the face of the statute or ordinance. City of Austin, 152 S.W.3d at 166. If the language is clear and plain, then the Court is bound by the plain meaning of the statutory language. In ascertaining the City's intent in enacting an ordinance, the Court should avoid an application of its plain literal language that leads to absurd results. City of San Antonio v. Bullock, 34 S.W.3d 650, 655 (Tex. App.—San Antonio 2000, pet. denied); see also City of Laredo v. Villarreal, 81 S.W.3d 865, 868 (Tex. App.—San Antonio 2002, no pet.).

It is with this applicable standard of review that the Court will review the claims raised by the Plaintiff, Responsible Growth for Northcross, Inc. (hereafter RG4N) in which they urge the Court to find the Site Plan 2 permit as ultra vires and be declared void.

Garden Center Claims

The ordinance at issue, Section 25-2-891 et. seq. defines Accessory Use as follows:

> a use that: (1) is incidental to and customarily associated with a principal use; ... (3) and may include parking for the principal use ...." Section 25-2-894 further defines the Accessory Use for Principal Commercial Use and specifically states "(B) ... a commercial or industrial use that is otherwise prohibited in the zoning district is permitted as an accessory use if the use: 1) is operated primarily for the convenience of employees, clients or customers of the principal use; 2) occupies less than 10% of the total floor area of the use; and 3) is an integral part of the principal use ....

RG4N asserts that even if a garden center could be an "accessory use" the garden center allegedly planned for this site could not be incidental because it is a significant part of the store. "Incidental" is not defined by the ordinance. The term "incidental" means "of minor, casual, or subordinate nature". The American Heritage Dictionary, 650 (2d ed. 1982). The City of Austin (hereafter City) approved Site Plan 1 with a 5,456 sq. ft. outdoor garden center. The City's position was that the garden center is not a conditional use but is an accessory use that does not require a public hearing and the conditional use process. Site Plan 2, the Plan that is at issue in this case, removed the garden center notation and identified the space for retail use. RG4N points out that the tenant, Walmart's representative, Mark

Stephens, testified that he did not know of any Walmart Superstores that did not have garden centers. Stephens testified Walmart intended to have a garden center at this site, but would comply with the law. The evidence also showed that Walmart has several other superstores in the Austin area with garden centers that varied in size up to 22,000 sq. ft. Both the City and Lincoln Property Co. Commercial Inc. (hereafter Lincoln) assert that since the approved Site Plan 2 does not include a garden center for the Northcross site and the City only approves a particular use for a proposed development, the City cannot be expected to speculate as to what might ultimately be sold at the site. The City asserts that if in the future, the tenant, Walmart, operates a garden center that does not comply with the Code, RG4N or any other interested citizen may file code violation complaints with the City and ultimately the Courts.

The City testified the purpose of the zoning statute is to control the use of land. As it applies to garden centers or plant nurseries, its purpose is to ensure that a development in a residential area complies with the City's rules to protect the safety and well being of the citizens and to protect the environment. The Land Development Code Section 25-2-806 imposes several specific disclosures for site plans with garden centers, specifically concerning the storage of herbicides, pesticides, or fertilizer.

The evidence showed that the City has, for at least the last two decades, interpreted Section 25-2-894 to allow the City to approve site plans if the use is an accessory use and meets the three requirements of Section 25-2-894 (B), which includes being less than 10% of the total floor area of the use. A 5,000 sq. ft. standalone garden center's site plan in a residential area, whose principal use is as a garden center, has to go through the conditional use zoning process requiring public hearings. Yet another store's site plan in a similar residential area may be approved without a public hearing even if the garden center has 20,000 sq. ft. if it was less than 10% of the total floor area of the use because it would be considered an accessory use.

After ascertaining the City's intent in enacting the ordinance as expressed in its plain language, the Court finds that the City's decision to approve Site Plan 2 is consistent with the clear language of the ordinance. The Court cannot rewrite the ordinance to apply to all garden centers whether an accessory use or not, or determine at what size an accessory use is unreasonable. Would it be 1,000 sq. ft., 5,000 sq. ft., 10,000 sq. ft. or 20,000 sq. ft.? Would it be 1%, 3% or 5% of the total floor area of the use? Even though the Court may not agree with the results of the City's interpretation of the ordinance, it is for the City Council, not this Court, to change the ordinance.

Other Claims

Further, the Court has reviewed all of RG4N's other claims with the same applicable standard of review and finds that the City's approval of Site Plan 2 is consistent with the ordinances.

Letter to Counsel
Cause No. D-1-GN-07-001957
December 21, 2007

I want to take this opportunity to thank the lawyers for their briefs in this matter. Both sides presented their respective positions well. Mr. Dobson, please prepare an Order to reflect the Court's ruling.

Yours very truly,

Judge Orlinda Naranjo
419th District Court, Travis County

xc: Ms. Amalia Rodriguez-Mendoza, District Clerk