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February 20, 2019

VIA E-MAIL

Mr. Steve Parker
Assistant City Manager/CFO | City Manager's Office
630 E Hopkins, San Marcos, TX 78666

Re: The City of Martindale – ETJ

Dear Steve,

This letter is written as a follow-up to the meetings Martindale and San Marcos have had regarding discrepancies in Martindale's and San Marcos's ETJ boundaries. While Martindale remains hopeful amicable resolution can be reached, there are a number of issues that must be addressed. In reviewing this letter, I hope what is stated herein is taken for what it actually is: an honest and sincere effort to set forth a thorough analysis of all positions Martindale has that Martindale believes support its claims. Martindale offers the following points and suggested course of action as a precursor to further discussions.

A. Martindale's Ordinances.

Beginning August 17, 2007, and continuing for a period thereafter, Martindale passed a series of ordinances bringing certain properties into Martindale's ETJ ("the Ordinances¹"). The Ordinances were passed at the request of the owner(s) of the properties. I am not sure if the Ordinances were previously provided to San Marcos, but in any event, they are attached to this letter. Martindale believes the Ordinances show a substantial portion of the disputed area is located in Martindale's ETJ.

B. San Marcos's Resolutions.

The memorandum dated September 7, 2017 San Marcos provided Martindale alleges San Marcos declared its "*Population*" to be at least fifty-thousand (50,000) (thereby establishing a 3.5 mile ETJ) by and through Resolution 2007-146R² ("R146"), on or about July 17, 2007. Martindale disputes that R146 is the resolution by and through which San Marcos declared its "*Population*" to be at least fifty-thousand (50,000). Martindale believes the proper ordinance by and through

¹ See Exhibit A

² See Exhibit B

which San Marcos alleges its “*Population*” to be at least fifty-thousand (50,000) (thereby establishing a 3.5 mile ETJ) is Resolution 2007-132R³ (“R132”).

C. What is “*Population*?”

“*Population*” means the population shown by the most recent federal decennial census⁴. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly⁵.

Courts apply rules of statutory construction to construe municipal ordinances⁶. Statutory construction is a legal question, and in construing statutes, Courts ascertain and give effect to the Legislature's intent as expressed by the language of the statute⁷. Courts use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired⁸. In the absence of any technical or particular meaning, Courts construe the statute's (ordinance's) words according to their plain and common meaning⁹. However, when statutory text is unambiguous, courts must adopt the interpretation supported by the statute's plain language¹⁰. Courts presume the Legislature intended a just and reasonable result by enacting the statute¹¹. When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language¹².

D. Local Government Code § 42.021

The extraterritorial jurisdiction of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located...within 3-1/2 miles of those boundaries, in the case of a municipality with 50,000 to 99,999 “*inhabitants*”¹³.

³ See Exhibit C

⁴ *Government Code* § 311.005(3)

⁵ *Government Code* § 311.011(b)

⁶ *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 164 (Tex. 2016) (citing *Board of Adjustment v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002)).

⁷ *State, Texas Parks and Wildlife Dept. v. Shumake*, 199 S.W.3d 279, 284 (Tex.2006).

⁸ *Tex. Gov't Code* § 311.011(b).

⁹ *Texas Department of Transportation v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex.2004).

¹⁰ *Tex. Dep't of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex.2004).

¹¹ *Tex. Gov't Code* § 311.021(3).

¹² *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex.1997); *Ex parte Roloff*, 510 S.W.2d 913, 915 (Tex.1974).

¹³ *Local Government Code* § 42.021(a)(4).

E. R132.

R132, in relevant part, reads as follows:

*Planning and Development services has been tracking the City's population by using the 2000 census as a base rate and adjusting that rate based on issuance of certificates of occupancy, demolition permits, and occupancy rates for multi-family residences...At the end of June 2007, the population of the City of San Marcos stood at 50,016 persons...**BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:**...The City Council for the City of San Marcos, Texas declares the City to have a population in excess of 50,000, an expanded Extraterritorial Jurisdiction to three and one-half (3 ½) miles, and all the responsibilities and benefits thereof.*

In short, it appears that San Marcos relied on the following in determining its “Population”:
(1) 2000 census as a base rate; (2) issuance of certificates of occupancy; (3) demolition permits; and (4) occupancy rates for multi-family residences.

F. Recent Case Law.

While the *City of Burleson* case is very instructive¹⁴, the *City of Granite Shoals* case is more recent and establishes weaknesses in San Marcos’s claims as to its “Population”¹⁵. A municipality’s fact-finding powers are not absolute, however, nor are its determinations entitled to conclusive deference. In deciding that a city “is properly empowered” to determine its eligibility to adopt a home-rule charter, the Texas Supreme Court has recognized that when the governing body once ascertained the fact that [the city] had a population of more than 5000 at the time of the adoption of its Home–Rule Charter, such ascertainment is presumed to have been validly exercised in the absence of allegations and of proof of *fraud, bad faith or abuse of discretion*¹⁶. Thus, while a municipality’s administrative determination of a predicate fact question prior to the ordering of an election “is intended to be final,” that determination may be set aside “on the ground of fraud or bad faith”¹⁷. The principles enumerated in *Burleson* and *Granite Shoals* are instructive and analogous in this matter.

G. San Marcos’s Population.

Per U.S. Census Data, San Marcos’s population was 34,733 in 2000, and 44,894 in 2010. Putting this data aside for arguments sake, as stated in R132: “*The City of San Marcos, Texas has*

¹⁴ *City of Burleson v. Bartula*, 110 S.W.3d 561 (Tex.App.—Waco 2003, no pet.).

