CITY OF HOUSTON
Legal Department

Sylvester Turner
Mayor

Arturo G. Michel
City Attorney
Legal Department
P.O. Box 368
Houston, Texas 77001-0368
City Hall Annex
900 Bagby, 4th Floor
Houston, Texas 77002

832.393.6491 - Telephone
832.393.6259 - Facsimile
www.houstontx.gov

May 3, 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 graduate-level Urban Planning programs at Texas A&M and Texas Southern University.

Thank you, Honorable Chairman Birdwell and committee members for taking testimony on House Bill 1526 by Representative Harris. I am submitting this letter in opposition to HB 1526, as I believe the bill is incompatible with and contradicts state and federal court decisions on park dedication, is unduly complicated, and the committee substitute, limiting the application to only multi-family and hotel-motels places the large five cities—the only cities this bill applies to--in a precarious position with federal law. The legislature has considered many bills that assist median income families and creating more opportunities for affordable housing; this bill goes against those efforts.

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. The bill also ignores, or attempts to change, other protections property owners have such as proportionality appeals and vesting protections.

- 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, that is, the 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 increase—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.

- 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.

- 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.

- Sec. 212.205, 212.009, 212.210, and 212.211 all deal with 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, or for cities to recalculate when the appraisal district has not. The recalculation by the appraisal districts, 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.

- Sec. 212.210(e) provides that cities must pay a landowner for excess park dedication. If a developer wishes to donate above and beyond the minimum parkland dedication requirements, that is at their option. To require payment by the city is to involve the legislature in the budget process, and require unfunded obligations—in violation of the State Constitution. If the city wishes to engage in a purchase of land for parks, that is a policy matter at the most local level; these should not be forced purchases.

- Sec. 212.211, utilizes a metric for percentage of the median family income that is far too low to provide funding for cities to provide parkland for median income families—two percent is insufficient, given land prices in the real estate booms that Texas cities are experiencing. This should be raised to 10 percent, which matches the percentage of land dedication the bill supports as sufficient.

- Sec. 212.212 incorporates the common practice of assessment (determination of how much in fees are due) at the beginning of development, with the collection of park dedication fees during the building permit period, but pushes it to the end of the process, just at issuance of the Certificate of Occupancy. This is extremely late in the process. This should 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 by 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. Appeals to planning commission and/or governing body makes this administrative hearing process required prior to litigation. There is already a well-established proportionality requirement process for exactions such as parkland dedication that could be handled outside of that being created 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, and Sec. 212.904 encapsulates that.

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, 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 —in deciding that exactions were not a taking requiring compensation if they had a nexus (i.e., were 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 like those targeted in this bill, 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 many counts.

Sincerely,

/s/Kimberly Mickelson
Kimberley Mickelson
Sr. Assistant City Attorney
City of Houston Legal Department