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Non-conformities and Chapter 245

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Nonconformities and Chapter 245

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. In addition, there will be a discussion of nonconformities as nonconformities relate to Chapter 245.

Rights of a Permit Applicant:

Rights to which a permit applicant is entitled to under Chapter 245 of the Texas Local Government Code **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.** (Emphasis added.)

Fair Notice:

The "fair notice" requirement was inserted into Chapter 245 during the 2005 legislative session. The legislature did not define what fair notice was in the context of a permit application. Without guidance from the legislature, local governmental entities are free to determine if an application provides fair notice of the project.

In 2006 the City of San Antonio adopted a "Fair Notice Ordinance" in response to changes the Legislature made to Chapter 245 in 2005. The Fair Notice Ordinance required that permit applicants submit an "optional" Fair Notice Form with permit applications. If the applicant did not submit the Fair Notice Form with the application, the City of San Antonio took the position that the applicant did not provide fair notice of the project and the project would not be vested under Chapter 245.¹

Under the Fair Notice Ordinance, the City of San Antonio would not recognize Chapter 245 rights unless the property owner submitted a "Fair Notice Form" to the City of San Antonio. The Fair Notice Form required the owner to identify any previous recognition of rights by the City of San Antonio for the proposed project. The Fair Notice Form also required a site plan for most projects, including

- lot layout,
- general building footprint with approximate square footage of any building, and
- land use.

In 2012, a district court struck down the Fair Notice Ordinance, holding that it was "invalid, insofar as it applies to projects seeking to acquire vested rights."² The City of San Antonio

¹ See, e.g., City of San Antonio Code of Ordinances, Section 35-712.

² *Greater San Antonio Builders Association and Indian Springs Limited v. City of San Antonio*,

appealed the decision. In *City of San Antonio v. Greater San Antonio Builders Association*, the Court of Appeals upheld the decision of the District Court.³ In their decision, the Court of Appeals discussed the history and purpose of Chapter 245.

Historically, the right to develop property in Texas was subject to regulatory changes brought by the local regulatory agency. However, the Texas legislature modified this rule by enacting Chapter 245. The effect of Chapter 245 is to freeze most of the regulatory agency's land-use regulations [,] as they existed at the time the first permit application is filed through completion of the project. The rights to which a permit applicant is entitled under Chapter 245 are commonly referred to as “vested rights.” Vested rights attach to a project, not to a particular property owner. Thus, vested rights follow any conveyances or transfer of rights related to the project. Chapter 245 defines a “project” as “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.” “Because the term project is defined as an endeavor, rights vest in a particular project and are no longer vested if the project changes.”

In enacting Chapter 245, the legislature found the statute's requirements were necessary to prevent “administrative and legislative practices that often result[ed] in unnecessary governmental regulatory uncertainty that inhibit[ed] the economic development of the state [,] increased the costs of housing and other forms of land development [,] and often resulted in the repeal of previously approved permits causing decreased property and related values, bankruptcies, and failed projects.”⁴

The Court of Appeals then looked critically at San Antonio’s Fair Notice Ordinance:

In the case before us, the City asserts the Fair Notice Ordinance is necessary for it to carry out its responsibilities under Chapter 245. According to the City, the Fair Notice Ordinance ensures it will have enough information about a project to determine whether the project has changed and, therefore, is subject to current development regulations.⁵

The Court noted that the evidence presented demonstrated that:

“[T]here were no circumstances under which the City would recognize vested rights in the absence of a completed Fair Notice Form. If an owner seeking recognition of vested rights did not submit the Fair Notice Form, his application would be deemed incomplete and the City would not begin its review to determine

No. 2006-CI-11580 (37th Dist. Ct., Bexar County, Tex. April 30, 2012).

³ *City of San Antonio v. Greater San Antonio Builders Association*, 419 S.W.3d 597 (Tex.Ct.App.- San Antonio 2013).

⁴ *Id.* at 601-602 (*internal citations omitted*).

⁵ *Id.* at 602.

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