ATTACHMENT "G"

RECA
REAL ESTATE COUNCIL
OF AUSTIN

March 24, 2014

The Honorable Lee Leffingwell, Mayor of Austin
and Members of the Austin City Council
301 W. 2nd Street
Austin, TX 78701

RE: Proposed Vested Rights Ordinance

Dear Mayor Leffingwell and Members of the City Council:

Vested rights and the City of Austin's policy related to project duration and expiration are critical issues to our membership and, ultimately, the community. As you are well aware, the Real Estate Council of Austin's position has been very clear that state law, specifically Section 245.005(b) of the Texas Local Government code, supersedes any municipal ordinance attempting to expire development projects and prohibits the ordinance that the city is currently contemplating. Our position was affirmed by a Texas Attorney General opinion in December 2012. RECA's position continues to be that the proposed Vested Rights Ordinance, to the extent it establishes project expiration dates, is contrary to state law.

Nonetheless, without waiving that position and in the interest of creating an ordinance that would lessen the potential adverse consequences and reduce future disputes, a RECA working group met with city planning department officials in late 2013 to work on changes to the proposed ordinance. Chief among the goals was to discuss time frames that would minimize these impacts according to the needs of our members and the community's desire to have high-quality development projects which, like Avery Ranch, Southpark Meadows, the Domain, Hyde Park and Travis Heights, can take decades to build.

A new Vested Rights Ordinance, delivered to RECA and other interested parties just two business days before the Tuesday February 25 Planning Commission meeting, failed to address, among other important things, the length of time needed to properly complete projects. It was postponed to the March 25 Planning Commission meeting.

After acting in good faith with the city to improve the ordinance, even though state law is on our side, we are making a last-ditch effort to incorporate elements into the ordinance that would make the ordinance less impactful to our members and reduce future disputes.

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Procedure

- The City Attorney should make the determination, not the Planning Director. We would like to see the City Attorney make these decisions since they amount to legal determinations and opinions.
- The determination must include specific findings of fact and conclusions of law. Currently these are not provided. Our members typically receive verbal explanations which continually change or get misstated. We need the city to be on record with specific justifications than can be reviewed.
- After reconsideration, administrative remedies are complete. The ordinance, as currently written, suggests that if an applicant disagrees with a vested rights determination, the applicant should go through a variance process before contesting the city's determination. We believe that an applicant should be free to immediately contest such a fundamental determination after a reconsideration.

Project Consent Agreements (PCA)

- The Land Use Commission should decide a PCA. Since subdivisions are considered by the Land Use Commission, it would be more efficient to have the commission decide a PCA at the same time it considers the subdivision.
- The applicant only should be able to appeal to city council. The applicant should have the ability to appeal a Land Use Commission decision on a PCA to City Council in case the Land Use Commission has made errors. Other groups should not have those appeal rights because it would defeat the purpose of having PCAs go to the Land Use Commission to avoid the politicization of these issues.

Project Expiration

- There should be a flat 13-year project expiration for all projects. The city's ordinance allows up to 13 years of grandfathering administratively for commercial projects with successive applications with a process that is not practical and will lead to "game playing." Instead, since 13 years of grandfathering is acceptable to the city, keep the ordinance simple and allow for that time period for all projects.

Managed Growth Agreements (MGA)

- Eliminate subsection (B) requirements regarding current regulations, size and location. As proposed, MGAs would only be available for new projects that exceed 250 acres and are located in the city limits outside the Barton

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Springs Zone. The concern about size is addressed by the requirement in subsection (C) that an MGA project "require a longer period of time to construct" and the concern about the BSZ is addressed by the requirement that the MGA project "result in development that is environmentally superior". With those two requirements, there is no need to draw an arbitrary 250 acre line or limit this to non-BSZ properties.

Instituting these provisions in the ordinance would greatly reduce the number of potential disputes that could arise and would prove workable in the majority of cases. We hope the council will seriously consider these recommended changes. In the meantime, with state law on our side, we are reviewing other remedies to ensure the integrity of vested rights in land development.

