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13TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

Wednesday, May 25, 2016

Marquette University Law School Eckstein Hall

1215 W. Michigan St., Milwaukee, WI 53233

Case Law Update *Attorney John Van Lieshout*

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CASE LAW UPDATE

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I. Hoffer Properties, LLC v. DOT, 366 Wis. 2d 372

FACTS

- DOT eliminated Hoffer's direct driveway connections to State Trunk Highway 19, a controlled-access highway.
- DOT also separately exercised its power of eminent domain to acquire 0.72 acres of Hoffer's land in order to extend Frohling Lane westward so as to connect Hoffer's property to the highway.
- Hoffer received \$90,000 in compensation for the 0.72 acres taken to construct the Frohling Lane extension.

PROCEDURAL HISTORY

- Hoffer appealed the amount of compensation to the Jefferson County Circuit Court.
- Hoffer argued that DOT owed him additional compensation for diminution of the value of the property due to the loss of direct access to STH 19 if a jury determined the access provided by the Frohling Lane extension was unreasonable.
- DOT argued that because of the exercise of its police power to eliminate Hoffer's direct access to STH 19 and because Hoffer has alternate access to the property through the Frohling Lane extension, Hoffer has reasonable access as a matter of law and no compensation was due.
- The Circuit Court agreed and granted partial summary judgment to DOT.
- The Court of Appeals affirmed concluding that under a 1972 Supreme Court holding Surety Savings and Loan Association v. DOT, 54 Wis. 2d 438, when DOT acts pursuant to the controlled-access highway statute, "the inquiry is merely whether alternate access was provided."
- The Court of Appeals determined that the Circuit Court's grant of summary judgment was proper because DOT provided alternate access to Hoffer's property.

ISSUES FOR REVIEW BY THE WISCONSIN SUPREME COURT

- First, whether DOT is duly authorized by Wis. Stat. § 84.25 to eliminate an abutting owner's direct access to a controlled-access highway and replace it with more circuitous access.
- Second, whether the provision or existence of some access to the abutting property obviates the need for a jury determination of "reasonableness" because the abutting owner is precluded from compensation pursuant to Wis. Stat. § 32.09(6)(b).

HOLDING

- First, the Supreme Court held that Wis. Stat. § 84.25(3) authorized DOT to change Hoffer's access to STH 19 in whatever way it deemed "necessary or desirable." Such changes, including elimination of direct access points, are duly authorized exercises of the police power and are not compensable under Wis. Stat. § 32.09 as long as alternate access is given that does not deprive the abutting owner of all or substantially all beneficial use of the property.
- Second, the WSC held that when DOT changes an abutting owner's access to a controlled-access highway but other access is given or exists, the abutting owner is precluded from compensation pursuant to Wis. Stat. § 32.09(6)(b) as a matter of law and no jury determination of reasonableness is required. Reasonableness is the wrong standard to apply because the provision of some access preserves an abutting property owner's right of access to a controlled-access highway, and thus no taking compensable under Wis. Stat. § 32.09(6)(b) occurs. Accordingly, Hoffer is precluded from compensation under Wis. Stat. § 32.09(6)(b) because alternate access to the property was provided by the Frohling Lane extension.

ANALYSIS

- Was this a taking, or an exercise of police power?
- The primary distinction between the power of eminent domain and the police power of the state most relevant to the present case is that government takings by eminent domain are compensable under Wis. Stat. § 32.09, while government actions pursuant to the police power are not, except in limited circumstances. Wis. Stat. § 32.09(6)(b) allows the state "to deprive or restrict such access without compensation under any duly authorized exercise of the police power."
- DOT exercises police power when it designates a highway "controlled-access."
- By means of Wis. Stat. § 84.25, the controlled-access highway statute, the legislature has authorized DOT to designate up to 1,500 miles of heavily travelled, rural highways "controlled-access."
- This is a tightly circumscribed power, and the designation can be made only if DOT first takes the specific steps enumerated in Wis. Stat. § 84.25(1). Among other things, DOT must conduct "traffic engineering surveys, investigations and studies," and hold a public hearing on the matter following notice by publication in the county newspaper.
- If, after the required surveys and investigations and the required public notice and hearing, DOT then finds that both the traffic potential is above 2,000 vehicles a day "and that the designation of the highway as a controlled-access highway is necessary in the interest of public safety, convenience and the general welfare," DOT shall make its finding, which must be recorded with the Register of Deeds and filed with the county clerk, as well as published in the same newspaper as the notice of hearing.

