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Dear Zoning and Platting Commissioners: *via email*

Our firm represents Friends of Zyle Road, a group of residents living along Zyle Road who have been monitoring the proposed Live Oak Springs development for more than five years and who have grave concerns about the safety and legality of what is being proposed. For the reasons set forth herein, we ask you to deny the Application as it does not meet "all applicable regulations." See Tex. Loc. Gov't Code § 212.005. In the alternative, we ask that you send the proposed restrictive covenant to Travis County Commissioners Court before voting on the preliminary plan or otherwise make clear that any approval of the preliminary plan is contingent on the Commissioners Court approving the language of the restrictive covenant.

To be clear, it is our position that the law does not support the approval of this preliminary plan, because there is no basis for a balance of tract waiver. Even if there was a basis for the waiver, the draft restrictive covenant is inadequate to meet all applicable City and County regulations. However, at this point, Friends of Zyle Road would support a robust restrictive covenant and a commitment to enforce it. Given the short notice and timeline since the current restrictive covenant language was proposed, we have not been able to negotiate adequate language with the Single Office and the Applicant. We are copying all parties, in the hopes of initiating these negotiations.

I. Executive Summary

The Live Oak Springs development is proposed on a 164.6-acre environmentally-sensitive tract that is divided by Slaughter Creek into two landlocked properties—each accessible by only one road. The southern 140-acre portion is accessible only by way of Zyle Road, a rural dead-end road that already inadequately serves more than 90 lots, many of which were developed in the 1970s and 80s. The northern 25.6-acre portion is accessible only by Derecho Drive, another rural dead-end road that contains blind curves and already serves about 80 lots.

Residents on Zyle Road and Derecho Road are already concerned with the day-to-day safety of their roads, due to their narrow width, bar ditches, and lack of sidewalks. These inadequacies further underscore concerns related to emergency access and wildfire evacuation because each contains only one ingress/egress route. It is because of events like the Steiner Ranch fire, that County and City subdivision regulations require the developer of all new subdivisions to provide at least two access streets. After Travis County Commissioners expressed concern over the lack of a second access street to the Live Oak Springs subdivision, an earlier proposal for an 82-home subdivision planned to meet this requirement by building a bridge in an environmentally-

sensitive area over Slaughter Creek. This proposal was rejected by ZAP last August and was not appealed by the Applicant. No foreseeable second access street exists at this time.

The current 30-home Live Oak Springs subdivision, as proposed, rests on undocumented assertions that a secondary access road can be provided in the future. If ZAP approves this subdivision, it will be approving a division of the original tract that will create unplatted lots on which a reasonable use has not been shown, and thus are in violation of the Land Development Code and State law. Perhaps more concerning though, is that the restrictive covenant that accompanies the current proposal, will actually allow for additional development without a true second access street, in violation of what would be permitted under code today.

II. Background and previous rejections of this project

David Knapp owns Artek Investments (the "Applicant"), which owns the 164.6-acre tract of land in the southwest Austin ETJ. The tract is located in the Barton Springs Contributing Zone of the Drinking Water Protection Zone—surrounded on the west by water quality preserve land, the east by a large ranchland homestead with wildlife protections, and bisected by Slaughter Creek. Access to the 25.6-acre northern piece is via Derecho Drive and access to the 140-acre southern piece is via Zyle Road by way of Morninghill Drive.

a. Travis County Commissioners expressed concern over one access street because of the wildfire or emergency evacuation risk.

Generally, and as a matter of public safety and efficient transportation, our Travis County and City of Austin regulations require all new subdivisions to have at least two access streets that connect to different external streets. *See* LDC § 30-2-158. Approximately two years ago, the Applicant appeared before the Travis County Commissioners Court to request two variances to allow it to build an 82-home subdivision on the property, whereby the vast majority of those homes would be accessed only by Morninghill Drive/Zyle Road and the remaining homes would be accessed only by Derecho Drive. The Applicant requested: (1) a platting board variance to allow a dead-end street more than 2,000 feet long; and (2) a variance from the requirement that a new subdivision must have at least two access streets and each of the two access streets must connect to a different external street. *See* LDC § 30-2-152(B); § 30-2-158(B).

In light of neighbors' comments and what happened in Steiner Ranch, the Travis County Commissioners expressed their hesitation to approve an 82-home subdivision with only a single access street. It is important to emphasize that the neighbors' and Commissioners' concerns over fire and emergency evacuation are legitimate. In an August 2019 audit report on Wildfire Preparedness, the City Auditor described a map tool developed by the Wildfire Division to show wildfire risk information for Austin. The proposed Live Oak Springs development and Zyle Road appear on the Wildfire Risk Map in an area with the highest wildfire risk.

