

CAUSE NO. _____

BRIAN RODGERS
Plaintiff

§
§
§
§
§
§
§

IN THE DISTRICT COURT

v.

TRAVIS COUNTY

THE CITY OF AUSTIN
Defendant

_____ **JUDICIAL DISTRICT**

PLAINTIFF'S ORIGINAL PETITION FOR MANDAMUS & INJUNCTION

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Brian Rodgers (“Rodgers”) files this Original petition against Defendant City of Austin (“City”) and alleges as follows:

NATURE OF THE CASE AND DISCOVERY CONTROL PLAN

1. a. Discovery will be conducted under TRCP 190.3, Level 2.
- b. The Austin City Council may have the power to give away the farm to developers; they’ve been doing it for years. But they can’t do it without giving the public advance notice of their intentions, and the more interest the public has in the issue, the more specific the Council meeting notice must be. Such a violation of the Texas Open Meetings Act (TOMA) means their action can be declared void, and that’s what this lawsuit seeks for the Pilot Knob fee-waiver deal.
- c. Giving the public notice that the Council is just approving zoning for a piece of property, is not adequate notice that they are going to divert \$81 million from the water utility budget. This is especially inadequate notice considering that the average residential household in Austin just experienced a 22% increase in their water bill, Austin’ water utility under-recovered its costs by at least \$100 million over the period of 2010-2015, and the utility is on negative bond watch. This bold violation of the Open Meetings Act can also be viewed in the context that the last time the Austin City Council asked voters for permission for money for affordable housing in

2013, the amount approved was only \$65 million, after voters rejected a proposal in 2012 for \$78 million. Here the Council approved an even bigger deal without voter approval while hiding their actions from the public.

d. This whole deal seems to violate Austin laws on SMART housing ordinances, particularly when the development is not inside the City limits. But, in this case, the City Manager didn't even prepare a fiscal note, as required by the Austin Code, because the agenda item just indicated that it was a zoning case. Although the City Manager is also responsible for preparing the Council agenda, in referring to how "unique" this deal was, City Manager Ott said, "Zoning cases do not require a fiscal note given that there is not a fiscal impact."

e. In summary, if Council members themselves and key water utility staff members were surprised that the agenda zoning item also being used to approve waivers of \$81 million in growth impact fees, how was the public supposed to know that's what the Council was doing? Fortunately, the Texas Open Meetings Act does not allow the Council to get away with it this time.

CLAIM FOR RELIEF

2. Plaintiff seeks monetary relief of \$100,000 or less and nonmonetary mandamus and injunctive relief. TRCP 47(c)(2).

PARTIES

3. a. Plaintiff is Brian Rodgers, an interested person for purposes of the Texas Open Meetings Act (TOMA) claim regarding the City's action, and a resident of the City of Austin, Travis County, Texas. The last three digits of Brian Rodger's driver's license are 357, and the last three digits of his Social Security number are 488. Mr. Rodgers can be served through his attorney-of-record in this case.

b. Defendant City of Austin is a defendant pursuant to TOMA section 551.142 as the

governmental body who violated the meeting notice requirement of TOMA Section 551.041. Pursuant to Tex. Civ. Prac. & Rem. Code section 17.024(b), the City can be served through its Mayor, The Honorable Steve Adler, at the Mayor's office located at 301 W. 2nd Street, Austin, Texas 78701.

JURISDICTION & VENUE

4. The Court has jurisdiction over this case under TOMA section 551.142 which also makes venue mandatory in this Court.

FACTS

CITY'S MEETING NOTICE GIVES NO HINT OF AN \$81 MILLION FEE DIVERSION

5. In reverse chronological order, here are the meeting notices regarding the Pilot Knob deal that are challenged in this lawsuit:

a. December 17, 2015, Agenda Item 80 (Third Reading) under the heading of "10:00

AM - Zoning Ordinances / Restrictive Covenants (HEARINGS CLOSED)":

80. C814-2012-0152 – Pilot Knob Planned Unit Development – District 2 – Approve third reading of an ordinance amending City Code Chapter 25-2 by zoning property locally known as east and southeast of the intersection of East William Cannon Drive and McKinney Falls Parkway, and west of South U.S. Highway 183 and FM 1625 (Cottonmouth Creek Watershed; North Fork Creek Watershed; South Fork Creek Watershed) from interim-rural residence (I-RR) district zoning and interim-single family residence-standard lot (SF-4A) district zoning to planned unit development (PUD) district zoning. First Reading approved on October 8, 2015. Vote: 10-0, Council Member Pool was off the dais. Second Reading approved on November 19, 2015. Vote: 11-0. Owner/Applicant: Carma Easton, Inc. (Logan Kimble). Agent: Armbrust & Brown, L.L.P. (Lynn Ann Carley). City Staff: Wendy Rhoades, 512-974-7719. Related to Item #67.

