Austin's development truce: Who's getting what, and why

BYLINE: Ben Wear
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Mayor Kirk Watson and others deemed it ``historic'' last month when the Save Our Springs Alliance and the Real Estate Council of Austin signed a truce in their decadelong war over development of the Barton Springs watershed. Some likened it to the lion and the lamb lying together. Take your pick as to who's the lion and who's the lamb.

The two sides have been at odds for years about development in the watershed, where tainted runoff from rain and lawn watering makes its way into the underground Edwards Aquifer. Much of that water ends up either at Barton Springs or in the wells of the 40,000 people south of Austin who use it for drinking water.

If Barton Springs pool is sacred to some people, so too are property rights to another faction. So the argument raged for a decade between those two polar points of view. Picking up on Watson's attempts in the past two years to bridge that gulf, the Greater Austin Chamber of Commerce brought the Save Our Springs Alliance and the Real Estate Council of Austin together in November.

With the announcement of the agreement on development and land preservation, signed by all three groups, the parties declared the war at an end. But questions remain, both about the content and the viability of the deal.

Q: What did the two opposing sides agree on?

A: The 17-page document contains a variety of proposals regarding growth and the protection of Austin's environment, some of which would require the City Council to put them into the city code as laws. The council did not sit in on the meetings and had little involvement, although Watson helped smooth out last-minute differences.

Q: Who came up with the agreement?

A: About 15 representatives from the three groups met for about five months. The boards of all three groups approved the agreement in concept March 24 and March 25.

Q: Approved ``in concept?''

A: The **SOS** and Real Estate Council boards passed separate resolutions March 24 that were quite different from one another and contain some language that the other side in each case did not necessarily endorse. But leaders from the two main groups say the differences can be bridged.

Q: What differences?

A: The **SOS** resolution, at least in draft form, said the agreement does not apply to anyone in litigation with the city over water-quality law. **SOS** leaders say that was a misunderstanding and

that language has been removed. The Real Estate Council resolution says the group ``strongly supports" the re-enactment of a 1995 state law, Senate Bill 1704, which **SOS** and the City Council oppose.

Q: Were the votes unanimous?

A: The **SOS** vote was 13-3; the Real Estate Council board approved it 43-1; and the Chamber's board was unanimous, 22-0. Some leading groups on each side weren't at the table. The Texas Capital Area Builders Association opposes the agreement. The Austin chapter of the Sierra Club has not taken a position. The Save Barton Creek Association's board of trustees endorsed the deal in March.

Q: What are the main features of the agreement?

A: Begin with ``**grandfathering**," that is, allowing developments to build under rules no longer in effect.

This involves developments that filed for permits years ago, some of them in the early 1980s. Austin, until late 1997, did not set a time limit on permits, something that most other Texas cities have done for years. Some developers contend that they should be able to build under the development and water-quality rules in effect when they filed for their original permits, no matter how long it's been. In most cases, particularly in the Barton Springs watershed, later ordinances were much more stringent and allowed less building per acre.

The Legislature addressed this question in 1987 and again in 1995, passing laws over Austin's objection that ``grandfathered" the old permits. But after those laws were inadvertently killed in 1997, Austin reasserted the right in some cases to apply later rules. The Legislature is considering reinstating the **grandfathering** law.

With that in mind, the agreement allows old developments in the Barton Springs watershed to build under old rules, but only if they set aside undeveloped land elsewhere over the watershed (or contribute money to a fund to buy such land) to keep density comparable to the 1992 **SOS** law. In other words, if **SOS** allows 15 percent of the land to be developed, a project with 60 acres of development would need to include 400 acres total at the building site or on nearby undeveloped land.

Q: How much money could developers contribute in lieu of land?

A: The deal contemplates $10,500 an acre for commercial developments in the Barton Springs watershed and $900 per lot for residential developments in the Drinking Water Protection Zone, a designated large area of the city mostly west of MoPac Boulevard (Loop 1) that includes the Barton Springs watershed.

Q: Would this agreement cost taxpayers money?

A: Not initially.

In fact, allowing **grandfathering** might accelerate development and increase tax revenue in the short run. If another part of the agreement contemplating preservation of 50,000 acres of Hill Country becomes a reality, the initial negative tax impact would be negligible because most of the land is agricultural and pays low property taxes. And **SOS** and Real Estate Council officials say the intention is to buy the land with no local tax money. But in the long run, foregoing development on those 50,000 acres would mean less property tax revenue for local governments.

Q: The City Council is considering a policy that would allow setting aside land in return for permission to build more densely than allowed under the **SOS** law. Does this either conflict with or overlap the **SOS**/Real Estate Council agreement?

