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Zoning and Land Use

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I. INTRODUCTION

THIS Article covers cases from the Survey period which the author believes are noteworthy because they added to the jurisprudence on Zoning and Land Use. The author is indebted to Barry Knight and Tommy Mann for their assistance with the review of cases and drafting portions of this Article.

II. ANNEXATION

The right of landowners to trigger arbitration in an involuntary annexation was addressed in *City of Rockwall v. Hughes*.[1] The City of Rockwall ("Rockwall") sought to annex land under the "sparsely populated" exemption from the three year "annexation plan" requirement contained in chapter 43 of the Texas Local Government Code, however, the owner claimed that Rockwall was circumventing the requirement.[2] Pursuant to section 43.052(i), the owner requested arbitration of the dispute.[3] Rockwall responded that the proposed annexations were exempt from the three year plan and the request for arbitration was not appropriate.[4] After the trial court granted Rockwall's plea to the jurisdiction and dismissed the case, the court of appeals reversed the trial court.[5] The court of appeals found that the plain language of chapter 43 provides that "if the City [of Rockwall] fails to take action on the petition to include the area in the three year annexation plan, the landowner may request arbitration of the dispute."[6]

Because the case involved statutory construction, the Texas Supreme Court reviewed the legal question *de novo*.[7] In a five-to-four decision, the supreme court held that the Rockwall's refusal of the request for arbitration and finding that the proposed annexations were exempt from the three year plan, was an "action" pursuant to the statute.[8] The supreme court stated that ". . . [O]ur standard for construing statutes is not to

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1. 246 S.W.3d 621 (Tex. 2008).
2. *Id.* at 625.
3. *See* TEX. LOC. GOV'T CODE ANN. § 43.052(i) (Vernon 2008).
4. *See* § 43.052.
5. *Hughes*, 246 S.W.3d at 623.
6. *Id.* (emphasis excluded).
7. *Id.*
8. *Id.* at 631.

measure them for logic . . . our standard is to construe statutes to effectuate the intent of the Legislature, with the language of the statute as it was exacted to be our guide unless the context or an absurd result requires another construction."[9] It further held that the landowner has the right to seek a quo warranto action brought by the attorney general or district or county attorney to challenge the annexation, and the Legislature has the opportunity to amend the statute if it so desires.[10] The dissent stated that the majority espoused sound principles of statutory construction but misapplied them by taking "literalism too literally."[11] The dissent found that, "[r]ead naturally, section 43.052(i) means [that] landowners who request inclusion of their land in the city's annexation plan may arbitrate the city's failure to include it."[12]

The appellate opinion in *In re Spiritas Ranch Enterprises, LLP*[13] was issued prior to *Hughes*. The Town of Little Elm (the "Town") proposed to annex property without including it in the town's three year annexation plan. After the landowner sent the Town a letter asking that its property be included in the three year annexation plan in accordance with section 43.052(i), the Town Council voted not to include the land in the three year annexation plan and to proceed with fast track annexation. The landowner, pursuant to section 43.052(i) of the Texas Local Government Code, petitioned the Town for arbitration. The Town placed an agenda item to consider annexation of the property, and the owner sought a temporary restraining order ("TRO") to restrain the Town from taking steps to annex the property.[14]

After the trial court denied the TRO application, the Fort Worth Court of Appeals granted a writ of mandamus to compel the trial court to reverse its order denying the TRO until the issue of arbitration could be decided by the court.[15] Relying on the Dallas Court of Appeals decision in *City of Rockwall v. Hughes*,[16] the court held that a party has a privately enforceable, statutory right to arbitrate a dispute under Section 43.052(i).[17] "[A]fter annexation occurs, an arbitration would be meaningless as [the] landowner could not maintain a private action to disannex the property."[18] The case settled before the Texas Supreme Court decided *City of Rockwall v. Hughes*.

