



**LAW DEPARTMENT
MEMORANDUM**

TO: ZONING AND PLATTING COMMISSION
FROM: PATRICIA LINK, DIVISION CHIEF, LAND USE AND REAL ESTATE
DATE: MARCH 28, 2022
SUBJECT: C14-2018-0124 –RIVER PLACE (MILKY WAY) ZONING & RESTRICTIVE COVENANT

This memorandum concerns the neighborhood traffic analysis (NTA) referenced in a public restrictive covenant (RC) associated with Zoning Case C14-2018-0124 for property located on Milky Way Drive (Milky Way). In 2020, City staff and the property owner recorded an affidavit to correct the date of the NTA referenced in the RC. As explained below, this action did not amend or terminate the RC and Council approval was not required.

SUMMARY OF THE ZONING CASE HISTORY AND RESTRICTIVE COVENANT ACTIONS

In 2018, the property owner (applicant) applied to rezone the property from development reserve (DR) to single family residence large lot-conditional overlay (SF-1-CO). City staff conducted an NTA based on the applicant's request (Original NTA). The Commission forwarded the request to Council without a recommendation. Before Council considered the case, the applicant amended the rezoning request from SF-1-CO to townhouse and condominium residence-conditional overlay (SF-6-CO). The Commission considered the amended request and forwarded it to Council without a recommendation.

After the Commission considered the amended request, City staff revised the Original NTA based on the amended rezoning application (Revised NTA) and included the Revised NTA in Council's backup materials. Because SF-6-CO was the request presented to Council, the Revised NTA is the controlling NTA. At third reading, Council rezoned the property to SF-6-CO.

The applicant signed a RC related to the NTA.¹ This RC was recorded in the real property records. *See Exhibit A.* Subsequently, the applicant notified City staff that the RC did not reference the correct NTA (i.e. Revised NTA). City staff confirmed that the RC included an error because it referenced the Original NTA, not the controlling NTA (i.e. Revised NTA).

A correction document does not amend or terminate an existing recorded document but, instead, preserves the validity of the recorded document while still ensuring accurate official records. State law establishes the requirements for correction documents. To correct the date of the NTA, the City and the applicant signed and recorded a correction affidavit. *See Exhibit B.* The correction affidavit met the requirements in state law and, as a result, does not amend or terminate the RC. As a result, Council approval is not required.

¹ The restrictive covenant associated with this zoning case also addressed wildfire concerns.

ZONING CASE HISTORY

Initial Application

The applicant's initial application requested the City rezone Milky Way to SF-1-CO. The applicant's proposed conditional overlay would limit the number of residential units to 45 dwelling units and the development intensity for the entire site to less than 2,000 vehicle trips per day. Staff supported the applicant's request, including the proposed conditional overlay. An NTA was required and would be documented through a RC. The [staff report](#) included a NTA that was dated March 13, 2019 (Original NTA). *See* pg. 17. This NTA described the zoning request as "single family residence conditional overlay" (SF-1-CO) to allow for the construction of 45 single-family residences.

Zoning and Platting Commission – Initial Application

On [April 2, 2019](#), the Commission considered a motion to approve staff's recommendation with a new condition related to a secondary Fire/EMS emergency access. (Motion by S. Lavani, seconded by N. Barrera-Ramirez.) Commissioner King subsequently made an amendment to limit the size of each lot to a minimum of 30,000 square feet. This amendment was seconded by Commissioner Kiolbassa but failed. The primary motion failed on a 4-5 vote. The case was forwarded to Council without a recommendation.

Zoning and Platting Commission – Amended Application

On or about May 8, 2019, the applicant amended the rezoning request to SF-6-CO and proposed a conditional overlay that would limit development on the property to 1,362 vehicular trips per day. Because the amended request was a less restrictive/more intense zoning district, the case returned to the Commission.

On [July 16, 2019](#), the Commission considered the applicant's amended request. City staff did not recommend the applicant's amended request. Instead, City staff continued to recommend SF-1-CO. *See* [staff report](#) for July 16, 2019 Commission Meeting. The Commission considered a motion to approve the applicant's request to rezone to SF-6-CO. (Motion by H. Smith and seconded by B. Evans). Commissioner Denkler made a substitute motion, which was seconded by Commissioner King, to approve the neighborhood's request of SF-1-CO zoning with a minimum of 30,000 square foot lots and a maximum of 25 residential dwelling units. The substitute and primary motions failed. The case was forwarded to Council without a recommendation.

First Reading at Council

On [August 8, 2019](#), Council approved SF-6-CO zoning on 1st reading only. *See* [Minutes](#), pg. 39, Item No. 115: Motion made by CM Flannigan and seconded by CM Casar. Vote: 9-2, Mayor Pro Tem (MPT) Alter and CM Pool – no. The [backup materials](#) for Item No. 115 included the [staff](#)

[report](#) and the Revised NTA. (Note: The Revised NTA is an interlineated version of the NTA dated March 13, 2019. These revisions were made on July 22, 2019. *See* pg. 19 of the staff report.)