- The Wisconsin Supreme Court found that the designation of a highway as controlled-access is an exercise of the police power. Once a highway is designated as a controlled-access highway, the other subsections of Wis. Stat. § 84.25 grant DOT expansive powers including authority over how the general public and abutting property owners access the highway. In short, once the highway has been designated "controlled-access," the statute authorizes DOT to subsequently change the access points in whatever way it "deems necessary or desirable."
- Specifically, the statute states that no person shall have any right of entrance upon any controlled-access highway, to or from abutting lands except at places designated and provided for such purposes, and on such terms and conditions as may be specified from time to time by the DOT.
- Pursuant to 84.25, abutting property owners lose any right to compensation under Wis. Stat. § 32.09 for a change in access to the highway, provided some access remains, at the moment DOT makes the controlled-access designation.
- The controlled-access highway statute is unique in its operation against abutting property owners and consequently the legislature limited DOT's authority to exercise the police power. The legislature prescribed elaborate procedures, including public notice and hearing, which DOT must follow. Furthermore, the legislature limited the amount of highway DOT can designate "controlled-access" to 1,500 miles.
- Hoffer conceded that DOT can deprive or restrict an abutting owner's right-of-access to a controlled-access highway without compensation, and further conceded that DOT followed all of the required procedures to designate STH 19 a controlled-access highway.
- Hoffer argued, however, that the controlled-access highway statute does not grant DOT the power to subsequently eliminate its direct access to STH 19 and replace it with more circuitous access.
- Rather, Hoffer, claimed that Wis. Stat. § 84.25 granted DOT authority to "regulate" an abutting owner's direct access but did not grant authority to "eliminate" that access.
- The Wisconsin Supreme Court rejected this argument as being at odds with the specific wording of Wis. Stat. § 84.25(3), especially the language which allowed DOT to control access "on such terms and conditions as may be specified from time-to-time." The Wisconsin Supreme Court ruled that replacing direct access with a more circuitous route is inarguably a change of the terms and conditions by which an abutter is allowed to enter the highway.
- Hoffer argued that he was still entitled to a jury determination as to whether the more circuitous access he had been provided was unreasonable and, if such a finding were made, he was entitled to compensation. The Wisconsin Supreme Court disagreed.
- The Supreme Court ruled that a taking must occur before a viable claim for compensation can arise. It determined that no compensable taking occurs when DOT changes an

abutting property owner's access to a controlled-access highway if other access is provided that does not provide the owner of all or substantially all beneficial use of the property.

- Additionally, duly authorized acts of the police power that restrict or deprive access to a highway from abutting lands are not compensable pursuant to Wis. Stat. § 32.09(6)(b).
- However, this does not mean that the provision of alternate access to a controlled-access highway precludes the abutting owner from compensation in all possible contexts.
- Changes in access to a controlled-access highway may support a claim pursuant to Wis. Stat. § 32.10 for a regulatory taking of the property. Whether a regulatory taking has occurred depends upon whether the restriction practically or substantially renders the land useless for all reasonable purposes.
- The Wisconsin Supreme Court held that the proper mechanism for pursuing compensation claims for damages resulting from a change in access when DOT acts pursuant to the controlled-access highway statute is to bring an inverse condemnation claim under Wis. Stat. § 32.10. Hoffer brought its claim under section 32.09.
- "We recognize that this is a high standard for owners of the property abutting a controlled-access highway to meet."
- The Wisconsin Supreme Court also distinguished the cases relied upon by Hoffer. National Auto Truckstops and Seefeldt did not involve exercise of police power pursuant to the controlled-access highway statute.
- Finally, Hoffer argued that the taking of the 0.72 acres and the termination of his direct access were not two distinct acts, but rather a single taking for which he was entitled to compensation.
- The Wisconsin Supreme Court summarily rejected this argument and declared that Hoffer did not lose its direct access points because of the taking of the 0.72 acres of its land (in fact, none of Hoffer's access points were on the land taken). Rather, it lost its direct access points due to DOT's decision to restrict access to STH 19.

