

TAXPAYERS AGAINST GIVEAWAYS,
SAVE OUR SPRINGS ALLIANCE,
GONZALO BARRIENTOS, ORA
HOUSTON, and FAYE HOLLAND,
Plaintiffs,

v.

CITY OF AUSTIN MAYOR KIRK
WATSON, COUNCIL MEMBERS
NATASHA HARPER-MADISON,
VANESSA FUENTES, JOSE
VELASQUEZ, JOSE “CHITO” VELA,
RYAN ALTER, MACKENZIE KELLY,
LESLIE POOL, PAIGE ELLIS, ZOHAIB
“ZO” QADRI, ALISON ALTER, and
INTERIM CITY MANAGER JESUS
GARZA, ALL IN THEIR OFFICIAL
CAPACITIES
Defendants.

IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

**DEFENDANTS’ MOTION FOR TRADITIONAL AND
NO-EVIDENCE SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

Defendants Kirk Watson, Natasha Harper-Madison, Vanessa Fuentes, José Velasquez, José “Chito” Vela, Ryan Alter, Mackenzie Kelly, Leslie Pool, Paige Ellis, Zohaib “Zo” Qadri, Alison Alter, and Jesús Garza, in their official capacities, file this Motion for Traditional and No-Evidence Summary Judgment on all of Plaintiffs’ claims and in support respectfully show as follows:

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

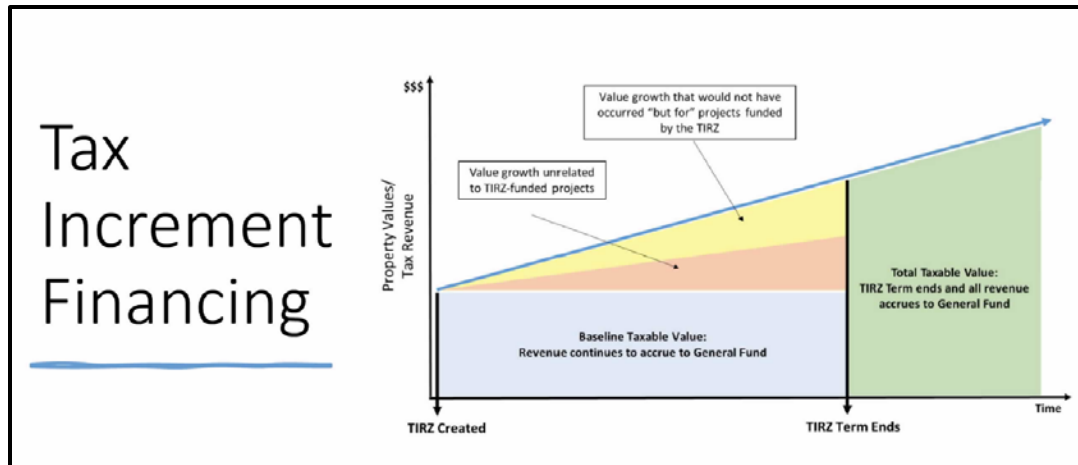
The South Central Waterfront— a 118-acre area running along the south shore of Lady Bird Lake and bisected by Congress Avenue—was identified by the City as an area in need of comprehensive planning as early as 1985. Although it is in the City’s center overlooking Lady Bird Lake, making it prime real estate, development of the area has been stymied by the lack of a

pedestrian-scale street grid. The City developed a vision plan for the area in 2016 which envisioned creating enticing, pedestrian-friendly and green streetscape, additional open space, and incentivizing affordable housing in the area. The 2016 Vision Plan envisioned that these upgrades would prompt private investment and create an attractive gateway into downtown Austin, as depicted by the following rendering:



Ex. 1: Vision Plan at 4.

That plan recommended using tax increment financing (TIF) as a tool to jumpstart investment in the area. Under that form of financing, which is governed by the Texas Tax Code, the City Council designates a certain area, called a Tax Increment Reinvestment Zone (TIRZ), and the baseline tax collection for that area is set at the time the TIRZ is created. Thereafter, a percentage of the tax revenue above that baseline amount is directed into specific projects included as part of the TIRZ plan. The idea is to stimulate development of the TIRZ area above what would have occurred naturally absent such stimulation, as depicted by the following graph:



Ex. 4: 11.2.21 Agenda Late Backup at 14.

In 2021, following the recommendation put forth in that 2016 plan, the City Council created the South Central Waterfront (SCW) TIRZ and set the initial amount of the tax increment—the amount of taxes above the baseline amount that would be reinvested into the zone for designated projects—at 0 percent as it continued to think through the details of how it wanted the TIRZ to be structured. In 2022, the City Council amended the SCW TIRZ by adjusting its boundaries and setting the amount of the increment at 46 percent. The SCW TIRZ still has not yet been fully implemented and established, however, because City Council must still approve a final financing plan, which has not yet occurred.

Plaintiffs seek to invalidate Council’s actions in creating and amending the SCW TIRZ on the ground that statutory requirements for creating a TIRZ under the Texas Tax Code were not met. Specifically, Plaintiffs assert that the information before Council—including the 2016 plan and the preliminary project plan created for the SCW TIRZ—did not justify Council’s factual findings in creating the SCW TIRZ. Plaintiffs further assert that the City failed to provide proper public notice and hearing in creating the SCW TIRZ. Plaintiffs finally assert that the SCW TIRZ is an unconstitutional gift in violation of the Texas Constitution because the required Tax Code findings were invalid.

None of Plaintiffs' claims has any merit. The City Council made all findings required by the Texas Tax Code, and those findings were supported by the information before Council when it acted. The SCW TIRZ was the product of study going back at least to the 2016 plan recommending that this particular financing tool be used to achieve the plan's goals, and a market study by an independent consultant verified that use of a TIRZ would create additional development that would not occur solely through private investment. The TIRZ was structured so that only the tax revenue generated as a result of that additional development, as determined by the independent consultant, would be reinvested for TIRZ purposes. There was no fraud, arbitrariness, or capriciousness in the making of those findings, and absent such evidence, a court should defer to Council's findings. Any alleged defect in how the City noticed and conducted hearings leading up to the creation of the SCW TIRZ is insufficient to invalidate it, the public was afforded notice and the opportunity to speak at public hearings creating the TIRZ, and Plaintiffs' process concerns fall short. And there is certainly no unconstitutional gift—in fact, no gift at all, since the SCW TIRZ simply reinvests tax dollars into creating City-owned infrastructure. Defendants are entitled to summary judgment on all claims.