In *City of Cresson v. City of Granbury*,[19] both the City of Cresson ("Cresson") and the City of Granbury ("Granbury") claimed jurisdiction over certain property. Granbury began the annexation process by adopt-

9. *Id.* at 629.
10. *Id.* at 631.
11. *Id.* (Willett, J., dissenting).
12. *Id.*
13. 218 S.W.3d 887 (Tex. App.—Fort Worth 2007, no pet.).
14. *Id.* at 891-93.
15. *Id.* at 901.
16. 153 S.W.3d 709 (Tex. App.—Dallas 2005), *rev'd*, 246 S.W.3d 621 (Tex. 2005).
17. *In re Spiritas Ranch*, 218 S.W.3d at 898.
18. *Id.*
19. 245 S.W.3d 61 (Tex. App.—Fort Worth 2008, pet. granted).

ing a resolution directing its staff to prepare a service plan and call two sets of public hearings to accomplish a series of five one-mile annexations along State Highway 377, a process upheld in *City of Longview v. State ex rel. Springhill Utility District*.[20] The Granbury resolution provided for the annexations to be implemented in sequential order with the first annexation within Granbury's one mile extraterritorial jurisdiction ("ETJ"). After Granbury passed the resolution but before completing the annexation process, several property owners outside of Granbury's ETJ petitioned to have their land included within Cresson's ETJ in accordance with chapter 42 of the Texas Local Government Code. Cresson approved four ordinances accepting the land owners' petitions. Cresson's one-half mile ETJ expanded accordingly. Subsequently, Granbury passed five annexation ordinances and claimed jurisdiction over the disputed property. After the trial court held for Granbury, the Fort Worth Court of Appeals reversed and rendered judgment for Cresson.[21]

The court held that the common law first in time rule—that the first municipality to begin the annexation procedures on unclaimed territory obtains exclusive jurisdiction over that property—was inapplicable after the passage of the Municipal Annexation Act.[22] "A municipality may not annex land included within another municipality's ETJ without the other municipality's consent."[23] Because the property owners petitioned Cresson to include their properties within Cresson's ETJ and Cresson adopted appropriate ordinances before Granbury could pass its ordinances, Granbury's final four annexation ordinances were void. The court also found that Cresson did not violate the Open Meetings Act[24] and enjoined Granbury from continuing to assert jurisdiction over the disputed tracts.[25]

III. BOARD OF ADJUSTMENT

Identifying the correct parties in a judicial appeal of a Board of Adjustment decision was addressed in *Tellez v. City of Socorro*.[26] The owner of a salvage yard petitioned for writ of certiorari and declaratory relief against the City of Socorro ("Socorro") seeking review of the Board of Adjustment's (the "Board's") denial of an application for a nonconforming use permit.[27] After the trial court affirmed the Board's decision, the El Paso Court of Appeals dismissed the suit because the property owner's failed to name the Board as a party and specify how the Board's decision was illegal.[28] The Texas Supreme Court acknowledged that section

20. 657 S.W.2d 430, 431 n.2 (Tex. 1983).
21. *City of Cresson*, 245 S.W.3d at 63.
22. *Id.* at 65-66. The Municipal Annexation Act is now codified at TEX. LOC. GOV'T CODE ANN. §§ 43.001-.907 (Vernon 2008).
23. *City of Cresson*, 245 S.W.3d at 66; *see* TEX. GOV'T CODE ANN. §§ 551.002, 551.043 (Vernon 2004 & Vernon Supp. 2008).
24. *City of Cresson*, 245 S.W.3d at 68-69.
25. *Id.* at 72.
26. 226 S.W.3d 413 (Tex. 2007) (per curium).
27. *Id.* at 414.
28. *Id.*

211.011(a)-(c) of the Texas Local Government Code requires such challenges to be filed within ten days of a Board's decision by verified petition that avers the decision of the Board is illegal and specifies the grounds for the illegality.[29] However, the court found that whether the suit should be dismissed because the Board was not joined as a defendant is a prudential rather than a judicial question, and that nothing indicates the Legislature intended that specific allegations of illegality to be jurisdictional.[30] The Court found that Socorro never objected and its failure to do so waived any defect.[31] This case seemingly overrules years of precedent first established by *Reynolds v. Haws*,[32] which held that the Board of Adjustment is an indispensable party, that the failure to timely file a petition naming the Board as a party defendant is jurisdictional, and that such a case must be dismissed.[33]

IV. INVERSE CONDEMNATION

Procedural requirements for bringing a takings claim were addressed in *Hallco Texas, Inc. v. McMullen County*.[34] Hallco Texas, Inc. ("Hallco") claimed, *inter alia*, that McMullen County's (the "County's") denial of a variance from an ordinance prohibiting landfills within three miles of a water supply reservoir was an unconstitutional taking of property. The trial court and court of appeals granted summary judgment for the County, and the Texas Supreme Court affirmed in a five-to-three decision, finding the causes of action were barred by res judicata.[35]

In 1995, Hallco initially brought a takings claim in state and federal court challenging the County's ordinance, but the County alleged the taking claim was not ripe. The trial court and court of appeals denied Hallco's taking claim, finding that the regulation did not deprive Hallco of a protected property interest.[36] Hallco's federal claim was dismissed without prejudice for lack of ripeness because Hallco did not pursue its state law claims.[37] Hallco did not appeal the court of appeals' determination.

