

CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

MEMORANDUM

TO: Common Council

FROM: Doran Viste, Assistant City Attorney

DATE: October 7, 2015

RE: Downtown Park—Possible Condemnation Process

File No. 40068 is currently under consideration by the Common Council. This resolution, if adopted by the Council, would authorize the condemnation of six properties at the West Mifflin St. and North Basset St. intersection for the purposes of building a new downtown City park. This memo describes the basic process that will unfold should the Council adopt this resolution.¹

The Determination of Necessity

To condemn property for a park, the City must follow the requirements of Wis. Stat. Sec. 32.06 (attached). This type of condemnation is referred to as a “slow-take” condemnation. The first step in a slow-take condemnation is that the City needs to make a “determination of necessity.” Here, File No. 40068 is the determination of necessity for the downtown park taking. The resolution describes the properties to be acquired, and specifies the reason behind the acquisition. Once the resolution is adopted, the City can proceed with the condemnation process.

Initial Contact and Appraisals

Following adoption of the resolution, staff from the City's Office of Real Estate Services (ORES) will send an introductory letter to the property owners explaining the Council's action and the condemnation process that will be occurring. Included with this letter will be the state mandated condemnation pamphlets that explain the condemnation process and the property owner's rights in such a matter. ORES will then have at least one appraisal made of each of the six parcels proposed to be acquired. The City's appraiser is required to confer with the property owners, if reasonably possible.

Once an appraisal is prepared for a property, ORES staff will provide the property owner with a copy of the appraisal, and inform them that they have the opportunity to obtain an appraisal on their own. The City will be required to reimburse the owner for

¹ Disclaimer: This memo is meant to provide the Madison Common Council with a general summary of the condemnation process that will occur should it adopt File No. 40068. As such, many specific details of the condemnation process are not included herein. Moreover, unforeseen events may occur that could alter how things develop. This document is not intended to be used by any party as a substitute to legal counsel, and is meant only for the education of the Common Council.

the reasonable costs of any such appraisal if the appraisal is submitted to the City within 60 days of the owner receiving the City's appraisal.

Negotiations

Once the introductory letter is sent out, ORES may commence negotiations with the property owner. These initial discussions usually occur while the appraisals are being prepared, although the City will wait to make a formal offer until it has its appraisal completed. It is possible that the acquisition will be agreed to at this stage, in which case the City and the property owner will proceed to closing and the City will obtain title to the property. A property owner, or a person having a legal interest in the property, has six-months from the recording of the deed to appeal the amount of compensation paid in a negotiated acquisition, which appeal would be heard by the County's condemnation commission. If the City and the property owner are not able to reach an agreement, the City may proceed to the next step.

Issuance of a Jurisdictional Offer

If negotiations are unsuccessful, ORES will issue a jurisdictional offer. A jurisdictional offer must contain specific information about the condemnation process, the property owner's rights, and the intent of the City. The jurisdictional offer also formally makes an offer to acquire the property on behalf of the City. If the jurisdictional offer is accepted, the matter proceeds to closing. If the jurisdictional offer is either rejected or not accepted within twenty days, the City may petition the circuit court to have the Dane County Condemnation Commission determine the value of the property to be acquired. A lis pendens must be filed with the City at the same time as the petition.

Condemnation Commission Hearing

The County Condemnation Commission will hear the case regarding the valuation of the property no earlier than twenty days from the filing of the petition. At this hearing, the City and the property owner will each have the opportunity to present evidence to the Commission regarding the valuation of the property to be taken. Upon hearing all evidence, the Commission will make and file its award with the clerk of the circuit court, specifying the compensation due the owner.

Payment of Award or Abandonment of the Proceedings

Once the Commission files its award with the circuit court, the City has a choice to make: either pay the award or abandon the proceedings. To abandon the proceedings, the City must file a petition with the court within thirty (30) days. Otherwise, the City has seventy (70) days from the filing of the award to pay the amount of the award to the owner or the clerk of court, for the benefit of all persons having a legal interest in the property. Upon payment of the award to either the owner or the clerk of court, title to the property will vest in the City.

Appeal to Circuit Court

Within sixty (60) days of the filing of the Commission's award, the City or the property owner may appeal the Commission's determination to the Circuit Court. It will then be up to a jury to decide what the just compensation to be paid by the City should be. If the jury verdict exceeds the Commission's award, the City will have to pay the additional amount within sixty (60) days of the entry of the judgment. If the verdict exceeds the jurisdictional offer, the City may petition the court for leave to abandon the proceedings within forty (40) days of the entry of the judgment, at which point title will revert to the owner. Alternatively, if the jury's verdict is less than the Commission's award, the City will obtain a judgment in its favor from the owner, who has sixty (60) days to pay the excess amount back to the City.

Relocation Benefits

It should be noted that State law does provide certain protections to persons residing in buildings condemned for public projects. Because the City will be condemning active apartment buildings should the resolution be adopted, the City will need to be certain that the laws regarding relocation benefits are followed and considered. The Council should be aware that it may be the case that it is far cheaper for the City to take on active management of the properties and allow tenants to reside in the properties through the end of their leases than it would be to evict tenants prior to the end of the leases.

