

# TAKING AWAY LOCAL CONTROL: THE RISKS OF REGULATING PUBLIC UTILITY'S EMINENT DOMAIN AUTHORITY

## I. INTRODUCTION

For over 100 years, the state's authority of eminent domain has been delegated to public utility companies.<sup>1</sup> They utilize this authority when they are unable to voluntarily acquire the property necessary to provide services to their customers. Due to rapid growth in metro Atlanta over the past decade, a need for such property has increased.<sup>2</sup> As citizens become less tolerant of voluntarily relinquishing their property or placing equipment in their neighborhood, however, utility companies have been forced to exercise their authority of eminent domain.<sup>3</sup> Unhappy with this result, citizens often turn to their local government in an attempt to stop the utility companies.

Recently, local governments have attempted to regulate public utility companies by passing ordinances targeting the utilities' eminent domain authority. Georgia courts repeatedly have held that these ordinances are invalid because local governments have no authority to regulate in this area.<sup>4</sup> On

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1. Jones v. N. Ga. Elec. Co., 54 S.E. 85, 89 (Ga. 1906).

2. Brief of Appellee at 3, Forsyth County v. Ga. Transmission Corp., 632 S.E.2d 101 (Ga. 2006) (No. S06A0421 Nov. 28, 2005), 2005 WL 5095872; see also Sarah Elizabeth Tosone, Legislative History, *Eminent Domain and Utilities*, 21 GA. ST. U. L. REV. 157 (2004).

3. Stacy Shelton, *Proposed Pipeline Spurs Questions*, ATLANTA J. CONST., December 13, 2008, at B-6, available at 2008 WLNR 23910464; see also Carol M. Chinn, Editorial, *Don't Let the Lights go Out in Georgia*, ATLANTA J. CONST., Feb. 25, 2003, at A11, available at 2003 WLNR 6214120.

4. Rabun County v. Ga. Transmission Corp., 575 S.E.2d 474 (Ga. 2003) (three year moratorium on construction of high voltage power lines); Cobb County v. Ga. Transmission Corp., 578 S.E.2d 852 (2003) (seven and one-half month moratorium on construction of above-ground high voltage power lines); City of Buford v. Ga. Power Co., 581 S.E.2d 16 (Ga. 2003) (one year moratorium on electric power substations); Forsyth County v. Ga.

January 15, 2009, legislation was introduced to explicitly require a public utility to obtain approval from the local governing authority before condemning land.<sup>5</sup> If enacted, this legislation would cause a curious dichotomy in Georgia law—public utilities which provide a vital and useful service to Georgia citizens would be required to obtain approval from a local government before they can condemn land, but the local government would be prohibited by Georgia’s Constitution from withholding approval of the condemnation.

Several legal and policy rationales demonstrate the consequences of this legislation. If local governments were allowed to approve condemnations, utilities would be subject to potentially conflicting and disabling regulations throughout different localities in which they operate. Furthermore, unlike a typical developer, a utility is statutorily limited in the uses to which it can put a parcel of property.<sup>6</sup> When local government regulation deprives the public utility of use of the property it has acquired, the government risks effecting a taking of the utility’s property without just compensation.

To understand and resolve these issues, Part II will explore the language of the proposed legislation. Part III will provide a brief overview of the nature of public utility companies in Georgia and their statutorily delegated power of eminent domain. Part IV will analyze local government’s prior attempts at regulating a public utility, specifically focusing on why such regulations have failed. Finally, Part V will analyze the risks of

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Transmission Corp., 632 S.E.2d 101 (Ga. 2006) (overlay zoning district required public utility to obtain approval from county before constructing high voltage transmission line); all discussed *infra* § V.

5. H.B. 362, 150th Gen. Assem., Reg. Sess. (Ga. 2009); H.R. 70, 150th Gen. Assem., Reg. Sess. (Ga. 2009).

6. See O.C.G.A. § 22-3-20 (2008) (Any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others in order to run power lines, maintain dams, flow backwater, or carry on other activities necessary for constructing and operating such a plant provided that the person first pays just compensation to the owner of the land to be affected.”); O.C.G.A. § 46-3-201 (2008) (An electric membership corporation shall have power to acquire “all interests in realty necessary and appropriate to effectuate the purposes of such electric membership corporation.”); *infra* text accompanying notes 132 and 133.

local government regulations, particularly the risk that the local governments will violate the Takings Clause of the United States and Georgia Constitutions.

## II. PROPOSED LEGISLATION

Motivated by a “property rights philosophy,” Representative Ron Stephens of the 164th district introduced legislation in the Georgia House which would add a provision to the Eminent Domain title of Georgia’s Code.<sup>7</sup> The bill would require a public utility to obtain approval from the local government before it can exercise its eminent domain authority.<sup>8</sup> House Bill 362 is limited in scope and provides:

No public utility shall exercise the right of eminent domain unless it has obtained prior approval by resolution or ordinance from the governing authority of the municipality within which the property is located, if any, or otherwise from the governing authority of the county within which the property is located. No action for condemnation shall be brought by a public utility in any court of this state without the resolution or ordinance required by this Code section.<sup>9</sup>

Representative Stephens also introduced legislation which would amend Georgia’s Constitution to provide similar terms: “Condemnation of private property pursuant to the power of eminent domain shall be approved by a resolution or ordinance of the governing authority of the municipality within which the property is located, if any, or otherwise by the governing authority of the county within which the property is located.”<sup>10</sup> This proposed constitutional amendment does not address public utilities specifically, but it states in more general terms that the governing authority of the municipality must approve condemnations. Notably, if passed, the proposed resolution would amend the Eminent Domain paragraph in the Bill of Rights section of Georgia’s Constitution and not the Home Rule

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7. *Bill Asserts Property Rights in Utility Visits*, ATHENS-BANNER HERALD, Jan. 16, 2009, available at: [http://www.onlineathens.com/stories/011609/new\\_377882709.shtml](http://www.onlineathens.com/stories/011609/new_377882709.shtml), last accessed Mar. 14, 2009.

8. H.B. 362.

9. *Id.*

10. H.R. 70.

Act—the portion of the constitution which authorizes and restricts local government regulation.<sup>11</sup>

### III. PUBLIC UTILITY COMPANIES AND THEIR EMINENT DOMAIN AUTHORITY

A public utility company is an entity that produces a service that benefits the public.<sup>12</sup> Georgia's statutes specifically list services and commodities which allow a company to qualify as a public utility.<sup>13</sup> Utility companies often provide services throughout multiple localities.<sup>14</sup> The corporate nature of a public utility company varies. Some public utilities are public corporations owned by political subdivisions of the state.<sup>15</sup> Others public utilities are either owned cooperatively by the customers the utility serves<sup>16</sup> or investor-owned corporations.

It has been recognized that “the public utility’s importance to society gives it a unique status in property law.”<sup>17</sup> This unique status often conflicts with the status of private property owners. Although Georgians have given paramount importance to private property rights, Georgians possess property subject to the perpetual repurchase option of the State to appropriate the

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11 *See infra* Part IV-A.

12. O.C.G.A. § 22-1-1 (2008) (“Public utility” means any publicly, privately, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil products, water, steam, clay, waste, storm water not connected with highway drainage, and other similar services and commodities, including publicly owned fire and police and traffic signals and street lighting systems, which directly or indirectly serve the public. This term also means a person, municipal corporation, county, state agency, or public authority which owns or manages a utility as defined in this paragraph. This term shall also include common carriers and railroads).

13. *Id.*

14. *See* Brief of Appellant at 9, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421 Nov. 28, 2005), 2005 WL 5095872.

15. *See* O.C.G.A. § 46-3-110 through O.C.G.A. § 46-3-155 (2008) (municipal electric membership corporations); O.C.G.A. § 46-6-80 through O.C.G.A. § 46-4-125 (2008) (Municipal Gas Authority of Georgia).

