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CHAPTER 245
GRANDFATHERING DEVELOPMENT AT CONCEPTION
(THE GOVERNMENT'S PERSPECTIVE)

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I. INTRODUCTION

When the Texas Legislature originally enacted Chapter 245 of the Texas Local Government Code, entitled “Issuance of Local Permits,” the legislature intended to grant land developers the right to develop their land in accordance with the local land use regulations in effect at the time that a project for development was commenced. Known to some as the “grandfathering” statute, Chapter 245 soon became known to governmental bodies as the “vested rights” statute and to developers as the “entitlement” statute.

The plain language of Chapter 245 requires each regulatory agency to approve, disapprove, or conditionally approve an application for a permit solely on the basis of the regulations in effect at the time the original application for the permit is filed, or a plan for development or plat application is filed.¹ A regulatory agency is defined as, “the governing body of, or a bureau, department, division, board, commission, or other agency of, a political subdivision acting in its capacity of processing, approving, or issuing a permit.”²

If a series of permits is required for a project, the regulations in effect at the time the original 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.³

The Texas Attorney General was asked whether real property for which an original application for a first permit which had been filed remains subject to the regulations in effect at the time of that filing, although the property has been conveyed to a different owner. Regardless of any change in ownership, based on the plain text reading of the definition of the term “project”, the project may continue so long as it is not altered to lose its 245 protections.⁴

Although the concept behind the grandfathering statute is relatively simple, and most would agree that the rules should not be changed in the middle of the game, the plain language of Chapter 245 is not so clear and has been the subject of numerous lawsuits, frequent amendments by the legislature, and much debate among lawyers and planners on both sides of the development question.

¹ TEX. LOC. GOVT CODE § 245.002(a) (2005).

² *Id.* at § 245.001(4).

³ *Id.* at § 245.002(b).

⁴ Tex. Att’y Gen. Op. JC-0425 (2001).

The evolution of Chapter 245 has occurred over the last twenty years. In almost every new amendment, the developer side of the equation has acquired a little more consideration. Under the current version of Chapter 245, the developer has the ability to lock in the regulations applicable to a piece of property even before the property is zoned for a particular use.

The perhaps unintended consequence of the most recent amendments to Chapter 245 is that cities and counties with an interest in managing development through responsible land use regulations are now faced with a dilemma. Many cities and counties traditionally have practiced a “customer service” model of land use approval: developers have grown accustomed to coming to the city or county at the very early stages of the development process in order to receive feedback from the governmental entity prior to spending a lot of money on the development. In fact, many city ordinances require a pre-application meeting with the developer to review the details of the application. Often this is helpful to both the developer and the governmental entity to plan and review this application, in light of the big picture, as the staff is privy to information on all the applications currently submitted, as well as generally have knowledge of the overall goals of the development of the city or county as a whole.

Now, however, a city or county must decide to forego oversight of land development activities and risk a vesting claim, or they must impose very specific and expensive development requirements at the very inception of the project process. Old Chapter 245 contemplated freezing the regulations before the developer incurred significant expense, *i.e.* actual physical commencement of construction of the project. New Chapter 245 contemplates freezing the regulations while the project proposed for the property may be nothing more than someone’s general idea.

II. 2005 LEGISLATIVE AMENDMENTS

The following is a summary of the major changes to Chapter 245 that occurred in the 2005 regular Legislative Session:

- Ø Ordinances that regulate landscaping, tree preservation, open space, or park dedication are now subject to Chapter 245 vesting and may not be enforced against a “vested” project.
- Ø Zoning regulations that affect property classification may not be enforced against the holder of a vested permit. This means that a city wishing to “down” zone a tract of land may be unable to do so for a vested project.
- Ø Approvals or individual permits for a project may not expire for at least 2 years and then only if no progress toward completion of a project is made.
- Ø Projects may not expire for at least 5 years from the date of the first approval and may not expire at that time, unless no progress toward completion of the project has occurred.
- Ø Cities and counties do not have governmental immunity from lawsuits related to actions by the city or county in violation of Chapter 245.
- Ø The definition of a permit has expanded to include a contract or other agreement for the construction or provision of utility services. Arguably, even a contract for services with a public provider other than the governmental entity imposing the land use regulations may trigger vesting.
- Ø Permits, and therefore projects, are vested when the original application for the permit is delivered or deposited in the mail.
- Ø Applications vest the permit unless the application is rejected for being incomplete within 45 days from the date of its mailing or

delivery and the applicant fails to respond. Since any part of the review process may be considered as part of a permit's approval, any pre-application discussions between the developer and the city or county staff or governing body should be undertaken only with great caution.

- Ø The filing of a development plan or preliminary plat is considered the first permit in development of a project and thereby vests the project under Chapter 245.

III. EXEMPTIONS

Chapter 245 does provide for limited exemptions in order to protect public health and safety and to prevent imminent destruction of property or injury to persons. The full list of exemptions can be found at Section 245.004. The specific regulations cited in the statute may be enforced by the regulatory agency and the project may not be grandfathered from complying with the listed regulations. One such exemption exempts permits two years or older from the protection of the statute when there may be new regulations for uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization and their local amendments, and to other regulations to prevent imminent destruction of property or injury to persons from flooding. Additional exemptions include the following:

- municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality;
- regulations for sexually oriented businesses;
- municipal or county ordinances, rules, regulations, or other requirements affecting colonias;
- fees imposed in conjunction with development permits; regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication;
- regulations for utility connections;
- construction standards for public works located on public lands or easements.

While the governmental entity may not force a developer to comply with the new regulations for a vested project, without forfeiting any of their Chapter 245 rights, the developer has the option to take advantage of recorded subdivision plat notes, recorded restrictive covenants required by a regulatory agency, or a change to the laws, rules, regulations, or ordinances that enhance or protect the project, including changes that lengthen the effective life of the permit after the date the application for the permit was submitted.⁵

IV. IMPACT OF AMENDMENTS

While the changes to Chapter 245 add clarification to a statute that has been plagued by uncertainty, new Chapter 245 may go too far. Authorizing a project to vest when the preliminary plat or development plan is filed or when an application for utility service is made, creates significant issues for both the developer and the city or county.

Traditionally, cities and counties have not imposed a requirement on developers for significant detail regarding a project at the time of filing of a preliminary plat or development plan. In particular, land use issues are not part of the initial filing requirements and zoning of the property often has not yet occurred at the time of filing. The preliminary plat process is associated with the orderly subdivision of land; not land use generally. Projects, from a governmental entity's perspective, are defined more by land use than they are by the technical mechanics of land

⁵ TEX. LOC. GOVT CODE § 245.002(d) (2005).

subdivision.

If projects are authorized to vest before land use issues are understood by a city or county's governing body, then responsible management of land development activities by the city or county may not occur. This concern is greatly enhanced due to several of the other changes to Chapter 245.

In theory, the changes to Chapter 245, which authorize the governmental body to impose regulations calling for permits and projects to lose their vesting if progress toward completion of a project does not occur, should have added a degree of certainty to the regulatory process. The language in Chapter 245 attempts to define "progress toward completion of a project". The practical effect of this broad language is to nullify the provision that provides that permits and projects may expire. Almost any effort and cost made toward progress could extend the life of a permit or project *ad infinitum*; thereby rendering meaningless the whole concept that a vested project could expire.

The final and most significant challenge to a city's ability to manage growth and development occurs with the changes to Chapter 245 that now embrace zoning. Most zoning ordinances have been exempt from Chapter 245 since its inception. The Texas courts have almost always recognized the authority of a city to regulate land use through zoning. Over time, land use activities change. Neighborhoods change. Land that was rural becomes urban. Land that was residential becomes commercial. Areas that were prosperous for a time become depressed. It is fundamental to the concept of local governance for locally elected officials to exercise their legislative authority over land use through their ability to establish zoning districts. When the legislature imposed Chapter 245 protection over a city's ability to zone and rezone land, it took away a significant portion of the legislative authority of a city.

