

# PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT GUIDELINES

## §1.0 GENERAL DESCRIPTION OF THE LEGISLATION, DEFINITION OF "TAKING." §1.1. PURPOSE OF GUIDELINES.

§1.11. The Private Real Property Rights Preservation Act (Act or PRPRPA) represents a basic charter for the protection of private real property rights in Texas.<sup>(1)</sup> The Act represents the Texas legislature's acknowledgment of the importance of protecting private real property interests. PRPRPA's purpose is to ensure that certain governmental entities take a "hard look" at their actions on private real property rights, and that those entities act according to the letter and spirit of the Act.<sup>(2)</sup> PRPRPA is, in short, another instrument to ensure open and responsible government. §1.12. Section 2007.041 requires the attorney general to:

- (a) prepare guidelines to assist governmental entities in identifying and evaluating those governmental actions described in §2007.003(a)(1)-(3) [of the Act] that may result in a taking;
- (b) file the guidelines with the secretary of state for publication in the Texas Register in the manner prescribed by Chapter 2002 of the Government Code; and
- (c) review the guidelines at least annually and revise the guidelines as necessary to ensure consistency with the actions of the legislature and the decisions of the United States Supreme Court and the supreme court of this state.

§1.13. Governmental actions undertaken pursuant to these Guidelines that compel the need to promulgate "Takings Impact Assessments" (TIAs) must ensure that information regarding the private real property implications of governmental actions are considered before decisions are made and actions taken. This information and analysis must be accurate, concise, and of high quality. 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. Nevertheless, the public is entitled to more than mere pro forma analyses by the governmental entities covered by the Act. TIAs shall serve as the means of assessing the impact on private real property, rather than justifying decisions already made. §1.14. The failure of a governmental entity to promulgate a TIA when one is required will subject the governmental entity to a lawsuit to invalidate the governmental action. §1.15. **Caveat.** These Guidelines do not represent a formal Attorney General's opinion and should not be construed as an opinion of the Attorney General as to whether a specific governmental action constitutes a "taking." The Act raises complex and difficult issues in emerging areas of law, public policy, and government. These Guidelines are intended to provide guidance as governmental entities





seek to conform their activities to the Act's requirements. **1.2**

**Definition of "Taking."** §1.21. The Act is directed at ensuring that governmental entities undertaking governmental actions covered by the Act do not do so without expressly considering or assessing whether "takings" of private real property may result. The duty to promulgate a TIA represents a critical mechanism in ensuring that requisite attention is paid to the impact of a covered governmental action on real property interests. Governmental entities need to be fully aware of three sets of criteria set forth in the Act defining the scope of what actions may constitute a "taking." §1.22. The Act, §2007.002(5), defines "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.

§1.23 The Act, §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."

- (a) The Fifth Amendment to the United States Constitution (the "Takings Clause") provides: "N[or] shall private property be taken for public use, without just compensation." The Takings Clause applies to the states by virtue of the Fourteenth Amendment.<sup>(3)</sup>
- (b) Article I, §17 of the Texas State Constitution provides as follows:

"No person's property shall be taken, damaged or destroyed without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . ."
- (c) The Act, §2007.002(5)(B), 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.

### **§1.3. "Regulatory Takings" Or "Inverse Condemnation":**

**General Principles.** §1.31. While there is usually little question that there is a "taking" when the government physically seizes or occupies private real property, there may be uncertainty as to whether a "taking" occurs when the government regulates private real property or activities occurring on private real property, or when the government undertakes some physically non-intrusive action which may have an impact on real property rights. These Guidelines pertain, for the most part, to the non-physical invasion and non-occupancy situations.<sup>(4)</sup> §1.32. The Takings Clause "does not bar government from interfering with property rights, but rather requires compensation in the event of otherwise proper interference amounting to a taking."<sup>(5)</sup> A physically non-intrusive governmental regulation or action that affects the value, use, or transfer of real property may constitute a "taking"