CONCURRING OPINION

- Justice Abrahamson did not "join Justice Gableman's, long, complex opinion." She disagreed there was any need to discuss inverse condemnation because "the parties' references to inverse condemnation are cursory, not full or adversarial. As a result, I would not discuss inverse condemnation."

DISSENT

- Justice Prosser dissented because he was concerned that the majority opinion would lead to a result in which "the only time the DOT is required to pay compensation to a property

owner for eliminating direct access to a controlled-access highway is when the alternative access is so circuitous or so grossly inadequate that it deprives 'the abutting owner of all or substantially all beneficial use of the property.'"

- Justice Prosser questioned whether the result would be the same "if the new access required vehicles to travel 10,000 feet—closer to two miles—instead of 1,000 feet to reach STH 19."
- Justice Prosser also disagreed that Seefeldt was distinguishable. He quoted Judge Clair Voss of the Court of Appeals who indicated that loss of access to U.S. Highway 41 should be compensable.
- Finally, he commented on the high standard necessary to support a claim for regulatory taking under Wis. Stat. § 32.10: "No matter how outrageously inconvenient a means of access might be, the property owner will still retain some ability to access the property. Unreasonably inconvenient access does not necessarily mean that a property is substantially useless. A use-based standard for inverse condemnation is fundamentally incompatible with a claim of unreasonable access because any access at all likely ensures that the property owner retains the ability to use the property."

II. Murr v. Wisconsin, 359 Wis. 2d 675 (Wis. App 2014) (United States Supreme Court granted certiorari on January 15, 2016)

FACTS

- The Murrs owned two contiguous parcels on the St. Croix River known as Lots E and F. The Murrs' parents purchased Lot F in 1960, built a cabin near the river and transferred title to their plumbing company.
- In 1963 the Murrs' parents purchased an adjacent lot, Lot E, which has remained vacant ever since. The Murrs allege that Lot E was purchased as an investment property, with the intention of developing it separate from Lot F or selling it to a third party.
- Together, the lots contain approximately .9 acres of net project area, which means developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands.
- The Murrs' parents transferred Lot F to the Murrs in 1994, followed by Lot E in 1995.
- The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under the St. Croix County code of ordinances.
- The relevant ordinance prohibits the individual development or sale of adjacent, substandard lots under common ownership, unless an individual lot has at least one acre of net project area. However, if abutting, commonly owned lots do not each contain the minimum net project area, they together suffice as a single, buildable lot.

- After repeated flooding, the Murrs decided to flood proof the cabin on Lot F and sell Lot E as a buildable lot. Among other things, the Murrs sought a variance to separately use or sell their two contiguous lots.
- The DNR and county zoning staff opposed the Murrs' application and, following a public hearing, the St. Croix County board of adjustment denied the application.
- The Murrs sought certiorari review and the circuit court affirmed the board's decision. On appeal, the Court of Appeals affirmed the circuit court. (332 Wis. 2d 172). The Wisconsin Supreme Court denied the Murrs' subsequent petition for review.
- The Murrs then filed a complaint against the state and county pursuant to Wis. Stat. § 32.10, alleging that the ordinance resulted in an uncompensated taking of their property. The Murrs alleged that the ordinance deprived them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot." They asserted that Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain. Finally, the alleged lot was useable only for a single-family residence, "and without the ability to sell or develop it the lot is rendered useless."

