

The Law and Facts are Clear: Seven Austin Planning Commissioners are Professionals Connected to Land Development, Violating the Very Broad Charter Amendment

(Fred I. Lewis, 12/12/2017)

The Summary: The Planning Commission Charter Amendment requires at least 2/3rds of the Planning Commissioners to be both non-professionals (“lay members”) and have no connection (“not directly or indirectly connected with”) with the development industry. These words are very broad and should be interpreted that way. The plain meaning captures professionals, like architects, engineers, planners, builders and developers, who are connected directly or indirectly to land development.

Seven Commissioners state in their own words – from their City applications and professional websites – that they are professionals and connected to real estate and land development. Architects are an integral part of land development, from design, permitting, planning, and construction oversight. There would be no land development without architects. In the plain meaning of the amendment, and in their own words, the 7 architect, engineer, and builder commissioners are clearly professionals connected to land development and real estate.

The Courts are going to rely on the plain meaning of the charter and provide a reasonable interpretation that comports with the voter’s intent and the history. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006)¹. They are likely to give little to no deference to the City’s interpretation, because the charter was passed by the voters (not the Council) and any City interpretation today is not contemporaneous with the charter amendment’s passage in 1994. See, e.g., *Id.*; *Nat’l Media Corp. v. City of Austin*, 2014 Tex. App. LEXIS 9530 (Tex. App - Austin 2014). In short, courts will decide the legal meaning of the charter amendment on their own and will rely on its plain language to restrict from serving on the Commission more than 1/3rd professionals connected in any manner to the development industry.

The Charter Amendment: The Austin City Charter, Article X, Section 2 requires that “a minimum of two-thirds of the [planning commission] members shall be lay members not directly or indirectly connected with real estate and land development.”

The Law has two requirements that at least 2/3 of the commission members must meet: 1) they shall be lay persons (not professionals), and 2) they shall not be connected directly or indirectly with real estate and land development.

¹ “It is true that courts give some deference to an agency regulation containing a reasonable interpretation of an ambiguous statute. But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions in documents like the Department's amicus brief here. Second, the language at issue must be ambiguous; an agency's opinion cannot change plain language. Third, the agency's construction must be reasonable.” *Fiess v. State Farm Lloyds*, 202 S.W.3d 747 at 748.

The 2/3rds requirement means at least 9 of the 13 commission members must be lay persons not connected to land development; therefore, only 4 members may be professionals or connected directly or indirectly to the industry.

The Amendment's History: In May 1994, Austin voters passed by 67% of the vote Proposition 13, the charter amendment in question. The Austin American Statesman opposed the proposition, stating it “layers on a requirement for zero connection to real estate and land development of a supermajority of the members”. Editorial, “Charter Amendments Ballot is Needlessly Confusing,” Austin American Statesman (April 27, 1994). In addition, the Sierra Club in a letter to the 1993 Charter Revision Commission pushing for the charter amendment emphasized the need for lay commissioners: “Thus, the charter should guarantee that a large majority - say 2/3rds - of commission members not have a professional association with development.” Austin Sierra Club Letter to Charter Revision Commission (September 30, 1993) (Archived in Austin History Center) (emphasis in original). The Sierra Club pointed out, in their opinion, the need for “lay persons” and “a diverse planning body drawn from a cross section of Austin”. Id. The voters agreed.

In short, the charter provision was intended and perceived to be very broad. Its intent was to have 2/3rds lay persons without a connection to the industry. Today, however, 7 commission members are clearly professionals connected to the industry, including all 4 commission officers. Architects are clearly captured by the charter amendment. They are licensed professionals. They are an integral part of the real estate and land development process. And they do much more than design buildings: they also process permits and plans, conduct development feasibility studies, provide planning and project management, and oversee construction, as evidenced by the architect Planning Commissioners' applications below.