A: No. The policy being considered by the City Council is for developments that begin their permitting process in the future. The **SOS**/Real Estate Council deal involves only developments that began the permitting process years ago.
Q: Is the Legislature an important player in this?
A: Possibly the most important. **SOS** specified from the beginning of the negotiations -- and repeated this in its resolution March 24 -- that the agreement with the Real Estate Council was contingent on the Legislature refraining from passing a ``bad 1704'' bill.
Q: ``Bad 1704?''
A: The name comes from SB 1704, the 1995 **grandfathering** law that was repealed in 1997 and that the Real Estate Council, despite signing this agreement, supports reinstating. A law this year doing that, unless it exempts Austin somehow, would likely be deemed a ``bad 1704'' bill and would doom the Austin agreement.
Q: So will **SOS** get what it wants from the Legislature?
A: ``It ain't going to happen'' is the succinct evaluation of that from state Rep. Edmund Kuempel, R-Seguin , who is carrying the aptly named House Bill 1704, which would reinstate SB 1704. Kuempel and state Sen. Florence Shapiro, R-Plano, who is carrying identical legislation in the Texas Senate, say the city broke faith with them after SB 1704 was inadvertently repealed, by writing a local law that forced old developments to play by newer, stricter rules. The local law, however, did not do that immediately but instead gave such developments at least a year to get started under old rules.
Despite the hard line by Kuempel and Shapiro, Austin and its large lobbying team still hope to stop the legislation or keep Austin out of its reach. The council likely will pass an ordinance later this month growing from the agreement, an attempt to demonstrate to the Legislature that its intervention in Austin's development politics is unnecessary.
The Texas Municipal League, which endorsed SB 1704 in 1995 because it considered parts of it an improvement over the 1987 law it amended, supports Austin's position now. The Texas Capital Area Builders Association and its statewide parent support Kuempel and Shapiro's bills.
Q: How many developments and how many acres in the Barton Springs watershed does the agreement affect?
A: Even the city is not sure. The city can say only that owners of about 2,100 acres of development in the Barton Springs watershed applied to be grandfathered under the local version of SB 1704 that the council passed in 1997. About 1,840 acres were in fact grandfathered, meaning that less than 300 acres of that group would be available to be covered by the **SOS**/Real Estate Council agreement. That's less than 0.2 percent of the 230,000-acre watershed.
But that doesn't include any old developments that did not apply in 1997 and 1998 for City of Austin **grandfathering**, among them the 4,661-acre Circle C development. Those properties could benefit from the **SOS**/Real Estate Council agreement.
The agreement specifically does not cover about 3,000 acres that Stratus Properties intends to develop in the Barton Springs watershed. The city and Stratus are negotiating separately. Leaders of **SOS** and the Real Estate Council said the Stratus development -- the source of lawsuits, legislation and local controversy since at least 1990 -- carries too much baggage to include in this agreement.
Q: What else is in the agreement?
A: The three parties set a goal of preserving an additional 50,000 acres in the Barton Springs watershed in the next five years. With 27,000 acres already protected, that would mean 34 percent of the watershed would be off-limits to development.

The three parties would contribute $20,000 each to jointly finance a nonprofit foundation -- separate from the city -- that would seek state, federal and private money for the program. Although the initial form of the **SOS** resolution mentioned the possible use of city money, including water fees, to buy land, Real Estate Council president David Armbrust now says that parties to the agreement agree that city money would not be used.

Q: 50,000 acres? Sounds expensive.

A: Based on the $65 million that Austin voters approved to buy 15,000 acres in the watershed, it would take more than $200 million to get another 50,000 acres.

Q: Given available non-city sources for money, what are the chances realistically of raising $200 million?

A: "It's going to be difficult to get it," Armbrust says.

The Clinton administration has talked about a huge program to combat sprawl with local grants to set aside green space. Armbrust said the parties to the agreement talked about possible state money as well. And they'll go after private gifts. But this effort will be competing for local gifts in an environment that includes fund drives for $250 million of arts and museum building projects.

Q: Anything else significant in the agreement?

A: For newly permitted developments, it lengthens time limits on permits set by the council in 1997. The limits would range from five years in the Drinking Water Protection Zone up to 14 years for some large developments in the rest of the city. Development that failed to begin within those time frames would be subject to whatever new rules the council passed in the interim.

Q: If this agreement passes muster, does it mean an end to the long-running divisive battles over development and the environment?

A: No. But the parties involved said that the five-month process, even if the agreement dies, built some personal bridges that might lend a more civil and constructive tone to future environ-- mental/development disputes.

You may contact Ben Wear at bwear@statesman.com or 445-3616.

Challenges loom after development truce

Pact designed to keep Legislature at bay is criticized by lawmaker, development group

BYLINE: Ben Wear
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Getting historical antagonists from Austin's environmental and development communities to agree on a compromise was like the pain of childbirth, Austin Mayor Kirk Watson said Friday. Watson, detailing Thursday's potentially historic agreement between the Save Our Springs Alliance and the Real Estate Council of Austin, paused to acknowledge that, as a man, he could only speculate on what childbirth involves. A father of two, he is more familiar with the next phase.

``Now we've got to raise this dude," he said at a press conference. ``There's still going to be some blips in the road."

A few of those blips popped up immediately Friday in the form of reactions from a key state legislator and one development group not included in the negotiations that produced the truce. The agreement would provide leeway for development over the environmentally sensitive Barton Springs portion of the Edwards Aquifer and pledge to find money to preserve 50,000 acres. Friday's reactions indicate that the agreement's underlying goal -- to deter the Legislature from reinstating a state development law that Austin leaders don't like -- may be beyond the city's grasp.

``Very interesting. Is that right?" said a chuckling state Sen. Florence Shapiro, R-Plano, when told of Austin's hopes. Shapiro is carrying one of three bills pending before the Legislature -- bills Austin wants killed or amended to exempt the city -- that would restore Senate Bill 1704. That 1995 law, inadvertently rescinded two years ago, allowed developers to build under the city rules that were in effect at the time of their initial applications for construction permits.

``Well, anything they do contingent on the Legislature is a mistake for them," Shapiro said. ``I think it is unfair, even un-American, for any level of government to arbitrarily change the rules on property owners, especially when the rules are changed retroactively."

Harry Savio, a vice president and lobbyist for the Texas Capitol Area Builders Association, said his group was not included in the five months of negotiations that led to the Austin agreement. The association and its statewide parent organization have made restoring SB 1704 a legislative priority this session.

