

**2017 SENATE POLITICAL SUBDIVISIONS**

**SB 2332**

# 2017 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee  
Red River Room, State Capitol

SB 2332  
2/2/2017  
Job # 27808

- Subcommittee  
 Conference Committee

Committee Clerk Signature

*M J Wocken*

## Explanation or reason for introduction of bill/resolution:

Relating to the valuation of property for just compensation

## Minutes:

Written testimony #1 Troy Coons  
Written testimony # 2- Joe Ibach  
Written testimony #3 Todd Kranda

**Chairman Burckhard** opened the hearing on SB 2332. All senators are present.

**Senator Luick**, District 25. Introduced and Sponsored SB 2332. Helps to clarify values of property and land.

**2.50-5.13 Troy Coons**, Chairman of the Northwest Landowners Association. Written testimony #1.

**Senator Judy Lee:** Would you give us an example of what that other testimony would be? I spent a long time in the real estate business and I get the appraisers role, and so I would say there is probably never a collegial relationship between the buyer and the seller because it's not imminent domain wouldn't step unless they were having a dispute. So we know it's going to be, a problem. They haven't reached an agreement, so here we are. What kind of other information would come in besides the value of comparable sales? If they are comparable they are going to have similar conditions.

**Terry Coons:** I guess what I was alluding too there, say you own property here, and a few miles away you own other property. There you've come to an agreement and say, on this property you don't come to an agreement you're being offered say \$100 a rod. Then over here you've willingly negotiated at \$275 and you could have that evidence put into play as well. Not just the property sale and then encumbered by an easement type of sale.

**Senator Judy Lee:** So if it's only a couple of miles away, the value of the land itself and from a production standpoint is going to be very similar, so that's not a factor. Really, in most cases you're not going to have, I am not talking about mineral rights now, we're just talking about surface rights. So, why would it be likely that you would have reached an agreement if it's only a couple of miles away on \$475 a rod and then there would only be offered \$100. There's got to be a difference in the youth, there has to be something different here, what is the rest of the story?

**Mr. Terry Coons:** When you look at this bill has it in there where it would be like youth, but like at other negotiations you may find a company that negotiates in this fashion and their more hurried and you need to use them for their name, they feel they only want to top out at \$100 where another company has a different philosophy. That would be one of the other reasons and how they would pay. So maybe they would prefer to pay the \$275 has better relations with the property owner and move forward.

**8.27-14.40 Derrick Braaten:** Attorney with Baumstark, Braaten Law partners in Bismarck. Our firm represents farmers and ranchers and other land owners. We focus our practice on agricultural law, energy and environmental law and primarily just serving land owners on landowner issues. I represent a lot of landowners who are faced with eminent domain and saw this bill in particular and appearing in support of it specifically because of some of the experiences I've had representing land owners. (9.06-12.08 examples cited) Eminent domain explanations for landowners. The final issue I want to discuss, there is some language in this law and I think there were concerns in Wyoming when it passed because one of them is when there's no market it is whatever is fair and equitable and that might sound like it's not very specific or somewhat vague, but, at the same time I think the important thing to remember is that with or without this law, you always have the judges acting as the gatekeepers of evidence. So they are still going to have the same standards for what is relevant, for what is probative and what kind of evidence and so those judges are still going to be watching this. In looking at that, one of other issues I think there was some concern in WY will you've got, one of the pieces of evidence you can get in is simply evidence of other easements and what they paid for those. Right now what they usually look at is diminution in value or they look at sales without a pipeline sale, with a pipeline, what is the difference. Sometimes there is no difference, but that doesn't mean there is not a damage when you've got a pipeline coming across your property and the best evidence of that damage what are they paying for other pipelines going across other people's property in an open transaction. Now you still have to have comparable's to those, so the question is alright so if we're paying \$300 rod for oil gathering lines, what happens when they come through with a fresh water line. Rural water comes through. Well, you still have to have a comparable sale.

**Senator Diane Larson:** You mentioned a situation where someone was offered \$40,000 and then when they went to court, they said it was only worth \$2000, it seems to me that maybe if they just want to get their project done and not go to court, they would've offered more just to get it finished but there really wasn't that much value to crossing that property. I mean that's the way it would sound to me, is that correct?

**Mr. Derrick Braaten:** I think that what we're really talking about here is how you value the property and so the appraiser. No, you're right, the appraiser didn't think there was value to it, but it's not the value to the condemned nor the value to the condemned nee, and I think that what that appraiser recognized is that using these traditional appraisal techniques we don't. He arrived at zero dollars. That's not even constitutional to say that. But, if there had been a market when you look at open market transactions, what is the value for a land owner who is going to willingly grant a pipeline easement and that's what we're saying is an appropriate measure of market rate for damages or market damages. So when you look at it that way, yes there is a value. There is damage to the landowner, and I guess the best way to put it, using these traditional appraisal techniques that they are saying is zero dollars as damages, but you've got a pipeline right-away getting trenched in and you've got heavy equipment going across that crop land, and you've got damage to crops, clearly this is damage and it's not being acknowledged basically by the traditional appraisal type.

**Senator Diane Larson:** So if for example you have 3 neighbors in a row, and these two neighbors want that water line across their property and their willing to give that easement; the guy in the middle says, no I want to be compensated or none of you get your water. So, I want and I'm saying to cross my property there's x amount of damage say \$40,000, then if the company just goes ahead and settles and gives them the \$40,000, are they required then to pay these other two guys \$40,000?

**Mr. Derrick Braaten:** No they would not be. What this does is just sort of broadens the scope of what's allowed in as evidence with respect to eminent domain evaluation specifically because our Supreme Court and some of our laws have been interpreted to only allow for the traditional appraisal techniques. What we're learning is that with transmission lines and pipelines specifically those traditional appraisal techniques just don't capture what the actual damages are and so we need alternatives but I would go back to, this is all subject to what a judge think is, relevant in probate and then the judge is still going to be a gatekeeper on that evidence.

**Chairman Burckhard:** There was reference made to when there is no market. What is that, when there is no market?

**Mr. Derrick Braaten:** So that is the Sandpiper case I mentioned. The NW part of the state I've had imminent domain cases where transmission lines, pipelines. There's a market there for pipelines. So I have a landowner that's got 4 pipelines on a quarter section and there's another one coming in, he can say well I've negotiated 4 pipelines and this is what it cost to run a pipeline across my property. Sandpiper case I had the land was over by Grand Forks, there is no market for pipelines and so over there what they're saying is okay you don't have a market for pipelines in the Eastern part of the state, but we're still going to allow you to use some kind of evidence to get to that value and so, using a discount perhaps you would be able to at least argue that you could use evidence of other pipeline transactions in that part of the state even if there aren't that many, if there aren't enough to create a market for it.

