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**A FRAMEWORK FOR ANALYZING VESTED RIGHTS
QUESTIONS UNDER TEXAS LAW**

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Brent Lloyd is an attorney with the City of Austin, where he advises all units of city government on land use, environmental, and general municipal law. Prior to joining the Law Department, Brent advised local governments on similar issues in Washington State and litigated regulatory cases before state and federal courts and administrative tribunals. As counsel for 29 governmental entities, Brent successfully defended a class action lawsuit seeking to recover over \$60M in “impact fees” used to mitigate the impacts of development on schools, roads, and parks.

Brent has written extensively on the law of urban planning and has been quoted in appellate court decisions, as well as law review articles and legal treatises. In 2006, he received an award from the governor of Washington for helping to develop a “transfer of development rights” program that uses density credits to incentivize environmental protection. In 2014, he co-authored an academic paper on the use of national constitutions to establish environmental rights and spoke on the topic at a conference in Edinburgh, Scotland.

The views expressed in this paper are his own and do not necessarily reflect the position of his City of Austin client departments or Law Department colleagues.

INTRODUCTION

This paper highlights key legal issues that arise in analyzing claims that a proposed development is entitled to be reviewed under municipal land use regulations that are no longer in effect, but which were in effect at some point in time during a project's history. These claims, referred to interchangeably as "vested rights" or "grandfathering," often pit a developer's preference for older, more permissive regulations against municipal planning goals embodied in current city codes and ordinances.

Rather than provide a detailed treatment of the law, this paper offers a framework for reviewing vested rights questions, discusses different approaches for looking at the issues, and summarizes points of contention that often arise. For more thorough understanding of the law, practitioners are encouraged to consult the legal authorities referenced in the bibliography.

BACKGROUND

Chapter 245 of the Texas Local Government Code provides, in general, that a municipality must review a development application under regulations in effect on the date that the first permit application for the project was submitted. For a project involving a single application, such as a building permit, Chapter 245 simply prohibits a municipality from applying new ordinances that take effect following submittal of the application. This is a fairly simple and straightforward directive.

For projects that require a series of permits to complete, however, Chapter 245 is more far-reaching in its effect and complex in its application. It requires, in essence, that a municipality determine whether a permit application submitted today is sufficiently related to a prior application to constitute a continuous and ongoing project; if so, then all permits for that project are entitled to review under the regulations in effect when the earlier application was submitted. While there are numerous statutory caveats and exceptions, as well as considerations specific to particular cases, the reality is that Chapter 245 sometimes requires municipal planners to apply regulations from many years—even decades—ago to development of wholly vacant parcels that appear unrelated to tangible efforts taken by prior applicants.

Chapter 245, together with its predecessor statutes going back to 1987, constitute an exception to the common law rule that permit applications are automatically subject to current regulations in effect on the date of application. While the statute is clear in its

fundamental intent, it leaves many practical questions unanswered. City planners, and attorneys representing developers or those impacted by development, must stay abreast of case law as well as local administrative precedents used to flesh-out the statutory requirements and directives.

FRAMEWORK OF LEGAL ISSUES

1. What constitutes the “project”?

When a project requires multiple permits to complete, determining what constitutes the “project” for purposes of Chapter 245’s vested rights protections is a critical first question. In general, a project constitutes “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.” *See* LGC § 245.001(3).

The first application for a project—often a preliminary plan or similar high-level approval—locks in a project’s vested rights and defines the broad contours of the development plan, such as land use and overall site layout, without nailing down all of the details. In most cases, the first application provides “fair notice” of the “project” for purposes of Chapter 245 and should be used as a point of reference for determining when a project is complete and whether subsequent applications are part of the original project.

In some cases, however, subsequent permit applications may have the effect of refining or narrowing the scope of an original project, which in turn may require establishing a new “vesting date” tied to a later permit application. This is especially true for older projects that began in a city’s extraterritorial jurisdiction and have subsequently been annexed or subject to intervening approvals affecting the nature, scope, or intensity of development.

2. When is a project “complete”?

The rule that a project is subject to regulations in effect on the date of the project’s first permit application applies to all permits “required for completion of the project.” *See* LGC § 245.002(b). Therefore, determining whether an original project is complete is a critical step in applying Chapter 245 to subsequent applications to develop property included in the original application.

In general, if the original application for a project is a site plan, building permit, or other construction approval, the project is complete when the structures or improvements

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