

Presented:
17th Annual Land Use Planning Conference

March 21, 2013
Austin, Texas

Grandfathering and Dealing with Nonconformities

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Acknowledgment:

The author acknowledges the contributions of Ms. Natasha John, whose efforts were critical to updating and expanding this paper. Natasha is a Junior Associate at the Bojorquez Law Firm.

I. INTRODUCTION

This paper provides an overview of the regulatory issues related to Chapter 245 of the 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. In addition to Chapter 245 applicability, this paper addresses the issues revolving around expiration, abandonment and amortization of nonconforming uses and structures.

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.

II. 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 represents an attempt by the Texas Legislature to statutorily determine when a land development project is subject to new or old government regulations. Moreover, the legislative record reflects that Chapter 245 was drafted to address situations where Texas cities imposed new regulatory restrictions retroactively on development projects causing “project failures, bankruptcies, and regulatory uncertainty for developers and landowners.”² Additionally,

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

² House Research Organization, Bill Analysis, Tex. H.B. 1704, 3-4, 76th Leg., R.S. (2005).

grandfathering is a common term used to address nonconforming uses and structures. A use or structure that lawfully existed prior to the enactment of an ordinance (e.g., zoning), and continues to exist out of compliance with the ordinance after the effective date, is called a "nonconforming use."³

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."

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.⁴

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?

III. ANALYSIS

A. CHAPTER 245

HB1704 was the number of the House Bill enacting the legislation. Pursuant to Chapter 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.⁵

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.⁶ A court has held that municipalities are prohibited from applying an ordinance to those projects that were approved before the ordinance was enacted.⁷

³ Anderson's, Am. Law of Zoning § 6.1 (4th ed.); *City of Univ. Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).

⁴ Tex. Loc. Gov't Code Ann. § 245.002(a) (Vernon 2005); *Hardee v. City of San Antonio*, 2008 WL 2116251 (Tex. App.--San Antonio, 2008, no pet.).

⁵ Loc. Gov't Code Ann. § 245.002(a).

⁶ *Id.* § 245.002(b).

⁷ *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).

Chapter 245 also applies to moratoriums. An ongoing project shall not be affected by a construction moratorium, or a cease construction order, issued during a project as long as the project has already been approved for development.⁸

1. 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.⁹

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.¹⁰ Recently, courts have included water commitment and sewer reports as permits when the reports are contracts for construction related to service from a municipal water utility.¹¹ Also, it is generally viewed that rezoning is not a “permit,”¹² and neither is a request for hardship relief (e.g., a variance).¹³ Further, filing a permit application with the county does not preclude a municipality from applying its own regulations.¹⁴ Thus, county applications are not considered “permits” when applying municipal ordinances and regulations.

2. 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.¹⁵

What is the minimal level of 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? Do the protections of a grandfathered status attach to the land or to the particular project which was approved?

⁸ *BMTP Holdings v. City of Lorena*, 359 S.W.3d 239, 245 (Tex. App.--Waco 2011, pet. granted).

⁹ Loc. Gov't Code Ann. § 245.001(1) [emphasis added].

¹⁰ *Id.* § 245.002(b).

¹¹ *City of San Antonio v. Rogers Shavano Ranch*, 383 S.W.3d 234 (Tex. App.--San Antonio 2012, no. pet. h.).

¹² *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 343 (Tex.App.--Austin 1995, no writ); *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 488-89 (Tex. App.--Austin 2004, pet. denied).

¹³ *2218 Bryan St. v. City of Dallas*, 2005 Tex. App. LEXIS 6493 (2005).

¹⁴ *Shumaker Enterprises v. City of Austin*, 325 S.W.3d 812, 813 (Tex. App.--Austin 2010, no pet.).

¹⁵ Loc. Gov't Code Ann. § 245.001(3) [emphasis added].

Courts have addressed the issue of a grandfathered status “running with the land” or “running with the project.” Vested rights attach to the project and not with the property, property owner or permit holder.¹⁶ Therefore, property can be conveyed to another owner and the subsequent owner still has vested rights to the regulations in place at the time the project application was filed.

