2019 SENATE FINANCE AND TAXATION

SB 2259

2019 SENATE STANDING COMMITTEE MINUTES

Finance and Taxation Committee
Lewis and Clark Room, State Capitol

SB 2259
1/21/2019
Job # 31088

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Alicia Larsgaard

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-22 of the North Dakota Century Code, relating to the valuation of property for just compensation.

Minutes: Attachments: 7

Chairman Cook: Called the hearing to order on SB 2259.

Senator Jordan Kannianen, District 4: Introduced SB 2259. See attachment #1. This isn't an anti-appraiser bill. There is certain information according to the proper practices that they follow, that they can't look at for their appraisals. There are groups that are concerned that this would cause costs to escalate. The best decisions are made with the best information and that is what this is looking at.

Senator Patten: I am sure the genesis of this probably came out of the Bakken oil fields as far as the impact but when we read through this, I believe it would apply state wide and would affect to the water pipelines. Could you address the state wide impact?

Senator Kannianen: I know that eminent domain cases are the exception and not the rule. Typically, these things are privately negotiated. It is the judge or the jury that would make the decision. In the case of freshwater, I am not sure how much new information would come from this is comparison to what you would find in the Bakken.

Senator Patten: Based on my own experience, eminent domain is very seldom used by the energy industry even with the transmission line. The gathering line are not affected but I would assume this would also apply to road easements for counties as well as the state when they need to use eminent domain to build roads.

Senator Kannianen: Yes, any eminent domain case.

Senator Unruh: Do you know how many eminent domain cases there are in our state in the average year?

Senator Kannianen: No, I do not.

Senator Unruh: Do you think if we passed this legislation that the number of eminent domain cases would go up or down?

Senator Kannianen: I am not sure, what do you think?

Senator Unruh: I am not sure either, that is why I asked.

Chairman Cook: Further testimony in support of SB 2259.

Troy Coons, Chairman of the Northwest Landowners Association: Testified in favor of the bill. See attachment #2. When you asked how many cases there are in the state, I do not know currently, however, we researched it about a year and a half ago and it was a fair amount. It was about 20-30 cases. Remember that all this bill does is allow the scope of information to be broader. I think we all know that when you are trying to make the best judgment, it is easiest to do that when you have the most information.

Chairman Cook: I am surprised to hear you say that we are not using best use when we evaluate land?

Troy Coons: If you have free and willing negotiations, both parties sit down and come to an answer. In some cases, if you have the possibility of eminent domain, it may move through smoothly and sometimes it does not. It may stall out. It may be over many different things. Not all appraisers use this type of information so this broadens the spectrum that they can look at. So to answer your question, no.

Chairman Cook: There is nothing in current law that says you can't use best use is there?

Troy Coons: No.

Derrick Braaten, Attorney, Braaten Law Firm: Testified in favor of the bill. See attachment #3. One of the problems is that the landowners are the ones that end up paying for the fights between lawyers. There is a Wyoming law where this has been in place for a while. My sense of it is that it is not used as often in eminent domain cases because the condemners usually high an appraiser. This doesn't fit into the typically appraiser methodology. This makes the appraisers also resistant to it and I understand that because it usually doesn't fit into their practices. It is true that this does apply state wide, however, it is always comparable easements. If you are someone in southern Cass county with a telephone running across your property and you are trying to argue that someone up in the oil patch got $700/rod from the Dakota Access Pipeline, that is not going to fly. That is not a comparable easement. I had a case up on the basin transmission line and the judge let the evidence in. The landowner argued that he got $500/rod for the Dakota Access Pipeline. Basin's attorney to his credit, had had an appraiser that said it was essentially around $2,000. I think it was around $70,000-$80,000 for everything and the attorney for Basin came back and said that on the open market they paid about $13,000 for land owners for this. They decided that what Basin paid was the best gauge for what fair compensation was. My point that I am trying to make it that this allows evidence in but that isn't the end of the discussion. The discussion is had by the jurors or the judge and they are going to consider the evidence. Even when that evidence

comes in, unfortunately it doesn't always mean that the landowner is going to get that. I have learned to trust the juries and judges. Right now, landowners have to hire experts and attorneys. Chairman you had asked a question about highest invest use; my understanding is that appraisers and the courts look and highest and best use but in my experience, the appraisers come back and say the highest and best use is whatever the existing use it. There is a law in Montana that says it can't be presumed to be the existing use. The reason I think that is important, you are going to put it to an industrial use and we believe you should be paying then industrial use values. The point in Montana was that you can't just assume that whatever you were doing with the land before, is the highest and best use. There was a case a few years ago where a landowner had a case of saltwater disposal put in without their permission and the state supreme court said they were going to look at what other saltwater disposal pay for the disposing of saltwater and he was going to get that per barrel price. My refrain would be that some of this evidence already does come in but unfortunately for my clients, I have to go hire an economist and we are going to have briefing and we are going to have to fight it out at the expense of both parties. A lot of times I win but sometimes I have lost. This just tell the judges that this is allowed evidence and we do not need to have that fight.

Chairman Cook: Is there a difference in the use of best use for eminent domain when you are taking the land compared to if you are just taking an easement?

Darrick Braaten: I guess I would answer that by saying there could be simply because if you are looking at a comparable transaction, you are going to look at partial takings rather than full takings. There are cases where they have said that essentially you have a pipeline corridor here and we are the best use of this land is using pipelines and not growing crops because that is what generates the most money.

Chairman Cook: Have you ever worked on a federal eminent domain case?

Derrick Braaten: I have.

Chairman Cook: Do you know what they have as far as what you can use?

Derrick Braaten: It is very complicated. That cases I have worked on are interstate natural gas pipelines and those are covered by the Natural Gas Act. They are in the federal courts and there are different rules that apply there. State to state, there is analysis done on whether the state law applies and how much of it does. So, it varies state to state and case to case. I think the question would be whether the state law comes into the federal courts or not. Generally, federal courts have a panel that is set which has appraisers that look at the evidence.

Senator Dotzenrod: I am trying to understand how this would work in practice. I remember that case that came through in my district and it was a dome pipeline alongside another line. Many farmers signed up and just accepted. There was a group that didn't sign and the sued. They got a larger settlement. There was a bitter pill for those who did sign. Are you worried that if we put this in place, those individuals who held out and didn't sign and were able to get an award, that that becomes the new baseline and creates a new uniform system of

compensation or does the highest price that is paid become the normal? Do you see that as a worry?

