

Ballot Study

City of Austin Charter Proposition 2 Save Our Springs Clean Water Amendment

May 13, 2006 General Election Ballot

Study Accepted

By Liveable City Board
April 22, 2006

liveablecity

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The Liveable City Clean Water Amendment Ballot Study

The Board of Liveable City designated a Board study team to review and report on the proposed Save Our Springs Clean Water Charter Amendment (Proposition 2) which qualified for the May 13, 2006 City General Election Charter ballot through citizen initiative. Proposition 2 is one of seven charter propositions on the ballot and will be voted on by City of Austin and Austin's extraterritorial jurisdiction voters. The purpose of the study is to present a review of the arguments for and against the proposed amendment to assist Austin voters in making their decision on this important public matter.

This study was accepted by the Liveable City Board of Directors on April 22, 2006.

About Liveable City

Liveable City is nonpartisan, nonprofit research, communications, capacity building and advocacy organization working to advance public policies that balance Austin's growth with our community's well being. The board is composed of experienced community advocates whose skills include neighborhood, business, academic, political, and environmental perspectives among others.

Liveable City's mission is to support solutions that address Austin's long-term social, environmental, and economic needs by focusing on the interconnections among issues while educating, informing and empowering citizen advocacy to improve quality of life.

Liveable City 611 S. Congress, Suite 200 A,
Austin, Texas, 78704

Telephone 512.326.3331
info@liveablecity.org
www.liveablecity.org

For questions email info@liveablecity.com or Wendi White at 512.326.3331

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Executive Summary

The Liveable City ballot study team examined the proposed Save Our Springs Clean Water Charter Amendment (Proposition 2) which qualified for the May 13, 2006 City General Election ballot.

The team found that Barton Springs Edwards Aquifer and the springs are becoming increasingly polluted, posing public health hazards for the thousands who rely on well water for drinking and who swim in the creeks and springs, as well as threatening the species that live in the watershed. Previous attempts to prevent pollution have proven insufficient in the face of increasing development. In response, environmental interest groups have proposed a change in the Austin City Charter, which is before the voters in the form of Proposition 2.

The primary *benefits* of Proposition 2 are that it would

- put protection of the Barton Springs aquifer in the city charter, reducing the likelihood of changes to city policies that aim to protect the aquifer;
- require that the city study the full effects of any expansion of roads, sewers, and other infrastructure on the Barton Springs watershed, and consider alternatives to expansion, before making any decision to expand;
- attempt to insure that “grandfathered” sites – those legally allowed to develop under older and less-restrictive regulations – produce no net increase in storm runoff; and
- increase the amount of information about grandfathering decisions to the public.

The primary *costs* of Proposition 2 are that it would

- restrict the city’s ability to encourage beneficial agreements including affordable housing, energy conservation, and other city objectives on the watershed;
- prevent the city from negotiating agreements outside the city limits that could help to prevent damage to the aquifer; and
- stimulate costly litigation and invite a response from the Texas legislature.

Proposition 2 would also allow subsidies only to firms that do not develop on the watershed. Over time, this may cause some firms to shift operations off the watershed. On the other hand, it may also reduce the number of firms interested in participating in the city’s planning efforts limiting capacity to affect developments in transit corridors and downtown, or to stimulate economic development off the watershed.

In short, Proposition 2 would provide both benefits and costs. The Liveable City ballot study team believes that people may reasonably disagree as to whether the good outweighs the bad.

I. Introduction

The City of Austin Charter

The form, powers, and limitations of Austin city government are laid out in the city charter – Austin’s constitution. The charter was first written in 1909 and has been amended many times since. Amendments can be proposed in two ways: by a vote of the city council, or by citizen initiative. All amendments must go before the voters, and are only added to the charter if a majority of voters agree. Nevertheless, no charter may contain any provision inconsistent with the Texas Constitution or any state law. Proposition 2 is one of seven charter amendments on the May 13, 2006 City ballot.

Proposition 2 Charter Ballot Language:

Charter ballot language is determined by a majority vote of the City Council. Save Our Springs Amendment supporters successfully contested in court an earlier version of Proposition 2 language they characterized as “misleading and inaccurate”. The judge found that the City Council “...exceeded its discretion by adopting ballot language that does not fairly portray the chief features of (the propositions).” Though contested, the language below will be on the May ballot. To compare the Proposition 2 wording with 2002 Charter language go to <http://www.ci.austin.tx.us/election/byrecord.cfm?eid=67>.

Proposition 2 Ballot Language:

“Shall the City Charter be amended to (a) limit investments in roads, utilities, water quality infrastructure, drainage infrastructure, and other infrastructure extension and capacity extensions in the Barton Springs Zone, which includes a large portion of southwest Austin and Travis County, including neighborhoods such as Oak Hill, Barton Hills, part of Zilker, Circle C, Travis Country, Village at Western Oaks, and Westcreek; (b) limit the city's ability to influence development in proposed utility and special districts in the extraterritorial jurisdiction; (c) limit the city's ability to enter into agreements that may subsidize private development in the Barton Springs Zone; (d) make all “grandfathering” decisions in the Barton Springs Zone under state law subject to City Council approval; (e) disqualify certain individuals from exercising certain property rights under state law in the Barton Springs Zone; (f) severely limit the city's ability to enter into economic development agreements citywide; (g) prohibit the city from participating in or supporting certain road projects; and (h) add an environmental policy statement?”

II. Background

Short History of Barton Springs Edwards Aquifer Protection Efforts

The Barton Springs Edwards Aquifer watershed, with rolling hills, beautiful creeks, and Barton Springs, has long been considered a jewel by the people of Austin and Central Texas.

