

Velva L. Price
District Clerk
Travis County
D-1-GN-16-001762
Victoria Chambers

Cause No. D-1-GN-16-001762

GRAYSON COX, SABRINA BRADLEY,	§	IN THE DISTRICT COURT
DANIEL DE LA GARZA, PIMPORN MAYO,	§	
JEFFREY MAYO, RYDER JEANES,	§	
JOSEPHINE MACALUSO, AMITY	§	
COURTOIS, PHILIP COURTOIS, ANDREW	§	
BRADFORD, MATTHEW PERRY,	§	
TIMOTHY HAHN, GARY CULPEPPER,	§	
CHERIE HAVARD, ANDREW COULSON,	§	
LANITH DERRYBERRY, LINDA	§	<u>126th</u> JUDICIAL DISTRICT
DERRYBERRY, ROSEANNE GIORDANI,	§	
BETTY LITRELL, and BENNETT BRIER,	§	
	§	
Plaintiffs,	§	
v.	§	
	§	
CITY OF AUSTIN,	§	
	§	
Defendant.	§	TRAVIS COUNTY, TEXAS

PLAINTIFFS’ ORIGINAL PETITION FOR DECLARATORY JUDGMENT

Plaintiffs Grayson Cox, et al, file this petition for declaratory judgment, complaining of the City of Austin and seeking a declaratory judgment determining and confirming certain important rights guaranteed to them by state statute to protect the use and enjoyment of their property and homes.

A. SUMMARY OF THE CASE AND REQUESTED RELIEF

1. This case involves the interpretation of the Valid Petition Rights section of the Texas Zoning Enabling Act, Texas Local Government Code Section 211.006(d) (the “**Valid Petition Rights Statute**”). That statute requires a ¾ vote of a City Council to approve any change in zoning regulations that are protested by at least 20% of the landowners in the area.

The requisite 20% of the neighboring landowners have submitted valid petitions objecting to the approval of the proposed zoning regulation changes for the Grove at Shoal Creek Planned Unit Development (herein “**Grove PUD**”). That Grove PUD is proposed as a high-density mixed-use development on a 76 acre tract of land at 4205 Bull Creek Road in Austin, Texas, commonly called the “**Bull Creek Tract.**”

2. Approval of the Grove PUD will require the Austin City Council to adopt an ordinance amending Austin’s City Code, making numerous and substantial amendments, modifications, and other changes to the existing regulations and restrictions in Austin’s comprehensive zoning ordinance. The question in this case is whether approval of that ordinance will require a $\frac{3}{4}$ vote by the Austin City Council under the Valid Petition Rights statute, or whether the Grove PUD is exempt from that statute and can be approved by simple majority vote.

3. Plaintiffs are homeowners in the residential neighborhoods surrounding the Bull Creek Tract. Due to certain adverse impacts the proposed Grove PUD will have on their homes and neighborhoods, Plaintiffs and other neighbors have filed the requisite valid petitions to trigger $\frac{3}{4}$ voting under the Zoning Enabling Act. The City has rejected those petitions based on the contention that the Grove PUD is exempt from the mandatory application of the Valid Petition Rights Statute.

4. Under the Valid Petition Rights Statute, if 20% or more of the neighboring landowners object to an ordinance amendment that will change the regulations or restrictions in a city’s zoning ordinance, a $\frac{3}{4}$ supermajority vote is required to approve that amending ordinance. To protect the property rights of the existing landowners, the Legislature mandated that any ordinance changing the city’s land use regulations to allow objectionable new or different uses,

must receive at least a $\frac{3}{4}$ vote by the city council to be effective. The fundamental law granting cities zoning powers says ordinances in such cases are not to be determined by the politics of a simple majority vote of city council.

5. The ordinance amending Austin's comprehensive zoning ordinance to approve the Grove PUD has not been scheduled for a vote by the City council. Nevertheless, certain rights of Plaintiffs to participate meaningfully in the city review and approval process for this PUD are being adversely affected by the City's determination not to comply with the Valid Petition Rights statute. The proposed Grove PUD is currently under review by various city departments for staff approval and recommendation to the city council. Plaintiffs are attempting to participate in that process as is their right. In good faith, Plaintiffs are seeking modifications to certain objectionable aspects of the proposed Grove PUD that would be damaging to their homes and neighborhoods. The Zoning Enabling Act and the requirement of $\frac{3}{4}$ voting is supposed to make that involvement meaningful so as to facilitate one of two solutions to such objectionable land use changes: either the objectionable parts of the proposed changes can be modified during the review process so that the valid petition objections can be withdrawn; or, the objections of the adversely affected neighbors will be overridden by a $\frac{3}{4}$ vote of the city council under the Valid Petition Rights Statute.

6. Plaintiffs prefer the first solution of constructively working toward a compromise that will provide sufficient protections for the use and enjoyment of their homes and neighborhoods. The possibility of that solution has been substantially foreclosed by the City's refusal to recognize the required $\frac{3}{4}$ vote requirement. This lawsuit has become necessary to ensure that proper balancing of Plaintiffs' rights will be considered through $\frac{3}{4}$ city council voting under that second avenue of protection provided by Valid Petition Rights statute.

7. This suit seeks a declaratory judgment that the Valid Petition Rights section of the Texas Zoning Enabling Act requires a ¾ vote by the Austin City Council to legally approve the Grove PUD.

