N.D.A.G. Letter to O'Connell (Dec. 8, 1989)

December 8, 1989

Honorable David O'Connell
North Dakota State Senator
District 5
Route 1, Box 78
Lansford, ND 58750

Dear Senator O'Connell:

Thank you for your letter of September 7, 1989, in which you inquired about the effect of the enactment of House Bill 1572, codified as N.D.C.C. § 11-10-26. You inquired whether the effect of the enactment would be to: 1) change the burden of proof in an eminent domain hearing from the government entity to the property owner; and 2) change the substantive issues to be decided.

According to legislative history, this bill was a response to the decision of the North Dakota Supreme Court in Johnson v. Wells Co. Water Resource Bd., 410 N.W.2d 525 (N.D. 1987). In that case, the Court held that the "quick take" provision of the North Dakota Constitution (Art. I, § 16) was not "self executing." Thus government entities could only take advantage of the "quick take" provision of the constitution if the legislature enacted provisions giving that power to specific government entities. According to the testimony of Calvin Rolfson, attorney for the North Dakota Association. of Counties, counties had assumed the constitutional provision was self executing prior to Johnson being decided, and had acted accordingly. Mr. Rolfson testified in favor of the bill and stated that the purpose for the bill was as described above. He also stated that the bill was subject to all of the due process protections set out in chapter 32-15 of the North Dakota Century Code. Nothing in his testimony or the legislative history of this bill indicate that it was the intention of the legislature that the burden of proof or the substantive issues to be decided in eminent domain cases would change as a result of this bill's enactment.

The North Dakota Supreme Court stated in Johnson that "the time, manner, and occasion of the exercise of the power of eminent domain are wholly in the control and discretion of the Legislature, except as it is restrained by the Constitution of the state." 410 N.W.2d at 527.

The N.D. Const. Art. I, 16, provides that private property will not be taken for public use without just compensation having first been made to, or paid into court for the owner. These general restraints are restated in the eminent domain chapter of the Code, N.D.C.C. ch. 32-15. N.D.C.C. ch. 32-15 requires, among other things, that the entity show that the use is authorized by law and the taking is necessary to the use.

Art. I, § 16, also provides that a government entity may take possession of the property to be condemned after an offer to purchase the property is made and the amount of the offer is deposited with the clerk of the district court. The clerk of the court is required to notify the property owner. The owner may appeal the offer to the court and have a jury trial to determine damages. These "restraints" are restated in N.D.C.C. § 11-10-26. The statute provides:

> When the county seeks acquisition of right of way through eminent domain proceedings authorized by chapter 32-15, the board of county commissioners may make an offer to purchase the right of way and deposit the amount of the offer to purchase the right of way and deposit the amount of the offer with the clerk of the district court and thereupon take immediate possession of the right of way as authorized by section 16 of article I of the Constitution of North Dakota. . . . the owner of the property taken may appeal to the district court by serving a notice of appeal upon the board of county commissioners, and the matter must be tried . . . in the manner prescribed for trials under chapter 32-15."

(Emphasis supplied.)

The statute does not indicate any additional procedure or substantive guidelines concerning burden of proof or the substantive issues. No North Dakota cases or cased from other jurisdictions were found on this specific issue. However, the minimum "restraints" or safeguards provided in the constitution are not eroded by this provision. This conclusion is supported by the first sentence of the statute which indicates that the "quick-take" procedure is merely a procedural variant of eminent domain, subject to the same procedural and substantive safeguards as other eminent domain cases. It is my opinion that whether the county does or does not use the quick-take provision when acquiring property for eminent domain purposes, it must comply with the substance and procedure of the eminent domain law as set out in chapter 32-15.

N.D.C.C. ch. 32-15 limits the public purposes for which eminent domain may be exercised; states the estates and rights in land which may be condemned for public use, and the types of private property that may be taken; provides what must be shown before property can be taken; authorizes the court to decide the issues of conflicting claims to the property and to the damages; and establishes the right of appeal.

The burden of proof is not specifically addressed in the chapter on eminent domain and the North Dakota courts have not addressed that issue with regard to eminent domain. However, the general rule of law is that the burden of proof in proceedings rests on the one having the affirmative of the issue; i.e. the petitioner or, in this case, the county. Bottineau County Water Resource District v. North Dakota Wildlife Society, 894, 898 (N.D. 1988). Thus, the county would be required to show all the facts necessary to establish its right to condemn the property, including a showing that the use is authorized by law and that the taking is necessary to the use. N.D.C.C. § 32-15-05.

If the court enters a final judgment and order for condemnation, the landowner/defendant may appeal those findings, however, the government has the right to continue to possess and use the property pending the appeal.

As a result of analysis of the research discussed in this letter, it is my opinion that the enactment of HB 1572 (N.D.C.C. § 11-10-16) did not effect a change in the burden of proof or substantive issues in an eminent domain proceeding.

I hope this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

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