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Regulatory Takings: The Next Step in Protecting Property Rights in Texas

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Findings

- Private property rights can be viewed as foundational to all other rights of a free people.
- Regulatory takings occur when governmental regulations or restrictions are imposed on private property to such a degree that the right to use the land is diminished, without actually divesting the owner of title.
- Texans have title to the dirt or water or other minerals that make up the land they own, but do not have the right to use them without permission from the state.

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Introduction

The Private Real Property Protection Act of 1995[1] (Act) was passed by the Texas Legislature in the midst of national concern over violations of property rights. Over 100 pieces of legislation in 44 states aimed at protecting private property rights were drafted in 1995.

The result of the national focus at the time of the Act's passage left Texas property owners with a law that doesn't adequately address the aspects of Texas law that allow regulatory takings to go uncompensated. Specifically, the Act exempts municipal actions—which are perhaps the primary source of regulatory takings—from its provisions. Additionally, it doesn't adequately address Texas case law that acknowledges property owners' title to land yet requires them to receive permission of the state to use it for just about anything.

To address the shortcomings in the Act, the Foundation proposes:

- Eliminating the municipal exemption;
- Reducing the amount of loss necessary for compensable takings;
- Allowing political subdivisions to issue a waiver of enforcement of a governmental action in lieu of paying compensation; and
- Requiring takings impact assessments.

Private Property

The concept of private property rights was viewed as essential to our Nation at the time of our founding. These principles derive from English common law. In 1765, Sir William Blackstone published his comprehensive legal treatise, *Commentaries on the Laws of England*, in which he described the right to property as an absolute right consisting of "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[2] The law, Blackstone said, should "not authorize the least violation of it."[3]

Private property rights can be viewed as foundational to all other rights of a free people. John Locke asserted that the preservation of property was the "chief end of government"[4] and this concept became a cornerstone of American political philosophy on the relationship between governments and those it represents. The Framers of the U.S. Constitution sought safeguards against arbitrary and tyrannical rule, specifically the taking of private property with no recourse.

The "Father of the Constitution" James Madison wrote that, "Government is instituted to protect property of every sort."[5] Madison understood:

> "In future times a great majority of the People will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation: in which case, the rights of property & the public liberty, will not be secure in their hands: or which is more probable, they will become the tools of opulence & ambition, in which case there will be equal danger on another side."[6]

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So fundamental was the concept of private property rights that it was enshrined in the Fifth Amendment to the U.S. Constitution: "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[7]

The Framers deemed property as a fundamental right, the procurement of which was not to be taken lightly or arbitrarily. They understood how to use modifiers such as "excessive fines" or "unreasonable searches and seizures" to limit constitutional protections.[8] The Framers used no such language in the Fifth Amendment—these were important principles.

The law has often described the collection of rights in property as a "bundle of sticks."[9] For example, a landowner has the right to use his property, exclude others from it, convey it upon death or through voluntary transaction, and so forth. Each one of those rights are "sticks" in the "bundle" that is the full ownership of property. To own property is to possess not only the physical real estate, but also all the uses that can be made of that estate. *Utility* gives property its value. Procurement of any of those uses, or "sticks," through government regulation is to take rights in the property that the owner would otherwise possess had the taking not occurred, while diminishing the property's value. Madison reflected that idea in his essay on property in which he expressed, "as a man is said to have a right to his property, he may be equally said to have a property in his rights."[10]

Regulatory Takings

Physical takings are easily recognized, of course—fee simple title or an easement is taken by the government; but regulatory takings tend to be opaque. The occasional difficulty in identifying the taking of one's property through the authority of government, however, does not mean that these takings are any less burdensome.[11] Regulatory takings occur when governmental regulations or restrictions are imposed on private property to such a degree that the right to use the land is diminished—a stick is taken out of the bundle—even without actually divesting the owner of title. For example, when a governmental agency places land into conservation zones, the use of privately owned property in those zones is restricted, and the value is often diminished as well.

Regulatory takings were first addressed by the U.S. Supreme Court in *Pennsylvania Coal Co. v. Mahon*, in which Chief Justice Oliver Wendell Holmes acknowledged that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a 'taking.'"[12] The question then became, "How far is too far?" The lack of a clear standard has resulted in regulatory takings cases largely being adjudicated on a case-by-case basis.

The ad hoc jurisprudence on regulatory takings has left lower courts with little direction as to what constitutes a "taking" for Fifth Amendment purposes. Governments at all levels have been left with ample space to define "how far is too far." Not surprisingly, they have answered that question through an expansion of the scope of their authority at the expense of private property owners.