Derrick Braaten: One thing I would point out is that they didn't sue; they were sued. Alliance decided to move forward with eminent domain proceedings. We did settle shortly after that. It is no different than what I view as the damages being paid under the Surface Damages Act in the oil field. Prices that have been paid for others will have an impact on prices paid in the future. With the Dakota Access Line, they came in at a level that similar companies were paying gathering lines. They ended up getting a lot of people signed up at those rates. In ND we have different markets and from an appraiser's standpoint, they don't see that as a market, however, from an economist standpoint, that's a market. I do think that it can have an impact on the prices paid in the future. The information being able to everyone goes both ways to the landowner and company.

Senator Patten: You have worked with land owners across the state or primarily in the western ND?

Derrick Braaten: More in northwestern ND in eminent domain issues but I have worked across the state.

Senator Patten: It appears that most of the eminent domain actions would take place with utilities, and counties for roads like I indicated earlier, with a very limited amount related to gas pipelines and so forth. Would you agree with that?

Derrick Braaten: Yes, and no. The number of eminent domain actions are skewed because sometimes you will have a Dakota Access Pipeline come through and there will be a huge batch of eminent domain actions as well. If you average it out, then yes I would agree that overall across the state it is more consistent that a utility is using it for something like a transmission line.

Chairman Cook: I assume you listed this quote from appraiser under oath in your testimony? Where he says, "The only accepted methodology is what I consider to be appropriate to come up with my judgement as to the properties market value." That might be his quote but he is so far from right. There is a very lengthy methodology that appraisers have to follow.

Derrick Braaten: I agree. However, I have seen that using that methodology, appraisers have the way to object subjective opinion into the ultimate result they get to.

Chairman Cook: They create an argument whether the value is correct or wrong but there is a methodology.

Derrick Braaten: I agree.

Chairman Cook: Testimony opposed to SB 2259?

Todd Kranda, Attorney, Kelsch Ruff Kranda Nagle & Ludwig Law Firm, Mandan, and Lobbyist, North Dakota Petroleum Council (NDPC): Testified in opposition to SB 2259. See attachment #4. I would like to comment on some of the statements and questions that

were said before me. The landowner can testify as to the value of the land. Under 321506.1, the person who is acquiring the easement is required to provide an appraisal to the landowner. That person, obtains the appraisal and provides it to the landowner. Through eminent domain under 321532, attorney's fees as well as reasonable costs, are awarded to the landowner. These worries about have to obtain expensive wires or costly appraisals or information is reimbursable through the court. Land is unique. You can't just take one and say that is applies to them all. Senator Dotzenrod, you are correct. The highest price then becomes the normal across the board and I do not think that is a consistent and fair methodology. I think there is a potential for the opposite impact. I think more eminent domain cases could be on the horizon if this type of law passes. There is uncertainty and lack of accuracy. The reliability and support that goes into an appraisal is something that is well known and is a fixed methodology. Appraisers are trained, licensed individuals who have certain standards they apply and everybody know what those are. You can challenge them or support them but that is what the lawyer is there to do if they think it is high or low. At least you have the same rules. There is no guessing. I haven't heard that there is a significant problem. Senator Patten you brought up that this isn't just for one industry, it is across the state. There is additional gate keeping. The public service commission is involved. Before you can use an eminent domain process, you have to go before and prove that it is in the public benefit. My company had to go before the PSC and get what is called a public convenience and necessity determination. I will urge your opposition to this bill and I will stand for questions.

Senator Dotzenrod: One of the words we hear a lot today is transparency. We think it is a good idea to get all the information we can. We don't want to have info that is faltered. We think that everyone that is in a position of making decisions should have the full data. I am looking at this and thinking that it doesn't seem like we are doing anything more than making available the whole data and information that is going to be presented instead of saying there is some information that we are not going to allow. Do you see anything in here that imposes a new requirement other than just that we are going to allow all the information that is out there to be revealed?

Todd Kranda: In terms of all the information, all the relevant information is important to have. This bill goes too far and creates a situation where you are watering it down and providing speculation on obligated sellers and discussions as to values that create uncertainty. Even the landowner should expect some uncertainty. The appraisals come in and this goes well beyond that and creates some serious concern to the system.

Senator Patten: In my previous life I was a banker and I looked at many appraisals. What goes into them are comparable and viable sales. Can you give me some specific examples of what you believe would be included as additional information is this bill were to pass? What additional things that would come in?

Todd Kranda: The biggest problem is if you look at lines 8-9 where there is an unobligated seller. I would like to go out there and speculate and throw some numbers out and never have to sign a contract. Does that set a price that can be relied on? That creates uncertainty and speculation.

Senator Unruh: Does that high value get carried to other cases as well? Is it just regarding that one case or can it be used in subsequent cases?

Todd Kranda: I would assume that that sets the standards. Once you set some negotiations, that is the next benchmark and so one. You keep elevating and there is no basis as to the actual highest best use of land. That is where you have some standard certainty which is necessary.

Senator Dotzenrod: You mentioned that you are required to provide an appraisal to the landowner. Would that appraisal also include the concerns the landowner may have that interferes with the ability to construct something on that. That once that line is in, they have the ability to go in there in the future and build on it or to construction. Tiling is also coming in and they are expecting the great majority of the Red River Valley that will eventually be tiled. If you have a rectangular grid pattern that you want to establish, on a field that is laid out in a set of lines that are about 80 feet apart. If there is a line that is running across that field, that is going to require a redesign. There could be consequences that an appraisal might not recognize that the landowner is concerned about. I would think that you would want to have a system where those things could be part of the discussion. I don't know if under current law that is allowed. Or would this bill allow that to be a part of the discussion?

Todd Kranda: The front page of the bill covers that. Lines 18-19 read that. Those are a part of the process.

Senator Kannianen: Do you think that the judge jury process would vet out most of your concerns? You will have both sides arguing. Every piece of land is unique.

Todd Kranda: I think this is a lawyer employment bill. I think it will increase the number of cases. We don't have a solid based appraisal document, we have a lot of hypothetical situations that are being thrown in and the standards are being loosened a lot. I think there is already reasonably information that is being provided. I landowner can testify.

Corey Kost, Member of Legislative Committee, North Dakota Appraisers Association (NDAA): Testified in opposition of SB 2259. See attachment #5.

Senator Kannianen: You stated that most state wide certified general appraisers do not have the competency to address the complexity in eminent domain appraisals. How many do you think do out of your 300 in your membership?

Corey Kost: I do not have the answer to that question. I know there are a number of very qualified and confident appraisers who can serve that function.

Senator Kannianen: How do we guarantee that those are the ones that would handle these cases?

Corey Kost: There is no way to guarantee it but the appraisers in the state of ND are licensed. They fall under the rules and regulations of the state of ND. We do have an appraiser board. If there is a case where an appraiser is not using standard accepted

methodology, anyone in the state can issue a complaint. The board looks at the person individually and sanctions can be handed down individually.

Senator Kannianen: Isn't that a reason why the judge should be able to look at additional information besides what an appraiser can handle?

