

Takings Impact Assessment

Watershed Protection Ordinance – City of Austin, Texas

Overview

The Austin City Council initiated an amendment to the Land Development Code in January 2011 to improve creek and floodplain protection; prevent unsustainable public expense on drainage systems; simplify development regulations where possible; and minimize the impact on the ability to develop land. The effort is the first of its kind since the City's Comprehensive Watershed Ordinance (CWO) was enacted in 1986. Staff met with both external and internal stakeholders from August 2011 to April 2012 to discuss potential code changes stemming from an analysis of current code deficiencies and needs compiled by staff. Based on the input received in stakeholder meetings, staff worked with the Law Department to develop draft ordinance revisions. These revisions were presented to the stakeholder community and to citizen boards and commissions for review in 2013 and will ultimately be presented to City Council and the Travis County Commissioner's Court for adoption.

Austin lies along the boundary of two ecological regions: the Edwards Plateau ("Hill Country") to the west and the Blackland Prairie to the east. The distinctive terrains and soils of these two regions pose unique challenges for the protection of creeks and floodplains. The Edwards Plateau features steep slopes, rugged canyons, and the caves and springs of the Edwards Aquifer. In addition, these western watersheds drain to the City's principle sources of drinking water. In contrast, the Blackland Prairie features broad, alluvial floodplains as well as erosive clay soils and creek banks. Given these fundamental physical differences, the City proposes to tailor its watershed regulations for the eastern and western watersheds to best fit the unique conditions of each region.

Regulatory Background

The purpose of the Private Real Property Rights Preservation Act (Tex. Gov't Code chapter 2007, the "Act" or "PRPRPA") is to ensure that governmental entities evaluate the effects of their actions on private real property rights and ensure that information regarding the private real property implications is considered before decisions are made or action is taken. The following information is taken from the regulatory background contained in a guidance document prepared by the State of Texas Office of the Attorney General (OAG)¹.

The Act defines "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

¹ https://www.oag.state.tx.us/AG_Publications/txts/propertyguide2005.shtml

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, §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."

(a) The Fifth Amendment to the United States Constitution (the "Takings Clause") provides: "[N]or shall private property be taken for public use, without just compensation." The Takings Clause applies to the states by virtue of the Fourteenth Amendment.

(b) Article I, §17 of the Texas State Constitution provides as follows:

No person's property shall be taken, damaged or destroyed without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . .

(c) The Act, §2007.002(5)(B), 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.

While there is usually little question that there is a "taking" when the government physically seizes or occupies private real property, there may be uncertainty as to whether a "taking" occurs when the government regulates private real property or activities occurring on private real property.

Regulatory or governmental actions are sometimes difficult to evaluate for "takings" because government may properly regulate or limit the use of private real property, relying on its "police power" authority and responsibility to protect the public health, safety, and welfare of its citizens. Accordingly, government may abate public nuisances, terminate illegal activities, 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.

In evaluating whether a governmental action may result in the “taking” of private real property, the governmental entity should consider the following questions:

- 1) Does the Proposed Covered Governmental Action Result Indirectly or Directly in a Permanent or Temporary Physical Occupation of Private Real Property?
- 2) Does the Proposed Covered Governmental Action Require a Property Owner to Dedicate a Portion of Private Real Property or to Grant an Easement?
- 3) Does the Proposed Covered Governmental Action Deprive the Owner of all Economically Viable Uses of the Property?
- 4) Does the Proposed Covered Governmental Action have a Significant Impact on the Landowner's Economic Interest?
- 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?
- 6) Does the Proposed Covered Governmental Action Deny a Fundamental Attribute of Ownership?

Evaluation Process

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 municipality, as a “political subdivision of this state”, is a covered governmental entity.

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"? See §2 of these Guidelines; and Governmental Entity-Specific TIA Procedures for "Categorical Determinations" as developed by the respective Covered Governmental Entities.³⁰*

- 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.*

Some of the provisions included in the proposed ordinance qualify as Covered Governmental Actions while others do not. The provisions that do not qualify as Covered Governmental Actions are summarized below. Covered Governmental Actions are further evaluated using subsequent questions.

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.*

Some of the Covered Governmental Actions included in the proposed ordinance may result in a burden on private real property while others will not. The provisions that will not result in a burden on private real property are summarized below. The provisions that may result in a burden on private real property will be further evaluated using subsequent questions.