And the agreement could likewise face trouble locally. The **SOS** vote to approve the agreement Wednesday night was 13-3 -- **SOS** officials would not name the dissenters -- and **SOS** executive director Bill Bunch, while not a voting member, recommended against signing it.

The Austin City Council would have to hurry to convert the agreement into an ordinance and do so in a hurry, so it would become official before the legislative session ends May 31.
Under the proposed agreement between **SOS** and the real estate council, the sort of older developments covered by SB 1704 would again be allowed to build under the original city rules.
One party to the agreement said that would include potential development covering some 10,000 acres in the Barton Springs watershed, long an area of contention in Austin because intense development there contributes to the pollution of Barton Creek and the Barton Springs pool.
Such developments could have higher density than allowed under the newer Save Our Springs ordinance, passed in 1992.
Under the agreement, the city would negotiate separately with Stratus Properties, which owns more than 2,000 undeveloped acres at the Barton Creek development and several hundred more at the Circle C subdivision.
The agreement sets a goal of putting aside for preservation an additional 50,000 acres in the 354-square-mile watershed in the next five years. Along with the 27,000 acres already preserved, that would mean about a third of the watershed would be left undeveloped.
It was unclear Friday if that is a feasible goal. Austin voters last year agreed to spend $65 million to preserve 15,000 acres. If the 50,000 acres comes at a comparable cost per acre, it would take another $217 million.
The agreement contemplates getting that money from several sources: private sector gifts with matching money from the public sector; money or land from developers as exchange for getting use the old rules; proceeds from selling off small pieces of the 15,000 acres the city bought last year; water and wastewater revenue from the city; federal grants and state grants.
None of that will matter, however, unless the Legislature cooperates.
The agreement between **SOS** and the real estate council, according to Armbrust and **SOS** Chairwoman Robin Rather, would be cancelled if a law is passed to exempt older developments.

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Details of the agreement
* Land preservation: Sets goal of preserving 50,000 acres in the Barton Springs watershed over five years -- beyond the 27,000 acres already preserved -- using a combination of public and private money. The three groups would contribute $20,000 each for a full-time staff person to oversee the program.
* **Grandfathering**: Older developments that might otherwise be subject to current law, including the **SOS** water-quality ordinance, could build at higher densities. But in the environmentally sensitive Drinking Water Protection Zone -- most of Austin west of MoPac Boulevard -- developers would be required to set aside other land or donate $10,500 an acre for commercial development and $900 a lot for residential building.
* Escape clause: The agreement would cease to exist, and the Austin City Council would repeal any ordinance growing from it, if the Legislature passed a ``bad 1704 bill.'' To the parties, that means a bill that would fully re-establish the grandfathered rights of developers to build under old city rules that are more permissive than the **SOS** ordinance.
* Moratorium: For three years, **SOS** would refrain from endorsing certain changes to the **SOS** law unless RECA agrees.
* New projects: **SOS** is the accepted standard for construction in the Barton Springs watershed. Development throughout the city would be subject to time limits to commence construction under rules in effect at the time of the first application, ranging from five years to as much as 14 years.

* Infrastructure: In the Barton Springs watershed, decisions on future roads and utility extensions will take into account the community preference for lower-intensity development in that area.
* Smart Growth: City boards and commissions will have ``appropriate representation of all stakeholder groups.'' The city will support adequate funding for the city department that processes permits and meet timelines set out in city law for reviewing and approving development documents.

The players

Save Our Springs Alliance:

Founded in the early 1990s, the 3,000-member Austin organization advocates policies to protect the Barton Springs watershed, a 354-square-mile area running southwest from Barton Springs pool.

Real Estate Council of Austin:

The council, founded in 1991, has 849 members from the Austin area with various ties to the development industry. Its membership includes lawyers, bankers, architects, builders, developers, engineers, title companies and real estate brokers. It is not affiliated with any state or national groups.

Greater Austin Chamber of Commerce:

The chamber has about 4,600 members from every point of the business spectrum and advocates for development and business-friendly public policy.

Texas Capital Area Builders Association:

The association, affiliated with statewide and national homebuilder associations, has 849 members. That includes 318 builders and 531 associate members .

Illustration: COLOR PHOTO

Kirk Watson: Agreement he brokered may prove easier to negotiate than apply.

Truce reached in city's environmental struggle, often

Save Our Springs Alliance, business groups approve development pact

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In what Mayor Kirk Watson called ``a historic day for Austin,'' the leading business and environmental antagonists in the city's long-running development war Thursday completed what amounts to an armistice. The agreement, the product of five months of often heated negotiations, provides additional leeway for development over the environmentally sensitive Barton Springs portion of the aquifer and a pledge to find money to protect 50,000 acres of land from development.

The governing boards of the Save Our Springs Alliance and the Real Estate Council of Austin approved it in intense meetings Wednesday night. The board of the Greater Austin Chamber of Commerce, which helped bring **SOS** and the Real Estate Council together, approved it by telephone Thursday morning.

Principals from the two groups have been bitter political enemies throughout the 1990s, supporting separate slates in council elections and fighting at City Council Chambers, the Legislature and various courtrooms.

``It is very, very significant,'' said David Armbrust, president of the Real Estate Council. ``I've been in the wars for 20 years and I've never seen the dialogue at this point. The level of trust is amazing. We never thought we'd get here.''

Robin Rather, chairwoman of **SOS**, called the agreement ``a major miracle. Nobody I talked to going into this thought we had a prayer.''

