EXHAUSTION OF ADMINISTRATIVE REMEDIES

Presented By

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Michael Whellan represents local and national clients in a variety of disputes, including those involving trade secrets, contracts, misrepresentations, fraud and product liability. He also represents clients before city and county governmental entities in land-use and business matters.

Representative Experience

- Arbitration of claims against brokerages for churning, unsuitability and failure to supervise.
- Represented securities dealer throughout Texas in connection with customer-list cases to enjoin former employees from utilizing such information.
- Defended environmental consulting firm against allegations of professional negligence.
- Obtained zoning for large tracts of land with organized neighborhood opposition.
- Assisted client in obtaining policy changes from municipal airport advisory board and City Council.
- Represented land owners in various litigation matters concerning easements, contracts, leases and city code interpretation.
- Negotiated the preservation and relocation of a downtown historic building.

Professional Qualifications

Admitted to bar, 1990, Texas; 1992, U.S. District Court, Western District of Texas; 1993, U.S. Court of Appeals, Fifth Circuit; 1994, U.S. District Court, Southern District of Texas.

Education: University of Texas (Plan II Liberal Arts Honors Program, B.A., with high honors, 1987; J.D., with honors, 1990). Phi Beta Kappa; Order of the Coif.

Briefing Attorney to the Honorable Lloyd Doggett, Supreme Court of Texas, 1990-1991. Robert W. Calvert Chapter of the American Inns of Court, 1996-1999.

40-Hour Mediation Training, 1992.

Publications and Presentations

- Co-Author, *Tips for Dealing with Local Governments*, State Bar of Texas Advanced Real Estate Law Course – Summer, 2007.
- Co-Author, *What Attorneys Want From Mediators*, The Texas Mediator - Fall, 2002.
- Author/Speaker, *Expert Liability in Real Estate Matters: What to Consider When Things Go Wrong, Eminent Domain* - CLE International, Dallas, Texas June 14-15, 2001.

Professional Affiliations

Member: Austin Bar Association (Chair, Settlement Week Committee, 1995-1996; Co-Chair, Family Law Task Force, 1993-1995; Settlement Week Volunteer Mediator, 1992-2001; ADR Section; Civil Litigation Section; Co-Chair, Land Development Seminar, Real Estate Section, 2000-2006); American Bar Association (Litigation Section); State Bar of Texas (Alternative Dispute Resolution Section, Secretary, 1996-1998, Treasurer, 1998-1999).

Awards and Honors

- Austin Young Lawyers Association, Community Service Award, 2000.
- Volunteer Legal Services of Central Texas, Pro Bono Recognition, 1995 - 2007.
- State Bar Alternative Dispute Resolution Section, Recognition for Service, 1999.
- Heritage Society of Austin, Recognition for Service, 2001.

Community

- Austin Area Research Organization (AARO) - Member, 2010.
- Court Appointed Special Advocates (CASA) of Travis County - President 1999-2000; Board of Directors, 1994-2001; Founders Board, 2001-present.
- Volunteer Legal Services of Central Texas - President, 2000-2001; Board of Directors, 1997-2004; Volunteer Attorney.
- Travis County Dispute Resolution Center - Board of Directors, 1995-1999; Advisory Board, 1999-present; Volunteer Mediator.
- Leadership Austin, Class of 1996-1997.
- Jewish Community Association of Austin - Board of Directors, 2003-2005.

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I. INTRODUCTION.[1]

If a permit or other authorization is denied or the City or other governmental staff reviewing an application make a decision that you do not think is correct, the client's first reaction may be to run immediately to the courthouse. Unfortunately, in most circumstances, before you can go to the Court, you have to give the City a chance to correct the mistake by following its administrative appeal process. Otherwise, if you attempt to head "directly to go" at the courthouse – without following the administrative appeal process – you may find your case poured out by the court because the court lacks jurisdiction.

