

## Regulatory Takings Impact Assessment

### Updating of the Wilson County Development Standards

## **TAKINGS IMPACT ASSESSMENT**

### Proposed Development Regulations -Wilson County, Texas

## **PURPOSE AND INTENT**

Wilson County, Texas, acting through the Wilson County Commissioners Court (hereafter County") is proposing to amend certain existing development regulations and to adopt certain new development regulations (hereafter "Proposed Regulations"). The Proposed Regulations will include revisions to the existing development regulations.

The Proposed Regulations will include new regulations in the following general subject areas:

- Standardized administrative procedures and applications processing
- Delegations of authority to County Staff
- Additional water availability demonstration requirements
- Additional land use restrictions authorized under Texas State Statutes, including the Texas Local Government Code, the Texas Water Code and the Texas Transportation Code.

This Takings Impact Assessment (hereafter "TIA") is intended to satisfy the statutory requirements of the Texas Private Real Property Rights Preservation Act (the "Act" or PRPRPA) in regard to the Proposed Regulations.

## **REGULATORY BACKGROUND**

### **Governmental Takings In General**

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

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

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

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

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

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

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

### Definition of A Regulatory Taking

The following information is taken from the regulatory background on the issue of Regulatory

Takings contained in a guidance document prepared by the State of Texas Office of the Attorney General (OAG). The Act [specifically TGC §2007.002(5)] defines a "taking" as follows:

- (a) *a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article 1, Texas Constitution; or*
- (b) *a governmental action that:*
  - a. *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*
  - b. *is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.*

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

TGC §2007.003(a) provides that the Act applies only to the following governmental actions:

- (1) *the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure;*
- (2) *an action that imposes a physical invasion or requires a dedication or exaction of private real property;*
- (3) *an action by a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality; and*
- (4) *enforcement of a governmental action listed in Subdivisions (1)-(3), whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.*

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

## Governmental Actions Exempted From the Act

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

- (a) an action by a municipality except as provided by subsection (a)(3);*
- (b) a lawful forfeiture or seizure of contraband as defined by Article 59. 01, Code of Criminal Procedure;*
- (c) a lawful seizure of property as evidence of a crime or violation of law;*
- (d) an action, including an action of a political subdivision, that is reasonably taken to fulfill an obligation mandated by federal law or an action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law;*
- (e) the discontinuance or modification of a program or regulation that provides a unilateral expectation that does not rise to the level of a recognized interest in private real property;*
- (f) an action taken to prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state;*
- (g) 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;*
- (h) a formal exercise of the power of eminent domain;*
- (i) an action taken under a state mandate to prevent waste of oil and gas, protect correlative rights of owners of interests in oil or gas, or prevent pollution related to oil and gas activities;*
- (j) a rule or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;*
- (k) an action taken by a political subdivision:*
  - a. to regulate construction in an area designated under law as flood plain;*
  - b. to regulate on-site sewage facilities;*
  - c. under the political subdivision's statutory authority to prevent waste or protect rights of owners of interest in groundwater; or*
  - d. to prevent subsidence;*
- (l) the appraisal of property for purposes of ad valorem taxation;*
- (m) an action that:*
  - a. is taken in response to a real and substantial threat to public health and safety ;*

- b. *is designed to significantly advance the health and safety purpose; and*
- c. *does not impose a greater burden than is necessary to achieve the health and safety purpose; or*

(n) *an action or rulemaking undertaken by the Public Utility Commission of Texas to order or require the location or placement of telecommunications equipment owned by another party on the premises of a certificated local exchange company.*

Based on the types of actions anticipated under the Proposed Regulations, Wilson County believes that while certain actions included in the Proposed Regulations are exempt, other actions may not be exempt and will require the County to prepare a TIA.

### Lawsuit to Invalidate a Governmental Taking

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

### Requirement to Prepare A Takings Impact Assessment (TIA)

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

## **EVALUATION PROCESS**

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

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

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

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

*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.*

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

Based on the County's review of the Act, certain of the actions included in the Proposed Regulations qualify as Covered Governmental Actions while others do not. As outlined above, the Proposed Regulations do not propose any "physical taking" of any particular property, but certain actions are required to be evaluated as a "regulatory taking". Those actions determined to be Covered Governmental Actions will be 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 No PRPI Determination should be made. No further compliance with the Act is necessary if a No PRPI Determinations 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 No PRPI Determinations.*
- (2) If the answer to Question 3 is "Yes": A TIA is required and the governmental entity must undertake evaluation of the proposed Governmental action on private real property rights.*

Based on the County's review of the Act, certain of the actions included in the Proposed Regulations may result in the imposition of a burden on "Private Real Property" as that term is defined in the Act. Those actions determined to impose a burden on "Private Real Property" will be further evaluated using subsequent questions and through the preparation of a TIA.

*Question 4. What is the Specific Purpose of the Proposed Covered Governmental Action? The TIA must clearly show how the proposed governmental action furthers its stated purpose. Thus, it is important that a governmental entity clearly state the purpose of its proposed action in the first place, and whether and how the proposed action substantially advances its stated purpose.*

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

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

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

The actions determined to be Covered Governmental Actions that also impose a burden on "Private Real Property" as that term is defined in the Act have been proposed to accomplish several different purposes. Each of those actions determined to be both a Covered Governmental Action and which impose a burden on "Private Real Property" will be further evaluated using Questions 4 through 7 through in the TIA. The Office of Attorney General guidance also provides the following sub-questions for items determined to be Covered Governmental Actions:

*(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? See the Act, §2007.002(5)(B).*

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

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

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

For each of the Covered Governmental Actions which also impose a burden on "Private Real Property", an alternatives evaluation will be provided.

## **SUMMARY OF THE PROPOSED REGULATIONS**

The following items provide a summary of the major actions from the Proposed Regulations. Based on the regulatory background information and the nature of the proposed actions, each major proposed action has been assigned to one of three categories, depending on whether it was determined to be a "Covered Governmental Action" and whether it places a "burden" on property, as those terms are defined under the Act. An-explanation of each action and the rationale for its inclusion in its selected category is provided below.

