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July 30, 2012

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

Re: City of Austin Response re: Opinion Request RQ-1070-GA

Dear Attorney General Abbott:

Please accept this letter as the City of Austin's response to the above-referenced opinion request, which was submitted by the House Committee on Land & Resource Management on June 22, 2012. The request challenges the validity of Project Duration Ordinance¹ under the state vested rights statute, codified at Chapter 245 of the Local Government Code ("LGC").

Given the detailed nature of the ordinance's requirements and the significant factual differences between development projects, the facial validity of the Project Duration Ordinance is ill-suited to the opinion process. The City therefore requests that the Attorney General decline to issue an opinion on the validity of the ordinance. In the alternative, the City requests that the Attorney General find that the City's application of the ordinance, as described in this letter, complies with Chapter 245.

BACKGROUND

A. The City of Austin's Project Duration Ordinance

Chapter 245 provides certainty for development projects requiring multiple permits by freezing most development regulations as of the date that the "first permit in the series" is submitted. *See Shumaker Enterprises, Inc. v. City of Austin*, 325 S.W.3d 812 (Tex.App.—Austin 2010). Prior to the adoption of state vested rights legislation, the rule was that development

¹ Austin City Ordinance No. 970905-A. *See* Exhibit A (uncodified ordinance with legislative findings and severability clause); and Exhibit B (codified version of ordinance).

projects were subject to “intervening regulations or regulatory changes.” *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex.1999) (op. on reh'g).

After the original vested rights legislation was repealed in 1997, municipalities were left with no statutory authority to apply earlier development regulations to new permit applications. The Project Duration Ordinance, adopted shortly after the repeal, sought to fill this void by establishing local vested rights protections to “provid[e] development projects with certainty concerning the nature of the regulations that apply to the project and the length of time for the completion of the development under those regulations.” *See* Exhibit A, Part 1(A) (legislative preamble).

For projects commenced after its effective date of September 6, 1997, the Project Duration Ordinance establishes permit expiration dates of 3-years within the Drinking Water Protection Zone (“DWPZ”) and 5-years within the Desired Development Zone (“DDZ”). *See* Exhibit B, City Code § 25-1-535(B)(4); (C)(3). One-year extensions may be approved administratively within the DWPZ and for any period of time with Council approval, regardless of location. *Id.*, City Code §§ 25-1-537 (*Extensions of Deadlines*); 25-1-540 (*Managed Growth Agreements*).

The ordinance also requires that, within the lifespan of a site plan, an applicant must either obtain all building permits required to construct the structures shown on the site plan or file a notice of construction. *Id.*, City Code § 25-1-533(B). The ordinance does not require construction to be complete prior to the expiration date, nor does it impose an expiration date on building permits. Consistent with nationally promulgated technical codes adopted by the City, a building permit remains active as long as work is done at least every six months.

The City continues to apply these provisions of the Project Duration Ordinance to projects for which the first permit in the series was submitted following its effective date of September 6, 1997. After the re-adoption of state vesting legislation in 1999, however, several other parts of the Project Duration Ordinance were superseded by the requirements of Chapter 245 and have not been applied by the City. *See* Declaration of Greg Guernsey, at 1 ¶ 5-6. These provisions include requirements that purported to impose different vesting standards retroactively, for projects commenced prior to the effective date of the ordinance, and for projects commenced during the one and two-year periods following its effective date. *Id.*, citing Exhibit B, City Code §§ 25-1-534 (*Exceptions to Provide a One-Year Grace Period*); 25-1-535(B)(1)-(3) and (C)(1)-(2); 25-1-538 (*Voluntary Compliance*).

To be clear, for projects in which the first permit in the series is submitted after the effective date of September 6, 1997, the City applies the portions of the Project Duration Ordinance that establish 3 and 5-year expiration periods. Guernsey Decl., at 1 ¶ 5. The City does not apply other parts of the ordinance, and in no case is the ordinance applied to projects in which the first permit in the series was submitted prior to the effective date.

B. Permit Expiration & Project Dormancy

Vested rights protections under Chapter 245 apply to permit expiration dates. *See* LGC § 245.002(a). This means that, “after an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for the project.” LGC § 245.002(c). Rather, the “expiration dates...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.” LGC § 245.002(b).

