

Cause No. D-1-GN-16-001762

GRAYSON COX, SABRINA BRADLEY,	§	IN THE DISTRICT COURT
DANIEL DE LA GARZA, PIMPORN MAYO,	§	
JEFFREY MAYO, RYDER JEANES,	§	
JOSEPHINE MACALUSO, AMITY	§	
COURTOIS, PHILIP COURTOIS, ANDREW	§	
BRADFORD, MATTHEW PERRY,	§	
TIMOTHY HAHN, GARY CULPEPPER,	§	
CHERIE HAVARD, ANDREW COULSON,	§	
LANITH DERRYBERRY, LINDA	§	126th JUDICIAL DISTRICT
DERRYBERRY, ROSEANNE GIORDANI,	§	
BETTY LITTRELL, and BENNETT BRIER,	§	
	§	
Plaintiffs,	§	
v.	§	
	§	
CITY OF AUSTIN and GREG GUERNSEY,	§	
in his official capacity as Director of the City	§	
of Austin Planning and Zoning Department,	§	
	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

PLAINTIFFS' BRIEF AND REPLY ON CROSS MOTIONS FOR SUMMARY JUDGMENT
ON THE VALID PETITION RIGHTS STATUTE
AND THE ABSENCE OF ANY EXCEPTION FOR THIS CASE

TO THE HONORABLE JUDGE OF SAID COURT:

This case is submitted on the parties' cross motions for summary judgment as authorized by Rule 166a(a) and (b) of the Texas Rules of Civil Procedure for declaratory judgment actions. The Agreed Scheduling Order sets these motions for hearing on the determinative legal issue of valid petition rights and ¾ supermajority voting, in order to have a ruling on that issue before the Austin city council votes on the proposed Grove PUD.¹ That vote is scheduled for August 11, 2016.

¹ A map of the location of the proposed Grove PUD is shown on the sixth page of the Attachment filed herewith. A PUD, a "Planned Unit Development" under Austin's zoning ordinance, is described in subpart 3 below at page 10.

Plaintiffs' Motion for Partial Summary Judgment and this response to the City's and ARG's cross motions for summary judgment, are supported by the summary judgment evidence filed with Plaintiffs' Motion for Partial Summary Judgment and Appendices 7 and 8 (numbered consecutive to Plaintiffs' previous summary judgment Appendices) filed herewith.

A. Summary Judgment Facts and Issue

The undisputed summary judgment evidence is that the adjacent landowners have filed valid petitions sufficient to trigger mandatory $\frac{3}{4}$ supermajority voting for approval of the proposed Grove PUD under the Texas Valid Petition Rights Statute.² The City issued an official determination that it will not honor those valid petitions and instead of the Valid Petition Rights Statute, the City will follow the wording of its City Code and use simple majority voting in this case.³

It is undisputed that the Grove PUD application is seeking city council approval of an amendment to the City's comprehensive zoning ordinance to permit the proposed Grove PUD development. It is documented by the record of the City's proceedings in this case that the Grove PUD application seeks substantial changes to City zoning regulations for that proposed Grove PUD.

Those are the operative facts for application of the Valid Petition Rights Statute and mandatory $\frac{3}{4}$ supermajority voting in this case.

² Plaintiffs' Motion for Partial Summary Judgment, paragraph 10(b).

³ Plaintiffs' Motion for Partial Summary Judgment, paragraph 10(c). That official determination is Exhibit E and confirmed with Exhibit I.

B. The Valid Petition Rights Statute Applies in this Case

1. The Texas Zoning Enabling Act

The Texas Zoning Enabling Act⁴ sets out the exclusive and mandatory procedures under which cities may adopt and amend zoning ordinances and zoning regulations. Those statutory procedures are jurisdictional and must be precisely followed in order for any zoning ordinance to be valid. *Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962); *Lawton v. City of Austin*, 404 S.W.2d 648, (Tex. App. – Austin 1966, writ ref'd n.r.e.).

