

GUIDE TO EMINENT DOMAIN PROCESS AND LITIGATION CONCERNS

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I. CONSTITUTIONAL PROVISIONS.

A. Fifth Amendment – U.S. Constitution.

“...nor shall private property be taken for public use, without just compensation.”

Made applicable to States by the Fourteenth Amendment. *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 17 S. Ct. 581 (1897)

B. Article 1, Section 13, Wisconsin Constitution.

“The property of no person shall be taken for public use without just compensation therefor.”

C. Fundamental sovereign power.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain, -- a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the

lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.

Kohl v. United States, 91 U.S. 367, 371-72 (1875).

II. WHO MAY EXERCISE POWER OF EMINENT DOMAIN AND WHEN?

- A. Wis. Stats. §32.02: Includes towns, cities and villages, but also a wide variety of other entities. Cities, under Wis. Stats. §62.22(1)(a) can exercise eminent domain outside of boundaries:

Except as provided in par. (b), the governing body of any city may by gift, purchase or condemnation acquire property, real or personal, within or outside the city, for parks, recreation, water systems, sewage or waste disposal, airports or approaches thereto, cemeteries, vehicle parking areas, and for any other public purpose; may acquire real property within or contiguous to the city, by means other than condemnation, for industrial sites; may improve and beautify the same; may construct, own, lease and maintain buildings on such property for public purposes; and may sell and convey such property. The power of condemnation for any such purpose shall be as provided by ch. 32.

- B. Wis. Stats. §32.015: “Property may not be acquired by condemnation to establish or extend a recreational trail; a bicycle way, as defined in s. 340.01 (5s); a bicycle lane, as defined in s. 340.01 (5e); or a pedestrian way, as defined in s. 346.02 (8) (a).”

(1) No definition for “recreational trail.”

(2)) “Bicycle lane” means that portion of a roadway set aside by the governing body of any city, town, village, or county for the exclusive use of bicycles, electric scooters, electric personal assistive mobility devices, or other modes of travel where permitted under s. 349.23 (2) (a), and so designated by appropriate signs and pavement markings.

(3)) “Bicycle way” means any path or sidewalk or portion thereof designated for the use of bicycles, electric scooters, and electric personal assistive mobility devices by the governing body of any city, town, village, or county.

(4) A pedestrian way means a walk designated for the use of pedestrian travel.

(5) Wis. Stats. §340.01(58) “Sidewalk” means that portion of a highway between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, constructed for use of pedestrians.

(6) Wis. Stats. §346.804 Riding bicycle on sidewalk. When local authorities under s. 346.94 (1) permit bicycles on the sidewalk, every person operating

a bicycle upon a sidewalk shall yield the right-of-way to any pedestrian and shall exercise due care and give an audible signal when passing a bicycle, electric scooter, or electric personal assistive mobility device rider or a pedestrian proceeding in the same direction.

- C. Wis. Stats. §32.03. Generally can't condemn property of the state, another municipality, public board or commission. Other limitations relating to utilities and condemnation for purpose of private development.

III. PUBLIC PURPOSE.

A. “Public Use” = “Public Purpose”

A taking satisfies the Public Use Clause if it is "rationally related to a conceivable public purpose."

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984);

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606-607, 52 L. Ed. 637, 28 S. Ct. 331 (1908) (noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people"). For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

Kelo v. City of New London, 545 U.S. 469, 482-83, 125 S. Ct. 2655, 2664 (2005)

B. States may further limit powers and purposes for which eminent domain may be exercised.

See e.g. Wis. Stats. §32.03.

C. Determination of necessity.

Determination of necessity generally left to the discretion of the condemning authority.

“[T]he necessity of a condemnation will be upheld absent a showing of fraud, bad faith, or a gross abuse of discretion.

Kauer v. Wis. DOT, 2010 WI App 139, ¶3, 329 Wis. 2d 713, 716, 793 N.W.2d 99, 101.

The determination of necessity is inherently a matter for the legislature.

Watson v. Three Lakes, 95 Wis. 2d 349, 355, 290 N.W.2d 520, 523 (Ct. App. 1980).

D. Wisconsin response to *Kelo*: - Wis. Stats. §32.03(6).

(1) To convey to private party, property itself must be “blighted.”