The next step: converting the 17-page agreement into an ordinance for the Austin City Council's approval by May 1. The next steps after that would be up Congress Avenue to the Legislature, where the council and the parties to the agreement hope it might soften lawmakers' stand on pending legislation aimed at Austin. The argument would be that with environmental activists in accord with developers -- the aggrieved party in the prevailing legislative view -- no statehouse intervention is necessary.

At least two bills have been filed to restore a 1995 law, inadvertently killed in 1997, that ``grandfathers'' long-dormant developments and allows them to be built under old, less restrictive city rules. Thursday's agreement would allow some **grandfathering** of development plans if the builders preserve other land from development.

``This is a very specifically negotiated item that is an effort to be the Austin solution," Watson said. ``I would hope it would have an impact on the discussions going on at the Legislature."
A key part of the agreement is the pledge to protect 50,000 acres of green space. Each of the three parties to the agreement would contribute $20,000 to hire a full-time staffer who would oversee efforts to raise money to buy the land. Armbrust said that, given the tens of millions Austin has already put into buying sensitive land, the focus would be on finding federal, state and private money.
``If we're really going to keep the things we love about Austin, we are going to have to find a way to do permanent protection . . . of our green space," Rather said.
The agreement includes a ``mitigation" section, essentially a change to the 1992 **SOS** water-quality law, that would allow developers in some cases to build more densely than **SOS** allows if they preserve other land. It puts a three-year moratorium on further changes to **SOS**, unless **SOS** and the Real Estate Council agree. And for new development, it sets limits for the time between first applying for permits and building under the original city rules.
It calls on the council to speed the processing of development permits by adequately financ ing the city department that handles themprocesses development permits to speed the process. And it requires ``appropriate representation of all stakeholder groups on city boards and commissions," an attempt to force the current council, which has strong support from environmental activists, to appoint some commission members from the development community.
The catalyst for bringing the two sides together was the good working relationship between Rather and Gary Valdez, president of the chamber in 1998.
At first, Rather said, nothing was accomplished beyond rehashing old grievances in loud and often tense sessions.
``It took us more than 2 1/2 months to get the venting and yelling done," Rather said. ``At the end of every single meeting, and we probably met 15 or 16 times by then, we asked, 'S should we even get together again?' "
The decision was the same each time. They'd try one more meeting.
The stalemate was broken in late January, when the 14 or 15 negotiators broke into smaller groups to handle one issue each. ``To everyone's amazement, the small teams did exceptional work," Rather said.
Still, there remained significant differences that required extensive negotiation. The give and take continued until Wednesday evening. Watson served as a sort of midwife at the last, shuttling between the **SOS** meeting on the 21st floor of 100 Congress and the Real Estate Council's board meeting at the Headliners Club at Sixth and Lavaca streets.
``We didn't take the easy issues. We didn't do fluffy work. We did the hardest imaginable issues," Rather said. ``People spent their early, early morning, their evenings, their weekends on this. We are exhausted."
Armbrust and Rather spent much of Thursday tying up loose ends. The resolutions passed by **SOS** and the Real Estate Council still include some differences -- **SOS**, for instance, would exclude from the agreement's control any developments with pending litigation against the city. That would exempt about a dozen large developments, including Barton Creek Estates and Circle C.
Armbrust said he and Rather believe the remaining differences can all be worked out on the way to the agreement becoming an ordinance.
``Crazy day," Armbrust said. ``Peace is hell."

You may contact Ben Wear at bwear@statesman.com or 445-3616. You may contact Chuck Lindell at clindell@statesman.com or 246-0040.

ATTORNEY GENERAL OPINION REQUEST RQ-1070-GA

DECLARATION OF GREG GUERNSEY, DIRECTOR OF THE CITY OF AUSTIN PLANNING & DEVELOPMENT REVIEW DEPARTMENT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

Before me, the undersigned notary, on this day personally appeared Greg Guernsey, known to me to be the person whose name is subscribed below, and being duly sworn, testified as follows:

1. "My name is Greg Guernsey. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
2. "I am a City of Austin employee. I have been employed by the City of Austin since 1985. My current job title is the Director of Planning and Development Review ("PDRD"). I became the Director of PDRD in July, 2009. My department handles many planning and development issues including but not limited to zoning, subdivisions, site plans, building permits, inspection, and Chapter 245 issues.
3. "Prior to becoming the Director of the Planning and Development Review Department, I was the Director of the Neighborhood Planning and Zoning Department ("NPZD"). I was the Director of that department for approximately 3.25 years. Prior to being the Director of NPZD, I was an Assistant Director of NPZD.

4. "In my role at both PDRD and NPZD, I have been directly involved in reviewing vested rights claims made by applicants for development permits under Chapter 245 of the Local Government Code.
5. "To the best of my knowledge, following the adoption of Chapter 245, the City has only applied the 3 and 5-year expiration periods under the Project Duration Ordinance to permits applications submitted after the effective date of September 6, 1997, that are not the continuation of a project in which the first permit in the series was submitted before the effective date.
6. "To the best of my knowledge, the City has not applied the following sections of the Project Duration Ordinance: City Code § 25-1-534 (*Exceptions to Provide a One-Year Grace Period*); Subsections (B)(1)-(3) and (C)(1)-(2) of City Code § 25-1-535 (*Exceptions to the General Rules*); and City Code § 25-1-538 (*Voluntary Compliance*).

"FURTHER AFFIANT SAYETH NOT"

GREG GUERNSEY
DIRECTOR OF PLANNING
AND DEVELOPMENT REVIEW

SWORN TO AND SUBSCRIBED before me on the 26 day of JULY, 2012.