An important procedural requirement in the Zoning Enabling Act is $\frac{3}{4}$ supermajority city council voting for protested cases involving particular properties. Whenever a city proposes to amend or change its regulations for a specific property within its city limits, as is the case here, that Act gives adjacent landowners the right to object and petition for $\frac{3}{4}$ voting, which then becomes mandatory. That right is guaranteed by the Valid Petition Rights Statute, which has been part of the Texas Zoning Enabling Act since it was originally adopted in 1927. As with the other statutory requirements of the Zoning Enabling Act, cities are strictly required to comply with that Statute. See *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234-5 (Tex. App. – San Antonio 1976, writ ref'd n.r.e.); *Truman v. Irwin*, 488 S.W.2d 907, 908-9 (Tex. App. – Fort Worth 1972, no writ).

⁴ The Texas Zoning Enabling Act has been codified in Chapter 211 of the Texas Local Government Code, sections 211.001 *et seq.* Those sections are a codification without substantive changes of the Act as it existed before the Local Government Code was adopted. See the legislative history set out in Plaintiffs' Motion for Partial Summary Judgment, paragraphs 79-90.

2. The Valid Petition Rights Statute and mandatory $\frac{3}{4}$ supermajority voting

The Valid Petition Rights Statute applies to any vote by the city council to “change” a zoning “regulation or restriction” for particular property in the city. The operative words “change” and “regulation” are broadly defined by the Legislature.⁵

The City and ARG do not appear to dispute that the language of the Valid Petition Rights Statute as written applies to this case. Instead, their arguments are that (1) the City can override that Statute with a city ordinance,⁶ and (2) there is an unwritten exception to the Statute for this case because the Bull Creek Tract, ARG’s main property to be included in the Grove PUD, was owned in the past by the State of Texas. As discussed in Part C.1. below at page 13, the City cannot legally override or act in any way inconsistent with the Valid Petition Rights Statute. As discussed in Part C.2. below at page 16, no such unwritten or implied exception to that Statute exists and none should be created here.

The statutory right to petition for $\frac{3}{4}$ supermajority voting is an important right guaranteed by the Legislature to property owners in a city. That right exists to protect established landowners from objectionable new land uses that result from any proposed change in the city’s land use regulations. Protecting that stability and predictability is among the stated purposes for the Valid Petition Rights Statute. See that legislative intent discussed in Plaintiffs’ Motion for Summary Judgment, paragraphs 83-87.

⁵ The Valid Petition Rights Statute covers any “restriction” on land use, not just something that is called a “regulation.” See the language of the Valid Petition Rights Statute in Section 5 of Zoning Enabling Act set out on page 6 of this Brief and Reply. See also the intended broad application “change” discussed on that page at footnote 8.

⁶ It is most unfortunate that the City is left to argue and is arguing in this case that one of its ordinances can override a State statute. See page 8 at footnote 11.

This is not to say a developer such as ARG cannot seek city council approval to changes to the City's zoning ordinance for land it purchases. City Council approval of such change, however, must be by a $\frac{3}{4}$ supermajority vote if protested by adjacent landowners under the Valid Petition Rights Statute, as is the case here.

In this case the Plaintiffs and literally hundreds of other homeowners in the area have protested that the proposed Grove PUD will adversely affect the use and enjoyment of their homes. Plaintiffs' Motion for Partial Summary Judgment, paragraphs 18-20; and Exhibit S, Parts S-2, pp. 1-312, and S-3, pp. 2-343. Whether those harms are outweighed by any perceived benefits of that development is a legislative decision to be made by the city council. However, that decision must be made in strict compliance with the procedures mandated by the Zoning Enabling Act and specifically in this case, the Valid Petition Rights Statute.

The Valid Petition Rights Statute is codified in Section 211.006(d) of the Texas Local Government Code:

“(d) If a proposed change to a regulation or boundary is protested in accordance with this subsection, the proposed change must receive, in order to take effect, the affirmative vote of at least three-fourths of all members of the governing body. The protest must be written and signed by the owners of at least 20 percent of either:

- (1) the area of the lots or land covered by the proposed change; or
- (2) the area of the lots or land immediately adjoining the area covered by the proposed change and extending 200 feet from that area.”

It is undisputed that landowners of more than 20% of the defined adjacent lots or land have submitted the required written protests.

