



20-02BOA

TITLE: Conduct a Public Hearing to Consider/Discuss/Act on whether to Conduct a Second Public Hearing to Determine an Amortization Period and Establish a Compliance Date for the Nonconforming Concrete Batch Plant Use (TXI Operations, LP / Martin Marietta Redi-Mix), at the Request of the City Council (Resolution No. 2019-12-145 R), for Property Located at **2005 South McDonald Street, McKinney, Texas**

BOARD OF ADJUSTMENT CASE NUMBER: 20-02

MEETING DATE: February 26, 2020

DEPARTMENT: Development Services

CONTACT: Michael Quint, Executive Director of Development Services
Rick Herzberger, Chief Building Official
Kerry Simpson, Interim Director of Code Services
Jennifer Arnold, AICP, Director of Planning
Kyle Odom, Environmental Engineering Manager

RECOMMENDED BOARD ACTION:

1. Determine that the continued operation of the nonconforming use will have an adverse impact on nearby properties or the community welfare;
2. Call for a second public hearing to determine an amortization period and establish a compliance date for the nonconforming use; and
3. Issue a subpoena to Martin Marietta for the production of all relevant operational, financial, and procedural documents which will be used to determine an amortization period.

ITEM SUMMARY: In accordance with the requirements outlined in Section 146-40(g) (Amortization of Nonconforming Uses) of the Zoning Ordinance, on December 3, 2019, the City Council adopted resolution no. 2019-12-145(R) formally requesting that the Board of Adjustment consider establishing a compliance date for a nonconforming use on the property located at 2005 South McDonald Street (TXI Operations, LP / Martin Marietta Redi-Mix). The subject property is more fully depicted on the attached Aerial Map. At this hearing, under this case number 20-02, the Board will only determine

whether the nonconforming use of the property will have an adverse effect on nearby properties or the community welfare, and whether the next steps in determining an amortization period and establishing a compliance date should be pursued.

As outlined in the aforementioned section of the Zoning Ordinance pertaining to the amortization of nonconforming uses, ten factors should be evaluated in order to determine whether continued operation of the nonconforming use will have an adverse effect on nearby properties or the community welfare. Those ten factors, including more detail regarding each, are outlined in more detail below.

a. The Comprehensive Plan.

The existing concrete batch plant use is not in conformance with the ONE McKinney 2040 Comprehensive Plan, which was adopted in October 2018.

McKinney's comprehensive plan, the ONE McKinney 2040 Comprehensive Plan, is the policy document which guides all development activity within the City and its Extraterritorial Jurisdiction (ETJ). A key aspect of the ONE McKinney 2040 Comprehensive Plan is to provide direction related to the desired development patterns for McKinney's future and to inform decisions related to the timing and phasing for future infrastructure investments in the City. To assist in guiding these decisions, the Preferred Scenario and a series of Land Use Diagrams establish distinctive districts, each with a clear intent and market focus that are reinforced through character-defining placetypes. These character-defining placetypes reflect the type of built environment that is expected to locate in each District.

Per the Preferred Scenario (which is the map showing the location of the various character Comprehensive Plan character districts throughout the City and its ETJ), the subject property is located in the Southgate District, which is envisioned as one of the entryways into the City of McKinney. The District establishes a distinctive urban character of high quality and provides high value places for urban living and working. The general placetypes envisioned in the Southgate District include Professional Campus, Mixed-Use Center, Urban Living, and Suburban Living. Specifically, the subject property is designated as Professional Campus, which is intended to provide office jobs that keep people in the city during normal work hours. Developments and land uses that are consistent with the Professional Campus placetype will typically be well-landscaped and provide opportunities for a number of employment uses such as corporate headquarters, institutional facilities, and medical campuses.

For more detailed information, please reference "Comprehensive Plan Documents", attached hereto.

b. The character of the surrounding or nearby properties.

The existing concrete batch plant use is not compatible with the surrounding and nearby properties.

