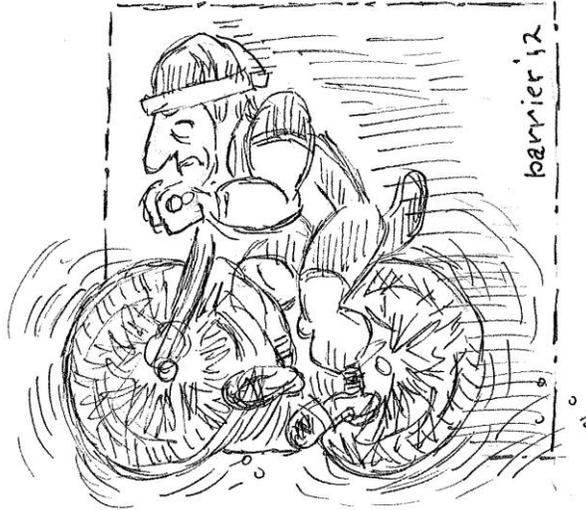


## DIRT LAW AT GROUND LEVEL



### **WHEN A “PUBLIC” PURPOSE IS NOT ENOUGH By W. Christopher Barrier Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.**

As in almost every other state, local Arkansas governments have the power to condemn private property for parks and recreational uses, so long as they are willing to pay for the land taken.

However, two recent Arkansas appellate decisions (Centerpoint Energy v. Green and Thomas v. City of Fayetteville) should remind us that the process does not necessarily end with a verdict, and in fact may (and perhaps should) begin long before the parties face judge and jury, through preparation and negotiation.

#### **BEFORE AND AFTER...**

The Centerpoint case revisits the rule that the typical calculation of damages to be awarded (especially when the taking is of an easement) looks at the value of the land before and after the taking.

For example, if a road widening shaves twenty feet off of a forty-acre tract, the parties should be prepared to establish the value of the land as it stood and without the condemned square footage.

### **EVERY LAST SQUARE FOOT...**

Two things the landowner should keep in mind when negotiating: (1) each square foot of the property is presumed to be worth the same as any other square foot, which means the landowner better get a good appraiser to overcome that presumption; and (2) except in very rare instances, the condemning authority does not get credit for any benefits the wider road or other right-of-way confers on the remaining property, (a rule juries routinely bend).

The availability of negotiation is the point. There may be some flex and give in the design that would lessen the damage to the landowner. In the Fayetteville case, the court pointed out that the bike trail that was planned would run along the edge of the owner's tract, not through the middle of it. The landowner might well want to talk to the condemning authority about alterations in the plans, rather than just tossing the dice, since park and trail plans are usually more easily massaged than roads and utilities rights of way.

### **CAN'T NEVER TELL...**

That willingness to negotiate on the part of the landowner may in part arise because the landowner senses that a jury might well decide that a bike trail through a pristine forest might change the value very little, since the loss might be largely non-economic.

On the other hand, condemning authorities may well want to negotiate so as to avoid the possibility of a jury deciding that bikers are a small group of faddists with expensive toys, indifferent to the value of solitude. Hard to guess sometimes.

### **TWO ELEMENTS...**

Every condemnation case is about (a) the public purposes represented by the taking; and (b) the just compensation to be awarded. Statutes are very broad and unless a blatant abuse is found, such as acquiring land to make it available to a specific identifiable developer, the first question is rarely significant. In other words, attempting a contest solely on a claimed absence of public purpose is a very long shot. In suits by the Arkansas Highway Department, the landowner can raise the issue early on with a motion to strike, within 20 days of the declaration of taking. The Department can simply wait the 20 days before turning dirt.

An adverse ruling on the public purpose issue cannot be appealed until just compensation has been litigated. However, as noted, the public purpose issue is very rarely worth litigating. If the landowner is claiming that a successful public purpose attack would come after irreparable harm has occurred---by depositing money in court, the condemner gets to proceed with construction before compensation is decided--- he had better have substantive evidence to present to support that claim.

### **IT'S ONLY MONEY...**

However, city councils have to appropriate the acquisition money, so a landowner may well want to get involved in the council's consideration of the proposed acquisition, to make the solitude v. bikers argument, and present alternatives at that point, if possible and realistic. It is possible to argue there that the acquisition is simply a bad idea, too expensive, etc., but that cannot be done in court.

So, a property owner faced with a threat of condemnation for recreational purpose, especially if compensation can't replace the lost benefits, should be pro-active, should present alternatives, should not depend on a challenge to the purpose of condemnation, but instead should be active, assertive and loaded for bear.

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