BRAUN & GRESHAM
ATTORNEYS AT LAW

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Via Email: Jose.Roiq@austintexas.gov; Andrew.rivera@austintexas.gov; nicole.corona@austintexas.gov; district8@austintexas.gov; brent.lloyd@austintexas.gov
City of Austin
Development Services Department
6310 Wilhelmina Delco Dr
Austin, TX 78752

RE: Appeal of Planning Commission Determination on Case Number: SPC-2024-0162C.SH, Project: Sunset Ridge Apartments from July 23, 2024

Dear Director, City Council and Staff:

My firm represents Barton Creek Southwest POA and Travis Country West HOA (collectively, the "Neighborhoods"), who make up roughly 500 households in Southwest Austin, and who have been recognized by the City of Austin (the "City") as interested parties with respect to the "Sunset Ridge Apartments" Project at 8413 Southwest Parkway (the "Project"). The purpose of this letter is to request an appeal of the Planning Commission's determination from July 23, 2024, on Case Number: SPC-2024-0162C.SH, Project: Sunset Ridge Apartments. This appeal is being submitted to you in accordance with City Land Development Code ("LDC"), Sec 25-1-181, 25-1-182 and 25-1-183, and with Sec. 25-5-149.

Pursuant to LDC Sec. 25-1-185, the appellant is furnishing the following information:

1. The appellant officers of the Neighborhoods are:

   Jason Svatek, President, Travis Country West HOA, P.O. Box 306, Salado, TX 76571, 512-255-1671 / jasonsvatek@gmail.com;

   Stuart Goodman, President, Barton Creek Southwest POA, 551 S IH35 Suite 150, Round Rock, Texas 78664, 512-381-2919 / goodman.stuart.n@gmail.com.

2. The applicant's name and address is Kendyl Saul/Sara Dincher (Kimley-Horn) 6800 Burleson Rd, Building 312, Suite 150 Austin, Texas 78744

3. The appellants are appealing the Planning Commission's decision to recommend approval of a site plan located within the Low Intensity Zone of the Southwest Parkway Hill Country Roadway Corridor.

4. The date of the decision is July 23, 2024.

5. In accordance with LDC Sec. 25-1-131(A)(C), the appellant Neighborhoods are persons who have an interest in a matter that is the subject of a public hearing or administrative decision, who have communicated an interest in the matter and are officers of an environmental or

neighborhood organization that has an interest in the site of the proposed development or whose declared boundaries are within 500 feet of the site of the proposed development.

6. The reasons the appellant believes the decision does not comply with the requirements of this title are clarified in the following summary:

The site plan for the Project does not comply with LDC Ch. 25 and with Tex. Loc. Gov't. Code 245. Therefore, the Planning Commission's decision to recommend approval of the proposed site plan, being located within the Low Intensity Zone of the Southwest Parkway Hill Country Roadway Corridor, violates both City ordinances and state statutes, and that decision must be overturned.

A site plan subject to Hill Country Roadway Corridor requirements must be approved by the Land Use Commission, who must make a determination that the proposed development complies with the requirements of Title 25. *See* LDC Sec. 25-2-147(C); Sec. 25-5-142. In addition, the Land Use Commission must apply additional requirements that pertain to projects along Hill Country Roadway Corridors, as described in LDC Sec. 25-2-1103. Therefore, all of the requirements for an approved and released site plan must be satisfied along with additional standards due to the corridor.

The following requirements must be satisfied before the Planning Commission may recommend a Hill County Corridor site plan for approval:

1. LDC § 25-8-481 "Applicability; Compliance" states:

   (A) This article applies to development in the Barton Springs Zone.

   (B) A person who develops in the Barton Springs Zone must comply with the requirements of:

   (1) this article; and

   (2) Article 13 (Save Our Springs Initiative).

2. LDC Ch. 25-8, Subchapter A, Article 13 (Save Our Springs Initiative) (the "SOS Ordinance") is a water quality initiative enacted in 1992 that limits development in the Barton Springs Zone, and more specifically, caps net site area for impervious cover at 25 percent in the portions of the contributing zone in Williamson, Slaughter, Bear, Little Bear and Onion Creeks.

3. Ch. 245.002 provides:

   (a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the permit is filed.

(b) If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project. All permits required for the project are considered to be a single series of permits. Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project.

4. Ch. 245.004. provides:

   This chapter does not apply to:

   (2) municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality.

