

TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT GUIDELINES

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1. INTRODUCTION

1.1. The Private Real Property Rights Preservation Act

1.11. Purpose

“The Private Real Property Rights Preservation Act,” Texas Government Code chapter 2007 (the Property Rights Act), represents a basic charter for the protection of private real property rights in Texas.¹ The Property Rights Act is the Legislature’s acknowledgment of the importance of protecting private real property interests in Texas. The purpose of the act is to ensure that certain governmental entities² make a careful evaluation of their actions regarding private real property rights, and that those entities act according to the letter and spirit of the Property Rights Act. In short, the Property Rights Act is another instrument to ensure open and responsible government for Texans.

1.12. Texas Attorney General Guidelines

The Property Rights Act section 2007.041 requires the Texas Attorney General’s Office to take the following steps:

- 1) prepare guidelines to assist governmental entities in identifying and evaluating those governmental actions described in Property Rights Act section 2007.003(a)(1)–(3) that may result in a taking;
- 2) 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
- 3) review the guidelines at least annually and revise those guidelines as necessary to ensure consistency with the actions of the Legislature and the decisions of the United States Supreme Court and the Texas Supreme Court.

**Please Note: These Property Rights Act guidelines do not represent a formal Attorney General Opinion and should not be construed as an Opinion of the Texas Attorney General as to whether a specific governmental action constitutes a taking. The Property Rights Act raises complex and difficult issues in emerging areas of law, public policy, and government. Should you need more specific advice, you are encouraged to hire counsel to address your specific concerns. These Guidelines are intended to provide guidance for governmental entities as they seek to conform their activities to the Property Rights Act’s requirements.*

1.13. Takings Impact Assessment Requirement (“TIA”)

Some governmental actions taken pursuant to these Property Rights Act guidelines (the Guidelines) require the governmental entity to promulgate “Takings Impact Assessments” (TIAs).

TIAs ensure that information regarding the private real property implications of governmental actions are considered before decisions are made and actions taken.³ This information and analysis must be accurate, concise, and legally sound. TIAs must concentrate on the truly significant real property issues—not merely amass needless detail and meaningless data. Nevertheless, the public is entitled to more than mere pro forma analyses by the governmental entities covered by the Property Rights Act. TIAs serve as the means of assessing the impact on private real property, rather than justifying decisions already made. The failure of a governmental entity to promulgate a TIA when one is required will subject that entity to a lawsuit to invalidate the governmental action.⁴ 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.

1.2. Takings

1.21. Governmental Entities Must Consider Takings

Under the Property Rights Act, a governmental entity undertaking a governmental action must expressly consider or assess whether takings of private real property may result. Governmental entities need to be aware of the criteria set forth in the Property Rights Act defining the scope of what actions may constitute a taking.

1.22. Property Rights Act Definition of “Taking”

Property Rights Act section 2007.002(5) defines “taking” as:

- (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:
 - (i) affects an owner’s private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner’s right to the property that would otherwise exist in the absence of the governmental action; and

(ii) is the producing cause⁵ of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.⁶

This Property Rights Act definition of “taking” incorporates current jurisprudence on takings under the United States and Texas Constitutions. These definitions are discussed in greater detail below along with the statutory definition of taking.

1.23. Incorporated Constitutional Definitions of “Taking”

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.⁷

Article I, § 17 of the Texas State Constitution provides as follows: “No person’s property shall be taken, damaged, or destroyed for or applied for public use without adequate compensation being made, unless by the consent of such person.”

1.24. “Regulatory Takings” or “Inverse Condemnation Takings”

There is usually little question that a taking has occurred when the government physically seizes or occupies private real property. However, in situations such as when the government regulates private real property, when government activities occur on private real property, or when the government undertakes a physically non-intrusive action that may have an impact on real property rights, the situation may be less clear. These Guidelines pertain, for the most part, to these less obvious situations.⁸ Under Texas law, a regulatory taking is also referred to as “inverse condemnation.”⁹

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.’”¹⁰ 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.”¹¹

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.

