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## Austin City Code

**ARTICLE 12. PROJECT DURATION.****§ 25-1-531 RELATIONSHIP TO OTHER LAW.**

(A) This article does not extend a deadline for, or expiration date of, an application or approval under this title.

(B) This article supersedes any conflicting provisions of this title, of other ordinances outside the Code, and of any other rules or regulations adopted under the Code or ordinances.

*Source: Ord. 990225-70; Ord. 031211-11.*

**§ 25-1-532 DEFINITIONS.**

In this article:

(1) **APPLICATION** means an application for approval of a preliminary subdivision plan, final subdivision plat, or a site plan.

(2) **CONSTRUCTION** means:

(a) for a site plan, the construction of site plan improvements;

(b) for a subdivision, the construction of infrastructure including streets, utilities, water quality facilities, and drainage facilities; or

(c) for a building permit, the construction of the building for which the building permit is issued, but not the construction of any site improvement not a part of the building.

(3) **FIRST APPLICATION** means the first application approved by the City for a project that requires more than one application approval.

(4) **INTERESTED PARTY** means a person described in Section 25-1-131 (*Interested Parties*) or an officer of an environmental organization registered with the director.

(5) **NONPROFIT CORPORATION** means a non-profit corporation that has been granted tax exempt status under 26 U.S.C. § 501(c)(3).

(6) **NOTICE OF CONSTRUCTION** means a notice required for construction other than construction that requires a building permit.

(7) **ORIGINAL REGULATIONS** means the regulations in effect on the date that the first application in a series of applications for a project was filed.

(8) **PROJECT** means a proposal for development that has a specific objective and that requires the approval of one or more applications.

(9) **REGULATIONS** means land development regulations contained in this title or the administrative rules adopted under the City Code.

(10) **SMALL PROJECT** means a project on less than five acres of land which has been under the continuous ownership by the applicant since August 31, 1987, and is not part of a larger project or development.

(11) **SUBSEQUENT REGULATIONS** means the regulations in effect on the date that an application other than the first application is filed.

*Source: Ord. 990225-70; Ord. 990805-46; Ord. 031211-11.*

### **§ 25-1-533 GENERAL RULES.**

(A) Except as otherwise provided in this article, an application must comply with the regulations in effect on the date the application is filed.

(B) If 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 Sections 25-1-534 (*Exceptions To Provide A One-Year Grace Period*) and 25-1-535 (*Exceptions To The General Rules*), the project, including the preliminary subdivision, expires. In that circumstance, the applicant must file a new application and comply with the regulations in effect on the date of the new application.

(C) The expiration date of a site plan approved before September 6, 1997, controls over the exceptions prescribed in this article.

*Source: Ord. 990225-70; Ord. 031211-11.*

### **§ 25-1-534 EXCEPTIONS TO PROVIDE A ONE-YEAR GRACE PERIOD.**

(A) If an application complies with Subsections (B) and (C), the application may comply with original regulations if all building permits are approved and a notice of construction is filed before September 6, 1998.

(B) This section applies to the following:

(1) except for a small project or a project that is owned by a non-profit corporation, an application for a project within the Drinking Water Protection Zone for which the first application was filed before September 1, 1987; or

(2) an application for a project within the Drinking Water Protection Zone or the Desired Development Zone for which the first application:

(a) was filed on or after September 1, 1987, and before September 6, 1997; and

(b) that was subject to an exemption from water quality regulations under Section 13-2-502 (*Exemptions*).

(C) A project with an application described in Subsection (B) must have either:

(1) except as provided in Subsection (C)(2), obtained one or more approvals for a final subdivision plat, including subdivision construction plans for infrastructure, for at least 50 percent of the land area within the project between September 1, 1992, and September 6, 1997; or

(2) obtained one or more approvals for a site plan, excluding subdivision construction plans for infrastructure, for at least 30 percent of the land area within the project between September 1, 1992, and September 6, 1997; or

(3) since September 1, 1992, has incurred direct costs for development of the project (exclusive of land acquisition, interest expense, attorneys fees, allocated corporate overhead, and ad valorem taxes) in the lesser amount of:

(a) 10 percent of the most recent appraised market value of the real property on which the project is located, as established by the applicable Appraisal District; or

(b) \$ 1 million.

