

AN ORDINANCE      **2010-06-17-0572**

**AUTHORIZING A FUNDING AGREEMENT WITH THE WHISPERING OAKS HOMEOWNERS ASSOCIATION FOR UP TO \$100,000.00 FROM THE TREE MITIGATION PROGRAM OPERATING BUDGET FOR CONTAINMENT OF OAK WILT DISEASE IN THE WHISPERING OAKS SUBDIVISION LOCATED IN COUNCIL DISTRICT 8.**

\* \* \* \* \*

**WHEREAS**, preservation of our existing tree canopy, in concert with various tree planting initiatives, is an established goal of the City of San Antonio; and

**WHEREAS**, oak wilt is an aggressive disease that affects all species of oak trees and has resulted in the death of thousands of trees in central Texas; and

**WHEREAS**, the Parks and Recreation Department has developed an oak wilt disease evaluation process that includes a weighted evaluation method; and

**WHEREAS**, this evaluative process utilizing the weighted evaluation scoring was adopted by the Parks and Recreation Board at its May 24, 2010 meeting; and

**WHEREAS**, the Whispering Oaks Homeowners Association identified the presence of oak wilt disease in early 2009 in the Whispering Oaks subdivision, which is located in north central San Antonio; and

**WHEREAS**, Whispering Oaks residents have taken appropriate precautions to minimize oak tree mortality, including fungicide treatments of many of the affected trees; and

**WHEREAS**, in order to enhance the efforts to contain this invasive disease to this area, Whispering Oaks will contract for the trenching of certain areas within the subdivision; and

**WHEREAS**, utilizing the oak wilt decision matrix, the oak wilt center affecting the Whispering Oaks subdivision received a score of 82 which supports the City's participation in containment efforts; and

**WHEREAS**, under the terms and provisions of this one year agreement, the City will provide a dollar for dollar match up to \$100,000.00 for oak wilt containment; and

**WHEREAS**, city funding is authorized from the Tree Mitigation Program Operating Budget; **NOW THEREFORE**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** The City Manager or her designee or the Director of the Parks and Recreation Department or his designee, is authorized to execute a funding agreement with the Whispering Oaks Homeowners Association for up to \$100,000.00 from the Tree Mitigation Program Operating Budget for containment of oak wilt disease in the Whispering Oaks subdivision located in Council District 8. A copy of said funding agreement is attached hereto and incorporated herein for all purposes as **Attachment I**.

SW/mgc  
06/17/10  
Item# 40

**SECTION 2.** Funding in the amount of \$100,000.00 for this ordinance is available in Fund 29619000, Cost Center 2616010001, General Ledger 5201040, as part of the Fiscal Year 2010 Budget.

**SECTION 3.** Payment not to exceed the budgeted amount up to \$100,000.00 is authorized to Whispering Oaks Homeowners Association and should be encumbered with a purchase order.

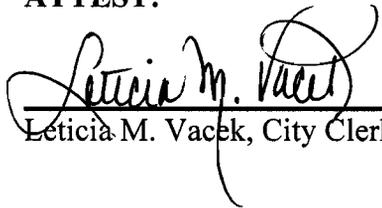
**SECTION 4.** The financial allocations in this Ordinance are subject to approval by the Chief Financial Officer (CFO), City of San Antonio. The CFO may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific Cost Centers, WBS Elements, Internal Orders, General Ledger Accounts, and Fund Numbers as necessary to carry out the purpose of this Ordinance.

**SECTION 5.** This ordinance shall become effective immediately upon passage by eight (8) or more affirmative votes of the entire City Council; otherwise, said effective date shall be ten (10) days from the date of passage hereof.

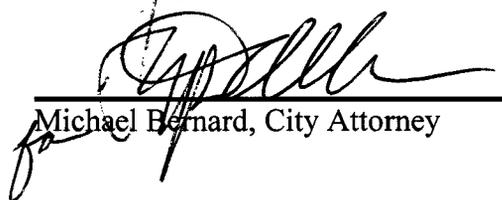
PASSED AND APPROVED this 17<sup>th</sup> day of June, 2010.

