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Picking Fights: Inverse Condemnation, Regulatory Takings, and Challenging the Right to Take

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Inverse Condemnation

The United States and Texas Constitutions prohibit government takings of private property without just compensation. U.S. CONST. AMEND. V; TEX. CONST. ART. I, §17. When governmental action effects an unconstitutional taking, the property owner may recover by filing an inverse condemnation suit. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). "An inverse condemnation may occur when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development." *City of Floresville v. Starnes Inv. Grp., LLC*, 502 S.W.3d 859, 866 (Tex. App.—San Antonio 2016, no pet.).

"The elements of an inverse condemnation claim are (1) the governmental entity intentionally performed an act in the exercise of its lawful authority, (2) that resulted in the taking, damaging, or destruction of the claimant's property, (3) for public use." *Walton v. City of Midland*, 409 S.W.3d 926, 930 (Tex. App.—Eastland 2013, pet. denied). A governmental act that comes short of a "physical invasion, appropriation, or occupation" is a taking if it "constitute[s] an unreasonable interference with the landowner's right to use and enjoy the property." *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994) (citation omitted). This is a question of degree, with the most important factors being the regulation's economic impact on the claimant, its interference with the claimant's reasonable investment-backed expectations, and the character of the governmental action. *Sheffield Dev. v. City of Glenn Heights*, 140 S.W.3d 660, 670–72 (Tex. 2004) (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Additionally, the Texas Supreme Court recognizes a separate "cause of action for inverse condemnation where the government acts to gain an unfair advantage 'against an economic interest of an owner.'" *State v. Biggar*, 873 S.W.2d 11, 13 (Tex. 1994) (quoting *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978)).

Sometimes, courts have dismissed takings claims after finding that the interest at stake did not qualify as "the claimant's property" in the constitutionally protected sense. *See Cypress Forest Pub. Util. Dist. v. Kleinwood Mun. Util. Dist.*, 309 S.W.3d 667, 675–76 (Tex. App.—Houston [14th Dist.] 2010, no pet.). For example, in *Cypress Forest* the court held that an inverse condemnation claimant "must show that it has a vested property interest" and concluded that a municipal utility district's right to collect tax revenue did not qualify because it was "based merely on the expectancy that all future landowners in the district will be subject to paying ad valorem taxes." *Id.*

<u>Fact Scenario #1</u>

Landowner purchased 0.88-acre tract of land in 2010. In 2004, the City passed Ordinance No. 2004-47, which rezoned the 10.908 acres of land immediately adjacent to the subject property for development as an H.E.B. grocery store (the "H.E.B. tract"). Based on the rezoning of the H.E.B. tract, Landowner's predecessor-in-interest requested the subject property be rezoned for use as a car wash.

In response to this request, the City passed Ordinance No. 2005-26, which reads in full:

ORDINANCE NO. 2005-26

AN ORDINANCE AMENDING THE ZONING ORDINANCE OF THE CITY OF BELTON BY CHANGING THE DESCRIBED DISTRICT FROM RETAIL ZONING DISTRICT TO PLANNED DEVELOPMENT-RETAIL ZONING DISTRICT FOR A CAR WASH AND LUBE CENTER.

WHEREAS, Bill Trainor, owner of the following described property has presented his petition duly signed, to the City Planning & Zoning Commission and filed said petition with the City Clerk of the City of Belton, and due notice of filing of said petition and hearing on said petition has been given as required by the City Zoning Ordinance and by law, and a hearing on said petition before the City Planning & Zoning Commission of the City of Belton was set for the 17th day of May, 2005, at 5:00 p.m. for hearing and adoption, said district being described as follows:

0.879 acres of the M. F. Connell Survey, Abstract #6, 2603 N. Main Street, Belton, Texas

WHEREAS, said application for such amendment was duly recommended by the said City Planning & Zoning Commission and the date, time and place of the hearing on said application by the City Council of the City of Belton was set for the 24th day of May, 2005, at 5:30 p.m. at the Police & Courts Building and due notice of said hearing was given as required by ordinances and by law; and

WHEREAS, a hearing was held upon the application by the City Council of the City of Belton at the time, place and date herein before set forth and no valid objection to said amendments was presented.

NOW THEREFORE, BE IT ORDAINED by the City Council of the City of Belton, Texas, that the said district located on a tract of land as more fully and completely described above, be and is hereby changed from Retail Zoning District to Planned Development-Retail Zoning District for a car wash and lube center, and that the Zoning Ordinance of the City of Belton be and is hereby amended, subject to the following:

1. The base-zoning district will be PD-Retail.

2. Additional allowed uses include a car wash and lube center.

3. A general site plan is attached and a detailed site plan will be submitted with a building permit application.

4. The detailed site plan shall include a tree survey and incorporate existing trees into the overall design.

5. The temporary access point will be closed when the Sparta Road extension is constructed and the northern access point reconstructed as a right-in/right-out only drive. One access point to the Sparta Road extension, as shown on the "Preliminary Site Schematic", will be allowed.

6. All buildings will be constructed of native stone veneers. Metal exteriors are prohibited.

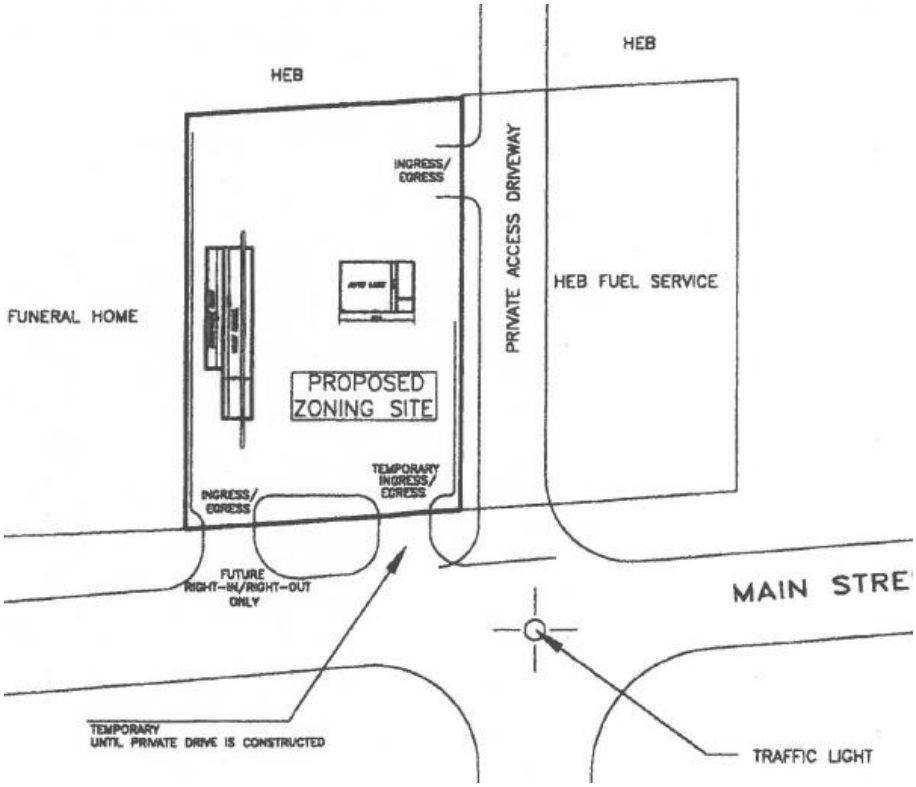
7. One monument sign will be permitted and shall not exceed six feet (6') in height and six feet (6') in length.

8. Noise screening shall be provided between this use and adjoining development to the north.

This ordinance was presented at the stated meeting of the City Council of the City of Belton and upon reading was passed and adopted by the City Council on the 24th day of May, 2005, by a vote of 7 ayes and 0 nays.

SIGNED AND APPROVED by the Mayor and attested by the City Clerk on this the 24th day of May, 2005.

The preliminary site schematic referenced in and attached to the ordinance depicted the access to be allowed from the subject property to the proposed extension of Sparta Road:



Relying on the access granted in Ordinance No. 2005-26, Landowner purchased the property at issue in December of 2010. Subsequent to Landowner's purchase of the property, H.E.B. requested that the access depicted on the preliminary site plan be omitted. Despite its ordinance confirming that this access would be allowed, the City acquiesced to H.E.B.'s request and approved a final plat for the H.E.B. tract that omitted the allowed access to Sparta Road.

Exaction

The Texas Constitution provides that no person's property "shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made." TEX. CONST. art. I, §17. An exaction occurs when a governmental entity requires an action by a landowner as a condition to obtaining governmental approval of a requested land development, unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2) is roughly proportional to the projected impact of the proposed development. *Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620, 634 (Tex. 2004).

According to the Texas Supreme Court, government has the burden to "make some sort of individualized determination that the required dedication was related both in nature and extent to the impact of the proposed development." *Id*. at 643. The government must further show that the required dedication was "roughly proportional" to the projected impact of the proposed development. *Id*. at 644.

Fact Scenario #2

The County filed a statutory condemnation case in December 2015 to acquire 2.166 acres of land located at the intersection of FM 1093 and Westheimer Lakes North Drive.

Almost 10 years before the taking, the developer landowner submitted a proposed plat for the subdivision of the 10.8776 acres of land into the Plaza at Westheimer Lakes subdivision. During the platting process, the County conditioned its approval of 7.6657 acres for commercial development upon the developer's dedication of a 150-foot-wide, 3.2119-acre reserve along FM 1093 restricted to right-of-way purposes, with no buildings permitted. The plat depicting this restricted reserve was approved on August 14, 2007.

The taking was out of this restricted reserve, and the County offered only nominal compensation.