Sincerely,

KC Willis
Chair, Real Estate Council of Austin

ATTACHMENT "G"

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October 10, 2013

The Honorable Lee Leffingwell, Mayor of Austin
and Members of the Austin City Council
301 W. 2nd Street
Austin, TX 78701

RE: Vested development rights

Dear Mayor Leffingwell and Members of the City Council:

As you know, the issue of vested rights and the City's policy related to project duration and expiration are of the utmost concern to RECA members. We believe the Attorney General opinion is clearly correct and that the City does not have any authority to impose project expiration in conflict with Section 245.005(b) of the Texas Local Government Code. RECA reserves its right to assert that any ordinance adopted by the City that is contrary to that statute is illegal.

However, in an effort to minimize the disputes that will arise if the City ignores the Attorney General opinion and passes a project expiration ordinance anyway, we feel that changes to the draft ordinance (which is unreasonable as it is now, especially Division 3) are necessary:

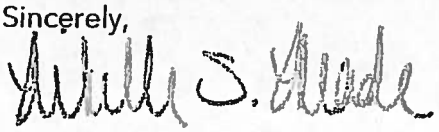
- The City should tie project expiration to first permit *approval* and not submittal.
- If the City wants to keep a project expiration time frame simple, it must be for a long enough period to truly be a "one size fits all" time frame. We believe **a minimum of 20 years** should be that time period given how long large projects take, the effect of economic cycles, and the difficulty of the City review and approval process.
- There should be no distinction between desired development zone (DDZ) and drinking water protection zone (DPZ) because: (1) this will apply prospectively to projects that meet current code, and current code in the DWPZ is already very, very restrictive and has been mostly unchanged for 20 years; and (2) projects do not take any less time in the DWPZ, and in fact probably take more, than they do in the DDZ, and that distinction is arbitrary.
- A project should not expire as long as there are unexpired permits active, including subdivision construction plans, building permits, and site plans.

- Projects should be able to get a Managed Growth Agreement (MGA) if they need longer than 20 years. The criteria for granting them should not be overly restrictive. For example, MGAs should be available to large, long-term, and civic projects without having to go through an arduous "public benefit" analysis. As in the prior code, MGAs should allow the extension of permits so that the re-filing of permits with shorter expiration dates than that allowed by an MGA is not necessary.

- The ordinance should not provide that "if all permits expire, the project expires".

The above are broad comments regarding project expiration, and RECA is likely to have other specific comments to the ordinance language that relate to project expiration and the process for making vested rights determinations which we will provide the City legal department. Thank you for your attention to this matter, and please do not hesitate to contact me if you have questions or concerns.

Sincerely,



Nikelle Meade
Board Chair

ATTACHMENT "H"

January 21, 2014

Greg Guernsey
Director of Planning
& Development Review
City of Austin

by email: Greg.Guernsey@AustinTexas.gov

Re: Proposed vest rights ordinance

Dear Mr. Guernsey:

Thank you for meeting with us last week. The meeting afforded those of us who are advocates for the environment a rare opportunity to try to push back a small amount against the relentless onslaughts by developers beginning in the 1980s that allowed developers' desire for investment certainty to wholly supersede cities' attempts to protect their citizens from environmental degradation and other threats to the community. Grandfathered exemptions from environmental regulations have been steadily expanded since the 1980s, with the Legislature initiating some of the exemptions and the City of Austin initiating others at the behest of the Real Estate Council of Austin and others.

The cumulative impact on the City's regulatory authority has been devastating. It is extremely rare for a development project to have to comply with the SOS Ordinance, even though Austin citizens overwhelmingly voted to enact it more than 20 years ago, back in 1992. Although tremendous work has been put into improving watershed ordinances for East Austin and into a rewrite of the Land Development Code, it appears that these new ordinances will not be applicable to major development projects for a long time in the future, if ever.

