

1. There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations or map in that:

The four interpretations ("Interpretation") are based on the applicant's statement that the outdoor amphitheater will be used for "Religious Assembly." "25-2-6(41) Religious Assembly use is regular organized religious or religious education in a permanent or temporary building. The use excludes private primary or secondary educational facilities, *community recreational facilities*, day care facilities, and parking facilities." (emphasis added)

The Interpretation approved the outdoor amphitheater as a principal use of the property. This means, the applicant could just build the outdoor amphitheater and parking on the property. Given the large size of the outdoor amphitheater, it is beyond question or any reasonable doubt that the Interpretation far exceeds the authority of the Director to approve a use that is strictly prohibited in RR zoning or to administratively approve a use that can only be approved as a conditional use.

According to the Texas Supreme Court, the Texas Religious Freedom Act ("TFRA") provides that "a government agency may not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person...is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest." There can be no question that the City has a compelling interest in regulating the location and community impacts of outdoor amphitheaters. It is also beyond question that TFRA does not authorize an administrative approval process when Chapter 25-2 requires a conditional use permit approval process for outdoor amphitheater..

2. An appeal of use provisions could clearly permit a use which is in character with the uses enumerated for the various zones and with the objectives of the zone in question because:

The Interpretation authorizes a principal use (outdoor amphitheater) that is not in character with a RR zoning district or any residential district. The Interpretation authorizes a principal use that is not in character with any zoning district in the City. An outdoor amphitheater, particularly one that is for 3,500 people is a commercial type use that requires a conditional use permit. See 25-2-491 Use Chart.

3. The interpretation will not grant a special privilege to one property inconsistent with other properties or uses similarly situated in that:

The Interpretation being appealed grants an unprecedented special privileges to the applicant by allowing the applicant to avoid 1) filing a re-zoning application to obtain a base commercial zoning district in which outdoor entertainment is a conditional use; and 2) requirement of obtaining a conditional use permit. The interpretation grants the applicant a substantive right or privileges not allowed under Chapter 25-2 by 1) authorizing a principal use (outdoor amphitheater) prohibited in a RR zoning district; and 2) authorizing a conditional use without obtaining a conditional use permit. The Interpretation denies due process to the adjoining landowners and usurps the authority of the Planning Commission to approve a conditional use permit.

The reason such venues require conditional use permit is due to the significant, adverse impacts on adjoining land. Therefore, an outdoor amphitheater use can not be approved administratively.

Pursuant to interpretation being appealed, so long as a religious assembly use exists on the land, an outdoor amphitheater can be built and operated . Further, the interpretation authorizes uses that are otherwise prohibited in the RR district so long as the use is for charitable purposes or any activity that constitutes "Religious Assembly, such as "Musical or theatrical performances." Please note the bolded language. The interpretation gives any owner of the property that has a tax exemption to hold as many "Musical and theatrical performances" that it wants.

APPLICANT/AGGRIEVED PARTY CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed  Printed KIM BUTLER

Mailing Address 7100 BRIGHT STAR LANE

City, State & Zip AUSTIN , TX 78736 Phone 512-288-3659

OWNER'S CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed _____ Printed _____

Mailing Address _____

City, State & Zip _____ Phone _____

Robert Kleeman
9607 Dawning Court
Austin, Texas 78736

October 21, 2011

Mr. Jeff Jack, Chair
Board of Adjustment
City of Austin
P.O. Box 1088
Austin, Texas 78767

Re: Interpretation Appeal by Hill Country Estates Homeowners Association
("HCEHA"); SP-2011-0185C ("Permit")

Dear Mr:

I am a resident of Hill Country Estates and a member of the HCEHA. I am writing this letter on behalf of Kim Butler who is the Secretary of the HCEHA. I am tendering this Interpretation Appeal within 20 days of the HCEHA receiving written confirmation that the City has administratively approved the Permit that allows the construction and operation of a conditional use.

As described in Section 25-1-131(A)(1)(c), the HCEHA is a neighborhood organization that has an interest in the development of the 53.113 acres located at 8901 W. SH 71, Austin, Texas. The 53 acres is the property described in SP-2011-0185C and is described in the restrictive covenant recorded in Document No. 2011146026, Official Public Records of Travis County, Texas ("Property"). The HCEHA has met the requirements of Section 25-1-131(C) by communicating its concerns regarding the proposed development described in the permit. Enclosed is a copy of correspondence to City staff regarding site development permit application case SP-2011-0185C ("Case"). Also, please see the enclosed print of the screen from the City's web site regarding the Case to verify HCEHA's interested party status.

As stated in the previous correspondence to City staff and the Interpretation Appeal application form, HCEHA appeals the administrative decision to approve an outdoor entertainment venue with 1,000 fixed seats and a hill side seating area that the applicant has represented can hold an additional 2,500 people. The Permit authorizes the use of the Venue for concerts and musical and theatrical performances. Under Chapter 25-2-4(45), such a structure and use are classified as Outdoor Entertainment. Under Section 25-2-491(A), this type of structure is not a permitted use in any zoning district and is a conditional use in a limited number of commercial zoning districts. The Property is zoned RR and is surrounded by residentially zoned property.

Outdoor Entertainment is a strictly prohibited use in all residential zoning districts. Even where an Outdoor Entertainment venue is conditionally allowed, it requires a conditional use

permit. By classifying Outdoor Entertainment as a conditionally use, Chapter 25-2 provides adjacent property owners procedural rights and protections by requiring a Land Use Commission to hold a public hearing before approving a conditional use permit. Further, Chapter 25-5 specifies that conditional use permits are purely discretionary in nature, just like zoning. In other words, approval of a conditional use permit is a legislative function.

By interpretation, City staff has usurped the legislative authority of the Planning Commission by administratively approving the Permit which includes the Venue. The administrative approval of the Permit has denied the adjoining property owners their due process rights granted by Chapter 25-2. That is, Outdoor Entertainment is strictly prohibited in RR zoning. Under Chapter 25-2, the applicant should have requested a zoning change to a zoning district in which Outdoor Entertainment is allowed as a conditional use. If the Permit applicant obtained the requisite re-zoning, then the Permit applicant would be required to file a conditional use permit application. The HCEHA and its members have been denied their rights under Chapter 25-2. As a result of the interpretations being appealed, the Permit applicant has received several special benefits and privileges- the administrative approval of a use and structure without appropriate zoning or a conditional use permit.

Finally, one of the interpretations being appealed has the effect of substantively amending the definition of "Religious Assembly" in Chapter 25-2 by adding an outdoor entertainment venue as an included use even though Section 25-2-(41) clearly excludes "community recreational facilities" as religious assembly. Again, amending the definition of Religious Assembly in Chapter 25-2 is a legislative function of the City Council. In effect, approval of the Permit constitutes an amendment of 25-2-491 to show Outdoor Entertainment as a permitted use in all zoning districts if the applicant claims the use is a religious assembly.

The HCEHA requests the Board of Adjustment to grant its appeal and instruct City staff to take immediate action to cancel the approval of the Permit so that the Permit applicant is required to following the requirements of Chapter 25-2, including the necessity of obtaining a conditional use permit for an appropriately zoned tract of land.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert Kleeman", with a long horizontal flourish extending to the right.

Robert Kleeman

Enclosures



City of Austin

Law Department

301 W. 2nd Street, P.O. Box 1088
Austin, Texas 78767-1088
(512) 974-2268

Writer's Direct Line
512-974-2974

Writer's Fax Line
512-974-6490

October 27, 2011

Robert Kleeman
MUNSCH HARDT KOPF & HARR, P.C.
Frost Bank Tower
401 Congress Avenue, Suite 3050
Austin, Texas 78701-4071

Re: Promiseland Zoning Appeal (SP-2011-0185C)

Dear Robert:

Per your request, I am writing to explain why the Planning & Development Review Department ("PDRD") has rejected your administrative appeal of October 21, 2011 as untimely.

City Code Section 25-1-182 (*Initiating an Appeal*) requires that an administrative appeal be submitted no later than 20-days after the decision was made. In this case, while Title 25 does provide a right of appeal for zoning determinations, the decision to allow construction of the outdoor amphitheater as part of a religious assembly use was made by Director Guemsey on December 23, 2008, which is well beyond the 20-day limitations period. I have attached a copy of the use determination, which was made by email, along with the applicant's initial request and more recent correspondence from staff outlining conditions on the project.

As we discussed, in most cases the date of a zoning use determination will be the date of the site plan or permit approval for the project. However, in some cases use determinations are made by the Director well before a development application is submitted, and that is what occurred in this case.

We recognize that this process is more informal than what is required for a development approval. As I mentioned, some cities require a separate application if a developer wants to obtain (and later rely on) a use determination before applying for permits. However, the City's Land Development Code does not require a formal application for a use determination, and there

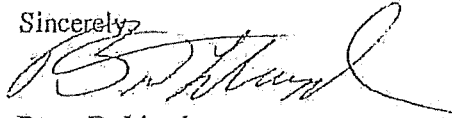
Robert Kleeman

October 27

Page 2

is no legal requirement against making such determinations by correspondence. The Board of Adjustment has considered timely appeals of such determinations in the past.

Sincerely,

A handwritten signature in dark ink, appearing to read "Brent D. Lloyd", written over a horizontal line.

Brent D. Lloyd
Assistant City Attorney

cc Greg Guernsey
George Zapalac
Sarah Graham



City of Austin
Law Department

301 W. 2nd Street, P.O. Box 1088
Austin, Texas 78767-1088
(512) 974-2268

EXHIBIT "2" 46

Writer's Direct Line
512-974-2974

Writer's Fax Line
512-974-6490

June 13, 2013

Robert Kleeman
Munsch Hardt Kopf & Harr
401 Congress Avenue, Ste. 3050
Austin, TX 78701

Re: Promiseland West—Appeals of Building Permit for Amphitheater

Dear Mr. Kleeman:

In support of the Director of Planning & Development Review ("PDRD") and the Building Official, I am writing in response to the two appeals you filed to the above-referenced building permit issued for an amphitheater previously approved in connection with the Promiseland West site plan.

After reviewing your submittals and the prior record in this case, the Director has determined that the appeals are untimely and do not fall within the subject matter jurisdiction of either the Board of Adjustment ("BOA") or the Building & Fire Code Board of Appeals ("BFCBA"). Following is a summary of the reasons for the Director's decision.

I. BOA Appeal

A. *Prior Zoning Determinations*

Though styled as an appeal of the May 2013 building permit,¹ the bulk of your BOA appeal challenges prior administrative determinations and staff-level communications made in connection with the amphitheater between 2007 and 2011. The allegations at pages 1-9 focus on the Director's 2008 zoning use determination and the 2011 site plan approval and related restrictive covenant, along with various staff emails from 2007-2008.

¹ Since your appeals allege error in issuance of the building permit, it is assumed for purposes of this letter that you are challenging BP No. 2013-047496-BP, which is attached hereto for reference. The document included and cited in both appeals, however, is the separately issued plan review.

Appeal of these prior determinations is untimely under City Code § 25-1-182 (*Initiating an Appeal*) for reasons explained in my letters to you on October 27 and December 30, 2011, both of which are attached to your appeal. Additionally, on March 21, 2013, the Travis County District Court (Livingston, J.) granted a plea to the jurisdiction filed by the City in response to litigation brought by your client challenging these same determinations. As you are aware, that case remains pending on your client's appeal to the Third Court.

B. Building Permit

A copy of the building permit, issued on May 10, 2013, is attached hereto for reference, but was not included with your appeal as required under City Code § 25-1-183(3) (*Information Required in Notice of Appeal*). The only error alleged in connection with the permit is a notation on the City's website listing the structural "Sub Type" as: "Amusement, Soc. & Rec. Bldgs."

That notation does not appear on the actual building permit, nor does it constitute a "use determination" under Section 25-1-197 (*Use Determination*) or in any way authorize new uses not allowed under the City's zoning regulations, as previously construed by the Director. Rather, the sub-type notation references occupancy categories for which the structure is approved under the 2009 International Building Code, as adopted in City Code § 25-12-1 (*Building Code*). From a construction standpoint, structures are frequently rated for occupancy types under the Building Code that may not be allowed under applicable zoning regulations.

Your appeal does not challenge the Building Official's designation of the appropriate occupancy rating under the Building Code. Moreover, since the Building Code is not a zoning ordinance, issues related to structural requirements are not within the BOA's subject matter jurisdiction. See Texas Local Gov't Code § 211.009(1) (authorizing BOA appeals for determinations made under zoning enabling statute or local zoning ordinances); City Code Section § 2-1-111 (F) (authorizing BOA appeals for determinations made under Chapter 25-2 (*Zoning*)).

II. BFCBA Appeal

Your appeal to the BFCBA focuses on the same zoning determinations covered in your BOA appeal. In addition to being time-barred, zoning determinations are beyond the jurisdiction of the BFCBA, which is limited to "appeals of orders, decisions, or determinations made by the building official *relating to the application and interpretations of*

Robert Kleeman
June 13, 2013
Page 3

the Building Code and Fire Code.” See City Code Section §2-1-121(C) (Building and Fire Code Board of Appeals) (emphasis added).

The appeal does not allege that the building permit violates the Building Code or the Fire Code, neither of which is mentioned. Like the BOA appeal, it also fails to include a copy of the actual building permit and instead focuses on notations appearing on the city website in connection with the separately issued *plan review* (No. 2013-002081PR), which is not an appealable decision. See City Code § 25-11-93 (*Appeal*) (granting a right of appeal for a decision by the building official to “grant or deny a *permit* to the [BFCBA]”) (emphasis added).

Based on the reasons explained above, the Director has determined that your appeals are untimely and beyond the jurisdiction of either the BOA or the BFCBA. As always, please do not hesitate to contact me if you have questions or concerns regarding this matter.

Sincerely,



Brent D. Lloyd
Assistant City Attorney

cc Sue Edwards
Greg Guernsey
Leon Barba

SNEED, VINE & PERRY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
ESTABLISHED 1926

900 CONGRESS AVENUE, SUITE 300
AUSTIN, TEXAS 78701

TELEPHONE (512) 476-6955

FACSIMILE (512) 476-1825

Writer's Direct Dial:
(512) 494-3135

Writer's e-mail address:
rkleeman@sneedvine.com

July 2, 2013

By Hand Delivery

Board of Adjustment
c/o Susan Walker
505 Barton Springs Road
Room 530
Austin, Texas 78704

Re: Appeal of Decision by Greg Guernsey to Not forward May 28, 2013 Appeal to the Board of Adjustment For the Issuance of a Building Permit for an Outdoor Amphitheater, 8901 West State Highway 71, Case Number 2013-002081PR ("Permit")

Dear Chairman Jack and Members of the Austin Board of Adjustment:

This firm represents the Hill Country Estates Home Owners Association ("HCE") and the Covered Bridge Property Owners Association, Inc. ("CB") with respect to their appeal of the issuance of the Building Permit. CB and HCE meet the requirements of an interested party, as defined by the City Code.

On May 10, 2013, the City of Austin issued a building permit for an amphitheater to be constructed on 53 acres located at 8901 West State Highway 71, Austin, Texas 78736 (the "Property"). The Permit was issued in conjunction with City case number 2013-002081 PR.

On May 28, 2013 a representative of CB and HCE delivered to City staff an appeal to the Board of Adjustment and an appeal to the Building & Fire Code Board of Appeals regarding the May 8, 2013 approval of a permit and the issuance of the May 10, 2013 building permit for the outdoor amphitheater which is the first building permit issued for the amphitheater.¹ In addition to the appeal, the CB/HCE representative also delivered a standing letter and the appropriate filing fee for an appeal to the Board of Adjustment. A copy of a confirming email sent to Leon Barba on May 28, 2013, who took delivery of the appeal related documents, is enclosed. Also enclosed are copies of the May 28, 2013 appeal, the standing letter, and the filing fee check. The May 28, 2013 CB/HCE appeal is incorporated into this letter and into this appeal for all purposes.

¹ This letter and the accompanying appeal application do not pertain to the CB/HCE appeal to the Building & Fire Code Board of Appeals.

On June 14, 2013, Assistant City Attorney Brent Lloyd sent a letter dated June 13, 2013 to me regarding the May 28, 2013 appeal to the Board of Adjustment. In his June 13, 2013 letter, Mr. Lloyd wrote:

"After reviewing your submittals and the prior record in this case, the Director of Planning and Development Review has determined that the appeals are untimely and do not fall within the subject matter jurisdiction of either the Board of Adjustment or the Building & Fire Code Board of Appeals."

The balance of Mr. Lloyd's letter summarizes "the reasons for the Director's decision." According to Mr. Lloyd's June 13, 2013 letter, these are all decisions that Mr. Guernsey made after Mr. Guernsey received and reviewed the May 28, 2013 CB/HCE appeal.

CB and HCE are appealing the decisions described in the June 13, 2013 Brent Lloyd letter. The decisions being appealed are described in the Appeal Application. A copy of the June 13, 2013 Brent Lloyd letter is enclosed with the Appeal Application.

Pursuant to Section 211.010(a)(1), Texas Local Government Code ("TLGC"), HCE and CB file this appeal of Director Guernsey's decision to not forward the CB/HCE May 28, 2013 appeal to the Austin Board of Adjustment. Pursuant to Section 211.009(a)(1), the Board of Adjustment has the authority to "hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of [Subchapter A of Chapter 211 of TLGC] or an ordinance adopted under [Subchapter A of Chapter 211 of TLGC]."

The present CB/HCE appeal to the Board of Adjustment alleges that Director Guernsey made one or more errors in his decision to not forward the May 28, 2013 CB/HCE appeal to the Board of Adjustment. The present CB/HCE appeal alleges that Director Guernsey's decision is erroneous under Subchapter A, Chapter 211, TLGC and under Chapter 25-2 of the Austin Land Development Code.

CB, HCE, and their members are aggrieved parties because their substantive and procedural rights under Section 211.010(a)(1) TLGC and under the City Code have been denied them by Mr. Guernsey's decision to pass judgment on the May 28, 2013 appeal and his decision to not forward the May 28, 2013 appeal to the Board of Adjustment. In other words, Mr. Guernsey has made a determination in the enforcement of Subchapter A, Chapter 211, TLGC and under Chapter 25-2 of the Austin Land Development Code. Section 211.009(a)(1), TLGC establishes the Board of Adjustment's authority to hear and decide an appeal alleging an error by an administrative official in the enforcement of Subchapter A of Chapter 211, TLGC and Chapter 25-2 of the Austin Land Development Code, which was adopted pursuant to Subchapter A of Chapter 211, TLGC.

HCE and CB are registered neighborhood associations and meet the requirements of Section 25-1-131(A) & (C) LDC to be Interested Parties by communicating their respective concerns regarding the proposed development described in the Building Permit. The enclosed May 28, 2013 appeal materials includes copies of email correspondences to City staff requesting recognition of Interested Party status with respect to the Building Permit application and the refusal of City Staff to do so. Mr. Frank Goodloe is treasurer of CB and Margaret Butler is the President of the HCE. Both HCE and CB are registered neighborhood associations with the City of Austin. All materials establishing the standing of CB and HCE in the May 28, 2013 appeal are incorporated into this letter for all purposes.

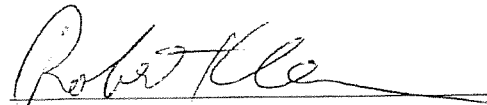
Importantly, the reasons given in the June 13, 2013 Brent Lloyd letter for Mr. Guernsey not forwarding the May 28, 2013 appeal to the Board of Adjustment do not include any assertion that CB or HCE are not interested parties, as defined by Section 25-1-131. Mr. Guernsey's reasons do not include his finding that the May 28, 2013 appeal was filed more than 20 days after the issuance of the May 10, 2013 building permit.

The contact information for Margaret Butler is (512) 699-6692 and her mailing address is 7100 Bright Star Lane, Austin, Texas 78736. The contact information for Frank Goodloe is (512) 906-1931 and his mailing address is 6705 Covered Bridge, Unit 10, Austin, Texas 78736.

Please let me know if there are any questions.

Sincerely,

SNEED, VINE & PERRY, P.C.

By: 
Robert Kleeman

RJK:dm
Enclosures

or other reproduction of this message is strictly prohibited.

From: Kleeman, Robert [<mailto:rkleeman@munsch.com>]

Sent: Tuesday, May 28, 2013 3:19 PM

To: Leon.Barba@austintexas.gov

Subject: Appeals Regarding Building Permit for Outdoor Amphitheater 8901 West SH 71 [MH-MHDocs.FID894290]

Leon:

Thanks for receiving the appeal to the Board of Adjustment and the appeal to the Building and Fire Code Commission today. For your convenience, I have attached PDFs of the two appeals, the standing letter for the Board of Adjustment appeal and the filing fee check that I left you.

Please let me know if there is any additional information required to complete the appeal application.

Brent D. Lloyd
Assistant City Attorney
(512) 974-2974

From: Robert Kleeman [mailto:rkleeman@sneedvine.com]
Sent: Tuesday, June 11, 2013 9:15 AM
To: Barba, Leon; Edwards, Sue; Lloyd, Brent
Subject: FW: Appeals Regarding Building Permit for Outdoor Amphitheater 8901 West SH 71 [MH-MHDocs.FID894290]

Dear Mr. Barba:

I represent the Covered Bridge Property Owners Association and the Hill Country Estates Homeowners Association regarding their appeals of the issuance of a building permit for an outdoor amphitheater on RR zoned property located at the above referenced address. I am following up with you regarding the appeals to the Board of Adjustment and the Building and Fire Code Commission that I delivered to you on May 28, 2013. Copies of those appeals and the check for the payment of filing fee for the Board of Adjustment appeal are attached.

Has my clients' Board of Adjustment appeal been forwarded to the Board of Adjustment as required by Section 211.010(b) of the Texas Local Government Code? If not, please let me know when you anticipate that my clients' appeal and "all papers constituting the record" of the of the building permit being appealed will be forwarded to the Board of Adjustment. If you do not intend to forward my clients' appeal and the record of the building permit to the Board of Adjustment, please notify as soon as such a decision is made.

Likewise, I have the same questions regarding my clients' appeal to the Building and Fire Code Commission.

Since our meeting on May 28, 2013, I have changed law firms. I sent you my new contact information by email on June 8, 2013. I resent my V-Card yesterday morning. Out of an abundance of caution, I have also attached my V-Card to this email

Please confirm your receipt of this email.

Robert Kleeman
Sneed, Vine & Perry, P.C.
900 Congress Avenue, Suite 300
Austin, Texas 78701
(512) 476-6955 – main
(512) 494-3135 - direct
(512) 476-1825 – fax

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CITY OF AUSTIN
APPLICATION TO BOARD OF ADJUSTMENT
INTERPRETATIONS
PART I: APPLICANT'S STATEMENT
(Please type)

STREET ADDRESS: 8901 West State Highway 71, Austin, Texas 78736.

