

# ALESHIRELAW

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**VIA EMAIL:** [Anne.Morgan@austintexas.gov](mailto:Anne.Morgan@austintexas.gov)

Anne Morgan, City Attorney  
City of Austin, Texas  
301 W. 2<sup>nd</sup> Street  
Austin, Texas 78701

RE: Opinion on How Litigation Might Stop Use of McKalla Place for a Soccer Stadium  
and Enforce Transparency Laws

Dear Ms. Morgan,

As you know, on several occasions I have contacted you in advance of pursuing litigation against the City in hope that matters could be resolved before heading to the courthouse. This is another such occasion.

Having looked into the matter—including the revised proposal Precourt announced today—I am confident that a court will grant an injunction if the City proceeds in that mistaken direction of offering McKalla Place to be leased for a soccer stadium. I have also reviewed a public information matter because, despite City press releases claiming the City wants a transparent process with public input on the soccer proposal, your office refused to supply public information about the previously-released appraisal and RFP that would help the public see how financially irresponsible it would be to sacrifice McKalla Place to the soccer proposal.

## KEY LEGAL ISSUES

1. It is not lawful to use McKalla Place for a soccer stadium without full reimbursement to the Austin Water Utility of at least \$18,261,323 (based on May 2017 numbers).

Based on what information has been disclosed publicly, the City of Austin is on the verge of violating laws that prohibit property acquired with water utility bonds for specific use by the utility to be leased to one who would devote the premises to an inconsistent use. McKalla Place is an Austin Water Utility asset purchased and improved with water bonds paid by Austin water

utility customers. A soccer stadium is not a water utility use. Turning McKalla Place over to Precourt for a soccer stadium offends the legal interests of both water-utility bond buyers and Austin Water customers, both customers who are City residents and particularly those customers outside the city limits.

According to the attached City report, “Braker Lane Service Center Analysis 05 25 2017,” (The May 2017 Report) Austin Water has spent \$18,261,323 for the land purchase, construction costs, hazardous clean up, and interest on water bond debt. The Precourt proposal being entertained by some members of the Council ignores this issue. If Precourt is not going to pay money to make the Austin Water Utility whole, then there is no point at all to be negotiating with them. This would not be the first time this city administration has ignored or undermined the financial integrity of the Austin Water Utility, while raising residential water rates and making it even less affordable to live in Austin. You may recall the Pilot Knob fiasco, where Council approved over \$80 million in water fee waivers, only to have the action overturned in court. And they took this action while Austin Water Utility was under bond watch by the bond rating firms.

The May 2017 Report notes some, but not all, of the legal peril of the proposed use of the McKalla Place property. The Report recognizes, “...this property at McKalla Place is owned by Austin Water...” That Report assumes that Precourt would provide revenue back to Austin Water, but, as we all know, Precourt expects to obtain a long-term lease for only \$1 per year. The Report also warns, “...it is possible the tax-exempt status of the [water] bond issuance could be undermined.” An issue not mentioned in the Report is that if the Precourt agreement is made as has been publicly suggested, a lawsuit could challenge the agreement as being void because it would create a debt under the Texas Constitution which is void unless the City Council levies a tax and sinking fund sufficient to retire the debt.

If the Council proceeds with the Precourt proposal, the City is risking having an injunction to stop this unlawful nonsense that further undermines the Austin Water Utility. One must also wonder about the City of Austin conspiring with Precourt to violate an Ohio law designed to protect local taxpayers from harm when a sports franchise tries to abandon the city after accepting public benefits. Isn’t that the kind of taxpayer protection law this Council should be respecting? It would seem to make sense for Council to wait and at least not make a commitment to Precourt until they get their legal mess in Ohio straightened out so we know if Precourt will even have a MLS franchise to locate here. What Austin has done to Columbus, Ohio smacks of tortious interference in their contract with Precourt.

2. It is not lawful for Austin to give Precourt the long-term lease they want in order to evade the statutory requirement for sale or exchange of public land through public notice and obtaining bids. (Tex. Loc. Gov’t Code section 272.001).