  
M A Y O R  
Julián Castro

**ATTEST:**

  
\_\_\_\_\_  
Leticia M. Vacek, City Clerk

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Michael Bernard, City Attorney



Request for  
**COUNCIL ACTION**



**Agenda Voting Results - 40**

<b>Name:</b>	6, 7, 8, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26A, 26B, 26C, 26D, 26E, 27, 29, 30, 32A, 32B, 32D, 32E, 33, 35, 36, 37, 39, 40, 41, 42						
<b>Date:</b>	06/17/2010						
<b>Time:</b>	02:23:40 PM						
<b>Vote Type:</b>	Motion to Approve						
<b>Description:</b>	An Ordinance authorizing a Funding Agreement with the Whispering Oaks Homeowners Association for up to \$100,000.00 from the Tree Mitigation Program Operating Budget for containment of oak wilt disease in the Whispering Oaks subdivision located in Council District 8. [Sharon De La Garza, Assistant City Manager; Xavier Urrutia, Director, Parks & Recreation]						
<b>Result:</b>	Passed						
<b>Voter</b>	<b>Group</b>	<b>Not Present</b>	<b>Yea</b>	<b>Nay</b>	<b>Abstain</b>	<b>Motion</b>	<b>Second</b>
Julián Castro	Mayor		x				
Mary Alice P. Cisneros	District 1		x			x	
Ivy R. Taylor	District 2		x				
Jennifer V. Ramos	District 3		x				x
Philip A. Cortez	District 4		x				
David Medina Jr.	District 5		x				
Ray Lopez	District 6		x				
Justin Rodriguez	District 7		x				
W. Reed Williams	District 8		x				
Elisa Chan	District 9		x				
John G. Clamp	District 10		x				

STATE OF TEXAS       §  
COUNTY OF BEXAR    §

**FUNDING AGREEMENT  
WHISPERING OAKS HOMEOWNERS ASSOCIATION**

This AGREEMENT (“Agreement”) is hereby made and entered into by and between the CITY OF SAN ANTONIO (“CITY”), a Texas municipal corporation, acting by and through its City Manager pursuant to Ordinance No. \_\_\_\_\_ dated May \_\_\_\_, 2010 and WHISPERING OAKS HOMEOWNERS ASSOCIATION, (“GRANTEE”), a Texas non-profit corporation, acting by and through its President, hereto duly authorized.

WHEREAS, the City of San Antonio Tree Mitigation Program supports tree preservation and tree planting programs; and

WHEREAS, trees assist with storm water runoff and erosion, remove pollutants from the air, reduce the heat island effect and energy use, provide a landscape and sound buffer between incompatible land uses, and protect and enhance property values; and

WHEREAS, preservation of our existing tree canopy, along with the addition of new trees, is an established goal of the CITY; and

WHEREAS, GRANTEE identified the presence of oak wilt disease within the Whispering Oaks subdivision in early 2009 and CITY and GRANTEE desire the implementation of containment efforts for the benefit of both the Whispering Oaks subdivision and the City of San Antonio;

NOW THEREFORE, the parties hereto (“Parties”) severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described.

**I. TERM**

1.01 This Agreement shall continue in full force and effect from the date of execution for a period of one year.

**II. GENERAL RESPONSIBILITIES**

2.01 GRANTEE shall utilize funding provided by CITY, along with funding secured by GRANTEE, for the containment of oak wilt disease within the Whispering Oaks subdivision through trenching and other remediation efforts as may be approved by CITY’s Parks and Recreation Department.

2.02 GRANTEE agrees to use a process to select its contractor(s) that includes solicitation of multiple potential entities and selection is based on a reasonable evaluation of qualifications, experience, price and the ability to meet the needs of GRANTEE and the provisions of this Agreement.

2.03 GRANTEE’S President shall be GRANTEE’S designated representative responsible for the administration of this Agreement on behalf of GRANTEE.

2.04 The Parks and Recreation Director ("Director") or his designee, is responsible for the administration of this Agreement on behalf of CITY.

2.05 Communications between CITY and GRANTEE shall be directed to the designated representatives of each as set forth in Sections 2.03 and 2.04.

### **III. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS**

3.01 GRANTEE warrants and represents that it will comply with all Federal, State and Local laws and regulations applicable to GRANTEE, and to GRANTEE'S use of City Funds.

3.02 GRANTEE agrees to ensure that its contractor(s) comply with the following in connection with activities outlined in this Agreement:

3.02.1 Government Code provisions regarding performance and payment bonds (copies of required bonds to be provided to City prior to the start of construction)

3.02.2 Government Code chapter 2258 and Ordinance No. 71312 regarding Prevailing Wage Rate regulations required for certain Public Works Contracts, including ensuring that its construction contractor submits certified payrolls to the City on a weekly basis utilizing the form required by the Wage and Hour office of CIMS.

