

2019 HOUSE JUDICIARY COMMITTEE

HB 1207

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1207
1/21/2019
31114

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to reasonable costs awarded to a defendant.

Minutes:

1, 2,3

Chairman K. Koppelman: Opened the hearing on HB 1207.

Rep. Zubke: Introduced the bill. (Attachment #1) Went over testimony. (:44- 3:37)

Chairman K. Koppelman: You talked about in incenting the political subdivisions or whatever government entity is sizing the property to make a reasonable offer. The idea of having to pay attorney fees in the event of a challenge would be an incentive to make a reasonable offer. If you take that away, then they would disincentive that am I missing something?

Rep. Zubke: The court still can aware fees and cost if the court awards a value that is greater than 20%. Typically, we are dealing with appraisals in these processes anyway. Often times an appraisal has been done and I think it is required.

Duane DeKrey: General Manager of Garrison Diversion Conservancy District: (Attachment #2) Read testimony. (5:34-11:20)

Eric Volk: NDRWSA: Read testimony. (13:20-14:15) (Attachment #3)

Chairman K. Koppelman: When it comes to easement versus acquiring land for a project do you still have a lot of folks contesting the value of the easement?

Eric Volk: Most of the rural water easements we are lucky to get them +.

Chris McShane: Attorney for the Cass County Joint Water Resource District: That was the case that was referenced this morning. Discussed and appraisal and offer made to land owners so they had a written offer and they rejected that offer and did not respond with a number of their own. As the project moved forward it became necessary that we acquire that property so an agreement was struck where the project was allowed to move forward while the parties debated the value of the two properties. Those negotiations didn't go very far,

but the water resource district made an offer in February 2016 for \$150,000. That \$150,000 matched what the landowners had paid for the property before the property suffered flooding in 2009. In that written offer that triggered this bill; that written offer included a statement for purposes of avoiding attorney fees and cost the water resource district is offering \$150,000; which is \$100,000 more than it was appraised. That offer was again rejected. The water resource district had to move forward with eminent domain. The process began and each party had their appraisers testify and ultimately the court determined that the appraiser for the water resource district was correct. The value of the property was \$48,200. The trial court also determined that the appraiser for the landowners had valued the property at \$456,000 did not know what he was doing. Discussed the problems with the appraiser. The district court awarded initially \$125,000 of attorney fees and costs based upon the existing statute 32-15-32; which is what we are trying to change with this bill. There was also \$38,000 paid to that appraiser that the court determined didn't know how to appraisal property in the Red River Valley. After that award of attorney fees and cost the water resource district was willing to pay that and let the case go away but the landowners appealed. The water resource district cross appealed to the supreme court arguing that the award of attorney fees and cost was not proper. You have to win to be awarded attorney fees and costs. That is what the bill before you would say? The supreme court decided the landowner may be awarded costs even though they recovered \$100,000 less before eminent domain even started. After that we contacted the landowners and asked where do we send the check and they decided to ask for more attorney fees and costs. \$115,000 in attorney fees and costs have been paid to these landowners and they will receive exactly the same amount that was offered to them at that time. In the end it was \$145,000 of attorney fees and costs that Cass County Resource District has paid to the Erickson's for the expenses they incurred by going backward.

Rep. Vetter: The second appraiser that was working for the property owner charged \$38,000 to appraise the property of \$450,000. As an appraiser you should always be unbiased. You never charge a fee based on the outcome of what the value is. This guy is breaking all kinds of appraisal laws. Was there anything ever done?

Chris McShane: No that I am aware of anything being done to him. This appraiser had an hourly rate of \$350. He was brought in by the landowners late in the process.

Rep. Rick Becker: The appraiser you use; is that a person on a retainer or specifically works for you in this type of circumstance?

Chris McShane: The appraiser that worked on this project I have worked with on the behalf of landowners and condemning authorities. He did work for the city of Moorhead as a tax assessment specialist.

Rep. Rick Becker: The appraisal was for 65-70% less than the landowner had paid 9 years ago?

Chris McShane: That is correct. This was two lots that was plotted for residential purposes along the Red River in Ox Bow. Discussed the property values had gone down due to the flooding and the Erickson's knew their property had questionable value.

Rep. Rick Becker: Are there other examples like this?

Chris McShane: There has been only five eminent domain processes that have started. This is the only one that has gone to trial. This is the only situation I am aware of where the landowners lost and then requested attorney fees.

Rep. McWilliams: What is the average cost per hour?

Chris McShane: Usually it is a set fee for the initial appraisal plus an hourly rate beyond that for any testimony that would be necessary.

Rep. Paur: If this passes can you see this little could take these cases on a contingency?

Chris McShane: There may already be contingency fees arrangements out there between landowners and their attorneys. But the ND case law out there in respect to award of attorney fees is based upon load star; and that is basically a calculation of what is a reasonable hourly rate and how many hours are reasonable to work on this project. There are seven factor tests already laid out for fees. That is laid out in the Erickson case.

Rep. Paur: They will take a third or a fourth of the settlement plus they also get their attorney fees?

Chris McShane: Landowners usually take a straight up fee.

Rep. Paur: So the attorneys do not just work for the fees they get from the court. They can also work on a contingency basis and they would not receive court awarded fees?

Chris McShane: The attorneys and their landowners can have whatever agreement they want. When it comes to a point where they are going to court that would go to that load star analysis. That is not going to change.

Rep. Vetter: I see the issue. Are other land owners now going to be affected? Are we just using this one example to pass this law? Are we going to be hurting other land owners who can't fight this?

Chris McShane: I just provided the facts to what happened in the Erickson case.

Rep. Magrum: Which one gets used the most use?

Chris McShane: Quick take is a subset of eminent domain. Discussed the process and how it works. Once the quick take process has begun then the landowner has the option to appeal the amount that was deposited. With that they follow the exact same process as eminent domain. Quick take is used more frequently because of that potential for delay. The Erickson situation was not a quick take.

Chairman K. Koppelman: Quick take is how much is the landowner is going to be paid for the property; not whether or not the property is going to be taken.

Chris McShane: You have both questions in both situations. The difference there is when can they go out and start the project.

Chairman K. Koppelman: So in quick take what if the project has started and then something happens?

Chris McShane: Even under quick take as it currently stands the city of Fargo has requested a quick take they wanted to start the project, but they were instructed if you go do that it is at your own risk.

Rep. Paur: Doesn't the quick take process doesn't that have to be approved by the county commissioners?

Chris McShane: There has been a long process set up to follow if a water resource district wants to use the quick take authority that is granted to them by that section. The county commission gets involved at the end.

Chairman K. Koppelman: Contingencies usually involve the agreement the attorney will collect their fees based on the success of their case and they will not if they aren't. Is that load star a rule and you said you can't change even with this bill?

Chris McShane: The case law out there says that reasonable attorney fees in ND is based upon load star.

Chairman K. Koppelman: If the law instead said reasonable attorney fees or contingency arrangements, it would alter that I would assume?

Chris McShane: The landowners can have whatever they want with their attorney. That is up to the landowner. This bill will not change this

Chairman K. Koppelman: Part of the discussion earlier on the case, you talked about the devaluation of the land and they were aware of that? You talked about the devaluation of the land. Did their assessment go down when the taxes go down?

Chris McShane: Their assessments were very low to begin with.

Rep. Rick Becker: It seems to me the judge in this case could very well have not awarded the court fees to the defendant.

Chris McShane: That is correct. The supreme court said that the argument made by the water resource that you have to win to be awarded attorney fees and costs failed. The district court must go through an analysis set forth by multiple cases of what different factors would go into a reasonable amount of attorney fees is.

Rep. Rick Becker: This bill is to limit the discretion of the judge on how and the manner they aware attorney fees?

Chris McShane: I would believe the supreme court would question the reason to awarding zero because of the hours it would take to have an attorney prepare a case.

Chairman K. Koppelman: The Supreme Court is not really concerned with the risk born by the political subdivision or the entity attempting to exercise eminent domain nor the risk born by the landowner, but it wants to be sure there is no risk with the attorneys?

Chris McShane: That is not the case with total amount. The District Court has upheld several cases where the district courts have had an application for attorney fees as X number and the district court has cut that in half or reduced it.

Representative Jones: Why did it happen to have to be taken?

Chris McShane: The ring level that was being built around the city of Ox Bow would have been on the wet side and flooded. Where these two lots are located there is now a very large ditch that flows into the Red River.

Chairman K. Koppelman: Regardless of this statute passing or not and the legislature says the attorney fees will be paid regardless and that troubles me.

Chris McShane: The Supreme Court will follow the statute. Under the existing statute as currently written to award zero; I don't believe that is the case. As the bill would amend it; it will be zero. There is not shifting fees or cost that are born by the condemning authority to the landowner. If a landowner has appealed and get a new hearing and they get the same amount or less than the condemning authority may ask for their appraiser and engineers but not attorney fees.

Recess.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1207
1/21/2019
31155

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to reasonable costs awarded to a defendant.

Minutes:

1, 2,3,4

Chairman K. Koppelman: Reopened the hearing on HB 1207; PM

Support:

Jack Dwyer, ND Water Users Association and the ND Water Resource Districts Association: (Attachment 1) handed out; not here.

Opposition:

Derrick Braaten: Braaten Law Firm: (Attachment #2) Went over testimony. (2:03-12:50)

Chairman K. Koppelman: Discussed the ND Constitutional Amendment you referred
Do you see eminent domain abused in ND?

Derrick Braaten: I don't think eminent domain is being abused but quick take is. It seems to be used more and more often and there is no reason a year from now to use this action. If you have the time to plan the project eminent domain can be used. David Drovda had a pipeline on this land and he did not know they were constructing this pipeline and that is all it is to it. Apparently it had been a year before that they needed an easement it shouldn't have been the day that they got on his land that he learned about it.

Chairman K. Koppelman: Is there a way we can accomplish all concerns?

Derrick Braaten: With respect of the attorney fee recovery. Quick take authority in the federal courts the system is a little bit different; they have to make a showing there is some kind of emergency to do that. There should be some kind of threshold showing it is needed before it can be used.

Rep. Paur: To apply this law to the common condemnation do they need the current provisions for quick take?

Derrick Braaten: Quick take It is not always just about the compensation. Even if condemning authority they are saying you are taking is too much? Discussed the easement amount for the water pipeline. Under this language it does not account for that. It only accounts for compensation.

Rep. Paur: The altercation is more than happen in quick claim where they are already laying the pipeline.

Derrick Braaten: I understand what you are saying. Discussed issues with the easements, but I don't think it is more likely to happen in quick take.

Troy Coons, Chairman of the Northwest Landowner Assoc., Want a do not pass on this one. Eminent domain is not always about the compensation. (Attachment #3) The judge is still the key factor.

Mark Gaydos, Environmental and Transportation Service Director: (Attachment #4) Read testimony. (26:51-30:24)

Chairman K. Koppelman: What might be the solution?

Mark Gaydos: We see the bill removes the ability for courts discursion; and doesn't apply reasonable to all the factors.

Chairman K. Koppelman: Compensation is one and the unreasonable attorney or appraiser fees. Would you be willing to work with members of the committee with this?

Mark Gaydos: Yes I would do that.

Hearing closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1207
2/5/2019
32193

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to reasonable costs awarded to a defendant.

Minutes:

1

Chairman Koppelman: Reopened the hearing on HB 1207.

Support:

Mary Meridian; Administrative Officer of Garrison Diversion: Introduced Tammy Norgard.

Tammy Norgard, Attorney Vogel Law Firm: (Attachment #1) I had a hand in drafting this legislation. I have been in practice with the Vogel Law Firm since 1995. A big part of my practice was environmental law, land use issues; big public infrastructure project. What I have seen with condemnation is those laws today as it addresses attorney fees. The concept is to make the landowner whole; so if a public body comes in and is going to take property; whether it is for library or a dam or a water project; they want to make the landowner whole. I have worked with a lot of water and pipeline issues. They make the landholder whole by negotiations. If that doesn't work sometimes it has to go to condemnation and that is very rare. There is an appraisal that is done usually by both sides. There is a deposit at the time of the condemnation begins and there can be a trial; if it doesn't settle. The law is set up so that the landowner should be allowed to ask for their reasonable attorney fees; appraisal cost and litigation costs; because the concept is to make the landowner whole. I think we are making a cottage industry of lawyers. They are coming in and taking advantage of something in your law. It is to the determinant of the landowners and the project. Water projects have a lot of cost share so that is going to increase those prices. In practice the lawyers are taking advantage of landowners and Garrison Division had requests from attorneys to assist them. Typically, rural residents have water lines going out to them and they want the rural residents to donate the easements because the water is coming to them. If someone is not willing to do that; often times, before condemnation is issued there is an offer of compensation. That offer could be \$750 for a 2" buried water pipeline. It is restored and they can still farm on it and run cattle on it. If the landowner says no and you will have to take me to condemnation the attorney's fees can be \$60,000 for a \$750 easement. Who would ever do that? when you have attorney's sending out requests like the for the Garrison Division Project I want the

names and addresses of every person who is along the alignment of your 133 miles. We have had word from some WASP and discussed the fact attorneys are contacting landowners and making promises of getting them more money and it ends up costing them a lot of money. I think we need a back check on these issues. I put in a limit of \$15,000 for small easements. If the taking is under \$15,000 there would be no attorney fees allowed at all and that is to address the small easement issues that we don't have huge attorney fees for small easements. Most of the language I took was some Minnesota language so we would have some place to start from. Their language is \$25,000. The landowner can ask for reasonable attorney fees as long as they get 20% more than they were offered before condemnation started. That is so the landowner has to take a hard look at what they are being offered. It also protects them if they are getting an offer that is too low. I talked to the DOT and generally they would like to see the word reasonable moved up in the paragraph before so reasonable addresses everything. (Attachment #1) They want to make for sure the courts still have a lot more flexibility that the fees being charged are reasonable.

Chairman K. Koppelman: If there are not enough ambulances to chase landowner list will do.

Tammy Norgard: It is a whole and with the huge resource trust fund and these big projects it is where people are training their associates by sending them to court.

Vice Chairman Karls: The other side says the agencies trying to get the easement hold that as a hammer over the landowners if you don't concede or agree to this we will take it through eminent domain. How do you equalize the two?

Tammy Norgard: On both sides of the debate; often project managers send out their agents so they are supposed to meet with each person so many times set by the project. Have them understand fully what is being offered and then often times before condemnation starts it gets sent to me and I send a letter out to the landowner; if I am representing an entity and say this has been turned over to me and I want to know what your concerns are because I am hoping we can accommodate them. Discussed examples with oil companies and how much they will pay and then here comes the McKenzie County Water District and asks them to give us this easement for free because we are bringing water to you and your neighbors; and they ask why would I sign this for free. The public body has power to take it one way or another and the landowner needs to be made whole. Discussed how this is done. If they show there is a 30% reduction because of a road or overhead power line that is the value of the easement. The appraiser has found that with underground water lines it is nothing. They can't tell any difference once they are put in and farm over them so it is not any harm.

Chairman K. Koppelman: Your point about reasonable in the bill deals with attorney fees, appraiser fees etc.

Tammy Norgard: That is determined by a court.

Rep. Paur: Isn't that up to the judge to determine if they receive those costs?

Tammy Norgard: Yes the judge has the discretion to issue the defendant its reasonable attorney fees and cost. There is a presumption that you will make the landholder's whole.

Rep. Paur: The award is not automatic. It is up to the judge.

Tammy Norgard: There is a presumption that the landowner gets his fees as long as they are reasonable.

Rep. Vetter: Some of the opposition said there is more to win than just the compensation? They are the ones getting their land taken away so they should be able to get their money back?

Tammy Norgard: There are sometimes other issues coming into play. You have a good point that there is discretion in this statute to allow a judge to reasonably award attorney fees. The concept is if it is a matter for public use they have to make over \$15,000 from a jury before there is any compensation. If it is not public necessity they are entitled to compensation.

Rep. Vetter: How do we know they are being frivolous with a case?

Representative Simons: Can't I then sue for those then?

Tammy Norgard: When you go through a jury trial and you get the award from the jury, then it is called a post trial motion so the landowner's attorney will put together a motion saying I am entitled to attorney fees and costs. That is filed and it will be considered reasonable. The landowner will put together an appeal and yes they are higher but they are still entitled to recovery. It is up to the judge to decide.

Representative Simons: This un cloud's this a little?

Tammy Norgard: This says they only get attorney fees if they get 40% more than that. this will make the landowner think hard before they move forward on whether this offer is reasonable. They have their right to get their own appraiser. If you have an attorney making it a cottage industry doing this and we get paid 100% of our fees most of the time; it is a 90% or 75% cost share on the state, then it is the state is going to pay all of that. when we have a limited but that we are all here fighting for projects; when you see how much of those budgets are going to get taken for attorney fees for landowners I thought there is a need to put a back check on this to make the landowner think is this reasonable.

Chairman K. Koppelman: The language being struck out on the bill; what is in the language of the bill should be look at more closely. Is the language in the bill going to change this? Is it the percentage that gives you the sense that they are going to look at it more closely? Is it going to change the courts in terms of what the awards are?

Tammy Norgard: I think it will get the landowners to think twice. In practice I think attorney's fees are awarded all the time.

Chairman K. Koppelman: Do they bill the landowner for the difference? Who gets the overage?

Tammy Norgard: They would have an agreement. I am going to make a request at the end of this to get my attorney fees paid, but you are contraction ally obligated to pay me and you are obligated to pay me. If I bill you \$78,000 and \$48,000 of that was reasonable by the court, then the condemning entity would pay \$48,000 and you personally would pay the rest.

Chairman K. Koppelman: is this document a suggested amendment then?

Tammy Norgard: They just put together six points they think would be agreeable.

Rep. Jones: I did see a lot of abuse on this quick take in western ND. They did not follow the rules. Is some of this from the abuse from WASP then?

Tammy Norgard: I have heard lots of things too. I didn't do the condemnation personally for WASP. We had issues and they had been contacted so I would love to talk to you about that.

Hearing closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee Prairie Room, State Capitol

HB 1207
2/12/2019
32619

☒ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to reasonable costs awarded to a defendant.

Minutes:

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Present: Rep. Roers Jones, Chairman; Rep. Jones and Rep. Rick Becker

Rep. Roers Jones: Opened the subcommittee meeting.

Rep. Jones: There is a cottage industry arising of attorneys encouraging them to go through the eminent domain process; not necessarily for their good, but the good of the attorneys. I think this is a good piece of legislation.

Rep. Rick Becker: Concerns about landowner would make payable if landowner prevails with the 40% greater finding and maybe payable if it is 20-40 and must also be \$15,000 or greater; maybe we should be decreased. Why not zero to 25? Especially if you are going to keep the threshold. This restricts the judge I think. We need to make sure there is incentive from home owners to in good faith.

Rep. Jones: The main purpose of having the 40% was to incentivize the people that were contemplating going through the eminent domain process to have a reality check that they had better believe that the money they are being offered is not appropriate.

Rep. Roers Jones: I don't think there was evidence that showed that people were being offered less than their property was valued at. I think the percentages we are looking at in the bill right now are appropriate.

Rep. Rick Becker: The judge can already so all this does it restrict the judge. It says the judge must on this bill. If it is believed 20% then the judge is not able to.

Rep. Roers Jones: There is case law that exists that the landowners will get paid their fees. I think having this formula that lays out; it is a good incentive for landowners to negotiate in good faith.

Rep. Jones: I think 40% to 20% would be more appropriate.

Rep. Roers Jones: Looks like there was a proposed amendment to move reasonable up in the paragraph.

Rep. Rick Becker: Does he think reasonable should proceed?

Rep. Jones made a motion to amend to remove the word reasonable from line 20 and add at the end of line 19 add reasonable fees including and: Seconded by Rep. Rick Becker

Voice vote carried.

Rep. Roers Jones: I am satisfied with the way the percentages are currently.

Rep. Rick Becker moved to amend on page 1, line 16 we changed that word forty to thirty; Page 2, line 1 at least twenty to ten but less than forty to thirty. Seconded by Rep. Jones

Voice vote carried.

Do Pass as amended Motion Made by Rep. Jones; Seconded by Rep. Rick Becker

Roll Call Vote: 3 Yes

Closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1207
2/13/2019
32663

☐ Subcommittee
☐ Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to reasonable costs awarded to a defendant.

Minutes:

1

Chairman Koppelman: Reopened the meeting on HB 1207.

Rep. Roers Jones: Went over the subcommittee meeting recommendations.

Motion made to amend Page 1, line 16 forty is changed to thirty; line 19 after the word owner reasonable fees including; is added. Line 20 the word reasonable is deleted; page 2, line 1 the twenty is changed to ten and the forty if changed to thirty by Rep. Roers Jones; Seconded by Rep. Rick Becker

Rep. Rick Becker: I am not a fan of the bill, but the aspect of the bill that sets mandates that the judge must comply with originally it would have been automatic you get your fees paid if the final finding is greater than 40% of what was offered. We wanted to make it if it was thirty for protection for the landowner. Then for greater judge discretion rather than have the range from twenty to forty we changed it from ten to thirty because we have that minimum threshold of \$15,000 so we are not having forced attorney fees for something minor that might be ten percent over, but it is only \$500.

Chairman K. Koppelman: Is it 10% of the amount, the entity that is taking the property has made an offer and the final judgement is at least ten percent higher but less than thirty percent higher.

Voice Vote Carried

Rep. Paur: (Attachment #1) Proposed amendment. Hog house of the bill. I think it is important we have the condemner paying the fees on court cases but only if they win. That would get rid of some of this shopping for law suits. If you are not satisfied with the judgement and you take it to court; if you win they pay the fees; if you don't you pay the fees.

Rep. Vetter: How do determine if they prevail?

Rep. McWilliams: So prevailing in a case may have nothing to do with money.

Rep. Paur: Yes as long as the court viewed in your favor. The court doesn't have to award it. This is common practice in a lot of states.

Rep. Roers Jones: Most of the language is returning the language that currently exists. It is mostly returning the bill to the original language.

