

Appraisal
Institute®

*Professionals Providing
Real Estate Solutions*

14TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

Thursday, May 18, 2017

Marquette University Law School Eckstein Hall
1215 W. Michigan St., Milwaukee, WI 53233

Co-Sponsored by:

The Wisconsin Chapter of the



Appraisal
Institute®

*Professionals Providing
Real Estate Solutions*



The Real Estate Group at von Briesen & Roper, s.c.



LAW SCHOOL



MARQUETTE
UNIVERSITY

College of Business Administration

SCHEDULE

8:30 - 8:45 a.m.	Registration
8:45 - 9:00 a.m.	Welcome <i>Dean Joseph Kearney</i>
9:00 - 10:00 a.m.	Interim Use <i>John Rolling and Attorney J.J. Rolling</i>
10:00 - 11:00 a.m.	Proximity Damages <i>Marian Barnes and Atty. Nicholas Boerke</i>
11:00 - 11:15 a.m.	Break
11:15 a.m. - 12:00 p.m.	Case Law Update <i>Attorney John Van Lieshout</i>
12:00 - 12:45 p.m.	Lunch
12:45 - 3:00 p.m.	Studies of Partial Taking Cases <i>Moderator/Mediator - Atty. Stan Riffle</i> <i>Lead Counsel for Owners - Atty. Alan Marcuvitz</i> <i>Lead Counsel for Condemnors - Atty. R. Duane Harlow</i> <i>Appraisers for Owners - Larry Nicholson and</i> <i>Art Sullivan</i> <i>Appraisers for Condemnors - Steve Vitale and</i> <i>Dominic Landretti</i>
3:00 - 3:15 p.m.	Break
3:15 - 4:00 p.m.	Studies of Partial Taking Cases (Continued)
4:00 - 4:30 p.m.	Q & A - Panel Discussion
4:30 - 5:30 p.m.	Social Hour

***See Speaker Bios on next page*

SPEAKERS

Marian J. Barnes, MAI, SR/WA

Marian J. Barnes, MAI, SR/WA has been appraising properties for public works projects for ten years in the upper midwest. Her work has included valuation of properties for conservation, aviation, road, sewer, pipeline and transmission line easements. Types of properties include quarries, agricultural, recreational, and commercial. She has also conducted appraisals for litigation and has testified in court. Prior to appraising, she worked in the environmental field assessing properties for contamination and design, installing, and maintaining remediation systems. Property types ranged from gas stations, to manufacturers, to refineries. She received a BA in geology from Albion College, Albion, Michigan and MS in geology from Northern Illinois University.

Nicholas J. Boerke

Nicholas J. Boerke is an attorney in the Milwaukee office of von Briesen & Roper, s.c.. He received his B.B.A. in finance, with honors, from the University of Wisconsin-Milwaukee's Lubar School of Business in 2007 and his J.D., magna cum laude, from Marquette University Law School in 2012. Nick's practice focuses on property taxation and eminent domain litigation. Nick also assists with real estate purchase and sale transactions and tax incremental financing. Nick is a member of the State Bar of Wisconsin, Milwaukee Bar Association and American Bar Association.

R. Duane Harlow

Duane Harlow is an Assistant Attorney General with the Wisconsin Department of Justice, and a Deputy Director of the DOJ's Civil Litigation Unit. As a Deputy Director, Duane supervises the Unit's Property and Tort's section, which includes the representation of the Wisconsin Department of Transportation in eminent domain related matters. Duane graduated Order of the Curia from the Capital University Law School and received his undergraduate degree from the University of Wisconsin LaCrosse.

Dominic Landretti, MAI, AI-GRS

Dominic Landretti, MAI, AI-GRS, is a real estate valuation consultant specializing in a variety of property types. Coupled with a background in accounting and auditing, Mr. Landretti provides a unique and detailed approach to valuation. Services for a wide client base include appraisal and consulting for financing purposes, eminent domain, litigation support, expert testimony, property tax appeal, market studies, and real and personal property assessment. He has given numerous presentations regarding valuation and appraisal standards issues and is an active member of the Wisconsin Chapter of the Appraisal Institute, serving as President in 2016. He has owned and managed Landretti & Company in Madison since 2006. Previous experience includes accounting and auditing specialties at TDS Telecom and Baker Tilly Virchow Krause. He graduated from UW-LaCrosse with a B.S. in Accounting.

Alan Marcuvitz

Alan Marcuvitz is a Shareholder with the firm of von Briesen & Roper, s.c. He received his B.S. degree from Marquette University's College of Business Administration and his J.D. degree from Marquette Law School. His areas of practice include eminent domain, property taxation and real estate development, in all of which he is acknowledged as exemplary counsel. While most of his practice is on behalf of the private sector, he has also provided significant representation to local governments. He is a member of the State Bar of Wisconsin, the Milwaukee Bar and American Bar Associations. He is also a member of Owners' Counsel of America.

Lawrence Nicholson, MAI

Lawrence Nicholson, MAI is the owner The Nicholson Group, a Milwaukee-based commercial real estate valuation firm. Larry has over 30 years of real estate valuation and consulting experience. He has the MAI designation from the Appraisal Institute and is a Certified General Appraiser in Wisconsin. He has extensive experience with a variety of property types including office buildings, shopping centers, apartments, hotels, golf courses, waterparks, marinas, industrial facilities and land. He is an expert in condemnation-related appraisals as well as in partial interest valuation and frequently provides expert testimony and litigation support services. Larry serves by Governor appointment to the Real Estate Appraisers Board for the State of Wisconsin and is currently chairman of the board. Larry has taught the Valuation of Real Estate course at the University of Wisconsin-Madison School of Business where he graduated from in 1981 with a Master's degree in real estate appraisal and investment analysis.

H. Stanley Riffle

H. Stanley Riffle is a founding partner of Arenz, Molter, Macy, Riffle & Larson, S.C., serving as municipal attorneys to over 50 municipal clients. Attorney Riffle handles all municipal tax appeals and condemnation litigation for all firm clients. Over the years, Attorney Riffle has been involved in hundreds of tax and condemnation proceedings and has appeared before numerous condemnation commissions, circuit and appellate courts throughout Wisconsin. In addition to handling litigation in these matters in office, Attorney Riffle has served as the Waukesha County Condemnation Commissioner for the past 20 years, has been engaged by both condemnors and condemnees as an expert witness and has mediated a significant number of tax and condemnation disputes, at the request of prominent and experienced condemnation lawyers, government lawyers or the court. Attorney Riffle has also spoken at numerous continuing legal education classes on the tax appeal and condemnation process and topics of interest, appearing at the request of the State Bar of Wisconsin, League of Wisconsin Municipalities - Attorneys Institute and the Appraisal Institute - Wisconsin Chapter and others.

J.J. Rolling

J.J. Rolling is an associate attorney with Eminent Domain Services, LLC in Madison, Wisconsin. There, his practice is focused on eminent domain and land valuation litigation. Many of his cases involve proving a "highest and best use" that is different from a property's current use. Working for his father's appraisal practice prior to law school has given J.J. unique skills and insights into the field. Now, he applies these insights during depositions of appraisal experts, engineers, and acquisition agents. J.J. received his B.S. in economics and his J.D. from the University of Wisconsin-Madison. He contributes legislative and case law updates for the Wisconsin chapters of the Appraisal Institute and the International Right of Way Association. In 2016, he was nominated for the IRWA's Young Professional of the Year Award and was recognized as an "Up and Coming Lawyer" by the Wisconsin Law Journal.

John Rolling, SR/WA

John Rolling, SR/WA is an independent fee appraiser with Rolling & Barnes, LLC in Madison, WI. He has specialized in appraisal and appraisal review regarding property interests acquired for public agency and utility projects since 1990. He has testified as an expert witness in eminent domain cases at condemnation commission hearings and circuit court trials in several Wisconsin counties. He is an instructor for the International Right of Way Association's courses "Principles of Real Estate Appraisal," "Easement Valuation," and "The Valuation of Partial Acquisitions" and he is an AQB-Certified USPAP Instructor.

Art Sullivan, MAI, SR/WA, R/W-AC

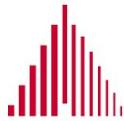
Art Sullivan, MAI, SR/WA, R/W-AC, is the President of Appraisal Specialists of Wisconsin. As a certified general appraiser based in Oshkosh, Art travels the state providing valuation services on a wide variety of property types, most typically those being effected by condemnation proceedings. After obtaining his Masters in Education from the University of Wisconsin - Oshkosh (1988), Art began his career in real estate in the early 1990's as a salesperson. He entered the field of appraisal in 2004, training extensively in eminent domain and starting his own firm in 2008. Art has completed his MAI designation with the Appraisal Institute and SR/WA with the International Right of Way Association (IRWA). Art is also certified in right of way appraisal (R/W-AC) by the IRWA. He has worked for private property owners as well as several municipalities, providing appraisal and expert witness services in the field of eminent domain.

John M. Van Lieshout

John M. Van Lieshout is a shareholder with Reinhart Boerner Van Deuren, s.c. in Milwaukee, Wisconsin and is the co-author of "Wisconsin Condemnation Law and Practice" published in December 2009 by the State Bar of Wisconsin CLE Books.

S. Steven Vitale

MAI is Senior Managing Director of Valbridge Property Advisors | Vitale Realty Advisors, LLC, a commercial real estate appraisal company based in Brookfield, Wisconsin. Valbridge Property Advisors launched in March 2013 as a joint effort of over 40 independently owned appraisal firms from across the U.S. Upon launch, Valbridge immediately ranked among the Top 3 national commercial real estate valuation and advisory services firms, with 145 MAIs, 59 office locations and 600 staff across the U.S. Vitale Realty Advisors, LLC, founded in 1998 by S. Steven Vitale, MAI, is a longtime appraisal services leader in Wisconsin. Steve received a Bachelor of Business Administration in 1988 with majors in finance and real estate from the University of Wisconsin - Milwaukee. Following a period working as a commercial real estate broker, Steve earned a Masters of Science degree in Real Estate Appraisal and Investment Analysis from the University of Wisconsin - Madison in 1991.



**Appraisal
Institute®**

*Professionals Providing
Real Estate Solutions*

14TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

Thursday, May 18, 2017

Marquette University Law School Eckstein Hall

1215 W. Michigan St., Milwaukee, WI 53233

Interim Use

*John Rolling
and
Attorney J. J. Rolling*

Co-Sponsored by:

The Wisconsin Chapter of the



**Appraisal
Institute®**

*Professionals Providing
Real Estate Solutions*



The Real Estate Group at von Briesen & Roper, s.c.



**MARQUETTE
UNIVERSITY**

LAW SCHOOL



**MARQUETTE
UNIVERSITY**

College of Business Administration

**Interim Use:
Legal and Appraisal Perspectives
on Eminent Domain Ramifications**

Condemnation Symposium
Milwaukee, Wisconsin
May 18, 2017

Presenters

- J.J. Rolling, Attorney
 - Eminent Domain Services, LLC
 - 608-661-8509
 - jj@eminentdomainservices.com
- John Rolling, SR/WA, Appraiser
 - Rolling & Barnes, LLC
 - 608-231-120
 - john@rollingandbarnes.com

5/18/2017 Rolling - Interim Use 2

Topics to Address

- 1) Do I have an Interim Use?
- 2) Compensability? Proof?
- 3) What's it worth?

5/18/2017 Rolling - Interim Use 3

The Lunch I Ordered



5/18/2017

Rolling - Interim Use

4

But the Server Brought...

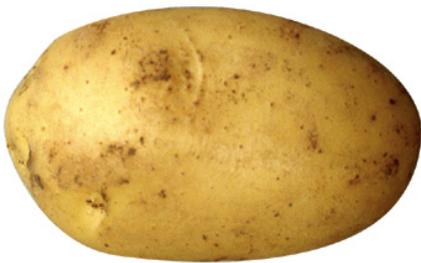


5/18/2017

Rolling - Interim Use

5

And ...

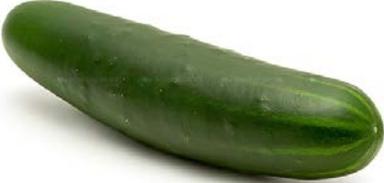


5/18/2017

Rolling - Interim Use

6

And.



5/18/2017 Rolling - Interim Use 7

What Should I Pay For ?

- Lunch?
- “Future Lunch Development”?
- A Bunch of Bull?

5/18/2017 Rolling - Interim Use 8

Issues for Eminent Domain

- HBU: the Foundation for Value
- Statutes & Courts Recognize Prospective, Not Present, Use May Be HBU
- But Not to Be “Speculative and Conjectural”
- Conflict with Principle of Consistent Use?

5/18/2017 Rolling - Interim Use 9

TOPICS TO ADDRESS

- 1) Do I have an Interim Use?
- 2) Compensability? Proof?
- 3) What's it worth?

5/18/2017

Rolling - Interim Use

10

Interim Use Defined-1

- “The temporary use to which a site or improved property is put until it is ready to be put to its future highest and best use.”
- Dictionary of Real Estate Appraisal, 5th edition, 2010, page 103.

5/18/2017

Rolling - Interim Use

11

Interim Use Defined-2

- “The temporary use to which a site or improved property is put until a different use becomes maximally productive.”
- The Appraisal of Real Estate, 14th edition, 2013, page 354.

5/18/2017

Rolling - Interim Use

12

Definition vs. Reality

- Isn't Every Use "Temporary?"
- How Long is "Temporary?"
- At What Point along the Line from "This" to "That" is our Property?
- Do We "Know it when We See It?"

"We Know it When We See It"

- Paraphrasing what US Supreme Court Justice Potter Stuart said of pornography...
- Examples
 - House on Main Street Adjoins New Strip Mall
 - One-Screen Movie Theater, Interim Church
 - Driving Range in Suburbs soon to be Car Dealer
 - Farmhouse & Barn in Path of Development



Buyer Intention: Interim Parking Lot

Or Do We?

- Examples of Anticipated Change that Didn't Happen
 - Developers purchase farmland 2006, sell back to farmers 2010
 - Distribution warehouse "interim" on way to retail development– still waiting 20 years later
 - What if the house on Main Street just remains a house, but now rental, not owner-occupied?

5/18/2017

Rolling - Interim Use

16

Tests for an Interim Use

- Duration of "Interim"
- Existing improvements
- "Reasonable & Probable" vs. "Speculative & Conjectural"
- "Considered to the Extent that Potential Affects Market Value"

5/18/2017

Rolling - Interim Use

17

How Long is an Interim?

- Some statements in appraisal literature
 - Laurence Sando, 1964 "...usually in one to five years, and certainly not more than 10 years."
 - Tom J. Keith, 1991 "...within the next three to four years."
 - James Eaton, 1995 "To estimate an interim use period longer than five years can be considered speculation and conjecture."
 - James Boykin, 2001 "...within the next three to five years."

5/18/2017

Rolling - Interim Use

18

How Long?

- But most recent literature and court decisions less definitive on timing:
 - “relatively short time—say, **five to seven years.**”
 - Experts’ opinions of **1-3 years or 2-3 years** rejected as normal development time.
 - *Emeryville Redevelopment v. Harcros Pigments, Inc.*, 101 Cal. App. 4th 1083, 125 Cal. Rptr. 2d 12 (1st Dist. 2002)

5/18/2017

Rolling - Interim Use

19

How Long?

- But most recent literature and court decisions less definitive on timing:
 - Implicitly accepted **10 years** interim use of truck terminal/office/pier in anticipation of commercial development.
 - *Jersey City Redevelopment Agency v. Costello*, 252 N.J.Super. 247, 599 A.2d 899 (N.J. Super. A.D., 1991)

5/18/2017

Rolling - Interim Use

20

How Long?

- But most recent literature and court decisions less definitive on timing:
 - “near future or within a reasonable time”
 - *Carazalla v. State*, 269 Wis. 593, 598, 70 N.W. 208 (1955).

5/18/2017

Rolling - Interim Use

21

How Long?

Haven't we all seen
"interim uses" lasting over
5-10 years?



5/18/2017

Rolling - Interim Use

22

How Long?

- Conclusion
 - No clear statement of timeline to development
 - But like the weather, the farther out the forecast, the less reliable the forecast

5/18/2017

Rolling - Interim Use

23

TOPICS TO ADDRESS

- 1) Do I have an Interim Use?
- 2) **Compensability? Proof?**
- 3) What's it worth?

