SUBJECT: Prohibiting retroactive changes to development permits by cities

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 9 ayes — Walker, Crabb, Bosse, F. Brown, Hardcastle, Howard, Krusee, Mowery, B. Turner

0 nays

WITNESSES: *(On original bill:)*
For — Thurman Blackburn, Texas Capital Area Builders Association and Texas Association of Builders; Craig Douglas, Drenner & Stuart and Stratus Properties; William L.V. Hale, II, Johnson Communities, Inc.; Maury Hood and Harry Savio, Texas Capital Area Builders Association; Kevin Kadlecek, Oak Hill United Methodist Church; Philip Savoy, Take Back Texas; Glenn Weichert; Eli James Garza; W.B. (Bill) Howell; Fred H. Thomas; William D. Schultz (Amendments 1 and 2)

Against — Charles Cryan, City of College Station; Chris Cuny, City of Heath; Jimmy Gaines, Texas Landowners Council, Inc.; Alice Glasco, City of Austin; Greg Ingham, City of Levelland; Kevin Lasher, City of Fort Worth Development Partnership; Emil Moncivais, City of San Antonio; Larry Niemann, Austin Building Owners & Managers Association and Texas Building Owners & Managers Association; Arthur Pertile, City of Waco; Len Wilson, City of Andrews; David Arscott; William Kent Snead

On — Jim Nias

BACKGROUND: Government Code, chapter 481, subchapter I, enacted in 1987 and amended in 1989 and 1995, was repealed inadvertently by an act of the 75th Legislature, effective September 1, 1997. Subchapter I dealt with restrictions on state and local permits and generally required that approval or disapproval of a permit for a project be based on the requirements in effect when the original permit was filed. Also, if a series of permits had to be filed for a project, the applicable requirements would be those in effect when the first permit was filed.

DIGEST:

CSHB 1704 would add chapter 245 to the Local Government Code, requiring political subdivisions, including cities, counties, and school districts, to review project permits solely on the basis of requirements in effect when the original application for a permit was filed. The bill would void any actions taken by political subdivisions after September 1, 1997, and before the effective date of the bill that caused or required the expiration or cancellation of a project, permit, or series of permits to which the bill would apply.

The bill would state the Legislature's intent that no project, permit, or series of permits that was protected by the former subchapter I should be prejudiced by or required or allowed to expire because of the law's repeal or regulatory action taken after the repeal.

CSHB 1704 would apply to projects in progress on or initiated after September 1, 1997. A project would be considered in progress or initiated if:

- a regulatory agency of a political subdivision approved or issued a permit for the project or an application was filed with a regulatory agency before September 1, 1997; and
- a regulatory agency imposed a requirement for the project or a deadline for a permit on or after September 1, 1997, that did not exist before that date or imposed a measure that retroactively would shorten the duration of a permit for the project.

If a project required more than one permit, all necessary permits would be considered a single series of permits, and the project would be bound only by the requirements in effect when the application for the first of the series of permits was made. Preliminary plans and subdivision plats for a project would be considered part of the series of permits.

The bill would prohibit political subdivisions from shortening the duration of any permit required for a project once an application had been filed. Permit holders could operate under any changes to permitting requirements after the initial application was made if the changes would enhance or protect the project or would lengthen the effective life of the permit.

CSHB 1704 would *not* apply to:

- permits at least two years old for construction of a building intended for

human occupancy that were issued for adoption of uniform construction codes or local amendments to those codes to address imminent threats of destruction of property or personal injury;

- zoning or land-use regulations that do not affect lot size, lot dimensions, lot coverage, or building size;
- regulations for the location of adult-oriented businesses;
- regulations or requirements affecting colonias;
- fees for development permits;
- regulations for annexation or utility connections or to prevent imminent destruction of property or personal injury; or
- construction standards for public works on public lands or easements.

The bill's provisions would be enforceable only through mandamus or declaratory or injunctive relief. The bill would not affect any litigation pending on the effective date of the bill or final judgments rendered by a court before the bill's effective date.