“(bm) ...property that is not blighted property may not be acquired by condemnation by an entity authorized to condemn property under s. 32.02 (1) or (11) if the condemnor intends to convey or lease the acquired property to a private entity.”

“(a) In this subsection, “blighted property” means any property that, by reason of abandonment, dilapidation, deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, or sanitation, high density of population and overcrowding, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, or the existence of conditions that endanger life or property by fire or other causes, or any combination of such factors, is detrimental to the public health, safety, or welfare. Property that consists of only one dwelling unit is not blighted property unless, in addition, at least one of the following applies:

1. The property is not occupied by the owner of the property, his or her spouse, or an individual related to the owner by blood, marriage, or adoption within the 4th degree of kinship under s. 990.001 (16).
2. The crime rate in, on, or adjacent to the property is at least 3 times the crime rate in the remainder of the municipality in which the property is located.

(2) Standard applicable to blight determination is unclear. Historically, blight determinations under Wis. Stats. §66.1333 have been reviewed by courts with a very high level of deference, see e.g. *Grunwald v. Cmty. Dev. Auth.*, 202 Wis. 2d 471, 486, 551 N.W.2d 36 (Ct. App. 1996). Blighted area determinations relating to establishment of tax increment districts under Wis. Stats. §66.1105(4)(gm)(4)(a) have been found to be, effectively, unreviewable. See *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶39, 382 Wis. 2d 1, 32, 913 N.W.2d 131. However, it is also well established that “[e]minent domain statutes are in derogation of the common law rules and must be strictly construed.” *Maxey v. Redevelopment Auth. of Racine*, 94 Wis. 2d 375, 399, 288 N.W.2d 794, 805 (1980).

IV. WISCONSIN CONDEMNATION PROCEDURES.

- A. Wis. Stats. §32.05. – “Quick take” procedure for “sewer and transportation facilities.” Includes: “public alleys, streets, highways, airports, spaceports, mass transit facilities, or other transportation facilities, gas or leachate extraction systems to remedy environmental pollution from a solid waste disposal facility,

storm sewers and sanitary sewers, watercourses or water transmission and distribution facilities.”

B. Wis. Stats. §32.06 – All other condemnations not specified in Wis. Stats. §32.05.

C. Similar procedures. Major difference is method and timing of acquisition. If jurisdictional offer not accepted:

(1) Wis. Stats. §32.05(7) provides for taking of title by unilateral action of award of compensation.

(2) Wis. Stats. §32.06 requires filing Petition for Condemnation Proceedings, compensation to be determined by condemnation commissioners and circuit court judgment. Lis Pendens required – establishes “date of evaluation” for purposes of just compensation.

D. Relocation Order / Determination of Necessity.

Under 32.05(1) eminent domain begins with “relocation order” (although need not necessarily be the actual first step undertaken. *Danielson v. City of Sun Prairie*, 2000 WI App 227, 16, 239 Wis. 2d 178, 619 N.W.2d 108. Must include a map or plat showing old and new locations and the land interests required. Relocation order must be filed with county clerk within 20 days after it is issued. Relocation order can be part of adoption of a transportation project plat under Wis. Stats. §84.095.

Under 32.06(1) the determination of necessity follows Wis. Stats. §32.07. For local governments, typically no significant formal requirements other than to identify property, public purpose and finding that acquisition is necessary to serve that public purpose. Typically done by resolution.

E. Appraisal.

(1) Must provide a “full narrative appraisal” and appraiser shall confer with the property owner if reasonably possible. Wis. Stats. §§32.05(2)(a) and 32.06(2)(a).

(2) Owner must receive a copy of the appraisal and be informed of right to obtain an appraisal at the condemnor’s expense. Wis. Stats. §§32.05(2)(b) and 32.06(2)(b).

(3) If owner gives owner’s appraisal to condemnor within 60 days, condemnor must pay reasonable cost therefor. Wis. Stats. §§32.05(2)(b) and 32.06(2)(b).

