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CAUSE NO. 05-16-00573-CV

**IN THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS
DALLAS, TEXAS**

CITY OF PLANO, TEXAS, LISA HENDERSON, IN HER OFFICIAL CAPACITY AS CITY SECRETARY; HARRY LAROSILIERE, IN HIS OFFICIAL CAPACITY AS MAYOR; ANGELA MINER, IN HER OFFICIAL CAPACITY AS MEMBER OF THE CITY COUNCIL; BEN HARRIS, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE CITY COUNCIL; RICK GRADY IN HIS OFFICIAL CAPACITY AS MEMBER OF THE CITY COUNCIL; LISSA SMITH, IN HER OFFICIAL CAPACITY AS MEMBER OF THE CITY COUNCIL; RON KELLEY, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE CITY COUNCIL; TOM HARRISON, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE CITY COUNCIL; AND DAVID DOWNS, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE CITY COUNCIL

Appellants

VS.

ELIZABETH CARRUTH; MATTHEW TIETZ; JANIS NASSERI; JUDITH KENDLER; AND STEPHEN PALMA

Appellees

BRIEF OF THE APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

This case involves well-settled exceptions to governmental immunity, and Appellants' arguments on those issues are frivolous and no oral argument is needed. To the extent the Court wishes to address the merits of the case in addition to the jurisdictional issues, oral argument may aid the Court.

TO THE HONORABLE FIFTH COURT OF APPEALS:

Elizabeth Carruth, Matthew Tietz, Janis Nasseri, Judith Kendler, and Stephen Palma (collectively, "Appellees" or Plaintiffs"), the Appellees herein and the Plaintiffs in the Trial Court below file this, their Brief, as follows:

I. STATEMENT OF THE FACTS[1]

Appellees are residents and registered voters in the City of Plano, Texas ("City").[2] Incorporated in 1873, the City has experienced rapid growth in recent decades.[3] Between 1970 and 2014, the population of the City grew from 17,872 to approximately 278,480.[4] The success of Plano was fueled by excellent schools, civic involvement, and comprehensive planning widely supported by local stakeholders.[5]

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[1] The facts alleged herein are pleaded in Plaintiffs' First Amended Petition for Declaratory Relief and Application for Writs of Mandamus ("First Amended Petition") found in the Clerk's Record (hereinafter C.R.) at 92-106. The Court must take as true all facts alleged by Appellees in their pleading because the Appellants submitted no evidence in the Trial Court. *See City of Dallas v. E. Vill. Ass'n*, 480 S.W.3d 37, 42 (Tex. App.—Dallas 2015, pet. denied) ("the court determines whether the claimant has pleaded facts that affirmatively demonstrate the trial court's jurisdiction, construing the pleadings liberally and in favor of the claimant"); *City of Dallas v. Brown*, 373 S.W.3d 204, 207 (Tex. App.—Dallas 2012, pet. denied) ("To prevail on a plea to the jurisdiction, a party must show that even if all the allegations in the plaintiff's pleadings are taken as true, an incurable defect apparent on the face of the pleadings makes it impossible for the pleadings to confer jurisdiction on the trial court.").

[2] *See* First Amended Petition at 3, ¶¶ 3-7 (C.R. at 94).

[3] *See* First Amended Petition at 5, ¶ 22 (C.R. at 96).

[4] *See* First Amended Petition at 5-6, ¶ 22 (C.R. at 96-97).

[5] *See* First Amended Petition at 6, ¶ 23 (C.R. at 97).

The City's first comprehensive plan was adopted in 1963.[6] After the creation of Legacy Business Park in the early 1980s, the City developed its second comprehensive plan in 1986.[7] That comprehensive plan was expressed through Resolution No. 86-11-22(R), Resolution No. 87-2-21(R), Resolution 87-9-4(R), Resolution No. 88-1-18(R), and Ordinance 2002-12-6, among other elements, maps, policy statements, and amendments ("Amended 1986 Comprehensive Plan").[8]

On October 12, 2015, the City Council adopted Ordinance 2015-10-9 (the "Ordinance").[9] The Ordinance repealed the Amended 1986 Comprehensive Plan and adopted the "Plano Tomorrow Comprehensive Plan."[10]

The City of Plano is governed by a Home Rule Charter (the "Charter").[11] As is the case for many municipalities in Texas, the Charter permits citizens to initiate

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[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See* First Amended Petition at 7, ¶ 27 (C.R. at 98). In their brief, Appellants mention that various hearings and open meetings occurred in which public input was sought. Of course, Appellants fail to mention that the public comments were overwhelmingly opposed to Appellants' proposals and that Appellants refused to make the changes to the Plano Tomorrow Comprehensive Plan that were requested by the public.

[10] *See* First Amended Petition at 7, ¶ 27 (C.R. at 98).

[11] *See* First Amended Petition at 7, ¶ 29 (C.R. at 98).

a referendum on ordinances adopted by the City Council.[12] Specifically, Section 7.03 of the Charter provides:

> Qualified voters of the City of Plano may require that any ordinance or resolution, with the exception of ordinances or resolutions levying taxes, passed by the city council be submitted to the voters of the city for approval or disapproval by submitting a petition for this purpose within thirty (30) days after final passage of said ordinance or resolution, or within thirty (30) days after its publication. Said petition shall be addressed, prepared, signed and verified as required for petitions initiating legislation as provided in section 7.02 of this charter and shall be submitted to the person performing the duties of city secretary. Immediately upon the filing of such petition, the person performing the duties of city secretary shall present said petition to the city council. Thereupon the city council shall immediately reconsider such ordinance or resolution and if it does not entirely repeal the same, shall submit it to popular vote as provided in section 7.02 of this charter. Pending the holding of such election such ordinance or resolution shall be suspended from taking effect and shall not later take effect unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof.[13]

After the adoption of the Ordinance on October 12, 2015, citizens began an effort to collect signatures from qualified voters on a petition that requested a referendum vote on the Ordinance.[14] On November 10, 2015, a petition addressed, prepared, signed, and verified as required by the Charter and containing over 4,000 signatures was submitted to the City Secretary (the "Petition").[15] Accordingly,

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[12] *See id.*

[13] *See id.*

[14] *See* First Amended Petition at 8, ¶ 31 (C.R. at 99).

[15] *See id.*

pursuant to the Charter, the Ordinance has been suspended unless and until a referendum vote occurs.[16] Because the Ordinance is of no force or effect, the Plano Tomorrow Plan is not the current comprehensive plan for the City.[17] Instead, the Amended 1986 Comprehensive Plan, the repeal of which has been suspended, is the current comprehensive plan for the City.[18]

Appellants disagree with this conclusion. Accordingly, Appellees have requested that the Trial Court issue a declaration against the City that: (1) unless and until a majority of the voters approve of the Ordinance in a referendum, the Ordinance has been suspended from taking effect and is invalid; (2) unless and until a majority of the voters approve of the Ordinance in a referendum, the Plano Tomorrow Plan is not the current comprehensive plan for the City; and (3) unless and until a majority of the voters approve of the Ordinance in a referendum, the current comprehensive plan for the City is the Amended 1986 Comprehensive Plan.[19]

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[16] *See* First Amended Petition at 11, ¶ 42 (C.R. at 102).

