**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

| | | |
|---|---|---|
| KRISTY KAY MONEY and ROLF JACOB STRAUBHAAR<br>*Plaintiffs*, | § | |
| v. | § | Civil Action No. 1:23-cv-00718-RP |
| CITY OF SAN MARCOS, AND DIRECTOR OF PLANNING AND DEVELOPMENT SERVICES AMANDA HERNANDEZ in her official capacity,<br>*Defendants*. | § | |

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

***Cases:*** ***Page(s):***

***Statutes, Ordinances, & Rules:***



***Constitutional Provisions:***

Plaintiffs Kristy Money and Rolf Straubhaar ("the Moneys") file this motion for summary judgment of their constitutional claims against Defendants ("the City").

## INTRODUCTION

This lawsuit challenges a local ordinance that requires private property owners to keep unwanted objects on their property for aesthetic purposes.

The Moneys own a home in San Marcos, Texas where they live with their five children. On the front of that home is a small metal decoration bearing the initial of a previous homeowner with historical ties to the Ku Klux Klan. Because this association clashes with the Moneys' values and their aesthetic preferences, they would like to remove it.

Unfortunately, under a local ordinance, any aesthetic change to the front of their home must receive approval from the City—which the City refuses to grant. As a result, the Moneys are forced to keep an unwanted object attached to their home that is contrary to their values, solely to appease the aesthetic sense of the City.

This is unconstitutional. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) the United States Supreme Court made clear that the takings clause of the United States Constitution prohibits cities from requiring property owners to maintain objects on their property for the public's benefit without compensation. And in both *Lombardo v. City of Dallas*, 73 S.W.2d 475 (Tex. 1934), and *Spann v. City of Dallas*, 235 S.W. 513 (Tex. 1921), the Texas Supreme Court made clear that the Texas Constitution prohibits cities from regulating private property for purely aesthetic reasons.

Nevertheless, last year, this Court dismissed this case. According to this Court: (1) the Moneys' claims were not ripe because they had not fully exhausted their administrative remedies, (2) the Moneys failed to plead a proper takings claim under *Loretto* for various reasons; and (3) Texas Supreme Court cases banning aesthetic zoning (like *Lombardo* and *Spann*) were allegedly "out of date."

The Fifth Circuit recently reversed that judgment. The court concluded that: (1) the Moneys' constitutional claims were ripe, (2) the facts of this case are virtually indistinguishable from *Loretto*, (3) *Lombardo* and *Spann* remain good law in Texas, and therefore, (4) unlike the federal Constitution, the Texas Constitution prohibits aesthetic zoning.

In light of these holdings, the Moneys' counsel conferred with the City two months ago requesting specific facts that the City believed were still relevant and in dispute. To date, the City has not responded with any. Summary judgment is therefore proper.

## STATEMENT OF FACTS

### *Background*

For most of Texas history, cities lacked authority to protect historic structures. See *Powell v. City of Houston*, 628 S.W.3d 838, 847-48 (Tex. 2021). In the 1980s, the Texas legislature amended the Texas Zoning Enabling Act to allow greater leeway for Cities to "protect[] and preserv[e] places and areas of historical, cultural, or architectural importance and significance." Tex. Loc. Gov't Code § 211.001.

Under this approach, both state and local governments have a host of tools at their disposal. For example, they may enter into voluntarily agreements with property owners to designate structures as historic. 13 Tex. Admin. Code § 21.6. Under those agreements, the property owners agree to restrictions on modifying their property in exchange for certain tax breaks. See, e.g., 13 Tex. Admin. Code § 13.2.

If such agreements are not possible, local governments may also impose restrictions by acquiring historic easements through condemnation proceedings. See, e.g., San Marcos's Development Code (Dev. Code) § 4.5.2.1 (k) (code available at: https://user-3vpeqil.cld.bz/ORD-2025-01-Development-Code-Effective-January-25-2025). Such easements leave the title of the property with the property owner, but place restrictions on how the property may be modified. *Id.* As with other

condemnations, however, the government must pay just compensation to the property owner. Tex. Const., Art. 1, Sec. 17.

