Bill Analysis

David M. Gold *Legislative Service Commission*

Sub. H.B. 5

127th General Assembly
(As Reported by H. Judiciary)

Reps. Gibbs, Blessing, Wagoner, Seitz, Dolan, Latta, Coley, Harwood, Batchelder, Bacon

BILL SUMMARY

- Defines "blighted area," "slum," and "blighted parcel" and applies the new definitions uniformly throughout the Revised Code to replace definitions of "blighted area," "slum," "slum area" and related terms.

- Prohibits any person from considering whether property could be put to a comparatively better use or could generate more tax revenue when determining whether the property is a blighted area or a blighted parcel.

- Exempts agricultural land from being classified as blighted if its condition is consistent with conditions normally incident to generally accepted agricultural practices and the land is used for agricultural purposes or if the land is devoted exclusively to agricultural use.

- Requires that before a public agency appropriates property for a private use based on a finding that the area is a blighted area or a slum, the agency adopt a comprehensive development plan describing and documenting the public need for the property and, if the agency is governed by a legislative body, obtain a resolution from that body affirming the public need for the property.

- Prohibits appropriations of real property except as necessary and for a public use, lists uses that are presumed to be public, and specifies certain uses that are not public.

- Requires that most public agencies provide a reasonable comment period before appropriating property, with exceptions for quick-take appropriations, appropriations by municipally owned public utilities, and

appropriations by the Department of Transportation if it complies with existing public-involvement requirements.

- Requires that an agency obtain an appraisal of property to be appropriated and provide a copy of the appraisal to the owner at or before making its first offer for the property.

- Requires an agency that is appropriating property for a project, other than a project initiated under R.C. Title 55 (Roads, Highways, and Bridges) that will disrupt traffic flow or impede access to property to make reasonable efforts to plan the project in a way that limits those effects.

- Requires a park authority to obtain the approval of the county legislative authority in order to appropriate land in the county if the park authority is not located in that county.

- Requires an agency to prove by a preponderance of the evidence that it has the right to make the appropriation, the parties were unable to agree, or the appropriation was necessary or for a public use.

- Modifies the evidentiary treatment of a resolution or ordinance declaring an appropriation to be necessary by providing that it creates a rebuttable presumption of necessity rather than being prima facie evidence of necessity in the absence of proof that the agency abused its discretion, provides that a public utility's presentation of evidence of necessity creates a rebuttable presumption of necessity, and creates an irrebuttable presumption of necessity based on the approval by a state regulatory authority of a taking by a public utility.

- Requires the jury to award up to $5,000 in compensation for any lost business and goodwill.

- Requires an agency to pay the actual reasonable expenses involved in moving or relocating a person, business, or farm operation, including up to $10,000 to reestablish a farm, nonprofit corporation, or small business at a new site and up to $2,500 to search for a replacement business or farm.

- Requires an agency to pay costs and expenses, including attorney's and appraisal fees, in most cases where the final award of compensation is greater than 125% of the agency's first or revised offer for the property or

150% in certain unusual or complex cases, with exceptions for certain road and rail projects and public health exigencies.

- Removes a provision prohibiting a court from staying appropriation proceedings during an appeal and authorizes the owner to take an immediate appeal from an adverse order regarding the right to appropriate or the necessity of an appropriation, with exceptions for quick-takes and exigencies.

- Encourages the Supreme Court to adopt rules requiring expedited appeals in appropriation actions and requiring credentials for witnesses who testify on the valued real property in appropriation actions.

- Grants the owner of property appropriated by an agency the right to repurchase the property if the agency decides not to use the property for the purpose stated in the appropriation petition unless the right is extinguished for specified reasons.

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Introduction

Eminent domain

Both the United States and Ohio constitutions limit the government's power of eminent domain to situations where the property is being taken for a public use and the owner is compensated (United States Const., Amend. 5; Ohio Const., Art. I, sec. 19). In *Kelo v. City of New London* (2005), 125 S.Ct. 2655, the United States Supreme Court held that economic development was a legitimate public use and authorized the taking of private property in an area that was economically depressed, but not blighted, in order to give it to another private entity for purposes of economic development. *Kelo* noted, however, that individual states were free to enact legislation to further restrict the exercise of eminent domain.