LEGAL DESCRIPTION: 53.11 acres as described in a Restrictive Covenant recorded in Document No. 2011146026, Official Public Records of Travis County, Texas ("Property")

Lot (s) _____ Block _____ Outlot _____ Division _____

ZONING DISTRICT: RR

We, Margaret Butler, on behalf of myself and as Authorized Agent for Kim Butler and as Authorized Agent for Hill Country Estates Home Owners Association and Frank Goodloe, on behalf of myself and as Authorized Agent for Covered Bridge Property Owners Association, Inc., affirm that on July 2, 2013, we hereby apply for an interpretation hearing before the Board of Adjustment.

The Director of Planning and Development Review Department interpretations regarding his decision to not forward to the Board of Adjustment the appeal submitted by Hill Country Estates Home Owners Association ("HCE") and the Covered Bridge Property Owners Association ("CB") regarding the issuance of a building permit in connection with City Case No. 2013-002081-PR for the Property ("Permit")¹:

1. The Director of Planning and Development Review ("Director") has determined that the Board of Adjustment has no subject matter jurisdiction under either Section 211.009(a) (1), Texas Local Government Code or Section 2-1-111, City Code to hear an appeal that alleges that a building permit was issued in error.
2. The Director has the authority under Subchapter A, Chapter 211, Texas Local Government Code and the City Code to determine the subject matter jurisdiction of Board of Adjustment.

¹ City staff describes the Permit has building permit having City case No. 2013-047496-BP. CB and HCE are appealing the issuance of the permit in connection with City Case No. 2013-002081-PR. Even if the City has assigned a new case number to the issued permit, it is the same permit that is appealed.

3. The Director has determined that the Board of Adjustment has no subject matter jurisdiction under Section 211.009(a)(1), Texas Local Government Code or Section 2-111(F), City Code to hear the May 28, 2013 CB/HCE appeal filed pursuant to Section 211.010(a)(1) that alleges the Permit was issued in error.

4. The Director has the discretionary authority under Section 211.010(b), Texas Local Government Code to not forward to the Board of Adjustment the May 28, 2013 CB/HCE appeal filed pursuant to Section 211.010(a)(1), Texas Local Government Code.

5. The Director has determined that the May 28, 2013 CB/HCE appeal is untimely with respect to the Permit issued on May 8, 2013.

6. The Director has determined that "under the prior record in this case," CB and HCE had the right to file only one appeal to the Board of Adjustment regarding the proposed outdoor amphitheater project on the Property. In other words, since late January 2009, CB and HCE have had no right under Section 211.010(a)(1), Texas Local Government Code to appeal any decision relating to the outdoor amphitheater, including the May 8, 2013 issuance of the Permit.

7. The Director has determined that CB and HCE may not file any appeal to the Board of Adjustment regarding the issuance of the Permit.

We feel the correct interpretations are:

1. The Board of Adjustment has subject matter jurisdiction under Section 211.009(a)(1), Texas Local Government Code and Section 2-111(F), City Code to hear and decide an appeal that alleges an error in the decision to issue a building permit if the alleged error relates to zoning regulations applicable to the subject property and the permit.

2. The Board of Adjustment has subject matter jurisdiction under Section 211.009(a)(1), Texas Local Government Code to hear and decide an appeal that alleges an error in the decision to issue any permit if the alleged error relates to the zoning regulations applicable to the subject property.

3. The Director does not have the authority to refuse the filing of an appeal made by an aggrieved person under Section 211.010(a)(1), Texas Local Government Code if the aggrieved person has substantially completed the applicable application form and submitted same within 20 days of the administrative decision being appealed.

4. An aggrieved person, who is not the permit applicant, may appeal a permit approval, including a permit that incorporates an earlier interpretation by City staff, if the error alleged relates to zoning regulations applicable to the permit and the subject property.

5. All appeals that are timely and complete pursuant to the City Code and are filed by an aggrieved person pursuant to Section 211.010(a) (1), Texas Local Government Code, must be forwarded to the Board of Adjustment.

6. The Director does not have the authority under Subchapter A of Chapter 211, Texas Local Government Code or the City Code to determine the subject matter jurisdiction of the Board of Adjustment over an appeal.

NOTE: The board must determine the existence of, sufficiency of and weight of evidence supporting the findings described below. Therefore, you must complete each of the applicable findings statements as part of your application. Failure to do so may result in your application being rejected as incomplete. Please attach any additional support documents.

1. There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations or map in that:

This is an appeal of decisions made by the Director of PDRD on June 14, 2013 regarding an appeal to the Board of Adjustment filed on May 28, 2013 by CB and HCE. Specifically, this is an appeal of the Director of PDRD's determinations of his authority to enforce Subchapter A, Chapter 211, Texas Local Government Code and Chapter 25-2, City Code.

A. Background Facts. On May 28, 2013, CB and HCE filed an appeal with Leon Barba appealing the issuance of the Permit on May 8, 2013. The appeal alleged an error in the issuance of the Permit because the activities described in the permit application are not authorized under the present zoning applicable to the Property. A copy of the May 28, 2013 CB/HCE Appeal is attached and made a part of this appeal for all purposes.

On June 14, 2013, Assistant City Attorney Brent Lloyd transmitted a letter to legal counsel for CB and HCE in support of the decision of the Director of PDRD to deny the May 28, 2013 CB/HCE appeal filed with the Board of Adjustment. In the letter dated June 13, 2013, Mr. Lloyd wrote:

"After reviewing your submittals and the prior record in this case, the Director has determined that the appeals are untimely and do not fall within the subject matter jurisdiction of either the Board of Adjustment ("BOA") or the Building & Fire Code Board of Appeals ("BFCBA")."

CB and HCE understand one of the purposes of Mr. Lloyd's June 13, 2013 letter is to inform CB and HCE that the Director of PDRD will not forward the May 28, 2013 CB/HCE appeal of the issuance of the Permit to the Board of Adjustment. The determinations described in Brent Lloyd's June 13, 2013 letter are referred to as the "Determinations" or "Mr. Guernsey's Determinations." A copy of the June 13, 2013 Brent Lloyd letter is enclosed and is made a part of this appeal for all purposes.

B. Differences in Interpretations of Applicable Law

1. Subject Matter Jurisdiction of the Board of Adjustment. There is a reasonable doubt of difference of interpretation as to whether the subject matter jurisdiction granted to the Board of Adjustment under Section 211.009(a)(1), Texas Local Government Code ("TLGC") includes appeals regarding the issuance of a building permit.

The first determination being appealed is Mr. Guernsey's Determination that the Board of Adjustment does not have subject matter jurisdiction to consider an appeal of the issuance of a building permit.

Section 2-1-111(F)(5), Austin City Code states that the Board of Adjustment shall "perform other duties prescribed by ordinance or state law." Pursuant to Section 211.009(a)(1), TLGC, the Board of Adjustment has the authority to:

"hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of [Subchapter A of Chapter 211 of TLGC] or an ordinance adopted under [Subchapter A of Chapter 211 of TLGC]."

Section 211.009(a)(1), TLGC is a statutorily mandated subject matter jurisdiction for boards of adjustments in the state of Texas. The City Council has not limited the scope of the authority of the Board of Adjustment because Section 2-1-111(F)(5), Austin City Code conforms the subject matter jurisdiction of the Board of Adjustment to Section 211.009(a)(1), TLGC. Therefore, Mr. Guernsey does not have the authority to limit the Board of Adjustment's subject matter jurisdiction under Section 211.009(a)(1), TLGC. As to the subject matter jurisdiction of the Board of Adjustment to hear and consider an appeal of a building permit, the Texas Supreme Court has ruled that building permits are within the subject matter jurisdiction of a board of adjustment under Section 211.009(a)(1) TLGC. *Ballantyne v. Champion Builders, Inc.*, 144 S.W. 3d 417, 425 (Tex. 2004).

Mr. Guernsey's determination that appeals of the approval of a building permit are outside the subject matter jurisdiction of the Board of Adjustment conflict with the plain language of Section 211.009(a)(1), TLGC and the ruling of the Texas Supreme Court in *Ballantyne*.

2. The May 28, 2013 Appeal is Untimely. In the June 13, 2013 Lloyd letter focuses on the portions of the May 28, 2013 appeal that describe the errors in previous decisions to approve permits with respect to the Property. The June 13, 2013 letter states that "appeal of these prior determinations is untimely under City Code Section 25-1-182 for reasons explained in my letters to you on specifically refers to letters from Mr. Lloyd dated October 27 and December 30, 2011, both of which are attached to your appeal."

Mr. Lloyd's letter does not challenge the fact that the May 28, 2013 CB/HCE appeal was filed within 20 days of the issuance of the Permit. Mr. Lloyd's letter also ignores the plain fact that the May 28, 2013 CB/HCE appeal alleges an error in the decision to issue the Permit in May 2013. The Director of PDRD and Mr. Lloyd maintain that an administrative decision in 2008 can control and preclude an appeal under Section 211.010(a)(1), TLGC more than four years later. While the May 28, 2013 CB/HCE appeal includes some facts that overlap the facts relating to the October 2011 appeal, the May 28, 2013 CB/HCE alleges errors in the issuance of new and totally different permit and alleges new facts.

Further, it does not matter whether the Director of PDRD believes he has permanently determined all issues relating to the permitting of the outdoor amphitheater on the Property. Section 211.010(a)(1), TLGC grants an aggrieved person, including

CB and HCE, the right to appeal a decision or determination of an administrative official to the Board of Adjustment. Each and every decision may be appealed. Section 211.009(a)(1), TLGC authorizes the Board of Adjustment (not the director of PDRD) to decide whether it will hear the appeal.

The clear purpose of Sections 211.009 and 211.010, TLGC is to provide the public an avenue to appeal administrative actions that an aggrieved person feels is wrong. Each property and each permit application is different. Community values and standards change over time. Every administrative decision should be subject to appeal, and if deemed appropriate by the Board of Adjustment, reviewed by the Board of Adjustment.

3. The Director of PDRD Has No Authority to Decide Which Appeals are forwarded to the Board of Adjustment. Mr. Guernsey's Determinations necessarily include his interpretation that the Director of PDRD has the discretionary authority to ignore the mandate of the third sentence of Section 211.010(b), TLGC. This sentence mandates that "...the official from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record of the action that is appealed."

The right of appeal under Section 211.010, TLGC also includes the right to have the appeal presented to the Board of Adjustment and to have the opportunity to be heard by the Board of Adjustment.

CB and HCE contend that this is a non-discretionary obligation under state law. The Director of PDRD does not have the ability or authority to thwart appeal rights of CB and HCE under Section 211.010(a)(1) TLGC by arbitrarily deciding which of his decisions can be appealed.

4. The Director of PDRD Has No Authority Under State Law or the Chapter 25-2 to Determine the Subject Matter Jurisdiction of the Board of Adjustment. There is no mention in Chapter 211, TLGC or in the City Code that the Director of PDRD or the administrative official whose decision is being appealed has the authority to decide the subject matter jurisdiction of the Board of Adjustment. The Director of PDRD has granted himself a power that neither state law nor the City Code provides to him.

Subject matter jurisdiction is determined by state law and may be expanded by the City Council. Section 211.009(a), TLGC provides: "The board of adjustment may: (1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter" (emphasis added).

The word "may" means the Board of Adjustment decides whether it will hear an appeal and the Board of Adjustment will decide whether the appealing party has standing. These powers of the Board of Adjustment are also reflected in Section 2-1-111(F), City Code. The Board of Adjustment should have had the opportunity to decide whether it wanted to hear the May 28, 2013 CB/HCE appeal. As a policy matter, the

Board of Adjustment should never be precluded from reviewing an appeal filed by an aggrieved party pursuant to Section 211.009(a)(1) seeks to present to this Board.

Under Sections 211.009 and 2.11.010, TLGC, the May 28, 2013 CB/HCE appeal should be forwarded to the Board of Adjustment. The director of PDRD can raise his subject matter jurisdiction objections at the hearing when the Board of Adjustment decides whether it will hear and consider the appeal. If the Director of PDRD is allowed to decide which of his or his staff's decisions are even forwarded to the Board of Adjustment, then the right of appeal granted by Section 211.009(a) (1) TLGC is completely nullified.

5. An appeal of use provisions could clearly permit a use which is in character with the uses enumerated for the various zones and with the objectives of the zone in question because:

This appeal does not pertain to use provisions under Chapter 25-2 of the Land Development Code. This is an appeal of certain determinations and decisions made by the Director of PDRD regarding his enforcement of Subchapter A, Chapter 211, TLGC. Therefore, this question is not applicable to the present appeal.

6. The interpretation will not grant a special privilege to one property inconsistent with other properties or uses similarly situated in that:

This appeal does not pertain to the granting of special privileges to one property. Therefore, this question is not applicable to the present appeal.

REQUESTS FOR INTERPRETATION
(Appeal of an Administrative Decision)

REQUIRED ITEMS FOR A COMPLETE APPLICATION:

The following items are required in order to file an application for interpretation to the Board of Adjustment.

- A completed application with all information provided. Additional information may be provided as an addendum to the application.
- Standing to Appeal Status: A letter stating that the appellant meets the requirements as an Interested Party as listed in Section 25-1-131(A) and (B) of the Land Development Code. The letter must also include all information required under 25-1-132(C).
- Site Plan/Plot Plan drawn to scale, showing present and proposed construction and location of existing structures on adjacent lots.
- Payment of application fee of \$360.00 for residential zoning or \$660 for commercial zoning. Checks should be made payable to the City of Austin.

An appeal of an administrative decision must be filed by the 20th day after the decision is made (Section 25-1-182). Applications which do not include all the required items listed above will not be accepted for filing.

If you have questions on this process contact Susan Walker at 974-2202.

To access the Land Development Code: sign on to: www.ci.austin.us.tx/development

APPLICANT/AGGRIEVED PARTY CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed Margaret G. Butler Printed Margaret G. Butler

Mailing Address 7100 Bright Star Lane

City, State & Zip Austin, Tx. 78736 Phone 512.699.6692

OWNER'S CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed _____ Printed _____

Mailing Address _____

City, State & Zip _____ Phone _____

APPLICANT/AGGRIEVED PARTY CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed Frank W. Goodloe Printed FRANK W. GOODLOE

Mailing Address 6705 COVERED BRIDGE DR. UNIT 10

City, State & Zip AUSTIN, TX. 78736-3311 Phone 512-906-1931

OWNER'S CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed _____ Printed _____

Mailing Address _____

City, State & Zip _____ Phone _____

Bill of Lading

User Name: Diann Mayer
Company: Sneed Vine & Perry PC

Corp Couriers-AUS (512) 479-4007

Control Number: 431968 eTrac Number: 109475960



Submitter Information	Shipping Information
Account: 1921 Name: SNEED VINE & PERRY PC Requested By: DIANN MAYER Reference: 70645-0002 BOL No.: Entered: 02-JUL-2013 10:45 Last Updated: 02-JUL-2013 11:45 (EST)	Service Type: 1 HOUR Return Service: 1 HOUR Pieces: 1 Weight: 1.0 Lbs. Charges: 0.00 Quote: 24.00
Pick Up From	Deliver To
SNEED VINE & PERRY PC DIANN MAYER 900 CONGRESS AVE 300 AUSTIN, TX 78701 Phone: 512-476-6955 Ext: 264	CITY BOARD OF ADJUSTMENT DIANA RAMIREZ 505 BARTON SPRINGS ROAD 530 AUSTIN, TX 78704
Pickup Details	Delivery Details
Requested Date: 02-JUL-2013 Ready Time: 11:10 Pickup Instructions: MUST BE DELIVERED BY 11:45 Actual Date: Arrival Time: Departure Time:	Requested Date: 02-JUL-2013 Deliver By: 12:10 Delivery Instructions: MUST GET SIGNED RECEIPT FROM DIANA RAMIREZ Actual Date: Arrival Time: 1125-1135 Departure Time:
Driver: JIM/#46 Date: 7-2-13 Time: 1111	Received by: X Diana Ramirez Print Name: DIANA RAMIREZ

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EXHIBIT ⁴⁶ 4 ⁴⁶

NO. 13-13-00395-CV

THE COURT OF APPEALS OF TEXAS
FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

HILL COUNTRY ESTATES HOMEOWNERS ASSOCIATION, and
COVERED BRIDGE PROPERTY OWNERS ASSOCIATION, INC.,

Appellants

v.

GREG GUERNSEY and THE CITY OF AUSTIN,

Appellees

APPELLEES' RESPONSE TO APPELLANTS'
MOTION TO EXPEDITE THE MANDATE

Appellees, Greg Guernsey and the City of Austin (collectively, the "City"), file their Response to Appellant's Motion to Expedite the Mandate pursuant to Texas Rule of Appellate Procedure 18.1(c).

I.
Introduction

Appellants, Hill Country Estates Homeowners Association and Covered Bridge Property Owners Association, Inc.,¹ ask this Court to depart from normal appellate procedures and issue the mandate early based on the erroneous assumption that the City will use the time to avoid Appellants' interpretation of this Court's ruling. This fear is unfounded for two reasons. First, nothing in this

¹ Although Covered Bridge Property Owners Association, Inc. joins in Appellants' Motion to Expedite, a ruling on the motion would have no effect on Covered Bridge. *Hill Country*, at *6 ("we hold that the trial court did not err in granting the plea to the jurisdiction solely as it relates to Covered Bridge on the issue of Guernsey's ultra vires actions of not forwarding Hill Country's appeal.")

Court's ruling requires the City to take any action regarding the site plan permit, or any other permit. Second, no action taken by the City between the present and issuance of the mandate will prejudice Appellees or deprive them of any rights or remedies afforded under Austin's Land Development Code, or state law.

II. Argument and Authorities

A. No Action by the City Would Circumvent This Court's Ruling.

Appellants broadly claim that by issuing a sound permit and certificate of occupancy, the City would avoid this Court's ruling. *Motion to Expedite*, at p.2. However, this Court expressly rejected Appellants' request for a writ of mandamus ordering the City to send the appeal to the Board of Adjustment, which would have stayed all development on the site. *Hill Country Estates Homeowner's Ass'n v. Guernsey*, No. 13-1300395-CV (Tex. App.—Corpus Christi, May 7, 2014). Because Appellants did not follow the proper procedure to petition for mandamus, this Court rejected mandamus, and did not issue a writ. *Id.*, at *7 n.6. Appellants had an opportunity to obtain a form of expedited relief, this Court rejected it, and Appellants seek to circumvent that ruling by asking this Court to help them mitigate the consequences of their failure to properly seek mandamus relief.

This Court affirmed all issues in favor of the City, remanding only the narrow issue of "whether the trial court possessed subject-matter jurisdiction to hear Hill Country's ultra vires claim that Guernsey failed to forward its

administrative appeal.” *Id.*, at *4. Answering that issue, this Court simply held that “Hill Country sufficiently pleaded jurisdictional facts to invoke the trial court’s subject matter jurisdiction.” *Id.* The effect of this Court’s ruling is to remand to the trial court for a trial on the merits, not an order that the City take any specific action. This Court’s opinion does not indicate that “this court found Hill Country’s appeal to the Board of Adjustment filed on October 21, 2011, was still pending,” requiring compliance with the stay provisions of the Local Government Code, as Appellants assert. *Motion to Expedite*, at p.6. Rather, the opinion simply held that “the trial court had jurisdiction to hear Hill Country’s ultra vires claims related to Guernsey’s failure to forward the administrative appeal.” *Hill Country*, at *7.

To expedite the mandate, Appellants submit a self-serving, overly broad interpretation of the opinion arguing that the City is now required to forward the appeal to the Board of Adjustment. However, consistent with this Court’s ruling, the City may now seek review on the merits, including Appellants’ standing, and “this argument may ultimately prove to be true.” *Id.*, at *7. The action that Appellants hypothesize the City will take will not allow the City to escape this Court’s ruling that the single remaining ultra vires claim go forward in the trial court, including by summary judgment.

B. Failure to Issue Mandate Early Will Not Prejudice Appellants.

Appellants have adequate administrative avenues to challenge any action taken by the City before the trial court takes up the issue of Appellants' first administrative appeal on the merits. For example, Appellants express concern in their motion that the City will issue a sound permit before this Court issues its mandate. *Motion to Expedite*, at p.6. If and when the City issues a sound permit, Appellants may appeal issuance of the permit to the City Council, as per § 9-2-56 of the Austin City Code. Appellants also express concern that the City will issue a certificate of occupancy before Appellants get a hearing before the Board of Adjustment. *Motion to Expedite*, at p.7. Yet, no authority has stated that Appellants are entitled to a hearing before the Board of Adjustment. Furthermore, even if the City issues a sound permit and/or certificate of occupancy before Appellants get a hearing, all activities may be stayed if Appellants get that hearing, regardless of whether or not already issued. *Land Development Code*, § 25-1-187; *Tex.Loc.Gov'tCode*, §211.010(c) ("appeal stays all proceedings in furtherance of the action that is appealed"). Finally, if the City eventually agrees with Appellants, the sound permit and/or certificate of occupancy can be revoked even if already issued. *Id.*, at §§ 25-1-413 and 416.

C. Conclusion

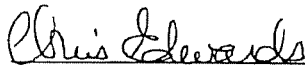
Appellants presume that the trial court will reinstate their administrative appeal, guaranteeing an automatic stay. *Motion to Expedite*, at p.7. Since this Court did not render judgement, nor grant the mandamus relief sought by Appellants, issues in the action remain for the trial court to resolve, and such a resolution may not be as Appellants presume. Appellants have failed to show good cause to expedite the mandate, as this Court's decision does not order the City to take any action and as expressed above, no action by the City would undermine the holding.

**III.
Prayer**

For the above reasons, Appellees respectfully request that the Court deny Appellants' motion to expedite the mandate.

RESPECTFULLY SUBMITTED,

KAREN M. KENNARD, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF LITIGATION



CHRIS EDWARDS

Assistant City Attorney

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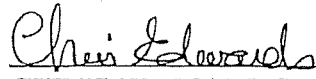
ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties, or their attorneys of record, in compliance with the Texas Rules of Appellate Procedure, this 9th day of June, 2015.

Via e-Service to:

Allen Halbrook
SNEED, VINE & PERRY, P.C.
ahalbrook@sneedvine.com
900 Congress Avenue, Suite 300
Austin, Texas 78701


CHRIS EDWARDS



LAW DEPARTMENT FAX TRANSMISSION COVER
Karen M. Kennard, City Attorney

DATE: June 9, 2015

FROM: Chris Edwards FAX NUMBER: (512) 974-1311

TO: Allen Halbrook FAX NUMBER: (512) 476-1825

RE: Thirteenth Court of Appeals – Response to Motion to Expedite the Mandate
Cause No. 13-13-00395-CV; *Hill Country Estates Homeowners Association and Covered Bridge Property Owners Association, Inc. v. Greg Guernsey and the City of Austin*; in the 13th Court of Appeals

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October 26, 2015

Mr. William Burkhardt, Chairman
Austin Board of Adjustment
c/o Ms. Leane Heldenfelds
Development Services Department
505 Barton Springs Road
Austin, Texas 78704

Re: Appeal of Approval of the Construction of an Outdoor Amphitheater;
8901 S.H.71 W; SP-2011-185C ("**Site Plan**") and associated Restrictive
Covenant; and 2013-002081 PR ("**Building Permit**")

Dear Chairman Burkhardt and Members of the Board of Adjustment:

This firm represents the Hill Country Estates Homeowners Association ("**HCEHOA**"), who appealed the approval of the Site Plan and Restrictive Covenant in October 2011 ("**Site Plan Appeal**") and the Building Permit in May 2013 ("**Building Permit Appeal**"), and the Covered Bridge Property Owners Association ("**CBPOA**") who also appealed the approval of the Building Permit in May 2013 (collectively, "**Appellants**"). This letter and the attached exhibits supplement and are incorporated into the Site Plan Appeal and the Building Permit Appeal (collectively, the "**Appeals**").