F. Negotiation.

- (1) After appraisal, condemnor is required to attempt “good faith” negotiation for voluntary sale of property. Before negotiation, must also provide copy of pamphlets prepared according to Wis. Stats. §32.26(6). Wis. Stats. §§32.05(2a) and 32.06(2a).
- (2) The requirement to negotiate is “fundamental” to acquiring the power to exercise eminent domain. *Warehouse II, LLC v. State DOT*, 2006 WI 62, ¶34, 291 Wis. 2d 80, 104, 715 N.W.2d 213.
- (3) If purchase is negotiated, conveyance must be recorded with the register of deeds. Notice of conveyance and right to appeal must be given to all persons of interest of record. Wis. Stats. §§32.05(2a) and 32.06(2a).
- (4) Any person of interest may appeal the amount of compensation within 6 months of recording. Wis. Stats. §§32.05(2a) and 32.06(2a).

G. Jurisdictional Offer.

- (1) If property cannot be acquired by negotiation, condemnor must deliver by personal service or certified mail a jurisdictional offer to the owner of the property and any mortgagee. Wis. Stats. §32.05(4) and 32.06(3).
- (2) Formal requirements under Wis. Stats. §32.05(3).
- (3) The jurisdictional offer need not be in the same amount as the condemnor’s appraisal, but it must be “based” on the appraisal: “a mere difference in dollar amounts between the initial appraisal and jurisdictional offer does not mean the jurisdictional offer was not “based” “upon” the appraisal, as required by Wis. Stat. § 32.05(2)(b) and (3)(e).” “Based on” means “a supporting part or fundamental ingredient”

Christus Lutheran Church of Appleton v. Wis. DOT, 2021 WI 30, ¶¶30,31, 396 Wis. 2d 302, 319, 956 N.W.2d 837, 845

- (1) Owner has 20 days to accept.
- (2) Can withdraw if not accepted under Wis. Stats. §32.05(6), but not under Wis. Stats. §32.06.

- (3) Service of jurisdiction offer triggers 40 day statute of limitations on bringing a right to take action under Wis. Stats. §§32.05(5) and 32.06(5).
- (4) If the jurisdictional offer is accepted, payment and transfer of title must occur within 60 days of acceptance. Wis. Stats. §§32.05(6) and 32.06(6).

H. Award of Compensation

In §32.05 takings, if the jurisdictional offer is not timely accepted, the condemnor makes an award of compensation which may not be less than the jurisdictional offer. Award must be in writing, name all persons with an interest of record and meet formal requirements in Wis. Stats. §32.05(7)(a). The award is recorded with the register of deeds after payment has been made and must be served on or mailed by certified mail to all persons named in the award. A check in the amount of the award, less tax liens and prorated taxes of that year, if any shall be either: (a) mailed to the owner(s) of record or be deposited with the clerk of circuit court.

Date of recording the award is the date of taking in a Wis. Stats. §32.05 taking.

Under the “unit rule” condemnor makes a single payment no matter the number of parties with interest in the property. It is up to the interested parties (by agreement or litigation) to determine how the award is distributed. See Wis. Stats. §32.05(9)(a)1.

I. Right to Take Actions.

Wis. Stats. §32.05(5) or 32.06(5) is the only method to challenge the taking on grounds other than the amount of compensation or questions of title. Procedural challenges, determinations of necessity, lack of public purpose are among the grounds supporting a right to take action.

A right to take action does not prevent the condemnor from proceeding to take the property.

J. Condemnation Commission – Appeal of Award.

- (1) In takings under Wis. Stats. §32.05, if the jurisdictional offer is not accepted, any party with an interest in the award can appeal the award within 2 years after the date of taking. Appeal is by application to circuit court for assignment to the county condemnation commission. Owners may bypass the condemnation commission and file a direct appeal to circuit court. Wis. Stats. §32.05(11).
- (2) In takings under Wis. Stats. §32.06, there is no award of compensation. If the jurisdictional offer is not accepted, the condemnor must file a petition for condemnation and for a determination of just compensation by the condemnation commissioners.
- (3) Under both takings procedures, either party may appeal the award of the condemnation commissioners within 60 days of the commission’s award.

