William J. Heaphy, III *Legislative Service Commission*

H.B. 172

123rd General Assembly
(As Introduced)

Reps. Sulzer, Terwilleger, Pringle, Tiberi, Taylor, Flannery, Winkler

BILL SUMMARY

- Generally prohibits specified political subdivisions from appropriating, by an exercise of the power of eminent domain, any property outside their boundaries.

- Specifies that the prohibition does not affect a municipal corporation's authority to appropriate property outside its boundaries for public utility purposes in accordance with Section 4 of Article XVIII of the Ohio Constitution.

- Amends various statutes that currently authorize certain political subdivisions to appropriate property both within and outside their boundaries for specified purposes, to remove the "outside" their boundaries eminent domain authority.

CONTENT AND OPERATION

Appropriation of property restriction

The bill specifies in the Appropriation of Property Law that a political subdivision *generally* is prohibited from appropriating any real or personal property *outside* its boundaries.[1] For purposes of this prohibition, "political subdivision" means a municipal corporation, county, township, school district, or

[1] *In connection with the sovereign power of "eminent domain," the Revised Code uses three equivalent terms: the "appropriation of property," "eminent domain," and "condemnation."*

other body corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state. (Sec. 163.70(A) and (B).)[2]

The bill specifically states that this prohibition does not restrict any authority that a municipal corporation possesses under Section 4 of Article XVIII of the Ohio Constitution to appropriate real or personal property outside of its boundaries for public utility purposes (sec. 163.70(C)). Section 4 of Article XVIII reads as follows (emphasis added):

> Any municipality may *acquire*, construct, own, lease and operate *within or without its corporate limits*, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The *acquisition of any such public utility may be by condemnation or otherwise*, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.[3]

Conforming changes

Consistent with the "***Appropriation of property restriction***," described above, the bill repeals language in several statutes that currently specifically permit political subdivisions to exercise eminent domain powers inside and *outside* their boundaries. Those statutes include the following:

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[2] *See* ***COMMENT*** *1 and 2 for an overview of the general principles governing the exercise of eminent domain in Ohio.*

[3] *See* ***COMMENT*** *3 for further background on Ohio constitutional provisions pertaining to municipal corporation appropriation of property.*

Statute Conferring Power of Eminent Domain and Authorized Political Subdivision	Circumstances Under Which or Purposes for Which the Power of Eminent Domain May Be Exercised
(A) R.C. 306.04(C)(15) and (16): county transit boards or boards of county commissioners operating a transit system	County transit systems.
(B) R.C. 306.35(J) and (K) and R.C. 306.36(A) and (C): regional transit authority (RTA)	Construction or efficient operation of, or access to, any regional transit facility; location or protection of, or access to, transit facilities and improvements, relocation of buildings, structures, and improvements situated on RTA lands, obtaining or storing specified materials, or any other necessary RTA purpose.
(C) R.C. 504.19(B): boards of township trustees	Water supply facilities improvement projects.
(D) R.C. 717.01(A), (G), (V), and (Y): municipal corporations	General authority to acquire real estate by condemnation plus authority to do so for specified purposes, including (1) extending a waterworks system that supplies water to the municipal corporation and its inhabitants "outside of the municipal corporation limits,"[4] (2) establishing, constructing, enlarging, improving, equipping, maintaining, and operating airports, landing fields, or other air navigation facilities, "either within or outside the limits of a municipal corporation," and (3) acquiring land, forest, and water rights necessary for conservation of forest reserves, water parks, or reservoirs, "either within or without the limits of the municipal corporation."