if it "goes too far."<sup>(6)</sup> Regulatory or governmental actions are sometimes difficult to evaluate for "takings" because government may properly regulate or limit the use of private real property, relying on its "police power" authority and responsibility to protect the public health, safety, and welfare of its citizens. Accordingly, government may abate public nuisances, terminate illegal activities, 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. §1.33. Governmental actions taken specifically for the purposes of protecting public health and safety may be given broader latitude by courts before they are found to be "takings." However, the mere assertion of a public health and safety purpose should be viewed as insufficient to avoid a taking determination. Actions which are asserted to be for the protection of public health and safety should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and should impose no greater burden than is necessary to achieve the health and safety purpose. Otherwise, the exemptions or exceptions for these actions may swallow the rule set forth by the Act to protect private real property. §1.34. If a governmental action diminishes or destroys a fundamental real property right—such as the right to possess, exclude others from, or dispose of real property—it could constitute a "taking."<sup>(7)</sup> Similarly, if a governmental action imposes substantial and significant limitations on real property use, there could be a "taking."<sup>(8)</sup>

#### **§1.4. CONSTITUTIONAL REGULATORY "TAKINGS" ANALYSES.**

§1.41. A governmental action may result in the "taking" of private real property requiring the payment of compensation if it denies an owner economically viable use of his land." Deprivation of economic viability may occur through the denial

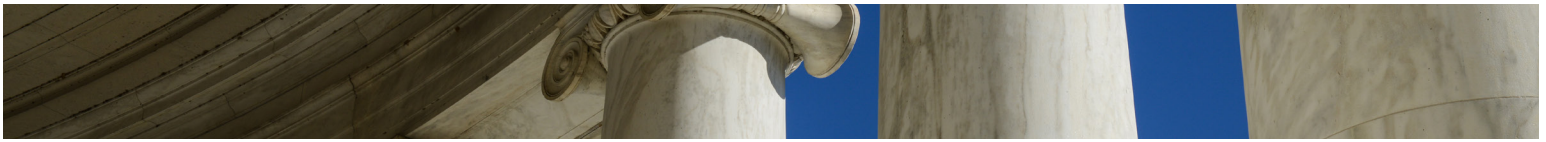
of development permits, as well as through the application of ordinances or state laws.<sup>(9)</sup> A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging a "physical" taking," a Lucas-type "total regulatory taking," a Penn Central taking, or a land-use exaction violating the standards set forth in Nollan and Dolan.<sup>(10)</sup>

Prior to 2005, the perception existed that a regulation that did not "substantially advance legitimate state interests" could result in a taking. In *Lingle*, however, the Supreme Court rejected that argument and concluded that the "substantially advances" test no longer has a place in takings jurisprudence, and observed that "an inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."<sup>(11)</sup>

Governmental actions requiring exactions of property must meet the "rough proportionality test." This test requires a governmental entity to make "some sort of individualized determination that the required dedication is related both in nature and extent to the project's anticipated impact, though a precise mathematical calculation is not required."<sup>(12)</sup>

#### **§1.42. Federal Law**

(a) A proper regulatory taking analysis considers the economic impact of the regulation, in particular whether the proposed governmental action interferes with a real property owner's reasonable investment-backed development expectations. For instance, in determining whether a "taking" has occurred, a court, among other things, might weigh the governmental action's impact on vested development rights against the government's interest in taking the action. Defining reasonable investment-backed expectations is a



complex, fact-intensive undertaking. In *Reahard v. Lee County*, the Eleventh Circuit of the United States Court of Appeals set forth the following set of eight essentially factual issues to be considered in determining whether a private real property owner's "investment-backed development expectations" have been negatively impacted and thus a regulatory taking effected:

1. History of the property. (when purchased? how much land purchased? where was the land located? nature of title? composition of the land? how was the land initially used?);
2. History of the development. (what was built on the land? by whom? how subdivided? to whom sold? what plats filed? what roads dedicated?);
3. History of zoning and regulation. (how and when was the land classified? how was use proscribed? changes in zoning classification?);
4. How did development change when title passed;
5. Present nature and extent of the property;
6. Owner's reasonable expectations under state common law;
7. Neighboring landowners' reasonable expectations under state common law; and
8. Diminution of owner's investment-backed expectations, if any, after passage of the regulation or the undertaking of a governmental action.

