NO. 11-0918

IN THE
SUPREME COURT OF TEXAS

CITY OF AUSTIN, TEXAS, AND GREG GUERNSEY,
IN HIS CAPACITY AS DIRECTOR OF PLANNING AND DEVELOPMENT
REVIEW DEPARTMENT OF THE CITY OF AUSTIN
Petitioners,

V.

HARPER PARK TWO, L.P.,
Respondent.

On Petition for Review from the
Third Court of Appeals at Austin, Texas

REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR REVIEW

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ATTORNEYS FOR PETITIONERS

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NO. 11-0918

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners, the City of Austin and Greg Guernsey (collectively the "City"), submit this reply to Respondent's response to the petition for review. The City respectfully shows the following:

INTRODUCTION

Contrary to Harper Park Two, L.P.'s ("Harper Park's") response, the judgment below is incorrect and warrants review by this Court. The decision mistakenly assumes that all commercial projects are alike for purposes of establishing vested rights under Chapter 245, regardless of the differences in scale, intensity, or use. That conclusion finds no support in the text of the statute or in the reality of municipal planning, which

requires local governments to accept the representations of project applicants in how they plan for growth and development.

As the Texas Municipal League stated in its letter of Amicus Curiae to the Austin court that was submitted on behalf of its 1,100 plus member cities:

> [T]he purpose of Chapter 245 would be defeated by allowing a landowner to file a "placeholder" subdivision plat for a project and later assert vested rights, no matter how unrelated the use.
>
> The requirement under state law that a project in the originally-filed plat be the same as the currently-proposed project is an important distinction that enables cities to regulate development safely within in their city limits. Cities are allowed to determine when a developer has lost his vested rights in development regulations because a project has changed. Any other interpretation would cause cities to lose their ability to adequately plan for infrastructure development in the area, would destroy the balance between city obligations and developer rights. ...
>
> Proper interpretation of Chapter 245 is important to all Texas cities that regulate development. This case presents an opportunity for the court to affirm an important foundational issue regarding vested rights, allowing both cities and landowners to operate with a clear understanding of what those rights include. A holding to the contrary would effectively allow rights to vest in a piece of property rather than a project, in contravention to Chapter 245."

Petitioner's Reply Appendix, Tab 2.

REPLY ARGUMENT

A. The City does not make the argument that was rejected in Hartsell v. Town of Talty.

Harper Park claims that the City's position in this case is similar to, if not the same, as the one taken by the Town of Talty in Hartsell v. Town of Talty, 130 S.W.3d 325 (Tex. App. – Dallas 2004, pet. denied). (Response at page 10.) In Town of Talty, the issue was whether the construction of homes was part of the same project as platting the property. Talty took the position that building homes was a new project from subdividing

the land. This is not the City's position in this case. If the City was following Talty's argument, the site plan would be a new project regardless of whether Harper Park wanted to build a hotel *OR* an office. Instead, the City recognizes that Harper Park Two, L.P. project started with a preliminary plan but argues that there is a change of project because a hotel is not the same as an office. If Harper Park wants to build an office, the City's position has been (and still is) that an office can be built pursuant to 1985 regulations because it is not a change in project.

B. Not all development projects begin with a preliminary plan so individual lots can be independent projects.

Harper Park argues that the thirteen individual proposed lots, standing alone, could not constitute individual projects so the project *has to be* the entire 98-acres. (Response at page 10.) This argument fails for two reasons. It assumes that the preliminary plan is always the first permit in a series of permits. Such an assumption is unsupported and undermines Harper Park's argument. There are situations where the first permit in the series of permits is a site plan because the land is already properly platted.

Harper Park's argument also fails because it ignores the fact that the City allows individual lots that are part of a preliminary plan to be final platted separately. If Harper Park is correct that the individual lots cannot stand alone, then there would only be one final plat for the 1985 Preliminary Plan. However, as the record in this case demonstrates, the City allowed individual lots that were part of the 1985 Preliminary Plan be final platted separately. Accordingly, there is no support for Harper Park's argument that all thirteen lots must be viewed as one project.

C. Section 245.002(d) does not allow a permit holder to change the scope of a project.

Harper Park argues that §245.002(d) allows it to develop a "commercial" project pursuant to the regulations effective on July 30, 1985, because it can take advantage of the zoning ordinance adopted in 1992. (Response at page 15.) Harper Park's argument related to §245.002(d) was not raised at the trial court and as such the argument was waived. The City responds to this argument in an abundance of caution.