Two years later, Hallco brought a variance request permitting it to operate its landfill in spite of the ordinance enacted by the county commissioners.[38] After the County's subsequent denial of the request and resulting litigation, the supreme court found that Hallco should have brought all of its claims in its original litigation. Hallco's failure to plead the variance issue in the original case barred the claim in the later case.[39]

29. *Id.*; *see* TEX. LOC. GOV'T CODE ANN. § 211.011 (Vernon 2008).
30. *Tellez*, 226 S.W.3d at 414.
31. *Id.*
32. 741 S.W.2d 582 (Tex. App.—Fort Worth 1987, writ denied).
33. *Id.* at 588.
34. 221 S.W.3d 50 (Tex. 2006).
35. *Id.* at 54, 62.
36. *Id.* at 55.
37. *Id.* at 54.
38. *Id.* at 55.
39. *Id.* at 60-61.

The dissent found that Hallco was "whipsaw[ed]" by the County's ripeness defense in the initial case.[40] The dissent would hold the County to its ripeness defense and allow Hallco to proceed with its takings claim.[41]

The Waco Court of Appeals reached a slightly different result in *Trail Enterprises, Inc. v. City of Houston*.[42] The City of Houston ("Houston") passed an ordinance prohibiting oil drilling on the property of Trail Enterprises, Inc. (the "Trail") near Lake Houston. After the jury determined the amount of Trail's damages, the trial court determined that Trail's claims were not ripe and dismissed the claims. The court of appeals reversed and rendered.[43] Houston's counsel argued that Trail's claim was not ripe because a formal permit application had not been submitted. However, the court of appeals held that Trail's claims were ripe upon enactment of the ordinance.[44]

The Texas Supreme Court addressed both regulatory takings and estoppel claims in *City of San Antonio v. TPLP Office Park Properties*.[45] In 1999, the City of San Antonio ("San Antonio") began blocking access from the driveway for a business park to a city street. TPLP Office Park Properties, Inc. ("TPLP") had developed an office park fronting on Interstate 10 ("I-10") in San Antonio city limits. There was limited access to I-10, and the plat for the office park showed a driveway connecting to Freiling Drive ("Freiling"). In response to neighborhood complaints about increased traffic on Freiling, San Antonio decided to close the street access. The owner of the private driveway filed suit, seeking a declaratory judgment and an injunction preventing San Antonio from blocking the driveway's access to the street.[46] The trial court declared that San Antonio was estopped as a matter of law from closing the street access because doing so was an unreasonable exercise of its police power and would result in a compensable taking of TPLP's property rights.[47] The court of appeals affirmed.[48] The Texas Supreme Court reversed, holding that "[San Antonio's] decision and actions to close access between the private driveway and the street constituted a proper exercise of [San Antonio's] police power" and "closing the access would not constitute a compensable taking."[49]

With respect to the denial of access issue, the supreme court stated that "access to a business was not materially and substantially impaired when one access point was closed, but another access point on a public street

40. *Id.* at 63 (Hecht, J., dissenting).
41. *Id.* at 78.
42. 255 S.W.3d 105 (Tex. App.—Waco 2007, pet. filed).
43. *Id.* at 108.
44. *Id.* at 109.
45. 218 S.W.3d 60 (Tex. 2007) (per curiam).
46. *Id.* at 62.
47. *Id.* at 61-62.
48. *Id.* at 63.
49. *Id.* at 62.

remained unaffected."[50] The supreme court further noted that, "[i]f the access to Freiling [was] closed, at least six points of egress and ingress along the I-10 access road [would] remain at the front of the business park."[51] Even though the remaining access points were inconvenient, there was not a substantial impairment of access and thus no inverse condemnation.[52]

Finally, San Antonio argued that the trial court and the court of appeals erred in holding that it was estopped from closing the driveway's access to Freiling.[53] With regard to estoppel, the supreme court indicated that "in exceptional cases a city may be estopped from taking certain actions where circumstances demand application of the doctrine to prevent manifest injustice."[54] "[E]ven if doing justice would otherwise warrant applying principles of estoppel, courts will not apply the doctrine if doing so interferes with a city's ability to perform its governmental functions."[55] TPLP argued that justice required application of the doctrine of estoppel in this case because San Antonio approved the plat depicting the driveway in 1975, and TPLP relied on the plat to confirm access to the property when it decided to purchase the property and spend over one million dollars on improvements.[56] Although these facts indicated a situation that might warrant application of estoppel principles,[57] the supreme court ruled that "estopping a City (sic) from employing its chosen method to regulate traffic would improperly interfere with [San Antonio's] performance of its governmental functions."[58] As a result, San Antonio was not estopped from closing the driveway.[59]

