CAUSE NO. D-1-GN-23-002238

TAXPAYERS AGAINST GIVEAWAYS,	§	**IN THE DISTRICT COURT**
SAVE OUR SPRINGS ALLIANCE,	§	
GONZALO BARRIENTOS, ORA HOUSTON,	§	
And FAYE HOLLAND,	§	
Plaintiffs,	§	
	§	
v.	§	**TRAVIS COUNTY**
	§	
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.	§	**126th JUDICIAL DISTRICT**

PLAINTIFFS' MOTION FOR FINAL SUMMARY JUDGMENT

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CAUSE NO. D-1-GN-23-002238

TAXPAYERS AGAINST GIVEAWAYS, SAVE OUR SPRINGS ALLIANCE, GONZALO BARRIENTOS, ORA HOUSTON, And FAYE HOLLAND, ***Plaintiffs,***	§ § § § § §	**IN THE DISTRICT COURT**
v.	§ §	**TRAVIS COUNTY**
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.***	§ § § § § § § § § §	**126th JUDICIAL DISTRICT**

PLAINTIFFS' MOTION FOR FINAL SUMMARY JUDGMENT

Plaintiffs, each a City of Austin property-tax taxpayer or an association with property taxpayer members, bring this action asking the Court to grant Summary Judgment and enjoin the Defendant Austin Officials, in their official capacities, to stop the illegal expenditure of property taxes relating to the unlawful and *ultra vires* approval of the South-Central Waterfront Tax Increment Reinvestment Zone No. 19 (SCWF-TIRZ).

I. SUMMARY OF THE MOTION AND ARGUMENT

This case presents matters of first impression in the interpretation of Texas Tax Code Chapter 311's provisions implementing the authority granted in a 1981 constitutional amendment allowing cities to create "redevelopment" areas that are "unproductive, underdeveloped, or blighted" and to dedicate "increases in ad valorem tax revenues imposed on property in the area"

to debt-finance “development or redevelopment of the area.” Tex. Const. Article VIII, Section 1-g (a) and (b).

Specifically, Tax Code 311.003 requires that the governing body of a municipality follow specific additional procedures in creating and operating a “Tax Increment Reinvestment Zone,” or TIRZ. These specific requirements include publishing special notice of the proposed TIRZ, holding a special public hearing on the proposal, adopting a detailed “preliminary reinvestment zone financing plan” for the proposed TIRZ, and making specific findings in support of the need for the TIRZ (among other requirements). Most notably, the city council must find that the proposed TIRZ area is "blighted" and “determine” that development within the proposed TIRZ area would not otherwise occur "in the reasonably foreseeable future" without—or "but for"—the investment of public taxpayer dollars into the area.

Pursuant to this authority, Defendants, members of the Austin City Council (the “City Council”), created the South-Central Waterfront District TIRZ on December 20, 2021, encompassing 118 acres of mostly private property along the south shore of Austin's iconic Lady Bird Lake and just south of downtown. On December 7, 2022, the City Council amended the original TIRZ boundaries to remove the so-called “Snoopy PUD” triangle, bounded by South First, Riverside Drive, and Barton Springs Road, where a new office and retail tower had just been completed. The Council’s December 7, 2022, amendment also, for the first time, diverted an estimated $354 million in future increases in property taxes collected within the TIRZ area away from the City’s general fund and dedicated it to supporting mostly private redevelopment within the TIRZ. PR 2022-12-01 1581 (PR 2022-12-01 refers to the TIRZ mandated public record for the City Council hearing on December 1, 2022 and the corresponding bates-stamped pages)

The SCWF TIRZ area encompasses some of the most valuable real estate in Austin and likely in all of Texas. The public hearing record, created by the City of Austin (the "City"), wholly and utterly fails to support the City Council's finding that development within the SCWF TIRZ would not occur "within the reasonably foreseeable future" without this dedicated $354 million in taxpayer funding. To the contrary, the entire record before the City Council – much of it officially adopted into the City Council's TIRZ creation ordinance--affirmatively negates the required "but for" finding by showing that the zone was already "rapidly" developing and was estimated to expand from 3.2 million square feet in 2021 to 8.6 million square feet of usable space in the coming 20 years without taxpayer funding. PR 2022-12-01 1363 (approved South Central Waterfront Vision Framework Plan, p. 13).

In addition to affirmatively negating the City Council's required "but for" determination, the undisputed record also shows that the City Council applied the wrong legal standard by effectively rewriting the "but for" test to add words not found within the statute. Most notably, Mayor Adler stated in the 2022 public hearing that

> *No one is saying that this area wouldn't develop if we didn't do this…* And legal says that *we're allowed to use the tirz if the development that we want to have happen [] isn't going to happen on its own*."

PR 2022-12-01 1206. December 1, 2022, Hearing Transcript at 8:02 pm. (emphasis added).
This is not what the statute authorizes.

This public admission by the Austin Mayor, admitting that "no one is saying that this area wouldn't develop if we didn't [create the TIRZ]," demonstrates the arbitrary and capricious manner by which the City Council approved the TIRZ. The Austin Mayor essentially admits the

"but for" public investment test was not met, and that the City Council was simply approving the creation of the TIRZ because they wanted another vision of redevelopment. The "but for" clause of §311.003(a) is replaced by the whim of the Council. By relying on City legal staff, the Mayor makes clear that the Council and Staff applied the wrong legal standard to fund development that it "wants," not development that meets the But-For test of Tax Code 311.003(a). This rewrite doesn't just interpret the statute: it eviscerates the statute's taxpayer protections and broadly exceeds the authority provided by the Texas Legislature. By failing to adhere to the strict requirements of the Texas Tax Code, the City Council acted in an *ultra vires* manner making arbitrary and capricious determinations and applying the statute's "but for" determination without evidentiary support.

Plaintiffs also show herein that Defendant City Officials also acted without authority by failing to demonstrate substantial compliance with the statutorily required additional TIRZ public notice and public hearings requirements.

Plaintiffs respectfully submit that this case may be decided on standard principles of Texas statutory construction based on a review of the record before the City Council when it made its decisions. Defendants acted in violation of the law and beyond the discretion provided by the Texas Constitution and Tax Code Chapter 311. Plaintiffs are entitled to summary judgement and an immediate injunction on expenditures of city funds on implementation of the SCWF TIRZ.

II. THE RECORD FOR JUDICIAL REVIEW

Plaintiffs designated and filed as the City Council's official record the public hearings transcripts and related documents for which the City published the public notices required by Tax Code § 311.003. This SCWF TIRZ record includes the official published public TIRZ notices, the

public notice agendas given under the Texas Open Meetings Act, the city documents published publicly online in support of the public hearings, the public hearing transcripts, the approved ordinances establishing the SCWF TIRZ, and the appendices to those ordinances that included, among other elements, the required preliminary project and financing plans, (bates-numbered from 0001-1603). This record contains the documents the Legislature mandates in Chapter 311 that a city must create to establish a TIRZ. Tex. Tax Code, Section 311.003 (a)-(c). Plaintiffs incorporate in full by reference and offer into evidence this previously filed record.

We also include with the filing of this motion additional verified evidence, incorporated fully herein by reference and offered into evidence, related solely to plaintiffs' standing: affidavits and records showing that the individual plaintiffs and members of the plaintiff associations pay property taxes to the city (Exhibit. A, Affidavit of Holly Reed; Exhibit B, Excerpts of the 2023 City of Austin Budget). Plaintiffs also enter Exhibit C, Appendices to the Approved 2016 South Central Waterfront Vision Plan, which the City failed to include and should be included under the evidentiary rule of optional completeness. Tex. R. Evidence 107. Plaintiffs also request the court to take judicial notice of the City of Austin videos of the three subject City Council meetings as posted on the City of Austin's website.

Plaintiffs further note that by Rule 11 agreement previously filed with the court, the parties have agreed that that this case should be heard based on a review of the record before the City Council as outlined by Tax Code Chapter 311. The parties hope to agree on the exact content of that record but have contemplated the need to resolve any differences on the record following the filing of cross motions for summary judgment based on the record.

III. STATEMENT OF FACTS

A. The South-Central Waterfront TIRZ Hearing Process

On December 9 and 20, 2021, the Austin City Council held two TIRZ public hearings and approved on the later date an ordinance with related documents to establish immediately the South Central Waterfront Tax Increment Reinvestment Zone No. 19 (PR 2021-1209 0004; PR 2021-12-20 0604,0638 (Aus. Tex. Ord. 20211220-002 (Dec. 20, 2021)). The SCWF TIRZ covers 118 acres of prime, mostly privately-owned real estate on the south shore of Lady Bird Lake across from Downtown. PR 2022-12-01 1367 (Approved TIRZ Preliminary Plan). The 2021 TIRZ plan envisions a massive $8 billion of private luxury development that adds 6 million square feet of new skyscrapers, condominium towers, and high-end retail space. PR 2022-12-01 1354, 1363 (South Central Waterfront Vision Plan, Part 2); PR 2022-12-01 1548 (South Central Waterfront Tax Increment Reinvestment Zone (TIRZ) Analysis (Capitol Market Research (September 24, 2021), p.73). The 2021 preliminary plan consists of three parts: Part 1, a short, nine-page TIRZ narrative with basic exhibits; Part 2, the city's 2016 South Central Waterfront Vision Plan; and Part 3, a 2021 SCWF market feasibility study. PR 2022-12-01 1337, 1351, 1467.