The Board of Adjustment ("**BOA**") hearings on the Appeals have been delayed years because staff acted as if it had the authority to decide whether the Site Plan Appeal had been timely filed. According to staff, the Appellants had only one opportunity to appeal the land use determinations subject to the Appeals. That is, Appellants should have filed their appeals within 20 days of Director Guernsey sending a December 23, 2008 email to Carl Connelly. Staff denied Appellants' right to appeal in October 2011 even though staff had not notified the Appellants of the existence of this private email until July 2011. In 2012, the Appellants sued the City and Director Guernsey over the denial of appeal rights and the legality of the approval of the Site Plan and Restrictive Covenant. Staff then challenged Appellants right to bring the lawsuit. The trial court granted the staff's motion to end the lawsuit in May 2013. Appellants appealed the trial court ruling.

In a May 2015 ruling, the Court of Appeals reversed the trial court decision as to HCEHOA stating that the trial court could not determine whether HCEHOA had standing to bring the lawsuit until the BOA had decided whether HCEHOA had standing to appeal the approval of the Site Plan and Restrictive Covenant. In effect, the Court of Appeals ruling overturned the staff's authority to withhold the Site Plan Appeal from the BOA. A copy of the Court of Appeals ruling is attached as Exhibit 6. In August 2015, the City Legal Department notified counsel for Appellants that staff would forward the Site Plan Appeal and the Building Permit Appeal to the BOA.

EXECUTIVE SUMMARY

Interpretations Being Appealed

When the Planning and Development Review Department ("PDRD") approved the Site Plan and the Restrictive Covenant in October 2011 and the Building Permit in May 2013, it made the following land use determinations:

1. outdoor religious assembly is a principal and permitted use in the Rural Residential zoning district;
2. an outdoor amphitheater is a principal use under the "religious assembly" use;
3. musical and theatrical performances (concerts, plays, ballet, movies, etc.) not part of a religious worship service are principal uses under the religious assembly use; and
4. benefits, festivals, community events and charitable events, including ticketed events, are principal uses under the religious assembly use.

The articulations of these land use determinations (collectively "Land Use Determinations") are found in the Restrictive Covenant. Exhibit 1.

Summary of Appellants' Positions

Section 25-2-921(C) of the Land Development Code ("LDC") absolutely prohibits all types of outdoor assembly of people, including public assembly, religious assembly, festivals, and benefits in the RR to SF-3 zoning districts. Therefore, in the RR to SF-3 zoning districts, religious assembly, festivals and benefits must be conducted inside an enclosed building. The definition of religious assembly in § 25-2-6(B)(41) of the LDC narrowly defines religious assembly use as "regular organized religious worship or religious education in a permanent or temporary building." While music and presentations are clearly part of religious worship and religious education, stand alone plays, ballets, movies and concerts advertised to attract the general public is simply entertainment.

Appellants contend that City staff exceeded their authority under the LDC and Chapter 211 of the Texas Local Government Code by authorizing outdoor activities that are explicitly prohibited by the Zoning Code and an expansion of the principal uses allowed under the religious assembly use. For years, City staff has approved public restrictive covenants to impose restrictions that are outside the scope of the Zoning Code. The modification of the uses allowed under religious assembly is clearly within the scope of the Zoning Code. State law requires public notice and public hearings to amend zoning regulations and zoning district boundaries.

Neither staff nor the BOA has the legislative authority to amend the Zoning Code. The adoption and modification of zoning regulations and zoning districts are legislative functions of the governing body of the municipality. *Thompson v. Palestine*, 510 S.W. 2d 579, 581 (Tex. 1974). "...the city council may not delegate legislative functions under Chapter 211 to any person or public board. *Lacy v. Hoff*, 633 S.W.2d 605, 607 (Tex. Civ. App.—Houston [14th] 1982, writ ref'd n.r.e.); *Swain v. Board of Adjustment*, 433 S.W. 2d 727 (Tex. Civ. App. - Dallas 1968, writ ref'd n.r.e.)

Appellants also contend that the limitation on the frequency of outdoor concerts and benefits stated in the Restrictive Covenant is legally void because of vagueness. The Restrictive Covenant states that “religious assembly use may include occasional charitable events (including concerts and performances)” that require tickets charging more than a nominal fee to cover utilities, maintenance, and other operational charges. (Emphasis added). Without a numeric limitation, the term “occasional” is so vague as to make the limitation on the frequency of such events completely non-enforceable by Code Compliance.

Appellants ask the BOA to reverse:

1. the Land Use Determination (“LUD”) that outdoor religious assembly is a principal use under religious assembly;
2. the LUD that an outdoor amphitheater is a principal use under religious assembly;
3. the LUD that the religious assembly use includes musical and theatrical performances and benefit concerts as principal uses;
4. the approval of the Site Plan;
5. the approval of Article I of the Restrictive Covenant; and
6. the approval of the Building Permit.

Alternatively, the Appellants ask the BOA to reverse the approval of Article I of the Restrictive Covenant because the limitation on the frequency of events held at the outdoor amphitheater (Occasional) is so vague that it is unenforceable.

STATEMENT OF FACTS

Supplemental Statement of Facts

The statement of facts in this letter describes additional events preceding the filing of the first site plan for the outdoor amphitheater in January 2011 and events occurring after the filing of the Building Permit Appeal in May 2013. A timeline of the events is attached as Exhibit 21.

Proposed Use of Outdoor Amphitheater

Randy Phillips, the lead pastor for Life Austin, has been a member of the recording group Phillips, Craig and Dean for 25 years. According to Mr. Phillips, he has dreamed for more than 20 years of having an outdoor amphitheater in Austin. Exhibit 2-1. In 2007, PromiseLand Church West, Inc.¹, now doing business as Life Austin, acquired approximately 68 acres of undeveloped land located between and adjacent to the Hill Country Estates (“HCE”), Covered Bridge (“CB”), and West View Estates residential subdivisions. The 68 acres was zoned Rural Residential in 2007 and remains so today. Exhibit 3.

Later in 2007, Randy Phillips announced plans to use 53 acres of the land (“**Property**”) for the “Dream City” development that he described as “a community resource, not just a church home.” Exhibit 2-2. As proposed, the Dream City development included an outdoor amphitheater. According to the church, the amphitheater could be used for “graduations,

¹ The property and the permits remain in the name of PromiseLand West.

theatrical plays/productions, seminars, 'family movie' night, weddings, educational productions, neighborhood meetings and occasional concerts."² (Emphasis added) In March 2011, Randy Phillips explained to the media that the Dream City amphitheater would serve as an integral part of the community, providing a place for graduation ceremonies, recitals, ballets, family movie nights, jazz concerts, and other events. Randy Phillips told the media that he wanted to build "an amphitheater befitting the Live Music Capital of the World."³ Large outdoor amphitheaters are very rare in Austin because of the conditional use permit requirement. Between 2007 and the end of 2011, only two permanent outdoor amphitheaters existed in the City of Austin—Symphony Square and Stubb's.

Neighborhood Discussions 2007 to 2009

From April 2007 to early 2009, representatives of Life Austin met with representatives of the Appellants and the Oak Hill Association of Neighborhoods ("OHAN") regarding the Dream City development. At an August 4, 2008 meeting, neighborhood representatives conveyed general willingness to support the Dream City development except for the outdoor amphitheater. Representatives of Life Austin expressed disappointment with the widespread concerns regarding the outdoor amphitheater. Life Austin offered to limit the number of productions at the outdoor amphitheater to 8 per month (2 per week or 100 per year).⁴

A final meeting between representatives of Life Austin and representatives of Appellants took place on January 12, 2009. During this meeting, Life Austin representatives indicated that while they would like the neighborhoods' approval and acceptance of the Dream City project, it in fact wasn't needed because of the religious nature of the project. Thereafter, Life Austin ceased communicating with the Appellants.

Site Plan, Restrictive Covenant and Building Permit Approved; Litigation

Background facts and the facts relating to the review and approval of the Site Plan, Restrictive Covenant, and Building Permit are set out in the May 2013 Building Permit Appeal, including the May 28, 2013 standing letter to the BOA.

A statement of facts relating to the litigation filed by Appellants in March 2012 to obtain a BOA hearing on the Site Plan Appeal is set out in my September 25, 2015 letter to the BOA accompanying the resubmittal of the Appeals.

Post-Filing of the Building Permit Appeal

By a June 13, 2013 letter, City Legal informed the Appellants that the Building Permit appeals would not be forwarded to the reviewing bodies; "... the Director has determined that your appeals are untimely and beyond the jurisdiction of ... the BOA ... " Exhibit 4.

On July 2, 2013, Appellants filed an appeal of the decision not to forward the building permit appeal to the BOA.⁵ Appellants never received a response from the City regarding the disposition of this appeal. The July 2, 2013 appeal is largely mooted as a result of the City agreeing to forward the Appeals of the Site Plan, Restrictive Covenant, and Building Permit after

² August 5, 2008 Oak Hill Gazette

³ August 5, 2008 Oak Hill Gazette.

⁴ August 5, 2008 Oak Hill Gazette.

⁵ A copy of this appeal accompanied September 25, 2015 letter submitted with re-filing of the Appeals.

the decision issued by the 13th Court of Appeals on May 7, 2015. Exhibit 6. Nevertheless, the July 2, 2013 appeal raises serious issues about the authority and propriety of staff deciding which appeals are sent to the BOA when the City Code and State law mandate that appeals shall be forwarded to the BOA.

Subsequent Events

On March 20, 2014, the Appellants sent a letter to Life Austin stating the Appellants would not abandon their legal fight to have the BOA hold hearings on the Appellants' appeals and informing Life Austin that if it proceeded with the construction of the outdoor amphitheater, then it would do so at the risk of having the permits authorizing the outdoor amphitheater reversed by the BOA. Exhibit 7.

In April 2014, Life Austin responded to the March 20, 2014 letter. The Life Austin letter stated that they understood that the Appellants had sued the City and Director Guernsey over the land use determinations made regarding the amphitheater, but they were committed to proceeding with their development in a timely manner. Exhibit 8. Both communications occurred prior to the construction of the outdoor amphitheater which began during the summer of 2014.

Outdoor Amphitheater Begins Operations

Between July 19, 2015 and October 17, 2015, 12 concerts and one movie were held at the outdoor amphitheater. Residents of Hill Country Estates and Covered Bridge have made more than 110 complaints to 3-1-1 regarding the noise from the outdoor amphitheater. A representative sampling of the 3-1-1 complaints is attached as Exhibit 9. Residents of Hill Country Estates have complained to 3-1-1 that the concert music can be heard inside their homes. On at least two occasions, the 3-1-1 operator has commented on hearing the music over the telephone. Sound from the outdoor amphitheater can be clearly heard more than a half mile away.

APPLICABLE CITY CODE PROVISIONS

Rural Residential Zoning District

Section 25-2-54 of the LDC states: "An RR district designation may be applied to a use in an area for which **rural characteristics** are desired or an area whose terrain or public service capacity require low density." (Emphasis added).

Religious Assembly

As previously discussed, § 25-2-6(B)(41) of the LDC defines the religious assembly use as "regular organized religious worship or religious education in a permanent or temporary building. The use excludes private primary or secondary educational facilities, community recreational facilities, day care facilities, and parking facilities." (Emphasis added) According to § 25-2-491(A) of the LDC, the religious assembly use is allowed in all residential zoning districts and the vast majority of all other zoning districts. § 25-2-491(B) of the LDC states: "The requirements of the other provisions of this subchapter [Subchapter C Use and Development Regulations] modify and supersede the requirements of this section."

Prohibited Activities Allowed with a Temporary Use Permit

Section 25-2-921(C) of the LDC is a provision within subchapter C of Chapter 25-2. This §25-2-921(C) provides:

An outdoor public, **religious**, patriotic, or historic **assembly** or exhibit, including a festival, benefit, fund raising event, or similar use that typically attracts a mass audience may be permitted as a temporary use under this division if:

- (1) for a gathering of not more than 50 persons, the use is located in an SF-4 or less restrictive zoning district;
- (2) for a gathering of more than 50 persons, the use is located in an LO or less restrictive zoning district;" (Emphasis added)

Sub§ 25-2-921(C)(1) of the LDC clearly prohibits the issuance of a temporary use permit ("TUP") for any activity that attracts a mass audience in the RR to SF-3 zoning districts. § 25-2-921(C) further limits the size of a gathering to no more than 50 people unless the tract is zoned LO (Limited Office) or less restrictive.

Provisions regulating the issuance of temporary permits for uses otherwise prohibited first appeared in the Austin Zoning Code with the adoption of Chapter 13-2A that went into effect on January 1, 1985. § 13-2A-5200 provided:

"Sections 5200 through 5299 shall be known as the Temporary Use Regulations. Provisions authorizing temporary uses are intended to permit occasional, temporary uses and activities when consistent with the purposes of the Zoning Regulations and when compatible with other nearby uses." (Emphasis added)
§ 13-2A-5230(d) provided:

"The following types of temporary use may be authorized, subject to specific limitations herein and such additional conditions as may be established by the Building Official." (Emphasis added)

Code language regarding temporary use permits for outdoor assembly remains virtually unchanged since 1985.

Temporary Use Permit Defined

Eight months prior to the approval of the Site Plan and Restrictive Covenant, the City Council adopted Ordinance No. 20110210-029 that added a definition of a "temporary Use Permit to the Sound Ordinance. Section 9-2-1(15) of the City Code defines a temporary use permit as "a permit issued by the Planning and Development Review Department under Chapter 25-2, Article 6 (*Temporary Uses*) [§ 25-2-921] to authorize **a temporary activity not otherwise allowed as a principal or accessory use in a base zoning district.**" (Emphasis added). In other words, a TUP is not necessary if the activity is allowed as a principal or accessory use. The outdoor activities listed as requiring a TUP in § 25-2-921(C) definitively establish these as prohibited activities.

Outdoor Entertainment

§ 25-2-4(B)(46) defines Outdoor Entertainment as a use that "is a predominantly spectator use conducted in open, partially enclosed, or screened facilities." This use includes sports arenas, racing facilities, amusement parks, venues for weddings, and other events. According to § 25-2-491 of the LDC, outdoor entertainment is not a permitted use in any zoning district and requires a conditional use permit in commercial and industrial zoning districts. Exhibit 10.

Determination of Use Classification

The authority for land use determinations is found in § 25-2-2 of the LDC. Following PDRD's refusal to forward Site Plan Appeal to the BOA, the City Council adopted Ordinance No. 20120426-122 to reform the Land Use Determination process to require notification of potential interested parties to prevent non-public determinations being used to deny appeal rights.⁶

The version of § 25-2-2 in effect in October 2011 read as follows:

- (A) The director of the Neighborhood Planning and Zoning Department shall determine the appropriate use classification for an existing or proposed use or activity.
- (B) In making a determination under this §, the director of the Neighborhood Planning and Zoning Department shall consider the characteristics of the proposed use and the similarities, if any, of the use to other classified uses. (Emphasis added)
- (C) An interested party may appeal a determination of the director of the Neighborhood Planning and Zoning Department under this § to the Board of Adjustment.
- (D) The director of the Neighborhood Planning and Zoning Department shall notify the Planning Commission and the Zoning and Platting Commission of the filing of an appeal within 30 days of the filing, and of the disposition of the appeal within 30 days of disposition.
- (E) The director of the Neighborhood Planning and Zoning Department **shall** maintain a list of determinations made under this section. (Emphasis added).

Amphitheater Now Conditional Use

In response to PDRD's refusal to forward the Site Plan Appeal to the BOA, the City Council adopted Ordinance No. 20130228-074 which added a definition of "amphitheater" to the LDC. Section 25-1-121(4) defines an "amphitheater" as "an outdoor or open-air structure or manmade area specifically designed and used for assembly of 50 or more people and the viewing of an area capable of being used for entertainment and performances."

This ordinance also added Section 25-2-517 that reads as follows:

⁶ See Council discussion on item 59 of the December 15, 2011 Council agenda (Resolution directing City Manager to draft an ordinance).

“(A) Construction of an amphitheater that is associated with a civic or residential use requires a site plan approved under Section 25-5, Article 3 (Land Use Commission Approved Site Plans), regardless of whether the amphitheater is part of a principal or accessory use. Review of the site plan is subject to the criteria in Section 25-5-145 (Evaluation Criteria) and the notice requirements of Section 25-5-144 (Public Hearing and Notice).

(B) A decision by the Land Use Commission on an application for an amphitheater is subject to appeal under Section 25-5-149 (Appeal to Council).”

Determination Of Standing To Appeal

- § 25-1-191(A) - CONDUCT OF PUBLIC HEARING.

“Before opening a hearing, a body hearing an appeal shall decide preliminary issues raised by the parties, including whether to postpone or continue the hearing and whether the appellant has standing to appeal.”

APPELLANTS' POSITIONS

The Land Use Determinations made in conjunction with the approval of the Site Plan, the Restrictive Covenant, and the Building Permit constitute significant and improper deviations from unambiguous provisions in Chapter 25-2 of the LDC:

1. The Restrictive Covenant authorizes the religious assembly use to occur outdoors in a Rural Residential (“RR”) zoning district even though § 25-2-921(C) of the LDC absolutely prohibits outdoor assembly of any type in the RR zoning district.

2. The Site Plan and the Restrictive Covenant classified a 3,500 seat outdoor amphitheater as a principal use under the “religious assembly” use. Exhibit 11 (Deposition of Greg Guernsey Page 99, lines 9-10; page 154, lines 16-20).

3. If a use is prohibited, then a structure required for the prohibited use is also prohibited. For example, a building permit for an office building cannot be issued in a residential zoning district.

4. Even if § 25-2-921(C) is interpreted as allowing some outdoor events on the Property, the size of the completed outdoor amphitheater (1,500 seats) dwarfs the 50 person limit placed on outdoor assembly in all residentially zoned property.

5. The Restrictive Covenant broadens the type of activities that constitute principal uses by adding community and charitable events and musical and theatrical performances not part of a religious worship service (concerts, plays, ballet, movies, etc.).

6. The limitation of the frequency of ticketed events held at the amphitheater is so vague that it is unenforceable. The Land Use Determinations are so contrary to the provisions of Chapter 25-2 that they should require the formal code amendment process required under Chapter 211 of the Texas Local Government Code. The proposed code amendment to § 25-2-921(C) discussed below confirms the conclusion made in the preceding sentence.

The approval of the Building Permit required the same Land Use Determinations made in conjunction with the approval of the Site Plan and the Restrictive Covenant. Director Guernsey stated under oath that the review and approval of every site plan and building permit application requires a Land Use Determination. Exhibit 11 (Deposition of Greg Guernsey, Page 22, line 11 to Page 23, line 23).

The Texas Supreme Court has ruled that "the BOA has the power to hear and decide appeals from any decision or determination by a city administrative official pertaining to the enforcement of the city's zoning ordinance." *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 426 (Tex. 2004). (Emphasis added). In the Ballantyne case, the Texas Supreme Court ruled that Chapter 211 of the Texas Local Government Code authorizes boards of adjustment to hear and decide appeals of the issuance of building permits based on zoning. *Id.* 425.

"Outdoor" Religious Assembly

Director Guernsey has defended his approval of outdoor religious assembly as a principal use under religious assembly by stating the Austin Zoning Code "does not distinguish between indoor and outdoor religious assembly." Exhibit 11 (Deposition of Greg Guernsey, Page 168, line 25- page 169, line 4).

According to Director Guernsey, all activities that may occur inside a building having a religious assembly principal use may also be conducted outdoors as a religious assembly use.

Director Guernsey's statement and determination that the Zoning Code "does not distinguish between indoor or outdoor religious assembly" is simply incorrect. § 25-2-921(C) of the LDC directly addresses the issue by absolutely prohibiting all types of outdoor assembly of people, including religious assembly, in the RR to SF-3 zoning districts. In all other zoning districts, all outdoor assembly activities require a Temporary Use Permit.

In February 2011, eight months before the approval of the Site Plan and Restrictive Covenant, the City Council adopted the following definition of a temporary use permit: "a permit issued by the Planning and Development Review Department under Chapter 25-2, Article 6 (*Temporary Uses*) to authorize a temporary activity not otherwise allowed as a principal or accessory use in a base zoning district." (Emphasis added) When §§ 25-2-921(C) of the LDC and 9-2-1(15) of the City Code are read together, there can be no doubt that outdoor religious assembly is not a permitted principal or accessory use in the RR to SF-3 zoning districts.

In addition to the plain language in the Zoning Code, there are strong public policy reasons for keeping religious assembly activities inside buildings, particularly in residential areas. Religious beliefs are varied and very personal. Allowing outdoor religious worship on any residential lot is likely to lead to situations where people with differing religious beliefs would interact and potentially conflict. When the City chose to regulate outdoor assembly of people in 1985, it also recognized the great difficulty of distinguishing between an activity that is religious assembly and one that is not religious assembly. Section 25-2-921(C) of the LDC avoids this enforcement challenge by regulating all outdoor mass gatherings of people, religious assembly or not, in the same way.

Determination that "Outdoor Amphitheater" is Principal Use Under Religious Assembly

The version of § 25-2-2(B) of the LDC [Determination of Use Classification] in effect in 2011 mandated PDRD and Director Guernsey to consider the "characteristics of the proposed

use and the similarities, if any, of the use to other classified uses." In other words, what classified use is the most similar to the proposed use.

Life Austin has been very open about how it intended to use the outdoor amphitheater—a community resource for events and entertainment. Since 2007, Randy Phillips and Life Austin have described and promoted the outdoor amphitheater as an events venue (concerts, plays, ballets, movies, weddings, etc.) befitting the "Live Music Capital of the World." Exhibit 2-2. In the context of a § 25-2-2 Land Use Determination, the type of events that Life Austin proposed and now holds at the outdoor amphitheater are most similar to the classified use of "outdoor entertainment" defined in § 25-2-4(B)(46) of the LDC.

When asked in February 2013 to identify an example of a church with an outdoor open structure resembling the Life Austin outdoor amphitheater, Director Guernsey responded:

"I believe there are structures probably in Austin somewhere that have either outdoor prayer gardens or - I know the church - my church actually has a couple of benches outside where people can sit and people can talk. There are other - probably other venues that are out there where there may be a place where people can congregate outside." Exhibit 11. (Deposition of Greg Guernsey, February 20, 2013; Page 37, lines 19-25).

