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The Honorable Greg Abbott
Office of the Attorney General
Attn: Opinion Committee
209 West 14th Street
Austin, Texas 787101

RE: Supplemental Brief for Opinion Request RQ-1070-GA regarding Texas Local Government Code Chapter 245

Dear General Abbott:

I write on behalf of the Real Estate Council of Austin ("RECA") to reply to the responses of the City of Austin (the "City"), the County Judges and Commissioners Association (the "CJCA"), and Travis County (the "County") to Attorney General Opinion Request (1070). The real estate industry in Central Texas is an industry that generates more than $17.4 billion in total economic activity each year, employs more than 121,000 people in Central Texas and generates $204 million in local tax revenue. RECA's approximately 1,500 members view the issues raised in this request as critically important in fulfilling the legislative intent of the Texas Legislature with respect to Chapter 245 of the Texas Local Government Code ("Chapter 245") to provide regulatory certainty and promote economic development.

The City, the CJCA, and the County, in their respective responses, have attempted to complicate your consideration of this matter by confusing the issues presented and, moreover, by mischaracterizing both Chapter 245 and the ordinance in question, Article 12, Chapter 25-1 of the Austin City Code (the "Project Duration Ordinance"). Despite some complexity in regulatory issues involved, the City and the CJCA either ignore or fail to refute two very simple, facially apparent truths:

(1) As Chairman Oliveira clearly raises in his request, the Project Duration Ordinance is *void* pursuant to Tex. H.B. 1704, Sec. 3(a), 76th Leg., R.S. (1999) ("H.B. 1704") (the adopted bill that established Chapter 245), because the Project Duration Ordinance is (i) "an action taken by a regulatory agency for the issuance of a permit", (ii) after the repeal of the prior version of Chapter 245 and before the effective date of Chapter 245, and (iii) "causes or requires the expiration or termination of a project..." to which Chapter 245 applies.

(2) The Project Duration Ordinance is *contrary* to the *only* legislatively established method available to municipalities to expire projects as set

forth in Section 245.005 of the Texas Local Government Code ("TLGC"), because the Project Duration Ordinance expires some projects within three (3) years of the first application date (instead of five (5) years, as mandated by Chapter 245), and because it expires projects even where "progress towards completion" has occurred.

These two simple conclusions are facially apparent, without the need for any factual determinations, by simply reviewing the text of Section 3 of H.B. 1704, Chapter 245 and the Project Duration Ordinance.

I. The Project Duration Ordinance Expires Projects and is Void Under Section 3, HB 1704, and Contrary to Section 245.005(b) of the TLGC

A. The City and County Mischaracterize the Project Duration Ordinance as Expiring Permits

The City asserts in its response (and the County reiterates in its response) that the Project Duration Ordinance is a valid exercise of the City's right to expire *permits*, and in doing so attempts to confuse the consideration of this matter by mischaracterizing the explicit provisions of the Project Duration Ordinance (*See* City of Austin response, p. 2, ¶ 3 ("[T]he 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')." (emphasis added))). A "project" under Chapter 245 is different from a "permit" thereunder. A "project" is the actual real estate development endeavor being pursued. A "permit" is a governmental authorization needed to begin or continue a project. Under Chapter 245, a permit may expire, but a project may nevertheless continue so long as the project does not become "dormant" under Section 245.005 of the TLGC. While the City is in fact wrongly using the Project Duration Ordinance to expire permits that have not otherwise expired under the Austin City Code, it is doing so on the *basis* that the project has expired. The distinction between a "permit" expiring and a "project" expiring is an important one. If a permit expires at a time when the project has not, then an owner can file for a new permit under the same rules governed by the previous permit. On the other hand, if a project expires, then all subsequent permits must follow the then-current rules, and vested rights are lost.

