

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

KRISTY KAY MONEY AND ROLF §
JACOB SRAUBHAAR §
Plaintiffs, §
§
vs. §
§
CITY OF SAN MARCOS, AND §
DIRECTOR OF PLANNING AND §
DEVELOPMENT SERVICES AMANDA §
HERNANDEZ in her official capacity §
Defendants. §

CASE NO. 1:23-CV-718-RP

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' ORIGINAL COMPLAINT

COMES NOW, Defendants City of San Marcos and, in her official capacity, Director of Planning and Development Services Amanda Hernandez, and file this Motion to Dismiss Plaintiffs' Original Complaint [Document 1] pursuant to Federal Rule of Civil Procedure 12(b).

I.
NATURE OF THE LAWSUIT AND SUMMARY OF MOTION

Plaintiffs' Complaint arises from a decision of the San Marcos Historic Preservation Commission. In May 2023, the Commission denied a request to allow removal of a Juliette balcony located on the second story front facade of Plaintiffs' home located in the designated Burleson Historic District. Plaintiffs assert that this decision constituted an unconstitutional taking under Fifth and Fourteenth Amendments of the United States Constitution and pursuant to Article 1 Section 19 of the Texas Constitution.

Defendants are entitled to dismissal as a matter of law as the Complaint on its face establishes that Plaintiffs failed to exhaust administrative remedies required for state law relief and the federal claim is not ripe. As such, this Court lacks jurisdiction over Plaintiffs' claims and the Complaint fails to state a claim as a matter of law.

II.
LEGAL STANDARDS OF REVIEW

If a complaint fails to state a claim upon which relief can be granted or if the Court does not have jurisdiction, the complaint is subject to dismissal as a matter of law. *See* FED R. CIV. P 12(b)(1) and (6).

To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L.Ed.2d 209 (2007)). A claim is plausible on its face “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 556). The plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* The court must be sure that the complaint alleges sufficient facts to move the claim “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. When considering a motion to dismiss under Rule 12(b)(6) the court “accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007)(quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d 191,205 (5th Cir. 2007)).

While a complaint need not contain detailed factual allegations to survive a 12(b)(6) motion, a plaintiff’s “obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. “[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993); *Rogers v. Raycom Media, Inc.*, 628 F. App’x 324 (5th Cir. 2016), cert. denied, 137 S. Ct. 189, 196 L. Ed. 2d 127 (2016).

Plaintiffs must allege “enough facts to state a claim to relief that is plausible on its face” and “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 570; *Montoya v. FedEx Ground Package System, Inc.*, 614 F.3d 145, 148 (5th Cir. 2010). The Court need not “strain to find inferences favorable to the plaintiffs.” *Southland Sec. Corp. v. INSPire Ins. Sols., Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)(quoting *Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir.1996)).

A motion to dismiss filed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure “allow[s] a party to challenge the subject matter jurisdiction of the district court to hear a case.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In a Rule 12(b)(1) motion, the burden of proving that jurisdiction does exist falls to the party asserting jurisdiction. *Id.* The motion to dismiss should only be granted “if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief.” *Id.* (*citation omitted*). There is “no presumptive truthfulness attaches to a plaintiff’s allegations” for purposes of a Rule 12(b)(1) inquiry. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

When moving to dismiss under Rule 12, the general rule is that a court may not consider documents that are extrinsic to the complaint. However, when a Complaint incorporates documents into the pleading by reference or refers to them and makes them central to the claims, the Court is also entitled to rely on those documents. *See, e.g., Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008); *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010). As such, even in the context of a motion to dismiss, a defendant can attach this evidence without converting the dismissal motion into a summary judgment motion. “In so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated.” *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499 (5th Cir. 2000).

Plaintiffs' Complaint incorporates by reference, quotes from and cites to portions of the City's Development Code, the May 2023 Commission hearing, and the written notice of denial of Plaintiffs' request. *See Doc. 1, ¶¶22,25,27-31,39-41.* As such, Defendants include these exhibits in support of its Motion to Dismiss. *Attached hereto as Exhibits A, B, and C respectively.*

Defendants' Motion to Dismiss should be granted as the federal constitutional claim is not ripe and the state constitutional claim fails for failure to exhaust administrative remedies.

