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CONDEMNATION OF FARMLAND IN NORTH DAKOTA

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FOREWORD

This informational report was prepared cooperatively by the School of Law, University of North Dakota, and the Department of Agricultural Economics, North Dakota State University. The work was conducted under the joint Agricultural Law-Economics Research Program, with research funds provided by the North Dakota State University Experiment Station Project ND 3319. This joint research program is well adapted to cooperative studies of such concerns as estate planning, farm leases and partnerships, land use problems, rural zoning, fence laws, and condemnation laws in North Dakota.

The authors extend their appreciation for the reviewing of this report to the staff of the Department of Agricultural Economics.

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More land is being devoted to public uses in North Dakota and throughout the nation. With 93 percent of North Dakota land area as farmland, many takings of additional land for public uses involve farmers. Eminent domain is the right to take private property for public use. Condemnation is the process by which the right or power of eminent domain is exercised.

Figures from the North Dakota Highway Department illustrate the taking of land for public uses. The Highway Department acquired 876 parcels in 1967 of which 90 parcels, or about 10 percent, were acquired by condemnation. The respective figures for 1970 are 647 parcels acquired, and 85 parcels or 13 percent condemned. In 1975, 98 parcels were acquired with seven tracts or about 7 percent condemned. The figures for 1977 were 326 parcels acquired, with only five tracts or 2 percent being condemned. The Highway Department takings seem to indicate that this topic is decreasing in significance, but the increasing amount of energy development in the state suggests otherwise.

Most landowners prefer to sell their land or grant an easement rather than have their land condemned, because condemnation proceedings are expensive and time consuming. But if a landowner feels his land should not be taken or that he should be paid a better price, a condemnation proceeding is his opportunity to litigate the need for the condemnation and the question of compensation. The landowner should not feel overly threatened by the possibility of condemnation because it is just as unattractive to the condemnor as it is to the landowner. The amount of money that the jury will award in a condemnation suit is difficult to predict for either party.

Eminent domain is the right to take private property for public use. Private property is not to be taken or damaged without just compensation being paid to the owner or being deposited with the court. The right of eminent domain can be used to acquire property only if the taking is necessary and for a use authorized by law. Property which is already in public use can only be condemned if the proposed use is more necessary than the present. The condemnor or taking agency is given much discretion in the selection of the site or location, and good faith on the part of the taking agency will likely suffice once necessity for the exercise of the power of eminent domain is shown.

A person or company wanting to condemn land or obtain an easement on land prepares a complaint in the condemnation action. The complaint is the first or initial action on the part of the plaintiff in a civil suit. Its purpose is to inform the defendant of all material facts on which the plaintiff relies to support his demand. It must include: a description of the person or entity exercising the right; a description of those people whose interests are to be condemned (the defendants); and a statement of the condemnor's right to exercise the power. It must include a description of the land to be taken and whether the entire tract is to be taken. A map showing the location, route, and end points must be included if an easement is being acquired. Any person who has an interest in the property described may appear as defendant even if not named as defendant. An interested person could include one employed on affected property, an adjoining landowner suffering consequential damages, or a tenant on affected or adjoining land.

The North Dakota Century Code does not specifically deal with the reply to be made to a notice of condemnation. Therefore, the general rule of requiring an answer within 20 days after the service of process would apply. One does not count the day of service of process in counting the 20-day period, but does include the last day of the period, unless it is a Saturday, Sunday, or holiday.

The court of general jurisdiction in the county where the land is located has authority in condemnation proceedings. Condemnation proceedings are given no priority or precedence over other types of actions in the courts of North Dakota.

The condemnor may include all parcels of land to be condemned in the same proceeding. However, the court may consolidate or separate the parcels for the convenience of the parties.

The plaintiff (condemnor) must pay the assessed sum of money within 30 days after the condemnation proceeding has taken place. An exception to this general rule exists where school or public land is condemned for public use. In this situation ⅕ is paid at the time for the sale, and ⅕ every five years thereafter until paid, interest to be paid in advance and at a rate not less than 3 percent per annum.

