

CAUSE NO. D-1-GN-12-003061

BCAC ACQUISITION, LLC.	§	IN THE DISTRICT COURT OF
Plaintiff	§	
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
CITY OF AUSTIN	§	
Defendant	§	<u>98TH</u> JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff, **BCAC ACQUISITION, LLC.** (hereinafter "Plaintiff")

complaining of Defendant City of Austin (hereinafter "City") and in support thereof would respectfully show the Court the following:

I.

Plaintiff is a limited partnership formed and existing under the laws of the State of Texas. The City is a municipal corporation formed and existing under the laws of the State of Texas and may be served by serving its Mayor, Lee Leffingwell, City Hall, 300 W. 2nd Street, Austin, Texas 78701.

II.

This lawsuit seeks a declaratory judgment that development of Plaintiff's One World Center complex is subject only to those rules, regulations, ordinances and requirements in effect

in July, 1983, the date the first permit application initiating the project was filed. This first permit application was the Rob Roy on the Creek Preliminary Subdivision Plan, City of Austin File No. C8-83-59 filed on July 15, 1983 ("Preliminary Plan").

III

Venue is Travis County, Texas, pursuant to §15.02 and 15.011, Tex. Civ. Prac. Rem. Code.

IV.

This Court has jurisdiction over this controversy pursuant to the express language in Chapter 245.006, Local Gov't. Code

V.

This case is appropriate for a Level III Discovery Control Plan for which order Plaintiff now prays.

VI.

Plaintiff is the owner of Lot 103, Block A, Rob Roy on the Creek Section 8, final platted as a 9.3367 acre lot pursuant to the map or plat thereof recorded in Plat Book 85, Page 83C-D, Plat Records of Travis County, Texas on January 17, 1985 (the "Final Plat"). As a dedication on the Final Plat, .9567 acres was reserved for future widening of FM 2244 and later deeded to Texas Department of Transportation (TxDOT) for that purpose. Lot 103, less the area deeded to TxDOT for additional right-of-way, is hereinafter referred to as the "Property."

VII.

This Final Plat for the Property was issued in furtherance of the Rob Roy on the Creek

mixed use project (the "Project") which Project was initiated in July, 1983, with the filing of the Preliminary Plan permit application with the City. This initial permit application for the Project identified the Property, a portion of the land covered by the Project, as being intended for "commercial" development. At the time the Project was initiated, all the land within the boundaries of the Preliminary Plan was in the Austin extra territorial jurisdiction ("ETJ") and not within the corporate limits of the City. There were no governmental land use controls or limitations for land located in the ETJ under the applicable City of Austin subdivision and site plan watershed ordinance requirements that differentiated between the type of land use other than as between residential and commercial uses of land

VIII.

The relevant watershed ordinance to be applied to development of the Property is the Barton Creek Watershed Ordinance (81-04-30-C and 82-11-18-N) since this was the relevant watershed ordinance addressing development of land in this part of the ETJ at the time of the filing of the Preliminary Plat application in July, 1983. Consistent therewith, notes on the Final Plat for the Property make clear that the Property portion of the Project was to be developed in accordance with the Barton Creek Watershed Ordinance and entitled to 35% gross site area impervious cover of the commercial site. After its annexation into the limited purpose zoning jurisdiction of the City on May 5, 1984, the Property was zoned for office use, one of the many commercial uses that could be made of the Property consistent with the initial Project. The Barton Creek Watershed Ordinance made no distinction between office uses and other commercial uses and classifies all uses other than single family or duplex uses as merely "commercial" uses.

IX.

The Project first took physical form on the Property as the beginning of the One World Theatre complex which was constructed on or about the fall of 1999. The One World Theatre use is the only physical improvement ever built on the Property and the only use made of the Property since 1983. This use is consistent with both the mixed use development Project for the entire area covered by the Preliminary Plan, as well as the commercial use (as opposed to residential) designated for the Property on the Preliminary Plan and the Final Plat

X.

The One World Theatre was originally labeled as the "Barton Creek Arts Center" on a 1998 site development permit or site plan application (SP-98-0332-D) approved by the City on or about February 2, 1999. This site development permit authorized the development and use of the three buildings currently constructed on the Property as the beginning of the One World Theatre complex. A later 2003 site development permit or site plan application, approved for the One World Theatre complex (SP-03-0353D), reaffirmed the development of the use and also phased the further development of the complex on the Property with the original three buildings as Phase I and a proposed kitchen and amphitheater as Phases II and III respectively. At present, only the three buildings in Phase I of the 2003 site plan have been constructed. At all times the actual site development for the One World Theatre use as depicted on the approved site plans has been in compliance with the Barton Creek Watershed Ordinance and has never been in compliance with the S.O.S. Ordinance (92-09-03-D). Existing impervious cover for the Phase I buildings depicted on the 1998 site plan and the additional improvements which are described as Phases II and III of the 2003 site plan total approximately 2.426 acres of impervious cover, which constitutes 29% of gross site area and is in compliance with the requirements of the

Barton Creek Watershed Ordinance and not the S.O.S. Ordinance. Also, the approved site plans allow for existing and implemented cut and fill that is in compliance with the Barton Creek Watershed Ordinance but not the S.O.S. Ordinance.

