Troy Coons
Northwest Landowners Association
House Energy and Natural Resources Committee
SB 2065 Subcommittee
March 21, 2021

Re: Senate Bill 2065

Chairman George Keiser and Members of the Subcommittee:

We are writing to address our request for an amendment to SB 2065 to allow landowners a trial by a jury of our peers for damages arising from forced amalgamation of pore space. While we understand that there have been some reservations with the idea of a jury trial de novo following a Commission determination on compensation, we want to ensure that our position has been clearly stated before the subcommittee takes action. More importantly, since we last spoke our legal counsel has conducted additional research in the process of trying to explain our own proposal, as well as draft an alternative appeal procedure with a normal standard of review from NDCC Chapter 28-32. In conducting this research, our legal counsel has concluded that it is unconstitutional to deny the right to have a jury determine compensation for a nonconsenting amalgamated pore space owner.

We do not believe it is legal to allow the Industrial Commission to determine the compensation owed to a landowner for a forced "amalgamation" of their property interest unless that landowner has the right to a trial by jury de novo. A jury must decide just compensation. Both the North Dakota constitution, Art. 1, § 16, and N.D.C.C. § 32-15-01 state clearly: "Compensation shall be ascertained by a jury, unless a jury be waived."

To be clear, the forced amalgamation of the pore space interest is a taking of private property. It is questionable whether it is a taking of private property for a public use, but that will depend on the nature of each individual project and that project's proponent (a public utility might have less risk in this regard, for example). The reason we are not simply saying that this is an unconstitutional taking is that, as we have always said, private property may not be taken without just compensation. But "just compensation" has requirements of its own, and is not simply synonymous with "some compensation." There are legal requirements, and if the legal requirements for an award of "just compensation" are not met, it is an illegal taking.

It is an illegal taking to simply remove any right to compensation for the pore space property interest. SB 2065, rather than entirely removing the right to compensation, states that the landowner will get "equitable" compensation, something that is undefined. Therefore, even if the Commission moves ahead with its proceeding and issues an award of what it believes to be "equitable" compensation, this does not necessarily satisfy the constitutional requirement that property cannot be taken without "just" compensation being paid, and it is a jury, unless waived by the landowner, who must determine this. It is also clear that the goal of the Commission here is to ensure that landowners receive less than they would otherwise, so it is almost certain that the first time this statute is used the landowner will not receive just compensation, and we know compensation will not be determined by a jury.

We are willing to agree to the Commission having its own process, and we think that this can be done constitutionally, but only if the landowners have the ability to demand a jury trial if they are unhappy with that process. Otherwise the landowners are having their right to a jury trial and their rights to open access to the courts barred and the legislation is unconstitutional.

Putting this aside, we would also like to note that the typical appeal from an administrative agency, and the unique appeal standard for the Industrial Commission, are not appropriate. To use an example that has been discussed, Workforce Safety Insurance issues compensation awards for workers' compensation claims, and while there are appeals allowed, the law is very clear that no separate legal actions are allowed. The Century Code chapter created for WSI starts out by stating: "sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this title, and to that end, all civil actions and civil claims for relief for those personal injuries and all jurisdiction of the courts of the state over those causes are abolished except as is otherwise provided in this title. A civil action or civil claim arising under this title, which is subject to judicial review, must be reviewed solely on the merits of the action or claim." Even in this arena, abrogating all rights to civil actions is an incredibly broad action for a legislature to take. It is acceptable, however, because the legislature simultaneously created a comprehensive framework to fund and pay those claims, along with specific rules on how those compensation awards would be determined. As such, WSI is really a unique agency administering a unique law, and because it is an agency and law designed with the actual and primary purpose of assessing and paying such compensation awards under a detailed rubric for decision-making, it withstood constitutional scrutiny that would arise from taking away other remedies (but note that there is no constitutional guarantee of a jury for worker's compensation claims, so the threshold inquiry was different in that context).

