CAUSE NO. D-1-GN-19-008617

FRANCISCA ACUÑA; SUSANA ALMANZA; JEFFERY L. BOWEN; WILLIAM BURKHARDT; ALECIA M. COOPER; ROGER FALK; SETH O. FOWLER; RANDY HOWARD; MARY INGLE; PATRICIA KING; FRED I. LEWIS; BARBARA MCARTHUR; ALLAN E. MCMURTRY; LAURENCE MILLER; GILBERT RIVERA; JANE RIVERA; JOHN UMPHRESS; JAMES VALADEZ; and ED WENDLER, JR., *PLAINTIFFS*,	§	IN THE DISTRICT COURT OF
V.	§	TRAVIS COUNTY, TEXAS
THE CITY OF AUSTIN; THE CITY COUNCIL OF AUSTIN; THE HONORABLE AUSTIN MAYOR STEVE ADLER, IN HIS OFFICIAL CAPACITY; THE HONORABLE AUSTIN CITY COUNCIL MEMBERS NATASHA HARPER-MADISON, DELIA GARZA, SABINO RENTERIA, GREGORIO CASAR, ANN KITCHEN, JIMMY FLANNIGAN, LESLIE POOL, PAIGE ELLIS, KATHIE TOVO, AND ALISON ALTER, IN THEIR OFFICIAL CAPACITIES; AND THE HONORABLE AUSTIN CITY MANAGER, SPENCER CRONK, IN HIS OFFICIAL CAPACITY, *DEFENDANTS*	§	201ST JUDICIAL DISTRICT

PLAINTIFFS' REPLY BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Plaintiffs and submit this Reply Brief, and would respectfully show as follows:

I.

INTRODUCTION

City Defendants' Trial Brief was filed on March 5, 2020. Trial is set for March 9, 2020.

II.

THE PLAIN MEANING OF THE STATUTE, LEGISLATIVE HISTORY, AND CASE LAW ALL SHOW THAT PROTEST RIGHTS APPLY TO COMPREHENSIVE REVISIONS.

The City Defendants (the "City") maintain that protest rights apply only when there is one zoning change to one specific property and that protest rights do not apply to a comprehensive revision. Their argument is undermined by the plain meaning of Texas Local Government Code, Section 211.006(c), the legislative history, City practices, and the case law.

A. Section 211.006(d)'s plain language

The City notes that the protest rights provision applies to "**a** proposed change to **a** regulation or boundary" of an owner's property or nearby property [the City's emphasis; *see* City Defendants' Trial Brief ("City's Brief") at 17-18]. The City argues that this means protest rights apply to only one change of one zoning regulation or boundary to one property. The plain meaning, however, of the word "a" is that it applies to *one or more* changes. Merriam Webster's defines "a", among many meanings, as an indefinite article that means "any." "A zoning change," therefore, applies to any change, whether one or many. This interpretation also prevents cities from circumventing protest rights simply by

making at one time 2 or more changes to a property's zoning regulations, or rezoning one or more properties.

B. Section 211.006(d)'s legislative history

1) The original protest provision, which has not changed substantively, clearly covered changes to multiple "regulations, restriction, and boundaries".

Section 211.006(d) is a non-substantive recodification of Tex. Rev. Civ. State, Art.1011e (1928). Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. The plain meaning of the original protest rights provision clearly applies to changes to regulations, restrictions, and boundaries - plural:

> "Change***s.***-Such regulation***s***, restriction***s***, and boundarie***s*** 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…"

Tex. Rev. Civ. Sta. Art 1011e (1928) (emphasis added).

Protest rights clearly apply to changes to one or many zoning regulations, restrictions or boundaries to a protesting owners' property. The City's interpretation would have absurd results. According to the City's interpretation, when the City proposes to change four different regulations on a property (say the density, floor area ratio, the height, and impervious cover), then the owner would not be entitled to notice or protest rights.

2) The City's own practices apply protest rights to multiple changes to multiple properties, contrary to the City's current interpretation.

The City has long recognized protest rights on individual properties when making multiple zoning changes to hundreds of properties in neighborhood plans. (Joint Trial Exhibits 30-34). The City's practices do not comport with their current interpretation.

3) The Legislature amended the law in 1985 to allow a "comprehensive revision" alternative to individual notice, but did not provide for a comprehensive revision exception to protest rights.

The legislative history of the Texas zoning statutes indicates that the Legislature has not eliminated protest rights when municipalities enact comprehensive revisions. Since 1927, when the Texas Legislature first authorized zoning and accompanying protest rights, it has not eliminated or restricted property owners' protest rights. Tex. Rev. Civ. Stat 1011a-f (Vernon 1928) (Acts 1927, 40th Leg., p. 424, ch. 283); Tex. Local Government Code, Section 211.006 (recodifying with non-substantive changes the 1927 law). The Texas Legislature, however, has authorized municipalities when enacting comprehensive revisions to eliminate individualized, mailed notice to property owners in certain circumstances. Tex. Local Gov. Code, Section 211.007(d). The fact the Texas Legislature has made no exemption for protest rights when cities are enacting comprehensive revisions— unlike for individualized notice— strongly indicates the Legislature intended protest rights to remain unchanged during comprehensive revisions.

In 1985, the Texas Legislature amended the state's zoning notice provision. HB1205 authorized city councils to provide alternative notice other than mailed notice to property owners (*i.e.*, notice by newspaper publication) if the council voted by 2/3rds majority for the alternative notice and held a joint council zoning commission hearing: "The legislative body may also by a two-thirds vote *prescribe the type of notice to be given of the time and place of a public hearing held jointly between the legislative body and the zoning commission under Section 6(b) of this Act.* Any notice prescribed by the legislative body is in lieu of the notice required by Section 6(b) of this Act [written mailed notice to property

owners].” Acts 1985, 69th Legislature, p. 3018, ch. 894. Mixon, in *Texas Municipal Law,* Section 7.02, makes clear that the 1985 amendment’s alternative notice was for the purpose of avoiding written notice to all property owners when there was a comprehensive revision: “A 1985 amendment to the enabling act allows home-rule cities to reclassify tracts (*and adopt comprehensive revisions) without mailing notice to owners whose land will be affected by the change.”*(emphasis added). The Texas Legislature in 1985 (and subsequently) has not amended protest rights to provide an exception for comprehensive revisions- although the Texas Legislature was clearly aware of comprehensive revisions in allowing alternative notice by publication for comprehensive revisions.