## **Actions in the Proposed Regulations Determined to Not Be "Covered Governmental Actions" ("No" to OAG Question 2)**

### Additional Water and Wastewater Availability Demonstration Requirements

The County's existing subdivision regulations contain certain requirements for demonstrating water and wastewater availability. Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code (TLGC), Chapter 232 and authority granted to the County under the Texas Water Code (TWC), Chapters 26 and 35 the County is proposing additional requirements for demonstrating water and wastewater availability for certain developments. The proposed actions are outlined in Chapter 715 of the Proposed Regulations. Specifically the County is proposing:

- Providing that the availability of water, and waste water treatment, be considered in calculating the permissible density of residential lots

The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(11)(C) due to the County's intent to protect the rights of the owners of interest in groundwater and in accordance with TGC §2007.003(b)(13) due to the County's intent to protect public health and safety by establishing minimum requirements for the provision of drinking water and the proper management of wastewater. Based on these exemptions, these proposed actions are not subject to the requirement to prepare a TIA.

### New Public Sewage Treatment Construction and Performance Bond Requirement

The County's existing subdivision regulations allow for construction of a public sewage plant to treat sewage. Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code (TLGC), Chapter 232 and authority granted to the County under the Texas Water Code (TWC), Chapters 26 and 35 the County is proposing new rules require that the construction, and performance, of such a plant be secured by a bond, and engineering studies. The proposed actions are outlined in V(E) of the Proposed Regulations. Specifically the County is proposing:

- Providing that the design of the sewage treatment facility be made by an engineer.
- Providing that the design of the sewage treatment facility be approved by the Texas Commission on Environmental Quality, or other State agency charged with regulating public sewage facilities
- Providing that a bond be posted to insure the construction, and proper operation, of the public sewage facility.
- Providing that the public sewage treatment facility must be owned by an entity capable of levying sufficient fees to keep it in operation.
- Providing that the developer pay any professional fees incurred by the County with regard to the public sewage facility.

The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(11)(C) due to the County's intent to protect the rights of the owners of interest in groundwater and in accordance with TGC §2007.003(b)(13) due to the County's intent to protect public health and safety by establishing minimum requirements for the provision of drinking water and the proper management of wastewater. Based on these exemptions, these proposed actions are not subject to the requirement to prepare a TIA.

#### Regulation of Certain Private Roadways

Under the County's authority to regulate the subdivision of property provided in TLGC Chapter 232, the County is proposing new requirements for regulating certain private roadways in gated subdivisions. The proposed part VII(O) of the Proposed Regulations. The proposed actions are intended to ensure unrestricted access to all areas of new subdivisions by emergency vehicles. The County is proposing these actions specifically to address situations where width restrictions, obstructions, and roadway conditions may prevent timely emergency response activities. The County believes that delays in timely emergency response caused by impassable private roadways constitute a "grave and immediate threat" to life and property. Based on this belief the County further believes that the proposed actions were developed in "good faith" to prevent delays in timely emergency response. As such, the proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(7) due to the County's intent to prevent grave and immediate threats to life or property. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

#### Regulation of Gated Communities

Under the County's authority to regulate access controls to certain developments under TLGC Chapter 352, the County is proposing new requirements for regulating vehicular gates to gated communities. The proposed actions are in part VII(O) of the Proposed Regulations specifically in Subchapter 6. The proposed actions mirror the requirements of the TLGC Chapter 352, Subchapter E, and are intended to ensure unrestricted access to these developments by emergency vehicles. The County is proposing this action specifically to address situations where a closed, locked gate may prevent timely emergency response activities. The County believes that delays in timely emergency response caused by impassable access control gates constitute a "grave and immediate threat" to life and property. Based on this belief the County further believes that the proposed actions were developed in "good faith" to prevent delays in timely emergency response. As such, the proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(7), due to the County's intent to prevent grave and immediate threats to life or property. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA

#### Modification of Minimum Roadway Right-of-Way Widths

The County's existing subdivision regulations contain certain requirements for roadway right-of-way widths. Under the County's authority to regulate the subdivision of property provided in TLGC Chapter 232, the County is proposing to amend certain requirements for the provision of minimum right-of-way widths for new Public Roadways. The proposed actions are found in part VII(A) the Proposed Regulations. The proposed actions are intended to ensure that new roadways provide

adequate right-of-way to comply with the latest engineering design standards for safe travel over public roadways. The County believes that adequate roadway right-of-way widths may contribute to a real and substantial threat to public safety, and is proposing the changes to the right-of-way widths to improve public safety, but is limiting those changes to only those necessary to accomplish the public safety purpose. Based on this belief: the County further believes that the proposed actions do not impose a burden greater than that necessary to accomplish this purpose. As such, the proposed actions were determined to be exempted from the Act in accordance with TGC§2007.003(b)(13) due to the County's intent to address public safety concerns. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

#### Modifications to the Flood Damage Prevention Standards

Under the County's authority under the Texas Water Code, Chapter 1622, the County is proposing additional requirements for regulating development in flood hazard areas. The proposed actions are part V(B) of the Proposed Regulations.

- Requiring the developer to submit a detailed drainage analysis showing the 100 flood event, floodways and base elevations
- Requiring the developer to submit an engineered storm water drainage and management plan, that does not change the down stream peak 100 year storm water discharge rate.
- Requiring a developer to provide at least one entrance to a subdivision that either does not pass over the 100 year flood plain, or has drainage structures designed to keep the road passable during a 100 year flood event.
- Requiring a developer to build drainage structures with the right of way of a public to road to prescribed standards.
- Requiring a developer to dedicate drainage easements as necessary to comply with all flood damage prevention standards.

The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(11)(A) due to their inclusion in the County's regulation of construction in floodplains, and §2007.003(b)(7) and §2007.003(b)(13). Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

#### Modifications to the On-Site Sewage Facility (OSSF) Standards

Under the County's authority under a cooperative delegation agreement under TWC Chapter 26 and the Texas Health and Safety Code (THSC), Chapter 366, the County is proposing additional requirements for regulating On-Site Sewage Facilities (OSSFs). The proposed actions are outlined in part V(E) of the Proposed Regulations. The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(11)(B) due to their inclusion in the County's regulation of On-Site Sewage Facilities. Based on this exemption, these proposed actions are not subject to the requirement to prepare a TIA.