In *Penn Central v. New York,* the U.S. Supreme Court established factors for determining whether government restrictions on private property are proper, including the economic impact and character of the regulation.[13] The Court held that government action need only be "substantially related to the promotion of the general welfare."[14] The Court found that a taking has not occurred if the government's regulation advances a legitimate government interest and the owner still retains some viable use of the property. In sum, an owner must have been denied *all* reasonable use of their property for a taking to occur. This new standard constituted a fundamental shift in how the Court viewed private property rights. The Court shifted their focus away from the question of *whether* the government action deprived the property owner of any of the proper uses of their property, and toward an examination of whether there was still value to the owner's "bundle of sticks" *after* the taking occurred. Put plainly, the Court worked backwards. Instead of first asking whether a taking had occurred and then determining the value of the loss, the Court first determined the value of the loss and used that metric to determine whether a taking had occurred.

Takings Law in Texas

The Texas Supreme Court has followed the federal courts, granting broad latitude to the government when promulgating regulations, including when the government is "protecting residents from the ill effects of urbanization," "enhancing the quality of life," and "protecting a beach system for recreation, tourism, and public health."[15]

Case Study: *Sheffield v. Glenn Heights**

In 1996, real estate developer Gary Sheffield bought undeveloped land in the suburban Dallas community of Glenn Heights with the intent to develop the land into single-family subdivisions. The City of Glenn Heights, seeking to remedy what it deemed as crowded residential areas, adopted a comprehensive land use plan restricting the size of single-family lots owned by Sheffield. The parties went to court and a lengthy legal battle ensued, with years of city-imposed development moratoriums, legal appeals, exhaustive studies, and ever-changing zoning requirements by the city.

In the trial, both parties offered evidence regarding the value of Sheffield's property prior to, and after, the rezoning. Sheffield's witnesses testified that the value of the property was worth between $12,000 and $14,000 per acre before the rezoning and only $600 after. This change represents a reduction of 95 percent or more of the value of the property. The trial court found that the rezoning had "a severe economic impact on Sheffield," but failed to quantify that impact. The jury found that the property was worth $5,000 per acre prior to the rezoning and only $2,500 afterwards, and the court rendered judgment awarding Sheffield $485,000. Both parties appealed.

By 2004, the case had made its way to the Texas Supreme Court, which held that the City's rezoning substantially advanced "legitimate government interests" and was, therefore, not a compensable taking.† They found that Sheffield was due nothing for damages.‡

* Sheffield, 140 S.W.3d 660 (Tex. 2004).
† Ibid., 679.
‡ Ibid., 660.

The standard for compensable regulatory takings in Texas was set out by the Supreme Court in *Mayhew*, where the Court ruled that financial compensation for a taking is proper if 1) a regulation does not substantially advance a legitimate governmental purpose, 2) the regulation denies the owner all economically viable use of the property, or 3) the regulation unreasonably interferes with the owner's use and enjoyment of the property.[16] The Texas Supreme Court followed up its *Mayhew* decision with *Sheffield*, in which they held that the city's desire to curb growth was a sufficient reason for government regulation of private property.[17] The Texas Supreme Court has gone on to uphold government regulation that reduced property value by as much as 90 percent.[18]

The reasoning behind these decisions by the Texas courts, that are antithetical to property rights, can be found in *City of University Park v. Benners*. In this case, the Texas Supreme Court said, "Property owners do not acquire a constitutionally protected vested right in property uses."[19]

In other words, Texans have title to the dirt or water or other minerals that make up the land they own, but do not have the right to use them without permission from the state.

While the Supreme Court placed some limits on how far a state may limit restricting property use when it said "[A] regulation may, under some circumstances, constitute a taking requiring compensation," in the same sentence it reiterated that "all property is held subject to the valid exercise of the police power."

As a result, Texas courts grant municipalities wide latitude in placing regulatory restrictions on land. A common practice that takes advantage of this is cities restricting development on lands because of aesthetic, economic, or environmental

concerns. Local zoning ordinances are often the way these restrictions get put into place—except in Houston, which is the only major city in Texas and the U.S. that doesn't have zoning. In other cities, zoning and rezoning of property can be done with little concern for the impact on property owners. Rezoning and other city ordinances that restrict use and diminish the value of a property are generally considered a legitimate "exercise of police power" as long as they "accomplish a legitimate goal" and are "reasonable."

The result of this is that in most cases a city can prohibit an activity or even force a business to close through zoning without it being considered a taking. This is particularly true when a city employs the concept of amortization. Because property owners have no right to use their property without permission, the courts reason that a property owner whose property use has become "nonconforming"* simply needs to have a little time to recoup their investment through amortization. There is no consideration of the income, jobs, and property value that vanishes when the nonconforming use is finally terminated.