Section 245.002(d) gives a permit-holder the option to take advantage of recorded plat notes, recorded restrictive covenants, or changes in the rules or regulations that enhance a project without forfeiting the right to have the project reviewed under prior regulations. TEX. LOC. GOV'T CODE §245.002(d). The Austin court has stated that §245.002(d) allows a permit-holder to take advantage of changes in regulatory schemes. City of Austin v. Garza, 124 S.W.3d 867, 873 (Tex.App. – Austin, 2003, no pet). However, there is nothing in §245.002(d) that speaks to changing *what* the project is, which is essentially what Harper Park argues is sufficient to support the Austin court's decision.

If Harper Park is allowed to expand what its project is because the zoning category is broader than the project identified on the Preliminary Plan, the zoning will be allowed the supersede the evidence of the applicant's intent in 1985. Such a result would be untenable because it would contradict the role of zoning and the fact that zoning is not a permit. The label on the Preliminary Plan is evidence of the intended project because the

Preliminary Plan was the first in the series of permits and it should control. As a result, §245.002(d) does not support the Austin court's decision.

PRAYER FOR RELIEF

In the instant case, the City has not changed the rules of the game in the middle of development; rather the developer has changed the project. Accordingly, the City respectfully asks this Court to grant this Petition for Review, reverse the judgment of the court of appeals on the issue raised by the City, and render the judgment that the trial court rendered, finding in the City's favor. In the alternative, the City asks the Court to limit the court of appeals decision by holding that the record in this case supports the notion that there are insufficient differences between a hotel and an office. The City further requests that this Court award it any further relief to which it may be entitled in law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Texas Rules of Appellate Procedure, this **29th** day of **February, 2012**.

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PETITIONER'S REPLY APPENDIX

Tab 1: City of Austin v. Garza, 124 S.W.3d 867, 873 (Tex.App. – Austin, 2003, no pet).

Tab 2: Texas Municipal League and Texas City Attorneys Association Letter of Amici Curiae (dated March 29, 2011)

TAB 1

124 S.W.3d 867
(Cite as: 124 S.W.3d 867)

Court of Appeals of Texas,
Austin.
CITY OF AUSTIN, Appellant,
v.
Eli J. GARZA and Provident Realty Advisors, Inc., Appellees.

No. 03–03–00307–CV.
Dec. 18, 2003.

Background: Developer obtained right to develop commercial property from city planning commission. City disputed validity of note in subdivision plat. Developer sought judicial declaration that development could proceed pursuant to plat notes. The 261st Judicial District Court, Travis County, Pete Lowry, J., granted declaratory judgment for developer upholding validity of disputed plat note. City appealed.

Holdings: The Court of Appeals, David Puryear, J., held that:
(1) statute that allowed property developer to choose to develop property under regulatory scheme in place at time developer originally filed application to subdivide, or under regulatory scheme as set out in final and approved subdivision plat, was not unconstitutional delegation to private actors of authority to create laws, and
(2) city could be estopped from requiring that property developer comply with restricted impervious cover requirements established by interim ordinance that amended comprehensive watershed ordinance.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⚿2442

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2442 k. To non-governmental entities. Most Cited Cases
(Formerly 92k64)

Zoning and Planning 414 ⚿1010

414 Zoning and Planning
414I In General
414k1008 Constitutional and Statutory Provisions
414k1010 k. Validity of statutes. Most Cited Cases
(Formerly 414k8)

Statute that allowed property developer to choose to develop commercial property under regulatory scheme in place at time developer originally filed application to subdivide, or under regulatory scheme as set out in final and approved subdivision plat, was not unconstitutional delegation to private actors of authority to create laws; statute allowed developer to choose between two distinct regulatory schemes created by city pursuant to city's lawfully delegated power to regulate land use, but developer did not create either regulatory scheme. V.T.C.A., Local Government Code § 245.002(d).

[2] Constitutional Law 92 ⚿2442

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2442 k. To non-governmental entities. Most Cited Cases
(Formerly 92k64)

Delegation of legislative powers occurs when private entity is given power to: (1) make rules, (2) determine public policy, (3) provide details of law, (4) promulgate rules and regulations to apply law, or (5) ascertain conditions upon which existing laws may operate.

[3] Zoning and Planning 414 ⚿1352

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1350 Right to Permission, and Discretion
414k1352 k. Change of regulations as affecting right. Most Cited Cases
(Formerly 414k376)

124 S.W.3d 867
(Cite as: 124 S.W.3d 867)

City could be estopped from requiring that property developer comply with restricted impervious cover requirements established by interim ordinance that amended comprehensive watershed ordinance (CWO), where city had benefited from its error of applying CWO, which had less restrictive impervious cover requirements, to developer's project; developer had donated land to city so that developer could take advantage of transfer credit provisions available only under CWO, and it would be unjust to allow city to retain land donated under CWO, while denying developer benefit of developing land under less restrictive provisions of CWO.

