

TAKINGS IMPACT ASSESSMENT: AMENDMENT OF CHAPTERS 64 AND 82

This takings impact assessment is prepared using the series of questions in the Private Real Property Rights Preservation Act Guidelines (“Guidelines”) promulgated by the Attorney General’s Office under Ch. 2007, GOVT. CODE ANN. (“the Act”). The proposed action is Travis County’s adoption of amendments to Chapters 64 and 82, Travis County Code. The amendments include both substantive and procedural requirements. The substantive requirements address water quality, the environment, and availability of groundwater-based water supply. The procedural requirements address all development-related, including subdivision, applications. The amendments apply (1) to all development within the watershed of Lake Travis outside of the City of Austin ETJ; and (2) to single-family residential development applications over 20 acres and all commercial development applications proposed in other areas outside the Lake Travis watershed that are in unincorporated areas outside ETJs.

Guidelines Question 1: Is Travis County a governmental entity covered by the Act?

Yes.

Guidelines Question 2: Is the proposed action covered by the Act?

All of the amendments are exempt from the Act. The amendments are exempt under the following provisions of the Guidelines or the Act for the reasons indicated:

a. §2.18 of the Guidelines.

The procedural amendments and many of the substantive amendments impose no new burden on private real property. To the extent the amendments impose no new burdens, they will not result in a taking. Therefore, to the extent no new burden is imposed, the amendments are not subject to the requirement in §2007.042 to perform a takings impact assessment.

b. §2007.003(b)(4) of the Act.

The substantive and procedural amendments are exempt under §2007.003(b)(4) because they are actions reasonably taken to fulfill obligations mandated by state and federal law. First, the U.S. Environmental Protection Agency (“EPA”) and the Texas Commission on Environmental Quality (“TCEQ”), through the Texas Pollutant Discharge Elimination System (“TPDES”) program, have mandated that Travis County, as an operator of a small municipal separate storm sewer systems (“MS4”), regulate development that drains stormwater into the County’s MS4. In addition to mandating that Travis County require developers to implement construction phase and post-construction measures, EPA and TCEQ mandate that the County itself ensure ongoing maintenance of the MS4. Further, most of these amendments are proposed today to make the Travis County Code consistent with or more stringent than the requirements on development established by the Lower Colorado River Authority (“LCRA”) in the Lake Travis watershed .

TPDES requirements also mandate that an MS4 operator inspect and enforce control measures and these amendments will facilitate the division of labor for this substantial task with the LCRA. A division of labor would not be feasible without code requirements that are equivalent or similar.

The scope of the TPDES mandate depends on urban population and density. Some of the unincorporated areas of Travis County do not currently meet population or density thresholds that would trigger MS4 requirements because development has not yet occurred there. Construction of the MS4 infrastructure in these areas will necessarily occur prior to construction and sale of homes that will generate the population growth or density that will inevitably bring these areas within the scope of the TPDES mandate. In light of these facts, it is prudent for Travis County to require developers to meet stormwater requirements as development occurs now. If the County fails to ensure that development occurring today includes adequate measures for managing stormwater, once these areas are populated, the County could be liable for retrofitting and maintaining a storm sewer system that is inadequate to meet TPDES requirements. Therefore, it is a reasonable response to the EPA and TCEQ mandate to require developers to meet these requirements now.

Travis County is authorized under Chapter 573 of the Local Government Code to take any necessary or proper action to comply with the requirements of the stormwater permitting program under TPDES and the federal Clean Water Act, including developing, implementing, and enforcing stormwater management guidelines, design criteria, or rules to reduce the discharge of pollutants into the County's MS4. Also, the County is required under Subchapter J, Chapter 16 of the Water Code to regulate development to mitigate the effects of development on flooding and thus ensure that flood insurance is available to all residents of the County. Most of the substantive measures imposed by the amendments are recognized not only as effective, practical, and ordinary measures to control the discharge of pollutants in urban stormwater runoff, but are also recognized by the Federal Emergency Management Agency ("FEMA") as effective floodplain management techniques. In Chapter 232 of the Local Government Code, the Texas Legislature has mandated that counties review applications for the approval of subdivisions of property to ensure the public health, safety, and welfare and the orderly development of unincorporated areas.

c. §2007.003(b)(11)(A) of the Act.

