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January 11, 2016

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

via email

RE: Item No. C. 13 on the January 12, 2016 Planning Commission Agenda;
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 and is not a "re-zoning". For the reasons that follow, I am writing to state ARG's opposition to the item.

1. Summary of Opposition

ARG opposes the Item No. C.13 for the following reasons:

- The proposed Code amendment is illegal as it violates Section 211.007(f) of the Texas Local Government Code by applying super-majority voting requirements to cases of initial zoning
- No other city in Texas is known to have applied super-majority requirements to cases of initial zoning
- The City Code was written to expressly be consistent with state law and is not some "mistake" or "oddity"
- The proposed amendment is being rushed through City amendment propose to "move the goal posts" for a single zoning case already in process and not being conducted in a thoughtful manner with stakeholders involved to address a City-wide issue
- Changing the voting rules for a project already in process creates a potential due process violation and is not fair, transparent or consistent
- Un-zoned lands are **very** different from lands already zoned and are not only entitled to different treatment under state law but there are very good reasons to that they should be treated differently
- Un-zoned lands, according to the City, do not allow **any** use. There is no underlying zoning for a landowner to fall back
- Un-zoned lands do not have pre-existing zoning that sets expectations for neighboring properties

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- As such un-zoned lands represent an opportunity for the City by a majority of its elected representatives to implement policy priorities, and not have those priorities defeated by a small majority of Council
- Un-zoned lands do not give the landowner an opportunity to force a super-majority vote on a negative zoning decision. That is, the landowner is subject to the same simple majority requirements with respect to an adverse decision
- Most significantly, the proposed amendment will discourage the State of Texas from pursuing PUD zoning (and providing superiority and required affordable housing that goes along with it)

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

Item C.13 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 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 $\frac{3}{4}$ -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 $\frac{3}{4}$ -majority vote requirement to The Grove at Shoal Creek (which has been in the formal City process for over 10 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. I am aware of no other jurisdiction that has applied a $\frac{3}{4}$ -majority vote to cases of initial zoning. This Code amendment, which would be unique to the City of Austin, is being done for the simple reason of “moving the goal posts” on The Grove at Shoal Creek PUD.

Specifically, 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 over a year in pursuit of a PUD zoning that was specifically suggested 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 this clear state law. The change to the code proposed by Item No. C.13 will not comply with state law.

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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 suggestion 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 10 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 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. Finally, in the case of a re-zoning, a landowner could also require a super-majority vote to avoid an adverse result through protest. In this case, if the code amendment passes, a landowner could be left with no zoning and no way to oppose adverse zoning.

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 suggested that ARG pursue PUD for those reasons might want PUD zoning for other State owned lands for similar reasons. Such PUD zoning would be effectively discouraged, and the state would look to alternatives to PUD zoning to entitle property that might be for sale.

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3. Conclusion

For the reasons set forth above, ARG requests that, upon considering this item, that 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