XI.

On April 23, 2012, Defendant City arbitrarily and without warning issued a stop work order to Plaintiff which prevented it from proceeding with the approved Phase II development of the One World Theatre complex. The stop work order claimed that the One World Theatre development as built was contrary to site plan permit SP-03-0353D and declared, without explanation, that such site plan permit had "expired."

Plaintiff did not believe that the already completed Phase I work on One World Theatre complex was contrary to the issued site plan permit or that the site plan had expired. Nonetheless, in order to proceed with the remaining phases of the One World Theatre complex, Plaintiff submitted an application for a new site development permit or site plan permit for the previously approved phased development ("New Site Plan" application). As part of this application, Plaintiff asked the City to recognize that the relevant watershed ordinance covering the development of the Property for the intended commercial development was the Barton Creek Watershed Ordinance.

The City has refused to consider and review the New Site Plan application under the Barton Creek Watershed Ordinance. The City has taken the position that the Plaintiff's One World Theatre development as depicted on the New Site Plan application is not entitled to Chapter 245 protection and is not grandfathered under the watershed ordinance applicable in 1983 because the City incorrectly asserts (1) there has been an intervening site plan which

changed the Project from either mixed use or from commercial and (2) the Project (relevant to the development of the Property) was complete.

XII.

Chapter 245, Local Gov't Code, mandates that the Barton Creek Watershed Ordinance applies to the New Site Plan application for the One World Theatre use and the development of its phases because that use is consistent with and the continuation of the Project initiated with the first permit application filed in 1983. The rules, regulations, ordinances and requirements in effect when the first permit to initiate a project is filed determine the applicable rules for all remaining permits. The only use ever made of the Property is as the One World Theatre. There has been no change of project. This commercial use as a theater is consistent with the initial Project. There has never been an intervening project. The theater development is authorized as a phased project by SP-98-0332D and SP-03-0353D and has yet to be completed. No change of project has occurred. The New Site Plan application is entitled to review under the Barton Creek Watershed Ordinance.

XIII.

In addition or in the alternative, if it is determined that the New Site Plan application and Plaintiff's One World Theatre use is not entitled to Chapter 245 protection because the protected project is somehow determined to have changed since its initiation in 1983 or is otherwise complete (both of which are denied), Plaintiff is entitled to take advantage of plat notes on the Final Plat of the Property which give it a more favorable entitlement than would otherwise follow from the otherwise applicable current watershed ordinance. In accordance with the Section 245.002(d) Local Government Code, Plat Notes 6 and 7 of the Final Plat declare that if

the Property is developed for commercial use it is entitled to 35% gross site area impervious cover with a downstream buffer. Plaintiff's new site plan application is entitled to be reviewed under the Barton Creek Watershed Ordinance on the basis of the Plat Notes, even if the Project initiated in 1983 has changed or if it has been completed. In either event, the Plat Note entitlement has survived. Plaintiff's New Site Plan application should be reviewed subject to the Barton Creek Ordinance.


XIV.

There are no administrative remedies that are available to be exhausted prior to bringing this action challenging the City's determination that Plaintiff has no vested grandfathered rights under Chapter 245, Local Gov't Code, to application of the Barton Creek Watershed Ordinance. If there are such administrative remedies, they were already exhausted as part of Plaintiff's appeal of the stop work order. If there are administrative remedies that were not exhausted, then attempting to pursue such remedies would be futile and such may not serve as a bar to bringing this action.


WHEREFORE, PREMISES CONSIDERED, Plaintiff requests and prays that Defendant be cited to appear and answer; Plaintiff have its rights under Chapter 245, Local Gov't Code, declared as follows: (i) the One World Theater site plan application submitted on July 3, 2012 under Tracking Number 10791988 (New Site Plan application) is a permit application in the series of required permits to initiate, continue or complete the Project initiated in 1983, (ii) the New Site Plan application is entitled to be reviewed and permitted under only those rules, regulations, ordinances and requirements in effect when the Project was initiated on July 15, 1983, and (iii) the Barton Creek Watershed Ordinance is the controlling subdivision and site plan

watershed ordinance under which all permits for the Project are to be reviewed and permitted. Alternatively or in addition thereto, Plaintiff prays this court declare that pursuant to the Final Plat Notes that the New Site Plan application and the One World Theatre use are entitled to review under the Barton Creek Watershed ordinance. Plaintiff further prays that it be granted judgment for collection of costs and reasonable expert and attorney's fees and costs of litigation, with additional contingent amounts in the event of appellate proceedings; Plaintiff be granted judgment for all costs of court; and Plaintiff be granted judgment for all such other and further relief to which Plaintiff may show itself justly entitled.

