Watch Your Assets

Exposing the misuse and abuse of the public commons

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Imminent Domain: Will Austin Voters End Retail Subsidies?

By Paul Heberling

Within two weeks, Austin voters will decide whether or not to allow city leaders to continue giving away millions of dollars in taxpayer-funded subsidies to retail-store developers. Although corporate welfare has become controversial across the country, Austin's Proposition 2 is believed to be the nation's first ballot initiative asking voters to ban retail subsidies. Retail subsidies are especially controversial, since the vast majority of retail stores operate without handouts. Moreover, a major rationale for subsidizing manufacturing plants—to create new jobs that pay good wages—is largely missing in action where the service-oriented retail sector is concerned.

Domain "lifestyle" mall in Austin, TX. Photo from *Austin City Guide*.

The City of Austin previously subsidized a variety of private companies[1] but did not dole out its first tax reimbursement incentives for retail development until 2003. Austin officials bestowed these retail subsidies upon the Domain—a high-end "lifestyle mall" in north Austin. At the time, Austin leaders were in a bit of a panic, as competing retail centers went up (with the help of public subsidies) in bedroom communities such as Round Rock and Bee Cave. Onto this stage strode Austin-based Endeavor Real Estate Group, which proposed a mixed-use development near the IBM facility at MoPac and Braker Lane. Endeavor pledged to recruit high-end retail stores, create 1,100 jobs, build at least 300 units of so-called SMART-growth housing and meet other benchmarks.[2] In exchange, the city offered sales-tax abatements of 80 percent for the first five years and 50 percent for 15 years thereafter. The city also promised developers a 25 percent break on property taxes for 20 years.[3] The City Council approved this fast-track proposal on May 15, 2003,[4] with then-Council Member Daryl Slusher casting the sole "No" vote.[5] The estimated costs to the city for the Domain giveaways range from $57 million to $65 million over two decades.[6]

Endeavor principal Kirk Rudy supported a variety of progressive Austin candidates over the years. He also has raised more than $200,000 for presidential candidate Barack Obama, along with numerous other Democrats nationwide.[7] Yet some of his local ties frayed in 2003 as a result of the Domain, as well as Rudy's sale of land on the Edwards Aquifer recharge zone to Wal-Mart. The retail giant clearly intended to build a Supercenter on the site—which was grandfathered out of SOS aquifer-protection rules.[8] Once it signed the Domain deal, Endeavor recruited America's biggest mall company to co-manage the project. After the mall opened last year, Indianapolis-based Simon Properties Group bought out Endeavor's stake, thereby expanding its portfolio of almost 400 malls on three continents. Simon's rich track record of taking public subsidies includes the $23 million that the City of Indianapolis gave the company to build its corporate headquarters on top of a historic park.[9]

Don't Subsidize a Mall, Y'all

As details of the fast-tracked Domain deal became known, citizens objected to the city giving taxpayer subsidies to a "lifestyle mall" that would compete with the homegrown, local businesses that "Keep Austin Weird." Leading the backlash was local developer Brian Rodgers, who filed a 2004 lawsuit to block the Domain subsidies. His legal complaint alleged that the Domain developers intentionally misrepresented their project to the city council and that the council improperly authorized the subsidies. In an out-of-court settlement, the defendants agreed to pay Rodgers' legal fees and the developer effectively released the city from its legal obligation to make future subsidy payments to Simon Property.[10] Nonetheless, the city (which passed a non-binding resolution in 2007 to ban future retail subsidies) has indicated that it intends to voluntarily continue making the payments to Simon.[11]

Supporters of Prop. 2 at a press conference Oct. 20, 2008.
Photo courtesy of Stop Domain Subsidies.

Despite the settlement of the Domain litigation, activists were not convinced that city officials would end retail subsidies. The rebels decided to make their case directly to fellow citizens. Calling themselves "Stop Domain Subsidies," they collected 27,000 signatures to propose a city charter amendment. If approved, the resulting Proposition 2 will ban any further subsidies for retail projects—including the Domain.[12] Stop Domain Subsidies raised $47,683, led by $33,038 from Brian Rodgers, who said he could spend $100,000 of his money by the end of the campaign.[13] Stop Domain also relied on local businesses that contributed money or donated merchandise for a fund-raising auction.[14] Texans for Public Justice, the non-profit publisher of Watch Your Assets, contributed $100 to Stop Domain.[15]

Stop Domain's endorsers include 500 local businesses, many of which believe it is insane to pay malls to recruit outside retail chains to compete against homegrown shops. Some Stop Domain supporters cite a study estimating that for every $100 spent in a local store such as Bookpeople or Waterloo, $45 goes directly back into the Austin economy, while the same amount spent at a national chain like Borders injects just $13 back into the economy.[16] To be sure, the Domain has not recruited all of its retailers from outside Austin. Some stores relocated there from other Austin locations, including the Arboretum across MoPac.[17] If these stores already were doing business in Austin, did they really need taxpayer subsidies? At a time when budget shortfalls of up to $36.8 million are prompting the city of Austin to make cuts that range from library hours to road maintenance,[18] Stop Domain suggests that paying $65 million over 20 years to a lifestyle mall is a misguided priority.

