

TAKINGS IMPACT ASSESSMENT

Proposed Development Regulations – Wise County, Texas

PURPOSE AND INTENT

Wise County, Texas, acting through the Wise County Commissioners Court (hereafter “County”) is proposing to adopt new Development Ordinances (hereafter “Proposed Regulations”) for the County. The Proposed Regulations will include revisions and incorporate the requirements of the following existing regulations and ordinances:

- 2019 Amendments to The Wise County Subdivision Development Rules and Regulations (Adopted March 1997, Amended May 2000, May 2002, May 2005, December 2008 and September 2014, February 2017)

The Proposed Regulations will include specification of County and Commissioners’ Court authority to define and implement its regulations along with definition of procedures and rules for implementation of site and subdivision land development projects within County jurisdictional areas including, but not limited to the following:

- Administrative Procedures and Requirements
- Preliminary Plat Requirements
- Final Plat and Construction Document Requirements
- Construction Procedures and Requirements
- Design Criteria
- Standard Construction Details

This Takings Impact Assessment (hereafter “TIA”) is intended to satisfy the statutory requirements of the Texas Private Real Property Rights Preservation Act found at Chapter 2007 of the Texas Government Code (the “Act” or PRPRPA) in regard to the Proposed Regulations.

REGULATORY BACKGROUND

Governmental Takings in General

A governmental “taking” is a governmental action which restricts or regulates a private property interest to such a degree that it violates prohibitions on the taking of private property without just compensation, as outlined in either the United States Constitution¹ or the Texas Constitution. One form of a taking is a “Physical Taking” where a governmental entity physically takes or occupies private property (e.g., a city condemning an easement to expand a roadway across private property).

A more difficult-to-define form of taking is a “Regulatory Taking” which is a governmental regulatory requirement which has the effect of reducing the economic usefulness and value of private property to such an extent that it constitutes a taking of private property. The Proposed Regulations do not propose any “physical taking” of any particular property, but certain actions included in the Proposed Regulations are evaluated to determine whether they may constitute a “regulatory taking”.

General Principles in the Law of Regulatory Takings

The U.S. Supreme Court and the Texas Supreme Court have struggled to formulate a standard for determining when a governmental regulation of private property goes so far as to become a taking. At present the U.S. Supreme Court and Texas Supreme Court have adopted the following basic legal principles concerning the law of regulatory takings:

- Possible remedies for a regulatory taking are to invalidate the offending regulation or to make the governmental entity liable for monetary damages.
- In defending a challenge to a regulation, the governmental entity must show that the regulation actually substantially advances a legitimate state interest. A legitimate state interest has been liberally interpreted to include even such things as protecting residents from the “ill effects of urbanization” and the preservation of desirable aesthetic features.
- A compensable regulatory taking occurs when a land use regulation either (1) denies the landowner all economically viable uses of the property, or (2) unreasonably interferes with the owner’s right to use and enjoy his property. The Texas Supreme Court has held that a land use regulation denies a landowner all economically viable uses of the property if the regulation renders the property valueless.
- In determining whether a governmental regulation unreasonably interferes with an owner’s right to use and enjoy his property, a court must evaluate two factors: (1) the economic impact of the regulation (i.e., comparing the value that has been taken from the property with the value that remains), and (2) the extent to which the regulation interferes with “distinct investment backed expectations” of the landowner. A regulation that interferes with existing or already-permitted land uses is more likely to be considered a regulatory taking than a regulation which interferes with speculative uses or the landowner’s asserted entitlement to the highest and most valuable use of every piece of his property.
- In the case of governmental exactions, the required dedication for public use or of public facilities must be roughly proportional to the actual need for those public facilities which is generated by the proposed development. For example, the amount of roadway required to be dedicated by the developer must be reasonably commensurate to the amount of traffic generated by the new development.

The Texas Real Property Rights Preservation Act

In response to widespread concerns about governmental intrusions on private real property rights in the mid-1990’s (sometimes referred to as the “Take Back Texas” movement), the Legislature enacted the Act which is codified in Chapter 2007 of the Texas Government Code (TGC).¹¹ The overriding purpose of the Act was to ensure that governmental entities in Texas take a “hard look” at the effects on private real property rights of the regulations they adopt.

