

capacities as appointed or elected officials of the City of Austin (collectively, the “Defendant(s)”) violated the Texas Constitution and Texas Statutes, and would respectfully show as follows:

SUMMARY OF THE CASE

1. Plaintiffs bring this *ultra vires* action challenging the Defendants’ authority to approve and implement two separate zoning ordinances (Ordinance 20230720-181 and Ordinance 860904-X) that each, individually and collectively, grant special favor to an individual landowner. The approvals of these ordinances represent unlawful and unconstitutional actions, inconsistent with the legal framework and requirements of the Texas Constitution and Chapter 211 of the Texas Local Government Code. Because Defendants lacked legal authority to approve the subject ordinances, the ordinances are *void ab initio* (void at their inception) and cannot be used as a basis for the approval of building permits, site plans, or other development-related entitlements.

2. In 2023, the Defendants approved Ordinance 20230720-181 (“Borden PDA”), granting LI-PDA (limited industrial – planned development agreement) zoning for a new development on the [21] acres of land located on Levander Loop between Strandtman Cove and Julieanna Cove (the “Borden Tract”) above the Colorado River, adjacent to the [47-acre] Colorado River Wildlife Sanctuary and across from the [400-acre] Roy Guerrero Park.

3. The Borden PDA defies traditional principles of zoning by making permissible residential uses in an industrial zoning base district (LI – limited industrial). The ordinance achieves this by attempting to craft an apparent “loophole” in the City’s zoning code, attaching the planned development agreement (PDA) combining district, intended for large-scale manufacturing and industrial facilities. The Borden PDA also grants height, setback, and impervious cover entitlements that would not otherwise be allowed or achievable in residential zoning base districts.

4. Using the PDA combining district, in this manner, constitutes illegal “spot zoning.”

Spot zoning is a common law term that describes an impermissible “amendatory ordinance that singles out a small tract for treatment that differs from that accorded similar surrounding land without proof of changes in conditions.” *City of Pharr v. Tippitt*, 616 S.W.2d 173, 177 (Tex. 1981). Spot zoning occurs when “preferential treatment” is given to a property that would “defeat[] a pre-established comprehensive plan.” *Id.* “It is piecemeal zoning, the antithesis of planned zoning.” *Id.*

5. The Borden PDA violates several provisions of Chapter 211 of the Texas Local Government Code, including (i) §211.005(b), which requires uniformity of zoning regulations within zoning districts; (ii) §211.004, which requires that zoning regulations be approved in accordance with the City’s approved comprehensive plan; and (iii) §211.008, which designates the City’s Board of Adjustment as the authority to grant special exceptions to zoning regulations (requiring the applicant to meet the standards for a hardship variance). Tex. Loc. Gov’t Code §§ 211.004, 211.005(b), & 211.008.

6. Because the Borden PDA violates these mandatory provisions of Chapter 211 and further grants unique, preferential spot-zoning treatment to an individual landowner, the City Council lacked the requisite authority to approve the ordinance, making it *void ab initio*. Thus, the Defendants should be enjoined from any further actions resulting from the approval of the ordinance, including the approval of any building permits, site plans, subdivisions, or other development-related entitlements that result from the approval of Ordinance 20230720-181.

7. The use of the PDA on the Borden Tract compounds upon a history of environmental injustice and racial inequality that led to the site being zoned industrial in the first place. Most of Austin’s industrial zoning is located within East Austin, protecting (mostly white) West Austin neighborhoods from such nuisance uses. Compounding upon this discrimination, the

PDA is a tool that is only available to such industrial properties, doubling down on the longstanding impacts from industrial zoning.