- (4) In 32.06 cases, the condemnor can petition the court to abandon the taking within 30 days of the award. If the condemnor does not abandon the taking, title vests in the condemnor after the award is paid and receipt filed. Like 32.05 award of compensation, payment can be made to owner or filed with clerk. Wis. Stats. §32.06(9(a) and (b).
- (5) The amount of any award or prior jurisdictional offer cannot be disclosed to the commission. Wis. Stats. §32.08(6)(b).

V. APPEAL TO CIRCUIT COURT

- A. Whether the appeal is a bypass from the award of compensation or the award of the condemnation commissioners, just compensation is to be determined by a jury unless both parties agree it should be determined by the court. Commenced by notice of appeal, not summons and complaint. Wis. Stats. §§32.05(10), (11) and 32.06(10).
- B. Like condemnation commission hearings, neither the jurisdictional offer, the award of compensation nor award of the commission may be disclosed.
- C. Burden of proof is on the appellant. *Loeb v. Board of Regents*, 29 Wis. 2d 159, 164, 138 N.W. 2d 227 (1995).
- D. If the jury verdict is less than the award of compensation, the condemnor is entitled to a judgment against the owner in the amount of the difference plus interest at the legal rate. Wis. Stats. §32.05(11)(a) and 32.06(10)(b).
- E. If the jury verdict exceeds both the award of compensation and the commission's award, the owner is entitled to judgment for the difference plus interest at the legal rate. Wis. Stats. §§32.05(10)(b) and (11)(b) and 32.06(10)(a).
- F. The term legal interest refers to § 138.04, STATS., which indicates the legal rate of interest is five percent. *Calaway v. Brown Cty.*, 202 Wis. 2d 736, 756, 553 N.W.2d 809, 817 (Ct. App. 1996).
- G. If the jury verdict exceeds the jurisdictional offer, the condemnor may petition the court to abandon the proceedings. Wis. Stats. §§32.06(9), (10)(c), and 32.28(3)(a).
- H. All monies payable must be paid within 60 days after entry of judgment. Wis. Stats. §§32.05(10)(c), (11)(c), and 32.06(10)(d).
- I. Litigation Expenses.

(1) Owner may recover all litigation expenses under Wis. Stats. §32.28 if:

- a. The proceeding is abandoned by the condemnor;
 - b. The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking;
 - c. The judgment is for the plaintiff in an action under s. 32.10; (inverse condemnation).
 - d. The award of the condemnation commission under s. 32.05 (9) or 32.06 (8) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least the amount specified in sub. (4) and at least 15 percent and neither party appeals the award to the circuit court;
 - e. The jury verdict as approved by the court under s. 32.05 (11) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least the amount specified in sub. (4) and at least 15 percent;
 - f. The condemnee appeals an award of the condemnation commission which exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least the amount specified in sub. (4) and at least 15 percent, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the award of the condemnation commission by at least the amount specified in sub. (4) and at least 15 percent;
 - g. The condemnor appeals the award of the condemnation commission, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least the amount specified in sub. (4) and at least 15 percent;
 - h. The condemnee appeals an award of the condemnation commission which does not exceed the jurisdictional offer or the highest written offer prior to the jurisdictional offer by 15 percent, if the jury verdict as approved by the court under s. 32.05 (10) or 32.06 (10) exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least the amount specified in sub. (4) and at least 15 percent; or
 - i. The condemnee appeals an assessment of damages and benefits under s. 32.61 (3), if the judgment is at least the amount specified in sub. (4) and at least 15 percent greater than the award made by the city. (Procedure in 1st class cities).
- (2) Litigation expenses means “the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under” Wis. Stats. Chap. 32.
- (3) Litigation expenses may only be awarded for expenses incurred after the jurisdictional offer. *DSG Evergreen FLP v. Town of Perry*, 2007 WI App 115, ¶17, 300 Wis. 2d 590, 731 N.W.2d 667.

- (4) Litigation expenses include expenses incurred in appeals from circuit court. *Joyce v. Sch. Dist. Of Hudson*, 169 Wis. 2d 611, 618, 487 N.W. 2d 41 (Ct. App. 1992).

VI. DETERMINING JUST COMPENSATION

A. Date of value. Date of valuation, date of taking or date of evaluation is important to valuation. See Wis. Stats. §§32.05(7)(c), (2a), and 32.06(7). Establishes all physical and market conditions necessary to determine just compensation.

