



**LAW DEPARTMENT  
MEMORANDUM**

**CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION**

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**To:** Mayor and Council  
**From:** Anne Morgan, City Attorney  
**Date:** February 28, 2018  
**Subject:** Potential November 2018 election on citizen-initiated petition

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There are currently three citizen-initiated petition drives ongoing that might mandate a November 2018 special election. Given this possibility, I write to provide the following timeline and a discussion of legal issues involved with calling such election:

|                 |  |
|-----------------|--|
| August 8 - 20   | Statutory window for council to order election                             |
| October 9       | Last day to register to vote in early voting or election day voting        |
| October 24      | First day of early voting by personal appearance                           |
| October 26      | Last day for receipt of application by mail for ballot to be voted by mail |
| November 2      | Last day of early voting by personal appearance                            |
| November 6      | <b>ELECTION DAY</b>  |
| November 10 -19 | Window for council to canvass results of election                          |

Attached please find scans of the citizen-initiated petitions that are currently being circulated for signatures. It has been reported in the media from petition organizers that the anticipated filing date for the CodeNEXT petition will be "timely to trigger a November election." Presumably, that means submission at least three weeks prior to the statutory window for Council to call the election – August 8 - August 20. That would make for an achievable timeframe for the City Clerk to determine and certify sufficiency.

In an effort to stay in front of any possible issues, we reviewed the citizen-initiated petitions for legal concerns. We have identified a potential legal problem with the CodeNEXT petition. Given the highly political and sensitive nature of the Land Development Code rewrite, I asked a neutral outside-counsel attorney, Bob Heath of Bickerstaff Heath Delgado Acosta, to review the petition and to assist in addressing legal concerns.

Mr. Heath's memo is attached. In short, his determination is that council is neither required nor authorized to call an election on the petition because Texas courts have held that zoning is not a permissible subject within the scope of the initiative and referendum process. Additionally, the petition seeks adoption of an ordinance which would "override all city charter provisions, ordinances, and laws" but an ordinance cannot override charter or law. Further, the petition's proposed ordinance would establish a referendum process in conflict with the one set out in our charter.

We will post an executive session to discuss these concerns with you for an upcoming council meeting date.

Please feel free to contact me with any questions or concerns you might have.

Cc: Spencer Cronk, City Manager



**CONFIDENTIAL: ATTORNEY/CLIENT COMMUNICATION**

**MEMORANDUM**

**TO:** Anne Morgan  
Austin City Attorney

**FROM:** C. Robert Heath  
Bickerstaff Heath Delgado Acosta LLP

**DATE:** February 21, 2018

**RE:** Legal Status of CodeNEXT Initiative Petition

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**Question Presented**

Opponents of the CodeNEXT process are circulating an initiative petition to mandate an election to require that any ordinance coming out of the CodeNEXT process, as well as any subsequent comprehensive revision of the city's land development laws, have a significantly delayed effective date so that a council election could occur before the ordinance became effective. Additionally, even after that delay, the CodeNEXT or other land development ordinance would still not be effective until it was submitted to and approved by the voters. Essentially, before any comprehensive revision of the land development laws could become effective there would be two opportunities to reject the changes. First by newly elected council members and second by a vote of the people.

If the petition is submitted to the city and contains a sufficient number of signatures, is the city required to call an election?

**Short Answer**

The city is not required or authorized to call an election on the initiative petition. The citizen initiative is directed at a comprehensive revision of the zoning laws, and Texas courts have held that zoning is a subject that is outside the scope of the initiative and referendum process. A failure to order an election may well result in the petition circulators filing a mandamus suit against the city. The outcome of litigation is never guaranteed; however, the significant weight of legal authority supports the conclusion that an election is not required.

## Potential Timing Issues

The one remaining uniform election date in 2018 is November 6. The last day the measure could be added to the November election is August 20. Assuming the persons circulating the petition are pushing for a 2018 election, they would need to submit the petitions to the city clerk a sufficient amount of time before August 20—probably in July—to permit the clerk to review the signatures.

## DISCUSSION

### **The Proposed Ordinance Raises Issues Regarding Both Its Validity and Whether It Is a Permissible Subject to be Submitted as an Initiative**

#### **The Proposed Ordinance**

The proposed ordinance has four alphabetically designated sections, which, in paraphrase, provide:

- A. “CodeNEXT, or subsequent comprehensive revisions of the land development laws” will not go into effect until June 1 of the year following the next regularly scheduled council elections “to ensure voters can learn about the proposed comprehensive revisions and elect council members with sufficient time to amend or reject the prior council’s adopted comprehensive revisions” before they go into effect.
- B. After the June 1 date referred to above, CodeNEXT or a subsequent comprehensive revision of the land development laws will still not go into effect unless and until it is approved at the next municipal election.
- C. “This section overrides all city charter provisions, ordinances, and laws and should be liberally construed to uphold Austin citizens’ sovereign rights to control their government and laws.”
- D. The provisions of the proposed ordinance are severable so that if one part is invalid, the invalidity will not affect the other sections.

