The Amphitheater is a project eight years in the making. The Church engaged leading engineers and employed top-of-the-line sound mitigation measures to minimize the impact of the Amphitheater on the surrounding neighborhoods. The finished Amphitheater has 1,000 covered seats and available space for 500 on the hillside. Since the first event at the Amphitheater in July 2015, at all times the Church has operated the Amphitheater in compliance with the directives it has received from the City of Austin ("the City"), as well as state and federal law, as described more fully in detail below.

A. City Directives

Appellants' allegations of "secret meetings" and "secret determinations" are factually inaccurate. The land use determinations made by City staff, and particularly the one made by Mr. Guernsey regarding the religious assembly nature of the Amphitheater, were conducted in the ordinary course of Mr. Guernsey's role as Director of the Planning and Development Review Department. While Appellants repeatedly assert that it was incumbent upon the Church to seek a rezoning or conditional use permits, the City did not require the Church to do so.[2]

At all times the Church has complied with the directives of the City as it developed the land at issue in this appeal. The Church entered into the Restrictive Covenant, attached as Exhibit C, because the City required them to do so as a condition precedent to approving the Church's site development plan. *See* Exhibit D, Hanrahan Letter, describing the restrictive covenant as a condition precedent to approval of a site development plan.

At the City's direction, the Church also went through the process of applying for an Outdoor Music Venue Permit ("OMV Permit"). Upon review of the OMV Permit application, however, the City indicated that the Amphitheater was not a commercial use and therefore should operate in accordance with Section 9-2-5 of the City Code. As such, the Church withdrew its OMV Permit application. Section 9-2-5 prohibits the Church from using sound equipment that produces sound in excess of 75 decibels at the property line, and allows for sound that is audible beyond the property line only between the hours of 10:00 a.m. and 10:00 p.m. *See*

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[2] The Court of Appeals specifically found that Mr. Guernsey had the authority to make the determinations he made, and take the actions he took. Specifically, the Court of Appeals' decision stated:

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

Court of Appeals decision, p. 11. For the convenience of the BOA, the full decision of the Court of Appeals is attached as Exhibit E. It should also be noted that the Church was not a party to this lawsuit, so its voice was not heard by the trial court or the appellate court.

Austin City Code § 9-2-5. Appellants do not allege that the Church has ever violated this ordinance. To be clear, any resident of the Appellant homeowners associations could operate amplified sound at this same level and during these same hours under the City Code. This is not a special privilege that has been granted to the Church.

As a part of the OMV Permit process, Don Pitts, the City Music Program Manager, conducted a sound test at the Amphitheater in June 2015. The Church maintains a state-of-the-art sound monitoring system on its property, with sound monitors at the front of house position, the stage left property line, and the stage right property line. Although the OMV Permit application was withdrawn and no formal action was taken as to the application, Mr. Pitts and the Austin Police Department produced a sound report that concluded, "As far as the requirements of state law and city ordinance, the sound levels are significantly lower at the property line than what is allowed." The report further stated that the Church had gone above and beyond in its sound mitigation efforts. The report is attached as Exhibit F. The report also noted that there was no sound from the Amphitheater audible in the Covered Bridge neighborhood during the test, and that sound was below allowable levels in the Hill Country Estates neighborhood, the only Appellant found by the Court of Appeals to have the right to bring this appeal before this Board, assuming this Board is satisfied that Hill Country Estates has standing to do so.[3]

The Church strongly disagrees with Appellants' characterization that the Church has a "penchant for disregarding City Code," particularly when they mention only two alleged citations in the past eight years.[4] The Church has endeavored, and continues to endeavor, to operate the Amphitheater pursuant to all directives that it receives from the City, including the restrictions contained in the Restrictive Covenant and the City Code noise ordinances.

Additionally, Appellants contend that the Church should have been required to obtain a Temporary Use Permit ("TUP"), pursuant to a potential 2013 code amendment to City Code Section 25-2-921(C) concerning outdoor uses in residential zoning districts. Not only did the City not pass such an amendment, but such an amendment would not have applied to the Church.