Task force

In response to *Kelo*, the 126th General Assembly created the Legislative Task Force to Study Eminent Domain and its Use and Application in the State (hereinafter "task force"). The task force was instructed to study the use of eminent domain and its impact on the state, how the decision in *Kelo* affects state law governing the use of eminent domain, and the overall impact of laws governing the use of eminent domain on economic development, residents, and local governments. The task force included members of the House and Senate, representatives from executive branch agencies, local government representatives, and advocates for developers and property owners. (Sections 3 and 4 of Am. Sub.

S.B. 167 of the 126th General Assembly.) The task force issued its final report on August 1, 2006.

Moratorium

In addition to creating the task force, Am. Sub. S.B. 167 placed a moratorium on any public body using eminent domain to take private property that is not in a blighted area, without the consent of the owner, when the primary purpose for the taking is economic development that will result in ownership of the property being vested in another private person. This moratorium did not apply if the property was to be used for streets, roads, walkways, paths, or other ways open to public use, public utilities, common carriers, public parks or recreation areas, or government buildings or grounds. If an agency violated the moratorium, it could lose state funding for the project. The moratorium expired on December 31, 2006. (Section 2 of Am. Sub. S.B. 167.)

Norwood v. Horney

Shortly before the task force issued its final report, the Ohio Supreme Court issued an opinion in *Norwood v. Horney* (2006), 110 Ohio St.3d 353, that interpreted the Ohio Constitution to provide greater protections for property rights than under the *Kelo* decision. In *Horney*, the court held that an economic benefit to the community is not enough on its own, absent any other public benefit, to satisfy the public-use requirement. The court also struck down the City of Norwood's definition of blight as unconstitutionally vague because it included "deteriorating" areas, a classification that the court found improperly relies on speculation as to the future condition of the property. Although the task force was unable fully to evaluate the implications of the *Norwood* decision, its final recommendations incorporate the major holdings of that decision.

Blight

Definitions

Current law. Current law contains multiple definitions of blighted areas and slums that are similar to, but not necessarily consistent with, each other.

The laws authorizing counties and municipal corporations to conduct renewal projects (R.C. 303.26 to 303.59; Chapter 725.--not in the bill) contain nearly identical definitions of blight and slum. "Blighted area" is defined as an area which substantially impairs or arrests sound growth, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of a substantial number of slum, deteriorated, or

deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions to title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors. In the case of county renewal projects, "blighted area" also includes a disaster area in need of redevelopment or rehabilitation as certified by the county commissioners and the governor. "Slum area" is defined as an area which is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, or crime, and is detrimental to the public health, safety, morals, or welfare because it contains a predominance of buildings or improvements, whether residential or nonresidential, that suffer from dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property, by fire and other causes, or any combination of such factors. (R.C. 303.26(D) and (E); 303.36--not in the bill, 725.01(A) and (B).) A county that is conducting a renewal project to address blight or slum conditions is specifically authorized to exercise eminent domain (R.C. 303.37(C), 303.38--not in the bill). A municipal corporation is generally authorized to acquire property as necessary for an urban renewal project--unlike a county, a municipal corporation does not need a specific statutory authorization because its constitutional home rule powers include eminent domain authority (R.C. 725.01(I); *State ex rel. Breustle v. Rich* (1953), 159 Ohio St. 13, 13-15).

The laws authorizing the creation of community urban redevelopment corporations (Chapter 1728.--not in the bill) define "blighted area" as an area containing a majority of structures that have been extensively damaged or destroyed by a major disaster, or that, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, unsafe and unsanitary conditions or the existence of conditions which endanger lives or properties by fire or other hazards and causes, or that, by reason of location in an area with inadequate street layout, incompatible land uses or land use relationships, overcrowding of buildings on the land, excessive dwelling unit density, or other identified hazards to health and safety, are conducive to ill health, transmission of disease, juvenile delinquency and crime and are detrimental to the public health, safety, morals, and general welfare (R.C. 1728.01(E)). A project undertaken by a community urban redevelopment corporation may include the acquisition of blighted property "by purchase or otherwise" (R.C. 1728.01(F)(2)).

