

**FOSTER • RAMSEY**

A PROFESSIONAL CORPORATION

400 WEST 15<sup>TH</sup> STREET • SUITE 1405  
AUSTIN, TEXAS 78701  
(512) 610-1616  
FAX: (512) 610-1617

**RECEIVED**

**OCT 10 2011**

**CITY OF AUSTIN**

October 10, 2011

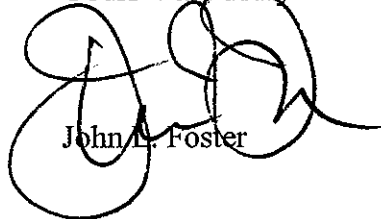
To: Board of Adjustment  
City of Austin

Re: Standing for Appeal of Administrative Decision

Subject: Decision of Greg Guernsey, Director Planning and Development Review  
Department, City of Austin

My name is John L. Foster. I am an attorney for National Media Corporation and Anchor Equities, Ltd. Anchor Equities, Ltd., is the owner of the property located at 5222 ½ South Congress Avenue, in Austin. Anchor has sold and conveyed to National Media Corporation the ownership and right to operate the billboard sign located on that property. Accordingly, both Anchor Equities, Ltd. and National Media Corporation are interested parties under §25-1-131 giving them standing in relation to the public hearing of the appeal of Mr. Guernsey's determination set forth in this letter of September 10, 2011.

Yours Very Truly



John L. Foster

JLF/pdb

cc: Curtis Ford

CITY OF AUSTIN  
APPLICATION TO BOARD OF ADJUSTMENT  
INTERPRETATIONS  
PART I: APPLICATIONS STATEMENT

C15-2011-0127  
ROW-10676358  
TP-041508-13-09

STREET ADDRESS: 5222 1/2 South Congress Avenue

LEGAL DESCRIPTION: Subdivision -

**RECEIVED**

**OCT 10 2011**

Lot(s) \_\_\_\_\_ Block \_\_\_\_\_ Outlot \_\_\_\_\_ Division CITY OF AUSTIN

ZONING DISTRICT: \_\_\_\_\_

I/WE John L. Foster on behalf of myself / ourselves as authorized agent for National Media Corporation and Anchor Equities, Ltd affirm that on 10<sup>th</sup> Day of October, 2011, hereby apply for an interpretation hearing before the Board of Adjustment.

Planning and Development Review Department interpretation is: \_\_\_\_\_

See attached Exhibit A

I feel the correct interpretation is: \_\_\_\_\_

See attached "Reasons Decision Does Not Comply with Requirement of the law

Exhibit B

**NOTE:** The board must determine the existence of, sufficiency of and with of evidence supporting the findings described below. Therefore, you must complete each of the applicable findings statements as part of your application. Failure to do so may result in your application being rejected as incomplete. Please attach any additional support documents.

1. There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations or map in that: \_\_\_\_\_

See Exhibit B

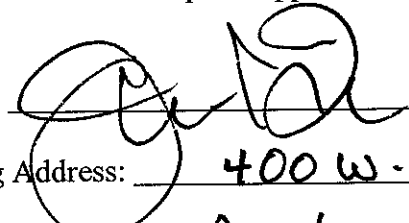
2. An appeal of use provisions could clearly permit a use which is in character with the uses enumerated for the various zones and with the objectives of the zone in question because:

The billboard structure has been in place at the location since the 1960's or earlier

3. The interpretation will not grant a special privilege to one property inconsistent with other properties or uses similarly situated in that: \_\_\_\_\_

The City has never taken the position before that any billboard would lose its legal non-conforming status because its face is removed for 90 days.

