

**AFFIRMED and Opinion Filed March 31, 2022**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-20-01111-CV**

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**CITY OF DALLAS, Appellant  
V.  
KATHERINE V. HOMAN, Appellee**

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**On Appeal from the 44th Judicial District Court  
Dallas County, Texas  
Trial Court Cause No. DC-19-02758**

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**MEMORANDUM OPINION**

Before Justices Carlyle, Smith, and Garcia  
Opinion by Justice Garcia

This case involves the validity of an amended zoning ordinance. The trial court denied the City of Dallas's plea to the jurisdiction and motion for summary judgment and granted summary judgment in favor of Homan on her declaratory judgment claim that the ordinance is invalid.

In two issues with multiple subparts, the City argues the trial court erred (i) in denying its plea to the jurisdiction because Homan lacks standing and (ii) in denying its motion for summary judgment and granting Homan's motion. Concluding the City's arguments are without merit, we affirm the trial court's judgment.

## I. BACKGROUND

Methodist Hospitals of Dallas (“Methodist”) applied to the City of Dallas for a zoning change to the approximately 35.86 acres of land on which it operates in Oak Cliff (the “Property”). The City advertised a February 13, 2021 public hearing in which the City Council was scheduled to vote on the proposed amendment.

The deadline for property owners with property within two hundred feet of the Property to file a written protest to the proposed amendment was noon on February 12, 2019. By that date, more than twenty percent of eligible property owners, including Homan and Yan Hong Isenberg, had filed protests.

When more than twenty percent of the eligible property owners file written protests in accordance with the Dallas Development Code, the Local Government Code requires that the proposed zoning change receive the affirmative vote of at least three fourths of the City Council. *See* TEX. LOC. GOV’T CODE ANN. § 211.006 (a), DALLAS DEV. CODE § 51A-4.701(g). The Dallas City Council has fifteen members; therefore, twelve affirmative votes are required when this section of the Local Government Code applies. But if less than twenty percent of eligible property owners protest, only a simple majority of the City Council vote is required to pass a zoning amendment. *See* DALLAS DEV. CODE § 51A-4.701(c)(2).

On the day of the public hearing, the Assistant Director of Sustainable Development and Construction announced that the proposed zoning change would

require a favorable three fourths vote of the City Council because more than twenty percent of the eligible property owners opposed the change.

After various members of the public spoke for and against the ordinance, Angela Hunt, counsel for Methodist, raised a “technical issue” concerning the protest affidavit filed by Yan Hong Isenberg (the “Protest Affidavit”). Hunt argued that Ms. Isenberg did not have the authority to represent the majority of the owners of her community property, but rather, only had the ability to represent fifty percent.

Hunt provided the council members with a new affidavit signed on February 13 by both Ms. Isenberg and her spouse, Ralph Isenberg (the “Withdrawal Affidavit”). In that affidavit, Mr. Isenberg acknowledges that his wife previously signed the Protest Affidavit, but states that the affidavit “was secured by false or misleading information” and his wife no longer opposes “the project in question.” Mr. Isenberg further states that he currently supports and has for some time supported the proposed zoning change.

Mr. Isenberg also addressed the council in person, stating that he did not “give his wife permission” to sign the Protest Affidavit. He claimed that the Protest Affidavit is a fraud because his name is on it, but he did not sign it.<sup>1</sup> Mr. Isenberg

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<sup>1</sup> The Protest Affidavit has only one signature and states at the bottom that it is “signed by Yan Hong Isenberg.” The notary’s affidavit explains that she filled in both names for joint property owners in advance. Thus, the Protest Affidavit has Mr. Isenberg’s name handwritten at the top.

further claimed that his wife was “hoodwinked.” Ms. Isenberg was not present at the hearing.

Hunt requested that the Protest Affidavit be withdrawn, and the council voted 8-7 to “throw the affidavit out.” After the Protest Affidavit was thrown out, the percentage of opposition to the zoning amendment was less than twenty percent. The motion to approve the zoning change was then approved by a vote of ten to five.

Homan subsequently initiated this action against the City, Methodist, and a city building official. Homan’s petition sought a declaratory judgment that the zoning amendment was invalid because a three fourths majority had not voted for its approval.

The City, Methodist, and the building official filed pleas to the jurisdiction and motions for summary judgment. Homan also filed a motion for summary judgment.