It is clear that Statute is intended to cover changes such as those sought by the Grove PUD application in this case. Section 211.006(d) was codified from Section 5 of

the Zoning Enabling Act without any intended substantive change.⁷ That Section 5 stated:

“Sec. 5. **Changes.** Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of 20 percent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending 200 feet therefrom, or of those directly opposite thereto extending 200 feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourth of all members of the legislative body of such municipality. The provisions of the previous section relative to public hearing and official notice shall apply equally to all changes or amendments.”

The drafters of that Section 5 made it clear that its intent was require a $\frac{3}{4}$ vote in cases involving “a protest from a substantial proportion of the property owners whose interests are affected.”⁸ There is no dispute that this case is one with that substantial protest. See volume and substance of protests contained in Exhibit S, Parts S-2, pp. 1-312, and S-3, pp. 2-343.

It is documented to a certainty that the Grove PUD application proposes “changes” to “regulations” in Austin’s comprehensive zoning ordinance. As discussed in subpart 3 below, the filing of the application for an amendment to create a PUD is itself a

⁷ See Plaintiffs’ Motion for Partial Summary Judgment, paragraphs 79-90 for discussion of that codification.

⁸ As stated by the drafters of Zoning Enabling Act: “This term [change], as used here, it is believed will be construed by the courts to include ‘amendments, supplements, modifications, and repeal,’ in view of the language which it follows. These words might be added after the word ‘change,’ but have been omitted for the sake of brevity. On the other hand, there must be stability for zoning ordinances if they are to be of value. For this reason the practice has been rather generally adopted of permitting **ordinary routine changes** to be adopted by a majority vote of the local legislative body but requiring a three-fourths vote in the event of a **protest from a substantial proportion of property owners whose interests are affected**. This has proved in practice to be a sound procedure and has tended to stabilize the ordinance.” Footnote 31 comment to the Model Zoning Enabling Act (emphasis added), discussed in more detail in Plaintiffs’ Motion for Partial Summary Judgment, paragraphs 80-85.

proposed change to that ordinance. It is also documented beyond any doubt that there are at least 27 specific zoning regulations that the Grove PUD application seeks to change. The City staff's most recent July 14, 2016 Review Sheet for that application details those proposed regulation changes. Exhibit S, pages 7-10 detail those proposed changes. (Those pages are included in the Attachment to this Brief and Reply). ARG confirmed it is seeking those regulation changes for the Grove PUD in its document that is attached to that city Review Sheet. *Id.*, pp. 36-45 (also in the Attachment hereto).⁹

In this case, it is clear that:

1. The proposed zoning ordinance amendment to create the Grove PUD is an **amendment** to Austin's previously adopted comprehensive zoning ordinance;
2. That amendment as sought by ARG, proposes to **amend, supplement, change, modify or repeal** existing **regulations or restrictions** to allow the Grove PUD land uses and development that are otherwise prohibited; and
3. It also proposes to change **boundaries** with a new PUD district for the Grove PUD that includes the Bull Creek Tract and the adjacent 45th Street lot also owned by ARG.¹⁰

⁹ The summary judgment record contains additional undisputed documentary confirmation that this case involves "changes" to "regulations." See Plaintiffs' Motion for Partial Summary Judgment paragraph 60 and Exhibits D and D-1; and Guernsey deposition (Appendix 8, Exhibit T), p. 54.

¹⁰ The Attachment to this Brief and Reply, at the sixth page, is a copy of the land use plan for the Grove PUD showing the 45th Street lot. Exhibit S (City Staff Review Sheet), p. 23. As stated by the City Staff, "Final design of the extension of Jackson Street to 45th Street will be completed as part of the subdivision infrastructure improvements to the development. The applicant is responsible for 100% of this construction cost as part of the subdivision infrastructure to serve the development." Exhibit S, Part S-4, p. 101. See other summary judgment evidence confirming that the 45th Street lot is "integral to the viability" of the Grove PUD and will be "incorporated into the final PUD Ordinance" for this case. Plaintiffs' Motion for Partial Summary Judgment, paragraphs 63-65 and Exhibits M and N.

Any one of these facts triggers the application of the Valid Petition Rights Statute in this case. All three facts are proven as a matter of law by the summary judgment evidence.