(b) If a governmental action prohibits all economically viable or beneficial uses of real property, a "taking" occurs, unless the governmental entity can demonstrate that laws of nuisance or other pre-existing limitations on the use of the real property prohibit the proposed uses, or unless the governmental entity can show that there is no interest at stake protected or defined by common law. The United States Supreme Court has acknowledged that it has never clarified the "property interest against which the loss of value is to be measured, but has

suggested that a real property owner's "investment-backed development expectations" as shaped by state property law may provide the answer.<sup>(13)</sup>

(c) In 2002, the United States Supreme Court held that temporary development moratoria are not per se takings of property under the Takings Clause. The Court reasoned that "the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."

#### §1.43 State Law

- (a) The governmental entity must consider whether there is a taking under state constitutional law (commonly referred to as inverse condemnation). In the non-physical intrusion cases, Texas courts, on a case-by-case basis, have employed several general tests to determine whether a compensable governmental taking has occurred under the provisions of the Texas Constitution, such as:
1. whether the governmental entity has imposed a burden on private real property which creates a disproportionate diminution in economic value or renders the property wholly useless,
  2. whether the governmental action against the owner's real property interest is for its own advantage, or
  3. whether the governmental action constitutes an unreasonable and direct physical or legal restriction or interference with the owner's right to use and enjoy the property.
- (b) In *City of College Station v. Turtle Rock Corporation*, the Texas Supreme Court held that there must be a reasonable connection between an exaction and the need for the property by the government. The court recognized that in order to be a compensable taking, the ordinance must render the entire property "wholly useless" or otherwise cause "total destruction"



of the entire tract's economic value. Furthermore, the landowner must show that the ordinance is unreasonable or arbitrary in that particular application.<sup>(14)</sup>

**§1.5. REGULATORY TAKINGS ANALYSIS: NEW STATUTORY FORMULATION. §1.51. PRPRPA** creates a new definition

of taking, in addition to judicially-determined takings. The Act, §2007.002(5), provides that a "taking" occurs when a governmental action covered by the Act is a producing cause of a 25% or more reduction in the value of private real property affected by the governmental action. Section 2007.02(5)(B), however, limits the application of the new definition.<sup>(15)</sup> **§2.0.**

**APPLICABILITY OF THE ACT. §2.1. GOVERNMENTAL ACTIONS COVERED. §2.11**

(a) Section 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.

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

§2.12. The following actions, furthermore, 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.

§2.13. According to §2007.003(c) of the Act, §2007.021 ("Suit Against Political Subdivision") and §2007.022 ("Administrative Proceeding Against State Agency") (collectively, "Action To Determine Taking") do not apply to the enforcement or implementation of a statute, ordinance, order, rule, regulation, requirement, resolution, policy, guideline, or similar measure that was in effect September 1, 1995, and that prevents the pollution of a reservoir or an aquifer designated as a sole source aquifer under the federal Safe Drinking Water Act (42 United States Code, §300h-3(e)). §2.14. Nor does the Act apply to the enforcement or implementation of the Open Beaches Act, Subchapter B, Chapter 61, Natural Resources Code, as it existed on September 1, 1995, or to the enforcement or implementation of any rule or similar measure that was adopted under that subchapter and was in existence on September 1, 1995. §2.15. In order to effectuate the will of

the legislature and to ensure that the Act is not read either too broadly or too narrowly, each governmental entity covered by the Act should promulgate a set of procedures ("Governmental Entity-Specific TIA Procedures") specific to the governmental entity that defines which of its activities, programs, or policy, rule, or regulation promulgation activities trigger the need for a TIA. Such promulgation of the Governmental Entity-Specific TIA Procedures should be completed as soon as possible after the publication of these Guidelines. However, the promulgation of these TIA procedures must not delay conformance with the Act or these Guidelines. §2.16. In promulgating the Governmental Entity-Specific TIA Procedures, the governmental entity should establish (1) "Categorical Determination" categories that indicate that there are no private real property rights affected by certain types of proposed governmental actions, as well as (2) a quick, efficient, and effective mechanism or approach to making "No Private Real Property Impacts Determinations" ("NoPRPI Determinations") associated with the proposed governmental action. §2.17. Categorical Determinations that no private real property interests are affected by the proposed governmental action would obviate the need for any further compliance with the Act. Without limitations the following are examples of the types of activities that might fall into such a Categorical Determination category: (i) student policies established by state institutions of higher education and (ii) professional qualification requirements for licensed or permitted professionals. §2.18. NoPRPI Determinations would also obviate the need for any further compliance with the Act once it is determined that there are no private real property interests impacted by a specific governmental action. In such a case, there would be no established Categorical Determination category in which the proposed governmental action fits, but after consideration and preliminary analysis of a specific proposed governmental action, the governmental entity is satisfied that there would be no impacts on private



