WISCONSIN CASES THAT EVERY EMINENT DOMAIN ATTORNEY SHOULD KNOW AND UNDERSTAND

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I. DON'T NECESSARILY SETTLE FOR THE HAND YOU ARE DEALT.

Condemnees too often accept the current use of their property as its highest and best use. That is not always the case. Alternatively, the highest and best use of the property as it is currently being used might be enhanced by making changes to the property. It is always necessary to explore all available options for making the best and highest use of the property.

A. *Clarmar Realty Co. v. Redevelopment Authority of Milwaukee*, 129 Wis. 2d 81, 383 N.W.2d 890 (Wis. 1986)

BASIC FACTS – Clarmar owned a truck terminal that was condemned in its entirety. Clarmar had been using a neighboring property with permission in order to facilitate larger trucks in some of its docking bays. In order to maintain the property at peak productivity and maximize its value, the neighboring property would need to be acquired.

The owner's appraiser estimated the cost to obtain the neighboring parcel and then valued the property as a "larger parcel" utilizing the "doctrine of assemblage."

HOLDING – The Wisconsin Supreme Court "conclude[d] that allowing a court to consider a prospective, integrated use with the land of another in determining the fair market value of a parcel is consistent with our standards for valuation of condemned land and adapts them to settings in which potential assemblage of lands, as a matter of fact, does affect the fair market value of the land. Accordingly, we hold that a court may determine the fair market value of a condemned parcel of land in combination with the land or lands of another in a prospective, integrated use if: **1)** the prospective, integrated use is the "most advantageous" use of the condemned land; **2)** the "most advantageous" use can be achieved only through combination with another parcel or parcels; **3)** combination with another parcel or parcels is "reasonably probable;" and **4)** the prospective,

integrated use is not speculative or remote." ***Clarmar***, 129 Wis. 2d 81, 92, 383 N.W.2d 890, 895 (Wis. 1986).

WHY THIS DECISION IS IMPORTANT – ***Clarmar*** is one of many cases which tells us that we do not have to play the hand that we are dealt. It represents a fundamental example of assemblage and consideration of the larger parcel. But we cannot limit consideration of the larger parcel to a simple expansion of the existing use. Whenever a property is taken, we need to consider not just what is the property and what is it worth. We need to think about what could the property be and what could it be worth.

B. ***Bembinster v. State Dep't of Transp., Div. of Highways***, 57 Wis. 2d 277, 203 N.W.2d 897 (Wis. 1973).

BASIC FACTS – In ***Bembinster***, the property owner's appraiser valued the land based on the assumption that the property could be rezoned from agricultural to residential. At issue was not necessarily whether a property owner could proceed on such a theory of value but rather how the property owner must go about doing so.

HOLDING – The Wisconsin Supreme Court quoted Nichols on Eminent Domain extensively, concluding that "[w]here the enactment of the zoning restriction is not predicated upon the inherent evil of the proscribed use . . . and there is a possibility or probability that the zoning restriction may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value." ***Bembinster***, 57 Wis. 2d 277, 284, 203 N.W.2d 897, 900-901 (Wis. 1973).

"The type of evidence which has been admitted as material as tending to prove a reasonable probability of change includes the granting of many variances which showed a continuing trend that will render rezoning probable, the actual amendment of the ordinance subsequent to the taking, and an ordinance rezoning neighboring property. [Citations omitted]. Opinions based upon such facts are also admissible." ***Bembinster***, 57 Wis. 2d 277, 284-285, 203 N.W.2d 897, 901 (Wis. 1973).

WHY THIS DECISION IS IMPORTANT – Once again, the case instructs us that we do not have to play the hand we are dealt. We cannot look at the zoning of the property and conclude that we are limited to certain uses. We need to explore the extent to which we may be able to rezone property. We may need to engage the services of land use planners who can study what the trends are in the municipality.

II. CONDEMNORS CANNOT DISCARD.

Oftentimes a condemnor will try to give back rights taken by an Award of Damages. Sometimes it is best for the client to allow the condemnor to do so. Other times, compensation may be maximized by refusing to acknowledge the give back.

A. ***Van De Hey v. Calumet County***, 161 N.W.2d 923, 40 Wis. 2d 390 (Wis. 1968)

BASIC FACTS – ***Van De Hey*** is the flipside of ***Bembinster***. The property owners had highway access taken as a result of a condemnation. The taking of the access diminished the potential to use the agriculturally zoned property as residential development property in the future. The condemnor sought to introduce into evidence of a legend on two maps showing the properties in relation to the proposed improvement of the highway. The legend suggested that additional access might be granted in the event the property was developed in the future.

