Steering Committee Members:
Ted Barnhill: Chair
Brockett Davidson: Vice Chair
Renae Alsobrook, Amy Bodle, Sinikka Green, Lindsey Heron, Ellen Justice, Marissa Latta, Ellu Nasser, Erin Ator Thomson, Derek Victory, Sean Williams, Denise Younger

November 20, 2019

The Honorable Kathie Tovo
District 9 Council Member
301 W 2nd Street
Austin, TX 78701

Dear Council Member Tovo:

The Old West Austin Neighborhood Association (OWANA) opposes the new Land Development Code as written. This letter briefly outlines how the new code will negatively impact our neighborhood. *Then it shifts focus.* Assuming the code will pass even if you vote against it, we have outlined eight parts of the code that could be altered or clarified in order to mitigate its negative effects on our neighborhood and many other neighborhoods in Austin.

Why we oppose the new Land Development Code:

We are a small neighborhood bordered on three sides by transit corridors. Accordingly, no neighborhood is more affected than ours. Just focusing on the interior lots, rather than those along the corridors, about ⅓ of those lots (approximately 230 lots) will be aggressively upzoned to RM1. Roughly another ⅓ (approximately 270 lots) will be upzoned to R4. The rest (approximately 275 lots) will be upzoned to R2B. This aggressive and pervasive upzoning is particularly ironic because we are one of the most historic neighborhoods in the city, with three Local Historic Districts, a National Register Historic District, and numerous historic landmark homes.

Eight concrete ways to mitigate the proposed revised code's negative effects:

1. Preserve the existing balanced approach to zoning along 5th and 6th St. reflected in the current Vertical Mixed Use Ordinance.

   The Old West Austin Neighborhood Plan provided for more density along this corridor provided that public benefits were provided. This recommendation resulted in a Vertical

Mixed Use (VMU) designation for 31 tracts in Old West Austin, including many along 5th and 6th Street. The VMU ordinance is an overlay, and owners can opt into it by providing public benefits such as affordable housing (10% at 70% AMI unless larger units are built for families, in which case 80% AMI is allowed). The proposed land development code removes the affordability incentives and provides much greater entitlements.

2. Do not expand Short-Term Rental or Late-Night Bar uses.

   The stated goal of the land development code rewrite is to promote affordability so that people who are being forced out of central Austin, such as families with kids, will be able to continue living here. Certain uses, such as late-night bars and short-term rentals, have the opposite effect. Unfortunately, the revised land development code draft broadens the geographic areas where short-term rentals and late-night bars are permitted in Old West Austin.

   Rainey Street is a good example of what happens when late-night bars are permitted, driving families with kids from the neighborhood. Late-night bars will drive out families with kids living within a few blocks away as the loud thump-thump-thump of music (which you can hear along 6th Street east of Lamar every Friday and Saturday night) is incompatible with kids' and parents' need for a good night's rest. Ideally the current VMU zoning would continue (as mentioned above), but at a minimum the tracts along 5th and 6th Streets should be designated MU-4 rather than MU-5. Alternatively, the code could preclude bars open past 11pm when within a certain distance from single family homes, or allow bars only as part of a conditional use permit.

   STRs are similarly disruptive. If a triplex or fourplex is allowed to become a short-term rental, the tenants who live there will be displaced by out-of-towners visiting, for example, for a bachelor party. Families living next to STRs will be forced out. Many tracts in the interior (RM1, R4) and periphery (MU-1, MU-2, MU-3, MU-4, MS2A, MS2B) of our neighborhood allow non-owner occupied short term rentals. Those "Type 3" STRs should be removed from the tables of uses permitted in those zoning designations.

3. Height Compatibility.

   Several of the existing apartment buildings in the interior of our neighborhood will be switched to RM2. The 60 ft height allowance for RM2 creates significant economic incentives to demolish the existing apartment buildings and replace them with much taller buildings. Several properties along Lamar, 6th, and Enfield will be zoned MU5A, which allows 90 ft buildings. The new compatibility provisions will allow those buildings to be full height, even though they will overshadow many nearby single family homes.