The substantive amendments dealing with development within stream buffers are partially exempt under §2007.003(b)(11)(A) because they regulate construction in legally designated floodplains.

d. §2007.003(b)(5) of the Act.

The substantive and procedural amendments are exempt under §2007.003(b)(5) because they simply modify regulations that provide a unilateral expectation that does not rise to the level of a

recognized interest in real property. Cities' legal authorities were historically more expansive than counties' and were relied on to regulate certain aspects of development in the extraterritorial jurisdiction ("ETJ") that the County could not. The Texas Legislature recognized that limitations on county authority to regulate development were, particularly in the case of urban counties like Travis County, arbitrary because they were enacted at a time when Texas counties were overwhelmingly rural in character. Because the Legislature realized that urban development had outstripped city jurisdiction, in 2001 the Legislature expanded county authority to deal with the fact that counties were becoming the sole local government responsible for regulating development in many areas. Given this fact, a land owner in the unincorporated area of Travis County outside ETJs could not have a reasonable investment-backed expectation that the County would not adopt precisely the type of regulations contained in these amendments. The legal standard for recognizing an expectation rising to the level of a real property interest is extremely high with regard to changes in regulations. Given the historic lack of county authority to adopt the type of requirements contained in the amendments and the growing and very public pressure from residents of unincorporated areas that resulted in the Legislature expanding county authority in 2001, it would not be reasonable to assume that Travis County would not fill the previously existing regulatory void by adopting measures such as those contained in these amendments.

e. §2007.003(b)(13) of the Act.

The substantive amendments are exempt under §2007.003(b)(13) because they respond to real and substantial threats to public health and safety, significantly advance that purpose, and do not impose a greater burden than is necessary. The amendments will apply in the watershed of Lake Travis, where it is now known that several hundred structures are at substantial risk (based upon the current 100-year floodplain depicted on current FEMA maps. Because they include measures that FEMA has determined help to reduce flood damage, they respond to a substantial threat in a way that substantially advances public safety without imposing unnecessary burdens.

Guidelines Questions 3 and 5: Does the proposed action result in a burden on private real property as that term is defined in the Act? How does it burden private real property?

The procedural provisions in the amendments do not impose any burdens on private real property. They specify a particular sequence in which a developer must obtain various approvals that are already required as part of the development process. Rather than restricting the land itself in any way, they simply provide greater order and structure to the process of receiving these approvals.

As for the substantive provisions in the amendments, most of these requirements already exist in LCRA, TCEQ, other regulations, or recognized technical guidelines established for this specific geographical area and local hydrologic conditions. In particular, LCRA and TCEQ already require construction and post-construction water quality controls. Since the private real property affected by Travis County's amendments is already subject to these LCRA or TCEQ

requirements, the County's amendments impose no new burden. Rather, incorporating these requirements into the Travis County Code simply gives the County the legal standing and ability through the County's development review process to use County staff resources to apply these same standards in coordination with LCRA's or TCEQ's efforts. A material new burden is created to the extent that certain post-construction water quality control requirements are applied in areas where the LCRA and TCEQ requirements do not currently exist. However, the burden is not a severe one because requirements for permanent water quality controls are common in much of Travis County and have not impaired the economic viability of development of private real property.

With regard to environmentally sensitive feature and waterway buffer zone requirements, Travis County existing requirements will expand to apply within the ETJ of a municipality (other than the City of Austin ETJ) in the Lake Travis watershed. Travis County's buffer requirements impose a new burden, but it is minimal. The stream buffers are based on and largely comprise the 100 year floodplain. Travis County's existing regulations already require that this floodplain be dedicated as a drainage easement, which severely restricts the amount of development that can occur there. Since the buffer zones consist largely of floodplain, the new burdens imposed by the stream buffers do not extend to a very large area. With regard to the environmental feature buffers, a material new burden is created because some or all of the municipal ETJs affected may have no similar existing restrictions of that type. The extent of that burden will depend on how many environmental features are present on a given tract of land. Again, however, the burden is not a severe one because environmental feature buffers are common in much of Travis County and have not impaired the economic viability of development of private real property.

