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VORYS CLIENT ALERT

NEW CHANGES TO OHIO'S EMINENT DOMAIN LAW TAKE EFFECT

In October 2007, Ohio Senate Bill 7 ("SB 7") took effect bringing significant changes to Ohio's eminent domain law. SB 7 is the result of a task force created by the Ohio legislature to recommend changes to Ohio's eminent domain law in response to the United States Supreme Court decision of *Kelo v. City of New London*. In *Kelo*, the U.S. Supreme Court held that economic development was a legitimate public use and an appropriating authority could take private property and turn it over to a private developer. However, the Court noted that individual states were free to enact legislation to further restrict the exercise of eminent domain.

In response to *Kelo*, the Ohio Eminent Domain Task Force proposed significant restraints on the use of eminent domain power to appropriate land for private development. In addition, the Task Force proposed substantial additional protections to Ohio landowners throughout the appropriation process. Many of the Task Force's recommendations were incorporated into SB 7. This update highlights the key changes to Ohio law governing eminent domain.

BURDEN OF PROOF

Under prior law, the burden of proof was on the owner as to issues of the right or necessity to acquire private property or the inability of the parties to agree on price to be paid for the property. With the passage of SB 7, the burden has shifted and the appropriating authority must establish the right, necessity, and inability of the parties to agree by a preponderance of the evidence. Similarly, an ordinance or resolution declaring the necessity of the appropriation is no longer *prima facie* evidence of the necessity to acquire the property which can only be challenged by showing an abuse of discretion by the appropriating authority. Instead, a resolution or ordinance merely creates a rebuttable presumption of necessity.

PREREQUISITES TO APPROPRIATION

Ohio law now requires that appropriating authorities follow new, specific notice, offer, and appraisal procedures prior to initiating an appropriation action.

Notice

At least thirty (30) days prior to filing a petition for appropriation, an appropriating authority must provide the property owner with notice of its intent to appropriate. The notice must be personally served on the owner or sent via certified mail to the owner of the property or the owner's designated representative. Among other things, the notice must contain a description of the property sought, the purpose of the appropriation, and advise the property owner of the owner's rights – including the right to seek attorneys' fees and costs if the appropriation is determined not to be necessary, or, if the compensation awarded by the jury is "significantly in excess" of the offer received prior to the filing of the petition for appropriation.

Good Faith Offer

New provisions also require that an appropriating authority submit a good faith offer to purchase the property no less than thirty (30) days prior to filing a petition for appropriation. The offer may be made in conjunction with the required notice of intent. Significantly, due to the availability of an award of attorneys' fees to the property owner in certain circumstances described below, the agency may revise its offer only if the agency becomes aware of conditions "indigenous" to the property that could not reasonably have been discovered at the time of the initial good faith offer or if the agency and the owner exchange appraisals prior to the filing of the petition.

Appraisals

An agency must obtain an appraisal of the property prior to submitting the good faith offer and provide a copy – or in the case of property valued at less than $10,000, a written summary – to the owner at the time of the first offer to purchase.

VALUATION AND COMPENSATION

Some of the most extensive revisions contained in SB 7 relate to issues of valuation and compensation. The new law not only allows compensation for things such as lost goodwill and relocation expenses, it provides for the award of attorneys' fees to owners when the jury award is "significantly in excess" of the good faith offer made by the appropriating authority. SB 7 also provides for extended time to prepare for the compensation stage and includes a provision for mandatory mediation if requested by either party.

Goodwill Payments

In cases where the appropriation involves the entire property of a business, SB 7 provides that a jury "shall" assess compensation to the owner for the loss of goodwill provided the owner can prove: (1) the loss of goodwill is caused by the taking of the property; and (2) the loss cannot reasonably be prevented by relocation of the business or by taking steps to preserve the goodwill.

Relocation Expenses

When the appropriation causes an owner, commercial tenant or residential tenant to relocate, the appropriating authority, upon application by the displaced person or business, must provide a relocation payment. Relocation payments may include payment for actual moving expenses, expenses involved in searching for a replacement business (up to a maximum $2,500) and actual expenses to re-establish a farm, non-profit organization, or small business at a new site (up to a maximum of $10,000). If the agency rejects the application for relocation expenses, the issue will be submitted to the jury.

Economic Damages

In addition to relocation expenses, an owner of a business required to relocate may recover the actual economic loss resulting from an appropriation. The burden is on the business owner to establish the amount of economic loss and the amount may not include attorneys' fees, nor duplicate any other amount awarded through the appropriation. Economic damage payments may not exceed twelve months net profit for the business.

