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

NELSON LINDER, et.al.,	IN THE DISTRICT COURT
RELATORS,	
VS.	TRAVIS COUNTY, TEXAS
CITY OF AUSTIN, TEXAS, et. al.,	201st JUDICIAL DISTRICT
RESPONDENTS.	

RELATORS' REBUTTAL BRIEF IN SUPPORT OF THEIR

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE JUDGE ORLINDA NARANJO:

Comes now, Realtors, and respectfully file this Rebuttal Brief, and would show:

I.

Summary

Relators seek to highlight in this brief our main rebuttal points to Respondents' brief. First, Respondents use the wrong legal framework to analyze the petition initiative, failing to acknowledge that the people's initiative power must be "liberally construed," that there must be "clear and compelling grounds" to find an initiative subject matter withdrawn, and that a statutory limitation on a home-rule city's power must appear with "unmistakable clarity." Respondents also are impermissibly asking the Court to look beyond the November 2018 election, the only issue before it, and render an advisory opinion based on speculation about what might happen in the future.

Respondents assertion that all zoning ordinances, not just those assigning zoning to specific parcels of land, have been withdrawn from the field of initiative process is incorrect. The case law is confined to holding that zoning of specific parcels has been withdrawn by necessary implication because the individual landowner's written notice, quasi-adjudicative hearing, and supermajority petition rights that attach to zoning specific parcels cannot be accommodated by the initiative and referendum process. These requirements do not apply for adopting general zoning ordinances, and thus there are no clear and compelling grounds for general zoning standards being withdrawn from the field.

Section 211.015 does not impact much less control the outcome of this proceeding. Neither its language nor its legislative history suggests that either a waiting period or a voter approval provision are withdrawn from the field of voter initiatives.

Having not even addressed initiatives, or comprehensive revisions of land development codes, it cannot be said that Section 211.015 clearly and compellingly withdrew comprehensive land development code revisions from the field of the initiatory process.

As to the waiting period, it stands independently on its own from the voter approval requirement for CodeNEXT, and there is no clear and compelling reason for finding it withdrawn from the initiative field.

II.
Respondents Fail to Give Proper Legal Deference to the People's Right to Directly Legislate.

Respondents open and close their brief saying that they "acknowledge and respect" the power of city voters to initiate municipal legislation by petition but in the body of their brief, ignore the legal framework provided by the Texas Supreme Court to assure that both plenary home rule powers and citizen initiative powers are in fact respected and receive deference. Instead, Respondents invite the Court to issue an unconstitutional advisory opinion that would violate fundamental notions of separation of powers and would be based on a string of assumptions about hypothetical future "scenarios."

Even assuming Respondents can side step the Texas Supreme Court mandate in *Coalson v. City Council of Victoria* and its progeny – that all challenges to a petitioned initiative must be resolved post-election if and when the voters complete the legislative process and approve the initiative – they cannot show that any part of the petitioned ordinance, much

less all of it, has been "withdrawn from the field" of the initiative process.[1] As laid out in the earlier Texas Supreme Court case of *Glass v. Smith*, such withdrawal of the subject matter of citizen-initiated legislation must be "clear and compelling." 244 S.W. 2d 645, 649 (Tex. 1951). *See also Quick v. City of Austin*, 7 S.W. 3d 109, 124 (Tex. 1999). This pre-election judicial inquiry must only go "this far and no further." *Glass v. Smith*, 244 S.W. 2d at 649. "[T]he wisdom of the initiative . . . is not the issue." *Id.* Absent a showing of being "withdrawn from the field" in a "clear and compelling" manner, Respondents "should be compelled to perform their ministerial duties so as to permit the legislative branch of the municipal government to function to the full fruition of its product, though that product may later prove to be unwise or even invalid." *Id*. at 654.

After avoiding the very narrow pre-election legal inquiry before the court, Respondents then misconstrue the framework for judicial review that would be exercised later (assuming the initiative is approved by the voters and its legality is then challenged). Instead of recognizing that home rule cities "possess the powers of self-government and look to the Legislature not for grants of authority, but only for limitations on their authority," *BCCA Appeal Grp. v. City of Houston*, 496 S.W. 3d 1, 7 (Tex. 2016), Respondents incorrectly refer to the "City's statutory zoning authority" and argue that much of the draft CodeNEXT "depends on [Local Government Code Chapter 211's] grant of authority." Resp. Brief, pp. 22-23. This is backwards.