The laws authorizing metropolitan housing authorities to operate housing projects (R.C. 3735.40 to 3735.50--not in the bill) define "slum area" as any area where dwellings predominate which, by reason of dilapidation, overcrowding,

faulty arrangement or design, lack of ventilation, light, or sanitary facilities, or any combination of these factors, are detrimental to safety, health, or morals (R.C. 3735.40(B)). Metropolitan housing authorities are authorized to use eminent domain to conduct housing projects in slum areas (R.C. 3735.31(B)--not in the bill).

Current law authorizes municipal corporations to appropriate and rehabilitate buildings or structures that they find to be a threat to the public health, safety, or welfare, that have been declared to be a public nuisance, and that either have been found to be insecure, unsafe, structurally defective, unhealthful, or unsanitary or violate a building code or ordinance (R.C. 719.012). Current law also authorizes "impacted cities" to use eminent domain for purposes of economic development (R.C. 719.011--not in the bill). "Impacted cities" are cities that have been extensively damaged by a major disaster and declared to be a major disaster area under federal law, or cities that have attempted to cope with the problems of urbanization, and that provide for economic development by either authorizing the construction of housing by a metropolitan housing authority or adopting a program to combat blight and slums that has been certified as workable by the director of development (R.C. 1728.01(C)).

Operation of the bill. The bill replaces all of these definitions with a single set of definitions that are applicable throughout the Revised Code.

The bill defines "blighted area" or "slum," as used in the Revised Code, as an area in which at least 50% of the parcels are blighted parcels and those blighted parcels substantially impair or arrest the sound growth of the state or a political subdivision of the state, retard the provision of housing accommodations, constitute an economic or social liability, or are a menace to the public health, safety, morals, or welfare in their present condition and use (R.C. 1.08(A)).

The bill defines for use throughout the Revised Code a "blighted parcel" to mean either of the following (R.C. 1.08(B)):

(1) A parcel that has one or more of the following conditions:

(a) Conditions that constitute a nuisance;

(b) Environmental contamination;

(c) Vermin infestation;

(d) Tax or special assessment delinquencies exceeding the fair value of the land.

(2) A parcel that has two or more of the following conditions:

(a) Dilapidation and deterioration;

(b) Age and obsolescence;

(c) Inadequate provision for ventilation, light, air, sanitation, or open spaces;

(d) Unsafe and unsanitary conditions;

(e) Hazards that endanger lives or properties by fire or other causes;

(f) Non-compliance with building, housing, or other codes;

(g) Non-working or disconnected utilities;

(h) Is vacant or contains an abandoned structure;

(i) Excessive dwelling unit density;

(j) Is located in an area of defective or inadequate street layout;

(k) Overcrowding of buildings on the land;

(l) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;

(m) An incompatible land use or a use that creates land use relationships that cannot be reasonably corrected through enforcement of existing zoning codes or other land use regulations;

(n) Extensive damage or destruction caused by a major disaster when the damage has not been remediated within a reasonable time;

(o) Identified hazards to health and safety that are conducive to ill health, transmission of disease, juvenile delinquency, or crime;

(p) Ownership or multiple ownership of a single parcel when the owner, or a majority of the owners of a parcel in the case of multiple ownership, cannot be located.

Absent any environmental or public health hazard that cannot be corrected under its current use or ownership a property is not a blighted parcel because of any of the conditions listed in the above definition if (1) the condition is consistent with conditions that are normally incident to generally accepted agricultural practices

and the land is used for agricultural purposes (as defined in R.C. 303.01 or 519.01) or (2) the county auditor has determined that the land is devoted exclusively to agricultural use (as defined in R.C. 5713.30). (R.C. 1.08(D).)