The Project Duration Ordinance does not "establish *permit* expiration dates" as the City and County contend. Expiration dates for specific permits are expressly found elsewhere in various and entirely different provisions of the Austin City Code.[1] The Project Duration Ordinance, in fact, explicitly expires projects—as its name suggests. Section 25-1-533(B) of the Project Duration Ordinance expressly provides that 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*" (emphasis added). In

[1] For example, preliminary plan expiration is found in Section 25-4-62 of the Austin City Code, site plan expiration is found in Section 25-5-81 of the Austin City Code, and building permit expiration is found in Section 25-11-94 of the Austin City Code (*see attached*).

addition, the Project Duration Ordinance in Section 25-1-533 and 25-1-535 clearly establishes the "regulations" that apply to permit *applications*, not when an approved permit *expires*. The fact that the City may be inappropriately using the Project Duration Ordinance to expire permits as well as projects does not validate or excuse this void City action that expressly "causes or requires the expiration of a project" in clear violation of Section 3 of H.B. 1704.

The City states that it "does not apply those portions of the Project Duration Ordinance that purport to impose different standards and requirements retroactively . . . ." and that "the City *only* applies the requirements that establish 3 and 5-year expiration periods for permit applications . . . ." to projects commenced after September 6, 1997. (*See* City of Austin brief, p. 5, ¶ 1 (citing Guernsey Decl., p. 1, ¶3). Whether the City imposes different standards and requirements retroactively is of no importance in the context of the questions submitted in the opinion request. The City and the County do not contest the fact that the Project Duration Ordinance is "an action by a regulatory agency for the issuance of a permit." The City and the County also admit the Project Duration Ordinance was adopted during the two (2)-year repeal period (*See* City of Austin brief, p. 4, last paragraph). The real issue, therefore, is whether the Project Duration Ordinance "causes or requires the expiration of a project" to which Chapter 245 applies. As Section 25-1-533(B) of the Project Duration Ordinance makes crystal clear, it most certainly does expire such projects. The Project Duration Ordinance, therefore, violates Section 3 of H.B. 1704 and is void.

The CJCA, on the other hand, contradicts the City and the County and acknowledges in its response that the Project Duration Ordinance "does not provide for the expiration of *permits* based upon a project's dormancy. Rather, it provides for the expiration of a *project* if the applicant fails to obtain the requisite building permits within a certain time period (e.g., 3 years) or fails to begin construction before a building permit expires (by its own terms)," without regard to progress toward completion of a project (*See* County Judges and Commissioners Association brief, p. 6, ¶ 1). However, the CJCA response wholly fails to address the central issue raised by Chairman Oliveira's request that the Project Duration Ordinance is void pursuant Section 3 of H.B. 1704. Because the Project Duration Ordinance is void, it can survive, if at all, only if it complies with the "Dormant Project" provisions of Section 245.005 of the TLGC. It does not.

B. The Project Duration Ordinance is Contrary to Section 245.005 of the TLGC

Section 245.005(b) of the TLGC, entitled "Dormant Projects," specifically prohibits placing an "expiration date on a project" less 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." The Legislature provided in Section 245.005(c) the items that may constitute "progress towards completion," which list does *not* require the filing of building permits for every single building in the project. The Project Duration Ordinance is contrary to Section 245.005 of the TLGC on its face because (i) it expires some projects after three (3) years instead of after five (5) years, and (ii) it expires all projects if *all* building permits have not been obtained–instead of the more permissive statutory standard for "progress towards completion." Strangely, the CJCA appears to argue that the Project Duration Ordinance is not contrary Section 245.005 of the Texas Local Government Code because it does not expire permits but instead

expires projects. That is precisely the point raised in Chairman Oliveira's request. Both Section 3 of H.B. 1704 and Section 245.005 of the TLGC expressly prohibit the Project Duration Ordinance's causing or requiring the expiration of "projects." And whereas the County asserts that "project expiration" and "project dormancy" are two different things (*see* County brief p. 2), they are not. Section 245.005(b) of the TLGC clearly prohibits the placing of an "expiration date on a project" that is contrary to its terms.