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[3] The Court of Appeals held that the trial court was correct in dismissing Covered Bridge's claims, as Covered Bridge did not file a separate appeal related to the Church's project. As a further, and elementary, matter, the Church asserts that Hill Country Estates is not in the City of Austin, and does not have standing for this appeal. AUSTIN CITY CODE § 25-1-2(A)(1). It is neither in the zoning jurisdiction nor within "500 feet" of the Church's property to assert rights under City Code. *Id.* § 25-2-2(c). It is neither "immediately adjoining" nor with "200 feet" of the Church to assert rights under Chapter 211, even if this was a zoning case, which it is not. TEX. LOC. GOV'T CODE § 211.006(d)(2), § 211.007(c). The issue of standing to even bring this particular appeal must be determined by the Board of Adjustment. *See* Court of Appeals decision, p. 14. The Church's position, based upon the full facts, is that Hill Country Estates lacks standing for this appeal. The City of Austin agrees with the Church's position, as it also raised these points in its Plea to the Jurisdiction in the trial court.

[4] The Church acknowledges that it has received three notices of violations from the City related, respectively, to its septic system, its recycling plan, and its site plan. None of these notices involved the Amphitheater, and each was rectified promptly after it was brought to the Church's attention.

Because the Church's site development permit was issued in 2011, the Church likely would be grandfathered in from a 2013 amendment.

The neighbors also contend that the Church should be required to seek a Conditional Use Permit ("CUP"). However, the City resolution (20120412-024) and ordinance (20130228-074) were enacted after the Church's site development permit was issued, and therefore the Church is grandfathered from obtaining a CUP.

B. Operation of the Amphitheater

While Appellants make much of public statements made many years before the Amphitheater was built, let alone operational, the relevant evidence for this Board is how the Amphitheater is operated in practice today. The undisputed evidence is that the Church has continuously listened to and addressed the City's directions concerning the use and construction of the Amphitheater, to make sure it is in complete compliance with all City regulations. Each event held at the Amphitheater since it began its operations in July 2015 has been for the purpose of religious assembly. The Amphitheater is scheduled to hold approximately 20 events total in 2015, for an average of 3.33 events per month. All of these religious assembly events have been operated in compliance with City directives, City Code, and the Restrictive Covenant.

The Church does not use the Amphitheater for commercial, for-profit events and operates in full compliance with the Restrictive Covenant.[5] *See* Exhibit G, Declaration of John Capezzuti. The Restrictive Covenant allows the Church to collect money from ticketed events only for the purpose of covering its own operating expenses. *See* Exhibit C, Restrictive Covenant, at I.D. ("Except for occasional charitable events . . . [t]icketed events may charge only nominal fees to cover utilities, maintenance, and other administrative and operational expenses."). The Church reads the Restrictive Covenant to prohibit use of the Amphitheater for commercial, for-profit events.

Many of the events at the Amphitheater are free to the public, with the Church paying the costs for artists to appear. When the Church has an event for which a ticket is necessary, ticket proceeds generally are to the benefit of the performing artist, the artist's booking agent, and/or the third-party ticket vendor. The nominal fees the Church receives as the result of ticket sales rarely cover even the Amphitheater's operating expenses. Again, the Church is allowed to recoup its utilities, maintenance, and other administrative and operational expenses pursuant to the Restrictive Covenant.

[5] The Church questions Appellants' ability to contest the Restrictive Covenant, as that document is a contract between the City and the Church to which Appellants are not a party and are not beneficiaries. Additionally, the Restrictive Covenant makes clear that it can 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." Exhibit C, Restrictive Covenant, at IV.D.

In sum, the Church operates the Amphitheater no differently than the Main Worship Center building itself. The Amphitheater holds the same types of events as would be held in the Main Worship Center, but in a different building on the Church's property. The Amphitheater is the Church. Mr. Guernsey has previously determined that this is an acceptable religious assembly use, and his determination is supported not only by City Code, but also by the applicable state and federal laws that govern the use of land for religious assembly purposes.