The purpose of this paper is to provide an overview of the judicial doctrine of exhaustion of administrative remedies, the traditional exceptions to the doctrine, and the pitfalls particular to working with Texas municipalities on land development projects. The hope is to provide not just an illustration of some of the complexities of working with city land development codes and the Texas Local Government Code, but also to provide a guide for practitioners. Interesting problems and potential approaches for achieving judicial remedies to administrative disputes will be pointed out along the way.

II. LAW, POLICY, AND EXCEPTIONS.

A. The Judicial Doctrine of Exhaustion of Administrative Remedies

As a well-established judicial doctrine, the requirement for the exhaustion of administrative remedies assures that "no one is entitled to judicial relief for a supposed threat or injury until the prescribed administrative remedy has been exhausted."[2] The doctrine achieves the important goal of preserving comity between administrative agencies and the judiciary, and on a practical level ensures the efficient and orderly resolution of matters under consideration by administrative agencies.[3] The doctrine also upholds "the basic legislative intent that full use should be made of [an] agency's specialized understanding within [a] particular area of regulation" and gives an agency "first opportunity to discover and correct its own errors."[4] The doctrine is codified under Texas law in the Government Code as follows: "A person who has exhausted all

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[1] This paper was prepared with the tremendous help of UT Law Student and Graves Dougherty Hearon & Moody, PC law clerk, Tania Culbertson. I am grateful for Ms. Culbertson's outstanding work. Additionally, I thank my law partner Alan Haywood at Graves Dougherty Hearon & Moody, PC for his thoughts and advice on this paper.

[2] *Meyers v. Bethlehem Corp.*, 303 U.S. 41, 50-51 (1938).

[3] *Tex. Air Control Bd. v. Travis Cnty.*, 502 S.W.2d 213, 215 (Tex. Civ. App.—Austin 1973, no writ) (finding that Travis County failed to exhaust its remedies).

[4] *Id.* at 215-216.

administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter."[5]

However, administrative agencies may exercise only those powers expressly conferred upon them by clear statutory language.[6] Thus, for an administrative agency to resolve a dispute, it must have either exclusive jurisdiction by Legislative grant or primary jurisdiction over the subject matter at issue.[7] An agency has exclusive jurisdiction when "a pervasive regulatory scheme indicates that [the Legislature] intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed."[8] Conversely, an agency has primary jurisdiction when both the agency and the courts have authority to make initial determinations in a dispute but the courts have chosen to defer to the agency.[9] Trial courts will allow an agency to initially decide an issue when: "(1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations."[10] Where exclusive jurisdiction exists, a trial court lacks subject matter jurisdiction to hear a claim until all administrative remedies have been exhausted.[11] Unquestionably, zoning, subdivision, and site plan regulations in Texas serve as "pervasive regulatory schemes" sufficient to confer exclusive jurisdiction upon the administrative agencies charged with their enforcement.

B. Exceptions to the Doctrine

The doctrine of exhaustion of administrative remedies is subject to several common exceptions. These exceptions have been recognized, and judicial review granted, across all areas of administrative law in Texas, and should be kept in mind and asserted in the land development context where appropriate. However, it should also be noted that at least one Texas court has held that exceptions to the exhaustion doctrine must be invoked, and judicial relief sought, before the issuance of a final agency order, therefore timing is of the essence when raising an exception.[12]

1. Dispositive Question Is a Pure Matter of Law

The most commonly and successfully argued exception to the doctrine of exhaustion of administrative remedies is the "pure matter of law" exception. As stated by the Supreme Court of Texas, "[g]enerally, the doctrine of exhaustion of administrative

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[5] TEX. GOV'T CODE ANN. § 2001.171 (Vernon 2008).
[6] *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002).
[7] *Id.* at 221.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 527 (Tex. App.—Austin 2002, pet. denied).