Motion Made to amend using 19.0299.01001 by Rep. Paur; Seconded by Vice Chairman Karls

Voice vote carried

Chairman K. Koppelman: We adopted by voice vote the subcommittee amendment; committee passed the Paur amendment so what we have before us; the Paur amendment is the bill.

Rep. Roers Jones made an amendment to return that language for all judicial proceedings to the Paur amendment. Seconded by Rep. Paur

Rep. Roers Jones: I it is another opportunity to limit the recovery of attorney's fees for charges that might not be related to judicial proceedings. If we have these activist's attorneys that are convinced they can get more money for someone and then they inflate their charges this would limited to charged related to the judicial proceedings.

Rep. Rick Becker: Does this include what the judges can allow?

Rep. Roers Jones: That will be at the courts discretion. There may be some costs related to that.

Representative Simons: What is the code of ethics for attorney's?

Rep. Roers Jones: There is an oath that attorney's take when admitted to the bar. It is clearly subjective.

Rep. Jones: I am concerned about there we are going here. The percentages put in place were to weed out the attorneys to take a second because if they didn't revile by this percentage difference they weren't going to get the attorney fees.

Chairman K. Koppelman: What do you think the effect of the bill as it stands now?

Rep. Jones: We are taking away the courts discursion; so I don't know what we are gaining here.

Voice Vote Carried.

Do Pass as Amended Motion Made by Rep. Roers Jones; Seconded by Rep. Hanson

Rep. Jones: As I read the bill now we struck out the court may discursion award and replaced that with judicial proceedings with which the defendant prevails the courts award is limited.

The intent of this bill was to discourage people from shopping and encouraging people to abuse the eminent domain process. This is taking us back to existing law and it doesn't really do anything.

Rep. Hanson: I am comfortable with the bill in front of us. This might not be about compensation; but about the easement.

Rep. Roers Jones: I think this bill provides greater protection. The original bill did not allow for attorney fees; this allows attorney fees for any incremental win. This is a better solution for Rep. Jones's concern. It doesn't say must or may; it probably does create an assumption that they would be awarded.

Roll Call Vote: 11 Yes 3 No 0 Absent **Carrier:** Rep. Roers Jones

Closed.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1207

Page 1, line 1, after "A BILL" replace the remainder of the bill with" for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-15-32 of the North Dakota Century Code is amended and reenacted as follows:

32-15-32. Costs.

~~The court may in its discretion award~~For any judicial proceeding in which the defendant prevails, the court's award to the defendant is limited to reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings. If the defendant appeals and does not prevail, the costs on appeal may be taxed against the defendant. In all cases when a new trial has been granted upon the application of the defendant and the defendant has failed upon such trial to obtain greater compensation than was allowed the defendant upon the first trial, the costs of such the new trial ~~shall~~must be taxed against the defendant."

Renumber accordingly

February 13, 2019

DP 2/13/19

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1207

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Renumber accordingly

**2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1207**

House Judiciary Committee

☒ Subcommittee

Amendment LC# or Description: **remove the word reasonable from line 20 and add at the end of line 19 add reasonable fees including and**

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 Rep Jones Seconded By Rep Becker

Representatives	Yes	No	Representatives	Yes	No
Rep. Roers Jones					
Rep. R. Becker					
Rep. Terry Jones					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice Vote Carried

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1207

House Judiciary Committee

☒ Subcommittee

Amendment LC# or Description: **on page 1, line 16 we changed that word forty to thirty;
Page 2, line 1 at least twenty to ten but less than forty to
thirty**

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 Rep. Becker Seconded By Rep. Jones

Representatives	Yes	No	Representatives	Yes	No
Rep. Roers Jones					
Rep. R. Becker					
Rep. Terry Jones					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice Vote Carried

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1207

House Judiciary Committee

☒ Subcommittee

Amendment LC# or Description: _____

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 Rep. Jones Seconded By Rep. Becker

Representatives	Yes	No	Representatives	Yes	No
Rep. Roers Jones	X				
Rep. R. Becker	X				
Rep. Terry Jones	X				

Total (Yes) 3 No 0

Absent 0

Floor Assignment _____

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

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1207

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: Page 1, line 16 forty is changed to thirty; line 19 after the word owner reasonable fees including; is added. Line 20 the word reasonable is deleted; page 2, line 1 the twenty is changed to ten and the forty if changed to thirty.

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 Rep. Roers Jones Seconded By Rep. Becker

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman			Rep. Buffalo		
Vice Chairman Karls			Rep. Karla Rose Hanson		
Rep. Becker					
Rep. Terry Jones					
Rep. Magrum					
Rep. McWilliams					
Rep. B. Paulson					
Rep. Paur					
Rep. Roers Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice Vote Carried

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1207

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 19.0299.01001

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 Rep. Paur Seconded By Rep. Karls

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman			Rep. Buffalo		
Vice Chairman Karls			Rep. Karla Rose Hanson		
Rep. Becker					
Rep. Terry Jones					
Rep. Magrum					
Rep. McWilliams					
Rep. B. Paulson					
Rep. Paur					
Rep. Roers Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice Vote Carried

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1207

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: Return language for all judicial proceedings to the Paur amendment.

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 Rep. Roers Jones Seconded By Rep. Paur

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman			Rep. Buffalo		
Vice Chairman Karls			Rep. Karla Rose Hanson		
Rep. Becker					
Rep. Terry Jones					
Rep. Magrum					
Rep. McWilliams					
Rep. B. Paulson					
Rep. Paur					
Rep. Roers Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Voice Vote Carried

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
HB 1207

House Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

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 Rep. Roers Jones Seconded By Rep. Hanson

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	X		Rep. Buffalo		X
Vice Chairman Karls	X		Rep. Karla Rose Hanson	X	
Rep. Becker	X				
Rep. Terry Jones		X			
Rep. Magrum		X			
Rep. McWilliams	X				
Rep. B. Paulson	X				
Rep. Paur	X				
Rep. Roers Jones	X				
Rep. Satrom	X				
Rep. Simons	X				
Rep. Vetter	X				

Total (Yes) 11 No 3

Absent 0

Floor Assignment Rep. Roers Jones

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

REPORT OF STANDING COMMITTEE

HB 1207: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1207 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with" for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-15-32 of the North Dakota Century Code is amended and reenacted as follows:

32-15-32. Costs.

~~The court may in its discretion award~~For any judicial proceeding in which the defendant prevails, the court's award to the defendant is limited to reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings. If the defendant appeals and does not prevail, the costs on appeal may be taxed against the defendant. In all cases when a new trial has been granted upon the application of the defendant and the defendant has failed upon such trial to obtain greater compensation than was allowed the defendant upon the first trial, the costs of ~~such the~~ new trial ~~shall~~must be taxed against the defendant."

Renumber accordingly

2019 SENATE JUDICIARY

HB 1207

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1207
3/5/2019
#33205 (34:23)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

Minutes:

4 Attachments

Chair Larson opens the hearing on HB 1207. Senator Osland was absent.

Denton Zubke, District 39 Representative, testifies in favor (see attachment #1)

Vice Chairman Dwyer: When you talk about “legal entities”, are you referring to lawyers or the project sponsor?

Representative Zubke: I’m talking more about lawyers.

(4:40) Merri Mooridian, Deputy Program Manager of the Red River Valley Water Supply for Administration, testifies in favor (see attachment #2)

Mooridian: There are some word concerns such as “prevail” or “defendant” that our attorney would like to continue working with the committee on. Tami Norgad is our attorney from Vogel Law, and she helped Representative Zubke write the underlying part of the bill. She was unable to make it today, but Bennet Johnson is here on her behalf.

Senator Luick: Who decides fair and reasonable offers?

Mooridian: When it goes to court, I would say it would be the court that would decide the reasonable offer. We have looked at what other projects around the state have offered for easements including the state water commission and other large projects. We bring in an appraiser and come up with a dollar amount. For Garrison Diversion, we are currently offering \$1,350 an acre or the underground easement. You can still continue to use the property as is such as ranching and farming, but you would not be able to build a structure over it.

Vice Chairman Dwyer: We have to have some definition of “prevail” because we have to clarify that we are talking about if the sponsoring entity offers \$100,000 and the landowner gets 110, that’s what we’re talking about I think.

Mooridian: I understand that that is the concern.

Vice Chairman Dwyer: Is Garrison offering per acre or per rod?

Mooridian: It is per acre. I cannot tell you how many rods would go in an acre, but I could find that out.

Vice Chairman Dwyer: In western North Dakota the companies that get underground pipeline easements offer so much per rod as opposed to per acre. That would probably have to go into the discussion about what the fair and reasonable value is.

Chair Larson: but that doesn’t have to be defined in law.

Vice Chairman Dwyer: No.

(12:50) Bennet Johnson, Vogel Law Firm, testifies in favor on behalf of Tami Norgard (see attachment #3)

Senator Luick: What happens when that’s what they have to bargain with? We are basically taking away their bargaining rights if we were to pass this because if someone comes in with an unreasonable offer and that landowner knows that it’s unreasonable, they don’t have any ground to stand on.

Johnson: In that scenario the land owner would still have bargaining power because if it is an unreasonable offer and they go to court, reasonable attorney’s fees would still be available. We just want to find what “prevails” is in that if they’re offered a generous amount precondemnation and decide to contest unreasonably or based on principle, then the attorney’s fees should not be awarded in that scenario.

Senator Luick: So in this bill, we aren’t looking at the value of the property; it is only who pays the attorney’s fees?

Johnson: In this scenario, yes. It is the reasonable attorney’s fees being offered. When attorney’s fees are awarded to a landowner, it may be that the landowner receives far less than what was offered, but the attorney’s fees amount is significantly high for the project owner to pay. The landowner is still out \$67,000 as was in the Cass County case in the testimony.

Senator Luick: Let me give you a scenario. There are some utilities coming across my property, and they’re offering me \$1,000 an acre for the utility, but the attorney fees for me to make sure this is done properly will cost me out of pocket \$5-10,000. I get the \$1,000 an

acre and they use two acres, so I get \$2,000, but it will cost me \$5,000. What incentive do I have?

Johnson: If you can prove that the offer was unreasonable, your attorney's fees would be paid by the project owner.

Senator Luick: If I can prove that.

Johnson: Correct. What we're asking is if "prevails" is you're awarded a higher amount. This is something we need to work on with the committee and attorneys. We're asking that the value be determined to be precondemnation offers rather than what was deposited. If the project owner is working to put the project through and they offer \$5,000 for your two acres and you think it's worth more, you contest it and it goes to condemnation, we deposit \$1,000 and you're able to prove that it's \$2,000 for your two acres, your attorney's fees would still be paid under the current system. If the offer was \$5,000, it would make you second guess if this is something you should go forward with.

Senator Luick: You will pay me \$2,000 for two acres. I want to make sure that this is done properly. My attorney will cost me \$5,000, so I will go in the hole \$3,000 right away. I'm okay with that \$1,000 an acre, but it's costing me an extra \$3,000 for you to get the benefit of using my property.

Chair Larson: It seems that if they're going to give \$1,000 per acre and you believe that is a fair price, then you can just agree. However, if you take them to court for a higher price even though you know it's not worth more, then that's a frivolous lawsuit, and you won't get the attorney's fees covered for that.

Johnson: Correct.

Senator Luick: I don't think there's anything wrong with the \$1,000 per acre. The problem is I want to hire an attorney to look at this legal document for me, and it costs me \$5,000, not contesting what you're willing to pay me, but just to make sure the process is done properly. Why would I have any incentive to go through a deal like that?

Johnson: In this scenario, we're concerned about the cases that are contesting the deposit amounts, not looking to make sure if the offer is fair or reasonable.

Senator Luick: I understand, but that comes back and gets the other types of cases as well.

Johnson: Correct. There's more details that need to be worked out, but we're looking for additional context in this bill.

Senator Bakke: Is this just about who pays the attorney fees?

Johnson: It needs additional context on what "prevails" means as it relates to the attorney's fees at the end of the trial.

Senator Bakke: From what I understand in here they're saying if the defendant wins the lawsuit, then the person they're suing pays the attorney fees. But if they lose, then they pay it.

Johnson: Correct.

Senator Bakke: In Senator Luick's scenario, a reasonable person would know they would lose money if they lose, but if they win, they would have that \$5,000. They have to make the decision whether they want to chance it or not.

Johnson: Correct.

(28:30) Eric Volk, Executive Director of the ND Rural Water Systems Association, testifies in favor (see attachment #4)

Senator Bakke: This sounds like attorneys who are looking for easements to see if they can ruffle feathers. Is that what's happening?

Volk: Yes.

Senator Luick: Did you understand where I was coming from in my scenario? What gives me any incentive to work with you at all if I have to make sure this is done legally with an attorney, and it costs me out of my pocket for your easement on my property.

Volk: I understand, and hopefully this would help.

Senator Luick: I understand the frivolous lawsuits and the abuses that can happen with this; I'm not talking about that. However, this does not address the logical landowner that is trying to help you out; it is taking his or her rights away. That is what my concern is.

Senator Bakke: Does this bill only have to do with eminent domain situations?

Chair Larson: Correct.

Chair Larson closes the hearing on HB 1207.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1207
3/5/2019
#33244 (5:45)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

Minutes:

1 Attachment

Chair Larson begins discussion on HB 1207. Senator Osland was absent.

Senator Myrdal: I checked on this. I think the original bill is a better bill (**see attachment #1**). I'm equally concerned as Senator Luick is about the proceedings here. I understand that frivolous lawsuit shouldn't be there, but this is too broad. It doesn't give any limitations or specifics, and I think the original bill did. We should take a look at the original bill before the amendment. The amendment came from the opinion that all eminent domain and all QuickTakes are wrong. It makes it difficult because there are times where landowners do lose out, and they do have a right to an attorney whether somebody wins or loses. We need to sincerely take a look at that.

Chair Larson: I think it was Merri Mooridian who said she would be willing to work with somebody on addressing some concerns.

Senator Bakke: Representative Roers Jones had mentioned that she thought the original bill was better than the amended.

Chair Larson appointed a subcommittee: Vice Chairman Dwyer, Senator Luick and Senator Bakke.

Vice Chairman Dwyer: On the original bill, the concern was that in order to be awarded attorney's fees, the defendant or landowner had to get an award 140% greater.

Chair Larson: the amount was specified in there?

Vice Chairman Dwyer: Yes. Excuse me, 20-40%. The House felt that was too much of a burden on the landowner to have to prove that much of an increase over and above what the project sponsor offered.

Chair Larson ends the discussion on HB 1207.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1207
3/13/2019
#33684 (1:18:01)

☒ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel/ Amy Crane
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Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

Minutes:

2 Attachments

Chairman Dwyer calls the subcommittee to order on HB 1207. Committee members include Senator Dwyer, Chairman, Senator Bakke and Senator Luick. Stephanie Dassinger from League of Cities and Mark Gaydos from DOT were also present.

(see attachment #1)

Vice Chairman Dwyer: We're trying to balance between the ambulance chasing attorneys and the public entities that are seeking fee titles for a public project and the example in the testimony was that the Cass County joint board offered \$110,000 for property, the land owner for whatever reason, refused that, they went to court and the court awarded \$48,000 based on appraisals. But the Cass County joint board had to pay the attorney fees for the land owner in the amount of \$110,000 plus their own attorney fees, so instead of it costing them \$110,000, it cost them \$270,000. And so, that's one example. The other testimony was, an attorney has done an open records request to get the names of all of the landowners along the pipeline right away, and since the statute provides that anybody challenging an offer can be awarded attorney's fees, they're worried this could be one of those cases. So that's the side of the public entity. The side of the landowner is to have as much leverage as possible so that you don't get your land taken from you without a fair approach to the matter. So working with Stephanie, we came up with this language and what it does is says that the court may award reasonable attorney's fees and costs, which may include interest, if they go to court and the court awards a higher amount than what was offered by the public entity, two weeks prior to the trial and the reason for that is, so that the date before the trial, you've spent all this on trial preparation now and they say we'll give you \$120,000 instead of \$100,000 and now the landowner would have to prove over \$120,000 to get attorney's fees. It's to prevent the public entity from doing a last minute manipulation of what the deal is. As the bill was introduced in the house, it would have required the land owner to prove greater than 120%, between 120-140. That would be a steep climb for the landowner. Let's use

\$100,000. The project uses \$100,000, now the landowner has to prove \$120,000 has to get a court award of \$120,000 in order to get attorney's fees. House didn't like that and they said he just has to prevail. But that doesn't make any sense because nobody knows what prevail means. This would say if they offer \$100,000, the land owner has to prove \$100,001. If we had a lower percentage, it would give incentive for the public entity to make a higher award and put less burden on the landowner to exceed whatever that offer was. We're trying to find this balance.

Senator Bakke: This is what it would look like on the bottom it says for compensation.

Vice Chairman Dwyer: We're looking at a hog house amendment that would go with this.

(see attachment #2)

Senator Luick: This is an email I got this morning from an attorney in Fargo, dealing with that particular instance in Fargo. This outlines the concerns I have about the bill, the timing and the availability of these cases where, for example, a few years ago there was a movement in the Obama administration where they were looking at taking IRA money, 401k accounts, and taking 5-10% of all investment accounts to balance the federal budget. That was awful of course, but in my case I don't have an IRA for a 401k, my investments, my retirement in my farmland. These individuals that are in this case like that Fargo case, they're investments are in that property that they have had for a long time or came out of their parents' estates or whatever it is. And now they have come in there and taken that property at fair market value so not only are they losing their investment, but the consideration of paying for the attorneys to protect that asset. I understand that we do have to figure out a way to let the ambulance chasing attorneys to come up with a fair reasonable way to make this all come out in the end. But what we're looking at here is going to be a problem for these cases where that judge's decision on fair market value of this property is firstly, a problem. Now these individuals that lost that property is going to have to take another shlicking because they may or may not get their attorney's costs covered. I don't understand the percentages of how we can make this work. I asked for a schematic so I can get a better understanding of just how that would lay out. I'm in favor of figuring out how we can make this work. I think it's important that we don't take the system for granted and don't abuse the system.

Senator Bakke: Obviously there's a problem here. They've presented what they see as a solution. It maybe isn't a clear fix for everyone so if there is a problem and we can fix it, rather than just killing it, I'd rather fix it.

Senator Luick: Me too.

Senator Bakke: This is area that's totally unfamiliar with me. Let me just talk this out so I make sure I understand it. You have some land and they want to take it by eminent domain. They make an offer on the land to the landowner. Is there an appraisal done?

Gaydos: Yes.

Senator Bakke: And are they required to offer the appraisal amount?

Gaydos: Yes.

Senator Bakke: And the landowner sometimes thinks they could get more than that?

Senator Luick: Correct.

Senator Bakke: Who maintains the mineral rights to the property, does the landowner? Or does that go with the sale?

Vice Chairman Dwyer: Very seldom does the minerals go with this kind of an acquisition. Never.

Gaydos: Specifically, with the DOT in title 24, we are prohibited from acquiring the oil, gas and mineral rights.

Vice Chairman Dwyer: I've never heard of an instance where that has happened.

Dassinger: As a general theme under eminent domain, you're only allowed to take what is necessary, and I can't imagine a time when the mineral rights would be necessary.

Senator Bakke: Are there situations where they are taking all their land or just a portion?

Senator Luick: In the case in Fargo, they took 80 acres from one farmer and 67 from another and now they're taking back 320 more acres from the first farmer. It's his entire farm and building spot.

Senator Bakke: Why?

Senator Luick: For the staging area of the flood diversion. But 5 miles down the road, they acquired land for \$25,000 an acre because it was unique property, which meant they needed it to build the city a golf course on. Now when they come to this guy's farm to build this eminent structure, that's not unique property, even though it had to be there. So they gave him fair market value which was roughly \$6,000 per acre.

Senator Bakke: I would sue too.

Senator Luick: That's the problem we have. If something like this goes forward, the leverage always goes to the person or people or the agency with the deepest pockets, and that's the government. Because there is no way that a farmer of that size would have the wherewithal to keep continuing to fight this in the court system, so they have to give up. Then it goes back to fair market value.

Senator Bakke: And then the issue is they're paying their attorney fees on top of this?

Senator Luick: Exactly right.

Senator Bakke: So what they are asking for is at least the attorney's fees be paid by the county or whomever.

Vice Chairman Dwyer: Currently if the landowner challenges, the court will award attorney's fees to the landowner regardless of what the settlement is. Regardless of what the court awards.

Senator Bakke: How did the one- they would have had to do an appraisal on the \$25,000 per acre land?

Senator Luick: No.

Senator Bakke: Was that taken by eminent domain? That was just an offer?

Senator Luick: Correct, that was an offer by the diversion authority.

Vice Chairman Dwyer: And you have instances with pipelines where they will go along and get easements for \$200 a rod. Then they get into a stretch where the landowners are a little ornery, and they agree to give \$300 a rod. Now they have to go back and give these guys \$300 a rod too, or else have a lawsuit.

Senator Luick: And that's what we're looking at here too, because that \$25,000 set precedence as to what the value of that property is in that area. But you move over five miles and now because they're using eminent domain, they now don't have to do it.

Senator Bakke: It's sort of the same thing with wind turbines. But there was a bill to say that nobody had to disclose what this person got from this person because they didn't want lawsuits.

Vice Chairman Dwyer: Need, appraisal, offer, negotiation, trial. The first four aren't eminent domain, they are just trying to work out a fair price. Are those steps right?

Gaydos: Yes.

Vice Chairman Dwyer: So the public entity identifies a need, they're going to build a drain or pipeline or road, so they identify the need. They do an appraisal. Was the \$25,000 an acre based on an appraisal?

Senator Luick: No, just an offer.

Senator Bakke: It was just a straight offer, that's what I asked. There was no appraisal done, because it wasn't eminent domain.

Senator Luick: I don't know the acreage but I think it was like 50 or 60 acres.