The aquifer is an underground river that flows south of Austin to Barton Springs, near the Colorado River at Zilker Park. The aquifer provides drinking water to tens of thousands of residents of Hays County and southwest Travis County who rely on well water as well as water for business, agriculture, and recreation. The Aquifer flows through *karst* limestone – essentially rock with large holes. Because the holes in the limestone are large, aquifer water is not filtered; whatever goes into the aquifer comes out in wells and springs. It is the consensus of local

scientists that the thin soils, porous limestone, and rapid flow make the Edwards Aquifer especially vulnerable to pollution, including household chemicals, fertilizers and pesticides, and leaching of asphalt roads.

Pollution in the aquifer is important because of the potential public health hazard to thousands who rely on untreated well water for drinking and many others who are exposed to pollutants when they swim in the Barton Springs pool and creeks. The aquifer is also home to 50 species of plants and animals found nowhere else on Earth, some of them endangered. In particular, continuing pollution threatens to make the Barton Springs salamander, found only in the Barton Springs pool, extinct.

Pollution is increasing due to urbanization. In undeveloped areas, most pollutants are filtered by plants and absorbed by the soil. As more homes and businesses locate over the aquifer, more of the water that flows into the aquifer passing unfiltered over concrete and asphalt. Stormwater also passes more quickly into creeks in developed areas, increasing levels of sediment and pollution.

Early attempts to control pollution

The City of Austin and other local governments have tried for years to prevent pollution in the Barton Springs aquifer. Austin passed a series of watershed protection ordinances in the 1970s and 1980s, attempting to control the amount of impervious cover (buildings and parking lots) that could be built on a lot, and requiring detention ponds and other structures that keep rainwater from flowing directly into the aquifer. These early efforts were a focus for continual political conflict between development interests and conservationists. In 1987, the Texas legislature formed the Barton Springs/Edwards Aquifer Conservation District to regulate wells drilled over the aquifer. In 1992, citizens of Austin passed the SOS Initiative, an ordinance that called for stringent impervious cover limits and required that stormwater runoff be as clean after development as before.

One problem is that the vast majority of the Barton Springs Aquifer – about 75 percent – does not lie within Austin City limits. One way to address this problem is to buy land in the path of development, particularly if it includes caves, sink holes, or creek bottoms that must be preserved to maintain the aquifer's health. Austin has in fact taken over 15,000 acres of land on the aquifer out of development, either by buying it outright or by purchasing development rights. Nevertheless, 170,000 acres of land lies over the aquifer but outside city control.

“Grandfathering”

Partly in response to these environmental protection efforts, and at the behest of development interests, the Texas legislature passed a series of laws to exempt landowners and developers from compliance with stricter watershed protection ordinances. In particular, House Bill 4 barred a city from enforcing new water quality rules once a development was underway. Thus the state effectively “grandfathered” numerous developments begun before SOS and other local ordinances were passed. Although many permits for proposed developments over the Barton Springs Aquifer have expired, others remain on the books and the city continues to determine their status on a case-by-case basis. Because these are administrative decisions, they are made by city staff and do not require a public hearing or city council vote.

New threats: Toll roads and LCRA waterlines

During the first years of this decade, major new threats have risen to challenge aquifer protection efforts. Large-scale expansion of waterlines by the Lower Colorado River Authority intended to serve tens of thousands of additional households over the aquifer have begun. Additionally, the development of new debt financing schemes to allow toll road construction by the new Regional Mobility Authority forms the backbone of over one billion dollars in planned road expansion on or near the aquifer. Complicating the problem is that the location and construction of major highways in the Austin area are determined, not primarily by the city, but by the Texas Department of Transportation and the Regional Mobility Authority. These infrastructure improvements will likely stimulate further development.

Triggers for the latest aquifer protection effort

Because of the desirability of the watershed and Austin's strong growth rate, development over the aquifer remains high. Official city policy calls for new development to be directed to the desired development zone, and away from the drinking water protection zone (more or less, the Edwards Aquifer, with the Barton Springs section). Nevertheless, because of grandfathering legislation, developers are free to develop over the aquifer, so long as they meet whatever rules were in place when they first proposed the development. As a result, few developments comply with the Save Our Springs Citizen Initiative passed in 1992.

One such "grandfathered" development is Lantana, which was originally proposed as a mixed-use development in the mid-1970s and is required to meet the rules in place at that time. Stratus, the current developer of Lantana, recently acquired Advanced Micro Devices as an anchor tenant. AMD proposes to move 3,000 employees into an 825,000 square-foot campus located on the aquifer contributing zone. This would increase the number of vehicle trips across the aquifer each day and likely spur additional retail and residential development. AMD's decision also challenges existing City policy against locating a major employment center on the aquifer, making further relocations more likely in future.

Extensive "grandfathering," expansion of LCRA waterlines and accelerated toll road construction represent major challenges to long-term protection of the Barton Springs Edwards Aquifer. Many conservationists are concerned that it is only a matter of time before much of watershed becomes urbanized resulting in the loss of the aquifer. The Save Our Springs Charter Amendment is the latest in a series of efforts to protect the aquifer and Barton Springs.

III. What Does Proposition 2 Say?

The following is a short explanation of the ballot study committee's reading of the amendment language.

ARTICLE XIII. SAVE OUR SPRINGS AMENDMENT

Section 1 - Policy. The amendment reaffirms current city policies to preserve quality and quantity of water in the Barton Springs Edwards Aquifer. It describes the regional economic benefits of preventing water pollution, and cites a scientific study calling for limitations in infrastructure investment and impervious cover, and for directing further development off the aquifer. The amendment objects to the Texas legislature's limiting of the city's ability to protect the watershed, and calls for city policies to limit grandfathering and development agreements that would lead to increased development on the aquifer.