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 fact a public health and safety determination is made does not mean the action is not a taking. Actions that are for the protection of public health and safety should be undertaken only in response to real and substantial threats, and be designed to significantly advance the health and safety purpose. These actions should impose no greater burden than necessary to achieve the health and safety purpose. Otherwise, the exemptions or exceptions for these actions may swallow the rules set forth by the Property Rights Act to protect private real property.¹²

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.”¹³ Similarly, if a governmental action imposes substantial and significant limitations on real property use, there could be a “taking.”¹⁴

1.3. Constitutional Regulatory “Takings” Analyses

1.31. Introduction

A governmental action may result in the taking of private real property requiring the payment of compensation if that action denies an owner of the economically viable use of her land. Deprivation of economic viability may occur through the denial of development permits, as well as through the application of ordinances or state laws.¹⁵ “[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*.”¹⁶

Prior to 2005, the perception existed that a regulation that did not “substantially advance legitimate state interests” could result in a “taking.” The United States Supreme Court has since rejected that argument in *Lingle v. Chevron U.S.A., Inc.* The Court concluded that the “substantially advances” test no longer has a place in “takings” jurisprudence and observed that “[a]n 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.”¹⁷

Governmental actions requiring exactions of property (i.e., green space dedications required for permitting approval) 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.”¹⁸

1.32. Federal Law

The governmental entity must consider whether there is a taking under federal constitutional law. 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.¹⁹ 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*,²⁰ the United States Court of Appeals for the Eleventh Circuit set forth the following eight-factor list to consider when determining whether a private real property owner’s investment-backed development expectations have been negatively impacted and a regulatory taking thereby effected:

- 1) history of the property (When was it purchased? How much land was purchased? Where was the land located? What is the nature of title? What is the composition of the land? How was the land initially used?);
- 2) history of the development (What was built on the land? Who built it? How was the land subdivided? Who bought the property? What plats were filed? What roads were dedicated?);
- 3) history of zoning and regulation (How and when was the land classified? How was use proscribed? Were there 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.

A governmental action that prohibits *all* economically viable or beneficial uses of real property is a taking—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 there is no interest at stake protected or defined by common law. The United States Supreme Court has acknowledged that the Court has never clarified the “property interest” against which the loss of value is to be measured. The Court

suggested that a real property owner’s “investment-backed development expectations” as shaped by state property law may provide the answer.²¹

Additionally, the United States Supreme Court has 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.”²²

1.33. State Law

The governmental entity must also consider whether there is a taking under state constitutional law. In cases of non-physical intrusion, 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. These general tests include the following:

- 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;²³
- 2) Whether the governmental action against the owner’s real property interest is for its own advantage;²⁴
- 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;²⁵
- 4) Whether the governmental action is a constitutionally cognizable injury that results in diminished value of a property;²⁶
- 5) Whether the governmental action accords with substantive due process principles through a rational relationship to a legitimate governmental interest; or²⁷
- 6) Whether the ordinance renders the entire property “wholly useless” or otherwise causes “total destruction” of the entire tract’s economic value.²⁸

To distinguish a taking from a cause of action under tort law (e.g., negligence or nuisance), contract, or some other law, the Texas Supreme Court has emphasized intent as a factor among the elements comprising a state constitutional taking claim. These elements include the following:

- 1) the government intentionally performed certain acts;
- 2) that resulted in a taking of property; and
- 3) that taking is for public use.²⁹

Thus, private economic loss from a contract dispute with the government does not give rise to a constitutional “taking.” In that case, the government is acting in its capacity as a contracting party and not in its capacity as a sovereign intending to act upon private property for a public purpose.³⁰ In other contexts, Texas courts examine whether the government knows that its specific act caused identifiable harm or that private property damage was substantially certain to result from the act.³¹

2. APPLICABILITY OF THE PROPERTY RIGHTS ACT

2.1. Governmental Actions Covered and Exempted

2.11. Actions Covered

Property Rights Act section 2007.003(a) provides that the Property Rights 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 an effect in the extraterritorial jurisdiction of the municipality,³² excluding annexation, and that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions on the entire extraterritorial jurisdiction of the municipality; and
- 4) enforcement of a governmental action listed in Subdivisions (1) through (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.