B. PARTIES

8. Plaintiffs are Grayson Cox, 2621 W. 45th Street; Sabrina Bradley, 1900 W. 40th Street; Daniel de la Garza, 2621 W. 45th Street; Pimporn Mayo, 2623 W. 45th Street; Jeffrey Mayo, 2623 W. 45th Street; Ryder Jeanes, 2629 W. 45th Street; Josephine Macaluso, 2641 W. 45th Street; Amity Courtois, 2643 W. 45th Street; Philip Courtois, 2643 W. 45th Street; Andrew Bradford, 2619 W. 45th Street; Matthew Perry, 4006 Bull Creek Road; Timothy Hahn, 1502 Bull Creek Road; Gary Culpepper, 3905 Idlewild Road; Cherie Havard, 4011 Idlewild Road; Andrew Coulson, 4011 Idlewild Road; Lanith Derryberry, 4100 Idlewild Road; Linda Derryberry, 4100 Idlewild Road; Roseanne Giordani, 4107 Idlewild Road; Betty Littrell, 4112 Idlewild Road; and Bennett Brier, 4112 Idlewild Road; all of Austin, Travis County, Texas 78731.

9. Defendant City of Austin is a home rule city with its City Hall located at 301 W. Second St., Austin, Travis County, Texas 78701. It may be served with process by serving its Mayor or its City Clerk at that address.

10. An additional party whose interest could be affected by the declaration of this action pursuant to Section 37.006 of the Declaratory Judgments Act, is ARG Bull Creek Ltd. (referred to herein as “**ARG**”), the owner of the properties included in the proposed Grove PUD. It may be served with process by serving its Registered Agent, Garrett Martin at its address, 9111 Jollyville Road, Suite 111, Austin, Texas 78759.

C. JURISDICTION

11. The Court has jurisdiction of this case under Section 37.003 of the Texas Declaratory Judgments Act.

D. VENUE

12. Venue is mandatory in Travis County, Texas, under § 15.011 of the Texas Civil Practice & Remedies Code because this case concerns real property located in Travis County, Texas.

13. Venue also is proper in Travis County, Texas, under § 15.002(a)(1) of the Texas Civil Practice & Remedies Code because all or a substantial part of the events or omissions giving rise to this case occurred in Travis County, Texas.

14. Venue is also proper in Travis County, Texas, under § 15.002(a)(3) of the Texas Civil Practice & Remedies Code because Defendant's principal offices are located in Travis County, Texas, as are those of ARG.

E. DISCOVERY CONTROL PLAN

15. Pursuant to Tex.R.Civ.P. 190.3, Plaintiffs intend for discovery in this case be conducted under Level 2.

F. FACTS AND CLAIMS

1. Plaintiffs' Properties and Homes

16. Plaintiffs are home owners in residential neighborhoods adjacent to the Bull Creek Tract. These neighborhoods were developed initially in the 1930's under Austin's comprehensive zoning ordinance regulations. Soon after the end of World War II, these

neighborhoods were built out with homes and have retained their residential use and character to this day.

17. Within these surrounding neighborhoods is the 76-acre Bull Creek Tract. It was owned by the State of Texas for well over 100 years, during which time it was used for certain defined governmental operations that were compatible with the surrounding residential neighborhoods. The history of the Bull Creek Tract is discussed further in the following section of this Petition.

18. The State determined that the Bull Creek Tract was no longer needed for state government operations after 2018 and should be sold. In 2014, the State offered the Bull Creek Tract for sale. Prior to offering the land for sale, the Legislature required the State to consult with the surrounding neighbors regarding their concerns about the future development of the land. The State did that and included the neighbors' input in the bidding information. In the bid package issued by the State, it stated that the best use for this tract was for single and multifamily residential.

19. In 2015, the Bull Creek Tract was sold to ARG, the developer who was the high bidder. Instead of pursuing residential development for this tract as recommended by the State and the neighbors, ARG filed an application with the City of Austin to put a high density, mixed use Planned Unit Development ("PUD") on this tract. That proposed development is called The Grove at Shoal Creek PUD (referred to herein as the "**Grove PUD**"). That application includes proposed residential units, but is dominated by hundreds of thousands of square feet of proposed high density commercial and retail development.

20. The magnitude of that proposed commercial and retail development, combined with the density of the proposed residential units, is not compatible with adjoining residential

neighborhoods and would cause certain harms and disruptions to the use and enjoyment of the existing homes in the area. The harms and disruptions include putting excessive traffic on Bull Creek Road, the already congested two-lane street adjacent to this tract. The Grove PUD is projected to generate more than 19,000 additional car and truck trips per day, causing transportation break-downs and spilling excessive traffic over onto other neighborhood streets.

21. The traffic harms will be compounded by the additional cars and trucks on neighborhood streets every evening and night going to and especially coming from the tens of thousands of square feet of late night restaurants and cocktail bars proposed for the Grove PUD.

22. Disturbingly, the City has used extraordinary means to conceal the magnitude of the harms from the increased traffic, and to otherwise circumvent the normal transportation review process for projects such as this. The City's traffic engineers were ordered not to complete their study of the traffic burdens coming from the proposed Grove PUD. Further, the City and ARG are operating together to conceal important underlying data detailing the harms that additional traffic will cause.

23. The Grove PUD's high density commercial and retail development not only will cause traffic and other environmental harms to adjacent neighborhoods, it is incompatible with the residential uses of those neighborhoods. The proposed development is not permitted under the current regulations of Austin's zoning ordinance and is very different from any past or current use of the Bull Creek Tract. See following Part 2.

24. There is no question that the Valid Petition Rights Statute was intended to apply to instances such as this and provide certain protections to established homeowners such as Plaintiffs. That statutory protection, which has existed since Texas cities were first given zoning authority, is the requirement that zoning regulation changes permitting new or different land uses

that are protested by at least 20 % of the landowners in the area, need a $\frac{3}{4}$ supermajority vote by the city council to be approved. The only question in this case is whether, as the City contends, there is a loophole in that otherwise mandatory statute for the Grove PUD.

25. Plaintiffs have fully complied with the statutory requirements to trigger the mandatory $\frac{3}{4}$ supermajority voting to approve an ordinance changing the zoning regulations to permit the Grove PUD. Plaintiffs and other landowners with homes within the statutorily defined 200 foot area of the proposed Grove PUD, filed petitions with the City protesting the zoning regulation changes sought by that PUD application.