Even with judicial interpretations, there is a growing trend for municipalities to fill-in the gaps left by the Legislature. This is achieved sometimes by ordinance, or through unwritten policies. Of the ordinances reviewed, most tend to do the following:

- a. Create a presumption that all permits sought today will be subject to today’s regulations.
- b. Establish the procedures and criteria for the municipality to determine if a particular development project is grandfathered.

3. What is a “Dormant Project”?

Chapter 245 allows a regulatory agency to expire projects when:

the permit does not have an expiration date; the ordinance expiration date is no earlier than five years from the date the application was filed; and *no progress* has been made towards completion of the project¹⁷

They key for municipalities to declare a project dormant is determining when no progress has been made on the project. *Progress* toward the completion of a project includes any of the following¹⁸:

- a. An application for a final plat or plan is submitted to a regulatory agency;
- b. A good-faith attempt is made to file with a regulatory agency an application to continue towards completion of the project;
- c. Costs incurred while developing the project are five percent of the most recent appraised market value of the real property;
- d. Fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or
- e. Utility connection fees or impact fees for the project have been paid to a regulatory agency.

¹⁶ *Harper Park Two v. City of Austin*, 359 S.W.3d 247, 256 (Tex. App.--Austin 2011, pet. denied).

¹⁷ Loc. Gov’t Code Ann. § 245.005(a) [emphasis added].

¹⁸ *Id.* § 245.005(c).

An agency can declare a project dormant as long as the ordinance or rule expiring the project does not violate Chapter 245. Although the statute permits cities to expire dormant projects, it does not automatically cause projects to lose their vested rights granted by Chapter 245.¹⁹ The Attorney General has determined an ordinance is void if it causes a project to prematurely lose its Chapter 245 protections (e.g., it expires before the 5-year anniversary date).²⁰

4. Points to Consider

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

- a. Will the city be granting status or merely recognizing (acknowledging) status already conferred by statute?
- b. Will the city's implementation policy be observed through custom and practice, or through formally enacted rules (e.g., an ordinance)?
- c. Must the applicant (property owner, developer, builder) assert a claim before the city?
- d. Is there an application form that must be completed before the city will recognize a project's grandfathered development status?
- e. If an application is required, what information must the applicant provide in order to convince the city of the project's grandfathered status?
- f. Will the city assess and collect a review fee for determining a project's status?
- g. What are the deadlines regarding submissions to the city?
- h. What are the timelines for city actions?
- i. Who makes the initial determination(s) on behalf of the city? Are the decision-makers employees or members of appointed boards / commissions?
- j. Does the city's policy provide any clarification of what a "project" is?
- k. Can initial determinations be appealed? If so, to whom? Which administrator or board / commission will hear appeals?
- l. If determinations can be appealed, what are the grounds for reversal or modification?
- m. Will the city have criteria for assessing whether the city has received fair notice of a project?

¹⁹ Op. Tex. Att'y Gen. No. GA-0980 (2012).

²⁰ *Id.*

- n. 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?
- o. What is the relationship between grandfathered status and permits that have expiration dates?
- p. 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?
- q. Will the city's Chapter 245 implementation policy create any additional rights? Will the city's Chapter 245 implementation policy expressly deal with any rights that may have "vested" under other law?
- r. Do the rights under Chapter 245 prevent the city from condemnation and eminent domain actions? Or, are those rights waived if the city determines the project on the property is dormant?

5. Opportunities to Settle

Chapter 245 does not specify who has the authority to settle disputes between city and developer over grandfathered status. The City of Denton allows a petitioner to challenge a vested rights determination with an appeal to City's Board of Adjustment.²¹ Some cities use Development Agreements,²² 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.

B. NONCONFORMING USES

Grandfathering is a term that might also apply to nonconforming uses or structures. A use that lawfully existed on the land prior to the enactment of an ordinance, and continues to exist out of compliance with the ordinance after the effective date, is a "nonconforming use."²³ A nonconforming use, such as a junk yard in a residential neighborhood, is not to be confused with a nonconforming structure. Buildings that do not comply with a zoning ordinance, building code, etc., but the use complies with the general zoning scheme, are nonconforming structures.²⁴ For example, a house in a residential area is setback 20 feet from the street, but an ordinance requires a 30-foot setback. The house is a conforming use, but its proximity to the street makes it a nonconforming structure.