Recalling Rodgers' lawsuit, Stop Domain argues that developers misrepresented the Domain project to sell it to the city and the public. Stop Domain says that developers falsely argued that their mall would be infeasible without public subsidies and inaccurately forecast the city's subsidy obligations, as well as the mall's sales and profits. After Endeavor's initial sales pitch, Stop Domain says the developer has scaled back claims about the average wages that would be paid at the Domain and about the amount of green space and permeable cover that the project would offer.[19]

Simon Says

In one of the weirdest twists in this saga, Simon Property is denouncing similar subsidies that El Paso officials are considering granting to one of Simon's competitors.[20] Simon's accusations against competing developer Regency Centers sound as if they were shoplifted from Stop Domain Subsidies.

El Paso officials have considered several subsidy proposals to raze a shuttered Farah apparel plant and replace it with a mall. Six years ago they rejected a $20 million subsidy proposal for the site from Simon, which already boasts two El Paso malls.[21] As officials this summer considered awarding $18 million in subsidies for that same site to be developed by rival Regency,[22] a familiar fight erupted. El Paso's mall brawl features much the same cast of citizen groups, business interests and developers as the Austin fight. In a roll reversal, however, subsidy king Simon Property is one of the critics trashing El Paso's mall subsidies. With an air of knowing whereof it speaks, Simon says that Regency misrepresented the project's finances and misled people about the design of its project. Simon also complains that its competitor balked at "pirating" clauses that would limit the number of stores that Regency can lure away from existing shopping centers in the area. In a June letter to fellow members of the Greater El Paso Chamber of Commerce, two Simon executives expressed disappointment that the Chamber's executive committee endorsed taxpayer subsidies for Regency. Simon's letter has eerie parallels to the Domain battle.

"Without anti-piracy provisions, tenants at [Simon's] Cielo Vista Mall and other shopping centers will be fair game for pirating using tenant inducements made possible because the developer will receive the $12 million in tax subsidies," Simon's El Paso letter says.[23] "Why should the city give up any of its current sales tax from existing stores and a stable revenue stream just because a tenant walks across the street?" Simon's letter reads like a restatement of Stop the Domain's central argument that the city should not subsidize new malls that pirate business from existing ones—much less to compete against unsubsidized funky, iconic, homegrown businesses.[24]

Simon's El Paso letter also weighs in on the local chamber's support for subsidies. "We're puzzled that neither the Board of Directors nor the Chamber membership including Simon was contacted prior to its leadership's quick decision," Simon's letter says. This recalls Stop Domain's criticism of the Austin Chamber's subsidy support (see below), as well as Stop Domain's complaint that Austin fast-tracked the Domain deal to the detriment of public discussion.

On Monday, Stop Domain held a press conference to publicize Simon's El Paso letter, which Brian Rodgers sent to top Austin officials. The document "reveals Simon as a duplicitous corporate predator with nothing but contempt for Austin and its citizens," Rodgers wrote to city leaders. "These are the people you are standing beside. We told you so."

Keep Austin's Word

The main bulwarks against Stop Domain's populist tide are the Greater Austin Chamber of Commerce and most of the Austin City Council (council member Laura Morrison has yet to state her position on the issue). Former council member Betty Dunkerley, who voted for the Domain subsidies in 2003, heads Keep Austin's Word—a group formed to defeat Proposition 2. Keep Austin's Word has raised $185,000 from just three sources. The Chamber's Greater Austin Economic Development Corp. provided $100,000, the Real Estate Council of Austin kicked in $75,000 and Simon Properties donated $10,000 worth of polling data.[25] Countering Stop Domain, Keep Austin's Word[26] argues that the developers have acted in good faith and have not misrepresented the complicated Domain project. Saying that the developers kept their word, Keep Austin's Word argues that Austin also must honor its commitments.