real property interests. §2.19. Until and unless a covered governmental entity develops Governmental Entity-Specific TIA Procedures, it will have to determine on an ad hoc basis whether any private real property interests are impacted (including to what extent) by its proposed actions. Furthermore, because the TIA necessarily depends on the type of governmental action being proposed and the specific nature of the impacts on specific private real property, the governmental entity promulgating a TIA has discretion (within the parameters of the Act, §2007.043(b)) to determine the precise extent and form of the assessment, on a case-by-case basis. **§3.0. GUIDE TO PROMULGATING TIAs.** §3.1. Requirements for Promulgating TIAs.

The Act, §2007.043(b) requires that the TIA:

- (a) describe the specific purpose of the proposed action and identify:
  1. whether and how the proposed action substantially advances its stated purpose; and
  2. the burdens imposed on private real property and the benefits to society resulting from the proposed use of private real property;
- (b) determine whether engaging in the proposed governmental action will constitute a taking; and
- (c) describe reasonable alternative actions that could accomplish the specified purpose and compare, evaluate, and explain:
  1. how an alternative action would further the specified purpose; and
  2. whether an alternative action would constitute a taking.
- (d) A takings impact assessment prepared under this section is public information.

### §3.2. Guide for Evaluating Proposed Governmental Actions.

Governmental entities covered by the Act should use the following guide in reviewing the potential impact of a proposed governmental action covered by the Act. While this

guide may provide a framework for evaluating the impact on private real property a proposed governmental action may have generally, "takings" questions normally arise in the context of specific affected real property. This guide for evaluating governmental actions covered by the Act is another tool that a governmental entity should aggressively use to safeguard private real property owners.

- (a) 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.
- (b) 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"? See §2 of these Guidelines; and Governmental Entity-Specific TIA Procedures for "Categorical Determinations" as developed by the respective Covered Governmental Entities.
  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.
- (c) 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.

§3.3 Elements of the TIA As set forth in §3.11 supra, the Act sets forth explicit elements that must be evaluated by the governmental entity proposing to undertake a governmental action covered by the Act.

- (a) 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.
- (b) Question 5. How Does the Proposed Covered Governmental Action Burden Private Real Property?<sup>31</sup>
- (c) Question 6. How Does the Proposed Covered Governmental Action Benefit Society?
- (d) Question 7. Does the Proposed Covered Governmental Action result in a "taking"? Whether a Proposed Covered Governmental Action "burdens," in the first analysis, and ultimately results in a "taking" must be measured against all three prongs of the "takings" analysis outlined in secs.1.2-1.5 of these Guidelines. The Covered Governmental Entity proposing to engage in a Covered Governmental Action should consider the following subquestions:
  1. Does the Proposed Covered Governmental Action Result Indirectly or Directly in a Permanent or Temporary Physical Occupation of Private Real Property? Regulation or action resulting in a permanent or temporary physical occupation of all or a portion of private real property will generally constitute a "taking." For example, a regulation that required landlords to

allow the installation of cable television boxes in their apartments was found to constitute a "taking."<sup>32</sup>

2. Does the Proposed Covered Governmental Action Require a Property Owner to Dedicate a Portion of Private Real Property or to Grant an Easement? Carefully review all governmental actions requiring the dedication of property or grant of an easement. The dedication of real property must be reasonably and specifically designed to prevent or compensate for adverse impacts of the proposed development. Likewise, the magnitude of the burden placed on the proposed development should be reasonably related to the adverse impacts created by the development. A court will also consider whether the action in question substantially advances a legitimate state interest. For example, the United States Supreme Court determined in *Nollan* that compelling an owner of waterfront property to grant a public easement across his property that does not substantially advance the public's interest in beach access, constitutes a "taking."<sup>33</sup> Likewise, the Court held that compelling a property owner to leave a public green way, as opposed to a private one, did not substantially advance protection of a floodplain, and was a "taking."<sup>34</sup>
3. Does the Proposed Covered Governmental Action Deprive the Owner of all Economically Viable Uses of the Property? If a governmental action prohibits or somehow denies all economically viable or beneficial uses of the land, it will likely constitute a "taking." In this situation, however, the governmental entity should consider whether it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other preexisting limitations on the use of the property.<sup>35</sup> It may be important to analyze the action's impact on the property as a whole, and not just the impact on a portion of the property. It is also important to





