

## TAKINGS IMPACT ASSESSMENT

### Proposed Ray Roberts Planning and Zoning Ordinances – Cooke County, Texas

#### PURPOSE AND INTENT

Cooke County, Texas, acting through the Cooke County Commissioners Court (hereafter “County”) is proposing to adopt new Lake Ray Roberts Planning and Zoning Regulations (hereafter “Proposed Regulations”) for the County. The Proposed Regulations will include revisions and incorporate the requirements of the following existing regulations and ordinances:

- 2019 Amendments to The Cooke County Lake Ray Roberts Zoning Regulations (Adopted 2003)

The Proposed Regulations will include specification of County and Commissioners’ Court authority to define and implement its regulations along with definition of procedures and rules for implementation of site and land use and development projects within 5,000 feet of the 645 elevation take line for Lake Ray Roberts within Cooke County, including but not limited to the following:

- Administrative Procedures and Requirements
- Zoning Regulations and Requirements
- Land Use Details and Requirements
- Planning and Construction Document Requirements
- Construction Procedures and Requirements
- Design Criteria
- Standard Construction Details

This Takings Impact Assessment (hereafter “TIA”) is intended to satisfy the statutory requirements of the Texas Private Real Property Rights Preservation Act found at Chapter 2007 of the Texas Government Code (the “Act” or PRPRPA) in regard to the Proposed Regulations.

#### REGULATORY BACKGROUND

##### Governmental Takings in General

A governmental “taking” is a governmental action which restricts or regulates a private property interest to such a degree that it violates prohibitions on the taking of private property without just compensation, as outlined in either the United States Constitution or the Texas Constitution. One form of a taking is a “Physical Taking” where a governmental entity physically takes or occupies private property (e.g., a city condemning an easement to expand a roadway across private property).

A more difficult-to-define form of taking is a “Regulatory Taking” which is a governmental regulatory requirement which has the effect of reducing the economic usefulness and value of private property to such an extent that it constitutes a taking of private property. The Proposed Regulations do not propose any “physical taking” of any particular property, but certain actions included in the Proposed Regulations are evaluated to determine whether they may constitute a “regulatory taking”.

##### General Principles in the Law of Regulatory Takings

The U.S. Supreme Court and the Texas Supreme Court have struggled to formulate a standard for determining when a governmental regulation of private property goes so far as to become a taking. At present the U.S. Supreme Court and Texas Supreme Court have adopted the following basic legal principles concerning the law of regulatory takings:

- Possible remedies for a regulatory taking are to invalidate the offending regulation or to make the governmental entity liable for monetary damages.
- In defending a challenge to a regulation, the governmental entity must show that the regulation actually substantially advances a legitimate state interest. A legitimate state interest has been liberally interpreted to include even such things as protecting residents from the “ill effects of urbanization” and the preservation of desirable aesthetic features.
- A compensable regulatory taking occurs when a land use regulation either (1) denies the landowner all economically viable uses of the property, or (2) unreasonably interferes with the owner’s right to use and enjoy his property. The Texas Supreme Court has held that a land use regulation denies a landowner all economically viable uses of the property if the regulation renders the property valueless.
- In determining whether a governmental regulation unreasonably interferes with an owner’s right to use and enjoy his property, a court must evaluate two factors: (1) the economic impact of the regulation (i.e., comparing the value that has been taken from the property with the value that remains), and (2) the extent to which the regulation interferes with “distinct investment backed expectations” of the landowner. A regulation that interferes with existing or already-permitted land uses is more likely to be considered a regulatory taking than a regulation which interferes with speculative uses or the landowner’s asserted entitlement to the highest and most valuable use of every piece of his property.
- In the case of governmental exactions, the required dedication for public use or of public facilities must be roughly proportional to the actual need for those public facilities which is generated by the proposed development. For example, the amount of roadway required to be dedicated by the developer must be reasonably commensurate to the amount of traffic generated by the new development.

### **The Texas Real Property Rights Preservation Act**

In response to widespread concerns about governmental intrusions on private real property rights in the mid-1990’s (sometimes referred to as the “Take Back Texas” movement), the Legislature enacted the Act which is codified in Chapter 2007 of the Texas Government Code (TGC). The overriding purpose of the Act was to ensure that governmental entities in Texas take a “hard look” at the effects on private real property rights of the regulations they adopt.

