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EXECUTIVE ADMINISTRATION

Liz Robinson

Chairman
Tarrant County Delegation

State of Texas
House of Representatives

BILL G. CARTER

DISTRICT 91

April 26, 1999

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Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Opinion Committee

RQ-0061-AC

Dear John:

I am requesting an Attorney General's Opinion on the following questions:

- Can a municipality implement a cap of the number of building permits issued when no emergency situation exists to justify the limit?
- Can a municipality limit the number of residential building permits while placing no limits on the issuance of non-residential permits?

Supporting documents explaining the situation in the town of Flower Mound are attached.

Mr. Robert Morris of the Home Builders Association of Greater Dallas has brought this matter to my attention and will be pleased to answer any questions you or your staff may have. He may be reached at 972-931-4840 or 5816 W. Plano Parkway, Plano, Texas 75093-4636.

Thank you for your attention to this matter.

Sincerely,

Bill Carter

Bill G. Carter

Chairman, House Committee on Urban Affairs.

cc: Robert Morris

Austin Office:
P.O. Box 2910
Austin, Texas 78768-2910
512-463-0482

District Office:
3525 Denton Hwy., Ste. A
Fort Worth, Texas 76117
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Building Permit Apportionment in Flower Mound, Texas

Introduction

The Town of Flower Mound (Town) is a community located in the north central area of the Dallas/Fort Worth Metropolitan area. Good highways, surrounding lakes and close proximity to the DFW Airport, the largest in the United States, make the Town an attractive place for many new Texans. But in January 1999 the Town enacted a SMARTgrowth program that features a moratorium on residential development, as well as other components, but allows development of commercial and industrial land to continue. The Town's staff and elected leadership claim that traffic congestion and high demand for water and waste water service beyond existing capacities have caused them to make this decision.

According to reports released by the Town, the current population is estimated to be 47,000. For the past five years, the Town has experienced an annual growth rate of 11.0%. Total population growth since 1994 is 79.5%. In terms of land area, 44% of the Town is developed. At current growth rates, approximately 69% is projected to be developed by year 2004.

The Town's growth has exceeded the high growth scenario contained in their 1994 Comprehensive Master Plan (CMP). Because of this fact, and the Town's fear that growth will adversely affect its character and quality, the Town began to reexamine its CMP, development ordinances, and capital improvements program. The reexamination can also be attributed to a change on the political landscape on the Town's Council that will be discussed further below.

The Town Council claims that during a review of their Impact Fee Ordinance they discovered that the Town's maximum day demand (MMD) for water in 1998 was 20.0 million gallons per day (MGD) whereas their total existing supply is 21.0 MGD. They further claim that only a small incremental supply (approximately 2.5 MGD) will be available in 1999 and 2000. However, the Upper Trinity River Water District has stated that water is available to the Town and that no shortage exist.

Similarly, the Town stated at their Council meeting held on January 11, 1999 that the average daily flows at their 5.0 million gallon waste water treatment facility is 4.8 million gallons a day (MGD). The Town stated that the situation was so serious that if residential development did not stop raw sewage would backup in the system and begin running in the streets. However, recent figures released by the Town after the SMARTgrowth plan was enacted puts the daily treatment flows at 3.8 MGD.

Traffic congestion was also a variable used by the Town to support their SMARTgrowth program. The Town characterized traffic congestion by stating there is a reduced level of service on the roadways, increased traffic signal and stop delays, increased number of accidents and, overall, traffic congestion is an obstacle to economic development. The Town could not fully explain how traffic caused by the continuing commercial, office, retail and industrial developments would not increase roadway congestion.

Components of the SMARTgrowth Program

There are four components of the Town's SMARTgrowth program. The components are:

- An update of the existing Comprehensive Master Plan,
- A temporary moratorium on residential development proposals,
- An amendment of the Building Code, and;
- Implementation of a Growth Management Plan which includes "apportionment" of building permits.

The stated goal of these four components is to advance the Town's economic health by sustaining the continued expansion of the non-residential property tax base thereby reducing the current imbalance in assessed valuation between residential and non-residential development.

