NO. 03-12-00188-CV

IN THE THIRD DISTRICT COURT OF APPEALS
AUSTIN, TEXAS

NATIONAL MEDIA CORPORATION AND ANCHOR EQUITIES, LTD.,

Appellants

v.

CITY OF AUSTIN

Appellee

Appealed From the 345th Judicial District Court
Travis County, Texas
The Honorable Lora Livingston Presiding
Trial Court Cause No. D.-1-GN-10-003997

BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This case arises from Appellee City of Austin's denial of Appellants National Media Corporation and Anchor Equities, Ltd.'s attempt to register a ''non-conforming" advertising sign, which has been standing in its current location for almost half a century. On November 19, 2009, Austin's Code Enforcement Inspector issued his Notice of Denial of Registration and a Notice of Violation. CR 139-43. On November 12, 2010, Appellants filed a declaratory judgment action in the Travis County district court challenging the Inspector's determination. On September 20, 2011, the City's Planning Development Review Department Director issued a new "Use Determination" that once again rejected the sign's registration but on different grounds. CR 144. Appellants appealed the Director's "determination" to the City of Austin's Board of Adjustment, which denied the appeal on November 29, 2011. CR 196-206, 245. Pursuant to Texas Local Government Code § 211.011, Appellants appealed the Board of Adjustment's decision to the Travis County district court, which issued a writ of certiorari. On February 1, 2012, Appellants and Appellee filed cross motions for summary judgment seeking declaratory and injunctive relief. CR 30-153, 154-233. On February 23, 2012, the district court rendered its final judgment granting Appellee's motion for summary judgment and denying Appellants' motion. The lower court's judgment, which was signed June 13, 2012, also ordered the removal of the sign. CR vol. B 26-27, Appx. Tab A. On May 9, 2012, the lower court granted Appellants' motion to stay enforcement of the judgment pending appeal. CR vol. B 24-25.

STATEMENT REGARDING ORAL ARGUMENT

Oral Argument will aid the Court's decision making process in this case because the Court must determine, as a matter of first impression, nuanced issues of statutory construction that turn on opaque terms of art, decades of municipal legislative history and factual issues that are difficult to ascertain and appreciate from the written record alone. Specifically, the Court must determine, in the face of detailed and specific Austin City Code provisions regulating advertizing signs, whether the general abandonment provisions of the Austin zoning ordinances can be properly extended to advertising signs that are not otherwise subject to the use classifications of the zoning code. To make this determination, the Court must understand the conflicts and redundancies between the sign ordinance and the zoning code and the subtle definitional distinctions between these parallel but separate regulations. The Court must also evaluate whether record facts demonstrating that the City of Austin has not previously denied a sign registration based on its new application of the zoning ordinance, and, to the contrary, has registered signs under circumstances indistinguishable from those of the sign at issue, betray an arbitrary and capricious application of the law in the instant case that is not entitled to deference. Oral argument should be permitted so the Court has a full opportunity to question counsel concerning these important legal issues.

ISSUES PRESENTED

I. **Whether the Court owes any deference to the Austin Board of Adjustment's interpretation of the unambiguous municipal ordinances at issue in this case.**

II. **Whether the Board of Adjustment's application of the zoning ordinance abandonment provision to the nonconforming Sign was an abuse of discretion.**

III. **Whether the City of Austin's refusal to register Appellants' nonconforming Sign based on the City's new abandonment rule was arbitrary and illegal.**

STATEMENT OF FACTS

Aerial photographs of Austin dating back to February 1966 demonstrate that the advertizing billboard at issue in this appeal (the "Sign") has been standing at its current location on South Congress Avenue for at least 46 years.[1] *See* CR 151-53, Affidavit of Luci Miller, Ex. A. On October 16, 1969, the City of Austin annexed the land on which the Sign is located. CR 112-15, City Ord. No. 691016-G. On March 1, 1984, the City of Austin revised its zoning regulations to place all properties in Austin into newly defined use classifications. *See* Appx. Tab B, City Ord. No. 840301-S. Subsequently, in 1992, the City of Austin also enacted sign regulations generally prohibiting "off premise signs," *i.e.*, signs "advertising a business, person, activity, goods, products, or services not usually located on the site where the sign is installed, or that direct[] persons to any location not on that site." *See* Appx. Tab C at 301-02, City Code § 13-2-863 (1992) (currently codified at City Code §§ 25-10-3(10) & 25-10-102(1)). Because the advertising Sign at issue was lawfully erected before the property on which it is located

came within Austin's city limits, and well before the enactment of Austin's sign regulations generally prohibiting off premises signs, the Sign met the grandfathering criteria set out in the City's sign ordinance to be deemed a legal "nonconforming sign." *See* Appx. Tab D at 5 & 27-31, City Code §§ 25-10-3(10) & 25-10-152; CR 42-43, Affidavit of Curtis Ford at 3-4.

Pursuant to Austin's sign regulations, which currently appear in Chapter 25-10 of the Austin City Code, a sign owner may maintain a nonconforming sign at its existing location, or relocate it to a different location, provided it does so in compliance with the City's regulations concerning nonconforming signs. *See* Tab D at 27 & 30-31, City Code § 25-10-152(A) & (D). In 2008, the City of Austin added to the applicable regulations a new requirement that the sign owner must register a nonconforming off-premise sign every year. *See* Tab D at 31, City Code § 25-10-152(F)(1)(a); *see also* Appx. Tab E at 9, City Ord. No. 20080605-076.