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The landowner may appeal a condemnation proceeding. However, the court may allow the plaintiff to use the condemned land for its intended purpose during the appeal by paying damages. The landowner, by accepting the condemnation award, is giving up all his defenses except a claim for higher compensation. The taker can deposit the amount with the court if the landowner refuses to accept the payment.

DAMAGES

A landowner is entitled to compensation for the value of land taken. Also, one may be entitled to consequential and severance damages. One may be entitled to nominal damages, even where no actual damages can be shown.

Consequential damages are those which arise not from the actual taking itself, but as a result of it, such as from the use to which the condemned land is to be put. These damages can arise even though no part of the tract is taken. The consequential damage suffered must be greater to the specific tract than to the public in general in order to be compensable if no part of the land is taken.

Severance damages only occur where less than an entire tract is taken and results in a lower value to the remainder than it had as part of the larger tract. Generally, there must be unity of title, contiguity of use, and unity of use to have severance damages. One must prove unity of lands to be awarded severance damages, but under some circumstances the presence of all such unities is not essential. Unity of title means ownership by one party or entity. Contiguity of use means the parcel severed must be adjacent to or attached to the part not being condemned. Unity of use means that the previous use of the severed tract must have been the same as the remaining tract from which it was severed. Unity of use is usually given the greatest emphasis. An example of severance damage might be the cutting off of access to a parcel by a highway, or the inability to use large equipment on a small remaining tract. The condemnor can include benefits to the remainder to offset some or all of the consequential and severance damages if only a portion of a parcel is taken.

The court may award nominal damages when there is no substantial loss or injury to be compensated, or the loss cannot be proven satisfactorily. A small sum, often one dollar, is awarded to the condemnee when nominal damages are granted as recognition of the technical invasion of a legal right.

WHEN DOES RIGHT TO DAMAGES ACCRUE

The right to compensation and damages starts as of the date of taking. Actual value at that date is the measure of compensation for property actually taken. Also, the date of taking is the date for assessing damages to property not actually taken but harmed. The date of taking is determined by the court. Compensation should be assessed separately for property actually taken and for damages to property not taken.

DETERMINING COMPENSATION

A property owner is entitled to just compensation for the property loss he has suffered. Generally, courts will award compensation in a condemnation case in an amount within the range of values testified to by the witnesses. The award will be set aside where it is so flagrantly against the weight of the evidence that it appears the jury was biased or prejudiced. The value of the property is its market value; that is, the highest price for which the property could be sold in the open market by a willing seller to a willing buyer.

Market value is set by the fact finder (often a jury, whose only duty is to establish damages) by considering the testimony of all witnesses, plus all other evidence which aids in determining value, such as location, environment, and suitability for a particular use. The fact finder may view the land. However, value of the condemned land to the taking agency is not to be considered.

The property owner may testify giving his own opinion of the market value, which is to be given the same consideration as any other evidence. A witness, who is deemed to be an "expert" in property valuation due to his experience and education, can testify as to the reasons for his opinions. But an ordinary witness cannot give reasons unless these reasons have been admitted as evidence for another purpose. Any opinion is to be given such weight as the fact finder (jury) thinks it deserves. The award must be by unanimous decision if a jury is used as fact finder. The award cannot be an average of the sum of what each juror thinks the owner deserves, nor can it be an average of the highest and lowest figures.

The court may award the defendant (landowner) reasonable costs, which may include interest from the time of taking, costs of appeal, and reasonable attorney's fees.

The defendant may appeal and if he does not prevail on appeal, the costs of the appeal may be taxed against him. The defendant may request and be granted a new trial. But if he fails to obtain greater compensation for damages than allowed at the first trial, the costs of such new trial will be taxed against him.

