Reverse and Render; Opinion Filed July 22, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01195-CV

ELIZABETH CARRUTH, MATTHEW TIETZ, JANIS NASSERI, JUDITH KENDLER, and STEPHEN PALMA, Appellants
V.
LISA HENDERSON, IN HER OFFICIAL CAPACITY AS CITY SECRETARY, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-00469-2016

OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Schenck

Elizabeth Carruth, Matthew Tietz, Janis Nasseri, Judith Kendler, and Stephen Palma, residents and qualified voters of the City of Plano, appeal the summary judgment in favor of the city secretary of the City of Plano ("City Secretary") in their suit seeking to compel the City Secretary to present a citizen's referendum petition concerning the Plano Tomorrow Comprehensive Plan to the Plano City Council ("City Council"). In a single issue, appellants urge the trial court erred in granting the City Secretary summary judgment and in denying their motion for summary

judgment. We reverse the trial court's summary judgment in favor of the City Secretary, render judgment in favor of appellants, and direct the district court to issue a writ of mandamus, as requested by appellants below, ordering the City Secretary to present the referendum petition to the City Council.

HOME-RULE MUNICIPALITIES, COMPREHENSIVE PLANS, AND REFERENDUMS

Home-rule municipalities, such as the City of Plano, "derive their powers from the Texas Constitution," "possess the full power of self government," and generally, "look to the Legislature not for grants of power, but only for limitations on their power." *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (quoting *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490–91 (Tex. 1993)).[1] Given the broad grant of power to home-rule municipalities, it has long been understood that such cities have enjoyed the authority to develop and promulgate long-term plans to protect the health, safety and welfare of their citizens. In 1997, the legislature conferred similar powers on general-law municipalities. TEX. LOC. GOV'T CODE ANN. §§ 213.001–.006. The City Secretary urges that this enactment—and its interplay with municipal zoning ordinances—has the effect of divesting the right of citizens to initiate referenda. As detailed below,

[1] In contrast to home-rule municipalities, general-law municipalities are political subdivisions created by the state and, as such, possess only those powers and privileges that the state expressly confers upon them. *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 531 (Tex. 2016).

we disagree. Because the relationship between a city charter, legislative regulation of comprehensive plans in Chapter 213, and the citizens' right to initiate referenda, is complex and subject to well-developed and distinct rules of construction, we will begin with a discussion of their general operation.

Chapter 213 of the local government code now comprehensively addresses municipal comprehensive plans. It provides that the governing body of any municipality "*may* adopt a comprehensive plan" for the long-range development of the municipality, including provisions on land use, transportation, and public facilities, and provides that such a plan or coordinated set of plans *may* be used to coordinate and guide the establishment of development regulations. *Id.* § 213.002(a),(b)(1)(3) (emphasis added). As to procedure, the legislature provided a long-term plan "*may* be adopted or amended by ordinance" after a public hearing allowing testimony and written evidence and review by the city's planning commission or department, if one exists, *or* a city *may* establish in its charter or by ordinance the procedures for adopting and amending a comprehensive plan. *Id.* § 213.003 (emphasis added); *see also* 2 TEX. PRAC. GUIDE REAL ESTATE LITIG. § 8:47. Zoning regulations *must* be adopted in accordance with a comprehensive plan, if one exists. LOC. GOV'T § 211.004; 2 TEX. PRAC. GUIDE REAL ESTATE LITIG. § 8:44 (no requirement in state law that a municipality adopt a comprehensive ordinance that will constitute its "comprehensive plan") (citing *Bernard v. City of*

Bedford, 593 S.W.2d 809, 812 (Tex. App.—Fort Worth 1980, writ ref'd n.r.e.)); 2 TEX. PRAC. GUIDE REAL ESTATE LITIG. § 8:53 (where a municipality has a separately adopted comprehensive plan, the law is settled that the adopted comprehensive plan must, by statutory mandate, serve as the foundation for subsequent zoning amendments) (citing *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 294–95 (Tex. App.—Dallas 1989, writ denied)). The legislature was also aware of the potential interplay with zoning rules. It separately required that maps of a comprehensive plan *must* contain the statement that a "comprehensive plan *shall not* constitute zoning regulations or establish zoning district boundaries." LOC. GOV'T § 213.005 (emphasis added).

