ORAL ARGUMENT — 11/3/97
96-1154
QUICK V. CITY OF AUSTIN

MINTON: In August 1992, after an initiative and referendum, the SOS Ordinance was adopted for the City of Austin. This ordinance replaced another ordinance, the composite ordinance, which was a non-degradation water pollution prevention program, which very effectively prevented any development in the Barton Creek watershed would result in any increase in water pollution.

The SOS, the record at trial shows was an arbitrary and unreasonable totally unnecessary ordinance. It was clearly designed by Mr. Bunch not to prevent water pollution, but to prevent development in the Barton Creek watershed, that is the whole southwest part of this county and into Hays county.

The SOS requires that there be no increase in the average loadings in 13 specific constituents. If I haven't lost you there, I don't know why. The composite regulated runoff in such a way that the concentrations of a particular constituent, and a constituent is a pollutant like phosphorous, nitrate, or whatever it was, in such a way that in a given volume of water there would be as low a percentage as possible. The composite required that in its natural state if this land had for example: a gram of nitrate running off with so many gallons over a period of year, then that concentration (let's use the word "percentage") would have to be less than that in the development if you understand me.

Whenever you have development, you have impervious coverage. Whenever you have impervious coverage, you inevitably have some increase in water runoff, we all know that, unless you keep all of the water on that tract of land, which of course is not good pollution control. So that as the volume of water increases, you can have an increase in the loadings, that is the weight of a particular given pollutant but, nonetheless, have much, much, much cleaner water. That is what the composite provided. That is what the SOS changed to begin with. Whatever loading, whatever amount not percentage or concentration, but whatever amount it had in its natural state prior to development is what it had to have for the rest of the history of that development. That's anti-development. That's virtually impossible. If it's not impossible it requires an incredible cost. The estimates of the city of Austin concerning that type of loading as opposed to concentrations was such that together with impervious cover, the values in that particular area were lost over $300 million.

Now then impervious coverage, we all know what that means: concrete, asphalt, anything that the rain does not go through so that it soaks into the ground.

ABBOTT: Do you have a copy of the City of Austin's brief?

MINTON: Yes.

ABBOTT: Would you please turn to page 6 of it. The second indented paragraph where it starts: "reasonable minds may differ." Why is that not the standard of review for us to apply?

MINTON: I believe that the standard of review for this court to apply is the same as it was in the lower court and, that is, whether or not this statute was arbitrary and unreasonable. I mean this ordinance. That is what the statute set out. I think that that holding is consistent with all of the other cases that we've had, which I have read at least, which set out terms of arbitrary and unreasonable in *Edgewood* even inefficient. And I believe that that is the appropriate rule to be used here and it was the rule that was used.

ABBOTT: Is that standard of review not the standard of review that typically is applied when you're undertaking a due process analysis, substantive due process analysis?

MINTON: Arbitrary and unreasonable as being the same as in due process? I'm not smart enough to say that I can answer that categorically. I would guess that it is close. But arbitrary and unreasonable is the rule that is used in common law review of ordinances. It is the rule that is effectively what we have in the substantial evidence rule. I think in due process, there may be perhaps a little stricter argument, but I'm not knowledgeable.

ABBOTT: If the standard of review that you're advocating is identical or virtually identical to the standard of review that would be applied if we were to undertake a substantive due process analysis, what would be the status of your position being that at least as the respondent's contend, you lost on the due process issue in the CA, and you are not raising that issue here?

MINTON: I believe that we still have the right to have this court determine if the test that was applied is a test that is accepted under the laws of the State of Texas. All of the water quality is turned over to the Water Commission with this little bit, the legislature turns over to the cities to be submitted to the water commission, now the TNRCC, which in turn reviews that itself and approves it. And I believe that they have the right to say: "we can set certain limits beyond which you can go." Suppose for example that they said: We're all going to have water pollution in the cities around here, but they will never be more than $1 million. We are not going to spend that on water pollution or $5 million or whatever it was. And the city sets $10 million. Is is not possible that there can be a review if the statute provides for it to determine if they have gone beyond the limits that the legislature has delegated that authority in that particular area to a city.

ABBOTT: On the cases that you rely to support your proposition for the standard of review it seems to me that all of those cases concern with use of commission or commission type hearings, and don't concern review of city ordinances. Could you identify for me any case that you rely upon for your position concerning the standard of review that reviews a city ordinance?

MINTON: There is one, and I can't say it, which reviewed an ordinance. And the common law test as to ordinance is arbitrary, reasonable and there's one other word it will come to

me in a moment, that they review on. I not only rely on that, I rely on the *Davis v. the City of Lubbock*, and such cases as that that are using essentially the same test. They changed the procedure, but they do not change the test.

The court will recall that Judge Greenhill said in the *City of Lubbock*, he gets to the de nova part: te appellate Johnson contends that the city and its agency erroneously designated the area as a slum area, and that he is entitled to have the court decide that question anew and independently - that's de nova as we know it. He does not allege that the city acted arbitrarily, capriciously, fraudulently, unreasonably, or illegally. Arbitrarily and unreasonably is what is set out in this statute. It is precisely what Justice Greenhill was talking about in that case.