5/18/2017

Rolling - Interim Use

24

PROSPECTIVE USE STANDARDS

Wisconsin:

1. Most advantageous use of the land
2. "Reasonably Probable" use of the land
3. Non-imaginary, non-speculative use of the land
 - o *Clarmar Realty Co. v. Redevelopment Auth.*, 129 Wis. 2d 81, 91-92, 383 N.W.2d 890 (1986).

5/18/2017

Rolling - Interim Use

25

"Reasonably Probable" Legal Standard

Reasonably Probable:

- As of date of taking
- Burden
- Test may be at or before trial
- Not landowner's intent

No improvements
or tangible steps

Plat Drawn (but
hastily, for trial?)

Grading, paving,
staking lots

5/18/2017

Rolling - Interim Use

26

"Reasonably Probable" Legal Standard

- Zoning Change:
 - Illinois Pattern Jury Instruction 300.85
 - Date of valuation
 - Reasonable probability of rezoning; Effect
- Assemblage: (*Clarmar*)
 - Assemblage of truck terminal and neighboring land for turning area
 - Prior owner had handshake agreement
 - Doors permitted additional long trucks
 - Scheduling small trucks and long trucks was unfeasible
 - Buyer would continue business even with premium for land

5/18/2017

Rolling - Interim Use

27

**“Reasonably Probable”
Appraisal Practice**

- Legally Permissible
 - Current Zoning Status
 - Land Use Plan
 - Access?
 - Eligible for Utilities?
 - Pattern of Rezoning/Permits

5/18/2017 Rolling - Interim Use 28

**“Reasonably Probable”
Appraisal Practice (2)**

- Physically Possible
 - Can proposed use be constructed with the land available today?
 - Does proposed use depend on contingencies so uncertain that those contingencies would not factor into a prospective purchaser’s calculations?

5/18/2017 Rolling - Interim Use 29

**“Reasonably Probable”
Appraisal Practice (3)**

- Financially Feasible/Maximally Productive
 - Is there a demand for the prospective use?
 - Will value in prospective use outweigh demolition costs?
 - Opportunity cost of losing present use?
 - Will market pay more for this property’s potential for future use than for other properties continuing in present use?

5/18/2017 Rolling - Interim Use 30

4 Elements for “Potential Use”

United States Court of Appeals for the Sixth Circuit

1. Potential use must not require substantial capital expenditure;
2. Potential use must not be highly uncertain;
3. Property must be physically adaptable to potential use; and
4. A market for the property must exist at time of taking or must be reasonably likely to exist in the near future.

United States v. 1291.83 Acres of Land,
411 F.2d 1081, 1084-85 (6th Cir. 1969)

5/18/2017

Rolling - Interim Use

31

“Considered to the Extent that a Potential Use Affects Market Value”

- Value = Present Worth of Future Benefits
- Wis. Stat. § 32.09(2)
- Foundation for compensability of potential and the guide for valuation
 - That potential affects present value
 - See *Spiegelberg v. State*, 2006 WI 75, 291 Wis. 2d 601, 717 N.W.2d 641
 - How we measure contributory value of potential

5/18/2017

Rolling - Interim Use

32

Compensability Issues

Principle of Consistent Use

“...the concept that land cannot be valued on the basis of one use while the improvements are valued on the basis of another.”



J.D. Eaton, *Real Estate Valuation in Litigation*, 114 (2d ed. 1995)

5/18/2017

Rolling - Interim Use

33

Compensability Issues

Principle of Consistent Use

Predominant

- Value land and improvements together
 - *U.S. v. 91.90 Acres of Land, Situate in Monroe County, Mo.*, 586 F.2d 79, (8th Cir. 1978)
 - *Emeryville Redevelopment v. Harcos Pigments*, 101 Cal.App.4th 1083, 1110-11 (Cal. Ct. App. 2002)

Minority

- Valuations of land and improvements may be independent
 - *Department of Transp. v. Foster*, 262 Ga. App. 524, 586 S.E.2d 64 (2003)

5/18/2017

Rolling - Interim Use

34

Compensability Issues

Principle of Consistent Use

• Acceptable:

- Gas production was an interim use before use as buffer area. Uses were not inconsistent.
 - *Northern Natural Gas Co. v. Approximately 9117 Acres in Pratt* (D. Kan., 2015).

5/18/2017

Rolling - Interim Use

35

Compensability Issues

Other Court Confusion

- Interim use of farm was undisputed. Court said this was proof that prospective HBUs were too remote.
 - *Liere v. State*, 333 N.Y.S.2d 266, 39 A.D.2d 980 (N.Y.A.D. 3 Dept., 1972)

5/18/2017

Rolling - Interim Use

36

Demonstrating and Challenging an Interim Use

- “A finding of compensable “interim use” will ordinarily require concrete evidence of circumstances that could reasonably cause a buyer of the particular property at issue to view the presence of incompatible improvements as a net economic benefit rather than a net cost.”
– *Emeryville*

Has the *temporary* use been established?

Is value of improvement considered in light of that use?

Do the improvements serve to enhance the value of the property over its unimproved condition?

- *Emeryville*

5/18/2017 Rolling - Interim Use 37

TOPICS TO ADDRESS

- 1) Do I have an Interim Use?
- 2) Compensability? Proof?
- 3) **What's it worth?**

5/18/2017 Rolling - Interim Use 38

Problems in Valuing Interim Use

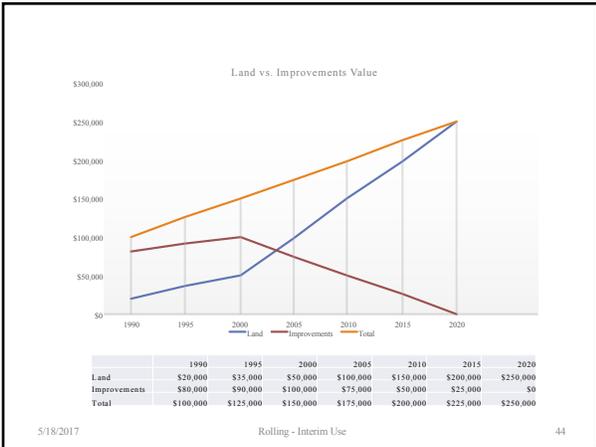
5/18/2017 Rolling - Interim Use 39



5/18/2017

Rolling - Interim Use

43



5/18/2017

Rolling - Interim Use

44

Appraisal Theory Solution

- Add interim income to discounted cash flow analysis.
- Sales comparison– Sales of properties with interim improvements vs. sales of vacant parcels. E.g., SFR to interim office use– any increment over vacant land?

5/18/2017

Rolling - Interim Use

45



A Discounted Cash Flow Solution

BEFORE VALUE	Year 1	Year 2	Year 3	Year 4	Year 5
Income					
House Rental	\$12,000	\$12,000	\$12,000	\$10,000	\$10,000
Garage Rentals	\$1,200	\$1,200	\$1,200	\$1,000	\$1,000
Potential Gross Income	\$13,200	\$13,200	\$13,200	\$11,000	\$11,000
Less: Vacancy & Credit Losses	-\$660	-\$660	-\$660	-\$1,100	-\$2,200
Effective Gross Income	\$12,540	\$12,540	\$12,540	\$9,900	\$8,800
Expenses					
Taxes	-\$3,000	-\$3,000	-\$3,000	-\$3,000	-\$2,000
Insurance	-\$500	-\$500	-\$500	-\$500	-\$500
Management	-\$627	-\$627	-\$627	-\$495	-\$440
Maintenance	-\$1,200	-\$1,200	-\$1,200	-\$800	-\$500
Subtotal Expenses	-\$5,327	-\$5,327	-\$5,327	-\$4,795	-\$3,440
Net Cash Flow	\$7,213	\$7,213	\$7,213	\$5,105	\$5,360
Reserve for Replacements	\$0	\$0	\$0	\$0	\$0
Net Operating Income	\$7,213	\$7,213	\$7,213	\$5,105	\$5,360
PV of \$1 @ 11%	0.9009	0.8116	0.7312	0.6857	0.5935
PV of Income Stream	\$6,498	\$5,854	\$5,274	\$3,500	\$3,181
Subtotal Income Stream					\$24,308
FV Vacant Site	10000 SF	At \$10/SF			\$100,000
Less: Demolition Expense					-\$10,000
Net FV Land Only					\$90,000
PV of Land Only @ 8%		PV Factor	0.6806		\$61,254
Total PV Income & Land Value					\$85,562

How This Helps in Partial Taking?

- Allocation between land & improvements.
- Land value = PV of whole (vacant) property at EOY 5.
- Improvements value = PV of net rental income stream possible due to improvements.

Land	\$ 61,254
Improvements	\$ 24,308
Total	\$ 85,562

How DCF Aids Partial Acquisition

Allocation of Land & Improvements Leads to Partition between Elements Taken/Damaged.

Taking: 2,000 SF Land in Fee
Garage Building

Remainder: 10,000 SF Land
House & Site Improvements

5/18/2017

Rolling - Interim Use

49

DCF After Condition

AFTER VALUE	Year 1	Year 2	Year 3	Year 4	Year 5
Income					
House Rental	\$12,000	\$12,000	\$12,000	\$10,000	\$10,000
Garage Rentals	\$0	\$0	\$0	\$0	\$0
Potential Gross Income	\$12,000	\$12,000	\$12,000	\$10,000	\$10,000
Less: Vacancy & Credit Losses	-\$660	-\$660	-\$660	-\$1,100	-\$2,200
Effective Gross Income	\$11,340	\$11,340	\$11,340	\$8,900	\$7,800
Expenses					
Taxes	-\$3,000	-\$3,000	-\$3,000	-\$3,000	-\$2,000
Insurance	-\$500	-\$500	-\$500	-\$500	-\$500
Management	-\$627	-\$627	-\$627	-\$495	-\$440
Maintenance	-\$1,200	-\$1,200	-\$1,200	-\$800	-\$500
Subtotal Expenses	-\$5,327	-\$5,327	-\$5,327	-\$4,795	-\$3,440
Net Cash Flow	\$6,013	\$6,013	\$6,013	\$4,105	\$4,360
Reserve for Replacements	\$0	\$0	\$0	\$0	\$0
Net Operating Income	\$6,013	\$6,013	\$6,013	\$4,105	\$4,360
PV of \$1 @ 11%	0.9009	0.8116	0.7312	0.6857	0.5935
PV of Income Stream	\$5,417	\$4,880	\$4,397	\$2,815	\$2,588
Subtotal Income Stream					\$20,096
FV Vacant Site:	8000 SF	A1 \$10/SF			\$80,000
Less: Demolition Expense					-\$10,000
Net FV Land Only					\$70,000
PV of Land Only @ 8%					\$47,642
Total PV Income & Land Value					\$67,738

5/18/2017

Rolling - Interim Use

50

Before/After Comparison

	Before	After	Difference
Land	\$61,254	\$47,642	\$13,612
Improvements	\$24,308	\$20,096	\$ 4,212
Total	\$85,562	\$67,738	\$17,824

5/18/2017

Rolling - Interim Use

51

Allocating Losses/Damages

Item	Proof	Amount
2000 SF Land Taken	$\$61,254 \div 10,000 \text{ SF} = \$6.13/\text{SF} * 2000 \text{ SF}$	\$12,260
Garage Building Taken	From Before- After Comparison	\$ 4,212
Severance to Remainder Land	Cost of Demo Re-Amortized over Smaller Remaining Site	\$ 1,352
Total Losses/Damages		\$17,824

5/18/2017

Rolling - Interim Use

52

DCF Issues for Eminent Domain Legal Perspectives

- Is Income Approach Admissible in Your State?
 - *Leathem Smith Lodge, Inc. v. State*, 94 Wis. 2d 406, 288 N.W.2d 803 (1980)
- Is DCF Method “Speculative” or “Reasonably Probable?”
 - *City & County of Honolulu v. Market Place Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973).
- Court Concerns re: Consistent Use Principle?
 - *Redevelopment Agency of Salt Lake City v. Barrutia*, 526 P.2d 47 (Utah 1974)

5/18/2017

Rolling - Interim Use

53

By Sales Comparison

- What if Any Premium over Bare Land?
- Are there Comparables?
 - Improvements with Similar (Short-Lived) Utility
- What Basis for Adjustments?
 - Buyer Expectations for Timeline to Conversion

5/18/2017

Rolling - Interim Use

54

By Sales Comparison

- At Least– Concept a Check on Violation of Consistent Use
 - Examples: Does residential landscaping have CV to “future commercial development” site?

5/18/2017 Rolling - Interim Use 55

“Simplified” Sales Comparison

- Compare subject “as improved” vs. SFR’s continuing in residential use.
- Allocate Before Value between land and improvements.
- Allocate improvements based on typical ratios.
- After Value = Before – CV Items Taken- Damages
- Works in “State Rule” Jurisdictions

5/18/2017 Rolling - Interim Use 56

“Simplified” Sales Comparison *Illustration*

• Before Value	\$150,000
– Land Value as Commercial-Ready	\$ 100,000
– Left to Improvements	\$ 50,000
• Allocated to Dwelling	\$40,000
• Allocated to Garage	\$ 6,000
• Allocated to Site Improvements	\$ 4,000
– Paved Driveway	\$2,000
– Landscaping	\$2,000

5/18/2017 Rolling - Interim Use 57

“Simplified” Sales Comparison *Illustration Continued*

Before Value	\$150,000
- Land Taken: 2000 SF X \$10	- \$20,000
- Improvements Taken: Garage	- \$ 6,000
- Severance: Driveway Obsolete	- \$ 2,000
After Value	\$122,000

- Overstates current land value
- But recognizes CV of improvements in consistent use

5/18/2017

Rolling - Interim Use

58

Take-Away #1

An Interim Use is a temporary use to which a site or improved property is put until it is ready to be put to its future highest and best use.

5/18/2017

Rolling - Interim Use

59

Take-Away # 2

Duration of an interim use is not precisely defined, but the longer the delay to future highest and best use, the less reliable the forecast.

5/18/2017

Rolling - Interim Use

60

Take-Away # 3

Value of an interim use may be compensable, but the courts are very skeptical. The case for an interim use must have a solid foundation.

5/18/2017

Rolling - Interim Use

61

Take-Away # 4

An interim use only has value if the market says it has value. If not, then HBU is present use.

5/18/2017

Rolling - Interim Use

62

Take-Away # 5

Discounted cash flow analysis is the most flexible technique for valuing an interim use and so DCF is the most-favored by appraisers.

But DCF is also the method most likely to draw legal challenge.

5/18/2017

Rolling - Interim Use

63

Take-Away # 6

Sales comparison is less accurate but more easily understood. Watchword here is allocation of components within consistent use.

5/18/2017

Rolling - Interim Use

64

Take-Away # 7

A dollar you are to receive in the future is worth less than a dollar you receive today, but you might just pocket a few coins while waiting to collect your future dollar!

5/18/2017

Rolling - Interim Use

65

Thank You!

John Rolling, SR/WA
Certified General Appraiser
Rolling & Barnes, LLC
Madison, Wisconsin
608-231-2120
john@rollingandbarnes.com

J.J. Rolling
Attorney
Eminent Domain Services, LLC
Madison, Wisconsin
608-661-8509
jj@eminentdomainservices.com

5/18/2017

Rolling - Interim Use

66

Interim Use Bibliography

Laurence Sando, "Theories of Valuation for Interim Use," Appraisal Journal, January 1964, pp. 29-34.

William H. Crouch, "A Perspective Look at Highest and Best Use," Appraisal Journal, April 1966, pp. 166-176.

Kenneth R. Wheeler, "Non-Conforming or Interim Use Improvements," Appraisal Journal, April 1973, pp. 211-219.

Laurence Sando, "Transitional Use Valuations," Appraisal Journal, April 1973, pp. 222-233.

Robert L. Blake, "The Interim-Income Approach to Value of Improvements No Longer Suited to Highest and Best Use," Appraisal Journal, October 1978, pp. 588-591.

Fred H. Cothorn, "Interim Use Revisited," Appraisal Journal, October 1980, pp. 556-561.

Max J. Derbes, "Highest and Best Use—What Is It?," Appraisal Journal, April 1981, pp. 166-178.