### New Fire Suppression Requirements

Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code (TLGC), Chapter 232 the County is proposing new requirements for fire suppression, specifically:

- Requiring developers to install water storage tanks, for fire suppression, in new subdivisions not served a public water system rated for fire suppression.
- Requiring developers to install fire plugs, in new subdivisions served a public water system rated for fire suppression.

The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(7) and §2007.003(b)(7), due to the County's intent to protect public health and safety by establishing minimum requirements for the provision water for fire suppression in new subdivisions.

### New 100 Year Storm Event Passable Roads

Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code (TLGC), Chapter 232 the County is proposing new requirements for roads to be constructed in subdivisions, specifically:

- Requiring developers who build roads that cross the FEMA Special Flood Hazard Area (100 year storm event flood plain), to insure that at least one road to each lot is passable during a year storm event.

The proposed actions were determined to be exempted from the Act in accordance with TGC §2007.003(b)(7) and §2007.003(b)(7), due to the County's intent to protect public health and safety by establishing minimum requirements for the provision of roads to lots, allowing residents, and emergency services personnel, unimpeded access to lots, during a 100 year storm event.

### Incorporation by Reference of the Requirements of Other Jurisdictions

The County is proposing to incorporate by reference the current requirements of other governmental jurisdictions, including federal and state entities. This proposed action is outlined in several different locations within the Proposed Regulations. The purpose of the proposed action is to allow the County to notify the regulated community of the requirements of other jurisdictions, and where the County has information indicating that a particular action by a person may not be in compliance with the applicable requirements of another jurisdiction, to notify such other jurisdiction. The proposed action was determined to be exempted from the Act in accordance with TGC §2007.003(b)(4) due to the County's intent to include these items to comply with state and federal law. Based on these exemptions, the proposed action is not subject to the requirement to prepare a TIA.

## **Actions in the Proposed Regulations Determined to Not Place a Burden on Property ("No" to OAG Question 3)**

### Standardization of Administrative Procedures, Applications Processing, Public Notice Procedures and Development Agreements

Under the County's authority to regulate various aspects of land development as authorized under various chapters of the Texas Local Government Code, the County is proposing changes and additions to the administrative procedures, applications processing procedures, public notice procedures, utilized by the County in the regulation of development within the County. While these proposed actions affect the information to be prepared and submitted to the County, and how the County will apply the Proposed Regulations, the administrative procedures themselves do not create a "burden" per se on "Private Real Property", as that term is defined in the Act, being regulated by the Proposed Regulations. As outlined in the guidance from the OAG:

*TIA's must concentrate on the truly significant real property issues. No need exists to amass needless detail and meaningless data. The public is entitled to governmental conformance with legislative will, not a mass of unnecessary paperwork.*

The proposed actions regarding the administrative procedures and applications processing were determined to not place a direct burden on "Private Real Property" and qualify for a "No Private Real Property Impact" Determination (hereafter "No PRPI Determination") as provided in the OAG Guidelines, and would not be subject to the requirement to prepare a TIA.

## **Actions in the Proposed Regulations Determined to Be "Covered Governmental Actions" and to Place a "Burden" on "Private Real Property"**

Based on the evaluation conducted by the County the following list of proposed actions may qualify as "Covered Governmental Actions" and place a "burden" on Private Real Property. The further evaluation of these items is presented in the following section:

Attachment 17 Affidavit Claiming Exemption from Platting Requirements

Denial of Driveway Permit to Lot Created in Violation of Development Rules

Pre-payment of ad-valorem taxes on lands, such as roads, to be conveyed to, and accepted by, the County

Guarantee against defective work of roads, to be conveyed to, and accepted by, the County

Regulation of Private Roads and Drainage Structures in a Gated Community

Information Requirements for Plats

Requirement that Drainage Easements Benefit Wilson County

Requirement of Setback Lines

Requirement of Roads Being Built to Certain Standards

Commonly Used Property, or Drainage Structures, Forbidden Without Property Owners

Association With Mandatory Dues

Ban on Lots Smaller than State Minimum

Extra Platting Requirements for Small Subdivision Lots

## Requirement of Utility Easements

### **TAKINGS IMPACT ASSESSMENT FOR THE QUALIFYING ACTIONS**

#### **Impacts of Development Regulation In General**

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

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

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

*"Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements generally without creating a compensatory 'taking.' Government may also limit the use of real property through land use planning, zoning ordinances, setback requirements, and environmental regulations."*

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

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

The following proposed actions have been determined to be "Covered Governmental Actions" that may place a "burden" on Private Real Property. Each of these proposed actions has been evaluated using the additional questions in OAG Guidelines (specifically Questions 4 through 8, and where necessary, the sub-questions).

## Attachment 17 Affidavit Claiming Exemption from Platting Requirements

Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code, Chapter 232 the County is proposing to implement requirements that a person subdividing land, who claims that the subdivision is exempt from regulation because the lots otherwise meet minimum standards, and all lots are all being conveyed to family members. TLGC §232.0015(e). The County is relying on TLGC §232.001, which authorizes Counties to regulate subdivisions. While TLGC §232.0015 does provide for a number of situations in which the County may not require that a plat be prepared, it does not prevent the County from creating an administrative process to verify that a developer claiming an exemption from the platting requirements is in fact entitled to that exemption.

These proposed regulations actions are found in III, and Attachment 17, which is a fill in the blank Affidavit, which recites facts demonstrating that the developer is in fact exempt from platting requirements.

### *OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that developers claiming that their subdivision is exempt from platting requirements are correct. Unscrupulous developers may attempt to circumvent the County's requirements by selling property to unsuspecting buyers while claiming to fall under an exemption. Misinformed developers may unwittingly circumvent the County's requirements by selling property to buyers, in the erroneous belief that the sale falls under an exemption. In the absence this affidavit requirement the County, faced with facially illegal subdivisions, must launch an investigation into the subdivision, and determine whether the subdivision falls within an exemption. The affidavit requirement raises the punishment bar for the unscrupulous, as filing a false affidavit is a State Jail Felony, protects the misinformed, as the process of filling out the affidavit will educate them about the exemptions under TLGC §232.0015, saves the County the trouble and expense of an investigation, and saves the landowner the aggravation of being, even if only briefly, the target of an investigation.