16. *See* O.C.G.A. § 46-3-170 through O.C.G.A. § 46-3-440 (2008) (electric membership corporations).

17. 8 S.W. MOORE, NICHOLS ON EMINENT DOMAIN, § G14A.01 (2008).

property for a public use and oust the owner therefrom upon receipt of compensation.<sup>18</sup> Georgia's Code specifies, "the right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good."<sup>19</sup> This right of the state is not without limitation, however, as both the United States and Georgia Constitutions place limits on the exercise of eminent domain power.<sup>20</sup> The legislature determined that some situations arise where, for the public good, the state must delegate its authority to take property to non-governmental entities such as corporate bodies.<sup>21</sup>

One such delegation is granted to public utilities, including electric utility companies.<sup>22</sup> A public utility does not acquire all of the property it uses via its eminent domain power—most of the property is obtained via a voluntary sale.<sup>23</sup> When the utility

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18. 1 DANIEL F. HINKLE, PINDAR'S GEORGIA REAL ESTATE LAW & PROCEDURE § 2-1 (6th ed. 2009).

19. O.C.G.A. § 22-1-2 (2008).

20. *See* U.S. CONST. AMEND. V.; GA. CONST. art. I, §3, ¶1(a) (private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid).

21. O.C.G.A. § 22-1-4 (2008) (authorizing General Assembly to exercise right of eminent domain through the medium of corporate bodies or individual enterprise).

22. *See* O.C.G.A. § 46-3-201(b)(9) (2008) (electric membership corporations shall have the power to "acquire rights off way, easements, and all interests in realty necessary and appropriate to effectuate the purposes of such electric membership corporate by condemnation. . ."); O.C.G.A. § 46-3-126(3) (2008) (municipal electric authorities shall have the power "to acquire. . .real property. . . necessary or convenient for its corporate purposes . . . by the exercise of the power of eminent domain."); O.C.G.A. § 22-3-20 (2008) ("Any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others in order to run power lines, maintain dams, flow backwater, or carry on other activities necessary for constructing and operating such a plant provided that the person first pays just compensation to the owner of the land to be affected").

23. O.C.G.A. § 22-3-161(b) (2008) (" . . .the utility shall attempt in good faith to negotiate a settlement with each property owner from whom the utility needs to acquire property rights for the line"); *see also* Carol M. Chinn, Editorial, *Don't Let the Lights go Out in Georgia*, ATLANTA

is unable to acquire land via a voluntary transaction, however, it is entitled to take land by exercising the State's power of eminent domain if the land is reasonably necessary for the utility to achieve their purposes.<sup>24</sup> The delegation results from recognition that public utilities need to acquire property from an owner "who will not, for the common good, submit their property to use by a utility company."<sup>25</sup> Georgia courts have held such delegations are constitutional because they serve a public purpose of supplying the public with light, heat and power.<sup>26</sup> In consideration of receiving the legal benefits for generating this service or commodity, a public utility is subject to extensive regulation either by the General Assembly or by a commission established by the State for such purpose.<sup>27</sup>

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J.CONST., Feb. 25, 2003, *available at* 2003 WLNR6214120 ("In practice, electric utilities seldom use eminent domain authority. Typically, it is a last resort to keep a single property owner or group of property owners from refusing to provide access").

24. *See* O.C.G.A. § 46-3-201(b)(9) (2008) (electric membership corporation authorized to acquire property by condemnation); O.C.G.A. § 46-3-126(3) (2008) (municipal electric authorities shall have the power to acquire property by condemnation); O.C.G.A. § 22-2-20 (2008) ("Any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others in order to run power lines, maintain dams, flow backwater, or carry on other activities necessary for constructing and operating such a plant provided that the person first pays just compensation to the owner of the land to be affected").

25. *Jones v. N. Ga. Elec. Co.*, 54 S.E. 85, 89 (Ga. 1906); *Ga. Power Co. v. Ham*, 77 S.E. 396, 397-398 (Ga. 1913), *abrogated in part* *Central Ga. Power Co. v. Nolen*, 85 S.E. 945 (1915).

26. *Ham*, 77 S.E. at 397. (State authorized to delegate their authority of eminent domain to corporate bodies and such delegation is not unconstitutional); *Banks v. Ga. Power Co.*, 481 S.E.2d 200 (Ga. 1997) (Court held that O.C.G.A. § 22-3-20 is constitutional even in the absence of guiding language on what is reasonably necessary); *but c.f.* *Garbutt Lumber Co. v. Ga. & Al. Ry.*, 46 S.E. 942 (Ga. 1900) (power of eminent domain may not be delegated to entities "engaged in a business in which the public is in no way interested, and a business which from its very nature is a purely private enterprise, and necessarily entered into for the purpose of private pecuniary gain").

27. For example, Georgia's Code has 270 chapters devoted to rules, regulations, and requirements of an electric membership corporation; *See* O.C.G.A. § 46-3-170 through O.C.G.A. § 46-3-440 (2008) (electric membership corporations); *see also* O.C.G.A. § 46-2-1 through 46-2-95

Delegation of the eminent domain authority to public utilities is not unfettered. As with all takings, the property must be put to a public use.<sup>28</sup> Further, property taken by a utility must be “useful, needful, and necessary for public purposes.”<sup>29</sup> For instance, generation of services, such as electricity, which directly or indirectly serve the public are considered a public purpose.<sup>30</sup> However, the court has acknowledged that defining which parcels of property are necessary to achieve this purpose is notoriously difficult and depends upon the facts of each case.<sup>31</sup> Although the utility company must put the property to a public use, the utility company acquires ownership of and all accompanying property rights in the parcel.

#### IV. LOCAL REGULATIONS OF PUBLIC UTILITY COMPANIES

As the population of Georgia has expanded, so has the need for public utility services, such as gas and electricity.<sup>32</sup> A public utility has to acquire property to furnish these services, and voluntarily purchasing property is not always possible.<sup>33</sup> As public utilities have resorted to their eminent domain authority to acquire land, local governments have attempted to prevent such acquisitions by using their authority to enact ordinances and regulations within their local area. When local governments attempt to enact these ordinances and regulations, they act pursuant to limited authority granted by either the state’s constitution or statutes.

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(2008) (rules, regulations and jurisdiction of Georgia Public Service Commission).

28. U.S. CONST. art. V; GA. CONST. art. I, § 3, ¶ 1.

29. *Banks*, 481 S.E.2d at 203, citing *Piedmont Cotton Mills v. Ga. Ry. Elec. Co.*, 62 S.E.2d 52 (Ga. 1908); *see also* statutory text recited *supra* note 22.

30. *Nolan v. Cent. Ga. Power Co.*, 67 S. E. 656 (Ga. 1910).

31. *Banks*, 482 S.E.2d at 203; *Jones v. N. Ga. Elec. Co.*, 54 S.E. 85, 89 (Ga. 1906).

32. Brief of Appellee at 3, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421 Nov. 28, 2005), 2005 WL 5095873; *see also*, *Tosone*, *supra* note 2; *Shelton and Chin*, *supra* note 3.

33. *Jones*, 54 S.E. at 89 (delegation of power of eminent domain results from the need to acquire land from one lone land owner who refuses for the common good to release his property); *see also*, *Shelton and Chinn*, *supra* note 3.