[4] *The bill specifically states in section 717.01(G) that a municipal corporation "shall not appropriate" any real or personal property outside those limits to extend a waterworks system. Ohio courts might find this specification to conflict with Section 4 of Article XVIII of the Ohio Constitution, and this specification seems to be inconsistent with proposed section 163.70(C)'s provision that the bill's proposed "**Appropriation of property restriction**" does not restrict a municipal corporation's authority under Section 4 of Article XVIII to appropriate real or personal property outside of its boundaries for public utility purposes. See **COMMENT** 4.*

Statute Conferring Power of Eminent Domain and Authorized Political Subdivision	Circumstances Under Which or Purposes for Which the Power of Eminent Domain May Be Exercised
(E) R.C. 719.01(I), (M), and (O): municipal corporations	Although this section generally authorizes appropriations of property within municipal corporations for specified purposes, a municipal corporation may appropriate property both within or outside its boundaries, including (1) constructing, opening, excavating, improving, or extending any canal or watercourse, (2) providing a water supply for the municipal corporation and its inhabitants, and (3) establishing airports, landing fields, or other air navigation facilities.
(F) R.C. 747.09: boards of rapid transit commissioners (cities)	Specified purposes.
(G) R.C. 755.08: boards of park commissioners (cities)	Establishing or extending parks, parkways, boulevards, connecting viaducts, subways, public comfort stations, children's playgrounds, and public baths.

COMMENT

1. The State of Ohio is vested with the power of eminent domain or the *right to appropriate property* of its citizens under certain circumstances or for certain purposes because it is a "sovereign" state. The power of eminent domain reflects the principle that *public necessity* may result in private property becoming *subservient to the public welfare* without the property owner's consent.

Ohio court decisions recognize that the general grant of "legislative power" to the General Assembly in Section 1 of Article II of the Ohio Constitution confers the authority to exercise the power of eminent domain upon the General Assembly.[5] Consequently, the power of eminent domain generally may be

[5] *See,* Giesby v. Cincinnati, Wilmington and Zanesville R.R. Co. *(1854), 4 Ohio St. 308, 323-327;* Railroad Co. v. Village of Belle Centre *(1891), 48 Ohio St. 273, 295;* Covington & Cincinnati Bridge Co. v. Magruder *(1900), 63 Ohio St. 455, 475;* Cincinnati v. Louisville & Nashville R.R. Co. *(1913), 88 Ohio St. 283, 294;* Bd. of Township Trustees v. Lambrix *(1978), 60 Ohio App.2d 295, 298-299 (motion to certify record to the*

exercised only by the General Assembly or *by authority of* (i.e., statutory delegation by) the General Assembly, except that municipal corporations have a constitutional, "home rule" right under Section 3 of Article XVIII of the Ohio Constitution to exercise the power of eminent domain *within their territories*[6] and also have certain other *express* constitutional eminent domain power under Sections 4 and 10 of Article XVIII of the Ohio Constitution.

Consistent with its ability to expressly confer authority to exercise the power of eminent domain, the General Assembly has the ability to *expressly deny* that power to an Ohio political subdivision, state governmental official or entity, or private sector entity and thereby eliminate the need for an Ohio court to construe *statutory provisions* to determine whether or not the power of eminent domain has been conferred. One example is R.C. § 1728.13(B) that prohibits a *municipal corporation* from acquiring "by the exercise of the right of eminent domain, for any of the purposes of Chapter 1728. of the Revised Code [the Community Urban Redevelopment Corporation Law], any property used by any public utility . . . in furnishing any commodity or service which, by law, it is authorized to furnish." Another example is R.C. § 3382.02(A) pursuant to which the General Assembly conferred certain broad powers upon the Ohio Arts and Sports Facilities Commission but stated that "it [the Commission] does not have and shall not exercise the power of eminent domain."

2. The Ohio Constitution contains two provisions that generally deal with eminent domain "takings": Section 19 of Article I and Section 5 of Article XIII. Section 19 of Article I is within the Bill of Rights of the Ohio Constitution and essentially provides as follows:

(a) Private property is "inviolate" but is subservient to the public welfare.

(b) *Compensation* for private property, which *only* can be taken for *public purposes*, must be assessed by a jury (but see below) without deduction for benefits to any property of the owner.