### *OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property by preventing a property owner from subdividing real property until the Affidavit has been completed and filed.

### *OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Serving as a deterrent to unscrupulous developers by forcing them to either comply with the law, or falsely swear that their subdivision is exempt from platting requirements.

- Educates unknowing would be developers about what is, and what is not, exempt from platting requirements.
- Provides a simple way for those who are exempt from the platting requirements to demonstrate that exemption.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

*OAG Sub-question 2-Does the Proposed CGA Require a Property Owner to Dedicate a Portion o/Private Real Property or Grant an Easement?*

No.

*OAG Sub-question 3-Does the Proposed CGA Deprive the Owner of all Economically Viable Uses o f the Property?*

No. The CGA merely requires a developer who claims to be exempt form the platting requirements to spell out, and swear to, that exemption.

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

No. The CGA merely requires a developer who claims to be exempt form the platting requirements to spell out, and swear to, that exemption.

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

No. The CGA merely requires a developer who claims to be exempt form the platting requirements to spell out, and swear to, that exemption..

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

No. The CGA merely requires a developer who claims to be exempt form the platting requirements to spell out, and swear to, that exemption.

*OAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority.

The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of Requiring Utility Providers to Obtain Approval Prior to Furnishing Utility Service to a Regulated Development does not constitute a Regulatory Taking.

#### Denial of Driveway Permit to Lot Created in Violation of Development Rules

Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code, Chapter 232 the County is proposing to deny a permit to establish a driveway, onto a County road, from any lot created in violation of these rules. The County is relying on TLGC §232.001, which authorizes Counties to regulate subdivisions, and the Texas Transportation Code.

#### *OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that developers are not subdividing property in violation of the development rules.

#### *OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property by preventing a property owner, of a lot has been created in violation of the development rules, from establishing a driveway one a County Road.

#### *OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Serving as a deterrent to unscrupulous developers by forcing them to comply with the law, or be sued by a purchaser who is denied a driveway permit.
- Educates unknowing would be developers about what is, and what is not, exempt from platting requirements.
- Provides a simple way for those who are exempt from the platting requirements to demonstrate that exemption.

#### *OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

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

No.

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

In an extreme case, the proposed CGA could result in a property owner being deprived of all economically viable use of the property in an instance where an unscrupulous developer sold that property owner certain real property from a non-compliant development. If the unscrupulous developer were to go bankrupt without having provided adequate financial assurance, the property owner might be unable to have utilities furnished to property intended for a home site. This would have the effect of depriving that owner of the ability to use that property for a home site, thus depriving him of an important economic use of the property as a home site. However, for a regulatory taking as defined under TLGC §2007.002(5)(B)(ii), to exist, the CGA would need to be the "producing cause". In this instance, the producing cause of the property owner being deprived of the economically viable use of his property would be the actions of the unscrupulous developer and not the CGA of the County. Based on this definition, the proposed CGA would not constitute a regulatory taking.

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

As outlined in the response to OAG Sub-question 3, the proposed CGA could result in a significant impact to a property owner's economic interest. However, the proposed CGA would not be the "producing cause", and would therefore not constitute a regulatory taking.

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

As outlined in the response to OAG Sub-question 3, the proposed CGA could result in a significant impact to a property owner's economic interest, including a reduction of 25% or more of the market value of the affected Private Real Property. However, the CGA would not be the "producing cause", and would therefore not constitute a regulatory taking.

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

In an extreme case, the proposed CGA could result in a property owner being denied the right to have utilities extended to his property, which would be considered a fundamental attribute to ownership. However, as outlined in the response to OAG'S sub-questions 3 through 5, the proposed CGA would not be the "producing cause", and would therefore not constitute a regulatory taking.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of denying driveway permits to lots created in violation of the development rules does not constitute a Regulatory Taking.

Pre-payment of ad-valorem taxes on lands, such as roads, to be conveyed to, and accepted by, the County

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapters 232, and 262, and Texas Transportation Code, Chapter 251, the County is proposing to implement requirements that a person who conveys real property to the County pre-pay ad-valorem taxes to become due on that property. The County is relying on TLGC §232.001, which authorizes Counties to regulate subdivisions, TLGC Chapter 262, which authorizes Counties to acquire right of ways, and Texas Transportation Code, Chapter 251, which authorizes the County to create and maintain roads.

Specifically the proposed regulation requires that the developer conveying land to the County also convey to the County a sum of money that will be used to pay the ad-valorem taxes that become due on that land, the year after the County accepts the land. For example, if a developer conveys 3 acres of roadway to the County on July 1<sup>st</sup>, the developer must also tender to the County money which the County may use to pay the ad-valorem taxes that become due on those 3 acres the next January, for the part of the year that the County did not own the land.

These proposed regulations actions are found in V(G).

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that the County does not have lose out on ad-valorem taxes due to the County form the period of time before the County owned the land, and to make sure that the County does not have to pay ad-valorem taxes to other taxing entities.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property by preventing a property owner from conveying a road right of way to the County without prepaying the ad-valorem taxes.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Prevents the County from losing ad-valorem taxes, on lands conveyed to the County, for the portion of the year that the lands were owned by the developer.
- Prevents the County from having to pay ad-valorem taxes, on lands conveyed to the County, for the portion of the year that the lands were owned by the developer, to other taxing entities, such as a school district.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

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

No.

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

No.

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

No. .

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

No.

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

No.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers, who convey land to the County, to prepay ad-valorem taxes, does not constitute a taking.

Guarantee against defective work of roads, to be conveyed to, and accepted by, the County

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapters 232, and 262, and Texas Transportation Code, Chapter 251, the County is proposing to implement requirements that a person who constructs, and conveys to the County, a public road, guarantee such roads. The County is relying on TLGC §232.001, which authorizes Counties to regulate subdivisions, TLGC Chapter 262, which authorizes Counties to acquire right of ways, and Texas Transportation Code, Chapter 251, which authorizes the County to create and maintain roads.