III. UNDISPUTED BACKGROUND FACTS

Although Defendants largely dispute the allegations in the Complaint, the following facts relevant to this Motion are undisputed.

In 2017, Plaintiffs purchased real property located in the Burleson Historic District, designated a Historic District in 2005. Doc.1, ¶¶16,18; *Exhibit A, §4.5.2.1(B)(e).* Per the provisions of the San Marcos Development Code, Plaintiffs were required to seek a Certificate of Appropriateness from the San Marcos Historic Preservation Commission ("Commission") in order to make certain alterations to the property, specifically including alterations to the front façade. *Exhibit A, Division 5.*

Plaintiffs submitted a request for removal of a balcony located in the front façade and Money appeared at the Commission for a hearing on her request. *Doc. 1, ¶38-40; Exhibit B.* The request for removal was denied by unanimous vote during the hearing. *Id.*

Per Section 2.5.5.5 of the San Marcos Development Code "an applicant ... may appeal a final decision of the Historic Preservation Commission on an application for a certificate of appropriateness to the Zoning Board of Adjustments within ten (10) days of the Historic Preservation Commission's action on the application." *Exhibit A.*

On May 5, 2023, written notice confirming the denial was submitted to Plaintiff Money, which included notice of the appeal process and deadline, but Plaintiffs did not timely challenge

the Commission's decision. *Exhibit C*. They assert in their Complaint that it would be futile because the Zoning Board lacks authority to consider the constitutionality of the Development Code or the Commission. Doc. 1, ¶30-32.¹

IV. DISMISSAL OF STATE LAW CLAIMS

Defendants are entitled to dismissal of Plaintiffs' Texas Constitutional claim as a matter of law as Plaintiffs' Complaint concedes that they did not exhaust administrative remedies.

The District Court applies Texas substantive law to the state law claims over which it exercises supplemental jurisdiction. *Felder v. Casey*, 487 U.S. 131, 151 (1988). Texas requires a party to exhaust remedies available at the administrative level before proceeding at the judicial level, and claims based on the Texas Constitution are not exempt from this rule. *Garcia v. City of Willis*, 593 S.W.3d 201, 211 (Tex. 2019). A litigant is “at least required to seek administrative relief before filing a takings claim in district court.” *Id.* at 212; *see also id.* at 211 (“[A] litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim.” (quoting *City of Dallas v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012))(internal quotation marks omitted)).

This principle applies when reviewing land use decisions by a local government entity. *See, e.g. Murphy v. City of Galveston*, 557 S.W.3d 235, 241 (Tex. App.-Houston [14th Dist.] 2018, pet. denied)(“Because the Property Owners did not appeal the loss of the property's ‘grandfather’ status to the ZBA, they failed to exhaust their administrative remedies, and the trial court did not have subject-matter jurisdiction over their takings claims.”); *City of Dallas v. Gaechter*, 524 S.W.2d 400, 405 (Tex. Civ. App.-Dallas 1975, writ dism'd)(holding that when the applicability of

¹ While the Complaint cites the City's Development Code for this proposition regarding a lack of authority, the Code does not say that. *See Exhibit A*. It is a product of State law. Generally, administrative bodies do not have authority to rule on the constitutionality of statutes and ordinances. *City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012).

a Zoning Ordinance is questioned, administrative remedies must be exhausted before redress can be obtained from the courts.)

Plaintiffs did not exhaust administrative remedies. Their application for authority to remove the balcony at issue was denied by the Commission and they were apprised of their appeal rights. It is undisputed, and is acknowledged in the Complaint, that Plaintiffs failed to timely present an appeal of the Commission decision to the Zoning Board of Adjustments.

Plaintiffs attempt to excuse this failure on the grounds that it would be futile, since the Zoning Board cannot consider a constitutionality challenge. However, this has been expressly rejected as a *per se* response to an exhaustion issue. Although administrative bodies do not have the authority to rule on the constitutionality of statutes and ordinances, that does not mean that a plaintiff can always forgo an administrative remedy and pursue a constitutional claim in court. *Garcia*, 593 S.W.3d at 211. In *Garcia*, the Texas Supreme Court noted that it had “never globally exempted claims based on the Texas constitution from statutory exhaustion-of-administrative-remedies requirements.” *Id.* Instead, if the administrative proceeding might “obviate[] the need” for the constitutional claim, a party must exhaust its administrative remedies. *Id.*; *City of Dallas v. Stewart*, 361 S.W.3d at 579 (“a litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim.”); *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011)(“When there exists provision for compensation—or, as here, for the property’s return—a constitutional claim is necessarily premature.”).

