CITY OF AUSTIN
Board of Adjustment - Interpretation
Decision Sheet

DATE: Monday, August 14, 2017 **CASE NUMBER: C15-2015-0147**

_____Brooke Bailey
_____William Burkhardt
_____Christopher Covo
_____Eric Goff
_____Melissa Hawthorne
_____Bryan King
_____Don Leighton-Burwell
_____Rahm McDaniel
_____Veronica Rivera
_____James Valadez
_____Michael Von Ohlen
_____Kelly Blume (Alternate)
_____Martha Gonzalez (Alternate)
_____Pim Mayo (Alternate)

APPELLANT: Robert Kleeman
ADDRESS: 8901 SH 71

VARIANCE REQUESTED: The appellant has filed an appeal challenging a Land Use Determination and related development approvals made in connection with the approval of an outdoor amphitheater located at LifeAustin Church, 8901 West State Highway 71, including decisions to classify the use as "religious assembly" and to subsequently approve Site Plan No. SP-2011-0185C, an associated restrictive covenant, and a building permit. The appellant disagrees that, among other things, the Land Use Determination and related development approvals incorrectly treat various outdoor activities held at educational and religious assembly facilities as part of the principal use rather than as temporary activities subject to City Code Section 25-2-921(C) in an "RR-NP", Rural Residential – Neighborhood Plan zoning district. (West Oak Hill)

BOARD'S DECISION: November 9, 2015 POSTPONED TO A SPECIAL CALLED MEETING DECEMBER 9, 2015, CITY COUNCIL CHAMBERS AT 7:00PM BY BOARD MEMBER ERIC GOFF, MELISSA HAWTHORNE SECOND ON A 9-0 VOTE: PP TO DEC 9, 2015; Dec 9, 2015 the public hearing was closed on a motion to pp to Feb 8, 2016; FEB 8TH, 2016- REQUESTING POSTPONEMENT TO APRIL11, 2016; APRIL 11, 2016 POSTPONED TO JUNE 13, 2016; JUNE 13, 2016 POSTPONED TO JULY 11, 2016 BY APPLICANT; July 11, 2016 POSTPONED TO AUGUST 8, 2016 BY APPLICANT; BOARD WILL NOT ENTERTAIN ADDITIONAL POSTPONEMENTS BEYOND AUGUST 8, 2016; AUG 8, 2016 POSTPONED TO SEPTEMBER 28, 2016 BY APPLICANT; Sept 28, 2016 POSTPONED TO November 14, 2016 BY APPLICANT; Sept 28, 2016 POSTPONED TO November 14, 2016 BY APPLICANT; Nov 14, 2016 POSTPONED TO DECEMBER 12, 2016 BY APPLICANT; Dec 12, 2016 The discussion was closed on Board Member Michael Von Ohlen motion to Postpone to August 14, 2017, Board Member Melissa Hawthorne second on an 11-0 vote; POSTPONED TO AUGUST 14, 2017. Aug 14, 2017 POSTPONED TO JANUARY 8, 2018 BY APPLICANT

FINDING:

1. There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations or map in that:
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:
3. The interpretation will not grant a special privilege to one property inconsistent with other properties or uses similarly situated in that:

Leane Heldenfels
Executive Liaison

William Burkhardt
Chairman

From: [redacted]
[redacted]
[redacted]
Subject: RE: 1/8 Board of Adjustment hearing
Date: Tuesday, December 19, 2017 11:18:04 AM

Leane:

I am confirming the appellants' concurrence with Life Austin's requested extension to March 12, 2018.

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

From: Nicole LeFave [redacted]
Sent: Tuesday, December 19, 2017 11:14 AM
To: Leane.Heldenfels@austintexas.gov
Cc: [redacted]
Subject: 1/8 Board of Adjustment hearing

Dear Leane,

I'm writing to request a postponement of the interpretation appeal related to the Covered Bridge POA, Hill Country Estates HOA, and LifeAustin Church for two months to the March 12, 2018 meeting. The Church has made good progress on the installation of the sound mitigation improvements that the parties agreed upon. The Church is motivated to properly and timely complete the work, and is on schedule to have everything completed within the timeframe that the parties have agreed to. The HOAs have been given a status update on where construction stands.

The requested postponement is to allow the Church to complete the improvements, pursuant to the agreement between the Church and the HOAs.

The HOAs are in agreement with the request for the postponement and Mr. Kleeman has authorized me to send you the following message:

The Covered Bridge POA and the Hill Country Estates HOA have authorized me to convey their respective concurrences with the 60 day postponement to March 12, 2018, as proposed by Life Austin. You may forward this email to the City to confirm the concurrence of the appellants

In light of this status, we hope that the BoA members will not find it necessary for representatives of the HOAs or the Church to be present at the meeting.

Please let me know if you have any questions.

Thanks,
Nicole

NICOLE LEFAVE
direct 512.652.5789 toll-free 888.844.8441 fax 512.682.2074
[redacted]

WEISBART SPRINGER HAYES LLP
212 Lavaca, Suite 200 Austin, TX 78701
wshllp.com

From: [redacted]
Subject: RE: 1/8 Board of Adjustment hearing
Date: Tuesday, December 19, 2017 2:43:46 PM
Attachments: image002.png

Hi Leane:

I will not object to the postponement if the church and the neighborhood are in agreement.

Greg

From: Heldenfels, Leane
Sent: Tuesday, December 19, 2017 1:43 PM
To: Guernsey, Greg; Johnson, Christopher [DSD]; Lloyd, Brent
Cc: Ramirez, Diana
Subject: FW: 1/8 Board of Adjustment hearing

See below request from appellant to postpone the pending LifeAustin interpretation appeal to the Board's 3/12 meeting. I advised the parties to have a representative on hand at the beginning of the 1/8 hearing to speak to the further postponement request in the event any members have questions, concerns.

FYI –

Leane Heldenfels
Planner Senior – Board of Adjustment Liaison
City of Austin Development Services Department
One Texas Center, 505 Barton Springs Road, 1st Floor, Development Assistance Center
Walk-in hours 9a-12p M-F
Office: 512.974.2202 Cell: 512.567.0106 *(personal, for meeting day & after hours emergency use only)*

CITY OF AUSTIN Development SERVICES DEPARTMENT
Building a Better and Safer Austin Together

From: [redacted]
Sent: Tuesday, December 19, 2017 11:18 AM
To: [redacted]
Subject: RE: 1/8 Board of Adjustment hearing

Leane:

I am confirming the appellants' concurrence with Life Austin's requested extension to March 12, 2018.

Robert Kleeman
Sneed, Vine & Perry, P.C.
900 Congress Avenue, Suite 300
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(512) 476-6955 – main
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[redacted]

WEISBART SPRINGER HAYES LLP
212 Lavaca, Suite 200 Austin, TX 78701
wshllp.com

WEISBART SPRINGER HAYES

[redacted]

July 25, 2017

VIA EMAIL: [redacted]
Robert Kleeman
Sneed, Vine & Perry
900 Congress Avenue, Suite 300
Austin, Texas 78701

Re: LifeAustin Church, the Hill Country Estates Home Owners Association and the Covered Bridge Property Owners Association

Dear Robert:

In light of the impending Board of Adjustment hearing on August 14, I write to confirm our mutual agreement that LifeAustin Church, the Hill Country Estates Home Owners Association, and the Covered Bridge Property Owners Association wish to postpone the hearing and seek to reset the hearing for a later date.

The parties are continuing to operate pursuant to the December 12, 2016 Agreement. The Church is in the process of constructing sound mitigation improvements to the LifeAustin Amphitheatre pursuant to that Agreement. Given the current status, we agree that the hearing on August 14 is not necessary at this time.

Please respond to this letter to confirm that your clients are in agreement to seek a postponement of the August 14 hearing to January 8, 2018. Please do not hesitate to contact me if you would like to discuss this matter further.

Sincerely,

Nicole LeFave

c: Steve Metcalfe *(*[redacted]*)*
Michele Rogerson Lynch *(*[redacted]*)*
Geoffrey D. Weisbart *(Firm)*

CITY OF AUSTIN
Board of Adjustment - Interpretation
Decision Sheet

DATE: Monday, December 12, 2016 **CASE NUMBER: C15-2015-0147**

___Y___Brooke Bailey
___Y___Michael Benaglio
___Y___William Burkhardt
___Y___Eric Goff
___Y___Melissa Hawthorne **2nd the Motion**
___Y___Bryan King
___Y___Don Leighton-Burwell
___Y___Rahm McDaniel
___Y___Melissa Neslund
___Y___James Valadez
___Y___Michael Von Ohlen **Motion to PP to Aug 14, 2017**
___-___Kelly Blume (Alternate)

APPELLANT: Robert Kleeman
ADDRESS: 8901 SH 71

VARIANCE REQUESTED: The appellant has filed an appeal challenging a Land Use Determination and related development approvals made in connection with the approval of an outdoor amphitheater located at LifeAustin Church, 8901 West State Highway 71, including decisions to classify the use as "religious assembly" and to subsequently approve Site Plan No. SP-2011-0185C, an associated restrictive covenant, and a building permit. The appellant disagrees that, among other things, the Land Use Determination and related development approvals incorrectly treat various outdoor activities held at educational and religious assembly facilities as part of the principal use rather than as temporary activities subject to City Code Section 25-2-921(C) in an "RR-NP", Rural Residential – Neighborhood Plan zoning district. (West Oak Hill)

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FINDING:
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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:
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Leane Heldenfels
Executive Liaison

William Burkhardt
Chairman

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___-___Rahm McDaniel OUT
___Y___Melissa Neslund
___Y___James Valadez
___-___Michael Von Ohlen OUT
___Y___Kelly Blume (Alternate)

APPELLANT: Robert Kleeman
ADDRESS: 8901 SH 71

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I01/12

H/2

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

Leane Heldenfels
Executive Liaison

William Burkhardt
Chairman

101/13
C15-2015-0147
#1

ORDINANCE NO. 20130228-074

AN ORDINANCE AMENDING CITY CODE SECTION 25-1-21 AND SECTION 25-5-142 AND ADDING A NEW SECTION 25-2-517 RELATING TO THE APPROVAL OF AMPHITHEATERS AND AREAS FOR ASSEMBLY.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. City Code Section 25-1-21 (*Definitions*) is amended to add a new definition of "amphitheater" to read as follows and to renumber the remaining definitions accordingly:

(4) AMPHITHEATER means 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.

PART 2. City Code Chapter 25-2, Article 2, Division 2 (*Requirements for All Districts*) is amended to add a new Section 25-2-517 to read:

§ 25-2-517 REQUIREMENTS FOR AMPHITHEATERS.

(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*).

(C) A lawfully constructed amphitheater may be expanded one time without obtaining the approval required under Subsection (A) of this section, provided that the expansion is consistent with the applicable site development regulations and does not expand the total area of the amphitheater by more than ten percent.

PART 3. City Code Section 25-5-142 (*Land Use Commission Approval*) is amended to read:

H.2

§ 25-5-142 LAND USE COMMISSION APPROVAL.

Land Use Commission approval of site plan is required for:

(1) a conditional use; [~~and~~]

(2) except as provided in Section 25-5-2 *(Site Plan Exemptions)*, development in a Hill Country Roadway Corridor[~~.~~]; and

(3) if otherwise required by this title.

PART 4. This ordinance takes effect on March 11, 2013.

PASSED AND APPROVED

§
§
February 28, 2013 §

Lee Leffingwell
Mayor

APPROVED: Karen M. Kennard
City Attorney

ATTEST: Jannette S. Goodall
City Clerk

101/15
C15-2015-0147
ROW 11423880
TAX 0101480301
TCAD ✓

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:
[redacted]

September 25, 2015

Leanne Heldenfelds
Board of Adjustment Liaison
City of Austin
One Texas Center, 5th Floor
505 Barton Springs Road
Austin, TX 78704

Re: Resubmittal of October 2011 Appeal of Approval of the Construction of an Outdoor Amphitheater; SP-2011-185C and associated Restrictive Covenant ("Site Plan"); and Resubmittal of May 2013 Appeal of a Building Permit 2013-002081 PR ("Building Permit"); 53 Acres Located at 8901 S. H. 71 W

Dear Chairman Harding and Members of the Board of Adjustment:

This firm represents the Hill Country Estates Homeowners Association ("HCEHOA") and the Covered Bridge Property Owners Association ("CBPOA") (collectively, "Appellants"). With this letter, I am re-filing copies of the appeals originally submitted to City staff in October 2011 and May 2013. The purpose of this letter is to explain why these appeals are just now being forwarded to the Board of Adjustment ("BOA") and to demonstrate that Appellants have diligently sought to have these appeals heard by the BOA.

The 53 acres located at 8901 S.H. 71 West ("Property") is situated between and among the Hill Country Estates, Covered Bridge, and West View Estates neighborhoods. At all times, the Property has been zoned Rural Residential ("RR").

On October 12, 2011, staff administratively approved the Site Plan and associated Restrictive Covenant that authorized the construction of a large permanent outdoor amphitheater as a principal use under Religious Assembly and also made outdoor concerts, theatrical performances, and other events as principal uses under Religious Assembly. On October 21, 2011, Appellant HCEHOA appealed the approval of the Site Plan and Restrictive Covenant. A complete copy of the Site Plan and Restrictive Covenant appeal is enclosed ("Site Plan Appeal"). The Land Use Determinations regarding the outdoor amphitheater and outdoor activities made in approving the Site Plan and Restrictive Covenant are the subject of the Site Plan Appeal.

Despite filing of the Site Plan Appeal within 20 days of the approval of the Site Plan and Restrictive Covenant and meeting all other requirements of the City Code to have standing to appeal, City staff did not forward the appeal to the BOA. Exhibit 1. Staff asserted that all Land Use Determinations regarding the outdoor amphitheater and the outdoor activities were made in a December 23, 2008 private email from Director Guernsey to Carl Connelly and that all appeal rights relating to the December 23, 2008 email expired in January 2009. Staff first notified Appellants and the public in July 2011 of the existence of the December 23, 2008 private email. Other than the reference to the December 2008 email, staff did not identify any other deficiencies in the Site Plan Appeal.

In March 2012, Appellants sued the City and Director Guernsey seeking, in part, a court order to compel City staff to forward the Site Plan Appeal to the BOA. The City filed a motion challenging Appellants' right to even bring the lawsuit and asked to have the lawsuit dismissed. In May 2013, the trial court granted the City's motion to dismiss the lawsuit. Appellants appealed the trial court ruling.

In May 2013, the City approved the first building permit for the outdoor amphitheater. Appellants submitted to City staff appeals of the approval of the Building Permit. Copies of the May 2013 appeals are enclosed ("Building Permit Appeals"). In June 2013 staff refused to forward the Building Permit Appeals to the BOA based on Appellants not filing an appeal within 20 days of the December 23, 2008 email. Exhibit 2. Other than the reference to the December 2008 email, staff did not identify any deficiency in the Building Permit Appeal. The Land Use Determinations regarding the outdoor amphitheater and outdoor activities made in approving the Building Permit are the subject of the Building Permit Appeal.

In July 2013, Appellants submitted to staff an appeal of staff's decision to not forward the Building Permit Appeal to the BOA ("Third Appeal"). Staff did not bother to respond to the Third Appeal. A copy of the Third Appeal is enclosed as Exhibit 3. The Third Appeal challenged the staff's decision to ignore Section 211.010(b), Texas Local Government Code that mandates that upon notice of the filing of an appeal, the responsible official shall immediately forward the file to the board of adjustment. Section 25-1-185 of the City Code imposes a similar mandate on staff.

There is a fourth appeal filed by Appellants in December 2013 challenging interpretations regarding Section 25-2-921(C) of the City Code that regulates outdoor activities. The interpretation of Section 25-2-921(C) is pivotal to the Site Plan Appeal and the Building Permit Appeals. Staff also refused to forward this appeal to the BOA. Discussion of that appeal will be addressed later in the brief supporting the appeals.

The Court of Appeals issued a ruling in early May 2015 in favor of Appellant HCEHOA. During the three years the Appellants spent in litigation seeking to enforce their appeal rights, the outdoor amphitheater has been completed and has already hosted 9 concerts and one movie between July 19, 2015 and September 20, 2015. Concert music is heard inside many homes in the Hill Country Estates neighborhood.

My clients are concerned that some may view the Site Plan Appeal and the Building Permit Appeal as legally moot with the completion and operation of the outdoor amphitheater. The appeals are not moot for several reasons, including Sections 25-1-411 to 418 of the City Code that authorize the suspension and revocation of an improperly issued permit. The City conceded this point when the City opposed Appellants application to the Court of Appeals to issue its final order early so that Appellants could seek relief from the trial court before the City issued the certificate of occupancy for the outdoor amphitheater. The City argued, in part, that the Appellants would not suffer any loss of rights under the City Code:

> "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 . . . if the City eventually agrees with Appellants, the sound permit and/or certificate of occupancy can be revoked even if already issued." Exhibit 4.

On June 11, 2015, the Court of Appeals denied Appellants' application for the early issuance of the Court's final order. The City issued the certificate of occupancy for the outdoor amphitheater in early July 2015. On August 12, 2015 Brent Lloyd notified me that staff would forward the Site Plan Appeal and the Building Permit Appeals to the BOA.

As previously stated, the purpose of this letter is to inform the BOA of the procedural history of the delays in the BOA receiving the appeals. A letter brief in support of the appeals will be submitted once a hearing date has been determined.

Sincerely,

SNEED, VINE & PERRY.P.C.

By: Robert Kleeman
Robert Kleeman

Enclosures

Cc: HCEHOA (w/o enclosures)
CBPOA (w/o enclosures)
Allen Holbrook (of firm) (w/o enclosures)
Brent Lloyd (w/o enclosures)
Chris Edwards (w/o enclosures)

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

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As previously stated, the purpose of this letter is to inform the BOA of the procedural history of the delays in the BOA receiving the appeals. A letter brief in support of the appeals will be submitted once a hearing date has been determined.

Sincerely,

SNEED, VINE & PERRY.P.C.

By: Robert Kleeman
Robert Kleeman

Enclosures

Cc: HCEHOA (w/o enclosures)
CBPOA (w/o enclosures)
Allen Holbrook (of firm) (w/o enclosures)
Brent Lloyd (w/o enclosures)
Chris Edwards (w/o enclosures)

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, Kim Butler, on behalf of myself 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 May 28, 2013, we hereby apply for an interpretation hearing before the Board of Adjustment.

Planning and Development Review Department interpretations regarding building permit 2013-002081 PR ("Building Permit") are:

1. A building permit may be issued for an outdoor amphitheater within an RR zoning district to authorize outdoor amusement, outdoor social activities and outdoor recreation if the putative principal use is Religious Assembly.[1]
2. The decision to issue the building permit for the outdoor amphitheater in question necessarily includes the following interpretations:
    a. Outdoor Religious Assembly activities are allowed by right in RR zoning districts.
    b. The site development permit SP-2011-0185C authorizes outdoor Religious Assembly activities.
    c. The site development permit SP-2011-0185C authorizes community recreation, club/lodge uses and activities in the amphitheater.
    d. The site development permit SP-2011-0185C authorizes the amphitheater to be an outdoor amphitheater, meaning the amphitheater does not have to be a fully enclosed building.

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[1] Religious Assembly is a civic use described in Section 25-2-6(B)(41), Austin City Code.

e. An outdoor amphitheater is a principal use under Religious Assembly.
f. Musical and theatrical performances, including ballets, concerts, and plays are principal uses or activities allowed under a Religious Assembly use.
g. The phrase "in a temporary or permanent building" in the definition of Religious Assembly means any structure that requires a building permit.
h. Principal uses under Religious Assembly, include, non-religious activities, community recreation, club/lodge activities, musical and theatrical performances and any type of fund raising activity as long as the religious entity receives financial benefits from the activity and do not require a conditional use permit in the RR zoning district.

3. City staff has the authority to determine the standing of an aggrieved party and the timeliness of any filed appeal without notifying the Board of Adjustment of the filing of the appeal.
4. City staff has the authority under Section 25-2-2 and other provisions of the LDC to "back date" an interpretation and use the date selected by City staff as the basis for rejecting an appeal and not forwarding the appeal to the Board of Adjustment.
5. City staff has the authority under Section 25-2-2, LDC to modify the scope and terms of a "back dated" interpretation and still refuse to forward to the Board of Adjustment an aggrieved party's appeal of the modified interpretation.
6. The Director of the Planning and Development Review Department ("PDRD") has the authority under Section 25-2-2, LDC, to issue a use determination that converts a prohibited outdoor activity described in Section 25-2-921(C) into an allowed outdoor activity.
7. The Director of PDRD has the authority under Section 25-2-2, LDC, to issue a use determination that converts a conditional use into a permitted use.
8. The Director of PDRD has the authority, at his sole discretion, to enlarge, expand or add to activities allowed under a defined zoning use by entering into a contract with the landowner.
9. The Director of PDRD has the authority to grant to a landowner vested rights to specific uses for a piece of property.

We feel the correct interpretations are:

1. Within the RR zoning district, Religious Assembly activities may occur only inside a fully enclosed permanent or temporary building.
2. Site Development Permit SP-2011-0185C authorizes only Religious Assembly activities in the amphitheater.

3. Pursuant to Section 25-2-6(B)(41), LDC, the only allowed uses under Religious Assembly are "organized religious worship and religious education. Private primary or secondary educational facilities, community recreational facilities, day care facilities, and parking facilities are excluded from the Religious Assembly use.
4. The amphitheater shown on Site Development Permit SP-2011-0185C must be a fully enclosed building because Section 25-2-921(C) prohibits outdoor Religious Assembly. Other outdoor activities are also prohibited in the RR zoning district.
5. Community recreation and club/lodge uses and facilities are not allowed on the property because no conditional use permit has been issued to authorize these uses and activities.
6. 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 are prohibited in the RR, SF-1, SF-2 and SF-3 zoning districts.
7. For purposes of Section 25-2-921(C), LDC the term "outdoor" means a space that is not fully enclosed in a building by permanent, solid walls and a roof.
8. A permanent outdoor venue cannot be constructed if the uses of the venue are prohibited from taking place outdoors.
9. Musical and theatrical performances, including ballets, concerts, and plays are not principal or incidental uses or activities allowed under a Religious Assembly use.
10. An aggrieved party, who is not the permit applicant, may appeal a permit approval, including a permit that incorporates an earlier interpretation by City staff.
11. All appeals filed with the Board of Adjustment must be forwarded to the Board of Adjustment. Only the Board of Adjustment has the authority to make determinations of standing and timeliness.
12. The Director of PDRD does not have the authority under Section 25-2-2, LDC to make outdoor activities prohibited by Section 25-2-921(C) permitted uses.
13. The Director of PDRD does not have the authority to under Section 25-2-2, LDC to convert a conditional use to a permitted use.
14. The Director of PDRD does not have the authority to enter into contracts with a landowner that grant the landowner special privileges, including expansion of the type of uses and activities that may occur under a defined zoning use. Land use and zoning are regulatory functions and should not be implemented through contracts unless approved by the City Council.
15. The Director of PDRD does not have the authority to grant vested rights to specific uses and structures on a piece of property.

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:

The decision to issue the Building Permit includes an interpretation of the uses allowed under Religious Assembly that differs significantly from the requirements found in Chapter 25-2 of the Land Development Code ("LDC"). First, the folder on the City of Austin website for this building permit shows the following uses: Religious Assembly, amusement, social and recreation building. The description of the uses allowed under the building permit include uses that are in the nature of community recreation and club/lodge which are explicitly excluded from the description of Religious Assembly: "The use excludes private primary or secondary educational facilities, **community recreational facilities**, day care facilities, and parking facilities." (emphasis added) A copy of the folder on the building permit as it appears on the City of Austin website is included with this appeal.

Second, the description of Religious Assembly specifies two allowed activities: organized religious worship and religious education. The Building Official has ignored this limitation and expanded the principal uses allowed under Religious Assembly to include musical and theatrical performances, and exhibits, including festivals, benefits, fund raising events and similar uses that attract a mass audience.

Third, the Building Official has ignored the prohibitions of Section 25-2-921(C), LDC and has issued a building permit for a permanent outdoor venue in a RR zoning district to be used for prohibited activities and has authorized activities that are explicitly prohibited.

Fourth, the building permit describes the amphitheater as a recreational building associated with Religious Assembly. Community Recreation requires a conditional use permit in the RR zoning district. No such conditional use permit has been issued for the Property.

Fifth, Section 25-2-921(C), LDC modifies the phrase "in a permanent or temporary building" found in Section 25-2-6(B)(41), LDC to mean a fully enclosed building. Since Religious Assembly cannot take place outdoors in a RR zoning district, Religious Assembly must take place indoors. Therefore, the only reasonable interpretation of the word "building" in the description of Religious Assembly is a fully enclosed structure. For further guidance, Section 9-1-2(5) of the City Code defines "outdoor" to mean a space that is not fully enclosed by permanent, solid walls and a roof.

There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations controlling the procedures relating to the filing of an appeal of an administrative decision.

The Hill Country Estates Home Owners Association filed an appeal to the Board of Adjustment in October 2011 regarding 1) a restrictive covenant signed by the owner of the Property and approved by the Director of PDRD; and 2) the approval of site development permit SP-2011-0185(C). City staff decided that every issue raised in the appeal was untimely even though the appeal had been submitted to Susan Walker within 20 days of the date of the restrictive covenant and the approval of the site development permit.

City staff determined that all appeal issues had been decided in a December 23, 2008 private email from Greg Guernsey to Carl Conley. City staff "back dated" all administrative decisions contained in the restrictive covenant and the site development permit and claimed the appeal was not timely. The fact that the existence of this private email was kept from the appellants and their members for two and half years did not matter to staff. City staff decided that Hill Country Estates Homeowners Association did not have the right to appeal or even have its appeal forwarded to the Board of Adjustment. Likewise, City staff determined that the Board of Adjustment had no authority to review the decisions contained in the site development permit and the restrictive covenant. A copy of the 2011 Board of Adjustment appeal and cover letter are enclosed. The letter from City staff stating that no appeal rights existed is also enclosed.

Subsequently, Hill Country Estates Home Owners Association tendered an exhaustive analysis of how the restrictive covenant and the site development permit included new decisions and new interpretations. A copy of this letter is enclosed. Again, City staff refused to forward the appeal to this Board. A copy of the second denial letter is enclosed.

Section 211.010(a)(1), Texas Local Government Code ("TLGC") grants to an aggrieved person the right to appeal the decision of an administrative official to the Board of Adjustment. Section 211.010(b) TLGC 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." This is a non-discretionary obligation under state law. City staff cannot have the ability or authority to thwart appeal rights under Section 211.010(a)(1) TLGC by arbitrarily deciding which of its decisions can be appealed.

This state law provides the right to appeal a decision of an administrative official. The right of appeal 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. 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 Chapter 25-2, LDC. The Board of Adjustment should have had the opportunity to decide whether it wanted to hear the appeal. As a policy matter, the Board of Adjustment should never be precluded form reviewing any administrative decision that an aggrieved party seeks to present to this Board.

The clear purpose of Section 211.009(a)(1) TLGC is to provide the public an avenue of appeal to 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.

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. The details of the illegal interference with the prior appeal are more thoroughly discussed in the enclosed standing letter.

There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations that allow the Director of PDRD to contractually grant vested rights to specific uses on a piece of property. Land use determinations and the decision to issue any permit are and should be regulatory in nature. The Land Development Code includes specific provisions that authorize the suspension and the revocation of a permit if it is determined that the permit has been issued in error. By approving the restrictive covenant, the Director of PDRD may have contractually granted the owner of the property in question an exemption from the City's permit revocation powers. Contract zoning is illegal. The Board of Adjustment should determine whether the Director of PDRD has the authority to waive the City's regulatory authority to review prior decisions.

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 character of the uses allowed in RR zoning is largely encompassed in two sections. Section 25-2-54, LDC describes the RR zoning district as follows: The Rural Residence (RR) district is the designation for a low density residential use on a lot that is a minimum of one acre. 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)

Section 25-2-921(C), LDC prohibits outdoor religious assembly, public assembly or an outdoor exhibit, including a festival, benefit, fund raising event, or similar use that typically attracts a mass audience. The Building Official has no authority to even issue a temporary use permit for these types of outdoor activities in the RR, SF-1, SF-2 and SF-3 zoning districts.

Religious Assembly activities are strictly limited to organized religious worship and religious education because Religious Assembly is allowed in every residential zoning district. Requiring Religious Assembly to occur only inside enclosed buildings is an appropriate policy. Large outdoor gatherings of people on any residential lot owned by a religious organization could create significant traffic and noise impacts on the surrounding neighborhood. By requiring the gathering of large numbers of people to be indoors, the noise impacts of such gatherings are minimized. For the same reasons, community recreation and club/lodge are conditional uses in the low density residential zoning districts.

The building permit issued for the 1,000 seat outdoor amphitheater defines the uses of the outdoor amphitheater as Religious Assembly, amusement, social and recreation. The gathering of mass audiences to an outdoor entertainment venue violates the characteristics that the RR zoning district is supposed to protect. For this reason, community recreation is a conditional use in the RR zoning district.

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

The building permit issued for the outdoor amphitheater grants the applicant unprecedented special privileges. These special privileges are both procedural and substantive in nature.

