

## Environmental Law: A Burden Established in Eminent Domain Proceedings

Kansas Power and Light Company (KPL) filed an eminent domain action seeking 800 acres<sup>1</sup> in Pottawatomie County, Kansas, for the purpose of constructing four coal-powered generating units.<sup>2</sup> Plaintiff sought to enjoin the eminent domain action unless and until KPL demonstrated the project would comply with applicable state and federal environmental standards.<sup>3</sup> Plaintiffs contended the four coal-burning generators would produce excess sulfur and nitrogen dioxide making compliance with applicable environmental standards impossible; KPL's noncompliance would be an abuse of its discretion because the land could not be used for a lawful corporate purpose.<sup>4</sup> KPL presented evidence, and the trial court found, that the proposed generators operating at 100 percent capacity under the worst possible weather conditions would violate no existing state or federal air quality standards.<sup>5</sup> The Kansas Supreme Court affirms and defines the burden of proof required to show abuse of discretion by corporate agencies exercising their eminent domain power. *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*, 215 Kan. 218, 523 P. 2d 755 (1974).

Previous Kansas cases have not established the burden of proof necessary to show abuse of discretion by a corporate agency in the exercise of its eminent domain power. These cases merely have placed the burden of producing evidence on the party seeking to enjoin the agency action without establishing the burden of proof required.<sup>6</sup> Whether abuse of discretion has occurred is determined by the presiding judge based upon the weight and suf-

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1. KPL's proposed energy center will ultimately require 12,800 acres of land.

2. Past and projected use of electrical energy lead KPL to the conclusion that electrical energy will be in critically short supply by 1978. After determining the necessity for electrical energy, KPL was faced with the problems of determining the type of fuel to use and plant location. KPL determined that using oil or gas would be unwise from the standpoint of availability and that nuclear power would not be economical considering the peculiar energy load experienced by KPL. KPL then entered a contract for a 40-year supply of the lowest sulfur content coal in the country. The decision was then made to locate the plant (1) where there existed a low population density, (2) near available water, (3) where rail transportation is available and (4) near KPL's load center.

3. Plaintiffs also presented issues which are beyond the scope of this paper. Those issues are (1) whether KPL must obtain changes in zoning prior to condemnation and (2) whether KPL must have definite plans to use the condemned land in the near future. The court held that it is not an absolute condition precedent to condemnation that changes in zoning be obtained prior to condemnation and that future needs may properly be considered when condemning land.

4. If the land cannot be used for a lawful corporate purpose (producing electrical energy) because environmental standards are not complied with, the taking is not necessary to the corporate agency's lawful purpose and abuse of discretion has occurred.

5. State and federal air quality standards are the only areas of environmental law with specific standards. Plaintiffs claimed KPL would violate a regulation against significant deterioration of the atmosphere. The court said that since there was no regulation defining significant deterioration and that they would not predict what future interpretation might be given significant deterioration, plaintiff's argument was not impressive.

6. *Eastborough Corp., Inc. v. City of Eastborough*, 201 Kan. 491, 441 P.2d 891 (1968); *Urban Renewal Agency v. Decker*, 197 Kan. 157, 415 P.2d 373 (1966).

ficiency of the evidence.<sup>7</sup> *Concerned Citizens* retains the burden of proof on plaintiff and defines the extent of the burden when plaintiff alleges environmental standards cannot be complied with. The plaintiff seeking to enjoin condemnation on the grounds the corporate agency has abused its discretion must prove no reasonable probability exists that the proposed use will comply with applicable environmental standards and meet requirements for issuance of necessary permits.<sup>8</sup>

Kansas statutes delegate eminent domain power to public utilities.<sup>9</sup> The public utility decides when a "taking" is necessary<sup>10</sup> for its lawful corporate purposes.<sup>11</sup> It then commences an eminent domain proceeding in the district court. The court determines from the petition (1) whether the agency has the condemning power and (2) whether the taking is necessary for its lawful corporate purposes.<sup>12</sup> Once a favorable determination is made, the public utility may not be questioned further in the condemnation action.<sup>13</sup>

A separate equity proceeding may be brought, however, to enjoin a corporate agency's exercise of its eminent domain power.<sup>14</sup> The equity court will not enjoin the condemnor absent proof of fraud, bad faith<sup>15</sup> or abuse of discretion in the determination that the taking of land is necessary.<sup>16</sup>

7. See *Shelor v. Western Power & Gas Co.*, 202 Kan. 428, 449 P.2d 591 (1969); *State Highway Comm'n v. Ford*, 142 Kan. 383, 46 P.2d 849 (1935).