II. EXHIBITS

- Ex. 1: South Central Waterfront Vision Framework Plan
- Ex. 2: July 26, 2022 City Council Work Session Presentation
- Ex. 3: Ordinance No. 20160616-074
- Ex. 4: Ordinance No. 2017-216-034
- Ex. 5: July 28, 2020 Staff Memo
- Ex. 6: Resolution No. 20200220-044
- Ex. 7: October 21, 2021 City Council Meeting Transcript

- Ex. 8: Resolution No. 20211021-044
- Ex. 9: Resolution No. 20211021-045
- Ex. 10: Resolution No. 20141211-131.
- Ex. 11: Nov. 16, 2021 City Council Work Session Transcript.
- Ex. 12: Nov. 16, 2021 City Council Work Session Late Backup Staff Briefing
- Ex. 13: Dec. 9, 2021 Public Hearing Newspaper Notice
- Ex. 14: Dec. 9, 2021 City Council Meeting Backup Draft Preliminary Project and Financing Plan
- Ex. 15: Dec. 9, 2021 City Council Meeting Backup Draft Ordinance
- Ex. 16: Dec. 9, 2021 City Council Meeting Questions and Answers
- Ex. 17: Dec. 9, 2021 City Council Meeting Transcript
- Ex. 18: Dec. 20, 2021 Public Hearing Notice
- Ex. 19: Dec. 20, 2021 City Council Special Called Meeting Agenda
- Ex. 20: Dec. 20, 2021 City Council Special Called Meeting Transcript
- Ex. 21: Dec. 20, 2021 City Council Special Called Meeting Minutes
- Ex. 22: Ordinance No. 20211220-002
- Ex. 23: Feb. 1, 2022 City Council Work Session Minutes
- Ex. 24: July 26, 2022 City Council Work Session Transcript
- Ex. 25: Aug. 30, 2022 City Council Work Session Minutes
- Ex. 26: Sept. 1, 2022 City Council Meeting Minutes
- Ex. 27: Nov. 3, 2022 City Council Meeting Minutes
- Ex. 28: Dec. 1 2022 Public Hearing Notice
- Ex. 29: Dec. 1, 2022 City Council Meeting Transcript
- Ex. 30: Ordinance No. 20221201-010

Ex. 31: Mar. 22, 2018 City Council Meeting Transcript

Ex. 32: Dec. 1, 2022 City Council Meeting Backup Amendment 1 to Preliminary Project and Financing Plan.

III. FACTUAL BACKGROUND

Development of the south shore of Lady Bird Lake is, from the beginning, hampered by a lack of a street grid.

For the first 120 years after the City of Austin’s founding, the area now known as the South Central Waterfront—a 118-acre area running along the south shore of Lady Bird Lake and bisected by Congress Avenue¹—was river bottom and floodplain. Ex. 1: Vision Plan at 17, 18. The north shore of Lady Bird Lake was meticulously laid out in a grid by Edwin Waller as early as 1839. *Id.* at 18. The south shore, by contrast, was largely undeveloped and subject to flooding until the construction of the Longhorn Dam in 1960. *Id.*² From the beginning, the South Central Waterfront area had no physical framework to orchestrate development. *Id.*

The City considers comprehensive planning for the area as early as 1985 and identifies lack of a street framework as a significant impediment to orderly growth

As early as 1985, the City identified the South Central Waterfront as an area in need of comprehensive planning and where growth could be stimulated through infrastructure investments such as investments in an upgraded street network. The City studied how this area was developing in response to construction of a Hyatt Hotel in the area in 1984. Ex. 1: Vision Plan at 19, 20. The Town Lake Corridor Study, authored in 1985, established benchmark planning and goals to promote harmonious growth along the lakefront. *Id.* at 20.

In 2000, the City commissioned the ROMA Design Group to recommend updated development standards for the area. *Id.* at 21. The ROMA study identified lack of a framework of

¹ That area is the area bounded by South First Street on the west, Blunn Creek to the east, Lady Bird Lake to the north, and East Riverside Drive and East Bouldin Creek on the south. Ex. 1: Vision Plan at 17.

² A photograph from 1910 shows it being used for agricultural purposes. Ex. 1: Vision Plan at 18.

streets as a principal impediment to orderly redevelopment in the area. *Id.* It concluded that orderly development could only be achieved by designing and building an infrastructure framework, including a new grid of streets, to allow for rational intensification of development. *Id.*

The City adopts the South Central Waterfront Vision Framework Plan in 2016, which identifies the street grid as hampering development and recommends using tools including tax increment financing to achieve development goals for the area

In 2016, the City adopted the South Central Waterfront Vision Framework Plan as an amendment to the City’s Imagine Austin Comprehensive Plan. *See* Ex. 2: July 26, 2022 City Council Work Session Presentation at 3; Ex. 3: Ordinance No. 20160616-074. The Vision Plan again noted the negative impact of the existing street structure on the area:

The built environment – streets, buildings, and other public spaces – of the South Central Waterfront reflects the fragmented nature of the parcels and the piecemeal evolution of the area. Each of these elements contributes to the sense that the South Central Waterfront is primarily a space that people drive through to get between South Congress and Downtown. At a district scale, the lack of a dense street grid and small blocks discourages pedestrian activity and creates little frontage for retail and other active uses. The layout of the streets and the lack of landmarks makes the area confusing, whether on foot or driving. At the level of individual streets and buildings, sidewalk are narrow and fronted by wide stretches of surface parking or blank walls. At almost every level, the built environment of the South Central Waterfront has been designed as an area that people drive through between the hours of 9 and 5, rather than a lively neighborhood with shops, homes and offices that feels safe and inviting 24 hours a day.

Ex. 1: Vision Plan at 22. The first element of its recommendation for the area was to create “a physical framework that provides a connecting network of streets, pedestrian access ways, open spaces, and green infrastructure.” *Id.* at 37.

In addition to planning recommendations, the Vision Plan also offered financing recommendations on how to pay for the suggested improvements. Ex. 1: Vision Plan at 95–103. The project team considered public funding in the form of tax increment financing, parking

partnership, Capital Improvement Program funds, general obligation bonds, tax abatements, Housing Trust funds, and Vertical Housing Development Program. *Id.* at 95–97. It also considered private funding through a public improvement district, philanthropy, transfer of development rights, low income housing tax credits, and a real estate investment trust. *Id.* The project team ultimately recommended tax increment financing as one means of financing the vision for the area. *Id.* It concluded that the City had the requisite experience creating TIRZs and that a TIRZ could “pay for significant portions of many key projects” and “the potential for [a TIRZ] to raise significant revenue looks promising.” *Id.* at 96.

