

July 20, 2012

The Honorable Greg Abbott
Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78732

Re: Opinion Request 1070 Regarding Texas Local Government Code Chapter 245

Dear General Abbott:

This firm represents the Home Builders Association of Greater Austin ("HBA") with respect to Opinion Request 1070. The HBA is a 501c(6) trade association that represents the residential construction industry in the five county metropolitan area that includes Austin, Texas. With over 800 member firms, the HBA monitors thirty municipal and county jurisdictions on behalf of its members.

Importance of Opinion Request 1070

Members of the HBA apply for and obtain permits from the City of Austin to construct homes, construct infrastructure and subdivide land. The number of City of Austin ordinances, rules and policies that must be met in order to develop land and construct a house is enormous. Because of the City of Austin's proclivity to constantly change its rules and regulations, every permit, approval application, and construction project is colored by and affected by Chapter 245, Local Government Code ("Chapter 245"). The completion of a residential subdivision, from the filing of the preliminary plat¹ application to the issuance of the certificate of occupancy for the last home frequently takes seven to fifteen years.

Since the passage of Senate 574 in 2005, the City of Austin ("City") has begun taking actions to expire projects pursuant to its Project Duration Ordinance (adopted September 5, 1997) regardless of how much has been invested in the completion of the "project." Under the City's Project Duration Ordinance, the City of Austin terminates a project after a fixed period of time (five or less years) measured from the date the first

¹ The City of Austin requires the approval of a "preliminary plan" if a proposed subdivision of land requires the dedication of public improvements, such as streets. Preliminary plans layout the road, drainage and utility infrastructure for the entire proposed plat. A final plat can be recorded cannot be approved until the City has approved the preliminary plan. Construction plans for the infrastructure are reviewed and approved in conjunction with the approval of the final plat. Once the infrastructure is constructed by the developer and then accepted by the City, then building permits can be issued for actual home construction.

application is filed. If a developer wants to continue a "development" after the City expires the "project" under the City's Project Duration Ordinance, the developer is required to file new applications for all incomplete portions of the project.² The City requires the payment of filing fees for the new applications and the City requires the new applications to comply with all new regulations adopted since the just expired project began. The City's application of its Project Duration Ordinance is of immense economic importance to HBA members and to the public that seeks affordable housing.

Chairman Oliviera's Questions

Critical to one of Chairman Oliviera's questions is the second sentence of Section 245.005(b), as adopted by Senate Bill 574 effective September 1, 2005:

"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 added)

As discussed below, the emphasized language can only be interpreted in light of Sections 1 and 3 of House Bill 1704 adopted in 1999. That is, a regulatory agency could **not** enforce a project duration ordinance prior to the effective date of Senate Bill 574.

Senate Bill 574, which went into effect on September 1, 2005, is the first time vested rights legislation authorized regulatory agencies to adopt or enforce a project duration ordinance, rule or regulation. The Chairman's questions leads to two ancillary questions. Does the phrase "enacted pursuant to this section" operate as a term of limitation so as to distinguish "project duration ordinances" adopted pursuant to Section 245.005(b) from "project duration ordinances" not adopted pursuant to Section 245.005(b)? Is the City's Project Duration Ordinance, adopted during the period between the repeal of Chapter 481 of the Government Code in 1997 and the effective date of House Bill 1704 in 1999 ("period of repeal") and whose enforcement was effectively rendered void by House Bill 1704, restored and made legally enforceable by the passage of Senate Bill 574?

HBA Position on Project Duration Ordinances

The HBA submits this letter to advocate that 1) pursuant to House Bill 1704 (defined below) and Senate Bill 574 (defined below), a regulatory agency, including the City of Austin, may adopt and enforce an ordinance, rule or regulation that causes the expiration of a project **only if** such ordinance, rule or regulation has been adopted in

² See Part 4(B) of the Interim Development Ordinance attached as Exhibit 1.

accordance with Section 254.005(b) of Chapter 245 (effective September 1, 2005); and 2) the City's actions of expiring "projects" pursuant to its Project Duration Ordinance are void under Section 3 of House Bill 1704.

