

RESPONSIBLE GROWTH FOR
NORTHCROSS, INC., and
ALLANDALE NEIGHBORHOOD
ASSOCIATION,

Plaintiffs

v.

CITY OF AUSTIN,
LINCOLN PROPERTY COMPANY
COMMERCIAL, INC., and
LINCOLN NORTHCROSS, LTD.,

Defendants

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

200th JUDICIAL DISTRICT

Filed by the District Court
of Travis County, Texas

OCT 30 2007

Al 3:31 P.M.
Amalia Rodriguez-Mendoza, Clerk

**ANSWER OF PLAINTIFF ALLANDALE NEIGHBORHOOD ASSOCIATION TO
CROSS-MOTIONS OF DEFENDANTS, CITY OF AUSTIN AND LINCOLN
NORTHCROSS, LTD. AND REPLY TO DEFENDANTS' PLEA TO THE
JURISDICTION AND RESPONSES TO MOTION FOR SUMMARY JUDGMENT OF
PLAINTIFF ALLANDALE NEIGHBORHOOD ASSOCIATION**

TO THE HONORABLE COURT:

ALLANDALE NEIGHBORHOOD ASSOCIATION (hereinafter "ANA"), Plaintiff and Cross-Defendant, files this Answer to the Cross-Motions of Defendants, City of Austin (hereinafter "COA") and Lincoln Northcross, Ltd. (hereinafter "LINCOLN"), and Reply to Defendants' Plea to the Jurisdiction and Responses to the Motion for Summary Judgment of ANA pursuant to Texas Rule of Civil Procedure 166a, and in support thereof would show as follows:

I. INTRODUCTION

In response to ANA's Motion for Summary Judgment, Defendants have raised standing, ripeness of the claim, accurate interpretation of the ordinance to allow a "garden center" as an accessory use through deference owed for past interpretation, and that the relief requested is inappropriate. ANA has standing under the Uniform Declaratory Judgment Act § 37.004; the claim is ripe as ANA is asking for interpretation of an ordinance which dictates the proper means of application and processing of a request which has now been completed and

resulted in approval of a site development plan; the ordinance to be construed contains plain and specific language which is not doubtful or ambiguous and therefore needs no interpretation by the City and no deference should be shown for past interpretation; and the remedy sought is the only appropriate remedy, as the clear reading of the ordinance shows the approval as improperly granted and requiring of an approval process including new notice and public hearing.

II. STANDING

LINCOLN asserts that there is no statute that grants ANA permission to bring this cause while admitting that ANA bases its standing on ANA having been an interested party to the applications by LINCOLN under the COA Land Development Code. LINCOLN also alleges that ANA has not demonstrated any actual and particularized injury to support its standing.

The ANA petition was brought under the Uniform Declaratory Judgment Act. Section 37.004 of that act specifically allows an interested person whose rights are affected by a municipal ordinance to obtain a judicial declaration of the rights thereunder. The ANA in both its petition and Motion for Summary Judgment seek just such a declaration. The ANA Motion includes reference to City filing CI 1-80-077, which includes a map of a portion of the boundaries of the ANA as recognized by the City. In simple terms, Northcross is within the territory recognized by the City as ANA territory. In fact, Allan McMurtry, corporate representative of ANA stated:

So we are worried about the safety issue as traffic increases...we're worried about the ability of EMS and fire to negotiate through intersections due to the traffic backups predicted there. We're worried about the loss of property values in the homes from the number of cars that will be going up and down the streets and the hours that they'll be going up and down the streets...And we're also worried about the impact of the truck traffic going in and out of a store that

size...” Q. Yes, Sir. Are there any other injuries or damages that the members of the Allandale Neighborhood Association contend that they’ll probably suffer as a result of the approval of a garden center for the Northcross site? A. Well, I think also that, you know, increased traffic means increase to air pollution. It also means a rise in the noise level within the neighborhoods and on the peripheries of the neighborhood. That impacts the general quality of life¹.