For the purposes of this paper, both nonconforming uses and structures will be referred to as nonconforming uses.

²¹ Denton, Tex., Ordinance No. 2012-335 (Dec. 4, 2012).

²² Loc. Gov't Code Ann. § 212.172 (Vernon 2011).

²³ *City of Univ. Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).

²⁴ Fort, Julie. "Annexation of Nonconforming Uses," *Texas City Attorneys Association*. (November 2007).

Due to municipal growth and frequently changing zoning laws, municipalities are often faced with nonconforming uses. The city can do the following: expire the use, declare the use abandoned or honor the use.

1. Expiration of Nonconforming Uses

Municipalities have used various methods to expire or terminate nonconforming uses. The City of Dallas terminates nonconforming uses at the discretion of the Zoning Board of Adjustment. The Board's decision to terminate a nonconforming use "enjoys a presumption of legality."²⁵ In Dallas, as in many municipalities, it is reasonable to terminate a use that does not meet the zoning standard (e.g., terminating an apartment building in an area zoned for single-family use).²⁶ Typically, the zoning board will allow the use to continue for a reasonable period of time. The reasonableness standard only gives the landowner the opportunity to recoup his actual investment in the nonconforming use.²⁷ If the Board's decision is appealed, the reviewing court has to determine that the Board's decision was reasonable. However, the property owner carries the burden of showing the Board abused its discretion in terminating the nonconforming use.²⁸

Other municipalities use zoning ordinances to terminate nonconforming uses. Under a municipality's police power, zoning ordinances can be used if the ordinance is related to public health, safety or welfare.²⁹ Municipalities such as the City of Longview can terminate nonconforming use signs to encourage uniform aesthetics, attract shoppers and reduce hazards to motorists and pedestrians.³⁰

2. Abandoned Uses

Municipalities have terminated nonconforming uses due to abandonment or discontinued use. Under Texas law, a discontinuance of a prior nonconforming use for fixed time such as six months will not of itself constitute abandonment. Courts have established a two-part test to determine whether the discontinuance of a nonconforming use constitutes abandonment. The test requires³¹:

- a. an intent to abandon; and
- b. some overt act or failure to act which carries the implication of abandonment.

However, a municipality, by ordinance, may have the ability to avoid the impact of this common law precedent by providing that discontinuance of a use for a fixed time constitutes

²⁵ *Bd. of Adjustment of City of Dallas v. Winkles*, 832 S.W.2d 803, 805 (Tex. App.--Dallas 1992, writ denied).

²⁶ *Dyer v. Bd. of Adjustment of City of Dallas*, 05-94-00093-CV, 1995 WL 23637 (Tex. App.--Dallas 1995, writ denied).

²⁷ *Id.* at 3.

²⁸ *Zoning Bd. of Adjustment of the City of San Antonio v. Marshall* 387 S.W.2d 714 (Tex. Civ. App.--San Antonio 1965, writ ref. n.r.e.).

²⁹ *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 616 (Tex. App.--Texarkana 2008, no pet.), citing *Murmur Corp. v. Bd. of Adjustment of City of Dallas*, 718 S.W.2d 790, 794 (Tex.App.--Dallas 1986, writ ref'd n.r.e.).

³⁰ *Id.* at 616.

³¹ *Rosenthal v. City of Dallas*, 211 S.W.2d 279, 284 (Tex. Civ. App.--Dallas 1948, writ ref'd n.r.e.).

abandonment. Some municipalities have legislatively created a rebuttable presumption of the intent to abandon a use if its operation ceases for a specific period of time. This is reflected, for example, in the City of Dallas Development Code section 51A-4.704(a)(2) which provides:

The right to operate a nonconforming use ceases if the nonconforming use is discontinued for six months or more. The board may grant a special exception to this provision only if the owner can show that there was a clear intent not to abandon the use even though the use was discontinued for six months or more.