8. The Borden Tract was removed from protections applicable to similar properties in West Austin. It is located along the bluff of the Colorado River. This free-flowing section of the Colorado River between Longhorn Dam and the mouth of Walnut Creek is one of the cleanest sections of urban rivers in Texas. In 2021, the Texas House determined that this stretch of the Colorado met the standard for “pristine waters” for which the discharge standards should be heightened, based upon phosphorus levels less than .06 milligram per liter more than 92% of the time. It is also among the most natural and well-preserved stretches of river in Texas, characterized by “[e]xceptional vistas of the entire river valley” and a densely wooded corridor on both banks that provides precious urban wildlife habitat and recreational opportunities for residents.¹ Nearby residents, including members of the Plaintiff organizations, have spent significant time, energy and resources over the last several decades to preserve the river’s water quality and the environmental integrity of the surrounding lands through parkland acquisition and development protections. As articulated in the Town Lake Park Comprehensive Plan, this area of the river is intended to develop as a “Preserve,” where “[w]ildlife and waterfowl will be nurtured” and where “[m]anmade scars will be healed.”²

¹ Aus., Tex. Resolution 880414-1 (Apr. 14, 1988), Town Lake Park Comprehensive Plan, p. 87.

² *Id.*



Figures 1, 2. Colorado River at Colorado River Park Wildlife Sanctuary.

9. In 1986, the City approved Ordinance 860717-Z, creating the Waterfront Overlay, which is a zoning overlay that protects the Colorado River, along with its supported parkland and natural spaces, from overdevelopment through certain height limits, setbacks, impervious cover limits, and other development-related restrictions. The Waterfront Overlay is divided into subdistricts, establishing zoning regulations tailored to each subdistrict. When the Austin City Council created the Waterfront Overlay, the Borden Tract was included within the Red Bluff Subdistrict. The new overlay was intended to reflect the goals and policies set forth in the 1985 Town Lake Corridor Study and the 1985 Montopolis Area Study. The Town Lake Corridor Study recommended development regulations tailored to the unique conditions of each subdistrict of the urban river from Lake Austin to the Longhorn Dam. With respect to the Colorado River below Longhorn Dam, the emphasis was on protecting the uniquely well-preserved natural character of the river for parks, wildlife habitat and recreation uses, based on the findings of the City's Montopolis Area Study, which summarized the conditions as follows:

The Colorado River and its environs . . . are very different in character from the upstream dammed segment and its highly urbanized environment. The aesthetic quality of the river corridor is best described as pastoral, tranquil. The scene is

that of the Colorado River in early days: gravel and sand bars, shallower waters easily fished by many species of waterfowl and other birds, e.g., osprey, bald eagles and peregrine falcons and beds of submerged aquatic plants, and ashes, willows and anacuas. Although Highway 183 noises dominate the soundscape of the far eastern boundary, even there the river is quite lovely and peaceful.

This description of the conditions remains accurate today, with the river protected by the preservation of parklands and the effectiveness of the Waterfront Overlay in limiting the encroachment of development along the river corridor.

10. Shortly before the approval of the ordinance creating the Waterfront Overlay, Defendants entered into an agreement with the then-owner of the Borden Tract, contractually agreeing to exclude the property from “any new or special ordinance affecting Town Lake and the Colorado River.” This contractual agreement is recorded in that certain Warranty Deed recorded as Instrument No. 0954400063 in the Real Property Records of Travis County, Texas.

11. Within months of the creation of the Waterfront Overlay, the then-owner of the Borden Tract contacted and testified to the City Council, resulting in the City’s approval of Ordinance 860904-X, removing the Borden Tract from the Red Bluff Subdistrict. The removal of the Borden Tract from the Waterfront Overlay is an act of unconstitutional contract zoning.

12. In Texas, it is unconstitutional for cities to engage in contract zoning, because it violates resident voters' rights to have decisions made by a democratically elected government. Contract zoning occurs when a city council enters into a bilateral agreement to approve, disapprove, or omit certain zoning regulations in exchange for a landowner’s agreement to use the land in a particular manner. Contract zoning “impermissibly abdicates . . . authority to determine proper land use, effectively bypassing the entire legislative process.” *City of White Settlement v. Super Wash*, 198 S.W.3d 770, 772 n. 2 (Tex. 2006).

