CAUSE NO. D-1-GN-18-002688

NELSON LINDER, *et al.*,
Relators

IN THE DISTRICT COURT

201st JUDICIAL DISTRICT

v.

CITY OF AUSTIN, TEXAS, *et al.*,
Respondents.

TRAVIS COUNTY, TEXAS

RELATORS' TRIAL BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF MANDAMUS

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ATTORNEYS FOR RELATORS

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Come now, Relators, and file their Trial Brief in Support of their Petition for Writ of Mandamus against Respondents, and would show:

I.

SUMMARY OF ARGUMENT

A mandamus should be issued against Respondents because the City Council has a ministerial duty to place the citizen petition initiative on the November 6, 2018 ballot. The certified petition proposes a vote in November 2018 on whether to require a waiting period and future election before any comprehensive revision of a land development code approved by the City Council would go into effect. The November 2018 vote would not be an election on CodeNEXT itself; that would occur only if, and when, at some point in the future the voters pass the petition initiative ***and*** the Council passes CodeNEXT. The November 2018 vote would not affect any zoning law, nor would it alter the zoning on any property. The petition initiative is a proposed public accountability and election ordinance, not a zoning ordinance.

The Texas Supreme Court has upheld mandamuses issued to city councils to place petitions that have been certified (including the requisite signatures) on the ballot without further legal inquiry. *Coalson v. City Council of Victoria*, 610 S.W. 2d 744, 747 (Tex. 1980) (orig. proceeding); *In re Woodfill*, 470 S.W. 3d 473, 478 (Tex. 2015). Two fundamental legal principles underlie the *Coalson* line of cases: 1) to prevent the rendering of advisory opinions

on initiatives that have not yet been passed by the voters, and are based on contingent and speculative facts; and 2) to prevent violations of separation of powers by city councils interfering with the people's right to directly legislate by initiative. If and when the initiative passes, and if and when CodeNEXT is approved by the Council, then the Court, and not the City Council, may exercise traditional judicial review of the then-adopted municipal legislation.

Some Texas Courts take a different approach than the *Coalson* case line and recognize a narrow exception to the rule that courts and councils may not exercise judicial review of citizen-initiated legislation before the legislative process is completed and the voters have actually approved the legislation. In these cases, Texas Courts determine only if the subject matter of the ordinance has been withdrawn in its entirety from the field of the initiative process, and not the law's validity. These cases liberally construe the petition initiative in favor of the public's right to legislate directly, and the initiative process applies unless there is a clear and compelling reason.

The instant petition initiative's subject matter has not been withdrawn at all, much less in its entirety, from the field of the initiative process. The waiting period is a governance and accountability provision, not a substantive zoning law. CodeNEXT is a proposed comprehensive revision of the City's land development code, ninety percent (90%) of which does not involve zoning. The portion that is zoning involves comprehensive general zoning laws which, unlike specific zoning amendments applicable to individual properties, are not withdrawn from the field of initiative. Lastly, while Texas Local Government Code Section 211.015 is neither applicable nor exclusive, the petition initiative complies with its requirements.

II.
THE UNDISPUTED FACTS

In the fall of 2017, Austinites began circulating the CodeNEXT Waiting Period and Election Petition (hereafter "petitioned ordinance" or "petition initiative") (Appendix Tab A, the Petition; Exhibit 1, COA 001). If approved by Austin voters, the citizen-initiated ordinance would require a waiting period and voter approval before a Council-approved

comprehensive revision of the City of Austin's land development code would take effect. It also contains a severability clause. In the event the voters rejected the council-approved comprehensive revision, the petitioned ordinance provides that the existing land development code would remain in effect.

The petition initiative calls for a public vote on the initiative at the next available election, November 6, 2018. The vote in November would be on whether to have a waiting period and future vote on comprehensive revisions of the land development code (CodeNEXT or subsequent comprehensive code revisions) (hereafter "CodeNEXT" for simplicity). The November vote would not be an election on CodeNEXT itself; that would occur only if in the future the voters pass the petition initiative and the Council passes CodeNEXT.

The petition initiative's proposed waiting period would allow voters a reasonable time to educate themselves on CodeNEXT to evaluate how it will affect their families, their neighborhood and the city as a whole. The waiting period also would provide voters an opportunity to vote on the re-election of City Council members who approved CodeNEXT. This would offer public accountability for current council members as well as the opportunity to elect new members of council who could revoke or amend CodeNEXT before it took effect. Finally, the waiting period would ensure that no new property rights would vest under a comprehensive revision later rejected by the voters. After the waiting period, Austinites would vote on any Council-approved version of CodeNEXT. Thus, by requiring a waiting period and voter ratification of CodeNEXT, the petitioned ordinance creates a powerful incentive for the City Council to approve a version of CodeNEXT that is supported by the community. The petition initiative calls for a November vote on whether to have a waiting period and election before CodeNEXT may go into effect; it is not a vote on CodeNEXT. November's vote would affect no zoning law and would not alter or impose zoning on any property anywhere.

On March 29, 2018, petitioners submitted to the City the petition initiative with more than 31,062 signatures. (Exhibit 23, COA 002). By City Charter, incorporating state law, Austin requires 20,000 valid signatures of registered voters to place an initiative ordinance on the ballot. Austin, Tex., Charter art. IV, § 1 (2018); Tex. Loc. Gov't Code Ann. § 9.004(a) (West 2008). On April 23, 2018, the City Clerk certified that the petition initiative contained 25,790 valid signatures of Austin registered voters (Exhibit 24, COA 004). As a result, the petition initiative satisfied all City Charter initiative prerequisites. Austin, Tex., Charter art. IV, §§ 1, 2.

Earlier, in February 2018, Respondents' counsel concluded in a legal memo for the City that the petitioned ordinance is a "zoning law" and is not subject to the initiative and referendum process. (The legal memo is marked confidential, but the City released it into the public domain). (Appendix Tab B, p. 1). For this reason, a narrow majority of the City Council voted six-to-four on April 26, 2018, against adopting the petitioned ordinance and voted on May 24, 2018, by the same margin against putting it on the November 2018 ballot. (Appendix Tab C; Ex. 41, COA 8244) (Ex. 28, COA 369-370). The Council majority's resolution of May 24th reiterated its counsel's view that the subject matter of the petitioned ordinance was zoning. (Appendix Tab C; Ex. 41, COA 8242-8244). However, the resolution also stated expressly that "the City of Austin will place the petition-sponsored ordinance on the November 6, 2018, ballot if a court, pursuant to a challenge of today's action, determines the City of Austin was under a legal requirement to place the matter on the ballot…" (Tab C; Ex. 41, COA 8243). Relators filed this mandamus action five business days later, on June 1, 2018, requesting the District Court to mandamus the Respondents to place the petition initiative on the November 2018 ballot.