Specifically the proposed regulation requires that the developer conveying a new public road, to the County, guarantee such roads against defects in materials, workmanship and design, for a period of two years.

These proposed regulations are found in VII(N).

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that the developer, not the County, at least for the first two years, bears the burden of defects in the roads designed, and constructed by the developer.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property by requiring a property owner to guarantee, and post a bond to make good such guarantee, defects in materials, workmanship and design, in a road built by the developer and conveyed to the County, for a period of two years.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Gives the developer a strong incentive to properly design, and construct, roads, as the developer will, for two years, bear the burden of putting the road right, if it becomes apparent that the developer, or its agents, cut corners and built a sub-standard road.
- Shifts the burden of unintentional, or unforeseen, problems with newly constructed public roads from the County, to the developer.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

*OAG Sub-question 2-Does the Proposed CGA Require a Property Owner to Dedicate a Portion o/Private Real Property or Grant an Easement?*

No.

*OAG Sub-question 3-Does the Proposed CGA Deprive the Owner of all Economically Viable Uses o f the Property?*

No.

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

No.

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

No.

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

No.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers, conveying a new public road, to the County, guarantee such roads against defects in materials, workmanship and design, for a period of two years, does not constitute a taking.

#### Regulation of Private Roads and Drainage Structures in a Gated Community

As stated above, the County does not believe that its proposed actions regarding private roads, and drainage structures, in gated communities are a CGA. Even if the proposed regulations are a CGA, they are not a taking.

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapter 232, the County is proposing to implement requirements that a developer, who creates private roads, and drainage structures, in a gated community, place a notice on the plat that the roads are not public and will not be maintained by the County, that the developer construct the roads, and drainage structures, to the same standards that would apply to them if they were to be conveyed to the County, and that the developer must guarantee the proper construction of such roads, and drainage structures, by conveying to the County a 1 foot non-access easement around the private roads, until such time as they have been constructed to County standards.

These proposed regulations actions are found in VII(O).

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that the private roads, and drainage structures, meet County health and safety standards, to make sure that developers do not try to evade the development rules by creating sub-standard roads, and drainage structures, leaving the County with property owners petitioning the County to fix their crumbling private roads, and drainage structures, to make sure that the development has a plan in place to keep the private roads, and drainage structures, maintained, and to make sure that the developer actually builds the roads, and drainage structures, after approval of the plat.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property by preventing a developer from constructing a sub-standard private roads, and drainage structures, and may create a burden on Private Real Property by requiring a home-owners association, with mandatory dues, to keep the private road maintained.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Prevents a developer from endangering the health and safety of future land owners, and emergency services personnel, by building sub-standard road roads, and drainage structures.
- Prevents a developer from building sub-standard roads, and drainage structures, in a subdivision, under the guise of being private roads.
- Prevents the County from facing a future clamor from property owners, on a substandard private road, whose road, and/or drainage structures, were either sub-standard from the beginning, or have deteriorated due to lack of maintenance.
- Prevents a developer from deceptively securing approval of a plat of a development with private roads, and drainage structures, then failing to actually construct those private roads, and drainage structures, as promised.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

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

Yes. The developer must grant a non-access easement, to the County, around the proposed private roads, until such time as the private roads, and drainage structures, are constructed to County standards. If the developer failed to ever construct the private road, and fails to ever have the plat cancelled, such non-access easement might be permanent.

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

No.

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

No. The developer may always construct exactly the same roads, and drainage structures, in exactly the same manner, and dedicate it to the County.

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

No.

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

No. The ability to construct buildings on the property is not denied, it is merely restricted, in so far as the non-access easement exists, until such time as the developer either builds the private roads, and drainage structures, it has agreed to build, to induce the County to approve a plat, or has the plat cancelled.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority, and not allow private roads in subdivisions. The County believes that the proposed action protects the public interest, while allowing developers flexibility, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers to build private roads to County standards, to create a property owners association with mandatory dues to keep the private roads maintained, and requiring a non-access easement until roads, and drainage structures, shown on the plat are constructed, does not constitute a taking.

#### Information Requirements for Plats

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapter 232, the County is proposing to implement requirements that developers place a number of items of information the plat. These items are described on Attachment 5.

#### *OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that the plat discloses to the County information required by the Development Rules, and discloses to the public items of interest, such the identity of school districts, existence of drainage structures, and existence of property owners associations.

#### *OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property by preventing a developer from constructing a subdivision without creating a conforming plat.

#### *OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Allows the County to see information it requires to evaluate a proposed subdivision in a standardized, concise, display.
- Allows the developer to know in advance the best way to disclose to the County the information required.
- Protects the public from purchasing lots without knowing in advance important information, such as the school district, existence of a property owners association, existence of drainage easements, setback lines, and the like.

#### *OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

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

No.

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

No.

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

No. A prudent developer would want to know the information the County requires, and want to make the required disclosures, to protect itself from lawsuits by unhappy purchasers.

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

No.

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

No.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers place various items of information, and disclosures, on the Plat, does not constitute a taking.

#### Requirement that Drainage Easements Benefit Wilson County

As stated above, the County does not believe that its proposed actions regarding drainage easements, and specifically making a Wilson County a specific beneficiary of drainage easements, is a CGA. Even if the proposed regulations are a CGA, they are not a taking.

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapter 232, the County is proposing to implement requirements that a developer, who creates a subdivision that requires a certain areas to not be developed, or tampered with, to make the drainage plan work, burden those areas with a drainage easement that benefits Wilson County.

These proposed regulations actions are found in V(B)(10).

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that lands utilized by the developer, as a part of a compliant drainage plan, and not given over to some other use that interferes with the drainage plan. Specifically, making Wilson County a beneficiary of the drainage easement will allow it to enter the easement, to keep it functioning properly, and to enforce the easement in court.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property, if a developer chooses to develop a tract of land in a way that requires a drainage easement.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Prevents a developer, or lot owner, from negating the requirement of an approved drainage plan, by interfering with the drainage plan after approval of the plat.
- Protects lot owners by allowing the County to use a drainage easement to keep water draining off a development as planned.
- Protects lot owners by allowing the County to go to court, to stop interference with a drainage easement, to keep water draining off a development as planned.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

Maybe. Interference with a drainage easement, caused by either man, or nature, could cause the County to enter the drainage easement to restore planned drainage of water off of the development.