**APPLICANT/AGGRIEVED PARTY CERTIFICATE:** - I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed:  Printed: John L. Foster  
Mailing Address: 400 W. 15th St, Suite 1405, Austin, TX 78701  
City, State & Zip: Austin Tx 78701 Phone: 512 476 4473

**OWNER'S CERTIFICATE:** - I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed: \_\_\_\_\_ Printed: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City, State & Zip: \_\_\_\_\_ Phone: \_\_\_\_\_



# City of Austin

Founded by Congress, Republic of Texas, 1839  
Neighborhood Planning and Zoning Department  
One Texas Center, 505 Barton Springs Road  
P.O. Box 1088, Austin, Texas 78767

September 20, 2011

**Via Facsimile to: 476-1315**

John L. Foster  
Minton, Burton, Foster & Collins  
1100 Guadalupe Street  
Austin, TX 78701

**RE: Use Determination for 5222½ South Congress Avenue**

Dear Mr. Foster:

Pursuant to City Code Section 25-2-2 (*Determination of Use Classification*), I have determined that the construction, installation, or maintenance of an off-premises sign at the above-referenced location does not qualify as a legal non-conforming use.

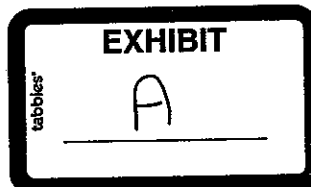
As stated in the City's registration denial of November 19<sup>th</sup>, 2009, the sign was dismantled. Accordingly, the right to maintain a non-conforming off-premises sign at the property was abandoned pursuant to City Code Section 25-2-945 (*Abandonment of Nonconforming Use*).

It is my understanding that your clients did not appeal the November 19<sup>th</sup> denial of registration of the aforementioned billboard sign under the mistaken belief that there was no appeal process. Pursuant to Section 25-2-2(C), this use determination is appealable to the Board of Adjustment with twenty (20) days according to the process for appeal of administrative decisions under Chapter 25-1, Article 7, Division 1 (*Appeals*) of the City Code. I hope that this determination letter clarifies the City's position with regard to the zoning issues for the above-referenced property.

Sincerely,

Greg Guernsey, Director  
Planning & Development Review Department

cc: Chris Edwards



NATIONAL MEDIA CORPORATION  
AND ANCHOR EQUITIES, LTD.

CITY OF AUSTIN

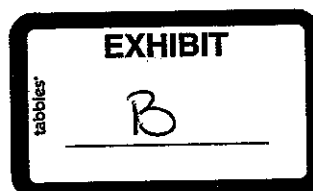
**REASONS THE DECISION DOES NOT  
COMPLY WITH THE REQUIREMENTS OF LAW**

**I. FACTUAL BACKGROUND**

Anchor Equities, Ltd. owns property at 5222 ½ South Congress Avenue on which is installed a billboard sign which has been located there since at least the 1960's. In 2009 Anchor sold to National Media Corporation the right to operate that sign under Austin's sign regulations. The sign was not at that time in use as a sign, and the face was not installed, but it had not been dismantled, nor had it been damaged. The use of the sign, at the time it was acquired by National Media, only required routine maintenance as permitted by §§25-10-152(A), 25-10-152(B)(1) and 25-10-152(E) of Austin's Ordinances.

National Media filed a registration of the sign under the provisions of §25-10-152(F) and paid the required registration fee. On November 19, 2009, Austin's Code Enforcement Inspector delivered National Media a Notice of Denial of Registration and Notice of Violation requiring the removal of the sign.

There being no administrative appeal available under the Code of Ordinances from a denial of sign registration, Anchor and National Media brought suit against the City in Cause No. D-1-GN-10-003997 of the 345<sup>th</sup> District Court of Travis County, styled National Media Corporation and Anchor Equities, Ltd v. City of Austin (the Court Case).



In August of 2011 the City filed its third plea to the jurisdiction in the Court Case alleging that National Media and Anchor had failed to exhaust their administrative remedies by appealing the decision to deny registration of the sign to the Board of Adjustment. On September 6, 2011, Judge Amy Clark Meachum denied that motion holding that such an appeal was not available under Austin's ordinances. That case thus remains pending in that Court.

On September 20, 2011, Counsel received the document attached as Exhibit A from Greg Guernsey, Austin's Director of Planning and Review Department. By that letter Mr. Guernsey announced that, without prior notice that subject determination had been requested, and without prior input from the affected parties, that he had "determined" that the maintenance of a billboard at the subject sign's location "does not qualify as a legal non-conforming use." That determination is the subject of this appeal.

