



City of Austin Development Services Department
505 Barton Springs Road / P.O. Box 1088 / Austin, Texas 78767-8835

**ENVIRONMENTAL
VARIANCE APPEAL**

If you are an applicant and/or property owner or interested party, and you wish to appeal a decision on an environmental variance associated with a preliminary subdivision plan, the following form must be completed and filed with the Director of the Development Services Department, City of Austin, at the address shown above. The deadline to file an appeal is 14 days after the decision of the Land Use Commission (ZAP or PC), or 20 days after an administrative decision by the Director. If you need assistance, please contact the assigned City contact at (512) 974-2786.

CASE NO. C8J-2016-0228

DATE APPEAL FILED 8/21/2018

PROJECT NAME Live Oak Springs Preliminary Plan

YOUR NAME Nikelle S. Meade

PROJECT ADDRESS 9406 Morninghill Drive
Austin, TX 78737

SIGNATURE _____

YOUR ADDRESS 111 Congress Ave., Suite 1400
Austin, TX 78701

APPLICANT'S NAME David Knapp

YOUR PHONE NO. (512) 479-1147 **WORK**

CITY CONTACT Don Perryman

() **HOME**

INTERESTED PARTY STATUS: Indicate how you qualify as an interested party who may file an appeal by the following criteria: (Check one)

- ☐ I am the record property owner of the subject property
- ☒ I am the applicant or agent representing the applicant
- ☐ I communicated my interest by speaking at the Land Use Commission public hearing on (date) _____.
- ☐ I communicated my interest in writing to the Director or Land Use Commission prior to the decision (attach copy of dated correspondence).

In addition to the above criteria, I qualify as an interested party by one of the following criteria: (Check one)

- ☐ I occupy as my primary residence a dwelling located within 500 feet of the subject site.
- ☐ I am the record owner of property within 500 feet of the subject site.
- ☐ I am an officer of a neighborhood or environmental organization whose declared boundaries are within 500 feet of the subject site.

DECISION TO BE APPEALED*: (Check one)

- ☒ Environmental Variance associated with a preliminary plan
- ☐ Replacement site plan
- ☒ Land Use Commission Disapproval of a Preliminary Plan
- ☐ Waiver or Extension
- ☐ Planned Unit Development (PUD) Revision
- ☐ Other: _____

Date of Decision: 8/7/18

Date of Decision: _____

Date of Decision: 8/7/18

Date of Decision: _____

Date of Decision: _____

Date of Decision: _____

*Administrative Approval/Disapproval of a Site Plan may only be appealed by the Applicant.

STATEMENT: Please provide a statement specifying the reason(s) you believe the decision under appeal does not comply with applicable requirements of the Land Development Code:

See the enclosed letter brief in support of the appeal.

(Attach additional page if necessary.)

HUSCH BLACKWELL

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512.472.5456

Nikelle S. Meade

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512.226.7373 fax

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August 21, 2018

Via Hand Delivery and Via Email: Don.Perryman@austintexas.gov

Director of Development Services
c/o Don Perryman
Development Services Department
P.O. Box 1088
Austin, Texas 78767

Re: Zoning and Platting Commission (the "Commission")
Appeal of Denial of Variance Request and Preliminary Plan
Live Oak Springs Preliminary Plan
C8J-2016-0228 (the "Case")
9406 Morninghill Drive (the "Property")
Commission meeting of August 7, 2018, Item C-1

Dear Mr. Perryman:

Husch Blackwell represents the applicant, David Knapp, in the above-referenced case, and hereby files this letter brief in support of its appeal of the Commission's denial of the applicant's request for an environmental variance and approval of a preliminary plan (the "Request").

BACKGROUND

On August 7, 2018, the Commission denied the applicant's Request. Since today marks the fourteenth day from the date of the Commission's decision, this appeal has been timely filed. In addition, the applicant is an interested party and has standing by virtue of being the applicant and by being the owner of the Property.

The Request was for the approval of a preliminary plan with 91 lots (83 single-family lots) and associated right-of-way on approximately 165 acres in Austin's ETJ. The Request was also for a variance from Land Development Code ("LDC") Section 30-5-262(B)(1) for a Critical Water Quality Zone street crossing.

The Staff Recommendation was that the preliminary plan should be approved contingent upon the approval of the environmental variance.

SUMMARY OF THE LEGAL ARGUMENTS

The evidence shows that the applicant met the Land Use Commission variance requirements, so the variance should be granted. In addition, the Commission did not provide a written findings of fact to support the grant or denial of a variance request, as required by LDC § 30-5-41(D), so its denial of the preliminary plan and variance request must be vacated for being in violation of City Code, especially since the absence of written findings of fact have deprived the applicant of notice of the full range and scope of the findings subject to appeal. Finally, the preliminary plan should be approved since its approval was contingent on the variance being granted.

