ORAL ARGUMENT REQUESTED

CAUSE NO. 05-19-01195-CV

IN THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS DALLAS, TEXAS

ELIZABETH CARRUTH, MATTHEW TIETZ, JANIS NASSERI, JUDITH KENDLER, and STEPHEN PALMA,

Appellants

VS.

LISA HENDERSON, City Secretary for the City of Plano, Texas,

Appellee

BRIEF OF THE APPELLANTS

Jack G. B. Ternan
State Bar No. 24060707
jt@ternanlawfirm.com
Ternan Law Firm, PLLC
1400 Preston Road, Suite 400
Plano, Texas 75093
Telephone: (972) 665-9939
Facsimile: (972) 476-1361
Counsel for the Appellants

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.1(a), the Appellants certify that the following is a complete list of the interested parties in this matter, as well as their attorneys, so that the members of this Court may determine disqualification or recusal:

ELIZABETH CARRUTH	Appellant
MATTHEW TIETZ	Appellant
JANIS NASSERI	Appellant
JUDITH KENDLER	Appellant
STEPHEN PALMA	Appellant
LISA HENDERSON	Appellee

Jack G. B. Ternan — Counsel for Appellants
State Bar No. 24060707
jt@ternanlawfirm.com
Ternan Law Firm, PLLC
1400 Preston Road, Suite 400
Plano, Texas 75093
Telephone: (972) 665-9939
Facsimile: (972) 476-1361

Andy Taylor — Counsel for Appellee
State Bar No. 19727600
ataylor@andytaylorlaw.com
ANDY TAYLOR & ASSOCIATES, P.C.
2628 Highway 36S, #288
Brenham, Texas 77833
Telephone: (713) 222-1817

Paige Mims
State Bar No. 00787550
paigem@plano.gov
City Attorney
CITY OF PLANO, TEXAS
P.O. Box 860358
Plano, Texas 75086
Telephone: (972) 941-7125

Robert J. Davis
State Bar No. 05543500
bdavis@mssattomeys.com
MATTHEWS, SHIELS, KNOTT, EDEN,
DAVIS & BEANLAND L.L.P.
8131 LBJ Freeway, Suite 700
Dallas, Texas 75251
Telephone: (972) 234-3400

Wallace B. Jefferson
State Bar No. 00000019
wjefferson@adjtlaw.com
Amy Warr
State Bar No. 00795708
awarr@adjtlaw.com
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Avenue,
Suite 2350
Austin, Texas 78701-3562
Telephone: (512) 482-9300

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page(s)**

STATEMENT OF THE CASE

Appellants brought suit against Lisa Henderson ("Henderson"), the City Secretary for the City of Plano, Texas ("City") seeking a writ of mandamus compelling her to present a citizen petition to the City Council pursuant to Section 7.03 of the City's Home Rule Charter.[1] In a prior interlocutory appeal, this Court held that Henderson did not have immunity from suit because Appellants had properly alleged a mandamus claim against Henderson.[2]

After the conclusion of the prior appeal, on September 19, 2019, the Trial Court entered a Final Judgment that granted a motion for summary judgment filed by Henderson and denied a motion for summary judgment filed by Appellants.[3] Appellants filed a notice of appeal on September 25, 2019.[4]

[1] *See* Clerk's Record at 110-11. Hereinafter, all citations to the Clerk's Record are denoted with "C.R."

[2] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *4 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) ("This is a ministerial duty and the allegations support the conclusion that the City Secretary failed to perform that duty.").

[3] *See* C.R. at 730.

[4] *See* C.R. at 733-34.

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because they believe it will materially aid in the disposition of this appeal. This is a matter of public importance and of public concern that has previously been subject to an appeal, and the Court may benefit from oral argument on both procedural and substantive matters.

STATEMENT OF ISSUES PRESENTED

1. Did the Trial Court err by granting Henderson's motion for summary judgment and denying Appellants' motion for summary judgment when there is no statute preempting Henderson's obligation to present the citizen petition to the City Council pursuant to Section 7.03 of the city charter?

TO THE HONORABLE FIFTH COURT OF APPEALS:

Elizabeth Carruth, Matthew Tietz, Janis Nasseri, Judith Kendler, and Stephen Palma (collectively, "Appellants" or Plaintiffs"), the Appellants herein and the Plaintiffs in the Trial Court below file this their Brief as follows:

I. STATEMENT OF THE FACTS

While the public debate regarding the Plano Tomorrow Plan and this lawsuit is wide-ranging, the legally operative facts are fairly narrow and have always been undisputed. Appellants will endeavor to state the facts "concisely and without argument" as required.[5]

A. Despite The Requirements Of Section 7.03 Of The City Charter, The City Secretary Did Not Present A Citizen Petition To The Plano City Council.

Appellants are qualified voters of the City of Plano, Texas ("City").[6] At all times relevant to his suit, Appellee Lisa Henderson ("Henderson") has been the City Secretary for the City.[7] Section 7.03 of the City's Home Rule Charter ("Charter") 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

[5] *See* TEX. R. APP. P. 38.1(g).

[6] *See* C.R. at 189.

[7] *See* C.R. at 189; C.R. at 664.