In another case, the city successfully defended an inverse condemnation claim. In *Park v. City of San Antonio*,[60] Park applied for and had approved the rezoning of his property to allow for a golf driving range.[61] The City of San Antonio approved construction permits, and the site was constructed. There was no record of a permit issued for the fence surrounding the driving range. A storm destroyed the poles supporting Park's forty-feet high netting fence around the driving range, and Park applied for a new fence permit using metal poles. San Antonio denied the permit because fences in the district were limited to six feet in height. Park then applied to the Board of Adjustment for a variance and was denied. Park brought suit for negligence, gross negligence and inverse

50. *Id.* at 66 (citing Archenhold Auto Supply Co. v. City of Waco, 396 S.W.2d 111, 114 (Tex. 1965)).
51. *Id.* at 66.
52. *Id.* at 67.
53. *Id.*
54. *Id.* (citing City of White Settlement v. Super Wash, Inc., 198 S.W.3d 770, 774 (Tex. 2006)).
55. *Id.* at 67 (citing *Super Wash*, 198 S.W.3d at 776).
56. *Id.* at 67.
57. *Id.*
58. *Id.*
59. *Id.*
60. 230 S.W.3d 860 (Tex. App.—El Paso 2007, pet. denied).
61. *Id.* at 864.

condemnation.[62] Relying heavily Park's application for the rezoning, the court upheld summary judgment in favor of San Antonio on the negligence claims and upheld the trial court's ruling for San Antonio on the inverse condemnation claim, finding that all economically viable use of the property was not taken.[63]

In *Rowlett/2000, Ltd. v. City of Rowlett*,[64] a developer brought an inverse condemnation action against the City of Rowlett ("Rowlett") for repeatedly denying rezoning applications for certain real estate.[65] The property was zoned as a single family lot with a minimum lot size of one acre when the developer purchased it, and the rezoning applications were for higher density single family developments similar to those adjacent to the property. Appraisers for both the developer and Rowlett agreed that the property was undevelopable under the one-acre zoning. Market value for development of single family land in the area was approximately $25,000 an acre while the value under the one acre zoning was only $2,500 an acre.[66] The court held that the minimum lot size ordinance did not deprive the developer of all economically viable use of the property.[67]

In *Howeth Investments, Inc. v. White*,[68] a developer sought to subdivide a property into two flag lots. The Planning and Zoning Commission failed to take action on the plat applications within thirty days and ultimately denied the requests.[69] In addition to suing the City of Hedwig Village, the developer also brought suit against the individual members of the Commission for a state law regulatory taking because of the failure to issue "no action certificates" and the wrongful denial of the applications. In addition, the developer attempted to reserve its federal takings claim.[70] The case was severed and the appeal only dealt with the developer's ability to bring a suit against the individual Commission members. The court of appeals held that the trial court, by granting summary judgment, could not have addressed the reserved federal claim.[71] If the developer had abandoned its state takings claim against the individual defendants, the trial court should have dismissed the claim without prejudice instead of rendering a take-nothing summary judgment.[72]

62. *Id.* at 864-65.
63. *Id.* at 869.
64. 231 S.W.3d 587 (Tex. App.—Dallas 2007, no pet.).
65. *Id.* at 589.
66. *Id.* at 592-94.
67. *Id.* at 594.
68. 227 S.W.3d 205 (Tex. App.—Houston [1st Dist.] 2007, no pet.).
69. *Id.* at 207.
70. *Id.* at 208.
71. *Id.* at 210.
72. *Id.* at 211.

