S T A T E O F N E W Y O R K

1670

2009-2010 Regular Sessions

I N S E N A T E

February 4, 2009

Introduced by Sens. FLANAGAN, MAZIARZ -- read twice and ordered printed, and when printed to be committed to the Committee on Transportation

AN ACT to amend the transportation law, in relation to enacting the "eminent domain ombudsman act"

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Short title. This act shall be known and may be referred to as the "eminent domain ombudsman act".

S 2. The transportation law is amended by adding a new section 23 to read as follows:

S 23. EMINENT DOMAIN OMBUDSMAN; POWERS; ARBITRATION PROCEDURES. 1. AS USED IN THIS SECTION:

(A) "CONDEMNATION" OR "TAKING" MEANS A GOVERNMENTAL ACTION THAT RESULTS IN A TAKING OF PRIVATE PROPERTY SO THAT COMPENSATION TO THE OWNER OF THE PROPERTY IS REQUIRED BY:

(I) THE FIFTH OR FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES; OR

(II) THE STATE CONSTITUTION UNDER ARTICLE I, SECTION 7 OR ANY OTHER LEGAL PROVISION HAVING TO DO WITH EMINENT DOMAIN.

(B) "TAKINGS LAW" MEANS THE PROVISIONS OF THE FEDERAL AND STATE CONSTITUTIONS, THE CASE LAW INTERPRETING THOSE PROVISIONS, AND ANY RELEVANT STATUTORY PROVISIONS THAT REQUIRE A GOVERNMENTAL UNIT TO COMPENSATE A PRIVATE PROPERTY OWNER FOR A TAKING.

2. (A) THERE IS CREATED AN EMINENT DOMAIN OMBUDSMAN IN THE DEPARTMENT.

(B) THE COMMISSIONER SHALL APPOINT A PERSON WITH BACKGROUND OR EXPERTISE IN TAKINGS LAW TO THE POSITION.

(C) THE POSITION IS AN EXEMPT POSITION.

(D) THE COMMISSIONER MAY EMPLOY CLERKS, INTERNS, OR OTHER PERSONNEL TO ASSIST THE EMINENT DOMAIN OMBUDSMAN.

3. THE EMINENT DOMAIN OMBUDSMAN SHALL:

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD04813-01-9

(A) DEVELOP AND MAINTAIN EXPERTISE IN AND UNDERSTANDING OF TAKINGS LAW;

(B) ASSIST STATE AGENCIES AND LOCAL GOVERNMENTS IN DEVELOPING THE GUIDELINES;

(C) AT THE REQUEST OF A STATE AGENCY OR LOCAL GOVERNMENT, ASSIST THE STATE AGENCY OR LOCAL GOVERNMENT IN ANALYZING ACTIONS WITH POTENTIAL EMINENT DOMAIN IMPLICATIONS;

(D) ADVISE PRIVATE PROPERTY OWNERS WHO HAVE A LEGITIMATE POTENTIAL OR ACTUAL EMINENT DOMAIN CLAIM AGAINST A STATE OR LOCAL GOVERNMENT ENTITY;

(E) IDENTIFY STATE OR LOCAL GOVERNMENT ACTIONS THAT HAVE POTENTIAL EMINENT DOMAIN IMPLICATIONS AND, IF APPROPRIATE, ADVISE THOSE STATE OR LOCAL GOVERNMENT ENTITIES ABOUT THOSE IMPLICATIONS;

(F) PROVIDE INFORMATION TO PRIVATE CITIZENS, CIVIC GROUPS, GOVERNMENT ENTITIES, AND OTHER INTERESTED PARTIES ABOUT TAKINGS LAW AND THEIR RIGHTS AND RESPONSIBILITIES UNDER IT;

(G) IF APPROPRIATE AND REQUESTED TO DO SO BY THE PRIVATE PROPERTY OWNER, MEDIATE OR CONDUCT OR ARRANGE ARBITRATION FOR DISPUTES BETWEEN PRIVATE PROPERTY OWNERS AND GOVERNMENT ENTITIES THAT INVOLVE:

(I) TAKINGS LAW ISSUES;