II. Applicable State and Federal Law Concerning Religious Land Use.

The Amphitheater presents a special case for this Board's review because it involves religious land use. State and federal law contemplate protections for religious assembly that are much broader than the City Code definition. To the extent City law conflicts with those state and federal provisions, the state and federal provisions control.

A. The Texas Religious Freedom Restoration Act

The Texas Religious Freedom Restoration Act ("TRFRA") provides that "a government agency may not substantially burden a person's free exercise of religion" unless the government agency can show that the application of the burden furthers "a compelling government interest" and is also "the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem Code § 110.003. "Free exercise of religion" is defined as "an act or refusal to act that is substantially motivated by sincere religious belief." *Id.* § 110.001(a)(1). "[I]t is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief." *Id.*

A municipality of the state of Texas, such as the City of Austin, and a board of municipality, such as the Board of Adjustment, each qualify as a "government agency," and therefore are prohibited from imposing substantial burdens on free exercise. *Id.* § 110.001(2). TRFRA applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority and to any act of a government agency in granting or refusing to grant a government benefit to an individual. *Id.* § 110.002.

The Texas Supreme Court interpreted TRFRA for the first time in *Barr v. City of Sinton*, 295 S.W.3d 287, 300 (Tex. 2009). The Court's analysis sets forth four questions for a court's consideration when a violation of TRFRA is alleged: (1) Does the ordinance or action in question burden the free exercise of religion? (2) Is the burden substantial? (3) Does the ordinance further a compelling government interest? and (4) Is the ordinance the least restrictive means of furthering that interest? *Id.* at 299. The *Barr* decision is attached as Exhibit H.

1. Free Exercise

At the outset, it is important to note that the City has already determined that the Amphitheater is for the purpose of religious assembly. Moreover, courts generally will not question the sincerity of particular religious beliefs, because, as the United States Supreme Court has repeatedly stated, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 887 (1990) (citation omitted). Only Appellants contend that religious freedom is not at issue here, and only with reference to the City Code's strict definition of what constitutes "religious assembly." TRFRA, however, contemplates protections for free exercise that are much broader than what City Code allows.

2. Substantial Burden

In the *Barr* case, Plaintiff Pastor Rick Barr offered housing and religious instruction to men recently released from prison in two homes he owned in the City of Sinton. *Barr*, 295 S.W.3d at 290. In response to this activity, the city passed an ordinance that effectively banned Barr's ministry from the city. *Id.* The city argued that Barr's free exercise was not involved because a halfway house need not be a religious operation, but the Court rejected that argument, noting that "the fact that a halfway house *can be* secular does not mean that it *cannot be* religious." *Id.* at 300 (emphasis in original). Here too, just because an amphitheater can be secular does not mean that the Church's Amphitheater cannot be religious.

The Court went on to define "substantial" as having two basic components: "real vs. merely perceived, and significant vs. trivial." *Id.* at 301. "[T]he focus is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression." *Id.* The burden is measured from the perspective of the person and not the government agency. *Id.* Because the ordinance at issue in the *Barr* case ended Barr's ministry as a practical matter, the Court concluded that the ordinance substantially burdened Barr's free exercise. *Id.*

The Court further noted that "a burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else." *Id.* at 303. Additionally, nothing in TRFRA suggests that an individual must be cited or charged with a crime under a challenged law in order to establish that the burden on his free exercise imposed by that law is substantial. *Id.* Finally, "[a] restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely restricted." *Id.* at 305.

Subsequent to the decision in *Barr*, the Fifth Circuit Court of Appeals decided the case of *Merced v. Klasson*, 577 F.3d 578 (5th Cir. 2009). A copy of this decision is attached as Exhibit I. In *Merced*, a combination of city ordinances forbid the keeping and slaughter of four-legged animals within its borders, a ban that resulted in preventing practitioners of the Santeria faith

from performing ceremonies essential to their religion. *Id.* at 581. Plaintiff Jose Merced was a Santeria priest who for sixteen years regularly preformed ritualistic animal sacrifices on his residential property in accordance with his faith, and challenged the ordinances as substantial burdens to his free exercise. *Id.* at 582.