Finally, cities may preserve historic structures by restricting the use of property in the area to prevent fires, crowding, or congestion that could damage historic properties. Tex. Loc. Gov't Code § 211.004.

But, like any exercise of the zoning authority, these restrictions are subject to constitutional restraints. *Powell*, 628 at 866–67, n. 37 (J. Bland, concurring) (citing *Spann*, 235 S.W. at 515). A city may not, in the name of historical preservation, require that a property owner keep objects on her property for a public benefit without compensation, or regulate changes to that property for solely aesthetic purposes. *Money v. City of San Marcos*, No. 24-50187, 2025 U.S. App. LEXIS 2897, at *11-13 (5th Cir. Feb. 7, 2025). As explained below, that is precisely what has happened here.

***The City Begins Regulating Historic Areas***

Starting in the late twentieth century, the City of San Marcos began designating various areas of town as "historic districts." Dev. Code § 4.5.2.1(B)(1)(a)–(g). By 2017, the City had adopted seven historic districts composing a significant portion of the downtown core. *City of San Marcos — Historic Districts*, Map, (2017) https://tinyurl.com/42r2dz39. Despite the implication of the name, many of the homes and structures within historic districts are not historic in any meaningful sense of the word. The Burleson Historic District—at issue here—includes vacant lots and homes built as recently as 2017. See, e.g. *City of San Marcos, My Historic SMTX City of San Marcos Historic Resources Survey Report Phases 1 & 2* (Historic Resources Survey Report), p. 594, 840. (Sept. 2019), https://tinyurl.com/h6n9pf5u.

Nevertheless, all homes, buildings, and lots within historic districts are subject to a host of additional land-use regulations beyond those found in the City's zoning code. Dev. Code § 2.5.5.1. This case involves one subset of those additional regulations.

***The Challenged Ordinance***

Under Dev. Code § 2.5.5.1(B) a property owner may not, among other things, alter, relocate, or demolish any visible portion of a property within a historic district without first receiving a "certificate of appropriateness" (hereafter, "Certificate").

While this is done in the name of "history," the requirement applies whether the property is historic or not. *Id.* Indeed, the restriction applies to vacant lots and homes built in the 1980s. *Id.* See also, Historic Preservation Meeting (March 2, 2023) (video available at https://tinyurl.com/2p9pt7j5 (7:55) (Considering an application to add a fence to a house built in 1989.).

Certificate decisions are made by an unelected commission (the Commission) based on the application of a number of mandatory aesthetic factors. Dev. Code § 4.5.2.1(I)(1)(a)-(j). For example, the Commission is required to determine whether a change is "visually compatible with other buildings to which they are visually related" in terms of: (1) height; (2) proportion of the building's front façade; (3) proportion of openings within the facility; (4) rhythm of solids to voids in front facades; (5) rhythm of spacing of buildings on streets; (6) rhythm of entrance and/or porch projection; (7) relationship of materials, texture and color; (8) roof shapes; (9) walls of continuity; and (10) scale of a building. *Id.*

Indeed, when Commission members have tried to consider non-aesthetic factors during the application process, the City Attorney has reminded them that "it's really about the aesthetic that the Commission approves" and that other factors may not be considered. Historic Preservation Meeting, 26:30 (December 2, 2021) available at: https://tinyurl.com/mt32jyv5.

A decision from the Commission is referred to in the Ordinance as a "final decision." Dev. Code § 2.5.5.5(A). A "final decision" may be appealed to the Zoning Board of Adjustments (the "Board"), but such appeals must be brought within 10 days, and the scope of that appeal is limited to claims where "the record reflects the

lack of substantial evidence" supporting the Commission's decision. Dev. Code § 2.5.5.5(C)(3). The Board "may not substitute its judgment for the judgment of the Historic Preservation Commission on the weight of the evidence." Dev. Code § 2.5.5.5(C)(3).

