



Mississippi Forestry Association

Legislative Bulletin

The Voice of Forestry

Volume 2009 Number 7

April 3, 2009

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MFA Member Question of the Week

Q: I have heard that Governor Barbour recently vetoed a private property rights bill. What is eminent domain?

A: Webster's New Collegiate Dictionary defines eminent domain as "a right of government to take private property for public use by virtue of the superior dominion of the sovereign power over all lands within its jurisdiction."

Mississippi law states that acceptable public uses include drainage and levee facilities and usage, roads and bridges for public conveyance, flood control projects with a levee component, seawalls, dams, toll roads, public airports, public ports, public harbors, public wayports, common carriers or facilities for public utilities and other entities used in the generation, transmission, storage or distribution of telephone, telecommunication, gas, carbon dioxide, electricity, water, sewer, natural gas, liquid hydrocarbons or other utility products.

2009 Legislative Session Not Over Yet

The Mississippi Legislature has recessed and gone home, but the 2009 session will resume later in May or June when lawmakers will return to the Capitol to develop the state's budget for the fiscal year that begins on July 1, 2009.

Mississippi's forestry and natural resources community was impacted this year by legislation that dealt with issues such as eminent domain, 16th Section Lands management, a reduction on the sales tax on logging equipment, and the renewal of the harvest permit that allows log truck weights up to 84,000 pounds.

Several forestry related bills are now on the Governor's desk for his review and approval. MFA's next *Legislative Bulletin* will report on the final results of the Session and how the forestry and natural resources community fared this year.

However, the eminent domain issue is expected to be brought up again during a special Session called when lawmakers return to work on the budget. MFA is working behind the scenes to develop a solution that will foster future economic development in Mississippi and protect private property rights.

GOVERNOR'S VETO MESSAGE FOR HOUSE BILL 803

MFA Staff Note: Governor Barbour's veto message provides very thoughtful public policy ideas on eminent domain and future economic development.

March 23, 2009

TO THE MISSISSIPPI HOUSE OF REPRESENTATIVES:

I am returning House Bill Number 803: "AN ACT TO AMEND SECTION 11-27-1, MISSISSIPPI CODE OF 1972, TO PROHIBIT USE OF THE POWER OF EMINENT DOMAIN EXCEPT FOR A PUBLIC USE; AND FOR RELATED PURPOSES" without my approval, and assign the following reasons for my veto.

After full consideration, I am vetoing House Bill 803 because it would do more damage to job creation and economic development than any government action since Mississippi rightfully began trying to balance agriculture with industry in 1935.

If the Mississippi Legislature had set out to devise a law to make it highly unlikely that Mississippi could attract major projects with large numbers of jobs like Nissan, Toyota, PAC-CAR, Stennis Space Center or facilities along the Tennessee-Tombigbee Waterway, House Bill 803 would do the trick. None of these huge job creation projects would exist in Mississippi today without the prudent, lawful use of government's power to take private property by eminent domain.

Gov. Barbour's letter continued on p. 3



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In his recent veto message of House Bill 803, Governor Barbour wrote "From the Bill of Rights of the United States Constitution to the original Mississippi State Constitution in 1817, the taking of private land for public use has been recognized as an undesirable but necessary power for the good of the citizens. The Fifth Amendment of the U.S. Constitution contains federal provisions relative to the taking of private property."

"In the Mississippi Constitution, the subject is addressed in Article III, Section 17, which states, "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

For more information on the subject of taking private property for economic development purposes, read Governor Barbour's Veto Message of House Bill 803 in this issue of Legislative Bulletin or at <http://billstatus.ls.state.ms.us/documents/2009/html/veto/HB0803.htm>

2009 MFA Forestry Bills Watch List

Note: As of March 31, 2009. Bills will be added and deleted as necessary throughout the Legislative Session

Recommended MFA Positions: M = monitor, S = support, O = oppose

House Bills

HB 503 Beaver control programs; increase amount that counties may expend for.