Appellants contend that neither a prayer garden nor a park bench share any similarities or characteristics with an outdoor amphitheater that seats up to 1,500 people. The use of this outdoor amphitheater is more similar to an outdoor entertainment use than it is to a prayer garden. The potential impacts of the outdoor entertainment use are so significant that the outdoor entertainment use is possible in a limited number of commercial zoning districts and requires a Conditional Use Permit. There is no basis or legal authority for an administrative determination that the construction and use of a large outdoor structure with amplified sound could be classified as a permitted use in the RR zoning district. If outdoor assembly is prohibited in the RR zoning district then a structure for outdoor assembly is also prohibited.

Appellants' Position on § 25-2-921(C) Supported by Other Staff Actions

Below, Appellants cite several written City staff interpretations and an enforcement of § 25-2-921(C) of the LDC that are consistent with Appellants' position. These instances occurred before and after the approval of the Site Plan, Restrictive Covenant, and the Building Permit. Two staff statements made in 2008 and 2007 regarding the proposed outdoor amphitheater are discussed on page 4 of the Robert Kleeman May 28, 2013 letter to the BOA filed with the Building Permit Appeal.

Proposed Amendment to § 25-2-921(C)

At the September 18, 2012 meeting of the Planning Commission Codes and Ordinances Committee, PDRD staff presented a request to initiate a code amendment regarding "Public Assembly Permits." According to the minutes of this meeting:

"Greg Dutton explained that the city's current code does not allow institutions such as churches and schools, that have certain residential zoning, to apply for a temporary use permit that would be needed to conduct temporary outdoor events, such as fund raising events or festivals." Exhibit 12-1.

The Planning Commission formally initiated the requested code amendment on September 25, 2012 which was assigned City case # C20-2012-016 "Temporary Outdoor Public Assembly Code Amendment" ("**Code Amendment**"). Attached as Exhibits 12-2 through 12-6 are several versions of the Ordinance Amendment Review Sheets prepared by City staff between December 2012 and October 2013 for the Planning Commission and the City Council. The Background Sections in the attached Ordinance Review Sheets include the following statement:

"Under the current code, certain temporary outdoor events are only allowed in certain zoning districts, depending on the number of attendees at said events. These events can include public, **religious**, patriotic, or historic **assembly** or exhibit, **including a festival, benefit, fund raising event, or similar use**. Temporary **outdoor public assembly events held by churches** and schools, which often have residential zoning, are currently prohibited or restricted in conducting temporary outdoor events if their zoning is residential." (Emphasis added.)

The Code Amendment, as initially proposed, would have allowed properties whose principal use is religious assembly, educational, or community recreation apply for and obtain a temporary use permit to hold outdoor public assembly events. Exhibit 13-1. At public hearings on the Code Amendment, staff explained that the Code Amendment was needed to allow for traditional outdoor school and church festivals and fund raising events. Importantly, the Code Amendment, as initially drafted, did not propose to make any activity listed in § 25-2-921(C) a permitted principal or accessory use. Even if the Council had approved the Code Amendment, outdoor public assembly events would remain prohibited for outdoor public assembly events held by churches, schools and community recreation facilities.

Notably absent from the Ordinance Review Sheets is any mention of the approval of the Land Use Determinations made in the approval of the Site Plan, the Restrictive Covenant, or the Building Permit. The code interpretations stated in the Ordinance Review Sheets for the Code Amendment reflect the plain language of the LDC. Based on the Land Use Determinations granted to Life Austin, the Code Amendment should not have been needed if the City (as an institution) recognized the Life Austin Land Use Determinations as legal and consistent with the plain language of the LDC.

As of mid-October 2013, everyone in the City of Austin, except Life Austin, remained subject to the limitations and prohibitions of § 25-2-921(C) of the LDC. Outdoor public assembly, including, religious assembly, benefits, festivals, and any other mass gatherings of people were prohibited in all residential districts except for Life Austin. Simply put, the Land Use Determinations gave Life Austin special privileges not enjoyed by any other property in the City. This contrast (or double standard) is heightened by the City's legal actions against an east Austin Catholic church, as described below.

In late October 2013, PDRD staff released a new version of the Code Amendment that added a new subsection 25-2-921(D) that read:

"This provision does not apply to religious services held on property with a principal developed use of religious assembly. A permit is not required for religious services." (See Exhibit 13-2).

PDRD staff had not previously proposed or even mentioned making any of the outdoor public assembly activities described in § 25-2-921(C) an allowed principal or accessory use. The topic had not been discussed at any public hearing held on the Code Amendment. Again, based on the Land Use Determinations granted to Life Austin, the proposed subsection 25-2-921(D) should not have been needed if the City (as an institution) recognized the Life Austin Land Use Determinations as legal and consistent with the plain language of the LDC.

November 18, 2013 Memorandum

In response to the last minute insertion of the proposed § 25-2-921(D) language, the Executive Committee of the Austin Neighborhoods Council adopted a resolution requesting public hearings on the added language. Exhibit 14. Shortly thereafter, Director Guernsey sent the City Council a memorandum dated November 18, 2013 explaining that he had taken another look at § 25-2-921(C) and decided that outdoor festivals and benefits at schools and churches were part of the principal uses of education and religious assembly and that the Code Amendment was no longer necessary. Exhibit 15. Based on the November 18, 2013 Memorandum, the Council tabled action on the Code Amendment.

There are several aspects to the November 18, 2013 Memorandum that are relevant to the Appeals. First, the interpretation of § 25-2-921(C) in this memorandum is a complete reversal the position staff had taken for more than year. Exhibits 12-2 through 12-6.

Second, this memorandum does not mention the Land Use Determinations made in the approval of the Site Plan, the Restrictive Covenant, and the Building Permit for Life Austin. Instead, Director Guernsey bases his conclusion on the lack of complaints made about festivals, vents and benefits held at schools and religious assembly facilities:

"These types of events have long occurred in Austin and until now have not been a problem. To our knowledge, only a single individual has issued complaints against two Catholic churches regarding outdoor festivals. There does not, however, seem to be a community-wide concern with these types of events occurring as they always have in the past." Exhibit 15.

In legal terminology, Director Guernsey asserts that the restrictions of § 25-2-921(C) have been amended through non-enforcement. Under Texas law, a municipality cannot be prevented or estopped in its governmental functions. *Trudy's Texas Star v. City of Austin*, 307 S. W. 3d 894, 906 (Tex. Civ. Appeals—Austin 2010). The adoption and modification of zoning regulations and zoning districts are legislative functions of the governing body of the municipality. *Lawton v. Austin*, 404 S.W. 2d 648, 651 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.). Zoning regulations can only be amended through the public notice and public hearing process required by Chapter 211 of the Texas Local Government Code.

Third, generally, the City enforces the City Code and the Zoning Code based on complaints made by citizens. Exhibit 11 (Deposition of Greg Guernsey, page 236). This enforcement approach allows community standards to decide what activities are intrusive and disruptive. Based on the frequency of complaints cited by Director Guernsey, the stereotypical outdoor events held at churches and schools do not bother nearby residents. What Director Guernsey failed to mention in this memorandum is that the complaints he referred to related to outdoor events with bands playing with amplified sound. The nature of the events being held is changing.

Fourth, the November 18, 2013 Memorandum does not state that outdoor religious assembly is a principal or accessory use. Instead, the discussion in the November 18, 2013 Memorandum is limited to outdoor benefits and festivals held on properties whose principal use is religious assembly, education, and community recreation. Again, if the City (as an institution) recognized the Life Austin Land Use Determinations as legal and consistent with the plain language of the LDC, the Code Amendment, the last minute insertion of the § 25-2-921(D) language and the November 18, 2013 Memorandum should not have been necessary.

The only conclusion is that the Life Austin Land Use Determinations violated the Zoning Code and exceeded staff authority.

Dolores Catholic Church

In May 2013, Code Compliance and the City Attorney's Office interpreted and enforced § 25-2-921(C) of the LDC, consistent with Appellants' position in this appeal and consistent with the staff explanations made in conjunction with the Code Amendment. The City's actions against the Dolores Catholic church further demonstrate the special privileges granted to Life Austin. On May 18, 2013, Code Compliance issued a citation to the Dolores Catholic Church for holding an outdoor event without a TUP. Exhibit 16-1. In June 2013, the City filed suit against the Austin Diocese in Municipal Court (Cause No. 7923874).

According to the complaint filed by the City of Austin, the Dolores Catholic Church property, located at 1111 Montopolis Drive, was zoned SF-3 and did not have a TUP to hold its event. Exhibit 16-2. According to an October 23, 2013 Court Order, the City had agreed to drop the complaint against the Diocese once the City Council adopted the Temporary Outdoor Public Assembly Code Amendment then scheduled to be heard by the Council on October 25, 2013. Exhibit 16-3. In other words, once the Council amended § 25-2-921(C) to authorize the issuance of TUPs for future events at the church, the City would drop its prosecution of the church for violating § 25-2-921(C) of the LDC.

The Council tabled action on the Code Amendment at the November 21, 2013 Council meeting. On November 25, 2013, one week after the issuance of the November 18, 2013 Memorandum, the City dropped the municipal court action against the Austin Diocese. Exhibit 16-4.

Appeal of November 18, 2013 Memorandum

The November 18, 2013 Memorandum is the subject of a December 2013 appeal filed by the Appellants. Exhibit 17. PDRD, as communicated by the City Legal Department, refused to forward Appellants' December 2013 appeal to the BOA, claiming that the November 18, 2013 Memorandum did not contain any "appealable" decisions: "PDRD has determined that Director Guernsey's memo is not an "administrative decision" and is therefore not within the BOA's jurisdiction to review." Exhibit 18.

Since the settlement agreement between the City and Diocese was contingent upon Council adoption of the Code Amendment, the City Attorney's office must have recognized the November 18, 2013 Memorandum as having sufficient legal significance to drop the case against the Diocese. That is, the November 18, 2013 Memorandum was deemed a land use determination. In May 2014, a complaint was filed regarding an outdoor event held at the Dolores Catholic Church. Carl Smart, Director of Code Compliance, responded that based on a decision by Director Guernsey, a TUP was no longer required for such an event. Exhibit 19.

Because City staff has treated the November 18, 2013 Memorandum as an official land use determination, the Appellants ask the BOA to direct City staff to forward the December 2013 appeal to the BOA.

Expanded Activities Allowed Under Religious Assembly Use

As previously discussed, Life Austin announced their intent to use the outdoor amphitheater for "graduations, theatrical plays/productions, seminars, 'family movie' night, weddings, educational productions, neighborhood meetings and occasional concerts"⁷ years before the approval of the Site Plan and Restrictive Covenant. Since outdoor entertainment is not a permitted use in the RR zoning district, Life Austin needed the religious assembly use broadened to authorize these activities and the outdoor amphitheater. The Restrictive Covenant accomplished this goal.

As Director Guernsey stated under oath, "a restrictive covenant of this type is not necessarily one that is required by the City. It can be certainly offered by an applicant." Exhibit 11 (Deposition of Greg Guernsey, Page 211, lines 5-8). Counsel for Life Austin prepared the first draft of the Restrictive Covenant. See page 8, May 28, 2013 Robert Kleeman letter to BOA filed with the Building Permit Appeal.

The Preamble to the Restrictive Covenant references Life Austin's proposal "to allow an approximately 3,500 seat outdoor amphitheater to be included as part of a proposed religious assembly use." The fourth clause of the Preamble states the Director [Guernsey] determined that the applicable zoning classifications established by the Land Developed [sic] Code allowed an outdoor amphitheater as part of the proposed religious assembly use, subject to the conditions included in the proposal."

The Restrictive Covenant attempts to define, by extensive detail, new principal use activities (musical or theatrical performances, weddings, and funerals) as well as "customary and incidental accessory uses" (neighborhood meetings, school graduation, public meetings, and other civic or non-profit group meetings). The Restrictive Covenant appears to be contract zoning, which is illegal in Texas.

Paragraphs C and D of Article I of the Restrictive Covenant state that "religious assembly use may include occasional charitable events (including concerts and performances)" that require tickets charging more than a nominal fee to cover utilities, maintenance, and other operational charges. (Emphasis added.) The term occasional is so vague as to be completely non-enforceable. Appellants contend the term "occasional" was intended to mean "infrequent"; perhaps once or twice a year but certainly not on any regular basis. The terms "occasional" and "infrequent" lack the numerical specificity that land use regulations require. Even Director Guernsey has admitted that he is not sure how the term "occasional" would be enforced. Exhibit 11 (Deposition of Greg Guernsey, Page 235, line 6 to Page 237, line 1). During the two months between July 24, 2015 and September 20, 2015, at least six "ticketed" concert events were held at the amphitheater. Exhibit 2-3. Based on this frequency of "ticketed" events, Life Austin defines the term "occasional" to mean "regular" or "weekly."

Finally, representatives of Life Austin have publicly stated that the Restrictive Covenant allows Life Austin, as a charitable organization, to hold benefits to raise funds to pay for the construction of the amphitheater itself. Director Guernsey has also testified that so long as Life

⁷ August 5, 2008 Oak Hill Gazette

Austin maintains its tax-exempt status, virtually any type of event may be held at the outdoor amphitheater so long as it is a "fundraising event." Exhibit 11 (Deposition of Greg Guernsey, Page 233, lines 18- 24). In effect, there is virtually no zoning limit on the type of outdoor "benefit" events that can be held on the Property.

Given the preferential treatment afforded Life Austin so far and Life Austin's penchant for disregarding the City Code⁸, and sound impacts on their neighbors, Appellants and their members fear that if unchecked, Life Austin will fully utilize the special privileges granted by the Restrictive Covenant. Appellants filed another appeal to the BOA in October 2015 after the Development Services Department approved Correction No. 12 to the Site Plan that authorized a dog park and disc golf course on the Property.

SPECIAL CONSIDERATIONS REGARDING THE RESTRICTIVE COVENANT

Paragraph G of Article I of the Restrictive covenant provides:

"The restrictions in this Article I are imposed as conditions to Site Plan No. 2011-0185C and apply to the extent that an outdoor amphitheater remains part of the principal assembly use."

The meaning and effect of the clause "apply to the extent that an outdoor amphitheater remains part of the principal assembly use" clearly indicates that City Staff and Life Austin knew that a determination could be made at some point to reverse the approval of the Site Plan as it applies to the outdoor amphitheater. Reversal is the most appropriate decision under the circumstances. Appellants, however, are concerned that even if the BOA reverses only the approval of the Site Plan and the Building Permit and the previously described Land Use Determinations, Life Austin is likely to claim that those actions do not affect the right to continue the operation of the outdoor amphitheater pursuant to rights granted by the Restrictive Covenant.

Director Guernsey's answer to the following question is instructive:

Q. "So, in other words, unless the owners of the property agree that this restrictive covenant goes away, it doesn't, right?"

A. "Right. These conditions would remain on the property. And a restrictive covenant by its nature is generally being something more restrictive, not less restrictive." Exhibit 11 (Deposition of Greg Guernsey, Page 238, lines 10-16).

Therefore, BOA must specifically reverse the approval of Article I of the Restrictive Covenant; otherwise, the Restrictive Covenant may be interpreted as creating a grandfathered right to construct and operate an outdoor amphitheater under § 245.002(d) of the Texas Local Government Code:

"Notwithstanding any provision of [Chapter 245] to the contrary, a permit holder may take advantage of ... recorded restrictive covenants required by a regulatory agency..."

⁸ The City issued a citation to Life Austin in 2007 for cutting trees without a permit. The City issued a citation in 2015 for the construction of a dog park and Frisbee golf course without a permit.

Unless the BOA reverses the approval of the Site Plan and Article I of the Restrictive Covenant, the termination or amendment of the Restrictive Covenant will require the joint action of the Property owner and the Director of PDRD.

RELIEF REQUESTED

The insertion of the proposed § 25-2-921(D) language into the Code Amendment begs the question as to why this provision would have been needed if Director Guernsey had already made a Land Use Determination that the Zoning Code made no distinction between indoor and outdoor religious assembly. If the City recognized the legitimacy of the Land Use Determinations made with the approval of the Site Plan, Restrictive Covenant, and Building Permit for Life Austin, then the Code Amendment would have been unnecessary and the prosecution of the Austin Dioceses would not have been appropriate. The clear and unambiguous language in § 25-2-921(C) of the LDC, a year's worth of PDRD memoranda to the Planning Commission and City Council regarding the Code Amendment, and the 2013 prosecution of the Dolores Catholic Church conclusively prove that the Land Use Determinations made in the approval of the Site Plan, Restrictive Covenant, and Building Permit violated § 25-2-921(C). These approvals and the Land Use Determinations were wrong when made and remain wrong today. Moreover, the approval of the Site Plan, Restrictive Covenant in 2011, and the Building Permit in 2013 granted Life Austin special privileges that are not shared by similarly situated properties. The BOA should now reverse those decisions.

Appellants ask the BOA to reverse:

1. the Land Use Determination ("LUD") that outdoor religious assembly is a principal use under religious assembly;
2. the LUD that an outdoor amphitheater is a principal use under religious assembly;
3. the LUD that the religious assembly use includes musical and theatrical performances and benefit concerts as principal uses;
4. the approval of the Site Plan;
5. the approval of Article I of the Restrictive Covenant; and
6. the approval of the Building Permit.

Alternatively, the Appellants ask the BOA to reverse Article I of the Restrictive Covenant because the limitation on the frequency of events held at the outdoor amphitheater (Occasional) is so vague that it is unenforceable.

EFFECT OF REQUESTED RELIEF

Potential Staff Interpretation of BOA Granting Appeals

Appellants are also concerned that even if the BOA reverses the approval of the Site Plan, the Restrictive Covenants, the Building Permit, and the Land Use Determinations, City staff will make new interpretations that will allow the outdoor amphitheater to continue to operate. On two occasions members of City staff have indicated that if the BOA grants all the relief requested by Appellants, City staff may determine that the outdoor amphitheater is a legal non-conforming use. Exhibit 11 (Deposition of Greg Guernsey, Page 79, lines 14-22). If the BOA grants Appellants' appeals, a determination of legal non-conforming use would be legally

incorrect because the outdoor amphitheater would not have been legally constructed in the first place. Under Texas law, an improperly issued permit is void from the beginning and is deemed to never have existed. *Swain v. Bd. of Adjustment of City of University Park*, 433 S.W.2d 727, 733 (Tex.Civ.App.—Dallas 1968, writ ref'd n.r.e.). No rights can be derived from an improperly issued permit. *City of Amarillo v. Stapf*, 129 Tex. 81, 101 S.W.2d 229 (1937).

As the members of the BOA know, when an appeal of an administrative decision is filed, all proceedings relating to the appealed decision are automatically stayed until the appeal is resolved. § 211.010(c), Texas Local Government Code; § 25-1-187 of the LDC. City staff was legally obligated to enforce the automatic stay on the Site Plan, Restrictive Covenant, and Building Permit even if staff believed the appeals were not timely filed. *In re Jared Woodfill, et al*, 2015 WL 4498229 @ 5 (Tex. 2015). Staff was required by law to forward the Site Plan Appeal and the Building Permit Appeals to the BOA. § 211.010(b), Texas Local Government Code; § 25-1-185 of the LDC. Only the BOA has the authority to decide whether it will hold a hearing on a filed appeal. § 211.010(d), Texas Local Government Code § 25-1-191(A) of the LDC. Appellants should not be penalized because City staff failed to comply with state law and the City Code.

If City staff were to decide that outdoor religious assembly, the outdoor amphitheater, and the expanded list of activities allowed under religious assembly were legal non-conforming uses, then Appellants would have no alternative but to file yet another appeal to the BOA on a determination that the outdoor amphitheater was “legally” constructed even though the BOA had reversed the approval of the applicable permits. Appellants hope that such an appeal will not be necessary.

Options for Life Austin

Life Austin purchased the Property knowing the Property had RR zoning. Life Austin decided not to participate in the Oak Hill Neighborhood Plan approved in December 2008. Life Austin decided not to apply for a zoning change and conditional use permit to authorize the construction and operation of the outdoor amphitheater. Instead, they sought and obtained administrative approvals in contravention of the plain language of the LDC and the City Code.

Appellants' right to appeal those administrative decisions were denied and delayed long enough to allow Life Austin to construct and complete the outdoor amphitheater. Life Austin should not benefit and Appellants should not suffer from the delay. After all, Life Austin was fully aware of the risks if it built the outdoor amphitheater before the resolution of the appeals. Exhibit 7. Of course, Life Austin has known as a matter of law that the LDC authorizes the suspension and revocation of permits that are determined to have been issued in error. See § 25-1-411 *et. seq.*

If the BOA grants all of the relief requested by the Appellants, Life Austin will have the options of:

1. filing a zoning application or a conditional use permit for the amphitheater;
2. appealing the BOA's decision to district court; and
3. making the amphitheater an enclosed building.

Appellants have already spent three years in litigation to enforce their right to have their appeals heard by the BOA. Rather than leaving the door open for more litigation, the Appellants

respectfully ask the BOA to take every action available to it to have the future of the outdoor amphitheater addressed in the open process of a zoning case.

Appellants respectfully ask the BOA to grant their appeals.

Sincerely,

A handwritten signature in cursive script that reads "Robert Kleeman".

Robert J. Kleeman

RJK/dm

enclosures

EXHIBIT 1

Site Development Permit No. SP-2011-0185C

RESTRICTIVE COVENANT

ORIGINAL
FILED FOR RECORD

OWNER: The Promiseland Church West, Inc.,
a Texas non-profit corporation

ADDRESS: c/o Michael Heflin
1301 Capital of Texas Hwy, Suite A-308
Austin, Texas 78746

CONSIDERATION: Ten and No/100 Dollars (\$10.00) and other good and valuable consideration paid by the City of Austin to the Owner, the receipt and sufficiency of which is acknowledged.

PROPERTY: A 53.113 acre tract of land, more or less, described by metes and bounds in Exhibit "A" incorporated into this covenant.

WHEREAS, the Owner of the Property and the City of Austin (the "City") have agreed that the Property should be impressed with certain covenants and restrictions;

WHEREAS, on December 17, 2008, a proposal was submitted to the Director of the City's Neighborhood Planning & Zoning Department ("Director") to allow an approximately 3,500-seat outdoor amphitheater to be included as part of a proposed religious assembly use on the Property under applicable zoning regulations codified in the City's Land Development Code;

WHEREAS, due to the size of the outdoor amphitheater and the potential for large-scale music events, the proposal included several conditions intended to ensure that use of the amphitheater remains consistent with a principal use of religious assembly and does not become an outdoor entertainment use as defined under the Land Development Code;

WHEREAS, on December 23, 2008, the Director determined that the applicable zoning classifications established by the Land Developed Code allowed an outdoor amphitheater as part of the proposed religious assembly use, subject to conditions included in the proposal;

NOW, THEREFORE, it is declared that the Owner of the Property, for the consideration, shall hold, sell and convey the Property, subject to the following covenants and restrictions impressed upon the Property by this Restrictive Covenant ("Agreement"). These covenants and restrictions shall run with the land, and shall be binding on the Owner of the Property, its heirs, successors, and assigns.

