

**TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE**

**REGARDING HOUSE BILL 2070
RELATING TO EMINENT DOMAIN PROCEDURE**

January 18, 2012

Mr. Chairman and Committee Members:

I am Dustin Bradley, Staff Attorney at the Kansas Department of Transportation. HB 2070 would amend current eminent domain law to prohibit the Department of Transportation through the Secretary of Transportation, hereinafter referred to as KDOT, from appealing appraisers' awards to the district court. The exclusion would be applied retroactively and apply to all eminent domain proceedings pending on or commenced after January 1, 2009. An identical prohibition was proposed in the 2010 legislative session but failed to make it out of the House.

Many governmental entities and utilities have the power of eminent domain under Kansas law including state agencies, cities, airport authorities, etc. All condemning authorities follow the procedures set out in K.S.A. 26-501 et seq. This process is used when governmental agencies are unable to reach an acquisition agreement with the owner of property needed for public purposes.

Prior to engaging in the statutory eminent domain process, KDOT is required to have the subject properties appraised pursuant to Uniform Standards of Professional Appraisal Practice (USPAP) and Federal Highway Administration (FHWA) standards, and to engage in good faith negotiations to reach a negotiated purchase. It is only when that process fails that eminent domain actions are commenced. The focus of that process is to determine the difference between the fair market value of the landowner's property before the taking by the governmental entity, and the fair market value of the portion of the property remaining, if any, in the hands of the landowner after the taking. This difference is the "just compensation" to be paid by the governmental entity to the landowner.

During the first hearing in the statutory process, the court appoints three disinterested residents of the county in which the eminent domain proceeding is pending to serve as "court appointed appraisers." The term "appraiser" as used in K.S.A. 26-504 is misleading. Only two of the three appointed "appraisers" must have "experience in the valuation of real estate" and that experience does not have to be appraisal experience. It can be experience as a real estate agent, banker, insurance agent, auctioneer, or just experience privately buying and selling real estate, etc.

The appraisers hold a hearing which is informal and not subject to the rules of evidence. Property owners are allowed at that hearing to give whatever assessment of value they desire. The appraisers are provided with a set of instructions by the Court. Based upon the information provided at the hearing and the instructions given, the appraisers make an award to the landowners for the value of the property

taken through the condemnation process. The appraisers are not required to justify or document how they reached the figure awarded, and the district court judge does not review or consent to the award. The fact that court appointed appraisers are not required to have specific knowledge of real estate and are not required to justify awards given were cited as two weaknesses in the condemnation process by a 1997 Legislative Post Audit review of KDOT's acquisition of right of way for highway projects.

The only check on the work of the court appointed appraisers in condemnation proceedings is that any landowner or condemning authority may appeal, pursuant to K.S.A. 26-508, the award to the district court in the county in which the land is located and have the just compensation determined by a jury. However, there are checks and balances built into the statutory process to ensure condemning authorities have a valid reason to appeal and do not abuse the appeal process. First, before any appeal can be filed, the condemning authority must pay the amount awarded by the appraisers to the Clerk of the District Court for distribution to the landowners. Second, when a governmental entity files an appeal of the appraisers' award and the jury finds the amount owed to the landowner to be greater than or equal to the amount determined by the court appointed appraisers, the governmental entity is required to pay all of the landowner's costs of the appeal including attorney's fees. This provision increases the risk to governmental entities of taking an appeal and, as a result, significantly limits appeals taken by governmental entities.

KDOT carefully analyzes cases where court appointed appraisers' awards exceed the KDOT appraisal amount before making the decision to appeal. In addition to the potential liability for attorney's fees and costs, KDOT considers the dollar difference between the award and the agency's appraisal; the percentage of the increase; legal issues presented by the situation including whether adverse travel, severance, or police power issues are raised by the situation; whether there are related issues outstanding with the landowner such as relocation assistance payments; cost of prosecuting an appeal; and the potential for bad case law to be created if the legal issues on appeal are decided adversely to KDOT.