As with any state law, Chapter 211 does not "grant" Austin any authority; Austin has plenary authority as a home-rule city. Rather, Respondents must show that any withdrawal of Austin's plenary home rule powers, including its powers of initiative and referendum, appears with "unmistakable clarity" in the express language or clear intent of state

[1] Respondents contend that the Texas Supreme Court in *Coalson* did not address the "withdrawn from the field of initiative" exception to the rule, that pre-election judicial review of a petitioned initiative seeks a prohibited advisory opinion, that was narrowly drawn in the 1951 Supreme Court decision of *Glass v. Smith*. This is true, but begs the question as to whether the *Coulson* court was overruling or backing away from the "withdrawn from the field" exception to the rule that the initiative legislative process must be completed first before courts have jurisdiction to exercise judicial review (and avoid rendering advisory opinions). Some Post-*Coulson* Court of Appeals cases have followed *Coalson's* approach, others have followed *Glass'*. See Relators' Original Brief, pp.9-12. However, Respondents urge the court not only to follow *Glass*, but expand its narrow exception to swallow the rule, making a long list of arguments that challenge the wisdom or validity of the initiated ordinance. But Respondents cannot show that the subject matter of the petitioned ordinance has been clearly and compellingly withdrawn from the field of the initiative power.

legislation. *City of Laredo v Laredo Merchant's Ass'n*., 2018 Tex. LEXIS 647 (Tex. S. Ct. June 22, 2018), pp. 9-10. *See also Quick v. City of Austin*, 7 S.W. 3d at 124. Further, "[a]bsent an express limitation, if the general law and local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency." *City of Laredo* at 10. A statute and a home-rule city ordinance will be harmonized and "will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *Id*., p. 7, ftn. 38, *quoting, City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. 1927) (emphasis added). *See also Quick v. City of Austin*, 7 S.W. 3d at 124. The initiated ordinance's waiting period and voter approval requirement have not clearly and compellingly been removed from the initiative field,

III.

Respondents Ask the Court to Look Beyond the November 2018 Election Before the Court and Render an Impermissible Advisory Opinion on Speculative Facts in the Future.

Respondents misunderstand the petition initiative and the role of this Court at the July 2 hearing, seeking an advisory opinion based on speculative facts. The only matter before the Court at this hearing is whether to place the petition initiative on the November 2018 ballot. The petition initiative asks voters whether they want to have a waiting period and voter approval requirement *in the future if and when* Council passes a comprehensive revision. It is not a zoning ordinance: whether the voters approve or disapprove the initiated ordinance this November will not change or affect in any way the zoning or land use on any piece of property. It is therefore not withdrawn from the field of permissible initiatives. Any subsequent second election on a comprehensive revision *is not before the Court at this time and may never occur*. Respondents, however, expressly ask this Court to speculate as to the future, and "*assume* …the voters will approve it [the "petition]," "*anticipate* that the City Council will adopt" a CodeNEXT, and guess its contents although it "*is not yet known what the precise CodeNEXT terms will be*." (Resp. Brief, pp. 2, 7, 33-34) (emphasis added).

Respondents are asking the Court to look beyond the November 2018 election and render an advisory opinion based on speculation that (a) the initiated ordinance will be approved by the voters, (b) the council will approve a comprehensive revision ordinance, (c)

the approved comprehensive revision ordinance will contain the kind of individual zoning laws that courts have held are withdrawn from the field, and (d) those withdrawn elements will be so pervasive and entangled with other comprehensive revision elements that the provisions cannot be severed. Courts constitutionally cannot render advisory opinions on such speculative facts, in this or any other context: "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." *Coalson v City Council of the City of Victoria*, 610 S.W. 2d 744, 747 (Tex. 1980). *See also City of Cleveland v Keep Cleveland Safe*, 500 S.W. 3d 438, 449 (Tex. App.– Beaumont 2015, no pet.) (mandamus issued against City Council to place matter on the ballot pre-election "because it does not present a justiciable question"). *City of Cleveland*, 500 S.W. 3d at 449. *In Re Roof*, 130 S.W.3d 414, 417-418) (Tex. App.– Houston [14th] 2004, orig. proceeding) (mandamus issued against City Council because "an election will determine whether a justiciable issue exists."); *Green v City of Lubbock*,627 S.W. 2d 868, 870 (Tex. App. – Amarillo 1982, no writ) (mandamus issued against City Council to place an initiative on the ballot because "matters presented are not ripe for resolution").

In addition, the Austin City Council has violated separation of powers by interrupting the people's right to directly legislate before the process is completed with a vote. *Coalson v City Council of the City of Victoria*, 610 S.W. 2d at 747. "When the people exercise their rights and powers" of initiative, they "become the legislative branch of the city government [and] the City Council . . . become ministerial officers in the legislative process. *Glass*, 244 S.W.2d at 653. To avoid rendering advisory opinions and interfering with the legislative process before it is completed, thereby violating separation of powers, Texas Courts have refused to entertain most and, with Coalson and other cases, all attempts to secure premature, pre-election judicial review of petitioned legislation. The Court should do the same here and refuse Respondents' invitation to interfere with the legislative process and wade into a wide ranging legal analysis based on hypothetical "scenarios."

