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Dorothy Palumbo currently serves as the City Attorney for the City of Galveston. She is also Of Counsel with the Bojorquez Law Firm, Austin, Texas. She was the City Attorney and Assistant City Manager for the City of Highland Village, Texas. She is an IMLA Fellow and has received the Galen Sparks Award as the "Assistant City Attorney of the Year." Having worked for the cities of Abilene, Midland, Garland, and Denton, she advised city officials, Boards, and Commissions, and prepared legal documents in all areas of municipal law with primary concentration in Land Use, Utility Franchise Fees, Gas Well Development, and Legislation. As a Registered Lobbyist as Assistant General Counsel for the Texas Municipal League from 1994 to 2000, she was primarily responsible for drafting and passing legislation. She has litigated in State and Federal Court from inception of litigation through settlement, mediation, trial, and appeal in the areas of civil rights, employment, condemnation, nuisance condemnation, and injuries arising under the Texas Tort Claims Act. She is also a Board member of the Texas Coalition of Franchised Utilities and had served as Board Secretary for the Denton County Transportation Authority from 2005 to 2011.

Introduction

This paper will explore Chapter 245 "Issuance of Local Permits" of the Texas Local Government Code issues, including processes for the recognition of rights, "fair notice" and attorney fees awards in recent litigation. Relevant cases and statutes that impact Chapter 245 will also be discussed along with best practices for the municipal and development community.

Overview of Legislation

Most land use attorneys refer to Chapter 245 as the "Vested Rights Statute." Vesting occurs when property owners have made significant steps in developing a project prior to the enactment of statutes or local regulations that prohibit or limit what was formally permitted. Texas courts have historically provided limited common law vested rights protection.[1] Another theory that has been used is a claim of estoppel. Equitable estoppel has been claimed to prevent a local government from exercise its zoning powers when a property owner relying in good faith, upon some act or omission of the government, has made a substantial change in position or incurred such extensive obligations and expenses that it would be inequitable and unjust to destroy the rights which the property owner acquired. The general law in Texas is that a municipality is not estopped from enforcing its zoning ordinances unless the zoning violator has detrimentally relied upon an authorized act of the municipality.[2]

A municipality may be estopped, however, in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions. The primary Texas case supporting equitable relief is *Rosenthal v. City of Dallas*.[3] The Rosenthal court held that the City of Dallas was estopped from revoking a permit for a meat processing plant that was in violation of zoning ordinances. The court reached this result due to a building inspector's statements coupled with the city's failure to timely object as work progressed and substantial monies were spent. On retrial, the position was affirmed.[4] The Supreme Court recently addressed estoppel in two instances and reaffirmed that this exception is narrow.[5]

Generally, the right to develop property is subject to intervening regulations or regulatory changes.[6] In adopting sections 481.141–.143 of the Texas Government Code on September 1, 1987, the Texas Legislature significantly altered this rule by locking in for the life of a project the regulations in effect at the time of the application for the project's first permit as follows:

> The approval, disapproval or conditional approval of an application for a permit shall be considered by each regulatory agency solely on the basis of any orders regulations, ordinances, or other duly adopted requirements in effect at the time the original application for the permit is filed. If a series of permits is required for

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[1] *See, City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972); *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex. Civ. App.–Dallas 1951, writ ref'd n r.e.); *City of Hutchins v. Prasifka,* 450 S.W.2d 829 (Tex. 1970).
[2] *See, Prasifka, Id.* at 833.
[3] *City of Dallas v. Rosenthal,* 239 S.W.2d 636 (Tex. Civ. App.–Dallas 1951, writ ref'd n r.e.).
[4] *Id.*
[5] *See, City of White Settlement v. Super Wash,* 198 S.W.3d 770 (Tex. 2006); *City of Dallas v. Vanesko*, 189 S.W.3d 769 (Tex. 2006).
[6] *See, Connor v. City of University Park,* 142 S.W.2d 706, 709 (Tex. Civ. App.–Dallas 1940, writ ref'd).

> a project, the orders, regulations, ordinances, or other requirement 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.

In 1995, the Texas Legislature passed Senate Bill 1704.[7] Senate Bill 1704 amended the definition of a regulatory agency, permits required for a project, preliminary plans, related subdivision plans, site plans, and other development plans were considered to be part of a series of permits and applied to projects in progress since the effective date of H.B. 4 in 1987. The statute created exemptions. In 1997, the statute was inadvertently repealed.[8]

In 1999, the legislature reinstated the former statute with sweeping changes now codified in Chapter 245 of the Texas Local Government Code to insure uniform requirements during the approval of a project by a regulatory agency.[9] Thereafter, in 2003 with H.B. 2130, the Legislature took away the ability of cities to enact new regulations to prevent the imminent destruction of property or injury to persons by limiting the exemption to flooding that is 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 or regulations to prevent the imminent destruction of property or injury to persons if the regulations do not affect lot size, lot dimensions, lot coverage, building size, residential or commercial density, or the timing of a project; or change development permitted by a restrictive covenant required by a municipality.[10]

In 2005, the legislature passed two bills making significant changes to Chapter 246.[11] Senate Bill 848 amended Chapter 245 to clarify that an original application is considered filed when it is filed for review for any purpose, including review for administrative completeness, or when a plan for development of real property or plat application is filed with a regulatory agency if the filing gives the regulatory agency fair notice of the project and the nature of the permit sought. The bill specifies what actions determine the date on which an application or plan is considered filed. The bill authorizes the regulatory agency to set a permit to expire on or after the 45th day after the filing date if it provides appropriate notice of requirements that have not been met and the applicant does not satisfy these requirements within the time allowed. The bill further provides that the chapter does not prohibit a regulatory agency from requiring compliance with technical requirements relating to the form and content of an application that are in force at the time that the application is filed, even if the application is not the original application. Senate Bill 848 also includes among the types of permits covered by the chapter a 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.

Senate Bill 574 amended Chapter 245 to clarify that the issuance of local land development permits applies to municipal zoning, land use, annexation, and imminent destruction regulations

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[7] *See,* Act of May 24, 1995, 74th Leg, R.S. ch. 794 § 1, 1995, Tex. Gen. Laws 4147 (repealed 1997).
[8] *See,* Act of June 1, 1997, 75th Leg, R.S., ch. 1041, § 51(b), 1997, Tex. Gen. Laws 3966.
[9] *See,* Act of May 11, 1999, 76th Leg. R.S. ch. 73, § 2, 1999, Tex. Gen. Laws.
[10] *See*, Act of June 20, 2003, 78th Leg. R.S. ch. 646 § 1, 2003, Tex. Gen. Laws.
[11] *See*, Act of April 27, 2005, 79th Leg. R.S. ch. 7 § 1, 2005, Tex. Gen. Laws; Act of May 9, 2005, 79th Leg. R.S. ch. 31 § 1, 2005, Tex. Gen. Laws.

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