No. 04-06-00206-CV

IN THE FOURTH COURT OF APPEALS, SAN ANTONIO, TEXAS

CITY OF SAN ANTONIO, TEXAS, Appellant

v.

EN SEGUIDO, LTD., Appellee

BRIEF OF AMICI CURIAE

Greater Edwards Aquifer Alliance (GEAA) and Aquifer Guardians in Urban Areas (AGUA)

Respectfully Submitted,

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Table of Authorities

Greater Edwards Aquifer Alliance ("GEAA") and Aquifer Guardians in Urban Areas ("AGUA") respectfully submit this amici curiae brief. Amici curiae were not involved in the district court trial of this case and rely on City of San Antonio's briefs for presentation of Statement of the Case, Issues Presented, and Statement of Facts.

Summary of the Argument

These *amici curiae* are non-profit, community conservation organizations. AGUA is an organization of concerned individuals and citizen groups working together to preserve the environmentally sensitive Edwards Aquifer in San Antonio. AGUA is a member organization of GEAA, a coalition of thirty-five organizations from Austin to Del Rio[1], all dedicated to maintaining the health of the aquatic ecosystem of Central Texas and the rivers and streams flowing across it through the Edwards Aquifer and toward the Gulf of Mexico. These groups chose to submit a brief in this case because application of Texas Local Government Code chapter 245, the statute at issue in this case, has profound consequences on water quality and resource conservation in this area.

Argument

AGUA and GEAA support the City of San Antonio's position in this case. The application of Texas Local Government Code chapter 245 has critical impacts on community planning and resource conservation. An overly broad interpretation of the

[1] Member organizations of the Greater Edwards Aquifer Alliance include: Alamo Group of the Sierra Club, Austin Regional Sierra Club, Bexar Audobon Society, Bexar Green Party, Boerne Together, Cibolo Nature Center, Environmental Stewardship Committee of the Episcopal Diocese of West Texas, Environment Texas, First Unitarian Universalist Church of San Antonio, Friends of Canyon Lake, Fuerza Unida, Government Canyon Natural History Association, Hays Community Action Network, Helotes Heritage Association, Kendall County Well Owners Association, Kinney County Ground Zero, Medina County Environmental Action Association , Missionary Catechists of the Divine Providence, Northwest Interstate Coalition of Neighborhoods, Preserve Our Water—Blanco County, San Antonio Conservation Society, San Geronimo Watershed Alliance, San Marcos Greenbelt Alliance, San Marcos River Foundation, Santuario Sisterfarm, Save Barton Creek Association, Save Our Springs Alliance, Save Scenic Loop, Smart Growth San Antonio, SEED Coalition, Texas Water Alliance, Travis County Green Party, West Texas Springs Alliance, Wimberley Valley Watershed Alliance.

statute, as adopted by the trial court in this case, has the effect of severely undermining local, community control. It also has the effect of allowing developers to pollute public trust waters, endanger human health by increasing flooding, and shifting costs that should be born by developers onto the shoulders of citizens and taxpayers.

The proposed development in question in this case lies to the east and downstream from the sensitive contributing and recharge portions of the Edwards Aquifer, but interpretation of chapter 245 in the Fourth Judicial District will affect thousands of acres of development threatening to pollute the Edwards Aquifer.

"The industry portrays the statute as protection for the little guy from overbearing government...[i]n reality, the law almost always is used by large development companies, which have invoked it hundreds of times to trump efforts by citizens to tame explosive growth, a yearlong investigation by the San Antonio Express-News [] found."[2] The "efforts by citizens" referred to in the quoted article include ordinances to limit vegetation clearing, protect large trees, preserve water quality, prevent erosion, protect caves and sinkholes, assure aquifer recharge, and manage traffic. These essential public health, safety and welfare ordinances and rules must be waived when a project is deemed to qualify for chapter 245 "grandfather"[3] status. These ordinances are developed by the community, and improved over time in order to avoid undesired and disastrous

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[2] San Antonio Express-News, "Vested Rights Cost Taxpayers" article from multi-part series titled "Losing Ground" published October 16-19, 2005. Available through MySanAntonio.com archive at: http://archives.newsbank.com/ar-search/we/Archives?p_action=search&p_perpage=20&p_product=SAEC&s_search_type=keyword&p_text_base=%22losing+ground%22&p_field_psudo-sort-0=psudo-sort&p_sort=_rank_%3AD&p_field_date-0=YMD_date&p_params_date-0=date%3AB%2CE&p_text_date-0=&p_field_YMD_date-0=YMD_date&p_field_YMD_date-0=YMD_date&p_params_YMD_date-0=date%3AB%2CE&xcal_ranksort=4&xcal_useweights=yes&%5B+Search+%5D.x=72&%5B+Search+%5D.y=12

[3] TEX. LOC. GOV'T. CODE ANN. § 245.001-007 (Vernon 2005). "Grandfather[ing]" is a colloquial term used to describe development that proceeds under superseded regulations through this state statute.

consequences to public health and safety, municipal infrastructure, the Edwards Aquifer and other natural resources –and, consequently, to public coffers.