In July of 2018, Travis County Commissioners ultimately passed a motion to grant the variance for a dead-end street, but that approval was contingent on the Applicant finding a second access street. At that time, a bridge over Slaughter Creek was proposed to connect Zyle Road/Morninghill Drive with Derecho Drive, but the bridge required an environmental variance

from the City of Austin. County Commissioners made no inquiry into whether the bridge would cause environmental harm or was otherwise appropriate.

b. ZAP rejected a variance request for the bridge, meaning no potential second access street exists.

In all watersheds other than an urban watershed (such as the Barton Springs Contributing Zone of the Drinking Water Protection Zone), a major waterway's critical water quality zone may only be crossed by an arterial street that is identified in the Transportation Plan. LDC § 30-5-262(B)(1). Slaughter Creek is a major waterway, and neither Derecho Drive, Morninghill Drive, nor Zyle Road are identified as arterial streets in the Transportation Plan. Thus, a variance was required for the 82-home development. However, consistent with Staff's recommendation, on August 7, 2018, ZAP denied the variance.

The variance was necessitated by the scale, layout, construction method, or other design decision made by the applicant. *See* 30-5-41(2)(a). In other words, the Applicant would not have needed the bridge, if he would have reduced the scale from 82 homes to 30 homes.

The Applicant eventually withdrew his appeal of ZAP's denial and indicated his willingness to redesign the project to a maximum of 30 homes. Friends of Zyle Road indicated at that time that they would not oppose a plan that limited development to 30 homes, but wanted to work together to help ensure any concerns or potential problems were addressed ahead of time. In particular, neighbors were concerned that the Applicant could attempt to circumvent the 30-home limit by building the subdivision in phases.

When Friends of Zyle Road and other neighbors were not apprised of the details of the Applicant's plan, until after the ZAP hearing was noticed, it appeared the Applicant has done just what neighbors feared—the subdivision plan, as proposed with the restrictive covenant, would effectively circumvent the 30-home limit that was the primary concern of the neighbors.

c. The current proposed Live Oak Springs preliminary plan allows for more development than what current code would permit.

Although current regulations require all new subdivision to have at least two access streets that connect to different external streets, Title 30 provides a "compromise" to this general rule that would allow the Applicant to develop with a single access street a new subdivision that contains no more than 30 homes. While, it would appear at first blush that the Live Oak Springs Applicant has now re-submitted its application for a subdivision that is limited to 30 homes, the nature of the proposal indicates the Applicant's desire to ultimately develop something like the original 82-home subdivision regardless of the number of access streets.

First, rather than plat the entire tract with a plat note that makes it clear the entire tract is limited to 30 homes until a second access street is provided, the Applicant is seeking a balance of the tract waiver. However, no demonstration has been made that a secondary access road can provide for reasonable use of the balance of the tract in the future. Another danger would be that without a restriction filed in the property records, future owners and future Single Office staff,

would not realize the 30-home limit applied to Live Oak Springs AND any additional development. And while a restrictive covenant may be one tool to fix that potential danger, instead of clearly regulating future development on the remaining tracts, the proposed restrictive covenant, as drafted, would actually expand development rights beyond what would be allowed today.

III. The Application does not demonstrate compliance with subdivision requirements and would be in violation of code.

Little in ZAP's backup materials provide clarity about this complex situation, and ZAP's procedural role is obscured by the reference to administrative variances for which there is no documentation that they have been granted by the Single Office. ZAP is now being told that you have no authority to reject the preliminary plan, when in fact, there is nothing in the record to demonstrate compliance with applicable City and County regulations and State law.

a. Single Office Balance of the Tract Waiver.

Section 30-2-34(B) requires that "[a]n applicant shall include all land in the original tract in an application for preliminary plan or plat approval." Section 30-2-34(D) allows the Single Office to waive the requirement to plat all land in the original tract, but only "if the single office determines" that four separate requirements are met:

- (1) subdividing only a portion of the original tract will not substantially impair the orderly planning of roads, utilities, drainage, and other public facilities;
- (2) the portion of the original tract contiguous to the area to be subdivided has direct access to a public street, or the applicant has provided access to a public street...;
- (3) a reasonable use of the balance of the original tract is possible; and
- (4) the applicant has mailed...to all owners of land that is a portion of the original tract... a request that each owner provide written confirmation to the director that:
 - (a) the owner's land is not a legal lot or tract; and
 - (b) the owner must plat the land before the city may approve a development permit...

LDC § 30-2-34(D). It is worth pointing out that section 30-2-34(C) allows for balance of the tract variance to be granted jointly by Commissioners Court and ZAP after determining that the requirement to plat the entire tract is impractical or imposes an unreasonable hardship on the applicant. The administrative waiver under Subsection D on the other hand, spells out four distinct criteria, all of which are intentional and must be met before the waiver may be granted—otherwise, Staff would effectively read all meaning out of the Subsection D.