B. Fair Market-Value.

(1) "[T]he amount for which the property could be sold in the market on a sale by an owner willing, but not compelled, to sell, and to a purchaser willing and able, but not obliged, to buy." *Spiegelberg v. State*, 2006 WI 75, ¶21, 291 Wis. 2d 601, 615-16, 717 N.W.2d 641, 648.

(2) Market value is the measure of what the owner has lost, not what the condemnor has gained. *Besnah v. City of Fond du Lac.*, 35 Wis. 2d 755, 758 151 N.W.2d 725, 727 (1967).

(3) Any factor affecting the value of property that is likely to influence the decision of a prospective buyer should be considered. *Hoekstra v. Guardian Pipeline, LLC.*, 2006 WI App. 245, ¶15, 298 Wis. 2d. 165, 726 N.W. 2d 648.

C. Highest and Best Use.

(1) Wis. Stats. §32.09(2): Just compensation shall be determine don the basis of the property's most advantageous use as such use affects present market value.

(2) Property, for purposes of just compensation, must be valued according to its highest and best use which means a use that is (1) the most advantageous use of a condemned parcel; (2) reasonably probable; and (3) not imaginary or speculative. It may include a prospective use to which the property has not yet been put. *Clarmar Realty Co. V. Redevelopment Authority of City of Milwaukee*, 129 Wis. 2d 81, 90, 383 N.W.2d 890, 894.

D. Partial takings.

(1) Under Wis. Stat. § 32.09(6) "In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date

of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement.”

(2) Elements of loss or damage include:

- a. Loss of land or fixtures actually taken.
- b. Deprivation of right to access highway.
- c. Loss of air rights.
- d. Loss of a legal nonconforming use.
- e. Damage to property from highway change of grade.
- f. Fencing necessary to separate condemned land.
- g. Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land. In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.

E. Loss of access.

- (1) "Where access to a highway is controlled under the exercise of the police power and reasonable access remains, no compensation is required." *Schneider v. State*, 51 Wis. 2d 458, 462, 187 N.W.2d 172 (1971); *Nat'l Auto Truckstops, Inc. v. DOT*, 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198
- (2) There must be an actual physical taking to trigger the obligation to pay just compensation, thus, the physical taking must be the cause of the loss of access. Where an easement is condemned, but the loss of access is caused by the relocation of a roadway, compensation for the loss of access is not required. *118th St. Kenosha, LLC v. Wis. DOT*, 2014 WI 125, ¶36, 359 Wis. 2d 30, 49, 856 N.W.2d 486, 495.

F. Special Benefits.

- (1) Under Wis. Stats. §32.09(3), special benefits accruing to the remaining property as a result of the project must be considered in determining just compensation.
- (2) A benefit is “special” if the landowner “has gained a benefit not shared by any other parcel.” Special benefits, as opposed to general benefits, “differ in kind

rather than in degree from those which accrue to the public generally.” *Red Top Farms. Dep’t of Transportation*, 177 Wis. 2d 822, 828, 832-33, 503 N.W. 2d 354, 357, 359 (Ct. App. 1993).

- (3) No special benefit exists as a matter of law when a benefit is not unique to the condemnee’s property. *Washburn v. Milwaukee & L.W.R. Co.*, 59 Wis. 364, 376-77, 18 N.W. 328, 334 (1884).
- (4) “Although the meaning of the term "special benefits" itself remains the same in both statutes, how it is used and applied in the eminent domain and special assessment contexts is textually different.” *CED Props., LLC v. City of Oshkosh*, 2018 WI 24, ¶27, 380 Wis. 2d 399, 421, 909 N.W.2d 136, 147. Eminent domain requires special benefit to have effect on value. No impact on value is required for special assessments. *Id.* at ¶¶29-30.