¹⁵ *City of Granite Shoals v. Winder*, 280 S.W.3d 550 (Tex.App.—Austin, 2009).

¹⁶ *State ex rel. Rose v. City of La Porte*, [REDACTED] 386 S.W.2d 782, 785 (Tex.1965) (citing *Town of Freeport v. Sellers*, 144 Tex. 389, 190 S.W.2d 813 (1945); *Williams v. Castleman*, 112 Tex. 193, 247 S.W. 263 (1922)).

¹⁷ *Harrison v. Bunnell*, 420 S.W.2d 777, 779 (Tex.Civ.App.-Austin 1967, no writ) (quoting *School Board v. State*, 162 Tex. 9, 343 S.W.2d 247, 248 (1961)).

been experiencing a growth rate averaging nearly 5% per year since 2000.” Assuming San Marcos did in fact achieve five-percent “5% per year since 2000,” San Marcos would fail still fail to reach a “Population” of fifty-thousand (50,000). Consider the following chart that assumes five-percent (5%) growth per year:

Year	Population	5% of Population
2000	34,733 ¹⁸	1,736 ¹⁹
2001	36,469 ²⁰	1,823 ²¹
2003	38,292 ²²	1,914 ²³
2004	40,206 ²⁴	2,010 ²⁵
2005	42,216 ²⁶	2,111 ²⁷
2006	44,327 ²⁸	2,216 ²⁹
2007	46,543 ³⁰	2,327 ³¹

Even if five-percent (5%) growth were extrapolated out through 2008, San Marcos would still have a population under 49,000. Of course, the census data shows that estimates as to growth were wildly inaccurate. The U.S. Census from 2010 determined San Marcos’s population to be 44,894.

H. Bad Faith.

¹⁸ U.S. Census Data

¹⁹ 5% of 34,733 = 1,736

²⁰ 34,733 + 1,736 = 36,469

²¹ 5% of 36,469 = 1,823

²² 36,469 + 1,823 = 38,292

²³ 5% of 38,292 = 1,914

²⁴ 38,292 + 1,914 = 40,206

²⁵ 5% of 40,206 = 2,010

²⁶ 40,206 + 2,010 = 42,216

²⁷ 5% of 42,216 = 2,111

²⁸ 42,216 + 2,111 = 44,327

²⁹ 5% of 44,327 = 2,216

³⁰ 44,327 + 2,216 = 46,543

³¹ 5% of 46,543 = 2,327

The Austin Court of Appeals has previously held that a challenge to an “*inhabitancy*” finding based on fraud or bad faith implicates “*voidness*” rather than voidability. The distinction between the two depends on whether the municipal act is “*unauthorized by law or color of law*” or, on the other hand, is “*a mere irregular exercise of power*”³². In *Granite Shoals*, appellees did not complain of a mere irregularity, but instead challenged the City's fundamental authority to call a home-rule election and thereafter convert to home-rule-issues that bear on the City's existence as a home-rule municipality from its inception³³. Specifically, they asserted that the City violated the Texas Constitution by calling the election when it had fewer than the requisite 5,000 inhabitants, that its determination to the contrary was made fraudulently or in bad faith, and that because the City lacked the authority to adopt the ordinance calling the election, “the election held pursuant to such an order is void”³⁴. Based on the foregoing, Martindale believes there is strong evidence San Marcos acted in “*Bad Faith*” in passing R132 that could result in a finding that R132 is “*void ab initio*.” Furthermore, Martindale believes any claim it might have to establish as much is still viable and can be pursued.

I. Martindale’s Request

As San Marcos is in a better position to do as much, Martindale requests that San Marcos incorporate the Ordinances into San Marcos’s GIS system so San Marcos and Martindale may have occasion to see what an actual map that incorporates the Ordinances looks like. Martindale also requests that it be provided access to all information that San Marcos used to determine its “*Population*” per R132. Thereafter, Martindale would like to schedule a meeting to discuss resolution. Martindale understands it cannot have everything it wants if short-term resolution is to be reached, and hopes San Marcos is willing to meet with the same mindset. Please understand San Marcos’s initial proposal is fundamentally unacceptable, and Martindale is unwilling to agree to any ETJ agreement that is materially consistent with said proposal. That being said, Martindale desires to work in good-faith with San Marcos to resolve this issue.

V. Conclusion

I am available to discuss this matter at your convenience. Feel free to contact me at 512-346-3600 or kent@thewymorelawfirm.com.

Respectfully,

³² *City of San Antonio v. Hardee*, 70 S.W.3d 207, 210 (Tex.App.-San Antonio 2001, no pet.); see *City of Balch Springs v. George F. Lucas Irrevocable Family Trust*, 101 S.W.3d 116, 119–20 (Tex.App.-Dallas 2002, no pet.).

³³ *Hudman*, 996 S.W.2d at 911; *Durham*, 578 S.W.2d at 441; *Derrick*, 374 S.W.2d at 264; *Callaway*, 363 S.W.2d at 835.

³⁴ *Hudman*, 996 S.W.2d at 911; see also *Todd v. Helton*, 495 S.W.2d 213, 216 (Tex.1973) (“an order calling an election to organize a county may be annulled upon discovery of fraud”) (citing *Oden v. Barbee*, 103 Tex. 449, 129 S.W. 602, 603 (1910)).

/s/ Kent E. Wymore IV

Kent E. Wymore IV