ATTACHMENT "H"

S.O.S.

SAVE OUR SPRINGS ALLIANCE

May 22, 2014

Hon. Lee Leffingwell, Mayor
Hon. Sheryl Cole, Mayor Pro Tem, and
Members of Council
City of Austin
Austin, Texas

Via Email

Re: Vested Rights ordinance, 2nd reading; Item 59 on today's agenda

Dear Mayor Leffingwell, Mayor Pro Tem Cole, and Members of Council:

Please consider the following comments on behalf of Save Our Springs Alliance on this matter.

1. We first restate the overriding points: the ordinance should (a) fit with the statute, and (b) within the confines of the statute, encourage only *bona fide* development applications and discourage applications designed to create development futures for speculation and trading. Preserving the right of the community, the council, and votes to manage growth and implement new standards is essential to managing our future. These goals are met by keeping project life relatively short (but reasonable) with progress required along the way as provided in long-standing city codes and ordinances.

Significant progress was made in clarifying and improving the ordinance on first reading. Some important details remain along with important questions that should be answered and language that should be clarified.

2. The challenge of understanding a complex subject matter is made much more difficult by the failure of the Law Department to produce a standard "legislative format" draft for second reading consideration, with underlines and strikeouts showing what council added and deleted on first reading. The working "May 7 . . . 2nd Reading Draft" does not do that. Compounding the confusion, the "2nd Reading Draft" does include strikeout and underlining that has no relation of any kind to the actions taken by City Council on first reading. Provisions referenced or deleted are just missing. It should go without saying that this is not acceptable practice.

Given the absence of a working legislative draft, the council should consider postponing action on second reading. At minimum, the council should make it clear that a legislative draft is required well in advance of third reading, and such draft should include all code language referenced in the draft ordinance.

(512) 477-2320 voice
(512) 477-6410 fax

Save Our Springs Alliance
P.O. Box 684881 • Austin, Texas 78768
905 West Oltorf Street, Suite A • Austin, Texas 78704

http://www.sosalliance.org
email: sosinfo@sosalliance.org

3. The key "expirations" section on pages 10 and 11 of the 2nd Reading Draft should be amended as follows:

A. 25-1-552 (A) should be amended for clarification to read ". . . that is submitted and approved on or after [[insert date of approval]] ~~June 1, 2014~~.

B. While subsections (A) through (G) are fairly clear (with the exception noted above), subsection (H) as currently worded adds unnecessary confusion. It has been represented that this was included to address the Planning Commission recommendation, and that it was intended to serve as a cap, meant to assure that no "daisy chaining" of permits occurred, and to catch the rare case that might not fall within (B) through (G). It is further my understanding that it was not intended to "trump" (B) through (G) where projects (or portions of projects) failed to meet the intervening processing deadlines. This language can and should be clarified to address these questions and avoid confusion.

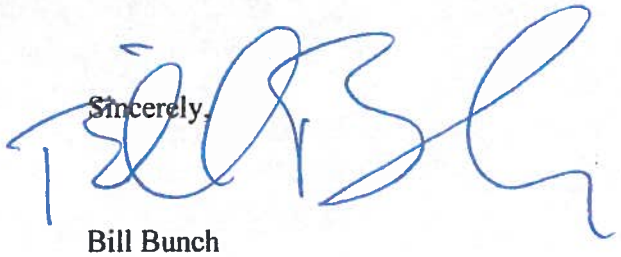
4. The transparency provision, 25-1,-541(G), at the bottom of page 5, should be expanded to read "The director shall make vested rights applications and determinations completed ~~issued~~ under this subsection available on the City of Austin's website within seventy-two (72) hours of being filed (for applications) or rendered (for determinations)."

5. We are still not clear on proposed "Managed Growth Agreements" provisions. We respectfully submit that they remain restricted to areas outside of the Barton Springs watershed and used in rare instances for larger, multi-phase commercial projects that demonstrate special values to the community that more than offset community concerns about excessive "lock in" periods that thwart implementation of new ordinances.

Finally, as to litigation threats from the Real Estate Council, any such litigation would be premature until a project is actually expired and a permit applicant has exhausted his or her administrative remedies. The threats should not dictate council policy on these important issues.

Thank you in advance for your consideration.

Sincerely,



Bill Bunch

ATTACHMENT "H"

S.O.S.

SAVE OUR SPRINGS ALLIANCE

April 16, 2014

RE: Proposed vested rights/project duration ordinance

Dear Mayor Leffingwell, Mayor Pro Tem Cole and Members of Council:

Please consider the following key points in your consideration of the proposed vested right, or project duration, ordinance.

SOS Alliance first recommends that Council adopt the staff drafted ordinance approved unanimously by the Planning Commission last October. This is a fair compromise ordinance. As observed by Planning Commissioner Chimenti, every single change since that time has been to the favor of developers and the Real Estate Council and to the detriment of home rule powers, local control, and obtaining compliance with current ordinances

*If the October ordinance is to be set aside, any changes **should (a) fit with the statute**, and (b) **encourage only *bona fide* development applications and discourage applications designed to create development futures for speculation and trading**.

These goals are achieved by ikeeping project life relatively short (but reasonable) and **tying project expiration to the date of the application, not the date of approval**.

***Linking to date of approval and allowing extended project life (13 years or more) is not consistent with or required by the statute, hampers local control, growth management, and accountability to voters.**

*The Chapter 245 statute references a five year project term: if there is to be a change from the October PC approved ordinance, projects should have 5 year lives (extended from 3 years in that ordinance) **from the date of application.**

The more recent Planning Commission recommendation of "everything" expiring at 9 years can be aligned with a 5 year project life that would live beyond the 5 years to the extent of a living site plan or building permit and progress is real.

***There should be NO project consent agreements without a showing of a well-founded or "reasonable" claim for Chapter 245 grandfathering.** As written, the applicant merely has to make a "claim" that they are grandfathered. Anyone can "claim" grandfathering, even where

(512) 477-2320 voice
(512) 477-6410 fax

Save Our Springs Alliance
P.O. Box 684881 • Austin, Texas 78768
905 West Oltorf Street, Suite A • Austin, Texas 78704

http://www.sosalliance.org
email: sosinfo@sosalliance.org

there is zero basis, and that has happened repeatedly. This should not be a sufficient basis for contemplating a project consent agreement.

Further, the ordinance should be clarified or amended to provide that project consent agreements in the Barton Springs watershed require a council supermajority vote.

*__There should be NO "repeal" of prior ordinances__. The ordinance (and all other ordinances) should always read that it is an amendment that applies going forward but leaves prior ordinances on the books. Given Chapter 245, we should never, ever "repeal" old ordinances lest we end up, inadvertently, leaving development unregulated altogether when that was not the intent of council. See, e.g Part 3, bottom of page 12; Part 4 bottom of page 13

*We do NOT believe the backup draft ordinance accurately reflects the recommendations of the Planning Commission. A significant rewrite is needed.

*__The "Fair Notice Application" should be removed__ so that current practice of allowing 45 days after a "fair notice" application is filed to file a formal permit application to keep the "fair notice" initiation of a project alive.

*Managed Growth Agreements should be eliminated or restricted to only large projects, as provided in previous staff drafts, and, only then, where substantial benefit over current ordinances is demonstrated.

Thank you for your consideration.

/s/

Bill Bunch
Executive Director
Save Our Springs Alliance

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, we don'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