remedies does not apply when there are purely questions of law involved."[13] The case of *Currey v. Kimple* provides a typical example of an application of this exception.[14] Homeowners Mr. and Mrs. Louis T. Kimple were granted variances by the Board of Adjustment of the City of Dallas allowing them to build a tennis court on their residential lot.[15] Neighboring homeowners sought judicial relief from the variances as well as from the building inspector's issuance of the building permit.[16] The court held that because they had not appealed the building inspector's actions to the Board of Adjustment, the neighbors had failed to exhaust their administrative remedies.[17] Regardless, the court assumed jurisdiction of the case and ruled on the merits of the case because the dispositive issue could be resolved as a matter of law – in this case, whether a tennis court was permitted under the city's zoning ordinance.[18] The court construed the Dallas City Zoning Ordinance to permit a tennis court as "an accessory use in a single-family residential district" as well as "a recreational use within the primary use of property as a residential dwelling."[19]

In order to prevail on a "pure matter of law" exception argument, one must first be sure that the issues in dispute can be resolved by a court without the need for determinations of fact. As one Texas court has stated:

> [T]he fact that a party suggests that the resolution of the issue as framed on appeal might involve some determinations of law cannot be the end of our jurisdictional inquiry; rather, we must also ascertain whether the determination of the 'pure questions of law' specified are in fact questions of law and, if so, whether addressing those questions, on their own, will resolve the actual controversy at issue.[20]

Trial court judges, however, are reluctant to decide cases based solely on legal issues, and are inclined to prefer the case be heard by the trier of facts before a final judgment is entered. As a result, having the court conclude the issue is purely a matter of law can be difficult. For example, in *Buffalo Equities*, the appellant argued that the court must, as a pure matter of law, determine whether the City may condition the approval of a site-plan application on fulfillment of a condition not required under either the "planned unit development" ordinance or the City code.[21] The court disagreed, holding that this

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[13] *Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 892 (Tex. 1986), *overruled on other grounds*.
[14] 577 S.W.2d 508 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).
[15] *Id.* at 510.
[16] *Id.* at 510-11.
[17] *Id.* at 513.
[18] *Id.* at 514.
[19] *Id.* Given this interpretation, the variance presumably required by the staff in this case was not required. This serves as a good reminder for applicants to consider challenging a director's decision administratively to the Land Use Commission, rather than to the Board of Adjustment.
[20] *Buffalo Equities, Ltd. v. City of Austin*, 2008 WL 1990295 at *5 (Tex. App.—Austin 2008, no pet.) (mem. op.).
[21] *Id.*

question did not constitute a pure matter of law sufficient to excuse appellant from the exhaustion requirement, but rather that, "[a] declaration that the City may not impose a condition for approval that is contrary to the City's code will not resolve the controversy over whether a [city employee's] determination and a potential decision by the City to forestall development are contrary to the City's code."[22] Because that determination would involve questions of fact, the court insisted that the appellant appeal the city employee's decision to the Board of Adjustment before pursuing a judicial remedy.[23]

2. Agency Action Beyond Statutorily Conferred Powers

Administrative agencies are entitled to exercise the duties and functions conferred upon them by statute without interference from the courts.[24] In exercising those duties, however, the governmental agencies may exercise only those powers that are conferred by the statute. It follows, therefore, that intervention by the courts in administrative proceedings may be allowed when an agency is exercising authority beyond its statutorily conferred powers.[25] So held the Supreme Court of Texas in enjoining the Commissioner of Education from holding a hearing to review a final order of the State Board of Education creating the Westheimer Independent School District.[26] Section 11.52(j) of the Texas Education Code (since repealed) stated that, "The commissioner of education shall observe and execute the mandates, prohibitions, and regulations established by law or by the State Board of Education in accordance with the law."[27] Because a hearing to review the order was not provided in the statute, the Commissioner, in conducting a hearing to review the Board's order, would be exceeding his statutorily conferred powers, the court had jurisdiction to prohibit any further administrative hearings of the matter before the Commissioner.[28]