Much of the recent growth and development that has occurred in this area has been suburban in nature, which is in stark contrast to the heavy industrial use of a concrete batch plant. In fact, other than the presence of a state-owned contractor's yard, concrete batch plant, and a lime slurry, the remainder of the development patterns in the area can be categorized as residential, commercial, undeveloped, or parkland. In particular, several senior memory care and independent living facilities (Grand Brook Memory Care, HarborChase of McKinney, Country Lane Seniors Community) are located within a half a mile south of the subject property. Additionally, while there is a rail line on the eastern side of the subject property, adjacent to the rail line is designated parkland, including the Heard Natural Museum and Wildlife Sanctuary. It is important to note that the City is actively working to relocate the other existing concrete batch plant and lime slurry operators from the area as well.

In addition to the existing development patterns, the completion of the SH 121 corridor and the reconfiguration of the interchange of US 75 and Spur 399/SH5 in the mid-2000's has established the area in and around the subject property as a principal gateway and "front door" to the City and specifically, McKinney's Historic Downtown. In recent years, the City has invested significant resources to support the area as a primary gateway into the City and to activate desirable growth patterns. This includes investments in the "Southgate" property which is generally located a mile south of the subject property with the aim of creating a master planned development to facilitate the attraction of retail / office development. Additionally, the City recently took ownership of a previously privately owned golf course and has converted it to a passive recreational destination. These efforts and the vision for the area were reaffirmed and reinforced in the ONE McKinney 2040 Comprehensive Plan.

For a visual reference of the land uses located adjacent to the subject property, please reference the "Existing Land Use Map", attached hereto.

- c. The degree of incompatibility of the use with the zoning district in which it is located.

The subject property is currently zoned "RO" - Regional Office District. The City Council approved a city staff-initiated rezoning of the subject property to this zoning designation on April 16, 2019. The "RO" zoning district primarily allows the development of office uses. Based on the designation of Professional Campus on the ONE McKinney 2040 Comprehensive Plan, the rezoning action better aligned the subject property with the vision set forth by the plan, as well as the property's ultimate compatibility with the surrounding area.

As a result, the subject property is now considered a nonconforming use subject

to Section 146-40 (Nonconforming Uses and Nonconforming Structures) of the Zoning Ordinance.

As a heavy industrial use, the existing concrete batch plant operation is not compatible with the existing “RO” zoning district. Examples of uses that are allowed within the “RO” zoning district include, but are not necessarily limited to, banks and financial institutions, office buildings, medical offices, restaurants, and studios. The “RO” zoning district also allows for some non-office, but compatible uses such as assisted living facilities, clinics, day-cares, and fitness centers. The existing batch plant operation is not only significantly incompatible with the uses permitted in the “RO” zoning district, it also interferes with the character of the comprehensive plan designation for the subject property which may inhibit the realization of the comprehensive plan’s vision for this area of the community. Moreover, the existing concrete batch plant use deteriorates the relatively suburban nature of the existing nearby development patterns.

d. The manner in which the nonconforming use is being conducted.

In addition to the incompatibility of the nonconforming use with the surrounding area, operation of the concrete batch plant on the subject property is being conducted in a manner that has an adverse effect on nearby properties and the community welfare.

A concrete batch plant or batch plant is a manufacturing operation that uses equipment to combine various ingredients to form concrete. Some of these ingredients include sand, water, aggregate (rocks, gravel, etc.), fly ash, and cement. In general, a concrete batch plant can utilize a variety of equipment for its operation, including mixers, cement and aggregate batchers, conveyors, cement silos, and dust collectors. Due to the nature and intensity of a concrete batch plant, it is commonly considered a heavy industrial use.

The City has received and/or been aware of several noise-related complaints, air quality complaints, traffic safety concerns, and a recent equipment malfunction event that impacted more than a quarter-mile radius. More detailed information about these concerns and complaints are provided below.

Over the last several months, city staff has attempted to coordinate with representatives of TXI Operations LP / Martin Marietta Redi-Mix to discuss an alternative solution to a City-imposed amortization period and compliance date; however, these attempts have been unsuccessful.

e. The hours of operation of the use.

The current hours of operation of the use has repeatedly violated McKinney’s regulations governing noise.

The current concrete batch plant appears to be operating at all times throughout the day and night as needed to fulfill concrete orders. On several occasions, employees for the nonconforming use have stated to city staff that they were working to fill concrete orders regardless of the time of day, as directed by management.

