



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT
819 TAYLOR STREET
FORT WORTH, TEXAS 76102

CESWF-RDE

December 22, 2023

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ [SWF-2023-00220](#)

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.² AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.³ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁴ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable in this state due to litigation.

¹ While the Supreme Court’s decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² 33 CFR 331.2.

³ Regulatory Guidance Letter 05-02.

⁴ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

- i. Pond (PUB) (0.2 acres) (30.202283°, -97.737909°) – non-jurisdictional

2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
- b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
- c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
- d. *Sackett v. EPA*, 598 U.S. __, 143 S. Ct. 1322 (2023)

3. REVIEW AREA. The review area is approximately 23 acres and located in the municipality of Austin, Travis County, Texas. The center point of the proposed project area is 30.202383°, -97.739635°. There is no other relevant site-specific information or previous JDs associated with the review area. Reference enclosed map.

4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. The pond does not have a hydrologic, continuous surface connection to a TNW, interstate water, or territorial sea.

5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Not applicable.

6. SECTION 10 JURISDICTIONAL WATERS⁵: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with

⁵ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce or is presently incapable of such use because of changed conditions or the presence of obstructions.

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Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁶ [Not applicable.](#)

7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of “waters of the United States” in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.

- a. TNWs (a)(1): [Not applicable](#)
- b. Interstate Waters (a)(2): [Not applicable](#)
- c. Other Waters (a)(3): [Not applicable](#)
- d. Impoundments (a)(4): [Not applicable](#)
- e. Tributaries (a)(5): [Not applicable](#)
- f. The territorial seas (a)(6): [Not applicable](#)
- g. Adjacent wetlands (a)(7): [Not applicable](#)

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁷ Include size of the aquatic resource or feature within

⁶ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

⁷ 51 FR 41217, November 13, 1986.

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the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. All available information referenced in Section 9 indicate that the subject pond listed in Section 1a was excavated by humans within dry land (i.e., upland). Flows received to and conveyed from the pond is solely the result of stormwater runoff from uplands. Review of aerial imagery indicates that streams, lakes, or adjacent wetlands are not within the immediate vicinity of the pond. The pond meets the description of a water feature that generally is not considered a water of the United States, as detailed in the 1986 preamble of the regulations—33 CFR, part 328.3 (c)—artificial lakes or ponds created by excavating and / or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance. [Not applicable.](#)
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system. [Not applicable.](#)
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. [Not applicable.](#)
- e. Describe aquatic resources (i.e., lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “*SWANCC*,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with *SWANCC*. [Not applicable.](#)
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are

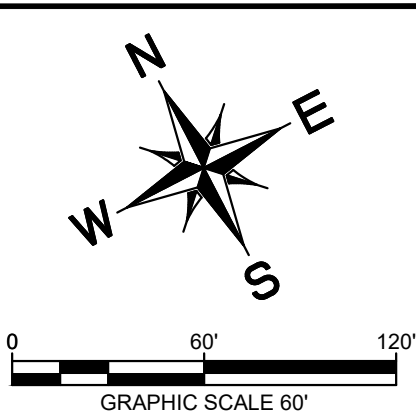
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non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water). [Not applicable](#).

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. [Site visit conducted May 16, 2023. Observations during the site visit confirmed that a continuous hydrologic surface connection is not present between the pond and the nearest RPW. Any water exiting the pond does so around the excavated earthen dam and moves from the pond through overland sheet flow, not by using a confined channel. Additional tools were used during desktop evaluation on or prior to December 22, 2023.](#)
 - b. [National Wetlands Inventory, National Hydrography Dataset, 3DEP Hillshade, USGS Topo Map—National Regulatory Viewer-SWD-Texas, December 22, 2023.](#)
 - c. [Maps, delineation of aquatic resources, and other information submitted on behalf of the applicant—Map enclosed, additional project information available within the electronic project file, SWF-2023-00220.](#)
 - d. [Aerial imagery provided by online resources, Google Earth Pro and Historicaerials.com, all available years, reviewed on and prior to December 22, 2023.](#)
10. OTHER SUPPORTING INFORMATION. [None](#)
11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

Plotted By: D:\Projects\2023\07\26\2023_07_26_10am File Path: \\kimley-horn.com\TX-AUS\AUS-Sub\069264307 - Dominium Sage at Franklin Park\Grid\GridSheets - SDR\VC - Grading\Plan.dwg
 This document, together with the concepts and designs presented herein, is intended only for the specific purpose and client for which it was prepared. Reuse of and improper reliance on this document without written authorization and adaptation by Kimley-Horn and Associates, Inc. shall be without liability to Kimley-Horn and Associates, Inc.