Vice Chairman Dwyer: Well now you're in trouble, because negotiation is going to fail because you offered the neighbor \$25,000 and the next neighbor \$6,000. The highway department knows this well, because you're building a road. (attachment #1) initial offer on number 2 from the condemning authority. Let's take out most recent written, and put in initial offer. Number 3, they go to the land owner and say we'll give you \$10,000 an acre.

Senator Bakke: Is that the appraisal?

Vice Chairman Dwyer: Some entities don't get an appraisal.

Senator Bakke: So an appraisal isn't required for every purchase by a political subdivision?

Vice Chairman Dwyer: No.

Senator Bakke: It should be.

Vice Chairman Dwyer: Well to sanctify the state's money...

Senator Bakke: Well first of all, if you're telling me that this property over here, you are going to offer them exactly what the appraisal is, and over here, you're just gonna because you don't want it by eminent domain, but you still want it, you're just going to give them whatever you want and you're a government agency. I think that's irresponsible. If we're a government agency, a political subdivision and we're working for the people we need to do an appraisal of everything and it's straightly based on appraisal.

Vice Chairman Dwyer: Let's separate between formal appraisal and informal appraisal.

Senator Bakke: What's the difference?

Vice Chairman Dwyer: Well you could get a realtor to say based on what we know; they're paying \$300 a rod. When you get to the trial, almost every entity will get an official appraisal. You wouldn't want to require or they'd be spending a quite a bit of money.

Senator Bakke: We can't set a price because land is different in different parts of the state. I don't think it's fair.

Senator Luick: That's what's happening.

Senator Bakke: How do we fix this?

Senator Luick: Let's push this further in the form of real estate for buildings. Houses and property were bought and appraised for \$150,000 was bought out for over \$1 million by the diversion authority. There are a lot of property that are appraised at market value and bought out at 3-4 times more.

Senator Bakke: Why is that being offered?

Senator Luick: Because we have been inundating the group down there with so much cash from this state, they're trying to keep the project moving; it's becoming a behemoth that is getting too big to even stop.

Senator Bakke: Who is making these offers?

Vice Chairman Dwyer: the issue we're trying to fix is not a mismanagement. We're trying to fix attorney's fees. And we're trying to decide if there should be some limit to a landowner getting compensated and reimbursed for his attorney fees if he goes to trial.

Senator Bakke: Currently, what do they get? Nothing?

Vice Chairman Dwyer: Currently they get attorney's fees and actual costs.

Senator Bakke: If they win the lawsuit, or if they lose?

Vice Chairman Dwyer: The public entities are saying they're worried that these unethical attorneys are going to use this and turn it into a cottage industry where they talk all these landowners into going to court. And the attorneys don't care what the outcome is because they know they're going to get paid for all of their time.

Senator Bakke: But they weren't giving unfair amounts out in the first place, they wouldn't have the problem.

Vice Chairman Dwyer: Grand Forks they had to use condemnation to build the English coulee diversion. They were totally fair, they offered all ten guys the same. Two of them wouldn't accept it so they went to court. They got less than what the board offered them. But the problem was, let's say that all 10 owners owned the same amount of land and the offer was \$100,000 for each. 8 accepted. They were satisfied, but two of them objected because they didn't like the project. The court awarded them \$60,000 each and they realized the water board had actually given them a high offer. Under current law, the water board has to pay that \$60,000, they have to pay their own attorney, and they have to pay that land owner's attorney. It wasn't because the offers weren't good, it was because the landowners just didn't like the project. They're going to court because they know the attorney fees are going to get paid. The attorney went in and talked these land owners into go into court because he knows he'll be awarded the attorney fees.

Senator Luick: That's the part that I abhor. There has to be a way that we can figure this out to make this equitable.

Senator Bakke: We're trying to find out who pays the attorney's fees.

Vice Chairman Dwyer: If you recall, today we had a division of a bill. Senator Luick did that a while back with a water bill, separate the Fargo section with the rest of the section. The purpose of this is the attorney's fees.

Senator Bakke: If these landowners are refusing to accept the offer, why aren't they paying their own attorney fees?

Vice Chairman Dwyer: Nobody wants their land taken. Unethical attorneys. The other way. Northwest North Dakota the public project has been aggressive and said if you don't sign this easement, we're not going to serve you water and furthermore, we think this easement is worth 100 bucks. The landowner just got paid from another entity, \$5,000 and he knows that

he's getting trampled by this public entity. So he decides he's going to court. So on that side, the entity is being unfair. We're trying to find that balance.

Senator Luick: I want to put something across your yard. I'm a contractor. Do you think you should have the right to have that contractor put that back into the condition it was plus this is not my problem unless I'm getting a service? Should you have to pay for that attorney to come after me to get this rectified?

Senator Bakke: We have an attorney general, why aren't they doing this? It's a part of their salary.

Vice Chairman Dwyer: You'd have to have 500 attorneys if they were going to represent all of the landowners that were suing.

Gaydos: The attorney general's office represents the political subdivisions and the state, not the citizens. We typically use the court appointed attorney. I'm an engineer in the environmental services division, actively involved for the DOT acquisitions.

Senator Bakke: What if we capped what an attorney can charge for something like this?

Vice Chairman Dwyer: We're trying to come with a balance where you don't have the inappropriate, unethical ones on both sides. This outline, number 1 is current law, 2 says you have to get 100% of the initial offer. So Mark let me ask you this, so you're going to build a road. Step 1, you identify the need. Your engineers identify what the right of way is. Because you're the state, you might do an official appraisal. Now you're ready to make an offer. That initial offer would be whatever it is?

Gaydos: the initial offer would be based on the appraised value we do. You might perform an informal appraisal. If you've got greater risk because the appraisal if you do an eminent domain appraisal, you're probably going to pay the higher amount. The initial offer is made and you don't come to an agreement. As you work through the process once you've done the eminent domain, you do some depositions. Based on that we'll either come to a different understanding or we don't have that legal settlement. Rule 68 offer. That offer will be made. That's a pretty serious offer. In that case, the reason that the 14 days is in there is for right of way acquisitions the rule 68 does not apply. As we do an eminent domain, we become the plaintiff. As they have that, that gets put out there, and the reason the rule 68 offer is made, is so that they can say to the judge we made an offer at this amount, the award was greater, therefore you should reward us these extra attorney fees. Our side would say we made an offer, they got less shouldn't be paid. In eminent domain, I don't think rule 68 is applicable so as you work through that in the old bill it talked about the discretion of the judge. The judge going to get some type of the attorney fees. In the cases I've been involved with, I said sometimes the landowner will get more or less. That depends on the jury many times and the makeup would have that affect. I haven't seen any cases that I've been involved in where they get the exact amount. In most cases, they get something more. The difference is to give you a case in Watford City, our deposit was approximately \$3.2M and as the defendant their request for payment was \$4.9M and the jury awarded \$300,000 additional, so it was \$3.5M versus \$4.9M. As you went through that, the judge looked at what had been submitted by the opposing side which was \$277,000 in attorney expert fees, and the awarded cost was

\$94,000 it was a significant difference there. The difference was the attorney on the defendant side had two attorneys. Sometimes it was two attorneys doing the same work. They brought in three expert witnesses that was essentially the same, the judge disallowed some of it. Our cost was about \$84,000 so very similar to what the judge used in discretion. We're comfortable with attachment one as you proposed. The reason that that was written to say most recent was to take into account some of that negotiation that goes across.

Vice Chairman Dwyer: Was \$3.2M your initial offer?

Gaydos: Yes, that was the appraised amount which would have been inclusive to the land damages and the remainder.

Senator Luick: Let's assume we are not looking at appraisals or offers. How do we figure how we get the attorney fees? What is an approximate hourly rate for attorneys?

Gaydos: With the attorneys that we've used, they generally bill between \$180-200 an hour. We've seen requests as high as \$600 an hour. Typically, \$250-350, somewhere in that range.

Senator Luick: I don't want to make this a burden for attorneys. If we were to stipulate the cost per hour is \$300 an hour so at least the entity has an idea as a starting point.

Gaydos: I think it might be difficult to ascertain an hourly rate. Generally, we support that being at the discretion of the court. In one case we did, they had four attorneys. So when the judge looked at that he did not award them fees for all four attorneys. Asking that question might be limitation to represent you and you won't need a team.

Senator Luick: Agencies hire professional witnesses with a smaller rate. It would be a starting point what kind of dollar amounts these cases should cost. I know we're going against capitalism, but we do it all the time when determining how much things cost the government or how much anyone is allowed to pay to do services for the government.

Vice Chairman Dwyer: Number 1, the language is reasonable attorney's fees and costs. And as mark just said, the defendant tried to get more than the court only awarded. The limit has to be in number 2. Their initial offer was \$3.2M. the final award was \$3M. That landowner should probably be entitled by attorney fees determined by the court. The court awarded 90% of the initial offer. That's still pretty close. Let's say that the court awarded \$1.5M. obviously they over offered, because the jury say. The entity should have to pay because the reason they went to court obviously wasn't about value. That's where the limit has to be or what the amount is. That should be left up to the court.

Senator Luick: It gets back to whether it will be on percentage.

Vice Chairman Dwyer: We're not talking about the award for the land.

Senator Luick: The award for the land and offer all of that leaving that up to the court.

Senator Bakke: Let's say we go to court and you've offered \$2M and the person doesn't take it and the court says I think your offer was too high. Could the attorney's fees be based

on a percentage that the person gets and therefore pays a certain percentage of 1.5 is what the attorney will get, so then the attorney will work harder to get a better amount for their client, cause then they will get a better percentage. Do you see what I'm saying?

Senator Luick: That's counterproductive as to how do we save the state/utilities those dollars. Because then they would want their pay out to be as high as possible because then they would get paid higher hourly based on that percentage.

Senator Bakke: But if you go on an hourly rate they're going to just spend more time on it.

Senator Luick: At least we have a starting point. I don't know where that magic number is.

Senator Bakke: If the court comes back and offers less than the initial offer, then we don't pay attorney's fees.

Vice Chairman Dwyer: Correct.

Senator Bakke: But if they come back and offer more than what we offered, then we do pay for attorney's fees

Vice Chairman Dwyer: Yes.

Senator Bakke: If the court determines that the taking is not for a public use or not lawful, the court shall award the property owner reasonable attorney's fees and statutory costs. So what does the fourth one mean?

Vice Chairman Dwyer: It means, let's say the Grand Forks water board decides to start a drainage project and it goes across your land but it turns out its really only for one farmer. At the extreme, I-94, it's really hard to win that that's not public use. A driveway for one farmer, is hard to argue that's public use. Let's say Grand Forks County decides to acquire your property for one guy and you go to court, they say that's not public use, they would pay your attorney fees. When you use eminent domain, you have to establish public use.

Senator Bakke: I like two and three cause its saying, you're taking them to court cause you're saying you're not getting enough. And the judge says you were getting plenty, then they would pay for their own attorney fees right?

Vice Chairman Dwyer: Let's just say we set the award at 80%.

Senator Bakke: So the land owner would pay 80%?

Vice Chairman Dwyer: No, we set the award at 80% before we would get attorney's fees. So the offer is \$200,000. He's not sure he goes to court and the court awards \$85,000 that's pretty close. He probably should get attorney's fees in that case. But if the court awards \$50,000 then he probably shouldn't. So back when I was serving as acting superintendent. We had to dismiss this guy and he sued the school. He wanted a settlement of \$23,000. On principle, I was right. And I wanted to go to court and fight that offer. The attorney said you're going to spend \$50,000 fighting a \$23,000. So we settled and paid. If you couldn't get

attorney's fees a very reasonable offer of \$100,00 and you knew that if you got more than \$80,000 you couldn't get attorney's fees, the attorney would probably tell you to settle so he ensures he gets paid. The attorney wouldn't encourage the land owner to go to court when he knows there's a really good offer on the table, if he knows he's not gonna get paid.

Senator Luick: Would you explain one more time that 80%?

Vice Chairman Dwyer: Number 2 as its written right now, if it goes to court, in order for the land owner to get condemning authority. He'd have to get \$101,000 from the court.

Senator Bakke: Why?

Vice Chairman Dwyer: Because it says if it's not more favorable than the initial offer, you're not getting attorney's fees.

Senator Bakke: So if he got \$100,000.01, he wouldn't get attorney's fees. So where would you put that?

Vice Chairman Dwyer: You put it under number two. And say if the award for the compensation damages is not more favorable than 80% of the initial aware.

Senator Bakke: What do you do with the 14 days?

Vice Chairman Dwyer: I took that out. So now let's say he goes to court. He legitimately feels it's worth more than \$100,000. But the court awards him \$82,000. He still would get his attorney's fees if we put 80% in there. It makes it more favorable to the landowner, he only has to get it better than 80. The landowner doesn't want to get awarded \$80,000 by the court and then turn around and pay his attorney \$80,000. That makes it better for the land owner. That puts pressure on the entity to makes a good initial offer. And that's what we have to work at here.

Dassinger: I've never practiced this kind of law, so it sounds reasonable but I'd like to check with a couple of the attorneys just to be sure.

Vice Chairman Dwyer: I sent this out to about 10 different attorneys that are involved in these kinds of things. And I said we'd have a discussion today and potentially another hearing on Tuesday say no way if they so choose.

Senator Bakke: These four things would be the bill with the corrections to number 2. What is rule 68?

Vice Chairman Dwyer: Rule of civil procedure, judgement or a formal court rule for making an offer and getting a response. We couldn't really use it for this because it applies for medical malpractice cases or personal injury cases where you're talking about pending trials.

Senator Luick: Senator Dwyer would you craft up some language so that we have something to work with?

Vice Chairman Dwyer: number 3. There is a point where a landowner shouldn't go to condemnation for like the garrison conservatory is paying \$150 per acre for an underground pipeline. That seems way under what it should be. Let's say you have land worth \$1000 an acre, a company comes and puts a pipeline 6 feet down, the next year you didn't even know it was there. They pay \$150 an acre. Most of those easements are donated. Those kind, you shouldn't be able to take to court and get attorney's fees. I don't know what the right number should be.

Senator Bakke: In number 3, you're saying if your amount is less than \$1,000, you wouldn't get attorney's fees?

Senator Luick: I would say \$5,000. To me that for a \$5,000 you're better off to suck it up and make the project work. In my area, that's one acre.

Vice Chairman Dwyer: It would be a small acquisition.

Senator Luick: Correct.

Dassinger: Is that decided? And no changes to number 1?

Vice Chairman Dwyer: No that's the one that says land owners still get reasonable attorney's fees and costs as determined by the courts, which may include interest. Let's say the total value of the taking is \$200,000 but they put \$100,000 in your bank account. You only get interest on the \$100,000 that you don't have access to. That's saying you get attorney's fees but if you go to court and you get less than 80%, you don't get them. If they don't make a good award. It's putting a burden on the entity to make a good award.

Senator Bakke: So they both have to do it in good faith.

Vice Chairman Dwyer: If it's a really good offer and he has a chance of getting less than 80%, he's probably not going to do it.

Gaydos: You mention the actual. Part of the reason it was written, actual sometimes results in us having to pay for meals and drinks and alcoholic beverages. That's the reason actual was changed.

Senator Bakke: So if an attorney goes to lunch and has a drink, the client has to pay for it?

Dassinger: The example that I was given was someone had taken their client out to drinks after the trial and I believe it was \$300 in alcohol costs that the government entity had to pay.

Vice Chairman Dwyer ends the subcommittee discussion on HB 1207.

Testimony was emailed to the subcommittee (see attachment #2)

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1207
3/19/2019
#33997 (59:41)

☒ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel / Marne Johnson

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

Minutes:

1 Attachment

Chairman Dwyer begins calls the subcommittee to order on HB 1207. Committee members include Senator Dwyer, Chairman, Senator Bakke and Senator Luick.

(see attachment #1)

Vice Chairman Dwyer: I sent an email to as many people as we knew wanted to be involved in the discussion. The email had four points: attorney's fees and costs could be provided, only if the award was more than 80% of something, subsequent to the email, we didn't like the initial offer of settlement, let's have a written offer 60 days prior to trial, then we talked about 'of a written offer of settlement submitted by the condemning authority less than 60 days prior to the trial.' There we some other ideas. Maybe we should just ask folks in the room to talk to this subject.

(1:25) Chris McShane, attorney

McShane: I am the attorney that represented the Cass County Joint Water Resource District (CCJWRD) in the Erickson case. This was the case that prompted the initial bill in the House. That was a case where the condemning authority needed two residential lots for a projects. They were the last two lots out of 70 that were being acquired. There was an appraisal done and it came back at \$48,200. An offer was made at the exact amount at fair market value. The landowners wanted more than \$500,000. Through the process of negotiation, it was determined that the landowners had purchased those two lots for \$150,000, before there had been flooding and the lots started to collapse into the river. The district said, we'll to be friendly, we'll make them whole and made them an offer of \$150,000. That was back in 2015 and 2016. Work needed to start on the property in the spring of 2016. That work ultimately got delayed a little bit. There was an eminent domain action that started. That case ultimately

marched forward to a trial, which took place in 2017. That was after the landowners acquired an appraiser from the Minneapolis area, he came back with an appraisal of \$456,000. We tried the matter to the court. The court agreed with us that the appraisal done by a local appraiser was correct. He stated that the appraiser from Minneapolis didn't know enough about sales in the Red River Valley to be credible. The appraiser from Minneapolis used seven comparable sales for these lots, and two of those sales were in gated communities. After the CCJWRD won in the amount of \$48,200; the landowners asked for attorney's fees and costs. Judge Irby said based on the existing statute, 32-15-32, that attorney's fees and costs were allowed, and he awarded \$125,000 to the landowners, including \$38,000 for their appraiser.

Senator Bakke: Was the \$38,000 included in the \$125,000, or was that in addition?

McShane: It was included in that \$125,000 awarded. The landowners appealed, saying that the \$48,200 was wrong and the water district said we don't think it's right that you can cost your clients \$100,000 and get rewarded. We cross appealed, saying it's not appropriate to award attorney's fees and costs when the landowner did not receive more than what was offered. The supreme court affirmed the value, saying \$48,200 was correct, and affirmed the decision \$125,000 of attorney's fees and costs, saying that the Bismarck Vs. Thom was overruled. The current status of case law today is that it doesn't matter what you recover, if you are a landowner in an eminent domain action, you may receive attorney's fees and costs. The landowners went back to the district court and said had to pay to appeal, so we get more attorney's fees and costs. The district court awarded an additional \$19,000. For a property that was worth \$48,200, the water district ended up paying \$170,000 to the Ericksons. The Ericksons refused to give us a 1099 information sheet, they went to their tax professional and found out under the new tax laws, they can't write off their attorney's fees and costs that have been awarded in this eminent domain act. This bill is meant to address this. It was crafted to say if you as a landowner recover less than 20% more than what was offered, that you don't get attorney's fees and costs. If you are between 20-40% more than what was offered, you may receive attorney's fees and costs. If it's more than 40% more than the condemning authority offered, you shall pay attorney's fees and cost. It came out of the House in a format that was different than that. It took out the 20% and 40% and the discretion of the judge. HB 1207 now says that if you, as a landowner, are a 'prevailing party' – we're not really sure what 'prevailing party' means, a condemning authority goes into that action saying 'we owe you money.' In the civil arena, that means that you've lost. But here, condemning authority goes in saying we owe money.

I'm not familiar with what happened last week, I'm here to tell you that the language '80% of something' under the current draft of this, the water district would have still had to pay all of those attorney's fees and costs for two reasons. One is timing, that initial offer, that would be the starting point. The water resource district said, 'this is just compensation, equal to fair market value, therefore we are offering what has been defined as just compensation.' It's very possible that a condemning authority gains additional information from a landowner after that. With this language, we can't make adjustment for that.

Vice Chairman Dwyer: Did the supreme court say that the court 'may' in it's in discretion? Does that 'may' mean 'shall'?

McShane: They said that there is no prohibition on recovering attorney's fees and costs, even though you recover \$100,000 less than what was offered before an eminent domain action starts.

Vice Chairman Dwyer: Wouldn't that seem like an abuse of discretion by a court?

McShane: We argued that it was abuse of discretion for them to award it. We also argued that it should never been awarded because they didn't receive more than what was offered, and even if it should have been awarded, it was an abuse of discretion and the supreme court said we don't look at what an award is from a district court, because it's presumed they know more about the situation and therefore we will not substitute our judgement for their judgement.

Vice Chairman Dwyer: Would these four paragraphs be something that would be workable if we could come up with some language that identified what we're using as a comparison?

McShane: These are a good start. Paragraph one is appropriate as written. That helps clarify things. Under the current law, it's a fully discretionary matter for a judge to award any attorney's fees and costs. A landowner might win, the judge could have said you don't get any attorney's fees and costs, and the Supreme Court would not have really reviewed that in depth. Paragraph 2 is workable, as long as we identify that the 80% issue, and the second is initial offer. I've never seen 80% in case law. What was the impetus for including 80%?

Vice Chairman Dwyer: It's trying to find the balance between what the condemning entity offers and the landowner getting an award that's some amount greater than what they offered. Let's try to find a balance making it so it's not too onerous to the landowner to be successful in going to trial versus the condemning authority making a reasonable offer so that it puts pressure on the landowner to accept. It provides incentive to accept rather than going to trial. It's trying to find the balance. 140% seems too excessive, 80% is maybe the other extreme. The testimony in the original hearing was these ambulance chasing attorneys trying to get these landowners to go to trial, so they get fees, even though the condemning authority has made a reasonable offer. The initial offer was trying to find some term that everybody could understand so you're not litigating what that means.

Senator Luick: How many of these cases do you see as far as the way the Erickson case went?

McShane: This is the first and only eminent domain case I've had that went all the way through trial. I had four eminent domain trials scheduled for January and February for projects across the eastern half of North Dakota. Every one of them settled because they were afraid of the results of the Erickson case. They knew that even if they win, they would lose, it would be expensive for the project, they were going to have to pay the attorney's fees for the landowners. The Erickson case is the only one from the condemning authority where I've seen it go through trial.

