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March 28, 2023

The Honorable Brian Birdwell
Chairman, Senate Committee on Natural Resources and Economic Development
P.O. Box 12068- Capitol Station
Austin, Texas 78711

Dear Chairman Birdwell and Members of the Committee:

My name is Kimberley Mickelson, and I am a Senior Assistant City Attorney for the City of Houston. I have been practicing land development law for cities of all sizes for 30 years and have also served as a Professor of Practice in the Urban Planning programs at Texas A&M and Texas Southern University.

Thank you, Honorable Chairman Birdwell and committee members for taking testimony on Senate Bill 558 by Senator Bryan Hughes. I am submitting this letter in opposition to SB 558, as I believe the bill is incompatible with and contradicts state and federal court decisions on park dedication, and the amendment to limit only to multi-family and hotel-motels place cities in a precarious position with federal laws.

In addition to my earlier comments, I am further responding to a draft committee substitute to HB 1257, the companion bill to SB 558. All references below are to the new sections added under Section 1 of the proposed committee substitute.

First, a general statement: this bill makes every aspect of the parkland dedication process overly complicated. Maybe that is the intention, but complexity creates burdens on both city operations and on development. In this bill, it also creates burdens on the appraisal districts.

Proposed Sec. 212.206(a)—Describes a process for how and when the fee that will be required is determined. In current processes, this is how it works—the assessment (determination of the amount of the fee due) is made at the time of platting. Fees are later assessed (collected) at the time of building permit. Therefore, the developer does not pay the fee—the builders do, who pass it on to the homeowners. The fee does not go up—it is determined at the date of platting—it is vested, at least as to the number of dwelling units.

212.006(b) “allows” cities to request additional information that is “publicly and readily available” to make further evaluations as to the amount of the fee. However, there is almost no such information available outside of corporate or title documents, as sales prices are not listed on title documents, and are not rendered for taxation purposes, so land values are only based on the appraisal district.

Proposed Sec. 212.208 ignores local preferences for parkland by capping dedication at a flat 10%, based on nothing. National parks and recreational standards may be higher than this, without taking into account the residents' preferences for an "outdoorsy" city and activity space.

Proposed Sec. 212.209 requires cities to designate various types of development areas. Amendment of these boundaries can occur only during the amendment or adoption of a comprehensive plan. Not every city has a comprehensive plan—while this might be truer for smaller cities that are not (now) included in the bill, it is true for Houston. This should be amended to allow a Parks Plan (or similarly named parks planning document) to be utilized as the basis. Parks plans often have different parks sectors or areas, based on population and park needs.

Proposed Sec. 212.205, .210, .211, all deal with the process of calculating the fee. The mathematical calculations aside, just arriving at the equation doesn't have to be this hard. As noted above, appraisal districts do not know the real cost of land; sales prices are not rendered, and appraised values are long and hotly contested, often in court. This places an additional burden on appraisal districts by requiring them to categorize land in ways they have not, and to calculate the values on an ongoing basis. The recalculation, at only every 10 years, may be a minor burden, however, it is inadequate and will contribute to a lag in parkland acquisition, as land values change much more rapidly in our growing cities. If this remains in, it should be reduced to every 3 years, as the appraisal districts are reassessing on that frequency already.

Proposed Sec. 212.212 seems to incorporate what is the common practice of collection of park dedication fees during the building process, but pushes it to the end of the process, just at issuance of the Certificate of Occupancy. This is extremely late in the process. I recommend this be treated just as impact fees are, and remain collected at the time of building permit purchase. There are, in likely every existing park dedication ordinance, reimbursement processes for fees when permits expire.

Proposed Sec. 212.213 creates legal problems, of mixing administrative procedures (e.g., assessment and collection of fees) with quasi-judicial decision making. Courts have consistently upheld fees in lieu of dedication where they are firm and established, and applied even handedly. Appeal to planning commission and/or governing body. This places administrative hearing requirements in the mix prior to litigation. This process should utilize the already well-established proportionality requirements for exactions such as parkland dedication that could be handled outside of the process they are creating here. See Sec. 212.904, Tex. Local Gov't Code. There is no need to create a new process or calculation. Exactions are required to be "roughly proportional" to the impact placed on development, according to the US Supreme Court.

Caselaw has established that park dedication requirements are not an unconstitutional taking.

In 1984, the Texas Supreme Court, in its decision on a challenge to the City of College Station's park dedication ordinance,[1] analyzed the method used by the City in determining the amount of parkland necessitated by new residential development, and the fee-in-lieu amount. The Court specifically found that the City had determined the land area and the fees were "necessitated by and attributable to" the impact new development—i.e., new residents—would place on the City's park system. The method of doing this, and the ordinance itself, became the model for Texas cities. The quoted phrase was cited with approval by the US Supreme Court ten years later[2]—in deciding that exactions were not a taking requiring compensation if they had a nexus (i.e., were

[1] *City of College Station v. Turtle Rock Development Corp.*, 680 S.W.2d 802 (Tex. 1984).

[2] *Dolan v. City of Tigard* (OR), 512 U.S. 374 (1994).

necessitated by and attributable to new development) and were "roughly proportional" in scope. These decisions, and current park dedication requirements and practices, are based on the idea that land or the collection of fees from new development is constitutionally permissible, because it is a need created by new residents. It is important to note that these decisions also place prohibitions on the use of such fees for operations and maintenance of existing parks—new development should pay for itself.

Park Planning provides a sound basis for the requirements. Planning for parks does not happen by someone waking up one day and thinking of a number of acres, or the amount of a fee. Cities, especially large ones, spend significant time and money on comprehensive planning, which also assesses citizens' desires for park needs and how to obtain them. Existing residents, who may already have sufficient parks for their needs should not be burdened with paying for the parks needs of new residents. Growth should pay for itself. Parks are a cultural element of local communities—some may want them, some may not. Texas is in an "economic miracle" of growth, where new residents are coming to cities, especially larger cities, and the laws of supply and demand necessarily mean land costs for cities to acquire land for parks are higher. Many factors bring people to Texas cities, likely including the availability of parks and recreational facilities. As noted above, parks plans (sometimes a component of comprehensive or master plans) are the product of this public engagement process that provides the sound and legally defensible basis for dedication and fees in lieu.

Applying the restriction to just multi-family and hotel/motel. Two major issues with this proposal that put cities in precarious legal positions: First, is an equal protection challenge—perhaps even to the bill on its face. A residence is a residence. There is no rational basis for treating multi-family residences differently than single family. Second, cities around the country (e.g., New York, Chicago, and Baltimore) have been investigated under the Fair Housing Act—when some neighborhoods and communities have more parks, better improved parks, and others don't, a situation of precarious liability and costly defense of complaints and possibly litigation results. This bill places cities at risk on both counts.

Thank you for your consideration. I look forward to working with you through the duration of this legislative session.

Sincerely,

Kimberley Mickelson

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