Section 2 - Conservation Measures – Calls on City, public officials, and citizens to request all parties implement aquifer conservation measures.

(A) Direct Development Downstream – Requires that the city prioritize infrastructure investments off aquifer. City policies should stress watershed protection over additional road capacity. Require economic, social, and environmental impact analysis before major infrastructure expansion over watershed with analysis of buy-out option. Prohibits City support for toll road projects that will receive financing through projected traffic increases on watershed. Adds policy statement requesting major employers to locate outside the watershed and calls for Chamber of Commerce to join the City and citizens to direct development into Desired Development Zone.

(B) Limitations on Subsidies – Prohibits City from agreements having the effect of subsidizing private development within Barton Springs watershed. Require developments receiving subsidies to repay full value if the firm or subsidiary uses "grandfather" claim to locate over the aquifer. Prohibits economic development agreement outside the watershed if subsidiary or spin off builds or locates a major employment center in the watershed. Allows agreement with firms moving two thirds of employees outside the watershed. Allows City action to support rural-scale, conservation development in watershed.

(C) Eliminate Grandfathering - Prohibits Council and staff from recognizing grandfather claims without 2/3 Council vote, specific unchanged development plan, and claim is mandated by superior state law. Prohibits Council and staff from recognizing grandfather claims when applicant has filed for bankruptcy protection. Requires any grandfathered development capture and treat stormwater runoff to prevent annual increase of volume of runoff.

(D) Other Measures – States that amendment is intended to guide Council and staff to take action to preserve aquifer.

Section 3 - Severability – If any part of amendment is found unconstitutional or invalid, the remaining portions shall remain intact.

Section 4 - Adoption and Implementation – Amendment takes immediate effect upon adoption.

IV. Arguments Pro and Con

A. Arguments Advanced by Proposition 2 Supporters

The Save Our Springs Charter Amendment should be supported because:

Unprecedented New Threats to the Aquifer Require Immediate Action

- The LCRA is planning to spend \$225 million for new waterlines over the aquifer to serve 45,000 homes.
- The CAMPO 2030 Regional Mobility Plan proposes \$1.25 billion in road expansions on or near the aquifer.
- Major employment centers such as AMD are attempting to build on the aquifer.
- There is consensus from local scientists and the U.S. Geological Survey that increasing levels of pesticides, fertilizers and other pollutants are present in the Aquifer.

City Council Inaction is Failing to Protect Barton Springs

- The amendment makes protection of Barton Springs a basic priority for Austin's future by integrating water quality with economic development.
- The Charter is the people of Austin's fundamental declaration of what kind of City we want to be and water is one of the most fundamental issues we face.

Major Road Expansions Including Toll Roads Threaten the Aquifer

- \$1.25 billion in new polluting roads are planned on or near the aquifer.
- Currently proposed developments are estimated to add over 78,000 new car trips per day over the aquifer.
- City supported debt-financed toll roads will spur development over the aquifer and pass costs to the community.

The City is Subsidizing Development Over the Aquifer

- The City Council is not supporting the longstanding City policy against locating major employers over the aquifer such as AMD.
- The City is making long-term development agreements that facilitate large developments over the aquifer such as the agreement with Stratus Properties.

Grandfathering is Undermining Protection of the Aquifer

- The City is not standing firm against grandfathering developments allowing them to build under weaker pollution controls than the Save Our Springs Ordinance.
- The City is granting grandfathered status to projects that bear little resemblance to their original proposal.

B. Arguments Advanced by Proposition 2 Opponents

The Save Our Springs Charter Amendment should be opposed because:

The Wording Was Developed in an Undemocratic Process

- The amendment was written in secret to bypass the democratic process.
- The Charter is our fundamental governing document and should not include comments about specific companies or policies.
- The amendment is poorly written and lacks definitions, so is certain to lead to future legal problems for the City.

Unintended Consequences Will Cost Taxpayers Millions

- The need to interpret and defend the amendment from certain challenge will require expensive time consuming legal battles.
- Poor drafting will invite a response from the Texas Legislature.
- As a charter amendment it cannot be changed for two years.

The Amendment Will Threaten Needed Road Improvements

- The amendment could threaten federal funding for City projects included in the CAMPO Regional Mobility Plan.
- The amendment conflicts with the state law requiring the City to partly fund utility relocations adjacent to state roadways.
- The decision to create toll roads and freeways are not within the jurisdiction of the Austin City Council.

Restricting Incentives Will Hurt Economic Development Across the City

- Restricting incentives on the watershed will eliminate the City's ability to secure open space and other benefits like affordable housing through development agreements.
- The amendment puts an unfair burden on companies by eliminating incentives for any business that previously located over the aquifer or has an "affiliate" or "spin-off" locate there in the future.
- The proposal puts Austin at a competitive disadvantage by attaching to economic development packages provisions that create long-term risk and uncertainty for companies such as the full payback provision if an "affiliate" or "spin off" locates on the aquifer any time in the future.
- The proposal would prevent the provision of conservation-oriented incentives, such as water conservation or solar rebates, to homes or businesses that are located on the aquifer.

Restricts Development Rights Under Grandfathering

- The City is already contesting “grandfathering” requests to the full extent of the law.
- The amendment will require the Council to vote on every grandfathering project taking valuable time from other serious issues.
- The proposal will undermine Austin’s long-term strategy to protect home rule land development powers at the Texas Legislature.
- The amendment may conflict with Federal bankruptcy law by denying access to grandfathering because of a bankruptcy by any applicant or permit holder during the life of the project.

