MEMORANDUM
on Westlake Residential Site Plan

To: The Chair and Members of the Zoning and Platting Commission
From: Brad Rockwell, Frederick Perales Allmon & Rockwell PC
Re: Site Plan for Westlake Residential SPC-2016-0453C
Date: February 19, 2018

The Site Plan before you on Tuesday, February 20, does not comply with City Code and therefore should be denied. It does not comply with zoning law, and would place a potentially odorous Civic Use wastewater system on a lot zoned SF-2 in a single-family neighborhood. The Site Plan further does not clearly delineate irrigation areas as required by the Environmental Criteria Manual and the irrigation areas designated by the applicant to TCEQ locate portions of the irrigation areas on slopes greater than 15% in violation of 25-8-361(B)(1). The site plan also places irrigation fields within the CEF buffer zone in violation of 25-8-361(B)(5) & 25-8-281(C)(2)(c). The site plan does not comply with the signage and the topsoil requirements of the ECM and does not comply with the City of Austin ordinances protecting trees. The irrigation areas are substantially less than required by the City Environmental Criteria Manual guidelines. The common cause of these violations is that the scale of the project is too large for the site.

Scope of ZAP Review of Site Plan

For site plans in the Hill Country Roadway corridor, site plans are not approved by staff administratively. Rather the Zoning and Platting Commission is assigned authority to approve. LDC § 25-5-41(B)(1). Approval by ZAP is contingent on ZAP, not City staff, making a determination that the proposed development complies with the Land Development Code. LDC § 25-5-147(C). *Accord* Hill Country Roadway Ordinance, §5187.

This site plan does not comply with the Code.

I. Site Plan Does not comply with Zoning Restrictions

This site plan includes two very differently zoned lots. Lot 1 which contains all the townhomes was zoned as a PUD site. The Land Development Code defines a PUD as "land developed as a single unit under unified control." LDC § 25-1-21. Yet this site plan seeks authorization for development of PUD-zoned lot that is not being developed as a single unit. The development is dependent on and would incorporate land outside the Lot 1 PUD: Lot 5, which is an SF-2 lot in a residential neighborhood.

Another Code section states a PUD development authorizes "a large or complex single or multi-use development that is planned as a single contiguous project and that is under unified control [for the] purpose of … ensur[ing] adequate public facilities and services for development within a PUD." § 25-2-144. But this PUD (Lot 1) *as laid out in this site plan* does not ensure

adequate facilities or services for development within the PUD. The site plan before you includes a lot, Lot 5, located outside the PUD that is burdened with facilities serving the PUD. Lot 5 is an SF-2 zoned lot that was omitted from the PUD. The site plan would demolish the existing single-family home and replace it with an immense wastewater irrigation field serving the 67 townhomes of the PUD on Lot 1.

Because the site plan authorizes a PUD-zoned tract to be developed not as a single unit, and because the PUD lot, Lot 1, does not have adequate public services within the PUD for its development, the site plan does not comply with the Land Development Code. LDC §§ 25-1-21 & 25-2-144.

a) A utility facility is impermissible on an SF-2 Lot.

The site plan proposes a wastewater system with irrigation discharge fields serving the 67 townhomes to be operated by a utility as defined by Title 30, section 291.3(51) & (52) of the Texas Administrative Code. A wastewater utility is a civic use. The Code defines civic uses to include not only the provision of utility facilities such as "wastewater treatment plants or similar facilities" but also "local utility services…necessary to support development in the area … and involve only minor structures." LDC §25-2-6(B) (28) & (30). A civic use is not legally located on an SF-2 lot like Lot 5.

The City Code defines what is authorized to be built on an SF-2 lot:

> SINGLE-FAMILY RESIDENTIAL use is the use of a site for only one dwelling unit, other than a mobile home.

