

I. A garden center is a conditional use requiring a hearing before the Zoning and Platting Commission

In its site plan application, Lincoln Properties asked that it be approved administratively by City staff. City staff complied. By approving the site plan administratively, instead of going through the Zoning and Platting Commission, City staff unlawfully acquiesced to Wal-Mart's efforts at avoiding a public hearing.

The site plan required a conditional use permit and therefore could not have been administratively approved. The site plan identified a garden center as being a component of the project. A garden center is defined as a plant nursery use. LDC 25-2-4 (51). The property is zoned GR. A plant nursery is a use is not prohibited under GR zoning but instead one that requires a conditional use permit from the Zoning and Platting Commission. LDC §§ 25-2-491(C); 25-5-142(1).

A site plan containing a conditional use must be submitted to and approved by the Zoning and Platting Commission. 25-5-142(1). Every site plan application considered by the Zoning and Platting Commission requires a public hearing. 25-5-144. A site plan requiring approval by the Zoning and Platting Commission cannot be administratively approved. 25-5-111. The Administrative approval of this site plan is invalid because City staff had no authority to administratively approve the site plan.³ The approval was *ultra vires*.

Now that this defect has been publicly pointed out, City staff has defended itself with the argument that the garden center was an accessory use acceptable in a GR zoning district without public review and approval by the Zoning and Platting Commission. This staff interpretation is neither supported by the Land Development Code nor by common sense.

The Land Development Code defines a commercial accessory use as something that is otherwise a "prohibited use." 25-2-894(B). The zoning use chart detailing the zoning for each zoning district sorts each use into one of three categories: permitted uses, prohibited uses and conditional uses. 25-2-491. The accessory use option only is available to prohibited uses. 25-2-894(B). The plant nursery use is not a prohibited use for GR zoning; it is a conditional use. 25-2-491. A conditional use is not a prohibited use. "Conditional use means a use that is *allowed* on a discretionary and conditional basis in accordance with the conditional use process established in Chapter 25-5." 25-1-21(21) (emphasis supplied). The process is what the persons residing in the Northcross neighborhood were denied. Because a garden center is not a prohibited use, it cannot be an accessory use.

The accessory use provisions were not drafted to enable a landowner to circumvent the procedural protections that define conditional use. Under the "accessory use" argument advanced by City staff, staff could approve administratively factories or ballparks or hospital services as close as 100 feet to a residential district without a public

³ It is too late for the applicant to "update" its site plan to eliminate the conditional use. 25-5-113.

hearing so long as one of these uses was less than 10% the size of the principle commercial use on the property and was operated primarily for the employees, clients, or customers of the principle commercial use. LDC §§ 25-2-894(B) & 25-2-491(C).

Indeed the interpretation treating a big box garden center as an accessory use could be equally applied to circumvent the entire big box ordinance under consideration today by the City Council. The proposed ordinance purports to require public hearings and consideration of big box development by a city commission simply by saying: “A retail use with 100,000 square feet or more of gross floor area in a single building is a conditional use.” Proposed LDC 25-2-813(B). Under the City staff reasoning today, these provisions all could be sidestepped if Wal-Mart or a big box developer simply submitted a site plan where the 100,000 square foot big box was an accessory use – i.e. part of a 1,000,000 square foot retail development. Clearly this is not how the zoning regulations work. If the Council defines a big box store as a conditional use requiring notice and public hearing, it is not intending that a developer of an even bigger project has the option of avoiding big box public hearing simply by treating a big box development as an accessory use. The staff’s willingness to argue that conditional use procedures can be circumvented simply by characterizing a conditional use as an accessory use is not logical or consistent with language and the plain intent of the Code.

II. The notice of the site plan application did not contain the required content.

The notice of the site plan filing was required to “generally describe the nature of the proposed development” as required by 25-1-133(C)(3). The nature of Lincoln Property’s Wal-Mart development is the biggest of the big boxes, the largest retail store in the history of the City of Austin. It was a partial teardown of a shopping mall to be replaced largely by one big box retailer. None of this most basic essential information was disclosed. The notice only said that Lincoln Property “proposes to demolish the westerly two-thirds of the existing shopping mall, renovate the remaining portion, construct 5 ancillary retail buildings, a three-level parking garage and associated improvements.” This misleadingly gives the impression that what is being proposed is a remodel of a existing shopping mall, rather than the replacement of the shopping mall by a big box anchor tenant.

