

PERMIT PROCESSING: Are You Really Grandfathered?

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1. INTRODUCTION

This paper provides an overview of the regulatory issues related to 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.

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.

2. 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 of the Texas Local Government Code (“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. In essence, Chapter 245 grandfathers certain construction projects.

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.”

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

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.

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?

3. ANALYSIS

A. Chapter 245

HB1704 was the number of the House Bill enacting the legislation. Pursuant to 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.²

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.³ A court has held that municipalities such as Dripping Springs are prohibited from applying an ordinance to those projects that were approved before the ordinance was enacted.⁴

B. What is a “Permit”?

Chapter 245 defines a "Permit" as:

a license, certificate, approval, registration, consent, permit, 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, 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.⁵

² LGC § 245.002(a).

³ LGC § 245.002(b).

⁴ *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).

⁵ LGC § 245.001(1) [emphasis added].

Under the statute, preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are *typically* considered collectively to be one series of permits for a project.⁶ Also, it is generally viewed that rezoning is not a “permit,”⁷ and neither is a request for hardship relief (e.g., a variance).⁸

C. What is a “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.⁹

What is the minimal level detail that the developer must provide the municipality in order to satisfy the notice requirements. Will a plat application, alone, secure grandfathered status for a project beyond plat approval if the only “project” being described to the municipality is the laying out of lots and easements, and nothing else?

There is a growing trend for municipalities to fill-in the gaps left by the Legislature. This is achieved sometimes by ordinance (e.g., San Antonio), or through unwritten policies (e.g., Austin). Of the ordinances reviewed, most tend to do the following:

1. Create a presumption that all permits issued today will be subject to today’s regulations.
2. Establish the procedures and criteria for the municipality to determine if a particular development project is Grandfathered.

D. Points to Consider

When implementing LGC 245, municipal officials may want to consider the following questions:

1. Will the city be granting status or merely recognizing (acknowledging) status already conferred by statute?
2. Will the city’s implementation policy be observed through custom and practice, or through formally enacted rules (e.g., an ordinance)?
3. Must the applicant (property owner, developer, builder) assert a claim before the city?
4. Is there an application form that must be completed before the city will recognize a project’s grandfathered development status?

⁶ LGC § 245.002(b).

⁷ *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 343 (Tex.App.—Austin 1995, no writ).

⁸ *2218 Bryan St., Ltd. V. City of Dallas*, 2005 Tex.App. LEXIS 6493 (2005).

⁹ LGC § 245.001(3) [emphasis added].

5. If an application is required, what information must the applicant provide in order to convince the city of the project's grandfathered status?
6. Will the city assess and collect a review fee for determining a project's status?
7. What are the deadlines regarding submissions to the city?
8. What are the timelines for city actions?
9. Who makes the initial determination(s) on behalf of the city? Are the decision-makers employees or members of appointed boards / commissions?
10. Does the city's policy provide any clarification of what a "project" is?
11. Can initial determinations be appealed? If so, to whom? Which administrator or board / commission will hear appeals?
12. If determinations can be appealed, what are the grounds for reversal or modification?
13. Will the city have criteria for assessing whether the city has received fair notice of a project?
14. How will the city address substantive changes in projects? How will substantive changes be determined? What implications will substantive changes have on the project's status?
15. How will the city deal with dormant or expired projects?
16. What is the relationship between grandfathered status and permits that have expiration dates?
17. If the city acknowledges the grandfathered status of a project, will the city still require updated site plans or engineering reports even if that information was not required under the grandfathered regulations?
18. Will the city's 245 implementation policy create any additional rights? Will the city's 245 implementation policy expressly deal with any rights that may have "vested" under other law?

E. Opportunities to Settle

Chapter 245 does not specify who has the authority to settle disputes between city and developer over grandfathered status. Some cities use Development Agreements,¹⁰ Planned Development Districts (aka, Planned Unit Developments), or Conditional Overlays to negotiate a *win-win* situation and avoid litigation. Such compromises allow the municipality to be flexible while also protecting the public interest.

¹⁰ See LGC § 212.172.

F. Legislation to Watch

HB 1732 (Kuempel) Relating to the authority of municipalities to adopt zoning regulations affecting the appearance of buildings or open spaces.

Amends LGC Section 211.016 by adding to the list of zoning regulations that may not be applicable to a residential subdivision for a two-year period after plat approval. Currently, zoning regulations that affect exterior appearance and landscaping are not applicable for two years. The bill would amend this provision to make zoning regulations affecting impervious cover of a previously platted lot and the vertical setbacks for lots similarly subject to the two-year grace period.

HB 1736 (Kuempel) Relating to the authority of municipalities to adopt zoning regulations for impervious cover and floor area ratio on lots.

Amends LGC Section 211.003, which outlines the zoning regulations available to a municipality. Currently, municipalities may regulate the percentage of a lot that may be occupied. The bill would give municipalities the ability to regulate just one of the following three options: (a) the percentage of a lot that may be occupied; (b) the amount of impervious cover on a lot; or (c) the floor to area ratio of the lot.

HB 3604 (Kuempel) Relating to the notice of projects given with the filing of certain permit applications with local regulatory agencies

Amends the “fair notice” provision of 245.002(a-1) by deleting the word “fair”, and providing a list of the elements of the project that must be described in order the notice given to the regulatory agency to trigger the protections of 245.