Relators respectfully submit that there are no disputes of material fact, there is no adequate remedy at law, and that Respondents have a ministerial duty to place the petitioned ordinance on the November 2018 ballot. The petitioned ordinance proposes a government

accountability and election ordinance, not a zoning ordinance. It is properly the subject of the Austin public's reserve powers to legislate directly by citizen initiative. Relators further will show that under controlling Texas case law any questions as to the legal validity of the proposed ordinance may only be raised and adjudicated if and when the petitioned ordinance is approved by the voters at the ballot box and CodeNEXT is passed by the Council.

III.

TEXAS AND AUSTIN LAWS RELATING TO HOME-RULE CITY INITIATIVES

A. The Plenary Power of Texas Home-Rule Cities.

The Texas Supreme Court has held that home-rule cities, such as Austin, have all powers except those expressly taken away from them by state law. *Burch v. City of San Antonio*, 518 S.W.2d 540, 543 (Tex. 1975); *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948). The Texas Constitution, Article XI, Section 5, grants home-rule cities "full powers of self-government." *Forwood*, 214 S.W.2d at 286. Home-rule cities are "not required to look to the legislature for a grant of power to act, but only to ascertain if the legislature has placed any limitations on the city's constitutional power." *Burch*, 518 S. W.2d at 543. Whether adopted by council or by initiative, home-rule city ordinances are presumed valid: courts will look to harmonize such ordinances with state law and will only find a conflict between a home-rule ordinance and state law where such conflict appears with "unmistakable clarity." *Quick v. City of Austin*, 7 S.W.3d 109, 122 (Tex. 1999); *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975).

B. The People's Right to Directly Legislate by Initiative in Texas Home-Rule Cities.

Pursuant to their home-rule powers, cities may reserve their broad lawmaking power to the people through initiative and referendum. *See generally Glass v. Smith*, 244 S.W.2d 645 (Tex. 1951). Today, eighty-eight percent (88%) of Texas home-rules cities have adopted some form of initiative and referendum. Terrell Blodgett, *Texas Home Rule Charters* 84

(Texas Municipal League, 2d ed. 1994). Initiative and referendum are "the exercise by the people of a power reserved to them, and not the exercise of a right granted." *Glass*, 244 S.W. 2d at 648-49. Texas Courts repeatedly have held that the people's power to legislate directly by initiative at the local level is "the same right to legislate that the Council has." *Taxpayer Ass'n of Harris County v. City of Houston*, 105 S.W.2d 655, 657 (Tex. 1937). "Citizens who exercise their rights under initiative provisions act as and 'become in fact the legislative branch of the municipal government.'" *Blum v. Lanier*, 997 SW2d 259, 262 (Tex. 1999), *quoting Glass*, 244 S.W.2d at 649.

The people's right to directly legislate is "liberally construed" in favor of that right and any statutory or charter limitations on that right must be "clear and compelling". *Quick*, 7 S.W. 3d at 124; *Glass*, 244 S.W.2d at 649; *Taxpayers' Ass'n of Harris County*, 105 S.W.2d at 657. "Charter provisions are to be liberally construed in favor of the power of initiative and referendum. While the initiative power may be either expressly or impliedly limited by the city charter, such a limitation will not be implied unless the provisions of the charter are clear and compelling." *Quick*, 7 S.W. 3d at 124 (citations omitted).[1]

C. The Local Right of Initiative and Referendum in Austin.

The City of Austin is a home-rule city chartered under the Texas Constitution. Austin, Tex., Charter art. I. The Austin City Charter provides residents with the City's full power to legislate directly by initiative except for appropriating money or levying taxes: "The people of the city reserve the power of direct legislation by initiative, and in the exercise of such power may propose any ordinance, not in conflict with this Charter, the state constitution,

[1] In *Quick v. City of Austin*, 7 S.W. 3d at 122-24, Justice Abbott held for a unanimous Texas Supreme Court that the Save Our Springs ordinance was a proper subject for a citizen initiative, despite the challengers' claim that it constituted a zoning ordinance, and could be harmonized with a number of allegedly conflicting state and city laws.

or the state laws except an ordinance appropriating money or authorizing the levy of taxes." *Id.* art. IV, § 1. The City Charter does not expressly withdraw any matters other than the appropriation of money or the authority to levy taxes. *Id.* The Austin City Council has a ministerial duty under the City Charter to either adopt a certified petition initiative within ten days or alternatively place it on the next available election ballot:

> When the council receives an authorized initiative petition certified by the city clerk to be sufficient, the council shall either:
>
> (a) Pass the initiated ordinance without amendment within ten (10) days after the date of the certification to the council; or
>
> (b) Order an election and submit said initiated ordinance without amendment to a vote of the qualified voters of the city at a regular or special election to be held on the next allowable election date authorized by state law after the certification to the council.

Id. art. IV, § 4.

The City Council has taken formal action refusing to adopt the initiated ordinance or alternatively to place it on the ballot (Appendix Tab C; Ex. 41, COA 8244) (Ex. 28, COA 369-370). At this point in time, the petition initiative has been certified by the clerk as valid and Respondents have a ministerial duty to place the ordinance on the November 2018 ballot. *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980) (orig. proceeding); *In re Woodfill*, 470 S.W.3d 473, 478 (Tex. 2015); *In re Roof*, 130 S.W.3d 414, 417-18 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding). As argued below, this Council interference with the citizens' right to legislate by petition, prior to that legislative process being completed at the ballot box, violates the Council's ministerial duty under the Charter to place the initiated ordinance on the November 2018 ballot.

IV.
RELATORS' LEGAL ARGUMENTS

1. ARGUMENT ONE:

The District Court should issue a writ of mandamus against Respondents because they have a ministerial duty to place the certified petition initiative on the November 2018 ballot. By ordering city councils to place certified petitions on the ballot, Courts avoid rendering advisory opinions on speculative facts and avoid violating separation of powers and interfering with the people's lawmaking power. If and when an initiative passes, and if and when there is a concrete case or controversy, then the Courts, not city councils, should address any legal issues.

The Texas Supreme Court has held that city councils have a ministerial duty to place certified petitions, without legal inquiry, on the next available ballot. In the leading case of *Coalson v. City Council Victoria*, the Court unanimously held that a mandamus would lie regardless of the City Council's position that the petitioned ordinance was invalid or that its subject matter had been withdrawn from the initiative field. *Coalson*, 610 S.W.2d at 747. Justice Pope wrote: "The City Council's duty is clear, and its compliance with the law is ministerial in nature. The City Council's refusal to submit the proposed amendments to the vote of the people thwarts not only the legislature's mandate but the will of the public." *Id.* Justice Pope explained the basis for this conclusion in an often-quoted section:

> The declaratory judgment suit, at this stage in the proceeding, seeks an advisory opinion. The election may result in the disapproval of the proposed [initiative] amendment. District Courts, under our Constitution, do not give advice nor decide cases upon speculative, hypothetical, or contingent situations. *Firemen's Ins. Co. of Newark New Jersey v. Burch*, 442 S.W.2d 331 (Tex. 1968); *Cal. Prod., Inc. v. Puretex Lemon Juice, Inc.*, 334 S.W.2d 780 (1960). The election will determine whether there is a justiciable issue, at which time the respondents' complaints against the validity of the initiatory process under article 1170 may be determined by the trial court.