As the Houston Court of Appeals explains, "Amortization is a valid technique to allow owners of property to recoup their investment in property that becomes nonconforming as a result of the regulations. … In the *Benners* case, the owner had 25 years notice that the nonconforming use would have to terminate. The court determined that this was sufficient time to recoup any loss in property value caused by the zoning ordinance."[20]

The Private Real Property Protection Act of 1995

The Act is directed at governmental takings which are defined as governmental actions affecting "private real property, in whole or in part or temporarily or permanently," as required by the Fifth and Fourteenth Amendments to the United States Constitution and Article I of the Texas Constitution.[21]

The Act requires compensation when governmental regulations are the producing cause of a reduction of 25 percent or more in real property value.[22]

The Act also requires government to prepare a Takings Impact Assessment (TIA), when "the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure … imposes a physical invasion or requires a dedication or exaction of private real property." The Act further requires that TIAs "describe the specific purpose of the proposed action," as well as the burdens and benefits of the government action. The TIA is also required to describe "reasonable alternative actions that could accomplish the specified purpose."

The Act contains a lengthy itemization of exemptions from application, including government actions fulfilling obligations mandated by state or federal law, the lawful seizure of contraband or property for evidentiary purposes, nuisances as defined under Texas property law, actions taken when "necessary to prevent a grave and immediate threat to life or property," formal exercises of eminent domain authority, actions preventing oil and gas waste and pollution, regulation of water safety, hunting, fishing or control of "exotic aquatic resources," regulation of construction in floodplains, regulation of on-site sewage facilities, property appraisals for tax purposes, and placement of telecommunication equipment by the Public Utility Commission.

Most notably, the Act exempts city governments. While the Legislature sought to ensure that political entities protect private property "according to the letter and spirit of the Act," an amendment was included in the final version of the bill exempting local municipalities.[23] At the time, this might have been because property rights advocates were focused on protecting private property from laws such as the Endangered Species Act.[24] The problem with this is that municipal zoning is perhaps the major source of governmental regulation negatively affecting private property value. Therefore, in many cases, cities can prohibit an activity or even force a business to close through zoning without it being considered a taking.

* Nonconforming uses are uses that do not comply with a new or existing city ordinance.

Case Study: Houston Floodway Ordinance

In 1998, Harold Noonan purchased two lots on the shore of Lake Houston intending to build a residence. The land was not a part of a regulated floodway when purchased. After the results of a flood study in 2006, however, the Houston City Council enacted a "Flood Plain Ordinance" which prohibited new construction or "substantial improvement" to existing structures within designated floodway zones, which now included Noonan's land.[*]

The ordinance took effect in October 2006 and private appraisals began to reveal plummeting property values within the floodway zones.[†] Noonan sued the City of Houston for engaging in a regulatory taking of his property for public purpose without compensation, in violation of the Fifth Amendment to the U.S. Constitution. More than four years into litigation, the legal wrangling continues.[‡]

Fellow Houston landowner Bruce Norcini's two lots in the White Oak Bayou floodway were valued at more than $70,000 each. The 2006 floodway ordinance prohibited the issuance of a permit for "development to be located in any floodway … if that development provides for … new construction, additions to existing structures, or substantial improvement of any structure within the floodway."[§] Once the city designated his property to be within the floodway, the Appraisal Review Board determined that the value of each the lots to be $4,150—a loss of more than 90 percent in property value.

John and Mary O'Fiel have also felt the negative effects of the 2006 floodway ordinance restricting development within the floodway. In 2007, the O'Fiel's filed suit alleging that the ordinance unlawfully deprived them of use, benefit, and enjoyment of the property and that the property's value was drastically reduced because they can neither construct improvements on the property nor sell the property to anyone who can.[**] The O'Fiel's are trying to sell their property in order to be closer to their daughter in South Carolina while their son-in-law is fighting in Afghanistan. However, the ordinance has de-valued their land to the point where they cannot sell and make enough to afford the move.

Anywhere from 7,000 to more than 9,000 properties have been affected by the Houston floodway ordinance, costing property owners hundreds of millions of dollars in lost property value. [††] Although Houston has attempted to fix this problem by allowing exceptions in certain cases, the loss of property value has not returned. If the Act had applied to municipalities when enacted, the City of Houston would have been compelled to examine and address these problems before subjecting property owners and taxpayers to costly litigation.

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[*] The City Code of Ordinances provided: "No permit shall hereafter be issued for a development to be located in any floodway … if that development provides for … [n]ew construction, additions to existing structures, or substantial improvement of any structure within the floodway[.] Houston, Tex., Code of Ordinances §19-43(a)(2) (Ord. No. 2006-894) (2006).

