

Thursday, March 8, 2018 by [Jo Clifton](#)

## LAND DEVELOPMENT CODE

### Legal memo says CodeNEXT petition flawed

Texas courts have ruled that “zoning is a subject that is outside the scope of the initiative and referendum process.” Therefore, the city is neither required nor authorized to call an election on the petition currently being circulated by opponents of the new land development regulations known as CodeNEXT.

That is one of the conclusions of a memorandum from well-known Austin attorney C. Robert Heath of Bickerstaff Heath Delgado Acosta LLP, which City Attorney Anne Morgan recently forwarded to City Council. The subject of the memo is the petition titled, “Petition for an Austin Ordinance Requiring Both a Waiting Period and Voter Approval Before CodeNEXT or Comprehensive Land Development Revisions Become Effective.”

In a cover memo, Morgan told Council members that “given the highly political and sensitive nature of the Land Development Code rewrite,” she had asked Heath to review the petition and assist in addressing the city’s legal concerns.

Although he recognized that the city’s failure to call an election “may well result in the petition circulators filing a mandamus suit against the city,” Heath said, “the significant weight of legal authority” would support a rejection of the petition.

Attorney Fred Lewis, one of the petition’s backers, told the *Austin Monitor* Wednesday that the usual legal analysis does not apply because CodeNEXT is “not intended to solve a specific zoning problem.” He stated that “this is a comprehensive rewrite of the land code, and there’s a specific provision in the Local Government Code about it. So it’s not the same thing.”

Lewis was apparently referring to section 211.015 of the Texas Local Government Code. However, in his memo, Heath states that state law “permits repeal of a home rule city’s zoning regulations by (1) a charter election or (2) by a city’s referendum process but only in regard to the initial adoption of the city’s zoning regulations.”

According to the cases cited, the statute permits a referendum only when the city enacts a zoning ordinance when none previously existed.

The statute, Heath argues, is only to allow people to decide whether

or not to have any zoning at all, not to reject a rewrite of the zoning ordinance.

Petitioners with IndyAustin, including both volunteers and paid circulators, have been seeking signatures since January, and the group's leader, Linda Curtis, has said that she hopes to turn in the more than 20,000 signatures required around March 22. If the petition is valid and has a sufficient number of signatures, Council would normally put the proposed ordinance on the Nov. 6 ballot.

Petitioners are continuing to gather signatures, and Lewis stressed that, generally speaking, a large number of signatures are invalid because they are illegible or belong to people who live outside the city or are not registered to vote. That means petitioners have to gather quite a few more signatures than they actually think they might need.

In addition to problems related to trying to legislate zoning by referendum, other parts of the petition also raise serious legal questions, according to Heath and Morgan.

The petition states that if adopted it would override "all city charter provisions, ordinances, and laws," without explaining what part of the charter or what other ordinances or laws that might address. In his memo, Heath points out that "while an ordinance can repeal or supersede another ordinance, it cannot override a charter provision or a state law. If the petitioners had sought to amend the charter rather than to initiate an ordinance, that could be effective to override other provisions of the charter, although, of course, it still could not supersede state law."

When the *Monitor* asked her about the legality of the petition, Curtis prefaced her remarks by noting that she is not an attorney. However, she said she thought the petition was legal because it was challenging a whole new code as opposed to a single zoning matter. Curtis said she is anticipating a legal battle with the city. "If we get this thing filed and it qualifies for the ballot, the next step is going to be a big legal hassle. We do expect that. I expect that. This is just my opinion. They really need to be careful because people will interpret this, I hope, as a challenge to the right to vote on this. That's really what this petition is," she said.

Heath's memo concludes that Council should decline to call the election. "While it is true that a suit challenging the validity of an initiated ordinance is not ripe for decision unless and until it is approved by the voters, the issue here is not whether the proposed

ordinance is valid, but instead is whether the subject of the initiative is outside the lawful scope of the initiative process,” he wrote. However, if the petition has enough valid signatures and Council decides to reject the advice of its attorneys, Council would then be asserting that it could challenge the ordinance after the election if the referendum passes. That raises other problems, Heath wrote, such as who Council would sue to invalidate the ordinance. These questions should make for interesting conversations in executive session.