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August 5, 2013

VIA E-MAIL

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City of Austin, Texas

Re: Opposition to C814-2012-0160 (PUD Application for 211 South Lamar)

Dear Mayor Leffingwell and Members of the City Council:

This supplements my letter of July 31, 2013, opining that the City Council lacks legal authority to approve the above-referenced Application.¹ First, I wish to clarify that although my letter of July 31, 2013, discusses Subsection 2.2(B), Subsections 2.2(A) and 2.5.1 of the PUD Ordinance make clear that PUD development bonuses may not be used to modify the 10-acre minimum of the PUD Ordinance.² However, as noted below, the interplay among Subsections 2.2(A) & (B) and 2.5.1 of the PUD Ordinance is relevant to the issue of height limitations for a proposed PUD located in the Waterfront Overlay District.

The principal purpose of this letter is to assist the City Council in construing the term “base zoning district,” as that term is used for purposes of the Subdistrict height restrictions in Subpart C³ of the Waterfront Overlay District and Subdistrict Development Regulations. With respect to the Application, the relevant provision is Subsection 25-2-733(H), which provides:

The maximum height is the lower of 96 feet or the maximum height allowed in the base zoning district.

¹ See Zoning Change Review Sheet, Case No. C814-2012-0160, 211 South Lamar PUD, updated for CC 2013-08-08, at Exhibit C-82 to C-92.

² As used herein, the term “PUD Ordinance” refers to Austin City Code Chapter 25-2, Division 5, Sections 1.1 through 2.5.7.

³ Austin City Code §§ 25.2-731 to 25.2-746.

Specifically, the question is whether “base zoning district” in this context refers to the base zoning district *prior* to rezoning as a PUD, or to the PUD base zoning district (if the application were to be approved). If “base zoning district” in Subsection 25-2-733(H) refers to the pre-PUD base zoning district, the development proposed by the Application is limited to a maximum height of 60 feet. On the other hand, if “base zoning district” for this purpose refers to the proposed PUD base zoning district, approval of the Application would result in there being no maximum height at all for the development, because the Code does not prescribe any maximum height for a PUD.

As explained below, my opinion is that the Subdistrict height restriction provisions are unambiguous, that the term “base zoning district” in that context can reasonably refer only to the base zoning district *before* rezoning as a PUD, and that the City Council therefore may not supersede the Waterfront Overlay Subdistrict height limits by approving a PUD application.

Applicable Canons of Statutory Construction⁴

The Texas Supreme Court has described legislative intent as the “polestar of statutory construction.”⁵ As that court elaborated in another opinion:

When possible, the Legislature’s intent is drawn from the plain meaning of the words chosen, giving effect to all words so that none of the statute’s language is treated as surplusage. Our ultimate goal, however, is to understand the Legislature’s intent and apply that intent according to the statute’s purpose.⁶

In yet another opinion, the Texas Supreme Court provided the following relevant guidance:

We must construe statutes as written and, if possible, ascertain legislative intent from the statute’s language. Even when a statute is not ambiguous on its face, we can consider other factors to determine the Legislature’s intent, including: the object sought to be obtained; the circumstances of the statute’s enactment; the legislative history; the common law or former statutory provisions, including laws on the same or similar subjects; the consequences of a particular

⁴ Rules of statutory construction also apply to city ordinances. *Taylor v. State*, 117 S.W.3d 848, 850 (Tex. Crim. App. 2003).

⁵ *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995).

⁶ *Marks v. St. Luke’s Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010) (quoting a statute’s statement of purpose (citations omitted); see also *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 248 n.35 (Tex. 2010) (noting that courts “construe statutes to give effect to every provision and ensure that no provision is rendered meaningless or superfluous”); Austin City Code § 1-1-3 (providing that “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage,” and that “[w]ords and phrases that have acquired a technical or particular meaning, whether by definition or otherwise, shall be construed accordingly”).

construction; administrative construction of the statute; and the title, preamble, and emergency provision.