I. LAND USE & ZONING RESTRICTIONS

The buildings and outdoor amphitheater located or to be located on the Property will be subject to the following limitations:

- A. Religious Assembly Use will be permitted (as defined in the Austin Land Development Code), including such uses as:
 - 1. Worship services;
 - 2. Musical or theatrical performances;
 - 3. Weddings; and
 - 4. Funerals.
- B. Customary and incidental accessory uses will be permitted, including such uses as:
 - 1. Educational presentations;
 - 2. Neighborhood meetings;
 - 3. School graduations;
 - 4. Public meetings; and
 - 5. Other civic or non-profit group meetings.
- C. Religious Assembly Use may include occasional charitable events (including concerts and performances) for the benefit of an individual or family in need or for a charitable organization or charitable cause.
- D. Except for occasional charitable events under Paragraph C, above, ticketed events may charge only nominal fees to cover utilities, maintenance, and other administrative and operational expenses.
- E. The buildings and outdoor amphitheater will not be used for commercial, for-profit events.
- F. The outdoor amphitheater is subject to all applicable City ordinances.
- G. The restrictions in this Article I are imposed as conditions to Site Plan No. 2011-0185C and apply to the extent that an outdoor amphitheater remains part of the principal religious assembly use.
- H. The restrictions in this Article I shall be interpreted consistent with all applicable local, state, and federal laws, including but not limited constitutional requirements.

II. SHARED PARKING

- A. The site has been granted a parking reduction under section 9.6. of the Transportation Criteria Manual and shall maintain the minimum number of parking spaces as approved with site plan SP-2011-0185C, as amended from time to time with approval from the Director of the Planning and Development Review Department. Concurrent use of the sanctuary located within the multipurpose building, the chapel, or the amphitheater is prohibited.

- B. The owner will provide a study based on Section 9.6.7 of the Transportation Criteria Manual within 12 months following the issuance of the certificate of occupancy for the multipurpose building to the Planning and Development Review Department; however the scope and content of the study will be adjusted to contain the level of analysis reasonably determined to be necessary by the parties, which may not include all technical requirements of Section 9.6.7.
- C. If additional parking is added to the site that addresses the parking deficiency, then consideration shall be given for allowing a function area or activity to operate as a "separate use" (i.e., can be used contemporaneously with another one of the other uses restricted pursuant to subparagraph A. above). This would include any change of occupancy or manner of operation that currently is approved as shared parking with site plan SP-2011-0185C, as amended from time to time with approval from the Director of the Planning and Development Review Department.

III. TRAFFIC MANAGEMENT

- A. To improve safety and reduce delays for entering and exiting vehicles at the driveway to SH 71, the owner will be responsible for providing law enforcement officials to direct traffic for all events.
- B. A site plan or building permit for the property may not be approved, released, or issued, if the completed development or uses of the Property, considered cumulatively with all existing or previously authorized development and uses, generates traffic that exceeds the total traffic generation for the Property as specified in that certain Traffic Impact Analysis ("TIA") prepared by HDR, Inc., dated December 23, 2010, or as amended and approved by the Director of the Planning and Development Review Department. All development on the property is subject to the recommendations contained in the TIA and memorandum from the Transportation Review Section of the Planning and Development Review Department dated August 19, 2011. The TIA shall be kept on file at the Planning and Development Review Department.

IV. MISCELLANEOUS

- A. If Owner shall violate this Agreement, it shall be lawful for the City of Austin, its successor and assigns, to prosecute proceedings at law or in equity against the person or entity violating or attempting to violate this Agreement, and to prevent said person or entity from violating or attempting to violate such covenant. The restrictions set forth herein may only be enforced by the City of Austin and there are no third party beneficiaries to this Agreement.
- B. If any part of this Agreement is declared invalid, by judgment or court order, the

same shall in no way affect any of the other provisions of this Agreement, and such remaining portion of this Agreement shall remain in full effect.

- C. If at any time the City of Austin fails to enforce this Agreement, whether or not any violations of it are known, such failure shall not constitute a waiver or estoppel of the right to enforce it.
- D. This Agreement may be modified, amended, or terminated only by joint action of both (a) the Director of the Planning and Development Review Department of the City of Austin, and (b) all of the Owners of the Property at the time of the modification, amendment or termination.

[Signature page follows]

EXECUTED this the 2nd day of October, 2011.

OWNER:

The Promiseland Church West, Inc.,
a Texas non-profit corporation

By: [Signature]
Name: Michael Herlin
Title: Executive Pastor

ACCEPTED: CITY OF AUSTIN, PLANNING
AND DEVELOPMENT REVIEW DEPARTMENT

By: [Signature]
Name: Gregory T. Gurnsey
Title: Director

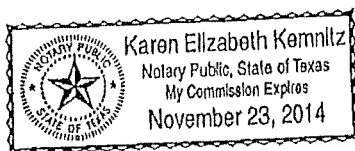
APPROVED AS TO FORM:

[Signature]
Assistant City Attorney
City of Austin

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

This instrument was acknowledged before me on this the 2nd day of October, 2011, by Michael Herlin of The Promiseland Church West, Inc., on behalf of said non-profit corporation.



[Signature]
Notary Public, State of Texas

Signature Page to Restrictive Covenant

After Recording, Please Return to:

City of Austin

Planning and Development Review Department

P. O. Box 1088

Austin, Texas 78767-1088

Attention: Sarah Graham Case No. SP-2011-0185C

Exhibit A

Legal Description

FIELD NOTES FOR 53.113 ACRES OUT OF THE HUGH McCLURE SURVEY NO. 63 AND HUGH McCLURE SURVEY NO. 94, TRAVIS COUNTY, TEXAS, BEING THAT SAME TRACT CALLED 53.13 ACRES AS CONVEYED TO JOHN L. GOULD AND ALEXANDER LEE BY DEED RECORDED IN BOOK 7238, PAGE 482, TRAVIS COUNTY DEED RECORDS, SAID 53.113 ACRES BEING DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

BEGINNING at a $\frac{1}{2}$ " steel pipe found in the fenced south right-of-way (ROW) line of U.S. Highway 71, at the northwest corner of said 53.13 acres, also the northeast corner of a tract conveyed to Rosie Worrell as recorded in Book 3792, Page 49, Travis County Deed Records, for the northwest corner hereof;

THENCE generally following a fence with said south ROW line these 2 courses:
1) S40°06'49"E 390.94 feet to a 18" tall concrete monument for angle point,
2) along a curve to the left with chord of S43°50'06"E 369.04 feet and radius of 2955.00 feet to a $\frac{1}{2}$ " steel pipe found at a fence corner at the northwest corner of a 3.869 acre tract conveyed to James Kretzschmar as recorded in Book 9504, Pages 840 and 842, for the northeast corner hereof;

THENCE S34°37'09"W 3303.22 feet generally following a fence with the east line of said 53.13 acres and the west line of said 3.869 acres, a 32.476 acre tract conveyed to Marvin & Marie Kretzschmar as recorded in Book 9504, Page 847, Travis County Deed Records, and the west line of the Harkins/Wittig Subdivision, passing at 2094.82 feet a $\frac{1}{2}$ " steel pin found on the south line of the Hugh McClure Survey No. 94 and north line of the Hugh McClure Survey No. 63, to a $\frac{1}{2}$ " steel pipe found at the southwest corner of Lot 1 of said Harkins/Wittig Subdivision, for the southeast corner hereof;

THENCE generally following a fence with the south line of said 53.13 acres and the north line of Westview Estates Section 3, a subdivision recorded in Book 85, Page 85, Travis County Plat Records, these 3 courses:

1) N59°21'33"W 347.69 feet to a $\frac{1}{2}$ " steel pin found at the mutual north corner of Lots 21 and 22, for angle point,
2) N59°01'17"W 59.03 feet to a $\frac{1}{2}$ " steel pipe found in the north line of Lot 21, for angle point,
3) N50°27'38"W 215.76 feet to a $\frac{1}{2}$ " steel pipe found in the north line of Lot 20, at the southwest corner of said 53.13 acres and southeast corner of said Rosie Worrell tract, for southwest corner hereof;

THENCE with the west line of said 53.13 acres and east line of said Worrell tract these 2 courses:

1) N32°37'24"E 1302.47 feet to a $\frac{1}{2}$ " steel pin found in a rock mound, on the east side of a dirt road, at the north line of the Hugh McClure Survey No. 63 and south line of the Hugh McClure Survey No. 94, for angle point,
2) N32°45'10"E 2222.75 feet to the POINT OF BEGINNING, containing 53.113 acres of land, more or less. BEARING BASIS: east line of 53.13 acres (7238/482)

FILED AND RECORDED

OFFICIAL PUBLIC RECORDS

Dana DeBeauvoir

Oct 05, 2011 03:05 PM

2011145026

PEREZTA: \$44.00

Dana DeBeauvoir, County Clerk

Travis County TEXAS

EXHIBIT 2-1

A DREAM TO REACH OUT TO ALL

BYLINE: Eileen E. Flynn AMERICAN-STATESMAN STAFF **DATE:** February 25, 2007

PUBLICATION: Austin American-Statesman (TX) **EDITION:** Final **SECTION:** Metro & State

Pastor **Randy Phillips'** dream is to turn a piece of land near Oak Hill into a sprawling complex where the sacred and the secular come together, where a church for the faithful is surrounded by a live music venue, ball fields, a wedding chapel and a counseling center open to the public.

He already has a name for it: Dream City.

"What I want to build is a community resource," he said. "I didn't want to build a church."

The rest of the property will be geared toward secular diversions. ... Phillips is looking for private investors to support the counseling and recreation centers, ball fields, a skate park and a retirement center.

Phillips said the project is not about attracting new church members or even winning more souls for Christ. If people are drawn to the church, he'll welcome them. But he said the force that drives his vision is bettering the community with a place where people with problems such as eating disorders, addiction or marital strife and can receive inexpensive counseling.

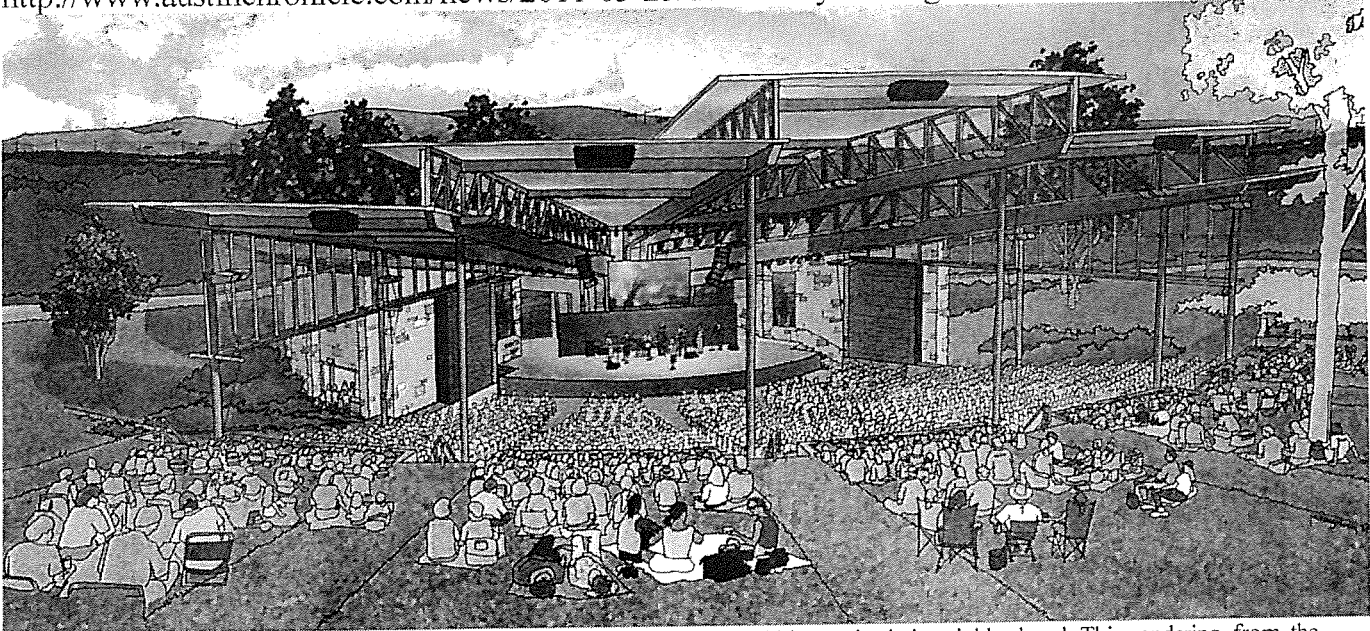
news

'Dream City' or Neighborhood Threat?

A proposed church development has some residents losing sleep

By Amy Smith, Fri., March 25, 2011

<http://www.austinchronicle.com/news/2011-03-25/dream-city-or-neighborhood-threat/>



Some Southwest Austin residents are raising questions about a proposed amphitheatre in their neighborhood. This rendering, from the church's website, is an early conceptual image.

From Promiseland Church Website

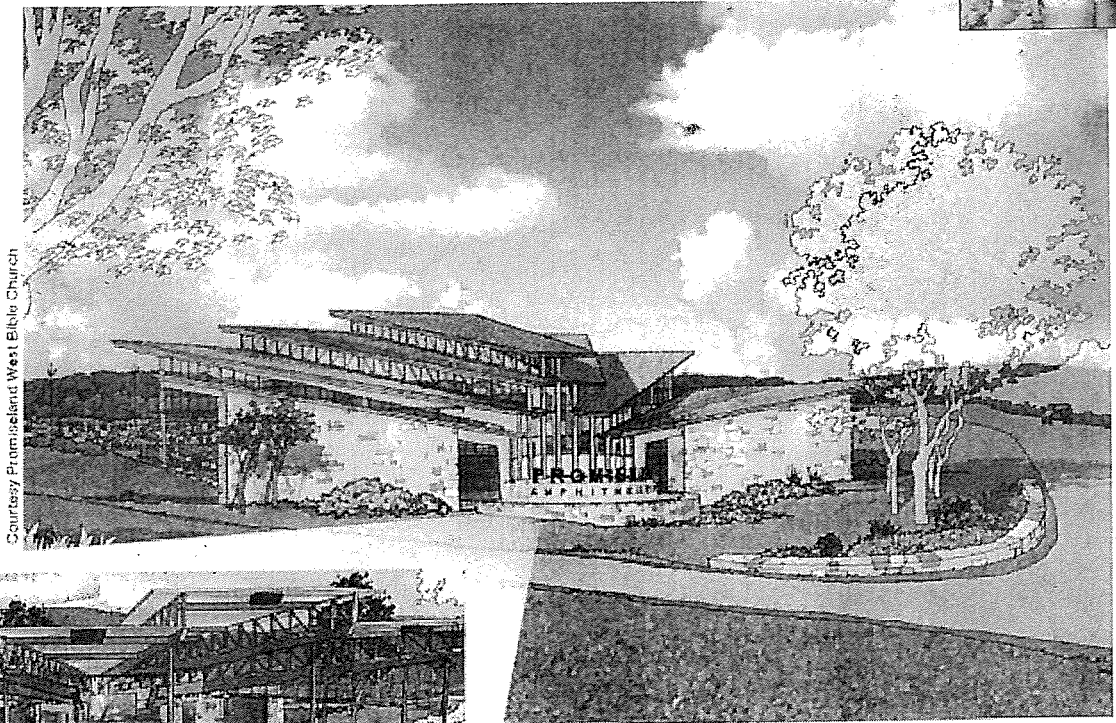
The Dream City amphitheatre, he explained, will serve as an integral part of the community, providing a place for graduation ceremonies, recitals, ballets, family movie nights, jazz concerts, and other events. ... Which leads back to the question of whether "religious assembly use" would accurately apply to the proposed amphitheatre, suggesting that Dream City has some miles left in its journey to becoming PromiseLand West.

<http://impactnews.com/southwest-austin/144-news/12012-dream...>

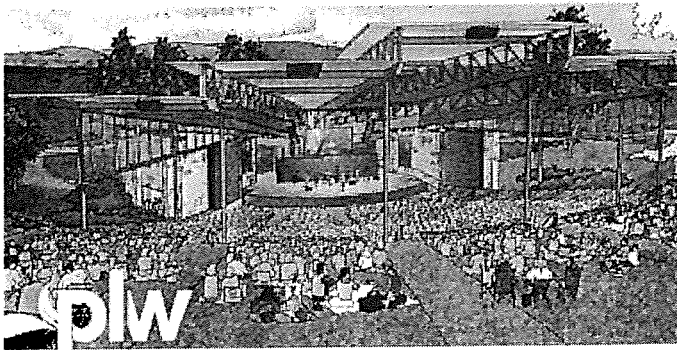
Dream City project moving forward, says Promiseland West

By Kate Hull Tuesday, 15 March 2011

Local church aims for fall 2013 opening despite city's initial rejection, land use questions



Courtesy Promiseland West Bible Church



The amphitheater is planned to hold more than 1,000 people with the capacity to host concerts, plays, ballets and other events.

Dream City would include a worship center, auditorium and amphitheater and is intended to serve nearby communities. Some neighbors have raised concerns about usage and noise. The project is the brainchild of Pastor Randy Phillips, an Austin minister and member of Christian band Phillips, Craig and Dean. Phillips' vision has been in the making since he first decided to open a church in Southwest Austin six years ago.

People are not going to church that frequently in this community, Phillips said. "To simply build an auditorium and say come join us for worship would not get many people on our property," he said. "So we want something more than a worship experience. Whether they come to church or not does not matter."

"We want to be a community resource for Austin, but we also want to be a place where the community can come seven days a week and do whatever they want," Phillips said, "whether that means using our hike and bike trails, counseling services, having weddings or funerals or attending concerts in the park."

HOME LIFEUNIVERSITY LIFETRACK

EXHIBIT 2-2



FIND US ON



I'M NEW

CONNECT

VISIT

EVENTS

MEDIA

GIVE

TAKE A SEAT

HOME » EVENTS » CAMPUS CONCERTS AND EVENTS » TAKE A SEAT - COPY



Dear Friends,

[CLICK HERE TO GIVE](#)

Twenty years ago, God gave me a vision of an outdoor venue in Austin, TX. A place where children dance and sing, families enjoy movie nights with popcorn and ice cream, musicals dazzle the stage, worship bands inspire, relationships are healed, non-profits are resourced and lives are transformed.

I dreamed of a place where legacy is created.

As one of the fastest growing and most artistic cities in the nation, Austin presents a unique audience of creative souls in need of a divine touch. Knowing that many in our city are resistant to organized religion, we began to dream about opportunities that would draw our community to this 68 acre campus. Dog parks, disc golf, walking trails, concerts, and dance have been the colors that we've painted as invitations and they have visited by the thousands!

Today we dream big about a venue that will capture the imagination of a community, the LifeAustin Amphitheatre. A state-of-the-art facility that embraces our culture, celebrates the arts, and empowers souls with the presence of God.

You have a dreaming nature. You must dream. Dream big with me.

– Pastor Randy Phillips

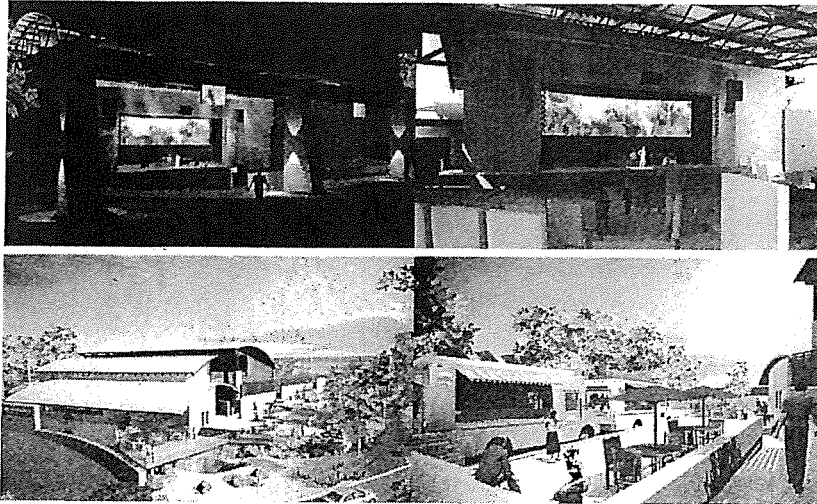
FLY THROUGH THE AMPHITHEATRE

UPCOMING EVENTS

[LIFEKIDS](#)
[LIFEMEN](#)
[LIFESTUDENTS](#)
[LIFEWOMEN](#)
[LIFEUNIVERSITY](#)
[CAMPUS CONCERTS AND EVENTS](#)
[TAKE A SEAT - COPY](#)

[CLICK HERE TO GIVE](#)

ARTIST RENDERINGS OF THE AMPHITHEATRE



AMPHITHEATRE FEATURES

[CLICK HERE TO GIVE](#)

- 1000 seat capacity
- covered stage & audience
- hillside seating for 500-800
- 22,000 sq. foot venue
- state-of-the-art lighting
- audio system designed to reduce noise pollution while maintaining dynamic experiences
- family movie nights, ballets, musicals and other artistic city outlets
- concourse plaza for gathering, with permanent restrooms, where food trucks can serve food & beverages
- backstage area with men's/women's green rooms and dressing facilities
- abundant and convenient on-site parking
- dual loading dock for easy ingress - egress

HOW TO GIVE

[CLICK HERE TO GIVE](#)

Exhibit 2-3

Verizon

3:26 PM
@austlinamp.com

39%

E MAIL US

UPCOMING EVENTS



ABOUT US

OUR FACILITY

DIRECTIONS

CONTACT US

AUG
28

LARRY GATLIN AND THE
GATLIN BROTHERS

LEARN MORE +

PASSES

AUG
29

MARCOS WITT

LEARN MORE +

PASSES

SEP
4

PHILLIPS, CRAIG & DEAN

LEARN MORE +

PASSES

SEP
18

LINCOLN BREWSTER

LEARN MORE +

PASSES

SEP
20

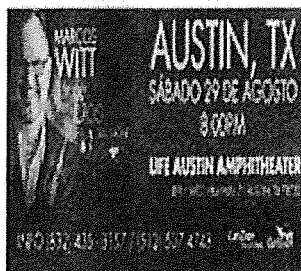
NICOLE C. MULLEN

LEARN MORE +

PASSES

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Marcos Witt Sigues Siendo Dios 8/29/15



Share with your friends:

[Share on Facebook](#)[Share on Twitter](#)[Preview Video](#)

Purchase Tickets

Marcos Witt Sigues Siendo Dios 8/29/15 Life Austin Amphitheater, 8901 West Highway 71, Austin, 78735
Sat, Aug 29, 2015 08:00 PM

[Click To Show Additional Ticket Details](#)

Available Tickets	Price	Qty*
Orquesta (Orchestra Pit)	\$49.08	0
Seccion Intermedia (Mezzanine)	\$14.16	0
Loma/Césped/Lawn (No Asientos/No Seats)	\$17.08	0

[Register Now](#)

Description

- Doors Open 7:00 PM
- Las entradas se enviaron por correo
- Tickets will be mailed



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Your Solution for Concerts & Events

Have Questions or Need Help?
Call us at 210-468-5592
or email us at
info@liveshowticketing.com

Items • Details • Overview & Address

Lincoln Brewster

EVENT INFO

Friday, September 18, 2015 07:00 pm • Austin, TX

Step One: Choose Your Items

Live Austin
8901 West Highway 71
Austin, TX 78735

View Cart

0 Items

Reserved VIP • Early Admission at 5:15pm

0 - +

\$40.00

VIP ticket includes early admission at 5:15pm, best seats, and a Meet & Greet

General Admission Covered Amphitheater Seating

0 - +

\$29.50

First come first serve seating under covered area

General Admission Lawn

0 - +

\$18.50

Blankets and lawn chair seating permitted. This is an uncovered area

TOTAL

Items \$0.00
Tax \$0.00



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Call us at 210-468-5592
or email us at
info@liveshowticketing.com

Items → (0 items) → Home & Address

Building 429

EVENT INFO

Friday, July 24, 2015 07:00 pm - Austin, TX

Step One: Choose Your Items

LilaAustin
2301 West Highway 71
Austin, TX 78735

Reserved VIP - Early Admission at 5:15pm - + \$40.00

VIP ticket includes early admission at 5:15pm, best seats, and a Meet & Greet

General Admission Covered Amphitheater Seating - + \$20.00

First come first serve seating under covered area

General Admission Lawn - + \$10.00

Buckets and lawn chair seating permitted. This is an uncovered area

TOTAL

Items	\$0.00
Fees	\$0.00
Total	\$0.00



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Have Questions or Need Help?
Call us at 210-468-5592
or email us at
info@liveshowticketing.com

Items → Details → Review & Approve

Larry Gatlin & The Gatlin Brothers

EVENT INFO

Friday, August 28, 2015 07:30 pm • Austin, TX

Step One: Choose Your Items

ITEMS	QUANTITY	PRICE	SUBTOTAL
Orchestra Seating	<input type="text" value="0"/> - +	\$28.50	\$0.00
Covered Amphitheater Seating	<input type="text" value="0"/> - +	\$23.50	\$0.00
Lawn Seating	<input type="text" value="0"/> - +	\$12.50	\$0.00

TOTAL

Items	\$0.00
Fees	\$0.00
Total:	\$0.00

Continue



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Your Solution for Concerts & Events.