26. On April 14, 2016, the City's Planning and Zoning Department confirmed that the landowners petitioning against the Grove PUD constituted 28.68% of the landowners within 200 feet of the proposed PUD as defined in the Valid Petition Rights Statute. While that percentage is above the statutory 20% threshold to trigger $\frac{3}{4}$ super majority voting, that Department reaffirmed that $\frac{3}{4}$ supermajority voting under the Valid Petition Rights would be denied in this case.

2. The Bull Creek Tract and Its Past and Current Uses

27. The proposed Grove PUD is to be located mainly on the Bull Creek Tract, a 76 acre (more precisely, 75.746 acres) tract of land at 4205 Bull Creek Road in Austin, Texas. A map showing this tract's location is attached as Exhibit A.

28. The Bull Creek Tract was owned by the State of Texas from 1887 until 2015, when it was sold to ARG (through an ARG affiliated entity). During the years of State ownership, this tract was used for legislatively defined governmental purposes, all of which have been compatible with the character and residential uses of the surrounding neighborhoods. The

buildings on this Bull Creek Tract continue to be occupied and used by the State for governmental operations under a lease agreement with ARG.

29. This 76-acre Bull Creek Tract was originally part of the 100-acre tract purchased by the State of Texas in 1887 for establishment of the “Deaf, Dumb, and Blind Asylum for Colored Youths” as the combined schools for the blind and the deaf “youth of the people of color in this State.” Acts 1887, 20th Leg., R.S., ch. 147. Dormitories, class rooms, dining hall, chapel and other buildings were constructed on the property to house the children, their teachers and other caregivers, and to provide education and training in various agricultural and vocational occupations in a campus-type setting. Annual Reports of the Texas State Board of Control.

30. In 1918, the City of Austin agreed to supply this property with city water and electricity even though at that time it was approximately one-half mile outside the city limits of Austin. The City has provided those and other city services continuously to this property since then.

31. In 1929, the State closed the African-American orphan school in Gilmer, Texas, and the children there were moved into the facility on this land, and it was renamed the “Texas Blind, Deaf, and Orphan School.”

32. By the early 1930’s, residential development in Austin expanded into the areas around the School on the Bull Creek tract. Land in the area was subdivided for that development in the 1920’s and 30’s.

33. In 1931, Austin adopted its first comprehensive zoning ordinance pursuant to the delegation of authority by the original 1927 Texas Zoning Enabling Act. That Act, discussed in part 4 below, is still the basis for city zoning powers today. The Valid Petition Rights Statute was part of that 1927 Act and continues in force today.

34. In 1935, the City of Austin annexed this Bull Creek Tract and the surrounding properties. Since then, this Bull Creek Tract has been served with all city services provided to other properties in the city limits.

35. In 1954, Austin's comprehensive zoning ordinance was revised and re-adopted. That has occurred several more times since the 1935 annexation of the Bull Creek Tract, including in 1988 when the comprehensive "Land Development Code" was adopted, and 1999 when that Code was recodified in its current form as Chapter 25 of the City Code.

36. This Bull Creek Tract was operated as the segregated school for African-American children until that school was moved to a location in East Austin in 1960. (In 1965, the State schools for the blind and the deaf were finally integrated and that East Austin facility was closed).

37. Beginning in 1960, this tract was used as a residential facility operated by the Texas Department of Mental Health and Mental Retardation ("MHMR") for mentally disabled adults, and was sometimes called the "State School Annex." The buildings and grounds included dormitories, dining facilities, staff office buildings, workshops and a plant nursery. That residential facility continued in operation until the late 1970's, when care for those citizens was transferred by the State to privately run facilities.

38. In 1963, the Legislature authorized the State Board of Control to study whether other state agencies might have use for this tract. Acts 1963, 58th Leg., R.S., ch. 346. As a result 24 acres on the east side of this tract was transferred for use by the State Library Commission. By 1972, the State Records Management Building was built on that 24 acres and continues in State operation today. By severing out that 24 acres, the Bull Creek Tract came to be the 76 acre tract that it is today.

39. In the mid-1980's, Texas was suffering through an economic recession caused by the Savings & Loan/real estate crises. By 1987, the Legislature was struggling with budget problems caused by declining state revenues. In its second special session of that year, the Legislature passed a budget-related bill requiring MHMR to "sell" the Bull Creek Tract to the State Department of Highways and Public Transportation. In exchange, MHMR received certain dedicated highway funds, which were placed in the State's general revenue account and in turn became available for other State spending. The effect was that the Legislature converted dedicated highway funds into general revenue for non-highway spending in order to balance the State budget. The bill making that transfer specified that this tract was to be used for "the construction of building to house the administrative offices and support facilities of the State Department of Highways and Public Transportation." Acts 1987, 70th Leg., 2nd C.S., ch. 2, sec. 1(c).

40. The Texas Department of Transportation ("TxDOT"), the successor to the State Department of Highways and Public Transportation, developed plans to use this tract as a campus-type facility for its administrative offices. Those development plans were never fully carried out. However, in 1988, TxDOT began using the buildings on this tract for those legislatively authorized purposes. TxDOT's use of the buildings of this Bull Creek Tract is still ongoing and will continue under a lease with ARG until 2018.

41. In 1995, at the urging of Lt. Governor Bob Bullock, the Legislature dedicated 44 acres of this tract for the future site of the State Cemetery under the control of the State Purchasing and General Services Commission (successor to the State Board of Control and now the Texas Facilities Commission). SB 21, Acts 1995, 74th Leg., R.S., ch. 264. That dedication

for cemetery use, commonly called **the Bullock Law**, was codified in Section 2165.256(b) of the Texas Government Code.

