Grandfathered Permits:

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

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Grandfathered Permits

Introduction

In recent years, there has been a sea change in litigation against governmental entities. This trend was evident in the past year when three cases substantially expanded the potential reach and scope of grandfathered permits.

Specifically, the first case found a subdivision plat to have grandfathered a development against a sanitary sewer moratorium under Chapter 212 of the Texas Local Government Code. *City of Lorena v. B.M.T.P. Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013). The second case found that Chapter 245 grandfather rights could not be limited or conditioned on compliance with the administrative, "fair notice" requirements of a City development ordinance. *City of San Antonio v. Greater San Antonio Builders Ass'n & Indian Springs Ltd.*, 419 S.W.3d 597 (Tex. App. — San Antonio 2013, pet. denied). The third case effectively found that a Chapter 245 grandfather permit was, potentially, a property interest protected by Article 1, Section 17 of the Texas Constitution. *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532 (Tex. 2013).

A Wikipedia Definition of a Grandfather Clause

"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... Frequently, the exemption is limited; it may extend for a set period of time, or it may be lost under certain circumstances. For example, a 'grandfathered power plant' might be exempt from new, more restrictive pollution laws, but the exception may be revoked and the new rules would apply if the plant were expanded. 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."

The Post-Civil War Antecedent

Following the 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. These provisions were struck down by the United States Supreme Court as violative of the Fifteenth Amendment of the United States Constitution. *Guinn v. United States*, 238 U.S. 347 (1915). The grandfather concept has, however, lived on to describe any provision that saves and excepts the application of any new rule or regulation to any person, groups of persons or property. *See Save Our Springs Alliance v. City of Austin* 149 S.W.3d 674 (Tex. App. — Austin 2004, no pet.).

Current Examples of Grandfathered Provisions

Validating and Curative Legislation. Section 51.003, Local Government Code

Section 51.003 of the Local Government Code saves and excepts certain governmental actions from future litigation. The section provides a conclusive presumption of validity for a governmental act or proceeding if: (1) the third anniversary of the effective date of the act or proceeding has expired; and (2) a lawsuit to annul or invalidate the act or proceeding has not been filed on or before that third anniversary.

Public Bonds - Chapter 1202 of the Government Code

Bonds approved by the Texas Attorney General are saved and excepted from challenge by Chapter 1202 of the Texas Government Code:

Sec. 1202.006. VALIDITY AND INCONTESTABILITY.

> (a) A public security and any contract the proceeds of which are pledged to the payment of the public security are valid and incontestable in a court or other forum and are binding obligations for all purposes according to their terms:
>
> > (1) After the public security is approved by the attorney general and registered by the comptroller; and
> >
> > (2) On issuance of the public security.
>
> (b) In any action brought to enforce the collection of county or municipal bonds that are payable from ad valorem taxes and that have been approved by the attorney general and registered by the comptroller, the certificate of the attorney general shall be admitted as evidence of the validity of the bonds and the interest coupons pertaining to the bonds.

Permits Grandfathered by Chapter 245, Local Government Code

In 1999, the Texas legislature enacted Chapter 245 of the Local Government Code entitled "Issuance of Local Permits." One court has described the purpose of Chapter 245 as follows:

> ...The legislature considered the problem that arises when a party has applied for a development permit under one set of land-use regulations when those regulations have changed after an application has been filed. It declared that in those situations regulatory agencies should consider development applications based, in part, on the ordinances "in effect at the time the original application for the permit is filed." Tex. Loc. Gov't Code Ann. § 245.002(a) (West Supp. 2004). It also decided that "[p]reliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project." *Id.* § 245.002(b).1 At the same time, the legislature provided that the grandfather clause "does not apply to regulations to prevent imminent destruction of property or injury to persons, including regulations effective only within a flood plain established by a federal flood-control program and enacted

to prevent the flooding of buildings intended for public occupancy. Former section 245.004(9).

Save our Springs Alliance v. City of Austin, 149 S.W.3d 674, 678 (Tex. App. — Austin May 6, 2004, no pet.).