RELEVANT CITY OF AUSTIN CODE PROVISIONS

The following LDC provisions are relevant to this case:

§ 30-5-262 - CRITICAL WATER QUALITY ZONE STREET CROSSINGS.

[. . .]

(B) This subsection applies in a watershed other than an urban watershed.

(1) A major waterway critical water quality zone may be crossed by an arterial street identified in the Transportation Plan.

[. . .]

§ 30-5-41 - LAND USE COMMISSION VARIANCES.

(A) It is the applicant's burden to establish that the findings described in this Section have been met. Except as provided in Subsections (B) and (C), the Land Use Commission may grant a variance from a requirement of this subchapter after determining that:

(1) the requirement will deprive the applicant of a privilege available to owners of other similarly situated property with approximately contemporaneous development subject to similar code requirements;

(2) the variance:

(a) is not necessitated by the scale, layout, construction method, or other design decision made by the applicant, unless the design decision provides greater overall environmental protection than is achievable without the variance;

(b) is the minimum deviation from the code requirement necessary to allow a reasonable use of the property; and

(c) does not create a significant probability of harmful environmental consequences; and

(3) development with the variance will result in water quality that is at least equal to the water quality achievable without the variance.

(B) The land use commission may grant a variance from a requirement of Section 30-5-422 (Water Quality Transition Zone), Section 30-5-452 (Water Quality Transition Zone), Section 30-5-482 (Water Quality Transition Zone), or Article 7, Division 1 (Critical Water Quality Zone Restrictions), after determining that:

(1) the criteria for granting a variance in Subsection (A) are met;

(2) the requirement for which a variance is requested prevents a reasonable, economic use of the entire property; and

(3) the variance is the minimum deviation from the code requirement necessary to allow a reasonable, economic use of the entire property.

(C) The Land Use Commission may not grant a variance from a requirement of Article 13 (Save Our Springs Initiative).

(D) The Land Use Commission shall prepare written findings of fact to support the grant or denial of a variance request under this section.

THE ENVIRONMENTAL VARIANCE SHOULD BE GRANTED

The Staff Recommendation indicated that the applicant failed to satisfy the requirements of LDC § 30-5-41(B) ("Land Use Commission Variances"), and the Commission subsequently denied the environmental variance. However, the evidence supports approval of the environmental variance.

II. The Variance Request Met the Requirements of 30-5-41(B).

The variance request should have been approved for having met the applicable criteria. The criteria under Subsection (B) are as follows:

(1) the criteria for granting a variance in Subsection (A) are met;

(2) the requirement for which a variance is requested prevents a reasonable, economic use of the entire property; and

(3) the variance is the minimum deviation from the code requirement necessary to allow a reasonable, economic use of the entire property.

First, as will be explained in the next section, the criteria for granting a variance in Subsection (A) were met.

Second, the denial of a variance to allow for the street crossing would prevent a reasonable, economic use of the entire property since, as Paul Linehan testified, not having a street crossing would limit development of the entire 165-acre tract to only 30 single-family homes. Such a low level of density would render the development economically unviable. Upon appeal, the applicant would be able to demonstrate just how economically unviable a development limited to 30 homes would be. There was no evidence presented at the hearing to support the contention that denying the variance would still allow for a reasonable economic use of the entire property.

In addition, the variance is undeniably the minimum deviation from the code requirement that would be necessary to allow a reasonable, economic use of the entire property. This is because, as was elicited during testimony, the environmental variance was the only thing standing in the way of Staff recommending approval of the preliminary plan. The applicant did not require or request any other variances, the project satisfied the requirements of the SOS ordinance, and the variance request came on the heels of meetings with City Staff and public meetings before the Environmental Commission and the County Commissioner's Court, and was requested by the Commissioner's Court. In fact, the project received a 5-3 vote in favor of the Environmental Commission.

Finally, the Staff Recommendation that the requirement in Section 30-5-41(B)(3) is contrary to the Staff Recommendation under the identical requirement found in Section 30-5-41(A)(2)(a), which required that the variance is "the minimum deviation from the code requirement necessary to allow reasonable use of the property." The Staff Recommendation noted that this requirement had been met, since "the location of the second access is the only other viable connection at this time since the neighboring properties are not allowing access." The Staff's logically inconsistent findings were never noted during the hearing before the Commission, and demonstrates that the reliability of other Staff Recommendations relating to variance requirements that had not been met are also suspect and should be reexamined by the given this newly highlighted information.