Contrary to this testimony, LINCOLN contends that ANA’s individual members have somehow not shown actual and particularized injury to support standing. LINCOLN then relies upon *Felts v. Harris County*² for the premise that traffic increases do not support standing. However, LINCOLN fails to note that this was an action for damages under inverse condemnation related to a proposed public road. LINCOLN also relies upon *Concerned Community Involved Development, Inc. v. City of Houston*³, which involved an attempt to enjoin a public bridge alleging trespass, nuisance and surface flooding as an unconstitutional taking. In this case, the Court of Appeals determined there was no evidence that land of a private person or property owner would be denied access or would be restricted. Both of these cases are extremely different and can be distinguished from the case at hand where the impact on the property owners is caused by a private, rather than a public, undertaking.

LINCOLN also cites *City of Canyon v McBroom*, 121 S.W.3d 410 (Tex. App.-Amarillo 2003) as “holding alleged harm to neighborhood school children from increased traffic resulting from the proposed construction of a Wal-Mart was not individualized injury different from the felt by general subject and did not support standing⁴”. However, LINCOLN fails to mention that in the same opinion, the Amarillo Court of Appeals upheld the standing of Mike McBroom, an individual who owned a house and land near the property.

¹ Deposition of Allan McMurtry on September 5, 2007, pp. 4-6. (Attached to Lincoln Response as Exhibit A)

² *Felts v. Harris County*, 915 S.W. 2d 482 (Tex. 1996)

³ *Concerned Community Involved Development, Inc. v. City of Houston*, 209 S.W. 3d 666 (Tex. App.-Houston [14th Dist.] 2006)

⁴ Lincoln’s Cross-Motion and Response, pg. 8

Clearly, the courts have recognized the standing of an affected individual property owner to allege harm from private enterprise. In fact, the Houston Court of Appeals did a review of the injury required to establish standing with regard to zoning and planning compliance issues and found, as had the Texas Supreme Court, that “persons who reside or operate a business in the restricted zone are persons who have ‘an interest peculiar to themselves and distinguishable from the public generally’” and that they were entitled to a factual hearing⁵. See also affidavit of Alan Edward McMurtry attached hereto as Exhibit “A” and incorporated herein by reference.

ANA has demonstrated its right to be in this court under the doctrine of standing.

III. RIPENESS OF THE CLAIM

Contrary to LINCOLN’s assertion, the claim asserted by ANA is ripe, as the approval has been issued in contravention of the ordinance which ANA is asking this Court to construe. LDC §§ 25-5-142 and 25-5-144 very clearly state that the presence of a proposed conditional use requires a conditional application and a process to include a public hearing before the Land Use Commission. It is ANA’s assertion that a site development plan approval was issued to LINCOLN in contravention of this application and process, creating an approval ripe to be challenged.

Unlike the situation cited by LINCOLN in *Save Our Springs Alliance v. City of Austin*⁶, ANA is not objecting to possible future development, but rather challenging the process which allowed issuance of a building permit and ongoing construction under that approval. As the Court advised in the ripeness discussion of *Save Our Springs Alliance v. City*

⁵ *Galveston Historical Foundation v. Zoning Board of Adjustment of the City of Galveston*, 17 S.W.3d 414 (Tex.App.-Houston [1 Dist.], 2000) citing *Hunt v. Bass*, 664 S.W.2d 323 (Tex.1984)

⁶ *Save Our Springs Alliance v. City of Austin*, 149 S.W. 3d 674 (Tex. App. – Austin, 2004)

of *Austin*⁷, ANA has waited until conclusive action was taken, in this case approval of the second site development plan to proceed.

IV. INTERPRETATION OF THE ORDINANCE

Contrary to LINCOLN's assertion that its site plan did not set forth a garden center element, the COA, upon review of the second presented plan, issued notice on February 7, 2007 which included a listing of "an accessory garden center" in the description of the proposed project. While LINCOLN now takes the position that it cannot anticipate its tenants' use of the structure, obviously the inclusion of a garden center was necessary enough to be included and specifically named on the site plans, including Jim Schissler's version produced yesterday⁸. By submission of the site plan with a proposed "garden center" LINCOLN and the COA must then walk through the clear language of the City Ordinances.