> The initiative process, which article 1170 authorizes, affords direct popular participation in lawmaking. The system has its historical roots in the people's dissatisfaction with officialdom's refusal to enact laws. 1 Bryce, The American Commonwealth (1st ed. 1888). It is an implementation of the basic principle of Article I, Section 2, of the Texas Bill of Rights: "All political power is inherent in the people …." This court stated in *Taxpayers' Ass'n of Harris Cnty. v. City of Houston,* 105 S.W.2d 655, 657 (1937), that "the power of initiative and referendum … is the exercise by the people of a power reserved to them, and not the exercise of a right granted," and that "in order to protect the people of the city in the exercise of this reserved legislative power, such charter provisions should be liberally construed in favor of the power reserved." *See also Glass v. Smith,* 244 S.W.2d 645 (1951).

Id.

Recently, the Texas Supreme Court unanimously reiterated Coalson's holding in *In re Woodfill*, 470 S.W.3d at 481; *see also, In re Roof,* 130 S.W.2d at 417-18; *City of Cleveland v. Keep Cleveland Safe*, 500 S.W. 3d 438, 449 (Tex. App.—Beaumont 2015, no pet.). When the Houston City Council refused to place a certified referendum petition on the ballot, the Court mandamused the Council: "City officials must perform their ministerial duties… We agree with the Relators that the City Secretary certified their petition and thereby invoked the City Council's ministerial duty to reconsider and repeal the ordinance or submit it to popular vote." *In re Woodfill*, 470 S.W. 3d at 475, 478.

Two fundamental legal principles underlie the Courts' decisions to require city councils to place citizen initiatives on the ballot regardless of their alleged invalidity or removal from the initiative field: 1) avoiding the rendering of advisory opinions on proposed initiative laws that may not be approved by voters; and 2) respecting the separation of powers and the people's right to directly legislate by initiative. Both principles are served by Courts granting writs of mandamus requiring city councils to place petition initiatives on the ballot regardless of any alleged legal infirmities.

A. Avoiding Advisory Opinions.

Until the public votes in favor of a petition initiative, it is only a proposed law. By requiring city councils to place certified petition initiatives on the ballot, Texas Courts avoid rendering advisory opinions on initiatives that may not pass and that may be based on speculative, contingent facts. *Coalson*, 610 S.W.2d at 747. Relying on *Coalson*, the Beaumont Court of Appeals, in *City of Cleveland v. Keep Cleveland Safe*, recently ordered an initiative to be placed on the ballot, holding "the judicial power does not embrace the giving of advisory opinions. District Courts generally should refrain from interfering with the election process before the matter is submitted to the electorate, because it does not present a justiciable question." *City of Cleveland*, 500 S.W.3d at 449; *see also, In re Roof*, 130 S.W.3d at 417-18.

By not rendering advisory opinions, Courts promote judicial efficiency. If the public votes against a proposed initiative, the Courts avoid rendering a legal decision on the people's lawmaking power or interfering in the election process. *City of Cleveland*, 500 S.W.3d at 449; *see also City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex. 1985); *Coalson*, 610 S.W.2d at 747. On the other hand, if Courts entertain initiative legal challenges pre-election, the Courts may end up having to address legal issues twice, pre-election and post-election. In addition, by waiting until post-election, Texas Courts may adjudicate more deliberately any legal issues that arise, since pre-election challenges often result in hurried decision-making.

In the instant case, the situation is speculative and contingent; a decision on the validity of the petition ordinance at this time would result in an advisory opinion. *Coalson*, 610 S.W.2d at 747. Neither the council nor the courts should have the right to exercise judicial review of the validity of the petitioned municipal legislation prior to its approval by voters; doing so would render an advisory opinion on contingent facts in a way that unlawfully intrudes on the citizens' reserved legislative powers. If and when the voters approve the petitioned ordinance, and if and when the city council approves CodeNEXT, at that time the courts– and not the city council – may exercise judicial review and determine if some part of the petitioned ordinance is in conflict with superior and controlling law.

B. Respecting Separation of Powers and the People's Right to Directly Legislate by Initiative.

Based on the doctrine of separation of powers, Texas Courts prevent city councils from interfering with the sovereign power of the people to directly legislate and to vote. Under the Texas Constitution, "all political power is inherent in the people." Tex. Const. art. I, § 2. In *Glass v. Smith*, where the Austin City Council refused to place an initiated ordinance on the ballot, the Texas Supreme Court held that "in order *to protect the people of the city in the exercise of this reserved legislative power*, such charter provisions should be liberally construed in favor of the power reserved." *Glass*, 244 S.W.2d at 648-49 (emphasis added).

By requiring certified petitions to be placed on the ballot, Texas Courts prevent city councils from interfering with the people's exercise of their direct legislative power. City councils are virtually by definition hostile to the policy choices behind initiatives, which is what necessitated the people seeking the initiatives in the first place. It would defeat the purpose of initiatives, and violate separation of powers, if Courts were to allow city councils to decide which people's initiatives are wise, valid or legal. When city councils refuse to place initiatives on the ballot, they ignore separation of powers, step into the shoes of the Court, and improperly render their own advisory opinions on the legality of petition initiatives. As the Supreme Court explained in *Glass v. Smith*:

> [T]here should be no judicial interference with the legislative process. If the Courts into whose province the duty is committed by the Constitution to adjudge the validity or invalidity of municipal legislation will not themselves interfere with the legislative process how could they justify their inaction while ministerial officers, usually without judicial training, interrupted that process? The same cogent and persuasive reasons which prompt judicial non-interference with the legislative process should compel courts in proper cases to prevent interference by others with that process.

Glass, 244 S.W.2d at 644-45.

In the instant case, the Austin City Council has violated separation of powers by interfering with the right of the people of Austin to directly legislate by initiative. This action by council violates fundamental separation of powers obligations by, in essence, acting as a judge exercising judicial powers to determine the legal validity of the petitioned

ordinance and block the citizens' legislative process before it has been completed. The Council has refused to allow the public to vote on whether to require a waiting period on CodeNEXT, so the public can be better informed and can hold the City Council members accountable at the next election. The Council has blocked the sacred right of the people to vote in a democracy. The Court should remedy this interference with Austinites' right to directly legislate by ordering the petition initiative on the ballot. If and when the petitioned ordinance and CodeNEXT pass, then the Court, not the Council, may decide any legal matters, as is proper in our tripartite form of government.

2. ARGUMENT TWO:

A writ of mandamus should issue because the subject matter of the petition initiative has not been withdrawn at all, much less in its entirety, from the initiative process. The waiting period is a governance and accountability provision, not a substantive zoning law. Further, CodeNEXT is a land development code, ninety percent (90%) of which does not involve zoning. The portion that is zoning involves comprehensive general zoning laws which, unlike specific zoning amendments that apply to individual properties, are not withdrawn from the field of initiative.