In New Jersey, an appellate court in 2008 addressed the identical issue in this case: whether the legislature’s amendment eliminating individual property owners’ zoning notice for comprehension revisions *eliminated by implication* property owners’ protest rights for comprehensive revisions. *Campbell v. Borough of North Plainfield*, 961 A.2d 770 (N.J. App 2008). In 1995, a New Jersey amendment removed individualized notice for comprehensive revisions: “We noted that in creating the exemption from the personal notice requirement, the Legislature was well aware of the ‘distinction between an isolated zoning change and a broad-based review of a municipality’s entire zoning scheme.’” *Id.* at 780. The New Jersey court held that protest rights and notice rights were separate and independent rights: “‘the public’s right to notice and protest’ should not be read to require that these rights exist in tandem. On the contrary, as we will further explain, the rights are separate and independent of each other.” *Id.* The Court explained that “the Legislature enacted the notice exemption to save local government the time and expense of providing

personal notice to a group of individuals that should be aware, because of this lengthy period of oversight, of the possibility of future zoning changes." *Id.* at 782. But the notice exemption did not indicate a Legislative intent to eliminate protest rights during comprehensive revisions:

> "The mere addition of this [notice] language does not demonstrate, however, a desire to remove from the affected property owners the right to maintain 'the stability and continuity of zoning regulations [of protest rights]'".

On the contrary, the statute, as amended, reserves the right to protest '*any* proposed amendment or revision.'" *Id.* The New Jersey court concluded that it would not repeal protest rights by implication: "This signifies that the right [to protest] continues undiminished. Absent clear and compelling evidence of the Legislature's intent to remove these protections, we have no occasion to conclude that the 1995 amendment repealed them by implication." *Id.* at 782.

Like New Jersey's courts, Texas courts do not favor repealing legislative enactments by implication: "If repeal was effected it was by implication only, and repeal by implication is not favored." *Standard v. Sadler*, 383 S.W.2d 391 (Tex. 1964). See also *Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000) As stated in *Ramirez v. State of Texas*, 550 S.W.2d 121 (Tex.Civ.App.—Austin 1977, no writ), "for repeal by implication to occur, the implication must be clear, necessary, irresistible and free from reasonable doubt." The implication for repeal of protest rights during comprehensive revisions in Texas is not clear, necessary, irresistible, or free from reasonable doubt.

III.

THE CITY MISINTERPRETS THE STATE'S REQUIRED NOTICE PROVISIONS: SECTION 211.007(d) PROVIDES AN ALTERNATIVE TO INDIVIDUAL NOTICE FOR COMPREHENSIVE REVISIONS, BUT THE CITY FAILED TO FOLLOW IT.

A. Defendants contend that the Council's a*nd Planning Commissions'* notices by publication satisfy state law under 211.006(a) of the Texas Local Government Code.

The City argues that state law does not address notice for comprehensive revisions, rather just addresses providing notice for initial adoption under Section 211.006(a) and rezoning amendments of specific parcels under Section 211.007(c). Therefore, the City contends that since comprehensive revisions are like initial adoptions (which Plaintiffs dispute), they gave proper notice by publication under Section 211.006(a). Their analysis is wrong because a 1985 amendment adopted Section 211.007(d), which allows a procedure for alternative Planning Commission notice for comprehensive revisions. The City, however, failed to follow this subsection's procedure and, therefore, their notice was illegal.

B. The City's notice by publication under Section 211.006 (a) does not comply with Texas law for the Planning Commission's required notice for two reasons.

1) The City relies on the wrong notice provision.

Section 211.006(a) applies to only City Council's notice, not the Planning Commission's notice. The applicable provisions for Planning Commission notice are in Section 211.007(c) and (d). Plaintiffs do not contend the City Council's required notice was illegal, but rather *that the Planning Commission's* required notice under Section 211.007 was not given.

2) The City failed to provide either of the two alternative notices required for the Planning Commission under 211.007 (c) or (d).

As noted above, the Texas Legislature in 1985 amended the Planning Commission's notice to allow alternative notice for comprehensive revisions and other situations, rather than individual notice. Section 211.007(d) provides the city council may prescribe alternative planning commission notice (*i.e.*, by publication) if there is a 2/3 super-majority city council vote and a joint city council/planning commission hearing.

C. Notice Under Section 211.006(a), cited by the City's Brief, applies only to the City Council and Not to the Planning Commission

Section 211.006(a)'s notice provision applies, as it states, only to the "governing body of a municipality", *i.e.*, t*he City Council.* Plaintiffs, however, are contesting the City's failure to provide *Planning Commission* notice under Section 211.007. Section 211.006 (a) states, in relevant part: "The *governing body of a municipality* wishing to exercise the authority relating to zoning regulations and zoning district boundaries shall establish procedures… Before the 15th day before the date of the hearing, notice of the time and place of the hearing must be published in an official newspaper…" (emphasis added).

Plaintiffs don't dispute the City provided Council's required notice by publication under Section 211.006(a), but contend that the City failed to provide the required Planning Commission's notice under Section 211.007. Section 211.007 requires home-rule cities, in order to exercise their authority to zone, to establish a zoning commission, provide notice, hold a hearing, and submit a final report to Council. Section 211.007(a)("To exercise the powers authorized by this subchapter, the governing body of a home-rule municipality *shall… appoint a zoning commission*"); Section 211.007(b)("The zoning commission *shall*

make a preliminary report and hold public hearings on that report before submitting a final report to the governing body."). Subsections (c) and (d) of 211.007 (c) and (d) prescribe the Planning Commission's required notice. Section 211.006(a) is inapplicable.