Board Recommendation: M, 03/17 (H) Conferees Named Eaton, Ward, Weathersby, 03/19 (S) Conferees Named Gollott, Browning, Tollison, 03/27 (H) Conference Report Adopted, 03/27 (S) Conference Report Adopted <http://billstatus.ls.state.ms.us/documents/2009/html/cr/HB0503CR.htm>

HB 803 An Act to amend section 11-27-1, Mississippi Code of 1972, to prohibit use of the power of eminent domain except for a public use; and for related purposes.

Board Recommendation: S, 03/24 (H) Veto Overridden, **03/26 (S) Veto Sustained** <http://billstatus.ls.state.ms.us/documents/2009/html/HB/0800-0899/HB0803SG.htm>

Governor Barbour's Veto Message

<http://billstatus.ls.state.ms.us/documents/2009/html/veto/HB0803.htm>

HB 881 An Act to amend section 29-3-81, Mississippi Code of 1972, to grant local school boards the option, during the final year of any additional five-year lease on agricultural Sixteenth Section Lands that the board intends to reclassify, to again re-lease the land for an additional five-year term or to proceed with the reclassification; and for related purposes.

Board Recommendation: O, 03/16 (H) Conferees Named Brown, Warren, Holloway, 03/16 (S) Conferees Named Carmichael, Blount, Tollison, 03/30 (H) Enrolled Bill Signed, 03/31 (S) Enrolled Bill Signed, **03/31 Due From Governor 04/06/09**

<http://billstatus.ls.state.ms.us/documents/2009/html/HB/0800-0899/HB0881SG.htm>

HB 1132 Harvest permits; extend repealer on law authorizing and revise maximum weight limit and vehicles for which may be issued.

Board Recommendation: S, 03/11 (H) Conferees Named McBride, Walley, Ward, 03/16 (S) Conferees Named King, Yancey, Lee (35th), 03/31 (S) Conference Report Adopted, 03/31 (H) Conference Report Adopted, <http://billstatus.ls.state.ms.us/documents/2009/html/cr/HB1132CR.htm>

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MFA's mission is leading diverse forestry groups to promote landowner rights, environmental stewardship, member prosperity, and community understanding.

HB 1381 Scenic streams; designate a certain portion of the Escatawpa River.

Board Recommendation: S, 03/18 Approved by Governor
<http://billstatus.ls.state.ms.us/documents/2009/html/HB/1300-1399/HB1381SG.htm>

HB 1733 Sales tax; revise rate on certain sales of tractors, farm implements, logging/pulpwood equipment, repair parts and labor.

Board Recommendation: S, 03/02 (S) Referred To Finance, 03/12 (S) Title Suff Do Pass As Amended, 03/17 (S) Died On Calendar

Senate Bills

SB 2230 An Act to amend section 11-27-1, Mississippi Code of 1972, to prohibit use of the power of eminent domain for certain private, nongovernmental purposes; to provide exemptions; and for related purposes.

Board Recommendation: S, 03/30 (S) Died On Calendar

SB 2606 Sales tax; revise rate on sales of farm tractors and certain farm equipment and parts and labor.

Board Recommendation: S, 03/30 (S) Enrolled Bill Signed, 03/31 (H) Enrolled Bill Signed, 03/31 Due From Governor 04/06/09
<http://billstatus.ls.state.ms.us/documents/2009/html/SB/2600-2699/SB2606SG.htm>

SB 2659 State-funded buildings; energy performance regulations shall apply to buildings constructed with CDBG funds.

Board Recommendation: M, 03/11 Approved by Governor
<http://billstatus.ls.state.ms.us/documents/2009/html/SB/2600-2699/SB2659SG.htm>

SB 2947 Sixteenth section forest lands; authorize management services by private forester subject to approval by the Secretary of State and Forestry Commission.