42. In 1997, the Legislature created the State Cemetery Committee as a separate division of the General Services Commission, to develop a state cemetery on these 44 acres, as well as to oversee the existing State Cemetery on Comal Street in Austin. SB 973, Acts 1997, 75th Leg., R.S., ch. 264.

43. In 1999, an additional two acres from the part of this tract used by TxDOT was moved to the State Cemetery portion, expanding that dedicated acreage to 46.19 acres. SB 1546, Acts 1999, 76th Leg., R.S., ch. 486.

44. The State Cemetery Committee developed a Master Plan for use of the Bull Creek Tract as a state cemetery. In furtherance of those plans, it funded the drilling of a water well to irrigate the grounds.

45. There was, however, resistance from state officials and other potential users of the State Cemetery. Generally, they preferred final resting places in the existing State Cemetery on Comal Street in Austin nearer to important past Texans. And in 1999, Bob Bullock passed away.

46. The Texas General Land Office Asset Management Division placed the Bull Creek Tract on its list of underused State assets in its 2002 Report to the Governor as State land that could be considered for sale. The Division's 2005 through 2011 Reports to the Governor listed only that portion of the Bull Creek Tract occupied by TxDOT as an underused asset. All of those Reports referenced the residential land uses of the surrounding neighborhood and stated that if sold, "the highest and best use of the tract ... is for single-family residential development."

47. In 2013, the Legislature put into motion steps to repeal the Bullock Law. It amended Section 2165.256(b) of the Government Code to say that the dedication of the Bull

Creek Tract for use as a state cemetery could be released and that this land could be sold if the State Cemetery Committee met certain conditions. Those conditions included affirmative findings that (1) the proceeds from any sale would “further the goals of the State Cemetery,” and that (2) “concerns expressed by residents of neighborhoods in the vicinity of the property have been considered and that efforts have been made to address those concerns.” SB 1871, Acts 2013, 83rd Leg., R.S., ch. 1243, sec. 1. That latter condition to address concerns of residents in nearby neighborhoods was added by amendment sponsored by Representative Elliott Naishtat of Austin.

48. In accordance with that statutory directive, the residents of neighborhoods surrounding the Bull Creek Tract engaged positively with the State Cemetery Committee to address the impacts the sale and development of that tract could have on them. The Bull Creek Road Coalition (“**BCRC**”) was formed by the surrounding landowners for the purpose of working with the State to ensure the sale and development of the Bull Creek Tract would be compatible with the existing neighborhoods. BCRC was organized as a coalition of seven neighborhood associations surrounding the Bull Creek Tract: Ridgelea, Rosedale, Oakmont Heights, Allandale, Bryker Woods, Highland Park West/Balcones Area and Westminster, which combined include over 7,500 households.

49. BCRC worked extensively with the State and developed an Information Packet addressing the concerns of the neighboring residents and the recommended best use of the Bull Creek Tract in accordance with the Legislature’s directive. A copy of that BCRC Information Packet is attached as Exhibit B.

50. In 2014, the State issued notice that the Bull Creek Tract was available for purchase and requested the submission of bids. The State provided a copy of the BCRC

Information Packet (Exhibit B) to each person or entity expressing interest in bidding. In its Request for Bids to potential bidders, the State discussed the established surrounding residential neighborhoods and stated its highest and best use was for residential development under Austin SF-3, SF-6 and MF-2 zoning.

51. Six bidders submitted bids. ARG was the winning bidder. In early 2015, the sale of the Bull Creek Tract to ARG was closed.

52. In its 2015 session, the Legislature finally removed the statutory dedication of the 46-acre portion of this tract for use as the State Cemetery. The Bullock Law was repealed and Section 2165.2565 was added to the Government Code to create the State Cemetery Preservation Trust Fund to receive certain funds earmarked from the sale of this property for preservation and expansion of the State Cemetery on Comal Street. Acts 2015, 84th Leg. R.S., ch. 932, sections 4 and 5.

53. While this tract was sold in 2015, it continues to be used for governmental purposes by TxDOT and the Texas Department of Transportation and the Department of Motor Vehicles (which was split off from TxDOT into a separate State agency in 2009) under a lease-back agreement with ARG that runs until 2018. There are currently between 125 and 150 State employees working for these two agencies on the campus of buildings on the Bull Creek Tract.

3. The Grove PUD Application and Its Impact on Surrounding Homes and Neighborhoods

54. In June of 2015, ARG filed an application with the City of Austin for a zoning change for this tract to develop it as a high density, mixed-use Planned Unit Development (“PUD”). ARG did not seek SF (single family) or MF (multi-family) zoning districts as recommended by State in its offering documents.

55. Under the Austin City Code, a PUD is a zoning district classification allowed on a case-by-case basis through an amendment to Austin's comprehensive zoning ordinance. The regulations and restrictions of that zoning ordinance are changed and modified substantially by each such amendment to permit the PUD's particular proposed land uses. The Grove PUD application is such a PUD application that seeks substantial changes to the zoning ordinance and rezoning the Bull Creek Tract into a unique PUD zoning district.

56. While the proposed Grove PUD includes residential units, it is dominated by hundreds of thousands of square feet of high density commercial and retail development that is not compatible with the residential zoning and uses of the surrounding neighborhoods.

57. The BCRC, including Plaintiffs and others in the area, were alarmed. They sought to become involved in the City's review and approval process to express their concerns about the excessive amount of proposed commercial and retail development, and to seek modifications to mitigate the certain adverse impacts that incompatible development would have on their homes and neighborhoods. It is important that the Valid Petition Rights Statute is specifically intended to give nearby landowners a meaningful voice in situations such as this, where a landowner seeks to change the zoning ordinance regulations to allow a new and different land use from the surrounding existing uses established under the current regulations. That right is especially important in cases such as this where the existing uses are homes. For homeowners such as Plaintiffs, their properties are not only their homes and residences; they are most often the only, or at least the main, real property assets that they own.