Have Questions or Need Help?
Call us at 210-468-5592
or email us at
info@liveshowticketing.com

[Items](#) → [Details](#) → [Review & Approve](#)

Phillips, Craig & Dean

EVENT INFO

Friday, September 4, 2015 07:30 pm • Austin, TX

Step One: Choose Your Items

ITEM TYPE	QUANTITY	UNIT PRICE	SUBTOTAL
Orchestra Seating	SOLD OUT	\$28.50	\$0.00
Covered Amphitheater Seating	<input type="text" value="0"/> - +	\$23.50	\$0.00
Lawn Seating	<input type="text" value="0"/> - +	\$12.50	\$0.00

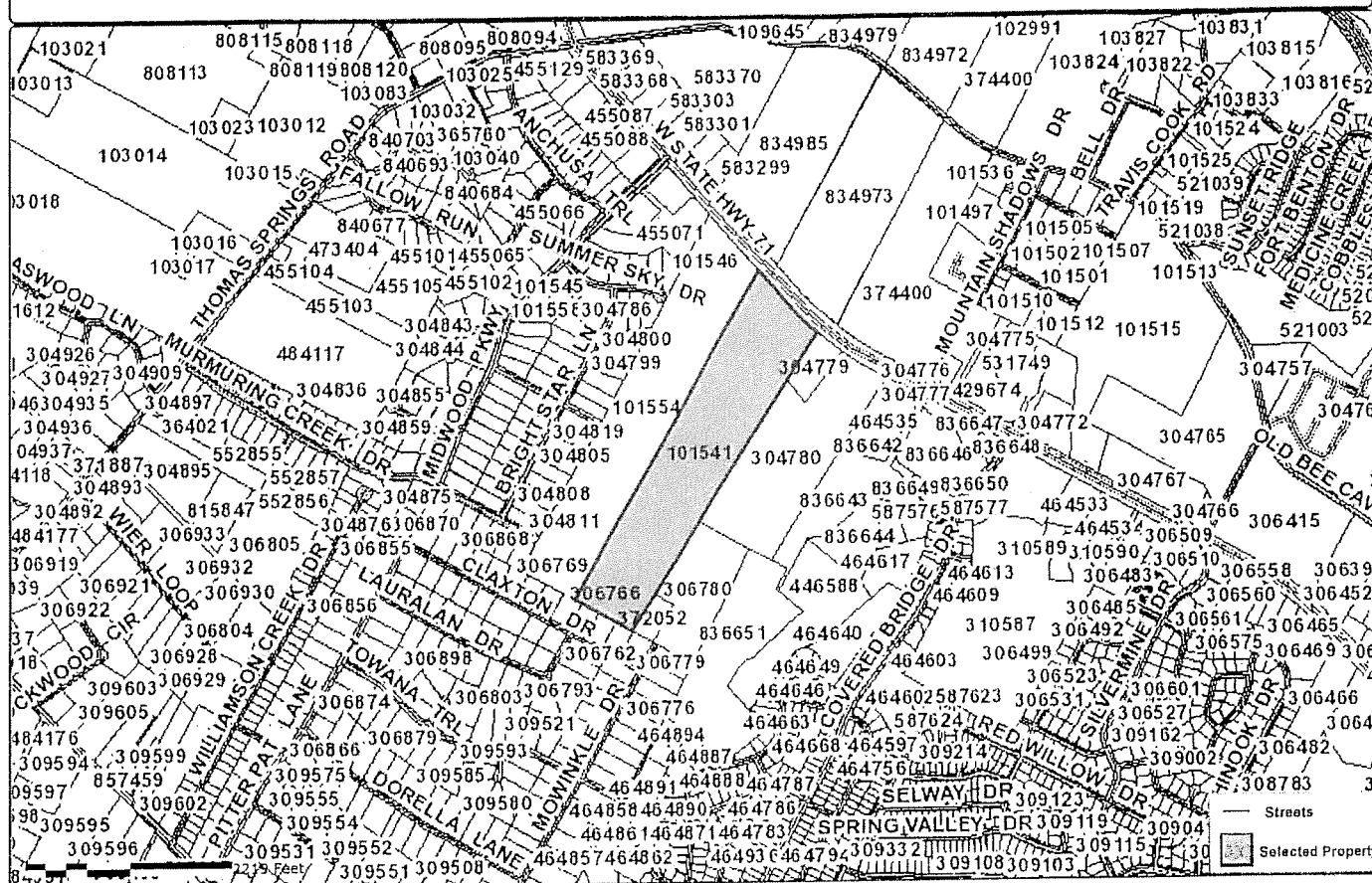
TOTAL

Items: \$0.00
Fees: \$0.00
Total: \$0.00

Continue

EXHIBIT 3

Travis CAD - Map of Property ID 101541 for Year 2015



Property Details

Account

Property ID: 101541

Geo ID: 0101480301

Type: Real

Legal Description: ABS 569 SUR 94 MCCLURE H ACR 53.28

Location

Situs Address: 8901 W STATE HY 71 TX 78735

Neighborhood: EXEMPT COMMERCIAL PPTY

Mapsc0: 611K

Jurisdictions: 01, 68, 03, 0A, 2J, 02

Owner

Owner Name: PROMISELAND CHURCH WEST THE

Mailing Address: % PATRICK R ROGERS, 2600 VIA FORTUNA STE 130, AUSTIN, TX 78746-7982

Property

Appraised Value: N/A

<http://propaccess.traviscad.org/Map/View/Map/1/101541/2015>

powered by
PropertyACCESS

www.trueinformation.com

Map Disclaimer: This tax map was compiled solely for the use of TCAD. Areas depicted by these digital products are approximate, and are not necessarily accurate to mapping, surveying or engineering standards. Conclusions drawn from this information are the responsibility of the user. The TCAD makes no claims, promises or guarantees about the accuracy, completeness or adequacy of this information and expressly disclaims liability for any errors and omissions. The mapped data does not constitute a legal document.

EXHIBIT 3

AUSTINTEXAS.GOV AIRPORT LIBRARY AUSTIN ENERGY AUSTIN WATER CONVENTION CENTER VISITORS BUREAU OPEN GOVERNMENT

austintexas.gov
the official website of the City of Austin

Zoning Profile Report

Address: 14000
[Map Icon]

Questions? Click here for help and contact information.

Disclaimer

The Information on this website has been produced by the City of Austin as a working staff map and is not warranted for any other use. No warranty is made by the City regarding its accuracy and completeness.

For official verification of the zoning of a property, please order a Zoning Verification Letter at 512-974-6370.

Location: (3,063,882.25, 10,063,366.67)

Grid: A20

A21

Future Land Use (FLUM): Rural Residential
Null

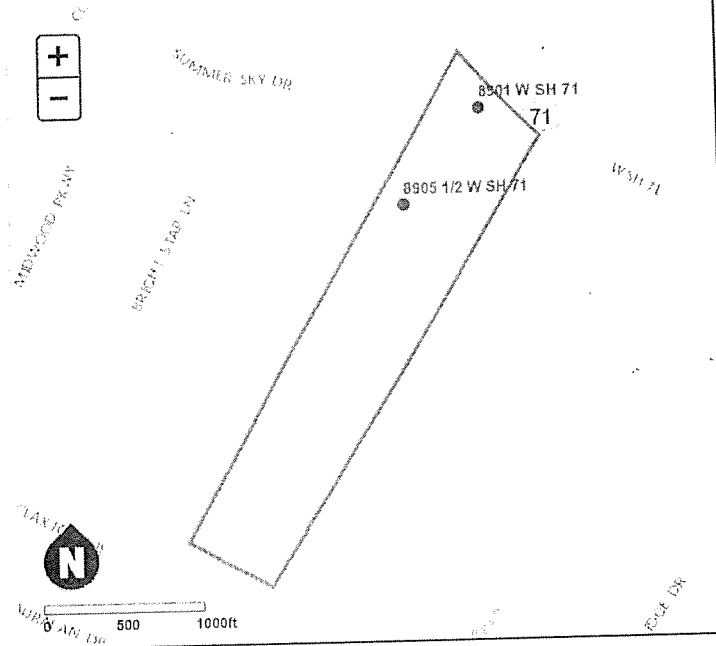
Regulating Plan:

Zoning: RR-NP

Zoning Case: C14-2008-0125

Zoning Ordinance (Mostly after 2000): 20081211-097

Zoning Overlays: NEIGHBORHOOD PLANNING AREA
■ WEST OAK HILL
■ Oak Hill Combined NPA
BARTON SPRINGS ZONE



Zoning Guide

The Guide to Zoning provides a quick explanation of the above Zoning codes, however, the Development Assistance Center provides general zoning assistance and can advise you on the type of development allowed on a property. General information on the Neighborhood Planning Areas is available from Neighborhood Planning. Visit Zoning for the description of each Base Zoning District.



City of Austin
Law Department

301 W. 2nd Street, P.O. Box 1088
Austin, Texas 78767-1088
(512) 974-2268

EXHIBIT 4

Writer's Direct Line
512-974-2974

Writer's Fax Line
512-974-6490

June 13, 2013

Robert Kleeman
Munsch Hardt Kopf & Harr
401 Congress Avenue, Ste. 3050
Austin, TX 78701

Re: Promiseland West—Appeals of Building Permit for Amphitheater

Dear Mr. Kleeman:

In support of the Director of Planning & Development Review ("PDRD") and the Building Official, I am writing in response to the two appeals you filed to the above-referenced building permit issued for an amphitheater previously approved in connection with the Promiseland West site plan.

After reviewing your submittals and the prior record in this case, the Director has determined that the appeals are untimely and do not fall within the subject matter jurisdiction of either the Board of Adjustment ("BOA") or the Building & Fire Code Board of Appeals ("BFCBA"). Following is a summary of the reasons for the Director's decision.

I. BOA Appeal

A. *Prior Zoning Determinations*

Though styled as an appeal of the May 2013 building permit,¹ the bulk of your BOA appeal challenges prior administrative determinations and staff-level communications made in connection with the amphitheater between 2007 and 2011. The allegations at pages 1-9 focus on the Director's 2008 zoning use determination and the 2011 site plan approval and related restrictive covenant, along with various staff emails from 2007-2008.

¹ Since your appeals allege error in issuance of the building permit, it is assumed for purposes of this letter that you are challenging BP No. 2013-047496-BP, which is attached hereto for reference. The document included and cited in both appeals, however, is the separately issued plan review.

Appeal of these prior determinations is untimely under City Code § 25-1-182 (*Initiating an Appeal*) for reasons explained in my letters to you on October 27 and December 30, 2011, both of which are attached to your appeal. Additionally, on March 21, 2013, the Travis County District Court (Livingston, J.) granted a plea to the jurisdiction filed by the City in response to litigation brought by your client challenging these same determinations. As you are aware, that case remains pending on your client's appeal to the Third Court.

B. *Building Permit*

A copy of the building permit, issued on May 10, 2013, is attached hereto for reference, but was not included with your appeal as required under City Code § 25-1-183(3) (*Information Required in Notice of Appeal*). The only error alleged in connection with the permit is a notation on the City's website listing the structural "Sub Type" as: "Amusement, Soc. & Rec. Bldgs."

That notation does not appear on the actual building permit, nor does it constitute a "use determination" under Section 25-1-197 (*Use Determination*) or in any way authorize new uses not allowed under the City's zoning regulations, as previously construed by the Director. Rather, the sub-type notation references occupancy categories for which the structure is approved under the 2009 International Building Code, as adopted in City Code § 25-12-1 (*Building Code*). From a construction standpoint, structures are frequently rated for occupancy types under the Building Code that may not be allowed under applicable zoning regulations.

Your appeal does not challenge the Building Official's designation of the appropriate occupancy rating under the Building Code. Moreover, since the Building Code is not a zoning ordinance, issues related to structural requirements are not within the BOA's subject matter jurisdiction. See Texas Local Gov't Code § 211.009(1) (authorizing BOA appeals for determinations made under zoning enabling statute or local zoning ordinances); City Code Section § 2-1-111 (F) (authorizing BOA appeals for determinations made under Chapter 25-2 (*Zoning*)).

II. BFCBA Appeal

Your appeal to the BFCBA focuses on the same zoning determinations covered in your BOA appeal. In addition to being time-barred, zoning determinations are beyond the jurisdiction of the BFCBA, which is limited to "appeals of orders, decisions, or determinations made by the building official *relating to the application and interpretations of*

Robert Kleeman
June 13, 2013
Page 3

the Building Code and Fire Code.” See City Code Section §2-1-121(C) (Building and Fire Code Board of Appeals) (emphasis added).

The appeal does not allege that the building permit violates the Building Code or the Fire Code, neither of which is mentioned. Like the BOA appeal, it also fails to include a copy of the actual building permit and instead focuses on notations appearing on the city website in connection with the separately issued *plan review* (No. 2013-002081PR), which is not an appealable decision. *See City Code § 25-11-93 (Appeal)* (granting a right of appeal for a decision by the building official to “grant or deny a *permit* to the [BFCBA]”) (emphasis added).

Based on the reasons explained above, the Director has determined that your appeals are untimely and beyond the jurisdiction of either the BOA or the BFCBA. As always, please do not hesitate to contact me if you have questions or concerns regarding this matter.

Sincerely,



Brent D. Lloyd
Assistant City Attorney

cc Sue Edwards
Greg Guernsey
Leon Barba

SNEED, VINE & PERRY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
ESTABLISHED 1926

EXHIBIT 5

900 CONGRESS AVENUE, SUITE 300
AUSTIN, TEXAS 78701

TELEPHONE (512) 476-6955

FACSIMILE (512) 476-1825

Writer's Direct Dial:
(512) 494-3135

Writer's e-mail address:
rkdeeman@sneedvine.com

July 2, 2013

By Hand Delivery

Board of Adjustment
c/o Susan Walker
505 Barton Springs Road
Room 530
Austin, Texas 78704

Re: Appeal of Decision by Greg Guernsey to Not forward May 28, 2013 Appeal to the Board of Adjustment For the Issuance of a Building Permit for an Outdoor Amphitheater, 8901 West State Highway 71, Case Number 2013-002081PR ("Permit")

Dear Chairman Jack and Members of the Austin Board of Adjustment:

This firm represents the Hill Country Estates Home Owners Association ("HCE") and the Covered Bridge Property Owners Association, Inc. ("CB") with respect to their appeal of the issuance of the Building Permit. CB and HCE meet the requirements of an interested party, as defined by the City Code.

On May 10, 2013, the City of Austin issued a building permit for an amphitheater to be constructed on 53 acres located at 8901 West State Highway 71, Austin, Texas 78736 (the "Property"). The Permit was issued in conjunction with City case number 2013-002081 PR.

On May 28, 2013 a representative of CB and HCE delivered to City staff an appeal to the Board of Adjustment and an appeal to the Building & Fire Code Board of Appeals regarding the May 8, 2013 approval of a permit and the issuance of the May 10, 2013 building permit for the outdoor amphitheater which is the first building permit issued for the amphitheater.¹ In addition to the appeal, the CB/HCE representative also delivered a standing letter and the appropriate filing fee for an appeal to the Board of Adjustment. A copy of a confirming email sent to Leon Barba on May 28, 2013, who took delivery of the appeal related documents, is enclosed. Also enclosed are copies of the May 28, 2013 appeal, the standing letter, and the filing fee check. The May 28, 2013 CB/HCE appeal is incorporated into this letter and into this appeal for all purposes.

¹ This letter and the accompanying appeal application do not pertain to the CB/HCE appeal to the Building & Fire Code Board of Appeals.

On June 14, 2013, Assistant City Attorney Brent Lloyd sent a letter dated June 13, 2013 to me regarding the May 28, 2013 appeal to the Board of Adjustment. In his June 13, 2013 letter, Mr. Lloyd wrote:

"After reviewing your submittals and the prior record in this case, the Director of Planning and Development Review has determined that the appeals are untimely and do not fall within the subject matter jurisdiction of either the Board of Adjustment or the Building & Fire Code Board of Appeals."

The balance of Mr. Lloyd's letter summarizes "the reasons for the Director's decision." According to Mr. Lloyd's June 13, 2013 letter, these are all decisions that Mr. Guernsey made after Mr. Guernsey received and reviewed the May 28, 2013 CB/HCE appeal.

CB and HCE are appealing the decisions described in the June 13, 2013 Brent Lloyd letter. The decisions being appealed are described in the Appeal Application. A copy of the June 13, 2013 Brent Lloyd letter is enclosed with the Appeal Application.

Pursuant to Section 211.010(a)(1), Texas Local Government Code ("TLGC"), HCE and CB file this appeal of Director Guernsey's decision to not forward the CB/HCE May 28, 2013 appeal to the Austin Board of Adjustment. Pursuant to Section 211.009(a)(1), the Board of Adjustment has the authority to "hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of [Subchapter A of Chapter 211 of TLGC] or an ordinance adopted under [Subchapter A of Chapter 211 of TLGC]."

The present CB/HCE appeal to the Board of Adjustment alleges that Director Guernsey made one or more errors in his decision to not forward the May 28, 2013 CB/HCE appeal to the Board of Adjustment. The present CB/HCE appeal alleges that Director Guernsey's decision is erroneous under Subchapter A, Chapter 211, TLGC and under Chapter 25-2 of the Austin Land Development Code.

CB, HCE, and their members are aggrieved parties because their substantive and procedural rights under Section 211.010(a)(1) TLGC and under the City Code have been denied them by Mr. Guernsey's decision to pass judgment on the May 28, 2013 appeal and his decision to not forward the May 28, 2013 appeal to the Board of Adjustment. In other words, Mr. Guernsey has made a determination in the enforcement of Subchapter A, Chapter 211, TLGC and under Chapter 25-2 of the Austin Land Development Code. Section 211.009(a)(1), TLGC establishes the Board of Adjustment's authority to hear and decide an appeal alleging an error by an administrative official in the enforcement of Subchapter A of Chapter 211, TLGC and Chapter 25-2 of the Austin Land Development Code, which was adopted pursuant to Subchapter A of Chapter 211, TLGC.

HCE and CB are registered neighborhood associations and meet the requirements of Section 25-1-131(A) & (C) LDC to be Interested Parties by communicating their respective concerns regarding the proposed development described in the Building Permit. The enclosed May 28, 2013 appeal materials includes copies of email correspondences to City staff requesting recognition of Interested Party status with respect to the Building Permit application and the refusal of City Staff to do so. Mr. Frank Goodloe is treasurer of CB and Margaret Butler is the President of the HCE. Both HCE and CB are registered neighborhood associations with the City of Austin. All materials establishing the standing of CB and HCE in the May 28, 2013 appeal are incorporated into this letter for all purposes.


Importantly, the reasons given in the June 13, 2013 Brent Lloyd letter for Mr. Guernsey not forwarding the May 28, 2013 appeal to the Board of Adjustment do not include any assertion that CB or HCE are not interested parties, as defined by Section 25-1-131. Mr. Guernsey's reasons do not include his finding that the May 28, 2013 appeal was filed more than 20 days after the issuance of the May 10, 2013 building permit.

The contact information for Margaret Butler is (512) 699-6692 and her mailing address is 7100 Bright Star Lane, Austin, Texas 78736. The contact information for Frank Goodloe is (512) 906-1931 and his mailing address is 6705 Covered Bridge, Unit 10, Austin, Texas 78736.

Please let me know if there are any questions.

Sincerely,

SNEED, VINE & PERRY, P.C.

By: 
Robert Kleeman

RJK:dm
Enclosures

or other reproduction of this message is strictly prohibited.

From: Kleeman, Robert [<mailto:rkleeman@munsch.com>]
Sent: Tuesday, May 28, 2013 3:19 PM
To: Leon.Barba@austintexas.gov
Subject: Appeals Regarding Building Permit for Outdoor Amphitheater 8901 West SH 71 [MH-MHDocs.FID894290]

Leon:

Thanks for receiving the appeal to the Board of Adjustment and the appeal to the Building and Fire Code Commission today. For your convenience, I have attached PDFs of the two appeals, the standing letter for the Board of Adjustment appeal and the filing fee check that I left you.

Please let me know if there is any additional information required to complete the appeal application.