Summary of Proposed Regulations

The Watershed Protection Ordinance is organized around the major themes of Austin City Council Resolution 20110113-038:

- **Creek Protection**

One major cornerstone of the new ordinance is the extension of the critical water quality zone buffer to headwaters streams with 64 acres of drainage citywide. This change will be most significant in the eastern Suburban watersheds, which currently only protects streams up to 320 acres of drainage. In addition, a number of western watersheds currently only protect streams up to 128 acres of drainage. Another fundamental part of the ordinance is the establishment of the erosion hazard zone and the prohibition on development within this setback. Additional provisions ensure that improvements within the critical water quality zone, such as parks and trails, minimize disturbance to existing vegetation and drainage patterns.

- **Floodplain Protection**

Another major revision of the ordinance is to adjust the approach to protecting and enabling the recovery of degraded waterways by strengthening rules for floodplain design and modification. Proposed development will need to plan for fully vegetated, natural floodplains rather than altered, mowed floodplains. Floodplain modification will be prohibited within the critical water quality zone, except for public health and safety, significant environmental benefit, and development already permitted (e.g., road crossings). In addition to these exceptions, floodplain modification will be allowed outside of the critical water quality zone if a functional assessment of floodplain health determines the area to be in poor or fair condition. Modification must be offset through on-site restoration or off-site mitigation where restoration is infeasible.

- **Development Patterns and Greenways**

The ordinance will add several provisions to promote the connectivity and local food goals of the Imagine Austin Comprehensive Plan, including clarification that trails and sustainable urban agriculture are permitted conditionally within the critical water quality zone. The ordinance will also improve and expand the menu of “Tier 2” elements for Planned Unit Developments to demonstrate superior environmental protection.

- **Improved Stormwater Controls**

To improve structural stormwater controls, the ordinance will revise the current threshold for water quality controls from 20 percent of net site area to 5,000 square feet, require controls to be accessible for maintenance and inspection, and require maintenance plans and third-party inspections for subsurface controls. In addition, the ordinance will remove the requirement for isolating the water quality volume from larger flood flows.

- **Mitigation Options**

The Watershed Protection Ordinance will improve the existing, limited transfers of development rights sections within the Code to allow for increased flexibility and protection of additional environmental resources (e.g., floodplains). In addition, the ordinance proposes to expand the Barton Springs Zone Redevelopment Exception to the rest of the Water Supply watersheds. This exception allows sites to keep their current impervious cover in exchange for providing water quality controls and providing off-site mitigation, such that impervious cover limits are achieved across the two sites.

- **Simplifying Regulations and Maintaining Opportunity**

The resolution from Council called for the ordinance to “simplify development regulations where possible and minimize the impact of any changes on individual and collective abilities to develop land.” In order to offset impacts from the new core protections of this ordinance, a number of trade-off provisions are proposed for the eastern Suburban watersheds, including:

- Using gross site area (instead of net site area) to calculate impervious cover
- Eliminating the Water Quality Transition Zone
- Allowing “buffer averaging” to reduce the width of buffers by up to one-half if the overall amount of area protected remains the same
- Allowing additional uses within the upper half of the critical water quality zone, including green stormwater controls and utilities

In addition to these offsets, a large number of clarifications and corrections of existing code and policy interpretations are proposed as well.

Evaluation of Proposed Actions

Actions in the Proposed Regulations Determined to Not Be “Covered Governmental Actions”

The requirement for a Takings Impact Assessment only applies to provisions of the proposed ordinance that do not “impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality.” Several of the major provisions summarized above (e.g., extension of creek protection to 64 acres of drainage, floodplain modification, erosion hazard zone) will apply citywide. Provisions that will differ based on watershed classification are summarized in the following section.

“Covered Governmental Actions” Determined to Not Place a Burden on Property

The following actions are provisions that will differ based on watershed classification in order to match the unique geology of the ecological region:

Blackland Prairie

As mentioned above, one of the core objectives of the ordinance is to provide better creek protection in the eastern watersheds of the Blackland Prairie. Although the size of creek protected (64 acres of drainage) was made uniform citywide, the geometry of the buffer (referred to as the Critical Water Quality Zone) was customized for the eastern watersheds to match the erosive nature of these creeks and soils. The potential burden of this change will be discussed in further detail below. To help offset the impact of this change, a number of provisions were introduced to minimize the individual and collective ability to develop land. These provisions are designed to provide more flexibility than existing regulations, and thus would not impose a burden on private real property.