> 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.[8]

On October 12, 2015, the City Council of the City of Plano, Texas enacted the Ordinance 2015-10-09 (hereinafter, the "Ordinance").[9] The Ordinance adopted the "Plano Tomorrow Comprehensive Plan."[10]

On November 10, 2015, one of the Appellants, Elizabeth Carruth, presented a petition to Henderson which called upon the City Council to schedule the Ordinance for a public referendum vote (hereinafter, the "Citizen Petition").[11] The Citizen Petition contained over 4,000 signatures, which substantially exceeded the

[8] *See* C.R. at 593.

[9] *See* C.R. at 189; C.R. at 664.

[10] *See* C.R. at 193-194.

[11] *See* C.R. at 189.

necessary number.[12] The Citizen Petition complied with the requirements of the Texas Election Code and the Charter.[13]

Although Section 7.03 of the Charter provides that "[i]mmediately upon the filing of such petition, the person performing the duties of city secretary shall present said petition to the city council," Henderson did not immediately present the Citizen Petition to the City Council.[14] Indeed, to date Henderson has not presented the Citizen Petition to the City Council. Henderson's continued failure to present the Citizen Petition was and is an intentional refusal to comply with Section 7.03 of the Charter.[15]

B. Appellants Filed Suit To Compel Henderson To Comply With Her Ministerial Duty To Present The Citizen Petition.

On February 1, 2016, Appellants filed a lawsuit against the City, Henderson, and the members of the City Council.[16] On April 29, 2016, Appellants filed a First Amended Petition making clear what relief was being sought against each particular

[12] *See* C.R. at 190.

[13] *See* C.R. at 189-90.

[14] *See* C.R. at 190, C.R. at 664-65.

[15] *See* C.R. at 664-65.

[16] *See* C.R. at 16.

defendant.[17] With respect to the claim against Henderson,[18] Appellants alleged that Section 7.03 of the Charter imposes a ministerial, nondiscretionary, legal duty on her to immediately present the Citizen Petition to the City Council,[19] and Henderson refused to present the Petition to the City Council in violation of her legal duty.[20] Appellants requested that the Trial Court issue a writ of mandamus against Henderson requiring her to present the Citizen Petition at the next meeting of the City Council.[21]

On April 29, 2016, Appellants also filed a Motion for Partial Summary Judgment to Compel City Secretary to Comply With Ministerial Duty.[22] Appellants showed that Henderson had failed to comply with Section 7.03 of the Charter by refusing to present the Citizen Petition to the City Council.[23] Appellants requested

[17] *See* C.R. at 99.

[18] As discussed below, this Court later dismissed on ripeness grounds the claims against the defendants other than Henderson.

[19] *See* C.R. at 110.

[20] *See* C.R. at 110.

[21] *See* C.R. at 111.

[22] *See* C.R. at 179.

[23] *See* C.R. at 181.

that the Court enter summary judgment and issue a writ of mandamus compelling Henderson to present the Citizen Petition.[24]

C. In An Interlocutory Appeal, This Court Dismissed The Claims Against The Other Defendants On Ripeness Grounds And Agreed With Appellants Regarding Henderson's Ministerial Duty To Present The Citizen Petition.

On May 3, 2019, the defendants, including Henderson, filed a Plea to the Jurisdiction.[25] The Trial Court denied the Plea to the Jurisdiction,[26] and the defendants filed an interlocutory appeal.[27]

This Court affirmed the denial of the plea to the jurisdiction with respect to the claims against Henderson.[28] The Court agreed that Henderson's duty under

[24] *See* C.R. at 185.

[25] *See* C.R. at 253.

[26] *See* C.R. at 363.

[27] *See* C.R. at 359-61.

[28] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *1 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) ("we affirm the denial of the plea as to the mandamus claim against the City Secretary.").

Section 7.03 of the Charter is ministerial,[29] and that Appellants had a viable mandamus claim against her.[30]

The Court dismissed the claims against the members of the city council and City on ripeness grounds.[31] The Court recognized that "[w]hat the City Council will do when presented with a referendum petition is unknown."[32]

After this Court's ruling, Henderson filed a petition for review with the Supreme Court of Texas. Later, Appellants filed a cross-petition for review. The Supreme Court denied the petitions for review.

[29] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *4 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) ("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.").

[30] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *5 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) ("appellees alleged facts supporting a claim for mandamus relief against the City Secretary").

[31] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *7 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) ("The trial court has subject matter jurisdiction over the petition for a writ of mandamus against the City Secretary, but the remaining claims presented are not yet ripe for adjudication.").

[32] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *6 (Tex. App.—Dallas Feb. 23, 2017, pet. denied).

D. Despite This Court's Ruling, The Trial Court Granted Summary Judgment For Henderson And Denied Appellants' Motion for Summary Judgment.

After this case returned to the Trial Court, Appellants set their motion for summary judgment—which had ceased to be a motion for partial summary judgment after the dismissal of the other defendants—for a hearing.[33] At Henderson's request, the hearing was reset several times.[34] Henderson filed a cross-motion for summary judgment.[35]

On September 19, 2019, after a hearing, the Trial Court entered a "Final Judgment" (hereinafter, the "Judgment").[36] The Judgment denied Appellants' motion for summary judgment and granted Henderson's motion for summary judgment.[37] Appellants filed a Notice of Appeal on September 25, 2019.[38]

[33] *See* C.R. at 364-65.