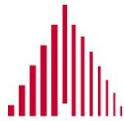
Tom J. Keith, "Applying Discounted Cash Flow Analyses to Land in Transition," Appraisal Journal, October 1991, pp. 458-470.

Mark Galleshaw, "Evaluating Interim Uses," Appraisal Journal, January 1994, pp. 52-56.

David M. Champagne, "Interim Highest and Best Use: Condemnation Appraising," Appraisal Journal, January 2001, pp. 19-25.

Finally—Here's an article that touches on the mathematics of interim use, but warning—the method prescribed is so theoretical that it would likely be branded "conjectural and speculative." Read with a large salt shaker close at hand.

Dorothea M. Colwell and Peter F. Colwell, "The Timing of Development Revealed by the Market: An Options Approach," Appraisal Journal, February 2004, pp. 121-126.



Appraisal
Institute®

*Professionals Providing
Real Estate Solutions*

14TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

Thursday, May 18, 2017

Marquette University Law School Eckstein Hall

1215 W. Michigan St., Milwaukee, WI 53233

Proximity Damages

*Marian Barnes
and*

Attorney Nicholas Boerke

Co-Sponsored by:

The Wisconsin Chapter of the



Appraisal
Institute®

*Professionals Providing
Real Estate Solutions*



The Real Estate Group at von Briesen & Roper, s.c.



MARQUETTE
UNIVERSITY

LAW SCHOOL



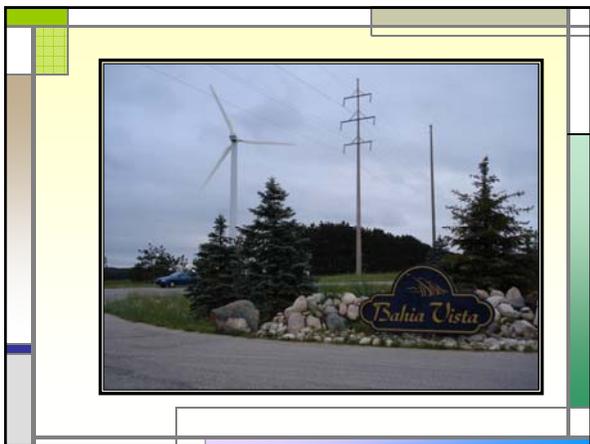
MARQUETTE
UNIVERSITY

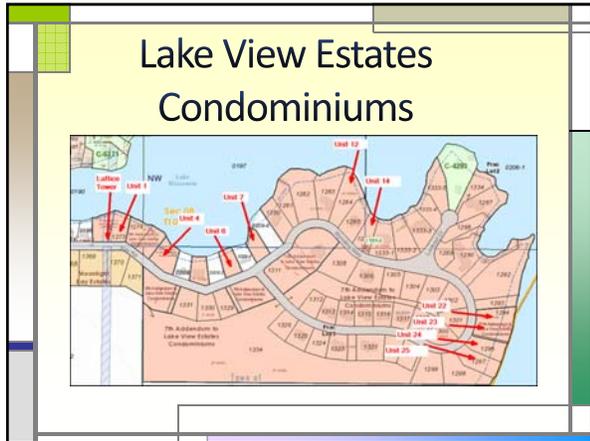
College of Business Administration

**Transmission Lines:
Impact on Property Values**

Marian J. Barnes, MAI, SR/WA
Rolling & Barnes, LLC
AI Condemnation Seminar May 2017







Lake View Estates Condos

- 69 kV dating back to 1913
- Sales of 10 lots from 2014 to 2016
- Sales graphed unit price/size, linear equation used to estimate value of lots 1 and 4 as if unaffected.
 - Lot 1 was -34% less, loss of utility and proximity
 - Lot 4 was -24% less, proximity only

Cottage Grove, Dane County

69 kV

□ Sold October 2010 for \$354,000
□ 2,215 SF house



□ 80 feet wide
□ 26% of the lot area

4 Comparables



Cottage Grove, Dane County

- Arrayed in a grid
- Adjusted for standard house features
- The encumbered sale was -5% less

Meadowlands Village, Fond du Lac

138 kV







Meadowlands Village Improved Sales

- 71 sales from June 2012-June 2016
- 8 encumbered sales, easement 17 to 35 feet from house
- 1,218 SF to 2,115 SF
- Ranch, 2-story, multi level
- Constructed 2004 – 2014
- Average lot size: 11,118 SF
- Average price, all sales: \$180,641

Marian J. Barnes, Transmission Lines and Proximity Impact, IRWA ROW Magazine, Sept/Oct 2016

Variables

- GLA
- Bedrooms
- Bathrooms
- Garage bays
- Age
- Lot size
- Easement

Regression Analysis Results

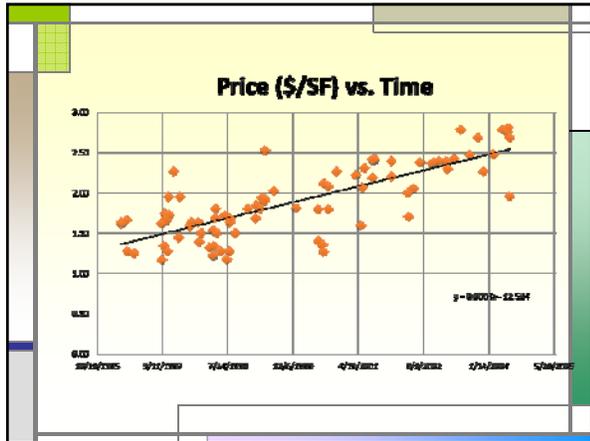
- 3rd bath, GLA, and age impacted price
- P-value for easement 0.579
- Encumbered houses were -2.2% lower value

Descriptive Statistics

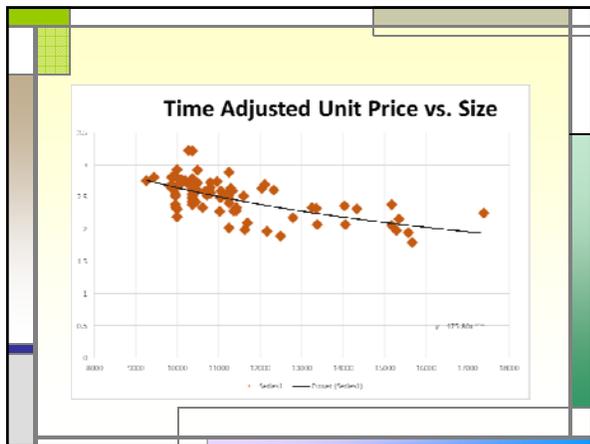
	No Adjustment Average Price	Adjusted for Age, Baths, GLA
No Easement	\$181,584	\$170,779
With Easement	\$173,213	\$167,601
	-4.61%	-1.86%

Meadowlands Village Lot Sales

- Lot Sales from a 2004 study :
682 subdivision lots less than 1 acre
- 104 of those lots were in Meadowlands Village
- 9 encumbered with easement
- 87 unencumbered
- Outliers, Time and Size adjustment







Meadowlands Village Lots

Impact of Easement on Lot Value

Descriptive Statistics:
-9%, -14% including larger corner lots

Regression Analysis:
-17% impact on price

Entire 2004 study showed a -12% impact

Meadowlands Conclusions

- 9% to -17% in lot value
- 2% to -5% in improved value
- 138 kV and distribution
- Easement encumbers 33% of the lot
- Edge of easement to homes:
17 to 35 feet
- Diminution attributed to proximity

Conclusions

- Percent impact is greater for lots:
-9% up to -34%
- Percent impact for subdivision homes:
-2% to -5%
- Our studies are consistent with other published studies.

Proximity Damages

VON BRINSEN
Real Estate & Appraisals, LLC

Milwaukee | Madison

411 East Wisconsin Avenue | Suite 1000 | Milwaukee, WI 53202 | www.vonbrinsen.com

WHAT IS IT?

- Proximity damages are a form of severance damages, or a diminution of value to the remainder.
- *Eaton* defines "Proximity Damages" as "[a]n element of severance [compensable] damages that is caused by the remainder's proximity to the improvement being constructed, e.g., a highway...
- *J.D. Eaton, MAI*, Real Estate Valuation in Litigation, p. 314. (hereinafter, "Eaton")

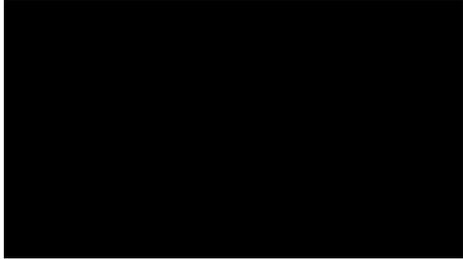
2

Proximity to the Improvement



3

**Proximity
to the Improvement**



4

WHAT IS IT?

- *Eaton* further explains that “Proximity Damages,” “may also arise from proximity to an objectionable characteristic of a site or improvement, *e.g.*, dirt, dust, noise, vibration.”
 - *Id.*
- For example, *sewage treatment facility*.

5

Codified in Wisconsin

- Wis. Stat. sec. 32.09 (6)(e)

(6) In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, 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 condemnor's land*. In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, *including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property*. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.

6

Need to think "outside the box"



7

Need to think "outside the box"

- Example, dentist's office...



8

Forms of Proximity Damages

- Damages to the remainder *from proximity of the improvement* may come in various forms, all of which an appraiser and/or attorney should look for:
- *Nichols* on Eminent Domain identifies some (*Nichols* sec. 14.02):
 - Loss of Access
 - Change in highest and best use
 - Development potential
 - Zoning violations
 - Fear and apprehension / stigma

9

Access

- *Access damages* in eminent domain has become such a complex issue in Wisconsin case law, I reserve a discussion for another symposium, but refer you to:
 - *Hastings Realty Corp. v Texas Co.*, 28 Wis. 2d 305, 137 N.W.2d 79 (1965).
 - *Crown Zellerbach Corp. v. Department of City Development of City of Milwaukee*, 47 Wis. 2d 142, 177 N.W.2d 94 (1970).
 - *National Auto Truckstops, Inc. v. DOT*, 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198.
 - *118th Street Kenosha, LLC v. Wis. Dept of Transp.*, 2014 WI 125, 359 Wis. 2d 30, 856 N.W.2d 486
 - *Hoffer Props., LLC v. DOT*, 2016 WI 5, 366 Wis. 2d 372, 874 N.W.2d 533.
 - Stay tuned for: *North Mayfair 1, LLC, et al. v. DOT*, 2017 AP 256.

10

Change in Highest and Best Use

- The proximity of an improvement can change the highest and best use of a property:
 - For example:
 - Rural residential home with screening and privacy becomes lower-end residential rental.

11

Change in Highest and Best Use



12

Development Potential

- When a taking changes the size/shape of a parcel it may impacts what could be built on the parcel.
 - *Nichols, sec. 14.02* gives the example of a property that in the before condition allowed for enough on-site circuitry to be operated as a large distribution center, but in the after condition only small delivery trucks can operate on the property.
 - This proximity damage may overlap with change in highest and best use.

13

Zoning Violations

- A taking will often result in a property that, in the after condition, does not conform to local zoning ordinances, *namely setback, lot size and parking requirements*.
 - Even if the property and its current structure are considered *legal non-conforming* in the after condition, *the property still may suffer additional damage from the non-conforming status*.

14

Zoning Violations

- For example, a property that becomes legal *non-conforming* because proximity of the new road may suffer, *inter alia*, the following:
 - Inability to secure, or loss of, financing because of non-conforming status.
 - *Inability to expand, redevelop or remodel the property because of non-conforming status.*

15

Zoning Violations

- *Securing a variance* is the easiest way to remedy severance damages due to a zoning violation, but an appraiser should hesitate to simply include the cost of securing the variance as damages because *getting the variance is far from guaranteed*.

16

Stigma



17

Stigma

- *Fear and apprehension* from the proximity of an improvement may significantly impact the value of the remainder.
 - This is often referred to as "*stigma*."
 - *Examples:*
 - High voltage transmission wires
 - Pipelines
 - Transpiration of nuclear waste
 - Waste water treatment

18

Stigma

- *Courts throughout the County have taken THREE DIFFERENT APPROACHES:*
 - “Majority Rule”
 - “Intermediate Rule”
 - “Minority Rule”

- 4A-14 Nichols on Eminent Domain sec. 14.03 (2017)

Stigma

- *The Majority Rule:*
 - Evidence of fear or apprehension is admissible if there is proof that such fear or apprehension actually causes a diminution in market value of the property being taken, without any need for independent proof of the reasonableness of the fear or apprehension.

• See, e.g., *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 898-899 (Fla. 1987); see also *United States ex rel. TVA v. Easement and Right of Way*, 405 F.2d 305 (6th Cir. 1968); *Whitney v. Kansas City Power & Light Co.*, 6 Kan. App. 2d 599, 631 P.2d 268 (Kan. Ct. App. 1981); *Criscoada v. Power Auth. of N.Y.*, 81 N.Y.2d 649, 602 N.Y.S.2d 588, 621 N.E.2d 1195 (N.Y. 1993); *City of Santa Fe v. Komis*, 114 N.M. 659, 845 P.2d 753 (N.M. 1992).

4A-14 Nichols on Eminent Domain § 14.03.

Stigma

- *The Intermediary Rule:*
 - Evidence of fear or apprehension is admissible only if it is proven that the fear or apprehension is reasonable, and the existence of such fear decreased the market value of the remainder.

• See, e.g., *Gulledge v. Tex. Gas Transmission Corp.*, 256 S.W.2d 349 (Ky. 1952); *Dunlap v. Loup River Pub. Power Dist.*, 136 Neb. 11, 284 N.W. 742 (Neb. 1959); *Fanning v. MAPCO, Inc.*, 181 N.W.2d 190 (Iowa 1970) (articles were not admitted to prove the truth of their content but to show that the fear of danger was a matter of common knowledge among the population from whom a buyer for the property would likely come); *Phillips Pipeline Co. v. Ashley*, 605 S.W.2d 514 (Mo. Ct. App. 1980) (articles not introduced to prove fact of pipeline explosion but to show existence and reasonableness of fear in the minds of possible purchasers).

Stigma

• The Minority Rule:

- In only a few jurisdictions, courts do not allow any evidence of the public's fear or apprehension regarding the public project under any circumstances, regardless of how reasonably grounded that fear and/or apprehension may be.

- See, e.g., *Ala. Elec. Coop., Inc. v. Jones*, 574 So. 2d 734 (Ala. 1990).

22

Stigma

• Wisconsin Follows the MAJORITY RULE:

The Court of Appeals has concluded that:

"where the requisite nexus has been established by a qualified expert between the evidence of fear regarding the presence of a natural gas transmission pipeline on condemned property and the fair market value of that property following the taking and the evidence is relevant and not speculative, remote or a waste of time, such evidence may be admissible in a condemnation proceeding to determine the diminution value of that property."

Hoekstra v. Guardian Pipeline, LLC, 2006 WI App 245, 298 Wis. 2d 165, 726 N.W.2d 648, (Wis. Ct. App. 2006).

23

How to Measure Proximity Damages

- Examples:

- If change in highest and best use, different comparable sales in after value
- Change adjustment made in your adjustment grid
- Paired sales analysis or proximity study
- Apply a % diminution in value to the remainder based on professional judgment and common sense

24

The von Briesen & Roper, s.c. Eminent Domain Team:

Milwaukee

Alan Marcovitz

Nick Boerke
Smitha Chintamaneni
Rebecca Roeker
Andrea Roschke

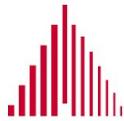
Madison

Tom Hornig

Kraig Byron
John Kassner
Ron Trachtenberg



Milwaukee | Madison
411 East Wisconsin Avenue | Suite 1000 | Milwaukee, WI 53202 | www.vonbriesen.com



Appraisal
Institute®

*Professionals Providing
Real Estate Solutions*

14TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

Thursday, May 18, 2017

Marquette University Law School Eckstein Hall

1215 W. Michigan St., Milwaukee, WI 53233

Case Law Update

Attorney

John Van Lieshout

Co-Sponsored by:

The Wisconsin Chapter of the



Appraisal
Institute®

*Professionals Providing
Real Estate Solutions*



The Real Estate Group at von Briesen & Roper, s.c.



