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**VESTED RIGHTS
APPLICATIONS
AND ISSUES
UNDER TEXAS
LAW**

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Mr. Brown was recently named as one of the "Best Lawyers in Dallas 2007" by *D Magazine*.

I.

INTRODUCTION

Whether you are a private practitioner, government employee, developer, planner, appraiser, environmental representative, or real estate professional involved in eminent domain matters, you will be confronted, in most instances, with the concept of the highest and best use of property. Highest and best use may be defined as “the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.” *The Appraisal of Real Estate*, The Appraisal Institute (11th ed.) at p. 297. And, as any qualified appraiser will tell you, a highest and best use determination will, in most instances, determine the methodology by which the market value of land is estimated.

Therefore, it is critical that those who practice in the eminent domain field, both in statutorily filed condemnation cases and in inverse condemnation cases, understand the concept of highest and best use. One element of the highest and best use test, and the one that will be discussed within the context of this paper regarding vested rights and nonconforming uses, is the requirement that the highest and best use be legally permissible. Traditionally, one of the items that influence value are governmental restrictions placed on property, such as zoning, building codes, historic district controls, and environmental regulations. In the zoning context in particular, many a heated dispute over value has revolved around whether there is a reasonable probability that the current zoning on a tract can be changed, so that the highest and best use will be driven not by the current zoning in place, but by a change in zoning that may be reasonably obtained.

The assumption in this dialogue, of course, is that the current zoning and other regulations in place on the property apply to the property and govern its legally permissible uses. This assumption, however, may not hold true when vested rights are involved. As will be discussed below, there are circumstances when a property owner may not have to comply with the current regulatory scheme in place on his property if that property has obtained a vested right, either by statute or by common law, that allows the property owner to develop his property under an older regulatory scheme. The critical element is one of timing and the determination of when did the property owner vest his rights, if any, under a prior regulatory scheme. Additionally, issues may arise as to the process, if any, to lock in those vested rights with the local government so that they are put into action as part of the development rights involved in the property.

The issue of vested rights creates another layer of “due diligence” for those in the eminent domain field since the traditional assumption that governmental regulations, which on their face apply to the property, do, in fact, govern the property, may no longer hold true.

II.

OVERVIEW AND BACKGROUND OF THE VESTED RIGHTS STATUTE

To properly understand the vested rights conundrum, it is important to understand Texas Local Government Code Chapter 245 (commonly referred to as the “Vested Rights Statute”), both in its historical context and as it exists today.

A. History of the Vested Rights Statute

Inherent conflicts arise in land use regulation between private property rights and public interests. One such conflict arises when local government seeks to regulate property in a way contrary to the expectations of an owner who has purchased property and begun development of the property with the intent to develop based on the existing development regulations governing his property. This conflict is typically resolved by determining the exact juncture at which a landowner has progressed sufficiently with his project so that his right to proceed is considered “vested.” See Julian Conrad Juergensmeyer and Thomas E. Robert, *Land Use Planning and Development Regulation Law* at 242 (2003); David L. Callies *et. al.*, *Cases and Materials on Land Use* at 103 (2d ed. 1994). The question of when does a landowner acquire a “vested right” to a particular land use classification or development regulation, such that the legislature cannot subsequently apply new development regulations to his property, is inherently problematic and requires a balancing of conflicting private property rights and public interests. In fact, the 50 states utilize different rules to determine if and when such rights to develop property vest in a developer.¹

Some states have attempted to provide clarity to the vested rights determination by enacting vested rights legislation. Some jurisdictions, known as “early vesting” jurisdictions, provide for vesting of the right to develop upon filing of the first required development permit application, while “late vesting” jurisdictions vest rights upon approval of the final permit. See Hagman, 11 Sw. U. L. Rev. at 545 (providing an analysis of early versus late vesting jurisdictions). Texas’ vested rights legislation, as is explained in full below, provides for the early vesting of rights upon filing of the initial permit application.

In 1987, the Texas Legislature adopted legislation, commonly referred to as House Bill 4, to provide landowners or developers the ability to “freeze” government regulations that apply to development by filing a permit application.² After declaring that existing regulatory practices

¹ See Ralph D. Rinaldi, *Virginia’s Vested Property Rights Rule: Legal and Economic Considerations*, 2 Geo. Mason L. Rev. 77, 77 (1994); Donald G. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. U. L. Rev. 545, 547-76 (1970) (discussing theories courts have used to decide vested rights in particular cases); John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Wash. U. J. of Urb. & Contemp. L. 27, 40-62 (1996) (comprehensive listing of how vesting occurs in each state and a state-by-state synopsis of vested rights cases in alphabetical order).

² Act of May 30, 1987, 70th Leg., R. S., ch. 374, 1987 Tex. Gen. Laws 1838-39, repealed by Act of June 1, 1997, 75th Leg., R.S., ch. 1041, § 51(b), 1997 Tex. Gen. Laws 3966.

resulted in “unnecessary governmental regulatory delays that inhibit the economic development of the state,” the bill sought to “alleviate bureaucratic obstacles to economic development” and provided that approval or disapproval of applications for permits be based solely on “duly adopted requirements in effect at the time the original application for the permit is filed.”³ House Bill 4 was subsequently codified as Chapter 481 of the Texas Government Code (“Chapter 481”).

In 1997, the Texas Legislature inadvertently repealed Chapter 481, the former version of the Vested Rights Statute. To remedy this situation, the Legislature adopted a new vested rights law effective May 11, 1999. This “new” Vested Rights Statute, which now can be found in Chapter 245 of the Texas Local Government Code, did not significantly change the rules under which a municipality was required to operate prior to the repeal of the former vested rights law. In fact, Section 3 of the 1999 legislation re-enacting the Vested Rights Statute makes the statute retroactive to the date of repeal. Section 3 of the 1999 Act states:

The repeal of Subchapter I, Chapter 481, Government Code, by section 51(b), Chapter 1041, act of the 75th Legislature, Regular Session, 1997, and any actions taken by a regulatory agency for the issuance of a permit, as those terms are defined by Section 245.001, Local Government Code, as added by Section 2 of this Act, 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 to which Section 2 of this Act applies. An action by a regulatory agency that violates this section is void to the extent necessary to give effect to this section.

The Vested Rights Statute, as well as the concept of vested rights, is significant in the Texas land use context, particularly in the case of residential subdivisions that previously were platted but never developed due to a variety of reasons—downturns in local real estate markets, developer insolvency or bankruptcy, and environmental issues, among others. Preliminary plats without expiration dates often were approved by municipalities (and occasionally still are). Consequently, developers would seek approval of final plats for these subdivisions, asserting that under the Vested Rights Statute only those ordinances and regulations in effect *at the time the preliminary plat was approved* should apply to the development of these tracts. Obviously, in many cities land development regulations and ordinances will have changed dramatically in the interim.