13. Contract zoning is problematic for two reasons: (i) a city council cannot contract

away its police powers and (ii) each future council must be free to act to make changes, as it sees fit. In other words, contract zoning can represent an “unconstitutional delegation of legislative power,” both at the time of the initial bargain and, if applicable, the abdication of future authority. *Id.* Any zoning ordinance based upon an illegal bargain is therefore *void ab initio*. Actions that are *void ab initio* are void at their inception.

JURISDICTION AND VENUE

14. Jurisdiction of this action lies in this Court pursuant to Tex. Const. Art V, § 8; Texas Civil Practice & Remedies Code § 65.021; and Texas Government Code § 24.007 and § 551.142. Venue is proper in this Court pursuant to Texas Civil Practice & Remedies Code § 15.0151 and § 65.023(a).

PARTIES

15. Plaintiff River Bluff Neighborhood Association (“River Bluff NA”) is a neighborhood association officially registered with the City of Austin, with boundaries extending from East 5th Street (north) to Roy G. Guerrero Colorado River Park (south, inclusive) and from Pleasant Valley Drive (west) to US 183 (east), the area which includes the Borden Tract. The River Bluff NA brings this suit on its own behalf and on behalf of members who live in the immediate vicinity of the Borden Tract and will be impacted by the noise, traffic, light pollution, stormwater pollution, erosion, air pollution and construction activities and whose use and enjoyment of existing parks and natural areas along the Colorado River, including the river itself, will be harmed as a direct result from the development of the Borden Tract, as permitted by the subject zoning ordinances.

16. Plaintiff People Organized in Defense of Earth and Her Resources (PODER) is a women-led, people of color, grassroots social justice organization formed in 1991 to increase the

participation of residents of East Austin in decisions related to the economic development and environmental protection of our communities. PODER's mission includes addressing environmental issues as social and economic justice issues and as basic human rights. PODER brings this suit on its own behalf and on behalf of members who live in the immediate vicinity of the Borden Tract and will be impacted by the noise, traffic, light pollution, stormwater pollution, erosion, air pollution, and construction activities and whose use and enjoyment of existing parks and natural areas along the Colorado River, including the river itself, that will be harmed as a direct result from the development of the Borden Tract, as permitted by the subject zoning ordinances.

17. Plaintiff Save Our Springs Alliance, Inc. ("SOS Alliance") is a membership-based association, a Texas nonprofit organization. On behalf of its members, the SOS Alliance provides education outreach, advocacy, and scientific research concerning issues that affect water quality, water quantity, and other natural resources throughout the Texas Hill Country and Central Texas, including the City of Austin. SOS also provides its members a legal voice in protecting their interests in the use and enjoyment of these natural resources, as well as safeguarding their rights to a participatory democracy and fair, open government, as more particularly described in the SOS Alliance's official purpose statement included on its certificate of formation on record with the Texas Secretary of State.

18. Members of the River Bluff NA, PODER, and SOS, frequently visit and walk the natural trails within the Colorado River Park Wildlife Sanctuary, which borders the Borden Tract, engaging in activities such as bird watching, observing local wildlife, and enjoying the peace and sanctuary offered by the park. The members' enjoyment of this area will be impaired by the noise,

traffic, light pollution, construction activities, and impairment of existing parks and natural areas along the Colorado River, and the river itself, from the development of the Borden Tract.

19. Members of the River Bluff NA, PODER, and SOS frequently enjoy the parks, trails, and civic amenities in and along the shorelines of the Colorado River, including kayaking, canoeing, birdwatching, fishing, hiking, playing with children, nature education, and amateur naturalist activities. The development resulting from the implementation of the zoning ordinances will affect the shoreline, water quality, air quality, noise levels, light pollution, and use and enjoyment of this free-flowing section of the Colorado River, including the ecological systems that it supports, and introduce increased human activity that will adversely impact the wildlife habitat. The Plaintiffs bring this action on behalf of their respective membership adversely impacted by the unlawful approval of the Borden Tract zoning ordinance and the removal of the Borden Tract from the Waterfront Overlay and the Defendants refusal to enforce the zoning entitlements contained within its original approval.

20. The interests of the River Bluff NA, PODER, and SOS members set out above are particularized to them, and the protection of such interests in this action is within the mission of each organization and does not require their individual participation as parties.