The court in the *Merced* case noted that "at a minimum, the government's ban of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion." *Id.* at 590. "The relevant inquiry is . . . whether the regulations substantially burden a specific religious practice." *Id.* at 591. While Merced could still perform some Santeria ceremonies, the city's ordinances wholly prevented him from performing the particular ceremony necessary to initiate a Santeria priest. *Id.* Because the ordinances amounted to a complete ban of this specific religious practice, the court found that they substantially burdened Merced's free exercise rights. *Id.* As in *Merced*, any attempt to completely ban the religious activities that occur in the Amphitheater would amount to a substantial burden of the Church's free exercise of religion.

Appellants' interpretation of City Code would substantially burden on the Church's free exercise of religion. Reversal of the land use determination, the site plan approval, the Restrictive Covenant, or the building permit could have effect of ending the Church's use of the Amphitheater, a complete ban on religious assembly. Similarly, the arduous process of rezoning would work a severe restriction on the Church's right to free exercise and completely ban that exercise until the rezoning was obtained. Any requirement of seeking a temporary or conditional use permit for each event also would substantially burden Church's free exercise, and would unnecessarily burden City resources for a use the City has already approved. In short, each of Appellants' desired outcomes amounts to a substantial burden on the Church's free exercise rights.

3. Compelling Government Interest

The Church does not argue that because the Amphitheater is used for religious assembly the Church has carte blanche to use the Amphitheater however and whenever the Church sees fit. The City of Austin can regulate the Amphitheater, and indeed has done so. But under the law, the City's regulation must be in furtherance of a compelling government interest and must be the least restrictive means of furthering that interest.

The Texas Supreme Court made clear in *Barr* that because free exercise is a fundamental right, a "compelling interest" can only be found in "interests of the highest order," and only to "avoid the gravest abuses that endanger paramount interests." *Barr*, 295 S.W.3d at 306 (citation omitted). "[C]ourts must look beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* (citation and internal punctuation omitted).

For example, in the *Barr* case, the city argued that the ordinance in question served a compelling interest in advancing safety, preventing nuisance, and protecting children. *Id.* at 307. The Court, however, noted no evidence supported the city's assertion that the halfway houses presented a safety problem, nuisance, or threat to children, particularly in light of Barr's testimony that he only accepted nonviolent offenders. *Id.*

Assuming without conceding here that the City has a compelling interest in regulating the Amphitheater, the City is, in fact, regulating the Amphitheater. The City required the Church to enter into the Restrictive Covenant, which limits the types of events it may hold, and the City requires the Church to adhere to Section 9-2-5 of the City Code with respect to the allowed decibel levels and operating hours. The question then becomes whether these regulations are the least restrictive means of furthering these interests.

Additionally, the City has never asserted that it has a compelling interest in keeping religious assembly indoors, as Appellants contend. Appellants offer no support whatsoever for their assertion that "[a]llowing outdoor religious worship on any residential lot is likely to lead to situations where people with differing religious beliefs would interact and potentially conflict." For its part, the City has made no distinction between religious assembly that occurs indoors and religious assembly that occurs outdoors, and Appellants' strained interpretation of City Code should not be allowed to replace the judgment of City officials. It is hard to imagine that the City would ever create a precedent that would prohibit outdoor church services, such as Easter services, sunrise prayer services, or tent revivals. It is also hard to imagine how or why the City would begin to regulate the kinds of religious assembly that would be allowed outdoors and the kinds of religious assembly that would be prohibited outdoors.

4. Least Restrictive Means

The last inquiry under the *Barr* test requires the City to show not only that its conduct is narrowly tailored to combat the compelling interest it has identified, but also that it is using the least restrictive means possible to do so. *See Merced*, 577 F.3d at 594 ("TRFRA requires the least restrictive means, not merely less than a complete ban."); *Barr*, 295 S.W.3d at 308 ("TRFRA requires that even when the government acts in furtherance of compelling interest, it must show that it used the least restrictive means of furthering that interest."). For example, in the *Merced* case, the court found that the city was not using the least restrictive means because Merced was able to propose "no fewer than three less restrictive alternatives." *Merced*, 577 F.3d at 595.