Abandonment

As noted above, the City has two points where it may abandon the proceedings: following the filing of the Commission's award, or following the jury verdict if the verdict is greater than the jurisdictional offer. However, if the City abandons the proceedings at either of these points, the City will be liable for the property owner's reasonable litigation expenses to that point (we would also be liable for these expenses if the Commission's award or the jury verdict is more than 15% greater than the jurisdictional offer or the highest written offer). Those additional costs, which can be very substantial in a condemnation case, would have to be considered if the City decides that it no longer wants to proceed with the condemnation at that time.

Timing

Finally, attached to this memo is a general timeline for this slow-take process, should the council adopt this resolution. As noted therein, it may be closer to two years before the City has title to the properties needed to commence with the actual development of the downtown park.

/s/ Doran Viste

Doran Viste

Encl.

32.06 General Condemnation Timeline (“Slow Take” Proceeding)

1. Common Council adoption of determination of necessity of taking	Start
2. Order Appraisals	30-45 days
3. Appraisal Review	10 days
4. Owners appraisals (statutory 60 days)	60 days
5. Review owners appraisals	10 days
6. Negotiation period	10 days
7. Jurisdictional Offer (statutory minimum 20 day period)	40 days
8. City Petition in Circuit Court for Condemnation Proceedings	5 days
9. Order assigning matter to county condemnation commission	30 days
10. Assignment of commissioners for hearing	7 days
11. County condemnation commission hearing on just compensation	30-120 days
12. Award of just compensation made by commission	10 days
13. Filing of commission’s award with clerk of courts	1 day
a. Abandonment of proceedings	30 days
b. Payment of the award	70 days
14. Appeal to Circuit Court of award	60 days
15. Jury trial on just compensation	90-120 days
a. City’s period to abandon proceedings if verdict greater than JO	40 days
b. City’s period to pay additional compensation	60 days
c. Owner’s period to reimburse City if verdict less than award	60 days

**Total Potential Time Involved:
Could be close to around 600 days**

A purchase agreement under sub. (2a) is subject to the provisions of ch. 32; failure to refer to the provisions of ch. 32 is not a waiver. Sub. (11) (a) applies to all awards including negotiated awards. *Dorschner v. DOT*, 183 Wis. 2d 236, 515 N.W.2d 311 (Ct. App. 1994).

Comparable sales occurring after the taking may be considered by a court, but may be found inadmissible as too remote. Postjudgment interest under sub. (10) (b) is determined under s. 815.05 (8) while interest under sub. (11) (b) is at the statutory rate. *Calaway v. Brown County*, 202 Wis. 2d 736, 553 N.W.2d 809 (Ct. App. 1996), 95–2337.

After the DOT commences condemnation proceedings under this section, sovereign immunity is fully waived. The question of whether the cost of the condemnee's appraisal was reasonable and, therefore, subject to payment by the DOT under sub. (2) (b) is not for the DOT to unilaterally determine; it is a question of fact for the court. *Miesen v. DOT*, 226 Wis. 2d 298, 594 N.W.2d 821 (Ct. App. 1999), 98–3093.

Service on the state through the attorney general, rather than the department of transportation, was sufficient service under sub. (9). *DOT v. Peterson*, 226 Wis. 2d 623, 594 N.W.2d 765 (1999), 97–2718.

When through inadvertent error the award of damages was attached to the notice of application under sub. (9), the award was not a part of the application, and it was error to declare the application a nullity and to withdraw the assignment of the application from the county condemnation committee. *Schoenhofen v. DOT*, 231 Wis. 2d 508, 605 N.W.2d 249 (Ct. App. 1999), 99–0629.

Filing of an award is complete, and the 60-day appeal period under sub. (10) (a) begins to run, when the commission has filed its award with the circuit court clerk and the clerk has mailed and recorded the award under s. 32.08 (6) (b). *Dairyland Fuels, Inc. v. State*, 2000 WI App 129, 237 Wis. 2d 467, 614 N.W.2d 829, 99–1296.

Consistent with *Peterson*, service on the state through the attorney general, rather than the department of transportation, was sufficient service under sub. (10). *Dairyland Fuels, Inc. v. State*, 2000 WI App 129, 237 Wis. 2d 467, 614 N.W.2d 829, 99–1296.

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a given part have been entirely abrogated but instead focuses on the extent of the interference with rights in the parcel as a whole. *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781, 99–2904.

Section 893.80 (1), 2001 Stats., [now s. 893.80 (1d)] does not require that the making of a relocation order be the first step in the condemnation process. *Danielson v. City of Sun Prairie*, 2000 WI App 227, 239 Wis. 2d 178, 619 N.W.2d 108, 99–2719.

“Acceptance and retention of any compensation” under sub. (3) (h) requires that the landowner negotiate the check and retain the check proceeds before the landowner can be barred from contesting the condemnation. Additionally, a landowner who negotiates the check but returns the proceeds to the DOT before filing suit may pursue an action contesting the condemnation. *TJF Nominee Trust v. DOT*, 2001 WI App 116, 244 Wis. 2d 242, 629 N.W.2d 57, 00–2099.