(c) Private property may be taken, *without first paying compensation* for the property, (i) in time of war or other public exigency that imperatively requires its immediate seizure or (ii) for the purpose of making or repairing roads that must be open to the public without charge. Compensation for private property taken in

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Sup. Ct. overruled 10/78); and Union Cemetery Assn. v. Columbus *(1967), 10 Ohio Misc. 161, 167.*

[6] *This home rule authority is supplemented by certain statutory grants of eminent domain power.*

this manner must be made *in money* and in accordance with (b) above *subsequent* to the taking.

(d) In the case of *proposed takings* of private property for *other public purposes*, compensation must either (i) first be made in money or (ii) first secured by a deposit of money. This compensation must be determined in accordance with (b) above *before* the taking occurs.

Section 5 of Article XIII, which is within the "corporation" article of the Ohio Constitution, deals with the appropriation of *rights-of-way* by corporations. This section prohibits the appropriation of a right-of-way to the use of a corporation, unless "full compensation" for the right-of-way is *first* made in money or *first* secured by a deposit of money. Compensation must be ascertained by a jury and be determined irrespective of any benefit from any improvement proposed by the corporation.

3. Many Ohio constitutional and statutory provisions pertain to (a) the circumstances under which or the purposes for which the power of eminent domain may be exercised and (b) the Ohio political subdivisions, state governmental officials or entities, and private sector entities that are authorized to exercise that power. Some of the statutory or constitutional provisions authorize the exercise of the power of eminent domain *only within a political subdivision's territory*, whereas others authorize its exercise both inside and *outside a political subdivision's territory*.

The following table summarizes provisions of the Ohio Constitution that grant authority to appropriate property to Ohio *municipal corporations* under certain circumstances or for certain purposes:

CONSTITUTIONAL PROVISION CONFERRING THE POWER OF EMINENT DOMAIN	**CIRCUMSTANCES UNDER WHICH OR PURPOSES FOR WHICH THE POWER OF EMINENT DOMAIN MAY BE EXERCISED**
Article XVIII, Section 3, Ohio Constitution	The authority to exercise all powers of local self-government (i.e., home rule) granted by the constitutional provision includes the power of eminent domain "within the municipal corporation." See, *Britt v. Columbus* (1974), 38 Ohio St.2d 1 and *State, ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13.
Article XVIII, Section 4, Ohio Constitution	Any public utility the product or service of which is or is to be supplied to the municipality or its

CONSTITUTIONAL PROVISION CONFERRING THE POWER OF EMINENT DOMAIN	CIRCUMSTANCES UNDER WHICH OR PURPOSES FOR WHICH THE POWER OF EMINENT DOMAIN MAY BE EXERCISED
	inhabitants. *See, Britt v. Columbus, supra.*
Article XVIII, Section 10, Ohio Constitution	An excess over that actually to be occupied by an improvement, in order to sell the excess with restrictions appropriate to preserve the improvement made.

4. Section 4 of Article XVIII of the Ohio Constitution provides broad extraterritorial authority to municipal corporations. The Ohio Supreme Court has generally interpreted this section to mean that the operations of a municipally owned public utility are exempt from restriction or regulation by the General Assembly. See *Pfau v. Cincinnati* (1943), 142 Ohio St. 101; *Swank v. Shiloh* (1957), 166 Ohio St. 415; *State, ex rel. McCann v. Defiance* (1958), 167 Ohio St. 313; and *In re Complaint of Residents of Struthers* (1989), 45 Ohio St.3d 227.

Thus, a municipal corporation may acquire property, located outside its borders, with an abundant water supply in order to increase its ability to supply water to its inhabitants pursuant to the authority granted by the Ohio Constitution. Since the constitutional grant of authority is self-executing, it operates regardless of the existence of statutory provisions. Therefore, legislation amending only the statutes may be held unconstitutional, depending on the particular facts at issue, if the constitutional provision is not also amended.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-16-99	p. 197

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