The 2021 TIRZ plan projects costs of $278.1 million in property taxpayer-funded infrastructure, consisting of streets, sidewalks, parks, utilities, and other project costs. PR 2022-12-01 1465)). The plan provides no project or cost details other than ballpark estimates for eight broad categories. *Id.* Further, the ordinance "authorizes the *City Manager to return with the final project plan and financing plan* for council approval, after holding at least one council work session in early February [2022]." PR 2021-12-20 0639 (Ordinance. 20211220-002, p.2) (*emphasis* added). Council provided additional direction to the City Manager to finalize the TIRZ

plan and provide the necessary additional specifics. PR 2021-12-20 0622-23, 0625-26, 0631-32 (City of Austin Council Transcript, Dec 20, 2021, pp. 11-12, 14-15, 20-21).

The initial 2021 ordinance set the "tax increment base" for the district's properties at 2021's current valuation ($824 million), but in an unusual action, the City Council set the district's tax capture rate at zero. PR 2021-12-20 0639 (Ord. 20211220-002, p. 2). As a result, at that time none of the district's additional property taxes, from increased district property values above the 2021 base values, were to be diverted from city general revenue to the TIRZ. [1] However, because the council set the TIRZ's tax value base in 2021, the TIRZ's future property value increases (and corresponding tax increments) are measured from its 2021 property values rather than 2022's higher values. This ultimately results in a larger tax increment and more property taxes diverted to the SCWF TIRZ.

Despite the direction given in 2021, the City Council did not consider and hold a public hearing on a finalized plan or provide cost breakdowns as planned for in February 2022. Instead, the Council ultimately held a public hearing on December 1, 2022, where it passed an amended SCWF TIRZ ordinance and amended preliminary financing plan with no project cost details. PR 2022-12-01 1328 (City of Austin Ordinance No. 20221201-054 (December 1, 2022)("2022 Ordinance")). This amended TIRZ excluded an area, known as the "Snoopy PUD" where a new office and retail tower was already under construction prior to the approval of the TIRZ and was completed in 2022. PR 2022-12-09 0512-13. Although the initial 2021 TIRZ ordinance had been approved unanimously by the Austin City Council, the final and amended 2022 TIRZ ordinance passed with only seven votes (7-3-1). PR 2022-12-01 1581 (Minutes of December 1 meeting, Item

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[1] See David Merriman, Improving Tax Increment Financing For Economic Development (Lincoln Institute Of Land Policy 2018), pp. 6-10 for an overview of tax increment financing.

54). Council Members Kathie Tovo, Mackenzie Kelly, and Alison Alter each voted against funding and amending the TIRZ, and Council Member Ann Kitchen abstained. *Id.*

The amended ordinance made effective immediately a district tax capture rate of 46%. The 46% tax capture rate means that 46% of all property tax increases in property valuations above the 2021 base value will go for 19 years from city coffers to the TIRZ to pay for its mostly private infrastructure. See Merriman, Improving Tax Increment Financing For Economic Development, pp. 6-10. The 2022 plan provides that these property taxes will pay for a projected $354,614,211 in TIRZ infrastructure, an additional $76,514,211 in projected costs from the previous 2021 TIRZ plan. PR 2022-12-01 1343 (2022 TIRZ Plan, Part I (narrative), p. 7). The amended plan again included only ballpark cost estimates on broad categories of spending without details, and the plan provided no explanation for the large increase in infrastructure costs in only a year. Id.

The language in the 2021 and 2022 ordinances and preliminary plans are essentially identical, except that the 2022 versions of the documents set the 46% tax increment capture rate, added $76.5 million in additional projected infrastructure costs, and added "affordable housing" as one of the categories of project costs. PR 2022-12-01 1343, 1345. As noted above, the 2022 Ordinance also amended the boundaries of the TIRZ to remove from the district the recently fully redeveloped "Snoopy PUD" office and retail tower project. parcel. PR 2022-12-01 1329-30 (Ord. 20221220-054, pp. 2-3); *see also* PR 2022-1201 1343, 1351-1462, 1467-1554.

B. The South Central Waterfront Vision Plan and the SCWF TIRZ boundaries

Although the SCWF TIRZ ordinances incorporate the 2016-approved South Central Waterfront Vision Plan, this plan conflicts with the TIRZ ordinances in important ways. Most notably, the first two sentences of the 2016 Vision Plan state:

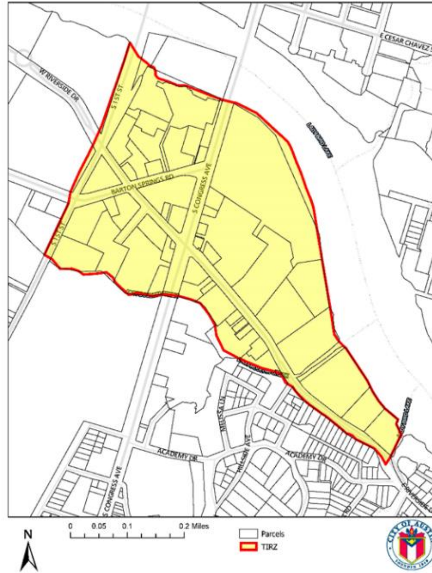
> "The South Central Waterfront (SCW) is bound for change. In fact, change is rapidly underway."

PR-2022-12-01 1343. The plan both acknowledges and identifies "properties that are the most likely to redevelop over the next 20 years given market trends," or in other words, regardless of the adoption of the TIRZ or changes to the area's regulations. PR-2022-12-01 1344. These properties are identified on the following map:

The map above indicates properties currently being redeveloped (already underway), Planned Unit Development (PUD) entitled (redevelopment parameters have been decided), and the "tipping point" properties that are the most likely to redevelop over the next 20 years, given market trends.

Id. The 2016 Vision Plan boundaries matched with the 2021 TIRZ boundaries, shown here:

Exhibit A: Boundary Map



PR 2021-12-20 0638-40. The amended 2022 ordinance excluded the triangle “Snoopy PUD”:

Exhibit A: Boundary Map

PR 2022-12-01 1330.

The 2016 Vision Plan predicted as its "Feasible Baseline Scenario" that if "existing [zoning] entitlements stay in place" and "without any intervention from the City of Austin beyond planned capital improvements," that development in the district would grow from 2.2 million square feet to "4.5 million square feet of usable space." PR 2022-12-01 1450. The Vision Plan also proposed a "Test Scenario" that would (a) greatly increase zoning entitlements allowing a total of 8.5 million square feet of development in the zone, including "26 stories for high-rise point towers," and (b) provide for an enhanced "public realm" that would include "significant public open spaces, streetscape enhancements, and affordable housing." PR 2022-12-01 1451

The Vision Plan "Test Scenario map shows the "tipping parcels – parcels most likely to redevelop within the next 15 years." Further, '[u]nder the Test Scenario, private properties ultimately pay for the whole public realm vision…" Id at 102. This enhanced "public realm," estimated then to cost $73 million, would be paid through one or more funding tools. Id. at pp. 93-98 The Vision Plan emphasized the use of a "Public Improvement District," like the one covering downtown Austin, in which the private landowners—not taxpayers-- would pay for the improvements. Id.

Finally, while the 2016 Vision Plan and 2021 and 2022 TIRZ ordinances call for investments in "public realm" infrastructure, it should be understood and undisputed that both City ordinances and state statutes provide that, absent taxpayer funding through a TIRZ and/or waivers to standard city development impact fees, private developers must otherwise pay for all of the "public" facilities of streets, roads, water and sewer facilities, parks, sidewalks, drainage and water

quality facilities that their private developments require.[2] Thus while these facilities are referred to as "public" they are standard costs that private developers must normally bear without the subsidy of TIRZ taxpayer funding.

IV. THE CONSTITUTIONAL AND STATUTUTORY FRAMEWORK

Before the adoption in 1981 of a state constitutional amendment, tax increment financing was found to be facially unconstitutional by the Texas Attorney General for violating the uniform and equal taxation constitutional provision. Tex. Att'y Gen. Op. No. MW-337 (1981) at 11. In November of that year, the voters enacted Tex. Const. Art. VIII, Sec. 1-g, which authorized tax increment financing in limited circumstances. The constitutional amendment authorizes tax increment financing only where an area is blighted and public investment is needed to encourage development:

> (a) The legislature by general law may authorize cities, towns, and other taxing units to grant exemptions or other relief from ad valorem taxes on property located in a reinvestment zone *for the purpose of encouraging development* or redevelopment and improvement of the property.

