

By: Cook of Colorado, Cook of Navarro,
et al.

H.B. No. 2833

A BILL TO BE ENTITLED

AN ACT

relating to the protection of private real property from regulatory
takings.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2007.002, Government Code, is amended by
amending Subdivision (5) and adding Subdivision (6) to read as
follows:

(5) "Taking" means:

(A) a governmental action or series of actions
that affects private real property, in whole or in part or
temporarily or permanently, in a manner that requires the
governmental entity to compensate the private real property owner
as provided by the Fifth and Fourteenth Amendments to the United
States Constitution or Section 17 or 19, Article I, Texas
Constitution; ~~or~~

(B) a governmental action or series of actions
that:

(i) affects an owner's private real
property that is the subject of the governmental action, in whole or
in part or temporarily or permanently, in a manner that restricts or
limits the owner's right to the property that would otherwise exist
in the absence of the governmental action; and

(ii) is the producing cause of a reduction
of at least 25 percent in the market value of the affected private

1 real property, determined by comparing the market value of the
2 property as if the governmental action is not in effect and the
3 market value of the property determined as if the governmental
4 action is in effect; or

5 (C) except as provided by Section 2007.003(g), a
6 governmental action or series of actions that has the effect of
7 limiting the overall impervious cover of any development or use of
8 an owner's private real property to less than 45 percent of the
9 surface area of the property, excluding any portion of the property
10 that is within the 100-year floodplain as determined by the most
11 recent maps published by the Federal Emergency Management Agency or
12 that slopes more than 35 percent.

13 (6) "Impervious cover" means impermeable surfaces,
14 such as pavement or rooftops, that prevent the infiltration of
15 water into the soil. The term does not include a rainwater
16 collections system for a domestic water supply.

17 SECTION 2. Section 2007.003, Government Code, is amended to
18 read as follows:

19 Sec. 2007.003. APPLICABILITY. (a) This chapter applies
20 only to the following governmental actions:

21 (1) the adoption or issuance of an ordinance, rule,
22 regulatory requirement, resolution, policy, guideline, or similar
23 measure;

24 (2) an action that imposes a physical invasion or
25 requires a dedication or exaction of private real property; and

26 (3) ~~[an action by a municipality that has effect in the~~
27 ~~extraterritorial jurisdiction of the municipality, excluding~~

1 ~~annexation, and that enacts or enforces an ordinance, rule,~~
2 ~~regulation, or plan that does not impose identical requirements or~~
3 ~~restrictions in the entire extraterritorial jurisdiction of the~~
4 ~~municipality, and~~

5 ~~[(4)]~~ enforcement of a governmental action listed in
6 Subdivisions (1) and (2) ~~[through (3)]~~, whether the enforcement of
7 the governmental action is accomplished through the use of
8 permitting, citations, orders, judicial or quasi-judicial
9 proceedings, platting, or other similar means.

10 (b) This chapter does not apply to the following
11 governmental actions:

12 (1) ~~[an action by a municipality except as provided by~~
13 ~~Subsection (a)(3),~~

14 ~~[(2)]~~ a lawful forfeiture or seizure of contraband as
15 defined by Article 59.01, Code of Criminal Procedure;

16 (2) ~~[(3)]~~ a lawful seizure of property as evidence of
17 a crime or violation of law;

18 (3) ~~[(4) an action, including an action of a political~~
19 ~~subdivision, that is reasonably taken to fulfill an obligation~~
20 ~~mandated by federal law or an action of a political subdivision that~~
21 ~~is reasonably taken to fulfill an obligation mandated by state law,~~

22 ~~[(5)]~~ the discontinuance or modification of a program
23 or regulation that provides a unilateral expectation that does not
24 rise to the level of a recognized interest in private real property;

25 (4) ~~[(6) an action taken to prohibit or restrict a~~
26 ~~condition or use of private real property if the governmental~~
27 ~~entity proves that the condition or use constitutes a public or~~

1 ~~private nuisance as defined by background principles of nuisance~~
2 ~~and property law of this state;~~

3 ~~[(7)] an action taken out of a reasonable good faith~~
4 ~~belief that the action is necessary to prevent a grave and immediate~~
5 ~~threat to life or property;~~

6 ~~[(8)]~~ a formal exercise of the power of eminent
7 domain;

