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

NELSON LINDER, *et al*.,	§	IN THE DISTRICT COURT
Relators	§	
	§	
v.	§	TRAVIS COUNT, TEXAS
	§	
THE CITY OF AUSTIN, TEXAS, *et al*.	§	
Respondents	§	201st JUDICIAL DISTRICT

CITY DEFENDANTS' TRIAL BRIEF ON THE MERITS

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TO THE HONORABLE ORLINDA NARANJO:

Respondents The City of Austin, Texas (the "City"); The City Council of Austin; Austin Mayor Steve Adler, in his Official Capacity; The Honorable Austin City Council Members, Individually and in their Official Capacities; and the Honorable Austin City Manager Spencer Cronk, in his Official Capacity (together, the "City Defendants") file this Trial Brief on the Merits in this mandamus action.

INTRODUCTION

This action involves whether CodeNEXT—a comprehensive revision of the City's Land Development Code—can properly be subject the subject of a petition initiative. The City Defendants recognize the power of direct legislation by initiative that state law and the City Charter reserve to the people of the City and do not dispute that the petition included enough qualifying signatures. But under state law, the inquiry on whether to include the CodeNEXT initiative on the ballot does not end there. Certain subjects, such as zoning, have been withdrawn from the field of initiative and referendum and are not properly the subject of petition initiative. Because CodeNEXT involves a comprehensive revision of the City's zoning regulations, and based on the advice of legal counsel, the City Council by a 6-4 vote determined that it was not properly the subject of ballot initiative. Recognizing that the issue is contested, and giving due regard to the petition process and the citizens supporting it, the City Council acted quickly to allow judicial review of its decision in time for the initiative to be put on the ballot in November 2018 if the Court determines that CodeNEXT is properly the subject of petition initiative.

The narrow legal issue for this Court, therefore, is whether CodeNEXT is properly the subject of a petition initiative, or whether it involves subjects—including zoning—that have been withdrawn from the field of initiative and referendum by state law. If CodeNEXT's subject matter has been withdrawn, then the City Council was right to keep it off the ballot. If not, then the City Council has a ministerial duty to put it on the ballot.

The City Defendants respectfully submit that the City Council's decision was correct. CodeNEXT is not properly the subject of initiative and referendum.

A copy of the petition initiative is attached as Appendix A.

STATEMENT OF FACTS

A. What is CodeNEXT?

"CodeNEXT" is the lengthy process that the City has undertaken to update its current land development ordinances. Land development in the City and its extra-territorial jurisdiction is currently governed by Title 25 ("Land Development"), Title 30 ("Austin/Travis County Subdivision Regulations"), and other provisions of the City's Code of Ordinances (the "City Code"). Through the CodeNEXT process, it is anticipated that the City Council will adopt a new Title 23 to be known as the City's new "Land Development Code" that will supersede the existing Title 25 and ultimately result in revisions to the existing Title 30 and other provisions of the City Code.[1]

[1] The current (third) draft of the proposed new Title 23 Land Development Code is Joint Exhibit ("JX") 14. Before they are effective, the changes to Title 30 will require negotiations and an agreement with Travis County, pursuant to a "single-office agreement" between the City and Travis County. Changes to other provisions of the City Code would be effected by the ordinance that adopts Title 23.

B. What steps are legally required to adopt a new Land Development Code?

The legal requirements for adopting the new Land Development Code envisioned by CodeNEXT are found in both state law and the City's Charter. These legal requirements include adopting a comprehensive plan, as well as notice and public hearing requirements.

1. The comprehensive plan requirement

State law requires that the City's new land development code "*must be adopted in accordance with a comprehensive plan* and must be designed to: (1) lessen congestion in streets; (2) secure safety from fire, panic, and other dangers; (3) promote health and general welfare; (4) provide adequate light and air; (5) prevent the overcrowding of land; (6) avoid undue concentration of population; or (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements. Tex. Loc. Gov't Code § 211.004 (emphasis added). A city may only adopt a comprehensive plan by ordinance, and only after "(1) a hearing at which the public is given the opportunity to give testimony and present written evidence; and (2) review by the municipality's planning commission . . . ." Tex. Loc. Gov't Code § 213.003(a).

Consistent with that state law, the City Charter defines mandatory procedures for adopting a comprehensive plan and a land development code to implement that plan. City Charter art. X.[2] The City's Planning Commission must make recommendations regarding the adoption of a comprehensive plan and forward the proposed comprehensive

[2] Articles IV and X of the City Charter are attached as Appendix B. The entire City Charter is JX2.

plan to the City Manager. City Charter art. X §§ 4(1), 5. The City Manager must then make recommendations on the plan to the City Council. *Id.* § 5. The City Council must then hold at least one public hearing before adopting the plan, and must either adopt the plan or return it to the Planning Commission within 60 days of their receipt of the City Manager's recommendations. *Id.*

In compliance with state law and its Charter, the City Council unanimously adopted the current comprehensive plan—known as the "Imagine Austin Comprehensive Plan"—on June 15, 2012. JX5. Imagine Austin requires the City to "revise Austin's development regulations and processes to promote a compact and connected city":

> Austin's City Charter requires that land development regulations be consistent with the comprehensive plan. Significant revisions to existing regulations will be necessary to fully implement the priority programs described above. For example, Imagine Austin calls for new development and redevelopment to be compact and connected, but many elements of the existing Land Development Code make this difficult to accomplish. Achieving these goals will require a comprehensive review and revision of the Land Development Code, associated technical and criteria manuals, and administrative procedures.

JX5 p. 207. CodeNEXT is the process through which the City is following that directive.

2. Notice and public hearing requirements

The Local Government Code mandates additional procedures before a city may adopt zoning regulations, zoning district boundaries, and rules governing plats and subdivisions of land, all of which are included in and integral to the new Land Development Code that is envisioned by CodeNEXT. Tex. Loc. Gov't Code §§ 211.006(a), 212.002. These requirements include public notice in the local newspaper and a public hearing at which citizens have an opportunity to be heard. *Id.*

The City Charter also sets forth legal requirements for adopting the land development regulations envisioned through CodeNEXT—such regulations must first be reviewed by the City's Planning Commission, which must then make recommendations on them to the City Council. City Charter art. X § 4(2).

In compliance with these requirements, the City published notices of public hearings held in April, May, and June of 2018 for the "Proposed Adoption of Comprehensive Revision to the City of Austin's Land Development Code" in the Austin American Statesman, and the Planning Commission delivered the requisite recommendations and report to the City Council. JX20, 35, 42.

C. CodeNEXT has been a complex and public process.

CodeNEXT has been a lengthy and complex process, the extent of public input and engagement has been extraordinary, and that does not happen overnight. In 2009, the City began the multi-year public-input process that resulted in the adoption of Imagine Austin in June 2012. Since then, the CodeNEXT process has included much public input, consultation with experts, and multiple drafts of the proposed Land Development Code revisions.

Public meetings: Since 2012, the City has held hundreds of formal and informal community outreach events, public meetings, and public hearings about CodeNEXT. JX6 (Community Engagement spreadsheet).[3] The CodeNEXT process has also included

[3] For example, the City held multiple public events known as "Code TALKS" at the Palmer Events Center and City Hall, and "CodeNEXT Open Houses" at area libraries, public schools, and recreation centers. JX6. The City Boards and Commissions that have held public meetings on various aspects of CodeNEXT include the Planning Commission, the Zoning and Planning

many public meetings, working groups and reports and recommendations from multiple City boards and commissions, including the Planning Commission and the Zoning and Platting Commission. JX42, 34; *see also, e.g.*, JX11 (listing board meetings).

Retained experts: After adopting Imagine Austin in 2012, the City also engaged the help of national and local experts to work with elected officials, staff, appointed representatives, and the community at large on how best to align the City's land use standards and regulations with the goals of Imagine Austin. As part of the CodeNEXT process, from 2014 to 2016, this team of experts produced the "Listening to the Community Report," the "Land Development Code Diagnosis," the "Community Character Manual," the "Code Approach Alternative and Annotated Outlines," and the "Code Prescriptions." JX7-10.

Multiple Drafts: The first and second drafts of the new Land Development Code—the actual work product of the CodeNEXT process—were released in 2017.[4] The third and current draft was released in February 2018. JX14. The "Draft 3 Materials" are currently available for public review and input (there is even an online comment tool, where citizens can make comments directly on the draft code provisions).[5] Those online materials include a full draft of the proposed new Land Development Code, Zoning

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Commission, the Waterfront Planning Advisory Board, the Community Development Commission, the Environmental Board, the Urban Transportation Commission, the Land Development Code Advisory Group, the Design Commission, the Downtown Commission, and the Historic Landmark Commission. *See* JX11 and https://www.austintexas.gov/department/city-council/2018/20180613-spec.htm.

[4] *See* www.austintexas.gov/codenext/draft1; www.austintexas.gov/codenext/draft2.

[5] *See* www.austintexas.gov/page/codenext-draft-3.

Framework Tables, Zoning Maps, Errata and Addendum, an Equity Assessment Report, and multiple related reports and analyses of the third draft.

The City Council is still considering extensive suggested revisions to the third CodeNEXT draft. As such, it is not yet known what the precise CodeNEXT terms will be or when it may be adopted. Nevertheless, the subject matters set forth in the current CodeNEXT draft are those that any comprehensive revision to the City's current land development ordinances would address.

D. The petition seeks to make "CodeNEXT" the subject of both a ballot initiative and a ballot referendum.

The petition seeks voter approval of a new City ordinance that would impose a series of additional steps to the legal framework established by state law and the City Charter to adopt a new land development code. In that sense, it is a ballot initiative. If the voters in November 2018 were to approve this "extra steps" ordinance, it would subject CodeNEXT (or any future comprehensive revision of the City's Land Development Code) to an additional two-part required legal process: (1) a "waiting period" that allows municipal elections to take place, and then (if the newly formed City Council does not wholly undo CodeNEXT), (2) a referendum vote on CodeNEXT itself. In that sense, the petition also provides for a ballot referendum. *See* App.A (the petition).

1. "Waiting Period"—implementation of CodeNEXT would be initially delayed until after June 1, 2021.

Under the terms of the proposed "extra steps" ordinance, if the City Council votes to adopt CodeNEXT, it would not take effect "until the June 1st following the next

regularly scheduled council elections." App.A.[6] General municipal elections are held in November of even numbered years. City Charter art. III § 2(A). Thus, if (1) the proposed "extra steps" ordinance were on the ballot in November 2018 and passed, and (2) the City Council were to adopt CodeNEXT thereafter, CodeNEXT could not go into effect until after a "waiting period" that allows another municipal election to take place in November 2020—or until June 1, 2021 at the earliest.[7]

2. "Voter Approval"—implementation CodeNEXT would then be further delayed until a referendum election could be held.

Under the "extra steps" ordinance, the City Council as constituted after the November 2020 elections would vote to "amend or reject" the prior Council's iteration of CodeNEXT. But if the new Council retains CodeNEXT, the revision would still not yet go into effect. Instead, under section B, there would be a further delay to allow CodeNEXT—in whatever form it exists at the time—to be the subject of a referendum election after June 1, 2021. App.A. The voters would be asked to "approve or disapprove CodeNEXT . . . in its entirety and not piecemeal." *Id.* This referendum election would likely take place during the next regular municipal election in November 2022 unless a special election is called earlier.[8] *See* City Charter art. III § 2(A) (regular

[6] This is the language of the proposed "extra steps" ordinance, but section (B) of the proposed ordinance imposes further delay, so there is actually no circumstance under which CodeNEXT would in fact go into effect on June 1st as stated in section (A).

[7] The stated intent of the "waiting period" provision is to allow opponents of CodeNEXT to support candidates in the following municipal election who would promise to reconsider the prior council's vote on CodeNEXT: "The waiting period is to ensure voters can . . . elect council members with sufficient time to amend or reject the prior council's adopted comprehensive revisions . . . ." App.A section A.

[8] The referendum could be decided by a special election, which could be held the first Saturday in May 2022 at the earliest, given that the petition provides for the referendum election "after the

city elections are held in November of even-numbered years); art. IV § 4 (initiative and referendum elections may be "at a regular or special election").

E. The City Council votes not to place the petition initiative on the ballot.

Relators secured the required signatures on the initiative petition and submitted it to the City Clerk to be placed on the ballot for the November 2018 election. JX23. After extensive debate at two public meetings (JX30-32, 39), the City Council twice voted 6-4 not to place the petition initiative on the ballot based on the advice of legal counsel that the subject of CodeNEXT has been withdrawn from the field of initiative and referendum. JX28 at COA_000369, Item 90 (Apr. 26); JX3 (May 24). Though it declined to place the petition initiative on the ballot, the City Council took affirmative procedural steps to ensure that the propriety of its decision could be subject to judicial review in time to get on the November 2018 ballot if its decision was incorrect:

> IT IS FURTHER RESOLVED: The city Council takes this action today, more quickly than is required by law, in order to ensure there is ample time and opportunity for legal challenges to Council's action so as to not preclude the opportunity to have the item placed on the next allowable municipal election date . . . .

JX3 p. 2.

This suit followed.

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waiting period in Subsection (A)" (*i.e.*, after June 1, 2021). City Charter art. III § 1 (allowing for special elections "provided that every special election shall be held on a Saturday"); art. IV § 4 (allowing referendum to be submitted by special election); Tex. Elec. Code § 41.001(a) (providing that special elections can be held only on Tuesdays in November or the first Saturday of May).

ARGUMENT

A. Mandamus is an appropriate remedy to enforce ministerial duties, but there is no ministerial duty to place improper subjects on the ballot.

The City Charter and state law reserve to the people of the City the right to legislate by initiative and referendum. The City Charter provides that 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, or the state laws . . . ." City Charter art. IV § 1. State law confirms the City's right to provide for such initiative rights in its Charter. *See* Tex. Const. art. XI § 5 (authorizing Home Rule cities to adopt a Charter); Tex. Loc. Gov't Code § 9.004(a) (authorizing amendment of a Charter by initiative). This authority is consistent with the proposition that, in our democracy, "all political power is inherent in the people." Tex. Const. art. I § 2.

Relators contend that, pursuant to the initiative power, once the requisite number of qualifying petition signatures was verified, the City Defendants had a ministerial duty to either adopt the initiative as written or put the initiative as written on the ballot for the next available election. Petition p. 4. They seek a writ of mandamus against the City Defendants to enforce that claimed ministerial duty.

"A writ of mandamus is an extraordinary remedy and will issue only to compel a public official to perform a ministerial act. An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *City Council of Austin, Tex. v. Save Our Springs Coal.*, 828 S.W.2d 340, 342 (Tex. App.—Austin 1992, no writ) (reversing writ of mandamus

issued by Travis County district court because City Council did not have a ministerial duty to place SOS initiative on the ballot at the time mandamus issued).

Mandamus is an appropriate remedy if a city fails to place a proper initiative on the ballot. *In re Woodfill*, 470 S.W.3d 473, 481 (Tex. 2015) (mandamus "has long been recognized as an appropriate remedy when city officials improperly refuse to act on a citizen-initiated petition"). It is not a proper remedy, however, where the initiative involves a subject that has been withdrawn from the field of initiative and referendum. The Supreme Court of Texas long ago explained that, "to entitle [Relators] to a writ of mandamus on the ground that they have a legal right to have the election called and held and that [the City Defendants] are under a legal duty to order and to hold it, it is not enough that the subject matter of the proposed ordinance be legislative in character *but 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) (emphasis added); *see also In re Bouse*, 324 S.W.3d 240, 243 (Tex. App.—Waco 2010, orig. proceeding) (quoting *Glass v. Smith* and holding that "mandamus may issue only where the 'subject matter of the proposed ordinance [is] legislative in character' and has not been 'withdrawn from the field in which the initiatory process is operative'").