Appellant National Media Corporation ("National Media") engages in the business of advertising and owns and operates billboards in Austin and in Travis County. CR 42, Affidavit of Curtis Ford at 3. National Media acquired the right to operate the Sign located at 5222 ½ South Congress Avenue, within the corporate limits of the City of Austin, from Appellant Anchor Equities, Ltd. ("Anchor"). The Sign is a fixture on land owned by Anchor, and is thus owned by Anchor and Anchor has assigned to National Media its rights of ownership. *Id.* At the time National Media acquired the ownership

[1] The sign's address has been identified as either 5210 South Congress Avenue or 5222 ½ South Congress Avenue. CR 42, Affidavit of Curtis Ford at 3.

rights, the Sign was not currently in use for purposes of advertising and the face of the Sign had been removed. *Id*. However, the Sign had not been damaged or intentionally dismantled and only required routine maintenance to begin generating rental revenue for National Media. *Id*.

After purchasing the right to operate the Sign, National Media filed for registration of the Sign under the newly codified provisions of Austin's sign ordinance, Section 25-10-152(F), and paid the required registration fee. CR 43, 138. On November 19, 2009, Austin's Code Enforcement Inspector issued a Notice of Denial of Registration and a Notice of Violation requiring the removal of the sign. CR 139-43. The stated authority for these notices was originally derived exclusively from Austin's sign ordinance Section 25-10-152. The inspector concluded that the Sign had been "dismantled" and that "the repairs/replacement" of the Sign had not been completed within the sign ordinance's 90-day period for replacement or relocation of a nonconforming sign. CR 139; *see also* Tab D at 30, City Code § 25-10-152(C).

Appellants filed a declaratory judgment action in the Travis County District Court challenging the City Inspector's conclusion that the sign violated Section 25-10-152 of the Austin sign ordinance. CR 4-8. Appellants' original petition raised the following issues:

1) Pursuant to Section 25-10-152, a sign owner is entitled to "maintain" a sign at its existing location (see § 25-10-152(A)), and to change or alter a nonconforming sign without permit (see § 25-10-152(B)(1) & (2)).

2) Pursuant to Section 25-10-15(E), a sign owner is entitled, without permit, to repair the sign so long as the maintenance cost does not

exceed 60 percent of the cost of installing a new sign of the same type and in the same location.

3) Section 25-10-152(D) does not apply to the sign in question because the sign had not ever been "dismantled." Indeed, in response to Appellants' protestations, the City acknowledged that the Sign had been, at most, only "partially dismantled."

CR 6. Then, while the declaratory judgment action was still pending in the district court and without prior notice or opportunity for input from Appellants, on September 20, 2011, the City's Director of its Planning and Review Department, Greg Guernsey issued a new "Use Determination for 5222 ½ South Congress Avenue." CR 144. That use determination changed the City's basis for the registration denial and for the first time asserted that because the Sign was allegedly "dismantled," Appellants' right to maintain a nonconforming off-premise sign at the property was ''abandoned." *Id*. However, rather than relying on any provision of Austin's sign ordinance (Chapter 25-10) as the basis for his abandonment determination, the Director based his conclusion on Austin's zoning regulations. The Director specifically referenced City Code Section 25-2-2, which permits the Director to "determine the appropriate use classification for an existing or proposed use or activity," and City Code Section 25-2-945 (*Abandonment of Nonconforming Use*), which provides for abandonment of uses that do not conform with the use classifications in the City's zoning jurisdiction. *See id.*; *see also* Appx. Tab F at 32, City Code § 25-2-1 (describing the five major zoning use categories). Doing so, Director Guernsey fashioned a novel administrative rule that under Section 25-2-945, if a nonconforming sign has its face removed for a period of 90 days, then its

"nonconforming use" is "abandoned" and the sign's status as a "nonconforming sign" is lost. *See* CR 144.

Appellants perfected their appeal of Director Guernsey's "Determination" to Austin's Board of Adjustment, which, on November 29, 2011 both heard and denied the appeal. CR 169. On December 8, 2011, Appellants filed their Second Amended Original Petition and Petition for Writ of Certiorari, timely appealing the Board of Adjustment's decision to the Travis County district court. CR 17-26. That same day, the district court issued the writ directing the City of Austin to state the material facts that show the grounds for the Board of Adjustment's decision. CR 27. After the City filed its response, both parties filed cross motions for summary judgment. CR 30-153, 154-233. Without the benefit of oral argument on the parties' motions,[2] on March 8, 2012, the district court denied Appellants' motion, granted the City of Austin's motion in its entirety and ordered the Sign to be dismantled. Appellants filed their notice of appeal to this Court on March 27, 2012.

ARGUMENT SUMMARY

The Board of Adjustment abused its discretion by misapplying the plain language of Austin's municipal ordinances regulating nonconforming signs. Because no party contends that the ordinances in question are ambiguous and because the purely legal statutory interpretation issues presented in this appeal are subject to de novo review, the

[2] Due to the lower court's very full docket on the day that the summary judgment motions were set for argument, trial counsel agreed to submit the case to the district court on the basis of the summary judgment briefing.

Court should not give any deference to the Board's decision or the lower court's judgment affirming it.

The record evidence demonstrates that the Sign fully complied with Austin's sign ordinance, which was enacted to regulate billboards and other signs within the city more than a decade after the 1984 changes to Austin's zoning ordinance. The sign ordinance (City Code § 25-10-152(B)) states expressly that it is the sole authority for a person to change or alter a nonconforming sign and specifically allows a person to remove the face of a nonconforming sign without stipulating any deadline for when the face must be restored. Significantly, nothing in the sign ordinance mentions the term "abandonment" or provides for the removal of a nonconforming sign due to lack of use.