Meanwhile, the citizens of Texas municipalities have long enjoyed the power to initiate "referendums" and "initiatives." A "referendum" is the practice of submitting a question to the voters of whether legislative action taken by a governmental body should stand. An "initiative" is the right of a citizen, or a defined number of citizens, to originate legislation by submitting it to the voters of the jurisdiction. John Martinez, *Direct Participation: Initiative and Referendum*, 1 LOCAL GOV'T LAW § 9:3 (2020). Municipal charters may address each of these powers. The powers of initiative and referendum, as provided for in a city's charter, are the exercise by the people of a power reserved to them and not the exercise of a right granted, and 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. *Taxpayers' Ass'n of Harris Cty. v. City of Houston*, 105 S.W.2d 655, 657 (Tex. 1937). It is uncontested here that, with limited exceptions, these powers have been reserved by the citizens of Plano.

Specifically, the City of Plano's Home Rule Charter (the "Charter") permits qualified voters to submit a referendum petition seeking reconsideration of and a public vote on *any* ordinance, other than taxation ordinances. PLANO, TEX., HOME RULE CHARTER § 7.03. The referendum petition must be filed with the City Secretary within thirty days of passage or publication of the ordinance and be signed and verified as required by section 7.02 of the Charter. *Id.* Section 7.02 provides that a petition must be signed by at least twenty percent of the qualified voters at the last regular municipal election, or one hundred fifty, whichever is greater. *Id.* § 7.02. "Immediately upon the filing of such petition, the person performing the duties of city secretary *shall* present said petition to the city council." *Id.* § 7.03 (emphasis added).

After presentation of a referendum petition by the City Secretary, 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." *Id.* Upon submission of the ordinance to popular vote, "[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." *Id.*

The City Secretary contends that in enacting Chapter 213, in light of earlier judicial decisions limiting the right to pursue an initiative as it respects zoning regulations, the legislature intended to remove the citizens' power under the City of Plano's Charter to present the referendum at issue here. For the reasons set forth herein, the City Secretary's contention lacks merit.

BACKGROUND

On October 12, 2015, following public hearings and review by the city planning department, the City Council adopted ordinance 2015–10–9 (the "Ordinance") establishing a new comprehensive plan, known as the Plano Tomorrow Comprehensive Plan (the "Plan"), and repealing the previous comprehensive plan, adopted in 1986. Immediately thereafter, several citizens began collecting signatures on a petition seeking a referendum under the provisions of the Charter. On November 10, 2015, the petition was presented to Lisa Henderson, the City Secretary.

Although the City Secretary did not make a formal presentment of the petition to the City Council, the City Council met on November 23, 2015, to discuss the

petition and was advised by outside counsel that "zoning regulations" are not subject to a referendum vote.[2]

When no action was taken on the petition,[3] appellants filed suit against the City of Plano, the City Secretary, the Mayor, and the members of City Council (collectively the "City") seeking a writ of mandamus directing the City Secretary to present the petition to the City Council and, in turn, directing the City Council to either reconsider and repeal the Plan or submit the referendum to popular vote. In addition, appellants sought a declaration that, pending approval by the voters in a referendum, the Plan is suspended and other, related declarations.

The City filed a plea to the jurisdiction challenging the ripeness of the controversy and asserting governmental immunity. The trial court denied the plea, and the City sought review of that ruling by interlocutory appeal in 2016.

This Court resolved that appeal by concluding the petition for writ of mandamus against the City Secretary was ripe for decision and subject to the *ultra vires* exception to governmental immunity although the claims against the City Council were not yet ripe. *City of Plano v. Carruth*, No. 05-16-00573-CV, 2017

[2] As we discuss later in this opinion, zoning and comprehensive plans are not synonymous.

[3] The City Secretary's refusal to comply with the mandatory provision of the Charter for presenting the petition to the City Council is based upon her contention that the subject matter of the Ordinance has been withdrawn from the referendum process.

WL 711656, at *4 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) (mem. op.).[4] Both sides sought review in the Supreme Court of Texas. That court denied the parties' petitions. Consequently, at this juncture, appellants and the City Secretary are the only parties to the suit.

