SUBJECT: Revising regulatory takings to include impervious cover restrictions

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 6 ayes — Mowery, Harper-Brown, Blake, R. Cook, Miller, Pickett

1 nay — Leibowitz

2 absent — Escobar, Orr

WITNESSES: For — Hank Smith; Ted Stewart, Charlotte Warren, Dan Wheelus, Texas Landowner's Conservancy; (*Registered, but did not testify*: Ron Amini, Bill Horabin, Terry Irion, Texas Landowner's Conservancy; Doreen Budde; Jorn Budde; Tim Cases; Floyd Davis; Tricia Davis; Daniel Gonzalez, Texas Association of Realtors; Christopher Horabin; Billy Howe, Texas Farm Bureau; Tom Martine; David Mintz, Texas Apartment Association; John Noell; Scott Norman, Texas Association of Builders; Jerry Patterson, Texas General Land Office; Karen Peterson; Jerry Reed; Harry Savio, Homebuilders Association of Greater Austin; Suzanne Stewart)

Against — Sarah Baker, Save Our Springs Alliance, Inc.; Scott Halty, San Antonio Water System; Scott Houston, Texas Municipal League; Ben Luckens, Texas Chapter of The American Planning Association; Patrick Murphy, City of Austin; Michael Pichinson, Texas Conference of Urban Counties; Brad Rockwell, Lauren Ross, Greater Edwards Aquifer Alliance; (*Registered, but did not testify*: Christopher Brown, National Wildlife Federation; Jeff Heckler, City of Sunset Valley; Christy Muse, Hill Country Alliance, Hamilton Pool Road Scenic Corridor, Lakeway First, Friendship Alliance; Susan Rocha, City of Round Rock; Frank Turner, City of Plano)

BACKGROUND: The 74th Legislature in 1995 enacted SB 14 by Bivins, the Private Real Property Rights Preservation Act (Government Code, ch. 2007). Before SB 14, a "taking" could result from a governmental action that would affect private real property in whole or in part, temporarily or permanently, in a manner that would require compensation as provided by the Fifth and 14th Amendments to the U.S. Constitution or Art. 1, secs. 17 and 19 of the Texas Constitution.

Since SB 14, a "taking" also can result from a governmental action that would affect an owner's private real property in whole or in part, temporarily or permanently, in a manner that restricts or limits a right to private property and is the producing cause of a reduction in market value of at least 25 percent of the affected private real property.

The "takings" provision applies to the adoption or issuance of an ordinance, order, rule, regulatory requirement, resolution, policy, guideline or similar measure. It also applies 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. This provision is meant to limit municipal authority from applying stricter requirements on non-voting residents of its ETJ than on voting city residents.

Under Government Code, ch. 2007, state agencies and other political subdivisions now may be sued for compensation for actions that would reduce the market value of private real property by 25 percent or more. Governmental actions currently exempt as takings are:

- city zoning regulations and other actions by a city;
- 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 providing a unilateral expectation that does not rise to the level of a recognized interest in private real property;
- an action to prohibit or restrict a condition or use of private real property that a governmental entity proves constitutes a public or private nuisance;
- an action taken out of a reasonable good faith belief that it is necessary to prevent a grave and immediate threat to life or property;
- a formal exercise of the power of eminent domain;
- an action under state mandate to prevent waste of oil and gas, protect correlative rights, or prevent pollution related to oil and gas activities;
- a rule or proclamation for water safety, fishing, hunting, or control of exotic aquatic resources;

- 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 ad valorem taxation; and
- an action in response to a real and substantial threat to public health and safety, taken to significantly advance health and safety, and that would not impose a greater burden than necessary to achieve that purpose.

Governmental entities must prepare written takings impact assessments that describe the specific purpose of a proposed action and identify whether and how the proposed action substantially advances its stated purpose, the burdens imposed on private real property, and the benefits to society from the proposed use of the property. The assessment determines whether a proposed governmental action would constitute a taking and describes reasonable alternatives that could accomplish the same purpose, and whether those alternatives would constitute takings.

A political subdivision proposing an action that could result in a taking must provide at least 30 days' notice of the proposed action in a newspaper of general circulation in the county where the property is located, including a reasonably specific summary of the takings impact assessment and the name of the official of the political subdivision from whom a copy of the full assessment can be obtained.

A state agency proposing to engage in an action that could result in a taking must file notice of the proposed rule, provide at least 30 days notice before it adopts the rule, and arrange to publish in the *Texas Register* a reasonably specific summary of the takings impact assessment for that action. A municipality must post notice of adoption of most regulations 30 days before adoption.