None of Appellants' proposals meet this least restrictive means test. Instead, as discussed above, Appellants' proposals amount to a complete ban of the Church's protected religious activity. Appellants are clearly aware of the TRFRA standards, as they mention TRFRA more than once in their briefing. But Appellants do not even attempt to argue that the outcomes Appellants suggest are the least restrictive means of allowing the Church to engage in protected

religious activity. While the current restrictions may not be the least restrictive means of allowing the Church to engage in protected activity, they certainly are somewhat tailored to addressing Appellants' concerns. The Board therefore should reject this appeal.

B. The Federal Religious Land Use and Institutionalized Persons Act

Two provisions of the Federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") are relevant the Board's review. The first, entitled "substantial burdens," imposes the same standard of review on land use regulations that TRFRA imposes, as discussed above. *Compare* 42 U.S.C. § 2000cc(a)(1) *with* Tex. Civ. Prac. & Rem Code § 110.003. This portion of RLUIPA would apply with equal force here, but is not discussed further in light of the overlap.

The second section of RLUIPA, entitled "discrimination and exclusion," contains three subsections. The third subsection prohibits imposition or implementation of a land use regulation that "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." *Id.* § 2000cc(b)(3)(A)–(B).

Under RLUIPA, a "land use regulation" is "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." *Id.* § 2000cc-5(5). "Religious exercise" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). RLUIPA further provides that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." Here, RLUIPA would apply to any application of the City's zoning or land use laws to the extent they limit or restrict the Church's use of its land.

RLUIPA does not define "jurisdiction," but at least one federal court in Texas has concluded that "[a]s applied to a land use regulation like a zoning ordinance, 'jurisdiction' logically refers to the geographical area covered by [the] ordinance." *Elijah Grp., Inc. v. City of Leon Valley*, 2009 U.S. Dist. LEXIS 92249, at *28 (W.D. Tex. Oct. 2, 2009). Since a city's zoning ordinance applies to the entire city, in the context of a zoning ordinance, "jurisdiction" means "city." *Id.*

Appellants' interpretations of the applicable regulations would amount to an unreasonable limitation on the Church's religious assemblies. As discussed above, Appellants suggest only alternatives that would end religious assembly at the Amphitheater altogether or would substantially limit the Church's ability to engage in free exercise of religion at the Amphitheater. This unreasonable result cannot stand under RLUIPA. Appellants' appeal should be rejected for this additional reason.

III. Conclusion

The City allowed the Church to build the Amphitheater, correctly recognizing that the Amphitheater is for religious assembly purposes. The Church, pursuant to its legal and constitutional rights and in reliance upon the City's representations and contractual promises, built the Amphitheater at great expense. Since its opening, the Church has used the Amphitheater for religious assembly purposes. The Church has also gone above and beyond in its sound mitigation efforts to minimize the impact of its religious assembly events on Appellants. Moreover, the Church has followed each directive from the City regarding use of the Amphitheater, including entering in to the Restrictive Covenant and adhering to the applicable noise ordinance contained in the City Code.

Any further restrictions by the City on the Church's ability to use the Amphitheater, over and above the current restrictions and Restrictive Covenant, may cause the City to violate state and federal law, as well as the Texas and United States Constitutions. Freedom of religion, and the laws that protect this freedom, are in many respects some of the most important laws in our country. These laws were previously recognized by the City. Appellants' efforts, if sustained, could infringe on the laws that protect the fundamental rights that are essential to the fabric of our great nation. Attached to this letter as Exhibit J are several letters from supporters of the Amphitheater, attesting to its religious assembly purpose. Also attached as Exhibit K is a copy of a petition the Church circulated and approximately 450 signatures, as well as individual comments, gathered in support of the Amphitheater.

The Church asks that this Board reject Appellants' appeal and affirm each action of the City with respect to the Amphitheater. Please feel free to contact me, should you have any further questions.