Prior to the City's appealing the denial of its plea to the jurisdiction, appellants filed a motion for partial traditional summary judgment urging the City Secretary has a ministerial duty to present the referendum petition to the City Council. After this Court remanded this case to the trial court, the City Secretary filed a cross-motion for traditional summary judgment asserting she did not have a ministerial duty to present the petition to the City Council or, alternatively, the Ordinance is not subject to a referendum. Without specifying the grounds for its rulings, the trial court granted the City Secretary's motion and denied appellants' motion. This appeal followed.

STANDARD OF REVIEW

In their sole issue, appellants challenge the trial court's rulings on the parties' motions for traditional summary judgment. A party moving for traditional summary judgment under Texas Rule of Civil Procedure 166a(c) must establish that no

[4] Under the rule of orderliness and the law-of-the-case doctrine, all determinations necessary to the disposition of the earlier appeal are generally foreclosed from re-examination. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Robinson v. Home Owners Mgmt. Enter., Inc.*, 549 S.W.3d 226, 236–37 (Tex. App.—Fort Worth 2018, pet. granted).

genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). If the movant discharges its burden, the burden shifts to the nonmovant to present to the trial court any issue that would preclude summary judgment. *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 50 (Tex. App.—Dallas 2006, pet. denied). When, as in this case, both parties move for summary judgment, each party bears the burden of establishing it is entitled to judgment as a matter of law. *Id.* On appeal, the reviewing court applies a *de novo* standard of review, determines all questions presented, and, if it determines error, should reverse and render the judgment that the trial court should have rendered, or reverse and remand if neither party has met its summary-judgment burden. *See Comm'rs Ct. of Titus Cty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997); *Hackberry Creek*, 205 S.W.3d at 50. If the issue raised is based on undisputed and unambiguous facts, as in this case, the appellate court determines the question presented as a matter of law. *Johnston v. Crook*, 93 S.W.3d 263, 267 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

DISCUSSION

I. Appellants' Motion for Traditional Summary Judgment

Appellants' motion sought to establish a right to the issuance of a writ of mandamus compelling the City Secretary to present the referendum petition to the City Council. Such a writ "[w]ill issue to compel a public official to perform a

ministerial act." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). An "act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *Id.*

In moving for summary judgment against the City Secretary, appellants relied on section 7.03 of the Charter, which 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[,]

PLANO, TEX., HOME RULE CHARTER § 7.03, and evidence that, despite having received the referendum petition, which complied with section 7.02 of the Charter, the City Secretary has failed to present the petition to the City Council.[5]

A prior panel of this Court has concluded,

> The City Secretary's duty under section 7.03 is clear: the secretary must present the petition to the City Council immediately upon the filing of such petition. Charter § 7.03. This is a ministerial duty and the allegations support the conclusion that the City Secretary failed to perform that duty.

See Carruth, 2017 WL 711656, at *4. The panel further held,

> [T]he Plano City Charter does not give the City Secretary any discretion to determine whether the subject matter of a referendum petition has been withdrawn from the referendum power by general law or the charter. We will not imply such discretion absent express language in the charter supporting its existence. Therefore, appellees alleged facts supporting a claim for mandamus relief against the City Secretary under the ultra vires exception to governmental immunity.

Id. at *5 (citations omitted). As noted, we are generally foreclosed from re-examining the prior panel holdings here under the law-of-the-case doctrine and the rule of orderliness. Accordingly, we conclude appellants met their summary-judgment burden on the issue of whether the City Secretary was required to present the petition to the City Council and, thus, are entitled to a writ of mandamus unless

[5] Appellants presented the declaration of Carruth, in which she established she prepared and delivered the petition to the City Secretary within 30 days of the date the City Council adopted the Plan, and the City Secretary has not presented the petition to the City Council. The City Secretary concedes that all procedural requirements for the presentation of the petition for referendum have been met and no objection is made to its form.

the subject matter of the Ordinance has been withdrawn from the field in which the referendum process is operative. *See Glass v. Smith*, 244 S.W.2d 645, 648 (Tex. 1951).

