



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>October 22, 2019</p>	<p>No. I19-005 (R19-002)</p> <p>Re: Whether a private developer may use Arizona's public works eminent domain statutes</p>
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To: Hon. Frank Pratt
Arizona State Senate

Question Presented

Can a private developer use Arizona's public works eminent domain statutes, Arizona Revised Statutes §§ 12-1141 to -1162, if it is necessary to build a transmission line that connects an Arizona substation with a California substation?

Summary Answer

Yes. A private developer can use Arizona's public works eminent domain statutes, A.R.S. §§ 12-1141 to -1162, if it is necessary to build a transmission line that connects an Arizona substation with a California substation, as long as (1) the private developer qualifies as an "authorized corporation" and (2) the project qualifies as a "public works project." The Attorney General is unable to opine on whether A.R.S. § 12-1142(A) authorizes a particular private developer to use the power of eminent domain for a particular project because that inquiry would involve a question of fact rather than a question of law.

Background

The request for this opinion supplied the following background facts and conclusions, which do not constitute factual findings or conclusions by the Attorney General. *See* A.R.S. § 41-193(A)(7) (authorizing the Attorney General to “render a written opinion upon any question of *law* relating to [the] offices” of authorized requestors (emphasis added)).

The Delaney to Colorado River 500 kV Transmission Line or Ten West Link Project is a proposed 500 kV transmission line that connects the Arizona Public Service Delaney substation to the Southern California Edison Colorado River substation, providing a 500 kV interstate interconnection for the transmission of electricity between Arizona and California. In 2015, the California Independent System Operator Corporation selected DCR Transmission, LLC as the project sponsor to develop, permit, finance, construct, own, operate, and maintain the Ten West Link Project. While DCR Transmission, LLC is considered a “utility” under Arizona’s line siting statutes, it is not a “public service corporation” or a “public service agency.”

The opinion request appears to concern whether DCR Transmission, LLC is authorized under A.R.S. § 12-1142(A) to exercise the power of eminent domain as necessary to construct and operate the Ten West Link Project. As explained below, the Attorney General is not authorized to opine on that specific issue, which involves particularized questions of fact rather than a question of law. Instead, this opinion provides more general guidance on the question identified above: whether a private developer can use Arizona’s public works eminent domain statutes, A.R.S. §§ 12-1141 to -1162, if it is necessary to build a transmission line that connects an Arizona substation with a California substation.

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Analysis

“The power of eminent domain is inherently vested in the State.” *City of Phoenix v. Harnish*, 214 Ariz. 158, 161, ¶ 12 (App. 2006). This power, however, is not inherently vested in the political subdivisions of the State. *Id.* Political subdivisions “may only exercise those powers that are statutorily delegated to them.” *Id.* The requirement of statutory delegation applies with equal force to private parties seeking to exercise the power of eminent domain.

Thus, whether private developers may condemn property under Arizona’s public works eminent domain statutes involves a matter of statutory construction. The “best and most reliable index of a statute’s meaning is its language.” *Janson on Behalf of Janson v. Christensen*, 167 Ariz. 470, 471 (1991). The words of a statute “are to be given their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended.” *Arizona ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539, 541, ¶ 7 (2018). Where the language is plain and unambiguous, courts follow the text as written. *Mid Kansas Fed. Sav. & Loan Ass’n of Wichita v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128 (1991); *see also Balestrieri v. Hartford Acc. & Indem. Ins. Co.*, 112 Ariz. 160, 163 (1975).

A. Statutory Analysis

The statutory delegation to condemn property under the public works eminent domain statutes is set forth in A.R.S. § 12-1142(A). It provides in part: “A federal agency, state public body or authorized corporation may institute condemnation proceedings under this article for acquisition of real property necessary for a public works project.” *Id.* This statute has two requirements. First, the entity seeking to exercise the power of eminent domain must be authorized under the statute—that is, the entity must be a “federal agency,” a “state public body,” or an “authorized corporation.” Second, the power of eminent domain must be used for an

authorized purpose. In the words of the statute, the acquisition of real property must be “necessary for a public works project.” These two requirements are addressed below.

