

APPEALS OF OUTDOOR

AMPHITHEATER

8901 S. H. 71 West

C15-2015-0147

KEY QUESTIONS OF THE APPEALS

1. Is outdoor assembly that attracts a mass audience is an allowed principal or accessory use in the RR zoning district?
2. Is the religious assembly use exempt from the general prohibition?
3. If religious assembly use is exempt from the general prohibition, then what activities come within the religious assembly use?
4. Can staff legally issue permits for the construction of a permanent structure for a non-permitted use?

Reverse Land Use Determinations

- that outdoor religious assembly is a principal use under religious assembly;
- that an outdoor amphitheater is a principal use under religious assembly;
- that musical and theatrical performances (concerts, plays, ballet,) not part of a religious worship service; movies, benefits, festivals, community events and charitable events, including ticketed events, are principal uses under the religious assembly use;

Reverse Approval of

- Site Plan SP-2011-185C, as it pertains to the outdoor amphitheater.
- Article I of the Restrictive Covenant.
- Building Permit 2013-002081 PR.

Staff Response to Appeals

- Zoning Code “does not distinguish between indoor and outdoor religious assembly.” **(Page 274-275).**
- “The site plan and building permit were issued for a religious assembly use in permanent buildings . . . and not for temporary use set forth in Section 25-2-921(C).”

Reasonable Doubt as to Life Austin Land Use Determinations

The approval of the Site Plan, the Restrictive Covenant and the Building Permit conflict with zoning code interpretations by:

- DAC
- the City Council
- PDRD
- Code Compliance
- the City Legal Department.

Staff Interpretations 2007 & 2008

- Staff emails from DAC state that the proposed outdoor amphitheater project would require a zoning change or conditional use. (**Pages 60, 62 & 67**)
- No previous outdoor amphitheater approved administratively
- Outdoor amphitheater not a recognized accessory use

Section 25-2-921(C)

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:

- for a gathering of not more than 50 persons, the use is located in an SF-4 or less restrictive zoning district;
- for a gathering of more than 50 persons, the use is located in an LO or less restrictive zoning district

Staff Response to 25-2-921(c)

- 25-2-921(c) is not applicable because it applies to “temporary uses”.
- If the building official can issue a temporary use permit for an activity, then that activity is prohibited as a principal or accessory use.

2011 Council Adds Definition of Temporary Use

Permit to the Sound Ordinance

- **Section 9-2-1(15)** “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.”
- Adopted by Ord. No. 20110210-029.
- 8 months before the approval of the Site Plan and Restrictive Covenant.

2012 Proposed Amendment to § 25-2-921(C)

Rationale for proposed amendment:

- 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.” Exhibit 12 (**Page 301**).

2012 Proposed Amendment to § 25-2-921(c)

“the proposed code amendment would allow properties whose principal use is religious, educational, or community recreation, to apply for a temporary use permit to hold a temporary outdoor public assembly event.” (Exhibit 12 Pages 309, 311, 312, 314).

October 2013 PDRD Proposes new 25-2-921(d)

- After all public hearings closed.
- “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). (**Page 318**).
- Would have made outdoor “religious services” a permitted use but not festivals, benefits, etc..

November 18, 2013 Guernsey Memo

(Pages 322-323)

- Explains 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.

November 18, 2013 Guernsey Memo

- A complete reversal the interpretation that PDRD staff had presented to the Planning Commission and City Council for more than year.
- No mention of Life Austin land use determinations.
- Based new interpretation on non-enforcement of 25-2-921(c)

Dolores Catholic Church

May-November 2013

- May 2013 Code Compliance issues code violation for holding an outdoor event in SF-3 zoning district (**Page 324**).
- June 2013 Legal Department files legal action in municipal court for violation.
- October 2013 Legal Department agrees to dismiss action if Council adopts proposed amendment to 25-2-921(c) (**page 327**).
- City dismisses lawsuit on November 25, 2013 (**page 328**).

Reasonable Doubt: Outdoor RA

- 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 prosecution of the Dolores Catholic church should never have happened

Outdoor Amphitheater as Principal Use

- If a use is prohibited in a zoning district then development permits for the prohibited use should not be approved.

Reasonable Doubt: Religious Assembly

- December 17, 2008 Conley letter (**page 27**):
 - Religious assembly activities
 - Non-religious non-profit civic uses
 - Some activities would include a fee that would be used to provide benefit to an individual or group that had a special emergency need (family's house burns down) or for some charitable organization.

Reasonable Doubt: Religious Assembly

Guernsey December 23, 2008 email:

“I understand that the educational and musical presentations will be limited in scope and will be subordinate to the primary religious assembly use.” (**page 73**)

RESTRICTIVE COVENANT REDEFINES ZONING RELIGIOUS ASSEMBLY

- Principal Uses:
 - Worship services
 - Musical or theatrical performances
 - Weddings
 - Funerals
 - 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.
- **(page 81)**

Restrictive Covenant

- The Restrictive Covenant appears to be contract zoning, which is illegal in Texas.
- Director Guernsey-- so long as Life 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." (**Page 283**, 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.

“OCCASIONAL”

- Term is so vague as to be completely non-enforceable.
- Should mean infrequent and not regular.
- Based on Conley letter, once or twice a year.
- Life Austin concedes that 3 to 4 events a month during second half of 2015.
- Lacks the numerical specificity that land use regulations require (**page 285**).

End

REBUTTAL

Life Austin Reliance on “City Directives”

Active Participant in creating the City directives:

- November 2008 meeting with ACM Laura Huffman (**pages 258-260**).
- December 17, 2008 Conley letter (**page 27**).
- Prepared first draft of the Restrictive Covenant (**pages 79-80**).

Sound Impacts

- 311 calls from all adjacent neighborhoods.
- Music and sound heard inside homes (Exhibit 9 pages 213-237).
- Staff changes interpretation of Sound Ordinance (Exhibit 20 **pages 352-359**).
- Outdoor entertainment (Exhibit 10 **pages 238-240**).
- Community standards/complaint enforcement.

Appeal of Nov. 18, 2013 Memo (page 329)

- Memo is not an “administrative decision” and is therefore not within the BOA’s jurisdiction to review.” (Page 349).

Staff treatment of Memo:

- Dismissed lawsuit against Dolores Catholic Church (page 328).
- Ceases to require TUP for outdoor events in SF-3 zoning (Exhibit 19 pages 350-351).

Appeal of Nov. 18, 2013 Memo

- Impact of Memo is citywide.
- Staff did not comply with 25-1-197(E) requirements for Non-project use determinations.
- 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.

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- Alternatively, Article I of the Restrictive Covenant ---limitation on the frequency of events held (Occasional) is so vague that it is unenforceable

Findings

- There is a reasonable doubt of difference of interpretation as to the specific regulations.
- An appeal of use provisions could clearly permit a use which is in character with the uses enumerated for the various zones and the objectives of the zone in question.
- The interpretation will not grant a special privilege to one property inconsistent with other properties or uses similarly situated.

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