In order to prevent a 60+ ft building from towering over existing single family homes, compatibility limits should change. Currently, those limits are only triggered by nearby lots that are zoned R3 (or more restrictive). We suggest that compatibility limits be triggered by any lot that is being used as a single family home, or any lot in a Local Historic District.

4. Help people stay in their homes.

   The prospect of large apartment buildings next door to traditional homes will make it hard for families and long-time elderly residents to stay in our neighborhood. Since the people who try to stay will bear the brunt of the burden, we would like you to help them get some benefits from the upzoning as well. To keep pace with increasing land values, homeowners might need to build rental units like ADUs or duplexes. We would like you to ensure that RM1 and R4 lots will get increased FAR and Impervious Cover allowances to do so. This will at least give them a chance to stay in their homes and offset the increased taxes. It will also serve the city's overall goal of increasing density. This would require amending 23-2H-3020 and resisting amendment MM-2 in the LDC Supplemental Staff Report.

5. Promote family-friendly 3-bedroom units.

   Old West Austin is a close knit community that centers on Mathews Elementary School and community-centered gatherings at West Austin Park. We are very concerned that the LDC's focus on greater density overlooks the need for family-friendly residences. Recent developments along 9th St. and Enfield Rd. confirm that developers are interested in building larger 1 and 2 bedroom condos. We would like to see the code promote 3 bedroom units, and especially townhouses or cottage courts. Homes with 3 bedrooms are much more attractive to families. *If anyone needs to live close to work and have a decreased commute, it is those who need to come home to care for their children.* We suggest decreasing the fee-in-lieu for 3 bedroom units relative to the fees-in-lieu for smaller units. This could be done just for neighborhoods close to downtown, or citywide.

6. Increase fees-in-lieu.

   It is unrealistic to believe any developer will build affordable housing in our neighborhood with the current high property values. They will instead choose to pay fees-in-lieu. We see two practical ways to achieve more affordable housing in our neighborhood. First, the city could substantially increase the fees-in-lieu for neighborhoods near downtown like Old West Austin. To remain consistent with our recommendation above, the fees for 3-bedroom units could still be close to, or even lower than, the fees for smaller units.

Second, the city could eliminate the opportunity to pay fees-in-lieu altogether in Old West Austin, and instead require that some number of units actually be affordable.

7. Offer more protection to historic homes.

   We are very concerned that developers will have no incentive to work with existing neighbors when considering demolitions to older homes because they can essentially demolish houses (due to very lax preservation obligations) and still receive a generous preservation incentive. The best way to deal with this would be to require a greater percentage of the structure to remain intact to receive the preservation incentive. This is particularly important in our historic neighborhood. We would also like to ensure that the new zoning rules do not disrupt restrictions imposed by Local Historic Districts. The relevant code provisions on the preservation incentive for R4 and RM1 zones are 23-3C-3050(D)(2) and 23-3C-4050(C)(2) respectively.

8. Preserve Petition Rights.

   Petition rights are legally required. In enacting the land development code rewrite, the City Council at third reading must allow valid petition rights to apply. We understand the City Law Department has provided a different opinion, but without providing any legal authority or citations for that position. We cite the *James v. City of Round Rock* case (attached to this letter as an exhibit), in which the appellate court with jurisdiction over Austin, the Third Court of Appeals, states clearly that valid petition applies to comprehensive repeal and replacement of a city's zoning code. As the court states, "There appear to be no other restrictions upon the promulgation of new comprehensive zoning ordinances *unless there is a written protest, Tex. Rev.Civ. Stat. Ann. art. 1011(e)"* In other words, a valid petition written protest is a restriction on promulgation of a new comprehensive zoning ordinance. How else could this sentence be interpreted? Please press the City Law Department to explain why the Round Rock case, and indeed the text and legislative history of valid petition rights that have existed since the original zoning enabling statute was passed by the Legislature in the 1920s, does not apply to Austin.

   Moreover, petition rights are important to creating a dialogue between developers and neighbors. The new code makes building approvals automatic and eliminates any notice to nearby property owners about new development. Petition rights help encourage developers to engage with neighbors to ensure that new buildings fit within the fabric of our neighborhood. The preservation incentive already limits one of our major tools for getting developers to listen to neighborhood concerns. Eliminating notice and petition rights would be a double blow to our ability to be heard.