### **IV. LEGAL AUTHORITY**

4.01 GRANTEE represents, warrants, assures, and guarantees that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement and to perform the responsibilities herein required.

4.02 GRANTEE represents, warrants, assures and guarantees that the undersigned has full legal authority to execute this Agreement on behalf of GRANTEE and to bind GRANTEE to all terms, performances and provisions herein contained.

### **V. PERFORMANCE BY GRANTEE**

5.01 GRANTEE, in accordance and compliance with the terms, provisions and requirements of this Agreement, shall enter into an agreement with one or more contractors for the containment of oak wilt disease within the Whispering Oaks subdivision through trenching and other remediation efforts as may be approved by the CITY'S Parks and Recreation Department ("Project").

5.02 GRANTEE will secure all necessary permits and approvals prior to the start of the Project, including but not limited to, all City of San Antonio permits and approval of the Project by Parks and Recreation and Public Works Departments.

5.03 GRANTEE'S agreements with its contractor(s) and any change orders will be subject to the review and approval of CITY'S Parks and Recreation Department.

### **VI. FUNDING AND ASSISTANCE BY CITY**

6.01 In consideration of GRANTEE'S performance of all services and activities set forth in this Agreement, CITY agrees to reimburse GRANTEE for all Eligible Expenses (as defined in Section 8.01) for the Project incurred hereunder on the basis of a match of \$1.00 for each \$1.00 secured by GRANTEE for the Project, up to a maximum CITY funding of \$100,000.

6.02 CITY shall not be obligated nor liable under this Agreement to any party, other than GRANTEE, for payment of any monies or provision of any goods or services.

**VII. RECEIPT, DISBURSEMENT AND ACCOUNT  
OF FUNDS BY GRANTEE**

7.01 GRANTEE understands and agrees that it shall maintain a numbered account for the receipt and disbursement of all funds received pursuant to this Agreement and further agrees that all checks and withdrawals from such account shall have itemized documentation in support of the use of such CITY funds.

7.02 GRANTEE agrees to maintain records that will provide accurate, current, separate, and complete disclosure of the status of any funds received pursuant to this Agreement. GRANTEE further agrees:

- (A) That maintenance of said records shall be in compliance with all terms, provisions, and requirements of this Agreement and with all generally accepted accounting practices; and
- (B) That GRANTEE's record system shall contain sufficient documentation to provide, in detail, full support and justification for each expenditure.

7.03 GRANTEE agrees to retain all books, records, documents, reports, written accounting policies and procedures and all other relevant materials ("Records") pertaining to activities pertinent to this Agreement for a minimum of four (4) years after the termination of this Agreement.

7.04 In order to be reimbursed for Eligible Expenses, GRANTEE shall submit to CITY a report indicating the amount of funds expended, the payee, the date paid, a copy of the paid invoice, the purpose of the payment, a copy of its agreement with the contractor(s) along with any change orders, evidence of all funds raised for the Project by GRANTEE in order to calculate the dollar for dollar match requirement, and provide supporting documentation in such detail as CITY may request. CITY shall reimburse GRANTEE a total of up to \$100,000, such reimbursement to be limited to a dollar for dollar match for funds raised by GRANTEE for the Project and not to exceed 50% of the total amount due to GRANTEE's contractor(s).

7.05 CITY agrees to provide GRANTEE written notice regarding any expenditure the CITY reasonably determines to be outside the permissible parameters of this Agreement. GRANTEE shall have thirty (30) days from receipt of such notice to cure the deficiency or, in the event that payment has been made to GRANTEE, refund to the CITY those funds, determined to:

- (A) Have not been spent by GRANTEE strictly in accordance with the terms of this Agreement; or
- (B) Not be supported by adequate documentation to fully justify the expenditure.

7.06 Unless CITY has questions concerning an expenditure by GRANTEE, CITY agrees to provide payment to GRANTEE within twenty (20) calendar days of receipt of a request for reimbursement as defined above.

7.07 Upon termination of this Agreement, should any expense or charge be subsequently disallowed or disapproved using the same criteria as set out in Section 7 as a result of

any auditing or monitoring by CITY, GRANTEE shall refund such amount to City within thirty (30) calendar days of CITY's written request therefore wherein the amount disallowed or disapproved shall be specified.

