



# Public Law Report

JUNE 2009

## Eminent Domain Law for "MUD"ies

BY JOSHUA W. GOLDEN

*This is Part I of a two-part series. Part I highlights the basic principles of eminent domain law in Texas; Part II will address the condemnation process.*

"Eminent domain," or "condemnation" as it is generally known, is the power of government to take private real estate (by force, if necessary) to serve a public need. Texas' eminent domain law is relatively narrow in scope, but it contains many unique aspects that could serve as pitfalls for the unwary. For this reason, public officials who understand the basic concepts of eminent domain law, and its effect on the governments they oversee, are better equipped to make decisions when the need arises. While this article specifically addresses eminent domain law from the perspective of water board directors in Texas and in no way attempts to cover every nuance, the principles discussed apply equally to cities and other governmental bodies of Texas.

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## 2009 Legislative Session Update Vol. 2—Bills of Interest

BY JONATHAN D. POLLEY

As usual, some interesting legislation was introduced during this 81<sup>st</sup> Regular Session of the Texas Legislature. The session started slowly and ended with virtual gridlock in the House, mostly due to wrangling over a bill that would have required voters to present photo identification in order to vote ("Voter ID"). During the session, however, legislators filed a staggering 7,609 bills, 1,468 of which passed both the House and Senate. Over 1,400 bills passing is especially significant, considering that as of May 17<sup>th</sup> only 136 bills had passed both chambers, meaning that during the final 14 days of the session about 1,300 bills passed. For comparison's sake, last session about 6,200 bills were filed and about 1,400 became law.

Shortly after June 21, 2009, the last day for Governor Perry to act on bills requiring his signature or catching his eye for veto, JRPB will send you a comprehensive memorandum outlining all of the notable changes resulting

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## Strict Criminal Liability to Public Officials from Violations of the Texas Open Meetings Act

BY ANDREW P. JOHNSON, III and REGINA D. ADAMS

*This article serves as Part I of a four-part series regarding director/council member liability as it has evolved over the last decade.*

We are regularly asked at board and council meetings whether or not a governing body may go into executive session to discuss a myriad of issues. More often than not, the issues that the governing bodies want to discuss are either not included on the agenda or do not fall under the exceptions to the Texas Open Meetings Act (the "Act"), which generally governs the conduct of meetings of public bodies in the State of Texas. Therefore, we must often explain to the governing body that there can be no executive session to discuss certain issues. This article provides a review of examples of the types of situations that can create criminal liability for public officials if they violate the Act.

### Tovar vs. State

We begin our review of the evolution of criminal liability for public officers with the 1998 landmark case, *Tovar vs. State*, which upheld the criminal conviction of a school board president for violating the Act. The court, for the first time,

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# Legislative Update

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 from this session. As a result, this article only attempts to highlight a handful of bills that have a major impact on water districts and other local government entities or are particularly interesting (as well as one that is so bizarre I had to mention it). In addition, I will mention a couple of bills that failed because one is sure to reappear in the future and the other has a substantial impact.

The obvious place to begin, however, is with an update on the generator-related bills highlighted in the March 2009 *Public Law Report*: House Bill ("HB") 632, Senate Bill ("SB") 221 and SB 361 (*available at <http://publiclaw.com/news/>*). Volume 1 of the 2009 Legislative Session Update focused exclusively on these three (3) bills, each of which sought to require public water and/or wastewater systems to install and maintain auxiliary power at some or all of their facilities.

Of these bills, Sen. Patrick's SB 361 is the only one that passed both chambers, although the final product is significantly different than the original. The final version of SB 361, which was sent to Governor Perry on June 3<sup>rd</sup>, applies only to water systems in Fort Bend, Harris and Montgomery Counties. In addition, this bill requires affected utilities to ensure operation of their water systems during an extended power outage and to file an emergency preparedness plan with the Texas Commission on Environmental Quality (the "TCEQ").

SB 361 offers several methods utilities may employ to ensure emergency operations, including installation and maintenance of auxiliary generators, sharing generator capacity among utility systems and hardening of the electrical supply serving the water system, among others. Finally, this bill includes substantial provisions related to coordination of emergency operations among water systems, county judges, county offices of emergency management and the Public Utilities Commission, in an effort to more quickly restore electricity to water supply facilities.

HB 632, on the other hand, moved very slowly to start the session, but then re-emerged as an amendment to HB 4409. HB 4409 passed the House with the bulk of HB 632' provisions intact, but in the Senate this bill morphed into the Texas Windstorm Insurance Association Sunset Bill and the HB 632 provisions bit the dust.

The third generator bill, SB 221, was apparently dead on arrival because it was referred to the Senate Natural Resources Committee on February 11<sup>th</sup> and never made it to a hearing.

