SUBJECT: Expanding vested land development rights from time of original filing

COMMITTEE: Land and Resource Management — favorable, as amended

VOTE: 7 ayes — Mowery, Harper-Brown, Blake, R. Cook, Miller, Orr, Pickett

1 nay — Leibowitz

1 absent — Escobar

WITNESSES: For — Craig Douglas, Rick Sheloin, FC Properties; Michael Moore, Texas Association of Builders; Scott Norman, Texas Association of Builders; Harry Savio, Henry Smith, Home Builders Association of Greater Austin; (*Registered, but did not testify:* George Allen, Texas Apartment Association; Dominic Chavez, The Real Estate Council of Austin, Mike French, Texas Manufactured Housing Association; Jimmy Gaines, Texas Landowners Council, Inc; Mark Lehman, Texas Association of Realtors; To dd Morgan, Temple Inland, Inc.)

Against — Euline Brock, City of Denton; Bill Crolley, Texas Chapter of The American Planning Association; David Gattis, City of Benbrook; Joe Gieselman, Travis County; Scott Houston, Texas Municipal League; Laura Huffman, City of Austin; Pat Murphy, City of Austin; Michael Pichinson, Texas Conference of Urban Counties; John Reynolds, San Antonio Water System; Brad Rockwell, Greater Edwards Aquifer Alliance; Lauren Ross, Glenrose Engineering, Inc; Roderick Sanchez, City of San Antonio; Tom "Smitty" Smith, Hill Country Alliance and Hamilton Road Scenic Corridor Coalition; Frank Turner, City of Plano (*Registered but did not testify:* Sarah Baker, Save Our Springs Alliance; Mary Eichner, Austin Community Coalition for Responsible Development; Lisa Fithian, Alliance for Clean Texas; Richard Gertson, City of Mesquite; Marcia Lucas, Another Business for Barton Springs; Charles O'Dell, Hays CAN; Leilah Powell, Bexar County Commissioners Court; Bret Raymis, Friendship Alliance; Joseph Vining, City of Round Rock)

BACKGROUND: Government Code, ch. 481, subchapter I, enacted in 1987 and amended in 1989 and 1995, was repealed inadvertently by an act of the 75th Legislature, effective September 1, 1997. Subchapter I dealt with

restrictions on state and local permits and generally required that approval or disapproval of a permit for a project be based on the requirements in effect when the original permit was filed. Also, if a series of permits had to be filed for a project, the applicable requirements would be those in effect when the first permit was filed.

In 1999, the 76th Legislature added Local Government Code, ch. 245, which requires political subdivisions, including cities, counties, and school districts, to review project permits solely on the basis of requirements in effect when the original application for a permit was filed. When a project requires a series of permits, the regulations in effect at the time of the first permit's filing apply to all subsequent permits.

According to Chapter 245 a "permit" is a license, certificate, approval, registration, consent, permit, or other form of authorization required for a developer to begin a project.

DIGEST:

HB 1704, as amended, would amend Local Government Code, ch. 245 to:

- broaden the definition of "permit" to include a contract or other agreement for the construction of or provision of service from a utility owned, operated, or controlled by a regulatory agency;

- require permit approval to be based on the regulations in effect at the time an original application was filed for any purpose, including a review of the application for administrative completeness;

- allow permit rights to vest upon the filing of a permit application or development plan that gave a regulatory agency fair notice of the project, with the application considered to be filed upon delivery to the regulatory agency in person or when deposited by certified mail with the U.S. Postal Service.

- authorize a regulatory agency to require compliance with all applicable technical requirements in effect at the time of filing.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005.

SUPPORTERS SAY:

Cities are prohibited under Chapter 245 from changing the rules for a development project after a permit application is originally filed. HB 1704 would reaffirm that retroactive changes to development regulations should not be allowed. When cities impose retroactive changes, these changes create regulatory uncertainty for many developers and landowners, resulting in the repeal of previously approved permits and causing project failures, declines in land values, and bankruptcies.

