

By: Cook of Colorado, et al. H.B. No. 2833
(Senate Sponsor - Staples)
(In the Senate - Received from the House May 11, 2005;
May 13, 2005, read first time and referred to Committee on Natural
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Committee Substitute by the following vote: Yeas 7, Nays 2;
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COMMITTEE SUBSTITUTE FOR H.B. No. 2833 By: Staples

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

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

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

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

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

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

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

~~(3) [an action by a municipality that has effect in the
extraterritorial jurisdiction of the municipality, excluding
annexation, and that enacts or enforces an ordinance, rule,
regulation, or plan that does not impose identical requirements or
restrictions in the entire extraterritorial jurisdiction of the~~

~~municipality, and~~

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

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

~~(1) [an action by a municipality except as provided by Subsection (a)(3);~~

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

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

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

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

~~(4) [(6)] an action taken to prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state;~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) an action taken to prohibit or restrict a condition or use of private real property if the governmental

entity proves that the condition or use constitutes a public, common, or private nuisance as defined by nuisance and property law of this state;

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

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

(5) an action that:

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

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

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

(6) an action taken by a political subdivision relating to the regulation of:

(A) sexually oriented businesses;

(B) fireworks;

(C) discharge of firearms;

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

(E) junked or abandoned vehicles;

(F) noise;

(G) alcohol, including hours of sale;

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

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

(J) manufactured housing;

(K) multifamily housing; or

(L) barrier islands; or

(7) an action or rule related to protecting views of the State Capitol. ~~[Sections 2007.021 and 2007.022 do not apply to the enforcement or implementation of a statute, ordinance, order, rule, regulation, requirement, resolution, policy, guideline, or similar measure that was in effect September 1, 1995, and that prevents the pollution of a reservoir or an aquifer designated as a sole source aquifer under the federal Safe Drinking Water Act (42 U.S.C. Section 300h-3(e)).]~~

(d) This chapter does not apply to a governmental action or series of actions by a municipality within the municipality's corporate territorial limits. For the purposes of this subsection, corporate territorial limits do not include areas within a municipality's extraterritorial jurisdiction or annexed for limited purposes ~~[applies to a governmental action taken by a county only if the action is taken on or after September 1, 1997].~~

(e) This chapter does not:

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

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

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

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

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

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

or

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

1, 1995.

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

(g) For the purposes of the definition of "taking" in Section 2007.002(5)(C), a home-rule municipality with a population of more than 1.1 million that relies on a sole source aquifer for more than 50 percent of the municipality's water supply may elect, with respect to single family and duplex uses over an aquifer recharge zone within the municipality's corporate and extraterritorial jurisdiction, to define a taking as an action or series of actions by the municipality that has the effect of limiting the overall impervious cover of any development or use of an owner's private real property to less than 30 percent of the surface area of the property, including any portion of the property that is within the 100-year floodplain as determined by the most recent maps published by the Federal Emergency Management Agency or that slopes more than 35 percent.

(h) This chapter does not apply to the following governmental actions unless the governmental action regulates building size or lot size or has the effect of limiting the overall impervious cover of any development or use of an owner's private real property to less than 45 percent of the surface area of the property, excluding any portion of the property that is within the 100-year floodplain as determined by the most recent maps published by the Federal Emergency Management Agency or that slopes more than 35 percent:

(1) an ordinance or order adopted by the governing body of a municipality or county under Subchapter I, Chapter 16, Water Code;

(2) an ordinance or order adopted under a permit issued under Section 402, Federal Water Pollution Control Act (33 U.S.C. Section 1342); or

(3) a water pollution control and abatement program established under Section 26.177, Water Code.

(i) This chapter does not confer any new or additional regulatory authority on a political subdivision with respect to the items listed in Subsection (c)(6).

(j) This chapter does not apply to a governmental action relating to the regulation of historical buildings.

(k) A political subdivision is not liable to a private real property owner under this chapter for an action or series of actions taken by another political subdivision. If jurisdiction over private real property has changed, the owner may assert a claim or bring a cause of action under this chapter against the political subdivision that took the action or series of actions that resulted in a taking.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 2007.042. PUBLIC NOTICE. (a) A political subdivision that proposes to engage in a governmental action described in Section 2007.003(a)(1) [~~through (3)~~] that may result in a taking shall provide at least 30 days' notice of its intent to engage in the proposed action by providing a reasonably specific description of the proposed action in a notice published in a newspaper of general circulation published in the county in which affected private real property is located. If a newspaper of general circulation is not published in that county, the political subdivision shall publish a notice in a newspaper of general circulation located in a county adjacent to the county in which affected private real property is located. The political subdivision shall, at a minimum, include in the notice a reasonably specific summary of the takings impact assessment that was prepared as required by this subchapter and the name of the official of the political subdivision from whom a copy of the full assessment may be obtained.

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

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

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

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

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

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

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

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

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

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

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

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

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

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