IV.

"Zoning" Has Not Been Categorically Removed from the Initiative Field; Comprehensive Revisions to Zoning Have Not Been Removed By Necessary Implication.

As its main point, Respondents argue that case law supports a conclusion that the withdrawal from the field of initiative is "categorical" as to all ordinances having anything to do with "zoning," and not just those that assign zoning to specific parcels of land. They point to cases that address municipal incorporation, annexation and dis-annexation to support this point, and incorrectly assert that "subdivision regulation has been withdrawn from the field as well." Resp. Brief, pp. 14 – 21 Respondents argue that any time a statute or charter provision calls for notice and a public hearing then the subject matter has been withdrawn from the field. However, none of the cases cited by Respondents support this position.

As set out in Relators Initial Brief, pp. 19-22, some Texas courts have held that the statutory zoning procedural requirements for re-zoning specific properties cannot be reconciled with the initiative and referendum process which does not provide those procedural requirements. These state requirements include 10-day written notice to properties within 200 feet of a parcel to be rezoned, a quasi-adjudicative planning commission hearing, and the right of the property owner and surrounding landowners to require approval by a supermajority through a "valid petition" process. Tex. Local Gov. Sections 211.006(d), 211.007(c). These requirements go well beyond the legislative notice and hearing that are required for adopting general zoning standards that apply across the entire city. Relators' Initial Brief, pp. 21- 22.

Similarly, as with the zoning of specific parcels of land, the state statutes governing incorporation, annexation and de-annexation require additional conflicting procedures beyond legislative notice and hearing, in recognition that these processes affect specific pieces of land and specific people in those defined areas, are thus more adjudicative than legislative in nature, and necessarily cannot be reconciled with the initiative and referendum process. *Hitchcock v. Longmire*, 572 S.W.2d 122, 128 (Tex. App.– Houston [1st Dist.] 1978, no writ) (dis-annexation referendum conflicted with specific state dis-annexation procedures); *In re Bouse*, 324 S.W.3d 240 (Tex. App.-Waco 2010, orig. proceeding)(state's incorporation procedures conflict with referendum process).

The Texas Supreme Court's decision in the SOS ordinance case, *Quick v. City of Austin*, 7 S.W. 3d at 122-124, is directly on point, specifically holding that legislative notice and hearing requirements and Planning Commission review can be easily reconciled with the initiative and referendum process and do not, by necessary implication, withdraw the subject matter from the field of the initiative process.

> "Petitioners claim that, because the charter requires a comprehensive plan to regulate development and a planning commission to review development proposals, the subject matter of the Ordinance has been implicitly withdrawn from the people. However, such an implicit withdrawal must be "clear and compelling." The provisions of article X do not clearly compel the conclusion that the Ordinance cannot be passed through the initiative and referendum process. The planning commission's review and recommendation powers over development can reasonably coexist with the adoption of a water quality regulation through public initiative."

Quick, 7 S.W.3d at 124. The same is true for general zoning standards, which only require general public notice and a public hearing.

V.

The Legislative History Does Not Show Clearly and Compellingly that Section 211.015 Removed Comprehensive Revisions From the Initiative Field.

Respondents misconstrue the legislative history of 211.015, contending the Legislature authorized in Section 211.015 only a limited exception for "initial zoning adoptions" from the categorical prohibition on zoning initiatives and referendum. The legislative history demonstrates this is incorrect: the Legislature was simply clarifying in Section 211.015 that an initial zoning referendum in the City of Houston was allowed; it was not considering, and did not take a position on, the general dispute as to the extent general zoning standards may be the subject of a citizen-initiated waiting period and voter approval requirement as part of a larger comprehensive revision. On March 22, 1993, Senator Henderson of Houston sponsored section 211.015 as Floor Amendment Number 1 to SB506 (a Board of Adjustment bill) (Rebuttal Ex. 1, Floor Amendment No. 1) (attached). In the Senator's recorded floor remarks, he stated that the amendment was "simply to make clear, for there had been some question by our City Attorney [Hall], about a referendum to repeal a zoning act by the Council… This makes clear the citizens of the City of Houston… may hold a referendum…." (Rebuttal Ex. 2, Texas State Library and Archives Commission, March 22, 1993 Senate Floor audio tape (https://www.tsl.texas.gov/node/43681, at 46:30-48:07). Senator Henderson's intent was only to remove any legal dispute as to the City of Houston's upcoming zoning referendum. In his floor speech, he specifically referenced a Houston Chronicle article, published 5 days before, indicating the general legal uncertainty regarding zoning. *Id.* The article stated:

> Because Houston is the first city to face the question of a zoning referendum, legal experts are applying different interpretations to the same, relevant court cases. The cases are: San Pedro North LTD vs. City of San Antonio, in which the Texas Court of Civil Appeals ruled in 1978 that citizens cannot force a referendum to repeal a certain portion of an ordinance. Virgil Hancock vs. William H. Rouse, in which the Texas Court of Civil Appeals ruled in 1969 that the city of Bellaire did not have to submit a proposed zoning ordinance to voters, as sought by petitioning residents… *Zoning experts around the state say there is no simple answer about whether voters can repeal a zoning ordinance because it has never happened before. … 'there is no case law', said University of Houston law Professor John Mixon.*

(Rebuttal Ex. 3, John Williams, "Law Prevents Change in Zoning, Hall Says. Vote on Ordinance Allegedly Prohibited" (Houston Chronicle, March 17, 1993) p. A-13 (attached) (emphasis added).

In summary, the Legislature in Section 211.015 sought only to clarify that Houston could have a referendum on initial zoning, not dictate the entire law of zoning-related referenda, much less zoning-related initiatives. Reflecting this history, Section 211.015 provides for an initial zoning referendum, but does not expressly prohibit the use of initiatives for a waiting period and voter approval for comprehensive revisions of land development standards that may include general zoning standards. The Legislature could have, but did not, expressly preclude local initiatives on comprehensive revisions, unlike in the recent bag ban case where the Legislature expressly stated cities could not adopt bag bans ("a local government… may not adopt an ordinance"). *City of Laredo v Laredo Merchant's Ass'n.*, p. 2. Tex. Health & Safety Code § 361.0961(a)(1). The Texas Supreme Court noted in *City of Laredo* that "the mere entry of the state into a field of legislation… does not automatically preempt that field from city regulation." *Id.*, at 9-10. *See also City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982); *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990). "[L]ocal regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable." *City of Brookside Village v. Comeau*, 633 S.W.2d at 796. Even when the Legislature has entered a field, "[a] general law and a city ordinance will not be held

repugnant to each other if *any other reasonable construction leaving both in effect can be reached*." *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d at 19 (emphasis added). An initiative election for a waiting period and voter approval for comprehensive revisions are ancillary and in harmony with the State and City's general legislative hearing requirements, as explained below.

Respondents also claim that a very minor 2007 Legislative amendment to preempt waiting periods for airport zoning regulations in Section 211.015(f)(2) somehow results in the Legislature adopting *obiter dicta* regarding referendum on initial zoning adoptions in the 2003 decision of *City of Canyon v Fehr*, 121 S.W.3d 899 (Tex. App. Amarillo- 2003, no pet.) (Resp. Brief, p. 39). First, *City of Canyon* did not involve an initiative for a waiting period and voter approval of a comprehensive revision, but a referendum on the rezoning of two individual parcels– a piecemeal referendum. *Id.*, at 901-902. The Legislature cannot adopt by amendment a prior case holding that was not made. Second, the 2007 amendment was added for a very narrow purpose, to preempt the City of Houston's waiting period from applying to airport zoning regulations because of federal funding requirements[2]:"The purpose of S.B. 1360 is to exempt from the provisions of Chapter 241, Local Government Code [Airport Zoning], procedural requirements adopted or applied by a political subdivision that imposes a waiting period before the adoption of a zoning regulation..." (Rebuttal Ex. 4, p. 1, Senate Bill Analysis for S.B. 1360 (80th Regular Session)). (attached). It strains credulity to say a minor legislative amendment to preempt a waiting period for airport zoning in Houston ratifies the *obiter dicta* in a case that does not involve comprehensive revisions to zoning standards, thereby precluding the Austin petition initiative. Such a result is neither clear nor compelling.

Respondents ask the Court to rely on classic *obiter dicta* in several lower court cases for the proposition that initiatives on zoning are categorically prohibited; the holdings in these cases,

[2] The Senate Bill Analysis on S.B. 1360 lays out the history behind this very narrow waiting period amendment to zoning surrounding airports. It explains that the bill "preempts the relevant part of the City of Houston's Charter [the waiting period] but only around the perimeter of the three Houston airports… Since the Houston Airport System is considering additional capacity enhancements… the federal government is insisting upon the adoption of land use control measures to protect its investment in airport facilities both existing and new… However, the City of Houston's Charter requires that if the City Council adopts a zoning ordinance, it must wait six months and then hold a binding citywide referendum. … Accordingly, the City of Houston would not have to conduct [under the bill] a citywide referendum…." (Rebuttal, Ex. 4, p. 1)

however, apply only to referendum on rezoning of individual parcels. Relators' Trial Brief, pp 19-24. *Obiter dictum* is "an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication… Obiter dictum is not binding as precedent…The statement was made without argument, or full consideration of the point." *Seger v. Yorkshire Ins. Co*., 503 S.W.3d 388, 399-400 (Tex. 2016). *Dicta* in a case cannot be used to support an argument on a matter that was not before the Court. *Federal Sign v. Texas Southern Univ*., 951 S.W.2d 401, 406-407 (Tex. 1997). "When the courts have a question presented to them for decision for the first time they have never regarded themselves as bound by *obiter dictum*." *State ex rel. Childress v. School Trustees of Shelby County*, 239 S.W.2d 777, 782 (Tex. 1951)

VI.