Regulatory Takings

There are two categories of *regulatory* action that generally will be deemed per se takings without a case-specific inquiry. The first occurs when a regulation "compel[s] the property owner to suffer a physical 'invasion' of his property." *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a *taking*). The direct, physical effect on property, although short of government possession, makes the regulation categorically a *taking*. *Id*. The second is "where regulation denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-16, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)*. "To deprive an owner of all economically beneficial use of land is tantamount to depriving him of the land itself." *Id*. But this is "limited to 'the extraordinary

circumstance when no productive or economically beneficial use of land is permitted'" and "the landowner is left with a token interest." *Id.*; *see City of San Antonio v. El Dorado Amusement Co., 195 S.W.3d 238, 245 (Tex. App.—San Antonio 2006, pet. denied)*. Outside these two relatively narrow categories, *regulatory* takings challenges require an essentially ad hoc, factual inquiry and are governed by the standards set forth by the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)*.

In *Penn Central*, the U.S. Supreme Court identified "several factors that have particular significance" in evaluating *regulatory* takings. *438 U.S. at 124*. Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id*. In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a *taking* has occurred. *Id*. "The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving *regulatory* takings claims that do not fall within the physical takings or *Lucas* rules." *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 839 (Tex. 2012).

However, "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Palazzolo v. Rhode Island*, 533 U.S. 606, 634, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)) (O'Connor, J., concurring). "The temptation to adopt what amount to per se rules in either direction must be resisted." *Id*. "Thus, for example, the economic impact of a regulation may indicate a *taking* even if the landowner has not been deprived of all economically beneficial use of his property." *Hallco Tex. Inc. v. McMullen Cnty*., 221 S.W.3d 50, 75 (Tex. 2006). "Nor are the three *Penn Central* factors the only ones relevant in determining whether the burden of regulation ought 'in all fairness and justice' to be borne by the public." *Id*. No single *Penn Central* factor is determinative; all three must be evaluated together, as well as any other relevant considerations. *Day*, 369 S.W.3d at 840. Whether a *regulatory taking* has occurred "'depend[s] on a complex of factors including' the three set out in *Penn Central." Hallco Texas, Inc*., 221 S.W.3d at 75. "The analysis 'necessarily requires a weighing of private and public interests' and a 'careful examination and weighing of all the relevant circumstances in this context.'" *Id*. The Texas Supreme Court has held in "*regulatory*-takings issues, we consider all of the surrounding circumstances" in applying "a fact-sensitive test of reasonableness." *Id*. While the trial court may resolve disputed facts regarding the extent of the governmental intrusion on the property, the ultimate determination of whether the facts are sufficient to constitute a *taking* is a question of law. *Day*, 369 S.W.3d at 839; *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998).

Fact Scenario #3

Prior to 2005, the City was located entirely north of US 290 and the Union Pacific railroad running along the south side of US 290. On June 20, 2005, the City adopted a plan to annex a 640-acre block of land on the south side of US 290, including 54.93 acres of land immediately south of Jones Road, in anticipation of Harris County's extension of Jones Road over Union Pacific's railroad and through the 54.93-acre tract.

At the time of its annexation, the 54.93-acre tract was classified as Zone H–Industrial District in the City's zoning ordinances and map. This zoning classification was consistent with the prevailing development of properties south of the Union Pacific railroad being for industrial and warehouse uses. City agents represented, however, that this zoning designation could be changed to permit more intensive commercial uses upon the recording of a plat dedicating the right of way needed for the extension of Jones Road south from US 290 to FM 529, running through the 54.93 acres.

Landowner purchased 23.34 acres out of the 54.93 acres of land on June 30, 2008, for a purchase price of $4.65 million. The City approved the plat dedicating the Jones Road right of way on August 4, 2009; the plat was recorded on August 6, 2009. The resulting subdivision, known as Jones Rd. 290 Commercial Reserves, contained several commercial reserves, including Landowner's property, identified as Reserves B (9.13 acres), F (10.89 acres), and G (3.32 acres).

On January 16, 2009, the City retained Kimley-Horn & Associates, Inc. and other consultants to perform a feasibility study and analysis of a proposed development plan for approximately 297 acres located south of the Union Pacific railroad at Jones Road, including Landowner's property. This proposal included a commuter rail station at Jones Road and US 290, about a million square feet of commercial and office space, an 18-acre area for high density office space along the US 290 border, mixed-use three-to-five-story buildings; a residential development in a combined 81-acre area, approximately 38 acres devoted to parks and open space, and a 4.35-acre public area that could one day house the Jersey Village City Hall. This proposed development plan became known as the "Transit-Oriented Development" or "TOD" proposal.

In August of 2010, the City voted to move forward with the final phase of the transit-oriented development feasibility study, incorporating a form-based code concept for controlling land use within this area, including Landowner's commercial reserves. At the time, the City's planning and zoning board recommended to City Council that the proposed zoning change allow future warehousing and storage businesses to open along the Jones Road extension in the development, consistent with the prevailing development in this area. City Council, however, rejected this recommendation as not in line with the vision of the development. According to the City's consultants, this vision would allow for "a mix of residential and retail development in the same location—specifically a foot-traffic area with ground-level retail and restaurant tenants and loft-type residences on the upper floor."

In December of 2010, the City implemented a building moratorium on the property within this area, including Landowner's land, so that it could determine appropriate codes for a pedestrian-friendly, mixed-use development that could be tied to light rail and other transit projects. In February of 2011, this moratorium was extended into the summer.

On May 23, 2011, the City Council passed Ordinance No. 2011-25, changing the applicable zoning classification for Landowner's property to the Jersey Village Crossing District (District D). The District D regulating plan denotes the official character zones within District D and identifies the applicable character zones within Jersey Village Crossing. Under the ordinance, a character zone creates a distinct urban form within that zone which is different from urban forms in other character zones. Each Character Zone establishes use and development standards including height, bulk, building and parking location, and functional design. The District D regulating plan classifies all property within Jersey Village Crossing into one of five Character Zones.

Landowner's property is located within District D Core, Mixed Use, and Highway Mixed Use character zones. The additional dedications of land and restrictions on development included in the City's new form-based zoning classification have and continue to interfere unreasonably with Landowner's rights to use and enjoy its property and with its investment-backed expectations.

Since the ordinance was passed, Landowner and several potential purchasers of Landowner's property have met with the City to discuss the development permissible under the form-based codes adopted by the City. In every instance, it became clear that the property could not be sold or developed to an economic use without substantial modification to these codes. The City, however, would not consider any development plan that deviated in a meaningful way from the form-based codes.

For several months, Landowner worked with the City's planning and zoning staff to try to reach a modification of the codes that would allow its property to be sold or developed for a financially feasible use. These efforts culminated in a Planning and Zoning Committee recommendation to City Council in June of 2013 that it amend the codes to allow warehouse as a permitted use within District D, a critical component to the development of a business or industrial park.

In August of 2013, the City amended the form-based codes through Ordinance No. 2013-28 to allow warehouse and storage uses only within the Highway Mixed Use character zone and only with an approved special development plan (SDP) permit. For a SDP to be approved, it has to go through a tedious process of being presented before the Planning and Zoning Commission for a preliminary report that is presented to Council. A public hearing is conducted and a final report is prepared by the Planning and Zoning Commission. The SDP is only approved once Council votes and approves the Ordinance for same. Warehouse and storage uses are the only uses that require an SDP permit.

Since this partial change in the form-based codes applicable to Landowner's property, the City has persistently refused to allow any portion of Landowner's property to be developed for warehouse or storage use, even the portion of Landowner's property located within the Highway Mixed Use character zone in which such uses are permitted with an SDP permit. The City subsequently denied or declined to take action on all attempts to have a SDP approved for development of Landowner's property. Without an approved plan for development of the property, it was effectively unmarketable in light of the City's regulatory scheme.

Fact Scenario #4

Landowner is the developer of a 3,327.097-acre master-planned community located on Lake Houston. Landowner has successfully sold all of its development but 344.3138 acres within the City of Houston, comprised of 34 developed home sites and 531 lots planned for development as "The Crossing."

Landowner has been actively working to develop lots for sales to homebuilders and end users for over a decade. In 2004, Landowner filed a petition for the creation of a municipal utility district to serve the 560 acres of its development within the City of Houston, which the City approved in 2006. In 2009, Landowner entered into a utility agreement with the City to serve the MUD. In 2011, the City approved a general plan covering the entire development. Landowner subsequently

recorded three subdivision plats for more than 25 acres each within that general plan, thus extending its life through 2027 pursuant to City of Houston Code of Ordinances 42-24(f).

After developing the earlier stages of its development, Landowner shifted its focus to The Crossing, which was scheduled to be ready for sale by summer of 2018. In 2017, the City approved a general plan covering Crossing Sections I and II. That same year, the City signed off on a Developer Participation Contract covering Section I and approved plans for its water, sanitary sewer, drainage facilities, and paving. Also in 2017, the City approved a preliminary plat for Crossing Section II, and in 2018, Landowner recorded a final plat for Section I. Finally, Landowner invested millions of dollars towards amenities and entitlements for The Crossing.

Due to its lakefront location, significant portions of The Crossing as well as the scattered developed lots that Landowner still owns are located within the 100- or 500-year floodplain, as delineated by FEMA. When Landowner filed the above-listed development documents with the City, the regulated area of the City's existing floodplain ordinance, set forth in Chapter 19 of its Code of Ordinances, did not include the 500-year floodplain. Additionally, the existing ordinance imposed a slab elevation of just one foot above the 100-year floodplain elevation. On April 4, 2018, the City amended Chapter 19. This amendment expanded the regulated area to include the 500-year floodplain, increased the required slab elevation for new construction to two feet above the regulated floodplain elevation, and imposed a new "no-net-fill" rule within the 500-year floodplain. The amendments took effect on September 1, 2018.