Senator Luick: I can see how the problem can arise. Are we taking enough away from the true landowners for a government entity to come in and take this property with eminent domain? Is it that onerous on the government to do this? There are bad farmers as well as

attorneys. If this were put on the head of the landowner, as far as the costs for all of this. I don't think that that should be their sole expense to do that. It should be the government's expense, if they want to pursue that. How is fair market value determined?

McShane: Fair market value is a term used in the appraisal industry. The supreme court has said just compensation is equal to fair market value in North Dakota. That's common around the county, I'm not sure how you would find a different metric for just compensation, unless you have a fair market value. The appraisal industry is based on that. Fair market value is what a willing seller and a willing buyer both fully understanding of the market conditions and accounting for an appropriate amount of marketing time, would agree as to the value of that property. I understand that this is not a willing seller. That is missing the point of identifying a value. A value is independent of a project. That was one of the arguments of the Ericksons in this case. You're changing the value of my property, based on the project you are acquiring the property for. The goal of statute and case law, including United States Supreme Court case law is to divide the amount that is being offered to a landowner from the project that the property is being acquired for. There's two purposes: The project influence rule, if an entity comes in and starts building a municipal improvement, knowing they'll have to continue to build that improvement over to other property, they don't want the condemning authority to have to pay more for the next piece of property, because now it's next to a municipal improvement, which adds value to the other property. You take out the influence of the project. The flip side of that is true as well, because that's the opposite of what the Ericksons were arguing, they were saying that you devalued my property because of the project. The goal of case law is to avoid it on both sides, so the taxpayers don't pay too much and the landowners get what they deserve.

Senator Luick: Then what is true value? We see it on our tax form.

McShane: That is not a term that is used in eminent domain. True and assessed value for tax purposes is set by the legislature and it is completely independent from what your property would sell for.

Senator Luick: Let's say that this piece of property that was taken away from this individual, I would think that the true value of that would be some sort of balance between what that utilities value on it versus the fair market value, now that they've taken it away from this individual. That individual, the fair market value of that is going to be whatever surrounding properties are around that area?

McShane: Yes, there are three different calculations for fair market value, comparable sales, income approach, and the replacement cost approach.

Senator Luick: Nothing about any type of investment?

McShane: That's the income approach.

Senator Luick: That is all inclusive in that fair market value?

McShane: An appraiser is required to go through an analysis of which of those three measures of value to be used to arrive at fair market value. It could be a blend. I see

appraisals where they take the average between comparable sales and income approach. For landowners in North Dakota, I wouldn't want to link it to true and assessed value, because the true and assessed value for farmland is miniscule compared to what you can sell that property for. I wouldn't want to link it to the amount of the income approach, because farmland is not a good income investment, it has an appreciation to it, but the actual income from rental is not that great.

Senator Luick: We need to talk about the location of that farmland, if it's being taken from someone in an area where they are not looking at urban sprawl and investment going that way, that property can turn into something very valuable.

McShane: That's fair market value, that is comparable sale approach. That's where they take the idea that the city is coming towards a particular property, so comparable sales show that appreciation of value. That's the purpose of comparable sale. The income approach from an appraiser's perspective is what kind of income you can get off of it each year. A piece of property selling for \$5000 an acre, you're probably paying \$125 an acre for rent. The normal rate of return from farmland is 3%. I don't think an income approach would be a place to start.

Senator Luick: I misspoke about tax evaluation and true value. I was thinking of true value being the value of the property at the assessed value, I didn't realize they go into those other two factors. The value of that property once that the utility determines that the fair market value of that piece of property is \$100 an acre, and once this is expanded now that value worth \$10,000 an acre now.

McShane: This is a debate we have with all landowners. That's the purpose of a situation like this, we want to allow this debate. The way paragraph two is currently drafted, where it says 80% of an initial offer, it eliminates the debate, because there is no incentive for a condemning authority to go up.

Vice Chairman Dwyer: Nobody is stuck on that; we're just trying to find something that works.

McShane: 80% is problematic to me as a condemning authority, it's problematic to me representing a landowner. In an eminent domain action, the amount of damages has to fall within the range of evidence, meaning that a condemning authority provides an appraisal, and a landowner provides an appraisal, and their own landowner testimony. A landowner is not going to come in saying it is less than the condemning authority's appraisal. By going to trial, you are guaranteed that the lowest you would get is that appraised amount. In this situation, the offers have to be at an appraised amount, by statute. It's setting it up for failure of that. I know the initial proposal was basing that on an offer 14 days before trial. That's too close to trial. You've already expended all of your discovery costs, your jury instruction costs. I can understand where 80% of an offer in that late stage of the game would be appropriate, but a better solution would be more than 14 days, it would eliminate the risk the landowner has and allow a condemning authority to gather all that information and make a good offer to these landowners. Both for what the property is worth and to avoid the cost of going to trial. We focus on the landowner being compensated for their attorney's fees and costs, but the condemning authority has to pay me. That's a cost that the project bears.

Senator Luick: Should we put time frame in there?

McShane: 60 or 90 days before trail commences would be fine.

Vice Chairman Dwyer: We'll see if anyone else has anything else to say, and then we'll see if we can't craft something that finds that balance and possibly could pass. We have to do something.

(31:50) Jordan Wier, attorney

Wier: I have worked on behalf of both landowners and authorities. Most recently I've worked on cases involving rural water easements. Easements that juries and appraisers would all say are worth somewhere in the range, depending on location, productivity of the land, the size of the easement, somewhere in the range of \$750, to a couple thousand at the most. Litigation I've been involved with it's still the discovery process, it's still depositions, travel, the appraisals themselves are just as exhaustive as they would be if you were talking about the full value of residential lots, or taking a whole property to pull the highway through. My clients have paid between \$7,000 and \$10,000 for those appraisals. That's just the appraisal, not testimony at trial. I have settled cases for easements in that range, where we have agreed to pay all attorney's fees in exchange for an easement worth that amount in upwards of \$60,000 and we have not reached 60 days prior to trail. That is only the fees on the landowner's behalf. The costs of litigation alone are too onerous on all parties involved, and most damaging to taxpayers and this state that should be appropriating those funds to other projects. You asked are we striking the correct balance between making this onerous enough on the government, because it is the government initiating this. They're doing that. I would suggest that just by discussing a fee shifting scheme of any kind, we're making it unique to all civil litigation. Every one of those litigants are paying their own fees, regardless of who initiated it. They're paying their attorney's fees. By discussing fee shifting to begin with, we're creating a unique area, that places a greater burden on the government than any other litigant.

Vice Chairman Dwyer: Doesn't the court in most civil cases have the discretion to award attorney's fees?

Wier: Absolutely not, not at all, unless it's in the contract, and other than if a case is frivolous. Then there is no discretion for a judge to award attorney's fees, based purely on the result. I would agree with Senator Dwyer on 140% being too far over, I'd respectfully submit that 80% is too far the other way. I think that should a landowner receive a result that is better than the offer made by a condemning authority, that it would create quite a burden on the government. Now the authority has to discuss what kind of evidence is there it would make a difference on when and where you are comparing it. 14 days prior to trial, I saw an email from Mr. Allende, I'd agree with him, now land owners have expended tens of thousands of dollars, that's just the landowner's fees, you've expended way too much money, you've given the condemning authorities too much time to make a lowball offer in the hopes that the landowner accepts it. That's not what we're hoping to do here. I think what we want is a balance that avoids litigation, avoids all those costs altogether. That creates enough of a burden on a condemning authority that forces them to make a good faith, fair market offer; taking consideration for everything that's being taken, whether that severance of land involved,

damage to the investment. Another analysis that the appraiser might go through is the highest and best use of the property. Appraisers might defer. But if it's 90 days prior to trial, and so long as the lawyers have done their jobs, now you have these competing appraisals, now you are placing a fairly high burden to make a full, fair offer where they would be taking quite a risk if they were under valuing the property and not taking into consideration the landowners position, because the jury may swing above what the evidence presented by a condemning authority might have been. I'd submit that if it is 80%, it should not be the initial offer, which is fairly early in the process, long before I would be involved in the litigation. That would make it impossible for the condemning authority. It would be very difficult to start out, and the evidence would never be less than that. There is always a start to every negotiation, that should not be what ties our courts system. I'd submit something along the lines of what Chris suggested as well, between 60 to 90 days prior to trial and I think that would achieve that balance.

Senator Dwyer: Could we say a formal written offer? We have to have some term to identify.

Wier: I don't know if the term formal really achieves much, but it should be a written offer, because otherwise we have some debate between the landowner and an agent or representative talking about what the offer made should be. A written offer would achieve what we are hoping to do here, and it would make very certain what offer was made by the authority.

The last part I wanted to emphasize how expensive litigation can be. Previous testimony has stated \$40,000 to \$100,000; I think that may even be an undervalue of how much it will be. If we are talking about going to trial again, I've settled a couple cases where it was a \$60,000 and we hadn't gotten anywhere close to trial. Litigation costs per litigant will be \$100,000 if you are talking about going through trial. Regardless of the property taken, it will be \$200,000 to the government, if they are to pay fees. Any authority that's negotiating, that's making offers, they are going to be taking all of that into account when they make their offers. I think we're striking the right balance at 100% and somewhere in that range well before a vast majority of those costs would be incurred 60 to 90 days before trial.

Senator Bakke: You are saying 100% of the written offer and 60 to 90 days before trial?

Wier: I would submit something along those lines, yes.

Senator Bakke: You only commented on the first two paragraphs, did you have any thoughts about the last two? Where we say attorney fees,

Wier: Paragraph four is perfectly fine, paragraph three, I would prefer if that number was at \$15,000. \$5,000 is not a lot. \$15,000 is what our current scheme is for in small claims court.

(43:00) Mark Gaydos, North Dakota DOT

Gaydos: Joining with the other parties testifying, we agree that 80% is difficult, we find it inconceivable that a jury would award less than something we said the value was as a condemning authority. We think that is probably better at 100%. As with the other two, the department in number two, believes initial offer could be written offer or settlement, in that that would occur 30, 60, 90 whatever number days prior to the start of trial. As we have that,

one of the things in that written offer of settlement, that can identify or may include attorney fees and expert witness costs, or that can also be written in a manner that allows that to go to the court for their evaluation as to what reasonable fees are. That written offer could contain the attorney fees and expert fees.

Vice Chairman Dwyer: We're talking about saying attorney's fees and costs may not be awarded in this section, unless the award for compensation and damages is equal or greater than the written offer. Are you suggesting that we write in something in legislation that the written offer should include attorney's fees?

Gaydos: I don't think that needs to be in there. What I would include at the end of the sentence would be '60 days prior to the start of trial.' We differ that. We heard 60 to 90 days, whichever the committee would prefer.

We've worked and done settlement agreements, those agreements may include attorney fees, interest, expert witness costs etc, sometimes they don't. The last thing is how many cases. Since 2010, we've had quite a few projects, we only went to court 6 times. I think the present system does work somewhat good and these improvements would be beneficial.

Senator Bakke: Are you okay with the \$15,000 on number 3?

Gaydos: Yes, I am.

(47:00) Dale Neislager, Basin Electric Power Cooperative

Neislager: We really appreciate the reach out; we haven't had a lot of time to digest the bill. From electric utilities side, we are very affected by this as well. We have had situations where we have ended up through eminent domain, the landowner being awarded less than we offered, and we still pay attorney's fees on that. We can look at what you have as far as numbers, we can look at numbers. If you need information from us, we'd be happy to provide it. We're also affected by this and we'll do what we can.

Senator Luick: We're trying to get that balance, where the utilities, the government, the landowner going through the eminent domain process is treated fairly. I don't have a 401k. My property is my retirement, and there's a lot of people in the same situation I'm in. For someone to come in through the process of eminent domain and the process of fair market value; how does that fair market value get established? That's where I have a problem with this. That tangible property is no different than anybody else 401k sitting in a bank.

Senator Bakke: From what you heard, did this sound reasonable to you of what we were talking about and the wording on this?

Neislager: I can't give you an answer on that right now. Our legal counsel said they had some concerns about it, I haven't been able to sit down with them, but I'll be glad to do that, and get information back.

Vice Chairman Dwyer: Have you seen the document we are working from?

Neislager: Yes.

(49:55) Todd Kranda, North Dakota Petroleum Council

Kranda: We're still processing it and we are impacted as well under the eminent domain chapter. What you are changing here will impact our entities involved, we are still looking at the four points we got yesterday. We want to be a part of the conversation, I understand you haven't settled on anything yet, we want the opportunity to be in this discussion.

Senator Luick: Mr. Chairman, I was wondering if you had contacted any landowners or land groups.

Vice Chairman Dwyer: We circulated it to everyone we knew, hoping it would get forwarded on.

Senator Luick: This is one-sided.

Vice Chairman Dwyer: We're going to have to have another meeting next week to make sure it's fully vetted. I know that there are some that would like to keep the law the way we have it, even though the supreme court affirmed what you went through.

Wier: I have represented landowners in these situations. I can think of one case, it was in relation to a Federal Energy Regulatory Commission (FERC) case, they had granted the ability of an oil and gas company to come through the eastern side of the state and bring natural gas through in a pressurized line. My client was a farmer, landowners, in retirement age and felt his property was an investment and that the risks he ran of the pipeline under his property and the dangers that might present in the future, weren't being properly considered by this company coming through. He asked us, can we achieve better than what has been offered? We consulted the appraisers we knew, the information we had, the verdicts in the past and case law. We told them that there was a low chance to receive much better, let alone the fact he was looking for something about 10 times more than what was offered. We told him the current status of the law, this is six months after the Erickson case came down. We can fight this tooth and nail and do everything we can, and perhaps the jury will follow the verdict, perhaps it won't but there's very little risk to you, because the oil and gas company will have to pay your attorney's fees. It makes it difficult as an attorney to get your client to be reasonable. They're going to go through 18 months of frustration and their costs will be fronted, and it's very unlikely that we're going to achieve any kind of result, and it's a lot of money spent for what will likely be fruitless. We should do what we can to avoid those situations.

Senator Luick: Do you know Cash Holly? What would he say about this? 60-90 days, 100%, \$15,000.

Wier: Stephanie passed along an email of his. The email being related to that 14 day and I completely agree with those thoughts, that doesn't help anybody. Now you're going through everything I've just described. I've not been able to discuss with my client true negotiation until on the eve of trial. Two weeks sounds like a lot of time. In our world, that's right there and you've spent a lot of money up to that point. I agree with Cash. I wouldn't venture to

guess what he would say about the 6-90 days prior to trial. I'd imagine he'd agree with us, Chris and I. You spend some money, but you're doing so in your diligence, your discovery, you're exchanging, you're not expending all the money doing the travel and trial prep that is the most onerous of any litigation process. I don't know what he would say about the 100%. I'd venture to say he wouldn't agree to 140%. I'm not suggesting that either. I'd be telling my client, we're going to be getting at least 80% of what the gas company has offered you, it will never be less. I wouldn't be any help to my client at that point.

Senator Luick: That's why Senator Dwyer had recommended the 80%, if we stayed under that we could probably get the 100%, as far as the attorney's fees being included into the settlement.

Wier: sure, but damages and compensation don't include attorney's fees. When the jury awards damages and compensation, they're specifically instructed not to consider attorney's fees. That wouldn't be a part of that award calculation.

Vice Chairman Dwyer: I will redraft this to say, attorney's fees and costs may not be awarded under this section, unless the award for compensation and damages is equal or greater than the written offer submitted by the condemning authority, not less than 90 days prior to trial. We'll send it out to everybody that we have the email for, and see if this is something that works and go from there.

Vice Chairman Dwyer ends the discussion.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1207
3/25/2019
#34215 (15:05)

☒ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

Minutes:

2 Attachments

Chairman Dwyer begins calls the subcommittee to order on HB 1207. Committee members include Senator Dwyer, Chairman, Senator Bakke and Senator Luick.

(see attachment #1)

Vice Chairman Dwyer: We've had two long meetings. This is our most recent attempt to find a balance between the condemning entity being responsible and providing a reasonable offer to the landowner and the landowner who we want to reasonable and not take the condemning authority to court simply because they know they'll get their attorney's fees paid.

Pete Hanebutt, ND Farm Bureau

Hanebutt: A lot of cases are settled out of court, so you could be on the prevailing side. Maybe you didn't you have the judgement in your case because you settled out of court. Does that all mean the same thing?

Vice Chairman Dwyer: The language we're considering doesn't address that because it provides that if a landowner decides to go to court, he will get his attorney fees, or the court in its discretion may award attorney's fees if his award is greater than the written offer submitted prior to 90 days. It's not based on prevailing, winning or losing.

Hanebutt: judges have that discretion now?

Vice Chairman Dwyer: They do.

(see attachment #2)

Senator Bakke: I sent a copy of an email from Howard Swanson who does a lot of these types of cases in Grand Forks.

Vice Chairman Dwyer reads the testimony out loud to audience.

(4:20) Todd Kranda, ND Petroleum Counsel

Kranda: 90 days seems lengthy. I would urge pulling it back a bit. Scheduling orders come out through the court at telling you when you have to do things. You're doing internal preparation work, but you don't have any formal completion requirements for the most part. Discovery and deadlines for disclosure of experts get a little closer in, so I think the 90 day is still quite a way out. 60 days would be better. I agree that the negotiation portion where you settle out of court isn't impacted by this, but when I was involved in this, that was part of the negotiation settlement. We also discussed other things such as compensation for lawyers and things like that. That's not in the bill, and I think that's clarified.

Vice Chairman Dwyer: There would be nothing to prevent parties settling and paying attorney's fees or a portion of them in a settlement.

Kranda: Absolutely. When you're at the table, some of that comes up as part of the damages that they've incurred to that point. This statute doesn't cover that; that's all negotiated, and you run into something where you'd resolve it whether that's the cost that they want to include as part of their damages as well. That's taken into consideration.

Vice Chairman Dwyer: This would not change that.

Kranda: No, it doesn't.

(6:50) Tami Norgard, Vogel Law Firm

Norgard: I represent a number of water entities across the state and worked with a number of landowners on projects. I started this initiative that lead to this bill because of some experience with different clients. I think the amendment is great. You're addressing to this bill and what I was seeing. I want to compliment this amendment. Subsection 3 is great to address the rural water projects where there's really not much value being taken. I would emphasize that I think we need to have some kind of a back check on the landowners that want to fight and go to trial as a matter of principle. Garrison Diversion received a request saying they want the names and addresses of every landowner being impacted on the 133-mile alignment of the pipeline, and that's really what has inspired us to be here. There has to be some level of reasonableness, and I think the way you've drafted it, it absolutely protects landowners because it gives them an opportunity to think about if it's a reasonable value. If they're not being treated appropriately, if the contemnor is off-base on the value, they

absolutely get their attorney's fees paid in this case. It's safeguarding the state money in terms of the cost share that you're paying on some of these big projects. It's a great amendment, and I urge that you pass it.

Vice Chairman Dwyer: Do you have any comment the 60 versus 90 days?

Norgard: Our initial draft said we'd like to see the date as right before you go to condemnation. We looked at what Minnesota did. The reason is because some of the entities that I worked with, they put their best offer out there before they started condemnation. Then the deposit that they put in the court would be just the appraised value typically, which was usually far less than what was being offered. I thought that would be a good time because it's before the condemning entity spends a lot of money on litigation, and it's before the landowner has to. Howard Swanson had concerns because of the way the DOT does their projects; they don't have a formal, big appraisal that early on in the process. They don't do that until litigation starts. I've worked with a lot of landowners out in McKenzie and Williams County on DOT projects, and I know they negotiate before they go to condemnation, but they maybe don't have that formal appraisal before condemnation. I would agree with Mr. Kranda that when you're looking at the court's scheduling order, you want to make sure there's time to make both sides' appraisals in. When I'm an attorney on either side, I want to get the other side's appraisal so I can look through it, find out their weaknesses and have my appraiser look at their appraisal to figure out what makes sense to counsel my client. I can see that the 60 days would make more sense than the 90 days. You also don't want to have people spending a ton of money and all of a sudden get this nice offer from the condemnor. I will also point out that I think clients that I work with usually, if the landowner is saying they have \$7,000 in attorney's fees, then usually the condemnor is saying they can take care of that depending on where you are in the process. If it's early on, \$750; if it's during litigation, and they have \$7,000, then maybe they'll take care of it. I don't see that changing based on any of these amendments that we've been talking about. I think the condemnors want to make the landowners happy and have good relationships with them. They're trying to treat people fairly and uniformly along that alignment. I don't expect that that would change.

Vice Chairman Dwyer: Not Quick Take, but if you file a condemnation action, it could be several months before you actually have a trial, correct?

Norgard: Definitely. With clients that I have that don't have Quick Take, I usually tell them they can expect at least 18 months. If you're going to have someone that will be fighting, you're not necessarily going to get that property for 18 months because you have the whole condemnation process and trial, and then you have the appeal process. The earliest you're going to get through that is going to be 18 months.

Vice Chairman Dwyer: The real work of preparing for a trial and hiring experts happens within 60 days prior to trial.

Norgard: Right because it's usually it's a good 30-45 days before you even go to court to get a scheduling order. You don't actually dig in for a while. I think that's where the 60 days makes sense to me.

(13:05) Mark Gaydos, ND DOT

Gaydos: We support the 60 days.

Vice Chairman Dwyer: I feel this is balanced.

Senator Bakke: I motion to change the “ninety” to “sixty” days and accept the amendments to propose to the full committee.

Senator Luick: Seconds.

A Roll Call Vote Was Taken: 3 yeas, 0 nays, 0 absent. Motion carries.

Vice Chairman Dwyer: I will bring this up to legislative council to get it properly drafted.

Vice Chairman Dwyer ends subcommittee discussion on HB 1207.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1207
3/27/2019
#34263 (19:35)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

Minutes:

1 Attachment

Chair Larson begins discussion on HB 1207.