(II) ACTIONS FOR EMINENT DOMAIN UNDER THE EMINENT DOMAIN PROCEDURE LAW OR ANY OTHER SECTION OF LAW HAVING TO DO WITH EMINENT DOMAIN; OR

(III) DISPUTES ABOUT RELOCATION ASSISTANCE UNDER ARTICLE FIVE OF THE EMINENT DOMAIN PROCEDURE LAW; AND

(H) IF ARBITRATION OR MEDIATION IS REQUESTED BY THE PRIVATE PROPERTY OWNER UNDER THIS SECTION, AND ARRANGED BY THE EMINENT DOMAIN OMBUDSMAN, THE GOVERNMENT ENTITY OR CONDEMNING ENTITY SHALL PARTICIPATE IN THE MEDIATION OR ARBITRATION AS IF THE MATTER WERE ORDERED TO MEDIATION OR ARBITRATION BY A COURT.

4. (A) THE EMINENT DOMAIN OMBUDSMAN MAY ASSIST A PRIVATE PROPERTY OWNER WITH RESPECT TO A DISPUTE INVOLVING THE EFFECT OF LOCAL GOVERNMENT REGULATION ON THE USE AND OCCUPANCY OF REAL PROPERTY;

(B) IN ASSISTING A PRIVATE PROPERTY OWNER WITH A DISPUTE UNDER PARAGRAPH (A) OF SUBDIVISION FIVE OF THIS SECTION, THE EMINENT DOMAIN OMBUDSMAN MAY NOT REQUIRE MEDIATION OR ARBITRATION OF A DISPUTE EXCEPT AS PROVIDED IN PARAGRAPH (G) OF SUBDIVISION THREE OF THIS SECTION.

5. (A) (I) IN CONDUCTING OR ARRANGING FOR ARBITRATION, THE EMINENT DOMAIN OMBUDSMAN SHALL FOLLOW THE PROCEDURES AND REQUIREMENTS OF ARTICLE SEVENTY-FIVE OF THE CIVIL PRACTICE LAW AND RULES.

(II) IN APPLYING ARTICLE SEVENTY-FIVE OF THE CIVIL PRACTICE LAW AND RULES, THE ARBITRATOR AND PARTIES SHALL TREAT THE MATTER AS IF:

(A) IT WERE ORDERED TO ARBITRATION BY A COURT; AND

(B) THE EMINENT DOMAIN OMBUDSMAN OR OTHER ARBITRATOR CHOSEN AS PROVIDED FOR IN THIS SUBDIVISION WAS APPOINTED AS ARBITRATOR BY THE COURT.

(III) FOR THE PURPOSE OF ARBITRATIONS CONDUCTED UNDER THIS SUBDIVISION, IF THE DISPUTE TO BE ARBITRATED IS NOT ALREADY THE SUBJECT OF LEGAL ACTION, THE COURT OF APPROPRIATE JURISDICTION SHALL ACT AS THE COURT.

(IV) THE AWARD FROM AN ARBITRATION CONDUCTED UNDER THIS CHAPTER MAY NOT BE VACATED UNDER THE PROVISIONS OF ARTICLE SEVENTY-FIVE OF THE CIVIL PRACTICE LAW AND RULES BECAUSE OF THE LACK OF AN ARBITRATION AGREEMENT BETWEEN THE PARTIES.

(B) THE EMINENT DOMAIN OMBUDSMAN SHALL ISSUE A WRITTEN STATEMENT DECLINING TO ARBITRATE OR TO APPOINT AN ARBITRATOR WHEN, IN THE OPINION OF THE EMINENT DOMAIN OMBUDSMAN:

(I) THE ISSUES ARE NOT RIPE FOR REVIEW;

(II) ASSUMING THE ALLEGED FACTS ARE TRUE, NO CAUSE OF ACTION EXISTS UNDER UNITED STATES OR STATE LAW;

(III) ALL ISSUES RAISED ARE BEYOND THE SCOPE OF THE EMINENT DOMAIN OMBUDSMAN'S STATUTORY DUTY TO REVIEW; OR

(IV) THE ARBITRATION IS OTHERWISE NOT APPROPRIATE.

