

CAUSE NO. D-1-GN-16-000615

BRIAN RODGERS <i>Plaintiff</i>	§	IN THE DISTRICT COURT
	§	
v.	§	TRAVIS COUNTY
	§	
THE CITY OF AUSTIN <i>Defendant</i>	§	345th JUDICIAL DISTRICT

**PLAINTIFF’S SECOND AMENDED PETITION
FOR MANDAMUS, INJUNCTION, AND DECLARATORY JUDGMENT**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Brian Rodgers (“Rodgers”) files this Second Amended 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. Many people might be surprised that this “progressive” Austin City Council would do something that is illegal to begin with and then conceal their scheme from the public by posting a meeting notice that hides their controversial and unlawful intentions. But that is what the Austin Council did when it posted a wholly inadequate Council meeting notice that just said they were approving PUD zoning for the Pilot Knob Development when, in fact, they were approving an illegal scheme:

(a) to divert \$81 million from the water utility budget (that would have helped growth pay for itself) to what amounts to a slush fund to be used for anything under the guise of being a fund for “affordable” housing,

(b) to get only 10% “affordable” rental units in the development, when state and federal law requires at least 20% be provided to qualify for fee waivers,

(c) to calculate the fee diversion or waivers based on every unit in the development instead of only on those “affordable” units, and

(d) without mention in the meeting agenda notice, to provide exemptions from important City ordinances, including one that prohibits giving affordable housing fee waivers for developments that are outside the City limits of Austin, such as Pilot Knob.

And instead of admitting that they gave inadequate public notice and that this scheme is illegal, the Mayor told the press that the Pilot Knob scheme was still a good deal and a model for the future.¹ The Mayor’s Chief of Staff wrote, “...the question isn’t whether we should undo this deal, but whether we should do a lot more of them.”² This attitude, and the City’s use of a Trojan Horse tactic for hiding controversial subjects inside bland public notices of “zoning” agenda items, demonstrates the need not only to have the Council’s action on the Pilot Knob Ordinance voided, but to obtain permanent injunctive relief to prevent such future violations of the Texas Open Meeting Act and violations of restrictions in the Texas Local Government Code on imposition and use of water impact fees.

c. This is especially inadequate notice considering that the average residential household in Austin just experienced a 22% increase in their water bill with more increases planned for next year; Austin’ water utility under-recovered its costs by at least \$100 million over the period of 2010-2015; and the utility was 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

¹ The Austin Monitor, February 10, 2016.

² Opinion, John-Michael Cortez, Austin American-Statesman, February 8, 2016.

approved an even bigger amount without voter approval for a development that, being outside the City Limits, violated City ordinances restricting affordable housing fee waivers to require that affordable housing be inside the city limits. And Council did all of this while hiding their intentions from the public in an inadequate meeting notice.

d. 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." There sure was a fiscal impact in this case.

CLAIM FOR RELIEF

2. Plaintiff seeks monetary relief of \$100,000 or less and nonmonetary mandamus and injunctive relief. TRCP 47(c)(2). Plaintiff also seeks a declaratory judgment that the action of the City Council in passing Ordinance Number 20151217-080 ("the Pilot Knob Ordinance") was in direct violation of Texas Local Government Code sections 395.011, 395.012, and 395.016, pursuant to the Texas Uniform Declaratory Judgments Act, Chapter 37 of the Texas Civil Practice and Remedies Code.

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. The City has been served and has filed an answer.

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.

6. The City now argues in this lawsuit, that by telling the public that Council intended to “*approve an ordinance amending City Code Chapter 25-2 by zoning property ... to planned unit development (PUD) district zoning*” that was adequate notice for Council to do anything that the massive Code Chapter 25-2 would allow the Council to do without more specific public notice of what the Council was actually going to do. This is why Plaintiff refers to the City’s meeting notice tactic as a “Trojan Horse” meeting notice. The public might yawn reading that Trojan Horse meeting notice not realizing that hidden inside is a massive attack on \$80 million dollars of much-needed water utility funds—as occurred in the case of Pilot Knob. The City, before and during this lawsuit, is ignoring—and vows to continue to ignore—its duty under the Open Meetings Act, “*especially when an issue is one of special interest to the public, to give full and adequate notice*”

of the subject matter of the meeting so that an objective reader receives meaningful notice.” *See, Odessa Texas Sheriff’s Posse, Inc. v. Ector County*, 215 S.W.3d 458 (Tex. App.—Eastland 2006, pet. denied).

**THE ‘DEAL’ ITSELF IS ILLEGAL UNDER
THE TEXAS LOCAL GOVERNMENT CODE**

7. 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—without giving public notice first—the Council’s approval of the final agenda item included an exemption from the Austin Code section 25-9-347 that was intended to encourage affordable housing *within* the city limits of Austin. 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.”

8. a. The City lacks authority to divert the water impact fees as they did with the Pilot Knob Ordinance. The Ordinance violates Chapter 395 of the Texas Local Government Code in several ways. First, Chapter 395 restricts what water impact fees such as this can be imposed for and spent on. The law permitting the water impact fees does not give authority to Austin to impose the fee and spend it on “affordable housing” or, as the Mayor told the Council on February 9, 2016, to put it in a pot that the Council could use even for other purposes. Thus, the Ordinance is an *ultra vires* act by the Austin Council because Chapter 395 does not give authority to impose a water impact fee or spend it for any purpose other than water capital improvements or facility expansions. Tex. Loc. Gov’t Act, section 395.012(a) (“An impact fee may be imposed only to pay the costs of constructing capital improvements or facility expansions”).

b. In addition, even to the limited extent that Chapter 395 permits waivers of the fee on housing units that qualify as affordable housing under federal law, the Ordinance fails to even get enough affordable *rental* units to comply with that statute. Ordinance Number 20151217-080 sets aside only 10 % of the total multifamily *rental* housing units as affordable rental units. *See* Ordinance, Part 8 B. 2. The federal definition cited in the Local Government Code section

395.16(b)³ (42 U.S.C section 12745) also requires a **minimum of 20% of** the rental units to be occupied by very low income families for them to qualify as affordable housing, something the Austin Ordinance ignored and did not require. The federal standard Austin must meet says:

(1) **Qualification.** Housing that is for rental shall qualify as affordable housing under this subchapter *only if* the housing— ...