D. The Planning Commission must provide one of two types of notice: either individualized, mailed notice under Section 211.007(c), or alternative notice by a 2/3rds super-majority vote of Council under Section 211.007(d)

Because the Planning Commission is the first step in the zoning process, and Council is authorized to provide notice by publication, Texas law has required individualized, mailed notice for zoning classification changes since 1949. Tex. Local Gov. Code, § 211.007(c). *See* Acts 1949, 51st Leg., p. 205, ch. 111, sec. 1. Section 211.007(c) mandates: "Before the 10th day before the hearing date, written notice of each public hearing before the zoning commission on a proposed change in a zoning classification shall be sent to each owner, as indicated by the most recently approved municipal tax roll…"

In 1985, in order to avoid the cost of providing individualized mailed notice for comprehensive revisions and other circumstances, the Texas Legislature specifically authorized alternative notice for the Planning Commission in Section 211.007(d). This section allows alternative Planning Commission if there is a super-majority 2/3 vote of Council and the City holds a joint Commission/Council hearing. "The governing body of a home-rule municipality may, by a two-thirds vote, prescribe the type of notice to be given of the time and place of a public hearing held jointly by the governing body and the zoning commission. If notice requirements are prescribed under this subsection, the notice requirements prescribed by Subsections (b) and (c) and by Section 211.006(a) do not apply. Section 211.007(d)." The House Committee Bill Report states that the amendment's

purpose was to provide "optional notice if a public hearing is jointly held between the legislative body and zoning commission."

According the treatise co-authored by the City's expert, Brenda McDonald, the 1985 amendment was specifically designed to allow cities to provide alternative Commission notice for situations like comprehensive revisions. In *Texas Municipal Zoning Law*, Section 7.02, Mixon, et. al. states: "A 1985 amendment to the enabling act allows home-rule cities to reclassify tracts *(and adopt comprehensive revisions) without mailing notice to owners whose land will be affected by the change.* The amendment, which specifically applies to home-rule cities that hold joint zoning commission and governing body public hearings, provides that, by a two-thirds vote, the governing body can *substitute* a locally formulated notice procedure for the specific notice by mail required by the enabling act."

The 1985 amendment was passed to allow alternative notice by the City for comprehensive revisions and other situations. If Texas cities already had authority to provide notice by publication for comprehensive revisions, like the City contends, then there was no reason for the Legislature to pass the 1985 amendment authorizing alternative notice for comprehensive revisions.

E. Since the Legislature's 1985 amendment prescribed an alternative notice procedure for the Planning Commission for comprehensive revisions, t*he City was required to follow that procedure for notice by publication*

Once the Legislature prescribed the procedure in Section 211.007(d), the City may not follow another procedure. This is because Texas law clearly holds cities to exercise Chapter 211's zoning authority must "strictly and rigidly comply" with state required procedures.

Bolton v. Sparks, 362 S.W.2d 946, 950 (Tex. 1962) (failure to provide statutory notice renders council's zoning change invalid).

F. Council's actions are void ab initio for failure to strictly comply with the Planning Commission's notice requirements.

The Planning Commission is required to give notice, have a public hearing, and submit a final report to Council. Section 211.007(a)-(d). The Planning Commission's LDC Revision report is void because proper notice was not given; therefore, the Council cannot even hold a hearing on the LDC Revision under state law.

Council's action on the LDC Revision are void *ab initio* because of the City's failure to provide proper Planning Commission notice. *See, City of San Antonio v. Pope*, 351 S.W.2d 269 (Tex. Civ. App.—Eastland 1961, no writ); *City of North Richland Hills v. Home Town Urban Partners, Ltd.*, 340 S.W.3d 900, 915 (Tex. App.—Fort Worth 2011, no pet.) (overruled on other grounds *Zachry Constr. Corp. v. Port of Houston Auth.*, 449 S.W.3d 98 (Tex. 2014). Without proper notice, there is no valid Commission final report, and the statute precludes the Council from even holding a hearing, much less a vote: "The governing body *may not hold a public hearing* until it receives the final report of the zoning commission…" Section 211.007(b). The Council and Planning Commission's actions are void a*b initio*.

IV.

THE CITY'S ZONE CONVERSION TABLE (EXHIBIT 57) IS LEGALLY IRRELEVANT AND FACTUALLY INACCURATE.

A. The City alleges protest rights do not apply because their Conversion Table shows that the LDC Revision uniformly rezones all properties based on the same zoning conversion rules.

The City argues, that the state's procedural protections for property owners somehow do not apply, because the LDC Revision is a comprehensive revision that is making only textual amendments based on broad legislative policies. The City's argument is misplaced for 4 reasons: 1) there is no statutory exception in state law to protest rights for alleged uniform textual zoning amendments or zoning by broad legislative policymaking; 2) the LDC Revision changes not just the text in a vacuum, but also changes the City's map and Plaintiffs' zoning classifications affecting their property, which triggers notice and protest rights; 3) the City, contrary to its assertions, is rezoning similarly situated Plaintiffs differently, with, for example, property currently zoned SF-3 being rezoned to 4 different classifications: R2A, R2B, R4, and RM1; and 4) the City is changing Plaintiffs' zoning regulations and classifications, and contrary to their statements, their zoning is not "comparably equivalent."

B. There Is No Statutory Exception to Protest Rights Based on Allegedly Uniform Textual Revisions or Alleged Broad Legislative Policymaking Rezoning.

Section 211.006(d) has no express exception to protest rights when the City changes zoning based on allegedly uniform textual zoning changes or zoning based on broad legislative policymaking reasons. Protest rights attach when the City changes the zoning regulations or district boundaries that apply to a specific property owners' property, not

when the City changes the zoning text. There is no exception to state-mandated protest rights procedure for zoning changes to Plaintiffs' property based on the City's alleged manner and reasons for making the zoning changes.

C. Protest rights are triggered by changes to the maps that apply to or affect Plaintiffs' property, regardless of the City's alleged bases for textual changes.