***The Ordinance Restricts the Moneys' Property Rights***

The Moneys own a home in San Marcos where they live with their five children. ECF 4-1, p.1. The home is located in the "Burleson Historic District," but the home is not a historically designated structure. *Id.* The home is adjacent to houses that were built in 2017 and 1984 and down the street from a house built in 2013. Historic Resources Survey Report, *supra*, p. 594, 827, 956 (https://tinyurl.com/h6n9pf5u). At the time, the Moneys purchased the home, it had been long vacant and was in need of repairs. ECF 4-1, p. 1.

On the front of the home is a small metal grate with a decorative "Z." ECF 4-1, p. 2; ECF 15-1, p. 16.

The "Z" is the initial of a previous owner with undisputed ties to the Ku Klux Klan. ECF 4-1, p. 2; see also, ECF 4-2 (news articles). The decoration is attached with several metal bolts and can be easily removed without any damage to the home. See ECF 15-1, p. 16.

The Moneys would like to remove the decoration because it is contrary to their values. ECF 4-1, p. 2; ECF 15-1, p.5. However, under the Ordinance, the Moneys may not remove the decoration without permission from the City. Dev. Code § 2.5.5.1(B).

***The Moneys' Application to Remove a Decoration from their Home is Denied***

In January of 2023, the Moneys filed an application for a certificate to remove the decoration. The City's staff concluded that: (1) the decoration was not a "distinctive feature of the home in the historic resources survey" (ECF 15-1, p. 8); (2) the City could not confirm whether the decoration was original to the house (*id.*); and most importantly, (3) removal of the decoration would "***not affect***" the "historical, architectural, or cultural character of the Historic District." *Id.* at p. 5 (emphasis added).

Nevertheless, the Commission denied the request based on vague appeals to the removal's effect on character of the home. Historic Preservation Meeting, 52:20 (May 4, 2023) available at: https://tinyurl.com/ys9tzssa. That decision is now final and unappealable. Dev. Code § 2.5.5.5. The Moneys therefore may not remove the decoration from their home without risking significant penalties. Dev. Code § 2.3.7.4.

***The Moneys File Suit***

To avoid this encumbrance on their property, the Moneys filed suit, alleging that, both on its face and as applied, the Ordinance: (1) violates the takings clause of the United States Constitution under *Loretto*, 458 U.S. 419, because it requires the mandatory physical occupation of their property by an unwanted object for a public benefit; and (2) violates Article 1, Section 19 of the Texas Constitution, under cases like *Lombardo*, 73 S.W.2d 475, and *Spann*, 235 S.W. 513, because it arbitrarily restricts their property based on aesthetic factors. ECF 1.

Because these claims present pure questions of law, the Moneys filed for summary judgment shortly after filing their complaint. ECF 4.

***The City Moves to Dismiss this Case***

After reviewing the complaint and summary judgment motion, the City filed a motion to dismiss. ECF 12. The City's motion argued that the Moneys' claims were not ripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473

U.S. 172 (1985), because the Moneys had failed to exhaust administrative remedies by failing to file a (by then time-barred) appeal with the Board. ECF 12, p. 6-8.

The City also filed a response to the Moneys' summary judgment motion. ECF 13. While that response raised jurisdictional and legal arguments, it tellingly did not point to a single disputed fact that the City believed would be relevant to the outcome of this case. *Id*.; see also, ECF 15, p. 10 (pointing out the lack of a factual dispute). Both motions were assigned to the Magistrate Judge.

***This Court Dismisses the Case***

After full briefing, the Magistrate issued a recommendation that the case be dismissed. ECF 19. According to the Magistrate, the Moneys had not received a "final" decision under *Williamson County* because they failed to discuss the Klan affiliation of the home at the final hearing, and they also failed to exhaust any administrative appeals with the Board. *Id*. at 6-8. As such, the Magistrate concluded that the Moneys' claims were not ripe. *Id*. at 8.