The notice also failed to “describe the procedure and requirements for becoming an interested party” as required by 25-1-133(C)(6). A person who had registered as an interested party would have received notice of the proposed site plan extension and other administrative actions. 25-1-88(A)(1). The notice gave no indication that by failing to seek interested party status, adjoining neighbors would be waiving rights including rights to future notices.

City staff had no authority to administratively approve a site plan without following the public notice requirements and its approval therefore was *ultra vires*. Because the site plan was not approved pursuant to the requirements of City ordinance, it is invalid.

III. City staff unlawfully extended the 180-day deadline for updates from the applicant.

The applicant failed to comply with the 180-day deadline for updating the site plan. As a result, the site plan application should have been rejected. Instead, unbeknownst to the community, City staff quickly granted a 60-day extension. City ordinances that authorize such extensions are unlawful because they unconstitutionally delegate such authority to City staff without providing sufficient guidelines and limitations on staff discretion. Moreover, in granting the extension, City staff may have failed to follow procedural requirements in City ordinances as set forth below. The extension therefore was invalid, as is the approval of the site plan.

a. The City unlawfully rushed its approval of an extension.

The letter from City staff granting the extension provided that it was granted pursuant to 25-1-88. This section requires staff to give notice of the extension request under 25-1-133(B) to interested parties⁴ and to the record owner. 25-1-88(A)(1). In situations where 25-1-133(B) applies, section 25-1-133(D) requires staff to delay any decision regarding an extension request until 14 days have elapsed after notice is provided. Here the extension was granted 4 days after it was requested.⁵ The extension was the result of a decision that was unlawfully rushed by City staff.

b. Staff had no lawful authority to approve the extension because the extension provisions in the Land Development Code unconstitutionally delegate authority by giving certain city staff members standardless and arbitrary discretion.

The only authority relied on by City staff for the extension is 25-1-88. The text of 25-1-88(A)(2) gives discretion to the staff without any real or clear guidelines to limit that discretion – the only limitation being a requirement that “good cause” be shown. Because this non-standard leaves the extension decision to the “caprice, whim or unbridled discretion” of an individual City employee, this ordinance is an unconstitutional delegation of authority by City Council. *See City of Houston v. Freedman*, 293 S.W. 515, 519020 (Tex. Civ. App. – Galveston 1956, writ ref’d n.r.e.); *Prescott v. City of Borger*, 158 S.W.2d 575, 582 (Tex. Civ. App. – Amarillo 1942, writ ref’d); *Bd. Of Adjustment v. Patel*, 887 S.W.2d 90, 93-94 (Tex. App. – Texarkana 1994, writ denied). *See also Squire Restaurant and Lounge v. City and County of Denver*, 890

⁴ To the extent that the initial notice failed to inform recipients as to how to register to become an interested party, the failure is compounded by the fact that those who didn’t get notice on how to be an interested party did not get notice of the request for extension. Similarly, they did not get notice of the approval of the site plan.

⁵ As set forth below, any decision as to whether to comply with the 14-day delay timetable for deciding on the extension is also unconstitutionally delegated to the unbridled discretion of the staff. 25-1-133(D).

P.2d 164, 167 (Col. App. 1994, cert. denied) (“good cause” standard fails to impose meaningful limits on discretion of administrative official); *State v. Review Board*, 101 N.E.2d 60, 63-64 (Ind. 1951) (same).

For all of these reasons, the staff was without legitimate authority to grant the extension and therefore the extension and the approval are *ultra vires* and void.

IV. The City Council has the authority and duty to void the site plan.

This year the Texas Supreme Court has recognized a city’s right to correct its mistakes and void unlawful site plan approvals that were mistakenly given by city staff. *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770 (Tex. 2006). In *City of White*, a city staff member approved a site plan that was in violation of a zoning ordinance. *Id.* at 772. “Within a week of the permit’s issuance, residents in the abutting neighborhood brought the [zoning] Ordinance to the City’s attention and insisted that the car wash comply with it.” *Id.* The City acknowledged its mistake and indeed forced the submission of a site plan that conformed to the zoning ordinance. *Id.* The landowner challenged the city’s change of position regarding the validity of the site plan. The Supreme Court upheld the city’s authority to retract its approval of a site plan that in fact was unlawful under the city’s zoning ordinances.