V. Discussion of Proposition 2

The Liveable City ballot study committee strongly believes that the Barton Springs Edwards Aquifer is gravely threatened and that current strategies employed by the City of Austin are inadequate to protect the watershed in perpetuity. Reports from the Greater Edwards Aquifer Alliance, the U.S. Geological Survey and the large number of local scientists who published “Protecting the Edwards Aquifer: A Scientific Consensus” have conclusively shown that pollution from human activity continues to increase in the aquifer. Pesticides, metals, and petroleum hydrocarbons have all been detected above natural background levels in wells and in streams that recharge the aquifer. Furthermore, the massive expansion of roadways and waterlines is sure to promote further development and pollution of this fragile watershed. The study committee believes the question is not whether strong action needs to be taken to protect the aquifer, but whether the Save Our Springs charter amendment will add effective and appropriate tools to further that protection.

The ballot study committee will examine some of the key public issues related to the proposition in three parts. We will first consider the process arguments whether the language is appropriate for the charter, and whether the fact that it was drafted in a private setting is pertinent. We then consider arguments on the merits of the amendment: examining whether the strategies the amendment employs of prioritizing infrastructure investment, limiting subsidies, and scaling back grandfathering will succeed in their objective of protecting water quality in the Barton Springs watershed. We will then close with an examination of the issues related to implementation of the amendment should it pass.

Amendment Process

Appropriateness for charter. Some opponents have questioned the suitability of this amendment for inclusion in the city charter, our City’s fundamental governing document. Certainly it includes much language that is rarely found in charters, including a reference to a specific company, a direct quotation from a scientific study, and an objection to actions of the Texas legislature. This may make some people uncomfortable, and it may not be the best practice for a charter. But these provisions are not legally binding and have little practical effect.

A more substantial concern is that the city charter can only be amended every two years. If experience shows that any provision of this amendment has unintended negative consequences, the city will have to live with it until 2008. In contrast, an ordinance passed by citizen initiative (requiring 10% of voters signatures instead of the charter’s 5% requirement) can

be amended immediately, although a supermajority of the council (six of seven votes) typically is required. As a result, we should be particularly cautious in interpreting this amendment and its effects.

Charter amendment process. Some critics have called Proposition 2 “undemocratic” because it was developed by a citizen’s group rather than by the city council. Although the argument is no doubt intended to highlight differences between citizen initiatives and city council-sponsored amendments, the similarities are striking. It would not occur to any city councilmember to attempt to draft an amendment to a city charter in an open session of the council.

Now consider what the framers of Proposition 2 had to do to put this initiative on the ballot. As with the councilmember, a small group met to draft the language. Once written, the citizen’s group had to gather 20,000 signatures of voters registered in the City of Austin. By law, the full language of the proposed amendment needs to be available for citizens to read before signing (or deciding not to sign) the petition. Thus a minimum of 20,000 Austin voters had a chance to read the proposal before deciding whether to support it or not, a much higher standard than that adhered to by the Council.

We believe this argument against the proposition is itself undemocratic. Initiatives are part of the democratic process, authorized by the Texas Constitution. Although the citizen review process is different than that usually used for city council-sponsored amendments, it is no less rigorous. The amendment should stand or fall on its merits, not on how it came to be on the ballot.

Prioritizing Infrastructure Investments

Infrastructure priorities. For years, it has been the city’s stated policy to encourage development outside the Barton Springs watershed. This underlies the city’s master plan (Austin Tomorrow, developed in the late 1970s); it was an important consideration in the Austin Plan discussions and watershed ordinances of the 1980s, and of the Smart Growth policies of the 1990s.

This amendment would put this policy and strategy into the city charter. Specifically, it would write into the charter the city’s current stated priority of encouraging development outside the Barton Springs watershed and protecting water quality and public health and safety within it. It would do so by mandating that infrastructure improvements be “prioritized” outside the watershed. It would also require that any infrastructure improvements within the watershed only be adopted after careful consideration of the alternatives.

Contained in the amendment is a requirement for the city manager to prepare an “economic, social, and environmental impact statement” before proposing infrastructure improvements over the Barton Springs watershed. Depending on the scope of the study, there may be a significant cost to taxpayers, but the study committee believes it would be money well spent and may ultimately result in overall savings for infrastructure. The research record is clear: Development follows infrastructure. If the city is serious about limiting development over the Barton Springs watershed, it should only expand the infrastructure on which that development depends when it is required to protect public health and safety, and when there is no reasonable alternative.

Limiting City Support for Toll Roads. The amendment restricts the City from “supporting” any toll road, road extension or expansion in or “leading to” the Barton Springs Aquifer that relies on a “significant” traffic increase to finance the project. This provision raises questions of interpretation as to the meaning of “support” “significant” or “leading to” the Barton Springs watershed. This section of the amendment appears to conflict with State law that requires that a city participate in right-of-way purchases for freeways and pay a percentage of utility relocations adjacent to state roads. Opponents have suggested but the study committee has been unable to verify that the City may face loss of federal funding if it did not meet its responsibilities under CAMPO 2030 Mobility Plan. While these claims have not been verified, it does appear that the charter provisions are inconsistent with state law.

Subsidies

Limitation on subsidies. Current city economic development policy only allows incentives to be granted to investment and job creation projects in the Desired Development Zone (off the aquifer). This amendment would restrict the city from making any “development agreement, delay of annexation, or other types of agreements that have the effect of subsidizing private development within the Barton Springs watershed.” This is a broad statement, and covers a wide range of agreements including those that some people may see as being beneficial. For example, though proponents state that it is not their intention, opponents have argued the amendment would prohibit granting of city subsidies for affordable housing, green building, or solar rebates. While the study committee does not believe that the amendment language would prohibit all beneficial city programs within the watershed (affordable housing could be developed by a non-profit foundation), the language will require interpretation to allow some programs to go forward. On the other hand, the amendment clearly prohibits “delay of annexation” agreements, in which the city agrees not to annex property outside current city limits in exchange for the property owner’s agreement not to create a municipal utility district or to abide by current city development regulations.