Corey Kost: I think for stuff like this, you should rely on professionals. That should be the basis of decision making. If you were to allow other nonprofessionals to give other information that may not be properly bedded, it probably has the effect of confusing the jury or judge more than assisting them. Having proper procedures would be an important part in making it clear to all those involved.

Senator Kannianen: Now when you talk about the prices agreed to through private negotiations do not constitute an open market, is that the same as saying they don't constitute fair market value?

Corey Kost: Those private negotiations that have not been exposed to an open market, would not meet the criteria necessary to be considered an arm's length transactions that should be given consideration. We could look to what is done on the federal level for projects that are used or that involve federal money. They follow standards that are in the yellow book. It has a specific section relating to going rates and non-market considerations. Section 4.6.5.1.1 form the uniform appraiser standards for federal land acquisitions. It states that "Going rates cannot be used as a proxy for market value and federal acquisitions requiring payment for just compensation. Going rates tend to reflect non compensable considerations above the market value of the property required such as avoiding the cost of condemnation or other litigation and economic pressures to complete construction and place the plant facility or infrastructure in operation. For these reasons, appraisals of easements for federal acquisitions cannot be based on going rates but rather must be based upon accepted before and after appraisal techniques." That is what I had outlined as the current method that has been used for decades. These are the rules that must be followed for projects that involve federal money. I have to assume they are based on similar considerations as to what is being brought up today.

Senator Dotzenrod: It seems like there are two venues in which the values get discussed and settled. One is where the appraiser takes a look at it and comes up with a value that they think is appropriate. The other is where this bill is discussing that in a venue of court. This is an eminent domain situation and is different than when an appraiser comes out and says what they think it is worth. Is there a two-way communication at that point between the appraiser and the landowner where the landowner can say that they have a building project plan that they would like to put in a certain place but it will take away their ability to construct something there? Is that going on when that appraisal is being made or does that only come up when they end up in court?

Corey Kost: That is something that is required by those federal guidelines and would be accepted appraisal methodology to go through the process and talk with the landowner. We would find out their concerns and give them appropriate consideration as to how their concerns impact the highest and best use of the property.

Chairman Cook: Who chooses the appraiser?

Corey Kost: I think it depends on what project it would be.

Senator Patten: Usually both parties are going to hire appraisers if it is in court. It could be either party.

Danette Welsh, Director of Government Relations for ONEOK, Inc: Testified in opposition to SB 2259. See attachment #6. This law has been in effect in Wyoming since 2007. We have experienced an increase in the number of eminent domain cases. They are finding themselves on the threshold of costs escalating to the point that it is impacting the decision to develop minerals. We do not want to see that here. This language about market evaluation for easement and compensation, serves to divorce itself from the level of harm the landowner is incurring and for the evaluation of the land. As a pipeline company, we have over 8,000 miles of pipe in western ND alone. Most of that isn't subject to eminent domain because we don't have the tool of eminent domain for gathering sides in ND. It is important to us because we are held to specific pieces of land. When we are going to put in a pipeline, it is to serve a specific development. It is because we have to put the pipe there. This language is very impactful for us and for how we manage those developments and we want to be sure that we are not impacted to the point where we are no longer able to make it economic to install that type of infrastructure. I will stand for questions.

Senator Kannianen: Did you say that in Wyoming that eminent domain is allowed for gathering?

Danette Welsh: Yes, it is allowed for gathering in the state of Wyoming.

Senator Kannianen: Does that make the comparison between Wyoming and North Dakota obsolete?

Danette Welsh: No. I think the requesters are asking for pieces of Wyoming's eminent domain law, but they are not allowing the other piece of it. It makes it just as impactful but without us having the same kinds of tools. It is going to affect what the ultimate number is for negotiation and we will not have the same set of tools that they do in Wyoming.

Ron Day, Marathon Petroleum: Testified in opposition to the bill. One thing this does create is uncertainty. As we go out in the industry and start challenging our corporate office for funds to invest in ND, they will look at this and ask what the fair market value is for the next easement. We are concerned that it could be in a gathering system where we do not have eminent domain capability. Marathon has never had an eminent domain case. We try to negotiate with the individual landowner. If there are damages, we try to value that in the eyes of the landowner. We are concerned that this will escalate the cost of doing business and potentially drive away investments into ND.

Chairman Cook: Amy other testimony?

Michael Knox: Testified neutrally for SB 2259. See attachment #7.

Chairman Cook: Excuse me, you said included where at the bottom of your testimony, it says excluded.

Michael Knox: It says “not to be excluded” which means they should be included. Continued reading from testimony. When I negotiate a lease on easement, there’s a 30” oil pipeline that has a bigger and greater risk than a 4” pipeline. Comparable easements should be further defined. Timelines also need to be considered. Someone who signed an easement 5 years ago may be $15,000 an acre. I do not know if that may or may not be the going rate today. It should be categorized in a certain timeline. As a DOT rep. we do temporary easements across the entire state. We see a lot of different types of easements and different evaluations. I believe Senator Unruh asked how many ongoing eminent domain cases are at the moment. The DOT has had between 85-90 cases. Six went to trial. In those cases, some are unavoidable. It allows us to go around the probate process. We saw a lot of situations where people were signing 5 year options. We would give them so much money saying we have the exclusive right to by your money for a certain price but we would only give them a certain amount that day. The landowner tried to introduce that in our meeting. We are here neutrally on the bill but we would be opposed to the bill if some of these fine points were not incorporated into it.

Chairman Cook: Any more testimony? We will close the hearing on SB 2259.

2019 SENATE STANDING COMMITTEE MINUTES

Finance and Taxation Committee
Lewis and Clark Room, State Capitol

SB 2259
1/29/2019
Job #31651

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Alicia Larsgaard

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 32-15-22 of the North Dakota Century Code, relating to the valuation of property for just compensation.

Minutes:

Attachments: 0

Chairman Cook: Called the hearing to order on SB 2259.

Senator Kannianen: The whole purpose of this bill is to allow more information to be allowed for judges and juries consideration. When the appraiser that testified made the comment about many situations regarding eminent domain or partial takings saying that every situation is so unique so there are very few appraisers that are actually specialized to do that type of work. You also can't guarantee that any appraiser that is doing that type of work is one of the specialized one. It could even be something as simple as the going rate. The landowners previously negotiated various things and now one land is being taken against his will. All of his data used previously doesn't matter anymore, it is all about what the appraiser says that isn't even specialized to do that work. If you potentially give more to the landowner for their land, that means that the entities have to pay more out of their pocket. The bottom line is the judges and the juries still make the decision.

Senator Meyer: Did an appraisers come out in opposition of this?