*Source: Ord. 990225-70; Ord. 031211-11.*

#### **§ 25-1-535 EXCEPTIONS TO THE GENERAL RULES.**

(A) The exceptions prescribed in this section do not apply to an application described in Section 25-1-534 (*Exceptions To Provide A One-Year Grace Period*) of this article.

(B) Within the Drinking Water Protection Zone, the following apply:

(1) Except as provided in Subsection (B)(3), an application for a single family residential subdivision for which the first application was filed on or after September 1, 1987, and before September 6, 1997, may comply with original regulations if a notice of construction is filed before September 6, 1999.

(2) Except as provided in Subsection (B)(3), an application for a project other than a single family residential subdivision project, for which the first application was filed on or after September 1, 1987, and before September 6, 1997, may comply with original regulations if an application for a site plan is approved before September 6, 1998, and all building permits are approved and a notice of construction is filed before September 6, 1999.

(3) An application for a small project or a project owned by a non-profit corporation for which the first application was filed before September 6, 1997, may comply with original regulations if all building permits are approved and a notice of construction is filed before September 6, 2000.

(4) An 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.

(5) The applicant for a project for which the first application is filed on or after September 6, 1997, may request that the director grant a single one year extension of the deadline for building permit approval or the

filing of notice of construction under Section 25-1-537 (*Extension Of Deadlines*).

(C) In the Desired Development Zone, the following apply:

(1) An application for a project for which the first application was filed before September 1, 1987, may comply with original regulations if all building permits are approved and a notice of construction is filed before September 6, 1999.

(2) An application for a project for which the first application was filed on or after September 1, 1987, and before September 6, 1997, may comply with original regulations if all building permits are approved and a notice of construction is filed before September 6, 2002.

(3) An 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.

Source: Ord. 990225-70; Ord. 031211-11.

#### § 25-1-536 NOTICE OF CONSTRUCTION.

A notice of construction must be filed with the director and include a description of the improvements to be constructed. A notice of construction expires 180 days after the notice is filed unless construction has begun or at any time when construction is abandoned.

Source: Ord. 990225-70; Ord. 031211-11.

#### § 25-1-537 EXTENSION OF DEADLINES.

(A) An applicant may file a request for an extension authorized by Section 25-1-535(B)(5) (*Exceptions To The General Rules*) with the director not later than 60 days before the deadline prescribed in Section 25-1-535(B)(4) (*Exceptions To The General Rules*).

(B) The director shall grant an extension if the applicant for the extension has:

(1) obtained one or more approvals for a final subdivision plat, including subdivision construction plans for infrastructure, for at least 50 percent of the land area within the project; or

(2) obtained one or more approvals for a site plan, excluding subdivision construction plans for infrastructure, for at least 30 percent of the land area within the project; or

(3) has incurred direct costs for development of the project (exclusive of land acquisition, interest expense, attorneys fees, allocated corporate overhead, and ad valorem taxes) in the lesser amount of:

(a) 10 percent of the most recent appraised market value of the real property on which the project is located, as established by the applicable Appraisal District; or

(b) \$ 1 million.

Source: Ord. 990225-70; Ord. 031211-11.

### **§ 25-1-538 VOLUNTARY COMPLIANCE.**

(A) This section applies to projects for which the first application was filed on or after September 1, 1987, and before September 6, 1997.

(B) An application for a project in the Drinking Water Protection Zone that may comply with original regulations may be withdrawn and a new application filed to comply with the regulations in effect on the date the new application is filed. If a new application is filed, all building permits must be approved and a notice of construction filed within 10 years of the date on which the new application is approved. The new application must reduce impervious cover as follows:

(1) Other than in the Barton Springs Zone, impervious cover must be reduced to not more than the lesser of 25 percent of net site area or of the impervious cover limitations for the net site area under the regulations in effect for the original application; and

(2) Other than in the Barton Springs Zone, impervious cover must be reduced to not more than the lesser of 20 percent of the net site area in any portion of the recharge zones of the Northern Edwards Aquifer and Southern Edwards Aquifer located outside the Barton Springs Zone or of the impervious cover limitations for the net site area under the regulations in effect for the original application.