Sincerely,

Geoffrey D. Weisbart

Enclosures

EXHIBIT A

DECLARATION OF PASTOR RANDY PHILLIPS

My name is Pastor Randy Phillips. I am over 21 years of age, am of sound mind, and am fully competent to make the statements contained in this Declaration. Each of the statements below is within my personal knowledge and is true and correct to the best of my knowledge.

1. Ten years ago our small congregation began in Westlake High School with big dreams and one passion: let's use the arts to attract Austin into an encounter with Jesus Christ. Today that dream has been realized. Thousands of people gather each weekend at LifeAustin Church to celebrate their transformation stories in unique venues, including the Amphitheater.

2. In the few months that the Amphitheatre has been open, stories of hope and resurrection pour in week after week. From the young lady who attended a worship concert in the Amphitheatre who had plans of suicide that she abandoned, to the fatherless young man who gave his heart to Jesus Christ at a Back-To-School event, the Amphitheatre has welcomed so many who would never have come inside a traditional church. I bear witness to the fact, and attest through my personal observation and involvement, that the Amphitheater and its use is an integral part of the religious assembly of our Church.

3. Our congregation recognized early on the uniqueness of our city in its passion for music. Our congregation understood the great chasm between Christianity and the population of Austin. We asked ourselves this question: how can we invite people to have a spiritual conversation? With that question as the catalyst, hundreds of our members and friends gave sacrificially to make the Amphitheatre a reality. Today we are so proud of what God has done through this venue.

4. One great win among so many happened Veteran's Day Sunday. We invited veterans from Central Texas so that we could honor the men and women who served our country. Hundreds of veterans filled the Amphitheatre and listened to patriotic music, heard testimonies from those who saw combat, and were led in prayer for those serving abroad. I sat in silent gratitude and thought of the great sacrifice our church members made to make this moment possible. At the conclusion of the evening, proud veterans thanked our church and asked, "Can we please do this again next year?"

5. As church attendance has trended down nationwide, LifeAustin has seen meteoric growth. People can't wait to get to the Church and the Amphitheater. Unique venue, unique City, unique Savior. Transformation happens here.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on the 23 day of November, 2015.

Pastor Randy Phillips

EXHIBIT B

Travis CAD

Property Search Results > 101541 LIFE AUSTIN INC for Year 2015

Property

Account

Property ID:	101541	Legal Description:	ABS 569 SUR 94 MCCLURE H ACR 53.28
Geographic ID:	0101480301	Agent Code:	
Type:	Real		
Property Use Code:			
Property Use Description:			

Location

Address:	8901 W STATE HY 71 TX 78735	Mapsco:	611K
Neighborhood:	EXEMPT COMMERCIAL PPTY	Map ID:	010247
Neighborhood CD:	00EXE		

Owner

Name:	LIFE AUSTIN INC	Owner ID:	1357961
Mailing Address:	8901 W HIGHWAY 71 AUSTIN , TX 78735-8015	% Ownership:	100.0000000000%
		Exemptions:	EX-XV

Values

(+) Improvement Homesite Value:	+	$0		
(+) Improvement Non-Homesite Value:	+	$11,479,168		
(+) Land Homesite Value:	+	$0		
(+) Land Non-Homesite Value:	+	$2,901,096	Ag / Timber Use Value	
(+) Agricultural Market Valuation:	+	$0		$0
(+) Timber Market Valuation:	+	$0		$0
(=) Market Value:	=	$14,380,264		
(–) Ag or Timber Use Value Reduction:	–	$0		
(=) Appraised Value:	=	$14,380,264		
(–) HS Cap:	–	$0		
(=) Assessed Value:	=	$14,380,264		