Specific to the Bull Creek Tract, the Legislature intended that “the concerns expressed by residents of the neighborhoods in the vicinity of the property” be considered and “addressed” when that Tract was sold and its governmental use changed to private use. Plaintiffs’ Motion for Partial Summary Judgment, paragraph 48. As a result, the State gave notice of the details of those concerns to all potential purchasers. *Id.*, paragraphs 49-50 and Exhibit B. Those are the same concerns that continue to be expressed by neighbors here. Exhibit S, Parts S-2, pp. 1-312, and S-3, pp. 2-343. In the bid package delivered to all potential purchases, including ARG, the State not only included neighbors’ Information Packet of their concerns, it also stated the best use of this Tract would be for residential development with SF-3, SF-6 and MF-2 zoning under Austin’s comprehensive zoning ordinance. Plaintiffs’ Motion for Partial Summary Judgment, paragraph 51. Clearly the Legislature did not intend for the Bull Creek Tract to undergo any sort of new “initial zoning” where the concerns of the neighboring homeowners could be ignored and their statutory valid petition rights could be abolished.

The same intent for the Valid Petition Rights Statute to apply in this case has been expressed by the Austin City Council. In 2008 it directed the City Manager to fix the City’s zoning map to ensure the City Code would not be interpreted to deny valid petition rights in cases such as this involving State land.¹¹

¹¹Guernsey deposition (Appendix 8, Exhibit T), pp. 63-65 and exhibit 3 thereto. The city manager never got that done and the conflict between the City Code and the Valid Petition Rights Statute that would have solved is now before this Court.

City precedent also confirms that when the use of the Bull Creek Tract is changed from governmental use by the State of Texas to a private development use, that is change in zoning classification, not some form of “initial zoning.” In 1994 a portion of the Bull Creek Tract was severed and sold for private development. Plaintiffs’ Motion for Partial Summary Judgment, paragraph 46. The City approved that zoning change with an ordinance amending the comprehensive zoning ordinance and “REZONING AND CHANGING THE ZONING MAP” to “change the base zoning district from ‘UNZ’ Unzoned district to ‘SF-2-CO Single Family ... district.” *Id.* and Exhibit G. That ordinance amendment was not any type of “initial zoning” in form or in substance under the Zoning Enabling Act.

The 1994 ordinance amendment basically recognized that specifically for the Bull Creek Tract, the State’s superior regulations constitute a regulated and recognizable classification of use that cannot be ignored.¹² Those land use controls are no less effective than city zoning regulations to define a use classification for that land, giving it “base zoning district” status as explicitly stated by that ordinance amendment.

The Bull Creek Tract is not some wild and “unzoned” land coming into the city for the first time. Instead, it has established uses under State regulations that have been accepted by the City over time, and from time to time approved by its actions.¹³

¹² Plaintiffs’ Motion for Partial Summary Judgment, paragraphs 24-55, detail the regulated uses of the Bull Creek Tract over the years it was owned by the State.

¹³ For decades the Bull Creek Tract has been supplied with all city services available to other property within the city limits. It has been given City approvals for construction of certain facilities. As discussed above, with 1994 ordinance amendment, it has been granted rezoning as with other land in the city limits. Plaintiffs’ Motion for Partial Summary Judgment, paragraphs 27, 30, 35, 46; Appendix 2-5, 2-10; Appendix 3-15; Appendix 5-5, 5-7, 5-16.

3. A PUD can never be created by “initial zoning;” it can only be created by a subsequent amendment to the City’s comprehensive zoning ordinance

Confirming this case involves a “change” under the Valid Petition Rights Statute is the fact it involves the creation of a PUD. Unlike traditional zoning districts, PUD’s are special districts for a specific tract of land, with various modifications to applicable zoning regulations and building standards.¹⁴ They are created only for a particular tract of land for the benefit a single landowner.¹⁵ They can only be created under special requirements of state law and the Austin PUD Ordinance with procedures unique to PUD’s.¹⁶ Unlike traditional zoning districts, PUD’s are typically mixed-use districts created on a case-by-case basis with modifications to the regulations of the comprehensive zoning ordinance for the specific property involved.¹⁷ PUD’s can only be created with an amendment to the underlying comprehensive zoning ordinance.¹⁸ The City Motion is wrong in saying the creation process for a PUD is no different than that for traditional zoning districts.¹⁹

By definition the required ordinance amendment to create the Grove PUD is a substantive “change” to the City’s comprehensive zoning ordinance for specific property. That amendment changes “regulations” applicable to that property and changes a “boundary” by creating PUD district boundaries where none existed before.