Finally, the amendments contain restrictions on cut and fill that will create burdens because other municipal governments may not pose similar requirements within the ETJs affected by these amendments. Again, the extent of the burden will depend on the topography of individual tracts of land. However, the burden is not a severe one because cut and fill restrictions are common in much of Travis County and have not impaired the economic viability of development of private real property.

Guidelines Questions 4 and 6: What is the specific purpose of the proposed action? How does it benefit society?

Most of these amendments are proposed today as a way to make Travis County Code at least as stringent as requirements on development required by the LCRA in the watershed of Lake Travis. Developing common requirements applicable to both jurisdictions instead of having two sets of requirements relating to water quality protection for the same development proposal, will ease a burden on owners of private property who seek to develop property. TPDES requirements also mandate that an MS4 operator inspect and enforce control measures, and these amendments will facilitate the division of labor for this substantial task with the LCRA. A division of labor would not be feasible without code requirements that are equivalent or similar. A division of labor will allow more efficiency and potentially less public cost including development

application fees to implement the mandated stormwater management program.

Even more broadly, the purpose of the proposed action is to adopt regulations that balance the public benefits and detriments of development in unincorporated areas. The growing population of Travis County is creating unprecedented land development in unincorporated areas of the County. Historically, much of the development in Travis County took place within cities' ETJs, so it was regulated by both the County and cities. Cities' legal authorities were more expansive than counties', so land owners and other persons affected by development relied on cities to regulate certain aspects of development that the counties could not. However, cities' ability or desire to expand their jurisdiction through annexation has been diminished, so growth has outstripped city jurisdiction. Counties are becoming the sole local government responsible for regulating much of today's development to ensure that it is properly designed and constructed. Recognizing this trend, the Texas Legislature enacted legislation in 2001 to fill some of the historic void in county regulatory authority. The specific purpose of the proposed action is to amend Travis County's development regulations to protect surface and ground water from the effects of development, to mitigate the effects of development on flooding, and to make Travis County's process for review and approval of subdivisions more effective and efficient.

a. Substantive Amendments

The substantive amendments impose stormwater control and environmental protection requirements applicable to the construction and post-construction phases of development. The purpose of these is to protect water quality from polluted runoff, to reduce pollutants discharges from development to the maximum extent practicable, and to mitigate flooding and environmental damage that can result from urban development.

i. Water Quality Measures for Construction Activities.

It is clear that stormwater runoff from construction sites can negatively affect water quality in receiving water bodies. Moreover, the resulting sedimentation can inhibit the ability of those streams to convey stormwater, resulting in increased flooding. The amendments would establish a common regulatory basis between Travis County and the LCRA for reviewing construction projects in the areas affected by the amendments. This allows Travis County to supplement the efforts of LCRA and will facilitate Travis County assuming LCRA's regulatory functions, thereby streamlining government by establishing a "one stop shop" for subdivision, floodplain management, and water quality permitting. Enabling County staff to enforce water quality requirements will substantially reduce the likelihood of future occurrences of stormwater pollution from construction sites.

ii. Buffer Zones.

The amendments would expand existing buffer zone requirements to include ETJs of municipalities within the Lake Travis watershed, potentially limiting development around

streams and environmentally valuable features. Creating areas where stormwater flows across undisturbed natural ground before entering streams and environmentally valuable features allows the stormwater to be slowed and filtered, reduces the peak discharge flows, and prevents pollutants from contaminating these features. Thus, buffer zones are a commonly used measure for protecting water quality and the environment. Moreover, FEMA recognizes buffer zones as a measure that mitigates flooding in streams.

iii. Cut and Fill.

The amendments would expand existing cut and fill requirements to include ETJs of municipalities within the Lake Travis watershed, potentially limiting the depths and heights of cutting and filling on slopes. Some of the areas covered by the amendments have steep slopes; protecting this natural topography preserves natural hydrology, prevents erosion and stormwater pollution, and preserves the environmental character of the area.

b. Procedural Amendments.