8. *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*, 215 Kan. 218, 237, 523 P.2d 755, 769 (1974).

9. KAN. STAT. ANN. § 17-618 (1974).

10. *City of Dayton v. Keys*, 21 Ohio Misc. 105, 110, 252 N.E.2d 655, 659 (C.P. Montgomery County 1969). "Necessity in eminent domain cases means that which is reasonably convenient or useful to the public."

11. *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*, 215 Kan. 218, 227-28, 523 P.2d 755, 763 (1974).

12. KAN. STAT. ANN. § 26-502 (1973) provides in part: "A petition shall include allegations of (1) the authority for and the purpose of taking . . . ."

13. *Id.* § 26-504 (1973) provides in part:

If the judge finds from the petition: (1) the plaintiff has the power of eminent domain; and (2) the taking is necessary to the lawful corporate purposes of the plaintiff, he shall enter an order . . . . The granting of an order determining that the plaintiff has the power of eminent domain and that the taking is necessary to the lawful corporate purposes of the plaintiff shall not be considered a final order for the purpose of appeal to the supreme court . . . .

Appeals to the supreme court may be taken from any final order under the provisions of this act.

In *State v. Highway Comm'n v. Bullard*, 208 Kan. 559, 493 P.2d 196 (1972) the Kansas Supreme Court said proceedings in eminent domain are administrative in nature and the code of civil procedure has no application since the legislature fully prescribed the procedure in KAN. STAT. ANN. § 26-501 *et seq.* (1973). "As such, the eminent domain proceeding is not a proper forum for litigating the right to exercise the power of eminent domain, or to determine the extent of that right." *State Highway Comm'n v. Bullard*, *supra* at 560, 493 P.2d at 198.

14. *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*, 215 Kan. 218, 523 P.2d 755 (1974); *State Highway Comm'n v. Bullard*, 208 Kan. 558, 493 P.2d 196 (1972); *State v. Boicourt Hunting Ass'n*, 177 Kan. 637, 282 P.2d 395 (1955).

15. In *Concerned Citizens*, fraud and bad faith were eliminated as issues during pre-trial conference and will not be considered further in this paper.

16. In *Mid-West Photo Play Corp. v. Miller*, 102 Kan. 356, 359, 169 P. 1154, 1155 (1918), the court stated:

There have been repeated holdings that the decisions of a board or other tribunal upon which the legislature has conferred the exercise of nonjudicial power, if made in good faith, are not open to judicial control or review, and that in such case a court may go no further than to prevent the abuse of the

Abuse of discretion occurs when the taking is not necessary for one of the utility's lawful corporate purposes. When reviewing the determination of necessity in order to find abuse of discretion, an equity court may determine the burden of proof required to establish abuse.<sup>17</sup>

*Concerned Citizens* follows existing Kansas law placing the burden of proving abuse of discretion on the plaintiff.<sup>18</sup> The court concludes that enjoining the eminent domain power is unreasonable unless plaintiff proves no reasonable probability exists that the proposed use will comply with applicable environmental standards and meet requirements for issuance of necessary permits. The court relies principally on a Washington<sup>19</sup> and a Massachusetts<sup>20</sup> decision. Recognizing that a project of the type undertaken by KPL must be completed in parts, the court concedes the possibility that the land may not be devoted to the proposed enterprise if KPL fails to complete one of the project's essential parts.<sup>21</sup> The court believes, however, as long as the condemnor (KPL) is proceeding diligently and no factual showing is made that the condemnor cannot reasonably expect to accomplish its ultimate goal, an injunction should not issue merely because the possibility exists the project will not be completed.<sup>22</sup> Were the court to issue an injunction unless and until KPL could obtain necessary permits and show compliance with existing environmental regulations, the project might never be completed because compliance could be shown only when the project is actually completed.<sup>23</sup>

Reflecting a growing concern for the public's environmental interest

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powers so vested.

*Accord*, *Bowers v. City of Kansas City*, 202 Kan. 268, 448 P.2d 6 (1968); *Smouse v. Kansas City S. Ry.*, 129 Kan. 177, 282 P. 183 (1929).