## II. APPLICABLE SIGN REGULATIONS

§25-10-2 of Austin's Ordinances provides that a person may maintain and use a sign in areas subject to the city's regulation so long as it does so "in accordance with the provisions of (Chapter 25-10. Sign Regulations) and other applicable Code provisions." Under §25-10-2(7), a sign which was lawfully installed at its current location but does not comply with the city regulations is a "non-conforming sign." The sign at issue was installed decades ago, at least in the 1960's, before the location was in Austin's city limits, and thus is a "non-conforming sign." As the Board knows, off-premises advertising signs are generally prohibited in Austin by §25-10-102(1), and a non-conforming sign must be in compliance with the ordinance provisions concerning non-conforming signs set forth in §25-10-152.

Chapter 25-10-152 provides that a non-conforming sign may be continued and maintained in its existing location 25-10-152(A). The face of the sign can be changed (25-10-152(B)(1)). If a sign is “damaged by accident, natural catastrophic or the intentional act of a person, other than the sign owner or landowner,” the sign may be repaired if the cost of that repair “does not exceed 60 percent of the cost of installing a new sign of the same type at the same location”, so long as a permit is applied for and the repairs are finished within 90 days (25-10-152(C)). The cost of maintenance of a non-conforming sign may not exceed 60 percent of the cost of installing a new sign of the same type in this same location (25-10-152(E)). An off-premise non-conforming sign must be registered in accordance with §25-10-152(F).

### III. THE SUBJECT SIGN COMPLIES WITH THE REQUIRMENT OF §25-10-152

The sign ordinance requires that a non-conforming sign be repaired within 90 days if it is “damaged by accident, natural catastrophic, of the intentional act of a person other than the sign owner or land owner.” No one contends, and there is no evidence, that any of those things occurred. Mr. Guernsey’s letter states that the sign was “dismantled.” In fact, the sign was not dismantled, and in response to an open records request by National Media requesting proof that the sign was ever dismantled, Lia Warner, Performance Consultant in Code Compliance, described the state of the sign as “partially” dismantled. The sign did not at that time have a face installed, and the sign owner is specifically permitted by the sign ordinances to replace the face. The cost of reinstalling a face to the sign is much less that 60 person of the cost of replacing the sign, and the sign ordinance specifically permits that degree of maintenance.

§25-10-152, the ordinance regulating non-conforming signs, permits the continued use of the sign at issue, and City staff tacitly acknowledges that fact by relying on ordinance provisions not contained in Chapter 25-10- Sign Regulations.

IV. THE NON-USE OF A NON-CONFORMING SIGN FOR 90 DAYS DOES NOT CAUSE THE LOSS OF ITS LEGAL NON-CONFORMING STATUS.

In Mr. Guernsey's letter of September 20<sup>th</sup>, the Sign Regulations of the City of Austin are not mentioned once. The regulatory ordinances referred to are from Chapter 25-2 of the Code, regarding zoning use classifications and his determination is made pursuant to §25-1-2, which permits the holder of his position to "determine the appropriate use classification for an existing proposed use or activity." The "major use categories" from which he can select a zoning classification are residential, commercial, industrial, civil, and agricultural (§25-2-1). Whichever "use classification" he selects has no impact on any non-conforming sign, which may be located on property of any use classification since, by definition, a non-conforming sign came to exist before the City had determined a zoning use. Nothing in Austin's ordinances permits Mr. Guernsey to make the determination that he has made, i.e., that "an off-premises sign at the above-referenced location does not qualify as a legal non-conforming use."

Moreover, the provisions of Chapter 25-2 of the Ordinance provide that "(t)he use of a ..... structure .... that conformed with the zoning regulations in effect on March 1, 1984 is a conforming use notwithstanding the requirements of (Charter 25-2)," (§25-2-942). If zoning use classifications are at all relevant to the status of a billboard as a legal non-conforming sign this sign, which has indisputably been located at its site since at least the 1960's, is a "conforming use" under §25-1-942, and not subject to the requirements of Chapter 25-2.

Further, the fundamental position taken by Mr. Guernsey in his "determination of zoning use" is that if a non-conforming sign has its face removed for a period of 90 days then its 'use' is



“abandoned” under §25-2-945. In the existing litigation the City has been unable to document a single instance in which it has taken the position that the removal of a sign’s face for that period results in a loss of a sign’s legal non-conforming status. (see Defendant’s Response to Plaintiff’s First Set of Interrogatories, Responses to Interrogatories 1 and 2, Exhibit C).

