Condemnor's Duty to Negotiate in Good Faith is Restricted to Just Compensation

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Wisconsin's eminent domain rules generally require condemnors to engage in "good faith negotiations" with landowners. Back in July, the Wisconsin Court of Appeals said "good faith negotiations" only encompassed negotiations about the amount of compensation owed to the landowner. *Zastrow v. American Transmission Co.*, 2018 WI App 51, 383 Wis. 2d 644, 916 N.W.2d 821. Just recently, the Wisconsin Supreme Court declined further review, leaving the court of appeals' published decision as the law.

The landowners (collectively "Zastrow") own property in Outagamie County. When Zastrow purchased the property in 1987, American Transmission Company's ("ATC") predecessor held an easement for a 138-kV transmission line on the property. In 2014, ATC sought the Wisconsin Public Service Commission's ("PSC") approval to build two new transmission lines. During the PSC's public comment period, Zastrow appeared and argued that ATC should be required to employ a "wire-zone border-zone" vegetation management technique that would allow small trees and tall shrubs on the edge of the easement area. ATC wanted the ability to clear the entire easement area of all vegetation that could interfere with the lines' operation and maintenance.

The PSC approved the new lines, but declined to require ATC to use the wire-zone border-zone technique.

ATC went about acquiring a new easement on the Zastrow property. ATC approached Zastrow with a proposed easement agreement, which would prohibit Zastrow from planting in the easement area. The proposed agreement also allowed ATC to "[t]rim, cut down and remove" vegetation perpetually. Zastrow asked ATC to modify the agreement, but ATC refused. Instead, ATC served a jurisdictional offer.

In turn, Zastrow filed a "right-to-take" action in circuit court, challenging ATC's compliance with jurisdictional pre-requisites to condemn the easement. One such pre-requisite, contained in Wis. Stat. § 32.06(2a), obligates a condemnor to "attempt to negotiate personally with the owner or one of the owners or his or her representative of the property sought to be taken for the purchase of the same" before making a jurisdictional offer. Wisconsin courts have interpreted this to require the condemnor to engage in "good faith negotiations." Zastrow alleged that ATC failed to meet this requirement by "[d]emanding un-needed rights to cut trees…and refusing to negotiate an alternative set of rights sufficient to protect and maintain" ATC's transmission lines.

The circuit court disagreed, concluding Wis. Stat. § 32.06(2a) only required good faith negotiation on the issue of just compensation.

On appeal, Zastrow reiterated that Wis. Stat. § 32.06(2a) requires ATC to negotiate in good faith, including as to vegetation management. Like the circuit court, the court of appeals concluded that the condemnor's duty of good faith negotiation applies only to compensation.

The court of appeals also rejected Zastrow's claim that ATC had made false statements through the pamphlets it provided to the PSC and to her. Had ATC violated Wis. Stat. § 32.29, the court explained, it was not apparent that such a violation would signal a duty to negotiate in good faith.

This decision significantly narrows the scope of pre-condemnation negotiations required of condemnors. It will be interesting to see how this decision affects negotiations on upcoming projects involving eminent domain in Wisconsin.

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