

April 23, 2020

Lindsey Oskoui
Director of Planning and Development
City of Bee Cave
4000 Galleria Parkway
Bee Cave, Texas 78738

via email: loskoui@beecavetexas.gov

RE: Little Barton Creek Tract (the “Property”); Cassandra Interests, Ltd. (“Cassandra”)

Dear Lindsey:

I hope that you and the rest of City staff are staying safe and healthy. Hopefully, we’ll be through this pandemic soon and back to work in our offices. I am writing to follow up from our meeting on 2/25. As you know, Cassandra wishes to enter into a development agreement (the Development Agreement) with the City of Bee Cave allowing for development of the Property in general accordance with the attached Concept Plan containing 30 lots, 6 of which are in the City’s Water Quality Buffer Zone (the WQBZ). As part of the Development Agreement, Cassandra will agree to allow open space and pedestrian trails on the north side of the creek at the rear of the Shops at the Galleria. There are two reasons why we believe the City should be compelled to enter the Development Agreement: 1.) the Property has vested rights under Chapter 245 of the Texas Local Government Code (Chapter 245); and 2.) application of the WQBZ to the Property represents a regulatory taking of the Property. We believe the proposed 30 lot project is a more than reasonable compromise on the part of Cassandra.

1. Applicable History of the Property

The Spanish Oaks Development Agreement (the Original DA) was entered into between the City and CCNG Development Company, L.P. (CCNG) in late April of 1999 establishing certain rules and agreements for the development of the Spanish Oaks project (the “Project”). The Property was included in the 983-acre tract covered by the Original DA and was designated as “Single Family” on the Exhibit “B” concept plan attached to the Original DA, a copy of which is included. The Original DA allowed for development of the land included therein at a density of up to three LUE’s per acre. The Original DA clearly describes the agreement and acknowledgement of the Project’s vested rights under Section 8.02, specifically including the character of land uses, the number of LUE’s, the general location of roadways, the design standards for streets and roadways, and development of the Bee Cave Area in accordance with the standards and criteria set forth in the Agreement and applicable Bee Cave ordinances in existence at the time of the Original DA.

Following the execution of the Original DA, CCNG embarked on a long-standing development project that has proceeded on a phase by phase basis and continues to this day. CCNG broke ground in February of 2020 with the 18-hole golf course and continued with the completion of extensive infrastructure, 485 single-family lots and homes, 293 apartment units, 72 townhome units, the Shops at Galleria Power Center (Lowes) and other project improvements and amenities. Along the way, it formed three municipal utility districts, entered numerous utility and other development-related agreements and filed and received approvals for countless development permits. Currently, CCNG is completing the Hillside section of Spanish Oaks and has submitted plats and plans for the Villages at Spanish Oaks. The current assessed value of the developed land and improvements within the Spanish Oaks MUD's is \$842 million. In short, this massive Project has proceeded continuously since the date of Original DA, all taking place on land covered by the Original DA, as amended. As with any large, master-planned development, portions of the Project, including the Property, have been held for future development as demand warranted. Well after commencement of the Project and years of continuous development activity, the City changed its Code to provide for Water Quality Buffer Zone (WQBZ) setbacks. The term of the Original DA ended in 2014.

Cassandra is an entity that was created by one of the principals of CCNG to take ownership of the Property in 2010. When the City sought to annex the Property in 2016, the City presented Cassandra the option to either accept annexation or enter into a non-annexation development agreement in accordance with Chapter 43 of the Texas Local Government Code (TLGC). This was not a "voluntary" process for Cassandra nor was the non-annexation development agreement a negotiated document. The agreement and any language therein is not a reflection of Cassandra's intent with respect to use or development of the Property, but, instead a reflection of the requirements of Chapter 43 of the TLGC and the lesser of two unattractive options for Cassandra.