**Chairman Burckhard:** Are you familiar with the North West landowners?

**Mr. Derrick Braaten:** I am aware of the organization, yes.

**Senator Judy Lee:** We talked about the oil and water pipelines. My Dad got the easement for the first rural water system in ND which is in Walsh County. Nobody was paid anything. We were so darn glad to get the water. So I think there is a big difference a pipeline which may have a potential benefit to the property owner whose land it crosses and those for whom there may not be a benefit such as the trans quart of oil so that makes a difference. Something that really doesn't want really big equipment, sometimes that trenching equipment is pretty sophisticated and it's a pretty narrow little track that it makes so it's still very much available for crop and livestock raising, so I am curious why the person who is offered \$40,000 didn't take it. He must have gone to court because he wanted more.

**Mr. Derrick Braaten:** I know this client well enough to know he would comfortable with me disclosing this although, I am normally not supposed to talk about details but, the bottom line is that it really wasn't the compensation so much as the company was saying, this is our easement form and you're going to sign this. This is a problem with eminent domain where it might not be about the money, it might be well I don't like these provisions in your easement and those concern me,

and the company says tough luck, you sign this easement or you don't. So that was the real problem it was that he would be fine with that, as compensation but there were certain provisions in the easement that I don't think any landowner should have been signing. To your other comment, I think that if you're talking about rural water going to farms and ranches, out in a rural area, I don't think number 1, that they are going to have any issues with eminent domain, and I think that most in my experience, the issues when we are talking about rural water, with eminent domain is when landowners have already had a couple come across them and they've got a couple more coming to run to oil wells and it's not giving them any benefit at all. But they are being told that you should just lie down and take it.

**Opposition:** SB2332

**22.40-27.55 Joe Ibach**, Real Estate appraiser, opposed SB 2332. Representing the ND Appraisers Association. Written testimony #2. Talked about the verbiage in the bill.

**Senator Anderson:** Mostly of what we've heard talked about here now, is an easement and not selling the property. So how do you compare those two?

**28.10-29.36 Joe Ibach:** Example cited and question answered. Continued reading his testimony.

**33.20-33.49 Senator Anderson:** When you say that they negotiation between private people is not the value, isn't it true that when we appraise property in our county or for assessments and so forth, we use comparable sales which are both private negotiations and that's how we fix the value, so how do you see this different?

**33.48 Joe Ibach:** The measure of damages goes to value in the appraisal world. So if I am engaged to appraise a project where they need to determine damages, I have to base it on more than just one private negotiation. I base it on what the market says. The market then has to be something that has been exposed to everything, everybody. When there's a private negotiation between a land owner and a utility company, that's never been exposed to everybody. It has only been exposed to that property owner. So it has to be market exposed and that's the definition of market value.

**34.44-38.07 Joe Ibach** Continued and referenced his testimony.

**38.13 Senator Anderson:** Are you familiar with the Wyoming law that was discussed earlier and have you talked to any of your counterparts about the application of that law and how its working in Wyoming?

**38.25 Joe Ibach:** I have not. I was not even aware of that but as soon as I heard, it is something I am going to peruse.

**38.36 Senator Dotzenrod:** You mentioned a parcel if they come across and they needed 33 acres and the compensation was based on the value of the 33 acres. In our current law, which, in the bill, would be page 1 line 14, says 'That if this 33 acres that you mentioned is part of a larger parcel, the damages which accrue are that portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.' This is the list of things that people determine the value must ascertain, so there saying you would look at the value through trade but you would also say there is an

Additional amount that may have to be considered here, in addition to that 33. But how does it affect the property that gets divided? It isn't just that 33 acres, there is other factors they have to determine and awarding with some value to that, right?

**39.50 Joe Ibach:** You are absolutely correct. The prime example that people can really understand is let's assume that the DOT built a road and they cut a cross  $\frac{1}{4}$  of land diagonally and over on this side of the triangle there is road here that has access; on the other side of the road there is no access to it, and maybe they created a real small triangle. It's possible that they created no value for that severed parcel, and it's the appraiser's responsibility to recognize that and we do. Because what generates value, well access and ability to use the land so they severed the parcel, or they do anything that adversely impacts the utility if the appraiser's responsibility measures that and compensate the land owner for that. So your observation is absolutely correct.

**40.46 Senator Dotzenrod:** One of things that you asserted in your testimony is that if the compensation for tracts that are needed for a project end up being out of line or too high, the person that is going to end up paying that is the consumer. I was thinking about that and wondering if it's a publically held company or a private company that is stock held company, and they declare a stock dividend once a year to their shareholders. It's possible that the consumers may not see any change, but the shareholders would just get a smaller dividend. Is that also alternative situation that the consumers may not see any effect?

**41.38 Joe Ibach:** your correct. Because the acquisition of an easement, in the scheme of building an oil pipeline is nothing. But, does it not need to be fair? Because, just because it's virtually nothing in the scope of a company that is worth a billion dollars, is it fair? That's all I am here to testify on, whether or not the system that's in place in front of us, were to be fair.

**42.11 Senator Anderson:** We heard some comments earlier about how a water line and whether people are always happy to grant easements. I don't know if you have any specific experience, but my experience in watching the lines in our area weave in and out of the private land under the road ditch and so forth. It makes it clear that not everybody was happy with the easement, because they didn't want it on there so they either went across the road to the other side, all at additional expense for the project. Do you see that occurring?

**42.45 Joe Ibach:** Yes, I've seen it. Unfortunately, these companies are dealing with people. I've seen it and I know that where the wheel that squeaks the loudest normally isn't impacted as much. Is it fair, no. But the world's not fair. So your right, it all gets down to negotiation between the property owner and the company and I am not here to impact that negotiation, I am only here to impact or provide testimony that if it gets down to where you have to have a measure of value loss we've already got that system in place. I am not here to testify what the companies would do on a private negotiation, or whether or not they should use that but if you choose the law to put this verbiage in there, I think, the appraisers think in North Dakota that it's only going to make the situation worse. It's not perfect, but it's the best we have.

**44.07-50.21 Todd Kranda,** Attorney with the Kelsch, Kelsch, Ruff and Kranda Law Firm. I am appearing to you today as a lobbyist, representing the ND Petroleum Council in opposition to SB 2332. Written **testimony #3**, with attachment describing Eminent domain. There was some reference early on that leverage comes into play. Again, just compensation has nothing to do with the leverage situation. That is not a factor at all. There was also an example given about a \$40,000

offer, and I think some of the questions by the committee members have kind of brought that out but I wanted to point out that offer may have been made to compensate some of those extra provisions that were concerned about in the easement itself. So, when you heard the \$40,000 compared to what a trial came up to \$2000, the provisions in that easement as I understood from the testimony, were of some concern. So, there may have been something. Typically, I do have a company that I represented doing the pipeline. They offer usually some full value as if they were buying the fee simple of the property, not just imposing something like an easement underneath. So these offers that are made, are typically to expedite the process to avoid litigation, so they may be enhanced significantly and incentivized method to try and resolve it through negotiations. They are not necessarily the just compensation offered for the easement. It's a different process. Then there was some confusion I think, and maybe Mr. Ibach covered it, but there is a separate calculation for those damages that are for the use or the temporary use with construction, the loss of crops, maybe the crops are inhibited for a year or two, the actual use for construction access. So those are separate, that surface activity is compensated for separately and not part of the process for the easement evaluation. We urge your opposition and ask for a do not pass recommendation for SB2332.