CSHB 1704 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house.

SUPPORTERS SAY:

The accidental repeal of subchapter I has allowed at least 10 cities, including Austin and San Antonio, to adopt retroactive requirements for local projects after the September 1, 1997, effective date of the repeal. The City of Austin, for example, took advantage of the repeal to impose retroactive ordinances on developments in the southwestern part of the city. This blatantly violated the intent of the Legislature, which specifically had prohibited retroactive ordinances. CSHB 1704 would restore the legislative intent that existed before 1997.

The City of Austin systematically has adopted retroactive changes for many different types of projects for at least two decades. The changes have created regulatory uncertainty for many developers and landowners. They often have resulted in the repeal of previously approved permits, causing project failures, decline in land values, and bankruptcies.

It is bad policy for a city to change the rules for a development project while the project is underway. Regulatory conditions at the beginning of a project should remain the same for the entire duration of the project. Regulatory certainty is an essential element of successful development policy for

developers and municipalities. Retroactive changes to development regulations should not be allowed.

The potential for increased use of retroactive ordinances by other cities across the state is high. A statewide law is needed to ensure that developers and landowners across the state enjoy equal protection against retroactive ordinances by municipalities.

Many of the witnesses representing landowners and developers who testified against the original bill are in favor of the committee substitute. They had serious concerns as to whether projects by small-scale developers would qualify for protection against retroactive ordinances under the original bill's Applicability section. The committee substitute has addressed these concerns adequately.

OPPONENTS SAY:

CSHB 1704 would restrict the ability of cities to manage their growth and development. Cities need the flexibility to adapt development standards to changing circumstances, including rapid growth, changing patterns of land use, and revisions of federal regulations. This bill would allow developers to file incomplete permit applications to qualify for development standards at the time of filing, even if they had no intention of completing the project in a timely manner. This could prevent cities from conducting long-range planning efforts in areas with projects underway.

Some projects may lie dormant for many years, during which the city may need to update development regulations to adjust to changing local circumstances. CSHB 1704 would allow projects that are reactivated after long periods of inaction to be completed under regulations that are outdated and inappropriate. Cities should be able to decertify projects on which no action is taken for years at a time.

Most cities in Texas have worked closely and successfully with developers to update development regulations, including regulations that have a retroactive effect. Cities across the state have issued very few retroactive changes to regulations since September 1, 1997. Most such problems encountered by developers have been confined to Austin, and the Austin City Council should resolve these problems. There is no need for a statewide law that could harm a large number of municipalities when it is intended to address problems in a specific area of the state.

The retroactive ordinances adopted by Austin in 1997 were negotiated carefully by a working group that included developers, environmentalists, and city officials. The ordinances were approved by members of the development community before adoption by the city. Ninety percent of development projects affected by the ordinances successfully reapplied to meet the new standards. The ordinances have not had a large-scale negative impact on development in Austin.

The City of Austin has negotiated an agreement to manage growth in environmentally sensitive portions of the metropolitan area. The Real Estate Council of Austin and many developers in the area support this agreement. Enactment of CSHB 1704 effectively would negate this consensus agreement, using state intervention to interfere with a matter of local concern.

OTHER OPPONENTS SAY:

The bill also should restrict state agencies from adopting retroactive ordinances. State agencies can create the same types of problems caused by local governments with regard to environmental permits and other land-use ordinances.

NOTES:

The committee substitute revised the definition of a project in progress on or after September 1, 1997. The original bill would have defined a project in progress as a project that was at least 50 percent finally platted or had "substantial infrastructure" installed. The substitute added the provision that a regulatory agency must have imposed a new requirement or deadline for the project or shortened a project deadline for the project to be considered "in progress." The substitute also added recorded subdivision plat notes and restrictive covenants to the items of which landowners may take advantage if the items benefit their development projects.

A bill with some similar provisions, HB 1287 by Hilderbran et al., was reported favorably by the House Land and Resource Management Committee on March 29.