Sub. (8) does not mean that a court may not grant a condemnor possession of condemned premises until a replacement property deemed acceptable by the condemnee is procured, regardless of its acquisition costs, all of which the condemnor must bear or tender, nor does it mean that the condemnee will never have to vacate the condemned property if a replacement property acceptable to the condemnee cannot be acquired for an amount not exceeding the award of compensation plus the maximum relocation benefits to which the condemnee is entitled. *Dotty Dumpling's Dowry, Ltd. v. Community Development Authority of the City of Madison*, 2002 WI App 200, 257 Wis. 2d 377, 651 N.W.2d 1, 01–1913.

A condemnor may obtain a writ of assistance after it has provided the relocation assistance to which a displaced person is statutorily entitled. *Dotty Dumpling's Dowry, Ltd. v. Community Development Authority of the City of Madison*, 2002 WI App 200, 257 Wis. 2d 377, 651 N.W.2d 1, 01–1913.

When the condemnee's counsel instructed the department to not contact the condemnee directly regarding the condemnation, the instruction constituted a special circumstance that excused the department from having to serve the jurisdictional offer on the condemnee personally. *Morris v. DOT*, 2002 WI App 283, 258 Wis. 2d 816, 654 N.W.2d 16, 02–0288.

Income evidence is generally disfavored as a method of measuring property values. It is within the trial court's discretion to admit or exclude this evidence. *National Auto Truckstops v. DOT*, 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198, 02–1384.

Sub. (1) does not apply to appeals of condemnation awards under sub. (11). *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, 265 Wis. 2d 422, 665 N.W.2d 379, 02–2212.

A business that owned a parking lot used for customer and employee parking was an occupant of the lot and a displaced person under s. 32.19 (2) (e) eligible for relocation benefits under sub. (8). *City of Milwaukee v. Roadster LLC*, 2003 WI App 131, 265 Wis. 2d 518, 666 N.W.2d 524, 02–3102.

Sub. (11) does not require service of an authenticated copy of a notice of appeal. To cut off the landowners' right to a review when they complied with the literal language of the service requirement in sub. (11) would be extraordinarily harsh. *The Landings LLC v. The City of Waupaca*, 2005 WI App 181, 287 Wis. 2d 120, 703 N.W.2d 689, 04–1301.

The sale price of a surrounding property voluntarily sold to the condemnation authority is not admissible in determining the fair market value of a property taken by formal condemnation proceedings. That formal condemnation had not been commenced at the time of the sale did not make the evidence admissible when the condemning authority's intent was known at the time of the sale. *Pinczkowski v. Milwaukee County*, 2005 WI 161, 286 Wis. 2d 339, 706 N.W.2d 642, 03–1732.

In certain situations, fair market value may be proved using offers to purchase, but only when they are made with actual intent and pursuant to an actual effort to purchase. In order to qualify as probative evidence, there must be a preliminary foundation of the bona fides of the offer, the financial responsibility of the offeror, and the offeror's qualifications to know the value of the property. *Pinczkowski v. Milwaukee County*, 2005 WI 161, 286 Wis. 2d 339, 706 N.W.2d 642, 03–1732.

Section 801.02 (1) serves to extend by 90 days the 2-year deadline in sub. (9) (a) for the filing of the proof of service. When the original assignment of an appeal to the condemnation commission was premature because the proof of service had not yet been filed, but the defect was corrected within the extended time limits, there was no impediment to the issuance of a fresh assignment of the appeal. *Community*

Development Authority v. Racine County Condemnation Commission, 2006 WI App 51, 289 Wis. 2d 613, 712 N.W.2d 380, 05–1370.

Complete condemnation of a property terminates a lease attached to that property, but the parties to a lease may contract for their rights and obligations in the event of a condemnation. Condemnation does not necessarily preclude a lessor from seeking a remedy against a lessee in a breach of contract action. *Wisconsin Mall Properties, LLC v. Younkers, Inc.* 2006 WI 95, 293 Wis. 2d 573, 717 N.W.2d 703, 05–0323.

In satisfying its statutory obligation to make available a comparable replacement property under sub. (8) (c) and prior to being entitled to a writ of assistance, the condemnor must identify one or more properties that meet the parameters of s. 32.19 (2) (c) to serve as a comparable replacement business. A condemnor has no open-ended obligation to provide a replacement property that is acceptable to the business being relocated. *City of Janesville v. CC Midwest, Inc.* 2007 WI 93, 302 Wis. 2d 599, 734 N.W.2d 428, 04–0267.

When read in conjunction with sub. (7) (d), s. 59.40 (3) (c) empowers a circuit judge not only to veto the clerk's authority to invest a condemnation award but also to direct the clerk to transfer the award from the clerk's control into a private money market account for the benefit of the persons named in the award or to otherwise invest the funds for the benefit of those persons. *HSCB Realty Credit Corporation v. City of Glendale*, 2007 WI 94, 303 Wis. 2d 1, 734 N.W.2d 874, 05–1042.