First, the building permit authorizes the construction of a permanent outdoor structure to serve as the venue for outdoor activities that are prohibited in the RR zoning district by Section 25-2-921(C).

Second, the building permit grants the special privilege of authorizing additional principal uses under Religious Assembly. These new principal uses include community recreation, social activities, amusement, musical and theatrical performances, non-religious civic activities and exhibits, including festivals, benefits, fund raising events and similar uses that attract a mass audience so long as the non-profit owner of the property financially benefits from holding the non-religious event.

Third, the building permit grants the special privilege of authorizing outdoor Religious Assembly and the other previously described outdoor activities that Section 25-2-921(C) prohibits in the RR zoning district.

Fourth, the building permit authorizes community recreation and club/lodge uses without the requirement of a conditional use permit. According to the land use chart found in Section 25-2-491(C), community recreation and club/lodge uses are conditional uses in RR zoning. As a result, the building permit grants rights that are supposed to be granted only through the conditional use permit process.

Fifth, the building permit grants the special privilege of avoiding all public hearings on the proposed land uses. Other large religious assembly campuses were required to re-zone property to achieve approval of the uses granted administratively here.

For example, the ordinance adopting a Planned Unit Development zoning for the Riverbend Church authorizes many uses, including, commercial uses outdoor entertainment, indoor entertainment, theater, outdoor sports and recreation and civic uses Religious Assembly, public and private community recreation, club or lodge and camp.[2]

Similarly, the ordinance adopting the PUD for the Dell Jewish Center included civic uses club or lodge, outdoor sports and recreation, private and public community recreation, religious assembly and theater.[3]

[2] Ordinance No.001214-97.
[3] Ordinance No. 20080925-135.

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, UNIT 10

City, State & Zip AUSTIN, TX 78736 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_____

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 JOHN 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 _____

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

FOLDER DETAILS

Permit/Case	Reference File Name	Description	Sub Type	Work Type	Project Name	Status	Application Date	Issue Date	Expiration Date
2013-002081 PR	2013-002081 PR	New Amphitheater for Religious Assembly w/tiered seating, stagehouse, office, support areas and restrooms- PHS 3 A	C- 318 Amusement, Social & Rec Bldgs	New	8901 W SH 71	Approved	Jan 9, 2013	May 8, 2013	Jul 8, 2013

Related Folders: Yes

FOLDER INFO

Information Description	Value
Is this over a Landfill ?	No
Smart Housing	No
Plan Review Required	Yes
Project Name	PROMISELAND WEST - AMPHITEHEATER PHS 3A
Is this a quick turnaround?	No
Concurrent Site Plan Review	Yes
Design Standards Review Required	Yes
Building Review Required	Yes
Electrical Review Required	Yes
Mechanical Review Required	Yes
Plumbing Review Required	Yes
Medical Gas Review Required	No
Energy Review Required	Yes
Fire Review Required	Yes
Special Inspections Review Required	Yes
Site Plan Review	Yes
Commercial Zoning Review	No
Total Job Valuation	1842000
Building Valuation New/Addn	1267000
Electrical Valuation New/Addn	350000
Mechanical Valuation New/Addn	35000
Plumbing Valuation New/Addn	150000
Current Zoning for Building	RR-NP
Is Site Plan or Site Plan Exemption req?	Yes
Approved Site Plan Number	SP-2011-0185C
Approved Site Plan Expiration Date	7/6/2014
Current Use	Vacant
Proposed Use	Amphitheater
Total New/Addition Bldg Square Footage	5344
Building Inspection	Yes
Electric Inspection	Yes
Mechanical Inspection	Yes
Plumbing Inspection	Yes
Energy Inspection	Yes
Driveway Inspection	No
Sidewalks Inspection	No
Environmental Inspection	Yes
Landscaping Inspection	Yes
Tree Inspection	No
Water Tap Inspection	Yes
Sewer Tap Inspection	Yes
On Site Sewage Facility Inspection	No
Fire Inspection	Yes
Hazardous Materials	No
Health Inspection	No
Water District (If not AWU)	AWU
Usage Category	318
Hazardous Pipeline Review Required	No
Hazardous Waste Materials	No
New HVAC	2
Install/Changeout HVAC	0
Install/Repair Chiller	0
Stove Hood Type 1	0
Stove Hood Type 2	0
Walk-in Cooler	0
Walk-in Freezer	0
# Remote refrigeration equip	0
Commissioning Form Submitted?	No
Electric Service Planning Application?	Yes
Electrical Meter Provider	Austin Energy
Site has a septic system?	No
Certificate of Occupancy to be Issued	Yes

Certificate of Occupancy to be Issued	Yes
Fixed Seating Occupancy	0
Non-Fixed Occupancy	1022
Code Year	09
Code Type	ibc
Special Inspection Reports ?	Yes
Concrete	Yes
Bolts Installed in Concrete	Yes
Reinforcing and Pre-Stressing Steel	Yes
Structural Welding	Yes
High-Strength Bolting	No
Structural Masonry	Yes
Spray-Applied Fireproofing	No
Piling, Drilled Piers and Caissons	Yes
Shotcrete	No
Special Grading, Excavations & Filling	No
Smoke Control System	No
Layout Inspection (Form Survey)	Yes
Soils Bearing Test	Yes
Wood Trusses & High-Load Wood Diaphragms	No
Penetration Fire Stopping	No
Insulated Roof Deck	No
Exterior Insulation & Finish Systems	No
Pre-Fabricated Metal Buildings	No
Other	n

PEOPLE DETAILS

Desc.	Organization Name	Address	City	State	Postal	Phone1
Applicant	LCCP (Tim Langan)	201 OAK PLAZA	Austin	TX	78753	(512)587-4354
Billed To	THE PROMISELAND CHURCH WEST, INC.	1301 N CAPITAL OF TEXAS HWY SUITE C100	AUSTIN	TX	78746	(512)220-6383

FOLDER FEE

Fee Description	Fee Amount	Balance
Plan Review Fee	$2,491.00	$0.00
Development Services Surcharge	$99.64	$0.00

PROCESSES AND NOTES

Process Description	Status	Schedule Date	Start Date	End Date	Assigned Staff	# of Attempts
Plan Review Administration	Open					0
Coordinating Reviews	Approved	May 6, 2013	Jan 9, 2013	May 8, 2013	Carol Raney (512-974-3469)	7
Design Standards Review	Approved	Jan 9, 2013	Feb 8, 2013	Feb 8, 2013	Doug Votra (512-974-2295)	1
Building Reviewer	Approved	Jan 9, 2013	Feb 8, 2013	Feb 8, 2013	Doug Votra (512-974-2295)	1
Electrical Reviewer	Approved	Mar 27, 2013	Feb 14, 2013	Mar 28, 2013	Florin Vasile (512-974-2537)	2
Mechanical Reviewer	Approved	Mar 27, 2013	Feb 15, 2013	Mar 28, 2013	Lou Quiroga (512-974-3481)	2
Plumbing Reviewer	Approved	May 6, 2013	Feb 11, 2013	May 7, 2013	Bryan Ellis (512-974-2685)	3
Energy Reviewer	Approved	Mar 27, 2013	Feb 14, 2013	Mar 28, 2013	Lou Quiroga (512-974-3481)	2
Fire Reviewer	Approved	Mar 27, 2013	Feb 22, 2013	Apr 11, 2013	Sonny Pelayo (512-974-0194)	2
Site Plan Review	Approved	Jan 9, 2013	Jan 15, 2013	Jan 15, 2013	Carol Raney (512-974-3469)	1
Special Inspections Reviewer	Approved	Mar 27, 2013	Jan 15, 2013	Mar 27, 2013	Carol Raney (512-974-3469)	2
Revisions After Issuance	Open					0

Back

City of Austin Planning and
Development Review Department
505 Barton Springs Road • P.O. Box 1088 • Austin, Texas 78767-8835

July 13, 2011

Lawrence Hanrahan, PE
Hanrahan Pritchard Engineering, Inc
8333 Cross Park Dr
Austin, TX 78754

Subject: PromiseLand West Church - SP-2011-0006C

Dear Mr. Hanrahan,

The applicant has represented to City staff that the proposed use of the site for PromiseLand West Church – SP-2011-0006C will be Religious Assembly, as defined by the Land Development Code 25-2-6 (B) (41). Greg Guernsey, Director of the Planning and Development Review Department (PDRD), determined in December 2008 that the proposed development met the requirements for a Religious Assembly use.

However, the 2008 use determination was made in response to a written request by Carl Conley of Conley Engineering, Inc. dated December 18, 2008, a copy of which is attached for your reference. As you can see, the request on which PDRD based its use determination included significant limitations on the nature and extent of the proposed amphitheater which ensure its consistency with a Religious Assembly land use.

Accordingly, any site plan approval for the project would be conditioned on the execution and recording of a public restrictive covenant that sets forth these specific limitations outlined in the 2008 request, as well as additional restrictions that "help to identify/clarify specific uses that are not permitted under the proposed religious assembly use."

In particular, the 2008 request provided that the amphitheater would be used for the same type of religious activities as the 3500-seat indoor auditorium, including:

- "worship services, weddings, funerals, and educational and musical presentations"
- "non-religious non-profit civic uses such as neighborhood meetings, boy scout/girl scout meetings, school graduations, public meetings, etc."

The request also provided that any fees charged for an event would be "nominal" and used to "cover setup, clean up, utilities, and administrative and other operational expenses" or, in limited cases, contributions to benefit "an individual or group that has a special emergency need (i.e. a

family whose house burned down) or for some charitable organizations." Compliance with "all of the City's ordinances, including sound levels at the boundary properties[,]" would also be required.

Since PDRD issued its 2008 determination, representations have been made regarding site uses that may go beyond the scope of a Religious Assembly use. The conditions outlined above, as set forth in the 2008 Conley letter, would effectively prohibit any such non-Religious Assembly uses at the site.

If you have any questions, please call Sarah Graham, Case Manager, at 974-2826.

George Zapalac

George Zapalac, Development Services Manager
Planning and Development Review

Attachments

Xc: Greg Guernsey, Planning and Development Review Department
George Adams, Planning and Development Review Department
Sarah Graham, Planning and Development Review Department
Brent Lloyd, Law Department

Graham, Sarah

From: Rhoades, Wendy
Sent: Monday, February 28, 2011 4:03 PM
To: [redacted]
Subject: FW: PromiseLand West Church site--Amphitheater
Attachments: G. Guernsey Ltr_12.17.08.pdf

Hi Sarah,
Carol Gibbs was just in my office in regards to the site plan that is currently in process and thought that this email would be useful for you.

Wendy

From: Guernsey, Greg
Sent: Tuesday, December 23, 2008 5:15 PM
To: [redacted]
Cc: Rhoades, Wendy; Johnson, Christopher [WPDR]; Meredith, Maureen; Rusthoven, Jerry
Subject: RE: PromiseLand West Church site--Amphitheater

Hello Carl:

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 complaint 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.

Happy Holidays to you!

Greg

Gregory I. Guernsey, AICP, Director
Neighborhood Planning and Zoning Department
City of Austin
P.O. Box 1088
Austin, TX. 78767
Phone: (512) 974-2387
Fax: (512) 974-2269
Email: greg.guernsey@ci.austin.tx.us

From: Carl P. Conley, P.[redacted]
Sent: Monday, December 22, 2008 9:21 AM
To: Guernsey, Greg
Subject: FW: PromiseLand West Church site--Amphitheater

Morning Greg—

I was just checking to see if you received this e-mail last week and if you had a chance to look at it. The church is meeting this morning, and this is a very key issue for them.

Hope your holidays are Merry and Bright!!!!!

Carl P. Conley, P.E., R.P.L.S.
Conley Engineering, Inc.
512.328.3506 office
512.328.3509 fax
[redacted]

From: Carl P. Conley [redacted]
Sent: Thursday, December 18, 2008 11:16 AM
To: GREG GUERNSEY
Cc: 'Michael Heflin'; Bob Hinkle
Subject:

Here is the letter we discussed yesterday.

Please let me know if there is anything else you need to make this determination.

If we get your response back before the weekend it would be outstanding, but if not till next week, it would be OK.

Thanks for all your help on this matter.

Carl P. Conley, P.E., R.P.L.S.
Conley Engineering, Inc.
512.328.3506 office
512.328.3509 fax
[redacted]

conley engineering, inc.

Civil Engineers • Land Planners • Development Consultants

December 17, 2008

Mr. Greg Guernsey
Director
Neighborhood Planning and Zoning
P.O. Box 1088
Austin, Texas 78701

Re: PromiseLand West Church
Amphitheater as an Accessory use

Dear Greg,

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

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 educational 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

1301 South Capital of Texas Hwy. Building A. Suite 230
P.O. Box 162713 • Austin, Tx 78716-2713 • (512) 328-3506 • Fax (512) 328-3509

Mr. Greg Guernsey
December 17, 2008

would also entertain the concept of a voluntary restrictive covenant that would help identify/clarify specific uses that are not permited under the proposed religious assembly use.

The church has met with the adjoining neighborhood representatives and have 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.

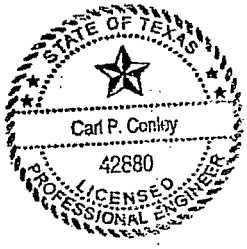
Please let me know if you need anything else to help you in your determination as to whether the amphitheater is an accessory use to the primary use of religious assembly.

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

Sincerely,

Conley Engineering Inc.

Mr. Carl P. Conley, P.E. R.P.L.S.
President



MUNSCH HARDT KOPF & HARR PC
ATTORNEYS & COUNSELORS
Dallas | Houston | Austin

Frost Bank Tower
401 Congress Avenue
Suite 3050
Austin, Texas 78701-4071
Main 512.391.6100
Fax 512.391.6149
munsch.com

ROBERT J. KLEEMAN
Writer's Direct Dial: 512.391.6115
[redacted]
Direct Fax: 512.482.8932

December 12, 2011

Via Email and Regular Mail

Mr. Brent Lloyd
City of Austin
Legal Department
301 W. 2nd Street
Austin, Texas 78701-3906

Re: Appeal of Land Use Determination Interpretation; Dream City Development; SP-2011-0186C ("Permit"); 53.113 Acres Located at 8901 W. Hwy 71 ("Property")

Dear Mr. Lloyd:

On October 21, 2011 the Hill Country Estates Homeowners Association ("HCE") filed an appeal of certain land use determinations embedded in the approval of the Permit, including, the October 2, 2011 public restrictive covenant recorded in Document No. 2011146026 Official Public Records of Travis County, Texas ("Restrictive Covenant"). On behalf of HCE, this letter responds to your October 27, 2011 letter which provides the reasons for the City of Austin's denial of the HCE appeal. Attached to your letter were copies of a December 17, 2008 letter from Carl Conley to Greg Guernsey, a December 23, 2008 email from Greg Guernsey to Carl Conley and a July 13, 2011 letter from George Zapalac to Larry Hanrahan.

In your letter you write that the City denied HCE's appeal because City Code Section 25-1-182 requires that an administrative appeal be submitted no later than 20-days after the decision was made. You note that the "decision" to allow the construction of the outdoor amphitheater as part of religious assembly use was made by Director Guernsey on December 23, 2008. Your letter neither describes any other "decisions" regarding uses allowed on the Property nor identifies any other basis for rejecting the HCE Appeal.

HCE disputes the City's conclusion that all of the HCE appeal issues are encompassed within the December 23, 2008 email. HCE contends that the issues raised in the HCE appeal pertain to interpretations and determinations that appear for the first time in the Restrictive Covenant.

Director Guernsey executed the Restrictive Covenant in the same capacity that he issued the December 23, 2008 email. As you state in your letter, a land use determination can be informal but will typically have the same date of that the site plan or permit is approved. In light of the City's claim that the December 23, 2008 email constitutes a formal land use determination under Section 25-2-2 (even though the email does not reference such a legal status), HCE contends that the Restrictive Covenant must be accorded the same legal status to the extent that the Restrictive Covenant exceeds or differs from the terms of the December 23, 2008 email. HCE filed its appeal on October 21, 2011 within 20 days of the execution of the Restrictive Covenant by Greg Guernsey. Without waiving its assertion that the December 23, 2011 email is a legally invalid determination under Section 25-2-2, HCE maintains that its appeal was timely filed regarding the expansion of the definition of "religious assembly" and other provisions in the Restrictive Covenant that are beyond the terms and conditions of the December 23, 2008 email. The HCE appeal should be forwarded to the Board of Adjustment for consideration of the appeal issues described below.

FACTS RELATING TO HCE APPEAL

CARL CONLEY LETTER

In his December 17, 2008 letter to Greg Guernsey Carl Conley wrote: "The church building includes a typical indoor auditorium for 3500 seats. This indoor facility will be used for various religious assembly activities including worship services, weddings, funerals and educational and musical presentations."

Mr. Conley goes on to write that the church building will be used for "***non-religious*** non-profit ***civic uses*** such as neighborhood meetings, boy scouts/girl scout meetings, school graduations, public meetings, etc. Again, these uses would be for non-profit activities...***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...or for some charitable organizations.*** All of these are typical of the use of a church facility." (emphasis added)

Mr. Conley clearly distinguishes "religious assembly" uses (worship services, weddings, funerals and educational and musical presentations) from "civic" uses (neighborhood meetings, boy scouts/girl scout meetings, school graduations, public meetings and charity events). Mr. Conley also states that the civic uses he described are typical uses of a church facility. He does not contend that these civic uses constitute "religious assembly."

GREG GUERNSEY DECEMBER 23, 2008 EMAIL

In response to Mr. Conley's letter, Director Guernsey sent the December 23, 2008 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 complaint [sic] with all applicable City Codes and ordinances, including the noise ordinance." (emphasis added)"
>
> If the primary use of one or both of the facility does change from a religious assembly use to an outdoor entertainment or an indoor entertainment use, a zoning change may be required."

In the emphasized sentence, Director Guernsey states that the "religious assembly" use (regularly scheduled religious worship or religious education) must be the predominate use of the worship building and the outdoor amphitheater. Mr. Guernsey places two limitations on "educational and musical presentations." One, they must be "limited in scope," meaning, in part, of short duration. Two, they are subordinate to the primary use of religious assembly, meaning the frequency of "educational and musical presentations" must be much less that "religious assembly" activities.

Director Guernsey does not mention any of the civic uses described by Mr. Conley in his December 17, 2008 letter. Mr. Guernsey's email does not incorporate or adopt the Carl Conley letter. There is no basis to interpret Mr. Guernsey's email as interpreting a "religious assembly" use to include the "civic" uses described in Conley's letter. Instead, Mr. Guernsey states that the church must comply with all applicable City Codes and ordinances, including, presumably, Chapter 25-2 which establishes allowable uses in RR zoning districts.

JULY 13, 2011 GEORGE ZAPALAC LETTER

The July 13, 2011 George Zapalac letter to Larry Hanrahan includes the following:

> "The applicant has represented to City staff that the proposed use of the site for Promiseland West Church – SP-2011-0006C will be Religious Assembly, ***as defined by the Land Development Code 25-2-6(B)(41)***...As you can see, the request on which ***PDRD based its use determination included significant limitations on the nature and extent of the proposed amphitheater which ensure its consistency with a Religious Assembly use.*** (emphasis added)
>
> Accordingly, any site plan approval for the project would be conditioned on the execution and recording of a public restrictive covenant that sets forth these specific limitations outlined in the 2008 request, as well as additional restrictions that "help to identify/clarify specific uses that are not permitted under the proposed religious assembly use."
>
> .....
>
> ***Since PDRD issued its 2008 determination, representations have been made regarding site uses that may go beyond the scope of a Religious Assembly use. The conditions outlined above, as set forth in the 2008 Conley letter, would effectively prohibit any such non-Religious Assembly uses at the site."*** (emphasis added)

Mr. Zapalac's letter is quoted here to establish that Mr. Guernsey's December 23, 2008 "determination" had not be superseded by any subsequent land use determination. In his letter, Mr. Zapalac incorrectly describes the "non-religious non profit civic uses" outlined in Mr. Conley's letter as "religious activities." Mr. Zapalac's error is of no import because he does not have the authority to make or issue a land use determination under Section 25-2-2 of the Land Development Code.

Mr. Zapalac does acknowledge that public statements made by the applicant regarding its intended use of the outdoor amphitheater for various activities that could fall outside of the scope of a religious assembly use, as defined in the Land Development Code. Mr. Zapalac's comment comports with City staff site plan

review comment SP-15, update 1 for SP-2011-0006C[1]. As you know, HCE and other nearby neighborhoods have provided the City examples of repeated statements by the applicant that the applicant intended to use the outdoor amphitheater for non-religious assembly uses. Mr. Zapalac's letter and Staff comments strongly support the conclusion that the one or more of the applicant's intended uses of the outdoor amphitheater, as reported in the media and on the applicant's blog, were not authorized by the December 23, 2008 email.

Notwithstanding the Staff's recognition that the applicant's intended uses of the amphitheater exceeded the limitations of the December 23, 2008 email, the City executed the Restrictive Covenant.

NEW INTERPRETATIONS IN THE RESTRICTIVE COVENANT

HCE appealed four interpretations embedded in the approval of the Permit and the Restrictive Covenant.[2] HCE appeal issues 2 and 3 address the Planning and Development Review Department interpretation: [2] "that expands the definition of Religious Assembly (25-2-6(41)) to include "musical and theatrical performances" and concerts, if the concert is held for a charitable purpose;" and [3] "that an outdoor amphitheater that seats 1,000 people is a ***principal*** use of the property if the applicant ***claims*** a Religious Assembly use." (emphasis added). Appeal point 3 means that City staff accept a use as allowed under "religious assembly" merely on the basis of the applicant claim the use was a religious assembly use.

Below is a list of the new interpretations and determinations that are materially different than the interpretation of December 23, 2008. To the extent that these interpretations are different from the terms of the December 23, 2008 email, they constitute new interpretation under Section 25-2-2 that HCE timely appealed.

1. The Restrictive Covenant is the first time that Director Guernsey interpreted "religious assembly" use to include "theatrical performances." If the Restrictive Covenant complied with the interpretation found in the December 23, 2008 email, the term "theatrical performances" would not have been included at all.

2. Section 1.C of the Restrictive Covenant is the first time that Director Guernsey interpreted "religious assembly" use to include "charitable events." The Carl Conley letter describes charitable events as "non-religious non-profit civic uses." The December 23, 2008 email does not mention any of the civic uses described by Mr. Conley and certainly does not categorizes "non-religious non-profit civic uses" as within the category of "religious assembly" use.

3. The Restrictive Covenant is the first time that Director Guernsey interpreted "musical or theatrical performances" (Section I.A.2) as ***principal or primary*** uses under "religious assembly." In the December 23, 2008 email, "musical presentations" were required to be subordinate to the primary use of religious assembly and to be of limited scope. The uses described in Restrictive Covenant Section I.C, regarding "occasional charitable events (including concerts and performances," can only be interpreted as placing "concerts and performances" within the category of "musical or theatrical performances" found in Restrictive Covenant Section I.A.

---

[1] The site development permit application for the Property prior to its withdrawal and resubmital of the site development permit application for the Permit.

[2] My letter addressed to Board of Adjustment Chair Jeff Jack was delivered with and is part of the HCE appeal documents delivered to the City of Austin on October 21, 2011.

In contrast to Sections I.A and I. C, Section I.B lists "customary and incidental accessory uses" associated with "religious assembly" use. If the Restrictive Covenant complied with the interpretations in the December 23, 2008 email, then Section I.B would have included "musical presentations" and Section I.C would not have been included at all.

4. The Restrictive Covenant provision that a benefit concert or performance is a principal use without any objective limitation on the frequency of such events is materially different than the December 23, 2008 email interpretation of "musical presentation" as a secondary or subordinate use. The only apparent attempt in the Restrictive Covenant to limit the number of concerts and "performances" is the word "occasional." The Restrictive Covenant, however, does not define the term "occasional." As a result, the Restrictive Covenant does not place any objective limit on the frequency of benefit concerts or charitable events as required by the December 23, 2008 email.

5. Unlike the text of the December 23, 2008 email, the Restrictive Covenant does not require "regularly scheduled worship or religious education" to be the predominate use of either building.

6. The Restrictive Covenant does not contain the "limited in scope" constraint on "educational and musical presentations" found in the December 23, 2008 email. The Restrictive Covenant can be interpreted to authorize concerts, which by definition and experience, are not limited in scope or duration.

7. In the December 23, 2008 email Mr. Guernsey wrote that he had "no problem" with the worship building and outdoor amphitheater co-locating on property ***if both are being used primarily for religious assembly uses***. Section 25-2-6(41) defines 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)

Under this Land Development Code definition, "religious assembly" has a narrow definition that excludes many other uses which are commonly associated with a church or a "religious assembly" use structure. Mr. Conley is correct when he wrote: "All of these [non-religious non-profit civic uses] are typical of the use of a *church facility*." Under the Land Development Code, the use of a church facility for "civic uses" does not, however, result in a code amendment that adds "non-religious non-profit civic uses" to the allowed activities under "religious assembly" use. As you know, the Land Development Code includes other defined land use categories, such as, "club or lodge" and "community recreation-private," that encompass the "non-religious non-profit civic uses mentioned by Mr. Conley.

Under Section 25-2-491, "club or lodge" and "community recreation" (private and public) are conditional uses in the RR zoning district. Mr. Guernsey does not have the authority to convert a conditional use into an allowed use much less to authorize a conditional use as a primary allowed use. The December 23, 2008 email did not articulate such an authorization; but the Restrictive Covenant does.

Riverbend Baptist Church ("Riverbend") and the Dell Jewish Center ("DJC") are examples of large campuses providing a variety of community services that are operated by a religious group. The respective PUD ordinance for each facility includes an extensive list of permitted and prohibited community and civic oriented uses, including, "club or lodge," "community recreation" (private and public) and "religious assembly."[3]

[3] Ord. No. 20080925-135, Part 5, PUD Zoning for Dell Jewish Center and Ord. No. 20001214-97, Part 4, PUD zoning for Riverbend Church.

The Riverbend PUD and the DJC PUD ordinances are consistent with the interpretation of the Land Development Code that "religious assembly" is a distinct and separate regulated use from other activities that are typically found at a church facility. Neither the December 23, 2008 email nor prior zoning ordinances for multi-function religious assembly facilities support the new and expansive interpretation of the new primary or principal uses allowed under "religious assembly" found in the Restrictive Covenant.

In that the Restrictive Covenant authorizes "non-religious non-profit civic uses" as primary uses of both buildings, the Restrictive Covenant abandons the limitation set forth in the December 23, 2008 email that allows the co-location of the worship building and the outdoor amphitheater *if* both buildings are used primarily for "religious assembly." Instead of enforcing the terms of the December 23, 2008 email, the Restrictive Covenant fundamentally changes the nature and scope of the activates allowed under "religious assembly" use in a RR zoning district.

If it remains the City's position that the only land use determination made under Section 25-2-2 that is applicable to the Permit is the December 23, 2008 email, then the Restrictive Covenant must be modified to strictly conform with the terms of the December 23, 2008 email. If it is the City's position that the Restrictive Covenant (and not the December 23, 2008 email) is the document that regulates the use of the Property, then the Restrictive Covenant must constitute a new land use determination under Section 25-2-2. In the latter case, the HCE appeal was timely filed under Section 25-1-182 of the Land Development Code and the appeal must be forwarded immediately to the Board of Adjustment for a public hearing.

Since construction has started on the Property, it is of great urgency that the City respond to this letter as quickly as possible. Please let me know if the City will forward the HCE appeal to the Board of Adjustment or revise the Restrictive Covenant to strictly comply with the terms and conditions of the December 23, 2008 email. I would appreciate a written response by December 22, 2011.

Very truly yours,

Robert J. Kleeman

RJK/dlr

cc: Sue Edwards, Assistant City Manager *(via email)*
Greg Guernsey *(via email)*
Marc Ott, City Manager *(via email)*
Mayor and City Council *(via email)*

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

December 30, 2011

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

Re: Dream City Site Plan [SP-2011-0186C]—Zoning & Administrative Issues

Dear Mr. Kleeman:

After reviewing your letter of December 12, 2011, we have advised the Planning & Development Review Department ("PDRD") that your appeal is barred on timeliness grounds for the reasons set forth in our previous letter of October 27, 2011.

The zoning issues related to this development were resolved in December 2008 by Director Greg Guernsey's determination that construction of the proposed outdoor amphitheater is allowed as part of a religious assembly use. That determination was made in direct response to the applicant's submittal, which included conceptual plans as well as a list of specific uses and associated conditions to be imposed via a restrictive covenant. The 2008 determination must be presumed to incorporate the uses and conditions detailed by the applicant's submittal.

The restrictions in the covenant do clarify particular requirements in order to assist with enforcement and administration, but they do not constitute a new use determination under Section 25-2-2 (*Determination of Use Classification*) or contradict Director Guernsey's prior 2008 determination. In particular, there is no indication that non-religious assembly uses will be permitted unless they are accessory to the principal use of religious assembly. As stated in Mr. Guernsey's 2008 determination, such uses "will be limited in scope and will be subordinate to the primary religious assembly use."

It should be emphasized that the terms of the covenant are not an exhaustive list of limitations applicable to use of the amphitheater, but merely those included as part of the applicant's 2008 submittal. City Code imposes numerous other restrictions, including the requirement that any accessory use be "incidental to" the principal use of religious assembly. 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.