#### Definition of a Regulatory Taking

The following information is taken from the regulatory background on the issue of Regulatory Takings contained in a guidance document prepared by the State of Texas Office of the Attorney General (OAG). The Act [specifically Texas Local Government Code (LGC) §2007.002(5)] defines a "taking" as follows:

- (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:
  - (1) 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

- (2) is the producing cause of a reduction of at least 25% 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.

The Act, in TGC §2007.002, thus sets forth a definition of "taking" that (i) incorporates current jurisprudence on "takings" under the United States and Texas Constitutions, and (ii) sets forth a new statutory definition of "taking." Essentially, if a governmental entity takes some "action" covered by the Act and that action results in a devaluation of a person's private real property of 25% or more, then the affected party may seek appropriate relief under the Act. Such an action for relief would be predicated on the assumption that the affected real property was the subject of the governmental action.

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

The requirement to do a TIA only applies to §2007.003(a)(1)-(3).

#### Governmental Actions Exempted From the Act

There are certain governmental actions exempted by the Act. The following actions are exempted from coverage of the Act under §2007.003(b):

- (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.

Based on the types of actions anticipated under the Proposed Regulations, Cooke County believes that actions included in the Proposed Regulations are exempt or have “No Private Real Property Impact” (**NoPRPI**). In this TIA, Cooke County will provide the analysis of the conclusions.

#### Lawsuit to Invalidate a Governmental Taking

The Act allows landowners whose property is significantly impaired by governmental regulations to sue the governmental entity to invalidate the regulation. As an alternative to invalidation of the governmental action, the governmental entity may elect to pay the landowner compensation for the loss in value of the property interest. The Act is generally applicable to any governmental action (e.g., adoption of an ordinance, regulatory requirement or policy, or a governmental exaction) that restricts or limits the landowner's rights in the real property and that causes a reduction of 25% or more in the market value of the property. Any lawsuit by an affected real property owner against the governmental entity must be filed within 180 days after the owner knew or should have known of the governmental action. The prevailing party in the lawsuit against the governmental entity is entitled to recover reasonable and necessary attorney's fees and court costs from the losing party.

Requirement to Prepare a Takings Impact Assessment (TIA)

In addition to a lawsuit to invalidate a taking by a governmental entity, all governmental entities in Texas (including the County) are required to prepare a TIA evaluation of any proposed regulation that may impair private real property interests and to provide public notice of the takings impact assessment. If a governmental entity fails to prepare a required takings impact assessment, an affected real property owner may bring suit to invalidate the governmental action and recover attorney's fees and court costs.

**EVALUATION PROCESS**

Based on those items within the Proposed Regulations which might reasonably be determined to be subject to the preparation of a TIA, the County evaluated these items using the guidelines prepared by the State of Texas Office of the Attorney General. These guidelines require each action be evaluated through a series of questions. These questions, with subsequent instructions, are:

*OAG Question 1 - Is the Governmental Entity undertaking the proposed action a Governmental Entity covered by the Act, i.e., is it a "Covered Governmental Entity"? See the Act, §2007.002(1).*

- (1) If the answer to Question 1 is "No": No further compliance with the Act is necessary.*
- (2) If the answer to Question 1 is "Yes": Go to Question 2.*

TGC §2007.002(1)(B) indicates that "a political subdivision of this state" is a covered governmental entity. Article IX of the Texas Constitution indicates that Counties are political subdivisions of the State. Therefore the County would be a covered governmental entity, subject to the requirement to prepare a TIA where it would otherwise be required.

*OAG Question 2 - Is the proposed action to be undertaken by the Covered Governmental Entity an action covered by the Act, i.e., a "Covered Governmental Action"?*

- (1) If the answer to Question 2 is "No": No further compliance with the Act is necessary.*
- (2) If the answer to Question 2 is "Yes": Go to Question 3.*

Based on the County's review of the Act, certain of the actions included in the Proposed Regulations may arguably qualify as Covered Governmental Actions (CGA) while others do not. As outlined above, the Proposed Regulations do not propose any "physical taking" of any particular property, but certain actions are required to be evaluated as a "regulatory taking".