Background on Texas Vesting Laws

For purposes of brevity, this letter adopts the descriptions and legislative designations provided in Chairman Oliviera's Letter requesting an Attorney General's opinion as well as in the June 29, 2012 letter submitted by the Real Estate Council of Austin ("RECA Letter") regarding the various pieces of legislation affecting vested rights in Texas, including, House Bill 4 in 1987 and Senate Bill 1704 in 1995; the inadvertent repeal of Subchapter I, Chapter 481, Texas Government Code ("Chapter 481") in 1997, the City's adoption of its Project Duration Ordinance; and the subsequent passage into law of House Bill 1704 during the 76th Regular Session ("House Bill 1704") which includes the adoption and codification of Chapter 245. Supplementary information is provided in this letter.

House Bill 4

The City of Austin has been openly hostile and resistant to complying with vested rights legislation since the passage of House Bill 4 in 1987. The City narrowly interpreted House Bill 4 to mean that each permit was essentially a separate project. Presumably, the City based its interpretation on the House Bill 4 definition of *Project*: "an endeavor over which a regulatory agency exerts its jurisdiction and for which a permit is required before initiation of the endeavor." (emphasis added)

The impacts of the City's interpretation were economically devastating on commercial development in Austin. Under the City's interpretation of House Bill 4, the construction of subdivision infrastructure was a separate project from the construction of a building on a lot. As a result, the City would review all individual applications under the rules in effect on the date the application was filed. From the early 1980s through the late 1990's, the City of Austin frequently adopted new water quality regulations that typically allowed less impervious cover than the previous water quality ordinance. On many occasions, commercial lots were platted when the allowable impervious cover was 70%. After the filing of the plat application and before the filing of the site plan application, the City would adopt a new water quality ordinance reducing the allowable impervious cover to 40%. As result, the development yield of the lot was dramatically reduced or the lot was rendered unusable. The Austin development community derisively referred to the City's interpretation of House Bill 4 as the "Austin Two Step."

By interpreting a "project" to be effectively the same thing as a permit, the City preemptively negated the issue of project duration.

Senate Bill 1704

The City of Austin applied its Austin Two Step interpretation until the passage of Senate Bill 1704 in 1995 which amended the definition of *Project* to read as follows: "an endeavor over which a regulatory agency exerts its jurisdiction and for which **one or more permits** are required to initiate **or continue** the endeavor." (emphasis added)

Additionally, Senate Bill 1704 amended Section 481.183(a) by adding the following:

Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by such preliminary plans or subdivision plats are considered collectively to be one series of permits. Once an application for a project has been filed, a regulatory agency shall not shorten the duration of any permit required for the project.

Senate Bill 1704 also added a new Section 481.183(b):

This subchapter shall apply to all projects in progress on or commenced after the effective date of this subchapter as originally enacted by Section 1, Chapter 374, Acts of the 70th Legislature, Regular Session, 1987, and the duly adopted requirements in effect at the time the original application for the first permit for the project was filed shall control.

Taken together, these three provisions clearly established the intent of the Legislature to protect "projects" from expiring. If "projects" expired, then the grandfathering protection provided by Chapter 481 would have been largely eviscerated. After the passage of Senate Bill 1704, the City began to complain about "projects" that would never expire. The City's analysis of Senate Bill 1704 was correct. With the explicit clarification that a "project" could be comprised of many different permits over time, a "project" did not expire for purposes of grandfathering protection until the completion of the "project." Quick v. City of Austin, 7 S.W.3d 109, 128 (Tex. 1998).

Austin's Project Duration Ordinance

After the inadvertent repeal of Chapter 481 became publically known, several legislators publically advised the City of Austin to not take advantage of the situation because these legislators committed to restoring vested rights legislation in the 1999 legislative session.

Four days after the effective date of the repeal of Chapter 481 on September 1, 1997, the City adopted Ordinance No. 970905-A ("Interim Development Ordinance" or "Project Duration Ordinance"), a copy of which is attached as Exhibit "1." The City explicitly adopted the Project Duration Ordinance in response to the repeal of Chapter 481. See Part 1(A) of the Interim Development Ordinance. Prior to September 5, 1997, Chapter

481 prohibited a regulatory agency from establishing expiration dates for development projects.

Under the Interim Development Ordinance, the City established two general rules: 1) "an application must comply with the regulations in effect on the date the application is filed;" and 2) if construction is not begun by the specified deadline, then the project, including the preliminary plan expired. Parts 4 and 5 of the Interim Development Ordinance then laid out a complicated framework for expiring projects then in existence. Future projects were given 3 year or 5 year exceptions to the "general rule" to obtain a building permit.