*A. Georgia's Home Rule Act: Authority to Regulate*

Both counties and municipalities are creations of the state, and as such, the state government grants certain powers to them.<sup>34</sup> Like many states, Georgia's Constitution contains a Home Rule Act which provides authority to local governments and defines the specific areas where the localities may regulate.<sup>35</sup> Initially, Georgia was hesitant to grant regulatory authority to counties and municipalities.<sup>36</sup> After many years of resisting the national trend to enable local governments to enact regulations, and a few failed attempts,<sup>37</sup> Georgia established two home rule acts: "a system of indirect ("legislative") rule for municipalities and a system of direct ("constitutional") home rule for counties."<sup>38</sup> Although the basis for municipal and

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34. *See* *Hammond v. Clark*, 71 S.E. 479, 487 (Ga. 1911) ("A county has been defined to be: 'One of the civil divisions of a country for judicial and political purposes, created by the sovereign power of the state of its own will, without the particular solicitation, consent, or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is invested with certain functions of corporate existence.'"); *see also* *Dept. of Transp. v. City of Atlanta*, 337 S.E.2d 327, 332 (Ga. 1985) ("Cities exist by the grace of the state through special acts of the General Assembly").

35. *See, e.g.* GA. CONST. art. IX, § 2, ¶ 1(a) ("The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution or any local law applicable thereto. . ."); *see also* GA. CONST. art. IX, § 2, ¶ 2 ("The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly") and O.C.G.A. § 36-35-3 (2008) (statutory Home Rule authority for municipalities which mirrors constitutional authority for counties).

36. R. Perry Sentell, Jr., *The Georgia Home Rule System*, 50 MERCER L. REV. 99 (1998).

37. *Id.* at 106.

38. *Id.* (stating Georgia takes an "intriguing approach" to Home Rule delegation by granting Counties Constitutional authority and municipalities statutory authority); *See also* GA. CONST. art. IX, § 2, ¶ 2 ("The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to the municipalities may be dealt with without the

county regulations may differ, and the court must base its analysis differently depending on the local entity at issue, for the limited purpose of this discussion, the substance of a locality's authority and the end result is substantially the same.<sup>39</sup>

The Constitutional Home Rule Act and Statutory Home Rule Act enable counties and cities to enact ordinances, resolutions or regulations relating to its property, affairs and local government.<sup>40</sup> The ability of a local government to act is limited to provisions for which there is no general law applicable at the state level and to actions which are not inconsistent with Georgia's Constitution.<sup>41</sup> Based upon this provision, both counties and municipalities in Georgia have the ability to regulate the use and development of land pursuant to their police powers.<sup>42</sup> Both home rule provisions, however, emphatically exclude several enumerated matters from a local government's regulation authority.<sup>43</sup> Among these exclusions, Georgia's Constitutional Home Rule Act and Statutory Home Rule Act state that local authority to regulate "shall not be construed to extend to . . . action affecting the exercise of the power of eminent domain."<sup>44</sup>

#### *B. Local Ordinances which Affect Eminent Domain*

House Bill 362 prohibits a public utility company from exercising its right of eminent domain until it obtains an ordinance or resolution from the locality in which the property is located.<sup>45</sup> Along the same lines, House Resolution 70 states that the local governing authority shall approve all condemnations. Unlike House Bill 362, however, House Resolution 70 does not explicitly reference public utilities in its

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necessity of action by the General Assembly").

39. See Sentell, *supra* note 36.

40. GA. CONST. art. IX, § 2, ¶ 1(1)(c)(6); O.C.G.A. 36-35-6(a)(4) (2008).

41. GA. CONST. art. IX, § 2, ¶ 1(1)(c)(6), and O.C.G.A. 36-35-6(a)(4).

42. See *id.*

43. GA. CONST. art. IX, § 2 ¶ 1 (emphasis added); see also, Sentell, *supra* note 36 at 117.

44. GA. CONST. art. IX, § 2, ¶ 1(c)(6); O.C.G.A. § 36-35-6(a)(4) (2008) ("the powers granted to municipal corporations...shall not be construed to extend to the following:... action affecting the exercise of the power of eminent domain").

45. H.B. 362.

language nor does it mandate any action by the condemning body. In light of current constitutional principles, this comment will first address the constitutionality of House Bill 362, and then address, the effect, if any, that the proposed constitutional amendments contained in House Resolution 70 may have on House Bill 362.

### *1. House Bill 362*

The language of the House Bill 362 mandates that “no public utility shall exercise the right of eminent domain unless it has obtained prior approval by resolution or ordinance from the governing authority.”<sup>46</sup> However, the Home Rule Acts in Georgia’s Constitution and statutes prohibit these same local governments from taking any action which may affect the exercise of the eminent domain power.<sup>47</sup> The court has consistently reiterated that local government regulations or ordinances, which may not address condemnations on their face, could still interfere with the reasons for which a utility company condemned property; thus, the regulations would still offend the Home Rule Act.<sup>48</sup>

House Bill 362 requires local governments to approve the condemnation by an ordinance or resolution. Local governments have the authority to create such ordinances pursuant to the first paragraph of the Home Rule Act. This paragraph of the Home Rule Act also limits the circumstances under which local governments may grant an ordinance or resolution.<sup>49</sup> The government may only enact ordinances “for which no provision has been made by general law and which is not inconsistent with this Constitution.”<sup>50</sup> The limitations in the Home Rule Act are important when considering House Bill 362. The General Assembly has enacted numerous general laws, an entire chapter in fact, governing the exercise of eminent domain by a utility.<sup>51</sup>

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46. *Id.*

47. *Rabun County v. Ga. Transmission Corp.*, 575 S.E.2d 474 (Ga. 2003); *Cobb County v. Ga. Transmission Corp.*, 578 S.E.2d 852 (Ga. 2003); *City of Buford v. Ga. Power Co.*, 581 S.E.2d 16 (Ga. 2003); *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006).

48. *Id.*

49. GA. CONST. art. IX, § 2, ¶ 1.

50. *Id.*

51. *See* Official Code of Georgia Annotated, Chapter 22 (Eminent

Included among these provisions are provisions specifying that it is “the province of the General Assembly to determine when the right of eminent domain may be exercised”<sup>52</sup> and the condemning body shall initially decide whether property is necessary for the public use it is trying to achieve.<sup>53</sup> Counties are not empowered to frustrate the purpose of a public utility by second guessing a utility’s determination of necessity.<sup>54</sup> The General Assembly has also enacted numerous other provisions to regulate and specify the rights, duties, and obligations of public utilities, including the right to condemn property.<sup>55</sup> Thus, these numerous general laws remove from a local government any authority to pass ordinances or resolutions approving the exercise of eminent domain of a public utility. While House Bill 362 would purport to require public utilities to seek approval of a condemnation, when the language is construed or interpreted along with other statutes which are more specific and place greater limitations upon regulations of eminent domain (even at the state level), the local government would be extremely limited in what circumstances, if any, they could deny a condemnation based upon this limitation in the Home Rule Act.

The Home Rule Act contains specific areas where local governments are exempted from acting. In the same paragraph which grants the local governments the authority to enact reasonable ordinances, local governments are explicitly exempted from taking action which affects the exercise of eminent domain.<sup>56</sup> The courts have interpreted the meaning of this exclusion within the context of a public utility’s eminent domain authority.

Recently, using authority granted under the Home Rule Acts, local governments enacted ordinances creating a moratorium on construction of any high voltage power lines<sup>57</sup> and substations<sup>58</sup>

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Domain).

52. O.C.G.A. § 22-1-3 (2008).

53. *Forsyth County*, 632 S.E.2d at 104; O.C.G.A. § 22-2-102.1 (2008) (condemning body shall be the exclusive judge of the necessity of the taking).

54. *Forsyth County*, 632 S.E.2d at 104.