McKinney Municipal Code § 70-120(b)(7) states: "Operating or permitting to be operated any power equipment within a residential district or quiet zone, or within 500 feet of any residence or quiet zone, in such a manner as to cause a noise disturbance. Furthermore, any such activity shall create a noise disturbance per se if conducted between the hours of 10:00 p.m. and 7:00 a.m."

Due to ongoing complaints of power equipment being operated between the hours of 10:00 p.m. and 7:00 a.m. at these concrete batch plants, staff performed repeated inspections. City staff has witnessed the concrete batch plant operating power equipment on portions of the property located within 500 feet of a residence or quiet zone on several occasions.

f. The extent to which continued operation of the use may threaten public health or safety.

Continued operation of the nonconforming concrete batch plant use on the subject property is anticipated to continue to negatively impact the public health or safety.

As has been more fully described in other sections of this staff report, the nonconforming concrete batch plant use on the subject property has been the genesis of several noise, lighting, traffic, particulate, and water quality complaints in recent years. Because of this history of complaints, one could safely assume that the complaints and negative impacts on adjacent properties will continue if the nonconforming use is allowed to continue operations.

An example of the potential threat to the public's health or safety as a result of the continued operation of the nonconforming use occurred on the late evening of July 18 and early morning of July 19, 2019. According to a Texas Commission on Environmental Quality (TCEQ) report, on the morning of July 19, 2019, the Martin Marietta concrete batch plant facility experienced an equipment malfunction and emitted some four tons of Portland cement particulate matter into the air over the span of approximately five hours. The negative impacts to adjacent property owners was immediately obvious as can be seen from countless photos, reports, and personal inspections. While one might assume that this was an isolated incident, the truth is that similar instances could occur in the future and as the area continues to develop with non-industrial uses (examples: residential, office, retail, and restaurants), the future impacts of a similar or even worse event to the public health or safety could be significant.

- g. The environmental impacts of the use's operation, including, but not limited to the impacts of noise, glare, dust, and odor.

Since the beginning of 2018, the Texas Commission on Environmental Quality (TCEQ) has conducted ten on-site investigations of the nonconforming concrete batch plant use on the subject property. Three of these investigations resulted in notices of violations. These violations generally included a failure to prevent visible emissions from leaving the property, failure to maintain intact surfaces intended to minimize dust emissions, failure to properly suppress dust on-site, failure to prevent the emission of air contaminants that contribute to air pollution, failure to prevent the discharge of such quantity of dust as would have a tendency to cause a traffic hazard, and failure to prevent the discharge of air contaminants in such concentration and duration as to interfere with the normal enjoyment of complainants properties. One of these notices of violations was turned over to the TCEQ Enforcement Division partly due to the severity of the incident.

The incident in question has been previously described but on July 18-19, 2019, the Martin Marietta concrete batch plant facility emitted some four tons of Portland cement particulate matter into the air over the span of approximately five hours. This resulted in 35 complaints to the TCEQ and countless more to various members of city staff.

On July 30, 2019, McKinney's Chief Building Official suspended the Certificate of Occupancy for this batch plant based on the cement dust emitted into the atmosphere on July 18-19, 2019. The Notice and Order suspending this certificate of occupancy required the owners to address five concerns related to "inadequate maintenance" that caused a condition "dangerous to human life or the public welfare".

On August 30, 2019, the Building Official re-activated the Certificate of Occupancy after proof of compliance with the July 30, 2019 Notice and Order was submitted and accepted. For more detailed information, please reference "Building Official Notices", attached hereto.

After additional investigation, it was determined that the wiring of the automatic shutoff system failed, and the system failed as a result leading, to this incident. As part of the cleanup effort, Martin Marietta representatives issued some 425 vouchers for car washes, completed almost 80 interior home cleanings, completed over 80 exterior home cleanings, and completed the cleaning of approximately 80 duct systems for the adjacent property owners.

For more detailed information, please reference "TCEQ Documentation", attached hereto.

