

## CHAPTER 245: POINTS TO PONDER AND POTENTIAL PROBLEMS FOR UNPREPARED CITIES

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### INTRODUCTION

Chapter 245 of the Texas Local Government Code (LGC) is entitled “Issuance of Local Permits.” However, it is generally referred to as the “vested rights statute.” In 2005, the Texas Legislature passed two bills amending Chapter 245: (1) Senate Bill No. 848 (S.B. No. 848); and (2) Senate Bill No. 574 (S.B. No. 574). Both bills made significant changes to Chapter 245 and further eroded the regulatory authority of Texas cities. This paper will highlight some practical problems and issues created by the bills.

### SENATE BILL NO. 848

Section 245.002(a) of the LGC requires a city to consider each application for a permit on the basis of the ordinances that existed at the time the original application for the permit is filed. Senate Bill No. 848 expanded §245.002(a) to say that vesting occurs at the time “the original application for permit is filed for review for any purpose, including review for administrative completeness” or when “a plan for development of real property is filed” with the city.

Senate Bill No. 848 also added §245.002(a-1), providing that vesting accrues either when an “original application” or a “plan of development” that gives the city “fair notice of the project and the nature of the permit sought” is filed. The application or plan is considered filed on the date it is delivered to the city or on the date the applicant mails it to the city by certified mail. Many cities have standard or uniform submittal dates on which applications are considered filed for purposes of streamlining the processing and consideration of permits by staff and deliberative bodies. However, the new requirement that an application is considered filed when received, or when put in the mail, prevents a city from assigning a standard submittal date to an application as the application’s filing date. Any delays in delivery by the postal service could be problematic. For example, plats are required to be acted upon within 30 days from the date they are filed, or they are deemed approved. LGC §212.009(a). Under the new statute, the 30 day clock starts ticking when the plat application is deposited in the mail, regardless of how long the postal service takes to deliver the application to the city.

The general rules of statutory construction say that the words of a statute should be given their plain and ordinary meaning. *Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). So what exactly is the meaning of “application for a permit”, “plan for development of real property”, “plan of development”, “fair notice”, “project”, or “permit”? Section 245.001 contains definitions for “project” and “permit”, but not for any of the other terms listed above. Did the Legislature inadvertently use inconsistent terminology for the same thing when it used the phrases “plan for development of real property” and “plan of

development”, or are they two different things? Until the question is answered by a Court or the legislature, it may be beneficial to use both terms in local ordinances governing permits.

In regards to the terms that are defined, “Project” is defined in §245.001(3) as:

. . . an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.

“Permit”, as amended by S.B. No. 848, is defined in §245.001(1) as:

. . . a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.

Another significant change made by S.B. No. 848 is the addition of paragraph (e) to §245.002, which provides as follows:

(e) A regulatory agency may provide that a permit application expires on or after the 45th day after the date the application is filed if:

- (1) the applicant fails to provide documents or other information necessary to comply with the agency's technical requirements relating to the form and content of the permit application;
- (2) the agency provides to the applicant not later than the 10th business day after the date the application is filed written notice of the failure that specifies the necessary documents or other information and the date the application will expire if the documents or other information is not provided; and
- (3) the applicant fails to provide the specified documents or other information within the time provided in the notice.

Ordinances requiring that applications be “administratively complete” before they are considered filed (and thus trigger vesting) are common among cities. Under the new paragraph (e), an applicant could vest with the filing of an incomplete application, so long as the application provides “fair notice” of the project. Cities must now take the affirmative steps outlined in §245.002(e) to expire an application and prevent vesting based on an incomplete application.

The author has advised municipal clients to develop a form letter for various types of applications that states the application received is administratively incomplete and lists each item required for that particular type of application to be considered complete. Immediately upon receipt of an application for a permit, the application is reviewed. City staff then checks off each missing item on the list and fills in the date the application will expire if all of the checked items

are not submitted by that date. If the applicant fails to timely submit all of the requested items, then the author suggests that a second letter be sent stating the date the permit application expired and that no vesting occurred as a result of the incomplete application. Cities should be mindful that for any application considered filed on the date it was mailed, a portion of the 10 days for providing the notice letter will have already passed before the application is actually received by the City. In such cases, deadlines should be calendared from the date of the postmark.

The author has also advised municipal clients to consider eliminating preliminary meetings and permits, such as pre-submittal meetings or preliminary site plans. If the city requires them, property owners might use them to claim an earlier date of vesting. Another option to eliminating preliminary meetings and permits would be to leave it to the property owner's discretion as to whether it wishes to make use of those tools. The definition of "permit" in §245.001(1) states that a permit is only something that is "required". An argument can be made that if a meeting or permit is optional, and whether to use such tools is left up to the property owner, then the property owner should not vest in those if it voluntarily chooses to participate. Only time will tell whether this issue will become the subject of litigation.

