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

FRANCISCA ACUNA, *et al.*, *Plaintiffs*	§	IN THE DISTRICT COURT
v.	§	TRAVIS COUNTY, TEXAS
THE CITY OF AUSTIN, TEXAS, *et al.* *Defendants*	§	201st JUDICIAL DISTRICT

NOTICE OF FILING OF PLAINTIFFS' TRIAL EXHIBITS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs and submit this their Notice of Filing of Plaintiffs' Trial Exhibits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 4TH, 2020, a true copy of the foregoing *Notice of Filing of Plaintiffs' Trial Exhibits* 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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PLAINTIFFS' TRIAL EXHIBITS

Plaintiffs' Exh. No.	Date	Description
1.		Landowner Protest Forms (In boxes)
2.	03.03.20	Expert Affidavit (Affidavit of David B. Brooks)

AFFIDAVIT OF DAVID B. BROOKS

STATE OF TEXAS §

COUNTY OF TRAVIS §

Before me, the undersigned authority personally appeared David B. Brooks, who being by me first duly sworn on his oath, deposed as follows:

"My name is David B. Brooks. I am an adult resident of Travis County and am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge are true and correct.

"I am a recognized legal expert on Texas local government laws, including municipal zoning laws. I received my law degree from the UT School of Law in 1978. I have served in various legal capacities for Texas state agencies, the Legislature, Texas counties, and other local governments. I am the author of the following Texas law treatises: *County and Special District Law, 2d* (Vols. 35, 36 and 36A, Texas Practice Series); *Municipal Law and Practice*, 2d (Vols. 22, 23, and 23A, Texas Practice Series); *Property Taxes, 4th* (Vols. 21 & 21A, Texas Practice Series) (contributor). I have spent many years researching Texas laws and am an expert on analyzing Texas legislative history. I am under contract to prepare a treatise on the Texas Constitution. I have served as legal counsel to the House Committee on Urban Affairs under multiple chairmen during several legislative sessions. I have served on the City of Austin Board of Adjustment. In addition, I have been accepted as an expert at trial on four prior occasions. I have looked carefully at the legislative history of Texas' municipal zoning enabling laws and their amendments.

"Based on my research and analysis, Texas' legislative history on zoning statutes establishes that the Texas Legislature has not excepted property owners' long-standing zoning

PLAINTIFFS' TRIAL EXHIBIT 2

protest rights from comprehensive rezonings. Texas in 1927 adopted verbatim the Standard State Zoning Enabling Law, including its protest rights provision. Tex. Rev. Civ. Stat 1011a-f (Vernon 1928) (Acts 1927, 40th Leg., p. 424, ch. 283); *A Standard State Zoning Enabling Act: Under Which Municipalities May Enact Zoning Regulations* (The National Advisory Committee on Zoning, US. Government Printing Office 1926). Since the Texas Legislature first specifically authorized zoning, it has required cities, in order to exercise their authority to rezone properties, to provide protest rights, notice, hearings and other statutory procedural protections to property owners. Tex. Rev. Civ. Stat 1011a-f (Vernon 1928) (Acts 1927, 40th Leg., p. 424, ch. 283). And for 92 years, property owners' protest rights have never been restricted in Texas. Tex. Local Government Code, Section 211.006(d) (the zoning law was recodified in 1987 with non-substantive changes).

"Texas' original zoning law, and the non-substantive recodification in 1987, both make clear that property owners' protest rights apply to any zoning regulation or boundary change. Texas' 1927 law provides: '*Changes.*-Such regulations, restrictions, and boundaries may from time to time *be amended, supplemented, changed, modified, or repealed;* In case, however, of a protest against such change..." Tex. Rev. Civ. Stat 1011e (Vernon 1928)(emphasis added). Similarly, the 1987 recodification defines a zoning regulation or district boundary change, triggering protest rights, as 'the amendment, repeal, or *other change of a regulation or boundary.*' Tex. Local Gov. Code, § 211.002 (emphasis added). Protest rights in Texas have applied to all zoning regulation and boundary changes, with no exceptions, since 1927. Some states have modified or eliminated their original protest rights protections under the Standard State Zoning Enabling Act, but not Texas.

"In 1985, the Texas Legislature did amend explicitly the state's mandatory zoning notice provisions. It authorized cities when enacting zoning amendments, including comprehensive

rezonings, to provide alternative notice (such as notice by publication rather than individualized, mail notice) by 2/3rds vote of the City Council if it held a joint council and zoning commission hearing. Tex. Local Gov. Code, § 211.007(d) Acts 1985, 69th Legislature, p. 3018, ch. 894. The fact the Texas Legislature explicitly amended the state's zoning laws to provide an alternative to individualized, mailed notice for comprehensive rezonings, but has made no such exception for protest rights, indicates the Legislature did not intend to exempt protest rights from comprehensive rezonings.