#### **The Legal Concerns Regarding the Proposed Ordinance**

Without regard to the policy merits or demerits of the proposed initiative, the draft raises various legal issues. These include:

1. Although the proposed initiative seeks to adopt an ordinance, it purports to accomplish what can be done, if at all, only through a city charter amendment. Specifically, section C says that it “overrides all city charter provisions, ordinances, and laws.” While an ordinance can repeal or supersede another ordinance, it cannot override a charter provision or a state law. If the petitioners

had sought to amend the charter rather than to initiate an ordinance, that could be effective to override other provisions of the charter, although, of course, it still could not supersede state law.

2. The proposed ordinance would have the effect of establishing a referendum process that is different than the one set out in the charter. Under the citizen-proposed ordinance, if the council adopts a comprehensive revision of the land development laws, that revision would be required to be submitted to the voters for their approval or disapproval. This submission of an adopted ordinance to voter approval is what is provided for in the portion of the city charter (article IV, §§ 2-5) dealing with the referendum process. Under the charter, though, the council must first adopt the ordinance, and, if persons seek to subject it to the referendum process, they must collect the required number of signatures between the time the council approved the ordinance and its effective date. Under the initiated ordinance, however, the ordinance, either what ultimately becomes the CodeNEXT ordinance or some subsequent comprehensive revision, would be submitted to the voters even though the signatures were collected before the ordinance was adopted and before the signers could know what the challenged ordinance provided. This procedure, which would be established by the initiated ordinance, would be significantly different from and inconsistent with the process established by the city charter.
3. Perhaps the most fundamental legal problem is that the proposed initiative relates to a comprehensive revision of the city's zoning laws, yet, as discussed below, the courts have ruled that the subject of zoning has been withdrawn from the initiative and referendum process.

### **Texas Courts Have Ruled That Zoning Is Not a Proper Subject for Initiative or Referendum**

Texas law has long provided that certain subjects have been withdrawn from the initiative and referendum process. For example, in 1925, the Supreme Court considered a case where a voter, who had submitted a petition to the City of Dallas with the required number of signatures, sought to compel the city to conduct a referendum election on an ordinance setting rates on a street railway system. The Court ruled that the rate-setting process, which was assigned by the charter to the city council and was required to be preceded by notice and hearings, had been implicitly removed from the initiative and referendum process. *Dallas Ry. Co. v. Geller*, 271 S.W.1106, 1107-08 (Tex. 1925).

In *Hancock v. Rouse*, 437 S.W.2d 1 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1969, writ ref'd n.r.e.), the court specifically considered whether zoning was subject to initiative and referendum. The court determined it was not. Both state law and the city charter, as is the case with Austin, required that the zoning process follow specified procedures including public hearings and recommendations by the planning commission before a zoning ordinance could be adopted or amended. The court concluded that

[t]hese provisions of the general law, adopted into the Charter of the City of Bellaire, by implication, have withdrawn the subject of Zoning from the field in which the initiatory process is operative and have reserved this subject from referendum.

*Id.* at 4. Because the subject had been withdrawn from the scope of the initiative and referendum process, the court denied a petition for a writ of mandamus to compel the city to call an election on the ordinance.

The San Antonio Court of Civil Appeals reached the same conclusion when it declared an initiative election seeking to effect a zoning change to be invalid. It relied on the *Hancock* rationale and also found that even having a referendum election on a zoning matter “would be to add a procedural step to zoning which is not required by the comprehensive provisions of the Enabling Act. A city can no more add a step to the procedures required by state law than it can omit one.” *San Pedro North, Ltd. v. City of San Antonio*, 562 S.W.2d 260, 262 (Tex. Civ. App.—San Antonio 1978, writ ref’d n.r.e.). See also, *In re Arnold*, 443 S.W.3d 269, 278 (Tex. App.—Corpus Christi—Edinburg 2014) (orig. proceeding) (“Existing Texas law holds that the referendum process is not available to challenge individual zoning ordinances.”)

The question does not appear to have been presented to the Texas Supreme Court; however, the courts of appeals that have addressed the issue are unanimous in their view that zoning is outside the scope of initiative and referendum. Even though the Supreme Court may not have specifically considered the question of whether zoning can be a subject of an initiative petition, it has said that before a city can be compelled to call an election pursuant to an initiative petition, “it must also appear that the subject matter of the ordinance has not been withdrawn from the field in which the initiatory process is operative.” *Glass v. Smith*, 244 S.W.2d 645, 648 (Tex. 1951).

