

DAMAGES TO PROPERTY DURING CONSTRUCTION : COMPENSABLE? HOW MEASURED?

Charles P. Graupner
Michael Best & Friedrich LLP
100 East Wisconsin Avenue
Suite 3300
Milwaukee, Wisconsin 53202
414-225-2770
cpgraupner@michaelbest.com

I. UNDER SECTION 32.09(6), SEVERANCE DAMAGES INCLUDES DAMAGES CAUSED BY CONSTRUCTION ACTIVITIES.

A. Section 32.09(6)

In the case of a partial taking of property . . . the compensation to be paid by the condemnor shall . . . [give] effect . . . to the following items of loss or damage to the property where shown to exist:

(e) 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 improvements, 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

(Emphasis added.)

B. In this regard, Wisconsin law departs from the general rules of eminent domain just compensation.

1. Eaton, Real Estate Valuation in Litigation (p. 317):

An annoyance or inconvenience such as circuitry of travel is often ruled noncompensable because the damage is shared with the public in general and is not peculiar to the remainder property. For the same reason, noise, dust, and fumes from highway traffic are sometimes ruled noncompensable.

2. Nichols, Eminent Domain, § G12.03[3][a]:

Another exception to recovery for damages to the residue as a result of a partial taking is damage resulting from the construction activities. Annoyance, noise, inconvenience and interference of temporary duration

during construction of an improvement and common to the public are usually not recoverable on the theory that these elements are not permanent in nature as they do not last beyond the completion of the project.

- C. Legislative history indicates that the underlined portions of § 32.09(6)(c) were added by the Wisconsin Legislature in 1977 to reverse the result in *De Bruin v. Green County*, 72 Wis. 2d 464, 241 N.W.2d 167 (1976).
1. *De Bruin* involved the County taking a strip of farmland along County Trunk S in Green County. The facts of the case are important to understanding the injustice seen by the Wisconsin Legislature.
 - a. The De Bruin's farm buildings and house were set back about one-quarter mile from County S.
 - b. The County provided a road from these buildings to County S for use as a driveway.
 - c. De Bruin's regular driveway, as well as County-provided alternative access, became impassible for four months.
 - d. De Bruins devised a further alternative across farm fields and neighboring farm, but became impassible in wet weather.
 - e. De Bruin's automobile was ruined; De Bruin's farm tenant vacates due to lack of access.
 2. Jury instruction in effect at the time of *De Bruin* trial provided that inconvenience occasioned during construction could be taken into consideration in determining value of the property after the taking. Instruction was based on *Carazalla v. State*, 269 Wis. 593, 70 N.W.2d 208 (1955). De Bruin's appraiser included in his report "discrete and identifiable portions of the market value that correlate to a lump-sum evaluation of inconvenience damage." Nevertheless, the trial court excluded the appraisal evidence on construction damages.
 3. The Wisconsin Supreme Court recognized that "inconvenience" damages could be reasonably calculated:

"A competent appraiser using the income approach, for example, will certainly assign a monetary value to the loss of income and increased expense generated by 'inconvenience' factors in arriving at a proposed market value." *Id.* at 469
 4. The Wisconsin Supreme Court affirmed the judgment and ruled that the inconvenience damages were not recoverable.
 - a. "Inconvenience" is a factor in proving eminent domain damages "only when the landowner's property rights in his remaining portion

are so impaired that the owner has, in effect, had that portion taken also." *Id.* at 470.

- b. "If temporary highway repairs had otherwise impaired the De Bruins access without a prior taking of their property, they would have no claim for compensation in the ordinary course of events." *Id.* at 471.
- c. Section 32.09(6) requires damages be proven "assuming the completion of the public improvement," and thus, excludes consideration of interim damages.
- d. The trial court's rulings on admitting or precluding expert testimony should be affirmed unless clearly erroneous.

D. 1977 Wis. Laws. Ch. 438 Amended Wis. Stats. 32.09(6)(c):

- 1. The Legislative Council Note to the enacted statute states: Chapter 438 allows the condemnor to pay severance damages for two additional items. The first of these is damages caused by construction of the public improvement, including damages from noise, dirt, temporary interference with access to the property and limitations to the use of the property . . . The second element is the costs of extra travel made necessary by the improvement based on the increased distance which must be traveled to reach one part of the property from another. The construction of a limited access highway which bisects a farm, causing inconvenience in reaching portions of the farm with agricultural implements, is one example of a situation in which such costs may be considered.

Wis. Stat. Ann. § 32.09, Legislative Council Notes – 1977 (West 2006)

- 2. The *De Bruin* case is referenced in the summary of proceedings of the Special Committee on Eminent Domain, which drafted the amendment.

II. ANTICIPATED REPOSSES TO PROOF OF CONSTRUCTION-RELATED DAMAGES.

A. Not compensable in the absence of taking; therefore, shouldn't be compensable as part of taking.

- 1. This argument was accepted in regard to access damages in *National Auto Truckstops Inc. v. DOT*, 2003 WI 95, 263 Wis. 2d 649, 665 N.W. 198.
- 2. But this was also the ruling in *De Bruin*, which was specifically reversed by the Wisconsin Legislature.

B. Can't use income method to prove damages:

- 1. See, *Rademan v. DO*, 2002 WI App. 59, 252 Wis. 2d 191, 642 N.W.2d 600.

2. But no comparable sales available to prove loss; similar to proving TLE value. Also income method is mentioned in *De Bruin*.
- C. The statutory directive of "assuming completion of the public improvement" precludes consideration of construction damages.
1. This would seem to directly overrule the 1977 amendments.