Although sub. (5) allows owners to bring a wide range of cases, the necessity of a condemnation will be upheld absent a showing of fraud, bad faith, or a gross abuse of discretion. A reviewing court may find a gross abuse of discretion where there is utter disregard for the necessity of use of the land or when the land is taken for an illegal purpose. Generally, an allegedly unsafe road design does not constitute an utter disregard for the necessity of the use of the land. *Kauer v. Department of Transportation*, 2010 WI App 139, 329 Wis. 2d 713, 793 N.W.2d 99, 09–1615.

Sub. (11) makes clear that a party in interest does not lose any rights by not joining in another party's appeal of an award. Sub. (9) (a) 1. makes clear that the unit rule applies in cases in which all parties in interest have not joined in an appeal and instructs that the separate property interests shall, in cases of dispute, be resolved by a separate partition action. A party does not lose its right to bring a claim for partition by accepting payment from the DOT for relocation expenses, which are distinct from the DOT's award for the fair market value of the property taken. *The Lamar Company, LLC v. Country Side Restaurant, Inc.* 2012 WI 46, 340 Wis. 2d 335, 814 N.W.2d 159, 10–2023.

Statutory restrictions on the exercise of eminent domain in Wisconsin: Dual requirements of prior negotiation and provision of negotiating materials. 63 MLR 489 (1980).

Towards success in eminent domain litigation. *Southwick*, 1973 WBB No. 5.

New development in law of eminent domain, condemnation and relocation. *Thiel*, WBB June, 1979.

32.06 Condemnation procedure in other than transportation matters. The procedure in condemnation in all matters except acquisitions under s. 32.05 or 32.22, acquisitions under subch. II, acquisitions under subch. II of ch. 157, and acquisitions under ch. 197, shall be as follows:

(1) DETERMINATION OF NECESSITY OF TAKING. The necessity of the taking shall be determined as provided in s. 32.07.

(2) APPRAISAL. (a) The condemnor shall cause at least one (or more in the condemnor's discretion) appraisal to be made of the property proposed to be acquired. In making any such appraisal the appraiser shall confer with the owner or one of the owners, or the personal representative of the owner or one of the owners, if reasonably possible.

(b) The condemnor shall provide the owner with a full narrative appraisal upon which the jurisdictional offer is based and a copy of any appraisal made under par. (a) and at the same time shall inform the owner of his or her right to obtain an appraisal under this paragraph. The owner may obtain an appraisal by a qualified appraiser of all property proposed to be acquired, and submit the reasonable costs of the appraisal to the condemnor for payment. The owner shall submit a full narrative appraisal to the condemnor within 60 days after the owner receives the condemnor's appraisal. If the owner does not accept a negotiated offer under sub. (2a) or the jurisdictional offer under sub. (3), the owner may use an appraisal prepared under this paragraph in any subsequent appeal.

(2a) AGREED PRICE. Before making the jurisdictional offer under sub. (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners or his or her representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor shall consider the owner's appraisal under sub. (2) (b) and may contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 where shown to exist. Before attempting to negotiate under this subsection, the condemnor shall provide the owner or his or her representative with copies of applicable pamphlets prepared under s. 32.26 (6). When negotiating under this subsection, the condemnor shall pro-

vide the owner or his or her representative with the names of at least 10 neighboring landowners to whom offers are being made, or a list of all offerees if less than 10 owners are affected, together with a map showing all property affected by the project. Upon request by an owner or his or her representative, the condemnor shall provide the name of the owner of any other property which may be taken for the project. The owner or his or her representative shall also have the right, upon request, to examine any maps in the possession of the condemnor showing property affected by the project. The owner or his or her representative may obtain copies of such maps by tendering the reasonable and necessary costs of preparing copies. The condemnor shall record any conveyance by or on behalf of the owner of the property to the condemnor executed as a result of negotiations under this subsection with the register of deeds of the county in which the property is located. The condemnor shall also record a certificate of compensation stating the identity of all persons having an interest of record in the property immediately prior to its conveyance, the legal description of the property, the nature of the interest acquired and the compensation for such acquisition. The condemnor shall serve upon or mail by certified mail to all persons named therein a copy of the statement and a notice of the right to appeal the amount of compensation under this subsection. Any person named in the certificate may, within 6 months after the date of its recording, appeal from the amount of compensation therein stated by filing a petition with the judge of the circuit court of the county in which the property is located for proceedings to determine the amount of just compensation. Notice of such petition shall be given to all persons having an interest of record in such property. The judge shall forthwith assign the matter to the chairperson of the county condemnation commissioners for hearing under sub. (8). The procedures prescribed under subs. (9) (a) and (b), (10) and (12) and chs. 808 and 809 shall govern such appeals. The date the conveyance is recorded shall be treated as the date of taking and the date of evaluation.

(3) MAKING JURISDICTIONAL OFFER. The condemnor shall make and serve the jurisdictional offer and notice in the form (insofar as applicable) and manner of service provided in s. 32.05 (3) and (4), but *lis pendens* shall not be filed until date of petition under sub. (7). The offer shall state that if it is not accepted within 20 days, the condemnor may petition for a determination of just compensation by county condemnation commissioners and that either party may appeal from the award of the county condemnation commissioners to the circuit court within 60 days as provided in sub. (10).