LDC § 25-2-4 "Commercial Uses Described" lists classifications which include, (34) General Retail Sales (General) - to include department stores, as well as a specific listing: "(51) Plant Nursery – use is the use of a site for the sale of plants or related goods or services. This use includes **garden centers** and tree service firms." (*emphasis added*)

The Northcross Mall property is presently zoned General Retail (GR)⁹, and the Development Regulations as set out in LDC § 25-2-491 provides a table listing "the permitted and conditional uses for each base district" in subsection (C) which lists both a plant nursery and large retail as uses which are "conditional".

LDC § 25-5-142 (1) states that "Land Use Commission approval of a site plan is **required** for: (1) a conditional use." (*emphasis added*)

⁷ *Save Our Springs Alliance v. City of Austin*, 149 S.W. 3d 674 (Tex. App. – Austin, 2004)

⁸ Lincoln 02019 – Site Plan Draft by Jim Schissler (Attached as Exhibit "B").

⁹ See Exhibit A to ANA Motion for Summary Judgment.

LDC § 25-5-144 states: (A) The Land Use Commission **shall** hold a public hearing on each site plan application it considers. (*emphasis added*)

While LDC Article 2 - “Administrative Site Plans” sets forth in § 25-5-111 “that” This article applies to an Administrative Site Plan. An Administrative Site Plan is a site plan that does not require approval by the Land Use Commission under Article 3, clearly directing the Administrative approval to be taken only on those site plans not subject to review by the Land Use Commission.

And, significantly, the LDC also provides under “Article 5. Accessory Uses in § 25-2-892 “Applicable Regulations. The regulations applicable to a principal use apply to an accessory use, except as otherwise provided in this division.”

LDC § 25-2-892 clearly shows the intent to carry forward those classifications specifically set out in the principal use and make it impossible for Defendants to now assert that an unapproved “conditional use” is actually classed as “otherwise prohibited” and therefore may be permitted as an accessory use.¹⁰

Under the doctrine of in pari materia, the LDC ordinances above are to be construed together. Defendants’ asserted position would completely bypass § 25-2-892 and give the classification of uses no meaning, as both conditionally and prohibited uses would now be treated in the same manner. It is presumed that the entire statute is intended to be effective, and that a just and reasonable result was intended. *Industrial Accident Board v. Martinez*, 836 S.W.2d 330, 332 (Tex.App.-Houston [14th Dist.] 1992, no writ), and a plain reading of the ordinances gives a clear direction of what was intended.

¹⁰ See Dobson Letter attached at Exhibit I in ANA’s Motion for Summary Judgment
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In *City of Austin v Hyde Park Baptist Church*,¹¹ the court clearly set out the process by

which a statute is construed:

In making our determination, we look first to the plain meaning of the words of the ordinance. See, *Wende*, 92 S.W.3d at 430; *Upjohn Co. v. Rylander*, 38 S.W. 3d 600, 607 (Tex. App.-Austin 2000, pet. denied). If a legislative body does not define words or phrases, we should apply their ordinary meaning and will not enlarge the meaning of words or phrases beyond their ordinary meaning. *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993). We are to read every word, phrase, and expression as if it were deliberately chosen and presume that words excluded from the statute were excluded purposefully. *Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist.*, 81 S.W. 3d 869, 873 (Tex. App.-Austin 2002, pet. denied). When construing a phrase within a statute, we should consider the associated words and the context in which they appear. *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994). If the meaning of an ordinance is doubtful or ambiguous, we will give serious consideration to the construction given it by the governmental body charged with its enforcement or administration. *Texans to Save the Capitol, Inc. v. Board of Adjustment*, 647 S.W.2d 773, 776 (Tex. App.-Austin 1983, writ ref'd n.r.e.). However, "Texas courts have universally adopted the 'clear and unambiguous meaning' test," under which we may "interpret the ordinance *only* if the language's meaning is not clear and plain on the law's face. If the language is clear and plain, the court is bound by the statutory language's 'plain meaning.'" *Texans to Save the Capitol*, 647 S.W.2d at 775 n. 4; see also *Stanford v. Butler*, 142 Tex. 692, 181 S.W.2d 269, 273 (1944) ("in view of the doubt as to the meaning of the provisions of" statute in question, long-standing construction by governmental entity charged with statute's enforcement is entitled to serious consideration); *Seawall East Townhomes Ass'n, Inc. v. City of Galveston*, 879 S.W.2d 363, 364 (Tex. App. - Houston [14th Dist.] 1994, no writ). ("When the words in an ordinance or statute are clear, the ordinance must be given its literal interpretation."); but see *Tennessee Gas Pipeline Co. v. Rylander*, 80 S.W.3d 200, 203 (Tex. App. - Austin 2002, pet. denied) (in construing statute, "courts *may* consider, regardless of whether the statute is ambiguous," statute's administrative construction (emphasis added)). In other words, if the disputed phrase is clear and unambiguous, extrinsic aids and rules of construction are inappropriate and the ordinance should be given its common meaning.

The City of Austin Land Development Code clearly and expressly addresses that a garden center use, as listed by LINCOLN in its application and site plan and as provided in the

¹¹ *City of Austin v Hyde Park Baptist Church*, 152 S.W.3d 162, 166 (Tex. App. - Austin 2004, no writ)

notice sent to ANA and other surrounding property owners, is a conditional use subject to specific provisions requiring approval by the Land Use Commission and a public hearing. Defendant's attempts to circumvent this specific provision through convoluted renaming and intentional violation of their own provisions is an adulteration of the process and was intended to avoid the supervision and public inquiry that the City determined was necessary in these specific and few situations.

V. REMEDY SOUGHT IS APPROPRIATE

Defendants contend that invalidation of the site development plan is not the proper remedy. Citing Section 25-1-412 of the City Code, which empowers the director to take suspension action upon determination of errors, Defendants argue that this city code section is the exclusive remedy. This is not an "error" to be remedied by the Director, instead the petition alleges that the correct interpretation of the ordinance requires a declaration that the city erred in approving the applications by LINCOLN without the approval process required for a conditional use permit, including a public hearing.

The COA error occurred when it sent the LINCOLN Application for **Administrative Approval** in contravention of LDC §§ 25-2-491, 25-5-142, 25-5-111 and 25-2-892. By letter to Laura Huffman, Assistant City Manager, on February 15, 2007, ANA notified the COA and LINCOLN of the error which was responded to the following day¹². If LINCOLN and COA had changed course and followed the plain language of the city ordinances, which require processing of the application as a request for a conditional use permit, issuing notice, and conducting a public hearing, only 8 days would have been lost. Yet, without articulating a valid reason, LINCOLN is maintaining that the director can simply suspend and have the

¹² See Exhibit I to ANA Motion for Summary Judgment

applicant cure the defect. However, LDC clearly does not allow the director to approve the site plan submitted by LINCOLN. Therefore, as the approval process which created it is flawed, the resulting approval is not valid.

VI. SUMMARY OF ARGUMENT

LINCOLN's applications for reconstruction of Northcross included a garden center which, according to City Ordinance, is specifically listed as a conditional use requiring approval by the Land Use Commission and a public hearing. As neither the Land Use Commission approval was obtained nor a public hearing occurred, LINCOLN's applications are void.