The line between accessory and principal use can be difficult to define, but the Director will carefully consider any alleged violations related to the frequency or intensity of activity at the amphitheater. Additionally, as outlined in my email to you on December 7, 2011, any use of sound equipment on the property will require a sound amplification permit under City Code Chapter 9-2 (*Noise and Amplified Sound*) as well as compliance with other restrictions under the City's noise regulations. Where a permit is sought for outdoor music, the City has authority under the ordinance to impose conditions to mitigate the impacts of events on adjoining properties, including limitations on the size, scale, and duration of the event. If such permits are requested, Hill Country Estates would have the opportunity to raise any concerns you may have regarding potential impacts.

Finally, as you may be aware, earlier this month the City Council initiated code amendments that would establish clearer requirements for appealing use determinations. Consistent with existing practices, however, an informal use determination of the sort at issue in this case is treated as an appealable decision subject to the 20-day limitations period under City Code Section 25-1-182 (*Initiating an Appeal*).

Please feel free to contact me if you have further questions or concerns regarding this matter.

Sincerely,

Brent D. Lloyd
Assistant City Attorney

cc Greg Guernsey
Sue Edwards
Deborah Thomas
Chad Shaw

MUNSCH HARDT KOPF & HARR PC
ATTORNEYS & COUNSELORS
Dallas | Houston | Austin

Frost Bank Tower
401 Congress Avenue
Suite 3050
Austin, Texas 78701-4071
Main 512.391.6100
Fax 512.391.6149
munsch.com

Direct Dial 512.391.6115
Direct Fax 512.482.8932
rkleeman@munsch.com

May 28, 2013

By Hand Delivery
Board of Adjustment
c/o Leon Barba
505 Barton Springs Road
Room 530
Austin, Texas 78704

Re: Appeal of Decision to Issue a Building Permit for an Outdoor Amphitheater, 8901 West State Highway 71, Case Number 2013- 002081PR ("Building 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. HCE and CB have filed their appeal with Leon Barba pursuant to Section 211.009(a)(1), Texas Local Government Code and Section 25-1-18 *et seq.*, Land Development Code ("LDC").

HCE and BP 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. Enclosed are 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 Kim Butler is the Secretary of the HCE. Both HCE and CB are registered neighborhood associations with the City of Austin. See enclosed print from the City of Austin website on registered neighborhood associations.

Additionally, HCE and CB have "aggrieved party" status under Section 211.010(a)(1), Texas Local Government Code ("TLGC"). On May 8, 2013, the Austin Building Official 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 building permit has City case number 2013-002081 PR ("Building Permit"). The Property is located between the Covered Bridge and Hill Country Estates neighborhoods. Covered Bridge and the Property are within the corporate limits of the City of Austin. Hill Country Estates is predominately if not entirely within the extra-territorial jurisdiction of the City. Hill Country Estates contains one acre or larger residential lots and would be zoned Rural Residential ("RR") if it were annexed.

The Property already has a multi-purpose building that contains an indoor auditorium used for religious services. Many residents of Covered Bridge and Hill Country Estates already hear, **inside their homes**, the very loud music played inside the existing indoor auditorium on the Property. CB, HCE, and their members fear that the very loud worship services taking place

inside the existing building will take place in the outdoor amphitheater. They fear the impacts on their quality of life and property values if the outdoor amphitheater is used in the manner promoted by the Promiseland West Church which has now rebranded itself as Life Austin ("Owner"). In addition to religious worship, the Owner has promoted the outdoor amphitheater as a community resource to be used for community recreation and theater purposes such as ballet, jazz concerts, and family movie nights.[1]

Both neighborhoods and the Property are included in the West Oak Hill Neighborhood Plan adopted in December 2008. During the consideration of the West Oak Hill Neighborhood Plan, the Property and the land between the Property and Hill Country Estates was zoned Rural Residential ("RR"). The Future Land Use Map shows the Property as low density residential and the Property retains its RR zoning today. Notably, the Owner did not participate in the Oak Hill Neighborhood Plan process. More importantly, the Owner has never filed a zoning application to even attempt to rezone the Property to a zoning classification that would allow the outdoor amphitheater at issue in this appeal.

Rather than follow the normal and appropriate course of seeking a re-zoning of the Property or seeking a conditional use permit, the Owner found a pliant City staff willing to redefine the uses and activities allowed under Religious Assembly to meet the desires of the Owner. For years, the Owner of the Property have openly discussed and advertised their plans to operate the amphitheater as a community center and venue for a variety of non-religious activities.[2] Representatives of the Owner attended a meeting with Oak Hill Association of Neighborhoods in January 2012. At this meeting the representatives stated that the purpose of the "outdoor" amphitheater was to attract that 1 or 2 percent of the population that prefers outdoor music to indoor music.

Over the years, CB, HCE and its members have provided City staff copies of newspaper article, church blogs, and the church's website to document the open and clearly stated intent of the Owner to use the outdoor amphitheater for non-religious purposes. Copies of the materials provided to staff are enclosed. When some City staff questioned the Owner's intended use of the outdoor amphitheater for non-religious purposes, the uses allowed under Religious Assembly were re-interpreted to encompass the very activities that had raised the concerns.

As the record will show, City staff have provided the Owner of the Property singular special privileges enjoyed by no other property owner in the City of Austin. These special privileges include avoidance of all public hearing and Land Commission approval processes that other religious assembly campus projects have had to participate in to obtain entitlements comparable to what the Owner has been granted through administrative processes. For example, Riverbend Church and the Dell Jewish Center applied for and obtained PUD zoning to have authorized uses such as public and private community recreation, outdoor sports and recreation, club or lodge and religious assembly.[3]

---

[1] Austin Chronicle article, March 24, 2011.
[2] Austin American Statesman article, February 25, 2007.
[3] Ordinance No.001214-97 for Riverbend Church and Ordinance No. 20080925-135 for the Dell Jewish Center.

City staff have repeatedly re-interpreted the activities allowed under Religious Assembly to grant to the Owner of the Property the right to conduct Religious Assembly activities outdoors even though the Property is zoned RR. In October 2011, City staff expanded the number of principal uses allowed under Religious Assembly by making weddings, funerals and **musical and theatrical performances** principal uses under Religious Assembly. Unlike the typical land use determination or interpretation made by staff a thousand times a year, this particular re-interpretation (land use determination?) came in the form of a restrictive covenant drafted by the Owner's attorney and then approved by City staff. Rather than use a regulatory process, a contract was used.

As the evidences show, the principal uses of musical and theatrical performances have been reinterpreted again to allow virtually any type of secular music, theater and entertainment content so long as the Owner is a non-profit entity and the Owner receives financial benefit from the performance.[4]

CB, HCE, and their members are aggrieved parties because the substantive and procedural protections of Chapter 25-2 have been denied them again with the issuance of the Building Permit. The Building Permit is the latest example of City staff granting new and additional special privileges to the Owner. The Building Permit grants the right to conduct amusement, community recreation and club or lodge activities in the Amphitheater. These are new uses not addressed in previous interpretations of Religious Assembly. None of these uses or activities falls within the LDC description of Religious Assembly (organized religious worship or religious education). None of these activities is an accessory use to Religious Assembly. None of these activities and uses are allowed in RR zoning except with a conditional use permit. None of these activities are allowed outdoors in the RR zoning district.

Pursuant to Section 25-1-183(6) and the instructions provided with the appeal application form, CB and HCE allege that one or more errors were made in the decision to issue the Building Permit on May 8, 2013. The activities described in the Building Permit application, including the uses of "amusement, social and recreational buildings" do not comply with applicable law.

Since 2007, City staff has repeatedly changed its position regarding 1) the legality of an administrative approval of a 1,000 seat outdoor amphitheater on property zoned Rural Residential; 2) whether an outdoor amphitheater would be considered an accessory use or a principal use of Religious Assembly, 3) whether Religious Assembly can even be conducted outdoors in an RR zoning district; 4) what activities are allowed under Religious Assembly; and 5) which of the new allowed Religious Assembly activities are principal use under Religious Assembly and which are an accessory use.

BACKGROUND

First Interpretation

[4] Page 233, Deposition of Greg Guernsey, February 20, 2013. Hill Country Estates Homeowners Association and Covered Bridge Property Owners Association, Inc. v. Greg Guernsey and the City of Austin, Cause No. D-1-GN-12-000878 in the 250th District Court, Travis County, Texas. ("Guernsey Depo.")

In 2007 and 2008 members of HCE and CB asked City Staff in writing whether an outdoor amphitheater could be administratively approved on the Property with RR zoning.

In 2007, a City staff person, after repeated questioning from an HCE member, wrote:

"I did look on the [Promiseland West] website and saw the future plans. From what I saw they will definitely need a zoning change and a fully engineered site plan. The scope of what they are doing looks like it goes beyond what the City would classify as Accessory Uses."[5]

In mid-2008, a different City staff person responded to questions from a different member of HCE regarding whether an outdoor amphitheater was an accessory use to Religious Assembly. The City staff person wrote:

"I can tell you definitively that there has never been an outdoor amphitheater administratively approved as an accessory use for a Religious Assembly facility. If one were to be shown on a site plan submitted for a proposed church, Land Use Review staff would identify it and require the developer to obtain a Conditional Use Permit for the proposed Community Recreation or Outdoor Entertainment."[6]

From 2007 until February 2011, members of HCE and CB relied on City staff assurances that an outdoor amphitheater on the Property would require at least a conditional use permit and perhaps a zoning change. CB and HCE believe that the initial interpretation is the correct interpretation that an outdoor amphitheater is not an accessory use and that a zoning change and possibly a conditional use permit would be required before an outdoor amphitheater could be constructed on the Property.

Second Interpretation

Carl Conley, engineer for the Owner in 2008, sent Greg Guernsey a December 17, 2008 letter asking whether an outdoor amphitheater could co-locate on the Property and whether all of the indoor activities could also take place outdoors in the amphitheater. The Conley letter asked "whether an outdoor amphitheater **is considered an accessory use** to an overall religious assembly use under RR or SF-1." (emphasis added)

In his letter, Mr. Conely described three categories of uses that would occur in the church buildings and outdoor amphitheater. He described the first category as "various religious assembly activities, including worship services, weddings, funerals and educational and musical presentations." Mr. Conley's interpretation of the description of Religious Assembly is generally consistent with the narrow description found in Section 25-2 6(41), LDC.

Mr. Conley's second category of uses included non-religious non-profit civic activities that would also take place in the "church buildings and the outdoor amphitheater:" "...non-

[5] December 4, 2007 email from Glenn Rhoades to Paula Jones. Defendant production document No. 2626 included as part of Exhibit 14 to the February 20, 2013 deposition of Greg Guernsey.
[6] July 16, 2008 email from Chris Johnson to Daloma Armentrout. Defendant production document No. 2620 included as part of Exhibit 14 to the February 20, 2013 deposition of Greg Guernsey

religious non-profit civic uses such as neighborhood meetings, boy scout/girl scout meetings, school graduations, public meetings, etc.."

Mr. Conley's letter then described the third category of uses as "benefit events": "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**." (emphasis added)

In response to Mr. Conley's December 17, 2008 letter, Greg Guernsey transmitted a private email to Carl Conely on December 23, 2008. Regarding Mr. Conley's question as to whether an outdoor amphitheater could be an accessory use to Religious Assembly, Mr. Guernsey wrote in the December 23, 2008 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."

Taken at face value, all Mr. Guernsey has stated is that the outdoor amphitheater can be built on the property if the "church building" and the outdoor amphitheater are both used primarily for religious assembly uses. In other words, Mr. Guernsey states that Religious Assembly uses can take place outdoors.

As to uses that would be allowed in the outdoor amphitheater, Mr. Guernsey wrote:

"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 complaint [sic] with all applicable City Codes and ordinances, including the noise ordinance."[7]

Taken at face value, Mr. Guernsey's email statements clearly distinguish educational and musical presentations from the "primary religious assembly use." Also important to this appeal are the limiting conditions he placed on educational and musical presentations: "limited in scope" and "subordinate" to the "primary religious assembly use." Since Mr. Guernsey distinguished educational and musical presentation from religious assembly use, Mr. Guernsey took a limited, strict constructionist view of the description of Religious Assembly: "regular organized religious worship or religious education." The second sentence in the previous quote created an inherent conflict-- the church had to comply with all applicable City Codes and ordinances. Clearly, the condition that the Church must always comply with applicable City Codes and ordinances brings every permit and every appeal of a permit within the purview of the Board of Adjustment to determine the applicable City Codes and ordinances.

The December 23, 2008 Guernsey email ends with the following:

"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."

[7] December 23, 2008 email from Greg Guernsey to Carl Conley.

This last sentence appears to set some sort of boundary as to what constitutes an allowed use under Religious Assembly. This boundary proves to be an illusion. Mr. Guernsey's email does not address Mr. Conley's second and third categories of non-religious activities and benefit events. Mr. Guernsey does answer the initial question of whether the outdoor amphitheater is an accessory use to Religious Assembly. Notably, neither Mr. Conley nor Mr. Guernsey refer to the outdoor amphitheater as a "building."

Since the summer of 2011, Mr. Guernsey and City Staff have re-interpreted Mr. Guernsey's December 23, 2008 email as adopting and accepting all of Mr. Conley's letter even though no such language appears in the email. As discussed below, Mr. Guernsey and City Staff have continued to expand and stretch the scope of the December 23, 2008 email interpretation to cover and justify several modifications to the definition of Religious Assembly.

For example, Mr. Guernsey will re-interpret his December 23, 2008 email to mean: 1) all non-religious activities described in the Conley are allowed with a Religious Assembly use; 2) all of the non-religious assembly uses described in the Conley letter can be held in the outdoor amphitheater; 3) musical and theatrical performances are principal uses under Religious Assembly use; 4) benefit events can be of virtually any nature so long as the church financially benefits from the event; and 5) the limiting conditions of "limited in scope and subordinate to the primary religious assembly use" are replaced by the word "occasional."

As discussed below, CB and HCE did not learn of the December 23, 2008 "interpretation" email until July 21, 2011. Copies of the December 17, 2008 Conley letter and December 23, 2008 Guernsey email are enclosed.

Third Interpretation

The first indication that the City staff position regarding uses allowed under Religious Assembly had changed from the 2007 and mid-2008 emails appeared in the first staff comments to the first site development permit application for the Property (SP-2011-0006C). The case manager wrote in the first set of staff comments dated February 9, 2011:

"SP 15…Clarify if the amphitheater is intended for Religious Assembly Use only, or if the applicant intends to use the structure in any other commercial way. Or is it an accessory use of Outdoor Entertainment (not allowed in RR zoning) or Community Recreation (commission-approved required)? Please be aware that this site plan application may be a conditional use permit site plan, which would require re-notification and additional fees."

Staff comment SP 15 to the first update submittal to the site development permit application reads as follows:

"U1. Please clarify. The engineer's response letter states that the amphitheater is intended for religious assembly use only, however, the owner was quoted saying **many non-religious events will take place in the amphitheater, including 'graduation ceremonies, recitals, ballets, family movies nights, jazz concerts, and other events' (Austin Chronicle article, March 24, 2011**)." (emphasis added)

These Staff comments indicate an interpretation that an outdoor amphitheater is allowed in RR zoning if the amphitheater is limited to Religious Assembly uses only; however, non-religious activities, such as those reported in the Austin Chronicle, would not be allowed in the outdoor amphitheater. The staff comments suggest a conditional use permit may not be required for Religious Assembly activities in the outdoor amphitheater. It is not certain whether staff had seen the December 23, 2008 Greg Guernsey email when the first set of staff comments issued on February 9, 2011.

The case manager had received a copy of the December 23, 2008 Greg Guernsey email on February 28, 2011.[8] Presumably, the case manager had seen the December 23, 2008 email and December 17, 2008 Conley letter by the time the staff comments to the first update issued on March 25, 2011. The Staff comments to the first update suggest a narrow interpretation of what activities are allowed under Religious Assembly.

At the time of the issuance the above Staff comments to the first site development permit application, neither the case manager nor the members of HCE and CB knew that Director of PDRD had laid the groundwork for an even broader re-interpretation of the zoning regulations applicable a Religious Assembly use on the Property. Mr. Guernsey has conceded that the above quoted comments under SP 15 indicate that the drafting staff member was not aware of his first re-interpretation of his December 23, 2008 email to add non-religious activities and benefit events as allowable uses in the outdoor amphitheater.[9]

Fourth Interpretation

In June 2011, the first site development permit application was withdrawn with two outstanding comments regarding the septic system and the land use issue under SP 15. The site development permit application was resubmitted in July 2011 and assigned case number SP-2011-0185C. This is the site development permit application that was ultimately approved. On July 21, 2011, George Adams sent an email to the HCE officers to notify them that a land use determination regarding the outdoor amphitheater had been made by Greg Guernsey in December 2008 and that the 20 days allowed for appealing that determination had long passed. The Adams email responded to repeated inquiries from HCE members about when the City would make a decision about whether the outdoor amphitheater could be constructed on the Property. The Adams email transmitted a copy of a July 13, 2011 letter from George Zapalac to Lawrence Hanrahan, P.E., the new engineer for the church ("Zapalac Letter").

Although the December 23, 2008 email did not address the second and third categories of uses described by Mr. Conley, the Zapalac Letter changes religious activities to include "non-religious non-profit civic uses such as neighborhood meetings, boy scout/girl scout meetings, school graduations, public meetings, etc." In effect, the Zapalac Letter makes the above described "non-religious activities" principal uses under Religious Assembly.

The Zapalac Letter mentions "benefit events" but it is not clear whether Mr. Zapalac intended to classify "benefit events" as a principal use under Religious Assembly. Nevertheless, the Zapalac Letter expresses a concern that "[S]ince PRDR issued its 2008 determination,

[8] Wendy Rhoades email to Sarah Graham dated February 28, 2011.
[9] Page 180 Guernsey Depo.

representations have been made regarding site uses that may go beyond the scope of a Religious Assembly use. The conditions outlined above, as set forth in the 2008 Conley letter, would effectively prohibit any such non-Religious Assembly uses at the site."

Unlike staff comment SP 15 to the first update, the Zapalac Letter provides no example of what the represented "non-religious assembly" activities are, but they must be different than the list of non-religious activities appearing on the first page of the letter that were made principal uses under Religious Assembly.

The Zapalac Letter does not resolve the question of whether the outdoor amphitheater is an accessory use to Religious Assembly.

Finally, Zapalac Letter restates the requirement for compliance with "all of the City's ordinances, including sound levels at the boundary properties[,]."

A copy of the July 21, 2011 George Adams email and the George Zapalac Letter are enclosed.

Fifth Interpretation

After City staff informed members of HCE that a restrictive covenant would be required that would protect the adjoining neighborhoods an HCE officer made repeated requests to see a draft of the proposed restrictive covenant. City staff refused to provide any drafts or outlines of the proposed restrictive covenants. Copies of the emails requesting the opportunity to review the restrictive covenant are enclosed.

Also enclosed is a copy of a September 13, 2011 email from Brent Lloyd to George Zapalac, George Adams and Sarah Graham. Attached to the email is an "outline for the restrictive covenant" prepared by counsel for the Owner. Note in the first sentence of the draft, the Owner's counsel believe that the outdoor amphitheater is an accessory use. A copy of the email and draft outline are enclosed.

The first version of the restrictive covenant seen by CB, HCE and their members was the version recorded in Document No. 2011146026, Official Public Records of Travis County, Texas on October 5, 2011 ("Restrictive Covenant").

Once again, the activities allowed under Religious Assembly changed. First, the "musical presentations" that were originally required to be of short duration and subordinate to the primary Religious Assembly are no longer so limited.

Second, regular organized religious worship or religious education were no longer required to be the predominate use of the outdoor amphitheater.

Third, musical and theatrical presentations were renamed "musical and theatrical performances" and changed to a principal use under Religious Assembly. This change allows concerts and theatrical performances to constitute a Religious Assembly use.

Fourth, the outdoor amphitheater is a principal and not an accessory use under Religious Assembly.

Other changes are described in a December 12, 2011 letter to Brent Lloyd detailed below. A copy of the recorded Restrictive Covenant is enclosed.

On October 15, 2011, the City approved site development permit SP-2011-0185C. A copy of the cover sheet and sheet 11 of the approved site development permit are enclosed.

HCE filed an appeal to the Board of Adjustment on October 21, 2011 within 20 days of the issuance of the site development permit for the Property. The HCE appeal challenged the Chapter 25-2 administrative decisions involved with approval of the site development permit and the Restrictive Covenant. Despite the clear and unambiguous mandate of Section 211.010(a)(1), Texas Local Government Code, City staff refused to forward the HCE appeal to this Board. Such action by City Staff also violated Section 25-1-181(B), LDC: "A body holding a public hearing on an appeal **shall determine whether a person has standing to appeal the decision**." (emphasis added)

On October 27, 2011 Brent Lloyd sent a letter to Robert Kleeman that explained how every appeal issue raised in the HCE Appeal was encompassed in the December 23, 2008 Greg Guernsey and that HCE had missed the 20 day fining deadline: "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." A copy of the October 27, 2011 Brent Lloyd letter is enclosed.

After hearing from City management in November 2011 that City staff had approved the outdoor amphitheater as an accessory use, I compared the terms of the Restrictive Covenant to the December 23, 2008 email and the December 17, 2008 Conley letter. In a December 12, 2011 letter to Brent Lloyd, I outlined how the Restrictive Covenant and the approved site development permit exceeded the terms of the December 23, 2008 Greg Guernsey email. The arguments set forth in the December 12, 2011 letter are incorporated here and are made a part of this appeal for all purposes. A copy of the December 12, 2011 letter is enclosed.

On December 30, 2011 Brent Lloyd responded, in part, with the following sentence:

"The zoning issues related to this development were resolved in December 2008 by Director Greg Guernsey's determination that construction of the proposed outdoor amphitheater is allowed as part of a religious assembly use."

A copy of the December 30, 2011 Brent Lloyd letter is enclosed.

Sixth Interpretation

As of May 10, 2013, the description on the City's Website of the structure authorized by the Building Permit read as follows: "New Amphitheater for Religious Assembly w/tiered seating, stagehouse, office, support areas and restrooms."

The sub type description for the Building Permit found on the City's Website describes the outdoor amphitheater in question as "Amusement, Social & Rec. Bldgs." A May 10, 2013 print out of the City's Website Folder Detail for the Building Permit is enclosed ("May 10th Folder Detail").

According to the sworn testimony of Greg Guernsey the principal use of the outdoor amphitheater in question is Religious Assembly.[10] Sheet 11 of the Site Plan for the Property does not show any use for the amphitheater except Religious Assembly. Therefore, the sub type description shown on the May 10th Folder Detail (Amusement, Social & Rec. Bldgs.) is a land use determination of the principal use for the Building Permit.

HCE and CB contend that the Building Official erred when he issued the Building Permit for "Amusement, Social & Rec. Bldgs." uses of the outdoor amphitheater. First, the "recreational building" component falls under the definition of Community Recreation.[11] The Building Permit is the first time that a Community Recreation facility has been explicitly mentioned by City staff. Section 25-2-6(B)(41), LDC explicitly excludes Community Recreation as an allowed use under Religious Assembly. Further, Section 25-2-897, LDC does not include Community Recreation type uses as an accessory use to any Civic Uses.

Second, according to the land use chart found in Section 25-2-491(C), LDC, Community Recreation is a conditional use in RR zoning. No conditional use permit of any type has been issued for the Property. The Building Permit has approved a conditional use without following the conditional use permit procedures and, therefore, was issued in error.

Third, the term "social" appears only in the descriptions of "Camp" and "Club or Lodging" found in chapter 25-2, LDC. According to the land use chart found in Section 25-2-491(C), the use "Club or Lodge" is a conditional use in RR zoning and "Camp" is not allowed in RR zoning under any circumstances. Again, no conditional use permit has been issued for the Property.

Fourth, the term "Amusement" does not appear in Chapter 25-2 as a defined use but does appear in the Airport Overlay Land Use Table found in Section 25-13-44. In this section, "Amusement" is classified under "Recreational Uses." Therefore, a principal "Amusement" use should fall under Community Recreation which cannot be an authorized principal use under Religious Assembly without a conditional use permit.

HCE and CB agree that "Amusement, Social & Rec. Bldgs." is a correct determination of the principal use of the outdoor amphitheater. The Building Official erred when he ignored all of the applicable City codes and ordinances and issued the Building Permit anyway. Upon

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[10] Page 99, Deposition of Greg Guernsey, February 20, 2013. Hill Country Estates Homeowners Association and Covered Bridge Property Owners Association, Inc. v. Greg Guernsey and the City of Austin, Cause No. D-1-GN-12-000878 in the 250th District Court, Travis County, Texas. ("Guernsey Depo.")

[11] 25-2-6(B)(9) COMMUNITY RECREATION (PRIVATE) use is the use of a site for the provision of an indoor or outdoor recreational facility for use by residents or guests of a residential development, planned unit development, church, private primary or secondary educational facility, club or lodge, or non-profit organization.

determining that the outdoor amphitheater is a Community Recreation and Club or Lodge facility, the Building Official should have denied the Building Permit application.

Outdoor Amphitheater Violates Explicit Zoning Code Provisions.

Notwithstanding the five previously discussed interpretations of Religious Assembly, the outdoor nature of the amphitheater does not comply with applicable law. First, Section 25-2-921(C), LDC prohibits "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..." for property zoned RR. Further, Section 25-2-921(C) prohibits the Building Official from issuing even a temporary use permit for the above described outdoor activities on RR zoned property. If the Building Official has no authority to issue a Temporary Use Permit for Outdoor Religious Assembly on RR zoned property, then the Building Official has no authority to issue a building permit to authorize such outdoor activities on a permanent basis.

Second, the definition of Religious Assembly found in Section 25-2-6(B)(41), LDC states that a Religious Assembly use must occur in a permanent or temporary building. The phrase "in a permanent or temporary building" means indoors or a fully enclosed building. Even if a contorted interpretation could be made that the phrase "in a building" could include "outdoor" buildings in some zoning districts, such an interpretation cannot be made for property zoned RR through SF-3 because of Section 25-2-921(C), LDC.

Third, Section 25-2-491(B) states: "The requirements of other provisions of this subchapter modify and supersede the requirements of this section, to the extent of conflict." The Land Use Chart (Section 25-2-491(C) and Section 25-2-921(C) are both found in subchapter C of Title 25. The Land Use Chart allows Religious Assembly in RR zoned districts subject to any other requirements in Subchapter C. One of the modifying requirements found in Subchapter C is the prohibition in RR zoned districts of outdoor religious assembly and other outdoor activities described in Section 25-2-921(C). The Building Official cannot issue a building permit for an "outdoor amphitheater" and simultaneously say it is not outdoors.

In conclusion, several aspects of the first five previously discussed interpretations of Religious Assembly exceed the authority of the director of PDRD to interpret use categories pursuant to Section 25-2-2, LDC. The Director's authority under Section 25-2-2 arises only when a particular use has not been classified within a zoning category or land use. Under the previous version of Section 25-2-2(E), the Director was required to maintain a list of determinations made under Section 25-2-2. The so called land determination made by the December 23, 2008 email was never added to the list of use determinations and was kept from the site development permit case manager until February 28, 2011.

The original interpretations of the LDC regarding outdoor amphitheaters made by City staff in 2007 and mid-2008 were correct. The original interpretation request made by Mr. Conley was whether an outdoor amphitheater was an accessory use to Religious Assembly. Since Section 25-2-897, LDC provided a clear answer to Mr. Conely question, the authority of the Director to issue a land use determination under Section 25-2-2 never arose. Further, the staff interpretation that made the outdoor amphitheater a principal use did not occur until the Restrictive Covenant recorded in October 2011. HCE timely filed its appeal to the Restrictive Covenant and to the approved Site Development Permit.

The Board of Adjustment should find that the Director of PDRD has never had the authority under Section 25-2-2 to make a prohibited outdoor activity an allowed use. That is, by interpretation the Director cannot convert the outdoor activities prohibited by Section 25-2-921(C) into allowed uses. Further, the Director does not have the authority to amend the Land Use Chart by converting a conditional use (Community Recreation and Club or Lodge) into a permitted use.

The Board of Adjustment should use its authority to find that all prior Interpretations, including the Building Permit, that authorize any outdoor activities on the Property are rescinded because they were issued in contravention of the explicit provisions of Chapter 25-2. The Board of Adjustment should use its authority to find that all prior Interpretations, including the Building Permit, that authorize a conditional use on the Property are rescinded because they were issued in contravention of the explicit provisions of Chapter 25-2. The Board of Adjustment should use its authority to suspend all permits for the Property, including the Building Permit that were issued in reliance on any rescinded interpretation. The Board of Adjustment should also find that the interpretation of Chapter 25-2 used by City staff to reject HCE's October 2011 appeal to this Board was wrong, are rescinded and the City staff should be instructed to forward to the Board of Adjustment the October 2011 HCE appeal of the Restrictive Covenant and the approved site development permit in accordance with Section 211.010, TLGC.

The contact information for Kim Butler is (512) 288-3659 and his 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.

Sincerely,

MUNSCH HARDT KOPF & HARR, P.C.