To apply the Vested Rights Statute as it exists today, one must examine the recent history of vested rights laws in Texas. The 1995 Texas Legislature enacted several significant amendments to Chapter 481, the prior Vested Rights Statute. After its 1999 adoption, the “new” Vested Rights Statute was re-visited and amended by the Texas Legislature in 2003 and again in 2005. Most of these amendments were pro-developer and restricted the ability of municipalities to apply current zoning ordinances and regulations or any amendments thereof to certain real estate developments. The 2005 amendments in particular significantly weakened municipal authority regarding permit vesting for the first time making “property classifications” subject to the vested rights statute.⁴ In

³ *Id.*

⁴ See Senate Bill No. 574, Acts of the 79th Legislature, Regular Session, 2005 (effective September 1, 2005) (hereinafter

addition, certain of the 2005 amendments could have a significant impact on the manner in which municipalities approach plats and other development permits and even contracts or agreements for water and sewer services.⁵

B. Overview of Former Vested Rights Statute Prior to 1995 Amendments

The former vested rights statute stated:

Section 481.142 DEFINITIONS

In this subchapter:

- (1) “Political subdivision” means a political subdivision of the state, including a county, a school district, or a municipality.
- (2) “Permit” means a license, certificate, approval, registration, consent, permit, or other form of authorization required by law, rule, regulation, or ordinance that must be obtained by a person in order to perform an action or initiate a project for which the permit is sought.
- (3) “Project” means an endeavor over which a regulatory agency exerts its jurisdiction and for which a permit is required before initiation of the endeavor.
- (4) “Regulatory agency” means an agency, bureau, department, division, or commission of the state or any department or other agency of a political subdivision that processes and issues permits.

Section 481.143 UNIFORMITY OF REQUIREMENTS

- (a) The approval, disapproval, or conditional approval of an application for a permit shall be considered by each regulatory agency solely on the basis of any orders, regulations, ordinances, or other duly adopted requirements in effect at the time the original application for the permit is filed. If a series of requirements 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.

Under the former law, developers argued that only those ordinances and regulations in effect

“Senate Bill 574”).

⁵ See Senate Bill No. 848, Acts of the 79th Legislature, Regular Session, 2005 (effective April 27, 2005) (hereinafter “Senate Bill 848”).

at the *initial* stage of the permit application process could be applied to the final permit review and the ultimate construction of the project. According to the developers' argument, all subsequent revisions to regulations governing permit review, including zoning and subdivision ordinances, were inapplicable. In effect, a "snapshot" was to be taken of existing ordinances and regulations at the time of application for the initial permit, and that picture could not later be changed by the municipality.

Prior to the 1995 amendments, municipalities had effective rebuttals to the developers' aforementioned arguments. For example, the statute was unclear whether it was applicable to zoning ordinance amendments since the statute did not expressly state that it was applicable to a municipality or other governing body.⁶ Municipalities also could argue that the developers' position would result in seemingly inequitable results, such as a planning and zoning commission being forced to review and approve two permits under vastly differing regulations during the same meeting's agenda.

There was little Texas case law directly addressing these issues. The court in *Long Reach Associates, Inc. v. City of Sugarland*⁷ sustained the plaintiff developer's argument that approval of a preliminary plat vested the developer's rights under the statute. In *Williamson Pointe Venture v. City of Austin*⁸ the trial court indicated in an informal letter opinion that permit applications which had expired could not be used to "lock in" applicable regulations. The court further indicated that zoning was not a "permit" and therefore regulations, ordinances, and other requirements in effect at the time of a zoning application were not controlling. Uncertainty regarding these and related issues undoubtedly provided the impetus for the 1995 amendments, which resolved most ambiguities, although not in favor of Texas cities.

The 1999 Act, which re-enacted the Vested Rights Statute, uses substantially the same language contained in former Texas Government Code Chapter 481 and therefore should be interpreted substantially the same. In addition, certain additions to the 1999 statute make the current version retroactive to the date of repeal.

C. Committee Report to the 1995 Amendments

The Committee Report to the 1995 Amendments stated that "[i]n the case of real estate development, there has been some confusion as to what constitutes a project and what constitutes a series of permits under the current law." Additionally, the Report noted confusion whether health and safety regulations can be changed after a permit has been filed. The stated purpose of the

⁶ The prior Vested Rights Statute referred to approvals, etc., by a "regulatory agency." Since, by definition, a "regulatory agency" is an agency, department or division of a political subdivision, the political subdivision itself was not included. Therefore, a rezoning of property, which can only be implemented by the governing body, arguably did not come within the express terms of the Vested Rights Statute.

⁷ Cause No. 84,807, 240th Judicial District Court of Fort Bend County, Texas.

⁸ Cause No. 93-09435, 126th Judicial District Court of Travis County, Texas.

amendments was to “clarify the existing law with regard to the uniformity of requirements for the approval of permits related to real estate development.”

D. Significant Sections of the Vested Rights Statute and the 2005 Amendments

1. Definitions

Under the 1999 Act, the following definitional changes were enacted:

- (3) “Project” means 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.
- (4) “Regulatory agency” means the governing body of, or a bureau, department, division, board, commission, or other agency of, a political subdivision acting in its capacity of processing, approving, or issuing a permit.⁹

The definition of “project” makes clear that the real estate development permit process, which will generally include multiple stages, will be viewed as a single event for purposes of the statute. In addition, the “regulatory agency” amendment eliminates any argument that the statute does not apply to municipalities or their governing bodies.

During the 2005 Legislative Session, the definition of “permit” contained in Section 245.001 was expanded to include contracts or agreements regarding the construction or provision of water and sewer service as follows:

- (1) “Permit” means 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.¹⁰

The addition of contracts or other agreements regarding the construction or provision of water and sewer service to the laundry list of items defined as a permit is troubling for several reasons.

First, such a contract or agreement may provide water or sewer services to property supporting an existing use making it nearly impossible to ascertain that the contract or agreement is actually intended for some as yet undisclosed future project.

⁹ Tex. Local Gov’t Code § 245.001 (1999).

¹⁰ Senate Bill 848.

Second, a water or sewer contract or agreement typically is not going to trigger any type of development review process that would place the regulatory body on notice of potential vested development rights for the property sought to be served.

Third, water and sewer contracts and agreements generally do not contain a dormancy clause that would terminate the property owner's purported vested rights if the project is not timely acted upon and completed. These real world concerns may very well give rise to situations where an agreement to extend water or sewer lines and service will arguably vest the development rights on that property despite the fact a plat or development plan has not been filed. It is possible that a mere reference contained in such a contract or agreement stating that the proposed water or sewer lines are intended to serve a planned residential subdivision or commercial development will be sufficient to provide the legislative body with "fair notice" of the planned development and vest the development rights on the subject property. In addition, it could be argued that the regulatory agency should have known the contract or agreement was intended to serve a new development of some type on the parcel in question because it involved a line or service that was obviously excessive for the property's current use. Once such a contract or agreement is executed the vested rights could hypothetically, if not actually, remain in place forever due to the absence of a dormancy clause.

The debate that took place on the floor of the Texas House of Representatives regarding Senate Bill 848 is very instructive in this regard and reinforces the concern voiced above.

LEIBOWITZ: If I wrote the San Antonio water system 40 years ago, and I told them I had a piece of land at Loop 1604 and Patranka Road on which I want to put 4,000 homes, and I ask them will they be able to supply me with water, and I wrote them a certified letter, and the letter fell through the cracks—they never responded to it, but I still have my green card. Are you telling this body that the letter I wrote 40 years ago is going to cause the rights of that letter that was written to retroactively apply back 40 years?

KUEMPEL:¹¹ If he could find that, if he could find out, I think that would be correct. To best of my knowledge that would be correct.

* * *

KUEMPEL: To the best of my knowledge that would be correct. If he could find his certified letter. It's just playing by the rules if you said he lost his—

LEIBOWITZ: So you do want it to retroactively apply?

KUEMPEL: I want him to play by the rules that were enforced 40 years ago.