PROCEDURAL HISTORY

- The State and County separately sought summary judgment. Their motions essentially advanced the same argument: The Murrs' claim was time-barred; the Murrs failed to exhaust their administrative remedies; they had no protectable property right to sell a portion of their property; and they were not deprived of all or substantially all the beneficial use of their property.
- The circuit court granted summary judgment to the County and State. The circuit court first concluded the Murrs claim was time-barred, reasoning that the ordinance "had immediate economic consequences" when it was enacted.
- Despite this conclusion, the court also reached the merits of the Murrs' claim. The court determined that applicable law required it to analyze the effect of the ordinance on the Murrs' property as a whole, not each lot individually.
- Accordingly, the court held there was no taking because the Murrs' property, taken as a whole, could be used for residential purposes, among other things.

ISSUES FOR REVIEW BY THE WISCONSIN COURT OF APPEALS

- The Murrs argued the circuit court erred for two reasons. First, they asserted that their claim was not time-barred, because it was not ripe until their request for a variance was denied and they exhausted their appellate rights from that decision.
- Second, the Murrs argued the ordinance deprived them of all, or substantially all, beneficial use of their property.

HOLDING IN THE WISCONSIN COURT OF APPEALS

- The Wisconsin Court of Appeals held that the takings claim failed on its merits as a matter of law. Accordingly, the Wisconsin Court of Appeals did not reach the issue of whether the claim was timely filed and assumed, without deciding, that it was.

ANALYSIS

- A landowner who believes the government has taken his or her property without instituting formal condemnation proceedings may bring an inverse condemnation claim under Wis. Stat. § 32.10 to recover just compensation. The statute is designed to deal with traditional exercise of the government's eminent domain power by means of physical occupation. However, the Wisconsin Supreme Court has concluded regulatory takings are also cognizable under section 32.10.
- To state a claim under Wis. Stat. § 32.10 in the absence of physical occupation, the facts alleged must demonstrate that a government restriction "deprives the owner of all, or substantially all, of the beneficial use of his property."
- The Murrs sought compensation solely for the alleged taking of Lot E. They contended that, given the application of the ordinance, Lot E served no purpose or use and has no value because it cannot be sold. The Murrs argued the circuit court erred by examining the beneficial uses of Lots E and F in combination.
- The Court of Appeals indicated that the Wisconsin Supreme Court had already considered this issue in Zealy v. City of Waukesha, 201 Wis. 2d 365 (1996). In Zealy, the landowner argued that the city had accomplished a regulatory taking by creating a conservancy district over 8.2 acres of his 10.4-acre parcel, thereby precluding residential development on the majority of the property. The Wisconsin Supreme Court, however, rejected the owner's attempt to segment the property, concluding a "landowner's property in such case should be considered as a whole."
- The Murrs contended that Zealy was distinguishable because it turned on the owner's ability to use one large parcel, whereas the Murrs asserted they had been wholly deprived of the use of at least one of their two separate parcels.
- The Wisconsin Court of Appeals disagreed: "Regardless of how that property is subdivided, contiguity is the key fact under Zealy."
- In fact, the Court of Appeals declared that it was a "well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."
- As a consequence, the Court of Appeals declared that it was "evident" that the Murrs failed to establish compensable taking as a matter of law. There was no dispute that their property sufficed as a single, buildable lot under the ordinance.

- The Murrs contended that Lot E was unsuitable for use in wildlife conservation, agriculture or forestry. The Wisconsin Court of Appeals stated: "We are not concerned with what uses are prohibited or what are the 'highest and best uses,' but rather only what use or uses remain." The critical question is whether the property owner has been denied "all or substantially all practical uses of [the] property."