[17] *See id.*

[18] *See id.*

[19] *See* First Amended Petition at 11-12, ¶ 45 (C.R. at 102-03).

Section 7.03 of the Charter imposes a ministerial, nondiscretionary, legal duty on the City Secretary to immediately present the Petition to the City Council.[20] The City Secretary has refused to present the Petition to the City Council in violation of her legal duty.[21] Section 7.03 of the Charter imposes a ministerial, nondiscretionary, legal duty on the City Council to immediately reconsider the Ordinance upon the presentment of the Petition to the City Council.[22] The City has indicated that the City Council will not comply with its legal duty to immediately reconsider the Ordinance.[23]

Section 7.03 of the Charter imposes a ministerial, nondiscretionary, legal duty on the City Council to submit the Ordinance to a popular vote if it does not repeal the Ordinance in its entirety after reconsidering the Ordinance in response to the Petition.[24] The City has indicated that the City Council will not comply with its legal duty to submit the Ordinance to a popular vote if it does not repeal the Ordinance.[25]

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[20] *See* First Amended Petition at 12, ¶ 50 (C.R. at 103).

[21] *See id.*

[22] *See* First Amended Petition at 12-13, ¶ 51 (C.R. at 103-04).

[23] *See* First Amended Petition at 13, ¶ 51 (C.R. at 104).

[24] *See* First Amended Petition at 13, ¶ 52 (C.R. at 104).

[25] *See* First Amended Petition at 13, ¶ 52 (C.R. at 104).

Because Appellants have refused to perform nondiscretionary acts required by legal duty, the Appellees have requested that the Trial Court issue writs of mandamus requiring the Appellants to perform their duties.[26] Specifically, the Appellees request that the Trial Court enter an order and issue writs of mandamus requiring: (a) the City Secretary to present the Petition to the City Council at the next meeting of the City Council; (b) the members of the City Council to reconsider the Ordinance at such meeting; and (c) the members of the City Council to submit the Ordinance to a popular vote in the event that the City Council does not repeal the Ordinance at such meeting.[27]

II. APPLICABLE STANDARDS

Whether subject-matter jurisdiction exists is a question of law that can be challenged by a plea to the jurisdiction.[28] When the plea challenges the claimant's pleadings, the court determines whether the claimant has pleaded facts that affirmatively demonstrate the trial court's jurisdiction, construing the pleadings liberally and in favor of the claimant.[29] In performing the review, the court does not look to the merits of the claimant's case and considers only the pleadings and the

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[26] *See* First Amended Petition at 13, ¶ 53 (C.R. at 104).

[27] *See* First Amended Petition at 13, ¶ 54 (C.R. at 104).

[28] *See City of Dallas v. E. Vill. Ass'n*, 480 S.W.3d 37, 42 (Tex. App.—Dallas 2015, pet. denied).

[29] *See id.*

evidence pertinent to the jurisdictional inquiry.[30] If the jurisdictional evidence creates a fact question, then the trial court cannot grant the plea to the jurisdiction, and the issue must be resolved by the fact finder.[31]

Immunity from liability does not affect a court's jurisdiction to hear a case while, in contrast, immunity from suit does preclude subject-matter jurisdiction.[32] Therefore, a defendant may assert immunity from suit but not immunity from liability in a plea to the jurisdiction.[33] To prevail on a plea to the jurisdiction, a party must show that even if all the allegations in the plaintiff's pleadings are taken as true, an incurable defect apparent on the face of the pleadings makes it impossible for the pleadings to confer jurisdiction on the trial court.[34]

III. SUMMARY OF THE ARGUMENT

This appeal was filed by Appellants solely to delay a public vote on the Ordinance. Appellees' claims for mandamus and declaratory relief fit squarely within settled exceptions to governmental immunity. Appellants' arguments regarding the merits of the claims are also without merit. Appellees request that the

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[30] *See id*.

[31] *See id*.

[32] *See Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

[33] *See id*. at 638-39 ("We therefore reaffirm that immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction.").

[34] *See City of Dallas v. Brown*, 373 S.W.3d 204, 207 (Tex. App.—Dallas 2012, pet. denied).

Court expeditiously affirm the Trial Court's denial of Appellants' plea to the jurisdiction so that the democratic process may proceed.

With respect to the first issue, Appellants have not identified any jurisdictional defect regarding Appellees' claims for mandamus relief. Government officials have no immunity from suits seeking to compel compliance with a ministerial duty. The City Secretary and members of the City Council have failed to comply with the ministerial duties in the Charter, and Appellees have sought writs of mandamus to compel compliance with the Charter. Accordingly, the Trial Court has jurisdiction over Appellees' claims.

Recognizing the frivolous nature of its jurisdictional argument, the bulk of Appellants' brief addresses an issue irrelevant to the jurisdictional question on appeal—namely, whether Appellants will prevail on the merits of their affirmative defense to Appellees' claims. In short, Appellants argue that a comprehensive plan is akin to zoning and, therefore, a referendum should not be permitted. However, the Supreme Court of Texas has made clear that only the Legislature (or charter amendment) can limit the public's right to a referendum, and the Texas statutes governing comprehensive plans expressly preserve charter rights. Accordingly, to the extent the Court chooses to opine on the merits of the case, Appellees prevail on those issues.

In issue two, Appellants challenge the Trial Court's jurisdiction over Appellees' claims against the City for declaratory relief. The Legislature has mandated that municipalities be joined to suits involving the validity of municipal ordinances and thereby waived immunity. Appellees contend that the Ordinance and Plano Tomorrow Comprehensive Plan were suspended by the Charter and thus rendered invalid. Therefore, the City clearly does not have immunity from suit. The City also decided to challenge standing, even though courts have repeatedly held that signatories to petitions calling for referenda have standing. Finally, on the merits, the City asserts that the arguments regarding the purported impropriety of a referendum effect the claim for declaratory relief as well. However, the Charter provisions provide that unless and until a majority of the voters approve the Ordinance, the Ordinance will remain without effect. Accordingly, in the unlikely event that the referendum is never held, the Ordinance will remain suspended indefinitely.

In issue three, Appellants contend that Appellees' claims are not ripe. The Ordinance has been invalid since the Petition was presented in November 2015, and Appellees' request that the Trial Court declare the Ordinance invalid has been ripe since that time. The City Council has repeatedly indicated that it will not comply with its duty to either repeal the Ordinance or hold a referendum. Accordingly, Appellees' claims for mandamus relief are likewise ripe.

IV. ARGUMENTS AND AUTHORITIES

A. Issue 1: Appellants Have Identified No Jurisdictional Defect Regarding Appellees' Claims For Mandamus Relief And Appellants' Arguments Regarding The Merits Of Appellees' Claims Are Also Incorrect.

Given that Appellants have appealed the denial of a plea to the jurisdiction, the Court might have expected Appellants to identify a jurisdictional defect with Appellees' claims. While Appellants spend thirty pages in their brief addressing the merits of their defenses to Appellees' claims, Appellants never explained how or why the Trial Court erred in concluding that it has jurisdiction.[35] Because the jurisdictional question is dispositive, Appellees will address it first in this response. Appellees will then address the merits of Appellants' defenses to their claims.