(B) has *not less than 20 percent of the units* (i) occupied by very low-income families who pay as a contribution toward rent (excluding any Federal or State rental subsidy provided on behalf of the family) not more than 30 percent of the family’s monthly adjusted income as determined by the Secretary, or (ii) occupied by very low-income families and bearing rents not greater than the gross rent for rent-restricted residential units as determined under section 42(g)(2) of title 26; ...

42 U.S.C. section 12745(a)(1)(b) (emphasis added).

c. That Ordinance requires 10% of owner occupied units to be permanently affordable. *See* Ordinance, Part 8 C. Incredibly, in return for this, the Ordinance grants 100 % fee waiver for *all units in the development*, regardless of affordability. This “deal” is in direct violation of Texas Local Government Code 395.016(g), which allows for reduction or waiver of impact fees for any service unit that would qualify as affordable housing under 42 USC 12745, once the unit is constructed, but the Pilot Knob fee waiver is being applied to all units, not just the affordable ones.

9. a. The City has applied City Code 25-1-704(a) (fee waivers) to its water impact fees, even though they are not specifically listed as one of the fees to be waived under that

³ Section 395.16(g) says, “(g) Notwithstanding Subsections (a)-(e) and Section 395.017, the political subdivision may reduce or waive an impact fee *for any service unit* that would qualify as affordable housing under 42 U.S.C. Section 12745, as amended, *once the service unit is constructed*. If affordable housing as defined by 42 U.S.C. Section 12745, as amended, is not constructed, the political subdivision may reverse its decision to waive or reduce the impact fee, and the political subdivision may assess an impact fee at any time during the development approval or building process or after the building process if an impact fee was not already assessed.” (emphasis added)

ordinance. City officials have admitted publicly—after the vote—that they have diverted the impact fees from the purpose(s) authorized under Chapter 395 of the Local Government Code.

The Austin Monitor of February 10, 2016 said:

At Tuesday’s work session [2/9/2016], Mayor Steve Adler launched a discussion on the Pilot Knob planned unit development *with a spirited defense* of the City Council’s now controversial decision *to redirect the PUD’s water and wastewater impact fees to the city’s affordable housing trust fund*. The fees would normally be paid instead to the Austin Water utility.

And, John-Michael Cortez, the Mayor’s Chief-of-Staff, wrote in an Opinion piece in the Austin American-Statesman on February 8, 2016:

Had we not negotiated this affordable housing deal, the \$50 million in developer fees would have gone primarily into the water utility’s account.

b. The City has also admitted that the fee waivers will result in higher water utility rates for all Austin Water customers. “Any capital recovery fees that are waived, in general, will result in higher water utility rates to cover the growth-related debt service that the capital recovery fees were planned to be used. All current and future customers of the utility system would have higher rates to pay for the growth related costs not covered by the waived capital recovery fees.”

Marc Ott February 8, 2016 Memo at page 4. The unauthorized fee waivers thus have an adverse economic impact on all customers of Austin Water, including Plaintiff Brian Rodgers who is an Austin Water Utility customer.

A BAD DEAL DONE THE WRONG WAY

10. This Council action is not only a classic violation of the open meetings notice requirement, this unlawful scheme 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."

With such secretive internal process of cooking up this scheme with telling key City staff what was going on, no wonder the Trojan Horse meeting notice failed to alert the public what the Council was up to.

THE OPEN MEETINGS ACT REQUIRES BETTER NOTICE

11. The Austin City Manager and Mayor have practically admitted that the agenda postings for the Pilot Knob deal did not disclose the fee waiver/diversion 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/diverson. Therefore, the action is subject to being voided.

12. Because this Council and City administration refuse to recognize the serious and clear violation of TOMA by their actions—and call this a model for the future—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

13. 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 sections 551.141, 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 (a) to declare the meeting notice for the Pilot Knob Ordinance violated TOMA section 552.041 and to void all actions the Council took regarding the Pilot Knob agenda items, and (b) to enjoin the City from giving water impact fee waivers or to divert water impact fees from the Austin Water Utility via a zoning case in the future without including such intention in its meeting notice for such an agenda item.

COUNT 2- SUIT FOR DECLARATORY JUDGMENT

14. The facts stated above are incorporated here as the basis for this cause of action for declaratory judgment. *See* UDJA, Tex. Civil Practice and Remedies Code section 37.001, et seq Plaintiff Rodgers brings this suit for declaratory judgment against the City of Austin and asks the Court to declare void and enjoin the implementation of the entirety of Part 8 of Austin City Council Ordinance No. 20151217-080 regarding the Pilot Knob “affordable housing” fee waiver/diversion, and to grant ancillary injunctive relief as necessary to prevent future violations by the City of Texas Local Government Code sections 395.011, 395.012, and 395.016.

CONDITIONS PRECEDENT

15. All conditions precedent to plaintiff’s claim for relief have been performed or have occurred.

ATTORNEY FEES

16. 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) and Tex. Civ. Prac. & Rem. Code section 37.009.

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 to grant an 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 declare void and enjoin the implementation of the entirety of Part 8 of Austin City Council Ordinance No. 20151217-080. 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,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via e-file on this the 30th day of July, 2016 on the following:

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