At the hearing of this appeal it will be documented that another sign company has “abandoned” a sign, leaving its face off, for a over a year and then registered and relocated a sign under §25-10-152(B)(5), even though the sign could not legally have been used as a sign during that year because such use would have required a state permit which it did not have, and could not have obtained. The City has never before taken the position that the failure of a billboard to have a face installed constitutes a waiver of its legal non-conforming status, and that position is unsupported by the City Code.

V.

National Media has made a substantial investment in the sign at issue, and has complied with all sign regulations. The City of Austin has denied its sign registration and thus its ability to profit from its investment. The results are arbitrary taking of its property interest without due process and in violation of it’s right to equal protection of the laws. The damages it will suffer will be in the tens of millions of dollars.

VI.

The issue here, and the issue in the district court proceeding, is whether National Media is entitled to registration of the sign at issue under the City of Austin’s regulations. That issue, will ultimately be decided by a district court and finally by the appellate courts if necessary. Mr. Guernsey’s determination that the sign at issue is not a legal non-conforming sign should be set

aside, and the pending case raising the identical issue should proceed to a final judicial resolution of the issue.

CAUSE NO. D-1-GN-10-003997

NATIONAL MEDIA CORPORATION  
AND ANCHOR EQUITIES, LTD.,  
Plaintiffs

§  
§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT OF

V.

TRAVIS COUNTY, TEXAS

CITY OF AUSTIN,  
Defendant

345<sup>TH</sup> JUDICIAL DISTRICT

**DEFENDANT'S RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES**

TO: Plaintiffs, by and through their attorney of record, John L. Foster, Minton, Burton, Foster & Collins, 1100 Guadalupe Street, Austin, TX 78701

Pursuant to Rule 1967 of the Texas Rules of Civil Procedure, Defendant City of Austin makes the following responses to Plaintiffs First Set of Interrogatories to Defendant.

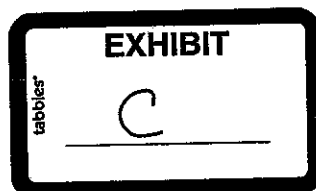
RESPECTFULLY SUBMITTED,

KAREN KENNARD, ACTING CITY ATTORNEY  
ANNE L. MORGAN, CHIEF, LITIGATION



CHRIS EDWARDS  
Assistant City Attorney  
State Bar No. 00789276  
Post Office Box 1546  
Austin, Texas 78767-1546  
(512) 974-2419  
(512) 974-6490 [FAX]

ATTORNEYS FOR DEFENDANT  
CITY OF AUSTIN



**CERTIFICATE OF SERVICE**

This is to certify that I have served a copy of the foregoing on all parties, or their attorneys of record, in compliance with the Texas Rules of Civil Procedure, this 23<sup>rd</sup> day of February, 2011.

2771

Via CM/RRR #91 7108 2133 3938 8801 ~~2825~~:

John L. Foster  
Minton, Burton, Foster & Collins  
1100 Guadalupe Street  
Austin, TX 78701



CHRIS EDWARDS

**INTERROGATORY NO. 1:**

Identify by City of Austin file number and by street address each nonconforming sign as to which the City of Austin has taken the position that the discontinuance of its use as a legal nonconforming sign for a 90 day period constituted a forfeiture of its status as a legal nonconforming sign under the provisions of §25-2-945 of the Land Development Code.

**RESPONSE:**

Defendant objects to this request because it is unduly burdensome and overbroad and not limited in scope or time. Defendant further objects to this Interrogatory to the extent it seeks information protected by the attorney/client privilege, the work product privilege, informer privilege, or by any mediation privilege or mediation confidentiality agreement.

Subject to, and without waiving the foregoing objection, Defendant responds that no such lists exist because there is no database capturing the information requested, and no program written to search and/or extract the requested information from potentially hundreds of thousands of complaints received and entered by 311 and/or received and entered in the Amanda database.

