



# Public Law Report

OCTOBER 2009

## Important Checklist For Public Officials

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

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

Four (4) primary protections are available to public officials to aid in avoiding litigation, even with qualified immunity in place.

**1. Educate Yourself.** Learn the rules that govern your area of public service, hire consultants who deal in that area and follow their advice.

**2. Do Not Micromanage.** Governing bodies are designed to make policy, not supervise every pipe laid in the ground, every traffic ticket written, or every child disciplined. Plan the menu, but don't cook every meal. That's why you have hired employees, managers and outside consultants.

**3. Buy Liability Insurance.** Buy public officials (directors and officers) liability insurance in reasonable amounts.

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## 2009 Legislative Session Update Vol. 3—Constitutional Amendments

BY JONATHAN D. POLLEY

By now, I hope everyone has had the opportunity to review JRPB's comprehensive memorandum on the new law resulting from the 81st Texas Legislature and get answers to any questions it might have sparked. If not, you can always contact me or any of the other attorneys at my firm. Sadly (or thankfully, depending on your preference), this column will be the final update on the 81<sup>st</sup> Texas Legislature in the *Public Law Report* and, as the subtitle indicates, it will focus on a few possible amendments to the Texas Constitution. However, before diving in to the proposed amendments, I will briefly update the special session that took place in early July and on the status of Senate Bill ("SB") 361.

First, the special session. Governor Perry called the special session for the purpose of extending the life of several state agencies, including the Texas Department of Transportation, that would have otherwise been wound up under the Sunset Review process. Mission accomplished. Despite some hopeful filings related to other topics, Governor

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## What Every Public Official Should Know About Eminent Domain

BY JOSHUA W. GOLDEN

*This article provides a bird's-eye view of the condemnation process and concludes a two-part series on Texas eminent domain law. Readers may find it useful to re-read Part I for context.*

### The Condemnation Process

The condemnation process consists of three (3) stages, each dependent upon the outcome of the previous stage: (1) negotiation for purchase; (2) an administrative proceeding before "special commissioners"; and (3) a formal trial.

**A. Negotiation Stage.** Generally, a condemning authority ("condemnor") must satisfy certain procedural requirements prior to the acquisition or purchase of real property in Texas.

1. Landowner's Bill of Rights. Until January 15, 2010, the condemnor, prior to entering into negotiations with the landowner for the acquisition of real property, must

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# Legislative Update

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Perry did not allow debate on any unrelated topics.

Next, as I hope you recall, SB 361 requires specified water systems to adopt and implement emergency preparedness plans ("EPP"). Well, the Texas Commission on Environmental Quality ("TCEQ") has been diligently working on rules to implement the bill (the "Rules"), as well as the EPP template the bill required it to draft. The first draft of the Rules was approved by the TCEQ Commissioners on August 12, 2009, a copy of which can be found at <http://www.tceq.state.tx.us/rules/prop.html>. Also as required by SB 361, two (2) public hearings on the Rules were held in Harris County, the first (1<sup>st</sup>) on September 21<sup>st</sup> at the Houston-Galveston Area Council in Houston and the second (2<sup>nd</sup>) on September 22<sup>nd</sup> at the Harris County public library in Katy. The Rules are tentatively scheduled to receive final approval on November 18 and be effective December 10.

Now, on to the Constitutional amendments. All proposed Constitutional amendments must be approved by a two-thirds (2/3) vote of the members of each House before being put to a public vote. If the proposal passes by a simple majority in the election, it will become a part of our Constitution. During the session, only nine (9) resolutions received the vote required to appear on our November ballots (matching the number in 2005 and otherwise the lowest total since prior to 1991, although each resolution could contain multiple items that will appear on the ballot). In this article, I will just be noting a couple proposals relevant to my practice and one (1) proposal I found interesting because I like the beach. Later in this *Public Law Report*, Ms. Regina Adams will discuss all eleven (11) propositions appearing on the November ballot.