By: 
Robert Kleeman

RJK:dm
Enclosures

From: Kim Bu[redacted]
Sent: Thursday, May 23, 2013 8:53 PM
To: Kleeman, Robert
Subject: FW: Interested Party Case #2013-002081PR

Hi Robert,

Here's an e-mail chain that contains both Frank's AND my request for Interested Party status...AND the argument I presented as cause for the appeal of the Building Permit.

Kim

------ Forwarded Message
From: Frank Goodloe[redacted]
Date: Wed, 03 Apr 2013 16:23:53 -0500
To: Kim Butler[redacted]
Cc: "Kleeman, Robert" <[redacted]
Subject: Re: Interested Party Case #2013-002081PR

Sounds damn solid Kim. Well laid out.
(ps, how are the Giants looking this year?)
:-)

Sent from my HTC Inspire™ 4G on AT&T

----- Reply message -----
From: "Kim Butler" [redacted]
To: "Frank Goodloe" [redacted]
Cc: "Kleeman, Robert" <[redacted]
Subject: Interested Party Case #2013-002081PR
Date: Wed, Apr 3, 2013 4:12 pm

Hey All,

I'm out in CA, but took a call between meetings from someone at the city who called in response to today's e-mails from

Frank and myself.

He indicated there is no such thing as an "interested party" status for the commercial building plan review process, as the issues requiring/enabling public input, traffic/safety/sanitation/parking, have already been addressed in the city's review of the Site Plan for the development.

He also told me that if we wish to appeal the approval of a commercial building plan, that it does not require interested party status to do so, that we can take an appeal directly to the Board of Adjustment. He got mixed up a couple of times, so I asked him to send me what he had told me on the phone, in writing, via e-mail. He refused, saying we already had the information in writing. I told him I wanted his description of our appeal rights in writing, and asked that he copy Frank on the message, as well. He hesitantly agreed to do so, but I don't know if I believe him..

I didn't get his name down, though. His number, 512-974-2355, may be trackable to an individual person. I'll see this evening.

The valuable piece of information he gave, IMO, was that the commercial review team ASSUMES the city has already done a thorough evaluation of the traffic/parking/safety/sanitation impact associated with the approved components of the original Site Plan.

If everyone recalls, PLW never added the impact of even a single event at the amphitheater to their Site Plan. THAT was the issue I kept pounding on, and the bone of contention Sarah Graham was working on when Greg Guernsey called a halt to the Site Plan review process...that the church hadn't ever specified any use, or frequency of use, for the amphitheater, so there was no consideration given for traffic/parking/safety/sanitation issues associated with the actual USE of the amphitheater.

Therefore, the assumption the commercial review team is working of off is inherently false. The site, INCLUDING the amphitheater's uses, has never been approved...only the site plan with the amphitheater's use being defined as an alternative site where the congregation will do what they normally do in the primary church facility.

There has NEVER been any consideration given to the traffic/parking/ safety/sanitation impact of an event with as many as 3,000 participants involved at one time. Neither has consideration been given to the impact of amphitheater uses beyond the activities that regularly occur in the church.

This, I believe should give us the opportunity to appeal the approval of the building plan due to the failure of the city to incorporate full use and frequency of use data into the original Site Plan.

Just my 2¢.

Kim

Kim Butler
President
Greywolf Consulting Services, Inc.
4611 Bee Cave Road, Suite 203
Austin, TX 78746
512-732-0700 ext 205 (office)
512-699-6693 (cellular)
512-732-0716 (fax)
[redacted]

That makes a case for a legal letter to the right people citing the continuing lawsuit related to the inappropriate administrative approval of the site plan, denial of our rights to be heard and demanding/requesting that any final approval of the building plans until that issue is resolved.

May not stop them, but puts our objections on record.
(...yes, I'm just shooting in the dark on this...need Robert/ Eric input)

Sent from my HTC Inspire™ 4G on AT&T

----- Reply message -----

[redacted]

Subject: Interested Party Case #2013-002081PR
Date: Wed, Apr 3, 2013 3:08 pm

FYI when I spoke with Carol Raney @ COA she said they did not 'do' interested party status on commercial plans & 'that was part of the site plan review, not the building plans'.

Therefore, I don't think we can request such if it doesn't exist, but it would be nice for the COA to respond and state such in writing.

Amanda Lavin
512.565.7058
amanda@lavinfm.com <mailto:amanda@lavinfm.com>

LAVIN
FACILITY MANAGEMENT

[redacted]

Cc: Board of Directors Covered Bridge; Kleeman, Robert; P Jones; David VanDelinder
Subject: Re: Interested Party Case #2013-002081PR

As Frank indicated, I have also failed to receive any written verification/acknowledgement as to my request for Interested Party status for case #2013-002081PR, as the Secretary for the Hill Country Estates Homeowners Association.

Please correct what I am hoping is simply a clerical oversight by city staff.

Regards,

Kim Butler
Secretary
Hill Country Estates Homeowners Association
512-699-6693

Messrs. Meier, Haught, Raney,

I have not received confirmation from you or anyone else with responsibility for this case acknowledging the request of the Covered Bridge Property Owners Association to be recognized as an "interested party". We are just one of several Oak Hill neighborhoods which would be negatively affected by this proposed commercial development in RR zoning.

I ask again for your written/e-mail confirmation that you have received and acknowledge our request.

Regards,

Frank Goodloe
Treasurer – Covered Bridge Property Owners Association

[redacted]

Subject: Interested Party Case #2013-002081PR

Mr. Meier and Ms. Haught,

I am Treasurer of the Covered Bridge Property Owners Association in Oak Hill, a registered HOA.
We request interested party status in regard to the Building Permit under review by the City of Austin, case # 2013-002081PR.

This project has direct impact on our Association and its residents.

Please acknowledge to me your receipt of this request and our interested party status.

Regards,

Frank Goodloe
Treasurer, Covered Bridge Property Owners Association
Austin, Texas 78736
512-906-1931 – Home

From: Frank Goodloe [redacted]

Sent: Wednesday, February 27, 2013 9:55 AM

[redacted]

Subject: Registering POA as Interested Party in Building Permit Application

Carol,

I am the Treasurer of the Covered Bridge Property Owners Association (CBPOA) in Oak Hill. We are a registered neighborhood association.

CBPOA wishes to register as an interested party in the city's consideration of permit application **2013-002081PR** – the proposed amphitheater at Dream City/Promised Land West/LiveAustin on Hwy. 71 W in Oak Hill..

I live at 6705 Covered Bridge Dr., Austin, 78736. If possible, I would like to also register individually.

Could you or your staff contact me to make sure we take the right steps to be heard on this issue?

Frank Goodloe
Treasurer, Covered Bridge Property Owners Association
512-906-1931 – Home
512-826-0158 - Mobile

------ End of Forwarded Message

Community Registry

Community Information

Name: Hill Country Estates Homeowners Assoc.

Planning Id: 639

Organization Email Address:

Organization Website:

Primary Contact Information

Name: Mrs. Charlsa Bentley

E-mail: Not Displayed By User Request

Phone: 301-2675

Address: 2409 Ann Arbor Avenue Apt. B2 ,Austin, TX 78704

Secondary Contact Information

Name: Mrs. Marlene Warner

E-mail [redacted]

Phone: 632-9675

Address: 7001 Midwood Pkwy
Austin, TX 78736

Meeting Information

Residents homes at 7:00pm.1/yr

Return to Austin Neighborhood Resources

Community Registry

Community Information

Name: Covered Bridge Property Owners Association, Inc.

Planning Id: 1318

Organization Email Address:

Organization Website:

Primary Contact Information

Name: William A. Dabbert

E-mai [redacted]

Phone: 512.799.8067

Address: 8622 Foggy Mountain Dr. ,Austin, TX 78736

Secondary Contact Information

Name: Jack Baker

E-mail: Not Displayed By User Request

Phone: 512.288.2376

Address: P. O. Box 92649
Austin, TX 78709

Meeting Information

Annual meetings are held typically in March at the Travis County Community Center, 8656 Hwy 71 W

Return to Austin Neighborhood Resources

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Q. So does it matter what the content of the music is as opposed to the performance or the people that are doing it?

A. I think it has to do with, really, what is the religious activity or the benefit to that religious assembly use that's really there.

Q. Who makes that decision? You?

A. Partly me, partly the Travis County Appraisal District.

Q. How does the Travis County Appraisal District determine whether the Gatlin Brothers are performing a religious concert or not?

MS. EDWARDS: Objection, form.

A. As I said, if they are still deemed to be a tax exempt and sanctioned by the Appraisal District as a tax exempt entity, the definition still brings me back to being a religious assembly use.

Q. (By Mr. Taube) So it's your testimony, sir, that as long as the Promiseland West Church maintains its tax-exempt status, regardless of the nature of events that occur in that outdoor amphitheater, so long as it has some relationship to the church, like a fundraising event, it is permitted. Is that fair?

A. Generally, yes.

Q. Mr. Guernsey, take a look, if you would,

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please, at Exhibit No. 11, and specifically at Page No. 2.

A. (Witness complies.)

Q. There is a listing of things that are -- well, it's a carryover. It says, "The buildings and outdoor amphitheater located or to be located on the Property will be subject to the following limitations." Then it goes "A. Religious Assembly Use will be permitted (as defined in the Austin Land Development Code), including such uses as: Worship services; musical or theatrical performances; weddings; and funerals."

Have I read that correctly?

A. Yes.

Q. So music and theatrical performances under this restrictive covenant, regardless of whether it is of a secular or religious nature, would come under religious assembly use?

A. There's a tie under part A back to the religious assembly use. If it had no affiliation with a religious assembly use and it was just simply bands every weekend charging a cover charge to get in, similar to The Backyard, then it probably would not be a religious assembly use any longer.

Q. Mr. Guernsey, if you look at C, it says, "Religious Assembly Use may include occasional

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charitable events (including concerts and performances) for the benefit of an individual or family in need or for a charitable organization or charitable cause."

I read that correctly?

A. Yes.

Q. Who determines what "occasional" is?

A. I think that goes back to looking at, again, the definition that I had to work with. You know, you spoke several times of the frequency of that. They may be putting their tax exemption in jeopardy if it -- if it was something that actually started, no longer doing a worship service, they were actually putting on performances in lieu of doing worship in that facility, that would be a -- raise a little concern of whether or not they're really doing a religious assembly use.

MR. TAUBE: Objection, nonresponsive.

Q. (By Mr. Taube) My question, Mr. Guernsey, is, who determines what "occasional" is for the purpose of enforcing this Restrictive Covenant?

A. It would probably end up being the Code Compliance Department.

Q. So does that include you?

A. They may consult me, but the Code Compliance Department is the enforcement arm of the City of Austin. And there may be also questions, although I don't know

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how that would work, by the Appraisal District.

Q. How's it being monitored?

MS. EDWARDS: Excuse me. Let's go off the record for just a minute.

MR. TAUBE: Sure.

(Discussion off the record.)

Q. (By Mr. Taube) Who's monitoring whether it's occasional or not? Who gets to monitor that? Is it Code Enforcement?

A. Code Enforcement, if they receive a complaint, would go out and investigate.

Q. But not otherwise?

A. But not otherwise unless there's some other permit requirement in the city that may have a limitation, such as an outdoor music venue permit, which is an annual permit. Then APD may come out and enforce

Q. So if I'm a neighbor, Mr. Guernsey, and I say, you know what, more than once a month is more than occasional, and this happened twice a month, and I make a complaint to Code Enforcement, how does Code Enforcement determine whether or not they're complying with the restrictive covenant or not?

MS. EDWARDS: Objection, form.

A. I'm not sure what -- how they would go out and enforce that. Normally, we try to work with all

From:
Subject: Plan Approval, Religious Assembly Accessory Use
Date: July 18, 2008 2:36:17 PM CDT
To: [redacted]
Cc:

Dear Mr. Johnson,

Thank you for the information; it has been most helpful. Our citizen group would like a further clarification, and hope you can help or can direct us to the party that can.

You mention that no outdoor amphitheater has been administratively approved. After reading the Development Code (Title 25, Austin City Code), I find there are at least two paths to site plan approval. One, the administrative approval, seems to be via Development Review department (and the many departments consulted in that process, eg, Watershed, Neighborhood, etc). Is that an adequate description of the administrative approval process?

An alternate route to site plan approval seems to be via the Land Use Commission, which is charged (in the Code) with appeals and with approval of Conditional Use plans. I can not find any Land Use Commission by searching the City website. It does not seem to be listed on the Boards and Commissions page. Multiple references are made in the Code, but I am unclear whether another department if filling the role of the Land Use Commission (eg, the Zoning & Platting Commission), or if it is not actually a City entity.

Can you help us find the Land Use Commission, so that I may inquire about their responsibilities and process? If it is a possible venue for review and approval of the amphitheater in our neighborhoods, we wish to have a chance of being heard on the issue. If there is yet another possible path to site plan approval, we would of course need to learn of it as well.

Thank you for all your time in providing information to our multi-neighborhood work group.

D Armentrout

Communications Facilitator,
DreamCity Work Group

From: D Armentrout
Sent: Wednesday, July 16, 2008 10:30 AM
To: Devweb

Subject: Re: devweb - Zoning, Religious Assembly Accessory Use

Mr. Johnson,

Thank you very much, on behalf of our several surrounding neighborhoods. We appreciate your time in answering our inquiries.

Regards,

D Armentrout

On Jul 16, 2008, at 7:48 AM, Devweb wrote:
Ms. Armentrout-

The purpose of the City's Law Department is to provide legal council and representation for City staff. The City's attorneys do not provide legal council to the general public.

I can tell you definitively that there has never been an outdoor amphitheater administratively approved as an accessory use for a Religious Assembly facility. If one were to be shown on a site plan submittal for a propose church, Land Use Review staff would identify it and require the developer to obtain a Conditional Use Permit for the proposed Community Recreation or Outdoor Entertainment use. Even if the developer did not specifically show the amphitheater on the plans, and just provided an open space—a Sound Permit would be required for any type of event with amplified sound equipment. Section 9-2-14 of the City Code prohibits the issuance of an Amplified Sound permit for any property within 100-ft of property with residential zoning. If the church property itself is zoned RR – Rural Residential, it would not be able to obtain a Sound Permit.

When a development application is filed, the City will send notice by mail to all property owners and residents within 500-ft of the subject tract, as well as any neighborhood associations that are registered in the Community Registry with the Public Information Office. The notice will identify the proposed project and provide the name and contact information of both the applicant, and the City Staff case manager. Once an application is filed, the case file is public information and you may contact the staff case manager to make arrangements to view the plans and case file and any questions about the project can be directed to the case

manager assigned to the case.

If you have any additional questions, feel free to contact me.

Christopher Johnson
City of Austin - Development Assistance Center
505 Barton Springs Road, 1st floor
Ph 512/974-2769
Fax 512/974-2934

From: D Armentrout
Sent: Tuesday, July 15, 2008 11:02 AM
To: Devweb
Subject: Re: devweb - Zoning, Religious Assembly Accessory Use

Thank you, Christopher, for your prompt reply.

Can the City Attorney tells us exactly what will be required? Are we certain that the Land Use Commission is the place to go for answers and applications and hearings?

The developers are representing that they have the right to so develop (as a religious assembly), and the community needs assistance in determining the proper venue and procedure to oppose this outdoor events amphitheatre. They are professionals in development, and we are just citizens requesting public information and clarification, so that we may be heard.

Please advise.

D Armentrout

On Jul 15, 2008, at 8:01 AM, Devweb wrote:

Daloma-

Although *Religious Assembly* is a permitted use in almost any zoning district, the site is still subject to the site development regulations of that district with regard to impervious cover, setbacks, height, etc. Accessory uses are also permitted in addition to the Religious Assembly use for such things as a dwelling unit, a gift shop, a meeting hall, or a columbarium. An amphitheater or sports facilities would not be considered customary accessory uses for a *Religious Assembly* use. I believe those uses would be considered *Community Recreation (Private)* which would require approval of a Conditional Use site plan by the Land Use Commission.

Christopher Johnson
City of Austin - Development Assistance Center
505 Barton Springs Road, 1st floor
Ph 512/974-2769
Fax 512/974-2934

From:
Sent: Monday, July 14, 2008 9:59 AM
To: Devweb
Subject: devweb - Zoning, Religious Assembly Accessory Use

Date/Time Submitted: Monday, 7/14/08, 0958 hours
From: Daloma Armentrout

E-mail address:

Subject: Zoning, Religious Assembly Accessory Use

Comments:

Greetings. Our community needs an opinion from Zoning, and a contact

person. Religious Assembly is planning construction in RR. Site plans include accessory uses (outdoor events amphitheatre for rock concerts; active sports fields)that we think require conditional use permits & Zoning review. Developers contend otherwise. Community is highly opposed. Height Variance request (BoAdjusmt) is being heard now, for entire site plan. WHO can help us get a legal opinion about what the developers must achieve through regulations? Do we need to steer this case to Zoning Review? What is proper forum for outdoor events center approval? Thank you for guidance.

[redacted]
Sent: Thursday, July 17, 2008 1:37 PM
[redacted]
Subject: Another COA develop employee on PLW

History thread, between Paula Jones & Glenn Rhoades. Paula has been working since last year to determine whether PLW had a chance of getting the outdoor events facilities and counseling center approved through COA. See final entry date Dec 07.

An addition for your list of Development Center and other COA contacts offering opinions on the site plan viability & process.

On Jul 17, 2008, at 12:59 PM, P Jones wrote:

Daloma, Per your earlier e-mail, I am forwarding one of a number of string e-mails between me and Glenn Rhoades with the CofA development assistance dept. Glenn has been very helpful and seems sympathetic to our concerns.

You also asked how I wanted to help. I am happy to help in whatever way is needed. I will, however, have difficulty doing things that require a lot of time during the work day due to my job responsibilities. I am happy to read or help draft comments, ordinances, etc.

Paula

Date: Tuesday, January 15, 2008, 5:09 PM
[redacted]
Subject: RE: PromiseLand West church
To: "[redacted]

Thank you for the reply. I will be happy to let you know what happens.

Paula Jones

[redacted]

Ms. Jones. Still no applications filed. My guess is that they want to meet with you all in order to discuss their future plans. As far as a curb cut goes, they would go to the Watershed Protection and Development Review Department for review. They would not go to Council at this point. I would be curious to know what they are planning. Let me know what it is after you attend the meeting.

Thanks,

Glenn Rhoades, Development Assistance Center

Sent: Monday, January 14, 2008 9:21 AM
[redacted]

Subject: RE: PromiseLand West church
Glenn, The Oak Hill Association of Neighborhoods recently received a call from a representative of PromiseLand West Church. The church is looking at asking the City Council for a curb cut on Hwy 71 and they are asking for OHAN's support. Our neighborhood, of course, is interested in this and is working with OHAN. We would also like to cooperate with the Church but have not been permitted to visit with them in quite some time.
Have there been any applications filed recently? If not, is it appropriate for the Church to go to the City Council before going to the planning commission and before filing a site plan? I would appreciate any assistance you can offer.
Sincerely, Paula Jones

--- [redacted]
Ms. Jones, Still nothing submitted. I'm still only pulling up the same exemption application from October. If you need anything else, let me know.]
Thanks,
Glenn Rhoades, Development Assistance Center

Sent: Friday, January 04, 2008 12:50 PM
[redacted]]
Subject: RE: PromiseLand West church
Glenn, I hope you had a restful and wonderful holiday. I'm just checking to see if there has been any activity for permits, applications, site plans, etc. for the PromiseLand West church at 8901 SH 71 W? Thanks again for your help.
Paula Jones

[redacted]
Ms. Jones, I did a search using the address and the only application is still the one from earlier. Nothing else has been submitted. Keep checking back though.
Glenn

Sent: Tuesday, December 04, 2007 3:37 PM
[redacted]
Subject: Re:
Glenn, Has there been any change in status regarding PromiseLand West Church seeking permits, zoning or filing a site plan?
Thank you for your help.
Paula jones

--- "Rhoades, Glenn" <G[redacted]
Ms. Jones, I did another search for permits pulled at 8901 SH 71 W. and only found one application. In October they submitted a site plan exemption application. A site plan exemption basically exempts an applicant form doing a site plan for small projects. The request was for clearing of a 15 foot wide pathway in order to facilitate a topographic survey. That is all that I have found. I did look on the website and saw the future plans. From what I saw they will definitely need a zoning change and a fully engineered site plan. The scope of what they are doing looks like it goes beyond what the City would classify as Accessory Uses. However, like I said nothing other than the application for the 15 foot pathway has been submitted. I would suggest contacting me periodically to see if other applications are submitted. If you have questions let me know.

Thanks,

Glenn Rhoades, Development Assistance Center

[redacted]

Subject: RE: thanks

[redacted]

Date: Monday, November 19, 2007, 2:46 PM

Mrs. Jones,

Answers to you questions:

Q1. If a zoning change is needed, will the neighborhoods in the vicinity be given notice of the Planning Commission and later the City Council hearings on the issue?

A. Notice goes out to all those within 300 feet and to all registered neighborhood associations.

Q2. Who approves the site plan?

A. The site plan is approved by the Watershed Protection and Development Review Department. If No variances are being requested, it is an administrative process without a public hearing.

Q3. If the property owner submits a site plan similar to what is on the church's Web site (i.e., it has items that clearly aren't permitted like the amphitheater and ball fields), does the site plan get rejected?

A. If the site plan does not meet the zoning requirements then yes, it would be rejected.

Q4. Is there a case number for this project?

A. There is not a case number for the project because it has not been filed yet.

If you have further questions let me know. Below I have attached the accessory use section of the Code

Thanks,

Glenn Rhoades

§ 25-2-897 ACCESSORY USES FOR A PRINCIPAL CIVIC USE.

For a principal civic use, the following are accessory uses:

(1) a dwelling unit that is occupied only by a family that has at least one member employed on-site for security, maintenance, management, supervision, or personal service;

(2) refreshment stands and convenience food or beverage sales that serve a public assembly use;

(3) cafeterias, dining halls, and similar food services that are primarily for the convenience of employees, residents, clients, patients, or visitors;

(4) gift shops, news stands, and similar commercial activities primarily for the convenience of employees, residents, clients, patients, or visitors;

(5) parking facilities, except a facility located in an SF-6 or more restrictive zoning district may not exceed the minimum parking requirements; and

(6) a columbarium that:

(a) is affiliated with a religious assembly use;

(b) occupies not more than 10 percent of the site area or 10,000 square feet, whichever is less;

(c) is oriented to the interior to the site; and

(d) is not visible from public rights-of-way.

Graham, Sarah

From: [redacted]
Sent: Monday, February 28, 2011 4:03 PM
To: [redacted]
Subject: FW: PromiseLand West Church site--Amphitheater
Attachments: G. Guernsey Ltr_12.17.08.pdf

Hi Sarah,
Carol Gibbs was just in my office in regards to the site plan that is currently in process and thought that this email would be useful for you.

Wendy

[redacted]
Subject: RE: PromiseLand West Church site--Amphitheater

Hello Carl:

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 complaint 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.

Happy Holidays to you!

Greg

Gregory I. Guernsey, AICP, Director
Neighborhood Planning and Zoning Department
City of Austin
P.O. Box 1088
Austin, TX. 78767
Phone: (512) 974-2387
Fax: (512) 974-2269
[redacted]

[redacted]
Sent: Monday, December 22, 2008 9:21 AM
To: Guernsey, Greg
Subject: FW: PromiseLand West Church site--Amphitheater

Morning Greg---

I was just checking to see if you received this e-mail last week and if you had a chance to look at it. The church is meeting this morning, and this is a very key issue for them.

Hope your holidays are Merry and Bright!!!!!

Carl P. Conley, P.E., R.P.L.S.
Conley Engineering, Inc.
512.328.3506 office
512.328.3509 fax

[redacted]

Sent: Thursday, December 18, 2008 11:16 AM

[redacted]

Subject:

Here is the letter we discussed yesterday.

Please let me know if there is anything else you need to make this determination.

If we get your response back before the weekend it would be outstanding, but if not till next week, it would be OK.

Thanks for all your help on this matter.

Carl P. Conley, P.E., R.P.L.S.
Conley Engineering, Inc.
512.328.3506 office
512.328.3509 fax

conley engineering, inc.

Civil Engineers • Land Planners • Development Consultants

December 17, 2008

Mr. Greg Guernsey
Director
Neighborhood Planning and Zoning
P.O. Box 1088
Austin, Texas 78701

Re: PromiseLand West Church
Amphitheater as an Accessory use

Dear Greg,

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

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 educational 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

1301 South Capital of Texas Hwy. Building A. Suite 230
P.O. Box 162713 • Austin, Tx 78716-2713 • (512) 328-3506 • Fax (512) 328-3509

Mr. Greg Guernsey
December 17, 2008

would also entertain the concept of a voluntary restrictive covenant that would help identify/clarify specific uses that are not permited under the proposed religious assembly use.

The church has met with the adjoining neighborhood representatives and have 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.

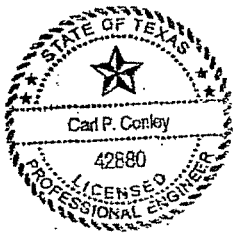
Please let me know if you need anything else to help you in your determination as to whether the amphitheater is an accessory use to the primary use of religious assembly.

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

Sincerely,

Conley Engineering Inc.

Mr. Carl P. Conley, P.E., R.P.L.S.
President



Graham, Sarah

From: [redacted]
Sent: Monday, February 28, 2011 4:03 PM
To: [redacted]
Subject: FW: PromiseLand West Church site--Amphitheater
Attachments: G. Guernsey Ltr_12.17.08.pdf

Hi Sarah,
Carol Gibbs was just in my office in regards to the site plan that is currently in process and thought that this email would be useful for you.

Wendy

From: Guernsey, Greg
Sent: Tuesday, December 23, 2008 5:15 PM
[redacted]
Subject: RE: PromiseLand West Church site--Amphitheater

Hello Carl:

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 complaint 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.

Happy Holidays to you!

Greg

Gregory I. Guernsey, AICP, Director
Neighborhood Planning and Zoning Department
City of Austin
P.O. Box 1088
Austin, TX. 78767
Phone: (512) 974-2387
Fax: (512) 974-2269
Email: greg.guernsey@ci.austin.tx.us

[redacted]
Subject: FW: PromiseLand West Church site--Amphitheater

PLAINTIFF'S EXHIBIT A

Morning Greg—

I was just checking to see if you received this e-mail last week and if you had a chance to look at it. The church is meeting this morning, and this is a very key issue for them.

Hope your holidays are Merry and Bright!!!!

Carl P. Conley, P.E., R.P.L.S.
Conley Engineering, Inc.
512.328.3506 office
512.328.3509 fax
[redacted]

[redacted]

Subject:

Here is the letter we discussed yesterday.

Please let me know if there is anything else you need to make this determination.

If we get your response back before the weekend it would be outstanding, but if not till next week, it would be OK.

Thanks for all your help on this matter.

Carl P. Conley, P.E., R.P.L.S.
Conley Engineering, Inc.
512.328.3506 office
512.328.3509 fax
[redacted]

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Do you see that?
A. Yes, sir.
Q. Okay. Is that a land use decision?
A. **It may again, yes, but I would again speak to I'm speaking of uses, not a structure.**
(Exhibit No. 15 marked.)
Q. (By Mr. Taube) Mr. Guernsey, I'm now going to hand you what's been marked for identification as deposition Exhibit No. 15. Can you identify what that document is, please, sir.
A. **It appears to be site plan review comments by Sarah Graham.**
Q. Okay. Now, this is a site plan that was originally submitted by the Promiseland West Church on January 12, 2011. Is that right?
A. **January 12th?**
Q. That's what it says up on the top, "Submittal date."
A. **Oh, okay, very good. Yes.**
Q. Now, as I recall, there was a site plan submitted by the Promiseland West Church that was withdrawn, correct? Or do you know?
A. **I believe there was an initial site plan application and then I think it expired. I don't know if it was withdrawn or expired.**

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Q. This is the initial site plan application, isn't it?
A. **I would have to go back and look at the site plan that was approved. If it has a different number, then I would presume this is the first site plan application that did not ultimately get approved.**
Q. Now, as I understand it, and we've actually had this in another case, this review process is a process by which City staff reviews an application and provides feedback to the applicant about the site plan application; is that right?
A. **Yes.**
Q. Okay. And it also provides and summarizes internal comments of City staff with regard to the application, doesn't it?
A. **Yes.**
Q. If you would, take a look at Exhibit No. 15, the page marked 3087.
A. **(Witness complies.) Okay, I'm looking at 3087.**
Q. And particularly SP 8. And it says in the middle, "Please be aware that this reviewer has been contacted by many affected neighbors who have concerns about the proposed amphitheater."
Do you see that?