1. Governmental immunity does not apply to Appellees' request to compel the municipal officials' compliance with a ministerial duty.

The Trial Court's jurisdiction arose from the Texas Constitution, and Appellants did not question jurisdiction on that basis.[36] Instead, as is often the case, the Appellants contend that they are immune from suit.[37] As shown below, the

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[35] *See* Brief of Appellants at 14-44.

[36] TEX. CONST. art. V, § 8 ("District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction."); *see also* TEX. GOV'T. CODE §§ 24.007-24.008.

[37] *See City of Dallas v. E. Vill. Ass'n*, 480 S.W.3d 37, 45 (Tex. App.—Dallas 2015, pet. denied) ("Of course, the City does not contend this suit is outside of the broad, constitutional or statutory jurisdiction of the district court below. Rather, it argues that its immunity to suit has not been waived.") (internal citations omitted).

members of the City Council and City Secretary ("Officer Appellants") do not have immunity to the claims alleged by Appellees.

Courts have repeatedly held that government officials do not have immunity from a suit seeking to compel them to comply with the law.[38] Appellees are seeking writs of mandamus to compel: (1) the City Secretary to comply with her obligation under the Charter to present the Petition to the City Council; (2) the members of the City Council to reconsider the Ordinance as required by the Charter; and (3) the members of the City Council to submit the Ordinance to a popular vote if the City Council does not repeal the Ordinance as required by the Charter.[39] Appellees met their pleading requirements by alleging that "governmental immunity is not applicable to claims against government officials to compel compliance with the law."[40] In short, Appellees' claims for mandamus relief to compel compliance with

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[38] *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) ("[I]t is clear that suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity . . . . Thus, *ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control of the state. Stated another way, these suits do not seek to alter government policy but rather to enforce existing policy.") (internal citations omitted); *see also Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 161 (Tex. 2016) ("[W]hile governmental immunity provides broad protection to the state and its officers, it does not bar a suit against a government officer for acting outside his authority—i.e., an ultra vires suit."); *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) ("While a legislative waiver of governmental immunity is usually required for suit against a governmental entity, 'an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars.'").

[39] *See* First Amended Petition at 12-13, ¶¶ 48-54 (C.R. at 103-04).

[40] First Amended Petition at 5, ¶ 19 (C.R. at 96).

the Charter fit within a black-letter exception to governmental immunity, and the Trial Court correctly concluded that it has jurisdiction over the dispute.

The Officer Appellants provide no explanation as to how their affirmative defense to Appellees' claims (*i.e.*, preemption of the Charter by state law)[41] would somehow create immunity to claims that the Supreme Court has repeatedly stated fall outside the scope of governmental immunity.[42] Indeed, this Court has already rejected the contention of government officials that a significant inquiry into the merits of the case is appropriate when evaluating the trial court's jurisdiction to remedy alleged *ultra vires* acts.[43] In that case, the plaintiff alleged that the defendants had not complied with the charter of the City of Dallas, and the Court concluded that such allegations were sufficient to overcome any immunity to suit.[44]

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[41] *See Kelly v. Brown*, 260 S.W.3d 212, 217 (Tex. App.—Dallas 2008, pet. denied) ("Preemption is an affirmative defense."); *Stier v. Reading Bates Corp.*, 992 S.W.2d 423, 436 (Tex. 1999) ("Preemption is an affirmative defense.").

[42] *See supra* n. 38.

[43] *See City of Dallas v. Brown*, 373 S.W.3d 204, 209 (Tex. App.—Dallas 2012, pet. denied) ("Appellees counter that a mere claim of ultra vires acts is insufficient. They contend that to assert a valid ultra vires claim, the plaintiff must allege and ultimately prove that an officer acted without legal authority. They argue that Brown alleges only facts demonstrating acts within appellants' legal authority and discretion, and therefore that her claims are barred by sovereign immunity. We disagree that Brown's allegations are insufficient to allege lack of legal authority, and we do not decide in this appeal whether Brown can 'ultimately prove' her ultra vires allegations.").

[44] *See id.* at 209 ("The substance of these claims is that appellants' actions to remove Brown from her position on the municipal court exceeded any authority granted to appellants in the City Charter or the Texas Constitution. Based on these allegations, Brown sufficiently invoked the ultra vires exception to sovereign immunity described in *Heinrich*.").

Similarly here, Appellees have alleged that the Officer Appellants have failed to comply with the Charter.[45] Accordingly, Appellants' thirty page journey into the merits of the case is simply irrelevant to the jurisdictional question before the Trial Court and this Court.[46]

2. **Appellants' arguments regarding the merits of their defenses are incorrect.**

In Texas, "[a]ll political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit."[47] Accordingly, the "the power of referendum is the exercise by the people of a power reserved to them, and this power should be protected."[48] To protect the right of the people to vote on matters of public importance, charter provisions are liberally

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[45] *See* First Amended Petition at 12-13, ¶¶ 48-54 (C.R. at 103-04).

[46] Appellants cite one case from a different Court of Appeals for the proposition that the merits can be evaluated on a plea to the jurisdiction. *See* Brief of Appellants at 14 (*citing Tex. Music Library & Research Ctr. v. Tex. Dep't of Transp.*, 13-13-00600-CV, 2014 WL 3802992, at *16 (Tex. App.—Corpus Christi Jul 31, 2014, pet. denied)). In that case, the plaintiffs could not identify any law that they sought to enforce by mandamus. *See id.* In this case, Appellees have identified the source of the legal duties (*i.e.*, the Charter) with which the Officer Appellants have failed to comply. Appellants' authority does not stand for the proposition that a court lacks jurisdiction over a properly pleaded claim if the government officials allege an affirmative defense to liability. *See also Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) ("Immunity from liability does not affect a court's jurisdiction to hear a case.").

[47] TEX. CONST. art. 1 § 2.

[48] *In re Woodfill*, 470 S.W.3d 473, 475 (Tex. 2015).

construed in favor of the power reserved.[49] Accordingly, Appellants have the burden to establish that the Charter provisions have been superseded by other law.

Appellants cannot meet their burden because, when enacting the general laws governing the adoption of comprehensive plans, the Texas Legislature expressly elected not to supersede charter provisions. Indeed, the state statute governing comprehensive plans states: "A municipality may establish, *in its charter* or by ordinance, procedures for adopting and amending a comprehensive plan."[50] The applicable statute settles the merits question in Appellees' favor, which is why the applicable statute is never quoted in Appellants' thirty-page discussion of other inapplicable statutes and cases.

Nonetheless, in accordance with the applicable rules, Appellees will address Appellants' arguments in the order in which they are presented.[51]

a. **<u>The public's reserved right to approve legislation can only be superseded by other charter provisions or state law.</u>**

Appellees and Appellants are in agreement that a charter's referendum provisions can be limited by other law. Indeed, the Supreme Court of Texas has

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[49] *See Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980) ("in order to protect the people of the city in the exercise of this reserved legislative power, such charter provisions should be liberally construed in favor of the power reserved.").