Another concern involves subsidies to companies for activities outside the Barton Springs watershed. “Subsidies” come in a wide variety of forms, identified in the amendment but not limited to tax abatements, fee waivers, consent to creation of utility or other special districts, and infrastructure commitments. The amendment would require that a company accepting such a subsidy would have to return it in full if it later established a “major employment center” or built under a “grandfather claim” at any point later in the watershed. Major employment center is not defined, although figures between 200 to 500 employees have been suggested. So long as only that company is involved, the amendment seems a sensible way to persuade companies to develop outside the watershed.

The difficulty is that one company may have to pay for the actions of another. Consider the following scenario. In exchange for a subsidy of some kind, Company A agrees to site a factory or office outside the Barton Springs watershed, providing jobs and tax base. Then Company B (a completely independent company with former connection to Company A) moves a major employment center or uses a grandfather claim over the aquifer. Because Company B was at one time part of A – it was “spun off” – then Company A must repay the entire subsidy.

The same problem could apply, to lesser degree, to subsidiaries, parents, and affiliates – also mentioned in the charter amendment. Even companies in the same family can make independent decisions. Any company that has, has ever had, or is considering having subsidiaries, parents, or affiliates may have to think twice before accepting a subsidy of any kind from the City of Austin that it may have to pay it back without warning. This may limit the ability

of the city to enter into development agreements of any kind across the city, potentially losing a negotiating tool, and inhibiting the city's capacity to create jobs or tax base in the future.

This section seems intended for companies such as Stratus Properties, which has large developments over the aquifer and is seeking city subsidies for downtown development and transit-oriented development. But, the wording is vague, a favorable interpretation is necessary, and there still may be unintended negative consequences.

Grandfathering

Decision making authority. As described above, proposed developments on the Barton Springs watershed must meet the standards of the SOS ordinance unless the developer can show that the proposal dates from a period before SOS was passed. If so, then the developer is free to rely on whatever water quality regulations were in place at the time the proposal received its first permit. Decisions are made by city staff and are guided by precedent. The critical question is whether the current proposal is fundamentally the same as the original proposal. If the proposal has changed, it is not "grandfathered" and the developer must abide by the SOS ordinance. According to city records, since review began in May of 1999, city staff has granted 122 of 192 grandfathering claims in the watershed.

Proposition 2 would transfer authority for decision making from city staff to the City Council, and would require a two-thirds vote (five of seven council members) to uphold any grandfathering claim. Although the amendment requires that the proposal be denied unless it "has not changed," under city rules developers currently have some leeway to make changes after the initial subdivision permit or site plan has been adopted. Supporters of the practice argue that some leeway is necessary, to ensure fairness and to avoid litigation. The most likely result is that the council would respect precedent and continue to provide developers with some wiggle room.

It is not clear whether this provision would produce a major change in grandfathering decisions. And it is debatable what role general public comment would play in the council's deliberations given the complexity of the legal issues. But shifting the decision to the council would certainly produce a change in the amount of information available to the public about these decisions. City staff track the status of grandfathering claims, but do not publish the results; most citizens are probably not even aware that such decisions are being made. Bringing these decisions into the open would raise awareness of the issues and give concerned citizens a better sense of the threats the watershed faces.

Changes in rules. Proposition 2 also would prohibit any grandfathered development from discharging more water off the site than it did in its undeveloped state. Due to the addition of impervious cover, developed sites discharge more water than undeveloped sites; the water is also dirtier. The methods used to reduce discharge (for example, detention ponds) also clean up the discharge.

This provision conflicts with HB4 and its successors, in that it makes new demands on otherwise-grandfathered developers. The amendment justifies this by relying on a loophole written into the statute: The provision is required "to prevent imminent destruction of property and injury to citizens." Such decisions are usually made on a case-by-case basis; large developments and those with much impervious cover are obviously more destructive. On the other hand, any increase in runoff increases the likelihood of flood and the amount of pollution in

the aquifer, so this provision is not unreasonable. The proponents argue that the City has relied on the same provision in its recent moratorium on McMansions.

The last “grandfathering” provision is that a project ends and consequently loses its grandfathered status if any applicant in the series of permits files for bankruptcy. There is substantial disagreement between proponents and detractors on this provision. Proponents argue that a project is a continuous endeavor, and bankruptcy breaks the continuity. Opponents argue that federal law, which typically holds that rights and permissions go with the land, not the individual, governs these decisions. The issue will likely be settled in the courts.

Implementation

Need for interpretation. All laws must be interpreted and the proposed amendment is no exception. Eventually, any interpretation by the city council and city staff may be open to challenge through the courts. Because this is a time-consuming process, the city can provide some measure of certainty to all interested parties by passing ordinances and resolutions and issuing administrative procedures that explain how the city will define the terms and act on the new requirements. The interpretation issues are even thornier because this is a charter amendment, not an ordinance. The City rules must be consistent with the charter; if they appear to be inconsistent in any way, it will only stimulate further litigation. Nevertheless, meetings with developers, environmentalists, neighborhood groups, and others with an interest in development in the Barton Spring watershed may help the city to develop rules that are both consistent with the amendment and likely to head off needless law suits.