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

Yes. The developer must grant a drainage easement, if the developer chooses to develop a tract in such a way that a drainage easement is required to comply with County standards for water on road right-of-ways, and water leaving a development.

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

No.

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

A determination as to whether the proposed CGA has a significant impact on the landowner's economic interest must be made on a case-by-case basis. In an extreme case, the proposed CGA could result in a significant impact to the landowner's economic interest in an instance where substantially all of the affected property was restricted. However, in the vast majority of instances, only a portion of the property, if any, will be affected by the drainage easement, and the requirement would not be expected to have a significant adverse impact on the landowner's economic interest. Even if it does, in some instance, the producing cause of that significant impact is not the CGA, but the fact that the developer has chosen to develop a tract in a way that requires a drainage easement to meet drainage requirements. In the rare instances where the proposed setbacks might otherwise have a significant impact on the landowner's economic interests, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking.

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

Determinations as to whether the proposed CGA decreases the market value of affected Private Real Property must be made on a case-by-case basis. However, given the considerations outlined in the responses to OAG Sub-questions 3 and 4, the circumstances where the proposed drainage easements would have a significant adverse impact would be relatively rare. The need for a drainage easement indicates a tract of land that, while perhaps not in the FEMA Special Flood Hazard Area, is prone to periodic inundations with rainwater runoff. Formalizing that fact, by delineating a drainage easement, does not change the fact that no prudent landowner will construct significant improvements on land prone to periodic inundations with rainwater runoff, and cannot, under existing civil law, change the natural runoff of that rain water to the detriment of neighbors. In the rare instances where the proposed setbacks might otherwise decrease the market value of the Private Real Property by 25% or more, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking. Given these allowances, the proposed CGA will not generally result in the decrease in market value of any specific Private Real Property by 25% or more.

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

No. While the ability to construct improvements on land prone to periodic inundations with rainwater runoff may be an attribute of ownership, it is hardly a fundamental one.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority, and allow developers, or lot owners, to change the approved drainage plan of a development, in a manner adverse to neighboring land owners, down stream land owners, and County roads. The County believes that the proposed action protects the public interest, and that failing to implement

the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers to create drainage easements, and allow the County to benefit from them, does not constitute a taking.

#### Requirement of Setback Lines

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapter 232, and provide for setback requirements, under TLGC, Chapter 233, the County is proposing to implement requirements that a developer, who creates a subdivision, impose set back lines of 25 feet along a public road, and 15 feet along each boundary of each lot.

#### *OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that improvements to lots are setback from County Roads, that utility easements are not encroached on by developers, or landowners, and that improvements are not constructed so closely together, on adjoining lots, that they constitute a fire hazard.

#### *OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA creates a burden on Private Real Property, by burdening the 25 feet of land nearest County Roads, and the 15 feet of land along each boundary line, with a set back.

#### *OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Prevents a developer, or lot owner, from interfering with County Roads, including interfering with back slope easements.
- Prevents a developer, or lot owner, from interfering utility easements along the boundary lines with other lots.
- Prevents a developer, or lot owner, from constructing improvements so near a property line as to endanger that property, through fire, collapse, or similar incident.
  
- Reducing the cost of obtaining future right-of-way for public roadway expansion projects by insuring that the area most likely to be required for expansion is not occupied by above-grade construction. In addition to the purchase price of the land, any above-grade structures present would increase the amount of compensation required for securing the expanded right-of-way.
  
- Providing an additional safety zone for traveling vehicles that may leave the roadway. This additional safety zone will reduce potential damage and harm to the vehicle and its occupants as well as to the property, fixtures and occupants adjacent to the roadway.

#### *OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

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

Yes. The developer must grant a negative easement, in the form of a setback line.

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

No.

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

A determination as to whether the proposed CGA has a significant impact on the landowner's economic interest must be made on a case-by-case basis. In an extreme case, the proposed CGA could result in a significant impact to the landowner's economic interest in an instance where substantially all of the affected property was restricted. However, in the vast majority of instances, only a portion of the property will be affected by the setback easement, and the requirement would not be expected to have a significant adverse impact on the landowner's economic interest. In the rare instances where the proposed setbacks might otherwise have a significant impact on the landowner's economic interests, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking.

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

Determinations as to whether the proposed CGA decreases the market value of affected Private Real Property must be made on a case-by-case basis. However, given the considerations outlined in the responses to OAG Sub-questions 3 and 4, the circumstances where the proposed set back easements would have a significant adverse impact would be relatively rare. In the rare instances where the proposed setbacks might otherwise decrease the market value of the Private Real Property by 25% or more, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking. Given these allowances, the proposed CGA will not generally result in the decrease in market value of any specific Private Real Property by 25% or more.

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

No. Minimum lot size requirements leave ample room for construction of improvements.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority, and allow public roads to be threatened, or interfered with, due construction in the setback from public roads. Further, the only alternative is to allow utility easements to be interfered with, and/or allow structures to be constructed so close to a property line as to endanger the adjoining property, by fire, collapse, or the like. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers to impose set back requirements does not constitute a taking.

Requirement of Roads Being Built to Certain Standards

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapter 232, and Texas Transportation Code, Chapter 251 the County is proposing to implement requirements that a developer, who creates a subdivision with public roads, build those roads to certain standards, set out in Article VII.

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that newly constructed County Roads are properly designed, and constructed, in a way that insures public safety and convenience, and in a way that makes them long lasting, with little maintenance.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA creates a burden on Private Real Property, by requiring a developer who wants to create new County Roads to do so according to a specific standard.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Provides safe, County Roads.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

Maybe. If the developer decides to develop in a way that includes the Construction of new, County Roads, then right of way must be dedicated to the County.

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

Maybe. If the developer decides to develop in a way that includes the Construction of new, County Roads, then right of way must be dedicated to the County.

