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:

- The Wise County Subdivision Development Rules and Regulations (Adopted March 1997, Amended May 2000, May 2002, May 2005, and December 2008)
- The Wise County Flood Damage Prevention Ordinance (Adopted December 1987 and Amended January 1990 and July 2010)
- The Order Adopting Rules of Wise County, Texas for On-Site Sewage Facilities (Adopted May 1998, Amended September 2007 and February 2012)
- The Wise County Master Thoroughfare Plan (Adopted July 2009)

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 and Exceptions to Plat Requirements
- Final Plat and Construction Document Requirements
- Construction Procedures and Requirements
- Design Criteria
- Development Procedures for Manufactured Home Rental Communities
- Development Procedures for Commercial and Other Types of Developments
- 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.

<u>Definition of a Regulatory Taking</u>

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).

<u>Governmental Actions Exempted From the Act</u>

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

(a) an action by a municipality except as provided by subsection (a)(3);

(b) a lawful forfeiture or seizure of contraband as defined by Article 59.01, Code of Criminal Procedure;

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

(d) 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;

(e) 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;

(f) 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;

(g) 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;

(h) a formal exercise of the power of eminent domain;

(i) 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;

(j) a rule or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;

(k) an action taken by a political subdivision:

(1) to regulate construction in an area designated under law as a floodplain;

(2) to regulate on-site sewage facilities;

(3) under the political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater; or

(4) to prevent subsidence;

(l) the appraisal of property for purposes of ad valorem taxation;

(m) an action that:

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

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

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

(n) 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 while certain actions included in the Proposed Regulations are exempt, other actions may not be exempt and will require the County to prepare a TIA.

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 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 Determinations 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, certain of 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. Therefore, Question 3 is answered as a qualified "YES", and those actions determined to impose a burden on "Private Real Property" will be further evaluated using subsequent questions and through the preparation of a TIA.

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 actions determined to be Covered Governmental Actions which also impose a burden on "Private Real Property" as that term is defined in the Act have been proposed to accomplish several different purposes. Each of those actions 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 Covered Governmental Actions which also impose a burden on "Private Real Property", an alternatives 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. Additional Water and Wastewater Availability Demonstration Requirements

The County's existing subdivision regulations contain certain requirements for demonstrating water and wastewater availability pursuant to the so-called "Model Rules" provided by Section 16 of the Texas Water Code. Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code (TLGC), Chapter 232 and authority granted to the County under the Texas Water Code (TWC), Chapter 26 and 35, the County is proposing additional requirements for demonstrating water and wastewater availability. The proposed actions are outlined in Articles 3 and Article 4 of the Proposed Regulations.

Specifically, the County is proposing:

- Additional technical requirements for demonstrating water and wastewater availability
- Additional methods of providing water and wastewater service to be considered in demonstrating availability
- Additional requirements for water availability demonstrations relying on groundwater in Priority Groundwater Management Areas (PGMAs), as those areas are defined by the Texas Commission on Environmental Quality (TCEQ)

The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(11)(C) due to the County's intent to protect the rights of the owners of interest in groundwater and in accordance with TGC §2007.003(b)(13) due to the County's intent to protect public health and safety by establishing minimum requirements for the provision of drinking water and the proper management of wastewater. Based on these exemptions, these proposed actions are not subject to the requirement to prepare a TIA.

2. Regulation of Certain Private Roadways

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. The proposed actions are outlined in Article 3 of the Proposed Regulations, specifically in Section 3.06.E. The proposed actions are intended to ensure unrestricted access to all areas of new subdivisions by emergency vehicles. 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. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

3. Adoption of Minimum Roadway Right-of-Way Widths

The County's existing subdivision regulations contain certain requirements for roadway right-of-way widths. Under the County's authority to regulate the subdivision of property provided in TLGC Chapter 232, the County is proposing to adopt requirements for the provision of minimum right-of-way widths for new Public Roadways. The proposed actions are outlined in Article 6 of the Proposed Regulations, specifically, Section 6.06.E and the Wise County Master Thoroughfare Plan. The proposed actions are intended to ensure that new roadways provide adequate right-of-way to comply with the latest engineering design standards for safe travel over public roadways.