Of these actions governed by the Property Rights Act, governmental entities are required to prepare a TIA only for those listed in subsections (1)–(3) above.³³

2.12. Actions Exempted

Pursuant to Property Rights Act section 2007.003(b), the following actions are explicitly exempted from Property Rights Act coverage:

- 1) an action by a municipality except as provided by subsection (a)(3);
- 2) a lawful forfeiture or seizure of contraband as defined by Article 59.01, Code of Criminal Procedure;

- 3) a lawful seizure of property as evidence of a crime or violation of law;
- 4) an action, including an action of a political subdivision, that is reasonably taken to fulfill an obligation mandated by federal law, or an action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law;
- 5) the discontinuance or modification of a program or regulation that provides a unilateral expectation that does not rise to the level of a recognized interest in private real property;
- 6) an action taken to prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state;
- 7) an action taken out of a reasonable, good faith belief that the action is necessary to prevent a grave and immediate threat to life or property;
- 8) a formal exercise of the power of eminent domain;
- 9) an action taken under a state mandate to prevent waste of oil and gas, protect correlative rights of owners of interests in oil or gas, or prevent pollution related to oil and gas activities;
- 10) a rule or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;
- 11) an action taken by a political subdivision:
 - (A) to regulate construction in an area designated under law as a floodplain;
 - (B) to regulate on-site sewage facilities;
 - (C) under the political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater; or
 - (D) to prevent subsidence;
- 12) the appraisal of property for purposes of ad valorem taxation;
- 13) an action that:
 - (A) is taken in response to a real and substantial threat to public health and safety;
 - (B) is designed to significantly advance the health and safety purpose; and

- (C) does not impose a greater burden than is necessary to achieve the health and safety purpose; or
- 14) an action or rulemaking undertaken by the Public Utility Commission of Texas to order or require the location or placement of telecommunications equipment owned by another party on the premises of a certificated local exchange company.

The Property Rights Act section 2007.003(c) contains further exclusions for governmental actions enforcing or implementing certain statutes, rules, or agency policies. For example, the Property Rights Act does not authorize suits to determine whether a taking is caused by the enforcement or implementation of a statute, ordinance, order, rule, regulation, requirement, resolution, policy, guideline, or similar measure that was in effect September 1, 1995 and that prevents the pollution of a reservoir or an aquifer designated as a sole source aquifer under the federal Safe Drinking Water Act (42 U.S.C. § 300h-3(e)).

The Property Rights Act section 2007.003(e) further excludes statutory taking suits concerning 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, 1995.³⁴

2.2. Takings Impact Assessment Procedures

Governmental Entity Specific Guidelines. In order to ensure that the Property Rights Act is not read either too broadly or too narrowly and to ensure the intent of the Texas Legislature behind the statute, each governmental entity covered by the Property Rights Act should promulgate a set of procedures specific to the governmental entity (“Governmental Entity-Specific TIA Procedures”) that defines which of its activities, programs, or policy, rule, or regulation promulgation activities trigger the need for a TIA.³⁵ 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 Property Rights Act or these Guidelines.

Establish Categorical Determinations. In promulgating the Governmental Entity-Specific TIA Procedures, the 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” (“No Impact Determinations”) associated with the proposed

governmental action.

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 Property Rights Act. Without limitations, the following are examples of the types of activities that might fall into such a Categorical Determination category: 1) student policies established by state institutions of higher education; and 2) professional qualification requirements for licensed or permitted professionals.

No Impact Determinations obviate the need for any further compliance with the Property Rights Act once it is determined that there are no private real property interests impacted by a specific governmental action. In such cases, there would be no established Categorical Determination category in which the proposed governmental action fits; yet, after consideration and preliminary analysis of the specific proposed governmental action, the governmental entity would be satisfied that there would be no impact to private real property interests.