Additionally, we must always consider the statute as a whole rather than its isolated provisions. We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone. We must presume that the Legislature intends an entire statute to be effective and that a just and reasonable result is intended.⁷

The Ordinary Meaning of “Maximum Height,” in Context

According to common usage in the context in which the term “maximum height” is used, the term “maximum height allowed in the base zoning district,” means an upper limit allowed by a base zoning district.⁸ The “base zoning district” cannot refer to a post-approval PUD base zoning district, because a PUD district does not have any maximum height or upper height limit. Therefore, according to the ordinary usage of words and the context, “base zoning district” for purposes of Subsection 25-2-733(H) can reasonably refer only to the pre-PUD base zoning district.

The Goals and Purposes of the Waterfront Overlay Subdistrict Regulations (*i.e.*, Division 8)

The polestar for construing the Waterfront Overlay Subdistrict Regulations is the Council’s intent as expressly stated in Section 25-2-710 (Goals and Policies):

Decisions by the accountable official and city boards regarding implementation of this Division *shall be guided at all stages by the goals and policies of the Town Lake Corridor Study, including but not limited to the following:*

- (A) Ensure that zoning decisions in the Colorado River corridor achieve the highest degree of land use compatibility by:

....

⁷ *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citations omitted); *see also Mahaffey v. State*, 364 S.W.3d 908, 913 (Tex. Crim. App. 2012) (noting that when interpreting a statute, courts look to other provisions within the entire “statutory scheme” rather than merely the single, discrete provision at issue); *State v. Cooper*, 396 S.W.3d 603, 605 (Tex. App.—Dallas 2012, writ granted) (noting that courts “construe statutes and ordinances according to the plain meaning of the text without resort to extratextual sources unless doing so would lead to absurd consequences or the statute is ambiguous.”) (citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)).

⁸ *Cf. Merriam Webster online dictionary* (defining “maximum” as “an upper limit allowed (as by a legal authority)”). <http://www.merriam-webster.com/dictionary/maximum>

3. providing the public [sic] visual . . . access to the Colorado River.

....

(C) Recognize the potential of the waterfront as an open space connector . . .

(emphasis added).

The goals and policies of the Town Lake Corridor Study, which Section 25-2-710 incorporates by reference, include the following relevant to the interpretation of the term “base zoning district” in the Waterfront Overlay Subdistrict Regulations:

Goal 6.00: *Provide maximum visual and physical access to the waterfront; encourage pedestrian access to and use of the corridor.*

Policy 6.04: *Protect open panoramic views of the waterfront by limiting building heights and prohibiting buildings from blocking views.*

Town Lake Corridor Study (emphases added).⁹

Construing the term “base zoning district,” for purposes of Subsection 25-2-733(H), as the post-approval PUD base zoning district, would conflict with the requirement that the Waterfront Overlay Subdistrict Regulations be implemented and guided by the goals and policies of the Town Lake Corridor Study (including the policy of “limiting building heights”). Rather, in order to effectuate the legislative purpose of “limiting building heights” in the Waterfront Overlay, the term “base zoning district” in the Waterfront Overlay Subdistrict Regulations generally, and in Subsection 25-2-733(H) specifically, must be construed as referring to the applicable base zoning district *prior to* a proposed PUD rezoning.

Administrative Construction

At the time that the City Council last amended the Subdistrict Development Regulations by Ordinance 20090611-074, an Assistant City Attorney responded as follows to questions by Council Members during the public hearing:

The larger question of whether or not in adopting a PUD – adopting a new PUD down the road, Council would be able to supersede say, the height

⁹ <http://www.austintexas.gov/page/lady-bird-lake-waterfront-resources>

requirements . . . of the Waterfront Overlay, is a larger legal question, and I don't think that's an entirely clear question.¹⁰

The Legislative History and Former Code Provisions on the Same Subject¹¹

Ordinance No. 86 0717-Z, which established the Waterfront Overlay by amending then-Title 13 of the City Code of 1981, provided in relevant part:

Height restrictions imposed by the applicable base district may be increased pursuant to Section 2855 to a maximum height of ninety-six (96) feet for structures located north of Barton Springs Road and sixty (60) feet for structures located south of Barton Springs Road.¹²