Austin's sign ordinance also has different definitions that conflict with the definitions set out in the zoning ordinance. Key to the issues in this appeal, the definitional scheme to classify a "nonconforming use" in the zoning ordinance can result in the exact opposite classification from the scheme for defining a "nonconforming sign" under the sign ordinance, particularly for structures in place prior to the March 1, 1984 enactment of the current zoning regulations. Rather than deem prior conforming uses to be legal "non-conforming uses" in the same way that the sign ordinance does for "nonconforming signs," the zoning ordinance instead defines any use that complied with the pre-March 1, 1984 zoning uses to be "*conforming uses*" notwithstanding the requirements of the zoning code. *See* Tab F at 52, City Code § 25-2-942. Consequently, it is impossible to interchange the terms "nonconforming use" and "nonconforming sign"

when applying the zoning code's abandonment provision to a structure that predates March 1, 1984. Yet this is precisely what the Board of Adjustment's decision attempts to do in the case of the 46-year-old Sign in issue and is one of the principal reasons the Board of Adjustment's determination should be reversed.

Longstanding rules of statutory construction also dictate that specific and more recent regulations control over older and more general ones. In this case, there are several indicia that the City intended that the general provisions of the zoning regulations be kept separate from those of the sign ordinance, even if their provisions often parallel each other. For example, the property use classifications that define the five major use zones of the zoning ordinance do not coincide with the independent and overlapping sign districts set out in the sign regulations. Even though billboards may not comfortably fall within the use categories of the zoning ordinance (*i.e.*, residential, commercial, industrial, civic, and agricultural uses), the sign ordinance specifically allows signs to be located in all five of the use zones. Thus, it is illogical to remove a sign on the basis that it fails to conform to the zoning use of the location where it is placed. It is also illogical to assume that a sign that by legislative design does not need to conform to any particular zoning use, can be said to have "abandoned" a nonconforming use under the zoning regulation.

Finally, the record evidence demonstrates that the City arbitrarily applied its new "abandonment" rule to Appellants' Sign. The City has never before taken the position that the failure of a billboard to have a face installed constitutes a waiver of its nonconforming sign status. During the course of discovery, the City admitted that it has

no record of any other case in which it has denied the registration of a nonconforming sign based on the 90-day abandonment provision in the zoning ordinance. To the contrary, the record evidence demonstrates that the City has repeatedly registered nonconforming signs that did not have faces for a period of more than 90 days. With the sole exception of the instant case, there is no record evidence that the City of Austin has ever applied the zoning ordinance 90-day abandonment rule to a nonconforming sign, or initiated any proceeding to remove a nonconforming sign because of non-use for 90 days. Thus, even if the Court concludes the ordinances in question are susceptible to multiple interpretations, the Court need not defer to the interpretation the City applied in this case.

For all of these reasons, the Court should reverse the judgment of the lower court and render a decision correcting the Board of Adjustment's clear abuse of discretion. Pursuant to the express terms of Austin's sign ordinance, Appellants are entitled to registration of the Sign at issue.

ARGUMENT

I. The Standard of Review Precludes Deference to Austin Board of Adjustment's Interpretation of the Unambiguous Ordinances at Issue.

A board of adjustment is a quasi-judicial body. *Bd. of Adjustment v. Flores*, 860 S.W.2d 622, 625 (Tex. App.—Corpus Christi 1993, writ denied). A district court may review the legality of a board's decision by writ of certiorari. *See* Appx. Tab G, Tex. Loc. Gov't Code Ann. § 211.011 (Vernon 2003). "Although this is an appellate review of an agency's action, [courts] do not employ the substantial evidence standard of review in reviewing [decisions] by the Board of Adjustment." *Texans to Save the Capitol v. Bd. of*

Adjustment, 647 S.W.2d 773, 777 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Instead, the only question before the district court, and an appellate court reviewing the decision of the district court, is the legality of the board's order, which is a question of law. *See Pearce v. City of Round Rock*, 78 S.W.3d 642, 646 (Tex. App.—Austin 2002, pet. denied). In this case, the Court must ask only whether the board correctly analyzed and applied the sign ordinance and zoning regulations in issue. *Cf. Pearce*, 78 S.W.3d at 646; *Wende v. Bd. of Adjustment*, 27 S.W.3d 162, 167 (Tex. App.—San Antonio 2000), *rev'd on other grounds*, 92 S.W.3d 424 (Tex. 2003). Ultimately, the Court must review the legality of the board's decision to determine whether the district court abused its discretion in affirming the board. *See Pearce*, 78 S.W.3d at 647-48.

Because a board of adjustment has no discretion to determine the law, a failure to correctly analyze or apply the law constitutes an abuse of discretion. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). A board of adjustment also abuses its discretion when it acts without reference to any guiding rules and principles or acts arbitrarily and unreasonably. *See Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985); *Flores*, 860 S.W.2d at 626.

Statutory construction and the propriety of a summary judgment are questions of law, and a trial court's summary judgment based on statutory construction is reviewed *de novo*. *City of Pflugerville v. Capital Metro. Transp. Auth.*, 123 S.W.3d 106, 109 (Tex. App.—Austin 2003, pet. denied).

Additionally, municipal ordinances are interpreted by the same rules of construction that apply to statutes. *SWZ, Inc. v. Bd. of Adjustment of City of Fort Worth*, 985 S.W.2d 268, 270 (Tex. App.—Fort Worth 1999, pet. denied). Contemporaneous construction of an ordinance by the agency charged with its enforcement can be entitled to serious consideration, but only if the construction is reasonable and does not contradict the plain language of the ordinance. *Id.* Moreover, as the Texas Supreme Court has made clear, several prerequisites must be satisfied before a court gives any deference to an agency's interpretation of a statute.