Relators argue that this Court should not engage the question of whether the subject of CodeNEXT has been withdrawn from the field of initiative and referendum but instead should leave that question for after the election. Brief p. 8-12. They argue that the petition initiative should be placed on the ballot, and if it passes, then a court after the

election should determine whether ordinance was invalid because the subject had been withdrawn. *Id*. They rely on *Coalson v. City Council of Victoria*, which granted mandamus to require a city council to put a petition initiative on the ballot. 610 S.W.2d 744, 745 (Tex. 1980). *Coalson* did not analyze, however, the issue of whether the subject had been withdrawn or the scope of proper judicial review of proposed petition initiatives. The Supreme Court in *Glass v. Smith* did exactly that and analyzed at some length whether a court, pre-election, should review: (1) general questions of invalidity, or (2) whether the subject had been withdrawn from the field of initiative and referendum. The Court held that questions of general invalidity cannot be reviewed pre-election, but the analysis of whether the subject has been withdrawn *must* be analyzed pre-election:

> From what has been said it follows that we must first determine whether the initiative election sought by respondents is within the field in which the initiatory process is operative and therefore one which they have a legal right to have held. That the scope of our inquiry should be thus extended is indicated by the opinion of this Court in the case of *Dallas Ry. Co. v. Geller*, 114 Tex. 484, 271 S.W. 1106, and that the Court is justified in extending in this far and no further is indicated by the opinion of the Supreme Court of Massachusetts. . . . *The Massachusetts Court declined to decide in advance the substantive validity questions but held that it not only could but should decide in advance whether the subject matter of the proposals had been reserved from initiative procedure*, saying: 'We think that the question whether an initiative provision relates to an excluded matter is a justiciable question.' From these cases it will appear that the theory upon which we proceed in this case in deciding some of the questions challenging the validity of the proposed ordinance and in refusing to decide others is no new or novel theory or approach to those questions.

Glass v. Smith, 244 S.W.2d at 637-38 (emphasis added) (citations omitted). The Supreme Court twice more reviewed, pre-election, the question of whether the subject had been withdrawn from the field. *See Dallas Ry. Co. v. Geller*, 271 S.W. 1106, 1107

(Tex. 1925); *Denman v. Quin*, 116 S.W.2d 783, 786 (Tex. Civ. App.—San Antonio 1938, writ ref'd).[9] That continues to be the practice of Texas courts today. *See In re Arnold*, 443 S.W.3d 269, 275 (Tex. App.—Corpus Christi 2014, orig. proceeding) (analyzing on mandamus whether zoning has been withdrawn from the field of initiative and referendum); *City of Cleveland v. Keep Cleveland Safe*, 500 S.W.3d 438, 452 (Tex. App.—Beaumont 2016, no pet.) ("Therefore, *before mandamus can issue*, the appellate court must determine that the subject matter of the proposed ordinance has not been withdrawn from the field in which initiatory process is operative.") (emphasis added). The sparse opinion in *Coalson* did not address *Glass v. Smith* or *Geller*, and it certainly did not overrule them. The rule in Texas remains, therefore, that courts may not analyze general question of initiative invalidity pre-election, but they can and must address whether the subject has been withdrawn from the field of initiative and referendum.

The City Council thus did not have a ministerial duty to put the CodeNEXT initiative on the ballot, and mandamus is not proper, if its subject matter has been withdrawn from the field of initiative and referendum. As is discussed below, CodeNEXT's subject matter *has* been withdrawn from the field, so mandamus is not warranted here.

[9] The Supreme Court's designation that the application for writ of error was "refused" in *Denman* indicates that "it determined that the 'the principles of law declared in the opinion of the court are correctly determined.'" *Izen v. Nichols*, 944 S.W.2d 683, 684 (Tex. App.—Houston [14th Dist.] 1997, no writ) (quoting Tex. R. App. P. 133(a) (repealed)). A "writ ref'd" opinion "has the same precedential value as an opinion of the Supreme Court." Tex. R. App. P. 56.1(c).

B. CodeNEXT entails a comprehensive revision of the City's zoning regulations, and it is not properly subject to initiative and referendum.

1. Certain subjects—including zoning—have been withdrawn from the field of initiative and referendum.

For almost a century, Texas courts have recognized that certain subjects are not properly decided by initiative or referendum. *See Dallas Ry. Co. v. Geller*, 271 S.W.at 1107. The Supreme Court in *Geller* explained that setting rates of a "public service company" is both legislative and adjudicative in character, and "in its nature one which is at least impractical, if not impossible, for the public at large, the voters, to pass on. They cannot have or digest the information, data, and facts necessarily incident and essential to the forming of a correct, accurate, and fair judgment upon the subject." *Id*. The Court noted that the charter provided for a fair hearing, inspection of books, and attendance of witnesses before passing a rates ordinance, and in light of such procedures, "we think it clear that the charter provisions themselves reserve from referendum the fixing and regulating of the schedule of rates." *Id*. The Court held that the setting of rates was withdrawn from the field of referendum even though "the referendum provision [in the city charter] is broad, and provides generally for referendum of ordinances." *Id*.

The Supreme Court in *Glass v. Smith* expounded further on the principle that "the field in which the initiatory process is operative is not unlimited," and certain subjects can be withdrawn by state law or city charter, either expressly or impliedly, from the field of initiative and referendum:

> *The field where the initiatory process is operative may also be limited by general law*. Article XI, Section 5 of our Constitution provides that no city charter shall contain any provision inconsistent with the general laws of this

> state. Any rights conferred by or claimed under the provisions of a city charter, including the right to an initiative election, are subordinate to the provisions of the general law. *It follows that the Legislature may by general law withdraw a particular subject from the field in which the initiatory process is operative.* Again, the field may be limited by the city charter itself. Other provisions of the charter may withdraw from the people the power under the initiative provisions to deal with a particular subject. The limitation by the general law or by the charter of the field in which the initiatory process is operative may be either an express limitation or one arising by implication. Such a limitation will not be implied, however, unless the provisions of the general law or of the charter are clear and compelling to that end.

244 S.W.2d at 648-49 (emphasis added). *Glass v. Smith* is the seminal Texas case regarding whether subjects have been withdrawn from the field, and a copy of the opinion is attached as Appendix C.

Glass v. Smith explained that subjects are generally withdrawn from the field of initiative and referendum either because (1) the authority to act is expressly conferred on a governmental body, or because (2) there are mandatory procedures—like hearings—that could not be performed in the context of an initiative election:

> In all the Texas cases called to our attention in which it has been held that the people of a municipality could not validly exercise a delegated legislative power through initiative proceedings, it will be found that authority to act was expressly conferred upon the municipal governing body exclusively, or there was some preliminary duty such as the holding of hearings, etc., impossible of performance by the people in an initiative proceeding, by statute or charter made a prerequisite to the exercise of the legislative power.

244 S.W.2d at 653.

Another court explained that a subject can be withdrawn from initiative and referendum if it necessarily rests on consideration of technical and expert issues:

> It seems to be perfectly obvious, too, that ordinances which must rest upon minute investigation of facts and figures, or application of expert, skilled, or technical knowledge, or upon audits, or upon close and careful study or ascertainment or adjustment of masses of facts and figures, such as the elements entering into matters of rate making, cannot be efficiently initiated or passed upon by the public en masse, however intelligent and patriotic they may be.
>
> It seems obvious that when the ordinance in question here is tested by the rules stated, it falls at once into the class of ordinances which are not deemed referable to a vote of the people.

Denman v. Quin, 116 S.W.2d at 786.

Texas courts applying these principles uniformly agree that zoning has been withdrawn from the field of initiative and referendum. *See, e.g.*, *Hancock v. Rouse*, 437 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) ("These provisions of general law . . . have withdrawn the subject of Zoning from the field in which the initiatory process is operative and have reserved this subject from referendum."); *San Pedro N., Ltd. v. City of San Antonio*, 562 S.W.2d 260, 262 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) ("Plaintiff contends that a zoning ordinance is not subject to the initiative and referendum provisions of City's charter. We agree."); *City of Canyon v. Fehr*, 121 S.W.3d 899, 904 (Tex. App.—Amarillo, 2003, no pet.) ("Along that line, we note Texas case authority that historically prohibited the use of initiative and referendum in the arena of zoning."); *In re Arnold*, 443 S.W.3d 269, 275 (Tex. App.—Corpus Christi 2014, orig. proceeding) ("Texas case authority historically prohibited the use of initiative and referendum with regard to zoning.").

Courts have identified several rationales supporting the principle that zoning is not a proper subject for initiative and referendum. Primarily, courts recognize that zoning is

withdrawn from the field of initiative and referendum because mandatory procedural requirements for zoning ordinances such as hearings—whether prescribed by city charter or general state law—cannot be satisfied through an election process:

> *A zoning ordinance enacted by the City Council without the notice and hearing required by statute would be invalid and the power of the people to legislate directly is subject to the same limitations.* Since notice and hearing are clearly required by the Charter, and the general law of the State, as a prerequisite to the enactment of Zoning Ordinances, and since notice and hearing have no place in the process of legislating through initiative and referendum, the power of the people . . . to legislate directly does not extend to the subject of zoning.

Hancock, 437 S.W.2d at 4 (emphasis added); *San Pedro*, 562 S.W.2d at 262.

It is no defense that the initiative process may simply be adding additional steps—a waiting period, an intervening election, and another City Council vote—after the city council has already completed the statutory mandated procedures: "To give effect to the election [in such a situation], 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*."[10] *San Pedro*, 562 S.W.2d at 262 (emphasis added); *City of Hitchcock v. Longmire*, 572 S.W.2d 122, 127 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (same).

Moreover, the procedural protections regarding zoning are critical and cannot be brushed aside because "the requirement of notice and hearing are intended for the protection of property owners against arbitrary action and . . . compliance with the

[10] This prohibition against adding extra steps to zoning procedures relates to the discussion below in section C.4 of the Argument regarding Relators' contention that the waiting period procedure of the petition initiative is simply a governance measure that is properly subject to initiative and referendum. It is not.

mandatory provisions of the statutes is essential to the exercise of jurisdiction by municipal governing bodies and each act must be performed." *San Pedro*, 562 S.W.2d at 262 (citing *Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962)). The Supreme Court has explained that the "steps directed to be taken for notice and hearing, when provided for in the law, are intended for the protection of the property owner, and are his safeguards against the exercise of arbitrary power. Each act required is essential to the exercise of jurisdiction by the City Council, and each must be rigidly performed." *Bolton*, 362 S.W.2d at 950.

Courts have also explained that zoning is properly withdrawn from the field "based on the necessity for continuity and expertise in zoning, rather than on the statutory requirements for notice and hearing." *Arnold*, 443 S.W.3d at 277 (articulating this rationale for the prohibition even where "the instant case does not present concerns regarding the failure to provide notice and public hearing"); *see also Hancock* 437 S.W.2d at 4 (describing the imperative for technical expertise in zoning).

2. Zoning has been withdrawn from the field of initiative and referendum categorically, not just as to individual zoning cases.

Relators argue that zoning has not been broadly withdrawn from the field of initiative and referendum, but only individual zoning cases affecting individual parcels of property have been withdrawn. Brief pp. 19-23. That is incorrect. Texas case law and statutes make plain that zoning has been withdrawn from the field of initiative and referendum as a categorical matter.

First, none of the cases draws the line in that way or distinguishes between individual zoning cases and zoning generally. Indeed, the primary stated rationale for withdrawing zoning from the field is that state law (and sometimes also city charters) mandate procedures for zoning that cannot be satisfied through a ballot initiative, and mandatory notice and hearing procedures apply as to all zoning, not just individual cases. *See, e.g.*, *San Pedro*, 562 S.W.2d at 262 ("Since notice and hearing are clearly required by the . . . general law of the State as a prerequisite to the enactment of Zoning Ordinances, and since notice and hearing have no place in the process of legislating through initiative and referendum, the power of the people . . . to legislate directly does not extend to the subject of zoning.").

In identifying the specific applicable procedures that withdraw zoning from the field, the *Hancock* court quoted in full Tex. Rev. Civ. Stat. Ann. art. 1011d (the predecessor to Tex. Loc. Gov't Code 211.006(a)), which governs notice and hearing requirements to "exercise the authority relating to zoning regulations and zoning district boundaries." 437 S.W.2d at 3. Those are the procedures the City followed regarding CodeNEXT. Far from limiting its rule to individual zoning decisions, the *Hancock* court described the imperative for technical expertise in terms of a comprehensive zoning ordinance:

> *The preparation of a comprehensive Zoning Ordinance*, which would meet the objectives set out in the statute, requires careful study, the accumulation of masses of detailed information concerning land use within the city, and is a matter concerning which the professional advice of one experienced in city planning would be most helpful. It would be very difficult to present the information necessary to evaluate a proposed Zoning Ordinance to the voters in an intelligible manner.

Id. at 4 (emphasis added).

Texas courts consistently describe the rule as a categorical one. *See, e.g.*, *City of Canyon*, 121 S.W.3d at 904 ("Along that line, we note Texas case authority that historically prohibited the use of initiative and referendum in the arena of zoning."); *Arnold*, 443 S.W.3d at 275 ("Texas case authority historically prohibited the use of initiative and referendum with regard to zoning."). The prohibition against submitting zoning to initiative and referendum is so well-established that the Legislature in 1993 adopted a narrow exception to that rule to authorize the repeal of a city's "initial adoption of zoning regulations" by referendum. Tex. Loc. Gov't Code § 211.015(a). The application and construction of section 211.015 is discussed more fully below in section D of the argument. But the fact that the Legislature expressly authorized repeal by referendum of the "initial adoption of zoning regulations"—which are emphatically not individual zoning cases—indicates that zoning is otherwise not the proper subject of a referendum election absent the exception.

In sum, there is no support in the case law or the statutes for Relators' contention that only individual zoning cases have been withdrawn from the field of initiative and referendum. The withdrawal as to zoning is categorical, and it applies to CodeNEXT.

3. Subdivision regulation has been withdrawn from the field as well.

Texas law is thus well-settled that zoning—categorically, not just individual zoning cases—has been withdrawn from the field of initiative and referendum because the election process conflicts with the mandatory procedures for zoning, and the same rationale applies to other subjects as well. *See, e.g.*, *Bouse*, 324 S.W.3d at 243-44

(holding that mandatory procedures in Tex. Loc. Gov't Code § 42.041 have withdrawn incorporation from the field of initiative and referendum); *Hitchcock v. Longmire*, 572 S.W.2d 122, 127 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e) (holding that mandatory procedures in Municipal Annexation Act have withdrawn annexation from the field of initiative and referendum); *Vara v. Houston*, 583 S.W.2d 935,937-38 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) ("[T]he subject matter of the ordinance, disannexation, had been withdrawn from the 'field in which the initiatory process is operative.'"). For that reason, subdivision regulation has likewise been withdrawn from the field of initiative and referendum, because like zoning (and incorporation and annexation), state law regarding subdivision regulation includes mandatory procedures such as notice and a public hearing that cannot properly be resolved by ballot. Tex. Loc. Gov't Code § 212.002 ("After a public hearing on the matter, the governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction.").

Under well-settled Texas law, therefore, both zoning and subdivision regulation have been withdrawn from the field of initiative and referendum. In particular, because CodeNEXT involves zoning in a comprehensive and pervasive way, it is not properly the subject of the petition initiative.

C. CodeNEXT involves subjects—including zoning—that have been withdrawn from the field of initiative and referendum, so it cannot properly be placed on the ballot.

CodeNEXT comes squarely within the prohibition against submitting zoning ordinances to the initiative and referendum process, because zoning is pervasive throughout its provisions, both directly and indirectly.

1. Zoning is implicated and implemented throughout CodeNEXT, not just in Chapter 23-4.

Zoning is commonly understood to include regulation of the use of land, but it goes beyond pure questions of use. The City's zoning authority derives from state law, which allows municipalities to regulate the following: "(1) the height, number of stories, and size of buildings and other structures; (2) the percentage of a lot that may be occupied; (3) the size of yards, courts, and other open spaces; (4) population density; (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and (6) the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health." Tex. Loc. Gov't Code § 211.003(a). All of those topics are zoning, and a significant portion of CodeNEXT directly implicates zoning and directly depends on the City's statutory zoning authority. For the Court's convenience, a copy of the index of the current third draft of CodeNEXt is attached as Appendix D.

CodeNEXT will adopt a new Title 23 of the City Code, to be known as the Land Development Code. The new Title 23 includes 13 chapters, and Chapter 23-4 is the Zoning Code. Chapter 23-4 executes the primary functions of municipal zoning: the

adoption of zoning districts with regulations governing land use, site development, and density, as well as procedural requirements and adoption of the City's official zoning map. But zoning is much more than just one of thirteen chapters of CodeNEXT. Zoning makes up an outsized proportion of the City's new Land Development Code, and it is pervasive throughout CodeNEXT.

From a pure volume standpoint, the Zoning Chapter of the new Title 23—Chapter 23-4—is 44.4% of the entire code (695 pages out of a total of 1,566 pages), far more than the 10% Relators argue.[11] In addition to the Zoning Chapter, the Subdivision Chapter is an additional 56 pages of Title 23, bringing the percentage of withdrawn subjects to 48.5% of Title 23 as a whole. Substantively, even that 44.4% (or 48%) of the new Title 23 cannot readily be carved out, because zoning pervades other provisions of CodeNEXT as well, in three distinct respects.