"Municipal zoning commissions have been required since 1949 in Texas to provide written notice of a zoning classification change to owners of the subject property and owners within 200 feet of the property: 'Written notice of all public hearings before the Zoning Commission on proposed changes in classification shall be sent to owners of real property lying within two hundred (200) feet of the property on which the change in classification is proposed, such notice to be given, not less than ten (10) days before the date set for hearing.' Tex. Local Gov. Code, § 211.007(c). *See* Acts 1949, 51st Leg., p. 205, ch. 111, sec. 1. Texas Courts have strictly construed this notice provision, repeatedly voiding zoning changes that failed to strictly comply with it. *See, e.g., Bolton v. Sparks*, 362 S.W.2d 946 (Tex. 1962).

"The Texas Legislature added an alternative zoning notice provision in 1985. HB1205 authorized cities to provide for the zoning commission alternative notice other than mailed notice to property owners under Tex. Local Gov. Code, § 211.007(c). The new subsection, Tex. Local Gov. Code, § 211.007(d), authorized notice by newspaper publication (or other means of notice) when a city council voted by 2/3rds majority for 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 [individual mailed notice].' Acts 1985, 69th Legislature, p. 3018, ch. 894. The House Committee Bill Report for HB1205 states its purpose as providing 'optional notice if a public hearing is jointly held between the legislative body and zoning commission under Section 6 (a).'

"Mixon, *Texas Municipal Law,* Section 7.02, notes that the 1985 amendment's purpose was to allow cities an alternative notice procedure to avoid providing written notice to property owners when there was a comprehensive rezoning: '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.'

"It is important to note that the Legislature did not amend in 1985 the state's protest rights provision to provide a comprehensive rezoning exception or alternative. Legislators, however, were clearly aware of comprehensive rezonings when they adopted the alternative notice provision in HB1205.

"Since there is no express exception to protest rights for comprehensive rezonings in the Texas statute, any such exception or repeal must exist by necessary implication, which Texas Courts strongly disfavor. *Gordon v. Lake,* 356 S.W.2d 138 (Tex. 1962). Last year, the Texas Court of Criminal Appeals in *Diruzzo v. State*, 581 S.W.3d 788 (Tex. Crim. App. 2019) reiterated that Texas law disfavors repeal by implication. It held that in deference to the Legislature laws should be harmonized if possible and that repeal by implication must be based on some specific language:

'Even so, the presumption against implied repeals recognizes that, 'if statutes are to be repealed, they should be repealed with some specificity.' So long as the original provision is susceptible to a construction that is in harmony with the amendment, so as to avoid implied repeal of some part of the original, salvage rather than subtraction should be the preferred judicial response...' *Id.*, at 799-800. (internal citations omitted).

"Turning to the 1985 zoning amendment, it addressed only notice. The 1985 amendment made no reference to protest rights. The 1985 notice amendment can be harmonized with protest rights. The Legislature considered notice and protest rights to be independent procedural protections in separate sections of the law. It allowed with a 2/3rds vote alternative notice for comprehensive revisions, because of the cost to cities of mailed, individual notice when lots of properties were rezoned. The Legislature, on the other hand, did not address and did not want to take away property owner's long-standing, statutory protests rights for comprehensive rezonings. There is not a 'clear, necessary, irresistible, free from reasonable doubt' implication that the 1985 notice amendments excepted protest rights from comprehensive rezonings. *Ramirez v. State of Texas,* 550 S.W.2d 121, 124 (Tex. Civ. App.—Austin 1977, no writ). If the Texas Legislature intended protest rights to be excluded from comprehensive revisions, it would have included statutory language with such an exception. But the Legislature did not.

"Texas law also doesn't create statutory exceptions, however allegedly meritorious, where the Legislature has not. It is "the settled law that exceptions will not be ingrafted on statutes by implication or merely because good reasons might be found for adding them." *Spears v. City of San Antonio*, 223 S.W. 166, 169 (Tex. 1920). In deference to the Legislature, the Courts should not graft on protests rights an exception that the Legislature did not.

"Lastly, even when cities decide to provide mailed notice under Section 211.007(c), rather than alternative notice under Section 211.007(d), the statutory provision is not particularly prescriptive. Section 211.007(c) states only that 'written notice' be provided to property owners within 200 feet of the proposed rezoning. Tex. Local Gov Code, § 211.007(c). Texas Courts have interpreted the 'written notice' as 'sufficient if it reasonably apprises those for whom it was intended of the nature of the pending proposal to the extent that they can determine whether they should be present at the hearing.' *City of Dallas v East Village Association*, 480 S.W.3d 37, 41 (Tex. App- Dallas 2015, writ denied). Any more burdensome notice requirements are not mandated by state law.

"Further affiants sayeth not."

DAVID B. BROOKS

SWORN TO AND SUBSCRIBED before me on the 3 day of March, 2020, to certify which witness my hand and official seal of office.

TERESA MELCHOR
My Notary ID # 6559333
Expires April 3, 2020

Notary Public in and for the State of Texas