[34] *See* C.R. at 366, 368, 728.

[35] *See* C.R. at 370.

[36] *See* C.R. at 730.

[37] *See* C.R. at 730.

[38] *See* C.R. at 733.

II. APPLICABLE STANDARDS

A trial court's summary judgment ruling is reviewed de novo.[39] On "cross-motions for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law."[40] When "the trial court grants one motion and denies the other, the reviewing court must determine all questions presented and render the judgment that the trial court should have rendered."[41] To prevail on summary judgment, Appellants had the burden to establish the elements of their cause of action but not the burden to disprove Henderson's affirmative defense of preemption.[42]

[39] *See City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252, 258 (Tex. 2018) ("We review the trial court's summary judgment de novo."); *Kartsotis v. Bloch*, 503 S.W.3d 506, 515 (Tex. App.—Dallas 2016, pet. denied) ("We review the trial court's grant of a summary judgment de novo.").

[40] *See City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252, 259 (Tex. 2018); *Kartsotis v. Bloch*, 503 S.W.3d 506, 515 (Tex. App.—Dallas 2016, pet. denied) ("Each party, however, bears the burden of establishing that it is entitled to judgment as a matter of law.").

[41] *See City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252, 259 (Tex. 2018); *Kartsotis v. Bloch*, 503 S.W.3d 506, 515 (Tex. App.—Dallas 2016, pet. denied) ("When both parties move for summary judgment on the same issues and the trial court grants one motion and denies the other, we review both parties' summary judgment evidence and determine all questions presented. . . . If we determine that the trial court erred, we render the judgment that the trial court should have rendered.").

[42] *See Holmes v. Graham Mortgage Corp*., 449 S.W.3d 257, 264 (Tex. App.—Dallas 2014, pet. denied) ("The plaintiff, as movant, must conclusively prove it is entitled to prevail on each element of its cause of action as a matter of law. But the plaintiff is not under any obligation to negate the defendant's affirmative defenses.")

III. SUMMARY OF THE ARGUMENT

The Trial Court erred by granting summary judgment for Henderson and denying Appellants' motion for summary judgment, and this Court should reverse the Judgment and render judgment for Appellants. As this Court previously held in this case, Henderson's duty to present the Citizen Petition to the City Council pursuant to Section 7.03 of the Charter was and is ministerial, and mandamus should issue unless Section 7.03 of the Charter is preempted. Henderson's preemption theory—that a referendum cannot be held on an ordinance adopting a comprehensive plan—is a *non-sequitur* because Appellants are not seeking to compel her to call a referendum and, as this Court has recognized, a referendum may never be called even if Henderson complies with her duties under the Charter. Moreover, Henderson's preemption argument is wrong because the applicable statute explicitly allows the process for adopting comprehensive plans to be modified by charter and, therefore, the Legislature did not manifest intent to preempt charter provisions with "unmistakable clarity."

(internal citations omitted); *Tarrant Restoration v. TX Arlington Oaks Apartments, Ltd.*, 225 S.W.3d 721, 730 (Tex. App.—Dallas 2007, pet. dism'd w.o.j.) ("Under summary judgment procedure, once the plaintiff/movant produces evidence entitling it to summary judgment on its cause of action, the burden shifts to the defendant/non-movant to raise a fact issue on its affirmative defenses. The plaintiff/movant has no burden to disprove a pleaded affirmative defense absent proof of the defense.") (internal citations omitted).

Because the Trial Court erred in granting summary judgment for Henderson and denying summary judgment for Appellants, this Court should reverse the Judgment and render summary judgment in favor of Appellants—which is what the Trial Court should have done.

IV. ARGUMENTS AND AUTHORITIES

A. Based On This Court's Prior Decision In This Case, The Trial Court Should Have Granted Appellants' Motion for Summary Judgment Absent Henderson Demonstrating An Affirmative Defense.

Appellants filed their motion for summary judgment against Henderson on April 29, 2016—before the interlocutory appeal.[43] In their motion, Appellants pointed to Texas Supreme Court authority for the proposition that a "writ of mandamus will issue to compel a public official to perform a ministerial act."[44] Appellants pointed out that Section 7.03 of the Charter imposes a ministerial duty on Henderson to present the Citizen Petition to the City Council and that she had failed to do what was required.[45] Accordingly, Appellants sought summary

[43] *See* C.R. at 179.

[44] *See* C.R. at 184 (*citing Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991)).

[45] *See* C.R. at 183-84.

judgment on their claim for a writ of mandamus requiring Henderson to comply with her duty to present the Citizen Petition.[46]

This Court's ruling during the interlocutory appeal confirmed that Appellants' theory of the case is correct. The Court confirmed that mandamus will issue "to compel a public official to perform a ministerial act."[47] The Court further stated:

> The charter provides: "Immediately upon the filing of such petition, the person performing the duties of city secretary shall present said petition to the city council." Charter § 7.03. "The filing of a 'signed and verified' petition in the prescribed form and manner triggers the City Secretary's duties." *In re Woodfill*, 470 S.W.3d 473, 476 (Tex. 2015) (per curiam). ***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.[48]

The Court also 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. *See Howard*, 589 S.W.2d at 751–52. Therefore, appellees alleged facts supporting a claim for mandamus

[46] *See* C.R. at 185.