58. One of the ways the Valid Petition Rights Statute serves to accomplish balance between existing property owner rights and new proposed land uses, is to encourage compromise and consensus during the review process, before the necessary zoning ordinance changes are

finalized and submitted for a city council vote. As discussed in the following Parts, the City determined that it would not comply with the Valid Petition Rights Statute and severely limited the voice the Plaintiffs and their neighbors have in that process to protect the use and enjoyment of their homes.

59. In March 2016, it was made clear that ARG was including other land it owns in the Grove PUD in addition to the Bull Creek Tract. That land is lot 43, Section 2 of the Shoal Village Subdivision, 2627 45th Street, Austin, Texas (herein the “**45th Street lot**”). It is a 6,639 square foot residential lot that was purchased by ARG from a private landowner, not the State of Texas, for use as part of the Grove PUD. It is zoned single family “SF-2” with a single family house on it. ARG proposes to remove that house and change that lot into a non-standard street serving the Grove PUD. See Exhibit C .

60. As stated by the City, the 45th Street lot is “integral to the viability of [Grove PUD] development as proposed” and that “code modifications” related to use of that lot for a PUD street would be “incorporated into the final PUD Ordinance.” These facts were confirmed and agreed to by ARG in its written supplementation of its Grove PUD application.

61. On information and belief, the City interprets PUD applications involving both zoned and unzoned land, regardless of the amount of each, as involving “rezoning” under the definitional scheme of the Austin City Code. With that “rezoning” label, such PUD applications, including the Grove PUD, are subject to valid petition rights under the City’s interpretation of its City Code. See Part 5 below. Moreover, the inclusion of that zoned 45th Street lot in the Grove PUD further confirms valid petition rights directly under the Valid Petition Rights Statute itself.

4. The Valid Petition Rights Statute Requiring $\frac{3}{4}$ Supermajority Voting

62. The Valid Petition Rights Statute, now codified as Section 211.006(d) of the Texas Local Government Code (see paragraph 71 below), has been part of the Texas Zoning Enabling Act since that Act was enacted in 1927 to give cities zoning powers. One of the purposes of the valid petition rights statute is to provide stability and protection for property owners with land uses established in reliance on a city's zoning regulations. The statute does not give those landowners the right to veto objectionable zoning regulation changes; however, it does guarantee them the right to petition to have the threshold for approving those changes raised. That statutory protection is the requirement that any such changes to a regulation can only be approved by a $\frac{3}{4}$ majority vote of the city council instead of a simple majority. The Plaintiffs have complied with the statutory requirements to trigger $\frac{3}{4}$ majority voting in this case. That fact is not disputed. The City, however, is refusing to recognize the statutory requirement for $\frac{3}{4}$ voting because it says the valid petition rights statute does not apply in this case.

63. When Texas adopted the Zoning Enabling Act in 1927 (Acts 1927, 40th Leg., R.S., ch. 283), it was essentially a verbatim adoption of the 1926 Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations (referred to herein as the "Model Act"). The Model Act was prepared by the U.S. Department of Commerce Advisory Committee on Zoning, appointed by then Secretary of Commerce Herbert Hoover. The nine sections of that Act were all adopted by Texas. (The only change was the addition of a Section 8a exempting telephone companies). That Act was placed in the Texas Revised Civil Statutes as Articles 1011a through 1011i.

64. That Act set out the logical order of authorizing cities to adopt original zoning regulations with a comprehensive zoning ordinance. It then requires procedures for changing

those regulations and gives individual landowners certain protections from any of those changes that might impact their properties.

65. Section 1 of the Act grants cities the power to regulate land uses. Section 2 permits dividing cities into districts with regulations, which must be uniform across the city. Section 3 requires that the city's land use regulations apply "throughout such municipality" in accordance with a comprehensive plan.

66. Sections 4 and 5 follow and specify the procedures by which the regulations are to be adopted and changed, and provide important protections to existing landowners from particular changes that are objectionable to them:

"Sec. 4. **Method of Procedure.** The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

"Sec. 5. **Changes.** Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of 20 percent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending 200 feet therefrom, or of those directly opposite thereto extending 200 feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourth of all members of the legislative body of such municipality. The provisions of the previous

section relative to public hearing and official notice shall apply equally to all changes or amendments.”

67. A “change” for purposes of valid petition rights under Section 5, encompasses any “amendments, supplements, modifications and repeal” of comprehensive zoning ordinance authorized by the preceding sections of the Act. Confirming the comprehensive meaning of “changes” covered by that Section 5, the comments to the Model Act stated:

“This term, as used here, it is believed will be construed by the courts to include ‘amendments, supplements, modifications, and repeal,’ in view of the language which it follows. These words might be added after the word ‘change,’ but have been omitted for the sake of brevity. On the other hand, there must be stability for zoning ordinances if they are to be of value. For this reason the practice has been rather generally adopted of permitting ordinary routine changes to be adopted by a majority vote of the local legislative body but requiring a three-fourths vote in the event of a protest from a substantial proportion of property owners whose interests are affected. This has proved in practice to be a sound procedure and has tended to stabilize the ordinance.” (Footnote 31 comment to the Model Act).

68. Only one initial adoption of comprehensive city-wide zoning regulations is contemplated by the Act. There are no provisions in the Act allowing piecemeal initial zoning of land within the city after the comprehensive zoning ordinance is adopted. As stated by the drafters of the Model Act, one of the purposes of the Act is to avoid such “piecemeal zoning.” *See* Footnote 23 comment to the Model Act. After initial adoption of that comprehensive ordinance, its regulations can be changed only through the change procedures authorized by Section 4. All such changes are subject to the valid petition rights under the following Section 5,

the Valid Petition Rights Statute. *See, City of San Antonio v. Lanier*, 542 S.W.2d 232, 234-35 (Tex. App. – San Antonio 1976, writ ref’d, n.r.e.).