#### **SENATE BILL NO. 574**

The changes made to §245.004 by S.B. No. 574 are also significant. The bill added a new paragraph (b) to the dormant projects provisions of §245.005, which restricts expiration dates from being less than two years for permits and less than five years for projects. However, the expiration dates will not apply if the applicant makes "any progress towards completion of the project", which is defined in LGC § 245.005(c) as doing any one of the following:

(c) Progress towards completion of the project shall include any one of the following:

- (1) an application for a final plat or plan is submitted to a regulatory agency;
- (2) a good-faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project;
- (3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located;
- (4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or
- (5) utility connection fees or impact fees for the project have been paid to a regulatory agency.

Given the ease that property owners will enjoy in preventing a permit or project from expiring, it is important for cities to adopt the permit application expiration provisions provided by §245.002(e), discussed above, since it is the only way to prevent the filing of an incomplete application from fixing the date of vesting. Section 245.002(a-1) does require that the incomplete application has to provide a city with “fair notice” of the project for vesting to occur. However, “fair notice” is not defined in Chapter 245 and its meaning is another likely subject of future litigation. It may be beneficial to define a “fair notice” in local ordinances regulating permits.

Section 245.004 was also amended by Senate Bill No. 574. Section 245.004 purports to list items to which the vesting provided by §245.002 does not apply. However, it then lists items that are excluded from the exemption (meaning an applicant does vest in the excluded items).

For example, §245.004(2) states that Chapter 245 does not apply to city zoning regulations so long as the zoning regulation does not affect the classification of property. Classifying property *is* zoning and is a primary function of a zoning ordinance. Stated differently, zoning regulations are exempt from vesting, but not the provisions of the zoning regulations that zone the property. Other items added to the list of exclusions from the exemptions by Senate Bill No. 574 include zoning regulations affecting landscaping or tree preservation, and open space or park dedication. So if a city’s park dedication requirements are in a stand-alone ordinance apart from the zoning ordinance, are they exempted from vesting? For home-rule cities, the plain meaning of the words seems to be that an applicant does not vest in the requirements of a stand-alone park dedication or tree preservation ordinance. But for general-law cities that rely on Chapter 211 of the Local Government Code for authority to regulate park dedication and tree preservation, the answer may not be the same.

Also significant is the addition of paragraph (b) to §245.006 of the LGC, which states that “A political subdivision’s immunity from suit is waived in regard to an action under this chapter.”

### **IS GRANTING A ZONING CLASSIFICATION A PERMIT?**

One of the most interesting aspects of Chapter 245 seems to have gone unnoticed by many cities. Every city zoning ordinance the author has seen requires that property within the jurisdictional boundary of the city cannot be developed until (or unless) a zoning classification is granted for the property. A zoning classification is usually granted by ordinance pursuant to LCG Chapter 211. The Chapter 245 definition of “permit”, quoted above, is quite broad. An ordinance granting a zoning classification is an “. . . approval. . . required by law. . . that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.” (Quoting the definition of “permit” found in §245.001(1)). The definition of permit appears to include a zoning ordinance. If a zoning ordinance is a permit, then the expiration provisions of §245.005 would apply to ordinances granting a zoning classification.

## **EXPIRATION PERIODS**

Another issue raised by Chapter 245 is at what point do the 2-year and 5-year expiration periods start to run? For example, will the 2-year expiration period for a site plan begin to run at the time the applicant vests (when the application for the site plan is filed) or when the site plan is approved? Section 245.005(b) states that the 5-year period for projects begins to run on “the date the first permit application was filed for the project.” Chapter 245 does not expressly address when the 2-year expiration period begins to run. The statute is clear in providing that the applicant vests on the date of filing, so shouldn’t the clock for expiration start ticking at the same time? Additionally, it would not make sense for the 2-year and 5-year periods to start running at different times. When an ordinance is adopted by a city that establishes expiration periods for permits and projects, the ordinance should not only address how long the permit or project is valid, but expressly provide that the time starts running when the application is filed.

## **GRANDFATHERED STATUS**

Cities will need to determine which regulations apply to a permit or project when applications are received. If a permit is one in a series, then a determination needs to be made regarding when the first application for a permit in the series was filed and whether it has expired. There are many issues to consider when developing a policy to determine and monitor grandfathered, or vested, projects and permits.

Cities also need to determine whether formal policies will be adopted to determine what regulations, if any, a property owner has vested in. In addition, cities need to decide who will have the burden of establishing the date of vesting for a permit or project.

## **CONCLUSION**

There are many issues to consider in regards to adopting and/or amending city ordinances in light of Senate Bill No. 848 and Senate Bill No. 574. Every city should carefully review its ordinances to be sure they function in a way that is best for that city within the constraints of Chapter 245.