In reviewing the record for these four criteria, there is evidence in ZAP's backup that the owner has acknowledged that the remainder tract is not a legal tract and would need to be platted before any development could be approved. But this alone does not ensure the 30-home limit is honored. There is no evidence that the Single Office considered or made a determination on the

first three criteria. For example, although the Single Office may require that the applicant provide a schematic land plan to show that a reasonable use of the remainder tract is possible, none exist. *See* LDC § 30-2-34(F).

The Applicant's request for administrative balance of the tract waiver said:

Subdividing only a portion of the original tract will not impair the orderly planning of roads because the balance of the original tract is in the Barton Springs Zone and is bisected by Slaughter Creek and its associated critical water quality zone (CWQZ). The [LDC] prohibits road crossings of the CWQZ. Additionally, the balance of the original tract has direct access to Derecho Drive, a public street.

Seemingly, the balance of the tract would be limited by Slaughter Creek and its CWQZ but a second access street in order to demonstrate reasonable use would also be possible over Slaughter Creek and the CWQZ. The recent denial of the Slaughter Creek bridge indicates otherwise. Nor have any schematic land plans been provided that would indicate a reasonable use of the 8.79-acre tract and the 80.22-acre tract are possible. By approving this plat that leaves a remainder tract divided and unplatted, ZAP would be approving a division of property into lots that cannot be developed, and for which development would be prohibited absent some second access street that has not yet been disclosed.

Not only does this process sidestep City and County code, it sidesteps State law, which establishes additional standards, and providing that the municipal authority shall approve a plat if, among other requirements, it conforms to general plan of the municipality and its current and future streets and alleys, and it conforms to the general plan for the extension of municipality and its roads, streets, and public highways within the municipality and in its ETJ. Tex. Loc. Gov't Code § 212.010(a). In other words, ZAP's requirement to approve a plat that meets all applicable regulations is still dependent on the evaluation of existing roads and plans for future ones.

Platting only a portion of the tract will confuse what will be considered an "access street" and an "external street" for purposes of a "new" subdivision in the future, thus, how section 30-2-158 is interpreted when and if another plan is submitted for development at the end of the Live Oak Springs development. Rather than clear up this confusion, the proposed restrictive covenant, as shown in Exhibit C, would assign additional development rights to the remainder tracts.

b. The phasing agreement as a condition of the balance of the tract waiver.

As a condition to the granting of the balance of the tract waiver, the County prepared a restrictive covenant (referred to in Title 30 as a "phasing agreement"),¹ for the remaining portion of the balance of the tract, so that the document can be recorded and run with the property if it is ever sold. However, the language of the restrictive covenant must be approved by the County Commissioners, and only after the Commissioners make certain findings.

¹ Pursuant to LDC § 30-2-34(I), this "restrictive covenant" should also be deemed a "phasing agreement," but since a phasing agreement is a type of restrictive covenant, it is arguably irrelevant. Therefore, I have referred to it as a restrictive covenant here, but it would be useful to confirm with the Single Office that they are one in the same envisioned under Title 30.

While the Single Office may make a recommendation on the restrictive covenant, it is up to the Commissioners Court to approve the restrictive covenant, and you may only approve it if they determine, among other things, that the restrictive covenant accommodates the development *and protects the public interest*. LDC § 30-2-34(a)(emphasis added). The Commissioners Court has not determined whether the restrictive covenant protects the public interest, and therefore, it is premature for ZAP to be considering the Preliminary Plan.

Even more problematic are the contents of the proposed covenants, which imply that subsequent development of one or more of the unplatted lots whose creation the City and County will be agreeing to here, will be served by connecting the additional new development to Zyle Road. But it is the fact that Morninghill Drive/Zyle Road are the sole route of ingress/egress that the entire original tract is limited 30 lots under current code. Therefore, approval of this waiver will actually authorize the circumvention of the 30-lot limitation and impose unreasonable hazards on all the people dependent on Zyle Road to flee fires, travel to work, or take care of their transportation needs, an outcome that surely does not protect the public interest.

IV. Conclusion:

For the foregoing reasons, we ask that you deny this Preliminary Plan, because without a basis for granting the administrative waiver, the Application does not meet "all applicable regulations." The Applicant will suffer no hardship, in that he will be allowed to develop 30 homes as he has proposed, in an environmentally-sensitive area which is at risk of wildfires. If you approve this plan, future buyers of the nonplatted lots will be confronted with hardship due to the failure to resolve these issues as part of the platting process.

In the alternative, we ask that you defer the vote on the Preliminary Plan until the County Commissioners have had an opportunity to vote on the phasing agreement and restrictive covenant, or otherwise make any approval of the preliminary plan contingent on the County Commissioners making changes to the restrictive covenant that would ensure any future development on the remainder tract include a second access street that connects to an external street other than Zyle Road.

Thank you for your attention to this matter. Please contact me with any questions.

Sincerely,



Lauren Ice

Counsel for Friends of Zyle Road

Cc: Sue Welch, Travis County
Don Perryman, City of Austin
Terry Irion, counsel for the Applicant