> It is true that courts give some deference to an agency regulation containing a reasonable interpretation of an ambiguous statute. But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions in documents like the Department's amicus brief here. Second, the language at issue must be ambiguous; an agency's opinion cannot change plain language. Third, the agency's construction must be reasonable; alternative unreasonable constructions do not make a policy ambiguous. An agency's opinion can help construe an existing ambiguity, but it cannot create one . . . .

Fiess v. State Farm Lloyds, 202 S.W.3d 744, 746-48 (Tex. 2006).

No party to this case has made any contention that the language of the applicable sign ordinances and the zoning regulations is ambiguous. As the following sections make clear, there is only one reasonable interpretation of the ordinances at issue that both adheres to the plain language of the regulations and is consistent with the City of Austin's enforcement precedent respecting billboard registration. Accordingly, the standard of review the Court must apply in this case is a de novo statutory review,

without any deference to the interpretation and decisions of the Board of Adjustment and the lower court. *See Pearce*, 78 S.W.3d at 647-48.

II. The Board of Adjustment's Application of The Zoning Ordinance's Abandonment Provision to The Nonconforming Sign Was An Abuse of Discretion.

The Board of Adjustment abused its discretion by adopting an unreasonable and illegal interpretation and application of the Austin City Code. When interpreting municipal ordinances, "the primary duty of this court is to carry out the intentions of the municipal legislative body." *Bolton v. Sparks*, 362 S.W.2d 946, 951 (Tex. 1962). To perform this duty, the court should "begin with the statute's plain language because we assume that the Legislature tried to say what it meant and, thus, that its words are the surest guide to its intent." *Cardinal Health Staffing v. Bowen*, 106 S.W.3d 230, 237-38 (Tex. App.—Houston [1st Dist.] 2003, no pet.). If the language is unambiguous, courts interpret the ordinance using its plain language unless that interpretation leads to absurd results. *See Tex. Dep't of Protective & Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004). In ascertaining legislative intent, the Court cannot confine its review to isolated statutory words, phrases, or clauses, but instead must examine the entire act. *Id*. at 238.

A reviewing court must give the ordinance its plain meaning, presuming that every word in the ordinance is used for a purpose and giving effect to each sentence, clause, and word if reasonable and possible. *See Texas Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000). Likewise, every word excluded from a statute

must also be presumed to have been excluded for a purpose. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981); *Gray v. Nash*, 259 S.W.3d 286, 291 (Tex. App.—Fort Worth 2008, pet. denied). Courts construe words according to their common usage, unless they have acquired a technical or particular meaning. *Bowen*, 106 S.W.3d at 238.

A. The City's Sign Ordinance Does Not Provide for Abandonment of a Nonconforming Sign Based on Lack of Use.

The "Use Determination for 5222 ½ South Congress Avenue" issued by Director Guernsey and upheld by the Board of Adjustment denying Appellants' registration of the Sign was a matter of statutory interpretation. CR 144. Director Guernsey relied on the provisions of the Austin City Code to support his conclusion that Appellants' right to maintain a non-conforming off-premises sign at the property was "abandoned," due to the fact that the Sign did not have a face for a period of more than 90 days. CR 172, November 28, 2011 Guernsey Memorandum at 2 ("This off-premise sign structure . . . was abandoned in accordance with the City Code since the sign structure was dismantled to the point where it could not be used as a sign and had been in this state for many years."). Significantly, the Director failed to cite any provision of the Austin sign ordinance to support his conclusion. Nothing in the Austin sign ordinance, Chapter 25-10, mentions the term "abandonment" much less provides for the removal of a nonconforming sign that merely lacks a face for a particular period of time.

City Code Section 25-10-152 provides that a nonconforming sign may be continued and maintained at its existing location. *See* Tab D at 27, City Code § 25-10-

152(A). It also states that the face of the sign can be changed provided the change does not increase the degree of the existing nonconformity, change the method or technology used to convey a message, or increase the illumination of the sign. *See* City Code § 25-10-152(B). In this case, Appellants have simply attempted to change the face of the Sign in compliance with these provisions of the sign ordinance. *See* CR 42.

It is true that if a sign is "damaged by accident, natural catastrophe or the intentional act of a person, *other than the sign owner or land owner*," the sign may be repaired only 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," and so long as a permit is applied for and the repairs are completed within 90 days. *See* Tab D at 30, City Code § 25-10-152(C) (emphasis added). However, in this case, no party contends, and there is no evidence, that the Sign was damaged by accident, natural catastrophe or the act of a third party. To the contrary, the uncontroverted affidavit of Mr. Curtis Ford expressly refutes those contentions. *See* CR 42. There is also no evidence that the Sign was dismantled for replacement or relocation. *Cf.* City Code § 25-10-152(D). At the time that Appellants sought to register the Sign, the sign posts were in the same place they had always been for the last half century and all that was required to make the Sign useful was routine maintenance. *See* CR 42. The best that City officials could contend in support of the City Inspector's decision was that the Sign had been "partially dismantled." *See, e.g.*, CR 116-17. But nothing in the sign ordinance defines a "partially dismantled" sign or classifies the actual condition of the Sign as anything other than a

faceless sign that is specifically allowed under the terms of Section 25-10-152. Although the Sign did not have a face installed, the sign ordinance specifically permits a sign owner to replace the sign face and does not set out any specific deadline for doing so. *See* City Code § 25-10-152(B). Accordingly, there is no legal basis for the Board's decision that can be derived from the plain language of the Austin sign ordinance and the undisputed record evidence. To the extent that the Board of Adjustment or the lower court relied upon the language of the Austin sign ordinance to uphold the sign permit denial, that decision was a clear abuse of discretion.