**Senator Anderson:** It's interesting that the issue about the damages being negotiated separately once a company, let's say they do quick take and then they hire a contractor and it's going across somebody's land. Then that landowners' recourse then is to try and negotiate and maybe the contractor goes a little quick and he leaves the ground open here and there so it makes it difficult for his equipment to operate and so forth. I don't object to any landowner trying to get the best prices that he can, for somebody who wants to cross his land. But once that contractor starts and then the landowners out there north of Watford City, that I've talked too, get a little irritate sometimes with this and maybe, it's the oil companies and making sure the contractors are doing a good job, but then this guy is stuck with hiring an attorney to try and get his compensation for what he feels like he should have. I think this is a reaction to that, and trying to solve some of those problems. Of course they all know what their neighbor got for the easement that went through, so consequently they want to get at least that much when they go for the negotiations. Question about the issue with and between the pipeline company and their contractors and how the compensation for the land owner for their damages is figured out.

**Mr. Todd Kranda:** You referenced Quick Take. That is not available in ND. It is a private industry and how you deal with the is I think it is the state. The state kept Quick Take for the highway projects. Quick Take is not available for a company such as mine or other utility companies. What you're talking about is more along the lines of reclamation, the clean-up, the damages on the surface for maybe the contractor who built the pipe, put it in, or put the facilities on the land, and so that is a little bit different than what we're talking about for just compensation with the easement or the land taking that may occur under eminent domain. But those are just as important. You're absolutely correct. I think there is good companies and bad, there is companies that oversee the construction crews better than others. For instance, the Public Service Commission has learned a little bit more over the citing process to implement a third party inspector that goes along. I think you as a body last session even the Ombudsman program through the AG department there is a person that is available to the land owners; I think Industry and the Northwest landowners Association came together and said we need someone out there in the field and I think there are two representative across the state that help facilitate those communications that address exactly the concerns that Senator Anderson addressed, that the reclamation isn't done right, the crop isn't working right, something is going wrong and who do we talk too. So, I think there are other programs out there.

This bill is not an immediate reaction but I think it is an appropriate directive to clean those things up or deal with those. I think this is going to a different direction to cause more problems than they can resolve.

**Senator Anderson:** So one of the instances I heard about was where the pipeline was cited and apparently the route was approved, but the easement had not been received yet from the land owner. Yet the pipeline company simply went across the land and with the intention of settling with the land owner later. Now, you say there's not any Quick Take, but they were already digging the pipeline across the guys' land and of course he would have to call the sheriff or go to court to get them to stop until they settled it. Is that how it would work?

**54.42 Todd Kranda:** I don't know the specifics of that but what I would anticipate is that there was a legal action already commenced for eminent domain. Otherwise they were trespassing, it was simple as that. If you're not on there through some legal process, you're a trespasser and they certainly could've been contacted through the sheriff, to say get off. But, my belief is, is that there was negotiating, they failed, the citing and permit went through to the Regulator such as the PFC, so they knew the route was approved, they didn't have the formal easement but they went to court through a legal means and they would have been granted access through the court and then only determine what the compensation and damages would be through that litigation at a later point. But the judge would have unnecessarily approved that go ahead and proceed with the project because that's going to happen, it's not compensated and settled completely so the landowner may not have fully understand or was involved in the litigation, but not completed where an easement would've been entered but the court would have allowed permission to continue with the project. Otherwise it is a trespass.

**Senator Judy Lee:** First, of all, in 1997, from my desk upstairs I called my home town to tell them to stop building what they considered a permanent dike on property that we owned because they thought they could. So it happens in all situations too. We had a very spirited conversation about that whole thing. But at the other end of the state, we're not looking at oil pipelines but we have flood control by-outs and my point going back to Mr. Ibach the difference between value and compensation. Because there are some eminent domain situations in those cases where somebody is not accepting the offers, generous as they might be, and they are, but the additional compensation that they have in order to be able to move forward with the project, is decimal dust in the project, and it needs to be done in order to provide the flood protection along the valley along the Red, so I get the part about value being different. We would never use a comparable sale of a property that was purchased for being able to move forward with flood mitigation with a property that was not in the circumstance because they are entirely different. So how are the circumstance like that, let's talk about the eastern end of the state, because the law effects everybody both places. Do you see the same challenge for the appraisers who are working and all those parties who are determining what the compensation will be for the buyout for flood mitigation in the same way as far as how you would, or what is the damage? Because those people's attitude is and I don't blame them, they can't replace what they have for what the actual value is as far as market value is concerned. They are going to move to a comparable house there is no comparable house that is along the river with a great view and nice backyard, so they are going to have to spend more money in order to get that and that's part of their rub as well. So, it's not as big a deal as the pipeline accept it is to the property owner. How do you see this all fitting in on that kind of situation?

**58.09-59.33 Mr. Todd Kranda:** That is an interesting and difficult process for the appraisers and for the judge to establish the just compensation but I guess I would fall back to, you don't want to change the rules for some if it's been working. I think it is a fair application across the board. There is some unique qualities and I think the rule that I heard in law school, was land is unique in itself, and you can never replace it exactly, and as a real estate past experience that is exactly true. I think your right. However, you do the best you can with the rules you have and you don't have some hypothetical factors that come in that disrupt the process and make ripples that make it unpredictable and uncertain. I think there is certainly other factors that probably go with those situations, then the typical ones that I am dealing with pipelines, but I still think the rules apply fairly equitably across the board and should be implemented the same way. As to the evaluation there you would probably be taking a complete taking of what the land is and I do believe that I would argue on the home owners side that I can't replace this for what it is and whether or not the like circumstances exist. You can never make it exact, and so you try to do the best you can.

Chairman Burckhard called for anymore opposed or in neutral positions? No one came forward.  
**Chairman Burckhard** closed the hearing on SB 2332.

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Political Subdivisions Committee  
Red River Room, State Capitol

SB 2332  
2/9/2017  
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- Subcommittee  
 Conference Committee

Committee Clerk Signature

*M. Gwozdz*

## Explanation or reason for introduction of bill/resolution:

Relating to the valuation of property for just compensation

## Minutes:

**Chairman Burckhard** asked the committee to meet for additional committee work. All senators are present.

**Troy Coons, Northwest Landowners Association.** I have meet with several of you trying to clarify things, but if you have further questions. All this bill does is allow more information to be used in determining these values. The judge is still the gatekeeper and the decision maker, it just broadens the amount of information he is allowed to use in that decision making.