[4] Estoppel 156 ⚿62.4

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Government, or Public Officers
156k62.4 k. Municipal corporations in general. Most Cited Cases

Although general rule is that municipality may not be estopped in exercise of its governmental functions, exception to rule exists if city has received substantial benefits as result of its own mistake.

[5] Appeal and Error 30 ⚿984(5)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(5) k. Attorney fees. Most Cited Cases

Costs 102 ⚿194.12

102 Costs
102VIII Attorney Fees
102k194.12 k. Discretion of court. Most Cited Cases

Award of attorney's fees is discretionary and cannot be reversed on appeal absent clear abuse of discretion.

*868 Chester E. Beaver, Asst. City atty., Jane M.N. Webre, Casey L. Dobson, Scott, Douglass & McConnico, LLP, Austin, for appellant.

Daniel M. Anderson, Stephen I. Adler, Barron, Adler & Anderson, LLP, Austin, for Eli J. Garza.

George B. Slade, Law Office of George B. Slade, Austin, for Provident Realty Advisors, Inc.

Before Justice KIDD, Justices B.A. SMITH and DAVID PURYEAR.

OPINION

DAVID PURYEAR, Justice.

This case concerns the development of commercial property over the Barton Creek Watershed. Eli Garza applied for and was granted the right to develop property in what was once known as the Garza Ranch in the Barton Creek Watershed. The City of Austin ("City") subsequently refused to allow development to proceed under the terms set out in the final and approved subdivision plat. The City disputed the validity of one of the notes contained in the plat, which would have allowed up to seventy percent impervious cover under certain circumstances. Garza sought and obtained a judicial declaration that development could proceed pursuant to the subdivision plat notes. In finding in Garza's favor, the trial court upheld the validity of the disputed plat note on various equitable and legal grounds. Because we agree with the trial court's conclusions of law, we affirm.

STATEMENT OF FACTS

On February 21, 1991, the City passed Ordinance Number 910221 E, the "Interim Ordinance." [FN1] The Interim Ordinance was *869 a temporary amendment to the Comprehensive Watershed Ordinance ("CWO") and reduced the permissible amount of impervious cover [FN2] a commercial developer could lay from up to seventy percent to eighteen percent.[FN3] On March 1, 1991 and during the effective period of the Interim Ordinance, Garza filed an application for approval of a subdivision plat covering approximately thirty-five acres at the intersection of Mopac and William Cannon in south Austin. The City Planning Commission ("Commission") approved the plat on May 7, 1991. The plat was recorded on September 11, 1991 and contained the following notes:

FN1. The Interim Ordinance read in relevant part as follows:

124 S.W.3d 867
(Cite as: 124 S.W.3d 867)

ORDINANCE NO. 910221–E

AN ORDINANCE ADOPTING INTERIM NON DEGRADATION REGULATIONS FOR THE BARTON CREEK WATERSHED AND THE WATERSHEDS CONTRIBUTING TO BARTON SPRINGS....

Part 1. Chapter 13–2 (Land use) Article V (Water Quality related Development Intensities) of the Austin City Code of 1981 is hereby amended for an interim period to read as provided in the attached Exhibit "A", incorporated herein as if repeated verbatim.

....

Part 6. This ordinance shall automatically expire and have no effect on August 23, 1991.

....

DIVISION 5. Barton Springs and Contributing Zone

Sec. 13–2–584 UPLANDS ZONE

....

(b) Impervious cover shall be limited to the following:

	Maximum Impervious Cover (NSA)	
Use	Recharge Zone	Non-Recharge Zone
....		
Commercial	18%	30%

Sec. 13–2–585 TRANSFER OF DEVELOPMENT INTENSITY

There shall be no transfer of development within this zone.

FN2. Impervious cover is defined as "the total horizontal area of covered spaces, paved areas, walkways, and driveways." *See* Austin City Code § 25–1–23.

FN3. As indicated in note 1, the Interim Ordinance was effective February 21, 1991 through August 23, 1991. The expiration date was later extended to October 27, 1991.

6. This subdivision shall be developed, constructed and maintained in accordance with the terms and conditions of Chapter 13–2, Article V, and chapter 13–7, Article V, *dated June 1, 1988.*[FN4]

FN4. Chapter 13–2, Article V of the City Code deals with "Water Quality Related Development

Eli J. Garza (grantor) issued a Special Warranty Deed to the City of Austin (grantee) July 26, 1991 (recorded Oct. 8, 1991) for approximately 2.8 acres of land dedicated for park and recreational and drainage easement purposes for public use by the citizens of Austin. The deed states that in return Garza was transferred development rights for 90,284 SF of land in the upland area.