When Landowner received news of the amendments to Chapter 19, it conducted an analysis and determined that it would be unable to sell 15 of the 34 remaining developed lots and 371 of the 531 planned lots as home sites because the estimated increased costs of construction for potential buyers would be prohibitive. Landowner contacted the City to find out whether its development would be grandfathered under the floodplain ordinance as it existed at the time Landowner filed its above-referenced development documents. The City responded that "[t]he required elevation of structures and grading plans including required floodplain storage mitigation can only be grandfathered if that particular scope of work is part of plans submitted for permit by the effective date of the ordinance (September 1, 2018)." Under this interpretation, Landowner's vested rights in completing its development under the requirements articulated in the existing floodplain ordinance are effectively eliminated, and its plans to complete the project by the 2018 summer selling season are stymied.

Because of the City's enactment of the amended ordinance, Landowner could not proceed with its development of The Crossing without incurring further damages in developing lots that are unsaleable and could not sell The Crossing property in its current state of development without foregoing all of the value created by its development efforts to date.

The Right to Take

While the procedural framework of condemnation cases differs from other civil matters, the filing of the condemnation petition and special commissioners' hearing has been described by the Supreme Court as an "administrative proceeding" which "converts into a normal pending cause when objections to the commissioners' award are filed." *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 179 (Tex. 2004) (internal citations and quotations omitted); *see generally* TEX. PROP. CODE §§21.011–.016. Thus, upon the filing of objections to the special commissioners'

award, the condemnor had the burden of proving, in the normal manner of a judicial proceeding, the essential elements of its condemnation claim.

Broadly speaking, a condemnor has to prove three essential elements to prevail on its condemnation claim. First, it must establish that it satisfied various formal prerequisites necessary to proceed in the trial court. The prerequisites include proof that a petition was filed that complies with Section 21.012(b) of the Texas Property Code; an offer to purchase was made; special commissioners were duly appointed, sworn and made an award; and objections were filed. *See Hubenak*, 141 S.W.3d at 183–84.

Next, the condemnor has to prove that the condemnation was for a "public use." This requirement derives from Article I, section 17 of the Texas Constitution:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money. . .

TEX. CONST. ART. I, §17. This provision is not a grant of powers to the State, but a limitation on the inherent sovereign power of eminent domain by imposing the requirements that the State take property only for "public use" and pay "adequate compensation" whenever doing so. *McInnis v. Brown Co. Water Improvement Dist. No. 1*, 41 S.W.2d 741, 744 (Tex.App.—Austin 1931, writ ref'd). Consistent with these limitations, the State, when delegating general eminent domain power, qualified the grant of power to the "exercise [of] the right of eminent domain for a public purpose to acquire public or private property" for various listed purposes or "any other municipal purpose the governing body considers advisable." TEX. LOC. GOV'T CODE §251.001(a). By requiring takings to be solely for public purposes, these limitations impliedly prohibit takings for private purposes or benefit. *Maher v. Lasater*, 163 Tex. 356, 354 S.W.2d 923, 924 (1962).

There are two aspects to the "public use" requirement. First, the condemnor must intend a use for the property that constitutes a "public use" under Texas law. Second, the condemnation must actually be necessary to advance or achieve the ostensible public use. A related concept is that a mere legislative declaration that a given use is a public use or is necessary does not control if the true intended use is a private use. This second aspect of public use is commonly termed the "necessity" or "public necessity" requirement. *See, e.g., Bevley v. Tenngasco Gas Gathering Co*., 638 S.W.2d 118, 120 (Tex.App.—Corpus Christi 1982, writ ref'd n.r.e.); *see also City of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 88 (1940); *City of Arlington, Tex. v. Golddust Twins Realty Corp*., 41 F.3d 960, 964–65 (5th Cir. 1994); how each aspect is proven differs.

Assuming there is proof of the condemnor's professed intended use of property, the question of whether that use constitutes a public use is one of law. *Maher*, 354 S.W.2d at 925 ("the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts."). Texas courts traditionally afford great weight to legislative declarations that a given use of property is a public use, whether in the form of statutes generally authorizing condemnation for that purpose, *see, e.g., Higginbotham*, 143 S.W.2d at 83–85, or in a governmental body's condemnation resolution regarding the particular property. *See Golddust*, 41 F.3d at 964 ("A municipality's exercise of eminent domain power is a legislative act."). Nonetheless, despite such deference, the Texas Supreme Court has been resolute that public use ultimately remains a judicial

question. *Maher*, 354 S.W.2d at 925; *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699, 704 (1959); *Higginbotham*, 143 S.W.2d at 83; *see Golddust*, 41 F.3d at 963. As the Supreme Court put it, "a mere declaration by the Legislature cannot change a private use or private purpose into a public use or public purpose." *Maher*, 354 S.W.2d at 925.3

As for necessity, unless a statute requires affirmative pleading and proof of that element, necessity is presumed from "a determination by the condemnor of the necessity for acquiring certain property." *Higginbotham*, 143 S.W.2d at 88. "[W]here the use for which property is sought to be taken . . . is public, the necessity and expediency of exercising the power, and the extent to which the property thereunder is to be taken, are political or legislative, and not judicial, questions." *West v. Whitehead*, 238 S.W. 976, 978 (Tex.Civ.App.—San Antonio 1922, writ ref'd); *see also Higginbotham*, 143 S.W.2d at 88 (explaining that the question of necessity is "essentially political in its nature and not judicial") (internal citation omitted); *Bevley*, 638 S.W.2d at 121. Once the presumption of necessity arises, the landowner can contest the fact of necessity only by establishing affirmative defenses such as fraud (that, contrary to the ostensible public use, the taking would actually confer only a private benefit),[1] abuse of discretion, or arbitrariness. To gain this presumption of necessity, the condemnor must first establish that its governing board actually made a determination that the particular taking was necessary to advance the ostensible public use.

Additionally, in 2005 the Texas Legislature passed the Limitations on Use of Eminent Domain Act. Act of Aug. 16, 2005, 79th Leg., 2d C.S., ch. 1, § 1, 2005 Tex. Gen. Laws 1, 1–2. Codified as Texas Government Code Section 2206.001, the Act precludes a government taking that (1) would confer "a private benefit on a particular private party through the use of the property," (2) was "merely a pretext to confer a private benefit," or (3) served purely "economic development purposes." The Act was amended in 2011 to make clear that the government may not condemn property if it "is not for a public use." Act of May 6, 2011, 82d Leg., R.S., ch. 81, § 2, sec. 2206.001, 2011 Tex. Gen. Laws 354, 354.

Finally, the legal requirements governing condemnation proceedings "must be strictly followed." *Horton v. Mills County*, 468 S.W.2d 876, 878 (Tex.Civ.App.—Austin 1971, no writ).

Fact Scenario #5

The South Mayde Creek Pedestrian & Bicycle Facility Project was a Harris County trail project proposed for Precinct 3 of Harris County. In May of 2001, the County nominated this trail project to receive $2,166,429 in federal funds under the Texas Department of Transportation's Statewide Transportation Enhancement Program ("STEP"). According to the County's nomination form:

> This project will extend and connect two trails: the existing City of Houston Cullen Park multi-use Pedestrian & Bicycle trail that terminates in Bear Creek Park and the planned Mayde Creek Trail funded in the 1999 STEP.

[1] Taking property for private use under guise of public use constitutes legal fraud upon property owners even if there is no fraudulent intent. *Golddust*, 41 F.3d at 963 (citing *Saunders v. Titus County Fresh Water Supply Dist. No. 1*, 847 S.W.2d 424, 427 (Tex.App.—Texarkana 1993, no writ); *Whitfield v. Klein Indep. Sch. Dist*., 463 S.W.2d 232, 235 (Tex.Civ.App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.)).

Landowner has owned the 0.5779-acre tract of land located at the corner of Spanish Needle Drive and Greenhouse Road in west Harris County since 1993. From its inception, the County's trail project included an alignment along the Greenhouse Road frontage of Landowner's property. The County first contacted Landowner in June of 2001 to obtain its agreement to negotiate the granting of a recreational easement needed for the trail project. At that time, Landowner agreed to negotiate the granting of the easement rights required.

On September 2, 2009, the County made a written offer of $10,094 for the purchase of Tract 8E, described as a recreational easement across 0.1545 acres of Landowner's property fronting on Greenhouse Road, for the South Mayde Creek Pedestrian & Bicycle Project, referenced by the County as Project Id. No. HC-3273. Landowner rejected this offer. Because of the federal funding requirements of the STEP program, the County could not acquire the needed easement through the exercise of eminent domain. To get around this requirement, the County removed Tract 8E from the trail project and proceeded to acquire the interests required from Landowner separately from the balance of the trail project.

