

11/18/16  
Late Backup

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Of Counsel:

Richard Lowerre

September 22, 2016

Mayor Steve Adler  
Members of the Austin City Council  
City of Austin Texas

By oral and hand delivery

Dear Mayor and City Council members:

I represent neighbors who live near the Champion tract 3. I ask you to vote against the ordinances proposed to you for the Champion tract 3 for the following reasons.

**This tract and the proposed project for this tract should not be and cannot be arbitrarily exempted from the law.** The manner in which things have proceeded so far, it would appear that everything is up for grabs and laws are free to be ignored when it comes to facilitating a development on Champion tract 3. The landowners have agreed to be bound by ordinances in effect in 1993, but in seeming arbitrary fashion, contemporary ordinances, or ordinances from other eras are applied and if city regulations are not good enough to get a development satisfactory to the applicant going; then new regulations are fashioned ad hoc with little consideration to Texas statutes or the the City's Land Development Code. By this letter I will provide a few examples of the ways in which the proposed ordinances contravene city ordinances, the City Charter, and state law.

Section 211.006(a) of the Texas Local Government Code requires cities to establish procedures for adopting and enforcing zoning regulations. "The Legislature having provided ... that cities adopting a ... Zoning ordinance must provide a procedure for the amendment of such ordinance by implication directs that the city will follow the procedure it adopts." *Wallace v. Daniel*, 409 S.W.2d 184, 188 (Tex. Civ. App. – Tyler 1966, no writ). The City has adopted very specific general procedures and procedures specifically applicable here for rezoning, waivers, special exceptions and variances to zoning regulations. But when it comes to Champion tract 3, these procedures enacted pursuant to section 211.006(a) have been ignored and transgressed. To use one example within all the moving pieces both hidden and disclosed, the draft ordinance released just yesterday, purporting to amend the Settlement Agreement, would grant

numerous significant waivers to the Hill Country Roadway Ordinance by fiat without following its rules governing waivers, variances and exceptions found in Land Development Code sections 25-2-1105, 25-2-472 et seq., or 25-2-281 et seq. Because the approval of these zoning waivers would be through procedures other than those enacted pursuant to section 211.006 of the Local Government Code, they would be invalid. In addition, it would constitute spot zoning. Alternatively, if valid it would be superseded by the stricter Hill Country Roadway ordinance and other zoning ordinances which were adopted pursuant to the statutorily mandated procedures. See Tex. Loc. Gov't Code § 211.013(a).

The new zoning category for the Champion 3 tract has been designated a CO, yet the Land Development Code requires that districts with CO designation consist of more restrictive measures rather than exemptions from restrictions that would otherwise apply. So for this reason also, the proposed rezoning of tract 3 would violate LDC § 25-2-332 and on this additional ground be invalid.

**These zoning changes are illegal and void because they are not being adopted in accordance with a lawful comprehensive plan.** Section 211.004(a) of the Texas Local Government Code requires any zoning regulations to be adopted in accordance with a comprehensive plan. One of the more recent judicial opinions on this issue came in a case I brought against the City of Laredo on behalf of some neighbors to a large tract of land that had been rezoned by the City of Laredo. *City of Laredo v. Rio Grande H2O Guardian*, San Antonio Court of Appeals, 2011. There the San Antonio Court of Appeals ruled that a zoning ordinance is invalid if not enacted in accordance with pre-existing provisions of a comprehensive plan.

For this attempt to rezone a tract here on FM 2222, an essential element of the comprehensive plan, one required by the City Charter, is missing. Section 5 of the Charter for the City of Austin defines the elements that must be in the City of Austin's comprehensive plan. Among other things the comprehensive plan must contain a "future land use element." This is what guides zoning decisions as it is zoning that authorizes particular uses. The City's comprehensive plan, Imagine Austin, does not contain the requisite future land use element. The city's future land use map, or FLUM, was not created pursuant to the Imagine Austin process and only applies to certain limited areas of the city. For the area the City now seeks to rezone, there is no FLUM, no other proscriptive future land use element in the comprehensive plan that could guide zoning decisions. Because the City's so-called comprehensive plan lacks this essential element required explicitly by the City Charter and implicitly by Texas statute, the City cannot lawfully rezone this property pursuant to section 211.004 of the Local Government Code.

Even the limited standards contained in the text of Imagine Austin are inconsistent with the proposed zoning. City staff evaluating this zoning request was willing to overlook the absence of a FLUM covering the tract. But the reviewer pointed out that this tract "is not located along an Activity Corridor or within an Activity Center, which the Imagine Austin Growth Concept Map targets for growth." The reviewer quotes Imagine Austin as requiring new development to "be connected by sidewalks, bicycle lanes, and transit to the surrounding area and the rest of the city ... to encourage walking and bicycling..." The reviewer notes, however, that "this area of Austin is currently lacking...safe routes for pedestrians (sidewalks and hike and bike trails) or public transportation stops available within several miles of this location." The staff evaluator concluded that the zoning only "partially complies" with the comprehensive plan, and this partial compliance was due only to the original retail component of the zoning which is not now before the City Council. Because the proposed zoning does not comply with Imagine Austin, it would be void pursuant to section 211.004 of the Local Government Code.

By this letter I do not claim to have identified all the legal deficiencies in these hastily assembled ordinances. The City has already been advised about contract zoning and I have not addressed that here. Given the numerous legal regimes that have been applied to this tract and the length of time it has remained undeveloped, there would appear to be no reason to rush something through now that will create numerous problems for everyone moving forward.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a horizontal line that tapers off to the right.

Brad Rockwell