First, House Joint Resolution ("HJR") 14 would further limit the purposes for which entities may acquire property by eminent domain (a.k.a. condemnation). The resolution accomplishes this goal by clarifying that public use of the property to be condemned must be more than merely incidental. Second, HJR 14 would provide that "public use" excludes transfer of the property to a private entity for the primary purpose of economic development or enhancement of tax revenues (as occurred in the now infamous U.S. Supreme Court case, *Kilo v. City of New London*). While neither of these changes impact the process by which property may be condemned (as SB 18 sought to do, but was derailed by the Voter I.D. fight in the House over Memorial Day weekend), I fully expect a lot of action on that topic in 2011.

Next, HJR 36 seeks to allow the legislature to require that a residence homestead be taxed solely on the homestead's value as a homestead, regardless of whether that use is considered to be the highest and best use of the property. If voters authorize HJR 36, Section 2 of House Bill ("HB") 3613, which states virtually the same thing as HJR 36, will become

effective. The result would be that the people whose homes are currently valued based on some higher and better use will effectively receive a property tax decrease.

Finally, HJR 102 involves one of my favorite topics - beaches. This proposal seeks to create a Constitutional right for the public to use and access public beaches and to dedicate such right as a permanent public easement, which would essentially write the guiding principle behind the existing Texas Open Beaches Act ("TOBA") into the Constitution. Much discussion has occurred recently over the fate of homes that are now suddenly on a public beach because of erosion. The Texas General Land Office, the department charged with overseeing and enforcing the TOBA, has stated that it will not seek to have any such home removed as long as it is not a health or safety risk and it does not significantly restrict the public's right to access the beach. However, this statement leaves the door open to requiring removal of some homes that were not on a public beach when built.

These are just a few of the numerous proposed Constitutional amendments we will all have an opportunity to vote on in November. If you have any questions about any of the proposals resulting from the 81<sup>st</sup> Legislature, feel free to give me a call. If you cannot tell from reading the updates this session, I enjoy the legislative process and would be happy to discuss it.

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# November 2009 Ballot Propositions

BY REGINA D. ADAMS

Below are eleven (11) propositions that will appear on the November 3, 2009 Texas Constitutional Amendment Election ballot. Voters will vote "for" or "against" each proposition. This article explains the effect of each proposition, assuming each proposition passes (i.e., voting "for" each proposition). This article is not meant to influence the reader to vote for or against any proposition.

## **Proposition 1 (HJR 132)**

"The constitutional amendment authorizing the financing, including through tax increment financing, of the acquisition by municipalities and counties of buffer areas or open spaces adjacent to a military installation for the prevention of encroachment or for the construction of roadways, utilities, or other infrastructure to protect or promote the mission of the military installation."

*If passed, HJR 132 would authorize the legislature to allow a municipality or a county to issue bonds and notes to finance the purchase of buffer areas or open spaces adjacent to military installations. The buffer areas would be used to prevent encroachment or to construct roadways, utilities, or other infrastructure to protect or promote the mission of the military installation. The municipality or county may pledge increases in ad valorem tax revenues for repayment of the bonds or notes.*

## **Proposition 2 (HJR 36-1)**

"The constitutional amendment authorizing the legislature to provide for the ad valorem taxation of a residence homestead solely on the basis of the property's value as a residence homestead."

*If passed, HJR 36-1 would authorize the legislature to provide for the taxation of a residence homestead solely on the basis of the property's value as a residence homestead, regardless of whether the property may have a higher value if it were used for other purposes.*

## **Proposition 3 (HRJ 36-3)**

"The constitutional amendment providing for uniform standards and procedures for the appraisal of property for ad valorem tax purposes."

*If passed, HRJ 36-3 would require the legislature to provide for the administration and enforcement of uniform standards and procedures for appraisal of property for ad valorem tax purposes.*

## **Proposition 4 (HJR 14-2)**

"The constitutional amendment establishing the national research university fund to enable emerging research universities in this state to achieve national prominence as major research universities and transferring the balance of the higher education fund to the national research university fund."

*If passed, HJR 14-2 would establish the national research university fund to provide a source of funding that will enable emerging research universities in this state to develop into major research universities. The amendment would require the legislature to dedicate state revenue to the fund and to transfer the balance of the existing higher education fund to the national research university fund. This amendment would further require the legislature to establish the criteria by which a state university may become eligible to receive and use distributions from the fund.*

## **Proposition 5 (HJR 36-2)**

"The constitutional amendment authorizing the legislature to authorize a single board of equalization for two or more adjoining appraisal entities that elect to provide for consolidated equalizations."