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[2] The City of Austin has approved various impact fees, which are incorporated into the City's fee schedule, approved as part of the City's annual budget process. *See* Aus. Tex. Ordinance 20230816-008 (Aug. 18, 2023). The Texas Local Government Code authorizes municipalities to charge impact fees on new development in order to generate new "revenue to fund or recoup the costs of capital improvements or facility expansions necessitated by and attributable to new development." Tex. Loc. Gov't Code § 395.001(4). These fees are used to improve facilities for water supply, treatment, distribution facilities, wastewater collection and treatment, and roadways. *Id.* § 395.001(1). Other impact fees are authorized under Texas law, including parkland dedication fees. *See, e.g.*, Tex. Loc. Gov't Code, ch. 212.

> (b) The legislature by general law may authorize an incorporated city or town to issue bonds or notes to finance the development or redevelopment of an *unproductive, underdeveloped, or blighted area within the city* or town and to pledge for repayment of those bonds or notes increases in ad valorem tax revenues imposed on property in the area by the city or town and other political subdivisions.

Tex. Const. Art. VIII, Sec. 1-g (1981)(emphasis added). This constitutional amendment explicitly limits tax reinvestment zones to the "purpose of encouraging development" in "unproductive, underdeveloped or blighted area[s]." Id.; Tex. Att'y. Gen. Op. No. JC-152 (1999), at 5. Thus, tax increment financing in an area, that does not require public investment to "encourage[e] development" or is not "unproductive, underdeveloped, or blighted," "is not authorized by the constitution… and, moreover, would violate article VIII, section 1." Tex. Att'y. Gen. Op. No. JC-152, at 5, citing, Tex. Att'y Gen. Op. No. MW-337 at 5. See also Tex. Att'y. Gen. Op. No. GA-276 (2004), at 3.

To ensure cities use TIRZs constitutionally and appropriately for redevelopment, the Texas Legislature adopted Texas Tax Code, Chapter 311. This chapter preempts Texas cities' home rule powers related to TIRZs and "imposes *numerous requirements that a city must follow* before adopting an ordinance providing for a reinvestment zone." Tex. Att'y. Gen. Op No JC-152, at 3 (emphasis added). See also Tex. Att'y. Gen. Op. No GA-276, at 3.

The Legislature mandates in Chapter 311 the documents and findings that a city must produce to establish a TIRZ. Section 311.003 delineates, as its title states, "PROCEDURE FOR CREATING REINVESTMENT ZONE." The legislatively prescribed process requires a city to

create three main documents “[b]efore adopting an ordinance or order designating a reinvestment zone”: a public hearing transcript, a preliminary financing plan, and an ordinance with specific findings. Tex. Tax Code, Section 311.003 (a)-(c). (The statute requires a public hearing, which we presume requires the transcript to be part of the record).

1. Published Notice and a Public Hearing. The city must “hold a public hearing on the creation of the zone and its benefits to the municipality…Not later than the seventh day before the date of the hearing, notice of the hearing must be published in a newspaper…” Id., Section 311.003(c). The statute further provides that all aspects of the proposed TIRZ are subject to public testimony. Id. at 311.003(c).

2, A TIRZ Ordinance. The ordinance must contain a host of statutorily required findings, the most important of which is a determination of the necessity of public investment (the “but-for finding”), the existence of blight, and the financial feasibility of the district. The but-for requirement is found in Tex. Tax Code, 311.003 (a), which provides that a city may establish a TIRZ only “*if the governing body determines* that development or redevelopment would not occur solely through private investment in the reasonably foreseeable future.” (emphasis added). The requirements for findings of blight and a general community benefit are found in Section 311.004 (a)(7) and 311.005.

3. A Preliminary Reinvestment Zone Financing Plan, Section 311.003 (b) mandates that the city “must prepare a preliminary reinvestment zone financing plan” before adopting a TIRZ.

As set out further below, the constitutional framework for the Tax Code Chapter 311 provisions authorizing the challenged SCWF TIRZ suggest that these terms should be strictly construed by courts exercising judicial review.

V. BURDEN OF PROOF AND STANDARDS FOR JUDICIAL REVIEW

Plaintiffs' ultra vires claims fall within an established exception to governmental immunity: *ultra vires* acts contrary to law by governmental officials. *Ultra vires* acts are found when officials violate the law, even when they had some discretion in their actions. Plaintiffs as property owners may enjoin property tax expenditures related to such *ultra vires* acts.

Texas law has long recognized that governmental immunity does not bar claims that allege a "government officer acted *ultra vires*, or without legal authority, in carrying out his [or her] duties." Houston Belt & Terminal Ry. Co. v. City of Houston, 487 S.W.3d 154, 157-158 (Tex. 2016). To establish an *ultra vires* act, a lawsuit "must allege, and ultimately prove, that the officer, acted without legal authority or failed to perform a purely ministerial act." City of El Paso v. Heinrich, 284 S.W.3d 366, 372 (2009). The Texas Supreme Court has held that even officials who have discretion under the law are not immune from suit if they exercise their discretionary authority beyond that allowed by the constitution or statute. Houston Belt & Terminal Ry. Co. v. City of Houston, 487 S.W.3d at 166-169; City of El Paso v. Heinrich, 284 S.W.3d at 372. "Although governmental immunity justifiably provides broad protection to the government and its agents, it does not protect every act by a government officer that requires some exercise of judgment—*a government officer with some discretion to interpret and apply a law may nonetheless act 'without legal authority,' and thus ultra vires, if he exceeds the bounds of his granted authority or if his acts conflict with the law itself.*" Houston Belt & Terminal Ry.

Co. v. City of Houston. 487 S.W.3d at 158 (emphasis added); See also City of El Paso v. Heinrich, 284 S.W.3d at 372.

In applying this standard, it should be noted that the TIRZ factual findings and reports required of cities under Chapter 311 are much greater than the minimal facts and analysis required for typical council legislative decisions. Normally, the courts may speculate that legislative facts exist without any evidence: "We must uphold the law if we can conceive of any rational basis for the Legislature's action. It does not matter whether the justifications courts may hypothesize as a rational basis in fact underlay the legislative decision." Owens Corning v. Carter, 997 S.W.2d 560, 581 (Tex. 1999). This normal judicial evidentiary deference to local government decisions, however, does not apply to TIRZs established under Chapter 311.

While the statute and case law are silent on the standards of judicial review for assessing the city's compliance with the required TIRZ findings and public hearing determinations, the parties have agreed that the court's review of the city's decision on the SCWF TIRZ should be based solely on the statutorily required record, which would be the case for substantial evidence review on an agency record. Furthermore, the courts have recognized that the Texas Administrative Procedures Act ("TAPA") provides guidance for review of agency and local government final decisions that are not directly subject to the TAPA. See, e.g. Bd. of Law Examiners v. Allen, 908 S.W.2d 319, 321 (Tex. App. Austin 1995).

The rationales for creating an official government record for both an agency decision and a TIRZ are the same: to allow for a meaningful process and effective judicial review. As the Texas Supreme Court has explained for many years, when

> "[t]he statute prescribes, in mandatory language, the scope and extent of the findings of fact which must be made and included in the order…. There is purpose in the statute. One purpose no doubt is to restrain any disposition on the part of the Commission to grant a certificate without *a full consideration of the evidence and a serious appraisal of the facts.* Another is *to inform protestants of the facts found so that they may intelligently prepare and present an appeal* to the courts. Still another is *to assist the courts in properly exercising their function of reviewing the order.* If an order is to accomplish these purposes, it must contain findings of basic facts as distinguished from mere factual, or mixed factual and legal, conclusions.

Miller v. Railroad Com., 363 S.W.2d 244, 245-246 (Tex 1962)(emphasis added). See, e.g., State Banking Bd. v. Allied Bank Marble Falls, 748 S.W.2d 447, 449 (Tex. 1988); Texas Health Facilities Comm. v. Charter Med-Dallas, 665 S.W.2d 446, 452 (Tex. 1984)

While the statute does not prescribe the manner of judicial review under Chapter 311, we believe judicial review of the City Council's approval of the SCWF TIRZ should be based on the "substantial evidence" test, *i.e.,* whether the Council's action violated the law by applying the wrong legal standard and/or was arbitrary and capricious. *See* Tex. Att'y. Gen. Op. JC-0152 at 5 (1999) (noting that the required determinations are for "the city to make in the first instance, in good faith, exercising reasonable discretion, subject to judicial review").

