

ETTER OPINION
2001-L-12

April 3, 2001

Honorable George Keiser
Honorable Al Carlson
State Representatives
House Chambers
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Dear Representatives Keiser and Carlson:

Thank you for your March 23, 2001, letter inquiring about the authority of home rule cities to acquire by condemnation and municipalize a public utility's electric distribution system. You have asked two questions: (1) whether a home rule city can use a quick take eminent domain action to do this; and (2) if not, whether a normal eminent domain action requiring a court or jury determination of the dollar amount followed by payment to the utility prior to the city taking control of the system would be required.

As your letter indicates, there are two basic procedures for exercising eminent domain. N.D.C.C. ch. 32-15 sets out the procedure for both public and private entities exercising eminent domain, which is defined in N.D.C.C. § 32-15-01 as "the right to take private property for public use." N.D.C.C. ch. 32-15 sets forth, among other things, the purposes for which eminent domain may be exercised (N.D.C.C. § 32-15-02); what estates or rights in land may be taken (N.D.C.C. § 32-15-03); what types of property may be taken (N.D.C.C. § 32-15-04); what must be shown before property may be taken (N.D.C.C. § 32-15-05); the actions required of a condemnor before initiating an eminent domain action (N.D.C.C. §§ 32-15-06.1 and 32-15-06.2); the requirements of an eminent domain complaint (N.D.C.C. § 32-15-18); and the means of assessing damages and taking possession (N.D.C.C. §§ 32-15-22, 32-15-23, and 32-15-29). Under the procedures outlined in N.D.C.C. ch. 32-15, the necessity for the condemnation is first tried by the court, and then a jury, if requested, will determine the damages. See N.D.C.C. §§ 32-15-05, 32-15-13, 32-15-22; City of Minot v. Minot Hwy. Ctr., Inc., 120 N.W.2d 597 (N.D. 1963); Gissel v. Kenmare Tp., 512 N.W.2d 470 (N.D. 1994). However, the condemnor does not take possession of the property until after entry of judgment and payment to the defendant. See N.D.C.C. § 32-15-29.

The second option for exercising eminent domain is through the quick take procedure referred to in your letter, and established by Article I, Section 16 of the North Dakota Constitution. Under this procedure, the condemnor seeking to acquire a right of way takes

possession of the right of way by making an offer to purchase and depositing the amount of the offer with the clerk of district court of the county where the right of way is located.

Your first question is whether the quick take eminent domain action is available to a home rule city seeking to condemn and municipalize a public utility's electric distribution system. First, it should be noted that Article I, Section 16 of the North Dakota Constitution does not refer to taking property by eminent domain, but only to taking right of way. Accordingly, this provision may only apply to instances in which right of way is taken. Second, the North Dakota Supreme Court has specifically held that the quick take provisions of Article I, Section 16 of the North Dakota Constitution are not self-executing. See Johnson v. Wells County Water Resource Bd., 410 N.W.2d 525 (N.D. 1987); Central Power Coop v. C-K, Inc., 512 N.W.2d 711 (N.D. 1994).

In Johnson v. Wells County Water Resource Bd., the Court held that a county water resource board did not have quick take authority to acquire flowage easements. Johnson, 410 N.W.2d at 525. The Court held that the quick take provision of N.D. Const. art. I, §16 did not grant power to the board, but rather removed limitations on the Legislature's authority to enact quick take statutes if it chose to do so. Id. at 529. The Court further held that because N.D. Const. art. I, §16 establishes the general objective of empowering the Legislature, and not the board, it must remain inoperative until the Legislature takes advantage of it. Id. In Central Power Elec. Coop v. C-K, Inc., the Court held that a rural electric cooperative did not have quick take authority to acquire easements for a transmission line. Central Power Elec. Coop, 512 N.W.2d at 711. The Court held that the eminent domain statute, contained in N.D.C.C. ch. 32-15, does not provide for quick take, but only provides for possession after judgment. Id. at 714.

Based on these holdings, it is clear that a home rule city cannot use quick take action to exercise eminent domain without specific statutory authority. There is no such statutory authority for home rule cities. Accordingly, you are correct that a home rule city does not have quick take authority to condemn and municipalize a public utility's distribution system.

Your second question is whether, if there is no authority for quick take action, a home rule city proposing to take such an action would be subject to the requirements of N.D.C.C. ch. 32-15. Your letter does not ask the underlying preliminary question of whether a home rule city has the authority to condemn and municipalize a public utility's electric distribution system both within and outside the city, but rather, focuses on the procedures that must be followed to take such an action. While chapter 32-15 outlines the procedures that must be followed by a home rule city exercising eminent domain, the city's authority to take this action depends on the statutes referenced in your letter. These statutes do not all clearly provide such authority.

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While N.D.C.C. § 40-05-01(67) most clearly authorizes the governing body of a municipality to purchase or acquire electric light and power plants and appurtenances for distribution by eminent domain, it does not indicate whether that authority extends beyond the city limits. The other statutes do not expressly provide authority to acquire utilities by eminent domain. N.D.C.C. § 40-05.1-06(1) authorizes home rule cities to exercise the right of eminent domain to acquire property within or without the corporate limits, but does not specifically refer to electric utilities. N.D.C.C. § 32-15-02 specifies the public uses for which eminent domain may be exercised, but not all of those uses are exercised exclusively by public entities. For example, subsection 4 includes “electric light plant power and transmission lines” as public uses, but the power of eminent domain for such uses may also be exercised by public utilities or rural electric cooperatives. Subsection 10 lists “works and plants for supplying . . . power for the use of any county, city, or the inhabitants thereof, . . . and buildings, works, and plants for the purpose of generating, refining, regulating, compressing, transmitting, or distributing the same[.]” However, while these are public uses for which a city may exercise eminent domain, it is not clear that N.D.C.C. § 32-15-02 authorizes a city to condemn and municipalize an existing facility.

In conclusion, a home rule city does not have quick take authority to condemn and municipalize a public utility’s distribution system. If a city has the authority to take such an eminent domain action, it can only be done according to the procedures outlined in N.D.C.C. ch. 32-15.

Sincerely,

Wayne Stenehjem
Attorney General

cgm/pg