8 (5) ~~[(9)]~~ an action taken under a state mandate to
9 prevent waste of oil and gas, protect correlative rights of owners
10 of interests in oil or gas, or prevent pollution related to oil and
11 gas activities;

12 (6) ~~[(10)]~~ a rule or proclamation adopted for the
13 purpose of regulating water safety, hunting, fishing, or control of
14 nonindigenous or exotic aquatic resources;

15 (7) ~~[(11)]~~ an action taken by a political subdivision
16 under its statutory authority to prevent waste or protect rights of
17 owners in groundwater or ~~+~~

18 ~~[(A)] to regulate construction in an area~~
19 ~~designated under law as a floodplain;~~

20 ~~[(B)] to regulate on-site sewage facilities;~~

21 ~~[(C)] under the political subdivisions's~~
22 ~~statutory authority to prevent waste or protect rights of owners of~~
23 ~~interest in groundwater; or~~

24 ~~[(D)]~~ to prevent subsidence, if the actions do
25 not affect impervious cover;

26 (8) ~~[(12)]~~ the appraisal of property for purposes of
27 ad valorem taxation; or

1 (9) ~~[(13) an action that:~~

2 ~~[(A) is taken in response to a real and~~
3 ~~substantial threat to public health and safety;~~

4 ~~[(B) is designed to significantly advance the~~
5 ~~health and safety purpose; and~~

6 ~~[(C) does not impose a greater burden than is~~
7 ~~necessary to achieve the health and safety purpose; or~~

8 ~~[(14)]~~ an action or rulemaking undertaken by the
9 Public Utility Commission of Texas to order or require the location
10 or placement of telecommunications equipment owned by another party
11 on the premises of a certificated local exchange company.

12 (c) This chapter does not apply to the following
13 governmental actions, if the actions do not affect building size,
14 lot size, or impervious cover:

15 (1) an action that is reasonably taken to fulfill an
16 obligation mandated by federal or state law;

17 (2) an action taken to prohibit or restrict a
18 condition or use of private real property if the governmental
19 entity proves that the condition or use constitutes a public,
20 common, or private nuisance as defined by nuisance and property law
21 of this state;

22 (3) an action taken based on reasonable evidence that
23 the action is necessary to prevent a grave and immediate threat to
24 life or property;

25 (4) an action taken by a political subdivision to
26 regulate construction in an area designated under law as a
27 floodplain;

1 (5) an action that:

2 (A) is taken in response to a threat to public
3 health and safety;

4 (B) is designed to significantly advance the
5 health and safety purpose; and

6 (C) does not impose a greater burden than is
7 necessary to achieve the health and safety purpose;

8 (6) an action taken by a municipality relating to the
9 regulation of:

10 (A) sexually oriented businesses;

11 (B) fireworks;

12 (C) discharge of firearms;

13 (D) weeds or other unsanitary or unwholesome
14 matter on public or private property;

15 (E) junked or abandoned vehicles;

16 (F) noise;

17 (G) alcohol, including hours of sale;

18 (H) smoking in or on public or private property;

19 (I) plumbing, electrical, and building
20 construction codes;

21 (J) manufactured housing;

22 (K) multifamily housing;

23 (L) historical buildings; or

24 (M) barrier islands; or

25 (7) an action or rule related to protecting views of
26 the State Capitol. [~~Sections 2007.021 and 2007.022 do not apply to~~
27 ~~the enforcement or implementation of a statute, ordinance, order,~~

1 ~~rule, regulation, requirement, resolution, policy, guideline, or~~
2 ~~similar measure that was in effect September 1, 1995, and that~~
3 ~~prevents the pollution of a reservoir or an aquifer designated as a~~
4 ~~sole source aquifer under the federal Safe Drinking Water Act (42~~
5 ~~U.S.C. Section 300h-3(e)).]~~

6 (d) This chapter does not apply to a municipality's exercise
7 of zoning authority unless the exercise of zoning authority:

8 (1) results in a taking under Section 2007.002(5)(C);
9 or

10 (2) is undertaken without the owner's consent within
11 the three-year period following the date of the filing of an
12 application pertaining to an owner's private real property under
13 Chapter 242 or 245, Local Government Code [applies to a
14 governmental action taken by a county only if the action is taken on
15 or after September 1, 1997].