¹¹ Representative Kuempel was the House Sponsor of Senate Bill 848, which was considered in lieu of House Bill No. 1704.

LEIBOWITZ: What's the rules? I sent in a letter 40 years ago and asked them if they could supply water, and that's playing by the rules?

KUEMPEL: I think you're probably grasping at straws but I still believe you play by those rules.¹²

Senate Bill 848 also amended Chapter 245 to specifically define and determine what "filed" means as it relates to city applications for land development permits. Senate Bill 848 makes several changes to the "permit vesting" statute, including: (1) expanding the definition of a permit for which a developer's rights would "vest" under current regulations to include a contract or other agreement for the construction or provision of a city-owned or city-controlled utility; (2) providing that a permit vests when the original application for a permit is filed for review for any purpose, including review for administrative completeness, or when a plan for development of real property or a plat application is filed; (3) providing that an application or plan is considered filed on the date the applicant delivers the application or plan to the city or deposits the application or plan with the United States Postal Service by certified mail addressed to the city; and (4) authorizes a city to provide that a permit application expires on or after the forty-fifth day after the date the application is filed if the application is incomplete, the city provides notice, and the applicant fails to respond.

Most cities have adopted regulations on when a permit or application is considered "filed." Primarily to address the requirement of Section 212.009 that plat applications are deemed automatically approved if they are not disapproved within 30 days after they are filed, Texas cities have routinely adopted regulations that provide that an application is not considered "filed" unless it has been deemed to be "substantially complete" or "administratively complete." Accordingly, unless an application is 100% correct, or at least very, very close to 100% correct, many cities reject the application as incomplete, thus not triggering the 30-day platting rule or the application of Chapter 245's vesting provisions. These types of practices, which are designed to prevent premature vesting through inaccurate and incomplete applications, will no longer be allowed under the new law.

Given the open government requirement in state law that requires at least 72-hours advance public notice for city actions to be taken, it is hard to imagine that a landowner would not be able to vest his rights before a city could adopt a new law. Imagine that a landowner finds out for the first time at a city council meeting that a new law is on the agenda for consideration that night that might impact his property -- say a new zoning regulation or more stringent development standards. Under the new law, he could probably take out a sheet of paper, draw his land on it in very rough terms, draw in some lots and a street or two, write "development plan" on it, sign it, turn it in to the city secretary before the council acts on the agenda item, and then claim vested rights from the new law enacted that night. Absurd you say! Think again. While very crude to say the least, the hand-drawn development plan arguably does "give the [city] fair notice of the project and the nature of the permit sought." If so, then while the city can make the applicant totally rewrite his application under the new law, the applicant's rights will have nevertheless vested under the hand-drawn application.

¹² See H.J. of TEX., 79th Leg., R.S. 2039 (2005).

2. Uniformity of Requirements

Section 245.002 was also amended by Senate Bill 848,13 amending subparagraph (a) and adding new subparagraphs (a-1) and (e) through (g). Section 245.002 now provides as follows (new language underscored):

Section 245.002 UNIFORMITY OF REQUIREMENTS

- (a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other duly adopted requirements in effect at the time:
- (1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or
- (2) a plan for development of real property or plat application is filed with a regulatory agency.
- (a-1) Rights to which a permit applicant is entitled under this chapter 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. An application or plan is considered filed on the date the applicant delivers the application or plan to the regulatory agency or deposits the application or plan with the United States Postal Service by certified mail addressed to the regulatory agency. A certified mail receipt obtained by the applicant at the time of deposit is prima facie evidence of the date the application or plan was deposited with the United States Postal Service.
- (b) If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates or other properly adopted requirements 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 completion of the project. All permits required for the project are considered to be a single series of permits. Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project.
- (c) After an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for the project.

* * *

- (e) A regulatory agency may provide that a permit application expires on or after the 45th day after the date the application is filed if:
- (1) the applicant fails to provide documents or other information necessary to comply with the agency's technical requirements relating to the form and content of the permit application;
 - (2) the agency provides to the applicant not later than the 10th business day after the date the application is filed written notice of the failure that specifies the necessary documents or other information and the date the application will expire if the documents or other information is not provided; and
 - (3) the applicant fails to provide the specified documents or other information within the time provided in the notice.
- (f) This chapter does not prohibit a regulatory agency from requiring compliance with technical requirements relating to the form and content of an application in effect at the time the application was filed even though the application is filed after the date an applicant accrues rights under Subsection (a-1).
- (g) Notwithstanding Section 245.003, the change in law made to Subsection (a) and the addition of Subsections (a-1), (e), and (f) by S.B. No. 848, Acts of the 79th Legislature, Regular Session, 2005, apply only to a project commenced on or after the effective date of that Act.

The expansive language of § 245.002, prior to the 2005 amendments, supported a developer's argument that the first act required by a municipality for real estate development "locks in" the applicable ordinances and regulations. The 2005 amendments provide even more support and strength to the developer's argument. Some developers likely will attempt to push this argument to its illogical extreme, asserting that the mere application for change of a comprehensive plan or zoning ordinance is sufficient, upon approval, to vest the application of the then existing ordinances and regulations. While the expansive language may lend some credence to this argument, it should not prevail. The Vested Rights Statute addresses procedural administrative practices, and zoning is more properly viewed as an exercise of a municipality's legislative powers.¹⁴

This analysis is consistent with the Austin Court of Appeals decision in *Williamson Pointe Venture v. City of Austin*,¹⁵ which analyzed the vested rights statute prior to the 1995 amendments to

¹⁴ See *City of Pharr v. Tippitt*, 616 S.W.2d 173, 175 (Tex. 1981).

¹⁵ 912 S.W.2d 340 (Tex.App.—Austin 1995, no writ).

that statute. In that case, the court held that a rezoning was not a permit that entitled a property owner to later develop his property to comply only with the standards existing at the time of the rezoning. In its analysis, the court distinguished between zoning, subdivisions and platting, and site plan analysis.¹⁶ The court reviewed the definition of permit, which is essentially the same definition of permit used in Chapter 245, and concluded that a permit did not include the legislative act of rezoning.¹⁷

Established law provides that no property owner has a vested interest in particular zoning categories. Otherwise, “a lawful exercise of the police power by the governing body of the city would be precluded.” Because the City could rezone the property to entirely prohibit previously permissible uses, even established uses, the City can amend regulations that affect the prospective development of the property within the broad zoning categories. The proposition that the legislative act of zoning entitles the landowner to develop his or her property free from all subsequent regulatory changes is so contrary to established law that the legislature, had it wanted to effect such a change, must have clearly so stated.¹⁸

Moreover, the court held that even if zoning could be considered as a “permit,” it was not at all clear that zoning is part of a “project.” In reviewing substantially the same language that is contained in Chapter 245 regarding what is a “project” and what is a “series of permits for a project,” the court concluded that “[z]oning, which appellants claim is simply another development permit, is not included in that definition.”¹⁹

In fact, the language used in Chapter 245 provides further support that a “permit” cannot include zoning because Chapter 245 provides lawful authority for municipalities to provide for the expiration of a permit under certain circumstances. Clearly, the Legislature would not have included zoning as a permit if the Legislature intended for permits to expire at some point in time. Accordingly, the better argument is that the applicable rules and ordinances do not “vest” until a person has made application for a preliminary plat with one caveat. If a municipality requires a developer to obtain utility commitments before the first permit can be filed, compliance with those requirements is considered the first permit for a project.²⁰

The legislative justification behind Senate Bill 848, which makes wholesale changes to Section 245.002, is that Senate Bill 848 specifically defines and determines what “filed” means as it relates to city applications for land development permits.²¹ This clarification is required, according

¹⁶ *Id.* at 342.

