



Vested Rights Project Protection for Developers

by Reid C. Wilson

Historically, local governments could change land use regulations, then apply the new rules to planned projects that did not yet have a permit, and sometimes, even to projects with permits. They also could limit certain changes to existing but newly nonconforming projects, which were considered grandfathered under prior regulations.

Grandfathered rights were based on legal principals of equity and fairness resulting in a judicial balancing of private property owners' rights to use real estate and local governments' rights to regulate land use for the benefit of the public. The result was limited protection of private property rights.

The Texas Legislature expanded this protection in Chapter 245 of the Texas Local Government Code, which protects owners from changes in certain regulations once they have filed a development permit *application* (<http://www.statutes.legis.state.tx.us/Docs/LG/htm/LG.245.htm>). These vested rights apply to some, but not all, land use regulations, and only to the project described in the application. If the project becomes dormant, the vested rights may be lost. Although these protections have been in place since 1987, many owners are not aware of them.

According to the Texas attorney general, statutory vested rights run with the real property, much like a restrictive covenant (deed restriction). They do not belong to the party filing the application.

When does vesting occur?

A project is vested on submission of an application for a required permit. The permit may be the first in a series of permits for a project.

A "mailbox rule" applies, which allows the application to be mailed by certified mail, return receipt requested. In that case, vesting occurs when the application is deposited in the mail, as documented on a certified mail receipt. This provision enables owners to submit last-minute applications before regulations change.

The application must describe the proposed project in enough detail that the local government receives "fair notice" of the nature and scope of the project, with a particular focus on the features to be vested.

How is 'project' defined?

The definition of *project* is broad and includes "an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue or complete the endeavor." It leaves much room for litigation, and there are already several reported decisions.

In one case, the court held that a residential subdivision development was a single project including the design, platting and construction of the lots, as well as the subsequent construction of houses on the lots. The courts look to the specific facts of each matter to determine if the current project is sufficiently similar to the project covered by an earlier application.

How long does vesting continue?

Vested rights continue as long as the project is not dormant, and the permit does not lapse. An owner may prevent a project

from becoming dormant by making "progress toward completion," which is evidenced by:

- filing an application for a final plat or plan;
- a good-faith attempt to file a permit application necessary to begin or continue toward completion of the project;
- costs being incurred for developing the project, such as roadway, utility and other infrastructure facilities (but not land costs) exceeding 5 percent of the appraised market value of the land for the project;
- posting of fiscal security; or
- payment of utility connection or impact fees.

A local government may pass regulations that cause an individual permit to expire no less than two years from application, and an entire project to expire no less than five years from application, if no progress is made toward completion. Vesting will also expire.

What land use regulations may be vested?

- Landscaping
- Tree preservation
- Open space
- Park dedication
- Property classification
- Lot size/dimensions/coverage
- Building size
- Regulations that do not change development permitted by a restrictive covenant required by a municipality

What regulations may not be vested?

- Zoning regulations not listed previously.
- Nonzoning land use regulations not listed previously.
- Certain construction regulations.
- Regulations relating to sexually oriented business, colonias, permit fees, annexation, utility connections, flooding, public works, imminent destruction of property or injury of persons.

Why did Texas Legislature adopt vested rights?

Vested rights protect the reasonable expectation of owners and developers to be able to develop under the regulations applicable at the inception of a project. Substantial risk, costs and time are saved if the regulatory scheme is "frozen" when the development process is commenced. A recent court decision describes the justification for vested rights:

