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# OHIO LEGISLATIVE SERVICE COMMISSION

Office of Research  
and Drafting

Legislative Budget  
Office

H.B. 64  
135<sup>th</sup> General Assembly

## Bill Analysis

**Version:** As Introduced

**Primary Sponsors:** Reps. Kick and Creech

Andrew Little, Attorney

### SUMMARY

- Voids appropriations (the taking of property through eminent domain) that do not follow statutorily mandated procedures.
- Increases the taking agency's (the government or private entity appropriating property) burden of proof in appropriation proceedings.
- Narrows factual presumptions made in favor of taking agencies in appropriations proceedings.
- Excludes the use of property as a recreational trail as a "public use" for which property may be appropriated.
- Prohibits a taking agency from reducing any offer it makes in an effort to acquire property, if the attempts may result in appropriations proceedings, or subsequently arguing for a lower valuation in an appropriation proceeding.
- Expands required attorneys' fee, cost, and expense awards due to property owners in appropriation actions.
- Allows property owners who allege their property has been appropriated outside of the required judicial process to sue for inverse condemnation.
- Requires courts hearing inverse condemnation cases to award successful property owners attorneys' fees, costs, and expenses.
- Requires courts hearing appropriations cases to award property owners damages if the taking agency uses coercive actions.
- Lengthens certain appropriation proceeding deadlines.

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## DETAILED ANALYSIS

Under the Ohio Constitution, the government has the power to take private property for public use, but must pay a fair price if it does.<sup>1</sup> This power is commonly referred to as “eminent domain.” The bill makes several modifications to the law governing eminent domain.

### Background – terminology and procedure

As used in continuing law and for the purpose of this analysis, the use of eminent domain is called an **appropriation**. Appropriations may be carried out by public or private actors that have constitutional authority to carry them out, or that have been granted that authority by state law. Entities with the power to appropriate property are referred to as **agencies** or **taking agencies**.<sup>2</sup>

Under continuing law, agencies seeking to acquire property, and willing to appropriate it, must first make every reasonable effort to acquire it through negotiation.<sup>3</sup> In those instances, the appropriations procedure may follow this general path:

- The agency must give the property owner notice that it intends to acquire the property, or an easement across the property, and that it will be presenting a written offer based on the agency’s determination of the property’s value.<sup>4</sup>
- *Before negotiations begin*, the agency usually must have the property appraised, and the owner must be given a reasonable opportunity to accompany the appraiser during the appraiser’s inspection;
- The head of the agency must determine what he or she considers just compensation for the property. That must be at least as much as the appraisal, and the agency head must make a prompt offer. The offer must be in writing and include a summary of the basis for determining the amount (see “**Initial offer**,” below).<sup>5</sup>
- The owner must be given a reasonable opportunity to consider the offer, present material relevant to the property’s value, and to suggest modifications to the proposed terms of the acquisition, and the agency must consider the information and suggestions.<sup>6</sup>
- If the agency and the owner are unable to agree on a voluntary purchase and sale:

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<sup>1</sup> U.S. Constitution, Amendment 5 and Ohio Constitution, Article I, Section 19.

<sup>2</sup> R.C. 163.01(C); R.C. 163.041 and 163.63, not in the bill.

<sup>3</sup> R.C. 163.01(A) to (C), 163.04(D), and 163.59(A).

<sup>4</sup> R.C. 163.041, not in the bill.

<sup>5</sup> R.C. 163.59(C).

<sup>6</sup> R.C. 163.59(C) and (D).

- At least 30 days after the initial notice given to the property owner and delivery of the good faith offer to purchase, the agency may file a petition to appropriate the property in the court of common pleas or probate court in the county where it is located.
- The property owner may file an answer to the petition. The answer must contain a general or specific denial of any point in the agency's petition which the owner does not admit. In general, if the owner chooses to deny the agency's authority to make the appropriation, the inability to agree on a voluntary purchase and sale, or the necessity for the appropriation, the owner must do so specifically.
- If the agency's authority to appropriate the property, the validity of the public use, or the necessity of the appropriation for that public use are denied, the court resolves those issues. If the amount of just compensation is at issue, a jury determines the amount required (see "**Burden of proof**" and "**Case timing**," below).<sup>7</sup>

The bill makes an agency's failure to follow the required procedures a reason to void an appropriation, restricts the ability to use eminent domain for recreational trails, changes requirements for agencies' initial offers and expands the legal effect of those offers. It also changes the burden of proof in appropriation proceedings and makes provision for a procedure called "inverse condemnation," which applies when an agency appropriates property without instituting appropriation proceedings and obtaining a court order.