5. LDC § 25-2-1025(A) and (D): (A) at least 40 percent of a site, excluding dedicated right-of-way, must be left in a natural state. Natural areas within parking medians and in an area in which clearing is prohibited by Section 25-2-1023 (Roadway Vegetative Buffer) count toward this requirement. (D) If an area required to be kept in a natural state by this section is revegetated, not more than 25 percent of the area may be used for sewage disposal fields.

6. LDC § 25-6-113: Except as otherwise provided in Section 25-6-117 (*Waiver Authorized*), a person submitting a site plan application or a zoning or rezoning application must submit a traffic impact analysis to the department if the expected number of trips generated by a project exceeds 2,000 vehicle trips per day.

7. City of Austin Ordinance No. 20060727-113, which established the GO-CO-MUNP zoning district, provides that a site plan or building permit for the Property may not be approved, released, or issued, if the completed development or uses of the Property, considered cumulatively with all existing or previous authorized development and uses, generates traffic that exceeds 2,000 trips per day.

8. LDC § 25-8-641 prohibits the removal of a Heritage Tree, subject to the variances processes in LDC § 25-8-642 or § 25-8-643.

9. LDC Ch. 25-2 establishes procedural requirements for enacting or amending zoning regulations.

Regarding the first, second, third and fourth cited regulations, the site plan for the Sunset Ridge Apartments Project is required to comply with LDC § 25-8-481 and Article 13 of Title 25, since the Project is being developed in the Barton Springs Zone and contributing zone of Williamson

Creek Watershed. To date, the City has faced a conflict involving the applicability of impervious cover requirements in a restrictive covenant (*see* Zoning Case No. C14-85-288.166, as amended) versus the applicability of a municipal ordinance, which was enacted after the restrictive covenant. Therefore, the legal question at issue here is, in the event of a conflict between a restrictive covenant and an ordinance, which requirement prevails? The City has decided that the less restrictive impervious cover allowances of 55% and 35% in the applicable restrictive covenants should apply to the Project rather than the more restrictive requirements of 25% in the SOS ordinance. As a result, the City has allowed the proposed site plan to proceed, as the Planning Commission has demonstrated through its recommendation, despite the more restrictive SOS requirements. This decision is in violation of established case law, which finds:

> The rule is that if the restrictive covenant is less restrictive than the ordinance, as here, the ordinance prevails; and if the restrictive covenant is more restrictive than the ordinance, the covenant prevails; and in either case the ordinance is enforceable. Thus a zoning ordinance cannot override or impair a restriction limiting the use of property, nor can it relieve the land from such restriction; but a zoning ordinance may be more restrictive than a restrictive covenant, as here, and in such case is valid and enforceable.

City of Gatesville v. Powell, 500 S.W.2d 581, 583 (Tex. Civ. App. 1973)). *See also, Air Park-Dallas Zoning Comm. v. Crow-Billingsley Air Park, Ltd.*, No. 05-01-01137-CV, 2002 WL 826957, at *2–3 (Tex. App. May 2, 2002) ("The ordinance prevails if the restrictive covenant is less restrictive than the ordinance, the restrictive covenant prevails if it is more restrictive than the ordinance, and in either case, the ordinance is enforceable.).

In addition, the Project's vesting date is November 1, 2023, as determined by the City in Case No. VR-2024-0028000, yet the City has accepted the applicable restrictive covenant as vesting certain development rights to this Project that contravene the City's own ordinances. The Staff Report for Case SPC-2024-0162C.SH, from which the Planning Commission issued its site plan recommendation, contains the statement, "except for impervious cover, the development will comply with current code [including] non-degradation standards as defined by the Save Our Springs Ordinance […]." (*Site Plan Review Sheet,* Case SPC-2024-0162C.SH, pg. 2). This begs the question, if the site plan is complying with current code, including SOS, by what authority does the City have to except impervious cover from that compliance? Chapter 245 of Texas Local Government certainly does not provide the authority, since the restrictive covenant at issue does not meet the requirements for grandfathering, by the City's own admission. *River City Partners, Ltd. v. City of Austin*, No. 03-19-00253-CV, 2020 WL 3164404 (Tex. App. June 4, 2020). Consequently, the Planning Commission lacked authority to approve the Project Site plan in violation of the LDC Title 25, including the SOS Initiative Ordinance, and such approval must be overturned.