¹⁷ *Id.* at 343.

¹⁸ *Id.* (citations omitted).

¹⁹ *Id.* at 345 n.7.

²⁰ *See* Senate Bill 848, Section 1.

²¹ *See* Senate Bill 848, Senate Committee Analyses, Author’s/Sponsor’s Statement of Intent.

to the Legislature, because the current practice in some localities is to refuse to acknowledge vested rights until an application is “administratively complete,” meaning days or weeks of reviews and approvals despite the fact an amendment regarding the concept of administratively complete permits and applications was rejected by the Texas House of Representatives during floor debate in 1999.²² Senate Bill 848 clarifies the intent of Chapter 245 that rights vest upon filing an application, regardless of local administrative procedural barriers (*i.e.*, being “administratively complete”).²³ Senate Bill 848 also ensures that where local policies require an applicant to obtain utility commitments before the first permit can be filed; compliance with these requirements is considered the first permit for a project.²⁴

3. Applicability of Chapter 245

Section 245.003 states:

This chapter applies only to a project in progress on or commenced after September 1, 1997. For purposes of this chapter a project was in progress on September 1, 1997, if:

- (1) before September 1, 1997:
 - (A) a regulatory agency approved or issued one or more permits for the project; or
 - (B) an application for a permit for the project was filed with a regulatory agency; and
- (2) on or after September 1, 1997, a regulatory agency enacts, enforces, or otherwise imposes:
 - (A) an order, regulation, ordinance, or rule that in effect retroactively changes the duration of a permit for the project;
 - (B) a deadline for obtaining a permit required to continue or complete the project that was not enforced or did not apply to the project before September 1, 1997; or
 - (C) any requirement for the project that was not applicable to or enforced on the project before September 1, 1997.

As indicated, the Vested Rights Statute applies to all projects in progress on or commenced after September 1, 1997, the date of the inadvertent repeal of the former Vested Rights Statute.

²² Senate Bill 848, House Committee Analyses.

²³ *Id.*

²⁴ *Id.*

Ironically, the statute, as read, will apply even with respect to preliminary plats approved prior to the 1987 enactment of the original Vested Rights Statute if the preliminary plat in question has no expiration date. The changes made by Senate Bill 848 to Section 245.002 (a) and the addition of subsections (a-1), (e) and (f) to Section 245.002, however, apply only to projects commenced on or after April 27, 2005.²⁵

4. Exemptions

Section 245.004 of the Texas Local Government Code states:

This chapter does not apply to:

- (1) a permit that is at least two years old, is issued for the construction of a building or structure intended for human occupancy or habitation and is issued under laws ordinances, procedures, rules or regulations adopting only:
 - (A) uniform building, fire electrical, plumbing, or mechanical codes adopted by a recognized national code organization; or
 - (B) local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons;
- (2) municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by the municipality;
- (3) regulations that specifically control only the use of land in a municipality that does not have zoning and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, or building size;
- (4) regulations for sexually oriented businesses;
- (5) municipal or county ordinances, rules, regulations, or other requirements affecting colonias;
- (6) fees imposed in conjunction with development permits;
- (7) regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication;
- (8) regulations for utility connections;

²⁵ See Senate Bill 848.

- (9) regulations to prevent imminent destruction of property or injury to persons including regulations effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy;
- (10) construction standards for public works located on public lands or easements; or
- (11) regulations to prevent the imminent destruction of property or injury to persons if the regulations do not:
 - (A) affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, building size, residential or commercial density, or the timing of a project; or
 - (B) change development permitted by a restrictive covenant required by a municipality.

A. *Health and Safety Regulations*

As indicated, health and safety regulations adopting uniform codes are exempt from the Vested Rights Statute. Municipalities therefore can compel a developer to comply with the most recent uniform codes regardless whether such codes were modified after the permit process began. Local amendments addressing imminent threats of destruction of property or injury to persons are also exempted if the applicable permit is less than two years old. It is unclear if the two-year requirement under subsection (1) also applies to changes in a uniform code. If so, developers would not be required to comply with modifications to a uniform code enacted within two years of the initial permit application.

B. *Municipal Zoning Regulations*

Municipal zoning regulations that do not affect “lot size, lot dimensions, lot coverage, or building size” have been historically excluded under the statute. The reasonable construction of this exemption has been that all other zoning ordinances and regulations are exempt from the statute and changes are therefore permissible during the permit application process. It should be noted, however, that most zoning regulations directly or indirectly affect lot size, dimensions, and/or coverage, and therefore most zoning regulation amendments and certainly most site-specific rezonings of property would be prohibited once a preliminary plat has been filed. Prior to the 2005 amendments, it was unclear how a court might view changes to certain environmental ordinances, such as tree or noise ordinances. Arguably, these ordinances did not affect the totality of the uses of the land and were properly viewed as zoning regulations exempt from the statute.

Then the 2005 Legislature adopted Senate Bill 574, which made it clear that environmental ordinances, discussed above, including newly-enacted landscaping, tree preservation, open space,

and park dedication requirements are subject to the vested rights statute.²⁶ The bill also specifically waived a political subdivision's immunity from suit under Chapter 245 and seriously impacted the only defense that a regulatory agency has to outdated and often substandard speculative development projects—it modified the dormancy provisions regarding permit expiration dates in favor of developers. After postponing consideration of Senate Bill 574 to the end of the day's calendar,²⁷ Senate Bill 574 was amended on third reading from the floor of the House of Representatives adding a provision to the bill that was never previously discussed in either house and without public input or debate on the floor.²⁸

This amendment added the phrase “property classification” to Section 245.004(2). The amendment essentially states that the Vested Rights Statute now applies to municipal zoning regulations that affect property classification. This two-word amendment, “property classification,” could have drastic implications on a city's ability to regulate development and on its face appears to be a dramatic policy change. It seems like the Legislature created a vested right in zoning where no right or entitlement to a specific zoning classification has been previously recognized. However, the Legislature, in its rush, did not define the phrase “property classification.” This omission creates a problem in the interpretation of the statute because the rules of statutory construction should result in the phrase “property classification” being interpreted to mean something different than “municipal zoning regulations.” While this amendment may prohibit a municipality from changing a property's zoning classification, it seems that it would have no effect on a municipality's ability to adopt text amendments within a “property classification” to increase the quality of building standards required and restrict or reclassify the uses allowed within a particular zoning classification.

Specifically, Senate Bill 574 amended Chapter 245 by providing that a city: (1) may not enforce landscaping, tree preservation, open space, or park dedication regulations against the holder of a vested permit; (2) may not enforce zoning regulations that affect property classification against the holder of a vested permit; (3) may place on a project an expiration date that is no earlier than the fifth anniversary of the date the first permit application was filed for the project, if no progress has been made toward completion of the project; (4) may place an expiration date of not less than two years on an individual permit if no progress has been made toward completion of the project; and (5) does not have immunity from suit for an action regarding a vested permit.

The Bill Analysis for Senate Bill 574 is particularly telling as to its intent:

The current statutes related to “vested rights” were created to protect the private property and development rights of landowners from the application of retroactive rulemaking by cities and other governmental entities. Despite the clear intent of the language found in Chapter 245 to prevent punitive retroactive rulemaking by cities that is oftentimes intended to restrict, or even stop development, there has been a

²⁶ Senate Bill 574, Section 1.

