SUBJECT: Collective review of land development permits by regulatory agencies

COMMITTEE: Land and Resource Management — favorable, without amendment

VOTE: 7 ayes — Saunders, Mowery, Alexander, Hilderbran, Howard, Krusee, B. Turner

0 nays

2 absent — Combs, Hamric

SENATE VOTE: On final passage, May 16 — 29-2 (Barrientos, Zaffirini)

WITNESSES: No public hearing

BACKGROUND: In 1987 the Legislature enacted HB 4 by A. Smith et al., which amended Government Code secs. 431.141 - 481.143 to provide that a regulatory agency's decision regarding certain projects for which a permit is required must be made solely on the basis of regulations or ordinances in effect at the time the original application for the permit is filed. If a series of permits is required for a project, the ordinances and regulations in effect at the time of the original application for the first permit in the series can be the sole basis for consideration of the remaining permits needed to finish the project.

Government Code, sec. 481.142 defines a "*project*" as an endeavor over which a regulatory agency exerts its jurisdiction and for which a permit is required before initiation of the endeavor.

"*Regulatory agency*" is defined as an agency, bureau, department, division, or commission of the state or any department or other agency of a political subdivision that processes and issues permits.

DIGEST: SB 1704 would amend Government Code, secs. 481.141-481.143, which concerns state and local permitting, to specify that preliminary plans and related subdivision plats, site plans and all other development permits for the land be considered collectively as one series of permits.

The bill would amend the definition of "project" in Government Code, sec. 481.142, to add that a project be an endeavor for which one or more permits are required to initiate or continue the endeavor. The definition of "regulatory agency" would also be amended to include a board, commission or governing body of a political subdivision in its capacity of processing, approving or issuing permits.

The permitting provisions of SB 1704 would apply only to projects in progress on or commenced after the effective date of HB 4 by A. Smith enacted in 1987 by the 70th Legislature (September 1, 1987) and the requirements in effect at the time the original application was filed would be the ones applicable to the project. Provisions of the Government Code relating to state and local permitting would be enforceable solely through declaratory, mandamus or injunctive relief.

SB 1704 would stipulate that if a series of permits were required for a project, rules, expiration dates and other duly adopted requirements in effect at the time the first permit was filed would be the sole basis for consideration of all subsequent permits required by the project. The bill would include rules and expiration dates in effect at the time the original permit application was filed in the list of requirements that a regulatory agency would have to consider before making a permitting decision.

Once an application for a project was filed, a regulatory agency would be prohibited from shortening the duration of any permit required for the project. A permit holder would have the right to take advantage of procedural changes to the laws, rules, regulations or ordinances of a regulatory agency (including measures that would lengthen the effective life of the permit) that would enhance or protect the project.

The provisions of SB 1704 relating to the duration or expiration date of a permit would not apply to a Railroad Commission permit that did not have an expiration date or a specific duration when originally issued.

Exemptions from the permitting requirements. The permitting requirements in the section of the Government Code that SB 1704 would amend would not apply to:

• permits for building that are issued pursuant to requirements of uniform building, fire, electrical, plumbing or mechanical codes, or local amendments made to such codes enacted solely to address imminent threats to destruction of property or injury to persons, unless such permits are less than two years old;

• city zoning regulations that do not affect lot size, dimensions, coverage or building size;

• regulations for the location of adult-oriented businesses;

• all laws, ordinances, rules, regulations or requirements affecting colonias;

• fees lawfully imposed in conjunction with development permits;

• regulations for annexation, utility connections and to prevent imminent destruction of property or injury to persons or

• construction standards for public works located on public lands and easements.

The bill could not be construed to affect permits or other requirements adopted under the federal Coastal Zone Management Plan or to impair the rights of any person under a final judgment or in any pending litigation concerning the interpretation of Subchapter I, Chapter 481 of the Government Code, governing state and local permitting.

The bill would take immediate effect if approved by two-thirds of the membership of each House.

SUPPORTERS SAY:

SB 1704 would clarify certain provisions of HB 4 by A. Smith et al., enacted by the 70th Legislature (and now ensconced in Government Code, secs. 481.141-481.143) to provide developers with a predictable regulatory framework in which to work. The bill would prevent cities from retroactively applying regulations after original permits are filed. These retroactive standards are inequitable, even punitive and impede economic development.