¹⁴ Guernsey deposition (Exhibit T), pp. 4-5.

¹⁵ Guernsey deposition (Exhibit T), pp. 7-8.

¹⁶ Guernsey deposition (Exhibit T), pp. 8-10. The PUD Ordinance is part of the Austin comprehensive zoning ordinance. It was adopted in its current form in 2008 and can be found here: www.austintexas.gov/faq/planned-unit-development-pud-what-it

¹⁷ Guernsey deposition (Exhibit T), pp. 10-11.

¹⁸ Guernsey deposition (Exhibit T), p. 12, ll. 18-21.

¹⁹ City’s Motion for Summary Judgment, p. 9.

There is no authority to support the contention that a PUD can be created with “initial zoning.” Nor is there any authority to support the contention that the creation of a PUD can be exempt from the Valid Petition Rights Statute. This case is the first time that those contentions have been made.²⁰

The creation of the Grove PUD cannot happen but for the existence of the regulations of Austin’s comprehensive zoning ordinance. The authorization to create a PUD for the Bull Creek Tract exists only by virtue of the specific authorization of the Austin PUD ordinance, which is part Austin’s comprehensive zoning ordinance. The zoning regulations of that ordinance must exist and apply to the Bull Creek Tract; otherwise there is no applicable PUD Ordinance under which the Grove PUD could be created.

The only possible procedure available to create the Grove PUD in compliance with the Zoning Enabling Act is through an amendment to Austin’s comprehensive zoning ordinance with a necessary “change” to its applicable regulations precisely within the coverage of the Valid Petition Rights Statute.

C. Reply to the City’s and ARG’s Arguments for an Exception to the Valid Petition Rights Statute in this case

The City and ARG are aligned on arguing for an exception to the Valid Petition Rights Statute in this case. Responding to the arguments of one of them by name is intended to be a response to similar arguments of the other as well. This part of this

²⁰ See Guernsey deposition (Exhibit T), p. 13, ll. 13-15.

Brief and Reply is organized according to the party that appears to take the lead on the argument addressed.

In their arguments, the City and ARG use undefined conclusory labels that can be misleading. They use labels such as “unzoned” and “initial zoning” which not only are misleading, but are not operative terms under the Valid Petition Rights Statute. The use of such undefined terms in this case is simply a statement of an argumentative conclusion, not something of substantive meaning. There is no competent summary judgment evidence supporting the use of those labels in the manner argued by the City and ARG. They are irrelevant in this case. See Plaintiffs’ Objections to Inadmissible Summary Judgment Evidence Filed by the City of Austin Defendants and ARG Bull Creek Ltd. in this case.

With regard to the “unzoned” label the City and ARG use for the Bull Creek Tract, there is no official action by the City of Austin making or leaving the Bull Creek Tract “unzoned.” To the contrary, official action was by the city council stating that State land such as the Bull Creek Tract shall have a zoning designation specifically for the purpose of recognizing neighboring landowners’ valid petition rights.²¹

With regard to the label of “initial zoning,” that concept was rejected by the city council in the 1994 ordinance amendment rezoning part of the Bull Creek Tract from State use to private development use. That ordinance amendment specifically stated that change was “rezoning,” not any form of “initial zoning.”²²

²¹ See page 8 at footnote 11.

²² See discussion of that 1994 rezoning ordinance in part B.2. above at page 9.

1. The Austin City Code Cannot Override the Valid Petition Rights Statute

The City of Austin argues it can use its City Code provisions to deny Plaintiffs valid petition rights in this case. Those City Code sections are not consistent with the Valid Petition Rights Statute.

It is fundamental that cities cannot enact ordinances that conflict with statutes. As stated by the Texas Constitution “no city ordinance shall contain any provision inconsistent with . . . the general laws enacted by the Legislature of this State.” TEX. CONST. art. XI, sec. 5(a); *BCCA Appeal Group, Inc. v. City of Houston*, ___ S.W. 3d___ (Tex. 2016). Any city ordinance that is inconsistent with a clear and specific state statute is pre-empted and invalid. *Dallas Merchant’s and Concessionaire’s Association v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993). The Zoning Enabling Act’s procedures are mandatory statutory requirements that cities have no discretion to ignore or vary by ordinance. *Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962); *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234-5 (Tex. App. – San Antonio 1976, writ ref’d n.r.e.); *Lawton v. City of Austin*, 404 S.W.2d 648, 652(Tex. App. – Austin 1966, writ ref’d n.r.e.).