[†] Mike Snyder, "Floodway law could cost county millions," *Houston Chronicle* (22 Feb. 2008) A-1.

[‡] *City of Houston v. Noonan*, 2009 WL 1424608 (Tex.App.-Houston [1 Dist.]), 2009.

[§] Houston, Tex. Code of Ordinances Sec. 19-43(a)(2) (2006).

[**] *City of Houston v. O'Fiel*, 2009 WL 214350 (Tex.App.-Houston [1 Dist.]), 2009.

[††] Ibid.

Case Study: Woodard Paint & Body Shop

Bill Woodard's family has operated the Woodard Paint & Body Shop in downtown Dallas since 1920.[*] They have remained a thriving business as the city grew around them. In 2005, however, the City Council approved a comprehensive new plan for Ross Avenue with the aim of transforming the area for new restaurants and multi-family residences. Despite significant criticism from local citizens, the City Council went forward with their plans. The City used their zoning authority to compel Woodard to move his business elsewhere.[†]

Forcing Woodard Paint & Body to close its doors to make room for multi-family condominiums led to a proposal to create an exception to keep Woodard in business. The exception includes forcing Woodard to create a new face to "fit in" to the new neighborhood. As of July 21, 2010, the proposal had not been assigned to a City Planner—the first in a series of steps prior to even having the city commission review the exception.

Assuming that the exemption passes and Woodard complies with the demands in order to stay on Ross Avenue, the fact remains that many businesses did not receive such an offer. Most of these aesthetically-challenged businesses were re-zoned into extinction to lure luxury condominiums into the area. Dallas' comprehensive planning does not end at Ross Avenue. Its Trinity River project may have similar consequences.

[*] Rudolph Bush, "City Council denies Ross Avenue body shop special-use permit," *Dallas Morning News* (14 Aug. 2008).
[†] Ibid.

Recommendations

Eliminate the Municipal Exemption: Include cities under the Act by removing the exemption for municipalities in Sec. 2007.003, Government Code.

The municipal exception significantly narrows the scope of the statute, rendering it ineffective. Not only does the municipal exception frustrate the spirit and purpose of the Act by failing to address the confiscatory authority of municipal governments, it disproportionately punishes Texans living in urban areas by exposing them to local governmental takings authority not permitted in rural areas.

Municipalities wield significant power in their zoning authority. Substantive checks on this authority are crucial. The guiding principle should be fair transaction between municipalities and property owners free from government coercion. Property owners should have just compensation when the value of their property is diminished. The Act should guard against the ability of local governments to arbitrarily devalue a citizen's private property.

Reduce the Amount of Loss Necessary for Compensable Takings: Lower or eliminate the 25 percent value loss threshold in Sec. 2007.002, Government Code, which determines what compensable takings are.

Under the Act, Texas property owners must currently establish a property value loss of 25 percent for the governmental action to constitute a "taking," thus warranting compensation for the property owner under the Fifth Amendment. This arbitrary threshold creates inequity in litigation since less wealthy property owners are discouraged from pursuing their rights.

The cost of litigating a 25 percent reduction in property value means that relief is available only to a narrow sliver of property owners. Property owners with fewer financial resources with which to assert their rights under the Act are deterred. For example, if a property valued at $1 million has its value diminished by a municipal regulation, the owner has lost $250,000 and has incentive to litigate the taking. The middle class property owner, however, whose land was valued at $100,000 before the 25 percent value loss would be much less willing to litigate. The Act is a barrier to the less wealthy property owner pursuing his rights in the courts.

The current 25 percent value loss threshold is an arbitrary one—it is unreasonable for a property owner with a 25 percent value loss to be compensated while a property owner with a 22 percent value loss has no recourse. All the more reason it should be lowered or eliminated to more closely align itself with the principle it purports to address—as a

Case Study: El Paso's Downtown Revitalization Plan

El Paso recently applied for a $3 million federal grant to rewrite the City's comprehensive plan in order to "project recommended land uses into the development paths identified by the Growth Plan to ensure quality of development and compatibility of uses." This "compatibility of uses" should concern many downtown property owners.

El Paso's "downtown revitalization plan" requires amassing large tracts of land—currently filled with houses and businesses—to attract developers and retailers in the area. The municipality had initially declared much of the area "blighted," which until the constitutional amendment would have allowed the property to be taken by eminent domain.