While we believe the best approach is the *Coalson* line of cases, which places initiatives on the ballot without pre-election legal inquiry, some Texas cases recognize a narrow exception to the rule that courts and councils may not interfere with or exercise judicial review of citizen- initiated legislation before the legislative process is completed and the voters have actually approved the legislation. Courts, in these cases, determine only if "the subject matter of the ordinance has been withdrawn from the field in which the initiatory process is operative." *Glass*, 244 S.W.2d at 639; *see also Quick*, 7 S.W.3d at 124. These Courts do not look pre-election at the legal validity of a proposed petitioned ordinance, but only whether its subject matter is entirely outside the scope of the initiative process. *Glass*, 244 S.W.2d at 636. They will find that a subject matter has been withdrawn from the

initiative field only if such conclusion is "clear and compelling." *Quick*, 7 S.W.3d at 124; *Glass*, 244 S.W.2d at 649.

Out of deference to the people's right to directly legislate, many states' courts interpret "withdrawn from the initiative field" to require that the petition initiative's subject matter be outside the scope of the initiative process "in its entirety." 5 McQuillin, *The Law of Municipal Corporations*, § 16:68 (3d ed. 2007-2018). Only "an ordinance which is facially defective in its entirety does not have to be placed on the ballot." *Id*. Although no Texas Court has addressed this issue, a number of other state's Supreme Courts have required initiatives to be placed on the ballot unless their subject matter has been withdrawn "in its entirety" from the initiative process. *See, e.g.*, *Burnell v. City of Morgantown*, 558 S.E.2d 306 (W. Va. 2001); *Dade Cnty. v. Dade Cnty. League of Municipalities*, 104 So. 2d 512 (Fla. 1958); *Hilton Head Island v. Expressway Opponents*, 415 S.E.2d 801, 805 (S.C. 1992); *Wyo. Nat'l Abortion Rights League v. Karpan*, 881 P.2d 281, 289 (Wyo. 1994).

The leading case is *Burnell v. City of Morgantown*. This petition initiative case involved city employee rights, some of which were clearly not subject to initiative. *Burnell*, 558 S.E.2d at 315-16. But because "the proposed ordinance, if adopted, would not be invalid in its entirety," the Court ordered it on the ballot. *Id.* The Court's rationale was to avoid rendering advisory opinions and violating separation of powers:

> Initiatives and referendums should be afforded the same dignity and respect as any other legislative process. Indeed, it has been our longstanding practice to refrain from interfering in the enactment of municipal legislation. By confining pre-election judicial review to instances where voter petitions are either technically defective or otherwise wholly extraneous by embracing a subject matter that is expressly or impliedly precluded, we limit ourselves to adjudicating present and justiciable controversies…. Any other approach would entail the undesirable risk of judicial usurpation of the legislative process.

Id. at 313. Based on these principles, many states require certified petitions to go on the

ballot unless their subject matter is "in its entirety" withdrawn from the initiative processor wholly invalid.

Similar principles are reflected in Texas' severability case law. These cases suggest by analogy that Texas Courts should place initiatives on the ballot even if part of the subject matter is allegedly invalid and outside the initiative process; then, if the initiative passes, Courts can sever the offending portion. The petition initiative in this case contains a standard severability clause: "If any provisions of this ordinance or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable." (TAB A; Ex. 1, COA 001). The goal of Texas severability law "is to retain valid portions and applications of the statute whenever possible," reflecting the Courts' duty to construe a law so as to render it valid. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990); *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 797 (Tex. App.—Austin 2008, no pet.). As the Austin Court of Appeals recently stated, "the purpose of severability is to sever a statute's problematic portions while leaving the remainder intact whenever possible—i.e., to 'limit the solution to the problem.'" *Auspro Enter. v. Tex. Dep't of Transp.*, 506 S.W.3d 688, 702 (Tex. App. —Austin 2016, pet. granted, judgm't vacated w.r.m.). If a part is stricken, the law must stand if "that which remains is complete in itself." *Rose*, 801 S.W.2d at 844; *Auspro Enterp.* 506 S.W.3d at 702. Just as after legislative passage, Texas Courts sever whenever possible any legal infirmity in final and approved municipal legislation; any legal infirmity in citizen-initiated direct legislation, if and when it is approved by the voters, may be severed in the same manner.

The petition ordinance's call for a waiting period and an election has not been withdrawn at all, much less in its entirety, from the initiative process. First, it is important to note that the City incorrectly categorizes the petition initiative as a "zoning law" as the basis for their argument that the subject matter of the petition has been withdrawn from the

initiative and referendum process. (Appendix Tab B, Heath memo, pp. 1, 6). The City misunderstands the citizen petition. The petition initiative before the Court is not a zoning ordinance or regulation; it does not create or change zoning laws. The petition ordinance if adopted would not diminish, enhance, or alter in any way the zoning, use or development standards on any parcel of land. The initiative is a governance and election ordinance that calls for a vote in November 2018 to determine whether to have a waiting period and a *future* vote on CodeNEXT (if and when the Council adopts it). Accordingly, there is no basis for the City's contention that the citizen's petition initiative has been withdrawn from and unavailable to the initiative and referendum process on the grounds that it deals with "zoning." It plainly does not. The petition initiative has been certified and the subject matter of the petition initiative has not been withdrawn from the initiative and referendum process. That should be the end of the analysis. The citizens are entitled to vote.

The City, however, wants to focus now on post-election considerations. As discussed above, this is improper. Even so, when considered at the appropriate time, the adopted petition ordinance will be seen as a valid subject of the initiative and referendum process.

If the initiative is approved by the voters, and assuming the Council adopts CodeNEXT, there would be a waiting period for CodeNEXT to take effect, allowing for citizen study and debate and for council accountability. A waiting period clearly is not a substantive zoning regulation, but a governance procedure. As proposed today, CodeNEXT Draft 3 would be a comprehensive land development code revision, with multiple subject matters, all of which, except one, indisputably are not zoning and are subject to an election. While the most controversial, the small piece of CodeNEXT as currently proposed that would involve zoning would be a general zoning law not a zoning ordinance tailored to individual properties. Therefore, all portions of CodeNEXT including these general zoning laws would be the proper subject for any second initiative election. We will take up each of these points in turn below.

A. The Petition's waiting period is subject to the initiative process. A waiting period is a procedural requirement to enhance government accountability, not a substantive zoning law.

A waiting period before CodeNEXT would take effect promotes public education and political accountability– which are essential in our democracy. The people have the right to pass by initiative a legislative waiting period so that they may become better informed on a crucial public policy issue and so that they can hold accountable their city council members at the next council election. In a democracy, a city council should not be able to block its constituents from enacting through the initiative process a waiting period designed to hold those same council members accountable. The proposed waiting period also offers an opportunity to amend CodeNEXT or correct any errors before it takes effect and development rights under the new code are vested. *See* Tex. Local Gov't Code §§ 245.001-245.007 (West 2008). The waiting period is a procedural check and balance on the Council. It is not a zoning law: it alters no zoning regulation; it repeals no zoning law; it calls for a waiting period on *all* of CodeNEXT, if and when the council passes it, and not just the small piece of CodeNEXT that may adopt general zoning laws.