*OAG Question 3 - Does the Covered Governmental Action result in a burden on "Private Real Property" as that term is defined in the Act?*

- (1) If the answer to Question 3 is "No": A "No Private Real Property Impact" or NoPRPI Determination should be made. No further compliance with the Act is necessary if a NoPRPI Determination is made. Logically, the initial critical issue regarding any proposed governmental action is whether there is any burden on private real property. If a governmental entity has not resolved this issue by reference to its preexisting list of Categorical Determinations, it can do so by quickly and concisely making a NoPRPI Determination.*
- (2) If the answer to Question 3 is "Yes": A TIA is required and the governmental entity must undertake evaluation of the proposed governmental action on private real property rights.*

Based on the County's review of the Act, the actions included in the Proposed Regulations do not result in the imposition of a burden on "Private Real Property" as that term is defined in the Act. Therefore, Question 3 is answered as a qualified "NO", and therefore "No Private Real Property Impact" or NoPRPI

*Determination should be made. No further compliance with the Act is necessary if a NoPRPI Determinations is made.*

*OAG 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.*

*OAG Question 5 - How Does the Proposed Covered Governmental Action Burden Private Real Property?*

*OAG Question 6 - How Does the Proposed Covered Governmental Action Benefit Society? OAG Question 7 - Does the Proposed Covered Governmental Action result in a "taking"?*

None of the actions determined to be Covered Governmental Actions imposed a burden on “Private Real Property” as that term is defined in the Act. If those actions had been determined to be both a Covered Governmental Action and which imposed a burden on “Private Real Property” it could have been further evaluated using Questions 4 through 7 in the TIA. The Office of Attorney General guidance also provides the following sub-questions for items determined to be Covered Governmental Actions:

*OAG Sub-question 1 - Does the Proposed Covered Governmental Action Result Indirectly or Directly in a Permanent or Temporary Physical Occupation of Private Real Property?*

*OAG Sub-question 2 - Does the Proposed Covered Governmental Action Require a Property Owner to Dedicate a Portion of Private Real Property or to Grant an Easement?*

*OAG Sub-question 3 - Does the Proposed Covered Governmental Action Deprive the Owner of all Economically Viable Uses of the Property?*

*OAG Sub-question 4 - Does the Proposed Covered Governmental Action have a Significant Impact on the Landowner's Economic Interest?*

*OAG Sub-question 5 - Does the Covered Governmental Action Decrease the Market Value of the Affected Private Real Property by 25% or More? Is the Affected Private Real Property the subject of the Covered Governmental Action? See the Act, §2007.002(5)(B).*

*OAG Sub-question 6 - Does the Proposed Covered Governmental Action Deny a Fundamental Attribute of Ownership?*

In addition to these questions to be addressed for each proposed action, the Office of Attorney General guidance also recommends an alternative evaluation:

*OAG Question 8 - What are the Alternatives to the Proposed Covered Governmental Action?*

## TAKING IMPACT ASSESSMENT FOR THE QUALIFYING ACTIONS

### Impacts of Development Regulation in General

In general, reasonable development restrictions will serve a basic public purpose but will not be of such an extreme character as would constitute a regulatory taking. First, the goals of protecting public health and safety and water quality clearly appear to qualify as a legitimate state interest since prior U.S. Supreme Court rulings have held that governmental regulations addressing the “ill effects of urbanization” and the preservation of desirable aesthetic features are legitimate state interests. It has also been expressly held by the Supreme Court that governmental restrictions on the use of only limited portions of a parcel of land such as setback ordinances are not considered regulatory takings.

Moreover, in a recent U.S. Supreme Court case on regulatory takings, the Court was faced with the question of whether a temporary moratorium on all development around Lake Tahoe constituted a regulatory taking per se. The Supreme Court held that such a moratorium did not constitute a per se taking and that various factors must be analyzed to determine whether a moratorium constitutes a taking. In so ruling, the Court referred to a set of Lake Tahoe water quality protection ordinances enacted in 1972 which restricted impervious cover and established setback limits. These measures preceded the establishment of the development moratorium at issue in the case. Since the moratorium was held not to be a per se regulatory taking, it is very doubtful that traditional development regulations would be considered a regulatory taking if crafted to accomplish their stated purpose while still allowing the landowner to reasonably use and enjoy his property.

This conclusion is consistent with the guidelines adopted by the OAG. These guidelines provide as follows:

*“Accordingly, government may abate public nuisances, terminate illegal activity, 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.”*

These guidelines further indicate that some types of development regulation may qualify for the exemption from the Texas Private Real Property Rights Preservation Act as regulatory actions which protect public health and safety.

### **Actions in the Proposed Regulations Determined to Be “Covered Governmental Actions” That Place a “Burden” on Private Real Property**

None of the proposed actions have been determined to be “Covered Governmental Actions” that may place a “burden” on Private Real Property.

Conclusion: The County’s Proposed Amendments do not constitute a Regulatory taking.