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFF

CAUSE NO. D-1-GN-12-003061

BCAC ACQUISITION, LLC. Plaintiff	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
CITY OF AUSTIN Defendant	§	98 TH JUDICIAL DISTRICT

**PLAINTIFF'S, BCAC ACQUISITION, LLC,
TRADITIONAL AND NO EVIDENCE
MOTION FOR SUMMARY JUDGEMENT**

TO THE HONORABLE JUDGE OF HONORABLE SAID COURT:

COMES NOW, Plaintiff, BCAC ACQUISITION, LLC (hereinafter "Plaintiff") and files this its Traditional and No Evidence Motion for Summary Judgment and would show the Honorable Court the following:

I. Issue Presented

This lawsuit seeks a declaratory judgment that continued development of Plaintiff's One World Theatre complex is subject only to those rules, regulations, ordinances and requirements in effect on July 15, 1983, the date the first permit application initiating this project was filed. Continued development of the complex has these grandfathered development rights because:

- a. Section 245.02(a), Local Gov't. Code, provides that all permits issued to continue or complete a project shall be issued in compliance with those rules, regulations, ordinances and requirements in effect on the date the first permit was submitted for that project. In this case, that initial permit application for what is now known as the One World Theatre complex was the preliminary subdivision plan filed on July 15, 1983; and,
- b. The final plat for the lot on which the One World Theatre Complex is being constructed contains plat notes 6 and 7 that declare that development on the platted lot shall be in accordance with the requirements of the Barton Creek Watershed Ordinance, the applicable subdivision and environmental development

ordinance in effect on July 15, 1983.

II. Background

The Defendant (“City”) issued a Stop Work Order on April 23, 2012, requiring Plaintiff to halt construction of approved additions to the One World Theatre complex pursuant to site plan permit SP-03-0353D (**Exhibit E**). Plaintiff filed an administrative appeal to this Stop Work Order that was denied by letter determination from Director of Planning Development and Review Department, Greg Guernsey, on May 18, 2012. The letter/order denying the appeal declared that the site plan, allowing for construction of the additions to the complex, had “expired.”

Plaintiff submitted a new site plan application for a permit to complete construction of the additions to the One World Theatre complex. Associated therewith, Plaintiff submitted with its new site plan application a “Project Application HB 1704 / Chapter 245 Determination” form as requested by City procedures. The determination sought was that the development and construction of the existing and planned additional phases of the One World Theatre complex are grandfathered and could continue so long as they conform, as they do, with the watershed regulations, ordinances, rules and requirements in effect on July 15, 1983, the date the preliminary plan was filed that had initiated development of the One World Theatre complex. Current ordinances allow for significantly less impervious cover and more restricted cut and fill allowances, among other things, that would prevent the completion and operation of the One World Theatre complex.

Texas law provides that a project is entitled to be developed with the regulations,

ordinances, rules and requirements in place at the time the project is initiated, and it also provides a property is entitled to benefits contained in plat notes on approved plats.

On July 20, 2012, the City rejected Plaintiff's claim that the theater complex has grandfathered development rights and thus the City refused to accept the associated new site plan application for continued development of the One World Theatre complex under the development regulations, ordinances, rules and requirements in effect on July 15, 1983. The bases for the City's determination that the One World Theatre complex was not grandfathered were that "intervening site plans changed the project" and that the "project had been completed."

Exhibit D.

Plaintiff brings this action because the One World Theatre complex is the project initiated in 1983. The project has never changed nor has it been completed. Further, plat notes on the property's final plat provide that commercial development on the property will be under those standards in effect in 1983. The continued development and operation of the One World Theatre complex is grandfathered under Texas law and is subject to the 1983 regulations, ordinances, rules and requirements.

III. Facts and Evidence

In support of its Motion and in addition to any pleadings and discovery on file with this Court, Plaintiff relies on the following evidence by reference. These Exhibits, with the exception of Mr. Stearns' and Mr. Loomis' affidavits, are all official documents of the City of Austin and are self authenticating and the Court is requested to take judicial notice thereof. If required, each is authenticated in either or both of the two affidavits.

- Exhibit A: Rob Roy on the Creek **Preliminary Plat** – City of Austin File No. C8-83-59
- Exhibit B: Rob Roy on the Creek Section 8, Block A, Lot 103 **Final Plat**, Book 85, Page 83, C-83, D, Plat Records of Travis County, Texas
- Exhibit C: Affidavit of Hartt Stearns
- Exhibit D: Project Application HB 1704 Chapter 245 Determination dated July 10, 2012
- Exhibit E: 2003 Site Plan Permit – SP-03-0353D
- Exhibit F: Affidavit of Tom Loomis

In support of its Motion, Plaintiff relies on the following statement of facts, as presented in the affidavits of Hartt Stearns (**Exhibit C**) and Tom Loomis (**Exhibit F**):

A. Plaintiff is the owner of Lot 103, Block A, Rob Roy on the Creek Section 8, final platted as a 9.3367 acre lot pursuant to the map or plat thereof recorded in Plat Book 85, Page 83C-D, Plat Records of Travis County, Texas on January 17, 1985 (the “Final Plat,” **Exhibit B**). As a dedication on the Final Plat, .9567 acres was reserved for future widening of FM 2244 (Bee Caves Road). Lot 103, less the area reserved for right-of-way, is hereinafter referred to as the “Property.”

B. The Final Plat for the Property was issued in furtherance of the Rob Roy on the Creek mixed residential/commercial use project (the “Project”) that was initiated in July, 1983, with the filing of the “Preliminary Plan” permit application with the City. **Exhibit A**. This initial permit application for the Project generally identified the Property, which was a portion of the land covered by the Preliminary Plat and the Project, as being intended for

“office/commercial” development.

