KELLY HART

ANDREW WEBER
andrew.weber@kellyhart.com

TELEPHONE: (512) 495-6451
FAX: (512) 495-6401

June 29, 2012

The Honorable Greg Abbott
Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

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

Dear General Abbott:

I write on behalf of the Real Estate Council of Austin ("RECA"). RECA is a business organization that consists of approximately 1,500 members engaged in various aspects of the real estate industry. RECA's members include local architects, engineers, brokers, planners, bankers, developers, attorneys, property managers, and other real estate professionals. RECA represents an industry that generates more than $17.4 billion in total economic activity each year, employs more than 121,000 people in Central Texas for a total labor income of $5.4 billion, and generates $204 million in local tax revenue annually.

RECA believes that every individual in the Greater Austin region should have the opportunity to find meaningful employment, affordable housing, and an outstanding education within a clean and safe environment. This is accomplished by achieving a sustainable balance between economic, social, and environmental interests, which will protect the long-term vitality of our community. RECA also believes that reducing the fiscal impact of an excessive regulatory environment and providing more affordable housing opportunities, where appropriate, are the cornerstones to long-term affordability for businesses and residents. RECA thus advocates for a broad range of interests related to achieving development policies that bring jobs and the resulting sales and property tax revenue to Central Texas.

I. Current Law

As discussed in the above-referenced opinion request, in 1999, the Legislature adopted House Bill 1704 ("H.B. 1704"), now Chapter 245 of the Local Government Code, to reinstate the "vested rights statute" (Chapter 481 of the Government Code) that it had inadvertently repealed two years before. *See* Tex. H.B. 1704, §1(a), 76th Leg., R.S. (1999) ("find[ing] that the former Subchapter I, Chapter 481 . . . [as thereafter amended and existing in] 1995, was

inadvertently repealed . . . in 1997."). Generally, the Legislature expressly found that reinstatement was necessary because the September 1, 1997 inadvertent repeal had "resulted in the reestablishment of administrative and legislative practices that often result in unnecessary governmental regulatory uncertainty that inhibits the economic development of the state . . . and often resulted in the repeal of previously approved permits . . .." *Id.* at Section 1(b). "[R]estoration 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 vested rights statute] . . . ." *Id.* at Section 1(c). Specifically, "the legislative record reflects that bill proponents advocated chapter 245 as an appropriate response to instances when the City of Austin had purportedly imposed new regulatory restrictions retroactively on development projects that were already underway, causing project failures, bankruptcies, and regulatory uncertainty . . .." *Harper Park Two, L.P. v. City of Austin*, 2011 WL 3658923 *2 (Tex. App.—Austin 2011, pet denied) (citing House Research Organization, Bill Analysis, Tex. H.B. 1704, 3-4, 76th Leg., R.S. (2005)(sic)). And it is noteworthy that even the bill's opponents acknowledged that "[m]ost such problems encountered by developers have been confined to Austin." House Research Organization, Bill Analysis, Tex. H.B. 1704, 4, 76th Leg., R.S. (2005)(sic)).

Further, after setting out the text of the reenacted statute in Section 2 of H.B. 1704, the Legislature provided in Section 3, entitled Effect of Prior Law, that "any actions taken by a regulatory agency for the issuance of a permit, *as those terms are defined by [Section 2] . . ., 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* . . . ." Tex. H.B. 1704, §3(a), 76th Leg., R.S. (1999) (emphasis added). To punctuate its prohibition, the Legislature then clarified that "an action by a regulatory agency that violates this section is void to the extent necessary to give effect to this section." *Id.*

A. What then is an "action[] . . . for the issuance of a permit?" under Section 3(a)?

First, the Legislature pointed to the text of Chapter 245 itself (Section 2 of H.B. 1704) to define "any actions taken by a regulatory agency for the issuance of a permit." *Id.* While "permit" and "regulatory agency" are defined terms, the phrase "actions taken for the issuance" is not, *per se*, defined. But the reason for that omission becomes apparent upon review of Section 245.002. In that Section, entitled Uniformity of Requirements, the Legislature addressed the kinds of actions a regulatory body might take related, or with respect to, a permit. The permit application might be approved, disapproved, or conditionally approved. *See id.* at Section 245.002(a) (clarifying that the decision can only be predicated on the law in effect "at the time the original application for the permit is filed."). However, whether a permit is approved, denied or conditionally approved necessarily depends on whether and how the Project Duration Ordinance (as defined below) applies. Specifically, the Project Duration Ordinance

purports to establish the rules and regulations that apply to the permit application and also purports to establish expiration dates for approved permits and projects. Accordingly, "actions taken for the issuance of a permit" must include the adoption of the Project Duration Ordinance because it fundamentally controls and affects the approval, denial, and conditional approval of an application for all permits issued in the City of Austin.

