

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

SESSION LAW 2009-439  
SENATE BILL 600

AN ACT TO REQUIRE A DEMONSTRATION OF LACK OF PRUDENT AND FEASIBLE ALTERNATIVE IN ORDER FOR PUBLIC CONDEMNORS TO CONDEMN PROPERTY ENCUMBERED BY A CONSERVATION EASEMENT.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 40A of the General Statutes is amended by adding a new Article to read as follows:

"Article 6.

"Condemnation of Property Encumbered by a Conservation Easement.

**"§ 40A-80. Applicability of Article; definition.**

(a) Applicability. –

(1) The provisions of this Article shall apply only to a condemnation action initiated by a public condemnor, which for purposes of this Article shall be any entity exercising the power of eminent domain under any authority except G.S. 40A-3(a).

(2) Except with respect to G.S. 40A-84, the provisions of this Article shall not apply to those circumstances in which: (i) the terms of the conservation easement provide an express exception for uses, purposes, and rights that may be subject to condemnation in the future, or circumstances in which the condemnation action to be taken would not extinguish, restrict, or impair the property rights of the holder of the conservation easement. "Property rights" as used herein shall include the purposes for which the easement was created; and (ii) a local public condemnor or other public condemnor under G.S. 40A-3 is constructing, enlarging, or improving electric distribution systems; gas production, storage, transmission, and distribution systems; water supply and distribution systems; wastewater collection, treatment, and disposal systems of all types; storm sewer and drainage systems; or trails associated with greenways. In condemnation actions exempt pursuant to this subdivision, a condemnor shall make reasonable efforts, after completion of the project for which the condemnation was undertaken, to return the property to the condition that the property existed in prior to condemnation to the extent practicable.

(b) Definition. – As used in this Article, the term "conservation easement" means a conservation or historic preservation easement that meets all of the following criteria, as each of the criteria are defined under 26 U.S.C. § 170(h): (i) a qualified real property interest, (ii) held by a qualified organization, and (iii) exclusively for conservation purposes.

**"§ 40A-81. Additional information required in petition or complaint filed.**

Any public entity that acts to exercise the power of eminent domain on property encumbered by a conservation easement shall initiate the action as required by this Chapter or Chapter 136 of the General Statutes as applicable. The complaint filed as required by those



Chapters also shall include a statement that alleges that there is no prudent and feasible alternative to condemnation of the property encumbered by the conservation easement.

**"§ 40A-82. Demonstration of no prudent and feasible alternative required in certain actions; judicial determination.**

(a) If a holder of a conservation easement contests an action to condemn property encumbered by a conservation easement on the basis that the condemnor failed to sufficiently consider alternatives to the action or that a prudent and feasible alternative exists to the action, the holder of the conservation easement may file an answer to the complaint within 30 days from the date of service of the complaint as to that issue. If the holder of the conservation easement does not assert that the condemnor failed to sufficiently consider alternatives to the action or that a prudent and feasible alternative exists to the action, the holder of the conservation easement may file an answer within 120 days from the date of service of the complaint.

(b) If the holder of a conservation easement contests an action pursuant to subsection (a) of this section, the judge shall hear and determine whether or not a prudent and feasible alternative exists to condemnation of the property. The burden of persuasion on this issue is on the condemnor if the holder of the conservation easement, after discovery, has identified at least one alternative. If no alternative identified by the holder of the conservation easement is adjudged prudent and feasible, then the condemnation action shall proceed under the provisions of Article 3 of this Chapter, or Article 9 of Chapter 136 of the General Statutes, as applicable. If the judge determines that a prudent and feasible alternative does exist to condemnation of the property, the court shall dismiss the action and award the holder of the conservation easement costs, disbursements, and expenses in accordance with G.S. 40A-8(b) or G.S. 136-119, as applicable, except that attorneys' fees may not be awarded. The procedure for this hearing shall be as set forth in G.S. 40A-47 or G.S. 136-108, as applicable.

(c) A determination as to whether a prudent or feasible alternative exists to condemnation of the property as set forth in subsection (b) of this section shall not be required for actions meeting all of the following criteria:

- (1) The Department of Transportation or the North Carolina Turnpike Authority is the condemnor.
- (2) Prior to filing the condemnation action, a review of the project for which the property is being condemned was conducted that considered the alternatives to the condemnation of the property encumbered by the conservation easement and mitigation measures to minimize the impact. The condemnor shall, in the complaint filed with the court, identify the alternatives and mitigation measures considered with regard to condemnation of the property encumbered by the conservation easement.
- (3) The review was conducted pursuant to any of the following:
  - a. The State Environmental Policy Act (SEPA), G.S. 113A-1, et seq.
  - b. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq.
  - c. 49 U.S.C. § 303.

**"§ 40A-83. Vesting of title and right of possession.**

Notwithstanding the provisions of G.S. 40A-42 or G.S. 136-104, title and right to immediate possession of property subject to this Article shall not vest in a condemnor any earlier than any of the following:

- (1) The failure of the easement holder to file an answer within the 30-day time period established by G.S. 40A-82(a).
- (2) Determination by the court that no prudent or feasible alternative exists to condemnation of the property pursuant to G.S. 40A-82(b).

(3) Filing of the complaint and deposit in actions meeting all of the requirements of G.S. 40A-82(c).

**"§ 40A-84. Compensation for condemnation.**

In any action to condemn property encumbered by a conservation easement, the court shall determine just compensation pursuant to Article 4 of this Chapter or in accordance with Chapter 136 of the General Statutes, as applicable, by first determining the value of the property taken as a whole, unencumbered by the conservation easement, as well as any other, separately owned interest in the property. The court shall allocate the just compensation award between or among any holders of the conservation easement and any owners of the property as provided by the easement agreement or, if the agreement fails to address the issue, as the judge finds equitable based upon evidence to include the opinion of a real estate valuation expert with experience in the valuation of conservation easements. Any party may demand trial by jury on the issue of total just compensation for the taking.

**"§ 40A-85. Appeal.**

The parties shall have a right of appeal as provided in G.S. 40A-13."

**SECTION 2.** This act becomes effective October 1, 2009, and applies to condemnation proceedings initiated on or after that date.

In the General Assembly read three times and ratified this the 30<sup>th</sup> day of July, 2009.

s/ Walter H. Dalton  
President of the Senate

s/ Joe Hackney  
Speaker of the House of Representatives

s/ Beverly E. Perdue  
Governor

Approved 11:05 a.m. this 7<sup>th</sup> day of August, 2009