

By: Patrick, Dan

S.B. No. 1180

A BILL TO BE ENTITLED

AN ACT

relating to 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

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

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

11 (6) "Impervious cover" means impermeable surfaces,  
12 including pavement and rooftops, that prevent the infiltration of  
13 water into the soil. The term does not include a rainwater  
14 collection system for a domestic water supply.

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

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

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

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

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

1 ~~restrictions in the entire extraterritorial jurisdiction of the~~  
2 ~~municipality; and~~

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

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

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

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

14           (2) ~~[(3)]~~ a lawful seizure of property as evidence of  
15 a crime or violation of law;

16           (3) ~~[(4) an action, including an action of a political~~  
17 ~~subdivision, that is reasonably taken to fulfill an obligation~~  
18 ~~mandated by federal law or an action of a political subdivision that~~  
19 ~~is reasonably taken to fulfill an obligation mandated by state law;~~

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

23           (4) ~~[(6)]~~ an action taken to prohibit or restrict a  
24 condition or use of private real property if the governmental  
25 entity proves that the condition or use constitutes a public or  
26 private nuisance as defined by background principles of nuisance  
27 and property law of this state;



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

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

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

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

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

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

18                   (4) an action that:  
19                               (A) is taken in response to a threat to public  
20 health and safety;

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

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

25                   (5) an action taken to prevent waste or protect rights  
26 of owners of an interest in groundwater ~~[Sections 2007.021 and~~  
27 ~~2007.022 do not apply to the enforcement or implementation of a~~

1 ~~statute, ordinance, order, rule, regulation, requirement,~~  
2 ~~resolution, policy, guideline, or similar measure that was in~~  
3 ~~effect September 1, 1995, and that prevents the pollution of a~~  
4 ~~reservoir or an aquifer designated as a sole source aquifer under~~  
5 ~~the federal Safe Drinking Water Act (42 U.S.C. Section~~  
6 ~~300h-3(e))].~~

7 (d) ~~[This chapter applies to a governmental action taken by~~  
8 ~~a county only if the action is taken on or after September 1, 1997.~~

9 ~~[(e)]~~ This chapter does not:

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

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

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

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

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 or

26 (3) limit or otherwise affect ~~[apply to]~~ the  
27 enforcement or implementation of Subchapter B, Chapter 61, Natural

1 Resources Code, as it existed on September 1, 1995, or to the  
2 enforcement or implementation of any rule or similar measure that  
3 was adopted under that subchapter and was in existence on September  
4 1, 1995.

5 (e) This chapter does not apply to an action taken by a  
6 political subdivision to ensure compliance with on-site sewage  
7 facility regulations promulgated by the Texas Commission on  
8 Environmental Quality.

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

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

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

17 (2) the earliest date on which the ordinance, rule,  
18 regulatory requirement, resolution, policy, guideline, or similar  
19 measure on which the suit is based is applied to the owner's private  
20 real property with respect to any permit application affecting the  
21 real property [~~180th day after the date the private real property~~  
22 ~~owner knew or should have known that the governmental action~~  
23 ~~restricted or limited the owner's right in the private real~~  
24 ~~property].~~

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

27 (b) A contested case must be filed with the agency not later

1 than the second anniversary of the later of:

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

6 (2) the earliest date on which the ordinance, rule,  
7 regulatory requirement, resolution, policy, guideline, or similar  
8 measure on which the case is based is applied to the owner's private  
9 real property with respect to any permit application affecting the  
10 real property [~~the 180th day after the date the private real~~  
11 ~~property owner knew or should have known that the governmental~~  
12 ~~action restricted or limited the owner's right in the private real~~  
13 ~~property].~~

14 SECTION 5. Section 2007.023(b), Government Code, is amended  
15 to read as follows:

16 (b) If the trier of fact in a suit or contested case filed  
17 under this subchapter finds that the governmental action is a  
18 taking under this chapter, the private real property owner is only  
19 entitled to, and the governmental entity is only liable for:

20 (1) [7] invalidation of the governmental action or the  
21 part of the governmental action resulting in the taking; and

22 (2) damages determined under Section 2007.024(b).