Taxing Jurisdiction

Owner: LIFE AUSTIN INC
% Ownership: 100.0000000000%
Total Value: $14,380,264

Entity	Description	Tax Rate	Appraised Value	Taxable Value	Estimated Tax
01	AUSTIN ISD	1.202000	$14,380,264	$0	$0.00
02	CITY OF AUSTIN	0.458900	$14,380,264	$0	$0.00
03	TRAVIS COUNTY	0.416900	$14,380,264	$0	$0.00
0A	TRAVIS CENTRAL APP DIST	0.000000	$14,380,264	$0	$0.00
2J	TRAVIS COUNTY HEALTHCARE DISTRICT	0.117781	$14,380,264	$0	$0.00
68	AUSTIN COMM COLL DIST	0.100500	$14,380,264	$0	$0.00
	Total Tax Rate:	2.296081			
				Taxes w/Current Exemptions:	$0.00
				Taxes w/o Exemptions:	$330,182.51

Improvement / Building

Improvement #1: OFFICE LG >35000 **State Code:** F1 **Living Area:** 74514.0 sqft **Value:** $11,107,086

Type	Description	Class CD	Exterior Wall	Year Built	SQFT
1ST	1st Floor	C - 5		2012	36720.0
2ND	2nd Floor	C - 5		2013	37794.0
501	CANOPY	A - *		2013	3447.0
611	TERRACE	CA - *		2013	8146.0
413	STAIRWAY EXT	S - *		2013	1.0
551	PAVED AREA	AA - *		2012	263521.0
482	LIGHT POLES	* - *		2013	13.0
611	TERRACE	CA - *		2013	1980.0

Improvement #2: OFFICE (SMALL) **State Code:** F1 **Living Area:** 3888.0 sqft **Value:** $372,082

Type	Description	Class CD	Exterior Wall	Year Built	SQFT
1ST	1st Floor	C - 5		2015	3888.0
501	CANOPY	S - *		2015	3636.0
611	TERRACE	CA - *		2015	4670.0

Land

#	Type	Description	Acres	Sqft	Eff Front	Eff Depth	Market Value	Prod. Value
1	LAND	Land	53.2800	2320876.80	0.00	0.00	$2,901,096	$0

Roll Value History

Year	Improvements	Land Market	Ag Valuation	Appraised	HS Cap	Assessed
2016	N/A	N/A	N/A	N/A	N/A	N/A
2015	$11,479,168	$2,901,096	0	14,380,264	$0	$14,380,264
2014	$10,310,124	$745,920	0	11,056,044	$0	$11,056,044
2013	$10,286,935	$745,920	0	11,032,855	$0	$11,032,855
2012	$0	$745,920	0	745,920	$0	$745,920
2011	$0	$745,920	0	745,920	$0	$745,920

Deed History - (Last 3 Deed Transactions)

#	Deed Date	Type	Description	Grantor	Grantee	Volume	Page	Deed Number
1	3/29/2007	WD	WARRANTY DEED	GOULD JOHN L & ALEXANDER LEE	PROMISELAND CHURCH WEST THE			2007056641TR
2	3/29/2007	WD	WARRANTY DEED	PROMISELAND CHURCH WEST THE	PROMISELAND CHURCH WEST THE			2007056641TR
3	6/27/2005	MS	MISCELLANEOUS	PROMISELAND CHURCH WEST THE	LIFE AUSTIN INC			

Questions Please Call (512) 834-9317

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EXHIBIT C

Site Development Permit No. SP-2011-0185C

RESTRICTIVE COVENANT

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 T. 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

After Recording, Please Return to:
City of Austin
Planning and Development Review Department
P. O. Box 1088
Austin, Texas 78767-1088
Attention: Sarah Graham **Case No.** SP-2011-0185C

Exhibit A

Legal Description

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

BEGINNING at a 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°50'08"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) N60°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\

EXHIBIT D

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

EXHIBIT E

THE THIRTEENTH COURT OF APPEALS

13-13-00395-CV

HILL COUNTRY ESTATES HOMEOWNERS ASSOCIATION AND COVERED BRIDGE PROPERTY OWNERS ASSOCIATION, INC.
v.
GREG GUERNSEY AND THE CITY OF AUSTIN

On Appeal from the
250th District Court of Travis County, Texas
Trial Cause No. D-1-GN-12-000878

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes the judgment of the trial court should be affirmed in part and reversed and remanded in part. The Court orders the judgment of the trial court AFFIRMED IN PART and REVERSED IN PART, and the case is REMANDED for further proceedings consistent with its opinion. Costs of the appeal are adjudged 50% against appellants and against appellees.