Intensities." Chapter 13–7, Article V deals with "Environmental Protection and Management." With the date, the Plat Note would seem to indicate that development would proceed under the CWO, which was in effect on June 1, 1988.

....

10. Block E Lot 2 and Block A Lot will be deeded to the City of Austin as an extension of the Williamson Creek Greenbelt. This dedication will take place prior to or simultaneously with final plat approval.

(Emphasis and footnote added). Plat Note 11 dealt with the transfer of impervious cover credits and contained a table with two main columns—one marked "DONATING TRACTS" and the other "RECEIVING TRACTS." The "donating tracts" were Lots 1 and 2 of Block A and Lot 2 of Block E (Plat Note 10 above) containing 46,574 square feet. The 46,574 donated square feet was transferred to and allocated between the "receiving tracts," which were Lots 1, 2, 3 and 4 of Block B, and Lots 1 of Blocks C, D and E.[FN5]

FN5. Under a regulatory scheme which allowed a developer to take advantage of transfer credits, the donation of property to the City effectively meant that Garza could increase the square footage of the receiving tracts. For example, if a developer donated a 2,000 square foot lot to the City, the developer could then, for purposes of determining impervious cover, add 2,000 square feet to the total square footage of another lot. If the receiving lot were 4,000 square feet, without the donation, the donation would enlarge that lot to 6,000 square feet for purposes of determining impervious cover. For purposes of determining the percentages of impervious cover, then, one would use the 6,000 total lot size instead of the 4,000 square feet actual lot size. Impervious cover measuring 2,000 square feet would equate to 33% impervious cover, with the donation, and 50% impervious cover without the donation.

In 1997, Garza contracted to sell some of the "receiving tracts," Lots 1, 3 and 4 of Block B, approximately five-and-one-half acres, to Gordon Dunaway, Provident Realty Advisors, Inc. Closing was contingent upon obtaining a Consolidated Site Development Permit from the City. The City ***870** rejected the application because it did not conform to the Interim Ordinance.[FN6]

FN6. According to state and local law, the regulatory scheme in place at the time Garza originally filed his plan to develop, the Interim Ordinance, should have governed all subsequent development undertaken pursuant to their application.

Garza filed suit, which Provident later joined, seeking a declaratory judgment that the provisions of the CWO governed the development of the subdivision and not the Interim Ordinance. The City argued that the inclusion of the date in Plat Note 6 was at best a mistake, and at worst Garza's deliberate attempt to circumvent the Interim Ordinance. Garza argued that the Commission had the authority to and did authorize the plat with the date reflected in the note. Garza also cited section 245.002(d) of the Local Government Code, which would allow him to develop pursuant to the regulatory scheme indicated in the recorded subdivision plat. The City claimed that section was unconstitutional. Garza also contended that any procedural defects in approving his subdivision map, for example, the failure to receive a formal variance, was validated by Vernon's Annotated Texas Civil Statutes of the State of Texas, articles 974d–39, 974d–40 and 974d–44 (the "Validation Statutes"). [FN7] The Validation Statutes provide that "governmental acts and proceedings of a municipality since adoption or attempted adoption of the charter are validated as of the dates on which they occurred." *See West End Pink, Ltd. v. City of Irving*, 22 S.W.3d 5, 8 (Tex.App.-Dallas 1999, pet. denied). The purpose for the Validation Statutes is to "give effect to an ordinance passed in good faith, but plagued by some procedural or minor defect." *See City of Murphy v. City of Parker*, 932 S.W.2d 479, 485 (Tex.1996). "They are not intended to put the Legislature's stamp of approval on otherwise void enactments." *Id.* The City asserted that the defect was not procedural but substantive thus not subject to the Validation Statutes. Garza also questioned, under equitable estoppel principles, whether it would be fair for the City to deny the enforceability of Plat Note 6 after having accepted his donation of land as shown in Plat Note 10. The City's position was that municipalities, in general, were not subject to estoppel when exercising their regulatory power over land use. According to the City, regardless of the source of the mistake, the City could not now be bound by it.

FN7. Act of June 16, 1991, 72d Leg., R.S., ch. 861, § 1, 1991 Tex. Gen. Laws 2964, *repealed by* Act of May 22, 2001, 77th Leg., R.S., ch.