Definition of a Regulatory Taking

The following information is taken from the regulatory background on the issue of Regulatory Takings contained in a guidance document prepared by the State of Texas Office of the Attorney General (OAG). The Act [specifically Texas Local Government Code (LGC) §2007.002(5)] defines a "taking" as follows:

- (a) a governmental action 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 that:
 - (1) 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

- (2) is the producing cause of a reduction of at least 25% 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.

The Act, in TGC §2007.002, thus sets forth a definition of "taking" that (i) incorporates current jurisprudence on "takings" under the United States and Texas Constitutions, and (ii) sets forth a new statutory definition of "taking." Essentially, if a governmental entity takes some "action" covered by the Act and that action results in a devaluation of a person's private real property of 25% or more, then the affected party may seek appropriate relief under the Act. Such an action for relief would be predicated on the assumption that the affected real property was the subject of the governmental action.

TGC §2007.003(a) provides that the Act 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;
- (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)-(3), whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.

The requirement to do a TIA only applies to §2007.003(a)(1)-(3).

Governmental Actions Exempted From the Act

There are certain governmental actions exempted by the Act. The following actions are exempted from coverage of the Act under §2007.003(b):

- (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;
- (3) a lawful seizure of property as evidence of a crime or violation of law;
- (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;

- (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;
- (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;
- (10) a rule or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;
- (11) an action taken by a political subdivision:
 - (A) to regulate construction in an area designated under law as a floodplain;
 - (B) to regulate on-site sewage facilities;
 - (C) under the political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater; or
 - (D) to prevent subsidence;
- (12) the appraisal of property for purposes of ad valorem taxation;
- (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.

Based on the types of actions anticipated under the Proposed Regulations, Wise County believes that actions included in the Proposed Regulations are exempt, other actions may not be exempt and will require the County to prepare a TIA. In this TIA, Wise County will provide the analysis of the conclusions.

Lawsuit to Invalidate a Governmental Taking

The Act allows landowners whose property is significantly impaired by governmental regulations to sue the governmental entity to invalidate the regulation. As an alternative to invalidation of the governmental action, the governmental entity may elect to pay the landowner compensation for the loss in value of the property interest. The Act is generally applicable to any governmental action (e.g., adoption of an ordinance, regulatory requirement or policy, or a governmental exaction) that restricts or limits the landowner's rights in the real property and that causes a reduction of 25% or more in the market value of the property. Any lawsuit by an affected real property owner against the governmental entity must be filed within 180 days after the owner knew or should have known of the governmental action. The

Taking Impact Assessment Proposed Amendments to the Wise County Development Rules and Regulations prevailing party in the lawsuit against the governmental entity is entitled to recover reasonable and necessary attorney's fees and court costs from the losing party.

Requirement to Prepare a Takings Impact Assessment (TIA)

In addition to a lawsuit to invalidate a taking by a governmental entity, all governmental entities in Texas (including the County) are required to prepare a TIA evaluation of any proposed regulation that may impair private real property interests and to provide public notice of the takings impact assessment. If a governmental entity fails to prepare a required takings impact assessment, an affected real property owner may bring suit to invalidate the governmental action and recover attorney's fees and court costs.

EVALUATION PROCESS

Based on those items within the Proposed Regulations which might reasonably be determined to be subject to the preparation of a TIA, the County evaluated these items using the guidelines prepared by the State of Texas Office of the Attorney General. These guidelines require each action be evaluated through a series of questions. These questions, with subsequent instructions, are:

OAG Question 1 - Is the Governmental Entity undertaking the proposed action a Governmental Entity covered by the Act, i.e., is it a "Covered Governmental Entity"? See the Act, §2007.002(1).

- (1) If the answer to Question 1 is "No": No further compliance with the Act is necessary.*
- (2) If the answer to Question 1 is "Yes": Go to Question 2.*

TGC §2007.002(1)(B) indicates that "a political subdivision of this state" is a covered governmental entity. Article IX of the Texas Constitution indicates that Counties are political subdivisions of the State. Therefore the County would be a covered governmental entity, subject to the requirement to prepare a TIA where it would otherwise be required.

OAG Question 2 - Is the proposed action to be undertaken by the Covered Governmental Entity an action covered by the Act, i.e., a "Covered Governmental Action"?