HB 2070 would continue to allow all condemning authorities, *except KDOT*, and all landowners to appeal appraisers' awards. This would result in situations where a landowner is subject to an appeal if the condemning authority is a county, city or other state agency, but **not** if KDOT were the condemning authority. KDOT administers many local projects and often handles the property acquisition for those projects. If enacted, this bill will result in local units of government having to do right of way acquisitions for those projects in order to enjoy the benefit of having appeal rights. Many local units of government are ill-equipped to handle these property acquisition matters.

If enacted, this bill would leave KDOT without the ability to be a good steward of public funds with respect to right of way acquisition. In cases in which the court appointed appraisers misinterpret or disregard the instructions of the court and award a landowner significantly more than KDOT believes the property is worth, KDOT would have no recourse but to pay the award or abandon the project. When KDOT abandons a property it has condemned, state law requires payment to the landowner of "reasonable expenses incurred in defense" of the condemnation.

This bill will also effectively eliminate KDOT's ability to challenge instructions given by the Court to the appraisers as the only avenue for doing so under existing law is through the appeal of the court appointed appraisers' award. This leaves trial judges free to instruct in ways not in conformity with

statutory requirements or case law applicable to governmental takings in general when KDOT is the condemnor.

The dollar effect of this legislation on KDOT is difficult to determine due to many variables that would have an impact on that calculation. Those variables include, among others:

- How much land is needed in any given year to construct projects;
- How many of the needed tracts can be acquired through negotiation;
- The extent to which the awards given by the court appointed appraisers follow the instructions given to them by the court;
- The extent to which the trial court judge instructs the appraisers according to established law; and
- The extent to which the appraisers appointed by the court understand and apply the instructions given by the court.

Since 2008, KDOT has filed appeals on 19 tracts of land, resulting in only 17 litigation cases, out of the hundreds of tracts which were acquired during that time period for KDOT projects.¹ The amounts awarded by the court appointed appraisers on those 19 tracts were 436% of, or over 4 times, the amounts supported by the KDOT appraisals on those tracts. The difference in dollars between the court awards and KDOT's appraisals was just under \$10 million. This increase in compensation on those tracts would have increased the project costs by that \$10 million difference, reducing funds available for other projects.

The impact would not end there, however. Recognizing that it will have no recourse from excessive appraisers awards, KDOT will have to hedge its bets and be willing to negotiate higher settlements overall to avoid having to go through a process where values are taken completely out of its control without recourse. Lawyers for landowners will understand immediately that they can hold out for more in pre-condemnation negotiations knowing KDOT will not want to "roll the dice" with court appointed appraisers. This will undoubtedly increase the cost to acquire all right-of-way for highway project by an unknown, but significant amount.

An even greater concern if this legislation is passed is that in KDOT condemnations, court appointed appraisers will operate completely unchecked by any review on awards given to landowners.

Finally, the language of this bill makes it retroactive to cases that were pending or commenced after January 1, 2009. Of the 19 awards appealed by KDOT since 2008, only a single case, involving three of the tracts, remains in litigation. Of the appeals for the other sixteen tracts, two were tried to a jury, one was disposed of at the trial court level by stipulated verdict, and thirteen have been settled. The combined return to KDOT on these sixteen cases is nearly \$4 million. KDOT would be required to return those sums to the landowners even though they were recovered by KDOT after trial or through negotiated settlements.

KDOT strongly opposes this legislation. If this were to pass, Kansas would be the only state in the United States to prohibit a transportation department from appealing a condemnation order or award.

¹ Of those 19 tracts of land, five tracts were consolidated into two KDOT appeals.

The current system provides for adequate checks and balances to protect landowners from overreaching by governmental entities in the eminent domain process

Thank you for allowing me to testify on HB 2070. I will gladly stand for questions at the appropriate time.