²⁷ See H.J. of TEX., 79th Leg., R.S. 2310 (2005).

²⁸ *Id.* at 2347.

troubling rise in cities' attempts to circumvent the original intent of the statute.

S.B. 574 amends the existing exemptions to clarify that zoning regulations or other land use regulations, annexation regulations, or regulations to prevent the imminent destruction of property or injury to persons affecting “landscaping or tree preservation” or “open space or park dedication” are not exempt from the application of the Act. It also makes clarifying and updating changes in regard to the language on dormant projects. Finally, the bill clarifies that political subdivisions are not immune from suit for enforcement of Chapter 245.²⁹

One of the few bright spots for local governments in Chapter 245 has been the list of exemptions found in Section 245.004, which provides for categories of matters of which developers cannot vest rights by the filing of a permit. The most widely used exemption has been Section 245.004(2), which prior to Senate Bill 574 provided that no vested rights could be obtained in “municipal zoning regulations that do not affect lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality.”

Section 245.004(2), as amended, now provides that no vested rights can be obtained in “municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality.” To remove the double negative and state this in the affirmative, developers can vest their rights in zoning regulations that address lot size, lot dimensions, lot coverage, building size, landscaping, tree preservation, open space or park dedication, and property classification. As a practical matter, the exceptions have now swallowed the rule since it is hard to imagine a zoning regulation that does not impact one of these “hands off” areas, particularly the limitation on changing “property classification.”

The changes to the Section 245.004 exemptions are also retroactive. Senate Bill 245 provides that “Section 245.004, Local Government Code, as amended by this Act, applies to a permit where a person files a permit application and demonstrates progress towards completion of a project before, on, or after September 1, 2005.”³⁰ How this retroactivity applies, however, could be problematic. For example, say a city approved a preliminary plat for a five-phase residential subdivision under the old Section 245.004 exemptions, without any landscaping requirements, and approved a final plat for the 1st phase of the subdivision without any landscaping requirements. Under the old law, the city could adopt landscaping requirements that would apply to all future phases of the development. So, let us assume that the city did just that and the developer built phases 2 and 3 of the development with the required landscaping as part of the required final plat approval for those phases. Phases 4 and 5 are now submitted for final plat approval after September 1, 2005, the effective date of Senate Bill 574.

29 Senate Research Center, Intergovernmental Relations, Bill Analysis, Tex. S.B. 574, 79th Leg., R.S. (2005).

30 See Tex. S.B. 574, Section 2(a), 79th Leg., R.S. (2005).

Can the developer now ignore the landscaping requirements that he complied with in phases 2 and 3 of his development? It would certainly appear so given that he can show that before September 1, 2005, he filed for a permit (*i.e.*, his preliminary plat application) and that he can demonstrate progress towards completion of his project given the prior phases of approved development. The application of “on again, off again,” development standards such as this may result in strange looking developments, as well as create practical administrative headaches for local government officials trying to apply development standards.

C. Impact Fees

Pursuant to subsection (6), impact fees assessed by a municipality pursuant to Chapter 395 are exempt from the statute and may be modified at any phase of development.

D. Construction Standards for Public Streets

Pursuant to subsection (10), construction standards for public works on public lands and easements are exempt. Accordingly, those provisions of a municipality’s subdivision ordinance governing construction standards for streets, medians, curbs, fencing, and similar matters may also be changed. In addition, the modifications may be made at any time in the permit process, even post-final plat.

5. Developers Can Change The “Snapshot”

Section 245.002(d) of the Texas Local Government Code states:

- (d) Notwithstanding any provision of this chapter to the contrary, a permit holder may take advantage of recorded subdivision plat notes, recorded restrictive covenants required by a regulatory agency, or a change to the laws, rules, regulations, or ordinances of a regulatory agency that enhance or protect the project, including changes that lengthen the effective life of the permit after the date the application for the permit was made, without forfeiting any rights under this chapter.

Accordingly, although a developer is not required to suffer the consequences of changes in regulations restricting his rights, the developer may take advantage of any changes benefiting the development project. The “snapshot” can be changed, but only if the developer wants it to be changed. Furthermore, while a municipality cannot shorten the effective time periods of permits, developers can take advantage of changes lengthening the effective life of a permit.

6. Dormant Projects

Section 245.005 states:

- (a) After the first anniversary of the effective date of this chapter, a regulatory agency may enact an ordinance, rule, or regulation that places an expiration date on a permit if as of the first anniversary of the effective date of this chapter: (i) the permit does not have an expiration date; and (ii) no

progress has been made towards completion of the project. Any ordinance, rule, or regulation enacted pursuant to this subsection shall place an expiration date of no earlier than the fifth anniversary of the effective date of this chapter.

- (b) A regulatory agency may enact an ordinance, rule, or regulation that places an expiration date of not less than two years on an individual permit if no progress has been made towards completion of the project. Notwithstanding any other provision of this chapter, any ordinance, rule, or regulation enacted pursuant to this section 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. Nothing in this subsection shall be deemed to affect the timing of a permit issued solely under the authority of Chapter 366, Health and Safety Code, by the Texas Commission on Environmental Quality or its authorized agent.
- (c) Progress toward completion of the project shall include any one of the following:
 - (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;
 - (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 body.

This provision, while seemingly innocuous, indeed is rather significant. Many developers filed preliminary site plans during the housing boom of the 1980s only to abandon the project in the late 1980's or early 1990's when the housing market took a turn for the worse. As the housing market continues to expand, many of these same developers will argue that their rights are vested and they should be allowed to develop their property under the ordinances (both zoning ordinances

and subdivision regulations) in effect at the time of preliminary plat approval. Alternatively, municipalities will argue that the zoning ordinances have changed in the interim period and they should not be required to accede to a developer's demand to develop under antiquated rules. While Section 245.005 does not grant a municipality the power to unilaterally cancel all approved applications, it does allow a municipality to place a time limit during which the developer must complete its project.

The 2005 amendments contained in subsection (b) attempt to place minimum time limits on individual permits for a project and on the completion of a project. It is not clear from this legislation and the legislative history exactly how these minimum time limits will be applied. The easy application is the situation in which a municipality has not previously enacted expiration dates on the permits it issues and the various plats it approves. In that situation, the municipality will have to provide a two-year expiration date on individual permits and apply a five-year expiration date on projects.

Subsection (b), however, does not account for the fact that many municipalities established expiration dates on permits and plats prior to the creation of the Vested Rights Statute and did not adopt their expiration dates pursuant to Section 245.005. Subsection (b) does not state that it preempts the authority of municipalities to establish or continue to apply and enforce their own expiration dates. Subsection (b) does not state that all municipalities must adopt legislation creating a five-year expiration period for projects calculated from the date of the first permit application for the project. Rather, Subsection (b) applies only to ordinances imposing expiration dates that are enacted pursuant to Subsections (a) and (b). Even then, it appears that subsection (b) only applies to ordinances created after September 1, 2005.

If a municipality has previously adopted an ordinance imposing expiration dates on various plats or permits that are approved and the expiration dates are less than two years in duration (*e.g.*, final plats expire within one year after approval if they have not been filed of record, grading permits expire within one hundred eighty (180) days after issuance) there is an argument to be made that Subsection (b) does not require the amendment of such ordinances to allow for a two-year permit life. Similarly, if the municipality's expiration dates on various permits and plats predate Chapter 245, there exists a similar argument that the municipality is not required to recognize a five-year project life. Because of its vagaries, Subsection (b) will no doubt be a hotbed of controversy. It will be very interesting to see how the nuances of this legislation are ultimately interpreted by the courts.