**Sen. Dotzenrod:** I am not sure I really understand exactly what the problem is, because it does appear to me that when you look at what's going on out on the land, from my experience in my district, when they come through, that the offers that have been made by the utilities and the pipeline companies, have been pretty much in line with assessed values, current values, selling prices, and not really unusually high or low, there are some holdouts that seem at the end of the process, can hold up the process and sometimes they negotiate a better rate. But am I missing something here? Are we seeing these projects come through and people are just not getting fairly compensated?

**Mr. Troy Coons:** if you have a full taking the current process works well. But it's been these partial takings where its' just an easement for a certain section of land that is not taking the full 10 acres, or hundred acres that you own. It is the partial takings where it would be good to look outside of the scope of just the appraisal and look like other like circumstances where there has been other negotiations or other transactions. It allows the judge to look at that and help in determining these evaluations, and yet we brought it forward for that reason because there is a discrepancy out there.

**Chairman Burckhard:** So the bill as its written is there anything wrong with that? Are there amendments you want to make to this?

**Mr. Troy Coons:** No, the amendment is good to go. It is the language from Wyoming, it's the language that has been on the un-amended there for 10 years.

**Chairman Burckhard:** So there is no, you're not proposing an amendment. **Mr. Troy Coons:** Correct. **Chairman Burckhard:** you selling SB2332 as is was proposed is a good bill? **Mr. Troy Coons:** Yes.

**Sen. Anderson:** Example cited (5.15-6.06) The same thing here, it seems like this opens it up to anybody to say gosh I think that's worth \$5000 an acre and I am not obligated, I don't have to buy it, I am not going to buy it, but I just say that. That troubles me with this bill.

**Mr. Troy Coons:** Again that will come back to evidence that has to be introduced that would be quantified and the judge is still the gatekeeper to qualify that information.

**Sen. Judy Lee:** There really are 3 ways that certified appraisers use to determine what's going on, the markets would be other comparable prices have been at fix sale and based on sales. This has to do obviously with income property, and costs for new construction primarily. Everybody wants their assessed value to be really low when they are having their taxes figured and really high when they want to sell the house. So sometimes you've got to pick your poison here. I firmly believe that good certified appraisers do a fine job dealing with comparable sales, publicly disclosed sale information which we have a hard time getting in ND, because people don't want to say what they bought or sold for. But it's really important to have that information and most deeds now do have it put it on there but you can send it directly to the State Board of Tax Equalization and it will be useful for a statistical year. But I don't approve of the idea of bringing in some other kind of information because (ex.cited 8.15-9.06). I just can't go along with the idea that we should bring in these additional and other information. We have good certified appraisers who know how to do their job well and I know from years of experience that the work that's done doesn't have to be in oil leases, or easements, or anything different, the concept is the same. If it's a good appraiser, you can always challenge an appraisal if it isn't correct. It will be fair and equitable. I kind of got to stick with the current program myself.

**Sen. Kannianen:** On 3b, when it talks about when there is no relevant market, I am assuming like a rural area maybe where there's no comparable sales available, what would be an example of any "just and equitable method evaluation could be used"? What would be an example of that?

**Mr. Troy Coons:** They are referring there again it's going to come back to all of this information will be verified and the judge will be the gatekeeper to this information if it is true and valid. So it can't be just a rumor or these coffee such type statements. It would be verified information by the judge. It would be the closest relevant one in the region that would be comparable. It wouldn't be where you would say, over here we have a fresh water line and its going for x amount of value, that wouldn't apply to a natural gas line or a crude line.

**Chairman Burckhard:** Senator Lee, do you think one method and one method only is the right method?

**Sen. Judy Lee:** There are three different approaches to this same method, but the people who are certified are educated and have to pass an exam in order to qualified to do this and they focus generally in one area or another. They might be a commercial appraiser but they might even focus on something narrower than that. The ones who are good and experienced and that whom I assume would be involved in doing these things know the drill and if there's a variance you, this is an unusual situation where you can't, that there isn't some process where you can have 3 and throw out the bad one, so that you get to see the closest to 3% + or minus. But to have an outlier. What's with the judge? The judge isn't an appraiser so how does the judge decide if the information is valid?

**Chairman Burckhard:** I suppose that is you know that he has more than one source of information in front of him tell which one he thinks is best or maybe comes to a compromise. I don't understand that.

**Sen. Diane Larson:** I move a do not pass. **2<sup>nd</sup> Senator Judy Lee**

**Discussion:**

**Senator Dotzenrod:** I am trying to visualize how this would work if it was in law, and it was an easy way of doing things. If someone goes to court right now, and the judge has to look at information to try and determine what should be the payment, I assume is not happy with, but they got offered it, so the judge right I think is limited to looking at the things that are identified here in current law. So it's kind of a limited universe based on the things that Senator Lee mentioned. Comparable sales, income method of determining value and cost. But if we had this in law, the effect of that is that now information, those three, is bought into the process. The judge up until this point under current law is limited to those three as I understand it, but then if you pass this, it opens up and says other stuff now can be bought, as the utilities are working its way through their easement, right of ways and trying to get the signatures and get these easements done, that there making offers as they along. The ones that are difficult they offer something that is above what those other 3 would offer. Or, that there is a critical spot where they need to through that one area that is going to be crossing a river, might be place where they are having difficulty because of geography or crossing an interstate, or some feature that makes it difficult so they are paying a premium and that gets now under the provisions of this bill. It gets bought in, up until now, it is not allowed. So does it have the effect if you have this in law? Would it have the effect of making those offers less because the people that are making the offers know that now we've got this new law and by virtue of this new law if I make an offer that is a premium offer, that will become part of the judicial review process now. We heard the attorney say that the universe is kind of limited right now to what the judge can look at. By passing this bill we expand and allow a larger universe of data and numbers. If you do that, and the people making an offers know the new law is there, does that chill a little bit with what they are willing to do or not? I wish I knew because the only place I know this is in effect is in Wyoming. I don't know what the effect it has been, but how would it affect the process that is in front of us.

**Senator Anderson:** I am going to support the motion because whenever I read one of these lines that is suggested to be added to this bill, I have to ask someone to explain to me what they think that means. I think that is a bad precedent to put in the legislation when I cannot interpret it on my own.

**Senator Judy Lee:** I don't have experience with easements in western ND, but I can certainly tell you what's happened in Fargo. (example cited 16.07-17.40)

**Chairman Burckhard:** this is a motion for a do not pass,  
**Role call vote: 3-3-0; a tie**

**Senator Anderson:** Maybe more discussion would help because I haven't heard from the people who voted no on this why they felt that way.

**Senator Diane Larson:** I guess one of the things that I remember Joe Ibach saying that I thought was really significant is "price does not equal value". Just like what Senator Dotzenrod was talking about, when somebody because they want something, a certain part because the holdout or whatever and so they pay an exhorbant amount. Once they go down here that then shouldn't be the base price going forward to get an easement. That's the price not the value. If were doing this, then we're bringing price into it and not value. That's why I am opposing the bill.