The issues created by including zoning within the purview of Chapter 245 protection may go well beyond the realm of guaranteeing a developer's right to construct a new project on a particular tract of land.

The result is zoning of property, not based on valid objective planning reasons; but the types of uses may then be dictated by the developer's bottom line and market demands without due consideration of the compatibility of the uses with the surrounding property uses. Amending a zoning classification on a piece of property generally consists of an application and approval of an ordinance by the city council. During critical steps along the way, notice must be provided to the adjoining property owners.

By allowing vesting to occur early in the process, surrounding property owners are left out of the process and their comments on the proposed uses may have no effect at all. The amendments raise grave concerns over a city's ability to re-zone for redevelopment in the future. Interpretations of old Chapter 245 never expanded the vesting of a project beyond the actual construction of the initial project. New Chapter 245 may have greatly expanded the umbrella of protection to include future development or even redevelopment of land.

The legislature originally conceived Chapter 245 to protect developers from a city or county "changing the rules in the middle of the game". In all fairness, developers should be allowed to complete their projects in accordance with the regulations in place when a particular project is commenced. Thus, Chapter 245 was created to level the playing field and to achieve a balance of expectations between the local government's interest in protecting its citizens and maintaining community identity and the developer's expectations. The issues arise with the definitions of "project", "commencement" and "progress". However, the 2005 changes to Chapter 245 went too far by stripping away a governmental entity's legislative authority to

protect the public health, safety and welfare of their community.

The playing field now leans heavily in the direction of the developer. Where previously a city or county would expect to conduct pre-application meetings with a developer and assist the developer with informal “pre-review” meetings regarding a permit application, the changes to Chapter 245 will have a chilling effect on any informal review process.

In addition, governmental entities will need to ensure further coordination if they also are a public provider for utility infrastructure or services. In order to determine the feasibility of a project, often the developer will first show their plan to the public utility provider and not necessarily the planning department of the governmental entity. The developer may enter into an agreement with the utility for the construction of infrastructure. While the utility may be versed in the availability of services, they most likely do not review the project in terms of compatibility with surrounding uses, landscape needs or setbacks.

In communities throughout the state, the development process by necessity is becoming more formalized and bureaucratically cumbersome. Much of the detail required of developers at the site plan or concept plan stage in development when land use issues are resolved may need to be required much sooner and at the time of the approval of the first permit. This adds complexity to the process and considerable up-front expense for the developer, without the certainty that the project will receive the requisite approvals. In addition, zoning decisions will become more difficult for Planning Commissions and Council with much more inquiry made toward the specific project before approval is granted.

V. RESPONSE FROM GOVERNMENTAL ENTITIES

The pattern of cities and counties closing their once open doors and denying projects up front without review can already be seen throughout the state. Many governmental entities are also attempting to equalize the playing field by amending the procedures in their ordinances and regulations in processing and accepting these applications, as well as instituting expiration dates, which may not have existed before. Some entities have formalized an application procedure for granting or recognizing vested rights of developers, while others continue an informal policy as each case arises. A formal procedure is not required in the statute and it is up to each individual entity that makes these decisions whether a project is grandfathered or not. Often it may be a decision left up to a designated planner or the entity’s legal counsel.

VI. CONCLUSION

In conclusion, cities and counties now find themselves in uncharted waters when it comes to responsible regulation of land use in light of the new Chapter 245. It will be up to the courts, no doubt, to resolve many of these issues. No one wants to be the test case. However, as the legislature continues to push the balance in favor of developers, local officials must evaluate the unique concerns and values of their constituencies in deciding how hard to push back.