In some situations, however, local regulations do not establish an expiration date for particular types of permits.² In such cases, LGC § 245.005(a) provides a tool for cities to declare certain projects “dormant” and thereby prevent unfinished development from remaining grandfathered in perpetuity. As the Court of Appeals observed:

[A] regulatory agency may enact an ordinance that places an expiration date on a permit if as of the first anniversary of the effective date of chapter 245 (which was May 11, 2000): (1) the permit does not have an expiration date; and (2) no progress has been made towards the completion of the project.

City of San Antonio v. En Seguido, Ltd. 227 S.W.3d 237, 244 (Tex.App.–San Antonio 2007) (citing LGC § 245.005).³ Once the expiration date for a dormant project passes, “the project would be subject to current development regulations.” Tex. Atty. Gen. Op. JC-0425, at 2.

The City of Austin amended the Land Development Code to implement the dormant projects law in 2005. *See* Exhibit C, City Code Chapter 25-1, Article 13 (*Dormant Projects Expiration*). Consistent with LGC § 245.005(a), the City’s regulations provide that a permit expires on May 11, 2004 if it: “(1) did not have an expiration date; and (2) no progress has been made towards completion of the project.” *Id.*, City Code § 25-1-522(A). The code also restates the statutory criteria for demonstrating “progress towards completion.” *Id.*, § 25-1-522(B).

The Project Duration Ordinance does not apply to projects in which the first permit in the series had no expiration date. Rather, the City acknowledges that the requirements for dormant projects under LGC § 245.005(a) apply to such projects would and allow an applicant to continue towards completion of the project as long sufficient progress is made under the statutory criteria.

² The City of Austin’s Land Development Code, for example, does not impose an expiration date on final subdivision plats, which establish legal lots, but does establish impose expiration dates on construction-related approvals, such as site plans and building permits. Depending on a variety of factors, any of these various approvals may constitute the “first permit in the series” for a particular project.

³ A separate provision of the statute, LGC § 245.005(b), includes further requirements for addressing dormant projects. This section of the law became effective on September 1, 2005, and was not made retroactive.

LEGAL ANALYSIS

- A. The Attorney General should decline to address the validity of the Project Duration Ordinance because it must be presumed valid and cannot be evaluated outside the context of specific facts.

The City adopted the Project Duration Ordinance in 1997, and it has never been challenged. Therefore, the validation statute dictates that the ordinance is entitled to a conclusive presumption of validity. *See* LGC § 51.003. The ordinance is also entitled to the general presumption of validity that attaches to all municipal enactments. *See, e.g.,* Tex. Atty. Gen. Op. GA-0697, *citing Price v. City of Junction*, 711 F.2d 582, 588 (5th Cir. 1983); *City of Lucas v. N. Tex. Mun. Water Dist.*, 724 S.W.2d 811, 820 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

Even if portions of the ordinance are in tension with Chapter 245, the ordinance was not void at the time of adoption because Chapter 245 was not in effect until the Legislature readopted state vesting legislation with the passage of HB 1704 in 1999. Any discrepancies with Chapter 245, therefore, are not sufficient to overcome the presumption of validity. *See* LGC § 51.003(b)(1) (providing that the presumption does not apply to “an act or proceeding that was void at the time it occurred[.]”) Additionally, given the detailed nature of the ordinance’s requirements and the significant factual differences between development projects, the facial validity of the ordinance is ill-suited to the opinion process. *See, e.g.,* Tex. Att’y Gen. Op. No. GA-0446 (2006) at 18. (“[q]uestions of fact are not appropriate to the opinion process.”)

- B. The only provisions of the Project Duration Ordinance applied by the City are permit expiration dates for applications submitted after adoption of the ordinance, which fully comply with the requirements of Chapter 245.

The opinion request incorrectly conflates Chapter 245’s treatment of permit expiration with its requirements for project dormancy. As explained below, the portions of the Project Duration Ordinance applied by the City are consistent with Chapter 245’s requirements for permit “expiration dates” and are not superseded by the separate statutory requirements for dormant projects.