GLADYS CLEMONS
NOTARY PUBLIC STATE OF TEXAS
10-06-2014

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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 Ordinance[1] 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 "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." 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.

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[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.

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[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:

KAREN KENNARD, CITY ATTORNEY

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LAND USE DIVISION

TOM NUCKOLS, DIRECTOR

CHRISTOPHER GILMORE

JULIE JOE

August 1, 2012

Mr. Jason Boatright
Chair, Opinion Committee
Office of the Attorney General
P.O. Box 12458
Austin, Texas 78711-2548

RE: Opinion Request RQ-1070-GA

Dear Mr. Boatright:

Travis County and City of Austin jointly regulate subdivision plats in the extraterritorial jurisdiction of the City of Austin under Chapter 242, Local Govt. Code. Therefore, Travis County is familiar with how the City administers its Project Duration Ordinance. The City applies the ordinance in a manner that is entirely consistent with chapter 245, Local Govt. Code.

Section 245.002(a), Local Govt. Code, provides:

> "(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 properly 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." (Emphasis added.)

Section 245.002(b), Local Govt. Code, provides:

> "If a series of permits is required for a project, the orders, regulations, ordinances, rules, ***expirations 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 the completion of the project."

Section 245.002(c), Local Govt. Code, provides:

> "***After an application for a project is filed***, a regulatory agency may not shorten the duration of any permit required for the project."

These provisions of Chapter 245 recognize a local government's authority to adopt permit expiration dates, as long the dates are not changed after the permit application is filed so as to retroactively to shorten the duration of that permit. In this regard, expiration dates are treated like any other development regulation covered by Chapter 245.

The City of Austin applies its Project Duration Ordinance in a manner that complies with Chapter 245 because the City applies it only to projects for which the original permit application was filed after the ordinance's effective date of September 6, 1997. The City does not in any way apply the ordinance in a manner that retroactively shortens the duration of a permit.

Some parts of the Project Duration Ordinance were superseded when Chapter 245 became law in 1999. These include the ordinance's requirements imposing vesting standards retroactively for projects commenced before its effective date of September 6, 1997. Again, because the City does not in any way apply or attempt to enforce these parts of ordinance, the City complies with Chapter 245.

Project expiration dates and project dormancy are two distinct matters under Chapter 245. Project dormancy is addressed in §245.005. That section deals only with permits for projects if "no progress has been made towards completion of the project." This section allows local governments to prevent unfinished development from remaining grandfathered in perpetuity. Just as Chapter 245 contains separate sections on permit expiration dates and project dormancy, the City's regulations address project dormancy in a different section than it addresses Project Duration.

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, in enacting HB 1704 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 to which HB 1704 applied. Section 1(d) of HB 1704 provides:

> "It is the intent of the legislature that no project, permit, or series of permits ***that was protected by former Subchapter I, Chapter 481, Government Code,*** be

prejudiced by or required or allowed to expire because of the repeal of former Subchapter I or an action taken by a regulatory agency after the repeal." (Emphasis added.)

The only projects that were protected by former Subchapter I, Chapter 481 Government Code were those for which the original permit application was filed before the repeal of Subchapter I in 1997. Again, the City does not apply its Project Duration Ordinance to projects for which the original permit application was filed when Subchapter I was in effect. Therefore, the City's application of the ordinance complies with Chapter 245.

The opinion incorrectly presumes a project is perpetually grandfathered to earlier regulations unless it is a dormant project. This reading of the statutes would totally negate Chapter 245's express recognition of local governments' authority to adopt permit expiration dates. It would render language §245.002(a), §245.002(b), and §245.002(c) totally meaningless.

For the foregoing reasons, any opinion the Attorney General issues on this matter should conclude the City's application of its Project Duration Ordinance complies with Chapter 245.

Sincerely,

Tom Nuckols
Assistant County Attorney

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 10, 2012

The Honorable René O. Oliveira
Chair, Committee on Land and Resource Management
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. GA-0980

Re: Whether a "project duration ordinance" adopted by the City of Austin contravenes section 245.005 of the Local Government Code (RQ-1070-GA)

Dear Representative Oliveira:

You inquire about a potential conflict between the City of Austin's Project Duration Ordinance ("Ordinance") and chapter 245 of the Local Government Code.[1] You contend that the Ordinance violates chapter 245 by establishing expiration criteria for building projects that differ from the expiration criteria specified in chapter 245. Request Letter at 3–4. The Ordinance provisions about which you ask are contained in the Austin City Code as sections 25-1-533(B), 25-1-535(B)(4), and 25-1-535(C)(3).[2] *See* Request Letter at 3. Section 25-1-533(B) provides that:

> [i]f a building permit for a building shown on a site plan or a notice of construction expires before construction begins, the project, including the preliminary subdivision plan, expires. If all building permits are not obtained or a notice of construction is not filed within the time periods contained in . . . [section] 25-1-535 . . . , the project, including the preliminary subdivision, expires.

AUSTIN CITY CODE § 25-1-533(B). Section 25-1-535(B)(4) applies in the City's "Drinking Water Protection Zone" and provides that:

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[1]*See* Letter from Honorable René Oliveira, Chair, House Comm. on Land & Res. Mgmt., to Honorable Greg Abbott, Tex. Att'y Gen. at 1 (June 22, 2012), http://www.texasattorneygeneral.gov/opin ("Request Letter").