MARQUETTE
UNIVERSITY

LAW SCHOOL



MARQUETTE
UNIVERSITY

College of Business Administration

CASE LAW UPDATE

John M. Van Lieshout
Reinhart Boerner Van Deuren s.c.
jvanlieshout@reinhartlaw.com
414-298-8182



CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017)

Facts:

- City utilizes power of eminent domain to acquire approximately 6% of CED's property to reconstruct the intersection of Jackson Street and Murdock Avenue to include the construction of a roundabout
- The total cost of the project was \$4,060,000, with the City's share (the Wisconsin DOT paid the balance) being \$1.4 million, of which \$307,118.72 was special assessed to property owners adjacent to Jackson Street and Murdock Avenue
- CED is the owner of a property located at the corner of Jackson Street and Murdock Avenue on which a Taco Bell Restaurant franchise operates



CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

- The City acquired a portion of CED's property for the project, and CED and the City litigated the amount of just compensation, but reached a settlement in April 2012 that the City would pay \$180,000. The City was released from claims arising out the condemnation.
- When the City levied special assessments against CED, CED challenged the special assessments on the grounds that the City was foreclosed from assessing special benefits to its property where it failed to allege special benefits in the earlier condemnation action, as well as maintaining that a genuine issue of material fact remains as to whether its property incurred any special benefits
- The Circuit Court granted summary judgment to the City, and from that summary judgment ruling, CED appealed



CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

Decision:

- CED argued it was error for the Circuit Court to allow the City to exercise its police power and levy a special assessment where the City failed to allege special benefits in the eminent domain action
- CED provided no case law or direct statutory support for its argument, claiming only that the term "special benefits" as used in Wis. Stat. Ch. 66 was indistinguishable from its use in Wis. Stat. Ch. 32
- The City argued that special benefits under eminent domain law and special benefits under special assessment law are two different beasts
- The Court of Appeals rejected CED's contention that the concept of special benefits is the same for both condemnation and special assessment

© 2017 All Rights Reserved
Reinhart, Bullman, Moore & Root LLP



CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

- The Court agreed with the City that special benefits are not required to be present in an eminent domain action in order for the City to allege special benefits under a special assessment
- The Court reasoned that in an eminent domain proceeding, special benefits accrued to the remaining property and affecting its market value are deductible in ascertaining the amount of damages to be awarded
 - Under such circumstance, the taking must affect the market value of the remaining property
 - The benefit must accrue to the property itself as distinguished from the owner or its business

© 2017 All Rights Reserved
Reinhart, Bullman, Moore & Root LLP



CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

- In the eminent domain proceeding, the City's expert, Patrick Wagner, appraised the CED property and testified that there were no special benefits arising from the condemnation as the condemnation did not result in an increase in the fair market value of CED's remaining property
 - CED's appraiser also indicated that the partial taking caused a loss in fair market value to the remaining property
 - The Court concluded that the testimony established that the special benefits arose from an increase in services and not market value
- From the special assessment context, improved services, as for example, the new lanes resulting in special benefits of an improved traffic flow and reduced traffic congestion, may benefit commercial property

© 2017 All Rights Reserved
Reinhart, Bullman, Moore & Root LLP



CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

- CED also argued that summary judgment was improper because it had raised a genuine issue of fact regarding the presence of special benefits due to the improvements
- In this context, the Court noted that "when a property owner challenges a special assessment, a presumption exists that the city officers proceeded regularly unless the contrary is shown by competent evidence"
- The Court noted that the improvements to the intersection specially benefited CED by providing better traffic flow; a substantial increase in accessibility; a safer, lower cost and shorter travel times for customers, deliveries and employees

CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

- CED's expert claimed that that roundabout intersections are disfavored by the public and actually impair fast food sites as fast food sites are "impulse stops" which benefit from longer intersection delays, and are difficult for larger trucks to navigate
- The majority opinion concluded the CED had failed to overcome the presumption of correctness of the City's actions, as well as establishing a genuine issue of material fact
 - The Court noted that the simple existence of the factual dispute between the parties will not defeat summary judgment if the factual issue is not genuine
 - The Court found that the phrase "special benefit" sets a low bar, requiring only that CED's property be "benefited to some extent"

CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

Concurring Opinion:

- The concurring opinion noted that the special benefits addressed in the City's assessments of approximately \$20,000 for each property were assessed to recoup the cost of the improvements -- increased services -- not changes to market value
- The concurring opinion rejected the contention that special benefits in the context of condemnation is an identical analysis to that in special assessments
- The concurring opinion noted that CED had failed to show by "strong . . . clear and positive proof" that the \$20,000 special assessments were not reasonable -- given that it was undisputed that improvements to the sidewalks, curbs and gutters, etc. had been made -- and the reasonableness analysis requires only that CED's property be "benefited to some extent" and that the amount of the assessment can exceed the value of the special benefits

CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

Dissenting Opinion:

- Judge Gundrum dissented based upon his belief that there was a genuine issue of material fact as to whether a special benefit existed
- Judge Gundrum noted that in opposition of the City's motion for summary judgment, CED submitted the Affidavit of James C. Johnson a "certified general appraiser" who alleges he was previously employed by the Wisconsin Department of Transportation as an "access specialist"
- Judge Gundrum related the many and diverse qualifications of Johnson including the fact that he served as a litigation coordinator for WDOT during which time he trained consultant appraisers who work for the Department "on evaluating general vs. special benefits"

CED Properties, LLC v. City of Oshkosh
373 Wis. 2d. 767 (January 18, 2017) (Cont.)

- Having personally inspected CED's property and the changes to the intersection, Johnson alleged that CED received "no benefits . . . let alone a special benefit" due to the changes
- Johnson stated that the roundabout was not an improvement for CED but actually a detriment because fast food restaurants, like its tenant at the site, Taco Bell, receive business based upon driver impulse while waiting at traffic lights and the new roundabout will impede that business
- Johnson alleged that it was more desirable for Taco Bell to have slowly moving traffic in front of it as opposed to faster moving traffic
- In Judge Gundrum's opinion, all of these allegations created a genuine issue of material fact which should have resulted in a denial of summary judgment and a jury trial on the issue

Fischer v. City of Prairie du Chien
372 Wis. 2d. 185 (September 1, 2016)

Facts:

- The City of Prairie du Chien displaced Delores Fischer from her house and lot in connection with a public project
- Fischer purchased a replacement property
- Fischer was paid \$108,000 from the City as the fair market value of her house and lot, and it was determined that the cost of a comparable replacement dwelling available in the private market was \$95,000

Fischer v. City of Prairie du Chien
372 Wis. 2d. 185 (September 1, 2016) (cont.)

- However, despite the fact that the \$108,000 payment to Fischer exceeded the \$95,000 cost for replacement housing, Fischer filed a claim with the City for an additional \$35,600 as a "replacement housing" payment
- The City denied Fischer's claim
- Pursuant to Wis. Stats. section 32.20, Fischer filed an action seeking an order requiring the City to pay \$35,600
- The Circuit Court dismissed the action, and Fischer appealed

© 2017 All Rights Reserved
 Reinhardt & Reinhardt, P.C.
 13



Fischer v. City of Prairie du Chien
372 Wis. 2d. 185 (September 1, 2016) (cont.)

Decision:

- The Court of Appeals rejected Fischer's argument and affirmed the dismissal of the suit
- The Court noted that a displaced person is entitled under Wis. Stats. section 32.19 to a replacement housing payment that equals the amount, if any, by which the reasonable cost of a comparable replacement dwelling available on the private market falls short of the acquisition payment received by the displaced person
- Despite the fact that Fischer was paid \$108,000, and it was undisputed that the comparable replacement amount was \$95,000, Fischer filed a claim for \$35,600
- Fischer did not object to the comparable replacement amount "side of the equation" (\$95,000)

© 2017 All Rights Reserved
 Reinhardt & Reinhardt, P.C.
 14



Fischer v. City of Prairie du Chien
372 Wis. 2d. 185 (September 1, 2016) (cont.)

- Instead, she contended there needed to be a "carve out" from the acquisition payment side of the equation because she asserted the value of the "residential portion" of the acquired property was only \$59,400 (\$95,000 - \$59,400 = \$35,600)
- Fischer pointed to the fact that her appraiser had opined that if the acquired property had been vacant and unimproved, it had a higher and better use as a commercial property
- The Circuit Court rejected Fischer's argument on the grounds that the "complicated mathematics" involved in Fischer's proposed residential aspect carve out do not apply, given that the acquisition payment for the acquired property was based on a residential use fair market valuation

© 2017 All Rights Reserved
 Reinhardt & Reinhardt, P.C.
 15



Fischer v. City of Prairie du Chien
372 Wis. 2d. 185 (September 1, 2016) (cont.)

- The Court noted that Wisconsin Administrative Code Chapter 92 does refer to a variety of carve outs and modifications for replacement housing payments in order to achieve "apples to apples" comparisons
- However, the Court noted that such arguments were not relevant because it was "uncontested" that the City paid Fischer \$108,000 based on an appraisal that included the following statement: "As improved, the highest and best use of [the] subject property is that of its current use, residential use"
- Indeed, Fischer acknowledged in her briefing that the appraiser she hired, who established the \$108,000 value, concluded the highest and best use of the property, as it was then currently improved, was residential

© 2017 All Rights Reserved. Reinhard & Reinhard, PSC, Chartered
16



Fischer v. City of Prairie du Chien
372 Wis. 2d. 185 (September 1, 2016) (cont.)

- The Court noted that Fischer's entire argument rested on a statement of her appraiser that immediately followed the above statement: "if [the property were] vacant, the highest and best use of [the] subject property would be that of commercial purposes"
- The Court concluded that this observation does not help Fischer, because it merely says that if the situation were different, that is, if the property were vacant, then the highest and best use of the property would be commercial
 - "But the property is not vacant. To repeat, Fischer's own appraiser states that, as improved, the property's highest and best use is residential."

© 2017 All Rights Reserved. Reinhard & Reinhard, PSC, Chartered
17



Gerhartz v. Town of Lomira
372 Wis. 2d 183 (September 22, 2016)

Facts:

- The Elsingers operate a large dairy farm on property to the west of the Gerhartzs' property. They grow crops on farmland east of the Gerhartzs' property.
- The manure from the Elsingers' dairy farm is kept in a storage system and is removed and spread over the Elsingers' farm fields one or two times per year, depending upon the crop rotation. Traditionally, the manure was transported from the storage system to the farm fields in trucks holding approximately 5,500 to 6,000 gallons of manure.
- In August 2010, with the Town of Lomira's permission, the Elsingers installed within the Town's right-of-way across the Gerhartzs' property a manhole cover and an in-ground 8-inch steel casing, which extends from the Gerhartzs' property to the east into property owned by another individual. The in-ground casing is utilized by the Elsingers to pump large quantities of liquid cow manure from their dairy farm to their farm fields located east of the Gerhartzs' property.

© 2017 All Rights Reserved. Reinhard & Reinhard, PSC, Chartered
18



Gerhartz v. Town of Lomira
372 Wis. 2d 183 (September 22, 2016) (cont.)

- Following the installation of the manhole cover and in-ground pipe, the Gerhartzs brought suit against the Town, alleging a claim for inverse condemnation and against the Elsingers for civil trespass. All parties moved for summary judgment.
- The Circuit Court entered summary judgment in favor of the Gerhartzs on their inverse condemnation claim. Further, the court entered summary judgment in favor of the Elsingers on the Gerhartzs' trespass claim. The court determined that the Town had the right to authorize the installation of the manhole cover and in-ground casing within the Town's right-of-way on the Gerhartzs' property.
- The Gerhartzs appealed summary judgment in favor of the Elsingers on the Gerhartzs' trespass claim

Gerhartz v. Town of Lomira
372 Wis. 2d 183 (September 22, 2016) (cont.)

Holding:

- The Gerhartzs contended that the Elsingers were not entitled to summary judgment on the trespass claim based upon the premise that the Town's taking of their property is "void" because the land was not taken for any public use. From this premise, the Gerhartzs argued that the Town did not have the authority to permit the Elsingers to install the manhole cover and in-ground casing, and the Elsingers were thus trespassers upon the Gerhartzs' land.
- The Elsingers argued that the Gerhartzs were judicially estopped from arguing that the Town's taking of the Gerhartzs' property was unlawful. The Court of Appeals agreed with the Elsingers and affirmed.

Gerhartz v. Town of Lomira
372 Wis. 2d 183 (September 22, 2016) (cont.)

Reasoning:

- The Court of Appeals noted that the Gerhartzs had asserted an action for inverse condemnation and that such a claim required the plaintiff to prove that his or her property has been occupied by an entity that possesses the power of condemnation, but that power of condemnation has not been exercised
- The Gerhartzs argued that their argument on appeal was not inconsistent with their inverse condemnation argument before the Circuit Court because in both instances they argued that the Town unlawfully took their property
- However, the Court of Appeals held that a necessary element of the Gerhartzs' inverse condemnation claim before the Circuit Court was that the Town's taking must have been for a public use. To now argue that the taking was not for a public use was wholly inconsistent with their prior legal position. The appeals court affirmed summary judgment dismissing the trespass claim.

118th Street Kenosha, LLC v. DOT
2017 WL 831339 (March 1, 2017)

Facts:

- The LLC owns commercial property improved with a four-store strip shopping center which had been fronted on the east by 118th Avenue
- As a result of a DOT project involving State Highway 50 and I-94, the DOT moved 118th Avenue to the east, leaving the LLC without frontage on and direct access to 118th Avenue
- In addition, the DOT condemned a temporary limited easement on the LLC's property in order to "construct and restore legally conforming access" to it
- The LLC alleged that the subject property now fronts and abuts a large grass area instead of 118th Avenue, which is now a block away

© 2017 All Rights Reserved
Reinhart Tabor Strickland & Shusterman LLP

22



118th Street Kenosha, LLC v. DOT
2017 WL 831339 (March 1, 2017) (cont.)

- The LLC alleged that as a result of DOT moving 118th Avenue, the fair market value of the property had been reduced by \$427,600. The LLC sought these amounts in an action commenced pursuant to Wis. Stat. §§ 84.29(5) and 84.295(6).
- The court stated that, although not noted in the complaint, the LLC had previously sued the DOT to recover compensation pursuant to Wis. Stat. § 32.09(6g) for the decline in the subject property's value as a result of 118th Street being moved. However, the Wisconsin Supreme Court held that the LLC was "precluded from seeking damages under Wis. Stat. § 32.09(6g) for the commercial property's diminution in value which resulted from its loss of direct access in proximity to 118th Avenue" because "the temporary limited easement did not cause the commercial property to lose direct access and proximity to 118th Avenue." 359 Wis. 2d 30, ¶ 61.

© 2017 All Rights Reserved
Reinhart Tabor Strickland & Shusterman LLP

23



118th Street Kenosha, LLC v. DOT
2017 WL 831339 (March 1, 2017) (cont.)

- The DOT moved to dismiss the LLC's complaint for failure to state a claim upon which relief can be granted. The DOT argued that both statutes under which the LLC sued, Wis. Stat. §§ 84.29(5) and 84.295(6) did not create an independent right of action, but merely provided that the DOT "shall pay any damage legally payable under existing law to any property owner directly injured by the vacation or relocation of such street or highway."
- The LLC had not cited any other existing laws as the basis of its claim and therefore the Circuit Court dismissed its complaint with prejudice.
- The LLC appealed.

© 2017 All Rights Reserved
Reinhart Tabor Strickland & Shusterman LLP

24



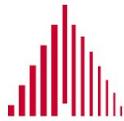
118th Street Kenosha, LLC v. DOT
2017 WL 831339 (March 1, 2017) (cont.)

Decision:

- The Court of Appeals affirmed the dismissal of the LLC's complaint and found that the statutes in question were plain and unambiguous.
- They provide for no separate cause of action, but merely recognize to the extent another "existing law" provides for liability, these statutes . . . do not relieve the state of that liability when the state undertakes actions under the authority provided.
- The court cited to Wis. Stat. § 88.87(2)(c) which allows a landowner to make claims for damage caused by a highway grade which thereby impeded the general flow of surface water or stream water in an unreasonable manner so as to cause an unnecessary accumulation of water. That statute provided a specific procedure for making such a claim (including a time deadline), which the Court of Appeals held was an express waiver of sovereign immunity which is wholly absent from Wis. Stat. §§ 84.29(5) and 84.295(6).