It was at this time that the County personnel decided that, if the County was going to have to condemn the property anyway, it might as well condemn the whole property. According to Darrell Toombs, Administrative Superintendent for Harris County Precinct 3 and the County's manager for in-house construction projects within Precinct 3, if Landowner had been willing to sell the trail easement to the County voluntarily, the County would not have condemned Landowner's whole property. Toombs further acknowledged that the only reason the County condemned Landowner's whole property, as opposed to the easement required to complete the trail project, was because the County already had to go to condemnation anyway:

> *Q* *All right. Is there -- other than your reason that you told the Commissioner, which was, "We are going to condemnation anyway; we might as well take the rest of this person's property," is there any other reason for taking the rest of their property?*
>
> *A* *No.*

Paul Hawkins, Assistant Manager of Engineering for Harris County Precinct 3 and Project Manager for the County's trail project, concurred:

> *Q:* *Well, it's true that if my client had conveyed the trail easement that the County had requested, the County would not have initiated a condemnation case to acquire his whole property?*
>
> *A* *That's correct, yes.*

On February 9, 2010, Commissioners Court of Harris County ("Commissioners Court"), the County's governing body, entered a resolution and order approving the plans for the alignment and construction of the South Mayde Creek Pedestrian & Bicycle Project and declaring that a public necessity existed for the South Mayde Creek Pedestrian & Bicycle Project. In this resolution and order, the South Mayde Creek Pedestrian & Bicycle Project was identified as Project Id. No. HC-3273, the same project identification number referenced by the County in its earlier attempts to negotiate to voluntary acquisition of the trail easement from Landowner.

Commissioners Court's resolution and order did not mention any need for a park. At the time of Commissioners Court's resolution and order, the 100%-complete design plans for the trail project did not call for any parks or the use of any portion of Landowner's property outside of the 0.1545-acre trail easement originally requested.

The property authorized to be condemned under the February 2010 resolution and order was still referenced as Tract 8E but was now described as a fee acquisition of Landowner's whole property. In the 100%-Complete Design Plans for the South Mayde Creek Pedestrian & Bicycle Project, Tract 8E is depicted as a trail easement.

On February 10, 2010, the County made a written offer for the purchase of Landowner's whole property, still referenced as Tract 8E and as part of the South Mayde Creek Pedestrian & Bicycle Project. On March 18, 2010, the County withdrew its September 2, 2009 offer for Tract 8E. In all of the County's correspondence regarding its trail project, the County always identified the South Mayde Creek Pedestrian & Bicycle Project as Project Id. No. HC-3273.

On May 14, 2010, the County filed a statutory condemnation case to take Landowner's whole property, described in the County's petition as Tract 8E of the South Mayde Creek Pedestrian & Bicycle Facility Project. An administrative award was filed on August 30, 2010. Landowner timely appealed this award by filing objections to the award. Additionally, Landowner filed a plea to the jurisdiction challenging the County's right to take Landowner's whole property on the grounds that Commissioners Court, as the County's governing body, failed to determine a public necessity for the taking of Landowner's whole property and that Commissioners Court abused its discretion or acted arbitrarily and capriciously in determining a public necessity for the taking of Landowner's whole property.

Fact Scenario #6

Landowners collectively owned 11.93 acres of land located in south Montgomery County. The City filed a condemnation case to take approximately 7.81 acres of Landowners' property for the stated purpose of "the housing and expansion of the City's public utility operations and services." Landowners contend that the City condemned more land than was required for its public project and that its City Council, the governing body of the City, abused its discretion and acted arbitrarily and capriciously in determining that a public necessity existed for the portion of Landowners' property located south of the existing 3.3275-acre drainage channel when the City's public purpose could have been achieved without this land and the City has no proposed public use for the additional lands.

The City's resolution authorizing the taking was vague as to the nature of the public-use facilities that purported require the taking of Landowners' land:

> WHEREAS, in order for the City to fulfill its purposes and functions under the Texas Constitution and the Local Government Code, the Council deems it necessary and proper and in the public interest to construct, operate, and maintain additional public facilities, together with any and all necessary incidentals and appurtenances thereto, for the housing and expansion of the City's public utility operations and services (the "Facilities");

In discovery, its City Manager expanded on the nature of the facilities to be constructed and the circumstances that would result in the City's need for Landowners' property. According to the City Manager, Landowners' property was needed to accommodate the City's Public Works department that could be dislocated by the potential realignment of Robinson Road and the City's redevelopment of City Hall into a retail center:

Page 6

Q In your own words, what would you say is the public use for which the City is acquiring the property from Vaught Investments?

A First of all, we are currently laying a water

Page 7

supply line across the property to provide some resources for a business park that's adjacent -- immediately adjacent to the property.

We have plans for a water distribution system. We have plans for public works offices on that site.

Page 9

Q And in this Comprehensive Plan that was adopted in June of 2013, were there specific plans for a public works building to be located on the Vaught Investment's property?

A Not specifically. But the alignment of Robinson Road required a plan -- the realignment of Robinson Road was -- and it came right through the City Hall property that we're on right now -- and would have dislocated our public works department.

So, our barns and et cetera are located on

Page 10

this property. So, that -- knowing that the plan was to realign the road, we knew that we had to have a -- a longer term plan for relocating that property.

Also, in the Comprehensive Plan is a plan for redevelopment of the entire City Hall property as a retail center called the Plaza District.

So, the combination of Robinson Road and the Plaza District -- there is an actual plan for the

9 Plaza District in there -- specifies that City Hall, the
10 public works barns, equipment storage, needs to go
11 somewhere else so, that this property could also be
12 full -- used as its highest and best use as well.

Before the City's authorization of this acquisition, its public works department was housed in a 1,200-1,400-square-foot building on the City Hall property. The public works department was subsequently relocated to inside of City Hall. There were no plans for a new public works department building, and the City had not hired any architect or engineer to determine the suitability of Landowners' property for the public works building.[2] The only depiction of how the public works department would be situated on Landowners' property is a crude "site plan" put together by the department's director:

According to the City Manager, the City's Comprehensive Plan adopted in 2013 called for the redevelopment of the entire City Hall property as a retail center called the Plaza District, and it is this redevelopment that will require the construction of a new City Hall and the relocation of the public works department. This was not true: while the Comprehensive plan did depict a development concept of a town center in the area of City Hall, these plans, which were conceptual in nature, continued to depict the City Hall building in its current location and configuration, even with a realigned Robinson Road. The 2013 Comprehensive Plan did not identify Landowners' property as a location for any public-use facilities. A feasibility study subsequently performed by Jones & Carter, an engineering firm, similarly did not identify Landowners' property as a location

[2] Similarly, there were no building plans for a "new" City Hall building that would, for some reason, require the public works department to be relocated out of City Hall.

for any public-use facilities.[3] According to the land use plan adopted as part of the 2013 Comprehensive Plan, and contrary to the City Manager's testimony, the planned use of Landowners' property being acquired in this case was identified as light industrial.

In light of the specific public use identified in City Council's determination of public necessity and the City's petition, it is important to note that the public works department building proposed to be relocated to the acquired property (if and when Robinson Road is realigned and City Hall is relocated to accommodate a retail center) did not provide any utility service. Any realignment of Robinson Road is not funded. The purported relocation of the public works building to the acquired property never made it to the City Council's agenda outside of executive session, and was never mentioned in any public action by City Council.

Prior to the City's filing of its condemnation petition, there were several developers interested in purchasing Landowners' property with other tracts towards an assembled development. None of these transactions came to fruition, in part due to statements made to potential purchasers by representatives of the City during their due diligence. *Id*. A broker representing one of these potential purchasers met with the City Manager regarding potential reimbursement from the City for putting in utilities and roadways to serve the prospective development. In that meeting, the City Manager told that broker that his clients' development plan would not work because the City was going to acquire Landowners' property through condemnation. The City Manager told him that the City would sell off land it did not use after the condemnation was concluded.

In addition to the City Manager's conversation with the broker, the Public Works Director testified that the developer of the office park located immediately east of Landowners' property being acquired, looked at Landowners' property and the property located immediately to the south of Landowners' property as potential sites for the expansion of his development. The City even prepared a price comparison analysis of the Landowners' property and the adjacent property in which it noted how much of the acquisition the developer was interested in purchasing back from the City.

[3] In fact, the Jones & Carter Feasibility Study did not mention a public works building to be located in the area of Landowners' property. This, despite the fact that this study is the document that is supposed to embody what the City intends to do with the property to be acquired from Landowners.

APPENDIX A

ORDINANCE NO. 2005-26

AN ORDINANCE AMENDING THE ZONING ORDINANCE OF THE CITY OF BELTON BY CHANGING THE DESCRIBED DISTRICT FROM RETAIL ZONING DISTRICT TO PLANNED DEVELOPMENT-RETAIL ZONING DISTRICT FOR A CAR WASH AND LUBE CENTER.

WHEREAS, Bill Trainor, owner of the following described property has presented his petition duly signed, to the City Planning & Zoning Commission and filed said petition with the City Clerk of the City of Belton, and due notice of filing of said petition and hearing on said petition has been given as required by the City Zoning Ordinance and by law, and a hearing on said petition before the City Planning & Zoning Commission of the City of Belton was set for the 17th day of May, 2005, at 5:00 p.m. for hearing and adoption, said district being described as follows:

0.879 acres of the M. F. Connell Survey, Abstract #6, 2603 N. Main Street, Belton, Texas

WHEREAS, said application for such amendment was duly recommended by the said City Planning & Zoning Commission and the date, time and place of the hearing on said application by the City Council of the City of Belton was set for the 24th day of May, 2005, at 5:30 p.m. at the Police & Courts Building and due notice of said hearing was given as required by ordinances and by law; and

WHEREAS, a hearing was held upon the application by the City Council of the City of Belton at the time, place and date herein before set forth and no valid objection to said amendments was presented.

NOW THEREFORE, BE IT ORDAINED by the City Council of the City of Belton, Texas, that the said district located on a tract of land as more fully and completely described above, be and is hereby changed from Retail Zoning District to Planned Development-Retail Zoning District for a car wash and lube center, and that the Zoning Ordinance of the City of Belton be and is hereby amended, subject to the following:

1. The base-zoning district will be PD-Retail.
2. Additional allowed uses include a car wash and lube center.
3. A general site plan is attached and a detailed site plan will be submitted with a building permit application.
4. The detailed site plan shall include a tree survey and incorporate existing trees into the overall design.
5. The temporary access point will be closed when the Sparta Road extension is constructed and the northern access point reconstructed as a right-in/right-out only drive. One access point to the Sparta Road extension, as shown on the "Preliminary Site Schematic", will be allowed.
6. All buildings will be constructed of native stone veneers. Metal exteriors are prohibited.
7. One monument sign will be permitted and shall not exceed six feet (6') in height and six feet (6') in length.