City staff has also been receiving complaints about the nonconforming concrete batch plant use on the subject property since 2018. The majority of the early complaints received came from residents of the McKinney Greens subdivision which is located to the west and north of the subject property. Additional complaints were received from residents of Villa View Mobile Home Park located at 2201 S. McDonald Street, immediately south of Cowtown Redi-Mix. These complaints mainly addressed noise, lighting, and particulate matter issues. For more detailed information, please reference "Complaint Info", attached hereto. While particulate matter complaints received by city staff were directed to TCEQ for investigation, city staff did further investigate the noise and lighting complaints.

It was determined that the nonconforming concrete batch plant use was permitted during a time wherein the City's ordinances governing lighting did not address glare or require the shielding of lighting fixtures to prevent glare. Consequently, no enforcement action regarding lighting could be taken but, it was recommended to the operator of the nonconforming use to take appropriate actions to shield the lights. To date, glare is still visible from the property.

A comprehensive noise analysis was also conducted to ensure that the nonconforming use was in compliance with City regulations. Unfortunately, sound emitted from the subject property could not be isolated from noise created from the adjacent roadway (State Highway 5 / McDonald Street). Transient noise from moving sources such as automobiles are exempt from the noise level regulations contained within Section 146-134 (Performance Standards) of the Zoning Ordinance. Given these facts, no violations could be confirmed even with evidence of noise being emitted from the subject property being provided by the complainants.

For more detailed information, please reference "Comprehensive Noise Analysis Summary Report", attached hereto.

- h. The extent to which public disturbances and nuisances may be created or perpetuated by continued operation of the use.

Given the extent of regulatory violations generated by the nonconforming concrete batch plant use and the history of complaints generated by this use, it is reasonably safe to assume that violations and complaints from adjacent property owners will continue. The violations and complaints have consistently occurred over the last two years, which generally coincides with the influx of new residents to the area. While the full extent to which public disturbances and nuisances may be created or perpetuated by continued operation of the use is unknown, it is reasonably understood that past performance is a good predictor of future behavior. It is primarily for these reasons that continued operation of the nonconforming concrete batch plant use on the subject property is anticipated to continue to create public disturbances and nuisances.

- i. The extent to which traffic or parking problems may be created or perpetuated by continued operation of the use.

The nonconforming concrete batch plant use has generated some traffic safety complaints from nearby residents. Primarily, these concerns center on semi-truck traffic and other related traffic generated by the nonconforming use conflicting with the normal flow of vehicular traffic on McDonald Street (State Highway 5).

There is an existing median opening directly adjacent to the subject property which is used by semi-truck and other related vehicles for “u-turn” maneuvers and left-turn (heading southbound) movements from the subject property. At times, the vehicles from the nonconforming concrete batch plant use have reportedly blocked or otherwise impeded the normal flow of traffic. While most of the reported vehicular movements are legal, they have raised safety concerns from residents nonetheless.

Since 2015, there have been eleven traffic accidents on McDonald Street (State Highway 5) adjacent to the property. While none of the accident reports cite the nonconforming concrete batch plant use as the cause, one accident did occur after a concrete truck exited the subject property heading northbound. In this instance, a vehicle slowed when the concrete truck exited the subject property and was rear-ended. The concrete truck was not involved in the accident.

For more detailed information, please reference “Traffic History”, attached hereto.

No parking related problems have been reported as a result of the nonconforming concrete batch plant use.

- j. Any other factors relevant to the issue of whether continued operation of the use will adversely affect nearby properties.

While more anecdotal in nature, it is anticipated that continued operation of the nonconforming use on the subject property may negatively impact the development and redevelopment of nearby properties for the uses envisioned by the ONE McKinney 2040 Comprehensive Plan. From a general market development standpoint, it is widely understood that heavy industrial uses are seen as incompatible with the non-industrial land uses envisioned for this area of the community and thereby may hinder the ability to realize higher and better land uses. While not the primary factor behind city staff’s recommendation, it should be stated that the area may not develop or redevelop as intended if the nonconforming concrete batch plant use is allowed to continue its operation.

PUBLIC SUPPORT/OPPOSITION:

To date, no letters of support or letters of opposition to this item have been submitted.

