

MEMORANDUM

To: Managers, Administrators, Clerks, Planners and Attorneys

From: Paul A. Meyer, Chief Legislative Counsel

Date: September 16, 2009

Re: Legislative Changes to Eminent Domain Law
Condemnation/Conservation Easements – SB 600 (SL 2009-439)

As some of you are aware, the 2009 General Assembly added an exception to North Carolina's eminent domain laws as they relate to the condemnation of properties subject to a conservation or historic preservation easement. This memorandum highlights the changes, but please consult your municipal attorney for further analysis of the impacts on local projects.

Background

For a number of decades, the land conservation community has successfully utilized conservation easements to protect properties throughout our state to achieve a number of worthy public policy goals. In the simplest of these arrangements, a property owner either donates or sells the development rights of his or her property to a conservation easement holder--generally a state or local government, or a private land trust--and the holder of the easement is responsible for ensuring that the land owner complies with the terms of the easement. These arrangements have resulted in the preservation of open spaces in urban areas throughout North Carolina.

The stated purpose for ***SB 600 - Condemnation/Conservation Easements (SL 2009-439)*** was to prevent "rogue" governments from using eminent domain powers to target properties subject to conservation easements. Proponents argued that public entities would focus on conservation easement lands because the sites were easier to condemn due to a lack of development on the land, and the government could obtain them for less than fair market value. Both the original Senate and House versions of the legislation (SB 600- Sen. Dan Clodfelter; HB 1080 – Rep. Ruth Samuelson, Rep. Pricey Harrison, Rep. Lucy Allen, and Rep. Jonathan Rhyne) would have required public condemnors to obtain a judicial determination that no prudent and feasible alternative existed to the condemnation of the land, payment of attorneys' fees to the easement holder if such an alternative did exist, and payment of an additional 25% on top of the "value" of the conservation easement to assure that easement holders would be fully compensated. In essence, the bill proponents sought to eliminate the use of condemnation powers as to conservation easement lands by creating significant disincentives – namely a legal hurdle that virtually no condemnor could clear.

The League was concerned with a number of issues throughout the debate over the bill, and we worked diligently to protect the legal authority of cities to use the power of eminent domain under existing law. We also worked to prevent problematic changes in the eminent domain law that could bleed over into non-conservation easement condemnations. Ultimately, both the attorneys' fee provisions and the additional 25% valuation were removed, and the scope of the legislation was scaled back so that the provision of utility services would not be unduly affected.

Applicability

Type of Condemnor. Under G.S. Chapter 40A, certain entities are granted condemnation powers for specified purposes. As an overlay to the existing law, SB 600 (SL 2009-439) applies to condemnation actions initiated by public condemnors, including cities, counties, and various types of special districts and authorities.

Type of Easement. The provisions apply to "conservation easements," which are defined to include both conservation and historic preservation easements that are a qualified real property interest, held by a qualified organization, and exclusively for conservation purposes.

Utilities Extensions. Please take special note of the exception for most utility-related condemnations (see below). This will significantly narrow the impact on local governments.

Summary of Requirements

Alternatives Analysis. Public condemnors must include in the complaint a statement alleging that there is "no prudent and feasible alternative" to condemnation of the property encumbered by the conservation easement. If the holder of the easement contests the condemnation on the grounds that a prudent and feasible alternative does exist or that the condemnor did not sufficiently consider the alternatives, the judge must make a determination as to whether or not a prudent and feasible alternative exists. If the easement holder identifies at least one alternative, the burden shifts to the condemnor to demonstrate there is no qualified alternative. Procedurally, if the easement holder wants to challenge the action based on alternatives analysis, he or she must do so within 30 days of the date of service of the complaint. Otherwise, the holder has up to 120 days to file an answer to the complaint.

Exceptions. Other than the method for determining compensation, the act's requirements do not apply to:

- condemnation for constructing, enlarging, or improving electric, gas, water, wastewater, stormwater, or greenway trails;
- actions by private condemnors (railroads, power companies, telephone companies, etc.);
- situations in which the terms of the conservation easement expressly provide for condemnation of those property rights;

- circumstances in which the condemnation would not extinguish or impair the property rights of the conservation easement holder;
- condemnation actions by the NC Department of Transportation or NC Turnpike Authority if a review of the project was conducted pursuant to the State Environmental Policy Act, the National Environmental Policy Act, or 49 U.S.C. § 303, and the review included an alternatives analysis and consideration of mitigation measures.

Compensation. The act attempts to address the concerns of holders of conservation easements that they were not receiving just compensation for their property rights in eminent domain proceedings. New G.S. 40A-84 establishes a method that determines the value of the property as if it were unencumbered by a conservation easement, then allocates the total value between the owners of property interests. The court is to allocate the value based on the terms of a conservation easement, or based on evidence presented, including the opinion of real estate appraisers.

Vesting of Title. The act provides that title and right to possession of the property will not vest in the local government any earlier than (1) the failure of the easement holder to file a timely answer contesting the action on the basis of alternatives analysis; or (2) a determination by the court that no prudent or feasible alternative exists.

Effective Date

SL 2009-439 applies to condemnation proceedings initiated on or after October 1, 2009.