The bill inserts by cross reference into the provision authorizing municipal corporations to appropriate and rehabilitate nuisance structures an incorrect reference to this definition. The bill modifies this authority so that it can only be exercised if the municipal corporation finds the buildings or structures to be "blighted property as defined in section 1.08 of the Revised Code." However, the bill only defines "blighted area" and "blighted parcel." (R.C. 719.012.) The new definition also modifies the law authorizing "impacted cities" to use eminent domain to address blight and slums by changing the operative definition of "blighted area" (R.C. 719.011--not in the bill, 1728.01(E)).

When determining whether a property is a blighted parcel or whether an area is a blighted area or slum for purposes of these definitions, the bill prohibits persons from considering whether there is a comparatively better use for the property, premises, structure, area, or portion of an area, or whether the property could generate more tax revenue if put to another use (R.C. 1.08(C)).

Limitations

The bill provides that before an agency appropriates property based on a finding that the property is a blighted area or slum, the agency must adopt a comprehensive development plan describing the public need for the property. The plan must include at least two studies documenting the public need for the property. All of the costs of developing the plan must be publicly financed. Additionally, if the agency is governed by a legislative body, it must obtain a resolution from that body affirming the public need for the property. (R.C. 163.021(B).)

General

R.C. 163.01 through 163.22 contain the general provisions that govern appropriations of real property, whether the property is taken because of blight or otherwise. R.C. 163.51 through 163.62 include additional provisions that apply to takings for state highway projects or projects that receive federal funding and that displace persons from their homes or businesses. With a couple of exceptions noted below, the bill does not modify the latter group of Revised Code sections.

Definitions

In addition to defining "blighted area" (and slum) and "blighted parcel," the bill adds or amends definitions related to eminent domain generally. Except as otherwise noted, the following definitions apply to R.C. 163.01 through 163.22.

Agency

The Revised Code authorizes "agencies" to appropriate property under the eminent domain power. There are two types of agencies, public and private. Under existing law, "public agency" means any governmental corporation, unit, organization, or officer authorized by law to appropriate property in the courts of Ohio. The bill adds governmental instrumentality to this list. Existing law defines "private agency" as any other corporation, firm, partnership, voluntary association, joint-stock association, or company authorized by law to appropriate property in the courts of Ohio. The bill rewords the definition to read "any corporation, firm, partnership, voluntary association, joint-stock association, or company *that is not a public agency and that* is authorized by law to appropriate property in the courts of Ohio." (R.C. 163.01(A), (B), and (C).)

Public use

Existing statutory law does not define "public use" for eminent domain purposes. The bill establishes a presumption that utility facilities, roads, sewers, water lines, public schools, public parks, government buildings, projects by an agency that is a public utility, an agency holding a certificate of public convenience and necessity granted by the Federal Energy Regulatory Commission, and similar facilities and uses of land are public uses. The bill specifies that "public use" does not include any taking that is for conveyance to a private commercial enterprise, economic development, or solely for the purpose of increasing public revenue, unless the property is conveyed or leased to (1) a public utility, common carrier, or municipal power agency, (2) a private entity that occupies an incidental area within a publicly owned and occupied project, or (3) a private entity that establishes by a preponderance of the evidence that the property is a blighted parcel or a blighted area. (R.C. 163.01(H).)

Public utility

Under the bill, "public utility" has the same meaning as in R.C. 4905.02 and also includes an electric cooperative (R.C. 163.01(G)). R.C. 4905.02 defines "public utility" to include every corporation, company, copartnership, person, or association, their lessees, trustees, or receivers, defined in R.C. 4905.03, including all public utilities that operate their utilities not for profit, except electric light companies that operate their utilities not-for-profit; public utilities, other than

telephone companies, that are owned and operated exclusively by and solely for the utilities' customers, including any consumer or group of consumers purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas exclusively by and solely for the consumer's or consumers' own intended use as the end user or end users and not-for-profit; public utilities that are owned or operated by any municipal corporation; and railroads as defined in R.C. 4907.02 and 4907.03. R.C. 4905.03 defines the following entities: telegraph, telephone, motor transportation, electric light, gas, natural gas, pipe-line, water-works, heating or cooling, messenger, street railway, suburban railroad, interurban railroad, and sewage companies.