The Austin City Code sections the City relies on to deny valid petition rights in this case are 25-2-284(A)(3) and 25-2-241, which provide:

“§ 25-2-284 - REQUIREMENT FOR APPROVAL BY THREE-FOURTHS OF COUNCIL.

(A) The affirmative vote of three-fourths of the members of council is required to approve:

. . .

(3) a proposed rezoning that is protested in writing by the owners of not less than 20 percent of the area of land:

(a) included in the proposed change; or

(b) immediately adjoining the area included in the proposed rezoning and extending 200 feet from the area.”

“§ 25-2-241 - DISTINCTION BETWEEN ZONING AND REZONING.

(A) Zoning is the initial classification of property as a particular zoning base district. Zoning amends the zoning map to include property that was not previously in the zoning jurisdiction or that was not previously included in the boundaries of a base district.

(B) Rezoning amends the zoning map to change the base district classification of property that was previously zoned.”

On their face, these sections are materially “inconsistent” with the wording of the Valid Petition Rights Statute. Specifically, they ignore the statutory standard for recognizing valid petition rights, which is “a proposed change to a regulation ...”. In addition to the legislative intent for broad coverage of that standard,²³ “regulation” is also defined in the Zoning Enabling Act to include much more than what is in the city’s extra-statutory definitions of “zoning” versus “rezoning.”

Generally Zoning Enabling Act encompasses land use regulations that relate to “the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.” Section 211.001 of the Local Government Code. Section 211.003 provides:²⁴

“Sec. 211.003. ZONING REGULATIONS GENERALLY.

(a) The governing body of a municipality may regulate:

- (1) the height, number of stories, and size of buildings and other structures;
- (2) the percentage of a lot that may be occupied;
- (3) the size of yards, courts, and other open spaces;
- (4) population density;

²³ See pages 4-6 above.

²⁴ Sections 211.001 and 211.003 were originally together in Section 1 of the Zoning Enabling Act.

- (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and
- (6) the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health.
- (b) In the case of designated places and areas of historical, cultural, or architectural importance and significance, the governing body of a municipality may regulate the construction, reconstruction, alteration, or razing of buildings and other structures.
- (c) The governing body of a home-rule municipality may also regulate the bulk of buildings.”

Changing any of these types of regulations can allow new and different land uses for property, which may be objectionable to the neighboring landowners. If the requisite percentage of adjacent landowners object, $\frac{3}{4}$ supermajority voting is mandatory. That is what the Valid Petition Rights Statute requires with the operative language of a proposed “change” to a “regulation.”

The City implicitly concedes the material conflict between its City Code sections and the Valid Petition Rights Statute,²⁵ with the argument that its code sections must be given deference as a local zoning decision. City’s Motion for Summary Judgment, pp. 4-7. That argument is misplaced in this case.

This case does not involve a zoning decision that is entitled to any presumption of validity. Instead this case involves the procedure the City must follow in order to make a zoning decision. Any presumption of validity only applies to a legislative zoning decision if it was made in accordance with the procedures of the Texas Zoning Enabling Act. *Thompson v. City of Palestine*, 510 S.W. 2d 579, 581 (Tex. 1974). As the cases cited above hold, the procedures of the Zoning Enabling Act are mandatory and must be rigidly

²⁵ That conflict was more explicitly recognized in 2008 by the City Council. See page 8 at footnote 11.

followed by a city. The city has no discretion but to follow them precisely. That precision requires recognition of valid petition rights and $\frac{3}{4}$ supermajority voting in this case.