[50] TEX. LOCAL. GOV'T. CODE § 213.003 (emphasis added).

[51] *See* TEX. R. APP. P. 38.2(a)(2) ("When practicable, the appellee's brief should respond to the appellant's issues or points in the order the appellant presented those issues or points.").

held that there are two methods by which the rights reserved in a charter can be limited.[52] First, a charter provision may be preempted by the Texas Constitution or a general law adopted by the Legislature.[53] For instance, a state statute governing franchise rights that explicitly superseded any contrary charter provisions overrides a charter's referendum provisions.[54] Second, other charter provisions can limit the initiative or referendum rights of the public.[55] For instance, Appellants cite numerous cases where other charter provisions limited the initiative or referendum rights of the public.[56]

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[52] *See Glass v. Smith*, 244 S.W.2d 645, 649 (1951) ("The limitation by the general law or by the charter of the field in which the initiatory process is operative may be either an express limitation or one arising by implication. Such a limitation will not be implied, however, unless the provisions of the general law or of the charter are clear and compelling to that end.").

[53] TEX. CONST. art. XI § 5 ("The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

[54] *McCutcheon v. Wozencraft*, 294 S.W. 1105, 1106 (Tex. 1927).

[55] *Glass v. Smith*, 244 S.W.2d 645, 649 (Tex. 1951) ("Again, the field may be limited by the city charter itself.").

[56] *See, e.g., Southwestern Tele. & Telephone Co. v. City of Dallas*, 134 S.W. 321 (Tex. 1911) (holding that a charter provision requiring the city council hold a hearing precluded the public from initiating legislation on that subject); *Lindsley v. Dallas Consolidated St. Ry. Co.*, 200 S.W. 207 (Tex. Civ. App.—Dallas 1918, no writ) (applying requirements of charter provision governing franchises rather than more general initiative provision); *Dallas Ry. Co. v. Geller*, 271 S.W. 1106 (Tex. 1925) (charter provision gave City Council exclusive power over rate setting, thereby limiting the referendum power); *Denman v. Quin*, 116 S.W.2d 783 (Tex. App.—San Antonio 1938, writ ref'd) (charter did not give the public a right of initiative or referendum on administrative matters).

While the Legislature or citizens of Plano are free to evaluate the wisdom of the referendum power and place limits on such power, courts are not permitted to make such public policy decisions. Indeed, the Supreme Court has said:

> There may be those whose political philosophy cannot accept the initiative and referendum as a sound investment of political power. But the wisdom of the initiative and referendum is not the question here . . . . Once the people have properly invoked their right to act legislatively under valid initiative provisions of a city charter and the subject matter of the proposed ordinance is legislative in character and has not been withdrawn or excluded by general law or the charter, either expressly or by necessary implication, from the operative field of initiative, members of the City Council and other municipal officers should be compelled by the courts to perform their ministerial duties so as to permit the legislative branch of the municipal government to function to the full fruition of its product, though that product may later prove to be unwise or even invalid.[57]

Throughout their brief, Appellants point to situations and cases where the Legislature has limited the referendum power (expressly or by necessary implication). Appellants suggest that comprehensive plans are equally complicated and important and, therefore, the public's right to a referendum on a comprehensive plan should likewise be precluded. Appellants' pleas should be directed to the Legislature, not the courts, as it is not the Court's role to question the wisdom of the referendum power reserved by the citizens of Plano in the Charter.[58]

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[57] *Glass v. Smith*, 244 S.W.2d 645, 654 (1951).

[58] *See id.*

b. **<u>Appellants' discussion of zoning is a lengthy *non sequitur*.</u>**

Appellants dedicate over six pages of their brief to a discussion of the undisputed fact that zoning regulations are exempt from the initiative and referendum process.[59] The Legislature has adopted many mandates governing and restricting the manner and circumstances in which a governing body may modify zoning ordinances.[60] Because those mandates could not be followed when citizens initiated zoning changes, two intermediate appellate courts concluded that those requirements overrode initiative rights in city charters.[61] Later, two other intermediate appellate courts extended that reasoning to conclude that members of the public could not hold a referendum on zoning changes.[62] This body of law is inapposite for three reasons.

<u>First</u>, this case does not involve a zoning ordinance. Indeed, the Legislature requires municipalities to make clear that comprehensive plans are not zoning

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[59] *See* Brief of Appellants 20-26.

[60] *See, e.g.*, Chapter 211 of the Texas Local Government Code.

[61] *See Hancock v. Rouse*, 437 S.W.2d 1 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e); *San Pedro N. Ltd. v. City of San Antoni*o, 562 S.W.2d 260 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

[62] *See City of Canyon v. Fehr*, 121 S.W.3d 899 (Tex. App.—Amarillo 2003, no pet.); *In re Arnold*, 443 S.W.3d 269, 274-78 (Tex. App.—Corpus Christi 2014, orig. proceeding).

regulations.[63] As required, the Ordinance repeatedly states that it is not a zoning regulation.[64] Given that comprehensive plans and zoning regulations are governed by different chapters of the Local Government Code and the Legislature has made clear that comprehensive plans and zoning regulations are not to be confused for the other, the law governing zoning regulations is simply not applicable to this case.

Second, the reasons the courts concluded that the state's zoning regulations preclude initiatives and referenda do not apply to comprehensive plans. Again, the general laws governing zoning changes impose many requirements that are incompatible with the exercise of initiatives or referenda.[65] In contrast, the general laws governing the adoption of comprehensive plans impose no obligations on the municipality.[66] In fact, the general law explicitly allows charters to modify the

[63] TEX. LOCAL GOV'T. CODE § 213.005 ("A map of a comprehensive plan illustrating future land use shall contain the following clearly visible statement: 'A comprehensive plan shall not constitute zoning regulations or establish zoning district boundaries.'").

[64] *See, e.g.*, Exhibit A to Ordinance at 17 ("The Future Land Use Map shall not constitute zoning regulations or establish zoning district boundaries.") (C.R. at 126); *id.* at 21 (same) (C.R. at 130).

[65] *See, e.g.*, Chapter 211 of the Texas Local Government Code.

[66] Indeed, almost the entirety of Chapter 213 is permissive. *See, e.g.*, TEX. LOCAL GOV'T. CODE § 213.002(a) ("The governing body of a municipality *may* adopt a comprehensive plan for the long-range development of the municipality. A municipality *may* define the content and design of a comprehensive plan.") (emphasis added); *id.* at § 213.003 ("A comprehensive plan *may* be adopted or amended by ordinance following . . .") (emphasis added); *id.* at § 213.004 ("This chapter does not limit the ability of a municipality to prepare other plans, policies, or strategies as required.").

process for adopting comprehensive plans.[67] Given the vast differences in the general laws, the cases addressing zoning changes shed no light on whether the general laws governing comprehensive plans preempt Appellees' rights.[68]

Third, the differences in the general laws reflect different public policy concerns. Zoning ordinances affect the rights of specific property owners. The state mandated process for changing zoning ordinances reflects the important due process rights of those owners, and the due process rights of those owners would be undermined if their rights in land were subject to the democratic process. In contrast, the amendment of a comprehensive plan does not change the zoning of any property owner or deprive any property owner of vested rights. Instead, comprehensive plans represent the aspirations of the public body as a whole.[69] It is entirely appropriate for the public to vote on the guiding principles of the City.