Electric cooperative

Under the bill, "electric cooperative" has the same meaning as in R.C. 4928.01 (a not-for-profit electric light company that both is or has been financed in whole or in part under the federal Rural Electrification Act of 1936 and owns or operates facilities in Ohio to generate, transmit, or distribute electricity, or a not-for-profit successor of such company) (R.C. 163.01(I)).

Municipal power agency

Under the bill, "municipal power agency" has the same meaning as in R.C. 3734.058 (any Ohio nonprofit corporation, the members of which are municipal corporations that own and operate electric utility systems, that sells electricity to its members for resale) (R.C. 163.01(J)).

Condemnation

The bill stipulates that any reference in the Revised Code to an authority to acquire real property by "condemnation" or to take real property pursuant to a power of eminent domain is deemed to be an appropriation of real property pursuant to R.C. Chapter 163. and that such taking or acquisition must be made pursuant to Chapter 163. (R.C. 163.63).

Purpose of appropriations of property

The bill prohibits any taking of real property by an agency except as necessary and for a public use. In any appropriation, the taking agency must show by a preponderance of the evidence that the taking is necessary and for a public use. (R.C. 163.021(A).)

Applicable procedure

Existing law requires that all appropriations of real property be made pursuant to R.C. 163.01 through 163.22, except that the Director of Transportation

may also appropriate real property as otherwise provided by law, a conservancy district may appropriate real property pursuant to R.C. Chapter 6101., and a sanitary district may appropriate real property pursuant to R.C. Chapter 6115. In each of these exceptional cases, the proceeding remains subject to R.C. 163.21(B) (fees and costs; see below). In addition, existing law authorizes a county, township that has adopted a limited home rule government, conservancy district, sanitary district, county sewer district, or a regional water and sewer district to appropriate real property in the manner prescribed in R.C. 307.08(B), 504.19(D), 6101.181(B), 6115.221(B), 6117.39(B), or 6119.11(B), as applicable. These provisions all permit quick-takes to deal with public health exigencies. The bill consolidates these provisions into two divisions, R.C. 163.02(A) and (B), but makes no substantive change in the statute by specifying that all appropriations of real property must be made pursuant to R.C. sections 163.01 to 163.22, except as except as otherwise provided in R.C. 163.06 or because of a public exigency as provided in R.C. 307.08(B), 504.19(D), 6101.181(B), 6115.221(B), 6117.39(B), or 6119.11(B). (R.C. 163.02(A), (B), (C), (D), (E), and (F).)

Prerequisites to appropriation

County approval for takings by park authority

The bill requires any park board, park district, board of directors of a conservancy district, incorporated association with a purpose of establishing or preserving public parks and memorial sites, or similar park authority that wishes to appropriate real property outside the county or counties in which the park authority is located to first obtain the written approval of the legislative authority of each county in which the property is located, other than the county or counties in which the park authority is located (R.C. 163.021(C)).

Public comment

The bill requires that before a public agency appropriates property, it must permit a reasonable public comment period during which persons must at a minimum be allowed to submit written statements. The agency must give notice of the proposed appropriation and of the opportunity for public comment once a week for two consecutive weeks in a newspaper of general circulation in the county in which the appropriation is proposed to take place. This provision does not apply to "quick-take" appropriations (see **COMMENT**), appropriations to abate a public health nuisance, appropriations by a public utility owned by a municipal corporation, or appropriations by the Department of Transportation if the Department complies with the public-involvement requirement of R.C. 5511.01. (R.C. 163.04(A).)