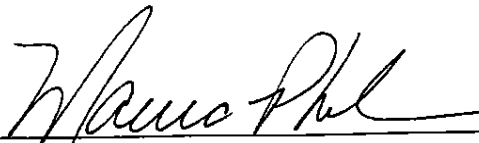
PRAYER

WHEREFORE, the Plaintiff ANA requests that Defendants be cited to appear and answer herein, and that on final hearing, the Plaintiff ANA have judgment as follows:

1. A declaration that the site plans submitted by Lincoln required a conditional use permit under LDC §§ 25-2-491(C); 25-5-142(1);
2. A declaration that the City of Austin erred in approving the applications by Lincoln without a conditional use permit;
3. A declaration that the provisions of LDC §§25-2-491(C) and 25-5-142(1) required a hearing on each of Lincoln Site Plans 1 and 2 before the Land Use Commission;
4. A declaration that the City of Austin erred in approving the applications by Lincoln without a public hearing;
5. A declaration that plan approvals given by City of Austin staff to Lincoln are void;
6. Attorney's fees;
7. Costs of suit; and
8. All other relief, in law and in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

BLAZIER, CHRISTENSEN, BIGELOW & VIRR, P.C.
221 W. 6th Street, Suite 1500
Austin, Texas 78701
Tel: (512) 476-2622
Fax: (512) 476-8685

By: 

Maura Phelan

Bar. No. 15902010

Bruce Bigelow

Bar No. 02307500

Attorneys for Allandale Neighborhood
Association

CERTIFICATE OF SERVICE

I hereby certify that the foregoing ANSWER OF PLAINTIFF ALLANDALE NEIGHBORHOOD ASSOCIATION TO CROSS-MOTIONS OF DEFENDANTS, CITY OF AUSTIN AND LINCOLN NORTHCROSS, LTD. AND REPLY TO DEFENDANTS' PLEA TO THE JURISDICTION AND RESPONSES TO MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF ALLANDALE NEIGHBORHOOD ASSOCIATION has been served upon the following parties and/or counsel of record on this the 30th day of October, 2007, in accordance with the Texas Rules of Civil Procedure.

Casey L. Dobson
Christopher D. Sileo
Scott, Douglass & McConnico, LLP
600 Congress Avenue, 15th Floor
Austin, Texas 78701

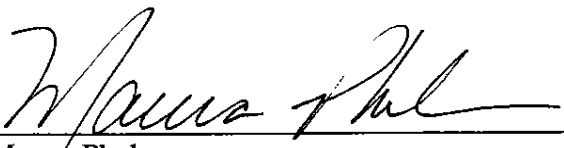
- Hand Delivery
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Maura Phelan

CAUSE NO. D-1-GN-07-001957

RESPONSIBLE GROWTH FOR
NORTHCROSS, INC., and
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CITY OF AUSTIN,
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IN THE DISTRICT COURT

200th JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

AFFIDAVIT ALLAN EDWARD MCMURTRY

THE STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared Allan Edward
McMurtry, known to me to be a credible person, and after being duly sworn, stated as follows:

I reside at 5901 Cary Dr., Austin, Texas, 78757, within the boundaries of Allandale Neighborhood Association and reside approximately 1.3 miles from Northcross Mall. My business, which is the sole support of my family, is within 3 blocks of Northcross Mall. I have lived at this address for 29 years and my business has been at this location for 19 years. The northern boundary of Allandale Neighborhood Association is Anderson Lane, therefore, all of Northcross Mall is within the Association's boundary.


I am currently Secretary of the Allandale Neighborhood Association. Allandale Neighborhood Association was formed in October, 1973, and, to my knowledge, has been a party in two prior law suits, one in state court and one in federal court, both of which were appealed. The purposes of Allandale Neighborhood Association are to protect the quality of life, safety, residential character and property values of the neighborhood. It is one of the largest neighborhood associations in Austin, with some 3100 homes. Many members live in very close proximity to Northcross Mall on Shoal Creek Boulevard, Great Northern Trail, and Foster Lane or on streets that would be impacted by the development on Greenlawn Parkway, Maryland Dr, and Bullard Dr.