House Bill 1704

During the 1999 Regular Session, sponsors of the legislation that would restore vested rights intentionally sought the same number as Senate Bill 1704 to emphasize dissatisfaction with the City of Austin for the City's actions during the "period of repeal". Section 6 of House Bill 1704 declares the legislation's importance as "an imperative public necessity." The Legislature forwarded House Bill 1704 to the Governor on May 3, 1999. House Bill 1704 went into immediate effect upon the Governor's signature on May 11, 1999.

Sections 1 and 3 of House Bill 1704 control the applicability of Chapter 245 to actions taken by a regulatory agency to expire a project or permit. In other words, the Legislature unequivocally intended to re-establish statutory vested rights law as the controlling law of Texas regarding the issuance and approval of permits, including the expiration of permits and projects.

Section 1(d) clearly articulates the Legislature's intent "that no project, permit, or series of permits protected by former Subchapter I, Chapter 481 of the Government Code would 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 repeal." That is, an action taken by a regulatory agency, such as the Interim Development Ordinance, could not prejudice or expire any project, permit or series of permits that was protected prior to the repeal of Chapter 481.

Section 3 of House Bill 1704, in part, implements the intent stated in Section 1(d) by addressing the possible adverse or "prejudicial" effects of 1) the repeal of Chapter 481 and 2) any actions taken by a regulatory agency during the so called "period of repeal." Section 3 provides that neither the repeal of Chapter 481 nor "any action taken by a regulatory agency for the issuance of a permit," (as those terms are defined by Section 245.001) [during the "period of repeal"] shall "cause or require the expiration or termination of a project, permit or series of permits to which [Chapter 245] applies."

The Legislature intent in responding to the inadvertent repeal of Chapter 481 is clear from Section 1(c) of House Bill 1704: the Legislature sought to restore, "to the extent possible," the status quo of vested rights as it existed on the day before the repeal of Chapter 481. Under Chapter 481 status quo, a project duration ordinance could not have been legally enforced. Section 1(c) speaks to the "restoration" of requirements relating to the processing and issuance of permits. As previously discussed, projects did not "expire" under Chapter 481. Both Section 1(d) and Section 3 reference the expiration of permits and projects and the legislature's intent to make sure permit and project expirations do not occur because of the inadvertent repeal of Chapter 481.

Regarding actions caused by the repeal of Chapter 481, Section 3 of House Bill 1704 provides that any agency action made during the "period of repeal" that causes the expiration of a project, permit or series of permits is "void to the extent necessary to give effect to this section." Section 3 unambiguously applies to any existing or future permit, project or series of permits protected by Chapter 245. The phrase "shall not cause" as well as "Applicability of the Chapter" provision in Section 245.003 denote the prospective application of the provisions of Section 3 to future permits and projects.

The phrase "any action taken by a regulatory agency for the issuance of a permit," refers to the processing and issuance of permits. That is, Section 3 applies to actions by regulatory agencies, including the adoption of ordinances like the Interim Development Ordinance, that affect the processing and issuance of future permits as opposed to actions relating to specific permit applications during the "period of repeal." This meaning is clear when Section 3 is read in the context of the other sections of House Bill 1704 of the repeal of Chapter 481 and the passage of House Bill 1704.

Section 1(c) of House Bill 1704 states: "The legislature finds that the restoration of requirements relating to the processing and issuance of permits and approvals by local governmental regulatory agencies is necessary to minimize to the extent possible the effect of the inadvertent repeal of the former Subchapter I, Chapter 481, Government Code..." (emphasis added). As noted by the Texas Supreme Court in the *Quick* decision, "the stated purpose of the statute [Subchapter I] was to establish requirements relating to the processing and issuance of permits and approvals by governmental regulatory agencies in order to alleviate bureaucratic obstacles to economic development." *Quick* at 128 (emphasis added).

Any other interpretation of the phrase "any action taken by a regulatory agency for the issuance of a permit" cannot be reconciled with Section 1(b),(c),and (d), the remainder of Section 3 or with Section 4 of House Bill 1704. Section 3 does not declare void all actions taken by regulatory agency during the "period repeal," only the application of such actions to the extent the application of such actions violate Section 3 of House Bill 1704. For example, new substantive land development regulations (as opposed to

project duration ordinances) adopted during the "period of repeal" would apply to any new project initiated after the adoption of the new regulations.