ABBOTT: It also says: that de nova review occurs when a court is permitted to substitute its judgment for that of the legislative body on the public policy issue?

MINTON: Yes.

ABBOTT: By the statute wording the way that it is that would allow this court or any other court to modify the particular statute in question, why would we not be substituting our own policy judgment for the cities when it comes to the most efficient or effective way of implementing this particular policy?

MINTON: Two things that you have here. The term "modify" as used in 26.177, this court may decide to take it out. I believe that modify was put in there for the same reason that perhaps you all have the authority here to strike a word, so that if a court said: I believe that this test is good with the exception that they can put this one thing in here and we are going to modify it only insofar as taking that out is concerned. I do believe that modify is something that would have been better left unsaid. But this court, I need not say, as any court can strike any part of a statute and make it constitutional, make 26.177(d) so that it is not unconstitutional. I have no idea why the lower court did not do that if they wanted to do it.

PHILLIPS: You can't point to any other statute that sets up a review, standard of ineffective?

MINTON: No. I do not. And I would say the same thing about ineffective. I think that arbitrary and unreasonable are what we went on. We went on inefficient because the evidence on inefficiency was so overwhelming, we couldn't resist it. But arbitrary and unreasonable is a time honored in all of these reviews, and I believe that it is one that the legislature would have reason to believe would be accepted if they put it in this one. We did not go into that district court and say, let us put on a whole lot of evidence and, you, Judge, determine what kind of a pollution control program we ought to have. We went into that court and said: this one, we are going to put on evidence directed solely and only to the fact that this is arbitrary, unreasonable and inefficient. And I believe that is a proper test for them to have.

ABBOTT: As I understand it substantive due process demands could a city not pass an ordinance that is arbitrary, and unreasonable; do you agree with that?

MINTON: I agree with that.

ABBOTT: And since that is the substantive due process test, and since that is where you want to come out, and since you lost on substantive due process and are not appealing that up to the SC, how is that you can prevail on te issue of claiming that the statute is arbitrary and unreasonable?

MINTON: Because we chose to take into the SC, the fact that the court held unconstitutional a statute which provided for us to have a test of arbitrary and unreasonable. And without regard to due process, we felt that that was something that we were entitled to, and that it was a mistake. The CA, all my buddies, went so far out of their way to strike down a statute which they did not need to strike down in order to arrive at an end that we have here.

The SOS sent the impervious coverage limits in concrete. And what I want to make clear about this is that they put them in concrete - no variances, no exceptions, no waivers. And where that is so lethal, may it please the court, is that the composite all the ordinances that I know of and that were shown in the record will permit a variance if the landowner can demonstrate that he is going to be able to develop with less pollution, if you understand me. With the variance included, like from 15% to 20%, you've got to show and that is what that ordinance required. They did away with all of that. And when you read the declaration of intention you think that none of that was in there. I recall testimony that we had earlier in the trial where people from the city did not even know that that's what the composite required was first a showing so that now as with the situation with Ms. Quirk, the Bryants, and the Cox's and the others, they were first faced with a situation. Austin Lee Brock testified that if he could have given Ms. Quirk a variance, he would have done it like that, because the impact on her was cruel, not just arbitrary and unreasonable, but he could not do it. It is for this reason that we brought this case before a district court for the single purpose of having him decide, not what kind of a pollution program we ought to have, but whether or not the one that had been enacted was in fact unreasonable, arbitrary.

HECHT: As a matter of law?

MINTON: As a matter of law.

HECHT: Why the jury issues?

MINTON: Justice Forbis said, and it's in the record, the word "remand" is a vulgar term that should never be used in _____ society. And he told us, we were going to bring up every single issue and submit it to the jury that could conceivably be done, so that some court would not do as some other court, I gather in the past, have done to him was to remand back saying: here is a fact question that you need. If you notice, he submitted everything as to arbitrary, everything as to

unreasonable, everything as to insufficient. Then he went one-by-one as to each one of the elements of it, and submitted that. Those were legal questions. There is no question about that. And we brought that to him. But he found that. The court will read where he says in his judgment: The court finds that plaintiffs are entitled to judgment in their favor consistent with the jury answers and the evidence at trial and the applicable law. There is no question of what the jury submission was for the sole and only purpose if some appellate court, the court of appeals had said: You decided something as a matter of law, and it was a jury question and we're going to send it back down there for you to do it again.

ABBOTT: Assume we find in your favor, why should we not at least send it back down to the TC for the TC judge to make his or her own findings as opposed to having jury findings as to whether or not it's arbitrary and unreasonable?

MINTON: He did that. When the court finds that we are entitled to the relief, when he finds that under the evidence and the law that we are entitled to judgment, it is clear that that is what he is doing. I understand where the court is coming from. But there is no question as to what Judge Forbis himself personally thought that the ordinance was incredible.