- (1) If the answer to Question 2 is "No": No further compliance with the Act is necessary.*
- (2) If the answer to Question 2 is "Yes": Go to Question 3.*

Based on the County's review of the Act, certain of the actions included in the Proposed Regulations may arguably qualify as Covered Governmental Actions (CGA) while others do not. As outlined above, the Proposed Regulations do not propose any "physical taking" of any particular property, but certain actions are required to be evaluated as a "regulatory taking". Those actions determined to be Covered Governmental Actions will be further evaluated using subsequent questions.

OAG Question 3 - Does the Covered Governmental Action result in a burden on "Private Real Property" as that term is defined in the Act?

- (1) If the answer to Question 3 is "No": A "No Private Real Property Impact" or NoPRPI Determination should be made. No further compliance with the Act is necessary if a NoPRPI Determination is made. Logically, the initial critical issue regarding any proposed governmental action is whether there is any burden on private real property. If a governmental entity has not resolved this issue by reference to its preexisting list of Categorical Determinations, it can do so by quickly and concisely making a NoPRPI Determinations.*

(2) If the answer to Question 3 is "Yes": A TIA is required and the governmental entity must undertake evaluation of the proposed governmental action on private real property rights.

Based on the County's review of the Act, the actions included in the Proposed Regulations may result in the imposition of a burden on "Private Real Property" as that term is defined in the Act. Those actions will be further evaluated below.

OAG Question 4 - What is the Specific Purpose of the Proposed Covered Governmental Action?

The TIA must clearly show how the proposed governmental action furthers its stated purpose. Thus, it is important that a governmental entity clearly state the purpose of its proposed action in the first place, and whether and how the proposed action substantially advances its stated purpose.

OAG Question 5 - How Does the Proposed Covered Governmental Action Burden Private Real Property?

OAG Question 6 - How Does the Proposed Covered Governmental Action Benefit Society?

OAG Question 7 - Does the Proposed Covered Governmental Action result in a "taking"?

The action determined to be a Covered Governmental Action which also has imposed a burden on "Private Real Property" as that term is defined in the Act have been proposed to accomplish a number of different purposes. The action determined to be both a Covered Governmental Action and which impose a burden on "Private Real Property" will be further evaluated using Questions 4 through 7 in the TIA. The Office of Attorney General guidance also provides the following sub-questions for items determined to be Covered Governmental Actions:

OAG Sub-question 1 - Does the Proposed Covered Governmental Action Result Indirectly or Directly in a Permanent or Temporary Physical Occupation of Private Real Property?

OAG Sub-question 2 - Does the Proposed Covered Governmental Action Require a Property Owner to Dedicate a Portion of Private Real Property or to Grant an Easement?

OAG Sub-question 3 - Does the Proposed Covered Governmental Action Deprive the Owner of all Economically Viable Uses of the Property?

OAG Sub-question 4 - Does the Proposed Covered Governmental Action have a Significant Impact on the Landowner's Economic Interest?

OAG Sub-question 5 - Does the Covered Governmental Action Decrease the Market Value of the Affected Private Real Property by 25% or More? Is the Affected Private Real Property the subject of the Covered Governmental Action? See the Act, §2007.002(5)(B).

OAG Sub-question 6 - Does the Proposed Covered Governmental Action Deny a Fundamental Attribute of Ownership?

In addition to these questions to be addressed for each proposed action, the Office of Attorney General guidance also recommends an alternative evaluation:

OAG Question 8 - What are the Alternatives to the Proposed Covered Governmental Action?

For each of the CGA which also impose a burden on "Private Real Property", alternative evaluation will be provided.

SUMMARY OF THE PROPOSED REGULATIONS

The following items provide a summary of the major actions from the Proposed Regulations. Based on the regulatory background information and the nature of the proposed actions, each major proposed action has been assigned to one of three categories, depending on whether it was determined to be a "Covered Governmental Action" and whether it places a "burden" on property, as those terms are defined under the Act. An explanation of each action and the rationale for its inclusion in its selected category is provided below.