2. Chapter 245 Vested Rights

Chapter 245 generally provides that a development "project" will be governed by the rules and regulations of a city in effect on the date on which the first application for a "permit" is filed for the project. *Tex. Loc. Gov't Code* §245.002. The Original DA, by its own terms, is the initial permit for the Spanish Oaks project. Once an application for the first "permit" is filed for a "project", the rules and regulations are effectively "frozen" and the city is prohibited from enforcing subsequent regulations (with certain exceptions). *Harper Park Two v. City of Austin*, 359 S.W. 3d 247, 248 (Tex. App.—Austin 2011, writ denied). Vested rights provided by Chapter 245 apply as long as the project has not become dormant. *Id.* at 248-49; *Tex. Loc. Gov't Code* §245.005. The Texas Attorney General has stated that under the statutory definition of "project," "it is irrelevant whether the owner who files the original application for the first permit retains the property for the duration of the project or conveys the property." Att'y Gen. No. JC-0425 (2001). Vested rights attach to the "project," not to a particular property owner or permit holder and, as such, "follow" any conveyances or transfers of rights related to the project, provided the project remains the same. Provided that Cassandra does not change the proposed use of the Property from "Single Family" as provided in the Original DA, it would be entitled to the protections of Chapter 245. In *Harper Park Two*, the Court stated that "the project includes the entire process, not the discrete components" *Harper Park Two*, at 256. In applying that concept,

the Court recognized that the relevant "project" under chapter 245 is the Harper Park subdivision as a whole, as reflected in the 1985 preliminary plan application, not the six-acre lot viewed in isolation. *Id.*

The City has argued that the expiration of the Original DA eliminates Cassandra's vested rights with respect to the Property. Chapter 245 makes a clear distinction between expiration of permits and termination of projects. While City's may impose expiration dates on permits, projects may continue if "progress toward completion" under Chapter 245 is made to avoid becoming "dormant". *Tex. Loc. Gov't Code Section §245.005*. Even the City's own code recognizes this concept by providing that "an expiration occurs unless progress towards completion of the project has occurred." *Bee Cave City Code §30.01.007* Under state law and City Code, progression of development activities within Spanish Oaks constitutes "progress towards completion" and the Spanish Oaks project in this case should not be "dormant". *Tex. Loc. Gov't Code §245.005(c)(1); Bee Cave City Code §30.01.007(D)(3)(A)*. As stated above, virtually all of the activities described in Section 245.005(c) have occurred within Spanish Oaks, including filing of final plats, posting of fiscal, payment of impact fees, expenditure of millions of dollars on development of infrastructure, lots, homes apartments, townhomes, commercial development and other improvements. For Bee Cave's argument to prevail, it would have to isolate the Property from the rest of the Spanish Oaks project, a concept that was rejected by the Court in the *Harper Park Two* case.

Since the Spanish Oaks project has proceeded in massive scale without cessation since 1999, the expiration of the Original DA is irrelevant as the "project" itself has held the protections of Chapter 245 in place, including those portions of the project that have been held for future development as infrastructure progresses and demand is warranted.

3. Regulatory Taking

In addition to its vested rights, Cassandra is protected from application of the City's WQBZ requirements based on state and federal law pertaining to regulatory takings. Even if a governmental action substantially advances a legitimate state interest, "[a] compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property." *Lingle v. Chevron USA, Inc*, 544 U.S. 528 (2005). The Texas Supreme Court in *Mayhew* held that "[e]ven if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 937 (Tex. 1996).

Cassandra's owner, Harris Kaffie, was also a founding principal owner in CCNG from the beginning of the Spanish Oaks project and he remained in an ownership position for 30 years. The result is that he has made a substantial investment and expenditures related to Spanish Oaks and the Property since project inception and well before adoption of the City's WQBZ requirements. According to our engineer's calculations, the Bee Cave WQBZ requirement results in approximately 98.5 acres of undevelopable acreage on the Property, leaving only approximately

25 acres of developable land, much of which is not contiguous or serviceable by common infrastructure. A site constraints map depicting the impact of the WQBZ is attached. Under prior rules, about 76 acres of the Property was developable. Given the limited amount of allowable density and the costs associated with developing the Property, imposition of the CWQZ on the Property represents denial of all economically viable use of the Property and an unreasonable interference with Cassandra's investment-backed expectations.

4. Conclusion

We believe that Cassandra has valid claims both for vested rights and regulatory taking. If Cassandra proceeds with a permit application that conforms to the "project" as originally conceived, then the protections of Chapter 245 would apply and Cassandra would be entitled to develop up to 75 acres of the Property. Alternatively, Cassandra could pursue compensation for the devaluation of the Property as a result of the WQBZ. Instead of pursuing either of these controversial and costly alternatives, Cassandra prefers to reach a reasonable compromise through the execution of a new development agreement as described herein.