Under the *Save our Springs Alliance* case, the legislative purpose of Chapter 245 was therefore, 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. Specifically, Section 245.002(a) provides:

(a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:

(1) The original application for the permit is filed for review for any purpose, including review for administrative completeness; or

(2) A plan for development of real property or plat application is filed with a regulatory agency.

Excepted from the rule were certain regulations:

Sec. 245.004. EXEMPTIONS. This chapter does not apply to:

(1) A permit that is at least two years old, is issued for the construction of a building or structure intended for human occupancy or habitation, and is issued under laws, ordinances, procedures, rules, or regulations adopting only:

(A) Uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization; or

(B) Local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons;

(2) Municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change

development permitted by a restrictive covenant required by a municipality;

(3) Regulations that specifically control only the use of land in a municipality that does not have zoning and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, or building size;

(4) Regulations for sexually oriented businesses;

(5) Municipal or county ordinances, rules, regulations, or other requirements affecting colonias;

(6) Fees imposed in conjunction with development permits;

(7) Regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication;

(8) Regulations for utility connections;

(9) Regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy; Section 245.004 Local Government Code.

In a special form of legislative lagniappe, in 2005, Chapter 245 was amended to allow a permit holder to take advantage of any subsequent, beneficial change in local regulation. Section 245.002(d) provides:

(d) Notwithstanding any provision of this chapter to the contrary, a permit holder may take advantage of recorded subdivision plat notes, recorded restrictive covenants required by a regulatory agency, or a change to the laws, rules, regulations, or ordinances of a regulatory agency that enhance or protect the project, including changes that lengthen the effective life of the permit after the date the application for the permit was made, without forfeiting any rights under this chapter.

Additionally, Chapter 245 made provision for administrative flexibility:

Section 245.002(f) This chapter does not prohibit a regulatory agency from requiring compliance with technical requirements relating to the form and

content of an application in effect at the time the application was filed even though the application is filed after the date an applicant accrues rights under Subsection (a-1).

Finally, Chapter 245 was limited to solely mandamus, declaratory and injunctive relief:

Sec. 245.006. ENFORCEMENT OF CHAPTER.

(a) This chapter may be enforced only through mandamus or declaratory or injunctive relief.

(b) A political subdivision's immunity from suit is waived in regard to an action under this chapter.

Recent Cases Involving Grandfather Issues

***City of Lorena v. BMTP Holdings. L. P.*, 409 S.W.3d 634 (Tex. 2013.)**

In this case, a suburban municipality approved a phased, final subdivision plat and subsequently enforced a moratorium against the property, citing the municipality's limited sewage system capacity. The landowner sued for a declaratory judgment that the moratorium did not apply against its approved development, as well as for damages arising from a regulatory taking under an inverse condemnation claim.

The trial court granted summary judgment in favor of the municipality on the declaratory judgment and inverse condemnation claims and awarded attorney's fees to the municipality. The court of appeals reversed, holding that the moratorium could not apply to the property in question because it had been approved for development before the moratorium took effect. The court remanded the inverse condemnation and attorney's fees claims.

On appeal, the Texas Supreme Court held:

> We hold that the moratorium cannot apply to the property because the municipality approved the property for subdivision before it enacted the moratorium, and the owner is therefore entitled to prevail on its declaratory judgment claim. We further conclude that, with respect to the inverse condemnation claim, the trial court must resolve factual disputes pertaining to the extent of the government's interference with the owner's use and enjoyment of its property before the merits of the takings claim are judicially addressed. Accordingly, we affirm the judgment of the court of appeals and remand this cause to the trial court for further proceedings.

Id. at 637.

The Facts

Lorena is a fast-growing city southwest of Waco. The BMTP development started in 2003 and consisted of five phases. The disputed lots in this case were in the last phases of the development. The City approved a phase of a BMTP subdivision plat for 22 additional lots. Subsequently, the City's engineers indicated that the City did not have any additional sewer capacity in the existing plant for these lots. The TCEQ then began an enforcement action against the City for wastewater permit violations. In response, the City enacted a moratorium on new sewer connections under Subchapter E of Chapter 212 of the Local Government Code.