(3m) DEFINITION. In this section, “uneconomic remnant” means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability. If acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

(4) RIGHT OF MINORS AND INDIVIDUALS ADJUDICATED INCOMPETENT. If any person having an ownership interest in the property proposed to be condemned is a minor or is adjudicated incompetent, a special guardian shall be appointed for the person pursuant to s. 32.05 (4).

(5) COURT ACTION TO CONTEST RIGHT OF CONDEMNATION. When an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer for any reason other than that the amount of compensation offered is inadequate, such owner may within 40 days from the date of personal service of the jurisdictional offer or within 40 days from the date of postmark of the certified mail letter transmitting such offer, or within 40 days after date of publication of the jurisdictional offer as to persons for whom such publication was necessary and was made, commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant. Such action shall be the only manner in which any issue other

than the amount of just compensation or other than proceedings to perfect title under ss. 32.11 and 32.12 may be raised pertaining to the condemnation of the property described in the jurisdictional offer. The trial of the issues raised by the pleadings in such action shall be given precedence over all other actions in said court then not on trial. If such action is not commenced within the time limited the owner or other person having any interest in the property shall be forever barred from raising any such objection in any other manner. The commencement of an action by an owner under this subsection shall not prevent a condemnor from filing the petition provided for in sub. (7) and proceeding thereon. Nothing in this subsection shall be construed to limit in any respect the right to determine the necessity of taking as conferred by s. 32.07 nor to prevent the condemnor from proceeding with condemnation during the pendency of the action to contest the right to condemn. This section shall not apply to any owner who had a right to bring a proceeding pursuant to s. 66.431 (7), 1959 stats., prior to its repeal by chapter 526, laws of 1961, effective on October 8, 1961, and, in lieu of this section, s. 66.431 (7), 1959 stats., as it existed prior to such effective date of repeal shall be the owner’s exclusive remedy.

(6) ACCEPTANCE OF JURISDICTIONAL OFFER. The owner has 20 days from the date of personal service of the jurisdictional offer or 20 days from the date of postmark of the certified mail letter transmitting such offer or 20 days from the date of filing the final judgment order or remittitur in the circuit court of the county in an action commenced under sub. (5), if the judgment permits the taking of the land, in which to accept the jurisdictional offer and deliver the same to the condemnor. If the offer is accepted, the transfer of title shall be accomplished within 60 days after acceptance including payment of the consideration stipulated in such offer unless such time is extended by mutual written consent of the condemnor and condemnee. If the jurisdictional offer is rejected in writing by all of the owners of record the condemnor may proceed to petition in condemnation forthwith. If the owner fails to convey the condemnor may proceed as hereinafter set forth.

(7) PETITION FOR CONDEMNATION PROCEEDINGS. If the jurisdictional offer is not accepted within the periods limited in sub. (6) or the owner fails to consummate an acceptance as provided in sub. (6), the condemnor may present a verified petition to the circuit court for the county in which the property to be taken is located, for proceedings to determine the necessity of taking, where such determination is required, and the amount of just compensation. The petition shall state that the jurisdictional offer required by sub. (3) has been made and rejected; that it is the intention of the condemnor in good faith to use the property or right therein for the specified purpose. It shall name the parties having an interest of record in the property as near as may be and shall name the parties who are minors, who are adjudicated incompetent, or whose location is unknown. The petition may not disclose the amount of the jurisdictional offer, and if it does so it is a nullity. The petition shall be filed with the clerk of the court. Notice of the petition shall be given as provided in s. 32.05 (4) to all persons having an interest of record in the property, including the special guardian appointed for minors or individuals adjudicated incompetent. A *lis pendens* shall be filed on the date of filing the petition. The date of filing the *lis pendens* is the “date of evaluation” of the property for the purpose of fixing just compensation, except that if the property is to be used in connection with the construction of a facility, as defined under s. 196.491 (1), the “date of evaluation” is the date that is 2 years prior to the date on which the certificate of public convenience and necessity is issued for the facility. The hearing on the petition may not be earlier than 20 days after the date of its filing unless the petitioner acquired possession of the land under s. 32.12 (1) in which event this hearing is not necessary. If the petitioner is entitled to condemn the property or any portion of it, the judge immediately shall assign the matter to the chairperson of the county condemnation commissioners for hearing under s. 32.08. An order by the judge determining that the petitioner does not have the right to condemn or

refusing to assign the matter to the chairperson of the county condemnation commissioners may be appealed directly to the court of appeals.

(8) COMMISSION HEARING. Thereafter the commission shall proceed in the manner and with the rights and duties as specified in s. 32.08 to hear the matter and make and file its award with the clerk of the circuit court, specifying therein the property or interests therein taken and the compensation allowed the owner, and the clerk shall give certified mail notice with return receipt requested of such filing, with a copy of the award to condemnor and owner.

(9) ABANDONMENT OF PROCEEDINGS; OR PAYMENT OF AWARD.
(a) Within 30 days after the date of filing of the commission's award, the condemnor shall petition the circuit court for the county wherein the property is situated, upon 5 days' notice by certified mail to the owner, for leave to abandon the petition for taking if the condemnor desires to abandon the proceeding. The circuit court shall grant the petition upon such terms as it deems just, and shall make a formal order discontinuing the proceeding which order shall be recorded in the judgment record of the court after the record of the commission's award. The order shall operate to divest any title of condemnor to the lands involved and to automatically discharge the *lis pendens*.