69. In summary, the logical order of the Act is for the adoption of a comprehensive zoning ordinance with comprehensive regulations for city-wide planning and development. After that ordinance is in place, the Act provides for changes to that ordinance that are typically sought by an individual property owner wanting a use not permitted by those regulations, as is the case with the Grove PUD. The Valid Petition Rights Statute covers any such change to zoning ordinance regulations sought by an individual landowner.

70. The Grove PUD application seeks city council passage of an amendment to Austin’s comprehensive zoning ordinance. That requested amendment will change many of the ordinance’s regulations and restrictions in order to allow otherwise prohibited new land uses for the Bull Creek Tract. In form and in substance, that application seeks changes to the Austin Land Development Code regulations clearly within the definitions of “changes” in the Valid Petition Rights Statute. However, in this particular case, the City believes there is an exception or loophole in the law that allows it to say the regulation changes sought by Grove PUD applications are not “changes” under the Valid Petition Rights Statute, and thereby deny Plaintiffs their rights under that statute. As discussed in the following Part 5, the City is incorrect in arguing that changes to regulations in this case are not changes to regulations under the law.

71. As part of the ongoing codification of Texas statutes, the Texas Zoning Enabling Act (Articles 1011a through 1011i) was moved into Chapter 211 of the Texas Local Government Code in 1987. The Legislature specifically stated that the codification of the Local Government Code was not intended to make any substantive change in the statutes moved into that Code.

Acts 1987, 70th Leg., R.S., ch. 149. The Valid Petition Rights Statute, Section 5 of that Act (article 1011e in the Texas Revised Civil Statutes), was moved to section 211.006(d) of the Texas Local Government Code. **Section 211.006(d)** provides today:

“(d) If a proposed change to a regulation or boundary is protested in accordance with this subsection, the proposed change must receive, in order to take effect, the affirmative vote of at least three-fourths of all members of the governing body. The protest must be written and signed by the owners of at least 20 percent of either:

- (1) the area of the lots or land covered by the proposed change; or
- (2) the area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area.”

5. The City’s Rejection of Valid Petition Rights and $\frac{3}{4}$ Supermajority Voting Under the Austin City Code is in Conflict with the Valid Petition Rights Statute

72. The Grove PUD application in form and in substance seeks substantial “changes” in Austin’s applicable zoning and land use regulations and restrictions in Austin’s comprehensive zoning ordinance. See, for example Exhibit D from the Grove PUD Application listing some of the requested changes to zoning ordinance regulations. It also seeks a district boundary change by proposing to create a new PUD district with a new boundary for the 76-acre Bull Creek Tract, particularly with the boundary change for the inclusion of the 45th Street lot. See paragraphs 59-60 above. Without all of those changes, the Grove PUD cannot be approved. Such changes are explicitly the type of “changes” subject to valid petition rights under the Valid Petition Rights Statute.

73. Fundamentally, the approval of any PUD always requires changes in the zoning regulations through an ordinance adopted by city council amending Austin’s comprehensive zoning ordinance. Due to the unique mixed-use nature of PUDs, they are not allowed under any

traditional zoning district classification contemplated by the Zoning Enabling Act or defined in the City Code. The Grove PUD application is no different than any other PUD application in inherently seeking to change zoning regulations. As with any PUD in Austin, the Grove PUD application specifically details certain regulations and restrictions it seeks to change. See Exhibit D listing some of the requested specific changes.

74. Reflecting the reality of the zoning changes sought by the Grove PUD, the City staff originally advised Plaintiffs that valid petition rights would be available to them for this PUD application. On April 24, 2015, a meeting was held to discuss this PUD application and included city staff and representatives from BCRC and the surrounding neighborhoods. At that meeting, the City's Development Services Manager assured the group that this PUD application would be subject to valid petition rights and super majority $\frac{3}{4}$ voting.

75. However, the City's position on valid petition rights for this particular Grove PUD application later changed. The form and substance of the Grove PUD application notwithstanding, the City decided at some level that it would not recognize the statutory valid petition rights in this particular case.

76. Hearing that their valid petition rights were being questioned by some at the City, Plaintiffs requested a written determination by the City of those rights. The City's written response reversed the City's original position. By letter dated July 31, 2015, Greg Guernsey, Director of the Planning and Zoning Department, wrote that valid petition rights would not be recognized for this particular PUD application. (A copy of that letter is attached as Exhibit E). His letter did not address the language of the Valid Petition Rights Statute, but focused instead on the sections of the Austin City Code dealing with valid petition rights.

77. The Austin City Code deviates in a substantial way from the Valid Petition Rights Statute. Austin’s version of valid petition rights is contained in **Section 25-2-284(A)(3)** of the City Code which provides:

“§ 25-2-284 - REQUIREMENT FOR APPROVAL BY THREE-FOURTHS OF COUNCIL.

(A) The affirmative vote of three-fourths of the members of council is required to approve:

- (1) rezoning property to a planned unit development if the Land Use Commission recommends denial of the application;
- (2) zoning previously unzoned property to a planned unit development if the Land Use Commission recommends denial of the application by a vote of at least three-fourths of the members of the Land Use Commission; or
- (3) a proposed rezoning that is protested in writing by the owners of not less than 20 percent of the area of land:
 - (a) included in the proposed change; or
 - (b) immediately adjoining the area included in the proposed rezoning and extending 200 feet from the area.”

78. Section 25-2-284(A) was adopted in this form in February 2016. Subpart (3) related to valid petition rights was not substantively changed. A copy of Section 25-2-284 as it existed previously is attached hereto as Exhibit F. Subparts (1) and (2) of Section 25-2-284(A) are separate from statutorily guaranteed valid petition rights. Those sections are adopted under a separate statutory provision for permissive $\frac{3}{4}$ majority voting by cities under a 1977 amendment to the Zoning Enabling Act (now in Section 211.006(f) of the Local Government Code).