CASE NUMBER
SP-03-0121C.SH

(TITLE COMMITMENT NOT PROVIDED)
 CALLED 8.421 ACRES
 PLEASANT VALLEY COURTYARDS HOUSING, LTD
 DOC. NO. 2002232043
 O.P.R.T.C.T.
 MF-3-CO-NP

CALLED 9.997 ACRES
 ANGELOS ANGELOU AND JOHN SASARIDIS
 VOL. 12508, PG. 1771
 R.P.R.T.C.T.

LEGEND

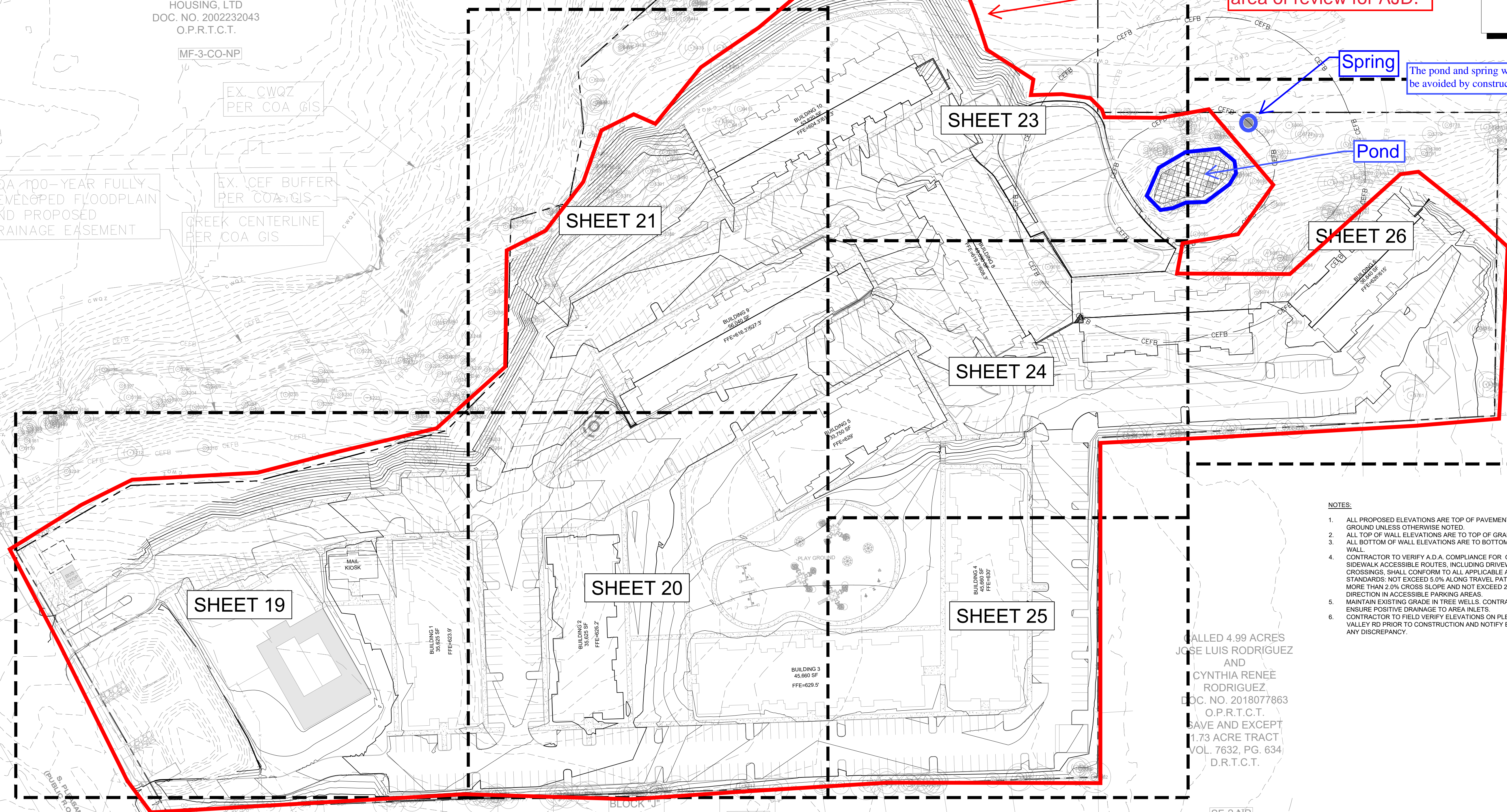
---	PROPERTY LINE
FF=XXX.XX	PROPOSED FINISHED FLOOR ELEVATION
XXX.X	PROPOSED TOP OF PAVEMENT ELEVATION
EX XXX.X	EXISTING TOP OF PAVEMENT ELEVATION
TG XXX.X	PROPOSED TOP OF GRATE
TW XXX.X	PROPOSED GRADE AT TOP OF WALL
BW XXX.X	PROPOSED GRADE AT BOTTOM OF WALL
EW XXX.X	PROPOSED GRADE AT END OF WALL
---	PROPOSED SWALE
HP	HIGH POINT
---	FLOW DIRECTION
---	PROPOSED RETAINING WALL
555	PROPOSED CONTOUR
555	EXISTING CONTOUR
○	EXISTING TREE TO REMAIN