21. Defendant Jesús Garza is the Interim City Manager of the City of Austin. He is sued in his official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Third Floor, Austin, Texas, 78701.

22. Defendant Kirk Watson is the Mayor of the City of Austin. He is sued in his official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

23. Defendant Natasha Madison-Harper is a Council Member of the City of Austin. She is sued in her official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

24. Defendant Vanessa Fuentes is a Council Member of the City of Austin. She is sued in her official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

25. Defendant José Velásquez is a Council Member of the City of Austin. He is sued in his official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

26. Defendant José (Chito) Vela is a Council Member of the City of Austin. He is sued in his official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

27. Defendant Ryan Alter is a Council Member of the City of Austin. He is sued in his official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

28. Defendant Mackenzie Kelly is a Council Member of the City of Austin. She is sued in her official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

29. Defendant Leslie Pool is a Council Member of the City of Austin. She is sued in her official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

30. Defendant Paige Ellis is a Council Member of the City of Austin and serves as Mayor Pro Tem of the City Council. She is sued in her official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

31. Defendant Zohaib Qadri is a Council Member of the City of Austin. He is sued in his official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

32. Defendant Alison Alter is a Council Member of the City of Austin. She is sued in her official capacity only and can be served at Austin City Hall, 301 W. 2nd Street, Second Floor, Austin, Texas, 78701.

DISCOVERY

33. Plaintiffs assert that discovery should be conducted under Discovery Control Level 2, pursuant to Rule 190 of Texas Rules of Civil Procedure.

ZONING REQUIREMENTS

34. Under Chapter 211 of the Texas Local Government Code, cities may implement a zoning map and code that regulates height, lot size, population density, and land uses. *See generally*, Tex. Loc. Gov't Code Title 7, Subtitle A, Chapter 211, § 211.001 *et seq.*

35. Under the requirements of Chapter 211, if a city has approved a comprehensive plan (as is the case in Austin), all zoning regulations and changes to those regulations must be approved in accordance with such plan. *Id.* at § 211.004. Furthermore, zoning regulations must be designed to perform certain health and welfare functions, such as lessening traffic congestion, preventing overcrowding of land, and providing adequate light and air. *Id.*

36. Chapter 211 sets forth various procedural requirements that allow property owners affected by proposed zoning changes to participate in the legislative process to approve such

changes. Prior to approving a change to a zoning regulation or district boundary, a municipality must follow certain procedural requirements, including the posting of notice and the holding of public hearings for the Planning Commission and the City Council. Additionally, certain statutorily afforded rights are granted to nearby property owners to protest proposed zoning changes, triggering the necessity of a supermajority approval of the City Council before such change could take effect.

37. The granting of special exceptions and variances to the City's zoning code is the responsibility of the City's Board of Adjustment, which is a body that serves independently from the City Council. *Id.* at § 211.008. In other words, the City Council may establish the base zoning districts but variances to the standards for such base districts is the purview of the Board of Adjustment (not the City Council).

FACTS

38. On July 20, 2023, the Austin City Council approved a rezoning ordinance, Ordinance 20230720-181, applying the Planned Development Agreement (PDA) combining district to the limited industrial (LI) base district for the property known as the "Borden Tract." The site is referred to as the Borden Tract, because it formerly was the location of a Borden Dairy Co. facility.

39. The Borden Tract is comprised of several parcels that combine to form a 21-acre tract of land, generally located at 2, 21 ½, 41, & 71 Strandtman Cove and 11, 21, 41, & 41 ½ Julieanna Cove in the City of Austin, Travis County, Texas. The Borden Tract is located within the boundaries of the River Bluff Neighborhood Association.



Figure 3. Map of Borden Tract.

40. The northern section of the site was developed with a milk manufacturing facility, while the southern section of the remains undeveloped, providing a buffer between the site's development and the Colorado River Park Wildlife Sanctuary ("Wildlife Sanctuary") along its southern border. The Wildlife Sanctuary is a rare, low-human-impact wildlife preserve and city-owned park in an otherwise urban environment.