... to prohibit land-use regulators from changing the rules governing development projects "in the middle of the game," thereby insulating already-underway development and related investment from the vicissitudes and uncertainties of regulatory decision making and all that may influence it. That intent is further confirmed by the Legislature's

explicit findings regarding chapter 245's purpose: to combat "administrative and legislative practices that often result in unnecessary governmental regulatory uncertainty that inhibits the economic development of the state[,] increases the costs of housing and other forms of land development[,] and often resulted in the repeal of previously issued permits causing decreased property and related values, bankruptcies, and failed projects." . . . [the] purpose of chapter 245's statutory predecessor, former chapter 481 of the government code, was to "establish requirements relating to the processing and issuance of permits and approvals by governmental regulatory agencies in order to alleviate bureaucratic obstacles to economic development." . . . Moreover, as an incidental matter of historical fact, the legislative record reflects that bill proponents advocated chapter 245 as an appropriate response to instances when the City of Austin had purportedly imposed new regulatory restrictions retroactively on development projects that were already underway, causing project failures, bankruptcies, and regulatory uncertainty for developers and landowners.

Although statutory vested rights have been around for almost 15 years, some real estate practitioners are not aware of them. Local governments, which have an interest in applying current regulations, are unlikely to notify owners or developers of their vested rights. It is up to owners or developers to understand and assert their vested rights. Even then, some local governments interpret vested rights narrowly.

Significant Areas of Protection

Property Classification

The Texas Association of Realtors interprets the 2005 addition of "Property Classification" to the list of land use regulations

that may be vested as preventing application of use limitations in new zoning regulations to a vested project. For example, if a multifamily project is vested, the rezoning of the project area to single family after the date of vesting will not prevent the development of that project.

This is a dramatic change from prior law, which would grandfather only a similar multifamily project if it had received a permit and construction had commenced. The extent of property classification vesting is an ongoing debate between lawyers representing owners who assert broad application and

those representing cities who assert a narrower scope. Guidance from the courts will be needed to settle the issue.

Building Size

The allowable size of a building may not be reduced by subsequent regulation after vesting. This broad protection should apply to limits on setback, buildable area or footprint, height, floor area ratios, square footage and any other land use regulation that has a direct impact on building size.

Lot Size/Dimensions/Coverage

Residential lot developers have significant protection from post-application

regulatory changes attempting to reduce density by increasing minimum lot sizes or dimensions, or reducing maximum building or impervious coverage. ➔

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THE TAKEAWAY

Vested rights freeze land use regulations affecting property classification, building size, lot size/dimension/coverage and certain other matters once the owner or developer files a permit application for that project.



STATUTORY VESTED RIGHTS were created to ensure that changes in land use regulations could not be applied to development projects already in progress. This protection ends if a project becomes dormant or if the project permit lapses.



