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Grandfathering and Dealing with Nonconformities

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I. INTRODUCTION

This paper provides an overview of the regulatory issues related to Chapter 245 of the Texas Local Government Code (“Chapter 245”), and the challenges facing developers and government agencies when determining whether a project is subject to current rules or grandfathered under previous regulations. In addition to Chapter 245 applicability, this paper addresses the issues revolving around expiration, abandonment and amortization of nonconforming uses and structures.

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, and usually vague) development proposals is often the most crucial and challenging. The rural 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 apparent commitment of some Texas Legislators to providing long-term certainty to land speculators.

II. BACKGROUND

Beginning on October 16, 2005, the *San Antonio Express-News* launched a rare four-part series of in-depth articles, published on the front page, above the fold. The first sentence read as follows:

“An obscure Texas law written for developers has cost San Antonio millions of dollars, stripped parts of the scenic Hill Country of trees and blocked attempts to protect the region’s water supply.”¹

The article went on to state that between 1997 and 2001, the City of San Antonio had turned down less than 1% of all “vesting” requests, and thus exempted 500 land development projects (covering nearly 70,000 acres- about ¼ the City’s entire acreage). The oldest “permit” ever to trigger “vested rights” in San Antonio was reported to have been a “... hand-drawn plan for the site dating nearly a century before...”, which H-E-B used to successfully grandfather a project back to 1908.

Since the publication of that landmark series, San Antonio has changed its approach to dealing with allegedly-grandfathered projects, and so have many other municipalities.

Chapter 245 represents an attempt by the Texas Legislature to statutorily determine when a land development project is subject to new or old government regulations. Moreover, the legislative record reflects that Chapter 245 was drafted to address situations where Texas cities imposed new regulatory restrictions retroactively on development projects causing “project failures, bankruptcies, and regulatory uncertainty for developers and landowners.”² Additionally,

¹ Tedesco, John, “Losing Ground,” *San Antonio Express-News* (October 16, 2005).

² House Research Organization, Bill Analysis, Tex. H.B. 1704, 3-4, 76th Leg., R.S. (2005).

grandfathering is a common term used to address nonconforming uses and structures. A use or structure that lawfully existed prior to the enactment of an ordinance (e.g., zoning), and continues to exist out of compliance with the ordinance after the effective date, is called a "nonconforming use."³

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.⁴

Simply stated, the statute prevents state and local government agencies from ***changing the rules in the middle of the game***. This is a proposition that the majority of Americans 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:

What the game is? Who the players are? When the game begins?

III. ANALYSIS

A. CHAPTER 245

HB1704 was the number of the House Bill enacting the legislation. Pursuant to Chapter 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.⁵

If a series of permits is required for a project, 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. All permits required for the project are considered to be a single series of permits.⁶ A court has held that municipalities are prohibited from applying an ordinance to those projects that were approved before the ordinance was enacted.⁷

³ Anderson's, Am. Law of Zoning § 6.1 (4th ed.); *City of Univ. Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).

⁴ Tex. Loc. Gov't Code Ann. § 245.002(a) (Vernon 2005); *Hardee v. City of San Antonio*, 2008 WL 2116251 (Tex. App.--San Antonio, 2008, no pet.).

⁵ Loc. Gov't Code Ann. § 245.002(a).

⁶ *Id.* § 245.002(b).

⁷ *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).

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