III.

CAN A PROPERTY OWNER'S DEVELOPMENT RIGHTS REGARDING A PARTICULAR REGULATORY AUTHORITY BE VESTED BY A PERMIT APPLICATION SUBMITTED OR APPROVED BY ANOTHER REGULATORY AUTHORITY

One cutting edge issue that is percolating in vested rights disputes is whether the approval of a permit by one regulatory authority locks in all development rights on the property as to other regulatory authorities that have not yet issued a permit for the property. A common example is whether a county's approval of a preliminary plat on property, regardless of whether such approval occurred before the property was located in a city's extraterritorial jurisdiction ("ETJ") or at the same time that the property was located in a city's ETJ, vests the property with development rights under the Vested Rights Statute such that the city may not require the landowner to meet all city regulations in order to final plat and develop the property?

While there are no reported court cases or Texas Attorney General opinions that address this issue of whether a landowner vests rights relating to regulatory agency B by obtaining a permit from regulatory agency A (even though no permit has been sought from regulatory agency B), based on the author's review of the legislative history behind the Vested Rights Statute, and its intent to keep a regulatory agency that is exercising jurisdiction over a project from changing the rules "mid-stream" over the project once a permit by that agency has issued, it is the author's opinion that obtaining a permit from a county would only lock in the permit holder's rights as to that county over the project, but would not lock in rights related to a city's exercise of regulatory authority over the project once the city obtained such jurisdictional authority.

In the author's opinion, the legislative history behind the Vested Rights Statute supports a legislative intent to keep a regulatory agency, which has issued a permit to a landowner for a particular project, from changing the rules on the landowner once that permit has been obtained. In essence, it is a fairness and reliance statute whereby a developer can be assured that the developmental authority over its project, from which it has obtained a permit, will not change the rules that govern its development. Once a development authority grants a permit, the landowner expects that all of the rules of that particular development authority will not change. There is nothing in the legislative history, however, to suggest that obtaining a permit from one agency will act as a "universal" vesting of all rights that will govern the project from other agencies for which no permit has yet been sought or obtained.

The debate that took place on the floor of the Texas House of Representatives regarding Senate Bill 848, which amended the Vested Rights Statute in 2005, is typical of this stated public policy.

REPRESENTATIVE LEIBOWITZ: Mr. Kuempel, as I understand your bill, your goal is to prevent the rules from being changed in the middle of the game. Is that correct sir?

REPRESENTATIVE KUEMPEL: It's to play by the rules that when they accepted—when they took the permit in for that city and they said this permit is approved—to play by those rules at that time.

LEIBOWITZ: Yes sir, and you don't want the rules changed in the middle of the game based upon the date the permit is filed. Is that correct?

KUEMPEL: I want them to play by the rules when whomever took the permit in that day, to play by the rules.

LEIBOWITZ: And you want the developers to know the rules under which they have to play. Is that true, sir?

KUEMPEL: I want the rules to be played by when the developer took his plat in to play by those rules when they put their plat in and it was approved.

LEIBOWITZ: And you want, if someone starts a development, you want them to be able to finish the development under the same guidelines. Is that accurate?

KUEMPEL: Under the guidelines that were approved by the city or whomever they took those plats to, those are the rules the have to play by.

LEIBOWITZ: Because you do not believe that it's fair to change the rules in the middle of the game. Is that true?

KUEMPEL: I want them to play by those rules they originally had.

LEIBOWITZ: That's correct, sir. You want to take the rules they originally had and work through the process. And you don't want the cities and counties changing the rules on the developers in the middle of the game.

KUEMPEL: And to play by the original rules. That's right. To play by the original rules.

LEIBOWITZ: Is that correct, sir?

KUEMPEL: To play by the original rules at the time that they were...

LEIBOWITZ: And not change those rules in the middle of the game?

KUEMPEL: To play by those rules. Yes, that's what I'm saying.

LEIBOWITZ: Do you want the cities to change the rules in the middle of the game?

KUEMPEL: I want them to play by the rules they originally stuck by when it was platted.

LEIBOWITZ: Which means you don't want them....

KUEMPEL: I guess it might mean different things to different people. I want them to play by the rules when it was platted. That's what I'm saying.

LEIBOWITZ: And not change the rules in the middle of the game?

KUEMPEL: To play by the original rules, yes.

LEIBOWITZ: Okay. So, do you feel that it's equitable—we need to go with both

sides of the equation. If there's a city, if there's the Edwards Underground Aquifer Authority, if there's the developers—you don't think it's fair for anyone to be changing the rules in the middle of the game?

KUEMPEL: I want, if the city approved those rules and approved that plat, those are the rules I want the developer to play by.³¹

The heated exchange above certainly indicates that when a city or county approves a plat, that that city or county (whichever approved the plat) is locked in on the development rules. There is nothing to suggest, however, that a vesting occurs as to any other regulatory agency that has not approved a permit for the project.

Common sense also supports this interpretation. Otherwise, a landowner could get a water permit from the TCEQ for his project and then take the position that a city, that subsequently annexes his land, could not exercise any regulatory control over the development because no such laws were applicable at the time he obtained his water permit. If the Legislature intended such a broad sweeping interpretation, one would suspect that somewhere in the legislative history of the Vested Rights Statute there would have been a comment to that effect.

Moreover, the Vested Rights Statute itself seems to be concerned with one regulatory agency at a time, defining 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.”³² Note: Had the language been “one or more regulatory agencies,” the argument might be stronger that approval by any one regulatory agency vests rights in all regulatory agencies.

Further, the uniformity requirements of Section 245.002 suggest that the rights vest due to the interaction between the permit applicant and the agency that receives the permit, going so far to say that a permitting agency is deemed to know the permit is filed when “an original application or plan for development or plat application . . . gives the regulatory agency fair notice of the project and the nature of the permit sought.”³³ Obviously, a permitting authority that does not receive a permit cannot be put on notice of anything.

Any other interpretation would make the structure of the Vested Rights Statute, and its anticipated interplay between the permit applicant and the permitting authority (including the respective checks and balances contained therein), meaningless, at least as to the few rights afforded to the permitting authorities under the Statute.

These opinions, of course, are the author's opinions and they are not supported by any legal authority at this time, so take them with a grain of salt. This discussion should illustrate, however, the types of unanswered questions that permeate the vested rights debate.

31 See H.J. of TEX., 79th Leg., R.S. 2038-39 (2005).

32 Section 245.001(3) (emphasis added).

33 Section 245.002(a-1).

IV.
**NONCONFORMING USES AND OTHER SOURCES
OF VESTED RIGHTS**

A. Nonconforming Uses

One type of common law “vested right” is a nonconforming use or “grandfathered” use of land. This right, however, is more limited than a vested right under the Vested Rights Statute since it does not include the right to expand the use or develop vacant land with the use.