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FIELD: Our responsibility this morning is to apply the SOS's application for writ of error. As this court knows, the SOS Alliance has the burden of proof on this issue to show that the TC abused its discretion in striking their plea to intervention. And to do that, this court has outlined the factors they must show, and clearly in the *Guaranty Federal* case there are three elements they must show, and they can't show any of the three. Let's just take an example: the SOS Alliance must show that the intervention that they sought was necessary to effectively protect their interest in the TC. And the only evidence the SOS Alliance has brought up to this court is that the City of Austin at one time in the past opposed the passage of the SOS ordinance. We admit that. That's true. But let's look at what was in front of the TC when it made its decision. The facts had severely changed by that time. By that time, the City of Austin voters had passed the SOS ordinance, and the City of Austin had an expressly incorporated the SOS ordinance and made it part of its own land development code. It developed by doing that an interest and a duty to defend the SOS ordinance, and that's the interest of the SOS Alliance, is defending the SOS ordinance.

And in carrying out that duty, the City of Austin hired Tom Watkins and his firm to go in and do everything they could to zealously defend the SOS ordinance. The SOS Alliance based on those facts simply cannot show anything in front of the TC that would lead to the conclusion that it abused its discretion. And that's just one of the three.

Now the SOS Alliance, because they can't meet *Guaranty Federal* wants to do something different. They want to take the court's attention, just like they tried to in the CA and in the TC, to a different issue. I will just read briefly from the TC record: The SOS's attorney

said: The sole question before this court is whether te members of the SOS legal defense fund, the fund itself and Al St. Lewis, who is a member has a legally recognizable interest in this controversy, which gives them the right to protect that interest in this court.

As you will notice in their briefing what the SOS Alliance wants to say is: We have a justiciable interest, we have standing; therefore, we have a right to intervene as a matter of law. But if you look at *Guaranty Federal* what this court wrote, that's nowhere to be found. It's not one of the three elements, that's not enough.

But let's just assume for the sake of argument that the SOS Alliance somehow could meet the *Guaranty Federal* test and show an abuse of discretion. The inquiry does not end there. They must also show as any appealing party must, the TC's failure to allow them to intervene somehow led to the rendition of an improper judgment in this case. And they just can't do it. The fact of the matter is, we're the ones appealing to this court. Mr. Watkins and his firm, we hope only to this point, but up to this point they've been successful in defending the SOS ordinance.

What's more, the TC actually let the SOS Alliance have some meaningful participation in the proceedings. They didn't have to. It allowed Mr. Bunch to be excluded from the rule, to be present at every proceeding. It allowed Mr. Bunch and his wife to testify extensively and it allowed amicus briefs from Mr. Bunch and all legal issues.

I will conclude by saying, that the SOS Alliance not only can't show an abuse of discretion in *Guaranty Federal*, but it can't show harmful error also. And for those reasons, we respectfully request that this court affirm the judgment of the CA on this issue.

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RESPONDENT

WATKINS: The citizens of Austin by 73% of the votes adopted the SOS ordinance. That ordinance was then codified by the City council as a part of the water quality programs for the City of Austin. The petitioners in this case appealed that adoption of the SOS ordinance to a district court under 26.177(d), which gave to the DC some what I think are fairly strange powers for a court. And it was because of those strange powers, that the Austin CA declared 26.177(d) unconstitutional. And the question before this court, I suggest, is whether or not that is an appropriate exercise of judicial power.

SPECTOR: Is the SOS ordinance that is at issue here, the ordinance that is presently on the city books, or has there been subsequent modifications of it?

WATKINS: At the time that the CA's opinion came down, the city started enforcing the SOS ordinance as it was written and as it was tried before the TC. So it is currently the ordnance that is in effect for developments and has been since the CA wrote its opinion.

ENOCH: Do you agree with Mr. Minton that arbitrary and unreasonable is a basis for a court to set aside an ordinance?

WATKINS: Yes. As a legal question, under substantive due process, if an ordinance is arbitrary and unreasonable, a court has the power to declare it...

ENOCH: If there's a statute that says, a court can strike down an ordinance that's arbitrary and unreasonable, there's nothing that makes that type of statute somehow a breach of the separation of powers?

WATKINS: Absolutely not. I presume that they can pass a statute that says: All of the rights that are contained in the constitution are for the citizens.

ENOCH: So your point is, because the statute also permits an invalid ordinance and ineffective ordinance and an inefficient ordinance be set aside, that that makes the statute which also says: arbitrary and unreasonable, unconstitutional?

WATKINS: With two additions to that. One, because it also gives to the court the power to modify, that means that it is legislative and not judicial in nature. In other words, judicial is to decide between competing interests. To modify the ordinance to make it something else is a legislative function. Arbitrary and reasonable as it appears in the statute, I think, are clearly not the constitutional test of arbitrary and unreasonable as it appears in substantive due process litigation, unless this court chooses to interpret it that way. If the court does, the statute is meaningless. 26.177(d) is either unconstitutional, or it doesn't add anything to what existed prior to the time of its passing. And if that's the situation, then the legislature passed a meaningless act. And this court in order to save the statute should not presume that the legislature intended for it to be meaningless. I think the legislature intended to give legislative power to a district judge. And I think that statute is unconstitutional because of it. And for this court to define it back to the state of the law before the legislature passed it, is to deny what the legislative intent of that statute is. And I think it's unconstitutional on its face.

HECHT: But it's a nonargument that we should take it to mean what you think they said it meant, so that we can strike it down as being unconstitutional?