Repeal of the Project Duration Ordinance

But RECA is not done. The most recent travesty was the City's unilateral repeal in 2013, at the behest of RECA, of its longstanding project duration ordinance, an ordinance that was actually protected by and incorporated into the Chapter 245 grandfathering process. Until the City repealed it. All the environmental organizations in Austin opposed this repeal.

Planning Commission Approved a Replacement Project Duration Ordinance

A replacement ordinance was subsequently drafted by you and City legal staff. This draft ordinance contains significant compromises that will make it difficult to ensure City environmental regulations are consistently applied. The Planning Commission approved this compromise Ordinance in early October 2013. This was not enough for RECA. After the Planning Commission approved the ordinance, RECA approached City Council members and City staff to get additional concessions that will further expand the regulatory exemptions bestowed on developers. It gravely concerns us that you seem poised to agree with any of the RECA

recommendations, which would further compromise the severely battered ability of the City to get anyone to comply with current or future environmental and development regulations.

RECA has some problems with the version of the project duration ordinance prepared by city staff and approved by the Planning Commission. We have some problems too, but we were prepared to accept the staff and Planning Commission ordinance. We do not understand why the process has been completely reopened for second-guessing at this time and we again urge that it not be.

If the ordinance is going to be re-opened, it should be strengthened in favor of enhanced local control and community participation, not further weakened. The entire procedure created pursuant to this ordinance excludes input and consideration by neighbors and members of the public who are supposed to be protected by environmental and other land use regulations. The ordinance should require timely and immediate notice to Interested Parties when a vested rights petition or fair notice application is submitted and when a vested rights determination or project duration determination or expiration date extension determination is made. Interested Parties should be able to appeal these determinations to the Planning Commission and City Council in most, if not all, cases.

Another problem is that the criteria for project consent agreements set forth in 25-1-544(C) are vague to the point of meaninglessness. One criterion is that the applicant show that the exemption from current regulations would create "a greater degree of environmental protection." The way things work in Austin is: all a developer has to do is say his project is "high density infill" as opposed to "sprawl" or it is "LEEDs certified" and these magic incantations cause City staff and the Council to automatically conclude the project offers "a greater degree of environmental protection." It should be made clear that "greater protection" does not mean greater protection than the ordinance to which the applicant claims grandfathering when there is simply no basis in fact or law to support the grandfathering claim. Yet it appears that this is exactly what will happen. The meaningless and arbitrary standard for project consent agreements contained in this draft should be replaced by specific rigorous standards reflecting the values of the community. The legitimacy and compliance should be required to be documented by objective and scientific analysis.

<u>RECA's latest shameless ploy</u>

No special privileges the City bestows on developers are ever going to be good enough for RECA. No matter how much the City bends over to please, developers will always be approaching the City Council and Legislature to gain additional exemptions from laws that protect our community. On October 10, Nikelle Meade on behalf of RECA sent a letter to Mayor Lee Leffingwell and the City Council asking for additional major exemptions from

environmental regulation in the new project duration ordinance. RECA in fact has the audacity to ask the City for much greater exemptions from City regulations than RECA even has been able to secure from the Texas Legislature under Chapter 245. Shamelessly, RECA also asserts that whatever form this ordinance takes, "RECA reserves its right to assert that any ordinance adopted by the City" is illegal pursuant to Chapter 245.

One outrageous request in Meade's letter is that the time period during which any project should be grandfathered from current environmental regulations is a minimum of 20 years! The only Chapter 245 reference to any time frame in any context is five years. § 245.005 (project dormancy). It is also worth remembering that the House sponsor of Chapter 245, Edmund Kuempel, can be seen in Laura Dunn's film "The Unforeseen" laughing on the House floor about a "hypothetical" that developers might claim 20 years of grandfathering.

