

SUBSURFACE UTILITIES

Outline of presentation of Attorney Benjamin Southwick

Introduction

Two topics relating to subsurface utilities will be covered in this outline:

1. Admissibility of fear and stigma evidence relating to nature gas pipelines.
2. Status of underground utilities if a highway is discontinued.

Admissibility of fear and stigma evidence

Two reasonably recent Court of Appeals decisions relate to the admissibility of fear and stigma evidence in partial taking eminent domain valuation litigation regarding the taking of an easement for a high volume natural gas transmission pipeline. The cases are Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 696 N.W. 2d 194 and Hoekstra v. Guardian Pipeline, 2006 WI App. 245, 298 Wis. 2d 165, 726 N.W. 2d 648.

The holdings in these two cases are as follows:

1. Generalized evidence, such as public opinion surveys, relating to the effect of the presence of an underground pipeline carrying potential dangerous material, such as natural gas, is not by itself admissible if the evidence is not related to the fair market value of the subject property.
2. Such evidence is admissible if there is an appropriate nexus or connection between the evidence and the fair market value of the property.
3. There are two bases for the admission of fear and stigma evidence which is related to the fair market value of the subject property:

- (a) Wisconsin Statutes, section 907.03 allows the admission of evidence which, by itself may not be admissible into evidence, if the evidence is of a type reasonably relied upon by appraisers and which has in fact been relied upon by the appraiser, or
- (b) Under the doctrine which allows the admission into evidence of any factor affecting the value of property that could influence or sway the decision of a prospective buyer may be considered in the valuation of the property in a condemnation proceeding, as long as the evidence is relevant and not remote or speculative.

Status of underground utility easement in highway right-of-way after the highway has been discontinued

This matter is the subject of Wisconsin Statutes, section 66.1005.

Section 66.1005 (1) provides that title to discontinued highway right-of-way reverts to the abutting owners.

It is provided in subsection (2) of that statute that easements for underground utilities in discontinued highway right-of-way shall continue unless one of the following applies:

- (a) The owner of the easement gives written consent to the discontinuance of the easement and the discontinuance order refers to that written consent, or
- (b) The owner of the easement fails to use the easement for 4 years after the highway has been discontinued.

If the highway discontinuance proceedings (see Wisconsin Statutes, section 66.1003) involve the assessment of benefits or damages, the easements for underground utilities may be discontinued if one of the following applies:

- a. The interested parties fail to reach agreement permitting discontinuance of the easement, or
- b. The owner of the easement refuses to give written consent to its discontinuance.

Damages for the discontinuance of easements shall be assessed against the land benefited in proceedings for assessment of damages or benefits upon discontinuance of a highway. Unless agreement is reached as to a different amount, the amount of damages shall be the present value of the property to be abandoned plus the cost of removal, less salvage value of the removed or abandoned property. The owner of the easements shall be entitled to all payments relating to the assessment of damages.

Any person aggrieved by the assessment of damages may appeal the assessment in the manner provided for appeals of assessments in highway discontinuance proceedings.