In this case, we believe the statutorily mandated procedures and findings should require at least a judicial "record review" or "substantial evidence based on the record developed before the agency review." *See* Lewis v. Metropolitan Sav. & Loan Ass'n, 550 S.W.2d 11, 13 (Tex. 1977). Since the City Council is required to have a public hearing, and the method of its exercise is

prescribed, that method excludes all others and must be followed by the city council. Cobra Oil & Gas Corp. v. Sadler, 447 S.W.2d 887, 892 (Tex. 1968); Sexton Oil & Gas Co. v. Mt. Olivet Cemetary Ass'n., 720 S.W.2d 129, 137 (Tex. App.-Austin 1986, writ ref'd n.r.e.). Reading Chapter 311 as a whole, the Legislature clearly implied a "record hearing." Gerst v. Nixon, 411 S.W. 2d 350, 354-56 (Tex. 1966). This reading is further supported by Lewis v. Metropolitan Savings and Loan, 550 S.W.2d 11, 13 (Tex. 1977) that said: "In the eyes of the law, there is no hearing unless a fair opportunity is afforded to the parties to prove their case."

Where the applicable statute is silent, Courts have held that the factual review should be governed by the substantial evidence test. *Gerst v. Nixon*, 411 S.W.2d 350, 354-56 (Tex. 1966). Chapter 311 requires special published newspaper notice of a public hearing on the creation or amendment of a TIRZ. Tex. Tax Code 311.003. It requires specific findings and creation of the "preliminary reinvestment zone financing plan" and other supporting documents, including a map of the proposed boundaries and a parcel list. Id., 311.005. At the public hearing "an interested person may speak for or against the creation of the zone, its boundaries, or the concept of tax increment financing." Tax Code 311.003(c). This opportunity to argue for or against the proposal can only be meaningful if the city has publicly posted and provided all the government's supportive facts and only constitutes meaningful content if the public is aware of all facts and arguments to the contrary. There must be a fair opportunity afforded to the parties. Only a record hearing ensures that.

. Most importantly, the City Council must supply reasons for their decision because these are necessary to an intelligent understanding of their final decision. The "substantial evidence" test incorporates the "arbitrary and capricious" standard of review. *See City of El Paso v. El Paso Elec. Co*., 851 S.W.2d 896, 900-01 (Tex. App.-Austin, writ denied). Thus, whatever constitutes the

record, if the city council does not set forth explicit reasoning as to the meaning of the statutory requirements and found facts to support each, the Court should reject the Council's determinations as a matter of law for being arbitrary and capricious as well as a lack of substantial evidence.

Upon review of the record in this case, the Court will see that Plaintiffs' have conclusively established that the Council's determinations, statutorily required to establish the SCWF TIRZ, were based on an error of law and are arbitrary and capricious. Further, Defendants act without legal authority, or beyond their reasonable discretion, when reasonable people could not differ on the conclusion to be drawn from the evidence. City of Keller v. Wilson, 168 S.W.3d 802, 816 (Tex. 2005). If the plaintiff establishes his right to summary judgment as a matter of law, the burden shifts to the defendants to present evidence that raises a genuine issue of material fact. *See* Chavez v. Kan. City S. Ry. Co., 520 S.W.3d 898, 900 (Tex. 2017); Amedisys, Inc., 437 S.W.3d at 511; State v. $90,235, 390 S.W.3d 289, 292 (Tex. 2013).

Plaintiffs are entitled to summary judgment on their claims for relief because, with the undisputed record in this case, only questions of law form the basis for summary judgment.

VI. CONSTITUTIONAL PROVISIONS DICTATE A STRICT CONSTRUCTION OF TAX CODE CHAPTER 311.

The Court should strictly construe the procedural and factual findings required under Chapter 311 for three reasons: 1) Chapter 311 preempts the city's authority on TIRZs and mandates the specific procedures that must be followed; 2) the constitutional constraints of uniform taxation in Art. VIII, 1-g, and no private gifts of public funds Art. III, Sec 52; and 3) the known history of TIRZ abuses.

A. Chapter 311's Requirements Are Strictly Construed Because They Preempt Cities' General Home Rule Powers.

Chapter 311 TIRZ requirements should be strictly construed because state law has preempted cities' general home rule powers related to tax increment financing: "Thus, in the case of tax increment financing permitted by article VIII, section l-g(b), a home-rule city does not exercise full power of local self-government but rather must look to general law implementing section l-g(b) for the authority to engage in tax increment financing." Tex. Att'y. Gen. Op. No. GA-276 at 5-6. *See also* Tex. Att'y. Gen. Op. No JC-152 at 5 5. "When the constitution grants a power, and where the manner of exercising that power is prescribed, it is implied that the prescribed manner excludes all others." Tex. Att'y. Gen Op. No JC-152 at 5, *citing*, Walker v. Baker, 196 S.W.2d 324,327-28 (Tex. 1946). In short, home rule cities such as Austin may enact tax increment reinvestment zones only when they strictly comply with the state's prescribed procedural and substantive requirements in Chapter 311.

B. The Texas Constitution's Equal and Uniform Taxation Requirement and Anti-Gift Prohibition Call for Narrowly Applying Chapter 311

The history of the TIRZ constitutional amendment supports a narrow construction of Chapter 311 to prevent violation of the equal and uniform taxation and anti-gift provisions of the Texas Constitution. Tex. Const. Article VIII, Section 1; Article III, Section 52. In 1981, the Texas Attorney General declared the original Tax Increment Financing Act of 1979 (Vernon Tex. Civ. Stat. Ann. Art. 1666d (1979)) facially unconstitutional under the equal and uniform taxation constitutional provision. Tex. A.G. Op. No. MW-337 (1981). The Attorney General found TIRZs "would unconstitutionally impact the general tax burden of all taxable property in the city by systematically exempting a portion of the value of the property in the district from the municipal taxation necessary 'to meet the current annual want,' i.e. from ad valorem taxation that is subject to the 'equal and uniform' requirement in Article VIII, Section 1." Id., at 1101. Article VIII, Section 1-g's adoption authorized tax increment financing as a narrow exception

to equal and uniform taxation when there is a demonstrated need for economic development in a blighted area: “Unless the area is in fact unproductive, underdeveloped, or blighted within the meaning of article VIII, section l-g(b), however, such a designation would run afoul of article VIII, section 1. We must presume that the legislature intended section 3 11,005(a)(5) to comply with the constitution.” Tex. Att’y Gen. Op. No JC-152, at 6.

Similarly, Article III, Section 52 calls for a narrow construction of Chapter 311. The Texas Attorney General avoided a finding of unconstitutionality under Article III, Sec. 52 only by applying the Act narrowly. Id., at 1107. Although the Attorney General found the Act “on its face” did not violate the anti-gift provisions, “[it] would be held unconstitutional in application *if not narrowly applied*.” Id., at 1107. See also Id., at 1104 (emphasis added). The Attorney General recognized that Article III, Section 52 required narrow application of tax increment financing laws to prevent violations of the Texas Constitution’s prohibition against public gifts to private parties.

The anti-gift provisions in Article III, Section 52 of the Texas Constitution may be violated in certain situations with tax increment financing.[3] Tex. Att’y. Gen Op. No. MW-337, at 1104, 1107. Article III, Sec 52’s purpose is to prevent governments from making “gratuitous payments to individuals, associations, or corporations.” Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission, 74 S.W.3d 377, 379(Tex. 2002). It requires that the “transfer of funds to a local development corporation must

[3] The Tex. Const., Article III, Section 52 states, in relevant part: “[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. . . .”

serve a public purpose, *and must be subject to adequate controls, contractual or otherwise, to ensure that the public purpose is accomplished*." Tex. Att'y. Gen. Op. No. JC-0335 (2001), at. 7, *citing*, Key v. Commissioners Court, 727 S.W.2d 667,669 (Tex. App.-Texarkana 1987, no writ)(emphasis added).

In Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission,74 S.W.3d at 384, the Texas Supreme Court established a three-part test for satisfying this constitutional provision to safeguard the spending of public funds on private parties:

> 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.

When used appropriately, tax increment financing serves the public purpose of promoting economic development. Judicial scrutiny, however, is necessary to determine if government controls actually ensure "the public purpose is *accomplished*," public funds are "*protect[ed],"* and that the government receives a "return *benefit*" for public funds going to private development. Id. (emphasis added). To prevent public funds from being used in violation of Article III, Sec 52's anti-gift strictures, Chapter 311's provisions should be "narrowly applied." Tex. Atty. Gen. Op. No. MW-337, at. 1110. See also Tex. Atty. Gen. Op. No JC-152, at. 5..

Chapter 311's But-For required statutory finding is clearly animated by both the constitutional prohibitions of unequal taxation and the prohibition of gifts to private parties Chapter 311's finding requirements are designed to address these constitutional concerns by

preventing localities from spending public funds when the private development would have occurred anyway -- in essence where there would be a gift of public funds to private parties. See Brief, *supra*.