- 7.08 Within sixty (60) days following the final payment by CITY to GRANTEE under the terms of this Agreement, GRANTEE will provide to CITY a copy of the final agreement and any change orders between GRANTEE and its contractor(s) and a copy of all paid invoices and payments made by GRANTEE to its contractor(s).

#### **VIII. ALLOWABLE EXPENDITURES AND OWNERSHIP OF PROPERTY**

8.01 GRANTEE may use the funds provided under the terms of this Agreement for costs directly associated with the containment of oak wilt disease through trenching and other remediation efforts as may be approved by CITY's Parks and Recreation Department ("Eligible Expenses"). Expenditures of the funds by GRANTEE provided under this Agreement shall only be allowed if incurred directly and specifically in the performance of and in compliance with this Agreement and all applicable city, state and federal laws, regulations and/or ordinances.

#### **IX. FURTHER REPRESENTATIONS, WARRANTIES AND COVENANTS**

- 9.01 GRANTEE further represents and warrants that as of the date hereof:
- (A) All information, data or reports heretofore or hereafter provided to CITY is, shall be, and shall remain complete and accurate in all material respects as of the date shown on the information, data, or report, and that since said date shown, shall not have undergone any significant change without written notice to CITY.
  - (B) It is financially stable and capable of fulfilling its obligations under this Agreement and that GRANTEE shall provide CITY immediate written notice of any adverse material change in the financial condition of GRANTEE that may materially and adversely effect its obligations hereunder.
  - (C) No litigation or proceedings are presently pending or to GRANTEE'S knowledge, threatened against GRANTEE.
  - (D) None of the provisions contained herein contravene or in any way conflict with the authority under which GRANTEE is doing business or with the provisions of any existing indenture or agreement of GRANTEE.

#### **X. ACCESSIBILITY OF RECORDS**

10.01 At any time during normal business hours and as often as CITY may deem necessary, upon three (3) days written notice, GRANTEE shall make all of its records pertaining to this Agreement available to CITY or any of its authorized representatives, and shall permit CITY or any of its authorized representatives to audit, examine, and make excerpts and/or copies of same.

10.02 GRANTEE agrees and represents that it will cooperate with CITY, at no charge to the CITY, to satisfy, to the extent required by law, any and all requests for information received by CITY under the Texas Public Information Act or related laws pertaining to this Agreement.

## XI. MONITORING AND EVALUATION

11.01 GRANTEE agrees that CITY may carry out reasonable monitoring and evaluation activities, and GRANTEE shall provide reasonable access to CITY for such activities, so as to ensure compliance by GRANTEE with this Agreement and with all other laws, regulations and ordinances related to the performance hereof.

## XII. INDEMNITY

12.01 GRANTEE covenants and agrees to **FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS**, the CITY and the elected officials, employees, officers, directors, volunteers and representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the City directly or indirectly arising out of, resulting from or related to GRANTEE'S activities under this Agreement, including any acts or omissions of GRANTEE, any agent, officer, director, representative, employee, consultant or subcontractor of GRANTEE, and their respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of City, its officers or employees, in instances where such negligence causes personal injury, death, or property damage. **IN THE EVENT GRANTEE AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

12.02 The provisions of this **INDEMNITY** are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. GRANTEE shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or GRANTEE known to GRANTEE related to or arising out of GRANTEE'S activities under this Agreement and shall see to the investigation and defense of such claim or demand at GRANTEE'S cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving GRANTEE of any of its obligations under this paragraph.

## XIII. INSURANCE

13.01 GRANTEE will ensure that its contractor(s) comply with the insurance requirements outlined in Section 29-173 of the San Antonio Municipal Code.

## XIV. NONDISCRIMINATION

14.01 GRANTEE covenants that it, or agents, employees or anyone under its control, will not discriminate against any individual or group on account of race, color, sex, age, religion, national origin, handicap or familial status, in employment practices or in the use of or admission to the premises, which said discrimination GRANTEE acknowledges is prohibited.

## **XV. CONFLICT OF INTEREST**

15.01 GRANTEE covenants that neither it nor any member of its governing body or of its staff presently has any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Agreement. GRANTEE further covenants that in the performance of this Agreement, no persons having such interest shall be employed or appointed as a member of its governing body or of its staff.

15.02 GRANTEE further covenants that no member of its governing body or of its staff shall possess any interest in, or use their position for, a purpose that is or gives the appearance of being motivated by desire for private gain for themselves or others, particularly those with which they have family, business, or other ties.