U.S. SUPREME COURT

- Amicus briefs have argued that separate properties under common ownership should not be combined to measure the "parcel as a whole." "Regulatory takings are about the impact of government regulation on an owner's use of property and how the regulation has the same economic impact on the property as an exercise of the government's eminent domain power. In this area of law, the size of the property often dictates the severity of the impact--the smaller the property, the more severe the impact . . . the Wisconsin Appellate Court decision creates larger parcels of land, making it easier for the government to effect uncompensated takings."
- Murr v. Wisconsin is a regulatory takings case involving the "relevant parcel" or "parcel-as-a-whole issue," one of the most important takings issues that the Supreme Court has never addressed.
- Generally speaking, the larger the scope of property to be considered, the less severe the regulatory impact on the entire parcel as a whole; conversely, if only a small parcel is relevant to the takings analysis, the regulatory impact will be more concentrated on that small parcel and likely more adverse. Because the economic impact of a regulation is usually the most important factor in determining whether a taking has occurred, property owners would benefit from a ruling in Murr that leads courts to define the relevant parcel narrowly, and thus to make regulatory impacts more concentrated and more severe.

III. NDC, LLC v. WDOT, 366 Wis. 2d 809 (2015)

FACTS

- DOT sought to acquire a portion of NDC's property and sent a letter and purchase agreement to NDC.
- DOT offered NDC \$90,500 for the property and enclosed a purchase agreement. The purchase agreement stated that the agreement would not be binding unless signed by DOT within 60 days after NDC signed the agreement.
- DOT, NDC and an NDC appraiser met on February 20, 2014. NDC's representative allegedly informed DOT that the \$90,500 offer was "ridiculously low" and that NDC was not going to "accept an amount that wasn't fair."
- In addition to these oral statements by NDC, on March 31, 2014, NDC's appraiser sent a written appraisal to DOT valuing NDC's property at \$854,700.

- On April 17, 2014, NDC did "an about-face." NDC wrote to DOT stating that NDC had decided to accept the \$90,500 and included the purchase agreement now signed by NDC.
- DOT did not sign the purchase agreement. Instead, DOT advised NDC that it was willing to increase its offering price to \$250,000.
- NDC took the position that DOT had made a \$90,500 offer and that NDC had accepted that offer by signing and returning the purchase agreement resulting in an enforceable contract.
- NDC sued seeking specific performance of the \$90,500 amount.

PROCEDURAL HISTORY

- The case proceeded to a bench trial.
- DOT maintained, for several reasons, that there was no valid contract.
- The circuit court agreed with DOT and found that NDC rejected DOT's \$90,500 offer by NDC's oral statements and by sending NDC's appraisal to DOT.
- In addition, the circuit court concluded that, even assuming NDC accepted the \$90,500 offer price, there was no enforceable contract without DOT's signature on the purchase agreement.

ISSUES FOR REVIEW BY THE WISCONSIN COURT OF APPEALS

- NDC argued that DOT was bound by an agreement to purchase the property for \$90,500.
- NDC argued that it was entitled to specific performance in the sense that DOT must proceed as if it had offered, and NDC had accepted, DOT's \$90,500 offering price for the property.
- If NDC were to receive a circuit court order for specific performance, NDC believes it could then challenge the \$90,500 amount as too low and receive additional compensation and attorneys' fees.

HOLDING

- The Court of Appeals affirmed the circuit court's order denying NDC's claim for specific performance. Because the appeal was resolved on other grounds, the Court of Appeals did not address DOT's argument that NDC's claim for specific performance was barred by sovereign immunity.

ANALYSIS

- NDC challenged the circuit court finding that NDC rejected DOT's offer.

