I. Introduction

In 1997, the Texas Legislature inadvertently repealed Section 481.141 et seq. of the Texas Government Code, commonly known as the vested rights statute. To remedy this situation, the Legislature adopted a new vested rights statute which became 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 statute. 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 statutes in Texas. The 1995 Texas Legislature enacted several significant amendments to former Section 481.141 et seq. of the Texas Government Code, 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 arguably 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. In addition, certain of the 2005 amendments could have a significant impact on the manner in

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1 See Senate Bill No. 574, Acts of the 79th Legislature, Regular Session, 2005 (effective September 1, 2005) (hereinafter “Senate Bill 574”).
which municipalities and counties approach plats and other development permits and even contracts or agreements for water and sewer services.\(^2\)

II. **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 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. 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*\(^4\) 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*\(^5\) 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. As previously stated, the results were generally not favorable to municipalities.

The 1999 Act which re-enacted the vested rights statute uses substantially the same language contained in former Texas Government Code § 481.141 *et seq.* 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.

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

### IV. Significant Sections of the Vested Rights Statute and Its Application

#### A. Definitions

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

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3 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.

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

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

“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.6

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 of the Local Government Code was expanded to include contracts or agreements regarding the construction or provision of water and sewer service as follows:

"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.7

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. 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

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

7 Senate Bill No. 848.
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.

Question by Representative 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?

Response by Representative Kuempel: ⁸ 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.

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Response by Representative 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—

Question by Representative Leibowitz: So you do want it to retroactively apply?

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

Question by Representative 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?

Response by Representative Kuempel: I think you’re probably grasping at straws but I still believe you play by those rules.⁹

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⁸ Representative Kuempel was the House Sponsor of Senate Bill No. 848, which was considered in lieu of House Bill No. 1704.

The only positive that cities can draw from the 2005 amendments in Senate Bill 848 is that a property owner’s development rights regarding a municipality are not vested by a permit application that is submitted to or approved by another regulatory agency.\(^\text{10}\)

**B. Uniformity of Requirements**

Section 245.002 of the Local Government Code was also amended by Senate Bill 848,\(^\text{11}\) 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.

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\(^{10}\) Id. at 2056.

\(^{11}\) Senate Bill 848.
(c) After an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for the project.

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(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, clearly strengthens 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.\textsuperscript{12}

\textsuperscript{12} See City of Pharr v. Tippitt, 616 S.W.2d 173, 175 (Tex. 1981).
This analysis is consistent with the Austin Court of Appeals decision in *Williamson Pointe Venture v. City of Austin*, which analyzed the vested rights statute prior to the 1995 amendments to 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. 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.

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.

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.”

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 your municipality or county 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. Chapter 245 still does not address a developer’s application for a replat. Again, the better argument is that the replat is a new project and therefore begins the permit process anew under the ordinances in place at the time of application for such replat.

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13 912 S.W.2d 340 (Tex.App.—Austin 1995, no writ).
14 *Id.* at 342.
15 *Id.* at 343.
16 *Id.* (citations omitted).
17 *Id.* at 345 n.7.
18 See Senate Bill 848, Section 1.
The legislative justification behind Senate Bill 848, which makes wholesale changes to Section 245.002 of the Local Government Code, is that Senate Bill 848 specifically defines and determines what “filed” means as it relates to city applications for land development permits.\(^\text{19}\) This clarification is required, according 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.\(^\text{20}\) 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”).\(^\text{21}\) 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.\(^\text{22}\)

C. 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

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\(^\text{19}\) See Senate Bill 848, Senate Committee Analyses, Author’s/Sponsor’s Statement of Intent.

\(^\text{20}\) Senate Bill 848, House Committee Analyses.

\(^\text{21}\) Id.

\(^\text{22}\) Id.
(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. 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. However, as is noted above, 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 apply only to projects commenced on or after April 27, 2005. 23

D. 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;

23 See Senate Bill 848.
(7) regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication;

(8) regulations for utility connections;

(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.

1. 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.

2. 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. As filed, Senate Bill 574 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. As filed, 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, 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.

This amendment added the phrase “property classification” to Section 245.004(2) of the Local Government Code. 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. Please consult with your attorneys prior to undertaking any such action because these comments are purely speculative and may yet be resolved prior to the end of the legislative session.

3. Impact Fees

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

4. 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.

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24 Senate Bill 574, Section 1.


26 Id. at 2347.
E. 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.

F. 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.

However, Subsection (b) does not account for the fact that many municipalities established expiration dates on permits and plats prior to the creation of Chapter 245 of the Local Government Code 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 of the Local Government Code 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.

V. Summary

In summary, the vested rights statute generally favors developers. Prior to the 2005 amendments the law remained substantially the same as it existed in 1997 when the Texas Legislature inadvertently repealed the statute as it then existed in the Texas Government Code. Over the years, the statute has been clarified to “lock in” most procedural requirements at the time of preliminary plat application. For this reason, it is important that municipalities take all available steps to limit the adverse effects of the new legislation. In this regard, municipalities should initially establish expiration periods for all preliminary plats. A time period of twelve to eighteen months is generally reasonable. Second, comprehensive plan regulations, zoning ordinances and subdivision ordinances should clearly state that approval of proposed changes does not begin the permit process. As indicated above, the permit process should only begin upon approval of a preliminary plat. Finally, municipalities must be aware of the various modifications and exemptions to the former law. Specifically, certain health and safety standards, zoning ordinances, impact fees, and construction standards for street improvements are expressly exempted under the statute. For these reasons, municipalities must become knowledgeable about the advantages, as well as the disadvantages, of the new legislation.

There are a number of other precautions that municipalities may want to consider in light of the 2005 amendments identified herein above. Municipalities may want to add dormancy clauses, expiration dates or disclaimers to any contracts or agreements regarding the construction of facilities for or the provision of water and sewer services. Municipalities may also want to adopt new practices, policies and procedures—if not additional ordinances—regarding the handling of permit applications to include a ten (10) business day review deadline to identify defects in the permit application and a 45-day permit application expiration date for defective incomplete permit application to avoid the potential attachment of vested rights to a sham application. Municipalities may further want to adopt ordinances establishing expiration dates for their various classes or categories of permits and plats prior to the effective date of Senate Bill 848 (September 1, 2005). Municipalities may also need to evaluate their processes and alternatives if they utilize the “administratively complete” approach to plat filing in light of the legislative history identifying that process as an evil which the legislature if focused on eradicating. Last, municipalities may want to re-evaluate the zoning on large tracts or key tracts of land to determine whether municipality-initiated zoning to a less intensive use will aid in protecting the municipality’s efforts to protect the health, safety and welfare of the community and examine the scope of uses allowed in various zoning districts.