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 Property Rights Act section 2007.043(b)) to determine the precise extent and form of the assessment, on a case-by-case basis.

3. GUIDE TO PROMULGATING TAKINGS IMPACT ASSESSMENTS

3.1. Requirements for Promulgating Takings Impact Assessments

Under the Property Rights Act section 2007.043(c), a TIA is public information. The Property Rights Act section 2007.043(b) requires that the TIA prepared by covered government entities contain the following information:

- 1) describe the specific purpose of the proposed action and identify:
 - (A) whether and how the proposed action substantially advances its stated purpose; and
 - (B) the burdens imposed on private real property and the benefits to society resulting from the proposed use of private real property;
- 2) determine whether engaging in the proposed governmental action will constitute a “taking;” and

- 3) describe reasonable alternative actions that could accomplish the specified purpose and compare, evaluate, and explain
 - (A) how an alternative action would further the specified purpose; and
 - (B) whether an alternative action would constitute a “taking.”

3.2. Guide to Evaluating Proposed Governmental Actions

3.21. Burden Analysis. Governmental entities covered by the Property Rights Act should use the following guide in reviewing the potential impact of a proposed governmental action covered by the Property Rights Act. While this guide may provide a framework for evaluating the impact on private real property that 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 Property Rights Act is a tool that a governmental entity should aggressively use to safeguard private real property owners.

Question 1: Is the Governmental Entity undertaking the proposed action a governmental entity covered by the Property Rights Act (i.e., is it a “Covered Governmental Entity”)? *See* Property Rights Act § 2007.002(1).

- If the answer is “No” → no further compliance with the Property Rights Act is necessary.
- If the answer is “Yes,” continue to Question 2.

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Question 2: Is the proposed action to be undertaken by the covered governmental entity an action covered by the Property Rights Act (i.e., a “Covered Governmental Action”)? *See*, section 2.1 of these Guidelines; and Governmental Entity-Specific TIA Procedures for “Categorical Determinations” as developed by the respective Covered Governmental Entities.

In addition, governmental entities may develop categorical determinations and specific procedures for developing TIAs.³⁶ *See, supra*, section 2.2.

- If the answer is “No” → no further compliance with the Property Rights Act is necessary.
- If the answer is “Yes,” continue to Question 3.

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Question 3: Does the covered governmental action result in a burden on “private real property” as that term is defined under Property Rights Act section 2007.002(4)? This question may be resolvable by reference to the governmental entity’s preexisting list of Categorical Determinations.

- If the answer is “No” → a No Impact Determination should be made, and no further compliance with the Property Rights Act is necessary.
- If the answer is “Yes,” then a TIA is required. Continue with Questions 4-8.
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3.22. Takings Impact Analysis. As explained in section 3.1, the Property Rights Act sets forth explicit elements that must be evaluated by the governmental entity proposing to undertake an action covered by the Property Rights Act.

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.

Question 5: How does the proposed covered governmental action burden private real property?³⁷

Question 6: How does the proposed covered governmental action benefit society?

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 (statutory, federal constitutional, and state constitutional) outlined in sections 1.2–1.3 of these Guidelines. In addition, the proposed governmental action must be a final and authoritative determination.³⁸ 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.”³⁹

- 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."⁴⁰ Likewise, the Court held that compelling a property owner to give public access to a green way, as opposed to keeping it private, did not substantially advance protection of a floodplain, and was a "taking."⁴¹

- 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.⁴²

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 still available.⁴³ 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.

