

March 19, 2008 Spaceport District and the Power of Eminent Domain

Kelly O'Donnell, Chair
Steve Landeene, Executive Director
New Mexico Spaceport Authority
301 South Church St., Suite G
Las Cruces, NM 88001

Re: Opinion Request – Spaceport District and the Power of Eminent Domain

Dear Dr. O'Donnell & Mr. Landeene:

You have requested our opinion regarding whether a regional spaceport district created under the Regional Spaceport District Act, NMSA 1978, §§ 5-16-1 to 5-16-13 (2006), will have the power of eminent domain. Residents of Sierra County have expressed concern that once a spaceport district is formed, the district will have the power of eminent domain to take private property.

Based upon our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, we conclude that a regional spaceport district lacks a sufficiently explicit grant of the power of eminent domain and therefore does not have the power of eminent domain under New Mexico law.

The New Mexico Constitution states that “private property shall not be taken or damaged for public use without just compensation.” N.M. Const. art. II, § 20. The New Mexico Supreme Court has explained takings in the following manner:

Condemnation or eminent domain is the process by which the sovereign exercises the power to “take” private property for public purposes subject to the constitutional requirement that just compensation be paid to the owner ... the essence of condemnation is its involuntary, compulsory nature. See United Water New Mexico, Inc. v. New Mexico Public Utility Com'n, 121 N.M. 272, 910 P.2d 906 (1996).

The state may appropriate private property under the inherent power of eminent domain by legislative act. See State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935). Also, “[t]here is no limitation on the right of the legislature to designate the agencies that shall exercise the power of eminent domain except as restricted by the constitution.” See State ex. Rel. State Hwy Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

The procedure for taking private property is set out in the Eminent Domain Code. See NMSA 1978, §§ 42A-1-1 to 42A-1-33 (amended through 2001). The code defines a “condemnor” as a “person empowered by law to condemn.” NMSA 1978, § 42A-1-2(C)(1981) (emphasis added). Therefore, for a regional spaceport district to lawfully

condemn private property for public use, it must have an express legislative mandate to do so.

The Regional Spaceport District Act provides that a regional spaceport district is a political subdivision of the state. See NMSA 1978, § 5-16-3(E). The board of directors of a district has the power to include property within or exclude property from the boundaries of the spaceport district. See NMSA 1978, § 5-16-6(B) (2006). Merely including property within the district's boundaries does not amount to a taking in the constitutional sense. The Regional Spaceport District Act includes no provision expressly empowering a district to condemn private property. Therefore, we believe that a regional spaceport district lacks the power of eminent domain.

Your request to us was for a formal Attorney General's Opinion on the matter discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,

STEPHEN A. VIGIL
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General