The moratorium was extended seven times, 120 days for each extension. The City issued permits for 15 of the 22 lots to be connected based on their prior sale to a third party before the moratorium. Ultimately, BMTP sued over the remaining seven lots, including an amended pleading seeking monetary damages for a regulatory taking. The trial court granted summary judgment for the City and the Court of Appeals reversed.

The Supreme Court held that

- The matter was ripe for adjudication because there was no administrative procedure that needed to be observed. Under the moratorium, fees and application for utilities were returned if there was no capacity.
- The seven remaining lots were exempt under Subchapter E Chapter 212 as Developed Property.

Interpretation of Subchapter E, Chapter 212, Local Government Code, As Grandfathering Development

At the outset, it should be noted that Chapter 212, Subchapter E of the Texas Local Government Code, has no express provisions for grandfathering development permits. Additionally, Chapter 245 of the Local Government Code specifically exempts regulations for utility connections from its grandfather procedures in Section 245.004(8).

In its analysis, the Supreme Court first focused on the procedures for adopting a moratorium under Chapter 212, found in subchapter E, Sections 212.133 and 212.135:

> Sec. 212.133. PROCEDURE FOR ADOPTING MORATORIUM. A municipality may not adopt a moratorium on property development unless the municipality:
>
> (1) Complies with the notice and hearing procedures prescribed by Section 212.134; and
>
> (2) ***Makes written findings*** as provided by Section ***212.135***, 212.1351, or 212.1352, as applicable. (Emphasis added).

The applicable moratorium section related to a shortage of essential public facilities is Section 212.135 that provides:

Sec. 212.135. JUSTIFICATION FOR MORATORIUM: SHORTAGE OF ESSENTIAL PUBLIC FACILITIES; WRITTEN FINDINGS REQUIRED.

(a) If a municipality adopts a moratorium on property development, the moratorium is justified by demonstrating a need to prevent a shortage of essential public facilities. The municipality must issue written findings based on reasonably available information.

b) ***The written findings must include a summary of***:

(1) Evidence demonstrating the extent of need beyond the estimated capacity of existing essential public facilities that is expected to result from new property development, including identifying:

(A) Any essential public facilities currently operating near, at, or beyond capacity;

(B) The portion of that capacity committed to the development subject to the moratorium; and

(C) The impact fee revenue allocated to address the facility need; and

(2) Evidence demonstrating that the moratorium is reasonably limited to:

(A) Areas of the municipality where a shortage of essential public facilities would otherwise occur; and

(B) ***Property that has <u>not been approved</u> for development because of the insufficiency of existing essential public facilities***. (Emphasis added).

The Court then considered the definition of "Property development" in Chapter 212:

(3) "Property development" means the construction, reconstruction, or other alteration or improvement of residential or commercial buildings or the subdivision or replatting of a subdivision of residential or commercial property. Section 212.131(3) Tex. Loc. Gov't Code Ann.

The Court held that if a property meets any of the elements of the definition of "development"; it is exempt from the application of a moratorium for insufficient public

facilities. A moratorium can only address property that has not been approved for development. In this case, BMTP's lots were included in a phased subdivision plat approved by the City, and, therefore, could not be the justification for a development moratorium under Chapter 212.

Accordingly, the Court explained that the lots were exempt from any subsequent moratorium because one of the initial plat review requirements that had been considered was the availability of utilities in the City's subdivision 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, citing Section 212.047(1 of the Texas Local Government Code.[1]

The Supreme Court affirmed the Court of Appeals' holding that the plat was exempt from the moratorium under Chapter 212. *Lorena* at 409 S.W.3d 644. As read by the Court, the effect of the City's plat approval was to grandfather the lots from any subsequent moratorium.