C. Well-Known TIRZ Abuses Call for Courts to Carefully Scrutinize TIRZ Findings.

The Legislature presumably knew about the widespread abuses of TIRZs when enacting Chapter 311. It is well-established, according to leading TIRZ authorities, that public funds are often granted private developers when they are not necessary to encourage development, and, therefore, do not meet the but-for test. After comprehensively reviewing the studies on TIRZs, a scholar found "research suggests that TIFs often displace economic activity that would have occurred anyway." See Merriman, Improving Tax Increment Financing For Economic Development, pp. 4, 46 In accord, see also these studies: Who Pays for the Only Game in Town (Neighborhood Capital Budget Group 2000), p. 459; Dye & Sundberg, A Model of Tax Increment Financing Adoption Incentives, 29 Growth & Change (Winter 1998), p. 96; Sullivan, Johnson, and Soden, Tax Increment Financing (TIF) Best Practices Study (Institute for Policy and Economic Development at the University of Texas at El Paso, 2002), p. 14. The purpose of the but-for, blight and other statutory findings required under Chapter 311 is to prevent these illegal, wasteful taxpayer abuses of TIRZs. The required factual findings should be scrutinized carefully to prevent unauthorized, unconstitutional uses of TIRZs.

Lastly, the Courts also should carefully review cities' but-for determinations and supportive evidence because unlike councils, the judiciary is very familiar with the application of But-For tests, which are an integral part of tort and contract law. See, e.g., Hart & Honoré, Causation in the Law (2d ed. 1985); R. Keeton, Legal Cause in the Law of Torts (1963). The But-For TIRZ test is essentially the same test as the general But-For cause--in-fact element in the law.

As is well understood in the law, there is no cause of action if the plaintiffs do not show that but-for the tort or breach the damages would not have occurred. Similarly, Chapter 311 does not authorize a TIRZ if cities do not show that private development in the area would not have occurred "in the reasonably foreseeable future" but-for the injection of public funds. While courts are familiar and experienced with but-for causation, scholars have found many instances where city official have misunderstood and misapplied the But-For test. *Supra*.

VII. CLAIM NO. 1:

The Council's determination, as required by Tex. Tax Code § 311.003(a)—that *but for* creation of the SCWF TIRZ, development of the area would not occur in the reasonably foreseeable future—uses the wrong legal standard, is not supported by substantial evidence in the record, and is not supported by factual findings that demonstrate reasoned decision making. For each of these three reasons, the Council's action creating the SCWF-TIRZ is a void *ultra vires* act.

A. THE COUNCIL APPLIED THE WRONG "BUT-FOR" LEGAL STANDARD, CONTRARY TO THE LANGUAGE IN SECTION 311.003(A)

The City Council and its Legal Department applied an incorrect legal standard for the required But-For determination in Section 311.003 (a). As a result, the city's findings and evidence were legally defective. By applying the wrong legal standard, the record evidence cannot support a conclusion that there is substantial evidence in the record to adopt the SCWF TIRZ. The city's use of the wrong but-for legal standard was revealed in the official public hearings as well as the preliminary plan.

The But-For test requires that "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). If development would have occurred anyway in the area without public dollars, then a TIRZ is not authorized under this provision and the constitutional provisions that buttress this core statutory requirement.

The City Council and Legal Department, however, grafted additional subjective language onto the statutory But-For test, greatly expanding the council's latitude in using TIRZs. The statute's But-For language is straightforward-- requiring the governing body to determine that redevelopment unqualified "would not occur solely through private investment in the reasonably foreseeable future." In contrast, the city's expansive modification is inherently subjective and would allow TIRZs when redevelopment that would not occur how "we want it to happen." It would allow the council to adopt a TIRZ even if the area would clearly redevelop without public funds if the city simply did not like the nature of the unsubsidized development. By misreading the But-For determination to say, "the development that is happening won't be like we want it," instead of it will not happen "in the reasonably foreseeable future," Defendants acted without legal authority.

At the December 1, 2022 TIRZ Council hearing, Mayor Adler supported the City Legal Department's subjective modification of the but-for test that would allow the city to adopt the SCWF TIRZ even though the area was clearly rapidly developing on its own. Mayor Adler stated:

> *There's been a question about whether or not you can do a tirz in an area that would otherwise develop on its own. And our legal staff has told us, yes. No one is saying that this area wouldn't develop if we didn't do this*… And legal says that we're allowed to use the tirz if the development that *we want to have happen*? Isn't going to happen on its own. This is urban planning." (*emphasis* added).

PR 2022-12-01 1206. (December 1, 2022, Hearing Transcript at 8:02 pm)

Mayor Adler's 2022 statement was not a new admission of the Council and Legal Department's legal misapplication of the But-For Test. At the prior year's TIRZ public hearing, Mayor Adler stated:

> You know, in my view, what we need to understand better is the law surrounding the situation where *we have land that's undoubtedly going to develop on the south waterfront*, but unless we put in a grid system of roads it's not going to develop the *way that it best should.* (*emphasis* added)

PR 2021-12-20 0619 (December 20, 2021 hearing transcript at 9:38 a.m.).

Similarly, Council Member Tovo stated at the same hearing: "*This area will develop in the future*. We need to make sure that it *develops correctly* and in a way that all of Austin can benefit." PR 2021-12-20 0621 (December 20, 2021 hearing transcript at 9:43 a.m.). Council Member Kitchen made the same point: "I support what others have said about the fact that -- *I agree that this area is going to develop* but it needs to *develop in a way that is for the whole city*. (emphasis added)." PR 2021-12-20 0621 (December 20, 2021 hearing transcript at 9:45 a.m.). A similar statutory modification is found in the city's SCWF TIRZ Plans, which states the But-For test as the SCWF "will not *effectively* occur solely through private development." PR 2022-12-01 1449; PR 2022-12-20 0643). The statute, however, does not contain any modifier that would authorize the city to arbitrarily decide that rapid redevelopment on its own is "ineffective," "incorrect," or "not what council wants to happen."

The Texas Attorney General has directly rejected the city's subjective reinterpretation of the statutory standard: "An area may not be designated as a reinvestment zone simply because [the] municipality contemplates that greater future development would occur in that area if a tax increment zone were created than if it were not created. Tex. Att'y Gen. Op. No. JC-0152 at 7 (1999). The Texas Supreme Court has held in other contexts that words cannot be read into statutory requirement that are not in the statute. In <u>In the Interest of H.S.</u>, 550 S.W.3d 151, 158 (Tex 2018), the Court held that words may not be grafted on to a statute that are not there: "By conditioning nonparent standing on a finding that the parents have wholly 'abdicated' their

parental rights to the nonparent, the court of appeals and the dissent would effectively add an exclusivity requirement that is not reflected in the statute's plain language. See Iliff, 339 S.W.3d at 80-81 (‘We have no right to engraft upon the statute any conditions or provisions not placed there by the legislature.’) Again, had the Legislature intended to require total ‘abdication’ by the parent, it would have done so expressly.” *See also* Lippincott v. Whisenhunt, 462 S.W.3d 507, 5o8 (Tex. 2015)("A court may not judicially amend a statute by adding words that are not contained in the language of the statute, Instead, it must apply the statute as written.").

The city’s grafting of these subjective modifiers on the statute subverts the legislative intent behind the But-For requirement. These grafted modifiers have been used by cities across the country to eviscerate the But-For test and thereby undermine the legislative intent to prevent TIRZ abuses in unnecessarily diverting public tax dollars for private development, Merriman, Improving Tax Increment Financing For Economic Development, pp. 15-16.

The City’s proposed rewrite of the but-for test essentially eviscerates the statutory protections for taxpayers. Pouring in public funds to private development that would occur on its own in the reasonably foreseeable future can always seem to make it “better” or “more effective” from the City Council’s subjective point of view. That’s not what the statute or the constitution intended.

In conclusion, the court should not read language into a statute that is not there and undermines the legislature’s intent. Besides violating the statute, it conflicts with the necessity of interpreting the Constitutional Amendment authorizing TIRZ’s in “blighted” areas in harmony with the Constitutional prohibitions against unequal taxation and public gifts. The court should

find as a matter of law that the city used the wrong but-for legal standard for the SCWF TIRZ and, therefore, its but-for determination is *ultra vir*es.

B. The City's Record Lacks Substantial Evidence to Support the Required But- For Legal Finding

In the City official record, there is no evidence, much less substantial evidence, to support the required But-For finding, Therefore, as a matter of law, the city's adoption of the SCWF TIRZ is *ultra vires.* Below, we first will review the law and then analyze the city's alleged evidence for its But-For finding in each part of the city's record.

1. The extensive administrative case law in Texas under the Texas Administrative Procedure Act is instructive on what constitutes legally sufficient factual findings.

The mandatory, statutory TIRZ findings should be treated like agency statutory findings under TAPA because like the required TIRZ findings "the underlying findings of fact required by the [TAPA] have a substantial statutory purpose and are more than a technical[ity]." Texas Health Facilities Comm. V. Charter Medical-Dallas, 665 SW. 2d 446, 451 (Tex. 1984). To give meaning to Chapter 311's numerous extra procedures and findings, the Court should require that the evidence for establishing a TIRZ meet the standard for substantial evidence under the TAPA. Otherwise, cities will treat the But-For and other findings as mere technicalities, undermining the Legislature's concerns with abuse and waste.

