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Real



Property



Preservation



By Daniel Anderson and Judon Fambrough

Summer 1994 was pivotal for private property rights in Texas. That summer central Texans protested proposed regulations that appeared to threaten their private property rights. On August 26, 1994, more than 5,000 landowners, orchestrated by "Take Back Texas," marched on the state capital.

The movement responded to three regulatory land-use proposals in central Texas. These included efforts by the:

- Texas Natural Resources Conservation Commission (TNRCC) to regulate several bodies of water,
- U.S. Fish and Wildlife Service to list the Barton salamander as an endangered species and to designate 33 central Texas counties as critical habitat for the golden cheeked warbler.

Such actions threatened to burden hundreds of thousands of acres in Central Texas with federal and state land-use regulations without compensation. As awareness of the movement spread, property rights leaped to the political forefront. Politicians scrambled to cast themselves as protectors of private property rights.



In his campaign, George Bush, Jr., promised to enact protective legislation. Upon election, Gov. Bush and Lt. Gov. Bob Bullock supported a bipartisan property rights initiative. This culminated with the passage of SB 14, now codified as the Texas Government Code, Chapter 2007 and better known as the Texas Private Real Property Rights Preservation Act of 1995.

With the legislation, Texas joined 17 other states that have enacted limited forms of private property protection. However, 14 of the states do not compensate landowners. Only Texas, Florida, Louisiana and Mississippi require some compensation when property rights are taken by the state.

The act is not a panacea for landowners. On one hand, the statute supplements the limited protection of property rights provided by the Texas and U.S. Constitutions. On the other hand, the apparent protection is eroded by the numerous exceptions and limitations. This article discusses both aspects.

Enhanced Protection

The act requires compensation when governmental regulations reduce real property values by 25 percent or more (the threshold level). The act does not limit the state's right to regulate. However, compensation must be forthcoming when the resulting diminution in property values reaches the threshold level and the government chooses not to withdraw the regulation.

The act provides significant protection in addition to that afforded by the Texas and U.S. Constitutions. Under those provisions, the government must compensate landowners when a land-use regulation destroys all or substantially all of the land's value or use or results in a physical invasion of the property. While this may oversimplify the rules, both the U.S. and Texas constitutions allow substantial regulations of private property without compensation.

More importantly, the rule applies to the actual acreage affected, not to an entire tract. For example, assume a landowner owns 100 acres and the governmental regulation burdens five acres. The

provisions of the act are triggered whenever the regulation reduces the value of the five acres by 25 percent or more. The fact that the regulation reduces the entire tract by 10 percent is irrelevant.

Cautious is advised, though, because the word *affected* is not defined. The statute simply states that the measure of damages is determined by the difference in the market value of the affected private real property before and after the government action.

In condemnation, when a partial taking occurs, the measure of the damages includes the fair market value of the property taken plus the damages to the remaining uncondemned land (damages to the remainder). It is unclear how damages to the remainder figure into the formula.

A jury, not a judge, decides the reduction in property values. It is a question of fact for a jury, not a question of law for a judge, to decide when the threshold levels are reached. In the past, Texas courts have held in some instances that the issue was one for the courts (judges). Attorneys who represent landowners feel more comfortable presenting evidence to a jury rather than to a judge.

The government must be cautious. Before passing any law that interferes with the use of private property, the government must prepare a "Takings Impact Assessment" that:

- describes the specific purpose of the proposed action,
- identifies how the proposal substantially advances the purpose,
- lists the burdens imposed on the property as well as the benefits to society by the proposed use,
- determines whether the action will reduce property values below the threshold level and
- compares, evaluates and explains how alternative action could accomplish the same purpose.

Sponsors of the act felt the assessment was the crowning virtue of the statute. Pre-evaluation of an enactment's impact on property values is critical. The requirement follows a majority of the 17 other states that have passed similar measures.

The governmental body must notify landowners of the potential loss in property values. At least 30 days before the government undertakes any action that interferes with



Texas and 17 other states have limited forms of private property protection. Only Texas, Florida, Louisiana and Mississippi require some compensation when property rights are taken by the state.