(see attachment #1)

Vice Chairman Dwyer: The subcommittee met three times. This is what we developed. If you look towards the bottom of the amendments, essentially it is trying to find a balance between the landowners and the entities that are acquiring easements for pipelines, drainages or whatever it might be. While the court can award reasonable attorney's fees and costs, that part doesn't change, but this puts in a limitation that the award for compensation and damages is greater than the written offer of settlements submitted by the condemning authority at least sixty days before trial. We tried to find a balance between providing incentive for the condemning authority to make a reasonable, good offer, and at the same time, for the landowner to be reasonable in not saying no simply because he knew he was going to get attorney's fees paid. The written offer that is submitted sixty days before trial, if the landowner still wants to proceed and go to court, if he gets a dollar more than what the entity offered, then the court in its discretion can pay for the landowner's attorney's fees. The limit is \$15,000. That was included because that's the small claims court limit. If you have a case of any kind and you don't want to hire a lawyer, you can just go to small claims court. So long as the action is less than \$15,000, you can access small claims court and make your case. If we're dealing with rural water systems where the easements are \$200 or \$500, they would not get their attorney's fees paid if they refuse to sign an easement up to \$15,000. In number 3, if by some reason a condemning authority tries to take land and turns out it's not for public use, the landowner gets attorney's fees. That's what we came up with in trying to find that balance.

Chair Larson: If they try to take the land, but in court they find out they couldn't because it's not for public use, then they get their attorney's fees paid?

Vice Chairman Dwyer: Yes. You can't use condemnation unless it's for public use. The landowner can argue it's not for public use if it's for a single landowner who wants to build a pipeline across someone's land for a livestock tank is not public use. Obviously, interstate 94 is public use.

Senator Myrdal: As the originally bill came to us, I was strongly in opposition. How does this improve the landowner's rights? To me, it didn't in the original bill.

Vice Chairman Dwyer: I wouldn't say that this improves the landowner's position. If you recall the testimony, the offer was made for \$100,000. The court awarded \$48,000, but the condemning authority had to pay the attorney's fees for both sides which exceeded \$100,000. It's trying to find that balance making both the condemning authority responsible and the landowner responsible, but I wouldn't say that it improves the landowner's position.

Chair Larson: I had circled on lines 13-15 the word "defendant" because there was some question that it may not be a defendant. Do you remember what the issue was with that?

Vice Chairman Dwyer: I don't. Generally, the condemning authority is the plaintiff, and the landowner is the defendant. The last part of the current law talks about the appeals.

(7:05) Joseph Jensen, UND Law Intern, neutral party

Jensen: The reason it's listed as "defendant" in this particular section is because this entire chapter of the century code uses that language for the person whose land was taken by the government. If you change it to something like "landowner", then for consistency sake, you might have to do it throughout that entire chapter otherwise the courts would have to treat it differently because they're using a different term.

Chair Larson: Tami Norgard mentioned it in her testimony.

Vice Chairman Dwyer: Like Joe says, we can't do it.

Chair Larson: Your subcommittee worked with others to talk to about this?

Vice Chairman Dwyer: We had a room full of attorneys and lobbyists representing different groups that need to get easements for rural water, utility lines or whatever it may be. Farm Bureau attended the last meeting and indicated that they were fine with what we were doing, but I think some landowner groups since have indicated that they're concerned about it.

Chair Larson: You felt like this was the best solution you could come up with?

Vice Chairman Dwyer: Over the three meetings, it was trying to find that balance. It's not the landowners that are necessarily the problem in terms of being unreasonable; it's the ambulance-chasing attorneys that are trying to get landowners to not settle so that they can go to court because they know that they'll get their attorney's fees paid by the condemning authority. That was the purpose of the bill, and this is the balance that we thought would work. The subcommittee did vote 3-0 to submit this to the full committee, and I also talked to Senator Hogue for his view.

**Vice Chairman Dwyer: Motions to adopt Amendment 19.0299.02001.
Senator Myrdal: Seconds.**

Senator Luick: We do have a problem. It's not necessarily the landowners or the condemnor. It's the in between that is the issue with this bill. I think these amendments do make this bill better; however, the process of eminent domain is not supposed to be a simple process. We have the right of our property in this state, and that's the concerning part to me. The language in this new amendment doesn't address the problem that we were initially looking at. Yes, we're going to make this easier for the condemnor and but more problematic for the person that's losing their property. I think the amendments do make this a better bill, but I still can't support the bill. More agriculture industry groups have come forward and shown some interest in this that were not aware of before, and they are not supportive of this at all.

Chair Larson: You still support the amendments but not the bill.

Senator Luick: Correct.

Senator Bakke: We worked very hard on trying to come up with a compromise. Should we add a study of this whole issue?

Vice Chairman Dwyer: I don't know that we need to have a study. If the bill passes, this will be the system and go to conference committee. If this bill doesn't pass, the entities that need to acquire right of way for pipelines, water and so forth can work with farm groups and come up with a plan for next session.

Senator Lemm: It's hard to know the full background because it's new, but landowner rights are very important to me. As a kid, I remember my dad going through condemnation proceeding when they were trying to build the interstate through our farm. That's my only experience with it, and I'm not sure how I'll vote.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent. Amendment is adopted.

Senator Luick: Can Senator Lemm vote before he's sworn in?

Senator Lemm: Yes, I've signed the oath of office.

**Senator Bakke: Motions for a Do Pass as Amended.
Vice Chairman Dwyer: Seconds.**

(16:20) Senator Luick: I stand opposed simply because the process shouldn't be an easy one, especially for the government to be taking property for public use. There is an inherent right to property if you own it, and if it is absolutely needed for public use, great; then it should be done. I don't think we are addressing the problem here. We are making it easier for that process to go through, but we are not addressing the true problem.

Chair Larson: I applaud the committee for struggling for with such a difficult issue. I think we all like property rights, but we don't like that there are attorneys out there looking at this as a

way of making a profit to line their pockets. I don't know that this bill really gets to the heart of all of that. We also want to be able to have some public access to things. It is a difficult balance; maybe one that we're not going to be able to complete this year.

A Roll Call Vote Was Taken: 2 yeas, 4 nays, 0 absent. Motion fails.

Senator Luick: Do Not Pass as Amended.

Senator Myrdal: Seconds.

A Roll Call Vote Was Taken: 4 yeas, 2 nays, 0 absent. Motion carries.

Senator Bakke: I think Senator Luick is right. This isn't solving the problem but rather the first step. I think more work needs to be done on this issue to fix it, but I don't know what the fix is.

Chair Larson: Perhaps this is one of those that overturns on the floor. You may want to be ready with both sides of the argument.

Senator Luick will carry the bill.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1207
4/2/2019
#34434 (1:06:42)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

Minutes:

2 Attachments

Chair Larson begins discussion on HB 1207.

Chair Larson: We were asked to bring this bill back because there was some information that was given to the subcommittee that we didn't all get. Vice Chairman Dwyer asked to bring this back so we could get some additional information.

Vice Chairman Dwyer: I provided the Christmas version (**see attachment #1**). It's a little easier to work from this. Page 1 line 8, the words "in its discretion" is overstruck, and that's a mistake. If we were to reconsider, that overstruck should be removed. Senator Myrdal asked if this would provide greater protection for landowners. My answer was I can't say that it provides greater protection for landowners, but if you look on line 16, if you said "unless the award for compensation and damages is greater than..." Currently it's "written offer". If you wanted to provide greater protection for the landowner, you can use a percentage such as 75% of the written offer of settlement. It would provide greater protection for the landowner. In the Cass County case, the condemning authority offered \$110,000 and wasn't satisfied, so they went to court, and the court awarded around \$50,000. He got his \$50,000, but then the court awarded attorney's fees for him as well. If you used a percentage, you'd be providing greater protection for the landowner because the burden on him wouldn't be quite so great. If you said 75% and the condemning authority offered \$100,000, he went to court, and the court offered \$76,000, that would be 76%. The court in its discretion could award attorney's fees in that case, so you'd be providing greater protection for the landowner while still accomplishing the other things that we're trying to accomplish.

(6:05) Chris McShane, Twichell attorney in West Fargo

McShane: We represent a variety of condemning authorities and also landowners in eminent domain actions. More than half of my practice is eminent domain. I was the attorney for the condemning authority in the case that has been referenced, the Erickson case. In that case,

the offer of settlement was \$150,000 and the ultimate award was \$48,200 to the landowner. That was the same offer of settlement as had been made more than 2 years prior to trial, which had been made more than a year prior to even starting an eminent domain action. That \$150,000 offer was actually made in this case before an eminent domain action started. Throughout this process, my clients get an appraisal because they have to go to an expert to figure out what a property is worth. The courts in ND have said that the calculation of just compensation in eminent domain is based upon fair market value. Fair market value is determined in the court system and ND law based upon an appraisal because a condemning authority can't have one of the board members come in and say it's worth x because it's worth x and I say it's worth x. They have to have an outside expert come in and do that. We had an appraisal done, and it came in at \$48,200. The landowners were offered \$48,200 in February 2015. The landowners responded seeking \$380,000 in March 2015. It made my client go back to the drawing board wondering where we went wrong and consider an offer that would be higher in an effort to avoid the cost of eminent domain.

I have a letter from that case that I can provide (**see attachment #2**). This is a letter from the land agent for my client. This is a letter to the Ericksons. I would direct your attention as a committee to the last paragraph. This letter is dated February of 2016, a year after the initial offer was made, and was an attempt to settle. I direct your attention to the last paragraph which says, "In an interest of reaching a voluntary settlement and to avoid costs incurred by both parties in an eminent domain action, CCJWRD does offer \$150,000 to purchase both lots". These are two lots where the landowner had made a demand of the city of Oxbow that they buy these lots because they were falling in the river following the flood of 2009 and 2011 saying that his lots were experiencing slumping, and that cause a question as to the value of his property. When it's convenient for him thinking he might get a buyout to get him out of the liability, he recognizes that there are damages. When it's inconvenient for him such as when an appraisal comes in claiming liabilities of the property, he does not agree.

Chair Larson: I would rather you not talk about a particular person who is not here. Just give us the facts instead of arguing this case because we're not the jury.

McShane: The landowner here made a counter offer of \$380,000. The condemning authority made an offer of \$150,000. Following that offer of settlement, the landowner didn't negotiate further, and as a result of that, an eminent domain action had to be started to acquire the property. Throughout the eminent domain action, both sides got to provide testimony as to the value. The landowner's request for compensation actually went up because they hired an appraiser that was not familiar with the market. The judge said in two different opinions that the appraiser was not credible because he lacked experience in the market and used the wrong type of comparable sales, and therefore the judge awarded the landowner \$48,200- the exact amount of the offer to begin the negotiation process. As soon as that judgement was entered, the landowner, through his attorneys, requested attorney's fees and costs. Those attorney's fees and costs were \$125,000, so the landowner in this case had expended \$125,000 to ultimately recover \$100,000 less than what was offered before an eminent domain action had started, an offer that was made to avoid those costs. The judge awarded the \$125,000.

The landowner ultimately appealed the award of just compensation saying the \$48,200 is not correct, took that to the supreme court, and as it was already going to the supreme court, my clients decided to cross appeal because there were virtually no costs

involved. They cross appealed saying there is the case Bismarck versus Thom that said that you needed to have at least exceeded the offer of settlement to recover attorney's fees and costs. The supreme court overruled Bismarck v. Thom and said there is no threshold to reach where attorney's fees and costs are eligible for a landowner. This effort to define whether there's a threshold for attorney's fees and costs has been ongoing for quite some time.

Some of my other clients following the Erickson case, such as the Barnes County Water Resource District, settled a case knowing that the courts likely will award attorney's fees and costs. So my clients in Barnes County settled a case for \$369 for an acre and a half flowage easement over property that was already wet. In addition to that, they ended up paying \$17,000 of attorney's fees because they know that with the Erickson case out there, there is a substantial likelihood that they will end up paying the attorney's fees for that landowner. Another client was the Dickey County Water Resource District. They settled a matter and agreed to pay the attorney's fees and costs to the landowner knowing that there was a high likelihood that they would be forced to do so anyway, despite the fact that that settlement was roughly the amount that was initially offered.

The current status of the law where the landowner is substantially likely based upon the Erickson case and how the district courts have viewed that case, the law as it stands is causing several different impacts. One impact I hear from my clients is we don't feel it helpful for us to make an offer of settlement because there's no incentive to do so. Our clients are going to be forced to pay the attorney's fees and costs of the opposing party even if a very reasonable and generous offer of settlement is made. The landowner would still be entitled to their attorney's fees and costs in that situation, so our clients are not making offers of settlement that are as generous as they were before the Erickson case. The other impact is that once we do get into an eminent domain case, our clients are general settling these cases by paying considerably more for the property for people that have refused to agree to sell their right of way and instead forced eminent domain. For that, the cost of acquiring the right of way has gone up considerably.

The unfortunate part about that is that those costs are not being paid necessarily to the landowners. In the Barnes case, the landowner received \$150 more than was offered while his attorney received \$17,000 more. The districts that are funding those projects are incurring a far greater expense, but those expenses are not going to the landowners; they're going to attorneys and appraisers. Unfortunately, that landowner and his neighbors and all the other neighbors that own land within that district have to pay for that. Those projects are becoming extremely expensive, and it is becoming more difficult for our clients to actually engage in a project because of the expense of acquiring right of way. The impact here, in the case of the Erickson's, is paying \$48,000 for the right of way plus an additional \$144,000 paid to the attorneys and their appraiser. By quadrupling the cost of acquiring that right of way, it makes a project unsustainable.

(17:35) Senator Luick: Was there a fair market value statement on the Erickson property? What was the fair market value per acre?

McShane: In the Erickson case, it was two lots that had been platted. It was within the city of Oxbow, and I couldn't tell you how many acres it was. The initial intention was to use those for residential purposes. Approximately it was an acre and a half between the two of them. That was platted property that had access to a paved road, sewer and water. Those were lots that were purchased before the 2009 flood for \$150,000. The 2009 flood came, and every property in Oxbow had water on it, and since 2009, virtually no properties had sold. With that,

the value had gone down considerably, but my clients recognized that these people had paid \$150,000 for these lots and offered to make them whole by paying them \$150,000 in the settlement.

Senator Luick: They may have paid that much for those lots, but then there's specials and other things that go right along with that. The value of that property wouldn't have decreased if the problems that were created by the diversion project to move out there. 200-500 feet away from that, you paid \$25,000 an acre for that acquired property. That wasn't eminent domain; that was an offer, so I would think that the value of that property that you're talking about, the Erickson case, has nothing to do with eminent domain fair market value. You had him over a barrel, and that's where they had to end up. We can't make law on just one case; it has to be something more substantial that's going on across the country. I understand that there are people that take advantage of this, but eminent domain is not supposed to be a simple task for anybody. I don't think you're proving any case here by saying that these individuals rate somebody over the coals, and your law firm and you won by that. The landowners certainly didn't.

McShane: I agree. The landowners did not win in this situation. The landowners presumably were told your attorney's fees and costs will be awarded. I know after the Erickson case when I advise landowners, I tell them that based upon the Erickson case, it is highly unlikely that you will be out of pocket for your attorney's fees and costs. As a result of that, they turn down \$150,000 offer. They actually went backwards by \$100,000 based upon the assumption and understanding that their attorney's fees and costs will be paid for, so they had no risk.

The way we had identified this in briefing to the court is the landowners were in a situation of flip of a coin. Heads you win and get \$480,000, which was the appraised amount based upon their appraisal from their expert out of Minneapolis who had no experience in ND. Tails you break even, which is you're not out of pocket for your attorney's fees and costs expenses. The law before the Erickson case based upon Bismarck v. Thom was that that was not correct. You had a threshold. The supreme court went back and changed that, and this bill is to get us back to the Bismarck v. Thom position that you have to have a threshold.

You can't as a landowner have an unrealistic expectation that even if you push forward with a case where there's a substantial risk that the condemning authority is correct with how much this property is actually worth, you can force the project to go through the process. It's a very difficult and long process, a process put in place to make sure that property owners get what they are owed. The term is "just compensation" and that is the goal of the entire eminent domain process, to provide just compensation for those land owners. But for a land owner to seek more than just compensation and put that burden back on either the tax payers that are funding the project or a special assessment district that is put in place to fund a particular project. Now by seeking to get more than what was just out of the project, you're costing the project, your neighbors and fellow taxpayers of ND more for that.

Senator Luick: Let's say there's a big development in a strip mall with a beautiful connecting interstate area. Is that property there fair market value of what the land a little further away is? That's prime property because it is the necessity or desire to build that strip mall on that corner.

Chair Larson: I don't think eminent domain can be used for a private business.

Senator Luick: What I'm after here is the valuation of property. In an eminent domain situation, when somebody is trying to determine the valuation of that property, there is many different things that need to be taken into account on those things. If I'm the owner of that property, and you want it for a pipeline project, why is it that public control tells me that I have to sell that to you at fair market value? Why shouldn't I have the support of being able to negotiate and come up with a more expensive cost? I should have the right to do that. Eminent domain in many of these cases may be the scourge of a lot of things that it shouldn't be. I think that that negotiating right should stay there with that property owner. The cost of the attorney's, that's an entirely separate deal, but this bill takes away that negotiating right of a property owner having to have that property taking away from him or used for the benefit of the public without the proper compensation.

McShane: You are correct. The issue of just compensation and how that's calculated and ultimately paid to the landowner and the attorney's fees are two separate issues. This bill is purely an attorney's fees and costs issue. I don't begrudge a landowner for negotiating; I expect and want them to negotiate. I want them to get what is just compensation for their property. The evidence and testimony that was before the court in the Erickson case was that the landowners had an attorney write a letter to the city of Oxbow saying, "my property is slumping and has questionable value". Their appraiser has never been told that. You have a landowner that is trying to game the system by jacking up the price that they are seeking for their property by not providing the information to their own appraiser.

Senator Luick: The \$25,000 per acre property, was that before or after this Erickson case?

McShane: I believe the property you're talking about is a farm field. It was the balance of a quarter section that was located south of the city of Oxbow. That was purchased by the city of Oxbow and not part of an eminent domain action. It couldn't have been because there was no eminent domain authority. That was done before the Erickson property was acquired. The Erickson's were ultimately paid more per acre than the people who sold their property to the city of Oxbow. At \$48,200 for two residential lots that were less than an acre a piece...

Senator Luick: That's why I was asking how big those lots were.

McShane: I don't know the exact acreage, but I know that they were less than an acre a piece, and most of the square footage of those lots was under water.

Senator Luick: That particular case doesn't really have much to do with the bill because it's just one example. I think that that landowner still has the right to do whatever they can to get what they can out of their own property.

McShane: I don't bring this forth as just a single example. I mentioned three other eminent domain cases that I've personally been involved with. I'm also aware of other cases. Excel energy had a project in Minot where they actually won the case based on summary judgement by saying the landowner has been objecting to the whole process but doesn't come forward with a value. In that situation, the landowner is seeking \$60,000 with no trial involved. Under the Erickson case, their eligible to receive \$60,000 for losing even before a trial. I'm aware of city cases, water resource district cases and many situations where that is the case. I don't begrudge a landowner, and I don't want this bill, however it comes out of the

legislature, to chill good faith negotiations by a landowner. I want to make sure that the committee understands that if the threshold is met, whatever that threshold may be, then the landowner is in the situation to recover attorney's fees and costs. Attorney's fees and costs are calculated based upon case law right now based upon a "lodestar factor" which is identifying how many hours it was necessary for a landowner's attorney to spend on the case versus a normal hourly rate.

I have recovered that in an eminent domain action on behalf of a landowner. I was actually working against Ms. Norgard where her client had an appraisal and was unwilling to revise that appraisal for current property values. The jury came back awarding more than the offer that was initially made. We went to the district court based upon 32-15-22 saying we prevailed and got more than what was offered, and our attorney's fees and costs should be paid based upon this lodestar standard- number of hours worked and the hourly rate. The condemning authority did not object to the number of hours I had worked or the rate that was being charged, but they did object to our appraiser because our appraiser didn't do the greatest job. However, the landowner's attorney's fees and most of his costs were paid. I don't want this bill to limit that in any way.

What was suggested as a 75% threshold, as long as we're in the trial process and this is an offer being made in preparation for trial, that percentage is okay. We talked about the threshold being the initial offer and a percentage of that initial offer. That's not workable because it does not allow for a condemning authority to gain information from a property owner. An appraisal is made, and there is a requirement by the federal relocation act to make an offer at that appraised amount. Eminent domain is not purely for the benefit of the landowner. It's to allow for public projects to acquire land without being put in a position where they have to pay too much for it because we as the public have to pay for the acquisition of that right of way when it is a public project.

There is a balance of protecting the tax payer while at the same time protecting the landowner, that they receive just compensation for their property. I think that that's a separate argument as to how you calculate what just compensation is. The goal of this bill is to protect one of those two competing principles in eminent domain. By doing that, it's protecting the tax payer and public projects but really not to the detriment of a landowner because if a landowner is reasonable in their negotiation process, then their attorney's fees and costs will be paid.

Senator Luick: In the process of the city of Oxbow buying that land for \$25,000 an acre, who do you think fronted the bill for that? That precedence and value of that property was set at that time. They didn't need to use eminent domain because they paid \$25,000 an acre for that property. We the tax payers and the legislatures initiated that.

Chair Larson: Let's try to limit our discussion instead continuing to refer to one case. Let's talk about policy. I understand using a case as an example, but let's move on.

(36:30) Tami Norgard, Fargo Vogel Law Firm attorney

Norgard: I had a hand in initially proposing this bill probably two years ago. This has nothing to do with the Erickson case. I think it's great you have it as a case study to hit these policy points, but I started seeing this when I was working with Western Area Water Supply on some eminent domain matters. I've been up to the supreme court with Minnkota Power on a big

power line from Bismarck center to Grand Forks, and that's one of the cases that I had against Chris when he represented a landowner. When working with Garrison Diversion, I've been in supreme court with Minnkota. I've represented a lot of water boards across the state and also a number of landowners. My family farms in western ND and has for years. I understand the landowner perspective.