[47] *City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *3 (Tex. App.—Dallas Feb. 23, 2017, pet. denied).

[48] *City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *4 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) (emphasis added).

> relief against the City Secretary under the ultra vires exception to governmental immunity.[49]

Therefore, this Court agreed with Appellants that Section 7.03 of the Charter imposes a ministerial duty on Henderson to present the Citizen Petition, which she undisputedly did not do.

The allegations that Henderson received the Citizen Petition and failed to act on it were, on summary judgment, proven by a sworn declaration of Elizabeth Carruth[50] and confirmed by an affidavit from Henderson.[51] Henderson did not present the Citizen Petition as required by Section 7.03 of the Charter. Therefore, Appellants established their right to summary judgment and a writ of mandamus unless Henderson established an affirmative defense.[52] As shown below, Henderson's proposed preemption defense is without merit.[53] Accordingly,

[49] *City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *5 (Tex. App.—Dallas Feb. 23, 2017, pet. denied).

[50] *See* C.R. at 188-91; *see also* C.R. at 718-19.

[51] *See* C.R. at 663-65.

[52] *See supra* n. ____.

[53] *See infra* Section IV(B) and Section IV(C). Preemption is an affirmative defense. *See Whitten v. Vehicle Removal Corp*., 56 S.W.3d 293, 298 (Tex. App.—Dallas 2001, pet. denied) ("Preemption is an affirmative defense. The burden of demonstrating preemption is on the party who asserts it.") (internal citations omitted).

summary judgment should have been granted for Appellants, and the Trial Court erred by denying Appellants' motion for summary judgment.

B. The Trial Court Erred In Granting Summary Judgment For Henderson Because Her Argument That State Law Preempts The Holding Of A Referendum On A Comprehensive Plan Is Inapplicable To Her Ministerial Duty To Present The Citizen Petition To The City Council.

As noted above, it is undisputed that Henderson did not present the Citizen Petition to the City Council as required by Section 7.03 of the Charter. In her motion for summary judgment and response to Appellants' motion for summary judgment, Henderson sought to escape a writ of mandamus by asserting that Section 7.03 of the Charter was preempted by state law because comprehensive plans cannot be the subject of a referendum.[54] In Section IV(C) of this Brief, Appellants demonstrate that state law does not preclude a referendum on comprehensive plans. However, ***the question of whether a referendum can be held is irrelevant to the question of whether an obligation to present the Citizen Petition to the City Council has been preempted***.

Section 7.03 of the Charter imposes one duty and one duty only on Henderson—the immediate submission of the Citizen Petition to the City Council.[55]

[54] *See* C.R. at 382-94; *id*. at 549-62; *see also* C.R. at 532 (asserting a preemption affirmative defense).

[55] *See supra* n.___ and accompanying text.

Appellants asked the Trial Court to issue a writ of mandamus requiring Henderson to do one thing and one thing only: present the Citizen Petition to the City Council.[56] Whether a referendum can or must be called by the City Council is not relevant to Appellants' claim and the relief requested against Henderson.

Indeed, as this Court previously held in this case, it is possible that the question of whether a referendum must occur may never arise.[57] After the presentment of the Citizen Petition, the City Council will be obligated under Section 7.03 to "reconsider" the Ordinance.[58] After reconsidering the Ordinance, the City Council must, under the Charter, either repeal the Ordinance or call a referendum on the Ordinance.[59]

[56] *See* C.R. at 111.

[57] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *6 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) ("The City Council has no duty to act on a referendum petition until the petition is actually presented by the City Secretary. What the City Council will do when presented with a referendum petition is unknown and appellees merely speculate the council will refuse to act.") (internal citations omitted).

[58] *See* Charter § 7.03 ("the city council shall immediately reconsider such ordinance or resolution") (C.R. at 593).

[59] *See* Charter § 7.03 ("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.") (C.R. at 593).

Henderson has identified no provision of the Texas Constitution, Texas statute, or legal precedent that precludes: (1) a city secretary from presenting a citizen petition to the City Council; (2) a city council from reconsidering an ordinance that it adopted; or (3) a city council from repealing an ordinance that it adopted. Accordingly, even if Henderson is ordered to do her duty, it is possible that the disputed question—whether a referendum on the Ordinance is preempted by state law—will never arise.

Even if Henderson were correct (which, as shown below, she is not) that a referendum is prohibited by law, Appellants are still entitled to have the City Council reconsider the Ordinance, and Henderson is still obligated to present the Citizen Petition to trigger that reconsideration. Thus, at this juncture, the question of whether a referendum can occur is not yet at issue. The question is whether Henderson should be compelled to present the Citizen Petition to the City Council, triggering an obligation on the City Council to reconsider the Ordinance. The Charter places the obligation of calling the election on the City Council, not the City Secretary.[60] Only after the City Council has called an election does the Charter

[60] *See* Charter § 7.03 ("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.") (C.R. at 593); *see also* Charter § 7.02 ("Upon presentation to it of the petition and draft of the proposed ordinance or resolution, it shall become the duty of the city council, within ten (10) days after receipt thereof, to pass and adopt such ordinance or resolution without alteration as to meaning or effect in the opinion of the persons

impose a duty on the City Secretary to take action in connection with that election (such as posting required public notices).[61]