Brent D. Lloyd
Assistant City Attorney
(512) 974-2974

From: Robert Kleeman [mailto:rkleeman@sneedvine.com]
Sent: Tuesday, June 11, 2013 9:15 AM
To: Barba, Leon; Edwards, Sue; Lloyd, Brent
Subject: FW: Appeals Regarding Building Permit for Outdoor Amphitheater 8901 West SH 71 [MH-MHDocs.FID894290]

Dear Mr. Barba:

I represent the Covered Bridge Property Owners Association and the Hill Country Estates Homeowners Association regarding their appeals of the issuance of a building permit for an outdoor amphitheater on RR zoned property located at the above referenced address. I am following up with you regarding the appeals to the Board of Adjustment and the Building and Fire Code Commission that I delivered to you on May 28, 2013. Copies of those appeals and the check for the payment of filing fee for the Board of Adjustment appeal are attached.

Has my clients' Board of Adjustment appeal been forwarded to the Board of Adjustment as required by Section 211.010(b) of the Texas Local Government Code? If not, please let me know when you anticipate that my clients' appeal and "all papers constituting the record" of the of the building permit being appealed will be forwarded to the Board of Adjustment. If you do not intend to forward my clients' appeal and the record of the building permit to the Board of Adjustment, please notify as soon as such a decision is made.

Likewise, I have the same questions regarding my clients' appeal to the Building and Fire Code Commission.

Since our meeting on May 28, 2013, I have changed law firms. I sent you my new contact information by email on June 8, 2013. I resent my V-Card yesterday morning. Out of an abundance of caution, I have also attached my V-Card to this email

Please confirm your receipt of this email.

Robert Kleeman
Sneed, Vine & Perry, P.C.
900 Congress Avenue, Suite 300
Austin, Texas 78701
(512) 476-6955 – main
(512) 494-3135 - direct
(512) 476-1825 – fax

This communication may be protected by the attorney/client privilege and may contain confidential information intended only for the person to whom it is addressed. If it has been sent to you in error, please reply to the sender that you have received the message in error and delete this message. If you are not the intended recipient, any dissemination, distribution, copying

EXHIBIT 5 -\

CITY OF AUSTIN
APPLICATION TO BOARD OF ADJUSTMENT
INTERPRETATIONS
PART I: APPLICANT'S STATEMENT
(Please type)

STREET ADDRESS: 8901 West State Highway 71, Austin, Texas 78736.

LEGAL DESCRIPTION: 53.11 acres as described in a Restrictive Covenant recorded in Document No. 2011146026, Official Public Records of Travis County, Texas ("Property")

Lot (s) _____ Block _____ Outlot _____ Division _____

ZONING DISTRICT: RR

We, Margaret Butler, on behalf of myself and as Authorized Agent for Kim Butler and as Authorized Agent for Hill Country Estates Home Owners Association and Frank Goodloe, on behalf of myself and as Authorized Agent for Covered Bridge Property Owners Association, Inc., affirm that on July 2, 2013, we hereby apply for an interpretation hearing before the Board of Adjustment.

The Director of Planning and Development Review Department interpretations regarding his decision to not forward to the Board of Adjustment the appeal submitted by Hill Country Estates Home Owners Association ("HCE") and the Covered Bridge Property Owners Association ("CB") regarding the issuance of a building permit in connection with City Case No. 2013-002081-PR for the Property ("Permit")¹:

1. The Director of Planning and Development Review ("Director") has determined that the Board of Adjustment has no subject matter jurisdiction under either Section 211.009(a) (1), Texas Local Government Code or Section 2-1-111, City Code to hear an appeal that alleges that a building permit was issued in error.
2. The Director has the authority under Subchapter A, Chapter 211, Texas Local Government Code and the City Code to determine the subject matter jurisdiction of Board of Adjustment.

¹ City staff describes the Permit has building permit having City case No. 2013-047496-BP. CB and HCE are appealing the issuance of the permit in connection with City Case No. 2013-002081-PR. Even if the City has assigned a new case number to the issued permit, it is the same permit that is appealed.

3. The Director has determined that the Board of Adjustment has no subject matter jurisdiction under Section 211.009(a)(1), Texas Local Government Code or Section 2-111(F), City Code to hear the May 28, 2013 CB/HCE appeal filed pursuant to Section 211.010(a)(1) that alleges the Permit was issued in error.
4. The Director has the discretionary authority under Section 211.010(b), Texas Local Government Code to not forward to the Board of Adjustment the May 28, 2013 CB/HCE appeal filed pursuant to Section 211.010(a)(1), Texas Local Government Code.
5. The Director has determined that the May 28, 2013 CB/HCE appeal is untimely with respect to the Permit issued on May 8, 2013.
6. The Director has determined that "under the prior record in this case," CB and HCE had the right to file only one appeal to the Board of Adjustment regarding the proposed outdoor amphitheater project on the Property. In other words, since late January 2009, CB and HCE have had no right under Section 211.010(a)(1), Texas Local Government Code to appeal any decision relating to the outdoor amphitheater, including the May 8, 2013 issuance of the Permit.
7. The Director has determined that CB and HCE may not file any appeal to the Board of Adjustment regarding the issuance of the Permit.

We feel the correct interpretations are:

1. The Board of Adjustment has subject matter jurisdiction under Section 211.009(a)(1), Texas Local Government Code and Section 2-111(F), City Code to hear and decide an appeal that alleges an error in the decision to issue a building permit if the alleged error relates to zoning regulations applicable to the subject property and the permit.
2. The Board of Adjustment has subject matter jurisdiction under Section 211.009(a)(1), Texas Local Government Code to hear and decide an appeal that alleges an error in the decision to issue any permit if the alleged error relates to the zoning regulations applicable to the subject property.
3. The Director does not have the authority to refuse the filing of an appeal made by an aggrieved person under Section 211.010(a)(1), Texas Local Government Code if the aggrieved person has substantially completed the applicable application form and submitted same within 20 days of the administrative decision being appealed.
4. An aggrieved person, who is not the permit applicant, may appeal a permit approval, including a permit that incorporates an earlier interpretation by City staff, if the error alleged relates to zoning regulations applicable to the permit and the subject property.
5. All appeals that are timely and complete pursuant to the City Code and are filed by an aggrieved person pursuant to Section 211.010(a) (1), Texas Local Government Code, must be forwarded to the Board of Adjustment.

6. The Director does not have the authority under Subchapter A of Chapter 211, Texas Local Government Code or the City Code to determine the subject matter jurisdiction of the Board of Adjustment over an appeal.

NOTE: The board must determine the existence of, sufficiency of and weight of evidence supporting the findings described below. Therefore, you must complete each of the applicable findings statements as part of your application. Failure to do so may result in your application being rejected as incomplete. Please attach any additional support documents.

1. There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations or map in that:

This is an appeal of decisions made by the Director of PDRD on June 14, 2013 regarding an appeal to the Board of Adjustment filed on May 28, 2013 by CB and HCE. Specifically, this is an appeal of the Director of PDRD's determinations of his authority to enforce Subchapter A, Chapter 211, Texas Local Government Code and Chapter 25-2, City Code.

A. Background Facts. On May 28, 2013, CB and HCE filed an appeal with Leon Barba appealing the issuance of the Permit on May 8, 2013. The appeal alleged an error in the issuance of the Permit because the activities described in the permit application are not authorized under the present zoning applicable to the Property. A copy of the May 28, 2013 CB/HCE Appeal is attached and made a part of this appeal for all purposes.

On June 14, 2013, Assistant City Attorney Brent Lloyd transmitted a letter to legal counsel for CB and HCE in support of the decision of the Director of PDRD to deny the May 28, 2013 CB/HCE appeal filed with the Board of Adjustment. In the letter dated June 13, 2013, Mr. Lloyd wrote:

"After reviewing your submittals and the prior record in this case, the Director has determined that the appeals are untimely and do not fall within the subject matter jurisdiction of either the Board of Adjustment ("BOA") or the Building & Fire Code Board of Appeals ("BFCBA")."

CB and HCE understand one of the purposes of Mr. Lloyd's June 13, 2013 letter is to inform CB and HCE that the Director of PDRD will not forward the May 28, 2013 CB/HCE appeal of the issuance of the Permit to the Board of Adjustment. The determinations described in Brent Lloyd's June 13, 2013 letter are referred to as the "Determinations" or "Mr. Guernsey's Determinations." A copy of the June 13, 2013 Brent Lloyd letter is enclosed and is made a part of this appeal for all purposes.

B. Differences in Interpretations of Applicable Law

1. Subject Matter Jurisdiction of the Board of Adjustment. There is a reasonable doubt of difference of interpretation as to whether the subject matter jurisdiction granted to the Board of Adjustment under Section 211.009(a)(1), Texas Local Government Code ("TLGC") includes appeals regarding the issuance of a building permit.

The first determination being appealed is Mr. Guernsey's Determination that the Board of Adjustment does not have subject matter jurisdiction to consider an appeal of the issuance of a building permit.

Section 2-1-111(F)(5), Austin City Code states that the Board of Adjustment shall "perform other duties prescribed by ordinance or state law." Pursuant to Section 211.009(a)(1), TLGC, the Board of Adjustment has the authority to:

"hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of [Subchapter A of Chapter 211 of TLGC] or an ordinance adopted under [Subchapter A of Chapter 211 of TLGC]."

Section 211.009(a)(1), TLGC is a statutorily mandated subject matter jurisdiction for boards of adjustments in the state of Texas. The City Council has not limited the scope of the authority of the Board of Adjustment because Section 2-1-111(F)(5), Austin City Code conforms the subject matter jurisdiction of the Board of Adjustment to Section 211.009(a)(1), TLGC. Therefore, Mr. Guernsey does not have the authority to limit the Board of Adjustment's subject matter jurisdiction under Section 211.009(a)(1), TLGC. As to the subject matter jurisdiction of the Board of Adjustment to hear and consider an appeal of a building permit, the Texas Supreme Court has ruled that building permits are within the subject matter jurisdiction of a board of adjustment under Section 211.009(a)(1) TLGC. *Ballantyne v. Champion Builders, Inc.*, 144 S.W. 3d 417, 425 (Tex. 2004).

Mr. Guernsey's determination that appeals of the approval of a building permit are outside the subject matter jurisdiction of the Board of Adjustment conflict with the plain language of Section 211.009(a)(1), TLGC and the ruling of the Texas Supreme Court in *Ballantyne*.

2. The May 28, 2013 Appeal is Untimely. In the June 13, 2013 Lloyd letter focuses on the portions of the May 28, 2013 appeal that describe the errors in previous decisions to approve permits with respect to the Property. The June 13, 2013 letter states that "appeal of these prior determinations is untimely under City Code Section 25-1-182 for reasons explained in my letters to you on specifically refers to letters from Mr. Lloyd dated October 27 and December 30, 2011, both of which are attached to your appeal."

Mr. Lloyd's letter does not challenge the fact that the May 28, 2013 CB/HCE appeal was filed within 20 days of the issuance of the Permit. Mr. Lloyd's letter also ignores the plain fact that the May 28, 2013 CB/HCE appeal alleges an error in the decision to issue the Permit in May 2013. The Director of PDRD and Mr. Lloyd maintain that an administrative decision in 2008 can control and preclude an appeal under Section 211.010(a)(1), TLGC more than four years later. While the May 28, 2013 CB/HCE appeal includes some facts that overlap the facts relating to the October 2011 appeal, the May 28, 2013 CB/HCE alleges errors in the issuance of new and totally different permit and alleges new facts.

Further, it does not matter whether the Director of PDRD believes he has permanently determined all issues relating to the permitting of the outdoor amphitheater on the Property. Section 211.010(a)(1), TLGC grants an aggrieved person, including

CB and HCE, the right to appeal a decision or determination of an administrative official to the Board of Adjustment. Each and every decision may be appealed. Section 211.009(a)(1), TLGC authorizes the Board of Adjustment (not the director of PDRD) to decide whether it will hear the appeal.

The clear purpose of Sections 211.009 and 211.010, TLGC is to provide the public an avenue to appeal administrative actions that an aggrieved person feels is wrong. Each property and each permit application is different. Community values and standards change over time. Every administrative decision should be subject to appeal, and if deemed appropriate by the Board of Adjustment, reviewed by the Board of Adjustment.

3. The Director of PDRD Has No Authority to Decide Which Appeals are forwarded to the Board of Adjustment. Mr. Guernsey's Determinations necessarily include his interpretation that the Director of PDRD has the discretionary authority to ignore the mandate of the third sentence of Section 211.010(b), TLGC. This sentence mandates that "...the official from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record of the action that is appealed."

The right of appeal under Section 211.010, TLGC also includes the right to have the appeal presented to the Board of Adjustment and to have the opportunity to be heard by the Board of Adjustment.

CB and HCE contend that this is a non-discretionary obligation under state law. The Director of PDRD does not have the ability or authority to thwart appeal rights of CB and HCE under Section 211.010(a)(1) TLGC by arbitrarily deciding which of his decisions can be appealed.

4. The Director of PDRD Has No Authority Under State Law or the Chapter 25-2 to Determine the Subject Matter Jurisdiction of the Board of Adjustment. There is no mention in Chapter 211, TLGC or in the City Code that the Director of PDRD or the administrative official whose decision is being appealed has the authority to decide the subject matter jurisdiction of the Board of Adjustment. The Director of PDRD has granted himself a power that neither state law nor the City Code provides to him.

Subject matter jurisdiction is determined by state law and may be expanded by the City Council. Section 211.009(a), TLGC provides: "The board of adjustment **may:** (1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter" (emphasis added).

The word "may" means the Board of Adjustment decides whether it will hear an appeal and the Board of Adjustment will decide whether the appealing party has standing. These powers of the Board of Adjustment are also reflected in Section 2-1-111(F), City Code. The Board of Adjustment should have had the opportunity to decide whether it wanted to hear the May 28, 2013 CB/HCE appeal. As a policy matter, the

Board of Adjustment should never be precluded from reviewing an appeal filed by an aggrieved party pursuant to Section 211.009(a)(1) seeks to present to this Board.

Under Sections 211.009 and 2.11.010, TLGC, the May 28, 2013 CB/HCE appeal should be forwarded to the Board of Adjustment. The director of PDRD can raise his subject matter jurisdiction objections at the hearing when the Board of Adjustment decides whether it will hear and consider the appeal. If the Director of PDRD is allowed to decide which of his or his staff's decisions are even forwarded to the Board of Adjustment, then the right of appeal granted by Section 211.009(a) (1) TLGC is completely nullified.

5. An appeal of use provisions could clearly permit a use which is in character with the uses enumerated for the various zones and with the objectives of the zone in question because:

This appeal does not pertain to use provisions under Chapter 25-2 of the Land Development Code. This is an appeal of certain determinations and decisions made by the Director of PDRD regarding his enforcement of Subchapter A, Chapter 211, TLGC. Therefore, this question is not applicable to the present appeal.

6. The interpretation will not grant a special privilege to one property inconsistent with other properties or uses similarly situated in that:

This appeal does not pertain to the granting of special privileges to one property. Therefore, this question is not applicable to the present appeal.

APPLICANT/AGGRIEVED PARTY CERTIFICATE — I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed _____ Printed _____

Mailing Address _____

City, State & Zip _____ Phone _____

OWNER'S CERTIFICATE — I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed _____ Printed _____

Mailing Address _____

City, State & Zip _____ Phone _____

REQUESTS FOR INTERPRETATION
(Appeal of an Administrative Decision)

REQUIRED ITEMS FOR A COMPLETE APPLICATION:

The following items are required in order to file an application for interpretation to the Board of Adjustment.

- A completed application with all information provided. Additional information may be provided as an addendum to the application.
- Standing to Appeal Status: A letter stating that the appellant meets the requirements as an Interested Party as listed in Section 25-1-131(A) and (B) of the Land Development Code. The letter must also include all information required under 25-1-132(C).
- Site Plan/Plot Plan drawn to scale, showing present and proposed construction and location of existing structures on adjacent lots.
- Payment of application fee of \$360.00 for residential zoning or \$660 for commercial zoning. Checks should be made payable to the City of Austin.

An appeal of an administrative decision must be filed by the 20th day after the decision is made (Section 25-1-182). Applications which do not include all the required items listed above will not be accepted for filing.

If you have questions on this process contact Susan Walker at 974-2202.

To access the Land Development Code: sign on to: www.ci.austin.us.tx/development

APPLICANT/AGGRIEVED PARTY CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed Margaret G. Butler Printed Margaret G. Butler

Mailing Address 7100 Bright Star Lane

City, State & Zip Austin, Tx. 78736 Phone 512.677.6672

OWNER'S CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed _____ Printed _____

Mailing Address _____

City, State & Zip _____ Phone _____

APPLICANT/AGGRIEVED PARTY CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed Frank W. Goodloe Printed FRANK W. GOODLOE

Mailing Address 6705 COVERED BRIDGE DR. UNIT 10

City, State & Zip AUSTIN, TX. 78736-3311 Phone 512-906-1931

OWNER'S CERTIFICATE – I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Signed _____ Printed _____

Mailing Address _____

City, State & Zip _____ Phone _____

EXHIBIT 6



NUMBER 13-13-00395-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

HILL COUNTRY ESTATES
HOMEOWNERS ASSOCIATION
AND COVERED BRIDGE PROPERTY
OWNERS ASSOCIATION, INC.,

Appellants,

v.

GREG GUERNSEY AND
THE CITY OF AUSTIN,

Appellees.

On appeal from the 250th District Court
of Travis County, Texas.

MEMORANDUM OPINION

**Before Justices Garza, Benavides, and Perkes
Memorandum Opinion by Justice Benavides**

By six issues, which we consolidate into one, appellants, Hill Country Estates Homeowners Association ("Hill Country") and Covered Bridge Property Owners

Association, Inc. ("Covered Bridge") appeal the trial court's granting of a plea to the jurisdiction filed by appellees, the City of Austin ("Austin" or "the City") and Greg Guernsey, the City's Planning and Development Review Department's Director. We affirm in part and reverse and remand in part.

I. BACKGROUND¹

The Texas Local Government Code provides that a municipality may regulate zoning within its city limits and outlines various procedures that a municipality must follow in its regulation. See generally TEX. LOC. GOV'T CODE ANN. §§ 211.001–.017 (West, Westlaw through 2013 3d C.S.). In Austin, zoning uses are regulated by the Land Development Code (LDC). See AUSTIN, TEX., LAND DEV. CODE, Title 25 (2015), available at <https://www.municode.com/library/tx/austin>. The LDC gives the director of the Planning and Development Review Department the authority to "determine the appropriate use classification for an existing or proposed use or activity." *Id.* § 25-2-2(A).

In 2007, PromiseLand Church West, Inc. ("the Church") sought to develop a 53-acre project on Highway 71 in Austin to build a chapel, multipurpose building, and an outdoor amphitheater. The area of land for the project is designated "rural residential," which "may be applied to a use in an area for which rural characteristics are desired or an area whose terrain or public service capacity require low density." *Id.* § 25-2-54. Religious assembly use is a civic use that is: "regular organized religious worship or

¹ This appeal was transferred from the Third Court of Appeals pursuant to a docket equalization order issued by the Texas Supreme Court. See TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2013 3d C.S.).

religious education in a permanent or temporary building. The use excludes private primary or secondary educational facilities, community recreational facilities, day care facilities, and parking facilities. A property tax exemption is prima facie evidence of religious assembly use." *Id.* § 25-2-6(B)(41).

Hill Country and Covered Bridge are residential neighborhood associations in the area surrounding the Church's construction site, and both opposed the Church's request to build an outdoor amphitheater. Hill Country and Covered Bridge relied on statements made in the press that the Church's proposed amphitheater would be used for outdoor entertainment events, including live music performances, concerts, ballets, graduations, and theatrical performances. Hill Country and Covered Bridge opposed the Church's amphitheater proposal on grounds that such uses did not comport with the religious assembly use definition.

On December 17, 2008, Carl Conley, a licensed professional engineer who represented the Church, wrote to Guernsey, the City's planning and development review director, about the concerns over the proposed amphitheater. The letter stated the following:

Thank you for meeting with me today to discuss whether an outdoor amphitheater is considered an accessory use² to an overall religious assembly use under RR or SF-1 zoning.

² An accessory use is a use that:

- (1) Is incidental to and customarily associated with a principal use;
- (2) Unless otherwise provided, is located on the same site as the principal use; and
- (3) May include parking for the principal use.

AUSTIN, TEX., LAND DEV. CODE, § 25-2-891 (2015).

The attached Conceptual Site Plan shows the overall project, including the primary church buildings and the outdoor Amphitheater. The church buildings include a typical indoor auditorium for 3500 seats. This indoor facility will be used for various religious assembly activities including worship services, weddings, funerals and education and musical presentations. This facility would also be available for non-religious non-profit civic uses such as neighborhood meetings, boy scout/girl scout meetings, school graduations, public meetings, etc. Again, these uses would be for non-profit activities. Like most churches, they may charge a nominal fee to the users to cover setup, clean up, utilities, and administrative and other operational expenses. There may be some activities that would include a fee that would be used to provide benefit to an individual or group that had a special emergency need (i.e. a family whose house burned down) or for some charitable organizations. All of these are typical of the use of a church facility. The church would not typically provide a venue for commercial "for profit" organizations.

The amphitheater would be used for the exact same type activities as the indoor auditorium but in an outdoor setting. This would be on a "weather permitting" basis while taking advantage of the natural environmental surroundings. As we discussed, the use of the amphitheater (along with any other use on the property) would be subject to all of the City's ordinances, including sound levels at the property boundaries. The church would also entertain the concept of a voluntary restrictive covenant that would help identify/clarify specific uses that are not [permitted] under the proposed religious assembly use.

The church has met with the adjoining neighborhood representatives and [has] offered to restrict uses of the amphitheater, including dates, times and incorporate sound attenuation design techniques, in order to assure the compatibility with the adjoining residential uses. PromiseLand Church will continue to work with the neighbors even after any permits are issued to work toward being a good neighbor in the surrounding community.

Please let me know if you need anything else to help you in your determination as to whether the amphitheater is an accessory use to the primary use of religious assembly.

Thanks for your consideration on this very important issue for this church.

On December 23, 2008, Guernsey responded to Conley with the following email:

I have reviewed your letter and attachment. Since the worship building and the outdoor amphitheater are both being primarily used for religious assembly uses, I don't see a problem with these two facilities co-locating on

the property. I understand that the educational and musical presentations will be limited in scope and will be subordinate to the primary religious assembly use. I also understand the church will be compliant with all applicable City Codes and ordinances, including the noise ordinance.

If the primary use of one or both of the facilities does change from a religious assembly use to an outdoor entertainment or an indoor entertainment use, a zoning change may be required.

On July 6, 2011, the Church applied for a site plan permit to begin construction on the project, including the amphitheater, and the City approved the application on October 12, 2011. The application noted that the construction site was "subject to [a] Restrictive Covenant . . . which addresses land use restrictions, shared parking and traffic management." The restrictive covenant entered into by the Church and the City on October 2, 2011 provided for the following restrictions and limitations for the church buildings and outdoor amphitheater:

- A. Religious Assembly Use will be permitted (as defined in the Austin Land Development Code), including such uses as:
 - 1. Worship services;
 - 2. Musical or theatrical performances;
 - 3. Weddings; and
 - 4. Funerals
- B. Customary and incidental accessory uses will be permitted, including such uses as:
 - 1. Educational presentations;
 - 2. Neighborhood meetings;
 - 3. School graduations;
 - 4. Public meetings; and
 - 5. Other civic or non-profit group meetings
- C. Religious Assembly Use may include occasional charitable events (including concerts and performances) for the benefit of an individual or family in need or for a charitable organization or charitable cause.