BOARD AUTHORITY:

Amortization of nonconforming land uses. The board shall have the authority to establish a compliance date for nonconforming uses at the request of the city council in accordance with [section 146-40 <https://library.municode.com/tx/mckinney/codes/code_of_ordinances?nodeId=SPBDERE_CH146ZORE_ARTIISPPR_S146-40NOUSNOST>](https://library.municode.com/tx/mckinney/codes/code_of_ordinances?nodeId=SPBDERE_CH146ZORE_ARTIISPPR_S146-40NOUSNOST) (Nonconforming uses and nonconforming structures).

Sec. 146-40. - Nonconforming uses and nonconforming structures.

(g) *Amortization of nonconforming uses.*

- (1) *Request to establish compliance date.* The city council, by a simple majority vote, may request that the board of adjustment consider establishing a compliance date for a nonconforming use. Upon receiving such a request, the board shall hold a public hearing to determine whether continued operation of the nonconforming use will have an adverse effect on nearby properties or the community welfare. Notice of the public hearing shall be in the manner established in [section 146-165 <https://library.municode.com/tx/mckinney/codes/code_of_ordinances?nodeId=SPBDERE_CH146ZORE_ARTIISPPR_S146-165>](https://library.municode.com/tx/mckinney/codes/code_of_ordinances?nodeId=SPBDERE_CH146ZORE_ARTIISPPR_S146-165).

- (4)b. If, based on the evidence presented at the public hearing, the board determines that continued operation of the nonconforming use will have an adverse impact on nearby properties, it shall call for a second public hearing to establish a compliance date for the nonconforming use.

- (2) *Factors to be considered.* The board of adjustment shall consider the following factors when determining whether continued operation of the nonconforming use will have an adverse effect on nearby properties or the community welfare:

- a. The Comprehensive Plan;
- b. The character of the surrounding or nearby properties;
- c. The degree of incompatibility of the use with the zoning district in which it is located;
- d. The manner in which the nonconforming use is being conducted;
- e. The hours of operation of the use;
- f. The extent to which continued operation of the use may threaten public health or safety;
- g. The environmental impacts of the use's operation, including, but not limited to, the impacts of noise, glare, dust, and odor;
- h. The extent to which public disturbances and nuisances may be created or perpetuated by continued operation of the use;
- i. The extent to which traffic or parking problems may be created or perpetuated by continued operation of the use; and
- j. Any other factors relevant to the issue of whether continued operation of the use will adversely effect nearby properties.

- (3) *Determination of amortization period.*

- a. If the board of adjustment determines that continued operation of the nonconforming use has an adverse effect on nearby properties or the community welfare, it shall hold a second public hearing, in accordance with the law, to set a compliance date for the nonconforming use under a plan whereby the owner's actual investment in the use before the time that the use became nonconforming can be amortized within a definite time period. Notice of the second public hearing

shall be in the manner established in [section 146-165](https://library.municode.com/tx/mckinney/codes/code_of_ordinances?)
<https://library.municode.com/tx/mckinney/codes/code_of_ordinances?
(4)b.