The Texas Supreme Court has developed a clear body of law for analyzing whether agency factual findings are legally sufficient and constitute substantial evidence. The seminal Court case is Charter Medical: "The logical first step in evaluating the Commission's order is to examine the agency's fact findings to determine whether they meet the statutory requirements." 665 S.W.2d at 450. The factual findings must relate to and support the stated statutory criteria:

"The findings should relate to material basic facts and should relate to the ultimate statutory finding that they accompany. In general, the findings of fact required by [§ 16(b)] should be sufficient to serve the overall purposes evident in the legislative requirement that they be made." State Banking Bd. v. Allied Bank Marble Falls, 748 S.W.2d at 448, *citing,* Charter Medical, 665 S.W.2d at 452.

Charter Medical sets out what constitutes valid factual findings:

- "Valid findings of fact must be clear and specific.
- "A mere conclusion or a recital of evidence is inadequate.
- "The required underlying facts may not be presumed from findings of a conclusional nature.
- "In general, underlying findings of fact must be such that the reviewing court can fairly and reasonably say that the underlying findings support the statutorily required criteria."

Id. (citations omitted)(bullet points added).

Furthermore, the evidence must be "supportive of the ultimate fact findings" related to the statutorily-required criteria. Non-probative evidence is ignored. Texas Health Facilities Comm. v. Presbyterian Hospital North, 690 S.W.2d 564, 567 (Tex. 1985)

2. The three components of the city's TIRZ record lack substantial evidence to support the City's required But-For finding; to the contrary, the city's undisputed record shows the area is already "rapidly" developing on its own without TIRZ funds. The conclusory but for findings are legally deficient without supporting facts that demonstrate reasoned decision-making**.**

The 2021 and 2022 TIRZ Ordinances. The two ordinances contain no But-For factual findings; they simply copy *verbatim* the statutory language. The ordinances state only that "Development

or redevelopment in the Zone would not occur solely through private investment in the reasonably foreseeable future." PR 2021-12-20 0864; PR 2022-12-01 1328 2021 Ordinance, p. 1; 2022 Ordinance, p. 1. This professed "finding" is no more than a perfunctory conclusory, legal statement tracking the statute without any supporting evidence or analysis.

Under Texas law, conclusory legal statements do not constitute factual findings or evidence to support the statutory criteria for establishing a TIRZ. See Charter Medical, 665 SW. 2d at 452; Presbyterian Hosp. North, 690 S.W.2d at 567. Texas Courts disregard legally conclusory statements that lack specific factual findings or evidence. Presbyterian Hosp. North, 690 S.W.2d at 567. "Proper underlying (basic) findings of fact should follow the guidelines we previously have noted: they should be clear, specific, *nonconclusory*, and supportive of the ultimate statutory finding. *Mere recitals of testimony or references to or summations of the evidence are improper*." Charter Medical, 665 SW. 2d at 452 (emphasis added). The ordinances contain no support for the city's But-For finding.

The two TIRZ ordinances incorporate the Preliminary Plans and 2016 South Central Waterfront Vision Plan as appendices to the ordinances and as plans for TIRZ development. These documents will be discussed below.

The 2021 and 2022 Preliminary Plans. Nor do the two preliminary plans contain any factual findings or evidence in support of the required But-For finding. We will look simultaneously at the relevant language in the two plans, because they are essentially the same except for infrastructure cost estimates. The incorporated City 2016 Vision Plan literally begins with the following two sentences: " The South Central Waterfront (SCW) is bound for change. In fact, change is rapidly underway." It is undisputed that this rapid change – and the predicted billions

of dollars of new development projected in the Vision Plan – was happening and was predicted to happen without public taxpayer funding from the TIRZ, which was only funded six years later in the 2022 TIRZ ordinance.

The SCWF preliminary plans have three parts:

a. Part One: The short narrative. The city's TIRZ narrative has nine cursory pages with several basic exhibits (district map, list of parcels, and ballpark costs). The narrative contains only a bald, conclusory statement that public investment is needed without any evidentiary support or analysis: "The area suffers from inadequate sidewalk and street layout and other factors, and due to its size, location, and physical characteristics, re-development will not effectively occur solely through private investment in the foreseeable future." PR 2022 12-01 1339; PR 2021-12-20 0643. No facts or analysis are provided in the narrative, or the rest of the preliminary plan (discussed below), to support its assertion that the area will not redevelop without $354 million in *publicly funded* infrastructure. There is no showing that the developers cannot feasibly pay for their own infrastructure. Nor is there any evidence on how the area's streets and sidewalks are inadequate or how they will impede the development of the SCWF. In fact, as seen below, the 2016 vision plan's analysis explicitly states that *no public funds are needed to develop the SCWF's infrastructure*—directly contrary to the narrative's unsupported assertion.

b. Part Two: The 2016 vision plan. The City incorporated the body of its lengthy 2016 SCWF vision plans into its 2021 and 2022 TIRZ plans (although the city left out the vision plan's appendices containing detailed infrastructure costs and financial analysis, which we include in the record as Exhibit C under the doctrine of optional completeness. Tex. Rules of

Evidence 107). The plan's financial projections actually reveal that no public investment is needed because the area is rapidly developing on its own: "the South Central Waterfront is experiencing tremendous and increasing market pressures to redevelop" and is 'reaching an economic tipping point." PR-2022-12-01 1357, 1377 It observes that "[i]n fact, change is rapidly underway." *Id.*

The plan lays out two development scenarios for the SCWF, which show that property tax dollars are *not* needed for the SCWF TIRZ to rapidly and massively redevelop in the reasonably foreseeable future. The plan first projects baseline SCWF development without any zoning changes or public investments of "2 million square feet of new development in a mix of low to mid-rise office towers, mixed-use office buildings, and multi-family residential buildings with ground floor retail." PR 2022-12-01 1450. This projected new development would bring the total usable space in the district over fifteen years to 4.5 million square feet. PR 2022-12-01 1450, 1452. This new development would occur even under the then-current, more restrictive zoning laws, with limited "[h]eight ranges from three to six stories, except for sites with an existing Planned Unit Development where heights could go to 15 stories." PR 2022-12-01 1450.

The plan then compares projections under the baseline development to a projected "test scenario" with large increases in zoning entitlements. The test scenario projects an additional 6 million square feet of development, resulting in "8.5 million square feet of total space in the district…". PR 2022-12-01 1450-51: The City's plan projects that "[t]he current market could support *new development of higher density office and residential product types…this Test Scenario assessment…does demonstrate that achievable rents for various product types are sufficient to encourage property owners to redevelop their land and secure viable returns for developer investments…* ." Id (emphasis added). (The body of the 2016 vision plan provides

some projection details, but the full analysis and details are laid out in its unincluded appendices). Exhibit C, *2016 Vision Plan, Appendix V, pp. 36-50).*

The city's 2016 test scenario projections were based on no public subsidies. The plan found that the SCWF's massive redevelopment would be feasible *without* property taxpayers paying for the district's infrastructure or for 527 affordable housing units. Id., Appendix V, pp. 49-50. The 2016 vision plan appendices lay out in detail the test projection's costs and analysis. They envision the public improvements would cost $73.36 million—1/5th of the ballpark and black box projected cost estimate (with no detail) presented only six years later in the City's 2022 TIRZ plan. Id., Ex. C Appendices I and II, pp.1-19.

Crucially, the city's 2016 test projection foresees that *the district's private owners will pay for its infrastructure* through a Public Improvement District (PID)-- without the need for property taxpayer dollars being spent through a TIRZ. Id., Ex. C; Appendix V., pp. 49-50. The test projection assumes that "[e]ach of the parcels includes an assumed cost associated with a Public Improvement District (PID) that's assessed [upon the property owners] at $10 per square of gross development." Id., Appendix V, p. 11. Since total additional square footage for the entire district is projected to be 6.2 million, a PID at $10 a square foot would yield approximately $63 million. Id., Appendix V, p. 50. The 2016 plan clearly contemplates that with increases in zoning entitlements, the SCWF does not need taxpayer dollars to fully develop: "The Test Scenario is a 'what if' financial model to calibrate the additional development needed beyond existing entitlements to incentivize private properties to participate in the Vision. The map reproduced supra at p.8 shows the Test Scenario on "tipping parcels" – properties most likely to redevelop within the next 15 years. ***Under the Test Scenario, private properties ultimately pay for the whole public realm vision through on site improvements and the***

recommended Funding Toolkit on page 97[the PID].*"Id., p. 102* (emphasis added)(it is unclear why there is a $10 million difference between the projected costs and the PID fees).

In summary, since according to the city's 2016 vision plan, the SCWF does not need public funds to redevelop, the But-For test is not met and the SCWF TIRZ is not authorized under Chapter 311.

c. Part Three: SCWF feasibility study. The plan's last part consists of a 2021 SCWF market analysis report by the city's hired consultant, Charles Heimsath of Capitol Market Research ("CMR"). The city points to and specifically relies upon this study for its evidence for its But-For finding. At the December 2022 public hearing, council member Alison Alter asked the City's chief financial officer Ed Van Eenoo what evidence in the record supported the But-For test:

> [Van Eenoo]: **So that -- the market analysis that we had done is the basis for the "But for" analysis. That essentially what you see in the Charles high Smith [Heimsath] analysis and the CMR analysis** is that "But for," or with the public investment, we are projecting more than $3 billion of private investment occurring that would not happen, but for the public investment that would allow that to occur.