- First, NDC argued that the circuit court erred by relying on NDC's oral statements because the statements were too general to indicate a rejection. The Court of Appeals disagreed and observed that NDC cited no authority for the proposition that more specific statements would be necessary.
- Second, NDC complained that the circuit court's finding that there was a rejection depended on an erroneous underlying factual finding that NDC sent NDC's appraisal to DOT. Instead, NDC argued that NDC's appraiser, not NDC, inadvertently sent the appraisal to DOT against NDC's directions.
- This argument failed because, regardless whether sending the appraisal to DOT was attributed to NDC, NDC's earlier oral statements were enough to support the circuit court's finding that NDC had already rejected DOT's offer.
- In regard to DOT's failure/refusal to sign the purchase agreement, NDC argued that the letter and purchase agreement sent to NDC must be treated as a complete offer that became binding when NDC signed and returned the purchase agreement. NDC took the position that DOT could not make its offer contingent on further action by DOT.
- The Court of Appeals found that NDC failed to cite any contract law that supported its argument. Instead, the Court of Appeals noted that DOT's offer could have been construed as merely a step in negotiations that were never completed.
- The Court of Appeals also indicated that if it was a question of what the parties intended, there was no clearer indication of intent than the unambiguous language in the purchase agreement stating that DOT's signature was required before the agreement would become binding.
- NDC also pointed to evidence that, in at least one other acquisition for the same highway project, DOT closed a transaction without signing the purchase agreement or adhering to other formalities.
- The Court of Appeals ruled that NDC provided no "legally cognizable reason" why extrinsic evidence, such as DOT's practice in other transactions, should control over the unambiguous contract language requiring DOT's signature.

IV. Lee v. WDOT, 365 Wis. 2d 195 (2015)

FACTS

- Lee is the owner of commercial property located at 1851 East Moreland Boulevard and U.S. Highway 18 in Waukesha where he operates a business, JK Lee Black Belt Academy.
- The property has three driveway entrances: one on the north side from USH 18 and two on the south side from Paramount Drive.

- As part of the reconstruction of USH 18, DOT informed Lee that his USH 18 driveway connection would be removed for safety reasons.
- DOT informed Lee of its intent to remove the driveway without eminent domain proceedings and the payment of just compensation.
- A subsequent title search revealed that Lee's driveway connection stemmed from a 1983 quit claim deed which was drafted by the DOT and granted the owner of the property the property: "The right to one private driveway... in lieu of two residential access points reserved in a [recorded instrument] ... which access points will be released by... deed."
- Lee provided a copy of this quit claim deed to the DOT and asked that it reconsider its position. The DOT initially did so, pledging to compensate Lee for the value associated with this access rights acquisition, but two years later it reversed itself.

PROCEDURAL HISTORY

- Lee sought a review of DOT's decision before the Division of Hearings and Appeals.
- Lee's position was that, due to the quit claim deed, his USH 18 driveway connection could not be taken without eminent domain proceedings and the payment of just compensation.
- DOT objected, noting that the Division of Hearings and Appeals had no authority to consider such an argument.
- The ALJ agreed, explaining in relevant part that if Lee's argument was correct, he was "in the wrong forum."
- As a result, Lee filed suit in circuit court and moved for summary judgment seeking a declaration that the USH 18 driveway connection was an irrevocable compensable property right. DOT responded with its own request for summary judgment.
- The circuit court granted summary judgment in favor of Lee and declared that his driveway connection was a "valid property right pursuant to an irrevocable quit claim deed and not a revocable permit."

ISSUES FOR REVIEW BY THE COURT OF APPEALS

- On appeal, the DOT contended that summary judgment should have been granted in its favor instead of Lee for two reasons:
 - Lee failed to exhaust his administrative remedies before filing suit; and
 - the driveway at issue is not an irrevocable compensable property right but rather a temporary connection subject to permitting and revocation by the DOT.

HOLDING

- The Court of Appeals affirmed the grant of summary judgment in Lee's favor. The Court of Appeals held that if DOT wished to acquire Lee's driveway connection, it would have to commence eminent domain proceedings and pay just compensation.