Board Recommendation: M 03/18 (S) Conferees Named Carmichael, Blount, Lee (35th), 03/25 (H) Conference Report Adopted, 03/27 (S) Conference Report Adopted
<http://billstatus.ls.state.ms.us/documents/2009/html/cr/SB2947CR.htm>

SB 3278 Taxation; provide certain incentives to facilities that generate electricity through biomass or cogeneration. 03/26 (S) Conference Report Adopted, 03/26 (H) Conference Report Adopted, 03/31 (S) Enrolled Bill Signed

<http://billstatus.ls.state.ms.us/documents/2009/html/SB/3200-3299/SB3278SG.htm>



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From the Bill of Rights of the United States Constitution to the original State Constitution in 1817, the taking of private for public use has been recognized as an undesirable but necessary power for the good of the citizens. The Fifth Amendment of the U.S. Constitution contains federal provisions relative to the taking of private property.

In the Mississippi Constitution, the subject is addressed in Article III, Section 17, which states, "*Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.*"

Beyond the obvious fact that House Bill 803 clearly violates the Mississippi Constitution, the current law already protects private property owners in cases where their land is taken for public use in economic development and job creation projects.

Let the facts be clear: House Bill 803 does not prevent private property from being taken from its owners by government or even by certain private companies in the name of public use. The proponents of this bill had a slogan: "Protect private property." As passed, House Bill 803 does not protect private property.

Under House Bill 803, private property can be taken by the Mississippi Department of Transportation for its purposes by the vote of only two transportation commissioners . . . only two men can take private property for its owners for MDOT uses. Private property can be taken for county use by the vote of only three members of the county board of supervisors. Private property in a municipality can be taken for municipal use by the mayor and a simple majority of the city council or board of alderman (usually a majority takes three or four votes).

The likelihood of private property being taken for MDOT, county or municipal use is many, many times more likely than the use of eminent domain for a Mississippi Major Economic Impact Act project like Toyota, Nissan or PAC-CAR.

Before discussing how much better owners of private property are protected when it is sought to be taken for job creation and economic development uses, there is another common type of taking of private property for public use that also is not affected by House Bill 803. That is the taking of private property by eminent domain by private companies for certain public uses, including railroads, pipelines, toll roads, and utilities like electric and telephone companies. These takings of private property will not be affected by House Bill 803, and private property won't be "protected" against its taking by eminent domain for these public uses. Just as now, if a utility, pipeline or railroad determines as a private company that it needs your private property for public use, it can take it by eminent domain; and your remedy is to fight eminent domain in court. House Bill 803 will not change that one iota.

The practice and process used today for economic development projects is very different than what is used for the eminent domain takings mentioned above.

Before private property can be taken by eminent domain under the Mississippi Major Economic Impact Act (MEIA), the State's main program for recruiting large job creation projects like Nissan and Toyota, approval has to be given by several government entities.

First, the local government has to agree the project is desirable and worthy of public support. We don't try to recruit projects to a community unless the community wants it. In practice, the county and, if the project is within the limits of a municipality, then that municipality must support the project, including with financial support in nearly every case.

Then, before a MEIA project can go forward, the professionals at the Mississippi Development Authority must determine and certify that the project meets the standards required by the Act. That is the second step in protecting private property.

Next, both the Mississippi House of Representatives and the Mississippi Senate must vote to accept the project and provide MEIA and other State support for the project. That is the third layer of protection compared to an urban renewed project like *Kelo*, and it requires a majority of votes in each house, normally indicating statewide support.

Fourthly, the Governor has to sign the bill supporting the project. Compare that practice and process to the project being supported by the Transportation Commission or three Supervisors. This is not to say the use of eminent domain by either MDOT or local governments doesn't protect private property rights. It is simply to point out that private property rights are far better protected by the layers of elected officials who must support job creation projects under MEIA, with its required multi-jurisdictional agreement.

Yet, despite the far greater safeguards, the Legislature in House Bill 803 and those lobbying for its passage failed to include MEIA job creating and economic development projects as permissible uses of eminent domain to take private property. Property owners have greater protections of their property rights under the MEIA practice than for any other takings process.

If those concerned about *Kelo*-type abuses of eminent domain want the current practices used by this administration to be required by statute, I will be delighted to agree. In fact, I would actively support a bill that sets out that local government support and MDA certification be required by law, along with enactment of an MEIA amendment

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or successor law before eminent domain could be used for job creation and economic development purposes. If necessary, when the legislature returns to deal with the budget later this spring, I will call a Special Session within the Session to pass such legislation.

