



H.B. 16
124th General Assembly
(As Introduced)

Reps. Willamowski, Core, Flowers, Setzer, Hollister, Allen, Brinkman, Latell

BILL SUMMARY

- Requires that if metric measurements are used in any description, specification, elevation, grade change, or highway construction plan in a petition for appropriation of real property, the petitioner agency also must use parallel and customary U.S. imperial measurements in equivalent detail to the metric measurements.
- Allows both an owner and an agency to appeal a court's determinations with respect to preliminary matters pertaining to the agency's right to make an appropriation, the inability of the parties to agree, and the necessity for the appropriation or a public agency's qualification for depositing with the court an amount that the agency determines to be the value of the property appropriated and damages to the residue.
- Requires a jury, in assessing damages to the residue, to consider certain factors, including whether a diminution in the value of the residue will result from any restriction, impairment, or limitation of an owner's access to or from a right-of-way, street, road, or highway caused by any of specified constructions by the agency.
- Provides for supplemental appropriation proceedings for a jury to assess additional damages to the residue if, after taking possession of the appropriated property, the agency or successor agency has altered the proposed property uses or construction plans or specifications and the alteration may have caused a further diminution in the value of the residue.
- Makes nonsubstantive changes to update various provisions in the Appropriation of Property Law.

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CONTENT AND OPERATION

Background law

The Ohio Constitution grants the power of eminent domain in Section 19 of Article I (see **COMMENT 1**). With certain exceptions, all appropriations of real property are made pursuant to the Appropriation of Property Law, R.C. 163.01 to 163.22 (R.C. 163.02(A)--not in the bill). Appropriations can be made only after a public or private agency is unable to agree, for any reason, with the property owner, or if more than one, with any owner, or the owner's guardian or trustee or if any owner is incapable of contracting in person or by agent and has no guardian or trustee, is unknown, is not a resident of Ohio, or whose residence is unknown to the agency and cannot be ascertained with reasonable diligence (R.C. 163.04--not in the bill). (See **COMMENT 2**.) The Appropriation of Property Law sets forth the procedures for the appropriation of real property. The references in this analysis to "existing law" are references to the existing Appropriation of Property Law.

Petition for appropriation; descriptions of property

Existing law

Under existing law, an agency that has met the requirements regarding the inability to agree with the owner or the incapacity or absence of the owner, as described above in "*Background law*," may commence appropriation proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or an interest or right in the parcel or parcels. The petition of a private agency must be verified as in a civil action.

(R.C. 163.05, first paragraph.) All petitions for appropriation must contain the following (R.C. 163.05(A) to (H)):

(1) A description of each parcel of land or interest or right in a parcel of land sought to be appropriated, as will permit ready identification of the land involved;

(2) In the case of a private agency, a statement that the appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;

(3) A statement of the purpose of the appropriation;

(4) A statement of the estate or interest sought to be appropriated;

(5) The names and addresses of the owners, so far as they can be ascertained;

(6) A statement showing that the requirements of R.C. 163.04 have been met (see "**Background law**," above);

(7) A prayer for the appropriation;

(8) If an agency would require in an appropriation less than the whole of any parcel containing a residence structure and the required portion would remove a garage and sufficient land that a replacement garage could not be lawfully or practically attached, the appropriation must be for the whole parcel and all structures.

If an agency appropriates less than the fee of any parcel or a fee in less than the whole of any parcel of property, the agency either must make available to the owner or must file in the office of the county engineer, a description of the nature of the improvement or use that requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans is acceptable in providing a description for the purposes of the preceding sentence in the appropriation of land for highway purposes. (R.C. 163.05, last paragraph.)

Changes proposed by the bill

In addition to the requirements in existing law pertaining to the filing of a petition for appropriation, the bill also requires that if metric measurements are used in any description, specification, elevation, grade change, or highway

construction plan referred to in existing law, the agency involved also must use in the description, specification, elevation, grade change, or highway construction plan *parallel and customary U.S. imperial measurements* in equivalent detail to the metric measurements (hereafter, "measurements requirement") (R.C. 163.05(D)).

The bill further modifies existing law in the following manners:

(1) It repeals the requirement that the "petition of a private agency shall be verified as in a civil action" (R.C. 163.105(A)).

