

- SUBJECT:** Creating an ombudsman's office for private property rights
- COMMITTEE:** Land and Resource Management — favorable, without amendment
- VOTE:** 7 ayes — Saunders, Mowery, Combs, Hilderbran, Howard, Krusee, B. Turner
- 0 nays
- 2 absent — Alexander, Hamric
- WITNESSES:** For — Dan Byfield, Farm Credit Bank of Texas; Bill Powers, Texas Farm Bureau; Rodney W. Eckert.
- Against — None
- On — Sandra Skrei, National Audubon Society
- BACKGROUND:** The U.S. Constitution's Fifth Amendment states that no person may be deprived of life, liberty or property without due process of law, and that government may not take private property for public use without just compensation. The clause on private property is often referred to as the "takings" provision. The Texas Constitution contains a similar provision, in Art. 1, sec. 17.
- The U.S. Constitution's 14th Amendment states that no state can make or enforce a law that would abridge the privileges and immunities of a U.S. citizen, nor deprive any person of life, liberty or property, without due process of law.
- DIGEST:** HB 1266 would require the attorney general to establish an ombudsman office to represent the interests of private property owners in proceedings involving certain state agency actions. The ombudsman office would be authorized to present briefs and arguments or intervene on behalf of specific private property owners, or private property owners in general, in judicial, legislative or administrative hearings or proceedings.

The ombudsman office also could receive complaints and inquiries from private property owners relating to takings, and record these contacts to determine the general concerns of private property owners. The ombudsman could also advise private property owners on takings issues and inform them of services available from other governmental and private entities.

HB 1266 would apply only to rules proposed by state agencies that if adopted or enforced would limit the use of private property and to proposed or implemented licensing or permitting conditions, requirements or restrictions affecting the use of private property or a required dedication or exaction from private property owners.

HB 1266 would not apply to exercise of the power of eminent domain, the repeal of a rule in order to discontinue a governmental program, the amendment of a rule in a manner that would limit interference with private property or the seizure or forfeiture of private property by law enforcement agencies for a violation of law or as evidence of a crime.

Takings would be defined as the acquisition or proposed acquisition of private property by a state agency in a manner that requires the agency to compensate the private property owner as provided by the Fifth and 14th Amendments of the U.S. Constitution or Art. 1, sec. 17 of the Texas Constitution. Private property would be defined as property protected by the U.S. Constitution's Fifth or 14th Amendments or Art. 1, sec. 17 of the Texas Constitution.

The attorney general would have to submit a quarterly report describing the activities of the ombudsman office to the governor, lieutenant governor and speaker of the House.

**SUPPORTERS
SAY:**

Establishing a state ombudsman for private property rights would ensure that citizens whose rights have been taken or threatened by state agency actions have someone to appear on their behalf in legal proceedings. The state should strive to keep government bureaucrats from blocking honest citizens from using their own land for agriculture, homebuilding or other reasonable uses. Current laws and regulations are being misused to strip land of its economic value, without compensation.

The state has an interest in protecting the constitutionally guaranteed rights of private property owners, many of whom do not have the necessary resources to consult with attorneys with expertise in this area.

The fiscal note indicates that probable costs to the state of implementing the bill would be about \$100,000 a year for two extra employees. This is a small price to help protect the fundamental rights of Texas citizens. In fact, naming an ombudsman for private property rights could save money by inhibiting agency actions that courts might find require compensation, such as in the *Lucas* case, (*Lucas v. South Carolina Coastal Commission*, 112 S. Ct. 2886 (1992) in which a state was ordered to pay approximately \$1.6 million to a landowner because state regulation essentially eliminated any real use of the landowner's property.

The bill would not authorize an employee of the ombudsman's office to represent a private property owner. The ombudsman office would merely help out in judicial, legislative or administrative hearings or proceedings. This would cause state agencies, knowing that citizens could seek advice and help from an unbiased source at the Attorney General's Office, to more carefully consider the impact of proposed rules and regulations on private property rights before those rules were imposed. Such caution would help protect the state against lawsuits and reduce litigation costs in general.

The new office could help to resolve some of the problems that arise when regulations impinge on private property rights. Regulatory taking of private property can affect financial institutions as well as individuals. Often farmers, ranchers and other landowners have pledged their private property as collateral for loans. When a government regulation reduces the productive capacity or value of that land, both the landowners and the financial institutions that loaned them money are in trouble.

The ombudsman would parallel such entities as TNRCC's Office of Public Interest Council, which represents the public interest in environmental issues.

**OPPONENTS
SAY:**

HB 1266 would in effect allow the attorney general to use taxpayer dollars to hire an attorney to represent land speculators and other private interests claiming economic damages when the potential for appreciation in their

property value is reduced due to justified actions taken by state agencies to protect the public health and safety. The bill would permit an employee of the Attorney General's Office to present briefs and arguments, intervene or appear on behalf of a private property owner in a judicial proceeding concerning an agency's proposed rule. For all intents and purposes, therefore, an employee of the attorney general's ombudsman office would represent a property owner in a claim against the state in which the state might be represented by the Attorney General's Office. This would create a serious conflict of interest.

Representation by the ombudsman might violate constitutional prohibitions on grants of state funds and credit to aid a specific individual. An elected official, the attorney general, would be making decisions on which individual should get state legal help, which would create the potential for further conflicts. Also, the ombudsman would be allowed to appear at a legislative hearing on behalf of a private individual, which could conflict with the prohibition against lobbying by state employees.

It would be extremely difficult for the staff of the proposed office to advise property owners about takings without taking a political position on the issue. "Takings" is a constitutional term of art whose definition is still being honed by case law. The takings clause of the Fifth Amendment, as it is interpreted by the courts, strikes an appropriate balance between private rights and the exercise of governmental power in the public interest. If private property owners want to tip that balance against the state, the state should not be paying an attorney to help them.

Bills like HB 1266 would undermine health, safety and especially environmental regulations by making it extremely expensive for the state to implement new regulations, however justified. Some have defined "property rights" broadly to claim almost any regulation (like zoning laws) violate their property rights.

The estimated program cost of \$99,256 the first year and \$93,950 annually from then on is unrealistically low. The takings movement has played on many people's fears and expectations, two employees from the Attorney General's Office could never prepare briefs and appear on behalf of all the property owners in the state who feel that their property rights have been

violated. Requests for more funds would be forwarded and would result in endless rounds of litigation and greatly increased costs for state agencies that would have to defend themselves in these proceedings.

The TNRCC Office of Public Interest Council (OPUC) and other state public interest offices are not analogous to the ombudsman office proposed by HB 1266 because OPUC can represent only the public interest in environmental issues, not individual private interests.

NOTES:

Among related bills, HB 2591 by Combs et al., would create a cause of action for landowners if a governmental action devalued their real property more than 25 percent. Although the bill would not authorize recovery against the state it would prohibit enforcement of that action until the landowner was compensated. HB 2591 was reported favorably as substituted by the House Land and Resource Management Committee on April 11. SB 14 by Bivins et al., a bill similar to HB 2591, passed the Senate by 26-5 on April 12 and was referred to the House Land and Resource Management Committee.

HB 957 by B. Turner, which would create a cause of action under which property owners could sue a governmental entity for a reduction in property value if they could prove that the governmental action was adopted for the express purpose of reducing the value of their property, was reported favorably from the House Land and Resource Management Committee on April 20.