This state law serves to protect taxpayers’ interest in obtaining fair value when public land is transferred for private use. There may be City officials, or lawyers, who think they can just “wink, wink—nod, nod” at this statute and pretend that the long-term “lease” proposed by Precourt will not be considered a “sale” requiring competitive bidding for the McKalla Place property. That notion will surely be tested in court in a suit to enjoin operation of any such lease. The first legal

problem identified above—failure to reimburse Austin Water Utility for its McKalla investment—could be resolved by sale of the property and providing the utility with its reimbursement. But the City cannot lawfully just turn McKalla Place over to Precourt in a one-on-one negotiation. Besides, I noticed that just last month, the June 12, 2018 Council work session, a couple members of the Council pontificated about how important competitive bidding is to protect the taxpayers’ interest in getting the best deal:

Mayor Adler:

“I just point that out that part of the benefit of having a negotiated process like this is we can identify the things they want, and then in the competitive process, we get things like this program that is a wonderful program. *That's the benefit of having a competitively bid process.* And we wanted to ensure the opportunity to encourage this and have as much of this kind of thing as we can.” [Council Transcript, 6/12/2018 @ approximately 10:58 a.m.]

CM Flannigan:

“So I think it speaks to a larger issue that we've come across multiple times in the role of when it is that we think an rfp or an rfp process is is a requirement to move forward. We had some conversations about that yesterday on a separate item, and when we don't think that's a necessary tool. *And I tend to always fall on the side of open and transparent government process, and there are reasons why we procure things in the way we do and why it's harder for the government to do it than for private business, because we have a higher duty to the taxpayers and on and on and on.* So I would really struggle with doing this as a direct contract as I would for just about anything. So, yeah, I don't know if there's any way I could support doing that.” [Council Transcript, 6/12/2018 @ approximately 10:53 a.m.]

Now, admittedly, these comments noting support for competitive bidding were not about the proposed sole-source Precourt negotiation without competition; they were about whether to bid out the rowing center on Lake Austin. However, the stated positions would tend to fall in line with the statutory requirement to take bids on the McKalla Place property and maximize the return to the Austin Water utility.

3. The City can be challenged in court for refusing to disclose the McKalla Place appraisal it previously released and the RFP created to offer the property for sale on competitive bids.

On May 3, 2018, the City’s public information office issued a press release inviting public input on use of the McKalla Place property. The press release said, in part:

The City of Austin is asking for input from the community regarding the use of land for a major league soccer stadium at 10414 McKalla Place, a 24-acre piece of publicly owned land. Input given will help the City determine the community benefits that should be considered when entering into a partnership for a project, such as this opportunity at McKalla Place.

The truth is that public input about the Precourt soccer “partnership” or “opportunity” was conducted while the City hid important information for perspective about whether using the McKalla Place property was in the best interest of Austin taxpayers (or water-rate payers). On June 20, 2018, your office asked the Attorney General for a ruling on whether the City must release a copy of the appraisal that was done on the McKalla Place property. Your request for a ruling failed to inform the Attorney General that the City has previously released a copy of the appraisal to some business interests. The TPIA speaks to this situation, requiring that if public information is released to one, it must be released to all. Tex. Gov’t Code section 552.223 (“UNIFORM TREATMENT OF REQUESTS FOR INFORMATION. The officer for public information or the officer's agent shall treat all requests for information uniformly without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media.”).

Your office claimed, ironically, that releasing the appraisal for all to see might give a competitive advantage to bidders should the City decide to accept competitive bids for the property. It’s hard to imagine how a competitive advantage is obtained by anyone if *everyone* has all the same information. In addition, your office sought a ruling to withhold the RFP that was prepared when the previous Ott administration was planning to seek competitive proposals for the property.

Disclosure of the McKalla appraisal and RFP would have provided everyone, soccer proposal supporters and opponents, information they could have used to provide better-informed “input from the community” that the press release called for. It also appears that the request for an AG ruling serves as a delay tactic to keep the public from seeing this information and providing input to the Council before it decides whether to proceed with the Precourt sole-source deal or put the property out for competitive proposals. The appraisal and RFP would give the Precourt proposal much-needed perspective.

Neither the appraisal nor the RFP are “confidential” under the TPIA. The City administration *could* release that information voluntarily. The Dalai Lama said, “A lack of transparency results in distrust and a deep sense of insecurity.”<sup>1</sup> The Dalai Lama was referring to China totalitarianism, but it is equally true in Austin, Texas. If the City truly wanted the public to provide meaningful input on the Precourt proposal, the City would share all relevant information with the public first so the public input process is not a manipulated, cynical sham. Instead, you invite another transparency lawsuit to be filed against the City. That is unfortunate.

## CONCLUSION

As I’ve said to you before, I do not relish seeing my City of Austin hauled into court for arrogant abuse of power and failure to conform to standards of good government and transparency. I hope you will take this information under serious consideration and encourage the Council to not require another lawsuit to protect the people of Austin from its government.

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<sup>1</sup> May 13, 2012 as reported <https://www.telegraph.co.uk/news/worldnews/asia/tibet/9261176/Dalai-Lama-I-shout-and-say-harsh-words.html>

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*Bill Aleshire*

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