In other words, the Town is seeking to reserve its water and waste water system capacities for non-residential development despite the fact that water, waste water and roadway impact fees are paid by developers and builders for the sole purpose of funding capacity improvements.

A call to update the Comprehensive Master Plan is the first component of the Town's program. All municipalities should regularly update their comprehensive plan; however, the dynamic forces that have caused the Town to update their plan goes beyond rapid growth and shrinking water and waste water capacity. In 1997 a group calling itself Voter United to Preserve Flower Mound (VUPFM) was formed by a person who has since become Town Mayor. This group seeks to preserve the "rural character" of the Town by restricting the size of single family home lots to 2 acres and greater. Since 1997, the group has presented six candidates for Town Council and worked diligently to get all six elected. The CMP Task Force created by the Town is nearly entirely comprised of citizens who are members of VUPFM.

A temporary moratorium on residential master plan amendments, residential zoning amendments and the acceptance of residential development plans is the second component of the Town's SMARTgrowth plan. The moratorium will remain in effect until the CMP is complete. The moratorium ordinance provides for the process to take at least one year with a provision that can extend the moratorium in 60-day increments if necessary.

Like the moratorium on residential developments, the third component of the SMARTgrowth program has already been enacted. The Town has amended the building code to state that construction on residential projects must commence within 45 days from the time the building permit is issued. The previous time period allowed was 180 days. The Town claimed that this measure is necessary because home builders will rush to permit projects well before they are ready to commence construction in order to avoid the implementation of the pending growth management plan.

The last component of the SMARTgrowth program is the development of a Growth Management Plan (GMP). The Town defines this as a "plan to manage and equitably apportion residential building permits in a manner that ensures the Town's ability to maintain a defined level of service while accommodating reasonable and sustainable residential and non-residential growth."

The Town has not yet expressed exactly what "equitably apportion" will mean to existing developments and active home builders. Since 1995, the Town has averaged 1367 single family residential building permits per year. Some close to the issue say that permits will be apportioned at a rate not to exceed 40 per month – a rate less than one third of the current pace.

The Residential Construction Industry Reponds

The HBA of Greater Dallas has been involved in the growing debate about SMARTgrowth since the Town took its formal action on January 11, 1999. The Town's SMARTgrowth program was released to the press on Friday, January 8, was printed in the paper on Saturday, January 9 and was passed by Council on Monday, January 11. HBA staff and members presented industry concerns at the January 11 Town Council meeting but each presenter was limited to a two minute timed presentation.

The HBA has submitted two open records requests. The first request focused on obtaining information about the Town's impact fee account management and current balances. The second request focused on the procedures taken by the Town to develop and pass the SMARTgrowth program since they did so without advance public hearings or business community input.

The information and data collected by the HBA will be closely scrutinized to determine if the Town's claims are correct as well as to ensure that impact fees paid by developers and home builders have been used in accordance to State law.

The implementation of the SMARTgrowth program continues to make news in the Dallas/Fort Worth Area. The topic has been featured in many newspaper articles and television reports. Many of the 120 cities in the HBA service area have commented on the program, and some seem interested in replicating the Town's action in their own jurisdictions.

The HBA has met with industry stakeholders in the Town and in surrounding communities. The purpose of these meetings are to share opinions and to coordinate actions in order to increase communication between the Town of Flower Mound and the business community.

Summary

In conclusion, for the past five years the Town of Flower Mound has permitted an average of 1387 single family permits each year. Each home permitted has paid up to \$3500 in water, wastewater, and roadway impact fees. However, the Town now claims that its capacity to provide water and waste water treatment service is strained, and its roadways are unable to carry additional vehicle trips.

The Town has enacted a moratorium on new residential development until a new comprehensive Plan is created. In conjunction with the new comprehensive plan, the Town is creating a building permit apportionment system that will be used to limit the number of residential building permits issues each month. All other types of construction requiring building permits will not be governed by the apportionment system.

Since the moratorium has been enacted, the analysis used to justify the action has changed, and there appears to be no water or wastewater emergency as was originally claimed. A Texas Attorney General opinion is needed to determine if the pending building permit apportionment system that will soon be enacted by the Town of Flower Mound is compliant with existing State law.