LDC § 25-2-3(B)(12)

> Single-family residence standard lot (SF-2) district is the designation for a moderate density single-family residential use on a lot that is a minimum of 5,750 square feet. An SF-2 district designation may be applied to a use in an existing single-family neighborhood that has moderate sized lots or to new development of single-family housing on lots that are 5,750 square feet or more.

LDC § 25-2-56. The site plan would destroy the only use permitted on an SF-2 lot and replace it with an irrigation field serving a 67-unit development, something that is impermissible on an SF-2 lot. For this independent reason, the site plan does not comply with the Land Development Code.

b) The Drenner-Rusthoven maneuver.

If Lot 5 was so indispensable to the development of Lot 1, the developer should have had its zoning changed and included it within the PUD. The problem with this is that it would have

required notice to the neighbors in the single-family neighborhood and a public hearing. It also would have required the developer to demonstrate that putting a massive irrigation field in an adjacent SF-2 neighborhood would be a form of development superior to the pre-existing single family home in that neighborhood. §25-2-144(C).

To circumvent this process, after the Lot 1 PUD went through a public hearing and was approved, Steve Drenner's firm privately approached Jerry Rusthoven and got Mr. Rusthoven to issue a letter asserting that an immense irrigation field serving a 67-unit development on this PUD lot was an accessory use for the SF-2 lot, Lot 5. This is not even close to what is authorized by the Land Development Code. The letter is attached as an appendix to this Memo.

First of all, there is no single-family use of Lot 5 in the site plan so there is no principal use on Lot 5 to which an irrigation field can be an accessory. Rusthoven is authorizing the wastewater irrigation field for a utility as the only use and principal use for Lot 5. In other words, he is making a civic use the sole, primary and principal use of Lot 5. This is not authorized by the Land Development Code in a lot zoned SF-2. In the letter, Jerry Rusthoven seems to say that Lot 1 is a residential use, and somehow the entire SF-2 lot is an accessary to the residential use of Lot 1. Not only is this nonsensical on its face, but if Lot 1 is a residential lot, then it would be unlawful because it contains CEFs and section 25-8-281(B) of the Land Development Code prohibits CEFs on residential lots or within fifty feet of residential lots.

Section 25-2-893 of the Land Development Code authorizes specific enumerated accessory uses for residential use and a large wastewater utility is not one of them:

- Vehicle storage for each licensed driver residing on the premises.
- Home occupations
- Garage sales
- Household pets
- Solar collectors
- Antennas
- Playhouses, patios, porches, gazebos, household storage buildings
- Recreational facilities for use by residents
- A single accessory dwelling

These are all appropriately scaled for a single family residential neighborhood, unlike a wastewater utility facility serving a complex of 67 townhomes.

Because a wastewater utility facility serving a complex of 67 townhomes is not included within the expressly enumerated accessory uses for SF-2 lots, Jerry Rusthoven relied on subsection H of § 25-2-893 which states:

> A use other than one described in this section is permitted as an accessory use if the director determines that the use is necessary, customary, appropriate, incidental, and subordinate to a principal use."

In the letter, Rusthoven made no findings or determinations providing any factual basis that this wastewater utility facility is necessary, customary, appropriate, incidental, and subordinate to the principal use on Lot 5.

None of these five required elements of subsection H are met. First, in the proposed site plan there is no SF-2 principal use on Lot 5. The site plan would eliminate the existing principal use. There cannot be an accessory without a principal use. Second, a wastewater utility facility serving 67 residences is not a customary use for an SF-2 lot. Such use is not incidental. It would never be necessary or subordinate to the single-family home on that lot, and because that home is proposed to be demolished there is not principal use in this instance to which an irrigation field can be necessary or customary.

Wastewater utility facilities are both an inappropriate scale and inappropriate use within an SF-2 neighborhood. City of Austin Environmental Criteria Manual §1.11.4 requires signs clearly stating that the water on Lot 5, next to and across the street from single family homes, is from a non-potable supply to protect passersby from exposure to pathogens. No owners of a home in a single family residential neighborhood wants their home to be next to a lot displaying such signs. (Even though required by law to show all required and propsed structures, the site plan does not identify the size and location of these required signs.) Moreover, odors and overflow from Lot 5 into the neighborhood are possible because this particular wastewater facility is undersized.