The City works to implement the 2016 Vision Plan

After adopting the Vision Plan as part of Imagine Austin, the City worked to implement its recommendations. One first step was for City Council to create a South Central Waterfront Advisory Board—a recommendation in the Vision Plan to help bring the vision to fruition. Ex. 4: Ordinance No. 2017-216-034. The City also revised the recommendations in the original Vision Plan by modifying the physical framework goal and updating the projected buildout and cost estimates—updates it provided to the South Central Waterfront Advisory Board. Ex. 5: July 28, 2020 Staff Memo.³ Some of those updates were prompted by the 2019 submittal of a Planned Unit Development (PUD) of the former Austin-American Statesman site at 305 South Congress Avenue; the Vision Plan modeled that the Statesman Site would redevelop, but the redevelopment it anticipated was different than what was proposed. Ex. 5: July 28, 2020 Staff Memo.

³ The July 28, 2020 Staff Memo was prompted by a Council resolution directing, among other actions, that the City Manager provide a memo status update on all South Central Waterfront District-related efforts; that resolution noted that “as development pressures mount, it is imperative that the City works swiftly and intentionally to bring to fruition the vision laid out in the award winning South Central Waterfront Vision Framework Plan.” Ex. 6: Resolution No. 20200220-044.

With the “tipping” of the Statesman site, Council self-imposes a deadline to set up a SCW TIRZ by the end of 2021 to freeze the baseline tax value.

With the Statesman site poised to redevelop through a PUD, Council worked faster to implement the Vision Plan, including its suggestion that the improvements it described be paid for, at least in part, using tax increment financing. At its October 21, 2021 meeting, then-Mayor Steve Adler explained that the reason to move quickly in creating a SCW TIRZ is “just to establish the benchmark [i.e., the baseline tax value] so that we’re not in two years wishing that we had started the benchmark earlier.” Ex. 7: October 21, 2021 City Council Meeting Transcript at 36. The Council passed two related resolutions at that meeting regarding implementation of a SCW TIRZ in 2021 while including the possibility that the SCW TIRZ be initially set with an increment of 0 percent. Ex. 8: Resolution No. 20211021-044; Ex. 9 Resolution No. 20211021-045.⁴ One resolution noted the need to act quickly: “City’s adopted plans have begun to spur new investment in the South Central Waterfront area with the anticipation of the execution of proposed public investments.” Ex. 8: Resolution No. 20211021-044 at 2.

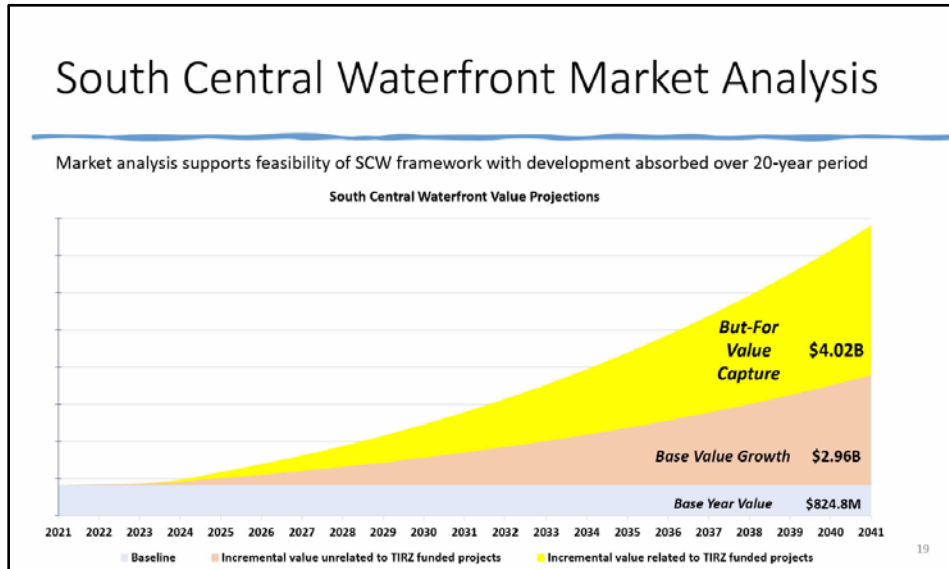
Council sets up the SCW TIRZ in December 2021 with an initial increment of 0 percent

Council met its self-imposed deadline to set up the SCW TIRZ by the end of 2021.

After its October 21, 2021 meeting, Council again discussed setting up a SCW TIRZ at their November 16, 2021 work session. Ex. 11: Nov. 16, 2021 City Council Work Session Transcript at 64–77. During that work session, City staff informed Council that, based on a consultant’s market analysis, it would be feasible to create a 20-year TIRZ in the area and would create additional development that would not happen but for the TIRZ, as summarized by the

⁴ Adopting a TIRZ with an increment of 0 percent was not unprecedented; as Resolution No. 2021021-044 notes, the City had previously taken similar action. Ex. 8: Resolution No. 20211021-044 at 2; Ex. 10: Resolution No. 20141211-131.

following graph:



Ex. 12: Nov. 16, 2021 City Council Work Session Late Backup Staff Briefing at 19; Ex. 11: Nov. 2, 2021 City Council Work Session Transcript 70–71.

The City set a public hearing on creation of the SCW TIRZ for December 9, 2021 and placed notice of that public hearing in the Austin-American Statesman. Ex. 13: Dec. 9, 2021 Public Hearing Newspaper Notice. The backup for the meeting included a draft preliminary project and financing plan. Ex. 14: Dec. 9, 2021 City Council Meeting Backup Draft Preliminary Project and Financing Plan. That plan listed the proposed projects to be financed using the TIRZ, including roadway, drainage, and streetscape improvements. *Id.* at 128. The projects were “tiered” because City staff recommended achieving the improvements in tiers tied to property tax revenue projections, associated financing capacity, and priority of need for public infrastructure, with only tier one projects eligible for funding upon creation of the TIRZ and implementation of tier two and tier three projects contingent upon performance of the TIRZ. *Id.* at 3.