[2]The City of Austin informs us that it does not enforce certain provisions of the Ordinance. *See* Brief from Brent D. Lloyd, Assistant City Att'y, City of Austin Law Dep't at 2 (July 30, 2012) (attaching affidavit of Greg Guernsey, Dir. of Planning & Dev. Review, which identifies provisions no longer enforced) ("City of Austin Brief"). The provisions the City asserts it still enforces are the same provisions that you specifically cite to in your request letter. Thus, we assume that you are concerned about only sections 25-1-533(B), 25-1-535(B)(4), and 25-1-535(C)(3) of the Austin City Code. *See* AUSTIN, TEX., AUSTIN CITY CODE ch. 25-1, art. 12, §§ 25-1-533(B), 25-1-535(B)(4), (C)(3) (2012).

> [a]n application for a project for which the first application was filed on or after September 6, 1997, may comply with original regulations if all building permits are approved and a notice of construction is filed within three years of the date the first application is filed.

Id. § 25-1-535(B)(4). Section 25-1-535(C)(3) applies in the City's "Desired Development Zone" and provides that:

> [a]n application for a project for which the first application is filed on or after September 6, 1997, may comply with original regulations if all building permits are approved and a notice of construction is filed within five years of the date the first application is filed.

See id. § 25-1-535(C)(3).[3]

Home-rule cities, such as Austin, derive their powers from the Texas Constitution. TEX. CONST. art. XI, § 5; TEX. LOC. GOV'T CODE ANN. § 51.072 (West 2008). They possess "the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power." *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490–91 (Tex. 1993).

The Texas Constitution prohibits a city ordinance from containing "any provision inconsistent with . . . the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5(a); *see also City of Fort Worth v. Atlas Enters.*, 311 S.W.2d 922, 924 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.) (discussing severability of municipal ordinances and stating that "[a] municipal ordinance may be void as to some of its provisions and valid as to others"). A court would not invalidate an ordinance as inconsistent with a statute unless the court can reach no reasonable construction that leaves both the ordinance and the statute in effect. *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002). Nevertheless, "an ordinance which conflicts or is inconsistent with state legislation is impermissible." *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex.), *cert. denied*, 459 U.S. 1087 (1982).

Chapter 245 of the Local Government Code is a legislative limit on cities' home-rule power to regulate construction and development within their jurisdiction. The statute "prohibit[s] land-use regulators from changing the rules governing development projects 'in the middle of the game,' thereby insulating already underway development and related investment from the vicissitudes and uncertainties of regulatory decision making and all that may influence it." *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 250 (Tex. App.—Austin 2011, pet. denied). Subsection 245.002(b) provides that "[i]f a series of permits is required for a project, the orders, regulations,

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[3]The Municipal Code defines "Drinking Water Protection Zone" as "the areas within the Barton Springs Zone, the Barton Creek watershed, all water supply rural watersheds, and all water supply suburban watersheds . . . that are in the planning jurisdiction." *Id.* § 25-1-21(30). The "Desired Development Zone means the area not within the drinking water protection zone." *Id.* § 25-1-21(26).

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 the completion of the project." TEX. LOC. GOV'T CODE ANN. § 245.002(b) (West 2005). The effect of the statute is that "once an application for the first permit required to complete a property-development 'project' is filed with the municipality or other agency that regulates such use of the property, the agency's regulations applicable to the 'project' are effectively 'frozen' in their then-current state and the agency is prohibited from enforcing subsequent regulatory changes to further restrict the property's use." *Harper Park Two, LP*, 359 S.W.3d at 248–49.

Section 245.005, entitled "Dormant Projects," authorizes cities to enact ordinances that expire projects when "no progress has been made towards completion of the project." TEX. LOC. GOV'T CODE ANN. § 245.005(b) (West 2005); *see id.* § 245.005(c) (providing a list of factors used to determine whether progress is being made toward the completion of a project). A project's "expiration" necessarily results in the project losing the "frozen" rights granted by chapter 245. Although the Legislature has permitted cities to expire projects that meet the statutory criteria for dormancy, it has not provided any further authority under which cities may cause a project to lose the rights granted by chapter 245. As a result, any project expiration ordinance that does not comport with section 245.005's dormancy criteria conflicts with chapter 245.

Section 245.005 provides:

> 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.

Id. § 245.005(b). Under the Ordinance, a project's expiration date could be sooner than five years after the filing of the first permit application. AUSTIN CITY CODE § 25-1-533(B). Under the statute, however, a project's expiration date must be no earlier than five years after the filing of the first permit application. TEX. LOC. GOV'T CODE ANN. § 245.005(b) (West 2005). Thus, the Ordinance's expiration periods conflict with those of the statute. Similarly, under the Ordinance, a project would expire if "all building permits are not obtained or a notice of construction is not filed within the time periods" established by the city. AUSTIN CITY CODE § 25-1-533(B). However, under the statute, a project may not expire unless it meets the dormancy criteria contained in section 245.005. TEX. LOC. GOV'T CODE ANN. § 245.005(c)(2) (West 2005). The failure to obtain all building permits or file a notice of construction within a time period set by the city is not one of the criteria set forth in section 245.005. Thus, the Ordinance's criteria for expiring a project conflicts with that of the statute. *See In re Sanchez*, 81 S.W.3d at 796.[4]

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[4]Briefing we received in connection with your request argues that subsection 245.002(a)'s reference to "expiration dates" implicitly authorizes a regulatory agency to impose expiration dates on permits. *See* City of Austin

(continued...)

