

TAKINGS IMPACT ASSESSMENT: WATER QUALITY PROTECTION RULES

This takings impact assessment is prepared using the series of questions in the Private Real Property Rights Preservation Act Guidelines (the “Guidelines”) promulgated by the Attorney General’s Office under Texas Government Code Chapter 2007 (the “Act”). The proposed action is Travis County’s adoption of amendments to water quality protection provisions to Chapter 82 of the Travis County Code.

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

Yes.

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

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

a. §2.18 of the Guidelines.

The procedural amendments and many of the substantive amendments impose no new burden on private real property. To the extent the amendments impose no new burdens, they will not result in a taking. Therefore, to the extent no new burden is imposed, the amendments are not subject to the requirement in §2007.043 to perform a takings impact assessment.

b. §2007.003(b)(4) of the Act.

The substantive and procedural amendments are exempt under §2007.003(b)(4) because they are actions reasonably taken to fulfill obligations mandated by state and federal law. First, the U.S. Environmental Protection Agency (“EPA”) and the Texas Commission on Environmental Quality (“TCEQ”), through the Texas Pollutant Discharge Elimination System (“TPDES”) program, have mandated that Travis County, as an operator of a small municipal separate storm sewer system (“MS4”), regulate development that drains storm water into the County’s MS4. In addition to mandating that Travis County require developers to implement construction phase and post-construction measures, EPA and TCEQ mandate that the County itself ensure ongoing maintenance of the MS4.

The County has authority under Section 573.002 of the Local Government Code to take any necessary or proper action to comply with the requirements of the stormwater permitting program under the national pollutant discharge elimination

system (Section 402, Federal Water Pollution Control Act (33 U.S.C. Section 1342)), including:

- (1) developing and implementing controls to reduce the discharge of pollutants from any conveyance or system of conveyance owned or operated by the county that is designed for collecting or conveying stormwater;
- (2) developing, implementing, and enforcing stormwater management guidelines, design criteria, or rules to reduce the discharge of pollutants into any conveyance or system of conveyance owned or operated by the county that is designed for collecting or conveying stormwater.

Subchapter J of Chapter 16 of the Water Code requires the County to regulate development to mitigate the effects of development on flooding and thus ensure that flood insurance is available to all residents of the County. Most of the substantive measures imposed by the amendments are recognized not only as effective, practical, and ordinary measures to control the discharge of pollutants in urban storm water runoff, but are also recognized by the Federal Emergency Management Agency (“FEMA”) as effective floodplain management techniques.

c. §2007.003(b)(5) of the Act.

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

d. §2007.003(b)(11)(A) of the Act.

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

e. §2007.003(b)(13) of the Act.

The substantive amendments are exempt under §2007.003(b)(13) because they respond to real and substantial threats to public health and safety, significantly advance that purpose, and do not impose a greater burden than is necessary. Travis County is amending the Travis County Code to implement requirements of the federal Clean Water Act and Chapter 26, Texas Water Code, which require the reduction and elimination of discharge of pollutants. Many pollutants discharged from urban area sources pose potentially negative impacts on human health in reservoirs and streams used for swimming and wading. Some pollutants can be biomagnified and concentrated in the food chain and ultimately consumed by persons who fish in Travis County waters. Urban storm water in Travis County

ultimately discharges into Lake Travis, Lake Austin, and the Colorado River downstream of Lady Bird Lake. From each of these water bodies, water is diverted for public drinking water use. The proposed amendments will safeguard the public health and safety by controlling and managing storm water discharges from the Travis County MS4.

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

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

As for the substantive provisions in the amendments, most of these requirements already exist in the City of Austin and in the City of Austin's extra-territorial jurisdiction ("ETJ"), or are recognized as technical guidelines established for this specific geographical area and local hydrologic conditions. In particular, on February 4, 2014, the Travis County Commissioners Court adopted water quality protection provisions into Title 30, Austin/Travis County Subdivisions. The proposed amendments to Chapter 82 would make the standards and procedures in Chapter 82 the same or similar to the 2014 amendments to Title 30.

Some of the proposed amendments are intended to provide more regulatory flexibility and better operational compliance, and some of them are intended to provide greater protection for water quality. In addition, some of the proposed changes are necessary in order to implement State of Texas requirements regarding small municipal separate storm sewer system ("MS4") operators.

A material new burden is created to the extent that certain post-construction water quality control requirements are applied in areas where the regulations of the LCRA, the City of Austin, and other municipalities do not currently . However, the burden is not a severe one because requirements for permanent water quality controls are common in much of Travis County, required in general by TCEQ requirements, and have not impaired the economic viability of development of private real property.

The proposed amendments require that setback areas for critical environmental features and waterways be recorded in the Official Public Records of Travis County, Texas.

With respect to setbacks from critical environmental features, the proposed amendments:

1. require the owner to maintain the critical environmental feature in accordance with the City of Austin Environmental Criteria Manual;
2. require the owner to install perimeter fencing; and
3. allow the owner to install certain innovative water quality controls within 50 feet from the edge of the critical environmental feature.