Thank you for your continued efforts on behalf of us and other District Nine neighbors, as well as folks citywide who are seeking a balanced approach toward rezoning. If it looks like the code will pass despite your vote against it, we hope that you will be able to push for some or all of these alterations. They will at least provide some hope that our neighborhood can retain the families and long-time residents that currently call it home.

Sincerely,

The OWANA Steering Committee:

Ted Barnhill: Chair
Brockett Davidson: Vice Chair
Renae Alsobrook
Amy Bodle
Sinikka Green
Lindsey Heron
Ellen Justice
Marissa Latta
Ellu Nasser
Erin Ator Thomson
Derek Victory
Sean Williams
Denise Younger

CC:
Office of Austin Mayor Steve Adler
Offices of all Austin City Council Members

Caution
As of: May 21, 2018 10:57 PM Z

James v. Round Rock

Court of Appeals of Texas, Austin

March 3, 1982

No. 13620

Reporter

630 S.W.2d 466 *; 1982 Tex. App. LEXIS 4017 **

Edgar James, et. al., Appellants, v. The City of Round Rock, Texas, et. al., Appellees

Prior History: **[**1]** From the District Court of Williamson County, 26th Judicial District.

Core Terms

ordinances, zoning, permanent, comprehensive zoning, appellants', moot, classification, repealed, zoning ordinance, annexed, city's, new ordinance, city council, regulation

Case Summary

Procedural Posture

Appellants, landowners, sought review of a decision of the District Court of Williamson County, 26th Judicial District (Texas), which granted summary judgment in favor of appellees, city and officials, in appellants' suit to have declared invalid and unconstitutional two of appellee city's zoning ordinances.

Overview

Appellee city annexed land belonging to appellants, landowners. Under appellee city's original zoning ordinance, the land automatically received a temporary classification as a residential district. Appellants applied for a permanent general business district classification, but the city council voted to give the tracts a permanent residential classification through its enactment of two ordinances. Appellants brought suit against appellees, city and officials, to have the ordinances declared invalid. The trial court granted summary judgment in favor of appellees, and appellants sought review. The court dismissed the appeal as moot. The court held that by repeal of the old comprehensive ordinance and adoption of a new one, the challenged ordinances had been repealed, and appellants' land had, in effect, been zoned again. The court noted that the situation was not capable of repetition yet evading review, because the new ordinance was designed to apply far into the future and appellants still had the right to contest the permanent zoning of their properties.

Outcome

The court granted the motion of appellees, city and officials, to dismiss the appeal for want of jurisdiction, and to dismiss as moot the cause of action of appellants, landowners, seeking to have declared invalid two of appellee city's zoning ordinances, because the adoption of a new comprehensive zoning ordinance by appellee city had repealed the ordinances of which appellants complained.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN1[] **Zoning, Regional & State Planning**

See Tex. Rev. Civ. Stat. Ann. art. 1011d (1963).

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

HN2[] **Zoning, Constitutional Limits**

The enactment of zoning laws is an exercise of police powers of the state by the legislative branch of government.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN3[⬇] **Zoning, Ordinances**

Tex. Rev. Civ. Stat. Ann. art. 1011d (1963) provides the proper procedure to be followed when promulgating a zoning ordinance: no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

HN4[⬇] **Justiciability, Mootness**

A case becomes moot or abstract when it does not rest, or ceases to rest on any existing right or fact. Several corollaries of this rule are: a case is not moot if some issue is still in controversy; a case becomes moot if it is impossible for the court to grant effectual relief for any reason; a case can become moot by reason of new legislation or acts which supersede existing legislation.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Zoning > General Overview

HN5[⬇] **Zoning, Ordinances**

A statute may be expressly or impliedly repealed. When a later enactment is intended to embrace all of the law upon the subject with which it deals, it repeals all former laws relating to the same subject.

Counsel: James Thoma, Grimes & Associates, Round Rock, for appellants.

Stephen L. Sheets, Round Rock, for appellees.