118th Street Kenosha, LLC v. DOT
2017 WL 831339 (March 1, 2017) (cont.)

- In sum, the Court of Appeals held that the liability language in Wis. Stat. §§ 84.29(5) and 84.295(6) is meant to preserve a landowner's causes of action under other statutes, and do not provide for a separate right of action.



Appraisal
Institute®

*Professionals Providing
Real Estate Solutions*

14TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

Thursday, May 18, 2017

Marquette University Law School Eckstein Hall
1215 W. Michigan St., Milwaukee, WI 53233

Studies of Partial Taking Cases

*Moderator/Mediator
Attorney Stan Riffle*

*Lead Counsel for Owners
Attorney Alan Marcuvitz*

*Lead Counsel for Condemnors
Attorney R. Duane Harlow*

*Appraisers for Owners
Larry Nicholson and Art Sullivan*

*Appraisers for Condemnors
Steve Vitale and Dominic Landretti*

Co-Sponsored by:

The Wisconsin Chapter of the



Appraisal
Institute®

*Professionals Providing
Real Estate Solutions*



The Real Estate Group at von Briesen & Roper, s.c.



MARQUETTE
UNIVERSITY

LAW SCHOOL



MARQUETTE
UNIVERSITY

College of Business Administration

STUDIES OF PARTIAL TAKING CASES

Attorney H. Stanley Riffle

Moderator/Mediator

Attorney Alan Marcuvitz

Lead Counsel for Owners

Attorney R. Duane Harlow

Lead Counsel for Condemnors

Larry Nicholson

Appraiser for Owners

Art Sullivan

Appraiser for Owners

Steve Vitale

Appraiser for Condemnors

Dominic Landretti

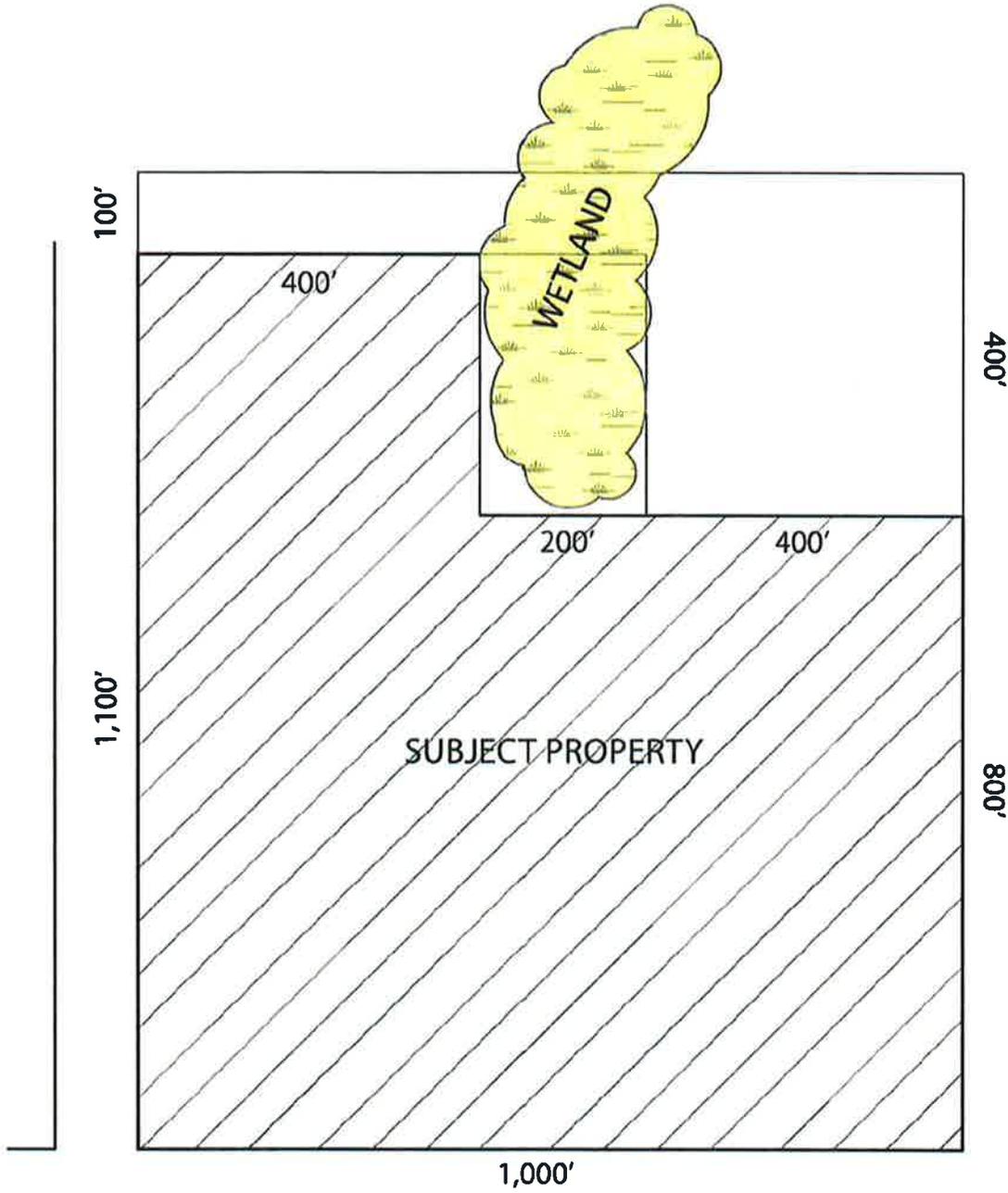
Appraiser for Condemnors

PARTIAL TAKING SCENARIOS

Scenarios 1 - 4

- A. The Issues
- B. Facts
- C. Law Elements
- D. When Does the Attorney for each party expect the appraiser to address the Issue in the appraisal, and what is to be addressed?

SCENARIO #1



AREA TAKEN

Prepared by:
Attorney Alan Marcuvitz
von Briesen & Roper, s.c.
411 E. Wisconsin Ave., Suite 1000
Milwaukee, WI 53202
amarcuvitz@vonbriesen.com

SCENARIO ONE

A. The Issue presented is whether the part not taken is an uneconomic remnant.

B. Facts.

1. The part taken is 21.12 acres, to build a new middle school, with the usual facilities, including athletic and play fields and faculty and visitor parking.

2. The part not taken is 6.43 acres.

3. The zoning of the property in the Before condition is for general commercial development on the southerly 10.56 acres and single family lots, minimum 1/3 acre area, on the northerly 10.56 acres.

4. The zoning of the property in the After condition is for institutional access and single family lots, minimum 1/3 acre area, on the part not taken of 6.43 acres.

5. The property to the east is zoned the same as the subject.

6. The property to the north is zoned the same as the northerly portion of the subject.

C. Law Elements.

1. Why is the Issue something which must be considered?
 - a. Sec. 32.06(3m)(a) and (b), Wis. Stats.
 - b. Sec. 32.05(3a), Wis. Stats.
2. What “tools” are provided by the Statutes?
 - a. Size
 - b. Shape
 - c. Condition
 - d. Little value
 - e. Economic viability
 - f. Substantially impaired economic viability
3. Issue must be raised timely or be barred.
Sec. 32.05(5); 32.06(5), Stats.

Waller v. ATC, 350 Wis.2d 242 (2013)

D. When does the attorney for each party expect the appraiser to address the Issue in the appraisal, and what is to be addressed?

1. Law requires Issue to be fully developed and reflected in owner’s appraisal by the time the jurisdictional offer is issued. Condemnor’s appraiser can either address issue in original appraisal or later, when claim arises.
2. Everything which allows an expression of a well-grounded opinion on the Issue is appropriate, under the Scenario presented, such as:
 - a. What would it cost to install a street running east/west through wetland?
 - b. Could a street be installed from either the north or east? If so, at what cost?
 - c. How many lots can be created by using 1 or more alternative streets?

- d. What would be hard development costs?
- e. What would be soft development costs?
- f. What would be selling prices for the lots?
- g. Would the development yield a profit?
- h. Would the profit justify the costs and efforts from an entrepreneurial standpoint?

SCENARIO I

Issue #1: Is the part not taken an uneconomic remnant?

Condemnation Symposium May 2017 Dominic Landretti, MAI, AI-GIS

UNECONOMIC REMNANT

• Wis. Stat. § 32.06(3m)(a) - In this subsection, "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.

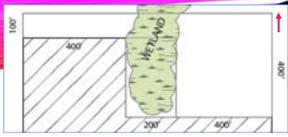
Condemnation Symposium May 2017 Dominic Landretti, MAI, AI-GIS

VALUATION ISSUES

<p>Before – 27.55 acres</p> <ul style="list-style-type: none"> • Apparent adequate size and shape • Wetland used for water feature • Apparent good condition • Subdivision development is feasible • Valuation – per acre analysis 	<p>after – part taken – 21.12 acres</p> <ul style="list-style-type: none"> • Apparent adequate size and shape • Wetland used for water feature • Apparent good condition • Subdivision development is feasible with some limitation • Valuation – per acre analysis 	<p>remainder – 6.43 acres</p> <p>Is subdivision development feasible?</p> <ol style="list-style-type: none"> 1. SIZE 2. SHAPE 3. CONDITION
---	--	---

Condemnation Symposium May 2017 Dominic Landretti, MAI, AI-GIS

REMAINDER ISSUES – SIZE



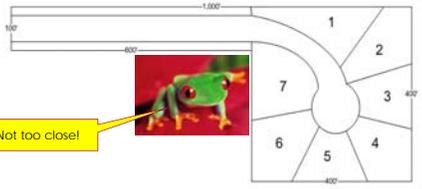
- Can't develop lots on entry point from west or wetland area
 - 100 feet x 600 feet plus 200 feet x 300 feet = 120,000 sf or 2.75 acres
- Remaining area 400 feet x 400 feet = 160,000 sf or 3.67 acres
 - Assume 30% for streets and green features and 70% for lot development
 - Lot development area = 160,000 sf x 70% = 112,000 sf or 2.57 acres
- Developable lots on 2.57 acres
- Zoning lot size is 1/3 acre = seven lots

Sufficient?

Condemnation Symposium May 2017 Dominic Landretti, MAI, AI, GRS

REMAINDER ISSUES – SHAPE

- Can seven lots fit into the east square with a street and cul-du-sac?
- Costs?



Reasonable?

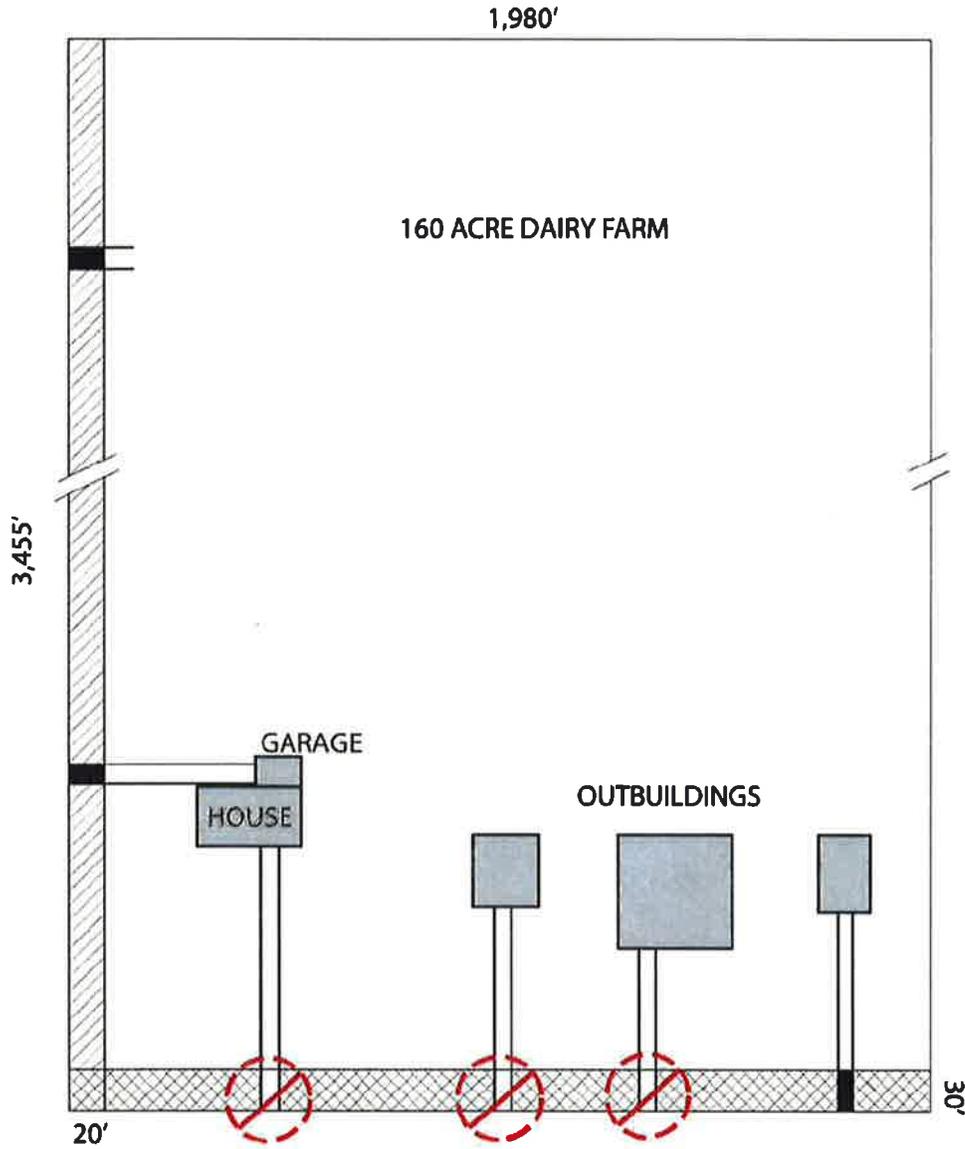
Condemnation Symposium May 2017 Dominic Landretti, MAI, AI, GRS

REMAINDER ISSUES – CONDITION

- Wetland impact on lots
- Wetland impact on road construction possibility and costs
- Impact on absorption – time value
 - Shape
 - School proximity
 - Wetland
 - Buildability
- Sales of similar size, shape and condition for development?

Condemnation Symposium May 2017 Dominic Landretti, MAI, AI, GRS

SCENARIO #2



-  ACCESS POINT
-  TLE TAKING
-  PRIOR TAKING

*Not to scale

Prepared by:
Attorney Alan Marcuvitz
von Briesen & Roper, s.c.
411 E. Wisconsin Ave., Suite 1000
Milwaukee, WI 53202
amarcuvitz@vonbriesen.com

SCENARIO TWO

A. The Issue presented is the amount of Just Compensation due to the farm owner.

B. Facts.

1. What was originally a 160 acre farm with a farmhouse and significant outbuildings common to a dairy farm had a taking occur 18 years ago, when the Town widened the road abutting on the west by taking 69,100 sq. ft. and imposed access limitations, except for 2 designated locations.

2. The current taking is to improve the E/W road on the south which serves as a frontage road for the freeway which also runs E/W. The 30' taking is only for a 3 year TLE. The access from the frontage road to the farmhouse and to the 2 westerly outbuildings are also being closed.

C. Law Elements.

1. Measurement of Just Compensation is directed by Sec. 32.09(6(a)-(g), Stats.

2. Comparison of diminution in value with cost(s) to cure.

Alsum v. WISDOT, 276 Wis.2d 654 (Ct. App. 2004)

Wisconsin Civil Jury Instruction - 8103

3. How, if at all, does the prior taking affect Just Compensation?

Seefeldt v. WISDOT, 113 Wis. 2d 212 (Ct. App. 1983)

D. What does the attorney for each party expect the appraiser to address in the appraisal?

1. Everything relevant to a well-supported opinion of Just Compensation, under the Scenario presented, such as:

a. What system could be installed to provide reasonable access to all outbuilding? At what cost?

b. What is value lost if no such cure is undertaken?

c. Has the house lost value if its single access is from the west?

d. Would it be worthwhile to extend the outbuilding access to the house?