WATKINS: I would put it another way. I would say the argument is, the words there clearly don't mean arbitrary and unreasonable as the constitutional test. They just don't. You're going to have to really stretch to interpret that statute to mean the substantive due process standard of arbitrary, unreasonable and capricious.

HECHT: Why isn't arbitrary and unreasonable the same in the statute or in the constitutional test?

WATKINS: As what's happened with the district judge in this case, he submitted these things to the jury because they look and feel and sounded like fact issues. He did it on a preponderance of the evidence. He did not think it was substantial due process questions. He thought they were fact issues that were there.

HECHT: But because he may have acted out of an abundance of caution?

WATKINS: Yes and that's what he was doing.

HECHT: Doesn't mean that the words mean something different?

WATKINS: If it's a preponderance of the evidence they clearly do mean something different.

HECHT: Is it?

WATKINS: Well I think that's what the legislature intended. I think this court certainly has the power to construe it to mean what is constitutionally permissible. But what do you do with inefficient, ineffective and the power to modify?

BAKER: Can't we strike them?

WATKINS: You certainly can. You can strike those words down, redefine arbitrary and unreasonable and say: that's what the legislature meant when they passed this statute. And then the statute is totally meaningless.

BAKER: I don't understand that. Redefine arbitrary and unreasonable in what way?

WATKINS: If you say the term "arbitrary" and "unreasonable" as it exist in 26.177(d) means the same thing as the due process arbitrary and unreasonable, then you've got a meaningless legislative act. They didn't need to pass it. These petitioners had an absolute right without 26.177(d) to go to the DC and say: declare the SOS unconstitutional because under the US Constitution and the Texas Constitution it is unreasonable, arbitrary and capricious, and we have a right to have it struck down. And 26.177(d) adds nothing.

So this court's choice, and I think Justice Hecht is right, it's a weird kind of situation in which to save the statute you've got to render it meaningless. And I don't think that's the right way to do it. I think the right way is to say it's unconstitutional because the legislature didn't intend the same thing as constitutional due process.

HECHT: Any review is a matter of law or not?

WATKINS: I think the only review of a legislative act as a matter of law.

PHILLIPS: We do have an obligation to read a statute constitutionally, to preserve its constitutionality if possible, do we not?

WATKINS: Yes, you do, unless you render it meaningless.

PHILLIPS: Do you have any authority that has that type of caveat to our general deference to the legislative process?

WATKINS: I don't think we've ever had a statute that was totally and meaningless if you interpret it constitutionally.

PHILLIPS: There are a whole lot of statutes that track constitutional provisions or constitutional grants are there not?

WATKINS: Yes. This is not one of them. This has other stuff in it.

PHILLIPS: Well there's no question under *Rose v. Doctor's Hospital* that we can strike any other stuff out of it is there?

WATKINS: That's correct, and have a duty to. I mean to strike down the unconstitutional portions of the statute.

BAKER: How is it that you think by putting arbitrary and unreasonable in this statute becomes meaningless because it's the same thing as the constitutional requirement?

WATKINS: As a practical matter, I guess, is what I'm saying. It doesn't change what the petitioner's rights are. They had the right. If 26.177(d) was declared unconstitutional or if it had never been passed, these petitioners had the right to go into court and challenge it because it was arbitrary and unreasonable as a constitutional question.

BAKER: Is there some little problem with this particular ordinance as "the City of Austin's Ordinance," but it goes over into Hays County because there is extraterritorial jurisdiction there, and that maybe SOS wants to really know where they are if they have to appeal, and that they've got a constitutional arbitrary and unreasonable standard of review on appeal?

WATKINS: The petitioners in Hays county always had that right.

BAKER: So they still have it under the statute?

WATKINS: Well the statute can't take it away. Their constitutional rights are there and

this statute cannot take it away. The issue for the court is, do we want to take a statute that was clearly intended to do something that was unconstitutional, and for the legislature recarve it down to where it has no meaning and no application and, therefore, say that it is a constitutional ordinance.

PHILLIPS: What is your position as to the trial judge's review of this statute under a legal rather than a factual standard?

WATKINS: I do not believe that Judge Forbis in any way made a fact finding to back up the jury findings. The way I read the judgment, he made some very specific conclusions of law, none of which were, that this is arbitrary, unreasonable or capricious and, therefore, is unconstitutional under a constitutional standard. He held it invalid based on the evidence submitted to the jury, which was by a preponderance of the evidence, and I don't think there's any implication that he backed it up with his own finding.

Now, that got to the CA, and the CA wrote on the issue of arbitrary and unreasonable under a constitutional standard, and they found it to be constitutional, the SOS ordinance. And the petitioners for whatever reasons did not assign that as error in this court. So we do not have an assignment of error by the petitioner here in the court saying: that the Austin CA erred in its finding that under a constitutional standard this statute is not arbitrary or unreasonable.

HECHT: Petitioners argue that the statute in some respects is virtually impossible to comply with, that the water runs off must be cleaner than processed water, and that's some of the reasons why the statute is unreasonable and arbitrary; what are the responses to that?