Section 25-5-2 of the Land Development Code also demonstrates the Rusthoven letter to be nonsensically inconsistent with the LDC. Subsection B of this section exempts from any site plan requirement the construction of an accessory structure if "not more than one principal residential structure is constructed on a legal lot or tract." So if Rusthoven were correct, a wastewater utility facility that takes up an entire SF-2 tract could be built without having to be included in any site plan at all. Clearly this kind of nonsensical result shows that projects of this nature and magnitude were never intended by the Land Development Code to be accessory uses on an SF-2 lot.

A wastewater utility facility is neither customary, appropriate, incidental, subordinate nor necessary to a single-family home on Lot 5. It does not meet any of the requisites of 25-2-893(H), let alone all of them as required. Jerry Rusthoven's letter was ultra vires. He had no authority to effectively change the zoning of Lot 5 by this backhanded method. For these additional and independent reasons, the site plan is unlawful.

c) Approval of this site plan would set horrible precedent

Approval of the Drenner-Rusthoven maneuver would set horrible precedent. Not only would it allow homes on single family lots to be torn down to be replaced by all manner of utility

facilities, it would allow a huge parking garage serving a nearby commercial or multifamily lot to be placed in a single-family neighborhood. It would allow a large entertainment venue serving a huge apartment complex to be placed on a single-family lot. It would allow a convenience store serving a multifamily apartment complex to be located on a single-family lot in the middle of a single-family neighborhood.

Because the site plan does not conform with the zoning for Lot 5, it is unlawful and must be denied.

II. City staff never even reviewed the Site Plan wastewater components for compliance with City environmental regulations

When Dr. Lauren Ross asked City staff about the failure of the applicant to meet City environmental regulations regarding irrigation fields and other city wastewater regulations, the reviewer seemed surprised by the question. The City Environmental Review Specialist apparently had never considered this issue. On January 2, 2018 she provided to Dr. Ross the following contradictory justifications.

After communicating with City employees Joydeep Goswami and John Bowman, the environmental review specialist, she was told that the "City does not review the OSSF system in this case. The site is in WCID 10, so we do not provide WW and do not regulate the OSSF. There is not a County reviewer in this case. Perhaps LCRA." This is wrong in several ways. By definition the Applicant's system is not OSSF. And it is not a WCID 10 facility.

Then the Environmental Review specialist was told by the Applicant's engineer Larry Hanrahan why she had not reviewed the system for compliance with City environmental regulations: "I have this bit of information from Larry Hanrahan: 'TCEQ permits any system over 5000 gpd, including this one. There is an application pending at TCEQ….'"

There is nothing in the LDC that exempts the Applicant from City environmental requirements for irrigation fields just because a TCEQ permit is also necessary for the system.

a) The Site Plan Places irrigation fields on slopes

As documented by Dr. Lauren Ross in her report, section 25-8-361(B)(1) of the City Code prohibits land application of treated wastewater effluent on a slope with a gradient of more than 15 percent. The applicant has not provided in its site plan a map clearly identifying slope areas and irrigation fields as required by section 1.11.3 of the Environmental Criteria Manual. But the Applicant did submit a map of irrigation fields to TCEQ that is incorporated into the TCEQ preliminary permit. This map when overlaid with a slope map shows that substantial portions of applicant's irrigation fields are located on slopes greater than 15%, with some located on areas where the slope is greater than 35%.

