

STATE OF OKLAHOMA

1st Session of the 44th Legislature (1993)

HOUSE BILL NO. 1812

By: Reese

AS INTRODUCED

An Act relating to eminent domain; defining terms; requiring Attorney General to adopt guidelines; providing for contents; providing completion date and annual updates; requiring certain designations of personnel, requiring certain assessments; providing for certain elements; requiring consideration of certain criteria; providing certain exception; providing for submission of assessment; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 40 of Title 27, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "Constitutional taking" or "taking" means due to a governmental action, private property is taken such that compensation to the owner of that property is required by either:
 - a. the Fifth or Fourteenth Amendment of the Constitution of the United States, or

b. Section 24 of Article 2 of the Constitution of the State of Oklahoma;

2. "Governmental action" or "action",

a. means:

- (1) proposed rules and emergency rules by a state agency that if adopted and enforced may limit the use of private property,
- (2) proposed or implemented licensing or permitting conditions, requirements or limitations to the use of private property, and
- (3) required dedications or exactions from owners of private property by a state agency;

b. shall not include:

- (1) activity in which the power of eminent domain is exercised formally,
- (2) repealing rules discontinuing governmental programs or amending rules in a manner that lessens interference with the use of private property,
- (3) law enforcement activity involving seizure or forfeiture of private property for violations of law or as evidence in criminal proceedings, and
- (4) orders that are authorized by statute, that are issued by a state agency or a court of law and that were the result of a violation of state law;

3. "Private property" means any real or personal property in this state that is protected by either:

- a. the Fifth or Fourteenth Amendment of the Constitution of the United States, or
- b. Section 24 of Article 2 of the Constitution of the State of Oklahoma; and

4. "State agency" means an officer or unit of the executive branch of state government that is authorized by law to adopt rules. The term "state agency" shall not include the legislative or judicial branches of state government.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 41 of Title 27, unless there is created a duplication in numbering, reads as follows:

A. The Attorney General shall adopt guidelines to assist state agencies in the identification of governmental actions that have constitutional taking implications.

B. In formulating the guidelines, the Attorney General shall observe the following principles:

1. State agencies shall be sensitive to, anticipate and account for the obligations imposed by the Fifth and Fourteenth Amendments of the Constitution of the United States and Section 24 of Article 2 of the Constitution of the State of Oklahoma in planning and carrying out governmental actions to avoid imposing unanticipated or undue additional burdens on the public treasury;

2. Governmental actions that are taken by state agencies and that result in a physical invasion or occupancy of private property and actions that affect value or use may constitute a taking of private property;

3. Governmental action may amount to a taking even though the action constitutes less than a complete deprivation of all use or value or of all separate and distinct interests in the same private property or the action is only temporary in nature;

4. State agencies whose governmental actions are specifically to protect public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Therefore, actions that are purportedly to protect the public health and safety shall be:

- a. taken only in response to real and substantial threats to public health and safety,
- b. designed to advance significantly the health and safety purpose, and
- c. no greater than necessary to achieve the health and safety purpose;

5. Although normal governmental processes do not ordinarily constitute takings, undue delays in decision-making that interfere with private property use carry a risk of being held to be a taking. In addition, a delay in processing may increase significantly the size of compensation due if a constitutional taking is later found to have occurred; and

6. The constitutional protections against taking private property are self-executing and require compensation regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation.

C. The Attorney General shall:

1. Complete the guidelines on or before January 1, 1995; and
2. Review and update the guidelines at least on an annual basis to maintain consistency with court rulings.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 42 of Title 27, unless there is created a duplication in numbering, reads as follows:

A. The Attorney General shall designate an assistant attorney general, who is counsel for a state agency, who shall determine whether a proposed governmental action has constitutional taking implications and who is responsible for ensuring compliance with this act.

B. Using the guidelines prepared under Section 2 of this act, the state agency shall prepare an assessment of constitutional taking implications that includes an analysis of at least the following elements:

1. The likelihood that the governmental action may result in a constitutional taking, including a description of how the taking affects the use or value of private property;

2. Alternatives to the proposed governmental action that may:

- a. fulfill the government's legal obligations of the state agency,
- b. reduce the impact on the private property owner, and
- c. reduce the risk of a constitutional taking; and

3. An estimate of financial cost to this state for compensation, and the source of payment within the agency's budget if a constitutional taking is determined.

C. In addition to the guidelines prepared under Section 2 of this act, each state agency shall adhere, to the extent permitted by law, to the following criteria if implementing or enforcing governmental actions that have constitutional taking implications:

1. If an agency requires a person to obtain a permit for a specific use of private property, any conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued, shall substantially advance that purpose and shall be expressly authorized by law;

2. Any restriction imposed on the use of private property shall be proportionate to the extent the use contributes to the overall problem that the restriction is to redress;

3. If an action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary; and

4. Before taking an action restricting private property use for the protection of public health or safety, the state agency, in internal deliberative documents, shall:

- a. clearly identify, with as much specificity as possible, the public health or safety risk created by the private property use,
- b. establish that the action substantially advances the purpose of protecting public health and safety against the specifically identified risk,
- c. establish, to the extent possible, that the restrictions imposed on the private property are proportionate to the extent the use contributes to the overall risk, and
- d. estimate, to the extent possible, the potential cost to the government if a court determines that the action constitutes a constitutional taking.

D. If there is an immediate threat to health and safety that constitutes an emergency and requires an immediate response, the analysis required by subsection B of this section may be made when the response is completed.

E. Before the state agency implements a governmental action that has constitutional taking implications, the state agency shall submit a copy of the assessment of constitutional taking implications to the Governor and to the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

SECTION 4. This act shall become effective September 1, 1993.

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