Before the Ohio House Civil Justice Committee
Opponent Testimony on House Bill 64

May 23, 2023

Chair Hillyer, Vice Chair Matthews, Ranking Member Galonski and members of the Ohio House Civil Justice Committee, thank you for the opportunity to provide opponent testimony on Substitute House Bill 64 (HB 64) on behalf of the members of the Ohio Chamber of Commerce. My name is Tony Long, and I am the General Counsel and Director of Taxation & Economic Policy at the Ohio Chamber.

Before I begin with the actual bill, let me provide a little context on Ohio Revised Code Section 163 which is now under review with the proposed revisions contained in HB 64. In 2005 the United States Supreme Court allowed the city of New London, Connecticut to take Susette Kelo's little pink house to further economic development in New London. The issue in the case was the meaning of "public use" in the Fifth Amendment's Taking Clause. In a 5-4 decision the Court ruled that a city could use its eminent domain authority to seize private property to sell to private developers under the city's economic development plans for that specific neighborhood.

Reaction to this decision was swift. 45 states passed some sort of reforms to their eminent-domain practices. In Ohio, the General Assembly passed Senate Bill 167 (signed by the governor on November 16, 2005). SB 167 placed a moratorium on the use of eminent domain by any entity without the owner's consent if the taking is economic development that will result in ownership of the property being vested with another private person. This moratorium ended on December 31, 2006. SB 167 also created a Legislative Task Force to study eminent domain and its use and application in the state. The task force was comprised of 25 members who produced a report in 2006 with a number of recommendations. The recommendations were taken into consideration by the General Assembly as it deliberated Senate Bill 7. SB 7 was signed by the governor on July 10, 2007.

Meanwhile the Ohio courts were also considering the ramifications of the Kelo decision. In 2006 the Ohio Supreme Court issued its decisions in four cases – City of Norwood v. Horney (two cases) and City of Norwood v. Gamble (two cases). Among the rulings, the Court reversed the denial of injunctive relief; found the term "deteriorating area" as a standard for taking to be void for vagueness and therefore unconstitutional; and although the appropriation of property would provide economic benefit to the governmental entity, standing alone that does not satisfy the public-use requirement.

Moving forward sixteen years, HB 64 reexamines various concepts and standards of proof in Ohio's eminent domain framework found primarily in Ohio Revised Code Sec 163. Chiefly, HB 64 would create an inverse condemnation procedure for property owners. Ohio currently allows a writ of mandamus procedure if the taking entity does not file an appropriation action. This would upend sixteen years of jurisprudence developed around the statutes modified in 2007. This new procedure will lead to a new body of case law that may take several years to develop. This will add cost and delay to appropriation cases. These delays and costs will result in higher costs and delay in enhanced service for utility ratepayers, added product and service cost for taxpayers and consumers. Adoption of new procedures in this area of the law could also delay safety projects under development in this state.

HB 64 also heightens burdens of proof, differentiates burden of proof for parties in the same proceeding and demands the state waive its immunity in certain provisions of the bill. HB 64 also contains a provision that could chill appeals and a provision that lowers last written offer percentage from 125% to 110% when a court considers compensation for a property owner. Currently, if the appropriation award is greater than 125% of the last offer for the property the court can award additional costs and expenses to the property owner. HB 64 lowers that to 110% and then adds additional bonus compensation of 10% to the jury award if the value of the property is greater than 125% of the last offer. HB 64 also strips out the disallowance of additional costs (including appraisal fees and attorney fees) if the award is at or below 125% of the last offer.

Additionally, an irrebuttable presumption is removed and replaced with a rebuttable presumption. Divisions containing rebuttable presumptions are deleted. As a level et, an irrebuttable presumption cannot be contradicted by evidence whereas a rebuttable presumption allows a party to provide evidence to counter the presumption. In common law the rebuttable presumption can be rebutted by a preponderance of evidence. The removal of the irrebuttable presumption leaves the judge as the lone determiner of the necessity of the appropriation.

At first blush these changes appear to create fairness for property owners. A closer examination reveals that the review of necessity for the appropriation of the property could be delayed. The fact that FERC or PUCO ruled that an easement for a new transmission line, gas pipeline or water line is no longer conclusory (irrebuttable presumption) means the utility or agency involved in the appropriation will need to defend against any evidence produced by a property owner. This adds costs and delays to projects. Such delays and costs are borne by the consumers both in higher costs and delays in services or improved and safer transportation routes.

The Ohio Chamber is opposed to the current form of HB 64. The Ohio Chamber believes that these substantial changes to the legacy framework of the eminent domain practices used in Ohio should receive the same time and consideration that SB 167 and SB 7 received before they were passed.

Thank you for the opportunity to provide opponent testimony for Substitute House Bill 64 on behalf of the Ohio Chamber. I will now try to address any questions you may have for me.