SUBJECT: Private Real Property Rights Preservation Act

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 8 ayes — Saunders, Mowery, Combs, Hamric, Hilderbran, Howard, Krusee, B. Turner

0 nays

1 absent — Alexander

SENATE VOTE: On final passage, May 17 — 26-5 (Barrientos, Ellis, Gallegos, Rosson, Truan)

WITNESSES: (*On House companion, HB 2591*):

For — Robert Howden, National Federation of Independent Business; Bob Stallman, Texas Farm Bureau; David Langford, Texas Wildlife Association; Dan Byfield, Farm Credit Bank of Texas; John Poerner, Southwest Texas Property Rights Association; Jerry Walzel, The Texas Citrus and Vegetable Association; Ed Small, Texas and Southwestern Cattle Raisers Association; Marshall Kuykendall and Robert Kleeman, Take Back Texas; Alan Lange, Lipan-Kickapoo Water Conservation District; Mary Miksa, Texas Association of Business; Tammy Cotton, Texas Citizens for a Sound Economy; Scott Holland, Irion County Water Conservation District; Lee Arrington, South Plains Underground Water Conservation District; Jimmy Gaines, Texas Landowners Council; Nolan Ryan; Walter Batla; Ben Love.

Against — Ken Kramer, Sierra Club; Tom "Smitty" Smith, Public Citizen; Sparky Anderson, Clean Water Action; Joe Aceves, San Antonio Water System; Rick Levy, Texas AFL-CIO; Sandra Skrei, National Audubon Society; Mary Kelly, Texas Center for Policy Studies; Mary Arnold, League of Women Voters of Texas; Jim Marston, Environmental Defense Fund; Janet Valenza; Brent White; Lin Ehrilich; Mary Alice Van Kerrebrook.

On — Drew Durham, Attorney General's Office; Garry Mauro, General Land Office; Mike Bradford and Frank Reilly, National Resource Foundation of Texas.

BACKGROUND: The U.S. Constitution's Fifth Amendment states that no person may be deprived of life, liberty or property without due process of law, and that government may not take private property for public use without just compensation. The clause on private property is often referred to as the "takings" provision. The Texas Constitution contains a similar provision, in Art. 1, sec. 17.

The U.S. Constitution's 14th Amendment states that no state can make or enforce a law that would abridge the privileges and immunities of a U.S. citizen, nor deprive any person of life, liberty or property, without due process of law.

For more background on takings law and related issues, see House Research Organization Session Focus Report Number 74-3, *Property Rights: A Balance of Interests,* February 1, 1995.

DIGEST: CSSB 14, the proposed Private Real Property Rights Preservation Act, would create a new cause of action for the statutory "taking" of private real property by the actions of a political subdivision or a state agency. State agencies and other political subdivisions could be sued for compensation for an action taken or enforced on or after September 1, 1995, that would reduce the market value of private real property by 25 percent or more.

Compensation could only be recovered from a state agency if the Legislature, by resolution, waived the agency's sovereign immunity, and the money was appropriated by the Legislature.

The attorney general would be required to prepare guidelines no later than January 1, 1996 to assist governmental entities in identifying actions that could constitute a taking. State and local governments would be required to perform written assessments of governmental actions that could result in a taking and provide public notice of any such proposed actions.

Actions covered under CSSB 14. CSSB 14 would apply to the adoption or issuance of an ordinance, order, rule, regulatory requirement, resolution, policy, guideline or similar measure.

The bill would also apply to an action imposing a physical invasion or requiring a dedication or exaction of private real property, or an action by a city that has an effect in the extraterritorial jurisdiction (ETJ) of the city but does not impose the same requirement in the city's entire ETJ.

Legal actions against political subdivisions for takings. A private real property owner could bring suit in district court to determine whether a political subdivision's action would result in a taking. The suit would have to be filed in a county where some or all of the affected property was located. A suit could not be filed later than two years after the date the private real property owner knew or should have known that a governmental action had limited the owners' right in the property.

Whether a governmental action of a political subdivision resulted in a taking would be a question of fact. If a court found that the action of a political subdivision resulted in a taking, the property owner would be entitled to compensation.