HOLDING – The Wisconsin Supreme Court concluded that the "legends, indicating some possible altering or expanding of the access rights dependent upon future conditions without any right in the owner to obtain an expanded use of access, presented a too speculative element of damage to be admitted." ***Van De Hey***, 40 Wis. 2d 390, 393-394, 161 N.W.2d 923, 925 (Wis. 1968).

WHY THIS DECISION IS IMPORTANT – ***Van De Hey*** does not come right out and say it, but the decision tells us that condemnors are stuck with what they have taken. The mere possibility that the condemnee could request additional access rights in the future did not establish a sufficiently reasonable likelihood that the condemnee would be able to obtain such rights. Condemnors have to be careful to take no more rights than they need and condemnees should not allow the value of their property to be increased by a condemnor in the after condition unless they are certain to obtain those rights upon which the increased value is premised. A condemnee has only one chance to be compensated for a taking, and the condemnor has to pay for the right to say "no."

It is also very important to get your trial judge to understand the difference between ***Bembinster*** and ***Van De Hey***. An inability to do so can prove highly problematic.

III. COMPENSATION VARIABLES

Compensation issues are not always clean cut, particularly in partial takings cases. When the condemnor does not take all of the property owned by the property owner, particular attention must be paid to severance damages. See. Wis. Stat. § 32.09(6).

A. ***Arents v. ANR Pipeline Co***., 2005 WI App 61, 281 Wis. 2d 173, 696 N.W.2d 194 (Wis. Ct. App. 2005)

BASIC FACTS – ***Arents*** involved the taking of an easement for a natural gas pipeline. At issue was whether a property owner was entitled to damages to the stigma to the property resulting from the presence of the pipeline.

HOLDING – Citing ***Clarmar***, the Court of Appeals (review denied by Supreme Court) found that "any factor affecting the value of property that could influence a prospective buyer in his or her purchasing decision should be considered in the valuation of property in a condemnation proceeding." . . . The Court denied general evidence of fear and stigma, but "conclude[d] 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." ***Arents***, 2005 WI App 61, P16-P18, 281 Wis. 2d 173, 189-191, 696 N.W.2d 194, 201-202.

WHY THIS DECISION IS IMPORTANT – Counsel and appraisers must be cognizant of any potential impact of a project on the fair market value of property. If a sufficient nexus can be established between a condition on the property and the impact on fair market value, evidence of the impact should be admitted. The holding in this case should also be analyzed in the context of the access restriction cases that will be discussed shortly.

B. ***Ken-Crete Products Co. v. State Highway Com***., 24 Wis. 2d 355, 129 N.W.2d 130 (Wis. 1964)

BASIC FACTS – ***Ken-Crete*** owned a cement block factory in southeast Wisconsin. Part of the property taken by the State was the area used by the factory to store its sand and gravel. The factory was able to lease property upon which to pile its sand and gravel, but it required the plant operators to truck the raw materials to the plant. All appraisers determined that the highest and best use of the property was a cement block factory. The property owner's appraiser determined that in order to maximize the highest and best use of the property, it was necessary for the factory to purchase and install a 240' conveyor to transport the raw materials from the leased property to the plant.

HOLDING – The Wisconsin Supreme Court found that "[t]he testimony with respect to the advisability and cost of installing the overhead conveyor was not offered by Ken-Crete to establish a separate item of damages, but only as an element to be considered in arriving at the value of the remainder of its property after the taking. The underlying theory is that a prospective purchaser would pay $43,900 less for the premises after the taking than before, if he would have to expend that amount to provide a facility to enable the block-manufacturing plant to continue to operate at the same capacity as before the taking. Under this theory, as borne out by the testimony of Ken-Crete's expert witnesses, the expenditure of this $43,900 would not cause the value of the remaining premises to exceed the value of the whole premises as they existed before the taking. The jury had the right to accept the testimony which substantiated this theory. ***Ken-Crete,*** 24 Wis. 2d 355, 360-361, 129 N.W.2d 130, 132-133 (Wis. 1964).

WHY THIS DECISION IS IMPORTANT – The principles established in this case have come to be known as evidence of the "cost to cure." Courts have since found that the cost to cure must be less than the diminished value of the property without effectuating the cure. In other words, if the value of the ***Ken-Crete*** property for another purpose or use had been diminished by less than the cost of installing the conveyor ($43,900), the cost to cure would be *per se* unreasonable, and inadmissible.

