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**Advanced Vested Rights:
Recent Issues in “Fair Notice” & Attorney Fees**

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Vested rights under Chapter 245 of the Texas Local Government Code (“Chapter 245”) are critical for investors, property owners and developers in establishing some sense of certainty in the development process. Unfortunately for those who rely on Chapter 245, these rights are constantly changing due to new case law, Attorney General Opinions and local interpretation and application of Chapter 245. Two issues that have been examined by the courts recently include the concept of fair notice of a project under Chapter 245 and payment of attorney fees for successfully asserting a vested rights claim.

I. Vested Rights Under Chapter 245

Vested rights, also known as grandfathering or permit rights, allows the developer of a project to continue to develop the project under the rules that applied to the project when the first permit application was submitted for the project.

Vested rights are derived from Chapter 245 of the Texas Local Government Code. Chapter 245 requires a regulatory agency, such as the City, to consider the approval of any application for a permit for a project based on the ordinances in effect at the time the application for the first permit for the project was filed. TEX. LOCAL GOV’T CODE, §245.002(a). The permit application filing date becomes the vesting date under Chapter 245.

Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:

- (1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or
- (2) a plan for development of real property or plat application is filed with a regulatory agency.

TEX. LOCAL GOV’T CODE, §245.002(a).

The “fair notice” requirement appears in Section 245.002(a-1). “Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought.”

Chapter 245 defines both “permit” and “project”. “Permit” means a license, certificate, approval, registration, consent, permit, 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.” TEX. LOCAL GOV’T CODE, §245.001(1). “‘Project’ means 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.” *Id.* at (2).

Chapter 245 contains a number of exceptions, including:

- (1) a permit that is at least two years old, is issued for the construction of a building or structure intended for human occupancy or habitation, and is issued under laws, ordinances, procedures, rules, or regulations adopting only:
 - (A) uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization; or
 - (B) local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons;
- (2) 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;
- (3) regulations that specifically control only the use of land in a municipality that does not have zoning and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, or building size;
- (4) regulations for sexually oriented businesses;
- (5) municipal or county ordinances, rules, regulations, or other requirements affecting colonias;
- (6) fees imposed in conjunction with development permits;
- (7) regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication;
- (8) regulations for utility connections;
- (9) regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy;
- (10) construction standards for public works located on public lands or easements;
or
- (11) regulations to prevent the imminent destruction of property or injury to persons if the regulations do not:

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