II. The City Secretary's Motion for Traditional Summary Judgment

Our prior panel opinion did not address the question of whether the subject matter of the referendum had been withdrawn from the referendum process by operation of the general law or the Charter. While the City Secretary raised the issue in her cross-motion for summary judgment, appellants contend that the issue is not jurisdictionally ripe for decision until after the City Council refuses to repeal the Ordinance and an election occurs. We will address the jurisdictional issue first.

A. The Question Before Us Is Ripe

Appellants' ripeness argument is grounded in the supreme court's decision in *Coalson v. City Council of Victoria*, 610 S.W.2d 744 (Tex. 1980) (orig. proceeding). In *Coalson*, the citizens of Victoria had requested an amendment of the city charter. Unlike the case before us, the city secretary concluded that the petition was "in proper form and in compliance with the local and state laws" and forwarded it to the city council. *Id.* at 746. The city council, in turn, voted on it on November 7, 1980. The council refused to add the proposed amendment to the ballot although an election to address charter amendments was already scheduled for January 17, 1981. Instead, the city council filed suit seeking a declaration that the subject matter of the

proposed amendment had been withdrawn from the field in which the initiative process could operate. As the supreme court observed, "the failure to submit the proposed amendment . . . would result in a two-year delay before another charter election [could] be held." *Id.*

Unsurprisingly, the supreme court concluded that the city was improperly using the declaratory-judgment action "to frustrate the process." *Id.* at 747. Appellants seize on the court's rationale—that the voters might decline to adopt the proposed amendment—as a general rule of ripeness by which any legal challenge to the validity of an initiative or referendum must await an answer from the voters before it can be addressed. We disagree.

The factual posture of *Coalson* was both unique and significant. As the supreme court stressed, "the election process had [already] been put in motion" and Victoria's city secretary had already determined that the petition was proper. *Id.* But for the city council's legal objections, framed as a last-minute declaratory judgment suit, the act of including the proposed amendment in the scheduled election was both incontestable and ministerial, and the city council's suit would have the effect of barring any election on the subject matter of the petition for two years. It is hardly surprising that the *Coalson* court, when confronted with a conflict

between a structural constitutional guarantee—the right of the voters[6] to participate in and, perhaps, control the content of their own elections—and prudential[7] aspects of the ripeness doctrine, preferred to develop the ripeness standards in response. Appellants' argument that resolution of all legal challenges to a proposed initiative or referendum must await the result of a vote, regardless of the effect that any delay in consideration of those challenges would have on the right, is too broad. Indeed, appellants' reading of *Coalson* would give it the effect of overruling the supreme court's earlier decision in *Glass* in which it held consideration of whether the initiative or referendum power remained must "first be determined" as part of any claim to compel submission to the voters. *Glass*, 244 S.W.2d at 648. As *Coalson* indicates no intention to overrule this general holding of *Glass*, and in fact cites it approvingly, we are obliged to treat *Glass* as valid and to harmonize the respective holdings.[8]

---

[6] As Justice Pope observed for the court in *Coalson*, the right at issue in these cases is "an implementation of the basic [structural] principle" enshrined in Article I, Section 2 of the Texas Bill of Rights: "All political power is inherent in the people . . ." *Coalson*, 610 S.W.2d at 747.

[7] The ripeness considerations "involve both jurisdictional and prudential concerns." *Perry v. Del Rio*, 66 S.W.3d 239, 251 (Tex. 2001).

[8] As an inferior court we are obliged to harmonize controlling, superior authority wherever doing so is feasible. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004) ("[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.").

In all events, the procedural posture of this case is more akin to *Glass*. The action has been brought by the petitioners—and not the city—with no suggestion by its posture that the case will work a frustration of a process. Moreover, the ultimate issue is now squarely before this Court given that appellants challenge the trial court's ruling on the City Secretary's motion for summary judgment, one of the grounds therefor being preemption.[9]

B. The Referendum Authority Has Not Been Withdrawn

The legislature may preempt municipal charters and ordinances. Its power to do so is found in Article XI, Section 5 of the Texas Constitution, which makes the Constitution and the general laws enacted by the legislature supreme over city charters and ordinances. TEX. CONST. art. XI, § 5. However, where the legislature intends to preempt a subject matter historically encompassed by the broad powers of a home-rule city, it must do so with *unmistakable clarity*. *See City of Sweetwater*