**There Is a Statutory Exception to Permit Some Zoning Initiatives and Referendums, but It Is Inapplicable Here.**

In apparent response to the cases holding that zoning was not subject to initiative and referendum, the legislature provided statutory authorization for a very limited use of those powers in association with zoning. Section 211.015 of the Texas Local Government Code permits the repeal of a home-rule city’s zoning regulations by (1) a charter election or (2) by a city’s referendum process but only in regard to the *initial* adoption of a city’s zoning regulations. TEX. LOC. GOV’T CODE, § 211.015(a). *City of Canyon v. Fehr*, 121 S.W.3d 899, 905 (Tex. App.—Amarillo 2003, no pet.) (Statute permits referendum only when city enacts zoning ordinance when none previously existed); see also, *In re Arnold*, 443 S.W.3d 269 (Tex. App.—Corpus Christi—Edinburg 2014) (orig. proceeding). Of course, in 2018 any referendum petition circulated in Austin would not involve an initial adoption of zoning.

Further, the statute authorizes an election only to repeal zoning regulations *in their entirety*, not merely to repeal a recently enacted comprehensive ordinance with the effect, as is provided in the citizen petition at issue here, of restoring the former zoning ordinance. The elections authorized by section 211.015 are to let the people decide whether to have zoning or not. The statute does not encompass a decision relating to which zoning system is preferred.

Section 211.015 does not prohibit the adoption of an ordinance to require a waiting period prior to the adoption of zoning regulations or to submit the initial adoption of zoning regulations to a binding referendum election. TEX. LOC. GOV'T CODE, § 211.015(c). While this is in some respects similar to what the citizen petition seeks to accomplish, the petition requires a waiting period by enactment of an ordinance while the statute requires action by charter amendment. Also, the statutory provision for submitting zoning regulations to a binding referendum is limited to the initial adoption of such regulations. TEX. LOCAL GOV'T CODE, § 211.015(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”)

Section 211.015 partially modifies *Hancock’s* and *San Pedro’s* removal of zoning from the initiative and referendum process, but the authority to submit zoning issues to popular vote is limited to a city’s initial adoption of zoning or a decision to repeal zoning regulations in their entirety. The citizen-initiated ordinance at issue here fits into neither of those categories. Thus, section 211.015 does not operate to remove this initiative petition from the court decisions holding that zoning is not a permissible subject for initiative and referendum.

### **The Process for Considering the Citizen Petition**

#### **The City Clerk Should Review the Signatures Even If the City Believes the Subject of the Proposed Ordinance Has Been Removed from the Scope of the Initiative Process.**

If a petition is submitted to the city clerk, she normally will request the Travis County Tax-Assessor and the Williamson County Elections Administrator for the current number of registered voters in the city. To be valid the petition must contain valid signatures from five percent of the number of non-suspense<sup>1</sup> registered voters in the city or 20,000, whichever is smaller.<sup>2</sup> Presumably, the 20,000 signature requirement will apply. She will then review the signatures to determine if the signers are indeed registered voters in the city, whether the signatures were collected within 180 days of the time the petition was submitted, and whether they otherwise comply with the requirements of chapter 277 of the Election code.<sup>3</sup>

If the clerk determines that the petition contains fewer than the required number of signatures, then she cannot certify it, and it will not be sufficient to cause an election to be called. On the other hand, if the clerk finds a sufficient number of valid signatures, an election will be required unless if the petition concerns a subject that has been withdrawn from the initiative process.

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<sup>1</sup> A suspense voter is someone who has registered but who appears to no longer reside at the place of registration. Generally voters will be placed on the suspense list when the new registration card that is mailed every two years is returned as undeliverable. The person’s name continues to be shown on the registration list, but it is given an “S” designation. If the person does not vote after two general elections for state and county officers following the person’s being placed on the list, the person’s registration will be cancelled. TEX. ELEC. CODE, §§ 14.021, 15.081, 16.032.

<sup>2</sup> City Charter, art. IV, §§ 1, 2; TEX. LOC. GOV'T CODE, § 9.004(a); TEX. ELEC. CODE, § 277.0024.

<sup>3</sup> Although suspense voters are not included in the determination of the number of signatures required, the signature of a suspense voter who signs the petition will be counted. Tex. Sec. of State Guidance on Petitions. ¶ I.D.