55. See Official Code of Georgia Annotated, Chapter 46 (Public Utilities).

56. GA. CONST. art. IX, § II, ¶ I

57. *Rabun County v. Ga. Transmission Corp.*, 575 S.E.2d 474 (three year moratorium on construction of high voltage power lines); *Cobb County*

or placing permitting requirements on an electric utility prior to any construction.<sup>59</sup> Each time, utility companies quickly sought court intervention to determine the constitutionality of the ordinances.<sup>60</sup> The ordinances did not directly address the ability of a utility company to acquire property using their eminent domain power.<sup>61</sup> Instead, the ordinances prohibited the utility from constructing or installing equipment for a specific period of time.<sup>62</sup> This however, according to the court, meant that the local government was attempting to prevent use of the land the utilities were taking pursuant to their eminent domain authority. Relying on the exemption in the Home Rule Acts, Georgia's Supreme Court consistently ruled that an ordinance which infringes on a utility's acquisition or *use* of property obtained through the exercise of their eminent domain authority offends this exemption in the Georgia Constitution.<sup>63</sup>

The court's rationale was not limited to a complete prohibition of construction or installation of equipment by a utility company. In *Forsyth County v. Georgia Transmission Corp.*, the court held that an ordinance which required a utility to obtain a permit before seeking to condemn land also violated the Home Rule Act because the county retained an ability to deny the permit and thus interfered with the utility's ability to use the acquired land.<sup>64</sup> The court quickly dismissed the county's argument that the ordinance gave them a "self-imposed duty to . . . work cooperatively with" and assist the utility in obtaining the permit.<sup>65</sup> The court construed the exemption in the

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v. Ga. Transmission Corp., 578 S.E.2d 852 (Ga. 2003) (seven and one-half month moratorium on construction of above-ground high voltage power lines).

58. *City of Buford v. Ga. Power Co.*, 581 S.E.2d 16 (one year moratorium on electric power substations).

59. *Forsyth County*, 632 S.E.2d 101 (overlay zoning district required public utility to obtain approval from county before constructing high voltage transmission line).

60. *Rabun County*, 575 S.E.2d at 475; *Cobb County*, 57 S.E.2d at 852; *City of Buford*, 581 S.E.2d at 591; *Forsyth County*, 632 S.E.2d at 102.

61. See *Rabun County*, 575 S.E.2d at 475; *Cobb County*, 578 S.E.2d at 852.

62. *Id.*

63. *Id.*

64. *Forsyth County*, 632 S.E.2d at 102.

65. Brief of Appellant at 9, *Forsyth County v. Ga. Transmission Corp.*,

Home Rule Act to include not only initial actions which stop a utility's power to actually take the property, but the court also extended this exemption to include later actions which occur after the property is taken.<sup>66</sup>

The county further argued that requiring the utility to obtain a permit before taking property would only advance its position in a taking proceeding by giving the utility a stronger argument that the taking is for a public necessity.<sup>67</sup> This too was rejected by the court as the utility is not required to demonstrate necessity to the county.<sup>68</sup> The court specifically held that "the power to wholly preclude construction is an unconstitutional infringement on [the utilities] legislatively-delegated power of eminent domain."<sup>69</sup> In essence, local governments can enact no regulations which retain even the potential to prohibit an entity with eminent domain authority from using the land it has taken because doing so would offend the Home Rule Act in Georgia's Constitution.<sup>70</sup>

Finally, the court rejected an argument that the specific zoning power of a local government trumped the general prohibition on actions affecting eminent domain in the Home Rule Act.<sup>71</sup> The court held that because the state granted public utilities the power of eminent domain, such delegation of power should exempt public utilities from local zoning laws.<sup>72</sup>

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632 S.E.2d 101 (Ga. 2006) (No. S06A0421 Nov. 28, 2005), 2005 WL 5095872.

66. *See id.*

67. Brief of Appellant at 9, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (No. S06A0421 Nov. 28, 2005), 2005 WL 5095872.

68. *Id.* at 12.

69. *Forsyth*, 632 S.E.2d at 104.

70. *Id.*

71. *Id.*

72. *Id.* The rationale of this holding of the court could potentially be subject to challenge, as the court's broad reading of utilities' general eminent domain authority arguably fails to comport with the court's prior cases reiterating that eminent domain statutes and condemnation procedures should be strictly construed. *See Dept. of Transp. v. City of Atlanta*, 337 S.E.2d 327 (Ga. 1985). Other states have construed eminent domain statutes to find that a public utility is not immune from local regulations unless a statute specifically says so. *See Potomac Edison v. Jefferson County Planning and Zoning Comm'n*, 512 S.E.2d 576, 581 (W.Va. 1998) (utility is subject to county land use regulations) (Georgia's Supreme Court expressly

Because a municipality's Home Rule Authority is statutory rather than grounded in the constitution,<sup>73</sup> the court has not based its analysis on the Constitutional Home Rule Act provision. The court has, however, reached the same result with a municipality as they have with counties.<sup>74</sup> Much like the Constitutional Home Rule Act for counties, the statutory Home Rule Act for a municipalities states that municipalities may not enact any ordinances which affect the exercise of eminent domain.<sup>75</sup> The statutory Home Rule Act also provides express preemption over areas regulated by the Public Service Commission. The court has combined this provision with the language in the Constitution requiring that state statutes shall control over local ordinances.<sup>76</sup> Because the Constitution expressly provides that "no local or special law shall be enacted in any case for which provision has been made by an existing general law", local governments are preempted from enacting ordinances regulated by the Public Service Commission.<sup>77</sup> Therefore, although a municipality's Home Rule Authority is derived primarily from statutes, constitutional provisions coupled with these statutes still prevent a municipality from enacting regulations which affect a public utilities' eminent domain authority.

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declined to follow this case in *Forsyth County v. Georgia Transmission Corp.*, 632 S.E.2d 104 (2006)); *Stopaquila.org v. Aquila, Inc.*, 180 S.W.3d 24, 41 (Mo. App. W.D. 2005) (electric utility must comply with county zoning regulations). Even if it were challenged however, zoning could never be used to prevent a utility from utilizing property they have already acquired. As discussed *infra*, part IV.

73. The Constitutional provision on municipal home rule is more general and broad than the provision for counties, stating instead, "the General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to the municipalities may be dealt with without the necessity of action by the General Assembly." GA. CONST. art. IX, § 2, ¶ 2.

74. *City of Buford v. Ga. Power Co.*, 581 S.E.2d 16 (Ga. 2003).

75. O.C.G.A. § 36-35-3 (2008).

76. *City of Buford*, 581 S.E.2d at 18.

77. *Id.* at 17, citing GA. CONST. art. III, § 6, ¶ 4(a) (The court held that, despite the fact that the Public Service Commission may not have rules and regulations in effect to regulate a public utility does not negate the granting of authority to them by the legislature.).

## 2. House Resolution 70

House Resolution 70 purports to amend Georgia's constitution to provide that local governments shall approve a condemnation by ordinance or resolution.<sup>78</sup> If ratified by voters House Resolution 70 would amend the Eminent Domain section of the Constitution, not the Home Rule Act section.<sup>79</sup> The proposed ordinance does not grant the local government the authority to pass an ordinance approving condemnations. It only requires the condemning body to obtain approval from a local government.<sup>80</sup> Therefore, the exemption in the Home Rule Act would remain in the constitution and potentially exclude local governments from enacting any ordinance which affects the exercise of eminent domain. Because the language of House Resolution 70 specifically addresses condemnations pursuant to the power of eminent domain, this could create a conflict between the eminent domain section of the Bill of Rights in the Constitution and the Home Rule Act section of the Constitution.

When the General Assembly enacts potentially conflicting constitutional provisions, courts can interpret the conflicts to give effect to the last enacted constitutional amendment and thus impliedly modify or repeal the conflicting prior constitutional provision.<sup>81</sup> However, courts do not favor finding a repeal of constitutional provisions by implication.<sup>82</sup> A repeal should be found only where there is an irreconcilable conflict and the two provisions cannot reasonably stand together.<sup>83</sup> Constitutional provisions relating to the same matter must be harmonized and construed together if possible.<sup>84</sup> Finally when

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78. H.R. 70.