The Petition Does Not Call for a Referendum, But a Voter Approval Requirement.

Respondents mischaracterize the petition initiative as containing both an initiative (the first election in November 2018 on the waiting period and voter approval) and referendum (any second or subsequent election on any comprehensive revision). This is incorrect: a voter approval requirement is not a referendum. Courts in California, the foremost initiative state, have specifically rejected Respondents' argument that a voter-approval requirement (before an ordinance may become effective) is a referendum. *Santa Clara County Local Transportation Authority v. Guardino* (1995), 902 P.2d 225 (Cal. 1995); *Consolidated Fire Protection District v Howard Jarvis Taxpayers' Ass'n*, 73 Cal. 2d. Rptr. 586, 595 (Cal. App- 2nd. Dist. 1998); *McBrearty v. City of Brawley*, 69 Cal 2d Rptr. 862, 867-868 (Cal. App. 4th. Dist. 1997)

In the leading case of *Santa Clara Local Trans. Auth.*, renowned California Supreme Court Justice Mosk held that a petition initiative that required voter approval, before any future proposed local tax raises could be enacted, did not constitute a referendum: "We conclude that petitioner's contentions that the voter approval requirement violates the referendum clauses of the Constitution must be rejected because the requirement is not a referendum…." 902 P.2d at 234 (references omitted). A local governmental authority sued to invalidate an initiative that required voter approval by a 2/3rds majority before local tax increases could go into effect. The local entity contended that the voter approval requirement violated the state's referendum laws, which excluded tax laws and that required a simple majority vote. *Id.*, 902 P. 2d at 228-229. A key

issue, therefore, was whether the voter approval requirement was a referendum, in which case the requirement would be invalid. *Id.*

Justice Mosk explained in depth why a voter approval requirement is not a referendum: a referendum applies only to laws after they have been enacted by the legislative body and that then are followed by a citizen petition to repeal the law; referendum does not apply to a voter approval requirement for a proposed law that is not yet enacted:

> First, the voter approval required by Proposition 62 is a condition precedent to the enactment of each tax statute to which it applies, while the *constitutional referendum may be invoked only after the statute has been enacted*. Second, *a statute subject to Proposition 62 [voter approval requirement] does not become law until the legislative body submits it to the voters and they approve it*, while a statute subject to the constitutional referendum automatically becomes law unless the voters themselves take the initiative and petition to disapprove it…*The referendum is limited in its operation to the adoption or rejection of legislation already enacted by a legislative body*, and in the absence of such prior enactment there can be neither [rejection] ... nor adoption by the electorate.

Id., 902 P. 2d at 237-238 (emphasis added).

Applying this analysis to the instant case, it is clear that the petition initiative's voter approval requirement for a future CodeNEXT (and any subsequent comprehensive revisions) is not a referendum. The petition's title expressly states it is a voter approval requirement: "Petition For An Austin Ordinance Requiring Both A Waiting Period And *Voter Approval Before CodeNext Or Comprehensive Land Development Revisions Become Effective*" (emphasis added). Like California's Constitution, Austin's City Charter distinguishes between *initiatives as citizen-proposed laws*[3] and *referendum as Council-enacted laws* that citizens petition to repeal.[4] Article IV, Sections 1,2. The petition initiative in this case states expressly that comprehensive

[3] Austin Charter, Article IV, Section 1: "POWER OF INITIATIVE. The people of the city reserve the power of direct legislation by initiative, and in the exercise of such power *may propose any ordinance*…" (emphasis added)

[4] Austin Charter, Article IV, Section 2: "POWER OF REFERENDUM. The people reserve the power to approve or reject at the polls *any legislation enacted by the council*…" (emphasis added)

revisions do not become effective until voters approve them: "CodeNEXT, or subsequent comprehensive revisions of the land development laws, *shall not go into effect*, or any legal entitlements granted or vested under these laws, *until the registered voters of Austin approve these laws at the next available election*." (emphasis added) (Ex. 1, COA 001). Because the petition initiative requires voter approval for all proposed comprehensive revisions before they can become law, it does not call for a referendum. Therefore, Respondents arguments, that the petition initiative violates the referendum provisions in Section 211.015 and the City's Charter, do not apply, or in Justice Mosk's phrase, "collapse into irrelevance." *Id*. at 236.

