CAUSE NO. D-1-GN-16-000615

BRIAN RODGERS,	§	IN THE DISTRICT COURT
Plaintiff,	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
THE CITY OF AUSTIN,	§	
Defendant.	§	345TH JUDICIAL DISTRICT

CITY OF AUSTIN'S ORIGINAL ANSWER, PLEA TO THE JURISDICTION, AFFIRMATIVE DEFENSES, AND REQUEST FOR DISCLOSURES

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

The City of Austin ("City") files this Original Answer, Plea to the Jurisdiction, Affirmative Defenses, and Request for Disclosures in response to the Original Petition for Mandamus and Injunction filed by Brian Rodgers:

I.
GENERAL DENIAL

1. Subject to such matters as may be admitted during discovery and upon trial of this cause, and in reliance upon its rights as provided by Texas Rule of Civil Procedure 92, the City generally denies the material allegations of Mr. Rodgers' pleadings, and any amendments or supplements thereof, and demands that Rodgers be required to prove each claim and allegation as required by law.

II.
SPECIFIC DENIAL

2. Pursuant to Texas Rule of Civil Procedure 54, the City specifically denies that all conditions precedent to Rodgers' claims have been performed or have occurred.

III.
PLEA TO THE JURISDICTION

3. A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of the action. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Whether the

trial court has jurisdiction is a question of law. *Texas Nat. Res. Conversv. Com'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). The plaintiff has the burden of alleging facts that affirmatively establish the trial court's jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 466 (Tex. 1993). The plaintiff must plead each element of each claim to establish jurisdiction. *Mission Consol. Independent School Dist. v. Garcia*, 372 S.W.3d 629, 637 (2012). Thus, a plaintiff pursuing state law claims against a Texas government agency must present more than mere conclusory allegations. The court must analyze the jurisdictional facts alleged to see if they actually support a cause of action that falls within a waiver or exception to sovereign immunity. *See Tex. Dep't of Crim. Justice v. Miller*, 41 S.W.3d 583, 587 (Tex. 2001). While the trial court accepts the allegations in the pleadings as true, it is also required to consider evidence relevant to jurisdiction when necessary to resolve the jurisdictional issue. *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).

4. Here, the trial court lacks jurisdiction to determine this suit on multiple grounds. First, Rodgers has failed to state a claim under the Texas Open Meetings Act (TOMA). Second, even if Rodgers stated a TOMA claim, subsequent action by the Austin City Council has made the controversy moot.

5. Under TOMA, a government body such as the City is required to provide "written notice of the date, hour, place, and subject of each meeting" of its governing body. TEX. GOV'T CODE § 551.041. To meet the standards of Section 551.041, the notice must be sufficiently specific to apprise the public in general terms of each subject to be discussed at an upcoming meeting. *City of Laredo v. Escamilla*, 219 S.W.3d 14 (Tex.App.—San Antonio 2006). Adequacy of notice is determined by comparing the content of the notice and the action taken at the meeting. *Markowski v. City of Marlin*, 940 S.W.2d 720 (Tex.App.—Waco 1997). If the contents

of a notice are undisputed, its adequacy is a question of law. *Burks v. Yarbrough*, 157 S.W.3d 876 (Tex.App.—Houston (14th Dist.) 2005).

6. Generally, notice is adequate if it alerts or informs the public that some action will be taken on a particular topic. *Cox Enterprises, Inc. v. Board of Trustees of Austin Independent School Dist.*, 706 S.W.2d 956, 958 (Tex. 1986). In disclosing that some action will be taken, the notice need not mention all possible results which may arise. *Id*; *see also id.* at 959 (noting that "substantial compliance" is sufficient for TOMA purposes).

7. A notice that refers to other actions and pending decisions properly incorporates those other topics for purposes of TOMA notice. *Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc.*, 912 S.W.2d 271, 274 (Tex.App.—Austin 1995). Similarly, any exhibits attached to a notice are also incorporated into the notice, for purposes of TOMA analysis. *York v. Texas Guaranteed Student Loan Corp.*, 408 S.W.3d 677, 687 (Tex.App.—Austin 2013).

8. Here, the notice in question is undisputed, and thus Rodgers' TOMA claims may be decided as a matter of law. *See* Orig. Pet. ¶ 5(a) (describing December 17, 2015 notice that is the subject of this suit).

9. As a matter of law, the December 17, 2015 notice concerning the "Pilot Knob Planned Unit Development" substantially complies with TOMA requirements. The notice properly discloses the "date, hour, place, and subject" of the proposed City Council action. TEX. GOV'T CODE § 551.041. Rodgers does not contest that the date, hour, and place are properly noticed. He only contests where the "subject" was properly disclosed. *See* Orig. Pet. ¶ 10 (alleging that the notice should have disclosed how the City Council intended to allocate certain "waivers").