In effect, Chapter 212, subchapter E, was interpreted to constitute a grandfathering of all approved subdivision plats from any subsequent moratorium. A moratorium based on insufficient facilities could not include already approved plats because the City was supposed to have already taken availability into account as part of the plat review process.

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[1] Note that this section is contained in Subchapter B of Chapter 212, "Regulation of Property Development," and describes a separate procedure (typically called a "Development Plat" procedure) that must be specifically adopted by municipal ordinance: "This subchapter applies only to a municipality whose governing body chooses by ordinance to be covered by this subchapter or chose by ordinance to be covered by the law codified by this subchapter." The City of Lorena did not have such a requirement in its ordinance at the time of this lawsuit, yet the Court relies on this section's language to support its decision. There is a provision of Chapter 212.010(a)(2) of the Texas Local Government Code that generally requires approval of a subdivision plat if, inter alia, the plat conforms to the general plan and takes into account access to and extension of sewer and water mains and the instrumentalities of public utilities. These are the same general utility access standards of Section 212.047(2) discussed below.

The review standards for the approval of plats under Section 212.047(1) which provides as follows:

Section 212.047 Approval of Development Plat

The Municipality Shall Endorse Approval on a Development Plat Filed with it if the Plat Conforms to:

(1) The general plans, rules, and ordinances of the municipality concerning its current and future streets, sidewalks, alleys, parks, playgrounds, and public utility facilities;

2) The general plans, rules, and ordinances for the extension of the municipality or the extension, improvement, or widening of its roads, streets, and public highways within the municipality and in its extraterritorial jurisdiction, ***taking into account access to and extension of sewer and water mains and the instrumentalities of public utilities.***[2]; and

(3) Any general plans, rules, or ordinances adopted under Section 212.044. (**Emphasis added**).

As to whether the City's action constituted a regulatory taking, the Court noted the applicability of the *Penn Central* taking test:

> BMTP also seeks damages for the City's application of the moratorium against its seven lots under an inverse condemnation claim for a regulatory taking. We have held that a regulatory taking occurs when the government has unreasonably interfered with a claimant's use and enjoyment of its property. ...To determine whether such an interference has occurred, we follow the Penn Central inquiry, which requires us to consider all of the circumstances surrounding the alleged taking. *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)); *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 672–73 (Tex. 2004). The United States Supreme Court has identified three key factors to guide our analysis: (1) the economic impact on the claimant; (2) the extent of interference with the claimant's investment-backed expectations; and (3) the character of the government's action. *Penn Cent.*, 438 U.S. at 124, 98 S.Ct. 2646. *Lorena*, 409 S.W.3d at 643.

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[2] The language shown in bold is arguably only applicable to access and extension, it does not mention capacity.

The Court then reviewed the disputed state of facts and remanded the matter to the Trial court for a determination under the *Penn Central* test:

> These facts, viewed in the light most favorable to the nonmovant, indicate that the extent of the moratorium's intrusion on BMTP's property is still in dispute. *City of Keller*, 168 S.W.3d at 824. Thus, we cannot determine as a matter of law whether the moratorium's intrusion on BMTP's property went so far as to constitute a taking under Penn Central. See *Hearts Bluff*, 381 S.W.3d at 489. For this reason, the City has failed to meet its burden of establishing that no issues of material fact exist with respect to its interference with BMTP's use and enjoyment of its property and that it is entitled to judgment as a matter of law. *Sheffield*, 140 S.W.3d at 673. Therefore conclude the trial court's grant of summary judgment was error and remand for resolution of these factual disputes and to determine the extent of governmental intrusion before assessing whether a regulatory taking has occurred.

Id. at 646.

One observation is that the rationale of the *Lorena* decision is inconsistent with the specific exemption granted by Section 245.004(8) of the Local Government Code that provides that Chapter 245 does not apply to "regulations for utility connections." The *Lorena* decision establishes a precedent for a new grandfather status for approved subdivision plats from a moratorium on utility connections, completely outside of Chapter 245. The *Lorena* reasoning could be offered to extend grandfathering to any approved subdivision plat from any subsequent regulation that involves any of the other standards included in the review of subdivision plats such as streets, parks and drainage listed in Sections 212.010 or 212.047 of the Local Government Code.