First, many other provisions of CodeNEXT are exercises of the City's Chapter 211 statutory zoning authority and depend on that grant of authority. For example, the provisions regarding definition and regulation of nonconforming uses are based on the City's authority to regulate use and non-conforming use of property. Art. 23-2G ("Nonconformity") (explaining that this chapter "applies to a use, structure, or lot within the zoning jurisdiction that is nonconforming to land use or site development regulations under Chapter 23-4 (Zoning) or a separately adopted zoning ordinance"). Chapter 23-12

[11] The Bates range of the zoning chapter of CodeNEXT is COA_002309-003004. The Bates range of the entire document is COA_001947-3512. JX14. That percentage increases to 45.5% when one considers that the land uses set out in Chapter 23-4 are defined in a separate part of CodeNEXT—in Division 23-13-A ("Land Uses"), representing another 18 pages of CodeNEXT.

("Airport Hazard and Compatible Land Use") establishes zoning regulations applicable to the areas around the Austin-Bergstrom International Airport. There is zoning to regulate land use in the floodplain in Division 23-10E-4 ("Special Standards in Zoning Jurisdiction"). While not contained in the Zoning Chapter of CodeNEXT, each of these address zoning topics and are dependent on the City's statutory zoning authority.

Second, many provisions of the new Title 23 are tied to the new zoning "zones" that the Zoning Chapter adopts and are thus dependent on those zones (and thus dependent on the Zoning Chapter) to make sense. The most notable example of this is CodeNEXT's subdivision regulations, found in Chapter 23-5, which rely on minimum lot sizes established under Chapter 23-4 to determine how much land area is required to plat a particular number of lots. *See* Sec. 23-5C-2020 ("Minimum Lot Size and Area") (requiring lots to meet minimum lot area for applicable zoning district). The standards for approval of a preliminary subdivision plat are expressly also tied to zoning regulations. *See* Sec. 23-5B-2050 ("Action on Preliminary Plan"). Aspects of the CodeNEXT affordable housing provisions found in Article 23-3E are tied to the new zoning districts as well. *See, e.g.*, Div. 23-3E-1020(A)(1) (Affordable Housing Bonus Program "applies citywide, *except in the following zones*: (a) A density bonus in the *Downtown Core Zone and Commercial Center Zone* must meet the requirements of Division 23-3E-2"); Div. 23-3E-2010 (Downtown Density Bonus Program "applies to developments applying for a density bonus within the *Downtown Core and Commercial Center Zones*") (emphasis added). Division 23-9F-3050 ("Block Dimensions") specifies

allowed block dimensions based on zoning districts. Section 23-8A-1050 ("Sign Districts and Sign Overlay") sets out a hierarchy of sign districts that is tied to zoning districts.

CodeNEXT's procedures implementing the new zoning regulations are located outside the Zoning Chapter as well. Division 23-1B-2 ("Boards and Commissions") establishes the City's board of adjustment and zoning commission pursuant to the authority granted by Sections 211.007-.008 of the Texas Local Government Code. Article 23-2E ("Legislative Amendments") establishes procedures and policies for amending zoning regulations. Article 23-2F ("Quasi-Judicial and Administrative Relief") establishes procedures for requesting zoning variances and special exceptions form the board of adjustment. Article 23-2I ("Appeals") regulates appeals of zoning determinations to the Board of Adjustment. Subsection 23-9B-2020(A)(2) ("Zoning Applications") appears in the Transportation chapter and establishes right-of-way dedication requirements applicable during the zoning application process.

Moreover, provisions in CodeNEXT implicate subdivision regulation, which has also been withdrawn from the field of initiative and referendum. Those are primarily set forth in Chapter 23-5, but, like zoning regulations, subdivision regulations infuse many provisions in CodeNEXT outside their primary home in Chapter 23-5. For example, through the subdivision platting process, the City regulates transportation issues, such as the dedication of roads and sidewalks and mitigation for offsite impacts. *See, e.g.*, Sec.. 23-9B-2010(A)(1) ("Right of Way Dedication and Improvement") ("A landowner shall dedicate all public right-of-way required to adequately serve the transportation needs of proposed development"); Div. 23-9D-1010: Action on Development Application ("This

article authorizes the City to condition development approval on changes or improvements necessary to ensure that new development will be adequately served by transportation infrastructure and that impacts of new development on the City's transportation system will be mitigated."). Street design and access requirements are likewise implemented at platting. *See* Art. 23-9F. Similarly, the requirement to dedicate parkland necessary to serve new development is implemented through the subdivision process, even though it is separately codified in Article 23-3B.

The tentacles of zoning (and subdivision regulation) reach far throughout CodeNEXT. There is no way to tease apart those withdrawn subjects from the remaining subjects in the document as a whole. The City Council was therefore right to decline to place the petition initiative on the ballot.

2. The severability clause does not save the initiative because zoning is not severable from the remainder of CodeNEXT.

a. The fact that CodeNEXT includes topics other than zoning does not mean that it can properly be subject to a petition initiative.

The petition initiative includes a severability clause such that, if any "provision of this ordinance or its application" is held invalid, the invalidity does not extend to the "other provisions or applications . . . that can be given effect without the invalid provision or application." App.A ¶ D. Relators contend that CodeNEXT includes subjects that have not been withdrawn from the field of initiative and referendum, so the initiative should be placed on the ballot even if zoning has been withdrawn and is not the proper subject of the ballot initiative. Brief p. 13. That is incorrect.

As a starting point, the petition initiative treats CodeNEXT as a single, indivisible whole. It does not identify specific, proper portions of CodeNEXT to subject to the "extra steps" procedures, but instead seeks to apply the waiting period and referendum to the entire CodeNEXT ordinance. Indeed, the referendum mandates that the voters "approve or disapprove" of CodeNEXT "in its entirety and not piecemeal." App.A. The City Council—and this Court—must take the petition initiative as they find it, because the City Charter mandates that any qualifying petition initiative must be placed on the ballot "as written." City Charter art. X § 1. The City Council is thus *prohibited* from rewriting the petition initiative to apply only to those portions of CodeNEXT that can properly be put to an initiative ballot, and it certainly did not have a ministerial duty to do so. *See also BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 18 (Tex. 2016) (holding that a court may not invalidate a city Ordinance only "to the extent" it conflicts with state law if that would require the court to "rewrite" the Ordinance, because a court may not "save the Ordinance from preemption by reading language into the Ordinance that simply is not there").

Relators argue that if any portion of CodeNEXT has not been withdrawn from the field of initiative and referendum then the petition initiative must be placed on the ballot. Brief pp. 12-14. They contend that other states have "required initiatives to be placed on the ballot unless their subject matter has been withdrawn 'in its entirety.'" *Id*. p. 13. They cite four out-of-state cases for the proposition, but only one—*Burnell v. City of Morgantown*—relates to whether the subject of the ordinance has been withdrawn from the field of initiative and referendum. 558 S.E.2d 306, 316 (W. Va. 2001). The other

three cases relate to pre-election determination of the proposed ordinance's validity, which is something that was permissible in those states but not in Texas. In addition, states have adopted various rules regarding the proper treatment of partially-defective petition initiatives. California reached the opposite result from *Burnell* and articulated the sensible rule that, "[w]hen a significant part of a proposed initiative measure is invalid, the measure may not be submitted to the voters." *Bighorn-Desert View Water Agency v. Verjil*, 138 P.3d 220, 230 (Cal. 2006); *see also Am. Fed'n of Labor v. Eu*, 686 P.2d 609, 629 (Cal. 1984) ("Under such circumstances, to submit the measure to the voters without redrafting would confuse the electorate and mislead many voters into casting their ballot on the basis of provisions which had already been found invalid . . . . [T]o order the proposal to be placed on the ballot when only a small part of it could be valid would be using the writ of mandate for the purpose of misleading the voters."). Other states, by contrast, allow courts to strike invalid portions of an initiative before submitting it to election. *See, e.g.*, *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 93 (Alaska 1988); *City of Colorado Springs v. Bull*, 143 P.3d 1127, 1128 (Colo. App. 2006).

Because of this varied treatment of the issue, looking to other states' case law regarding initiative and referendum is ultimately not enlightening. Instead, this Court should use a black-letter Texas severance analysis to decide the propriety of placing the petition initiative on the ballot. This Court should deny mandamus because the zoning provisions of CodeNEXT are not severable from the remainder of the ordinance. Stated another way, if the zoning portions of CodeNEXT are removed from the ordinance as a

whole, that would render the remainder entirely invalid "such that none of its provisions could, under any circumstances, have operative effect." *Burnell*, 558 S.E.2d at 316.

b. Standards for severability

Under Texas law, the rule governing the severability of invalid portions of statutes from valid portions is well-settled, and it turns on whether the portions of the statute are so connected that the Legislature would not have passed it absent the invalid portion:

> When, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, ***unless all the provisions are connected in subject-matter, dependent on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other.*** The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; ***but whether they are essentially and inseparably connected in substance.*** If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must stand.

Western Union Tel. Co. v. State, 62 Tex. 630, 634 (1884) (emphasis added) (citation and internal quotation marks omitted).

Applying this rule, Texas courts have consistently held that invalid portions of statutes cannot be severed from the remainder of the statute when they are "inextricably intertwined," or when it is clear that the Legislature would not have passed the statute without the invalid provisions. *See, e.g.*, *Ex parte Perry*, 483 S.W.3d 884, 903 (Tex. Crim. App. 2016) ("Severance is not feasible if the valid and invalid statutory provisions at issue are inextricably intertwined so that a severance would render the statute

incomplete or contrary to legislative intent."). For example, in *Western Union*, the Texas Supreme Court concluded that invalid portions of a statute could not be severed because "the different parts of the act under consideration are so intimately connected that the invalidity of a part of the law renders the entire law invalid." 62 Tex. at 636. And in *City of Forney v. J. W. Pinson's Estate*, the court explained that "in order to preserve the remaining parts of an ordinance after the invalid parts have been severed, there must remain an intelligible and valid ordinance . . . conforming to the General purpose and Intent of the enacting body." 575 S.W.2d 58, 61 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); *see also Kimbrough v. Barnett*, 55 S.W. 120, 123 (Tex. 1900) ("The provisions of the act giving a four-years term to the trustees, and those providing for alternate elections, are the heart of the act in question. All other parts are so dependent upon and connected with those that to declare the former void renders the act ineffectual for the accomplishment of the purpose which induced its enactment. The Legislature evidently would not have passed the law without the void provisions, and we must hold the law void as a whole.").

Determining whether an invalid portion of an ordinance is severable is a question of law for the court. *See, e.g.*, *City of Forney*, 575 S.W.2d at 61 (affirming summary judgment that invalid portion of ordinance could not be severed because, "deleted of their unconstitutional provisions, [the ordinances] certainly do not represent the purpose and the intent of the city council of appellant at the time of their adoption"). Thus, this Court must determine whether the zoning portions of CodeNEXT are severable, or whether the entire CodeNEXT would be rendered invalid if zoning were detached from the

remainder. Only if the zoning portions are severable can CodeNEXT properly be subject to a ballot initiative.

c. Zoning cannot be severed from those portions of CodeNEXT that can properly be the subject of a petition initiative.

As is discussed above in section C.1 of the Argument, zoning's tentacles are pervasive throughout CodeNEXT, not just in the lengthy Zoning Chapter, but also throughout many other sections that do not, at first glance, appear to implicate zoning. Zoning cannot be teased apart from the other subjects that could properly have been the subject of a petition initiative because zoning is "inextricably intertwined" with so much of CodeNEXT, and it is a substantial and pervasive part of the Land Development Code as a whole. The City Council undertook CodeNEXT to implement Imagine Austin, which sought to "revise Austin's development regulations and processes to promote a compact and connected city":

> Austin's City Charter requires that land development regulations be consistent with the comprehensive plan. Significant revisions to existing regulations will be necessary to fully implement the priority programs described above. For example, Imagine Austin calls for new development and redevelopment to be compact and connected, but many elements of the existing Land Development Code make this difficult to accomplish. Achieving these goals will require a comprehensive review and revision of the Land Development Code, associated technical and criteria manuals, and administrative procedures.

JX5 p. 207. The entire purpose of the CodeNEXT process was to revise the Land Development Code on a comprehensive basis, and it is plain the City Council would not have adopted such a comprehensive revision without addressing zoning at all. *Perry*, 483 S.W.3d at 903. There would be no point. Zoning is therefore not severable from the

remainder of CodeNEXT. Because zoning cannot be severed from the remainder of CodeNEXT, its severance would render the remainder entirely invalid "such that none of its provisions could, under any circumstances, have operative effect." *Burnell*, 558 S.E.2d at 316.

If the drafters of the initiative petition had directed it to specific, permissible subjects, such a petition could properly be on the ballot. That is what citizens of Austin did in 1992 to adopt the Save Our Springs Ordinance by ballot initiative to regulate water quality in the City's extra-territorial jurisdiction. After the SOS Ordinance was approved by the voters and enacted by the City Council as a part of the Land Development Code, certain private landowners challenged the SOS Ordinance on the grounds that the subject had been withdrawn from the field of initiative and referendum. The court of appeals rejected that challenge, holding that the SOS Ordinance "is a water pollution control measure," that it is not a zoning statute subject to statutory limits on the City's zoning authority, and that the trial court should not have asked the jury whether the SOS Ordinance "was an improper subject for the initiative and referendum process."[12] *City of Austin v. Quick*, 930 S.W.2d 678, 689-91 (Tex. App.—Austin 1996), *aff'd in part, rev'd in part, Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998). The Supreme Court likewise rejected the contention that mandatory procedures for zoning withdrew "water pollution regulations, such as the [SOS] Ordinance, from the domain of citizen initiators." 7

[12] The fact that the court of appeals' opinion in *Quick* devotes several pages to analyzing whether the SOS Ordinance is a zoning ordinance—before ultimately determining that it is not—further undercuts Relators' contention that only individual zoning cases, not zoning as a categorical matter, have been withdrawn from initiative and referendum.

S.W.3d at 124. Citing the black-letter provisions from *Glass v. Smith*, 244 S.W.2d at 649, regarding withdrawal from the field, the Court held that "water quality regulation" was not within the Planning Commission's authority under the City Charter, and that development authority thus "can reasonably coexist with the adoption of a water quality regulation through public initiative." *Quick*, 7 S.W.3d at 124.

The drafters of the petition initiative chose not to address a more narrow subject, like the SOS Ordinance petitioners did—they chose instead to challenge CodeNEXT all-or-nothing—and that strategic decision is dispositive.

3. Subjecting the entire CodeNEXT to the ballot initiative—including the zoning provisions—would lead to significant confusion and uncertainty.

Litigants sometimes play Chicken Little, contending that the sky will fall if the court does not rule in their favor. The City Defendants certainly do not want to overstate the confusion that could result from submitting CodeNEXT to this initiative, but this hypothetical fairly illustrates the potential outcome.

Assume this scenario: Relators' petition initiative is put on the ballot in November 2018, and the voters approve it. Then the City Council adopts CodeNEXT in late 2018. In November 2020 (the next regular City election), there is a City Council election. After that election, the new City Council makes some amendments but adopts CodeNEXT again in early 2021. In November 2022 (the next regular City election), the voters disapprove CodeNEXT pursuant to the subsection B Voter Approval referendum.

At that point, what is the status of the zoning (and subdivision) provisions that the City Council adopted as part of CodeNEXT? No doubt Relators would argue that the

whole CodeNEXT is repealed, and the existing Land Development Code remains the sole controlling regulation. But even assuming zoning could be severed from the remainder of CodeNEXT (it cannot), if zoning has been withdrawn from the field of initiative and referendum, then the referendum would be invalid to repeal the City Council's zoning enactment. Thus, the zoning aspects of CodeNEXT would remain operative, but the remaining parts would have been repealed by the referendum. And that would wreak havoc. A landowner wanting to improve her property would be left in a confusing situation where her property is zoned pursuant to CodeNEXT, but she still looks to the old Chapters 25 and 30 to develop her property. Implementing the zoning provisions of CodeNEXT (including the zoning and subdivision "tentacles" in other provisions of the new Land Development Code) as an overlay to the existing City code provisions would create confusion, bureaucratic nightmares, and unending litigation. And who would sort out what parts of CodeNEXT are in effect and what parts are not? A court? A jury?