- **Buffer Averaging**

This new option for Suburban watersheds allows sites to adjust the width of the buffer to achieve the same overall footprint of buffer. This adds flexibility to buffer design to work around site-specific geographic and cultural features.

- **Water Quality Transition Zone**

The ordinance proposes to eliminate the Water Quality Transition Zone (a secondary creek setback) in Suburban Watersheds. This will potentially enable higher impervious coverage on the site nearer to the creek in areas that currently require this secondary setback.

- **Gross Site Area**

Current rules calculate impervious cover using a “Net Site Area” formula which is complex and complicates development on properties with stream buffers. This change reduces the complexity of impervious cover calculations and increases opportunities to develop properties with buffers.

- **Transfers of Development Rights**

The ordinance expands the existing options for transfers of development rights in Suburban watersheds to protect the unique features of the Blackland Prairie, including broad, alluvial floodplains and remnant prairies.

- **Parallel Utility Lines**

The ordinance will allow utility lines under certain conditions in the upper half of the Critical Water Quality Zone in Urban and Suburban watersheds. This provides design flexibility and reduces the cost and environmental impact of deep wastewater trenching.

- **Green Stormwater Controls**

The ordinance will allow green water quality controls under certain conditions in the upper half of the Critical Water Quality Zone in Urban and Suburban watersheds. This provides design flexibility and allows more effective placement of water quality controls to help with baseflow enhancement.

Edwards Plateau

Several new provisions of the ordinance outline separate requirements for the western watersheds to acknowledge the importance of protecting the City's water supply and the increased sensitivity of aquatic resources such as the Edwards Aquifer to pollution from urban runoff. While these additional measures are designed to provide increased environmental protection, several of these provisions also offer additional options and flexibility to development. The remaining provisions are consistent with current City requirements and thus do not impose an additional burden to private real property.

- **Redevelopment Exception**

The Barton Springs Zone (BSZ) Redevelopment Exception was originally added as an option for projects in 2007 to achieve environmental protection while expanding redevelopment opportunity. It allows a redevelopment project to retain all of its existing impervious cover in exchange for providing an on-site water quality control and off-site land mitigation. The exception is being expanded under the ordinance to allow more properties to potentially utilize this option. The exception is also being extended to the rest of the water supply watersheds.

- **Athletic Fields**

Due to concerns with compaction and fertilizer use, athletic fields will not be allowed within the primary stream buffer in the Drinking Water Protection Zone. However, these western watersheds have a two-tiered buffer system, which allows space for athletic fields to set back into the secondary stream buffer further from the creek.

- **Water Quality Transition Zone**

The language for water quality transition zone requirements differs slightly for the various watersheds. This language was aligned as much as possible for consistency. In addition, provisions were added to ensure that permitted development within the water quality transition zone can also construct water quality controls within the buffer.

- **Natural Area Buffer**

The ordinance codifies the current City policy that the required natural area buffer in Water Supply Rural areas is located within the uplands and must receive overland drainage from developed areas (e.g., impervious cover) of the site. A clarification will be added to allow more flexibility for placement of the buffer if a water quality control is provided.

- **Porous Pavement**

The ordinance codifies the current City policy that porous pavement for pedestrian walkways does not count as impervious if not located over the Edwards Aquifer recharge zone. Since this credit is not allowed under current code over the recharge zone, there is no change in potential impact.

- **Street Crossings (Imagine Austin)**

Current code limits the frequency of stream crossings. This provision may conflict with the Imagine Austin Comprehensive Plan objective to facilitate connectivity and associated social and environmental benefits. The ordinance adds an option to allow additional street crossings within identified Imagine Austin Comprehensive Plan centers and corridors. The crossings must maintain the water quality and quantity of recharge in recharge and contributing areas of the Edwards Aquifer. Administrative variances are currently not allowed for additional street crossings in the Barton Springs Zone. This remains the case for crossings within Imagine Austin centers and corridors that fall within this area.