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[67] *See* TEX. LOCAL GOV'T. CODE § 213.003 ("A municipality may establish, *in its charter* or by ordinance, procedures for adopting and amending a comprehensive plan.") (emphasis added).

[68] *See Quick v. City of Austin*, 7 S.W.3d 109, 121 (Tex. 1998) ("On balance, the Ordinance is not a zoning regulation seeking to shape urban development, but rather is a measure designed to protect water quality. We accordingly hold that the requirements of sections 212.002 and 212.003 are not applicable to the Ordinance, and the Ordinance cannot be invalidated by these statutes.").

[69] *See, e.g.*, Exhibit A to the Ordinance (setting forth the vison and principles to guide various decisions) (C.R. at 110-14).

c. The Texas Legislature has expressly chosen not to preempt charter provisions with respect to comprehensive plans.

As Appellants note, comprehensive plans represent the long-term objectives of a municipality and govern future zoning decisions.[70] The importance of the comprehensive plan on the future of the community weighs in favor of a referendum, not against it. Appellants contend that a city council should be able to depart from a successful, thirty-year old comprehensive plan and, over the objections of the public, enact a new comprehensive plan without a public referendum. Fortunately, as shown below, the Texas Legislature disagrees with Appellants.

In a single paragraph on pages thirty and thirty-one of their Brief, Appellants finally address Chapter 213 of the Local Government Code, which governs comprehensive plans like the one at issue in this case. Although Appellants invite the Court to compare Chapter 213 with Chapter 211 (which governs zoning), they must hope that the Court will not actually read the statutes because their summary is misleading on the key issue.

Chapter 213 of the Local Government Code makes clear that the content of and process for adopting comprehensive plans is entirely discretionary. Pursuant to the Code Construction Act, the word "may" creates "discretionary authority or

[70] *See* Brief of Appellants at 26-30.

grants permission or a power."[71] Almost the entirety of Chapter 213 uses permissive language and grants discretionary power.[72] Indeed, the Legislature expressly *permitted* the process for adopting comprehensive plans to be modified by charter.[73] In fact, the only time mandatory language such as "shall"[74] or must"[75] appears in Chapter 213 is when the Legislature states that comprehensive plans *shall not be confused with* zoning regulations.[76]

In contrast with Chapter 213, which provides wide discretion and almost no mandates with respect to comprehensive plans, Chapter 211 of the Local Government Code governing zoning is full of mandates. Zoning regulations "must be adopted in accordance with a comprehensive plan and must be designed" in

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[71] *See* TEX. GOV'T. CODE §311.016(1).

[72] *See, e.g.*, TEX. LOCAL GOV'T. CODE § 213.002(a) ("The governing body of a municipality *may* adopt a comprehensive plan for the long-range development of the municipality. A municipality *may* define the content and design of a comprehensive plan.") (emphasis added); *id.* at § 213.003 ("A comprehensive plan *may* be adopted or amended by ordinance following . . .") (emphasis added); *id.* at § 213.004 ("This chapter does not limit the ability of a municipality to prepare other plans, policies, or strategies as required.").

[73] *See* TEX. LOCAL GOV'T. CODE § 213.003 ("A municipality may establish, *in its charter* or by ordinance, procedures for adopting and amending a comprehensive plan.") (emphasis added).

[74] *See* TEX. GOV'T. CODE §311.016(2) ("'Shall' imposes a duty.")

[75] *See* TEX. GOV'T. CODE §311.016(3) ("'Must' creates or recognizes a condition precedent.").

[76] TEX. LOCAL GOV'T. CODE § 213.005 ("A map of a comprehensive plan illustrating future land use shall contain the following clearly visible statement: 'A comprehensive plan shall not constitute zoning regulations or establish zoning district boundaries.'").

accordance with various criteria.[77] Zoning regulations "must be uniform" and "shall be adopted" only after consideration of specified mandatory factors.[78] A city council is required to hold a public hearing on a zoning change after giving a statutory mandated notice;[79] however, the city council cannot act until the statutorily mandated zoning commission issues its statutorily mandated recommendation after a statutorily mandated public hearing with mandated public notice.[80]

Appellants urge the Court to compare sections 213.003 and 211.006 of the Local Government Code. Appellees urge the same. Section 213.003 of the Local Government Code provides two open ended methods for adopting comprehensive plans:

> Sec. 213.003. ADOPTION OR AMENDMENT OF COMPREHENSIVE PLAN.
>
> (a) A comprehensive plan *may* be adopted or amended by ordinance following:
>
> > (1) a hearing at which the public is given the opportunity to give testimony and present written evidence; and
> >
> > (2) review by the municipality's planning commission or department, if one exists.

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[77] TEX. LOCAL GOV'T. CODE § 211.004(a).

[78] TEX. LOCAL GOV'T. CODE § 211.005(b).

[79] TEX. LOCAL GOV'T. CODE § 211.006(a).

[80] TEX. LOCAL GOV'T. CODE § 211.007.

> (b) A municipality *may* establish, in its charter or by ordinance, procedures for adopting and amending a comprehensive plan.[81]

In contrast, Section 211.006 is full of mandates:

> The governing body of a municipality wishing to exercise the authority relating to zoning regulations and zoning district boundaries *shall* establish procedures for adopting and enforcing the regulations and boundaries. A regulation or boundary *is not effective until* after a public hearing on the matter at which parties in interest and citizens have an opportunity to be heard. Before the 15th day before the date of the hearing, notice of the time and place of the hearing *must* be published in an official newspaper or a newspaper of general circulation in the municipality.[82]

Again, contrary to the claims of Appellants in their Brief, Chapter 211 mandates review of zoning regulations by the zoning commission while Chapter 213 makes review of comprehensive plans discretionary.[83]

As discussed above, Appellants have the burden of identifying a state law that expressly or by necessary implication overrides the Charter provisions protecting the public's referendum rights.[84] Appellants could never meet their burden because the

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[81] TEX. LOCAL. GOV'T. CODE § 213.003 (emphasis added).

[82] TEX. LOCAL GOV'T. CODE §211.006(a).

[83] *Compare* TEX. LOCAL GOV'T. CODE § 213.003(a) ("A comprehensive plan *may* be adopted or amended by ordinance following . . . review by the municipality's planning commission or department, *if one exists*") (emphasis added) *with* TEX. LOCAL GOV'T CODE § 211.007 ("To exercise the powers authorized by this subchapter, the governing body of a home-rule municipality *shall* . . . appoint a zoning commission. . . . The zoning commission *shall* make a preliminary report and hold public hearings on that report before submitting a final report to the governing body. The governing body *may not* hold a public hearing until it receives the final report of the zoning commission").