All of which is to say that there are significant negative consequences to placing this improper petition initiative on the ballot. There are practical costs: an improper election is expensive and time-consuming for the personnel who oversee the process, and it would likely also entail costly (and potentially divisive) campaigning by supporters on both sides of the issue. But there are also costs to the democratic process: if CodeNEXT is not properly the subject of initiative and referendum, then the better course is to make that hard call now and keep it off the ballot rather than allowing a wasteful and improper election whose results must ultimately be disregarded at the back end.

4. The "waiting period" is not a governance provision that can be adopted as a standalone provision.

Relators argue that the waiting period procedure of subsection A of the petition initiative is a non-zoning governance provision that should be placed on the ballot because it is not zoning. Brief pp. 15-17. That is not correct.

As an aside, the procedures involve more than simply a waiting period to "amend CodeNEXT or correct any errors before it takes effect." Brief p. 16. The waiting period mandates a second City Council election after the current Council adopts CodeNEXT, so that a newly-constituted Council can decide if they really meant it. Far from enhancing good governance, the waiting period provision in fact erects serious barriers to the Council's legislative function.

But more to the point, as discussed above, the zoning aspects of CodeNEXT cannot be severed from the remainder, and the entire CodeNEXT would be invalid if the zoning portions were removed. Thus, no portion of the petition initiative relating to CodeNEXT can properly be put on the ballot. In addition, the waiting period provision itself is a zoning initiative in that it seeks to adopt procedural "extra steps" that the City must follow in order to adopt CodeNEXT and its zoning provisions. Engrafting extra procedural requirements onto zoning enactments falls squarely within the subject of zoning that has been withdrawn from the field: "A city can no more add a step to the procedures required by state law than it can omit one." *San Pedro*, 562 S.W.2d at 262; *City of Hitchcock*, 572 S.W.2d at 127 (same). Finally, notwithstanding the severability

provision, the petition initiative must be placed on the ballot as written. City Charter art. X § 1. The City cannot rewrite it to submit only the "waiting period" portion.

Relators argue that waiting periods for adopting zoning ordinances are authorized by statute, and for that reason the waiting period provisions are properly the subject of initiative and referendum. Brief pp. 16-17, *citing Rossano v. Townsend*, 9 S.W.3d 357, 363 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The statute, however, authorizes adoption of such a waiting period *in the City Charter*, not as an ordinance. Tex. Loc. Gov't Code § 211.015(c) ("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."). In *Rossano*, the City Charter included such a waiting period (9 S.W.3d at 363), but the Austin City Charter does not. *Rossano* also involved a referendum regarding adoption of the city's *initial* zoning regulations, which is a statutory exception to the general prohibition against submitting zoning to initiative and referendum. Tex. Loc. Gov't Code § 211.015(a). That exception is not applicable, however, because CodeNEXT is not the City's initial adoption of zoning.

D. The zoning provisions of Chapter 211 of the Local Government Code do not make CodeNEXT a proper subject of ballot initiative.

1. CodeNEXT is not the City's first zoning ordinance, so the narrow statutory exception in § 211.015(a) is not applicable.

There is a statutory exception to the prohibition against "the use of initiative and referendum in the arena of zoning." *City of Canyon*, 121 S.W.3d at 904 (citing Tex. Loc. Gov't Code § 211.015). The exception provides that referendum is available for certain

specific zoning issues, but it is not applicable to CodeNEXT, because CodeNEXT is not the City's initial adoption of zoning. For the Court's convenience, relevant provisions of Chapter 211 are attached as Appendix E.

Section 211.015(a) provides for a referendum to repeal the initial adoption of municipal zoning regulations:

> 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.

Tex. Loc. Gov't Code § 211.015(a).

Relevant to Relators' contention that only individual zoning decisions have been withdrawn from the field, in adopting a specific exception authorizing use of the referendum process to repeal certain specific zoning ordinances, the Legislature necessarily recognized the general rule that zoning has been categorically withdrawn from the field of initiative and referendum. After all, if initiative and referendum were generally available regarding zoning, there would be no need for the § 211.015(a) exception. Section 211.015(a) thus undercuts Relators' contention that only individual zoning cases, not zoning as a categorical matter, have been withdrawn from the field.

On the merits, the § 211.015 exception is not applicable here. Courts construing the exception have explained that it is very limited and applies only to the *initial* decision by a city to adopt zoning; it does not authorize referendum as to any subsequent

amendment or rezoning ordinances. *City of Canyon*, 121 S.W.3d at 905-06; *Arnold*, 443 S.W.3d at 276 (adopting *City of Canyon*'s holding that "this legislation authorizes a referendum vote on the 'initial' adoption of zoning regulations" only).

City of Canyon explained the limited application of the exception to initial zoning decisions only:

> So, the procedure developed by the Legislature through § 211.015(a) and (e) can be best characterized by allusion to a phrase oft uttered by Deputy Barney Fife. To the extent a dispute about zoning arises, the Legislature intended to "nip it ... nip it in the bud." The proverbial "bud," for purposes of zoning, is represented by the first ordinances enacted by the city. And, to successfully "nip" the dispute surrounding their imposition on the local populace, they had to be proffered for rejection *in toto*; "all or nothing," according to the Legislature. And, in so constructing the statute, the Legislature effectively did two things. First, it modified *Hancock* and *San Pedro* to the extent they indicated that initiative and referendum could not be used to repeal zoning ordinances. Second, it restricted the use of initiative and referendum to the time and to the regulations described in the statute. Referendum, initiated by the voters, could not be used to vitiate such ordinances piecemeal. Nor could it be used after the first ordinances survived with or without attack.

121 S.W.3d at 905-06. In other words, if a city had no zoning at all (like Houston), and its City Council adopted an ordinance allowing for zoning, then under § 211.015(a), the citizens could "nip it in the bud"—and continue to have no zoning at all—by repealing that ordinance in its entirety through the referendum process.[13] *City of Canyon* explained that the statute limited the repeal by referendum in two ways: (1) it applies only to the

[13] The legislative history demonstrates that § 211.015(a) was directed expressly to Houston, which was at that time considering adopting a zoning ordinance for the first time. House Research Org., Bill Analysis, Tex. C.S.S.B. 506, 73rd Leg., R.S. (1993). The Bill Analysis explained that "both sides in the Houston zoning debate support this bill to let the people vote on the initial zoning plans." *Id.*

initial decision to adopt zoning, and (2) it had to be all-or-nothing and repeal the zoning ordinance in its entirety. *Id.*

Relators brush aside the *City of Canyon* interpretation that § 211.015 is limited to an initial adoption of zoning and argue that it is dicta. Brief p. 27. That contention ignores the opinion's comprehensive and lengthy statutory construction that dives deep into the textual and contextual aspects of § 211.015(a). *See* 121 S.W.3d at 904-06. It ignores the *Arnold* court's subsequent review and embrace of *City of Canyon*'s reasoning and statutory construction. 443 S.W.3d at 276-77. It also ignores that in 2007, after *City of Canyon*, the Legislature amended § 211.015. Acts 2007, 80th Leg., ch. 190, § 1, eff. May 23, 2007. Because the Legislature made no amendments to the provisions of § 211.015 that the court in *City of Canyon* construed, it is presumed that the Legislature approved of and adopted that judicial interpretation: "It is a firmly established statutory construction rule that once appellate courts construe a statute and the Legislature re-enacts or codifies that statute without substantial change, we presume that the Legislature has adopted the judicial interpretation." *Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 748 (Tex. 2012) ("We presume the Legislature is aware of relevant case law when it enacts or amends statutes."); *Gen. Servs. Comm'n v. Little–Tex Insulation Co.*, 39 S.W.3d 591, 596 (Tex. 2001) ("[T]he Legislature is presumed to be aware of case law relevant to statutes it amends or enacts.").

Because CodeNEXT is not the City's initial adoption of zoning, the § 211.015 exception does not apply. Instead, the general prohibition against "the use of initiative and referendum in the arena of zoning" controls. *See City of Canyon*, 121 S.W.3d at 904.

2. The City's treatment of CodeNEXT for purposes of public notice and protest rights sheds no light on the issues presented here.

Relators argue that comprehensive zoning revisions are "analogous" to initial zoning, and thus should fall within the § 211.015 exception, by reference to the procedural framework the City has followed with regard to CodeNEXT. Brief pp. 29-30. They assert that the City is following a framework that is appropriate for *initial* zoning, as opposed to the more rigorous procedural framework that is appropriate for *individual* zoning changes. *Id.* (noting that the City did not provide mailed notice to each property owner and has signaled its intent that property owners will not be able to protest the new zoning regulations in a manner that would require a supermajority to adopt them). The protest and individual notice provisions Relators reference are set out in Local Government Code Sections 211.006(d) (protest rights applicable to "a proposed change to a regulation or boundary") and 211.007(c) (individual mailed notice required of "a proposed change in a zoning classification"). Relators' argument incorrectly assumes that there are only two possible scenarios, either (1) a city is adopting initial zoning regulations, or (2) a city is making a zoning change to a specific parcel. The argument presumes that cities can never amend their existing zoning regulations other than changes to specific parcels, but more to the point, it ignores the fact that CodeNEXT is a comprehensive revision of the City's land development code, including its zoning regulations—which does not fall into either of those two categories.

The protest and individual notice provisions in Sections 211.006(d) and 211.007(c) do not apply to a comprehensive, city-wide revision to a city's zoning

regulations. *See FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 264 (Tex. App.—Fort Worth 2016, pet. denied) (explaining that "individual-property-owner notice statutes" generally do not apply to "general, broad zoning regulation changes, such as the enactment of a recodification of a zoning ordinance that rezones large parts of districts within a city as a while"); John Mixon, Texas Municipal Zoning Law § 7.002 (3rd ed.) ("Comprehensive revisions of zoning ordinances promote general community policies and communities should not be disabled from comprehensive revision by rules designed to protect private interests from specific tract reclassification.").

The fact that CodeNEXT is not a specific tract reclassification that would be subject to protest and individual notice rights under Sections 211.006(d) and 211.007 does not demand Relators' conclusion that it must be the "initial adoption" of zoning regulations under Section 211.015(c).[14] Instead, all one can glean from the notice framework the City followed here is that the City complied with the only notice requirement that applies to a comprehensive revisions to its zoning regulations: Section 211.006(a). Tex. Loc. Gov't Code § 211.006(a) (calling for newspaper notice before the 15th day before the date of a hearing at which a city intends to exercise its zoning

[14] Indeed, for limited purposes, Title 25 of the City Code will remain on the books and in effect, so Title 23 cannot possibly be the "initial adoption" of the City's zoning regulations. For example, CodeNEXT includes a "Former Title 25" (F-25) zone that explicitly incorporates existing regulations for particular areas, such as "planned unit developments." As acknowledged in Section 23-4D-8080, the existing Title 25 will continue to guide development within the F-25 zone subject to certain modifications. And in establishing requirements for "nonconforming" uses and structures, CodeNEXT also honors entitlements established under the existing Land Development Code and relaxes restrictions on redevelopment of structures built in conformance with current regulations. *See* Art. 23-2G. More broadly, in Section 23-1A-5030, CodeNEXT acknowledges that many of its provisions are "continuations" of existing code and expressly declares that such provisions are not new enactments.

authority). Section 211.006(a) makes no distinction between the initial adoption of zoning regulations and a comprehensive revision to zoning regulations, so its application to CodeNEXT sheds no light at all on whether the limited exception for ballot initiatives applicable to the initial adoption of zoning regulations applies to CodeNEXT.

E. The petition initiative suffers from additional defects.

As discussed above in section A of the Argument, under the proper scope of judicial review of proposed petition initiatives, a court "must first determine whether the initiative election . . . is within the field in which the initiatory process is operative and therefore one which they have a legal right to have held." *Glass v. Smith*, 244 S.W.2d at 649. The court should not, however, "decide in advance the substantive validity questions." *Id.*; *see also Coalson*, 610 S.W.2d at 745. In other words, the fact that defects within the ballot initiative would render the ultimate ordinance invalid is not a basis to keep the initiative off the ballot. But if the subject has been withdrawn from the field of initiative and referendum, or if the petition fails to comply with mandatory procedures (such as a lack of sufficient qualifying signatures), it is not properly submitted to a popular vote and there is no ministerial duty to place the initiative on the ballot.

There are defects within the CodeNEXT petition initiative that would render any ultimate ordinance invalid. For example, section (C) provides that the ordinance "overrides all city charter provisions, ordinances, and laws . . . ." That provision, if adopted by initiative, would be invalid because an ordinance cannot "override" either City Charter provisions or state law. *See City of Canyon*, 121 S.W.3d at 903–04 (citing Tex. Const. art. XI § 5 and explaining that the "Texas Constitution provides that neither a

city charter nor an ordinance may contain any provision inconsistent with the Constitution or the general laws enacted by the state Legislature").

The initiative also conflicts with the City Charter procedures for initiative and referendum in two related ways. First, it provides for both initiative (enacting legislation) and referendum (repealing legislation) in the same petitioned ordinance. Section A is initiatory in that it would adopt a waiting period and procedures for the City Council to adopt CodeNEXT, while section B calls for a referendum to approve or disapprove CodeNEXT after it has been passed by the City Council pursuant to the procedures of Section A. This conflicts with City Charter art. IV §§ 1 and 2, which treat initiative and referendum separately. Relatedly, section B conflicts with City Charter provisions regarding referendum in that it authorizes a future referendum to approve or disapprove an ordinance that does not yet exist and whose terms are not yet known. Article IV, section 2 of the City Charter allows citizens to petition for a referendum to repeal "the ordinance specified in the petition," but here the substance of the future CodeNEXT ordinance is not yet known.

These defects in the petition ordinance are not grounds to keep it off the ballot, but they are symptomatic of the drafters' broader failure to craft a ballot initiative that complies with applicable state law. The initiative could have addressed only particular subjects within CodeNEXT—such as water quality regulations—that have not been withdrawn from the field of initiative and referendum. Because the drafters did not do so, the City Council was correct to keep it off the November ballot.

CONCLUSION AND PRAYER

As noted at the outset of this brief, the City Defendants acknowledge and respect the power of the people of Austin to legislate through the petition initiative process. But that power is subject to state law, and state law has withdrawn zoning from the field of subjects that can properly be addressed by initiative and referendum. Because zoning is pervasive throughout CodeNEXT—indeed, CodeNEXT would not be adopted without its zoning aspects—it is not properly the subject of the petition initiative. The City Council was right to keep the petition initiative off the ballot.

The City Defendants therefore respectfully pray that this Court deny the petition for a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify I served a true and correct copy of the foregoing upon counsel for all parties as listed below via e-filing and e-mail on June 22, 2018:

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APPENDIX A

16

PETITION FOR AN AUSTIN ORDINANCE REQUIRING BOTH A WAITING PERIOD AND VOTER APPROVAL BEFORE CODENEXT OR COMPREHENSIVE LAND DEVELOPMENT REVISIONS BECOME EFFECTIVE

We, the undersigned registered voters of the City of Austin, support a proposed ordinance requiring that there shall be BOTH a waiting period and voter approval by election before CodeNEXT (or any subsequent comprehensive revisions of the City's land development laws) is legally effective. No land entitlements shall be granted or vested under the proposed comprehensive revisions until both requirements are met. Therefore, we, the undersigned, propose this ordinance be placed on the next available municipal election for a vote of the citizens of Austin:

I. Required Waiting Period and Voter Referendum for Comprehensive Revisions of the City's Land Development Laws.
A. Waiting Period. CodeNEXT, or subsequent comprehensive revisions of the land development laws, shall not go into effect legally, or any land entitlements be granted or vested under these laws, until the June 1st following the next regularly scheduled council elections after Council adopts CodeNEXT or the comprehensive revisions. This waiting period is 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 these laws may go into effect.
B. Voter Approval. After the waiting period in Subsection (A), CodeNEXT, or subsequent comprehensive revisions of the land development laws, shall not go into effect, or any land entitlements be granted or vested under these laws, until the registered voters of Austin approve these laws at the next available municipal election. Voters shall approve or disapprove CodeNEXT, or subsequent comprehensive revisions, in its entirety and not piecemeal. Should the voters fail to approve the comprehensive revisions, then the existing land development laws remain in effect. Notwithstanding any other provision, under no circumstances, shall the voters' rejection of CodeNEXT or proposed comprehensive revisions under this Section be considered or interpreted as repealing the existing land development code.
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. Severability Clause. If any provision of this ordinance or its application to any person or circumstance 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.

