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It's New to Me:

Grandfathered Development Projects

presented by:

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presented to:

Texas City Attorney Association

Semi-Annual Conference

South Padre Island, Texas

June 16, 2006

Author's Bio

Overview:

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Education:

Texas Tech University (JD, MPA, BA)

Professional Memberships:

- American Planning Association (Member)
- American Society for Public Administration (past National Council Member)
- International Municipal Lawyers Association (Member & Conference Presenter)
- State Bar of Texas – Government Lawyers Section (past Council Member)
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Notable Litigation:

Lead counsel in the City of Georgetown's successful Texas Supreme Court challenge of an adverse Attorney General's Open Records decision (*Russell v. Cornyn, 2001*)

Publications:

- *Texas Municipal Law & Procedure Manual* (5th Edition)
- *Religious Displays at City Hall*, Texas Town & City magazine, co-authored with Scott Houston, Fall 2005
- *U.S. Supreme Court Validates Moratoriums*, Texas City Attorney Association Newsletter, Summer 2002
- *Sand Dollars: The Need for Coastal Erosion Prevention & Response in Texas*, State Bar of Texas Environmental Law Journal, Winter 1999

Honors & Appointments:

- *Outstanding Alumnus*, Public Administration Program, Texas Tech University (2005)
- *Adjunct Professor*, Department of Political Science, Texas State University-San Marcos (1999-2003)
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1. INTRODUCTION

As an attorney who lives and breathes Municipal Law, the author spends more time advising clients on matters regarding Land Use & Development than any other topic. Among the issues confronting growing Texas cities, dealing with dormant (stale, vague) development proposals is often the most crucial and challenging. The landscape is rapidly changing, and municipal regulations are evolving to reflect new trends, expanding markets, ecological concerns, and improved technology. Municipalities whose citizens demand they remain on the cutting edge are confronted with the Texas Legislature's apparent commitment to provide long-term certainty to land speculators.

Chapter 245 of the Texas Local Government Code is an attempt by the Texas Legislature to statutorily determine when a land development project is subject to new or old government regulations. In essence, Chapter 245 *grandfathers* certain construction projects.

Black's Law Dictionary defines a "grandfather clause" as:

"An exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restrictions."

Chapter 245 is often referred to as the "Freeze Statute", "1704" or the "Vested Rights Act." The statute mandates that all "projects" be governed in accordance with the regulations that were in effect at the time the applicant filed for the first permit required to undertake the project.

Simply stated, the statute prevents state and local government agencies from *changing the rules in the middle of the game*. This is a policy that the majority of municipal lawyers probably support. For many, it is a matter of basic fairness. However, the primary problem with the statute is that it fails to provide sufficient guidance regarding key factors, such as:

What the game is,... Who the players are,... or When the game begins ???

2. ANALYSIS

Chapter 245

HB1704 was the number of the House Bill enacting the legislation at issue.¹ Pursuant to 245, a municipality must consider the approval, disapproval, or conditional approval of an application for a permit *solely on the basis* of regulations *in effect at the time* the original application for the permit is filed, or a plan for development or plat application is filed.²

If a series of permits is required for a project, regulations in effect at the time the original

¹ The original legislation was snuck-in by the Legislature without notice or hearings as part of a larger bill dealing with the Texas Department of Commerce. When the agency was later Sunset by the Legislature, the grandfathering provision was accidentally repealed, only to be brought back (in worse shape) the subsequent session.

² LGC § 245.002(a).

application for the *first permit* in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project. All permits required for the project are considered to be a single series of permits.³ A court has held that municipalities are prohibited from applying an ordinance to those projects that were approved before the ordinance was enacted.⁴

What is a “Permit”?

Chapter 245 defines a "Permit" 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.⁵

Under the statute, preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are *typically* considered collectively to be one series of permits for a project.⁶

What is a “Project”?

Chapter 245 defines a "Project" 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.⁷

What is the minimal level of detail that the developer must provide the municipality in order to satisfy the notice requirement? Will a plat application, alone, secure grandfathered status for a project beyond plat approval if the only “project” being described to the municipality is the laying out of lots and easements, and nothing else? The author asserts the answer is “no.”

There is a growing trend for municipalities to fill-in the gaps left by the Legislature. This is achieved sometimes by ordinance (e.g., San Antonio), or through unwritten policies (e.g., Austin). Of the ordinances reviewed by the author, most tend to do the following:

1. Create a presumption that all permits issued today will be subject to today’s regulations.

³ LGC § 245.002(b).

⁴ *Hartsell v. Town of Talty*, 130 S.W.3d 325 (Tex.App.—Dallas, 2004, reh’g denied) (Individual homes in the subdivisions could be constructed without obtaining building permits under a town’s ordinance that extended the town’s building codes into its ETJ where the town had approved preliminary plats for the subdivisions prior to its enactment of the ordinance).

⁵ LGC § 245.001(1) [emphasis added]. So, if the developer is not required to submit material to the city or obtain the approval that is sought, is the project still grandfathered by that action? It’s unclear.