The trial court conducted a hearing on the pleas and summary judgment motions. When the hearing concluded, the court granted Methodist’s and the building official’s pleas and dismissed the claims against them. The court denied the City’s plea and summary judgment motion and granted Homan’s summary judgment on her declaratory judgment claim. Attorney’s fees were submitted to the court by agreement, and the court subsequently entered a final judgment awarding Homan declaratory relief and attorney’s fees. The City now appeals from that judgment.

## II. ANALYSIS

### A. Standing

The City's first issue argues the trial court erred in denying its plea to the jurisdiction because Homan does not have standing. Specifically, the City argues that: (i) the Uniform Declaratory Judgment Act does not provide a substantive grant of standing; (ii) the legislature cannot confer standing; (iii) neither the legislature nor the City Council granted Homan a private right of action; and (iv) there is no constitutional or common law standing.

Standing is a constitutional prerequisite to maintaining suit. *See Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001). The general test for standing requires (1) that there be a real controversy between the parties, and (2) that the controversy will actually be determined by the judicial declaration sought. *See Sneed v. Webre*, 465 S.W.3d 169, 180 (Tex. 2015).

Generally, unless standing is conferred by statute, "a plaintiff must demonstrate that he or she possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury." *Williams*, 52 S.W.3d at 178. The focus is whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005).

“[T]he standing inquiry begins with the plaintiff’s alleged injury.” *Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012). “The injury must be concrete and particularized, actual or imminent, not hypothetical.” *Id.* Furthermore, the plaintiff’s injury must be fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief. *Tex. Propane Gas Assoc. v. City of Houston*, 622 S.W.3d 791, 799 (Tex. 2021).

Standing may be challenged through a plea to the jurisdiction, and we review the ruling on the plea de novo. *Heckman*, 369 S.W.3d at 153. We first look to the pleadings to determine if the pleader has alleged facts that affirmatively demonstrate the court’s jurisdiction to hear the cause. *See Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We construe the pleadings liberally in favor of the plaintiff, look to the pleader’s intent, and accept as true the unchallenged factual allegations in the pleadings. *See id.*

The City is correct in noting that the UDJA does not confer a separate grant of subject-matter jurisdiction on the state’s trial courts. Instead, it authorizes courts to issue declaratory relief as a form of remedy, in addition to others, in cases in which the court is otherwise vested with constitutional and statutory subject-matter jurisdiction over the dispute. *See City of Dallas v. Albert*, 354 S.W.3d 368, 378 (Tex. 2011); *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634 (Tex. 2010). Although the UDJA cannot confer subject matter jurisdiction, a court

may decide any cause of action within its general jurisdiction, and “[a] suit under the UDJA is not confined to cases in which the parties have a cause of action apart from the Act itself.” *Texas Dep’t of Pub. Safety v. Moore*, 985 S.W.2d 149, 153 (Tex. App.—Austin 1998, no pet.).

Standing to challenge a government action requires a showing that the plaintiff suffered a particularized injury apart from the general public. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555–556 (Tex. 2000). Thus, in the context of actions seeking declaratory judgments regarding zoning, a plaintiff has standing when the zoning affects the plaintiff differently than other members of the general public. *See City of Canyon v. McBroom*, 121 S.W.3d 410, 414 (Tex. App.—Amarillo 2003, no pet.). If the zoning affects the plaintiff differently than other members of the general public, she has a sufficient justiciable interest to challenge the validity of ordinances. *See City of Anahuac v. Morris*, 484 S.W.3d 176, 179 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 928 (Tex. App.—Austin 2010, no pet.). We therefore consider whether Homan demonstrated a sufficient justiciable interest in this controversy that is distinct from that of the general public.

Homan argues that as a property owner within the statutorily defined range of the proposed change, she has a distinct interest in the proper execution of the zoning process. We agree.