PR 2022-12-01 1207 (Hearing Transcript of 12/1/2022(starting at 8:07 p.m.). (emphasis added)

The Heimsath CMR report, however, is a feasibility study, which is the wrong study for satisfying the But-For test. The CMR report describes itself as a "market/feasibility report." PR 2021-12-20 0856; PR 2022 2022-12-01 1553 (2021 Plan, Part III. p. 78; 2022 Plan, Part III, p.

78) The city similarly describes the report as an "economic feasibility study". PR 2021-12-20 0660; PR 2022-12-01 1344.

CMR's SCWF feasibility study is essentially a detailed local market absorption study that projects that the Austin market could profitably absorb over the next twenty years an additional 6 million plus square feet of very high-end office, apartment, and condominium space in the SCWF area. PR 2022-12-01 1363-65, 1376-78, 1395-97, 1416-18, 1421-23. The feasibility study's conclusions are based on the 2016 vision plan's assumption of large increases in zoning entitlements from the 2016 baseline zoning. PR 2022-12-01 1363, 1424. It provides no evidence or analysis that public funds are necessary for the development to occur.

A market feasibility study is completely different than a But-For TIRZ study (also known as an efficiency study); it provides no probative evidentiary support for the statutorily required but-for finding. A feasibility study answers only whether the market can absorb the projected development; it does not address whether public investments are necessary for the development of the district in the future. George Lefcoe, Competing for the Next Hundred Million Americans: Uses and Abuses of Tax Increment Financing, 43 Urban Lawyer 427 (2011), p. 459-461. Professor Lefcoe, the nation's leading authority on tax increment financing explains "**the distinction between financial viability and economic efficiency":**

> **Policymakers unused to the concept of opportunity cost might be susceptible to making a poor decision if financial viability is confused with efficiency.** Thus, a TIF project that increased values by 3% in a part of the city where values had been rising by 5% might be financially viable in the sense that it covers costs. But if values in the project area would have risen by 5% without public intervention, the other taxing entities will be net losers (along with the general public).

Id., pp. 459-460 (emphasis added). Professor Lefcoe explains that TIFs are misused when **"TIF officials chasing financial viability at the expense of economic efficiency would not hesitate to designate an already thriving neighborhood as a TIF project area even though it would almost certainly have developed in virtually the same way without public assistance."** Id., p. 459 (emphasis added). He concludes that there are "convincing criticisms of TIF for granting excessive subsidies to private developers and hiding the fiscal realities from taxpayers…as local **governments sometimes neglect to determine through the use of 'but for' tests that TIF subsidies are needed and efficient.**" Id., p. 467 (emphasis added).

In other words, the city's SCWF feasibility study may show the area's redevelopment is financially viable for private developers, but it does not address whether public subsidies are necessary for the district's development to occur. The study is not probative of the required But-For statutory finding requirement, which is crucial to preventing public funds from being wasted on private developments. Id.

Chapter 311 recognizes that feasibility studies are distinguishable from but-for efficiency studies by requiring both types of studies. While Section 311.003 requires but-for efficiency findings, Section 311.011(c)(3) separately mandates "a finding that the plan is economically feasible and an economic feasibility study." Texas requires two separate findings because feasibility and but-for studies reflect different policy concerns and analysis.

In conclusion, the basis for the city's but-for finding has no factual support. The basis for its finding – the CMR feasibility study-- provides no support for its contention that solely for the $354 million in taxpayer dollars for infrastructure, the SCWF district would not develop. The study asserts without any evidence, and contrary to the 2016 vision plan that it relies upon, that

the district would not develop without the TIRZ's public subsidies. Ex. C -- *2022 TIRZ Plan, Part II, pp. 99-103; 2016 Vision Plan Appendices, pp. 36-50.*

VII. CLAIM NO. 2:

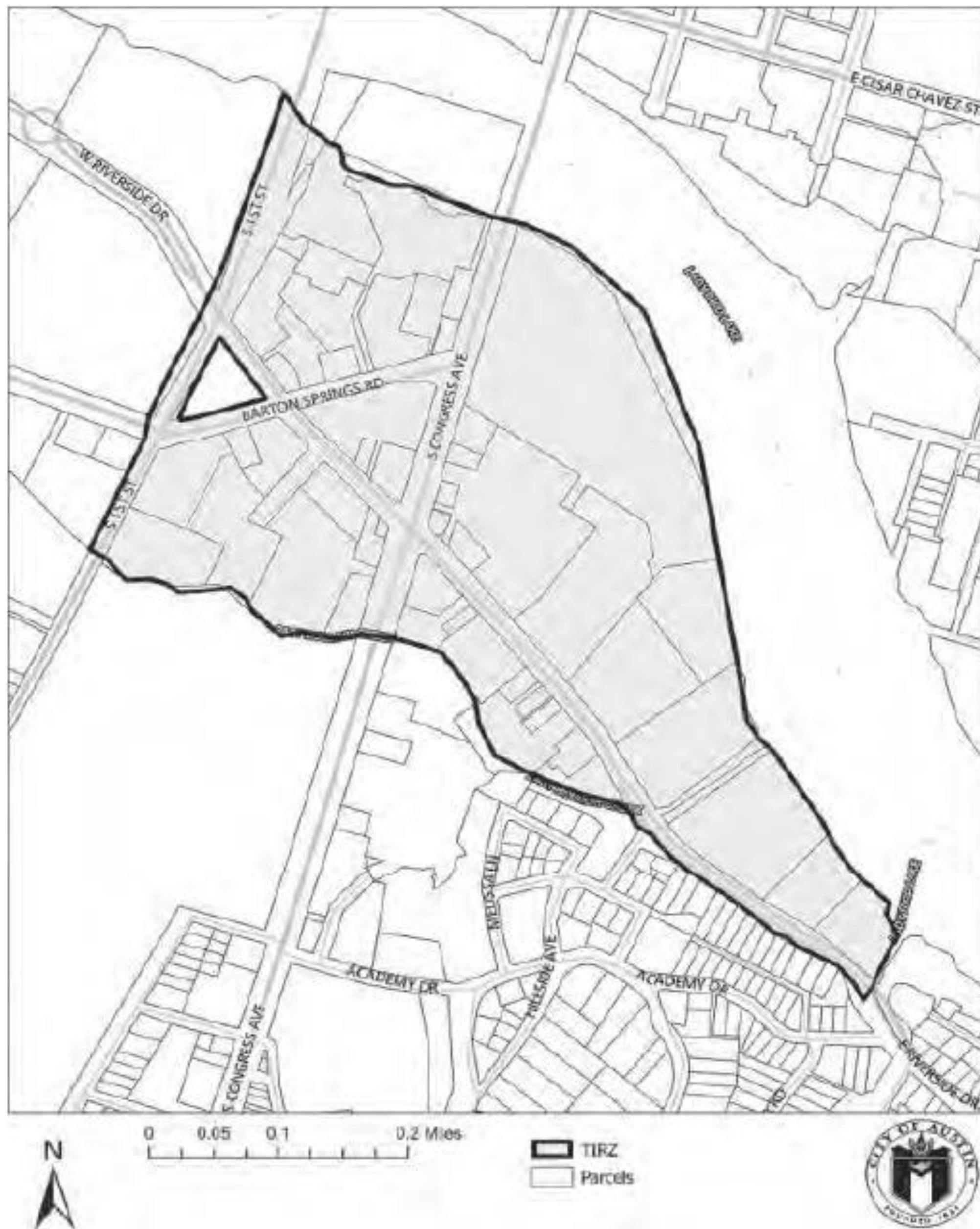
The Council created the SCWF TIRZ without substantial compliance with the public notice and hearing requirements in Tex. Tax Code § 311.003(c). For this reason, the Council's action creating the SCWF-TIRZ is a void *ultra vires* act.