The Draft Preliminary Project and Financing Plan included a market analysis by outside consultant Capitol Market Research, Inc. which supported the viability of a TIRZ for the area. *Id.*

at 8, 130–218. According to the report by City independent consultant Capitol Market Research, the TIRZ would generate an additional \$334.2 million in gross real property tax revenue through 2040, a portion of which could be reinvested into the TIRZ. *Id.* City staff recommended that the increment be set at 46 percent, meaning that only 46 percent of property tax revenue over the baseline amount would be put into the TIRZ fund. Ex. 15: Dec. 9, 2021 City Council Meeting Backup Draft Ordinance. City staff explained the 46 percent proposed increment in Questions and Answers from City Council: it was calculated by excluding the Austin Transit Partnership portion of the tax rate (approximately 16 percent), leaving 84 percent, and then limiting the increment to only that growth that would not have occurred but for the City’s investment. Ex. 16: Dec. 9, 2021 City Council Meeting Questions and Answers at 5–6. Based on the City consultant’s analysis, approximately 55 percent of the projected value growth would be attributable to the public investments associated with the SCW TIRZ, so multiplying 84 percent by 55 percent results in a 46 percent tax increment. *Id.*

Council held a public hearing on the SCW TIRZ on December 9, 2021 but moved to postpone a vote on adopting the SCW TIRZ until December 20, 2021. Ex. 17: Dec. 9, 2021 City Council Meeting Transcript at 57-58.⁵ At that meeting, Councilmember Kelly said about postponement, “I just strongly feel that postponing will give us a longer amount of time to engage in discussion about this important topic and the future of the TIRZ area, and really allow us to dig deeper into what it is that we’re trying to accomplish there, and to gain consensus among the council body in doing so.” *Id.* at 57-58.

⁵ At that meeting, the South Central Waterfront Advisory Board Chairman Samuel Franco spoke (in his individual capacity) and expressed the desire that some TIRZ money be included for affordable housing, among other suggestions. *Id.* at 9–11. In response, Councilmember Tovo indicated that she would be moving to amend the draft Preliminary Project and Financing Plan to include affordable housing as a tier one project. *Id.* at 11.

The City then renoticed a public hearing on the SCW TIRZ for December 20, 2021. Ex 18: Dec. 20, 2021 Public Hearing Notice. That meeting was a specially called meeting, and the only items up for discussion and vote were SCW TIRZ-related. Ex.19: Dec. 20, 2021 City Council Special Called Meeting Agenda. Two in-person and two remote speakers were signed up to speak at the meeting; ultimately, only two people spoke. Ex.20: Dec. 20, 2021 City Council Special Called Meeting Transcript.⁶

Council decided between adopting two different versions of an ordinance creating the SCW TIRZ, one of which had a larger geographic area than the other. Ex.20: Dec. 20, 2021 City Council Special Called Meeting Transcript. And Councilmembers shaped the draft ordinance they ultimately adopted by adding affordable housing to the tier 1 project list, setting the increment initially at zero percent,⁷ and giving instructions to the City Manager to consider adding water management infrastructure to the project list and to ensure implementation by clearly delineating staff roles and creating a comprehensive implementation plan to include regular opportunities for public input. Ex. 21: Dec. 20, 2021 City Council Special Called Meeting Minutes; Ex. 22: Ordinance No. 20211220-002.

Council discusses the SCW TIRZ at three work sessions and two meetings before adopting an ordinance amending the SCW TIRZ to set the increment at 46 percent and shrink its geographic area

The City Council discussed the SCW TIRZ during three Council work sessions and two Council meetings before approving an ordinance amending the SCW TIRZ at a public hearing to set the increment at 46 percent and change its geographic boundaries. Ex. 23: Feb. 1, 2022 City

⁶ Both of those speakers—Bill Bunch and Fred Lewis—are directors in Taxpayers Against Giveaways, a plaintiff in this case. as well as counsel for that plaintiff in this lawsuit.

⁷ The purpose of setting the increment initially at zero was to, accordingly to Councilmember Tovo, “have more time to answer some of the questions that members of the public have raised.” Ex.20: Dec. 20, 2021 City Council Special Called Meeting Transcript at 11.

Council Work Session Minutes; Ex. 24: July 26, 2022 City Council Work Session Transcript; Ex. 25: Aug. 30, 2022 City Council Work Session Minutes; Ex. 26: Sept. 1, 2022 City Council Meeting Minutes; Ex. 27: Nov. 3, 2022 City Council Meeting Minutes; Ex. 30: Ordinance No. 20221201-010. At their November 3, 2022 meeting, the City Council set a public hearing on an ordinance to amend the SCW TIRZ by amending the tax participation rate and financing plan. Ex. 27: Nov. 3, 2022 City Council Meeting Minutes. Specifically, Council wanted to adjust the amount of the increment to 46 percent (as previously proposed by City staff) and to exclude the so-called “Snoopy PUD,” also known as the River South development *Id.* Ex. 31: Mar. 18, 2022 City Council Meeting Minutes at 136 (explaining origin of “Snoopy” PUD nickname is that the parcel was once owned by Charles Schultz). The City published newspaper notice of the meeting. Ex. 28: Dec. 1, 2022 Public Hearing Notice. Twelve interested citizens, including Mr. Bunch and Mr. Lewis, addressed the Council on the SCW TIRZ. Ex. 29: Dec. 1, 2022 City Council Meeting Transcript at 106. Council ultimately adopted an ordinance amending the geographic boundaries of the TIRZ to exclude the River South development, to set the increment at 46 percent, and to amend the Preliminary Project and Financing Plan. Ex. 30: Ordinance No. 20221201-010. Per that amended Preliminary Project and Financing Plan, the updated market analysis by the independent consultant projected that \$3 billion in private investment would occur that would not occur but for the investment in infrastructure that would be accomplished through the TIRZ. Ex. 29: Dec. 1, 2022 City Council Meeting Transcript at 106; Ex. 32: Dec. 1, 2022 City Council Meeting Backup Amendment 1 to Preliminary Project and Financing Plan.

City staff explained at the meeting that Council was only amending a preliminary project and financing plan, and that they would come back to Council for approval of a final project and financing plan after the regulating plan was completed and the market analysis, revenue

projections, and cost estimates could all be updated. *Id.* at 108; Ex. 29: Dec. 1, 2022 City Council Meeting Transcript.

IV. APPLICABLE STANDARD

A party moving for traditional summary judgment has the burden to show that no genuine issue of material fact exists and that the party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860, 864 (Tex. 2021). A party may also move for no-evidence summary judgment after an adequate time for discovery has passed if there is no evidence of one or more essential elements of a claim on which an adverse party would have the burden of proof at trial. Tex. R. Civ. P. 166a(i).