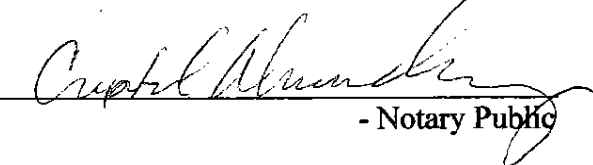
I was deposed in this suit on September 5, 2007, as corporate representative. On behalf of the association, I expressed our concern about the safety issue with traffic increases on the above referenced streets. Further, I expressed our belief in the inability of EMS and fire to negotiate through intersections due to traffic backups predicted there. I have personally reviewed the consultant's traffic study commissioned by Allandale Neighborhood Association and will be affected by the conclusions in the study that 4 intersections in the immediate area of Northcross Mall will become failing. Increased traffic means increased pollution and noise in our neighborhood and adversely affects our property values. It is obvious to me that residents whose homes are located proximate to Northcross Mall will suffer a greater impact from its redevelopment than citizens who reside further away. For example, we must commute through these intersections daily. I believe that if the project is constructed as proposed that my home value will diminish and my business suffer from congestion.

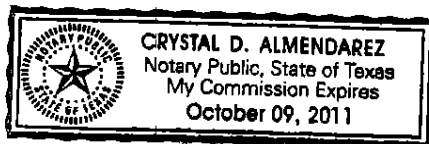
Over the years Allandale Neighborhood Association has fought for our interests both as an interested party through the City of Austin processes and before other agencies. I have reviewed the responses filed by the Defendants to our Motion for Summary Judgment. If the City of Austin's position is upheld, unless the ordinances are subsequently revised by the City Council, public participation in the land development process would be rendered meaningless. The public deserves to have meaningful notice and the opportunity to participate in land use decisions as it affects their residences, families, businesses, and other interests.

Further, Affiant sayeth not.


Allan McMurtry

SWORN TO AND SUBSCRIBED BEFORE ME on this the 30th day of October, 2007.