**Senator Anderson:** In the alternative I could support the bill if we remove Line 8,9, 10, 11 on page 2.

**Chairman Burckhard:** Is that part A and part B? **Senator Anderson:** replied yes.

**Sen. Kannianen:** I agree with you, if you took out Subsections A and B; and I voted no because I like the idea of certain parts of just simply allowing the judge to look at more information, but as far as not having a 3-3 tie, I would agree with Senator Anderson I could move forward on something like that too.

**Sen. Anderson:** I will 2<sup>nd</sup> that motion.

**Chairman Burckhard:** Can I get some input from landowners before I move on that motion? Are you aware of what they are suggesting, remove 3A and 3B on page 2?

**Troy Coons:** ND Landowners Association: Looking at "B" here, again that would come back to the judge would be able to bring in some information, determine its validity to this situation so, I would see that seems to be something that would be fair and equitable to both parties because the judge is going to be looking at that information. Again, I refer back to the exact language in the oil producing state has been working for 10 years without being amended. So, I understand everybody's concerns here, as I mentioned in earlier testimony, we have been watching this for 4 years and monitoring it, because we have wondered about those same things and it didn't show up to be a problem there.

**Chairman Burckhard:** Could you live with this it if we eliminated Lines 8,9, 10, 11 on page 2? Are you saying you can't?

**Sen. Kannianen:** So, could subsection B at least probably be considered as included in the subsection1 of subsection C when you look at techniques used by a certified appraiser, I mean when you talk about no relevant market, if there is no relevant market. Does that include a lot, it wouldn't have to be otherwise ordered?

**Troy Coons:** There is a little difference here. Some of the comments in the committee refer more to whole takings than partial takings. That is one thing that we need to make clear there. A lot of that is whole takings not partial takings or investment, so there is definite difference there. Again I come back to the judge is the gatekeeper on this.

**Sen. Anderson:** We've heard references to the Wyoming law and in order to be fair if we eliminate compare to what we have in ND, we need to see the Wyoming law and see how it compares with ND. The information I have I asked people to look into it, and they felt that there were enough differences in Wyoming law that you couldn't relate back and forth with them, so if we're going to stick with this and you want to look at it further, we need to see the Wyoming law and compare with ND and see what it is there.

**Sen. Judy Lee:** My first thought that is that the only state that's done anything in 10 years they must not be any raving demand for it, because you're not the only oil producing state. But the other thing is, you can never convince me that the judge is going to be an appraiser any more than a doctor is an appraiser. Being the gatekeeper that is not an operable word when you're determining value or price. So, for them to be able to make an arbitrary judgement about something which is absolutely not within their area of expertise gives me way more heartburn than having it be done by a certified appraiser with expertise in the area who understands. There is always someplace to find a comparable sale, that is what a good appraiser does. There is no such thing as no comparable sale.

**Sen. Dotzenrod:** Part of my thinking in this is that the judge really should have as much information and would probably know which ones of those are outliers, or caused by an unusual set of circumstances that caused one price to be higher than the other. The word "may" on line 13, I assume these other values, it's a question of how much deference you want to give to the judge. I would like to see what the Wyoming is, but if the judge knows as much as anybody else knows that is probably okay.

**Mr. Ron Ness: North Dakota Petroleum Council:** There are some differences in Wyoming, they have quick take so you can bond on. They do not have that in ND. So basically in Wyoming if you want to go one, you poke a bond and move one. There are big differences in Wyoming of course with lots of federal land. Here is biggest thing. One, is an obligated price. Joe Ibachs' testimony you ought to look at and as the appraiser you focus on this is an absolute opening up, this is worth anything that anybody tells me it might be worth. That was our objection to the bill that effect lines A and B. After that it basically does what Sen. Lee says what do appraisers use to validate land and we don't pay taxes on that unobligated costs. The essence of the bill is the potential value or the theoretical value or what's the true value and I think that's where Mr. Iback's testimony was very clear.

**Chairman Burckhard:** Do I have a motion? Did we have a motion after that?

**Chairman Burckhard:** We have to know what the motion is?

**Sen. Kannianen:** To strike A & B. **Chairman Burckhard:** Lines 8-11? Is that a motion?

**Chairman Burckhard:** Now we have a 3-3 tie on a do not pass, and we sounded like do we want to wait? **Senator Lee:** no.

**Sen. Judy Lee:** I think taking out lines 8-11 would remove the most onerous parts of this bill, because C, it talks about generally accepted appraisal techniques. I am not seeing anything that would have great resistance in that one. That would be my thought.

**Chairman Burckhard:** Senator Anderson 2<sup>nd</sup>.

**Discussion:**

**Sen. Anderson:** I think that takes everything out except appraisers what they do right now. So there is no reason for the bill if we take those 4 lines out. I am going to support the amendment.

**Sen. Dotzenrod:** On the amendment, line 9 unobligated seller and buyer. Does unobligated refer to the seller and to the buyer or is only to the seller? An unobligated seller would mean a seller who owns this asset free of any debt. How does unobligated fits into that circumstance?

**Sen. Anderson:** That is exactly why I don't like the bill because if you have to ask the sponsor of the bill to explain what every line means, then we are in trouble I think.

**Sen. Dotzenrod:** Normally an owner who is obligated that means that is debt. An unobligated owner would own it without any obligation, no debt. An unobligated seller would be someone who owns that asset, has no debts on it. **Senator Larson:** The buyer is someone who is not obligated to buy it, he's going to offer him whatever he wants.

**Sen. Anderson:** I think Sen. Dotzenrod is making up his own definition to this. I understand what you mean, obligated and non-obligated, but I think what their talking about here is somebody who doesn't plan on buying the property, he is unobligated, that means he is not making a good faith offer to purchase it. He is just saying I would pay \$ for that but I am not going to buy it.

**Sen. Dotzenrod:** Word unobligated refers to the buyer.

**Chairman Burckhard:** I would say it includes the buyer because it says and, but...

**Chairman Burckhard:** The motion is to have the bill as it is with lines 8,9,10&11 on page 2 removed. **Senator Anderson:** 2<sup>nd</sup>

**Roll call vote:** 5 yes, 1 no, 0 Absent

**Chairman Burckhard:** SB 2332 as amended – do not pass as amended: **Senator Judy Lee,** 2<sup>nd</sup> **Senator Diane Larson**

**Roll call vote:** 6 Yea, 0 No, 0 absent

**Carrier:** Sen. Judy Lee

February 9, 2017

ET  
2-9-17  
p. 1 of 1

PROPOSED AMENDMENTS TO SENATE BILL NO. 2332

Page 2, line 7, remove "determining the value of property under"

Page 2, line 7, remove the underscored colon

Page 2, remove lines 8 through 11

Page 2, line 12, replace "c. The" with ", the"

Page 2, line 14, replace "(1)" with "a."

Page 2, line 15, replace "(2)" with "b."

Page 2, line 17, replace "(3)" with "c."