1. Nonconformance

Cities can establish zoning districts under their general police power to protect the public health, safety and general welfare.³⁴ Such restrictions, however, may not be made retroactive; rather, they

must relate to the future rather than to existing buildings and uses of land, and ordinances may not operate to remove existing buildings and uses not in conformity with the restrictions applicable to the district, at least where such buildings and uses are not nuisances and their removal is not justified as promoting public health, morals, safety or welfare.³⁵

“A nonconforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist.”³⁶ In other words, nonconforming status is attributable to a use or structure when

- (a) such use or structure was constructed or operational prior to
 - (i) the annexation of such property into the municipality, or
 - (ii) the adoption or amendment of the zoning ordinance; and
- (b) the nonconforming use or structure has continued to exist without subsequent

³⁴ *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953).

³⁵ *Id.* at 761 (citations omitted) (wrecking yard in light industrial district not nuisance nor harmful to public safety and welfare; therefore, compulsion to cease operation constituted taking). *See also Carthage v. Allums*, 398 S.W.2d 799 (Tex.Civ.App.—Tyler 1966, no writ) (no retroactive application).

³⁶ *City of University Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972), *app. dismissed*, 411 U.S. 901, *reh'g denied*, 411 U.S. 977 (1973); *Town of Highland Park v. Marshall*, 235 S.W.2d 658, 662-63 (Tex.Civ.App.—Dallas 1950, writ ref'd n.r.e.) (the use of a garage apartment pre-dated the zoning ordinance; therefore, although the garage apartment violated the single-family district regulations, the privileged status or exemption applied).

abandonment.

Infrequent or sporadic use of land does not necessarily establish existing use for purposes of nonconformity.³⁷

The use must be lawful at the time the ordinance is passed. For example, a building that violates the building code when the zoning ordinance prohibiting its use is enacted, is not a lawful nonconforming use.³⁸ Further, it must be the same use and not a use of some other kind.³⁹

2. “Grandfathering” – The Right to Continue Use

The right to continue a nonconforming use has its genesis in federal and state constitutional provisions that prohibit the unconstitutional taking of property without just compensation and due process of law.⁴⁰ Additionally, the exemption for pre-existing nonconforming uses protects an owner’s investment in property. The exemption does not apply to uses initiated after the zoning ordinance is promulgated or which are illegal.⁴¹ The protected status continues until such time as the nonconforming building or structure has been abandoned by the owner or terminated under the ordinance.

3. Amortization and Termination

Pre-existing nonconforming uses need not continue in perpetuity and “[a]mortization is a valid method of eliminating existing nonconforming uses of land.”⁴² An owner’s investment in property, for purposes of calculation, is the recoupment of the landowner’s dollar investment, as opposed to the market value or replacement value.⁴³ The amortization formula may consider past depreciation of the structure,⁴⁴ or the value of structures which can be moved to another location.⁴⁵

³⁷ See generally *Silsbee v. Herron*, 484 S.W.2d 154 (Tex.Civ.App.—Beaumont 1972, writ ref’d n.r.e.).

³⁸ 8A McQuillin, *Municipal Corporations*, § 28.186.50.

³⁹ *City of Dallas v. Fifley*, 359 S.W.2d 177, 181-82 (Tex.Civ.App.—Dallas 1970, no writ) (owner must comply with permit requirements notwithstanding that owner commenced construction prior to zoning ordinance).

⁴⁰ *Eckert v. Jacobs*, 142 S.W.2d 374, 378 (Tex.Civ.App.—Austin 1940, no writ).

⁴¹ See generally *Scott v. Champion Bldg. Co.*, 28 S.W.2d 178, 184 (Tex.Civ.App.—Dallas 1930, no writ) (only “innocent” nonconforming uses protected; *i.e.*, one who legally and rightfully began or planned the construction of a building as opposed to one who acted in defiance of a valid ordinance).

⁴² *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D. Tex. 1986), *aff’d*, 837 F.2d 1268, 1371 (5th Cir. 1988).

⁴³ *Murmur Corp. v. Board of Adjustment, City of Dallas*, 718 S.W.2d 790, 795-97 (Tex.App.—Dallas 1986, writ ref’d n.r.e.).

⁴⁴ *Neighborhood Comm. on Lead Pollution v. Board of Adjustment, City of Dallas*, 728 S.W.2d 64, 70 (Tex.App.—Dallas 1987, writ ref’d n.r.e.).

⁴⁵ *Board of Adjustment, City of Dallas v. Winkles*, 832 S.W.2d 803, 807 (Tex.App.—Dallas 1992, writ denied).

It need not consider appreciation of land value, improvements or profit from an advantageous acquisition.⁴⁶

The Texas Supreme Court has recognized the “public need for a fair and reasonable termination of nonconforming property uses . . . [and is] in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power.”⁴⁷ In fact, a zoning regulation may have as a legitimate objective the eventual elimination of nonconforming uses.⁴⁸ In this regard, Texas courts have approved the direct and systematic termination of nonconforming uses provided that adequate time is allowed to recoup an owner’s investment in the property.⁴⁹ In *Benners*, the court held that termination of nonconforming uses is not a “taking in the eminent domain sense”; rather it is a legitimate exercise of the police power.⁵⁰ The court upheld the constitutionality of a twenty-five year amortization provision terminating pre-existing nonconforming uses.⁵¹

Abandonment of a nonconforming use may also terminate the privileged status. In *Rosenthal v. City of Dallas*,⁵² the court established the test for abandonment of a nonconforming use. Specifically, abandonment requires

(1) the intent to abandon and (2) some overt act or failure to act that carries the implication of abandonment.⁵³

Temporary discontinuance of a nonconforming use is insufficient to show abandonment. Specifically,

[t]he mere cessation of the use for a reasonable period does not itself work an

46 *Id.* at 806.

47 *Benners*, 485 S.W.2d at 778; *White v. Dallas*, 517 S.W.2d 344 (Tex.Civ.App.—Dallas 1974, no writ) (termination of wrecking yard within one year not unreasonable or arbitrary). *See also Fifley, supra.*

48 *City of Garland v. Valley Oil Co.*, 482 S.W.2d 342, 346 (Tex.Civ.App.—Dallas 1972, writ ref’d n.r.e.), *cert. denied*, 411 U.S. 933 (1973).

49 *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727, 735 (Tex.Civ.App.—Dallas 1968, writ ref’d n.r.e.), *cert. denied*, 396 U.S. 277, *reh’g denied*, 397 U.S. 977 (1970) (twenty-five years sufficient for amortization and discontinuance of nonconforming uses).

50 *Benners*, 485 S.W.2d at 777-78.

51 *Id.* *See also Valley Oil Co.*, 482 S.W.2d at 345-46 (ordinance requiring owner of property to discontinue use as gasoline station within one year not unreasonable and arbitrary given the equipment was removable and could be used at other stations and the owner had recouped the initial investment).

52 211 S.W.2d 279 (Tex.Civ.App.—Dallas 1948, writ ref’d n.r.e.).

53 *Id.* at 284; *Turcuit v. City of Galveston*, 658 S.W.2d 832, 834 (Tex.App.—Houston [1st Dist.] 1983, no writ) (discontinued use for 6 months not abandonment).

abandonment, whether the building is permitted to remain vacant or is temporarily devoted to a conforming use with the intent that the nonconforming use be resumed when opportunity therefore should arise, and periods of interruption due to lack of demand, inability to get a tenant, and financial difficulty do change the character of use.⁵⁴

In addition, the failure to adhere to registration requirements may effectuate the termination of a nonconforming use.⁵⁵

B. Section 43.002 of the Texas Local Government Code

In the 1999 legislative session, the Texas Legislature adopted Senate Bill 89 which changed the landscape under which municipalities may regulate territory which they annex. Section 43.002 of the Texas Local Government Code precludes a municipality, after annexing territory, from prohibiting a person from:

- (1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time; or
- (2) beginning to use land in the area in the manner that was planned for the land before the 90th day before the effective date of the annexation if:
 - (A) one or more licenses, certificates, permits, approvals or other forms of authorization by a governmental entity were required by law for the planned use; and
 - (B) a completed application for the initial authorization was filed with the governmental entity before the date the annexation proceedings were instituted.