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

No. The Developer may always not divide, or divide in a manner that does not require the construction of a new County Road.

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

A determination as to whether the proposed CGA has a significant impact on the landowner's economic interest must be made on a case-by-case basis. In an extreme case, the proposed CGA could result in a significant impact to the landowner's economic interest. However, in the vast majority of instances, the increase in value to the developers property, brought about by converting some portion of that property to into a County Road, would more than offset the cost of the new County Roads, and the requirement that those roads be built to standard would not be expected to have a significant adverse impact on the landowner's economic interest. In the rare instances where the proposed requirements might otherwise have a significant impact on the landowner's economic interests, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking.

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

Determinations as to whether the proposed CGA decreases the market value of affected Private Real Property must be made on a case-by-case basis. However, given the considerations outlined in the responses to OAG Sub-questions 3 and 4, the circumstances where the proposed road requirements would have a significant adverse impact would be relatively rare. In the rare instances where the proposed standards might otherwise decrease the market value of the Private Real Property by 25% or more, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking. Given these allowances, the proposed CGA will not generally result in the decrease in market value of any specific Private Real Property by 25% or more.

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

No.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority, and allow County roads to be created that are poorly designed, poorly constructed, and an immediate burden on the treasury, or to simply forbid the construction of new County Roads. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers to build new County Roads to, does not constitute a taking.

Commonly Used Property, or Drainage Structures, Forbidden Without Property Owners Association With Mandatory Dues

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapter 232, the County is proposing to implement requirements that a developer may not create a subdivision with commonly used areas, parks, hiking trails, sidewalks, curbs, club houses, traffic islands, and the like, or detention ponds, detention tanks, or other drainage structures, other than bar ditches, unless the developer also creates a property owners association, with mandatory dues, charged with taking care of those commonly used lands, or drainage structures.

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that, once the developer moves on to another project, commonly used areas in the development, or elaborate drainage structures requiring periodic maintenance, do not fall into disuse, or misuse, and do not become a burden on the taxpayers.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property, if a developer chooses to develop a tract of land in a way that requires a property owners association, with mandatory dues.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Prevents commonly used areas, parks, hiking trails, sidewalks, curbs, club houses, traffic islands, and the like, or detention ponds, detention tanks, or other drainage structures, other than bar

ditches, from becoming eyesores, overgrown, trash strewn, or occupied by squatters, because, once the developer has moved off to a new project, no one has charge of the.

- Protects the taxpayers of the entire County from assuming the burden of maintaining commonly used areas, parks, hiking trails, sidewalks, curbs, club houses, traffic islands, and the like, or detention ponds, detention tanks, or other drainage structures, other than bar ditches, that benefit only the landowners in a certain development.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No. None of these commonly used areas need be created.

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

No. None of these commonly used areas need be created.

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

No.

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

A determination as to whether the proposed CGA has a significant impact on the landowner's economic interest must be made on a case-by-case basis. In an extreme case, the proposed CGA could result in a significant impact to the landowner's economic interest in an instance where a lot owner failed to pay mandatory property owners assessments. However, in that case, the producing cause of the significant impact would be the lot owner's failure to pay the assessment, not the Development Rules.

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

A determination as to whether the proposed CGA has a significant impact on the landowner's economic interest must be made on a case-by-case basis. In an extreme case, the proposed CGA could result in a significant impact to the landowner's economic interest in an instance where a lot owner failed to pay mandatory property owners assessments. However, in that case, the producing cause of the significant impact would be the lot owner's failure to pay the assessment, not the Development Rules.

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

No.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority, and either allow developers to walk away from commonly used property, which has happened before in Wilson County, with very unfortunate consequences, or to totally forbid developers to construct commonly used areas. The County believes that the proposed action protects the public interest, while allowing developers flexibility, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers to create drainage easements, and allow the County to benefit from them, does not constitute a taking.

#### Ban on Lots Smaller than State Minimum

Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code, Chapter 232 the County is proposing to forbid developers to create residential lots smaller in size than the minimum size established, by state law and regulation, for a lot with an onsite sewage facility. The County is relying on TLGC §232.001, which authorizes Counties to regulate subdivisions, and the Texas Health and Safety Code, with its related regulations.

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that developers are not subdividing property into residential lots so small that a purchaser cannot, under state law, install an on site sewage facility, and/or a water well. The minimum size is 1/2 acres for a lot that will use either an onsite sewage facility, or an onsite private water well, and 1 acres for a lot that will use both an onsite sewage facility, and an onsite private water well. There is no minimum for lots with public sewage and public water.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property by preventing a developer from creating residential lots so small that they may not be fitted with both water and sewage facilities.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Serving as a deterrent to unscrupulous developers by forcing them to comply with State law.

- Protects purchasers from buying a lot, then finding out that its use is minimal, or nil, because water and sewage facilities cannot be installed.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

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

No.

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

Possibly, in an extreme case, the proposed CGA could result in a property owner being deprived of all economically viable use of the property. However, for a regulatory taking as defined under TLGC §2007.002(5)(B)(ii), to exist, the CGA would need to be the "producing cause". In this instance, the producing cause of the property owner being deprived of the economically viable use of his property would be the State law, and not the CGA of the County. Based on this definition, the proposed CGA would not constitute a regulatory taking.

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

As outlined in the response to OAG Sub-question 3, the proposed CGA could result in a significant impact to a property owner's economic interest. However, the proposed CGA would not be the "producing cause", and would therefore not constitute a regulatory taking

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

As outlined in the response to OAG Sub-question 3, the proposed CGA could result in a significant impact to a property owner's economic interest, including a reduction of 25% or more of the market value of the affected Private Real Property. However, the CGA would not be the "producing cause", and would therefore not constitute a regulatory taking.

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

The proposed CGA could result in a property owner being denied the right to subdivide his property, which could be argued to be a fundamental attribute of ownership. However, as outlined

in the response to OAG'S sub-questions 3 through 5, the proposed CGA would not be the "producing cause", and would therefore not constitute a regulatory taking.