79. The Austin City Code’s critical deviation from the Valid Petition Rights Statute stems from the use of the word “rezoning” instead of the statutory language of “change to a regulation or boundary” for triggering valid petition rights. And, it defines “rezoning” in a

different way than stated or intended by the statute. That term is defined in **Section 25-2-241** of the City Code, which states:

“§ 25-2-241 - DISTINCTION BETWEEN ZONING AND REZONING.

- (A) Zoning is the initial classification of property as a particular zoning base district. Zoning amends the zoning map to include property that was not previously in the zoning jurisdiction or that was not previously included in the boundaries of a base district.
- (B) Rezoning amends the zoning map to change the base district classification of property that was previously zoned.”

80. Relying on those City Code sections and determining the Grove PUD application was not “rezoning,” Mr. Guernsey’s letter (Exhibit E) concluded:

“In summation, the Austin City Code limits valid petition rights to rezoning requests. It does not grant valid petition rights for the first (initial) zoning of a property.”

Again, the City is creating a label outside of the statute, “first (initial) zoning,” in order to deny valid petition rights in this case.

81. The City has never denied that land uses proposed in the Grove PUD application will have adverse impacts on Plaintiffs’ use and enjoyment of their homes and on others in the surrounding neighborhoods. Nor is there any question that to approve the Grove PUD, the city council must adopt an amendment to the City’s zoning ordinance, which will change or modify many regulations and restrictions in that ordinance that currently prohibit this PUD. Instead, the City’s denial of valid petition rights is driven by the zoning label it decided to use for the Bull Creek Tract, during the period of the State’s past ownership. More accurately, it is the result of the City’s failure to assign a proper zoning classification corresponding to its public governmental use on the “official” zoning map as required by the City Code. In other words, the

City is using a unique, unauthorized zoning label of “UNZ” to ignore the form and substance of the Grove PUD application in order to deny the mandates of the Valid Petition Rights Statute.

82. As long as the Bull Creek Tract was owned by the State and was used for governmental purposes, it was exempt from mandatory compliance with city zoning and other land use regulations. (If State land is used for non-governmental purposes, it is required to comply with city zoning regulations. See Texas Natural Resources Code, sections 31.161-31.163). As stated, the classification “UNZ” is not defined or authorized by the Austin City Code and does not accurately reflect the Bull Creek Tract’s defined and controlled governmental uses. If the City had complied with the City Code provisions requiring all land to have a proper zoning classification, that tract should be labeled on the “official” map with the classification of “P” (for “Public”) as has been used on other city working and planning maps. Section 25-2-145 of the Austin City Code defines a Public (P) District as follows:

“Public (P) district is the designation for a governmental, civic, public service, or public institution use. A P district designation may be applied to a use located on property used or reserved for a civic or public institutional purpose or for a major public facility, regardless of ownership of the land on which the use is located. A P district designation may not be applied to government-owned property that is leased to a nongovernmental agency for a use other than a governmental service or for a use that supports a primary civic or public institutional use.”

83. Contrary to the position the City is taking in this case, it labeled a previous zoning change for a portion of the original Bull Creek Tract for private development as “rezoning.” In 1994, the State sold 3.6 acres on the east side of the Bull Creek Tract. To allow that private development, the City Council approved “AN ORDINANCE ORDERING A REZONING AND

CHANGING THE ZONING MAP” for that portion of this tract. A copy of that 1994 Ordinance is attached as Exhibit G. That Ordinance stated that it was “rezoning” when the zoning designation changed “from ‘UNZ’ Unzoned to ‘SF-2-CO’.”

84. Regardless of the labels used, the Bull Creek Tract is not without zoning regulations and restrictions as the City’s argument in this case necessarily presumes. There is a considerable set of applicable regulations and restrictions in the city’s comprehensive zoning ordinance that apply and control the land development uses of this tract. Moreover, this land is not without permitted land uses as shown by the continuing governmental operations under the lease between ARG and TxDOT. That use is legal and allowed under the State’s land use specifications for the Bull Creek Tract pursuant to its controlling authority over municipal zoning and the effective de facto “P” zoning by the City as discussed above. The Grove PUD application seeks to change that existing use through changes in the regulations of Austin’s zoning ordinance. Again, those “changes” are covered by the Valid Petition Rights Statute.

85. In April 2016, the City advised Plaintiffs of yet another labeling theory it would use in furtherance of its determination to deny Plaintiffs rights under the Valid Petition Rights Statute. Plaintiffs pointed out to the City that the incorporation of the 45th Street lot into the Grove PUD application made clear it was seeking both regulation changes and zoning district boundary changes for zoned land. Those facts removed any doubt that the application involved “rezoning” under the City Code definition and was subject to valid petition rights. See paragraphs 60-61 above. The City advised that based on unidentified staff discussions, it would treat the inclusion of ARG’s 45th Street lot in the Grove PUD as a completely separate matter from Grove PUD zoning application, notwithstanding the staff’s documented agreement with

ARG that such lot was “integral” to that PUD and will be “incorporated into the final PUD Ordinance.” See paragraphs 89-90 below.

6. Plaintiffs’ Exhaustion of Efforts and Remedies with the City

86. After receiving the Guernsey letter of July 31, 2015 (Exhibit E), Plaintiffs employed counsel and expended considerable efforts in meetings with City staff and officials and in providing research and briefings on the correct application of the Valid Petition Rights statute to the Grove PUD application. The City was unmoved in its position that valid petition rights would be denied in this case.