In the event that the City Council were to call a referendum on the Ordinance (rather than repeal it) and Henderson believed the referendum would be prohibited by state law, it would be understandable (but incorrect) if, at that time, she refused to post the required notices or sought a judicial determination of whether an election is appropriate. However, the purported conflict between the duties of the city secretary under the Charter and the purported prohibition of holding of an election under state law would arise only **after** the election has been called by the City Council, not ***before***. At this juncture, no election has been called and there is no colorable conflict between Henderson's duties under the Charter and her

filing the petition, or to call a Special Election in accordance with the Election Code.") (C.R. at 593); Charter § 7.04 ("The city council, upon its own motion and by a majority vote of its members, may submit to popular vote at any election for adoption or rejection any proposed ordinance or resolution or measure, or may submit for repeal any existing ordinance, resolution or measure, in the same manner and with the same force and effect as provided in this article for submission on petition, and may in its discretion call a special election for this purpose.") (C.R. at 593).

[61] *See* Charter § 7.06 ("The person performing the duties of city secretary shall publish at least once in the official newspaper of the city the proposed or referred ordinance or resolution within fifteen (15) days before the date of the election, and shall give such other notices and do such other things relative to such election as are required in general municipal elections or by the ordinance or resolution calling said election.") (C.R. at 594).

interpretation of state law. Accordingly, even if Henderson were correct that a referendum is precluded by state law (which she is not), such a prohibition is not relevant to the duty that Plaintiffs are seeking to enforce in this case (the presentation of the Citizen Petition to the City Council).

Thus, by granting summary judgment in favor of Henderson based on her preemption defense, the Trial Court erred. The Trial Court should have denied Henderson's motion for summary judgment and granted summary judgment in favor of Appellants. This Court should reverse the Trial Court's judgment and enter a judgment requiring the issuance of a writ of mandamus against Henderson—the judgment that the Trial Court should have rendered.[62]

C. The Trial Court Erred In Granting Summary Judgment For Henderson Because Her Argument That State Law Preempts The Holding Of A Referendum On A Comprehensive Plan Is Wrong.

As set forth in the preceding section, the theory underlying Henderson's defense—*i.e.*, that a referendum on an ordinance adopting a comprehensive plan is preempted by state law—is insufficient to support the Judgment even if true because Appellants were seeking to compel Henderson to present the Citizen Petition—not call a referendum. As set forth below, Henderson's preemption theory is also incorrect on the merits.

[62] *See supra* n. ____ and accompanying text.

1. Pursuant to the Texas Constitution, only a statute enacted by the Legislature can preempt a home rule charter.

The parties appear to be in agreement that municipalities are not sovereigns and that the Legislature can preempt municipal charters and ordinances. The Legislature's preemptive power 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 charters and ordinances.[63] However, "the mere fact that the legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted."[64]

The limited circumstances in which a charter or ordinance is preempted by state law are well defined. As the Supreme Court has said, "[h]ome-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."[65] A general law and a municipal law "will not be held repugnant to each other if any other reasonable construction

[63] TEX. CONST. art. XI § 5 ("The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

[64] *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

[65] *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490–91 (Tex. 1993).

leaving both in effect can be reached."[66] Again, "if the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity."[67]

Henderson never identified any statute that preempts Section 7.03 of the Charter, much less as a statute that preempts Section 7.03 of the Charter with "unmistakable clarity." As set forth below, the applicable statute clearly does not preempt charter provisions and, therefore, the Trial Court erred in concluding otherwise.

2. The Legislature expressly did NOT preempt charter provisions that might govern comprehensive plans.

When enacting the general laws governing the adoption of comprehensive plans, the Texas Legislature expressly elected **not** to supersede charter provisions. Indeed, the state statute governing comprehensive plans states: "A municipality may establish, *in its charter* or by ordinance, procedures for adopting and amending a comprehensive plan."[68] Additionally, there is no obligation to hold a public hearing or have the planning and zoning commission review the comprehensive plan—that

[66] *See Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

[67] *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993); *see also City of Houston v. Bates*, 406 S.W.3d 539, 546 (Tex. 2013).

[68] TEX. LOCAL GOV'T. CODE § 213.003(b) (emphasis added).

is merely one option identified and permitted by the Legislature.[69] The Legislature's broad grant of authority permitting the use of any method deemed desirable for the adoption of comprehensive plans is the ***opposite*** of a clear intent to preclude a referendum.

Indeed, Chapter 213 of the Local Government Code makes clear that the content of and process for adopting comprehensive plans is entirely discretionary. Pursuant to the Code Construction Act, the word "may" creates "discretionary authority or grants permission or a power."[70] Almost the entirety of Chapter 213 uses permissive language and grants discretionary power.[71] As already noted, the Legislature expressly *permitted* the process for adopting comprehensive plans to be

[69] *See* TEX. LOCAL GOV'T. CODE § 213.003(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.") (emphasis added).

[70] *See* TEX. GOV'T. CODE §311.016(1).