The County believes that adequate roadway right-of-way widths may contribute to a real and substantial threat to public safety, and is proposing the changes to the right-of-way widths to improve public safety, but is limiting those changes to only those necessary to accomplish the public safety purpose. Based on this belief, the County further believes that the proposed actions do not impose a burden greater than that necessary to accomplish this purpose. As such, the proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(13) due to the County's intent to address public safety concerns. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

4. Adoptions of Public Open Space Easements

The County's existing subdivision regulations contain requirements for public open space easements. Under the County's authority to regulate the subdivision of property provided in TLGC Chapter 232, the County is proposing to adopt requirements for the provision of public open space easements for corner lots located at the intersection of two roads. The proposed actions are outlined in Article 6 of the Proposed Regulations, specifically, Section 6.03.B. The proposed actions are intended to ensure that corner lots in developments provide a minimum sight distance. The County believes that a lack of site distance for vehicles pulling into an intersection may contribute to a real and substantial threat to public safety, and is proposing the public open space easements to improve public safety, but is limiting those changes to only those necessary to accomplish the public safety purpose. Based on this belief, the County further believes that the proposed actions do not impose a burden greater than that necessary to accomplish this purpose. As such, the proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(13) due to the County's intent to address public safety concerns. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

5. Modifications to the Flood Damage Prevention Standards

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 Article 3, Article 4, and Article 6. The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(11)(A) 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.

6. Modifications to the On-Site Sewage Facility (OSSF) Standards

Under the County's authority under a cooperative delegation agreement under TWC Chapter 26 and the Texas Health and Safety Code (THSC), Chapter 366, the County is proposing additional requirements for regulating On-Site Sewage Facilities (OSSFs). The proposed actions are outlined in The Order Adopting Rules of Wise County, Texas for On-Site Sewage Facilities and incorporated into the Proposed Regulations in Article 3, Article 4, and Article 6. The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(11)(B) due to their inclusion in the County's regulation of On-Site Sewage Facilities. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

7. Incorporation by Reference of the Requirements of Other Jurisdictions

   The County is proposing to incorporate by reference the current requirements of other governmental jurisdictions, including federal and state entities. This proposed action is outlined in several different locations within the Proposed Regulations. The purpose of the proposed action is to allow the County to notify the regulated community of the requirements of other jurisdictions, and where the County has information indicating that a particular action by a person may not be in compliance with the applicable requirements of another jurisdiction, to notify such other jurisdiction. The proposed action was determined to be exempted from the Act in accordance with TGC §2007.003(b)(4) due to the County's intent to include these items to comply with state and federal law. Based on these exemptions, the proposed action 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, Applications Processing, Public Notice Procedures and Development Agreements

   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 significant changes and additions to the administrative procedures, applications processing procedures, public notice 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:

   > *TIAs 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.

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

Based on the evaluation conducted by the County the following list of proposed actions may qualify as "Covered Governmental Actions" and place a "burden" on Private Real Property. The further evaluation of these items is presented in the following section:

- Obtaining Approval Prior to Furnishing Utility Service
- Registration of Certain Exempt Subdivisions
- Development Authorization Expiration
- Minimum Roadway Setbacks

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 actions have been reasonably determined to be "Covered Governmental Actions" that may place a "burden" on Private Real Property. Each of these proposed actions has been evaluated using the additional questions in OAG guidelines (specifically Questions 4 through 8, and where necessary, the sub-questions).