A judgment in favor of a property owner would enjoin the political subdivision from enforcing or continuing the action until all costs had been paid. The judgment would also be required to establish the amount of compensation, fees, costs and interest owed by the political subdivision. The subdivision would be required to certify to the court whether those costs had been paid.

Proceedings against state agencies. A private real property owner could file against a state agency to determine whether or not an agency action had resulted in a taking. The bill would provide for an administrative proceeding in which a property owner could file a contested case to determine if a state agency action were a taking. A contested case would have to be filed no later than 180 days after the date the property owner knew or should have known that the action would restrict or limit the owner's right in private real property. Whether a state agency action resulted in a taking would be a question of fact.

If a trier of fact in a contested case against a state agency found the action of state agency to be a taking, a final decision or order issued in the case would require the agency to rescind the action no later than 60 days after the date the decision or order was issued.

A property owner would be entitled to, and the state agency liable for, compensation for the taking but compensation could only be recovered if a waiver of sovereign immunity was granted by the Legislature and paid from an appropriation made expressly for that purpose.

If the Legislature waived sovereign immunity to suit for compensation for a taking, the final decision would establish the amount of compensation, fees, costs and interest owned by the agency and enjoin the agency from enforcing the action as applied to the property owner until the date the agency certified that all compensation, fees, costs and interest owed the property owner had been paid.

A person who had exhausted all administrative remedies available within the state agency concerning a final decision issued in a contested case would be entitled to judicial review.

Compensation. The amount of compensation owed to a private real property owner in a takings suit or contested case would be determined from the date of the taking and would be the reduction in the market value of a property caused by a governmental action. Compensation could also be recovered for a temporary or permanent economic loss sustained while a government action was in effect, even if the action was later repealed or invalidated.

A private real property owner who prevailed in such a suit would be entitled to reasonable and necessary attorney's fees, court costs and prejudgment interest. Prejudgment interest would be calculated from the day of the taking.

Waiver of sovereign immunity. The sovereign immunity of a political subdivision to suit and liability would be waived and abolished for liability created under the provisions of CSSB 14.

The sovereign immunity of a state agency to liability would be waived and abolished for liability created under the provision of CSSB 14, but immunity to suit of a state agency for compensation would be reserved, and would have to be granted by the Legislature.

Sovereign immunity to suit would be waived and abolished in relation to a state agency for:

• the determination of whether a state agency action is a "taking" under CSSB 14 or the invalidation of an action of a state agency in a final order or decision, the appeal of a final decision or order issued in a contested case and the invalidation of an action by a state agency that failed to prepare a takings impact assessment.

A person would not be authorized to execute a judgment against property of the state or a governmental entity.

Actions exempted. CSSB 14 would not apply to the following governmental actions:

• city zoning;

• an action by a city (except a city action that only applies to a portion of its ETJ);

• lawful forfeiture, seizure of contraband or seizure of property as evidence of a crime or violation of the law;

• an action reasonably taken to fulfill an obligation mandated by federal law;

• discontinuance or modification of a program or regulation that would provide a unilateral expectation that does not rise to the level of a recognized interest in private real property;

• 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;

• 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;

• a formal exercise of the power of eminent domain;

• an action taken by a governmental entity to prevent waste of oil and gas or protect correlative rights of owners of interests in oil and gas;

• a rule or proclamation adopted by Parks and Wildlife for purposes related to fishing and hunting;

• an action taken under a political subdivision's statutory duty to prevent waste or protect rights of owners of interest in groundwater or to prevent subsidence;

• the appraisal of property for purposes of ad valorem taxation;

• a action taken in response to a real and substantial threat to public health and safety, that is taken to significantly advance health and safety and would not impose a greater burden than is necessary to achieve the health and safety purpose.

Definitions. The bill would add Chapter 2007 to the Government Code, the Private Real Property Rights Preservation Act.

"Taking" would be defined as a governmental action taken — or the enforcement of a governmental action taken — on or after September 1, 1995, that would affect private real property in a manner that required compensation as provided by the Fifth and 14th Amendments to the U.S. Constitution or secs. 17 or 19, Article 1, Texas Constitution.