Red boundary is the area of review for AJD.

Spring
 The pond and spring would be avoided by construction.

Pond

COA 100-YEAR FULLY DEVELOPED FLOODPLAIN AND PROPOSED DRAINAGE EASEMENT
 EX. CWQZ PER COA GIS
 EX. CEF BUFFER PER COA GIS
 CREEK CENTERLINE PER COA GIS



- NOTES:**
- ALL PROPOSED ELEVATIONS ARE TOP OF PAVEMENT OR NATURAL GROUND UNLESS OTHERWISE NOTED.
 - ALL TOP OF WALL ELEVATIONS ARE TO TOP OF GRADE AT WALL.
 - ALL BOTTOM OF WALL ELEVATIONS ARE TO BOTTOM OF GRADE AT WALL.
 - CONTRACTOR TO VERIFY A.D.A. COMPLIANCE FOR GRADES IN ALL SIDEWALK ACCESSIBLE ROUTES, INCLUDING DRIVEWAY CROSSINGS. SHALL CONFORM TO ALL APPLICABLE A.D.A. STANDARDS; NOT EXCEED 5.0% ALONG TRAVEL PATH WITH NOT MORE THAN 2.0% CROSS SLOPE AND NOT EXCEED 2.0% IN ANY DIRECTION IN ACCESSIBLE PARKING AREAS.
 - MAINTAIN EXISTING GRADE IN TREE WELLS. CONTRACTOR TO ENSURE POSITIVE DRAINAGE TO AREA INLETS.
 - CONTRACTOR TO FIELD VERIFY ELEVATIONS ON PLEASANT VALLEY RD PRIOR TO CONSTRUCTION AND NOTIFY ENGINEER OF ANY DISCREPANCY.

BENCHMARKS
 TBM #1- SQUARE CUT IN TOP OF CURB AT SOUTHEAST CORNER OF PARKING LOT AT 5020 MAURFRAIS LANE, ±50' NORTHWEST OF THE END OF SIDEWALK NEAR SUBJECT PROPERTY'S SOUTHWEST CORNER.
 ELEVATION = 614.52'



WARNING: CONTRACTOR IS TO VERIFY PRESENCE AND EXACT LOCATION OF ALL UTILITIES PRIOR TO CONSTRUCTION.

		10814 JOLLYVILLE ROAD AVALON IV SUITE 200 AUSTIN, TX PHONE: 512-418-7971 FAX: 512-418-1791 © 2020 KIMLEY-HORN AND ASSOCIATES, INC. TBPE Firm No. 928	
KHA PROJECT 069264307	DATE JUNE 2023	SCALE: AS SHOWN	DESIGNED BY: XXX DRAWN BY: XXX CHECKED BY: NCB
MASTER GRADING PLAN			
DOMINIUM SAGE AT FRANKLIN PARK CITY OF AUSTIN TRAVIS COUNTY, TEXAS			
SHEET NUMBER 18 OF 51			REVISIONS No. DATE BY