To successfully assert this exception to the exhaustion doctrine, it must be shown that the agency acted wholly outside its jurisdiction.[29] Thus, it is not enough merely to assert that an agency has failed to meet certain statutory procedural requirements.[30] In *Appraisal Review Board*, a group of taxpayers brought an action against the county appraisal district and the appraisal review board seeking injunctive relief for alleged violations in the Tax Code procedure for property tax appraisal protest hearings.[31] The court held that the taxpayers were required to exhaust their administrative remedies by obtaining an appraisal protest hearing before the review board and then appealing the order in the manner dictated by the Tax Code.[32] The

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[22] *Id.*
[23] *Id.* at *4.
[24] *Westheimer Indep. Sch. Dist. V. Brockette*, 567 S.W.2d 780, 785 (Tex. 1978).
[25] *Id.*
[26] *Id.* at 786.
[27] *Id.*
[28] *Id*. at 785.
[29] *Appraisal Review Bd. of Harris Cnty. Appraisal Dist. v. O'Connor & Assocs.*, 267 S.W.3d 413, 419 (Tex. App.—Houston [14th Dist.] 2008, no pet.).
[30] *Id.*
[31] *Id.* at 415.
[32] *Id.* at 417.

court stated that, "the mere claim that an administrative agency acted ultra vires does not authorize litigation before administrative remedies are exhausted, nor does failure to perfectly comply with all of the intricacies of the administrative process necessarily constitute extra-jurisdictional action by an agency."[33]

3. Void Orders

In a similar vein, when an agency acts in such a manner that its order is void, a party may appeal such action directly to the courts without first exhausting administrative remedies.[34] In *State Line*, despite the fact that an order detaching territory from one school district and annexing it to another was made pursuant to a petition of a majority of the territories' voters together with the consent of the board of trustees, the order itself was void because the board acted in contravention of a specific statute, and, therefore, without authority of law.[35] Likewise, if a taxing authority were to fail to provide the constitutionally required notice of appraised property value to its taxpayers, it would be deprived of jurisdiction and the appraisal would be void.[36] Such a void order could be appealed judicially without regard to the requirement for exhaustion of administrative remedies.[37]

4. Irreparable Injury and Futility

Parties are not required to pursue administrative remedies without regard to the consequences that would result during pursuit of an administrative appeal process. If exhaustion of administrative remedies will result in irreparable harm, the courts may properly exercise their jurisdiction in order to provide relief.[38] In *Houston Federation*, teachers filed suit and enjoined the Houston Independent School District from implementing a plan allowing for the extension of the school day in Houston high schools.[39] HISD argued that the teachers should have first pursued their claim through the administrative process before resorting to the courts, but the Supreme Court of Texas disagreed, stating that "[b]y its very definition, irreparable harm means that an award of damages months later will not provide adequate compensation."[40] Because the Commissioner of Education was not authorized to order immediate injunctive relief,

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[33] *Id.* at 419.
[34] *State Line Consol. Sch. Dist. No. 6 of Parmer Cnty. v. Farwell Indep. Sch. Dist.*, 48 S.W.2d 616, 617 (Tex. Comm'n App. 1932, judgm't adopted).
[35] *Id.* (noting that the Court had previously considered the statute and had "held that that county board was without power under the act in question. . ." and, therefore, the district court had proper jurisdiction because of the county school board order was void at the time it was passed; however, subsequently, the legislature passed a validating act for the orders of county school boards with particular student populations).
[36] *MAG-T, L.P. v. Travis Cent. Appraisal Dist.*, 161 S.W.3d 617, 625 (Tex. App.—Austin 2005, pet. denied).
[37] *Id.*
[38] *Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 730 S.W.2d 644, 646 (Tex. 1987).
[39] *Id.* at 645.
[40] *Id.* at 646.

the available administrative remedies were inadequate to prevent the harm.[41] The Court therefore concluded that the court of appeals erred in dismissing the lawsuit and the case was remanded to the court of appeals for a determination of "whether the trial court clearly abused its discretion in granting the temporary injunction."[42]