[9] In her motion for summary judgment, the City Secretary sought to avoid the issuance of mandamus by disproving, as a matter of law, a ministerial duty to forward the petition to the City Council—an element of appellants' mandamus claim—or by proving, as a matter of law, her affirmative defense of preemption. As stated *supra*, we conclude the City Secretary had a ministerial duty to present the petition to the City Counsel; thus, her summary judgment is not sustainable on that ground. In reaching the issue of preemption here, we do not intend to imply that the City Secretary is the proper official to make that determination and recognize that a prior panel of this Court concluded she is not and we agree with that decision. *See Carruth*, 2017 WL 711656, at *5. Rather, in addition to reaching the preemption issue because it is before this Court by virtue of an appeal of a summary judgment, a ground for which was preemption, we reach the issue in the interest of judicial economy. *See De Anda v. Jason C. Webster, P.C.*, No. 14-17-00020-CV, 2018 WL 3580579, at *1 (Tex. App.—Houston [14th Dist.] July 26, 2018, pet. denied) (mem. op.); *see also Glass*, 244 S.W.2d at 648 (to be entitled to mandamus, it must appear the subject of the ordinance has not been withdrawn from the field in which the initiative process is operative).

v. Geron, 380 S.W.2d 550, 552 (Tex. 1964). And, where a limitation on home-rule municipalities' authority is said to arise by implication, be it by operation of general law or by charter,[10] "such a limitation" must be "*clear and compelling* to that end." *Glass*, 244 S.W.2d at 649 (emphasis added).

Thus, the question presented here is, has the subject matter of the Ordinance (a comprehensive plan) been withdrawn, expressly or by necessary implication, by either the general law or the Charter, from the field in which the referendum process is operative? For the reasons set forth herein, we answer this question in the negative.

A city's Charter functions as its organic law in the same nature as a constitution[11] and it is therefore not capable of being repudiated by ordinance. *See, e.g.*, *City of Wichita Falls v. Kemp Pub. Library Bd. of Trs.*, 593 S.W.2d 834 (Tex. App.—Fort Worth 1980, writ ref'd n.r.e.). The Plano City Charter itself excepts only ordinances and resolutions levying taxes from the referendum process. PLANO, TEX., HOME RULE CHARTER § 7.03. It does not expressly or by necessary implication withdraw comprehensive plans from the field in which the referendum process is

[10] *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975).

[11] *Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 354 (Tex. App.—San Antonio 2000, pet. denied).

operative.[12] The City Secretary wisely and candidly concedes this point, and, instead, contends that the general law, specifically section 213.003 of the local government code, impliedly withdraws comprehensive plans from the field in which the referendum process is operative. While we have no doubt that a statute would prevail over and preempt any city charter to which it applies, we disagree with the City Secretary that the legislature has constrained the natural reach of the City of Plano's Charter.

1. General Law - Adoption or Amendment of Comprehensive Plans

Section 213.003 provides:

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

LOC. GOV'T § 213.003 (emphasis added). Initially, we note that the mere fact that the legislature has enacted a law addressing comprehensive plans does not mean the subject matter is completely preempted, foreclosing application of the section 7.03

[12] Nothing in this opinion precludes the City of Plano from seeking to amend its Charter to exclude fields other than taxation from its referendum process.

referendum process to comprehensive plans. *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990). Further, section 213.003 would preempt section 7.03 of the Plano Charter if the legislature, with "unmistakable clarity," communicated an intention to preempt the right to pursue referendum on the subject. *See Geron*, 380 S.W.2d at 552. Notably, the text of section 213.003 makes no reference to referendum powers at all, leaving us to consider whether the legislature provided for that effect by "clear and compelling" implication. *Glass*, 244 S.W.2d at 649.

