

December 8, 2015

Mr. Steve Oliver, Chair
Planning Commission
City of Austin
505 Barton Springs Boulevard
Austin, Texas 78704

via email

RE: Item No. C. 12 on the December 8, 2015 Planning Commission Agenda;
Request for Postponement and Statement of Opposition

Dear Mr. Oliver:

I am writing on behalf ARG Bull Creek, Ltd. ("ARG"), the owner of the approximately 76 acre tract located generally at the intersection of 45th Street and Bull Creek Road in Austin, Texas (the "Property"). ARG has filed a Planned Unit Development ("PUD") zoning request on such Property, commonly known as "The Grove Shoal Creek". The Property was previously owned by the State of Texas and is currently un-zoned. The PUD zoning application filed by ARG is, therefore, an initial "zoning" of request for the Property as provided in Section 25-2-241(A) of the Austin City Code.

For the reasons that follow, I am writing to (1) respectfully request that the Planning Commission postpone consideration of the above-referenced item, and (2) state ARG's opposition to the item.

1. Request for Postponement

ARG hereby requests a postponement of this item to the Planning Commission's January 12, 2016 agenda for three (3) reasons: (i) the Planning Commission will be hearing short-term rentals this evening, which will take a very long time, (ii) the public hearing before City Council on this item is scheduled for January 28, 2016 so there is no adverse effect from postponement, and (iii) the City has not conducted any stakeholder meetings and, importantly, has not notified the State of Texas of this proposed change.

2. Planning Commission Should Recommend that the Proposed Amendment Not be Approved

Item C.12 is a proposed City Code amendment to amend Section 25-2-284 of the Austin City Code to require the affirmative vote of three-fourths (3/4) of the members of the City Council to approve a proposed "**zoning or** rezoning" if the Land Use Commission recommends denial of an application to zone or rezone a property to a PUD. Essentially, the proposed Code amendment would extend the current ¾-majority vote requirement for recommended denials of a PUD zoning to cases of initial "zoning" and not just to cases of "re-zoning". That is, the Code amendment would extend the ¾-

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majority vote requirement to The Grove at Shoal Creek (which has been in the formal City process for over 8 months) and to other State owned lands that are currently un-zoned.

This proposed change would create a new, major procedural obstacle for approval of PUDs on such properties that has not previously existed. In the case of The Grove at Shoal Creek, it represents a major change in the applicable procedural rules after ARG has spent an enormous amount of money and nearly a year in pursuit of a PUD zoning that was specifically requested by Council members and community members so that the City could lawfully require development "superiority" and affordable housing. In fact, this proposed amendment is apparently being sought, and rushed through the City amendment process for the sole purpose of changing the rules applicable to The Grove at Shoal Creek. However, other State owned lands will also likely be requested to pursue a PUD for the same reasons, and this Code amendment will, therefore, have major policy implications beyond The Grove at Shoal Creek.

a. The Proposed Code Amendment is Illegal

The current City Code on this issue applies only to a "re-zoning" case and was written in accordance with the Texas Local Government Code to apply only to re-zonings and not to cases of original zoning. Section 211.006(f) of the Texas Local Government Code only authorizes a $\frac{3}{4}$ -majority vote in circumstances like this for a "proposed **change**" to zoning regulations and boundaries. Texas courts have interpreted this to mean re-zonings and not cases of initial zoning. This distinction has been consistently and correctly followed by the City of Austin for over 30 years. The current code is written in a way that is consistent with state law. The change to the code proposed by Item No. C.12 will not comply with state law.

b. The Proposed Code Amendment is Bad Process

ARG is concerned that the proposed Code amendment is not being initiated to address a city-wide concern, but is instead an attempt to instigate a City-wide code change now in an apparent reaction to a single zoning case, which is already in process and nearing the point of Commission and Council consideration. If so, this has major due process concerns and undermines the public's faith in a fair, transparent and consistent public process. If this is truly not an effort to target The Grove at Shoal Creek, then the Planning Commission should recommend that the Code amendment not apply to projects that are already in process, so that the City can live by its stated goals of having a fair, transparent and consistent development process. Moreover, this change should not be unfairly applied to a project that has filed a PUD zoning case at the urging of Council members and community members that wanted development "superiority" and required affordable housing, has spent a huge amount of money in pursuing that PUD zoning, and has formally been in process in connection with PUD zoning for over 8 months.

c. The Proposed Code Amendment is Bad Policy

There are clear legal and factual distinctions between "zoning" and "re-zoning" cases that warrant the separate treatment of such cases under both the Texas Local Government Code and the City Code. Re-zoning cases involve land that already has zoning. That is, the landowner already has a zoning

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entitlement it can rely on, and the neighborhood has some expectation regarding what uses are possible. That pre-existing zoning status does not exist with un-zoned lands. The policy considerations for each case are, therefore, very different. A simple majority of council is and should be free to implement its policy priorities, with full and fair input from stakeholders, in such cases. In addition, for re-zoning cases, if a super-majority is required, a landowner that has existing zoning can fall back on that existing zoning if a small minority of council exercises its veto power. For un-zoned property, a landowner does not have that option.

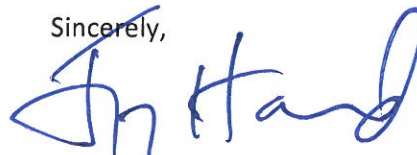
Most importantly, the proposed code change will be a major disincentive for this applicant and future applicants of un-zoned property to seek PUD zoning. Without PUD zoning for these types of cases, the City will not be able to require development "superiority" or affordable housing. After all, Council members and community members that urged ARG to pursue PUD for those reasons might want PUD zoning for other State owned lands for similar reasons. Such PUD zoning would be effectively discouraged.

3. Conclusion

For the reasons set forth above, ARG respectfully requests that Planning Commission postpone consideration of this item until January 12, 2016. ARG further requests that, upon considering this item, the Planning Commission either recommend that the Code amendment does not apply to projects that are already in process, or that the Code amendment should not be adopted.

Thank you for your consideration of this matter.

Sincerely,



Jeffrey S. Howard

cc: Planning Commissioners
Greg Guernsey
Jerry Rusthoven
Brent Lloyd
Garrett Martin
Ron Thrower