(b) If condemnor does not elect to abandon the condemnation proceeding as provided in par. (a), it shall within 70 days after the date of filing of the commission's award, pay the amount of the award, plus legal interest from the date of taking but less delinquent tax liens, proportionately allocated as in division in redemption under ss. 74.51 and 75.01 when necessary and less prorated taxes of the year of taking, if any, likewise proportionately allocated when necessary, to the owner and take and file the owner's receipt therefor with the clerk of the circuit court, or at the option of the condemnor pay the same into the office of the clerk of the circuit court for the benefit of the parties having an interest of record on the date of evaluation in the property taken and give notice thereof by certified mail to such parties. If the condemnor pays the amount of said award within 14 days after the date of filing of the commission's award, no interest shall accrue. Title to the property taken shall vest in the condemnor upon the filing of such receipt or the making of such payment.

(c) 1. In this paragraph, "condemnor" has the meaning given in s. 32.185.

2. No person occupying real property may be required to move from a dwelling or move his or her business or farm without at least 90 days' written notice of the intended vacation date from the condemnor. The person shall have rent-free occupancy of the acquired property for a period of 30 days commencing with the next 1st or 15th day of the month after title vests in the condemnor, whichever is sooner. Any person occupying the property after the date that title vests in the condemnor is liable to the condemnor for all waste committed or allowed by the occupant on the lands condemned during the occupancy. The condemnor has the right to possession when the persons who occupied the acquired property vacate, or hold over beyond the vacation date established by the condemnor, whichever is sooner, except as provided under subd. 3. If the condemnor is denied the right of possession, the condemnor may, upon 48 hours' notice to the occupant, apply to the circuit court where the property is located for a writ of assistance to be put in possession. The circuit court shall grant the writ of assistance if all jurisdictional requirements have been complied with, if the award has been paid or tendered as required and if the condemnor has made a comparable replacement property available to the occupants, except as provided under subd. 3.

3. The condemnor may not require the persons who occupied the premises on the date that title vested in the condemnor to vacate until a comparable replacement property is made available. This subdivision does not apply to any person who waives his or her right to receive relocation benefits or services under s. 32.197 or who is not a displaced person, as defined under s. 32.19 (2) (e),

unless the acquired property is part of a program or project receiving federal financial assistance.

(10) APPEAL TO CIRCUIT COURT. Within 60 days after the date of filing of the commission's award either condemnor or owner may appeal to the circuit court by giving notice of appeal to the opposite party and to the clerk of the circuit court as provided in s. 32.05 (10). The clerk shall thereupon enter the appeal as an action pending in said court with the condemnee as plaintiff and the condemnor as defendant. It shall thereupon proceed as an action in said court subject to all the provisions of law relating to actions brought therein, but the only issues to be tried shall be questions of title, if any, as provided by ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor, and it shall have precedence over all other actions not then on trial. It shall be tried by jury unless waived by both plaintiff and defendant. The amount of the jurisdictional offer or of the commission's award shall not be disclosed to the jury during such trial.

(a) If the jury verdict as approved by the court exceeds the commission's award, the owner shall have judgment increased by the amount of legal interest from the date title vests in condemnor to date of entry of judgment on the excess of the verdict over the compensation awarded by the commission.

(b) If the jury verdict as approved by the court does not exceed the commission's award, the condemnor shall have judgment against the owner for the difference between the verdict and the amount of the commission's award, with legal interest on such difference from the date condemnor paid such award.

(c) If the jury verdict as approved by the court exceeds the amount of the jurisdictional offer, the condemnor may within 40 days after filing of such verdict petition the court for leave to abandon the proceeding and thereafter sub. (9) (a) shall apply.

(d) All judgments required to be paid shall be paid within 60 days after entry of judgment unless within this period appeal is taken to the court of appeals or unless condemnor has petitioned for and been granted an order abandoning the condemnation proceeding. Otherwise such judgment shall bear interest from the date of entry of judgment at the rate of 10% per year until payment.

(11) WITHDRAWAL OF COMPENSATION PAID INTO COURT; BOND. If either party appeals from the award of the commission, the owner shall not be entitled to receive the amount of compensation paid into court by condemnor unless the owner files with the clerk of the court a surety bond executed by a licensed corporate surety company in an amount equal to one-half of the commission's award, conditioned to pay to the condemnor, any sums together with interest and costs as allowed by the court, by which the award of the commission may be diminished.

(12) EFFECT OF DETERMINATION OF COMPENSATION BY THE COURT WHERE JURY WAIVED. If the action is tried by the court upon waiver of a jury, the determination of the amount of the damages by the court shall be considered in lieu of the words "jury verdict as approved by the court" where such language occurs in this section.