Attorneys' Fee Awards

Under the new law, in certain cases, if the jury's award is greater than 125% of the appropriating authority's initial good faith offer, or revised offer when circumstances permit, the Court must enter judgment in favor of the owner, in amounts it considers just, for all costs and expenses, including attorneys' and appraisal fees that the owner actually incurred. However, the fees and cost award is capped and cannot exceed twenty-five percent of the difference between the agency's offer and the final award. An owner is not entitled to an award of fees and costs unless, not less than fifty (50) days prior to the trial date, the owner provides the agency with an appraisal of the property being appropriated accompanied by the owner's sworn statement setting forth the value of the property and an explanation of how the owner arrived at that value. Significantly, attorneys' fees are not recoverable in cases involving an appropriation for the purpose of making or repairing roads unless the property is devoted to agricultural use and the final award of compensation exceeds 150% of the initial good faith offer or revised offer.

Time Period for Compensation Hearing

Previously, all compensation hearings, including those where the owner opposed the necessity of the appropriation, were required to be held within twenty (20) days of the finding of necessity. Under SB 7, if, after the owner challenges the necessity of the take, the court finds in favor of the appropriating authority, the earliest the compensation hearing can take place is sixty (60) days after the courts order finding necessity. The time period may be extended even further through the parties' request for mediation.

Mediation

SB 7 empowers either party to the appropriation action to request non-binding mediation as to the value of the property being appropriated. The mediation must be concluded within fifty (50) days after the answer is filed, unless the judge extends the time due to an inability to obtain an appraisal. The appropriating authority is required to pay for the mediation.

APPEAL, VETO AND REPURCHASE

Appeal

SB 7 now provides an owner the immediate right to appeal if the court finds in favor of the appropriating authority on the issues of the right or necessity of the take. The owner may request a stay on appeal provided that the owner posts a bond in an amount set by the court.

Veto

In cases where an appropriation is commenced by a public agency that is not elected, an owner may try to obtain a veto of the appropriation. If the owner has provided the unelected public agency with written objection to the appropriation,
the elected officials of the public agency or the elected individual that appointed the unelected agency may veto the appropriation. In cases involving unelected instrumentalities of the state, the Governor may veto the appropriation.

Right to Repurchase

If an appropriating authority decides not to use appropriated property for the purpose stated in the petition for appropriation, the prior owner may repurchase the property at its fair market value. The right to repurchase is not available in all cases, including when more than five years have passed since appropriation or the agency has transferred the property to another person or agency.

APPROPRIATION OF BLIGHTED AREAS

SB 7 also resulted in significant changes to Ohio eminent domain law as it relates to appropriation of blighted areas for redevelopment.

Blight Defined

SB 7 eliminates the multiple definitions of blight under the previous law and now defines "blighted area" and "blighted parcel" in a new provision. Under SB 7, "blighted area" or "slum" is an area in which "at least seventy percent of the parcels are blighted" and the blighted parcels substantially impair the growth or development of the state or political subdivision, 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 use.

SB 7 goes on to define a "blighted parcel" as one which meets one of several conditions including a dilapidated or vermin infested structure, a property which poses a direct threat to public health or safety, or where a tax or special assessment exceeds the fair value of the land. In addition, a parcel may qualify as blighted when it contains two or more defined conditions (e.g., dilapidation and deterioration and fire hazard) that considered collectively, adversely affect surrounding or community property values and cannot be reasonably corrected through existing zoning codes or other land use regulations.

Notably, SB 7 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. In addition, the new law exempts agricultural land from being classified as blighted when the land is consistent with conditions that are normally incident to generally accepted agricultural practices.

Comprehensive Plan and Resolution Required

Before appropriating property based on a finding that the area is a blighted area or slum, an appropriating authority must first adopt a comprehensive development plan that describes the public need for the property. The plan must include one study documenting the public need. Notably, no private money can pay for the costs of the development plan or study. In addition, if the appropriating authority is governed by a legislative body, the legislative body must pass a resolution affirming the public need for the property.

Conveyance for Economic Development Not *Per Se* Public Use

Under SB 7, all appropriations must be necessary and for a public use. An appropriation for conveyance to private developers or solely for the purpose of increasing public revenue does not qualify as a public use unless the appropriating authority establishes by a preponderance of the evidence that the property is blighted.

If you have any questions regarding these new changes, or any eminent domain law issue, please contact Vorys partners Bruce Ingram at (614) 464-6480 or Joe Miller at (614) 464-6233.