The City and the County express their misplaced concern for projects remaining "grandfathered in perpetuity," even though both the City and the County acknowledge that Section 245.005 of the TLGC provides a mechanism for a City to expire projects when there has been no progress toward completion. Specifically, the County's brief on page 2 acknowledges that Section 245.005 of the TLGC "allows local governments to prevent unfinished development from remaining grandfathered in perpetuity." Despite this admission, the County nevertheless asserts that the opinion requested by Chairman Oliveira "would render language [in] §245.002(a), §245.002(b), and §245.002(c) totally meaningless" (*See* County brief, p. 3, ¶ 2). The essence of subsections (a), (b), and (c) of 245.002 of the TLGC is that regulatory agencies shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the regulations in effect at the time of filing of the original application. In other words, subsections (a) through (c) grant projects vested rights. To declare the Project Duration Ordinance void as contrary to Section 3 of H.B. 1704 and to presume that a project is grandfathered unless it is considered a dormant project or loses vested rights by changing the nature of the project,[2] would in no way render the language of Sections 245.002 (a), (b), and (c) meaningless. Rather, it would comport with the purpose of a vested rights statute and comply with the dormant project limitations in Section 245.005. Regulatory agencies' authority to adopt permit expiration dates would be untouched by the opinion requested by Chairman Oliveira. RECA acknowledges that the City may set new expiration dates for permits, provided those dates are applied prospectively. What the City cannot do, however, is expire projects contrary to Section 245.005 of the TLGC. The City and County concern about perpetually grandfathered projects is unfounded and irrelevant.

C. Legislative Intent in Section 1 of H.B. 1704 Supports Finding the Project Duration Ordinance Void Under Section 3

The County, in its brief, relies on Section 1(d) of H.B. 1704 and imputes the general legislative intent of H.B. 1704 to the requirements set forth in Section 3 of H.B. 1704. The County cites Section 1(b), which provides:

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[2] In *City of San Antonio v. En Seguido, Ltd.*, the court of appeals held that genuine issues of material fact existed as to whether En Seguido's project remained the same project from the original 1971 plat application, or whether it changed so as to constitute a different project. *City of San Antonio v. En Seguido, Ltd.*, 227 S.W.3d 237, 245 (Tex. App.—San Antonio 2007, no pet.). The court cited the Attorney General for the proposition that "[b]ecause the term project is defined as an endeavor, rights vest in a particular project and are no longer vested if the project changes." *Id.* at 242-43 (citing Tex. Att'y Gen. Op. No. JC-0425 (2001)). Therefore, it is clear that even projects which do not qualify as "dormant" under 245.005 may not be "grandfathered in perpetuity", because when the nature of a project changes significantly enough to constitute a different project, the project loses its vested rights.

> 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.

Travis County brief, p. 2-3. The County relies, in error, on the phrase "that was protected by former Subchapter I, Chapter 481, Government Code" to support its proposition that Section 3 of H.B. 1704 *only* applies to projects for which the original permit was filed before the repeal of Subchapter I, Chapter 481. However, Subchapter I, Chapter 481 clearly governed prospective projects because the purpose of enacting the vested rights statute was to prevent projects from being subjected to constantly varying regulations—not to assign particular expiration dates to particular projects. Additionally, section 1(d) of H.B. 1704 is but one portion of the stated legislative intent. Section 1 of H.B. 1704 also indicates that Chapter 245 is intended to address actions by local governments that result in "unnecessary governmental regulatory uncertainty that inhibits the economic development of the state and increases the cost of housing and other forms of land development and often result in the repeal of previously approved permits . . . ." H.B. 1704, Section 1(b). This intent easily supports finding the Project Duration Ordinance void under Section 3 of H.B. 1704 as the elements of that section have clearly occurred. Most importantly, the County is attempting to read an express limitation on the application of Section 3 of H.B. 1704 that is not actually written in the text of Section 3, by implying a strained interpretation from a portion the general intent portion of the Chapter 245. If the Legislature had intended such a limitation on the application of Section 3 of H.B. 1704, it could have easily provided for such limitation in the text. But it did not.

II. The Project Duration Ordinance Cannot be Presumed Valid because it is Void, and is Preempted by Chapter 245.

The City of Austin argues that the Project Duration Ordinance must be presumed valid under the Texas validation statute, or in the alternative, under a general presumption of validity of governmental actions. These presumptions of validity, however, do not apply here. Under the Texas validation statute in Section 51.003 of the TLGC, a governmental act or proceeding is conclusively presumed to be valid, as of the date it occurred, if three (3) years after the effective date expires and no *lawsuit* to annul or invalidate the act or proceeding has been commenced. TEX. LOC. GOV'T CODE ANN. § 51.003(a) (West 2008). However, under subsection (b) of that statute, Section 51.003 of the does not apply to an act or proceeding that was void at the time it occurred. *Id.* at (b).