assess whether there is any profitable use of the remaining property available.<sup>36</sup> The remaining use does not necessarily have to be the owner's planned use, a prior use, or the highest and best use of the property. One factor in this assessment is the degree to which the governmental action interferes with a property owner's reasonable investment-backed development expectations.

Carefully review governmental actions requiring that all of a particular parcel of land be left substantially in its natural state. A prohibition of all economically viable uses of the property is vulnerable to a "takings" challenge. In some situations, however, there may be pre-existing limitations on the use of property that could insulate the government from takings liability.

4. Does the Proposed Covered Governmental Action have a Significant Impact on the Landowner's Economic Interest? Carefully review governmental actions that have a significant impact on the owner's economic interest. Courts will often compare the value of property before and after the impact of the challenged action. Although a reduction in property value alone may not be a "taking," a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses. Another economic factor courts will consider is the degree to which the challenged action impacts any development rights of the owner.
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).

6. Does the Proposed Covered Governmental Action Deny a Fundamental Attribute of Ownership?

Governmental actions that deny the landowner a fundamental attribute of ownership-including the right to possess, exclude others and dispose of all or a portion of the property-are potential takings.

The United States Supreme Court has held that requiring a public easement for recreational purposes where the harm to be prevented was to the flood plain was a "taking." In finding this to be a "taking," the Court stated: The city never demonstrated why a public green way, as opposed to a private one, was required in the interest of flood control. The difference to the petitioner, of course, is the loss of her ability to exclude others. . . [T] his right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>37</sup>

The United States Supreme Court has also held that barring the inheritance (an essential attribute of ownership) of certain interests in land held by individual members of an Indian tribe constituted a "taking."<sup>38</sup>

- (e) Question 8. What are the Alternatives to the Proposed Covered Governmental Action?

Lastly, the governmental entity must describe reasonable alternative actions to the proposed governmental action that could accomplish the specified purpose and compare and evaluate the alternatives. The governmental agency must also evaluate the "takings" implication of each reasonable alternative to the proposed action pursuant to the applicable provisions of these Guidelines.



## ENDNOTES:

1 Private real property is defined in the Act, §2007.002(4), to mean an interest in property recognized by common law:

“Private real property” means an interest in real property recognized by common law, including a groundwater or surface water right of any kind, that is not owned by the federal government, this state, or a political subdivision of this state.

2 Furthermore, the Act may reflect a developing, broader appreciation of the importance of private property rights. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994):

We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

3 The Act, §2007.002 (1) defines “governmental entity” as:

(a) a board, commission, council, department, or other agency in the executive branch of state government that is created by constitution or statute, including an institution of higher education as defined by Education Code, §61.003; or

(b) a political subdivision of this state.

4 The Act, 2007.043(a) provides:

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

Section 2007.042 provides:

(a) A political subdivision that proposes to engage in a governmental action described in §2007.003(a)(1)-(3) that may result in a taking shall provide at least 30 days’ notice of its intent to engage in the proposed action by providing a reasonably specific description of the proposed action in a notice published in a newspaper of general circulation published in the county in which affected private real property is located. If a newspaper of general circulation is not published in that county, the political subdivision shall publish a notice in

a newspaper of general circulation located in a county adjacent to the county in which affected private real property is located.

The political subdivision shall, at a minimum, include in the notice a reasonably specific summary of the takings impact assessment that was prepared as required by this subchapter and the name of the official of the political subdivision from whom a copy of the full assessment may be obtained.