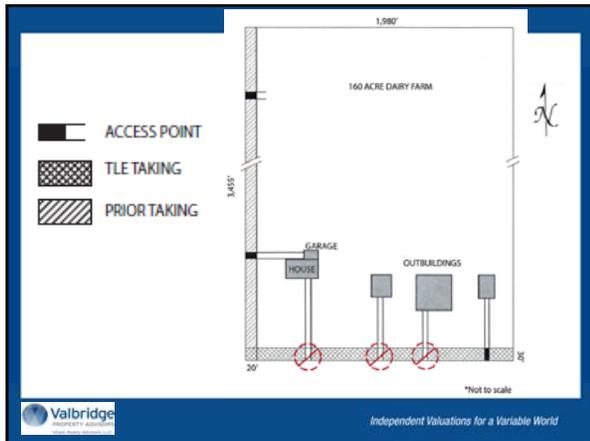
e. What is effect of prior taking, if any?

Valbridge
PROPERTY ADVISORS
Vitale Realty Advisors, LLC

SCENARIO 2: ISSUES 2 & 3 ACCESS & SEQUENTIAL TAKINGS

S. Steven Vitale, MAI
svitale@valbridge.com
262-782-7990

Independent Valuations for a Variable World



Fact Summary

- **Before**
 - 160 acre dairy farm with house with attached garage and 3 outbuildings.
 - 2 access points from West Road and 4 access points from South Road
 - Prior taking 18 years ago of 20' strip along West Road and limit access to 2 points as shown.
- **After**
 - New taking for construction of an improved frontage road along South Road
 - No fee taking, only TLE of 30' strip (59,400 SF or 1.364 acres) for 3 years
 - Access reduced to 1 access opposite easterly outbuilding

Valbridge
PROPERTY ADVISORS
Vitale Realty Advisors, LLC

Independent Valuations for a Variable World

Appraisal Considerations

- Highest and Best Use
- Alteration of Access
- Cost to Cure
- Sequential Takings

 *Independent Valuations for a Variable World*

Highest and Best Use

1. Continued farm or ag use?
2. Is ag use an interim use?

 *Independent Valuations for a Variable World*

Access

1. Does it impact current use or HBU?
2. Does it impact value?
3. Does "reasonable access" remain?
4. Is it compensable if closings are result of a Police Power?
5. Was access closings part of a taking or a regulatory action?

 *Independent Valuations for a Variable World*

Costs to Cure

1. Research alternatives to mitigate damages
2. What system could be installed to provide reasonable access to all outbuildings?
3. Shared drive with interior connecting drive for to the outbuildings
4. What is value lost if no cure is undertaken? (Need to determine Uncured After Value)
5. Is it necessary to replace the drive to the house? Has the house lost any value with only one access drive? A single drive is likely typical in the market.

 Independent Valuations for a Variable World

Sequential Takings

1. More of a legal argument than appraisal issue
2. Would want to rely on a legal opinion before including
3. Include an Extraordinary Assumption that prior taking is part of current project
4. In this example, 18 years seems like a long time to argue a sequential taking, but all the facts are not known

 Independent Valuations for a Variable World

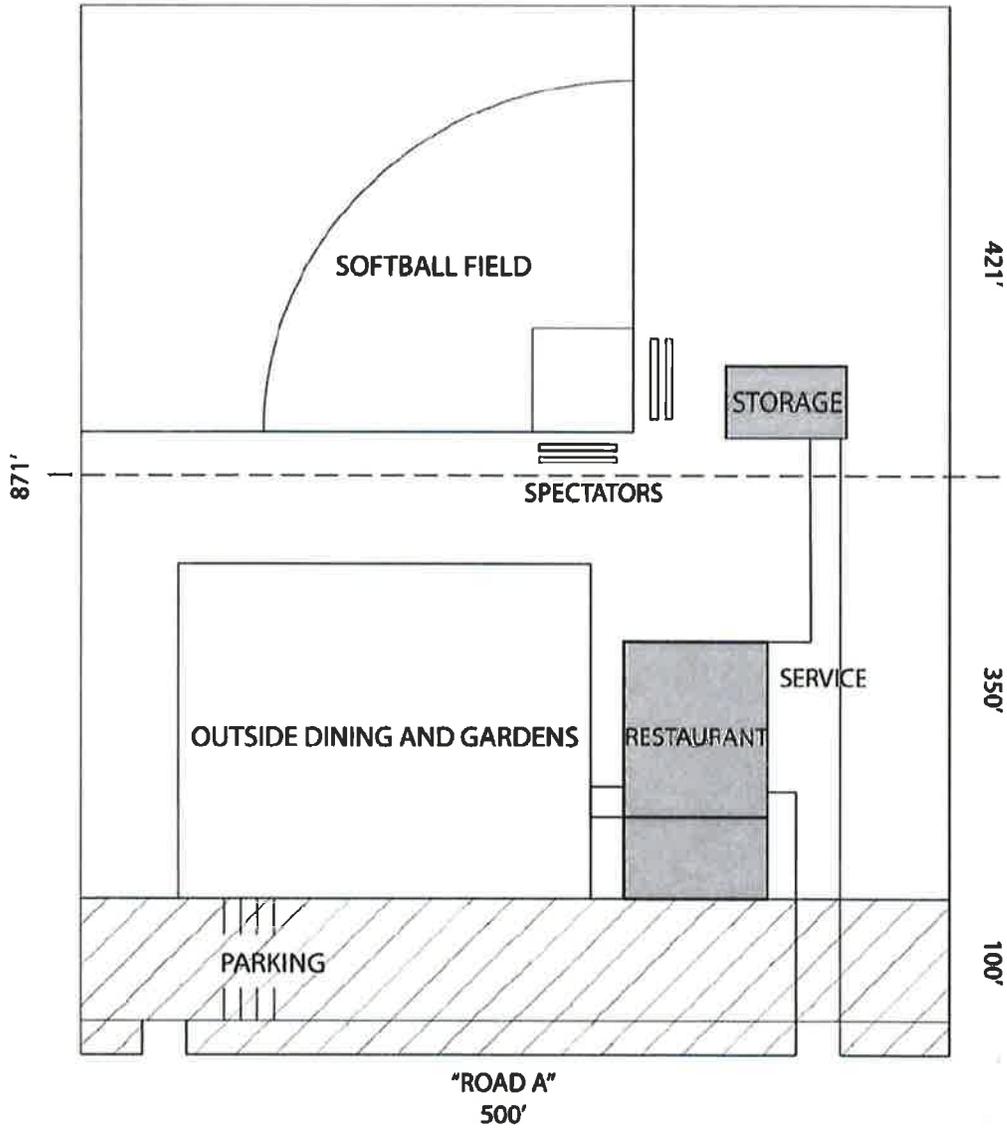

Valbridge
PROPERTY ADVISORS
Vitale Realty Advisors, LLC

EHT DNE!

S. Steven Vitale, MAI
svitale@valbridge.com
262-782-7990
valbridge.com

Independent Valuations for a Variable World

SCENARIO #3



Prepared by:
Attorney R. Duane Harlow
Assistant Attorney General – Wisconsin Department of Justice
17 West Main Street
P. O. Box 7857
Madison, Wisconsin 53707-7857
harlowd@doj.state.wi.us

SCENARIO THREE

A. The Issue presented is the amount of Just Compensation due to the landowner. Specifically, what are the before and after values as guided by Wis. Stat. § 32.09 and relevant case law.

B. Facts.

1. This 10 acre parcel of property is fully developed with a full-service restaurant, parking area, outside seating area and a league-used softball field. The restaurant is allowed to serve alcoholic beverages in the outside seating area, but not at the softball field.

2. The access points are simply to be moved to points along the new lot line, which extends E/W along the south wall of the restaurant building.

3. The access points are simply to be moved to points along the new lot line, which extends E/W along the south wall of the restaurant building.

4. Properties abutting on the east and west are fully developed with commercial uses to the same depth as the subject.

5. There is a vacant 40 acre parcel abutting the north line, which is for sale with an asking price of \$400,000. It is zoned and used for agricultural purposes.

C. Law Elements.

1. Measurement of Just Compensation is directed by Sec. 32.09(6)(a)-(g), Stats.

2. During construction damages? Wis. Stat. § 32.09(6)(e) vs. Before and After Rule?

3. Legal nonconforming remainder.

Wis. Stats. §§ 59.69, 59.692, 60.61, 62.23, 62.231

Wisconsin Civil Jury Instruction – 8140

4. Severance Damages for Proximity.

Wis. Stat. § 32.09(6)(e)

Require Additional Experts? *Daubert*. Wis. Stat. § 907.02.

5. Can assemblage with the North Parcel be considered?

a. Can a post taking purchase be a proposed cure?

Clarmar Realty Co., Inc. v. City of Milwaukee, 129 Wis. 2d 81, 383 N.W.2d 890 (1986).

Wisconsin Civil Jury Instruction – 8145

Bembinster v. State, 57 Wis. 2d 277, 203 N.W.2d 897 (1973).

6. Extension of the alcohol license to include the north half of the remainder?

D. What does the attorney for each party expect the appraiser to address in the appraisal?

2. What impacts, if any, are there due to the remainder being legal nonconforming?

- a. Loss of flexibility with regard to expansion or modification?
 - b. Stigma of “nonconforming”?
 - c. Market evidence one way or the other? Competitive disadvantage?
3. What severance damages, if any, due to a proximity to the roadway?
 - a. Noise, vibration, lights, other physical impacts?
 - b. Additional Experts?
 - c. Market evidence
4. Is there a cure that costs less than the severance damages?
 - a. Is there ample market evidence that assemblage is reasonably probable?
 - b. Is there ample evidence that rezone of the North Parcel is reasonably probable?
5. If a cure is employed, what is the after value of the remainder as cured?

Scenario 3

Issues:

- Non Conformity of remaining improvements
- Proximity of new right of way to improvements
- Assemblage as part of a cure?

Case Study 3

Before Taking Market Value

Land 10ac	\$ 400,000
Improvements	
12,000sf restaurant	
45,000sf outdoor dining and gardens	
Softball field	
Storage shed	
\$75/sf imp	
	<u>\$ 900,000</u>
Total	\$1,300,000

Size or depth of taking is not necessarily an indicator of significance of damage

<p>3' depth of fee taking New ROW – 47' minimum to building</p>	<p>100' depth of fee taking New ROW – 23' to building</p>
--	--

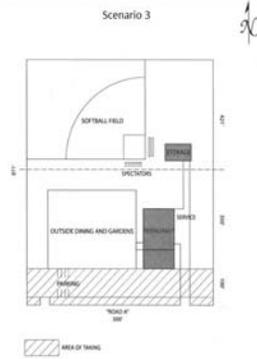
Project impacts are complicated by sites with existing non-conformity, limited setback, or special use structures in the before condition.



Scenario 3

Highest and Best Use

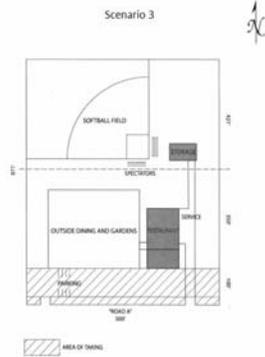
1. Legal Permissions
2. Physical Features
3. Financial Feasibility
4. Maximum Productivity



Case Study 3

Legal Permissions

Non-conformity
What will non-conformity mean to this property?



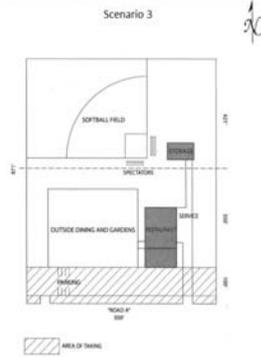
Case Study 3

Non-Conformity

2005 Senate Bill 253
2005 Wisconsin Act 112

Addresses restoration of non-conforming structures damaged or destroyed by vandalism or certain natural forces.

(see handout for copy of 2005 Wisconsin Act 112)



Non Conformity

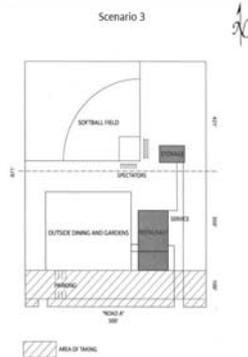
What about ordinance restrictions which prohibit the modification or addition to buildings within the setback area.



Case Study 3

What will non-conformity mean to this property?

1. Limited or no modification to building
2. If replacement of the parking area causes other improved areas to also be relocated, (dining area), compliance to current ordinance requirements, including serving alcohol outdoors, will be required.

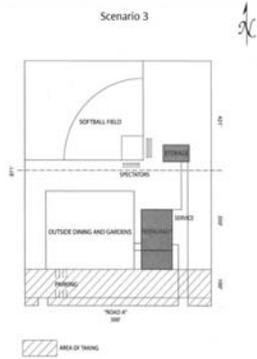


Scenario 3

Physical Possibilities

Proximity

What will the relocation of the right of way (closer to improvements) mean to this property?



Proximity

- Wisconsin Statutes address proximity issues in:
- 32.09 (6)
In the case of a partial taking . . . Compensation to be paid by the condemnor shall be to the following items

(e) Damages resulting from actual severance of land including . . . Proximity damage to improvements remaining on condemnee's land.

What are the practical issues of proximity

Can the site still function as it previously did?

Time for a site engineer.



Reasonableness of Proximity

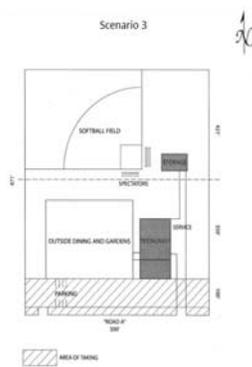
Would a local municipality allow this type of condition for new development?



Proximity

What will the relocation of the right of way, closer to improvements mean to this property?

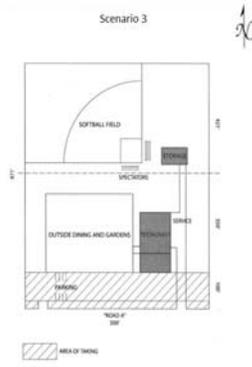
1. Road improvements have the potential of being 100' closer to customer areas, in fact up to the front wall of the building. Is this acceptable in the market for this type of use?
2. Loss of Parking – Where can parking be replaced without impacting other improvements on the site?



Scenario 3

Financial Feasibility

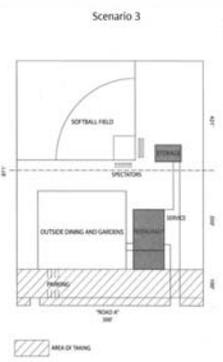
1. This appears to be a property, whose improvements contribute significantly to use as a restaurant/league recreational facility.
2. Loss of parking without replacement prevents any commercial use on this property.



Financial Feasibility

Cost to Cure

1. Is it reasonable to replace parking at back of site?
2. Is it reasonable to relocate outdoor dining without disconnecting it from restaurant or needing to relocate softball field as well?
3. Would assembling with the neighboring parcel assist in redeveloping this site?



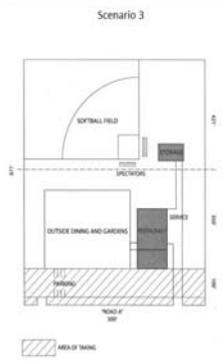
The site plan for Scenario 3 shows a rectangular lot with a softball field in the upper left, an outdoor dining and garden area in the lower left, a parking lot at the bottom, and a building footprint on the right. A north arrow is in the top right. A legend at the bottom indicates 'AREA OF TRAIL' with a hatched pattern.

Scenario 3

Maximum Productivity

Without replacement of parking, existing improvements are not usable for any purpose.

Cost to cure measures are complex in their impact on the maximum productivity of the property's use as a restaurant and league recreation facility.



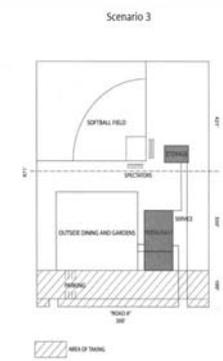
The site plan for Scenario 3 shows a rectangular lot with a softball field in the upper left, an outdoor dining and garden area in the lower left, a parking lot at the bottom, and a building footprint on the right. A north arrow is in the top right. A legend at the bottom indicates 'AREA OF TRAIL' with a hatched pattern.

Maximum Productivity

While working with a site engineer to redesign this site's layout, I would be considering what alternative uses could be considered, as a means of estimating diminished value.

Alternative uses would need to consider the cost of parking replacement, removing/razing unnecessary site components and remodeling building.

Do we need to relocate the current landowner if H/B use changes?