## **Failure to follow procedure**

In 1971, Ohio adopted a series of statutes in response to the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.<sup>8</sup> Those statutes contain a set of policies and procedures that apply when attempts to acquire property may result in the use of eminent domain, and largely mirror provisions of the federal act.

They include the requirement that heads of taking agencies make reasonable efforts to acquire property by negotiation, the requirement that property be appraised before an initial offer and that the owner be given the opportunity to accompany the appraiser (see "**Background – terminology and procedure**," above). They also include a prohibition on certain coercive actions (see "**Damages for coercive actions**," below) and other provisions. Under current law, an agency's failure to abide by those policies and procedures does not affect the validity of the appropriation. Under the bill, it voids the appropriation, and gives the property owner a cause of action against the agency, i.e., a claim that may be brought in a lawsuit.<sup>9</sup>

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<sup>7</sup> R.C. 163.04(A) and (B) and 163.09(A) and (B); R.C. 163.05 and 163.08, not in the bill.

<sup>8</sup> Section 3 of H.B. 295 of the 109<sup>th</sup> General Assembly of Ohio; 61 United States Code (U.S.C.) 4651.

<sup>9</sup> R.C. 163.52.

## Recreational trails

Appropriation proceedings may only be used to acquire property for public use. The bill excludes the use of property for recreational trails from the meaning of public use.

A **recreational trail** is a trail used for hiking, bicycling, horseback riding, ski touring, canoeing, or other nonmotorized forms of recreational travel.<sup>10</sup> The bill also narrows an existing provision of law that presumes that making and repairing roads is a public use. Under the bill, **making and repairing roads** specifically excludes the making or repairing of, or access management for, shared-use paths, bike paths, or recreational trails.<sup>11</sup>

As a result, under the bill's provisions, appropriation proceedings may not be used to acquire property for use as a recreational trail, though agencies may still use negotiation to acquire such property (see **COMMENT**, below).

## The initial offer

Under the bill, the amount of an agency's initial offer to acquire property by negotiation cannot be reduced or revoked. The agency may increase the offer, but if it does, the higher offer may not be reduced or revoked. The highest offer also sets the minimum award of compensation to the owner if the agency ultimately brings a successful appropriation proceeding. In that case, the agency may not argue, or present evidence to show, that a lower amount is justified.

This is a departure from current law, which allows agencies to revise their offers before filing an appropriation petition if they discover conditions that could not reasonably have been discovered at the time of the initial offer or upon the exchange of proposals between the agency and owner.

The bill also prohibits agencies from making any offers that are not in writing. Current law requires initial offers to be in writing, but is silent on the form of subsequent offers.<sup>12</sup>

## Burden of proof

When appropriations proceedings are filed, the taking agency has the burden of proof in most cases, though the burden may fall to the property owner under certain circumstances. For instance, the agency has the burden to show that the appropriation is both for a public use and actually necessary for that public use.

Burdens of proof vary in their requirements. The lowest burden, proof by a preponderance of the evidence, requires evidence showing something is more likely than not. A burden of clear and convincing evidence requires evidence that justifies a firm belief or conviction. The highest burden, beyond a reasonable doubt, requires evidence that leaves one

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<sup>10</sup> R.C. 163.01(H)(2).

<sup>11</sup> R.C. 163.02(H)(3) and (N).

<sup>12</sup> R.C. 163.04(B), with conforming changes in R.C. 163.21 and 163.59(E).

with no sense of real possibility that something is not true, and is typically reserved for criminal cases.<sup>13</sup>

The bill changes the burden of proof applied to questions of public use, the agency's authority to appropriate property, the agency's and property owner's inability to agree on a voluntary sale, and the necessity of an appropriation.

### **Public use**

Under current law, a taking agency must prove that an appropriation is for a public use by a preponderance of the evidence. The bill increases the burden of proof from a preponderance of the evidence to clear and convincing evidence.<sup>14</sup>

### **Authority, inability to agree, necessity**

If the property owner files an answer to an agency's petition for appropriation and specifically denies the agency's authority to make the appropriation, the inability of the parties to agree on a voluntary purchase and sale, or the necessity of the appropriation, the court will make a determination on those matters. Under current law, it is the agency's burden to prove them by a preponderance of the evidence. The bill increases the burden of proof to clear and convincing evidence.

It also eliminates two rebuttable presumptions in favor of taking agencies from the law, and limits a third. Rebuttable presumptions presume a fact in favor of one party, but allow the other party to present evidence disproving that fact. The first eliminated presumption creates a rebuttable presumption that an appropriation is necessary if the agency's governing body, council, or board adopted a resolution or ordinance declaring its necessity. Provided, however, that the presumption does not apply to property being taken because it is a blighted parcel or part of a blighted area. The second presumes the necessity of an appropriation in favor of a public utility or common carrier that presents evidence supporting that necessity.