1420, § 12.111(5), 2001 Tex. Gen. Laws 4343; Act of March 8, 1993, 73d Leg., R.S., ch. 6, § 1, 1993 Tex. Gen. Laws 15, *repealed by* Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 12.111(6), 2001 Tex. Gen. Laws 4343; Act of June 16, 1995, 74th Leg., R.S., ch. 792, § 1, Tex. Gen. Laws 4144, Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 12.111(9), 2001 Tex. Gen. Laws 4343.

The trial court ruled in Garza's favor and issued the following conclusions of law. First, Garza's dedication and the City's acceptance constituted a substantial benefit to the City, and estopped the city from repudiating Plat Note 6. Second, the Commission had authority to approve all the notes found in Garza's plat, thus Garza was entitled to have his site plan application reviewed and approved under the CWO per Plat Note 6. Third, Section 245.002(d) of the Government Code allowed Garza, as a "permit holder," to enforce the recorded Plat Notes against the City. Fourth, the Interim Ordinance could not be applied to the Garza property after October 1991 because, by its own terms, and from its inception, was intended to expire, and did expire, in October 1991. ***871** Fifth, any defects that occurred in the process of approving the plat were validated. The trial court also awarded Garza attorney's fees.

The City disputes each of these conclusions of law on appeal and requests that we reverse the award of attorney's fees.

STANDARD OF REVIEW

Declaratory judgments are reviewed under the same standards as other judgments and decrees. *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.010 (West 1997). The trial court's conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *See Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex.App.-Austin 1992, no writ)*. Because we find two independent legal theories by which to support the trial court's judgment, we affirm and address only those two grounds.

DISCUSSION

Constitutionality of section 245.002(d)

[1] The City argued at trial and on appeal that section 245.002(d) was an unconstitutional delegation of authority to private actors. Section 245.002(d) reads:

> 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 protect, 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.

Tex. Loc. Gov't Code Ann. § 245.002(d) (West Supp.2003).

The City argues that section 245.002(d)

> allows developers like Garza, in addition to the locked-in right to develop the project under regulations in place when the initial application is filed, to cherry-pick what other regulations will govern development of his project. Rather than applying the comprehensive set of regulations in effect at the time of the first application, section 245.002(d) allows a developer to pick and choose bits and pieces of other development regulation passed over time to compile his own 'set' of applicable regulations. By granting developers that authority to compile their own set of rules, § 245.002(d) unconstitutionally delegates governmental authority to private actors.
>
> ....
>
> Under the language of § 245.002(d), there is a delegation of governmental authority to private actors here, because no set regulatory scheme applies to projects. Rather, the developers get to pick and choose what regulations will apply to their project over time. That ability to decide what rules apply is a delegation of governmental authority.

In reviewing the constitutionality of Section 245.002(d), we apply several well-settled principles. If possible, we are to construe a statute in a manner that renders the statute constitutional and to give effect to the Legislature's intent. *Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex.2002). "We presume that the Legislature intended for the law to comply with the United States and Texas Constitutions, to achieve a just and reasonable result, and to advance a public rather than a private interest." *Id.* A presumption exists that the legislative body has ***872** acted within its power. *See Patterson v. Dallas*, 355 S.W.2d 838, 841 (Tex.Civ.App.-Dallas 1962,

writ ref'd n.r.e.). We should construe statutes in a manner avoiding serious doubt of their constitutionality. *See Federal Sav. & Loan Ins. Corp. v. Glen Ridge I Condos., Ltd.*, 750 S.W.2d 757, 759 (Tex.1988) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 840, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986)). The Legislature, however, may not authorize an action that our Constitution prohibits. *See Texas Mun. League*, 74 S.W.3d at 381. Were serious doubts to arise, we are to determine whether a construction of the statute is "fairly possible" to avoid the constitutional question entirely. *See id.* The party challenging a statute has the burden is to prove its unconstitutionality. *See Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex.2003). Article III, [FN8] Section 1 of the Texas Constitution vests in the Legislature the power to make laws and determine public policy. *See FM Props. Operating v. City of Austin*, 22 S.W.3d 868, 873 (Tex.2000). The Legislature can delegate authority to private entities " 'if the legislative purpose is discernible and there is protection against the arbitrary exercise of power.' " *See Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex.1998) (quoting *Office of Pub. Ins. Counsel v. Texas Auto. Ins. Plan*, 860 S.W.2d 231, 237 (Tex.App.-Austin 1993, writ denied).