*If passed, HJR 36-2 would authorize the legislature to allow for a single appraisal review board for two (2) or more adjoining appraisal entities that elect to provide for consolidated reviews of tax appraisals.*

## **Proposition 6 (HJR 116)**

"The constitutional amendment authorizing the Veterans' Land Board to issue general obligation bonds in amounts equal to or less than amounts previously authorized."

*If passed, HJR 116 would authorize the Veterans' Land Board to issue general obligation bonds, subject to certain constitutional limits, for the purpose of selling land and providing home or land mortgage loans to veterans of the state.*

## **Proposition 7 (HJR 127)**

"The constitutional amendment to allow an officer or enlisted member of the Texas State Guard or other state militia or military force to hold other civil offices."

*If passed, HJR 137 would allow an officer or enlisted member of the Texas State Guard or other state militia or military force to hold other civil offices.*

## **Proposition 8 (HJR 7)**

"The constitutional amendment authorizing the state to contribute money, property, and other resources for the establishment, maintenance, and operation of veterans hospitals in this state."

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# November Ballot

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 If passed, HJR 7 would authorize the state to contribute money, property, and other resources for the establishment, maintenance, and operation of veterans' hospitals in this state.

**Proposition 9 (HJR 102)**

"The constitutional amendment to protect the right of the public, individually and collectively, to access and use the public beaches bordering the seaward shore of the Gulf of Mexico."

*If passed, HJR 102 would define what is a state-owned public beach. The public, individually and collectively, would have an unrestricted right to use and a right of ingress to and egress from a public beach. The amendment would authorize the legislature to enact laws to protect these rights.*

**Proposition 10 (HJR 85)**

"The constitutional amendment to provide that elected members of the governing boards of emergency services districts may serve terms not to exceed four years."

*If passed, HJR 85 would authorize the legislature to provide that members of the governing board of an emergency services district may serve terms not to exceed four (4) years.*

**Proposition 11 (HJR 14-1)**

"The constitutional amendment to prohibit the taking, damaging, or destroying of private property for public use unless the action is for the ownership, use, and enjoyment of the property by the State, a political subdivision of the State, the public at large, or entities granted the power of eminent domain under law or for the elimination of urban blight on a particular parcel of property, but not for certain economic development or enhancement of tax revenue purposes, and to limit the legislature's authority to grant the power of eminent domain to an entity."

*If passed, HJR 14-2 would provide that the taking of private property for public use ("eminent domain") is authorized only if it is for the ownership, use, and enjoyment of the property by the State, its political subdivisions, the public at large, or by entities granted the power of eminent domain, or for the removal of urban blight. The amendment would prohibit the taking of private property for transfer to a private entity for the purpose of economic development or to increase tax revenues. The amendment would also limit the legislature's authority to grant the power of eminent domain in the future unless it is approved by a two-thirds (2/3) vote of all the members elected to each house.*

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# Ethics: Taking The High Road!

**BY ROSS J. RADCLIFFE**

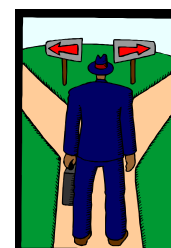
Public officials must keep in mind that ethics are rules of what you ought to do, not just what you should or should not do. Statutes and policies can list some of the things that a public official should or should not do, but knowing what you ought to do requires a conscious effort to ask yourself whether the action you are going to take is proper. Don't fall into those ethical lapses that you must rationalize or justify by asserting to yourself that you are entitled to take the unethical action, because:

- of all the good things you have done in your public office, or
- of all of the time you have spent in board meetings and board projects entitles you to something more; or
- even if the public found out, they would forgive you because those things were "minor" offenses compared to the wonderful services you have performed; or
- the public won't find out and don't care, because they don't attend any of your meetings; or
- the media won't care, because they are not interested in the affairs of my board.

Unfortunately, it's not enough to simply do the right things. In order to maintain the public's trust, you must continually communicate your intentions and the reasons why certain actions are taken. You also must remember that actions you would take in your private business, may not be appropriate as part of your public office.