The amendments make certain changes to how Travis County processes and reviews applications for development approvals. The County has limited staff resources to perform that important function. The purpose of that function is to protect the general citizenry, other land owners, and the purchasers of subdivided land from the negative effects of poorly designed or constructed subdivisions. In recent years, development issues have become more complex. Both citizens of the County and state and federal agencies are placing greater demands on the County for a more effective, efficient, and thorough development review process. The County's processes need to be updated to address these issues. The procedural amendments require that an applicant (1) submit documentation to Travis County with a preliminary plan and final plat, when a proposed residential subdivision would utilize groundwater as a water supply source; and (2) submit application materials to both LCRA and Travis County for proposals in the Lake Travis watershed. The purpose of these requirements is to ensure that the applicant performs adequate due diligence and coordinates with other agencies so as to provide greater certainty to the County, to citizens in general, and to prospective buyers of lots in the subdivision that the development has been properly planned and designed from the beginning. This due diligence and coordination will also help ensure that, once a development is approved, major revisions requiring additional County staff review will not occur.

Guidelines Question 7: Will the proposed action constitute a taking?

Even if the amendments are not exempt, they do not constitute a taking. Adoption of the amendments does not, in and of itself, eliminate all economic uses of any private real property. Whether application of the amendments to an individual development has that result can be determined only when the regulations are applied to the land as part of the development review process. However, it is highly unlikely that they will result in a taking. Clearly, the amendments are not a *per se* taking or denial of a fundamental attribute of ownership. First, the amendments

do not involve any sort of physical invasion of or limitation on title to private real property. Current County, TCEQ, LCRA, and municipal regulations basically already require land owners to construct stormwater control facilities for which land owners usually dedicate drainage easements. Thus, any new burden created by the amendments will be minimal. If such a dedication is required for a development, it will be roughly proportional to the impact of that development because the structure will only be required to have capacity to accommodate drainage for which that development is legally responsible.

Nor are the amendments a taking because they do not eliminate all economic uses of private real property or otherwise interfere with reasonable investment-backed expectations to the degree to be a taking. As noted above, the more significant material new burdens imposed are an expansion of current requirements to ETJs of municipalities in the Lake Travis watershed, related to environmental feature buffers, cut and fill restrictions, and any part of the stream buffer that extends outside the 100 year floodplain. When analyzing the extent to which a regulation affects the economic viability of development of a given tract of land, one looks to the impact of the regulation on the entire tract. For large tracts of land, these requirements would restrict development on a small percentage of the tract. Moreover, the cut and fill restrictions and buffer zones could actually add value to a tract because, through proper design, they can be incorporated into the development as aesthetic or recreational amenities. Moreover, in areas of Travis County affected by the amendments within cities' ETJs, projects have been and are being developed that must comply with city regulations that may be as strict or stricter than the requirements in the County's amendments. This indicates that the County's amendments will not have significant economic impacts. For a small tract of land having many slopes, environmental features, or streams, there is a greater possibility that these restrictions could have an economic impact. However, for some tracts of land affected by the buffers, the amendments identify exceptions that may be approved so that the economic impact could be mitigated.

Though the amendments restrict property rights that would otherwise exist in their absence in that they obviously restrict certain development activities in certain areas, it cannot be said that the amendments reduce the fair market value of private real property by 25% or more. Whether the amendments would have that result can be determined only through the development review process where the restrictions are applied to an individual tract and the development proposed there. If there is an economic impact from the amendments, a variance is available to mitigate that impact.

Guidelines Question 8: Are there reasonable alternatives to the proposed action that would accomplish its purpose?

An alternative to the amendments would be to leave the current Chapter 64 and Chapter 82 provisions just as they are today. This would ensure there is no possibility of a taking of private real property, but it would put the County at risk of violating federal and state mandates and result in an inadequate level of water quality and flood protection. The standards contained in the amendments reflect a balancing of, on the one hand, the interests of owners of private real

property who want to develop their land and, on the other hand, the public and other land owners whose interests could be negatively affected by that development. Not taking any action would also mean less governmental efficiency and greater governmental bureaucracy in that there would continue to be two sets (the County and the LCRA's) of sometimes differing development standards that would apply to development within the Lake Travis Watershed.