- D. Except for occasional charitable events under Paragraph C, above, ticketed events may charge only nominal fees to cover utilities, maintenance, and other administrative and operational expenses.
- E. The buildings and outdoor amphitheater will not be used for commercial, for-profit events.
- F. The outdoor amphitheater is subject to all applicable City ordinances.
- G. The restrictions in this Article I are imposed as conditions to Site Plan No. 2011-0185C and apply to the extent that an outdoor amphitheater remains part of the principal religious assembly use.
- H. The restrictions in this Article I shall be interpreted consistent with all applicable local, state, and federal laws, including but not limited to constitutional requirements.

On October 21, 2011, representatives from Hill Country filed an administrative appeal with the City regarding the City's use determination of the Church site. Specifically, the appeal challenges the City's interpretation of "religious assembly use" to include the Church's proposed outdoor amphitheater. On October 27, 2011, an attorney for the City rejected Hill Country's appeal and stated that the appeal was untimely because it was not filed within twenty days from the City's use determination by Guernsey on December 23, 2008.

On December 12, 2011, counsel for Hill Country sent written correspondence to the City contesting the City's October 27, 2011 letter. Hill Country argued that its appeal did not relate to Guernsey's December 23, 2008 email, but rather to the City's use interpretations and determinations made in the October 2, 2011 restrictive covenant. Hill Country requested that the City forward its appeal to the Board of Adjustment.

On December 30, 2011, the City responded to Hill Country's letter and reasserted that Hill Country's appeal was time-barred. Particularly, the City noted that the language

in the restrictive covenant merely clarified Guernsey's December 23, 2008 use determination, did not contradict it, and did not permit non-religious assembly use, unless such use was "accessory to the principal use of religious assembly." The City further noted that "to the extent an accessory use of the amphitheater exceeded that scope, enforcement would be appropriate regardless of whether the applicant had violated a term of the covenant." Finally, the City maintained its position that absent "clearer requirements" from the code of ordinances, it would treat Guernsey's December 23, 2008 email as an "appealable decision."

Hill Country and Covered Bridge eventually filed suit against Guernsey, in his official capacity, and the City seeking: (1) declaratory and injunctive relief against Guernsey for his ultra vires acts; (2) mandamus to require Guernsey to forward Hill Country's appeal to the Board of Adjustment; (3) declaratory and injunctive relief against the City for violation of Hill Country and Covered Bridge's due process rights; and (4) declaratory and injunctive relief against the City declaring that its ordinances regulating land use determinations and appeal are impermissibly vague and thereby void.

Guernsey and the City filed a plea to the jurisdiction and asserted that the trial court lacked subject-matter jurisdiction because: (1) Hill Country and Covered Bridge lack standing; (2) the trial court's subject-matter jurisdiction in this case is conferred only upon judicial review of a decision by the Board of Adjustment; (3) Guernsey's complained-of actions are discretionary acts protected by governmental immunity; (4) Hill Country and Covered Bridge's claims are moot and not ripe for review; and (5) Hill Country has no property interest to assert a due process claim. The trial court granted Guernsey and the City's plea, and this appeal followed.

II. PLEA TO THE JURISDICTION

By one consolidated issue, Hill Country and Covered Bridge assert that the trial court erred in granting Guernsey and the City's plea to the jurisdiction.

A. Standard of Review

A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Ind. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). Subject-matter jurisdiction is essential to a court's power to decide a case. *Id.* 554–55. Whether a court has jurisdiction is a question of law that is reviewed de novo. *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). When reviewing a trial court's ruling on a challenge to its jurisdiction, we consider the plaintiff's pleadings and factual assertions, as well as any evidence in the record that is relevant to the jurisdictional issue. *City of Elsa*, 325 S.W.3d at 625.

We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent. *Miranda*, 133 S.W.3d at 226. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency, and the plaintiffs should be afforded the opportunity to amend. *Id.* at 226–27. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id.* at 227.

If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *Id.* at 227. If the evidence

creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. *Id.* at 227–28. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law. *Id.* at 228.

B. Hill Country and Covered Bridge's Claims

Hill Country and Covered Bridge allege the following in their First Amended Petition and Application for Temporary Injunction: (1) Guernsey's actions, including making the "religious assembly use" determination and denying Hill Country's request for appeal, are without legal authority, ultra vires, and/or void; (2) Guernsey and the City violated Hill Country and Covered Bridge's due process rights of notice and opportunity to be heard regarding the religious assembly use determination, the Site Plan, the terms of the restrictive covenant, and the denial of Hill Country's request for appeal and public hearing before the Board of Adjustment; and (3) the City's ordinances or code provisions are vague. Hill Country and Covered Bridge further allege that Guernsey and the City's actions will increase "traffic, noise, and disturbance relating to the construction and use of the outdoor [amphitheater] to the detriment of the [Hill Country and Covered Bridge] neighborhoods." Finally, Hill Country and Covered Bridge also sought mandamus relief against Guernsey to "require him to follow the law and perform his non-discretionary duties," including forwarding Hill Country's appeal.³

³ The remainder of the mandamus arguments relate to Hill Country and Covered Bridge's ultra vires claims against Guernsey.

C. Discussion

a. Ultra Vires Claims Against Guernsey

We first examine whether Hill Country and Covered Bridge's ultra vires claims against Guernsey properly invoke the subject-matter jurisdiction of the trial court.⁴

Absent waiver by the Legislature, sovereign and governmental immunity generally deprive courts of subject-matter jurisdiction over suits against the State, its agencies, or officers or employees acting within their official capacity. See *Texans Uniting for Reform & Freedom v. Saenz*, 319 S.W.3d 914, 920 (Tex. App.—Austin 2010, pet. denied) (internal citation omitted). One exception to immunity, however, is an ultra vires action. To fall within this exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 792 (Tex. 1991). Thus, ultra vires suits do not seek to alter government policy but rather to enforce existing policy. *Heinrich*, 284 S.W.2d at 372.

1. Use Determination of the Church Project

Hill Country and Covered Bridge's ultra vires claims are two-fold. The first deals with Guernsey's use determination providing that the Church's outdoor amphitheater

⁴ Hill Country and Covered Bridge sought injunctive relief relating to Guernsey's use determinations and his refusal to forward Hill Country's appeal to the Board of Adjustment. After reviewing the pleadings, we find that these issues are identical to those addressed in this section, so we will address them as one.

constituted a “religious assembly” and his decision allowing the construction to move forward, including approving the site plan and entering into the restrictive covenant. The City argues that the authority to make such use determinations is delegated to Guernsey by the LDC. We agree.

Section 25-2-2(A) of the land development code states that “the director of the Planning and Development Review Department shall determine the appropriate use classification for an existing or proposed use activity.” AUSTIN, TEX., LAND DEV. CODE § 25-2-2(A). Here, with respect to each complained-of activity—Guernsey’s email, the restrictive covenant, approval of the site application, or any other activity determined to be a use classification—Guernsey had the statutory discretion to make such determinations and/or take such actions. *See id.* Therefore, we hold that this claim is barred by immunity. *See Saenz*, 319 S.W.3d at 920.

2. Forwarding Hill Country’s Appeal to the Board of Adjustment

Next, Hill Country and Covered Bridge’s second set of ultra vires claims relate to Guernsey’s failure to forward an appeal of his actions to the City of Austin Board of Adjustment. We first look to the relevant portions of the LDC and the Texas Local Government Code relating to appeals from administrative decisions.⁵

Section 25-1-182 of the LDC states that an “interested party” may initiate an appeal by filing a notice of appeal with the responsible director or building official, as applicable, not later than: (1) the 14th day after the date of the decision of a board or commission;

⁵ *See also* TEX. LOC. GOV’T CODE ANN. § 211.010 (West, Westlaw through 2013 3d C.S.) (setting forth the broader, general parameters of the appeals process to the board of adjustment).

or (2) the 20th day after an administrative decision. AUSTIN, TEX., LAND DEV. CODE § 25-1-182. When the responsible director receives the notice of appeal, he “shall promptly notify the presiding officer of the body to which the appeal is made and, if the applicant is not the appellant, the applicant.” *Id.* § 25-1-185. The LDC explains that a person has standing to appeal a decision if: (1) the person is an interested party; and (2) a provision of this title identifies the decision as one that may be appealed by that person. *Id.* § 25-1-181(A)(1)–(2). Furthermore, the “body holding a public hearing on an appeal shall determine whether a person has standing to appeal the decision.” *Id.* § 25-1-181(B).

If the appellant has standing, the appellant must establish that the decision being appealed is contrary to applicable law or regulations. *Id.* § 25-1-190. The body hearing an appeal may exercise the power of the official or body whose decision is appealed, and a decision may be upheld, modified, or reversed. *Id.* § 25-1-192. Finally, (1) a person aggrieved by a decision of the board; (2) a taxpayer; or (3) an officer, department, board or bureau of the municipality may file a verified petition for judicial review in district court, county court, or county court-at-law within ten days after the date the decision is filed in the board’s office. See TEX. LOC. GOV’T CODE ANN. § 211.011 (West, Westlaw through 2013 3d C.S.). In its petition for judicial review, the petitioner must state that the board of adjustment’s decision is illegal “in whole or in part” and specify the grounds of the illegality. *Id.* § 211.011(a). The trial court may then grant a writ of certiorari directed to the board to review the board’s decision. *Id.* The trial court may reverse or affirm, in whole or in part, or modify the decision that is appealed. *Id.* § 211.011(f).

Hill Country alleged that it filed an appeal on October 21, 2011 to be heard by the Board of Adjustment complaining about Guernsey’s use determination related to the

Church project. We note that Covered Bridge neither joined Hill Country's appeal nor did it file a separate appeal related to the Church's proposed project. As a result, Covered Bridge lacks a justiciable controversy in this declaratory action related to Guernsey's purported ultra vires actions of failing to forward the appeal to the Board of Adjustment. See *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) ("A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought."). To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute. *Id.* Absent a justiciable interest, Covered Bridge lacks standing to bring the second ultra vires action because no real controversy exists between Covered Bridge and Guernsey or the City on this particular issue. See *Tex. Ass'n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Therefore, we hold that the trial court did not err in granting the plea to the jurisdiction solely as it relates to Covered Bridge on the issue of Guernsey's ultra vires actions of not forwarding Hill Country's appeal.

On October 27, 2011, through a letter from the City's Law Department, Guernsey's department rejected Hill Country's notice of appeal, stating that it was filed more than twenty days after Guernsey's use determination on December 23, 2008, and was thus untimely. On December 12, 2011, Hill Country disputed Guernsey's interpretations of which action it was appealing and requested the City to forward its appeal to the City's Board of Adjustment. Again, on December 30, 2011, the City reaffirmed its position from the October 27, 2011 letter and barred Hill Country's appeal.

After construing the pleadings liberally in Hill Country's favor, we conclude that Hill Country sufficiently pleaded jurisdictional facts to invoke the trial court's subject matter jurisdiction on the alleged ultra vires action that Guernsey failed to forward Hill Country's appeal to the Board of Adjustment. Hill Country has appropriately cited the controlling provisions related to administrative appeals procedures and the ministerial duties that respectively belong to Guernsey and the Board of Adjustment. Hill Country further alleged that Guernsey failed to comply with the controlling provisions and failed to perform the purely ministerial act of forwarding its appeal to the Board of Adjustment.

In their plea to the jurisdiction, neither Guernsey nor the City specifically address how the trial court lacks jurisdiction over this particular alleged ultra vires action other than to assert that Hill Country lacked standing to bring the administrative appeal at its inception. While this argument may ultimately prove to be true, our concern today is limited to the issue of whether the trial court possessed subject-matter jurisdiction to hear Hill Country's ultra vires claims that Guernsey failed to forward its administrative appeal. The issue of standing to bring this particular appeal before the Board of Adjustment must first be determined by the Board of Adjustment before it can be decided by the trial court. See AUSTIN, TEX., LAND DEV. CODE § 25-1-181(B). Based upon Hill Country's undisputed allegations, it has not had an opportunity to make its administrative appeal because of Guernsey's failure to forward it to the Board of Adjustment. As a result, these ultra vires allegations are not those for which Guernsey is afforded immunity. See *Heinrich*, 284 S.W.3d at 372. We hold that the trial court erred in granting Guernsey and the City's plea to the jurisdiction on Hill Country's ultra vires claims against Guernsey for failure to

forward its appeal to the Board of Adjustment.⁶

b. Due Process Claims

Hill Country next alleged that if Guernsey's actions related to its appeal are held to be valid or did not exceed the City's ordinances, the City violated its due process rights under the local government code to notice and the opportunity to be heard. Earlier, we held that the trial court had jurisdiction to hear Hill Country's ultra vires claims related to Guernsey's failure to forward the administrative appeal. However, any due process claims by Hill Country are unripe at this stage of the proceeding. Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction. *Patterson v. Planned Parenthood of Houston & S.E. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). Standing focuses on the question of who may bring an action, while ripeness asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote. *Id.* The very nature of Hill Country's due process allegations depend upon a contingency—i.e., “if Guernsey's actions . . . are held to be valid.” The trial court may agree with Hill Country that Guernsey's actions were ultra vires, and it would render this point moot. Therefore, because this claim is unripe, the trial court did not err in dismissing it for lack of jurisdiction.

⁶ In its prayer for relief, Hill Country asks this court to “order a writ of mandamus” directing Guernsey to forward its administrative appeal to the City of Austin Board of Adjustment. Original proceedings, including petitions for writs of mandamus, are governed by the procedures set forth in the Texas Rules of Appellate Procedure. See generally TEX. R. APP. P. 52.1–52.11. Hill Country, however, has failed to comply with these procedures for us to properly consider such requested relief. Accordingly, we decline to address Hill Country's request for mandamus relief.

c. Vagueness Challenge

Next, Hill Country and Covered Bridge assert a vagueness challenge to the City's LDC as it relates to their "rights to notice, participation, and/or appeal relating to the land use determinations" made by Guernsey on the Church project. Because Hill Country and Covered Bridge's vagueness challenge centers on Guernsey's use determination, the LDC provides for administrative remedies by appeal to the Board of Adjustment. See AUSTIN, TEX., LAND DEV. CODE § 25-1-182. After obtaining a review from the Board of Adjustment, the aggrieved party may then seek judicial review. See TEX. LOC. GOV'T CODE ANN. § 211.011. Simply put, administrative remedies must first be exhausted before a party may seek judicial review of a determination made by an administrative official. See *Buffalo Equities, Ltd. v. City of Austin*, No. 03-05-00356-CV, 2008 WL 1990295 at *4 (Tex. App.—Austin May 9, 2008, no pet.) (mem. op.) (internal citations omitted). Failure to exhaust all available administrative relief before seeking judicial relief deprives a court of jurisdiction. See *Larry Koch, Inc. v. Tex. Natural Conserv. Comm'n*, 52 S.W.3d 833, 839 (Tex. App.—Austin 2001, pet. denied) (citing *Lindsay v. Sterling*, 690 S.W.2d 560, 563 (Tex. 1985)). Accordingly, the trial court lacks jurisdiction to hear Hill Country and Covered Bridge's vagueness challenge because neither party exhausted its administrative remedies before filing suit on this claim.

d. Summary

In summary, the trial court did not err in granting Guernsey and the City's plea to the jurisdiction on the following claims: (1) Hill Country and Covered Bridge's ultra vires claims against Guernsey related to his use determination; (2) Covered Bridge's ultra vires claims based upon Guernsey's failure to forward Hill Country's appeal to the Board of

Adjustment; (3) Hill Country and Covered Bridge's due process claims; and (4) Hill Country and Covered Bridge's vagueness challenge. The trial court erred in granting Guernsey and the City's plea to the jurisdiction with regard to Hill Country's ultra vires claims based upon Guernsey's failure to forward Hill Country's appeal to the Board of Adjustment. Therefore, Hill Country and Covered Bridge's issue on appeal is overruled in part and sustained in part.

III. CONCLUSION

We affirm the trial court's judgment in part and reverse and remand to the trial court to hear Hill Country's ultra vires action based upon Guernsey's failure to forward Hill Country's appeal to the Board of Adjustment.

GINA M. BENAVIDES,
Justice

Delivered and filed the
7th day of May, 2015.

March 20, 2014

EXHIBIT 7

LifeAustin
c/o Randy Phillips, Lead Pastor
8901 West State Hwy 71
Austin, Texas 78735

via Certified Mail, Return Receipt Requested
and First Class Mail

Re: Outdoor Amphitheater

Dear Pastor Phillips:

Your neighbors in the Covered Bridge and Hill Country Estates neighborhoods are writing to inform you that we are continuing to fight and defend our legal rights to have our appeals concerning your proposed outdoor amphitheater heard by the Austin Board of Adjustment.

We are also writing to inform you it is our understanding that under Chapter 211 of the Texas Local Government Code and the City Code, the Austin Board of Adjustment as well as the director of the Planning Department has the authority to suspend and revoke any permit it determines was issued in error. If your church proceeds with the construction of the outdoor amphitheater, then you do so at your own risk of having permits revoked by the City of Austin.

We have opposed the proposed outdoor amphitheater planned for your property since first learning of it in 2007. Representatives of our neighborhoods and your church met on a several occasions in 2007-2008 to discuss your Dream City project.

During the meetings we expressed our opposition to the outdoor amphitheater but we offered to work with your church on all other issues. At the end of the last meeting, representatives of your church promised to keep our neighborhoods informed with respect to permit applications. We never heard from you again.

We were shocked and dismayed to learn in July 2011 that your church had obtained a secret ruling from a City of Austin employee that the City claims authorized your church to build the outdoor amphitheater in the second most restrictive residential zoning district in the City.

We have filed multiple appeals to the Austin Board of Adjustment challenging the legality of the secret decision. City staff has refused to forward our appeals to the Board of Adjustment. We were left with no alternative but to sue the City and the one City employee who made the secret decision authorizing the outdoor amphitheater.

The lawsuit is about the legality of the City of Austin approving the outdoor amphitheater without a single public hearing and the legality of City staff refusing to forward our appeals to the Board of Adjustment.

The neighborhoods have never sued nor threatened to sue your church.

Our neighborhoods have pursued every available legal remedy to protect our homes from the devastating impact of what would be the largest outdoor amphitheater in the City of Austin.

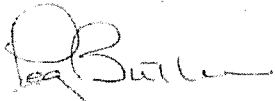
Our lawsuit is currently pending before the Court of Appeals. Our attorneys just completed the last brief to the Court of Appeals. If your church proceeds with the construction of the outdoor amphitheater, then you do so at your own risk of having permits revoked by the City of Austin.

In closing, we know that there are many activities that your church would like to legally conduct but that are prohibited under current zoning ordinances. Our neighborhoods remain willing to work with you to obtain the appropriate zoning for your campus if your church abandons the outdoor amphitheater.

Sincerely,



Michael Yuan, vice president, on behalf of the
Covered Bridge Property Owners Association, Inc.



Peg Butler, on behalf of the
Hill Country Estates Homeowners Association

Cc: David Estes, Executive Pastor, LifeAustin
Steve Metcalf, attorney, LifeAustin

April 14, 2014

EXHIBIT 8

Mr. Michael Yuan
Covered Bridge Property Owners Association
P.O. Box 92649
Austin, Texas 78709

- Ms. Peg Butler
Hill County Estates Homeowners Association
7100 Bright Star Ln.
Austin, Texas 78736

Dear Mr. Yuan, Ms. Butler, and members of your property owners' associations:

Thank you for your letter received April 1, 2014. LifeAustin understands the concerns addressed in your letter. As we have expressed since the planning stages of our campus development, LifeAustin wants to foster goodwill with its neighbors and reassure them that the development of LifeAustin's campus will not adversely impact the surrounding neighbors. LifeAustin has taken community concerns into consideration at every step of the process and has invested considerable resources into planning, designing, and developing its campus in an aesthetically pleasing, environmentally sensitive, and socially responsible manner.

LifeAustin understands that some of the members of the Covered Bridge Property Owners' Association and Hill Country Estates Homeowners' Association have opposed the development of any outdoor worship space (sometimes referred to as the amphitheater) on LifeAustin's fifty-three acre campus since the inception of the project. LifeAustin has met with and listened to its neighbors, including your respective homeowners' associations, regarding the development of its campus. LifeAustin undertook several efforts in the planning and design stages of the project to address the associations' concerns about potential noise and traffic associated with the amphitheater, and to solicit input regarding the development from the associations' members and other property owners surrounding the campus.

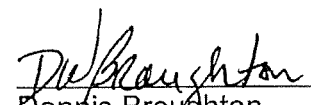
LifeAustin has incorporated many features into the planning, design, and construction of its campus, including the amphitheater, to minimize any potentially adverse impacts, and LifeAustin has expended considerable resources in attempting to reasonably accommodate its neighbors in the course of the development. We remain committed to doing so during the remaining development of our site. LifeAustin intends to continue seeking positive and productive dialogue with its neighbors, and welcomes all opportunities to do so.

The letter suggests that your boards remain opposed to any development of an outdoor worship space of any nature under any circumstances. However, many neighbors, including members of your respective associations, have come to embrace the development of LifeAustin's campus, and some have become members of our congregation. Others have accepted our standing invitation to join us for special events.

Additionally, LifeAustin submits that the characterizations in your letter dated March 20, 2014 of "secret meetings" and a "secret ruling" from City of Austin Planning and Development Director Greg Guernsey are factually inaccurate. The land use determination of the LifeAustin campus, including the amphitheater, as a "religious use" allowed on residentially-zoned land was an ordinary land use determination made by the City of Austin Development Director acting in the ordinary course of business and pursuant to the scope and authority of the Austin City Code. LifeAustin understands that the associations have sued the City of Austin and its Planning and Development Director, Greg Guernsey, over that land use determination, and LifeAustin has faith in the courts of the State of Texas to properly resolve the pending legal issues. However, LifeAustin is committed to proceeding with its development in a timely manner, as sensitively as possible, and respectfully maintains that the associations' concerns about adverse impacts are misplaced.

In summary, regardless of the outcome of the pending appeal of the associations' lawsuit, LifeAustin will continue to strive to be a good neighbor, and to respectfully and responsibly serve its members and the community. LifeAustin welcomes all of the members of your respective associations, as it does all of its neighbors, to join us in our regular worship services and special events. We hope to demonstrate we are a good neighbor, as we develop what is intended to be a valuable community resource and asset for the benefit of many. We invite you to work with us to that achieve that objective.

Respectfully,
LifeAustin Church, Inc.

By: 
Dennis Broughton
Site Development Team