Therefore, when reviewing newly annexed property, one should see if Section 43.002 of the Texas Local Government Code provides a vested right or other type of protection against regulatory changes.

C. Section 211.016 of the Texas Local Government Code

Another source for a vested right can be found in Section 211.016 of the Texas Local Government Code, which addresses zoning regulations, and which provides as follows:

⁵⁴ *Marshall*, 235 S.W.2d at 664 (citations omitted).

⁵⁵ *Board of Adjustment, City of San Antonio v. Nelson*, 577 S.W.2d 783 (Tex.Civ.App.—San Antonio 1979, writ ref'd n.r.e.).

§ 211.016. ZONING REGULATION AFFECTING APPEARANCE OF BUILDINGS OR OPEN SPACE.

(a) This section applies only to a zoning regulation that affects:

(1) the exterior appearance of a single-family house, including the type and amount of building materials; or

(2) the landscaping of a single-family residential lot, including the type and amount of plants or landscaping materials.

(b) A zoning regulation adopted after the approval of a residential subdivision plat does not apply to that subdivision until the second anniversary of the later of:

(1) the date the plat was approved; or

(2) the date the municipality accepts the subdivision improvements offered for public dedication.

(c) This section does not prevent a municipality from adopting or enforcing applicable building codes or prohibiting the use of building materials that have been proven to be inherently dangerous.

V.

CONCLUSION

As can be seen from the complexity of the issues involved, the determination of whether a property has a vested right (so that the property does not have to develop under some of the current laws that, on their faces, would appear to apply to the property and would typically play a part in determining the legal permissibility prong of the highest and best use test) is a difficult one. Unfortunately, it is one that should be undertaken if the highest and best use of property, and hence market value, is to be estimated in light of the legal uses that can be made of the property.

Some cities have tried to make this issue easier by developing a formal vested rights policy, wherein a property owner can ask for and receive a vested rights determination in advance of actually going through the development process and fighting about vested rights on a situation-by-situation basis. An example of such a policy is attached to this paper in the appendix.

APPENDIX

TOWN OF LITTLE ELM VESTED RIGHTS REVIEW POLICY

Introduction

Chapter 245 of the Texas Local Government Code (“Chapter 245”), commonly referred to as

the State’s “Vested Rights Law,” provides an opportunity for landowners or developers to “freeze” or “vest” government regulations that apply to development by filing a permit application. Other laws, such as Section 211.016 of the Texas Local Government Code, also provide certain vesting or “grandfathered” right.

To (1) ensure that the Town recognizes and protects all vested rights created by Chapter 245 and other applicable laws, (2) ensure that all vested rights determinations are made by the Town only after the Town is in receipt of all information necessary to allow the Town to determine whether vested rights are present and (3) provide a method of administrative review of vested rights decisions, the Town has established the following administrative procedure for consideration of any claim of a vested right under Chapter 245 or other applicable vesting laws.

Vested Rights Submission

FIRST, any property owner who believes that he has obtained a vested right under Chapter 245 or other applicable vesting law shall submit to the Director of Planning a letter explaining the factual and legal bases upon which the property owner relies in his contention that he has a particular vested right and, consequently, is exempt or not subject to a particular Little Elm order, regulation, ordinance, rule, expiration date, or other properly adopted requirement (hereinafter referred to collectively as “regulations”). Such written submission shall include, at a minimum, the following:

1. The name, mailing address, phone number and fax number of the property owner (or the property owner’s duly authorized agent);
2. Identification of the property for which the property owner claims a vested right;
3. Identification of the “project,” as that term is defined in Chapter 245 at § 245.001(3);
4. Identification of the original application for the first permit in the series of permits required for the project, as described in Chapter 245 at § 245.001(1) and § 245.002(a) and (b);
5. The date that the first permit in the series of permits required for the project was filed with the Town;
6. A chronology of the history of the project, with special emphasis on facts establishing that the project was in progress on or commenced after September 1, 1997, as required by Chapter 245 at § 245.003;
7. Identification of all Little Elm regulations in effect at the time the original application for the permit was filed that (a) the owner contends are vested and (b) the owner contends controls the approval, disapproval, or conditional approval of an application for a permit, pursuant to Chapter 245 at § 245.002(a) and (b); and

8. Identification of all Little Elm regulations that the property owner contends do not apply to the project due to the vested rights provided the property owner by Chapter 245 or other applicable vesting laws.

If a property owner contends that certain Little Elm regulations do not apply to the project, the property owner is expected to identify, **with particularity**, all requirements that the property owner contends do not apply. Global references to a particular ordinance, or set of criteria, may be deemed insufficient and the Town may consider the request for a vested rights determination to be incomplete and, hence, not subject to a staff determination at that time.

Vested Rights Determination

SECOND, the Director of Planning shall promptly forward the owner's vested rights request, along with any supporting information or documentation provided along with the request, to the Town Manager and Town Attorney for their respective reviews. The Town Manager, after consultation with the Town Attorney, shall issue a final administrative determination of whether a vested right exists in relation to the project, and shall identify, with particularity, all claims for vested rights that have been granted and all claims for vested rights that have been denied. Prior to rendering his final determination, the Town Manager may request a pre-determination conference with the owner to discuss the owner's vested rights claim and to ensure that the nature of the claim is fully and completely understood by the Town Manager prior to a final determination being rendered. The Town Manager shall act as the Building Official, as the term is defined in the Town's ordinances, for the limited purpose of determining vested rights claims.

Board of Adjustment Appeal

THIRD, if the property owner believes that the Town Manager's vested rights determination is in error, the property owner shall have the right to appeal such determination to the Town's Board of Adjustment ("BOA"), which will have jurisdiction to hear and decide the appeal pursuant to Section 9 of the Town's Zoning Code, Ordinance 04-05-610, as amended, and Chapter 211 of the Texas Local Government Code. The property owner may also request the BOA to grant a variance from the regulations at issue under the same standards governing variances for other matters, as set forth in Section 9 of the Town's Zoning Code, Ordinance 04-05-610, as amended, and Chapter 211 of the Texas Local Government Code.

Judicial Review

FOURTH, should the property owner be dissatisfied with the actions of the BOA, the property owner may avail himself of all legal remedies to review the BOA's decision as set forth in Section 211.011 of the Texas Local Government Code.

Binding Determination

FIFTH, the Town Manager's final determination, if not timely appealed to the BOA, shall be immediately filed in the Town's files related to the project and the determination shall be considered binding upon the Town and the property owner for the duration of the project. Similarly, any decision by the BOA regarding a vested right claim, if not timely appealed pursuant to Section 211.011 of the Texas Local Government Code, shall be filed in the Town's files related to the project and the determination shall be considered binding upon the Town and the property owner for the duration of the project. Notwithstanding the binding nature of the Town Manager's final determination and any ruling by the BOA, the Town and the property owner may, at any time, enter into a development agreement that, to the extent authorized by law, modifies the final determination and the applicable development regulations to be applied to the project.