IV. The Applicant Met the Variance Requirements in Section 30-5-41(A)(1).

The application met the criteria of Section 30-5-41(A)(1). The requirement of that section is that "the requirement will deprive the applicant of a privilege available to owners of other similarly situated property with approximately contemporaneous development subject to similar code requirements."

In this case, the requirement would deprive the applicant of the privilege enjoyed by the owners of similarly situated properties since, unlike other owners, the applicant would preclude

the reasonable economic use and development opportunity of the Property, essentially making the Property undevelopable. Testimony that the applicant could just develop the Property with less density is incorrect.

In addition, residential land in the area of the Live Oak Springs Preliminary Plan consists of acre-sized lots, ranging from ± 1 acre to ± 3 acres in size. Strict enforcement of Section 30-5-262(B)(2) would deprive the applicant of the privilege of developing the Property in a similar manner, because of the 30 lot limit on single-access developments imposed by Section 30-2-158(C)(2)(a) of the Austin Land Development Code.

Finally, subdivisions in the surrounding area include Sunrise Country, Wilkerson Estates, Overlook at Lewis Mountain, and multiple phases of Lewis Mountain Ranch, each with lots ranging in size from ± 1 acre to ± 3 acres. The Live Oak Springs subdivision proposes similarly sized lots, in keeping with the existing development density in the area. Not having a bridge across Slaughter Creek would limit development density to no more than 30 lots on a single-access roadway, which would calculate to lots of approximately 5.5 acres in size (approximately 165 acres with only 30 lots). This is a significantly different development density than the surrounding subdivisions.

Please note that the existing Sunrise Country and Wilkerson Estates subdivisions, totaling approximately 78 residential lots, take access solely to FM 1826 via Zyle Road. Therefore, these subdivisions are not compliant with the 30-lot limitation on single-access subdivisions. If Live Oak Springs were limited to 30 lots (with single-access only), these additional 30 lots would all have to take access to Zyle Road, for a total of 108 single-family lots on a single-access roadway. By providing secondary access to Derecho Lane, vehicular traffic is dispersed between two points of access instead of all trips coming through Zyle Road.

V. The Applicant Met the Variance Requirements in Section 30-5-41(A)(2).

While the Commission did not provide written Findings of Fact, it appears that the Commission may have determined that the applicant failed to meet the requirements of Section 30-5-41(A)(2). The requirement of that section is that the variance is “not necessitated by the scale, layout, construction method, or other design decision made by the applicant, unless the design decision provides greater overall environmental protection than is achievable without the variance.” Any finding that this requirement was not met is incorrect, since the variance is not necessitated by the proposed scale, layout, construction method, or other design decision by the applicant, and the evidence shows that the applicant met the requirements of Subsection (A)(2).

The variance is not required by a design decision but rather by LDC Section 30-2-158(C)(2)(a), which requires two points of access for a subdivision, with the two points being to different exterior roadways. Further, the proposed bridge is based on the guidance of Travis County commissioners, who want Zyle Road and Morninghill Drive to link with Derecho Drive, thereby providing the required two points of access to the proposed Live Oak Springs subdivision.

In addition, the variance is necessitated by the financial infeasibility of developing the Property with a maximum of 30 single-family homes.

Finally, even if the variance were in fact necessitated by the scale or other design decisions of the applicant, the relevant exception in Section 30-5-41(A)(2) would apply. The exception applies if “the design decision provides greater overall environmental protection than is achievable without the variance.” As stated in the “Staff Recommendations Concerning Required Findings,” construction of the bridge will restore the floodplain “to a degree that is better than its current condition.” (See backup documents for Item C-01, Pt. 1, p. 6 of 72). In addition, peer-reviewed scientific studies indicate that unvented fords such as the existing one have worse effects on water quality than bridges. In addition, as vehicles drive through water, oil, grease, and other chemical pollutants can wash off.¹ In one study, preliminary monitoring results from three streams show how off-highway vehicle traffic through fords affects turbidity, streambed fines, and concentrations of volatile organic compounds (Deiter, 2006).

III. The Applicant Met the Other Variance Requirements in § 30-5-41(A).

As reflected by the Staff Recommendations issued by Environmental Reviewer Atha Phillips on June 11, 2018, the applicant met the remaining requirements for a Land Use Commission variance under LDC Section 30-5-41: (A)(2)(b); (A)(2)(c); and (A)(3).

THERE IS NEW OR ADDITIONAL EVIDENCE

In addition to the above information and evidence, there is new or additional information to show that the appeal should be granted and that the variance and preliminary plan should be approved.