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

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

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

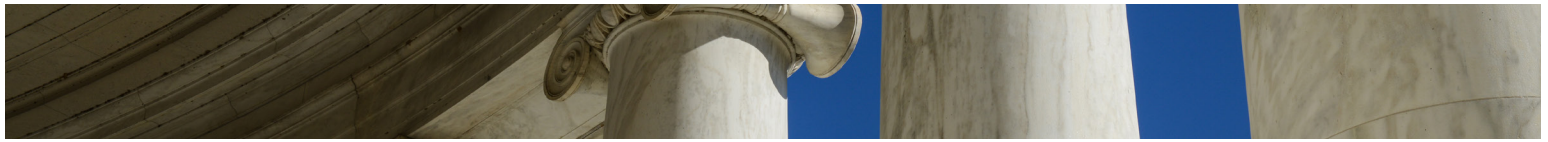
5 The Act, §2007.044 provides:

(a) A governmental action requiring a takings impact assessment is void if an assessment is not prepared. A private real property owner affected by a governmental action taken without the preparation of a takings impact assessment as required by this subchapter may bring suit for a declaration of the invalidity of the governmental action.

(b) A suit under this section must be filed in a district court in the county in which the private real property owner’s affected property is located. If the affected property is located in more than one county, the private real property owner may file suit in any county in which the affected property is located.

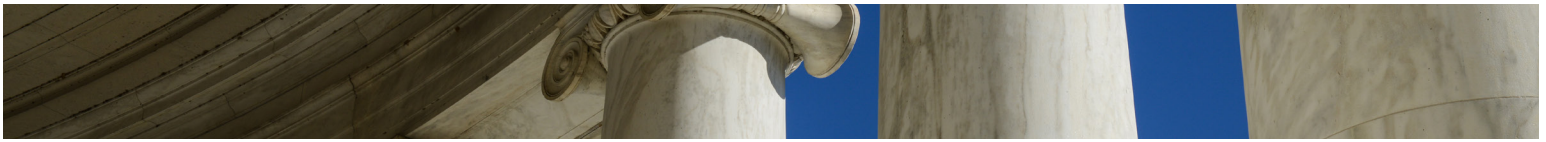
(c) The court shall award a private real property owner who prevails in a suit under this section reasonable and necessary attorney’s fees and court costs.

6 A “producing cause” is an “efficient, exciting, or contributing cause, which in the natural sequence, produced injuries of damages complained of, if any.” *Union Pump Company v. Allbritton*, 898 S.W.2d 773, 775 (Texas 1995) (citing *Haynes and Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 182



## ENDNOTES CONTINUED:

- (Texas 1995)). An element of “producing cause” is causation in fact. *Id.* Causation-in-fact requires that the defendant’s conduct be a substantial factor in bringing about the plaintiff’s injuries, and that the injuries would not have occurred without defendant’s conduct. *Id.* (citations omitted); *C. J. Doe v. Boys Club of Greater Dallas*, 907 S.W.2d 472, 481 (Texas 1995). A “producing cause” need not be foreseeable.
- 7 See *Chicago, B & Q. R. Co. v City of Chicago*, 166 U.S. 226 (1897).
- 8 The most easily recognized type of “taking” occurs when government physically occupies private property. Clearly, when the government seeks to use private property for a public building, a highway, a utility easement, or some other public purpose, it must compensate the property owner.
- Physical invasions of property, as distinguished from physical occupancies, may also give rise to a “taking” where the invasions are of a recurring or substantial nature. Examples of physical invasions include, among others, flooding and water related intrusions and overflight or aviation easement intrusions.
- 9 *Lingle v. Chevron*, 544 U.S. \_\_\_, 125 S.Ct. 2074, 2084 (2005), quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original). The Court went on to note that “if a government action is found to be impermissible—for instance because it fails to meet the ‘public use requirement or is so arbitrary as to violate due process—that is the end of the inquiry.” *Id.*
- 10 “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922).
- 11 *Lucas v. South Carolina Coastal Council*, 503 U. S. 1003, 1025 n.12 (1992).
- 12 See exemptions (6), (7), and (13) of §2007.003(b) of the Act (set forth *infra* in §2.12 of these Guidelines).
- 13 *Dolan*, 512 U. S. at 391.
- 14 *Lucas*, 503 U. S. at 1019, 512 U.S. at 385 n. 6.
- 15 *Lingle*, 125 S.Ct. at 2087.
- 16 *Lingle*, 125 S.Ct. at 2082-2083.
- 17 *Dolan*, 512 U. S. at 391. The rough-proportionality test, however, has not been extended beyond the special context of exactions. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).
- 18 *Penn Central Trans. Co. v. City of New York*, 438 U. S. 104, 124 (1978).
- 19 968 F.2d 1131 (11th Cir.), vacated, 978 F.2d 1212 (11th Cir.), rev’d., 30 F.3d 1412 (1992).
- 20 *Lucas*, 505 U. S.1003 (1992) at 1016, n.7.
- 21 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002). The Court went on to analyze the circumstances in *Tahoe-Sierra* within the *Penn Central* framework. *Id.*; see *Penn Central*, 438 U.S. at 124 (regulatory takings jurisprudence characterized by “essentially ad hoc, factual inquiries.”)
- 22 *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Texas 1978).
- 23 The Texas Supreme Court has held that in order for there to be an inverse condemnation there must be a “direct restriction” on the landowner’s use of his property. As used, “direct restriction” is the “actual physical or legal restriction on the property’s use such as blocking of access or denial of a permit for development.” *Westgate Ltd. v. State*, 843 S.W.2d 448 (1992). Since the court found that the condemnor’s unreasonable delay of condemnation proceedings did not rise to the level of a “direct restriction” on the landowner’s use of his property, the landowner therefore could not recover damages in a suit for inverse condemnation. 843 S.W.2d at 452.
- The court supported its findings with the decisions of two Texas appellate courts. A landowner may not recover in a suit for inverse condemnation even if there is the construction of improvements which would have the ultimate effect of increasing the property’s chances of flooding and thus reducing the property’s value. 843 S.W.2d at 452 (*citing, Allen v. City of Texas City*, 775 S.W.2d 863, 865 (Tex. App.-Houston [1st.