The reason I proposed this is because I would see examples such as rural water pipelines. You have a two-inch water pipeline that gets trenched in. The appraisers, when they're saying here's a 40-acre parcel with a water pipeline and here's a 40-acre parcel without, they look at paired comparable to find out the difference in value, and that difference is the value of the easement. That's supposed to make the landowner whole because that's the goal. I talked to four appraisers, and they said there's not much of a difference in the land value when there's water pipeline under these properties. If you're going to go to trial on a two-inch water pipeline crossing a half-mile of land, it's a nominal value. I think that the going value offered by laws before condemnation would be \$250 an acre, so maybe \$750 to cross a half-mile. Yet that same case can go to trial and the attorneys on the landowner side can have \$60-80,000 in attorney's fees. At the same time, I would be incurring \$60,000 in attorney's fees to fight it on behalf of the public entity.

There's a huge fight about how much money the state has and how much should be invested when we're looking at cost share percentages, and the question is how much of that cost share money do you want to go to attorneys? It's not that the landowners are getting much more money, but the attorneys are getting a lot. This issue is not about treating landowners fairly; if anything, sometimes it's for the landowner's protection. If the landowner is looking at an offer for \$150,000, and you have an appraiser that's gone through it and said look at the comparable- this isn't a buildable lot, and you've had problems slumping. If the Minneapolis appraiser used comparable of buildable lots, which they did in that case so they're not really comparable, and the attorney is saying, "what do we have to lose, I get my attorney's fees paid. Let's go to trial", the landowner may just listen to their attorney and not get that much more than what legitimately should be fair market value because a jury is charged to determine fair market value, not give the landowner windfall.

The concern is you have to make the landowner whole, but there's not a requirement to give the landowner a windfall in these situations. I've seen a lot of payments going to attorneys on cases where I think the offers to the landowners have been very fair and reasonable. In my experience, I'm seeing condemning authorities being very reasonable to landowners and trying to be very fair up front. I don't think this bill has any impact on the motivation for a government entity to engage in negotiation. Right now there is no entitlement to attorney's fees until litigation starts. Yet numerous condemning authorities are paying for attorney's fees, and the reason they're doing it is land owner relations and a positive perception of the project. They're not coming in trying to nickel and dime people; they're being fair.

I have also been a part of a case where the condemning authority did have the wrong vision of what that property should be used for, so there was more of a commercial influence as opposed to an agriculture influence. It was established by appraisers that the condemning authority did not use the right basis for their valuation. Once they determined that, they settled it. Once the appraisals came in, they realized it should be more and settled it and paid more. I point that out to show that if the condemning authority is wrong in how they're valuing the property, the landowner still gets compensated.

Vice Chairman Dwyer: We had a lot of discussion about just compensation about attorney's fees. What we tried to do in subcommittee was find a balance between landowner achieving what he thinks is fair and the condemning authority not having to go beyond in terms of cost to the tax payer. Let's assume that everyone is acting in good faith. Landowners know they can get their attorney's fees, so it gives them more leverage in negotiating. If he doesn't believe he's going to get his attorney's fees, he's got less leverage because he doesn't want to incur \$17,000 in fees and have to pay that himself by negotiating. If the eminent domain system is broken because condemning authorities are having to pay attorney's fees for both sides and costing tax payers money, we're trying to fix that. However, at the same time, we don't want to take away leverage or negotiating ability of a landowner. Do we achieve that with this bill, or are we taking away the ability of a landowner to fairly negotiate?

Norgard: I think you're still protecting the landowner. The big picture is what do you want to accomplish? Do you want the landowners to be made whole or be able to hold the governmental entity hostage to the point that the government entity has to overpay for everything? You mentioned the 75% before you're entitled to attorney's fees. On the surface, that's a good idea and it would accomplish what you're looking for. My concern about that is, right now, state law says we're making people whole, and they should be compensated for fair market value. I almost think this changes that definition. You're essentially going to have the governmental entities having to pay 125% to avoid the attorney's fees, so the entities are suddenly going to have to offer a lot more up front in order to avoid that. I think it skews the definition of fair market value in what you really have to offer. I think 75% might be low depending on your perspective.

One thing you could look at is in line 15. I talked to Senators and one said, "I don't like to see one case come down and try to change the law because of it". I think that's what the perception is with the Erickson case, which is why I'm bring up my history that I started this two years ago, long before the Erickson case, and it's far more wide-ranging than that case. That senator said, "I don't like to take the judge's discretion away". Line 15 you can say, "the court may not in its discretion" or "may use its discretion to deny an award of attorney's fees if". So it still keeps that discretionary element and gives more power to the landowner. That will keep more leverage on the landowner's side without imposing an obligation for the governmental entities to overpay.

With the Garrison Diversion Red River Valley water supply project, we're talking about 133 miles of buried water pipeline. We had an open records request from an attorney that does a lot of eminent domain land owner work asking for names and address of every landowner that's along this alignment, so it's like setting up the business plan, ready to get the associates turning on eminent domain files. Especially in these big cases where you have one consistent pipeline, typically these project owners offer a value to these landowners because you have to be fair to everyone. You can't offer one person \$1,000 an acre and another \$10,000 to award them for holding out. Usually the approach of the governmental entity is to pay everyone consistently, and they'll have their right of way agent say, "If we change the value and pay more, we're going to come back and pay you more". That often happens.

If the landowner won't accept the consistent value, unless they can prove that there's a higher value, the project isn't going to want to be negotiating with every landowner and rewarding some for holding out, so they have to take them to trial. The lawyers are going to have a cottage industry for the next 10 years representing these landowners on this project. It's more work for me, but the budget that we're fighting over in SB 2020 and the cost share

components, I don't think you want that money to be going to me and other attorneys. You want that money to be going to the projects, and that's why I started this initiative.

Senator Luick: You mentioned the landowner's windfall, so all we have to do is take all these attorneys out of the picture entirely.

Norgard: There might be some truth to that sadly.

(52:10) Amy Shelton, Executive Director of the Northwest Landowners Association, testifies in opposition

Shelton: Northwest Landowners Association represents over 525 farmers, ranchers and property owners in ND. It's a nonprofit organization, and I am not a paid lobbyist. We're opposed to this bill.

(52:55) Derrick Braaten, Bismarck Braaten Law Firm attorney, testifies in opposition

Braaten: I represent only landowners. We do not represent condemning authorities. My law practice is primarily agricultural law and energy law on behalf of farmers, ranchers and other landowners. The law as it stands allows attorney's fees in the discretion of the trial court judge. That judge has the discretion to award attorney's fees, reduce the fees or offer no fees. There are standards used in all cases. What they look at is the result obtained, and that's all we've been talking about. They also look at the customary fee charged in the locality and the ability and skill of the attorney. They weight these different factors together in determining whether or not to award attorney's fees. There is a philosophy in ND that you have landowners who are faced with a taking of their land by the government, many of whom don't want to give up their land for a public project even if they agree that it's a good project. That's their land being taken from them, and it's salt in the wound to tell them on top of that, you're going to need to pay for an attorney to defend you because this condemning authority has an attorney on retainer, and they're going to use an attorney to take that land.

I would encourage everyone to read the opinion from the supreme court. One of the things they said is that the plain language of our statute does not limit the authority of the court to award costs and attorney's fees only to cases in which the award is greater than the offer. They were clarifying and making clear that that was their position. They said, "to the extent it can be read to require that, we overrule it" in the Thom case. The court said the Erickson's were required to incur additional costs because the district commissioned the Bar report. An average knowledgeable buyer would not have commissioned that type of report in the process of acquiring the property. Their additional costs, because the district commissioned that report, included attorney's fees necessary for counsel to be knowledgeable about geotechnical reports and the hiring of an engineer to analyze the report. The court also found the case was more complex than the court anticipated because of the large discrepancy in the alleged value of the properties and the Bar report commissioned by the district. The court found the amount of time Erickson's counsel spent on the case was reasonable due to the complexity. My point is that was one case and an outlier. We should think about policy as a whole for eminent domain actions. The law gives the court discretion. The judges are going to take all of these different issues into consideration when they're making that decision.

Vice Chairman Dwyer: Let's get to the issue of finding a balance. Are you the attorney that requested the names of all the landowners on the Red River Valley Water Supply route?

Braaten: I don't think so, but I may have several years ago. Our firm regularly makes use of open records requests to look in to projects when we receive calls on them. It is possible I did that.

Vice Chairman Dwyer: My concern on the part of entities that are trying to build projects is that attorneys are making this a cottage industry. Can you speak to that?

Braaten: Yes, I can. With that project, the calls I received recently were from a gentleman that said they've been given easements for this project. He had 15-25 neighbors who were all interested in talking to an attorney.

With Dakota Access, our firm conducted a couple of meetings on pipeline issues. We represented over 10% of that line in terms of negotiations. In terms of a cottage industry, it was quite the contrary because in representing this landowner group for negotiating easements, we were able to share the expense among that entire group of landowners. It's not as if we had multiple different eminent domain actions that we were working, but instead we were conducting one negotiation on behalf of the entire group. Those attorney's fees were split among dozens of landowners and so much cheaper. Dakota Access appreciated it because they were able to wrap up negotiations of 10% of the easements on their entire line by talking to one person. We worked out an easement. There were eminent domain actions filed, but essentially, Dakota Access filed them to get a trial date. While that was happening, we had a very good relationship and negotiated an amicable resolution and easement. Everyone walked away happy, and in the end, all of the landowners we represented paid a fraction of the attorney's fees they would have paid had they been on their own because they were part of one group together. Yes, there are times when our firm represents groups, but to the contrary of a cottage industry, I make less money by doing that.

I would also say that I have had landowners on an individual level who are opposed to a taking. There was a comment earlier when someone said, "you'll have to take it from me". My response to that is does a landowner not have that option? Do they have to give their land away to a condemning authority if it's against their principles? I had a landowner who had a home quarter that's been in his family for over 100 years. He told the company that he won't grant any more easements on the home quarter, but he had 1,200 acres that he will give for free. He hired me because he wanted his day in court to say that. They took his land anyway. I don't think it's fair to that landowner to say he didn't get enough money for that because it wasn't about money to him. He was just saying as a matter of principle, he's not giving land on the home quarter. It's not fair to him to say he didn't hit a certain number and therefore isn't awarded attorney's fees.

That brings up a much larger issue and it's the reason I think the law as it is generally addresses this. I had one landowner who had a pipeline proposed on his land several years back. The easement being proposed allowed for multiple pipelines, and this company was going to use eminent domain to take the easement. Why should he have to give an easement for multiple pipelines? I told him that's the offer- you choose what you do. He went to court and was able to convince the court that the company is only getting authority from the public service commission for one pipeline, so they should only get authority and easement for one

pipeline. He won. Under this bill, he doesn't get his attorney's fees because apparently, he didn't get enough compensation, but it wasn't about the compensation.

Another landowner had a quarter section with a pipeline going through it. they said they wanted ingress and egress against all of his land and adjacent land to access their easement right of way. That means they can come across at any time they please to get to their pipeline right of way. He said that's not fair because you can access it from two points from a road; you shouldn't be able to drive across my soybean crop anytime you want to get to your right of way when you have these other access points. They didn't agree, and it went to court. Through briefing and argument, we convinced the court that the court needed to narrow the scope of the easement and judgement to make sure that they didn't have ingress and egress across his entire property; they only had what they needed to access their right of way. That had nothing to do with compensation. He didn't get more compensation than he offered because it wasn't about the compensation. I could give you more examples of issues like this where it's not about the compensation.

It shouldn't always be easy to use eminent domain. This is taking land from private property owners. We shouldn't do that lightly or make that decision lightly; it should be difficult to do that. We have a system that has been in place for decades. The courts have discretion. We may disagree with a couple of decisions made by a couple of trial judges- I know do. The point is, all in all, this system gives the judges in ND the discretion to award fees or not based on what they see in a particular case. Whether or not fees are awarded should be based on the case before that judge so that that judge can take into account the reasonableness of the landowner instead of simply applying a formula. It's not always about the amount of compensation, and we should leave the system as it stands now.

Chair Larson ends discussion on HB 1207.

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1207
4/2/2019
#34444 (12:27)

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

Minutes:

No Attachments

Chair Larson begins discussion on HB 1207.

Senator Luick: I don't believe we will garner any more information than what we have already heard today. The final two testifiers brought the points out about the property rights. I hope that we continue with the do not pass recommendation and look at this next session. There's obviously too many moving parts to this that we're not going to iron out in the next few days. I don't want a study; I don't think that's necessary. I think the people involved with this need to figure this out. There's information that needs to come to us. We shouldn't have to go out and try and excavate it ourselves.

Chair Larson: I would like to change my vote. As Senator Bakke mentioned earlier, this bill takes care of ambulance chasers, those who are looking for a way to make money by bringing lawsuits. It's creating problems. I agree that what this does is do more to limit what the litigators are able to try to sell to their clients.

Senator Luick: Motions to reconsider HB 1207.

Senator Bakke: Seconds.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent. The bill is reconsidered.

Senator Bakke: We're looking at this bill with the amendments that came out of our subcommittee. Those amendments are on the bill, correct?

Chair Larson: Correct.

Senator Luick: Motions for a Do Not Pass as Amended.

Senator Myrdal: Seconds.

Vice Chairman Dwyer: If you change your vote, it will be a 3 to 3 vote. If we are going to send it up, I'd like to further amend it in the event that it passes. I'd like to take out that overstrike over "in its discretion", take out lines 19-20 that limits the \$15,000, and add in "75% of". We should make it more favorable to the landowners.

Chair Larson: There was another one on line 15 after "the court" add "in its discretion may not award attorney's fees under this section" so it gives that court discretion again more clearly.

Senator Luick: Withdraws motion.

Senator Myrdal: Withdraws second.

(7:10) Senator Luick: We're opening it back up again. We don't have the information to push this forward at this time, and we are guessing at what the outcomes are going to be of this.

Vice Chairman Dwyer: If we want to let this be worked on for the next couple of years, we shouldn't even amend it at all and just send it up the way the House sent it to us with a do not pass. I have to vote for the subcommittee work, but if we didn't amend it, what the House sent to us is totally unworkable. We couldn't support that, and that would assure that all the attorneys and the landowners could work on this for the next couple years and come back with something that they think is workable. They could use our amendment as a starting point if they want.

Senator Bakke: I have no problem with that as long as we can put that responsibility on specific people to get this together because I don't want them to show up a month before the legislative session again and hand us garbage that we try to work through.

Senator Luick: That is exactly what my concerns are. We get started in the session and kill bills to work on them for the next two years. I don't want that either.

Senator Bakke: That's why I would like to see us be very intentional. A couple of us can make sure that we meet with some of those people and make sure we get them talking and working this through. We spent a lot of time on this.

Senator Luick: Motions to reconsider amendment 19.0299.02001.

Senator Myrdal: Seconds.

A Roll Call Vote Was Taken: 4 yeas, 2 nays, 0 absent. Amendment is removed.

Senator Myrdal: Motions for a Do Not Pass.

Senator Lemm: Seconds.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent. Motion carries.

Senator Luick will carry the bill.

House Bill 1207

Section 32-15-32. Costs.

1. Except as limited herein, the court may in its discretion award to a landowner reasonable attorney's fees and costs as provided by N.D.C.C 28-26-06 and 28-26-10, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal.
2. Attorney's fees and costs may not be awarded under this section unless the award for compensation and damages is greater than the written offer of settlement submitted by the condemning authority not less than ~~ninety~~ ^{Sixty} days prior to trial.
3. Attorney's fees may not be awarded under this section if the final award for compensation and damages does not exceed \$15,000. Note: \$15,000 is the statutory limit for actions in small claims court.
4. If the court determines that a taking is not for a public use or not lawful, the court shall award the property owner reasonable attorney's fees and statutory costs.

SK
1001
3/27

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1207

Page 1, line 7, after "~~The~~" insert:

"1. Except as otherwise provided in this section, the "

Page 1, line 7, remove the overstrike over "~~court may~~"

Page 1, line 7, remove the overstrike over "~~award~~"

Page 1, line 7, remove "~~For any judicial proceeding in which the defendant~~"

Page 1, line 8, remove "~~prevails, the court's award~~"

Page 1, line 8, overstrike "~~to the defendant~~"

Page 1, line 8, remove "~~is limited to~~"

Page 1, line 8, overstrike "~~reasonable actual or statutory costs or~~"

Page 1, line 9, overstrike "~~both,~~" and insert immediately thereafter "to a landowner reasonable attorney's fees and costs as provided in sections 28-26-06 and 28-26-10,"

Page 1, line 10, overstrike "~~, costs on appeal,~~"

Page 1, line 11, overstrike "~~and reasonable attorney's fees~~"

Page 1, line 11, after the period insert:

"2. The court may not award attorney's fees under this section:

a. Unless the award for compensation and damages is greater than the written offer of settlement submitted by the condemning authority at least sixty days before trial; or

b. If the final award for compensation and damages does not exceed fifteen thousand dollars.

3. If the court determines a taking is not for public use or is unlawful, the court shall award the property owner reasonable attorney's fees and statutory costs.

4."

Page 1, line 12, after the period insert:

"5."

Renumber accordingly

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1207**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

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 Senator Bakke Seconded By Senator Luick

Senators	Yes	No	Senators	Yes	No
Senator Dwyer	X		Senator Bakke	X	
Senator Luick	X				

Total (Yes) 3 No 0

Absent 0

Floor Assignment _____

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

**Hog House amendment to add language to give courts discretion in awarding
landowners reasonable attorney's fees and costs**

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1207**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 19.0299.02001

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 Vice Chairman Dwyer Seconded By Senator Myrdal

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Lemm	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

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

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1207**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

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 Senator Bakke Seconded By Vice Chairman Dwyer

Senators	Yes	No	Senators	Yes	No
Chair Larson		X	Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick		X			
Senator Myrdal		X			
Senator Lemm		X			

Total (Yes) 2 No 4

Absent 0

Floor Assignment _____

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

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1207**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

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 Senator Luick Seconded By Senator Myrdal

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke		X
Vice Chair Dwyer		X			
Senator Luick	X				
Senator Myrdal	X				
Senator Lemm	X				

Total (Yes) 4 No 2

Absent 0

Floor Assignment Senator Luick

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

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1207**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

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 Senator Luick Seconded By Senator Bakke

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Lemm	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

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

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1207**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 19.0299.02001

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

Other Actions: ☐ _____

Motion Made By Senator Luick Seconded By Senator Myrdal

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke		X
Vice Chair Dwyer		X			
Senator Luick	X				
Senator Myrdal	X				
Senator Lemm	X				

Total (Yes) 4 No 2

Absent 0

Floor Assignment _____

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

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1207**

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: _____

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

Other Actions: ☐ _____

Motion Made By Senator Myrdal Seconded By Senator Luick

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Lemm	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Luick

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

REPORT OF STANDING COMMITTEE

**HB 1207, as engrossed: Judiciary Committee (Sen. D. Larson, Chairman) recommends
DO NOT PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).**
Engrossed HB 1207 was placed on the Fourteenth order on the calendar.

2019 TESTIMONY

HB 1207

#1
HB1207
1-21-17
PJ1

Testimony to the Judiciary Committee
Chairman Koppelman
House Bill 1207

Good Morning Chairman Koppelman and members of the Judiciary Committee. My name is Denton Zubke and I am the representative from District 39 which encompasses the counties of Adams, Billings, Bowman, Golden Valley, Slope, McKenzie and parts of Dunn. I am here to support HB 1207.

Presently Section 32 allows that in eminent domain and quick take proceedings of private land the court at its discretion may award all attorney's fees and costs of the landowner to the expense of the public entity (condemnor) initiating the condemnation. In my experience the court has always awarded fees and costs regardless of outcome to the landowner. This has created situations where landowners have assumed they have nothing to lose by contesting the offers made by the condemnor. In also encourages attorneys to contact landowners in advance of a water line, for example the Red River Water Supply Project, or flood control, such as Fargo Diversion, and persuade the landowner to contest the offer made by the condemning agency with little regard for reasonable offers made by the public entity.

Recently landowners in Cass County litigated and were awarded a value for their property that was over one hundred thousand dollars less than the final offer by the public entity. The public entity still had to pay over \$114,000.00 in the landowner's legal costs. Both entities lost in this process.

This is one example but there are many where the attorney's fees outpaced the value of the property and the law as presently written not only creates a situation for unbridled attorney's fees but can also work to the detriment of the landowner.

This bill specifies that if a landowner contests the value of the offer of the condemning agency they will receive their attorney's fees and costs only if the court awards a value that is 40% or greater than the offer. This entices all public entities to make reasonable valuation offers. The bill also allows the court the flexibility of awarding the attorney's costs if the court awards a value that is 20% to less than 40% greater than the offer. If the landowner is awarded anything less than 20% or if the final award of compensation and damages is less than \$15,000, the landowners are responsible for their own attorney's fees and costs.

Respectfully

Representative Denton Zubke

#2
HB 1207
1-25-19
pg 1

Testimony to the Judiciary Committee

Chairman Koppelman

House Bill 1207

Good Morning Chairman Koppelman and members of the Judiciary Committee. My name is Duane DeKrey and I am the General Manager of Garrison Diversion Conservancy District. I am here to support HB 1207.

Garrison Diversion and other large state water projects have the ability to use eminent domain as a last resort to acquire necessary water pipeline easements. Garrison Diversion has signed option agreements from approximately half the landowner along the pipeline corridor that allows Garrison Diversion the option to take easements. That high percentage during an initial round of contacts reflects that Garrison Diversion offered very reasonable compensation for easements and found many willing landowners along the pipeline route. That said, we anticipate that, like other large water projects, there may be a need at some point to use eminent domain. With a lot of state money involved in large water projects, the legal costs associated with eminent domain add a significant amount to already large project budgets, many of which are subject to cost share by the state.