History: 1973 c. 244; 1975 c. 68, 410, 422; 1977 c. 29; 1977 c. 187 s. 134; 1977 c. 438, 440, 447, 449; 1979 c. 37; 1979 c. 110 s. 60 (13); 1981 c. 390; 1983 a. 27; 1983 a. 219 ss. 4, 46; 1983 a. 236 s. 13; 1983 a. 302 s. 8; 1985 a. 316 s. 25; 1987 a. 378; 1991 a. 39, 316; 1993 a. 184; 1997 a. 204; 2005 a. 387; 2013 a. 168 s. 21.

There was no failure to negotiate when the condemnor made an offer based on a competent appraisal offer after the condemnee had already rejected an offer that was higher and had refused to make a counteroffer. *Herro v. Natural Resources Board*, 53 Wis. 2d 157, 192 N.W.2d 104 (1971).

A news report of the amount of the jurisdictional offer did not invalidate the proceedings when the record did not show that the condemnation commission knew of it or was influenced by it. *Herro v. Natural Resources Board*, 53 Wis. 2d 157, 192 N.W.2d 104 (1971).

Costs may not be recovered if condemnation proceedings are stopped by court order. *Martineau v. State Conservation Commission*, 54 Wis. 2d 76, 194 N.W.2d 664 (1972).

The issues of title and navigability were entirely collateral to the amount of compensation. When the condemnation proceeding was terminated, the issues collateral thereto were likewise dismissed. *Martineau v. State Conservation Commission*, 66 Wis. 2d 439, 225 N.W.2d 613 (1975).

An owner who under sub. (5) contests a condemnation on grounds that achievement of the stated public purpose is too remote or contingent must demonstrate a lack

of reasonable assurance that the intended use will come to pass. *Falkner v. Northern State Power Co.* 75 Wis. 2d 116, 248 N.W.2d 885 (1977).

A condemnor did not exercise condemnation powers when it made a jurisdictional offer. A lessee's share of a condemnation award is discussed. *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 288 N.W.2d 794 (1980).

Time computations under ss. 32.05 (10) (a) and 32.06 (10) are controlled by s. 801.15 (1), not s. 990.001 (4). *Matter of Wisconsin Electric Power Co.* 110 Wis. 2d 649, 329 N.W.2d 186 (1983).

Notice of appeal under sub. (10) and the unit rule are discussed. *Green Bay Broadcasting v. Green Bay Authority*, 116 Wis. 2d 1, 342 N.W.2d 27 (1983); reconsidered 119 Wis. 2d 251, 349 N.W.2d 478 (1984).

A condemnee may, under s. 805.04, voluntarily dismiss an appeal to a circuit court without court order. *Dickie v. City of Tomah*, 160 Wis. 2d 20, 465 N.W.2d 262 (Ct. App. 1990).

Sub. (2a) does not require the condemnor to file the certificate of compensation at the same time that it records the conveyance. *Kurylo v. Wisconsin Electric Power Company*, 2000 WI App 102, 235 Wis. 2d 166, 612 N.W.2d 380, 99-1342.

The existence of an uneconomic remnant is not an issue of just compensation for a jury to decide under sub. (10). The proper forum in which to declare an uneconomic remnant and to compel the condemnor to include compensation for the remnant in its offer is in an action under sub. (5). Sub. (3m) requires the condemnor to make a concurrent offer to purchase or condemn an uneconomic remnant. A property owner who is left with a substantially diminished parcel of unencumbered property must have the right to contest a condemnation that does not acknowledge an uneconomic remnant. The only statute that provides the property owner with a forum for asserting such a right is sub. (5). *Waller v. American Transmission Co., LLC*, 2009 WI App 172, 322 Wis. 2d 255, 776 N.W.2d 612, 09-0411.

A clerk of circuit court must comply strictly with the notice requirements in sub. (8) in order to commence the 60-day time limit for an appeal under sub. (10). *Dahir Lands, LLC v. American Transmission Company LLC*, 2010 WI App 167, 330 Wis. 2d 556, 794 N.W.2d 784, 09-2583.

Whether a property is an uneconomic remnant under sub. (3m) is not just a question of value. A circuit court must also determine whether the property is of substantially impaired economic viability. A court must first determine whether a property is an uneconomic remnant before moving on to the just compensation issue. *Waller v. American Transmission Co., LLC*, 2011 WI App 91, 334 Wis. 2d 740, 799 N.W.2d 487, 10-1447.

Sub. (5) sets out the proper and exclusive way for a property owner to raise a claim that the owner will be left with an uneconomic remnant after a partial taking by the condemnor. An uneconomic remnant claim should be brought under sub. (5) because the condemnor has failed to include an offer to acquire any uneconomic remnant in the condemnor's jurisdictional offer. The inclusion of an offer to acquire an uneconomic remnant acknowledges the existence of the uneconomic remnant. The exclusion of such an offer indicates that the condemnor disputes the existence of an uneconomic remnant. *Waller v. American Transmission Company, LLC*, 2013 WI 77, 350 Wis. 2d 242, 833 N.W.2d 764, 12-0805.

A jury verdict need not be set aside on the ground that the before- and after-taking values arrived at by the jury exceed the values offered by the parties' experts. The jury is permitted to accept or reject figures experts use in determining the value of condemned property and to make adjustments to those figures based on its own view of the evidence. *Geise v. American Transmission Co.* 2014 WI App 72, ___ Wis. 2d ___, ___ N.W.2d ___, 11-0482.