41. The Wildlife Sanctuary is habitat for many native species of animals and native plants, including migratory birds, turtles, fish, mussels, and other aquatic species that rely upon this high-water-quality and free-flowing section of the Colorado River. These species include, but are not limited to, great blue herons, little blue herons, yellow-crowned night herons, great egrets, snowy egrets, ospreys, wood ducks, peregrine falcons, red-shouldered hawks, zone-tailed hawks, belted kingfishers, cliff swallows, yellow-bill cuckoos, golden-front woodpeckers, black and white

warblers, bald eagles, white-tailed deer, coyotes, grey foxes, bobcats, ring-tailed cats, Texas river cooters, Texas map turtles, softshell turtles, red swap crayfish, largemouth bass, long-eared sunfish, spotted gar, catfish, Guadalupe bass, and a variety of mussels, including the Texas fatmucket (pending federal listing as an endangered species).

42. Prior to Ordinance 20230720-181, the Borden Tract was zoned limited industrial (LI) base district zoning. Limited industrial is the “designation for a commercial service use or limited manufacturing use generally located on a moderately-sized site.” Austin, Tex., Ord. 031211-11 (Dec. 11, 2003), Austin, Tex., Ord. 990225-70 (Feb. 25, 1999) (Land Development Code, § 25-2-125).

43. Ordinance 20230720-181 applied to the Borden Tract a Planned Development Agreement (PDA) combining district to the property. The PDA combining district is a zoning tool that originates from economic development contracts that the City used to recruit and customize zoning for industrial businesses. It is a zoning combining district intended for one of only two circumstances, to either “(1) provide for industrial and commercial uses in certain commercial and industrial base districts; or (2) incorporate the terms of a planned development area agreement into a zoning ordinance following annexation of a property that is subject to a planned development area agreement.” *Id.* at §25-2-174. Neither circumstance is applicable to the present facts.

44. The industrial zoning for the Borden Tract is consistent with much of the City of Austin’s racist zoning history, placing most of the City’s industrial manufacturing and warehouse facilities in East Austin, where the neighborhoods are historically home to communities of color—while protecting predominantly white West Austin neighborhoods from these nuisance uses. The use of the PDA combining district doubles down on Austin’s racist past by attempting to use a

zoning combining district that is only available to properties with industrial and commercial highway zoning base districts.

45. The approval of the Borden Tract PDA significantly increased the development regulations for the property, including height (120 feet), impervious cover (75%), and floor-to-area ratio (4:1). The combination of these zoning entitlements is unachievable under any equivalent residential base district, such as the highest density classification for multi-family zoning, MF-6, which has a 90-foot height limit.

46. Along with various environmental and development regulations in the City's Land Development Code, development along shoreline of the Colorado River is regulated by the Waterfront Overlay, a zoning ordinance approved by the Austin City Council "to promote the harmonious interaction and transition between urban development and the park land and shoreline of Town Lake and the Colorado River." AUSTIN, TEX., Rev. Ordinances ch. 25, art. 2, §25-2-175(A). The boundaries of the Waterfront Overlay are described within Appendix B of Chapter 25-2 of the Austin Land Development Code. *Id.*, at § chapter 25, art. 2, app. B.

47. When the City of Austin first adopted the Waterfront Overlay in 1986, the Borden Tract was subject to its requirements, as part of the Red Bluff Subdistrict. Austin, Tex. Ord. 860717-Z (July 17, 1986). The Waterfront Overlay applies uniformly to all properties within each subdistrict.

48. The Red Bluff Subdistrict included all property bounded by East First Street on the north, the Colorado River shoreline to the south, Highway 183 on the east, and Pleasant Valley Road on the west. *Id.* The Red Bluff Subdistrict prohibited industrial uses, resource extraction, and stockyards. The Red Bluff Subdistrict regulations significantly restricted the construction of buildings and other improvements, including a vertical height limit of 35-ft. within the secondary

setback from the Colorado River (approx. 150 feet from the shoreline). Also, it requires that new buildings visible from parkland use natural building materials. *Id.* Other standards applicable to all districts also included certain screening requirements, design regulations, and building mass restrictions (such as floor-to-area ratio).