The Revised NTA described the zoning request as SF-6-CO to allow for the construction of up to 134 single-family residences. The Revised NTA concluded and recommended that the 134 single family residential units, in combination with existing traffic on Milky Way Drive, do not exceed the thresholds set forth in LDC Section [25-6-116](#). Moreover, the Revised NTA recommended that the intensity and uses for this rezoning be limited to no more than 134 single family dwelling units.

Second Reading at Council

On [October 3, 2019](#), Council approved SF-6-CO zoning with additional conditions on 2nd reading only. The additional conditions related to building materials, wildfire fuels, location of water source, access roads, and connectivity. *See* [Minutes](#), pg. 28, Item No. 76: Motion made by CM Flannigan and seconded by CM Casar. Vote: 9-1, CM Pool – no. The [backup materials](#) for No. 76 included the [staff report](#) and the Revised NTA. *See* pg. 22 of the staff report.

The backup materials also included a public restrictive covenant that was signed by the applicant but not by the Law Department. This public restrictive covenant only addressed the NTA. However, because Council only approved the ordinance on second reading, the Law Department did not sign or record this public restrictive covenant.

Third Reading at Council

On [October 31, 2019](#), Council approved SF-6-CO. *See* [Minutes](#), pgs. 14-15, Item No. 44: Motion by CM Flannigan and seconded by CM Casar. Vote: 8-3 MPT Alter, CM Tovo, and CM Pool – no. The [backup materials](#) for Item No. 44 included the [staff report](#) and the Revised NTA. *See* pg. 21 of the staff report. The backup materials also included a [public restrictive covenant](#) that addresses the NTA and wildfire concerns.

The conditional overlay requires two access streets or access points to an external street *unless* the development includes 30 or fewer residential units or the director determines that: (1) an additional emergency access point to an external street is provided; and (2) the completed development or uses of Milky Way (considered cumulatively with all existing or previously authorized development and uses) generates traffic that will not exceed 1,200 trips per day on Milky Way Drive as measured by the greater of a tube count taken at the time of site plan or the number in the ITE Trip General Manual. The conditional overlay also includes certain criteria for the access streets. *See* Ordinance No. [20191031-044](#).

NEIGHBORHOOD TRAFFIC ANALYSIS

A neighborhood traffic analysis (NTA) assesses the effect of a proposed project on a residential street. *See* City Code Section [25-6-112](#). More specifically, an NTA evaluates the existing and projected operating levels of a residential street and an identification of mitigation measures to minimize adverse traffic effects. City Code Section [25-6-114](#) establishes when a NTA is required.

In this instance, an NTA was required and was completed based on the applicant's initial request to rezone the property to SF-1-CO (Original NTA). However, the Original NTA was revised on July 22, 2019 (Revised NTA) because the applicant changed the rezoning request to from SF-1-CO to SF-6-CO. Both the Original and Revised NTAs concluded that the proposed rezoning would not exceed the desirable operating levels for Milky Way Drive established in City Code Section [25-6-116](#). The Revised NTA was the NTA in Council's backup materials.

PUBLIC RESTRICTIVE COVENANT AND CORRECTING RECORDED DOCUMENTS

To ensure that a future purchaser is aware that the City conducted an NTA for a specific property based on a specific zoning/rezoning application, the City utilizes public restrictive covenants. On October 31, 2019, the applicant signed a RC that concerned the NTA. *See* Exhibit A. The RC states:

Development on the Property is subject to the recommendations contained within the Neighborhood Traffic Analysis ("NTA") memorandum from the Land Use Review-Transportation Section of the Development Services Department (the "Department"), dated March 13, 2019. The NTA memorandum shall be kept on file at the Department.

The Law Department signed this RC "approved as to form" after Council acted on October 31, 2019. This document was subsequently recorded.

Subsequently, the applicant alerted City staff that the RC did not reference the correct NTA. City staff reviewed Council's backup materials and verified that the RC erroneously referenced the Original NTA. To address this error, the City and the applicant executed and recorded a correction affidavit. *See* Exhibit B.

Texas Property Code Sections 5.027-5.029 provide statutory guidance on how to appropriately correct recorded documents. These provisions preserve the validity of transactions while still ensuring accurate official records. Correction instruments recorded in the property records in accordance with these sections serve only to ensure accuracy within the property records. They are not independent transactions and do not convey any property interests.

CONCLUSION

In this instance, the controlling NTA is the Revised NTA since it was associated with the amended request and was included in Council's backup materials. This means that the RC contained an incorrect reference to the NTA and that recording a correction affidavit was appropriate. Furthermore, neither party amended nor terminated the RC by recording the correction affidavit. Therefore, Council approval was not required.