A "taking" would be an action that affected the owner's private real property in a manner that restricted or limited a right to private property and was the cause of a reduction in market value of at least 25 percent of the affected private real property.

"Private real property" would be defined as an interest in real property, including a groundwater or surface water right of any kind that is not owned by the federal government, the state or a political subdivision.

"Owner" would mean a person with legal or equitable title to affected real property at the time a taking occurs.

Requirements for proposed governmental actions. The attorney general would establish guidelines to assist governmental entities in identifying and evaluating governmental actions that could result in a taking. The guidelines would be revised annually and published in the Texas Register. The attorney general would file the guidelines for publication by January 1, 1996. In revising the guidelines, the attorney general would consider legislative actions and Supreme Court decisions as well as public comments suggestions and information.

Governmental entities would be required to prepare written takings impact assessments that would comply with the attorney general's evaluation guidelines concerning takings. A political subdivision would not be required to prepare a written assessment for an action mandated by state law, but would be required to prepare a statement describing the mandate, and citing under which statute it was imposed. A takings assessment would be public information.

A takings impact assessment would describe the specific purpose of the proposed action, identify whether and how the proposed action substantially advanced its stated burdens as well as the burdens imposed on private real property and the benefits to society from the proposed use of the property. The assessment would also determine whether engaging in a governmental action would constitute a taking and describe reasonable alternatives that could accomplish the same purpose, and whether those alternatives would constitute a taking.

An action requiring a takings impact assessment would be void if an assessment were not prepared, and a property owner affected by an action could bring suit for declaration of the invalidity of such a action. The court would be required to award a private real property owner who prevailed reasonable and necessary attorney's fees and court costs.

A political subdivision proposing an action that could result in a taking would be required to provide at least 30 days notice of the proposed action in a newspaper of general circulation in the county where the property was located. The notice would include a copy of the takings impact assessment.

A state agency proposing to engage in an action which could result in a taking would be required to provide at least 30 days notice before it adopted the rule, and file notice of the proposed rule, and the takings impact assessment for that rule with the secretary of state for publication in the Texas Register.

A state agency would be required to update the takings assessment for a rule that was not adopted three months after the date notice of the proposed action was given.

Provisions regarding takings assessments and notice requirements would go into effect January 1, 1996.

Real property appraisal. The effect of a governmental action on the market value of private real property would be taken into consideration by the chief appraiser determining the market value of a property.

Report. Before the Legislature convened in 1997 the comptroller would report to the governor, lieutenant governor, speaker and attorney general regarding state agency compliance with takings impact assessment procedures. The report would be limited to an analysis of state agency compliance with procedural requirements and would not engage in qualitative reviews or evaluations of state agency actions.

Except as otherwise provided, the bill would take effect September 1, 1995.

SUPPORTERS SAY:

Government laws and regulations sometimes strip private property of its economic value. Such actions amount to a "taking" of private property without compensation. Regulatory takings are common despite constitutional guarantees that private property cannot be taken without just compensation. In the last five years a number of states have enacted laws addressing the takings issue.

CSSB 14 would be a first step in assuring conformity with constitutional guarantees that private property cannot be taken for public use without just compensation. Government should not be allowed to arbitrarily block honest citizens from making reasonable use of their land. Restrictions on the use of private property inhibit economic development and cost Texas jobs.

CSSB 14 would set narrow guidelines to determine whether a governmental action would be considered a taking, leaving plenty of leeway for land-use regulations needed to protect citizens' health, safety and the environment. Many governmental actions would be exempted from being considered a taking under CSSB 14, including city zoning ordinances, actions taken to prohibit property uses that constitute a public or private nuisance, actions taken in response to a real and substantial threat to public health and safety and hunting and fishing regulations.

There would not be an "explosion" of lawsuits under CSSB 14. In fact, the bill is meant to prevent lawsuits by assuring that proposed governmental actions would not infringe on people's property rights. It is difficult to prove that a 25 percent reduction of property value has occurred due to a governmental action, and few property owners would attempt it.