B. Definitional Distinctions between The Sign Ordinance and The Zoning Regulations Preclude Application of The Abandonment Provision to the Nonconforming Sign.

To support his conclusion that the Sign's nonconforming use has been abandoned, Director Guernsey specifically referenced the abandonment provision of the zoning ordinance, which provides for abandonment of uses that do not conform with the use classifications in the City's zoning jurisdiction. CR 144. However, in his effort to extend the zoning ordinance abandonment provision to the Sign, Director Guernsey substituted the term "nonconforming sign" from the sign ordinance for the term "nonconforming use" in the abandonment provision of the zoning ordinance. Director Guernsey's September 20, 2011 "Use Determination" states in relevant part:

> 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 19th, 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)*.

CR 144 (emphasis added).

But, the unreasonableness and illegality of Director Guernsey's determination and the Board of Adjustment's decision adopting it is evident from the definitional distinctions between the sign ordinance and the zoning ordinance. The term "nonconforming use" as defined in the zoning code has very different meaning and application from the term "nonconforming sign" in the sign ordinance such that the two terms of art cannot be interchanged. The zoning regulation 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." *See* Tab F at 52, City Code § 25-2-941. By itself, this definition appears to be very similar to the sign ordinance's definition of a nonconforming sign. *Cf.* Tab D at 5, City Code § 25-10-3(10) ("NONCONFORMING SIGN" means a sign that was lawfully installed at its current location but does not comply with the requirements of this chapter."). However, the zoning ordinance adds to its definition of nonconforming use an additional provision that states: "The use of a building, structure, or property that conformed with the zoning regulations in effect on March 1, 1984 is a ***conforming use*** notwithstanding the requirements of this chapter. *See* Tab F at 52, City Code § 25-2-942 (emphasis added).

Thus, the zoning ordinance employs a very different definitional scheme to grandfather very old land uses that conformed with the zoning regulations in place on March 1, 1984, but that no longer comply with current land use zoning. Rather than

deem these prior conforming uses to be legal "non-conforming uses" in the same way that the sign ordinance does for all "nonconforming signs," the zoning ordinance instead defines any uses that complied with the pre-March 1, 1984 zoning uses to be "*conforming uses*" notwithstanding the requirements of the zoning code. *See* City Code § 25-2-942.

This definitional distinction makes it unreasonable, if not impossible, to harmonize the definition of a "nonconforming sign" under the sign ordinance with the "nonconforming use" definition of the zoning code. First, because the sign ordinance was not codified until 1992, it makes no sense to reference the March 1, 1984 date to determine if a sign is to be deemed a "conforming use" or "noncomforming use." Second, because the sign ordinance defines a "nonconforming sign" differently than the zoning ordinance defines a "nonconforming use," it is very possible that a "nonconforming sign" as defined in the sign ordinance could be considered a "conforming use" under the zoning regulation.

That is arguably the situation here. Assuming that the zoning use definitions did apply to advertising signs, which Appellants dispute, the Sign, which was installed almost 20 years before the March 1, 1984 zoning classifications were put in place and before the City annexed the property where it is located, would almost certainly be deemed a "conforming use" under the express terms of the zoning ordinance. *See* City Code § 25-2-942. But, because the Sign does not conform with the current sign restrictions related to off premise-signs, it would at the same time be deemed a legal "nonconforming sign" under the sign ordinance. *See* City Code § 25-10-3(10).

These definitional differences make it particularly difficult to uniformly apply the abandonment provisions of Section 25-2-945 to nonconforming signs because the abandonment provision incorporates and is dependent on the definition of a nonconforming use. Section 25-2-945 states, "[a] person abandons *a nonconforming use* if: (1) the person changes the use of property from a nonconforming use to a conforming use; or (2) the person discontinues the *nonconforming use* for 90 consecutive days." *See* Tab F at 53, City Code § 25-2-945 (emphasis added). As noted already, if the zoning ordinance definition of "nonconforming use" is applied to a sign that was in existence before 1984, (and assuming the pre-1984 sign conformed to the use classifications, if any, in place at the time the sign was erected), the sign would be deemed a "conforming use" and there would be no nonconforming use to abandon. *See* City Code § 25-2-942. Alternatively, if the sign ordinance's definition of "nonconforming sign" is inserted in the place of the "nonconforming use" language of the abandonment provision, as Director Guernsey and the Board of Adjustment applied the Code, the result is a wholesale rewrite of Section 25-2-945 that completely disregards the plain language of the ordinance.

Because an irreconcilable conflict exists between defined terms of the general abandonment provision of the zoning ordinance and the specific definitions of the sign ordinance, the Board of Adjustment's decision substituting the terms of art from these distinct code provisions was a clear abuse of discretion.

C. Structural Differences between the General Zoning Regulations and the Specific Sign Ordinance Contradict the Application of the Abandonment Provision to the Nonconforming Sign.

The Court should also reverse the lower court's decision to uphold Board of Adjustment's new abandonment rule for nonconforming signs based on the municipal legislative history and structural differences between the sign ordinance and the zoning regulations. Pursuant to statutory construction standards canonized in the Texas Government Code, whenever there is an irreconcilable conflict between terms of a general code provision and a more specific one, the terms of the special or local provision controls over the general.

> (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.
>
> (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

See Tab G, Tex. Gov't Code Ann. § 311.026 (Vernon 2012).

There is no dispute in this case that the more specific sign ordinance was enacted more recently than the general zoning ordinance. *Compare* Tab B, City Ord. No. 840301-S (setting out the 1984 zoning use classifications) *with* Tab C, City Code Chapter 13-2: Article VII. Sign Regulations (1992) (codifying the original sign ordinance). Moreover, a plain reading of the language of the zoning ordinance, coupled with an understanding of how advertizing signs transcend the use categories delineated in the zoning regulations, contradicts the Board of Adjustment's determination that the abandonment provision of Section 25-2-945 applies to Appellants' nonconforming Sign.