Similarly, a party is not required to exhaust administrative remedies if it would be futile to do so.[43] To demonstrate futility, a claimant must show that it is certain that the claim will be denied on administrative appeal.[44] In *Ogletree*, a teacher placed on leave and subsequently terminated sued the Glen Rose Independent School District.[45] The school district moved for summary judgment in part based on the fact that the teacher had failed to exhaust the administrative remedies available to her.[46] The teacher contended, however, that such exhaustion would have been futile because the superintendent of the school district told her that the decision was final and that nothing she could say would change the decision.[47] The court disagreed, holding that under the three-step process provided in the school district's grievance policy, the teacher could have appealed her dismissal to the district's board of trustees and then to the Texas Education Commissioner. Thus, a statement by the district superintendent alone did not demonstrate the futility of exhausting the available administrative remedies.[48]

III. LAND DEVELOPMENT: WHAT ARE THE AVAILABLE ADMINISTRATIVE REMEDIES? AND WHEN CAN YOU PROCEED DIRECTLY TO "GO"?

Having explored the doctrine of exhaustion of administrative remedies and its exceptions, we now turn to the available administrative remedies in the land development context, and where these exceptions might apply. In general terms, the approval sought determines the required administrative procedure, while the basis for the agency decision regarding the approval determines whether an administrative or a judicial appeal of the decision should be pursued. In other words, which maze are you entering, and which routes can you take to the exit?

As we have seen, when an agency makes a discretionary determination regarding an application, administrative remedies must be exhausted before a judicial appeal can be entertained. The particular administrative avenue to exhaustion will be determined by reference to the Land Development Code or Local Government Code.[49] When an approval is based on an invalid provision within a code, or on an incorrect

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[41] *Id.*
[42] *Id.*
[43] *Ogletree v. Glen Rose Indep. Sch. Dist.*, 314 S.W.3d 450, 454 (Tex. App.—Waco 2010, pet. denied).
[44] *Id.*
[45] *Id.* at 451.
[46] *Id*.
[47] *Id.* at 454.
[48] *Id.*
[49] Note that all references in this paper are to the Code of the City of Austin and the Texas Local Government Code. While many other Central Texas municipalities have adopted Austin's approach to land development issues, be sure to consult the code applicable to your project.

interpretation of a code provision, a judicial remedy may be immediately available. In essence, when a challenge is brought based on an invalid provision or incorrect interpretation, the "pure matter of law" exception to exhaustion of remedies may be available.

A. Board of Adjustment Appeals

Section 211.008 of the Texas Local Government Code permits the appointment of a board of adjustment charged with the authority to grant relief from zoning limitations.[50] Section 25-2-472 of the Code of the City of Austin in turn states that, "The Board of Adjustment shall hear and decide a request for a variance from a requirement of this chapter, except as otherwise provided in the Code."[51] In order to grant a variance from a zoning requirement, the Board of Adjustment must find that:

> (1) the requirement does not allow for a reasonable use of property;
>
> (2) the hardship for which the variance is requested is unique to the property and is not generally characteristic of the area in which the property is located; and
>
> (3) development under the variance does not:
>
> (a) alter the character of the area adjacent to the property;
>
> (b) impair the use of adjacent property that is developed in compliance with the City requirements; or
>
> (c) impair the purposes of the zoning district in which the property is located.[52]

The Board of Adjustment is a quasi-judicial board and, therefore, its decisions may only be reviewed by the courts using an abuse of discretion standard. Petition for a writ of certiorari must be presented to the court within ten days after the date the Board's decision is filed in the Board's offices.[53] The petition must state that the decision of the Board is illegal in whole or in part, as well as specify the grounds for the illegality.[54] The abuse of discretion standard means that, as a practical matter, it is very difficult to prevail in a judicial appeal of a Board decision denying a variance, as:

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[50] TEX. LOC. GOV'T CODE ANN. § 211.008 (Vernon 1997).
[51] AUSTIN, TEX., CODE § 25-2-472.
[52] AUSTIN, TEX., CODE § 25-2-474.
[53] TEX. LOC. GOV'T CODE ANN. § 211.011(b) (Vernon 1997).
[54] TEX. LOC. GOV'T CODE ANN. § 211.011(a) (Vernon 1997).

