

**Guernsey, Greg**

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**From:** Ward Tisdale <wtisdale@recaonline.com>  
**Sent:** Thursday, May 15, 2014 3:00 PM  
**To:** Spelman, William; Tovo, Kathie; Morrison, Laura; Riley, Chris; Martinez, Mike [Council Member]; Leffingwell, Lee; Cole, Sheryl  
**Cc:** Guernsey, Greg; Lloyd, Brent; 'K.C. Willis'; 'Steve Metcalfe'; 'Jeff Howard'  
**Subject:** Request for Postponement

Dear Mayor and Councilmembers,

On May 1, City Council action regarding the vested rights ordinance included the passing of at least eight amendments on first reading. The Real Estate Council of Austin has not had ample opportunity to fully understand the new ordinance and the vast implications it has for our members and our community.

In addition, council members indicated a desire to make possible major amendments to the critical MGA component of the ordinance. These proposed additional amendments have not been presented as of yet. These major amendments should not be discussed for the first time and passed from the dais. They should be presented to stakeholders who should be given ample opportunity to review them and provide guidance to the city on their impact before they are considered by council.

Therefore, we respectfully request that you postpone action on this ordinance from May 22 to, at least, your June 12 meeting.

Sincerely,

Ward

--

**Ward Tisdale**  
President



98 San Jacinto Blvd., Suite 510 | Austin, TX 78701  
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(p. 1 of 2)

ATTACHMENT "G"

RECA 5/1/2014

## Project Expiration

Proposed ordinance: Depending on the initial application filed, the proposed ordinance enables a residential project with a vested rights status to last nine (9) years. For commercial projects, through a series of applications, the applicant may get up to 13 years. The clock starts ticking at the time the first application is approved.

Planning Commission action: All projects (residential and commercial) get a flat nine years regardless of the initial application and subsequent applications. The clock starts ticking at date of application not approval.

RECA Position: 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 unnecessarily complicated and not practical. Instead, since 13 years of grandfathering is acceptable to the City and is a better measure of the actual time it takes to develop projects (factoring in things like approvals, financing, normal economic cycles and construction), keep the ordinance simple and allow for that time period for all projects. Additionally, the time period should be tied to the date of approval, not the date of application. The time it takes for applications to be approved is beyond the applicant's control and it often takes a year or longer for the city to make a decision.

## Managed Growth Agreements (MGAs)

Proposed ordinance: A project may be considered for a managed growth agreement only if the project:

- is filed for review under current regulations;
- is located within the zoning jurisdiction, outside of the Barton Springs Zone;
- does not require a variance, unless the project is limited to residential uses that do not require a site plan under Section 25-5-2 (Exemptions);
- includes at least 250 acres or is located wholly or partially within a regional center or town center designated by the Growth Concept Map of the Imagine Austin Comprehensive Plan; and
- is filed with the first application

Planning Commission action: The 250-acre requirement was stricken and not replaced with another number. No other changes.

RECA Position. Eliminate subsection (B) requirements regarding current regulations, size and location, and allow MGAs with any application. As proposed, MGAs would only be available for new projects that exceed 250 acres and are located in the city limits outside the Barton 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. Also, applicants may not realize additional time is needed at the first application and should be allowed to request additional time IF they meet the strict approval criteria.

(p. 2 of 2)

RECA

5/1/2014

## Procedure

Proposed ordinance: Not later than 10 working days after acceptance of a complete vested rights petition, the director shall review the petition under Section 25-1-542 (Criteria for 14 Approval) and render a determination consistent with the requirements of this section. The director shall provide a written determination.

Planning Commission action: Vested rights application decisions must be accompanied by findings of fact and published online. If denied, an applicant is not required to seek a variance before pursuing judicial remedies.

RECA Position: The City Attorney should make the determination, not the 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. Applicants should be provided a full and complete written basis for the determination setting forth both the factual and legal grounds by which the determination was made.

After reconsideration, administrative remedies are complete. The ordinance, as currently written, suggests that if an applicant disagrees with a vested rights determination, it 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 (PCAs)

Proposed ordinance: The director may recommend a project consent agreement for approval to the city council if the director finds that the agreement achieves a greater degree of environmental protection or compatibility with adjacent land uses than would occur if a project developed to the full extent of its claimed vested rights.

Planning Commission action: None.

RECA Position. 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 Council in case the Land Use Commission has made errors since it is the applicant's legal rights that are being determined. Other groups should not have those appeal rights because it would defeat the purpose of having PCAs go to Land Use Commission to avoid the politicization of these issues.

**RECA****REAL ESTATE COUNCIL  
OF AUSTIN**

ATTACHMENT "G"

March 24, 2014

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

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**PRESIDENT**

Ward Tisdale

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

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- 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



**RECA**

**REAL ESTATE COUNCIL  
OF AUSTIN**

ATTACHMENT "G"

October 10, 2013

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**PRESIDENT**

Ward Tisdale

The Honorable Lee Leffingwell, Mayor of Austin  
and Members of the Austin City Council  
301 W. 2<sup>nd</sup> 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:

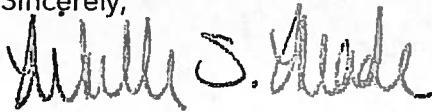
- The City should tie project expiration to first permit *approval* and not submittal.
- If the City wants to keep a project expiration time frame simple, it must be for a long enough period to truly be a "one size fits all" time frame. We believe a **minimum of 20 years** should be that time period 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 (DWPZ) 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.

Mayor Leffingwell and City Council Members  
October 10, 2013  
Page 2

- 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,

A handwritten signature in dark ink, appearing to read "Nikelle S. Meade". The signature is fluid and cursive, with the first name "Nikelle" being more prominent.

Nikelle Meade  
Board Chair