**ENDNOTES CONTINUED:**

- Dist.] 1989, writ denied); *Hubler v. City of Corpus Christi*, 564 S.W.2d 816 (Tex. Civ. App.--Corpus Christi 1978, writ ref'd n.r.e.). Moreover, the *Westgate* court reserved the question of whether a cause of action might exist where there is bad faith on the part of the condemnor. 843 S.W.2d at 454.
- 24 680 S. W. 2d 802, 806 (Tex. 1984). The *Turtle Rock* holding was cited by the United States Supreme Court in *Nollan*, 107 S.Ct. 3141, 3150, and is consistent with the holding of that opinion.
- 25 There are limitations to the Act's coverage included in the definition of "taking" in §2007.002(5)(B):
  - (a) private real property must be affected;
  - (b) the private real property must be the subject of the governmental action; and
  - (c) the governmental action must restrict or limit the owner's right to the property that would otherwise exist in the absence of the governmental action.
- 26 "Extraterritorial jurisdiction" means the unincorporated area, not part of any other city, that is contiguous to the corporate limits of a city. 52 Tex. Jur. 3d Municipalities §85 (1989). The extent of an extraterritorial jurisdiction depends on the population of the city. *See id.*; *see also* Texas Local Government Code, §42.021.
- 27 The Act, Section 2007.041(a).
- 28 *See* 31 TAC §§15.1-15.10.
- 29 Governmental entities are reminded that Section 2007.003 provides that the Act applies to the following governmental actions:
  - (1) adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure.
- 30 In 2002, the Texas Supreme Court decided its first case under the Private Real Property Rights Preservation Act. In *Bragg v. Edwards Aquifer Authority*, 71 S.W. 3d 729, 730-731 (2002) the court concluded that the adoption of well permitting rules by an aquifer authority is excepted from the Act as an action "taken under a political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater." The Court also concluded that "the Authority's proposed actions on the Braggs' permit applications constitute 'enforcement of a governmental action,' to which the TIA requirement does not apply."
- 31 *See* discussion of relevant issues under §3.3(d), *infra*.
- 32 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
- 33 *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).
- 34 *Dolan*, 512 U.S. at 394-396.
- 35 *Lucas*, 505 U. S. at 1029-1032.
- 36 *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).
- 37 *Dolan*, 512 U.S. at 393.
- 38 *Hodel v. Irving*, 481 U.S. 704 (1987).