1. Obtaining Approval Prior to Furnishing Utility Service

   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 utility providers to obtain written approval from the County prior to furnishing utility service to a regulated development (non-exempt subdivisions and Manufactured Home Rental Communities). Specifically, the County is relying on TLGC §232.106 which authorizes Counties to regulate the

connection of utilities in accordance with TLGC §232.0291. This provision of the TLGC authorizes counties to require a certification from the County before a "utility" extends service to "any subdivided land". The TLGC defines a "utility" as a "person, including a legal entity or political subdivision", and is further defined to include electric, gas and water and sewer utilities. The County is also relying on TLGC §232.007(h) which authorizes counties to regulate the connection of utilities to a Manufactured Home Rental Community. These provisions of the TLGC authorize the County, upon the adoption of the Proposed Regulations, to require all utility providers, including other governmental utility providers, to obtain certification from the County prior to extending utility service to either a non-exempt subdivision or a Manufactured Home Rental Community, subject to the provisions of TLGC §232.0291.

These proposed actions are outlined in Article 3 and Article 7 of the Subdivision Regulations. The proposed actions may subject certain utility providers to new requirements to obtain written approval from the County prior to furnishing utility service. These actions together have been determined to be a CGA that may place a burden on "Private Real Property".

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

The purpose of the proposed CGA is to prevent utility providers from furnishing utility service to developments that do not meet the County's requirements. Unscrupulous developers may attempt to circumvent the County's requirements by selling property to unsuspecting homeowners before ensuring that the County has issued approval for the development. By way of example, if a developer were to begin selling lots in a subdivision prior to filing the final plat and installing the necessary roadways and utilities, a utility provider would be required to obtain certification of approval from the County prior to connecting the utilities to a new home built in that subdivision. In this instance, the County would be notified of a violation of its regulations when the utility provider sought the certificate from the County to extend utility service to a development that had not yet been approved. This notice would allow the County to initiate enforcement activities against the offending party and institute any corrective measures at its disposal. While this might not prevent harm to the individual already victimized by the unscrupulous developer, it would allow the County to implement measures to control further harm to unsuspecting members of the public. The County believes that this is an important safeguard for the public and is intended to rectify a non-compliant situation. The County further believes that this proposed action will substantially advance the purpose of protecting the public interest.

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

In instances where it is invoked, the proposed CGA may create a burden on Private Real Property by preventing a property owner from having utilities connected to new or existing construction and by preventing utility owners from extending their property (utilities) to noncompliant developments.

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

The proposed CGA benefits society in the following ways:

- Serving as a deterrent to unscrupulous developers by providing a third-party notification to the County for non-compliant activities.
- Increasing the likelihood that the County is notified as early as possible about requests to extend utilities to a non-compliant development, providing the best opportunity for the situation to be corrected before additional harm is propagated on the public.

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?

Although the denial of utility connection under the proposed regulation is most cases will result in only a temporary limitation, in an extreme case, the proposed CGA could result in a property owner being deprived of all economically viable use of the property in an instance where an unscrupulous developer sold that property owner certain real property from a non-compliant development. If the unscrupulous developer were to go bankrupt without having provided adequate financial assurance, the property owner might be unable to have utilities furnished to property intended for a home site. This would have the effect of depriving that owner of the ability to use that property for a home site, thus depriving him of an important economic use of the property as a home site. However, for a regulatory taking as defined under TLGC §2007.002(5)(B)(ii), to exist, the CGA would need to be the "producing cause". In this instance, the producing cause of the property owner being deprived of the economically viable use of his property would be the actions of the unscrupulous developer and not the CGA of the County. Based on this definition, the proposed CGA would not constitute a regulatory taking.

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

As outlined in the response to OAG Sub-question 3, the proposed CGA could result in a significant impact to a property owner's economic interest. However, the proposed CGA would not be the "producing cause", and would therefore not constitute a regulatory taking.

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 response to OAG Sub-question 3, the proposed CGA could result in a significant impact to a property owner's economic interest, including a reduction of 25% or more of the market value of the affected Private Real Property. However, the CGA would not be the "producing cause", and would therefore not constitute a regulatory taking.

