

Eminent Domain and Water Districts

Impairing or preventing the proper exercise of eminent domain for public water projects, such as reservoirs, wastewater, water supply, drainage or flood control projects can have a detrimental affect on the development of needed infrastructure Texas must have to continue to grow and remain competitive. Texas water districts need exemption from legislation that limits its ability to properly and appropriately exercise the power of eminent domain.

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Protect water districts ability to exercise eminent domain for water and wastewater infrastructure projects Texas must have to continue to grow and remain competitive.

As a result of the U.S. Supreme Court decision in *Kelo vs. City of New London* in June 2005, affirming the right of state and local governments to exercise the power of eminent domain for economic development purposes, many state legislatures, including that of Texas, have passed new laws to clarify how local governments may exercise the power of eminent domain for economic development and other purposes. Congress also responded to the Supreme Court's decision. Among other federal legislative initiatives, Sen. Christopher Bond (R-Mo.) inserted an amendment in the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Act, 2006 (H.R. 3058) creating a condemnation–restricting condition of federal funds for funds appropriated under that statute. Section 726 of H.R. 3058 provides that “no funds in this Act may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use.” President Bush signed H.R. 3058 into law on November 30, 2005 as P.L. 109-115. The Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Act, 2007 (H.R. 5576), Section 719 provides the same restriction as the 2006 legislation. H.R. 5576 passed the House on June 14, 2006 and has been placed on the Senate Legislative Calendar.

On November 3, 2005, the House passed the Private Property Rights Protection Act of 2005 (H.R. 4128). H.R. 4128 prohibits states (or their political subdivisions, such as river authorities and water districts) from exercising the power of eminent domain over property to be used for economic development, or over property that is subsequently used for economic development, by threatening the loss of federal economic development funds for any years in which the state allows the exercise of the power. H.R. 4128 also creates a private cause of action on behalf of a property owner who alleges an improper exercise of the power of eminent domain and waives states' immunity under the Eleventh Amendment of the Constitution for any such action. Most significantly, the language contained in H.R. 4128 (or lack of language) creates unknowns that will almost certainly result in expensive and time-consuming litigation. As an example, the phrase “subsequently used for economic development” is undefined and has no outer limit. This omission raises the possibility that while a parcel was initially condemned in good faith for a non-economic development purpose (even one described in the legislation), its use many years or even decades later due to unforeseen changes in law, policy, or funding availability could trigger the penalty of loss of federal funds. A jarring scenario arising from this provision being applied to subsequent uses of property is the tremendous economic benefits conferred on an area after reservoirs are built for flood control or water supply. Could a property owner successfully convince a court to require a condemning authority to return property because a portion of the acquired property now is used for development, including a marina, beach, or similar facility?

TWCA is concerned that H.R. 4128 is overly broad and would prohibit the use of eminent domain for the kinds of water and wastewater infrastructure Texas must have to continue to grow and remain competitive. The Supreme Court's decision affirmed the right of state and local governments to exercise the power of eminent domain for economic development purposes, but it also specified that it was incumbent upon the states to regulate this power. Congress should follow the Court's lead and allow the state legislatures, who are better positioned to respond to local and regional interests, to resolve concerns relating to the use of eminent domain for economic development purposes. TWCA suggests the inclusion of language, similar to Senate Bill 7 (79th

Second Called Special Session of the Texas Legislature), to H.R. 4128 that would not affect the authority of entities such as river authorities, navigation districts and other conservation or reclamation districts that are authorized by law to take private property through the use of eminent domain for water supply, wastewater, flood control, and drainage projects.

TWCA does not support the exercise of the power of eminent domain for private or purely economic development programs. However, well-intentioned federal legislation may have the result of impairing or preventing the proper exercise of the power of eminent domain for public projects, such as reservoir and other water supply and flood control projects, which have secondary economic development impacts. Legislation limiting the power of eminent domain must be carefully considered to ensure that unintended consequences do not prevent the fulfillment of public projects which are essential to the provision of adequate water supplies for a rapidly expanding population, and the control of flooding to protect that population.