C. At the time the Project was initiated, all the land within the boundaries of the Preliminary Plan was in the Austin extra territorial jurisdiction (“ETJ”) and not within the corporate limits of the City. The governmental land use controls and limitations for land located in the ETJ under the applicable City of Austin subdivision and site plan watershed ordinance requirements did not differentiate between the type of land use other than as between single family/duplex residential and commercial uses of land.

D. The relevant watershed ordinance to be applied to development of the Property for the Project is the Barton Creek Watershed Ordinance (City of Austin Ordinance Nos. 81-04-30-C and 82-11-18-N) since this was the relevant watershed ordinance addressing the development of land in this part of the ETJ at the time of the filing of the Preliminary Plat permit application in July, 1983.

E. Consistent therewith, notes 6 and 7 on the Final Plat for the Property make clear that the Property portion of the Project area was to be developed in accordance with the Barton Creek Watershed Ordinance and thus entitled to the ordinance’s 35% gross site area allowance for impervious cover of a commercial site.

F. The Project first took physical form on the Property as the beginning of the One World Theatre complex, constructed thereon on or about the fall of 1999. The One World Theatre use is the only physical improvement ever built on the Property and is the only use made of the Property since 1983. This use is consistent with both the mixed-use development Project for the entire area covered by the Preliminary Plan, as well as the commercial use (as opposed to

single family/duplex residential) designated for the Property on the Preliminary Plan and the Final Plat.

G. After receiving a Stop Work Order from Defendant, in part because Defendant had taken the position that Plaintiff's site plan permit SP-03-0353D (**Exhibit E**) had expired, Plaintiff submitted a new site plan application ("New Site Plan" application, City Tracking Number 10791988). Plaintiff did this so as to be able to complete construction of the One World Theatre complex's Phase II kitchen and Phase III amphitheater (both previously approved as part of the prior SP-03-0353D site plan permit). Plaintiff believed the Stop Work Order was not issued because the prior site plan had truly expired but rather because the City was trying to stop development of the One World Theatre complex consistent with its grandfathered development rights. Plaintiff submitted with its New Site Plan application a "Project Application HB 1704 / Chapter 245 Determination" form as requested by City procedures.

H. The determination sought in this form from the City was that the development and construction of Phases II and III of the One World Theatre complex were grandfathered and could continue so long as such conformed with the regulations, ordinances, rules and requirements that were in effect on July 15, 1983, the date the Preliminary Plan for the Project on the Property was filed.

I. On July 20, 2012, the City rejected Plaintiff's claim the One World Theatre complex had grandfathered development rights. The City refused to accept the associated New Site Plan application for the Phases II and III development of the One World Theatre complex under the development regulations in effect on July 15, 1983. The bases shown for the City's

determination that the New Site Plan application was not grandfathered were that “intervening site plans changed the project” and that the Project was already “complete.” **Exhibit D.**

IV. Argument and Authorities for Motion

Plaintiff brings this suit and files this Motion to establish its right to issuance of a new site plan permit for the existing theater and the development of Phases II and III of the One World Theatre complex as grandfathered and subject to the standards of the Barton Creek Watershed Ordinance in effect on July 15, 1983.

Under the traditional summary judgment standard, the movant has the burden to show that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215-216 (Tex.2003). Once the movant establishes its right to summary judgment as a matter of law, the burden shifts to the nonmovant to present evidence raising a genuine issue of material fact which precludes the summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex.1979).

Chapter 245 of the Local Government Code provides that “once an application for the first permit required to complete a property development ‘project’ is filed with the municipality or other agency that regulates such use of the property, the agency’s regulations applicable to the ‘project’ are effectively ‘frozen’ in their then-current state and the agency is prohibited from enforcing subsequent regulatory changes to further restrict the property’s use.” *Harper Park Two v. City of Austin, et. al.* 359 S.W.3rd 247 (Tex. App. – Austin 2011, pet. denied) citing to Tex. Loc. Gov’t Code Ann. §§245.001 - .007; *Id.*, at §245.002(a) and (b).

The development of Plaintiff's Property for the One World Theatre complex, including all three phases and the associated parking, is consistent with the Project grandfathered under Chapter 245. The first in the line of permit applications that leads to this commercial theater use was the mixed "residential and commercial" use Preliminary Plat for the Rob Roy on the Creek Subdivision filed on July 15, 1983, which showed "office/commercial" in the area of the Property. "Office/Commercial" in this context should be read as "commercial" generally with no limitation to any specific commercial use since, as shown in the proof accompanying this motion as well as the discussion on this issue in *Harper Park Two*, the relevant City ordinances at the time only differentiated between commercial and single family/duplex residential uses. (*Harper Park*, 359 S.W.3d at 256-257, held that a preliminary plat for "condo, office, commercial" uses defined an overall project that allowed a hotel to be developed on a portion, even though that portion had been labeled as "office.")

The grandfathered Project on the Property is that which is reflected in this initial permit application. *Harper Park Two*, 359 S.W.3d at 255. It is not necessary in this case to decide if the grandfathered subject Project is broadly mixed use or limited to a commercial (as opposed to residential) use because both would support the vested grandfather development rights for the One World Theatre complex use.