Under sub. (10) (d), a judgment that is appealed within 60 days after entry of judgment does not have to be paid within that time period. The judgment nonetheless bears interest from the date of entry of judgment if it is not paid within that time period, assuming the judgment, or some portion of it, is upheld on appeal. *Geise v. American Transmission Co.* 2014 WI App 72, ___ Wis. 2d ___, ___ N.W.2d ___, 11-0482.

Condemnation of a lessor's property for purchase by lessees in order to reduce concentration of land ownership was a constitutional "public use." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

Statutory restrictions on the exercise of eminent domain in Wisconsin: Dual requirements of prior negotiation and provision of negotiating materials. 63 MLR 489 (1980).

New development in law of eminent domain, condemnation and relocation. *Thiel*. WBB June, 1979.

32.07 Necessity, determination of. The necessity of the taking shall be determined as follows:

(1) A certificate of public convenience and necessity issued under s. 196.491 (3) shall constitute the determination of the necessity of the taking for any lands or interests described in the certificate.

(2) The petitioner shall determine necessity if application is by the state or any commission, department, board or other branch of state government or by a city, village, town, county, school district, board, commission, public officer, commission created by contract under s. 66.0301, joint local water authority under s. 66.0823, redevelopment authority created under s. 66.1333, local exposition district created under subch. II of ch. 229, local cultural arts district created under subch. V of ch. 229, housing authority created under ss. 66.1201 to 66.1211 or for the right-of-way of a railroad up to 100 feet in width, for a telegraph, telephone or other electric line, for the right-of-way for a gas pipeline, main or service or for easements for the construction of any elevated structure or subway for railroad purposes.

(3) In all other cases, the judge shall determine the necessity.

(4) The determination of the public service commission of the necessity of taking any undeveloped water power site made pursuant to s. 32.03 (3) shall be conclusive.

History: 1973 c. 305; 1975 c. 68; 1979 c. 175 s. 53; 1981 c. 346; 1983 a. 27; 1985 a. 187; 1993 a. 134, 263; 1997 a. 184, 204; 1999 a. 65; 1999 a. 150 s. 672; 2009 a. 28; 2011 a. 32.

A public utility need only show that the property sought to be condemned is reasonably necessary, reasonably requisite, and proper for the accomplishment of the desired public purpose. *Falkner v. Northern States Power Co.* 75 Wis. 2d 116, 248 N.W.2d 885 (1977).

32.075 Use after condemnation. (1) In this section, "public utility" has the meaning given under s. 196.01 (5) and includes a telecommunications carrier, as defined in s. 196.01 (8m).

(2) Whenever the public service commission has made a finding, either with or without hearing, that it is reasonably certain it will be necessary for a public utility to acquire lands or interests therein for the purpose of the conveyance of telegraph and telephone messages, or for the production, transformation or transmission of electric energy for the public, or for right-of-way for a gas pipeline, main or service, and that such public utility is unlikely to commence construction of its facilities upon such lands within 2 years of such finding, such public utility may file its petition and proceed with condemnation as prescribed in s. 32.06 and no further determination of necessity shall be required. When the lands to be condemned under this subsection are needed for rights-of-way for telegraph, telephone or electric lines or pipelines, it shall not be necessary that the particular parcel or parcels of land be described in the commission's finding, but it shall be sufficient that such finding described the end points of any such lines and the general direction or course of the lines between the end points, but when the public utility files its petition under s. 32.06 it shall specifically describe therein the lands to be acquired. Notwithstanding the completion of the condemnation proceedings and the payment of the award made under this subchapter, the owner may continue to use the land until such time as the public utility constructs its facilities thereon.

(3) (a) The public service commission shall notify by certified mail any person whose ownership interest in the property was terminated by condemnation by a public utility under this chapter if all of the following occur:

1. The public utility's legal title was obtained after May 1, 1984, solely by a condemnation award under s. 32.06.

2. The public service commission revokes a certificate of public convenience and necessity required under s. 196.491 (3) (a) 1. or finds that a state or federal agency has denied or revoked any license, permit, certificate or other requirement on which completion of the public utility's project for which the land was condemned is contingent or that the public utility has for any other reason abandoned a project for which the condemned property was acquired.

3. The public utility within 365 days after issuance of the public service commission denial, revocation or finding under subd. 2. has not proposed, by application to the commission, an alternative use for the property or the public service commission has denied an alternative use proposed by the public utility.

(b) If the person is a minor or an individual adjudicated incompetent, the notice under par. (a) shall be to the special guardian appointed for him or her. The notice under par. (a) shall state that the person, or, if the person is deceased, the person's heirs, may petition the circuit court of the county in which the property is located, within 90 days after receipt of the notice, for an order to require the public utility to return the interest in the property to the petitioner. The circuit court shall grant the petition and shall make a formal order returning the petitioner's interest in the property. The order shall operate to divest any title of the public utility to the property subject to the petition and to automatically discharge any lis pendens filed in relation to the condemnation of the property.

(c) An order issued under par. (b) shall direct that:

1. The public utility return the petitioner's ownership interest in the property.