The Magistrate also held, *sua sponte*, that the Moneys had failed to state a claim under either the United States or Texas constitutions. *Id*. at 9. As for the federal claims, the Magistrate held that the Moneys failed to plead a *per se* takings claim under *Loretto*, 458 U.S. 419 because: (1) the decoration was already on the property and the ordinance was already in effect at the time of purchase, (2) the decoration was not installed by the government, and (3) Fifth Circuit precedent allegedly held that such claims should be pursued under *Penn Central Transportation, Co. v. City of New York,* 438 U.S. 104 (1978) rather than *Loretto*. ECF 19, p. 10-12.

As for the Texas claims, the Magistrate held that Texas cases banning aesthetic zoning, like *Spann* and *Lombardo*, were "generations out of date" and, in any event, the challenged Ordinance is based on history, not aesthetics. ECF 19, p. 12-16. The Magistrate therefore recommended that the case be dismissed, and that the Moneys' summary judgment motion be dismissed as moot. *Id*. at 17.

After the Moneys filed timely objections to the Magistrate's recommendation, this Court adopted the Magistrate's opinion in full without comment. ECF 23. Having dismissed the case, it also dismissed the Moneys' summary judgment motion as moot. *Id*. The Moneys appealed.

***The Fifth Circuit Reverses this Court's Dismissal***

After full briefing and oral argument, the Fifth Circuit reversed this Court's dismissal. *Money*, 2025 U.S. App. LEXIS 2897, at *17. First, the court held that the Moneys had received a "final decision" from the Commission and therefore both their state and federal claims were ripe. *Id*. at 7-9. Second, the court held that the facts of this case were basically indistinguishable from *Loretto*, and therefore that the Moneys had pled valid *per se* takings claims. *Id*. at 11-12. Finally, the court held that *Spann* and *Lombardo* are still good law in Texas, and therefore, that aesthetic zoning is unconstitutional in Texas. *Id*. at 12-17. The court left it to this Court on remand to determine whether the Ordinance itself, or the City's application of the Ordinance here, is contrary to those cases. *Id*. at 17.

***The City Fails to Point to Any Relevant Factual Dispute***

Once this case was remanded, the Moneys' counsel reached out to the City to see what factual issues might remain. To further that discussion, counsel asked specifically if there was any factual assertion in the Moneys' original (now moot) summary judgment motion that the City believed was in dispute. Two months later, the City has not responded. Because the City did not raise any relevant factual dispute in its initial response to the Moneys' original (now moot) summary judgment motion, and because it still cannot do so after almost two years of litigation, the Moneys now move again for summary judgment.

**STANDARD OF REVIEW**

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Young*

*Conservatives of Tex. Found. v. Univ. of N. Tex.*, 597 F. Supp. 3d 1062, 1071 (E.D. Tex. 2022) (quoting Fed. R. Civ. P. 56(a)). The "'existence of *some* alleged factual dispute' is insufficient to defeat a motion for summary judgment;" instead, the nonmovant must "show with 'significant probative evidence'" that the resolution of a legitimate factual dispute "might govern the outcome of the suit." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). The court must "view the evidence and the inferences to be drawn therefrom in the light most favorable to the non-moving party," but "unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." *Nuwer v. Mariner Post-Acute Network*, 332 F.3d 310, 313-14 (5th Cir. 2003).

## ARGUMENT

### I. THIS COURT HAS JURISDICTION TO HEAR THIS CASE

As a threshold matter, a movant for summary judgment must establish: (1) that the Court has subject matter jurisdiction, (2) that the movant has standing, and (3) that the movant's claims are ripe. These burdens are easily met here.

#### A. This Court has subject matter jurisdiction

This Court has subject matter jurisdiction over both of the Moneys' claims. The Court has jurisdiction over the *per se* takings claims under 28 U.S.C. § 1331, because those claims arise "under the Constitution, laws, or treaties of the United States." See *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 71 n.15 (1978) (holding that 28 U.S.C. § 1331 provides subject matter jurisdiction for suits seeking a declaration that a law is a taking).

