

Date: July 22, 2024



Memorandum

To: Planning Commission, City of Austin
From: Nicholas Paganini, Law Clerk, Save Our Springs Alliance
Bobby Levinski, Senior Staff Attorney
Re: Oak Hill Restrictive Covenant Background Information

The Austin Planning Commission is considering the approval of commission-approved site plan, SPC-2024-0162C.SH. Because this site plan is not consistent with the requirements of Chapter 25-8, Subchapter A, Article 13 (Save Our Springs Initiative) (the “SOS Ordinance”), we are expressing our opposition, consistent with our position on similar administratively approved site plans in the Barton Springs Zone that lack full environmental compliance.

Background of the Oak Hill Restrictive Covenants:

The site plan relies upon a vested rights (Chapter 245) determination based upon a restrictive covenant associated with the “Oak Hill Area Study,” a prelude to the City of Austin’s modern neighborhood planning process. When the City of Austin pursued annexation of the Oak Hill area in the mid-1980s, they carried out the Oak Hill Area Study. This study recognized that the Oak Hill area—encompassing a broad section of the Barton Springs Zone—is environmentally sensitive and recommended that the City establish *lower* impervious cover thresholds for the Oak Hill area than otherwise provided by the then-City Code.

When the City of Austin annexed the Oak Hill area and applied the first zoning designations for properties in this area, the city encouraged (but did not require) landowners to implement certain restrictions on development, including limits on impervious cover on their sites through recorded restrictive covenants. These impervious cover limits lowered allowable impervious cover as compared with the then-existing land development code.

A restrictive covenant was filed by the landowner for the subject property during this process. Via Zoning Case No. C14-85-288.166, the property was rezoned after annexation. A restrictive covenant relevant to the property was recorded in Real Property Records of Travis County, Texas, in Volume 10801, Page 236. It was once amended under recorded Instrument No. 2010095372. And, most recently, it was amended again pursuant to Zoning Case No. C14-85-288.166(RCA2).

What does the restrictive covenant do?

As its name suggests, a restrictive covenant restricts development. This newest amendment to the restrictive covenant removed the restriction on the property for residential uses and established a *maximum* impervious cover of 55% and 1:1 floor-to-area ratio for multifamily residential use.

Under the terms of the restrictive covenant, the project is also required provide water quality controls in accordance with the SOS Ordinance.

What is the subject of dispute for the applicable restrictive covenant?

The subject restrictive covenant is being interpreted to relax other environmental standards that would result in a project otherwise not in compliance with the impervious cover restrictions applicable to the Williamson Creek and Barton Creek watersheds under the SOS Ordinance, based upon an interpretation of vested rights under Chapter 245 of the Texas Local Government Code.

What is Chapter 245 of the Texas Local Government Code?

Chapter 245 of the Texas Local Government Code establishes vested rights (i.e., grandfathering) to ensure that a municipality does not attempt to change the applicable development regulations on a development “mid-stream,” locking in the applicable development regulations for a project at the point of fair notice to the City.

This statute was amended to include provisions addressing certain restrictive covenants. These provisions include allowing a landowner to “take advantage . . . recorded restrictive covenants *required* by a regulatory agency.” Tex. Loc. Gov’t Code § 245.002(d) (*emphasis* added). Chapter 245 does not apply to “municipal zoning regulations . . . that do not change development permitted by a restrictive covenant required by a municipality.” *Id.* at § 245.004(2).

However, the restrictive covenants associated with the Oak Hill Area Study were never required by any agency, which includes the City of Austin. From their inception, these restrictive covenants were voluntary, and any subsequent amendments were also voluntarily requested and executed by the landowners to further their desired developments. There has never been any City Code requirement for these instruments. To the extent they are not void agreements, these restrictive covenants are agreements to restrict development and could not be read in a way that would nullify the requirements of other applicable environmental codes, such as the SOS Ordinance.

A restrictive covenant does not guarantee levels of development inconsistent with other regulations of the Land Development Code. A restrictive covenant cannot be intended to be a bilateral contract establishing conditions of zoning, outside the zoning process required under Chapter 211 of the Local Government Code (such an interpretation would constitute contract zoning). A restrictive covenant cannot be used as a substitute for legislative action required to be carried by ordinance, under the Austin City Charter.

Put plainly, Chapter 245 is inapplicable to the present site plan. Therefore, the site plan does not conform to requirements of the City’s environmental code under Chapter 25-8.

Why are these types of restrictive covenants important to the Save Our Springs Alliance and for the protection of the Barton Springs Zone and Austin’s watersheds?

The SOS Ordinance is the City of Austin’s most effective tools in protecting the water quantity and quality of Barton Creek, Barton Springs, and the Edwards Aquifer. The ordinance is based on two basic principles: (i) mitigating pollution caused by development by enhancing water quality controls; and (ii) promoting aquifer infiltration and minimizing environmental impacts by reducing overall impervious cover within the Barton Springs zone. Both components of the ordinance are critical on their own but also work in concert with one another in achieving the ordinance’s—and the voter’s—intent. As such, proposed amendments, waivers, or deviations to the SOS Ordinance should receive the highest level of scrutiny and public review.

The approval site for this site plant would bypass the requirements of the SOS Ordinance, by giving final approval to a determination of vested rights under a restrictive covenant that is not consistent with state law, the Austin City Charter, or the Land Development Code. There are no state statutes nor city code provisions that would permit the City of Austin to disregard its environmental regulations by negotiating bilateral contracts with landowners.

The Oak Hill Area Study restrictive covenants are applicable to approximately 800 acres of land within the Barton Springs Zone. While this memo addresses specific harms and problems raised by the subject property, the interpretation of these restrictive covenants has a broader precedential impact to the overall enforcement of the voter-approved SOS Ordinance, as well as the enforcement of the City’s environmental regulation citywide established to protect its watersheds and creeks.