2. Reply to ARG's Argument that there is an exception to the Valid Petition Rights Statute for the Bull Creek Tract

The lynchpin in ARG's argument in this case is that there are no City of Austin regulations applicable to the Bull Creek Tract. ARG's Amended Motion for Summary Judgment, pp. 2, 4, 9, 10, 14, and 15. The summary judgment evidence clearly shows there are City zoning ordinance regulations applicable to that Tract and to ARG's Grove PUD application. See Part B.2 of this Brief and Reply at pp. 6-7, and Part B.3 at pp. 10-11. In turn, ARG concedes that the Bull Creek Tract "may be subject to various regulations." ARG's Amended Motion for Summary Judgment, p. 9. ARG's apparent theory is the reality of those applicable regulations can be ignored for the purpose of denying valid petition rights because no property owner of the that Tract has filed a zoning application. See ARG's Amended Motion for Summary Judgment, pp. 5 and 9. ARG cites no authority for that theory.

A property owner's application is not a precondition for zoning regulations on his or her property. Zoning regulations can be and usually are applied to properties in a city without any such landowner application. The vast majority of the zoning regulations applicable to any city property are imposed with the adoption of a comprehensive zoning ordinance (which is the only true form of original or "initial zoning" under the Zoning Enabling Act). Section 211.004 of the Local Government Code does not require a landowner application in order to adopt a comprehensive zoning ordinance. The City

has adopted such a comprehensive zoning ordinance with regulations covering all land within the City, including the Bull Creek Tract.

We turn to ARG's argument that it is exempt from the regulations of Austin's comprehensive zoning ordinance (which is totally inconsistent with the fact it filed the Grove PUD application pursuant to the regulations of that ordinance. See Part B.3 of this Brief and Reply, pp. 10-11).

ARG's argument is that because the State was exempt from zoning regulations when it owned the Bull Creek Tract, ARG is entitled to use that prior ownership to extrapolate an exemption from of the Valid Petition Rights Statute in this case. ARG's argument is flawed for several reasons:

First, the State's exemption from compliance with city zoning regulations is just that – an exemption. Op. Tex. Att'y Gen. JM-0117 (1983). An exemption does not mean that City regulations were never effectively adopted, only that the State can claim an exemption from those regulations if it so desires.²⁶ That exemption expires when the land is sold and becomes "privately owned," see Section 211.013(d) of the Texas Local Government Code; or if the land is proposed to be used for non-governmental purposes. See following Third point.

Second, ARG is not the State and cannot claim any right to the State's exemption or the consequence of the State's exemptions. No such right was acquired by ARG.²⁷ Any

²⁶ The State's exemption is not mandatory. The State can and has complied voluntarily with applicable zoning regulations in the past. See footnote 13.

²⁷ ARG (through an affiliate) acquired the Bull Creek Tract from the State with a "Deed Without Warranty." That deed is part of Exhibit 1 to ARG's Amended Motion for Summary Judgment. Basically ARG was conveyed the physical dirt of the Bull Creek Tract with no State exemptions or other appurtenant rights. That conveyance was expressly "subject to all matters of public record," of which Austin's comprehensive zoning ordinance is one. That Deed goes on to state in

effect of the State’s exemption was lost immediately upon conveyance of the Bull Creek Tract to ARG for private development. See preceding First point.

Third, the Bull Creek Tract would not be exempt from Austin zoning regulations even if it was still owned by the State. State land proposed for non-governmental use is not entitled to exemption from city regulations. To go from a governmental use to a non-governmental use, state land must go through a statutory “rezoning” process to change applicable city regulations. Texas Natural Resources Code sections 31.161 – 31.163.

Fourth, ARG cannot seek zoning for a PUD on the Bull Creek Tract unless that land is already necessarily subject to all of the regulations of the Austin comprehensive zoning ordinance. But for the regulations of that ordinance, no PUD can be created. See Part B.3. of this Brief and Reply at pp. 10-11.

Fifth, ARG is barred as a matter of law from questioning or challenging any of the Austin comprehensive zoning ordinance regulations applicable to the Bull Creek Tract. That ordinance was adopted and re-adopted in its current form more than three years ago. And, the Bull Creek Tract came within Austin’s city limits more than three years ago.²⁸ All such regulations are therefore conclusively presumed to be valid as to the Bull Creek Tract. Section 51.003(a) of the Local Government Code.

bold print that it was not granting or warranting any rights related to “(a) MATTERS OF TITLE; (b) ZONING; . . . (i) GOVERNMENTAL APPROVALS; (j) GOVERNMENTAL REGULATIONS OR ANY OTHER MATTER OR THING RELATING TO OR AFFECTING THE PROPERTY . . . GRANTEE FURTHER EXPRESSLY ACKNOWLEDGES AND AGREES THAT GRANTOR IS NOT REPRESENTING OR WARRANTING THAT ANYTHING CAN OR WILL BE ACCOMPLISHED THROUGH GRANTEE’S OR GRANTOR’S EFFORTS WITH REGARD TO THE PLANNING, PLATTING OR ZONING PROCESS OF ANY GOVERNMENTAL AUTHORITIES, BOARDS OR ENTITIES.”