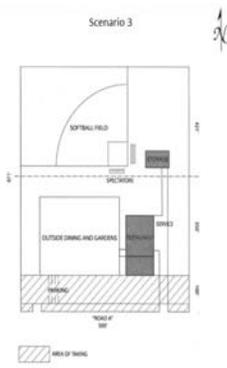


The site plan for Scenario 3 shows a rectangular lot with a softball field in the upper left, an outdoor dining and garden area in the lower left, a parking lot at the bottom, and a building footprint on the right. A north arrow is in the top right. A legend at the bottom indicates 'AREA OF TRAIL' with a hatched pattern.

Scenario 3

After Taking Market Value
Cost to Cure considered

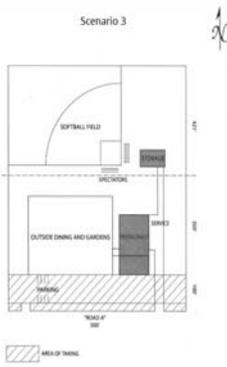
Land 8.85	\$ 354,000
Improvements	
Before Taking	\$ 900,000
Cost to Cure	
Parking	\$ (150,000)
Outdoor area	\$ (100,000)
Softball field	\$ (35,000)
Restaurant	\$ (75,000)
Total	\$ 894,000



Scenario 3

After Taking Market Value
Diminished Value

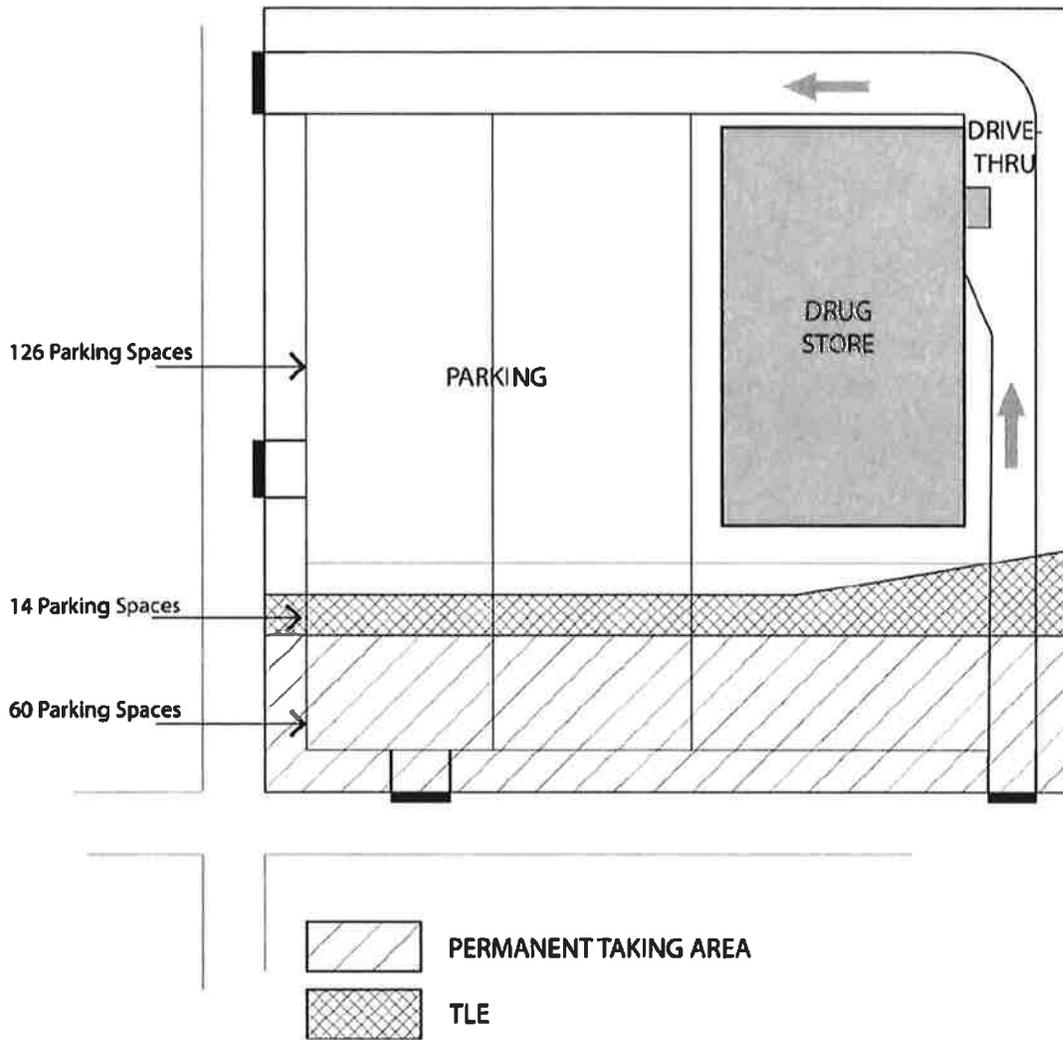
Land 8.85	\$ 354,000
Improvements	
12,000sf commercial in need of renovation	
\$30/sf	\$ 360,000
Site demo	\$ (20,000)
Parking	\$ (150,000)
Total	\$ 544,000



Maximum Productivity

<p>After Taking Market Value Cost to Cure considered</p> <table border="0"> <tr> <td>Land 8.85</td> <td>\$ 354,000</td> </tr> <tr> <td>Improvements</td> <td></td> </tr> <tr> <td>Before Taking</td> <td>\$ 900,000</td> </tr> <tr> <td colspan="2">Cost to Cure</td> </tr> <tr> <td>Parking</td> <td>\$ (150,000)</td> </tr> <tr> <td>Outdoor area</td> <td>\$ (100,000)</td> </tr> <tr> <td>Softball field</td> <td>\$ (35,000)</td> </tr> <tr> <td>Restaurant</td> <td>\$ (75,000)</td> </tr> <tr> <td>Total</td> <td>\$ 894,000</td> </tr> </table>	Land 8.85	\$ 354,000	Improvements		Before Taking	\$ 900,000	Cost to Cure		Parking	\$ (150,000)	Outdoor area	\$ (100,000)	Softball field	\$ (35,000)	Restaurant	\$ (75,000)	Total	\$ 894,000	<p>After Taking Market Value Diminished Value</p> <table border="0"> <tr> <td>Land 8.85</td> <td>\$ 354,000</td> </tr> <tr> <td>Improvements</td> <td></td> </tr> <tr> <td>12,000sf commercial in need of renovation</td> <td></td> </tr> <tr> <td>\$30/sf</td> <td>\$ 360,000</td> </tr> <tr> <td>Site demo</td> <td>\$ (20,000)</td> </tr> <tr> <td>Parking</td> <td>\$ (150,000)</td> </tr> <tr> <td>Total</td> <td>\$ 544,000</td> </tr> </table>	Land 8.85	\$ 354,000	Improvements		12,000sf commercial in need of renovation		\$30/sf	\$ 360,000	Site demo	\$ (20,000)	Parking	\$ (150,000)	Total	\$ 544,000
Land 8.85	\$ 354,000																																
Improvements																																	
Before Taking	\$ 900,000																																
Cost to Cure																																	
Parking	\$ (150,000)																																
Outdoor area	\$ (100,000)																																
Softball field	\$ (35,000)																																
Restaurant	\$ (75,000)																																
Total	\$ 894,000																																
Land 8.85	\$ 354,000																																
Improvements																																	
12,000sf commercial in need of renovation																																	
\$30/sf	\$ 360,000																																
Site demo	\$ (20,000)																																
Parking	\$ (150,000)																																
Total	\$ 544,000																																

SCENARIO #4



Prepared by:
Attorney Alan Marcuvitz
von Briesen & Roper, s.c.
411 E. Wisconsin Ave., Suite 1000
Milwaukee, WI 53202
amarcuvitz@vonbriesen.com

SCENARIO FOUR

A. The Issue presented is the amount of Just Compensation due to the owner.

B. Facts.

1. The area taken is 23,000 sq. ft. which contains 60 parking spaces.

2. The TLE area, needed to correct a grade issue contains 5,000 sq. ft., which contains 14 parking spaces.

3. The property is leased to a national chain under a 25 year lease, which is 8 years old. The annual triple net rent is \$250,000. The lease contains a covenant guaranteeing a minimum of 140 parking spaces. In the before taking condition there are 200 parking spaces. The lease allows the tenant to terminate the lease if, at any time, onsite parking is reduced below 140 parking spaces.

4. The tenant has notified the owner that the loss of 14 spaces in the TLE area will reduce on-site parking to 126 spaces and, when that occurs, the tenant will terminate the lease and move out.

5. The owner is exploring every alternative to keep the tenant from terminating, even as the condemnation process proceeds on its way.

C. Law Elements.

1. Measurement of Just Compensation is directed by Sec. 32.09(6(a)-(g), Stats.

2. Comparison of diminution in value with cost(s) to cure.

Alsum v. WISDOT, 276 Wis.2d 654 (Ct. App. 2004)

3. Is there an Uneconomic Remnant?

D. What does the attorney for each party expect the appraiser to address in the appraisal?

1. Everything relevant to a well-supported opinion of Just Compensation, under the Scenario presented, such as:

a. What system could be installed to provide reasonable access to all building? At what cost?

b. What is value lost if no such cure is undertaken?

c. Has the house lost value if its single access is from the west?

d. Would it be worthwhile to extend the outbuilding access to the house?

e. What is effect of prior taking, if any?

2. Diminution in Value.

3. Cost(s) to Cure.

4. Alternatives

2017 Condemnation Symposium

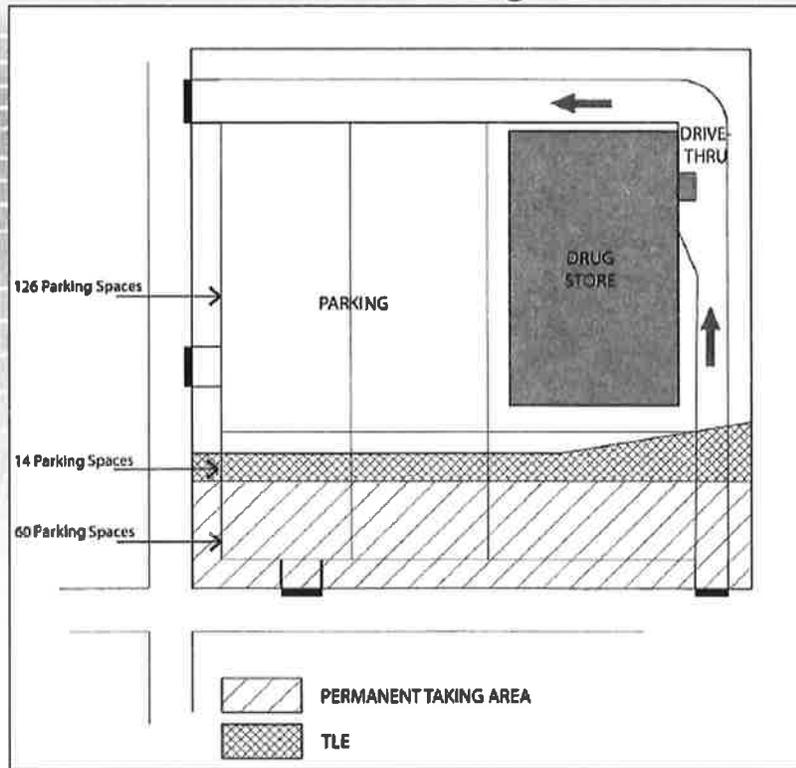
Case Study #8, Loss of Parking

May 18, 2017

Larry Nicholson, MAI

- How should damages be measured when the TLE reduces the amount of parking?
- How do lease provisions affect the property valuation?
- Severance damages from a TLE?
- The Appraiser as a Consultant
 - Replacement Parking Stalls
 - Circuity of Travel, On-Site

Situation Diagram



Situation Facts

1. The area taken is 23,000 sq. ft. which contains 60 parking spaces.
2. The TLE area, needed to correct a grade issue contains 5,000 sq. ft., which contains 14 parking spaces.
3. The property is leased to a national chain under a 25 year lease, which is 8 years old. The annual triple net rent is \$250,000. The lease contains a covenant guaranteeing a minimum of 140 parking spaces. In the before taking condition there are 200 parking spaces. The lease allows the tenant to terminate the lease if, at any time, onsite parking is reduced below 140 parking spaces.
4. The tenant has notified the owner that the loss of 14 spaces in the TLE area will reduce on-site parking to 126 spaces and, when that occurs, the tenant will terminate the lease and move out.
5. The owner is exploring every alternative to keep the tenant from terminating, even as the condemnation process proceeds on its way.

Situation Facts

- Other Facts
 - National chain drugstore with a long-term remaining lease term
 - 17 years plus renewal options
 - Fee taking is for road widening
 - TLE is needed for retaining wall and slope grading
 - Site improvements and sign relocation costs exist but are not part of this case study

Parking Lease Clauses

- Parking is so vitally important for retail stores that there is often a stated minimum number of parking stalls that the landlord must provide and specific default remedies written in leases.
- Lease clauses for parking loss, access change (site and drive-thru), change in grade exceeding 5%, and site drainage:
 - 1. Lease cancellation
 - 2. Reduction in rent
 - Based on percent loss in store sales retroactive to the event date and going forward
 - Issue: need to estimate future reduction in sales
 - Temporary or permanent reduction
 - 3. Rent at 90% of prior rent & no additional charges (i.e. CAM, taxes, etc.)
 - 4. No rent paid during the interruption period

Market Value Before the Taking

Market Value Before Taking	
Sales Comparison Approach	
15,000 sq. ft. store x	\$300.00 /sq. ft. = \$4,500,000
Income Capitalization Approach	
\$250,000 annual rent +	5.5% cap rate = \$4,545,000
Market Value	\$4,500,000

Market value reflects national chain drugstore with a long-term remaining lease term (17+ years)

Fee & TLE Compensation

Fee Taking Compensation

Parcel Size	87,120 sq. ft. (2 acres)
Fee Area	23,000 sq. ft.
	x \$15.00 /sq. ft.
	\$345,000

TLE Taking Compensation

TLE Area	5,000 sq. ft.
TLE Duration	3 years
Compensation	\$12,200

Parking Loss Considerations

- 1. Existing parking at the subject property
- 2. Parking requirements per zoning
- 3. Market parking levels

Parking Loss Considerations

- 1. Existing parking at the subject property

Parking Spaces Loss			
	#		Parking
	Spaces		Ratio
Before Taking	<u>200</u>		<u>13.3</u>
Spaces Affected:			
Fee Taking	<u>-60</u>	-30%	
	140		9.3
TLE Taking	<u>-14</u>	-7%	
	<u>126</u>	-37%	8.4

- 2. Parking requirements per zoning
 - a. Minimum parking ratio of 9:1 (stalls/1,000 sq. ft. of building area)
 - b. 135 stalls minimum (15,000 sq. ft. GBA at 9 stalls per 1,000 sq. ft.)