The current eminent domain law seeks to make the landowner "whole", allowing a landowner to recover the value of an easement as well as the landowner's attorneys fees and costs incurred engaging in eminent domain litigation as part of the process to make them whole. That principal has a sound basis, yet, in application, it sets up a system where the process provides no incentive for a cantankerous landowner to settle for a reasonable offer. For example, if a water authority seeks an easement valued by an appraiser at \$750, the water authority could be required to pay its own attorney \$60,000-\$80,000 in attorney and appraiser fees for trial and appeals, and also have to reimburse the landowner for the landowner's attorneys fees in a like amount. It could add \$150,000 to a property that budgeted \$750 for a water line easement. A cantankerous landowner could simply stonewall and make the project expend this money to get the necessary easement, with no downside to the landowner for rejecting a reasonable offer.

This has created a situation where attorneys are making a cottage industry of pushing landowners not to settle on water line easements. Garrison Diversion has a real concern about this, as we've had an open record request by a Bismarck attorney seeking the names, addresses and parcel information on each parcel of land crossed by the Red River Valley Water Supply Project. It's my understanding that the same lawyer has told landowners in northwest North Dakota that he can guarantee they'll get a bigger settlement if they don't settle, but instead continue to let him push their case. While the land value offer to the landowner may stay the

#2
HB 1207
1-21-19

same, when you add the escalating attorneys fees, that certainly causes the cost to go up, but is it simply lining the attorney's pocket, not benefitting the landowner. pg 2

A recent example was decided at the North Dakota Supreme Court on land needed for the FM Diversion project. The landowner rejected an offer of \$150,000 for two lots, and ultimately got only \$48,200 from the court for his two lots. Yet, despite getting far less than the offer, the landowner still received \$114,346.47 in fees and costs, and likely cost the FM Diversion Authority at least that same amount in its own lawyer fees going through the court process, so the financial impact to the project would be more like \$230,000 in legal fees for a \$48,200 property acquisition. This ultimately increases costs of projects and increases the cost significantly to the state since most projects are sharing costs with the state. In addition to the FM Diversion, similar stories exist with other state supported projects like WAWSA and various Devils Lake projects.

This bill gives a landowner a reason to seriously consider an offer from a project owner and not just say "no" and require the project owner to spend hundreds of thousands of dollars acquiring a \$1000 easement. This bill is modeled after other state's eminent domain attorney fee provisions, which provides incentive for a landowner to settle on a reasonable offer, or risk not getting the landowner's attorneys fees paid. If a landowner contests the value of the offer of the condemning agency, the landowner will receive its attorney's fees and costs only if the court awards a value that is 40% more than the last offer by the project owner. It provides that the court can, in its discretion, award attorney's fees and costs if the court-ordered property value is between 20 and 40% more than the last offer by the project owner. If the landowner is awarded anything less than 20% more than the offer, or if the final award of compensation for property damage is less than \$15,000, a landowner pays its own attorney's fees and costs.

This bill will make a landowner seriously consider the offer made since they are not guaranteed to receive their attorneys fees. With this, attorneys won't have an incentive to make a cottage industry of encouraging landowners to fight against necessary water projects, in an effort that simply benefits the landowners' attorneys. The bill respects landowner rights and allows plenty of opportunity for landowners to fight against an unreasonable and inequitable property value offer.

Thank you for considering my comments,

Duane DeKrey

Testimony of Eric Volk, Executive Director

ND Rural Water Systems Association

House Bill 1207

House Judiciary Committee – January 21, 2019

#3
HB 1207
1-21-19
Pg 1

Chairman Koppelman and members of the House Judiciary Committee, my name is Eric Volk and I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA). Our vision is to ensure all of North Dakota has access to affordable, ample, and quality water. Today I am submitting testimony in support of HB 1207.

It has come to our attention of a loophole in our state's current eminent domain/quick take law that is being misused by some attorneys.

Rural Water Project Example:

1. A Rural Water District has a project in development with hundreds of miles of pipe to be laid to provide water to hundreds of new users. Hundreds of easements will be needed to complete the project.
2. Historically, most Rural Water right of way easements are obtained at zero cost.
3. The "Quick Take" procedure may be needed to secure a right of way easement.
4. Attorneys can use the open record's law to obtain the project route and to contact landowners along the proposed route. The attorney can try to persuade the landowner into not signing the easement (potentially move into a quick take situation) or if an offer has been made through the quick take process, the attorney persuades them not to settle and to have the court decide the settlement.
5. Current law requires the Rural Water to be responsible for all attorney fees, win or lose.
6. Landowner's rights always need to be protected, but process should not allow certain individuals to game the system and make a quick buck at the expense of a political subdivision of the state.

With that said, I urge you to give HB 1207 a do pass recommendation. Thank you for your time and please email me with any questions, ericvolk@ndrw.org. EV

NORTH DAKOTA

*Water Users
Association*

#1
HB 1207
1-21-19
pg 1

701-223-4645
701-223-4645 (Fax) *PM*

PO Box 2254 • Bismarck, ND 58502-2254

Testimony, HB 1207

10:40 AM, January 21, 2019

Prairie Room, State Capitol, Bismarck, ND

Jack Dwyer, North Dakota Water Users Association, North Dakota Water Resource Districts

Chairman Koppleman and members of the House Judiciary Committee:

My name is Jack Dwyer and I am representing the North Dakota Water Users Association and the North Dakota Water Resource Districts Association. I am here to testify on behalf of those groups in support House Bill 1207.

Eminent domain judgements can be a large aspect of projects being conducted by our members intended to benefit the state and its residents. State water projects have the ability to use eminent domain as a last resort to acquire necessary water pipeline easements in order to provide clean, safe water or protection from flooding to those in need. Even though the goal is to treat everyone fairly, eminent domain projects can lead to expensive litigation and these expenses are often cost-shared by the state.

We believe that this bill will provide protection from frivolous litigation for government entities that sponsor water projects, while maintaining protection for landowners.

The North Dakota Water Users Association and the North Dakota Water Resource Districts Association appreciate your support of HB 1207.

Thank you for your time and allowing me to speak this morning.

Testimony of Derrick Braaten in Opposition to
HOUSE BILL NO. 1207
House Judiciary Committee
January 21, 2019

#2 - PM
HB 1207
1-21-19
pg 1

My name is Derrick Braaten, and I am an attorney in Bismarck and owner of Braaten Law Firm. My law practice is focused on representing landowners, and I practice in the areas of agricultural law, oil and gas law, natural resources law, and eminent domain actions. I am here to testify in opposition to House Bill 1207 because I believe the system that is in place with respect to recovery of attorneys' fees works, and I believe that the system set up by HB 1207 fails to account for the reality of a lot of eminent domain proceedings.

I have represented landowners in numerous eminent domain proceedings, and the issues that are litigated are not always focused solely on compensation. In one case, for example, we had a lengthy argument about the scope of the easement being taken. The condemnor drafted a proposed judgment and easement that gave it the "right to ingress and egress across" all of the landowner's property. This was not necessary, and in eminent domain proceedings, "necessity" is a prerequisite to the taking. Sometimes there are also challenges to whether or not a taking is truly for a public purpose. I have made this challenge in proceedings where a private pipeline (in my view) was attempting to use eminent domain as a "common carrier," despite being owned and likely utilized by one joint venture. Similar cases have been brought in Texas and other states. Just this last year a district court judge ruled against MDU, and in his ruling he stated that the taking was not necessary. In that case, because of that particular ruling, the landowner would have received fees under HB 1207. But if it was a close call and the court ultimately allowed that pipeline, even if the landowner's argument had been a good one, he could not have recovered fees.

Even if a landowner is seeking compensation, a couple examples show how this framework does not work. If a landowner is offered around \$2,000 (which is typical for certain easements), and spends \$8,000 on an attorney, and recovers \$14,000, the landowner has still gained an additional \$4,000 and a 600% increase in compensation. Under this law, that landowner cannot recover fees. Also, if a landowner is offered \$1,000,000, and spends \$50,000 on an attorney to recover \$1,185,000, that landowner does not meet the cutoff for fees under HB 1207. These are just a couple examples of how these numbers can play out in actual proceedings.

The bottom line is that landowners do not choose to go to court when the government decides to take their land. The current system gives judges discretion to determine what fees should be awarded based on the circumstances of each case. Judges do not need a bright line rule based on percentages that do not take account of the particular facts of each case. I trust our judges to make these decisions, and I urge the Legislative Assembly to do the same. For these reasons, I also urge a **do not pass** on HB 1207.

Thank you,



Derrick Braaten

Troy Coons
Northwest Landowners Association
Judiciary Committee
Testimony for HB 1207
January 21, 2019

PM
#3
HB 1207
1-21-19
131

Good morning, Chairman Koppelman and members of the committee, thank you for taking my testimony into consideration today.

My name is Troy Coons, and I am the Chairman of the Northwest Landowners Association. Northwest Landowners Association represents over 525 farmers, ranchers, and property owners in North Dakota. Northwest Landowners Association is a nonprofit organization, and I am an unpaid lobbyist.

Northwest Landowners Association is not in favor of HB 1207 and asks the committee to **vote do not pass.**

- Eminent domain cases are not only about the compensation
- Our concern with this legislation is there are many factors involved with a project including:
 - **Size and scope of the easement**
 - Many times landowners negotiate in good faith, and in the end they get sued while still trying to negotiate. This bill would give unfair power to the condemning government or company.
 - Landowners are already in a position of not wanting their property taken and they are the one being sued. It is unfair that they need to hire an attorney to defend their land in the first place. They should be able to recover their attorneys' fees.

Thank you for taking the time to consider our comments. I am available for any questions.

Sincerely,



Troy Coons, Chairman

Northwest Landowners Association

HOUSE JUDICIARY COMMITTEE

Date: January 21, 2019 at 10:40 a.m.

#4 PM
HB 1207
1-21-19
pg 1

North Dakota Department of Transportation
Mark Gaydos, Environmental and Transportation Services Director

House Bill 1207

Good morning, Mr. Chairman and members of the committee. I'm Mark Gaydos, Environmental and Transportation Services Director at the North Dakota Department of Transportation (Department). I am here to oppose House Bill 1207. Thank you for giving me the opportunity to discuss this proposed bill and answer any questions.

House Bill 1207 proposes to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to reasonable costs awarded to a defendant (property owner) in an eminent domain proceeding. The Department believes it is appropriate that property owners are awarded fees and costs in the case a jury awards more money than paid by the Department.

The existing language and other statutes, already allow for compensation to the property owner for interest, attorney fees, expert witness fees for appraisals and other experts, and costs. However, the proposed language does not appear to allow for the court's discretion in the award of those reasonable fees and costs to the property owner. The term "reasonable" should apply to all fees and costs identified in lines 20 to 24, page no. 1, of the bill draft. Further, the Department believes that the courts have the knowledge, experience, and case law necessary to determine and award reasonable fees and costs resulting from this process.

For example, reasonableness of attorney fees may include, analysis of the number of attorneys at trial, duplicate work done by each attorney, hourly rates, and number of hours to complete the work. The same analysis may also be applied to appraisal fees and other expert testimony. The point is there is currently a process in place to allow the court to determine reasonable, actual and statutory costs that are fair to the property owner, the Department, and public at large.

#24 PM
HB 1207
1-21-19
pg 2

The Department believes that using qualifiers like “forty percent” or “at least twenty percent, but less than forty percent” in sub paragraphs 1. and 2., provide arbitrary targets that would either encourage litigation, or serve to inflate offers of compensation and damages to obtain settlements. Additionally, sub paragraphs 3 through 5 do not resolve issues related to reasonable compensation of expenses and costs. Without checks and balances provided by the discretion of the courts, the proposed bill would likely increase both the number of eminent domain cases, and the costs associated to either settle or try the cases.

In all actuality, very few eminent domain cases go to trial, especially considering the total number of right of way acquisitions. Experience shows that a jury usually awards something more than offered and something less than requested. Also, this experience shows that a court tries to award reasonable fees and expenses to the property owner. The Department recommends that the courts be able to continue to determine and award reasonable fees and costs.

For these reasons, the Department is opposed to this change.

Thank you, Mr. Chairman, I would be happy to answer any questions.

House Bill 1207

#1
HB 1207
2-5-19
mg1

Section 32-15-32. Costs.

1. Except as limited herein, the court may in its discretion award to a property owner reasonable attorney's fees and costs as provided by N.D.C.C. § 28-26-06 and 28-26-10, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal.
2. Attorney's fees and costs may not be awarded under this section if the award for compensation and damages is not more favorable than the most recent written offer of settlement from the condemning authority made at least 14 days prior to the start of trial.
3. If the award for compensation and damages is less than 40% greater than the last written offer of settlement made by the condemning authority at least 14 days prior to the start of trial, the court may award the property owner reasonable attorney's fees and statutory costs.
4. If the award for compensation and damages is at least 40% greater than the last written offer of settlement made by the condemning authority at least 14 days prior to the start of trial, the court shall award the property owner reasonable attorney's fees and statutory costs.
5. The property owner may not be awarded any of the attorney's fees or costs in this section if the final judgment or award of compensation for the value of the property taken does not exceed fifteen thousand dollars.
6. If the court determines that a taking is not for a public use or not lawful, the court shall award the property owner reasonable attorney's fees and statutory costs.

January 23, 2019

#1
HB 1207
2-13-19
P. 1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1207

Page 1, line 1, after "A BILL" replace the remainder of the bill with" for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code, relating to costs awarded to a defendant.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-15-32 of the North Dakota Century Code is amended and reenacted as follows:

32-15-32. Costs.

~~The court may in its discretion award~~For any judicial proceeding in which the defendant prevails, the court's award to the defendant is limited to reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings. If the defendant appeals and does not prevail, the costs on appeal may be taxed against the defendant. In all cases when a new trial has been granted upon the application of the defendant and the defendant has failed upon such trial to obtain greater compensation than was allowed the defendant upon the first trial, the costs of such the new trial ~~shall~~must be taxed against the defendant. "

Renumber accordingly

#1
HB 1207
3.5.19

Testimony to the Judiciary Committee

Chairman Larson

House Bill 1207

Good Morning Chairman Larson and members of the Judiciary Committee. My name is Denton Zubke and I am the representative from District 39 which encompasses the counties of Adams, Billings, Bowman, Golden Valley, Slope, McKenzie and parts of Dunn. I am here to support HB 1207.

Presently Section 32 allows that in eminent domain and quick take proceedings of private land the court at its discretion may award all attorney's fees and costs of the landowner to the expense of the public entity (condemnor) initiating the condemnation. In my experience the court has always awarded fees and costs regardless of outcome to the landowner. This has created situations where landowners have assumed they have nothing to lose by contesting the offers made by the condemnor. It also encourages attorneys to contact landowners in advance of a water line, for example the Red River Water Supply Project, or flood control, such as Fargo Diversion, and persuade the landowner to contest the offer made by the condemning agency with little regard for reasonable offers made by the public entity.

Recently landowners in Cass County litigated and were awarded a value for their property that was over one hundred thousand dollars less than the final offer by the public entity. The public entity still had to pay over \$114,000.00 in the landowner's legal costs. Both entities lost in this process.

This is one example but there are many where the attorney's fees outpaced the value of the property and the law as presently written not only creates a situation for unbridled attorney's fees but can also work to the detriment of the landowner.

This bill specifies that if a landowner contests the value of the offer of the condemning agency they will receive their attorney's fees and costs only if they prevail in the court proceedings. This encourages responsibility on all parties to have some justification for their actions. It still encourages the public entity to make valid offers and it encourages the landowner to weigh that offer judiciously. This also does not give legal entities a blank check to litigate for higher offers.

Respectfully

Representative Denton Zubke

**Testimony of Merri Mooridian,
Deputy Program Manager, Red River Valley Water Supply Project Administration
House Bill 1207
Senate Judiciary Committee
Bismarck, North Dakota – March 5, 2019**

Good Morning Chairman Larson and members of the Senate Judiciary Committee. My name is Merri Mooridian and I am the Deputy Program Manager of the Red River Valley Water Supply for Administration, as well as the Administrative Officer at Garrison Diversion Conservancy District. I am here to testify in support HB 1207.

Many of us at Garrison Diversion, or our families, are landowners in North Dakota. We know the importance of laws that respect landowner rights and allow opportunity for landowners to contest an unreasonable and inequitable property value offer.

The current eminent domain law, however, creates issues when making a landowner "whole". The current law allows a landowner to recover the value of an easement as well as the landowner's attorney fees and costs incurred in engaging in eminent domain litigation as part of the process to make them "whole".

Although in theory this sounds like a fair principal, there has been unintended consequences as this process provides no incentive for "industrious" landowners and attorneys to settle for a fair and reasonable offer. Consequently, creating a small cottage industry for lawyers looking to expand these cases at the expense of State and Local water project sponsors.

Garrison Diversion and other water projects have the ability to use eminent domain, **as a last resort**, to acquire necessary water pipeline easements. Currently, with the Red River Valley Water Supply Project, Garrison Diversion is focusing our current easement efforts in Foster County and we have signed options agreements or easements from 95% of the landowners in Foster County. We are pleased with this high percentage of options and easements as it reflects Garrison Diversion's commitment to fair and reasonable compensation to landowners. That being said, the easement phase of the project is not complete. As with any

large water project, we expect that at some point Garrison Diversion may need to, **as a last resort**, utilize eminent domain.

As the current eminent domain law is written, easement disputes could cause project costs to skyrocket. For example, if a water authority seeks an easement valued by an appraiser at \$1,000, and a landowner rejects the offer and it goes to court. The water authority could be required to pay its own attorney roughly \$60,000 - in attorney and appraiser fees for trial and appeals, and also have to reimburse the landowner for the landowner's attorneys fees in a like amount. This is even if the court agrees that \$1,000 was a reasonable offer. This scenario could add \$120,000 to a water line easement that was budgeted at \$1,000. A landowner and lawyer could simply use this process, with no downside to the landowner for rejecting a reasonable offer. These types of scenarios have already played out in other water projects in the state.

Some attorneys have figured out the gaps in the current eminent domain laws and Garrison Diversion is very concerned. Garrison Diversion had an open record request by a Bismarck lawyer seeking the names, addresses and parcel information on each parcel of land crossed by the Red River Valley Water Supply Project pipeline. From discussions with other water project sponsors, it is our understanding that the same lawyer has told landowners in northwest North Dakota that he can guarantee they'll get a larger settlement if they don't settle, but instead continue to let him push their case.

HB 1207 rectifies gaps in the current eminent domain law. The intent of HB 1207 is to strike a balance between landowner rights and critical infrastructure projects and to provide incentive for a landowner to settle on a reasonable offer, or risk not getting the landowner's attorneys fees paid.

This bill allows State and Local funded water projects to reduce the burden of litigation and undue spending associated with people taking advantage of "the system", while providing opportunities for landowners to stand up to unfair or unreasonable property values.

Thank you for the opportunity to testify in support of HB 1207.

**Testimony of Tami Norgard
House Bill 1207
Senate Judiciary Committee
Bismarck, North Dakota – March 5, 2019**

#3
HB 1207
3.5.19

Good morning, Chairman Larson and members of the Senate Judiciary Committee. Thank you for this opportunity to testify in support of House Bill 1207. My name is Tami Norgard and I am an attorney who has worked on land acquisition for a number of water projects across the state, electric transmission line acquisition, and have worked with numerous landowners on oil and gas pipelines and private water pipelines. I had a role in initiating HB1207 given my experience with clients across the state and appreciate the opportunity to discuss this with you.

As the law currently reads, all landowners whose land is taken by eminent domain have a right to request an award of "reasonable attorneys fees" after the trial, regardless of what the landowner had been offered by the project owner and even if they receive far less at trial than what they were offered. The concept behind the statutory attorney fee award is to make the landowner whole. If a landowner needs to hire an attorney because their land is being taken by eminent domain, the landowner would not be made whole unless they can recover the \$40,000-\$100,000 that the landowner spends litigating the value of the taking. As such, the current North Dakota Century Code allows a landowner to request an award of reasonable attorneys fees from a court post-trial, regardless of whether the landowner had been offered more than that by the project owner.

This works well most of the time. Yet I've seen increasing instances where landowners want to fight against a project out of principle. With the law as written, there is no incentive for a principled landowner to negotiate if their attorney advises them that they will get their attorneys fees paid by the project owner. Then, the project owner will pay their own litigation fees and costs as well as a landowners' fees and costs, even if the project owner was being extremely over-generous in how it was treating a landowner. I'll give you a few examples:

Rural water lines are often 2 inch water distribution lines. They are installed by creating a limited trench with limited disturbance to the soil. The contractors are legally obligated to remediate the land and restore vegetation on the land. Many rural water systems expect landowners to donate easements under the principle that, if rural landowners want high quality water to be available, they need to be willing to grant easements on their property to bring the water to them. Rural water projects are already highly subsidized by the state, and if all landowners were paid what oil companies pay landowners for oil and gas pipeline easements, there would not be many rural water lines built. If a rural landowner refuses to grant an easement, the project owner often times has the power of eminent domain to take the easement by depositing fair market value for the easement into court and initiating condemnation. The landowner has the right to a jury trial over whether the deposit is sufficient compensation for the damage to their land, and the landowner has the right to ask for reasonable attorneys fees incurred in the litigation.

In North Dakota, appraisers value an easement as the difference between what the property was worth before the easement is imposed, less the value of the property with the easement. That difference, the devaluation of the land due to the easement, must be paid to the landowner to make the landowner whole. Appraisers determine what loss of value exists by using paired comparable sales to identify a loss in value. They will find a few similar size tracts of land sold, some with water lines and some without. They look for a difference in the property value between the unencumbered property and the encumbered properties, and generally apply that percentage reduction in value to the current landowner's pre-encumbered value. So an appraiser will look at two 40-acre parcels of land, one with a buried water line and one without, then will assess any difference, which will be the value of the easement. Appraisers often use that same paired comparable analysis when reviewing electric transmission line easements or road easements, with varying degrees of devaluation depending on the impact of the use on the land value.