FN8. The Texas Supreme Court in *Proctor* distinguished between a legislative delegation under Article II and Article III of the Texas Constitution. *See* 972 S.W.2d at 732–33. Section 1 of Article II explicitly prohibits the Legislature from delegating its lawmaking power to the executive or judicial branches. *See id.* at 733. Section 1 of Article III vests the power to make laws with the Legislature. *See id.* Both Articles II and III are at issue where the Legislature has delegated its lawmaking authority to the other branches of government. *See id.* Only Article III is at issue where the Legislature has made a delegation to a non-governmental entity.

[2] Our first inquiry necessarily must be whether there has been, in fact, a delegation of legislative powers. The City challenges the constitutionality of the delegation at issue here because the delegation allows the developer to "pick and choose what regulations will apply to their project over time." [FN9]

FN9. A delegation of legislative powers occurs when a private entity is given the power (1) to make rules, (2) determine public policy, (3) provide the details of the law, (4) promulgate rules and regulations to apply the law, or (5) ascertain conditions upon which existing laws may operate. *See FM Properties*, 22 S.W.3d at 873. As set out above, the City argued that allows developers like Garza were allowed to "cherry-pick" between regulations thus compiling their own set of applicable regulations. Their complaint, then, is not that Garza was allowed to make rules, determine public policy, provide the details of the law or promulgate rules and regulations but that Garza was allowed to "ascertain conditions upon which existing laws may operate."

Section 245.002(d) allows a "permit holder" [FN10] to "take advantage of recorded subdivision Plat Notes...." *See id.* § 245.002(d).[FN11] By contrast, *873section 245.002(a) requires regulatory agencies to consider only the "orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the permit is filed." *See id.* § 245.002(a). In effect, paragraph (d) allows a property owner to elect between developing pursuant to the notes within the subdivision plat or pursuant to the regulatory scheme in effect at the time the owner originally filed for a permit.

FN10. A "permit" means a "license, certificate, approval, registration, consent, permit, 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." *See* Tex. Loc. Gov't Code Ann. § 245.001(1) (West Supp.2003).

FN11. We find it unnecessary to address whether section 245.002(d) in its entirety amounts to an impermissible delegation of legislative powers. The relevant portion of section 245.002(d) deals with "subdivision Plat Notes." Whether and to what extent the remaining portions of (d) are unconstitutional is not relevant to this appeal. Were those portions of the statute unconstitutional, our mandate would have been to strike those portions and save the remainder—the remainder being the section dealing with "subdivision Plat Notes." *See Quick v. City of Austin*, 7 S.W.3d 109, 115 (Tex.1998).

The issue is whether in allowing private parties the choice to develop their property under (1) the regulatory scheme in place at the time they originally filed the appli-

cation to subdivide or (2) the regulatory scheme as set out in their final and approved subdivision plat the legislature has delegated its power to create laws? We think not.

In *FM Properties Operating v. City of Austin,* the Texas Supreme Court held that a statute that allowed private landowners to create their own water quality regulations and exempt themselves from the applicable regulations was a delegation of legislative powers. *See* 22 S.W.3d at 875. The statute allowed private landowners, owning 500 contiguous acres or more, to designate their property as "water quality protection zones." *See id.* at 870. The legislature intended the statute to relieve certain landowners from municipal "regulatory chaos." *See id.* Landowners designating 500 to 1000 acres had to seek approval for their water quality plan with the Texas Natural Resource Commission ("TNRCC") while landowners designating more than 1000 acres were not required to seek TNRCC pre-approval. *See id* at 871. In addition to complying with state and federal law, a plan had to conform with one of two general objectives: (1) maintaining background levels of water quality in waterways; or (2) capturing and retaining the first 1.5 inches of rainfall from developed areas, plus state and federal law. *See id.* Once designated, the water quality zones were not subject to municipal land and water use regulations. *See id.* at 872. The supreme court held the statute unconstitutional on the grounds it delegated legislative power to private landowners by allowing them to decide whether and how to create their own water quality regulations, make their own rules, "ascertain conditions upon which the statute may operate," and "exempt themselves from the enforcement of municipal regulations.". *See id* at 876.

The supreme court went on to make a key distinction that we believe is conclusive on the delegation issue before us. In addressing the dissent, the majority distinguished delegations which allow private parties "to choose between two distinct regulatory schemes" versus delegations which allow private parties "to *create* part of the regulatory scheme that they choose." *See id.* at 879 (emphasis in original). Here, the Legislature has allowed a private landowner to *choose* between two regulatory schemes: the one applicable at the time of the original application to subdivide and the one indicated in the subdivision plat. The landowner does not *create* either regulatory scheme—both were the product of the City's lawfully delegated power to regulate land use. The developer is held to an election between two regulatory schemes. While, in some respects, the developer is allowed to "ascertain conditions upon which existing laws may operate," the choice is limited to one of two regulatory schemes created pursuant to a municipality's lawfully delegated authority. Because section 245.002(d) allows the developer to choose between two distinct ***874** regulatory schemes but does not allow the developer to create the scheme, it is not a delegation of legislative power. *See id.* at 870.

