

PLANNING COMMISSION

OCTOBER 8, 2013

Handouts

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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.¹ You contend that the Ordinance violates chapter 245 by establishing expiration criteria for building projects that differ from the expiration criteria specified in chapter 245. Request Letter at 3–4. The Ordinance provisions about which you ask are contained in the Austin City Code as sections 25-1-533(B), 25-1-535(B)(4), and 25-1-535(C)(3).² See Request Letter at 3. Section 25-1-533(B) provides that:

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

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

¹See 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").

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

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

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

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

See id. § 25-1-535(C)(3).³

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

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

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

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

ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project.” TEX. LOC. GOV’T CODE ANN. § 245.002(b) (West 2005). The effect of the statute is that “once an application for the first permit required to complete a property-development ‘project’ is filed with the municipality or other agency that regulates such use of the property, the agency’s regulations applicable to the ‘project’ are effectively ‘frozen’ in their then-current state and the agency is prohibited from enforcing subsequent regulatory changes to further restrict the property’s use.” *Harper Park Two, LP*, 359 S.W.3d at 248–49.

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

Section 245.005 provides:

Notwithstanding any other provision of this chapter, any ordinance, rule, or regulation enacted pursuant to this section shall place an expiration date on a project of no earlier than the fifth anniversary of the date the first permit application was filed for the project if no progress has been made towards completion of the project.

Id. § 245.005(b). Under the Ordinance, a project’s expiration date could be sooner than five years after the filing of the first permit application. AUSTIN CITY CODE § 25-1-533(B). Under the statute, however, a project’s expiration date must be no earlier than five years after the filing of the first permit application. TEX. LOC. GOV’T CODE ANN. § 245.005(b) (West 2005). Thus, the Ordinance’s expiration periods conflict with those of the statute. Similarly, under the Ordinance, a project would expire if “all building permits are not obtained or a notice of construction is not filed within the time periods” established by the city. AUSTIN CITY CODE § 25-1-533(B). However, under the statute, a project may not expire unless it meets the dormancy criteria contained in section 245.005. TEX. LOC. GOV’T CODE ANN. § 245.005(c)(2) (West 2005). The failure to obtain all building permits or file a notice of construction within a time period set by the city is not one of the criteria set forth in section 245.005. Thus, the Ordinance’s criteria for expiring a project conflicts with that of the statute. *See In re Sanchez*, 81 S.W.3d at 796.⁴

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

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

⁴(...continued)


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

⁵It 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,


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

#C4

Collier, Virginia

From: Cesaro, Peter J. <PCesaro@gdhm.com>
Sent: Tuesday, October 08, 2013 11:14 AM
To: Collier, Virginia
Cc: Smith, Sharon; Dave Anderson; brian@brianroark.com
Subject: Postponement Request - Item C4 - C12M-2013-0001 (Cascades M.U.D.)

Follow Up Flag: Follow up
Flag Status: Flagged

Virginia,

I represent South IH 35 Investors, LP. It is a property owner adjacent to the Cascades M.U.D. We request a 30 day postponement of this matter at planning commission to continue discussion with the applicant and city staff so easements to adjacent property owners are granted simultaneously with M.U.D. approval.

Let me know if there are any questions.

-Peter

Peter Cesaro
512.480.5728 (p)
512.536.9928 (f)



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Meredith, Maureen

Planning Commission 10/8/13
Items # 7 & 8 - Commodore Perry Estate

From: Allan Cole
Sent: Friday, October 04, 2013 12:07 PM
To: Patterson, Clark; Meredith, Maureen
Subject: Fwd: Zoning case C14-2013-0040 (Perry Estate) Request for Postponement

Clark,

** Postponement Request **

Thanks for being in touch. I am resending yesterday's email. I'm request a postponement until October 22nd. Thank you.