With respect to setbacks from waterways in an eastern watershed, the proposed amendments:

1. increase the setback to from 300 to 400 feet for the Colorado River downstream from Lady Bird Lake;
2. allow a reduction of the setback boundary under some circumstances if the overall surface area of setback area is not reduced; and
3. allow certain innovate permanent water controls under some circumstances

Depending on site-specific facts for a given property, these setback requirements may result in either more land within a setback or less. Travis County's setback requirements impose a new burden, but it is minimal. The stream setbacks are based on and largely comprise the 100 year floodplain. Travis County's existing regulations already require that this floodplain be dedicated as a drainage easement, which severely restricts the amount of development that can occur there. Since the setbacks consist largely of floodplain, the new burdens imposed by the stream buffers do not extend to a very large area.

With regard to the environmental feature buffers, a material new burden is created. The extent of the burden from these amendments is minimal and will depend on how many environmental features are present on a given tract of land. Again, however, the burden is not a severe one because environmental feature buffers are common in much of Travis County and have not impaired the economic viability of development of private real property.

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

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

Some of these amendments are proposed as a way to comply with the Travis County MS4 permit issued by the TCEQ. The permit specifies that Travis County must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the MS4 from construction projects and to address storm

water runoff from new development and re-development. The program must include the development and implementation of, at a minimum, an ordinance or regulatory mechanism to require erosion and sediment controls and controls on post-construction runoff. Additionally, the permit requires an ordinance or other regulatory mechanism be utilized to prohibit and eliminate illicit discharges.

The purpose of the proposed action is to amend Travis County's development regulations to protect surface and ground water from the effects of development, to mitigate the effects of development on flooding, and to make Travis County's process for review and approval of subdivisions more effective and efficient. Also, the purpose of the proposed amendments is to provide the regulated community and the public a consolidated set of environmental quality requirements that apply to applications for Travis County development permits, preliminary plans, plats, and construction plans. The proposed amendments include requirements for the processing of the environmental review of applications as well as substantive, minimum environmental technical standards and guidelines that can be approved during the application process. The proposed amendments include requirements that will control, reduce, and eliminate the discharge of pollutants into the Travis County storm sewer system and water in the State through the proper management of storm water and drainage while achieving optimal management of floodplains to prevent loss of property and human life. In addition, the proposed amendments set forth prohibitions and standards that will eliminate the discharge of unauthorized waste or illicit discharges into the Travis County storm sewer system and water in the State.

a. Substantive Amendments

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

1. Water Quality Measures for Construction Activities.

It is clear that storm water runoff from construction sites can negatively affect water quality in receiving water bodies. Moreover, the resulting sedimentation can inhibit the ability of those streams to convey storm water, resulting in increased flooding. Enabling County staff to enforce water quality requirements will substantially reduce the likelihood of future occurrences of storm water pollution from construction sites.

2. Setbacks.

The amendments would revise existing critical environmental feature and waterway setback requirements and in eastern watersheds of Travis County, potentially limiting development around streams and environmentally valuable features. Creating areas where storm water flows across undisturbed natural ground before entering and environmentally valuable features allows the storm water to be slowed and filtered, reduces the peak discharge flows, and prevents pollutants from contaminating these features. Thus, setbacks are a commonly used measure for protecting water quality and the environment. Moreover, FEMA recognizes setbacks as a measure that mitigates flooding in streams.

b. Procedural Amendments.

The amendments make certain changes to how Travis County processes and reviews applications for development approvals. The County has limited staff resources to perform that important function. The purpose of that function is to protect the general citizenry, other land owners, and the purchasers of subdivided land from the negative effects of poorly designed or constructed subdivisions. In recent years, development issues have become more complex. Both citizens of the County and state and federal agencies are placing greater demands on the County for a more effective, efficient, and thorough development review process. The County's processes need to be updated to address these issues. The procedural amendments require that an applicant submit environmental documentation to Travis County with a preliminary plan, final plat, construction plan, or development permit application. The procedural amendments also require the processing of a Permanent Water Quality Control ("WQC") Permit application and fee for each post-construction structure that is approved during the development process. To implement a TCEQ requirement, the proposed amendments require that a property owner file a proposed permanent water quality control maintenance plan with the Travis County Clerk's Office after the plan has been approved by the County Executive of the Travis County Transportation and Natural Resources Department or his designee. The Permanent WQC Permit will ensure each responsible party operates and maintains the structure in accordance with the approved design and standards.

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

Even if the amendments are not exempt, they do not constitute a taking. Adoption of the amendments does not, in and of itself, eliminate all economic uses of any private real property. Whether application of the amendments to an individual development has that result can be determined only when the regulations are applied to the land as part of the development review process. However, it is highly unlikely that they will result in a taking. Clearly, the amendments are not a per se taking or denial of a fundamental attribute of ownership. First, the amendments do not involve any sort of physical invasion of or limitation on title to private real property. Current County, TCEQ, LCRA, the City of Austin, and other municipal regulations basically already require land

owners to construct storm water control facilities for which land owners usually dedicate drainage easements. Thus, any new burden created by the amendments will be minimal. If such a dedication is required for a development, it will be roughly proportional to the impact of that development because the structure will only be required to have capacity to accommodate drainage for which that development is legally responsible.

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

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

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

An alternative to the amendments would be to not adopt the proposed amendments. However, this alternative would put the County at risk of violating federal and state mandates and the clear responsibilities of a MS4 as stated in the MS4 permit and would result in an inadequate level of water quality and flood protection. The standards contained in the amendments reflect a balancing of, on

the one hand, the interests of owners of private real property who want to develop their land and, on the other hand, the public and other land owners whose interests could be negatively affected by that development.