Section 245.002(c) and Section 245.005, as set forth in House Bill 1704, also reflect the intent of the Legislature to wipe the slate clean with respect to actions by regulatory agencies that affected or would affect the expiration of permits. Section 245.002(c) mostly restored the language found in Section 481.143(a) that after an application for a project is filed, a regulatory agency cannot shorten the duration of a permit required for the project. Note that this provision presumes that if there is a "permit" there has to be a project.

Section 245.005, as set forth in House Bill 1704, established a process by which a regulatory agency could adopt and legally enforce an ordinance to expire a permit if the permit did not have an expiration date and if the associated project was "dormant." The introductory clause of the first sentence of Section 245.005 established a bright line that an ordinance to expire a permit (without an expiration date) could only be adopted pursuant to 245.005 at least one year past the effective date of House Bill 1704.

Importantly, Section 245.005, as it appears in House Bill 1704, did not authorize the expiration of the "dormant project" itself; but only the expiration of a permit without an expiration date associated with a "dormant project."

City Response to House Bill 1704

Following the enactment of House Bill 1704, the City revised a provision in the Interim Development Ordinance in recognition that Chapter 245 changed the City's definition of "project." See attached Exhibit "2". The attached Ordinance Amendment Review Sheet, prepared by the City of Austin in 1999, also acknowledges that a "project" is distinct from a specific permit or approval:

"Recent changes in state law (H.B. 1704) have changed the definition of project". "This amendment is intended to clarify the Code so that the expiration of a preliminary plan is independent from the expiration of the project."

The City's adoption of this ordinance demonstrates the City's own interpretation that Chapter 245 superseded the Interim Development Ordinance.

2005 Amendment to Chapter 245

Senate Bill 574 was one of two pieces of legislation that amended Chapter 245 during the 2005 Regular Session of the Texas Legislature. As discussed at the beginning of this letter, the second sentence of Section 245.005(b), as added by Senate Bill 574, is

the first time that Texas vested rights legislation authorized regulatory agencies to adopt an ordinance, rule or regulation that could expire a project.

Rules Statutory Interpretation

Although the HBA is fully confident that the Attorney General's Office is cognizant of the statutory interpretation rules found in Chapter 312, Texas Government Code, interpretation of House Bill 1704 (especially Sections 1 and 3) should be made in accordance with Sections 312.005 and 312.006(a). The purpose of Chapter 245 is to protect private sector economic activity. Therefore, Texas vested rights statutes should "be liberally construed to achieve their purpose and to promote justice."

The HBA respectfully requests your consideration of the arguments made in this letter and that your office determine that Chapter 245 as well as the non-codified provisions of House Bill 1704, are the controlling law of Texas regarding the expiration of projects and that any action taken by a regulatory agency that causes the expiration of an existing or future permit, series of permits, or a project based on an ordinance or rule adopted during the "period of repeal" or based on an ordinance or rule that otherwise does not comply with Section 245.005(b) is void to the extent such action violates Chapter 245 and House Bill 1704.

The HBA greatly appreciates the opportunity to convey its position on this critically important issue.

Very truly yours,



Robert J. Kleeman

RJK/dlr

cc: Homebuilders Association of Greater Austin
Texas Association of Builders

EXHIBIT 1

ORDINANCE NO. 970905-A

AN ORDINANCE ESTABLISHING INTERIM REGULATIONS FOR LAND DEVELOPMENT AND DECLARING AN EMERGENCY.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART I. PREAMBLE AND FINDINGS.

- (A) This ordinance is the City's response to the repeal of Subchapter I, Chapter 481 of the Texas Government Code ("Subchapter I"). This ordinance provides 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.
- (B) The Council finds that:
 - (1) the repeal of Subchapter I, Chapter 481 of the Texas Government Code ("Subchapter I") took effect on September 1, 1997;
 - (2) the Texas legislature recently enacted amendments to Section 16.051 of the Water Code to provide for "orderly development, management, and conservation of water resources and preparation for drought conditions in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state;"
 - (3) the City subscribes to the principles contained in these amendments to the Water Code and desires to protect its drinking water supply and be responsive to those principles in the management of its water resources;
 - (4) review of the City land development regulations is necessary to determine whether an amendment to the City Code is necessary as a result of the repeal of Subchapter I;

- (5) comment from the general public, the Planning Commission, and other boards and commissions on any proposed amendments is necessary;
- (6) the process of seeking public comment and review by City boards and commissions on the need for proposed amendments to the City's land development regulations could not have been completed before September 1, 1997, the effective date of the repeal of Subchapter I; and
- (7) it is in the public interest to establish the following interim development regulations to govern the processing, review, and approval of development applications and permits until final adoption by the Council of any amendments to its land development regulations that may be necessary.