(C)(I) THE EMINENT DOMAIN OMBUDSMAN SHALL APPOINT ANOTHER PERSON TO ARBITRATE A DISPUTE WHEN:

(A) EITHER PARTY OBJECTS TO THE EMINENT DOMAIN OMBUDSMAN'S SERVING AS THE ARBITRATOR AND AGREES TO PAY FOR THE SERVICES OF ANOTHER ARBITRATOR;

(B) THE EMINENT DOMAIN OMBUDSMAN DECLINES TO ARBITRATE THE DISPUTE FOR A REASON OTHER THAN THOSE STATED IN PARAGRAPH (B) OF THIS SUBDIVISION AND ONE OR BOTH PARTIES ARE WILLING TO PAY FOR THE SERVICES OF ANOTHER ARBITRATOR; OR

(C) THE EMINENT DOMAIN OMBUDSMAN DETERMINES THAT IT IS APPROPRIATE TO APPOINT ANOTHER PERSON TO ARBITRATE THE DISPUTE WITH NO CHARGE TO THE PARTIES FOR THE SERVICES OF THE APPOINTED ARBITRATOR.

(II) IN APPOINTING ANOTHER PERSON TO ARBITRATE A DISPUTE, THE EMINENT DOMAIN OMBUDSMAN SHALL APPOINT AN ARBITRATOR WHO IS:

(A) AGREEABLE TO BOTH PARTIES; OR

(B) AGREEABLE TO THE PARTY PAYING FOR THE ARBITRATOR AND THE EMINENT DOMAIN OMBUDSMAN.

(III) THE EMINENT DOMAIN OMBUDSMAN MAY, ON THE INITIATIVE OF THE EMINENT DOMAIN OMBUDSMAN OR UPON AGREEMENT OF BOTH PARTIES, APPOINT A PANEL OF ARBITRATORS TO CONDUCT THE ARBITRATION.

(IV) THE DEPARTMENT MAY PROVIDE AN ARBITRATOR PER DIEM AND REIMBURSE EXPENSES INCURRED IN THE PERFORMANCE OF THE ARBITRATOR'S DUTIES AT THE RATES ESTABLISHED THEREFOR.

(D) IN ARBITRATING A DISPUTE, THE ARBITRATOR SHALL APPLY THE RELEVANT STATUTES, CASE LAW, REGULATIONS, AND RULES OF THE STATE AND THE UNITED STATES IN CONDUCTING THE ARBITRATION AND IN DETERMINING THE AWARD, IF ANY.

(E) ARBITRATION BY OR THROUGH THE EMINENT DOMAIN OMBUDSMAN IS NOT NECESSARY BEFORE BRINGING LEGAL ACTION TO ADJUDICATE ANY CLAIM.

(F) THE LACK OF ARBITRATION BY OR THROUGH THE EMINENT DOMAIN OMBUDSMAN DOES NOT CONSTITUTE, AND MAY NOT BE INTERPRETED AS CONSTITUTING, A FAILURE TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES OR AS A BAR TO BRINGING LEGAL ACTION.

6. THE FILING WITH THE EMINENT DOMAIN OMBUDSMAN OF A REQUEST FOR MEDIATION OR ARBITRATION OF A CONSTITUTIONAL TAKING ISSUE DOES NOT STAY ANY MATTER UNDER THE EMINENT DOMAIN PROCEDURE LAW.

7. THE EMINENT DOMAIN OMBUDSMAN MAY NOT BE COMPELLED TO TESTIFY IN A CIVIL ACTION FILED WITH REGARD TO THE SUBJECT MATTER OF ANY REVIEW OR ARBITRATION BY THE OMBUDSMAN.

8. THE EMINENT DOMAIN OMBUDSMAN MAY NOT REPRESENT PRIVATE PROPERTY OWNERS, STATE AGENCIES, OR LOCAL GOVERNMENTS IN JUDICIAL PROCEEDINGS UNDER THE EMINENT DOMAIN PROCEDURE LAW.

S 3. This act shall take effect on the one hundred twentieth day after it shall have become a law.