Opinion by: PER CURIAM

Opinion

[*466] Appellant various affected landowners, sued the City of Round Rock, appellee, and its individual city officials, to have declared invalid and unconstitutional the city's zoning ordinances 647 and 648. The opposing sides each filed motions for summary judgment. The trial court, upholding the ordinances, granted summary judgment in favor of appellees from which appellants took their appeal to this Court.

The City of Round Rock has filed in this Court a motion to dismiss the appeal, on the ground that the appeal has become moot due to the city's adoption of a new comprehensive zoning code.

[*467] The claim of mootness is founded upon the following events which have occurred since the perfection of the appeal: on September 21, 1981, the Round Rock City Council repealed Chapter 11, sections 2 and 3 of the city's code of ordinances which included the general zoning plan and policy of the city and its comprehensive zoning regulations. The two ordinances **[**2]** complained of, namely numbers 647 and 648, were part of the code which was repealed.

The new comprehensive zoning ordinance sets up a new system of classification for the entire city. Appellants' land was not singled out for special treatment in the new zoning districts provided by the new ordinance. The new ordinance evidently was not adopted in direct response to the suit brought by appellants but constitutes the result and culmination of a three year project by the city aimed at bringing the original zoning ordinances in line with the rapid population growth recently experienced by the city.

We will therefore examine whether the new ordinance has rendered moot appellants' claims on appeal. Those claims are based upon the following facts.

Before 1978, appellants' land lay outside the city limits and as a result was not included within the original city comprehensive zoning ordinance. This land was later annexed by the city. Under the city's original zoning ordinance, all land annexed would automatically receive a temporary classification as a residential district or "R-

1". Appellants' land was therefore zoned as residential (single family dwellings).

Section 3.T.(1) of [**3] the planning and zoning section of the city code (Chapter 11), which was then applicable to zoning of annexed areas, read as follows:

> All territory annexed to the City hereafter automatically shall be temporarily classified as Residential District: R-1 until permanently zoned by the City Council. The Planning and Zoning Commission shall, as soon as practicable after annexation of any territory, recommend to the City Council a plan for permanent zoning in the area.

Three separate attempts have been made to give appellants' land a permanent zoning classification. The first attempt began in March of 1978. After public hearings, the city council voted not to adopt a permanent zoning designation for the tracts in question. Again in September, 1979, another attempt was made with the same result. Finally, in February, 1980, appellants applied for a permanent B-1, or general business district, classification. After public hearings, the Zoning Commission recommended that a permanent B-1 classification be adopted, but the city council voted to give the tracts a permanent R-1 classification through its enactment of ordinances 647 and 648, the ordinances questioned on appeal.

Appellants [**4] argue on appeal that ordinances 647 and 648 were not validly enacted because they did not meet the mandatory prerequisite for the exercise of zoning authority under Tex.Rev.Civ.Stat.Ann. art. 1011d (1963). HN1[] Article 1011d states "the legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed." (emphasis added). Appellants state there is no underlying provision in the city's ordinances which provides for the manner of establishing zoning districts and no clear procedure set out for original zoning. They state specifically that section 3.T.(1) of Chapter 11, quoted above, is insufficient for that purpose.

Second, appellants argue these two ordinances were unconstitutional since they were not formulated in a manner required by the due process clauses of the Texas and the United States Constitutions. Since zoning is a regulation of private property rights by a governmental body, any procedure regulating these rights must provide some degree of certainty in the standards used to limit the use of [**5] such property. Appellants claim section 3.T.(1) is "arbitrary" and "discriminatory" because (1) there is no established time frame within which the [*468] city must act to replace the temporary classification received at annexation with a permanent classification; and (2) the ordinance lacks procedural guidelines for this type of action.

Third, appellants claim the district court erred in granting summary judgment for appellee based on the "issuable fact" doctrine. In fact, appellants' argument is based on the idea that the adoption of the ordinances was arbitrary and capricious since they were unsupported by any credible evidence.

These claims can be divided into two areas-the procedural issue relating to compliance with article 1011d and the evidentiary issue. Both of these issues are, in our view, rendered moot by the adoption of the new comprehensive ordinance.