Additionally, it makes sense that typical decisions of administrative agencies need to have some degree of finality. For that reason, we generally only have appeals from administrative agency determinations, with somewhat deferential standards of review. In the typical context, this makes sense. Indeed, the amendment proposed by NWLA does not change this for any of the decisions made by the Commission. Even if a landowner files for a jury trial to determine compensation, our language states clearly that "Appeals under this section are limited to the issue of the amount of equitable compensation owed to any nonconsenting surface or pore space owner whose property is being amalgamated under this chapter. The Commission's decision will remain in full and force and effect when an appeal is taken under this section."

We understand that the industry is looking for certainty, and we understand that there is perhaps less certainty with a civil jury trial than with the Industrial Commission determining compensation. Our concern is the same, however – we know that the greater certainty with damages being awarded by the Commission comes down to a plain truth – the Commission is going to award less compensation. If that is not true, and the Commission awards truly fair and adequate compensation, then these jury trials should be rare. Most projects with some form of eminent domain authority still manage to obtain most landowner consent required without use of condemnation. And if projects are not successful without using condemnation, it should

perhaps reflect more on that project and its approach with landowners than it does on the landowners who were approached.

Again, we are truly trying to bend over backwards to only ask for what we consider to be the minimum amendments needed to protect our constitutional rights, and our property. We regret that we are just raising this significant constitutional issue now, but would only note that we have had very little communication from proponents of the bill and we are doing our best to research and review the legislation being proposed.

We do view a right to appeal under the standard of review in N.D.C.C. § 28-32-46 rather than 38-08-14 to be a far superior remedy. If this were combined with some definition for "equitable" compensation so that there was an objective standard by which a reviewing court could assess the Commission's decision, we would be more comfortable. Having the hearings before the Commission conducted by the Office of Administrative Hearings would make the process more objective. If a landowner taking such an appeal could recover fees and expenses, this would also make the legislation much better in our view. These changes would not, however, address the constitutional right to a jury for determination of just compensation. So while we would certainly support such an amendment and believe it would be far superior to what exists now, we simply cannot negotiate on constitutional rights. Even if we did, the constitution controls.

With respect to our proposal, we asked our legal counsel to look into the Minnesota law on which we based our proposed amendment and it was this research that led us to the conclusion that denying the right to a jury trial is unconstitutional. Putting that aside, our legal counsel found that numerous other states have similar laws and frameworks for such claims. Many states likely have such a system in recognition of how many states also have a right to a jury trial for these types of compensation claims. We are providing two memos from legal counsel describing similar laws in other states along with this letter.

We look forward to continuing our discussion and negotiating in good faith to find a resolution that produces constitutional legislation and addresses the concerns of all stakeholders.

Thank you for taking the time to consider our comments.

Sincerely,

Troy Coons, Chairman
Northwest Landowners Association

Montana

70-30-304. Appeal to district court from assessment of condemnation commissioners - Mont. Code Ann. § 70-30-304

The plaintiff grounds its contention upon the proposition that section 7344 authorizes an appeal from "any assessment," and argues that, since under section 7341 the commissioners are required to "ascertain and assess" the various elements of damage (but not the total), each finding made in accordance with that section, constitutes "an assessment" from which appeal will lie. We think this is untenable. The very section (7344) on which the right of appeal depends, provides that the appeal-
"shall be brought on for trial upon the same notice and in the same manner as other civil actions, and unless a jury shall be waived by the consent of all parties to such appeal, the same shall be tried by jury, and the damages to which appellant may be entitled by reason of the appropriation of his property, shall be reassessed upon the same principle as hereinbefore prescribed for the assessment of such damages by commissioners."
This clearly implies that not only is the case to be tried **de novo** before the jury, but it is to be tried **de novo** as to all the elements which go to make up "the damages," to which the owner may be entitled "by reason of the appropriation of his property." Again:
"Upon any verdict or assessment by commissioners becoming final, judgment shall be entered declaring that *** the right *** to take, use and appropriate the property described in such verdict or assessment *** shall *** be and remain in the plaintiff. *** In case the party appealing from the award of commissioners *** shall not succeed ***46** in increasing the amount of damages finally awarded to him in such proceeding, he shall not recover the costs of such appeal."
These expressions make it obvious, in our opinion, that the words "any assessment," as used in the first sentence of the section, are intended to refer, not to the findings or specifications going to make up the award, but to the award itself-the total assessment of damages as made pursuant to section 7341.