Contrary to the City's position, Plaintiffs are not objecting to changes to the LDC Revisions' textual amendments in the abstract, but rather to the application of those changes to their property. Property owners have protest rights under state law when *their property has had changes* to its regulations because the zoning map proposes reclassifying the zoning on their property. Section 211.006(d) provides that protest rights exist when a property owner objects to "a proposed change to a regulation or boundary" to their property or nearby property: " *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." (emphasis added). Protests rights are triggered when a property owners' property is impacted "by a change to a regulation or boundary" to their or nearby property; there are no other statutory criteria, contrary to the City's elaborate and convoluted argument.

For Plaintiffs' properties, and properties across the City, the LDC Revision proposes extensively changing basic zoning regulatory criteria, transforming Plaintiffs and nearby properties. *See* Appendix A (showing Plaintiffs' current zoning, proposed zoning, and the changes to their units per acre, bulk (floor area ratio), and impervious cover). Regardless

of whether the City's zoning changes are uniform, they are having a particular and specific impact on Plaintiff's property and unsettling Plaintiffs' zoning expectations. Regardless of how and why their property is being rezoned, property owners have protest rights to protect their interests "in the stability and continuity of zoning regulations," which the City is changing. *Levin v. Parsippany-Troy Hills Township*, 411 A.2d 704, 708 (N.J. 1979), citing *Anderson American Law of Zoning*, section 4.33 at 251 (2d ed. 1976.

D. The City Is Not Rezoning Plaintiffs' Properties Uniformly.

Even if uniformly applying zoning classifications mattered for protest rights, which it does not, the City is not rezoning Plaintiffs' property uniformly. Contrary to the City's Zone Conversion Table, released just days before trial, Plaintiffs' rezoning is not uniform. Fourteen of Plaintiffs' properties are currently zoned SF-3 (single family); yet seven properties are being rezoned R2A, three R2B, one R4, and three RM1. The zoning regulations for Plaintiffs' properties are being changed significantly, and they clearly are not being treated uniformly as evidenced by the four different zoning classifications. (Appendix A)

For example, Plaintiff Frances Acuña's home property is being rezoned from SF-3-NP to R2A, which the City's Zone Conversion Table maintains is comparably equivalent zoning. Yet under her current SF-3 zoning, 12.4-15.2 units can be built per acre with a floor-area-ratio of .4-.52; under Acuña's proposed R2A rezoning, 26.1 units per acre can be built with the "preservation incentive bonus" and the floor-area ratio has been increased to 1. (Appendix A). It is not "comparably equivalent" zoning to more than double Ms. Acuña's property's density and floor area ratio.

Another SF-3 rezoning considered "comparably equivalent" by the City involves Plaintiff Mary Ingle's homestead. Although currently zoned SF-3-NP like Ms. Acuña's property, Ms. Ingle's property is being rezoned to RM1. Her property's units per acre would increase from 12.4-15.2 units per acre to, with the preservation incentive bonus, 87.1 units per acre and her floor area ratio would be rise from .4 to 1.8. Six times the density per acre and 4.5 times the floor-area-ratio is neither uniform treatment nor comparably equivalent zoning.

E. The City is Changing Plaintiffs' Zoning Regulations and Classifications.

The City's Zone Conversion Table claims the LDC Revision is not really changing property owners' zoning regulations or district boundaries, and, therefore, it has not triggered property owners' notice and protest rights. The City contends that many proposed LDC Revision zoning regulation and district boundary changes are "comparably equivalent" to the current Code with "limited enhancements." (Joint Trial Exhibit 55, Third Supplemental Report of Jan. 31, 2020, p. 2). The City's argument is amiss because state law, the City Code, and the City's zoning guides make clear that the proposed LDC Revision's changes to Plaintiffs' properties constitute "a proposed change to a regulation or boundary," triggering notice and protest rights under state law. Tex. Local Gov. Code, Section 211.006(d). The City's proposed rezoning of Plaintiffs' properties is not "comparably equivalent" to their current zoning, because the City is making changes to key zoning regulatory criteria to their properties: the number of units (density), height, impervious cover, floor-area-ratio (FAR), and minimum lot size. Contrary to the City's

contention, these zoning regulatory criteria are the essence of zoning and serve to differentiate zoning district boundaries.

State law, Texas Local Gov. Code, Section 211.003, defines what constitutes zoning regulations, listing basic zoning criteria (number of units, lot size, bulk, height, open space, etc.— many of which the City is proposing to change in their rezoning of Plaintiffs' property. Similarly, the City's current Land Development Code defines district boundaries using the same as well as additional zoning criteria (number of units, lot size, building type, height, floor area ratio (FAR), setbacks, impervious cover, etc.) to differentiate among zoning classifications. *Under the current City Code, changes to these district boundary criteria constitute rezoning, triggering notice, hearing and protest rights.* (Joint Trial Exhibit 45) (Changing SF-2 zoning one home per lot) to SF-3 (one lot and an Auxiliary Dwelling Unit (small extra flat), is a zoning reclassification that triggers notice and protest rights). Logically, the LDC Revision's proposed changes to the same zoning regulatory criteria as under the current City Code should also constitute rezoning that triggers property owners' notice and protest rights.

1) The LDC Revision constitutes a major upzoning with increased density in Austin; it is not "comparably equivalent" zoning.

After stating for years that the LDC Revision was going to make major changes to the City's zoning, the City now alleges that the changes are just "limited enhancements" that are "comparably equivalent" to current zoning. However, City Council's official directive in May 2019 to the City Manager recognizes that the LDC Revision is a "significant departure" from CodeNEXT Draft 3, much less the current Code. The Council

adopted on May 2, 2019 its official directive to the City Manager and chose Option C. The Council's directive described Option C as "*a more significant departure* from the current Land Development Code than was proposed in Draft 3 and would generally provide for greater densification and housing capacity." Joint Trial Exhibit Ex. 22, *Council Direction on Land Development Code Revision Policy Guidance* (May 2, 2019), p. 5 (emphasis added).

2) State law defines a change in zoning regulations contrary to the City's position on "comparably equivalent" zoning.