Renumber accordingly



Date: 2.9.17  
 Roll Call Vote #: 2

**2015 SENATE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2232**

Senate Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: Senes 8, 9, 10, 11 17.0996.01001  
*delete*

- Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar

Other Actions:  Reconsider     \_\_\_\_\_

Motion Made By Sen. Judy Lee    Seconded By Sen. Anderson

Senators	Yes	No	Senators	Yes	No
Chairman Randy Burckhard	X		Senator Jim Dotzenrod		✓
Vice-Chairman Howard Anderson	X				
Senator Jordan Kannianen	X				
Senator Diane Larson	X				
Senator Judy Lee	X				

Total (Yes) 5 No 1

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 2.9.17  
Roll Call Vote #: 3

2015 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 2332

Senate Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: 17.0996.01001

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar  
Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Sen. Judy Lee Seconded By Sen. Diane Larson

Senators	Yes	No	Senators	Yes	No
Chairman Randy Burckhard	✓		Senator Jim Dotzenrod	✓	
Vice-Chairman Howard Anderson	✓				
Senator Jordan Kannianen	✓				
Senator Diane Larson	✓				
Senator Judy Lee	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Judy Lee

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2332: Political Subdivisions Committee (Sen. Burckhard, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2332 was placed on the Sixth order on the calendar.

Page 2, line 7, remove "determining the value of property under"

Page 2, line 7, remove the underscored colon

Page 2, remove lines 8 through 11

Page 2, line 12, replace "c. The" with ", the"

Page 2, line 14, replace "(1)" with "a."

Page 2, line 15, replace "(2)" with "b."

Page 2, line 17, replace "(3)" with "c."

Renumber accordingly

**2017 TESTIMONY**

**SB 2332**

**NORTH WEST LANDOWNERS ASSOCIATION**

6050 Old Highway 2, Berthold, ND 58781  
contactus@nwlandowners.com

SB2332

2.2.2017

Written Testimony #1

**Senate Bill 2332  
Testimony of Troy Coons  
Political Subdivisions Committee  
February 2, 2017**

Good morning Mr. Chairman and Committee Members. My name is Troy Coons and I am here as Chairman of the Northwest Landowners Association representing our membership of about 500 farmers, ranchers, and property owners. We are a nonprofit volunteer board. Northwest Landowners Association is in favor of SB 2332. This bill is important for property owners effected by eminent domain.

Our proposal of this bill stems back about seven years ago when Northwest Landowners Association first organized. From the beginning, we had been working with the Budd-Falen Law Firm in identifying potential landowner issues. The bill before you is the identical language of a law that Wyoming adopted 10 years ago. This language has not been changed since. The law was adopted in Wyoming to allow for more information to be put in front of the court in order to ensure a just decision on fair compensation. We have been watching this law for several years and believe it will work here. It will allow for evidence that does a better job of showing the actual value of a taking than what in some instances the traditional valuation methods will show.

We ask that the Committee votes do pass on SB 2332. Thank you. I will stand for any questions.



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#1

*For responsible development of  
North Dakota's resources*

6050 Old Highway 2  
Berthold, ND 58718  
[www.nwlandowners.com](http://www.nwlandowners.com)

To the Senate Political Subdivisions Committee:

I would like to supplement my testimony from yesterday concerning SB 2332. All this bill does is allow for both sides of an eminent domain case to present more information to the court to support what they believe to be just compensation. The opposition was worried about who gets to decide what evidence is considered. Judges will still be the gate keepers of relevant, comparable values and any other evidence allowed to be considered.

The opposition would like you to believe that the current valuation process for eminent domain compensation works just fine most of the time. It does work for instances where there is a complete taking of a parcel. And that process would still be there if this bill is enacted. Where the taking is an entire parcel, the traditional valuation process works because it is valuing what is actually being taken.

The same process does not work for valuing easements. Currently, to find what the compensation should be to a landowner for a taking of an easement, an appraiser looks at the sales of land without an easement, then looks at sales with an easement. As the appraiser who testified told you, he often finds no difference, which means that his opinion is that "just compensation" is zero dollars. This absurd outcome happens because the traditional appraisal methods do not work for easements.

The appraiser should be valuing the property being taken. The appraiser who testified told you that the statute already says that damages are "The value of the property sought to be condemned." His mistake is that his way of valuing an easement does not actually do this. The value of the easement itself is what should be paid for, not the diminution in property value. This bill allows for evidence of what other landowners in the area have been paid for a similar transaction.

The opposition to the bill tried distinguish the "market value" from "price." What an appraiser does to determine the market value of property is look at prices paid for similar freely negotiated transactions in the area and compare them with the transaction before it and he comes to a market value for the property to be taken. I am confused with the opposition's distinction and why a landowner cannot rebut an appraiser's determination with values paid for similar properties in the area which the appraiser did not consider, or why an appraiser should not have to explain why the presented values paid are not representative of the value of the property in question. Additionally, the opposition claims that landowners can testify to anything they want, basically. This is not true, and although landowners have the ability to testify as experts on the value of their own land, they are restricted just as any other expert is. If the appraiser who testified is correct that landowners can testify to anything they want, then there is no reason to be concerned with anything in this bill, since according to that appraiser landowners can apparently offer all this testimony anyway.

The opposition also claims that this bill will cause confusion because the law in North Dakota has been the same for a long time. This is true of most laws, before they are changed by the Legislature. That is not a reason to never change a law that is clearly not working. More importantly, this claim has been refuted by the 10 years this law has been in place in Wyoming without any substantive changes to the law. The courts and the industry in that state have continued on without confusion. It appears that the opposition was unaware that this bill contains the law from Wyoming, word for word. A copy of that law is below, with the reference to where to find it online.

On behalf of Northwest Landowners Association I urge you to vote do pass on SB 2332.

Sincerely,

Troy Coons  
President, Northwest Landowners Association

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**1-26-704. Fair market value defined.**

(a) Except as provided in subsection (b) of this section:

(i) The fair market value of property for which there is a relevant market is the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy;

(ii) The fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable;

(iii) The determination of fair market value shall use generally accepted appraisal techniques and may include:

(A) The value determined by appraisal of the property performed by a certified appraiser;

(B) The price paid for other comparable easements or leases of comparable type, size and location on the same or similar property;

(C) Values paid for transactions of comparable type, size and location by other public or private entities in arms length transactions for comparable transactions on the same or similar property.

*Taken from:* <http://legisweb.state.wy.us/LSOWeb/StatutesDownload.aspx>

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Written Testimony # 2  
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North Dakota Appraisers Association

P.O Box 7521, Rapid City, SD 57709

www.ndappraisers.org

**SENATE BILL NO. 2332**

**Testimony**

**Joe Ibach**

**Legislative Chairman, Board of Directors Member  
North Dakota Appraisers Association (NDAA)**

**February 2, 2017**

My name is Joe Ibach, the Chairman of the Legislative Committee for the North Dakota Appraisers Association. The NDAA was incorporated in March 2011, but the Association's bylaws and its formation did not occur until June 20, 2016. As of today, NDAA has 114 members of which 89 are charter members. Membership represents about 50% of the licensed and certified appraisers living/practicing in North Dakota. (There are about 323 licensed and certified appraisers in North Dakota, but ±30% do not live in the state.) We are excited about this opportunity and look forward to working with the State Legislature. The NDAA's intent is to be the future "voice" of the North Dakota appraisal profession.