Some cities attempt to legislatively define the terms “abandonment” and “discontinuance” to expressly exclude any element of intent.³² The City of Southlake’s ordinance provides³³:

- a. A nonconforming use, when discontinued or abandoned, shall not be resumed and any further use shall be in conformity with the provision of this ordinance. Discontinuance or abandonment shall be defined as follows:

When land used for a nonconforming [sic] use shall cease to be used in a bona fide manner for the nonconforming use for six (6) consecutive months or for a total of eighteen (18) months during any three (3) year period.

- b. Discontinuance or abandonment shall be conclusively deemed to have occurred *irrespective of the intent* of the property owner if the nonconforming use was dilapidated, substandard, or was not maintained in a suitable condition for occupancy during the above time periods. [emphasis added]

In part, the Court in *City of Southlake v. Hanson Aggregate Central* allowed an allegedly abandoned nonconforming use to continue because “intent” was not consistently used between subsections (a) and (b).³⁴ In order to overcome the two-step from *Rosenthal*, the exact wording of the ordinance is crucial and must be consistent throughout the ordinance.

3. Amortization Periods

In some cases, a municipality will allow a nonconforming use to stay for a defined period of time. This is a form of limited grandfathering known as amortization. For example, in the City of Kennedale, any nonconforming building or use of land is discontinued three years after the date that the building or use becomes nonconforming.³⁵ This is commonly done when immediate removal of the use would cause economic harm to the landowner, or the use brings utility to the community (e.g., a popular corner store in a residential neighborhood). The

³² *City of Southlake v. Hanson Aggregate Central*, 2003 Tex. App. Lexis 3557 (Tex. App.--Fort Worth 2003, no pet.) (A nonconforming use / abandonment ordinance was determined to not apply to a concrete batch plant that ceased operations due to their inability to obtain a state operating permit. Additionally, the city’s ordinance did not consistently define “intent to abandon”; therefore, the ordinance could not be used to determine if the plant had indeed abandoned the use).

³³ *Id.* at 5.

³⁴ *Id.* at 9.

³⁵ *Coyel v. City Of Kennedale*, 2-04-391-CV, 2006 WL 19604 (Tex. App.--Fort Worth Jan. 5, 2006, pet. denied).

amortization period (amount of time the use is allowed to remain) can vary from months to decades.

With regard to annexations, the Local Government Code does not support amortization. According to Section 43.002, a municipality *cannot prohibit* the continued use of land after annexation if the use legally existed prior to annexation.³⁶ Once the landowner proves the use pre-dated the annexation, a municipality is bound to grandfather the use, unless the use meets a public safety / welfare exception.

C. LEGISLATION TO WATCH DURING THE 83RD TEXAS LEGISLATIVE SESSION

HB 335 (Strickland) Relating to the posting of a required notice on a political subdivision's Internet website.

Amends Government Code Chapter 2051 by adding Section 2051.151 allowing a city to provide notice by publication in a newspaper by posting the notice on its website. Chapter 52 of the Local Government Code requires a newspaper publication when a general-law municipality adopts an ordinance. In some cases, this bill would affect the notice requirements for zoning ordinances.

HB 476 (Kolkhorst) Relating to the repurchase of real property from an entity with eminent domain authority.

Amends Property Code Chapter 21 by adding Section 21.0114 requiring an entity with eminent domain authority that makes a bona fide offer to acquire property to state with specificity in the initial and final offers the public use for which the entity intends to acquire the property. A municipality may use eminent domain as a method to acquire property with a nonconforming use.

SB 194 (West) Relating to ingress and egress access by emergency vehicles in certain new residential subdivisions.

Amends Local Government Code Chapter 212 by adding Section 212.0102 requiring cities and counties to adopt infrastructure standards that require, in a residential subdivision of 1,000 or more lots, two means of ingress and egress for use by emergency vehicles during evacuations resulting from fire or natural disasters. Local ordinances may result from this proposed legislation. Chapter 245 protections may be claimed to avoid compliance with this ordinance.

³⁶ Loc. Gov't Code Ann. § 43.002(a) (Vernon 2005).

IV. CONCLUSION

Chapter 245 and nonconforming use caselaw provide grandfathering as a municipal strategy to manage dated land uses. Some public safety and welfare exceptions apply that can be utilized to avoid grandfathering. Municipalities are encouraged to examine their current regulations to ensure compliance with Chapter 245 and nonconforming use law in the State of Texas.