SUBJECT: Zoning regulations affecting the appearance of buildings or open spaces

COMMITTEE: Urban Affairs — committee substitute recommended

VOTE: 5 ayes — Talton, Van Arsdale, Bailey, Edwards, Wong

0 nays

2 absent — Menendez, Hunter

WITNESSES: For — Thurman Blackburn, Homebuilders Association of Greater Austin; Andrew Erben, KB Homes, Austin and Greater Austin Builders Association; Hank B. Smith, Home Builders Association of Greater Austin

Against — Barbara Boulware-Wells, City of Cedar Park; Chris Bowers, City of Dallas; Phyllis Jarrell, City of Plano; Joe Vining, City of Round Rock; Barney L. Knight

BACKGROUND: In a 1926 ruling on *Euclid v. Amber Realty Co.*, the U.S. Supreme Court upheld the basic validity of zoning ordinances based on the power of communities to legislate for the health, morals, safety, and welfare of their residents (i.e., police power) even though such ordinances might impose burdens on the use and enjoyment of private property. Local Government Code, ch. 211 enables municipalities to create zoning laws based on their police powers, including protecting and preserving places and areas of historical, cultural, or architectural importance and significance. Sec. 211.003 specifically authorizes municipalities to zone the size, dimension, coverage, and use of lots in their communities, among other matters.

The 76th Legislature enacted ch. 245, requiring governments to consider applications for permits, including for plats, based only on the ordinances and regulations in effect at the time the permit application was filed. Sec. 245.004 exempts from this restriction municipal zoning regulations that do not affect lot size, lot dimensions, lot coverage, and building size, and regulations that do not change development permitted by a restrictive covenant required by a municipality.

Sec. 245.005 stipulates that a municipality may legislate to impose an expiration date on a permit if the permit does not already have an expiration date and no progress has been made toward completion of the permitted project. Progress toward completion of a project includes making application for a final plat or plan to a regulatory agency, a good-faith attempt to file an application for a permit necessary to begin or continue completion of a project, incurring costs for developing the project, posting of bonds with a regulatory agency, and paying utility connection fees or impact fees for the project to a regulatory agency.

DIGEST:

HB 1207 would prohibit a municipality from applying certain residential zoning regulations after the municipality approved a plat for the development of a residential subdivision. These zoning regulations would be those that affect:

- the exterior appearance of a single-family house, including the type and amount of building materials; and
- the landscaping of a single-family residential lot, including the type and amount of plants or landscaping materials.

If adopted after the filing of a plat application for the residential subdivision, a municipality could not apply these zoning changes to the subdivision until two years after the date the municipality approved the plat or the date the municipality accepted dedication of the subdivision improvements (streets, sidewalks, and other infrastructure), whichever came later.

HB 1207 would not prevent a municipality from adopting and enforcing applicable building codes or prohibiting the use of building materials proven to be inherently dangerous.

The bill would take effect September 1, 2003, and would apply only to a residential subdivision plat approved by a municipality on or after this date. A subdivision plat approved before the September 1, 2003, would be governed by law in effect when the plat was approved.

SUPPORTERS SAY:

CSHB 1207 would help protect developers and builders of residential housing and the housing market from surprise changes in government regulation that could compromise or even defeat development plans even after their

approval. The protections of ch. 245 do not give developers the certainty they need. Developers and other applicants can secure and make large, long-term investments only when they can presume that they may execute plans permitted by government at the time they applied for permits. Unpredictable regulations discourage large investments in new housing, causing housing prices rise as the availability of housing shrinks.

The bill would give developers needed relief from municipalities that adopt and enforce expensive new mandates for the yards and exteriors of homes after already having approved plat applications. For example, a city zoning ordinance might require houses only to have a brick facade. After approving a plat for a new residential neighborhood, however, the city could pass and enforce an ordinance requiring additional brick construction on house exteriors. This regulatory change would increase substantially the cost of each house and could threaten the feasibility of the entire development. Developers need clear protections from such changes after platting a project. Otherwise, they will begin creating smaller projects with fewer amenities, such as community pools, and will leave more of the housing market unserved.

Developers cannot rely on expensive, time consuming court challenges as a means of ensuring their rights. Courts rarely find that acts of government fail to satisfy the due-process standard that government not act arbitrarily or capriciously. Tightly crafted legislation that would affect only certain zoning ordinances, not special tree ordinances or other laws, would provide the best solution for the problem.

The bill would not prevent the observance of more permissive standards introduced after the approval of a plat. In such a case, the municipality most likely could agree with the developer on the use of different materials or fewer trees, for example, than the type or number required by the original zoning ordinance. In addition, developers normally do not seek plat approval in the first place for areas that are zoned too restrictively to accommodate their development goals.

CSHB 1207 properly would exempt protections that ensured the safety of homeowners. It would allow municipalities to adopt and enforce the latest building codes and prohibit the use of inherently dangerous construction materials, which would preserve the power of a city to exercise reasonable

authority in performing its core police function — ensuring public safety. Government actions merely to improve the aesthetics of residential properties do not deserve the same deference.

Also, the bill properly would limit the time that platted subdivisions would be exempted from new zoning laws affecting the appearance and landscaping of a home. Because platted land sometimes goes undeveloped for many years, CSHB 1207 would ensure that its exemption from zoning changes expired within a reasonable length of time.

OPPONENTS SAY:

CSHB 1207 would constrain municipalities from exercising their duty to ensure community welfare. Courts have held that the economic well-being and aesthetics of a community justify zoning ordinances and their modification. When municipalities first approve a simple subdivision plat, they may not previously have evaluated the consequences of subtle requirements in their governing zoning ordinances. CSHB 1207 would render a municipality unable to enact small zoning changes that served to diversify the cost of housing within major subdivision developments. Whether or not they already have approved a plat, municipalities need flexibility to adjust, within reason, zoning laws affecting the exterior appearance and landscaping of homes.

Developers already have the protection of Local Government Code ch. 245, which prohibits municipalities from changing ordinances affecting most substantive zoning requirements, such as lot size and coverage, after they approve plats. In addition, the constitution's due-process clause prohibits government from enacting arbitrary and capricious regulation. Developers with vested property rights can assert this protection to stop the application of unreasonably belated and costly zoning laws, including those affecting the exterior appearance of a home and landscaping. New legislation limiting the zoning power of local government is not necessary.

In addition, HB 1207 would have the unintended consequence of prohibiting municipalities from enacting more permissive zoning laws that would apply to subdivisions that had already received plat approval. In Plano, for example, a zoning ordinance used to require developers to cover at least 75 percent of the first floor of a home using brick. Since then, the city has adopted less restrictive ordinances that allow the use of stucco and concrete board siding.

Yet HB 1207 would appear to prohibit application of this change in a city's zoning ordinance to a subdivision after its plat was approved, even if the developer wanted the zoning change.

NOTES:

The bill as introduced differs from the committee substitute in that the original explicitly would have authorized municipalities to regulate the appearance or architectural style of buildings or other structures, including the types of building materials, and the appearance of yards, courts, or open spaces, and the types or quantities of plants or landscaping materials. The original bill also would have subjected such authorities to the restrictions of ch. 245.

The companion bill, SB 991 by Armbrister, was heard in the Senate Intergovernmental Relations Committee on April 28.

A related bill, HB 2130 by Kuempel, which would prevent a local government from imposing certain land-use regulations after the granting of a permit, was placed on the General State Calendar for April 25.