

May 19, 2017

Greg Guernsey, Director  
Planning and Zoning Department  
City of Austin  
505 Barton Springs Road, 5<sup>th</sup> Floor  
Austin, Texas 78703

via email

RE: C14H-2017-0006; 76 and 78 San Marcos Re-zoning Application

Dear Mr. Guernsey:

I am writing on behalf of Carrie Altemus, the owner of the property in the above-referenced re-zoning application. Specifically, I am writing to notify the City of Austin (the "City") of my client's right to continue the use of the property for commercial mixed-use purposes pursuant to the property's "non-conforming use" status. I am also writing to encourage the City to grant the reasonable zoning being requested by the applicant to avoid any possible legal disputes over such non-conforming status.

## **1. Background**

The property comprising 76 San Marcos and 78 San Marcos is actually one lot currently zoned SF-3. There are two, detached structures located on the lot. As the City's Historic Preservation Officer Steve Sadowsky has confirmed in his report to the Historic Landmark Commission, the property was originally improved with a grocery store and storekeeper's residence in 1925 by Louis and Johanna Bonugli. The establishment of commercial mixed-use, therefore, pre-dated the City's first zoning ordinance (adopted in 1931) by six (6) years. While it is not apparent if the current "SF-3" zoning was the result of that original 1931 zoning ordinance or a later enactment, it is clear that the property has a very, very long history as commercial mixed-use that pre-dated any zoning, and that the commercial mixed-use has been allowed to continue by the City for many, many years.

While a totally complete picture of all of its uses over the last 92 years is not possible, the property has been confirmed to have been used as a grocery store, used furniture store, used clothing store, thrift shop, multi-family residential, Catholic service center, art gallery, casting studio, and event services. In its entire 92-year history, the lot comprising 76 and 78 San Marcos has never been used for single-family or duplex residential. The main building on the property remains to this day the same building that served as Bonugli Grocery Store.

## **2. City Code Regarding Non-conforming Uses**

Section 25-2-945 of the City Code does not provide that changing from one non-conforming use to another non-conforming use causes the loss of non-conforming status. Indeed, it is the inherent nature of commercial property that uses change over time as different businesses come and go. Under

Texas law, if a city's zoning ordinance does not penalize owners for shifting non-conforming uses, then changing non-conforming uses will not result in the forfeiture of non-conforming use status. *McDonald v. Board of Adjustment of San Antonio*, 561 S.W. 2d 218 (Tex. Civ. App. San Antonio 1978, no writ).


In addition, while Section 25-2-945 of the City Code provides that a non-conforming use may be abandoned if discontinued for more than ninety (90) consecutive days, not counting any temporary cessations for repairs or seasonal closures, there is no indication that the non-residential was ever discontinued for that period of time and it would be the City's burden to prove that discontinuation. Even if the use had been discontinued for more than 90 consecutive days, the City Code's 90-day abandonment rule is an arbitrary time period that is not supported by Texas law. Under Texas law, a non-conforming use is only abandoned if there is (1) a clear intent to abandon, and (2) some overt act that carries the implication of abandonment. *Town of Highland Park v. Marshall*, 253 S.W.2d 658 (Tex. Civ. App. Dallas 1950, writ ref'd n.r.e.). Numerous Texas cases have held that there is no abandonment even where the temporary cessation of the non-conforming use lasted many months or even several years. The history of the property in this case clearly demonstrates no intent to abandon and no overt action that implies such abandonment. The City has tacitly acknowledged this fact by not showing the property to be single-family residential on the Future Land Use Map (which shows "Civic" based on the Catholic service center use at the time) and by failing to seek any zoning conformance for many decades.

### 3. Conclusion

As a result of the application of Texas law to the facts related to the use of the property, it is clear that 78 San Marcos has non-conforming use status that may continue and may have different non-conforming uses utilized. It is further clear that the City would be estopped under Texas law to deny such continuance. However, the applicant has sought re-zoning to avoid any potential legal disputes that could arise. Re-zoning the property "LO-MU" as requested will bring the property into conformance with current office and residential uses, will end the non-conforming status thereby, and voluntarily preclude subsequent, more intensive retail uses. The "H" zoning will also ensure the preservation of the structure and historic character that have contributed to the neighborhood for the past 92 years.

In this way, the requested zoning ensures that the historic structure and benign commercial mixed-use that has existed on this site for 92 years can continue without loss of the building or expansion of non-compatible uses, AND that the City can avoid potential legal disputes. For these reasons, we hope the City will re-zone the property as requested by the applicant.

Thank you for your attention to this matter.

Sincerely,  
  
Jeffrey S. Howard

cc: Ron Thrower  
Carrie Altemus