Senator Cook: Yes. The some on behalf of the association came out. Corey Cost and Joe Ibach. I had to hire an appraiser once and I was amazed at the work he did. A few years ago we passed a bill that required all appraisers to do so much training. I enrolled and started to take the training. I didn't finish but I was amazed at how in depth it was. I think that any time you have land being taken from you, chances are you are going to be unsatisfied.

Senator Patten: I have looked at several thousand appraisals in my lifetime. I understand how they work. The expansion that is requested here probably wouldn't qualify to be used in an appraisal as far as establishing value. The testimony in opposition came from the energy industry but by far the dominant impact will be on political subdivisions such as water districts, cities, counties, and townships. The burden would end up falling back on the tax payers. When you look at an obligated buyer, it doesn't mean much to me. They did provide a little

more after the hearing regarding what they felt unobligated meant but that part didn't carry much weight with me.

Senator Unruh: My question has to do with the highest and best use of the land and that becoming the standard for what the court would most likely consider in the case of a judge or jury. Arguing that the best and highest use is a number that differs from the way the ground is currently being used, which one would assume is the best and highest use because the land owner owns the land and is using it to the best of his ability for whatever his purposes are. If he is a rancher, he is using it to make sure his cattle gain weight properly so he can make the most money. The highest and best use for him to put the courts in a situation where they are assuming highest and best use of someone else's five-acre parcel for a use that is not being used here didn't make sense to me.

Senator Patten: An example of the highest and best use where the current use is not that would be if you are sitting with 30 acres of land in an expansion area of a city and you are still renting cattle on it. You have 20 developers that are offering you money to sell and you haven't done that yet. You may have a situation where it is still being used as grazing land which would carry a certain value. The opportunity to use it as development land is much higher and you just haven't made the decision yet.

Senator Unruh: To be able to take someone to court just to get that dollar amount, seems unfair to me.

Senator Dotzenrod: It appears that if this were to pass, it would come into play in eminent domain proceedings. It is not in a normal transaction that you would see where people are negotiating. If eminent domain comes into play, it triggers a whole different way of dealing with things. We have had bills in the legislature to try and soften the disputes between the mineral owners and surface owners. Some people feel like they are being pushed so they won't sign things. Is eminent domain a growing thing in the Bakken? Does it mean that if this passes, we will see more cases that are actually going to have to be resolved this way in an eminent domain environment? Or is the eminent domain not used very much?

Chairman Cook: I do not know how much it is used. I would think it is used some. Remember, this issue is not only to take land and own it, it is also to take land and use it with an underground pipeline. Highway right a ways have become very expensive.

Senator Patten: Eminent domain is almost never used in the energy sector. The only place that is available is under the transmission line. It has to be a common carrier. That gathering lines are not available for eminent domain. You have to negotiate an easement. The common carries would be the large pipelines that have more than one company transferring their product. Water systems are different. They are not necessarily energy related. They have used eminent domain for freshwater. It is available for roads as well.

Senator Dotzenrod: This is something that would be used. If it is an eminent domain proceeding, we are probably talking a small share of the right or way discussions and negotiations that go on. I would assume we are talking about a negative affect but maybe I am wrong.

Senator Patten: Appraisals use three different approaches when determining values. The market, cost, and income approach. In some cases, not all of them would apply. This would expand beyond that because you are getting into grey areas of value. They are not supported.

Senator Unruh: Moved a Do Not Pass.

Senator Meyer: Seconded.

A Roll Call Vote Was Taken. 4-2-0

Motion Carried.

Senator Patten will carry the bill.

Date: 1-29-19
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2259

Senate Finance and Taxation 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 Unruh Seconded By Meyer

Senators	Yes	No	Senators	Yes	No
Chairman Cook	✓		Senator Dotzenrod		✓
Vice Chairman Kannianen		✓			
Senator Meyer	✓				
Senator Patten	✓				
Senator Unruh	✓				

Total (Yes) 4 No 2

Absent 0

Floor Assignment Patten.

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

REPORT OF STANDING COMMITTEE

SB 2259: Finance and Taxation Committee (Sen. Cook, Chairman) recommends **DO NOT PASS** (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2259 was placed on the Eleventh order on the calendar.

2019 TESTIMONY

SB 2259

1/21 SB2259 #1 pg. 1

Testimony on SB 2259

Senator Jordan Kannianen - District 4

A judge or jury decides the valuation and compensation in an eminent domain case, and the language in this bill would clarify what information would be available to them in that determination.

The main purpose of SB 2259 is to codify into law methodologies and practices that are already frequently accepted by many North Dakota judges but often fought by the government and private corporations. In an eminent domain case the landowner has largely lost the ability to negotiate since they don't have a choice in whether to keep their land. The idea that they frequently must pay attorney fees and other costs to ensure all available information is on the record is what needs to be changed.

Example 1:

A landowner has negotiated three different pipeline easements over the past few years and received $500/rod. Now, in an eminent domain case, should he receive anything less than $500/rod? Sometimes this is the case, and he should not be paid less when his land is being taken against his will.

Example 2: Partial Taking - taking an easement and not the land entirely

Subsection 3(c)(2) in the bill covers partial takings.

Appraisers often look at the value of land without comparable easements and the value of land with comparable easements and determine there is minimal damage. In cases where eminent domain cannot be used - gathering lines, for example - landowners are usually compensated between $350-$800/rod, and comparable rates should be looked at in a partial taking case.

It is important to remember that it is still the judge or jury who determines the valuation and compensation. This bill is simply trying to ensure that all available information is entered into the record without the landowner having to pay expensive fees for attorneys and experts.

Please give SB 2259 a Do Pass Recommendation. Thank you.

1/21 SB 2259 #2 pg.1

Troy Coons
Northwest Landowners Association
Finance and Taxation Committee
Testimony for SB 2259
January 21, 2019

Good morning, Chairman Cook 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 appreciates the opportunity to submit comments regarding SB 2259, related to Eminent Domain valuations. We feel North Dakota landowners should receive just compensation along with the highest and best use of their property. In some cases the proper gauge for damages is an industrial use, instead of agricultural use, as this is how the land is being used after it's taken.

Similar language used for SB 2259 has been in statute for over a decade in Wyoming and that law is attached to my testimony; Montana is considering this change as well.

Under current Montana statute, current fair market value is the highest and best reasonably available use and its value for such use, but the current use may not be presumed to be the highest and best use.

The jury instruction in North Dakota says, "the determination of value in a condemnation proceeding is not a matter of a formula or artificial rules, but of sound judgment and discretion based upon your consideration of all the relevant facts in a particular case."

SB 2259 will allow judges and juries to broaden the spectrum of evidence they are able to consider and allow into evidence. The judge is still the final authority on what relevant evidence is considered.

Northwest Landowners Association is in favor of this proposed bill, and asks that you pass SB 2259 to allow landowners to receive just and fair compensation.