If a developer desired to subdivide property into lots not for residential use, which lots would not require water, or sewage, the developer could always seek a variance from this rule.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of forbidding the creation of residential lots smaller than the minimum allowed by State law does not constitute a Regulatory Taking.

Extra Platting Requirements for Small Subdivision Lots

Under the County's authority to regulate the subdivision of property provided in Texas Local Government Code, Chapter 232 the County is proposing to require developers that create small residential lots to establish that it is possible to install on each lot in the subdivision, a private water, and/or an onsite sewage facility. The County is relying on TLGC §232.001, which authorizes Counties to regulate subdivisions, and the Texas Health and Safety Code, with its related regulations.

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that developers are not subdividing property into residential lots so small that a purchaser may not be, under state law, allowed to install both an on site sewage facility, and a water well. This rule applies to lots of less than 1 acre, for either an onsite sewage facility, or an onsite private water well, and 2 acres for a lot that will use both an onsite sewage facility, and an onsite private water well. There is no minimum for lots with public sewage and public water.

State law, and rules, requires that both private water wells, and onsite sewage facilities, be set back various distances from property lines, residences, and other private water wells, and onsite sewage facilities. Wilson County has previously seen developers create small lots that, because of their shape, can make it impossible for every lot to have both a private water well, and onsite sewage facility, installed, because there simply is not enough room to comply with all of the State setback requirements. That can lead to a "race to install" where the first lot owners to install both private water wells, and onsite sewage facilities, are fine, but the last to install finds that he cannot, on his lot, get far enough away from the private water wells, and onsite sewage facilities, on neighboring lots, to install a private water well, and onsite sewage facility.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA may create a burden on Private Real Property by requiring a Developer to establish that small residential lots are large enough that they may all be fitted with both water and sewage facilities, as needed. In some circumstances, it may also require the developer to designate on the plat where structures, private water wells, and onsite sewage facilities, may be constructed, to insure that each lot owner has the ability to install a private water well, and onsite sewage facility, and that the above described “race to install” does not occur.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Compels developers to think through a project involving small lots, and insures that they do not discover, after platting, that they have inadvertently created a “race to install”.
- Protects purchasers from buying a lot, then finding out that its use is minimal, or nil, because water and sewage facilities cannot be installed.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

*OAG Sub-question 2-Does the Proposed CGA Require a Property Owner to Dedicate a Portion o/Private Real Property or Grant an Easement?*

No.

*OAG Sub-question 3-Does the Proposed CGA Deprive the Owner of all Economically Viable Uses o f the Property?*

No.

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

A determination as to whether the proposed CGA has a significant impact on the landowner's economic interest must be made on a case-by-case basis. However, the developer has the option of creating larger lots, and avoiding the requirements of this rule. The Proposed Regulations further make provision for the granting of variances in the event the proposed CGA may result in a regulatory taking in a particular case. Given these allowances, the proposed action will not generally have a 'significant impact on the landowner's economic interest.

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

A determination as to whether the proposed CGA has a 25% reduction of the landowner's real property value must be made on a case-by-case basis. However, the developer has the option of creating larger lots, and avoiding the requirements of this rule. The Proposed Regulations further make provision for the granting of variances in the event the proposed CGA may result in a regulatory taking in a particular case. Given these allowances, the proposed action will not generally have a 25% reduction of the landowner's real property value.

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

No.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of increased platting requirements for small residential lots does not constitute a Regulatory Taking.

#### Requirement of Utility Easements

Under the County's authority to regulate the subdivision of property provided in TLGC, Chapter 232, the County is proposing to implement requirements that a developer, who creates a subdivision, impose utility easements along each boundary of each lot, and a floating guy wire easement.

*OAG Question 4-What is the Specific Purpose of the Proposed CGA?*

The purpose of the proposed CGA is to make sure that utility providers have adequate, uniform, access to each lot in a subdivision.

*OAG Question 5-How Does the Proposed CGA Burden Private Real Property?*

The proposed CGA creates a burden on Private Real Property, by burdening the 15 feet of land along each boundary line with an utility easement.

*OAG Question 6-How Does the Proposed CGA Benefit Society?*

The proposed CGA benefits society in the following ways:

- Insures that each lot in a subdivision has a utility easement from its inception.
- Insures that a utility provider may, by using the utility easement around each lot, provide utility service to each lot in the most economically prudent way.
- Prevents the need for developers, and/or lot owners, to negotiate, sign and record, separate utility easements for each lot.

*OAG Question 7-Does the Proposed CGA result in a "taking"?*

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

No.

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

Yes. The developer must grant a utility easement.

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

No.

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

A determination as to whether the proposed CGA has a significant impact on the landowner's economic interest must be made on a case-by-case basis. In an extreme case, the proposed CGA could result in a significant impact to the landowner's economic interest in an instance where substantially all of the affected property was restricted. However, in the vast majority of instances, only a portion of the property will be affected by the utility easement, and the requirement would not be expected to have a significant adverse impact on the landowner's economic interest. In the rare instances where the proposed utility easement might otherwise have a significant impact on the landowner's economic interests, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking.

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

Determinations as to whether the proposed CGA decreases the market value of affected Private Real Property must be made on a case-by-case basis. However, given the considerations outlined in the responses to OAG Sub-questions 3 and 4, the circumstances where the proposed set utility easements would have a significant adverse impact would be relatively rare. In the rare instances

where the utility easement might otherwise decrease the market value of the Private Real Property by 25% or more, the Commissioners Court could grant a variance to remedy any rare set of circumstances that might result in a regulatory taking. Given these allowances, the proposed CGA will not generally result in the decrease in market value of any specific Private Real Property by 25% or more.

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

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

No. Minimum lot size requirements leave ample room for construction of improvements.

*GAG Question 8-What are the Alternatives to the Proposed CGA?*

The County's proposed CGA is based on optional authority granted to the County by the Texas Legislature. The only alternative to the proposed action is to not implement this optional authority. The County believes that the proposed action protects the public interest, and that failing to implement the proposed action is less protective of the public interest. The County further believes that there are no feasible alternatives to the proposed action.

Conclusion: The County's Proposed Action of requiring developers to impose utility easements does not constitute a taking.