



**TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE**

**REGARDING HOUSE BILL 2070
RELATING TO EMINENT DOMAIN PROCEDURE**

March 9, 2011

Mr. Chairman and Committee Members:

I am Jerry Younger, Deputy Secretary for Engineering and State Transportation Engineer at the Kansas Department of Transportation. HB 2070 would amend current eminent domain law to prohibit the Department of Transportation through the Secretary of Transportation, hereinafter referred to as KDOT, from appealing appraisers' awards to the district court. The exclusion would be applied retroactively and apply to all eminent domain proceedings pending on or commenced after January 1, 2009. An identical prohibition was proposed last legislative session but failed to make it out of the House.

Many governmental entities and utilities have the power of eminent domain under Kansas law including state agencies, cities, airport authorities, etc. All condemning authorities follow the procedures set out in K.S.A. 26-501 et seq. This process is used when governmental agencies are unable to reach an acquisition agreement with the owner of property needed for public purposes.

Prior to engaging in the eminent domain procedures KDOT is required to first have the property to be acquired appraised pursuant to Uniform Standards of Professional Appraisal Practice (USPAP) and Federal Highway Administration (FHWA) standards and good faith negotiations to reach a negotiated purchase must take place. It is only when that process fails that eminent domain actions are commenced. The focus of that process is to determine the difference between the fair market value of the landowner's property before the taking by the governmental entity, and the fair market value of the portion of the property remaining, if any, in the hands of the landowner after the taking. This difference is the just compensation to be paid by the governmental entity to the landowner.

During the first hearing in the statutory process, the court appoints three disinterested residents of the county in which the eminent domain proceeding is pending to serve as court appointed appraisers. Only two of the three appointed "appraisers" must have "experience in the valuation of real estate" and that experience does not have to be appraisal experience. It can be experience as a real estate agent, banker, insurance agent, auctioneer, or just experience privately buying and selling real estate, etc. The court provides the appraisers with a set of instructions and the appraisers hold a hearing which is informal and not subject to the rules of evidence. Property owners are allowed at that hearing to give whatever assessment of value they desire.

No judge or jury reviews or consents to the award given by the appraisers. The only check on the work of these appraisers is that any landowner or condemning authority may appeal, pursuant to K.S.A. 26-508, the award and have just compensation for the taking determined by a jury. At the conclusion of this administrative process, and before any appeal is decided, the condemning authority must pay the awards to the Clerk of the District Court for distribution to the landowners in order to take possession of the property and begin construction.

Under existing law, if a governmental entity files an appeal of the appraisers' award and the jury finds the amount owed to the landowner to be greater than or equal to the amount determined by the court appointed appraisers, then the governmental entity is required to pay all of the landowner's costs of the appeal including their attorney's fees. This provision increases the risk to governmental entities of taking an appeal and, as a result significantly limits the appeals taken by governmental entities.

KDOT very carefully analyzes the cases where court appointed appraisers' awards exceed the KDOT appraisal amount on the tract of land before making the decision to appeal those awards. In addition to the potential exposure to an attorney's fees and costs award, KDOT looks at the dollar difference between the award and the agency's appraisal; the percentage of the increase; legal issues presented by the situation including whether adverse travel, severance, or police power issues are raised by the situation; whether there are related issues outstanding with the landowner such as relocation assistance payments; the jury appeal of KDOT's position; cost of prosecuting an appeal; and the potential for bad case law to be created if the legal issues on appeal are decided adversely to KDOT.

HB 2070 would continue to allow all condemning authorities, except KDOT, and all landowners to appeal appraisers' awards. If enacted the result would be a situation where whether a landowner may be subjected to an appeal by the condemning authority is dependent on the identity of the condemning authority. Landowner "X" who is condemned by KDOT will not be subject to an appeal and landowner "Y" who is condemned by any other condemnor is subject to a possibility of having the appraisers' award for their property be appealed by the condemnor. KDOT administers many local projects and often handles the property acquisition for those projects. If enacted, this bill will result in local units of government having to do that work, in order to enjoy the benefit of having appeal rights. Many local units of government are ill equipped to handle these property acquisition matters.

If enacted, this bill would leave KDOT with no tools necessary to be a good steward of public funds with respect to right of way acquisition. KDOT would have no recourse but to pay the award or abandon the project in cases where the court appointed appraisers award landowners more than the property is worth or where the appraisers misinterpret or disregard the instructions of the court. Further, the bill will effectively remove KDOT's ability to challenge the instructions given by the Court to the appointed appraisers as well since the only avenue for doing so under existing law is through the appeal of the court appointed appraisers' award. This leaves trial judges free to instruct in ways not in conformity with statutory requirements or case law applicable to governmental takings in general when KDOT is the condemnor and there will be no recourse to appeal within the context of the condemnation action.