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

In an extreme case, the proposed CGA could result in a property owner being denied the right to have utilities extended to his property, which would be considered a fundamental attribute to ownership. However, as outlined in the response to OAG Sub-questions 3 through 5, the proposed CGA would not be the "producing cause", and would therefore not constitute a regulatory taking.

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

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of Requiring Utility Providers to Obtain Approval Prior to Furnishing Utility Service to a Regulated Development does not constitute a Regulatory Taking.

2. Registration of Certain 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 that are exempt under State Law. Specifically the County is relying on TLGC §232.0015(a) which authorizes counties to classify divisions of property and exempt some of those from platting requirements. This proposed action is outlined in Article 3, Section 3.01 of the Proposed Regulations. The County is proposing to exempt from platting, but require the registration of exempt property divisions in order to allow for subsequent monitoring of development that would no longer qualify for exemption, or to identify subdivisions of property determined to be exempt for financial severance purposes (hereafter "Financial Severance Subdivisions" or "FSS"). In general, Financial Severance Subdivisions are divisions of property made to allow a portion of a property to serve as collateral for a financial transaction, while the remaining portion of the property is not subject to the financial transaction.

Some property divisions that are exempt, such as intra-family divisions, or divisions of large sized parcels, may subsequently be modified in such a manner as to forfeit the exemption, or to become subject to the Proposed Regulation. 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 divided a portion of a tract of land to identify that separated property for financial severance purposes (an FSS). Most often this separated property is used as collateral for funding to construct of a home on the remaining portion of the property. While subdivision per se is not made when the FSS is identified, a subdivision would occur if that FSS is used as the basis for the transfer of the property to a person that does not qualify for an exempt transfer of property under State Law.

If the property owner defaults on the financial obligation, the financial institution may take possession of the separated portion of the property. If the financial lender is not a natural person

properly related to the defaulting property owner, when this separate ownership is perfected, a de-facto subdivision occurs that would be regulated under both state law and County ordinances. If the original FSS was not configured to include access to a public road, this de facto subdivision would create a separate tract with no public access, in violation of state law and County ordinances. The purpose of the proposed CGA is to prevent the adverse effects of these types of subdivisions of property that make no provision for public access to a portion of a property divided through financial severance.

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 paperwork with the County when establishing an FSS. The proposed CGA may further burden Private Real Property by requiring a property owner to utilize a configuration for the FSS to allow access to a public roadway or to grant an access easement across the portion of their property not included within the FSS.

Under TLGC §232.0015(e), real property resulting from exempt subdivisions may be transferred to individuals related to the owner within the third degrees of consanguinity or affinity of the property owner without invalidating the exemption.

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 an FSS that does not have access to a public roadway.
- Increasing the likelihood that the County is aware of an FSS as early as possible, providing the best opportunity for non-compliant developments to be corrected

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?

While the property owner could configure the FSS to provide access to a public roadway, as an alternative, the property owner could also grant an access easement to the FSS through the portion of their property that is not included in the FSS.

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

No. Even in an instance where the property owner might elect to grant an easement, this easement would only require the property owner to provide ingress/egress across the portion of their property that is not included in the FSS.

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. However, the property owner is given the option of configuring the FSS to allow public access or granting an easement across the property that is not included in the FSS. 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. However, the property owner is given the option of configuring the FSS to allow public access or granting an easement across the property that is not included in the FSS. 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 Action of Requiring the Registration of Certain Exempt Subdivisions does not constitute a Regulatory Taking.