V. PREEMPTION

City of Mont Belvieu v. Enterprise Products Operating, LP[73] addressed whether the Legislature intended to fully preempt a municipality's authority to regulate underground salt-dome hydrocarbon facilities.[74] Enterprise Products Operating, LP ("Enterprise") obtained permits from the Texas Railroad Commission ("TRCC") to operate and maintain an underground hydrocarbon storage facility and to drill a well to access the storage facility. The City of Mont Belvieu filed suit after Enterprise began site work because Enterprise had not obtained a drilling permit required by city ordinance, had violated zoning regulations, and had created a nuisance.[75] Enterprise argued for preemption, and the trial court granted its plea to the jurisdiction. The Houston Fourteenth Court of Appeals held that preemption was an affirmative defense and was not an appropriate issue to be resolved in a plea to the jurisdiction and remanded.[76] The court discussed the preemption issue and stated that the city ordinance would only be preempted to the extent it conflicted with the state statute with "unmistakable clarity."[77] "Simply because the Legislature has enacted a law addressing a subject matter does not mean that the Legislature completely preempted the subject matter."[78] In this case, chapter 211 of the Texas Natural Resources Code did not state that the Legislature has intended for the TRCC to have exclusive jurisdiction, and it expressly stated that cities could retain regulatory authority.[79]

VI. SEXUALLY ORIENTED BUSINESSES

In *Illusions-Dallas Private Club, Inc. v. Steen*,[80] owners of sexually oriented businesses ("SOB") located in designated dry areas challenged a Texas Alcoholic Beverage Code provision preventing them from renewing their permits as private clubs to serve alcohol.[81] The businesses brought claims for denial of due process and First Amendment violations.[82] The court stated that it did not even have to reach the question of whether the permits constituted property interests because the Alcoholic Beverage Code provision was generally applicable. As a result, the due process rights of the businesses could not have been violated.[83] However, the court did recognize that the business owners had a viable claim under the First Amendment.[84] The court applied intermediate

73. 222 S.W.3d 515 (Tex. App.—Houston [14th Dist.] 2007, no pet.).
74. *Id.* at 517-18.
75. *Id.* at 517.
76. *Id.* at 521-22.
77. *Id.* at 520.
78. *Id.*
79. *Id.* at 521; *see* TEX. NAT. RES. CODE §§ 211.002(a), 211.011 (Vernon 2001).
80. 482 F.3d 299 (5th Cir. 2007).
81. *See* TEX. ALCO. BEV. CODE ANN. § 32.03(k) (Vernon 2007).
82. *Id.* at 303-04.
83. *Id.* at 304.
84. *Id.* at 305.

scrutiny to the law.[85] In particular, the Texas Alcoholic Beverage Code provision was "constitutional if (1) the State regulated pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating negative secondary affects; and (4) the regulation is designed to serve a substantial governmental interest, is narrowly tailored, and reasonable alternative avenues of communication remain available, or, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest."[86] The court found that the Texas Alcoholic Beverage Commission had not advanced a substantial governmental interest in enforcing the law.[87]

Terminating a SOB was addressed in *City of Arlington v. Centerfolds, Inc.*[88] Centerfolds, Inc. ("Centerfolds") was operating a SOB before the City of Arlington ("Arlington") enacted a prohibition on such operations within 1,000 feet of a residence. SOBs in existence on the prohibition date were allowed to apply for an exemption to the location restrictions each year. Centerfolds had obtained a location exemption every year. Centerfolds changed tenants at the location and was not operational for several months. When it applied to renew its exemption after it reopened, the Amortization Appeal Board (the "Board") denied the application.[89] The Board terminated the use, but the court held that Centerfolds was denied procedural due process because witnesses at the Board hearing were not allowed to be fully cross-examined.[90] An administrative decision is arbitrary and may be overturned if it does not comply with procedural due process requirements.[91] Due process requires fair play and the opportunity to cross examine witnesses.[92] Consequently, the court ruled for Centerfolds and remanded the case finding the Board's decision to be arbitrary and capricious and a denial of due process.[93]

Simply because a SOB is operational does not mean it is immune from a new ordinance according to *Smartt v. City of Laredo*.[94] Smartt operated a SOB outside of Laredo's city limits, and in 1998, the City of Laredo ("Laredo") annexed his property. Later, Laredo amended its zoning ordinance to require SOB's to obtain licenses and to prevent their operation within 1,000 feet of a residential area. Smartt's business was located within this barrier, and Laredo sued to enjoin the sexually-oriented business use at the Smartt location. Smartt challenged the ordinance by

85. *Id.* at 307.
86. *Id.* at 311.
87. *Id.* at 315.
88. 232 S.W.3d 238 (Tex. App.—Fort Worth 2007, pet. denied).
89. *Id.* at 242.
90. *Id.* at 248.
91. *Id.* at 249.
92. *Id.* at 250-51.
93. *Id.* at 254.
94. 239 S.W.3d 869 (Tex. App.—Amarillo 2007, pet. denied).