Plaintiff also is entitled to take advantage of plat notes on the Final Plat of the Property which give it a more favorable development entitlement than would otherwise follow from applying the current SOS Ordinance. Plat notes 6 and 7 of the Final Plat declare that if the Property is developed for commercial use it is entitled to 35% gross site area impervious cover

allowance with a downstream buffer. This describes the standard for the Barton Creek Watershed Ordinance and not the current SOS Ordinance. In accordance with the Tex.Loc.Gov't Code, Section 245.002(d), Plaintiff's New Site Plan application is entitled to be reviewed under the Barton Creek Watershed Ordinance on the basis of the Plat Notes, even if the Project initiated in 1983 has expired, changed, or been completed. In any of these events, the plat notes' entitlement has survived. *City of Austin v. Garza*, 124 S.W.3d 867, 871-874 (Tex.Civ.App.—Austin 2003, no writ). Plaintiff's New Site Plan application should be reviewed subject to the Barton Creek Ordinance and its 35% gross site area impervious cover allowance with a downstream buffer.

The New Site Plan application for the One World Theatre complex and its three phases is consistent with the original Project application and this plan and use have vested rights to be reviewed and permitted under the Barton Creek Watershed Ordinance that was in effect as of July 15, 1983, when the first permit application was filed for what has taken the form of that use. This is also true considering the language of the plat notes for the Final Plat of the Property which also provide vested rights for development review consistent with the standards contained in that Barton Creek Watershed Ordinance.

The City has approved site plans and plat notes for the Project and has allowed the continued use of the One World Theatre complex for fourteen (14) years in a manner that is consistent with the Barton Creek Watershed Ordinance and that would be in violation of the SOS Ordinance. The One World Theatre complex has never been intended to comply with the SOS Ordinance by either the Plaintiff or the City. The only construction that has occurred on the

Property since the 1983 Preliminary Plan has been the One World Theatre complex and Phases II and III are continuations of that use. The Project, first established in 1983, has only materialized on the Property in the form of the One World Theatre complex.

V. No Evidence Motion for Summary Judgment on Anticipated Defenses

The City may claim that the Property cannot be operated as currently improved or consistent with the New Site Plan application under the Barton Creek Watershed Ordinance because the necessary grandfathering has “expired,” has been lost because “intervening site plans have changed the Project,” or the Project has been “completed.”

Plaintiff requests a No-Evidence Motion for Summary Judgment on any of these or other defenses the City might raise to the otherwise established grandfathering of the Barton Creek Watershed Ordinance of the three phases of the One World Theatre complex. Such defenses are not limited to, but should include, any defense that Plaintiff has somehow waived any grandfathering that might have otherwise existed; that the 1983 Project is somehow completed or has expired; or that there has been an intervening site plan that would cause the One World Theatre complex to lose grandfathering that would have otherwise existed.

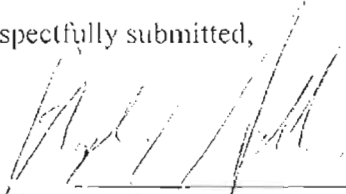
A party may, without presenting summary judgment evidence, move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W. 2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed2d 706, 7011 (Tex. 1998). The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces

summary judgment proof raising a genuine issue of material fact. TEX.R.CIV.P. 166a(i). More than scintilla of evidence exists only if the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions. *Merrell Dow Pharmaceuticals*, 953 S.W.2d at 711. Less than a scintilla of evidence exists when the evidence is “so weak as to do no more than create a mere surmise or suspicion” of fact, and the legal effect is that there is no evidence. *Kindred v. Con/Chem, Inc.* 650 S.W.2d 61, 63 (Tex. 1983).

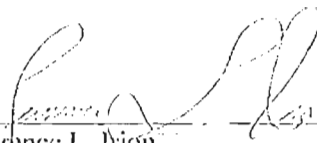
VI. Conclusion

Plaintiff requests summary judgment (traditional and no evidence) declaring that it has rights under Chapter 245, Local Gov’t Code as follows: (i) the One World Theater New Site Plan application submitted on July 3, 2012, Tracking Number 10791988, is a permit application in the series of required permits to initiate, continue or complete the Project initiated in 1983, (ii) the New Site Plan application is entitled to be reviewed and permitted under only those rules, regulations, ordinances and requirements in effect when the Project was initiated on July 15, 1983, and (iii) the Barton Creek Watershed Ordinance is the controlling subdivision and site plan watershed ordinance under which all permits for the Project are to be reviewed and permitted. Alternatively or in addition thereto, Plaintiff prays for summary judgment declaring that pursuant to the notes to the Final Plat that the New Site Plan application and the One World Theatre complex use are entitled to review under the standards of the Barton Creek Watershed ordinance.

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFF

EXHIBIT C

CAUSE NO. D-1-GN-12-003061

BCAC ACQUISITION, L.L.C.,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
Vs.	§	OF TRAVIS COUNTY, TEXAS
	§	
CITY OF AUSTIN	§	
Defendants.	§	98 th JUDICIAL DISTRICT

AFFIDAVIT OF HARTT STEARNS

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Hartt Stearns, being by me duly sworn, deposed and said:

"I am 21 years of age and competent to testify in a court of law.