8. Noise screening shall be provided between this use and adjoining development to the north.

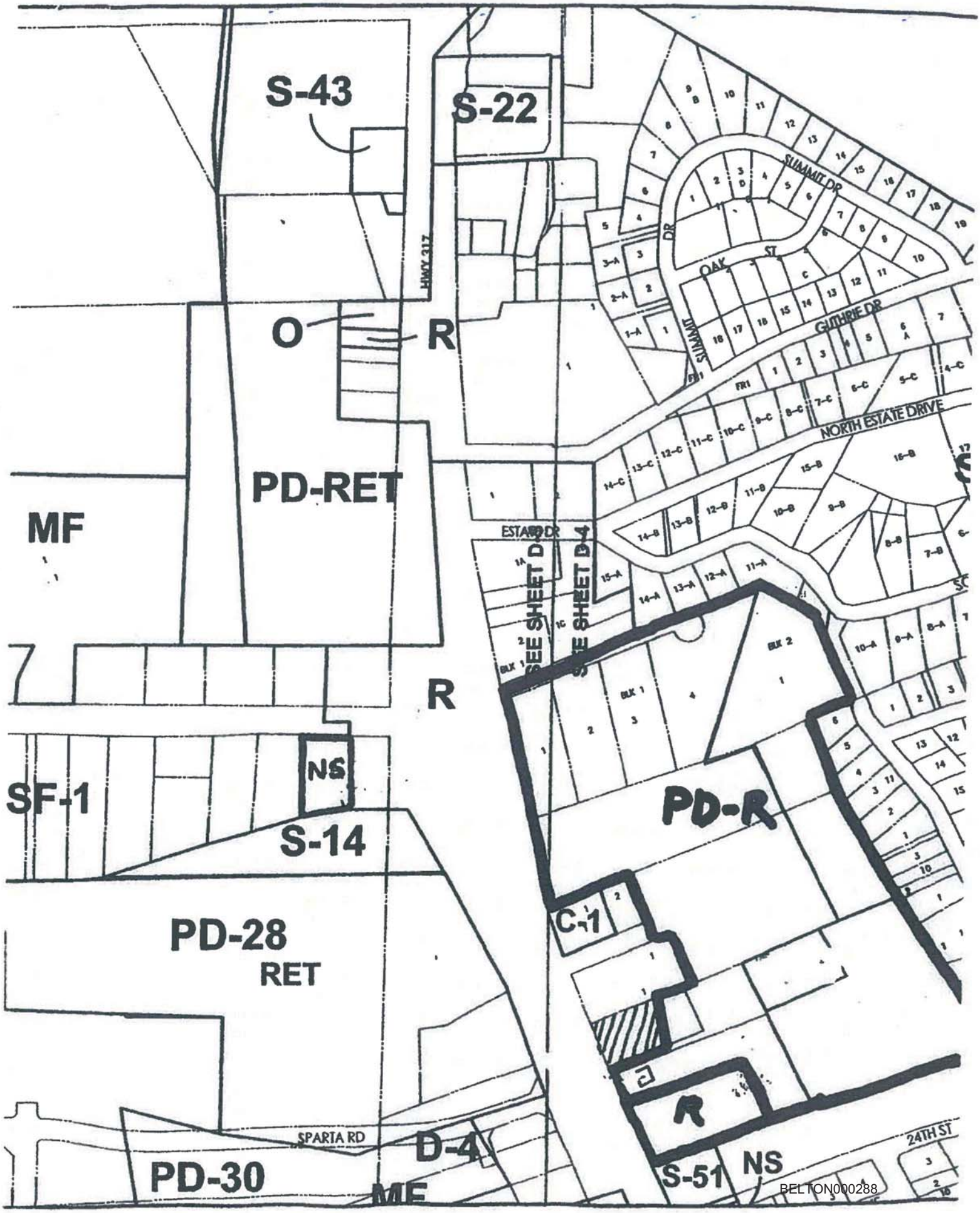
This ordinance was presented at the stated meeting of the City Council of the City of Belton and upon reading was passed and adopted by the City Council on the 24th day of May, 2005, by a vote of 7 ayes and 0 nays.

SIGNED AND APPROVED by the Mayor and attested by the City Clerk on this the 24th day of May, 2005.

Dwayne Digby, Mayor

ATTEST:

Connie Torres, City Clerk


S-43
S-22
HWY 317
O
R
PD-RET
MF
R
SF-1
NS
S-14
PD-28
RET
PD-30
SPARTA RD
D-4
MF
SUMMIT DR
OAK ST
GUTHRIE DR
NORTH ESTATE DRIVE
ESTATE DR
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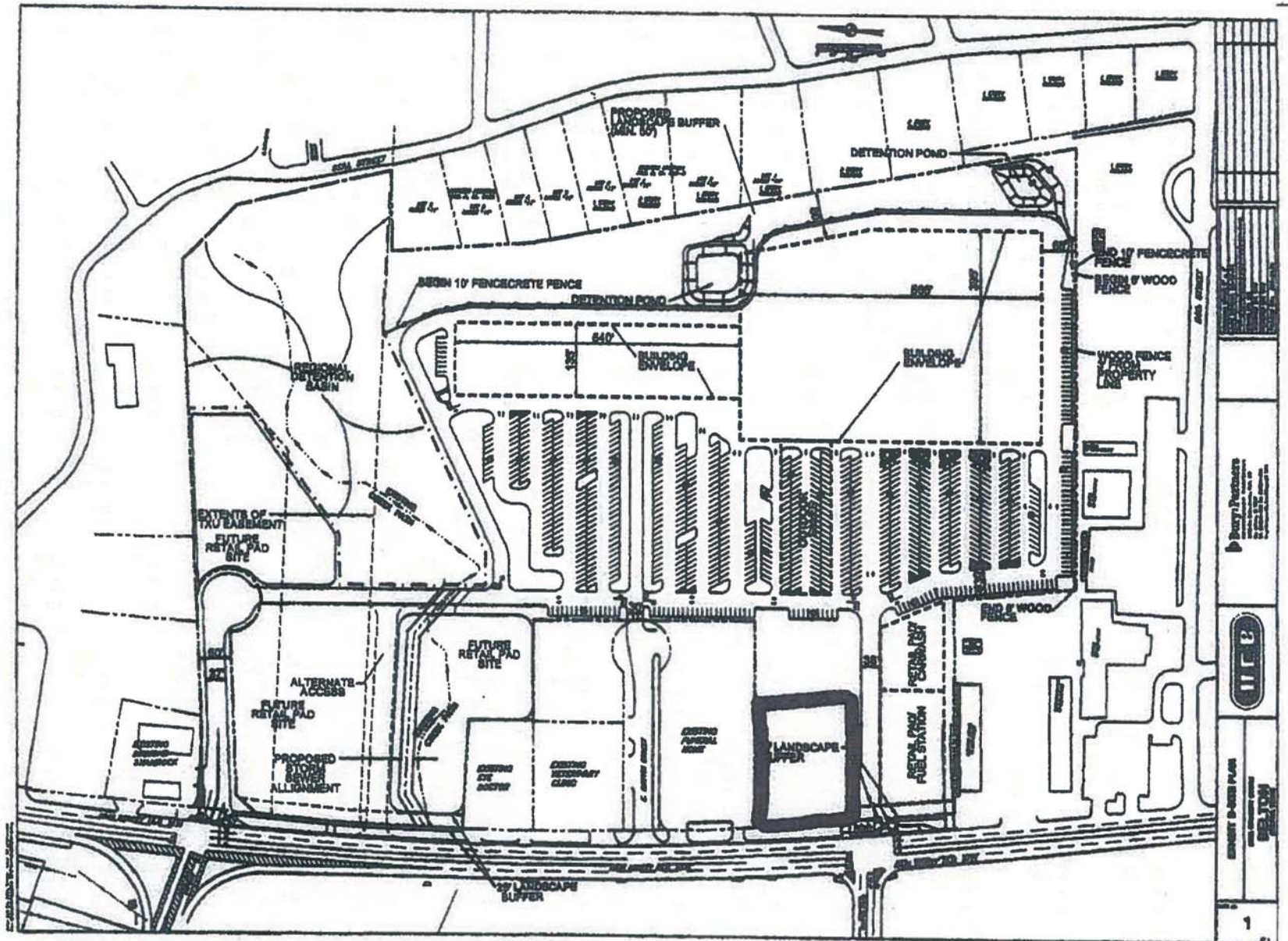
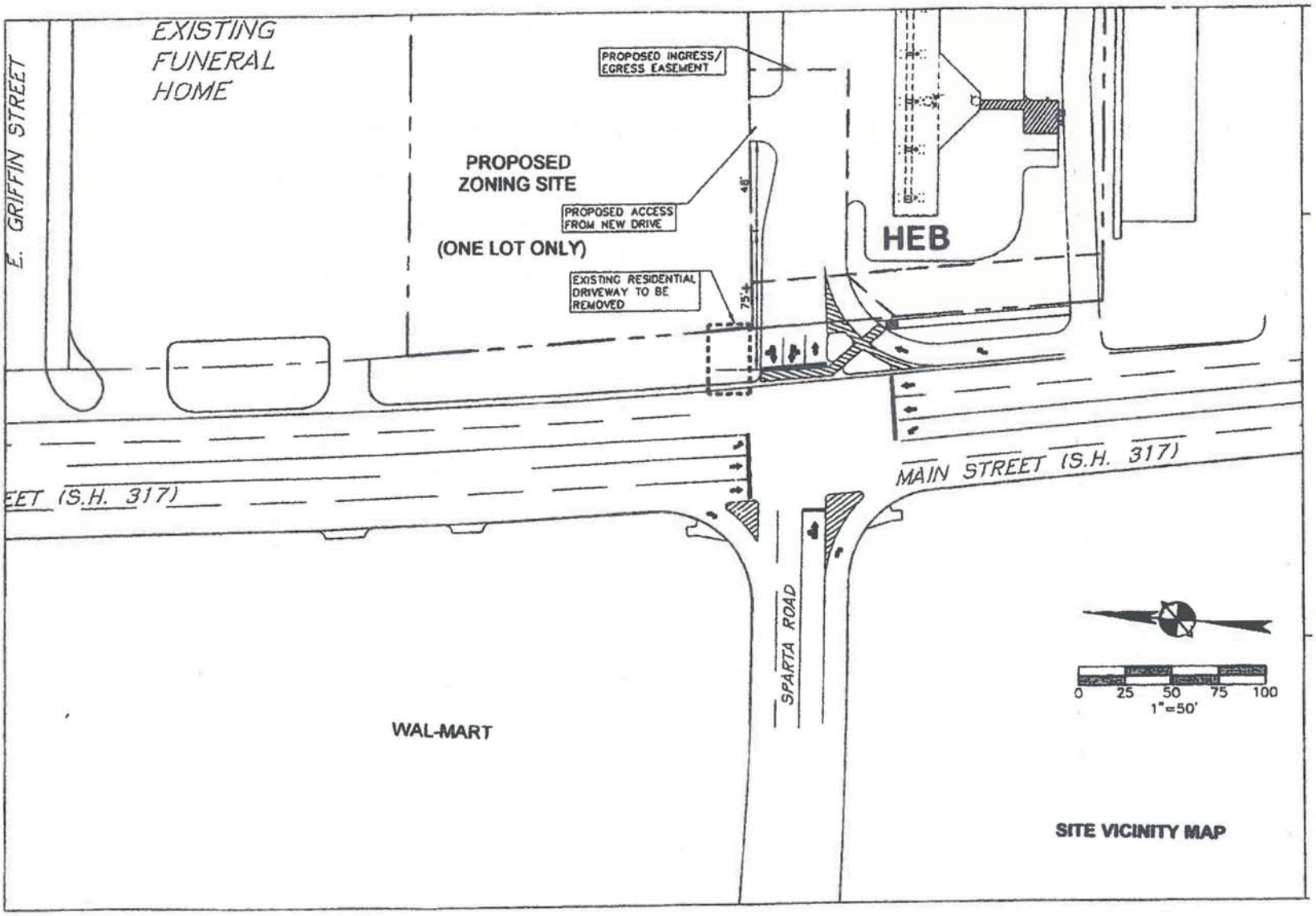
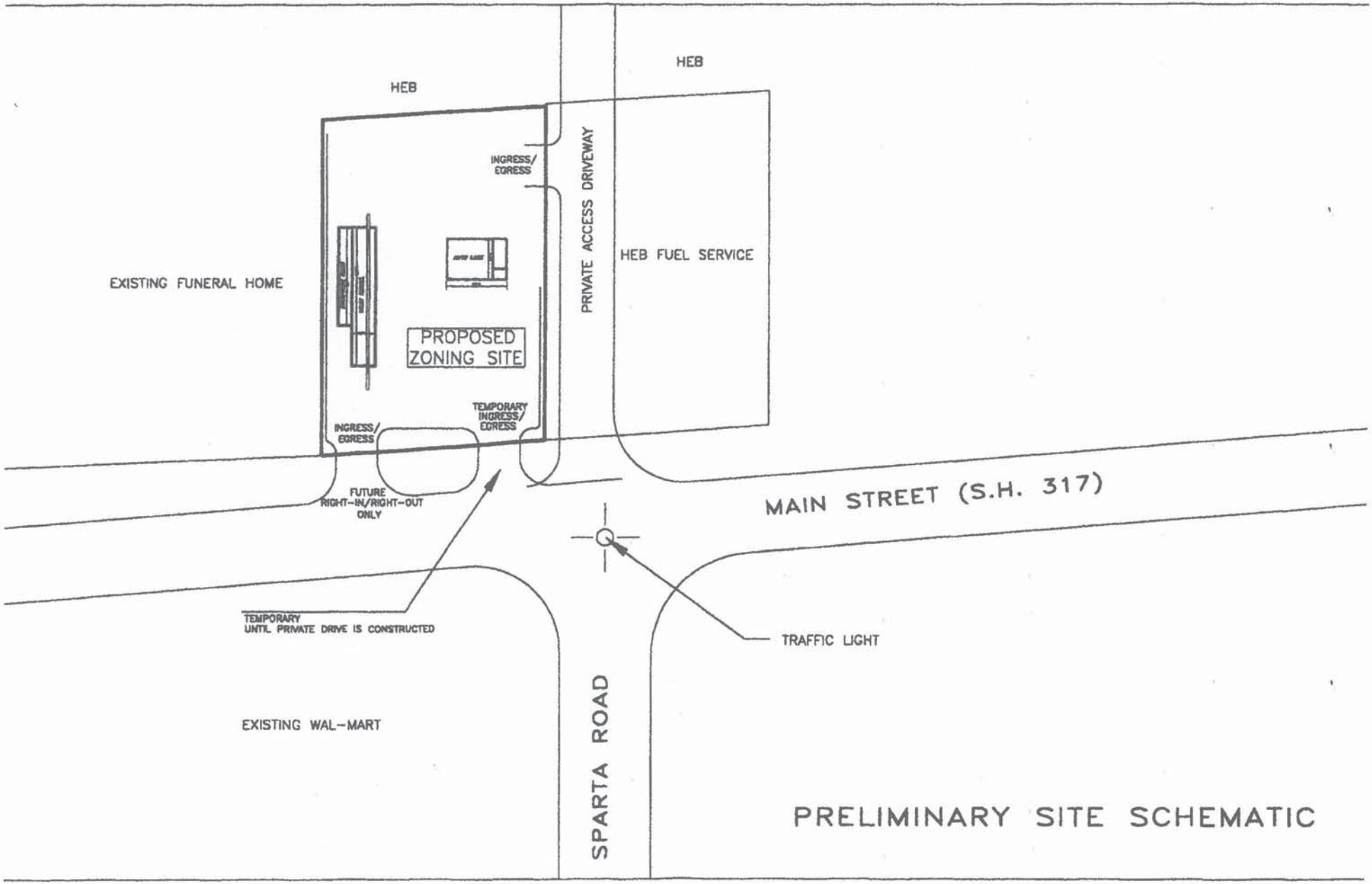
SEE SHEET D-4
PD-R
C-1
R
S-51
NS
24TH ST

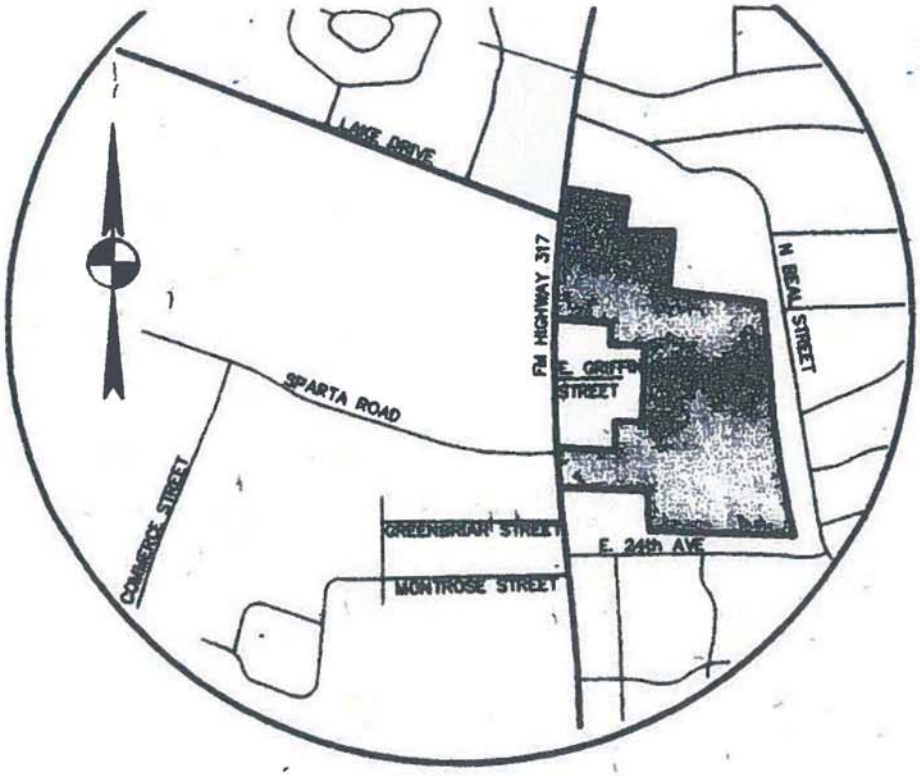


REVISED PROPOSAL - HCB

BELTON000289


EXISTING
FUNERAL
HOME
E. GRIFFIN STREET
PROPOSED INGRESS/
EGRESS EASEMENT
PROPOSED
ZONING SITE
PROPOSED ACCESS
FROM NEW DRIVE
(ONE LOT ONLY)
EXISTING RESIDENTIAL
DRIVEWAY TO BE
REMOVED
48'
75'
HEB
EET (S.H. 317)
MAIN STREET (S.H. 317)
SPARTA ROAD
WAL-MART
0 25 50 75 100
1"=50'
SITE VICINITY MAP