***Fair Notice Ordinance- the City of San Antonio v. Greater San Antonio Builders Assoc. and Indian Springs, Ltd.*, 419 S.W.3d 597 (Tex. App. — San Antonio 2013, pet. denied)**

This case stems from the 2006 enactment of the Fair Notice Ordinance by the City of San Antonio to address the issue of the applicability of city rules and regulations to projects. San

Antonio, Tex., Unified Development Code, § 35–410 (2006). The City's ordinance established an application process for the owner to establish the date of the original application and, thus, the applicability of specific regulations under Chapter 245 of the Local Government Code.

Chapter 245 expressly requires a regulatory agency 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. Tex. Loc. Gov't Code Ann § 245.002(a). This "freeze" of land use rules for a project extends from the first application through all of the development process. Tex. Loc. Gov't Code Ann § 245.002(b).

The 2006 ordinance required a property owner to file an application on an existing or proposed project before the City would recognize any of the owner's vested rights. The 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 stated function of the Ordinance was to establish a standard procedure for a person to accrue a Ch. 245 right. The Court described the Fair Notice Ordinance as follows:

> In February 2006, the City of San Antonio passed the fair notice ordinance. Section 35–410 of the ordinance requires permit applicants to complete a form, the fair notice form, with all permit applications. San Antonio, Tex., Unified Development Code, § 35–410 (2006). The express purpose of section 35–410 is "to provide standard procedures for an applicant to accrue rights under Chapter 245 of the Texas Local Government Code." The provisions of section 35–410 apply to "any application for a permit by which an applicant desires to accrue rights under Chapter 245 of the Texas Local Government Code." *Id.* § 35–410(a). "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." *Id.* § 35–410(e).

Id. at 599.

Therefore, the goal was for the City to carry out its Chapter 245 responsibilities. It wanted enough information to determine whether the project had so changed since the initial project application to determine to require conformance with the current, and not earlier, frozen regulations. An important point was that in order to enforce the Fair Notice Ordinance, the City *would not recognize a Vested Right or issue a permit or plat unless the form was submitted. Id.* at 603.

The Ordinance Made Changes in the Regulatory Process

- Before the Fair Notice Ordinance, a development had only to show "evidence of a project". (i.e., a copy of the original plat or permit.)
- After the ordinance, a development had to provide a form with additional, new "fair notice" required data;
- Prior permit numbers;
- A new site plan with lot layout;
- Building footprint with square footage; and
- If the fair notice form was incomplete, it was rejected and *no* vested rights were recognized.

The Builders Association and Indian Springs, Ltd., a developer, sued for a declaratory judgment challenging the validity of the ordinance *on its face*. Specifically, the challenge was that the Fair Notice Ordinance was void because it conflicted with, and was preempted by the provisions of the Local Government Code. The trial court granted a summary judgment for the Builders, which the Court of Appeals affirmed. The Court of Appeals held that:

- 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 could deny the exercise of vested rights based upon the owner's failure to provide information beyond that which was required to vest rights in the first place.

- Thus, the Fair Notice Ordinance directly conflicted with Chapter 245 and is therefore inconsistent with state law in violation of Article 11, section 5 of the Texas Constitution.

- Additionally the Fair Notice Ordinance limited the instruments and documents that could grandfather a project under Chapter 245, in that it was limited to only these four documents:

  (1) A master development plan,
  (2) a plat application,
  (3) a plat, or
  (4) a building permit.[3]

The Chapter 245 list of documents that can form the basis for a grandfathered right is much longer than these four documents, and, therefore, the limitations of the Fair Notice Ordinance were inconsistent with state law.