The City of Round Rock has the legal authority to enact zoning ordinances. Tex.Rev.Civ.Stat.Ann. art. 1011a (1963). HN2[] The enactment of zoning laws is an exercise of police powers of the state by the legislative branch of government. *Lawton v. City of Austin, 404 S.W.2d 648* (Tex.Civ.App.-Austin 1966, writ ref'd [**6] n. r. e.). HN3[] Article 1011d provides the proper procedure to be followed when promulgating a zoning ordinance:

> ... no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality.

These requirements were evidently met by the city in promulgating the new comprehensive zoning ordinance. There appear to be no other restrictions upon the promulgation of new comprehensive zoning ordinances unless there is a written protest, *Tex.Rev.Civ.Stat.Ann. art. 1011e* (Supp.1981), which is not the case before this Court.

HN4[] A case becomes moot or abstract when it does not rest, or ceases to rest on any existing right or fact. Several corollaries of this rule are: (1) a case is not moot if some issue is still in controversy; (2) a case becomes moot if it is impossible for the court to grant effectual relief for any reason, *Swank v. Sharp, 358 S.W.2d 950* (Tex.Civ.App.-Dallas 1962, no writ); (3) a case can [**7] become moot by reason of new

legislation or acts which supercede existing legislation, Gordon v. Lake, 163 Tex. 392, 356 S.W.2d 138 (1962).

Since zoning ordinances are considered legislative enactments, the question becomes what effect did the repeal of the old ordinance and the adoption of the new ordinance have on ordinances 647 and 648, which dealt directly with appellants' property. The general rule is that HN5[] a statute may be expressly or impliedly repealed. "When a later enactment is intended to embrace all of the law upon the subject with which it deals, it repeals all former laws relating to the same subject." McInnis v. State, 603 S.W.2d 179 (Tex.1980); Gordon v. Lake, supra. The old comprehensive ordinance was repealed on September 21, 1981, and replaced by a comprehensive zoning ordinance. Ordinances 647 and 648 were amendments to the old comprehensive zoning ordinance. When the entire ordinance was expressly repealed, other ordinances which were amendments to it were also repealed.

Appellants' procedural claims have been rendered moot because the land has, in effect, been zoned again, through a procedure of which no complaint is made. Appellants' complaint that section [**8] 3.T.(1) failed to set forth a clear procedure for original zoning has been preempted by the city's enacting an entirely new comprehensive zoning system which includes appellants' land. Had the city failed to give this land a permanent classification between 1978 and 1981, the new comprehensive zoning ordinance and zoning map would have accomplished the same result-the land would have been permanently zoned R-1. However, the procedure involved in adopting the new ordinance is now the controlling factor in whether the appellants received [*469] due process in the zoning of their land.

The evidence question also becomes moot since the facts surrounding the adoption of ordinances which have been repealed are no longer material. The facts surrounding the adoption of the new comprehensive ordinance will now be the only ones material to whether the city ordinances were arbitrary and capricious.

There is no problem in this appeal with the concept that this is a situation capable of repetition yet evading review. First, it appears that a new comprehensive ordinance was the result of a three year study to update the old ordinance. There is no indication that new comprehensive ordinances [**9] are in the making; in fact it appears that the new comprehensive zoning ordinance is designed to apply far into the future. Second, appellants still have the right to contest the permanent zoning of their property. Under both ordinances 647 and 648, which were amendatory zoning ordinances, and the new original comprehensive zoning ordinance, appellants' burden would be the same, i.e., the presumption is that both of these ordinances are valid until it is shown that the city acted arbitrarily and unreasonably. See City of Pharr v. Tippitt, 616 S.W.2d 173 (Tex.1981); Hunt v. City of San Antonio, 462 S.W.2d 536 (Tex.1971).

If this Court rules on the validity or invalidity of ordinances 647 and 648, appellants would still be faced with a presumptively valid zoning plan adopted in 1981 and hence their land would still be permanently zoned R-1. This Court would be unable to grant appellants any effectual relief since even declaring these two ordinances invalid would leave appellants in the same position. Appellants contend that invalidating these ordinances would merely leave the land as temporarily zoned R-1, but this ignores the valid enactment of an entirely new zoning map which [**10] designated appellants' property as permanently zoned R-1.

We grant the motion of The City of Round Rock to dismiss the appeal for want of jurisdiction, and the cause is dismissed as moot.

Dismissed as Moot.

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