Appraisals

The bill requires that before an agency appropriates property it must obtain an appraisal of the property and provide a copy of the appraisal to the owner or, if there is more than one owner, to each owner, or to a guardian or trustee of each owner, at or before the time of the first offer, unless the appraisal indicates that the value of the property is less than $10,000, in which case the agency need only provide an owner, guardian, or trustee with a summary of the appraisal. The agency need not provide an owner with a copy of the appraisal if the owner is incapable of contracting in person or by agent to convey the property and has no guardian or trustee, is unknown, or is not a resident of Ohio, or the owner's residence cannot be ascertained with reasonable diligence. A public utility or the head of a public agency may prescribe a procedure to waive an appraisal of property acquired by sale or donation if the property has a fair market value of $10,000 or less. (R.C. 163.04(B).)

Failure to agree

Under both existing law and the bill, an agency may appropriate real property only if the agency cannot reach an agreement with any owner or the guardian or trustee of any owner of the property, unless each owner is incapable of contracting in person or by agent and has no guardian or trustee, each owner is unknown or is not a resident of Ohio, or the residence of no owner can with reasonable diligence be ascertained. The bill rewords existing law and adds that the failure to agree must be on a conveyance or the terms of a conveyance. (R.C. 163.04(C).)

Traffic flow and access to property

The bill permits an agency to appropriate real property for a project that will disrupt the flow of traffic or impede access to property only after the agency makes reasonable efforts to plan the project in a way that will limit those effects. This requirement does not apply to an agency if the agency initiated the project for which it appropriates the property under R.C. Title 55 (Roads, Highways, and Bridges). (R.C. 163.04(D).)

Procedure in appropriation proceedings

Petition

Existing law sets forth the items that a petition for appropriation must include, such as a description of the property to be taken and the names and addresses of the owners. Existing law specifies that if the petitioner is a private agency the petition must contain a statement that the appropriation is necessary.

The bill extends the latter requirement to all agencies and further mandates a statement that the taking is for a public use. If the property being appropriated is a blighted parcel being appropriated pursuant to a redevelopment plan, the petition must contain a statement that shows the basis for the finding of blight and that supports that the parcel is part of a blighted area.

Under current law, if the agency would require less than the whole of a parcel containing a residence structure and the needed portion would remove a garage and sufficient land that a replacement garage could not be lawfully or practically attached, the agency must appropriate the whole parcel and all structures. The bill removes the requirement for an appropriation of the whole parcel and all structures if the owner agrees to a partial appropriation. (R.C. 163.05.)

Burden of proof

Under current law, before holding a jury trial to determine the compensation that is due to a property owner, the judge must determine whether the agency may take the property by determining whether the agency has the right to make the appropriation, whether the parties were unable to agree on a sale or other transfer, and/or whether the appropriation is necessary if the owner denies any of those matters in the answer. The owner bears the burden of proving that the agency has not met those qualifications. Furthermore, in regard to the necessity for the appropriation, a resolution or ordinance from the agency's governing or controlling body, council, or board declaring that the appropriation is necessary constitutes prima facie evidence of necessity in the absence of proof from the owner showing that the agency abused its discretion in making that determination.

The bill changes this process by placing the burden of proving the preliminary issues on the agency and specifying that the agency must prove those matters by a preponderance of the evidence, subject to three presumptions. First, the bill states that a resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity rather than prima facie evidence of that necessity, and it eliminates the reference to the need to show an abuse of discretion by the agency in determining necessity. Second, the bill provides that a public utility's presentation of evidence of necessity creates a rebuttable presumption of necessity for the appropriation. Third, the bill creates an irrebuttable presumption of necessity based on the approval by a state regulatory authority of an appropriation by a public utility. The bill expressly declares that subject to the irrebuttable presumption only the judge may determine the necessity for an appropriation. (R.C. 163.09(B)(1) and (2).)

The bill also declares in a separate provision that in any appropriation proceeding the taking agency has the burden of proving by a preponderance of the evidence that the taking is necessary and for a public use (R.C. 163.021(A)).

Expert witnesses

The bill states that the General Assembly finds that to ensure the fairness of appropriation proceedings under R.C. Chapter 163. and other provisions of the Revised Code, persons who testify in such proceedings as to property value should be licensed appraisers who are required to follow the Uniform Standards of Professional Appraisal Practice. The bill requests the Supreme Court to adopt rules to require that a witness who testifies in an appropriation proceeding as to the value of property hold a professional license as a real estate appraiser and to adhere to professional standards of practice (Section 4).