VII.

A Waiting Period Is Nothing More Than The Period Of Time Between The Passage Of An Ordinance And Its Effective Date; It Does Not Alter Zoning Laws.

Respondents point to no statute that clearly and compellingly removes a home rule city's power to enact by initiative a waiting period for comprehensive revisions. The City Council has the power to enact a waiting period– a period of time between the passage of an ordinance and its effective date– for any law, including CodeNEXT. In fact, some City Council members have suggested recently their own waiting period of 6 months for CodeNEXT (Exhibit 28, COA 370), and in 1984, the Austin City Council actually adopted a 10-month waiting period for the last comprehensive revision. (Rebuttal Ex. 5, Austin City Council Comprehensive Revision Ordinance, pp. 1-2). Respondents' brief expresses their dislike for the waiting period and its length; its wisdom, however, is for the voters to decide.

Furthermore, the waiting period clearly stands alone on its own without subsequent voter approval: if the petition and CodeNEXT were passed, a waiting period would apply until the June after the next Council election, independent of the voter approval requirement. *Rose v. Doctors Hospital*, 801 S.W.2d 841, 844 (Tex. 1990); *Auspro Enterprises v. Tex. Dept. Of Transportation*, 506 S.W.3d 688, 702 (Tex. App.- Austin 2016, pet. granted, judgement vacated w.r.m.).

Respondents claim the petition's waiting period adds a step to the Planning Commission and City Council hearings on CodeNEXT's text. But they have no explanation why a waiting period cannot be reasonably harmonized with this legislative hearing process. The petitioned ordinance establishes a waiting period by delaying the effective date for comprehensive

revisions, including CodeNext;[5]; it obviously can reasonably co-exist with CodeNEXT's existing legislative hearing process. Furthermore, the Texas Supreme Court rejected a similar "additional step" argument in *Quick v. City of Austin*, 7 S.W.3d at 124. Landowners maintained that Austin City Charter's requirement for a comprehensive plan and Planning Commission hearing on development proposals conflicted with the SOS initiative election. The Court unanimously found they could "reasonably co-exist." *Id*.

Lastly, Respondents allege that a waiting period can be enacted only by city charter, and not by ordinance as in the petition, citing Texas Local Government Code, Section 211.015(c). This subsection provides: "The provisions of this chapter 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." Pursuant to Austin's City Charter, however, the time period for when a law becomes effective, i.e., a waiting period, can be enacted by ordinance or charter. Austin City Charter, Article II, Section 14 provides: "*Unless otherwise provided by law or this Charter, no ordinance shall become effective until the* expiration of 10 days following the date of its final passage…" (emphasis added). Pursuant to this City Charter provision, the petition proposes by law (an initiated ordinance) a different effective date for a comprehensive revisions ordinance: the June following the next Council election. Therefore, Austin's Charter expressly authorizes a waiting period by ordinance; the petition initiative is consistent with Section 211.015 (c) (assuming arguendo it needs to be).[6]

Moreover, Section 211.015 (c) does not prescribe with unmistakable clarity a charter amendment as the exclusive means to enact a waiting period. This subsection provides only that "the provisions of this chapter *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

[5] Unlike the statutory process for zoning a specific parcel, CodeNEXT's process for the text does not require under state law specific notice to surrounding landowners, a quasi-adjudicative hearing, or valid petition rights requiring a supermajority vote. *See* Relators' Original Trial Brief, pp.21-22.

[6] The City Council has waived this and other procedural arguments by not raising them in the Council's official resolution of May 24, 2018 that refused to place the petition initiative on the ballot. (Exhibit 42, COA 8242-8244). As the United Supreme Court has held repeatedly regarding executive decisions, **"**the courts may not accept appellate counsel's *post hoc* rationalizations for agency action. …It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.**"** *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983)**;** *Burlington Truck Lines, Inc*. v. *United States*, 371 U.S. 156, 168 (1962)**.**

adoption of zoning regulations." (emphasis added). Palpably, that is not a prohibition of a waiting period established by ordinance and it says nothing about how to construe waiting periods by ordinance. There is no clear and compelling reason to conclude that subsection 211.015 (c) would allow waiting periods for zoning regulations by charter initiative, but disallow them by ordinance initiative. If a home rule city has the legislative power to enact a law by charter amendment, then it surely has the lesser power to enact such a law by ordinance, which provides more flexibility. *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 511, 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996) ("We do not dispute the proposition that greater powers include lesser ones."); *U.S. v. Johnson*, 194 F. 3d 657, 661 (5th Cir. 1999). Harmonizing and liberally construing the citizen's initiative and Section 211.015 (c), citizens may adopt a waiting period by initiative ordinance. *Quick v. City of Austin*, 7 S.W. 3d at 124; *Glass*, 244 S.W.2d at 649.