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A. **Yes.**
Q. Clearly, at the time that this application is provided, the City, specifically Sarah Graham, who was the case manager, is aware of significant community interest in what's going on with the outdoor amphitheater, correct?
A. **Correct.**
Q. And Ms. Graham identifies the neighbors as "affected neighbors," do you see that? "Please be aware that this reviewer has been contacted by many affected neighbors."
A. **Yes, I see that.**
Q. Do you know who that would be?
A. **I would -- no, I don't.**
Q. If you take a look at Page 3088 under SP 15, again, these are comments to the --
A. **88?**
Q. Yes, sir, 3088.
A. **Okay.**
Q. SP 15 up at the top of the page. And this is under the classification of "Site, Building and Zoning Information," is it not?
A. **Yes.**
Q. Now, it says in the third line, second sentence, it says, "Clarify if the amphitheater is

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intended for Religious Assembly use only, or if the applicant intends to use the structure in any other commercial way. Or is it an accessory use of Outdoor Entertainment (not allowed in RR zoning) or Community Recreation (commission-approval required)? Please be aware that this site plan application may be a conditional use permit site plan, which could require re-notification and additional fees."
Have I read all that correctly?
A. **Yes.**
Q. Okay. Clearly, Ms. Graham isn't aware at this point that you've determined that the amphitheater is religious use only or aware of Mr. Conley's statement to you in his letter, Exhibit No. 13, that the intended use includes non-religious civic meetings, correct?
A. **This application I don't believe was approved, but, yes, I would agree that it appears to be that way.**
Q. And it clearly also appears that Ms. Graham isn't aware that you've made a determination as to whether or not the amphitheater was an accessory use of outdoor entertainment or community recreation, right? That's her specific comment.
A. **That's her comment. I'm not sure -- I didn't specifically ask her or had a conversation with Sarah about this particular comment, so I'm not sure where**

Graham, Sarah

From: Adams, George
Sent: Thursday, July 21, 2011 10:49 AM
To: [redacted]
Subject: PromiseLand West Church
Attachments: promiseland church.pdf

To the Hill Country Estates Homeowners Association officers:

Thank you for your inquiry concerning the PromiseLand West Church site plan – SP-2011-0006C. The proposed amphitheater, built for the benefit of the congregation, was previously determined in 2008 to qualify as a Religious Assembly use as long as it is used for this purpose. The applicant has submitted the plan as a Religious Assembly use, and it is being reviewed accordingly. If the plan meets all established requirements for a Religious Assembly use, the City is required to permit the site plan application. In the event that the use changes in the future, the applicant will be required to obtain additional approvals and could be subject to enforcement action if these approvals are not granted. In addition to the site plan permit, the applicant will be required to obtain a separate permit for any proposed use of sound equipment outdoors.

Greg Guernsey, Director of the Planning and Development Review Department (PDRD), determined that the amphitheater was a Religious Assembly use in the attached email from December 2008. This determination is now outside the 20-day appeal period. PDRD based its 2008 use determination on a written request by Carl Conley of Conley Engineering, Inc, which included significant limitations on the nature and extent of the proposed amphitheater ensuring its consistency with a Religious Assembly land use. On June 13, 2011 PDRD requested a public restrictive covenant that sets forth these specific limitations outlined in the 2008 request. Please see the attached June 2011 request for a public restrictive covenant and original 2008 Conley letter for further information.

Should you have additional questions, please contact Sarah Graham, the case manager, at 974-2826.

Sincerely,

George Adams
Assistant Director
City of Austin
Planning and Development Review Department
(512) 974-2146
(512) 974-6525 Fax

City of Austin Planning and
Development Review Department
505 Barton Springs Road • P.O. Box 1088 • Austin, Texas 78767-8835

July 13, 2011

Lawrence Hanrahan, PE
Hanrahan Pritchard Engineering, Inc
8333 Cross Park Dr
Austin, TX 78754

Subject: PromiseLand West Church - SP-2011-0006C

Dear Mr. Hanrahan,

The applicant has represented to City staff that the proposed use of the site for PromiseLand West Church – SP-2011-0006C will be Religious Assembly, as defined by the Land Development Code 25-2-6 (B) (41). Greg Guernsey, Director of the Planning and Development Review Department (PDRD), determined in December 2008 that the proposed development met the requirements for a Religious Assembly use.

However, the 2008 use determination was made in response to a written request by Carl Conley of Conley Engineering, Inc. dated December 18, 2008, a copy of which is attached for your reference. As you can see, the request on which PDRD based its use determination included significant limitations on the nature and extent of the proposed amphitheater which ensure its consistency with a Religious Assembly land use.

Accordingly, any site plan approval for the project would be conditioned on the execution and recording of a public restrictive covenant that sets forth these specific limitations outlined in the 2008 request, as well as additional restrictions that "help to identify/clarify specific uses that are not permitted under the proposed religious assembly use."

In particular, the 2008 request provided that the amphitheater would be used for the same type of religious activities as the 3500-seat indoor auditorium, including:

- "worship services, weddings, funerals, and educational and musical presentations"
- "non-religious non-profit civic uses such as neighborhood meetings, boy scout/girl scout meetings, school graduations, public meetings, etc."

The request also provided that any fees charged for an event would be "nominal" and used to "cover setup, clean up, utilities, and administrative and other operational expenses" or, in limited cases, contributions to benefit "an individual or group that has a special emergency need (i.e. a

family whose house burned down) or for some charitable organizations." Compliance with "all of the City's ordinances, including sound levels at the boundary properties[,]" would also be required.

Since PDRD issued its 2008 determination, representations have been made regarding site uses that may go beyond the scope of a Religious Assembly use. The conditions outlined above, as set forth in the 2008 Conley letter, would effectively prohibit any such non-Religious Assembly uses at the site.

If you have any questions, please call Sarah Graham, Case Manager, at 974-2826.

George Zapalac

George Zapalac, Development Services Manager
Planning and Development Review

Attachments

Xc: Greg Guernsey, Planning and Development Review Department
George Adams, Planning and Development Review Department
Sarah Graham, Planning and Development Review Department
Brent Lloyd, Law Department

Graham, Sarah

[redacted]

Subject: FW: Promiseland

Attachments: Promiseland Site Plan Conditions.2.doc

Attached draft provided by the applicant. I haven't had the time to look at it yet, but when I do, I will revise to include the parking restriction per Section 25-6.

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

[redacted]

Subject: FW: Promiseland

Mr. Lloyd-

Attached please find the outline for the restrictive covenant. The restrictive covenant will be emailed to you later this week. Please contact Steve Metcalfe with any questions.

Thank you,

Julie Callis
Firm Administrator
Metcalfe Williams, LLP
301 Congress Avenue, Suite 1075
Austin, Texas 78701
(512) 961-8847
(512) 551-4943 (fax)

[redacted]

Promiseland Site Plan Conditions & Restrictive Covenant

The following conditions reflect the specific limitations included in the original 2008 request for a determination that the amphitheater is "an accessory use to an overall religious assembly use" under the applicable zoning for this property. Failure to follow these conditions may result in the amphitheater becoming an outdoor recreational use, which is not allowed under the applicable zoning. In the event of a violation of these restrictions by property owner, the City of Austin will first give property owner written notice of such violation and property owner will have ten (10) days after notice is given in which to cure such violation.

The conditions set forth herein may only be enforced by the City of Austin. Furthermore, in no event will the conditions set forth be interpreted in a manner which is contrary to the United States Constitution or other applicable local, state or federal laws.

I. The buildings and outdoor amphitheater will be limited to the following functions and activities, which must be conducted on a Non-profit basis:

A. Religious assembly uses that are part of the principal use, such as:

1. Worship services;
2. Musical or theatrical performances;
3. Weddings; and
4. Funerals;

B. Customary and incidental accessory uses, such as:

1. Educational presentations;
2. Neighborhood meetings;
3. School graduations;
4. Public meetings; and
5. Other civic or non-profit group meetings.

C. Occasional charitable events (including concerts and other similar 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 Subsection (C), above, ticketed events may charge only nominal fees to cover church operating expenses, including, utilities, maintenance, marketing and costs for promotion and other administrative and operational expenses.

II. The buildings and outdoor amphitheater will not be used for commercial, for profit events.

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: _____
Name: Michael Heflin
Title: Executive Pastor

ACCEPTED: CITY OF AUSTIN, PLANNING
AND DEVELOPMENT REVIEW DEPARTMENT

By: _____
Name: Gregory I. Guernsey
Title: Director

APPROVED AS TO FORM:

_____
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 Heflin of The Promiseland Church West, Inc., on behalf of said non-profit corporation.

Karen Elizabeth Kemnitz
Notary Public, State of Texas
My Commission Expires
November 23, 2014

_____
Notary Public, State of Texas

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 ½" 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 ½" 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 ½" 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 ½" 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 65, Page 85, Travis County Plat Records, these 3 courses:
1) N59°21'33"W 347.69 feet to a ½" 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 ¾" steel pipe found in the north line of Lot 21, for angle point,
3) N59°27'38"W 215.76 feet to a ½" 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 ½" 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 2011146026
PEREZTA: $44.00
Dana DeBeauvoir, County Clerk
Travis County TEXAS

C:\Documents and Settings\Lloydb\Local Settings\

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 Guernsey 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

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,

Brent D. Lloyd
Assistant City Attorney

cc Greg Guernsey
George Zapalac
Sarah Graham

MUNSCH HARDT
KOPF & HARR P.C.
ATTORNEYS & COUNSELORS
Dallas | Houston | Austin

Frost Bank Tower
401 Congress Avenue
Suite 3050
Austin, Texas 78701-4071
Main 512.391.6100
Fax 512.391.6149
munsch.com

ROBERT J. KLEEMAN
Writer's Direct Dial: 512.391.6115
[redacted]
Direct Fax: 512.482.8932

December 12, 2011

Via Email and Regular Mail

Mr. Brent Lloyd
City of Austin
Legal Department
301 W. 2nd Street
Austin, Texas 78701-3906

Re: Appeal of Land Use Determination Interpretation; Dream City Development; SP-2011-0186C ("Permit"); 53.113 Acres Located at 8901 W. Hwy 71 ("Property")

Dear Mr. Lloyd:

On October 21, 2011 the Hill Country Estates Homeowners Association ("HCE") filed an appeal of certain land use determinations embedded in the approval of the Permit, including, the October 2, 2011 public restrictive covenant recorded in Document No. 2011146026 Official Public Records of Travis County, Texas ("Restrictive Covenant"). On behalf of HCE, this letter responds to your October 27, 2011 letter which provides the reasons for the City of Austin's denial of the HCE appeal. Attached to your letter were copies of a December 17, 2008 letter from Carl Conley to Greg Guernsey, a December 23, 2008 email from Greg Guernsey to Carl Conley and a July 13, 2011 letter from George Zapalac to Larry Hanrahan.

In your letter you write that the City denied HCE's appeal because City Code Section 25-1-182 requires that an administrative appeal be submitted no later than 20-days after the decision was made. You note that the "decision" to allow the construction of the outdoor amphitheater as part of religious assembly use was made by Director Guernsey on December 23, 2008. Your letter neither describes any other "decisions" regarding uses allowed on the Property nor identifies any other basis for rejecting the HCE Appeal.

HCE disputes the City's conclusion that all of the HCE appeal issues are encompassed within the December 23, 2008 email. HCE contends that the issues raised in the HCE appeal pertain to interpretations and determinations that appear for the first time in the Restrictive Covenant.

Director Guernsey executed the Restrictive Covenant in the same capacity that he issued the December 23, 2008 email. As you state in your letter, a land use determination can be informal but will typically have the same date of that the site plan or permit is approved. In light of the City's claim that the December 23, 2008 email constitutes a formal land use determination under Section 25-2-2 (even though the email does not reference such a legal status), HCE contends that the Restrictive Covenant must be accorded the same legal status to the extent that the Restrictive Covenant exceeds or differs from the terms of the December 23, 2008 email. HCE filed its appeal on October 21, 2011 within 20 days of the execution of the Restrictive Covenant by Greg Guernsey. Without waiving its assertion that the December 23, 2011 email is a legally invalid determination under Section 25-2-2, HCE maintains that its appeal was timely filed regarding the expansion of the definition of "religious assembly" and other provisions in the Restrictive Covenant that are beyond the terms and conditions of the December 23, 2008 email. The HCE appeal should be forwarded to the Board of Adjustment for consideration of the appeal issues described below.

FACTS RELATING TO HCE APPEAL

CARL CONLEY LETTER

In his December 17, 2008 letter to Greg Guernsey Carl Conley wrote: "The church building includes a typical indoor auditorium for 3500 seats. This indoor facility will be used for various religious assembly activities including worship services, weddings, funerals and educational and musical presentations."

Mr. Conley goes on to write that the church building will be used for "***non-religious*** non-profit ***civic uses*** such as neighborhood meetings, boy scouts/girl scout meetings, school graduations, public meetings, etc. Again, these uses would be for non-profit activities...***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...or for some charitable organizations.*** All of these are typical of the use of a church facility." (emphasis added)

Mr. Conley clearly distinguishes "religious assembly" uses (worship services, weddings, funerals and educational and musical presentations) from "civic" uses (neighborhood meetings, boy scouts/girl scout meetings, school graduations, public meetings and charity events). Mr. Conley also states that the civic uses he described are typical uses of a church facility. He does not contend that these civic uses constitute "religious assembly."

GREG GUERNSEY DECEMBER 23, 2008 EMAIL

In response to Mr. Conley's letter, Director Guernsey sent the December 23, 2008 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 complaint [sic] with all applicable City Codes and ordinances, including the noise ordinance." (emphasis added)"
>
> If the primary use of one or both of the facility does change from a religious assembly use to an outdoor entertainment or an indoor entertainment use, a zoning change may be required."

In the emphasized sentence, Director Guernsey states that the "religious assembly" use (regularly scheduled religious worship or religious education) must be the predominate use of the worship building and the outdoor amphitheater. Mr. Guernsey places two limitations on "educational and musical presentations." One, they must be "limited in scope," meaning, in part, of short duration. Two, they are subordinate to the primary use of religious assembly, meaning the frequency of "educational and musical presentations" must be much less that "religious assembly" activities.

Director Guernsey does not mention any of the civic uses described by Mr. Conley in his December 17, 2008 letter. Mr. Guernsey's email does not incorporate or adopt the Carl Conley letter. There is no basis to interpret Mr. Guernsey's email as interpreting a "religious assembly" use to include the "civic" uses described in Conley's letter. Instead, Mr. Guernsey states that the church must comply with all applicable City Codes and ordinances, including, presumably, Chapter 25-2 which establishes allowable uses in RR zoning districts.

JULY 13, 2011 GEORGE ZAPALAC LETTER

The July 13, 2011 George Zapalac letter to Larry Hanrahan includes the following:

> "The applicant has represented to City staff that the proposed use of the site for Promiseland West Church – SP-2011-0006C will be Religious Assembly, ***as defined by the Land Development Code 25-2-6(B)(41)***...As you can see, the request on which ***PDRD based its use determination included significant limitations on the nature and extent of the proposed amphitheater which ensure its consistency with a Religious Assembly use.*** (emphasis added)
>
> Accordingly, any site plan approval for the project would be conditioned on the execution and recording of a public restrictive covenant that sets forth these specific limitations outlined in the 2008 request, as well as additional restrictions that "help to identify/clarify specific uses that are not permitted under the proposed religious assembly use."
>
> .....
>
> ***Since PDRD issued its 2008 determination, representations have been made regarding site uses that may go beyond the scope of a Religious Assembly use. The conditions outlined above, as set forth in the 2008 Conley letter, would effectively prohibit any such non-Religious Assembly uses at the site."*** (emphasis added)

Mr. Zapalac's letter is quoted here to establish that Mr. Guernsey's December 23, 2008 "determination" had not be superseded by any subsequent land use determination. In his letter, Mr. Zapalac incorrectly describes the "non-religious non profit civic uses" outlined in Mr. Conley's letter as "religious activities." Mr. Zapalac's error is of no import because he does not have the authority to make or issue a land use determination under Section 25-2-2 of the Land Development Code.

Mr. Zapalac does acknowledge that public statements made by the applicant regarding its intended use of the outdoor amphitheater for various activities that could fall outside of the scope of a religious assembly use, as defined in the Land Development Code. Mr. Zapalac's comment comports with City staff site plan

review comment SP-15, update 1 for SP-2011-0006C[1]. As you know, HCE and other nearby neighborhoods have provided the City examples of repeated statements by the applicant that the applicant intended to use the outdoor amphitheater for non-religious assembly uses. Mr. Zapalac's letter and Staff comments strongly support the conclusion that the one or more of the applicant's intended uses of the outdoor amphitheater, as reported in the media and on the applicant's blog, were not authorized by the December 23, 2008 email.

Notwithstanding the Staff's recognition that the applicant's intended uses of the amphitheater exceeded the limitations of the December 23, 2008 email, the City executed the Restrictive Covenant.

NEW INTERPRETATIONS IN THE RESTRICTIVE COVENANT

HCE appealed four interpretations embedded in the approval of the Permit and the Restrictive Covenant.[2] HCE appeal issues 2 and 3 address the Planning and Development Review Department interpretation: [2] "that expands the definition of Religious Assembly (25-2-6(41)) to include "musical and theatrical performances" and concerts, if the concert is held for a charitable purpose;" and [3] "that an outdoor amphitheater that seats 1,000 people is a ***principal*** use of the property if the applicant ***claims*** a Religious Assembly use." (emphasis added). Appeal point 3 means that City staff accept a use as allowed under "religious assembly" merely on the basis of the applicant claim the use was a religious assembly use.

Below is a list of the new interpretations and determinations that are materially different than the interpretation of December 23, 2008. To the extent that these interpretations are different from the terms of the December 23, 2008 email, they constitute new interpretation under Section 25-2-2 that HCE timely appealed.

1. The Restrictive Covenant is the first time that Director Guernsey interpreted "religious assembly" use to include "theatrical performances." If the Restrictive Covenant complied with the interpretation found in the December 23, 2008 email, the term "theatrical performances" would not have been included at all.

2. Section 1.C of the Restrictive Covenant is the first time that Director Guernsey interpreted "religious assembly" use to include "charitable events." The Carl Conley letter describes charitable events as "non-religious non-profit civic uses." The December 23, 2008 email does not mention any of the civic uses described by Mr. Conley and certainly does not categorizes "non-religious non-profit civic uses" as within the category of "religious assembly" use.

3. The Restrictive Covenant is the first time that Director Guernsey interpreted "musical or theatrical performances" (Section I.A.2) as ***principal or primary*** uses under "religious assembly." In the December 23, 2008 email, "musical presentations" were required to be subordinate to the primary use of religious assembly and to be of limited scope. The uses described in Restrictive Covenant Section I.C, regarding "occasional charitable events (including concerts and performances," can only be interpreted as placing "concerts and performances" within the category of "musical or theatrical performances" found in Restrictive Covenant Section I.A.

---

[1] The site development permit application for the Property prior to its withdrawal and resubmital of the site development permit application for the Permit.

[2] My letter addressed to Board of Adjustment Chair Jeff Jack was delivered with and is part of the HCE appeal documents delivered to the City of Austin on October 21, 2011.

In contrast to Sections I.A and I. C, Section I.B lists "customary and incidental accessory uses" associated with "religious assembly" use. If the Restrictive Covenant complied with the interpretations in the December 23, 2008 email, then Section I.B would have included "musical presentations" and Section I.C would not have been included at all.

4. The Restrictive Covenant provision that a benefit concert or performance is a principal use without any objective limitation on the frequency of such events is materially different than the December 23, 2008 email interpretation of "musical presentation" as a secondary or subordinate use. The only apparent attempt in the Restrictive Covenant to limit the number of concerts and "performances" is the word "occasional." The Restrictive Covenant, however, does not define the term "occasional." As a result, the Restrictive Covenant does not place any objective limit on the frequency of benefit concerts or charitable events as required by the December 23, 2008 email.

5. Unlike the text of the December 23, 2008 email, the Restrictive Covenant does not require "regularly scheduled worship or religious education" to be the predominate use of either building.

6. The Restrictive Covenant does not contain the "limited in scope" constraint on "educational and musical presentations" found in the December 23, 2008 email. The Restrictive Covenant can be interpreted to authorize concerts, which by definition and experience, are not limited in scope or duration.

7. In the December 23, 2008 email Mr. Guernsey wrote that he had "no problem" with the worship building and outdoor amphitheater co-locating on property ***if both are being used primarily for religious assembly uses***. Section 25-2-6(41) defines 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)

Under this Land Development Code definition, "religious assembly" has a narrow definition that excludes many other uses which are commonly associated with a church or a "religious assembly" use structure. Mr. Conley is correct when he wrote: "All of these [non-religious non-profit civic uses] are typical of the use of a *church facility*." Under the Land Development Code, the use of a church facility for "civic uses" does not, however, result in a code amendment that adds "non-religious non-profit civic uses" to the allowed activities under "religious assembly" use. As you know, the Land Development Code includes other defined land use categories, such as, "club or lodge" and "community recreation-private," that encompass the "non-religious non-profit civic uses mentioned by Mr. Conley.

Under Section 25-2-491, "club or lodge" and "community recreation" (private and public) are conditional uses in the RR zoning district. Mr. Guernsey does not have the authority to convert a conditional use into an allowed use much less to authorize a conditional use as a primary allowed use. The December 23, 2008 email did not articulate such an authorization; but the Restrictive Covenant does.

Riverbend Baptist Church ("Riverbend") and the Dell Jewish Center ("DJC") are examples of large campuses providing a variety of community services that are operated by a religious group. The respective PUD ordinance for each facility includes an extensive list of permitted and prohibited community and civic oriented uses, including, "club or lodge," "community recreation" (private and public) and "religious assembly."[3]

[3] Ord. No. 20080925-135, Part 5, PUD Zoning for Dell Jewish Center and Ord. No. 20001214-97, Part 4, PUD zoning for Riverbend Church.

The Riverbend PUD and the DJC PUD ordinances are consistent with the interpretation of the Land Development Code that "religious assembly" is a distinct and separate regulated use from other activities that are typically found at a church facility. Neither the December 23, 2008 email nor prior zoning ordinances for multi-function religious assembly facilities support the new and expansive interpretation of the new primary or principal uses allowed under "religious assembly" found in the Restrictive Covenant.

In that the Restrictive Covenant authorizes "non-religious non-profit civic uses" as primary uses of both buildings, the Restrictive Covenant abandons the limitation set forth in the December 23, 2008 email that allows the co-location of the worship building and the outdoor amphitheater *if* both buildings are used primarily for "religious assembly." Instead of enforcing the terms of the December 23, 2008 email, the Restrictive Covenant fundamentally changes the nature and scope of the activates allowed under "religious assembly" use in a RR zoning district.

If it remains the City's position that the only land use determination made under Section 25-2-2 that is applicable to the Permit is the December 23, 2008 email, then the Restrictive Covenant must be modified to strictly conform with the terms of the December 23, 2008 email. If it is the City's position that the Restrictive Covenant (and not the December 23, 2008 email) is the document that regulates the use of the Property, then the Restrictive Covenant must constitute a new land use determination under Section 25-2-2. In the latter case, the HCE appeal was timely filed under Section 25-1-182 of the Land Development Code and the appeal must be forwarded immediately to the Board of Adjustment for a public hearing.

Since construction has started on the Property, it is of great urgency that the City respond to this letter as quickly as possible. Please let me know if the City will forward the HCE appeal to the Board of Adjustment or revise the Restrictive Covenant to strictly comply with the terms and conditions of the December 23, 2008 email. I would appreciate a written response by December 22, 2011.

Very truly yours,

Robert J. Kleeman

RJK/dlr

cc: Sue Edwards, Assistant City Manager *(via email)*
Greg Guernsey *(via email)*
Marc Ott, City Manager *(via email)*
Mayor and City Council *(via email)*

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

December 30, 2011

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

Re: Dream City Site Plan [SP-2011-0186C]—Zoning & Administrative Issues

Dear Mr. Kleeman:

After reviewing your letter of December 12, 2011, we have advised the Planning & Development Review Department ("PDRD") that your appeal is barred on timeliness grounds for the reasons set forth in our previous letter of October 27, 2011.

The zoning issues related to this development were resolved in December 2008 by Director Greg Guernsey's determination that construction of the proposed outdoor amphitheater is allowed as part of a religious assembly use. That determination was made in direct response to the applicant's submittal, which included conceptual plans as well as a list of specific uses and associated conditions to be imposed via a restrictive covenant. The 2008 determination must be presumed to incorporate the uses and conditions detailed by the applicant's submittal.

The restrictions in the covenant do clarify particular requirements in order to assist with enforcement and administration, but they do not constitute a new use determination under Section 25-2-2 (*Determination of Use Classification*) or contradict Director Guernsey's prior 2008 determination. In particular, there is no indication that non-religious assembly uses will be permitted unless they are accessory to the principal use of religious assembly. As stated in Mr. Guernsey's 2008 determination, such uses "will be limited in scope and will be subordinate to the primary religious assembly use."

It should be emphasized that the terms of the covenant are not an exhaustive list of limitations applicable to use of the amphitheater, but merely those included as part of the applicant's 2008 submittal. City Code imposes numerous other restrictions, including the requirement that any accessory use be "incidental to" the principal use of religious assembly. 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.

The line between accessory and principal use can be difficult to define, but the Director will carefully consider any alleged violations related to the frequency or intensity of activity at the amphitheater. Additionally, as outlined in my email to you on December 7, 2011, any use of sound equipment on the property will require a sound amplification permit under City Code Chapter 9-2 (*Noise and Amplified Sound*) as well as compliance with other restrictions under the City's noise regulations. Where a permit is sought for outdoor music, the City has authority under the ordinance to impose conditions to mitigate the impacts of events on adjoining properties, including limitations on the size, scale, and duration of the event. If such permits are requested, Hill Country Estates would have the opportunity to raise any concerns you may have regarding potential impacts.

Finally, as you may be aware, earlier this month the City Council initiated code amendments that would establish clearer requirements for appealing use determinations. Consistent with existing practices, however, an informal use determination of the sort at issue in this case is treated as an appealable decision subject to the 20-day limitations period under City Code Section 25-1-182 (*Initiating an Appeal*).

Please feel free to contact me if you have further questions or concerns regarding this matter.

Sincerely,

Brent D. Lloyd
Assistant City Attorney

cc Greg Guernsey
Sue Edwards
Deborah Thomas
Chad Shaw

FOLDER DETAILS

Permit/Case	Reference File Name	Description	Sub Type	Work Type	Project Name	Status	Application Date	Issue Date	Expiration Date
2013-002081 PR	2013-002081 PR	New Amphitheater for Religious Assembly w/tiered seating, stagehouse, office, support areas and restrooms- PHS 3 A	C- 318 Amusement, Social & Rec Bldgs	New	8901 W SH 71	Approved	Jan 9, 2013	May 8, 2013	Jul 8, 2013

Related Folders: Yes

FOLDER INFO

Information Description	Value
Is this over a Landfill ?	No
Smart Housing	No
Plan Review Required	Yes
Project Name	PROMISELAND WEST - AMPHITEHEATER PHS 3A
Is this a quick turnaround?	No
Concurrent Site Plan Review	Yes
Design Standards Review Required	Yes
Building Review Required	Yes
Electrical Review Required	Yes
Mechanical Review Required	Yes
Plumbing Review Required	Yes
Medical Gas Review Required	No
Energy Review Required	Yes
Fire Review Required	Yes
Special Inspections Review Required	Yes
Site Plan Review	Yes
Commercial Zoning Review	No
Total Job Valuation	1842000
Building Valuation New/Addn	1267000
Electrical Valuation New/Addn	350000
Mechanical Valuation New/Addn	35000
Plumbing Valuation New/Addn	150000
Current Zoning for Building	RR-NP
Is Site Plan or Site Plan Exemption req?	Yes
Approved Site Plan Number	SP-2011-0185C
Approved Site Plan Expiration Date	7/6/2014
Current Use	Vacant
Proposed Use	Amphitheater
Total New/Addition Bldg Square Footage	5344
Building Inspection	Yes
Electric Inspection	Yes
Mechanical Inspection	Yes
Plumbing Inspection	Yes
Energy Inspection	Yes
Driveway Inspection	No
Sidewalks Inspection	No
Environmental Inspection	Yes
Landscaping Inspection	Yes
Tree Inspection	No
Water Tap Inspection	Yes
Sewer Tap Inspection	Yes
On Site Sewage Facility Inspection	No
Fire Inspection	Yes
Hazardous Materials	No
Health Inspection	No
Water District (If not AWU)	AWU
Usage Category	318
Hazardous Pipeline Review Required	No
Hazardous Waste Materials	No
New HVAC	2
Install/Changeout HVAC	0
Install/Repair Chiller	0
Stove Hood Type 1	0
Stove Hood Type 2	0
Walk-in Cooler	0
Walk-in Freezer	0
# Remote refrigeration equip	0
Commissioning Form Submitted?	No
Electric Service Planning Application?	Yes
Electrical Meter Provider	Austin Energy
Site has a septic system?	No
Certificate of Occupancy to be Issued	Yes

Certificate of Occupancy to be Issued	Yes
Fixed Seating Occupancy	0
Non-Fixed Occupancy	1022
Code Year	09
Code Type	ibc
Special Inspection Reports ?	Yes
Concrete	Yes
Bolts Installed in Concrete	Yes
Reinforcing and Pre-Stressing Steel	Yes
Structural Welding	Yes
High-Strength Bolting	No
Structural Masonry	Yes
Spray-Applied Fireproofing	No
Piling, Drilled Piers and Caissons	Yes
Shotcrete	No
Special Grading, Excavations & Filling	No
Smoke Control System	No
Layout Inspection (Form Survey)	Yes
Soils Bearing Test	Yes
Wood Trusses & High-Load Wood Diaphragms	No
Penetration Fire Stopping	No
Insulated Roof Deck	No
Exterior Insulation & Finish Systems	No
Pre-Fabricated Metal Buildings	No
Other	n

PEOPLE DETAILS

Desc.	Organization Name	Address	City	State	Postal	Phone1
Applicant	LCCP (Tim Langan)	201 OAK PLAZA	Austin	TX	78753	(512)587-4354
Billed To	THE PROMISELAND CHURCH WEST, INC.	1301 N CAPITAL OF TEXAS HWY SUITE C100	AUSTIN	TX	78746	(512)220-6383

FOLDER FEE

Fee Description	Fee Amount	Balance
Plan Review Fee	$2,491.00	$0.00
Development Services Surcharge	$99.64	$0.00

PROCESSES AND NOTES

Process Description	Status	Schedule Date	Start Date	End Date	Assigned Staff	# of Attempts
Plan Review Administration	Open					0
Coordinating Reviews	Approved	May 6, 2013	Jan 9, 2013	May 8, 2013	Carol Raney (512-974-3469)	7
Design Standards Review	Approved	Jan 9, 2013	Feb 8, 2013	Feb 8, 2013	Doug Votra (512-974-2295)	1
Building Reviewer	Approved	Jan 9, 2013	Feb 8, 2013	Feb 8, 2013	Doug Votra (512-974-2295)	1
Electrical Reviewer	Approved	Mar 27, 2013	Feb 14, 2013	Mar 28, 2013	Florin Vasile (512-974-2537)	2
Mechanical Reviewer	Approved	Mar 27, 2013	Feb 15, 2013	Mar 28, 2013	Lou Quiroga (512-974-3481)	2
Plumbing Reviewer	Approved	May 6, 2013	Feb 11, 2013	May 7, 2013	Bryan Ellis (512-974-2685)	3
Energy Reviewer	Approved	Mar 27, 2013	Feb 14, 2013	Mar 28, 2013	Lou Quiroga (512-974-3481)	2
Fire Reviewer	Approved	Mar 27, 2013	Feb 22, 2013	Apr 11, 2013	Sonny Pelayo (512-974-0194)	2
Site Plan Review	Approved	Jan 9, 2013	Jan 15, 2013	Jan 15, 2013	Carol Raney (512-974-3469)	1
Special Inspections Reviewer	Approved	Mar 27, 2013	Jan 15, 2013	Mar 27, 2013	Carol Raney (512-974-3469)	2
Revisions After Issuance	Open					0

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terms of what the statute says? I mean, I've read it correctly.