Regarding the fifth cited requirement, LDC § 25-2-1025 states that at least 40 percent of a site, excluding dedicated right-of-way, must be left in a natural state. The City has counted the areas represented by biofiltration, sedimentation, detention and retention basins in the Project site plan

as fulfilling the 40% natural area requirement. Under the Hill Country Corridor requirements of LDC § 25-2-1025(A) and (D), this calculation is not permitted. Only natural areas within parking medians and the Roadway Vegetative Buffer can count towards the natural area requirement, along with undisturbed or revegetated natural areas. Consequently, the Project site plan has failed to comply with the LDC Title 25 and any approvals of the site plan must be overturned.

Under the sixth and seventh requirements, LDC § 25-6-113 requires a traffic impact analysis for any project where the expected number of trips generated by a project exceeds 2,000 vehicle trips per day. In addition, City Ordinance No. 20060727-113 created a conditional overlay for the site, which states, "a site plan or building permit for the Property may not be approved, released, or issued, if the completed development or uses of the Property, considered cumulatively with all existing or previous authorized development and uses, generates traffic that exceeds 2,000 trips per day." The applicant originally submitted a Traffic Impact Analysis (TIA) Determination Worksheet to City that was used to determine if a TIA would be needed. In that worksheet the applicant stated that the Project would produce 428 units resulting in 1,995 daily trips. As a result, the City determined that no TIA would be needed. Since that time, the site plan has been revised to incorporate an additional 16 units, resulting in 2,070 trips per day, which should trigger the required TIA, and would also prohibit the proposed site plan from being approved under the conditional overlay requirements. Therefore, the Planning Commission's recommendation for approval fails to account for the requirements of LDC § 25-6-113 and must be overturned.

Under the eighth requirement, LDC § 25-8-641 prohibits the removal of a Heritage Tree, subject to the variances processes in LDC § 25-8-642 or § 25-8-643. The Project is proposing to remove numerous heritage trees. Four trees have been granted a variance from the City Arborist due the "dead, diseased, or imminent hazard" determinations. Beyond this, no public record exists to establish additional variance approvals or public hearings for the removal of the remaining heritage trees. As a result, the Project site plan fails to comply with the heritage tree requirements of the LDC and any approvals must be overturned.

LDC Chapter 25-2 established the City's zoning requirements and procedures in accordance with Texas Local Government Code, Ch. 211. The creation and amendment of the restrictive covenant to date has occurred through City zoning cases, such as C14-85-288.166 Ord 860731-C, as amended multiple times, and most recently through file C14-85-288.166(RCA2). As the City is well aware, the "C14" case designation is reserved for zoning and rezoning matters. The application of the amended restrictive covenant to the site plan is an application of zoning regulations that have not followed the required procedural process prescribed by LDC 25-2 and Tex. Loc. Gov't Code. Ch. 211 but have instead been applied through contract zoning.

> Impermissible "contract zoning" occurs when a governmental entity agrees to zone land in a certain way in exchange for a landowner's agreement to use the land in a certain way. *See City of White Settlement v. Super Wash, Inc*., 198 S.W.3d 770, 772 n.2 (Tex.2006). Zoning is a legislative function a city cannot cede. *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). Therefore, a city cannot

> surrender its authority to determine proper land use by contract. *Id*. Zoning decisions must occur via the legislative process and not by "special arrangement" with a property owner. *Id*. "[C]ontract zoning is invalid because, by entering into such agreements, the city impermissibly abdicates its authority to determine proper land use, effectively bypassing the entire legislative process." *Super Wash*, 198 S.W.3d at 772 n.2.

City of Shavano Park v. Ard Mor, Inc., No. 04-14-00781-CV, 2015 WL 6510544, at *6 (Tex. App. Oct. 28, 2015). Here, the City has established certain zoning criteria for the Project through amendments to the restrictive covenant in exchange for the Project being used in various ways. For example, amendments have enabled the multifamily residential use and have altered the floor to area ratio limitations so that an expansive affordable housing multifamily use that was otherwise prohibited, could proceed. These actions have occurred by amendment and not by ordinance in violation of the Texas Open Meetings Act and the requirements of LDC 25-2. The Planning Commission was charged with ensuring that the Project site plan was compliant with the LDC, Title 25, including the zoning requirements of Ch. 25-2, but it failed to do so before recommending the site plan for approval. As a result, the recommended approval must be overturned.

In addition to the issues raised in this letter, reference is made to the three enclosed letters previously submitted to the City that contain bases for overturning the Planning Commission's decision. These letters and the statements and evidence they contain are incorporated by reference. We look forward to raising each of these matters in this appeal letter with you during the appeal proceeding.

Sincerely,

Eric L. Gomez
Attorney for Appellants

Enc. Letter dated April 9, 2024
Letter dated June 14, 2024
SOS Memorandum letter dated July 22, 2024