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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**") [**101-126**] and the Building Permit in May 2013 ("**Building Permit Appeal**") [**9-100**], 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. [192-208] 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. [153-159]

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.
[350-351]

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 2-2. **[163]** 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. [172]

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 2-1. [160-162] As proposed, the Dream City development included an outdoor amphitheater. According to the church, the amphitheater could be used for "graduations, 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. **[37-48]**

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. **[3-5]**

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

² August 5, 2008 Oak Hill Gazette

³ August 5, 2008 Oak Hill Gazette.

⁴ August 5, 2008 Oak Hill Gazette.

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. **[173-175]**

On July 2, 2013, Appellants filed an appeal of the decision not to forward the building permit appeal to the BOA.⁵ **[112-127]** 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 the decision issued by the 13th Court of Appeals on May 7, 2015. Exhibit 6. **[192-208]** 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. **[209-210]**

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. **[211-212]** 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. Exhibit 2-3 **[165-170]** 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. **[213-237]** 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.

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

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. [238-240]

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.

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

(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:

"(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). **[254, 267]**

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). **[243-244]**

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). **[274-275]**

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 2-1. [160-162] 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). **[246]**

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. **[62, 67]**

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. **[297]**

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 **[301-314]** 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. **[316]** 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). **[318]**

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. **[320-321]** 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. **[322-323]** 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. **[301-314]**

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. **[323]**

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). **[286]** 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. **[324]** 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. **[326]** 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. **[327]** 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. **[328]**

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. **[329-348]** 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. **[349]**

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. **[350-351]**

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). **[279]** 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. **[44, 79-80]**

⁷ August 5, 2008 Oak Hill Gazette

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." **[153]**

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.) **[154]** 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). **[285-287]** 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. **[165-170]** 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 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). **[283]** 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.

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.

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." **[154]**

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). **[288]**

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..."

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). **[253]** 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. [209-210] 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,



Robert J. Kleeman

RJK/dm
enclosures