Second, this construction of the phrase is buttressed by the plain meaning of the word "for." In both Webster's Dictionary and Black's Law Dictionary, "for" means "with respect to." BLACK'S LAW DICTIONARY 580 (5th ed. 1979); Webster's Ninth New Collegiate Dictionary 481 (1989). The actions that a local regulatory body might take with respect to a permit would include applying the Project Duration Ordinance to the actions described in Section 245.002. Given Chapter 245's title "Issuance of Local Permits," the phrase "actions taken for the issuance of a permit" simply refers to the general subject matter of the statute.

The City's Project Duration Ordinance is, on its face, an action related, or with respect to, the issuance of a permit because it provides the framework for the City's granting, denying, or conditionally granting every permit application, and it can thus be used to impermissibly "cause or require the expiration" of a project and any permit in the City or to deny the issuance of subsequent permits based on prior permits. See Attachment A, §§ 25-1-531 (B), 25-1-533(B), and 25-1-535(B) (explaining that the Project Duration ordinance "supersedes any conflicting provisions of this title, of other ordinances outside this Code, or any other rules or regulations adopted under the Code or ordinances" and otherwise controlling expiration of building permits and applications).

II. Predecessor Law

In 1987, the Texas Legislature adopted, *inter alia*, Article 7 of House Bill 4 ("Article 7"), commonly known as the "vested rights statute" or the "freeze law." Tex. H.B. 5, 70th Leg., R.S. (1987). In 1989, Article 7, as amended, became Chapter 481, Subchapter I, of the Texas Government Code. *See* Tex. H.B. 1704, § 1(a), 76th Leg., R.S. (1999). This statute limited the ability of local governments to change the rules a real estate development project must follow once the development process for that project had begun. H.B. 4, § 7003, 70th Leg., R.S. (1987). Chapter 481 was very broad and general in its application, and simply required that an application for a permit required for a project be considered solely on the basis of the regulations, ordinances, and requirements in effect on the date the application for the permit was filed. *Id.* This prevented local governments from changing their land development and land use regulations once a landowner committed to develop his or her project under a certain set of rules.

In 1995, § 481.143, Senate Bill 1704 was adopted to enhance the vested rights statute. S.B. 1704 provided that all permits for a project, including a site plan and all other development permits, were one series of permits so that rules in effect on the date of the first permit application governed all subsequent permits, thus providing consistency for economic activity. Tex. S.B. 1704, 74th Leg., R.S. (1995).

In 1997, unfortunately, Senate Bill 932 was adopted to revise the Commerce Department, but it also inadvertently repealed Subchapter I of the Texas Government Code. Thus, the "vested rights statute" was gone. When the Legislature reconvened in 1999, House Bill H.B. 1704 was passed to reenact the "vested rights statute."

III. The Problem

During the gap between 1997 and 1999 (when the vested rights statute and provisions were inadvertently repealed), some municipalities, including the City of Austin, enacted what were thought to be temporary measures to address vested rights and the duration of vested projects. On September 5, 1997, four days after the repeal of the vested rights statute was effective, the City of Austin adopted city code provisions in Article 12, Chapter 25-1 of the Austin City Code ("Article 12" or the "Project Duration Ordinance"), entitled *Project Duration*, which assigned expiration dates to projects (depending on location), and permits.