The City Secretary claims section 213.003 impliedly withdraws comprehensive development plans from the field of initiative and referendum by mandating procedural requirements, including a public hearing and review by the planning commission, before cities can act on such plans. This argument ignores that the statute also allows a municipality to bypass the procedures set forth in subsection (a) and adopt other procedures in its charter or by ordinance. *See* LOC. GOV'T § 213.003(b). Thus, the legislature did not limit the power of home-rule municipalities to adopt comprehensive plans—and certainly did not indicate with "unmistakable clarity" its intent to withdraw the voters' retained power to invoke the referendum process with respect to such plans.[13] *See Dallas Merch.'s &*

[13] In fact, the City of Plano adopted and amended the 1986 Comprehensive Plan prior to the legislature adopting what is now Chapter 213 of the Local Government Code. Chapter 213 gave general-law

Concessionaire's Ass'n, 852 S.W.2d at 490–91 ("Home-rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power.").

2. Comprehensive Plan Process

Next, the City Secretary contends that under *Glass* and *Denman* an ordinance enacting a comprehensive plan is exempt from the initiative and referendum processes because section 213.003(a) of the local government code mandates procedural requirements that are complex and that cannot be supplied by a referendum. *See Glass*, 244 S.W.2d at 653; *Denman v. Quin*, 116 S.W.2d 783, 786 (Tex. App.—San Antonio 1938, writ ref'd). The City Secretary's reliance on *Glass* and *Denman* is misplaced.

Glass was an initiative case, not a referendum case. The City Secretary wishes to extend the Supreme Court of Texas's limitation of the initiation process in cases where there are complex procedural requirements to referendums, but no court has done so.[14] *See Glass*, 244 S.W.3d at 652. Here, appellants are not seeking to initiate

---

municipalities—which do depend on grants of power from the legislature—the same flexibility in adopting comprehensive plans that home-rule cities already enjoyed. *See Town of Lakewood Vill.*, 493 S.W.3d at 531.

[14] The language in *Glass* that the City Secretary relies upon is contained in the following paragraph of the opinion.

> In all the Texas cases called to our attention in which it has been held that the people of a municipality could not validly exercise a delegated legislative power through *initiative proceedings*, it will be found that authority to act was expressly conferred upon the

legislation, they are merely challenging an existing municipal enactment and wish to have the qualified voters of the City of Plano decide whether they approve of what the City Council adopted. In essence, they seek to veto an act of the City Council through this process. The process to create the Plan has already occurred, and that process, no matter how complicated, is not implicated here. That public officials may have to develop a new plan that survives voter hostility is inherent in the exercise of the power reserved to the people.

Denman, meanwhile, concerned an ad valorem tax. In that case, our sister court concluded that an ordinance that simply puts into execution previously declared policies, or previously enacted laws, is administrative or executive in character and not referable to the qualified voters as a legislative act.[15] *Denman*, 116 S.W.2d at 786. The court's additional commentary to the effect that ordinances that rely on a careful investigation of facts and figures or involve application of expertise

> municipal governing body exclusively, or there was some preliminary duty such as the holding of hearings, etc., impossible of performance by the people in an *initiative proceeding*, by statute or charter made a prerequisite to the exercise of the legislative power.

Glass, 244 S.W.3d at 652 (emphasis added).

[15] The supreme court denied review of the *Denham* decision with the notation "writ refused," which at the time indicated that the lower court's judgment was correct in its result and the legal principles that produced it. *Hunter v. State Farm County Mut. Ins. Co. of Tex.*, 02-07-00463-CV, 2008 WL 5265189, at *3 (Tex. App.—Fort Worth Dec. 12, 2008, no pet.). Treating the opinion as a Supreme Court precedent does little to advance the argument, however. For *stare decisis* purposes, *obiter dictum*, whether found in an intermediate or terminal appellate decision, is not authoritative. *E.g., Valmont Plantations v. State*, 355 S.W.2d 502 (Tex. 1962).

or skill cannot be efficiently initiated or passed by the public *en masse* is dicta and is neither controlling nor persuasive here. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 399 (Tex. 2016).

3. Zoning and Comprehensive Plans

The City Secretary also presses case law exempting individual zoning ordinances from the referendum process, urging that it should be read to apply to comprehensive plans because, so goes the argument, zoning regulations must be developed in harmony and in accordance with a comprehensive plan.[16] LOC. GOV'T § 211.004.

