GRANDFATHERED PERMITS

The Judicial Expansion of Chapter 212 Moratoria, Chapter 245 "Fair Notice" Technical Requirements and Inverse Condemnation Implications

Grandfather Clauses- origin

- **Post Civil War**, a number of states included "grandfather clauses" in state voting laws intended to disenfranchise black voters and favor white voters.
- These clauses exempted any voter who was a lineal descendant of a grandfather who had been eligible to vote prior to January 1, 1866, or who had been a resident of some foreign nation from the newly enacted voter literacy tests.
- Struck down by the United States Supreme Court as a violation of the Fifteenth Amendment of the United States Constitution. *Guinn v. United States*, 238 U.S. 347 (1915).

Grandfather Clause Today

"A grandfather clause is a provision in which an **old rule continues to apply to some existing situations while a new rule will apply to all future cases...** Often, such a provision is used as a compromise or out of practicality, to effect new rules without upsetting a well-established logistical or political situation. This extends the idea of a **rule not being retroactively applied.**" Wikipedia

Examples of Grandfathering

Public Bonds -Chapter 1202 of the Government Code

-After a public security is approved by the attorney general, registered by the comptroller, and issued, that public security thereafter is

"valid and incontestable in a court or other forum and are binding obligations for all purposes according to their terms."

- Validating and Curative Legislation. Section 51.003, Local Government Code
 - a conclusive presumption of validity for a governmental act or proceeding after three years and no suit or proceeding filed.

Chapter 245, Local Government Code

 In 1999, the Texas legislature enacted Chapter 245 of the Local Government Code entitled "Issuance of Local Permits."

The purpose was to "grandfather" from subsequent legislative amendment or change most local regulatory permits. The result was to freeze the applicable rules to those in effect at the time of the first permit or approval for the project. See- Save our Springs Alliance v. City of Austin, 149 S.W.3d 674, 678

Three Recent Cases- a Sea Change

City of Lorena v. BMTP Holdings -Texas Supreme Court- "Vested" right trumps utilities moratorium.

- City of San Antonio v Greater San Antonio Builders Assoc. and Indian Springs, Ltd- Appeals Court- City Fair Notice Ordinance cannot affect vested rights.
- Kopplow Development, Inc., v. City of San Antonio-Texas Supreme Court- construction of a public improvement can result in a taking of a "vested" permit right.

City of Lorena

• The Supreme Court of Texas rules that lots in approved subdivision cannot be denied utilities by a later moratorium under Chapter 212, Local Gov't Code.

Facts

- Lorena a fast growing city southwest of Waco.
- Fifth phase of BMTP's subdivision approved for 22 additional lots.
- City engineers then decide that the City did not have sewer capacity for 22 additional lots.
- TCEQ begins enforcement action against City for wastewater permit violations.
- The City enacts a moratorium on new sewer connections under Chapter 212, Loc. Gov't Code.

The Moratorium Extended

- The City enacts a series of extensions of the moratorium- a total of seven 120 day extensions.
- Under the moratorium ordinance, applications for new sewer connections were returned unfiled.
- The City, however, grants BMTP sewer connections for fifteen lots already sold prior to the moratorium and *denies connection to the remaining seven lots*.

The Lawsuit

- BMTP sues and claims that the seven remaining lots were exempt under Chapter 212 as "Developed Property" and a regulatory taking of their property .
- City denies the request its approval was only for subdivision, not construction.
- The Trial court rules for the City on both the moratorium issues and inverse condemnation

Court of Appeals

• On appeal, the Court of Appeals reverses and holds that Chapter 212 prohibited the City from enacting a moratorium against lots in an approved subdivision.

At the Texas Supreme Court

- On the City's claim that the suit was premature to be a regulatory taking, Court holds there is no need for BMTP to complete a administrative process that never starts.
- The moratorium ordinance *returned fees and application if there was no capacity-* there was no procedural remedy to exhaust.

Texas Supreme Court

- The Supreme Court reviewed the City's moratorium against Chapter 212 and finds it deficient.
- Specifically held that Chapter 212 requires that any moratorium enacted to prevent a shortage of essential public facilities <u>must not affect approved</u> <u>development.</u>
- Section 212.133(2) Local Gov't Code.

Moratorium cannot apply to Approved Development

Under Chapter 212, a moratorium must be *reasonably limited* to:

(B) property that has not been approved for development because of the insufficiency of existing essential public facilities.

Property Development Defined

Property development means the construction, reconstruction, or other alteration or improvement of residential or commercial buildings or <u>the subdivision</u> or replatting of a subdivision <u>of residential</u> or commercial property.

Section 212.131(3) Local Gov't Code

What is development for purposes of a Chapter 212 moratorium

 Because the 7 lots met the definition of "property development"- an approved subdivision, <u>they were</u> <u>exempt from a moratorium for insufficient public</u> <u>facilities.</u>

Supreme Court Policy Reasoning

 The Court explained that the lots were exempt from any subsequent moratorium because the plat review requirements had already considered utilities in the original City plat review process.

