MEMORANDUM

To: William Burkhardt, Chair and
Members of the Board of Adjustment

From: Gregory I. Guernsey, AICP, Director
Planning and Zoning Department

Date: November 23, 2015

Subject: Case No.: C15-2015-0147
Project: LifeAustin Church (formerly known as PromiseLand West)
Location: 8901 State Highway 71 West
Appellants: Kim Butler and the Hill Country Estates Home Owners Association, and Frank Goodloe and the Covered Bridge Property Owners Association.

This is a response to an appeal of a zoning use determination and related development permits approved by Mr. Gregory Guernsey, Director of Planning & Zoning Department, who was the previous Director of the Planning & Development Review Department.

Consistent with the City's Land Development Code, the director is authorized to determine how to classify a proposed land use or activity within the various "use classifications" defined by the Code. The director makes a use determination make based on the characteristics of the proposed use and the similarities, if any, of the use to other defined land uses.

How a land use is classified can effect whether it is prohibited, allowed, or conditional within a particular zoning district. The main issue in this case is whether the outdoor amphitheater located at LifeAustin Church is appropriately considered part of the overall "religious assembly" use, which is allowed under the site's Rural Residence (RR) zoning district, or is more appropriately regarded as "outdoor entertainment," which is not allowed or a community recreation use which is allowed with a conditional use permit.

This response addresses the Appellants' appeal of the use determination, as well as related development permits and associated conditions on use of the amphitheater building. However, this response does not address other non-zoning issues raised by the Appellants, such as sound amplification permits that are currently handled by another City Department, other alleged code violations or other appeals recently filed by adjacent property owners.

BACKGROUND

A. Zoning Use Determinations

A zoning use determination is usually requested by a property owner or a representative of a property owner seeking confirmation or a determination of how a proposed use is defined in the Code and whether it is permitted, prohibited, or allowed conditionally on their property.

In most cases, how to classify a land use is clear under Code and there is little room for interpretation. Uses like auto sales, medical office or pet stores all fit clearly into specific uses categories defined in the Land Development Code. Some land uses, however, may not be perfectly defined or may conceivably fall within more than one category. Where that's the case, the director must classify a proposed use based on its similarities to other land uses that are more specifically defined in Code.

Use determinations are important to a property owner because they become the basis for the design of a site plan that will locate future improvements on a property (such as buildings, parking, landscaping, drainage and water quality facilities, etc.) and/or the design of a building on a site. As mentioned above, a use determination can also effect whether or not a particular use is allowed on a property.

Use determinations are usually done informally by various City staff concurrent with the review of a site plan, site plan exemption, or a building permit application. In some cases, however, an applicant may request that a more formal use determination be made prior to submittal of a development application. This type of formal, pre-application use determination is often requested if a proposed use straddles the line between different use categories, such that an applicant wants some certainty as to the department's position before designing the project.

The City Council adopted a code amendment in April 2012 that requires public notice for certain use determinations was adopted by ordinance in April 2012.[1] However, since the use determination for the amphitheater building at LifeAustin Church was made in 2008, prior to adoption of the 2012 ordinance, no public notice was required for that determination. In addition, while State law does require notice for a rezone or an amendment to the text of municipal zoning regulations, it has never—either now or in 2008—required public notice for a zoning use determination.

The Board of Adjustment (BOA) has legal authority to hear appeals of use determinations and to uphold, reverse, or modify a determination by the director. Over the years, the BOA has heard numerous use determination appeals.

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[1] *See* Ordinance No. 20120426-122, accessible electronically at: http://www.austintexas.gov/edims/document.cfm?id=169593

B. The 2008 LifeAustin Use Determination and Related Approvals

On December 17, 2008, Mr. Carl Conley, the agent for PromiseLand West Church, sent Director Greg Guernsey a request for a use determination. In his request, Mr. Conley described the uses proposed on the property, including a 3,500-seat indoor multi-use building, chapel, and associated amphitheater building with a smaller 1,000-seat capacity. Mr. Conley's letter states that the activities in the larger indoor building that is used as the sanctuary would be "...the exact same type of activities...." that would take place in the amphitheater.

On December 23, 2008, Director Guernsey responded with a determination that the proposed amphitheater building and associated structure were "religious assembly" uses and thereby permitted within the Rural Residential (RR) zoning district. Director Guernsey's determination also set forth several conditions delineating the limitations of what could be considered "religious assembly" uses of the amphitheater building.

Beginning in 2011, PromiseLand West's successor entity, LifeAustin Church, began obtaining development approvals for construction of an indoor multi-use (sanctuary) building, outdoor amphitheater building, chapel, and related development on the property. As discussed more fully below, approval of the site plan was conditioned on recording a restrictive covenant, previously offered by the church, to tie-down some of the restrictions necessary to ensure that use of the amphitheater building would be consistent with a religious assembly use.