It is immaterial whether the administrative proceeding could have resolved all the claims being asserted—including constitutional—as long as the appellate body could “render relief that would have mooted those claims.” *Watson v. City of Southlake*, 594 S.W.3d 506, 522 (Tex. App.—

Fort Worth 2019, pet. denied)(citing *Garcia*, 593 S.W.3d at 211–12). The only question is whether the administrative proceeding could have rendered the claims moot. *Stewart*, 361 S.W.3d at 579.

Plaintiffs wanted to remove a balcony and the Historic Commission denied permission to do so. While an appeal of this decision to the Zoning Board would not have provided a platform for contesting the constitutionality of portions of the City’s Development Code, the Board did have the authority to reverse or remand for reconsideration the Commission’s decision as related to the balcony removal. *Exhibit A, Section 2.5.5.5*. If the Board reversed the decision and permitted removal of the balcony, then that would render moot the question of whether being compelled to keep the balcony was an unconstitutional taking.

Plaintiffs had the opportunity and failed to challenge the decision of the Historical Preservation Commission, when to do so may have resolved the alleged taking. As such, Plaintiffs’ state law takings claim must be dismissed.

V.
DISMISSAL OF FEDERAL LAW CLAIMS

Defendants are additionally entitled to dismissal of the federal law constitutional claims as these are not ripe for consideration by this Court.

In 2019, the United States Supreme Court made clear that there was no requirement that plaintiffs exhaust state remedies prior to asserting a takings claim under the United States Constitution. *Knick v. Township of Scott, Penn.*, 139 S. Ct. 2162, 2167, 2170 (2019).

However, this case did not overrule precedence related to the ripeness requirement. Long-standing Court precedence provides that a party alleging a regulatory taking must demonstrate that they received a “final decision” from the governmental entity or official that demonstrates how the regulations at issue would apply to the specific property at issue. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 735 (1997). Thus, a claimant must do more than claim that a land-use regulation as written enacts an unconstitutional taking; the claimant also must show how the

government plans to apply the regulation to their land. *Id* at 738-39. Because a plaintiff who asserts a regulatory taking must prove that the government “regulation has gone ‘too far,’” the court must first know “how far the regulation goes.” *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). The takings determination requires a final decision from the government entity so it can evaluate the takings claim. *See, e.g., DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215, 218-19 (5th Cir. 2021)(“Only after the final regulatory decision will a court have before it the facts necessary to evaluate a regulatory takings claim[.]”).

In 2021, the United States Supreme Court again weighed in on the issue of exhaustion of remedies, this time as specifically related to the ripeness requirement. *Pakdel v. City and Cnty. of San Francisco*, 141 S. Ct. 2226, 2230 (2021). While this case holds that exhaustion of administrative processes was not required for ripeness, it continued to recognize that the “finality requirement” remained. *Id*. This case recognizes that there is no finality when “avenues still remain for the government to clarify or change its decision.” *Id* at 2231 (internal citations omitted). There is a difference between a “finality requirement” and administrative exhaustion of remedies. *Id*. While Plaintiffs have no obligation to exhaust administrative remedies in order to proceed with the federal constitutional claims, they do have an obligation to show that they secured a “final decision” from the City of San Marcos.

The Historical Commission denied Plaintiffs’ request to remove the balcony. They were entitled to have the Zoning Board review this decision, and the Board had the authority to reverse the decision or remand it for reconsideration. Plaintiffs did not do so. Instead, they waited about six weeks and filed this Complaint suing the City of San Marcos and the head of Planning & Development Services for a determination made by the Commission. There has been no “final decision” issued by the City of San Marcos on the issue of removal of the balcony because Plaintiffs failed to request one. Plaintiffs’ federal claim for a constitutional deprivation is not ripe

and cannot proceed. As such, the City of San Marcos is entitled to dismissal of the federal claims as a matter of law.

VI.
DISMISSAL OF CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants are additionally entitled to dismissal of Plaintiffs' claims for declaratory and injunctive relief due to a lack of standing and ripeness.