**INTERROGATORY NO. 2:**

Identify by City of Austin file number and by street address each proceeding in which the provisions of Article 7. (Nonconforming Uses) of Subchapter C of Chapter 25-2 (Zoning) of the Land Development Code have been applied in any way to a sign regulated under Chapter 25-10 of that Code.

**RESPONSE:**

Defendant objects to this request because it is unduly burdensome and overbroad and not limited in scope or time. Defendant further objects to this Interrogatory to the extent it seeks information protected by the attorney/client privilege, the work product privilege, informer privilege, or by any mediation privilege or mediation confidentiality agreement.

Subject to, and without waiving the foregoing objection, Defendant responds that no such lists exist because there is no database capturing the information requested, and no program written to search and/or extract the requested information from potentially hundreds of thousands of pages of complaints received and entered by 311 and/or received and entered in the Amanda database.

**INTERROGATORY NO. 3:**

In which "Nonconforming Use Regulation Group" (*i.e.* "A," "B," "C," or "D") under §25-2-946 is the sign at issue in this case regulated?

**RESPONSE:**

None. There is no legal use of the location currently and no nonconforming use present. It is a vacant lot. There is a structure that appears to be a partial wooden frame present at the location in question; however, it is not in use for off premise advertising or any other purpose. There is no sign or nonconforming use at this location currently as the terms are defined by code.

**INTERROGATORY NO. 4:**

If you contend that a "Nonconforming Sign" subject to regulation under §25-10-152 of the Land Development Code is also subject to regulation as a "Nonconforming Use" under §25-2-941, *et seq.* of that Code, please state the factual and legal basis for that contention.

**RESPONSE:**

Under City Code §25-10 a "nonconforming sign" means a sign that was lawfully installed at its current location but does not comply with the requirements of §25-10. The provisions of §25-10 apply to a sign that is "used for advertising." The structure at issue in the current case is not currently, nor has it been recently, "used for advertising" and thus it does not currently meet the definition of a "sign." §25-10-152(A) specifies that "a person may continue or maintain a nonconforming sign at its existing location," but does not authorize a person to resume or replace an abandoned sign at its former location following extended period of abandonment of the sign. Nor does §25-10-152(A) authorize a person to install a sign face or off premise advertising upon a structure following the abandonment or removal of off premise advertising at the location, a change which would increase the existing nonconformity of the structure. If the Plaintiff contends that the face of a nonconforming sign was removed, lost, or damaged at the location due to damage caused by accident, natural catastrophe, or the intentional act of a person other than the sign owner or land owner, §25-10-152(C) requires that the sign owner or land owner:

(a) must apply to the building official for a repair permit not later than the 30<sup>th</sup> day after the date of damage, and shall finish the repairs not later than the 90<sup>th</sup> day after the date the building official approves the permit application; or

(b) shall remove the sign.

The structure in question has been without a face or off premise advertising use for well in excess of 90 days, and no timely application to the building official for a repair permit based on qualifying damage to the structure has been received. Under §25-10, the structure is required to be removed and is currently ineligible for repair as a nonconforming sign or for use for off premise advertising.

§25-10-2(A) specifies that "a person may not install, move, structurally alter, structurally repair, maintain, or use a sign except in accordance with the provisions of this chapter and other applicable Code provisions." This section explicitly states and also implies that other code provisions are applicable to local regulation of nonconforming signs by the City, not solely those of Chapter 25-10. §25-2-941 defines NONCONFORMING USE as a land use that does not conform to current use regulations, but did conform to the use regulations in effect at the time the use was established. Factually and legally, a nonconforming sign is a nonconforming use. As per §25-2-945, a person abandons a nonconforming use if the person discontinues the nonconforming use for 90 consecutive days (seasonal discontinuance of a use, or a temporary discontinuance of a use for maintenance or repair, is excluded from a calculation of the 90 day period used to determine abandonment; in the current case, however, it is the City's position that an abandonment well in excess of 90 days occurred, even if for the sake of argument only one assumes some of the extended period where there was no sign face or off premise advertising use.

of the location was “seasonal discontinuance” or used for legal “maintenance or repair”). As per ¶25-2-945, a person may not resume an abandoned nonconforming use. The structure currently at this location is not a nonconforming use or a nonconforming sign. The owner is required to remove the structure remaining on the lot as per the above-referenced code.