The provision limited currently creates an irrebuttable presumption that an appropriation is necessary if the taking agency is a common carrier or public utility and a state or federal regulatory authority has approved the appropriation. The bill makes the presumption rebuttable and limits it only to the specific interests in property reviewed and approved by the regulator.<sup>15</sup>

### **Attorney fee and cost awards**

The bill expands provisions calling for attorney fee, cost, and expense awards to property owners in appropriation proceedings.

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<sup>13</sup> *Black's Law Dictionary* 244, 698, 1431, and 1518 (11<sup>th</sup> ed. 2019).

<sup>14</sup> R.C. 163.021(A).

<sup>15</sup> R.C. 163.09(B)(1); *Black's Law Dictionary* 1436 (11<sup>th</sup> ed. 2019).

Under current law, if the property owner challenges the necessity of an appropriation or whether the proposed use of the property is a public use and the court makes a determination in favor of the property owner, in a final and unappealable order, the court must award the owner reasonable attorney's fees, expenses, and costs. The bill expands this provision, adding that the ruling may be "wholly or partially" in the property owner's favor to trigger the mandatory fee, cost, and expense award. It also requires an award of fees, costs, and expenses if a taking is void for failure to follow required policies and procedures (see "**Failure to follow procedure**," above).

The bill also eliminates existing law that prohibits attorney fee and cost awards, including appraisal fees, that an owner incurred if the owner and agency exchanged appraisals prior to the proceedings and the final compensation award is less than 125% of the agency's first offer.<sup>16</sup>

If an agency appeals and does not prevail, either in whole or in part, the bill requires the court to award reasonable attorney's fees, expenses, and costs incurred by the owner in defending the appeal. It also requires that, in all cases where the court is required to award, or an agency is required to pay, attorney's fees, any fees, expenses, and costs incurred in pursuit of the attorney fee award be included in the award.<sup>17</sup>

Finally, the bill removes a provision requiring the property owner to pay any court costs incurred after the taking agency offers a certain amount of compensation which the owner declines, provided that the owner is later awarded less compensation.<sup>18</sup>

## **Damages for coercive actions**

The bill requires courts hearing appropriation actions to award damages they consider appropriate if an agency uses coercive actions at any time during the appropriations process. The property owner has the burden to prove, by a preponderance of the evidence, that the agency used coercive actions. Those are not defined in the bill, but an existing provision of law prohibits heads of taking agencies from advancing the time of an appropriation, deferring negotiations, or deferring condemnation and deposit of funds with the court for use of the owner, or taking any other coercive action to compel agreement on price.

This new provision applies to those included in the existing provision of law, but is not limited to them. Any claim of coercive actions must be brought in the court of common pleas in the county where the property is located.<sup>19</sup>

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<sup>16</sup> R.C. 163.09(G), 163.21(C)(3), and 163.52(B).

<sup>17</sup> R.C. 163.16(A) and 163.19.

<sup>18</sup> R.C. 163.16(B).

<sup>19</sup> R.C. 163.09(H), with conforming change in R.C. 163.59(I).

## Appellate rights

Under continuing law, property owners have the right to an immediate appeal when a court enters an order in favor of the agency on questions of authority, inability to agree, or necessity unless the property is taken under specific circumstances:

- In time of war or other public exigency imperatively requiring its immediate seizure;
- For the purpose of making or repairing roads open to the public without charge (see “**Public use**,” above);
- For the purpose of implementing rail service.

The bill narrows the circumstance in which appeals are not allowed in appropriations cases for the purpose of making or repairing roads by requiring the appropriation to be for that sole purpose.<sup>20</sup>

## Inverse condemnation

The bill creates a specific cause of action for inverse condemnation (see “**Background – terminology and procedure**,” above). An inverse condemnation action is brought by a property owner who alleges an agency has taken the owner’s property without bringing appropriation proceedings.<sup>21</sup> Currently, the Revised Code does not make any provision for inverse condemnation proceedings. A property owner who alleges that an agency has taken property without following the required appropriations procedure may file an action for a writ of mandamus (an order telling a government agency to do something it was legally required to do but did not).<sup>22</sup>

The bill’s new cause of action allows property owners to sue taking agencies that have not followed the law’s required procedures. An inverse condemnation proceeding must be filed in the court of common pleas in the county where the property is located, and the owner has the burden of proof by a preponderance of the evidence. This is a departure from the standard in mandamus cases, where the property owner’s burden is by clear and convincing evidence.