For a claimant to establish standing, it must be shown that the person "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An injury in fact is an invasion of a legally protected interest which is "actual or imminent, not conjectural or hypothetical." *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008)(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

"To prove an injury in fact sufficient, a plaintiff must produce evidence of an intention to engage in a course of conduct proscribed by the provision at issue. *See, e.g., Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545 (5th Cir. 2008). Plaintiffs have the burden to demonstrate standing for each of their claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

"[A] declaratory judgment action, like any other action, must be ripe in order to be justiciable." *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000) (*citing United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000)). "A declaratory judgment action is ripe for adjudication only where an 'actual controversy' exists." *Id.* (quoting 23 U.S.C. § 2201(a)). The Fifth Circuit has said that "the case or controversy requirement of Article III of the United States Constitution is identical to the actual controversy requirement under the Declaratory Judgment Act." *State of Texas v. West Pub. Co.*, 882 F.2d 171, 175 (5th Cir. 1989).

Plaintiffs lack standing for the same reason that their federal claims are not ripe, as discussed above. While Plaintiffs assert a desire to alter their façade and that the request was denied by the Historical Commission, Plaintiffs had the right and responsibility to challenge this decision to the Zoning Board. The Board could have reversed the decision. Plaintiffs are asking this Court to exercise jurisdiction over Plaintiffs' requests when they failed to ever secure a final decision from the City of San Marcos that could eliminate the alleged harm. As such, the Court should dismiss Plaintiffs' request for declaratory and injunctive relief.

WHEREFORE PREMISES CONSIDERED, Defendants City of San Marcos and Director of Planning and Development Services Amanda Hernandez pray that Court grant their Motion to Dismiss, dismiss Plaintiff's claims with prejudice, and for all other relief to which these Defendants may be justly be entitled in either law or equity.

Respectfully submitted,

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Attorneys for Defendants, *City of San Marcos and Director of Planning and Development Services Amanda Hernandez*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Defendants' Motion to Dismiss** has been provided to the offices of:

Robert Henneke
Chance Weldon
Christian Townsend
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701

by Electronic Service, in accordance with the Federal Rules of Civil Procedure, on August 14, 2023.

/s/Joanna Lippman Salinas
Joanna Lippman Salinas

EXHIBIT A

Section 2.5.4.5 Criteria for Approval

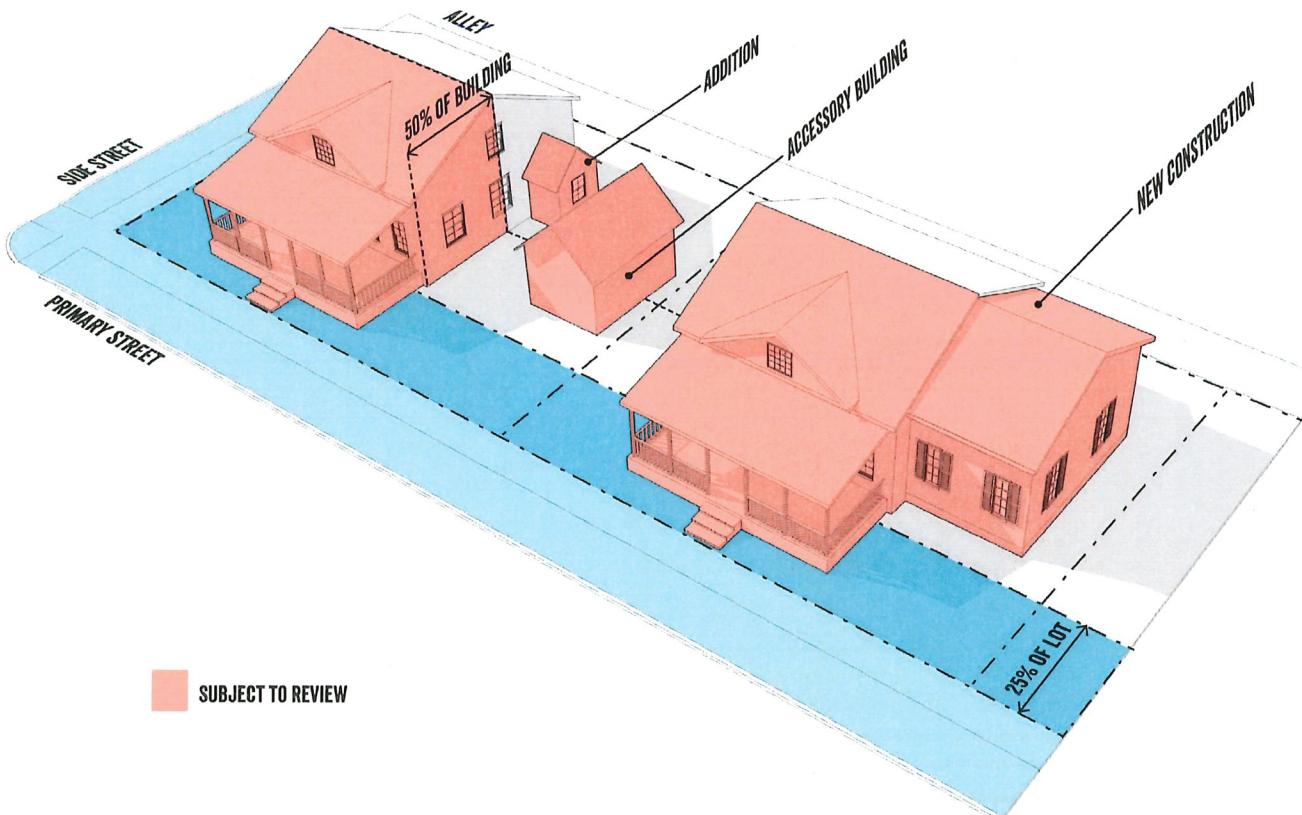
In making a determination or recommendation regarding the establishment or expansion of a Historic District or Landmark the following factors should be considered:

- A. Historical, architectural and cultural significance of the site(s);
- B. Suitability for preservation or restoration;
- C. Educational value; and
- D. Satisfaction of criteria established for inclusion of the site(s) and/or district in the National Register of Historic Places.

DIVISION 5: CERTIFICATES OF APPROPRIATENESS

Section 2.5.5.1 Purpose, Applicability, Exceptions and Effect

- A. **Purpose.** The purpose of a certificate of appropriateness is to assure that construction, alteration, restoration, relocation, or demolition of a structure, or alterations to the site or appurtenances in a Historic District or at a Historic Landmark is congruous with the historical, architectural or cultural aspects of the district or landmark. Furthermore, the purpose of a certificate of appropriateness is to make certain that historic structures, streets and neighborhoods are preserved and protected.
- B. **Applicability.** A certificate of appropriateness is required for portions of buildings and sites visible from adjacent public rights-of-way, streets or alleys as defined by Section 2.5.5.1(D) prior to undertaking any of the following activities in a local Historic District or at a local Historic Landmark:



DEVELOPMENT PROCEDURES

FIGURE 2.1 HISTORIC DISTRICT APPLICABILITY

1. Construction and reconstruction, including fences and walls;
2. Alteration, additions, restoration and rehabilitation;
3. Relocation;
4. Signage;
5. Construction or reconstruction of a parking lot;
6. Construction or reconstruction of an appurtenance;
7. Demolition; and
8. Establishment or alteration of lighting, furniture and seating plans, and/or awnings and umbrellas within public right-of-ways.

C. Exceptions. A certificate of appropriateness is not required for the following activities:

1. Changes in color to a structure's exterior, unless the structure is located in the Downtown Historic District. Painting of structures in the Downtown Historic District shall be subject to Section 4.5.2.1(J);
2. Interior arrangements for structures in a local Historic District or at a local Historic Landmark;
3. Ordinary maintenance or repair of any exterior feature that does not involve a change in:
 - a. Design,
 - b. Material, or
 - c. Outer appearance.
4. With the written approval of the Responsible Official, construction, reconstruction, alteration, restoration or demolition of any feature which the Building Official or other city department director shall certify is required for the public safety because of an unsafe or dangerous condition.