These Exhibits identified below, attached to the BCAC Acquisition, L.L.C, Motion for Summary Judgment, are identified in this Affidavit.

- Exhibit A: Rob Roy on the Creek Preliminary Plat – City of Austin File No. C8-83-59
- Exhibit B: Rob Roy on the Creek Section 8, Block A, Lot 103 Final Plat, Book 85, Page 83, C-83, D, Plat Records of Travis County, Texas
- Exhibit D: Project Application HB 1704 Chapter 245 Determination dated July 10, 2012
- Exhibit E: 2003 Site Plan Permit –SP-03-0353D

A. Plaintiff is the owner of Lot 103, Block A, Rob Roy on the Creek Section 8, final platted as a 9.3367 acre lot pursuant to the map or plat thereof recorded in Plat Book 85, Page 83C-D, Plat Records of Travis County, Texas on January 17, 1985 (the "Final Plat," **Exhibit B**). As a dedication on the Final Plat, .9567 acres was reserved for future widening of FM 2244 (Bee Caves Road). Lot 103, less the area reserved for right-of-way, is hereinafter referred to as the "Property."

EXHIBIT 

B. The Final Plat for the Property was issued in furtherance of the Rob Roy on the Creek mixed residential/commercial use project (the "Project") that was initiated in July, 1983, with the filing of the "Preliminary Plan" permit application with the City. **Exhibit A**. This initial permit application for the Project generally identified the Property, which was a portion of the land covered by the Preliminary Plat and the Project, as being intended for "office/commercial" development.

C. At the time the Project was initiated, all the land within the boundaries of the Preliminary Plan was in the Austin extra territorial jurisdiction ("ETJ") and not within the corporate limits of the City. The governmental land use controls and limitations for land located in the ETJ under the applicable City of Austin subdivision and site plan watershed ordinance requirements did not differentiate between the type of land use other than as between single family/duplex residential and commercial uses of land.

D. The Project first took physical form on the Property as the beginning of the One World Theatre complex, constructed thereon on or about the summer of 1999. The One World Theatre use is the only physical improvement ever built on the Property and is the only use made of the Property since 1983. This use is consistent with both the mixed-use development Project for the entire area covered by the Preliminary Plan, as well as the commercial use (as opposed to single family/duplex residential) designated for the Property on the Preliminary Plan and the Final Plat.

E. After receiving a Stop Work Order from Defendant, in part because Defendant had taken the position that Plaintiff's site plan permit SP-03-0353D (**Exhibit E**) had expired, Plaintiff submitted a new site plan application ("New Site Plan" application, City Tracking

Number 10791988). Plaintiff did this so as to be able to complete construction of the One World Theatre complex's Phase II kitchen and Phase III amphitheater (both previously approved as part of the prior SP-03-0353D site plan permit). Plaintiff believed the Stop Work Order was not issued because the prior site plan had truly expired but rather because the City was trying to stop development of the One World Theatre complex consistent with its grandfathered development rights. Plaintiff submitted with its New Site Plan application a "Project Application HB 1704 / Chapter 245 Determination" form as requested by City procedures.

F. The determination sought in this form from the City was that the development and construction of Phases II and III of the One World Theatre complex were grandfathered and could continue so long as such conformed with the regulations, ordinances, rules and requirements that were in effect on July 15, 1983, the date the Preliminary Plan for the Project on the Property was filed.

G. On July 20, 2012, the City rejected Plaintiff's claim the One World Theatre complex had grandfathered development rights. The City refused to accept the associated New Site Plan application for the Phases II and III development of the One World Theatre complex under the development regulations in effect on July 15, 1983. The bases shown for the City's determination that the New Site Plan application was not grandfathered were that "intervening site plans changed the project" and that the Project was already "complete." **Exhibit D.**

H. The City has approved site plans and plat notes for the Project and has allowed the continued use of the One World Theatre complex for fourteen (14) years in a manner that is consistent with the Barton Creek Watershed Ordinance and that would be in violation of the SOS Ordinance. The One World Theatre complex has never been intended to comply with the SOS Ordinance by either the Plaintiff or the City. The only construction that has occurred on the

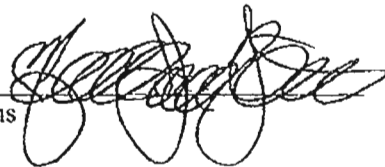
Property since the 1983 Preliminary Plan has been the One World Theatre complex and Phases II and III are continuations of that use. The Project, first established in 1983, has only materialized on the Property in the form of the One World Theatre complex.

I. I have reviewed this Affidavit and the Exhibits A, B, D and E to the Motion for Summary Judgment. The statements and the facts presented in the Affidavit are based on my personal knowledge and the Exhibits are true and correct copies of the official City of Austin documents relating to the subject property in the project.

Further, Affiant sayeth not.”

AFFIANT:

Hartt Stearns



STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

SUBSCRIBED AND SWORN TO BEFORE ME on the 11 day of December, 2012, to certify which witness my hand and official seal.