It should be noted that, in 2013, the City Council amended the Land Development Code to require that any outdoor amphitheater associated with a residential or civic use obtain a conditional use permit from the Land Use Commission. At the time LifeAustin submitted its site plan application for the amphitheater building, however, that ordinance was not in effect, so approval of the amphitheater building was solely administrative.

RESPONSE TO LIFEAUSTIN'S APPEAL

Under the BOA's Rules of Procedure, the BOA must find that "there is reasonable doubt or difference of interpretation" in order to overturn a decision by the director in a use determination or code interpretation appeal. As explained below, there is no basis for finding reasonable doubt or difference of interpretation with respect to the use determination or related development approvals.

1. Staff disagrees that "there is reasonable doubt or difference of interpretation" as to the specific intent of the regulations regarding "Religious Assembly" use.

The several appeals now before the BOA address the initial 2008 use determination as well as the site plan, restrictive covenant, and associated development approvals for the outdoor amphitheater. Fundamentally, however, the appeals boil down to a disagreement with the Director Guernsey's determination that the outdoor amphitheater is part of a "religious assembly" land use and not an outdoor entertainment or community recreation use.

The Director disagrees with the Appellants' position that an amphitheater associated with the indoor multi-use (including sanctuary) building of the size and scale of LifeAustin Church can be considered anything but religious assembly, provided that the uses occurring in the amphitheater are consistent with the activities customarily occurring within the indoor multi-use building or other primary structure devoted to worship-related activities. Under City Code § 25-2-6(41), "religious assembly" is classified as a "civic" use and is specifically defined:

> ***regular organized religious worship or religious education in a permanent or temporary building. The use excludes private primary or secondary educational facilities, community recreational facilities, day care facilities, and parking facilities. A property tax exemption is prima facie evidence of religious assembly use.***

Since all of the uses proposed for the amphitheater would be religious assembly if they occurred within the indoor multi-use (sanctuary) building or chapel, there is simply no basis under this definition for not treating the amphitheater as part of the religious assembly uses.

A religious assembly use may include many different activities, including musical and theatrical performances for the membership of the church; musical performances by youth groups, holiday celebrations, and theatrical reenactments of religious events; exhibit, benefits, fund raising events for the benefit of the congregation, the poor or homeless, or in response to a disaster are not uncommon, such as the recent Halloween floods or wildfires. In addition, many churches host boy/cub scout and girl scout troops, provide language classes, host or promote public meetings/lectures on life/financial counseling, health or on social topics such as human trafficking.

A religious assembly use is a permitted land use in a Rural Residence (RR) zoning district. The LifeAustin Church is a religious assembly use that is a permanent use not a temporary use as described in Section 25-2-921(C) of the Code and not similar a temporary church revival that may take place in a shopping center parking lot, or other temporary uses described in that section which includes Christmas tree sales, swap meets, carnivals, a new subdivision sales office or temporary construction trailers.

As stated previously, the LifeAustin Church buildings, including the amphitheater, are buildings used for religious assembly uses. The church acknowledged in 2008 by stating the same activities that take place in the large indoor building will be the same as the amphitheater building. It was not stated on the original letter from Mr. Conley, nor the site plan or building permit that the buildings on the property would be used community recreational facilities used as defined under City's the zoning regulations. An example of an outdoor community recreational (private) use is the Hyde Park Baptist Church Quarries Multi-Use Facility (4400 Mesa Woods) that includes facilities for basketball, tennis, baseball, softball, volleyball and basketball.

The amphitheater building is a permanent building that is enclosed by a roof and walls and required a building permit. The amphitheater building contains permanent

bathrooms, offices, storage areas and associated permanent seating. It is not occupied by a temporary use as described in City Code § 25-2-921(C). The Appellants'' reference to City Code § 9-1-2(5) appears to be an incorrect reference; however, if this is meant to reference to Chapter 9-2 (*Noise and Amplified Sound*), then this section is not applicable because it is devoted solely noise regulations and not zoning use regulations.

Appellants over-emphasize the significance of the occupancy classifications for the amphitheater and incorrectly suggest that it is inconsistent with religious assembly use. They point out that, although the building permit describes the amphitheater as a religious assembly use, the "Sub-Type" lists the building type as "C-318 Amusement, Social & Recreation Bldgs." These are not inconsistencies, however, because the "sub-type" addresses the U.S. Census Bureau building permit survey classification of the structure. It has nothing to do with use of the property from a zoning standpoint. Different uses may be permitted in the same building type; for instance, a school amphitheater building vs. a church amphitheater building.

2. Staff disagrees there is reasonable doubt or difference of interpretation as to the specific intent of the regulations relating to the procedures for filling of an appeal of the administrative decision.