PART 2. RELATIONSHIP TO OTHER LAW.

- (A) This ordinance does not extend a deadline for, or expiration date of, an application or approval under Title 13 of the City Code.
- (B) This ordinance supersedes any conflicting provisions of Title 13 of the City Code, of other ordinances outside the Code, and of any other rules or regulations adopted under the Code or ordinances.

PART 3. DEFINITIONS.

In this ordinance:

- (1) **Application** means an application for approval of a preliminary subdivision plan, final subdivision plat, or a site plan.
- (2) **Barton Springs Zone** has the meaning prescribed in Section 13-7-3 of the City Code.
- (3) **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.
- (4) ***Desired Development Zone*** means the area not within the Drinking Water Protection Zone.
 - (5) ***Director*** means the Director of the Development Review and Inspection Department or the Director's designee.
 - (6) ***Drinking Water Protection Zone*** means 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 City's planning jurisdiction.
 - (7) ***First application*** means the first application approved by the City for a project that requires more than one application approval.
 - (8) ***Interested party*** means a person described in Section 13-1-240 of the City Code or an officer of any environmental organization registered with the Director.
 - (9) ***Non-Profit Corporation*** means a non-profit corporation that has been granted tax exempt status under 26 U.S.C. § 501(c)(3).
 - (10) ***Notice of construction*** means a notice required for construction other than construction that requires a building permit.
 - (11) ***Original regulations*** means the regulations in effect on the date that the first application in a series of applications for a project was filed.
 - (12) ***Project*** means a proposal for development that has a specific objective and that requires the approval of one or more applications.
 - (13) ***Regulations*** means land development regulations contained in Title 13 of the City Code or the administrative rules adopted under Chapter 13-1, Article I, Division 4, of the City Code.

- (14) *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.
- (15) *Subsequent regulations* means the regulations in effect on the date that an application other than the first application is filed.

PART 4. GENERAL RULES.

- (A) Except as otherwise provided in this ordinance, 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 no building permit or notice of construction is obtained within the time periods contained in Part 5 and 6, 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 ordinance.

PART 5. EXCEPTIONS TO PROVIDE A ONE-YEAR GRACE PERIOD.

- (A) If an application complies with Sections (B) and (C) of this Part, the application may comply with original regulations if a building permit is approved or a notice of construction is filed before September 6, 1998.
- (B) This Part 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 of the City Code.
- (C) A project with an application described in Section (B) of this Part 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.

PART 6. EXCEPTIONS TO THE GENERAL RULES.

- (A) The exceptions prescribed in this Part do not apply to an application described in Part 5 of this ordinance.
- (B) Within the Drinking Water Protection Zone, the following apply:
 - (1) Except as provided in Section (B)(3) of this Part, 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 Section (B)(3) of this Part, 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 a building permit is approved or 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 a building permit is approved or 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 a building permit is approved or 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 Part 9.

(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 a building permit is approved or 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 a building permit is approved or 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 a

building permit is approved or a notice of construction is filed within five years of the date the first application is filed.

PART 7. 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.

PART 8. APPLICATIONS AND DETERMINATION OF APPLICABLE REGULATIONS.

- (A) To be eligible to appeal the Director's determination on the applicability of Parts 4, 5, 6(B)(1) through (3), or 6(C)(1) or (2) for a project for which the first application was filed before September 6, 1997, an applicant must file the next application for the project not later than 12 months after the effective date of this ordinance. The application must include a request for determination on a form prescribed by the Director.
- (B) The Director shall provide notice of the application and the request for determination, if any, under Sections 13-1-201(a) and 13-1-202 of the City Code and to an officer of any environmental organization registered with the Director not later than 15 days after the receipt of the application and the request for determination.
- (C) The Director shall make a determination under this Part and mail a notice of the determination to the applicant and all interested parties not later than the 30th day after the receipt of the application and the request. The deadlines to secure a building permit or file a notice of construction provided in Parts 5 and 6 shall be extended by the number of days required by the Director to make the determination.
- (D) The notice must include a statement that the applicant or any interested party may appeal the determination no later than the expiration of 10 days after the date of the determination.