[71] *See, e.g.*, TEX. LOCAL GOV'T. CODE § 213.002(a) ("The governing body of a municipality *may* adopt a comprehensive plan for the long-range development of the municipality. A municipality *may* define the content and design of a comprehensive plan.") (emphasis added); *id*. at § 213.003 ("A comprehensive plan *may* be adopted or amended by ordinance following . . .") (emphasis added); *id*. at § 213.004 ("This chapter does not limit the ability of a municipality to prepare other plans, policies, or strategies as required.").

modified by charter.[72] In fact, the only time mandatory language such as "shall"[73] or must"[74] appears in Chapter 213 is when the Legislature states that comprehensive plans *shall not be confused with* zoning regulations.[75]

It is impossible to read the Legislature's open-ended and flexible approach to comprehensive plans as a limit on the public's right to a referendum. Given that a charter provision is only superseded by "clear and compelling" implication[76] or "unmistakable clarity" from the Legislature,[77] Section 7.03 of the Charter cannot be preempted by Chapter 213 of the Local Government Code, and the Trial Court erred in concluding otherwise.

[72] *See* TEX. LOCAL GOV'T. CODE § 213.003 ("A municipality may establish, *in its charter* or by ordinance, procedures for adopting and amending a comprehensive plan.") (emphasis added).

[73] *See* TEX. GOV'T. CODE §311.016(2) ("'Shall' imposes a duty.")

[74] *See* TEX. GOV'T. CODE §311.016(3) ("'Must' creates or recognizes a condition precedent.").

[75] TEX. LOCAL GOV'T. CODE § 213.005 ("A map of a comprehensive plan illustrating future land use shall contain the following clearly visible statement: 'A comprehensive plan shall not constitute zoning regulations or establish zoning district boundaries.'").

[76] *See infra* n. ___ and accompanying text.

[77] *City of Houston v. Bates*, 406 S.W.3d 539, 546 (Tex. 2013).

3. The Trial Court's ruling conflicts with the Supreme Court precedent upon which Henderson relied in her motion for summary judgment.

As noted above, the Constitution and Supreme Court precedent require a statute enacted by the Legislature as a prerequisite to preemption of a charter or ordinance, and the applicable statute expressly allows municipalities to modify the process for adopting comprehensive plans through their charters. Given the total absence of any statutory basis for preemption, Henderson had to look elsewhere to find authority for her argument.

Henderson tried to find support for her position in the Supreme Court's decision in *Glass v. Smith*.[78] In that case, the Supreme Court affirmed a Court of Appeals decision affirming a trial court's issuance of a writ of mandamus requiring various Austin officials to call an public election on citizen-initiated legislation.[79] The outcome and (as shown below) the reasoning of this decision are decisively against Henderson's position; however, she had to rely on the decision because it is the *only* Supreme Court case that *suggests* that the propriety of holding an election should be decided *before* the election is held. Later, the Supreme Court made clear

[78] *See* C.R. at 550-51 (*citing Glass v. Smith*, 244 S.W.2d 645, 648 (Tex. 1951)).

[79] *See Glass v. Smith*, 244 S.W.2d 645, 647 (Tex. 1951).

that the question of whether an issue is within the scope of the initiative or referendum power should be determined *after* the election occurs—not *before*.[80]

In *Glass*, the Supreme Court confirmed that "'the power of initiative and referendum is the exercise by the people of a power reserved to them, and not the exercise of a right granted', and that '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.'"[81] In evaluating whether an initiative provision was precluded by general law, the Supreme Court held that preemption could occur in two ways:

> The limitation by the general law or by the charter of the field in which the initiatory process is operative may be either an express limitation or one arising by implication. Such a limitation will not be implied, however, unless the provisions of the general law or of the charter are clear and compelling to that end.[82]

This holding is consistent with the Supreme Court's more recent precedent holding that municipal powers are limited only when the Legislature "expresses its intent to do so with 'unmistakable clarity,'" and "if a reasonable construction giving effect to

[80] *See Coalson v. City Council of Victoria*, 610 S.W.2d 744, 747 (Tex. 1980) ("The election will determine whether there is a justiciable issue, at which time the respondents' complaints against the validity of the initiatory process under article 1170 may be determined by the trial court.").

[81] *Glass*, 244 S.W.2d at 648–49; *see also In re Woodfill*, 470 S.W.3d 473, 475 (Tex. 2015) (reaffirming this statement).

[82] *Glass*, 244 S.W.2d at 649.

both the state statute and the ordinance can be reached, then a city ordinance will not be held to have been preempted by the state statute."[83]

Henderson attempts to interpret *Glass* as standing for something that it does not. Her thesis was that "process- and expertise-driven ordinances—such as zoning—are impliedly excluded from initiative and referendum."[84] *Glass* does not stand for that proposition. In fact, the Supreme Court made clear that the opposite is true:

> 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.[85]

Courts do not concern themselves with whether "process" or "expertise" is appropriate. Courts should only concern themselves with what the statutes say—"expressly or by necessary implication." While a statutory requirement to holding

[83] *City of Houston v. Bates*, 406 S.W.3d 539, 546 (Tex. 2013).

[84] *See* C.R. at 551.