⁶ LGC § 245.002(b).

⁷ LGC § 245.001(3) [emphasis added].

2. Establish the procedures and criteria for the municipality to determine if a particular development project is grandfathered. *A sample ordinance is attached.*

3. MUNI LAWYER POW-WOWS

Last Fall, a collection of municipal lawyers from DFW to San Antonio gathered informally in Austin to put their heads together on how to interpret and implement 245. The group included in-house and out-house attorneys from general law and home rule cities, rural and urban.

Outlined below is a compilation of the questions, answers, and comments discussed by the group. Not all statements represent consensus among the participants.

A. What is Covered by 245?

1. 245.001(4) limits “regulatory agency” to that entity “acting in its capacity of processing, approving, or issuing permits.” Thus, arguably rulemaking (eg, zoning) is not covered.
2. Rezoning after a permit (eg, plat) has been requested for that project probably runs afoul of 245.004(2) [“property classification”].
3. Rezoning after submission of a concept plan for a plat application probably runs afoul of 245.004(2).
4. It’s unclear whether amortization still available as a remedy to compensation owner for change in regulations (eg, zoning).

B. What’s in a Name?

1. There was almost complete support from the participants for using a term other than “vested rights” when dealing with 245.
2. Some attorneys insisted that using “vested” in this context is a misnomer, and is contrary to the term’s use when applied to common law principles.

C. What’s an “Original Application for the Permit”?

1. It may be problematic that many cities use standardized model forms provided by Code companies, which are not crafted to deal with 245.
2. A “Conveyance Plat” might be a permit, which some cities have (eg, Frisco). This can be dangerous when 245 implications are considered.

D. What is a “Plan for Development of Real Property”?

1. This term is that was left undefined in 245.
2. Perhaps cities should clarify by ordinance and enact standards.
3. In order to get “fair notice,” cities should enumerate items needed from applicants.

E. What is a Permit?

1. A voluntary, pre-application meeting is probably not the same as filing an application for a permit. Cities should clarify this point.
2. Zoning might be interpreted as a permit because of “property classification” language. See 245.004(2).

3. A request for rezoning could be interpreted as an application for a permit.
4. If rezoning is a permit, *it should expire*.
5. Perhaps it is the first permit application *after* the requested rezone has been approved that Grandfathers the project.

F. What's the Role of a Concept Plan?

1. Some cities (e.g., Georgetown) have disallowed the submission of concept plans, alone, and instead, require that applicants go straight to Prelim Plat phase
2. If a city allows developers to voluntarily submit concept plans to the City for review, disclaimers in the ordinances such as "No development rights (if any) shall vest upon voluntary submission of a concept plan to the City" might not be enough to avoid 245.

G. What is a Project?

1. A project is a development endeavor/ undertaking of which the City has been provided fair notice.
2. Cities can use local rules to force applicants to narrowly and specifically define what their *proposed* "project" is.
3. Travis County requires specificity.
4. It is unclear whether a plat is a "project" or a "permit." *Perhaps both?!?!?*
5. A "building" is not a permit, it is a "project" that results from a permit. Thus, isn't a "plat" a "project," and thus the end result of the permitting process? *Please let the author know when you figure it out!*

H. What is Fair Notice?

1. Cities should attempt to define by ordinance what constitutes "Fair Notice."
2. Travis County has attempted to define what is fair notice in its newly-enacted rules, which are posted on the county's website.
3. See 245.002(a)(2), added by the 2005 Legislature.

I. When does a development undertaking evolve into a "New" Project?

1. If rezoning is requested by the owner/developer, then the project doesn't start until new zoning is granted, and thus the project can't be grandfathered.
2. If a project could not have been completed without change in municipal regulations, the endeavor becomes a new project upon enactment of the new regulations and is not grandfathered. *You can't "vest" back to a point in time at which it was not legal to do your project!*
3. It might be wise to do away with inclusionary zoning in order to force more requests for rezoning, so to change the project and eliminate the basis for grandfathered claims?
4. There is a difference between: (a) changing the boundary of a zoning district, and (b) changing the regulations that apply within that district provided the "property classification" (e.g., commercial, residential, etc.) stays the same. There is a difference provided the change doesn't involve other exceptions to exemptions (landscaping, open space, etc.) in 245.004(2).
5. It might be wise to clarify zoning ordinances to define "property classification" to be limited to *use district boundaries*, not the more detailed regulations within.
6. At this point, it seems that boundary changes remain an unanswered question under 245.

J. How do we treat permits issued by other agencies?

1. Representative Kuempler's Legislative History makes clear that the amendment enacted by SB 848 does not apply to permits issued by other agencies. So, it's arguable that the application for a permit submitted to one government entity does not necessarily freeze the rules applied by other government entities.
2. It seems that the specificity of SB 848 helps bolster the municipal position that permits from other agencies do not grant grandfathered status under municipal regulations.
3. When another agency issues a permit, the city is typically not given adequate notice. Thus, the city should not be bound by that action.
4. Obviously, cities can choose to be generous and grant grandfathered status to projects that have received permits from other agencies.
5. See *Hallco Texas v. McMullen County*, Not Reported, 1997 WL 184719 (Tex.App.-San Antonio 1997).