"That our statutes require a trial de novo has been settled in Great Northern Ry. Co. v. Fiske, 54 Mont. 231, 169 P. 44." State v. Bare, 141 Mont. 288, 294, 377 P.2d 357, 360 (1962)

Indiana

Indiana has court appointed appraisers. The section describing this process is found below.

> The court, being satisfied of the regularity of the proceedings and the right of the plaintiff to exercise the power of eminent domain for the use sought, shall appoint:
> (1) one (1) disinterested freeholder of the county; and
> (2) two (2) disinterested appraisers licensed under IC 25-34.1;
> who are residents of Indiana to assess the damages, or the benefits and damages, as the case may be, that the owner or owners severally may sustain, or be entitled to, by reason of the acquisition. One (1) of the appraisers appointed under subdivision (2) must reside not more than fifty (50) miles from the property.

Ind. Code Ann. § 32-24-1-7(c). “[I]f exceptions are filed within the requisite period, the issue of the defendants' compensation and damages is formed as a matter of law upon the filing of those exceptions. Van Sickle v. Kokomo Water Works Co. (1959) 239 Ind. 612, 616, 158 N.E.2d 460, 462. The trial is then de novo. Toledo & Chicago Interurban Railway v. Wilson (1909) 44 Ind.App. 213, 86 N.E. 508, 88 N.E. 864.” Best Realty Corp. v. State, 400 N.E.2d 1204, 1205 (Ind. Ct. App. 1980)

Alaska

“(5) Appeal From Master's Report. (A) Appeal in the form of a trial de novo may be taken from the master's report by filing a memorandum to set trial within the following time limits:

(i) the plaintiff may appeal within ten days after service of the master's report; and

(ii) a defendant may appeal within fifteen days after service of the master's report.

(B) The memorandum to set trial must contain the information required by Rule 40(b)(1)(a)-(d), (f), and (g).

(6) Demand for Jury Trial. (A) If all parties to the action have waived appointment of a master under subparagraph (h)(3), a jury trial may be had if demand is made by any party within twenty days after service of the Notice of Waiver of Master's Hearing upon that party. Otherwise, trial will be by the court.” Alaska R. Civ. P. 72

The proceeding before the jury is truly de novo in nature. Inglima v. Alaska State Hous. Auth., 462 P.2d 1002, 1004 (Alaska 1970)

Colorado

“Unless a jury is requested by the owner of the property as provided in section 38-1-106, the court shall appoint a board of commissioners of not less than three disinterested and impartial freeholders to determine compensation in the manner provided in this article to be allowed to the owner and persons interested in the lands, real estate, claims, or other property proposed to be taken or damaged in such county for the purposes alleged in the petition.” Colo. Rev. Stat. Ann. § 38-1-105 .

Not sure if *de novo* review

New Mexico

“If appraisers have not been appointed pursuant to Section 42A-1-5 NMSA 1978 and if the court is satisfied that proper notice of the petition has been given, it shall appoint up to three disinterested commissioners who are residents of the county in which the property or a part thereof is situated and who are familiar with the property values in the area of the proposed taking. The commissioners shall assess the damages which the condemnees may severally sustain by reason of the proposed taking and make a report to the clerk of the court within thirty days, unless extended by the court for good cause shown, setting forth the amount of the damages. The clerk of the court shall file the report prepared by the commissioners. Should more than one condemnee be included in the petition, the commissioners shall state the damages

allowed each condemnee separately, together with a specific description of the property for which such damages are assessed." N.M. Stat. Ann. § 42A-1-19

"A. Within twenty days after the filing of the petition if an appraisal has been prepared pursuant to Section 42A-1-5 NMSA 1978 or after the final confirmation of the report of the commissioners, a party may demand trial of any issues remaining in the cause. The cause shall be tried de novo, and unless waived, the parties shall be entitled to a trial by jury.
B. If no issues other than compensation are raised, the court shall render a final judgment awarding the property to the condemnor contingent upon payment of the awarded compensation to the condemnee. In all other cases, the court shall render final judgment upon decision of all contested questions of law and fact." N.M. Stat. Ann. § 42A-1-21