To properly interpret Section 25-2-945's abandonment provision for nonconforming uses, one must fully understand the land use categorization scheme laid out in the zoning ordinance. Section 25-2-1 of the zoning regulation classifies the uses in the City's zoning jurisdiction into five major uses: residential, commercial, industrial, civic, and agricultural. *See* City Code § 25-2-1. Section 25-2-2 then requires the Director of the Neighborhood Planning and Zoning Department to "determine the appropriate use classification for an existing or proposed use or activity." *See* City Code § 25-2-2(A).[3] The ordinance further requires that "[i]n making a determination under this section, the director . . . shall consider the characteristics of the proposed use and the similarities, if any of the use to other classified uses." *See* City Code § 25-2-2(B). For example, a residential use is defined to include "the occupancy of living accommodations on a nontransient basis" and is further classified into specific use categories, including Bed and Breakfast Residential, Condominium Residential, Conservation Single Family Residential, etc. *See* City Code § 25-2-3. Thus, when making his use determination, the Director must classify the use of a particular property or structure with other properties or structures that share similar land use characteristics. The zoning ordinance then divides the city into separate zoning districts in which only certain compatible categories of land development uses are permitted. *See* City Code §§ 25-2-31 & 25-2-32.

But, the five land use categories in the zoning ordinance often fail to accurately describe the uses for advertizing signs. For example, without knowing the content of the

[3] This is the same code provision that Director Guernsey cited as his authority to issue the "Use Determination" at issue in this case. *See* CR 144.

advertising, a billboard cannot truthfully be classified as having a residential, agricultural, industrial or civic use. Thus, the zoning district classifications do not provide specific, predictable guidance for the placement of signs. In fact, nothing in the zoning code refers to signs or even mentions the word "sign."

Instead, the later-enacted sign ordinance establishes its own geographic scheme of sign districts and establishes a hierarchy of restrictions applicable to those districts, which may or may not correspond to any particular zoning use. *See* Tab D at 11-13, City Code §§ 25-10-81 & 25-10-82. This separate sign district structure makes it possible for advertising signs to be placed in each of the five zoning use districts, irrespective of the fact that signs cannot be easily classified as having residential, commercial, industrial, civic, and agricultural uses.[4] Thus, although no one could possibly use a billboard as a residence, for farming or for manufacturing, billboards may be placed in sign districts that overlap residential, industrial and agricultural use zones. This separate sign district structure confirms that although many of their provisions are similar, the sign ordinances and the zoning regulations really are two distinct codes of ordinances with specific provisions that cannot be interchanged.

Director Guernsey ignored the irreconcilable structural differences between the general zoning ordinance and the specific sign ordinance and chose to imprecisely meld the two separate regulatory schemes. Citing Section 25-2-945's abandonment provision,

[4] The City of Austin's Code Enforcement Inspector, Charles Boas, acknowledged that nonconforming signs can exist in any of the five zoning use categories. (CR 56; Boas Depo 45:1-2.) He also testified that there is no specific zoning category for billboard signs. (CR 56; Boas Depo 45:17-19.)

the Director determined that because the Sign was allegedly dismantled, "the construction, installation, or maintenance of an off-premises sign at the [South Congress Avenue] location does not qualify as a legal non-conforming use." *See* CR 144. However, Director Guernsey's conclusion presupposes that a sign must conform to the use classification of the zone in which it is located or at least conform to the use regulations for that zone in effect at the time the use was established. However, because the separate sign district structure set out in the sign ordinance makes clear that billboards do not need to conform to the use requirements of the zoning code, it is not logical to remove a sign on the basis that it fails to conform to the zoning use of the location where it is placed. It is also illogical to assume that a sign that by legislative design does not need to conform to any particular zoning use, can be said to have "abandoned" a nonconforming use under the zoning regulation.

Because the Director's determination, which was upheld by the Board of Adjustment and the lower court, is contrary to the specific provisions of the later-enacted sign ordinance—in particular the provisions establishing separate sign districts—that determination is a clear abuse of discretion and should be reversed.

D. Parallel Repair Provisions and Conflicting or Redundant Deadlines Enumerated in Austin's Sign Ordinance and Zoning Regulation also Conflict with the Application of the Zoning Code's Abandonment Provision to Nonconforming Signs.

Austin sign ordinance Section 25-10-152, which specifically applies to nonconforming signs, also conflicts with the 90-day abandonment deadline set out in the zoning regulation in several important respects. As noted above, City Code Section 25-

10-152(B) states expressly that it is the sole authority for a person to change or alter a nonconforming sign and, by its terms, allows a person to remove the face of a sign without stipulating any deadline for when the face must be restored. Section 25-10-152(B) states in relevant part as follows:

> (B) A person may not change or alter a nonconforming sign except as provided in this subsection.
>
> (1) The face of the sign may be changed.
>
> (2) The sign may be changed or altered if the change or alteration does not:
>
> a. Increase the degree of the existing nonconformity;
>
> b. Change the method or technology used to convey a message; or
>
> c. Increase the illumination of the sign.

Tab D at 27, City Code § 25-10-152(B).