Texas Local Government Code, Section 211.002 defines a zoning change as "the amendment, repeal or other change of a regulation or boundary." Basic zoning regulations are defined by Texas Local Government Code, Sec 211.003. Zoning regulates "(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; (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes… the bulk of buildings". These are the basic statutory criteria that constitute zoning regulations under Texas law. Moreover, these zoning regulatory criteria are standard across the country: "Zoning, in theory, regulates the use and development of land by dividing the municipality into districts and, within each district, limiting the use of and density of development on land and the height, bulk, and use of buildings and structures thereon. Regulations may vary according to the use, bulk, and density classifications established for each type of district." Rathkopf, *The Law of Zoning and Planning* (Dec. 2019 Update), Section 10.1. As noted above, on Plaintiffs'

properties, and properties across the City, these basic zoning criteria are being extensively changed, transforming Plaintiffs' properties and surrounding properties' zoning. *See* Appendix A.

3) The current City Code's zoning regulatory criteria and rezoning practices show that the LDC Revision is changing Plaintiffs' zoning and are not "comparably equivalent."

Under the current City Land Development Code, the ordinance's criteria used to differentiate between zoning classifications are the same criteria the City is changing under the LDC Revision—but is denying constitute zoning reclassifications. The City's current definition of rezoning includes changing a property's base district classifications. The criteria the City currently uses for distinguishing between different base district classifications include the use, number of units, lot size, height, impervious cover, floor area ratio, type of structure etc. If an Austin property owner wants to change one or more of these criteria, they must apply under the current code for a zoning district boundary classification change, triggering Chapter 211's required notice, hearing and protest rights. (Ex. 45) (rezoning from SF-2 to SF-3 is a change in zoning classification, triggering protest rights).

The current City Code defines rezoning as changing the base district classification: "Rezoning amends the zoning map to change the base district classification of property that was previously zoned." Austin City Code § 25-2-241(b). The base district classifications in the City Code include not only broad general use categories, such as residential, commercial, industrial, etc., but a zoning hierarchy of numerous base district classifications within each general use category. *See* Austin City Code, Sections 25-2-33.

The current code has sixteen basic "residential base districts." City Code, Sec 25-2-32. *See also City of Austin Guide to Zoning* (September 2016), p. 4. These sixteen classifications are based on changes in regulatory zoning criteria, such as number of units, lot size, open space, type of building, etc.) *See, generally,* Austin City Code, Sections 25-2-53 to 25-2-68. The City Code's brief definitions of the six basic single-family residential zoning classifications differentiate among the classifications based on use, number of units, lot size, density, and/or building type (emphasis added):

- "Single-family residence large lot (SF-1) district is the designation for *a low density* single-family residential use on a lot that is a minimum of *10,000 square feet*…" Austin City Code, 25-2-55
- "Single-family residence standard lot (SF-2) district is the designation for *a moderate density* single-family residential use on a lot that is a minimum of *5,750 square feet*…" Austin City Code, Section 25-2-56.
- "Family residence (SF-3) district is the designation for *a moderate density single-family residential use and a duplex use* on a lot that is a minimum of *5,750 square feet*…" Austin City Code, Section 25-2-57.
- "Single-family residence small lot (SF-4A) district is the designation for *a moderate density single-family residential use* on *a lot* that is a *minimum of 3,600 square feet*… ." Austin City Code, Section 25-2-58.
- Single-family residence *condominium site* (SF-4B) district is the designation for *a moderate density single-family residential use* on a site surrounded by existing structures, most of which are single-family residences… ." Austin City Code, Section 25-2-59.
- "Urban family residence (SF-5) district is the designation for a *moderate density single-family residential use* on a lot that is a minimum of *5,750 square feet.* A *duplex, two-family, townhouse, or condominium residential use is permitted* in an SF-5 district under development standards that maintain single family neighborhood characteristics… An SF-5 district may be used as a *transition between*

a single family and multifamily residential use or to facilitate the implementation of City affordable housing program." Austin City Code, Section 25-2-60

- "*Townhouse and condominium residence* (SF-6) district is the designation for *a moderate density single family, duplex, two-family, townhouse, and condominium use that is not subject to the spacing and location requirements for townhouse and condominium use in an SF-5 district… An SF-6 district may be used as a transition between a single family and multifamily residential use*." Austin City Code, Section 25-2-61.

These and other basic criteria are identified in the *City of Austin Guide to Zoning* (September 2016), pp. 11-12 (Joint Trial Exhibit 7), as the main regulatory criteria constituting base district classifications in Austin: use, minimum lot size, minimum lot width, maximum impervious cover, maximum height allowances, required setbacks, building coverage (of the area of the lot), density (number of units), and floor area regulation (bulk of building). For each base district classification, including the single family residential districts above, the City specifies in detail these and other criteria in the City Code Chapter 25, Article 2 ("Principal Use and Development Regulations") and in a detailed summary in *City of Austin Guide to Zoning* (September 2016), pp. 13-77 (Joint Trial Exhibit 7).

Under the current City Code, a change in these criteria, including use, lot size, number of units, building type, floor area ratio, impervious cover, and setbacks, changes the residential zoning base district classification and constitutes a rezoning. Based on longstanding City zoning district boundary classification law and practice, the change in one or more of these criteria constitutes a change in zoning regulation and district classification, triggering notice, hearings, final reports, and protest rights under Chapter

211. (Joint Trial Exhibit 45). Now suddenly, according to the City, a change under the LDC Revision in the type of structures, number of units, open space, type of buildings, etc. on Plaintiffs' properties do not constitute a change in zoning regulations. The City's interpretation is contrary to its own long-standing practice and the common understanding in the country of a zoning classification change.

In light of established Texas precedent that state rezoning procedural rights, such as notice and protest rights, must be strictly construed, it is clear that the LDC Revisions' regulatory changes to Plaintiffs' properties are zoning changes that trigger procedural protections for property owners. The City cannot, as it is attempting to do here, redefine what is a change in a zoning regulation and district boundary, contrary to common usage, long-standing practice, and state law, to avoid state procedural protection for property owners.

V.

NOTICE AND PROTEST RIGHTS ARE NOT BURDENSOME

A. Defendants argue that notice and protest rights for comprehensive revisions would be very burdensome and would have absurd results, so the Court should on its own carve out an exception.