WATKINS: Responses to that is anytime you're dealing with water quality, the individual plaintiff will always be able to come into court and prove that what they're doing isn't' going to pollute the water. Because their contribution to the pollution process is not going to pollute the water and we'll never win the scientific fight. So a legislative body, not a court, has to make a decision: is there a way we can protect the water because we are headed towards a downward slope of year after year of worse and worse water until there's nothing we can do about it.

ENOCH: Why shouldn't science win that battle?

WATKINS: The point source polluters, the people up river that used to be dumping stuff in the river they can win that battle. What they're dumping in the river is not going to pollute the water. Other scientist will come in and say: but if we don't stop this one, this one, this one, and this one, the water is going to go bad. What the scientist in this case testified about is if we do not control...

ENOCH: But you're talking about point source. I'm just talking about I'm a homeowner out here, I've got some property, maybe I'm a big property owner, whatever, and I'm living in Hays county, and there's a city that lives next door, and the city says: We have determined

that we don't want pollution in this watershed over here, so we determine that the next door folks can't do anything with their property over there. Now, why wouldn't science dictate whether or not there's an arbitrary or unreasonable control of that neighbor's property?

WATKINS: I think science should tell us whether or not impervious covered limits and constituent limits are reasonably connected to water quality _____ regulation.

ENOCH: If it was determined virtually impossible to meet the standards that have been placed over there for the neighbor to do it, why wouldn't that then make the control arbitrary and unreasonable?

WATKINS: If that's what the evidence says. The evidence is disputed. Mr. Minton's version of what his scientist say when they got on the stand is different from what our scientist say when they get on the stand. And the question is, whether or not legislative, reasonable minds can differ as to whether or not impervious cover limits and load limits are reasonably connected to the control of water quality. And we will never in an instance be able to show why that is important in the instant property owner's situation. They will always be able to come in and say: the runoff that's coming off of my property is not going to pollute Barton Springs, it's not going to pollute the water. And I use the point source because that's exactly what they originally said with the first company that was dumping the chemical toxins into the river. You couldn't prove that the amount that that company was dumping into the river was going to pollute the river. You had to pass a law that said: nobody gets to dump. And in this situation this legislative group made a decisions that for the City of Austin, and because of Barton Springs and its position in the culture city of Austin, that we need an impervious cover limitation and a load limitation that would protect the springs in the future.

What this court has to say if it's going to declare it unconstitutional is: there's no possibility that those scientist that support the ordinance are right, that we make a judgment that 100 years from now there's still going to be pure water in Barton Springs, because we've decided that that nonpoint source pollution regulation wasn't scientifically valid even though scientist were arguing with each other at the time as to whether or not it is valid. And the only way this court can declare SOS unconstitutional is to substitute this court's legislative judgment on the reasonable nexus between impervious cover and load runoff as to what it's going to do for the future of the water in Travis county.

ABBOTT: Would it be unconstitutional for the commission to undertake that analysis?

WATKINS: I have avoided answering that question because I think so.

ABBOTT: You think it would be unconstitutional?

WATKINS: The difference between legislative and administrative is real unclear to me, and I looked and looked and looked and tried to decide how I could distinguish between a legislative

act and administrative act, and administrative review of a legislative act. The legislature gives quasi judicial functions to administrative, and I would have to see it in its context. It may well be that the commission would have the quasi administrative, quasi judicial right with a proper standard, substantial evidence review of the record at the TC to be able to review whether or not they did it right. I think if they sent it to the commission with no record from the TC to look at and no substantial evidence test, then it's probably unconstitutional, too.

ABBOTT: Along those same lines, let me get you to focus on the wording of 26.177(d). The second sentence says: An appeal must be filed with the commission within 60 days of the enactment of the rule in order to _____ ordinance, etc. It doesn't say anything about having an appeal filed with court within a certain period of time?

WATKINS: That's correct.

ABBOTT: And then the sentence immediately following that says: The issue on appeal is whether the action or program is invalid, arbitrary, unreasonable, inefficient, or ineffective, etc., the offensive language. Are you aware of any legislative history, any type of clarification or anything like that to determine whether or not that sentence that says: the issue on appeal, whether or not it refers specifically to the preceding sentence, which references only an appeal to the commission, and not any kind of an appeal for a court?

WATKINS: No. My own reaction to those words was that it was always intended to be an appeal to the commission based upon substantial evidence test of the record that was before some sort of TC at that point. It looked to me like somebody put "or district court" in the sentence that was intended to be something else.

ABBOTT: Could this be the reason why? If you look at the very first line of §d, it talks about more than just reviewing ordinances. It talks about reviewing rulings and orders, or other acts, which could be some type of judicial act. Would that be the reason for the purpose of including "court?"

WATKINS: Who knows. But it was consistent that this whole thing was intended to be a substantial evidence review to the commission to determine court rulings or any other kind of rulings of the defective water quality as an administrative body. And I think that passes a lot of constitutional muster. When they put "court" in there though they then take the court making a ruling on a legislative act with no record with this part. How does substantial evidence be applied to something at which there's just no record? The DC is starting all over from ground zero. They are creating water quality, and they can modify and change it.