79. *Id.* (to amend Article 1, Section III, Paragraph I of the Constitution).

80. *Id.*

81. *Copeland v. State*, 490 S.E.2d 68, 73 (Ga. 1997), citing *Birdsey v. Wesleyan College*, 87 S.E.2d 378 (Ga. 1955) (“When an amendment to the Constitution has been proposed by the General Assembly and ratified by the voters, the amendment will not be declared void on the ground that it does not accord with some other provision of the same Constitution. If an amendment, duly adopted, is in conflict with some previous provision, the amendment, being the last expression of the sovereign will of the people, will prevail as an implied modification pro tanto of the former provision”).

82. *McLennan v. Aldredge*, 159 S.E.2d 682, 686 (Ga. 1968).

83. *McLucas v. State Bridge Bldg. Auth.*, 77 S.E.2d 531 (Ga. 1953).

84. *Copeland*, 490 S.E.2d at 71.

construing the Home Rule Act, the Court has consistently applied a strict construction and construed any doubts against the local government.<sup>85</sup>

Using these interpretational principles, if voters pass and approve House Resolution 70, the Court should attempt to harmonize the prohibition in the Home Rule Act with the new provision in the Bill of Rights section. Pursuant to the proposed amendment, condemnations of private property shall be approved by an ordinance or resolution in the locality in which property to be condemned is located.<sup>86</sup> It does not grant a local government authority to act. Instead, it serves as a limit on actions of the condemning body. The location of the amendment in the Bill of Rights section of the Constitution further supports this interpretation.<sup>87</sup> The Bill of Rights section protects an individual's person and property,<sup>88</sup> by limiting the actions of both state and local government.<sup>89</sup>

The Bill of Rights section of the Constitution is not the only limit on actions of local government. The Home Rule Act is another provision of the Constitution which further defines and limits the authority of local governments to enact ordinances or resolutions.<sup>90</sup> Such authority shall not extend to matters affecting the exercise of eminent domain.<sup>91</sup> Thus, in addition to provisions in the Bill of Rights regarding private property, counties are further limited in passing ordinances or resolutions which affect the exercise of eminent domain.<sup>92</sup> With this consideration in mind, the court should view this provision as an additional limit on the actions of a local government. The proposed amendment could serve as a supplement to other constitutional limitations on local governments and thus further limit actions of the local government. As the local governments

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85. *See*, Sentell, *supra* note 36 at 148.

86. H.R. 70.

87. H.B. 362; H.R. 70.

88. GA. CONST. art. I, §3, ¶ 1; *see also* GA. CONST. art. I, §1, ¶ 2 (“Protection to person and property is the paramount duty of government and shall be impartial and complete”).

89. *See* Toombs County v. O’Neal, 330 S.E.2d 95, 98 (Ga. 1985).

90. *See* Dept. of Transp. v. City of Atlanta, 337 S.E.2d 327, 332 (Ga. 1985).

91. GA. CONST. art. IX, § 2, ¶ 1(1)(c)(6).

92. *Id.*

have no authority to act in a way that affects the exercise of eminent domain, local governments could only pass ordinances for areas which they can regulate.<sup>93</sup> In a dispute between a local government and a public utility company, Georgia's Supreme Court recently interpreted conflicting constitutional provisions against the limited powers of a local government.<sup>94</sup> The court interpreted the conflicts in a manner that gave full effect to the exemptions in the Home Rule Act, particularly the eminent domain exemption.<sup>95</sup>

The language of House Resolution 70 further bolsters this proposition. Unlike the language of the bill intended to amend Georgia's eminent domain code which was sponsored by the same legislator, the resolution does not specify that it applies to condemnations by public utilities.<sup>96</sup> Based upon the nature of a public utility providing service throughout multiple localities, coupled with the history of resistance for local government regulation in Georgia, the exception in the Home Rule Act should remain fully enforceable and prohibit localities from enacting regulations which affect the eminent domain authority of a public utility.<sup>97</sup> This provision serves as a means to prevent

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93. *See id.*

94. *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101, 104 (2006).

95. *See Id.* (denying argument that specific zoning authority trumped general eminent domain exemption of Home Rule Act because they were parts of the same constitutional section and because doing so would render the exemption meaningless); *see also* Sentell, *supra* note 36 (Georgia courts typically construe the exemptions narrowly and against the local government).

96. H.R. 70.

97. *See Nolan v. Central Ga. Power Co.*, 67 S.E. 656 (Ga. 1910) (generation of electrical power is a public benefit and is capable of being carried over long distances providing a large capacity of service of customers with this public benefit). Similar states have followed a rationale which limits local control of eminent domain authority of a public utility. *See e.g.* *Darlage v. Eastern Bartholomew Water Corp.*, 379 N.E.2d 1018 (Ind. App. 1978), citing *Graham Farms Inc. v. Indianapolis Power & Light*, 233 N.E.2d 656 (Ind. 1968) (utility held generally immune from zoning regulations); *Pa. Power Co. v. Township of Pine*, 926 A.2d 1241, 1252-1253 (Pa. Commw. Ct. 2007) ("Local authorities not only are ill-equipped to comprehend the needs of the public beyond their jurisdiction, but, and equally important, those authorities, if they had the power to regulate, necessarily would

a local government from denying citizens in another locality the service generated by the utility.<sup>98</sup> For this reason, interpreting the constitutional provisions in a manner which maintains the exemption in the Home Rule Act furthers the spirit of the Home Rule Act and local regulations in Georgia.<sup>99</sup> Unless the Home Rule Act is specifically repealed or modified, courts should continue to interpret conflicting constitutional provisions in a manner that makes condemnations by a public utility exempt from local government regulation.

Georgia's Supreme Court recently reaffirmed that a public utility is generally granted a protected status with respect to local regulation:

because of the greater public welfare which utilities serve and because "their facilities must often be located in areas which would otherwise not be the most suitable from the standpoint of customary zoning criteria. . . . [facilities. . .] must often be located in residential zones in order to properly provide service, even though they might tend to adversely affect property values or change the character of a neighborhood."<sup>100</sup>

The court has consistently held that "[a local government] cannot by ordinance impose upon a public utility essential to the welfare of the people, conditions of operation or maintenance of

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exercise that power with an eye toward the local situation and not with the best interests of the public at large as the point of reference"); *Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 109 (R.I. 1992) (local government preempted by state statutes from enacting ordinances affecting electric utility).

98. See Sager A. Williams, Jr., *Limiting Local Zoning Regulation of Electric Utilities: A Balanced Approach in the Public Interest*, 23 U. BALT. L. REV. 565 (1994) (arguing that because regulations by municipalities often go too far and deprive others of the benefits provided by the utility, a balanced regulatory framework with local input is the appropriate course of action).

99. See, *Sentell supra*, note 36 at 131, *discussing* *Gwinnett Co. v. Yates*, 458 S.E.2d 791 (Ga. 1995) (discussing another exemption in the Home Rule Act interpreted to further a peace keeping function within the local government and with the state and local government).

100. *Ga. Public Service Comm'n v. Turnage*, 669 S.E.2d 138, 139 (Ga. 2008), citing 4 EDWARD H. ZIEGLER, JR., ARDEN H. RATHKOPF, AND DAREN A. RATHKOPF, *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 78:2 (4th ed.) (2008) (correction to original source).

its property, which would confiscate or destroy its power to serve the public.”<sup>101</sup> Thus, Georgia’s Supreme Court has reiterated that enacting regulations which interfere with the eminent domain authority of a utility violates Georgia’s Constitution. Georgia’s legislature should not abandon this protection of all citizens.