Troy Coons
Northwest Landowners Association
Finance and Taxation Committee
Testimony for SB 2259
January 21, 2019

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

Sincerely,

Troy Coons, Chairman

Northwest Landowners Association

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West's Wyoming Statutes Annotated
Title 1. Code of Civil Procedure
Chapter 26. Eminent Domain
Article 7. Compensation

W.S.1977 § 1-26-704

§ 1-26-704. Fair market value defined

Currentness

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

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

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

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

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

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

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

(b) The fair market value of property owned by an entity organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if the following conditions exist:

(i) The property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function, or to render nonprofit educational, religious, charitable or eleemosynary services; and

(ii) The facilities or services are available to the general public.

(c) The cost of functional replacement under subsection (b) of this section includes:

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(i) The cost of a functionally equivalent site;

(ii) The cost of relocating and rehabilitating improvements taken, or if relocation and rehabilitation is impracticable, the cost of providing improvements of substantially comparable character and of the same or equal utility; and

(iii) The cost of betterments and enlargements required by law or by current construction and utilization standards for similar facilities.

(d) In determining fair market value under this section, no terms or conditions of an agreement containing a confidentiality provision shall be required to be disclosed unless the release of such information is compelled by lawful discovery, upon a finding that the information sought is relevant to a claim or defense of any party in the eminent domain action. The court shall ensure that any such information required to be disclosed remains confidential. The provision of this subsection shall not apply if the information is contained in a document recorded in the county clerk's office or has otherwise been made public.

Credits

Laws 1981, ch. 174, § 1; Laws 2007, ch. 139, § 2, eff. July 1, 2007; Laws 2013, ch. 201, § 1, eff. July 1, 2013.

W. S. 1977 § 1-26-704, WY ST § 1-26-704

Current through the 2018 Budget Session of the Wyoming Legislature

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Testimony of Derrick Braaten in Support of
SENATE BILL NO. 2259
Senate Finance and Taxation Committee
January 21, 2019

1/21 SB 2259
#3 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 support of Senate Bill 2259 because I believe it a very important clarification that will be helpful to not only landowners, but the judges and juries who are charged with determining compensation in eminent domain actions.

With respect to what are called "partial takings," the evidence that is allowed to go before the jury often becomes the subject of legal wrangling. By partial takings, I am referring to takings of interests such as easements, as opposed to taking the property in fee (i.e. taking the entire property). This bill will make it explicit and clear that this kind of evidence is not only allowed, but appropriate and helpful.

I believe one of the reasons that this evidence is sometimes challenged is because it is not the kind of analysis conducted by a real estate appraiser. In every eminent domain proceeding I have ever handled, the condemnor has hired a real estate appraiser to value the damages. When assessing a partial taking such as an easement for a pipeline or a transmission line, my experience with real estate appraisal methodology is that appraisers almost always conclude that there is minimal, or no damage. I have seen landowners offered less than $2,000 for transmission lines and pipelines crossing entire quarter sections of their property.

I would like to share some detail from one case in particular. I received permission from Representative David Drovdal to share what I can from his case in support of this bill. Mr. Drovdal came home one day to construction equipment in his field, and upon asking them what they were doing on his property, he was told that they had deposited $1,975 with the court, and if he did not agree, he needed to file an appeal with the district court. He did.

Rep. Drovdal had numerous other pipelines crossing his property, and he had negotiated fair compensation for all of them. In Rep. Drovdal's case and others, I have worked with experts who are not appraisers. One expert I have used in numerous cases is David Saxowsky, an economist and professor in the Department of Agribusiness and Applied Economics at NDSU. Mr. Saxowsky also holds a law degree, which means he is uniquely educated to offer expert testimony and opinions on the appropriate measure of damages in eminent domain actions.

On this specific issue Mr. Saxowsky concluded: "An argument could be made that the pipeline will have minimal impact on the agricultural use of the surface and therefore, a minimal payment is adequate to compensate the surface owner. At least two points arise explaining that a minimal payment is not adequate compensation: 1) easements recently granted for other buried pipelines through this same tract have paid substantially more compensation than is being offered for the water pipeline easement, and 2) economic concepts suggest that the law should consider more than the change in the value of the land surface to determine fair compensation for the right to bury a pipeline under agricultural land....A region experiencing extensive use of the subsurface

would consider how an additional pipeline may impact current and future uses of the surface and subsurface. A community or region active with pipeline infrastructure would have comparable "sales" to consider in placing a value on a subsurface that will be used for another pipeline. If the community has limited comparable sales for easements or other uses, comparable sales in other communities could be considered as long as the other traits or characteristics of the transactions are comparable, such as, the subsurface of agricultural land is being used as the location for a buried pipeline…In summary, comparable sales should be considered in setting an appropriate compensation for the property rights taken by eminent domain. At a minimum, comparable "sales" of easements should be used in determining compensation for the purpose of eminent domain." This is the opinion of a trained economist with a law degree who has studied this specific issue in North Dakota.

I would like to briefly address a couple other points. First, despite what some appraisers say, the appraisal methodology is itself largely subjective. I deposed one prominent appraiser, who testified under oath as follows:

> Q. So in your opinion, there are no accepted methodologies in the field of appraisal?
> A. The only accepted methodology is what I consider to be appropriate to come up with my judgment as to the property's market value.
> Q. And so the only limitation on the methodology used in appraisal, in your opinion, is what you determine to be appropriate in your judgment?
> A. Yes.

The fact that appraisal methodology is subjective does not bar this testimony, however. This is because, to some extent, placing a value on a piece of property is always somewhat subjective. The North Dakota Jury Instruction on this issue makes it clear that there are no hard and fast rules about the evidence a landowner can submit on his damages. The pattern jury instruction in North Dakota states: "The determination of value in a condemnation proceeding is not a matter of a formula or artificial rules, but of sound judgment and discretion based upon [the juror's] consideration of all the relevant facts in a particular case." *See* North Dakota Jury Instructions (NDJI)-Civil C-75.05 (2014). North Dakota courts are also very receptive to landowner testimony regarding the value of their land. North Dakota's Supreme Court has stated that North Dakota has a "liberal rule that permits an owner to testify concerning the value of his property is based upon a presumed familiarity with the subject, acquired from having purchased it or from having gained a knowledge in some other way, sufficient to qualify him." *See Alm Const. Co. v. Vertin*, 118 N.W.2d 737, 748 (N.D. 1962).

SB 2259 is a significant step in the right direction with respect to the way we determine compensation in eminent domain proceedings. For the reasons outlined here, I urge a **do pass**.

Thank you,

Derrick Braaten

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pg. 1

Testimony in Opposition to
SENATE BILL NO. 2259
Senate Finance and Taxation Committee
January 21, 2019

Chairman Cook, Senate Finance and Taxation Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Ruff Kranda Nagle & Ludwig Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to oppose SB 2259.