First, there was incorrect information about safety. For example, one person testified that “The bridge will create daily life threatening safety issues against our children and the residents in these two neighborhoods.” This is incorrect, since the bridge would allow for much needed ingress and egress related to increasing risk of wildfires and major flood events, and to quicken the response time of EMS, police, and other first responders in case of life-threatening emergencies. Relatedly, there was testimony that trucks could not safely cross each other or other vehicles because the roads are too narrow to allow for construction trucks or additional traffic. However, there is drone footage that clearly shows trucks having sufficient space to pass. *See* Appendix A (Trucks Crossing on Zyle Road) and Appendix B (Trucks Crossing at Zyle Road and Morninghill Drive).

Second, there was testimony that a fire official did not look at the roads. This incorrect, as demonstrated by the Oak Hill Fire Department Fire Chief’s letter to the Travis County Judge and Commissioners, dated May 16, 2018. *See* Appendix C – Letter from Fire Chief Wittig. In

¹ “Low-Water Crossings: Geomorphic, Biological, and Engineering Design Considerations.” Clarkin, Kim, et. al, U.S. Dep’t of Agriculture Forest Service (Oct. 2006); <https://www.fs.fed.us/eng/pubs/pdf/LowWaterCrossings/LoWholeDoc.pdf>, citing Taylor (1999)

The Development Services Director
The City of Austin
August 21, 2018
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that letter, Chief Wittig stated that, “we believe the improvements currently being planned with this subdivision will improve our capability to respond to emergencies in the general area.” In addition, the Chief stated that, “the connection of the proposed Live Oak Springs subdivision to Derecho Drive / Highway 290 would provide a more direct and prompt response from our Department to the general area.”

THE PRELIMINARY PLAN SHOULD BE APPROVED

As previously stated, the Staff Recommendation was that the Commission should approve the preliminary plan upon approval of the variance request. This fact was reiterated during the hearing and acknowledged by a Commissioner. Since the variance request should have been approved, then the preliminary plan should have also been approved.

CONCLUSION

For the reasons stated above, the appeal should be granted. The evidence indicates that the applicant has met the requirements for the requested variance, and so we respectfully request that the appeal be granted, and the variance and the preliminary plan approved.

Sincerely,

A handwritten signature in black ink, appearing to read "Nikelle Meade". The signature is fluid and cursive, with the first name "Nikelle" and last name "Meade" clearly distinguishable.

Nikelle Meade

**Appendix A:
Trucks Crossing on Zyle Road²**



**Appendix B:
Trucks Crossing at Zyle Road and Morninghill Drive**



² <https://www.youtube.com/watch?v=MtXnQrJYJp4&feature=youtu.be>

**Appendix C:
Letter from Fire Chief Wittig**

Oak Hill Fire Department
Travis County Emergency Services District #3

Station 301
Circle Drive
9211 Circle Drive
Austin, Texas 78736
512-288-5576
Fax 512-288-5903



Station 302
Barton Creek
4111 Barton Creek
Austin, Texas 78735
Admin 512-288-5534
Fax 512-288-5844

May 30, 2018

Travis County Judge and Commissioners –

In reference to the planned "Live Oak Springs" subdivision in Southwest Travis County and located in Emergency Services District #3's jurisdiction, we believe the improvements currently being planned with this subdivision will improve our capability to respond to emergencies in the general area.

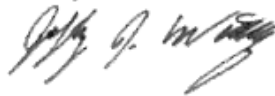
Travis County ESD #3 / Oak Hill Fire Department has engaged in a closest unit automatic aid agreement with all the fire departments in Travis County. Our dispatch system utilizes the closest unit available to respond to an emergency in our jurisdiction. With this system in place, a response from Austin Fire Station 43 would be likely.

Should the closest fire station be unavailable or should the incident require more than one fire apparatus to respond, the connection of the proposed Live Oak Springs subdivision to Derecho Drive / Highway 290 would provide a more direct and prompt response from our Department to the general area.

Additionally, the low water crossing on FM 1826 at Slaughter Creek has a demonstrated tendency to flood. During these times, our response to areas South of Slaughter Creek along FM 1826 in our jurisdiction are significantly hampered. The bridge along with other roadway features and improvements being proposed with the Live Oak Springs subdivision will potentially provide our department with a much needed connection to the southern end of our jurisdiction during times of flooding along Slaughter Creek.

Should you need additional information, please do not hesitate to contact me.

Thank you.



Jeffrey J. Wittig, CPE, CFO, EFO
Fire Chief
Travis County Emergency Services District #3
Oak Hill Fire Department
512-288-5534, ext. 214, Office
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Like us on Facebook at www.facebook.com/OakHillFireDept or visit us online at www.OakHillFire.org