> the question on appeal from the Board's order is whether or not there is any substantial evidence affording reasonable support for the findings and order entered by the Board, such being a question of law and not of fact. If the evidence before the Court, as a whole, is such that reasonable minds could have reached the conclusion that the Board must have reached in order to justify its action, the Board's action must be sustained.[55]

Only when an appeal asserts that the Board based its decision on an invalid zoning regulation or an incorrect interpretation of a zoning regulation can the court engage in a *de novo* judicial review. The best opportunity for an appeal from a Board of Adjustment decision is when the dispute centers on an incorrect interpretation of a regulation; otherwise, the abuse of discretion standard will control.

Board of Adjustment appeals are fast-paced. If you miss the 10-day deadline to file the petition for writ of certiorari to the district court, the Board of Adjustment decision becomes final and any appeal may be dismissed.[56] Even if you try to extend the deadlines by seeking a rehearing at the Board of Adjustment, the 10-day deadline will begin to run as soon as the board decides the rehearing, regardless of when you are notified of the decision.[57]

B. Subdivision Appeals

Section 212 of the Texas Local Government Code describes the process and requirements for subdivision approval. The City of Austin provides for a two step subdivision process, including review and approval of preliminary and final subdivision plats. The Planning Commission has the authority to approve preliminary plats, and must do so within 30 days after filing, or the plat is deemed approved.[58] The plat must be approved if it conforms to the City's general plan, meets bonding requirements, and meets the additional rules adopted by the City.[59] Thus, the only discretion that the Planning Commission may exercise during the approval process is the determination of whether all platting requirements have been met. If the Planning Commission denies a plat, a judicial remedy can immediately be sought through a mandamus action to order the approval of the plat as a ministerial act of the commission.[60]

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[55] *Zoning Bd. of Adjustment v. Marshall*, 387 S.W.2d 714, 715-16 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).
[56] *Tellez v. City of* Socorro, 226 S.W.3d 413, 414 (Tex. 2007).
[57] *Boswell v. Bd. Of Adjustment and Appeals of the Town of S. Padre Island*, 2009 WL 2058914 at *2-3 (Tex. App.—Corpus Christi 2009, no pet.) (Court could not consider property owners argument that they were misled by the Board concerning the date of its decision, because the petition was not filed within 10 days of the Board's decision and, therefore the Court lacked subject-matter jurisdiction).
[58] TEX. LOC. GOV'T CODE ANN. § 212.009(a) (Vernon 1997).
[59] TEX. LOC. GOV'T CODE ANN. § 212.010(a) (Vernon 1997).
[60] *Howeth Investments, Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 895-96 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

C. Administrative Site Plan Appeals

The site plan approval process naturally involves the interpretation of rules and regulations, and with limited exceptions, is an administrative process without public hearing for board or commission approvals. Section 25-2-475 of the Code of the City of Austin provides that "[a] person may appeal a decision of the building official regarding a site development regulation prescribed by this subchapter to the Board of Adjustment." Often a City representative who is not the "building official" will make a particular site plan decision, which depends on a particular regulatory interpretation.

Under Section 25-5-112 of the Code of the City of Austin, "[i]f the director disapproves a site plan, the applicant may appeal the director's interpretation or application of a requirement of this title to the Land Use Commission by filing a written objection with the director." Thereafter, "[t]he applicant may appeal the Land Use Commission's decision on an appeal under this subsection to the council." *Id.* Under the City of Austin Code, "disapproval" is distinct from a denial. Section 25-1-63. An applicant has the right to challenge a staff decision disapproving an application prior to the deadline for any further updates. *Id.* The disapproval decision can ultimately wind its way to the courthouse for a decision, especially if it is based on a "pure matter of law" issue.