ABBOTT: You're getting to the point I'm concerned about. And that is, that on the one hand it would be possible arguably for us to delete some offensive words in here. Let's say inefficient and ineffective, and the word "modify." In doing so, however, would we be altering the

true meaning of the statute of what it was intended to be able to do with regard to commission review?

WATKINS: I believe so. In other words, the easier way to make the whole statute constitutional is to take out the words "or court," and then I think you have a fairly cohesive substantial evidence review of all kinds of rulings by the commission for water quality matters. And my guess is that what happened was that somebody stuck the word "or court" in what was going to be an administrative review.

PHILLIPS: The petitioners did not challenge the substantive due process legal holding by the CA. But under point of error 1 they have a section e, pages 20-23, that does address this. Would it not be the height of formalism to say: subpoint doesn't preserve?

WATKINS: Clear, that's what the Austin CA did. They took it and looked at it. I'm not sure that their failure to assign it prohibits you from looking at it.

PHILLIPS: But I mean it is specifically referenced in a heading that comes under the point of error?

WATKINS: Relating to a different point of error having nothing to do with that issue. So I mean maybe I'm complaining about that and they didn't outline it right. And I'm not going to make a big point out of that because like I say, I think this court has the power on its own whether they assigned it or not to take a look at it. You can choose not to if you thought they failed to assign it. But it's a constitutional issue which I think comes before every court when they get a chance to look at it. And substantive due process I think is fundamental error. And so I think you always have the right to see if something is arbitrary, unreasonable or capricious, whether it's assigned or not.

212.002, and 212.003, and the other parts of the statute simply are not applicable to the SOS because it's a water quality ordinance. The same statute that passed 212.002 and 212.003 and that passed 26.177(d) also passed 401.002, which if you look at it in your index, is a specific statute granting to a home rule(?) municipality may provide for the protection of and may police any watershed, and it gives it the specific right to that in the extraterritorial jurisdiction. Therefore, if this is a legitimate water quality ordinance, that is if the scientist say: impervious cover and load limits are legitimate water quality procedures, then this ordinance has authority from 401, and it does not have to comply with the statutes relating to controlling subdivisions and plats in the extraterritorial jurisdiction.

That being the case, the City of Austin has the power to do this, it has the right to do it, and it had the obligation to do it, and a whole lot of citizens believe that they should do it. And we are really to the bases of what is the legislative choice about protecting water quality. And it's not the court's job to substitute its judgment for the judgment of the legislative body.

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BUNCH: I am here today on behalf of the applicant interveners, petitioners and respondents, Save Our Springs Alliance. As representatives of the sponsors of the citizen's initiative, I will be addressing the striking of our intervention, as well as the closely related issue of whether the SOS ordinance was a proper subject matter for initiative.

I will leave it to our briefs, our argument, that §481.141 - .143 in the government code should not apply in this case at all, because it did not address legislation of a municipality and instead is limited in its effect to regulations by regulatory agencies. That is at least in the form of the statute in place in 1987.

I would like to first touch on a few of the matters here. My impression is that the court is looking to see if they can in fact harmonize §26.177 of the Water Code with the constitution, and that's quite properly an exercise that you should undertake. I would simply suggest that if you believe that the statute can be bended or read in a way that would save it as being a constitutional statute, that it certainly was not applied that way in this case. There's nothing in the final judgment that indicates that the trial judge gave the proper deference and applied the proper test of whether starting with the presumption that it's a valid ordinance and asking the question: Do reasonable minds differ? This is underscored by the fact that he submitted those questions to the jury, and misunderstood the test to be applied.

BAKER: The CA held that the TC didn't abuse it's discretion in striking your intervention. And secondly, because if they reached that conclusion that you didn't have any standing which you argued any points on the merits, and now you're arguing the merits without first telling us why the court was incorrect in striking _____. As I understand it, your whole argument was that you didn't think the City would effectively protect your interest, is that correct?

BUNCH: Yes.

BAKER: So why is that an improper finding by the CA on what they found?

BUNCH: It is improper because in our view the CA misapprehended the *Guaranty Federal* test and misapplied it both in substance and procedure. And that's a technical issue. In broader scope it ignored the fact that the very nature of a citizen initiative is a power that's reserved to the citizens, that's really held in opposition to the City.

BAKER: Well if I understand it, the City opposed the ordinance that you're group wanted passed in the first place, but you were successful in your _____.

BUNCH: Yes.

BAKER: Do I understand correctly that what was actually passed by the City was exactly what you asked for?

BUNCH: We do not challenge the way that they subsequently enacted and put into the land development code what passed...

BAKER: So if they went all the way with your group how could they not want to also protect not only their interests by the City but your interest in defending this litigation?

BUNCH: For the very practical reason that the City had made a long record during the campaign of why the ordinance was not a good ordinance. They opposed us at every step of the way. And we've cited a few references of that in our briefs.

BAKER: But is it correct what the CA said that if we look at this determination on whether the TC abused its discretion as to the circumstances at the time of trial not before?