V. ARGUMENT AND AUTHORITIES

A. Defendants are entitled to judgment on Count 1 because City Council’s determination that Tax Code criteria for creation of the SCW TIRZ was satisfied is entitled to deference, and Plaintiffs have not offered a sufficient reason why such finding should not be deferred to here.

The Texas Tax Code provides that the governing body of a municipality may designate by ordinance an area as a reinvestment zone to promote development or redevelopment of the area “if the governing body determines that development or redevelopment would not occur solely through private investment in the reasonably foreseeable future.” Tex. Tax Code § 311.003(a). The City Council made that determination first when initially creating the SCW TIRZ and then when it amended the SCW TIRZ, each time making a specific finding on that point. Ex. 22: Ordinance No. 20211220-002; Ex. 30: Ordinance No. 20221201-010. Plaintiffs challenge that finding in this lawsuit.

First, Plaintiffs assert that a TIRZ may only be used for “blighted” or “unproductive” areas, citing Tex. Tax Code § 311.003(a) and Tex. Const. art. VIII, § 1-g. The word “blight” does not appear in Tax Code §§ 311.003-005 and is not defined in the Texas Constitution. Plaintiffs suggest

that to be “blighted,” an area must contain substandard, slum, or deteriorating structures. This is inaccurate. Blight is simply “an impaired condition.” WEBSTER’S NEW COLLEGIATE DICTIONARY (9th ed. 1983). The Texas Constitution refers to “slum and blighted conditions,” indicating that slum conditions are distinct from blighted conditions. TEX. CONST. art. VIII, § 1-o. The Local Government Code makes this even more clear, defining a blighted area as “an area that is *not* a slum area, but that, because of deteriorating buildings, structures, or other improvements; *defective or inadequate streets, street layout, or accessibility*; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality.” TEX. LOCAL GOV’T CODE § 374.003 (emphasis added). As the Austin City Council found, the area within the SCW TIRZ contains defective or inadequate sidewalk and street layout and faulty lot layout under Tax Code § 311.005(a)(1); it is blighted.

Both the Texas Constitution and the Texas Tax Code specifically allow use of a TIRZ to address more than just blight. The Texas Constitution allows a city to issue bonds or notes to finance the development or redevelopment of an “unproductive, underdeveloped, or blighted area.” TEX. CONST. art. VIII, § 1-g(b). Thus, the Texas Constitution allows issuance of debt to finance the development of an unproductive or underdeveloped, not just a blighted, area. *See id.*; *cf. City of El Paso v. El Paso Community College Dist.*, 729 S.W.2d 296, 296 (Tex. 1986) (“Tax increment financing is designed to aid cities and towns in financing public improvements in blighted or underdeveloped areas.”) (emphasis added).

Similarly, under Tex. Tax Code § 311.005(a)(1), to be designated a reinvestment zone, an area must “substantially arrest or impair the sound growth of the municipality or county

designating the zone, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of” issues including “the predominance of defective or inadequate sidewalk or street layout,” “faulty lot layout in relation to size, adequacy, accessibility, or usefulness,” or other factors. TEX. TAX CODE § 311.005(a)(1). An area that meets the requirements of Texas Tax Code 311.005(a)(1) comports with the constitutional requirement. TEX. ATT’Y GEN. OP. NO. JC-0152 (1999).

Here, Council found that the SCW TIRZ met the requirements of Texas Tax Code 311.005 because “the area within the zone substantially arrests or impairs the sound growth of the City, retards the provision of housing accommodations, or constitutes an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition or use because of the presence of the predominance of defective or inadequate sidewalk and street layout and faulty lot layout in relation to size, adequacy, accessibility, or usefulness.” Ex. 22: Ordinance No. 20211220-002; Ex. 30: Ordinance No. 20221201-010. That finding was made in good faith and reasonable given, among other things, the 2016 Vision Plan’s findings that (1) “the lack of a dense street grid and small blocks discourages pedestrian activity and creates little frontage for retail and other active uses”; (2) “[t]he layout of the streets and the lack of landmarks makes the area confusing, whether on foot or driving”; and “[a]t almost every level, the built environment of the South Central Waterfront has been designed as an area that people drive through between the hours of 9 and 5, rather than a lively neighborhood with shops, homes and offices that feel safe and inviting 24 hours a day.” Ex. 1: Vision Plan at 22.

Council’s determination that “development or redevelopment would not occur solely through private investment in the reasonably foreseeable future,” *see* Ex. 22: Ordinance No.

20211220-002; Ex. 30: Ordinance No. 20221201-010; Tex. Tax Code § 311.003(a), was also made in good faith and reasonable. The market analysis it had before it showed that a TIRZ would jumpstart development in the area; with the market analysis projecting, as City staff told Council, that an additional \$3 billion in growth would occur if a TIRZ were implemented. Ex. 29: Dec. 1, 2022 City Council Meeting Transcript at 106; Ex. 32: Dec. 1, 2022 City Council Meeting Backup Amendment 1 to Preliminary Project and Financing Plan. The market study showed that a TIRZ would help the area grow, and the TIRZ increment was designed so that only that growth attributable to the TIRZ would be reinvested into it. The requirement under Tax Code § 311.003(a) is not that *no* growth would occur absent a TIRZ; it is only that growth would not occur “*solely* through private investment in the *reasonably foreseeable future*.” TEX. TAX CODE § 311.003(a) (emphasis added). If the standard were that no growth could occur at all, it could never be met. Council was well within the bounds of the Texas Tax Code to form a TIRZ to *jumpstart* redevelopment of the area and ensure that redevelopment moved faster, and was greater, than it would have absent a TIRZ. The market analysis and Vision Plan Council had before it showed that development of the area was being hampered by the existing sidewalk and street grid and the area would grow faster, and the amount of redevelopment would be greater, if a TIRZ were implemented.

Council’s findings supporting the creation of the TIRZ are to be deferred to. “The reasonableness of a particular measure is [] a matter to be considered by the appropriate legislative body in the first instance[,]” with that decision reviewable only for whether it is “fraudulent, arbitrary and capricious.” *Barrington v. Cokinos*, 338 S.W.2d 133, 140, 141 (Tex. 1960) (analyzing relevant standard of review for challenge to legislative action under Article XI, Section 3 of the Texas Constitution); *see also Moseley v. City of Dallas*, 17 S.W.2d 36, 41 (Tex. Comm’n App.