K. Should municipal policy be established by ordinance or staff custom?

1. Austin's process is not set out by ordinance.
2. In Austin, the "245/1704 Committee" (staff planners and attorneys) makes a determination, which can be reconsidered, appealed to the Planning Director, or appealed to the City Manager. Beyond that, most disputes result in a negotiated agreement.
3. San Antonio's process is codified, and has recently been revised dramatically.
4. The grandfathered nature of a project may simply be recognized by the city, or subject to a separate authorizing instrument (e.g., San Antonio's "Development Rights Permit" (DRP)).
5. One potential benefit of formalizing the municipality's process and criteria by ordinance is the likelihood of having a developer suit abated by failure to exhaust the city's administrative remedies.

L. How long should cities take to decide if a project is grandfathered?

1. Twenty days appears to be common for the first determination of grandfathered status.

M. How can Cities handle Appeals?

1. If a city provides appeals from staff determinations as to grandfathered status, appeals can go through the same process as other appeals. It depends what boards/officials the city regularly charges with those types of matters.
2. Some cities have considered retaining outside legal counsel to serve as "Special Master" to rule on grandfathered determinations.
3. It may be risky to take appeals to P&Z or ZBA due to complexity of issue (law, policy and facts). With ZBAs (Boards of Adjustment), consider the standard of review upon appeal to court.
4. Appeals to the City Council is another option, but it might make the process too political.
5. Staff may be the best suited body because of technical expertise, experience and institutional knowledge.

N. What do we do with Dormant Projects & Expiration Dates?

1. Preliminary Plans tend to float around for years (much longer than plats), thus are a major problem.
2. Travis County has expiration dates on Preliminary Plans (expire after 4 years in Water Quality Zone, and 10 years in Desired Development Zones).
3. There is support among city attorneys for the interpretation that any increase in residential density results in a new project because that is a “substantive change,” as may be defined by ordinance.
4. Note that Section (a).245.005(b), which only applies to permits without expiration dates, distinguishes between “shall” & “may”.
5. If a developer gets a permit, and makes progress, the project is probably grandfathered forever.
6. The Code Construction Act might be helpful in an effort to garner an intention to somehow, someday, allow expiration even though slight progress made way back when.
7. Typically, if a property owner makes progress under Zoning, he’s grandfathered under Zoning forever (with obvious exceptions for nonconforming uses, destruction, vacation, amortization, etc).

O. What are the Exemptions?

1. It’s possible that a regulation on landscaping, tree preservation, etc. 245.004(2), not codified within the text of the Zoning ordinance does not have to comply with 245.

P. Are there opportunities to Settle disputes?

1. We are not told who has the authority to settle disputes between city and developer over grandfathered status.
2. Some cities use Development Agreements or Planned Development Districts (aka, Planned Unit Developments) to negotiate a *win-win* situation and avoid litigation.

Q. Moratoriums:

1. Note LGC 212.131, et seq.
2. Pay close attention to the “*only*” and “*only*” limits to moratoriums (only on residential, moratoriums only on commercial, or moratoriums only on residential and commercial). If moratorium applies to industrial, agricultural, etc., the entire statute might not apply.

4. POINTS TO CONSIDER

When implementing LGC 245, municipal attorneys should consider the following:

1. Will the city be granting status or merely recognizing (acknowledging) status already conferred by statute?
2. Will the city's implementation policy be observed through custom and practice, or through formally enacted rules (e.g., an ordinance)?
3. Must the applicant (property owner, developer, builder) assert a claim before the city?
4. Is there an application form that must be completed before the city will recognize a project's grandfathered development status?
5. If an application is required, what information must the applicant provide in order to convince the city of the project's grandfathered status?
6. Will the city assess and collect a review fee for determining a project's status?
7. What are the deadlines regarding submissions to the city, and timelines for city actions?
8. Who makes the initial determination(s) on behalf of the city? Are the decision-makers employees or members of appointed boards / commissions?
9. Does the city's policy provide any clarification of what a "project" is?
10. Can initial determinations be appealed? If so, to whom? Which administrator or board / commission will hear appeals?
11. If determinations can be appealed, what are the grounds for reversal or modification?
12. Will the city have criteria for assessing if the city has received fair notice of a project?
13. How will the city address substantive changes in projects? How will substantive changes be determined? What implications will substantive changes have on the project's status?
14. How will the city deal with dormant or expired projects?
15. If the city acknowledges the grandfathered status of a project, will the city still require updated site plans or engineering reports even if that information was not required under the grandfathered regulations?
16. Will the city's 245 implementation policy create any additional rights? Will the city's 245 implementation policy deal with any rights that may have "vested" under other law?