²⁸ Austin’s comprehensive zoning ordinance was readopted (more than once) after the Bull Creek Tract was annexed into the city limits. That mooted out any timing issue with the original adoption. *James v. City of Round Rock*, 630 S.W.2d 466, 468 (Tex. App. – Austin 1982, no writ).

The sole authority ARG and the City cite for the claimed exception from the Valid Petition Rights Statute is the 1972 case of *Appolo Development, Inc. v. City of Garland*, 476 S.W.2d 365 (Tex. App. – Dallas 1972, no writ). They claim that case created a broad exception for any land labeled “unzoned.” There is no authority for reading that case that way, and that is not what the court in *Appolo Development* decided.

Appolo Development was a defective notice case. In that case the City of Garland failed to comply with the notice requirements mandated by the Zoning Enabling Act in two respects: (1) by enacting the comprehensive zoning ordinance without notice to the landowner when the land in question was outside the city limits;²⁹ and (2) by publishing notice for only 11 days before it annexed that land instead of the mandatory 15. 476 S.W.2d at 367. Because strict compliance with all requirements of the Zoning Enabling Act is jurisdictional, the court voided the City’s zoning ordinance as it applied to that land. Without any valid comprehensive zoning ordinance, there were no regulations and therefore nothing to change under the Valid Petition Rights Statute. Other than for the general principal of required strict compliance with the Zoning Enabling Act, *Appolo Development* has only been cited by a court for the defective notice holding. See *TCI West End, Inc. v. City of Dallas*, No. 05-11-00582-CV, __S.W.3d__ (Tex. App. – Dallas, March 9, 2016), *on remand from*, 463 S.W.3d 53 (Tex. 2015). *Appolo Development* has never been construed as creating a general exception for “unzoned” land within a city as ARG argues.³⁰

²⁹ No such issue is involved in this case. See footnote 28.

³⁰ There is commentary that *Appolo Development* might stand for a general exemption to the Valid Petition Rights Statute for “newly annexed land” as defined in that case. See e.g. the City of Austin’s 1985 memorandum attached to the City’s determination in this case, Exhibit E. No court has accepted that expanded interpretation and whether it will is problematic and

D. Conclusion

With the cross motions for summary judgment, all parties agree that the facts relevant to the determination of the valid petition rights issue in this case are undisputed. Those facts are established by the documented record on ARG's Grove PUD application.

By seeking to create a PUD under Austin's comprehensive zoning ordinance, the Grove PUD application necessarily concedes and proves that the Bull Creek Tract is subject to the jurisdiction of that ordinance and all of its regulations. Not only does that application seek to change that zoning ordinance with an amendment to create the PUD, it also seeks to change 27 of that ordinance's regulations applicable to the Bull Creek Tract. The adjacent landowners have objected to that proposed amendment and those proposed changes with valid petitions under the Valid Petition Rights Statute. Therefore, $\frac{3}{4}$ supermajority voting is mandatory for any approval of the Grove PUD by the Austin City Council, regardless of the conflicting sections of the Austin City Code.

WHEREFORE, Plaintiffs respectfully pray that their Motion for Partial Summary Judgment on Valid Petition Rights and Mandatory $\frac{3}{4}$ Supermajority Voting be in all things granted as prayed therein, and that the City of Austin's and ARG's motions for summary judgment be in all things denied.

questionable given *Appolo Development's* fact-specific holding based on the defective notice in that case. In any event, the Bull Creek Tract is anything but "newly annexed land" and there is no question of defective notices in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and its Attachment have been served on all parties or their counsel pursuant to the Texas Rules of Civil Procedure on July 25, 2016, as follows:

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