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

Two of the Covered Governmental Actions in the ordinance were determined to potentially place a burden on private real property: the new geometry for the buffers in the eastern watersheds and the new 5,000 square foot threshold for water quality controls outside of the Barton Springs Zone.

In Suburban watersheds, the ordinance will establish buffer widths of 100, 200, and 300 feet for “minor”, “intermediate,” & “major” waterways respectively to protect water quality, preserve the Erosion Hazard Zone, and provide a uniform system. This action will be further evaluated in the takings impact assessment below.

The new ordinance will require water quality controls for projects with over 5,000 square feet of impervious cover. This requirement is consistent with TCEQ Edwards Aquifer Rules, EPA requirements for federal projects, and the existing City of Austin Environmental Criteria Manual requirement for Urban watersheds. The Barton Springs Zone will continue to require water quality controls for all development. Exceptions (no control required) are proposed for small roadway projects in the Barton Springs Zone. This action will be further evaluated in the takings impact assessment below.

Takings Impact Assessment for the Qualifying Actions

Buffer Widths in Suburban Watersheds

Question 4. What is the Specific Purpose of the Proposed Covered Governmental Action?

The purpose of the new buffer geometry is to protect and improve water quality, minimize threats to property and infrastructure from erosion, and prevent unsustainable public expense on drainage systems. These eastern creeks are among the most erosive in Austin’s jurisdiction. The City’s Stream Restoration program has spent over \$30 million to repair erosion problems—virtually all of which would have been prevented had the development been adequately set back from creeks. This expenditure represents only a fraction of the remaining, unresolved problems created in the past. The headwaters buffers provisions of the ordinance are central to implementing these cost-saving measures: the proposed buffers incorporate Erosion Hazard Zones.

Question 5. How Does the Proposed Covered Governmental Action Burden Private Real Property?

The proposed action may create a burden on private real property by requiring a larger setback than exists under current code. This could reduce the developable footprint for the site. However, several provisions were added to counterbalance this potential burden (e.g., gross site area, removal of the water quality transition zone) as previously described above.

Question 6. How Does the Proposed Covered Governmental Action Benefit Society?

Projects built in close proximity to erosive creek banks will likely create both nuisances for future property owners as well as potential public and private costs. The new geometry will ensure that projects are set back far enough from the creek to preserve water quality and to avoid future expenditures for maintenance or repair. With allowances for trails, community gardens, and parks, stream buffers also serve as a valuable opportunity to provide connectivity and community open space (at the discretion of the property owner).

Question 7. Does the Proposed Covered Governmental Action result in a "taking"?

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

No.

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

No.

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

In the rare instance that a buffer may deprive the owner of all economically viable uses of the property, the ordinance includes both a variance process and a limited adjustment for hardship cases. Variances to the proposed action would be evaluated by the Land Use Commission. One of the findings the Land Use Commission would consider is whether the variance "is the minimum change necessary to avoid the deprivation of a privilege given to other property owners and to allow a reasonable use of the property." In addition to the variance process, a limited adjustment provision was added to the ordinance under which a project may appeal to the City Council that a provision of the water quality regulations "violates the United States Constitution, the Texas Constitution, or federal or state statute." Given these allowances, the proposed action will not generally deprive an owner of all economically viable use of the property.

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

Staff performed an extensive analysis of the undeveloped parcels in the Suburban watersheds to model the maximum allowable impervious cover under current code and the proposed ordinance, given the

new buffer geometry, the gross site area calculation of impervious cover, and the removal of the water quality transition zone. According to the analysis, about 19 percent of properties, or about 57,000 acres would actually have a potential gain in the amount of impervious cover allowed. Only about 11 percent of properties, or about 13,000 acres, would have a potential reduction in the amount of impervious cover allowed. The remaining 70 percent of undeveloped properties, or about 35,000 acres, would not be affected. Although some properties may be significantly impacted by the proposed action, the ordinance includes provisions to increase flexibility, such as buffer averaging and additional uses allowed within the buffer. In addition, variances and a limited adjustment can be granted for hardship cases as described above. Given these allowances, the proposed action will not generally have a significant impact on the landowner's economic interest.

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?

Determinations as to whether the proposed action decreases the market value of the affected property by 25 percent or more must be made on a case-by-case basis. However, using impervious cover as a proxy for market value, the modeling analysis outlined above only predicted a loss of 25 percent or more impervious cover for 3 percent of properties, or about 200 acres. As stated in the previous questions, variances and a limited adjustment can be granted for hardship cases. Given these allowances, the proposed action will not generally result in a decrease in market value of 25 percent or more.