Opponents of Proposition 2 rarely assert that retail subsidies are wonderful. Rather, their main thrust has been to warn voters that adopting the charter amendment would subject Austin to unintended problems. Keep Austin's Word argues that passing Proposition 2 would broadcast a message that the city is hostile to business. The initiative's passage even could threaten bond ratings that affect what the city pays to borrow money, opponents say.[27]

Other critics have suggested that enacting Proposition 2 would sabotage city subsidies for the mixed-use Mueller development on the site of Austin's old airport. Currently Mueller is the only other city-subsidized project that includes retail space, although the city did not award the same type of economic-development incentives to Mueller in December 2004 that it previously awarded to the Domain. To inject more sustainability and affordability into that project, however, the city sold public bonds to finance Mueller's infrastructure. Since some of this city-funded infrastructure benefits Mueller retailers, critics have argued that Proposition 2 would jeopardize Mueller, too.[28] Critics warn that interrupting Austin's subsidy payments to the Domain or Mueller could entangle the city in costly litigation with developers.[29]

Keeping It Weird

Some city and state governments around the country have begun to question whether or not it makes sense to provide retail shopping centers with public subsidies. Public outcry against two Phoenix-area retail projects that received a total of $340 million in subsidies prompted the Arizona legislature last year to approve penalties that discourage any future retail subsidies in that part of the state.[30] This year legislatures in Arkansas, Colorado, Georgia, Missouri, North Carolina and Washington considered imposing a variety of restrictions on retail subsidies.[31] Yet Austin's Proposition 2 appears to be the first time that citizens have taken direct action against the controversial practice of doling out taxpayer subsidies to retail establishments. After voting for a slew of candidates for the White House on down, Austinites soon will endorse the subsidies—or take retailers off the dole.

Keep Austin Weird.

www.stopdomainsubsidies.com

www.keepaustinsword.com

Some will rob you with a fountain pen. – Woodie Guthrie

"Watch Your Assets" is a Texans for Public Justice project.
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[1] The city has awarded more than $100 million in such economic development incentives to companies that account for a small fraction of the businesses that come to Austin or expand here each year. See TPJ's "Austin's Not-So-Smart Growth," Watch Your Assets. Oct. 3, 2007. www.tpj.org/watchyourassets/Austin.

[2] Ten percent of the so-called SMART housing was reserved for residents making less than 65 percent of Austin's median income. SMART stands for Smart, Mixed-use, Accessible, Reasonably-priced, Transit-oriented. Endeavor also pledged to support businesses owned by locals, women and minorities. See City of Austin/Endeavor Real Estate Group, Chapter 380 Economic Development Agreement. June 13, 2003. www.ci.austin.tx.us/redevelopment/downloads/DomainCh380Eda.pdf

[3] Total payments were not to exceed $25 million over 20 years in 2003 dollars, with another $5 million from Travis County. See City of Austin/Endeavor Real Estate Group, Chapter 380 Economic Development Agreement, June 13, 2003.

[4] One rationale for rapid passage appears to have been to let the developers recruit tenants at a Las Vegas convention. Whatever the reason, the city's haste left negligible time for public scrutiny of the deal. "Wal-Mart or No, Council Defers to Endeavor's Domain," Apple, Lauri. *The Austin Chronicle*. May 23, 2003.

[5] There apparently was tension between Slusher and Endeavor principal Kirk Rudy. Shortly after the Domain deal passed over Slusher's dissent, Rudy's wife cussed Slusher out good. "Don't *%@$! With Amy Rudy!," Apple, Lauri. *The Austin Chronicle*. June 27, 2003.

[6] These are cost estimates after values in the 2003 agreement are adjusted for inflation. Different assumptions account for the range in estimates. "No council action on Stop Domain Subsidies," Humphrey, Katie. *Austin American-Statesman.* May 22, 2008.
See http://www.stopdomainsubsidies.com/?page_id=6

[7] "Bundlers make Texas cash a player in campaign," Selby, W. Gardner. *Austin American-Statesman.* October 20, 2008.

[8] "Unusual Insights: On the Wal-Mart backstory, the 'Statesman' displays its (yawn) everyday low standards," Clark-Madison, Mike. *The Austin Chronicle*. November 21, 2003.

[9] "Simon Property Group Headquarters," *Emporis*. October 15, 2008.
www.emporis.com/en/wm/bu?id=simoncorporateheadquarters-indianapolis-in-usa;
"TIF Hybrids BLOSSOM," Hequet, Marc. *Retail Traffic.* June 1, 2004. The following sources address other Simon controversies. "City sues for control of City Center," Pramik, Mike. *The Columbus Dispatch*. August 1, 2007; "Simon Property's 'Substantial Debt' Problems," Simonwatch. *The South End.* May 15, 2008; www.southend.org/tiki-read_article.php?articleId=16; "Simon Property Group Headquarters," *Emporis*. October 15, 2008. www.emporis.com/en/wm/bu?id=simoncorporateheadquarters-indianapolis-in-usa

[10] The agreement states that the owner of the Domain has no legal recourse to claim damages if the city does not *allocate* funds to finance the subsidies. As funds have already been allocated for the first payment, the city is not protected under the agreement should it fail to deliver the upcoming payment. See Cause No. GN30446 Brian Rodgers v. City of Austin and EGP Management, L.L.C., Compromise and Settlement Agreement. June 8, 2004. www.stopdomainsubsidies.com/images/nonpayment_opt.pdf

[11] See Austin City Council Resolution No. 20071206-049. December 6, 2007.