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

SB 2259 is not unfamiliar because a bill substantially the same was introduced in the 2017 Session as SB 2332, copy attached. I have also attached for your reference a copy of the Bill Actions for SB 2332 as well as the relevant portion of the Journal of the Senate, page 454 from the 31st Day, with the Senate vote defeating SB 2332 following a 6-0 Do Not Pass recommendation from the Senate Political Subdivisions Committee.

SB 2259 provides for changes to the assessment of damages statute within the eminent domain laws, namely Chapter 32-15 NDCC. For anyone not familiar with the eminent domain process, I have attached for your reference a Fact Sheet from the Attorney General's office entitled Landowner Rights under ND's Eminent Domain Law.

Under SB 2259 the existing appraisal methodology used in determining the value of property for just compensation is being changed unnecessarily. There is language being added that would create confusion and uncertainty. The current statute already provides for an adequate and fair process in determining valuations with damage assessments for just compensation with eminent domain proceedings.

SB 2259, adds language, at page 2 lines 8-9, that refers to "an informed and willing, but unobligated seller and buyer". That provision would allow evidence based on fabricated

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

Also, SB 2259, at page 2 lines 10-11, refers the use of "any just and equitable method of valuation." There are primary methods of valuation that are used by appraisers which include: comparable sales; income approach and cost approach. These are tested and proven methods that a qualified and competent appraiser already knows and uses. An appraiser would not want to simply speculate on a "just and equitable method" for determining a valuation which cannot be supported or defended as being consistent, fair or accurate.

Finally, SB 2259, at page 2 lines 12-19, refers to evidence of what had been paid for comparable easements. However those comparable easements are not necessarily "arms-length transactions" as they may be resolved under various unique situations including a concern over condemnation, time deadlines, and other special considerations and, as such, may not be an accurate, fair and reasonable representation of what certain property is truly worth. Testimony presented by Appraiser Joe Ibach from 2017 is also attached for review.

The process used for assessment of damages with eminent domain situations does not need to be changed. I am unaware of any specific situations nor any examples under which the application of the current law did not result in a fair and reasonable valuation. The Court always has the discretion to consider various forms of relevant evidence in determining a fair and reasonable valuation. SB 2259 is not necessary and would create valuation problems.

In conclusion, NDPC urges your opposition to **SB 2259** and respectfully requests a **Do Not Pass** recommendation. Thank you and I would be happy to try to answer any questions.

2017 Session

COPY

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#4 pg. 3

17.0996.01000

Sixty-fifth
Legislative Assembly
of North Dakota

SENATE BILL NO. 2332

Introduced by

Senators Luick, Erbele, Heckaman

Representatives B. Anderson, D. Anderson, Longmuir

A BILL for an Act to amend and reenact section 32-15-22 of the North Dakota Century Code, relating to the valuation of property for just compensation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 32-15-22 of the North Dakota Century Code is amended and reenacted as follows:

32-15-22. Assessment of damages.

1. The jury, or court, or referee, if a jury is waived, must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:

~~1.~~ a. The value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein. If it consists of different parcels, the value of each parcel and each estate and interest therein shall be separately assessed.

~~2.~~ b. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

~~3.~~ c. If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

~~4.~~ d. If the property is taken or damaged by the state or a public corporation, separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff, and if the benefit shall be equal to the damages assessed under ~~subsections 2 and 3~~ subdivisions b and c the owner of

21 8B 2259 #4 pg. 4

the parcel shall be allowed no compensation except the value of the portion taken, but if the benefit shall be less than the damages so assessed the former shall be deducted from the latter and the remainder shall be the only damages allowed in addition to the value of the portion taken.

~~5.~~2. As far as practicable, compensation must be assessed separately for property actually taken and for damages to that which is not taken.

3. For purposes of determining the value of property under this section:

a. The value of property for which there is a relevant market is the price upon which an informed and willing, but unobligated seller and buyer would agree.

b. The value of property for which there is no relevant market is determined by any just and equitable method of valuation.

c. The determination of value must use generally accepted appraisal techniques that may include:

(1) Techniques used by a certified appraiser;

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

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

North Dakota Legislative Branch

Bill Actions for SB 2332

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Send me to Bill No. (9999): [ ] Go!

HJ=House Journal; SJ=Senate Journal

Introduced by Sen. Luick, Erbele, Heckaman

Introduced by Rep. B. Anderson, D. Anderson, Longmuir

A BILL for an Act to amend and reenact section 32-15-22 of the North Dakota Century Code, relating to the valuation of property for just compensation.

Date	Chamber	Meeting Description	Journal
01/23	Senate	Introduced, first reading, referred Political Subdivisions Committee	SJ 177
02/02	Senate	Committee Hearing 10:00	
02/14	Senate	Reported back amended, do not pass, placed on calendar 6 0 0	SJ 426
02/15	Senate	Amendment adopted, placed on calendar	SJ 431
02/16	Senate	Second reading, failed to pass, yeas 13 nays 32	SJ 454

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to amend and reenact sections 15.1-36-01, 15.1-36-02, 15.1-36-06, and 15.1-36-08, subsection 1 of section 21-03-07, section 54-44.1-12, and subsection 1 of section 57-62-02 of the North Dakota Century Code, relating to school construction loans from the coal development trust fund and the school construction assistance revolving loan fund, control of the rate of expenditures, and the transfer of interest from the coal development trust fund; to repeal sections 9 and 10 of chapter 153 of the 2015 Session Laws and sections 15-10-60, 15.1-27-46, 15.1-36-02.1, 15.1-36-03, 15.1-36-06, and 15.1-36-07 of the North Dakota Century Code, relating to the scholarship endowment fund, the uses of the foundation aid stabilization fund, and school construction loans; to provide an expiration date; to provide contingent transfers; to provide transfers; to provide an appropriation; to provide an effective date; and to declare an emergency.

ROLL CALL

The question being on the final passage of the amended bill, which has been read, and has committee recommendation of DO PASS, the roll was called and there were 45 YEAS, 0 NAYS, 0 EXCUSED, 2 ABSENT AND NOT VOTING.

YEAS: Armstrong; Bekkedahl; Bowman; Burckhard; Campbell; Casper; Clemens; Cook; Dever; Dotzenrod; Erbele; Grabinger; Heckaman; Hogue; Holmberg; Kannianen; Kilzer; Klein; Krebsbach; Kreun; Laffen; Larsen, O.; Larson, D., Lee, G.; Lee, J.; Luick; Marcellais; Mathern; Meyer; Myrdal; Nelson; Oban; Oehlke; Osland; Piepkorn; Poolman; Robinson; Roers; Rust; Schaible; Sorvaag; Unruh; Vedaa; Wanzek; Wardner

ABSENT AND NOT VOTING: Anderson; Davison

Reengrossed SB 2272 passed and the emergency clause was declared carried.