- b. The board of adjustment shall request and shall have the authority to require, through the issuance of a subpoena, the owner to produce the financial documentation and records within its possession, custody or control (collectively "documents") relating to the factors listed in subsection (3)e, below. The owner shall provide to the board such documents at least 30 days before the second public hearing.
- c. The board of adjustment shall also have the authority to request that the owner allow the city and its representatives or experts reasonable access to, upon and about the property on which the nonconforming use in question is situated together with a reasonable amount of time to examine, photograph, videotape and inspect all aspects of the nonconforming use including, but not limited to, the property, structure, fixtures, assets, records, architectural drawings, and all appurtenances thereto relating to the factors listed in subsection (3)e, below (collectively the "physical inspection"). The owner shall cooperate with the city to schedule a date and time period that is acceptable to both the owner and the city to provide the city such reasonable access together with a reasonable amount of time to allow for the physical inspection at least 30 days before the second public hearing.
- d. If the owner does not provide the board any requested documents or fails to cooperate with the board in allowing the city the ability to perform the physical inspection, the board of adjustment is authorized to make its determination of a compliance date based upon any reasonably available public records, comparisons to physical inspection of one or more other similar uses, as well as public or expert testimony at the hearing. Failure or refusal by owner to provide any requested documents or to provide reasonable accommodation to perform a physical inspection shall not prevent the board of adjustment from setting a compliance date. In addition, owner's failure or refusal to provide any requested documents or to provide reasonable accommodation to perform a physical inspection shall constitute the owner's waiver of any and all rights to challenge the qualifications of any witness providing testimony, opinions or evidence of any kind or nature to the board submitted to the board for its consideration in establishing a compliance date. Owner's failure or refusal to provide any requested documents or to provide reasonable accommodation to perform a physical inspection shall also result in the owner's waiver of any and all rights to challenge any evidence, information, testimony, theories, conclusions, analysis, opinions and results submitted to the board for its consideration in establishing a compliance date.
- e. The board of adjustment shall provide a compliance date for the nonconforming use under a plan whereby the owner's actual investment in the use before the time that the use became nonconforming can be amortized within a definite time period. The following factors shall be considered by the board in determining a reasonable amortization period:
 - i. The owner's capital investment in structures, fixed equipment, and other assets (excluding inventory and other assets that may be feasibly transferred to another site) on the property before the time the use became nonconforming;
 - ii. Any costs that are directly attributable to the establishment of a compliance

date, including demolition expenses, relocation expenses, termination of leases, and discharge of mortgages;

- iii. Any return on investment since inception of the use, including net income and depreciation;
- iv. The anticipated annual recovery of investment, including net income and depreciation; and/or
- v. A reasonable wind-up period for the nonconforming use.

(4) *Compliance requirement.* If the board establishes a compliance date for a nonconforming use, the use must cease operations on that date and it may not operate thereafter unless such operations constitute a conforming use.

(5) For the purposes of this section, "owner" means the owner of the nonconforming use at the time of the board of adjustment's determination of a compliance date for the nonconforming use.

(h) *Decisions that cannot be immediately appealed.*

- (1) A decision by the board of adjustment to establish a compliance date is not a final decision and cannot be immediately appealed.
- (2) A decision by the board of adjustment that the continuing operation of a nonconforming use will have an adverse effect on neighboring property or the community welfare and a board of adjustment's decision to schedule a second public hearing to establish a compliance date are not final decisions and cannot be immediately appealed.

(i) *Decision to deny a request for a compliance date.* A decision by the board to deny a request to establish a compliance date is final unless appealed to state court within ten calendar days in accordance with Chapter 211 of the Texas Local Government Code.

(j) *Decision setting a compliance date.* A decision by the board of adjustment setting a compliance date is final unless appealed to state court within ten calendar days in accordance with Chapter 211 of the Texas Local Government Code.

(k) *Setting compliance date by agreement.* Nothing in this section shall prohibit the city and the owner(s) of such nonconforming use from mutually agreeing upon a compliance date. Any such agreement shall be in writing, approved by the city council and said owner(s), fully executed and attested by all parties, and filed in the real property records of Collin County, Texas.

(l) *Completion of structures.* Nothing contained herein shall require any change in the plans, construction, or designated use of a structure for which a building permit has been issued or a site plan approved prior to the effective date of this section, nor shall any changes be required in the plans, construction, or designated use of a structure for which a substantially complete application for a building permit was accepted by the chief building official on or before the effective date of this section, provided that the building permit shall comply with all applicable regulations on the date that the application was filed and the building permit is issued within 30 days of the effective date of these regulations.

BUILDING OFFICIAL STATEMENT:

The request has been validated, and I agree that the Board has the authority to consider establishing a compliance date, as requested by the City Council, and determining an amortization period, as described in the attached Resolution.

SUPPORTING MATERIALS:

- Resolution No. 2019-12-145(R)
- Aerial Map
- Comprehensive Plan Documents
- Existing Land Use Map
- Building Official Notices
- TCEQ Documentation
- Complaint Info
- Photos from 7.19.2019 Event
- Comprehensive Noise Analysis Summary Report
- Traffic History
- Proposed Subpoena

ACTION: **Approved** **Denied** **Tabled**

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