In addition to the generator bills, this session saw consideration of a number of other important and interesting bills involving local government entities. For example, House Joint Resolution ("HJR") 14 places a referendum on the November 3, 2009 ballot, so voters may determine whether the Texas Constitution should be amended to more clearly define the purposes for which private property may be condemned for public use. If approved by voters, HJR 14 will amend the constitution to prohibit condemnation to



transfer property to a private entity for the purpose of economic redevelopment or enhancement of tax revenues. In addition, this resolution would require a two-thirds vote of both chambers of the Legislature in order to pass any new law granting condemnation power to an entity (which presumably would include legislation creating new water districts).

Another bill involving condemnation is HB 2685, which tweaks the process by which entities with eminent domain authority provide notice to a landowner of his/her rights when such an entity seeks to acquire the landowner's property. Since the Landowner's Bill of Rights (the "BOR") was created during the 80<sup>th</sup> Legislative Session, entities with eminent domain authority have been required to send a copy of the BOR to a landowner before beginning negotiations to acquire property. However, HB 2685 allows such entities to provide the BOR at the same time as it first represents to a landowner that the entity possesses condemnation power or seven (7) days before making a final offer to the landowner, whichever occurs last.

Also related to condemnation, SB 18 sought to give property owners additional protections and rights during and after an entity acquires property by eminent domain. However, SB 18 failed to pass the House. Perhaps most notably, this bill would have required all entities authorized to exercise eminent domain authority to submit a letter to the Comptroller stating that the entity possesses condemnation power and identifying the law granting such power. Had SB 18 passed, the eminent domain authority of any entity failing to file this letter by December 31, 2010 would have

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## Legislative Update

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expired on September 1, 2011. While SB 18 failed this session, most people inside the capital expected it to pass and believe that it only failed because it was in line behind Voter ID, which was not allowed to reach the House floor. As a result, expect some version of this bill to reappear either in a special session this summer or in the 82<sup>nd</sup> Legislature.

Of major concern to the residential development community, is failure of the Sunset Bill filed to continue the existence of the Texas Residential Construction Commission (the "TRCC"). HB 2295 sought to keep the TRCC alive by extending the date on which it would cease to exist under the Texas Sunset Act until September 1, 2013 (a biennial routine called "Sunset Review"). However, the Senate Business & Commerce Committee effectively killed the bill – and the TRCC – by not scheduling it for a hearing. As a result, after a few months time to wind down its operations, the TRCC will cease to exist.

As usual during any legislative session, the 81<sup>st</sup> Legislature made some adjustments to the Public Information Act (the "PIA"). Previously, the 80<sup>th</sup> Legislature added a provision to the PIA allowing a governmental body to establish a reasonable limit on the time its personnel spends gathering information for a particular requestor without recovering its costs (as calculated under the PIA, which is often not the actual cost). However, that law exempted requestors who were representatives of radio or television stations or most newspapers of general circulation from any such limits. Well, with SB 1629, the 81<sup>st</sup> Legislature has broadened that exemption to include individuals who, for substantial financial gain, seek the information for newspapers of general circulation or weekly magazines that are published on the internet.

In addition to regular amendments to the Public Information Act, not a session passes without the Legislature tinkering with the Election Code. This session, a couple of election-related bills seem worth noting. First, SB 1134 allows high school students over age 16 to serve as election clerks (with their principal's approval) and requires the student-clerk's school to excuse an absence in the same manner as is currently done for religious holidays. In addition, the student-clerk may apply time served as a clerk toward a school project, at his/her teacher's discretion. Another election-related bill, HB 1720, further refines a political subdivision's use of public funds for election-related advertising. Previously, political subdivisions could only spend public funds for factual communications that did not advocate passage or defeat of a measure. HB 1720 clarifies that the facts in such communications may not be false and makes the knowing publication of such false information a Class A misdemeanor.

Another area of great scrutiny by this year's Legislature has been property taxes. While many property tax bills failed, HB 2291 passed and alters some of the specific language included in motions, ordinances, resolutions and/or orders related to tax increases. This bill requires that a motion to adopt an increased tax rate must include a specific statement including the percentage of the increase. Along the same lines, an ordinance, resolution or order setting an increased operation and maintenance tax rate that also increases the total revenue generated must include a similar statement about the percentage of the tax increase. In addition, the same statement must be included on any internet website maintained by the taxing unit.

Finally, the last "bill" of this article does not affect anything or anyone. HJR 39 post-ratifies Amendment XXIV to the United States Constitution (the "24<sup>th</sup> Amendment"), which prohibits denying someone the right to vote in a primary or general election for federal office for failure to pay a poll tax or any other tax. The 24<sup>th</sup> Amendment was declared ratified by the legislatures of 38 of the 50 states on February 4, 1964. Despite that poll taxes are already prohibited by the U.S. Constitution, whether Texas offered its consent or not, the 81<sup>st</sup> Legislature felt the need to jump on the bandwagon 45 years later. Similar bills were passed in Virginia in 1977, North Carolina in 1989 and Alabama in 2002.