87. Believing the City was in error, Plaintiffs sought to appeal the City’s rejection of valid petition rights to the City’s Board of Adjustment as allowed under the provisions of the Zoning Enabling Act (Texas Local Government Code Section 211.009), and the Austin City Code as confirmed by *Hill Country Estates Homeowners Association v. Guernsey*, No. 13-13-00395, 2015 WL 2160510 (Tex. Ct. App.— Corpus Christi 2015, no pet.). A copy of Plaintiffs’ Appeal to the Board of Adjustment is attached as Exhibit H.

88. The City declined to follow those authorities and refused to allow Plaintiffs’ appeal to be filed with the Board of Adjustment. The City stated that there were no procedures available at the City for further review of its determination to deny Plaintiffs valid petition rights in this case.

89. Plaintiffs sought one last time to have their valid petition rights recognized by the City. In March 2016, Plaintiffs and other landowners formally filed petitions to the City objecting to the Grove PUD pursuant to the Valid Petition Rights Statute. Plaintiffs also requested confirmation that the inclusion of the 45th Street lot in the Grove PUD removed any doubt that valid petition rights applied in this case. Plaintiffs were advised that Mr. Greg

Guernsey, Director of the Planning and Zoning Department, would make the final determination whether the City staff's position would be confirmed or overruled.

90. On April 14, 2016, Plaintiffs received an email from the Planning and Zoning Department confirming that Plaintiffs' petitions satisfied the 20% threshold of the Valid Petition Rights Statute. That email did not address the issue of the 45th Street lot, but simply included a copy of Mr. Guernsey's earlier July 31, 2015 letter denying valid petition rights in this case. A copy of that email is attached as Exhibit I.

91. Having exhausted those efforts with the City, this declaratory judgment action became necessary and proper. It is timely and the question regarding the statutory guarantee of valid petition rights in this case is ripe for this court to consider. All conditions precedent necessary to the bringing of this lawsuit, the claims asserted therein, and to the relief sought have been performed or have occurred.

G. THE CITY HAS NO LEGAL BASIS FOR NOT COMPLYING WITH THE VALID PETITION RIGHTS STATUTE REQUIRING ¾ MAJOIRTY VOTE IN THIS CASE

92. The City's main argument is that it is entitled to apply its City Code to deny valid petition rights in this case, notwithstanding the fact that the Code materially deviates from the state's Valid Petition Rights Statute. That argument is fundamentally unsound. Cities cannot enact zoning ordinances or apply them in a way that is inconsistent with the Zoning Enabling Act.

93. The City's second argument for denying valid petition rights in this case is the exception to or loophole in the statute that it says was created by the 1972 case of *City of Garland v. Appolo Development Inc.*, 476 S.W.2d 365 (Tex. Civ. App. – Dallas 1972, no writ). The City reads that case to create a blanket exemption from the Valid Petition Rights Statute if

the land subject to the proposed zoning change has been labeled “unzoned” by the City. That interpretation, however, is not what that case held. That case was specifically dealing with “newly annexed property” for which the city had not complied with jurisdictional notice requirements of the Zoning Enabling Act, either when comprehensive zoning ordinance was adopted, or when that land was annexed. Those facts are not the facts here. No subsequent case supports the City’s expansive interpretation of that 1972 *Garland* case to create a blanket exemption from the valid petition rights statute for any land that is labeled “unzoned.”

94. There is no contention that there has been any failure by the City of Austin to comply with the notice requirements of the Zoning Enabling Act when the current 2011 comprehensive zoning ordinance was adopted, or when any of the previous zoning ordinances were adopted over the 80 years the Bull Creek Tract has been in the city.

95. Unlike the land in the 1972 *Garland* case, the Bull Creek Tract has decades of established land uses within the city that were established and controlled by state statutes and regulations, if not by regulatory authority delegated to the city. Those long existing regulated uses were integrated into the city and relied upon by the surrounding landowners as they purchased their homes and established residential neighborhoods over the years. The City effectively approved the State’s defined uses by providing this tract with all city services over the 80+ years this tract has been within the city limits. A request by the Grove PUD to change the city regulations to allow uses very different than this Tract’s previous regulated use, is precisely the type of change that is subject to valid petition rights under state law.

H. REQUEST FOR WRITS TO PROTECT THIS COURT'S JURISDICTION

96. As stated, the State's lease to continue using the Bull Creek Tract for governmental operations continues until 2018. Should efforts be made to rush a vote by the Austin City Council on any aspect of the Grove PUD before this Court has had a considered opportunity to exercise its jurisdiction over the issues and matters in this case, the Court should issue necessary writs to the appropriate city governmental officials to abate such action by the City until this case can be finally decided. *See* Tex.Gov. Code § 24.011.

I. COSTS AND ATTORNEY'S FEES

97. In the preparation and prosecution of this lawsuit, Plaintiffs retained the undersigned attorney to represent them in this action. Plaintiffs seek a judgment for attorney's fees as are equitable and just under § 37.009 of the Texas Civil Practice & Remedies Code.

J. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that Defendant and the ARG parties be cited to appear herein and answer, and that after notice and hearing, the Court render judgment for Plaintiffs with the following declaratory relief:

A. A declaratory judgment that no ordinance or other action by the Austin City Council approving any development of or facilitating the development of the Grove PUD, in whole or in part, in its current form or as amended or modified, shall be lawful and effective unless said ordinance shall receive a vote of approval by at least three-fourths (3/4) of the members of the Austin City Council;

B. A declaratory judgment that any ordinance or other action approved by the Austin City Council related directly or indirectly to the Grove PUD shall be null and void unless said ordinance or other action shall have received a vote of approval of at least three-fourths (3/4) of the members of the Austin City Council;

C. The issuance of such writs as may be necessary to protect this Court's jurisdiction;

D. That Plaintiffs be awarded attorney's fees and other costs; and

E. That Plaintiffs be awarded such other and further relief to which they may be entitled.

Respectfully submitted,

/s/ Jeffery L. Hart

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