TITLE ACQUIRED BY CONDEMNOR

The extent of the interest acquired by the condemnor varies. The North Dakota Century Code provides that a fee simple is obtained by the condemnor when property is taken for public grounds or buildings, for permanent buildings, for dams and reservoirs and lands flooded thereby, for mine spoil piles, and for automobile parking lots and facilities.

An easement is granted when land is taken for highway purposes when there is no showing of a need

for a fee simple. The court can order the taking of a fee simple if one is necessary. The right to enter and occupy lands coupled with the right to remove earth, gravel, stones, trees, and timber is the only interest granted in certain situations, when such is necessary for a public use.

A fee simple generally means the largest estate which can be held in property, full title. An easement is the right to use the land of another for a special purpose. The former owner is not permitted any use of the land if a fee simple is granted to the condemnor. Where an easement is granted the condemnee may use the land in any manner consistent with the use for which the land was condemned, absent an agreement to the contrary between the parties. Despite granting a fee simple for certain uses, the North Dakota Century Code goes further and says that regardless of the title acquired, the state or any of its political subdivisions shall not acquire any rights or interest in oil, gas, or fluid minerals in or on the land taken. Land condemned for highway purposes which is not so used within 10 years or abandoned for 10 consecutive years is declared vacant and returned to the original owner, his heirs, or one to whom the land has been sold.

OTHER LAND ACQUISITION METHODS

Control of land also can be obtained by prescription and by police power.

Prescription

Prescription gives an easement in the land as a result of the adverse use of the land. The North Dakota Supreme Court has held that to establish a highway by prescription, there must have been general, continuous, uninterrupted, and adverse use by the public under a claim of right for a period of 20 years. Mere use of the land as a highway would not constitute adverse use. The use must be in conflict with the use to which the property owner otherwise would have personally put the land.

Only an easement, and not a title, is created in the public where a highway is established by prescription, and all other interests remain with the original owner. That easement would be extinguished by nonuse for the same length of period required to establish it. Hostile use means a use inconsistent with the owner's right to exclusive use, but does not necessarily mean hostility or ill will between the parties, and can be coexistent with friendly relations between the parties. No right of title by adverse possession can arise if the use of the land is with the permission of the landowner.

The attempt to quiet the title to the land after the required 20-year period of adverse possession carries the presumption that the possession is not adverse. The burden of proof is on the person claiming title by adverse possession.

Police Power

Property obtained under the power of eminent domain is acquired so that it may be applied to a beneficial public use. The police power is the state's ability to limit use of one's property to protect the health, safety, and general welfare of the people. Its exercise results in a limitation or regulation of use, such as zoning, and is imposed without compensation.

The construction of limited access facilities to a highway is an example of the exercise of police power. The North Dakota Century Code authorizes the design of controlled or limited access facilities. The right of a landowner to enter or leave the highway where it is most convenient to him may be restricted. Such a situation exists, among other places, along Interstates 29 and 94 in North Dakota, where access to and crossing over the roadway is limited for the protection of the motoring public.

Despite the general rule that compensation is generally not paid in the exercise of police power, the rights of ingress and egress have been held to be private rights which cannot be taken without just compensation. Thus, a landowner who has his access to a highway cut off by highway improvement is entitled to compensation. However, when a limited access facility is constructed where no highway previously existed, no right of ingress and egress has been taken which deserves compensation.

LAND ACQUISITION BY FEDERAL AGENCIES

Various constitutional and statutory provisions grant to Congress the right to take land pursuant to its power of eminent domain. The Federal government must be able to obtain land for military installations and missile sites as well as access to them. Other Federal statutes provide for condemnation of lands for interstate highway systems.

A condemnation action by a Federal agency is commenced by filing a complaint with the clerk of court of the U.S. District Court in the district where the property is located. The complaint should contain the authority for the taking, the use for which the property taken is to be put, a description of the property sufficient for its identification, the interests to be acquired, and a designation of the defendants (owners) of the affected land. The defendants must file an answer within 20 days of service of notice. Notice is to be by personal service if possible, and if not possible, by publication. The complaint can be amended any time prior to the trial unless it would result in a dismissal of the action after title or possession has been acquired.