17. Comment, *Abusive Exercises of the Power of Eminent Domain—Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200, 245 (1968). The author recognizes seven alternatives for the scope of judicial review:

(1) no review; (2) review for irrationality (abuse of discretion); (3) review for bad faith or fraud; (4) review for a scintilla of supporting evidence; (5) review for substantial supporting evidence; (6) review for a preponderance of the evidence and (7) trial de novo.

Kansas presently allows judicial review through the third alternative. The scintilla test (4) shifts the burden from the condemnee to condemnor. The condemnor must establish, by a scintilla of the evidence, that discretion has not been abused. The author believes courts should review for substantial supporting evidence—the general scope of review for fact findings by administrative agencies. According to the author, such a standard of review would not take away from the agency its discretionary power, but force the agency to consider all relevant information before making a final decision.

18. *Eastborough Corp., Inc. v. City of Eastborough*, 201 Kan. 491, 441 P.2d 891 (1968); *Urban Renewal Agency v. Decker*, 197 Kan. 157, 415 P.2d 373 (1966).

19. *State ex rel. Harlan v. Centralia-Chehalis Elec. Ry. & Power Co.*, 42 Wash. 532, 85 P. 344 (1906).

20. *Sellors v. Concord*, 329 Mass. 259, 107 N.E.2d 784 (1952).

21. No danger exists that the condemned land will be used other than for the purposes for which it was condemned. KPL only has a permanent easement upon the land for the purpose of constructing its energy center. If the land is not used for that purpose the condemnee may reclaim title to the property. Therefore, if KPL is unable to comply with applicable environmental standards and meet requirements for issuance of necessary permits at some future date, the condemnee, having received payment for the property, is also entitled to reclaim it. *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*, 215 Kan. 218, 243, 523 P.2d 755, 773 (1974).

22. *Id.* at 238-39, 523 P.2d at 770.

23. *See id.* at 238, 523 P.2d at 770.

when the eminent domain power is exercised,<sup>24</sup> some jurisdictions do not place the burden of proof with the party challenging condemnation.<sup>25</sup> Plaintiffs rely on a Florida<sup>26</sup> decision for the proposition that the condemning authority has the burden of demonstrating a reasonable probability of obtaining necessary permits and complying with environmental standards.<sup>27</sup> The Florida court reasons that a public utility should not act precipitously until it determines the public interest in the environment is satisfied.<sup>28</sup> The initial burden of producing evidence is placed with the utility<sup>29</sup> which is more likely to have pertinent information concerning the projects environmental impact than is the condemnee.<sup>30</sup> Once the utility demonstrates a reasonable probability of compliance, the burden shifts to the condemnee to present strong and convincing proof to the contrary.<sup>31</sup> Unless plaintiff overcomes the utility's proof, no injunction issues that might unreasonably restrict the eminent domain power.

The public interest may at times be served best by continuing the present use of land sought to be condemned.<sup>32</sup> The present use is more valuable to the public if the condemned land will never be used for the proposed purpose because of the condemnor's inability to comply with applicable environmental standards. Placing the initial burden of proof in an injunction proceeding with the utility, protects the public's interest; an injunction will issue halting condemnation absent proof of a reasonable probability of compliance with environmental standards.<sup>33</sup> Having the burden of proof, the utility may give more consideration to the project's environmental impact before condemning land.<sup>34</sup> By placing the burden of proof with the condemnee, *Concerned Citizens* gives the public interest less protection;<sup>35</sup> if the con-

24. Levine, *Extent of Judicial Inquiry into Power of Eminent Domain*, 28 S. CAL. L. REV. 369 (1955); Rheingold, *A Primer On Environmental Litigation*, 38 BROOKLYN L. REV. 113 (1971); Note, *Balancing Public Purposes: A Neglected Problem in Condemnation*, 35 ALBANY L. REV. 769 (1971); Comment, *Abusive Exercises of the Power of Eminent Domain—Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200 (1968).

25. *Department of Public Works v. Engel*, 318 Ill. 577, 146 N.E. 521 (1925); *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N.W. 395 (1907); *New Lisbon v. Harebo*, 224 Wis. 66, 271 N.W. 659 (1937).

26. *Seadade Indus., Inc. v. Florida Power & Light Co.*, 245 So. 2d 209 (Fla. 1971).

27. *Id.* at 213-14.