We begin by noting that the legislature, whose stated intent controls here, has clearly stated its understanding that comprehensive plans are to be treated distinctly from a city's zoning regime. LOC. GOV'T § 213.005. In fact, any comprehensive plan a city might adopt is, by that directive, supposed to come emblazoned with the warning that "[a] comprehensive plan shall not constitute zoning regulations or establish zoning district boundaries." *Id.*

[16] The City Secretary relies on *San Pedro* and *Hancock* in which our sister courts concluded the public notice and hearing requirements overrode initiative rights in city charters. *San Pedro N. Ltd. v. City of San Antonio*, 562 S.W.2d 260, 262 (Tex. App.—San Antonio 1978, writ ref'd n.r.e.); *Hancock v. Rouse*, 437 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e). The City Secretary further relies on *In re Arnold* in which a sister court extended the reasoning in *Hancock* and *San Pedro* to conclude members of the public could not hold a referendum to vote on zoning changes. *See In re Arnold*, 443 S.W.3d 269, 274–78 (Tex. App.—Corpus Christi–Edinburgh 2014, orig. proceeding). For the reasons set forth herein, the case before us is distinguishable from these cases because it concerns a referendum, not an initiative, and does not seek to affect individual vested property rights.

While there is an obvious long-run relation between a comprehensive plan and a city's resulting zoning rules, the two are not synonymous. The City Secretary's attempt to apply authorities restricting application of the referendum power in zoning cases to the field of comprehensive plans ignores that the role of a long-term plan is distinct from the implementation of it in a subsequent zoning regime.

Comprehensive plans provide for the long-range development of a municipality and may include provisions for land use, transportation, and public facilities. LOC. GOV'T § 213.002(a),(b)(1). Comprehensive plans represent the aspirations of the public body as a whole. When adopted (or rejected), comprehensive plans neither confer nor affect vested property rights in a way that would make them inherently inimical to revision by the referendum process.

Changes or amendments to zoning ordinances, on the other hand, affect the vested rights of property owners. Recognizing this, state law mandating a process for changing zoning ordinances reflects the important due process and just compensation rights of those owners and citizens. LOC. GOV'T §§ 211.005(a) (governing body may divide a municipality into districts and regulate land use), 211.007 (setting forth notice and hearing requirements). Indeed, the entire purpose of enshrining a right in the constitution is to insulate it from the will of the bare majority. *See De Zavala v. Daughters of the Republic of Tex.*, 124 S.W. 160, 166

(Tex. App.—Galveston 1909, writ ref'd). Thus, it is hardly surprising that the legislature would bar the back and forth that might accompany a rule subjecting zoning regulations to adoption and revocation by initiative and referendum. None of these concerns (and none of these resulting procedures) are applicable to comprehensive plans.

In any event, the legislature has also made clear that even zoning regulation is not completely exempted from the referendum process. In 1993, it enacted legislation authorizing a referendum vote (1) to repeal zoning wholesale and (2) on the "initial" adoption of zoning regulations, but not the amendment of individual zoning regulations.[17] *See* LOC. GOV'T § 211.015(a), (e); *City of Canyon v. Fehr*, 121

[17] Section 211.015(a) provides:

> Notwithstanding other requirements of this subchapter, the voters of a home-rule municipality may repeal the municipality's zoning regulations adopted under this subchapter by either:
>
> (1) a charter election conducted under law; or
>
> (2) on the initial adoption of zoning regulations by a municipality, the use of any referendum process that is authorized under the charter of the municipality for public protest of the adoption of an ordinance.

LOC. GOV'T § 211.015(a), Section 211.015(e) provides:

> The provisions of this section may only be utilized for the repeal of a municipality's zoning regulations in their entirety or for determinations of whether a municipality should initially adopt zoning regulations, except the governing body of a municipality may amend, modify, or repeal a zoning ordinance adopted, approved, or ratified at an election conducted pursuant to this section.

Id. § 211.015(e).

S.W.3d 899, 906 (Tex. App.—Amarillo 2003, no pet.). That it did so is significant in recognizing the public's ability to weigh in on land-planning issues generally, albeit not on a piecemeal basis.