The Edwards Aquifer and its 11 springs, through which underground fresh water flows, provides more than 1.5 million people with drinking water. In a 1992 citizen initiative election, called Save Our Springs (S.O.S.), Austin residents approved a "nondegradation" ordinance to regulate pollution from development in the Edwards Aquifer region. The ordinance required an impervious cover limit of 15 percent of net site area in the recharge zone, 20 percent in the Barton Creek contributing zone, and 25 percent in the Onion Creek contributing zone and its tributaries. Net site area

excludes sensitive areas including land on the 100-year flood plain and land with slopes of 35 percent or more.

DIGEST:

CSHB 2833 would amend Government Code, sec. 2007, to specify that a taking could result not just from a governmental action but from a series of governmental actions. Governmental actions resulting in a taking would include those that limited impervious cover – surfaces that prevent the infiltration of water into the soil – to less than 45 percent of a property's surface area, excluding land within the 100-year floodplain and lands sloping 35 percent or more.

The bill would remove the exemption for municipal actions, including actions that imposed regulations on a city's ETJ but not on the city itself.

It would retain exemptions for certain actions when they did not affect building size, lot size, or impervious cover, including:

- an action reasonably taken to fulfill an obligation mandated by federal or state law;
- an action taken to prohibit or restrict a condition or use of private real property that the governmental entity proved constituted a public or private nuisance;
- an action taken under a political subdivision's statutory duty to prevent waste or protect rights of owners of interest in groundwater;
- an action by a political subdivision to regulate construction in an area designated under law as a floodplain; and
- an action in response to a threat to public health and safety, taken to significantly advance health and safety, and that would not impose a greater burden than necessary to achieve that purpose.

An action taken out of a reasonable good faith belief that the action was necessary to prevent a grave and immediate threat to life or property now would have to be an action based on "reasonable evidence."

The bill also would exempt from ch. 2007, identifying governmental actions as potential takings, the following:

- municipal zoning authority, unless the regulation resulted in a taking under the impervious cover restrictions or if the regulation were imposed without the owner's consent within the three-year

period after the date of the filing of an application pertaining to an owner's private real property under chapter 242 or 245, Local Government Code;

- authority to uphold the federal Coastal Zone Management Act of 1972 and Natural Resource Code, Title 2 (Public Domain), subtitle E;
- actions limiting access to public beaches under subchapter B, ch. 61, Natural Resources Code; and
- Texas Commission on Environmental Quality regulations on on-site sewage facilities.

Under the bill, a suit or a contested case would have to be filed not later than two years from the later of:

- the date on which a governmental action was enforced and affected private real property;
- the date on which a governmental action was enforced and affected a permit application on the property; or
- September 1, 2005.

CSHB 2833 would require impact assessment statements be made before governmental actions were taken and would provide recourse for the public to ensure impact assessments complied with attorney general guidelines.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005.

SUPPORTERS SAY:

CSHB 2833 would strengthen takings provision for land owners when certain regulations unfairly devalued their property. Municipal regulations continue to impose restrictions on the use and development of private property, despite the U.S. and Texas constitutional protections with respect to the taking by government entities of private property. It would not prevent a city from applying any regulations deemed necessary to protect public health and safety.

The Texas Supreme Court, in *Quick v. City of Austin*, 7 S.W.3d 109 (1999), determined that the SOS Ordinance of 1992 devalued property in the affected area by as much as 90 percent. CSHB 2833 would limit but

not eliminate that devaluation by restricting the amount of surface area that could be subject to impervious cover restrictions without constituting a taking. This would be far less stringent than requirements of some other states where land owners receive compensation for any reduction in land values resulting from government regulations.

The misconception that development is consuming open space, wilderness, and farmland has increased regulatory takings through excessive regulation. Regulation couched in water protection authority has encouraged an anti-growth sentiment in the public. This is in spite of the fact that only 5.2 percent of the continental United States could be defined as developed.

Through technological advances, development can take place while preserving environmental quality. While impervious ground cover limits above 18 percent do introduce pollutants into a water supply, engineered storm water retention/detention systems can help maintain water quality. These engineered systems can include ponds, lakes, underground trenches, wetlands, or canals from which water is discharged via perforated pipes embedded in a filter material. Regardless of impervious ground cover, such systems protect water quality downstream.

Property owners should not have to bear the costs of regulations imposed to support the public good. Cities already issue bonds and purchase mitigation lands to prevent hazards and protect the public. Private property owners should not subsidize what government already can do with tax dollars.

The bill would not debase environmental regulations. Opposition has been based on erroneous assumptions that land owners in environmentally sensitive areas would develop their lands to the detriment of their neighbors. The bill would help prevent onerous mandates in the future that effectively result in the taking of private property.

CSHB 2833 would not necessarily cost the state much money. Increasing the impact assessments would save the state money in the long run by preventing actions that could require compensation. While finding that a governmental action was a taking could keep a regulation from being enforced until compensation was made, the process of proving a government action had reduced property value and was cause for compensation could be difficult. Under such circumstances, a property

owner and a regulatory agency might well be more inclined to negotiate on the regulation and agree upon a less intrusive means of accomplishing regulatory goals.