1929, judgment adopted) (stating, in analyzing propriety of injunctive relief to restrain board of education from operating a health department, that “[s]ince the board of education of the [C]ity of Dallas has the power and authority . . . to exercise sound judgment and discretion in performing and carrying out the powers and duties required of them by law, the courts will not interfere with them in the exercise of such powers, unless there is a clear abuse of their discretion. . . .”); *City of Austin v. Whittington*, 384 S.W.3d 766, 777 (Tex. 2012) (standard of review for condemning body’s determination that a taking is for public use is conclusive in the absence of evidence that the decision was fraudulent, in bad faith, or arbitrary or capricious). The burden is on the party challenging the legislative determination to offer proof of such fraud, bad faith, or arbitrariness. *See Whittington*, 384 S.W.3d at 777.

There is no evidence of fraud, bad faith, or arbitrariness that would justify judicially overturning the City Council’s determination that the Tax Code criteria for creation of a TIRZ was met. Plaintiffs disagree with the City Council’s decision to form a TIRZ and its finding that “development or redevelopment would not occur solely through private investment in the reasonably foreseeable future,” but that is not enough to overturn it. “Action is not arbitrary and capricious when exercised honestly and upon due consideration, where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached.” *Brown v. Lower Colorado River Auth.*, 485 S.W.2d 369, 371 (Tex. Civ. App.—Austin 1972, no writ) (internal quotation omitted).

B. Defendants are entitled to judgment on Count 2 because the TIRZ framework, even if the statutory criteria are not followed as Plaintiffs claim, is not a “gift,” and Plaintiffs have no evidence of a payment that would constitute a gift.

Article III, Section 52(a) of the Texas Constitution provides:

[T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State

to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever

TEX. CONST. art. III, § 52(a). The Texas Supreme Court uses a multipart test to determine whether a proposed expenditure violates Article III, Section 52(a). *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, 74 S.W.3d 377, 383–84 (Tex. 2002). “[S]ection 52(a) does not prohibit payments to individuals, corporations, or associations so long as. . . [those] payments: (1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return.” *Id.* “A three-part test determines if a statute accomplishes a public purpose consistent with Section 52(a). Specifically, the Legislature must: (1) ensure that the statute’s predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) ensure that the political subdivision receives a return benefit.” *Id.* (internal citations omitted).

In deciding whether a payment is gratuitous and violates Section 52(a), “the reasonableness of a particular measure is . . . a matter to be considered by the appropriate legislative body in the first instance,” which a court only reviews for whether it is “fraudulent, arbitrary[,] and capricious.” *Barrington v. Cokinos*, 338 S.W.2d 133, 141, 140 (Tex. 1960); *cf.* TEX. ATT’Y GEN. OP. NO. KP-0104 (2016) at 2 (“The determination of whether a particular expenditure satisfies the three-part test is for the political subdivision to make in the first instance, subject to judicial review for abuse of discretion.”). In addition, “an expenditure for the direct accomplishment of a legitimate public and municipal purpose is not rendered unlawful by the fact that a privately owned business may be benefited thereby.” *Cokinos*, 338 S.W.2d at 140.

Here, the claim fails at the first step because there is no payment of money or grant of thing of value to an individual, corporation, or association. The City is choosing to reinvest a portion of

tax revenue from the SCW TIRZ back into infrastructure improvements in the SCW TIRZ that would be City-owned. “[A]n expenditure for the direct accomplishment of a legitimate public and municipal purpose is not rendered unlawful by the fact that a privately owned business may be benefited thereby.” *Barrington v. Cokinos*, 338 S.W.2d 133, 141, 140 (Tex. 1960). Just because developers in the area would benefit from City investment in infrastructure in that area does not make that investment an unconstitutional gift of public funds, any more than any other capital improvement the City might invest taxpayer dollars in. The City’s choice to direct tax dollars toward this area, as opposed to other areas, is a policy decision that Article III, Section 52(a) does not regulate.

In the alternative, an adequate time for discovery has passed, and Plaintiffs have no evidence of a payment of money or grant of thing of value to an individual, corporation or association, an essential element of their claim under Tex. Const. art. III, § 52(a) and one on which they bear the burden of proof, because any TIRZ funds will go to pay for City-owned infrastructure improvements.

C. Defendants are entitled to judgment on Count 3 because, as with Count 1, Council’s finding that the requirements of the Texas Tax Code were met were reasonable and entitled to deference.

Plaintiffs’ reading of Tax Code Section 311.004⁸ is incorrect as a matter of law. Defendants have complied with the plain terms of the statute and have not committed an *ultra vires* act.

The Tax Code requires a TIRZ ordinance to “contain findings that: (A) improvements... will significantly enhance the value of all the taxable real property in the zone and will be of general benefit to the municipality...; and (B) the area meets the requirements of Section 311.005.”

⁸Count 3 cites to Section 311.005, but it is Section 311.004 that requires a TIRZ ordinance to contain certain findings. TEX. TAX CODE § 311.004(a)(7).

TEX. TAX CODE § 311.004(a)(7). The City has done this. Ex. 22: Ordinance No. 20211220-002; Ex. 30: Ordinance No. 20221201-010.. Plaintiffs disagree with the City’s findings and argue that the City must support and explain its findings in the ordinance itself. The plain language of the statute requires no such thing. TEX. TAX CODE § 311.004(a)(7). If the Legislature wanted to require cities to explain their findings, it was certainly capable of doing so. *See, e.g.*, TEX. GOV’T CODE § 2001.141(d) (certain findings of fact in a decision of a state agency “must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.”)

Count 3 is essentially a claim that the City has no evidence to support its ordinance. The determination whether a particular area satisfies the criteria of Section 311.005 is “for the city to make in the first instance, in good faith, exercising reasonable discretion, subject to judicial review.” Tex. Att’y Gen. Op. No. JC–0152 at 7 (1999). Plaintiffs, as the parties attacking the ordinance, bear the “extraordinary burden” to show “that no conclusive or even controversial or issuable fact or condition existed” which would authorize the City’s passage of the ordinance. *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792-93 (Tex. 1982); *Quick v. City of Austin*, 7 S.W.3d 109, 117 (Tex. 1998). Plaintiffs seek to flip this burden of proof and make the City marshal “factual support” in its ordinance to survive a legal challenge. This Court should reject Plaintiffs’ erroneous interpretation of the law.