*Source: Ord. 990225-70; Ord. 031211-11.*

### **§ 25-1-539 INCENTIVES FOR UPDATING TO CURRENT REGULATIONS.**

An application that may comply with original regulations may be withdrawn and a new application filed that complies with the regulations in effect on the date of the new application. As an incentive, the city council may approve modifications of site development regulations, other than compatibility standards, water quality regulations, or drainage regulations.

*Source: Ord. 990225-70; Ord. 031211-11.*

### **§ 25-1-540 MANAGED GROWTH AGREEMENTS.**

An applicant who files the first application for a project after September 5, 1997 may request that the city council enter into a Managed Growth Agreement for planning and developing large projects, long term projects, or any project which has special benefits that are in the public interest. The agreement may specify the time period during which an application may comply with original regulations and shall establish an expiration date for each application necessary to complete the project if the otherwise applicable expiration date is to be extended.

*Source: Ord. 990225-70; Ord. 031211-11.*

### **§ 25-1-541 WAIVER OF FEES.**

The director shall waive the filing fee for an application that is required to bring a project into compliance with subsequent regulations under this article.

*Source: Ord. 990225-70; Ord. 031211-11.*

### **§ 25-1-542 NONAPPLICABILITY; COUNCIL AGREEMENTS.**

(A) This article does not apply to:

- (1) Chapter 25-12, (*Technical Codes*), or Chapter 25-3, (*Traditional Neighborhood District*), of the City Code;
- (2) all zoning regulations;
- (3) ordinances and regulations for utility connections;
- (4) ordinances and regulations to prevent the imminent destruction of property or injury to persons;
- (5) ordinances and regulations regarding the construction of public works located on public lands and easements.
- (6) ordinances and regulations necessary to comply with federal or state requirements.

(B) The following agreements are governed by their terms and laws applicable thereto and are not subject to this article:

- (1) a planned development area agreement approved by the council or a planned development area combining district;
  - (2) a site plan that was specifically incorporated by reference into a public restrictive covenant, and that may be modified, amended, or terminated by only the mutual agreement of the council and the owners of the property encumbered by the restrictive covenant;
  - (3) a planned unit development zoning district or a Planned Unit Development Agreement in the extra-territorial jurisdiction;
  - (4) a site plan approved by council in connection with a zoning or rezoning request that was specifically incorporated by reference into the ordinance zoning the property covered by the site plan; or
  - (5) a municipal utility district consent agreement;
  - (6) a school district development agreement;
  - (7) a plan for development established in a litigation settlement agreement to which the City is a party;
- or
- (8) Brackenridge Development Agreement.

Source: Ord. 990225-70; Ord. 031211-11.

## **ARTICLE 13. DORMANT PROJECT EXPIRATION.**

### **§ 25-1-551 DEFINITIONS.**

In this article, "permit," "project," and "regulatory agency" have the meanings assigned to them by Texas Local

Government Code Chapter 245 (*Issuance Of Local Permits*).

Source: Ord. 20050512-035.

**§ 25-1-552 EXPIRATION OF PERMITS AND PROJECTS.**

(A) A permit expires on May 11, 2004 if the director determines that:

- (1) the permit did not have an expiration date; and
- (2) no progress had been made towards completion of the project.

(B) Progress towards completion of the project includes any one or more 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 agency.

(C) If all permits for a project expire, the project expires.

Source: Ord. 20050512-035.

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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.<sup>1</sup> 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).<sup>2</sup> 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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<sup>1</sup>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”).

<sup>2</sup>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).<sup>3</sup>

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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<sup>3</sup>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.<sup>4</sup>

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<sup>4</sup>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.<sup>5</sup>

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<sup>4</sup>(...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.

<sup>5</sup>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.

**S U M M A R Y**

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,

A handwritten signature in black ink, appearing to read "Greg Abbott", written over the printed name.