ONLY REGISTERED VOTERS IN THE CITY OF AUSTIN MAY SIGN THIS PETITION. Please fill in ALL blanks that are NOT optional.

If you circulated this petition beyond your household, please print your name here: _____ and your phone number here: _____. Thank you!

DATE SIGNED	NAME (please print clearly) / SIGNATURE	STREET ADDRESS	COUNTY (check one)	D.O.B. or VOTER REGISTRATION	EMAIL (optional) / PHONE (optional)
10/02 2017	Print name below: Joseph J Beaman Jr Sign name below: Joseph J Beaman	Street no. and name: 700 Texas Ave Austin TX Zip code: 78705	☒ Travis ☐ Williamson	06/19/1950 OR Voter no. 1140470996	[redacted]
10/02 2017	Print name below: LISA E. BEAMAN Sign name below: Lisa Beaman	Street no. and name: 700 TEXAS AVE Austin TX Zip code: 78705	☒ Travis ☐ Williamson	09/17/1955 OR Voter no. 13968947	
__/__ 2017	Print name below: Sign name below:	Street no. and name: Austin TX Zip code:	☐ Travis ☐ Williamson	__/__/19__ OR Voter no.	

QUESTIONS? Contact IndyAustin at 512-535-0989 or contact@IndyAustin.org.
This is pd. pol. adv. by IndyAustin SPAC.

Please print out, fill out all fields that are not optional, and mail to the following address ASAP:
IndyAustin, PO Box 41479, Austin, Texas 78704

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APPENDIX B

CITY CHARTER – SELECTED PROVISIONS

ARTICLE IV. - INITIATIVE, REFERENDUM, AND RECALL.

§ 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, not in conflict with this Charter, the state constitution, or the state laws except an ordinance appropriating money or authorizing the levy of taxes. Any initiated ordinance may be submitted to the council by a petition signed by qualified voters of the city equal in number to the number of signatures required by state law to initiate an amendment to this Charter.

§ 2. - POWER OF REFERENDUM.

The people reserve the power to approve or reject at the polls any legislation enacted by the council which is subject to the initiative process under this Charter, except an ordinance which is enacted for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency, and which is adopted by the favorable votes of five (5) or more of the councilmembers. Prior to the effective date of any ordinance which is subject to referendum, a petition signed by qualified voters of the city equal in number to the number of signatures required by state law to initiate an amendment to this Charter may be filed with the city clerk requesting that any such ordinance be either repealed or submitted to a vote of the people. When such a petition has been certified as sufficient by the city clerk, the ordinance specified in the petition shall not go into effect, or further action thereunder shall be suspended if it shall have gone into effect, until and unless it is approved by the voters as herein provided.

§ 3. - FORM AND VALIDATION OF A PETITION.

A petition under Section 1 or Section 2 of this article is subject to the requirements prescribed by state law for a petition to initiate an amendment to this Charter, and shall be in the form and validated in the manner prescribed by state law for a petition to initiate an amendment to this Charter.

§ 4. - COUNCIL CONSIDERATION AND SUBMISSION TO VOTERS.

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.

When the council receives an authorized referendum petition certified by the city clerk to be sufficient, the council shall reconsider the referred ordinance, and if upon such reconsideration such ordinance is not repealed, it shall be submitted to the voters at a regular or special election to be held on the next allowable election date authorized by state law after the date of the certification to the council. Special elections on initiated or referred ordinances shall not be held more frequently than once each six (6) months, and no ordinance on the same subject as an initiated ordinance which has been defeated at any election may be initiated by the voters within two (2) years from the date of such election.

§ 5. - BALLOT FORM AND RESULTS OF ELECTION.

The ballot used in voting upon an initiated or referred ordinance shall state the caption of the ordinance and below the caption shall set forth on separate lines the words, "For the Ordinance" and "Against the Ordinance."

Any number of ordinances may be voted on at the same election in accordance with the provisions of this article. If a majority of the votes cast is in favor of a submitted ordinance, it shall thereupon be effective as an ordinance of the city. An ordinance so adopted may be repealed or amended at any time after the expiration of two (2) years by favorable vote of at least three- fourths of the council. A referred ordinance which is not approved by a majority of the votes cast shall be deemed thereupon repealed.

***

ARTICLE X. - PLANNING.

§ 1. - PURPOSE AND INTENT.

It is the purpose and intent of this article that the city council establish comprehensive planning as a continuous and ongoing governmental function in order to promote and strengthen the existing role, processes and powers of the City of Austin to prepare, adopt and implement a comprehensive plan to guide, regulate and manage the future development within the corporate limits and extraterritorial jurisdiction of the city to assure the most appropriate and beneficial use of land, water and other natural resources, consistent with the public interest. Through the process of comprehensive planning and the preparation, adoption and implementation of a comprehensive plan, the city intends to preserve, promote, protect and improve the public health, safety, comfort, order, appearance, convenience and general welfare; prevent the overcrowding of land and avoid undue concentration or diffusion of population or land uses; facilitate the adequate and efficient provision of transportation, water, wastewater, schools, parks, recreational facilities, housing and other facilities and services; and conserve, develop, utilize and protect natural resources.

It is further the intent of this article that the adopted comprehensive plan shall have the legal status set forth herein, and that no public or private development shall be permitted, except in conformity with such adopted comprehensive plan or element or portion thereof, prepared and adopted in conformity with the provisions of this article.

§ 2. - THE PLANNING COMMISSION — ORGANIZATION.

There shall be established a planning commission which shall consist of citizens of the City of Austin who must be registered voters in the city and must have resided within the city for one year next preceding their appointment. The planning commission shall have a number of members equal to the number of members on the council plus two (2) additional members, a minimum of two-thirds of the members who shall be lay members not directly or indirectly connected with real estate and land development. The city manager, the chairperson of the zoning board of adjustment, the director of public works and the president of the board of trustees of the Austin Independent School District shall serve as ex officio members. The members of said commission shall be appointed by the council for a term of two (2) years, five (5) members to be appointed in every odd-numbered year and four (4) members in every even-numbered year. The commission shall elect a chairperson from among its membership and shall meet not less than once each month. Vacancies in an unexpired term shall be filled by the council for the remainder of the term.

§ 3. - DIRECTORS FOR PLANNING, GROWTH MANAGEMENT AND LAND DEVELOPMENT SERVICES.

The city council shall create by ordinance the department or departments necessary to provide technical and administrative support in the areas of planning, growth management and land development, and the director(s) of said department(s) shall be appointed by the city manager.

§ 4. - THE PLANNING COMMISSION — POWERS AND DUTIES.

The planning commission shall:

(1) Review and make recommendations to the council regarding the adoption and implementation of a comprehensive plan (as defined by Section 5 of this article) or element or portion thereof prepared under authorization of the city council and under the direction of the city manager and responsible city planning staff;

(2) After a comprehensive plan or element or portion thereof has been adopted in conformity with this article:

(a) Review and make recommendation to the council on all amendments to the comprehensive plan or element or portion thereof;

(b) Review and make recommendations to the council on all proposals to adopt or amend land development regulations for the purpose of establishing the relationship of such proposal to, and its consistency with, the adopted comprehensive plan or element or portion thereof. For purposes of this article and subsection, "land development regulations" includes zoning, subdivision, building and construction, environmental, and other police power regulations controlling, regulating, or affecting the use or development of land;

(3) Pursuant to ordinances adopted by the council, exercise control over platting and subdividing land within the corporate limits and the extraterritorial jurisdiction of the city to insure the consistency of any such plats or subdivision with the adopted comprehensive plan or element or portion thereof;

(4) Submit annually to the city manager, not less than ninety (90) days prior to the beginning of the budget year, a list of recommended capital improvements, which in the opinion of the commission are necessary or desirable to implement the adopted comprehensive plan or element or portion thereof during the forthcoming five-year period;

(5) Monitor and oversee the effectiveness and status of the comprehensive plan and recommend annually to the council any changes in or amendments to the comprehensive plan as may be desired or required;

(6) Prepare periodic evaluation and appraisal reports on the comprehensive plan, which shall be sent to the council at least once every five (5) years after the adoption of the comprehensive plan or element or portion thereof;

(7) Require information from the city manager relative to its work;

The commission shall be responsible to and act as an advisory body to the council and shall perform such additional duties and exercise such additional powers as may be prescribed by ordinance of the council not inconsistent with the provisions of this Charter.

§ 5. - THE COMPREHENSIVE PLAN.

The council shall adopt by ordinance a comprehensive plan, which shall constitute the master and general plan. The comprehensive plan shall contain the council's policies for growth, development and beautification of the land within the corporate limits and the extraterritorial jurisdiction of the city, or for geographic portions thereof including neighborhood, community or areawide plans. The comprehensive plan shall include the following elements: (1) a future land use element; (2) a traffic circulation and mass transit element; (3) a wastewater, solid waste, drainage and potable water element; (4) a conservation and environmental resources element; (5) a recreation and open space element; (6) a housing element; (7) a public services and facilities element, which shall include but not be limited to a capital improvement program; (8) a public buildings and related facilities element; (9) an economic element for commercial and industrial development and redevelopment; and (10) health and human service element.

The council may also adopt by ordinance other elements as are necessary or desirable to establish and implement policies for growth, development and beautification within the city, its extraterritorial jurisdiction, or for geographic portions thereof, including neighborhood, community, or areawide plans. The council shall provide for financing of all elements contained in the comprehensive plan in accordance with law.

The several elements of the comprehensive plan shall be coordinated and be internally consistent. Each element shall include policy recommendations for its implementation and shall be implemented, in part, by the adoption and enforcement of appropriate land development regulations.

The planning commission shall forward the proposed comprehensive plan or element or portion thereof to the city manager, who shall thereupon submit such plan, or element or portion thereof, to the council with recommendations thereon.

The council may adopt, or adopt with changes or amendments, the proposed comprehensive plan or element or portion thereof, after at least one public hearing. The council shall act on such plan, element or portion thereof, within sixty (60) days following its submission by the city manager. If such plan or element or portion thereof is not adopted by the council, it shall, with policy direction, return such plan or element thereof the planning commission, which may modify such plan or element or portion thereof, and again forward it to the city manager for submission in like manner to the council. Furthermore, all amendments to the comprehensive plan or element or portion thereof recommended by the planning commission shall be forwarded to the city manager and shall be subject to review and adoption in the same manner as for the original adoption of the comprehensive plan as set forth above.

§ 6. - LEGAL EFFECT OF COMPREHENSIVE PLAN.

Upon adoption of a comprehensive plan or element or portion thereof by the city council, all land development regulations including zoning and map, subdivision regulations, roadway plan, all public improvements, public facilities, public utilities projects and all city regulatory actions relating to land use, subdivision and development approval shall be consistent with the comprehensive plan, element or portion thereof as adopted. For purposes of clarity, consistency and facilitation of comprehensive planning and land development process, the various types of local regulations or laws concerning the development of land may be combined in their totality in a single ordinance known as the Land Development Code of the City of Austin.

§ 7. - LEGAL EFFECT OF PRIOR COMPREHENSIVE PLAN.

Any comprehensive plan or element or portion thereof adopted pursuant to the authority of Article X of this Charter or other law, but prior to the effective date of this amendment shall continue to have such force and effect as it had at the date of its adoption and until appropriate action is taken to adopt a new comprehensive plan or element or portion thereof as required and authorized by this amendment.

APPENDIX C

KeyCite Yellow Flag - Negative Treatment
Distinguished by Brown v. Todd, Tex., June 21, 2001

150 Tex. 632
Supreme Court of Texas.

GLASS et al.
v.
SMITH et al.

No. A-3171.
|
Nov. 28, 1951.
|
Rehearing Denied Jan. 16, 1952.

Synopsis

Mandamus proceeding by Taylor Glass, and others, against Steen Smith and others, to compel respondent city officials to call and hold an election for approval of ordinance initiated by citizens of the city of Austin classifying policemen and firemen, fixing their pay and designating holidays. A judgment granting the writ of mandamus entered in the District Court, Travis County, was affirmed by the Austin Court of Civil Appeals, Third Supreme Judicial District, Travis County, 238 S.W.2d 243, and the respond ents brought error. The Supreme Court, Calvert, A. J., held that where subject matter of the proposed ordinance initiated by citizens under initiatory provisions of city charter was legislative in character and had not been withdrawn by general law or the city charter from the operative field of initiative, mandamus would issue to compel city officials to perform their ministerial duty of calling and holding an election for approval of the ordinance as required by the city charter.

Judgment of Court of Civil Appeals affirmed.

Griffin, Smedley, Garwood, and Wilson, JJ., dissented.

West Headnotes (18)

[1] Municipal Corporations
Matters subject to initiative

Right of citizens conferred by city charter, to have initiative election called and held on a proposed ordinance classifying policemen and firemen, fixing their pay and designating holidays, could not be defeated by refusal of city council, city manager and city clerk to perform purely ministerial duties on ground that in their opinion ordinance would be invalid if adopted. Vernon's Ann.Civ.St. art. 1269m; Vernon's Ann.P.C. art. 1583–2; Vernon's Ann.St.Const. art. 3, § 56.

10 Cases that cite this headnote

[2] Mandamus
Calling of election and registration of voters

Where city officials refused to call and hold election, in compliance with initiatory provisions of city charter, on proposed ordinance initiated by citizens classifying policemen and firemen, fixing their pay and designating holidays, on ground that ordinance if adopted would be void, to entitle citizens to writ of mandamus compelling city officials to order and hold election, it would have to appear that subject matter of the proposed ordinance was legislative in character and had not been withdrawn from the field in which the initiatory process is operative. Vernon's Ann.Civ.St. art. 1269m; Vernon's Ann.P.C. art. 1583–2; Vernon's Ann.St.Const. art. 3, § 56.

22 Cases that cite this headnote

[3] Municipal Corporations
Matters subject to initiative

Where citizens of a city exercise their right to initiate an ordinance under initiative provisions of city charter, they are acting as and become in fact the legislative branch of the city, and accordingly the initiative process is limited to legislative matters whether such limitation is expressly provided for in the charter or not.

4 Cases that cite this headnote

[4] Municipal Corporations
Initiative

The field wherein right of citizens of a city to initiate ordinances is operative may be limited by general law. Vernon's Ann.St.Const. art. 11, § 5.

Cases that cite this headnote

[5] **Municipal Corporations**
Initiative

Any rights conferred by or claimed under provisions of a city charter, including right to an initiative election, are subordinate to provisions of general law. Vernon's Ann.St.Const. art. 11, § 5.

1 Cases that cite this headnote

[6] **Municipal Corporations**
Local legislation

The Legislature may withdraw a particular subject from the field in which the right of citizens of a city to initiate an ordinance is operative.

1 Cases that cite this headnote

[7] **Municipal Corporations**
Initiative

Provisions of a city charter may withdraw from citizens of the city the power under initiative provisions to initiate an ordinance dealing with particular subject.

2 Cases that cite this headnote

[8] **Municipal Corporations**
Initiative

Limitation by general law or by city charter of field in which is operative the right of citizens to initiate an ordinance under initiatory provisions of city charter may be either express or implied, but such limitation will not be implied unless provisions of general law or of city charter are clear and compelling to that end.

6 Cases that cite this headnote

[9] **Municipal Corporations**
Initiative

Civil Service Act directing that classification of firemen and policemen shall be provided by ordinance of the city council does not negate the right and power of citizens of city, under initiatory provisions of city charter, to initiate proposed ordinance classifying policemen and firemen, fixing their pay and designating holidays. Vernon's Ann.Civ.St. art. 1269m, § 8.

1 Cases that cite this headnote

[10] **Municipal Corporations**
Powers and functions of council or other governing body

City council in the aldermanic form of municipal government, and city commission in commission form of government, are the primary repositories of municipal legislative powers.

Cases that cite this headnote

[11] **Municipal Corporations**
Eligibility, examination, certification, and qualification

Municipal Corporations
Appointment and promotion of firemen

Public Employment
Particular cases and contexts in general

Public Employment
Manner and Mode of Selection

Civil Service Act directing that the civil service commission shall provide for classification of all firemen and policemen, and that such classification shall be provided by ordinance of the city council, only requires commission to act in aid of city council in creation of classifications to be embraced in a classification ordinance, and does not confer exclusive power on commission to create classifications. Vernon's Ann.Civ.St. art. 1269m, §§ 8, 12.