Finally, the Fair Notice Ordinance impermissibly redefined the manner in which Chapter 245 rights accrued and went beyond establishing "technical requirements" authorized by Chapter 245.002(f).

Disposition: the Texas Supreme Court denied the City's petition on March 14, 2014. A motion for rehearing was filed on May 15, 2014.

[3] The following can establish a grandfather right under Chapter 245: "a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought." Loc. Gov't Code, Sec. 245.001(1). *Id.* at 602.

***Kopplow Development v. City of San Antonio*, 399 S.W.3d 532 (Tex. 2013)**

In this case, the landowner Kopplow Development purchased property for development and obtained permits for development (flood plain and subdivision plat). The Court also indicated that Kopplow received a "Vested Rights Permit." *Id.* at 533.

Kopplow filled a portion of its property to the 100-year flood plain level 741 feet. The City then constructed facilities, one of which was partly on the dedicated property to divert/detain downstream storm water in a significant flood. This caused the project property to fall below the new 100-year flood plain level, rendering it undevelopable without additional fill.

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

Facts

Kopplow Development, Inc. purchased 18.45 acres of land and filed a plat application in late 1996. The property was below the 100-year FEMA flood plain elevation of 741 feet. With a floodplain permit from the City of San Antonio, Kapplow filled most of the property to 741 feet. For the portion of its property still below the flood plain elevation, Kapplow dedicated a drainage easement. The City then experienced two significant 100-year floods in 1998 and 2002 and responded with new flood improvements. In 2003, the City also asked for a drainage

easement that would be inundated as part of the improvements, and Kopplow refused. In 2004, the City acquired an adjacent 207-acre drainage easement, and built a wall and a berm/dam 1700 feet south of the Kapplow's property. The Court found that, in 2004, the City granted a Chapter 245 grandfathered permit for development of the land based on the rules in effect in 1996, the year of the initial application.

The parties agreed that the effect of the City's dam improvement was to raise the flood elevation two feet. Additionally, the City changed the flood elevation an additional two feet to account for future, upstream development, with the total effect of the public improvements and regulatory changes being that the new FEMA flood elevation increased a total of four feet to 745 feet. The damages sought were based on the cost of additional fill for the remainder, after the City's condemnation of the drainage easement.

Ruling

The Supreme Court reversed the Court of Appeals' ruling on the ripeness of the inverse condemnation claim. The Appeals Court had ruled the claim premature because no flooding had yet occurred. However, the Supreme Court found a regulatory taking based on the cumulative effect of the construction of the public improvements and the regulatory change in raising the flood elevation four feet. The Court held that:

> Kopplow purchased the property to develop it, obtained floodplain and vested rights permits, and filled the property to the 100–year flood level before the City built a flood control project partly on its property to detain storm water on the property. That project prevents Kopplow from developing the property as planned unless it fills it to the new 100–year flood level... Kopplow's inverse condemnation claim sought damages for the fill. The fact that flooding has not yet occurred did not render the claim premature because the claim is based on the thwarting of approved development, not flooding. We thus conclude the award of remainder damages is recoverable under Kopplow's inverse condemnation claim... The direct, immediate restriction on landowner's property

is the city's storm water detention facility that would subject the land to flooding in event of 100-year-flood. The landowner could no longer develop the property as previously approved, and fact that flooding had not yet occurred did not render landowner's inverse condemnation claim premature. The claim was based on thwarting of approved development, not flooding, and thus, a lack of ripeness did not bar landowner's inverse condemnation claim." *Id.* at 540.

The *Kopplow* case creates a judicial remedy of a "taking or damaging" preemption of the exceptions and limitations of remedies under Chapter 245, and creates a constitutional remedy outside of Chapter 245. As noted above, flood regulations are exempted by Section 245 from grandfathering under Section 245.004 (9) of the Texas Local Government Code:

This chapter (245) does not apply to:

(9) regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy; Section 245.004 Local Government Code.

Further, damages are not an enforcement remedy under Chapter 245 for a violation of the Chapter:

Sec. 245.006. Enforcement of Chapter.