In *Rossano v. Townsend*, 9 S.W.3d 357 (Tex. App.—Houston [14th] 1999, no pet.), the Houston 14th Court of Appeals invalidated a referendum on zoning because the city failed to comply with a waiting period (which the Court found was a preliminary election procedure). *Rossano*, 9 S.W.3d at 363-64. The Court noted that the waiting period "language closely tracks section 211.015(c) of the Local Government Code." This subsection provides, in relevant part:

> The provisions of this chapter [Chapter 211. Municipal Zoning Authority] shall not be construed to prohibit the adoption or application of any charter provision of a home-rule municipality that requires a waiting period prior to the adoption of zoning regulations….

Id.

Assuming arguendo Section 211.015 applies in the instant case to a small portion of the contemplated CodeNEXT ordinance, which we will discuss *infra*, it specifically provides that state law should not be construed to prohibit a waiting period for zoning regulations.

In conclusion, the case law and statute evidence that a waiting period is not a zoning regulation. State law does not clearly and compellingly preclude the people from directly legislating a waiting period to promote government accountability.

B. Ninety percent of CodeNEXT's subjects are not zoning and these are indisputably subjects the people have a right to directly legislate on.

"The land development code -- one small piece of it is zoning and what you can build where. 90% of it is other things " – Mayor Steve Adler. Casey Claiborne, *Council Hears from Public on CodeNET as Lawsuit Looms*, May 29, 2018, http://www.fox7austin.com/news/local-news/council-hears-from-public-on-codenext-as-lawsuit-looms.[2]

CodeNEXT is the City's on-going process for a comprehensive revision of the City's entire land development code. Thus far, the City has released three versions of CodeNEXT since January 2017. The latest draft, CodeNEXT Draft 3, was released in February 2018. (Exhibit 14, COA 1947-3512). Since then, the City's Planning staff has created an errata sheet and a lengthy addendum to Draft 3. (Exhibit 15, COA 3819-6318; Exhibit 16, COA 6319-6768). In addition, the Planning Commission has considered and adopted dozens of amendments to Draft 3 in May 2018. (Exhibit 42, COA 6775-6792). CodeNEXT, as of today, has not been approved by Council on First Reading, much less the required Third Reading. Austin City Code, Section 2-5-13. At this point in time, we do not know if or when CodeNEXT will be approved by the City Council. Unlike with the petitioned

[2] Mayor Adler's quoted statement to the local Fox news channel is one of Relators' proposed exhibits that Respondents' counsel have indicated they will object to its admissibility. As a party's out of court admission against interest, Relators intend to show that it is admissible evidence.

ordinance, we also don't know what CodeNEXT will say if passed. Until the content of CodeNEXT is known, it is impossible for the City to argue even post-election that it has been withdrawn from the field of initiative and referendum.

Recognizing these important unknowns, the current draft of CodeNEXT is not, as described in the City's February 2018 legal memo, a "comprehensive revision of the zoning laws." (Tab B, Heath memo, p. 1). It is a proposed comprehensive revision of the City's entire land development code. CodeNEXT Draft 3 describes itself as a "land development code," not as a comprehensive zoning law. CodeNEXT Draft 3, Section 23-1A-1010 (A) (Exhibit 14, COA 1965). CodeNEXT Draft 3 has a very broad scope encompassing many land development subjects, not just zoning, and the majority of the land development code's regulations apply to properties outside the City's zoning jurisdiction (such as its extra territorial jurisdiction). CodeNEXT Draft 3, Section23-1A-1030(A)(1). (Exhibit 14, COA 1966). CodeNEXT cites for its legal authority many laws besides zoning statutes, including state laws relating to affordable housing (Tex. Local Gov't Code Ch. 214), business uses (Tex. Local Gov't Code Ch. 215), billboards and signs (Tex. Local Gov't Code Ch. 216), sexually oriented businesses (Tex. Local Gov't Code Ch. 243), subdivisions and platting (Tex. Local Gov't Code Ch. 212), water and the environment (the Texas Water Code), and flood control (the Flood Control and Insurance Act), as well as the City's general police and home-rule powers. CodeNEXT Draft3, Section 21-1A- 2010 (A.). (Exhibit 14, COA 1969).

CodeNEXT Draft 3 covers a multitude of subjects other than zoning, including the environment, water quality, parks and open space, affordable housing, flooding, billboards, construction standards, platting, permitting, subdivisions, hearing and appeal rights, and transportation. (Exhibit 14, CodeNEXT Table of Contents, COA 1949-1958). These subjects are undeniably not zoning laws. Respondents cannot dispute that only a small part of the proposed CodeNEXT addresses zoning, yet they reference the "subject matter" of

CodeNEXT as "zoning." Of CodeNEXT Draft 3's thirteen chapters, only one involves zoning. (Exhibit 14, COA 1949-1958). These subjects have not been withdrawn from the field of the initiative process. Since the subject matter of the proposed waiting period and election ordinance cannot be shown to have been withdrawn in its entirety from the field of the initiative process, it should go on the ballot.

The City Council's resolution refusing to place the petitioned ordinance on the ballot, and the legal memorandum on which that decision was based, start with an invalid conclusion: that the petitioned ordinance is a zoning ordinance. (Tab B, Heath memo, p. 1). It is not a zoning ordinance of any kind, and in the event that council adopts CodeNEXT with a zoning component, there is nothing in state law that restricts with "unmistakable clarity" the right of home-rule cities to provide for waiting periods or elections to ratify general zoning ordinance changes that are embedded within a larger comprehensive revision of the city's land development code.

C. Initiatives are proper for CodeNEXT's comprehensive zoning law revisions, because only zoning amendments to individual parcels of property are outside the initiative process.

Respondents have contended that all zoning has been removed categorically from the field of initiatives in Texas. (Tab B, Heath memo., pp. 1, 4, 6). For this proposition, the City's February 2018 legal memo cites four Texas Appeals Court cases. (The memo acknowledges that "the question does not appear to have been presented to the Texas Supreme Court." (Tab B, at p. 4). Furthermore, none of the four appellate court cases involve the Austin Court of Appeals.) Most telling, the four appellate cases do not involve a comprehensive revision of general zoning laws, much less land development codes such as CodeNEXT. These cases all involve zoning ordinances regulating *only individual parcels of land*. *See generally In re Arnold*, 443 S.W.3d 269 (Tex. App.—Corpus Christi 2014, orig. proceeding); *City of Canyon v. Fehr*, 121 S.W.3d 899 (Tex. App.—Amarillo

2003, no pet.); *San Pedro N., Ltd. v. City of San Antonio,* 562 S.W.2d 260 (Tex. App.—San Antonio 1978, writ ref'd n.r.e.); *Hancock v. Rouse*, 437 S.W.2d 1 (Tex. App.—Houston [1st] 1969, writ ref'd n.r.e.).[3]

In *Hancock*, the earliest case, the Houston 1st Court of Appeals held that an initiative and referendum that changed the zoning on specific parcels of land should not go on the ballot. 437 S.W.2d at 4. The Houston Court reasoned that the initiative process interfered with the state's zoning notice and hearing requirements for the property owner and surrounding landowners: "The provisions of the [state] general law requiring notice and hearing cannot be complied with if the ordinance is submitted to an election." *Id*. The Court quoted prior decisions finding there was no right of initiative or referendum when "there was some preliminary duty such as the holding of hearings, etc., impossible of performance by the people in an initiative proceeding, that by statute or charter was made a prerequisite to the exercise of the legislative power." *Hancock*, 437 S.W.2d at 2. For the Court, zoning specific parcels had been removed by clear and compelling implication from the initiative process, because holding an initiative election precluded compliance with the state's mandatory notice and hearing requirements for zoning individual parcels of property.