Here, although the Project Duration Ordinance became effective in 1999 and more than three (3) years have passed without a *court* action to annul or invalidate being commenced, the validation statute does not apply to the Project Duration Ordinance because the *Legislature* declared it void when it enacted Chapter 245 in 1999, two years later. There was no need for any person to bring a court action within three (3) years of the Project Duration Ordinance because, as Chairman Oliveira correctly notes, the Legislature took corrective action in 1999 at the very next session. Surely, it cannot be the case, as the City appears to contend, that where the Legislature invalidates a City ordinance, the ordinance can still somehow survive such

invalidation simply because a private citizen has not challenged the ordinance in court within three (3) years of its adoption. That would lead to absurd results.

The City further argues that the presumption applies because the Project Duration Ordinance was not void "at the time it occurred." (*See* City of Austin brief, p. 4 ¶ 2). However, it is of no importance whether the Project Duration Ordinance was void when enacted, since the Legislature subsequently declared it void and, as stated above, Section 51.003 of the TLGC by its own terms applies to court actions and not legislative acts. Also, the Legislature invalidated the Project Duration Ordinance retroactively because Chapter 245 applies to projects in progress on or commenced after September 1, 1997.

In addition, the City's power, as a home-rule municipality, is limited by state law that clearly intends to limit such power. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 644 (Tex. 1975). A limitation on the City's power may be by express limitation or by implication where the limitation is clear and compelling. *Id.* Here, in addition to the fact that Section 3 of H.B. 1704 expressly makes actions like the Project Duration Ordinance void, the adoption of the "Dormant Project" provisions in Section 245.005 of the TLGC clearly evidences the unmistakably clear intent to limit the City's ability to expire projects to only those circumstances stated in the statute. Accordingly, the Project Duration Ordinance, which is facially contrary to this clear limitation, is invalid.

Further, the general presumption of validity of governmental actions cited by the City does not validate the Project Duration Ordinance. As discussed above, the Legislature both expressly stated that actions like the Project Duration Ordinance are void pursuant to Section 3 of H.B. 1704 and established the only mechanism for expiring projects in Section 245.005 of the TLGC. Because the Project Duration Ordinance violates Section 3 of H.B. 1704 and is contrary to clear limitations in Section 245.005 of the TLGC, the Project Duration Ordinance cannot be saved by some notion of "general presumption of validity." *See City of Allen v. Public Util. Comm'n*, 161 S.W.3d 195 (Tex. App.—Austin 2005, no pet).

III. Conclusion

The Texas Municipal League's ("TML") brief serves to frame the issues identified in the briefing on this opinion request, where the TML concedes that "[i]t is true that a city ordinance that attempted to contravene the Chapter 245 'dormant projects' requirement would be preempted. In other words, a city ordinance that imposed three-year dormancy would, in fact, be void." (*See* TML brief, pp. 1-2). The TML instead, simply accepting the City's position without questioning it, asserts that the Project Duration Ordinance is valid because it imposes a "permit expiration date." As stated above, this is fundamentally incorrect. Therefore, as the TML brief succinctly acknowledges, once you determine that the Project Duration Ordinance expires projects contrary to Section 245.005 of the TLGC (as opposed to establishing permit expiration dates), it is void.

In conclusion, RECA respectfully requests that you consider this supplemental briefing in support of answering Chairman Oliveira's questions in the affirmative. As Chairman Oliveira indicates, the Project Duration Ordinance is (on its face) void because it violates Section 3 of

H.B. 1704. The Project Duration Ordinance is also clearly, facially contrary to Chapter 245.005 of the TLGC because it expires a project earlier than the fifth anniversary of the first application despite progress having been made towards completion of the project. In light of this conflict with state law, the Project Duration Ordinance cannot be presumed valid under the Texas validation statute or a general presumption of validity of municipal actions.

On behalf of RECA, thank you for your consideration of this matter.

Sincerely,

Andrew Weber