



## Ohio Supreme Court: Eminent domain just compensation trials for electric transmission line easements must wait while necessity of appropriation on appeal

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In Ohio, utility companies generally have eminent authority where they are unable to negotiate voluntary easements with landowners. However, utilities do not have so-called “quick-take” authority and must wait to begin construction of the project until a trier-of-fact assesses the just compensation award at trial. In addition, Ohio’s eminent domain statutes allow landowners to assert certain “threshold” challenges to a utility company’s proposed taking and, significantly, provide the landowner with the right to an immediate appeal if the trial court rejects such challenge(s). This process compounds the delays that often plague any type of litigation. In recent cases coming out of Washington County, Ohio, a utility company and a trial court attempted to recognize and minimize potentially unwarranted delays in an important energy infrastructure project—to no avail.

The question before the Ohio Supreme Court in [State ex rel. Bohlen v. Halliday](#) was whether a trial court can proceed with a jury trial on just compensation while the owner’s necessity challenge is on appeal. The utility company in Bohlen—which sought easements for a high-voltage transmission line project—argued that Ohio public policy calls for the advancement of public projects through litigation “with all possible speed.” In rejecting this argument and others, the Ohio Supreme Court relied on the language and history of Ohio’s eminent domain statutes and ruled that a trial

court lacks jurisdiction to proceed with a just compensation trial while the issue of the necessity of the appropriation is on appeal.

A brief background of Ohio eminent domain law helps to set the stage for the issue decided in Bohlen. For some time under Ohio law, a landowner has been able to challenge the necessity of a proposed taking for projects such as electric transmission lines or natural gas pipeline projects. See R.C. 163.08.<sup>1</sup> If a landowner properly raises a necessity challenge, the trial court must hold a hearing and make a determination on necessity—before the matter goes to a just compensation trial. In 2007, significant amendments were made to Ohio's eminent domain statutes. Among those changes was a provision that gives the landowner the right to seek an immediate appeal when the trial court rejects the owner's necessity challenge. R.C. 163.09(B)(3).

In Bohlen, Ohio Power Company (a company related to AEP) filed a series of eminent domain actions to appropriate easement interests for AEP's Bell Ridge-Devola transmission replacement line project.<sup>2</sup> While the landowners did not challenge the general public necessity for the transmission line project, they challenged necessity based on the language of AEP's desired easements, arguing the proposed easements were overly broad and that AEP was seeking to acquire more rights than it needed for the project. In September 2020, the trial court (Judge Halliday) rejected the landowners' necessity challenge. Pursuant to R.C. 163.09(B)(3), the landowners filed an immediate appeal from Judge Halliday's decision, which is currently pending in the Fourth District Court of Appeals. In the meantime and over the objection of the landowners, Judge Halliday set compensation trials for early and late spring 2021. In response to the owners' argument that it lacks jurisdiction while the necessity issue is on appeal, the trial court found there would be no irreparable harm from holding the compensation trials, that the owners are not likely to succeed on the merits in their appeal of the necessity ruling, and that there is an overriding public purpose for this public infrastructure project that requires speedy resolution.

The landowners filed an original action in the Ohio Supreme Court against the trial court judge, seeking a writ of prohibition to prevent Judge Halliday from holding the just compensation trials while the necessity issue is on appeal. The landowners argued that the trial court lost jurisdiction once their appeals were filed. The Ohio Supreme Court agreed, holding that the trial court is divested of jurisdiction to proceed with the just compensation trials while the necessity issue is on appeal. In so ruling, the Ohio Supreme Court relied on language in R.C. 163.09(B)(2) that directs the trial court to set the matter for a compensation trial if it finds in favor of the agency on necessity—"subject to \* \* \* the right of the owner to an immediate appeal under" R.C. 163.09(B)(3). (Emphasis added.)

In response to the utility company's argument that public policy supports speedy resolution of public projects, the Court, again, looked to the plain language of the statute—pointing out that the General Assembly did provide for certain exceptions to the right of immediate appeal, such as situations involving public exigencies and road projects. It is in those situations that the General Assembly recognized a public policy to "expeditiously advance eminent-domain cases." 2021-Ohio-194 at ¶24. The electric transmission line project, however, does not fall under one of those exceptions. *Id.*

The Supreme Court's decision is not surprising given the plain language of the statutes, as well as well-recognized common-law principles that govern a trial court's jurisdiction during the pendency of an appeal. At the same time, the trial court's rationale for its attempt to move the cases to conclusion is understandable. This case is a reminder to taking authorities that do not have quick-take authority—such as utility companies—to build into a project's schedule delays in right-of-way acquisition due to potential eminent domain litigation, including the time it may take for an interlocutory appeal on the issue of necessity.

Case to watch: the Bohlen cases challenging the necessity of Ohio Power’s appropriation are on appeal in the Fourth District, with several interesting issues being argued.

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<sup>1</sup> In public highway/road projects and takings involving certain public exigencies, the necessity for the appropriation and the right-to-take may not be challenged. (R.C. 163.08.) Related, taking entities seeking condemnation for public highway/road purposes have “quick-take” authority and upon the filing of the eminent domain action and deposit of the amount claimed to represent just compensation, the taking entity may immediately take possession of the property—before the trier-of-fact determines the final just compensation award. (See R.C. 163.06.)

<sup>2</sup> AEP Ohio Transmission Company had previously obtained a Certificate of Public Convenience and Necessity from the Ohio Power Siting Board for this project.

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