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## FISCAL IMPACT REPORT

SPONSOR Muñoz ORIGINAL DATE 02/23/17  
 LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Public Use & “Eminent Domain” SB 452

ANALYST Daly

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Unknown	Unknown	Unknown	Recurring	Various State Funds

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Department of Transportation (DOT)  
 Energy, Minerals & Natural Resources Department (EMNRD)  
 Municipal League (ML)  
 New Mexico State University (NMSU)  
 Office of the Attorney General (OAG)

### SUMMARY

#### Synopsis of Bill

Senate Bill 452 enacts a new section of the Eminent Domain Code, which governs takings (condemnations) of private property by the State and its political subdivisions. The new section:

- Limits condemnations to those authorized by law and for a public use;
- Excludes from public use the public benefits of economic development, including increases in tax bases, tax revenues, employment or general economic health;
- Requires compensation for a taking to be the amount of the property owner’s initial purchase price or the current appraised value, whichever is greater;
- Entitles a property owner to just compensation when value is diminished by a land use law (“regulatory taking”), except when the law:
  - Is narrowly tailored to protect public health and safety;
  - Limits or prohibits uses or divisions that:

- Constitute public nuisances under common law;
- Are for the purpose of housing sex offenders, selling illegal drugs, liquor control, pornography, obscenity, nude or topless dancing or other adult-oriented businesses if the law is consistent with federal or state constitutional provisions;
- Establishes locations for utility facilities;
- Is required by federal law; and
- Does not directly regulate an owner’s real property.

Under HB 452, any question whether the use is public or whether a land use law fits within a specified exception is to be determined by the judiciary without regard to any legislative assertion by the regulating body concerning public use or the applicability of an exception. Any governmental entity enacting a land use law bears the burden of establishing by clear and convincing evidence that the law falls within one of the specified exceptions.

### **FISCAL IMPLICATIONS**

DOT advises that the fiscal impact of this bill, which could be considerable, cannot be determined presently as it is dependent on future courts’ interpretation of the provisions of the bill and the causes of action authorized.

### **SIGNIFICANT ISSUES**

This bill addresses the State’s constitutionally-based obligation to compensate private property owners for takings. See Article 2 Section 20 of the New Mexico Constitution (“Private property shall not be taken or damaged for public use without just compensation.”). While AOC suggests SB 452 may be aimed at perceived government abuses of the power of eminent domain, OAG advises the proposed legislation appears to grant rights to private property owners that extend beyond the baseline rights set forth in the New Mexico Constitution or the analogous clause in Amendment 5 of the United States Constitution. Similarly, DOT advises SB 452 changes much of the law relating to eminent domain in New Mexico.

#### Economic Development Excluded As Public Use

One significant change pointed out by responding agencies is the exclusion of the benefits of economic development from “public use” for purposes of condemnation proceedings. OAG advises that existing law does not require such a carve-out: it refers to the 2005 United States Supreme Court decision in *Kelo v. City of New London, Conn.* that allows a local government to take private property for public development purposes, even when the property is not located in a blighted area. Likewise, ML asserts that this limitation on public use sharply limits the *Kelo* decision. AOC provides further clarification of that decision, first citing this language:

Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose .... Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties.

AOC adds that the Kelo court found that although private profit and redevelopment plans might “raise a suspicion that a private purpose was afoot ...they do not warrant the crafting of an artificial restriction on the concept of public use.” However, the court went on to note:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

AOC sees SB 452 as a step towards that type of statute. It notes, however, that while excluding economic development purpose or benefit from allowable public use, the bill does not further define what does constitute public use, or provide examples of permissible public uses.

#### Judicial Role in Determining Public Use

A second change in existing law denoted by DOT is the grant of exclusivity to the courts regarding the question of what constitutes public use, and the express direction that courts are not bound by any statement of determination by the legislative body exercising its condemnation powers. Currently, DOT advises, the question of whether a use is a public use or not is a legislative determination and generally is not subject to judicial review. AOC, however, advises that “Whether the use to which the property is to be put is a public use is a judicial question.” *State ex rel. Red River Valley Co. v. District Court*, 39 N.M. 523, 51 P.2d 239 (1935) at {13}(citing *Shoemaker v. United States*, 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170).

#### Regulatory Takings

Responding agencies all call attention to the provisions in Section 3 that newly authorize suits for regulatory takings caused by land use laws that reduce existing rights to use, divide, sell or possess real property and generally require payment of damages when such a law is seen as diminishing the fair market value of that property. DOT advises that at present in the United States and in New Mexico the governmental entity is only required to pay compensation when the particular law or regulation is applied to stop all economically reasonable use of the property.

NMSU asserts that compensating landowners for diminution in value due to land use law changes could impact it and other institutions of higher education that are developing their available real estate assets. If a master planned development is planned for a portion of higher education-owned real estate and adjacent property owners believe this development will harm their property values, they may be entitled to litigate for just compensation due to diminution in value, resulting in court proceedings or the cancellation of the development.

EMNRD notes that while a land use law is commonly viewed as a zoning or planning law adopted by a local government, the definition of “land use law” in SB 452 appears to be broader because it includes any statute or rule that regulates the use of land. EMNRD questions whether a Section 3 inverse condemnation action could be brought based to rules that regulate the activities of extractive industries adopted under laws such as the Oil and Gas Act or the Mining Act.

Further, the same issue as to the judiciary’s role in determining public use may apply to SB 452’s language making the applicability of an exception to what may otherwise constitute a regulatory taking a solely judicial question. See Subsection 3(H).

### Just Compensation

The just compensation to be paid in actions brought under Section 3 of HB 425 may conflict with existing statute. As DOT notes, requiring that compensation to equal or exceed the landowner’s original purchase price creates a situation where the condemning authority may be required to pay that price for the condemned property, even when the fair market value may be less because property has declined in value or the purchaser overpaid for the property. At present, it advises, the condemning authority is only required to pay the fair market value for the property as currently determined, regardless of the original purchase price. See Section 42A-1-24 NMSA 1978. Further, existing law already provides that the purchase price paid by another landowner for similar property may be considered under certain circumstances. See Subsection (F) of Section 42A-1-24.

In the same vein, ML comments that establishing a “floor” of the greater of either the original purchase price or the current appraised value removes judicial discretion in awarding just compensation and replaces it with mandatory minimums. ML suggests that where a property’s actual value has significantly fallen due to neglect and disrepair, such an award could result in a windfall to the landowner at the expense of the taxpayers.

The just compensation provisions raise yet another issue. As the OAG notes, unlike existing law, SB 452 does not appear to distinguish between a complete taking and a partial taking, which may create conflicts in determining just compensation for partial takings. See Section 42A-1-26, NMSA 1978. Issues regarding the interplay of SB 452 and this section of the Eminent Domain Code may arise.

### **PERFORMANCE IMPLICATIONS**

DOT comments that the effect of SB 452 would be to encourage litigation in the courts, to make more difficult and uncertain the ability to condemn property for public uses, and make it more difficult to apply land use laws or other actions which might arguably affect land values in some fashion.

### **TECHNICAL ISSUES**

AOC notes the standard of proof for judicial determinations as to public use and just compensation is unclear. The same may be true for in determining the applicability of an exception to an alleged regulatory taking.

MD/jle