49. In May 1985, the City of Austin ordered a development and zoning moratorium for properties along the Colorado River until the City Council had time to approve new development regulations to protect the river from the impacts of overdevelopment.

50. While this process was underway, on December 30, 1985, the then-owner of the Borden Tract sold to the City of Austin the land that is dedicated as the Colorado River Park Wildlife Sanctuary. *See* Exhibit A. Within the deed for this transaction, the City of Austin contractually committed to “continue current zoning on or exclude or exempt Lots 1 – 11 (26.721 acres) of the Bridgeview Business and Industrial Park Plaza from any new or special ordinances affecting Town Lake and the Colorado River.” *Id.* at ¶ 4. This is the same land as the Borden Tract. It further exempted the development from compatibility standards associated with the purchased parkland.

51. Following the City Council’s approval of the zoning ordinance creating the Waterfront Overlay, on July 17, 1986, the then-owner of the Borden Tract contacted the City Council and testified before the council requesting the removal of the Borden Tract from the Waterfront Overlay.

52. The City Council removed the Borden Tract from the Waterfront Overlay on September 4, 1986, less than two months after the creation of the Waterfront Overlay.

53. The Borden Tract is located within the Govalle/Johnston Terrace Combined Neighborhood Planning area and is subject to the approved neighborhood plan for the area, which

is a component of the City of Austin’s approved comprehensive plan. Prior to the relevant zoning case, the property is listed as “Industrial District, with conditions to protect environment.” *Id.* at 37. This area was designated industrial to “provide a balance of land use and zoning for people to live and work in the area” and to “[d]evelop diverse economic and employment opportunities.” *Id.* at 37-38. To help ease pressures on residential neighborhoods, the plan intended to “[e]ncourage higher density, non-residential uses to locate near major intersections and in industrial districts/business parks.” *Id.* at 39.

54. In explaining the history of the neighborhood’s development and the conflicts that have occurred from the mixing together residential and industrial zoning, the neighborhood plan notes that the “pairing of incompatible uses remains the source of many of the land use conflicts that characterize parts of East Austin to this day.” *Id.* at 19. The City’s approval of Ordinance 20230720-181 directly conflicts with the guidance from the approved neighborhood plan.

55. The Waterfront Overlay is still in effect today, having been revised through a plain language rewrite in 1999 and amended again in 2009 to reinstate unintentionally omitted provisions.

CAUSES OF ACTION

I. Defendants Engaged in Illegal Spot Zoning; the Resulting Ordinance is *Void ab Initio*.

56. Paragraphs 1 thru 55 are fully incorporated herein by reference.

57. Although Texas law provides city councils broad discretion in the approval of zoning ordinances, these zoning decisions must be applied consistently, according to a plan,

without special favor to an individual landowner. When the City Council acts in a manner that unfairly benefits one landowner at the expense of others, it could be considered “spot” zoning.

58. “Spot zoning” is an impermissible “amendatory ordinance that singles out a small tract for treatment that differs from that accorded similar surrounding land without proof of changes in conditions.” *City of Pharr v. Tippitt*, 616 S.W.2d 173, 177 (Tex. 1981). Spot zoning occurs when “preferential treatment” is given to a property that would “defeat[] a pre-established comprehensive plan; [i]t is piecemeal zoning, the antithesis of planned zoning.”

59. In its approval of Ordinance 20230720-181, the City engaged in illegal spot zoning. The City Council improperly inserted itself into the role of the Board of Adjustment, adjusting the applicable base zoning district development regulations to provide special favor to the landowner in a manner that defies the foundations of zoning. The 2023 ordinance modifies the limited industrial base district to permit residential uses, relax development standards beyond those that would otherwise be allowed in other residential zoning districts, and in a manner that is inconsistent with the approved neighborhood plan. This approval fails to comply with the requirements of Chapter 211 of the Texas Local Government Code and is inconsistent with the text of the Govalle-Johnston Terrace Neighborhood Plan.