Actions in the Proposed Regulations Determined to Not Be "Covered Governmental Actions" ("No "to OAG Question 2)**1. Regulation of Certain Private Roadways and Driveways**

Under the County's authority to regulate the subdivision of property provided in TLGC Chapter 232, the County is proposing requirements for regulating certain private roadways and driveways. The proposed actions are outlined in Proposed Regulations, specifically in Section 3.06 (E)(1); 6.02; and 6.07B. The proposed actions are intended to ensure unrestricted access to all areas of new subdivisions by emergency vehicles and safe entrance and exiting from the subdivided land. The County is proposing these actions, specifically, to address situations where width restrictions, obstructions, and roadway conditions may prevent timely emergency response activities. The County believes that delays in timely emergency response caused by impassable private roadways constitute a "grave and immediate threat" to life and property. Based on this belief, the County further believes that the proposed actions were developed in "good faith" to prevent delays in timely emergency response. As such, the proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(7) due to the County's intent to prevent grave and immediate threats to life or property and not overwhelm the existing county roads. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

2. Modifications to the Flood Damage Prevention Standards and Groundwater Conservation

Under the County's authority under the Texas Water Code, Chapter 16, the County is proposing additional requirements for regulating development in flood hazard areas. The proposed actions are outlined in the Wise County Flood Damage Prevention Ordinance and incorporated into the proposed Regulations in Sections 3.07 (H)(6); 3.09 (A); and 6.08(B) and (F). Further, the County proposed cooperation language, under the authority the control of groundwater usage, in accordance with the Upper Trinity Groundwater Conservation District under a revision to language in section 3.09(A). The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(11)(A)(D) due 22 TWC, Title 2, "Water Administration", Chapter 16, "Provisions Generally Applicable to Water Development", as amended through the 80th Regular Legislative Session, Legislature of the State of Texas. Their inclusion in the County's regulation of construction in floodplains is exempted and is not subject to the requirement to prepare a TIA.

Actions in the Proposed Regulations Determined to Not Place a Burden on Property ("No "to OAG Question 3)**1. Standardization of Administrative Procedures and Applications Processing**

Under the County's authority to regulate various aspects of land development as authorized under various chapters of the Texas Local Government Code, the County is proposing changes and additions to the administrative procedures, applications processing procedures, and procedures to be utilized by the

County in the regulation of development within the County. While these proposed actions affect the information to be prepared and submitted to the County, and how the County will apply the Proposed Regulations, the administrative procedures themselves do not create a "burden" per se on "Private Real Property", as that term is defined in the Act, being regulated by the Proposed Regulations. As outlined in the guidance from the OAG:

TIA's must concentrate on the truly significant real property issues. No need exists to amass needless detail and meaningless data. The public is entitled to governmental conformance with legislative will, not a mass of unnecessary paperwork.

The proposed actions regarding the administrative procedures and applications processing were determined to not place a direct burden on "Private Real Property" and qualify for a "No Private Real Property Impact" Determination (hereafter "NoPRPI Determination") as provided in the OAG guidelines, and would not be subject to the requirement to prepare a TIA.

TAKING IMPACT ASSESSMENT FOR THE QUALIFYING ACTIONS

Impacts of Development Regulation in General

In general, reasonable development restrictions will serve a basic public purpose but will not be of such an extreme character as would constitute a regulatory taking. First, the goals of protecting public health and safety and water quality clearly appear to qualify as a legitimate state interest since prior U.S. Supreme Court rulings have held that governmental regulations addressing the "ill effects of urbanization" and the preservation of desirable aesthetic features are legitimate state interests. It has also been expressly held by the Supreme Court that governmental restrictions on the use of only limited portions of a parcel of land such as setback ordinances are not considered regulatory takings.

Moreover, in a recent U.S. Supreme Court case on regulatory takings, the Court was faced with the question of whether a temporary moratorium on all development around Lake Tahoe constituted a regulatory taking per se. The Supreme Court held that such a moratorium did not constitute a per se taking and that various factors must be analyzed to determine whether a moratorium constitutes a taking. In so ruling, the Court referred to a set of Lake Tahoe water quality protection ordinances enacted in 1972 which restricted impervious cover and established setback limits. These measures preceded the establishment of the development moratorium at issue in the case. Since the moratorium was held not to be a per se regulatory taking, it is very doubtful that traditional development regulations would be considered a regulatory taking if crafted to accomplish their stated purpose while still allowing the landowner to reasonably use and enjoy his property.

This conclusion is consistent with the guidelines adopted by the OAG. These guidelines provide as follows:

"Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements generally without creating a compensatory 'taking.' Government may also limit the use of real property through land use planning, zoning ordinances, setback requirements, and environmental regulations."

These guidelines further indicate that some types of development regulation may qualify for the exemption from the Texas Private Real Property Rights Preservation Act as regulatory actions which protect public health and safety.