The Facts: Seven Planning Commissioners Admit in Their Own Words That They Are Professional Connected to Land Development and Real Estate

1. Stephen Oliver, Chair, is a licensed professional architect and was re-appointed in June 2017. According to his application to the City of Austin for appointment to the Planning Commission, he is “an architect and planner experienced with urban design, sustainability, master planning, **residential infill, commercial development**, land use feasibility, and the City of Austin Land Development Code.” (emphasis added) On his web site, he states: “He has an in-depth understanding of zoning, **land development** and building codes as well as the larger context of best national architectural design and planning practice. **This knowledge is key to helping land owners, businesses and developers create and reach their goals.**” (<http://designopa.com/about/>) (emphasis added)
2. Faye Kazi, Vice-Chair, is a professional licensed engineer and head of Civiltude LLC and was appointed June 2015. His application to the City states he has “18-years' experience in **land development and infrastructure planning.**” (emphasis added). His company's website states “Faye is the Founder & President of Civiltude. He remains intimately **involved in the**

design and execution of all of Civiltude's project." <http://www.civiltude.com/staff/>. (emphasis added). Their projects include apartments, fire stations, restaurants, building towers, mixed-use developments, and many other types of development. (<http://www.civiltude.com/portfolio/>). He is a board member of RECA.

3. James Shieh, Secretary, is a licensed professional architect and was appointed in April 2015. His application states: "**Occupation: Design and Development.**" (emphasis added). "I have started my own firm which also assists our clients in **development work.** (emphasis added). His work experience is in "commercial real estate design and project management." At present, according to his firm's website, he provides "**real estate development services** from feasibility studies, master planning and site designs...and construction of eco-friendly prefabricated backyard studios." "Founded in 2007, the firm has developed a local reputation for excellence **in commercial and residential design, land development** and interior design." (<http://jsquarearch.com/firm/>) (emphasis added).

4. James Schissler, Parliamentarian, was appointed July 2015 and is a licensed professional civil engineer. He states in his application to the City that "I have over thirty years of civil engineering experience including **project management and project engineering** on a wide variety of civil engineering and site **development projects...** and design and permitting for single family, apartments, shopping centers, office buildings, school and other **development projects** in several states." (emphasis added) He is currently a Vice-President at Civiltude, which describes itself as "Engineers and Planners" Its website states that he has "**expertise in all phases of design from feasibility and conceptual layout to permitting and construction management** for office, retail, industrial, multi-family and single-family projects. <https://www.linkedin.com/in/jimschissler/> (emphasis added)

5. Karen McGraw is a licensed professional architect and was appointed in February 2016. According to her application, she specializes in historic preservation, neighborhood planning, and conservation and **commercial and residential architecture.**" (emphasis added) According to her AIA website, she "specializes in services that foster and renew elements of 'complete communities' in the central city. These include **neighborhood planning and zoning, home restoration and renovation, commercial projects, and historic preservation.** (https://www.aiaaustin.org/firm_profile/karen-mcgraw-architect) (emphasis added)

6. Trinity White is a professional licensed architect and appointed in June 2015. Her applications lists her occupation as "**building designer.**" (emphasis added). According to her website, "she has "run my own practice focusing on affordable and infill housing for the last three years. "These services include: Schematic Design, **Design Development**, Permit Set, **Construction Documents, Construction Observation.** <http://www.trinitywhite.com/services/> (emphasis added). She further states: "Each process is tailored to meet the needs of the specific

project and the owners. **So projects include a complete package from Feasibility Report through Construction Administration.**" (emphasis added).

7. Greg Anderson was appointed in January 2017 and his occupation, according to his application, is "**affordable housing builder.**" (emphasis added). He now works as "director of Operations of Habitat for Humanity and is **project manager** of our 53,000 square foot headquarters". Before joining Habitat for Humanity, he worked, among other things, "**as project manager on four planned developments and construction manager representative** for the developer on the 360 Condo tower consisting of 430 homes on 44 floors." (emphasis added). **According to the Statesman, he oversees Habitat's building projects and some are market rate:** "The [multi-family] project by Austin Habitat for Humanity is expected to break ground in 2018. The nonprofit didn't say how many units would be available for purchase, but Council Member Sabino "Pio" Renteria, who represents District 3 where the property is located, pointed to a number just over 30. Habitat's director of operations, Greg Anderson, said some of those units would be for sale at market value."

In conclusion, the 7 Planning Commissioners are clearly professionals connected directly or indirectly to the development industry. Based on the charter's plain meaning and history, it was intended to be given a broad interpretation that would allow only 4 of these commissioners to serve. In their own words, 7 commissioners are clearly professionals connected directly or indirectly to the development industry.

The Courts will decide one legal interpretation of the provision, which will be consistent with the very broad language and voters' clear intent to have a commission with 2/3rds of its members being lay-persons without connection to the development industry. No court is going to allow each council member to decide their own legal interpretation, which essentially would be lawless because it provides no consistent meaning to the voter-approved charter amendment.