While we believe that carving out any exception is for the Legislature and not the Courts, recognizing property owners' procedural protections would not be burdensome on the City.

B. As for Planning Commission notice, the City Council has a very easy remedy: vote by 2/3rd for alternative notice by publication under Section 211.007(d).

The City can adopt by 2/3rd vote notice by publication and hold a joint hearing with the Planning Commission and avoid individual notice. State law requires nothing more. As for the alleged horrors of providing individualized notice under the City's ordinances, the City Council may modify the City's ordinances to be in line with state law, which for unknown reasons the City has not done.

C. As for protest rights, the City Council simply has to enact maps that garner 9 Councilmember votes.

The City is proposing a very contentious, controversial LDC Revision, essentially eliminating single-family zoning and massively upzoning commercial and other properties across the City. This has caused over 14,000 property owners to file protest rights forms. (Plaintiffs' Ex. 1). The City has two reasonable solutions: it can either pass a less contentious LDC Revision or obtain 9 Councilmember votes.

Respectfully submitted,

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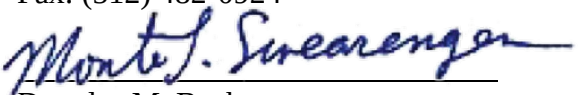
By: 
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CERTIFICATE OF SERVICE

I certify that on March 8, 2020, a true copy of the foregoing *Plaintiffs' Reply Brief* was served on counsel for Defendants in accordance with Texas Rule of Civil Procedure 21a via e-service through the Texas E-file system.

Via email: jwebre@scottdoug.com,
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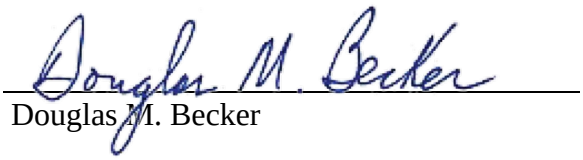


Douglas M. Becker

CAUSE NO. D-1-GN-19-008617

FRANCISCA ACUÑA; SUSANA ALMANZA; JEFFERY L. BOWEN; WILLIAM BURKHARDT; ALECIA M. COOPER; ROGER FALK; SETH O. FOWLER; RANDY HOWARD; MARY INGLE; PATRICIA KING; FRED I. LEWIS; BARBARA MCARTHUR; ALLAN E. MCMURTRY; LAURENCE MILLER; GILBERT RIVERA; JANE RIVERA; JOHN UMPHRESS; JAMES VALADEZ; and ED WENDLER, JR., *PLAINTIFFS*,	§	IN THE DISTRICT COURT OF
V.	§	TRAVIS COUNTY, TEXAS
THE CITY OF AUSTIN; THE CITY COUNCIL OF AUSTIN; THE HONORABLE AUSTIN MAYOR STEVE ADLER, IN HIS OFFICIAL CAPACITY; THE HONORABLE AUSTIN CITY COUNCIL MEMBERS NATASHA HARPER-MADISON, DELIA GARZA, SABINO RENTERIA, GREGORIO CASAR, ANN KITCHEN, JIMMY FLANNIGAN, LESLIE POOL, PAIGE ELLIS, KATHIE TOVO, AND ALISON ALTER, IN THEIR OFFICIAL CAPACITIES; AND THE HONORABLE AUSTIN CITY MANAGER, SPENCER CRONK, IN HIS OFFICIAL CAPACITY, *DEFENDANTS*	§	201ST JUDICIAL DISTRICT