Finally, it is simply untrue that the City provided insufficient support for the SCW TIRZ. Each ordinance is accompanied by detailed project and financing plans totaling more than 200 pages and setting forth the City’s rationale for adopting the TIRZ. Ex. 14: Dec. 9, 2021 City Council Meeting Backup Draft Preliminary Project and Financing Plan. This partial excerpt explains the defects with the area’s street layout, sidewalks and lot layout pursuant to Section 311.005:

At a district scale, the lack of a dense street grid and small blocks discourages pedestrian activity and creates little frontage for retail and other active uses. The layout of the streets and the lack of landmarks makes the area confusing, whether on foot or driving.

At the level of individual streets and buildings, sidewalks are narrow and fronted by wide stretches of surface parking or blank walls. At almost every level, the built environment of the South Central Waterfront has been designed as an area that people drive through..., rather than a lively neighborhood....

Ex. 1: Vision Plan at 22.

Summary judgment should be granted for Defendants on Count 3, which has no basis in law or fact.

D. Defendants are entitled to judgment on Count 4 because Defendants complied with statutory notice and hearing requirements.

Plaintiffs argue that the SCW TIRZ “should be annulled and invalidated” for failing to follow notice and hearing requirements in Tax Code Section 311.003. 2nd Am. Pet. ¶ 37. While Count 4 does not explicitly state that it is an *ultra vires* claim, the City interprets it as such.⁹ Defendants have complied with the plain terms of the statute and have not committed an *ultra vires* act.

Even if the City committed a minor violation of Chapter 311’s notice and hearing requirements, Plaintiffs have cited to no authority that this invalidates an ordinance. Unlike the Open Meetings Act, which states that an action taken by a governmental body in violation of the Open Meetings is “voidable,” Chapter 311 contains no similar provision. *Compare* TEX. GOV’T CODE § 551.141 *with* TEX. TAX CODE § 311.001–.021. Compliance with notice and hearing requirements is not necessary for an ordinance to be effective unless the authorizing statute explicitly states this. *TCI West End, Inc. v. City of Dallas*, 486 S.W.3d 692, 696 (Tex. App.—Dallas 2016, pet. denied).

⁹ It is presumably not a constitutional due process claim, which would necessarily fail. The enactment and amendment of ordinances is legislative in character and due process of law does not require notice of such proceedings. *Kinkaid School, Inc. v. McCarthy*, 833 S.W.2d 226, 230 (Tex. App.—Houston [1st Dist.] 1992, no pet.); *Lawton v. City of Austin*, 404 S.W.2d 648, 651 (Tex. Civ. App. —Austin 1966, writ red’d n.r.e.).

Plaintiffs complain that Defendants violated Section 311.003 when both the 2022 and 2021 ordinances were passed:

1. 2022 Ordinance

Plaintiffs' sole complaint with the public hearing on the 2022 Ordinance is that speakers were given only one minute to testify. Section 311.003(c) states that "an interested person may speak for or against the creation of the zone, its boundaries, or the concept of tax increment financing." Interested persons were given an opportunity to speak; City Council heard testimony from 12 different people. The plain language of the statute requires nothing further.

While there does not appear to be any case law on speaking limits under Section 311.003(c), both the Open Meetings Act and First Amendment case law support Defendants' position. The Open Meetings Act states that a "governmental body may adopt reasonable rules regarding the public's right to address the body..., including rules that limit the total amount of time that a member of the public may address the body on a given item." TEX. GOV'T CODE § 551.007(c).

Similarly, First Amendment case law recognizes that time limits on testimony "promote orderly and efficient meetings" and serve "a significant governmental interest in conserving time and in ensuring that others [have] an opportunity to speak." *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007); *Wright v. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984); *cf. Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (government may place reasonable restrictions on the time, manner, or place of protected speech consistent with the First Amendment)

Defendants did not commit an *ultra vires* act by limiting testimony to one minute.

2. 2021 Ordinance

As an initial matter, any defects with the 2021 Ordinance are moot because it has been amended. *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 682 (Tex. App.—Austin 2004, no pet.) (“Because the development agreement is a validly enacted amendment to the Ordinance, we must find moot any claim in which appellants attempt to apply the original terms of the Ordinance.”)

Plaintiffs make four complaints about the 2021 Ordinance:

a. Published newspaper notice did not include hearing time

Section 311.003 does not require the published newspaper notice to include the time of the hearing. *Compare* TEX. TAX CODE § 311.003(c) (“Not later than the seventh day before the date of the hearing, notice of the hearing must be published in a newspaper having general circulation in the municipality”) *with* TEX. GOV’T CODE § 551.041 (“A governmental body shall give written notice of the date, **hour**, place, and subject of each meeting held by the governmental body”) (emphasis added). Furthermore, the time of the hearing was readily available. The newspaper notices stated that “[f]urther information may be obtained by contacting Kim Olivares” and provided her phone number and email address. Ex. 13: Dec. 9, 2021 Public Hearing Notice, Ex. 18: Dec. 20, 2021 Public Hearing Notice. Additionally, the time of every City Council meeting is posted on the City’s website in compliance with the Open Meetings Act.¹⁰

¹⁰Tellingly, Plaintiffs have not made a claim that the City’s meeting notices violated the Open Meetings Act.

b. Hearing was postponed without publishing a second newspaper notice

Plaintiffs' claim is inaccurate. The City published newspaper notices for the hearings on both December 9, 2021 and December 20, 2021. Ex. 13: Dec. 9, 2021 Public Hearing Notice, Ex. 18: Dec. 20, 2021 Public Hearing Notice

c. Notice sufficiency

Plaintiffs make a convoluted complaint that the notice did not sufficiently explain that two sets of boundaries for the TIRZ were being considered: one including the Snoopy PUD and one excluding the Snoopy PUD. The newspaper notice for the hearing on December 9, 2021 contained a map of the proposed TIRZ that excluded the Snoopy PUD. Ex. 13: Dec. 9, 2021 Public Hearing Notice. The newspaper notice for the hearing¹¹ on December 20, 2021 contained a map that included the Snoopy PUD. Ex. 18: Dec. 20, 2021 Public Hearing Notice. The 2021 ordinance ultimately included the Snoopy PUD.