[85] *Glass*, 244 S.W.2d at 654.

a preliminary hearing might be inconsistent with citizen-***initiated*** legislation (commonly known as "initiatives"), the Supreme Court never suggested that the holding of a public vote on an ordinance ***after*** adoption by the city council (*i.e.*, a referendum) could be preempted by a requirement for a preliminary hearing.[86]

So, in short, *Glass* holds that the referendum power should be protected and only restricted by the express or "necessarily implication" of a statute passed by the Legislature. Anything less and mandamus must issue. ***Indeed, since the constitutional authorization of home rule charters in 1912, the Supreme Court of Texas has never held that the Legislature impliedly preempted the reserved referendum power of the people.***

The Trial Court could not properly deny Appellants relief based on its own preferences when the Legislature has not chosen to preempt the referendum provisions of charters in the statutes governing comprehensive plans. To the extent that the Trial Court adopted Henderson's contention that summary judgment should be granted because holding a referendum is a bad idea, the Trial Court erred because only a statute enacted by the Legislature—not public policy arguments—can preempt Section 7.03 of the Charter.

[86] This issue is largely academic as the Legislature did not mandate preliminary hearings when adopting comprehensive plans. *See supra* Section IV(C)(2).

4. Henderson's reliance on zoning cases is misplaced because Chapter 211 (zoning) is mandatory but Chapter 213 (comprehensive plans) is permissive.

Given that there is no Supreme Court precedent in support of denying a referendum vote, Henderson had to turn to intermediate Court of Appeals decisions regarding zoning.[87] Those cases are not applicable here because the statutory regimes are fundamentally different.

Chapter 211 of the Texas Local Government Code governs zoning, and it is full of procedural mandates. For example, a city council is required to hold a public hearing on a zoning change after giving a statutory mandated notice.[88] The city council cannot act until the statutorily mandated zoning commission issues its statutorily mandated recommendation after a statutorily mandated public hearing with mandated public notice.[89] Two intermediate appellate courts concluded that those requirements overrode initiative rights in city charters.[90] Later, two other

[87] *See* C.R. at 552.

[88] *See* TEX. LOCAL GOV'T. CODE § 211.006(a).

[89] *See* TEX. LOCAL GOV'T. CODE § 211.007.

[90] *See Hancock v. Rouse*, 437 S.W.2d 1 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e); *San Pedro N. Ltd. v. City of San Antonio*, 562 S.W.2d 260 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

appellate courts extended that reasoning to conclude that members of the public could not hold a referendum on zoning changes.[91]

Obviously, the holdings of the appellate decisions that the zoning statutory scheme, which imposes extensive procedural mandates, conflicts with the public's initiative or referendum power have no relevance to this case. Indeed, this Court has already recognized that the zoning cases are not applicable here.[92] As noted above, the Legislature has taken the exact opposite approach with comprehensive plans and left the process for adopting such plans entirely up to the discretion of the municipality.[93] The reason for the different treatment in the Legislature's statutes makes sense from a policy perspective. Zoning ordinances affect the rights of specific property owners. The state mandated process for changing zoning ordinances reflects the important due process rights of those owners, and the due process rights of those owners might be undermined if their rights in land were

[91] *See City of Canyon v. Fehr*, 121 S.W.3d 899 (Tex. App.—Amarillo 2003, no pet.); *In re Arnold*, 443 S.W.3d 269, 274-78 (Tex. App.—Corpus Christi 2014, orig. proceeding).

[92] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *3 n. 7 (Tex. App.—Dallas Feb. 23, 2017, pet. denied) ("The City has cited no case expressly holding that comprehensive plans have been withdrawn from the referendum power."); *id*. at *5 n.9 ("We are not presented with the situation where a referendum petition concerns a matter, such as zoning, that has clearly been held to be outside the referendum power. We express no opinion about such a case.").

[93] *See supra* Section IV(C)(2).

subject to the democratic process. In contrast, the amendment of a comprehensive plan does not change the zoning of any property owner or deprive any property owner of vested rights. Instead, comprehensive plans represent the aspirations of the public body as a whole. It is entirely appropriate for the public to vote on the guiding principles of the City. The differences in objectives between zoning and comprehensive planning is reflected in differences between the Legislature's statutes governing the topics. The general laws governing zoning are full of mandates[94] while the general laws governing the adoption of comprehensive plans impose no obligations on the municipality.[95] In short, the propriety of a public vote on zoning has no bearing on the propriety of a public vote on a comprehensive plan.

Accordingly, to the extent that the Trial Court relied on zoning cases to support its Judgment, the Trial Court erred.

[94] *See, e.g.*, Chapter 211 of the Texas Local Government Code.

[95] Indeed, almost the entirety of Chapter 213 is permissive. *See, e.g.*, TEX. LOCAL GOV'T. CODE § 213.002(a) ("The governing body of a municipality *may* adopt a comprehensive plan for the long-range development of the municipality. A municipality *may* define the content and design of a comprehensive plan.") (emphasis added); *id*. at § 213.003 ("A comprehensive plan *may* be adopted or amended by ordinance following . . .") (emphasis added); *id*. at § 213.004 ("This chapter does not limit the ability of a municipality to prepare other plans, policies, or strategies as required.").