(2) It requires that the description in the petition for appropriation of each parcel of land or interest or right in a parcel of land sought to be appropriated be consistent with the bill's measurements requirement (R.C. 163.05(A)(1)).

(3) If an agency appropriates less than the fee of any parcel or a fee in less than the whole of any parcel of property, the agency either must make available to the owner or must file in the office of the county engineer a description of the nature of the improvement or use that requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, *which description, specifications, elevations, and grade changes must be consistent with the bill's measurements requirement* (added by the bill) and be in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement *or use* (added by the bill). A set of highway construction plans *that is consistent with the bill's measurements requirement* (added by the bill) is acceptable in providing a description in the appropriation of land for highway purposes. (R.C. 163.05(C).)

(4) The bill restructures the provisions pertaining to the contents of the petition for appropriation (R.C. 163.05(A)(1) to (7)) and sets forth as a separate division (B) of R.C. 163.05, instead of as part of the contents of the petition, the existing law's requirement that if an agency would require in an appropriation less than the whole of any parcel containing a residence structure and the required portion would remove a garage and sufficient land that a replacement garage could not be lawfully or practically attached, the appropriation must be for the whole parcel and all structures.

Appeal of court's determinations with respect to preliminary matters

Existing law

Answer to petition for appropriation. Under existing law, any owner may file an answer to a petition for appropriation, and the answer must contain a general denial or specific denial of each material allegation not admitted. The

agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation (hereafter, "preliminary matters") must be resolved by the court in favor of the agency unless those preliminary matters are specifically denied in the answer and the facts relied upon in support of the denial are set forth in the answer, *provided* that when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads that must be open to the public, without charge, an answer may not deny those preliminary matters. (R.C. 163.08--not in the bill.)

No answer filed. If no answer is filed and if the court does not order the approval of a settlement of the rights of all necessary parties, the court, on motion of a public agency, must declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases, the court must fix a time, within 20 days from the last date that an answer could have been filed, for the assessment of compensation by a jury. (R.C. 163.09(A).)

Answer filed denying preliminary matters. When an answer is filed and any of the preliminary matters are specifically denied, the court must set a day, not less than five or more than 15 days from the date the answer was filed, to hear those "questions" (i.e., the preliminary matters). The burden of proof is upon the owner with respect to those questions. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation is prima-facie evidence of that necessity in the absence of proof showing an abuse of discretion by the agency in determining that necessity. If, as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court must set a time for the assessment of compensation by the jury within 20 days from the date of the journalization of that determination. An order of the court *in favor of the agency* on any of those "questions" (i.e., the preliminary matters) or on the "qualification" pertaining to a public agency's deposit with the court, at the time of filing the petition, of the value of the property appropriated and the damages, if any, to the residue, as determined by the public agency (see **COMMENT 3**), is *not a final order* for purposes of appeal. On the other hand, an order of the court *against the agency* on any of those questions, or on the question of that qualification, is a *final order* for purposes of appeal. If a public agency has taken possession of the property prior to the court's order and the order, after any appeal, is against the agency on any of those questions, the agency must restore the property to the owner in its original condition or respond in damages, which may include certain "items" (see **COMMENT 4**), recoverable by civil action, to which the state consents. (R.C. 163.09(B).)

Answer filed not denying preliminary matters. If an answer is filed and none of the preliminary matters is specifically denied, the court must fix a time within 20 days from the date the answer was filed for the assessment of compensation by a jury (R.C. 163.09(C)).

Hearing set; consolidation of cases. If answers are filed pursuant to the preceding two paragraphs, or an answer is filed on behalf of fewer than all the named owners, the court must set the hearing or hearings at the times that are reasonable under all the circumstances, but in no event later than 20 days after the issues are joined as to all necessary parties or 20 days after "rule therefor," whichever is earlier. The court, with the consent of the parties, may order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both must be *separately* determined by the jury in its verdict. (R.C. 163.09(D) and (E).)

Appeals as in other civil actions. Subject to the above-described provisions in existing law, R.C. 163.09, and to the existing provision in R.C. 163.07--not in the bill (see **COMMENT 5**), any party may prosecute appeals as in other civil actions from the judgment of the court (R.C. 163.19).