A. Perhaps if you could give me a specific example.

Q. I'm just reading the statute, Mr. Guernsey, and I'm just asking you if there's something else, some other interpretive provision of the statute that I need to look at that I'm not reading. Because what it says is --

A. I guess to the extent that we're talking about accessory use, that may be correct.

Q. And if you look at 25-2-897, which is "Accessory Uses for a Principal Civic Use." Right?

A. Okay.

Q. And is a religious assembly a civic use?

A. A religious assembly is a civic use.

Q. Okay. So "For a principal civic use, the following are accessory uses: A dwelling unit ... occupied by a family." Okay. That's not an amphitheater, is it?

A. No, sir.

Q. "Refreshment stands and convenience food or beverage sales that serve a public ... use." That might be in an amphitheater, but that's not an amphitheater itself, is it? I mean, you're not using a 1,000-seat

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amphitheater to sell refreshments. I mean, that's incidental to it, isn't it?

A. I would agree, yes.

Q. An amphitheater isn't a cafeteria, a dining hall or similar food services that are primarily for the convenience of the employees, residents, clients, patients, or visitors, is it?

A. That one may actually be a little different with respect to religious assembly uses. We've had, I believe, instances in the past in the city of Austin where we've had soup kitchens come up, and we've said that that is integral to the principal use and not necessarily accessory in all cases.

Q. Okay. But that's not an amphitheater, is it?

A. No, sir.

Q. A gift shop, news stand or similar commercial activities primarily for the convenience of employees, residents, clients, patients, or visitors, that's not an amphitheater either, is it?

A. No, sir.

Q. And it's not a -- an amphitheater isn't a parking facility, is it? Although it may have one next to it, itself it isn't a -- you don't park in an amphitheater.

A. Correct.

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Q. And I'm not sure what a columbarium is. Are you? I think I know, but --

A. I think I know, too. I'd have to go back and actually look up the definition. I think the state definition has actually changed. But no, I would agree that it's not an amphitheater.

Q. Okay. So none of the accessory uses for principal civic use would be applicable to the amphitheater, would it?

A. As an accessory, no. As a principal, yes, in this case.

Q. An amphitheater, are you aware of a bunch of churches, synagogues, mosques or places of worship that are outdoor amphitheaters in the city of Austin?

A. The particular case that was presented to me, and I would have to go back to look through some of the documents which may be in here or that you have --

Q. Yeah, we will.

A. -- I think it was described that the activities that would take place in one building, the main building, would also be the same that would take place in this particular building, the amphitheater building.

Q. So disc golf?

A. I'm not sure what you mean.

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Q. Is disc golf going to take place in the main building?

A. The religious worship is the principal use on this property. I'm not sure if they play disc golf in the sanctuary of most churches --

Q. How about --

A. -- synagogues or other places of worship.

Q. How about dance lessons?

A. The Zumba thing you were talking about?

Q. Zumba, piliates, exercise instruction?

A. I think -- I think there are many religious assembly uses in the city of Austin that provide services that may account for various activities which may or may not include those as being really, I guess you could say incidental and customary that you might find in the city.

Q. Isn't that more in the nature of community recreation than it is in the nature of religious worship or religious assembly?

A. Community recreation is probably something more specific. I mean, and there's a definition of that in here, too.

Q. Yeah, I'm aware of that.

A. Okay. I look at that as being different.

Q. Mr. Guernsey, can you have an illegal activity

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

STREET ADDRESS: 8901 West State Highway 71

LEGAL DESCRIPTION: Subdivision –

53.11 acres as described in the attached restrictive covenant

Lot (s)_____Block_____Outlot_____Division_____

ZONING DISTRICT: RR

I/WE KIM BUTLER, SECRETARY on behalf of myself/ourselves as authorized

Agent for HILL COUNTRY ESTATES HOMEOWNERS ASSN affirm that on THE 18TH

Day of October, 2011, hereby apply for an interpretation hearing before the Board of

Adjustment.

Planning and Development Review Department interpretation is:

1) An outdoor amphitheater that seats 1,000 people is a Religious Assembly use when the applicant's site development permit application asserts that it is for Religious Assembly;

2) one that expands the definition of Religious Assembly (25-2-6(41)) to include "musical and theatrical performances" and concerts if the concert is held for a charitable purposes;

3) one that an outdoor amphitheater that seats 1,000 people is a principal use of the property if the applicant claims a Religious Assembly use; and

4) that once a Religious Assembly use is applied to a structure, then the approval procedures mandated by Chapter 25-2 for an outdoor amphitheater (conditional use permit) no longer apply.

I feel the correct interpretation is:

1) By definition, Religious Assembly use excludes private primary or secondary educational facilities, community recreational facilities, day care facilities, and parking facilities. A 1,000 outdoor amphitheater is not a customary structure anywhere in the City and is certainly not a customary structure for religious assembly. If a new structure (outdoor amphitheater) is proposed to fall under Religious Assembly, then the City Council should make that determination after a public hearing.

2) Since the Land Development Code ("LDC") excludes Community Recreational Facilities, where one would expect to see musical and theatrical performances, outdoor amphitheaters are also excluded from Religious Assembly. If concerts and musical and theatrical performances are to be added, then the City Council should make that determination after a public hearing.

3) The LDC defines "Principal Use" as the "primary function of a site, building, or facility." As a Principal Use, the applicant can just build the amphitheater and no other buildings on the property. A 1,000 seat outdoor amphitheater, regardless of who owns or operates the facility, constitutes "Outdoor Entertainment," as defined in 25-2-4(45) and must be regulated and approved as an outdoor entertainment use.

4) This type of structure used for outdoor concerts, musical and theatrical performances is not a permitted use in any zoning classification; it is always a conditional use that the Land Use Commission must approve. The applicant must file for a zoning change and then a conditional use permit to operate an outdoor amphitheater.

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:

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,

Robert Kleeman

Enclosures

EXHIBIT "1"

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 Guernsey 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

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,

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"

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. <u>BFCBA Appeal</u>

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*

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

EXHIBIT 3

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: [redacted]

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, Robe[redacted]
Sent: Tuesday, May 28, 2013 3:19 PM
[redacted]
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 Klee[redacted]
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

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 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**

089-00431968-001

Control Number: 431968 eTrac Number: 109475960

Submitter Information		Shipping Information	
Account:	1921	Service Type:	1 HOUR
Name:	SNEED VINE & PERRY PC	Return Service:	1 HOUR
Requested By:	DIANN MAYER	Pieces:	1
Reference:	70645-0002	Weight:	1.0 Lbs.
BOL No.:		Charges:	0.00
Entered:	02-JUL-2013 10:45	Quote:	24.00
Last Updated:	02-JUL-2013 11:45 (EST)		

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: JM/#46 Date: 7-2-13 Time: 1111	Received by: X Diana Ramirez Print Name: DIANA RAMIREZ

EXHIBIT "4"

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

CHRIS EDWARDS
Assistant City Attorney
State Bar No. 00789276
[redacted]
City of Austin Law Department
Post Office Box 1546
Austin, Texas 78767-1546
Telephone: (512) 974-2419
Facsimile: (512) 974-1311

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.
[redacted]
900 Congress Avenue, Suite 300
Austin, Texas 78701

Chris Edwards
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

This transmission consists of this cover sheet plus 6 page(s) of copy. If problems occur and you do not receive all pages of this transmission, please call Cathy Curtis at 974-2691 or Sue Palmer at 974-2915 for assistance. The FAX machine used by the Law Department is located in our office, however, it is not always staffed. Please telephone the Law Department to ensure your transmitted documents are immediately picked up.

N

SUBJECT TRACT

PENDING CASE

ZONING BOUNDARY

NOTIFICATIONS

CASE#: C15-2015-0147

8901 W HWY 71

CITY OF AUSTIN FOUNDED 1839

This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.

1 " = 500 '

This product has been produced by CTM for the sole purpose of geographic reference. No warranty is made by the City of Austin regarding specific accuracy or completeness.

Heldenfels, Leane C15-2015-047

From: Robert Kleeman <[redacted]
Sent: Monday, October 19, 2015 2:07 PM
To: Heldenfels, Leane
Cc: [redacted]
Subject: RE: Interpretation Appeal, 8901 S.H. 71 W (LifeAustin) , to be heard on the Board of Adjustment's Mon 11/9 regular agenda

Leane:

Let this email serve as my request to postpone the hearing from the November 9, 2015 regularly scheduled Board of Adjustment meeting and as my request for a special called meeting as suggested in your email.

Let me know if you have any questions.

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

[redacted]
Sent: Monday, October 19, 2015 11:00 AM
To: [redacted]
Subject: RE: Interpretation Appeal, 8901 S.H. 71 W (LifeAustin) , to be heard on the Board of Adjustment's Mon 11/9 regular agenda

Mr. Kleeman – received your phone message, but sorry, no confirmation from Brent/Chair yet on 12/9 special meeting date.
What I'm anticipating is that the case will be called into the record at the 11/9 meeting, so you will need to be there.

101/145
C15-2015-0147
ROW 11423880
TAX 0101480301
TCAD ✓

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

September 25, 2015

Leanne Heldenfelds
Board of Adjustment Liaison
City of Austin
One Texas Center, 5th Floor
505 Barton Springs Road
Austin, TX 78704

Re: Resubmittal of October 2011 Appeal of Approval of the Construction of an Outdoor Amphitheater; SP-2011-185C and associated Restrictive Covenant ("Site Plan"); and Resubmittal of May 2013 Appeal of a Building Permit 2013-002081 PR ("Building Permit"); 53 Acres Located at 8901 S. H. 71 W

Dear Chairman Harding and Members of the Board of Adjustment:

This firm represents the Hill Country Estates Homeowners Association ("HCEHOA") and the Covered Bridge Property Owners Association ("CBPOA") (collectively, "Appellants"). With this letter, I am re-filing copies of the appeals originally submitted to City staff in October 2011 and May 2013. The purpose of this letter is to explain why these appeals are just now being forwarded to the Board of Adjustment ("BOA") and to demonstrate that Appellants have diligently sought to have these appeals heard by the BOA.

The 53 acres located at 8901 S.H. 71 West ("Property") is situated between and among the Hill Country Estates, Covered Bridge, and West View Estates neighborhoods. At all times, the Property has been zoned Rural Residential ("RR").

On October 12, 2011, staff administratively approved the Site Plan and associated Restrictive Covenant that authorized the construction of a large permanent outdoor amphitheater as a principal use under Religious Assembly and also made outdoor concerts, theatrical performances, and other events as principal uses under Religious Assembly. On October 21, 2011, Appellant HCEHOA appealed the approval of the Site Plan and Restrictive Covenant. A complete copy of the Site Plan and Restrictive Covenant appeal is enclosed ("Site Plan Appeal"). The Land Use Determinations regarding the outdoor amphitheater and outdoor activities made in approving the Site Plan and Restrictive Covenant are the subject of the Site Plan Appeal.

Despite filing of the Site Plan Appeal within 20 days of the approval of the Site Plan and Restrictive Covenant and meeting all other requirements of the City Code to have standing to appeal, City staff did not forward the appeal to the BOA. Exhibit 1. Staff asserted that all Land Use Determinations regarding the outdoor amphitheater and the outdoor activities were made in a December 23, 2008 private email from Director Guernsey to Carl Connelly and that all appeal rights relating to the December 23, 2008 email expired in January 2009. Staff first notified Appellants and the public in July 2011 of the existence of the December 23, 2008 private email. Other than the reference to the December 2008 email, staff did not identify any other deficiencies in the Site Plan Appeal.

In March 2012, Appellants sued the City and Director Guernsey seeking, in part, a court order to compel City staff to forward the Site Plan Appeal to the BOA. The City filed a motion challenging Appellants' right to even bring the lawsuit and asked to have the lawsuit dismissed. In May 2013, the trial court granted the City's motion to dismiss the lawsuit. Appellants appealed the trial court ruling.

In May 2013, the City approved the first building permit for the outdoor amphitheater. Appellants submitted to City staff appeals of the approval of the Building Permit. Copies of the May 2013 appeals are enclosed ("Building Permit Appeals"). In June 2013 staff refused to forward the Building Permit Appeals to the BOA based on Appellants not filing an appeal within 20 days of the December 23, 2008 email. Exhibit 2. Other than the reference to the December 2008 email, staff did not identify any deficiency in the Building Permit Appeal. The Land Use Determinations regarding the outdoor amphitheater and outdoor activities made in approving the Building Permit are the subject of the Building Permit Appeal.

In July 2013, Appellants submitted to staff an appeal of staff's decision to not forward the Building Permit Appeal to the BOA ("Third Appeal"). Staff did not bother to respond to the Third Appeal. A copy of the Third Appeal is enclosed as Exhibit 3. The Third Appeal challenged the staff's decision to ignore Section 211.010(b), Texas Local Government Code that mandates that upon notice of the filing of an appeal, the responsible official shall immediately forward the file to the board of adjustment. Section 25-1-185 of the City Code imposes a similar mandate on staff.

There is a fourth appeal filed by Appellants in December 2013 challenging interpretations regarding Section 25-2-921(C) of the City Code that regulates outdoor activities. The interpretation of Section 25-2-921(C) is pivotal to the Site Plan Appeal and the Building Permit Appeals. Staff also refused to forward this appeal to the BOA. Discussion of that appeal will be addressed later in the brief supporting the appeals.

The Court of Appeals issued a ruling in early May 2015 in favor of Appellant HCEHOA. During the three years the Appellants spent in litigation seeking to enforce their appeal rights, the outdoor amphitheater has been completed and has already hosted 9 concerts and one movie between July 19, 2015 and September 20, 2015. Concert music is heard inside many homes in the Hill Country Estates neighborhood.

My clients are concerned that some may view the Site Plan Appeal and the Building Permit Appeal as legally moot with the completion and operation of the outdoor amphitheater. The appeals are not moot for several reasons, including Sections 25-1-411 to 418 of the City Code that authorize the suspension and revocation of an improperly issued permit. The City conceded this point when the City opposed Appellants application to the Court of Appeals to issue its final order early so that Appellants could seek relief from the trial court before the City issued the certificate of occupancy for the outdoor amphitheater. The City argued, in part, that the Appellants would not suffer any loss of rights under the City Code:

> "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 . . . if the City eventually agrees with Appellants, the sound permit and/or certificate of occupancy can be revoked even if already issued." Exhibit 4.

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As previously stated, the purpose of this letter is to inform the BOA of the procedural history of the delays in the BOA receiving the appeals. A letter brief in support of the appeals will be submitted once a hearing date has been determined.

Sincerely,

SNEED, VINE & PERRY.P.C.

By: Robert Kleeman
Robert Kleeman

Enclosures

Cc: HCEHOA (w/o enclosures)
CBPOA (w/o enclosures)
Allen Holbrook (of firm) (w/o enclosures)
Brent Lloyd (w/o enclosures)
Chris Edwards (w/o enclosures)

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

Writer's e-mail address: [redacted]

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Leanne Heldenfelds
Board of Adjustment Liaison
City of Austin
One Texas Center, 5th Floor
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Austin, TX 78704

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Sincerely,

SNEED, VINE & PERRY.P.C.

By: Robert Kleeman
Robert Kleeman

Enclosures

Cc: HCEHOA (w/o enclosures)
CBPOA (w/o enclosures)
Allen Holbrook (of firm) (w/o enclosures)
Brent Lloyd (w/o enclosures)
Chris Edwards (w/o enclosures)

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, Kim Butler, on behalf of myself 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 May 28, 2013, we hereby apply for an interpretation hearing before the Board of Adjustment.

Planning and Development Review Department interpretations regarding building permit 2013-002081 PR ("Building Permit") are:

1. A building permit may be issued for an outdoor amphitheater within an RR zoning district to authorize outdoor amusement, outdoor social activities and outdoor recreation if the putative principal use is Religious Assembly.[1]
2. The decision to issue the building permit for the outdoor amphitheater in question necessarily includes the following interpretations:
    a. Outdoor Religious Assembly activities are allowed by right in RR zoning districts.
    b. The site development permit SP-2011-0185C authorizes outdoor Religious Assembly activities.
    c. The site development permit SP-2011-0185C authorizes community recreation, club/lodge uses and activities in the amphitheater.
    d. The site development permit SP-2011-0185C authorizes the amphitheater to be an outdoor amphitheater, meaning the amphitheater does not have to be a fully enclosed building.

[1] Religious Assembly is a civic use described in Section 25-2-6(B)(41), Austin City Code.

e. An outdoor amphitheater is a principal use under Religious Assembly.
f. Musical and theatrical performances, including ballets, concerts, and plays are principal uses or activities allowed under a Religious Assembly use.
g. The phrase "in a temporary or permanent building" in the definition of Religious Assembly means any structure that requires a building permit.
h. Principal uses under Religious Assembly, include, non-religious activities, community recreation, club/lodge activities, musical and theatrical performances and any type of fund raising activity as long as the religious entity receives financial benefits from the activity and do not require a conditional use permit in the RR zoning district.

3. City staff has the authority to determine the standing of an aggrieved party and the timeliness of any filed appeal without notifying the Board of Adjustment of the filing of the appeal.
4. City staff has the authority under Section 25-2-2 and other provisions of the LDC to "back date" an interpretation and use the date selected by City staff as the basis for rejecting an appeal and not forwarding the appeal to the Board of Adjustment.
5. City staff has the authority under Section 25-2-2, LDC to modify the scope and terms of a "back dated" interpretation and still refuse to forward to the Board of Adjustment an aggrieved party's appeal of the modified interpretation.
6. The Director of the Planning and Development Review Department ("PDRD") has the authority under Section 25-2-2, LDC, to issue a use determination that converts a prohibited outdoor activity described in Section 25-2-921(C) into an allowed outdoor activity.
7. The Director of PDRD has the authority under Section 25-2-2, LDC, to issue a use determination that converts a conditional use into a permitted use.
8. The Director of PDRD has the authority, at his sole discretion, to enlarge, expand or add to activities allowed under a defined zoning use by entering into a contract with the landowner.
9. The Director of PDRD has the authority to grant to a landowner vested rights to specific uses for a piece of property.

We feel the correct interpretations are:

1. Within the RR zoning district, Religious Assembly activities may occur only inside a fully enclosed permanent or temporary building.
2. Site Development Permit SP-2011-0185C authorizes only Religious Assembly activities in the amphitheater.

3. Pursuant to Section 25-2-6(B)(41), LDC, the only allowed uses under Religious Assembly are "organized religious worship and religious education. Private primary or secondary educational facilities, community recreational facilities, day care facilities, and parking facilities are excluded from the Religious Assembly use.
4. The amphitheater shown on Site Development Permit SP-2011-0185C must be a fully enclosed building because Section 25-2-921(C) prohibits outdoor Religious Assembly. Other outdoor activities are also prohibited in the RR zoning district.
5. Community recreation and club/lodge uses and facilities are not allowed on the property because no conditional use permit has been issued to authorize these uses and activities.
6. 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 are prohibited in the RR, SF-1, SF-2 and SF-3 zoning districts.
7. For purposes of Section 25-2-921(C), LDC the term "outdoor" means a space that is not fully enclosed in a building by permanent, solid walls and a roof.
8. A permanent outdoor venue cannot be constructed if the uses of the venue are prohibited from taking place outdoors.
9. Musical and theatrical performances, including ballets, concerts, and plays are not principal or incidental uses or activities allowed under a Religious Assembly use.
10. An aggrieved party, who is not the permit applicant, may appeal a permit approval, including a permit that incorporates an earlier interpretation by City staff.
11. All appeals filed with the Board of Adjustment must be forwarded to the Board of Adjustment. Only the Board of Adjustment has the authority to make determinations of standing and timeliness.
12. The Director of PDRD does not have the authority under Section 25-2-2, LDC to make outdoor activities prohibited by Section 25-2-921(C) permitted uses.
13. The Director of PDRD does not have the authority to under Section 25-2-2, LDC to convert a conditional use to a permitted use.
14. The Director of PDRD does not have the authority to enter into contracts with a landowner that grant the landowner special privileges, including expansion of the type of uses and activities that may occur under a defined zoning use. Land use and zoning are regulatory functions and should not be implemented through contracts unless approved by the City Council.
15. The Director of PDRD does not have the authority to grant vested rights to specific uses and structures on a piece of property.

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:

The decision to issue the Building Permit includes an interpretation of the uses allowed under Religious Assembly that differs significantly from the requirements found in Chapter 25-2 of the Land Development Code ("LDC"). First, the folder on the City of Austin website for this building permit shows the following uses: Religious Assembly, amusement, social and recreation building. The description of the uses allowed under the building permit include uses that are in the nature of community recreation and club/lodge which are explicitly excluded from the description of Religious Assembly: "The use excludes private primary or secondary educational facilities, **community recreational facilities**, day care facilities, and parking facilities." (emphasis added) A copy of the folder on the building permit as it appears on the City of Austin website is included with this appeal.

Second, the description of Religious Assembly specifies two allowed activities: organized religious worship and religious education. The Building Official has ignored this limitation and expanded the principal uses allowed under Religious Assembly to include musical and theatrical performances, and exhibits, including festivals, benefits, fund raising events and similar uses that attract a mass audience.

Third, the Building Official has ignored the prohibitions of Section 25-2-921(C), LDC and has issued a building permit for a permanent outdoor venue in a RR zoning district to be used for prohibited activities and has authorized activities that are explicitly prohibited.

Fourth, the building permit describes the amphitheater as a recreational building associated with Religious Assembly. Community Recreation requires a conditional use permit in the RR zoning district. No such conditional use permit has been issued for the Property.

Fifth, Section 25-2-921(C), LDC modifies the phrase "in a permanent or temporary building" found in Section 25-2-6(B)(41), LDC to mean a fully enclosed building. Since Religious Assembly cannot take place outdoors in a RR zoning district, Religious Assembly must take place indoors. Therefore, the only reasonable interpretation of the word "building" in the description of Religious Assembly is a fully enclosed structure. For further guidance, Section 9-1-2(5) of the City Code defines "outdoor" to mean a space that is not fully enclosed by permanent, solid walls and a roof.

There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations controlling the procedures relating to the filing of an appeal of an administrative decision.

The Hill Country Estates Home Owners Association filed an appeal to the Board of Adjustment in October 2011 regarding 1) a restrictive covenant signed by the owner of the Property and approved by the Director of PDRD; and 2) the approval of site development permit SP-2011-0185(C). City staff decided that every issue raised in the appeal was untimely even though the appeal had been submitted to Susan Walker within 20 days of the date of the restrictive covenant and the approval of the site development permit.

City staff determined that all appeal issues had been decided in a December 23, 2008 private email from Greg Guernsey to Carl Conley. City staff "back dated" all administrative decisions contained in the restrictive covenant and the site development permit and claimed the appeal was not timely. The fact that the existence of this private email was kept from the appellants and their members for two and half years did not matter to staff. City staff decided that Hill Country Estates Homeowners Association did not have the right to appeal or even have its appeal forwarded to the Board of Adjustment. Likewise, City staff determined that the Board of Adjustment had no authority to review the decisions contained in the site development permit and the restrictive covenant. A copy of the 2011 Board of Adjustment appeal and cover letter are enclosed. The letter from City staff stating that no appeal rights existed is also enclosed.

Subsequently, Hill Country Estates Home Owners Association tendered an exhaustive analysis of how the restrictive covenant and the site development permit included new decisions and new interpretations. A copy of this letter is enclosed. Again, City staff refused to forward the appeal to this Board. A copy of the second denial letter is enclosed.

Section 211.010(a)(1), Texas Local Government Code ("TLGC") grants to an aggrieved person the right to appeal the decision of an administrative official to the Board of Adjustment. Section 211.010(b) TLGC 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." This is a non-discretionary obligation under state law. City staff cannot have the ability or authority to thwart appeal rights under Section 211.010(a)(1) TLGC by arbitrarily deciding which of its decisions can be appealed.

This state law provides the right to appeal a decision of an administrative official. The right of appeal 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. 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 Chapter 25-2, LDC. The Board of Adjustment should have had the opportunity to decide whether it wanted to hear the appeal. As a policy matter, the Board of Adjustment should never be precluded form reviewing any administrative decision that an aggrieved party seeks to present to this Board.

The clear purpose of Section 211.009(a)(1) TLGC is to provide the public an avenue of appeal to 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.

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. The details of the illegal interference with the prior appeal are more thoroughly discussed in the enclosed standing letter.

There is a reasonable doubt of difference of interpretation as to the specific intent of the regulations that allow the Director of PDRD to contractually grant vested rights to specific uses on a piece of property. Land use determinations and the decision to issue any permit are and should be regulatory in nature. The Land Development Code includes specific provisions that authorize the suspension and the revocation of a permit if it is determined that the permit has been issued in error. By approving the restrictive covenant, the Director of PDRD may have contractually granted the owner of the property in question an exemption from the City's permit revocation powers. Contract zoning is illegal. The Board of Adjustment should determine whether the Director of PDRD has the authority to waive the City's regulatory authority to review prior decisions.

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 character of the uses allowed in RR zoning is largely encompassed in two sections. Section 25-2-54, LDC describes the RR zoning district as follows: The Rural Residence (RR) district is the designation for a low density residential use on a lot that is a minimum of one acre. 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)

Section 25-2-921(C), LDC prohibits outdoor religious assembly, public assembly or an outdoor exhibit, including a festival, benefit, fund raising event, or similar use that typically attracts a mass audience. The Building Official has no authority to even issue a temporary use permit for these types of outdoor activities in the RR, SF-1, SF-2 and SF-3 zoning districts.

Religious Assembly activities are strictly limited to organized religious worship and religious education because Religious Assembly is allowed in every residential zoning district. Requiring Religious Assembly to occur only inside enclosed buildings is an appropriate policy. Large outdoor gatherings of people on any residential lot owned by a religious organization could create significant traffic and noise impacts on the surrounding neighborhood. By requiring the gathering of large numbers of people to be indoors, the noise impacts of such gatherings are minimized. For the same reasons, community recreation and club/lodge are conditional uses in the low density residential zoning districts.

The building permit issued for the 1,000 seat outdoor amphitheater defines the uses of the outdoor amphitheater as Religious Assembly, amusement, social and recreation. The gathering of mass audiences to an outdoor entertainment venue violates the characteristics that the RR zoning district is supposed to protect. For this reason, community recreation is a conditional use in the RR zoning district.

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

The building permit issued for the outdoor amphitheater grants the applicant unprecedented special privileges. These special privileges are both procedural and substantive in nature.

First, the building permit authorizes the construction of a permanent outdoor structure to serve as the venue for outdoor activities that are prohibited in the RR zoning district by Section 25-2-921(C).

Second, the building permit grants the special privilege of authorizing additional principal uses under Religious Assembly. These new principal uses include community recreation, social activities, amusement, musical and theatrical performances, non-religious civic activities and exhibits, including festivals, benefits, fund raising events and similar uses that attract a mass audience so long as the non-profit owner of the property financially benefits from holding the non-religious event.