This would resolve the fatal flaw of House Bill 803.

At the same time I would urge lawmakers to consider whether it would be appropriate or necessary to add to the eligible uses of eminent domain to take private property any or all of the following: facilities for certain or all hospitals and health centers, housing authorities, industrial parks, schools and public improvement districts.

Let me address an inaccurate claim made by proponents during debate in both houses: that the Legislature could grant the use of eminent domain to take private property after an MEIA job creation project has decided to come to Mississippi. This claim is false; it ignores the way the siting of such large economic development projects is negotiated.

If House Bill 803 were to become law, Mississippi would enact a prohibition against the use of eminent domain for job creation or economic development projects under MEIA. Every company looking to site a new facility or significantly add to an existing facility here will know about this prohibition. And if they didn't, every state competing against Mississippi would tell them over and over about the prohibition; because every other state knows that the use of eminent domain is often required to provide good title to the site for the facility or the critical infrastructure needed to serve this job-creating project.

As a reminder, eminent domain was used to allow Nissan, Toyota, ATK, PACCAR, Stennis Space Center and the Tennessee-Tombigbee Waterway to exist in Mississippi. Eminent domain would likely be needed to secure title to many other MEIA economic development sites in the future, and experienced site selectors, whether corporate or under contract, know it.

Twice in negotiations with Toyota I was told by the company's site selector, the person who recommended to the board of directors and the top management where to put the new plant, that Toyota could not choose the site at Blue Springs because of title problems. If I had not been able to tell Toyota these problems could and would be solved by eminent domain, Toyota would have broken off negotiations with us and chosen one of the other states competing with us for the project.

In every major job creation project of my administration, Mississippi was always competing with sites in other states. If our State can't assure the company good title to the site for the project, we will be eliminated from the competition.

If House Bill 803 were law, no company would choose a Mississippi site and hope the Legislature would change its mind or make an exception. Site selectors will not take such a risk of embarrassing the company and/or losing his job or contract. Site selectors are risk-averse, since the companies they represent often are investing hundreds of millions or billions of dollars in the project.

And how big would the risk be? The proof is in the provision the Legislature added to House Bill 803 to "grandfather in" MEIA projects previously approved by the Legislature, like Toyota, Nissan and ATK. Further, House Bill 803 would cast doubt on whether land previously taken by eminent domain for other purposes (such as the Tenn-Tom Waterway, Stennis Space Center or the Yellow Creek Nuclear Power Plant) could be used in the future for other economic development purposes. The ATK \$200 million, 800 job expansion in Tishomingo County would be an example if it were not "grandfathered" under House Bill 803. Certainly we can expect more job creation projects inside those three large areas. Indeed, we promote MEIA projects, like ATK, in these areas. If House Bill 803 becomes law, it raises serious questions of whether these previously acquired areas can be used for future projects at all.

Before closing, the language of House Bill 803 raises more questions than it answers about some Mississippi local governments using eminent domain for a *Kelo*-type project.

Specifically, House Bill 803 says a municipality, like Jackson, can use eminent domain to take private property if the local government finds the property to be "a public nuisance" or "a structure beyond repair." What are the limits under that language compared to taking private property for an urban renewal scheme or a *Kelo*-type project?

Indeed, if Jackson condemns ten square blocks, as would be allowed by House Bill 803, what could it do with the property it takes? Let it sit vacant? Take it off the tax rolls forever? Give it to Jackson State?

Good people can disagree as to whether House Bill 803 even accomplishes its primary mission of protecting private property from a *Kelo*-type urban renewal project; but there is no question House Bill 803 would deal a terrible blow to job creating efforts in Mississippi, and does so unnecessarily. Protection of private property from taking by eminent domain is nowhere else as strong as the protections under Mississippi's Major Economic Impact Act as practiced. The real solution is to codify these practices to protect private property, and abide by the Constitution in the process.

Respectfully submitted,
HALEY BARBOUR
GOVERNOR