(Ord. No. 2019-45, 12-17-19)

D. The provisions of this Division 4 apply only to the following areas within the boundaries of each Historic District or Historic Landmark:

1. The lot area between the property line and the facade of any existing building or structure;
2. 25% of the depth of the lot area adjacent to the public right-of-way for vacant lots;
3. The first 50% of the depth of any existing principal building from the facade adjacent to a public right-of-way;
4. Any addition to a building or structure that projects beyond an existing building's front or side wall and roof plane envelope regardless of distance from the public right-of-way;
5. The entirety of any new principal building construction on a vacant lot;
6. The entirety of any new accessory building construction located in whole or in part in areas Section 2.5.5.1(D)1-3
7. The entirety of any Historic Landmark and its designated boundary area.

E. Effect. Approval of a Certificate of Appropriateness authorizes the applicant to apply for permits allowing construction, alteration, restoration, relocation, or demolition of a structure, or alterations to the site or appurtenances, in a Historic District or at a local Historic Landmark.

Section 2.5.5.2 Application Requirements

- A. An application for a certificate of appropriateness shall be submitted in accordance with Section 2.3.1.1 except as otherwise provided in this Division 5.
- B. A certificate of appropriateness must be approved prior to the issuance of a building permit or any other permit that authorizes construction, alteration, restoration, relocation, or demolition of a structure, or alterations to the site or appurtenances in the local Historic District or at a local Historic Landmark.

Section 2.5.5.3 Approval Process

A. Responsible Official Action

1. The Responsible Official shall review the application for a certificate of appropriateness in accordance with the criteria in Section 2.5.5.4 and provide a report and recommendation to the Historic Preservation Commission.
2. The responsible official shall schedule a public hearing and prepare personal and posted notice before the public hearing in accordance with Section 2.3.2.1.

B. Historic Preservation Commission Action

1. The Historic Preservation Commission shall conduct a public hearing concerning the application in accordance with Section 2.3.3.1
2. The Historic Preservation Commission shall approve, approve with conditions or deny the application for a certificate of appropriateness after consideration of the request during the public hearing.
3. If the Historic Preservation Commission determines that a certificate of appropriateness should not be issued, or should be issued subject to conditions, it shall place upon its records the reasons for its determination.
4. The Historic Preservation Commission shall render its decision on the request within forty-five (45) days of the date the application is deemed complete and adequate for review, subject to the supplemental options available under Section 2.5.5.5.

(This Section was approved by Ord. No. 2021-88, 11-3-21)

Section 2.5.5.4 Criteria for Approval

The following criteria shall be used to determine whether the application for a certificate of appropriateness shall be approved, conditionally approved or denied:

- A. Consideration of the effect of the activity on historical, architectural or cultural character of the Historic District or Historic Landmark;
- B. For Historic Districts, compliance with the Historic District regulations;

C. Whether the property owner would suffer extreme hardship, not including loss of profit, unless the certificate of appropriateness is issued; and

D. The construction and repair standards and guidelines cited in Section 4.5.2.1.

Section 2.5.5.5 Appeals

- A. **General Procedure.** An applicant or other interested person within the four-hundred foot (400') personal notification area may appeal a final decision of the Historic Preservation Commission on an application for a certificate of appropriateness to the Zoning Board of Adjustments within ten days of the Historic Preservation Commission's action on the application, except for appeals pertaining to property owned by the City of San Marcos. Appeals pertaining to property owned by the City of San Marcos shall be made to the City Council within ten days of the Historic Preservation Commission's action on the application. The appellate body shall decide the appeal in accordance with Section 2.8.1.1.
- B. **Supplemental Procedure.** In considering the appeal, the appellate body shall:
 1. Review the record of the proceeding from which an appeal is sought;
 2. Receive an overview of the case from the Responsible Official, including previous recommendations from city staff and the decision of the Historic Preservation Commission;
 3. Hear arguments from the party appealing the decision of the Historic Preservation Commission; and
 4. Remand the matter back to the Historic Preservation Commission when relevant testimony and newly-acquired evidence is presented that was not previously presented at the time of the hearing before the Historic Preservation Commission.

DEVELOPMENT PROCEDURES

C. Criteria on Appeal

1. The appellate body shall apply the substantial evidence test as established under Texas law to the decision of the Historic Preservation Commission;
2. The burden of proof before the Zoning Board of Adjustments shall be on the appealing party, who must establish that the record reflects the lack of substantial evidence in support of the decision of the Historic Preservation Commission;
3. The appellate body may not substitute its judgment for the judgment of the Historic Preservation Commission on the weight of the evidence.