Changes proposed by the bill

The bill repeals the provision in existing law described above in "**Answer filed denying preliminary matters,**" that provides that an "order of the court in favor of the agency on any of such questions or on qualification . . . shall not be a final order for purposes of appeal" (R.C. 163.09(B)(3)). The bill instead specifies that the court's journalized order containing its determination on the preliminary matters (the bill substitutes "matters" for "questions" in existing law) or on a matter of the "qualification" as described above in "**Answer filed denying preliminary matters,**" and in **COMMENT 3**, *shall be a final order for purposes of appeal* (R.C. 163.09(B)(4)). The bill thus eliminates the distinction under existing law between a court order in favor of the agency that is *not* a final and appealable order and a court order against the agency that is a final and appealable order and, in effect, allows both an owner and an agency to appeal the orders containing the court's determination on the specified preliminary matters.

The bill also modifies the following provisions in existing law in the following manners:

(1) If no answer is filed and if the court does not order the approval of a settlement of the rights of all necessary parties, the court, on motion of a public agency, must declare the value of the property taken and the damages, if any, *to the residue* (added by the bill) to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases, the court must fix

a time, within 20 days from the last date that an answer could have been filed, for the assessment by a jury of compensation *and the damages, if any, to the residue* (added by the bill). (R.C. 163.09(A).)

(2) The court, with the consent of the parties, may order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, *if any, to the residue* (added by the bill), or both must be separately determined by the jury in its verdict (R.C. 163.09(E)).

(3) The bill repeals the provision that the right of any party to prosecute appeals as in other civil actions as described above in "*Appeals as in other civil actions*," is "subject to section 163.09" pertaining to appeals described above in "*Appeal of court's determinations with respect to preliminary matters*" (R.C. 163.19).

Assessment by the jury of compensation and any damages to the residue

Existing law

Under existing law, in appropriation proceedings, the jury must be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner. The jury, in its verdict, must assess the compensation for the property appropriated and the damages, if any, to the residue to be paid to the owners. If a building or other structure is on the property appropriated or if a building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that the structure cannot be divided upon the line between the lands without manifest injury to the building or structure, the jury, in assessing compensation to any owner of the land, must assess the value of the building or structure as part of the compensation. The title to the structure must vest in the agency, and the agency has the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing the structure from the adjoining land, after deposit in accordance with the verdict. The removal must be made within 90 days after the agency takes title to the property appropriated, but the court may extend the removal time upon conditions that the court requires. (R.C. 163.14.)

The verdict must be signed by at least three-fourths of the members of the jury. If a jury is discharged without rendering a verdict, another jury must be impaneled at the earliest convenient time and must make the inquiry and assessment. (R.C. 163.14.)

Changes proposed by the bill

The bill requires the jury, in *assessing damages, if any, to the residue* to be paid to the owners, to consider specified factors as follows:

(1) The jury must consider the agency's stated purpose or purposes for the appropriation, the agency's proposed use or uses of the appropriated property, and any construction plans or specifications of the agency that relate to or otherwise affect the appropriated property or the residue. In answers to interrogatories that accompany its verdict, the jury must state whether any of those purposes, uses, plans, or specifications caused it to find a diminution in the value of the residue and was a factor in its determination of the damages, if any, to the residue to be paid to the owners. (R.C. 163.14(B)(3).)

(2) The jury must consider whether a diminution in the value of the residue will result from any restriction, impairment, or limitation of access to or from a public right-of-way, street, road, or highway caused by an agency's construction of any grade change, guard rail, curbing, fencing, ditch, traffic control device, barrier, embankment, structure, or median strip barrier or obstruction. In answers to interrogatories that accompany its verdict, the jury must state whether any of those types of restrictions, impairments, or limitations caused it to find a diminution in the value of the residue and was a factor in its determination of the damages, if any, to the residue to be paid to the owners. (R.C. 163.14(B)(4).)

The bill provides that the verdict of a jury with respect to damages, if any, to the residue to be paid to the owners is subject to adjustment in the supplemental appropriation proceedings required to be commenced under the circumstances described below in "**Supplemental appropriation proceedings**" (R.C. 163.14(D)).