10. The City properly noticed the subject of the "Pilot Knob Planned Unit Development" item because it informed the public that the City Council intended to take action on the third

reading of a zoning case concerning a planned unit development ("PUD"). Specifically, the notice read: "Approve third reading of an ordinance amended City Code Chapter 25-2 by zoning property . . . from interim-rural residence (I-RR) district zoning and interim-single family residence-standard lot (SF-4A) district zoning to planned unit development (PUD) district zoning." Orig. Pet. ¶ 5(a). This meets the standard of notice that "alerts or informs the public that some action will be taken on a particular topic." *Cox Enterprises, Inc.*, 706 S.W.2d at 958; *see also Midway Protective League v. City of Dallas*, 552 S.W.2d 170 (Tex.App.—Texarkana 1977) (in zoning case, notice is sufficient if it warns neighbors of property in question that they may be affected by contemplated action).

11. Rodgers argues that the notice should have also disclosed details of the PUD zoning decision, including details of the agreement between the City and the developer concerning how certain fees would be allocated among City departments. *See, e.g.*, Orig. Pet. ¶ 6 (arguing that the City had "waived" certain development fees). Rodgers' argument is not supported by law, however, and would lead to absurd results in the context of PUDs, which are complex agreements that contain numerous elements. *See* Ex. A (City regulations concerning PUDs). If Rodgers' argument were to prevail, the City would be required to post massive notices of each PUD zoning action, which would have the contrary effect of defeating public participation by overloading agendas with details of each development.

12. When the City placed the "Pilot Knob Planned Unit Development" item on its agenda, it gave the public notice that each element of a PUD is potentially up for discussion. Thus, in regards to Rodgers' complaints, the City properly advised the public that it could take action on a zoning case that could have among its elements various terms, including provisions regarding land use (Ex. A, § 1.4.3); open space requirements (§ 2.3.1(C)); green building

requirements (§ 2.3.1(D)); public facility provisions (§ 2.3.1(G)); landscaping requirements (§ 2.3.1(H)); and mass transit connections (§ 2.3.1(I)). Furthermore, among the additional of potential PUD provisions, the public had notice that the PUD could provide for "affordable housing" and that the developer could receive development bonuses based upon participation in affordable housing programs. Ex. A at 7-10. The City was not required to reprint its Code to provide public notice that it would take action on various aspects of a PUD application. Rather, by giving the public notice that it would take action on a PUD zoning case, it necessarily incorporated into the notice that it could take action on PUD elements, including the affordable housing and development bonus aspects that Rodgers complains of in his petition.

13. Furthermore, in addition to giving notice of the planned action on PUD zoning, the City also made publicly available numerous documents related to the Pilot Knob zoning case, including the ordinance that would established the PUD. *See* Ex. B. The ordinance specifically described the affordable housing program elements of the Pilot Knob PUD. *Id.* at 5-7. Because this ordinance was publicly available in conjunction with the notice of planned action, each element of the ordinance should be incorporated into the notice. Given the combination of the notice and the ordinance itself, the public was meaningfully apprised of the proposed zoning action by the City Council, and the City substantially complied with TOMA.

14. Finally, even if the City should have provided more detailed notice concerning the use of development fees as part of the Pilot Knob PUD, any defect was subsequently cured when the City Council voted, on March 3, 2016, to reconsider the PUD agreement provisions concerning the allocation of development fees to affordable housing programs. *See* Ex. C. Because the Council will again consider three readings of the PUD ordinance, and because the reconsideration of the ordinance will specifically focus on the affordable housing and

development fee aspects of the PUD agreement, Rodgers' action regarding the December 17, 2015 City Council meeting is moot.

15. In sum, the City has properly given the public numerous opportunities to meaningfully participate in discussion concerning the Pilot Knob PUD and its various elements. Furthermore, the City has guaranteed that the public will have multiple additional opportunities to participate in discussion of the affordable housing and development fee aspects of the PUD agreement. Under these conditions, the City has far exceeded any requirements of the Texas Open Meetings Act. Accordingly, Rodgers has failed to state a claim, and any claim he might have had has been rendered moot. The City's plea to the jurisdiction should be granted.

III.
AFFIRMATIVE DEFENSES

16. As a home-rule municipality and political subdivision of the State of Texas, the City has governmental immunity from suit and from liability, save only to the extent of the partial waiver of same granted by the Texas Legislature, and the City affirmatively pleads and asserts the affirmative defense of governmental immunity.

17. The City has substantially complied with the Texas Open Meetings Act in regards to the notice issues identified by Rodgers' petition.

18. Rodgers' petition was rendered moot by Austin City Council action undertaken on March 3, 2016.

19. The City reserves the right to assert additional affirmative defenses as they become apparent.

IV.
REQUEST FOR DISCLOSURE

Pursuant to Rule 194 of the Texas Rules of Civil Procedure, the City requests that Plaintiff disclose the information and materials described in Rule 194.2.

V.
PRAYER FOR RELIEF

The City prays that Plaintiff take nothing by this suit and that it recover all court costs and other and further relief, both at law and in equity, to which it may show itself justly entitled.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Texas Rules of Civil Procedure, this 14th day of March, 2016.

Via e-Service and/or facsimile to:

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