Accordingly, a court would likely conclude that the Ordinance is void to the extent it causes a project to expire sooner than it would under the provisions of section 245.005 of the Local Government Code. Likewise, a court would likely conclude that the Ordinance is void to the extent it causes a project to expire regardless of whether the project meets the section 245.005 criteria for progress towards completion of the project.[5]

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[4](...continued)
Brief at 3; Brief from Scott N. Houston, General Counsel, Texas Municipal League at 2 (Aug. 9, 2012). No Texas court has addressed this issue, and we need not address it here. The argument is unavailing to our consideration because the Ordinance results in the expiration of projects, not permits. The rights guaranteed to projects by chapter 245 continue to apply regardless of the expiration of individual permits within a project.

[5]It has been suggested in briefing submitted to this office that, because the Ordinance became effective on September 6, 1997, it is in violation of sections 2 and 3(a) of House Bill 1704 enacted in 1999. *See* Brief from Andrew Weber, Kelly Hart & Hallman, on behalf of the Real Estate Council of Austin at 2–4 (June 29, 2012). *See also* Act of Apr. 29, 1999, 76th Leg., R.S., ch. 73, §§ 1(a), 2, 1999 Tex. Gen. Laws 431, 432, 434 (eff. May 11, 1999) (finding that former subchapter I, chapter 481 of the Government Code "was inadvertently repealed" and adding chapter 245). House Bill 1704 provides that chapter 245 applies retroactively to a "project in progress on or commenced after September 1, 1997" and that "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, . . . 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." *Id.* §§ 2, 3(a). We do not address the question because we have concluded that the Ordinance conflicts with chapter 245.

SUMMARY

A court would likely conclude that the Ordinance provisions about which you ask are void because they conflict with chapter 245 of the Local Government Code.

Very truly yours,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JAMES D. BLACKLOCK
Deputy Attorney General for Legal Counsel

JASON BOATRIGHT
Chairman, Opinion Committee

Charlotte M. Harper
Assistant Attorney General, Opinion Committee

Anguiano, Dora

From: Jason Meeker <jason@jasonmeeker.com>
Sent: Tuesday, March 19, 2013 3:42 PM
To: Anguiano, Dora
Subject: Email 3 of 4

March 18, 2013

Commission urges Council to repeal city's Project Duration Ordinance

By Mike Kanin and Elizabeth Pagano

Last week, after an extended executive session, the **Planning Commission** voted to recommend that City Council declare a public emergency to repeal the city's **Project Duration Ordinance** and rewrite current vested rights rules so that they are in line with state law. The item will be on this week's Council agenda.

"I understand that there is quite a bit at stake.... And I understand that there is a concern that we risk losing a power to preserve the city ordinances that protect what matters most to our community. But at the same time, I understand that we have an obligation to fulfill the law, and have respect for the law," said **Commissioner James Nortey**.

The commission voted 5-3 in support of the repeal, with **Commissioners Danette Chimenti**, **Jean Stevens**, and **Myron Smith** voting in opposition. All three commissioners who were opposed had previously voted in favor of a postponement. **Chair Dave Anderson** was absent.

The Project Duration Ordinance was meant to fill a gap in state law created when the legislature inadvertently repealed the "grandfather bill" in 1997. Under the city's rule, projects can be forced to reapply for permitting materials if they haven't started within three to five years of initial filing. Austin's rule has the effect of insuring that a developer cannot keep a project open indefinitely to take advantage of older, perhaps more lenient development and environmental regulations.

State law was reestablished in 1999.

At the commission, many people from the development community spoke in favor of the repeal, citing the stress the ordinance places on smaller projects with tenuous financing, and the uncertainty it creates.

Nikelle Meade, who is the president of the **Real Estate Council of Austin**, stressed how important the city's decision will be for the real estate community.

"The real estate industry really cannot function with the sand moving under our feet at all times. We really have to have some certainty," said Meade. "It's not about whether or not you like grandfathering. Grandfathering is in the state law. All we're asking you to do is follow the state law, and make your code consistent with what's in the state law, which the Texas Constitution requires."

Several people also spoke in favor of retaining the city's ordinance, including **Save Our Springs Executive Director Bill Bunch**. Bunch warned that the repeal of the ordinance could "perpetually grandfather" projects, setting the clock back on the environmental regulations subsequently passed by the city.

Planning Commission action comes as the city faces a significant challenge over the Project Duration Ordinance from the legislature. **State Rep. Rene Oliveira** (D-Brownsville) requested an attorney general's opinion over the legality of the measure in June. (See *In Fact Daily*, Aug. 6, 2012) **Attorney General Greg Abbott** delivered that opinion on Dec. 10. It immediately spelled trouble for the city.

In a summary that followed a handful of paragraphs of law review, Abbott was blunt. "A court would likely conclude that the Ordinance provisions about which you ask are void because they conflict with chapter 245 of the Local Government Code," he wrote.

Nortey said that, given the Attorney's General opinion, it was a "no-brainer" that the appropriate action was for the city to ensure that city law is in complete compliance with the state law.

"My concern is that with a delay, we risk additional harm to the city in the form of either a legal dispute or in the form of state action from the legislature," said Nortey.

The Attorney's General opinion has already produced some amount of scrambling from Council members. Though opinions from attorneys general do not carry the same weight as a judge's ruling, parties tend to give them significant deference. In Austin's case, Council members immediately delayed what might well have been the disapproval of the **Shady Hollow Garden Townhomes** (See *In Fact Daily*, Feb. 5, 2013).

Council members came back two weeks later and subsequently approved a deal through a managed growth agreement that would allow Shady Hollow to move forward. "I really, really, really don't like this managed growth agreement," **Council Member Bill Spelman** said at the time, adding "it seems to me that no valid public purpose would be served by tilting at this particular windmill." (See *In Fact Daily*, Feb. 19, 2013.)