PART 9. EXTENSION OF DEADLINES.

- (A) An applicant may file a request for an extension authorized by Part 6 (B)(5) with the Director not later than 60 days before the deadline prescribed in Part 6(B)(4).
- (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.

PART 10. VOLUNTARY COMPLIANCE.

- (A) This Part 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, a building permit must be approved or 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.

PART 11. 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.

PART 12. MANAGED GROWTH AGREEMENTS.

An applicant who files the first application for a project after the effective date of this ordinance 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.

PART 13. APPEALS TO CITY MANAGER.

- (A) An applicant who complies with Part 8 or any other interested party may appeal the Director's decision to the City Manager or the City Manager's designee (the "City Manager") within 10 days of the date of the decision. The scope of an appeal may include the following:
 - (1) the Director's determination of the applicability of particular subsections of Parts 4, 5, 6(B)(1) through (3), or 6(C)(1) or (2) to a project; or
 - (2) the decision to grant or deny an extension under Part 9.

- (B) An appeal may be initiated by filing a completed notice of appeal with the Director on a form provided by the Director no later than 10 days after the date of the decision. The notice of appeal form shall require the following information:
- (1) the name, address, and telephone number of the interested party filing the appeal;
 - (2) the name of the applicant, if the appeal is brought by an interested party other than an applicant;
 - (3) the decision which is appealed;
 - (4) the date the decision to be appealed was made;
 - (5) an indication of the appellant's status as an interested party as defined in this ordinance;
 - (6) a statement giving as specifically as possible the reasons the party appealing believes the decision being appealed does not comply with the applicable provisions of this ordinance.
- (C) An approved plan or permit shall be suspended upon notice of the timely filing of an appeal. No development authorized by a site plan shall occur during the time period during which an appeal may be initiated. No construction which is affected by the appeal of a plan or permit shall occur pending the final disposition of the appeal.
- (D) The appellant has the burden of establishing that the appeal should be granted and may file written briefs with the City Manager with respect to the pending matter within 10 days of receipt of the notice of appeal. An interested party may be represented by an authorized agent.
- (E) The City Manager shall render a decision within 20 days of receipt of the appellant's notice of appeal. If the City Manager fails to render a decision within 20 days of receipt of the appellant's notice of appeal, the appeal is denied.

PART 14. 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 ordinance.

PART 15. NONAPPLICABILITY; COUNCIL AGREEMENTS.

(A) This ordinance does not apply to:

- (1) Chapter 13-8, Technical Codes, or Chapter 13-9, 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 ordinance:

- (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.

PART 16. PARTIAL REPEAL OF SECTION 13-2-502 OF THE CITY CODE.

All exemptions from water quality regulations under Section 13-2-502 of the City Code are repealed on the effective date of this ordinance.

PART 17. ADDITIONAL ORDINANCE.

The City Manager shall present a proposed ordinance to the City Council on October 16, 1997, that establishes a system of incentives and mitigation options, including the transfer of development rights, to encourage compliance in the Drinking Water Protection Zone with water quality regulations.

PART 18. EMERGENCY PASSAGE.

The Council finds that there is an urgent need to provide interim land development regulations as a result of the repeal of Subchapter I of the Texas Government Code and that this constitutes an emergency. Because of this emergency, this ordinance takes effect immediately on its passage for the immediate preservation of the public peace, health and safety.

PART 19. SEVERABILITY.

The provisions of this ordinance are severable. If any provision of this ordinance or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this ordinance.

PART 20. WAIVER.

The Council waives the requirements of Sections 2-2-3 and 2-2-7 of the City Code for this ordinance.

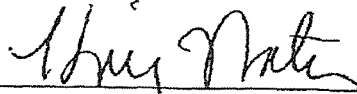
PART 21. EFFECTIVE DATE.

This ordinance takes effect on September 5, 1997.

PASSED AND APPROVED

September 5, 1997.