These bills are just a small selection of the more than 7,600 bills considered this session. However, Governor Perry has declared his intent to call a special session to address unfinished business. During the special session, the Legislature will address Sunset Reviews, without which several state agencies, including the Texas Department of Transportation, may cease to exist. In addition, Governor Perry very vocally supported SB 18, the condemnation bill that failed. As a result, additional movement on these issues would be expected. However, these and any other issues (Voter ID?) that the Governor would like addressed during the special session will be discussed in the next *Public Law Report*.

If you would like more detailed information about the bills discussed in this article or any other legislation, be on the look out for JRPB's comprehensive memo or feel free to contact me.

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# Eminent Domain

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## Legal Principles

**Authority.** The general framework of Texas' eminent domain law is established in Article I, Section 17 of the Texas Constitution and further governed by Section 21 of the Texas Property Code. Specific eminent domain powers, on the other hand, are generally conveyed by other statutes. As an example, Chapter 49 of the Texas Water Code authorizes water districts and water supply corporations to exercise eminent domain powers to acquire "any land, easements, or other property inside or outside the district boundaries...necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes...". Under this authority, water districts can acquire building sites for water or wastewater treatment facilities (if located within the district's boundaries), water and sewer line easements, drainage ditches, and any other real property necessary to serve a public purpose.

**Constitutional Limitations.** While the government holds strong powers to acquire property by eminent domain, such powers are strictly limited. Among the first issues a condemning authority ("condemnor") should address when considering whether to acquire property through eminent domain is whether the entity is constitutionally permitted to take the property in the first place. Texas courts have held that under the Texas Constitution, the condemnor must determine and be able to prove that: (i) the taking is for a "public purpose"; and (ii) the taking is "necessary" to achieve a public purpose.

**Other Limitations.** The Texas Legislature has further limited eminent domain powers. For example, Chapter 54 of the Texas Water Code prohibits municipal utility districts ("MUDs") from exercising eminent domain powers outside their boundaries to acquire: (i) a site for a water treatment plant, wastewater treatment plant, or wastewater disposal plant; (ii) a site for a park, swimming pool, or other recreational facility (except a trail); (iii) a site for a trail located on a homestead; and (iv) an exclusive easement through a county regional park.

**Adequate Compensation for Reduction in Value.** At the heart of Texas' eminent domain law is the requirement that property owners whose property is "taken, damaged, or destroyed" by government receive "adequate compensation" for losses in their property values. Public takings can occur under two forms: (i) direct condemnation; and (ii) indirect condemnation. Although takings can occur under many different scenarios, the most common type of taking, known as "direct condemnation," occurs when a condemnor identifies a specific piece of property and initiates an action

to acquire the property. In a direct condemnation, a condemnor can acquire all of a landowner's property (a "whole taking") or a portion (a "partial taking"), and it can acquire the entire interest in the property taken (a "fee taking") or a portion of the interest in the property (generally, an "easement taking").

## Calculation of Damages and Compensation

**Terms.** In evaluating the appropriate measure of adequate compensation for a direct condemnation, the following concepts must be considered:

- **Fair Market Value.** The appropriate measure of damages is directly tied to the fair market value of the property at the time of the taking. Generally, "fair market value" is defined as the purchase price a willing buyer would pay a willing seller for the property at the time of the taking.

- **Highest and Best Use.** In determining fair market value, the property must be appraised based on the property's "highest and best use." For example, assume that a condemnor proposes to acquire a tract of vacant land that is currently being used by the landowner for residential purposes. If the same land may be used for commercial purposes and doing so would increase its value, then the property must be appraised as commercial property rather than at its current residential use value.

- **Compensation for the Taking.** If a condemnor acquires property by a whole taking, the owner is entitled to adequate compensation (tied to fair market value) for the property taken. In a partial taking, however, the owner is not only entitled to compensation for the land taken but also for any damages the rest of the property incurs as the result of the primary taking. This form of compensation is referred to as "damages to the remainder."

- **Damages to the Remainder.** In certain circumstances, a partial taking may damage all or a portion of the remainder of the owner's property. A common example occurs when a condemnor acquires a partial fee taking of a commercial or industrial tract. If the taking then reduces the parking area such that the property can no longer be used at the same size, then the landowner would be entitled to damages to remainder.

That is all for now, but stay tuned to learn about the condemnation process in the nail-biting conclusion to this article in the next edition of the *Public Law Report*.