- Notary Public

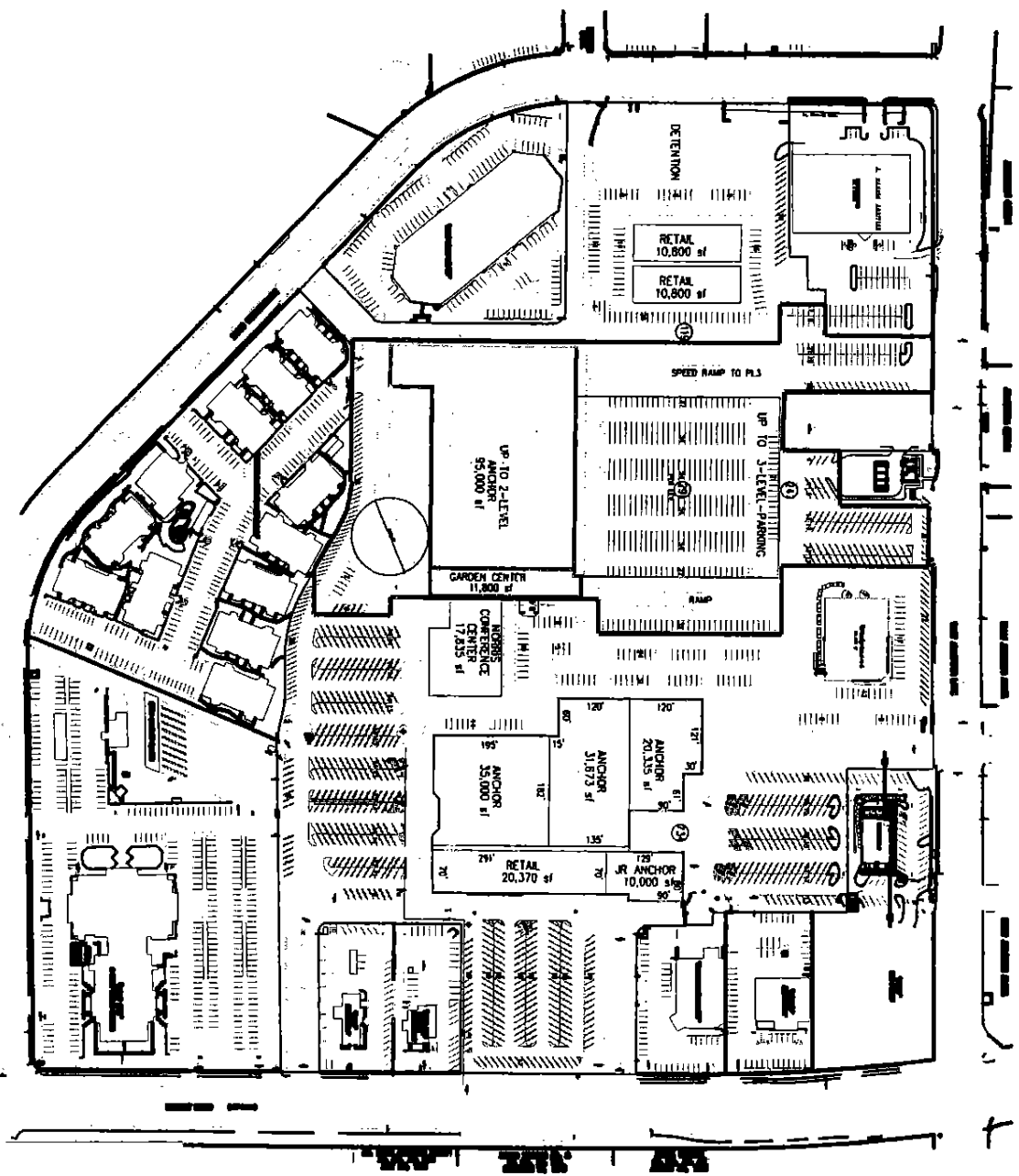




O'BRIEN & ASSOCIATES, INC.
 ARCHITECTURE ■ INTERIORS ■ PLANNING
 3410 WALKER BLVD. SUITE 1200 DALLAS, TEXAS 75245
 (214) 760-4300 FAX (214) 760-4301

NORTHCROSS MALL
 AUSTIN, TEXAS
 LINCOLN PROPERTY COMPANY

 SITE PLAN
 1-10-05



SP-32
 SCALE: 1"=80'-0" JOB# 28031 • ISSUE DATE: 12/28/05
 APPROVED BY: _____

ARTICLE 5. ACCESSORY USES.

§ 25-2-891 ACCESSORY USES GENERALLY.

An accessory use is a use that:

- (1) is incidental to and customarily associated with a principal use;
- (2) unless otherwise provided, is located on the same site as the principal use; and
- (3) may include parking for the principal use.

Source: Section 13-2-1; Ord. 990225-70; Ord. 031211-11.

§ 25-2-892 APPLICABLE REGULATIONS.

The regulations applicable to a principal use apply to an accessory use, except as otherwise provided in this division.

Source: Section 13-2-301; Ord. 990225-70; Ord. 031211-11.



TABLE OF AUTHORITIES

Cases

<i>Board of Adjustment of City of San Antonio v. Wende</i> , 92 S.W.3d 424, 45 Tex. Sup. Ct. J. 674	7
<i>Bridgestone/Firestone, Inc. v. Glyn-Jones</i> , 878 S.W.2d 132, 133 (Tex. 1994)	7
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<i>Gables Realty Ltd. P’ship v. Travis Cent. Appraisal Dist.</i> , 81 S.W.3d 869, 873 (Tex. App.-Austin 2002, pet. denied)	7
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<i>Stanford v. Butler</i> , 142 Tex. 692, 181 S.W.2d 269, 273 (1944)	7
<i>Tennessee Gas Pipeline Co. v. Rylander</i> , 80 S.W.3d 200, 203 (Tex. App. – Austin 2002, pet. denied).....	7
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