The dollar effect of this legislation on KDOT is difficult to determine due to the many variables that would have an impact on that calculation. The variables that would impact the figure would include, among others:

- How much land is needed in any given year to construct projects;
- How many of the needed tracts can be acquired through negotiation;
- The extent to which the awards given by the court appointed appraisers follow the instructions given to them by the court;
- The extent to which the trial court judge instructs the appraisers according to established law; and
- The extent to which the appraisers appointed by the court understand and apply the instructions given by the court.

During calendar years 2008, 2009, and 2010, KDOT filed appeals on only 19 tracts of land, resulting in 17 litigation cases, out of the hundreds of tracts which were acquired during that time period for KDOT projects¹. The amounts awarded by the court appointed appraisers on those 19 tracts were 436% of, or over 4 times the amounts supported by the KDOT appraisals on the tracts. The difference in dollars between the court awards and the KDOT appraisals was just under \$10,000,000. This increase in compensation on those tracts would have increased the project costs by the nearly \$10,000,000 difference, reducing the funds available for other projects.

The impact would not end there, however. There are a number of other likely impacts if this legislation were passed. First, KDOT, recognizing that it will have no recourse from excessive appraisers awards, will be placed in a position where it will have to hedge its bets and be willing to negotiate higher settlements overall to avoid having to go through a process where the values are taken completely out of its control without recourse. Landowner lawyers will understand immediately that they can hold out for more in negotiations knowing KDOT will not want to “roll the dice” with the court appointed appraisers. This will increase all negotiated settlements (on all tracts, not just the ones that would have gone to appeal under the current system) by some unknown amount. Alternatively, if the demands are just too high, this will make reaching negotiated settlements more difficult and more tracts will go to condemnation, increasing the cost of those proceedings.

A second, and perhaps more concerning impact resulting from passage of this legislation will be that in KDOT condemnations, the court appointed appraisers will be operating completely unchecked by any review on the awards they give to landowners. There is no review of these awards by the court so the three court appointed appraisers will be the final determiner of value to be paid.

Finally, the language of this bill makes it retroactive to cases that were pending or commenced after January 1, 2009. Of the 19 cases appealed by KDOT during 2008, 2009, and 2010, all were pending as of that date or filed after that date. Of those cases two have been tried to a jury, one was disposed of at the trial court level by stipulated verdict, and eleven have been settled. The combined return to KDOT on these fourteen cases is approximately \$1,288,200. It appears that KDOT would have to return those sums to the landowners from whom they were collected after trials or negotiated settlements. One of those settlements also resolved a companion relocation assistance appeal which would be reinstated if the settlement is voided and additional relocation benefits could be paid to that owner as well.

¹ Of those 19 tracts of land, five tracts were consolidated in to two KDOT appeals.

It is worth noting that KDOT is currently litigating twelve condemnation appeals. Of those appeals, KDOT initiated three; the nine other appeals were initiated by interested landowner(s). KDOT has not filed a condemnation appeal since January of 2009 when it initiated eleven appeals in the District Court of Finney County, Kansas. Of the three appeals KDOT filed and is currently litigating two of them are in the District Court of Finney County, Kansas. The pertinent details of the three appeals filed by KDOT are:

- Finney County: Commenced after January 1, 2009.
 1. 2009-CV-09:
 - KDOT Offer: \$482,535
 - Court-Appointed Appraisers' Award: \$5,048,785
 - Difference: \$4,566,250
 2. 2009-CV-13:
 - KDOT Offer: \$342,835
 - Court-Appointed Appraisers' Award: \$1,720,810
 - Difference: \$1,377,975
- Pratt County: Filed in 2008, Pending as of January 1, 2009.
 1. 2008-CV-08:
 - KDOT Offer: \$500.00
 - Court-Appointed Appraisers' Award: \$120,000
 - Difference: \$119,500

Over time as the chilling effect of this legislation on right of way negotiations plays out, and depending on the amount of right of way acquisition needed for projects, there may be the need for additional right of way staff to deal with the more protracted negotiations that are an inevitable result of removing one of the checks and balances in the system to the benefit of one side of the negotiations and not the other. The cost of this additional staff will be above and beyond the increased payments to landowners.

KDOT strongly opposes this legislation. If this were to pass, Kansas would be the only state in the United States to prohibit a transportation department from appealing a condemnation order or award. The current system has a good set of checks and balances in it already which protect the landowners from overreaching by governmental entities in the eminent domain process. It has been in place for a very long time and has served both sides in the process very well. If landowners are aggrieved in the process and their position turns out to be correct on the value of their property, the process makes them whole by affirming or increasing the award of damages as well as requiring the condemning authority to pay their costs.

Thank you for allowing me to testify on HB 2070. I will gladly stand for questions at the appropriate time.