BUNCH: I disagree with the way they did that. It has to be applied at the time of the plea of intervention. I don't think we can be asked to go forward and look at what might happen eventually in the future. We can't foresee the future. At the time of the plea in intervention, we had clearly pled that the City was opposed to us, and it's in our pleadings. Because there was no evidence to contradict that, those have to be taken as given, and instead, the CA ignored that.

PHILLIPS: In a politically charged situation such as this one, is there any authority that a trial judge could look to hypotheticals in the future or the reviewing appellate court should, that is a change in city administration might take a different view of the legal _____ on the way the administration was viewing that either at the time of the petition or at the time of trial? From what you're saying, there's not. It has to be a freeze frame review is that right?

BUNCH: I think this court doesn't have to go so far as to say it's a per se rule, that the very nature of an initiative is in opposition to a city. Because here we established the facts that there was actual conflict and that conflict made it impossible for the City to represent our interests. I also think that there is an important point here that this adequacy of representation by an existing party is not in this court's law. That is part of the federal rule of intervention. What the *Guaranty Federal* test is, that we have to show that it was almost essential to protect our interests to participate. It can hardly be argued that adverse judgment against the City of Austin would, and actually did, invalidate the ordinance and blocked the City's implementation of the ordinance. So certainly our interest in the initiative and under the Charter, that is an interest that is reserved to us, held apart and separate from the City was harmed and there was no other recourse for us to take.

Now if this court wants to integrate the federal standard of adequate representation by an existing party, I think our pleadings show that they could not do that.

Also, I want to point out that the plaintiffs want to have it both ways here. In their response to our application for writ of error, on page 4 they write: At the time of trial, the City had adopted the ordinance in full as part of its land development code, thus the posture of the City at trial was in defense of its own code. This is absolutely true. The record shows that there were hearings for the adoption before the election, and then there were hearings after the election. And the City incorporated the ordinance adopting it as their own. If it's their ordinance, then a challenge to it in its improper method of adoption is _____. If not, then it's still our ordinance, and we certainly have the right to participate in this litigation.

The key point is the adversity though. The very legitimacy of judicial review hinges upon parties who are active, willing, aggressive opponents not allies. In this case, the developers, the plaintiffs in this case and the city have been active allies. They were opponents to us. In fact, Mr. Minton represented the majority of the City Council in delaying the vote on the SOS ordinance. And in his representation, he filed a brief in the CA explaining that the ordinance had to be delayed to the next available uniform election day, so that the City could have the hearings that the charter set out that it should have. And it's in their briefs.

ENOCH: Do you disagree with Mr. Field that the SOS Alliance has to show that they were harmed as a result in not being permitted to intervene?

BUNCH: I do agree that if you uphold the ordinance, then there's harmless error. But if want to find that there's a problem here, then I think it's clearly not harmless error and that we have a right...

ENOCH: Is there some place in the record that you can point to that you would have done something differently at the trial of this case or on the appeal than was done by the City?

BUNCH: First, our second point of error is a legal case issue that were distinct and separate from the City. In our briefs, we point to the fact that the City was on record at one juncture saying: This ordinance was an improper ordinance for citizens initiative.

ENOCH: They testified at trial that they thought their ordinance was improper?

BUNCH: That was introduced by the plaintiffs.

ENOCH: What would you have done differently?

BUNCH: The City's experts and the city's case was predicated on defending the very ordinance that the SOS ordinance was supposed to replace. Their witnesses testified repeatedly that the previous ordinance was a good ordinance. And so, the court quite properly said: well if the previous ordinance is good, the plaintiffs are saying they like it too, even though it has the same impervious cover limits, then their challenge is separate.

ENOCH: So your point is, you would have objected and tried to keep that evidence out?

BUNCH: No. We would have put on affirmative technical case with a hydrologist, the City didn't even call a hydrologist, and shown that the previous ordinance could not protect the water problem. It was not a nondegradation ordinance as Mr. Minton has asserted today.

ENOCH: So your point is, you had proof that would have been different?

BUNCH: Yes. We would have shown that our ordinance was far superior protecting the water quality than the City Council's ordinance. And instead, the City's case defended the very ordinance we intended to replace.

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REBUTTAL

MINTON: Mr. Field certainly covered the issue of this intervention sufficiently. And I don't think Watkins would do the same thing for me, but I am going to go ahead as a matter of record and say, that to suggest that the City of Austin was injured by not having Mr. Bunch represent them instead of Mr. Watkins is the height of ridiculousness.

This case was so-well tried, I got so sick and tired of hearing Watkins review every judgment call that the court made over and over again. I never had anything put down for sure. I've been trying lawsuits against him since he got his license. He represented the City of Austin better than anybody I can imagine. I just want to make it clear, that is absurd.