Cases that cite this headnote

[12] **Municipal Corporations**
Initiative

Civil Service Act directing that the civil service commission shall provide for classification of all firemen and policemen, and that such classification shall be provided by ordinance of the city council, is not a limitation on the right of citizens of a city, under initiatory provisions of city charter, to initiate ordinance classifying policemen and firemen, fixing their pay and designating holidays. Vernon's Ann.Civ.St. art. 1269m, §§ 8, 12.

Cases that cite this headnote

[13] **Municipal Corporations**
Initiative

Municipal Corporations
Eligibility, examination, certification, and qualification

Municipal Corporations
Appointment and promotion of firemen

Public Employment
Particular cases and contexts in general

Public Employment
Authority to regulate

Statute providing that classifications and salary scales should be set up by all municipal governments within 30 days after effective date of the act, does not confer exclusive power upon city council to classify firemen and policemen and is not a limitation on power of citizens of city, under initiatory provisions of city charter, to initiate proposed ordinance classifying policemen and firemen, fixing their pay and designating holidays. Vernon's Ann.P.C. art. 1583–2.

5 Cases that cite this headnote

[14] **Municipal Corporations**
Special charters or acts

A city charter is to be read as a whole and its various provisions harmonized as far as possible.

1 Cases that cite this headnote

[15] **Municipal Corporations**
Initiative

Initiatory provisions of a city charter giving the citizens right to initiate ordinances, should be liberally construed in favor of the power of initiative reserved in the people.

9 Cases that cite this headnote

[16] **Municipal Corporations**
Initiative

Provisions of city charter vesting in city council power to control departmental organization, to manage fiscal affairs and fix wages and salaries of officers and employees, and vesting city council with power and duty of adopting all laws and ordinances, did not confer on city council exclusive power to classify policemen and firemen and were not a limitation on right of citizens, under initiatory provisions of city charter, to initiate proposed ordinance classifying policemen and firemen, fixing pay and designating holidays.

1 Cases that cite this headnote

[17] **Municipal Corporations**
Initiative procedure

When citizens of a city exercise their rights and powers under the initiative provisions of city charter and thereby become legislative branch of the city government, members of the city council, like other city officials and employees, become ministerial officers in the legislative process, burdened with mandatory obligation of performing duties imposed upon them incidental to carrying out initiative procedure.

6 Cases that cite this headnote

[18] **Mandamus**

Calling of election and registration of voters

Where subject matter of proposed ordinance which classified policemen and firemen, fixed their pay and designated holidays, and which was initiated by citizens under initiatory provisions of city charter, was legislative in character and was not withdrawn from field in which the initiatory process is operative either by general law or the charter itself, mandamus would issue to compel city council, city manager and city clerk to call and hold election for approval of ordinance as required by city charter. Vernon's Ann.Civ.St. art. 1269m, §§ 8, 12; Vernon's Ann.P.C. art. 1583–2, § 3; Vernon's Ann.Civ.St.Const. art. 3, § 56, art. 11, § 5.

15 Cases that cite this headnote

Attorneys and Law Firms

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***634** Cofer & Cofer, Austin, for respondents.

Opinion

CALVERT, Justice.

This case involves the right of respondents (six members of the Fire Department of the City of Austin who are also signers of an initiative petition) to a writ of mandamus to compel petitioners (the City Council, City Manager and City Clerk of the City of Austin) to perform certain duties prescribed by the charter of the City of Austin in the calling and holding of an election for approval or rejection by the qualified voters of the City of Austin of a proposed ordinance classifying policemen and firemen, fixing their pay, designating certain holidays, etc. The full text of the proposed ordinance is set out in the opinion of the Court of Civil Appeals and need not be repeated here.

The trial court granted the writ of mandamus as prayed for by respondents and that judgment was affirmed by the Court of Civil Appeals. 238 S.W.2d 243.

The proposed ordinance was initiated by a requisite number of citizens of the City of Austin under the provisions of Article IX of the Charter of the City of Austin. Section 1 of Article IX provides that 'The citizens of the City of Austin may propose and submit to the City Council ordinances * * *' by petition with 'a request that the same be enacted into law by the Council.' The section then directs that 'the Council shall either (a) pass the ordinance set out in said petition without alteration within ten days * * * or (b) submit the same to a vote of the qualified voters of the City at a special election to be called for that purpose within forty days * * *.' Section 2 provides for publication of the proposed ordinance by the City Clerk.

***635** It is conceded by petitioners that all procedural requirements for submission of the proposed ordinance have been met and no objection is made to its form. Refusal of petitioners to comply with the mandatory provisions of the Charter for the calling and holding of the election is based upon their contentions that the subject matter of the proposed ordinance is not legislative in character, and that the ordinance, if adopted, would be void. It follows, they contend, that the calling and holding of the election would be a vain and useless procedure and that a court of equity should not and will not issue a writ of mandamus to compel the performance of a vain and useless act.

Petitioners assign several reasons for their view that the proposed ordinance ****648** would be invalid. They may fairly be summarized as follows: (1) Because the proposed ordinance is in conflict with Article 1269m, Vernon's Annotated Civil Statutes, (Acts 1947, 50th Leg., p. 550, ch. 325 as amended by Acts 1949, 51st Leg., p. 1114, ch. 572 s 6,) in that whereas the proposed ordinance permits the electorate to create and provide classifications of firemen and policemen Article 1269m confers that power upon the Civil Service Commission and the City Council exclusively. (2) Because the proposed ordinance is in conflict with Article 1583-2, Vernon's Annotated Penal Code, in that that article also vests in the City Council exclusively power to set up the proposed classifications; (3) Because the Charter of the City of Austin vests in the City Council exclusively authority to deal with the subject matter of the proposed ordinance; (4) Because the proposed classifications are set up on a basis contrary to the requirements and provisions of Article 1269m; (5) Because the proposed ordinance is based upon a legislative

act which is itself void because violative of Article III, Section 56 of the Constitution of Texas, Vernon's Ann.St.

With these questions before it the Court of Civil Appeals concluded that the subject matter of the proposed ordinance was legislative in character, and, having so held, then refused, on authority of City of Austin v. Thompson, 147 Tex. 639, 219 S.W.2d 57 and City of Dallas v. Dallas Consolidated Electric Street Railway Co., 105 Tex. 337, 148 S.W. 292, to consider or pass upon any of the other questions touching the validity of the ordinance. The City of Austin and City of Dallas cases were cases in which this Court held that writs of injunction would not issue to restrain the holding of void elections duly called by those charged with the duty and responsibility of calling and holding elections. A like holding was made by the Commission of Appeals in the case of ***636** Winder v. King, Tex.Com.App., 1 S.W.2d 587. The basis of the decisions in the City of Austin and the Winder cases was that the courts will not interfere with the exercise by the people of their political right to hold elections. The same idea was involved in the decision in the City of Dallas case but that decision involved also another theory to be noticed later at greater length.

After referring to the City of Austin and the City of Dallas cases, the Court of Civil Appeals in the instant case said that 'as a corollary to the rule of nonjudicial interference with elections the courts are duty bound to prevent all interference with the political power of the people.' (238 S.W.2d 249) It was in keeping with this pronouncement that the Court of Civil Appeals held that the writ of mandamus would issue irrespective of the possible invalidity of the proposed ordinance. Petitioners vigorously attack this holding of the Court of Civil Appeals.

[1] **[2]** While we do not agree with the full import of the rule announced by the Court of Civil Appeals, we do agree with its conclusion that respondents being otherwise entitled to have the initiative election called and held, cannot be defeated in that right by the refusal of petitioners to perform purely ministerial duties on the ground that in their opinion the ordinance would be invalid if adopted. We believe also that to determine whether respondents are otherwise entitled to have the election called and held the court's inquiry should be on a broader basis than that established by the opinion of the Court of Civil Appeals. As heretofore indicated, the inquiry of the Court of Civil Appeals extended only to a determination of whether the subject matter of the ordinance was legislative in character. But to entitle respondents to a writ of mandamus on the ground that they have a legal right to have the election called and held and that petitioners are under a legal duty to order and to hold it, it is not enough that the subject matter of the proposed ordinance be legislative in character but 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.

[3] **[4]** **[5]** **[6]** **[7]** **[8]** In the case of Taxpayers' Ass'n of Harris County v. City of Houston, 129 Tex. 627, 105 S.W.2d 655, 657, this Court said that 'the power of initiative and referendum * * * is the exercise by the ****649** 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.' Even so, the field in which the initiatory process is operative is not unlimited. It is ***637** first limited by the very nature of the proceeding. When the people exercise their rights and powers under the initiative provisions of a city charter they are acting as and become in fact the legislative branch of the municipal government. Accordingly, city charters frequently expressly limit the right of initiative to legislative matters. But even though a charter contains no such express limitation-and there is none in the Charter of the City of Austin-the limitation is usually read into the charter by the courts. Southwestern Telephone & Telegraph Co. v. City of Dallas, 104 Tex. 114, 134 S.W. 321; Denman v. Quin, Tex.Civ.App., 116 S.W.2d 783 (writ ref.); McQuillen on Municipal Corporations, 3rd Ed., Vol. 5, p. 253, Sec. 16.55. The field where the initiatory process is operative may also be limited by general law. Article XI, Section 5 of our Constitution provides that no city charter shall contain any provision inconsistent with the general laws of this state. Any rights conferred by or claimed under the provisions of a city charter, including the right to an initiative election, are subordinate to the provisions of the general law. It follows that the Legislature may by general law withdraw a particular subject from the field in which the initiatory process is operative. Again, the field may be limited by the city charter itself. Other provisions of the charter may withdraw from the people the power under the initiative provisions to deal with a particular subject. The limitation by the general law or by the charter of the field in which the initiatory process is operative may be either an express limitation or

one arising by implication. Such a limitation will not be implied, however, unless the provisions of the general law or of the charter are clear and compelling to that end.

From what has been said it follows that we must first determine whether the initiative election sought by respondents is within the field in which the initiatory process is operative and therefore one which they have a legal right to have held. That the scope of our inquiry should be thus extended is indicated by the opinion of this Court in the case of Dallas Ry. Co. v. Geller, 114 Tex. 484, 271 S.W. 1106, and that the Court is justified in extending in this far and no further is indicated by the opinion of the Supreme Court of Massachusetts in the case of Bowe v. Secretary of the Commonwealth of Massachusetts, 320 Mass. 230, 69 N.E.2d 115, 167 A.L.R. 1447. In the Geller case this Court held that the referendum provisions of the charter of the City of Dallas did not apply to an ordinance authorizing a change of street railway rates. Referring to the provisions of the charter providing for a fair hearing, inspection ***638** of books, attendance of witnesses, etc., preliminary to the passage of a rate ordinance, the court said: 'we think it clear that the charter provisions themselves reserve from referendum the fixing and regulating of the schedule of rates.' (114 Tex. 484, 271 S.W. 1107.) In the Bowe case it appears that the Constitution of Massachusetts provided for popular initiative on a state level, but the very constitutional provision authorizing the initiative limited that right by providing that no proposition inconsistent with the individual's right to freedom of the press, freedom of speech, freedom of elections, and the right of peaceable assembly should be the subject of initiative or referendum petitions. Initiative proposals to regulate certain activities of labor unions were attacked on various grounds, among them that the proposed laws would violate the Fourteenth Amendment to the Constitution of the United States with respect to the equal protection of the laws and other provisions of the federal and state Constitutions, and also that they would violate the plaintiffs' right to freedom of speech, freedom of the press, peaceable assembly, etc. The Massachusetts Court declined to decide in advance the substantive validity questions but held that it not only could but should decide in advance whether the subject matter of the proposals had been reserved from initiative procedure, saying:

****650** 'We think that the question whether an initiative provision relates to an excluded matter is a justiciable question.' (69 N.E.2d 128, 167 A.L.R. 1447.) From these cases it will appear that the theory upon which we proceed in this case in deciding some of the questions challenging the validity of the proposed ordinance and in refusing to decide others is no new or novel theory or approach to those questions.

We agree with the conclusion of the Court of Civil Appeals that the subject matter of the proposed ordinance is legislative in character. This seems to us to be settled by the opinion of this Court in the case of Taxpayers' Ass'n of Harris County v. City of Houston, 129 Tex. 627, 105 S.W.2d 655. The fact that the proposed ordinance involved in that case fixed only minimum salaries whereas the proposed ordinance here sets up a fixed scale of salaries renders the proposal here nonetheless legislative in character. See McQuillen on Municipal Corporations, 3rd Edition, Vol. 5, s 16.57, pp. 262 and 263, and the cases there cited. The other matters included in the proposed ordinance-classification of firemen and policemen, providing for overtime, setting holidays, etc.-certainly are the general type of matters defined as legislative by the court in the case of Denman v. Quin, Tex.Civ.App., 116 S.W.2d 783 (writ ref.).

***639** Has the subject matter of the proposed ordinance been withdrawn, expressly or by necessary implication, by either the general law or the city charter, from the field in which the initiatory process is operative? Petitioners do not contend that there is any general law or any provision of the Austin City Charter expressly providing that ordinances of the type here involved may not be adopted by the people at an initiative election, but they do contend that both the general law and the charter confer on the city council exclusively the authority to pass ordinances dealing with the subject matter of this ordinance. If this contention is correct, it follows that by necessary implication the subject matter of the ordinance has been withdrawn from the field in which the initiatory process is operative.

As the basis of their contention that authority to deal with the matter here involved is conferred by general law upon the Civil Service Commission and the City Council exclusively, petitioners refer us to Sections 8 and 12 of Article 1269m, V.A.C.S., and Section 3 of the Article 1583-2, V.A.P.C. In neither of these articles of the statutes is authority to deal with the matters involved expressly conferred exclusively upon the Civil Service Commission and the city council.

Article 1269m, Vernon's Annotated Civil Statutes, is a Civil Service Act for firemen and policemen. Sections 8 and 12 are the only sections of the Act which deal with the creation of classifications. Section 8 in part provides: 'The Commission (Civil Service Commission) shall provide for the classification of all firemen and policemen. Such classification shall be provided by ordinance of the City Council, or legislative body * * *'. The following provisions appear in Section 12: 'All positions in the Fire Department, except that of Chief or head of the Department, and in the Police Department, except that of Chief or head of that Department, shall be classified by the Commission and the positions filled from the eligibility lists as provided herein. All offices and positions in the Fire Department or Police Department shall be established by ordinance of the City Council or governing body * * *'.

In reality petitioners' contention suggests two inquiries, viz.: (1) Did the Legislature, by providing that classification should 'be provided by ordinance of the City Council, or legislative body', intend to imply that the power to pass such an ordinance was reserved or withdrawn from the initiative process and was vested exclusively in the City Council? and (2) Did the legislature, by providing that the Civil Service Commission should 'provide for the classification of all firemen ***640** and policemen', intend to limit the power of the City Council so that it was authorized to include in a classification ordinance only the classification created and provided by the Civil Service Commission?

****651** **[9]** The legislative direction that classification 'shall be provided by ordinance of the City Council', does not negate the right and power of the people to pass the classification ordinance. The legislature's use of the words 'City Council, or legislative body' is simple of explanation. All legislative powers conferred by statute on municipalities in this state are conferred on the 'City Council' or 'City Commission'. It is to be doubted that there exists anywhere in our statutes a provision that a given legislative power of a municipality may be exercised 'by the people' or 'through the initiative'. If it were held that legislative powers could not be exercised by the people through the initiative in all cases in which the statutes provide that they shall be exercised by the 'City Council', the people would be shorn of all right to exercise any of the statutory powers conferred on municipal governments and the initiative would become an empty symbol. There can be no right or power existing in the people of Austin to adopt an ordinance through the initiative process if the power to adopt it is not lodged in the City Council in the first instance. Before the right to an initiative election under the Austin City Charter exists, an opportunity to pass the proposed ordinance must have been afforded the City Council and the City Council must have declined to pass it. The charter contemplates that the people's right to initiate an ordinance exists only where the council has been given the power to pass the ordinance. Moreover, Article 1269m confers upon the City Council other powers and duties such as the duty to confirm the appointment of Civil Service Commissioners, the fixing of the salary of the Director, the confirmation of the appointment of Fire and Police Chiefs, making provision for office space, extending leaves of absence for injuries, and establishing and abolishing offices and positions, but of these only the power to classify and the power to create and abolish offices and positions are directed by the Legislature to be exercised by ordinance. The Legislature itself recognized the subject matter of classification to be legislative in character and it did not by any language used in the Act clearly imply that the people should not have the right to deal with the subject matter through the initiative.