Notary Public, in and for the State of Texas

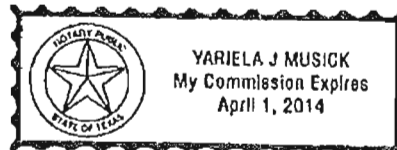
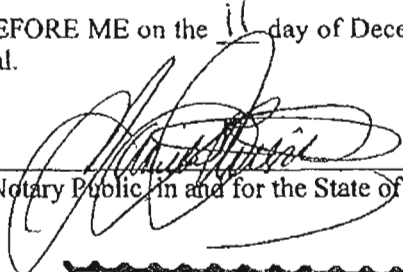


EXHIBIT D

Exhibit D
PROJECT APPLICATION H.B. 1704/Chapter 245 DETERMINATION
(Chapter 245, Texas Local Government Code)

(This completed form must accompany all subdivision and site plan applications)

File # Assigned: <u>SP-83-03113</u>	FOR DEPARTMENTAL USE ONLY	Date Filed: <u>6/3/2012</u>
Original Application Date: <u>6/26/2012</u>	Signature: <u>[Signature]</u>	Date: <u>7/10/2012</u>
Comments: <u>Insufficient information to establish Chapter 245 right.</u>		

Proposed Project Name: One World Theater
 Address / Location: 1701 Rm 2244
 Legal Description: Lot 10.3, Block A Section 8, R/W on the Creek

A. The proposed application is for a New Project and is submitted under regulations currently in effect.

NOTE: If A is checked above, proceed to signature block below.

- B. The proposed application is for an ongoing project not requesting House Bill 1704 consideration. The choice of this option does not constitute a waiver of any rights under Chapter 245.
- C. The proposed application is for a project requesting review under regulations other than those currently in effect, but not on the basis of House Bill 1704. All appropriate supporting documentation must be attached to this request. Provide a brief description of the basis for this request here:
- D. The proposed application is for a project requesting review under a specific agreement, not on the basis of House Bill 1704. All appropriate supporting documentation must be attached to this request. Provide a brief description of the basis for this request here:

E. Original Application Filing Date: 7/15/1983 File #: CS-83-59
 The proposed application is submitted as a Project in Progress under Chapter 245 (HB 1704) and should be reviewed under the applicable regulations pursuant to state law. The determination will be based on information submitted on and with this form.

The following information is required for Chapter 245 Review:

Attach supporting documentation, including a summary letter with a complete project history from the Original Application to the present, with a copy of the original subdivision or site plan approval by the City and subsequent application approvals. Specify project information for date claiming 1704 grandfathering; include a copy of the relevant permit upon which Chapter 245 vesting is claimed.

Project Application History	File #	Application Date	Approval Date
Annexation/zoning (if applicable to history)	<u>CS-84-003</u>		<u>5/3/1984</u>
Preliminary Subdivision	<u>CS-83-59</u>	<u>July 15, 1983</u>	
Final Subdivision Plat	<u>CS-83-59-2(54)</u>	<u>9/26/1984</u>	<u>12/9/1984</u>
Site Plan / Devel. Permit	<u>BZ-85-069; SP-98-0332D; SP-03-0353P</u>		

Proposed Project Application (check one): Preliminary Subdivision _____ Final Plat _____ Site Plan

Proposed Project Land Use: Specify one in each of the following land use categories:
 Single Family / Duplex _____ Townhouse / Condo / Multi-family _____ Office _____
 Commercial (Theater) Industrial / R&D _____ Other (Specify) _____

Total acreage: 4.3367 Watershed Barton Creek Watershed Classification Edwards Aquifer Zone
 This proposed project application will still be reviewed under those rules and regulations that are not subject to Chapter 915 such as those to prevent imminent destruction of property or injury to persons, including regulations dealing with stormwater detention, temporary erosion and sedimentation controls, and regulations to protect critical/significant recharge features.

Signature - Property Owner or Agent: [Signature] Date: 6/26/12
 Printed Name: Terrence L. Terrell Phone / Fax: 512-347-9927

EXHIBIT F

CAUSE NO. D-1-GN-12-003061

BCAC ACQUISITION, LLC.
Plaintiff

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

VS.

TRAVIS COUNTY, TEXAS

CITY OF AUSTIN
Defendant

98TH JUDICIAL DISTRICT

THOMAS LOOMIS AFFIDAVIT

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Thomas Loomis, being by me duly sworn, deposed and said:

"I am 21 years of age and competent to testify in a court of law.

These Exhibits identified below, attached to the BCAC Acquisition, LLC, Motion for Summary Judgment, are identified in this Affidavit.

Exhibit A: Rob Roy on the Creek Preliminary Plat – City of Austin File No. C8-83-59

Exhibit B: Rob Roy on the Creek Section 8, Block A, Lot 103 Final Plat, Book 85, Page 83, C-83, D, Plat Records of Travis County, Texas

A. The relevant watershed ordinance to be applied to development of the Property for the Project is the Barton Creek Watershed Ordinance (City of Austin Ordinance Nos. 81-04-30-C and 82-11-18-N) since this was the relevant watershed ordinance addressing the development of land in this part of the ETJ at the time of the filing of the Preliminary Plat permit application in July, 1983.