Third, the building permit grants the special privilege of authorizing outdoor Religious Assembly and the other previously described outdoor activities that Section 25-2-921(C) prohibits in the RR zoning district.

Fourth, the building permit authorizes community recreation and club/lodge uses without the requirement of a conditional use permit. According to the land use chart found in Section 25-2-491(C), community recreation and club/lodge uses are conditional uses in RR zoning. As a result, the building permit grants rights that are supposed to be granted only through the conditional use permit process.

Fifth, the building permit grants the special privilege of avoiding all public hearings on the proposed land uses. Other large religious assembly campuses were required to re-zone property to achieve approval of the uses granted administratively here.

For example, the ordinance adopting a Planned Unit Development zoning for the Riverbend Church authorizes many uses, including, commercial uses outdoor entertainment, indoor entertainment, theater, outdoor sports and recreation and civic uses Religious Assembly, public and private community recreation, club or lodge and camp.[2]

Similarly, the ordinance adopting the PUD for the Dell Jewish Center included civic uses club or lodge, outdoor sports and recreation, private and public community recreation, religious assembly and theater.[3]

[2] Ordinance No.001214-97.
[3] Ordinance No. 20080925-135.

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, UNIT 10

City, State & Zip AUSTIN, TX 78736 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 _____

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 JOHN 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 _____

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

FOLDER DETAILS

Permit/Case	Reference File Name	Description	Sub Type	Work Type	Project Name	Status	Application Date	Issue Date	Expiration Date
2013-002081 PR	2013-002081 PR	New Amphitheater for Religious Assembly w/tiered seating, stagehouse, office, support areas and restrooms- PHS 3 A	C- 318 Amusement, Social & Rec Bldgs	New	8901 W SH 71	Approved	Jan 9, 2013	May 8, 2013	Jul 8, 2013

Related Folders: Yes

FOLDER INFO

Information Description	Value
Is this over a Landfill ?	No
Smart Housing	No
Plan Review Required	Yes
Project Name	PROMISELAND WEST - AMPHITEHEATER PHS 3A
Is this a quick turnaround?	No
Concurrent Site Plan Review	Yes
Design Standards Review Required	Yes
Building Review Required	Yes
Electrical Review Required	Yes
Mechanical Review Required	Yes
Plumbing Review Required	Yes
Medical Gas Review Required	No
Energy Review Required	Yes
Fire Review Required	Yes
Special Inspections Review Required	Yes
Site Plan Review	Yes
Commercial Zoning Review	No
Total Job Valuation	1842000
Building Valuation New/Addn	1267000
Electrical Valuation New/Addn	350000
Mechanical Valuation New/Addn	35000
Plumbing Valuation New/Addn	150000
Current Zoning for Building	RR-NP
Is Site Plan or Site Plan Exemption req?	Yes
Approved Site Plan Number	SP-2011-0185C
Approved Site Plan Expiration Date	7/6/2014
Current Use	Vacant
Proposed Use	Amphitheater
Total New/Addition Bldg Square Footage	5344
Building Inspection	Yes
Electric Inspection	Yes
Mechanical Inspection	Yes
Plumbing Inspection	Yes
Energy Inspection	Yes
Driveway Inspection	No
Sidewalks Inspection	No
Environmental Inspection	Yes
Landscaping Inspection	Yes
Tree Inspection	No
Water Tap Inspection	Yes
Sewer Tap Inspection	Yes
On Site Sewage Facility Inspection	No
Fire Inspection	Yes
Hazardous Materials	No
Health Inspection	No
Water District (If not AWU)	AWU
Usage Category	318
Hazardous Pipeline Review Required	No
Hazardous Waste Materials	No
New HVAC	2
Install/Changeout HVAC	0
Install/Repair Chiller	0
Stove Hood Type 1	0
Stove Hood Type 2	0
Walk-in Cooler	0
Walk-in Freezer	0
# Remote refrigeration equip	0
Commissioning Form Submitted?	No
Electric Service Planning Application?	Yes
Electrical Meter Provider	Austin Energy
Site has a septic system?	No
Certificate of Occupancy to be Issued	Yes

Certificate of Occupancy to be Issued	Yes
Fixed Seating Occupancy	0
Non-Fixed Occupancy	1022
Code Year	09
Code Type	ibc
Special Inspection Reports ?	Yes
Concrete	Yes
Bolts Installed in Concrete	Yes
Reinforcing and Pre-Stressing Steel	Yes
Structural Welding	Yes
High-Strength Bolting	No
Structural Masonry	Yes
Spray-Applied Fireproofing	No
Piling, Drilled Piers and Caissons	Yes
Shotcrete	No
Special Grading, Excavations & Filling	No
Smoke Control System	No
Layout Inspection (Form Survey)	Yes
Soils Bearing Test	Yes
Wood Trusses & High-Load Wood Diaphragms	No
Penetration Fire Stopping	No
Insulated Roof Deck	No
Exterior Insulation & Finish Systems	No
Pre-Fabricated Metal Buildings	No
Other	n

PEOPLE DETAILS

Desc.	Organization Name	Address	City	State	Postal	Phone#
Applicant	LCCP (Tim Langan)	201 OAK PLAZA	Austin	TX	78753	(512)587-4354
Billed To	THE PROMISELAND CHURCH WEST, INC.	1301 N CAPITAL OF TEXAS HWY SUITE C100	AUSTIN	TX	78746	(512)220-6383

FOLDER FEE

Fee Description	Fee Amount	Balance
Plan Review Fee	$2,491.00	$0.00
Development Services Surcharge	$99.64	$0.00

PROCESSES AND NOTES

Process Description	Status	Schedule Date	Start Date	End Date	Assigned Staff	# of Attempts
Plan Review Administration	Open					0
Coordinating Reviews	Approved	May 6, 2013	Jan 9, 2013	May 8, 2013	Carol Raney (512-974-3469)	7
Design Standards Review	Approved	Jan 9, 2013	Feb 8, 2013	Feb 8, 2013	Doug Votra (512-974-2295)	1
Building Reviewer	Approved	Jan 9, 2013	Feb 8, 2013	Feb 8, 2013	Doug Votra (512-974-2295)	1
Electrical Reviewer	Approved	Mar 27, 2013	Feb 14, 2013	Mar 28, 2013	Florin Vasile (512-974-2537)	2
Mechanical Reviewer	Approved	Mar 27, 2013	Feb 15, 2013	Mar 28, 2013	Lou Quiroga (512-974-3481)	2
Plumbing Reviewer	Approved	May 6, 2013	Feb 11, 2013	May 7, 2013	Bryan Ellis (512-974-2685)	3
Energy Reviewer	Approved	Mar 27, 2013	Feb 14, 2013	Mar 28, 2013	Lou Quiroga (512-974-3481)	2
Fire Reviewer	Approved	Mar 27, 2013	Feb 22, 2013	Apr 11, 2013	Sonny Pelayo (512-974-0194)	2
Site Plan Review	Approved	Jan 9, 2013	Jan 15, 2013	Jan 15, 2013	Carol Raney (512-974-3469)	1
Special Inspections Reviewer	Approved	Mar 27, 2013	Jan 15, 2013	Mar 27, 2013	Carol Raney (512-974-3469)	2
Revisions After Issuance	Open					0

Back

City of Austin Planning and Development Review Department
505 Barton Springs Road • P.O. Box 1088 • Austin, Texas 78767-8835

July 13, 2011

Lawrence Hanrahan, PE
Hanrahan Pritchard Engineering, Inc
8333 Cross Park Dr
Austin, TX 78754

Subject: PromiseLand West Church - SP-2011-0006C

Dear Mr. Hanrahan,

The applicant has represented to City staff that the proposed use of the site for PromiseLand West Church – SP-2011-0006C will be Religious Assembly, as defined by the Land Development Code 25-2-6 (B) (41). Greg Guernsey, Director of the Planning and Development Review Department (PDRD), determined in December 2008 that the proposed development met the requirements for a Religious Assembly use.

However, the 2008 use determination was made in response to a written request by Carl Conley of Conley Engineering, Inc. dated December 18, 2008, a copy of which is attached for your reference. As you can see, the request on which PDRD based its use determination included significant limitations on the nature and extent of the proposed amphitheater which ensure its consistency with a Religious Assembly land use.

Accordingly, any site plan approval for the project would be conditioned on the execution and recording of a public restrictive covenant that sets forth these specific limitations outlined in the 2008 request, as well as additional restrictions that "help to identify/clarify specific uses that are not permitted under the proposed religious assembly use."

In particular, the 2008 request provided that the amphitheater would be used for the same type of religious activities as the 3500-seat indoor auditorium, including:

- "worship services, weddings, funerals, and educational and musical presentations"
- "non-religious non-profit civic uses such as neighborhood meetings, boy scout/girl scout meetings, school graduations, public meetings, etc."

The request also provided that any fees charged for an event would be "nominal" and used to "cover setup, clean up, utilities, and administrative and other operational expenses" or, in limited cases, contributions to benefit "an individual or group that has a special emergency need (i.e. a

family whose house burned down) or for some charitable organizations." Compliance with "all of the City's ordinances, including sound levels at the boundary properties[,]" would also be required.

Since PDRD issued its 2008 determination, representations have been made regarding site uses that may go beyond the scope of a Religious Assembly use. The conditions outlined above, as set forth in the 2008 Conley letter, would effectively prohibit any such non-Religious Assembly uses at the site.

If you have any questions, please call Sarah Graham, Case Manager, at 974-2826.

George Zapalac

George Zapalac, Development Services Manager
Planning and Development Review

Attachments

Xc: Greg Guernsey, Planning and Development Review Department
George Adams, Planning and Development Review Department
Sarah Graham, Planning and Development Review Department
Brent Lloyd, Law Department

Graham, Sarah

From: [redacted]
Sent: Monday, February 28, 2011 4:03 PM
To: [redacted]
Subject: FW: PromiseLand West Church site--Amphitheater
Attachments: G. Guernsey Ltr_12.17.08.pdf

Hi Sarah,
Carol Gibbs was just in my office in regards to the site plan that is currently in process and thought that this email would be useful for you.

Wendy

[redacted]
Sent: Tuesday, December 23, 2008 5:15 PM
[redacted]
Subject: RE: PromiseLand West Church site--Amphitheater

Hello Carl:

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 complaint 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.

Happy Holidays to you!

Greg

Gregory I. Guernsey, AICP, Director
Neighborhood Planning and Zoning Department
City of Austin
P.O. Box 1088
Austin, TX. 78767
Phone: (512) 974-2387
Fax: (512) 974-2269
Email: greg.guernsey@ci.austin.tx.us

[redacted]
Sent: Monday, December 22, 2008 9:21 AM
To: Guernsey, Greg
Subject: FW: PromiseLand West Church site--Amphitheater

Morning Greg—

I was just checking to see if you received this e-mail last week and if you had a chance to look at it. The church is meeting this morning, and this is a very key issue for them.

Hope your holidays are Merry and Bright!!!!!

Carl P. Conley, P.E., R.P.L.S.
Conley Engineering, Inc.
512.328.3506 office
512.328.3509 fax
[redacted]

[redacted]

Sent: Thursday, December 18, 2008 11:16 AM
To: GREG GUERNSEY
[redacted]
Subject:

Here is the letter we discussed yesterday.

Please let me know if there is anything else you need to make this determination.

If we get your response back before the weekend it would be outstanding, but if not till next week, it would be OK.

Thanks for all your help on this matter.

Carl P. Conley, P.E., R.P.L.S.
Conley Engineering, Inc.
512.328.3506 office
512.328.3509 fax
[redacted]

conley engineering, inc.

Civil Engineers • Land Planners • Development Consultants

December 17, 2008

Mr. Greg Guernsey
Director
Neighborhood Planning and Zoning
P.O. Box 1088
Austin, Texas 78701

Re: PromiseLand West Church
Amphitheater as an Accessory use

Dear Greg,

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

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 educational 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

1301 South Capital of Texas Hwy. Building A. Suite 230
P.O. Box 162713 • Austin, Tx 78716-2713 • (512) 328-3506 • Fax (512) 328-3509

Mr. Greg Guernsey
December 17, 2008

would also entertain the concept of a voluntary restrictive covenant that would help identify/clarify specific uses that are not permited under the proposed religious assembly use.

The church has met with the adjoining neighborhood representatives and have 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.

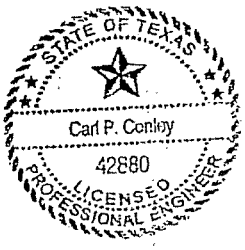
Please let me know if you need anything else to help you in your determination as to whether the amphitheater is an accessory use to the primary use of religious assembly.

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

Sincerely,

Conley Engineering Inc.

Mr. Carl P. Conley, P.E. R.P.L.S.
President



MUNSCH HARDT KOPF & HARR PC
ATTORNEYS & COUNSELORS
Dallas | Houston | Austin

Frost Bank Tower
401 Congress Avenue
Suite 3050
Austin, Texas 78701-4071
Main 512.391.6100
Fax 512.391.6149
munsch.com

ROBERT J. KLEEMAN
Writer's Direct Dial: 512.391.6115
[redacted]
Direct Fax: 512.482.8932

December 12, 2011

Via Email and Regular Mail

Mr. Brent Lloyd
City of Austin
Legal Department
301 W. 2nd Street
Austin, Texas 78701-3906

Re: Appeal of Land Use Determination Interpretation; Dream City Development; SP-2011-0186C ("Permit"); 53.113 Acres Located at 8901 W. Hwy 71 ("Property")

Dear Mr. Lloyd:

On October 21, 2011 the Hill Country Estates Homeowners Association ("HCE") filed an appeal of certain land use determinations embedded in the approval of the Permit, including, the October 2, 2011 public restrictive covenant recorded in Document No. 2011146026 Official Public Records of Travis County, Texas ("Restrictive Covenant"). On behalf of HCE, this letter responds to your October 27, 2011 letter which provides the reasons for the City of Austin's denial of the HCE appeal. Attached to your letter were copies of a December 17, 2008 letter from Carl Conley to Greg Guernsey, a December 23, 2008 email from Greg Guernsey to Carl Conley and a July 13, 2011 letter from George Zapalac to Larry Hanrahan.

In your letter you write that the City denied HCE's appeal because City Code Section 25-1-182 requires that an administrative appeal be submitted no later than 20-days after the decision was made. You note that the "decision" to allow the construction of the outdoor amphitheater as part of religious assembly use was made by Director Guernsey on December 23, 2008. Your letter neither describes any other "decisions" regarding uses allowed on the Property nor identifies any other basis for rejecting the HCE Appeal.

HCE disputes the City's conclusion that all of the HCE appeal issues are encompassed within the December 23, 2008 email. HCE contends that the issues raised in the HCE appeal pertain to interpretations and determinations that appear for the first time in the Restrictive Covenant.

Director Guernsey executed the Restrictive Covenant in the same capacity that he issued the December 23, 2008 email. As you state in your letter, a land use determination can be informal but will typically have the same date of that the site plan or permit is approved. In light of the City's claim that the December 23, 2008 email constitutes a formal land use determination under Section 25-2-2 (even though the email does not reference such a legal status), HCE contends that the Restrictive Covenant must be accorded the same legal status to the extent that the Restrictive Covenant exceeds or differs from the terms of the December 23, 2008 email. HCE filed its appeal on October 21, 2011 within 20 days of the execution of the Restrictive Covenant by Greg Guernsey. Without waiving its assertion that the December 23, 2011 email is a legally invalid determination under Section 25-2-2, HCE maintains that its appeal was timely filed regarding the expansion of the definition of "religious assembly" and other provisions in the Restrictive Covenant that are beyond the terms and conditions of the December 23, 2008 email. The HCE appeal should be forwarded to the Board of Adjustment for consideration of the appeal issues described below.

FACTS RELATING TO HCE APPEAL

CARL CONLEY LETTER

In his December 17, 2008 letter to Greg Guernsey Carl Conley wrote: "The church building includes a typical indoor auditorium for 3500 seats. This indoor facility will be used for various religious assembly activities including worship services, weddings, funerals and educational and musical presentations."

Mr. Conley goes on to write that the church building will be used for "***non-religious*** non-profit ***civic uses*** such as neighborhood meetings, boy scouts/girl scout meetings, school graduations, public meetings, etc. Again, these uses would be for non-profit activities...***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...or for some charitable organizations.*** All of these are typical of the use of a church facility." (emphasis added)

Mr. Conley clearly distinguishes "religious assembly" uses (worship services, weddings, funerals and educational and musical presentations) from "civic" uses (neighborhood meetings, boy scouts/girl scout meetings, school graduations, public meetings and charity events). Mr. Conley also states that the civic uses he described are typical uses of a church facility. He does not contend that these civic uses constitute "religious assembly."

GREG GUERNSEY DECEMBER 23, 2008 EMAIL

In response to Mr. Conley's letter, Director Guernsey sent the December 23, 2008 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 complaint [sic] with all applicable City Codes and ordinances, including the noise ordinance." (emphasis added)"
>
> If the primary use of one or both of the facility does change from a religious assembly use to an outdoor entertainment or an indoor entertainment use, a zoning change may be required."

In the emphasized sentence, Director Guernsey states that the "religious assembly" use (regularly scheduled religious worship or religious education) must be the predominate use of the worship building and the outdoor amphitheater. Mr. Guernsey places two limitations on "educational and musical presentations." One, they must be "limited in scope," meaning, in part, of short duration. Two, they are subordinate to the primary use of religious assembly, meaning the frequency of "educational and musical presentations" must be much less that "religious assembly" activities.

Director Guernsey does not mention any of the civic uses described by Mr. Conley in his December 17, 2008 letter. Mr. Guernsey's email does not incorporate or adopt the Carl Conley letter. There is no basis to interpret Mr. Guernsey's email as interpreting a "religious assembly" use to include the "civic" uses described in Conley's letter. Instead, Mr. Guernsey states that the church must comply with all applicable City Codes and ordinances, including, presumably, Chapter 25-2 which establishes allowable uses in RR zoning districts.

JULY 13, 2011 GEORGE ZAPALAC LETTER

The July 13, 2011 George Zapalac letter to Larry Hanrahan includes the following:

> "The applicant has represented to City staff that the proposed use of the site for Promiseland West Church – SP-2011-0006C will be Religious Assembly, ***as defined by the Land Development Code 25-2-6(B)(41)***...As you can see, the request on which ***PDRD based its use determination included significant limitations on the nature and extent of the proposed amphitheater which ensure its consistency with a Religious Assembly use.*** (emphasis added)
>
> Accordingly, any site plan approval for the project would be conditioned on the execution and recording of a public restrictive covenant that sets forth these specific limitations outlined in the 2008 request, as well as additional restrictions that "help to identify/clarify specific uses that are not permitted under the proposed religious assembly use."
>
> .....
>
> ***Since PDRD issued its 2008 determination, representations have been made regarding site uses that may go beyond the scope of a Religious Assembly use. The conditions outlined above, as set forth in the 2008 Conley letter, would effectively prohibit any such non-Religious Assembly uses at the site."*** (emphasis added)

Mr. Zapalac's letter is quoted here to establish that Mr. Guernsey's December 23, 2008 "determination" had not be superseded by any subsequent land use determination. In his letter, Mr. Zapalac incorrectly describes the "non-religious non profit civic uses" outlined in Mr. Conley's letter as "religious activities." Mr. Zapalac's error is of no import because he does not have the authority to make or issue a land use determination under Section 25-2-2 of the Land Development Code.

Mr. Zapalac does acknowledge that public statements made by the applicant regarding its intended use of the outdoor amphitheater for various activities that could fall outside of the scope of a religious assembly use, as defined in the Land Development Code. Mr. Zapalac's comment comports with City staff site plan

review comment SP-15, update 1 for SP-2011-0006C[1]. As you know, HCE and other nearby neighborhoods have provided the City examples of repeated statements by the applicant that the applicant intended to use the outdoor amphitheater for non-religious assembly uses. Mr. Zapalac's letter and Staff comments strongly support the conclusion that the one or more of the applicant's intended uses of the outdoor amphitheater, as reported in the media and on the applicant's blog, were not authorized by the December 23, 2008 email.

Notwithstanding the Staff's recognition that the applicant's intended uses of the amphitheater exceeded the limitations of the December 23, 2008 email, the City executed the Restrictive Covenant.

NEW INTERPRETATIONS IN THE RESTRICTIVE COVENANT

HCE appealed four interpretations embedded in the approval of the Permit and the Restrictive Covenant.[2] HCE appeal issues 2 and 3 address the Planning and Development Review Department interpretation: [2] "that expands the definition of Religious Assembly (25-2-6(41)) to include "musical and theatrical performances" and concerts, if the concert is held for a charitable purpose;" and [3] "that an outdoor amphitheater that seats 1,000 people is a ***principal*** use of the property if the applicant ***claims*** a Religious Assembly use." (emphasis added). Appeal point 3 means that City staff accept a use as allowed under "religious assembly" merely on the basis of the applicant claim the use was a religious assembly use.

Below is a list of the new interpretations and determinations that are materially different than the interpretation of December 23, 2008. To the extent that these interpretations are different from the terms of the December 23, 2008 email, they constitute new interpretation under Section 25-2-2 that HCE timely appealed.

1. The Restrictive Covenant is the first time that Director Guernsey interpreted "religious assembly" use to include "theatrical performances." If the Restrictive Covenant complied with the interpretation found in the December 23, 2008 email, the term "theatrical performances" would not have been included at all.

2. Section 1.C of the Restrictive Covenant is the first time that Director Guernsey interpreted "religious assembly" use to include "charitable events." The Carl Conley letter describes charitable events as "non-religious non-profit civic uses." The December 23, 2008 email does not mention any of the civic uses described by Mr. Conley and certainly does not categorizes "non-religious non-profit civic uses" as within the category of "religious assembly" use.

3. The Restrictive Covenant is the first time that Director Guernsey interpreted "musical or theatrical performances" (Section I.A.2) as ***principal or primary*** uses under "religious assembly." In the December 23, 2008 email, "musical presentations" were required to be subordinate to the primary use of religious assembly and to be of limited scope. The uses described in Restrictive Covenant Section I.C, regarding "occasional charitable events (including concerts and performances," can only be interpreted as placing "concerts and performances" within the category of "musical or theatrical performances" found in Restrictive Covenant Section I.A.

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[1] The site development permit application for the Property prior to its withdrawal and resubmital of the site development permit application for the Permit.

[2] My letter addressed to Board of Adjustment Chair Jeff Jack was delivered with and is part of the HCE appeal documents delivered to the City of Austin on October 21, 2011.

In contrast to Sections I.A and I. C, Section I.B lists "customary and incidental accessory uses" associated with "religious assembly" use. If the Restrictive Covenant complied with the interpretations in the December 23, 2008 email, then Section I.B would have included "musical presentations" and Section I.C would not have been included at all.

4. The Restrictive Covenant provision that a benefit concert or performance is a principal use without any objective limitation on the frequency of such events is materially different than the December 23, 2008 email interpretation of "musical presentation" as a secondary or subordinate use. The only apparent attempt in the Restrictive Covenant to limit the number of concerts and "performances" is the word "occasional." The Restrictive Covenant, however, does not define the term "occasional." As a result, the Restrictive Covenant does not place any objective limit on the frequency of benefit concerts or charitable events as required by the December 23, 2008 email.

5. Unlike the text of the December 23, 2008 email, the Restrictive Covenant does not require "regularly scheduled worship or religious education" to be the predominate use of either building.

6. The Restrictive Covenant does not contain the "limited in scope" constraint on "educational and musical presentations" found in the December 23, 2008 email. The Restrictive Covenant can be interpreted to authorize concerts, which by definition and experience, are not limited in scope or duration.

7. In the December 23, 2008 email Mr. Guernsey wrote that he had "no problem" with the worship building and outdoor amphitheater co-locating on property ***if both are being used primarily for religious assembly uses***. Section 25-2-6(41) defines 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)

Under this Land Development Code definition, "religious assembly" has a narrow definition that excludes many other uses which are commonly associated with a church or a "religious assembly" use structure. Mr. Conley is correct when he wrote: "All of these [non-religious non-profit civic uses] are typical of the use of a *church facility*." Under the Land Development Code, the use of a church facility for "civic uses" does not, however, result in a code amendment that adds "non-religious non-profit civic uses" to the allowed activities under "religious assembly" use. As you know, the Land Development Code includes other defined land use categories, such as, "club or lodge" and "community recreation-private," that encompass the "non-religious non-profit civic uses mentioned by Mr. Conley.

Under Section 25-2-491, "club or lodge" and "community recreation" (private and public) are conditional uses in the RR zoning district. Mr. Guernsey does not have the authority to convert a conditional use into an allowed use much less to authorize a conditional use as a primary allowed use. The December 23, 2008 email did not articulate such an authorization; but the Restrictive Covenant does.

Riverbend Baptist Church ("Riverbend") and the Dell Jewish Center ("DJC") are examples of large campuses providing a variety of community services that are operated by a religious group. The respective PUD ordinance for each facility includes an extensive list of permitted and prohibited community and civic oriented uses, including, "club or lodge," "community recreation" (private and public) and "religious assembly."[3]

[3] Ord. No. 20080925-135, Part 5, PUD Zoning for Dell Jewish Center and Ord. No. 20001214-97, Part 4, PUD zoning for Riverbend Church.

The Riverbend PUD and the DJC PUD ordinances are consistent with the interpretation of the Land Development Code that "religious assembly" is a distinct and separate regulated use from other activities that are typically found at a church facility. Neither the December 23, 2008 email nor prior zoning ordinances for multi-function religious assembly facilities support the new and expansive interpretation of the new primary or principal uses allowed under "religious assembly" found in the Restrictive Covenant.

In that the Restrictive Covenant authorizes "non-religious non-profit civic uses" as primary uses of both buildings, the Restrictive Covenant abandons the limitation set forth in the December 23, 2008 email that allows the co-location of the worship building and the outdoor amphitheater *if* both buildings are used primarily for "religious assembly." Instead of enforcing the terms of the December 23, 2008 email, the Restrictive Covenant fundamentally changes the nature and scope of the activates allowed under "religious assembly" use in a RR zoning district.

If it remains the City's position that the only land use determination made under Section 25-2-2 that is applicable to the Permit is the December 23, 2008 email, then the Restrictive Covenant must be modified to strictly conform with the terms of the December 23, 2008 email. If it is the City's position that the Restrictive Covenant (and not the December 23, 2008 email) is the document that regulates the use of the Property, then the Restrictive Covenant must constitute a new land use determination under Section 25-2-2. In the latter case, the HCE appeal was timely filed under Section 25-1-182 of the Land Development Code and the appeal must be forwarded immediately to the Board of Adjustment for a public hearing.

Since construction has started on the Property, it is of great urgency that the City respond to this letter as quickly as possible. Please let me know if the City will forward the HCE appeal to the Board of Adjustment or revise the Restrictive Covenant to strictly comply with the terms and conditions of the December 23, 2008 email. I would appreciate a written response by December 22, 2011.

Very truly yours,

Robert J. Kleeman

RJK/dlr

cc: Sue Edwards, Assistant City Manager *(via email)*
Greg Guernsey *(via email)*
Marc Ott, City Manager *(via email)*
Mayor and City Council *(via email)*

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

December 30, 2011

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

Re: Dream City Site Plan [SP-2011-0186C]—Zoning & Administrative Issues

Dear Mr. Kleeman:

After reviewing your letter of December 12, 2011, we have advised the Planning & Development Review Department ("PDRD") that your appeal is barred on timeliness grounds for the reasons set forth in our previous letter of October 27, 2011.

The zoning issues related to this development were resolved in December 2008 by Director Greg Guernsey's determination that construction of the proposed outdoor amphitheater is allowed as part of a religious assembly use. That determination was made in direct response to the applicant's submittal, which included conceptual plans as well as a list of specific uses and associated conditions to be imposed via a restrictive covenant. The 2008 determination must be presumed to incorporate the uses and conditions detailed by the applicant's submittal.

The restrictions in the covenant do clarify particular requirements in order to assist with enforcement and administration, but they do not constitute a new use determination under Section 25-2-2 (*Determination of Use Classification*) or contradict Director Guernsey's prior 2008 determination. In particular, there is no indication that non-religious assembly uses will be permitted unless they are accessory to the principal use of religious assembly. As stated in Mr. Guernsey's 2008 determination, such uses "will be limited in scope and will be subordinate to the primary religious assembly use."

It should be emphasized that the terms of the covenant are not an exhaustive list of limitations applicable to use of the amphitheater, but merely those included as part of the applicant's 2008 submittal. City Code imposes numerous other restrictions, including the requirement that any accessory use be "incidental to" the principal use of religious assembly. 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.

The line between accessory and principal use can be difficult to define, but the Director will carefully consider any alleged violations related to the frequency or intensity of activity at the amphitheater. Additionally, as outlined in my email to you on December 7, 2011, any use of sound equipment on the property will require a sound amplification permit under City Code Chapter 9-2 (*Noise and Amplified Sound*) as well as compliance with other restrictions under the City's noise regulations. Where a permit is sought for outdoor music, the City has authority under the ordinance to impose conditions to mitigate the impacts of events on adjoining properties, including limitations on the size, scale, and duration of the event. If such permits are requested, Hill Country Estates would have the opportunity to raise any concerns you may have regarding potential impacts.