3. Development Authorization Expiration

The County's existing development regulations contain minimal requirements for the expiration and in some cases, renewal, of various permits and approvals. Under the County's authority to regulate the expiration of various permits and approvals provided in TLGC, Chapter 245, the County is proposing to establish expiration periods for some and modify the expiration period for other various permits and approvals (referred to as "Development Authorizations") included within Article 3, Section 3.10 of the Proposed Regulations. Specifically, the County is relying on TLGC Chapter 245 which authorizes a "regulatory agency" to establish expiration periods for various permits and approvals. In this context, a "regulatory agency" includes a "political

subdivision, and "political subdivision" includes a county. This provision of the TLGC authorizes the County, upon the adoption of the Proposed Regulations, to establish expiration periods for a broad range of permits, which is defined to include an "approval" or "other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought." The County has construed this provision to cover all types of Development Authorizations approved following the effective date of the Proposed Regulations.

The proposed action subjects property owners and developers obtaining Development Authorizations from the County to a timeframe for making progress on their project. These actions, taken together, have been determined to be a CGA.

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

The purpose of the proposed CGA is to minimize the number of projects that are constructed under older and generally less protective standards, to the extent allowed by law.

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 Owner or Developer to continue to make progress on a project within a specific timeframe, regardless of the market or other timing factors. This burden can be removed by the applicant initiating the actions authorized in the Development Authorization within the expiration period.

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

In general, the County believes that these older standards are generally not as protective of the public as newer standards. By implementing the proposed expiration periods, the County intends to minimize the number of projects constructed under the older, generally less protective standards. The proposed CGA will benefit society by minimizing the number of project using old or outdated standards.

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?

In the event that a Development Authorization expired, the Applicant might be deprived of the specific use(s) authorized in the Development Authorization. However, there would likely be other uses available or the Applicant could apply again for a new

Development Authorization for the same use(s). Given these conditions, the proposed CGA will not deprive an owner of all economically viable use of the property.

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. As outlined in the response to OAG Sub-question 3, in the event that a Development Authorization expired, the proposed CGA could result in the loss of a particular use. However, the "producing cause" of this loss would be the Applicant's failure to act under the terms of the Development Authorization and not the expiration of the Development Authorization. Since the CGA would not be the "producing cause", it would therefore not constitute a regulatory taking.

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 CGA decreases the market value of affected Private Real Property must be made on a case-by-case basis. However, given the considerations outlined in the responses to OAG Sub-questions 3 and 4, if an instance occurred where the expiration of a particular Development Authorization resulted in the decrease of the market value of the Private Real Property by 25% of more, the "producing cause" of this loss would be the Applicant's failure to act under the terms of the Development Authorization and not the expiration of the Development Authorization. Since the CGA would not be the "producing cause", it would therefore not constitute a regulatory taking.

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 counties by the Texas Legislature. The only alternative to the proposed CGA is to not implement this authority. The County believes that the proposed CGA provides significant public benefits at relatively small risk of adverse impact to property owners.

Conclusion: The County's Proposed Action of Establishing and Modifying Development Authorization Expiration Periods does not constitute a Regulatory Taking.

4. Minimum Roadway Setbacks

Under the County's authority to regulate certain aspects of building construction as provided in TLGC Chapter 233, the County is proposing to implement minimum setbacks from Public Roadways. Specifically, TLGC Chapter 233 authorizes counties to "(1) establish by order building or set-back lines on the public roads, including major highways and roads, in the county; and (2) prohibit the location of a new building within those building or set-back lines." TLGC

Chapter 232 further authorizes counties to adopt these setback lines without a limitation period. These setbacks would extend a specified distance from the public roadway right-of-way line onto private property. This proposed action is outlined in Article 6 of the Proposed Regulations, specifically in Section 6.02. The proposed action may subject certain property owners to the requirement to conduct a review of their proposed construction plans and may restrict the placement of certain types of structures within the specified setbacks. This action has been determined to be a CGA.

This evaluation is intended only to address the impacts of the initial establishment of the setback lines and does not address subsequent right-of-way purchases or condemnation that may take place within these setbacks or elsewhere.

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

The purpose of the proposed CGA is to minimize the future cost to the County (including the taxpaying public) for expanding County roadways and to provide a public safety component by providing additional separation between the traveled roadway and an above-grade structure made of non-collapsible material.

