

SUBJECT: Prohibiting certain land-use regulations after the granting of a permit

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 7 ayes — Mowery, Pickett, Goolsby, Guillen, Haggerty, Howard, Noriega

1 nay — J. Jones

1 present not voting — Hochberg

0 absent

WITNESSES: For — Craig Douglas, John B. Harris, and Harry Savio, Home Builders Association of Greater Austin; (*Registered, but did not testify:*) Lisa Barton, Texas Hotel and Motel Association; Andy Erben, KB Home; Alan Haywood; Connie Heyer, Texas Building Owners and Managers Association and Texas Mini Storage Association; David Mintz, Texas Apartment Association; Scott Norman, Texas Association of Builders

Against — Brad Rockwell, Save Our Springs Alliance; (*Registered, but did not testify:*) Raul Alvarez; Roger C. Baker, Jr.; Pat Bulla; Deborah L. Ellison; Jim Marston, Environmental Defense; (*On committee substitute:*) Patrick Murphy, City of Austin

BACKGROUND: Local Government Code, sec. 245.002(a) requires a local government regulatory body to consider an application for a construction or other permit based solely on laws and other requirements in effect at the time a person files an application for the permit. If a project requires a series of permits, the laws and other requirements in effect at the time the original application for the first permit was filed must be the sole basis for considering all subsequent permits. Sec. 245.004 exempts certain regulations from application of the statute, including:

- municipal zoning regulations that do not affect lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality;

- regulations that specifically control only the use of land in a municipality with no zoning and that do not affect lot size, lot dimensions, lot coverage, or building size;
- regulations for sexually oriented businesses;
- municipal or county ordinances, rules, regulations, or other requirements affecting colonias;
- fees imposed in conjunction with development permits;
- regulations for annexation;
- regulations for utility connections;
- construction standards for public works located on public lands or easements; or
- regulations to “prevent imminent destruction of property or injury to persons, including regulations effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy.”

Courts have interpreted city ordinances that restrict the amount of impervious lot cover — including driveways, parking lots, and rooftops — and building setback requirements as preventing imminent destruction of property and injury to people.

Texas Constitution, Art. 1, sec. 17 states that “no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.”

DIGEST:

CSHB 2130 would prohibit a local government regulatory body, after granting a construction or other permit, from imposing a regulation that affects lot size, lot dimension, lot coverage, building size, residential or commercial density, or timing of a project, or that changes development permitted by a restrictive covenant required by a municipality. The bill also would amend the existing exemption provision in regard to preventing imminent destruction of property or injury to specify destruction or injury “from flooding.”

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 2130 would amend Local Government Code, ch. 245 in simple fashion to clarify the statute's basic purpose of protecting landowners and the housing market from surprise changes in government regulation that can defeat development plans even after their approval. Developers and others make large, long-term investments only when they can execute plans already permitted formally by local government. Unpredictable regulations, especially those that can remove from landowners rights previously granted, destabilize property values and discourage investment. Housing prices rise as the availability of housing contracts.

Landowners have existing incentives to modify their land use when they learn of imminent damage or injury. Landowners, even more than government, want to preserve their investments and the safety of users of their property. Government authority to force change after permitting is unnecessary

Developers cannot rely on expensive, time-consuming court challenges as a means of ensuring their rights. Courts rarely find that acts of government fail to satisfy the due-process standard that government not act arbitrarily or capriciously. Regulatory "takings" cases are similarly difficult to win, and the law governing the subject is considered unclear. Legal proceedings do not promise landowners the predictability they need to plan, invest, and prosper.

The authority of Texas' local governments, including home-rule cities, is governed by the Constitution and by statutory authorizations and restrictions. CSHB 2130 merely would amend the statute to restrict the behavior of state and local government in compliance with all provisions of the state and federal constitutions.

**OPPONENTS
SAY:**

CSHB 2130 would hinder local governments from ordering modifications proven to prevent property damage and human injury by restricting their ability to respond easily to unpredicted flooding patterns that occur after the issue of a permit. Mandatory setbacks and lot size and cover requirements ensure absorption of more rainwater and deter flooding. The City of Austin has begun spending \$15.5 million to relocate homeowners and to protect neighborhoods that only recently have become subject to flooding. Another Travis County flood-control project for 1,350 homes will cost local and

federal taxpayers more than \$100 million. When cities have evidence of imminent damage and injury, they need the ability to adjust regulations that affect developers and others. This bill improperly would prevent that.

Landowners already have legal remedies under the due-process and “takings” clauses of the state and federal constitutions for arbitrary decision-making and for depriving property owners without compensation. Broad legislation limiting the regulatory powers of local governments is not necessary and would do more harm than good.

CSHB 2130 would immunize landowners from exposure to a basic authority of government and would grant them a special privilege in violation of a constitutional prohibition from doing so. Most courts have applied Texas Constitution, Art. 1, sec. 17 to invalidate contracts in which government has relinquished certain duties. Courts would be likely to find CSHB 2130 unconstitutional, because it would abdicate to landowners the government’s duty to prevent imminent damage and injury to citizens.

NOTES:

The committee substitute added to the bill as filed the provision prohibiting regulations that affect lot size, lot dimensions, lot coverage, building size, residential and commercial density, or timing of a project, and prohibiting changing development permitted by a restrictive covenant required by a municipality.