23 SECTION 6. Section 2007.024, Government Code, is amended by  
24 amending Subsection (b) and adding Subsection (b-1) to read as  
25 follows:

26 (b) The judgment or final decision or order shall include a  
27 fact finding that determines the monetary damages suffered by the



1 private real property owner as a result of the taking, including, if  
2 the governmental action has ceased or has been rescinded, amended,  
3 invalidated, or repealed, the temporary or permanent economic loss  
4 sustained by the private real property owner while the governmental  
5 action was in effect.

6 (b-1) The amount of damages under Subsection (b) is  
7 determined from the date of the taking.

8 SECTION 7. Section 2007.026(b), Government Code, is amended  
9 to read as follows:

10 (b) The court or the state agency shall award a governmental  
11 entity that prevails in a suit or contested case filed under this  
12 subchapter reasonable and necessary attorney's fees and court costs  
13 only if the court determines that the private real property owner  
14 knew that the suit or contested case had no merit at the time the  
15 owner filed the suit or contested case.

16 SECTION 8. Section 2007.041(a), Government Code, is amended  
17 to read as follows:

18 (a) The attorney general shall prepare guidelines to assist  
19 governmental entities in identifying and evaluating those  
20 governmental actions described in Sections [~~Section~~]  
21 2007.003(a)(1) and (2) [~~through (3)~~] that may result in a taking.

22 SECTION 9. Section 2007.042(a), Government Code, is amended  
23 to read as follows:

24 (a) A political subdivision that proposes to engage in a  
25 governmental action described in Section 2007.003(a)(1) or (2)  
26 [~~through (3)~~] that may result in a taking shall provide at least 30  
27 days' notice of its intent to engage in the proposed action by

1 providing a reasonably specific description of the proposed action  
2 in a notice published in a newspaper of general circulation  
3 published in the county in which affected private real property is  
4 located. If a newspaper of general circulation is not published in  
5 that county, the political subdivision shall publish a notice in a  
6 newspaper of general circulation located in a county adjacent to  
7 the county in which affected private real property is located. The  
8 political subdivision shall, at a minimum, include in the notice a  
9 reasonably specific summary of the takings impact assessment that  
10 was prepared as required by this subchapter and the name of the  
11 official of the political subdivision from whom a copy of the full  
12 assessment may be obtained.

13 SECTION 10. Section 2007.044, Government Code, is amended  
14 by amending Subsection (a) and adding Subsection (d) to read as  
15 follows:

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

23 (d) A proposed governmental action described by Section  
24 2007.003(a)(1) or (2) that requires a takings impact assessment may  
25 be stayed if an assessment is not prepared or if the assessment is  
26 not in compliance with the evaluation guidelines developed by the  
27 attorney general under Section 2007.041. A private real property

1 owner affected by the proposed governmental action may bring suit  
2 to enforce the preparation of a takings impact assessment in  
3 compliance with those guidelines. If the trier of fact in a suit  
4 filed under this subchapter finds that the takings impact  
5 assessment is not prepared or is not in compliance with the  
6 evaluation guidelines, the court shall stay the proposed  
7 governmental action.

8         SECTION 11. The change in law made by this Act applies only  
9 to a governmental action or series of actions that commences on or  
10 after the effective date of this Act. A governmental action or  
11 series of actions that commences before the effective date of this  
12 Act is governed by the law in effect immediately before that date,  
13 and that law is continued in effect for that purpose.

14         SECTION 12. This Act takes effect immediately if it  
15 receives a vote of two-thirds of all the members elected to each  
16 house, as provided by Section 39, Article III, Texas Constitution.  
17 If this Act does not receive the vote necessary for immediate  
18 effect, this Act takes effect September 1, 2009.