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

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.

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Questions for PC on grandfathering ordinance:

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?