The Federal government has a quick take procedure which is similar to North Dakota's. Along with the complaint or any time before final judgment on a condemnation proceeding, the condemnor may file a declaration of taking which must contain:

1) A statement of the authority under which and the public use for which said lands are taken.

2) A description of the lands taken sufficient for the identification thereof.

3) A statement of the estate or interest in the lands taken for public use.

4) A plan showing the lands taken.

5) A statement of the sum of money estimated by the acquiring authority to be just compensation for the land taken.

The filing of the declaration of taking and deposit in court of the amount of estimated compensation vests title in fee simple to the said lands in the United States, unless a lesser title is specified in the declaration.

Compensation is to be assessed as of the date of taking, with interest being allowed at the rate of 6 percent annually on the amount of compensation due in excess of the amount on deposit with the court. Costs need not necessarily be awarded to the prevailing party.

STATE HIGHWAY DEPARTMENT PROCEDURES

A North Dakota State Highway Department pamphlet entitled, "The North Dakota Highway System and Your Land" lists a ten-step process taken in the planning, design, and construction of a highway. These ten steps are: traffic surveys, programming, preliminary engineering, public hearings, final design, right-of-way appraisal, right-of-way negotiation, contracts, construction, and finally the completed highway. The Right of Way Division of the State Highway Department is responsible for obtaining land for highway purposes. It also has responsibility for managing the real property interests for the Highway Department once the property is acquired.

A Supreme Court decision in North Dakota declared that determination of the value in condemnation proceedings shall be an exercise of sound judgment and discretion based on a consideration of all relevant facts. The ultimate objective is the application of sound judgment to ascertain the market value of the property condemned and the loss in market value to the severed land or the land injured by the construction of the highway improvement.

The Supreme Court has indicated that benefits that may accrue to severed property are also to be considered to reduce damages. Benefits which accrue to the entire community and not specifically to the landowner are not deductible from damages awarded the owner for injury to his farm. Benefits to severed property will not reduce damages where a private firm, corporation, or individual is the condemnor.

The Right of Way Division establishes its estimates of fair market value using two or three appraisal approaches.

The market or comparative data approach uses an analysis of recent sales of comparable property in the same or a similar area to arrive at an estimatd market value. The cost or summation approach is an estimate of the amount by which improvements contribute to the value of each type of land involved. The cost approach provides for no allowance for view, design, or sentiment held by the owner. The third approach is the capitalization of income or earnings approach. The latter develops the rate of return that capital invested in the specific type of enterprise in question ought to produce, and capitalizes the net income earned by the property owner over time. The final step is to determine which approach provides the best estimate of the value of the property subject to the taking.

PUBLIC UTILITY PROCEDURES

A public utility must go through several steps prior to approaching landowners to seek an easement for a utility conversion or transmission facility

The ability of a public utility to condemn farmland in North Dakota is controlled by The Energy Conversion and Transmission Facility Siting Act which was added to the North Dakota Century Code in 1975. The chapter says that no utility can begin construction of an energy conversion facility or transmission facility or exercise the right of eminent domain in connection with such construction without first obtaining a certificate of site compatibility. The application for such a certificate is to the Public Service Commission. It must contain a description of the size and type of facility and a summary of environmental impact studies concerning the project. The application must also set forth the need for the facility and a description of the preferred location for the facility.

The description must set forth the benefits and detriments of the preferred location and reasons why the preferred location is the best available. Additional information may be included as the applicant desires or the commission requires.