For this independent reason, the site plan must be denied as in violation of City of Austin Code.

b) Irrigation fields are located within the buffer zone of a CEF

As pointed out by Dr. Lauren Ross in her report, the Applicant has located irrigation fields in the buffer zone of a critical environmental feature. This is prohibited by LDC §§ 25-8-361(B)(5) and 25-8-281(C)(2)(c). The Applicant has failed to even provide a map demonstrating this as required by ECM § 1.11.3. For this independent reason, the site plan must be denied.

c) Irrigation Fields and topsoil is not demonstrated to be adequate

In their effort to squeeze as much on to Lot 1 as they can get away with, applicants not provided adequate space on Lot 1 for a wastewater plant and treatment system. The treatment system proposed by the Applicant is undersized. Section 1.11.1 of the ECM require 8000 square feet of irrigation fields per LUE. This is far above the capacity provided by the Applicant. Section 1.11.1 also requires a "soil survey demonstrating the presence of six (6) inches of topsoil (effective soil). This has not been done. There does not appear to be this amount of topsoil at the site.

III. Hill Country Roadway Ordinance has Not been Complied With

Section 5187 of the Hill Country Roadway Ordinance requires the location of all improvements to be provided. The Site plan does not show the location of wastewater outflow lines to irrigation fields. It does not provide the location of public health warning signs that must be placed around irrigation fields.

IV. Tree Protection Provisions of the Code have not been complied with

The site plan does not comply with the tree protection provisions in the LDC. The applicant is trying to squeeze too much onto a difficult site – 67 homes on less than 20 acres in the contributing zone. The applicant proposed to destroy half the caliper inches of trees on the sites and the record contains no evidence that the procedure that needs to be followed with protected trees (trees over 19 inches in diameter) have been followed.

The City arborist is required to review the site plan and make a recommendation for ZAP. LDC § 25-9-604(D).

"An application for site plan approval must … demonstrate that the design will preserve the existing natural character of the landscape, including the retention of trees eight inches or larger in diameter to the extent feasible." § 25-8-604(A)(2). Destruction of half of the caliper-

inches of trees is not a way to preserve the natural character of the landscape. There is no record of any showing by the Applicant that it was not feasible to preserve the many 19-inch or larger protected trees that the Applicant proposes to destroy. Some of these 19-inch trees could have been preserved simply by reducing the number of townhomes, something that would have allowed for a lawful wastewater system too. Or the applicant could have asked the city for a waiver on street width pursuant to LDC § 25-8-605 to preserve trees that were destroyed to make way for roads. There is no recommendation by the City Arborist that justifies the removal of so many protected trees.

SUMMARY

This site plan goes beyond what was authorized in the PUD for this project. The number of townhomes creates a need for irrigation fields of a size that cannot be accommodated on this PUD site and result in a site plan that violates innumerable sections of the Land Development Code intended to protect the integrity of single family neighborhoods and the environment. For this reason the Zoning and Platting Commission must deny the site plan.

City of Austin
Founded by Congress, Republic of Texas, 1839
Planning and Development Review Department
One Texas Center, 505 Barton Springs Road 5th Floor
P.O. Box 1088, Austin, Texas 78767
(512) 974-3207

March 6, 2015

Mr. Steve Drenner
Drenner Group
200 Lee Barton Drive Suite 100
Austin, TX 78704

Re: Rob Roy Multifamily – Planning and Development Review Department confirmation of land application of wastewater as a permitted accessory use in residential zoning.

Dear Mr. Drenner:

This letter is to outline and confirm the current permitting and process regulations applicable to land application of wastewater by drip irrigation as an accessory use for a principal residential use. Per our meeting on February 17, 2015, we understand that a wastewater use for a multifamily property is subject to the regulations of Land Development Code § 25-2-893(H), *Accessory Uses for a Principal Residential Use:*

> *A use other than one described in this section is permitted as an accessory use if the director determines that the use is necessary, customary, appropriate, incidental, and subordinate to a principal use.*

Consistent with this code regulation, a multifamily wastewater irrigation by land application use is a permitted land use on a single-family zoned property. The properties will be governed and permitted by a unified development agreement and site plan, and **no development will occur on the single-family tract other than actions necessary and incidental to the irrigation installation.**

Sincerely,

Jerry Rusthoven, AICP
Manager
Current Planning Division