Now, back to where Watkins is a bad guy. I want to make it clear that I am not asking this court, I have never asked any court that I want this court or the TC to substitute its judgment or the judgment of the City Council, or even the initiative and referendum process in deciding what it was that was the proper pollution prevention program. That is a legislative function. Mr. Watkins, I can hardly sit still with the way that he did it in the jury argument, where he talks about: if people today, if legislatures today want to anticipate what the technology is going to be in the future, how that we are polluting the water today in ways that we don't even know about. You all may have read in an editorial on Saturday that said: it's 10%, and that's it. Let me have any of those people on cross-examination. Let me have this hydrologist that Mr. Bunch says he would want to call. I have to live with the rules of evidence when cross-examination and putting on testimony. It is not there. What we were testing was whether this ordinance was arbitrary and unreasonable based on very specific facts, and very specific scientific evidence. The reason it is arbitrary and unreasonable, is because it adds nothing in the way of keeping water clean. We demonstrated and Austin Lee Brock, Mr. Bunch is here telling you that they were going to show that it was not a non-degradation ordinance. That was a challenge that was made by them and taken to the TNRCC, and the TNRCC found that the composite was a nondegradation ordinance with the City staff and engineers in there testifying that it was a nondegradation ordinance.

What the SOS wanted was what they have always wanted was to pass something that could not be met. And the testimony and the evidence and the correspondence in this lawsuit makes that clear. They want to see to it that a landowner's property is going to be so cheap, it is not the developer, we always want to paint the developer as the bad guy.

ABBOTT: Going back to 26.177(d). What parts of that provision do you suggest should be stricken in order to make it unequivocally constitutional?

MINTON: Let me put it this way. Were I to have been asked before they did this, I would have left it arbitrary and unreasonable. Because if you read the cases, that's what the cases say. An ordinance that is arbitrary and unreasonable can be set aside. I fully understand what they meant by saying "inefficient." And certainly, we know what ineffective is. And in this connection, we talked the judge out of submitting ineffective, but it was ineffective and that it did nothing more. But in answer to your question, I would just simply say arbitrary and unreasonable.

Now in addition to that on "may modify," I tried to make my point on that a few minutes ago. I think that you all may decide that you're going to modify it. At least it is my dear hope that you are going to decide that _____ by taking out 1-2 of these words that's in there. That is the way that I have read that was that if this was taken up, if an ordinance was taken up that had something in it that just couldn't go, but as in the cases that we read in Judge Calvert's case, and Judge Greenhill's case, *Southern Canal* where they are trying to look and take something out so they can make it good, and they do that in so many of these, and the cases are clear that they can do that, I look at that "modify" as being giving in this statute the ability of a court to say we're going to take this and strike it out, not we're going to write a new, not modify in the sense of we're going to change this 15% impervious coverage to 25% impervious coverage. But if you sit down and say are you telling me you wouldn't take it out? No, I'm telling you had they asked me, I would have said don't put that in there. You're going to have some lawyer up in your face some day saying that you shouldn't have done it.

BAKER: What about the phrase "or court"?

MINTON: He has heard something that I never heard before today. There has never been any question in my mind when this statute was passed, it was passed so that you could go to the commission or that you could go to the district court. You can go from the commission to the DC. All that this was saying that the people in the ETJ...

GONZALEZ: But the status of review would be different if it had gone to the commission and then to the court?

MINTON: Well the standard of review is set out in here if it goes on up is it not?

GONZALEZ: It would be substantial evidence rather than de nova review.

MINTON: Let me spot you there. But I do not see when we get down to it, and this is what I have tried to make clear here today is that this is not a substantial evidence test, but all of the language that we read in all of the cases that set up substantial evidence, is an arbitrary and unreasonable test.

In this case, in Ms. Quirk's _____ lot, 7a, there was a failure to file a survey of taking 50 acres off of one lot and putting it on the other. It had been done years before, the survey, but it had not been filed. And so when she found out about it at a later time, and they were saying you're going to have to get this filed, she got hold of her engineer and he took it down to file it. Understand, this is the residential part that had already been done. Nothing to do with the commercial part. And he took it down to have it filed, and they said: comply with the SOS. He said wait a minute: It's developed, there's nothing to comply with. Oh, yes, you do. You comply with the SOS. Can we have an exemption? There are no exemptions. Can we get a variance? There are not variances. This is built out. This lot was 7 acres with a man with his home, and the city went in there and said: This is what you're going to do, you're not going to have pets on the back of this. All of this is exhibits in evidence. No pets, no structures, no nothing. Back here where there is a ditch that drains once every two or three years, it is something that is not only arbitrary and unreasonable, it is inconceivable. That is what we showed that court. And when that court got through hearing all of that and submitting all of that to the jury in ways that were unnecessary, but he did it, he said: the court finds that the plaintiffs are entitled to judgment in their favor consistent with the jury's answers, and the evidence at trial and the applicable law.

ABBOTT: If we were to undertake some severance of the language of the statute, we must do so in a way that keeps the statute in accordance with the apparent legislative intent. Now if we were to strike the words "inefficient" and "ineffective," to arguably render the statute constitutional, would that not interfere with the legislative intent of being able to allow the commission to consider whether or not the ordinance was inefficient or ineffective?

MINTON: No, I don't think it would. I don't think that it would prevent the commission from looking at those things. The commission has the right to approve all of them. So, I don't believe there would be any reason in the world when they are supposed to be approving it to begin with where they would be limited insofar as their function is concerned.

ABBOTT: So even if we were to strike the words "inefficient" and "ineffective" you're saying that the commission can go ahead and review it for inefficiencies and ineffectiveness?

MINTON: They are supposed to be reviewing it for all those reasons right now. And they are not.