In adopting zoning regulations giving interested parties the right to be heard, the right to notice, and the right to protest, the Texas Legislature has recognized that property owners within 200 feet of a proposed zoning change face a greater risk of injury to the use, enjoyment, and value of their property. *See* TEX. LOC. GOV'T CODE ANN. § 211.0006; (regulation or boundary not effective until after public hearing in which parties of interest have opportunity to be heard); DALLAS DEV. CODE § 51-A-4.701(c)(2), (g) (right to notice and protest); *see also East Village Ass'n*, 480 S.W.3d at 44 (property owners within notice area have standing); *Wyly v. Preservation Dallas*, 165 S.W.3d 460, 464 (Tex. App.—Dallas 2005, no pet.) (residents of historic district had procedural right to notice and therefore had standing). Recognition of this interest is not, as the City suggests, tantamount to recognizing a statutorily conferred private cause of action. Rather, the statutory provisions reflect that certain property owners have an interest in the process that differs from that of the general public. *See City of McKinney v. OH Skyline/380, L.P.*, 375 S.W.3d 580, 584–585 (Tex. App.—Dallas 2012, no pet.) (property owner within 200 feet of property subject to zoning amendment had standing to challenge lack of notice); *City of N. Richland Hills v. Hometown Urban Partners, Ltd.*, 340 S.W.3d 900, 915 (Tex. App.—Fort Worth 2011, no pet.), *disapproved on other grounds by Zachary Const. Corp. v. Port of Houston Auth. Of Harris Cnty.*, 449 S.W.3d 98, 111 n.54 (Tex. 2014) (standing to challenge void ordinance due to lack of notice).

Therefore, while the UDJA does not confer standing, it is a remedy Homan had standing to pursue because, as a property owner within 200 feet of the proposed change, she has a sufficient relationship to the controversy and a justiciable interest in the City's compliance with the applicable zoning procedures. The trial court did not err in concluding that Homan had standing to assert her declaratory judgment claim that the ordinance at issue is invalid. The City's first issue is resolved against it.

### **B. Summary Judgment**

The crux of the summary judgment issue before the trial court on the parties' cross-motions was whether the amended ordinance was invalid because the City Council failed to follow established procedures. Homan moved for summary judgment on her declaratory judgment claim that the ordinance was invalid. The City's summary judgment motion argued that Homan lacked standing and the council's decision to disregard the Protest Affidavit and adopt the zoning amendment was not unlawful or an abuse of discretion. The trial court granted Homan's motion and denied the City's motion.

The City's second issue argues that the trial court erroneously concluded that (i) the council lacked authority to disregard the Protest Affidavit and (ii) the vote to disregard the Protest Affidavit was a vote to allow an untimely withdrawal of the

affidavit. The City further argues that the court applied the wrong standard of review, substituting its judgment for that of the City Council.

We review the granting of a motion for summary judgment de novo. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). Where, as here, the parties file cross-motions for summary judgment, and the trial court grants one and denies the other, we review the summary judgment evidence supporting the motions and determine all questions presented and preserved. *Kaufman Cty. v. Combs*, 393 S.W.3d 336, 341 (Tex. App.—Dallas 2012, pet. denied) (citing *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988)).

“Declaratory judgments rendered by summary judgment are reviewed under the same standards that govern summary judgments generally.” *Hourani v. Katzen*, 305 S.W.3d 239, 248 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). A declaratory judgment is appropriate when (1) a justiciable controversy exists as to the rights and status of the parties, and (2) the controversy will be resolved by the declaration sought. *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995).

It is undisputed that the City was required to give notice of the proposed zoning change:

A municipality is required to give written notice of each public hearing before the zoning commission on a proposed change in a zoning classification. The notice is to be sent to each owner of real property

within 200 feet of the property on which the change in classification is proposed.

TEX. LOC. GOV'T CODE ANN. § 211.007(c). The City gave notice of the February 13 hearing. As of that date, the proposed zoning change required a favorable three fourths vote of the City Council because more than twenty percent of the eligible property owners opposed the change.

There is also no dispute that protests were due by noon on February 12. The code provides:

A written protest must be filed with the director before noon of the working day immediately preceding the date advertised for the city council public hearing in the statutory notice published in the official newspaper of the city.

DALLAS DEV. CODE §51A-4.701(g)(5)(A). The Protest Affidavit was timely filed by the proscribed deadline.

Once filed, a protest may be withdrawn::

Withdrawals of protests must be in writing and filed with the director before the filing deadline. The provisions of this subchapter governing the form and filing of protests apply equally to withdrawals.

*Id.* §51A-4.701(g)(6).

The council is also permitted—before or after a public hearing begins—to extend the protest filing deadline. DALLAS DEV. CODE §51A-4.701(g)(5)(B), (C). If the deadline is extended after the hearing begins, it:

may only be extended by calling a subsequent public hearing and advertising that public hearing in the official newspaper of the city pursuant to statutory notice requirements. In such a case, the new filing

deadline is noon of the working day immediately preceding the newly advertised hearing date.