b. November 19, 2015, Agenda Item 83 (Second Reading), under the hearing "10:00

AM - Zoning Ordinances / Restrictive Covenants (HEARINGS CLOSED)":

83. C814-2012-0152 - Pilot Knob Planned Unit Development - District 2 - Approve second reading of an ordinance amending City Code Chapter 25-2 by

zoning property locally known as east and southeast of the intersection of East William Cannon Drive and McKinney Falls Parkway, and west of South U.S. Highway 183 and FM 1625 (Cottonmouth Creek Watershed; North Fork Creek Watershed; South Fork Creek Watershed) from interim-rural residence (I-RR) district zoning and interim-single family residence-standard lot (SF-4A) district zoning to planned unit development (PUD) district zoning. First Reading approved on October 8, 2015. Vote: 10-0, Council Member Pool was off the dais. Owner/Applicant: Carma Easton, Inc. (Logan Kimble). Agent: Armbrust & Brown, L.L.P. (Lynn Ann Carley). City Staff: Wendy Rhoades, 512-974-7719.

c. October 8, 2015, Agenda Item (First Reading), under the heading of “10:00 AM - Zoning and Neighborhood Plan Amendments (Public Hearings and Possible Action)” :

34. C814-2012-0152 – Pilot Knob Planned Unit Development – District 2 – Conduct a public hearing and approve an ordinance amending City Code Chapter 25-2 by zoning property locally known as east and southeast of the intersection of William Cannon Drive and McKinney Falls Parkway, and west of South U.S. Highway 183 and FM 1625 (Cottonmouth Creek Watershed; North Fork Creek Watershed; South Fork Creek Watershed) from interim-rural residence (I-RR) district zoning and interim-single family residence-standard lot (I-SF-4A) district zoning to planned unit development (PUD) district zoning. Staff Recommendation: To grant planned unit development (PUD) district zoning. Planning Commission Recommendation: To grant planned unit development (PUD) district zoning. Owner/Applicant: Carma Easton, Inc. (Logan Kimble). Agent: Armbrust & Brown, L.L.P. (Lynn Ann Carley). City Staff: Wendy Rhoades, 512-974-7719.

THE ‘DEAL’ ITSELF IS OF QUESTIONABLE LEGALITY

6. The “deal” changed substantially after the First Reading, and, notably, after the “Public Hearing” was closed. What the Council actually did was not only to approve the zoning, but, in the same action under the same meeting notice on December 17, 2015, approved an ordinance that waives or diverts over \$81 million in water utility fees, ostensibly to provide for “affordable” housing in the subdivision, by waiving all of the subdivision’s water impact fees.

a. According to a memo by City Manager Ott dated February 8, 2016, the “Amount Waived” by the Pilot Knob deal in financial potential impact to the Austin Water Utility is

\$81,472,000.

b. The development is not inside the city limits of Austin. *See* Austin Code section 25-9-347 (“Exemption for Certain Affordable Housing”):

....“(C) To be eligible for an exemption under this section, affordable housing must:
(1) meet design and construction guidelines established by the community development officer for habitability, affordability, accessibility, water conservation, and energy efficiency;
(2) be served by existing City infrastructure and services; and
(3) be a newly constructed single family home or multifamily housing unit **located within the corporate limits of the City** that is”

c. Incredibly, this obvious violation of the Austin Code, was noticed but ignored.

From the Ott February 8th memo at 5:

“SMART housing allows for fee waivers and expedited review for projects that lie within the full-purpose jurisdiction of the City of Austin. SMART housing policy, within the Land Development Code (25-9-347), **requires that housing units be within the corporate limits of the City. Council was required to take action on the Pilot Knob agreement given that the project was outside the corporate limits.**” (emphasis added).

d. Austin Water director Greg Meszaros said in remarks to Council on February 9, 2016, that, had he been consulted, he would not have recommended the Pilot Knob deal because the water utility is “still under negative bond watch” and he “would urge caution in moving fees out of the water utility at this time.”