The zoning code has similar but wholly distinct provisions providing for the "modification and maintenance of noncomplying structures."[5] *See* City Code § 25-2-963. For example, 25-2-963(A) states, "Except as provided in Subsections (B), (C), and (D) of this section, a person may modify or maintain a noncomplying structure. *See* City Code § 25-2-963(A). Section 25-2-963(B) sets out the requirements that must be met in order to "modify, maintain, or alter a non-complying residential structure;" Section 25-2-963(C) states that "a person may not modify or maintain a noncomplying structure in a manner that increases the degree to which the structure violates a requirement that caused the structure to be noncomplying;" and Section 25-2-963(D) describes the requirements

[5] The zoning ordinance defines "noncomplying" as "a building, structure, or area, including off-street parking or loading areas, that does not comply with currently applicable site development regulations for the district in which it is located, but did comply with applicable regulations at the time it was constructed." *See* City Code § 25-2-961.

that must be met to repair, reinforce, or maintain a non-complying dock, bulkhead, or shoreline access. *See* City Code § 25-2-963(B),(C), & (D).

It is unreasonable to assume that the drafters of these ordinances would create distinct ordinances for modifying or altering nonconforming signs and noncomplying structures, but at the same time intend, without any express direction requiring it, that the time limits from the zoning ordinance, including the 90-day abandonment deadline, will apply to the modification of nonconforming signs. This is particularly true in light of the sign ordinance's directive that "A person may not change or alter a nonconforming sign except as provided in this subsection." *See* City Code § 25-10-152(B).

As discussed above, nothing in the sign ordinance mandates that a sign owner who undertakes to change or alter the face of its own sign must make the change within any specified period of time.[6] On the other hand, there are specific time restrictions in the sign ordinance that, though not applicable to the Sign at issue, do apply to nonconforming signs that are accidentally damaged or that are fully dismantled for the purpose of relocation. *See e.g.*, City Code § 25-10-125(C) & (D). Such time restrictions are reasonable under the circumstances to avoid prolonged danger from a damaged sign or to hasten a sign's relocation to further a more productive use of the host property. These time limits in the sign ordinance also clearly signal the City's willingness and ability to add time limits in the sign ordinance when the City feels such limits are necessary. It follows that, if the drafters of the City Code took affirmative steps to add time limits to

certain provisions of the sign ordinance (*i.e.*, the provisions related to the repair of nonconforming signs damaged by natural disaster or the rebuilding of nonconforming signs completely dismantled for relocation), the omission of deadlines in other portions of the sign ordinance, (including the provision regarding changing or altering the face of a nonconforming sign), must have been intentional. *See Fireman's Fund Cnty. Mut. Ins. Co. v. Hidi*, 13 S.W.3d 767, 769 (Tex. 2000) (per curiam) ("When the Legislature has employed a term in one section of a statute and excluded it in another, we presume that the Legislature had a reason for excluding it."); *see also Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) (same).

The very fact that the sign ordinance has its own deadlines for the repair of nonconforming signs that are damaged by natural disaster that are different from the deadlines set out in the zoning ordinance for the restoration and use of damaged or destroyed noncomplying structures further underscores the separateness of the two ordinances. Section 25-10-125(C) of the sign ordinance, which applies to a nonconforming sign that is damaged by accident, natural catastrophe, or the intentional act of a person other than the sign owner or land owner, creates an obligation for the land owner to "apply to the building official for a repair permit not later than the 30th day after the date of damage, and shall finish the repairs not later than the 90th day after the date the building official approves the permit application." *See* City Code § 25-10-125(C)(2)(a). The zoning ordinance has a different deadline for restoration and use of

[6] Presumably, a sign owner that determines to change the face of its own sign has a financial incentive to expedite the change of the sign's face, and does not require a mandated

damaged or destroyed noncomplying structures. Section 25-2-964(A) states that "a person may restore a noncomplying structure that is damaged or destroyed by fire, explosion, flood, tornado, riot, act of the public enemy, or accident of any kind if the restoration begins not later than 12 months after the date the damage or destruction occurs." *See* City Code § 25-2-964(A). These specific and conflicting deadlines between the sign ordinance and the zoning code for seemingly identical circumstances, demonstrate the drafters' intent not to apply the zoning code's deadlines for noncomplying structures to nonconforming signs.

The inverse is also true. The fact that the sign ordinance and the zoning ordinance also create some separate but *identical* deadlines for nonconforming signs and noncomplying structures also demonstrates the municipal legislatures' intent to apply the two ordinances separately even when their provisions could be said to do the same or similar things. For example, at least one provision of the sign ordinance—*i.e.*, Section 25-10-152(D)—sets out its own 90-day time limitation that replicates the zoning ordinance abandonment provision Section 25-2-945's 90-day time limit. If as the Board of Adjustment determined Section 25-2-945 of the zoning ordinance applied to nonconforming signs, Section 25-10-152(D) of the sign ordinance would be completely unnecessary. Section 25-10-152(D) is the provision of the sign ordinance that provides a means for a sign owner to replace or relocate a nonconforming sign pursuant to a permit. By the regulation's terms, a sign owner may intentionally dismantle a nonconforming sign and replace or relocate it, provided the owner "(a) finish the replacement or

relocation of the sign not later than the 90th day following the date of dismantling, or (b) remove the sign." *See* City Code § 25-10-152(D)(2)(a)&(b). This specific time restriction in the sign ordinance would be superfluous if the 90-day time limit in the zoning ordinance abandonment provision is construed to require the removal of any nonconforming sign that was not in use (*i.e.*, lacked a face) for a period of more than 90 days. Such an interpretation would therefore violate the "cardinal rule of statutory construction" that every word in a statute is presumed to have been used for a purpose; and that each sentence, clause and word is to be given effect if reasonable and possible. *See Texas Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000); *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963); *see also State v. School Trustees of Shelby County*, 150 Tex. 238, 239 S.W.2d 777, 781 (Tex. 1951) ("We should not interpret the series of articles so as to convict the legislature of foolish and futile action."). Conversely, if the sign ordinance is interpreted to be separate and independent from the zoning regulations and the exclusive source for deadlines relating to the use of nonconforming signs, there is no conflict, redundancy or superfluous language between the sign ordinance and the zoning ordinance.