Appeals

Under existing law, a property owner may not appeal from an adverse order relating to the right to make the appropriation, the inability of the parties to agree, the necessity for the appropriation, or the right to a quick-take pursuant to the Constitution until the jury has made its award of compensation. However, a ruling against the agency on any of these matters is a final order from which the agency may appeal without waiting for the jury's decision. The bill gives the owner a right to an immediate appeal from an order in favor of the agency on any of these matters that the owner denied in the answer, unless the agency is appropriating the property (1) in time of war or other public exigency imperatively requiring its immediate seizure, (2) for the purpose of making or repairing roads that will be open to the public without charge, (3) for the purpose of implementing rail service under R.C. Chapter 4981., or (4) under R.C. 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 as the result of a public exigency. (R.C. 163.09(B)(3) and 2505.02(B)(7).)

The Revised Code authorizes the trial court to stay the execution of any order pending appeal, but provides that if the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, appellate review will not affect the agency's right to take and use the property. The Supreme Court declared this provision unconstitutional in *Norwood v. Horney*, and the bill eliminates it. (R.C. 163.19.)

The bill provides that the General Assembly finds that in order to adequately protect property rights and ensure that vital public improvements are completed in a timely manner it is necessary to provide prompt appeals from adverse judgments in appropriation actions. It farther states that the General

Assembly encourages the Supreme Court to adopt a procedural rule requiring expedited appeals in appropriation cases. (Section 3.)

Instrument of acquisition

Existing law requires that the instrument by which the state or a state agency acquires real property by eminent domain identify the state agency that has the use and benefit of the real property. The bill requires that the instrument include the name of that agency, a statement of the purpose of the appropriation as provided with the appropriation petition, and a statement that the prior owner has a right to repurchase the property within five years after the appropriation if the agency decides not to use the property for the stated purpose, as provided in R.C. 163.211 (see "***Right to repurchase***," below). (R.C. 163.02(D).)

Awards of compensation, costs, and fees

Compensation

Under existing law, the jury assesses compensation for the property appropriated and for damage to the residue. The bill directs the jury, when the property appropriated was used for a business, to assess compensation also for any lost business and any loss of goodwill up to $5,000. (R.C. 163.14.)

Under continuing law, if a structure straddles the dividing line between unappropriated land and land being appropriated for road construction or repair or for rail service by an agency using a quick-take procedure, and if the structure cannot be divided without manifest injury, the agency may remove the structure, and the jury must award compensation to the owner. Existing law requires the owner or occupant to vacate the structure "at no cost to the appropriating agency." The bill eliminates the quoted language. (R.C. 163.06(B).)

Costs and fees

Under existing law, the court, if it finds that the agency was not entitled to appropriate the property in question, must enter judgment for the owner for costs (including jury fees) and, in amounts the court considers just, witness fees, attorney's fees, and other actual expenses that the owner incurred in connection with the proceedings. These provisions do not apply to state agencies that take property in condemnation proceedings under R.C. 163.62. The bill adds that the fees awarded must cover the owner's reasonable costs, disbursements, and expenses, including appraisal and engineering fees. It eliminates the exception for state agencies subject to R.C. 163.62 and specifies that the award is to be paid by the head of the agency for whose benefit the appropriation proceedings were initiated. (R.C. 163.21(A) and (B).)

The bill further instructs the court to award reasonable attorney's fees and costs to the owner if the court determines the matter of necessity in the owner's favor in a final, unappealable order. The bill does not define "final, unappealable order." Presumably, it is a final order against the agency after all appeals have been exhausted or from which the agency did not take a timely appeal. (R.C. 163.09(G).)