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RESTRICTIVE COVENANT

OWNER: Milky Way Holdings GP, LLC, a Texas limited liability company

OWNER ADDRESS: 9111 Jollyville Road, Suite 111
Austin, Texas 78759

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 are acknowledged.

PROPERTY: 32.429 acres of land (approximately 1,412,611 sq. ft.) in the R.L. Preece Survey No. 2, Abstract No. 2269, Travis County, Texas, said 32.429 acres of land being more particularly described by metes and bounds in **Exhibit "A"** incorporated into this covenant.

WHEREAS, the Owner of the Property and the City of Austin have agreed that the Property should be impressed with certain covenants and restrictions;

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.

1. Development on the Property is subject to the recommendations contained in the Neighborhood Traffic Analysis ("NTA") memorandum from the Land Use Review-Transportation Section of the Development Services Department (the "Department"), dated March 13, 2019. The NTA memorandum shall be kept on file at the Department.
2. Exterior walls of dwelling units on the Property shall be constructed with one of the following materials:
 - A. Materials approved by the Fire Marshal for not less than 1-hour fire resistance-rated construction on the exterior side.
 - B. Non-combustible materials approved by the Fire Marshal.
 - C. Ignition-resistant or factory treated materials on the exterior side of a building or structure on the Property.

3. Wildfire fuels in the area up to 30' from any structure on the Property:
 - A. Trees must maintain a minimum of 18 feet between crowns and be pruned to a height of 10' from the ground or 1/3 the height of the tree crown, whichever is less.
 - B. Lawns, native grasses and other vegetation should be limited in height.
4. Wildfire fuels in the area up to 100' from any structure on the Property:
 - A. Trees must maintain a minimum 12 feet between crowns (or 30' between the crown of a group of trees) and be pruned to a height of 10' from the ground or 1/3 the height of the tree crown, whichever is less.
 - B. Lawns, native grasses, and other vegetation should be limited in height.
5. A water supply source available for use on the Property shall meet the requirements of the 2015 IFC with amendments as adopted by the City of Austin.
6. If any person or entity shall violate or attempt to violate this Agreement, it shall be lawful for the City of Austin to prosecute proceedings at law or in equity against such person or entity violating or attempting to violate such Agreement, to prevent the person or entity from such actions, and to collect damages for such actions.
7. 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.
8. 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.
10. This Agreement may be modified, amended, or terminated only by joint action of both (a) a majority of the members of the City Council of the City of Austin and (b) by the Owner of the Property, or a portion of the Property, subject to the modification, amendment, or termination at the time of such modification, amendment or termination.

EXECUTED this the 31ST day of OCTOBER, 2019.

Owner:

Milky Way Holdings GP, LLC, a Texas limited liability company

By: Milestone Community Builders, LLC, a Texas limited liability company, its manager

By: [Signature]
Garrett S. Martin, President

THE STATE OF TEXAS §
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COUNTY OF TRAVIS §

This instrument was acknowledged before me on this the 31ST day of OCTOBER 2019, by Garrett S. Martin, as President of Milestone Community Builders, LLC, a Texas limited liability company, manager of Milky Way Holdings, GP, LLC, a Texas limited liability company, on behalf of said company.

[Signature: Ellen K. Harrison]
Notary Public, State of Texas

APPROVED AS TO FORM:
[Signature]
Assistant City Attorney
City of Austin





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RESTRICTIVE COVENANT CORRECTION AFFIDAVIT

STATE OF TEXAS
COUNTY OF TRAVIS

Recitals:

This Restrictive Covenant Correction Affidavit (“the Affidavit”) is to be recorded pursuant to Section 5.028 of the Texas Property Code to correct a clerical error in the date of the Neighborhood Traffic Analysis (“NTA”) memorandum referenced in Condition 1 of the original instrument attached as **Exhibit “1”** to the Affidavit (“the Restrictive Covenant”). The date of the NTA memo should correctly read “revised on July 22, 2019”.

Other than the stated correction of the NTA memo date, this Affidavit is intended to restate in all respects the Restrictive Covenant, and the effective date of this Affidavit relates back to the effective date of the Restrictive Covenant.

The Affiant, by signing this Affidavit, represents that the Affiant has personal knowledge of the facts relevant to the correction of the original recorded Restrictive Covenant, and that date of the NTA memo was incorrect. The Affiant certifies that notice has been provided to the parties to the original instrument pursuant to Section 5.028 (d)(2) of the Texas Property Code.

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CITY OF AUSTIN:

By:

J. Rodney Gonzales
Assistant City Manager
City of Austin

APPROVED AS TO FORM:

Lee Simmons
Name: Lee Simmons
Assistant City Attorney
City of Austin

THE STATE OF TEXAS

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COUNTY OF TRAVIS

This instrument was acknowledged before me on this the 11th day of August, 2020, by J. Rodney Gonzales, as Assistant City Manager of the City of Austin, a municipal corporation, on behalf of said municipal corporation.



Cathy Curtis
Notary Public, State of Texas