G. Methods of Valuation.

- (1) Comparable sales. If available, this is the method that is to be used to determine fair market value. *Rademann v. DOT*, 2002 WI App. 59, 252 Wis. 2d 191, 642 N.W. 2d 600.
- (2) Income approach. Historically income approach disfavored. *Mancheski v. State*, 49 Wis. 2d 46, 181 N.W.2d 420 (1970). Now, see Wis. Stats. §32.09(1m)(b) “As a basis for determining value, a commission in condemnation or a court shall consider, if provided by the condemnor or condemnee, an appraisal based on the income approach and an appraisal based on the cost approach.” 2017 Act 243.
- (3) Cost approach. May be used for special purpose properties where sales evidence does not exist or property cannot be sold for the value to the owner. *Milwaukee Rescue Mission v. Redevelopment Auth.*, 161 Wis. 2d 472, 482, 468 N.W.2d 663, 667 (1991). See also Wis. Stats. §32.09(1m)(b).

H. Project Influence

Under Wis. Stats. §32.09(5)(b): Any increase or decrease in the fair market value of real property prior to the date of evaluation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, may not be taken into account in determining the just compensation for the property. See also *Spanbauer v. State DOT*, 2009 WI App 83, ¶24, 320 Wis. 2d 242, 255, 769 N.W.2d 137.

VII. RELOCATION BENEFITS.

- A. Required under Wis. Stats. §32.19. Additional expenses allowed under Wis. Stats. §32.195. Further detail and requirements found in Wis. Admin. Code Chap. Admin. 92. Not constitutionally required and not part of just compensation.
- B. Anytime a project will or likely will result in displacement of an owner or occupant of property, it is a good idea to get a relocation specialist involved.
- C. Wis. Stats. §32.05(8)(b) – Ninety day notice of vacation.
- D. Wis. Stats. §32.25: “[N]o condemnor may proceed with any activity that may involve the displacement of persons, business concerns or farm operations until the condemnor has filed in writing a relocation payment plan and relocation assistance service plan and has had both plans approved in writing by the department of administration.” (Does not apply to obtaining appraisals or options to purchase where no federal financial assistance).
- E. Wis. Stats. §32.19(2m). “Information on payments. **Before initiating negotiations** to acquire the property under s. 32.05 (2a), 32.06 (2a) or subch. II, the condemnor shall provide displaced persons with copies of applicable pamphlets prepared under s. 32.26 (6).” (Emphasis supplied).
- F. Displaced person, business, or farm operation. A condemnee is “displaced” for purposes of entitlement to relocation benefits if they move from real property or move their personal property from real property either as a direct result of a written notice of the acquisition or the intent to acquire the real property, or if the condemnee is a tenant-occupant of a dwelling as a result of the rehabilitation, demolition or other displacing activity and if their displacement is permanent. Wis. Stats. §32.19(2)(e)1.
- G. There are three conditions precedent to the issuance of a writ of assistance: (1) compliance with all jurisdictional requirements; (2) payment or tender of the award; and (3) making available comparable replacement property to the occupants." *Dotty Dumpling's Dowry v. Cmty. Dev. Auth.*, 2002 WI App 200, ¶13, 257 Wis. 2d 377, 389, 651 N.W.2d 1, 6.
- H. “There are three categories of property occupiers for whom the condemnor may be obligated to make available a "comparable replacement property" to a "displaced person" when a writ of assistance is sought following the exercise of the power of eminent domain: (1) an occupier whose dwelling must be vacated, Wis. Stat. § 32.19(2)(b); (2) an occupier whose business operation must be vacated, § 32.19(2)(c); and (3) an occupier whose farming operation must be vacated, §

- 32.19(2)(d). *City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶25, 302 Wis. 2d 599, 620-21, 734 N.W.2d 428, 439-40.
- I. Statute “does not require identification of a property that is identical to the property condemned or that, at the moment of identification, the property, without modification, can be used by the business that was relocated. *City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶40, 302 Wis. 2d 599, 629, 734 N.W.2d 428, 444. Contrast with comparable dwelling where statutory limits may be exceeded. *Id.* at ¶36.
 - J. But, see Wis. Stats. §32.19(4m) relating to owner-occupied business or farm operations added by 2017 Act 243.
 - K. Disputes about relocation benefits must be brought in separate actions under Wis. Stat. § 32.20. *Waller v. Am. Transmission Co.*, LLC, 2013 WI 77, ¶112, 350 Wis. 2d 242, 288, 833 N.W.2d 764, 787.