Thus, according to longstanding rules of statutory construction, the Court should interpret the sign ordinance and the zoning ordinance as stand-alone regulations and apply the plain and unambiguous terms of Section 25-10-152—the ordinance specifically codified to regulate nonconforming signs in Austin—to determine the regulations applicable to the Sign in question. That ordinance omits any time requirement for an

owner's replacement of the face of a nonconforming sign, and therefore, no time limits should be read into the ordinance, including the abandonment time limit taken from the general zoning ordinance, to prevent the permitting of Appellants' Sign. To the extent the Board of Adjustment and the lower court adopted Director Guernsey's application of the abandonment provision of the zoning ordinance to the nonconforming Sign, that decision should be reversed as an abuse of discretion.

III. The City's Enforcement of Its Purported Abandonment Rule against Appellants was Arbitrary and Capricious and is not Entitled to Deference.

Finally, even if the Court determines that the language of the sign ordinance and the abandonment provision of the zoning regulations are ambiguous, the Court should not give any deference to the City's interpretation of those ordinances in this case because the City's interpretation is a departure from its own consistent application of the City Code and a strained contortion of the Code's plain language in order to support a single arbitrary and capricious enforcement. As discussed already, only when a municipal ordinance is ambiguous will a "contemporaneous construction of an ordinance by the agency charged with its enforcement [be] entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the ordinance." *SWZ, Inc*., 985 S.W.2d at 270. However, even when some deference is due to a municipality's interpretation of its ordinance, the Court should look to the municipality's long-standing construction of that ordinance and not to an arbitrary, one-time interpretation that departs from the municipality's established precedent. *See R.R.*

Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d. 619, 632 (Tex. 2011); *Stanford v. Butler*, 142 Tex. 692, 181 S.W.2d 269, 273 (Tex. 1944).

The record evidence demonstrates that Director Guernsey's application of the 90 day abandonment deadline from the zoning ordinance to the nonconforming Sign at issue was an arbitrary departure from the City's otherwise consistent interpretation and application of its Code. In response to Appellants' Interrogatory requests, the City was unable to identify even one other sign from which it had denied a permit based on its new position that the discontinuance of its use as a legal nonconforming sign for a 90 day period constituted a forfeiture of the sign's status as a nonconforming sign. *See* CR 118; Plaintiffs First Set of Interrogatories to Defendant, No. 1. Instead, the record evidence shows that on January 4, 2011, the City of Austin issued a permit for the relocation of a nonconforming sign located at 910½ W. Ben White Blvd. *See* CR 119-22. Photographs of the sign taken on June 14, 2010 and May 5, 2011 demonstrate that the sign was left without a face for at least eleven months. *See* CR 126-27.

The City's Code Enforcement Inspector, Charles Boas, testified that the Ben White sign had been without a face for well more than 90 days. (CR 55, Boas Depo. 41:2-15). Even though nothing in the City Code creates any exception for nonconforming signs with contested ownership, and despite Mr. Boas' admission that the City does not resolve ownership disputes, Mr. Boas testified further that the City nevertheless allowed the owners to keep their registration of the sign current until they resolved an ownership dispute related to the sign. (CR 55, Boas Depo. 41:17-25.) The

City likewise permitted a second sign on Ben White Boulevard that also went without a sign face for at least eleven months based on an identical set of circumstances. Despite the fact that second nonconforming sign was also in clear violation of the City's purported new interpretation of the zoning ordinance abandonment provision, the City once again allowed the owners of the sign to maintain their registration. (CR 55, Boas depo 41:17-25.)

Mr. Boas identified four additional faceless signs in Austin that the City has not taken action to either deny their registration or compel their removal. (CR 54-55, Boas Depo at 37-40.) Indeed, Mr. Boas admitted that, with sole exception of the instant case, he has never participated in a proceeding for the removal of a sign for non-use for 90 days and he stated that he is not aware of anyone else who has done so. (CR 57, Boas Depo at 46:16-24.) This undisputed evidence contradicts any suggestion that the City has a long-standing history of applying the 90 day abandonment provision from the zoning ordinance to nonconforming signs within its jurisdiction. Accordingly, the Court should not give any deference to the City's arbitrary and capricious interpretation and application of that provision to Appellants' Sign.

CONCLUSION

There is no provision in the ordinances of the City of Austin authorizing the City to deny registration of the Sign at issue. The Austin Board of Adjustment's decision to the contrary was illegal and a clear abuse of discretion. Pursuant to Texas Civil Practice and Remedies Code § 37.004, Appellants pray the Court to reverse the judgment of the

district court and remand the case with the instruction that under the plain language of the Austin City Code, Appellants have a right to register the nonconforming Sign in accordance with City Code § 25-10-152(F) and to otherwise use and operate the Sign for its intended purpose.

Date: July 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 6th day of July, 2012 in accordance with the Texas Rules of Civil Procedure to the following:

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NO. 03-12-00188-CV

IN THE THIRD DISTRICT COURT OF APPEALS
AUSTIN, TEXAS

NATIONAL MEDIA CORPORATION AND ANCHOR EQUITIES, LTD.,

Appellants

v.

CITY OF AUSTIN

Appellee

Appealed From the 345th Judicial District Court
Travis County, Texas
The Honorable Lora Livingston Presiding
Trial Court Cause No. D.-1-GN-10-003997

APPENDIX TO BRIEF OF APPELLANTS

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APPENDIX TO BRIEF OF APPELLANTS