I am here representing the NDAA in opposition to Senate Bill No. 2332. As a practicing appraiser with more than 35 years of experience in the "eminent domain" world, attempting to legislate the "measure of damages" is concerning. The Chapter 32-15 of the North Dakota Century Code already details the measure of just compensation. Specifically, Section 32-15-06.1 details that *"The amount shall not be less than the condemnor's approved appraisal or written statement and summary of just compensation for the property."* The measure of damages, if not mutually negotiated between the condemnor and the property owner, is then addressed in the appraisal process. It is not my intent to educate everyone on the appraisal process. However, the standard appraisal methodology in determining the damages should be based on "market" reaction, not on private negotiations between a condemnor and property owner. It is the competent appraiser's responsibility to analyze the market to determine if the impact of the project adversely impacted the property.

The added language in Section 3 of Senate Bill No. 2332 is problematic. Specifically:

- The first sentence details that *"For purposes of determining the value of the property under this section..."*. No definition of "value" is specified. A multitude of value definitions exist. Simply referencing "value" then creates the issue of defining value. As defined in North Dakota Century Code: Chapter 24-01, market value is *"The highest price for which property can be sold in the open market by a willing seller to a willing purchaser, neither acting under compulsion and both exercising reasonable judgment."* The definition already allows for the highest price supported in an open market.
- Sections 3 a. and 3 b. refer to the existence or nonexistence of a "relevant" market. Who and how will one determine whether a relevant market exists? What is a relevant market?
- Section 3 b. also details that *"Any just and equitable method of valuation"* may be used. Historically, it has been held that the only just and equitable method of valuation is a determination of the property's market value "before" imposition of the project and "after" imposition of the project. The difference is the market value of the "take". What other just and equitable method of valuation exists? The language is so vague that each side in a dispute could introduce whatever evidence they determine to be applicable. The current system already allows the landowner to effectively put forth whatever evidence they deem appropriate. The State has a precedence that landowners are experts in the value of their own property. It is then conceivable that litigants will attempt to include anything relevant outside the market-based measure of damages.
- Section 3 c. details that *"The determination of value must use generally accepted appraisal techniques that may include..."*. The word "may" is also problematic as who determines what should or should not be used.
- Section 3 (1) details that one of the methods is *"Techniques used by a certified appraiser"*. The State of North Dakota has two levels of "certified" appraisers, certified residential and certified general. Only certified general appraisers are licensed to appraise all property types outside the residential world. Even most statewide certified general appraisers do not have the competency to address the complexities in eminent domain appraisals. The language must be more specific to reflect certified residential or general appraisers having the competency to undertake the assignment.

- Section 3 c. (2) relates to *"The price paid for comparable easements or leases of comparable type, size, and location on the same or similar property."* The prices agreed to through private negotiations do not constitute an open market. They can vary considerably based on the condemnor's motivations. If a company decides to pay a landowner compensation far exceeding what the market would support and this price is then used in a transaction of a public entity, the taxpayer is or will be ultimately paying for the above market price. Again, the current system is designed to be equitable so that the taxpayer is assured that every attempt is made to pay only "fair market value".
- Section 3 c. (3) is somewhat contradictory to Section 3 c. (2) as it relates to compensation based on "arms-length transactions". Again, only arms-length transactions must be considered in determining damages of a particular property in any particular project.

Examples of misuse in determining damages based on this proposed legislation are many. One company may, for whatever reason, decide to pay \$10,000/acre for an easement simply to expedite construction of the project. Another company building a project in proximity who is under no time constraint may decide to only pay "fair market value" which, in this particular example, is only \$2,000/acre. Which amount of compensation is equitable? Which is a windfall? Understandably, the taxpayer is not liable for the payment of damages when oil companies are involved. However, the consumer will ultimately bear the consequences of their decisions. If the proposed measure of determining value or compensation extends into municipality, county, and state projects, the taxpayer will pay. "Any" form of value to determine damages is not appropriate. The only fair value is "market value". The present system of determining damages has been in place for decades and, for the most part, is working extremely well.

In closing, the "market" should be the basis for determining all just compensation and/or damages, not atypical motivated for-profit companies. The U.S. Constitution emphasizes that a property owner should be fairly paid, not over paid as the taxpayer would then suffer. Our current laws are incredibly permissive concerning what evidence a landowner may use in a condemnation action. This proposed legislation only makes the determination of damages more confusing. If any legislation is proposed, it is our position that the determination of value in an eminent domain case involving real property must be based on generally accepted appraisal techniques and definitions used by a competent certified general appraiser. Inserting language in which no specific definitions or guidelines are provided does not serve the parties involved in possible condemnation actions, most importantly, the taxpayer. The NDAA, therefore, opposes Senate Bill No. 2332.

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Written Testimony  
#3

**Testimony in Opposition to  
SENATE BILL NO. 2332  
Senate Political Subdivisions Committee**

**February 2, 2017**

Chairman Burckhard, Senate Political Subdivisions Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Kelsch Ruff & Kranda Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to oppose SB 2332.

NDPC represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipelines, transportation, mineral leasing, consulting, legal work, and oilfield service activities, and has been representing the industry since 1952.

SB 2332 provides for changes to the assessment of damages statute within the eminent domain laws, namely Chapter 32-15 NDCC. For anyone not familiar with the eminent domain process, I have attached for your reference a Fact Sheet from the Attorney General's office entitled Landowner Rights under ND's Eminent Domain Law.

Under SB 2332 the existing appraisal methodology used in determining the value of property for just compensation is being changed unnecessarily. There is language being added that would create confusion and uncertainty. The current statute already provides for an adequate and fair process in determining valuations with damage assessments for just compensation with eminent domain proceedings.

SB 2332, adds language, at page 2 lines 8-9, that refers to "an informed and willing, but unobligated seller and buyer". That provision would allow evidence based on

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#3

transactions that never took place nor will take place. An appraiser already looks at completed sales of like or similar property to determine a fair and reasonable valuation. A hypothetical sale that never took place would allow complete speculation and conjecture to enter into a valuation. An example could be that "My neighbor said he would give me \$X for that property" which then could be used to artificially establish a valuation.

Also, SB 2332, at page 2 lines 10-11, refers the use of "any just and equitable method of valuation" There are primary methods of valuation that are used by appraisers which include: comparable sales; income approach and cost approach. These are tested and proven methods that a qualified and competent appraiser already knows and uses. An appraiser would not want to simply speculate on a "just and equitable method" for determining a valuation which cannot be supported or defended as being fair or accurate.