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

## LOCAL GOVERNMENT CODE

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND  
RELATED ACTIVITIESSUBTITLE C. REGULATORY AUTHORITY APPLYING TO MORE THAN ONE TYPE OF  
LOCAL GOVERNMENT

## CHAPTER 245. ISSUANCE OF LOCAL PERMITS

Sec. 245.001. DEFINITIONS. In this chapter:

(1) "Permit" means a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.

(2) "Political subdivision" means a political subdivision of the state, including a county, a school district, or a municipality.

(3) "Project" means an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.

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

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 6, Sec. 1, eff. April 27, 2005.

Sec. 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 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.

(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 the completion of the project. All permits required for the project are considered to be a single series of permits. Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project.

(c) After an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for the project.

(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.

(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.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.  
Amended by:

Acts 2005, 79th Leg., Ch. 6, Sec. 2, eff. April 27, 2005.

Sec. 245.003. APPLICABILITY OF CHAPTER. This chapter applies only to a project in progress on or commenced after September 1, 1997. For purposes of this chapter a project was in progress on September 1, 1997, if:

(1) before September 1, 1997:

(A) a regulatory agency approved or issued one or more permits for the project; or

(B) an application for a permit for the project was filed with a regulatory agency; and

(2) on or after September 1, 1997, a regulatory agency enacts, enforces, or otherwise imposes:

(A) an order, regulation, ordinance, or rule that in effect retroactively changes the duration of a permit for the project;

(B) a deadline for obtaining a permit required to continue or complete the project that was not enforced or did not apply to the project before September 1, 1997; or

(C) any requirement for the project that was not applicable to or enforced on the project before September 1, 1997.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Sec. 245.004. EXEMPTIONS. 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 a municipality;

(3) regulations that specifically control only the use of land in a municipality that does not have zoning and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, or building size;



- (4) regulations for sexually oriented businesses;
- (5) municipal or county ordinances, rules, regulations, or other requirements affecting colonias;
- (6) fees imposed in conjunction with development permits;
- (7) regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication;
- (8) regulations for utility connections;
- (9) regulations to prevent imminent destruction of property or injury to persons from flooding that are 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.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Amended by Acts 2003, 78th Leg., ch. 646, Sec. 1.

Amended by:

Acts 2005, 79th Leg., Ch. 31, Sec. 1, eff. September 1, 2005.

Sec. 245.005. DORMANT PROJECTS. (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 towards 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 agency.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.  
Amended by:

Acts 2005, 79th Leg., Ch. 31, Sec. 1, eff. September 1, 2005.

Sec. 245.006. ENFORCEMENT OF CHAPTER. (a) This chapter may be enforced only through mandamus or declaratory or injunctive

relief.

(b) A political subdivision's immunity from suit is waived in regard to an action under this chapter.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 31, Sec. 1, eff. September 1, 2005.

Sec. 245.007. CONSTRUCTION AND RENOVATION WORK ON COUNTY-OWNED BUILDINGS AND FACILITIES IN CERTAIN COUNTIES. (a) This section applies only to a building or facility that is owned by a county with a population of 3.3 million or more and is located within the boundaries of another political subdivision.

(b) A political subdivision may not require a county to notify the political subdivision or obtain a building permit for any new construction or any renovation of a building or facility owned by the county if the construction or renovation work is supervised and inspected by an engineer or architect licensed in this state.

(c) This section does not exempt a county from complying with the building standards of the political subdivision during the construction or renovation of the building or facility.

Added by Acts 2005, 79th Leg., Ch. 532, Sec. 1, eff. June 17, 2005.

## Late Backup

February 28, 2013

Hon. Lee Leffingwell, Mayor,  
Hon. Sheryl Cole, Mayor Pro Tem, and  
Members of the City Council  
City of Austin  
Austin, Texas

Via E-mail and Hand Delivery

RE: Request to postpone or vote "no" on Agenda Item No. 18, a proposed ordinance amending the City's project duration ordinance and "declaring an emergency"

Dear Mayor Leffingwell, Mayor Pro Tem Cole and Members of Council:

Please postpone any action on your Agenda Item 18, a proposed ordinance amending the city's project duration ordinance and "declaring an emergency."