HEB
HEB
INGRESS/
EGRESS
PRIVATE ACCESS DRIVEWAY
HEB FUEL SERVICE
EXISTING FUNERAL HOME
PROPOSED
ZONING SITE
TEMPORARY
INGRESS/
EGRESS
INGRESS/
EGRESS
FUTURE
RIGHT-IN/RIGHT-OUT
ONLY
MAIN STREET (S.H. 317)
TEMPORARY
UNTIL PRIVATE DRIVE IS CONSTRUCTED
TRAFFIC LIGHT
EXISTING WAL-MART
SPARTA ROAD
PRELIMINARY SITE SCHEMATIC



VICINITY MAP
BELTON, TEXAS
SCALE 1"=1000'

LEGEND

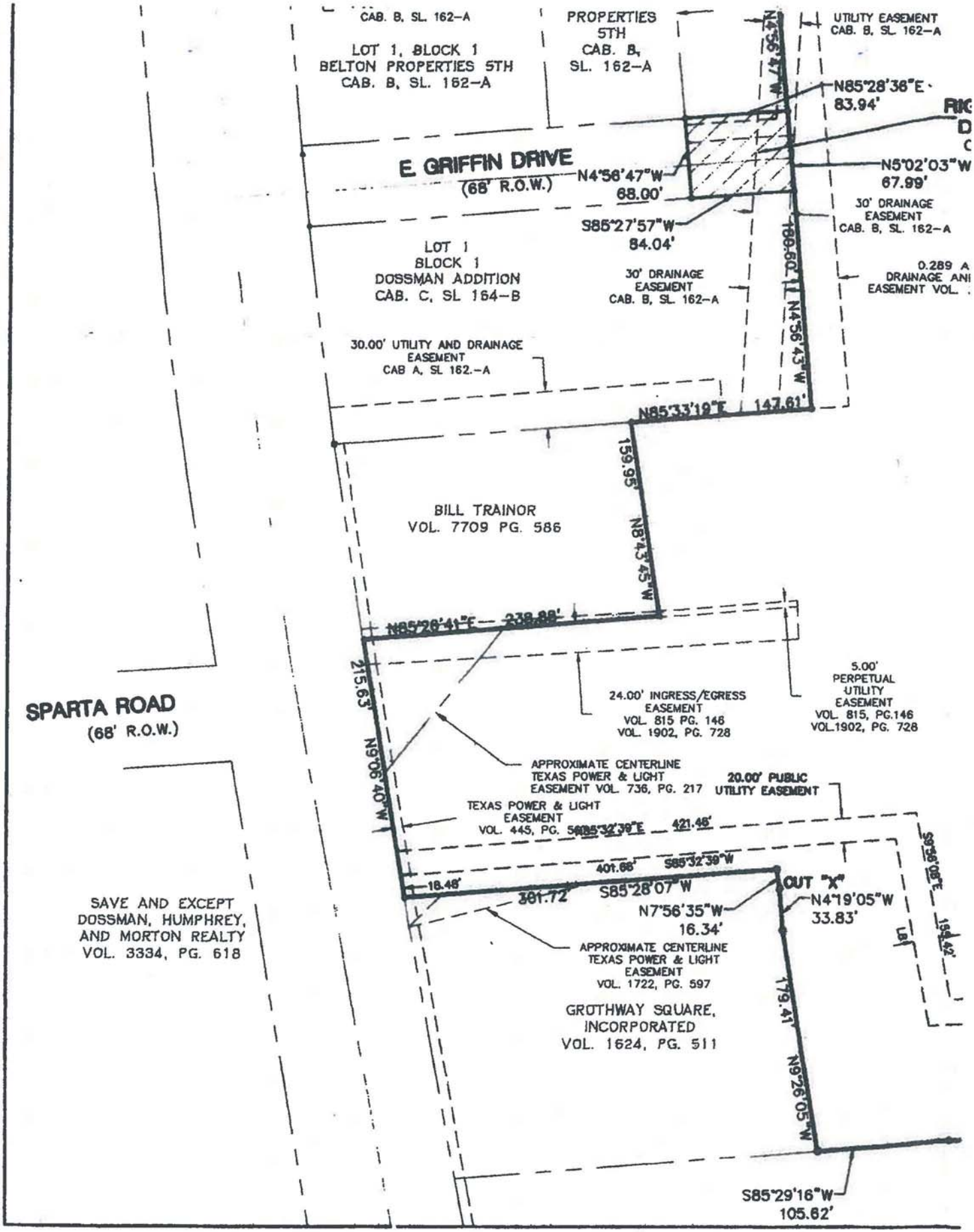
●	1/2" IRON ROD FOUND (UNLESS NOTED)
○	1/2" IRON ROD SET WITH YELLOW CAP MARKED "BPI" (UNLESS NOTED)
⊙	IRON PIPE FOUND
▲	NAIL FOUND
△	COMPUTED POINT
■	MONUMENT FOUND
□	MONUMENT SET

SUBDIVISION PLAT ESTABLISHING
HEB SPARTA ROAD SUBDIVISION

32.762 ACRES OF LAND LOCATED IN THE M.F. CONNELL SURVEY, ABSTRACT NO. 6, CITY OF BELTON, BELL COUNTY, TEXAS AND BEING A PORTION OF THAT CERTAIN 8.862 ACRE TRACT OF LAND CONVEYED TO HEB GROCERY COMPANY, LP, BY DEED OF RECORD IN VOLUME 5399, PAGE 770, AND A PORTION OF THAT CERTAIN 7.114 ACRES OF LAND CONVEYED TO HEB GROCERY COMPANY, LP, BY DEED OF RECORD IN VOLUME 5535, PAGE 96, BOTH RECORDED IN THE OFFICIAL PUBLIC RECORDS OF REAL PROPERTY OF BELL COUNTY, TEXAS

LOT 1 OWNER
HEB GROCERY COMPANY, LP
646 S. MAIN
SAN ANTONIO, TEXAS 78204

LOT 2 OWNER
MT EVEREST INVESTMENTS, INC.
15517 ECHO HILLS DRIVE
AUSTIN, TEXAS 78717



LINE TABLE		
LINE #	BEARING	DISTANCE

LINE TABLE		
LINE #	BEARING	DISTANCE

LINE TABLE		
LINE #	BEARING	DISTANCE

LINE	
LINE #	BEAR

APPENDIX B

SECTION 5 - DESIGN CRITERIA

5.1 General Public Street Arrangement and Layout

A. The public street system pattern proposed within any subdivision or development shall be based upon the following design concepts:
Roadway sections streets shall be designed by the development project engineer following the guidelines of the following publications and the standard given in these regulations. In case of conflicts within these requirement the most stringent requirement shall control.

1. RECOMMENDED GUIDELINES FOR SUBDIVISION STREETS, Institute of Transportation Engineers, Latest Edition.
2. GUIDELINES FOR URBAN MAJOR STREETS DESIGN, Institute of Transportation Engineers, Latest Edition.
3. A POLICY ON GEOMETRIC DESIGN OF HIGHWAYS AND STREETS, AASHTO, Latest Edition.
4. TEXAS MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (TMUTCD), Texas Department of Transportation, Latest Edition.
5. TRIP GENERATION MANUAL, Institute of Transportation Engineers, Latest Edition.
6. DESIGN STANDARDS AND DETAILS, Fort Bend County Engineering Department, Latest Edition.
7. GEOMETRIC DESIGN STANDARDS, Harris County and City of Houston as modified by Fort Bend County, Engineering Department, Latest Edition.
8. THOROUGHFARE DEVELOPMENT PLAN, Fort County, Texas, Latest Edition.

B. Adequate vehicular access to all properties within the subdivision plat boundaries shall be provided. All subdivisions should have more than one point of access. A boulevard entrance or emergency entrance is desirable. Adequate access for fireman, police and other emergency services shall be provided.

C. Adequate street connections to adjacent properties shall be provided to assure adequate traffic circulation within the general area.

D. A local street system serving residential properties should discourage through traffic, without the need of multiway stop signs, while maintaining sufficient access and traffic movement for convenient circulation within the residential area and access for fireman, police and other emergency services.

E. A sufficient number of continuous streets and major thoroughfares to accommodate the increased traffic demands generated by the subdivision shall be provided.

F. Where the proposed subdivision is located adjacent to a State maintained road, additional right-of-way may be required to accommodate the ultimate road development.

G. Block lengths shall be measured along the face of a block (being the adjacent street right-of-way line) from the centerline of street to the centerline of another street where such streets provide cross traffic circulation (not cul-de-sac streets).

1. Where loop street configuration is involved, the length of the interior block formed by the loop street is measured along the centerline of the

EXHIBIT
4
PENGAD 800-631-6989

EXHIBIT A

loop street between adjacent street centerlines.

2. Block lengths for streets terminated by a cul-de-sac is measured from the centerline radius point to the centerline of the intersecting street.

5.2 Major Thoroughfares

A. Location and Alignment
   1. The location and alignment of designated major thoroughfares shall be in conformance with the latest edition of the Major Thoroughfare Plan of Fort Bend County.
   2. Any proposals which constitute a change in the location or the alignment of any planned or designated major thoroughfare must be approved by Commissioners' Court.