As stated previously, the use determination for the amphitheater building at PromiseLand West Church was issued in 2008 via a communication sent directly to the applicant's representative. When the subsequent appeals were filed challenging the site plan, building permit, and other development approvals, the Director determined that the appeals were not filed within the 20-day appeal deadline established by City Code § 25-1-182(2) because each of the appeals was effectively a challenge to the 2008 use determination.

The Director did consult with the Law Department before making this decision and did not rush to judgement. Nor did the Director in any way attempt to conceal the 2008 use determination, since it was common practice at the time and allowed by ordinance to issue a use determination directly to the requestor without a public notice requirement. In association with their 2011 site plan, the Church offered a restrictive covenant to limit their property. The Director accepted the restrictive covenant as originally suggested by the church in 2008 and saw covenant as an additional tool to enforce the use limitations previously described with the use determination.

This memorandum does not address issues related to the subsequent litigation that occurred between the City and some of the Appellants in this case. It is the Director's understanding, however, that the litigation did not address the substance of the "religious assembly" land use issue or decide the question of whether or not the Appellants met the 20-day deadline for appealing under City Code § 25-1-182(2).

3. Staff believes the use determination would clearly permit the use which is in character with the uses enumerated for the various zones and the objectives of the zone in question because:

LifeAustin Church is a permanent and not a temporary religious assembly use. A religious assembly use is a permitted land use in a Rural Residence (RR) zoning district and which requires a minimum lot size of 1 acre, a maximum building coverage of 20% and maximum impervious cover of 25%. According to the original approved site plan, the church site is over 53 acres, with a building coverage of less than 3% and overall gross impervious cover less than 14%. In addition, the buildings on the property comply with the 35 foot height limitation and compatibility standards heights and setbacks. The PromiseLand West Church is meets the objectives for its zone and would be in character with other civic uses permitted in other RR and less restrictive residential zoning districts (ex. SF-1, SF-2, SF-3, etc.).

Although the size of the church buildings is fairly large compared to most church structures, they would not be out of scale at any location within the City because of the commensurately large size of the 53-acre LifeAustin property. Given the LifeAustin's larger indoor multi-use (sanctuary) building seats 3,500, the 1,000 seat amphitheater size is not unreasonable. At the time the use determination and the date site plan was submitted, the size of churches buildings, including the amphitheater building were subject to administrative approval and no special amphitheater regulations applied to the site. At that time, Staff would have approved a church of a similar scale but of a smaller size elsewhere in the City (ex. 5.3 acre site with church building of 350 seats and amphitheater of 100 seats; or 0.53 acre site with church building of 35 seats and amphitheater of 10 seats), if the zoning district permitted use and buildings complied with heights, setbacks and compatibility standards..

4. <u>Staff believes the previous interpretation does not grant a special privilege to one property inconsistent with other properties similarly situated.</u>

The site plan and building permits were issued for a religious assembly use in permanent buildings (including the amphitheater building) and not for a temporary use set forth in Section 25-2-921 (C). This religious assembly land use was identified on the approved site plan and the building permits and were consistent with the 2008 use determination that stated activities in the larger indoor building that is used as the sanctuary would be "...the exact same type of activities...." that would take place in the amphitheater.

The Code definition of a religious assembly use, as quoted above, also includes the following language: *"A property tax exemption is prima facie evidence of religious assembly use."* The PromiseLand West/LifeAustin Church qualified for a property tax exemption in 2008 and 2011, as well as today, as determined by the Travis County Appraisal District. Since the church does not operate a private primary or secondary educational facility, a community recreation facility or day care, this portion of the Code definition has added importance since it establishes "prima facie evidence" of the religious assembly use under the Code. The term" prima facie" generally means at first appearance and would signify that upon initial examination sufficient, corroborating evidence appears to support a case. Therefore, the tax exemption supports the religious assembly use determination.

The site plan and building permits do not grant a special privilege under City Code § 25-2-921 (C) for an outdoor religious assembly use, since these are not temporary uses.

Although it is not uncommon for a religious assembly use to allow the use of outside areas for events such as weddings, a sunrise service, a religious celebration, an Easter Egg hunt or Halloween Trunk or Treat. Some religious assembly uses also offer prayer or resurrection gardens that are open to the public.

CONCLUSION

In closing, the use determination that allowed approval of the LifeAustin Church site plan and associated building permits was based on information provided by the church or their representatives that their buildings would be used for a religious assembly uses. The City approvals were limited to permit religious assembly uses and the use determinations, the issuance of permits and the processing of appeal requests that followed were based on the Code in effect at that time. It is clear that not all religious assembly activities are limited only to the interior of buildings, and only religious worship and religious education take place on tax exempt church property.

The City does not have the discretion to deny a development application based on the scale of a project if it complies with the Code, nor does it ability to deny applications based on the likelihood the future Code violations. City Council has changed the Code to require notice of use determinations and Land Use Commission approval of certain amphitheaters in the future, but these regulations do not apply to this BOA use determination appeal.