1. Authorized Entities

Section 12-1142(A) delegates the power of eminent domain to three classes of entities: a “federal agency,” a “state public body,” and an “authorized corporation.” Section 12-1141 defines each of these terms.

A “federal agency” means “the United States, the federal emergency administration of public works or any other agency or instrumentality, corporate or otherwise, of the United States.” A.R.S. § 12-1141(3).

A “state public body” means “the state or a county, city, town, municipal corporation, authority or any other subdivision, agency or instrumentality thereof, corporate or otherwise.” A.R.S. § 12-1141(7). Because “state public body” is defined using the definite article “the state” instead of the indefinite article “a state,” the ordinary meaning of “the state” in the context of this statute clearly refers to the state of Arizona, not to any state generally. Webster’s Third New International Dictionary 2368 (1969) (explaining that “the” is “used as a function word to indicate that a following noun or noun equivalent refers to someone or something previously mentioned or clearly understood from the context or situation”).

Finally, an “authorized corporation” means:

a corporation or association engaged or about to engage in a public works project, as defined in this article, for a public use, but the construction of the public works project and its conduct thereafter by the corporation or association is subject to regulation or supervision by a federal agency, as defined in this article, or a state public body, as defined in this article, whether by virtue of an agreement, provision of law or otherwise.

A.R.S. § 12-1141(1). To qualify under this definition, an entity must satisfy four elements. It must be (1) a corporation or association, (2) engaged or about to engage in a public works project,¹ (3) for a public use,² and (4) the project’s construction and conduct thereafter must be subject to regulation or supervision by a federal agency or a state public body. Because A.R.S. § 12-1142(A) includes an “authorized corporation” which (by definition) is not limited to public entities, it is clear that a private developer may exercise the power of eminent domain under this law if that developer otherwise qualifies under the statute.

2. Authorized Purpose

Not only must the power of eminent domain be exercised by an authorized entity, it must also be “necessary for a public works project.” A.R.S. § 12-1142(A). While the statute does not define what is “necessary,” it does provide a definition for a “public works project.” *Id.* § 12-1141(5).³ This term means “a work or undertaking which is financed in whole or in part by a federal agency ... or by a state public body.” The same definitions of “federal agency” and “state public body” set forth above, *supra* Part A.1, apply to the “public works project” requirement.

B. Application of A.R.S. § 12-1142(A) to the Ten West Link Project

Consistent with the statutes set forth above, a private developer can use Arizona’s public works eminent domain statutes, A.R.S. §§ 12-1141 to -1162, if it is necessary to build a transmission line that connects an Arizona substation with a California substation, as long as the

¹ The meaning of “public works project” is discussed *infra* Part A.2.

² To qualify as a public use, the use must satisfy both the statutory and constitutional definitions of “public use.” A.R.S. § 12-1136(5); Ariz. Const. art. II, § 17.

³ The question presented assumes the necessity of eminent domain for the construction or operation of the project.

power of eminent domain is (1) exercised by an authorized entity and (2) the project qualifies as a “public works project.”

The opinion request includes details regarding a particular private developer seeking to construct a particular project to build a transmission line that connects an Arizona substation with a California substation. To the extent that the opinion request asks the Attorney General for an opinion about whether this particular private developer can exercise the power of eminent domain under A.R.S. § 12-1142(A) for this particular project, the Attorney General is unable to render such an opinion. Under A.R.S. § 41-193(A)(7), the Attorney General may “render a written opinion upon any question of law” relating to the office of a member of the Legislature. Whether A.R.S. § 12-1142(A) authorizes DCR Transmission, LLC to use the power of eminent domain for the Ten West Link Project involves questions of fact beyond the scope for which an Attorney General opinion is authorized under A.R.S. § 41-193(A)(7).

Conclusion

A private developer can use Arizona’s public works eminent domain statutes, A.R.S. §§ 12-1141 to -1162, if it is necessary to build a transmission line that connects an Arizona substation with a California substation, as long as (1) the private developer qualifies as an “authorized corporation” and (2) the project qualifies as a “public works project.” The Attorney General is unable to opine on whether A.R.S. § 12-1142(A) authorizes DCR Transmission, LLC to use the power of eminent domain for the Ten West Link Project, because that inquiry involves particularized questions of fact rather than a question of law.

Mark Brnovich
Attorney General