Texas enacted a limited form of private property protection with a 1995 statute. It requires some compensation when property rights are taken by the state. The apparent protection, however, is eroded by numerous exceptions and limitations.

property use, a notification must be published in a newspaper of general circulation in the county where the affected property is located. The notice summarizes the assessment.

The notice warns landowners that the regulation is imminent. However, the landowners have no recourse against the inaccuracy of the assessment. Their sole remedy lies with suing the government for the reduction in land value after the regulation takes effect.

The absence of the assessment invalidates the regulation. As mentioned earlier, the accuracy of the assessment can not be challenged. However, the absence of the assessment voids the regulation when an assessment is required but none prepared.

Note that the regulation is invalid whenever the assessment is **not prepared**. The statute does not address what happens if the assessment is **prepared but not published**.

Exceptions and Limitations

The act does not apply to all governmental agencies. Because the act is a state law, it does not apply to federal regulations such as the Endangered Species Act or the Wetlands Act. In such instances, Texas landowners must resort to the limited protection provided by the U.S. Constitution as described earlier. All or substantially all of the property value or use must be taken or physical invasion must occur before compensation is due.

The act has limited application to local governmental bodies. All city enactments, such as ordinances, are exempt with one exception. Nonuniform regulations imposed by a city within its extraterritorial jurisdiction are covered.

This exemption was prompted by environmental regulation passed by the city of Austin. The enactment subjected parts, but not all, of its extraterritorial jurisdiction to environmental land-use regulation. The exemption permits the regulation as long as it applies **uniformly** to all the city's extraterritorial jurisdiction. Cities may hesitate to enact an excessive, universal regulation. Thus, some protection extends to landowners residing in a municipality's extraterritorial jurisdiction.

County governments were totally exempt from the act until 1997. Counties must lobby the 1997 Texas Legislature to receive permanent exemption. Landowners also may organize opposition.

Not all state governmental actions are covered. There are 17 exceptions for state government. For example, regulations based on a reasonable good faith belief that the action is necessary to prevent a grave and imminent threat to life or property are exempt. Also exempt are actions to prevent the waste of oil and gas or to regulate water safety, hunting or fishing.

Compensation is not guaranteed. Texas landowners have no absolute right to compensation when property values diminish to the threshold level. When landowners successfully prove the threshold devaluation has occurred, the government must make an election. It can withdraw (invalidate)

the regulation, resulting in no payments to landowners. Alternatively, the government may choose to ratify the regulation and compensate the landowner.

The loser pays the winner's attorneys' fees and costs. A challenge is not without risks. Landowners need accurate data before seeking compensation. Otherwise, if they lose they must pay the government's attorneys' fees in defending the action.

The rule discourages the filing of marginal cases. Controversies involving the act depend on proving the threshold reduction in market value. Issues of this nature turn into battles between expert appraisal witnesses. The outcome is never certain, and the cost of the litigation is expensive. In short, the landowner may need to be rich, angry and willing to take risks. Not surprisingly, in the 12 months after becoming law, only one lawsuit has been filed under this act.

Successful landowners may be unable to collect attorneys' fees from the government. The act does not address how victorious landowners collect attorneys' fees when the government elects to invalidate the regulations.

Texas law generally indicates that the legislature must approve the payment. Pursuing legislation to recover attorneys' fees may be too expensive and time consuming. The act is specific on one point, however. A landowner can not seize and sell government property to collect a judgment under the act. (A judgment under the act includes the landowner's attorneys' fees.)

A landowner must file quickly. Landowners must file within 180 days after they know or should have known that the governmental action restricted or limited their private property rights. This time frame is roughly one-fourth of the two-year statute of limitations generally applicable to Texas litigation. It represents one-twentieth of the ten-year statute of limitations for filing for a compensatory taking under the constitution.

Not all news is bad news. The statute appears to follow the "discovery rule." The statute of limitations is tolled (the 180-day time limit is suspended) if the landowner did not know, and could not reasonably have been expected to know, about the regulation. Of course, the required publishing of the assessment in the newspaper may limit the discovery rule, but failing to publish the assessment does not invalidate the regulation.

Because of the endeavors of central Texans and formation of Take Back Texas, landowners now have property rights protection that did not exist prior to 1995. Time will tell how well the act withstands judicial and legislative scrutiny. ☐

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