16 (e) This chapter does not:

17 (1) limit or otherwise affect the authority of a
18 municipality, a county, another political subdivision, the state,
19 or an agency of the state, with respect to the implementation or
20 enforcement of an ordinance, a rule, or a statutory standard of a
21 program, plan, or ordinance that was adopted under:

22 (A) the federal Coastal Zone Management Act of
23 1972 (16 U.S.C. Section 1451 et seq.); or

24 (B) Subtitle E, Title 2, Natural Resources Code;

25 (2) apply to a permit, order, rule, regulation, or
26 other action issued, adopted, or undertaken by a municipality, a
27 county, another political subdivision, the state, or an agency of

1 the state in connection with:

2 (A) the federal Coastal Zone Management Act of
3 1972 (16 U.S.C. Section 1451 et seq.); or

4 (B) Subtitle E, Title 2, Natural Resources Code;
5 or

6 (3) limit or otherwise affect ~~[apply to]~~ the
7 enforcement or implementation of Subchapter B, Chapter 61, Natural
8 Resources Code, as it existed on September 1, 1995, or to the
9 enforcement or implementation of any rule or similar measure that
10 was adopted under that subchapter and was in existence on September
11 1, 1995.

12 (f) This chapter does not apply to an action taken by a
13 political subdivision to ensure compliance with on-site sewage
14 facility regulations promulgated by the Texas Commission on
15 Environmental Quality.

16 (g) For the purposes of the definition of "taking" in
17 Section 2007.002(5)(C), a home-rule municipality with a population
18 of more than 1.1 million that relies on a sole source aquifer for
19 more than 50 percent of the municipality's water supply may elect,
20 with respect to single family and duplex uses over an aquifer
21 recharge zone within the municipality's corporate and
22 extraterritorial jurisdiction, to define a taking as an action or
23 series of actions by the municipality that has the effect of
24 limiting the overall impervious cover of any development or use of
25 an owner's private real property to not less than 30 percent of the
26 surface area of the property, including any portion of the property
27 that is within the 100-year floodplain as determined by the most

1 recent maps published by the Federal Emergency Management Agency or
2 that slopes more than 35 percent.

3 SECTION 3. Section 2007.021(b), Government Code, is amended
4 to read as follows:

5 (b) A suit under this subchapter must be filed not later
6 than the second anniversary of the later of:

7 (1) the earliest date on which the ordinance, rule,
8 regulatory requirement, resolution, policy, guideline, or similar
9 measure on which the suit is based is enforced with respect to the
10 owner's private real property;

11 (2) the earliest date on which the ordinance, rule,
12 regulatory requirement, resolution, policy, guideline, or similar
13 measure on which the suit is based is applied to the owner's private
14 real property with respect to any permit application affecting the
15 real property; or

16 (3) September 1, 2005 ~~[180th day after the date the~~
17 ~~private real property owner knew or should have known that the~~
18 ~~governmental action restricted or limited the owner's right in the~~
19 ~~private real property]~~.

20 SECTION 4. Section 2007.022(b), Government Code, is amended
21 to read as follows:

22 (b) A contested case must be filed with the agency not later
23 than the second anniversary of the later of:

24 (1) the earliest date on which the ordinance, rule,
25 regulatory requirement, resolution, policy, guideline, or similar
26 measure on which the case is based is enforced with respect to the
27 owner's private real property;

1 (2) the earliest date on which the ordinance, rule,
2 regulatory requirement, resolution, policy, guideline, or similar
3 measure on which the case is based is applied to the owner's private
4 real property with respect to any permit application affecting the
5 real property; or

6 (3) September 1, 2005 ~~[the 180th day after the date the~~
7 ~~private real property owner knew or should have known that the~~
8 ~~governmental action restricted or limited the owner's right in the~~
9 ~~private real property]~~.

10 SECTION 5. Section 2007.041(a), Government Code, is amended
11 to read as follows:

12 (a) The attorney general shall prepare guidelines to assist
13 governmental entities in identifying and evaluating those
14 governmental actions described in Section 2007.003(a)(1) ~~[through~~
15 ~~(3)]~~ that may result in a taking.