Ethical behavior requires public officials to continuously look at their behavior from the public's perspective and to continue to ask themselves the question, AM I TAKING THE HIGH ROAD?

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# Eminent Domain

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deliver to the last known address of the person in whose name the property is listed on the most recent tax roll for the acquisition of real property, a statutorily required notice known as the Landowner's Bill of Rights ("LBOR"). The purpose of the LBOR is to educate landowners about the condemnation process and to inform them of their rights in negotiating and dealing with condemning authorities. Customarily, the condemnor (or its agent) satisfies this requirement by attaching a copy of the LBOR to a letter that is mailed immediately before the condemnor first contacts the landowner regarding the potential acquisition of the desired property. The Texas Legislature, however, recently enacted House Bill 2685, effective January 15, 2010, which permits the condemnor to delay delivery of the LBOR to the landowner until the earlier to occur of: (i) seven (7) days prior to making a final offer; or (ii) representing to the landowner that the condemnor has eminent domain authority.

2. **"Good Faith" Negotiations.** Generally, the condemnor must attempt to negotiate in good faith with the landowner to acquire the property before filing a condemnation petition (lawsuit) to acquire the property. Additionally, a condemnor may not file a petition unless the parties are "unable to agree" on a settlement. Texas courts have determined that in order to comply with the "unable to agree" requirement, the condemnor must: (1) make a single bona fide offer, which the condemnor in good faith believed was the amount of compensation due; and (2) the landowner rejected the offer.

**B. Special Commissioners' Hearing.** If the parties are unable to reach a settlement, the condemnor may file a petition in condemnation ("petition") with the county court at law. Unlike traditional lawsuits where parties proceed directly to court, the first step in a condemnation proceeding involves a type of non-binding arbitration known as the Special Commissioners' Hearing. After the condemnor files the petition, the court will assign a panel of three (3) commissioners to hear the parties' arguments and consider evidence for the purpose of determining what adequate compensation, if any, the owner is entitled to receive (the "Award"). The hearing is not of record and is an informal proceeding where formal legal rules and procedures do not apply.

1. **Notice.** Once the court assigns the panel of commissioners, the condemnor must provide notice to all necessary parties (those having a legal interest in the property) no later than eleven (11) days before the hearing date. If notice is not properly given, the commissioners do not have the authority to issue the Award.

2. **Award.** After the hearing (and often immediately following the conclusion of the hearing) the commissioners will issue the Award. At this point, the condemnor may elect to pay the owner the amount of the Award directly or deposit the Award into the registry of the court. This is a very important event in the process for the condemnor, because once the Award is paid or deposited into the registry, the condemnor may take possession of the property pending settlement or completion of the trial. This procedure ensures that the public's interest is not harmed by lengthy delays in the legal process.

**C. Formal Trial Proceeding.** If either party decides that the commissioners Award is unacceptable, one or both of the parties may appeal the Award by filing "objections" to the Award with the court. The objecting party will provide notice of the objections to the other party, and the court will set a trial date. At trial, the entire case will start over from scratch and any statements made during the Special Commissioners' Hearing may not be used as evidence at trial. The judgment of the trial court is then final and any adjustments for amounts previously paid or deposited will be made at that time.

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## Public Officials

Premiums are affordable today compared to a decade or so ago, and coverage is available for almost every need. In addition, business traveler and unowned automobile insurance is available to protect the public body when officials are involved in accidents while on public business.

**4. Inquire About Indemnification.** To the extent insurance does not protect a public official and to the extent the immunities from suit (including the limitation of damages under the Texas Tort Claims Act (the "Act") for certain personal injuries, death or property damage) do not fully protect a public official, the Act specifically allows public entities to indemnify public officials. This protection, of course, does not protect you where any other immunity does not protect you, such as intentional, malicious, grossly negligent or criminal acts or omissions.

Except for limited positions and circumstances, you *do* have qualified immunity. However, that immunity can be lost

if you fail to observe both objective and subjective good faith in the discharge of your duties.

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## MUNICIPAL BOND DEFINITION

### Advanced Refunding:

The refinancing of bond debt, whereby new bonds are issued prior to the date the original bonds can be redeemed. Bonds are considered advance refunded when the proceeds of the refunding bonds are escrowed until the due date of the bonds being refunded.