Similarly, the San Antonio Court of Appeals, in *San Pedro N., Ltd. v. City of San Antonio*, invalidated a referendum to repeal zoning ordinances related to several specific parcels of

[3] The first case cited in the City's legal memo, *Dallas Ry. Co. v. Geller*, 271 S.W. 1106 (Tex. 1925), is actually important because the following four zoning cases are based on the reasoning in that case. There, the Supreme Court held that a city ordinance governing rates charged on street cars was not subject to referendum. It reasoned that rate setting for private transit providers "is both legislative and judicial in character," required specific rate-setting procedures that could not be accommodated by the referendum process, and required detailed factual inquiries implicating the due process and contractual rights of the regulated private rail company. *Id.* at 271 S.W. at 1111-14. Each of these points apply to the application of specific zoning designations to individual parcels of land, but not to general zoning laws.

land. *San Pedro N., Ltd.*, 562 S.W.2d at 262-63. Following *Hancock's* reasoning, the San Antonio Court of Appeals "recognized that zoning ordinances and amendments to such ordinances are invalid where the mandatory provisions of the statutes concerning notice and hearing have been ignored." *Id*. The third referenced case, *City of Canyon v. Fehr*, involved a referendum to repeal the "re-zoning of two tracts of land within Canyon's boundaries from single family residential use to commercial use." *City of Canyon*, 121 S.W.3d at 901-02. The Court of Appeals refused to order a referendum to repeal the zoning amendments on individual properties. In *In re Arnold*, the Corpus Christi Court of Appeals specifically limited its holding to disallow a referendum on zoning amendments that applied to specific individual parcels: "We conclude that the initiative and referendum process does not apply to the repeal of *individual* zoning ordinances." *In re Arnold*, 443 S.W. 3d at 270 (emphasis added). In short, the City's four cited appellate cases hold only that the initiative process does not apply to ordinances amending zoning on specific parcels because it interferes with statutory procedural requirements for zoning notices and hearings. No Texas case holds that comprehensive general zoning laws–which apply to no particular property– are removed from the field of the initiative process

The legal reasoning given for precluding initiatives on zoning changes to specific, individual properties does not apply to comprehensive revisions of general zoning laws. Zoning amendments to specific properties require by state law written notice and a hearing to surrounding landowners, which do not apply to replacing general zoning laws. The Texas Local Government Code requires home rule cities, before making any zoning changes to any specific properties, to provide at least ten-days' written notice and a Zoning Commission hearing to landowners. Tex. Local Gov't Code Ann. §211.007(c) (West 2008). If the subject landowner or at least twenty percent of surrounding landowners object, then they may invoke their valid petition rights, which requires a three-fourths vote of the City Council to change that property's zoning. *Id.* §211.006(d). These notice, hearing, and valid petition rights

provide procedural protections to landowners' property rights. Oren, *The Initiative and Referendum's Use in Zoning*, 64 Cal. L. Rev. 74, 78-84 (1976). The Zoning Commission's hearing on the individual properties' zoning is "quasi-judicial," because it applies specific municipal zoning laws to an individual property with its own unique facts. *Id.* at 85-92. *See, e.g., Mayor & Council of Rockville v. Rylyns Enter., Inc.*, 814 A.2d 469, 476 (Md. 2002). "An increasing number of jurisdictions classify hearings on a proposed zoning change for a single parcel as 'adjudicative.' These decisions typically reason that the rezoning hearing is primarily concerned with determining contested facts *(e.g.,* if the sewage system would be able to accommodate the needs of a proposed apartment house) rather than ascertaining broad policy goals." *Id.* at 90.

If zoning changes on a specific parcel of land were made by initiative, there would be no quasi-judicial hearing or valid petition rights. Landowners' valid petition rights would be overruled by the election. Landowners would not be provided notice and an opportunity to be heard at a quasi-judicial zoning hearing on the zoning amendments to their individual properties. If allowed to interfere with the State's prescribed *adjudication* process for an individual property's rezoning, the initiative process would extend beyond its *lawmaking* power. *Glass*, 244 S.W.2d at 648 (the subject matter of an initiative must be legislative in character).

These statutory zoning requirements– which are the basis for the decisions relied upon by the City for the proposition that "zoning" has been withdrawn from the initiative process—do not apply to general zoning laws, which are legislative in character because they prescribe a general policy that applies to an "open class" of people, property, and interest. Tex. Local Gov. Code Sections 211.006, 211.007; Oren, *The Initiative and Referendum's Use in Zoning*, 64 Cal. L. Rev. at 90-92. *See, e.g., Generation Realty, LLC v. Contanzaro*, 21 A.3d 253, 262 (R.I. 2011) (finding that a comprehensive revision to a town's zoning ordinance was general in nature because it did not single out a specific property for revision)).

Being legislative in character, and not subject to state zoning procedural requirements, comprehensive revisions of local zoning laws are subject to initiatives in Texas.

3. ARGUMENT THREE:

In the alternative, and assuming without conceding that Section 211.015 of the Texas Local Government Code is considered relevant to the validity of the petitioned ordinance, the District Court should issue a writ of mandamus against Respondents because the contemplated comprehensive zoning revisions and the voter approval thereof would comply with Section 211.015 of the Texas Local Government Code. Depending on the City Council's future actions, CodeNEXT's comprehensive zoning revisions, which would repeal and replace the City's zoning ordinance in its entirety, would be considered an initial adoption under Section 211.015.

Respondents, believing that the petitioned ordinance is a "zoning" ordinance withdrawn from the initiative process, argue that it is subject to Texas Local Government Code §211.015 and that this section pertains only to the initial adoption of zoning regulations or their repeal in their entirety. (Tab B, Heath memo, pp. 4-5).

First, as noted above, the petitioned ordinance is not a zoning ordinance, and, therefore, Section 211.015 is inapplicable. Respondents' reliance on this Section is mistaken because the Respondents are looking ahead to a future election that would occur if and only if the voters approve of the petitioned ordinance and the City Council adopts CodeNEXT. A legal decision at this time on Section 211.015 is inappropriate because it would result in an advisory opinion.