If the clerk determines that the petition contains a sufficient number of valid signatures but relates to a subject that has been withdrawn from the initiative and referendum process, the question arises whether she should forward the petition to the council. Arguably, if the subject of the petition does not fall within the scope of the initiative and referendum power, it is irrelevant whether it contains the correct number of signatures, and there is nothing for the clerk or the council to consider. The better practice, though, would be for the clerk to forward the petition to the council with her conclusion on the number of valid signatures but with an indication that she is not certifying that the petition relates to a proper subject for initiative. Recently, in Plano, the city secretary determined that a referendum petition related to a subject that was outside the referendum power and did not forward it to the council. The court of appeals, relying in large part on the language of the Plano charter which is not the same as the Austin Charter, stated that the city secretary had no discretion to determine whether the subject matter of a petition had been withdrawn from the referendum power. *City of Plano v Carruth*, 2017 WL 711656, \*5 (Tex. App.—Dallas 2017, pet. filed). Presumably, her duty upon certifying the signatures was to forward the petition to the council, which would then make a decision as to whether the petition was a proper subject of a referendum. The case, which is still in the appellate process, was limited to jurisdictional issues, and the court never reached the question of whether the city was required to call the election.<sup>4</sup> Nevertheless, in light of the limited guidance available from this recent case, the safest course for the clerk would be to forward any petition with a sufficient number of valid signatures to the council for it to decide if the petition reaches a subject that is within the initiative power. Under the Austin charter the obligation to call an election is triggered by an “authorized initiative petition.” It is the conclusion of this memorandum that this petition is not authorized since it relates to a subject that has been withdrawn from the initiative and referendum process.

### **The Council’s Options**

- 1. Decline to call an election because the subject of the petition is outside the initiative power. (Recommended)<sup>5</sup>**

If the council concludes, as this memorandum does, that the subject of the petition is zoning and is outside the scope of the initiative and referendum power, then it should decline to call the election. “In our form of government elections must be held by virtue of some legal authority, and an election held without affirmative statutory authority or contrary to a material provision of law is universally held to be a nullity.” *Smith v. Morton Ind. Sch. Dist.*, 85 S.W.2d 853, 857 (Tex. Civ. App.—Amarillo 1935, writ dismissed). Because zoning has been withdrawn from the scope of the initiative and referendum process, there is no legal authority to hold an election pursuant to the petition.

If the council declines to call the election, there is a high probability that the proponents of the petition drive will seek to mandamus the city to hold the election. In that case the courts would ultimately decide if the subject of the petition falls within the initiative process. While there is no

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<sup>4</sup> Both sides filed petitions for review in the Supreme Court, which has not yet indicated whether it will hear the case.

<sup>5</sup> The recommendation relates only to the author’s view of the course of action that is legally required. It does consider or address policy considerations.



guarantee what a court will hold and while the issue of whether zoning is subject to the initiative and referendum process does not appear to have been directly addressed by the Texas Supreme Court, the unanimous authority in the courts of appeal is that zoning is outside the scope of a citizen initiative.

The persons seeking mandamus would probably argue that if there is a question about the validity of the initiated ordinance, the proper course is to hold the election and then, in the event the proposition passes, determine if ordinance is valid. *Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980). While it is true that a suit challenging the validity of an initiated ordinance is not ripe for decision unless and until it is approved by the voters, the issue here is not whether the proposed ordinance is valid, but instead is whether the subject of the initiative is outside the lawful scope of the initiative process. As such, it is appropriate, if not required, to decline to hold the election. See, *Glass v. Smith*, 244 S.W.2d 645, 650 (Tex. 1951); *In re Arnold*, 443 S.W.3d 269, 274 n. 4 (Tex. App.—Corpus Christi—Edinburg 2014) (orig. proceeding) (distinguishing *Coalson*).

**2. Call the election and challenge the initiated ordinance, if at all, only if it is approved by the voters.**

If the petition contains the requisite number of valid signatures, presumably the council could reject this legal analysis and place the issue on the ballot. In doing so, the council would be either rejecting the conclusion that the subject of the petition falls outside the scope of the initiative process or adopting the view that the appropriate time for any challenge is only after an election is held and the measure is approved. If it chooses this course in anticipation of bringing a challenge (e.g., a suit to resolve the inconsistency noted on pages 2 and 3 of this memorandum between the initiated ordinance and the city charter) in the event of a potential adoption of the initiated ordinance at an election, there are at least two questions the council may want to consider. First, if the people vote to approve the initiated ordinance, would the city want then to assert that it is invalid? It may be that the council finds it more appropriate to assert the invalidity of the initiative before an election rather than after it has been approved by a vote of the people. Second, if the council intends to challenge the ordinance after an election, whom would it sue? Normally, the city would be defending its ordinances. If it seeks a declaration that an ordinance is invalid, who would be an appropriate defendant to defend the ordinance? Given these realities, this option appears to have some practical pitfalls.