Two factors are considered to determine whether a governmental action has unreasonably interfered with a property owner’s right to use and enjoy property. The first factor compares the value that has been taken with the remaining value in the property, without considering any anticipated gains or future profits.⁴⁴ The second factor examines investment-backed expectations, including knowledge of existing regulations.⁴⁵ “Historical uses of the property are critically important when determining the reasonable investment-backed expectations of the landowner.”⁴⁶

When access to a property may be impaired as the result of a governmental action, compensation is owed only when access is materially and substantially impaired.⁴⁷ Roadways are for the benefit of the traveling public, and those doing business along public roadways must assume the risk that future improvements of the roadway system may divert traffic away from their businesses.⁴⁸ Consequently, impairment that results only in increased circuitry of travel is not compensable.⁴⁹ In addition, “partial, temporary disruption of access is not sufficiently ‘material and substantial’ to constitute a compensable taking.”⁵⁰ “The obstruction of streets and highways . . . must be reasonable and necessary for the public improvement which is being made.”⁵¹ Similarly, a property owner has no vested right that his premises must be visible from a public roadway.⁵²

- 5) Does the covered governmental action decrease the market value of the affected private real property by 25 percent or more? Is the affected private real property the subject of the covered governmental action? *See* Property Rights Act § 2007.002(5)(B).

Compensation is not required for every decrease in market value attributable to governmental action.⁵³ Historically, courts have only allowed recovery if the injury is not one suffered by the community in general.⁵⁴ “Community damages are not connected with the landowner’s use and enjoyment of property and give rise to no compensation.”⁵⁵ Whether governmental action results in community damages is determined by the nature of the alleged injury rather than the location of the property.⁵⁶

- 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.”

In *Dolan*, the United States Supreme Court held that a taking resulted when a city required a public easement for recreational purposes where the public interest asserted was conservation of the flood plain.⁵⁷ The Court found that the city had not established “why a public greenway, as opposed to a private one, was required in the interest of flood control.”⁵⁸ The Court emphasized that the right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”⁵⁹

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.”⁶⁰

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.

¹ Private real property is defined in Property Rights Act § 2007.002(4) to mean “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 Property Rights 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 Section 61.003; or (B) a political subdivision of this state.”

³ Property Rights Act § 2007.043(a) provides: “A governmental entity shall prepare a written takings impact assessment of a proposed governmental action described in Section 2007.003(a)(1) through (3) that complies with the evaluation guidelines developed by the attorney general under Section 2007.041 before the governmental entity provides the public notice required under Section 2007.042.”

Property Rights Act § 2007.042 provides: “(a) A political subdivision that proposes to engage in a governmental action described in Section 2007.003(a)(1) through (3) that

may result in a taking shall provide at least 30 days' notice of its intent to engage in the proposed action by providing a reasonably specific description of the proposed action in a notice published in a newspaper of general circulation published in the county in which affected private real property is located. If a newspaper of general circulation is not published in that county, the political subdivision shall publish a notice in a newspaper of general circulation located in a county adjacent to the county in which affected private real property is located. The political subdivision shall, at a minimum, include in the notice a reasonably specific summary of the takings impact assessment that was prepared as required by this subchapter and the name of the official of the political subdivision from whom a copy of the full assessment may be obtained. (b) A state agency that proposes to engage in a governmental action described in Section 2007.003(a)(1) or (2) that may result in a taking shall: (1) provide notice in the manner prescribed by Section 2001.023; and (2) file with the secretary of state for publication in the Texas Register in the manner prescribed by Chapter 2002 a reasonably specific summary of the takings impact assessment that was prepared by the agency as required by this subchapter.”

⁴ Property Rights 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.”

⁵ The Texas Supreme Court clarified that “the essential components of [a] producing cause [are] that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred.” *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007). An element of “producing cause” is causation in fact which 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. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 481 (Tex. 1995). A “producing cause” need not be foreseeable.

⁶ Property Rights Act § 2007.002(5)(B)(ii).

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 the 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. See, e.g., *Griggs v. Allegheny Cty., Pa.*, 369 U.S. 84 (1962) (recurrent overflights); *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004) (recurrent flooding); *City of Houston v. McFadden*, 420 S.W.2d 811 (Tex. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e) (overflights).

⁹ *Town of Flower Mound v. Stafford Estates, Ltd. P'ship*, 135 S.W.3d 620, 646 (Tex. 2004).