§
§
§



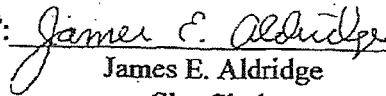
Kirk Watson
Mayor

APPROVED:



Andrew Martin
City Attorney

ATTEST:



James E. Aldridge
City Clerk

EXHIBIT 2

ORDINANCE AMENDMENT REVIEW SHEET

AMENDMENT: C20-99-009

DESCRIPTION:

An ordinance amending Title 25 of the City Code relating to the expiration of preliminary subdivision plans.

BACKGROUND:

This amendment changes the subdivision regulations of the Land Development Code to clarify expiration dates for preliminary subdivision plans. The amendment states that an approved preliminary plan expires three years after the filing date in the Drinking Water Protection Zone and five years after the filing date in the Desired Development Zone.

CURRENT REGULATIONS:

At present an approved preliminary plan expires two years after the date it is approved, unless a final plat application is filed for all or a portion of the preliminary plan within the two-year period and is subsequently approved. The Planning Commission may extend the expiration date for one year, except in the Barton Springs Zone.

The duration of an application may be further affected by Sec. 25-1-535, which specifies that all building permits for a *project* must be issued within three years of the filing of the initial application in the Drinking Water Protection Zone or five years of the filing of the initial application in the Desired Development Zone.

ISSUES:

Recent changes in state law (HB 1704) have changed the definition of *project*. This amendment is intended to clarify the Code so that the expiration of a preliminary plan is independent from the expiration of the project.

DEPARTMENTAL COMMENTS:

None.

STAFF RECOMMENDATION:

To approve the proposed amendment.

BASIS FOR RECOMMENDATION:

The amendment embodies the intent of Ordinance No. 970905-A, which established expiration dates for development projects.

PLANNING COMMISSION ACTION:

June 29, 1999: Recommended 8-0 (Rawlins absent).

CITY COUNCIL ACTION: APPROVED B5-1 (Spellman No, Garcia absent)

ORDINANCE READINGS: 1st 8-5-99 2nd 8-5-99 3rd 8-5-99

ORDINANCE NUMBER: 990805-46

ASSIGNED STAFF: George Zapalac, 499-2725

ORDINANCE NO. 990805-46

1 AN ORDINANCE AMENDING TITLE 25 OF THE CITY CODE RELATING TO
2 THE EXPIRATION OF PRELIMINARY PLANS.

3
4 BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:
5

6 PART 1. Section 25-1-21 of the City Code is amended to add the following definitions
7 in alphabetical order and renumber the definitions in the section accordingly:
8

9 DESIRED DEVELOPMENT ZONE means the area not within the drinking water
10 protection zone.

11
12 DRINKING WATER PROTECTION ZONE means the areas within the Barton
13 Springs Zone, the Barton Creek watershed, all water supply rural watersheds, and
14 all water supply suburban watersheds, as described in Section 25-8-2
15 (*Descriptions Of Regulated Areas*), that are in the planning jurisdiction.
16

17 PART 2. Section 25-1-532 of the City Code is amended to delete the definitions of
18 "desired development zone" and "drinking water protection zone" and renumber the
19 remaining definitions accordingly.
20

21 PART 3. Section 25-4-62 of the City Code is repealed and replaced by a new Section
22 25-4-62 to read as follows:
23

24 § 25-4-62 EXPIRATION OF APPROVED PRELIMINARY PLAN.
25

26 An approved preliminary plan expires:
27

- 28 (1) in the drinking water protection zone, three years after the date the
29 application for its approval is filed; or
30
31 (2) in the desired development zone, five years after the date the
32 application for its approval is filed.
33

34 PART 4. Chapter 25-4 of the City Code is amended to add a new Section 25-4-86 to
35 read as follows:
36

COA 1286

1 § 25-4-86 EFFECT OF PRELIMINARY PLAN EXPIRATION.
2

3 When an approved preliminary plan expires, a pending application for plat
4 approval expires.
5

6 PART 5. The Council waives the requirements of Sections 2-2-3 and 2-2-7 of the City
7 Code for this ordinance.
8

9 PART 6. This ordinance takes effect on AUGUST 15, 1999.
10

11
12 PASSED AND APPROVED

13
14 §
15 §
16 AUGUST 5, 1999 §
17 Kirk Watson
18 Mayor
19
20

21
22 APPROVED: _____ ATTEST: _____
23 Andrew Martin Shirley A. Brown
24 City Attorney City Clerk

COA 1287