The bill modifies the provision in existing law regarding the jury's impartial assessment of the compensation and the damages, if any, *to the residue* (added by the bill) without deductions for general benefits as to the property of the owner (R.C. 163.14(A)). The bill also makes changes in the terminology in the provision regarding the assessment of compensation to the owner when a building or other structure is on the property appropriated or when a building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that the structure cannot be divided upon the line between the lands without manifest injury to the building or structure, by substituting "property" for "land" and adding "building" in reference to "structure" and by making other technical changes (R.C. 163.14(B)(2)). The bill modifies the provision in existing law that gives the agency the right to enter upon the adjoining property upon which any part of the building or other structure is located for the purpose of removing the building or other structure from that adjoining property, after the deposit *of the compensation*

and damages, if any, to the residue (added by the bill) in accordance with the jury's verdict (R.C. 163.14(B)(2)).

Supplemental appropriation proceedings

Operation of the bill

The bill requires an agency that appropriates property under the Appropriation of Property Law or a successor agency in interest to promptly commence supplemental appropriation proceedings under that Law for the purpose of having a jury assess additional damages, if any, to the residue to be paid to the owners from whom the property was appropriated or to their successors in interest if *both* of the following circumstances apply (R.C. 163.141(A)(1) and (2)):

(1) After the agency took possession of the appropriated property, the agency or successor agency in interest effected any change in or otherwise altered a proposed use or uses of the appropriated property, or the agency's construction plans or specifications that related to or otherwise affected the appropriated property or the residue, at the time the jury assessed the damages, if any, to the residue under the circumstances described in paragraph (1) above in **'Changes proposed by the bill'** in **'Assessment by the jury of compensation and any damages to the residue.'**

(2) The change or other alteration in the proposed use or uses of the appropriated property or in the agency's construction plans or specifications may have caused a further diminution in the value of the residue to the owners from whom the property was appropriated or their successors in interest.

Under the bill, if the agency or its successor agency in interest fails or refuses to promptly commence the supplemental appropriation proceedings, the owners from whom the property was appropriated or their successors in interest may commence a mandamus action in the court of common pleas of the county in which the residue is located for the purpose of obtaining a court order compelling the agency or successor agency in interest to commence the supplemental appropriation proceedings in accordance with the bill. The mandamus action must be commenced within four years from the date an agency or its successor agency in interest completes the change or other alteration in a proposed use or uses of the appropriated property or in the agency's construction plans or specifications, or the action otherwise is barred. If the court of common pleas involved in a mandamus action under the bill determines that the owners from whom the property was appropriated or their successors in interest timely commenced the action and established, by a preponderance of the evidence, the circumstances listed in the preceding paragraphs (1) and (2), the court must enter an order compelling the

agency or its successor agency in interest to commence the supplemental appropriation proceedings and must award to the owners or their successors in interest the reasonable attorney's fees, court costs, and other reasonable expenses that they incurred in connection with the mandamus action. (R.C. 163.041(B).) (See **COMMENT 6**.)

COMMENT

1. Section 19 of Article I, Ohio Constitution, provides:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Section 5 of Article XIII, Ohio Constitution, provides for the appropriation of property by corporations, as follows:

No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

2. For purposes of the Appropriation of Property Law, R.C. 163.01, not in the bill, contains the following definitions of terms:

(A) "Public agency" means any governmental corporation, unit, organization, or officer authorized by law to appropriate property in the courts of this state. "Private agency" means any other corporation, firm, partnership, voluntary association, joint-stock association, or company authorized by law to

appropriate property in the courts of this state. "Agency" includes any public agency or private agency.

(B) "Court" includes the court of common pleas and the probate court of any county in which the property sought to be appropriated is located in whole or in part.

(C) "Owner" includes any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated.

(D) "Real property," "land," or "property" includes any estate, title, or interest in any real property which is authorized to be appropriated by the agency in question, unless the context otherwise requires.

3. Under R.C. 163.06, not in the bill, a public agency, other than an agency appropriating property for the purposes described in the following paragraph, that qualifies pursuant to Section 19 of Article I, Ohio Constitution, may *deposit with the court* at the time of filing the petition for appropriation the value of the property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon *take possession* of and enter upon the property appropriated. This right of possession upon deposit *does not extend to structures*. (R.C. 163.06(A).)