In all likelihood, with regard to site development regulation decisions, the City would file a plea to the jurisdiction and claim that the applicant bypassed the Board of Adjustment and, therefore, has failed to exhaust her remedies. The important aspect of this position will be whether the City's decision was by the "building official" or another City staff representative. This can be heard relatively quickly for a litigation matter in the format of a declaratory judgment action. Nevertheless, you would be well advised to pursue whatever appeals process may be available to avoid the exhaustion defense by the City, and the prospect of being unable to go through the administrative appeal process if the court agrees with the City on the exhaustion issue.

D. Building Permit Appeals

Building permits involve a slightly different path, but contain many similarities to the site plan approval process. Section 25-11-93 of the Code of the City of Austin states that, "[a]n interested party may appeal a decision of the building official to grant or deny a permit under this division to the Building and Fire Code Board of Appeal." The timeframe for such an appeal is probably set forth in the general provisions of Section 25-1-181, *et. seq*.

E. Chapter 245 Vesting Appeals

Chapter 245 of the Texas Local Government Code protects a development project from changes in regulatory standards after the project has already begun the permit application process.[61] Section 245.002 specifies that regulatory agencies are to consider the grant or denial of a permit based on the regulations in place at the time of the filing of the application for the original project permit.[62] For the purposes of vesting under Chapter 245, a "project" is defined 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."[63] Furthermore, if a series of permits is required for a project, the time at which the first permit in the series is filed is the time at which project regulations vest for all subsequent permits for that project.[64]

No written City of Austin procedures exist for appealing Chapter 245 determinations. A Chapter 245 application form has been promulgated, however, and must accompany all City of Austin subdivision and site plan applications.[65] Additionally, the 1704 Committee, made up of an assistant city attorney and members of the Watershed Protection and Development Review Department, can hear appeals of Chapter 245 determinations.[66] Without a documented administrative process in place for Chapter 245 appeals, there is a serious question whether an applicant who disagrees with the City's determination that the project is not grandfathered under Chapter 245 must resort to the informal appeal process before seeking relief at the courthouse. At this point in time, the City accepts applicant requests for rehearing before the 1704 Committee; but because there is no written requirement to undertake such an appeal or rehearing, the route to the courthouse is much quicker. Again, to avoid the consequences of the court agreeing that administrative remedies have not been exhausted, and with at least a chance of a successful appeal to the Director (which would be the fastest resolution), serious consideration must be given to pursuing the City's informal process.

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[61] For an excellent discussion of Chapter 245, please see Peter Cesaro's paper from the 2009 Austin Bar Association Land Development Seminar, "How To Preserve Entitlements In An Economic Downturn?"
[62] TEX. LOC. GOV'T CODE ANN. § 245.002 (Vernon 2005).
[63] TEX. LOC. GOV'T CODE ANN. § 245.001 (Vernon 2005).
[64] TEX. LOC. GOV'T CODE ANN. § 245.002(b) (Vernon 2005).
[65] A copy of the Chapter 245 Determination form is attached as Exhibit A to this paper.
[66] "1704" is a reference to the House Bill number that added Chapter 245 to the Texas Local Government Code.