1. *The City of Austin does not apply portions of the Project Duration Ordinance which purport to apply retroactively or establish different vesting standards for particular applications.*

The opinion request correctly notes that the Project Duration Ordinance was adopted during the 2-year period when state vesting legislation had been repealed and that, upon its readoption in 1999, the Legislature declared that no action taken during the repeal period could “cause or require the expiration or termination of a project, permit or series of permits[.]” Op. Request, at 1 and 3 (*citing* Tex. H.B. 1704. § 3(a)).

However, as discussed above, the City of Austin does not apply those portions of the Project Duration Ordinance that purport to impose different standards and requirements retroactively, for projects commenced prior to the effective date of the ordinance, or for projects commenced during the one and two-year periods following the effective date. Guernsey Decl., at 1 ¶ 3 (citing City Code §§ 25-1-534 (*Exceptions to Provide a One-Year Grace Period*); 25-1-535(B)(1)-(3) and (C)(1)-(2)). In light of HB 1704 § 3, and consistent with the severability clause included in the ordinance,⁴ the City only applies the requirements that establish 3 and 5-year expiration periods for permit applications submitted after effective date of September 6, 1997. *See id.*, ¶ 4.

2. *Chapter 245 does not prohibit jurisdictions from establishing new permit expiration dates, nor does it allow projects to remain grandfathered following expiration of the first permit in the series.*

Chapter 245 acknowledges the authority of regulatory agencies to adopt permit “expiration dates,” as long those dates are not changed retroactively to shorten the life of a project following submittal of a development application.⁵ In this regard, expiration dates are treated like any other development regulation covered by Chapter 245’s vesting protections.

The opinion request ignores Chapter 245’s requirements for permit expiration and instead focuses on the separate statutory requirements for “dormant projects” under LGC § 245.005. However, nothing in the text of LGC § 245.005 trumps a city’s authority to adopt new permit expiration dates and to apply them to subsequent applications, as the City of Austin has done with the 3 and 5-year expiration periods established by the Project Duration Ordinance. On the contrary, the dormant projects statute simply provides a tool to address unfinished development for which no progress towards completion has been made. *See* LGC § 245.005; *City of San Antonio v. En Seguido, Ltd.* 227 S.W.3d 237, 244 (Tex.App.–San Antonio 2007); Tex. Atty. Gen. Op. JC-0425, at 2.

Compounding this misreading of the law, the opinion request appears to presume that a project remains forever grandfathered to earlier regulations unless it qualifies as a dormant project under LGC § 245.005. Were this true, then the authority of regulatory agencies to adopt permit “expiration dates”—which Chapter 245 expressly acknowledges—would have no meaning or effect. Projects would remain vested forever, notwithstanding failure to take the basic steps necessary to keep development permits from expiring.

⁴ *See* Op. Request, Exhibit A at § 19.

⁵ *See* LGC § 245.002(a) (listing “expiration dates” among the types of regulations subject to Chapter 245); LGC § 245.002(b) (providing that “expirations dates...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”); and LGC § 245.002(c) (providing that “after an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for the project.”)

By ignoring Chapter 245's provisions on permit expiration, such a reading would violate the rules of statutory construction by failing to give effect to all provisions of Chapter 245's statutory scheme. *See Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987) (courts must "will give effect to all the words of a statute and not treat any statutory language as surplusage if possible") (citing *Perkins v. State*, 367 S.W.2d 140 (Tex. 1963)); *Railroad Comm'n v. Olin Corp.*, 690 S.W.2d 628, 631 (Tex. App.-Austin 1985, writ ref'd n.r.e.) ("[E]very word . . . of a statute is presumed to be intentionally used with meaning and purpose."); *see also* Tex. Gov't Code Ann. § 311.021(2) (Vernon 1998) (in enacting a statute, it is presumed that "the entire statute is intended to be effective"). Depriving municipalities of the right to adopt and apply permit expiration dates would dramatically expand the scope of Chapter 245, which in turn would have significant implications for communities across the state.

CONCLUSION

For the foregoing reasons, we respectfully ask that the Attorney General: (1) decline to issue an opinion on the validity of the ordinance; or, alternatively, (2) find that the City's application of the Project Duration Ordinance complies with Chapter 245.

Respectfully submitted:

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Enclosure

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