CSSB 14 would not necessarily cost the state much money. The cost to perform takings assessments would be negligible (as it has been in other states that passed similar legislation) and could save the state money in the long run by preventing actions that could require compensation — in some cases, states have had to pay millions of dollars in compensation to one person because of a regulatory taking. Those who complain about the costs of takings assessments are quick to advocate even more costly environmental assessments and impact reports under the National Environmental Policy Act.

The bill would not automatically authorize recovery against the state for compensation. Strict guidelines would have to be met before compensation could be ordered — and compensation by the state would only occur if the Legislature separately approved and appropriated the money.

A finding that a governmental action was a taking, however, could keep a regulation from being enforced until compensation was made. Both a property owner (who would have little chance of recovering any money) and a regulatory entity (which might be enjoined from enforcing an action) would be encouraged by the bill to negotiate over proposed regulations and agree upon a less intrusive means of accomplishing regulatory goals.

CSSB 14 would not stymie environmental regulations at all. Instead, the bill is written to protect both natural resources and constitutionally guaranteed freedoms. The bill would help to prevent heavy-handed regulatory mandates in the future that would result in the taking of private property. Property owners should not have to bear all the weight of costly regulations that purport to be for the public good.

The bill could not be used to compensate someone prohibited from opening a sexually oriented business — Local Government Code, sec. 243, allows local governments to regulate these sexually oriented businesses that may be detrimental to public health and safety and CSSB 14 would not affect this authority whatsoever.

Requiring an assessment of proposed regulations to summarize the costs and benefits of that regulation and whether it would result in a taking is sound public policy, and would result in carefully drafted, well thought out rules and regulations. The bill would not require takings assessments for permitting, for example, which could be burdensome for an agency.

The bill is intended to apply only to a governmental action or the enforcement of such an action taken for the first time on or after September 1, 1995, and as such, would leave all existing city and county laws, ordinances and regulations in place. It would not affect either Austin or San Antonio water quality ordinances. The bill would apply only to a city’s future actions that would only affect a portion of that city’s ETJ, to restrict any city in Texas (not just Austin) from abusing its powers and forcing certain ETJ residents, who cannot vote on such matters, to meet different standards than other residents of the same area.

There would not be a spate of nuisance lawsuits by plaintiffs "with nothing to lose" hoping to get their attorneys fees and court costs paid by the state,

because it would still be expensive and time-consuming to bring a suit. Few attorneys would work on a contingency basis knowing that they would only be paid if the state appropriated funds to pay the judgment.

The state should not propose regulations that would devalue the use or productive capacity of private land, without compensating property owners for that loss. Not only does this cripple farmers, ranchers and homeowners, it also devalues the collateral of lending institutions that lend to all these people. This bill would curb regulatory excesses and ensure that property owners are not unjustly denied the value of their property.

OPPONENTS SAY:

CSSB 14 is so inclusive that, except for the actions it specifically exempts, it would create a new cause of action for practically any governmental regulatory initiative that could be argued as affecting property values. Taxpayer money would have to be used by state and local governments to fend off the explosion of lawsuits for compensation that would be filed if CSSB 14 is enacted, and the cost of paying compensation for speculative use of property value "taken" by government regulation is potentially enormous.

The bill would establish a broader definition of a taking than any constitutional provision or Texas court ruling, and could cost the state many millions of dollars. Other states have rejected takings proposals because of fiscal concerns.

The bill would have widespread unintended consequences on a wide variety of actions (especially county actions since the bill's application to cities is limited). Flood-related regulations that would restrict development in flood plains, for example, could be challenged as a regulatory taking. Since the bill would allow a property owner to enjoin a governmental entity from enforcing or continuing a governmental action until the owner had been compensated, certain government actions (like road construction projects) could also be held up indefinitely until the Legislature agreed to compensate the property owners.

Local governments affected by these suits would have to spend time and money proving that various regulations would be exempted from takings suits because, for example, they were prohibiting a public nuisance. A

county, for example, might be forced to compensate a sexually oriented business as a result of seeking to enforce a county ordinance barring such a business from locating near a school. The business could claim that the county ordinance would limit its right "that would otherwise exist in the absence of a governmental action," which is the compensable right that CSSB 14 would create.