Actions in the Proposed Regulations Determined to Be “Covered Governmental Actions” That Place a “Burden” on Private Real Property

The following proposed action has been reasonably determined to be a “Covered Governmental Action” that may place a “burden” on Private Real Property. The proposed action has been evaluated using the additional questions in OAG guidelines (specifically Questions 4 through 8, and where necessary, the sub-questions).

1. Registration of Certain Previously Exempt Subdivisions

Under the County’s authority to regulate the subdivision of property provided in Texas Local Government Code, Chapter 232 the County is proposing to implement requirements for registering certain subdivisions of land that were previously exempt from preliminary platting under County rules. This proposed action is outlined in the Preliminary Plat Section 3 of the Proposed Regulations. The County is proposing to require the registration of certain previously exempt property divisions in order to allow for subsequent monitoring of development that would no longer qualify for exemptions or overwhelm the County's infrastructure. These certain developments were always required to file a final plat but the County proposes to add the requirement of the Preliminary plat.

The proposed action may subject certain property owners to new requirements to file documents with the County. This action has been determined to be a CGA.

OAG Question 4 -What is the Specific Purpose of the Proposed CGA?

In the past, the County is aware of instances where a property owner has carved out a portion of land and used a County road as the road infrastructure with no intention of providing privately created infrastructure. This can create a burden on the established county infrastructure from public safety purposes to drainage issues. As the County grows, the County needs to be aware of these divisions that are being established for larger development purposes. That is why the County proposes to reduce the division requirements of these portions of land from 10 lots to 3 lots that will require a preliminary plat when subdivision occurs without laying out a part of the tract as described on Section 3.01 of the Subdivision Rules,

OAG Question 5 -How Does the Proposed CGA Burden Private Real Property?

The proposed CGA may create a burden on Private Real Property by requiring the property owner to file preliminary plat paperwork with the County when dividing the property into more than 3 lots without laying out a part of the tract as described on Section 3.01 of the Subdivision Rules,

OAG Question 6 -How Does the Proposed CGA Benefit Society?

The proposed CGA benefits society in the following ways:

- Serving as a deterrent to the improper configuration of divisions of property that do not overburden established public roadway or infrastructure.
- Increasing the likelihood that the County is aware of the division as early as possible, providing the best opportunity for the situation to be corrected before an additional improper configuration is made so as not to overburden county resources from 911 addressing to the Sheriff's Department.

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OAG Question 7 -Does the Proposed CGA result in a "taking"?

OAG Sub-question 1 -Does the Proposed CGA Result Indirectly or Directly in a Permanent or Temporary Physical Occupation of Private Real Property?

No.

OAG Sub-question 2 -Does the Proposed CGA Require a Property Owner to Dedicate a Portion of Private Real Property or to Grant an Easement?

No.

OAG Sub-question 3 -Does the Proposed CGA Deprive the Owner of all Economically Viable Uses of the Property?

No.

OAG Sub-question 4 -Does the Proposed CGA have a Significant Impact on the Landowner's Economic Interest?

A determination as to whether the proposed CGA has a significant impact on the landowner's economic interest must be made on a case-by-case basis. The Proposed Regulations further make provision for the granting of variances in the event the proposed CGA may result in a regulatory taking in a particular case. Given these allowances, the proposed action will not generally have a significant impact on the landowner's economic interest.

OAG Sub-question 5 -Does the CGA Decrease the Market Value of the Affected Private Real Property by 25% or More? Is the Affected Private Real Property the subject of the Covered Governmental Action? See the Act, §2007.002(5)(B).

As outlined in the previous response, determinations as to whether the proposed action decreased the market value of affected Private Real Property must be made on a case-by-case basis. The Proposed Regulations further make provision for the granting of variances in the event the proposed CGA may result in a regulatory taking in a particular case. Given these allowances, the proposed action will not generally result in a decrease in market value of twenty five percent or more.

OAG Sub-question 6 -Does the Proposed Covered Governmental Action Deny a Fundamental Attribute of Ownership?

No.

OAG Question 8 -What are the Alternatives to the Proposed CGA?

The County's proposed CGA is based on authority granted to the County by the Texas Legislature to regulate the subdivision of property. The only alternative to the proposed CGA is to not implement this authority. The County believes that the proposed CGA protects the public interest, and that failing to implement the proposed CGA is less protective of the public interest. The County further believes that there are not feasible alternatives to the proposed CGA.

Conclusion: The County's Proposed Preliminary Plat Lot Amendment does not constitute a Regulatory taking.