¹⁰ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (quoting *First English Evangelical Lutheran Church v. Cty. 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.*

¹¹ “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.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹² See Property Rights Act § 2007.003(b), exemptions (6), (7), and (13) (set forth infra in section 2.12 of these Guidelines).

¹³ *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

¹⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

¹⁵ *Id.* at 1019; *Dolan*, 512 U.S. at 385 n.6.

¹⁶ *Lingle*, 544 U.S. at 548 (referring to *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978)); see also *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

¹⁷ *Lingle*, 544 U.S. at 542. Although the Texas Supreme Court adopted the “substantial advancement” test, see *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933-35 (Tex. 1998), the Court has had no opportunity to address whether the test still applies in Texas “takings” law post-*Lingle*. See, e.g., *Park v. City of San Antonio*, 230 S.W.3d 860, 868 n. 6 (Tex. App.—El Paso 2007, pet. denied). At least one state court of appeals has predicted the Texas Supreme Court will likewise abandon the substantial advancement test. See *2800 La Frontera No. 1A, Ltd. v. City of Round Rock*, No. 03-08-00790-CV, 2010 WL 143418, at *7 (Tex. App.—Austin Jan. 12, 2010, no pet.) (mem. op.).

¹⁸ *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).

¹⁹ *Penn Central*, 438 U.S. at 124.

²⁰ *Reahard*, 968 F.2d 1131 (11th Cir. 1992), *supplemented*, 978 F.2d 1212, *rev'd*, 30 F.3d 1412 (1994).

²¹ *Lucas*, 505 U.S. at 1016 n.7.

²² *Taboe-Sierra Pres. Council, Inc. v. Taboe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002). The Court went on to analyze the circumstances in *Taboe-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”).

²³ *Town of Flower Mound*, 135 S.W.3d at 643. In *Town of Flower Mound*, the Texas Supreme Court “restate[d] the rule of *Nollan* and *Dolan* generally as follows: conditioning government approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2) is roughly proportional to the projected impact of the proposed development.” *Id.* at 634. The U.S. Supreme Court, however, has since done away with the first prong of that test. *See Lingle*, 544 U.S. at 545; *see supra* section 1.41. The *Town of Flower Mound* court went on to find that “[t]he requirement that a developer improve an abutting street at its own expense is in no sense a use restriction; it is much closer to a required dedication of property—that being the money to pay for a required improvement.” *Town of Flower Mound*, 135 S.W.3d at 635. The court then held that “[f]or purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved.” *Id.* at 639-640. The court also followed the U.S. Supreme Court in agreeing “that the burden should be on the government to ‘make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.’” *Id.* at 643.

²⁴ *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978).

²⁵ In *Westgate, Ltd. v. State*, the Texas Supreme Court 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 and not merely an announcement of future restrictions. *Westgate*, 843 S.W.2d 448, 452-53 (Tex. 1992). 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.” *Id.* at 452. In *Westgate*, 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 could not recover damages in a suit for inverse condemnation; but, the court reserved the question of whether a cause of action might exist where there is bad faith on the part of the condemnor. *Westgate*, 843 S.W.2d at 452-54.

²⁶ *State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875, 878 (Tex. 2008).

²⁷ *City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 64-65 (Tex. 2007). In prior decisions, the Supreme Court had already applied the rational basis standard of review to a substantive due process challenge to the denial of a development application by a city. *Mayhew*, 964 S.W.2d at 938-39. In *City of San Antonio*, the Texas Supreme Court applied the rational basis standard of review from *Nollan* to determine whether the exercise of police power by a local government was in accord with substantive due process principles, and held that “[u]nder the rational relationship standard, the City’s decisions must be upheld if evidence in the record shows it to be at least fairly debatable that the decisions were rationally related to a legitimate governmental interest.” *TPLP Office Park*, 218 S.W.3d at 64-65.