Estoppel

[3][4] We hold that a second independent legal basis supports the trial court's judgment. The trial court held that the city was estopped from denying the validity of Plat Note 6 because the City had accepted Garza's dedication of property. In reply, appellant argues that a municipality may not be estopped in the exercise of its governmental functions. *See City of Hutchins v. Prasifka,* 450 S.W.2d 829, 836 (Tex.1970); *City of Corpus Christi v. Gregg,* 155 Tex. 537, 289 S.W.2d 746, 750 (1956); *City of San Angelo v. Deutsch,* 126 Tex. 532, 91 S.W.2d 308, 309 (Tex.1936); *see also City of San Marcos v. R.W. McDonald,* 700 S.W.2d 674, 676 (Tex.App.-Austin 1985, no writ). The general rule urged by appellants has an exception where a city has received a substantial benefit as a result of its own mistake. In *City of San Angelo,* Deutsch loaned money to a third party who gave Deutsch a note and deed of trust on the property. *See* 126 Tex. 532, 91 S.W.2d 308. Before making the loan, though, Deutsch checked the county tax records for tax liens on the property. *See id.* Finding none, Deutsch made the loan. *See id.* Upon default by the borrower, Deutsch realized the county tax records were wrong and that the property was encumbered by unpaid taxes. *See id.* at 309. Deutsch argued that the city was estopped from asserting a claim for the unpaid taxes because of his reliance upon the city's error. *See id.* The supreme court held that a city could not be estopped by the negligence of its officials in the exercise of its governmental function when the city has received no benefit from the error.

> The opinion is expressed in a number of decisions that a city may be estopped even when it is acting in its public [governmental] capacity if it has received or accepted benefit from the transaction.... In such case exception is properly made to the general rule which has been discussed, because there is added to the equities existing in favor of the individual on account of his reliance and injury the established and compelling equitable principle that the city may not, after having accepted benefit from the unauthorized act, repudiate it so far as it imposes an obligation upon it or is disadvantageous to it. *Doty v. Barnard,* 92 Tex. 104, 107, 47 S.W. 712; 17

Tex. Jur. pp. 135, 136, s 7. This exception is not applicable here because the city received no benefit from the unauthorized entries made in the tax records.

See id. at 311–12 (citations omitted). In *Doty v. Barnard*, the supreme court said "A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in another part," 92 Tex. 104, 47 S.W. 712, 713–14 (Tex.1898) (quoting Herman on Estoppel and Res Judicata). Again, this exception to the general rule applies even where the city is acting in its governmental capacity. *See Deutsch*, 91 S.W.2d at 312; *Gregg*, 289 S.W.2d at 750–51; *see also Roberts v. Haltom City*, 543 S.W.2d 75, 80 (Tex.1976) ("The court's equitable power to prevent injustice must not be frustrated by rules of law that limit or preclude the responsibility of the city for the conducts of its officers."). While we acknowledge that the applicability of estoppel against municipalities is rare, we conclude that it would be manifestly unjust for the City to retain the benefits of its mistake yet avoid its obligations. The City argues that Garza is prohibited from developing his property pursuant to the Plat Notes because the Commission had no authority to ***875** approve a subdivision plat that did not conform to the applicable land use regulations in place at the time the application to subdivide was filed. However, we find that it would be manifestly inequitable for the City to retain the land Garza donated so that he could take advantage of transfer credit provisions available only under the CWO and later deny him the benefit of developing under the CWO.

Attorney's Fees

[5] The City asks that we reverse the award of attorney's fees provided we find in their favor. The award of attorney's fees is discretionary and cannot be reversed on appeal absent a clear abuse of discretion. *See Texas Dep't. of Pub. Safety v. Moore*, 985 S.W.2d 149, 157 (Tex.App.-Austin 1998, no pet.). A trial court abuses its discretion when it acts without regard to guiding legal principles or supporting evidence. *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex.1998). Since we have affirmed the legal basis supporting the trial court's judgment, we affirm the award of attorney's fees. *See Steel v. Wheeler*, 993 S.W.2d 376, 381 (Tex.App.-Tyler 1999, pet. denied) (affirming the award of attorney's fees to the prevailing party in a declaratory judgment action).