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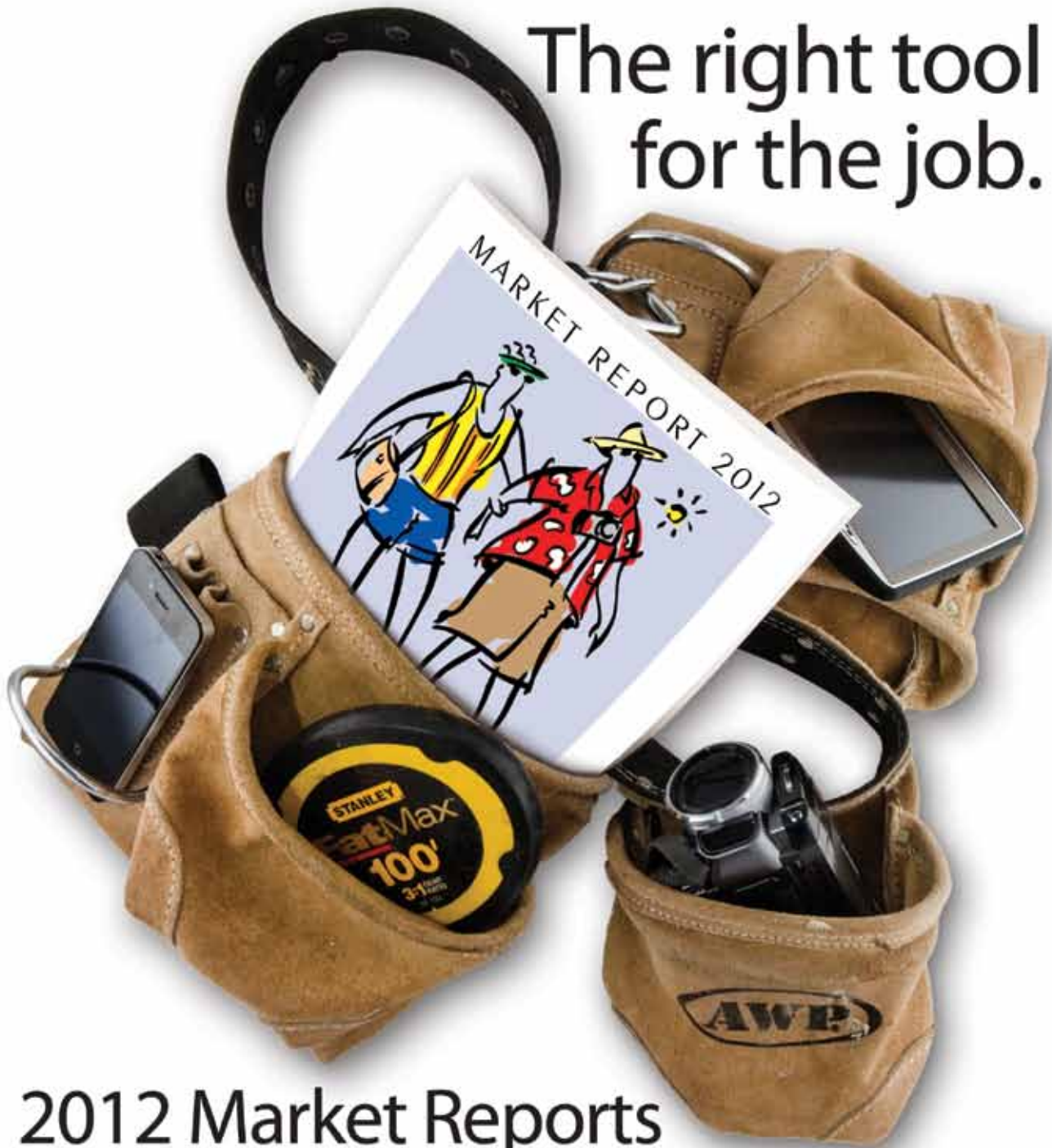
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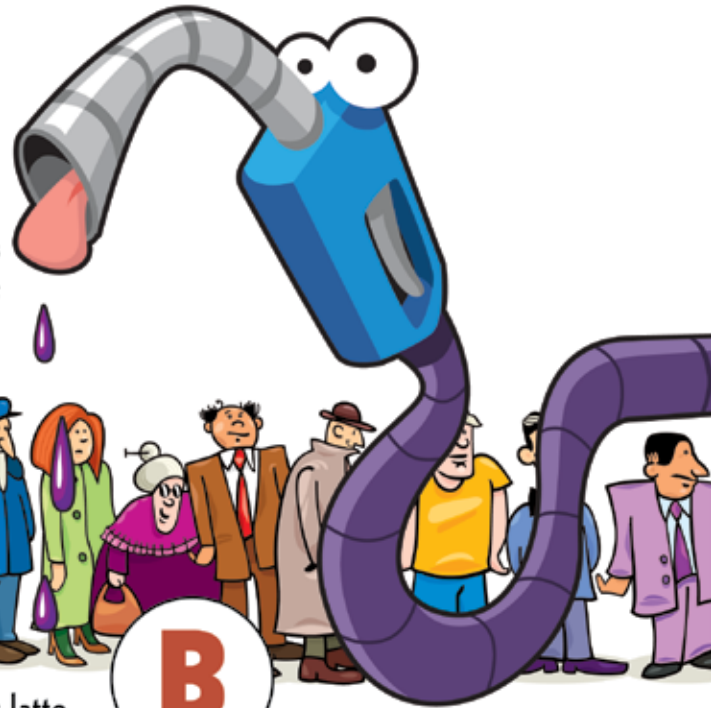
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