B. Consistent therewith, notes 6 and 7 on the Final Plat for the Property make clear that the Property portion of the Project area was to be developed in accordance with the Barton Creek Watershed Ordinance and thus entitled to the ordinance's 35% gross site area allowance for impervious cover of a commercial site.

EXHIBIT, 15

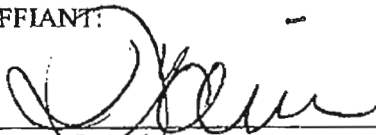
C. The plat notes on the Final Plat of the Property give it a more favorable development entitlement than would otherwise follow from applying the current SOS Ordinance. Plat notes 6 and 7 of the Final Plat declare that if the Property is developed for commercial use it is entitled to 35% gross site area impervious cover allowance with a downstream buffer. This describes the standard for the Barton Creek Watershed Ordinance and not the current SOS Ordinance. Plaintiff's New Site Plan application is designed subject to the Barton Creek Ordinance and its 35% gross site area impervious cover allowance with a downstream buffer.

D. The New Site Plan application for the One Word Theatre complex and its three phases is consistent with the original Project application and this plan and use are consistent with the Barton Creek Watershed Ordinance that was in effect as of July 15, 1983, when the first permit application was filed for what has taken the form of that use. The plat notes for the Final Plat of the Property describe development controls that are consistent with the standards contained in that Barton Creek Watershed Ordinance.

E. I have reviewed this Affidavit and the Exhibits A and B to the Motion for Summary Judgment. The statements and the facts presented in the Affidavit are based on my personal knowledge and the Exhibits are true and accurate copies of the official City of Austin documents relating to the subject property in the project.

Further, Affiant sayeth not."

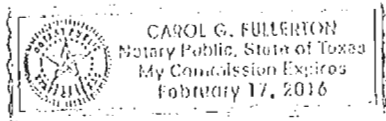
AFFIANT:



Thomas Leomis

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

SUBSCRIBED AND SWORN TO BEFORE ME on the 11th day of December, 2012, to certify which witness my hand and official seal.



Carol G. Fullerton
Notary Public, in and for the State of Texas

CAUSE NO. D-1-GN-12-003061

BCAC ACQUISITION, LLC.	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	OF TRAVIS COUNTY, TEXAS
	§	
CITY OF AUSTIN	§	
	§	
Defendant	§	98 TH JUDICIAL DISTRICT

DEFENDANT’S FIRST AMENDED ANSWER, AFFIRMATIVE DEFENSES & REQUEST FOR DISCLOSURE

TO THE HONORABLE DISTRICT JUDGE:

Defendant the City of Austin (the “City”) files its First Amended Answer, Affirmative Defenses, and Request for Disclosure to Plaintiff’s Original Petition as follows:

GENERAL DENIAL

Defendant generally denies the material allegations of Plaintiff’s pleadings, demands proof thereof as required by the Texas Rules of Civil Procedure and reserves the right to plead further and in greater particularity.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defenses:

1. Defendant has immunity from suit and from liability, save only to the extent of the partial waiver of same granted by the Texas Legislature, and the City affirmatively pleads and asserts the defense of governmental and sovereign immunity.

2. Defendant asserts that Plaintiff has waived its right, if any, to complete construction of its project under the Barton Creek Watershed Ordinance. In addition, Plaintiff

has waived its right to assert any entitlement to development under the “plat note” referred to on page 6 of Plaintiff’s Original Petition.

3. Defendant asserts that Plaintiff is estopped from asserting its right, if any, to complete construction of its project under the Barton Creek Watershed Ordinance. In addition, Plaintiff is estopped from claiming any entitlement to development under the “plat note” referred to on page 6 of Plaintiff’s Original Petition.

REQUEST FOR DISCLOSURE

Pursuant to the Rule 194 of the Texas Rules of Civil Procedure, the City Defendants request that Plaintiffs disclose the information and materials described in Rule 194.2.

PRAYER FOR RELIEF

Defendant prays that Plaintiff take nothing by this suit and that Defendant recover all court costs, reasonable attorney’s fees, and other and further relief, both at law and in equity, to which it may show itself justly entitled.

RESPECTFULLY SUBMITTED,

KAREN KENNARD, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION DIVISION

 \s\ Christopher Coppola
CHRISTOPHER COPPOLA
Assistant City Attorney
State Bar No. 24036401
City of Austin-Law Department
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(512)974-1311 [FAX]
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(512)974-1311 [FAX]
lynn.carter@austintexas.gov

ATTORNEYS FOR DEFENDANT
CITY OF AUSTIN

CERTIFICATE OF SERVICE

I certify that on the 21st of December, 2012, I electronically filed the above and foregoing pleading with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Via e-Service:

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BARRON & ADLER, LLP
808 Nueces Street
Austin, Texas 78701
(512) 478-4995 Telephone
(512) 478-6022 Facsimile
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Terrence L. Irion
LAW OFFICE OF TERRENCE L. IRION
1250 S. Capital of Texas Hwy.
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(512) 306-8903 Facsimile
tirion@tirionlaw.com

ATTORNEYS FOR PLAINTIFF

/s/ Christopher Coppola
CHRISTOPHER COPPOLA
Assistant City Attorney