The Public Service Commission is required to hold public meetings prior to issuing the certificate of site compatibility. Interested persons have a right and an opportunity to question and criticize the proposed location. The Public Service Commission also may set up an advisory committee to assist in evaluating a proposed site and its location. Such committee must have at least a majority of public representatives and at least one representative from the state agriculture department, one from a public utility, one from a private investor-owned utility, one from a cooperative-owned utility, and at least one from each county and city in which an energy conversion or transmission facility is proposed.

The public utility may begin acquiring easements once it has the certificate of site compatibility. No person seeking such easements is entitled to use any harassment, threat, intimidation, misrepresentation, deception, fraud, or other unfair tactics to induce the landowner to grant the easements.

If five landowners allege any unfair tactics by the person representing the utility, an action may be brought by them. A court ruling in favor of the aggrieved landowners can order the easements void and order the compensation returned, or allow the landowner to retain the compensation, or award the landowner triple compensation, as well as allowing costs and attorney's fees to the plaintiffs (landowners). A copy of the court's order is to be filed with the Public Service Commission if it is found that the utility knowingly allowed the conduct of the person seeking easements. As a result of such a finding, the Commission may revoke, suspend, or refuse to grant the necessary permits.

Once good faith bargaining for the easement has failed, a public utility can exercise its right of eminent domain.

This report is not intended as a substitute for sound legal advice; but rather is intended to familiarize the North Dakota landowner with the right of eminent domain and the related condemnation proceeding. There are many other considerations that may come into play in certain situations, such as tax consequences. It is impossible to discuss these types of situations in depth in this type of report. Should you have any questions about a condemnation which may affect your interests, your attorney should be consulted for sound legal advice.

Who Has Authority to Exercise the Right of Eminent Domain and Purposes for Which Condemnation is Allowed

Authority	Purpose
County, City, Park District, or Township Airport Authority	Airports, Landing Fields, and Support Facilities
Industrial Commission	Bank of North Dakota
Electric Cooperatives	Electric Utility Use
County Park Commissioner/Board of Joint Park Commissioners	Parks and Recreational Areas, and Access
General Authority	General Purpose
Public School Board	School Purposes and Incidental Functions
State Board of Public School Education	Public School Buildings
State Game and Fish Commissioner	Game, Fish, Predators, and Boating
City and County Housing Authorities	Housing Projects
Highway Commissioner	Public Highways, Customs, and Immigration Building of Federal Temporary Detour Routes
State, County, Municipal Highway Authorities	Controlled Access Facilities and Service Roads
State Highway Commissioner or Board of City Commissioners	Relocation of Utility Facilities
State Highway Commissioner with Federal Agency's	National Defense Roads, Bridges, Airstrips
Board of County Commissioners	Highways Deviating from Section and Township Lines
Board of Township Supervisors or Board of County Commissioners	Highway Drainage Ditches
State Highway Commission	Junkyards Along Highways, Signs Along Highways
Highway Corridor Board	Protection of Beauty of Lands Adjacent to Highways
Public Service Commission	Land Previously Mined and not Reclaimed
Governing Body of Municipality	Public Works
Governing Body of City Outside State, but within five miles	Public Works
Municipality	Urban Renewal
Municipal Parking Authority	Parking
Railroads	Right of Way Through Public Land
Pipeline Carriers	Pipeline
Utility Company	Energy Conversion or Transmission Facility
State	State Institutions or Industries
U.S. Government	Defense Buildings and Structures
U.S. Government	National Forests
Industrial Commission	Management, Operation and Control of State Industries, Utilities, Enterprises and Business Projects, State Mill
Director of Institutions	Capital Park and Site
State Historical Board	State Monuments
Director of State Parks	Park Purposes
U.S. or Any Person, Corp. or Association	Public Water Use
State Water Commission	Public Water, Flow, Use, and Distribution
Irrigation Districts, Board of Flood Irrigation Board of Water Commissioners Conservation and Flood Control Districts	Systems of Irrigation Works
Board of Drainage Commissioners	Drainage Projects
Board of Directors, Garrison Diversion Conservancy District	Garrison Diversion Project