Ordinance No. 99-0225-70(b) (repealing Title 13 and replacing it with Title 25), which purported to be a mere recodification, apparently omitted the Waterfront Overlay Subdistrict height limits, eventually resulting in litigation.¹³

Ordinance No. 20090611-074, which added the Subdistrict Development Regulations height limit in their current form, appears to have been intended to remedy the 1999 omission. Ordinance No. 20090611-074 also added the following language to Subsection 25-2-713(A)(3): "except that no variance [from the Waterfront Overlay Subdistrict Development Regulations] may be granted from restrictions on maximum height." Finally, Ordinance No. 20090611-074

¹⁰ Brent Lloyd, Assistant City Attorney, transcript and video of discussion of 20090611-074 immediately prior to passage on third reading.

¹¹ Well we know where we're goin'
But we don't know where we've been
And we know what we're knowin'
But we can't say what we've seen

....

We're on a road to nowhere

....

There's a city in my mind

Talking Heads, excerpt from "Road to Nowhere," from the 1985 album *Little Creatures*.

¹² City Code of 1981 at Section 2856(m)(4) (Height Restrictions for Butler Shores Subdistrict). Section 2855 of the City Code of 1981 set forth certain bonus provisions.

¹³ "Save Town Lake Trumps City in Court," *Austin Chronicle*, September 12, 2008 (reporting that Save Town Lake, a nonprofit group, sued to reinstate height limitations that were in the city's original 1986 Waterfront Overlay ordinance, and that the group intended to monitor "whether the Waterfront Overlay Task Force is successful in restoring the original protections provided by the WO Ordinance."); <http://www.austinchronicle.com/news/2008-09-12/671875/>.

also left unchanged Subsection 25-2-175(B): “The [Waterfront Overlay] district applies to all property in its boundaries.”

Therefore, the legislative history, as well as former code provisions on the same subject, provide further support to the conclusion that the current form of the Subdistrict Development Regulations height limits was not intended to exempt any property in the Waterfront Overlay District.

The PUD Ordinance

Subsections 2.2(A) and 2.5.1 of the PUD Ordinance provide that, under certain circumstances, the Council may modify “site development regulations for maximum height, maximum floor area ratio, and maximum building coverage in a PUD with residential uses,” which otherwise “may not exceed the baseline established under Section 1.3.3 (Baseline for Determining Development Bonuses).” Section 1.3.3, in turn, provides that the baseline is the “zoning district or districts that would be most appropriate for the property if it were developed without PUD zoning.” Therefore, the PUD Ordinance itself supports the conclusion that, for purposes of the Waterfront Overlay Subdistrict Regulations, “base zoning district” can reasonably only refer to the pre-PUD base zoning district, not the PUD base zoning district. Indeed, to conclude otherwise would impermissibly render Subsections 2.2(A) and 2.5.1 of the PUD Ordinance superfluous insofar as they apply to height limitations in the Waterfront Overlay Subdistricts. However, as the discussion at pages 5-6 of my letter of July 31 suggests, application of the standards in Subsections 2.2(A) & (B) and 2.5.1 of the PUD Ordinance would not permit the Council to supersede the maximum height set forth in Subsection 25-2-733(H) because the adverse effects of the waiver or modification would not be offset by other enforceable requirements.

Consequences of a Particular Construction

The applicant suggests that the term “base zoning district” in Subsection 25-2-733(H) should be construed to refer to the PUD base zoning district. The consequences of such an interpretation would be that there would be no limit in the City Code to how tall a building could be constructed in a PUD situated in the Waterfront Overlay District. Interpreting Subsection 25-2-733(H) in that manner would be antithetical to the aforementioned goals and policies of Section 25-2-710 and the Town Lake Corridor Study which it incorporates by reference.


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Conclusion

The term “maximum height allowed in the base zoning district,” as used in the Waterfront Overlay Subdistrict Regulations, may reasonably refer only to the maximum height allowed in the pre-PUD base zoning district, not to the PUD base zoning district (for which there is no maximum height).

Sincerely,



Pierre J. Riou

PJR:dkd

cc: Mr. Lee Heckman (lee.heckman@austintexas.gov)