"The proposition was stated without any citation to authority and is at odds with the Yandell majority's holding that, once confirmation of the commissioner's report is appealed for trial de novo, the report as **1284 *567 well as the act of confirmation become functus officio. Id. at 453, 367 P.2d at 941. Although the trial de novo is not the beginning of a new action, it is a new and distinct adjudication that requires a fresh presentation of evidence." *Yates Petroleum Corp. v. Kennedy*, 1989-NMSC-039, ¶ 9, 108 N.M. 564, 566–67, 775 P.2d 1281, 1283–84

"Giving the words of the statute their ordinary and usual meaning, *State ex rel. State Highway Comm'n v. Marquez,* 67 N.M. 353, 359, 355 P.2d 287, 291 (1960), we hold
that Section 42A–1–21 provides the right to a jury trial on all issues in condemnation actions brought under the Code." *Santa Fe S. Ry., Inc. v. Baucis Liab. Co.*, 1998-NMCA-002, ¶ 10, 124 N.M. 430, 432, 952 P.2d 31, 33

Texas

"(a) The judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned shall appoint three disinterested real property owners who reside in the county as special commissioners to assess the damages of the owner of the property being condemned. The judge appointing the special commissioners shall give preference to persons agreed on by the parties. The judge shall provide each party a reasonable period to strike one of the three commissioners appointed by the judge. If a person fails to serve as a commissioner or is struck by a party to the suit, the judge shall appoint a replacement." Tex. Prop. Code Ann. § 21.014.

"The trial court's function in a condemnation proceeding is "appellate" in the sense that the case is first considered by the special commissioners, and hence, as we noted in Nelson, the court's jurisdiction "is appellate as distinguished from original or concurrent."11 The court's jurisdiction is not, however, "appellate" in the sense that the evidence is fixed in the record of the proceedings below and the court is confined to that paper record, as ordinarily occurs when an appellate court reviews a case. Quite the opposite, the statutory scheme makes no provision for the commissioners' hearing to be recorded, and provides that "[i]f a party files an objection to the findings of the special commissioners, the court shall cite the adverse party and try the case in the same manner as other civil causes."12 In other words, the proceedings that occurred before the special commissioners are not considered, and the case is tried to the court de novo. There is

no option typically available to an appellate tribunal to simply affirm the special commissioners' award; instead, "[u]pon the filing of objections, the Special Commissioners' award is vacated and the administrative proceeding converts into a normal pending cause...."13 We agree with TxDOT that it is incongruous to label the trial court as appellate in the ordinary sense "given that its function is not to review and correct, but to determine the value of the property anew."
4 A trial de novo, conducted "in the same manner as other civil causes," is not confined to the same evidence that was presented at the administrative phase. By analogy, the statute governing judicial review of final decisions of state agencies provides that if judicial review is by trial de novo, "the reviewing court shall try each issue of fact and law in the manner that applies to other civil suits in this state as though there had not been an intervening agency action or decision," and generally may not even "admit in evidence the fact of prior state agency action."14 Similarly, in a condemnation case, the commissioners' award is generally not admissible in the trial court proceeding." *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 476 (Tex. 2008).

Tennessee

"The jury will consist of five (5) persons, unless the parties agree upon a different number, and either party may challenge, for cause or peremptorily, as in other civil cases." Tenn. Code Ann. § 29-16-108

"The jurors shall not be interested in the same or a similar question, and shall possess the qualifications of other jurors, and may be nominated by the court, selected by consent of parties, or summoned by the sheriff." Tenn. Code Ann. § 29-16-109.