These provisions conflict with Chapter 245's provisions regarding dormancy and permit expiration. Chapter 245 allows a project to become "dormant" if there exists no demonstrated "progress toward completion"; in that event, the applicant is required to comply with current rules and regulations. TEX. LOC. GOV'T CODE ANN. § 245.005 (West 2005). The Legislature included these dormant project provisions in Chapter 245 to provide a balance so that stale projects cannot sit dormant forever without complying with newer ordinances. The City of Austin's Article 12, however, terminates projects regardless of whether "progress towards completion," as defined in section 245.005, has been made. AUSTIN, TX, CODE §§ 25-1-531 – 25-1-542 (2012).

In imposing its Project Duration Ordinance, the City of Austin ignores those provisions of Chapter 245 that expressly prohibit expiration of a project when progress is being made towards its completion. The City of Austin continues to take the position that if a project expires, the permits for that project (unless building permits have been secured) also expire. This practice directly conflicts with state law, because Chapter 245 does not authorize absolute cut-off dates for either "permits" or "projects," so long as progress is being made towards completion of the project. Where and to the extent the City's Project Duration Ordinance in Article 12 conflicts with Chapter 245, it is necessarily void in order to give effect to the Legislature's express provisions regarding issuance and duration of permits and prohibiting the expiration of projects. Tex. HB 1704, §3(a), 76th Leg., R.S. (1999).

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

Sincerely,

Andrew Weber

ARTICLE 12. PROJECT DURATION.

§ 25-1-531 RELATIONSHIP TO OTHER LAW.

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

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

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

§ 25-1-532 DEFINITIONS.

In this article:

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

(2) CONSTRUCTION means:

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 25-1-533 GENERAL RULES.

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

(B) If a building permit for a building shown on a site plan or a notice of construction expires before construction begins, the project, including the preliminary subdivision plan, expires. If all building permits are not obtained or a notice of construction is not filed within the time periods contained in Sections 25-1-534 *(Exceptions To Provide A One-Year Grace Period)* and 25-1-535 *(Exceptions To The General Rules)*, the project, including the preliminary subdivision, expires. In that circumstance, the applicant must file a new application and comply with the regulations in effect on the date of the new application.

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

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

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

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

(B) This section applies to the following:

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

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

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

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

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

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

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

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

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

(b) $ 1 million.

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

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

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

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

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

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

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

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

(5) The applicant for a project for which the first application is filed on or after September 6, 1997, may request that the director grant a single one year extension of the deadline for building permit approval or the filing of notice of construction under Section 25-1-537 *(Extension Of Deadlines)*.

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

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

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

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

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

§ 25-1-536 NOTICE OF CONSTRUCTION.

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

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

§ 25-1-537 EXTENSION OF DEADLINES.

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

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

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

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

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

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

(b) $ 1 million.

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

§ 25-1-538 VOLUNTARY COMPLIANCE.

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

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

(1) Other than in the Barton Springs Zone, impervious cover must be reduced to not more than the lesser of 25 percent of net site area or of the

impervious cover limitations for the net site area under the regulations in effect for the original application; and

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

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

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

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

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

§ 25-1-540 MANAGED GROWTH AGREEMENTS.

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

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

§ 25-1-541 WAIVER OF FEES.

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

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

§ 25-1-542 NONAPPLICABILITY; COUNCIL AGREEMENTS.

(A) This article does not apply to:

(1) Chapter 25-12, *(Technical Codes)*, or Chapter 25-3, *(Traditional Neighborhood District)*, of the City Code;

(2) all zoning regulations;

(3) ordinances and regulations for utility connections;

(4) ordinances and regulations to prevent the imminent destruction of property or injury to persons;

(5) ordinances and regulations regarding the construction of public works located on public lands and easements.

(6) ordinances and regulations necessary to comply with federal or state requirements.

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

(1) a planned development area agreement approved by the council or a planned development area combining district;

(2) a site plan that was specifically incorporated by reference into a public restrictive covenant, and that may be modified, amended, or terminated by only the mutual agreement of the council and the owners of the property encumbered by the restrictive covenant;

(3) a planned unit development zoning district or a Planned Unit Development Agreement in the extra-territorial jurisdiction;

(4) a site plan approved by council in connection with a zoning or rezoning request that was specifically incorporated by reference into the ordinance zoning the property covered by the site plan; or

(5) a municipal utility district consent agreement;

(6) a school district development agreement;

(7) a plan for development established in a litigation settlement agreement to which the City is a party; or

(8) Brackenridge Development Agreement.

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