A public agency appropriating property for the purpose of *making or repairing roads* that must be open to the public, without charge, or for the purpose of implementing rail service under the High Speed Rail Authority Law, may deposit with the court at the time of filing the petition the value of the property appropriated together with the damages, if any, to the residue, as determined by the public agency and stated in an attached declaration of intention to obtain possession, and thereupon *take possession* of and enter upon the property appropriated, *including structures* situated upon the land appropriated for that purpose or situated partly upon the land appropriated and partly upon adjoining land in a manner in which those structures cannot be divided upon the line between those lands without manifest injury to the structures. The jury, in assessing compensation to any owner of land appropriated as described in this paragraph must assess the value of the land in accordance with the law described above in "**Assessment by the jury or compensation and any damages to the residue.**" The owner or occupant of the structures must vacate the structures

within 60 days after service of summons as required under the law, at no cost to the appropriating agency, after which time the agency may remove the structures. In the event the structures are to be removed before the jury has fixed their value, the court, upon motion of the agency, must do the following (R.C. 163.06(B)):

(1) Order appraisals to be made by three persons, one to be named by the owner, one by the county auditor, and one by the agency. Such appraisals may be used as evidence by the owner or the agency in the trial of said case but shall not be binding on said owner, agency, or the jury, and the expense of said appraisals shall be approved by the court and charged as costs in said case.

(2) Cause pictures to be taken of all sides of said structures;

(3) Compile a complete description of said structures, which shall be preserved as evidence in said case to which the owner or occupants shall have access.

At any time after the deposit is made by the public agency as provided in the preceding paragraphs, the owner may apply to the court to withdraw the deposit, and the withdrawal in no way interferes with the action, except that the sum so withdrawn must be deducted from the sum of the final verdict or award. Upon such an application being made, the court must direct that the sum be paid to the owner subject to the rights of other parties in interest if those parties make timely application for distribution of the deposit pursuant to law. Interest does not accrue on any sums that are withdrawable as provided in this paragraph. (R.C. 163.06(C).)

4. These items that are recoverable include the following that the owner incurred: witness fees, including expert witness fees, attorney's fees, and other actual expenses (R.C. 163.21(A)(2)--not in the bill).

5. Under R.C. 163.07, unless a person acquiring any interest in any property described in an appropriation petition after the filing of the petition moves to be made an additional party defendant prior to the date that the case is set for the jury trial on compensation or to any journalization of a settlement entry, the person is bound by the final judgment, *without right of appeal except as to distribution*, and must receive the compensation that was awarded to the person's predecessor in interest to the extent that the person has succeeded to the interest in the property.

6. In *Ziegler v. Ohio Water Service Co.* (1969), 18 Ohio St.2d, 101, 102, the Ohio Supreme Court stated that "[i]t is clear that if there is an added burden or servitude, Section 19 of Article I of the Constitution of Ohio requires that the property owner be compensated." In a later case, *Masheter v. Blaisdell* (1972), 30 Ohio St.2d 8, the Court relied upon this statement in considering the effect of special jury instructions given in the highway appropriation proceedings involved. The jury instructions in *Masheter* pointed out various uses to which a perpetual easement in land could be put for which the landowner could not seek further compensation, and concluded with: "The land appropriated for highway purposes by the Director of Highways can be used for any purpose that the state may elect . . . at such later date and in such manner as the Director of Highways may deem advisable without further compensating the property owner after this appropriation proceeding." The Court declared that as a consequence of these instructions, the juries were left with the *erroneous impression* that the landowner was precluded from *further compensation*, regardless of how burdensome any future uses constituted additional compensable servitudes. This declaration by the Court was not inconsistent with its ruling that damages in a highway appropriation proceeding are limited to a consideration of the present intended use of the land as revealed by the plans and specifications for the improvement in the absence of evidence of other reasonably foreseeable damages.

It appears that an unreported decision by the Court of Appeals of Trumbull County in *Smith v. Sembach* (No. 3763, April 22, 1988), 1988 WL 38809, rehearing denied (1988), 39 Ohio St.3d 722, has caused some confusion regarding a property owner's right to compensation for additional burdens caused by future uses of the property. Distinguishing the Supreme Court's declarations in the *Ziegler* and *Masheter* cases as involving a right to compensation for changes made in an existing right-of-way if those changes constitute an additional burden or servitude on the property, the Court of Appeals in *Sembach* noted that the proposed reconstruction changes in that case were an expansion of the original highway purpose within the original right-of-way and that the consistency with the purpose of the original dedication precluded the proposed changes within the right-of-way from constituting an additional burden or servitude to the landowner's adjoining property.

HISTORY

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