Parking Loss Considerations

- 3. Market parking level

Parking Ratio Comparables					
	<u>Year Built</u>	<u>Land Area Acres</u>	<u>Building Area Sq. Ft.</u>	<u># Parking Stalls</u>	<u>Parking Ratio</u> ⁽¹⁾
Subject	2000	2.00	15,000		
			Before Taking	200	13.3
			After Taking, Fee	140	9.3
			After Taking, TLE	126	8.4
Drugstore 1	1999	1.51	14,420	132	9.2
Drugstore 2	1997	1.22	13,792	100	7.3 ⁽²⁾
Drugstore 3	1995	1.51	13,500	135	10.0
Drugstore 4	2011	1.56	14,405	137	9.5
Drugstore 5	1995	1.30	13,500	110	8.1 ⁽³⁾
Drugstore 6	2005	1.61	14,820	142	9.6

⁽¹⁾ # stalls per 1,000 sq. ft. of building area
⁽²⁾ Adjacent shopping center or parcel parking available
⁽³⁾ Adjacent street parking available

Market Value After the Taking Without Cost to Cure

- Subject lease must provide 140 spaces or tenant can/will cancel
- Market value after reflects a general purpose retail store after the drugstore terminates the lease and vacates, re-tenanting costs and after the fee taking
- NOI reflects \$13.50psf rent, 5% vacancy and operating expenses for new tenant

Market Value After Taking

Sales Comparison Approach

$$15,000 \text{ sq. ft. store} \times \$175.00 / \text{sq. ft.} = \$2,625,000$$

Income Capitalization Approach

$$\$198,146 \text{ NOI} \div 7.5\% \text{ cap rate} = \$2,600,000$$

Market Value	\$2,625,000
--------------	-------------

Severance Damages Without Cost to Cure

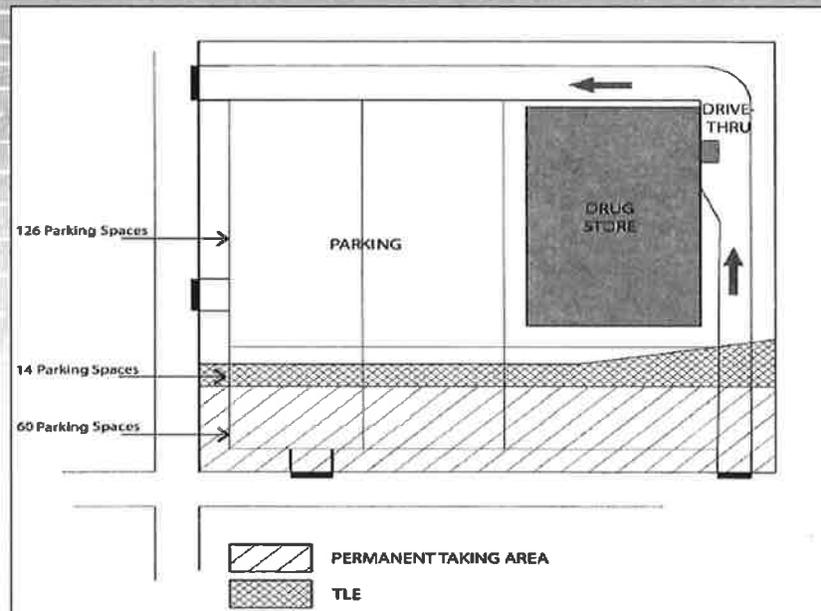
Summary of Damages Without Cost to Cure

Market Value, Before Taking	\$4,500,000
Market Value, After Taking	<u>-\$2,625,000</u>
Loss in Market Value	\$1,875,000
Add Other Damages:	
Temporary Limited Easement	\$12,200
Cost to Cure	<u>\$0</u>
Total Damages	\$1,887,200
<u>allocated as follows:</u>	
Fee Taking, Land	\$345,000
TLE Taking	\$12,200
Cost to Cure	\$0
Severance Damages	<u>\$1,530,000</u>

Severance damages without cost to cure \$1,530,000

Possible Cost to Cure Solutions

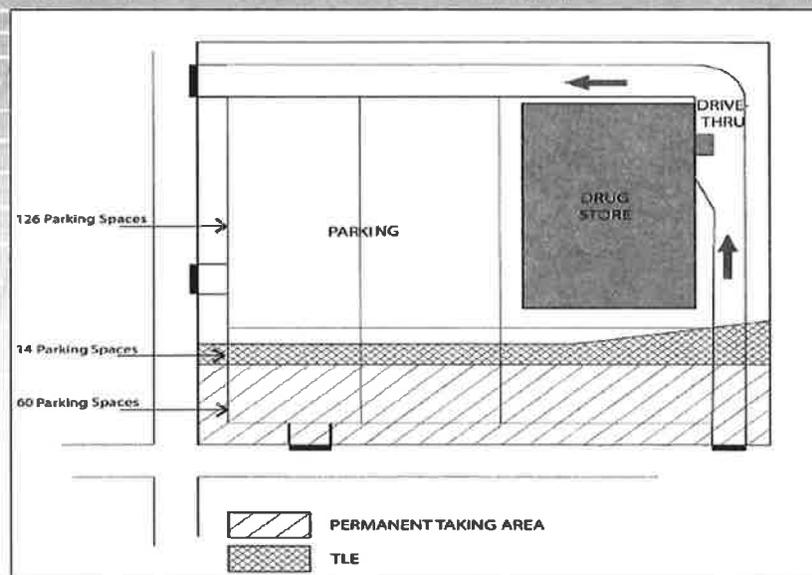
- Replacement parking



13

Possible Cost to Cure Solutions

- Retaining wall construction timing
 - \$250,000 cost for wall and access drives; by owner & before project



Damages with Cost to Cure

Summary of Damages With Cost to Cure

Market Value, Before Taking	\$4,500,000
Market Value, After Taking	<u>-\$4,155,000</u>
Loss in Market Value (Land Only)	\$345,000
Add Other Damages:	
Temporary Limited Easement	\$12,200
Cost to Cure (retaining wall)	<u>\$250,000</u>
Total Damages	<u>\$607,200</u>
<u>allocated as follows:</u>	
Fee Taking, Land	\$345,000
TLE Taking	\$12,200
Cost to Cure	\$250,000
Severance Damages	\$0

Cost to cure of \$250,000 vs. severance damages of \$1,530,000

Replacement Parking Issues

- Prime parking spaces vs. non-prime spaces
 - Prime parking spaces are located near the building entrance making them considerably more valuable than non-prime parking

- Need site planning expert and cost estimate

Replacement Parking



- Lose 30 stalls directly along street frontage (bottom row of parking)
- Change in access impacts on-site circuitry of travel
 - requires relocation of a freestanding ATM structure and another 15 parking stalls

Circuitry of Travel, On-Site Convenience Store & Roundabout



Aerial photograph before the taking; C-store parcel is in upper left quadrant of intersection

Circuitry of Travel, On-Site
Convenience Store & Roundabout



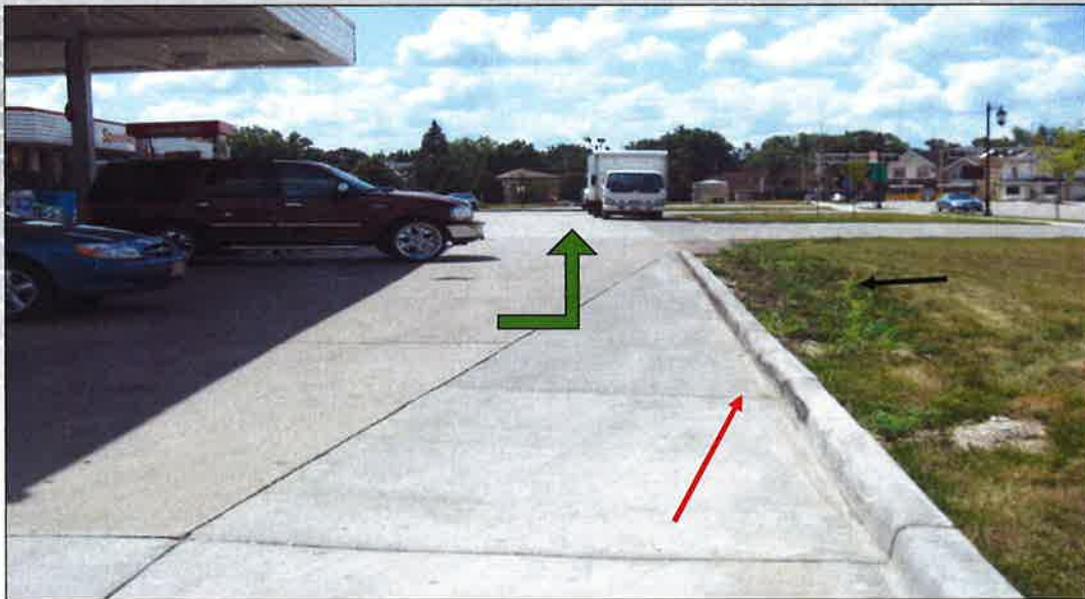
Before taking; note canopy and pump orientation relative to access

Circuitry of Travel, On-Site
Convenience Store & Roundabout



View from the roundabout after project completion but before cure

Circuitry of Travel, On-Site Convenience Store & Roundabout



View of vehicles fueling at two stations - FS#9 (blue car) and FS#2 (red SUV); note narrow passing width between vehicles and curb; also note tire marks on curb and track/ruts in grass

Circuitry of Travel, On-Site Convenience Store & Roundabout



The 20' grassy strip is to the right of blue line and left of curbing; photograph after project completion before cure; roundabout in upper left corner

Circuitry of Travel, On-Site
Convenience Store & Roundabout



After the Cure

2017 Condemnation Symposium

Case Study #8, Loss of Parking

May 18, 2017

Larry Nicholson, MAI

■ Thank you!

REAL ESTATE VALUATION
AND CONSULTING



TNG
THE NICHOLSON GROUP LLC
Integrity matters

Lawrence R. Nicholson MAI
1-761-629-5160 • l.r.nicholson@tng.com
555 Industrial Drive, Suite 201 | Highland WI 53049
www.NicholsonGroup.com

**2017 APPRAISAL INSTITUTE
SYMPOSIUM SUBMISSION**

H. Stanley Riffle
ARENZ, MOLTER, MACY, RIFFLE & LARSON SC
PO Box 1348
Waukesha, WI 53187
sriffle1@aol.com

COMMENTS ON SCENARIOS FROM A MEDIATOR'S VIEW

In addressing the Scenarios and Issues from a mediator's viewpoint, I would first like to provide a bit of insight into my mediation approach. It should surprise no one that, after thoroughly reviewing the parties' respective appraisals, I attempt to put myself in each litigant's proverbial shoes to identify and analyze the weaknesses of the opponent's case. The resolution of every lawsuit implicates a risk/reward analysis, so I endeavor always to personally calculate the best case-worst case scenarios for each party. I try to do background on the parties the involved to understand their tolerance for risk. I also do background on the judge handling the matter if I have not personally litigated before him/her, and likewise the venue/region where the taking is. Further, it is obviously good to know the background of the appraisers, and their strengths in cases where their testimony was required in circuit court.

In addition, I often step outside Chapter 32 proper to look at the bigger picture. As a municipal lawyer, I recognize that there are many factors separate and apart from the laws of eminent domain that may have significant bearing on the potential resolution of the case and can be provide value to the condemnee separate and apart from additional payment by the condemnor. Zoning, planning, land division

and use, environmental and other federal, state and local laws may have implications related to lands not taken, and it is important to me to have a full understanding of these implications so I have more tools at my disposal. So, I attempt to anticipate whether there are such implications in advance of the actual mediation.

At mediation, I attempt to discern who the “decision maker” is. Is counsel running the show for the condemnee? Is there a family member being relied upon? For the state, local government or utility, who is really calling the shots? Is there someone out of the room making final decisions that I need to get involved? If so, who is in the room that has the most influence on that person? Once I am fairly confident I know the hierarchy, I tend to focus on the decision maker, listen intently to their explanations and attempt to draw them out. It is paramount to learn what their perceived “real” problems are. Oftentimes their concerns have absolutely nothing to do with the compensation paid or offered. Many times, an acquisition agent has angered the condemnee in the approach taken, nature of communication, or more likely, lack of communication or miscommunication. It is important to try to get the venting out of their system to allow for resolution. In other instances, impacts from projects have created perceived or actual adverse impacts to the condemnee’s property. I look for creative ways to deal with the problem, rather than focus upon simply attempting to get more money from the condemnor.

With this background, I will address the initial impressions I would have if being asked to mediate these cases.

SCENARIO 1

In this scenario, the school district is condemning three-quarters of the parcel for construction of a middle-school. My approach might change depending on how far along in the process the actual planning/construction for the school. Depending on the layout of the school, parking and play fields, as well as topography, it would potentially make more sense for the district to condemn the lands west of the wetlands (and perhaps the wetlands as well) rather than the lands adjacent to the N/S street. With regard to the wetlands, perhaps the county or municipality would be interested.

I would want to look at the long-range land use plan for the immediate area to discern whether higher density residential development could be available for the remnant. More importantly, the biggest issue facing the parties is whether the delineated wetlands can be used or even traversed, that is, whether a Chapter 30 permit can be secured from WDNR (or whether local approvals could be secured even if so). The local zoning and land division ordinance must be reviewed to determine whether the acreage to the east can be developed at all as well (e.g. restrictions on length of roads serving “flag lot type development). I would want to look into the nature of the lands to the east.

Obviously, the concern I would raise with the District would be the real prospect that this remnant is an uneconomic remnant. The “flagpole” would have little value and the wetlands virtually none. As far as the owner, assuming I could validly point to development potential, I would point out that residential lands in the immediate vicinity of schools (especially new schools) have significant increases in assessed value. I would want to explore the traffic plan for the school to

determine if access to the E/W road to the south would be possible. Depending on the development of the lands to the east, synergistic development potential in that direction could be explored.

I would anticipate that the District's budget would be tight, and litigation costs for both the District and District's exposure for the owner 's costs would be a real threat. In the end, it may be cheaper for the District to acquire the entire parcel and attempt to find a developer for the remnant.

SCENARIO 2

This case involves the serial closure of access points to this poor farmer. I would guess that the farm has been around for many years and the owner may get a sympathetic ear from the fact-finder if this case was not resolved. I would also anticipate legal wrangling over issues involving whether the closures were compensable in the first place.

It would be important to learn early on in the mediation precisely how the farmer operates the farm, where other owned or leased land where he/she works may be located, the uses of the various outbuildings and the need for interactivity between those. Perhaps a simple fix could be achieved by the condemnor constructing something akin to a service road (and compensating for the square-footage of the lands thereunder). What are the future plans for these lands – is sale for development imminent? If so, contingent approvals for improvements such as accel/decel lanes, etc. may be achieved presently.

It may be the case that the condemnor paid compensation in excess of the TLE appraisals, giving me the rare opportunity to press the point that the farmer has the real danger of repaying the condemnor if the case moves forward. This is the type of case that has a strong probability of being resolved at mediation.

SCENARIO 3

This is a fascinating scenario with many avenues to explore in terms of potential resolution. Ease of resolution could in large part depend on who the condemnor is. If the municipality itself is taking the right-of-way, there are actions that are within the exclusive control of that municipality that can be taken advantage of.

The taking causes obvious problems for the restaurant. I'm certain that the taking renders the restaurant to be a legal non-conforming structure. The taking of the parking area undoubtedly leaves the parcel non-compliant with required parking ratios. Retrofitting the site to relocate the parking, allow for a new storage building and preserving the field amenity would be challenging if not impossible.

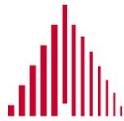
The fact that there is vacant land to the north is something to explore. Determining factors such the reasonable amount of land needed to cure the problems, divisibility of the acreage, to the north, costs to replicate the lost facilities and the like would be necessary. And assuming a willing buyer of the lands to the north, great care would be required so as not to run afoul of the complexities inherent in the arena of eminent domain.

SCENARIO 4

This is an extremely unusual scenario where a temporary limited easement raises the stakes beyond perhaps even those pertaining to the permanent taking. Add to this fact that we have a drugstore involved (allowing me to have some fun with counsel for the drugstore given the series of Wisconsin Walgreen's lease fee valuation cases) there is much fodder for discussion.

This is a case where the nature, staging and timing of the construction is likely the key to avoidance of a huge risk. It is also a rare case where there is great motivation for both owner and the condemning authority to work together to resolve the situation. Can the project work be stages so that the temporary and permanent easement areas necessary to accommodate the 14 spaces be available for parking at all times? Are there off site lands available for temporary parking during the project construction? Can work be segmented to allow access to the drive-thru at all times?

If these or other potential actions are not physically possible, there will be a vast difference in the parties' view of the value of the remnant – ranging from uneconomic remnant to simple loss of land for 60 parking spaces. But in the meantime, a valuable tenant is lost and the property is distressed and probably unmarketable until the project is completed. Thus, consultation between the owner, project managers, and municipal officials is imperative.



**Appraisal
Institute®**

*Professionals Providing
Real Estate Solutions*

14TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

Thursday, May 18, 2017

Marquette University Law School Eckstein Hall

1215 W. Michigan St., Milwaukee, WI 53233

Q & A

Panel Discussion

Co-Sponsored by:

The Wisconsin Chapter of the



**Appraisal
Institute®**

*Professionals Providing
Real Estate Solutions*



The Real Estate Group at von Briesen & Roper, s.c.



**MARQUETTE
UNIVERSITY**

LAW SCHOOL



**MARQUETTE
UNIVERSITY**

College of Business Administration