We further order this decision certified below for observance.

May 7, 2015

NUMBER 13-13-00395-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

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

v.

GREG GUERNSEY AND THE CITY OF AUSTIN, **Appellees.**

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

MEMORANDUM OPINION

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

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

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

I. BACKGROUND[1]

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

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

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

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

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

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

> Thank you for meeting with me today to discuss whether an outdoor amphitheater is considered an accessory use[2] to an overall religious assembly use under RR or SF-1 zoning.

---

[2] An accessory use is a use that:

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

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

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

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

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

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

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

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

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

> the property. I understand that the educational and musical presentations will be limited in scope and will be subordinate to the primary religious assembly use. I also understand the church will be compliant with all applicable City Codes and ordinances, including the noise ordinance.
>
> If the primary use of one or both of the facilities does change from a religious assembly use to an outdoor entertainment or an indoor entertainment use, a zoning change may be required.

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

A. Religious Assembly Use will be permitted (as defined in the Austin Land Development Code), including such uses as:

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

B. Customary and incidental accessory uses will be permitted, including such uses as:

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

C. Religious Assembly Use may include occasional charitable events (including concerts and performances) for the benefit of an individual or family in need or for a charitable organization or charitable cause.

D. Except for occasional charitable events under Paragraph C, above, ticketed events may charge only nominal fees to cover utilities, maintenance, and other administrative and operational expenses.

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

F. The outdoor amphitheater is subject to all applicable City ordinances.

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

H. The restrictions in this Article I shall be interpreted consistent with all applicable local, state, and federal laws, including but not limited to constitutional requirements.

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

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

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

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

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

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

II. PLEA TO THE JURISDICTION

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

A. Standard of Review

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

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

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

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

B. Hill Country and Covered Bridge's Claims

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

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

C. Discussion

a. Ultra Vires Claims Against Guernsey

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

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

1. Use Determination of the Church Project

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

forward its appeal to the Board of Adjustment.[6]

b. Due Process Claims

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

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

c. Vagueness Challenge

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

d. Summary

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

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

III. CONCLUSION

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

GINA M. BENAVIDES,
Justice

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

EXHIBIT F

Austin Police Department

City of Austin: Founded by Congress, Republic of Texas, 1839
P.O. Box 689001, Austin, Texas 78768-9001 Telephone (512) 974-5000
www.cityofaustin.org/police

Sound Report-Life Austin Church
8901 W Hwy 71, Austin Texas

On June 4th 2015 beginning at 12:00pm a sound evaluation was completed at Life Austin Church amphitheater in conjunction with APD and the City of Austin Music Office. The Equipment used was three Bruel & Kjaer 2250 Sentinel base units equipped with a weather station for wind speed and direction, and two Bruel & Kjaer 2250 handheld sound meters. Officer Cory Ehrler (APD) and David Murray (City Music Office) conducted the measurements and evaluation. During the evaluation the following persons were present as well;

Don Pitts (Director/City of Austin Music Office),
Zack Richards (Big House Sound),
Randy Phillips (Head Pastor/Life Austin Church),
John Capezzuti (Director of operations/Life Austin Church),
Mark Numan (Sound/Life Austin Church),
Barry Floyd (Facilities Manager/Life Austin Church).

After walking through the property three locations were chosen for the Sentinel base units, one at the east property line, one at the west property line, and one at the front of house at the mixer. The locations were titled;

FOH mix position,
Stage left property line,
Stage right property line.

See attached google map with pin drops for visual reference.

The measurements began at 12pm and continued until 3pm. A song was chosen that would represent the genre of music that would most likely be played at this location but also covered a large portion of the frequency spectrum to include the low end C weighted frequencies at and below 80 Hz. This song was repeated for consistency in measurements while we were in the neighborhood measuring with the handheld meters.

Sound and Stage