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OPINION COMMITTEE



HOUSE COMMITTEE ON
LAND AND RESOURCE MANAGEMENT

FILE # ML-47079-12
I.D. # 47079

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RQ-1070-GA

June 22, 2012

The Honorable Greg Abbott
Office of the Attorney General
Attn: Opinion Committee
Post Office Box 12458
Austin, Texas 78711-2548

RE: Texas Local Government Code Chapter 245

Dear General Abbott:

In 1999, the Legislature adopted, and expressly made retroactive, Texas Local Government Code Chapter 245—having inadvertently repealed its predecessor in 1997. Chapter 245 provides, as did its predecessor, statutory vested rights and regulatory stability for real estate development projects. Essentially, the local rules and regulations in effect when a permit application is filed apply to all subsequent permit applications for that project—for at least five years, and thereafter so long as progress has been made toward completing the project. Tex. Gov't Code Ann. § 245.005 (a), (b).

On September 5, 1997, the City of Austin (the "City"), a home-rule municipality established under the laws of the State of Texas, adopted Ordinance No. 970905-A (the "City of Austin's Project Duration Ordinance") that:

- (i) places expiration dates on real estate development "projects" of either 3 years or 5 years (depending on the project's location) from the original development application date;
- (ii) deems those projects to be ended unless "all building permits are approved and notice of construction [for construction that does not require a building permit] is filed"; and,
- (iii) has been interpreted by the City to expire all otherwise unexpired permits related to the project upon the project expiration date.¹

¹ See attached appendix A

As noted above, in contrast and partly in response to the City of Austin's Project Duration Ordinance,² in 1999, the 76th Texas Legislature enacted Chapter 245 of the Texas Local Government Code ("Chapter 245"), the goal of which was to provide statutory vested rights and regulatory stability to protect the enormous investment of time and money necessary to complete a project. Pursuant to Chapter 245, the rules and regulations in effect on the date that the first application for a permit is filed, shall apply to all subsequent permit applications for the project.³ Tex. Gov't Code Ann. § 245.002 (a), (a-1).

Chapter 245 establishes, in Section 245.005, the circumstances under which a municipality *may* "expire" a project. Subsection (b) of that section provides that any such ordinance "shall place an expiration date on a project of no earlier than the fifth anniversary of the date the first permit application was filed for the project if no progress has been made towards completion of the project." *Id.* at (b). Section 245.005(c) of Chapter 245 states the specific circumstances that constitute "progress towards completion of a project." Those circumstances include:

- (1) an application for a final plat or plan is submitted to a regulatory agency;
- (2) a good-faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project;
- (3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located;

² *Harper Park Two, L.P. v. City of Austin*, 2011 WL 3658923 *2 (Tex. App.—Austin 2011, pet denied) (citing House Research Organization, Bill Analysis, Tex. H.B. 1704, 3-4, 76th Leg., R.S. (2005)(sic)) (explaining that "the legislative record reflects that bill proponents advocated Chapter 245 as an appropriate response to instances when the City of Austin had purportedly imposed new regulatory restrictions retroactively on development projects that were already underway, causing project failures, bankruptcies, and regulatory uncertainty . . .").

³ Chapter 245 re-enacted and amended the similar statutory vested rights that had previously been in effect until an inadvertent repeal by the Legislature in 1997. Tex. H.B. 1704, § 1(a), 76th Leg., R.S. (1999). Chapter 245 was expressly made retroactive and even provides in Section 245.003 that Chapter 245 applies to a "project in progress on or commenced after September 1, 1997." Tex. Gov't Code § 245.003.

(4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or

(5) utility connection fees or impact fees for the project have been paid to a regulatory agency.

Id. at (c).

More particularly noteworthy is the sanction the Legislature provided for local ordinances or after setting out the text of the reenacted statute in Section 2 of H.B. 1704, the Legislature provided in Section 3, entitled Effect of Prior Law, that “any actions taken by a regulatory agency for the issuance of a permit, *as those terms are defined by [Section 2]* . . . , *after that repeal and before the effective date of this Act, shall not cause or require the expiration or termination of a project, permit or series of permits . . .*” Tex. H.B. 1704, §3(a), 76th Leg., R.S. (1999) at Section 3(a) (emphasis added). To punctuate its prohibition against local regulations that caused or required an expiration or termination of a project or permit, the Legislature then clarified that “an action by a regulatory agency that violates this section is void . . .” *Id.*

Nonetheless, the City of Austin’s Project Duration Ordinance contravenes Chapter 245 by expiring a project if “all building permits are not obtained or a notice of construction is not filed,” within the ordinance’s abbreviated time periods, without regard to the enumerated Texas statutory elements of progress toward completion of a project. Appendix A at Article 12, § 25-1- 533(B). In addition, in certain areas of Austin, the City of Austin’s Project Duration Ordinance expires projects in three (3) years. *Id.* at § 25-1- 535 (B)(4). As such, the City of Austin’s Project Duration Ordinance is “an action [taken] by a regulatory agency [the City of Austin]” for the issuance of a permit—and must be declared void.

I respectfully request an opinion on the following questions:

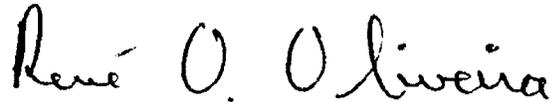
(1) Is the City of Austin’s Project Duration Ordinance, which places an expiration date on a “project” earlier than the fifth anniversary date of the first permit application date project void as being contrary to Chapter 245.005 of the Texas Local Government Code; and

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(2) Is the City of Austin's Project Duration Ordinance, which places an expiration on a project despite progress having been made towards completion of the project void as being contrary to Chapter 245.005 of the Texas Local Government Code, especially when the City's definition of "progress" conflicts with the statutory provisions?

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "René O. Oliveira". The signature is written in a cursive style with a large, prominent initial "R".

René O. Oliveira
Chairman,
House Committee on Land and Resource Management