I look forward to hearing back from you after you've had the chance to review this letter with fellow staff and your attorney.

Sincerely,



William P. McLean

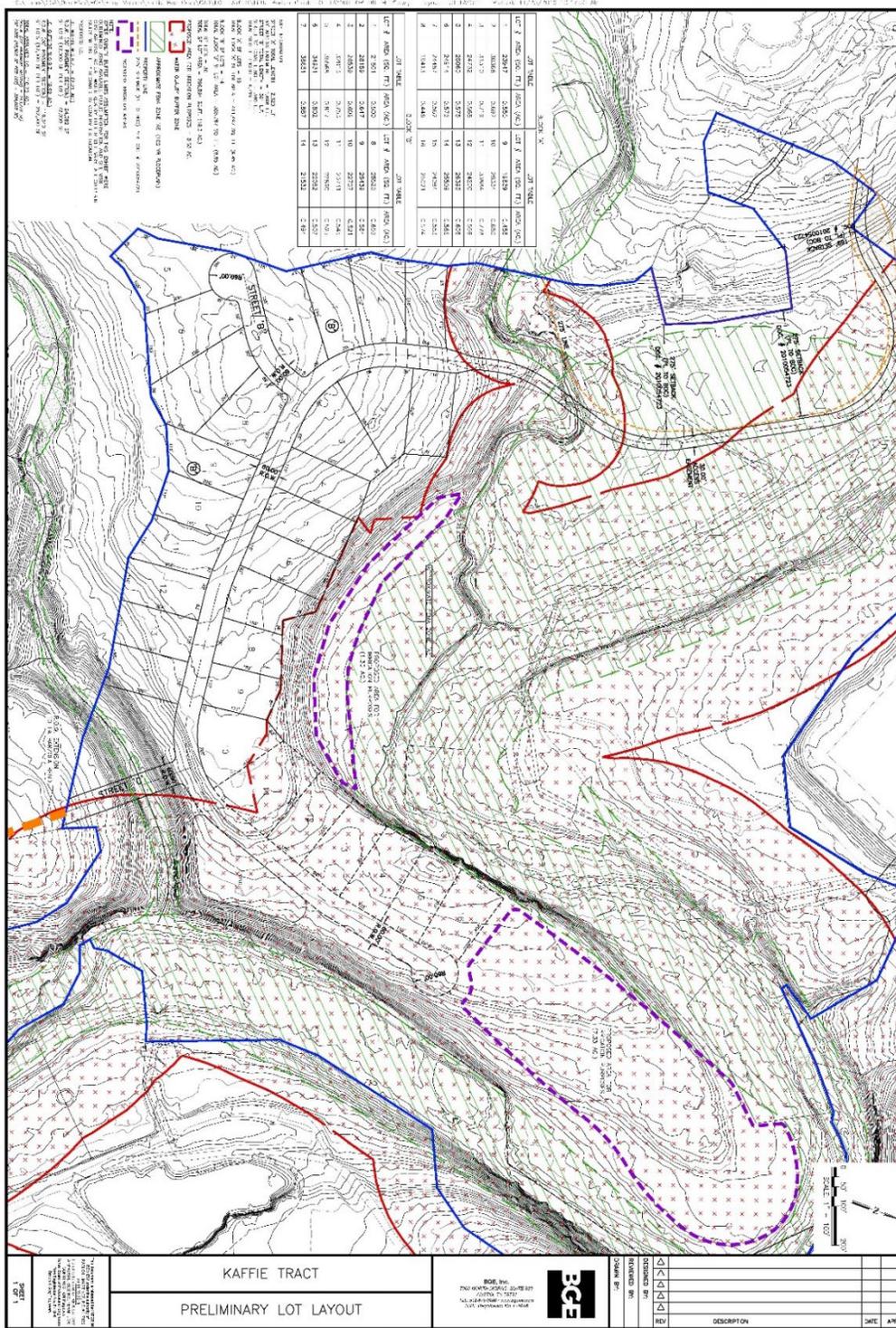
Attachments:
Proposed Concept Plan
Concept Plan from the Original DA
Site Constraints Map