OPPONENTS SAY:

CSHB 2833 would create a new cause of action for regulations intended to preserve and protect environmental standards and drinking water quality. Ordinances adopted by many cities, including Austin, Buda, and San Antonio, that limit impervious cover on environmentally sensitive areas would amount to a taking of private real property requiring compensation at market value.

Raising impervious ground cover limits would endanger stream flow, groundwater recharge, stream banks, and water quality. Safe drinking water supplies could not be maintained at 45 percent impervious cover. Pollutants would increase by 25 times, even with engineered water quality controls. Storm flow, the volume of water flowing during storms, would increase by eight times, increasing erosion and flooding. Base flow, water that flows between storms, could decrease by two-thirds, preventing water from reaching the recharge zone.

The bill would reverse protections intended to preserve critical water sources, such as the Edwards Aquifer. Because the aquifer's unique geology increases its vulnerability to pollution, land use regulations on surrounding land owners may seem severe. However, preserving the aquifer's water quality is essential for the 1.5 million people who depend on the Edwards Aquifer for drinking water. The aquifer also provides fresh water flows for rivers that feed bays and estuaries along the Texas coast, supporting fish, wildlife, and economic activity. The bill would reduce protections enjoyed by species in the unique habitats of the aquifer's eco-system. Even with structural controls, pollution could enter the aquifer. Relying on structural controls would require a political subdivision's maintenance and upgrades, which could increase fees to developers.

The bill would hamper a city's ability to regulate land use to protect property values. In cities where the S.O.S. ordinance has been adopted, the bill would invalidate voter initiatives instituted by the public. CSHB 2833 would require a city to pay for enforcing regulatory protections for which city residents hold government responsible. City residents depend on regulatory measures to protect their drinking water. While this bill would not prevent a city from enforcing regulations, it would make

enforcement prohibitive. Cities would have to pay landowners not to pollute water, and the bill would coerce cities into diluting regulatory protection.

The bill would force cities to pay for more public notices and impact assessments. Cities would have to provide 30 days' notice by publication in a newspaper of any governmental action that could result in a regulatory taking. The bill would require impact assessments for regulations that might reduce property value. These requirements would be excessive and penalize cities for proposing routine regulations. Some cities might be able afford the increased costs, but others would be forced to forego regulatory enforcement. With weakened ability to regulate land use, property values would decrease. The impact assessment provision would be administratively and fiscally too demanding on local governments.

According to the Texas Supreme Court, in *Sheffield Development Company, Inc. v. City of Glenn Heights* (NO. 02-0033), decided last year, land devaluation resulting from land use regulation does not necessarily constitute a taking. Impervious cover blurs the parameters for regulatory takings in the face of such a ruling. The Supreme Court also has said that the takings clause "…does not charge the government with guaranteeing the profitability of every piece of land subject to its authority."

The bill would impose a net site impervious ground cover limit, but it would not specify gross site limits, which include land within the 100-year floodplain and lands sloping 35 degrees or more when applying impervious ground cover limits. Gross site mainly is used for areas with flat terrain, whereas net site is for areas with irregular terrain. Converting the 45 percent net site limit to a gross site percent would be an imprecise calculation, and the bill does not specify how the takings provision would account for approximations. Undue compensation and litigation likely would result.

NOTES:

The committee substitute changed the bill as filed by adding a definition of impervious cover. The original bill would have deleted exemptions for groundwater and subsidence, but the substitute would replace them. The substitute added an exemption for the administration of the federal Coastal Zone Management Act and would impose deadlines on filing eminent domain suits and contested cases.

The House first considered HB 2833 on second reading on April 26, when the bill was recommitted on a point of order. The Land and Resource Management Committee reported the bill again, and House considered it on second reading again on May 2, when the House adopted amendments by Rep. R. Cook that would:

- allow a home rule municipality with a population over 1.1 million that receives more than 50 percent of its drinking water from a sole source aquifer (San Antonio) to impose impervious ground cover limitations of not less than 30 percent on single family and duplex development, including any portion of the property within a 100-year floodplain or that slopes more than 35 percent, without invoking a takings;
- add platting to the list of enforceable government actions in Sec. 2007.003; and
- exempt from the bill government actions concerning sexually oriented businesses, sale of fireworks, discharge of firearms, weeds or other unsanitary or unwholesome matter on public or private property, junked or abandoned vehicles, noise, alcohol, including hours of sale, or smoking in or on private or public property.

During second-reading consideration on May 2, the bill again was recommitted on a point of order. The committee substitute version of the bill reported from committee after being recommitted the second time and on today's calendar does not include the floor amendments that the House adopted on May 2.

The companion bill, SB 1647 by Staples, has been referred to the Senate Natural Resource Committee.