This Court also has supplemental jurisdiction under 28 U.S.C. § 1367(a) for the Moneys' Texas Constitutional claims, because those claims are "part of the same case or controversy" as the federal claims, seek the same relief, and would require no additional factual development. *ESI/Employee Sols., L.P. v. City of Dall.*, 450 F. Supp. 3d 700, 728 (E.D. Tex. 2020).

**B. The Moneys have standing**

The Moneys also clearly have standing. To establish standing, a plaintiff must allege: (1) a personal injury; (2) that is fairly traceable to the challenged regulation; and (3) likely to be redressed by the requested relief. *Contender Farms, L.L.P. v. United States Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir., 2015). When, as here, the plaintiff is the object of the regulation challenged, these three criteria are easily met because "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.*

Here, there is no dispute that the Moneys are the objects of the regulation they challenge. The Ordinance applies to their property on its face and the City has already applied it to limit their use of their property. That is more than sufficient for standing. *Contender Farms*, 779 F.3d at 264.

**C. The Moneys' claims are ripe.**

Finally, as the Fifth Circuit already held in this case, the Moneys' claims are ripe. *Money*, 2025 U.S. App. LEXIS 2897, at 6, 7. A facial challenge to a land use regulation is ripe the moment the regulation is passed. *Id.* at 6 (citing *Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279, 287 (5th Cir. 2012)). The Moneys' facial challenges are therefore ripe. *Id.*

The Moneys' as-applied challenges are likewise ripe. *Id.* at 7. An as-applied challenge to a land-use regulation is generally ripe once the property owner has applied for and been denied a permit to use their property. *Pakdel v. City & Cty. of S.F.*, 141 S. Ct. 2226, 2228 (2021). Because those steps have been taken here, the Moneys' as-applied challenges are ripe. *Money*, 2025 U.S. App. LEXIS 2897, at 7.

Because these issues were fully litigated in the Fifth Circuit, they are now the "law of the case" and may not be relitigated here. *McClain v. Lufkin Indus.*, 649 F.3d 374, 385 (5th Cir. 2011) ("an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a

subsequent appeal.")

## II. THE ORDINANCE CREATES A *PER SE* TAKING UNDER *LORETTO*

Turning to the merits, the City's historic preservation ordinance violates the Fifth Amendment, as incorporated against the states through the Fourteenth Amendment, to the U.S. Constitution, because it forces the Moneys to keep a decoration on their property for a public benefit without compensating them. *Loretto*, 458 U.S. 419, at 441.

In *Loretto*, the Court held that a local restriction which required a property owner to keep a small pre-existing cable box attached to her property constituted a "traditional" *per se* taking. *Id.* at 441. The Court explained that forbidding the removal of the cable box (which was attached by the previous owner prior to her purchase) was tantamount to "physical occupation authorized by government [and was] a taking without regard to the public interests that it may [have] serve[d]." *Id.* at 426. This remained true, the Court explained, despite the fact that the interference involved "relatively insubstantial amounts of space and d[id] not seriously interfere with the landowner's use of the rest of [the] land." *Id.* at 430.

As the Fifth Circuit already held in this case, there is "no meaningful distinction" between this case and *Loretto*. *Money*, 2025 U.S. App. LEXIS 2897, at *11-12. Just as in *Loretto*, the Moneys are required to keep an unwanted object—in this case, a small decorative grate—on their property for an alleged public benefit. *Id.* Just as in *Loretto*, that object was attached to the property at the behest of a previous owner. *Id.* Just as in *Loretto*, the Moneys cannot alienate that object, use the space occupied by that object for something else, or dispose of that object without facing civil and criminal penalties. *Id.* Therefore, just as in *Loretto*, the Ordinance mandates a physical occupation of property without just compensation in violation of the Fifth and Fourteenth Amendments and should be enjoined. See, *id.*

In light of the Fifth Circuit's holdings, summary judgment on the Moneys'

takings claims is proper.