15.03 No member of CITY'S governing body or of its staff who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this Agreement shall:

- (A) Participate in any decision relating to this Agreement which may affect his or her personal interest or the interest of any corporation, partnership, or association in which he or she has a direct or indirect interest;
- (B) Have any direct or indirect interest in this Agreement or the proceeds thereof.

## **XVI. POLITICAL ACTIVITY**

16.01 None of the activities performed hereunder shall involve, and no portion of the funds received hereunder shall be used, either directly or indirectly, for any political activity including, but not limited to, an activity to further the election or defeat of any candidate for public office or for any activity undertaken to influence the passage, defeat or final content of local, state or federal legislation.

## **XVII. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL**

17.01 All finished or unfinished reports, documents, data, studies, surveys, charts, drawings, maps, models, photographs, designs, plans, schedules, or other appended documentation to any proposal or contract, and any responses, inquiries, correspondence and related material submitted by GRANTEE, shall, upon receipt, become the property of CITY.

## **XVIII. CONTRACTING**

18.01 Any work or services contracted hereunder shall be contracted only by written contract or agreement and, unless specific waiver is granted in writing by CITY, shall be subject by its terms to each and every provision of this Agreement. Compliance by contractors with this Agreement shall be the responsibility of GRANTEE. GRANTEE is responsible to ensure that all permits required for the activities under this Agreement are obtained.

18.02 CITY shall in no event be obligated to any third party, including any sub-contractor of GRANTEE, for performance of or payment for work or services.

### **XIX. SEVERABILITY OF PROVISIONS**

19.01 If any clause or provision of this Agreement is held invalid, illegal or unenforceable under present or future federal, state or local laws, including but not limited to the City Charter, City Code, or ordinances of the City of San Antonio, Texas, then and in that event it is the intention of the Parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of the Parties hereto that in lieu of each clause or provision of this Agreement that is invalid, illegal, or unenforceable, there be added as a part of the Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

### **XX. DEFAULT**

20.01 Upon default by GRANTEE in the performance of its obligations hereunder, CITY shall give GRANTEE notice of the same and GRANTEE shall have 30 days following receipt of written notice of default from CITY (or such reasonably longer time as may be necessary provided GRANTEE commences the cure within 30 days and continuously and diligently pursues the cure to completion) to cure such default. If GRANTEE fails to timely cure such default, CITY may pursue all remedies available in law or at equity and/or other rights CITY may have in this Agreement; provided that it is expressly agreed that neither Party hereto shall have the right to seek consequential or punitive damages against the other for any default under this Agreement.

20.02 Upon default by CITY in the performance of its obligations hereunder GRANTEE shall give CITY notice of the same and CITY shall have 30 days following receipt of written notice of default from GRANTEE (or such reasonably longer time as may be necessary provided CITY commences the cure within 30 days and continuously and diligently pursues the cure to completion) to cure such default. If CITY fails to timely cure such default, GRANTEE may pursue all remedies available in law or equity and/or other rights GRANTEE may have in this Agreement, subject to the limitations set forth in Section 20.01.

### **XXI. NON-WAIVER OF PERFORMANCE**

21.01 No waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either Party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the Party to be charged.

21.02 No act or omission of either Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to either Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

21.03 No representative or agent of CITY may waive the effect of the provisions of this Article without formal action from the City Council.

**XXII. NOTICES**

22.01 For purposes of this Agreement, all official communications and notices among the Parties shall be deemed sufficient if in writing and shall be (1) mailed, registered or certified mail, postage prepaid, return receipt requested, or (2) delivered by a nationally recognized overnight air or ground courier service to the addresses set forth below:

**CITY:** Director Parks and Recreation  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

**GRANTEE:** President  
Whispering Oaks Homeowners Association  
P O Box 780454  
San Antonio, Texas 78278

Such Notice shall be deemed received within three (3) days after deposit in the U.S. mail, upon hand-delivery, or on the first business day after deposit with an overnight air or ground courier service. Notice of change of address by either Party must be made in writing and mailed to the other Party's last known address within five (5) business days of such change.

**XXIII. PARTIES BOUND**

23.01 This Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns, except as otherwise expressly provided herein.

**XXIV. RELATIONSHIP OF PARTIES**

24.01 Nothing contained herein shall be deemed or construed by the Parties hereto, or by any third party, as creating the relationship of principal and agent, partners, joint venturers or any other similar such relationship between the Parties hereto.

**XXV. TEXAS LAW TO APPLY**

25.01 This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the Parties created hereunder are performable in Bexar County, Texas.