WEST VIRGINIA CODE CHAPTER 22 ARTICLE 1A

WV Legislature

§22-1A-1. Short title.

This article shall be known and may be cited as the Private Real Property Protection Act.

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§22-1A-2. Legislative findings and purpose.

It is the policy of this state that action by the Division of Environmental Protection affecting private real property is subject to such protection as is afforded by the Constitutions of the United States and of West Virginia and the principles of nuisance law. The Legislature intends that the Division of Environmental Protection follow certain procedures to ensure Constitutional protection of private real property rights, while also meeting its obligation to protect the quality of the environment, and reduce the burden on citizens, local governments and this state caused by certain actions affecting private real property. The purpose of this article is to establish an orderly, consistent process that better enables the division to evaluate how potential administrative action by it may affect privately owned real property. It is not the purpose of this article to reduce or expand the scope of private real property protections provided in section nine, article three of the Constitution of West Virginia and the fifth and fourteenth amendments of the Constitution of the United States, as those provisions have been and may in the future be interpreted by the state and federal courts of competent jurisdiction with respect to such matters for this state.

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§22-1A-3. Actions by Division of Environmental Protection; requirement for assessment.

(a) Whenever the Division of Environmental Protection considers any action within its statutory authority that is reasonably likely to deprive a private real property owner of his or her property in fee simple or to deprive an owner of all productive use of his or her private real property, it shall prepare an assessment that includes, but need not be limited to, the following:

(1) An identification of the risk created by the private real property use, and a description of the environmental, health, safety, or other benefit to be achieved by the proposed action;

(2) The anticipated effects, if any, on other real property owners or on the environment if the division does not take the proposed action;

(3) An explanation of how the division believes its action advances the purpose of protecting against the risk;

(4) The reasons that the division believes that its action is likely to result in requiring the state, under applicable Constitutional principles and case law, to compensate the owner of private real property, including a description of how the action affects the use or value of private real property;

(5) Alternatives, if any, to the proposed action that the division believes will fulfill the legal obligations of the division, reduce the impact on the private real property owner and reduce the likelihood of requiring compensation; and

(6) An estimate of the cost to the state for compensation in the event such compensation is required.

No assessment is required under this article, unless the West Virginia Supreme Court of Appeals or the United State Supreme Court has under similar factual circumstances required compensation to be paid.

(b) In the case of an immediate threat to human health and safety that constitutes an emergency and requires an immediate response, the assessment required by this section may be delayed until after the emergency response is completed.

(c) The following do not require an assessment under this section:

(1) Licensing or permitting conditions, requirements or limitations to the use of private real property pursuant to any applicable state or federal statutes, rules or regulations; or

(2) Rules and emergency rules of the division that are reasonably likely to limit the use of private real property pursuant to any applicable state or federal statutes, rules or regulations; or

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(3) Enforcement actions undertaken by the division pursuant to any applicable state or federal statutes, rules or regulations.

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§22-1A-4. Buffer zones.

(a) Prior to the Division of Environmental Protection requiring that a buffer zone be created on private real property, the division shall prepare a report which shall identify the public purpose or policy which is to be served by the creation of the buffer zone and how the creation and maintenance of the buffer zone promotes or fulfills that public purpose or policy. This report is in addition to any other assessment required pursuant to the provisions of this article.

(b) Any report made pursuant to this section is public information.

(c) In the case of an immediate threat to human health and safety that constitutes an emergency and requires an immediate response, the report required by this section may be delayed until after the emergency response is completed.

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§22-1A-5. Remedies.

When a court of competent jurisdiction determines that action of the Division of Environmental Protection, within its statutory authority, requires that compensation be paid to a private real property owner pursuant to section nine, article three of the Constitution of West Virginia, or the fifth or fourteenth amendments of the Constitution of the United States or the principles of nuisance law, the private real property owner is also entitled to his or her reasonable attorney fees and costs:

(1) If the court determines that the division failed to perform the assessment required in section three of this article; or

(2) If the court determines that the division performed the assessment required in section three of this article but failed to conclude that its action was reasonably likely to require compensation to be paid to the private real property owner.

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§22-1A-6. Scope of application.

The provisions of this article only apply to the programs administered by the Division of Environmental Protection on the effective date of this article.

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