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**Supplemental Report and Follow-up to Kent McMillan's Report
Regarding Outlot 11, Division "Z" and the Sand Beach Reserve**

This morning, Monday, August 31, 1998, I received the attached report from Kent McMillan, RPLS, employed to prepare a land survey report on the boundary issues surrounding the tract of land known as the Sand Beach Reserve. In light of the fact that a site plan has been filed on a tract of land adjoining the city owned property on the north bank of Town Lake, the boundary issues need to be resolved. Surveyor McMillan's report is a detailed account of the events, persons and documents reviewed in his research of the early surveying of the City of Austin. It is however, incomplete at this time. Reading Mr. McMillan's report first would benefit those who are not familiar with the founding of Austin and it lays the groundwork for conclusions based on the facts presented here as well. Mr. McMillan has indicated to me that he is continuing to write and that there will be more forthcoming. I can therefore only offer the following, which was intended to supplement his report.

There are basically three possible boundary locations for the south line of Outlot 11, Division "Z" having their basis in an actual survey made on the ground of all four sides. There is no evidence that S. C. Wiltse (surveyor of the Government Tract) surveyed the south line of Outlot 11, but considerable evidence that he laid out West 6th Street, West Avenue and the east line of Outlot 1 which is the west line of Outlot 11. Of the maps and records clearly indicating all four sides, one possible construction is based on the subdivision of Outlot 11 created for James Raymond (patentee of Outlot 11) by Captain Michael J. Doyle in 1871. The second construction is based on a survey by

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unknown surveyors working for the International & Great Northern Railroad apparently between 1907 and 1917, copies of the maps of which are on file in the National Archives in Washington, D.C. The third location is based on a survey made in 1916 by O. E. Metcalfe for the City of Austin and the State Board of Health. In the next few paragraphs, I will discuss the theoretical and practical application of each of these. I have considered the question of whether or not the description in the patent should be interpreted to mean that the state intended to convey only sixty acres of land. While there are some court cases supporting this idea in situations involving other patents issued by the state, from a surveying standpoint, the introduction of language in the body of the description referring to meanders of the bluff line (a call for a natural monument) precludes in this instance a location on the basis of acreage alone. Additionally, it's worth noting that this particular letter patent does not reference the map or plan of the City of Austin on file in the General Land Office (GLO) as almost all the other patents of Outlots do. The south line of Outlot 11, Division "Z" is not shown on the 1863 map on file in the GLO.

O. E. Metcalfe's 1916 Survey

In short the Metcalfe survey, according to a report prepared by him is based entirely on the patent to James Raymond issued by the State of Texas in 1848 and a copy of the Sandusky map on file in the General Land Office. In particular, it is the scaling of distances and the angular relationships of the bluff line as depicted on the map, which Mr. Metcalfe's survey is based upon. David B. Gracy, founder of Gracy Title Company assisted Mr. Metcalfe in planning his survey. The influence of Gracy on the Metcalfe survey of Outlots 1

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and 11, Division "Z" should not be underestimated. Gracy was something of a literalist. He was the kind of person that had he been in the jury pool in the Scope's trial, William Jennings Bryant would have wanted him on the jury panel. If the patent read, as most involving the Outlots did, "according to a map on file in the General Land Office," then for Gracy that map was the basis on which a survey should be performed. In the field book of Metcalfe's survey notes is a sketch labeled "Gracy's suggestion for the location of the southeast corner of Outlot 11." The sketch indicates the bluff line as it intersects the west line of West Avenue as scaled southerly from the westerly prolongation of the north line of West 1st Street. When the city council was faced with the task of paving the streets in the downtown area in the early part of this century, the first phase of the work included locating the rights-of-way of the streets. When it was discovered that the improvements reflected something different than a right angle relationship with the east-west streets intersecting Congress Avenue, Alderman Gracy wanted an ordinance passed requiring that property owners remove their improvements to conform to the plan of the Original City of Austin. Mayor Woolridge was successful in getting his own ordinance passed which created a line of best fit based on the existing improvements. Not only was this the correct political solution but it turned out to be the correct surveying solution as well. The task for the surveyor is to follow in the footsteps of the original surveyor not to correct those footsteps and do what should have been done if, based on the evidence found on the ground, there is certainty as to the location of those footsteps. In the case of the southeast corner of Outlot 11 as placed by Mr. Metcalfe it is clear that he set the corner at a distance of

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approximately 54 feet south of where the westerly prolongation of the north line of West Cesar Chavez (formerly West 1ST Street) intersected the original west line of West Avenue or said another way, where the bluff line on the Sandusky map intersects the original west line of West Avenue. In fact the corner should have been set 180+/- feet south of this location because the patent reads *"thence with the meanders of the bluff plus 60 yards below."* To do so would have resulted in an obviously unreasonable solution as it would have placed the corner at or near the river bank and revealed the scaling of the Sandusky map as an imprudent choice of boundary construction.