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# Texas Open Meetings Act

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examined criminal liability under the Act and issued a decision effectively putting thousands of public officials throughout Texas on notice that they will have little excuse for violating the Act. Joseph Tovar, a former school board president in the San Antonio area, was indicted on two (2) charges that involved Section 551.144 of the Act: (1) that Tovar knowingly participated in a special closed meeting of the school board not permitted under the Act; and (2) that Tovar knowingly called, and aided in calling and organizing, a special closed meeting of the board not permitted under the Act. Tovar argued, in part, that he should not be convicted because he did not knowingly violate the Act. Judge Morris Overstreet wrote for the Court's opinion, "The Act places a duty upon members of a governmental body to hold open meetings and a... duty to find an exception to the rule if they desire to have a closed meeting. Neglect of this duty will subject a member of the governmental body to criminal sanction." In addition, Judge Overstreet wrote, "A member of a governmental body can be held criminally responsible for his involvement in the holding of a closed meeting which is not permitted under the Act regardless of his mental state with respect to whether the closed meeting is permitted under the Act."

## Amendments to Section 551.144

In response to *Tovar*, the 76<sup>th</sup> Texas Legislature amended Section 551.144 (the "1999 Amendment") to provide:

- (a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
  - (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
  - (2) closes or aids in closing the meeting to the public if it is a regular meeting; or
  - (3) participates in the closed meeting, whether it is a regular, special, or called meeting.
- (b) An offense under Subsection (a) is a misdemeanor punishable by:
  - (1) a fine of not less than \$100 or more than \$500;
  - (2) confinement in the county jail for not less than one (1) month or more than six (6) months; or
  - (3) both the fine and confinement.
- (c) *It is an affirmative defense to prosecution under Subsection (a) that the member of the*

*governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.*

(Amendment italicized). The legislative intent was to provide some kind of affirmative defense for public officials if they participated in a closed meeting in violation of the Act because they reasonably relied upon the opinion of those with legal authority.

## Case Law Since the 1999 Amendment

There have been fewer prosecutions of public officials based upon violations of the Act, even fewer appeals of those prosecutions since the 1999 Amendment and no real changes to the criminal liability for violations of the Act. However, a suit claiming that the Act is unconstitutional because it violates public officials' First Amendment (free speech) rights is currently pending in the federal court system (*Rangra v. Brown* will be discussed in-depth in Part III of this series).

## Texas Attorney General ("AG") Opinions Since the 1999 Amendment

There are two (2) relevant AG opinions that cite *Tovar* as guidance with regard to strict liability for violations of the Act by public officials. The hypothetical questions presented in Opinion No. JC-0307 (2000) were: (1) whether the Act extends to a person that is not a public official who urges individual members of a governing body to place an item on an agenda or to vote a certain way on an item on the agenda, and (2) whether a violation of the Act occurs when a claim, invoice or bill is approved for payment by members of a governing body in writing, rather than at a meeting held under the Act.

Regarding the first issue, the AG opined that such a person does not commit an offense, even if he or she informs members of the governing body of other members' views on the matter. The AG went further by stating,

[a]lthough a person who is not a member of [the governing body] may be charged with a violation of... the Act..., we believe that a person does not commit an offense under these provisions unless, acting with intent, he or she aids or assists a member or members who knowingly act to violate the Act.

With regard to the second issue, the AG concluded that, "a claim, invoice or bill must be approved by a [governing body] at a meeting held pursuant to the Act.

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## JUNE 2009

PUBLISHED FOR CLIENTS AND OTHER INTERESTED PERSONS BY JOHNSON RADCLIFFE PETROV & BOBBITT PLLC.

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# Texas Open Meetings Act

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Circulation of a claim, invoice or bill for approval in writing *in lieu* of its consideration at a meeting held pursuant to the Act would violate the Act" (emphasis added).

Opinion No. GA-0511 (2007) contemplates whether a governmental body may admit selected members of the public into a closed meeting under the Act to discuss the governmental body's employment matters. The AG determined that the Act does not permit a governmental body to admit members of the public into a closed meeting to provide input on a public officer or employee, and that the portions of a closed meeting attended by members of the public are not permitted under the Act.

## Conclusion

While not every possible fact pattern is explored, this article provides an overview of the ramifications for violating the Act. Closed sessions must be held in strict conformity with the Act. There can be no "walking quorums". All matters to be deliberated and voted upon must be discussed in open session at a meeting held subject to the Act, with very few exceptions. Closed sessions must be properly called and noticed and public officials may not stray from the topics listed in the notice. Even unintentional violations can have dire consequences.

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## **Municipal Bond Definition**

**Arbitrage:** Arbitrage refers to the difference between the amount of interest paid on bonds and the earnings derived from an investment of the bond issue's proceeds. Arbitrage can be either negative (borrowing costs exceed investment profits) or positive. Issuers of bonds may attempt to eliminate negative arbitrage (through investment of bond proceeds prior to the time they are spent) during certain temporary periods after issuance of municipal bonds. Internal Revenue Service regulations govern arbitrage of municipal bond proceeds.