ANALYSIS

- The Court of Appeals rejected DOT's exhaustion of administrative remedies argument. The Court ruled that the exhaustion rule does not apply "where the administrative agencies would not have afforded the party adequate relief because the agency did not have the authority to provide the remedy sought."
- DOT submitted that Lee might have prevailed on a different argument before the DHA (*e.g.*, arguing that the permit revocation was a misapplication of DOT's police powers) but the Court of Appeals held that such an argument presumed that the driveway was a temporary connection subject to permitting and revocation. It was Lee's position that the driveway was an irrevocable compensable property right pursuant to the quit claim deed. Given this stance, Lee could only obtain relief from the circuit court.
- In regard to DOT's argument that the driveway at issue was not an irrevocable compensable property right but rather a temporary connection, the court noted that the grant of the right was contained in a quit claim deed.
- According to the Court of Appeals, a quit claim deed passes "all of the interest in or pertinent to the land described which the grantor could lawfully convey." Thus, whatever ownership rights the DOT possessed in the driveway connection were conveyed to the owner of the property by virtue of this legal instrument.
- Second, the court found that the language in the deed conveyed "the right" to the private driveway and did not identify any condition, reservation, exception or contingency upon which the owner's access was encumbered, limited or extinguished. As a drafting party, the DOT had the power to choose the words of the deed and explicitly make the driveway connection subject to permitting and revocation. It chose not to accommodate and we will not rewrite the deed for it.

V. *Hoefl v. City of Beaver Dam*, 364 Wis. 2d 528 (2015)

FACTS

- Jay Hoefl owned a tavern on Front Street in the City of Beaver Dam. In June 2008, a flood damaged Hoefl's property and other nearby properties. Hoefl reopened his tavern later in 2008 and closed it in 2011.
- The city purchased Hoefl's property in July 2013 at its 2008 fair market value. After the sale, Hoefl filed a claim for relocation benefits totaling \$392,810.19, and was awarded \$20,000. In July 2014, Hoefl filed a complaint naming the City of Beaver Dam as the

sole defendant. Hoeft filed an amended complaint in July 2014 adding another claim under 42 U.S.C. § 1983 against the State of Wisconsin Department of Commerce/Department of Administration.

PROCEDURAL HISTORY

- The city moved for summary judgment on the basis that Hoeft failed to state a claim upon which relief can be granted. The state filed a motion to dismiss on the basis of sovereign immunity. The circuit court granted both motions.

ISSUES ON APPEAL

- Hoeft claimed that he was entitled to recover, under Wisconsin Statute Chapter 32, payment of the relocation claim in the amount of \$392,810.19.
- He also claimed he was entitled to compensatory and punitive damages pursuant to 42 U.S.C. § 1983 because the city violated certain federal laws when it allegedly acted maliciously with respect to the acquisition of his property and payment of his relocation claim.

HOLDING

- The Court of Appeals affirmed summary judgment dismissing the complaint.

ANALYSIS

- Hoeft's relocation claim itemized the following costs:
 - Moving costs \$9,845
 - Business replacement costs \$50,000
 - Loss of income/delay in relocation \$275,294
 - Rent loss \$37,200
 - Real estate taxes \$8,223.74
 - Attorneys' fees and costs \$12,247.45
- The City argued that Hoeft had recovered certain costs and cannot recover the remaining itemized costs for the following reasons:
 - (a) The Department of Administration awarded Hoeft \$20,000 in lieu of actual moving costs and real estate taxes, and the \$20,000 awarded exceeds the cost claimed by Hoeft for those items;

- (b) Hoeft did not actually replace his business and, therefore, he is not entitled to business replacement costs;
 - (c) Loss of business income is not recoverable under Wis. Stat. Chapter 32;
 - (d) Hoeft's rent losses cannot be recovered because they are not directly attributable to a public improvement project; and
 - (e) Attorneys' fees and costs are not recoverable under Chapter 32.
- Hoeft did not dispute the city's assertion that his claims for moving costs and taxes were covered by the award, and that his claim for business replacement costs, rent loss and attorneys' fees and costs were properly denied. However, he did dispute the city's assertion that his claim for loss of business income was properly denied.
 - The Court of Appeals disagreed: "Hoeft does not cite any particular section of Wis. Stat. Chapter 32, and we discern none, supporting his claim for loss of business income." Hoeft's second claim for loss of business income was based on Luber v. Milwaukee County, 47 Wis. 2d 271 (1970), wherein the Wisconsin Supreme Court distinguished "rental loss" from other "consequential losses," and declared that rental loss is required to be compensated. The Wisconsin Court of Appeals could not find any legal authority for expanding Luber's limited holding to encompass an alleged loss of business income.