[84] *See supra* n. 52.

applicable statutes, Chapter 213 of the Local Government Code, are permissive in nature and do not expressly or by implication limit charter provisions in any way. Indeed, the Legislature expressly preserved the Charter provisions.[85]

Accordingly, to the extent that the Court chooses to address the merits of this case in addition to the jurisdictional issues, the Court should rule in favor of Appellees.

d. Appellants' public policy arguments against the choice of the Legislature are irrelevant and incorrect.

Despite the clear statutory language, Appellants advance three arguments why the Court should override the Legislature. As noted above, the Supreme Court in *Glass* already rejected the idea that courts should limit the referendum process when the Legislature has not done so.[86] Indeed, the courts have an obligation to enforce, by mandamus, the public's right to a referendum in the absence of a law precluding such a referendum.[87] Nonetheless, Appellees will respond to Appellants' public policy arguments.

First, Appellants argue that allowing the referendum process to proceed would render the zoning ordinances inoperable because the zoning ordinances depend on

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[85] *See* TEX. LOCAL GOV'T. CODE § 213.003 ("A municipality may establish, *in its charter* or by ordinance, procedures for adopting and amending a comprehensive plan.") (emphasis added).

[86] *See supra* n. 57 and accompanying text.

[87] *See id.*

the comprehensive plan.[88] This is incorrect as the suspension of the Ordinance means that the prior 1986 Amended Comprehensive Plan is in effect and zoning changes in accordance with that plan can be adopted. However, even if the City were without a comprehensive plan (and thus the City was unable to adopt zoning changes) for a few months, the minor inconvenience hardly outweighs the public's right to determine the fate of the City.[89]

Second, Appellants argue that allowing the referendum process to proceed "would discourage the adoption of formal long-range planning documents."[90] This is again incorrect. The right to a referendum might discourage the adoption of comprehensive plans that offend large segments of the public, but there is no indication that the right to hold a referendum on comprehensive plans has discouraged municipalities from adopting plans in line with their communities. Moreover, discouraging elected officials from opposing the public will is a reason in favor of referenda, not against them.

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[88] *See* Brief of Appellants at 32.

[89] Appellants repeatedly state that the comprehensive plan is "inextricable" from zoning. If that were true, the Plano Tomorrow Comprehensive Plan would violate Texas Local Government Code Section § 213.005. Appellees assume that Appellants use "inextricable" to mean that changes to the zoning ordinance are dependent on the comprehensive plan. Obviously, the dependence of the zoning ordinance on the comprehensive plan makes it easy to separate what constitutes zoning and what constitutes a comprehensive plan, making the two different types of legislation the opposite of "inextricable".

[90] *See* Brief of Appellants at 33.

Third, Appellants argue that comprehensive plans are complicated and compiled by "experts" and, therefore, the plebs should not be permitted to have a say in the future of their city.[91] Appellees will concede that the Plano Tomorrow Comprehensive Plan is long and verbose; however, Appellants chose to construct a complicated plan, not the Appellees. The Texas Legislature has not required comprehensive plans to be difficult to understand or technical in nature.[92] In fact, if the Plano Tomorrow Comprehensive Plan was stated plainly rather than obscurely, the public opposition would be even greater. Appellants have offered no explanation as to why public officials should be allowed to evade public review by making legislation complicated. In any event, the many cases cited by Appellants show that the Legislature knows how to preclude referenda if it believes that to be important. The Legislature has placed no such restrictions in the highly permissive Chapter 213 governing comprehensive plans.

e. Even if Appellees were not entitled to a referendum vote, Appellees would still be entitled to mandamus relief.

Appellees seek three different writs of mandamus to compel: (1) the City Secretary to comply with her obligation under the Charter to present the Petition to the City Council; (2) the members of the City Council to reconsider the Ordinance

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[91] *See* Brief of Appellants 34-37.

[92] *See* TEX. LOCAL GOV'T. CODE § 213.002 ("A municipality may define the content and design of a comprehensive plan.").

as required by the Charter; and (3) the members of the City Council to submit the Ordinance to a popular vote if the City Council does not repeal the Ordinance as required by the Charter.[93] Appellants' arguments address only the last of these three obligations (*i.e*., the obligation to call an election). Appellants have identified no state law that purportedly overrides the City Secretary's obligation to present the Petition to the City Council. Similarly, Appellants have identified no state law that purportedly overrides the City Council's ability to reconsider or repeal the Ordinance. Accordingly, even if Appellants could prevail on one of the three requests for mandamus, Appellees are nonetheless entitled to relief on the other two requests.

Officer Appellants have never offered an explanation as to why they feel entitled to disobey their ministerial duties to present the Petition and reconsider the Ordinance. None of the cases cited by Appellants even involve a request for a writ of mandamus compelling a city council to reconsider an ordinance.[94] Indeed, most of the cases cited were original proceedings in the Court of Appeals, which only has

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[93] *See* First Amended Petition at 12-13, ¶¶ 48-54 (C.R. at 103-04).

[94] *See Coalson v. City Council of Victoria*, 610 S.W.2d 744 (Tex. 1980) (granting writ of mandamus compelling an election); *In re Roof*, 130 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding); *Denman v. Quin*, 116 S.W.2d 783, 787 (Tex. Civ. App.—San Antonio 1938, writ ref'd) (affirming denial of a writ of mandamus to compel an election); *In re Ryan*, No. 13-08-00179-CV, 2008 WL 1822442, at *3 (Tex. App.—Corpus Christi Apr. 18, 2008, orig. proceeding) (declining to issue writ of mandamus requiring repeal of an ordinance or an election); *In re Arnold*, 443 S.W.3d 269, 278 (Tex. App.—Corpus Christi 2014, orig. proceeding) (refusing to issue writ of mandamus to compel an election).

jurisdiction to order an election (and could not order a mere reconsideration of an ordinance).[95] In short, Appellants' cases in which the relief at issue here was not requested and could not be granted are not relevant to this Court's decision on Appellees' request to compel the presentation of the Petition and a reconsideration of the Ordinance.[96] To the extent the Court intends to rule on the merits in addition to the jurisdictional issues, the Court should rule that the question of whether a referendum should be compelled is immaterial to the question of whether the City Secretary should comply with her duty under the Charter to present the Petition and the duty of the City Council to reconsider the Ordinance.[97]

B. Issue 2: Appellants Have Failed To Identify Any Error By The Trial Court Relating To Appellants' Requests For Declaratory Relief.

As noted above, Appellees have requested that the Trial Court issue a declaration against the City that: (1) unless and until a majority of the voters approve

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[95] *See* TEX. ELECTION CODE § 273.061.

[96] Because the cases cited by Appellants do not involve comprehensive plans, the authorities are also of little relevance to the question of whether a referendum can be held. *See supra* Section IV(2)(b).

