

Property rights limited in budget bill

By [Thomas Content](#) of the Journal Sentinel June 13, 2011 | [\(19\) Comments](#)

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Owners of land that sits in the way of a highway or power line project would have a harder time challenging a government takeover of their property if a proposal inserted into the state budget becomes law, property rights advocates say.

The measure, adopted on a 12-4 party-line vote by the Legislature's Republican-dominated budget-writing committee, pits the state Department of Transportation and power-line builder American Transmission Co. against property rights advocates and lawyers.

It would raise the threshold for which landowners could obtain legal fees if they go to court to challenge the amount being offered for land that's seized by eminent domain to widen highways or build new power lines.

Supporters of the change say the measure aims to reduce the legal fees won by lawyers who challenge the amount of money offered to property owners in eminent domain cases.

"We're trying to strike a balance between owners' property rights at the same time making sure we minimize taxpayer dollars at DOT to do projects on schedule, under budget and to stretch our dollars further," said Reggie Newson, executive assistant at the Department of Transportation. "We have a cottage industry of attorneys who are out there, and what they do is follow projects and approach landowners and tell them they shouldn't negotiate with DOT and with ATC."

But property-rights lawyers say the change will lead to far fewer opportunities for property owners to get fair compensation for land that's taken from them for the public good.

"The majority of condemnations involve small amounts of land taken from ordinary people. Taken together, that adds up to a lot of value that should be protected, and property rights are fundamental to our republic," said Robert Roth, a Menomonee Falls lawyer who specializes in eminent domain cases. "This is very serious and is something that should not be slipped into a financial bill."

Awarding legal fees was a linchpin of landmark eminent domain legislation that Wisconsin passed in the 1970s to protect private property rights, opponents of the change say.

Large power lines sought

The case comes as two major high-voltage power lines are in the planning stages to cross farms in western Wisconsin and link Madison with La Crosse and Minnesota. American Transmission Co. is hosting open houses this month across south-central and western Wisconsin to discuss its proposed \$425 million Badger Coulee line, which would link Madison and La Crosse.

"It's very interesting that this is coming out at this particular time, when citizens are going to have their property condemned" for the planned lines, said Joe Morse, president of the Citizens Energy Task Force, a group that's been challenging the proposed lines. "In our view it limits citizens' opportunity to get fair compensation for their land. This needs to be thoroughly vetted."

The measure also comes several weeks after utility-owned ATC lost an eminent domain case in the state Supreme Court that it said would result in more litigation over property condemnations, and potentially higher costs for utility customers.

The new legislation would undo a 1977 law designed to give farmers and small property owners help in challenging government and utilities that were looking to take their property, according to critics who want the measure stripped from the budget bill and given a full hearing.

ATC spokeswoman Kaya Freiman declined to comment on the proposal, as did ATC lobbyist Bill McCoshen.

The Supreme Court's unanimous decision required ATC to compensate a Marathon County couple for attorney's fees after they challenged the amount that ATC offered for 1.3 acres of land the Pewaukee company needed to build a high-voltage power line.

Newson said that court case had nothing to do with the proposal, and noted the Department of Transportation made a similar proposal two years ago.

Litigation is costly

The DOT said that its litigation costs totaled \$9.6 million in the most recent fiscal year, and that costs have ranged from \$6.6 million to \$10.8 million in recent years.

"Under current law, the department remains exposed to unreasonable costs and delays in the real estate litigation process," the agency said, noting that the proposal could yield savings for taxpayers by capping opposing lawyers' fees and reducing the number of cases in litigation and the amount of staff time devoted to the issue.

"This is not about fairness," said Michael Bauer, a former Department of Justice lawyer who is now in private practice. "It's about cutting off the amount of dollars that the condemner, the government, has to pay the land owners. We're concerned about eliminating the ability of individuals to protect their property rights."

During oral arguments before the state Supreme Court, ATC's lawyer, Steven Streck, said ATC was looking to negotiate deals with land owners that would prevent cases from going to court and adding costs attached to litigation.

"ATC is very motivated to give a fair price in the first place because in the long run it benefits all of us," he said. "It benefits the ratepayers, because we don't have to go to litigation."

The Wausau lawyer who won the Supreme Court case against American Transmission Co. said he was stunned when the legislative proposal surfaced.

"You had a unanimous Supreme Court decision on May 16, with the conservatives and the liberals on the court together on an issue," said the lawyer, Shane Vanderwaal. "And now two weeks later, the Joint Finance Committee, without a public hearing, guts the eminent domain law and completely attacks property owners' rights."

Kurt Kielisch, an appraiser who has been active in eminent domain cases, said the changes would be a big setback in a state that is among the best in the country for protecting property rights.

Landowners aren't looking to game the system to bilk the taxpayers or the utility, he said.

"They are typically reluctant to get into the fray, are angered at getting shafted and are grateful that they have a legal course that they can follow to get just compensation," he said.

Caught off guard

The proposal caught some off guard given that Gov. Scott Walker's administration took a strong stance on property rights for owners of land near wind turbines earlier this year. The administration's wind-turbine proposal would require turbines to be built farther from nearby properties than a rule adopted by the state Public Service Commission.

"It is confusing that the same party and governor that recognized property rights and potential harm to property owners due to the close proximity of wind turbines does such an about face when they have the power of eminent domain in their grasp," Kielisch said.

In the Supreme Court case decided last month, a Marathon County couple was offered \$7,750 by ATC for a power-line easement. The couple, Mark and Jeanne Klemm, had the land appraised at \$44,000. They ended up reaching a settlement with ATC for \$30,000, but then spent several years litigating who should pay the litigation costs. The Supreme Court awarded legal fees to the Klemms.

"If a property owner is forced to go to litigation and if that property owner is successful, he or she shouldn't have to dip into their 'just compensation fund' for litigation expenses," Vanderwaal said. "If ATC would have paid the Klemms fairly to begin with, they would never have incurred that cost."