²⁸ In *City of College Station v. Turtle Rock Corporation*, the Texas Supreme 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. *Turtle Rock*, 680 S.W.2d 802, 806 (Tex. 1984). The court further held that there must be a reasonable connection between an exaction and the need for the property by the government; and, in order to show there is a taking, the landowner must show that the ordinance is unreasonable or arbitrary in that particular application. *Id.* The *Turtle Rock* holding was cited by the United States Supreme Court in *Nollan*, 483 U.S. at 840, and is consistent with the holding of that opinion.

²⁹ *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001).

³⁰ *See, e.g., State v. Holland*, 221 S.W.3d 639 (Tex. 2007) (holding no taking liability for government’s refusal to pay patent holder as part of its contract for oil spill cleanup technology).

³¹ *See, e.g., City of San Antonio v. Pollock*, 284 S.W.3d 809, 820-21 (Tex. 2009) (finding no taking intent in city’s negligent failure to prevent landfill gas migration to private houses); *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004) (distinguishing nuisance from taking to find no taking liability for city’s unintended sewage backup into private homes); *but see Tarrant Reg’l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004) (affirming taking verdict against water district for downstream flooding that was substantially certain to occur by the district’s actions).

³² “Extraterritorial jurisdiction” means the unincorporated area, not part of any other city, that is contiguous to the corporate limits of a city, and the extent of an extraterritorial jurisdiction depends on the population of the city. *See* Tex. Local Gov’t Code § 42.021.

³³ Property Rights Act § 2007.043(a).

³⁴ *See* 31 Tex. Admin. Code §§ 15.1-15.10.

³⁵ Governmental entities are reminded that the Property Rights Act applies to the following governmental actions: “(1) the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure.” Property Rights Act § 2007.003(a).

³⁶ In 2002, the Texas Supreme Court decided its first case under the Property Rights Act. In *Bragg v. Edwards Aquifer Authority*, the Court concluded that the adoption of well permitting rules by an aquifer authority is excepted from the Property Rights Act as an action “taken under a political subdivision’s statutory authority to prevent waste or protect rights of owners of interest in groundwater.” 71 S.W.3d 729, 730 (Tex. 2002). 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.” *Id.* at 731.

³⁷ See discussion of relevant issues under section **3.22(d)**, *infra*.

³⁸ *Mayhew*, 964 S.W.2d at 929. “A court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.” *Id.*

³⁹ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁴⁰ *Nollan*, 483 U.S. at 825.

⁴¹ *Dolan*, 512 U.S. at 394-96.

⁴² *Lucas*, 505 U.S. at 1029-32.

⁴³ *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

⁴⁴ *Mayhew*, 964 S.W.2d at 935-36.

⁴⁵ *Id.* at 936.

⁴⁶ *Id.* at 937.

⁴⁷ *Dawmar Partners*, 267 S.W.3d at 878.

⁴⁸ *State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993).

⁴⁹ *Dawmar Partners*, 267 S.W.3d at 880; *State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 174 (Tex. 2009).

⁵⁰ *Bristol Hotel*, 293 S.W.3d at 173 (citing *City of Austin v. Avenue Corp.*, 704 S.W.2d 11, 13 (Tex. 1986)).

⁵¹ *Avenue Corp.*, 704 S.W.2d at 13.

⁵² *Schmidt*, 867 S.W.2d at 774.

⁵³ *Felts v. Harris Cty.*, 915 S.W.2d 482, 484 (Tex. 1996).

⁵⁴ *Id.*

⁵⁵ *Id.* at 485. In *Felts*, the Supreme Court found that highway noise was a community damage and thus non-compensable.

⁵⁶ *Schmidt*, 867 S.W.2d at 781.

⁵⁷ *Dolan*, 512 U.S. at 392–96.

⁵⁸ *Id.* at 393.

⁵⁹ *Id.*

⁶⁰ *Hodel v. Irving*, 481 U.S. 704 (1987).

Burden Analysis

Governmental entities covered by the Property Rights Act should use the following guide in reviewing the potential impact of a proposed governmental action covered by the Property Rights 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 Property Rights Act is a tool that a governmental entity should use aggressively to safeguard private real property owners.