 The Court held that the City, in first approving the plat, was required to consider the impact of the subdivision on utilities when completed. Section 212.047
(1) Local Gov't Code

"Fair Notice Form" Case

• City of San Antonio v. Greater San Antonio Builders Assoc. and Indian Springs, Ltd- Texas Appeals Court (San Antonio)

Chapter 245- Vested Rights

- Chapter 245, Local Gov't Code, expressly requires a City to consider the approval or disapproval of an application for a permit, or a subdivision plat, based on the rules in effect at the time of the original application.
- This "freeze" of land use rules for a project extends from the *first application* through all of the development process.

San Antonio Fair Notice Ordinance

- Ordinance required a property owner also to file an extra Fair Notice application on an existing or proposed project before the City would recognize any of the owner's vested rights.
- City's purpose for the Fair Notice form was to provide the City with *"fair notice"* at the time of the filing of an application for a development plan or a subdivision plat.

The Ordinance Accrual Process

The ordinance specifically required:

"To accrue rights under Chapter 245 of the Texas Local Government Code an applicant shall submit a complete application for a required permit within ... 45 days of the submission of the Fair Notice Form."

Builder and Developer Lawsuit

- Builders and Developer sue to declare that the ordinance unconstitutional because it conflicted with state law- Chapter 245.
- Trial Court agrees with the Builders and Developer and held the ordinance to be in conflict with, and preempted by Chapter 245.

Accrual of Vested Rights

The Court focused on Chapter 245, and exactly when rights accrue:

"... filing of an original application or plan for development that gives the regulatory agency fair notice of the project and the nature of the permit that is sought. "

Section 245.002(a-1) ,Local Gov't Code.

Fair Notice Applied by City

Before the Fair Notice Ordinance, a development had only to show "evidence of a project"- a copy of the original plat or permit.

After the ordinance, a development had to provide all of the new, additional "Fair Notice" data:

- Prior permit numbers
- A new site plan with lot layout,
- Building footprint with square footage
- If the Fair Notice form was incomplete, it was rejected and no vested rights were recognized.

The Court finds conflicts with Chapter 245

- The fair notice ordinance created an *additional procedure* for obtaining recognition of vested rights under chapter 245.
- This additional procedure may wholly preclude the recognition of vested rights accruing under chapter 245 by redefining the manner in which vested rights accrue.
- By the fair notice ordinance the City *can deny* the exercise of vested rights based upon the owner's failure to provide more information than was required to vest rights in the first place.
- Thus, the fair notice ordinance directly conflicts with Chapter 245.

Other Conflicts

The Fair Notice Ordinance stated that only four documents that could vest rights:

- master development plan,
- a plat application,
- a plat or,
- a building permit.
- The Chapter 245 list of documents that can establish a vested right has 12 different sources of vested rights.

Kopplow Development v City of San Antonio

- Landowner purchased property for development, got permits, and filled its property to then current 100 year flood level-741 feet.
- The City then constructed a downstream facility to detain storm water in a significant flood, causing the developer's property to again be below the 100 year flood level and undevelopable without additional fill.

"Vested Rights"

- The City had first granted Kopplow a vested rights permit, allowing development of the property under the rules in effect in November 1996, when he filed his original plat application, now he can't develop.
- Important factor: A vested rights permit doesn't freeze floodplain regulation, such changes can be retroactive. Loc. Gov't Code, Section 245.002, 245.004(9).

Lawsuit and Appeal

- The landowner sought damages under statutory and inverse condemnation theories.
- The City counterclaimed for statutory condemnation.
- The jury awarded damages of \$694,600 to the remainder.
- The court of appeals reversed as to the inverse condemnation claim, *holding the claim was premature because the property had not yet flooded.*
- The Supreme Court finds that the landowner's claim is for the present inability to develop the property as previously approved unless the property is filled, and the claim is therefore not premature.

Loss of the vested right by public improvement

- The source of the direct, immediate restriction on landowner's property is the city's new storm water detention facility, that would subject the land to new flooding in event of 100-year-flood.
- The landowner's claim was based on thwarting of previously approved development, and not flooding, and thus, a lack of ripeness did not bar landowner's inverse condemnation claim.

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A form of regulatory taking of permit right by public improvement

 The direct, immediate restriction on landowner's property is that it can no longer be developed as previously approved, and, on these facts, states an inverse condemnation claim.

Summary-Three Grandfather Rights Cases

- City moratorium under Chapter 212 struck down for a subdivision. -Lorena
- An attempt to make a local change in the vested rights provisions of Chapter 245. -San Antonio Builder's
- A public improvement potentially taking an existing grandfathered permit right. Kopplow

Future grandfathering issues

- Review development process under Chapter 212, with focus on Subchapter B and development plats.
- Define terms, expiration dates to avoid curtailing statutory rights. Draft ordinance in paper.
- Review "technical requirements" ordinances adopted for administration of Chapter 245.
- Review the "may enact" provisions related to a dormant project under Section 245.009.
- Review Lorena and Kopplow inverse condemnation rationale when dealing with permits apparently exempt from grandfathering under Ch. 245, particularly when there is a claim of economic loss.
- Review Chapter 245 to circumstance where the regulatory power is used for economic benefit.