

# IN THE SUPREME COURT OF TEXAS

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No. 96-1154  
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JERRY W. QUICK, KAIRA G. QUICK, JOHN M. BRYANT, RUTH E. BRYANT, JOE  
COX, DOLORES COX, FLORENCE TURCK AND CIRCLE C LAND CORP.,  
PETITIONERS

v.

CITY OF AUSTIN, SAVE OUR SPRINGS LEGAL DEFENSE FUND, INC. AND AL ST.  
LOUIS, RESPONDENTS

=====  
ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS  
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**Argued on November 3, 1997**

JUSTICE HANKINSON filed a dissenting opinion on rehearing, in which JUSTICE ENOCH, JUSTICE BAKER, and JUSTICE O'NEILL joined.

While I agree with the Court's resolution of the first issue we address on rehearing, I dissent from what I perceive to be its impermissible and unnecessary retroactive application of Texas Government Code § 481.143. For the reasons expressed by the court of appeals, 930 S.W.2d 678, 693, I would hold that for section 481.143 to apply to a particular series of permits, the first permit in the series must have been filed after the effective date of section 481.143.

The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.

*United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908).

Texas has its own “well-entrenched legal hostility to retroactive laws.” *Houston Indep. Sch. Dist. v. Houston Chronicle Publ’g Co.*, 798 S.W.2d 580, 585 (Tex. App. — Houston [1st Dist.] 1990, writ denied). “Texas law militates strongly against the retroactive application of laws,” *id.*, and any doubts must be resolved against retroactive operation of a statute. *See Government Personnel Mut. Life Ins. Co. v. Wear*, 251 S.W.2d 525, 529 (Tex. 1952). The Legislature has codified the presumption that statutes apply prospectively: “A statute is presumed to be prospective in its operation unless *expressly* made retroactive.” TEX. GOV’T CODE § 311.022 (emphasis added).

The Court misconstrues the proper temporal reach of the statute before us. It seems reasonably clear to me that while section 481.143 is not retroactive on its face, the Court’s application of it creates a retroactive effect that can easily be avoided. The Court creates this retroactive effect by applying a statute not effective until September 1, 1987, to permit applications originally filed in 1985. Section 481.143 has retroactive effect if applied in this manner — it reaches back before its effective date and attaches new legal consequences to past acts by changing what the law was before section 481.143 was enacted.

Before the Legislature enacted section 481.143, under well-established law cities could pass or amend ordinances in the proper exercise of their police power, and citizens were bound by those intervening ordinances even if they were passed while an application for a permit was pending. *See Connor v. City of Univ. Park*, 142 S.W.2d 706, 709 (Tex. Civ. App. — Dallas 1940, writ ref’d). Thus, permit applications were subject to any intervening ordinances and amendments. Section

481.143 essentially eliminated any intervening ordinances and amendments passed by any city, including changes to fire, electrical, plumbing, and mechanical codes designed to further public safety. For example, if someone filed an application for a building permit in 1970, under the Court's reading of section 481.143, that person would only have to meet the safety standards of 1970 when applying in 1987 for the next permit in the series, and any ordinances passed in the intervening seventeen years would have no effect. In this manner, the Court's reading attaches new legal consequences to the 1985 permit applications and retroactively changes the law governing those 1985 applications, which were filed before the Legislature enacted section 481.143 in 1987. This is not "merely draw[ing] upon an antecedent fact," as the Court proposes. And I must emphasize that the Court's reading is what creates the retroactive effect, not the language of the Legislature as expressed in the statute itself; the Court agrees that the statute "does not expressly delineate its reach." Precisely because section 481.143 contains no clear expression that it operates retroactively, and because the Code Construction Act mandates that statutes operate prospectively in the absence of such clear expression, we are bound to read the statute in a way that does not create a retroactive effect.

Moreover, the Legislature knows precisely how to make the statute retroactive — it did so by amending section 481.143 in 1995 so that the section then expressly applied to projects "in progress on or commenced after" September 1, 1987. Act of May 24, 1995, 74th Leg., R.S., ch. 794, § 1, 1995 Tex. Gen. Laws 4147. That amendment bolsters the conclusion that we should not apply the 1987 version, which was not expressly retroactive, to have a retroactive effect. Thus, the Court's reading of the 1987 statute has the effect of making the 1995 amendments mere surplusage. The 1995 amendments also included an exemption for adopting the kind of codes affecting public safety

mentioned above, highlighting that the Legislature is the proper body to decide what the best policy is and how best to redress particular problems.

The practical danger of ignoring the Legislature's policy choice, as expressed in the Code Construction Act, and applying section 481.143 retroactively, is that we have no idea what rules, regulations, ordinances, or orders will be affected. Section 481.143 applies not just to the city of Austin, or to all cities in Texas, but to every "agency, bureau, department, division, or commission of the state or any department or other agency of a political subdivision that processes and issues permits." TEX. GOV'T CODE § 481.142(4). The statute applies not just to land development projects, but to every "endeavor over which a regulatory agency exerts its jurisdiction and for which a permit is required before initiation of the endeavor." TEX. GOV'T CODE § 481.142(3). The definition of permit is equally broad: "'Permit' means a license, certificate, approval, registration, consent, permit, or other form of authorization required by law, rule, regulation, or ordinance. . . ." *Id.* § 481.142(2). In striving to reach its result in this particular case, the Court ignores the fact that the implications of its decision are unknown. I would argue that is precisely why the Legislature has codified its decision that statutes not be applied retroactively without the Legislature itself saying so, without it's having weighed the consequences after considering the potential effects of retroactivity and expressed its decision that those consequences are desirable. Courts simply are not empowered or endowed with the jurisdiction or the resources to make those kinds of open-ended policy decisions.

The Court struggles to find legislative intent on retroactivity where none is apparent and uses that phantom intent to circumvent the express language of the Code Construction Act. Nothing in the language of the statute or its history supports the Court's assertion that the usual prospective

reading would cause the statute to “at least partially fail of its intended purpose.” Without some expression by the Legislature that it intended section 481.143 to apply to existing projects, how do we know whether it intended precisely the opposite, perhaps as part of a legislative compromise, or perhaps as a result of the Legislature’s understanding that statutes operate prospectively in the absence of clear expression to the contrary. Moreover, how can we liberally construe a statute on a point on which the statute is admittedly silent, without any proof of legislative intent, and when the Code Construction Act unequivocally mandates the opposite of the Court’s reading. Whether to apply a statute retroactively is, for very good reasons, a legislative policy choice:

Because [prospectivity] accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

*Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994). Through the Code Construction Act, the Legislature has clearly expressed its policy choice that its laws will not operate retroactively without its own deliberation and manifest expression of the value of retroactivity in the statute at issue. Ignoring the Code Construction Act, especially in the absence of any statutory language or legislative history to the contrary, is, in my view, tantamount to legislating.

The Court points out that “[n]owhere does [the 1987] statute require that the original application for the first permit be filed after September 1, 1987.” In the face of that legislative silence, and in light of the statutory presumption against retroactive application, I conclude we must apply the statute prospectively. Applying section 481.143 prospectively, I would hold that because section 481.143 was not effective until 1987, it did not apply to Circle C’s 1985 applications for

preliminary subdivision approval. I would further hold that section 481.143 governs Circle C's one application filed after the effective date of section 481.143 and before the SOS ordinance became effective, but that any other applications in that series must have been filed before section 481.143 was repealed for section 481.143 to govern those applications. Any other reading flouts our long-standing principles disfavoring retroactive lawmaking. Accordingly, I dissent.

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Deborah G. Hankinson  
Justice

**OPINION DELIVERED:** September 30, 1999