



Defending Property Rights Against Regulatory Takings

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Key Points

- Property rights are an important principle of governance in the state of Texas.
- Texas's current approach to regulatory takings adversely affects businesses and private citizens.
- Amending the Private Real Property Preservation Act can expand protection of property rights.

Overview

The right to private property has long held great importance in Texas's laws and in the legal system of the United States as a whole. In fact, property rights are firmly entrenched into the constitutions of each. The Fifth Amendment of the U.S. Constitution reads, "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." In a similar vein, the Texas Constitution states, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person" (Art. 1, Sec. 17).

However, in spite of both documents' clearly professed dedication to providing compensation in the event of a taking, the United States and the state of Texas regularly neglect their duty in regard to a particular subset of takings. Known as regulatory takings, this form occurs when government regulations interfere with a landowner's right to use, develop, and dispose of his or her property. Courts at both the national and state levels have consistently failed to properly compensate property owners in the case of regulatory takings, expressing reservations that government would be forced to pay out excessive sums. The end result is that many owners find their property's value effectively depleted through regulation without receiving any compensation in return.

Regulatory Takings in the State of Texas

Though Texas has taken some strides towards addressing its shortcomings in regard to regulatory takings, its approach remains problematic. To begin with, the Texas Supreme Court has opted to interpret the state constitution's guarantee of property rights quite narrowly. As a result, Texas law all but fails to acknowledge an individual's right to use and develop his or her property as he or she sees fit. In *City of University Park v. Benners*, the Court held that "property owners do not acquire a constitutionally protected vested right in property uses," an approach which exceeds even the federal courts' in severity; federal courts recognize at least some property rights beyond mere ownership (778).

Furthermore, according to the Texas Supreme Court's standard for awarding compensation, property owners receive financial remuneration only if the following conditions are met: 1) a regulation does not substantially advance a legitimate government purpose, 2) the regulation denies the owner all economically viable usage of the property, and 3) the regulation unjustifiably interferes with the owner's use and enjoyment of the property (Mayhew, 993-35). Under this strict standard, the Supreme Court has neglected to provide compensation even in a case in which regulations reduced a property's value by 90 percent (Quick). To compound these difficulties faced by property owners, the Supreme Court has combined this standard with a broad interpretation of "legitimate government purpose," including aesthetic, economic, and environmental concerns.

In 1995, the Texas Legislature attempted to address the issue of regulatory takings with the Private Real Property Preservation Act. While the Act provides property owners greater protection than before, it includes numerous sweeping exemptions which mitigate its effectiveness. One exception, outlined in Section 2007.002 of Government Code, requires government compensation only if the government's

actions devalue a citizen's property by 25 percent or greater. Any smaller losses in value remain uncompensated. Section 2007.003(a) further reduces the Act's power. Critically, it exempts municipalities from the compensation requirements. Given that municipal governments constitute a significant source of regulations that threaten the rights and value of private property, this exemption renders the Act's positive effects much less significant.

The Impact of Texas' Approach

Texas' stance on regulatory takings presents a significant problem for Texas business owners and ordinary citizens alike. Municipal zoning laws stand out as a key example of the hardship regulatory takings inflict upon Texans. Re-zoning initiatives, such as the city of Dallas' Ross Avenue project, have shuttered businesses lacking aesthetic appeal. In the Ross Avenue case, several blue-collar automotive shops were forced to close in order to make way for more upscale establishments. The end result is livelihoods endangered and valuable services lost.

Apart from regulating businesses out of existence, zoning laws and other similar regulations enabled by regulatory takings also jeopardize housing affordability. Restrictions on land use limit the availability of properties suited for residential construction. In turn, the reduced number of properties on the market results in higher prices than would ordinarily exist. Lower-income residents then find themselves effectively priced out of the housing market and forced to rely on a narrower set of options.

Bibliography

City of University Park v. Benners, 485 S.W.2d 773, 778 (1972).

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933-35 (Tex. 1998).

Quick v. City of Austin, 7 S.W.3d 109 (Tex. 1998).

Recommendations

The Texas Public Policy Foundation recognizes the issues regulatory takings present to the citizens of our state. Accordingly, we recommend a series of legislative measures to protect Texans' right to use their property as they see fit:

- Eliminate the municipal exemption in Sec. 2007.003, Government Code. Exempting municipalities from providing compensation to effected property owners not only reduces the statute's clout, by treating urban and rural citizens differently, it also violates the established principle that all citizens have their rights equally respected.
- Reduce or eliminate the numerical threshold of what qualifies as a taking in Sec. 2007.002, Government Code. Current law requires that a property suffer a loss in value of 25 percent or greater before the government is required to offer compensation. This threshold is arbitrary and encourages governments to push the boundaries of admissible regulatory burden.
- Grant political subdivisions the ability to issue waivers as an alternative to financial compensation. Waivers would allow legislators to design their proposals so that only properties in which there is no taking face regulation. These waivers ought to specify which property rights are being protected so that they "run with the land" for future owners.

Enacting these measures will greatly expand the protections offered to Texas residents against property rights infringement and provide the Texas Private Property Rights Preservation Act with real strength, as Texans deserve. ★