In the wake of eminent domain reform, updating the comprehensive plan will allow El Paso to re-zone the downtown area in a way that would force existing businesses to move or close, just as has happened in Dallas.

compensation for a taking. A taking is a taking whether it devalues property by 10 percent or 90 percent.

Waiver Provision: Allow a political subdivision to issue a waiver of enforcement of a governmental action, under Sec. 2007.021, Government Code, with regard to any parcel of land as part of a settlement agreement with a private real property owner.

The promotion and protection of the public health and safety of citizens is a valuable function of municipalities and it is important that municipalities retain condemnation powers for specific nuisances on specific properties. There is, however, a parallel responsibility local governments owe to taxpayers and property owners with respect to fundamental principles of property ownership. There is concern among city governments that compensation payments to property owners would be too burdensome a cost for local governments should the value loss threshold be lowered. Municipalities argue that compensation payments to property owners would be too burdensome a cost.

Sound reform should include a provision granting municipalities the authority to waive the application of the regulation on a property-by-property basis if the city determines the cost of compensation to be too high. In other words, the city could allow the business to continue operating rather than pay compensation in those instances where regulatory takings are properly applied.

A statutory waiver provision would have the dual benefit of allowing businesses to continue to operate post re-zoning, as well as ease the taxpayer burden of paying for regulatory taking compensation. Municipalities could then take a scalpel to their proposed plan and excise those properties for which the cost of compensation to property owners would be too costly for the city.

Require Takings Impact Assessments (TIA): Require a regulatory takings impact assessment be stayed if not in compliance with the Acts evaluation guidelines and that courts stay the proposed action if not in compliance, by including a provision to this effect in Sec. 2007.044, Government Code.

One significant and effective way to improve transparency and accountability is the completion of Takings Impact Assessments (TIA) by municipalities seeking to impose restrictions on private property owners. A TIA describes the specific purpose of the proposed action and examines the benefits, burdens, and alternatives to the regulation.

Conclusion

A full and objective examination of the government regulation helps determine whether restrictions on private property owners are appropriate. This "look before you leap" approach is a valuable characteristic of good government. Future municipal development should be done wisely and transparently with a fair and reasonable recognition of the fundamental rights of private property owners. Since the Texas Supreme Court has held that the Private Property Rights Act of 1995 does not require a TIA be performed,[25] it is an important part of reform legislation. ✯

Endnotes

[1] V.T.C.A., Government Code § 2007.003.
[2] Sir William Blackstone, "Of the Absolute Rights of Individuals," *Commentaries on the Laws of England* 1 (Oxford: Clarendon Press, 1765); English jurist Blackstone's four-volume treatise on the English Common Law was published between 1765-69 and is known as a the definitive work on the subject before the 19th century.
[3] Ibid.
[4] John Locke, Two Treatises of Government 368-69 (Peter Laslett ed., Cambridge Univ. Press 1967)(1690).
[5] *The Papers of James Madison* 266-68 (1792).
[6] James Madison, "Suffrage Qualifications for Electing the House of Representatives," *The Papers of James Madison*, 138-39 (Robert A. Rutland et al. eds., 1977).
[7] U.S. Const. Amend. V.; The Texas Constitution similarly guarantees "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made…" Tex. Const. Art. I, Sec. 17.
[8] The Fourth Amendment to the U.S. Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; the Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.
[9] John Lewis, *A Treatise on the Law of Eminent Domain in the United States*, 41, 43 (1888); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937).
[10] *The Papers of James Madison*, 266-68 (1792).
[11] In Hendler v. United States, the Court of Appeals for the Federal Circuit held that a private property owner is entitled to recover just compensation under the Fifth Amendment for government occupancy of a part of his land by wells drilled in connection with a Superfund site: "The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in the night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon." Hendler, 952 F.2d 1364, 1375 (Fed. Cir. 1991).
[12] *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 415 (1922).
[13] *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 U.S. N.Y. (1978).
[14] Ibid., 138.
[15] *Mayhew v. Town of Sunnyvale*, 964 S.W. 2d 922, 934 (Tex. 1998).
[16] Ibid., 935.
[17] *Sheffield Development Company, Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).
[18] *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998).
[19] *City of University Park v. Benners*, 485 S.W. 2d 773 (1972). At 773.
[20] *Eller Media Co. v. City of Houston,* 101 SW 3d 668, Houston (2003).
[21] V.T.C.A., Government Code § 2007.001.
[22] V.T.C.A., Government Code § 2007.002.
[23] Tex. Gov't Code Ann. § 2007.004 (West 1996).
[24] Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response To Environmental Takings*, 46 SCLR 613, 615.
[25] *Bragg v. Edward Aquifer Authority*, 71 S.W.3d 729, 737-38 (Tex. 2002).

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