B. Right-of-Way
   1. The minimum width of the right-of-way to be dedicated for any designated major thoroughfare shall not be less than 100 feet, nor more than 120 feet.
   2. Where the subdivision is located adjacent to an existing designated major thoroughfare having a right-of-way width of less than 100 feet, sufficient additional right-of-way must be dedicated, within the subdivision boundaries, to provide for the development of the major thoroughfare to a total right-of-way width of not less than 100 feet, nor more than 120 feet.
   3. Where open ditch drainage is planned, the minimum right-of-way width required for a designated major thoroughfare shall be not less than of 100 feet or sufficient width to accommodate the approved roadway pavement and attendant drainage facilities, whichever is greater.
   4. Right-of-way intersections with other public street right-of-ways should be at right angles. Deviations of up to ten (10) degrees may be approved by the County Engineer.
   5. The right-of-way line at intersections shall have a minimum radius of 30 feet.
   6. A right-of-way corner cutback of 25 feet may be substituted for the 30 foot radius.

C. Roadway Curves and Intersections
   1. Major thoroughfare horizontal curves shall have a centerline radius of 2,000 feet or more.
   2. Reverse horizontal curves shall be separated by tangent distance of not less than 100 feet.
   3. Intersections with other public streets should be at right angles. Deviations of up to ten (10) degrees may be approved by the County Engineer.
   4. Curb or pavement return radius of 30 feet shall be provided.
   5. Layout of medians including openings shall comply with the guidelines of GEOMETRIC DESIGN GUIDELINES FOR SUBDIVISION STREET, Harris County, City of Houston, Latest Edition (as modified by Fort Bend County).

D. Minimum Concrete Pavement shall be eight (8) inches.

APPENDIX C

Kimley»Horn

TECHNICAL MEMORANDUM

To: Joe Cox
Assistant County Attorney
Fort Bend County, Texas

From: Aaron W. Nathan, P.E., AICP
Kimley-Horn and Associates, Inc.
TBPE Firm Number F-928

Date: June 12, 2017

Subject: Plaza at Westheimer Lakes (Westheimer Holdings Shopping Center)
Rough Proportionality Analysis
Fort Bend County, Texas

Purpose

The purpose of this memorandum is to provide a "rough proportionality" calculation of the Plaza at Westheimer Lakes (Westheimer Holdings Shopping Center) located at the northeast corner of Westheimer Lakes North Drive and FM 1093 in Fort Bend County. For roads, the rough proportionality calculation is a comparison of the capacity provided by a development to the traffic impacts of the proposed development.

The Plaza at Westheimer Lakes was approved by Fort Bend County in 2007; therefore (based on guidance from Fort Bend County) this analysis was conducted using the information that would have been utilized in 2007 had this analysis been completed at that time. Inputs and variables in this calculation that were different in 2007 (than if the analysis was performed in 2017) have been noted accordingly.

Proportionality Methodology

Traffic and trip generation of development impacts the area roadway system by using available capacity. To measure the impacts a development has on the roadway system, an analysis using vehicle-miles of travel in the PM peak hour (which are then converted to dollars) was conducted. The value of capacity provided by roadway improvements and/or right-of-way reservation for future improvements (in dollars) can be compared with the impact of traffic generated by a development (in dollars). For roadway improvements that only include right-of-way reservation, supply is determined by measuring the value of the right-of-way needed to allow for future capacity to be provided.

For site traffic generation, demand (vehicle-miles) is determined by multiplying an appropriate trip rate for a specific use by an average trip length associated with such use. Trip generation rates and resulting trip estimates are found in the *Institute of Transportation Engineers* (ITE) publication entitled *Trip*

Generation. In 2007, the most recent version of *Trip Generation* was the 7th Edition (published in 2003). [The most current version is the 9th Edition (published in 2012).] Pass-by rates (trips that utilize the development but are not otherwise new trips on the adjacent roadway network) are found in the *ITE Trip Generation Handbook*. In 2007, the most recent version of this *Handbook* was the 2nd Edition (published in 2004). [The most current version is the 3rd Edition (published in 2014).] Trip length information was derived from information contained in the National Household Travel Survey as well as an evaluation of the adjacent roadway network.

Using this supply and demand information, a comparison can be made (in dollars) to determine the roughly proportionate share of the development.

Development and Roadway Improvements

Based upon information provided by Fort Bend County, the Plaza at Westheimer Lakes development consists of the following land use and intensity:

- ~75,000 Gross Leasable Square Feet of Shopping Center Development on 7.6657 acres (exact size of development in square feet not available from Fort Bend County as building permits were not required for this development when constructed)

At the time the Plaza at Westheimer Lakes property was being developed, Fort Bend County required the reservation of 3.2119 acres (139,911 square feet) to allow for the construction of the future Westpark Tollway Extension and associated Frontage Roads, which were both identified on the Fort Bend County Major Thoroughfare Plan and are being funded by Fort Bend County.

Proportionality Calculation

Projected Demand of Proposed Site

The vehicle-miles of demand are calculated by multiplying the proposed size of development by its appropriate trip rate, pass-by reduction rate, and trip length. The PM peak hour trip rate (the typical peak used to analyze the impact of a retail land use) for the shopping center land use (from ITE Trip Generation, 7th Edition) is 3.75 vehicles per hour for each 1,000 square feet of gross leasable area during the PM peak hour of adjacent street traffic. (*For reference, the 9th Edition of ITE Trip Generation has a rate of 3.71 vehicles per hour, a minor change between 2007 and 2017*). In addition, a pass-by reduction rate of 34% should be applied (from the ITE Trip Generation Handbook – this pass-by rate is the same in both the 2nd and 3rd Edition of this Handbook) to account for the number of pass-by trips anticipated for this type of land use (vehicles already utilizing FM 1093 that 'pass-by' and stop at this development). Based on these factors, this results in approximately 186 PM peak hour trips (3.75 x 66% x 75;

the product of 3.75 vehicles per hour per 1,000 square feet times 100% - 34% (reduction factor for pass-by trips) times 75 thousand square feet).

Trip length data from the National Household Travel Survey was utilized to calculate the trip length to/from the development. For shopping trips in the Houston Metropolitan Area, the average trip length is 6.45 miles. However, this trip length should be reduced to account for two significant factors. First, trips are associated with both the origin and destination land uses; therefore only 50% of the trip length should be directly attributable to the shopping center (reducing 6.45 miles to 3.225 miles). In addition, some portion of the trip (estimated to be approximately 50%) occurs on portions of the roadway network that Fort Bend County is not responsible for constructing or maintaining. Considering these two factors, a reasonable trip length to attribute to this development is to reduce the 6.45 miles to 1.5 miles (1.5 miles is a typical distance utilized for this purpose in rough proportionality determinations across major metropolitan areas in Texas including the DFW Metroplex, Austin, and San Antonio). The product of the number of trips (186) and the trip length (1.5 miles) results in an impact of 279 vehicle-miles of travel on the roadway network from this development.

Lastly, a calculation was performed to determine the average cost for Fort Bend County to provide capacity for these additional 279 vehicle-miles of travel. Based on work completed throughout the state of Texas on comparable projects (including other rough proportionality policy development and roadway impact fee evaluations), an average cost for a public agency to provide a vehicle-mile of capacity can be determined. This evaluation considers the costs for a public agency to plan for and provide roadway arterial facility capacity. This value is conservatively (meaning lower cost) estimated to be $1,750 per vehicle-mile (previous evaluations across Texas indicate this value ranges from roughly $1,750 - $2,250 per vehicle-mile; should a more detailed evaluation of roadway costs be performed, it is likely the cost per vehicle-mile would be higher than $1,750.). Roadway construction project costs in 2007 across Texas were comparable to recent planning level project cost projections completed for similar projects.

Therefore, the resulting impact this development has on the roadway network is **$488,250** (which is the product of 279 vehicle-miles times $1,750 per vehicle-mile).

Capacity Supplied by Proposed Roadway Improvements

This calculation determines the value of supply provided by the right-of-way reservation of 3.2119 acres (or 139,911 square feet), which is based on the amount of property reserved as shown in the Plaza at Westheimer Lakes Plat dated February 2007. It should be noted the current right-of-way requirement is only 2.166 acres; however, this analysis is considering the right-of-way reservation required in 2007. This approach results in a higher value for the capacity supplied by the development. The value of property is based upon information from the Fort Bend County Appraisal District.

In reviewing information provided by the Fort Bend County Appraisal District, the value of this right-of-way in 2007 was $2.40 per square foot. Information obtained from the Fort Bend County Appraisal District shows the 10.876 acres of property (from which the 3.2119 was part of) valued at $1,137,020 ($1,137,020 / 10.876 / 43,560 = $2.40). [For reference only, the Fort Bend County Appraisal District placed the 2017 land value for the improved portions of Plaza at Westheimer Lakes at $10 per square foot; the unimproved portions at $.10 per square foot.] Therefore, the resulting value of supply provided by the Plaza at Westheimer Lakes is **$335,786.40** (the product of 139,911 square feet times $2.40 per square foot).

Results

A comparison of the impact of the demand of the site (in dollars) relative to the value of roadway supply being provided reveals that the demand from the development exceeds the capacity supplied.

$488,250 (impact) > $335,786.40 (value of right-of-way reservation) [~145.4%]

Conclusion

The purpose of this evaluation was to assess the impacts of the development on the County roadway system and to determine the roughly proportional supply of roadway capacity necessary to address the added demand.

The rough proportionality analysis reveals that the County was justified in having the developer reserve right-of-way worth up to approximately $488,250.

Based on the results of this rough proportionality analysis, the impact of demand on the system ($488,250) exceeds the value of capacity (supply) provided by the development ($335,786.40) by $152,463.60 (45.4%).

Therefore, the improvements required by the County are justified (i.e. the development added less capacity than could have been required to support their development).