28. *Id.*

29. *Id.* at 214-15.

30. Note, *Eminent Domain and the Environment*, 56 CORNELL L. REV. 651, 663 (1971). This note calls for protection of the environment by switching to the condemnor the burden of proving lack of environmental harm. "The courts as well as the commentators have often recognized that one of the important bases for shifting the burden of proof is public policy . . ."

31. *Seadade Indus., Inc. v. Florida Power & Light Co.*, 245 So. 2d 209, 214 (Fla. 1971).

32. Comment, *Abusive Exercises of the Power of Eminent Domain—Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200, 238 (1968).

33. KAN. STAT. ANN. § 60-401(d), (e) (Supp. 1974).

34. See note 30 *supra*.

35. Although an argument exists that the public interest is best served by a rapid completion of the project (Willrich, *The Energy-Environmental Conflict: Siting Electric Power Facilities*, 4 ENVIRONMENTAL L. REV. 161, 174 (1973)), delay itself is costly, both to the public and the environment. Older, less efficient generating plants continue serving the public though possibly causing more environmental harm than a proposed new plant. Also, as the electrical energy need increases older plants become over-taxed, causing a greater likelihood of brownouts.

demnee fails to meet its burden, the utility may receive a directed verdict<sup>36</sup> without having to prove a reasonable probability of compliance with environmental standards.<sup>37</sup>

The public interest can be protected legislatively, as is done by the National Environmental Policy Act (NEPA),<sup>38</sup> without shifting the burden of proof to the condemnor. NEPA requires federal agencies to make threshold determinations concerning the environmental impact of proposed projects and determine whether an environmental impact statement will be necessary. A Second Circuit decision interpreting this Act requires federal agencies dealing with projects having probable environmental effect to have reviewable records showing grounds for the agency's decision.<sup>39</sup> The Second Circuit requires specific procedures be followed in making a threshold determination, thus limiting the agency's discretion. If plaintiff proves required procedures were not followed, an abuse of discretion results.<sup>40</sup> As interpreted, the statute protects the public interest by requiring the agency to follow specific procedures in considering the project's environmental effect without unreasonably restricting the eminent domain power; the determination whether required procedures were followed is reviewable only for abuse of discretion.<sup>41</sup>

After *Concerned Citizens*, a utility exercising its eminent domain power in Kansas does not abuse its discretion in condemning land unless the condemnee proves no reasonable probability exists that the utility can comply with environmental standards and obtain necessary permits. Placing such a burden on the condemnee when environmental interests are at issue is inconsistent with the growing concern about the environment and the public interest.<sup>42</sup> The legislature's requiring agency consideration of environmental

36. *Concerned Citizens* presented their evidence and KPL moved for an involuntary dismissal pursuant to KAN. STAT. ANN. § 60-241(b) (Supp. 1974). The trial court denied the motion declining to render judgment until all evidence had been presented. The Kansas Supreme Court said that assuming *Concerned Citizens* had established a prima facie case, KPL presented sufficient evidence to rebut plaintiffs' contentions by showing the proposed energy center had a reasonable probability of complying with environmental standards. *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*, 215 Kan. 218, 230, 239, 523 P.2d 755, 765, 771 (1974).

37. See note 33 *supra*.

38. 42 U.S.C. § 4321-47 (1970).

39. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

40. Comment, *The Mini-Impact Statement Requirement*, 13 WASHBURN L.J. 140-41 (1974).

Determining whether a proposed project significantly affects the environment and consequently requires an EIS generally is held a matter of agency discretion. *Hanly* limits that discretion by setting out objective standards to use in deciding the project's significance, by interpreting NEPA as mandating procedural requirements for the threshold determination process and by requiring a reviewable record reflecting the basis of the agency's decision. *Hanly* is the first case to interpret NEPA as directing specific agency procedures in making a threshold determination.

It should be noted that the agency by statute is required to make a threshold determination; Kansas has no similar statute.

41. *Id.* at 142 n.12.

42. See note 24 *supra*.

problems prior to commencing condemnation may prove the best answer.<sup>43</sup> With statutes requiring that specific procedures be followed when environmental interests are concerned, a court may merely review the procedure and determine whether an abuse of discretion has occurred.<sup>44</sup>

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43. Comment, *Abusive Exercise of the Power of Eminent Domain—Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200 (1968).

44. See note 39 *supra*.

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