In the alternative, we ask that you vote "no" on the proposed ordinance until there is sufficient time for the community and, at minimum, the City's Planning Commission, to review and comment on the proposal before a decision is made.

The proposed amendment, if approved, would have far reaching effects on the City's ability to manage growth and to protect water quality, public health, safety and the environment. Such a giant leap should not be made without careful deliberation and the consideration of both the consequences of such an action and potential alternatives to the proposed action.

We are aware that in a recent Opinion the Attorney General has stated, with regard to the City's current expirations, that "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." The opinion was based on a general hypothetical question without regard to such facts as whether a particular expiration was in effect prior to the first application pertaining to a particular project. The opinion is the sort of advisory opinion in the absence of any facts or dispute that our courts are forbidden to consider. No rash action based on the opinion is justified.

We are not aware of any emergency that would warrant bypassing the normal City ordinance adoption process and declaring an "emergency." Neither the ordinance nor the back-up have provided evidence of any such emergency. We see no significant harm that would flow from a postponement of a few weeks; conversely, the consequences of acting hastily could be severe and far reaching in both time and harm done to Austin's public health, safety and welfare.. The actual results of the proposed action have not, as far as we know, been evaluated by staff or interested stakeholders.

Finally, we note that as project sponsors claim "grandfathering" for decades on end, the legal arguments against what is, in effect, perpetual grandfathering, grow stronger. This is

especially true as our water resources are increasingly threatened with pollution and unsustainable uses.

As attorneys with extensive legal experience with Chapter 245 or environmental issues, we ask that you postpone action for at least a few weeks. We are committed to providing you with further input and alternatives for your consideration if the opportunity is provided. .

Thank you for your consideration,

/s/  
Marisa Perales

/s/  
Brad Rockwell

/s/  
Doug Young

/s/  
Bill Bunch

P.S. Sarah Baker Faust joins us in requesting a postponement; however, she was out of reach of computer resources and thus unable to participate in drafting this letter.

RECEIVED

MAR 12 2013

MEMORANDUM OF LAW  
RE IMPACT OF CHAPTER 245  
ON CITY'S PROJECT DURATION ORDINANCE

Planning & Development Review

To: City of Austin Planning Commission  
From: Brad Rockwell of Lowerre Frederick Perales Allmon & Rockwell  
Re: Abbott Opinion GA-0980 & City of Austin project duration ordinance  
Date: March 12, 2013

Attorney General Abbott issued an advisory opinion on December 10, 2012 that City ordinances governing the expiration of a project is inconsistent with Chapter 245 of the Texas Local Government Code. This opinion is being used to scare people into supporting an effort to repeal the project duration ordinance. This proposed repeal would immediately cripple land use regulation for at least 250 projects and prevent the City from applying current land use regulations for decades into the future.

There is no urgency. This City ordinance has been on the books for about 16 years without ever being challenged in court.

The Abbott opinion is deficient. It is perfunctory and doesn't address the arguments made in the briefs submitted by the City and Travis County. Moreover, it rests on fundamentally flawed legal assumptions. For example, the opinion says Chapter 245 "has not provided any further authority under which cities may cause a project to lose the rights granted by chapter 245." But cities do not need grants of authority to exercise police power. The most important flaw of the Abbott opinion is that it draws conclusions about Chapter 245 based on non-statutory statements about the purpose of the statute, rather than looking to the actual language of the statute.

When the language is read closely, it is clear that the Abbott opinion is wrong. In this memo I explain why the City's ordinance involving permit expirations, as it has been applied by the City, does not conflict with Chapter 245. There is no legal reason to repeal the City ordinance.

The governing section of state law is subparagraph (b) of section 245.005. There are two sentences, each applying to two different things. The first sentence says:

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.

This sentence applies to expiration of permits rather than expiration of projects. In addition, this provision appears to be both permissive and prospective. It is a grant of authority to cities, declaring that as of the date of this statute they can if they choose take action to impose expiration dates on permits subject to the "progress towards completion" limitation. There is no language in this sentence repealing existing City Ordinances; to the contrary, it should be read consistently with section 245.002 and to not negate the language of 245.002 which says that projects are governed by the permit expiration dates in effect at the time first application is made. In other words, what section 245.002 says is that if a City enacted an expiration date ordinance by authority it had prior to the enactment of this sentence of section 245.005(b), this pre-existing expiration date ordinance would govern subsequent applications for permits.