Despite the statutory requirement for public involvement in the process of creating a TIRZ, the Austin City Council initially created the SCWF TIRZ at a meeting on December 20, 2021—an unusual Monday meeting just before Christmas on that Friday. The Council adopted an Ordinance which, while ostensibly creating the TIRZ, set a Zero Recapture Rate—meaning there would not be any public funding available at that time for the TIRZ properties. It was essentially a skeleton or placeholder TIRZ. PR 2021-12-20 0865 ("PART 7. Council establishes the tax increment of the captured increment of City property taxes to be placed in the TIRZ No. 19 Tax Increment Fund and to be used for all purposes of the TIRZ as set forth in the Project Plan and Financing Plan at 0%."). (emphasis added)

The statutorily required public hearing notice was published in the Austin American-Statesman on December 2, 2021. PR 2021-12-09 0001

The boundaries of proposed South-Central Waterfront Reinvestment Zone No.19 are described in the map below:

This notice is being published in accordance with the provisions of Chapter 311, Texas Tax Code



But the notice had at least three fatal flaws: (1) the published notice failed to state what time the TIRZ public hearing would begin; (2) the notice said the hearing would be on December 9, 2021, but Council did not have the hearing that day, although three speakers, limited to 2 minutes total speaking time on multiple agenda items did reference the proposed

TIRZ during a general public communication period that contained dozens of council agenda items, before council much later in that meeting voted to postpone the hearing until December 20, 2021. Defendants then failed to give another statutorily required published public hearing notice; and the SCWF TIRZ boundary map in the notice showed the hearing would consider a TIRZ boundary that would *not* include the so-called Snoopy PUD. Yet, Ordinance No. 20211220-002 *included* the Snoopy PUD. Not only is this a public-notice violation, but it demonstrates how arbitrary the Council's determination was that the area would not develop or redevelop without creating the TIRZ. When the SCWF TIRZ ordinance was passed—including the Snoopy PUD—there was already a 15-story office building *under construction* in the Snoopy PUD in the boundary of the SCWF TIRZ.

Two separate public hearings for the SCWF TIRZ were held on December 20, 2021; Agenda Item 3 (public hearing for a TIRZ not including the Snoopy PUD PR 2021-12-20 0606) and Agenda Item 4 (public hearing for a TIRZ including the Snoopy PUD PR 2021-12-20 0607). The City did not post the 7-day public notice for the public hearing under Agenda Item 4—the hearing on which the Council actually took action. In addition, the public was not provided access to the "Preliminary Project and Financing Plan" (relating to Agenda Items 2 and 4, that excludes the Snoopy PUD) in advance of the hearing, because that "late agenda backup material" was not made available until December 20th, the day of the hearing. PR 2021-12-20 0608 (under "Work Papers and Other Backup Documentation" on the City's Website for Agenda Item 4, is said:"20211220-004, Agenda Late Backup: Draft Preliminary Plan, PDF, 20.8mb, posted12/20/2021"

To make the statutorily required SCWF TIRZ public hearings even less meaningful, the Council limited the speakers' testimony to only 2 minutes each, even though there were only 2

speakers who spoke. PR 2021-12-20 0617, 0618 At the public hearing at which adopted the ordinance creating the SCWF TIRZ, the Council allowed a total of 4 minutes for the statutorily required public hearing. Both speakers spoke against the proposed SCWF TIRZ and pointed out the facts obvious in the City's own record: that development across Austin, and including in central Austin, was booming, that almost none of this development was receiving taxpayer funding for required infrastructure, and no one could honestly believe that development within the SCWF TIRZ boundaries would not occur "in the reasonably foreseeable future" without taxpayer subsidies. Id.

The City Council waited almost a year to amend the zero-revenue TIRZ ordinance, meeting on December 1, 2022 with 86 items on the Council agenda. PR 2022-12-01 1098 At the December 1, 2022 meeting, Council made several changes to the original 2021 Ordinance: The SCWF TIRZ zone boundary was changed to exclude the Snoopy PUD and a 46% recapture rate, instead of zero rate, was adopted. Published notice of the public hearing for the December 1, 2022, meeting was published in the Austin American-Statesman on November 24, 2022. PR 2022-12-01 1097. Unlike the December 20, 2021 hearing, at this hearing, *there was no separate hearing for the TIRZ* from other hearings on other Council agenda items. Several highly controversial items and hearings were on the agenda, including Item 55 to allow residential development in commercial zones and Item 56 to change zoning compatibility standards. As shown above, up to this point, starting in 2021, the Council had received a grand total of 4 minutes of testimony during the statutorily required TIRZ public hearing. Despite that, at this hearing, all speakers were given only 1 (one) minute to testify, but that included any testimony they wanted to give on numerous other agenda items as well. For example, Bill Bunch (a Director of Plaintiff Taxpayers Against Giveaways) wanted to address 5 other important agenda items at that meeting in addition to the TIRZ public

hearing, but Mayor Adler told him he only had one minute to speak on all of the items. Excerpt from 12/01/2022 Transcript:

>>William bunch for item 36, 37, 39, 48, 56. Followed by Roy wayly.

[11:00:18 AM]

>>[Bunch] As a point of order, do I get one minute for each item or for all.

>>Mayor Adler: For all.

PR 2022-12-01 1114

At the December 20, 2022 SCWF TIRZ public hearing, a total of 12 minutes of testimony were taken from 12 speakers, all of whom were opposed to creation of the SCWF TIRZ, all of them strictly limited to speaking no more than two minutes. [12/01/2022 meeting transcript and video] For example, speakers Laura Templeton (a board member of Plaintiff Taxpayers Against Giveaways) and Mary Arnold were interrupted and cut off midsentence by Mayor Adler and the city's speaker buzzer. (Transcript and video starting at 11:14 a.m.) Some of these speakers asked the Council questions seeking information about the TIRZ, but no one answered their questions. Yet when other speakers asked questions about other agenda items, Council Members engaged in discussion with them. The record demonstrates that the City Council failed to properly give notice of, or properly conduct, the public hearing on SCWF TIRZ as required by law.

The Council violated the right of taxpayers of Austin to appear and speak on the issue of creating the SCWF TIRZ. *See City of Houston v. Fore*, 412 S.W.2d 35, 38 (Tex. 1967) ("Under these circumstances an opportunity for the interested owners to be heard prior to a determination of benefits and the amounts to be assessed against their properties *is a constitutional necessity and not a matter of legislative grace*.") (emphasis added) Tex. Tax Code section 311.003(c) says:

> Before adopting an ordinance or order providing for a reinvestment zone, the municipality or county must hold a public hearing on the creation of the zone and its benefits to the municipality or county and to property in the proposed zone. At the hearing an interested person may speak for or against the creation of the zone, its boundaries, or the concept of tax increment financing. 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 or county.

The Council failed, for the December 20, 2021 hearing, to publish notice of that hearing. The Council failed, for the December 1, 2022 hearing to give a reasonable amount of time for persons to testify about the TIRZ. Having failed to follow both the substantive and procedural requirements of Chapter 311, the Council's approval of the SCFW TIRZ Ordinances is a void *ultra vires* action.

CONCLUSION AND PRAYER FOR RELIEF

Because the city used the wrong legal standard, presented no probative evidence in support of the mandatory But-For finding, and failed to make supporting findings of fact demonstrating reasoned decision-making based on the record of the three noticed public hearings, the Council acted without legal authority in creating the SCWF TIRZ, resulting in the illegal expenditure of property taxes.

Furthermore, the SCWF TIRZ 2021 and 2022 Ordinances are void for failing to substantially comply with Chapter 311's public notice and hearing requirements. In the alternative, if the Court denies any part of plaintiffs' motion for summary judgment, plaintiffs ask the Court to sign an order specifying the facts that are established as a matter of law and directing any further proceedings as are just. Tex. R. Civ. P. 166a(e).

For these reasons, Plaintiffs ask the Court:

1. To grant this motion for summary judgment and invalidate, as void, the creation of the SCWF TIRZ;

2. Enjoin the Defendants from taking any action or expend any public funds to implement the SCWF TIRZ;

3. In the alternative, if the Court denies any part of plaintiffs' motion for summary judgment, plaintiffs ask the Court to sign an order specifying the facts that are established as a matter of law and directing any further proceedings as are just. Tex. R. Civ. P. 166a(e); and

4. Grant Plaintiffs such other relief which, by law or equity, they are entitled and award court costs to Plaintiffs.

Respectfully submitted,

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COUNSEL FOR PLAINTIFFS

VERIFICATION OF PLAINTIFFS' RECORD FOR SUMMARY JUDGMENT

My name is Bill Aleshire. I am capable of making this verification. The summary judgment evidence records incorporated in this Motion for Summary Judgement and listed in the Appendix to this Motion are true and correct copies obtained from the public website of the City of Austin meetings on December 9, 2021, December 20, 2021, and December 1, 2022 and from the public website of the Travis Central Appraisal District.

Bill Aleshire

CERTIFICATE OF SERVICE

A true and correct copy of the above filing was provided on December 22, 2023 via e-service to Defendants' counsel as shown below:

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William G. Bunch

APPENDIX OF PLAINTIFFS' RECORD FOR SUMMAR JUDGMENT:

2021-12-09 PLAINTIFFS' RECORD, PR 2021-12-09 0001 – 0602

2021-12-20 PLAINTIFFS' RECORD, PR 2021-12-20 0603 – 1096

2022-12-01 PLAINTIFFS' RECORD, PR 2022-12-01 1097 – 1597

TCAD RECORD - PLAINTIFF TAXPAYERS, PR TCAD 1598 – 1603

Exhibit A: Affidavit of Holly Reed

Exhibit B: Excerpt of 2023 City of Austin Budget

Exhibit C: Appendices to the 2016 South Central Waterfront Vision Plan