****

SECOND READING OF SENATE BILL

SB 2332: A BILL for an Act to amend and reenact section 32-15-22 of the North Dakota Century Code, relating to the valuation of property for just compensation.

ROLL CALL

The question being on the final passage of the amended bill, which has been read, and has committee recommendation of DO NOT PASS, the roll was called and there were 13 YEAS, 32 NAYS, 0 EXCUSED, 2 ABSENT AND NOT VOTING.

YEAS: Cook; Dotzenrod; Erbele; Grabinger; Heckaman; Luick; Marcellais; Mathern; Nelson; Oban; Robinson; Wanzek; Wardner

NAYS: Armstrong; Bekkedahl; Bowman; Burckhard; Campbell; Casper; Clemens; Dever; Hogue; Holmberg; Kannianen; Kilzer; Klein; Krebsbach; Kreun; Laffen; Larsen, O., Larson, D., Lee, G., Lee, J.; Meyer; Myrdal; Oehlke; Osland; Piepkorn; Poolman; Roers; Rust; Schaible; Sorvaag; Unruh; Vedaa

ABSENT AND NOT VOTING: Anderson; Davison

Engrossed SB 2332 failed.

****

SECOND READING OF SENATE BILL

SB 2327: A BILL for an Act to create and enact a new subdivision to subsection 2 of section 12-60-24, the 22.1, and subdivision v of subsection 1 of section 54-06-04 of the North Dakota Century Code, relating to the creation of the department of environmental quality, the transfer of duties and responsibilities of the state department of health relating to environmental quality to the department of environmental quality, and biennial reports of the department of environmental quality; to amend and reenact section 4-35.2-01, subdivision b of subsection 5 of section 6-09.4-03, sections 11-11-01, 11-33-02.1, and 11-33-22, subdivision d of subsection 2 of section 12-06.1-01, section 15-05-16, subsection 1 of section 19-01-01, sections 20.1-03-05, 20.1-17-01, and 23-01-02, subsection 8 of section

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SB 2332
2.2.2017
Written Testimony #2
1/3

NDAA
North Dakota Appraisers Association

P.O Box 7521, Rapid City, SD 57709

www.ndappraisers.org

SENATE BILL NO. 2332
Testimony
Joe Ibach
Legislative Chairman, Board of Directors Member
North Dakota Appraisers Association (NDAA)

February 2, 2017

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

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

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

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

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

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

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

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Landowner Rights under North Dakota's **Eminent Domain Law**

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

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

What is "Eminent Domain?"

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

Taking Private Property

Private property cannot be taken:

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

How is Property Selected?

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

Negotiation Before Condemnation

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

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

When is Condemnation Authorized?

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

The "Quick Take" Procedure

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

Condemnation

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

Use or Necessity?

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

Just Compensation

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

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

Damage Awards

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

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

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

Attorney Fees

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

A Summary of Landowner Rights

Landowners have the right to:

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

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

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North Dakota Appraisers Association

P.O Box 7521, Rapid City, SD 57709 www.ndappraisers.org

SENATE BILL NO. 2259
Testimony
Corey Kost, MAI
Legislative Committee
North Dakota Appraisers Association (NDAA)

January 21, 2018

My name is Corey Kost, member of the Legislative Committee of the North Dakota Appraisers Association (NDAA). As of today, NDAA has 153 members, representing about 95% of the licensed and certified appraisers living/practicing in North Dakota. (There are about 300 licensed and certified appraisers in North Dakota, but about half do not live in the state.) The NDAA appreciates this opportunity to present the "voice" of North Dakota appraisers.

I am here representing the NDAA in opposition to Senate Bill No. 2259. As a practicing appraiser with experience completing appraisals for use in "eminent domain" proceedings, I believe attempting to legislate the "measure of damages" to be concerning. Chapter 32-15 of the North Dakota Century Code already details the measure of just compensation. Specifically, Section 32-15-06.1 details that *"The amount shall not be less than the condemner's approved appraisal or written statement and summary of just compensation for the property."* The measure of damages, if not mutually negotiated between the condemner and the property owner, is then addressed in the appraisal process. It is not my intent to educate everyone on the appraisal process. However, the standard appraisal methodology in determining the damages is based on "market" reaction, not on private negotiations between a condemner and property owner. It is the competent appraiser's responsibility to analyze the market to determine if the project impact adversely impacts the property.

The added language in Section 3 of Senate Bill No. 2259 is problematic. Specifically:

- The first sentence of Section 3 starts: *"For purposes of determining the value of the property under this section…".* No definition of "value" is specified yet a multitude of value definitions exist. Simply referencing "value" then creates a need for a definition. As defined in North Dakota Century Code: Chapter 24-01, "market value" is *"The highest price for which property can be sold in the open market by a willing seller to a willing purchaser, neither acting under compulsion and both exercising reasonable judgment."* The definition already allows for the highest price supported in an open market.
- Sections 3a and 3b refer to the existence or nonexistence of a "relevant" market. Who and how will one determine whether a relevant market exists? What is a relevant market?
- Section 3b also details that *"Any just and equitable method of valuation"* may be used. Historically, it has been held that the only just and equitable method of valuation is a determination of the property's market value "before" imposition of the project and "after" imposition of the project. The difference is the market value of the "take". What other just and equitable method of valuation exists? The language is so vague that each side in a dispute could introduce whatever evidence they determine to be applicable. The current system already allows the landowner to effectively put forth whatever evidence they deem appropriate. The State has a precedence that landowners are experts in the value of their own property. It is then conceivable that litigants will attempt to include anything relevant outside the market-based measure of damages.
- Section 3c starts: *"The determination of value must use generally accepted appraisal techniques that may include…".* The word "may" is also problematic as it is unclear who determines what should or should not be used.
- Section 3c (1) details that one of the accepted methods is *"Techniques used by a certified appraiser".* The State of North Dakota has two levels of "certified" appraisers, certified residential and certified general. Only certified general appraisers are licensed to appraise all property types outside the residential world. Even most statewide certified general appraisers do not have the competency to address the complexities in eminent domain appraisals. The language should be more specific to reflect certified residential or certified general appraisers who have the competency to undertake the assignment.
- Section 3c (2) allows for *"The price paid for comparable easements or leases of comparable type, size, and location on the same or similar property"* to be included as a generally accepted appraisal technique used in the determination of value. The prices agreed to through private negotiations do not constitute an open market. They can vary considerably based on the condemner's motivations. If a company decides to pay a landowner compensation far exceeding what the market would support and this price is then used in a public

entity transaction, the taxpayer is or will be ultimately paying for the above-market price. Again, the current system is designed to be equitable so that the taxpayer is assured that every attempt is made to pay "fair market value".