CONCLUSION

There are two independent legal bases supporting the trial court's judgment in Garza's favor. We hold that section 245.002(d)'s reference to "Plat Notes" does not create an unconstitutional delegation of legislative power to a private entity. Further, we hold that the City is estopped to deny the validity of Plat Note 6 because it accepted Garza's dedication of property. We affirm the trial court's judgment.

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END OF DOCUMENT

TAB 2

TM

TEXAS MUNICIPAL LEAGUE

President Robert Cluck, Mayor, Arlington
Executive Director Bennett Sandlin

March 29, 2011

The Honorable Third Court of Appeals
Price Daniel Sr. Building
209 West 14th Street, Room 101
Austin, Texas 78701

RE: *Texas Municipal League and Texas City Attorneys Association letter of* Amici Curiae *in Harper Park Two v. City of Austin; Case No. 03-10-00506-CV.*

To the Honorable Court of Appeals:

The Texas Municipal League (TML) is a non-profit association of over 1,100 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties. Believing that the issue before this Court is of great significance to all Texas cities that regulate development, TML and TCAA respectfully submit this letter of *amici curiae* in the above-mentioned cause.

The principal issue before this Court is whether a plat, filed in 1985 for an office project, vests development regulations in place at that time. The plat clearly vests the development regulations for that project. TEX. LOC. GOV'T CODE §245.001(3). However, in 2007, the developer submitted new information that showed his intent to place a hotel on the property. While Texas law protects the rights of landowners and developers, it is not meant to secure vested rights in twenty-five-year-old development regulations by relying on a plat that does not include a currently-proposed project.

Chapter 245 of the Texas Local Government Code outlines current vested rights law in Texas. It defines to what extent a developer may "lock in," for the duration of a project, the development regulations in place when a project is commenced. *Id.* at § 245.001 *et seq.* Section 245.002 only allows a project to lock in development regulations if the plan provides "fair notice of the project and the nature of the permit sought." *Id.* § 245.002(a-

1). The statute also carves out certain exceptions to property owners' vested rights that allow cities to protect the health and safety of their citizens through updated development regulations. *Id.* at §245.004.

The City of Austin argues that current law prohibits a developer from moving forward under old development regulations if the project has changed. TML and TCAA agree because vested rights attach to a project, not a piece of property. Chapter 245 defines a "project" as "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." Id. at § 245.001(3). The attorney general and the Fourth Court of Appeals have concluded that, if a project is altered, the developer is no longer vested with respect to those regulations. Op. Tex. Att'y Gen. No. JC-0425 (2001); *City of San Antonio v. En Seguido* Ltd., 227 S.W.3d 237 (Tex. App. – San Antonio, 2007, no pet).

Opinion No. JC-0425 concludes that, if a developer or landowner alters a project, the project loses any rights that may have vested through an earlier filing with the city. Op. Tex. Att'y Gen. No. JC-0425 at 3-4 (2001). In addition, the opinion concludes that the local regulatory agency (e.g., the city) decides if a project has changed substantially enough to lose its vested rights. *Id.* at 3.

Furthermore, the purposes of Chapter 245 would be defeated by allowing a landowner to file a "placeholder" subdivision plat for a "project" and later assert vested rights, no matter how unrelated the use.

The requirement under state law that a project in the originally-filed plat be the same as the currently-proposed project is an important distinction that enables cities to regulate development safely within their city limits. Cities are allowed to determine when a developer has lost his vested rights in development regulations because a project has changed. Any other interpretation would cause cities to lose their ability to adequately plan for infrastructure development in the area, and would destroy the balance between city obligations and developer rights. In fact, the attorney general recognized the numerous fact questions involved in comparing an originally-contemplated project to a currently-proposed one, and refused to make a determination on the issue. *Id.* at 1 ("Whether a project remains the same is a fact question, and this office cannot resolve it.").

In this case, the originally-filed plat for Harper Two's property indicated an office. Harper Two now plans to change the project to build a hotel. That change is considerable

and will put a strain on the City's infrastructure, and could negatively affect property values.

Proper interpretation of Chapter 245 is very important to all Texas cities that regulate development. This case presents an opportunity for the court to affirm an important, foundational issue regarding vested rights, allowing both cities and landowners to operate with a clear understanding of what those rights include. A holding to the contrary would effectively allow rights to vest in a piece of property rather than a project, in contravention to Chapter 245.

TML and TCAA, as *amici curiae*, respectfully submit this letter and request this Court to affirm the judgment of the trial court. I have served a copy of the foregoing on all parties or their attorneys of record.

Respectfully Submitted,

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