*Id.* §51A-4.701(g)(5)(C).

Here, the City Council decided to “throw out” the Protest Affidavit based on the Withdrawal Affidavit Hunt provided on the day of the hearing. The City insists that the council had the discretion to do so because the code vests it with discretion to disregard the presumed validity of signatures on protest affidavits. According to the City, the Protest Affidavit did not validly and properly represent the property owners of the Isenberg property.

Regarding the required signatures on a protest affidavit, the Development Code provides:

(3) Who must sign.

(A) A protest must be signed by the owner of the property in question, or by a person authorized by power of attorney to sign the protest on behalf of the owner. If the property is owned by two or more persons, the protest must be signed by a majority of the owners, or by a person authorized by power of attorney to sign the protest on behalf of a majority of the owners, **except that in the case of community property, the city shall presume the written protest of one spouse to be the protest of both.**

DALLAS DEV. CODE 51A-4.701(g)(3)(A) (emphasis added).

The code further provides certain presumptions of validity regarding the signatures on protest affidavits:

(7) Presumptions of validity.

(A) In all cases where a protest has been properly signed pursuant to this subsection, the city shall presume that the signatures appearing on

the protest are authentic and that the persons or officers whose signatures appear on the protest are **either owners of the property or authorized to sign on behalf of one or more owners as represented.**

(B) In cases of multiple ownership, the city shall presume that a properly signed protest which on its face purports to represent a majority of the property owners does in fact represent a majority of the property owners.

(C) The presumptions in Subparagraphs (A) and (B) are rebuttable, and the city attorney may advise the city council that a presumption should not be followed in a specific case based on extrinsic evidence presented.

(8) Conflicting instruments. In the event that multiple protests and withdrawals are filed on behalf of the same owner, the instrument with the latest date and time of execution controls.

*Id.* § 51A-4.701(g)(7), (8) (emphasis added).

The City maintains that the rebuttable presumption in subsection (C) applies to all property owners, including community property owners. Homan counters that community property differs from property with “multiple ownership,” and the presumption that the written protest of one spouse is the written protest of the other is not rebuttable.

But we need not determine whether the rebuttable presumption applies to community property, limitations, if any, on the council’s discretion to deem the presumption rebutted, or the degree of deference courts are to afford such determinations.<sup>2</sup> Assuming that the council has the discretion to disregard protest

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<sup>2</sup> We do note, however, that community property differs from multiple ownership and the nature of Ms. Isenberg’s community interest did not require that she obtain her husband’s consent. Community property is subject to the “joint management, control and disposition” of the spouses unless the spouses

affidavits it deems invalid does not address the fundamental question of whether they are obligated to follow statutorily mandated procedures and the Development Code when they do so.

The City argues that it was not required to follow the code requirements for the withdrawal of protest affidavits because the Protest Affidavit was “thrown out,” not withdrawn. According to the City, Mr. Isenberg was not trying to retract the Protest Affidavit, he was challenging it because he did not authorize it.

The distinction the City seeks to make, however, is one of semantics. Moreover, the City’s reliance on Mr. Isenberg’s intent is misplaced. Mr. Isenberg couldn’t retract the Protest Affidavit—he did not sign it. The question is the effect of the Withdrawal Affidavit as it pertains to Ms. Isenberg.

Ms. Isenberg signed the Withdrawal Affidavit and disclaimed the Protest Affidavit, agreeing to her husband’s statement that she no longer opposes the proposed zoning amendment. The Withdrawal Affidavit also states that any other statements of opposition or support are void. The effect was to withdraw the Protest

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provide otherwise by power of attorney in writing or other agreement. TEX. FAM. CODE ANN § 3.102(c); *Jean v. Tyson-Jean*, 118 S.W.3d 1, 5 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The community property scheme thus makes the spouses equal owners of undivided interests in all of the community property. *See, e.g., Gen. Ins. Co. v. Casper*, 426 S.W.2d 606, 609 (Tex. App.—Tyler 1968, writ ref’d n.r.e.) (stating that “[a]n indispensable element” of community property is “the joint ownership of or interest in such property” by the married couple); *Davis v. Davis*, 186 S.W.775, 777 (Tex. Civ. App.—Texarkana 1916, writ dism’d) (explaining that one spouse “has as much interest in the community property” as the other spouse, and “has an equal right to its beneficial use.”).