In applying the terms of Chapter 245 to the facts of this case, the Court should begin with three directives that favor interpretations that protect public welfare and public trust resources when a choice must be made between private interests and public interests. First, the Code Construction Act provides that in enacting a statute, it is presumed that public interest is favored over any private interest. TEX. GOVT. CODE ANN. § 311.021(5) (Vernon 2005). Second, the local control of a home rule city may not be limited unless the legislative intention to do so appears "with unmistakable clarity." *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975). Third, the "Conservation Amendment" to the Texas Constitution provides that preservation and conservation of natural resources of the State is a "public right and dut[y]." TEX. CONST. art. XVI § 59(a). For the courts to dictate a finding that a "project" existed back in 1971 that is the same "project" today, over the objection of the City of San Antonio, conflicts with the Texas constitutional mandates to protect public rights in our public waters and to uphold home rule city powers unless explicitly and unmistakably withdrawn.

Under Texas Local Government Code chapter 245 "[p]reliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project, "and "[e]ach regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders regulations, ordinances, rules, expiration dates...in effect at the time the original application for the permit is filed." TEX. LOC. GOV'T. CODE ANN. §

245.002(a)(b)(Vernon 2005). Chapter 245 has become a complicated statute, but the basic structure, as outlined in section 245.002 quoted above, is that when a property developer initially permits a project and remains in compliance with the statute, all permits needed to build and operate that project will be reviewed under one set of rules.

The legislative justification for the original statute adopted in 1987 and the myriad of changes that have been made since is that developers don't want "the rules changed in the middle of the game."[4] The 1971 plat relied on by Appellee in this case fails to identify or indicate any project, and merely shows delineations of a single lot. There are no small or large residential lot divisions, commercial or industrial lot divisions, roads, parking, or any other defining features indicating what series of development regulations and permits under which the project will proceed. When Appellee's single lot plat was filed in 1971 the applicant had not decided what game was going to be played, and thus the rules to be applied cannot be fixed.

While municipalities and neighborhood groups would very much prefer to be able to enforce their current standards related to impervious cover, tree preservation, water quality, and infrastructure, chapter 245 precludes consistent application of current standards. Communities then, rely on the requirement that a project be identified in order to acquire rights under chapter 245 and that the same project proceed through the permitting process. The continuous endeavor requirement for projects allows communities, planners and neighboring landowners to incorporate the grandfathered project and its implications into local planning initiatives. If a project becomes dormant

[4] See Floor Debate on most recent legislative amendments to chapter 245: Representative Leibowitz: "Mr. Kuempel, as I understand your bill your goal is to prevent the rules from being changed in the middle of the game. Is that correct sir?" Representative Kuempel: "I want them to play by the rules when whomever took the permit in that day, to play by the rules." H.J. OF TEX, 79th Leg., R.S., 2038 (2005).

and subsequently the permits expire, the planners, adjacent landowners and surrounding community can make plans knowing that new development will comply with current regulations. Likewise, if a project is not identified, and/or is altered during the permit approval process, the community can plan on that property being developed under current standards.

The Texas Attorney General Opinion JC-0425 (2001) explains that a project can lose its entitlement under chapter 245 by concluding that a development "remains subject to the development regulations in effect at the time the original application for the first permit was filed, *but only if the project remains the same*." (emphasis added). "Neither a purchaser nor an owner may alter a project without the possibility of consequence…the development regulations are no longer locked in under chapter 245 and current development regulations apply." Id.

In order to for the City to evaluate whether a project has been altered, a project must have been identified by the "original application for the permit." 245.002(a). The Applicant must be able to show there was a project identified in the original application and it has not been altered. Appellee's attempt to establish chapter 245 status by claiming relation to a 1971 plat that clearly failed to articulate a vision for the project or development objective that might match the current proposal completely rewrites the definition of "project." Here no project was identified in the 1971 filing by Appellee's predecessor in interest, the City of San Antonio made the determination chapter 245 entitlements were not established because the Appellee could not show the project had not been altered from the original filing, and the City's determination should be upheld.

This case presents the Court an opportunity to provide clarification as to the application of chapter 245 within the Fourth Judicial District and across Texas. The determination that a development may proceed under decades old regulations is of great consequence to our cities, communities, infrastructure and natural resources. Amici curiae GEAA and AGUA support the City of San Antonio's claims in this case and respectfully request reversal of the trial court's ruling.

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Certificate of Service

I certify that on January 9, 2007, a true and correct copy of the foregoing brief has been served on the following, via U.S. Mail.

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