6) Does the Proposed Covered Governmental Action Deny a Fundamental Attribute of Ownership?

No.

Question 8. What are the Alternatives to the Proposed Covered Governmental Action?

The alternative to the proposed action would be to retain the current creek buffers. As new projects encroached on headwaters creeks, the City would likely continue to propose capital solutions (e.g., structural control retrofits, stream stabilization projects) to protect property and infrastructure from erosion and reduce impacts to water quality. Such projects and damage would have been prevented using the proposed buffers. As discussed above, this pattern of development will likely create both nuisances for future property owners as well as ongoing public and private costs. The City believes the proposed action provides significant public benefits while minimizing the individual and collective ability of properties to develop land.

Conclusion: The proposed action does not constitute a Regulatory Taking.

5,000 Square Foot Threshold for Water Quality Controls

Question 4. What is the Specific Purpose of the Proposed Covered Governmental Action?

The purpose of the proposed action is to reduce the impacts to water quality and erosion from urban stormwater runoff and altered hydrology. Specifically, the proposed action will set a threshold for structural controls based on square footage of impervious cover. The current threshold (20 percent impervious cover) allows large projects with a significant amount of impervious cover to avoid building structural controls, leading to erosion and water quality degradation downstream.

Question 5. How Does the Proposed Covered Governmental Action Burden Private Real Property?

Projects that previously did not have to construct a water quality control will now have to expend additional cost to design and build a control. Relatively few projects are built with less than 20 percent impervious cover in most of the affected watersheds, due to higher impervious cover limits. However, projects in the Water Supply Rural watersheds are currently limited to 20 percent impervious cover total and provide a downstream natural area in lieu of a structural water quality control. These sites would now have to provide a control. However, given the large amount of open space on a site with 20 percent cover, there are a number of flexible, passive, low-impact options such as vegetative filter strips and rain gardens that can be implemented to meet this new requirement—many of which can be integrated into the natural areas or landscaping on the site. Additionally, the proposed requirement would mean that small sites with less than 5,000 square feet of impervious cover—even those with more than 20% impervious cover—would not be required to build a water quality control, thereby saving the cost and associated land area required.

Question 6. How Does the Proposed Covered Governmental Action Benefit Society?

The proposed action will ensure that any project proposing a significant amount of impervious cover will need to build controls to preserve water quality downstream and prevent erosive flows. This will help protect the integrity of our streams and eliminate future public expenses for potential projects downstream of exempted sites. For example, the City spent over \$250,000 on a water quality retrofit to treat runoff from a school that was not required to build a control under current code.

Question 7. Does the Proposed Covered Governmental Action result in a "taking"?

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

No.

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

No.

3) *Does the Proposed Covered Governmental Action Deprive the Owner of all Economically Viable Uses of the Property?*

No. A water quality control typically only uses about 2 to 4 percent of the site footprint. Additional options to further minimize the impact of the developable area would include integrating the control into proposed landscaping or constructing a subsurface control.

4) *Does the Proposed Covered Governmental Action have a Significant Impact on the Landowner's Economic Interest?*

No. As discussed above, the footprint of the control is relatively small and many options exist to integrate passive, low-impact controls into the natural areas or landscaping on the site.

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?*

No. As discussed above, the footprint of the control is relatively small and many options exist to integrate passive, low-impact controls into the natural areas or landscaping on the site.

6) *Does the Proposed Covered Governmental Action Deny a Fundamental Attribute of Ownership?*

No.

Question 8. What are the Alternatives to the Proposed Covered Governmental Action?

The alternative to the proposed action would be to retain the current 20 percent impervious cover threshold for water quality controls. As new projects were exempted from controls, the City would likely continue to propose capital solutions (e.g., structural control retrofits, stream stabilization projects) to protect property and infrastructure from erosion and reduce impacts to water quality. As discussed above, this exemption may create both nuisances for future property owners downstream as well as ongoing public and private costs. In the limited instances where this new requirement will apply, the City believes the proposed action provides significant public benefits at relatively small costs to property owners.

Conclusion: The proposed action does not constitute a Regulatory Taking.