(Ord. No. 2020-60, 9-1-2020)

Section 2.5.5.6 Expiration and Extension

- A. **Time of Expiration.** A certificate of appropriateness shall expire one year from the date it is issued if the proposed activity has not commenced, or two years from the date the certificate is issued, if the proposed activity has not been completed.
- B. **Extension.** A certificate of appropriateness may be extended by the Historic Preservation Commission for a period not to exceed one year from the date required for commencement and two years from the date required for completion of the activity authorized by the certificate.

DIVISION 6: ADMINISTRATIVE CERTIFICATES OF APPROPRIATENESS**Section 2.5.6.1 Purpose, Applicability, and Effect**

- A. **Purpose.** The purpose of an administrative certificate of appropriateness is to allow the Responsible Official to administratively approve certain applications for the painting of a structure located within the Downtown Historic District. Furthermore, the purpose of an administrative certificate of appropriateness is to make certain these buildings are preserved and protected.
- B. **Applicability.** An administrative certificate of appropriateness is required for the painting of structures located within the Downtown Historic District.

- C. **Effect.** Approval of an administrative certificate of appropriateness authorizes the applicant to paint a structure located within the Downtown Historic District.

Section 2.5.6.2 Application Requirements

- A. An application for approval of an administrative certificate of appropriateness shall be submitted in accordance with the universal application procedures in Section 2.3.1.1, except as otherwise provided in this Division 6.
- B. An administrative certificate of appropriateness must be approved prior to the painting of structures located within the Downtown Historic District.

Section 2.5.6.3 Approval Process**A. Responsible Official Action.**

1. The Responsible Official shall approve, approve with conditions, or deny an administrative certificate of appropriateness based on the criteria in Section 2.5.6.4.
2. Should the Responsible Official be unable to approve the request, the Responsible Official may forward the request to the Historic Preservation Commission for review and final action at the next available meeting in accordance with Section 2.5.5.1.

Section 2.5.6.4 Criteria for Administrative Approval

The following shall be used to determine whether the application for an administrative certificate of appropriateness shall be approved, conditionally approved, or denied.

- A. Masonry that has not been previously painted shall not be painted;
- B. The proposed paint color shall be selected from an exterior, historic paint palette from any major paint manufacturer;
- C. The proposed paint color shall be appropriate to the time period of the structure; and
- D. Consideration of the effect of the paint on the material of the building.

Section 2.5.6.5 Expiration and Extension

- A. **Time of Expiration.** An administrative certificate of appropriateness shall expire one year from the date it is issued if the proposed activity has not commenced, or two years from the date the certificate is issued, if the proposed activity has not been completed.
- B. **Extension.** An administrative certificate of appropriateness may be extended by the Responsible Official for a period not to exceed one year from the date required for commencement and two years from the date required for completion of the activity authorized by the certificate.

(This Division was approved by Ord. No. 2019-45, 12-17-19)

DIVISION 7: REGULATING PLAN

Section 2.5.7.1 Purpose, Applicability and Effect

- A. **Purpose.** The purpose of a regulating plan shall be to designate Character Districts, streets, parkland, and any special requirements for any area zoned Planning Area District and to regulate development within the same Planning Area District.
- B. **Applicability.** An approved regulating plan shall be required prior to any development, re-development, improvement or construction, or substantial modification of or on any property within a Planning Area District, and as a condition to submission, consideration, or approval of any other development application or permit.
- C. **Effect.** Approval of a regulating plan authorizes the approval or issuance of subsequent requests and permits for the property subject to the regulating plan.

Section 2.5.7.2 Application Requirements

- A. An application for approval of a regulating plan shall be submitted in accordance with the universal application procedures in Section 2.3.1.1 except as otherwise provided in this Division 5.
- B. An application for a regulating plan shall not be approved unless the following applications and development permits, where applicable, have been approved and remain in effect for the land included in the regulating plan:
 1. All legislative approvals needed to authorize the proposed uses for the land;
 2. Any requests for relief identified in Section 2.8.1.1;
 3. A watershed protection plan (phase 1), and;
 4. A transportation plan.
- C. Regulating plans shall consist of one or more maps showing the following for each pedestrian shed in the Planning Area District, in compliance with the standards described in Section 4.4.3.7:
 1. Character District Allocation;
 2. Parkland;

ARTICLE 5: OVERLAY DISTRICTS

DIVISION 1: ESTABLISHMENT AND PURPOSE

Section 4.5.1.1 Purpose

An Overlay District is a district which establishes regulations to combine with the regulations of an underlying Base District. The purposes of an Overlay District are to prohibit Uses otherwise allowed in the Base District, to establish additional or different conditions for such Uses, or to authorize special Uses, together with standards for such Uses, not otherwise allowed in the base district.