The fundamental question in my mind regarding the boundary construction of Outlot 11 using the Metcalfe/Gracy method is this, "As a professional land surveyor could I locate the boundaries using the same two documents (only) that O. E. Metcalfe used in 1916 (the patent to James Raymond and the copied Sandusky map)?" The answer for me has to be no. The test would be could I give three different competent surveyors these two instruments and have each go out and place the boundary of Outlot 11 on the ground independently and get the same results. I believe the answer again to be no. The patent as written does not reference the map or plan of the City of Austin on file in the Land Office and the description has latent ambiguities, which unless surveyed at the time of issuance would be difficult or impossible to do at a later date after the railroad came in 1881. It appears that no survey was done at the time the state issued the patent. The question then is *"What is the best available evidence which could be used to confidently locate the boundaries of Outlots 1 and 11?"*

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Raymond's Plateau

Let's consider for a moment what we know to be some basic facts regarding the records. James Raymond received patents for Outlots 1 and 11 in 1848. He subsequently conveyed to Thomas Duval the east one half of Outlot 1, which adjoins 11 to the east (see Exhibit 1). There is no evidence to suggest that there was any disagreement between the owners (Duval and Raymond) as to the common line between the two Outlots and in fact, each owner platted subdivisions which adjoin each other. The common boundary remains to this day clearly defined on the ground and in the abstracts of the deed records.

In an effort to test whether or not the subdivision which James Raymond created in the early 1870s conforms to the blocks and streets as occupied today I digitally mapped the record information from the plat and overlaid the results on the City of Austin's digital orthophotos (see Exhibit 2). Using the northwest corner of Raymond's Plateau, which is the northeast corner of Duval's subdivision and marked on the ground by a ½" iron pipe at the northeast corner of an asphalt parking lot, the record distances along West 6th Street indicate a good fit with West Avenue on the east, the streets and blocks matching up surprisingly well. As to the south line of Raymond's Plateau (as the subdivision is called) there is a dimensional tie to the south right of way line of West Sixth Street (Pecan St. on the map) along Crockett Street (now named Baylor Street) which fixes the bluff line as it existed in 1871. The map of Raymond's Plateau is silent regarding the remaining distances along the lot lines extending south from West 3rd Street. Lot frontages in feet along West 3rd Street as well as an area of the individual lots is indicated on the plat. A trial

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scaling of the distances yielded acceptable results when compared to the quantity of land stated on the map and conversely the area divided by the frontage distances compares favorably with scaling. I was able to find a survey (Exhibit 3) made in May, 1915, by M. C. Welborn, City Engineer, of Lot 2, Block 7 of Raymond's Plateau where he finds 3" x 4" wooden stakes at the southeast and southwest corners of the lot. These stakes which represent a previous survey, are 158 feet from the south line of West 3rd street. The scaled distance from the subdivision plat is 160 feet. The absence of improvements delineating boundaries of the lots south of West 3rd Street, the fact that the railroads (International - Great Northern and Missouri Pacific) have since the 1880s altered the natural bluff line as well as tenants, Maufrais Concrete and Centex Materials and one hundred and fifty years of natural processes eliminates using the current bluff line in locating the south line of Outlot 11.

Railroad Survey

The topographical map prepared by O. E. Metcalfe in 1916 depicts a fence line below the bluff erected in a straight line from about the southerly prolongation of Baylor Street on the west to the present west line of West Avenue. When I compare by overlay the railroad's valuation map, the fence and the south line of Outlot 11 depicted on that map coincide exactly, indicating to me that the railroad fenced the property that it claimed ownership of. The survey made by the railroad was submitted to the Interstate Commerce Commission (see ICC records, National Archives) for the purposes of valuing the assets of the railroad. This in turn was used to set passenger and freight rates and was required of all the railroads operating in the United States. The map

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has angular relationships at the corners to the nearest minute of arc and distances stated to the nearest foot. In addition, monuments are indicated as having been set on the south line of what the railroad was claiming. The south line of Outlot 11 as depicted on these maps appears to be a southeasterly prolongation of a portion of the bluff at the westerly end of Outlot 11 apparently regarded as an undisturbed portion by the railroad surveyors. The south line of Outlot 11 (as fenced and used upon the ground in Metcalfe's survey) depicted on this survey is the same south line used in a conveyance to the City of Austin in 1949 for a 3.16 acre tract described in Volume 961 at Page 547 of the Real Property Records of Travis County, Texas (see Exhibit 4). This is the property which Seaholm power plant is situated on.

The surveys made in the 1980s, Jetco Partners International Resubdivision One, the Larry Turner's and Roy Smith's survey of the 3.19 acre tract railroad company tract conveyed by special warranty deed to Lumberman's Investment Corporation and a 1997 survey by Thomas Dodd, RPLS, have assumed the south line of Outlot 11 to be O. E. Metcalfe's line (see exhibit 5). In addition to the question of the location of the south line, the railroad and now Lumberman's Investment is claiming a portion of Bowie Street, a street conveyed to the City of Austin by the language included on the plat of Raymond's Plateau.

The impact of the 1992 District Court's conclusions seem be Lumberman's sole basis for asserting claims to the property now included in the site development plan being reviewed. The doctrine of collateral estoppel is discussed in the letter from Don Bush, attorney, who represented Missouri

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Pacific Railroad Company in the District Court Case styled State of Texas v. City of Austin. A copy of the letter is attached at the end of this report. The questions I have are, *Were the boundary issues properly addressed and litigated in the trial?*, and regarding Bowie Street and the area surrounding the south line of Outlot 11, *Does this doctrine mean that the City of Austin is forced to break the statutory law preventing the city (as representing the public's interest) from relinquishing public land without compensation?* These are questions, which require the scrutiny of an attorney and should be examined at the earliest opportunity. Exhibit 5 shows the area of possible ownership question depending on which version of the south line of Outlot 11 one accepts as being the true location.

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