- Section 3c (3) is somewhat contradictory to Section 3c (2) as it relates to compensation based on "arms-length transactions". Again, only arms-length transactions must be considered in determining damages of a particular property in any particular project based on market value.

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

In closing, the "market" should be the basis for determining all just compensation and/or damages, not atypically motivated for-profit companies. The U.S. Constitution emphasizes that a property owner should be paid fairly, not over-paid, as the taxpayer would then suffer. Our current laws are incredibly permissive concerning what evidence a landowner may use in a condemnation action. This proposed legislation only makes the determination of damages more confusing. If any legislation is to move forward, it is our position that the determination of value in an eminent domain case involving real property must be based on generally accepted appraisal techniques and definitions used by a competent certified general appraiser. Inserting language in which no specific definitions or guidelines are provided does not serve the parties involved in possible condemnation actions, most importantly, the taxpayer. The NDAA, therefore, opposes Senate Bill No. 2259.

ONEOK

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Written Testimony Provided To:
Senate Finance & Tax Committee
By Danette Welsh
January 21, 2019

Regarding: Senate Bill No. 2259

Mr. Chairman and members of the committee,

For the record, my name is Danette Welsh, and I serve as director of government relations for ONEOK, Inc. Based in Tulsa, Oklahoma with regional offices in Sidney, Montana and Watford City, North Dakota, ONEOK is the largest natural gas gathering and processing company in the Williston Basin. We currently have over 350 employees managing approximately 8,000 miles of natural gas gathering pipelines and 1 billion cubic feet per day of natural gas processing facilities in western North Dakota.

I stand before you in opposition to Senate Bill 2259, particularly out of concern for the language regarding comparable easements and compensation, which is taken directly from existing Wyoming statute. In addition to our assets in North Dakota, we also have gathering and processing and transmission pipeline facilities in Wyoming. In short, this statute has been incredibly negatively impactful.

Since passing this law in 2007, and with much slower development of its oil and gas resources in the past 10 years when compared to North Dakota, Wyoming now finds itself crossing the threshold where resource development decisions are being impacted because land prices are so far out of line with real valuations. The state of Wyoming is losing out on revenue, and its citizens are losing out on millions of dollars' worth of taxes, royalty income, jobs, etc., because the use of 'comparable easements and compensation' are systematically making natural resource development uneconomic.

The most expensive agreement any company has signed becomes the floor for negotiations for all companies because the landowner is able to present that agreement as evidence to a jury. In order to avoid the delay, expense and risk associated with condemnation, companies are forced to pay a premium to the next landowner. That new premium becomes the floor for the next round of negotiations and the spiral continues. The value for easements completely divorces itself from any harm to the landowner or value for land.

Our key concern is that a pipeline company has little to no choice in what property they purchase. They are required to purchase property in a specific area to serve specific mineral development. The only choice is condemnation or make a deal. And keep in mind, WY allows condemnation for gathering lines. North Dakota does not allow the use of condemnation for gathering lines, but with the passage of SB 2259 it is certain the ceiling-to-floor threshold will be de facto for all facilities.

Thank you for the opportunity to provide comment; we respectfully request a 'no' vote on SB 2259.

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SENATE FINANCE AND TAXATION COMMITTEE
Date: January 21, 2019 at 9:30 a.m.

North Dakota Department of Transportation
Michael Knox, Right of Way Program Manager
Environmental and Transportation Services Division

Senate Bill 2259

Good morning, Mr. Chairman and members of the committee. My name is Michael Knox, I am the Right of Way (ROW) Program Manager for the Environmental and Transportation Services Division. Thank you for giving me the opportunity to discuss the proposed changes as outlined by this bill and answer any additional questions that you may have.

Senate Bill 2259 proposes to establish a method of determining the value of a property and damages under different scenarios including comparable easement transactions and alternative valuation methods in lieu of an appraisal.

The current North Dakota Department of Transportation (DOT) guidelines generally mirror Federal Highway Code of Federal Regulation guidelines when it comes to determining property valuation and damages. Any transactions over $25,000 require an appraisal and the DOT requires those appraisals to be conducted by a certified general appraiser and reviewed by the DOT Chief Review Appraiser. Any valuations between $10,000 and $25,000 the landowner is given the option of having an appraisal provided. Any transactions under $10,000, a simple valuation method is all that is required.

For the most part, the DOT already follows the processes outlined in the proposed language of the bill. However, a couple areas of concern in the proposed sections 1 and 3 should be reconsidered.

In Section 1, regarding "legal testimony", it should be made clear that exhibits are not to be excluded as they may add the same or greater evidentiary value than testimony.

At the beginning of section 3 and for reference to the subcategories thereafter, any sales analysis of property should be prefaced with the conditional language by "in an arms length transaction" in order to further define and remove any ambiguity.

Secondly, in section 3. a, in addition to the proposed language stated above, we suggest changing the language to "the value of property for which there is a relevant market is the price upon which an informed and willing, but unobligated seller and buyer would agree" and that both parties are well advised and acting in what they consider to be their best interests. The DOT follows the Uniform Act, which closely relates to the Appraisal Institute's definition and is consistent with current standard definitions.

Thirdly, in section 3. b, the sentence containing the word **"any"** should be replaced with "**a reasonable**" just and equitable method of valuation. Again, the vagueness of the language does not define who would be able to determine the valuation. In this situation, qualified appraisers should be the experts in this area rather than a common lay person not in the versed in the field.

In section 3. c (2), "comparable easements should be more clearly defined. A permanent easement is different from a temporary construction easement in the type of land is acquired by the DOT. All agencies have different motivations, objectives and rules they must follow. A power line easement is not comparable to a roadway easement. A pipeline easement is not comparable to a roadway easement and has different impacts and restrictions than a power line easement. There are significant differences, both from an impact perspective and a risk perspective, between a 4" water pipeline easement and a 30" oil pipeline easement. A stipulation indicating a "reasonable and comparable timeframe" should also be included.

Finally, easements are similar to a commodity and are subject to market conditions. Easement and leases were much higher in demand at certain highpoints or at the height of the economic boom versus where they are at today or fifteen years ago. Just because one received and a high value easement payment five years ago may or may not be what the valuation would be today.

It appears that the DOT mostly follows the processes and guidelines contained within this bill. However, some points of clarification are needed to reduce the ambiguity and vagueness of the proposed bill changes. By incorporating our recommended language changes, it will provide needed clarity during our good faith negotiations. It will allow us to avoid situations by those who seek to exploit the loopholes which ultimately result in delayed project timelines and higher costs absorbed by the people of North Dakota.

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