IV. DEVELOPMENTS IN ACCESS ISSUES

No eminent domain compensation issue is more in flux or more a state of confusion than that of compensation for loss of access. Once would think that, consistent with *Clarmar* and *Arents*, any factor affecting the value of property that could influence a prospective buyer in his or her purchasing decision should be considered in the valuation of property in a condemnation proceeding. Not so much in the case of lost access.

A. ***Narloch v. State, Dep't of Transp., Div. of Highways, Div. II***, 115 Wis. 2d 419, 340 N.W.2d 542 (Wis. 1983)

BASIC FACTS – ***Narloch*** involved three different property owners. The condemnor took all of the property owners' rights of access to the state highway except for specific access points and the property owners' right to apply for future access permits. At issue was the compensation to which the property owners were entitled for their lost access.

HOLDING – The Wisconsin Supreme Court found as follows:

(1) "Existing right of access" in sec. 32.09(6) (b), Stats., includes the right of an abutting property owner to ingress and egress from his property to a public road, and the right to be judged on the criteria for granting permits for access points under sec. 86.07(2), and Wis. Admin. Code ch. Hy 31;

(2) The Department's restriction of the condemnees' rights of access was a taking, rather than an authorized exercise of its police power (state highway at issue was not a controlled access highway), and is therefore compensable;

(3) Before loss of access rights may be considered as an item of severance damages, the condemnee must establish a foundation demonstrating that prior to the taking, there was a reasonable potential in the foreseeable future for developing his or her property in accordance with its highest and best use, and that this potential is diminished because of the loss of access rights;

Narloch, 115 Wis. 2d 419, 423-424, 340 N.W.2d 542, 545 (Wis. 1983).

WHY THIS DECISION IS IMPORTANT – To use it as a club to try to fend off the decision of the Supreme Court in ***Nat'l Auto Truckstops***.

B. ***Nat'l Auto Truckstops, Inc. v. DOT***, 2003 WI 95, 263 Wis. 2d 649, 665 N.W.2d 198 (Wis. 2003)

BASIC FACTS – The DOT condemned a portion of the truck stop's highway frontage as part of an intersection reconstruction. Prior to the reconstruction, the truck stop had two points of direct access on a state highway that was not classified as "controlled access." After the reconstruction, all vehicles had to enter via a frontage road, which could only be accessed north of the property.

HOLDING – The Wisconsin Supreme Court found that "deprivation of direct access to a highway does not constitute a taking of property provided reasonable access remains." ***Nat'l Auto***, 2003 WI 95, P19, 263 Wis. 2d 649, 665, 665 N.W.2d 198, 206; citing ***Schneider***, 51 Wis. 2d at 463 (emphasis added) (citing ***McKenna v. State Highway Comm'n,*** 28 Wis. 2d 179, 135 N.W.2d 827 (1965)).

"The essential inquiry is whether a change in access is "reasonable." Thus, the fact that National Auto has access to Highway 12 via a frontage road does not resolve whether that access is reasonable. Rather, this is a question for a jury. . . . If the jury finds that the changed access is reasonable, then no compensation is to be awarded to National Auto due to the change in access. However, if the jury finds that the changed access is not reasonable, then National Auto is entitled to just compensation for the deprivation or restriction of its right of access." ***Nat'l Auto,*** 2003 WI 95, P21-P22, 263 Wis. 2d 649, 665-666, 665 N.W.2d 198, 206-207.

WHY THIS DECISION IS IMPORTANT – The importance of this case is its need to be overturned. The Court correctly identified all controlling authorities and expressly acknowledged the principles established in ***Narloch***. However, as recognized by Justice Sykes in her dissent, the Court inexplicably applied a standard that applies only to restrictions of access under the police power. Justice Sykes properly noted that "[b]ecause the relocation of Highway 59 at issue in ***Narloch*** involved neither a controlled access highway nor a restriction of access pursuant to an exercise of the police power, we held that the condemnation and

taking of the property owners' access rights required compensation. Id. at 431-32. Important to the analysis here, we did not hold in ***Narloch*** that the requirement of compensation depended upon whether the property owners were left with reasonable alternative access to Highway 59. Indeed, the property owners in Narloch retained at least some form of access to Highway 59 after the construction; their right to compensation was not affected by any determination of the "reasonableness" of what replaced their prior access." ***Nat'l Auto***, 2003 WI 95, P41, 263 Wis. 2d 649, 673-674, 665 N.W.2d 198, 210.

The key here for litigators is that ***Narloch*** was neither questioned nor overturned by ***National Auto***. One of us will someday bring this issue to a head in which either ***Narloch*** or ***National Auto*** will be overturned.