The second sentence of section 245.005(b) is quite different from the first. It, unlike the previous sentence, uses a "notwithstanding" phrase to not make it subject to any requirement that it be consistent with section 245.002. It also addresses "projects" rather than the "permits" that are addressed by the previous sentence.

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.

(emphasis supplied) So this sentence, like the City of Austin's project duration ordinance, addresses expiration dates of projects rather than permits. But it applies to and limits only those ordinances "enacted pursuant to this section" — i.e. section 245.005. The City of Austin project duration ordinance was not enacted pursuant to this section. It was enacted before this section existed. So this sentence has no application at all to the City Ordinance.

Citing, *In re Sanchez*, Abbott's opinion correctly states the legal proposition that 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." 81 S.W.3d 794, 796 (Tex. 2002). What I have laid out here is a very reasonable construction of Chapter 245.

- submitted by Bill Bunch to Planning Commission  
3-12-2013

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MAR 12 2013

Questions for PC on grandfathering ordinance:

Planning & Development Review

1. Who asked for the AG opinion? What is that representatives interest in Austin's ordinances? When was it requested?
2. Is the AG opinion binding on the city? On the courts?
3. Does the AG opinion address any specific development or does it only look to the Dormant Projects Ordinance?
4. Please provide a basic summary of the AG opinion?
5. It is our understanding that the City has been threatened with a bill to codify the AG opinion letter with a draft bill prepared by developer lobbyist Dick Brown. Is this true?
6. Who is Dick Brown registered to lobby on behalf of at the City? At the Legislature?
7. Is there a specific development that Dick Brown is working on that was denied grandfathering by City Staff? If so, what is the develop?
8. How many development applications would be revived if the proposed ordinance is approved by the counsel?
9. What bills have been introduced that would curtail Austin land use control powers? Please provide bill numbers, authors, and key provisions.
10. If we pass the proposed ordinance, what assurances do we have that these bad bills will not continue to be pushed at and passed by the legislature? Didn't the legislature pass Chapter 245 in 1999 after Austin adopted a compromise ordinance that was approved by the Real Estate Council and the Chamber of Commerce?
11. Isn't that the same ordinance we are proposing to repeal today?
12. Why was the ordinance okay from 1999 until 2012 but is not okay now?
13. Why is RECA pushing for us to repeal the ordinance that they supported as a reasonable compromise in 1999?
14. What development approvals have been denied over the last year that would now be approved if the proposed ordinance is passed? How far back were these developments seeking to be grandfathered?
15. If we pass the proposed ordinance, does that mean almost all development will be grandfathered forever without any expiration dates?
16. Besides water quality regulations, what other regulations are subject to being "frozen" by Chapter 245's grandfathering provisions?
17. Does it include:
  - street design standards?
  - parking requirements?
  - bicycle parking requirements?
  - flood management?
  - affordable housing requirements?
  - commercial landscape requirements?
  - water conservation requirements?
  - heritage tree protections?
  - zoning to restrict chemical factories or other potentially harmful businesses?



- setbacks between structures?
- compatibility standards between different uses?
- school zone protection measures?
- restrictions on alcoholic beverage sales?
- urban/wildlands interface fire protection requirements?
- waterway buffer zones?

18. How will passing the proposed ordinance affect our ability to implement code changes as part of the Imagine Austin code rewrite process?

19. What are the costs and benefits of taking additional time to explore options?

20. Don't we manage development approvals in the ETJ jointly with Travis County? What is Travis County's recommendation of what we do?

21. Has the City coordinated with Travis County on the proposed ordinance? Does the Travis County attorney have a position on how to respond to the AG opinion? Has the Commissioners Court taken a position?

22. What does Rollingwood do on grandfathering and expiration of permits and projects? What about Westlake? Cedar Park? San Antonio? San Marcos? Fort Worth? Dallas? Plano? Richardson? Brownsville?