## III. THE ORDINANCE VIOLATES ARTICLE 1, SECTION 19 OF THE TEXAS CONSTITUTION

The Ordinance also violates the Texas Constitution. Like the Federal Due Process clause, Texas's Due Course of Law clause requires that restrictions on private property rights be rationally related to a legitimate government interest. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015). But Texas courts' interpretation of the "Due Course" clause varies from federal rational-basis scrutiny in two ways that are relevant to this case.

*First*, as the Fifth Circuit confirmed in this case, Texas courts take a narrower view of what constitutes a legitimate government interest to regulate property. *Money*, 2025 U.S. App. LEXIS 2897, at *16. In Texas, the police power over private property is largely limited to policing harmful or incompatible uses. *Milton v. United States*, 36 F.4th 1154, 1161 (Fed. Cir. 2022) (citing *Lombardo*, 73 S.W.2d 475). As the Texas Supreme Court has explained, "the police power is subordinate to the right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody." *Lombardo*, 73 S.W.2d at 479; *Spann*, 235 S.W. at 515. As such, "the police power may be invoked to abridge the right of the citizen to use his private property when such use will endanger public health, safety, comfort or welfare—*and only* when this situation arises." *Id.* (emphasis added).

Applying this harm-based approach to the police power, the Texas Supreme Court has long held that "[r]egulations interfering with private property rights are invalid if founded upon purely aesthetic consideration." *Lombardo*, 73 S.W.2d at 479; *Spann*, 235 S.W. at 517 (collecting cases); *Money*, 2025 U.S. App. LEXIS 2897, at *12.

*Second*, unlike federal rational basis scrutiny, Texas rational basis scrutiny requires at least some consideration of proportionality as well as rationality. *Patel*, 469 S.W.3d at 90. If the "loss to the property owner affected, in proportion to the good

accomplished [by the ordinance]" is unreasonable, then the ordinance must fail. *W. U. Place v. Ellis*, 134 S.W.2d 1038, 1040–41 (Tex. 1940). The Ordinance fails this test.

**A. The Ordinance is based on aesthetics**

To begin, the challenged portions of the Ordinance turn on aesthetics. Under Texas precedent, an ordinance is aesthetic when it turns on appearance rather than externalities created by use. *Lombardo*, 73 S.W.2d at 479; *Spann*, 235 S.W. at 516.

That is certainly true here. The Ordinance is clear that the historic guidelines "have no control on the use of the building." ECF 15-2, p.14. Instead, as the City admits, the Ordinance is based on adding "visible value to the community" and regulating "what people see as they travel the City of San Marcos Streets." ECF 13, p. 12; see also Dev. Code § 2.5.5.1(B) (limiting the Ordinance to visible changes to visible portions of the property).

When reviewing requests for a Certificate of appropriateness, the Commission considers ten mandatory criteria, all of which turn on whether the change is "visually compatible" with other buildings in the area. Dev. Code § 4.5.2.1(I)(1)(a)-(j). These are, by definition, aesthetic concepts. See, *Bostock v. Sams*, 52 A. 665, 669 (1902) (the police power does not permit a city to compel "the citizen to conform a building which he may desire to erect, to the 'general character' [of] the building which his neighbor may, previously, have erected.")

Indeed, when Commission members have attempted to consider more traditional police power concerns while reviewing an application, the City Attorney has reminded them that "it's really about the aesthetic that the Commission approves" and that other factors may not be considered. Historic Preservation Meeting, 26:30 (December 2, 2021) available at: https://tinyurl.com/mt32jyv5.

The Commission's practice bears this out. For example, in 2023, the Commission denied an application because the proposed structure would look too similar to structures nearby. Ryan Patrick Perkins, San Marcos Historic Preservation

Commission Meeting, 1:01:07 (Jan. 5, 2023) (available at: https://tinyurl.com/2p8ht7nb). Five months later, (and without a hint of irony), the Commission denied that same individual's amended application because, as amended, the proposed structure would look too different from surrounding structures. Peter Dedek, San Marcos Historic Preservation Meeting, 43:26 (May 4, 2023) (available at: https://tinyurl.com/mr39z323).