# NOTICE OF PUBLIC HEARING LAND DEVELOPMENT CODE INTERPRETATION

**Mailing Date:** November 17, 2011

**Case Number:** C15-2011-0127

Please be advised that the City of Austin has received an application for an appeal a Code interpretation of the Planning and Development Department under the Land Development Code.

<b>Applicant:</b>	John Foster; Foster Ramsey, P.C. 512-610-1616
<b>Address:</b>	5222-1/2 S CONGRESS AVE, Lot: 4; Subdivision: VON ACH PARK SUBDIVISION

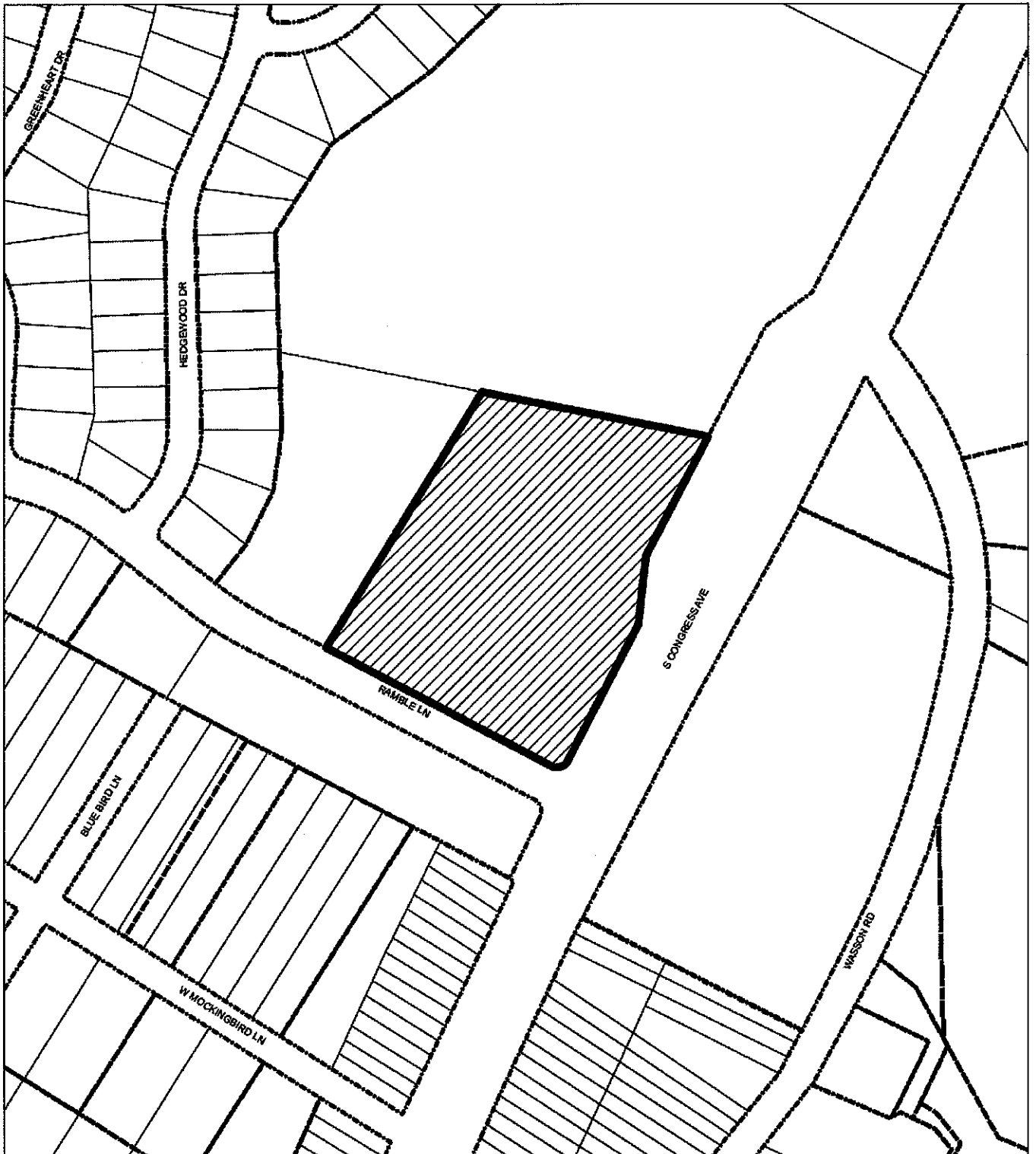
Summary of appeal(s): This appeal challenges the Planning and Development Review Department's determination, dated September 20, 2011, that the right to maintain an off-premises (billboard) sign at 5222 ½ South Congress Avenue as a non-conforming use was abandoned under City Code Section 25-2-975 (*Abandonment of Non-Conforming use*).