16 SECTION 6. Section 2007.042, Government Code, is amended to
17 read as follows:

18 Sec. 2007.042. PUBLIC NOTICE. (a) A political subdivision
19 that proposes to engage in a governmental action described in
20 Section 2007.003(a)(1) ~~[through (3)]~~ that may result in a taking
21 shall provide at least 30 days' notice of its intent to engage in
22 the proposed action by providing a reasonably specific description
23 of the proposed action in a notice published in a newspaper of
24 general circulation published in the county in which affected
25 private real property is located. If a newspaper of general
26 circulation is not published in that county, the political
27 subdivision shall publish a notice in a newspaper of general

1 circulation located in a county adjacent to the county in which
2 affected private real property is located. The political
3 subdivision shall, at a minimum, include in the notice a reasonably
4 specific summary of the takings impact assessment that was prepared
5 as required by this subchapter and the name of the official of the
6 political subdivision from whom a copy of the full assessment may be
7 obtained.

8 (b) A state agency that proposes to engage in a governmental
9 action described in Section 2007.003(a)(1) [~~or (2)~~] that may result
10 in a taking shall:

11 (1) provide notice in the manner prescribed by Section
12 2001.023; and

13 (2) file with the secretary of state for publication
14 in the Texas Register in the manner prescribed by Chapter 2002 a
15 reasonably specific summary of the takings impact assessment that
16 was prepared by the agency as required by this subchapter.

17 SECTION 7. Section 2007.043(a), Government Code, is amended
18 to read as follows:

19 (a) A governmental entity shall prepare a written takings
20 impact assessment of a proposed governmental action described in
21 Section 2007.003(a)(1) [~~through (3)~~] that complies with the
22 evaluation guidelines developed by the attorney general under
23 Section 2007.041 before the governmental entity provides the public
24 notice required under Section 2007.042.

25 SECTION 8. Section 2007.044, Government Code, is amended by
26 amending Subsection (a) and adding Subsection (d) to read as
27 follows:

(a) A governmental action requiring a takings impact assessment is void if an assessment is not prepared in compliance with the evaluation guidelines developed by the attorney general under Section 2007.041. A private real property owner affected by a governmental action taken without the preparation of a takings impact assessment as required by this subchapter may bring suit for a declaration of the invalidity of the governmental action.

(d) A proposed governmental action described by Section 2007.003(a)(1) that requires a takings impact assessment may be stayed if an assessment is not prepared or if the assessment is not in compliance with the evaluation guidelines developed by the attorney general under Section 2007.041. A private real property owner affected by the proposed governmental action may bring suit to enforce the preparation of a takings impact assessment in compliance with those guidelines. If the trier of fact in a suit filed under this subchapter finds that the takings impact assessment is not prepared or is not in compliance with the evaluation guidelines, the court shall stay the proposed governmental action.

SECTION 9. Section 2007.045, Government Code, is amended to read as follows:

Sec. 2007.045. UPDATING OF CERTAIN ASSESSMENTS REQUIRED. A state agency that proposes to adopt a governmental action described in Section 2007.003(a)(1) [~~or (2)~~] that may result in a taking as indicated by the takings impact assessment shall update the assessment if the action is not adopted before the 180th day after the date the notice is given as required by Section 2001.023.

1 SECTION 10. (a) The change in law made by this Act applies
2 only to:

3 (1) a governmental action described by Section
4 2007.003(a)(1) or (2), Government Code, that commences on or after
5 April 1, 2005; or

6 (2) a governmental action described by Section
7 2007.003(a)(3), Government Code, that commences on or after April
8 1, 2005, to enforce or implement any ordinance, rule, regulatory
9 requirement, platting requirement, resolution, policy, guideline,
10 or similar measure in effect on or after April 1, 2005.

11 (b) The change in law made by this Act may not be construed
12 to create any claim or cause of action for:

13 (1) a governmental action described by Section
14 2007.003(a)(1) or (2), Government Code, that commences before April
15 1, 2005; or

16 (2) a governmental action described by Section
17 2007.003(a)(3), Government Code, that commences before April 1,
18 2005, to enforce or implement any ordinance, rule, regulatory
19 requirement, platting requirement, resolution, policy, guideline,
20 or similar measure in effect before April 1, 2005.

21 SECTION 11. This Act takes effect immediately if it
22 receives a vote of two-thirds of all the members elected to each
23 house, as provided by Section 39, Article III, Texas Constitution.
24 If this Act does not receive the vote necessary for immediate
25 effect, this Act takes effect September 1, 2005.