APPENDIX A

PLAINTIFFS' REPLY BRIEF

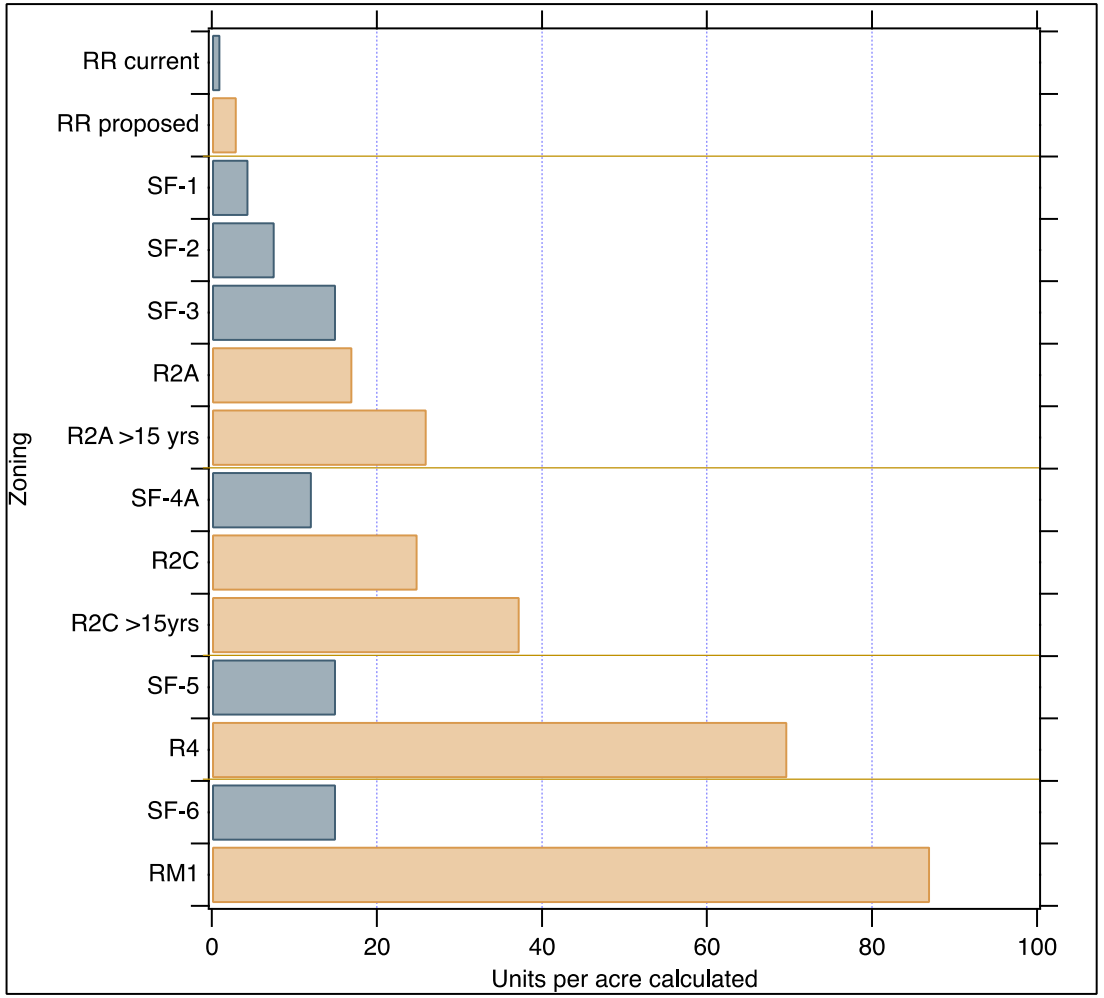
			Zoning		Units Per Acre			FAR			Height		Impervious Cover		Setback		Use
Name	Filed & Signed Protest Form	Own on TCAD	Current Zoning	Proposed Zoning	Current Zoning	Proposed Zoning	Proposed Zoning Principal structure > 15 years	Current Zoning	Proposed Zoning	Proposed Zoning Principal structure > 15 years	Current Zoning	Propose d Zoning	Current Zoning Building and Total Impervious	Proposed Zoning Impervious Cover Range with # of units	Current Zoning	Propose d Zoning	Proposed Zoning Additional Use
Allan McMurty	2412 Greenlawn Parkway, 7875	Y	CS	MU5A-Q	0.0	unlimited	—	2.0	unlimited	—	60	90	95%	90%	10	5	Bar
Pat King	13325 Thome Valley Dr., 7861	Y	I-SF-4A	R2A	12.1	17.4	26.1	—	0.4 - 0.52	~1	35	35	55%-65%	40%-45%	15	25	Food Sales(CUP)
Roger Falk	1501 West Koenig, 78756	Y	LR-MU-CO-NP	MU2	18-26	48.0	48.0	0.5	unlimited	—	40	50	50%-80%	0.7	25	10	Hotel, Bar(MUP)
Allan McMurty	5901 Cary Dr., 78757	Y	SF-2	R2A	7.6	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Allan McMurty	2605 Northland, 78756	Y	SF-2	R2A	7.6	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Jeffrey Bowen	8404 Caspian Dr., 78749	Y	SF-2	R2A	7.6	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Johnny Umphress	2604 Geraghty Ave, 78757	Y	SF-2	R2A	7.6	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Roger Falk	5904 Sierra Madre, 78759	Y	SF-2	R4	7.6	69.7	78.4	0.4	0.8	—	35	45	40%-45%	45%-55%	25	15	Food Sales(CUP)
Seth Fowler	6907 Drexel Dr., 78723	Y	SF-2-NP	R2A	7.6	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Ed Wendler, Jr	4803 Balcones Dr., 78731	Y	SF-3	R2A	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Laurence Miller	502 W. 33rd St., 78705	Y	SF-3-H-HD-NCCD-NF	RM1-HD-H	12.4 - 15.2	87.1	95.8	0.4	1.8	~1	35	45	40%-45%	45%-60%	25	10	Food Sales(CUP)
Mary Ingle	3406 Duval, 78705	Y	SF-3-NCCD-NP	RM1	12.4 - 15.2	87.1	95.8	0.4	1.8	—	35	45	40%-45%	45%-60%	25	10	Food Sales(CUP)
Alecia Cooper	3900 Wrightwood Rd., 78722	Y	SF-3-NP	R2A	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Allan McMurty	2003 Palo Duro, 78757	Y	SF-3-NP	R4	12.4 - 15.2	69.7	78.4	0.4	0.8	—	35	45	40%-45%	45%-55%	25	15	Food Sales(CUP)
Allan McMurty	1708 Madison, 78757	Y	SF-3-NP	R2A	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Barbara McArthur	5700 Clay Ave., 78756	Y	SF-3-NP	R2B	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	15	Food Sales(CUP)
Frances Acuna	5009 Brassiewood Dr., 78744	Y	SF-3-NP	R2A	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Fred Lewis	4509 Edgemont, 78731	Y	SF-3-NP	R2A	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
Gilbert and Jane River	1000 Glen Oaks Ct., 78702	Y	SF-3-NP	R2A	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
James Valadez	54 Waller St., 78702	Y	SF-3-NP	R2B	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	15	Food Sales(CUP)
Randy Howard	2626 Spring Lane, 78703	Y	SF-3-NP	RM1	12.4 - 15.2	87.1	87.1	0.4	1.8	—	35	45	40%-45%	45%-60%	25	10	Food Sales(CUP)
Susana Almanza	6103 Larch Terrace, 78741	Y	SF-3-NP	R2A	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	25	Food Sales(CUP)
William Burkhardt	802 Christopher St., 78704	Y	SF-3-NP	R2B	12.4 - 15.2	17.4	26.1	0.4	0.4 - 0.52	~1	35	35	40%-45%	40%-45%	25	15	Food Sales(CUP)
Pat King	9122 Balcones Club Dr #8, 7875	Y	SF-6-CO	RM2	12.4	60.0	60.0	—	unlimited	—	35	65	40%-55%	0.6	25	10	Food Sales(CUP)

Current zoning https://www.austintexas.gov/sites/default/files/files/Planning/zoning_guide.pdf
Proposed zoning http://www.austintexas.gov/department/land-development-draft-code-map#text

Appendix A

COA Title 25 (current zoning) and Title 23 (proposed zoning) comparing Units per Acre calculated