An owner who meets the burden of proof must be awarded reasonable compensation and damages for the appropriation, along with reasonable attorney’s fees, costs, and expenses, including appraisal fees and engineering fees. The court must also award attorney’s fees, costs, and expenses if the agency settles the action. The bill states that it is the General Assembly’s intent that the fee, cost, and expense provisions apply to judgments and settlements occurring on or after January 1, 2019.<sup>23</sup>

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<sup>20</sup> R.C. 163.09(B)(3).

<sup>21</sup> *Black’s Law Dictionary* 364 (11<sup>th</sup> ed. 2019).

<sup>22</sup> *State ex. rel. New Wen, Inc. v. Marchbanks*, 159 Ohio St.3d 15, 2020-Ohio-63, ¶ 15 (2020).

<sup>23</sup> R.C. 163.221 and 163.62(B) and (D).

## Case timing

How an appropriation action proceeds depends on the property owner's answer to the agency's petition. The questions that the court might address in a case include:

- Does the agency have the authority to appropriate property?
- Were the agency and property owner actually unable to agree on a voluntary purchase and sale?
- Is the appropriation for a public use?
- Is the appropriation necessary for that public use?
- What is just compensation?

The first three of those questions, if they are contested, are resolved by the court. The just compensation issue is resolved by a jury. The time in which each must be considered is extended by the bill.

### **Authority, inability to agree, necessity**

If the property owner files an answer and specifically denies the agency's authority to make the appropriation, the agency's and owner's inability to agree, or the necessity of the appropriation, current law requires the court to schedule a hearing on those questions at least five, but no more than 15, days after the answer is filed. The bill changes that timeframe to at least 30 days after the answer is filed.<sup>24</sup>

### **Compensation**

If the property owner does not file an answer, and the court does not approve a settlement reached outside of court, the court is required to declare the value of the property to be the value stated by the agency. In all other cases – those in which an answer is filed – current law requires the court to set a time within 20 days of the last day an answer could be filed for a jury to determine appropriate compensation. The bill increases this to at least 90 days, though, the period of time may be longer depending on circumstances.<sup>25</sup>

In cases where authority, inability to agree, or necessity of an appropriation are at issue (see, "**Burden of proof – Authority, inability to agree, necessity,**" above), current law requires the court, if it settles those matters in favor of the agency, to set a hearing for the jury to determine appropriate compensation at least 60 days later. The bill extends that to at least 90 days after the issues are decided.<sup>26</sup>

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<sup>24</sup> R.C. 163.09(B)(1).

<sup>25</sup> R.C. 163.09(A) and (C).

<sup>26</sup> R.C. 163.09(B)(2).



The bill also adds an indefinite extension in cases where the property owner appeals a court’s determination in favor of an agency on questions of authority, inability to agree, or necessity (see “**Right to immediate appeal**,” above) by prohibiting the court from setting a time for, or proceeding with, the determination of compensation until the immediate appeal is final.<sup>27</sup>

### All cases in which an answer is filed

Current law requires the court to set a hearing or hearings in all cases in which answers are filed, or in which an answer is filed on behalf of at least some named owners, at a reasonable time. In no case, though, may the court schedule a hearing more than 20 days after the issues are joined as to all necessary parties or 20 days after they could be joined by rule, whichever is earlier. (Joinder of issues allows common issues to be decided among multiple parties at a single hearing or set of hearings, instead of at separate hearings for each party.) The bill removes this specific deadline, leaving only the reasonableness requirement.<sup>28</sup>

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## COMMENT

The bill restricts taking agencies from appropriating land for recreational trails by excluding this purpose as a valid public use. The extent to which this provision will apply to restrict the appropriation authority of municipal corporations is unclear.

The Ohio Constitution’s Home Rule Amendment grants municipalities the authority to exercise powers of local self-government, which may be exercised independently from the requirements and restrictions of state law and includes the power of eminent domain.<sup>29</sup> Legislative attempts to limit, through state law, the use for which a municipal corporation may take property through eminent domain may conflict with this constitutional authority.

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## HISTORY

Action	Date
Introduced	02-21-23

ANHB0064IN-135/ts

<sup>27</sup> R.C. 163.09(B)(3).

<sup>28</sup> R.C. 163.09(D); *Black’s Law Dictionary* 1001 (11<sup>th</sup> ed. 2019).

<sup>29</sup> Ohio Const., art. XVIII, sec. 3; *State ex. rel. Bruestle v. Rich*, 159 Ohio St. 13, 32 (1953).