Second, Section 211.015 is not the exclusive authority for zoning initiatives and referendum in Texas; except for the removal of rezonings of specific parcels from the initiative process, the rest of citizens' initiative power remains, including comprehensive zoning revisions. As explained above, the four *Hancock* line of appellate cases hold only that zoning changes to specific individual parcels are withdrawn from the initiative process,

reasoning that a referendum election would interfere with state mandated zoning notice and hearing procedures for specific landowners. This holding and rationale do not apply to comprehensive zoning revisions, such as CodeNEXT, that apply to no particular property. There have been no cases, as well as no clear and compelling justification, that hold comprehensive zoning revisions are withdrawn from the initiative field. Therefore, home-rule cities retain initiative authority for comprehensive zoning revisions.

When Section 211.015 was passed in 1993, the only zoning situations that had been removed from the initiative field were rezonings of specific parcels pursuant to *Hancock*. The Legislature added Section 211.015 as an amendment to a Board of Adjustment bill in order to ensure that no matter how unclear the state of Texas law, that the City of Houston could hold a referendum on the initial adoption or repeal of a zoning law in its entirety. (Legislative history will be submitted as possible and shared with opposing counsel). *See* John Williams, *Law Prevents Change in Zoning, Hall Says Vote on Ordinance Allegedly Prohibited*, Houston Chronicle, March 17, 1993, at A13. Section 211.015 does not purport to apply to all other zoning situations. It does not apply to initiatives, only referenda. Its language is, in part, less than clear and compelling when considering how it may apply in situations other than the Houston initial zoning adoption and repeal that it targeted. It is less than clear and compelling in how it applies to the case at bar. Assuming arguendo that Section 211.015 applies, however, the following analysis shows that it cannot be read to "withdraw from the field" the petitioned ordinance, but rather the portion of the petitioned ordinance that may touch on zoning fits within the framework of the statute.

Sections 211.015(a)-(b) provide multiple methods by which voters may repeal a comprehensive zoning ordinance:

> (a) Notwithstanding other requirements of this subchapter, the voters of a home-rule municipality may repeal the municipality's zoning regulations adopted under this subchapter by either:
>
> (1) a charter election conducted under law; or

> (2) on the initial adoption of zoning regulations by a municipality, the use of any referendum process that is authorized under the charter of the municipality for public protest of the adoption of an ordinance.
>
> (b) Notwithstanding any procedural or other requirements of this chapter to the contrary, the governing body of a home-rule municipality may on its own motion submit the repeal of the municipality's zoning regulations, as adopted under this chapter, in their entirety to the electors by use of any process that is authorized under the charter of the municipality for a popular vote on the rejection or repeal of ordinances in general.

Id. §§ 211.015(a)-(b).

Additionally, Section 211.015(d) provides municipalities the option to make the adoption of a comprehensive zoning ordinance conditional upon the ratification of voters: "(d) Notwithstanding any charter provision to the contrary, a governing body of a municipality may adopt a zoning ordinance and condition its taking effect upon the ordinance receiving the approval of the electors at an election held for that purpose." *Id.* § 211.015(d). The only limitation on these procedures is that § 211.015 may only be used for the repeal of a zoning ordinance in its entirety or upon the initial adoption of a zoning ordinance:

> (e) The provisions of this section may only be utilized for the repeal of a municipality's zoning regulations in their entirety or for determinations of whether a municipality should initially adopt zoning regulations, except the governing body of a municipality may amend, modify, or repeal a zoning ordinance adopted, approved, or ratified at an election conducted pursuant to this section.

Id. § 211.015(e)

The petitioned ordinance sets forth procedures for voter ratification of a comprehensive revision to the City's zoning ordinance, which would be authorized under Section 211.015, because such comprehensive revision involves the initial adoption of zoning regulations in their entirety. As discussed above, a vast majority of a comprehensive revision to the City's land development code address topics other than zoning, so § 211.015 could only apply to a small

fraction of the overall comprehensive revision.[4] Nonetheless, because a comprehensive revision would include (i) the repeal of all zoning regulations in their entirety and (ii) the adoption of a new comprehensive zoning ordinance, such a revision would be susceptible to a citizen-led referendum or initiative consistent with the provisions of § 211.015.

The petitioned ordinance is structured to require voter ratification of a comprehensive revision of the land development code "in its entirety and not piecemeal" upon the City Council's adoption thereof. (Tab A; Ex. 1, COA 001). Such a procedure is expressly authorized under §211.015(d), which provides municipalities the authority to "adopt a zoning ordinance and condition its taking effect upon the ordinance receiving the approval" of the electorate. Tex. Loc. Gov't Code §211.015(d). Additionally, the petitioned ordinance could be viewed as establishing a future zoning referendum on the City's comprehensive revision ordinance, which referendum would be permitted under either § 211.015(a) or § 211.015(b) as a repeal of a zoning ordinance in its entirety. *Id.* §§ 211.015(a)-(b).[5]

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[4] As discussed above, the remainder of the land development code that does not involve zoning cannot be said to have been withdrawn from the field of initiative and referendum, and thus, any discussion of the limitations of §211.015 is irrelevant with respect thereto.

[5] Relators note that the Legislature elected to not insert the word "initial" as an adjective before the phrase "zoning ordinance" in § 211.015(d) and also before the phrase "zoning regulations" in §211.015(b). Tex. Loc. Gov't Code §§ 211.015(b), (d) (West 2017). This contrasts to the Legislature's deliberate use of "initial adoption of zoning regulations" in §211.015(a)(2). *Id.* § 211.015(a). When a phrase appears in one part of a statute but is omitted from another, such omission is presumed to be intentional. *Russello v. United States*, 464 U.S. 16, 23 (1983). Under a plain reading of the statute, then, it could be said that the Legislature meant to provide municipalities the ability to permit their citizens the option to ratify any zoning ordinance, regardless of whether it constitutes the initial adoption. To the extent that § 211.015(e) limits the applicability § 211.015(b) and § 211.015(d) to the "repeal of a municipality's zoning regulations zoning regulations in their entirety or for determinations of whether a municipality should initially adopt zoning regulations," the analysis contained herein concerning the legal effect of an initial adoption of a comprehensive revision would be applicable.

Following the adoption of § 211.015, there have been only two cases in which a Texas appellate court has considered its applicability to a set of facts, and neither involved a comprehensive revision. *See In re Arnold*, 443 S.W.3d 269 (Tex. App.—Corpus Christi 2014, orig. proceeding) (stating referenda may not be used for individual zoning amendments); *City of Canyon v. Fehr*, 121 S.W.3d 899 (Tex. App.—Amarillo 2003, no pet.) (explaining that zoning referenda may not be used to repeal amendments to a zoning ordinance in a piecemeal fashion). In both instances, the courts emphasized that the provisions of §211.015 are inapplicable to individual zoning amendments. *Id.* Although there is some dicta in *City of Canyon* that would indicate that "initial zoning" relates only to the first set of regulations when no zoning regulations exist before, the court's holding differentiated between the "piecemeal repeal of zoning ordinances" from the repeal of the zoning ordinance in its entirety. *City of Canyon*, 121. SW.3d at 905. The *City of Canyon* court did not consider a situation where a zoning ordinance was proposed to be repealed in its entirety and replaced with a new, comprehensive zoning ordinance.