Adverting now to the claim that the Act confers the power ***641** to create classifications upon the Civil Service Commission exclusively. It is the language quoted from Section 8 and not that quoted from Section 12 of the Act that empowers the Civil Service Commission to 'provide for' classification of firemen and policemen. The language quoted from Section 12 simply directs how the power to classify shall be exercised. It adds nothing to the power conferred by Section 8. If the language of Section 8 is held to vest in the Commission exclusively the power to create classifications it necessarily follows that it must also be held to be a limitation on the power of the City Council to act independently in the enactment of a classification ordinance. If Commission action in creating the classifications is a necessary prerequisite to passage by the Council of a classification ordinance, there can be no doubt but that the matter is, by necessary implication, withdrawn from the initiative field for the limitation thus imposed on the power of the Council would exist also on the power of the people. This would be true because there is no place in the initiative procedure for creation of the classifications by the Commission. It becomes important, therefore, to determine whether the Legislature intended that the power of the City Council to pass a classification

ordinance should be limited to the passage of an ordinance prepared by the Civil Service Commission.

[10] **[11]** **[12]** It is not to be doubted that in the absence of constitutional inhibition (and we know of none here) the Legislature could have conferred classification power upon the Civil Service Commission exclusively. Since, however, the Legislature itself declared that classifications should be provided by ordinance of the City Council, we cannot look with favor on the view that the Legislature intended at the same time to strip the Council of all discretion in the creation of classifications. The Legislature could have provided for the creation of classifications by the Commission by rule or resolution, obviating any necessity for action by the Council. It could have provided ****652** simply that the power to create classifications should be exercised 'only' or 'exclusively' by the Commission. That it did not do so is significant. The City Council in the aldermanic form of municipal government and the City Commission in the Commission form of government has always been the primary repository of municipal legislative powers in this state. If the legislature had intended that the Civil Service Commission should supplant the City Council in the exercise of any legislative power it could and should have made that intent known in clear and unmistakable language. Civil Service Commissions are usually regarded as administrative agencies exercising only ***642** purely administrative powers. It has been said that 'The fact that the commission (Civil Service Commission) is authorized by statute to make rules does not authorize it to divest the city council of its legal rights as governing body of the city'. Jazwinski v. City of Milwaukee, 253 Wis. 17, 33 S.W.2d 224, 226. If it were held that the Act invests the Commission exclusively with power to create classifications its failure to act would deprive the Council of the power to act and would deprive those entitled thereto of the benefits under the Act. To so hold would also be to deny to the Council the power before passing an ordinance prepared by the Commission to change or alter the classifications in any materials respect. These things argue against a holding that the language of Section 8 vests the power to create classifications in the Commission exclusively. We hold that the language of Section 8 of the Act simply requires the Commission to act in aid in the City Council in the creation of classifications to be embraced in a classification ordinance. So concluding, we hold further that the language of Section 8 is not a limitation on the power to pass a classification ordinance and does not withdraw the subject matter of such an ordinance from the operative field of the initiative.

[13] What has been said disposes of the contention that Article 1583-2, V.A.P.C. confers upon the City Council exclusively power to classify firemen and policemen by its provision that classifications and salary scales should be set up by all 'municipal governments' within thirty days after the effective date of the act.

[14] **[15]** **[16]** The charter provisions to which we are referred as conferring exclusively on the city council authority to deal with the subject matter of this ordinance are those which vest in the city council power to control departmental organization, to manage the fiscal affairs of the city and to fix wages are salaries of officers and employees. The particular provisions are no different in their wording from the many other charter provisions which confer certain powers or imposed certain duties on the city council. There are dozens of such provisions in the charter. In addition to the many separate provisions, Section 1 of Article XI of the Charter reads as follows: 'The City Council shall be vested with the power and charged with the duty of adopting all laws and ordinances not inconsistent with the Constitution and laws of the State of Texas, touching every object, matter and subject within the purview of the local self-government conferred by this act upon the citizens of the ***643** City of Austin.' If the mere fact that a particular provision directs that the City Council exercise a particular legislative power were held to exclude the right of the people to exercise the same power, it might well be argued that Section 1 of Article XI of the Charter completely nullifies the initiative provision of the Charter. Of course it does not. The Charter is to be read as a whole and its various provisions harmonized as far as possible, Dallas Ry. Co. v. Geller, 114 Tex. 484, 271 S.W. 1106, 1108, keeping in mind the rule laid down in the City of Houston case that the provisions should be liberally construed in favor of the power of initiative reserved in the people. Having held that the subject matter of the proposed ordinance is legislative in character and therefore normally subject to the initiatory process we would not hold that it was withdrawn from that field and placed within the exclusive jurisdiction of the City Council by the Charter unless we were driven to that result by express provision of the Charter or by clear and necessary implication of other Charter provisions. We find no such impelling provisions ****653** or language in this Charter. Cited by petitioners for a contrary holding is the case of

McElroy v. Hartsfield, 185 Ga. 264, 194 S.E. 737. That case was decided by a divided court and the reasoning of the majority was rejected by this Court in the City of Houston case. We do not choose to follow the majority opinion in the McElroy case.

In all the Texas cases called to our attention in which it has been held that the people of a municipality could not validly exercise a delegated legislative power through initiative proceedings, it will be found that authority to act was expressly conferred upon the municipal governing body exclusively, or there was some preliminary duty such as the holding of hearings, etc., impossible of performance by the people in an initiative proceeding, by statute or charter made a prerequisite to the exercise of the legislative power. Into this class fall the cases of McCutcheon v. Wozencraft, 116 Tex. 440, 294 S.W. 1105; Southwestern Telegraph & Telephone Co. v. City of Dallas, 104 Tex. 114, 134 S.W. 321; Lindsley v. Dallas Consolidated St.Ry. Co., Tex.Civ.App., 200 S.W. 207; Dallas Ry. Co. v. Geller, 114 Tex. 484, 271 S.W. 1106; Denman v. Quin, Tex.Civ.App., 116 S.W.2d 783 (writ ref.). There is no such impediment presented by the statute or charter in the passage by the people of the proposed ordinance involved in this case.

What we have said disposes of all the reasons assigned by petitioners for contending that the proposed ordinance if ***644** adopted would nevertheless be invalid except those shown as Numbers (4) and (5) in the first part of this opinion. These contentions present questions which we do not reach and will not determine at the time. It may be added, in passing, that the contention that Article 1269m is void because it is a local or special law passed in violation of Article III, Section 56 of the Constitution, was directly before this Court in the case of Fire Department of the City of Ft. Worth v. City of Ft. Worth, 147 Tex. 505, 217 S.W.2d 664, and although the Court did not write on the question the contention was necessarily overruled when the Court declared the act constitutional.

[17] **[18]** Since the subject matter of the proposed ordinance is legislative in character and neither the general law nor the City Charter of the City of Austin has withdrawn from the people the right to deal with the subject matter thereof under the initiative provisions of the Charter, it follows that the respondents are undertaking to exercise only such rights as are legally theirs. When the people exercise their rights and powers under the initiative provisions of a city charter and thereby become the legislative branch of the city government, the members of the City Council, like other city officials and employees, become ministerial officers in the legislative process, burdened with the mandatory obligation of performing the duties imposed upon them incidental to carrying out the initiative procedure. There is nothing in the charter that qualifies the mandatory duty of petitioners in the calling and holding of initiative elections so that they may decline to hold those which in their opinion might result in the adoption of void ordinances. Furthermore, the duty to call and hold the election is one imposed by the charter in order that the legislative machinery of the city may function to the full extent of its intendment. It was this phase of the factual background that appears to have been chiefly responsible for the refusal of this Court to issue a writ of injunction in the case of City of Dallas v. Dallas Consolidated Electric Street Ry. Co., supra, to prevent the canvass of the votes cast in an initiative election. The opinion of the Court in that case, much of which is quoted in the opinion of the Court of Civil Appeals in this case, clearly points out that there 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 them 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 ***654** reasons which prompt judicial non-interference with the legislative process should compel the ***645** courts in proper cases to prevent interference by others with that process.

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. Once the people have properly invoked their right to act legislatively under valid initiative provisions of a city charter and the subject matter of the proposed ordinance is legislative in character and has not been withdrawn or excluded by general law or the charter, either expressly or by necessary implication, from the operative field of initiative, members of the City Council and other municipal officers should be compelled by the courts 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. The Charter of the City of Austin requires the publication of penal ordinances by the City Clerk before they may become effective. If the City Council should pass a penal ordinance, can it be thought that the courts would stand idly by and permit the City Clerk to interrupt the legislative process by refusing to publish the ordinance because he thought in invalid? We think not. If the courts will compel ministerial officers to act to complete the legislative process when the City Council acts as the legislative body of the City they ought also to act to compel ministerial officers to complete that process when the people act as the legislative branch of the municipal government.

The Texas cases relied upon by petitioners for their contention that all questions touching the validity of the proposed ordinance ought to be adjudicated in this proceeding and the writ of mandamus refused if the ordinance be found to be invalid are McCutcheon v. Wozencraft, 116 Tex. 440, 294 S.W. 1105; Holman v. Pabst, Tex.Civ.App., 27 S.W.2d 340 (writ ref.) and McCarty v. Jarvis, Tex.Civ.App., 96 S.W.2d 564 (writ dism.).

The McCutcheon case has already been mentioned in this opinion. In that case this Court refused the issuance of a writ of mandamus to compel officials of the City of Dallas to call and hold an initiatory election so that the electorate of the City of Dallas might vote on a proposed ordinance granting to a bus company a franchise to use city streets. The proposed franchise ***646** had been refused by the City Commission before the initiative petition was filed. A reading of the opinion of the court will reflect that a general law expressly conferred upon the City Council exclusively the authority to pass the ordinance, thereby by necessary implication withdrawing the matter from the field in which the initiatory process was operative. Moreover, the general law expressly provided for a referendum vote on such ordinances only when the City Commission had voted to grant the franchise, here again by necessary implication withdrawing the right to a vote when the franchise was refused by the City Commission. The opinion in the McCutcheon case is in complete harmony with the rule we have announced in this case.

The case of Holman v. Pabst is also in harmony with and not contrary to the rule we have announced. That case did not involve the legislative powers of the people under the initiative provisions of a city charter but it did involve their legislative powers in a local option election. In that case the Commissioners Court refused to call and hold a local option stock election of the ground that the law providing for the election was invalid. The Galveston Court of Civil Appeals, in an opinion approved by this Court through the refusal of a writ of error, held void the act imposing the duty to call and hold the election and refused to require the holding thereof. In other words, there was no valid law imposing any ministerial duty on the officials.

****655** In the case of McCarty v. Jarvis three distinct questions were decided by the Ft. Worth Court of Civil Appeals, one of which was identical with the question here. By dismissing an application for writ of error this Court declined to place its full approval on all the holdings there made. The case therefore has no precedential value on the question involved here, and in so far as the holding in the McCarty case is in conflict with our holding in this case, the McCarty case is overruled.

In addition to the Texas cases here reviewed both parties cite a number of cases from other states. We see no need to review these cases.

The judgment of the Court of Civil Appeals is affirmed.

SMEDLEY, GARWOOD, GRIFFIN and WILSON, JJ., dissenting.

GRIFFIN, Justice (dissenting).

***647** I cannot agree with the majority opinion because I think the proposed ordinance is in conflict with the Firemen's and Policemen's Civil Service Act of 1947, as amended by Acts of the 52nd Legislature, 1949, and Article 1583-2, Vernon's Annotated Penal Code. I think the Legislature intended to make the civil service system, provided by the above acts, exclusive. I believe that these acts limit the authority to classify the positions held by firemen and policemen exclusively to the Civil Service Commission whose acts shall be carried forward by ordinances passed by the city council or other governing body of a city which has adopted the Civil Service Act of 1947 and 1949. It is admitted that the City of Austin has, by popular vote, adopted said acts.

The caption to Acts, 50th Leg., Reg.Sess., 1947, p. 550, states that it is 'creating a Firemen's and Policemen's Civil Service in cities having a population of ten thousand

(10,000) inhabitants or more', and 'providing for the civil service classification of Firemen and Policemen'. The caption to S. B. 71, Acts, 51st Leg., Reg.Sess., 1949, p. 1114 amending the original Civil Service Act for Firemen and Policemen, among other things, provides: '* * * requiring and regulating competitive examinations and classification of applicants for classification adn employment as firemen or policemen; * * *' Section 1 of the Act establishes, in certain cities named therein, 'a Firemen's and Policemen's Civil Service.' The wording of the last two paragraphs of Section 3 of the Act clearly shows that the Legislature intended this Act to be exclusive as to civil service benefits for firemen and policemen. The next to the last paragraph of Section 3 states that in those cities having in existence at the time of the passage of the Act, a civil service commission, such commission shall serve for this Act and that the 'said Commissioner shall administer the Civil Service of Firemen and Policemen in accordance with this law.' The last paragraph provides for the appointment of successors to a Civil Service Commission existing at the date of the passage of the Act in such manner 'as will cause a staggered or rotating system of terms to conform with the provisions of this Act.' This language, to my mind, can have no other meaning than that the Legislature, by the passage of the Act, intended to vest exclusive control of the Firemen's and Policemen's Civil Service in agencies set out in the Act, to the exclusion of all others.

To the same effect is the language of the last sentence of Section 6, wherein it is stated that any existing Director of Civil Service 'shall be the Director of the Firemen's and Policemen's ***648** Civil Service, but he shall administer civil service pertaining to Firemen and Policemen in accordance with this Law.' In Section 9, which has to do with the powers and duties of the Commission with reference to examinations for original appointment or promotion, it is said: '* * * The age and physical requirements shall be set by the Commission in accordance with provisions of this law and shall be the same for all applicants. * * *' Again, the last part of the second sentence of Section 12, which deals with probationary and fullfledged firemen and policemen, states: '* * * to discharge all Firemen and Policemen whose appointments were not regular, or not made in compliance with the provisions of this Act, or of the rules or regulations of the Commission, * * *' (When italics ****656** are hereafter shown, we have added same.)

The last sentence of the first paragraph of Section 12 of the Act is as follows: 'All positions in the Fire Department, except that of Chief or head of the Department, and in the Police Department, except that of Chief or head of that Department, shall be classified by the Commission and the positions filled from the eligibility lists as provided herein.'

The last sentence of the first paragraph, Section 14, Subd. D, states: 'No person shall be eligible for promotion unless he has served in such Department for at least two (2) years immediately preceding the date of such promotional examination in the next lower position or other positions specified by the Commission * * *.'

Section 14 deals generally with the powers and duties of the Commission over promotions, and examinations of candidates for positions, or promotion, and eligibility lists for filling vacancies by appointment and promotion. All these powers and duties are given to the Commission in such language that it seems to me no logical contention could be made that such powers and duties could be exercised by the people through an initiative and referendum election; but all such powers and duties are vested exclusively in the Commission. Respondents admit that exclusive powers over the administrative actions in connection with the establishment of a civil service system are vested in the agencies created and described by the Legislature in the Act. I cannot read the Act and find any difference in the language used by the Legislature with regard to the legislative duties in connection with establishing a civil service system, and in regard to the administrative duties. When the Act says it 'shall supersede all other civil service pertaining to Firemen and Policemen in the cities covered hereby', it does not exclude ***649** legislative actions to be taken, but by plain and express language it supersedes 'all other civil service', etc. Not having excluded legislative action from the terms of the Act, I do not see how it can be contended, with any degree of logic, that the Legislature did not mean what it said, to wit: to 'supersede all other civil service', etc. I do not see how the Legislature could have more clearly and plainly expressed its direction that this Act should be the exclusive and only law governing Civil Service.

The last subdivision of such Section 14 is as follows: 'G. In the event any new classification is established either by name or by increase of salary, the same shall be filled by competitive examination in accordance with this law.' To

my mind, this can mean only that the classification can be established wholly, solely and only by the Commission.

The provisions of Section 8 of the Act are specific that 'The Commission (meaning the Civil Service Commission) shall provide for the classification of all Firemen and Policemen. Such classification shall be provided by ordinance of the City Council, or legislative body. Said City Council, or legislative body, shall prescribe by ordinance, the number of positions of each classification.' This section clearly prevents the 'City Council, or legislative body' from making classifications as an original proposition, but confines the City Council to passing ordinances to carry into effect the classifications made by the Commission. It is admitted by the majority that if the Act prevents classifications by the City Council, it would also prohibit classifications by initiative and referendum. To my mind, one has only to read the Act, keeping in mind the purpose of the Legislature when passing it, to see clearly that the City Council cannot, as an original proposition, make classifications of the jobs and positions involved.