This application is scheduled to be heard by the Board of Adjustment on November 29th, 2011. The meeting will be held at City Council Chambers, 301 West 2<sup>nd</sup> Street beginning at 6:00 PM.

You are being notified because City Ordinance requires that all property owners and utility account holders within 500 feet of the proposed development and affected neighborhood organizations be notified when an application is scheduled for a public hearing. If you have any questions concerning this application, please contact **Susan Walker of the Planning and Development Review Department at 512-974-2202** and refer to the Case Number at the top right of this notice. However, you may also find information on this case at our web site [www.ci.austin.tx.us/devreview/index.jsp](http://www.ci.austin.tx.us/devreview/index.jsp).

For additional information on the City of Austin's land development process, please visit our web site [www.ci.austin.tx.us/development](http://www.ci.austin.tx.us/development).





SUBJECT TRACT



ZONING BOUNDARY

CASE#: C15-2011-0127  
 LOCATION: 5222 1/2 SOUTH CONGRESS AVE



This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.

This product has been produced by the Planning and Development Review Department for the sole purpose of geographic reference. No warranty is made by the City of Austin regarding specific accuracy or completeness.

## PUBLIC HEARING INFORMATION

Although applicants and/or their agent(s) are expected to attend a public hearing, you are not required to attend. However, if you do attend, you have the opportunity to speak FOR or AGAINST the proposed development or change. You may also contact a neighborhood or environmental organization that has expressed an interest in an application affecting your neighborhood.

During a public hearing, the board or commission may postpone or continue an application's hearing to a later date, or recommend approval or denial of the application. If the board or commission announces a specific date and time for a postponement or continuation that is not later than 60 days from the announcement, no further notice is required.

A board or commission's decision may be appealed by a person with standing to appeal, or an interested party that is identified as a person who can appeal the decision. The body holding a public hearing on an appeal will determine whether a person has standing to appeal the decision.

An interested party is defined as a person who is the applicant or record owner of the subject property, or who communicates an interest to a board or commission by:

- delivering a written statement to the board or commission before or during the public hearing that generally identifies the issues of concern (*it may be delivered to the contact person listed on a notice*); or
- appearing and speaking for the record at the public hearing; and:
- occupies a primary residence that is within 500 feet of the subject property or proposed development;
- is the record owner of property within 500 feet of the subject property or proposed development; or
- is an officer of an environmental or neighborhood organization that has an interest in or whose declared boundaries are within 500 feet of the subject property or proposed development.

A notice of appeal must be filed with the director of the responsible department no later than 10 days after the decision. An appeal form may be available from the responsible department.

For additional information on the City of Austin's land development process, visit our web site: [www.ci.austin.tx.us/development](http://www.ci.austin.tx.us/development).

Written comments must be submitted to the board or commission (or the contact person listed on the notice) before or at a public hearing. Your comments should include the name of the board or commission, or Council; the scheduled date of the public hearing; the Case Number; and the contact person listed on the notice.

**Case Number: C15-2011-0127 – 5222 ½ S Congress**  
**Contact: Susan Walker, 512-974-2202**  
**Public Hearing: Board of Adjustment, November 29th, 2011**

I am in favor  
 I object

Your Name (please print) \_\_\_\_\_

Your address (es) affected by this application \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_

Daytime Telephone: \_\_\_\_\_

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**If you use this form to comment, it may be returned to:**  
City of Austin-Planning & Development Review Department/ 1st Floor  
Susan Walker  
P. O. Box 1088  
Austin, TX 78767-1088