V. VALUATION PITFALLS

Like every area of the law, eminent domain has its share of pitfalls. The following three cases provide valuable lessons for the eminent domain practitioner.

A. *City of Milwaukee Post No. 2874 VFW v. Redevelopment Auth*., 2009 WI 84, 319 Wis. 2d 553, 768 N.W.2d 749 (Wis. 2009)

BASIC FACTS – The VFW held a 99 year renewable lease for its Post. The rent was $1 per year. The City of Milwaukee Redevelopment Authority condemned the property. The evidence showed that the cost of removing the building exceeded its value. The circuit court applied the "unit rule" in determining the amount that the Redevelopment Authority had to pay the VFW as just compensation for the taking. Under the unit rule, when property that is held in partial estates by multiple owners is condemned, the condemnor pays the fair market value of an undivided interest in the property rather than the fair market value of each owner's partial interest.

HOLDING – The Wisconsin Supreme Court concluded "that using the unit rule in the present case to value the whole property to determine the amount of compensation due to the VFW does not violate the just compensation clause. We conclude that the VFW receives just compensation when it receives no compensation for its leasehold interest in a property that has no value." ***VFW,*** 2009 WI 84, P8, 319 Wis. 2d 553, 560, 768 N.W.2d 749, 752.

WHY THIS DECISION IS IMPORTANT – The Unit Rule is controlling in this state. In ***VFW***, the judgment required the VFW to return a $300,000 award that it had previously received from the Redevelopment Authority and to pay $87,348 in interest and statutory costs. Challenging the rule in this case proved very costly.

B. ***Leathem Smith Lodge, Inc. v. State***, 94 Wis. 2d 406, 288 N.W.2d 808 (Wis. 1980)

BASIC FACTS – The State condemned a portion of the landowner's resort property for highway purposes. The landowner brought an action for damages, and the trial court entered a judgment in favor of the landowner. The State's primary issue on appeal was the trial court's refusal to receive evidence of value utilizing the income method.

HOLDING – The Wisconsin Supreme Court "noted that Wisconsin law holds that income evidence is never admissible where there is evidence of comparable sales. ***Rosen v. Milwaukee***, 72 Wis.2d 653, 662-63, 670-71, 242 N.W.2d 681 (1976); Lambrecht, supra at 227. Nichols, supra, sec. 19.3[5], p. 19-66, states that: "Where property is so unique as to make unavailable any comparable sales data evidence of income has been accepted as a measure of value."

"Because there was evidence of comparable sales in this case, the trial judge properly excluded the income method of valuation." ***Leathem Smith Lodge***, 94 Wis. 2d 406, 413-414, 288 N.W.2d 808, 812 (Wis. 1980)

WHY THIS DECISION IS IMPORTANT – Use the income method at the peril of you and your client.

C. ***118th St. Kenosha, LLC v. Wis. DOT***, 2014 WI 125, 359 Wis. 2d 30, 856 N.W.2d 486 (Wis. 2014)

BASIC FACTS – 118th Street owned commercial property in the City of Kenosha. DOT took a TLE to construct a new double-throated driveway connecting the commercial property to 118th Avenue via a private road. DOT also relocated 118th Avenue. The combined effect of both acts resulted in 118th Street no longer having direct access to 118th Avenue. The Circuit Court refused to permit evidence of damages caused by the loss of access, finding that the taking of the TLE did not cause the loss of access.

HOLDING – The Wisconsin Supreme Court concluded that 118th Street 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 and proximity to 118th Avenue due to the 118th Avenue relocation. The temporary limited easement did not cause the commercial property to lose direct access and proximity to 118th Avenue, so damages under § 32.09(6g) for the temporary limited easement cannot include damages for the loss of direct access and proximity to 118th Avenue." ***118th St. Kenosha, LLC,*** 2014 WI 125, P7, 359 Wis. 2d 30, 36, 856 N.W.2d 486, 489.

WHY THIS DECISION IS IMPORTANT – There is a better than average chance that condemnors may try to expand the scope of this ruling by breaking up projects into separate components. This decision indicates a willingness by the

Court to look the other way and not recognize that all of the actions were part of a consolidate project.

That said, see Footnote 5 in which the Court states as follows: "The LLC's claim for compensation for loss of direct access and proximity to 118th Avenue is based solely on Wis. Stat. § 32.09(6g). The LLC does not ask us to, and we do not, determine whether the LLC could be entitled to compensation for that loss under any other claim." Is the Court inviting a state constitutional takings claim?