claiming that his rights to use his property had been "grandfathered."[95]

The court relied on the Texas Supreme Court decision of *City of University Park v. Benners*[96] to hold that Smartt's business had not been grandfathered because zoning ordinances may be applied to terminate previously existing nonconforming uses.[97] Next, Smartt challenged the constitutionality of the Laredo ordinance as a violation of the First Amendment.[98] The court relied on the United States Supreme Court decision of *City of Renton v. Playtime Theatres*[99] for the rule that regulations on the "time, place, and manner" of an activity are "content neutral" and not abridgements of First Amendment freedom of speech.[100] The court viewed the Laredo ordinance as a "content neutral" law, and the decision of the lower court was affirmed.[101]

VII. VESTED RIGHTS

Chapter 245 of the Local Government Code is the state vested rights statute. The definition of a "project" under the statute was addressed in *City of San Antonio v. En Seguido, Ltd.*[102] In 1971 a subdivision plat for one lot on a twenty-seven acre tract of land was approved by the city. In 1999, the San Antonio Public Service confirmed that gas and electric service was available to the area. The next year, the owner obtained a Development Rights Permit ("DRP") from the City's Planning Department, and the San Antonio River Authority ("SARA") accepted the sanitary sewer plan and profiles for the project. En Seguido, Ltd. ("El Seguido") purchased the land in 2004 and then entered into a sewer agreement with SARA and paid impact fees for 154 sewer connections.[103] When a dispute arose between the landowner and the City of San Antonio with respect to En Seguido's ability to rely on the 1971 land use regulations, a lawsuit was filed. Following the filing of En Seguido's lawsuit, the trial court entered a partial summary judgment in En Seguido's favor.[104]

In its first issue on appeal, San Antonio argued that En Seguido did not have any vested rights in development based on the 1971 plat because: (1) En Seguido was not completing the same project identified and approved in the 1971 plat; (2) the 1971 plat was not a required permit that would trigger vested rights; and (3) the project contemplated in the 1971 plat had become dormant.[105] En Seguido countered by stating that San Antonio's interpretation of when rights vest is based on an overly narrow reading of the term "project." En Seguido further responded that the

95. *Id.* at 870-71.
96. 485 S.W.2d 773 (Tex. 1972).
97. *Smartt*, 239 S.W.3d at 871.
98. *Id.* at 872.
99. 475 U.S. 41 (1986).
100. *Smartt*, 239 S.W.3d at 872.
101. *Id.* at 872-73.
102. 227 S.W.3d 237 (Tex. App.—San Antonio 2007, no pet).
103. *Id.* at 239-40.
104. *Id.* at 240.
105. *Id.* at 241.

1971 plat was a required permit and the project had not become dormant.[106] The San Antonio Court of Appeals held that there was a material fact issue as to whether the project identified in the 1971 plat was the same as the current project.[107]

The City of San Antonio also argued that the 1971 plat was not a required permit because it was for one lot, and no subdivision occurred under chapter 212 of the Texas Local Government Code.[108] As a result, "En Seguido did not have vested rights based on the 1971 plat because it was not *a required* permit."[109] According to the court, section 245.002(a) does not refer to a required plan or plat.[110] Further, preliminary plans and plats are considered to be one series of permits for the project under section 245.002(b).[111] "Reading the two sections together, the filing of a plan for development or plat application, including preliminary plans and plats, gives rise to vested rights regardless of whether the plan or plat was required to be filed."[112]

Finally, San Antonio argued that there was no progress towards completion as of May 11, 2000, at which point the project became dormant.[113] However, such an interpretation of this statute would strip a project of its vested rights four years before the statutory deadline with no means to restore dormant vested right.[114] Section 245.005(a) mandates that the expiration date for dormant projects can be "no earlier than the fifth anniversary of the effective date of this chapter."[115] The court of appeals rejected San Antonio's dormancy argument,[116] finding En Seguido or its prior owners had taken actions to complete the project. According to the court of appeals, section 245.005 is not an exhaustive list of the activities that "can be considered in determining whether progress had been made towards the completion of a project."[117] While the record contained evidence of actions to complete the project, the court found that "reasonable people could differ as to whether the actions taken were sufficient to constitute progress toward completion," and because a material fact issue was involved, the trial court erred in granting summary judgment.[118]