Attorney's fees

In addition to the provisions for attorney's fees discussed under "***Costs and fees***," above, the bill requires a judgment for attorney's fees based on the amounts of the agency's offer and the final award of compensation, except in the situations noted below. Under the bill, with the exception noted in the next paragraph, if the award exceeds 125% of agency's first offer or, if before commencing the appropriation proceeding the agency made a revised offer based on conditions indigenous to the property that could not reasonably have been discovered at time of first offer, 125% of the revised offer, the court must enter judgment for the owner in amounts the court considers just for all costs and expenses actually incurred by owner, including attorney's and appraisal fees. The same rule applies in condemnation proceedings brought by state agencies. (R.C. 163.21(C)(1) and 163.62(A)(3).)

When an agency has negotiated in good faith with the owner or the owner's representative before and after filing the petition to appropriate property or when the nature of the property interest to be appropriated is inordinately complex or unique or of such a nature that expert appraisers may reasonably disagree, the court may not enter judgment in fabor of the owner for attorney's fees or costs unless the final award of compensation is more than 150% of the agency's first or revised offer. If the final award of compensation is more than 150% of the agency's first or revised offer, the court must enter judgment in favor of the owner for attorney's fees or costs or both in amounts that the court considers just. (R.C. 163.21(C)(2).)

The provisions described in the two preceding paragraphs do not apply if the agency is appropriating the property (1) in time of war or other public exigency imperatively requiring its immediate seizure, (2) for the purpose of making or repairing roads that will be open to the public without charge, (3) for the purpose of implementing rail service under R.C. Chapter 4981., (4) under R.C. 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11 as the result of a public exigency, or (5) if the agency is a municipal corporation that is appropriating the property as a result of a public health exigency. Nor do they apply if the owner and the agency exchanged appraisals prior to the filing of the petition and the final award of compensation was not more than 125% of the agency's first offer made

after the exchange of appraisals and at least 30 days before the filing of the petition. (R.C. 163.21(C)(3).)

Relocation assistance

In existing law dealing with appropriations for federally assisted or state highway projects that result in the displacement of persons, the Revised Code requires the displacing agency to pay a displaced person, upon proper application, for all of the following (R.C. 163.53(A)):

(1) Actual reasonable expenses in moving the person, the person's family, business, farm operation, or other personal property;

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the displacing agency;

(3) Actual reasonable expenses in searching for a replacement business or farm;

(4) Actual and reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not more than $10,000.

The bill caps the payment for searching for a replacement business or farm at $2,500 (R.C. 163.53(A)(3)). The bill also requires the same payments, upon proper application, by an agency when the agency's appropriation of real property requires a person to move or relocate (R.C. 163.15(B)).

Right to repurchase

Under the bill, if an agency decides not to use appropriated property for the purpose stated in the petition appropriation, the former owner from whom the property was appropriated may repurchase the property for its fair market value as determined by an independent appraisal. The right to repurchase is extinguished if the former owner declines to repurchase the property; fails to repurchase it within 60 days after the agency offers it for repurchase; a plan, contract, or arrangement is authorized that commences an urban renewal project that includes the property; the agency grants or transfers the property to another person or agency; five years have passed since the appropriation; or the appropriated property was a blighted parcel before the appropriation petition was filed, and the former owner had contributed to the blight. (R.C. 163.211.)

COMMENT

What is a quick-take appropriation?

"Quick-take" refers to a class of takings that are given special treatment by the Ohio Constitution. Generally, an agency must wait until the jury has assessed value and awarded compensation before it can pay the award to the owner or deposit it into the court and take possession of the property. However, in certain cases, the agency may take possession of the property immediately upon filing the petition for appropriation and paying or depositing the amount that the agency determines that the owner is entitled to, without first waiting for a jury determination. Those cases are referred to as "quick-takes," and they include takings in time of war or other public exigency imperatively requiring an immediate seizure, and for the purpose of making or repairing roads open to the public free of charge, implementing rail service under Chapter 4981. of the Revised Code, and addressing sewage emergencies under R.C. 307.08, 504.19, 6101.181, 6115.221, 6117.39, or 6119.11. (Ohio Const., Art. I, sec. 19; R.C. 163.06.)

HISTORY

ACTION	DATE
Introduced	02-20-07
Reported, H. Judiciary	06-07-07

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