5. The Trial Court should have treated Henderson's policy arguments as irrelevant.

In her motion for summary judgment and response to Appellants' motion for summary judgment, Henderson spent an inordinate number of pages talking about how complicated the Plano Comprehensive Plan is and how bad it would be if the public was allowed to weigh in on the future of their city.[96] As the Supreme Court made clear, the wisdom of holding a referendum is not an issue for the judiciary.[97] If Henderson believes that holding a referendum on a comprehensive plan is bad public policy, she should direct those arguments to the Legislature.[98]

The only one of Henderson's portents of doom that is worthy of a response is the inaccurate contention that the City would be left without a comprehensive plan if a referendum were held, which would result in a moratorium on development. If the public were to reject the Ordinance, the old comprehensive plan would remain in effect.[99] Similarly, the Charter provides that the Ordinance was suspended once

[96] *See* C.R. at 554-60; *id*. at 387-93.

[97] *See supra* n.__ and accompanying text.

[98] The lobbying efforts to limit the referendum power of the public in the context of comprehensive plans were unsuccessful in the last two sessions.

[99] *See Dandino v. Hoover*, 639 N.E.2d 767, 770 (Ohio 1994) (holding that rejection of an ordinance by the voters in a referendum left the prior ordinance—that otherwise would have been repealed—in effect).

the Citizen Petition was submitted.[100] There is nothing improper or destructive about requiring a municipality to operate under its prior comprehensive plan unless and until the public approves a new comprehensive plan.

To the extent that public policy concerns played a role in the Trial Court's ruling, the Trial Court erred.

6. As this Court made clear, the City Secretary's opinion on this subject is irrelevant.

Henderson concluded her motion for summary judgment by touting her oath of office and training.[101] So what? A first grader is qualified to carry sheets of paper from one person to another. Given Henderson's 4-year failure to fulfill a very simple and clear obligation to present the Citizen Petition, it is likely that a first grader would do a better job regarding the issue at hand without any special training. As this Court made clear in February of 2017:

> [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

[100] *See* Charter § 7.03 ("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.") (C.R. at 593).

[101] *See* C.R. at 393-94.

> charter. We will not imply such discretion absent express language in the charter supporting its existence.[102]

The Trial Court should have ordered Henderson to do her job, and the Trial Court's failure to do so was reversable error.

D. The Court Should Reverse The Judgment And Order Henderson To Do Her Duty, Which Is What The Trial Court Should Have Done.

In the Judgment, the Trial Court granted Henderson's motion for summary judgment and denied Appellants' motion for summary judgment.[103] When "the trial court grants one motion and denies the other, the reviewing court must determine all questions presented and render the judgment that the trial court should have rendered."[104] The only fact at issue—Henderson's non-delivery of the Citizen Petition to the City Council—is and has always been undisputed. Therefore, as this Court has already acknowledged, Henderson has failed to comply with the ministerial duty under Section 7.03 of the Charter unless that obligation has been

[102] *See City of Plano v. Carruth*, 05-16-00573-CV, 2017 WL 711656, at *5 (Tex. App.—Dallas Feb. 23, 2017, pet. denied).

[103] *See* C.R. at 730.

[104] *See City of Richardson v. Oncor Elec. Delivery Co. LLC*, 539 S.W.3d 252, 259 (Tex. 2018); *Kartsotis v. Bloch*, 503 S.W.3d 506, 515 (Tex. App.—Dallas 2016, pet. denied) ("When both parties move for summary judgment on the same issues and the trial court grants one motion and denies the other, we review both parties' summary judgment evidence and determine all questions presented. . . . If we determine that the trial court erred, we render the judgment that the trial court should have rendered.").

preempted.[105] As shown above, the purported preemption theory—that a referendum cannot be held because of state law—is irrelevant as a matter of law to the duty at issue in this case—the presentation of a Citizen Petition to the City Council. Moreover, Henderson's contention that state law preempts a referendum on a comprehensive plan is incorrect as a matter of law.

Accordingly, the Trial Court erred in granting summary judgment for Henderson and denying summary judgment to Appellants. This Court should reverse the Judgment, do what the Trial Court failed to do and render judgment in favor of Appellants, and order the issuance of a writ of mandamus directed to Lisa Henderson requiring her to present the Citizen Petition to the City Council within fourteen days.

V. PRAYER

For the foregoing reasons, the Appellants requests that the Court reverse the Trial Court's Judgment, render a judgment granting Appellants' motion for summary judgment and ordering the issuance of a writ of mandamus directed to Lisa Henderson requiring her to present the Citizen Petition to the City Council within fourteen days, and grant Appellants all such further relief as to which they may be entitled.

[105] *See supra* nn. ___ and accompanying text.

Dated: November 14, 2019

Respectfully submitted,

TERNAN LAW FIRM, PLLC

By: /s/ Jack G. B. Ternan

Jack G. B. Ternan
State Bar No. 24060707
jt@ternanlawfirm.com
TERNAN LAW FIRM, PLLC
1400 Preston Road, Suite 400
Plano, Texas 75093
Telephone: (972) 665-9939
Facsimile: (972) 476-1361

ATTORNEY FOR THE APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via electronic service or electronic mail upon the counsel of record on this 14th day of November, 2019.

/s/ Jack G. B. Ternan
Jack G. B. Ternan

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned certifies that this brief complies with the type and volume limitations of Texas Rule of Appellate Procedure 9(i)(2). Excluding than the words exempted by Texas Rule of Appellate Procedure 9(i), this brief contains _____ words. This brief has been prepared in proportionally spaced type face using Microsoft Word 2016 using 14 point Times New Roman.

/s/ Jack G. B. Ternan
Jack G. B. Ternan