Another long-debated Austin project could also be affected by Planning Commissioners' actions. In September, the owners of the **One World Theatre** sued after their expansion plans were stopped by the city. In the suit, theatre representation argues that One World's "new site plan application is entitled to be reviewed and permitted under only those rules, regulations, ordinances, and requirements in effect when the project was initiated on July 15, 1983."

If the court agrees – and Abbott's opinion suggests that it might – then One World would be allowed to develop its project without the restrictions included in the city's **Save Our Springs Ordinance**.

Legislative action from **State Rep. Paul Workman** (R-Austin) could further complicate matters for the city. Workman filed three bills directly aimed at the city's Project Duration Ordinance. In a statement released after a request from *In Fact Daily*, Workman wrote that "the intent of Chapter 245, Local Government Code, is to allow a property owner that is constructing a building or a series of buildings to comply with the development rules in place at the time they start a project and not be subject to changing rules during the course of the project. These bills seek to clarify Chapter 245 to make clear to municipalities what their responsibilities are with regard to this chapter."

The new legislation would also offer suing property owners the right to seek putative damages from municipalities over the matter.

Anguiano, Dora

From: Jason Meeker <jason@jasonmeeker.com>
Sent: Tuesday, March 19, 2013 3:42 PM
To: Anguiano, Dora
Subject: Email 4 of 4

Subject: FYI RECA's views

RECA sent an alert for members to email city council cc aarmbrust@recaonline.co, the following regarding grandfathering:
<<Please e-mail the Austin City Council today. Just click the "SEND E-MAIL" button below for a pre-written message for which you need only to type your name below the closing. Feel free to modify the message to convey your personal message.

Please Repeal the Project Duration Ordinance

Dear Mayor and Council Members,
I am writing to urge you to support the staff recommendation and repeal the Project Duration Ordinance because it is in conflict with State law. This action will not only bring the ordinances of the City of Austin in line with State law requirements - it is the right thing to do. Thoughtful planning for quality, multi-phase projects requires stable municipal rules that do not change mid-stream. This is your chance to lend predictability to the development process and acknowledge the supremacy of State law. This is an important issue to me, and once again, I urge you to vote to repeal the Project Duration Ordinance.

Respectfully, >>

<<ACTION ALERT - AUSTIN PROJECT DURATION ORDINANCE
Please join the Real Estate Council of Austin (RECA) Board of Directors in urging Austin City Council to stop expiring projects illegally and to repeal the City's Project Duration Ordinance.

On December 10, 2012, Texas Attorney General Greg Abbott issued an opinion concluding that Austin's Project Duration Ordinance conflicts with Chapter 245 of the Texas Local Government Code, and that a court would, therefore, likely determine it is void.

Council postponed action on this issue until Thursday, March 21, 2013. Planning Commission voted 5-3 to support the staff recommendation on Tuesday, March 12, 2013. Please plan to attend the Council meeting and sign-up in support, in addition to sending Council Members e-mails if you have not done so already.

Thank you for your help with one of the most significant issues our organization will face this year! The Austin City Council needs to hear from you!>

From Michael Wilt in BIG Red Dog Construction blog:

Attorney General Issues Opinion on Austin's Project Duration Ordinance

By Michael Wilt On December 11, 2012 In City of Austin, Environmental, Government, News With No Comment
Attorney General Greg Abbott issued an opinion on the City of Austin's Project Duration Ordinance yesterday (December

10, 2012) at the request of State Representative Rene Oliveira, Chairman of the Committee on Land and Resource Management. While Attorney General Opinions are advisory and don't carry the force of law, this opinion is an important milestone in the interpretation and future application of the City's Project Duration Ordinance. For those not interested in wading through the opinion, I will try to make it easy to digest.

The City of Austin's Project Duration Ordinance was called into question because of the following provision:
"[i]f a building permit for a building shown on a site plan or a notice of construction expires before construction begins, the project, including the preliminary subdivision plan, expires. If all building permits are not obtained or a notice of construction is not filed within the time periods contained in ... [section] 25-1-535 ... , the project, including the preliminary subdivision, expires."

The City was using this provision to expire projects after three years in the Drinking Water Protection Zone and after five years in the Desired Development Zone. Chairman Oliveira asked if that provision conflicted with provisions contained in Chapter 245 of Texas' Local Government Code that provide more expansive protection for the duration of projects and guard against their expiration.

Attorney General Abbott responded by saying:
"a court would likely conclude that the Ordinance is void to the extent it causes a project to expire sooner than it would under the provisions of section 245.005 of the Local Government Code. Likewise, a court would likely conclude that the Ordinance is void to the extent it causes a project to expire regardless of whether the project meets the section 245.005 criteria for progress towards completion of the project." More succinctly put, *"A court would likely conclude that the Ordinance provisions about which you ask are void because they conflict with chapter 245 of the Local Government Code."*

It's hard to ask for a better opinion than that. However, the Project Duration Ordinance will remain on the books unless the City of Austin decides to revisit it. During my tenure at the Real Estate Council of Austin, we asked the City to do that, and we were unsuccessful. Hopefully, this opinion will convince city officials that it's time to rethink their stance on the ordinance and make it one that is fully compliant with Chapter 245 and workable.

Big Red Dog closely follows Chapter 245 issues as demonstrated by a prior blog post on a separate Attorney General Opinion regarding Harper Park Two. We have and will continue to do this in order to provide the best land use consultation advice as possible.

Director Marketing and Media, Big Red Dog Construction