#### IV. REGULATIONS BY LOCAL GOVERNMENTS AND REGULATORY TAKINGS

In addition to the Home Rule Act, Georgia’s Constitutional provision against taking property without just and adequate compensation also serves as a limit on the actions of local governments.<sup>102</sup> Given the unique and limited nature of land acquired by a public utility, local government regulations could trigger this constitutional provision. A utility acquires property for a public purpose, and the utility is limited in the uses to which it can put a piece of property. When local government regulates the land owned by a public utility, more difficult issues are raised than with regulations applicable to a typical property owner. Local governments are entitled to regulate use of private property within their districts, but such regulations may not go too far or they could amount to a taking.<sup>103</sup>

Prior decisions of the Georgia Supreme Court provide an apt illustration of the effect local government regulations have on a public utility and its property. In 2004, a public utility was in the process of acquiring property throughout two Georgia counties in order to construct a new high voltage power line to provide service to customers in rapidly growing Forsyth County.<sup>104</sup> After the utility had acquired property and began construction, Forsyth County enacted an ordinance which required the utility to obtain approval from the county before

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101. *City of Doraville v. Southern R. Co.*, 181 S.E.2d 346 (Ga. 1971) (attempt by municipality to regulate location of railroad switching yard was preempted by state laws granting regulation of the utility to a state agency) (cited in *Rabun County v. Ga. Transmission Corp.*, 575 S.E.2d 474, 477(Ga. 2003)).

102. Ga. Const. Art. I, §3, ¶ 1.

103. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Mann v. Dep’t of Corrections*, 653 S.E.2d 740 (Ga. 2007).

104. *Forsyth County*, 632 S.E.2d at 103.

beginning any construction.<sup>105</sup> Ultimately, the utility did not seek county approval, but instead, sought court declaration that such ordinance violated the Home Rule Act, and the court agreed.<sup>106</sup> However, had the utility sought issuance of and been denied the permit, a different result could have occurred. The utility would have possessed land which it was wholly precluded from constructing necessary equipment upon.<sup>107</sup>

The county argued that it should be allowed to treat a public utility like any other developer.<sup>108</sup> At first blush, this analogy seems logical. It is true that, like a developer, a public utility does purchase a piece of property (either through a voluntary sale or through eminent domain). After the purchase, like any other developer, a utility also maintains a property right in the parcel. However, a significant factual distinction arises when dealing with a public utility. A utility's right to acquire property is limited by statute—it may only acquire property which is necessary for the utility to achieve its purposes.<sup>109</sup> Unlike a typical developer, the utility can only use property obtained via their eminent domain authority for a public purpose.<sup>110</sup> Local action's which deprive the utility of the ability to engage in these statutory uses, therefore, could constitute a taking of the property without just compensation.

The Court has hinted at this result in prior cases which determined local control of public utilities. The court expressed a concern that the utility “would be in danger of losing a valuable property right as a result of enforcement of the unconstitutional ordinance.”<sup>111</sup> Further, in one of the earliest Georgia cases to decide local regulation of public utilities'

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105. Brief of Appellant at 4, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421 Nov. 28, 2005), 2005 WL 5095872.

106. *Forsyth County*, 632 S.E.2d at 103.

107. *See id.* at 104.

108. Brief of Appellant at 19-20, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421 Nov. 28, 2005), 2005 WL 5095872.

109. *See*, *Banks v. Ga. Power Co.*, 481 S.E.2d 200, 203 (Ga. 1997), citing *Piedmont Cotton Mills v. Georgia Ry. Elec. Co.*, 62 S.E. 52 (1908); *see also* statutory text recited *supra* note 22.

110. GA. CONST. art. I, §3, ¶1.

111. *Cobb County v. Ga. Transmission Corp.*, 578 S.E.2d 852 (Ga. 2003).

eminent domain authority, the Court stated that “a municipality cannot by ordinance impose upon a public utility essential to the welfare of the people, conditions of operation or maintenance of its property, which would otherwise confiscate or destroy its power to serve the public.”<sup>112</sup> The court has acknowledged a utility’s importance to society and the value of their property rights. Thus, the Court has already suggested a willingness to consider a challenge against local government regulations as a regulatory taking.

#### *A. Regulatory Takings Law*

Following recent Supreme Court precedent, challenges against local regulations as a regulatory taking could potentially fair better than in previous years.<sup>113</sup> This has already proven true in Georgia. In 2007, a unanimous Georgia Supreme Court held in *Mann v. Department of Corrections* that a state statute which gives the government authority to constantly oust an individual from his property violated the takings clause of the United States and Georgia Constitutions.<sup>114</sup> The *Mann* case arose when a registered sex offender, Anthony Mann, challenged a state statute that required him to vacate his residence if a statutorily specified entity moved within 1,000 feet of his home.<sup>115</sup> The result in this case is significant. Prior to this case, regulatory takings challenges in Georgia were often denied by Georgia’s Supreme Court.<sup>116</sup> The court frequently was divided in those

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112. *City of Doraville v. S. Ry. Co.*, 181 S.E.2d 346, 351 (Ga. 1971).

113. See D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343 (2005) (*Lingle* has “a silver lining for property rights advocates,” as arguments that a regulation further a “really important purpose” are no longer applicable in a takings challenge).

114. *Mann v. Dept. of Corrs.*, 653 S.E.2d 740 (Ga. 2007). The decision was unanimous in declaring the residency restrictions an unconstitutional regulatory takings. The Court rejected a takings analysis as applied to the Defendant’s employment in which two justices filed a special concurrence.

115. *Id.*

116. See, e.g., *Greater Atlanta Homebuilders Ass’n v. Dekalb County*, 588 S.E.2d 694 (Ga. 2003) (tree preservation ordinance did not offend takings clause, but see dissent arguing that ordinance violated takings clause using an exactions analysis), *City of Atlanta v. TAP Assoc.*, 544 S.E.2d 433 (Ga. 2001) (three dissenting justices argued the zoning of petitioner’s property did not substantially advance overall goals of the zoning

opinions and most of the dissent centered around which legal test should be applied to determine if a taking had occurred.<sup>117</sup>

When the *Mann* case reached Georgia's Supreme Court, the Court reiterated that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster-and that such "regulatory takings" may be compensable under the Fifth Amendment."<sup>118</sup> The basis for this language came from *Lingle v. Chevron, U.S.A.*, a recent United States Supreme Court opinion which, in the view of many scholars, brought clarity to takings challenges.<sup>119</sup> In *Lingle*, the United States Supreme Court overruled application of a test which examines whether a regulation substantially advances legitimate state interests.<sup>120</sup> Instead, the Court stated such a test "revealed nothing about the magnitude or character of the burden a particular regulation

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regulation), *Parking Ass'n of Ga., Inc., v. City of Atlanta, Ga.*, 450 S.E.2d 200, 203 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (majority denied takings claim based on balancing test; dissent argued balancing test inappropriate and applied an exactions analysis instead), *Turner v. City of Atlanta*, 357 S.E.2d 802 (Ga. 1987) (majority denying takings claim because property owner did not show detriment, but see dissent arguing taking of property occurred when city down-zoned commercial property); *but cf.* *Lamar Advertising v. City of Albany*, 389 S.E.2d 216, 217 (Ga. 1990) (sign ordinance which required removal of signs was an unlawful taking without compensation), *Duffield v. Dekalb Co.*, 249 S.E.2d 235 (Ga. 1978) (property owner alleged sufficient facts to state a claim for inverse condemnation based on alleged noise and odors which interfered with right to use, enjoy and dispose of property).

117. *Id.*

118. *Mann*, 653 S.E.2d at 743.

119. See Dale A. Whitman, *Deconstructing Lingle: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573 (2007) (arguing that by eliminating the character of the government action prong, *Lingle* simplifies and rationalizes takings in a desirable way); Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVTL. L.J. 63 (2008) ("by establishing an authoritative 'canon' of regulatory takings decisions, the *Lingle* Court made great strides toward clarifying its jurisprudence in this area of constitutional analysis"); D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343 (2005) (arguing that the Supreme Court recently provided some clarity to the takings doctrine).

120. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005).

imposes upon private property rights.”<sup>121</sup> Many regulatory takings cases in Georgia had applied this same test to deny a regulatory taking.<sup>122</sup>

The *Lingle* Court reiterated that there are essentially three tests to determine “regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”<sup>123</sup> Facts which satisfy the first two tests are per se takings: first, the government requires the owner to suffer a permanent physical invasion of his property<sup>124</sup> or second, the government restricts the property to an extent that they deprive the owner of all economically beneficial use of their property.<sup>125</sup> Finally, takings challenges which factually do not fall within one of the prior categories are determined under an ad hoc factor balancing test which considers the economic impact of a regulation on a claimant, the extent to which the regulation has interfered with distinct investment backed expectations and the character of the government action.<sup>126</sup> Thus, when the *Mann* case reached Georgia’s Supreme Court in 2007, the *Lingle* opinion had disavowed a test which Georgia had applied in many regulatory takings challenges<sup>127</sup> and provided some clarification to help courts discern which test should be applied.<sup>128</sup>

The *Mann* court began their analysis by reiterating that

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121. *Id.*

122. *See* *Parking Ass’n of Ga., Inc., v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (majority denied takings claim because the ordinance advanced legitimate governmental interests); , *see also* *Gradous v. Bd. of Comm’rs*, 349 S.E.2d 707 (Ga. 1986) (reciting where plaintiff has burden of showing regulation has a insubstantial benefit to the public).

123. *Lingle*, 544 U.S. at 539.

124. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (law requiring landlords to place cable equipment in their buildings effected a taking because it was a direct physical invasion of the property by the government).

125. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (prohibiting property owner from placing any developments on his land was a taking because it deprived him of all use of the parcel).

126. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

127. *See* cases recited *supra* note 116.

128. *See* *Barros*, *supra* note 113.

“regulations that fall short of eliminating property’s beneficial economic use may still effect a taking, depending upon the regulation’s economic impact on the landowner, the extent to which it interferes with reasonable investment-backed expectations, and the interests promoted by the government action.”<sup>129</sup> In applying these factors, the Court found several facts significant in its takings analysis. First, the statute prevented Mann from using the property for its intended purpose thus causing a strong economic impact. Second, the scope of the regulation spanned the entire state and precluded Mann from having *any* reasonable investment backed expectations in his property.<sup>130</sup> Third, relying on the *Lingle* decision, the Court expressed doubt that the final factor was even relevant in a takings analysis. Instead the Court “[assumed] arguendo, that the substantiality of the public purpose advanced by the regulation is still pertinent to a takings challenge.”<sup>131</sup> The Court’s application of this factor at a minimum shows that it bears far less weight than the other two factors after *Lingle*.<sup>132</sup> Therefore, following *Lingle* and *Mann*, challenges to local government regulations as a regulatory taking in Georgia will focus less, if at all, on the character of the government’s action. Instead, courts should examine the impact of the (presumably valid) government action on a property owner.

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129. *Mann v. Dept. of Corrs.*, 653 S.E.2d 740 (Ga. 2007).

130. *Id.*

131. *Id.* The court’s assumption on this factor is of particular significance. Commentators are uncertain regarding the effect of government action following *Lingle*. Some commentators argue that the last factor creates a presumption in favor of the government. Others argue it is no longer relevant in the analysis at all. *See Whitman, supra*, note 119 (arguing according to *Lingle*, the only focus is on the regulation’s impact on the owner but character of government action is relevant for background principles which apply to all takings and are inseparably intertwined with the aims, objectives, and purposes of the governments action); Barros, *supra*, note 113 (stating, “the character of the government act generally should have no role in a takings analysis.” The author recognizes narrow exceptions to this general rule as stated in *Lingle*, including abatement of common law nuisances and per se physical invasions. He then concludes the next paragraph by stating, “post-*Lingle* it is clear that takings law presumes that the government will not affect property for really silly reasons”).

132. *Mann*, 653 S.E.2d at 745.

*B. Regulations Which Amount to a Per Se Taking of Property Without Just Compensation*

The United States Supreme Court has held, “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”<sup>133</sup> The Court views this as a per se taking.<sup>134</sup> Local governments have, on separate occasions, attempted to wholly preclude<sup>135</sup> and completely prohibit construction on utility-owned property.<sup>136</sup> In many of these cases, the utilities acquired property as part of an overall plan traversing numerous counties and cities.<sup>137</sup> The economically beneficial use of the land is fulfillment of the plan for which the property was acquired. Georgia’s statutes prohibit the utility from putting the land to any use other than that necessary for construction or operation of their plan.<sup>138</sup> Had the local governments been successful in their prior attempts (i.e. had the Court not declared such acts unconstitutional under the Home Rule Act), then the utility companies would have been left with property it could not use for any purposes. In essence, the local regulations would have deprived the utility of all economically beneficial use of land.

A public utility has limited use for property. The property must further the needs of the service provided by the utility

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133. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992) (emphasis in original).

134. *Id.*; *Lingle, v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005).

135. *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006).

136. *Rabun County. v. Ga. Transmission Corp.*, 575 S.E.2d 474, 476 (Ga. 2003).

137. *Forsyth County*, 632 S.E.2d at 102.

138. *See* O.C.G.A. § 22-3-20 (2008) (“any person operating or constructing or preparing to construct a plant for generating electricity shall have the right to purchase, lease, or condemn rights of way or other easements over the lands of others in order to run power lines, maintain dams, flow backwater, or carry on other activities necessary for constructing and operating such a plant provided that the person first pays just compensation to the owner of the land to be affected”); O.C.G.A. § 46-3-201 (2008) (an electric membership corporation shall have power to acquire “all interests in realty necessary and appropriate to effectuate the purposes of such electric membership corporation”).

company.<sup>139</sup> The deprivation of all economically beneficial use of the land is compounded when one considers the nature of property used by a public utility. Placement of the lines often spans multiple counties<sup>140</sup> and is part of an ongoing lawful enterprise to provide the public with much needed services.<sup>141</sup> Regulations which give local governments the ability to deny construction on property acquired by a utility would interfere with this ongoing plan and could affect both property and members of the public outside of the locality which denies the permit. Regulations which have the effect of destroying a substantial part of a lawful enterprise effects a taking of property.<sup>142</sup> As the law stands now, because of the exemption in the Home Rule Act, local governments may not regulate how a public utility uses property acquired by them via eminent domain. As such, they can not effect a taking of property. If amended, however, Georgia's General Assembly could give local governments a mechanism to regulate too far. Georgia's constitutional protection against taking property without just and adequate compensation does not make distinctions between property owned by a private individual and property owned by a public utility company.<sup>143</sup> As such, these Constitutional provisions apply with equal force to land owned by a public utility.

*C. Regulations Which Amount to the Functional Equivalent of a Direct Appropriation*

Even if the regulation does not deprive the utility of all economically beneficial use of their property, local regulations depriving the utility of use of the property could be the functional equivalent of a taking. "Regulations that fall short of eliminating property's beneficial economic use may still effect a

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139. See O.C.G.A. § 22-3-20 (2008); O.C.G.A. § 46-3-201 (2008).

140. See Brief of Appellants at 4, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421 Nov. 28, 2005), 2005 WL 5095872 (project which was already commenced spanned 15 mile swath through both Cherokee and Forsyth Counties).

141. See *Jones v. N. Ga. Elec. Co.*, 54 S.E. 85, 89 (1906).

142. *Lamar Advertising v. City of Albany*, 389 S.E.2d 216, 217 (Ga. 1990).