[97] In the Trial Court, the Officer Appellants argued that, like a thief who has not yet been caught, they are entitled to flout the law unless and until a court orders otherwise. *See* C.R. at 283. It was this specious argument that was rejected by the Supreme Court of Texas in *Coalson v. City Council of Victoria*, 610 S.W.2d 744 (Tex. 1980). In *Coalson*, the City Council contended that a requested public vote was outside the scope of permitted initiatives. The Supreme Court held that the City Council's contentions were premature given that the vote had not yet occurred and issued a writ of mandamus requiring the City Council to submit the issue to a public vote. *See Coalson*, 610 S.W.2d at 747. In this Court, the Officer Appellants appear to have abandoned their argument that it appropriate to disobey the law unless caught.

of the Ordinance in a referendum, the Ordinance has been suspended from taking effect and is invalid; (2) unless and until a majority of the voters approve of the Ordinance in a referendum, the Plano Tomorrow Plan is not the current comprehensive plan for the City; and (3) unless and until a majority of the voters approve of the Ordinance in a referendum, the current comprehensive plan for the City is the Amended 1986 Comprehensive Plan.[98]

In their brief, Appellants assert three arguments as to why the Trial Court purportedly lacks jurisdiction over Appellees' claims for declaratory relief.[99] Each of Appellants' arguments are without merit.

1. <u>The City's contention that it is immune from suit is frivolous.</u>

The Texas Legislature has made municipal corporations mandatory parties in suits involving the validity of a municipal ordinance.[100] This Court has said, "It is difficult to imagine a clearer or plainer expression of intent to render a governmental

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[98] *See* First Amended Petition at 11-12, ¶ 45 (C.R. at 102-03).

[99] *See* Brief of Appellants at 45-51. This section of Appellants' brief contains four sections; however, one section merely asserts that Appellees should not be given a chance to replead. In the unlikely event that the Court finds that there is a pleading defect, Appellees would request that the proceedings be remanded to the Trial Court so that Appellees may amend the First Amended Petition.

[100] *See* TEX. CIV. PRAC. & REM. CODE § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard").

entity susceptible to suit than one mandating that it be joined."[101] Appellees' suit clearly involves a request for a declaration regarding the validity of two different sets of ordinances. In particular, Appellees allege:

> Section 7.03 of the Charter provides that "[p]ending the holding of such election such ordinance or resolution shall be suspended from taking effect and shall not later take effect unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof." As set forth above, a referendum has not been held on the Ordinance. Accordingly, pursuant to Section 7.03 of the Charter, the Ordinance has been suspended and is invalid and of no force or effect. Because the Ordinance is of no force or effect, the Plano Tomorrow Plan is not the current comprehensive plan for the City. Instead, the Amended 1986 Comprehensive Plan, the repeal of which has been suspended, is the current comprehensive plan for the City. However, the City contends that the Ordinance is valid, and that the Plano Tomorrow Plan is the current comprehensive plan for the City. The City also contends that, if the Ordinance has been or will be suspended, then the City would be without any comprehensive plan as the Amended 1986 Comprehensive Plan has been repealed.[102]

In short, Appellees contend that the Ordinance is invalid pursuant to the Charter, the plan adopted by the Ordinance is invalid, and the prior ordinances adopting the prior

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[101] *See City of Dallas v. E. Vill. Ass'n*, 480 S.W.3d 37, 45 (Tex. App.—Dallas 2015, pet. denied) ("It is difficult to imagine a clearer or plainer expression of intent to render a governmental entity susceptible to suit than one mandating that it be joined. As the supreme court observed in a case involving the City, '[t]he DJA waives a municipality's immunity in a suit that involves the validity of a municipal ordinance....'"); *see also City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n. 6 (Tex. 2009) ("For claims challenging the validity of ordinances or statutes, however, the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity."); *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

[102] First Amended Petition at 11, ¶¶ 42-43 (C.R. at 102).

comprehensive plan are valid (while the City contends they are invalid). Because this suit plainly involves the validity of ordinances, the City is clearly not immune.

In response to this obvious conclusion, the City advances three meritless contentions. First, the City seems to suggest that, because the Ordinance was valid for a short period of time in the past, somehow the Court lost jurisdiction over Appellees request that a declaration be issued confirming that the Ordinance is invalid *now*. The Texas Legislature's mandate that the City be joined to a suit "involving the validity of a municipal ordinance" was not limited to suits involving ordinances that were *never* valid.[103] Accordingly, the less than thirty-day period in which the Ordinance was valid has no impact on the jurisdictional inquiry.[104]

Second, the City appears to contend that the Charter's suspension of the Ordinance and prohibition on the Ordinance taking effect unless and until approved by the voters is something other than an invalidation of the Ordinance.[105] The City

[103] *See* TEX. CIV. PRAC. & REM. CODE § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard").

[104] *See Fort Worth & D. C. Ry. Co. v. Welch*, 183 S.W.2d 730, 735 (Tex. Civ. App.—Amarillo 1944, writ ref'd) ("A statute valid when enacted may become invalid by a change in conditions to which it is applied.").

[105] Charter § 7.03 ("Pending the holding of such election such ordinance or resolution shall *be suspended from taking effect and shall not later take effect* unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof.") (emphasis added) (C.R. at 98-99).

offers no authority for this contention. To the contrary, invalidity and no legal effect are synonymous.[106]

Third, the City contends that Appellees are not claiming the Ordinance is invalid (despite the clear language of Appellees' petition in which they assert the Ordinance is invalid) but instead merely seeking the construction of laws. Appellees are not seeking a declaration regarding the meaning of the provisions of the Ordinance, the Plano Tomorrow Comprehensive Plan or the Amended 1986 Comprehensive Plan. Indeed, the contents of those documents have hardly been referenced in this proceeding. Instead, Appellees are asking the Trial Court to declare which ordinances are valid and in effect and which are not.[107]

Accordingly, Appellees' claims clearly fall within the scope of the Texas Legislature's waiver of immunity, and the Trial Court's order should be affirmed.

2. As signatories of the Petition, the Appellees have standing to assert their claims for declaratory relief.

Appellants contend that the Appellees lack standing because they have not suffered a particularized injury.[108] The courts have repeatedly held that the members

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[106] *See, e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (Invalid: Not legally binding"); *Tonroy v. City of Lubbock*, 242 S.W.2d 816, 818 (Tex. Civ. App.—Amarillo 1951, writ ref'd n.r.e) ("It is our opinion that the failure of the Lubbock City Commission to have the statutory notices . . . rendered the purported ordinance *invalid and of no force and effect*.") (emphasis added).

[107] *See* First Amended Petition at 11-12, ¶ 45 (C.R. at 102-03).

[108] *See* Brief of Appellants at 48-50.

of the public that sign a petition calling for a referendum have particularized injury sufficient to establish standing.[109] All of the Appellees signed the Petition.[110] Accordingly, Appellees have standing to contest the City's failure to give legal effect to the Petition.[111]

3. **The Ordinance is invalid even if a referendum cannot be held.**

In a short paragraph, the City contends that Appellees' claims for declaratory relief are precluded because a referendum purportedly cannot be held on the Ordinance.[112] As noted above, a referendum on the Ordinance is not precluded and is in fact mandatory. For that reason alone, Appellants' arguments against Appellee's request for declaratory relief are incorrect.

Nonetheless, even if a referendum were precluded as the City contends, the Ordinance would continue to be invalid. The Charter conditions the validity of the

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[109] *See Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999) ("We thus conclude that those qualified voters who sign the petition have a justiciable interest in the valid execution of the charter amendment election, and as such have an interest in that election distinct from that of the general public."); *Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001); *In re Robinson*, 175 S.W.3d 824, 828 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *City of Canyon v. Fehr*, 121 S.W.3d 899, 903 (Tex. App.—Amarillo 2003, no pet.).