VIII.

Respondents' Policy Arguments for Zoning's Withdrawal by Necessary Implication from the Initiative and Referendum Field Are Inapplicable.

Respondents point to two main policy concerns as the reasons for the alleged categorical withdrawal of zoning from the field of initiative and referendum, as allegedly articulated originally in *San Pedro* and *Hancock*: (i) statutorily prescribed procedural requirements for the adoption of zoning and (ii) the need for technical expertise in zoning. *Respondents' Brief*, p.19. Neither of these policy concerns apply.

First, the statutory procedures for re-zoning specific parcels that applied in *Hancock* and *San Pedro* do not apply to comprehensive revisions, such as CodeNEXT. (See Relators' Original Brief, pp. 21-22). The petition initiative's voter approval requirement does not interfere with the CodeNEXT's legislative hearing process by following it with a voter consent requirement. The statutory process requirements applicable to rezoning of individual parcels do not apply to a comprehensive revision - a point the City does not dispute - and therefore, no statutory procedures have been omitted. There being no statutory prohibition against requiring voter approval of a comprehensive revision, it is well within the reserved powers of a home rule city acting through its citizen legislators, to enact one even if Respondents mischaracterize it as an "additional step." The Texas Supreme Court has been clear: Home Rule cities "possess the powers of self-government and look to the Legislature not for grants of authority, but only

for limitations on their authority,*" BCCA Appeal Grp. v. City of Houston*, 496 S.W. 3d 1, 7 (Tex. 2016

Furthermore, Respondents' argument is inconsistent with numerous City of Austin code provisions that provide "additional steps" that augment the procedural elements of Chapter 211. *See, e.g.* LDC § 25-2, Subchapter B, Article 2, § 1.3 (requiring a pre-application project assessment and City Council review prior to the acceptance of a rezoning request for a Planned Unit Development); LDC § 25-1-133 (expanding the required notification area to 500 feet (beyond the state-required 200 feet)); LDC § 25-1-806 (requiring a community meeting for a rezoning request that requires a neighborhood plan amendment). Voter approval of CodeNEXT, which would affect no specific parcel of land, would not conflict with any statutorily required procedures for rezoning specific properties.

As to Respondents' technical expertise argument, it is contrary to the Texas Constitution, is a dangerous, slippery slope for the judiciary, and has never been adopted officially by the Texas Supreme Court. The Texas Constitution grants home-rule cities plenary power, and the Austin City Charter has delegated the City's lawmaking power to the citizens. Tex. Const. Art. XI, Section V. See Relators' Brief, pp. 5-6. There is no limitation on the Council's lawmaking in areas of technical expertise, and, therefore, there can be no such limitation on the people's power to directly legislate (except in the initiative subjects, taxes and appropriations, that are expressly removed by the Charter). Austin City Charter, Article IV, Section 1. Respondents' technical expertise argument is really an argument against initiative and referendum, which the citizens of Austin rejected when they adopted the City Charter. As the Supreme Court stated in *Glass v Smith*, 244 S.W. 2d at 644, "there may be those whose political philosophy cannot accept the initiative and referendum as a sound investment of political power. But the wisdom of the initiative and referendum is not the question here; the question of their wisdom was foreclosed when they became a part of the Austin Charter. They are as much a part of the Charter as is the provision for a City Council."

The technical expertise argument against initiatives (and democracy itself) is a slippery slope with no boundaries: was the SOS ordinance too technical for voters? Environmental laws? Campaign finance? Independent Redistricting Commissions? Nuclear power? Medicaid expansion? What is the useable standard for deciding what is too technical for the people? Wisely, the Texas Supreme Court has not gone this route, limiting the areas of initiative and

referendum on only two definite grounds: 1) the subject matter is not legislative in character; and 2) the legislature has expressly or by necessarily implication withdrawn the subject matter from the field. *Glass v Smith*, 244 S.W. 2d at 650-653. In every case cited by Respondents for their technical expertise argument, the Courts actually found the initiative was either not legislative in character or had an irremediable conflict with state procedures. See, e.g., *Dallas Ry. Co. v. Geller*, 271 S.W. 1106, 1007 (Tex. 1925) (referendum setting rail rates was part "judicial in character"); *Denman v Quin*, 116 S.W.2d 783,786 (Tex. Civ. App.- San Antonio 1938, writ ref'd)(referendum setting tax rate was "administrative or executive in character"); *Hancock v. Rouse*, 437 S.W.2d 1, (Tex. App.- Houston [1st] 1969, writ ref'd n.r.e.)(referendum zoning specific parcel conflicted with state procedures on notice and hearing, which has quasi-judicial features); *Hitchcock v. Longmire*, 572 S.W.2d 122, 128 (Tex. App.– Houston [1st Dist.] 1978, no writ) (dis-annexation referendum conflicted with specific state dis-annexation procedures). General zoning laws, such as comprehensive revisions, that apply to no specific property are clearly legislative in character. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 939-940 (Tex. 1998); *Waxahachie v. Watkins*, 275 S.W.2d 477 (Tex. 1955). (On the other hand, zoning specific parcels is outside the legislative power because it conflicts with state-mandated notice, hearing, and valid petition rights and has quasi- judicial features. See Relators' Original Brief, pp. 19-22).