Finally, SB 2332, at page 2 lines 12-19, refers to evidence of what had been paid for comparable easements. However those comparable easements are not necessarily "arms-length transactions" as they may be resolved under various situations including a concern over condemnation, time deadlines, and other special considerations and, as such, may not be an accurate representation of what certain property is truly worth.

The process used for assessment of damages with eminent domain situations does not need to be changed. SB 2332 is not necessary and would create valuation problems.

In conclusion, NDPC urges your opposition to **SB 2332** and respectfully requests a **Do Not Pass** recommendation. Thank you and I would be happy to try to answer any questions.

JB 2324  
2.2.17  
#3



# Landowner Rights under North Dakota's Eminent Domain Law

Office of Attorney General, 600 E. Boulevard Avenue, Bismarck, ND 58505. Tel: (701) 328-2210

Occasionally, private property must be acquired for projects that benefit the community as a whole, such as the construction of roads or public utilities. When a landowner refuses to sell property needed to allow the project to proceed, the eminent domain process may be initiated. This fact sheet describes how state agencies, local government, and some private entities use the condemnation process in North Dakota. It does not address the eminent domain process used by the federal government or by a private entity which gets condemnation power from federal law.

## What is "Eminent Domain?"

Eminent Domain, also called "condemnation," is *the power to take private property for public use*. Under state law, condemnation proceedings can be used for only projects which have a public use or public purpose. The law does not require a "public use" project be for actual use by the general public.

## Taking Private Property

Private property cannot be taken:

- For economic development projects, including an increase in tax base, tax revenues, employment, or general economic health;
- For the benefit a private individual or entity except as necessary for conducting a common carrier (such as telecommunications) or utility business.

## How is Property Selected?

The process begins when the condemnor (*the government agency or private entity that has the power to take private land*) determines that construction of a public project will require the use of private property. To get to that point, however, the condemnor often does surveys and studies to determine exactly which parcels of land are needed. If the property is damaged during the study period, the condemnor must compensate the landowner (*the person who owns or leases land subject to eminent domain proceedings*). If the landowner refuses to sell property identified as necessary for the public project, the property may be condemned.

## Negotiation Before Condemnation

Before beginning condemnation proceedings, the condemnor must make a "reasonable and diligent effort" to negotiate and buy the property from the landowner. First the condemnor must establish an amount which it believes to be "just compensation" for the property. The condemnor must give the landowner a copy of a written appraisal of the property (if one was done) or a written summary showing how the "just compensation" was determined.

## When is Condemnation Authorized?

The landowner has the right to request a list of at least ten neighboring landowners to whom offers are being made for the same project. If fewer than 10 are affected, then a list of all landowners must be provided. The landowner also has the right to examine and copy any map in the condemnor's possession showing the property affected by the project and to demand from the condemnor a list of any other landowners within the county or adjacent counties whose property must be taken for the project.

If the landowner and condemnor cannot reach an agreement, the condemnor may use its condemnation powers to acquire the property. At this point the eminent domain procedure differs depending upon what entity is acquiring the property and to what use that property will be put.

## The "Quick Take" Procedure

Certain state and local government entities have the power to use the "Quick Take" procedure to acquire property for "right of way." The "Quick Take" procedure allows the government entity to take immediate possession of the property upon offering to buy it and depositing the amount of the purchase offer with the clerk of the district court in the county where the property is located. The clerk must notify the landowner that the money has been deposited. If the landowner disputes the taking of the property or the amount offered for it, the landowner must appeal to the district court.

## Condemnation

In all other situations, the condemnor is not allowed to take possession of the property until the amount of "just compensation" has been determined through the court system and that amount has been paid to the landowner or deposited with the court. The court process begins when the condemnor serves the landowner with a summons and complaint.

**Use or Necessity?**

Landowners may challenge the "use" or "necessity" for taking the land. A judge must decide the legal question of use or necessity. The court will schedule a separate hearing to determine these questions. If they are not happy with the judge's decision, either the landowner or condemnor may appeal to the North Dakota Supreme Court.

**Just Compensation**

After the use or necessity issue has been resolved by the court, a trial will be set to determine the amount the landowner should be paid for the property - the "just compensation." Just compensation is *payment made by the condemnor that is intended to make the landowner financially "whole" again.* The determination will be made by a jury or, if the landowner waives the right to a jury, by a judge. At the trial, both the landowner and condemnor present their opinions on the amount of just compensation. Both sides are allowed to have witnesses, expert appraisers, exhibits and other evidence to support their claims.

"Just Compensation" is determined after the judge or jury has listened to the evidence and considered all the documents presented by both sides. If either side is dissatisfied with the amount determined at trial as just compensation, a new trial may be requested or an appeal made to the North Dakota Supreme Court, or both. While the appeal is pending, the trial court judge may allow the condemnor to take possession of the property after depositing the amount of just compensation awarded at trial. The amount ultimately decided to be due to the landowner will be paid when the appeals are finished.

**Damage Awards**

The landowner has the right to be compensated for the value of the property taken, including the value of any improvements to the property, as well as payment for certain additional damages:

1. **Severance Damages** - awarded if the property to be taken is part of a larger parcel of land and the remaining land loses value or is damaged because it is severed from the part taken in the condemnation process.
2. **Consequential Damages** - awarded if property not taken by condemnation is damaged by construction of the public project.

Occasionally, the construction of the public project improves or enhances the remaining property not taken. In that case, the value of such improvement is deducted from the amount of damages due to the landowner. These improvements do not reduce the value of the property taken or the amount of just compensation.

**Attorney Fees**

Most courts order the condemnor to pay the landowner's "reasonable" costs and attorney fees associated with the trial. The court decides what is "reasonable," so the landowner may not be fully reimbursed for all actual costs and attorney fees. The court may also require the condemnor to pay the landowner's attorney fees and costs associated with an appeal. However, if the landowner appeals or requests a new trial and does not win, the court may impose the costs of appeal or the new trial on the landowner.

**A Summary of Landowner Rights**

- Landowners have the right to:
- Negotiate with the condemnor before condemnation proceedings begin;
  - Receive a copy of the appraisal done by the condemnor, or a written statement and summary showing the basis of the condemnor's offer;
  - Request and receive a list of neighboring property owners to whom offers have been made, including a map of the affected property; and the list of landowners in adjacent counties whose property is affected by the project;
  - Ask a judge to decide whether the property the condemnor wants to take is "necessary" for the proposed use;
  - Have a judge or jury decide the amount of "just compensation;"
  - Appeal a court decision regarding public use, necessity, or just compensation; and to ask for compensation for attorney fees and costs.

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This fact sheet is not intended to describe every right a landowner may have or cover every situation. The Office of Attorney General is prohibited by law from providing legal advice. For legal advice or more information please contact an attorney in private practice knowledgeable about condemnation proceedings.