Moreover, the City Secretary's wholesale reliance on *San Pedro* and *Hancock*, cases in which our sister courts of appeals recognized zoning ordinances have been withdrawn from the field in which the initiative and referendum processes operate, ignores not only the distinctions between zoning and comprehensive plans but also the enactment of section 211.005 authorizing a referendum in limited circumstances. *San Pedro N. Ltd. v. City of San Antonio*, 562 S.W.2d 260, 262 (Tex. App.—San Antonio 1978, writ ref'd n.r.e.); *Hancock v. Rouse*, 437 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e). Our sister court in *Fehr* held that the legislature intended for section 211.015 to be utilized only when the municipality attempts to create and impose, for the first time, upon its citizenry a body of zoning ordinances when or where none previously existed. *Fehr*, 121 S.W.3d at 904–06. The court concluded that the legislative action (1) modified *Hancock* and *San Pedro* to the extent they indicated that initiative and referendum could not be used to repeal zoning ordinances and (2) restricted the use of an initiative and a referendum to the time and to the regulations described in the statute. *Id.* at 905. The court held that a referendum, initiated by the voters, could neither be used to vitiate such ordinances piecemeal nor be used after the first

ordinances survived with or without attack. *Id.* at 905–06. Neither *Hancock* nor *San Pedro* involved the question of long-term planning or suggested their holdings would apply to long-term plans because of a collateral impact on future zoning. *San Pedro*, 562 S.W.2d 260; *Hancock*, 437 S.W.2d 1.

We conclude that the legislature's enactment of section 211.015 recognizes the distinction between the public's right to vote on land-planning issues and a right to challenge individual zoning ordinances when vested property rights are implicated. We further conclude the appellate decisions that the zoning statutory scheme, which imposes extensive procedural mandates, conflicts with the public's initiative or referendum power, do not apply to comprehensive plans because the legislature, in enacting Chapter 213 of the local government code, did not with "unmistakable clarity" withdraw comprehensive plans from the field in which the referendum process is operative.

4. Public Policy

We are sympathetic to the City Secretary's concern about the possibility of not having a comprehensive plan in place and the public policy and practical implications that may flow therefrom. Nevertheless, we are mindful that the legislature, and not the courts, is primarily responsible for determining public policy **as it relates to statutory enactments**, and that it does so through the language it employs. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868,

873 (Tex. 2000) (power to make rules and determine public policy is legislative). Our supreme court has been clear in this regard:

> Public policy . . . is a term of vague and uncertain meaning, which it pertains to the law-making power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law.

Tex. Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240, 250 (Tex. 2002) (quoting *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001)). Indeed, the supreme court in *Glass* stated:

> 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.

Glass, 244 S.W.2d at 654.

Having concluded that neither the Charter nor the general law has withdrawn comprehensive plans either expressly or by necessary implication from the field in which the referendum process operates, we are compelled to conclude the City Secretary's motion for traditional-summary judgment is not sustainable on

preemption grounds and to conclude the trial court erred in granting the City Secretary summary judgment and in denying appellants summary judgment.

CONCLUSION

We reverse the trial court's summary judgment in favor of the City Secretary, render judgment in favor of appellants, and direct the district court to issue a writ of mandamus ordering the City Secretary to present the referendum petition to the City Council within fourteen days of this opinion.[18]

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

191195F.P05

[18] While Section 7.03 of the Charter requires the City Secretary is to immediately present the referendum petition, appellants have requested that this Court order the City Secretary to do so within fourteen days.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ELIZABETH CARRUTH, ET AL, Appellants

No. 05-19-01195-CV V.

LISA HENDERSON, IN HER OFFICIAL CAPACITY AS CITY SECRETARY, Appellee

On Appeal from the 380th Judicial District Court, Collin County, Texas Trial Court Cause No. 380-00469-2016.
Opinion delivered by Justice Schenck. Justices Molberg and Nowell participating.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's summary judgment in favor of Lisa Henderson and **RENDER** judgment in favor of appellants. We **REMAND** the case to the trial court for further proceeding consistent with the Court's opinion.

It is **ORDERED** that appellant ELIZABETH CARRUTH, ET AL recover their costs of this appeal from appellee LISA HENDERSON, IN HER OFFICIAL CAPACITY AS CITY SECRETARY.

Judgment entered this 22nd day of July, 2020.