Section 4.5.1.2 Establishment and Expansion of Overlay Districts.

Overlay districts shall be established by ordinance and processed in accordance with Section 2.5.2.2.

DIVISION 2: HISTORIC DISTRICTS

Section 4.5.2.1 Historic District

A. Purpose. The purpose of HD, Historic District is to promote the educational, cultural and economic welfare of the public and of the City by preserving, conserving, and protecting Historic Structures, Streets and neighborhoods that serve as visible reminders of the history and cultural heritage of the City, the State and the United States. Furthermore, it is the purpose of HD, Historic District to strengthen the economy of the City by stabilizing and improving property values in historic areas and to encourage new Buildings and developments that shall be compatible with the existing historic Buildings and squares.

B. Historic Districts and Historic Landmarks.

1. The following local Historic Districts are established within the City limits:
 - a. The Belvin Street Historic District. (1974)
 - b. The San Antonio Street Historic District. (1982)
 - c. The Downtown Historic District. (1986)
 - d. The Dunbar Historic District. (2003)
 - e. The Burleson Street Historic District. (2005)

- f. The Lindsey-Rogers Historic District. (2005)
- g. The Hopkins Street Historic District. (2008)
2. The following local Historic landmarks are established within the City limits:
 - a. The Oaks Heights Live Oak Tree located in the 500 Block of Franklin Drive (1986)
 - b. The Charles S. Cock House located at 400 E. Hopkins Street (2004)
 - c. The Merriman Cabin located at 150 C. M. Allen Parkway (2004)
 - d. The Dunbar School located at 801 Endicott Street (2004)
 - e. The Old Fish Hatchery located at 204 C. M. Allen Parkway (2004)
 - f. The Commemorative Air Force Hangar located at 2249 Airport Drive (2007)
 - g. Graham Tower located at 1921 Airport Drive (2007)
 - h. Old African American Baptist Church at 219 West Martin Luther King Drive (2018)
 - i. The Calaboose African American History Museum at 200 West Martin Luther King Drive (2021)
3. Designation of local Historic Landmarks shall be in accordance with Section 2.5.2.2.

(Ord. No. 2019-45, 12-17-19 and Ord. No. 2021-47, 8-3-21)

EXHIBIT B
Video Clip
Under Separate Cover

EXHIBIT C

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5/5/2023

Kristy Money
804 Burleson Street
San Marcos, TX 78666

VIA: noreply@mygovernmentonline.org (www.mypermitnow.org)

RE: HPC-23-09 804 Burleson Street – Removal of Balcony

Dear Ms. Money:

Your request for a Certificate of Appropriateness to allow the removal of the wrought iron Juliette balcony on the second story of the front façade was denied by the Historic Preservation Commission on May 4, 2023. The action taken by the Commission was as follows:

MOTION: A motion was proposed by Commissioner Dake to deny the removal of the wrought iron Juliette balcony on the second story of the front façade as the request was not consistent with Secretary of the Interior's Standards 2, 3, 4, and 5. The motion was seconded by Commissioner Baker. The motion passed with a vote of 6-0.

Per Section 2.5.5.5 of the San Marcos Development Code “*an applicant or other person within the four-hundred foot (400') personal notification area may appeal a final decision of the Historic Preservation Commission on an application for a certificate of appropriateness to the Zoning Board of Adjustments within ten (10) days of the Historic Preservation Commission's action on the application. The Zoning Board of Adjustments shall decide the appeal in accordance with Section 2.8.1.1.*”

Should you choose to appeal the decision of the Historic Preservation Commission, the Appeal Application Form, attached, is required to be submitted via My Government Online (www.mygovernmentonline.org) no later than May 14, 2023.

Sincerely,

Alison E. Brake

Alison E. Brake, CNU-A
Historic Preservation Officer
512.393.8232
abrade@sanmarcostx.gov