[12] See www.stopdomainsubsidies.com/?page_id=123 for the full text of Proposition 2.

[13] See Stop Domain Subsidies TEC finance report. www.cityofaustin.org/edims/document.cfm?id=112509

[14] Stop Domain sunk $22,500 of this money into an online documentary. "Campaign finance reports trickle in," Alexander, Kate and Sarah Copolla. *Austin American-Statesman.* October 7, 2008.

[15] Proposition 2 has garnered support from across the ideological spectrum, including Democratic, Republican, Green and Libertarian organizations.

[16] "Economic Impact Analysis: A Case Study," Civic Economics (prepared for Livable City). December 2002. www.liveablecity.org/lcfullreport.pdf

[17] "Report: Austin retail sales likely to increase 5% in '08," Mistretta, A.J. *Austin Business Journal.* July 12, 2008.

[18] "Financial Forecast & Presentation," City of Austin Financial and Administrative Services - Budget Office. April 2008; "City grids for financial crisis," *Austin American-Statesman*. October 17, 2008.

[19] See www.stopdomainsubsidies.com

[20] This deal is currently on hold after the El Paso city council approved the subsidies but county officials rejected them.

[21] "Towne Center Questions," Kolenc, Vic. *El Paso Times.* January 18, 2004.

[22] "Simon Property Group protests tax rebates," Kolenc, Vic. *El Paso Times.* August 12, 2008.

[23] The letter estimates that "Cielo Vista Mall alone will conservatively lose a minimum of 15% of its existing sales" as a result of subsidized competition.

[24] In August an El Paso weekly quoted one of the letter's authors, Simon development vice president Rod Vosper, elaborated on these piracy concerns. "If the proper anti-piracy provisions are not part of the agreement," Vosper warned, "the city's current revenue stream is at risk and the city will be left dealing with new vacancy, new blight, for many years to come." "Farah development in jeopardy," Ryan Poulos, *El Paso, Inc.* August 31, 2008.

[25] See Keep Austin's Word TEC finance report. www.cityofaustin.org/edims/document.cfm?id=121542

[26] Even the name "Keep Austin's Word" rankles Stop Domain Subsidies, which has complained that its nemesis hijacked the slogan and mimicked the logo of the Keep-Austin-Weird campaign, which supports local businesses.

[27] Stop Domain activist Johnny Barnett counter-spins these kinds of arguments. "Having a reputation for being a town where you can't mess with us, can't cheat us, and can't make promises you don't intend to keep…is a good reputation," he says. Barnett founded the pro-local business group Austin Unique.

[28] "City fears Domain vote will ensnare Mueller," Coppola, Sarah. *Austin American-Statesman.* October 13, 2008.

[29] Attorney Jim Cousar, outside counsel for the city, told the council on October 2 that Proposition 2 could create Domain liabilities for the city, despite the 2004 legal settlement with Rodgers that ostensibly makes the subsidies voluntary. This is because that settlement indemnifies the city from developer legal claims only if the city fails to budget funds for the Domain's subsidies. Since this year's city budget already allocates an estimated $946,964 for the Domain, the city would be liable for missing that payment. (Nobody expects this to happen since the payment comes due several days before voters decide Proposition 2.) Cousar's testimony did not make clear whether or not the city would be liable for any payments missed in the future. He argued, however, that it would be difficult to rework the Mueller deal to avoid Proposition 2 snares. The council agreed to pay Vinson & Elkins $75,000 to review these issues. See Closed Caption Log, Council Meeting. October 2, 2008. www.ci.austin.tx.us/council/2008/council_10022008.htm

[30] The Arizona law will penalize any municipality in two Phoenix area counties that grants such tax incentives. This law reduces state funding by an equivelant amount. "Arizona Bans Tax Breaks for Retail Development," *The Hometown Advantage*. July 19, 2007. www.newrules.com

[31] "Tax Incentives: Recent Legislation," Fitzgerald, John P. *PropertyTax.* May 1, 2008. www.propertytax.com/services_taxincentives.cfm