Allan

----- Forwarded message -----

From: Allan Cole
Date: Thu, Oct 3, 2013 at 8:23 AM
Subject: Re: Zoning case C14-2013-0040 (Perry Estate) Request for Postponement
To: Maureen.meredith@austintexas.gov, "Patterson, Clark" <clark.patterson@austintexas.gov>, bc-Dave.Anderson@austintexas.gov, bc-Alfonso.Hernandez@austintexas.gov, bc-Jean.Stevens@austintexas.gov, bc-Danette.Chimenti@austintexas.gov, bc-Jeff.Jack@austintexas.gov, bc-James.Nortey@austintexas.gov, bc-Stephen.Oliver@austintexas.gov, bc-Brian.Roark@austintexas.gov, bc-Myron.Smith@austintexas.gov

Dear Ms. Meredith and Mr. Patterson,

I write on behalf of my neighbors to request a postponement of the Perry Estate zoning change application hearing. My neighbors and I need an opportunity to review the most recent information submitted by the developer and time to gain more of an understanding of what he is proposing and how it impacts the surrounding residences. The developer has put forth numerous conceptual plans over the last several years, and a result is that there is confusion among neighbors about what exactly is being proposed and how it differs, or doesn't, from previous proposals. I appreciate you considering this request and encourage you to be in touch with me should you want additional information.

Please note that this is our first request for a postponement.
Sincerely,

Allan Cole
803 Park Blvd.
Austin, TX 78751
[512-404-4821](tel:512-404-4821) (W)

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www.allanhughcole.com

Allan Hugh Cole Jr.
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John Rosato, Landmark Commission
Mike Ward, Pioneer Fems

STAFF
Jacqui Schraad
Executive Director

October 4, 2013

Chair Dave Anderson and Commission Members
Planning Commission
City of Austin
Sent via E-mail

Re: Re-zoning and design concept of the Commodore Perry Estate

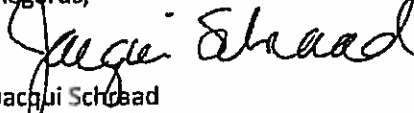
Dear Chair Anderson and Commissioners:

Preservation Austin (formerly The Heritage Society of Austin) expresses our support for the re-zoning and design concept of the Commodore Perry Estate located at 41st and Red River Street. Clark Lyda, the owner of the Estate, is to be commended for finding a creative solution to keep this historic asset financially viable, and for planning a design that is sensitive to both historic preservation and to neighborhood issues.

Mr. Lyda recently completed a meticulous restoration of the mansion, chapel and grounds in strict accordance to the Secretary of Interior's Standards for Rehabilitation of historic structures, with the guidance of restoration architects known for their high standards in preservation. Mr. Lyda's concept and design for a luxury, low-density hotel and residences at the Estate illustrate his high regard for maintaining the Estate's historic structures and improving its historic landscape. Further, the design for the Estate demonstrates his commitment to the neighborhood in which the Estate stands: confining scale and style of new construction to that of existing structures in the neighborhood; improving public features such as sidewalks, lighting and landscaping; keeping a minimum 25' set-back from adjacent residential property lines; planting an urban garden for use by both the Estate and neighborhood residents; and implementing state of the art controls to go beyond the requirements of the City of Austin's sound ordinance.

Preservation Austin believes that the re-zoning and design concept for the Commodore Perry Estate will prove a worthwhile investment, providing a means of financing the preservation and maintenance of this historically valuable property. We support the work that Mr. Lyda has completed to date, and urge implementation of his plan for the Estate. Please let us know if there is anything we can do to help foster the successful redevelopment of this property for our City.