The San Antonio Court of Appeals subsequently addressed the same

106. *Id.*
107. *Id.* at 243.
108. *Id.*; *see* TEX. LOC. GOV'T CODE ANN. § 212.004 (Vernon 2008).
109. *En Seguido*, 227 S.W.3d at 243 (citing 2218 Bryan Street, Ltd. v. City of Dallas, 175 S.W.3d 58, 62-64 (Tex. App.—Dallas 2005, pet. denied); Levy v. City of Plano, No. 05-97-00061-CV, 2001 WL 1382520, at *3-4 (Tex. App.—Dallas Nov. 8, 2001, no pet.)); *see* TEX. LOC. GOV'T CODE ANN. § 245.002(a) (Vernon 2005).
110. *En Seguido*, 227 S.W.3d at 243; *see* TEX. LOC. GOV'T CODE ANN. § 245.002(b).
111. *En Seguido*, 227 S.W.3d at 244.
112. *Id.*
113. *Id.*
114. *See* TEX. LOC. GOV'T CODE ANN. § 245.005(a) (Vernon 2005).
115. *Id.*
116. *En Seguido*, 227 S.W.3d at 245.
117. *Id.* at 244.
118. *Id.* at 245.

issue in *City of Helotes v. Miller*.[119] Miller owed approximately thirty-one acres located in the City of Helotes's ("Helotes's") ETJ which he contracted to sell to Wal-Mart. The sale was contingent upon Wal-Mart being able to develop the property for a "big box" retail store. Wal-Mart obtained curb cut permits, a utility services agreement with SARA and permits from Helotes. In 2005, Helotes initiated annexation proceedings and Helotes passed a resolution opposing the Wal-Mart store.[120] The resolution stated the City "may take those actions authorized by law to prevent the location of a Wal-Mart or other 'big box' department store within the city's municipal corporate limits or the extraterritorial jurisdiction."[121] Miller filed a lawsuit for declaratory relief to declare vested rights to develop the property as of October 24, 2004. Wal-Mart failed to close on its purchase contract, and Helotes argued in its plea to the jurisdiction that the controversy was therefore moot.[122]

Miller argued that his property remained in controversy because there still remained a development project for which a determination of his rights was necessary.[123] His argument was that the city's zoning actions should not apply to his property because he initiated the development prior to the city's annexation.[124] The court held that Miller submitted sufficient permits to initiate a commercial development project.[125] Miller claimed that he now intends to develop the property with a large retail store other than Wal-Mart as the anchor tenant. According to the court, this evidence was sufficient to raise a fact issue as to whether Miller's current intent to develop the property is the same as his intent when the permit applications for Wal-Mart were submitted.[126] Accordingly, it would have been improper to have granted Helofes's plea to the jurisdiction and dismiss the lawsuit.[127]

In *TSP Development, Ltd. v. Texas Natural Resource Conservation Commission*,[128] TSP Development, Ltd. ("TSP") filed with the Texas Natural Resource Conservation Commission (the "Commission") a permit to construct and operate a solid waste landfill in Chambers County. The Commission determined that TSP's application was "administratively complete" and began a "technical review" of the application.[129] Chambers County then enacted an ordinance which prohibited a landfill operation on TSP's property and the Commission returned the application to TSP.[130] Following an analysis of the *Quick v. City of Austin*[131] as it ap-

119. 243 S.W.3d 704 (Tex. App.—San Antonio 2007, no pet.).
120. *Id.* at 706-07.
121. *Id.*
122. *Id.* at 707.
123. *Id.* at 708.
124. *Id.* at 709.
125. *Id.*
126. *Id.*
127. *Id.* at 710.
128. 16 S.W.3d 148 (Tex. App.—Austin 2000, pet. denied).
129. *Id.* at 149.
130. *Id.* at 150-51.
131. 7 S.W.3d 109 (Tex. 1998).

plied to the repeal of chapter 245's predecessor statute,[132] the Austin Court of Appeals held that all rights acquired by the developer of a project at the time the initial permit was filed apply throughout the duration of the project.[133] Therefore, the new ordinance therefore could not be applied in the state agency review process.[134]

In *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation District No. 1*,[135] the landowner filed a 2002 application with the Hudspeth County Underground Water Conservation District (the "District") for drilling well permits. After the applications were filed, the District amended its rules. The District argued that Texas Local Government Code chapter 245 does not apply to groundwater protection, but instead applies only to real estate development.[136] While the El Paso Court of Appeals stated that it was "inclined to agree" with the District's argument, it did not reach this issue on the grounds that chapter 245 is superseded by chapter 36 of the Water Code.[137] According to the court, "application of [c]hapter 245 would be inconsistent with [c]hapter 36 because it would require the District to apply old rules that are no longer valid and that otherwise conflict with the regulatory requirements mandated under [c]hapter 36 . . . ."[138]