According to Webster's New International Dictionary, 2nd Ed., 'provide' as a transitive verb means: '2. To look out for in advance; to procure beforehand; to prepare. 3. To supply for use; afford; contribute; yield. 4. To furnish; supply; stock.' Also as an intransitive verb: '1. To take precautionary measures in view of a probable or possible need; to make provision. 2. To make proviso. 3. To make ready; to prepare for the future.'

Section 23 sets out that 'The Commission shall cause to be bublished all rules and regulations which may be promulgated by ****657** it, shall publish classification and seniority lists for each Department, and such rules and regulations and lists shall be made available upon demand.' Finally, and in my opinion, to ***650** put the cap stone on the proposition that classification shall be exclusively by the Commission, through ordinance of the City Council, or other governing or legislative body, the first sentence of Section 28 provides: 'This Act shall supersede all other civil service pertaining to Firemen and Policemen in the cities covered hereby.' This sentence was contained in the original 1947 act, and when that act was amended in 1949 for the express purpose of clarifying the original act, this particular sentence was left unchanged. Therefore, the provisions of the Act are exclusive and only the Commission can classify positions, and this classification is to be effective through an ordinance of the City Council or other governing body of the city.

In addition to the detailed provisions of the Civil Service Act above referred to which clearly evidence the intention on the part of the Legislature to confer by the Act exclusive authority upon the Civil Service Commission and the City Council to deal with the subject matter of the proposed ordinance; namely, the classification of the Firemen and Policemen employed by the City, the purpose and scope of the Act as a whole are such that it must necessarily be given that construction.

The Act sets up an elaborate Firemen's and Policemen's Civil Service, creates a Commission with full authority to administer the civil service in accordance with the provisions of the Act, authorizes the Civil Service Commission to provide for the classification of all Firemen and Policemen, requires the City Council to provide by ordinance for the classification so set up by and eligibility lists on the basis of the examination and eligibility lests on the basis of the examination for appointment and for promotion, provides for probationary periods of service as a condition to the enjoyment of full civil service protection, sets out methods of promotions which are made from eligibility lists and to those having the highest grades on the eligibility lists, which promotions necessarily are incidents to and a part of the classification, gives power of indefinite suspension but makes that subject to appeal to the Commission with hearing, and with the right of appeal to District Court, makes provision for demotion and disciplinary action, etc. The Act plainly, by reason of the above mentioned provisions, is intended to give full civil service benefits and protection to Firemen and Policemen and to assure them, after examination proving their fitness, employment and protection with consequent higher classification and compensation. In so doing the Act gives the Firemen and Policemen security and permanency of employment and opportunity for promotion in accordance with the carefully ***651** planned civil service set up by the Act. That kind of civil service cannot be effective unless it has permanency. Change from time to time in the classification of the Firemen and Policemen by ordinance initiated by petition and submitted to the voters of the City would be destructive of the whole elaborate plan set up by the Act, particularly in that it would destroy the permanency of the plan and would deprive Policemen and Firemen of classification that they had attained and earned in the systematic operation of the Act. Without

permanency the Act cannot perform a useful service, and to give permanency it must be construed as exclusive in so far as classification of Firemen and Policemen is concerned.

It may be observed that denial to the voters of the City of a right by the initiative process to change the provisions of the Civil Service Act with respect to classification of Firemen and Policemen is not contradictory of government by the people. The Civil Service Act is a general law, but it became effective in Austin, as the Act provides, only when the majority of the people voting at an election determined that the provisions of the Act should be adopted. The voters were free to reject the adoption of the Act and to leave the classification of Firemen and Policemen to another means or method, but when they adopted the Act, which is an elaborate general law, effective only if given at least a degree of permanency, they made the provisions ****658** of the act a general law applicable to the City and its provisions were not subject to change except by repeal at an election which could be called only after the Act had been in effect in the City for a period of five years. See Section 27(b) of the Act.

Further, the proposed ordinance conflicts with Article 1583-2, Section 3, Penal Code, as follows: The provision of the charter of the City of Austin, under which the election is sought to be held, provides that upon the presentation of a proper petition submitting to the City Council a proposed ordinance, the Council shall (a) pass the ordinance set out without alteration within ten days after date of clerk's certificate of sufficiency; or (b) submit the same to the qualified voters within forty days from the date of said certificate, unless there is a general municipal election within 90 days thereafter, in which event the proposed ordinance without alteration therein, shall be submitted at such general election. Article 1583-2, Section 3, Penal Code, provides 'that all municipal governments affected by this Act shall, within thirty (30) days following enactment, set up classifications in Police and Fire Departments * * *.' To follow the charter provision would be to violate the quoted part ***652** of Article 1583-2, Penal Code, and subject the city officials to a heavy fine for each day's delay. Such could not have been the intention of the Legislature, and this Court should not so declare the law.

It is admitted by all parties that Article XI, Section 5 of our State Constitution provides that no city charter shall contain any provision inconsistent with the general laws of this State, and that no charter may confer rights upon its citizens which violate this part of our State Constitution. Believing, as I do, that the proposed ordinance is violative of the general laws of this State, as I have set out in detail above, I am forced to the conclusion that such ordinance is void.

Having decided that the proposed ordinance is void, and would be of no force and effect should it be put to a vote and a majority of the electors of the City of Austin vote in favor of the ordinance, we must next decide if the writ of mandamus shall issue to force the proper city officials to proceed with the election.

Respondents in this court take the position that the cases of City of Austin v. Thompson, 147 Tex. 639, 219 S.W.2d 57, and the City of Dallas v. Dallas Consolidated Electric St. Ry. Co., 105 Tex. 337, 148 S.W. 292, and other cases wherein an injunction was sought to prevent an election, are authority for their right to the writ of mandamus herein. I do not think so. Those cases are for an injunction, while this is an application for writ of mandamus.

In 34 Am.Jur. 829, Mandamus, Sec. 32, it is said:
'* * * the writ will not issue in doubtful cases, but only where the right involved and the duty sought to be enforced are clear and certain and where no other specific and adequate mode of relief is available to the complaining party. Likewise the writ will not be granted where it would serve no useful purpose, or where it would work hardship or injustice, or be detrimental to the public interests.'

'It is apparent from the drastic and extraordinary character of the writ of mandamus that courts act with caution in respect to it and award it only in cases where it clearly appears that under the law it ought to issue. The right and the duty must be clear; for the writ will not be granted in a doubtful case, and especially not where, if granted, it would not be effectual.' Id., Sec. 36, p. 831.

***653** '* * * The writ will not issue if for any reason it would be useless or unavailing, nor for the mere purpose of determining an empty and barren technical right on the part of relator, nor where it is apparent to the Court that the object sought is impossible of attainment. * * *' 28 Tex.Jur. 524.

As stated in the note found in 30 A.L.R. 378, et seq.: '* * * Despite, however, the conflicting points of view which have been taken, which have resulted in apparently conflicting decisions on the question under annotation, the courts seem in general to have followed a line of thought **659 which, though not expressly or definitely brought out, or always adhered to, furnishes a general rule commonly applied; and that is that a merely ministerial officer, whose duties are of a subordinate character, imposing on him no personal obligation or liability, is not allowed to question the validity of a statute in a mandamus proceeding to compel his obedience thereto. Practically, however, when the constitutional objection is probably well taken and the consequences of enforced obedience to the statute, if in truth unconstitutional, would be serious, the courts not infrequently avoid the effect of the rule by making an exception where public interest is involved, or where in the circumstances the obedience to the requirements of the statute would violate the oath of office, or by ignoring the rule altogether and proceeding to consider the constitutional question without discussing the right to do so.'

Also in Annotation 129 A.L.R. 944, we find stated the rule in Texas as follows: 'The view which is opposed to the general rule first above stated has also been more recently expressed. Thus, in Holman v. Pabst, 1930, Tex.Civ.App., 27 S.W.2d 340, on an application for mandamus for freeholding taxpaying citizens against a county judge and members of a county commissioners' court to compel them, in their official capacities, to order an election to determine whether certain stock should be permitted to run at large in the county, pursuant to a statute providing for such determination, the court, in holding that the respondents could question the validity of the procedure set up by the act, said: 'That appellants, constituting as they did the governing body in all Galveston County's varied public business, although having no personal pecuniary interest to be affected, and despite the fact that calling the election may have constituted only a ministerial act or duty, were not beyond the pale of proper privilege in challenging the constitutional *654 validity of two alleged acts of the legislature, in virtue of which alone it was sought to control their official action by so drastic a proceeding as the writ of mandamus, is not, we think, to be doubted, notwithstanding the existence of such cases as State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers, 1922, 84 Fla. 592, 94 So. 681, 30 A.L.R. 362; State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 1895, 47 La.Ann. 1679, 18 So. 746, 47 L.R.A. 512; and Threadgill v. Cross, 1910, 26 Okl. 403, 109 P. 558, 138 Am.St.Rep. 964, seemingly holding otherwise; the contrary view, upon what we regard as much the better reason, has been applied in these decisions: Huntington v. Worthen, 1887, 120 U.S. 97, 7 S.Ct. 469, 30 L.Ed. 588; Van Horn v. State, 1895, 46 Neb. 62, 64 N.W. 365; Hindman v. Boyd, 1906, 42 Wash. 17, 84 P. 609; State ex rel. University of Utah v. Candland, 1909, 36 Utah 406, 104 P. 285, 24 L.R.A.,N.S., 1260, 140 Am.St.Rep. 834. The rationale of these last-cited holdings is that as an unconstitutional act of the legislature is no law at all, the courts have no power to compel anyone-much less a public body or officer-to obey it; by all the authorities, a writ of mandamus to compel a public officer or body to perform some act or duty will not issue unless and until it is shwon that the performance thereof is clearly imposed by law upon him or it, and that a correlative legal right to have it performed is vested in the applicant for the writ.''

Writ of error in the Pabst case was refused by this court. To the same effect is the holding of this court in McCutcheon v. Wozencraft, 116 Tex. 440, 294 S.W. 1105; City of Galveston v. Mann, 135 Tex. 319, 143 S.W.2d 1028; and of the Court of Civil Appeals at Fort Worth, writ dismissed, in the case of McCarty v. Jarvis, 96 S.W.2d 564. I fail to find where this holding in the above cases has been questioned by any Texas court. Therefore, I would reverse the judgment of both courts below and render judgment that the respondents take nothing.

SMEDLEY, GARWOOD and WILSON, JJ., join in this dissent.

All Citations

150 Tex. 632, 244 S.W.2d 645

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APPENDIX E

LOCAL GOVERNMENT CODE – SELECTED PROVISION

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES

SUBTITLE A. MUNICIPAL REGULATORY AUTHORITY

CHAPTER 211. MUNICIPAL ZONING AUTHORITY

SUBCHAPTER A. GENERAL ZONING REGULATIONS

Sec. 211.003. ZONING REGULATIONS GENERALLY. (a) The governing body of a municipality may regulate:

(1) the height, number of stories, and size of buildings and other structures;

(2) the percentage of a lot that may be occupied;

(3) the size of yards, courts, and other open spaces;

(4) population density;

(5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and

(6) the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health.

(b) In the case of designated places and areas of historical, cultural, or architectural importance and significance, the governing body of a municipality may regulate the construction, reconstruction, alteration, or razing of buildings and other structures.

(c) The governing body of a home-rule municipality may also regulate the bulk of buildings.

Sec. 211.004. COMPLIANCE WITH COMPREHENSIVE PLAN. (a) Zoning regulations must be adopted in accordance with a comprehensive plan and must be designed to: (1) lessen congestion in the streets; (2) secure safety from fire, panic, and other dangers; (3) promote health and the general welfare; (4) provide adequate light and air; (5) prevent the overcrowding of land; (6) avoid undue concentration of population; or (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

Sec. 211.005. DISTRICTS. (a) The governing body of a municipality may divide the municipality into districts of a number, shape, and size the governing body considers best for carrying out this subchapter. Within each district, the governing body may regulate the erection, construction, reconstruction, alteration, repair, or use of buildings, other structures, or land.

(b) Zoning regulations must be uniform for each class or kind of building in a district, but the regulations may vary from district to district. The regulations shall be adopted with reasonable consideration, among other things, for the character of each district and its peculiar suitability for particular uses, with a view of conserving the value of buildings and encouraging the most appropriate use of land in the municipality.

Sec. 211.006. PROCEDURES GOVERNING ADOPTION OF ZONING REGULATIONS AND DISTRICT BOUNDARIES.

(a) The governing body of a municipality wishing to exercise the authority relating to zoning regulations and zoning district boundaries shall establish procedures for adopting and enforcing the regulations and boundaries. A regulation or boundary is not effective until after a public hearing on the matter at which parties in interest and citizens have an opportunity to be heard. Before the 15th day before the date of the hearing, notice of the time and place of the hearing must be published in an official newspaper or a newspaper of general circulation in the municipality.

(b) ***

(c) If the governing body of a home-rule municipality conducts a hearing under Subsection (a), the governing body may, by a two-thirds vote, prescribe the type of notice to be given of the time and place of the public hearing. Notice requirements prescribed under this subsection are in addition to the publication of notice required by Subsection (a).

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

(1) the area of the lots or land covered by the proposed change; or

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

(e) In computing the percentage of land area under Subsection (d), the area of streets and alleys shall be included.

(f) The governing body by ordinance may provide that the affirmative vote of at least three-fourths of all its members is required to overrule a recommendation of the municipality's zoning commission that a proposed change to a regulation or boundary be denied.

Sec. 211.007. ZONING COMMISSION.

(a) To exercise the powers authorized by this subchapter, the governing body of a home-rule municipality shall, and the governing body of a general-law municipality may, appoint a zoning commission. The commission shall recommend boundaries for the original zoning districts and appropriate zoning regulations for each district. If the municipality has a municipal planning commission at the time of implementation of this subchapter, the governing body may appoint that commission to serve as the zoning commission.

(b) The zoning commission shall make a preliminary report and hold public hearings on that report before submitting a final report to the governing body. The governing body may not hold a public hearing until it receives the final report of the zoning commission unless the governing body by ordinance provides that a public hearing is to be held, after the notice required by Section 211.006(a), jointly with a public hearing required to be held by the zoning commission. In either case, the governing body may not take action on the matter until it receives the final report of the zoning commission.

(c) Before the 10th day before the hearing date, written notice of each public hearing before the zoning commission on a proposed change in a zoning classification shall be sent to each owner, as indicated by the most recently approved municipal tax roll, of real property within 200 feet of the property on which the change in classification is proposed. The notice may be served by its deposit in the municipality, properly addressed with postage paid, in the United States mail. If the property within 200 feet of the property on which the change is proposed is located in territory annexed to the municipality and is not included on the most recently approved municipal tax roll, the notice shall be given in the manner provided by Section 211.006(a).

(c-1) Before the 10th day before the hearing date, written notice of each public hearing before the zoning commission on a proposed change in a zoning classification affecting residential or multifamily zoning shall be sent to each school district in which the property for which the change in classification is proposed is located. The notice may be served by its deposit in the municipality, properly addressed with postage paid, in the United States mail.

(c-2) Subsection (c-1) does not apply to a municipality the majority of which is located in a county with a population of 100,000 or less, except that such a municipality must give notice under Subsection (c-1) to a school district that has territory in the municipality and requests the notice. For purposes of this subsection, if a school district makes a request for notice under Subsection (c-1), the municipality must give notice of each public hearing held following the request unless the school district requests that no further notices under Subsection (c-1) be given to the school district.

(d) The governing body of a home-rule municipality may, by a two-thirds vote, prescribe the type of notice to be given of the time and place of a public hearing held jointly by the governing body and the zoning commission. If notice requirements are prescribed under this subsection, the notice requirements prescribed by Subsections (b) and (c) and by Section 211.006 (a) do not apply.

(e) ***

Sec. 211.015. ZONING REFERENDUM IN HOME-RULE MUNICIPALITY.

(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.

(c) 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 or the submission of the initial adoption of zoning regulations to a binding referendum election, or both, provided that all procedural requirements of this chapter for the adoption of the zoning regulation are otherwise complied with. This subsection does not apply to the adoption of airport zoning regulations under Chapter 241.

(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.

(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.

(f) The provisions of this section shall not authorize the repeal of:

(1) an ordinance approving land-use regulations adopted under the provisions of this chapter by a board of directors of a reinvestment zone under the authority of Section 311.010 (c), Tax Code; or

(2) an ordinance approving airport zoning regulations adopted under Chapter 241.