A BAD DEAL DONE THE WRONG WAY

7. This Council action is not only a classic violation of the open meetings requirement, it is a model for poor management of the People’s business. Based on evidence discovered after the Council’s vote on this shady deal, here is what was going on in the background:

a. As a further demonstration of the backroom dealing, City staff negotiated with the developers, but key city staff were not consulted about the fee waiver/diversion before the

Council's vote. From Manager Ott's February 8th memo at Pg. 3:

* "Neighborhood Housing and Community Development (NHCD) staff met with the developer and developer's representatives to negotiate the affordable housing program component of the Pilot Knob Planned Unit Development (PUD)...."

* "Austin Water Utility staff or management were not involved in negotiating the proposed fee waivers nor were they provided copies of the proposed agreement. Austin Water Utility was not asked to provide a formal recommendation regarding the specifics of the fee waivers."

* "Development Services and Planning and Zoning were not involved in the negotiations."

* "The Law Department was not a part of the negotiations regarding the affordable housing provisions."

OPEN MEETINGS ACT REQUIRES BETTER NOTICE

8. The Austin City Manager and Mayor have practically admitted that the agenda postings for the Pilot Knob deal did not disclose the fee waiver action that got included with this zoning ordinance.

a. From the Ott memo of February 8th, at Pg. 5:

"5. Please explain why this item was presented to Council without a fiscal note. Because zoning cases generally are just a change in zoning and have no fiscal impact, a fiscal note is not provided for zoning cases. **A review of the Pilot Knob Planned Unit Development (PUD) agenda posting language would not indicate that a fiscal note was required....**" (emphasis added)

"....**Budget Office and Financial Services management review draft agenda language** to identify RCAs that need a fiscal review for which no fiscal review was requested. **Zoning cases do not require a fiscal note given that there is not a fiscal impact. The Pilot Knob item was a zoning case listed under the Planning and Zoning Dept.** This item was unique relative to the majority of zoning cases given the financial impact." (emphasis added)

b. From Mayor Adler's public comments at Council work session on February 9, 2016:

“In retrospect, we should have more clearly communicated the mechanics of the agreement and *the broader policies implicated* in the days leading up to the council meeting and from the dais at third reading.”

c. And Austin Water director, Greg Meszaros, whose department budget would lose \$81 million from action by the Council under the agenda item, told the Council on February 9, 2016 that he had not known, from news media reports, that the Council was considering fee waivers, and he was “not aware that a decision had been made to waive all the fees” until after the Council’s final action on December 17th.

This is all evidence that even internally, the agenda notice was not adequate notice that the Council was considering the enormous fee waivers. Therefore, the action is subject to being voided.

9. Because this Council and City administration apparently did not recognize the serious and clear violation of TOMA by their actions, Plaintiff also seeks injunctive relief to prevent the Austin City Council from doing this again in the future.

COUNT 1 – SUIT FOR MANDAMUS/INJUNCTIVE RELIEF

10. The facts stated above are incorporated here as the basis for this cause of action for mandamus and injunctive relief. *See* TOMA, Tex. Gov’t Code section 551.142(a) (“Sec. 551.142. MANDAMUS; INJUNCTION. (a) An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.”). Plaintiff Rodgers brings this suit for mandamus against the City of Austin and asks the Court to declare void all actions the Council took regarding the Pilot Knob agenda items and to enjoin the City from giving waivers via a zoning case in the future without including such intentions in its meeting notices for such agenda items.

CONDITIONS PRECEDENT

11. All conditions precedent to plaintiff's claim for relief have been performed or have occurred.

ATTORNEY FEES

12. Plaintiff has retained the under-signed attorney to bring this action. Plaintiff asks the court to award costs and reasonable and necessary attorney fees pursuant to TOMA section 551.142(b).

PRAYER

For these reasons, Plaintiff Brian Rodgers asks the Court to set this matter for hearing on mandamus to declare void the Council's actions on Pilot Knob as enumerated above, and injunction to prevent such Council actions in the future, pursuant to Tex. Gov't Code section 551.142 for violation of section 551.041. Plaintiff asks the Court to award Plaintiff costs and reasonable and necessary attorney fees, and to grant Plaintiff all other relief to which he may be entitled.

Respectfully submitted,



Bill Aleshire
Bar No. 24031810
AleshireLAW, P.C.
700 Lavaca, Suite 1400
Austin, Texas 78701
Telephone: (512) 320-9155
Cell: (512) 750-5854
Facsimile: (512) 320-9156
Bill@AleshireLaw.com