Affidavit. When the council voted to throw the Protest Affidavit out, it was effectively withdrawn.

Significantly, neither the code nor the applicable statute provide for “throwing out” an affidavit. Although the City maintains that this authority is derived from its discretion to consider evidence rebutting the presumed validity of signatures on protests, such discretion cannot be viewed in isolation. In essence, the City seeks to assume that the council can allow the untimely withdrawal of a protest affidavit and then characterize it as something other than a withdrawal so as not to trigger the statutorily imposed requirements for notice and a new hearing. This argument is not persuasive. Indeed, as the trial court properly recognized, “a municipality has broad discretion to establish procedures for adopting and enforcing zoning regulations and boundaries. Once adopted, there must be strict compliance with those procedures.”

The essential nature of strict compliance with code procedures is well-established. The Texas Supreme Court has held that:

The steps directed to be taken for notice and hearing, when provided for in the law, are intended for the protection of the property owner, and are the safeguards against the exercise of arbitrary power. Each act required is essential to the exercise of jurisdiction by the City Council, and each must be rigidly performed.

*Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex. 1962); *see also Powell v. City of Houston*, 628 S.W.3d 838, 856 (Tex. 2021) (chapter 211 imposes substantive limits on a city’s exercise of regulatory power).<sup>3</sup>

These principles are recognized in the Development Code, which was enacted “in keeping with the purpose, spirit, and intent of the state law.” The code provisions’ stated purposes are to:

- Allow staff sufficient time to accurately calculate the land area percentages that determine the voting requirement;
- Protect the rights of all parties by establishing minimum criteria to assure the reliability of written protests received;
- Protect the rights of those protesting by establishing procedures and deadlines which are not unduly burdensome or restrictive;
- Promote order and maintain the integrity of the zoning process.

DALLAS DEV. CODE 51A-4.701(a)(1)(C). Allowing an untimely withdrawal of a protest affidavit that changes the vote requirement without following the mandatory procedures for withdrawal of protests, extension of deadlines, notice and a new hearing is inconsistent with these purposes.

The deadline for withdrawal of the Protest Affidavit was February 12. DALLAS DEV. CODE 51A-4.701(g)(6). The council allowed the untimely withdrawal of the

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<sup>3</sup> The City’s argument that the trial court erred by requiring strict compliance with the applicable statutes and code is unavailing. The trial court did not, as the City suggests, substitute its own judgment for the council’s as to whether the Protest Affidavit should be considered. Instead, the court concluded that when the council made that determination, it did not follow the law.

Protest Affidavit on February 13, which extended the filing deadline. By extending the filing deadline, the council triggered §51A-4.701(g)(5)(C) which requires public notice of a subsequent hearing and a new filing deadline.

The summary judgment evidence establishes that no subsequent hearing was scheduled, and the requisite statutory notice was not given. The notice and hearing requirements are mandatory. *See Bolton*, 362 S.W.2d at 950. Homan established that there is a justiciable controversy as to the rights and status of the parties and the controversy would be resolved by the court's determination concerning the ordinance's validity. *See Bonham*, 907 S.W.2d at 467.

Therefore, the trial court did not err in awarding Homan declaratory relief on her claim that the ordinance is invalid. *See, e.g., City of Wichita Falls v. L.J. & Frances Streetman*, 607 S.W.2d 644, 648 (Tex. App.—Fort Worth 1980, no writ) (affirming declaratory judgment finding ordinance void for failure to publish required notice); *Wallace v. Daniel*, 409 S.W.2d 184, 187–188 (Tex. App.—Tyler 1966, writ ref'd n.r.e.). (zoning ordinance invalid because city failed to follow procedures in comprehensive zoning ordinance). We resolve the City's second issue against it.

### III. CONCLUSION

Having resolved all the City's issues against it, we affirm the trial court's judgment.

/Dennise Garcia/  
DENNISE GARCIA  
JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

CITY OF DALLAS, Appellant

No. 05-20-01111-CV      V.

KATHERINE V. HOMAN, Appellee

On Appeal from the 44th Judicial  
District Court, Dallas County, Texas  
Trial Court Cause No. DC-19-02758.  
Opinion delivered by Justice Garcia.  
Justices Carlyle and Smith  
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee KATHERINE V. HOMAN recover her costs of this appeal from appellant CITY OF DALLAS.

Judgment entered March 31, 2022.