VIII. EXACTIONS

Greater New Braunfels Home Builders Ass'n v. City of New Braunfels[139] addressed whether storm water connection fees were illegal "drainage charges."[140] The Greater New Braunfels Homebuilders Association, among others, (collectively, the "developers") sought declaratory judgment to invalidate ordinances adopted by the City of New Braunfels ("New Braunfels") that imposed fees for storm water development and connections on all new developments. The ordinances required that these fees be placed in a "stormwater connection fee fund."[141] The trial court denied relief, but on appeal the Austin Court of Appeals found that New Braunfels failed to follow the statutory requirements of chapter 402 of the Texas Local Government Code, including publishing notices, hold-

132. Current version at TEX. LOC. GOV'T CODE ANN. §§ 245.001 et seq. (Vernon 2005).
133. *TSP*, 16 S.W.3d at 153 ("One such acquired right is TSP's statutory right to have its application considered by the commission solely on the basis of regulations and ordinances in effect at the time TSP filed its application. . . .").
134. *Id.*
135. 209 S.W.3d 146 (Tex. App.—El Paso 2006), *rev'd*, No. 06-0704, 2008 WL 2223209 (Tex. 2008). This case was overruled by the Texas Supreme Court prior to publication. *See* Guitar Holding Co., L.P. v. Hudspeth County Conservation Dist., 2008 WL 2223209 (Tex. 2008). Future Surveys may discuss the implications of this supreme court action.
136. *Guitar Holding*, 209 S.W.3d at 164; *see* TEX. LOC. GOV'T CODE ANN. §§ 245.002-.004 (Vernon 2005).
137. *Guitar Holding*, 209 S.W.3d at 165; *see also* TEX. WATER CODE ANN. § 36.052 (Vernon 2008).
138. *Guitar Holding*, 209 S.W.3d at 165.
139. 240 S.W.3d 302 (Tex. App.—Austin 2007, pet. denied).
140. *Id.* at 305.
141. *Id.* at 306.

ing hearings, assessing drainage charges against all property owners within the service area, and exempting lots on which no structures exist.[142] By taking advantage of chapter 402, New Braunfels was required to comply with the statute's procedural requirements.[143] The court remanded the case to the trial court to reconsider the Developers' request for attorneys fees.[144]

The necessity to protest an exaction prior to filing suit was addressed in *Rischon Development Corp. v. City of Keller*.[145] Rischon owned land within the City of Keller which was zoned for single family residential uses with a minimum lot size of 36,000 square feet. Rischon filed a rezoning application for a planned development district for single family uses with a minimum lots size of 14,100 square feet. During the process, the city staff recommended additional conditions requiring Rischon to pay for on-site water and sewer extensions, wrought iron perimeter fencing, internal sidewalks, and fire sprinkler systems to be installed in certain homes located more than 600 feet from Davis Boulevard. Rischon accepted all of these conditions without objection, and the rezoning application was approved by the City Council. A preliminary plat was passed which reinforced the fencing requirement. Rischon later entered into a development agreement detailing how these different improvements were to be paid for and installed. The development agreement contained the same provisions as the planned development regulations and was approved by the City Council without Rischon's objection.[146]

Rischon later filed letters of complaint with the City of Keller to waive some of these requirements, and Rischon twice filed for zoning amendments, which were both denied.[147] The court differentiated this case from *Town of Flower Mound v. Stafford Estates L.P.*,[148] in which the developer objected to the regulations placed on it at every possible level of review.[149] Rischon, on the other hand, accepted all of the provisions of the development agreement.[150] Therefore, the court ruled that Rischon had consented to the conditions and that "the trial court did not err by rending a take-nothing judgment on Rischon's claims."[151]

142. *Id.* at 304; *see* TEX. LOC. GOV'T CODE ANN. § 402.045 (Vernon 2005).
143. *Greater New Braunfels*, 240 S.W.3d at 309.
144. *Id.* at 311.
145. 242 S.W.3d 161 (Tex. App.—Fort Worth 2007, pet. denied).
146. *Id.* at 165-66.
147. *Id.* at 155-56.
148. 71 S.W.3d 18 (Tex. App.—Fort Worth 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004).
149. *Id.* at 25.
150. *Rischon Dev.*, 242 S.W.3d at 168.
151. *Id.* at 169.

Articles


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