Section 311.003 requires “notice of the hearing” to be “published in a newspaper having general circulation in the municipality.” TEX. TAX CODE § 311.003(c). It does not require that the notice include a map, let alone all of the various maps that might emerge as a proposed TIRZ makes its way through the democratic process. The statute recognizes that the purpose of the hearing is to allow an “interested person to speak for or against the creation of the zone, **its boundaries**, or the concept of tax increment financing.” *Id.* (emphasis added). If the published newspaper notice must depict the TIRZ’s boundaries exactly as they are ultimately adopted, the boundaries would need to be fixed **before** the hearing, making public comment on the boundaries meaningless. Here, the newspaper notices sufficiently informed the public of the general

¹¹ Plaintiffs argue that there were “[t]wo separate public hearings” on December 20, 2021. The Austin City Council held a special called meeting on December 20, 2021 with four agenda items, all related to the SCW TIRZ. Ex. 19: Dec. 20, 2021 Meeting Agenda.

boundaries that were being contemplated for the SCW TIRZ. *See Rettberg v. Texas Dept. of Health*, 873 S.W.2d 408, 411 (Tex. App.—Austin 1994, no writ) (notice is sufficient under the Open Meetings Act “when it alerts a reader that some action will be taken relative to a topic”; “although the reader needs to know the topic of discussion, the notice need not state all of the possible consequences resulting from consideration of the topic.”)

d. Late agenda backup material

Finally, Plaintiffs complain that **Version Two** of the project and financing plan was not posted on the City’s website until December 20. The preliminary project and financing plan was posted on December 3. *See* <https://www.austintexas.gov/department/city-council/2021/20211209-reg.htm#069>, Agenda Backup: Draft Preliminary Plan. Version Two differs only slightly from the original document; it includes the Snoopy PUD whereas the original document excludes it. Documentation explaining the City’s rationale for adopting the TIRZ was available well in advance of the hearing.

For all of the reasons stated above, Defendants did not commit an *ultra vires* act in the course of adopting the 2021 or 2022 ordinances. Summary judgment should be granted for Defendants on Count 4.

E. Defendants are entitled to judgment on Plaintiffs’ claim that Council violated the Open Meetings Act because the time limit for speakers was reasonable.

Finally, Plaintiffs make a stray Open Meetings Act claim that the one-minute time limit “violated Mr. Bunch’s, and other speakers’, right under Tex. Gov’t Code (Texas Open Meetings Act) section 551.007 to address the Council on each agenda item.” 2nd Am. Pet. ¶ 31(c)(2) n.5.

The Open Meetings Act states that a “governmental body may adopt reasonable rules regarding the public’s right to address the body..., including rules that limit the total amount of time that a member of the public may address the body on a given item.” TEX. GOV’T CODE §

551.007(c). A rule capping the total amount of time a speaker has to address all agenda items is permissible if the rule is reasonable. TEX. ATT'Y GEN. OP. NO. KP-0300 at *2 (2020). Whether a particular period of time is reasonable to address all desired agenda items at an open meeting will depend on many factors, including the number of agenda items and their complexity, and is a fact question for the City to determine in the first instance subject to judicial review. *Id.*

The Austin City Council's December 1, 2022 meeting had "an hour's worth of speakers" in the morning alone.¹² Ex. 29: Dec. 1, 2022 City Council Meeting Transcript at 2. Since each speaker had one minute to talk, this translates to approximately 60 speakers. The City made a reasonable determination that a one minute time limit would allow all 60 morning speakers to address the Council and still keep the meeting orderly and efficient. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).

Furthermore, Plaintiffs' claim that Mr. Bunch had one minute to address the Council on December 1, 2022 is inaccurate. Mr. Bunch addressed the Council in both the morning and the afternoon. Ex. 29: Dec. 1, 2022 City Council Meeting Transcript at 13, 46. His morning comments were primarily about the SCW TIRZ:

[L]ast December when you voted to create the tirz not a single one of you believed this was a blighted district. None of you believed the official finding you made that this area would not develop in the reasonably foreseeable future unless we put a bunch of tax-payer give aways. You didn't believe it then. No one believes it today and yet you're going to sit here and say it again. You're directly taking the budget – escalated from 56 million to 354 million. All that inflation is going into private, not public benefit. You're taking money directly out of the general fund and services for your own districts.

Id. at 13.

¹² There were also two public comment periods in the afternoon, one for zoning items and one related to Austin Energy. Ex. 29: Dec. 1, 2022 City Council Meeting Transcript at 41, 64.

Twelve interested citizens, including Mr. Bunch and Mr. Lewis, *id.* at 7, addressed the Council on the SCW TIRZ. Members of the public had a reasonable opportunity to speak on the TIRZ. As for any complaints that Mr. Bunch and “others” were unable to discuss unnamed “other important agenda items,” 2nd Am. Pet. at ¶ 31(c)(2), these Plaintiffs do not have standing to bring these claims. Summary judgment should be granted for Defendants on the Open Meetings Act claim.

F. Defendants are entitled to judgment on Plaintiffs’ claim for costs.

Because Defendants are entitled to judgment on all Plaintiffs’ claims, Defendants are likewise entitled to judgment on Plaintiffs’ claim for costs, including any attorney’s fees claimed as costs.

VI. CONCLUSION AND RELIEF REQUESTED

Defendants respectfully request that they be granted summary judgment on all of Plaintiffs’ claims. Defendants further request any other relief, in law or in equity, to which they may be justly entitled.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

/s/ Hannah M. Vahl

Hannah M. Vahl
Assistant City Attorney
State Bar No. 24082377
hannah.vahl@austintexas.gov
Elissa Zlatkovich Hogan
Assistant City Attorney
State Bar No. 24075337
elissa.hogan@austintexas.gov

CITY OF AUSTIN LAW DEPARTMENT
P. O. Box 1546
Austin, Texas 78767-1546
Telephone (512) 974-2346
Facsimile (512) 974-1311

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document on all parties or their attorneys of record, in compliance with the Texas Rules of Civil Procedure, on December 22, 2023, as follows:

Via e-Service to:

William G. Bunch
SBN. 03342520
4701 Westgate Blvd., Bldg. D, Suite 401
Austin, Texas 78745
Bill@sosalliance.org
Cell: (512) 784-3749
Telephone: (512) 477-2320

Fred Lewis
SBN.12277075
4509 Edgemont Dr.
Austin, TX 78731-5223
f_lewis@sbcglobal.net
Cell: 512-636-1389

Bill Aleshire
SBN. 24031810
ALESHIRE LAW, P.C.
3605 Shady Valley Dr.,
Austin, TX, 78739
Bill@AleshireLaw.com
Cell: (512) 750-5854
Telephone: (512) 320-9155
Facsimile: (512) 320-9156

ATTORNEYS FOR PLAINTIFFS

/s/ Hannah M. Vahl
Hannah M. Vahl