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Tim Riley
Clint Garza
Megan Will

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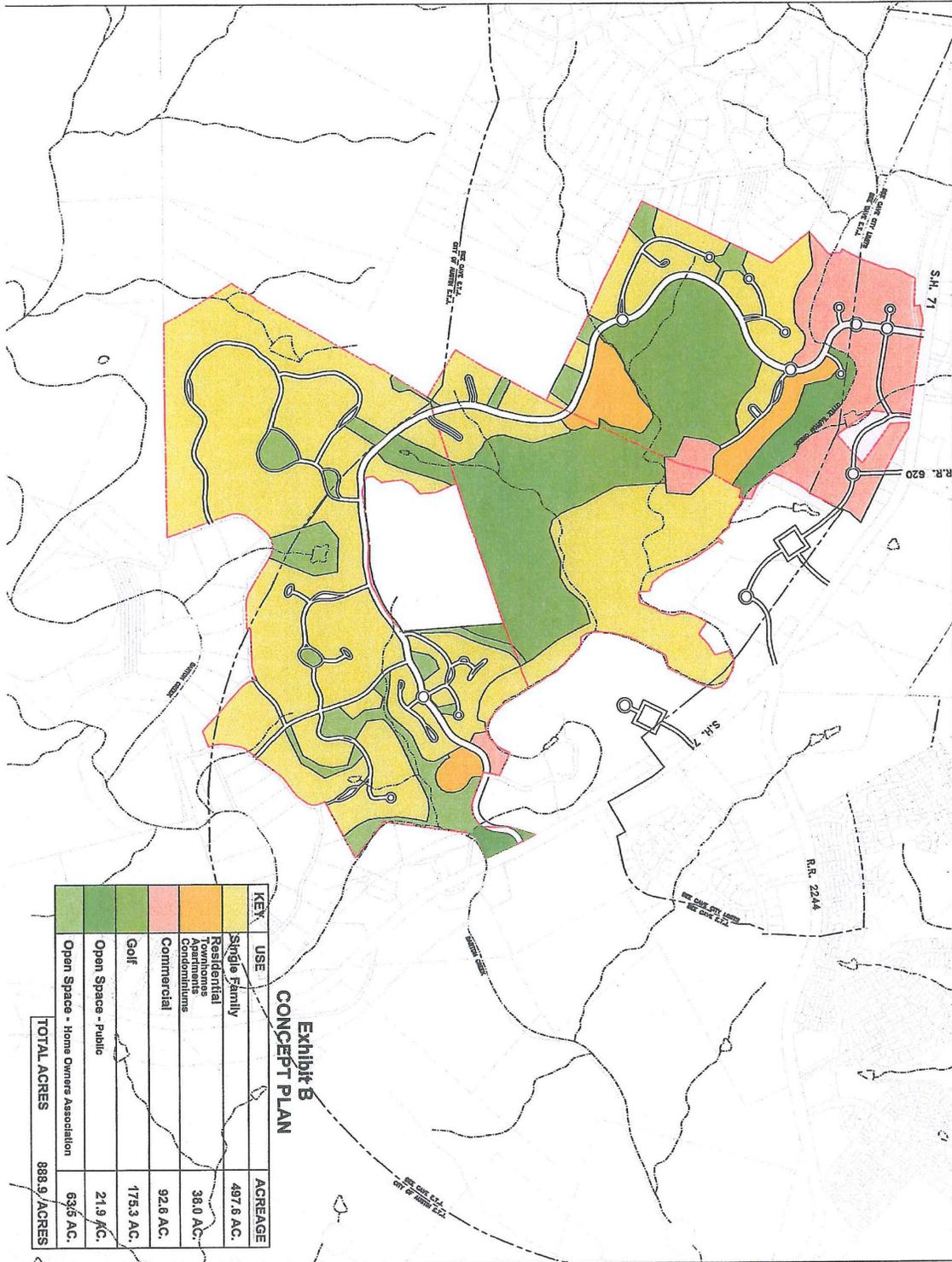
ATTACHMENT 1

PROPOSED CONCEPT PLAN



ATTACHMENT 2

CONCEPT PLAN FROM THE ORIGINAL DA



ATTACHMENT 3

SITE CONSTRAINTS MAP