(a) This chapter may be enforced *only through mandamus or declaratory or injunctive relief*. (Emphasis added).

Arguably, *Kopplow* can be viewed as the extension of a theory of inverse condemnation damages to include grandfathered rights established by the procedures of Chapter 245, notwithstanding the statutory exemptions and limitations as to flood regulations and remedies of that same chapter.

Future Issues Checklist

Finally, these cases suggest possible future issues to be considered on grandfathered permits.

- ☐ Review development process for possible grandfather consequences of approvals of plats and permits that involve the review and approval of "development" under Chapter 212 and similar Codes. This may include an avowal or disavowal of Subchapter B, Chapter 212 of the Texas Local Government Code.

- ☐ Define terms, expiration dates. Ensure any application or hearing process to internally determine applicability of regulations do not curtail statutory language.

- ☐ Review Technical Requirements ordinances adopted for the administration of Chapter 245 for their effect on existing permits.

- ☐ Review the "may enact" provisions related to dormant projects under Section 245.005 related to expiration dates for dormant projects. See paragraph a and b thereof on the one and five-year expiration provisions.

- ☐ Review the application of *Lorena* and *Kopplow* inverse condemnation reasoning when dealing with permits apparently exempt from grandfathering under Chapter 245 and Section 245.004, particularly if the exemption results in possible economic loss.

- ☐ Review the application of Chapter 245 in circumstances where the City may be viewed as using regulatory power for economic benefit in land condemnation.

APPENDIX

Expiration Ordinance

AN ORDINANCE ESTABLISHING AN EFFECTIVE DATE AND EXPIRATION DATE FOR A PERMIT UNDER THE PROVISIONS OF CHAPTER 245, TEXAS LOCAL GOVERNMENT CODE, AND MAKING OTHER FINDINGS AND PROVISIONS RELATED TO THE SUBJECT.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF __________, TEXAS:

That the Code of Ordinance of the City of _________, Texas is amended to add a new _________ that shall hereafter provide as follows:

_________of the Code of Ordinance of the City of ______, Texas

Section 1. *Definitions:*

As used in this (Ordinance), the following words and phrases shall be defined as follows:

1)"Permit" means a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by the City, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain from the City to perform an action or initiate, continue, or complete a project for which the permit is sought.

[Tex.Loc.Gov't Code § 245.001(1)]

(2) "Project" means an endeavor over which the City exercises its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.

[Tex.Loc.Gov't Code § 245.001(3)]

(3) "Regulatory agency" means the governing body of, or a bureau, department, division, board, commission, or other agency of, a political subdivision other than the City acting in its capacity of processing, approving, or issuing a permit.

[Tex.Loc.Gov't Code § 245.001(4)]

Section 2. *Expiration date for permits with an expiration date on September 1 , 1997.*

All permits shall have the expiration date that was established for such Permit as of September 1, 1997.

Section 3. . *Expiration date for permits without an expiration date on September 1, 1997.*

There is hereby established an expiration date of September 1, 2002 for (1) any permit that did not have an expiration date on September 1, 1997 and (2) on which no progress has been made towards completion.

Section 4. *Expiration date for all other permits and projects.*

There is hereby established for any permit issued from and after September 1, 1997, an expiration date of not 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.

[Tex.Loc.Gov't Code § 245.005(a)]

[Section 5. *Progress towards completion of a project.*

In the interpretation of this (Ordinance), progress towards completion of the project shall include and mean any one of the following acts or activities:

(a) An application for a final plat or plan is submitted to the City or another regulatory agency;

(b) A good-faith attempt is made to file with the City or another regulatory agency an application for a permit necessary to begin or continue towards completion of the project;

(c) Costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located;

(d) Fiscal security is posted with the City or another regulatory agency to ensure performance of an obligation required by the City or another regulatory agency; or

(e) Utility connection fees or impact fees for the project have been paid to the City or another regulatory agency.

[Tex.Loc.Gov't Code § 245.005(c)]