More recently, a commissioner suggested changes to a project, because the changes would make more "sense to [her] aesthetically" and "would be a lot prettier." Diana Baker, San Marcos Historic Preservation Commission Meeting, 30:55 (May 9, 2024 (available at https://tinyurl.com/yc7ca8n4).

This sort of aesthetic decision-making is common. See, e.g., San Marcos Historic Preservation Meeting, 18:05 (January 6, 2022) (available at: https://san-marcos-tx.granicus.com/player/clip/1775) (changing project from a crushed gravel driveway to a ribbon driveway based on commissioners' preferences); Diana Baker, San Marcos Historic Preservation Commission Meeting, 39:00 (Dec. 5, 2024) (available at https://tinyurl.com/4ryfpmsb) (instructing applicant that the proposed building needs more "pizzazz"); Jennifer Rogers, San Marcos Historic Preservation Commission Meeting, 1:33:22 (Jan. 9, 2025) (available at https://tinyurl.com/bdrd89vf) (rejecting a gate as "disruptive to the rhythm and cadence of the neighborhood"); Peter Dedek, San Marcos Historic Preservation Commission Meeting, 1:49:32 (Jan. 9, 2025) (available at https://tinyurl.com/bdrd89vf) (requiring an applicant to "reduce the height [of a structure]…to create a visual difference");

In short, the Ordinance allows—in fact, encourages—the sort of *ad hoc* aesthetic-based decision making rejected in *Spann*.

The City raises two arguments in response. ***First***, it claims that the Texas ban on aesthetic zoning is limited to restrictions that are based on "beauty." ECF 16, p.2.

But nothing in *Spann* or *Lombardo* support that approach. Indeed, the word "beauty" never appears in those cases. As noted above, those cases used the term "aesthetics" to distinguish between objective police power restrictions based on common-law harms and restrictions based on appearance or other subjective factors. *Lombardo*, 73 S.W.2d at 479; *Spann*, 235 S.W. at 516.

*Second*, the City claims that the Ordinance is not aesthetic because it is designed to protect historic structures and places. In support, the City points to language from the Ordinance claiming that it is designed to protect historic character. But even under rational basis scrutiny, the stated purpose for the Ordinance is not dispositive. See, *Patel*, 469 S.W.3d at 105 (Willett, J. concurring). Instead, the Court has a duty to look at the *operative* provisions of the Ordinance and what they *actually do*. *Id.*; see also *Humble Oil & Ref. Co. v. Georgetown*, 428 S.W.2d 405, 413 (Tex. Civ. App.—Austin, 1968).

For example, in *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013), the plaintiffs challenged a Louisiana law regulating the sale of caskets. The state claimed that the law was designed to prevent human remains from seeping into the soil—which is clearly a legitimate government interest. *Id.* But the Court did not accept the State's argument at face value. Instead, it looked at the text of the law itself. As it turned out, the restrictions did not turn on how the casket was constructed. *Id*. Indeed, under the challenged statutory scheme, individuals could be buried with no casket at all—thus allowing unlimited leakage of remains. *Id.* Based on this, the Court concluded that the State could not claim that its casket sales restrictions were based on protecting the public from leaking remains. *Id*.

Here, the City claims that the Ordinance is related to preserving historic structures. But, as in *St. Joseph*, the operative portions of the Ordinance tell a different story. Both on their face and as applied in this case, the challenged portions of the Ordinance have nothing to do with preserving historic structures. As noted

above, the Certificate of Appropriateness requirements: (1) apply whether a home is historic or not; (2) apply to vacant lots; (3) only apply to aesthetic changes to a property; and (4) turn on a list of mandatory aesthetic criteria that do not even mention history. Dev. Code § 4.5.2.1(I)(1)(a)-(j).