Regards,


Jacqui Schraad
Executive Director

Meredith, Maureen

From: Rebecca Bryant [REDACTED]
Sent: Thursday, October 03, 2013 9:11 PM
To: Meredith, Maureen
Subject: neighborhood plan amendent 2013-018648NP

Tonight I received a note in my door asking me to write you to complain about the Perry Mansion. They put the note at the wrong door. I have lived 3 blocks from the Perry Mansion for 30 years. We have all prayed it wouldn't get torn down. We get a buyer after how many years? That is willing to work with the neighborhood and keep the place special and they want me to complain? Please OK the zoning case and lets move on. I use to watch the water from Shipe pool as it flowed into the creek I have watched my children grow up here. I support this change

Rebecca Bryant
507 East 42nd ST
Austin TX

ARMBRUST & BROWN, PLLC

ATTORNEYS AND COUNSELORS

100 CONGRESS AVENUE, SUITE 1300
AUSTIN, TEXAS 78701-2744
512-435-2300

FACSIMILE 512-435-2360
FACSIMILE 512-435-2399

C14

LYNN ANN CARLEY, P.E.
(512) 435-2378
lcarley@abaustin.com

October 1, 2013

City of Austin Planning Commission

Dave Anderson, Chair
Danette Chimenti, Vice Chair
Jean Stevens, Secretary
Alfonso Hernandez, Parliamentarian
Richard Hatfield

Jeff Jack
James Nortey
Stephen Oliver
Brian Roark
Myron Smith

Re: Republic Square Mixed Use (SP-2012-0434C) – Curb Cut Waiver

Dear Ladies and Gentlemen:

The Republic Square Mixed Use site is located at 401 Guadalupe Street and currently consists of a surface parking lot and vacant building. The proposed project will consist of 160 hotel rooms, 2,401 square feet of restaurant, 226 apartments, and an associated hotel spa, bar, and restaurant.

Section 25-2-643(B) of the Land Development Code prohibits new development on streets adjacent to a downtown park from having surface parking lots, curb cuts, and unscreened garage openings, unless the Land Use Commission waives the prohibition. This property currently has a surface parking lot and curb cut located across Guadalupe Street from Republic Square Park. We are requesting a waiver to the Downtown Parks combining district to replace the existing curb cut on Guadalupe Street with a new curb cut/garage entrance.

Section 25-2-643(B)(2) allows the Land Use Commission to waive this prohibition “after determining that (a) compliance with this prohibition is impractical; (b) the proposed project will not unreasonably impair pedestrian or vehicular movement; and (c) adequate precautions have been made for public safety, convenience, and the aesthetic values of the combining district.” These provisions of the LDC have been met as follows:

- 1) There is currently a curb cut on Guadalupe Street across from Republic Square Park that provides access to a surface parking lot.
- 2) A Traffic Impact Analysis (TIA) was reviewed and approved by City staff in 2013 as part of the related zoning case. In order to assist with traffic congestion, the building was designed so that hotel traffic accesses the parking garage from a driveway on Lavaca Street, while apartment traffic accesses the parking garage from a driveway on Guadalupe Street.

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ARMBRUST & BROWN, PLLC

Page 2

- 3) The Downtown Austin Plan designates both Guadalupe Street and Lavaca Street as Automobile Priority Streets and Bus Priority Streets. These designations reinforce that vehicular access for the site should be located on Guadalupe Street and Lavaca Street, while 4th Street is a pedestrian connector and potential urban rail corridor.
- 4) A decorative roll up garage door is proposed for the garage entrance on Guadalupe Street to screen this access point. A high speed door is proposed, which will open quickly for vehicles entering the garage. In addition, the decorative roll up garage door is located a sufficient distance from the property line, so that a vehicle can pull up to the garage door and still leave space for the ADA route and pedestrians.
- 5) Adding another driveway on 4th Street will disrupt the pedestrian experience, given the Great Streets streetscape being provided.

Based on this information, we hereby request your approval of the Downtown Parks combining district waiver. Upon your review of this information, please feel free to contact Richard T. Suttle, Jr. at (512) 435-2300 or me at (512) 435-2378 with any questions or comments.

Sincerely,



Lynn Ann Carley, P.E.
Senior Land Development Consultant

Enclosures

cc: Christine Barton-Holmes
Shandrian Jarvis
Humberto Rey
Jennifer Wiebrand
Alan Rhames
Richard T. Suttle, Jr.