Takings impact assessments would be prohibitively expensive and time-consuming for state agencies and local governments to perform — and would create a massive new layer of bureaucracy. This could result in agencies like Texas Natural Resource Conservation Commission (TNRCC) having to lengthen the time frames of their permitting processes because essential staff would be busy with assessments rather than other TNRCC business.

Preparing a formal cost-benefit analysis identifying and quantifying the burdens imposed on real property as well as the benefits to society for every exercise of regulatory authority would be exhausting and expensive, especially for local governments. In fact, fear of compensation suits and claims, as well as the need to do complex takings assessments of every proposed regulation, would lead to regulatory paralysis, blocking necessary protections for health and the environment.

Regulatory paralysis is exactly the point of the takings movement, which is supported by corporate interests who are using the excuse of "takings" to undermine new and potentially expensive regulations. No one has a right to use property in a way that may damage neighbors or the community as a whole, but CSSB 14 would make regulations prohibiting unreasonable land use much more difficult. Texas' water and other irreplaceable resources belong to all residents and must be protected for use by all Texans.

Courts have up to now interpreted regulatory takings on a case-by-case basis, and carefully balanced the rights of private property owners with those of their neighbors and their community. CSSB 14 would tip the balance in favor of certain property owners and require taxpayers to pay corporations or land speculators to obey laws that might cut into their potential profit. In this way the bill could put taxpayers in the peculiar situation of paying industries not to pollute.

Specifically excluding city actions except those by a city that would have an effect in a only a portion of the city's ETJ could tie up Austin's water quality ordinances in endless lawsuits, expose Austin taxpayers to endless claims for compensation from affected landowners. San Antonio's new water quality ordinance to restrict development over the Edwards Aquifer recharge zone, (a negotiated agreement between the affected parties) could also be at risk if CSSB 14 is enacted.

Successful claimants in a takings case could recover the costs of their lawsuits, but unsuccessful claimants would not have to pay the state or local government's costs of successfully defending against such a suit. This would encourage frivolous and speculative lawsuits, which would be time-consuming and expensive for the state. Property owners would have little to lose by trying out their arguments in court.

The market value of real property is a function of many factors, and it would be almost impossible to determine whether a specific governmental action has caused a property devaluation of 25 percent or more. This would make it almost impossible to make an objective decision about whether or not an action has resulted in a taking. Also, CSSB 14 would not require the property owner to demonstrate that the claimed loss in market value is due solely to the government regulation.

OTHER OPPONENTS SAY:

The bill should be made truly prospective in nature and not apply to any rule or requirement adopted or enacted before September 1, 1995. The bill as written would "grandfather" existing laws and regulations since it would apply to the "enforcement of a governmental action on or after September 1, 1995."

The bill should specify that the state would be held liable for compensation owed as a result of takings by political subdivisions that occurred as a result of compliance with state mandates. It is simply not fair to blame a political subdivision for a law they are required to enforce.

NOTES:

The House committee substitute made substantial changes to the Senate-passed version, bill, including exempting municipal zoning or actions taken

by a joint airport board from the bill's requirements, limiting a taking to a governmental action taken on or after September 1, 1995, stating the actions for which sovereign immunity to suit could be waived, specifying that compensation from a state agency would have to be granted by the Legislature, providing for an administrative proceeding to determine if a state agency action was a taking and providing that a final decision in a contested case would order the agency to rescind the action as applied to the prevailing property owner.

The Senate-passed version of the bill defined takings in terms of a 20 percent reduction in market value, enjoined a governmental action permanently if compensation owed was not paid in three years, held the state liable for compensation owed as a result of takings by political subdivisions that occurred as a result of compliance with state mandates, and would have exempted actions from takings claims that were taken to prevent pollution of a "sole source aquifer," actions in a city's ETJ if they were imposed throughout the entire city and its ETJ, and certain actions by the Public Utility Commission of Texas.

A related bill, HB 1266 by Hilderbran et al., which would create an ombudsman's office for private property rights in the Attorney General's Office, was amended on the House floor to provide that the attorney general would use staff employed before the effective date of the bill to staff the office. The House passed by nonrecord vote on April 26. HB 1266 was referred to the Senate State Affairs Committee on May 1.