Legislative response. Previous attempts to protect the Barton Springs watershed have met with opposition from the Texas legislature. Landowners and developers have persuaded legislators to sponsor bills that would limit the city’s right to protect water quality, and some of these bills have passed. The courts have struck many of these laws down as an unconstitutional restriction on the rights of home rule cities. But not all such laws are unconstitutional, litigation is expensive, and bad blood between the city and the legislature can be costly in itself. The threat of a response by the legislature hangs over all of Austin’s efforts to protect its water quality, but the study committee believes the amendment should stand or fall on its merits.

Costs of litigation. The proposed amendment relies on many terms that are not defined, leaving open the potential for legal challenges. The city council must “prioritize” infrastructure outside the watershed and water quality on the watershed. Whether this precludes new roads and sewers on the watershed or merely lowers their priority is unclear. As a matter of policy, companies are asked to locate “major employment centers” off the watershed, and could not receive assistance from the city if they did. How big is “major”? The amendment doesn’t say.

Like any law, these terms can be clarified in a number of ways. The city council and city staff could issue interpretations. Because the courts presume that actions of a local government are valid until proven otherwise, these decisions would strengthen the city’s hand in litigation. Nevertheless, these decisions are likely to be controversial, and the court would ultimately rule on many of these issues. Litigation is time-consuming, expensive, and uncertain. The meaning of many of these provisions will remain murky until the judges make their ruling.

As described above, some provisions of the amendment appear to be inconsistent with state and federal law. The amendment includes a severability clause, however, so even if one section is struck down the remaining sections will stay on the books.

Although any charter amendment, ordinance, or policy is subject to litigation – and in our society, almost certainly will be – this amendment is more likely to be litigated than most. The vagueness of some of the provisions, and inconsistency with state and federal law, put the city in a difficult position. The study committee believes the potential for costly litigation is a mark against Proposition 2, but not by itself sufficient reason to vote against it.

VI. Conclusions

Proposition 2 will help to protect the Barton Springs aquifer, but at a cost. Whether Proposition 2 should be enacted or not depends on how important one believes these benefits and costs to be.

On the benefit side, Proposition 2 puts Barton Springs aquifer protection in the city charter – making it a fundamental principle in our fundamental governing document. It also gives additional weight to some current city policies, including giving priority to infrastructure improvements outside the watershed, moving new development downstream, and restricting grandfather claims to the minimum allowable by state law. Though many of these may have little effect on current policy, they may give the city council pause should it attempt to change these policies.

Proposition 2 would also enact some tangible benefits into law. It would require the city to study the full effects of any expansion of roads, sewers, and other infrastructure on the Barton Springs watershed, and to consider alternatives to expansion, before making any decision to expand. It would require that grandfathered sites produce no net increase in storm runoff, and move grandfathering decisions from the back room into public view. We believe these are clear improvements over current law and policy, and would help to prevent pollution of the aquifer.

Some of the costs are equally clear. At a minimum, Proposition 2 would put restrictions on the city's ability to encourage affordable housing, energy conservation, and other city objectives on the watershed. Conceivably, it may eliminate the city's ability to encourage these objectives on the watershed. It will prevent the city from entering into delay of annexation agreements, which (regardless of their current uses) at least have the potential for preventing damage to the aquifer. The polarizing language and the more far-reaching clauses invite a response from the Texas legislature. And, because many of the terms are undefined, Proposition 2 will probably stimulate costly litigation.

Other provisions of Proposition 2 are neither clearly good nor clearly bad. In particular, there are benefits and costs to eliminating subsidies to firms that develop on the watershed. The benefit is that, over time, most developers will recognize that they can make more money off the watershed than on it, and divest themselves of their watershed holdings to qualify for city subsidies. The costs are that the city has less leverage to improve developments by these firms off the aquifer. There may be fewer opportunities to affect developments in transit corridors and downtown, or to stimulate economic development off the watershed.

Finally, some provisions may not matter at all. Superior state and federal law could supercede the bankruptcy provision and the ban on support for toll roads. The reference to AMD and the plea for firms to move off the watershed have no force of law. And the fact that the proposition came before the voters in the form of a voter initiative rather than by city council vote is simply immaterial.

In short, Proposition 2 would provide benefits and costs. The study committee believes that people may reasonably disagree as to whether the good outweighs the bad.

Respectfully submitted, Liveable City ballot study team:

Cathy Echols
Bill Spelman
Mark Yznaga

VI. Appendix

A. Proposed Charter Proposition 2 Language

TEXT OF ORDINANCE NO. 20060309-005, AS AMENDED BY ORDINANCE NO. 20060403-002.

AN ORDINANCE ORDERING AN ELECTION TO BE HELD IN THE CITY OF AUSTIN AND ITS EXTRATERRITORIAL JURISDICTION ON MAY 13, 2006, FOR THE PURPOSE OF SUBMITTING A PROPOSED CHARTER AMENDMENT TO THE VOTERS; AND PROVIDING FOR THE CONDUCT OF THE ELECTION.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. A charter amendment election shall be held in the City and its extraterritorial jurisdiction on May 13, 2006, at which the ballot shall be prepared to permit voting “yes” or “no” on the following proposition: Shall the City Charter be amended to: (a) limit investment in roads, utilities, water quality infrastructure, drainage infrastructure, and other infrastructure extensions and capacity expansions in the Barton Springs Zone, which includes a large portion of southwest Austin and Travis County, including neighborhoods such as Oak Hill, Barton Hills, part of Zilker, Circle C, Travis Country, Village at Western Oaks, and Westcreek; (b) limit the City’s ability to influence development in proposed utility and special districts in the extraterritorial jurisdiction; (c) limit the City’s ability to enter into agreements that may subsidize private development in the Barton Springs Zone; (d) make all “grandfathering” decisions in the Barton Springs Zone under state law subject to city council approval; (e) disqualify certain individuals from exercising certain property rights under state law in the Barton Springs Zone; (f) severely limit the City’s ability to enter into economic development agreements city-wide; (g) prohibit the City from participating in or supporting certain road projects; and (h) add an environmental policy statement?