Under these requirements, a back-porch swing built by Davy Crockett himself would receive no protection (because it's not visible from the street), but a tacky set of vinyl front window shutters from 1995 would have to remain a permanent fixture unless the Commission approved the aesthetics of removing them. Dev. Code § 2.5.5.1(B) (limiting the Ordinance to visible changes to visible portions of the property). The City may not immunize an otherwise unconstitutional aesthetic review board from constitutional scrutiny simply by labeling it a historical commission.

The facts of this case prove the point. When the Moneys applied to remove the decoration from their home, the City's official findings were that: (1) the home was not historic, (2) the decoration may not have been original, and (3) removal of the decoration would "not affect" the "historical, architectural, or cultural character of the Historic District." ECF 15-1, pp. 5-8. The Commission denied the application anyway. Rational basis scrutiny is lenient, but it does not allow a City to insist that the preservation of a non-historic object, on a non-historic home, with no historic impact on surrounding properties, is rationally related to preserving historic structures. The "rational-basis bar may be low, but it is not subterranean." *Patel*, 469 S.W.3d at 95 (Willett, J., concurring).

### B. Even if the Ordinance is not based on aesthetics, it is unduly burdensome as applied to the Moneys

Finally, assuming, *arguendo*, that the denial of the Moneys' application was based on history, rather than aesthetics, it still fails the proportionality requirement for as-applied claims under the Texas rational basis test.

As noted above, the Texas Constitution requires that restrictions on property rights not only be rational, but also not "unduly burdensome" given the evidence of the government interest at stake. *Patel*, 469 S.W.3d at 87. This requires the court to evaluate the proportionality between the restriction on property rights and the government interest achieved. *U. Place*, 134 S.W.2d at 1040, 1041.

Here the impairment on property rights is severe. The Moneys may not make *any* change to the visible portions of their home without prior approval from the Commission. As a result, the Moneys are forced to keep unwanted objects on their property solely at leave of the Commission.

At the same time, any impact to a legitimate government interest is minimal to non-existent. Even assuming that the Ordinance is based *in part* on history, the Moneys' home is not historic, and the City concedes that removal of the decoration would "***not affect***" the "historical, architectural, or cultural character of the Historic District." ECF 15-1, p. 5 (emphasis added). In such circumstances, the complete elimination of fundamental property rights, like the right to exclude, is unduly burdensome given the government interest at stake.

## CONCLUSION

An "overriding respect for the sanctity of the home…has been embedded in our traditions since the origins of the Republic." *Wilson v. Layne*, 526 U.S. 603, 610 (1999). The Texas Supreme Court put it well:

> If the citizen is not to be left free to determine the architecture of his own house, and the lawful and uninjurious use to which he will put it; if he is not to be permitted to improve his land as he chooses without hurt to his neighbors; if by law he is to be allowed to do these things only as officials or the public shall decree, or as may for the time suit the taste of a part of the community, the law might as well deal candidly with him and assert that he holds his property altogether at public sufferance.

*Spann*, 235 S.W. at 516.

As shown above, the Ordinance at issue in this case invades the sanctity of the home by forcing the Moneys to keep an object on their home solely to appease the unbridled aesthetic sense of an unelected board of their neighbors. This unchecked invasion of the most fundamental of private property rights is unconstitutional.

Because the Moneys have shown they are entitled to summary judgment on their claims and entitled to the requested relief, the Court should grant their summary judgment on each claim and provide the relief requested in the Complaint.

Date: June 4, 2025,

Respectfully submitted,

*/s/ Chance Weldon*
ROBERT HENNEKE
Texas Bar No. 24046058
rhenneke@texaspolicy.com
CHANCE WELDON
Texas Bar No. 24076767
cweldon@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

*Counsel for Plaintiffs Kristy Money and Rolf Straubhaar*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was electronically filed on June 4, 2025, with the Clerk of the Court for the Western District of Texas using the CM/ECF system, which will serve a copy of same on all counsel of record.

*/s/ Chance Weldon*
CHANCE WELDON