IV. PRACTICAL CONSIDERATIONS: "FOCUS ON THE RULES AND REGULATIONS, KNOW YOUR PROCEDURES"

Ultimately, the availability of a judicial remedy will depend on your ability to navigate the administrative appeal process and to identify possibilities for direct action in the courts. Some of the practical steps include:

- Prior to seeking a permit or other authorization, confirm your administrative appeal rules in the codes and regulations
- Be aware of procedures and timeframes
- Exploit opportunities to argue exceptions to the doctrine of exhaustion
- Know when to argue exceptions and when to exhaust administrative remedies to appease the judge (political considerations)

V. CONCLUSION

Texas municipalities continue to promulgate administrative rules and regulations; sometimes as a reaction to prior lawsuits. Applicants for governmental approvals should be well aware of the administrative appeal process prior to filing their application – just in case it is denied during the initial administrative review. Preparing for possible judicial review also requires some thought prior to seeking the administrative approval as to the possible legal arguments that the applicant might make concerning the rules and regulations, especially if it is anticipated that a particular rule or regulatory interpretation will be an issue of debate for the administrative staff review.

As you select the administrative path and the particular permit that you need for a development, to the extent possible, maintain the option for a final review at the courthouse by either exhausting the administrative remedies or creating a way to utilize an exception to the exhaustion doctrine.

Exhibit D
PROJECT APPLICATION H.B. 1704/Chapter 245 DETERMINATION
(Chapter 245, Texas Local Government Code)

(This completed form must accompany all subdivision and site plan applications.)

FOR DEPARTMENTAL USE ONLY

File # Assigned: _____ **Date Filed:** _____

Original Application Date: _____ **Signature**: _____ **Date:** _____

Comments:

_____ **Insufficient Information to establish Chapter 245 rights.**

Proposed Project Name: _____

Address / Location: _____

Legal Description: _____

A. [ ] The proposed application is for a **New Project** and is submitted under regulations currently in effect.

NOTE : If A is checked above, proceed to signature block below.

B. [ ] The proposed application is for an **ongoing project not requesting House Bill 1704 consideration**. The choice of this option does not constitute a waiver of any rights under Chapter 245.

C. [ ] The proposed application is for a **project requesting review under regulations other than those currently in effect, but not on the basis of House Bill 1704**. **All appropriate supporting documentation must be attached to this request.** Provide a brief description of the basis for this request here: _____

D. [ ] The proposed application is for a **project requesting review under a specific agreement, not on the basis of House Bill 1704**. **All appropriate supporting documentation must be attached to this request**. Provide a brief description of the basis for this request here: _____

E. [ ] Original **Application Filing Date**: _____ File **#:** _____

The proposed application is submitted as a **Project in Progress** under Chapter 245 (HB 1704) and should be reviewed under the applicable regulations pursuant to state law. **The determination will be based on information submitted on and with this form.**

The following information is required for Chapter 245 Review:

Attach supporting documentation, including a summary letter with a complete project history from the Original Application to the present, with a copy of the original subdivision or site plan approval by the City and subsequent application approvals. Specify project information for date claiming 1704 grandfathering; include a copy of the relevant permit upon which Chapter 245 vesting is claimed.

Project Application History	**File #**	**Application Date**	**Approval Date**
Annexation/zoning (if applicable to history)			
Preliminary Subdivision			
Final Subdivision Plat			
Site Plan / Devel. Permit			

Proposed Project Application (*check one):* **Preliminary Subdivision**_____ **Final Plat**_____ **Site Plan**_____

Proposed Project Land Use: *Specify acreage in each of the following land use categories*:

Single Family / Duplex _____ **Townhouse / Condo / Multi-family** _____ **Office** _____

Commercial _____ **Industrial / R&D** _____ **Other (Specify)** _____

Total acreage: _____ **Watershed** _____ **Watershed Classification**_____

This proposed project application will still be reviewed under those rules and regulations that are not subject to Chapter 245, such as those to prevent imminent destruction of property or injury to persons, including regulations dealing with stormwater detention, temporary erosion and sedimentation controls, and regulations to protect critical/significant recharge features.

Signature - Property Owner or Agent _____ Date**:** _____

Printed Name _____ **Phone / Fax** _____

Form Date 5/06/2005

City of Austin / Watershed Protection and Development Review Department
505 Barton Springs Road, Austin, Texas 78704 Ph. 974-2659 / Fax 974-2934