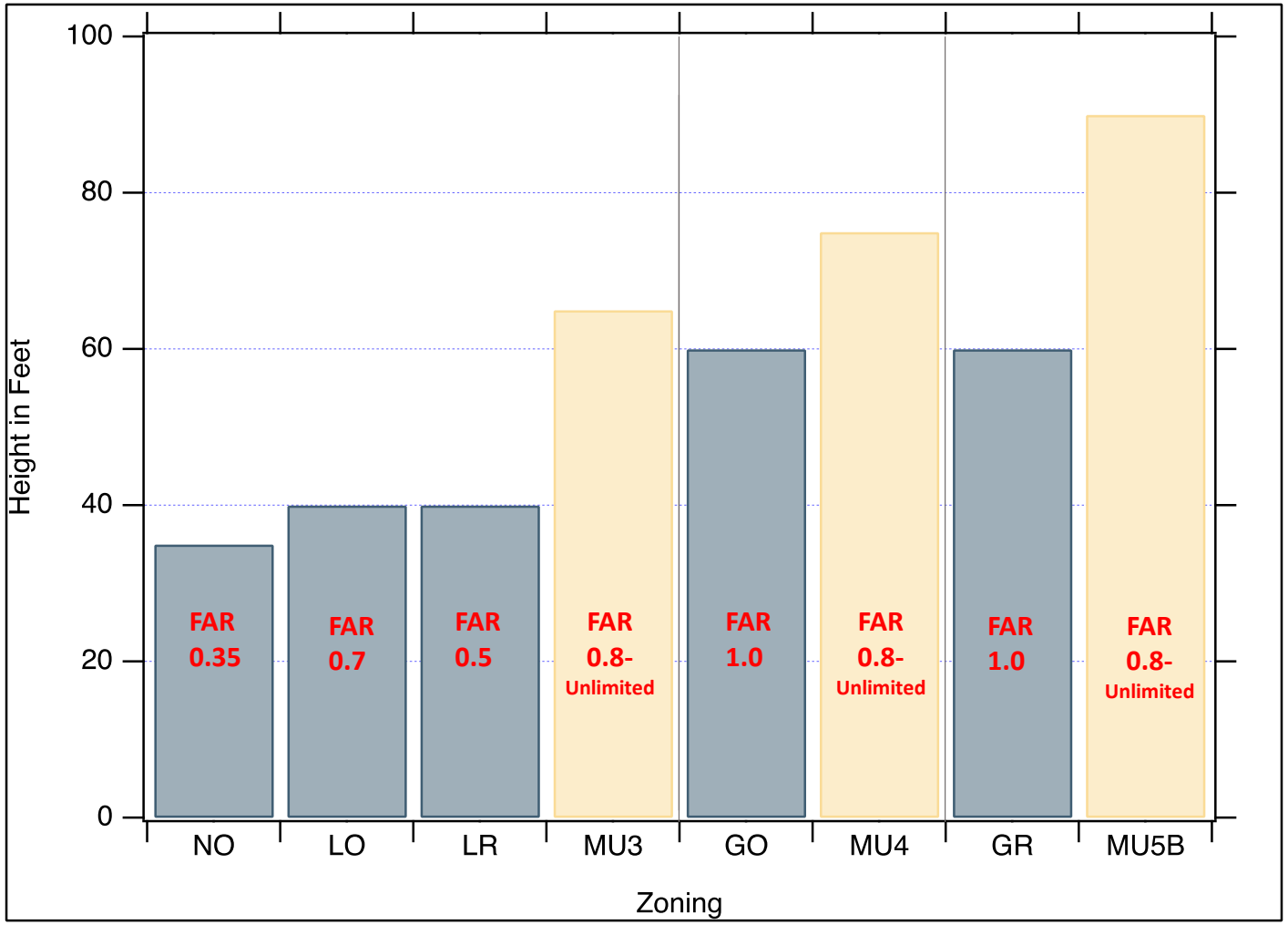
Title 25 Zone	Conversion Rules		Title 23 Zone
— Residential			
RR	Comparable Equivalency →		RR
LA	Comparable Equivalency →		LA
SF-1 SF-2 SF-3	Comparable Equivalency →		R2A
	Missing Middle Zones	Rule B.1.a, 2.a, 3.a, and	RM1
		Rule B.1.b, 2.b, 3.b, and	R4
		Rule B.1.c →	R3
	If direct frontage is within ½ mile from		R2B
	Property area is 2500 - 3500 sq. ft. →		R1
	Property area is 3501 - 5000 sq. ft. →		R2C
SF-4A SF-4B	Comparable Equivalency →		R2C
SF-5	Comparable Equivalency →		R4
SF-6	Comparable Equivalency	Property area < 21K sq.	RM1
		Property area ≥ 21K sq.	RM2



Conversion table: http://www.austintexas.gov/sites/default/files/files/LandDevCodeRev/Zone%20Conversion%20Table%20%2B%20Rules%20(02-28-20).pdf
Current zoning https://www.austintexas.gov/sites/default/files/files/Planning/zoning_guide.pdf
Proposed zoning http://www.austintexas.gov/department/land-development-draft-code-map#text

COA Title 25 (current zoning) and Title 23 (proposed zoning) comparing Height and FAR

Title 25 Zone	Conversion Rules		Title 23 Zone
— Commercial			
NO LO LR	Comparable Equivalency →		MU3
	Mixed Use & Main	Rule C.2.b →	MS2
		Rule C.1.a →	MU1
GO	Comparable Equivalency →		MU4
	Mixed Use & Main Street Zones	Rule C.2.a →	MS3
		Rule C.1.b →	MU2
GR CS CS-1	Comparable Equivalency →		MU5B
	Mixed Use & Main Street	Rule C.1.a →	MU5A
		Rule C.2.a →	MS3
		Rule C.2.b →	MS2
	Rule D (Regional Center Zones) →		UC60



FLOOR AREA RATIO (FAR). The ratio of gross floor area to gross site area.

Conversion table: http://www.austintexas.gov/sites/default/files/files/LandDevCodeRev/Zone%20Conversion%20Table%20%2B%20Rules%20(02-28-20).pdf
Current zoning https://www.austintexas.gov/sites/default/files/files/Planning/zoning_guide.pdf
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