PART 2. If this proposition is approved by the majority of the voters voting at the election, the City Charter shall be amended to add a new Article XIII to read:

ARTICLE XIII. SAVE OUR SPRINGS AMENDMENT

§ 1. POLICY.

(A) This Amendment reaffirms and extends City of Austin policies and commitments to assure that the quality and quantity of Barton Springs Edwards Aquifer flows are preserved and sustained. The economic prosperity of the Austin area is best served by preventing the pollution and depletion of the Barton Springs Edwards Aquifer caused by urbanization and by preserving the native soils and vegetation of the scenic Hill Country watersheds that supply the Aquifer and Springs.

(B) "Governments, private corporations, and citizens should act promptly to direct urban development away from the Edwards Aquifer’s recharge and contributing zones through control of infrastructure investment. . .” Impervious cover must be restricted in the Aquifer’s watershed “to levels that will sustain existing water quality.” (Quoting “Protecting the Edwards Aquifer: A Scientific Consensus,” as written and endorsed by Central Texas scientists, environmental engineers, and planners in August, 1997).

(C) The citizens of Austin object to actions by the Texas Legislature to undermine traditional home rule powers exercised by the City Council and the citizens of Austin to, among other purposes, protect the Barton Springs watershed. Long term and perpetual grandfathering of development as it applies in the Barton Springs watershed is contrary to home rule and the right and duty to protect public and private property and human health and safety and the further obligation to refrain from abdicating these continuing rights and duties. The policy of the City of Austin is to minimize and, where possible, to eliminate grandfathering and long-term development agreements that evade current rules and ordinances that strengthen water quality, recharge and spring flow protection in the Barton Springs watershed.

§ 2. CONSERVATION MEASURES.

In furtherance of the above, the City of Austin and its elected officials must take action -- and the citizens of Austin request that private corporations, other governmental agencies, other state, local and federal elected officials, and interested persons also act, as appropriate -- to implement the following Aquifer conservation and sustainability measures:

(A) **DIRECT DEVELOPMENT DOWNSTREAM.** The City must prioritize investments in roads, utilities, and other infrastructure extensions and capacity expansions that support private development in areas located outside of the Barton Springs Edwards Aquifer watershed. City actions and policies on highways and roads within the Barton Springs watershed must prioritize watershed protection, along with safety and efficient transportation for existing residents, and not significant capacity expansion.

(1) Before the City expends any significant funds on any major development infrastructure extensions or expansions within the Barton Springs watershed, the City Manager shall prepare an economic, social, and environmental impact analysis on the proposal and on alternatives that would meet the needs of existing residents, including non-structural alternatives such as buying out proposed development lands that would otherwise generate traffic, utility demands, and pollution if left to develop. Such analysis shall be subject to public hearing before the Council.

(2) The City must not support any toll road project, as an expansion, extension or conversion of a roadway located in or leading to the Barton Springs watershed, that relies on projections of toll revenue collections that predict any significant traffic increase from or over the Barton Springs watershed to support financing of all or part of the project.

(3) The citizens of Austin respectfully request that major employers, including Advanced Micro Devices, locate major employment centers outside the Barton Springs watershed and further request the Chamber of Commerce and others work with our city and citizens to direct significant urban and suburban development away from the Barton Springs watershed and into Austin's Desired Development Zone.

(B) **LIMITATIONS ON SUBSIDIES.** The City of Austin is without authority to enter into any development, delay of annexation, or other types of agreements that have the effect of subsidizing private development within the Barton Springs watershed through, for example and without limitation, granting tax abatements, infrastructure commitments, fee waivers, consent to creation of utility or other special districts, or other measures.

(1) Any City economic development agreement for development outside the watershed must require the recipient or beneficiary to repay the full value of the package if it or any subsidiary, parent, spin-off, or affiliate company builds or occupies any facility in the Barton Springs watershed that was built subject to any "grandfather" claim to avoid current water quality protection standards, or locates a major employment center in the Barton Springs watershed.

(2) The City is without authority to enter into any economic development agreement providing tax abatements or other subsidies to assist development outside the Barton Springs watershed where any subsidiary, parent, spin-off, or close affiliate of the beneficiary of the proposed recipient company has built, is currently building or seeks to build or occupy a major employment center in the Barton Springs watershed. However, this provision shall not restrict the City from entering into an incentive agreement with a company that has a significant number of employees located in the watershed and the agreement includes a binding commitment to promptly move at least two-thirds of the employees located in the watershed to a site or sites located outside the watershed.

(3) Nothing in this charter amendment shall prevent the City from taking actions to encourage or support rural-scale, conservation oriented development in the Barton Springs watershed.

(C) ELIMINATE GRANDFATHERING.

(1) In order to protect against the imminent destruction of property or injury to persons, the City Council and City Staff are without authority to recognize any "grandfather" claim seeking to avoid compliance with the Save Our Springs ordinance unless the claimant affirmatively shows and at least two-thirds majority of the City Council finds that the "initial application" or other basis for "grandfather" claim defined a specific development plan and that plan has not changed and further finds that recognizing the grandfather claim

is mandated by superior state law.

(2) The City Council and staff are without authority to recognize any “grandfather” claim, regardless of whether the section (C)(1) finding is made, where any applicant or permit holder in the series of applications has filed for bankruptcy protection under Federal bankruptcy laws.