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 a de facto easement across the designated portion of the property adjacent to the public roadway. While this portion of the property could be occupied by a yard, driveways, parking lots, or vegetation, it could not be occupied by above-grade structures.

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

The County believes that implementing the proposed roadway setbacks benefits society in the following ways:

- Reducing the cost of obtaining future right-of-way for public roadway expansion projects by ensuring that the area most likely to be required for expansion is not occupied by above-grade construction. In addition to the purchase price of the land, any above-grade structures present would increase the amount of compensation required for securing the expanded right-of-way.
- Providing an additional safety zone for traveling vehicles that may leave the roadway. This additional safety zone will reduce potential damage and harm to the vehicle and its occupants as well as to the property, fixtures and occupants adjacent to the roadway.

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?

For Private Real Property located adjacent to a public roadway, the proposed CGA would create a de facto easement across the designated portion of the property within the setback distance from the right-of-way line of the public roadway.

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

In an extreme case, the proposed CGA could result in a property owner being deprived of all economically viable use of the property in an instance where substantially all of the affected property was restricted by the minimum lot size requirements or the road setback. This would have the effect of depriving that owner of the ability to use that property for a building site, thus depriving him of an important economic use of the property as a building site. However, there are very few properties in the unincorporated areas of the County that would be subject to the Proposed Regulations that do not contain sufficient area to accommodate the Proposed Regulations. The Proposed Regulations make provision for the granting of variances in the event the proposed CGA may result in a regulatory taking in a particular case. In the rare instances where the proposed setbacks might otherwise deprive a property owner of all economically viable uses of their property, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking. Given these allowances, the proposed CGA will not generally deprive an owner of all economically viable use of the property.

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. As outlined in the response to OAG Sub-question 3, in an extreme case, the proposed CGA could result in a significant impact to the landowner's economic interest in an instance where substantially all of the affected property was restricted by the setback. However, in the vast majority of instances, only a portion of the property will be affected by the setback. Due to OSSF Regulations most lots are a minimum size of 1 or 2 acres. For a typical 1-acre (43,560 square feet) lot, with a public roadway frontage of one hundred fifty (150) feet, the length of the lot off the public roadway would be approximately two hundred ninety (290) feet. Assuming a twenty-five (25) foot front setback applied to the lot, the setback would restrict above-grade construction over the front 3,750 square feet, leaving the remaining 39,810 square feet available for above-grade construction. In addition, customary residential and commercial construction practices in Wise County generally result in the placement of driveways, parking areas, yards and other associated features between the right-of-way line and any above-grade structures. The setback area could also be occupied by an OSSF effluent discharge system. Since these features are customarily located in the area that would be occupied by the proposed setbacks, the setback requirement would not be expected to have a significant adverse impact on the landowner's economic interest. In the rare instances where the proposed setbacks might otherwise have a significant impact on the landowner's economic interests, the Commissioners' Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking. Given these allowances, the proposed CGA 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 CGA decreases the market value of affected Private Real Property must be made on a case-by-case basis. However, given the considerations outlined in the responses to OAG Sub-questions 3 and 4, the circumstances where the proposed setbacks would have a significant adverse impact would be relatively rare. In the rare instances where the proposed setbacks might otherwise decrease the market value of the Private Real Property by 25% of more, the Commissioners' Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking. Given these allowances, the proposed CGA will not generally result in the decrease in market value of any specific Private Real Property by 25% of 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 optional authority granted to the counties by the Texas Legislature. The only alternative to the proposed CGA is to not implement this authority. The County believes that the proposed CGA provides significant public benefits at relatively small cost to property owners, and in most instances will require very few, if any changes, to a property owner's site development plans. In return, the County can save significant costs in the acquisition of future right-of-way.

Conclusion: The County's Proposed Action of Establishing Setbacks Along Public Roadways does not constitute a Regulatory Taking.