[110] *See* First Amended Petition at 3, ¶¶ 3-7 (C.R. at 94).

[111] In a footnote, the Appellants raise an argument regarding the merits of Appellees' request for declaratory relief. *See* Brief of Appellants at 50 n. 18. In particular, Appellants cite to Section 1-10(a) of the Code of Ordinances which provides "[t]he repeal of an ordinance shall not revive any ordinance in force before or at the time the ordinance repealed took effect." That section is inapplicable as the Ordinance has been suspended, not repealed. Appellees will more fully address the merits issues when properly raised before the Trial Court.

[112] *See* Brief of Appellants at 51.

Ordinance on an affirmative vote by the public in an election.[113] If there is no public vote, then the Ordinance cannot meet the requirements of the Charter and will never become valid. Accordingly, the question of whether a referendum can occur is separate from the question of whether the Ordinance is invalid. As such, Appellants arguments regarding the merits of Appellees' claims against the City Officials for mandamus relief have no bearing on Appellees' claims against the City for declaratory relief. Moreover, the merits of Appellees' claims have no bearing on the Trial Court's jurisdiction over such claims. Accordingly, the Trial Court's order should be affirmed.

C. Issue 3: Appellants Have Failed To Show That The Trial Court Erred When It Concluded That Appellees' Claims Are Ripe.

In their third issue, Appellants contend that Appellees' request for mandamus relief against the members of the City Council and their request for declaratory relief against the City are not ripe.[114] Each of the Appellants' assertions are without merit.

First, Appellees' claims for mandamus relief against the members of the City Council are ripe. The City Council met on November 23, 2015 to discuss whether they would comply with their obligations under the Charter and concluded that they

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[113] Charter § 7.03 ("Pending the holding of such election such ordinance or resolution shall be suspended from taking effect and *shall not later take effect unless* a majority of the qualified voters voting thereon at such election shall vote in favor thereof.") (emphasis added) (C.R. at 98-99).

[114] *See* Brief of Appellants at 51-54.

would not.[115] Counsel for Appellees wrote a letter requesting that the City Council advise if they would be complying with their duties, and no response was provided.[116] In this proceeding, counsel for the Officer Appellants have contended that they cannot comply with the Charter, further indicating that the Officer Appellants will not be complying. At any time, the City Council could repeal the Ordinance if they had the desire to do so. In short, there is nothing hypothetical about the City Council's intentions. Moreover, even if the claims against the members of the City Council are not already ripe, it is clear the claims will soon ripen once the City Secretary complies with her obligations.[117] Therefore, the Trial Court's denial of the Plea should be affirmed.[118]

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[115] *See* First Amended Petition at 9, ¶ 33 (C.R. at 100).

[116] *See* First Amended Petition at Exhibit 2 (C.R. at 170-172); *id.* at 9, ¶ 35 (C.R. at 100).

[117] *See Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011) ("Although a claim is not required to be ripe at the time of filing, if a party cannot demonstrate a reasonable likelihood that the claim will soon ripen, the case must be dismissed.").

[118] Appellants appear to suggest that their duties are dependent on the validity of the signatures on the Petition. *See* Brief of Appellants at 54 ("Appellees presume that sufficient valid signatures have been collected by Plaintiffs prior to their being counted by the City Secretary"). The Charter does not provide the City Secretary or the City Council any right to evaluate or inspect the petition for validity. *See In re Suson*, 120 S.W.3d 477, 480 (Tex. App.–Corpus Christi 2003, orig. proceeding) ("We cannot infer from [the city charter] that the city secretary or the city commissioners have a right or duty to examine the sufficiency of the petitions."); *Burns v. Kelly*, 658 S.W.2d 731, 734 (Tex. App.–Fort Worth 1983, orig. proceeding) ("[W]e found that the city charter contains no provision authorizing the city council (or the city secretary or anyone else) to examine the signatures, etc., for authenticity. "); *Blanchard v. Fulbright*, 633 S.W.2d 617, 621 (Tex. App.–Houston [14th Dist.] 1982, orig. proceeding) (per curiam) ("[W]e do not find any provision in the Angleton City Charter giving any of the city officials a discretionary right of review.").

Second, Appellees' requests for declaratory relief regarding the validity of the Ordinance are already ripe. Appellees contend that the Ordinance has already been suspended and is invalid while the City contends that the Ordinance has not been suspended and is not invalid.[119] Appellants' contention is not contingent on future events—the Ordinance has been suspended and invalid since the date the Petition was submitted.[120] Indeed, the only way the Ordinance would become valid is if the Ordinance is submitted to a referendum and approved by a majority of the voters. Similarly, whether the ordinances adopting the 1986 Amended Comprehensive Plan are currently valid is likewise ripe. Appellees have already been injured by the

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[119] *See* First Amended Petition at 11, ¶¶ 42-43 (C.R. at 102).

[120] No Texas court has addressed whether the suspension of an ordinance upon the submission of a petition calling for a referendum is automatic or dependent on the act of a government official. However, every court that has considered the question in the United States has concluded that the suspension occurs upon the submission of the petition even if the government official fails to call the required election. *See, e.g., Jackson v. Denver Producing & Ref. Co.*, 96 F.2d 457, 460–61 (10th Cir. 1938) ("The right of referendum cannot be defeated and an ordinance which has been suspended cannot be vitalized by failure or refusal to submit the question to the electors. [If] it could, the right expressly reserved to the people would immediately become a vain and empty nothingness.") ; *Schichtl v. Uda*, 292 S.W. 981, 983 (Ark. 1927) ("We conclude, therefore, that when electors have sufficiently petitioned for the referendum of an ordinance, and have so far complied with the provisions of Amendment No. 7 that nothing remains but the ministerial act of calling the election, a duty the performance of which may be coerced by mandamus, the operation of the ordinance is suspended, and remains suspended until the election is ordered and held. It is immaterial, therefore, that the ministerial duty of ordering the election was not performed. The operative effect of the ordinance was suspended, and will remain suspended until the election is held and the ordinance adopted by the electors of the town.").

City's refusal to give legal effect to the submission of the Petition and, therefore, the Trial Court's ruling should be affirmed.[121]

V. PRAYER

For the foregoing reasons, the Appellees request that the Court affirm the Trial Court's order denying the Appellants' Plea to the Jurisdiction and grant Appellees all such further relief as to which they may be entitled.

Dated: July 25, 2016

Respectfully submitted,

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[121] *See Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011) ("In evaluating ripeness, we consider 'whether, at the time a lawsuit is filed, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.''").

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via electronic service upon the following counsel of record on this 25th day of July, 2016:

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned certifies that this brief complies with the type and volume limitations of Texas Rule of Appellate Procedure 9(i)(2). Excluding than the words exempted by Texas Rule of Appellate Procedure 9(i), this brief contains 10,136 words. This brief has been prepared in proportionally spaced type face using Microsoft Word 2016 using 14 point Times New Roman.

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