143. See *Dept. of Transp. v. Scott*, 492 S.E.2d 216, 217 (Ga. 2005) (Hunstein, J., dissenting).

taking, depending upon the regulation's economic impact on the landowner, the extent to which it interferes with reasonable investment-backed expectations, and the interests promoted by the government action."<sup>144</sup>

The economic impact of the regulation and particularly the extent to which that regulation interferes with the investment backed expectations of a property owner would bear great weight in a takings analysis.<sup>145</sup> In consideration of these factors, several characteristics regarding the nature and use of property by a public utility company is significant. A utility acquires the property because it is necessary, useful and appropriate for their purposes.<sup>146</sup> Utility companies determine when property is needed to fulfill their purposes.<sup>147</sup> There may be numerous routes available, but the court has deferred to a utility in choice of a route.<sup>148</sup> The survey, planning and acquisition of property along the route which the utility needs can cost millions of dollars.<sup>149</sup> The utility passes the financial burden of designing a plan onto customers.<sup>150</sup> Government action which exaggerates or increases this burden, including actions which require a utility to relocate from their desired plan, could arguably lead to even greater liability in a takings analysis if the company could show that investors were denied a return on capital for property currently dedicated to a public use.<sup>151</sup> Finally, based on the

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144. *Mann v. Dept. of Corrs.*, 653 S.E.2d 740 (Ga. 2007) citing *Mann v. State*, 603 S.E.2d 283 (Ga. 2004).

145. *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005). ("primary among [the *Penn Central*] factors are the economic impact of the regulation on the claimant and, *particularly*, the extent to which the regulation has interfered with distinct investment-back expectation.) internal citations omitted, emphasis added.

146. O.C.G.A. § 46-3-201 (b)(9).

147. O.C.G.A. §22-2-102.1 (the condemning body and not the governing authority is to be the exclusive judge of the necessity of the taking).

148. *Hagans v. Excelsior Elec. Membership Corp.*, 60 S.E.2d 162 (Ga. 1950); *Banks v. Ga. Power Co.*, 481 S.E.2d 200 (Ga. 1997).

149. See Brief of Appellee at 4, *Rabun County v. Ga. Transmission Corp.*, 575 S.E.2d 474 (No. S02A1372 July 2, 2002).

150. See Chinn, *supra*, note 3.

151. Other courts have held that where government actions deprive a public utility investors' of a return on capital for property currently dedicated to public use, this is an unconstitutional confiscation of property. See 29A C.J.S. EMINENT DOMAIN § 127, citing *Anaheim, Riverside, Banning, Colton*,

rationale in prior Georgia cases, it is doubtful that requiring a utility to sell and relocate would be sufficient to eliminate or minimize the economic impact of the regulation unless the utility specifically had this goal in mind when it acquired the property.<sup>152</sup>

The scope of local government regulations with the potential to force a public utility to abandon service plans in which it has invested numerous hours and substantial amounts of money “looms over every location” within the state.<sup>153</sup> Because property is acquired as part of an ongoing plan, the taking could be more than just one parcel or a few parcels in one locale. Utilities’ equipment and lines pass over numerous miles and localities to provide service to their customers pursuant to plans or routes drafted to fulfill their customers’ needs.<sup>154</sup> A taking by one county could affect the remainder of the route serviced or proposed to be serviced by a utility. If the action of the locality was of such a severe nature that it deprived the utility of the ability to continue with their plan, then the utility could hold other properties, outside of the locality, which have no economically beneficial use or suffer a severe economic impact, which would compound the economic impact on a utility.

Further, a lack of uniformity among neighboring counties where the utility must traverse to serve their customers could further impact the investment backed expectations of utility companies.<sup>155</sup> In *Forsyth County*, for example, the county passed the local regulation after the utility had already begun to acquire property in at least two counties to fulfill its multi-million dollar project.<sup>156</sup> The ordinance attempted to place limitations on the utility and ultimately, as viewed by the Court,

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and *Azusa, Ca., v. Federal Energy Regulatory Comm’n*, 669 F.2d 799 (D.C. Cir. 1981).

152. *See Mann v. Dept. of Corrs.*, 653 S.E.2d 740 (Ga. 2007).

153. *Id.* citing *Mann v. State*, 603 S.E.2d 283 (2004).

154. Brief of Appellant at 9, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421 Nov. 28, 2005), 2005 WL 5095872.

155. *See Williams, supra* note 98 (arguing that because regulations by municipalities often go too far, a balanced regulatory framework with local input is the appropriate course of action).

156. Cross Brief of Appellee at 29, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421), 2005 WL 5095906.

had the potential to stop it from completing the project.<sup>157</sup> The scope of such restrictions likely preclude a public utility from having *any* reasonable investment backed expectations in property it acquires or plans to acquire.<sup>158</sup>

The Georgia Supreme Court expressed doubt as to whether the character of the government action is still relevant in a takings claim.<sup>159</sup> Even assuming *arguendo*, as the court did in *Mann*, this factor is still relevant, it is likely outweighed by the other factors. Although local governments may enact these ordinances pursuant to their police power, after *Lingle*, it is clear that this type of argument has no place in a takings analysis.<sup>160</sup> Even if you presume these actions are valid, the character of the government action in this circumstance has a negative consequence.<sup>161</sup> In *Forsyth County*, for example, when enacting the ordinance the county was aware that the utility could ultimately hold property which they could not use and thus invest millions of dollars as a “wasteful expense.”<sup>162</sup> Because of the nature of public utilities, such expense gets passed onto the customers. Further, utilities attempted to acquire property in the past to expand their services.<sup>163</sup> They determined that without expanding their equipment, customers will suffer from deprivation of service.<sup>164</sup> By providing local control, the legislature could potentially deprive the public of a benefit.<sup>165</sup> Thus, even if the government action is presumed valid in enacting the ordinances, the negative consequence of the action could cause this factor to weigh against the local government.

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157. *Id.*

158. *Id.*; *see also* *Mann v. Dept. of Corrs.*, 653 S.E.2d 740, 743 (Ga. 2007).

159. *Mann*, 653 S.E.2d at 744.

160. *Id.* at fn 7, citing *Lingle v. Chevron U.S.A., Inc*, 544 U.S. 528 (2005).

161. *See*, *Kent*, *supra* note 119 at 101 (in takings challenges, the focus is on the consequences of the action, not on the reasons for the action).

162. Brief of Appellant at 4, *Forsyth County v. Ga. Transmission Corp.*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421), 2005 WL 5095872.

163. Brief of Appellee at 3, *Forsyth County*, 632 S.E.2d 101 (Ga. 2006) (No. S06A0421), 2005 WL 5095873.

164. *Rabun County v. Ga. Transmission Corp.*, 575 S.E.2d 474 (Ga. 2003).

165. *Jones v. N. Ga. Elec. Co.*, 54 S.E. 85, 89 (Ga. 1906); *Nolan v. Central Ga. Power Co.*, 67 S. E. 656 (Ga. 1910).

When viewed in this manner, local regulation of public utilities poses a substantial economic impact upon the utility. The regulations affect not only the public utility company but also the residents within the utility's service area. Allowing local governments to enact regulations might at first blush seem like a plausible idea. When examined more closely, however, these regulations do not protect property rights. Instead, they could deprive the public utility of their property rights and the public of utility services by perfecting a taking of property without just compensation.

#### V. CONCLUSION

Georgia's current law prohibits local governments from regulating when a public utility can acquire land. Because of the nature of a public utility and benefit provided by it, such prohibitions should remain. Even if such regulations were allowed, it would be difficult for a local government to regulate a public utility's use of land without effecting a taking. Although citizens may be upset that their property is taken or that unsightly equipment may be placed in their neighborhood, regulations by a local government raise far greater concerns for both the utility company and other citizens. State and local governments should consider the implications of such regulations before acting.

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