The bill would not violate constitutional provisions on retroactive laws by applying to projects in progress on or commenced after 1987. In actuality it would help prevent violations of the prohibition of Art. 1, sec. 16 of the Texas Constitution, by those seeking to make new rules apply retroactively to permits granted in the past.

Land development takes time. It is not unusual for an investor to spend several years locating potential development sites, getting financing and preparing plans to conform to applicable ordinances. It is only fair that government rules be predictable so developers can plan to comply with regulations that affect what can be put on the land and how the development is to take place. Prior to enactment of HB 4 in 1987 continuing projects often became subject to new rules, ordinances, standards, policies — usually more restrictive than the old ones. This was frustrating to those who had spent enormous amounts of money and time trying to meet previous requirements.

A land developer, for example, might file for a permit for a preliminary plat and spend money for design plans only to be told when presenting the plans to the city that another ordinance had been passed, requiring a total revamping of the project. Returning with a new plan, the developer might find yet another ordinance in effect. This often resulted in the cancellation of projects.

SB 1704 would ensure that government entities do not unfairly change the rules that apply to permitting decisions, making it almost impossible for developers to plan for the future. For example, four ordinances that affect regulation of land development were passed in the city of Austin between 1990 and 1992. When a Hays County court recently invalidated Austin's Save Our Springs ordinance, for example, Austin came up with a new one within days.

SB 1704 would not hinder zoning, regulations to prevent imminent destruction of property, injury to people, building codes or other local government regulations. Only zoning that would affect lot size, lot coverage or building size would come under the bill because it is reasonable to ask a city not to change regulations concerning lot or building size after construction of a development has already begun.

Austin has willfully misinterpreted the law for its own purposes by continuing to consider each part of a development project a different permit that is subject to all the rules that have passed since the project initiation. Recently a federal court found that Austin denied FM Properties' (a company trying to develop land in the Austin area) constitutional right to due process when the city rejected a permit for the company. In a pretrial hearing in that case, U.S. District Judge James Nowlin ruled that the city's interpretation of HB 4 was invalid. SB 1704 would clarify once and for all that site plans and subdivision plans are not separate projects, and that property owners must follow only the regulations in effect when an application is filed.

OPPONENTS SAY:

SB 1704 would limit the power of home rule cities to control land use and prevent local governments from improving on ordinances to protect public health and safety in development of new areas, unless the regulation was to prevent "imminent" destruction of property or injury to persons.

The bill would also violate constitutional provisions on retroactive laws by applying to projects in progress on or commenced after 1987. By providing that it would apply to all projects *in progress on* or commenced after September 1, 1987, the applicant for that permit could lock in development regulation dating from when the very first permit was filed, even though the build-out period for the project might exceed 20 years and involve numerous changes in ownership.

The bill would erase the distinctions between different steps in development and meld them into a single project, for which all standards would be frozen when the preliminary plan was filed. Many subdivisions are platted before the land was sold; there is no logical or equitable reason to freeze site development standards before a development is actually designed.

Locking in subsequent permit applications on land development under the rules in place the first time the developer obtained a permit would have all sorts of unforeseen implications on the ability of cities to regulate land use. New rules regarding water, sewer, sign regulation, road construction etc. that were not promulgated as part of a uniform national code could not be applied to anything previously permitted.

The bill would exempt various building code requirements from permitting provisions but specifies that local changes to the codes would be exempted only if they were enacted solely to address imminent threats to destruction of property or injury to persons. The word "imminent" would limit the exemption too much. A city, for example, might want to amend its building code to require fences around swimming pools, but it could be prevented if such a change were found not to be for an "imminent" threat of injury to a person.

SB 1029 by Armbrister, the bill that would have accomplished some of the same goals as SB 1704 was vetoed by then-Governor Ann Richards in 1993. Her reasons are still applicable to SB 1704. The governor felt that applying SB 1029 retroactively would create chaos for local governments forced to determine on a case-by-case basis which rules could be applied to specific projects, and would nullify rules and ordinances enacted for many projects. SB 1704 would apply retroactively as well.

The bill is an attempt to thwart various ordinances that the city of Austin has passed, and would undermine the city’s ability to regulate development and protect the natural resources in the area.

NOTES:

A similar bill, HB 2762 by Kuempel, was placed on the General State Calendar for May 11 but was not considered by the House.