(3) In order to preserve recharge and prevent downstream erosion and flooding that damages the Aquifer, and in order to prevent imminent destruction of property and injury to persons, the City must require any new development or redevelopment grandfathered from the Save Our Springs ordinance to include a stormwater capture and treatment system that prevents any annual increase in the volume of stormwater runoff from the developed site as compared with the undeveloped site. The City must assure that this requirement complies with § 245.004(11), Texas Local Government Code.

(D) **OTHER MEASURES.** These measures approved by the citizens of Austin to save our springs are intended to serve as a guide and inspiration to the Austin City Council and the City Manager to take other actions necessary or appropriate for the conservation and preservation of the Barton Springs Edwards Aquifer.

§ 3. SEVERABILITY.

If any provision or phrase of this charter amendment, or the application of the same to any person, property, or set of circumstances is for any reason held to be unconstitutional, void, or otherwise invalid, the validity of the remaining portions of this charter amendment shall not be affected by that invalidity; and all provisions and phrases of this charter amendment are severable for that purpose.

§ 4. ADOPTION AND IMPLEMENTATION.

Upon approval by the voters of the City of Austin, this charter amendment shall take effect immediately. In the event of any conflict with other provisions of the Austin City Charter, the provisions of this Save Our Springs Amendment shall prevail. This Amendment shall be codified together and as a separate article of the Austin City Charter.

PART 3. The City Clerk is directed to prepare the amendments to Exhibits A – E of Ordinance No. 20060302-002 that are necessary to provide for voting in the City’s extraterritorial jurisdiction and present the amendments for council approval.

PART 4. The election shall be conducted as provided in Ordinance No. 20060302-002, as amended. The provisions of Ordinance No. 20060302-002, as amended, relating to the conduct of the election are incorporated by reference as part of this ordinance in order to conduct voting in the City’s extraterritorial jurisdiction.

PART 5. This ordinance takes effect on March 20, 2006.

B. Persons Interviewed for Study

Bill Bunch - Executive Director, Save Our Springs Alliance
Jim Cousar – Attorney, Thompson and Knight LLP, for Coalition for Austin’s Future PAC
(amendment opponents)
Laura Huffman – Assistant City Manager, City of Austin
Anne Morgan – Attorney, City of Austin
Holly Noelke – Attorney, City of Austin
Brad Rockwell - Deputy Director, Save Our Springs Alliance
David Smith – Attorney, City of Austin

C. Web Resources

Proposition Supporters Websites

Clean Austin Campaign Website: cleanaustin.org/index.php

Clean Austin Blog: <http://www.cleanwateraustin.blogspot.com/>

Save Our Springs Alliance: www.sosalliance.org/

Save Our Springs Hill Country Road Planning Video:
www.sosalliancemediacom.org/hillcountryroads6.swf

Save Our Springs Hill Country Roads Website: <http://www.hillcountryroads.com/?news>

Proposition Opponents Websites

Real Estate Council of Austin (major funder of opposition):
www.recaonline.com/docs/2006_charter_amendments

EDUCATE PAC (Opponents): <http://www.educatepac.org/default.asp>

Building Owners and Management Association of Austin Charter Information:
www.bomaaustin.org/associations/3306/files/QandACleanWater.pdf

Greater Austin Chamber of Commerce Advisory Opposing Proposition: www.austin-chamber.org/TheChamber/AboutTheChamber/governmental.html#table2

City of Austin Website

City of Austin 2002 Charter Election Ballot Language
<http://malford.ci.austin.tx.us/election/byrecord.cfm?eid=67>

City of Austin Proposition 2 Ordinance Wording:
www.ci.austin.tx.us/election/downloads/20060403-002eng_prop2.pdf

City of Austin Website with SOS Presentation on Barton Springs
http://www.ci.austin.tx.us/budget/beac/downloads/20050927beacpres_sos.pdf

City of Austin Political Action Committees Contribution and Expenditures Reports
<http://www.ci.austin.tx.us/election/cfreports.htm>

Other Background Information

Barton Springs Edwards Aquifer Conservation District: <http://www.bseacd.org/>

San Antonio Express and News Grandfathering Special Section:
<http://www.mysanantonio.com/news/environment/stories/MYSA101605.1A.vested.main.3d67547.html>

RealEstateJournal.Com Story on Conservation Land Purchase:
<http://www.realestatejournal.com/propertyreport/newsandtrends/20060106-carlton.html>

LCRA Hill Country Water Planning: http://www.lcra.org/water/utility_details.html

D. Additional Resources (Available upon request from study committee)

City of Austin Law Department Memorandum, Feb. 6, 2006, on SOS Proposed Charter Amendments by Mitzi Cotton and Holly Noelke, attorneys.

Office of the Attorney General John Cornyn Opinion No. JC-0425 to Sen. Frank Madla on Section 245.002 of the Local Government Code.

Protecting the Edwards Aquifer: A Scientific Consensus, 1999 document

Edwards Aquifer Protection Plan - Greater Edwards Aquifer Alliance Vision and Regional Protection Plan endorsed by 23 conservation groups across the region.

Greater Edwards Aquifer Alliance Statement to the Texas Commission on Environmental Quality, August 12, 2005.

Former Austin City Council Member Daryl Slusher letter, 3.8.2006, opposing charter amendments

Reply to Daryl Slusher 3.8.2006 letter posted on Clean Austin Blog.
<http://cleanwateraustin.blogspot.com/2006/03/read-response-to-daryl-slusher-and.html>

For questions: info@liveablecity.com or Wendi White at 512.326.3331