"(a) Either party may also appeal from the finding of the jury, and, on giving security for the costs, have a trial anew, before a jury in the usual way.
(b) In all cases where the right to condemn is not contested and the sole question before the jury is that of damages the property owner shall be entitled to open and close the argument before the court and jury." Tenn. Code Ann. § 29-16-118

"Following the trial court's confirmation of the jury of view's report, Platinum filed an appeal requesting a *de novo* jury trial pursuant to Tennessee Code Annotated section 29–16–118. A number of pre-trial matters soon ensued, including the filing of several motions in limine. After these pre-trial matters were resolved, a trial was held over the course of several dates in August 2016. Upon the conclusion of the trial proceedings, the jury returned a verdict finding that the value of the Property was $2,032,380.00 at the time of the taking." *Metro. Dev. & Hous. Agency v. Nashville Downtown Platinum, LLC*, No. M201700450COAR3CV, 2017 WL 6210855, at *1 (Tenn. Ct. App. Dec. 8, 2017)

Other state eminent domain proceedings have used methods similar to Minnesota in determining compensation. While each statute has its variations, like Minnesota, other states will ask courts to first appoint a small body of disinterested individuals to investigate just compensation. *See* Mont. Code Ann. § 70-30-207 ("The court shall appoint three qualified, disinterested condemnation commissioners, unless appointment has been waived . . ."); Ind. Code Ann. § 32-24-1-7(c) (directing the court to appoint "one disinterested freeholder of the count . . . [and] . . . two disinterested appraisers"); N.M. Stat. Ann. § 42A-1-19 ("If appraisers have not been appointed pursuant to Section 42A-1-5 NMSA 1978 and if the court is satisfied that proper notice of the petition has been given, it shall appoint up to three disinterested commissioners who are residents of the county in which the property or a part thereof is situated and who are familiar with the property values in the area of the proposed taking."); Tex. Prop. Code Ann. § 21.014 ("The judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned shall appoint three disinterested real property owners who reside in the county as special commissioners to assess the damages of the owner of the property being condemned."); Tenn. Code Ann. §§ 29-16-108-109 (stating that the "jury will consist of five (5) persons, unless the parties agree upon a different number, and either party may challenge, for cause or peremptorily, as in other civil cases" and that the jurors "may be nominated by the court, selected by consent of parties, or summoned by the sheriff.").

Whether referred to as commissioners, appraisers, or jurors, the compensation determinations of these bodies are subject to *de novo* review at the district court. *See State v. Bare*, 377 P.2d 357, 360 (1962) (confirming that the Montana eminent domain statute requires "a trial de novo" and that in a previous case "this court approved the use of commissioners testifying as witnesses so long as the award itself was not testified to"). Indiana courts have

similarly stated that "if exceptions are filed within the requisite period, the issue of the defendants' compensation and damages is formed as a matter of law upon the filing of those exceptions. The trial is then de novo." *Best Realty Corp. v. State*, 400 N.E.2d 1204, 1205 (Ind. Ct. App. 1980) (internal citations omitted). New Mexico courts have also found that their eminent domain statutes provide the right to trial on all issues. *See Santa Fe S. Ry., Inc. v. Baucis Liab. Co*., 952 P.2d 31, 33 (N.M. Ct. App. 1997); *see also Yates Petroleum Corp. v. Kennedy*, 775 P.2d 1281, 1283–84 (N.M. 1989) (reviewing New Mexico eminent domain statutes to find that "[a]lthough the trial de novo is not the beginning of a new action, it is a new and distinct adjudication that requires a fresh presentation of evidence."). Texas courts have described the trial court's "function" in an eminent domain proceeding as "appellate," even though the evidence is not "fixed in the record of the proceedings below." *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 476 (Tex. 2008). "In other words, the proceedings that occurred before the special commissioners are not considered, and the case is tried to the court de novo." *Id.* Tennessee, likewise, allows for a "*de novo* jury trial pursuant to Tennessee Code Annotated section 29–16–118" following the "jury of view's report." *Metro. Dev. & Hous. Agency v. Nashville Downtown Platinum, LLC*, No. M201700450COAR3CV, 2017 WL 6210855, at *1 (Tenn. Ct. App. Dec. 8, 2017). Finally, the Alaska eminent domain statute contains a provision expressly granting parties the right to appeal "in the form of a trial de novo" from the report of the court appointed master. AS § 09.55.300(b) (directing the court to appoint a master "to determine the amount to be paid by the plaintiffs to each owner or other person interested in the property as compensation and damages by reason of the appropriation of the property" unless all parties object to the master and prefer a jury trial); Alaska R. Civ. P. 72(h)(5)(A) ("Appeal in the

form of a trial de novo may be taken from the master's report by filing a memorandum to set trial . . .").