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Ohio's Eminent Domain Law is in Need of Reform to Protect Ohio's Farmers

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Nearly a decade ago, in October 2007, the Ohio legislature made significant changes to Ohio's eminent domain law through its enactment of Senate Bill 7. The ten-year anniversary of the last significant reform to Ohio's eminent domain law presents an opportunity to revisit and reexamine the use of eminent domain law and its impact on Ohio's farmers. Experience has now shown that while Senate Bill 7 was a large step in the right direction for eminent domain reform, significant work remains to be done. At a minimum, the following additional reforms are necessary to protect Ohio's farmers:

1. Establish a Landowner's Right to Bring an Inverse Condemnation Action

In most states, a farmer has the right to file a civil action against a condemnor who he believes has taken his property without compensation. In that "inverse condemnation" action, a single court decides if a taking has occurred, determines the extent of the taking, and presides over the valuation trial. The landowner is only required to prove that a taking has occurred by a preponderance of the evidence.

Ohio law, on the other hand, requires that very same farmer to first file an action for an "extraordinary" writ to force a condemnor to start a separate appropriation action to determine the value of the taken property. Under the extraordinary writ standard, the Ohio farmer must prove that a taking has occurred by "clear and convincing evidence," a much higher standard than that used in inverse condemnation cases. If the writ is granted, the condemnor starts a second action (often in front of a different judge) to determine the value of the appropriation. The multiple standards, courts, and judges often lead to confusion, extra costs, and delay.

Ohio law should therefore be reformed to provide landowners with the right to sue the condemnor in the county court where their property is located in inverse condemnation. The landowner should bear the

burden of establishing a taking by a preponderance of the evidence. This eliminates the additional step of a mandamus action and would bring Ohio in line with almost all other states and federal law.

2. Grant Mandatory Attorney's Fees to Landowners for Successfully Defending Against Appeals

Under Ohio law as it exists today, a condemnor only has to pay a farmer's attorney's fees under certain circumstances, and even then is only responsible for certain fees incurred during the appropriation trial. That farmer is not guaranteed attorney's fees when he is forced to seek an extraordinary writ and he is not guaranteed attorney's fees when he is forced to defend against a condemnor appealing a jury verdict. The Ohio legislature should create a mandatory award of all attorney's fees and expenses incurred by a landowner in successfully obtaining an extraordinary writ and for successfully defending against a condemnor's appeal from a jury verdict. This would disincentivize a condemnor from avoiding their duty to bring an appropriation action or from appealing each and every jury verdict. Further, it promotes fairness to landowners, who are not only compelled into a forced sale but are then forced into litigation to obtain just compensation for that forced sale.

3. Clarify That a Good Faith Offer Is the Floor of Compensation

Ohio law requires a condemnor to make a good faith offer to a landowner before filing an action to take the property. This process is intended to avoid unnecessary litigation. If the condemnor makes a truly "good faith" effort to identify what is owed to a landowner, the landowner will accept it and no court involvement is necessary. If the landowner thinks the offer is unfair, they can go to trial and fight for a higher verdict.

Instead, condemnors have removed the "good faith" from this process and are using this process to coerce landowners into accepting whatever is offered. Instead of making an offer that truly reflects what a property is worth, a condemnor will make a lesser offer but threaten to proceed to trial using an even lower offer. For example, a condemnor may offer a farmer \$30,000 for a property worth \$50,000, but the condemnor will threaten to try to go in front of a jury and claim the property is actually worth \$10,000. This behavior acts as a direct threat to landowners – take what is offered or we will seek to drop the floor out from underneath you at trial.

To address these issues, the Ohio legislature should add express provisions to Ohio's eminent domain statute stating that (1) any initial offer made by a condemnor constitutes a good faith offer; (2) such good faith offer cannot be later reduced or revoked; and (3) the good faith offer is the minimum award of compensation to the landowner. This reform promotes the land acquisition policies set forth in the eminent domain statute, by preventing coercive tactics and promoting fairness and public confidence in land acquisitions, and prevents condemnors from penalizing landowners for challenging "good faith" offers of compensation.

4. Penalize Coercive Conduct

Ohio law sets forth eleven requirements that condemnors must follow when taking property. One such requirement, found at Revised Code 163.59(I), prohibits government agencies from engaging in coercive tactics or conduct. However, Ohio law provides no clear and express remedy for violations of this mandate. Ohio law should be reformed to clearly provide landowners with a private cause of action against

condemnors who use coercive tactics or conduct in land acquisitions in violation of Revised Code 163.59(I). Condemnors who engage in coercive tactics should not only face monetary penalties but should be liable for the landowner's attorney's fees and expenses for bringing the action.

5. Remove Provisions that Prevent Landowners from Challenging the Necessity of Takings

One of the few ways that a landowner can prevent a taking from occurring is by proving that the taking is not actually necessary for public use. Although often an uphill battle, necessity challenges are an important backstop to prevent eminent domain abuse. Currently, Ohio law prohibits landowners from challenging the necessity of a taking in certain types of cases. For example, Revised Code 163.09(B) tries to create an irrebuttable presumption of necessity if a state or federal regulatory agency approves an appropriation by a public utility or common carrier. And R.C. 163.08 is claimed to bar landowners from challenging the necessity of any rights taken so long as the condemnor claims it is for a repair or creation of a road.

These provisions pose a problem from a constitutional level, as the Supreme Court of Ohio has made clear that it is the role of the courts "to ensure that the [condemnor] takes no more than that necessary to promote the public use" *Norwood v. Horney*, 110 Ohio St.3d 353, ¶ 69. Statutes that leave the necessity decision only to executive agencies are dangerous and violate separation of powers.

Moreover, these provisions are ripe for abuse. Public utilities often use R.C. 163.09 to claim an irrebuttable presumption of necessity, even when the rights it is attempting to take are unnecessary to the approved project. For example, if an agency approves a 30" pipe project, a utility will attempt to take an easement for two 48" pipes and claim that a landowner cannot challenge the necessity for the take. Or, a condemnor will take property for landscaping purposes or sidewalks, claim that it is for road purposes, and will attempt to prevent a landowner from challenging the necessity of the taking.

To resolve this conflict, Ohio statutory law should remove any presumptions of necessity for common carriers and public utilities as well as for road projects. At a minimum, Ohio statutory law should remove any "irrebuttable" presumptions, as they are unconstitutional, and remove any bars to challenging the necessity of takings for road projects. Securing the right of landowners to challenge the necessity of a taking in all cases will protect private property rights and prevent excess and unnecessary takes by condemnors.

To effect these changes, farmers across the state must reach out and speak to their representatives about why eminent domain reform is necessary. Tell them about how condemnors are trying to use the system to take more farmland than is actually necessary for public projects, forcing farmers into multiple actions across multiple courts to defend their rights in these forced sale situations (often at their own expense), and are coercing farmers into selling their property for less than it is worth. Tell your representative that they must take action now to protect the private property rights of Ohio's farmers.