Under current law, landowners can decline a \$2,000 offer for a water line easement and require the parties to go to trial, requiring the water system to pay the landowner's attorney and appraisers \$50,000+ as well as the water system's litigation expenses, resulting in a six figure attorney fee award in a case where an appraiser isn't able to articulate much devaluation in a 40 acre parcel of land due to a water line easement placed at the edge of the property. In that case, even if the water system offered the landowner \$20,000 to settle the case before condemnation, and if an appraiser concluded the value of the easement was under \$1000, the project would still have to pay a litigious landowner's attorney's fees and costs.

I initiated conversation about a need to change this law with water supply projects, flood protection projects, legislators and State Water Commission members, all with overwhelmingly positive feedback. I've seen a pattern of churning legal fees developing, and I anticipate it will escalate with a few major water projects moving forward. For example, with the Red River Valley Water Supply Project (RRVWSP), an attorney who has handled landowner's eminent domain matters on other large water projects in Western North Dakota requested a list of all property owner names and addresses along the RRVWSP alignment. It appears landowner eminent domain litigation is being targeted as a cottage industry for lawyers at water project expense. It is particularly important for legislators to address this now, given the significant state cost share that is included for large water project and flood projects. The public money needed to construct these large projects should not be diverted to litigation expenses.

Another recent example underscoring the need for change is the recent *Cass County Joint Water Resource District v. Erickson* case, decided by the ND Supreme Court on October 9, 2018. The Cass Joint Board appraisal was \$48,000 for two lots for a flood protection project, but offered the landowner \$150,000 before initiating condemnation. The landowner refused the offer, demanding \$450,000. After a bench trial, the District Judge awarded \$48,200, which was \$67,000 less than the Cass Joint Board offered before trial. Yet, under the current law, the Judge also awarded \$115,000 in attorney's fees to the landowner since the landowner is

entitled to reasonable attorneys fees. The Supreme Court specifically stated that the legislature has not adopted a rule of law limiting attorneys fees to be allowed only when the landowner prevails, so the District Court's award of attorneys fees was upheld. Through this opinion, the Supreme Court has essentially invited legislative action if this result is not what legislators want to see.

It is noteworthy that in that case, the landowner's appraiser was not from this area and his testimony was completely disregarded by the court. He used flood-protected properties as comparables to establish the value of the landowner's unprotected lots, which the judge noted weren't comparable. Even though the appraiser's testimony was not reliable nor helpful, the Court awarded appraiser fees to be recovered since it was reasonable for the landowner to hire an appraiser to litigate his case, regardless of whether the appraiser was credible or not.

HB1207 amendments are needed since this scenario could play out over and over again for large, state-subsidized water projects, road projects and other infrastructure development across the state. The state's cost share funding on these projects should not be diverted to litigious attorneys who establish their business model on encouraging landowners to litigate cases, purportedly at no cost to the landowner, especially where the governmental entity has provided reasonable offers of compensation. In the end, the project loses money, the state cost share is diverted away from project construction, and landowner is harmed if they were encouraged to reject a generous offer by a project with assurances that their fees would be paid at trial, yet they get left with only the actual appraised value.

To be clear, the need for amendments to HB1207 is not to take anything away from landowners. In fact, most landowners in these situations settle at some acceptable value, which is almost always in excess of the appraised values. This change to the law is being suggested to give an antagonist landowner and his/her legal counsel incentive to be reasonable when negotiating with a project owner, rather than to proceed to litigation with the assumption that there is a blank check from the government to cover their attorneys fees.

With the Amended HB1207 before you, it requires the landowner to "prevail" in order to be entitled to an award of reasonable attorneys/appraisal fees and costs. While that is generally acceptable, this Committee should amend the bill to add context to what "prevails" means. A landowner may argue they prevailed if they receive any award of damages from a jury; or perhaps they would argue they prevailed if they get more than what was deposited into court when the condemning agency initiated condemnation, which is typically the amount of the appraisal for fair market value. Without additional context, this issue will be litigated and the North Dakota Supreme Court will be deciding what "prevails" means.

I encourage the Committee to add the language: "A defendant shall be deemed to have prevailed if the defendant establishes a higher property value award from a court, exclusive of costs or interest, than was offered to the defendant in writing prior to condemnation." One suggested change, however, is that "defendant" be changed to "landowner." This suggested change came about after various conversations with another attorney who handles many NDDOT cases, where the landowner is not always known as a "defendant."

Typically, a project owner will offer a landowner a generous amount, in excess of the appraised value, before initiating condemnation. For the protection of the state's cost share contributions and the project owners' funding, it would be very important for a landowner (and its attorney) to give careful consideration to whether they are being treated fairly. This does not harm landowners with legitimate issues about a project owner undercutting the valuation. If a landowner can prove they are being treated unfairly by a condemning authority, the landowner will obtain a higher jury verdict than what was offered and the landowner has the right to request reasonable attorneys fees and costs. The sole negative impact of this change would be to make landowners think twice if they are refusing to negotiate out of principle and as a result of assurances from their legal counsel that the government will pay all their attorneys fees. If the landowner and their attorney realize the project owner is offering reasonable compensation for the taking in writing before they initiate condemnation, and if the

landowner can only ask for attorneys fees if they get more than that at trial, it will cause landowners and their legal counsel to carefully weigh their valuation assessment and whether it makes sense to litigate. Adding the language proposed in this paragraph to amend HB1207 will provide certainty to landowners and condemnors alike with respect to the test that will be used by a court to judge reasonableness of attorneys fees and costs.

Given the already high cost of many of these water projects, the impact of attorney fee payments will be significant. HB1207 is fair to landowners who should get fair market value and be made whole, while dissuading abuse of the current North Dakota Century Code by creative attorneys inciting landowners to fight against projects simply out of principle at purportedly no cost and limited risk to themselves. This will encourage settlements, and make sure that the cases that make it into the legal system are the ones that are supposed to have values challenged.

Thank you, Chairman Larson and members of the Senate Judiciary Committee, for hearing my testimony this morning.

Testimony of Eric Volk, Executive Director

ND Rural Water Systems Association

House Bill 1207

Senate Judiciary Committee – March 5, 2019

#4
HB 1207
3.5.19

Chairman Larson and members of the Senate Judiciary Committee, my name is Eric Volk and I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA). Our vision is to ensure all of North Dakota has access to affordable, ample, and quality water. Today I am submitting testimony in support of HB 1207.

It has come to our attention of a loophole in our state's current eminent domain/quick take law.

Rural Water Project Example:

1. A Rural Water District has a project in development with hundreds of miles of pipe to be laid to provide water to hundreds of new users. Hundreds of easements will be needed to complete the project.
2. Historically, most Rural Water right of way easements are obtained at zero cost.
3. The "Quick Take" procedure may be needed to secure a right of way easement.
4. Attorneys can use the open record's law to obtain the project route and to contact landowners along the proposed route. The attorney can try to persuade the landowner into not signing the easement (potentially move into a quick take situation) or if an offer has been made, the attorney persuades them not to settle and to have the court decide the settlement.
5. Current law usually requires the Rural Water to be responsible for all attorney fees, win or lose.
6. Landowner's rights always need to be protected, but the process should not allow certain individuals to game the system and make a quick buck at the expense of a political subdivision of the state.
7. "Prevail" must be properly defined in code.

With that said, I urge you to give HB 1207 a do pass recommendation. Thank you for your time and please email me with any questions, ericvolk@ndrw.org. EV

Introduced by

Representatives Zubke, D. Anderson, Guggisberg

Senators Bekkedahl, Kreun

- 1 A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code,
2 relating to reasonable costs awarded to a defendant.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 32-15-32 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **32-15-32. Costs.**

7 ~~The court may in its discretion award to the defendant reasonable actual or statutory costs~~
8 ~~or both, which may include interest from the time of taking except interest on the amount of a~~
9 ~~deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal,~~
10 ~~and reasonable attorney's fees for all judicial proceedings. If the defendant appeals and does~~
11 ~~not prevail, the costs on appeal may be taxed against the defendant. In all cases when a new~~
12 ~~trial has been granted upon the application of the defendant and the defendant has failed upon~~
13 ~~such trial to obtain greater compensation than was allowed the defendant upon the first trial, the~~
14 ~~costs of such new trial shall be taxed against the defendant.~~

15 1. If the final judgment or award for compensation and damages in an eminent domain
16 proceeding is at least forty percent greater than the last written offer of compensation
17 made by the condemnor before the petition is filed, or, in the case of a right of way
18 taken for public use, before the condemnor deposits the amount of the offer with the
19 court, the court shall award the property owner:

- 20 a. Reasonable attorney fees;
21 b. Litigation expenses;
22 c. Appraisal fees;
23 d. Expert fees; and
24 e. Other related costs, compensation, and fees authorized by this chapter.

- 1 2. If the final judgment or award is at least twenty percent, but less than forty percent,
- 2 greater than the last written offer before the petition is filed, or, in the case of a right of
- 3 way taken for public use, before the condemnor deposits the amount of the offer with
- 4 the court, the court may award the property owner the fees, costs, compensation, and
- 5 expenses in subsection 1. The final judgment or award of damages must be
- 6 determined as of the date of taking.
- 7 3. Attorney fees may not be awarded under this section if the final judgment or award of
- 8 compensation and damages does not exceed fifteen thousand dollars.
- 9 4. For purposes of this section, the "final judgment or award for compensation and
- 10 damages" does not include an amount for loss unless the amount was included in the
- 11 last written offer by the condemning authority.
- 12 5. If the court determines a taking is not for a public use or is unlawful, the court shall
- 13 award the property owner reasonable attorney fees and other related expenses, costs,
- 14 compensation, and fees authorized by this chapter, regardless of the amount of the
- 15 final judgment or award of compensation and damages.

Dwyer, Mike A.

From: Dwyer, Mike A.
nt: Wednesday, March 13, 2019 10:43 AM
Subject: Dwyer, Mike A.
FW: HB 1207

1
HB 1207
3.13.19
(subcommittee)

House Bill 1207
Section 32-15-32. Costs.

1. Except as limited herein, the court may in its discretion award to a landowner reasonable attorney's fees and costs as provided by N.D.C.C 28-26-06 and 28-26-10, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal.
2. Attorney's fees and costs may not be awarded under this section if the award for compensation and damages is not more favorable than the most recent written offer of settlement from the condemning authority, ~~made at least 14 days prior to the start of trial.~~
3. Attorney's fees may not be awarded under this section if the final award for compensation and damages does not exceed \$10,000.
4. If the court determines that a taking is not for a public use or not lawful, the court shall award the property owner reasonable attorney's fees and statutory costs.

Luick, Larry E.

From: Cash <Cash@Aalandlaw.com>
Sent: Wednesday, March 13, 2019 2:15 PM
To: Luick, Larry E.
Subject: FW: HB 1207

2
HB 1207
3.13.19
(subcommittee)

CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

From: Cash
Sent: Wednesday, March 13, 2019 1:43 PM
To: Craig Hertsgaard <hertsfarm@juno.com>
Subject: RE: HB 1207

Craig:

Paragraph 2 means that the DA can act in bad faith, totally low-ball a land owner, force him to get a lawyer and prepare for trial. Client incurs all the usual fees for 6 months lead up to trial, attorney time for pleadings, depositions of experts, witnesses, research, preparation, etc. But then two weeks before the scheduled trial – DA raises their offer to something reasonable. Client has to take it and pay all the fees incurred getting there. Getting there – all the work pretrial which demonstrates to the DA they would lose if they go to trial - is what would make the DA settle. Under this framework – land owner has to pay attorney fees.

This 14 days is so unreasonable and would defeat the whole purpose – requiring the state to act fairly and in good faith.

Cash

From: Craig Hertsgaard <hertsfarm@juno.com>
Sent: Wednesday, March 13, 2019 1:13 PM
To: Cash <Cash@Aalandlaw.com>
Subject: FW: HB 1207

From: Luick, Larry E. <lluick@nd.gov>
Sent: Wednesday, March 13, 2019 10:48 AM
To: Craig Hertsgaard (hertsfarm@juno.com) <hertsfarm@juno.com>
Subject: FW: HB 1207

Mike Dwyer, myself and Sen, Bakke are meeting this afternoon to hash 1207 out. Mike just gave me these ideas and I don't know where they came from or what to think about them. Please advise. I brought to his attention that I am wanting to just kill the bill but we still have to do something to get it in better form incase in passes, and it could. It came through the House with high votes.

Dwyer, Mike A.

From:

Dwyer, Mike A.

|

At:

Wednesday, March 13, 2019 10:43 AM

HB 1207

Subject:

Dwyer, Mike A.

3.19.19

FW: HB 1207

(subcommittee)

House Bill 1207

Section 32-15-32. Costs.

1. Except as limited herein, the court may in its discretion award to a landowner reasonable attorney's fees and costs as provided by N.D.C.C 28-26-06 and 28-26-10, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal.
2. Attorney's fees and costs may not be awarded under this section if the award for compensation and damages is not more favorable than the most recent written offer of settlement from the condemning authority, ~~made at least 14 days prior to the start of trial.~~
3. Attorney's fees may not be awarded under this section if the final award for compensation and damages does not exceed \$10,000.
4. If the court determines that a taking is not for a public use or not lawful, the court shall award the property owner reasonable attorney's fees and statutory costs.

House Bill 1207**Section 32-15-32. Costs.**

1. Except as limited herein, the court may in its discretion award to a landowner reasonable attorney's fees and costs as provided by N.D.C.C 28-26-06 and 28-26-10, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal.
2. Attorney's fees and costs may not be awarded under this section unless the award for compensation and damages is greater than the written offer of settlement submitted by the condemning authority not less than ~~ninety~~ ^{sixty} days prior to trial.
3. Attorney's fees may not be awarded under this section if the final award for compensation and damages does not exceed \$15,000. Note: \$15,000 is the statutory limit for actions in small claims court.
4. If the court determines that a taking is not for a public use or not lawful, the court shall award the property owner reasonable attorney's fees and statutory costs.

Bakke, JoNell

From: Howard Swanson <hswanson@swlawltd.com>
Sent: Friday, March 22, 2019 3:29 PM
To: Bakke, JoNell
Subject: Re: HB 1207

2
HB 1207
3.25.19

CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Thank you for your email reply. Yes, I think this draft is quite good. I'm very supportive of it. I believe it addresses the concerns I have reasonably well. I would encourage your support of this amendment to the bill. As the bill was passed by the house, there are number of problems with it and I do not support that bill. We are better off with the current legislation then to adopt the house version. Thank you again. Howard

Sent from my LG G6, an AT&T 4G LTE smartphone

----- Original message-----

From: Bakke, JoNell
Date: Fri, Mar 22, 2019 10:23 AM
To: Howard Swanson;
Cc:
Subject: RE: HB 1207

Mr. Swanson,

I am a part of a subcommittee that has been reviewing this bill and working with several interested parties to see if we can come up with a compromise position. I have listed below the most current amendments for this bill and would like your feedback. We will be meeting again on Monday morning, so please let me know your thoughts.

Thank you.

House Bill 1207 Section 32-15-32. Costs.

1. Except as limited herein, the court may in its discretion award to a landowner reasonable attorney's fees and costs as provided by N.D.C.C 28-26-06 and 28-26-10, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal.
2. Attorney's fees and costs may not be awarded under this section unless the award for compensation and damages is greater than the written offer of settlement submitted by the condemning authority not less than ninety days prior to trial.
3. Attorney's fees may not be awarded under this section if the final award for compensation and damages does not exceed \$15,000. Note: \$15,000 is the statutory limit for actions in small claims court.
4. If the court determines that a taking is not for a public use or not lawful, the court shall award the property owner reasonable attorney's fees and statutory costs.

Senator JoNell A. Bakke
ND Legislature
District 43
Grand Forks, ND



March 26, 2019

#1

HB 1207

3-27-19

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1207

Page 1, after line 7, insert:

"1. Except as otherwise provided in this section, the "

Page 1, line 7, remove the overstrike over "court may"

Page 1, line 7, remove the overstrike over "award"

Page 1, line 7, remove "For any judicial proceeding in which the defendant"

Page 1, line 8, remove "prevails, the court's award"

Page 1, line 8, overstrike "to the defendant"

Page 1, line 8, remove "is limited to"

Page 1, line 8, overstrike "reasonable actual or statutory costs or"

Page 1, line 9, overstrike "both," and insert immediately thereafter "to a landowner reasonable attorney's fees and costs as provided in sections 28-26-06 and 28-26-10,"

Page 1, line 10, overstrike ", costs on appeal,"

Page 1, line 11, overstrike "and reasonable attorney's fees"

Page 1, after line 11, insert:

"2. The court may not award attorney's fees under this section:

a. Unless the award for compensation and damages is greater than the written offer of settlement submitted by the condemning authority at least sixty days before trial; or

b. If the final award for compensation and damages does not exceed fifteen thousand dollars.

3. If the court determines a taking is not for public use or is unlawful, the court shall award the property owner reasonable attorney's fees and statutory costs.

4."

Page 1, after line 12, insert:

"5."

Renumber accordingly

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE BILL NO. 1207

4.2.19

Introduced by

Representatives Zubke, D. Anderson, Guggisberg

Senators Bekkedahl, Kreun

1 A BILL for an Act to amend and reenact section 32-15-32 of the North Dakota Century Code,
2 relating to costs awarded to a defendant.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 32-15-32 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **32-15-32. Costs.**

7 ~~The~~

8 1. Except as otherwise provided in this section, the court may in its discretion award~~For~~
9 ~~any judicial proceeding in which the defendant prevails, the court's award to the~~
10 ~~defendant is limited to reasonable actual or statutory costs or both, to a landowner~~
11 reasonable attorney's fees and costs as provided in sections 28-26-06 and 28-26-10,
12 which may include interest from the time of taking except interest on the amount of a
13 deposit which is available for withdrawal without prejudice to right of appeal, ~~costs on~~
14 ~~appeal, and reasonable attorney's fees~~ for all judicial proceedings.

15 2. The court may not award attorney's fees under this section:

16 a. Unless the award for compensation and damages is greater than the written offer
17 of settlement submitted by the condemning authority at least sixty days before
18 trial; or

19 b. If the final award for compensation and damages does not exceed fifteen
20 thousand dollars.

21 3. If the court determines a taking is not for public use or is unlawful, the court shall
22 award the property owner reasonable attorney's fees and statutory costs.

23 4. If the defendant appeals and does not prevail, the costs on appeal may be taxed
24 against the defendant.

- 1 5. In all cases when a new trial has been granted upon the application of the defendant
- 2 and the defendant has failed upon such trial to obtain greater compensation than was
- 3 allowed the defendant upon the first trial, the costs of ~~such~~the new trial ~~shall~~must be
- 4 taxed against the defendant.

ProSource Technologies, LLC

9219 East River Road NW

Minneapolis, MN 55433

Phone 763-786-1445

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February 3, 2016

ProSource No. 2830

Delivered Via Email and

Certified US Mail

Curtis W. Erickson and Karen S. Erickson
4668 – 165th Avenue SE
Davenport, ND 58021-9720

RE: **Final Offer to Purchase**
Oxbow-Hickson-Bakke Ring Levee Project
PID# 78001000390000 and 78001000400000

Dear Mr. and Mrs. Erickson:

Please accept this letter as a formal *final* offer to purchase your two lots.

As you know, the Cass County Joint Water Resource District (CCJWRD) seeks to acquire your properties located at 354 & 358 Schnell Drive, Oxbow, ND for the proposed construction of the Oxbow-Hickson-Bakke Ring Levee as part of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project.

With regard to a final offer to settle the transaction, CCJWRD had offered to compensate you in the amount of **\$48,200** for both parcels of land. The compensation is based on the appraisal completed by Gerald E. Bock on March 9, 2015. You had last counter proposed in October 2015 in the amount of **\$380,000** for both parcels.

In this appraisal, the value is based on the definition of market value of the two lots as defined in the appraisal and as shown below:

"... "Market value" means 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." North Dakota, NDCC 24 (Highways, Bridges, & Ferries)..."

The appraisal report further states that to determine the market value of the two lots an appraiser must also consider the "Highest and Best Use" of the two lots. The appraisal states that the two lots are not buildable as one or more residential properties in today's market, as stated in the appraisal and shown below:

*"As a result of consideration of all of the factors that would be include for development of the property, it is concluded that the property is considered to be platted residential lots that are in a high risk zone of the flood plain and not available for residential development. **The Highest and Best Use would likely be for park, open space or seasonal recreational use, depending upon whether a variance to the existing zoning code could be granted.**"*

To aid in the determination of whether the lots are buildable, the CCJWRD, at its own expense, requested a geotechnical soil stabilization analysis from Barr Engineering Company. A final geotechnical report was issued October 12, 2015. This report shows the southerly lot is not buildable based on current zoning setbacks and the current soils on the property. The northerly lot does show a buildable area, but this area is atypical and less

Right of Way • Environmental • Disaster & Emergency Management Services

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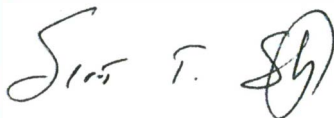
Fax 763-786-1030

desirable for a typical waterfront single-family residential lot in the real estate market of the Oxbow area. This geotechnical analysis supports the conclusion of the appraiser that the best use of the two lots is "open space" and that the valuation of the lots reflects the current conditions of the local real estate market.

We understand that you perceive more value in the two parcels of land and seek a higher settlement amount than what has been offered. However, the appraisal that was performed in March 2015 and the geotechnical analysis in October 2015, demonstrate the lots are not buildable, rendering them less valuable than you suggest. If you have a geotechnical report that demonstrates the lots are buildable, we would be interested in reviewing the report to determine what impact it may have on the valuation of your properties.

In the interest of reaching a voluntary settlement and to avoid costs incurred by both parties in an eminent domain action, the CCJWRD does offer \$150,000 for the purchase of both lots. This offer does not reflect a change in our opinion of the current market value of the two lots. The CCJWRD appreciates consideration of this offer to purchase and hopes to settle the matter of compensation with you soon.

Sincerely,
ProSource Technologies, LLC



Scott T. Stenger
Agent of behalf of the Cass County Joint Water Resource District

cc: Mr. Christopher M. McShane, Esq.