But even 20 years is not enough for RECA. They also ask for the right of developers to enter into "Managed Growth Agreements" with the City to lock in obsolete regulations for more than 20 years. If this isn't overreaching, wedon't know what is. It is unconstitutional for cities to contract away their legislative powers to private parties in this way. *Clear Lake City Water Authority v. Clear Lake Utilities Co.*, 549 S.W.2d 385, 391-92 (Tex. 1977); *Super Wash Inc. v. City of White Settlement*, 131 S.W.3d 249, 257 (Tex. App. Fort Worth 2004), *rev'g other part of judgment* 198 S.W.3d 770 (Tex. 2006); *City of Arlington v. City of Fort Worth*, 844 S.W.2d 875, 878 (Tex. App. – Fort Worth 1992, writ denied). Moreover, even if these kinds of agreements were legal, this ordinance would create agreements that offer nothing to the public in exchange for this financial boon to developers; the ordinance neither allows nor requires the City to secure any additional benefit for the community or the environment in return for this giant gift to developers.

Perhaps this ploy is not as outrageous as RECA's contention that no project should expire unless the underlying subdivision expires. Under current city ordinances, subdivisions never do expire unless a landowner decides to take action to replace them. So this would allow project duration to be forever. Additionally, RECA insists that a project should not expire so long as a site plan has not expired. This could allow a project to be extended indefinitely by a developer simply submitting another site plan before the previous one expired. [1]

[1] City policy program manager Chuck Lesniak contends that the City will not allow a new site plan to be submitted unless the previous site plan has first expired. But a developer can submit a new site plan for different areas of a "project" before a site plan for another area has expired. And even if it were the current practice to not allow a new site plan for the entire site until after the previous one has expired, that doesn't mean that this is the way it is always going to be enforced in the future. A project duration ordinance shouldn't have to depend on assumed practices either separately codified or uncodified in order to ensure that a project duration ordinance is not ridiculous.

RECA purports to be concerned that the different duration dates of five years for projects in the desired development zone and three years for projects in the drinking water protection zone is arbitrary. But of course, it is not geographical uniformity RECA is concerned about. RECA simply wants the expiration dates for the drinking water protection zones to be five years instead of three years. A rule that would better protect the environment and community and eliminate the arbitrariness that RECA complains about would make the expiration period uniformly three years no matter where, geographically, a project is located.

And finally, even though at the urging of RECA the submittal of an application has become under State law the trigger for the beginning of the grandfathering process, RECA now argues that this same submittal should not be the trigger that determines the length of time a project is grandfathered to obsolete regulations. This makes no sense. Developers often submit applications for projects that they have no intention of actually moving forward; the submission is merely an attempt to secure grandfathering rights. The proposal supported by RECA would allow developers to trigger grandfathering at the earliest time possible and slow down the application processing process in order to maximize the amount of time their projects are eligible for grandfathering. The ordinance should remain as written to avoid as much as possible the incentive to file applications that aren't really ready to be filed and, once filed, to then drag them out for as long as possible when the application was speculative at the outset. This demand in the Meade letter is just another ploy in RECA's relentless quest to tie the City to obsolete regulations as long as possible and to extend the life of applications that are made not for purposes of development but for speculation and grandfathering.

Conclusion

The City Council and City staff have done far too much for RECA already. RECA is never going to be satisfied, and in its letter expressly reserves the right to sue the City over the project duration ordinance no matter what concessions are granted to RECA and its members. For thirty years, the City has been pushed to apply increasingly obsolete regulations to more and more development projects due to the efforts by RECA and its allies. No matter what the staff and Council do with this project duration ordinance, RECA will always be back for more.

But today, please endorse the recommendations set forth in this letter and try to preserve the small possibility that someday grandfathered developments will actually have to comply with modern up-to-date regulations enacted by a democratically elected City Council, acting to protect the environment and the health, safety and welfare of the community. Elected officials and voters have every right to respond to changing circumstances in charting the future of our community: as RECA would have it, our powers of local control should be frozen even beyond the reach of Chapter 245 while only developers are allowed to respond to

changing information and markets. This perspective, and RECA's specific demands, should be rejected in favor of an ordinance that supports local control and the democratic process.

Sincerely,

Brad Rockwell, J.D.

Doug Young, J.D.

Dr. Lauren Ross, P.E.

Marisa Perales, J.D.

Bill Bunch, J.D.

cc: City Council members, City of Austin