Texas law does not explicitly address the repeal and replacement of all zoning regulations in their entirety, commonly known as a "comprehensive revision". *See generally* Tex. Loc. Gov't Code §211.006-007; *see also* John Mixon, *Texas Municipal Zoning Law* § 7.002 (LexisNexis, 3ed. 2018). Rather, Chapter 211 prescribes only two procedural options for the adoption of zoning regulations, through original adoption (i.e., "initial zoning") or through the reclassification of specific tracts (i.e., "rezoning"). *Id.* Chapter 211 is silent as to which of these two procedural processes would be applicable to a comprehensive revision. *Id.*

The City of Austin has codified these separate processes in its current land development code. Austin, Tex., Land Development Code (LDC) § 25-2-241 (Distinction between Zoning and Rezoning). The LDC defines "zoning" as "the initial classification of property as a particular zoning base district." *Id.* In contrast, rezoning is defined as an amendment to the

City's zoning map, which alters the base zoning district for a particular property from one classification to another. *Id.* § 25-2-241(B) ("Rezoning amends the zoning map to change the base district classification of property that was previously zoned.").

Initial zoning and rezoning differ in two critical ways: (i) the level of notification required and (ii) the ability to change voting requirements pursuant to a citizen-based protest petition. *Mixon,* at §7.002. For an initial zoning, state law requires notice to the community only via a newspaper, and the zoning itself need only be adopted by a simple majority of the governing body. *Id.* For a rezoning, however, notice must be provided to property owners within 200 feet of the subject tract (i.e., a "valid petition"), and there are procedures by which property owners may petition to require a supermajority of the governing body to approve of the rezoning request. *Id.*

In establishing separate procedures for initial zoning and rezoning, the Legislature recognized substantive differences between individual, site-specific amendments to a zoning ordinance and the adoption of initial zoning through a general ordinance. A site-specific amendment (or rezoning) relates directly to protecting private interests and an analysis of the characteristics of a particular tract of land, which is why the Legislature afforded affected residents more notice and opportunities to object. *Mixon*, at §7.002. In contrast, the adoption of a comprehensive ordinance addresses broader, community-level concerns to be deliberated by the city at-large. *Id.*

Other jurisdictions have acknowledged such fundamental distinctions between original/comprehensive zoning and piecemeal revisions/individual zoning amendments, as well. *See, e.g., Mayor & Council of Rockville v. Rylyns Enterprises, Inc*., 814 A.2d 469, 476 (Md. 2002) ("[A] fundamental distinction between original zoning, comprehensive zoning, and piecemeal zoning is that the first two are purely legislative processes, while piecemeal rezoning is achieved, usually at the request of the property owner, through a quasi-judicial process leading to a legislative act."); *Generation Realty, LLC v. Contanzaro, 21 A.3d 253,*

262 (R.I. 2011) (finding that a comprehensive revision to a town's zoning ordinance was general in nature, because it was a "far-reaching ordinance that did not single out a specific property for revision, but rather completely overhauled the town's zoning mosaic to conform to the comprehensive plan").

A comprehensive revision of a city's zoning ordinance is most analogous to initial zoning, because it relates to the original adoption of an entirely new set of a regulations rather than a piecemeal amendment to existing regulations. *See Mixon*, at §*7.002* ("Comprehensive revisions are similar to initial adoptions in that they consider anew all regulations and all zoning classifications in the municipality."). The Texas Supreme Court explained that the adoption of a new comprehensive set of regulations is an implicit, if not explicit, repeal and replacement of the older set of regulations. *McInnis v. State*, 603 S.W.2d 179, 183 (Tex. 1980). In other words, a comprehensive revision (i) repeals the existing zoning ordinance, in its entirety, and (ii) replaces it with an entirely new set of regulations. The Austin Court of Appeals recognized this principle when it found that a "new original comprehensive zoning map" repealed and replaced a city's prior zoning map in its entirety and, thus, mooted any procedural defects applicable to the prior, then-repealed map. *See James v. City of Round Rock*, 630 S.W.2d 466, 469 (Tex. App.—Austin 1982, no writ).

The benefit, from a municipality's perspective, in processing a comprehensive revision as a new, original adoption is that the municipality arguably need only follow the procedures applicable to initial zoning, such as limited notice requirements and adoption of the new code by only a simple majority of council. *Mixon* § 7.002. Presumably, this is why the City of Austin chose to send only a "courtesy notice" to utility account holders rather than notifying property owners of proposed zoning reclassifications. (Exhibit 19, COA 8272-8273) Similarly, the City of Austin has signaled its intent that property owners will not be able to protest proposed zoning regulations under the comprehensive revisions to trigger a requirement for regulations to be adopted by a supermajority of council. (Exhibit 39, COA,

p.495,). By processing CodeNEXT and its related zoning map pursuant to the requirements for initial zoning (rather than as a rezoning), the City of Austin has, in effect, treated the proposed comprehensive revision as an initial adoption.

The petitioned ordinance is consistent with the City of Austin's approach. The comprehensive revision of the land development code (which includes a comprehensive revision of the City's zoning ordinance) is a unique circumstance where regulations are repealed and replaced in their entirety. Should CodeNEXT ever be adopted by the City Council, the petitioned ordinance would require that the City Council provide the voters the opportunity to ratify the new zoning ordinance (in its entirety), as contemplated under §211.015. The petitioned ordinance's language is explicitly clear that it would not affect piecemeal revisions to the zoning ordinance, nor would it affect any proposed rezoning of the City's zoning map. The petitioned ordinance simply codifies, via city ordinance, procedures that fit within Chapter 211, should such a zoning ordinance be considered.

V.
CONCLUSION

Acknowledging the requisite deference to the people's reserved power of initiative and referendum, any ambiguity as to the applicability of this statute to the petition initiative should be decided in favor of the people. At this juncture, seeking to apply Section 211.015 to the as-yet-unadopted CodeNEXT calls for speculation upon speculation. Respondents cannot show that the subject matter of the petitioned ordinance has been withdrawn from the field of the City's plenary, home-rule powers; cannot show that Section 211.015 was ever intended to make such a withdrawal, even as to the small piece of CodeNEXT that may ultimately address zoning, and cannot show that the second election called for by the petitioned ordinance will not fit within the confines of Section 211.015.

Wherefore, premises considered, Relators respectfully request a mandamus lie against Respondents, and for such other relief, general or specific, at law or in equity, to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby, certify that all counsel of record have received, on this 20th day of June, a copy of this Trial Brief by email.

/s/ Fred I. Lewis
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