IX.

The City's CodeNEXT Process Is Inconsistent With Its Argument that the Voter Approval Requirement Conflicts with the Statutory Zoning Procedures in Section §211.006.

Respondents, without providing statutory authority, claim that a comprehensive revision does not fall into the category of either: (i) the adoption of initial zoning regulations, including original zoning districts ('initial adoption"); or (ii) the reclassification of specific tracts ("rezoning"). Respondents' Brief, p.40. Such an interpretation of Sections 211.006 and 211.007 is inconsistent with, and undermines, their argument that the petitioned ordinance is withdrawn by necessary implication from the field of referendum.

Respondents want the court to find that CodeNEXT– and by extension the petitioned ordinance calling for voter approval of CodeNEXT– has been removed from the referendum field by necessary implication because voter approval interferes with statutorily prescribed procedural requirements for changes to zoning districts contained in Sections 211.006 and 211.007. *Id.* at p.17. Yet, at the same time, the City's CodeNEXT process is not following these

statutorily prescribed procedures for changing zoning districts, contained in §§211.006(b)-(d). In other words, the very procedural requirements that Respondents highlight to assert CodeNEXT would be withdrawn by necessary implication from the field of referendum are, as shown by the City's own actions, not applicable to a comprehensive revision of general zoning standards such as are contemplated to be one part of CodeNEXT.

Respondents attempt to rationalize their omission of statutory "protest and individual notice provisions" for proposed re-zoning changes, as required under §211.006, contending CodeNEXT promotes general community policies. Respondents' Brief, p. 41. While the case Respondents cite for this premise is inapplicable, the case undermines their argument by holding statutory zoning procedures do not apply unless the zoning change affects specific property. In *LCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 265 (Tex. App.--Fort Worth 2016, pet. filed), the Fort Worth Court explained that additional, individualized notices to affected property owners, in accordance with § 211.007(c), was not required where a "zoning ordinance change applies district-wide or across multiple districts *without a change in classification of the individual owners' properties*." (emphasis added). In other words, the re-zoning statutory zoning procedures do not apply to comprehensive revisions of general zoning rules, and therefore, no part of CodeNEXT as proposed has been withdrawn by necessary implication from the referendum process.

Respondents' other cited authority supports Relators' position that there are only two procedural options available for cities seeking to classify properties with certain zoning districts: "The enabling act establishes two procedural paths for zoning commission and legislative action. The first applies to adoption of original zoning ordinances; the second applies to zoning amendments that reclassify specific tracts." John Mixon, *Texas Municipal Zoning Law* § 7.002 (LexisNexis, 3ed. 2018). Despite the Respondents' assertion of a third option, Chapter 211 does not provide municipalities the option to reclassify properties as a general ordinance. Instead, their cited authority proceeds to analogize a comprehensive zoning revision that reclassifies zoning districts to the first procedural path, the adoption of original zoning ordinances. *Mixon*, at § 7.002. As such, it would fall under the same statutory framework as an initial adoption, including under Section 211.015 (e).

Wherefore premises considered, Relators respectfully request that the Court issue a conditional mandamus forthwith to require Respondents to timely place the petition initiative on the November 6, 2018 ballot.

Respectfully submitted,

/s/ Fred I. Lewis

Fred I. Lewis
Tex. Bar No 12277075
Law Office of Fred I. Lewis
309 East 11th St., Suite 2
Austin Texas 78701
512-636-1389
f_lewis@sbcglobal.net

William Bunch
Tex. Bar No. 03342520
Save Our Springs Alliance
905A West Oltorf
Austin, Texas 78704
512-477-2320, ext. 302
512-477-6410 (fax)
bill@sosalliance.org

ATTORNEYS FOR RELATORS

CERTIFICATE OF SERVICE

I, hereby, certify that all counsel of record have received, on this 29th day of June, a copy of this Relators' Rebuttal Brief by email.

*/s/ Fred I. Lewis*_____
Fred I. Lewis