Regulatory certainty is an essential element of successful development policy for developers and municipalities. The intent of chapter 245 is to make the first step in filing a permit, whatever that may be for a particular city, the point at which development rights vest. While cities may require only an application, some require a pre-filing conference, preliminary plat, or some type of master development plan. Others require developers to file utility contracts. This is to ensure a high level of water, sewer, gas, and electric service to an area once the development is complete. Some cities, such as San Antonio, require a developer to contract with a water provider as a first step in filing for a permit. In some instances cities, including San Antonio, have claimed that their "first-step" requirements do not vest development rights.

HB 1704 further would clarify that regulatory agencies may apply to permit applications only those regulations already enacted at the time of filing, not those regulations in effect when the permit application was deemed administratively complete. Without such clarification, development rights would be subject to regulatory changes between the time the permit was filed and when it was administratively complete.

To further guarantee that regulatory conditions at the beginning of a project remain the same for the duration of the project, applications would vest when the document reached the regulatory agency by personal delivery or on a postmarked date. This clarification would reduce the impact of sudden and drastic changes to regulations on development by cities trying unreasonably to prevent growth.

The bill would not prohibit cities from requiring administrative completeness, setting strict expiration dates on permits, or otherwise revising permit guidelines. It only would prevent cities from changing regulations on projects for which permits already had been approved.

OPPONENTS SAY:

Current law provides weak support for cities that need to regulate development that affects urban and suburban growth. HB 1704 would further promote development interests over municipal authority to impose reasonable regulations. Development plans should not supplant meaningful city regulations intended to serve city residents. What developers consider regulatory uncertainty often is, in fact, a safeguard for public safety and environmental quality.

Expanding the definition of permits would vest development projects when skeletal plans lacking substantive information essential to engineering, public safety, and environmental review were submitted to a regulatory agency. The bill would increase the number of insufficient plans submitted for development, often to circumvent proposed regulations, resulting in development rights being vested for incomplete and unclear development plans.

Providing that utility contracts constitute vesting would result in serious consequences for rapidly growing cities. When an area rapidly develops, development speculation naturally increases. HB 1704 would allow an influx of utility contracts to vest development rights on projects lacking significant planning components and investments. Developers would be allowed to go forth with undesirable projects, preventing cities from accomplishing long-range planning. Land could become overcommitted to projects that may never come to fruition.

Administrative completeness is essential to ensuring vested projects comply with safety and environmental quality regulations. When development rights vest before administrative completeness is assured, cities lose flexibility in adapting development standards to changing circumstances, including rapid growth, changing patterns of land use, and revisions of federal regulations.

Some projects may lie dormant for many years, during which the city may need to update development regulations to adjust to changing local circumstances. HB 1704 would allow projects that are reactivated after long periods of inaction to be completed under regulations that are outdated and inappropriate. Cities should be able to de-certify projects on which no action has been taken for years at a time. Chapter 245 does have a dormant projects clause saying that any permit without an expiration date, and on which no progress toward completion has been made in five years, will expire. However, this clause rarely is enforced, and projects

lying dormant for much more than five years have been grandfathered back to the time of their filings and allowed to commence according to substandard building and environmental regulations.

NOTES:

The original bill would expand the definition of "permit" to include a "contract or other agreement for the construction or provision of utilities." Committee amendment No. 1 would substitute "service from a utility owned, operated, or controlled by the regulatory agency."

Committee Amendment No. 2 would affirm a regulatory agency's authority to require compliance with technical requirements in effect at the time development rights are vested.

The companion bill, SB 848 by Shapiro, was reported favorably, as substituted, by the Senate Intergovernmental Relations Committee by 4 ayes, 1 nay (Madla) on April 6 and was reported favorably, as substituted, by the House Land and Resource Management Committee on April 18.