60. Because this action is an act of illegal spot zoning, Defendants approval of Ordinance 20230720-181 is *void ab initio*.

II. Defendants Engaged in Unconstitutional Contract Zoning; the Resulting Ordinance is *Void ab Initio*.

61. Paragraphs 1 thru 60 are fully incorporated herein by reference.

62. Zoning, as an exercise of police powers, is a legislative function that a municipality cannot cede. *City of Bellaire v. Lamkin*, 317 S.W.2d 43, 45 (Tex. 1958); *Super Wash, Inc. v. City*

of White Settlement, 131 S.W.3d 249, 257 (Tex. App.—Fort Worth 2004), *rev'd on other grounds*, 198 S.W.3d 770 (Tex. 2006). “[A] city cannot ‘surrender its authority to determine proper land use by contract.’” 2800 La Frontera No. 1A, LTD v. City of Round Rock, No. 03-08-00790-CV, 2010 WL 143418, *2 (Tex. App.—Austin Jan. 12, 2010, no pet.) (quoting *Super Wash, Inc.*, 131 S.W.3d at 257. “Zoning decisions must occur via the legislative process and not by ‘special arrangement’ with a property owner.” *Id.*

63. When a city council attempts to bypass the legislative process by making contractual commitments with a property owner over the use of land, such an action is referred to as “contract zoning.” Contract zoning includes situations when a city enters into a bilateral agreement with a landowner, whereby the city binds itself to zone—or not zone—land in return for the landowner’s promise to use or not use his property in a certain manner or in exchange for other commitments. *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 772 n.2 (Tex. 2006); *see also City of Farmer’s Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 291 (Tex. App.—Dallas 1968, writ ref’d n.r.e). This practice is invalid because the city surrenders its authority to determine proper land use and bypasses the legislative process.

64. In its approval of Ordinance 860904-X, removing the Borden Tract from the Waterfront Overlay, the Defendants engaged in illegal, unconstitutional contract zoning. That ordinance is thus *void ab initio*. Because this action was taken as part of illegal, unconstitutional contract zoning, Defendants should be enjoined from recognizing these provisions as binding or otherwise hindering its exercise of its legislative zoning powers and administrative authority to approve any site plans or permits resulting from such illegal, unconstitutional contract zoning.

MANDAMUS & INJUNCTIVE RELIEF

65. Paragraphs 1 through 64 are fully incorporated herein by reference.

66. Plaintiffs seek to restrain the implementation of the Ordinance 20230720-181 and Ordinance 860904-X, including all actions and approvals that have resulted therefrom, which represent *ultra vires* and unconstitutional ordinances and/or agreements by City officials, and are therefore *void ab initio*.

67. Plaintiffs seek injunctive and mandamus relief against Defendants pursuant to Section 65.011 of the Tex. Civ. Prac. & Rem. Code.

CONDITIONS PRECEDENT

68. All conditions precedent to Plaintiffs' claims for relief have been performed or have occurred.

PRAYERS FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that Defendants be cited to appear and answer in this cause, timely respond to discovery, and that upon final hearing, judgment be entered in favor of Plaintiffs and against Defendants as follows:

- (i) mandamus and injunctive relief as specified above;
- (ii) enjoin the implementation of the void Ordinance 20230720-181, including all actions and approvals that have resulted therefrom;
- (iii) enjoin the implementation of the void Ordinance 860904-X, including all actions and approvals that have resulted therefrom; and
- (iv) award such other and further relief to which Plaintiffs may show themselves entitled.

Respectfully submitted,

/s/ Robert J. Levinski

Robert J. Levinski
State Bar No. 24097993
bobby@sosalliance.org

William G. Bunch
State Bar No. 03342520
bill@sosalliance.org

Victoria Rose
State Bar No. 24131088
victoria@sosalliance.org

Save Our Springs Alliance
4701 Westgate Blvd., D-401
Austin, TX 78745
Tel: 512-477-2320
Fax: 512-477-6410

Attorneys for Plaintiffs