Finally, as you may be aware, earlier this month the City Council initiated code amendments that would establish clearer requirements for appealing use determinations. Consistent with existing practices, however, an informal use determination of the sort at issue in this case is treated as an appealable decision subject to the 20-day limitations period under City Code Section 25-1-182 (*Initiating an Appeal*).

Please feel free to contact me if you have further questions or concerns regarding this matter.

Sincerely,

Brent D. Lloyd
Assistant City Attorney

cc Greg Guernsey
Sue Edwards
Deborah Thomas
Chad Shaw

MUNSCH HARDT KOPF & HARR PC
ATTORNEYS & COUNSELORS
Dallas | Houston | Austin

Frost Bank Tower
401 Congress Avenue
Suite 3050
Austin, Texas 78701-4071
Main 512.391.6100
Fax 512.391.6149
munsch.com

Direct Dial 512.391.6115
Direct Fax 512.482.8932
[redacted]

May 28, 2013

By Hand Delivery
Board of Adjustment
c/o Leon Barba
505 Barton Springs Road
Room 530
Austin, Texas 78704

Re: Appeal of Decision to Issue a Building Permit for an Outdoor Amphitheater, 8901 West State Highway 71, Case Number 2013- 002081PR ("Building 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. HCE and CB have filed their appeal with Leon Barba pursuant to Section 211.009(a)(1), Texas Local Government Code and Section 25-1-18 *et seq.*, Land Development Code ("LDC").

HCE and BP 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. Enclosed are 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 Kim Butler is the Secretary of the HCE. Both HCE and CB are registered neighborhood associations with the City of Austin. See enclosed print from the City of Austin website on registered neighborhood associations.

Additionally, HCE and CB have "aggrieved party" status under Section 211.010(a)(1), Texas Local Government Code ("TLGC"). On May 8, 2013, the Austin Building Official 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 building permit has City case number 2013-002081 PR ("Building Permit"). The Property is located between the Covered Bridge and Hill Country Estates neighborhoods. Covered Bridge and the Property are within the corporate limits of the City of Austin. Hill Country Estates is predominately if not entirely within the extra-territorial jurisdiction of the City. Hill Country Estates contains one acre or larger residential lots and would be zoned Rural Residential ("RR") if it were annexed.

The Property already has a multi-purpose building that contains an indoor auditorium used for religious services. Many residents of Covered Bridge and Hill Country Estates already hear, **inside their homes**, the very loud music played inside the existing indoor auditorium on the Property. CB, HCE, and their members fear that the very loud worship services taking place

inside the existing building will take place in the outdoor amphitheater. They fear the impacts on their quality of life and property values if the outdoor amphitheater is used in the manner promoted by the Promiseland West Church which has now rebranded itself as Life Austin ("Owner"). In addition to religious worship, the Owner has promoted the outdoor amphitheater as a community resource to be used for community recreation and theater purposes such as ballet, jazz concerts, and family movie nights.[1]

Both neighborhoods and the Property are included in the West Oak Hill Neighborhood Plan adopted in December 2008. During the consideration of the West Oak Hill Neighborhood Plan, the Property and the land between the Property and Hill Country Estates was zoned Rural Residential ("RR"). The Future Land Use Map shows the Property as low density residential and the Property retains its RR zoning today. Notably, the Owner did not participate in the Oak Hill Neighborhood Plan process. More importantly, the Owner has never filed a zoning application to even attempt to rezone the Property to a zoning classification that would allow the outdoor amphitheater at issue in this appeal.

Rather than follow the normal and appropriate course of seeking a re-zoning of the Property or seeking a conditional use permit, the Owner found a pliant City staff willing to redefine the uses and activities allowed under Religious Assembly to meet the desires of the Owner. For years, the Owner of the Property have openly discussed and advertised their plans to operate the amphitheater as a community center and venue for a variety of non-religious activities.[2] Representatives of the Owner attended a meeting with Oak Hill Association of Neighborhoods in January 2012. At this meeting the representatives stated that the purpose of the "outdoor" amphitheater was to attract that 1 or 2 percent of the population that prefers outdoor music to indoor music.

Over the years, CB, HCE and its members have provided City staff copies of newspaper article, church blogs, and the church's website to document the open and clearly stated intent of the Owner to use the outdoor amphitheater for non-religious purposes. Copies of the materials provided to staff are enclosed. When some City staff questioned the Owner's intended use of the outdoor amphitheater for non-religious purposes, the uses allowed under Religious Assembly were re-interpreted to encompass the very activities that had raised the concerns.

As the record will show, City staff have provided the Owner of the Property singular special privileges enjoyed by no other property owner in the City of Austin. These special privileges include avoidance of all public hearing and Land Commission approval processes that other religious assembly campus projects have had to participate in to obtain entitlements comparable to what the Owner has been granted through administrative processes. For example, Riverbend Church and the Dell Jewish Center applied for and obtained PUD zoning to have authorized uses such as public and private community recreation, outdoor sports and recreation, club or lodge and religious assembly.[3]

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[1] Austin Chronicle article, March 24, 2011.
[2] Austin American Statesman article, February 25, 2007.
[3] Ordinance No.001214-97 for Riverbend Church and Ordinance No. 20080925-135 for the Dell Jewish Center.

City staff have repeatedly re-interpreted the activities allowed under Religious Assembly to grant to the Owner of the Property the right to conduct Religious Assembly activities outdoors even though the Property is zoned RR. In October 2011, City staff expanded the number of principal uses allowed under Religious Assembly by making weddings, funerals and **musical and theatrical performances** principal uses under Religious Assembly. Unlike the typical land use determination or interpretation made by staff a thousand times a year, this particular re-interpretation (land use determination?) came in the form of a restrictive covenant drafted by the Owner's attorney and then approved by City staff. Rather than use a regulatory process, a contract was used.

As the evidences show, the principal uses of musical and theatrical performances have been reinterpreted again to allow virtually any type of secular music, theater and entertainment content so long as the Owner is a non-profit entity and the Owner receives financial benefit from the performance.[4]

CB, HCE, and their members are aggrieved parties because the substantive and procedural protections of Chapter 25-2 have been denied them again with the issuance of the Building Permit. The Building Permit is the latest example of City staff granting new and additional special privileges to the Owner. The Building Permit grants the right to conduct amusement, community recreation and club or lodge activities in the Amphitheater. These are new uses not addressed in previous interpretations of Religious Assembly. None of these uses or activities falls within the LDC description of Religious Assembly (organized religious worship or religious education). None of these activities is an accessory use to Religious Assembly. None of these activities and uses are allowed in RR zoning except with a conditional use permit. None of these activities are allowed outdoors in the RR zoning district.

Pursuant to Section 25-1-183(6) and the instructions provided with the appeal application form, CB and HCE allege that one or more errors were made in the decision to issue the Building Permit on May 8, 2013. The activities described in the Building Permit application, including the uses of "amusement, social and recreational buildings" do not comply with applicable law.

Since 2007, City staff has repeatedly changed its position regarding 1) the legality of an administrative approval of a 1,000 seat outdoor amphitheater on property zoned Rural Residential; 2) whether an outdoor amphitheater would be considered an accessory use or a principal use of Religious Assembly, 3) whether Religious Assembly can even be conducted outdoors in an RR zoning district; 4) what activities are allowed under Religious Assembly; and 5) which of the new allowed Religious Assembly activities are principal use under Religious Assembly and which are an accessory use.

BACKGROUND

First Interpretation

[4] Page 233, Deposition of Greg Guernsey, February 20, 2013. Hill Country Estates Homeowners Association and Covered Bridge Property Owners Association, Inc. v. Greg Guernsey and the City of Austin, Cause No. D-1-GN-12-000878 in the 250th District Court, Travis County, Texas. ("Guernsey Depo.")

In 2007 and 2008 members of HCE and CB asked City Staff in writing whether an outdoor amphitheater could be administratively approved on the Property with RR zoning.

In 2007, a City staff person, after repeated questioning from an HCE member, wrote:

"I did look on the [Promiseland West] website and saw the future plans. From what I saw they will definitely need a zoning change and a fully engineered site plan. The scope of what they are doing looks like it goes beyond what the City would classify as Accessory Uses."[5]

In mid-2008, a different City staff person responded to questions from a different member of HCE regarding whether an outdoor amphitheater was an accessory use to Religious Assembly. The City staff person wrote:

"I can tell you definitively that there has never been an outdoor amphitheater administratively approved as an accessory use for a Religious Assembly facility. If one were to be shown on a site plan submitted for a proposed church, Land Use Review staff would identify it and require the developer to obtain a Conditional Use Permit for the proposed Community Recreation or Outdoor Entertainment."[6]

From 2007 until February 2011, members of HCE and CB relied on City staff assurances that an outdoor amphitheater on the Property would require at least a conditional use permit and perhaps a zoning change. CB and HCE believe that the initial interpretation is the correct interpretation that an outdoor amphitheater is not an accessory use and that a zoning change and possibly a conditional use permit would be required before an outdoor amphitheater could be constructed on the Property.

Second Interpretation

Carl Conley, engineer for the Owner in 2008, sent Greg Guernsey a December 17, 2008 letter asking whether an outdoor amphitheater could co-locate on the Property and whether all of the indoor activities could also take place outdoors in the amphitheater. The Conley letter asked "whether an outdoor amphitheater **is considered an accessory use** to an overall religious assembly use under RR or SF-1." (emphasis added)

In his letter, Mr. Conely described three categories of uses that would occur in the church buildings and outdoor amphitheater. He described the first category as "various religious assembly activities, including worship services, weddings, funerals and educational and musical presentations." Mr. Conley's interpretation of the description of Religious Assembly is generally consistent with the narrow description found in Section 25-2 6(41), LDC.

Mr. Conley's second category of uses included non-religious non-profit civic activities that would also take place in the "church buildings and the outdoor amphitheater:" "...non-

[5] December 4, 2007 email from Glenn Rhoades to Paula Jones. Defendant production document No. 2626 included as part of Exhibit 14 to the February 20, 2013 deposition of Greg Guernsey.
[6] July 16, 2008 email from Chris Johnson to Daloma Armentrout. Defendant production document No. 2620 included as part of Exhibit 14 to the February 20, 2013 deposition of Greg Guernsey

religious non-profit civic uses such as neighborhood meetings, boy scout/girl scout meetings, school graduations, public meetings, etc.."

Mr. Conley's letter then described the third category of uses as "benefit events": "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**." (emphasis added)

In response to Mr. Conley's December 17, 2008 letter, Greg Guernsey transmitted a private email to Carl Conely on December 23, 2008. Regarding Mr. Conley's question as to whether an outdoor amphitheater could be an accessory use to Religious Assembly, Mr. Guernsey wrote in the December 23, 2008 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."

Taken at face value, all Mr. Guernsey has stated is that the outdoor amphitheater can be built on the property if the "church building" and the outdoor amphitheater are both used primarily for religious assembly uses. In other words, Mr. Guernsey states that Religious Assembly uses can take place outdoors.

As to uses that would be allowed in the outdoor amphitheater, Mr. Guernsey wrote:

"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 complaint [sic] with all applicable City Codes and ordinances, including the noise ordinance."[7]

Taken at face value, Mr. Guernsey's email statements clearly distinguish educational and musical presentations from the "primary religious assembly use." Also important to this appeal are the limiting conditions he placed on educational and musical presentations: "limited in scope" and "subordinate" to the "primary religious assembly use." Since Mr. Guernsey distinguished educational and musical presentation from religious assembly use, Mr. Guernsey took a limited, strict constructionist view of the description of Religious Assembly: "regular organized religious worship or religious education." The second sentence in the previous quote created an inherent conflict-- the church had to comply with all applicable City Codes and ordinances. Clearly, the condition that the Church must always comply with applicable City Codes and ordinances brings every permit and every appeal of a permit within the purview of the Board of Adjustment to determine the applicable City Codes and ordinances.

The December 23, 2008 Guernsey email ends with the following:

"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."

[7] December 23, 2008 email from Greg Guernsey to Carl Conley.

This last sentence appears to set some sort of boundary as to what constitutes an allowed use under Religious Assembly. This boundary proves to be an illusion. Mr. Guernsey's email does not address Mr. Conley's second and third categories of non-religious activities and benefit events. Mr. Guernsey does answer the initial question of whether the outdoor amphitheater is an accessory use to Religious Assembly. Notably, neither Mr. Conley nor Mr. Guernsey refer to the outdoor amphitheater as a "building."

Since the summer of 2011, Mr. Guernsey and City Staff have re-interpreted Mr. Guernsey's December 23, 2008 email as adopting and accepting all of Mr. Conley's letter even though no such language appears in the email. As discussed below, Mr. Guernsey and City Staff have continued to expand and stretch the scope of the December 23, 2008 email interpretation to cover and justify several modifications to the definition of Religious Assembly.

For example, Mr. Guernsey will re-interpret his December 23, 2008 email to mean: 1) all non-religious activities described in the Conley are allowed with a Religious Assembly use; 2) all of the non-religious assembly uses described in the Conley letter can be held in the outdoor amphitheater; 3) musical and theatrical performances are principal uses under Religious Assembly use; 4) benefit events can be of virtually any nature so long as the church financially benefits from the event; and 5) the limiting conditions of "limited in scope and subordinate to the primary religious assembly use" are replaced by the word "occasional."

As discussed below, CB and HCE did not learn of the December 23, 2008 "interpretation" email until July 21, 2011. Copies of the December 17, 2008 Conley letter and December 23, 2008 Guernsey email are enclosed.

Third Interpretation

The first indication that the City staff position regarding uses allowed under Religious Assembly had changed from the 2007 and mid-2008 emails appeared in the first staff comments to the first site development permit application for the Property (SP-2011-0006C). The case manager wrote in the first set of staff comments dated February 9, 2011:

"SP 15...Clarify if the amphitheater is intended for Religious Assembly Use only, or if the applicant intends to use the structure in any other commercial way. Or is it an accessory use of Outdoor Entertainment (not allowed in RR zoning) or Community Recreation (commission-approved required)? Please be aware that this site plan application may be a conditional use permit site plan, which would require re-notification and additional fees."

Staff comment SP 15 to the first update submittal to the site development permit application reads as follows:

"U1. Please clarify. The engineer's response letter states that the amphitheater is intended for religious assembly use only, however, the owner was quoted saying **many non-religious events will take place in the amphitheater, including 'graduation ceremonies, recitals, ballets, family movies nights, jazz concerts, and other events' (Austin Chronicle article, March 24, 2011)**." (emphasis added)

These Staff comments indicate an interpretation that an outdoor amphitheater is allowed in RR zoning if the amphitheater is limited to Religious Assembly uses only; however, non-religious activities, such as those reported in the Austin Chronicle, would not be allowed in the outdoor amphitheater. The staff comments suggest a conditional use permit may not be required for Religious Assembly activities in the outdoor amphitheater. It is not certain whether staff had seen the December 23, 2008 Greg Guernsey email when the first set of staff comments issued on February 9, 2011.

The case manager had received a copy of the December 23 2008 Greg Guernsey email on February 28, 2011.[8] Presumably, the case manager had seen the December 23, 2008 email and December 17, 2008 Conley letter by the time the staff comments to the first update issued on March 25, 2011. The Staff comments to the first update suggest a narrow interpretation of what activities are allowed under Religious Assembly.

At the time of the issuance the above Staff comments to the first site development permit application, neither the case manager nor the members of HCE and CB knew that Director of PDRD had laid the groundwork for an even broader re-interpretation of the zoning regulations applicable a Religious Assembly use on the Property. Mr. Guernsey has conceded that the above quoted comments under SP 15 indicate that the drafting staff member was not aware of his first re-interpretation of his December 23 2008 email to add non-religious activities and benefit events as allowable uses in the outdoor amphitheater.[9]

Fourth Interpretation

In June 2011, the first site development permit application was withdrawn with two outstanding comments regarding the septic system and the land use issue under SP 15. The site development permit application was resubmitted in July 2011 and assigned case number SP-2011-0185C. This is the site development permit application that was ultimately approved. On July 21, 2011, George Adams sent an email to the HCE officers to notify them that a land use determination regarding the outdoor amphitheater had been made by Greg Guernsey in December 2008 and that the 20 days allowed for appealing that determination had long passed. The Adams email responded to repeated inquiries from HCE members about when the City would make a decision about whether the outdoor amphitheater could be constructed on the Property. The Adams email transmitted a copy of a July 13, 2011 letter from George Zapalac to Lawrence Hanrahan, P.E., the new engineer for the church ("Zapalac Letter").

Although the December 23, 2008 email did not address the second and third categories of uses described by Mr. Conley, the Zapalac Letter changes religious activities to include "non-religious non-profit civic uses such as neighborhood meetings, boy scout/girl scout meetings, school graduations, public meetings, etc." In effect, the Zapalac Letter makes the above described "non-religious activities" principal uses under Religious Assembly.

The Zapalac Letter mentions "benefit events" but it is not clear whether Mr. Zapalac intended to classify "benefit events" as a principal use under Religious Assembly. Nevertheless, the Zapalac Letter expresses a concern that "[S]ince PRDR issued its 2008 determination,

[8] Wendy Rhoades email to Sarah Graham dated February 28, 2011.
[9] Page 180 Guernsey Depo.

representations have been made regarding site uses that may go beyond the scope of a Religious Assembly use. The conditions outlined above, as set forth in the 2008 Conley letter, would effectively prohibit any such non-Religious Assembly uses at the site."

Unlike staff comment SP 15 to the first update, the Zapalac Letter provides no example of what the represented "non-religious assembly" activities are, but they must be different than the list of non-religious activities appearing on the first page of the letter that were made principal uses under Religious Assembly.

The Zapalac Letter does not resolve the question of whether the outdoor amphitheater is an accessory use to Religious Assembly.

Finally, Zapalac Letter restates the requirement for compliance with "all of the City's ordinances, including sound levels at the boundary properties[,]."

A copy of the July 21, 2011 George Adams email and the George Zapalac Letter are enclosed.

Fifth Interpretation

After City staff informed members of HCE that a restrictive covenant would be required that would protect the adjoining neighborhoods an HCE officer made repeated requests to see a draft of the proposed restrictive covenant. City staff refused to provide any drafts or outlines of the proposed restrictive covenants. Copies of the emails requesting the opportunity to review the restrictive covenant are enclosed.

Also enclosed is a copy of a September 13, 2011 email from Brent Lloyd to George Zapalac, George Adams and Sarah Graham. Attached to the email is an "outline for the restrictive covenant" prepared by counsel for the Owner. Note in the first sentence of the draft, the Owner's counsel believe that the outdoor amphitheater is an accessory use. A copy of the email and draft outline are enclosed.

The first version of the restrictive covenant seen by CB, HCE and their members was the version recorded in Document No. 2011146026, Official Public Records of Travis County, Texas on October 5, 2011 ("Restrictive Covenant").

Once again, the activities allowed under Religious Assembly changed. First, the "musical presentations" that were originally required to be of short duration and subordinate to the primary Religious Assembly are no longer so limited.

Second, regular organized religious worship or religious education were no longer required to be the predominate use of the outdoor amphitheater.

Third, musical and theatrical presentations were renamed "musical and theatrical performances" and changed to a principal use under Religious Assembly. This change allows concerts and theatrical performances to constitute a Religious Assembly use.

Fourth, the outdoor amphitheater is a principal and not an accessory use under Religious Assembly.

Other changes are described in a December 12, 2011 letter to Brent Lloyd detailed below. A copy of the recorded Restrictive Covenant is enclosed.

On October 15, 2011, the City approved site development permit SP-2011-0185C. A copy of the cover sheet and sheet 11 of the approved site development permit are enclosed.

HCE filed an appeal to the Board of Adjustment on October 21, 2011 within 20 days of the issuance of the site development permit for the Property. The HCE appeal challenged the Chapter 25-2 administrative decisions involved with approval of the site development permit and the Restrictive Covenant. Despite the clear and unambiguous mandate of Section 211.010(a)(1), Texas Local Government Code, City staff refused to forward the HCE appeal to this Board. Such action by City Staff also violated Section 25-1-181(B), LDC: "A body holding a public hearing on an appeal **shall determine whether a person has standing to appeal the decision**." (emphasis added)

On October 27, 2011 Brent Lloyd sent a letter to Robert Kleeman that explained how every appeal issue raised in the HCE Appeal was encompassed in the December 23, 2008 Greg Guernsey and that HCE had missed the 20 day fining deadline: "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." A copy of the October 27, 2011 Brent Lloyd letter is enclosed.

After hearing from City management in November 2011 that City staff had approved the outdoor amphitheater as an accessory use, I compared the terms of the Restrictive Covenant to the December 23, 2008 email and the December 17, 2008 Conley letter. In a December 12, 2011 letter to Brent Lloyd, I outlined how the Restrictive Covenant and the approved site development permit exceeded the terms of the December 23, 2008 Greg Guernsey email. The arguments set forth in the December 12, 2011 letter are incorporated here and are made a part of this appeal for all purposes. A copy of the December 12, 2011 letter is enclosed.

On December 30, 2011 Brent Lloyd responded, in part, with the following sentence:

"The zoning issues related to this development were resolved in December 2008 by Director Greg Guernsey's determination that construction of the proposed outdoor amphitheater is allowed as part of a religious assembly use."

A copy of the December 30, 2011 Brent Lloyd letter is enclosed.

Sixth Interpretation

As of May 10, 2013, the description on the City's Website of the structure authorized by the Building Permit read as follows: "New Amphitheater for Religious Assembly w/tiered seating, stagehouse, office, support areas and restrooms."

The sub type description for the Building Permit found on the City's Website describes the outdoor amphitheater in question as "Amusement, Social & Rec. Bldgs." A May 10, 2013 print out of the City's Website Folder Detail for the Building Permit is enclosed ("May 10th Folder Detail").

According to the sworn testimony of Greg Guernsey the principal use of the outdoor amphitheater in question is Religious Assembly.[10] Sheet 11 of the Site Plan for the Property does not show any use for the amphitheater except Religious Assembly. Therefore, the sub type description shown on the May 10th Folder Detail (Amusement, Social & Rec. Bldgs.) is a land use determination of the principal use for the Building Permit.

HCE and CB contend that the Building Official erred when he issued the Building Permit for "Amusement, Social & Rec. Bldgs." uses of the outdoor amphitheater. First, the "recreational building" component falls under the definition of Community Recreation.[11] The Building Permit is the first time that a Community Recreation facility has been explicitly mentioned by City staff. Section 25-2-6(B)(41), LDC explicitly excludes Community Recreation as an allowed use under Religious Assembly. Further, Section 25-2-897, LDC does not include Community Recreation type uses as an accessory use to any Civic Uses.

Second, according to the land use chart found in Section 25-2-491(C), LDC, Community Recreation is a conditional use in RR zoning. No conditional use permit of any type has been issued for the Property. The Building Permit has approved a conditional use without following the conditional use permit procedures and, therefore, was issued in error.

Third, the term "social" appears only in the descriptions of "Camp" and "Club or Lodging" found in chapter 25-2, LDC. According to the land use chart found in Section 25-2-491(C), the use "Club or Lodge" is a conditional use in RR zoning and "Camp" is not allowed in RR zoning under any circumstances. Again, no conditional use permit has been issued for the Property.

Fourth, the term "Amusement" does not appear in Chapter 25-2 as a defined use but does appear in the Airport Overlay Land Use Table found in Section 25-13-44. In this section, "Amusement" is classified under "Recreational Uses." Therefore, a principal "Amusement" use should fall under Community Recreation which cannot be an authorized principal use under Religious Assembly without a conditional use permit.

HCE and CB agree that "Amusement, Social & Rec. Bldgs." is a correct determination of the principal use of the outdoor amphitheater. The Building Official erred when he ignored all of the applicable City codes and ordinances and issued the Building Permit anyway. Upon

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[10] Page 99, Deposition of Greg Guernsey, February 20, 2013. Hill Country Estates Homeowners Association and Covered Bridge Property Owners Association, Inc. v. Greg Guernsey and the City of Austin, Cause No. D-1-GN-12-000878 in the 250th District Court, Travis County, Texas. ("Guernsey Depo.")

[11] 25-2-6(B)(9) COMMUNITY RECREATION (PRIVATE) use is the use of a site for the provision of an indoor or outdoor recreational facility for use by residents or guests of a residential development, planned unit development, church, private primary or secondary educational facility, club or lodge, or non-profit organization.

determining that the outdoor amphitheater is a Community Recreation and Club or Lodge facility, the Building Official should have denied the Building Permit application.

Outdoor Amphitheater Violates Explicit Zoning Code Provisions.

Notwithstanding the five previously discussed interpretations of Religious Assembly, the outdoor nature of the amphitheater does not comply with applicable law. First, Section 25-2-921(C), LDC prohibits "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..." for property zoned RR. Further, Section 25-2-921(C) prohibits the Building Official from issuing even a temporary use permit for the above described outdoor activities on RR zoned property. If the Building Official has no authority to issue a Temporary Use Permit for Outdoor Religious Assembly on RR zoned property, then the Building Official has no authority to issue a building permit to authorize such outdoor activities on a permanent basis.

Second, the definition of Religious Assembly found in Section 25-2-6(B)(41), LDC states that a Religious Assembly use must occur in a permanent or temporary building. The phrase "in a permanent or temporary building" means indoors or a fully enclosed building. Even if a contorted interpretation could be made that the phrase "in a building" could include "outdoor" buildings in some zoning districts, such an interpretation cannot be made for property zoned RR through SF-3 because of Section 25-2-921(C), LDC.

Third, Section 25-2-491(B) states: "The requirements of other provisions of this subchapter modify and supersede the requirements of this section, to the extent of conflict." The Land Use Chart (Section 25-2-491(C) and Section 25-2-921(C) are both found in subchapter C of Title 25. The Land Use Chart allows Religious Assembly in RR zoned districts subject to any other requirements in Subchapter C. One of the modifying requirements found in Subchapter C is the prohibition in RR zoned districts of outdoor religious assembly and other outdoor activities described in Section 25-2-921(C). The Building Official cannot issue a building permit for an "outdoor amphitheater" and simultaneously say it is not outdoors.

In conclusion, several aspects of the first five previously discussed interpretations of Religious Assembly exceed the authority of the director of PDRD to interpret use categories pursuant to Section 25-2-2, LDC. The Director's authority under Section 25-2-2 arises only when a particular use has not been classified within a zoning category or land use. Under the previous version of Section 25-2-2(E), the Director was required to maintain a list of determinations made under Section 25-2-2. The so called land determination made by the December 23, 2008 email was never added to the list of use determinations and was kept from the site development permit case manager until February 28, 2011.

The original interpretations of the LDC regarding outdoor amphitheaters made by City staff in 2007 and mid-2008 were correct. The original interpretation request made by Mr. Conley was whether an outdoor amphitheater was an accessory use to Religious Assembly. Since Section 25-2-897, LDC provided a clear answer to Mr. Conely question, the authority of the Director to issue a land use determination under Section 25-2-2 never arose. Further, the staff interpretation that made the outdoor amphitheater a principal use did not occur until the Restrictive Covenant recorded in October 2011. HCE timely filed its appeal to the Restrictive Covenant and to the approved Site Development Permit.

The Board of Adjustment should find that the Director of PDRD has never had the authority under Section 25-2-2 to make a prohibited outdoor activity an allowed use. That is, by interpretation the Director cannot convert the outdoor activities prohibited by Section 25-2-921(C) into allowed uses. Further, the Director does not have the authority to amend the Land Use Chart by converting a conditional use (Community Recreation and Club or Lodge) into a permitted use.

The Board of Adjustment should use its authority to find that all prior Interpretations, including the Building Permit, that authorize any outdoor activities on the Property are rescinded because they were issued in contravention of the explicit provisions of Chapter 25-2. The Board of Adjustment should use its authority to find that all prior Interpretations, including the Building Permit, that authorize a conditional use on the Property are rescinded because they were issued in contravention of the explicit provisions of Chapter 25-2. The Board of Adjustment should use its authority to suspend all permits for the Property, including the Building Permit that were issued in reliance on any rescinded interpretation. The Board of Adjustment should also find that the interpretation of Chapter 25-2 used by City staff to reject HCE's October 2011 appeal to this Board was wrong, are rescinded and the City staff should be instructed to forward to the Board of Adjustment the October 2011 HCE appeal of the Restrictive Covenant and the approved site development permit in accordance with Section 211.010, TLGC.

The contact information for Kim Butler is (512) 288-3659 and his 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.

Sincerely,

MUNSCH HARDT KOPF & HARR, P.C.

By: 
Robert Kleeman

RJK:dm
Enclosures

[redacted]

Subject: FW: Interested Party Case #2013-002081PR

Hi Robert,

Here's an e-mail chain that contains both Frank's AND my request for Interested Party status...AND the argument I presented as cause for the appeal of the Building Permit.

Kim

------ Forwarded Message

[redacted]

Subject: Re: Interested Party Case #2013-002081PR

Sounds damn solid Kim. Well laid out.
(ps, how are the Giants looking this year?)
:-)

Sent from my HTC Inspire™ 4G on AT&T

----- Reply message -----

[redacted]

Subject: Interested Party Case #2013-002081PR
Date: Wed, Apr 3, 2013 4:12 pm

Hey All,

I'm out in CA, but took a call between meetings from someone at the city who called in response to today's e-mails from