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13TH ANNUAL CONDEMNATION APPRAISAL SYMPOSIUM

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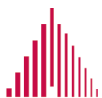
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Inverse Condemnation Issues

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**INVERSE
CONDEMNATION**

THE LAW



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WHAT IS IT?



- Simply put, "inverse condemnation" is when condemnation proceedings are instituted by the property owner and not the condemnor.
- The *inverse* of what is typical.

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 **Wis. Stat. Sec. 32.10** 



- Provides a statutory means for a property owner to bring an action in circuit court alleging that property has been "taken" without proceeding under the required statutory condemnation process.
- What is required:
 - Entity that action is brought against must possess the power of condemnation.
 - There has been a *permanent taking* of property by the Entity

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 **Wis. Stat. Sec. 32.10** 

- STATUTORY INVERSE CONDEMNATION DOES NOT LIE FOR TEMPORARY TAKING.
 - Case law has established that, pursuant to Wis. Stat. sec. 32.10, the taking must be *permanent*.
 - *Zinn v. State*, 112 Wis. 2d 417
 - *Eberle v. Dane County Bd. of Adjustment*, 227 Wis. 2d 609
 - *Anderson v. Village of Little Chute*, 201 Wis. 2d 467


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 **Wis. Stat. Sec. 32.10** 

- Section 32.10 “is designed to protect property owners against the slothful actions of a condemnor which, having constructively taken an owner’s property, is in no hurry to compensate the owner.”
 - *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 393 (1980).

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Article I Sec. 13 of the Wisconsin Constitution




- An inverse condemnation action may be brought directly under Article I, Sec. 13 of the Wisconsin Constitution, which states that:
 - “The property of no person shall be taken for public use without just compensation.”

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Article I Sec. 13 of the Wisconsin Constitution

- Pros of constitutional claim
 - Can be brought for BOTH temporary and permanent takings
- Cons of constitutional claim
 - Not entitled to award of all litigation costs, pursuant to Wis. Stat. sec. 32.28

ADVICE: Always include constitutional claim as alternative when asserting claim under Wis. Stat. sec. 32.10



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A "TAKING"

- Under the federal and Wisconsin standard, property must be "taken" before just compensation is required.
- In the minority of states, including Wisconsin, if your property is damaged by a condmenor, but there is no "taking", just compensation is not owed.

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When is there a "taking"

- As far back as 1887, a quarterly law review article noted that:
 - "[i]n the majority of decisions . . . a taking is defined as an *actual ouster* from land or a *virtual extinguishment* of an incorporeal right." The Eminent Domain, 3 L. Q. Rev. 314 (1887).

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When is there a "taking"

- In very general terms, a taking for purposes of just compensation only occurs, under two circumstances:
 - 1- Actual physical possession or occupation, or
 - 2 - deprivation of all, or substantially all, beneficial use.

* Owner has the burden to show there is a "taking"

Procedural Hurdles

- Notice of Claim
 - If against a governmental *subdivision*, must comply with notice of claim procedures, pursuant to Wis. Stat. sec. 893.80 before bringing circuit court action.
 - See *Olsen v. Spooner*, 133 Wis. 2d 371 (1986).
 - If against DOT no notice of claim procedures are required.

Filing an Action

- File a verified petition and complaint.
 - Wis. Stat. Sec. 32.10 requires an action for inverse condemnation be commenced with a petition verified by the property owner.
- File in Dane County *or* County where property is located

Court's Determination

- Single Question: Has there been a "taking" requiring just compensation?
 - Yes = matter must proceed as a normal condemnation action in accordance with the provisions of Ch. 32 with the sole remaining issue the amount of just compensation owed.
 - No = inverse condemnation claim is dismissed

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Cost\$ and Fee\$

- If a property owner is successful, under Wis. Stat. sec. 32.10, the property owner is entitled to actual litigation expenses, pursuant to sec. 32.28.
- Property owners that are successful in asserting a constitutional claim, but not a 32.10 claim, are *not* entitled to actual litigation expenses. See *Stelpflug v. Town of Waukesha, 2000 WI 81*.

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Some Examples

- Access 
- Air Space 
- Outdoor advertising signs 
- Regulatory 
- Water management / Flooding 

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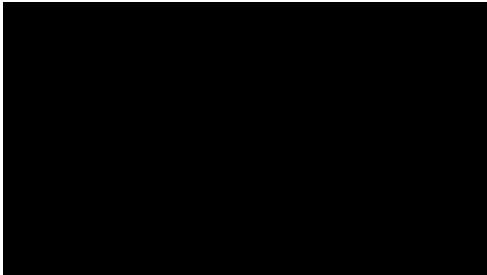
ACCESS



- *National Auto Truckstops, Inc. v. DOT*, 2003 WI 95.
 - Access is "one of a bundle of rights which appertain to a parcel of real estate." par. 31.
 - If reasonable access does not exist in the after condition, a taking has occurred and just compensation must be provided.** (be careful if it concerns a controlled access highway because of the unjust decision in *Hoffer Properties v. DOT*, 2016 WI 5).
- *Chan Lee v. DOT*, 365 Wis. 2d 195.
 - Access may be granted by deed and cannot be "revoked" without just compensation.

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Airports / Airspace



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Airports / Airspace



- *Brenner v. New Richmond Reg. Airport Comm.*, 2012 WI 98.
 - Airport runway was extended 1,500 feet and property owners alleged that there was a "taking" of an easement through the airspace over their homes because the resulting overflights had adverse effects, including diminished value, use and enjoyment. *Id.*, par. 1.
 - Circuit Court analyzed this case as a "regulatory taking" concluding that there was not a physical invasion and owners needed to show a deprivation of "all or practically all beneficial use." Although there was a clear adverse impact, the circuit court dismissed the inverse condemnation claim because it found that it did not meet the regulatory standard. *Id.*, par. 2.
 - Supreme Court overturned, holding that a "taking" occurs in airplane overflight cases when government action results in aircraft flying over a landowner's property low enough and with sufficient frequency to have a direct and immediate effect on the use and enjoyment of the property." *Id.*, par. 3.

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Airports / Airspace

- *U.S. v. Causby et ux.*, 328 U.S. 256, (1946).
 - The Wisconsin *Brenner* case is based on a post WWII case that established just compensation for the taking an aviation easement.
 - In *Causby* a taking was found when "regular and almost continuous daily flights . . . directly over and very, very close to [the] plaintiff's residence."
 - What factors create a taking?
 - When "flights over private land are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land" *Causby* at 266.
 - THREE FACTORS
 - 1- Directly over plaintiff's land,
 - 2- Altitude and frequency, and
 - 3- Inference with use and enjoyment of land.

Airports / Airspace

- **HOWEVER:**
 - "Where a plaintiff complains only of noise resulting from normal aircraft operations, not passing directly overhead," the plaintiff is not entitled to recovery. *Argent v. United States*, 124 F. 3d 1277, 1284.
 - RECENT CASE with good overview:
 - *Andrews v. United States*, 108 Fed. Cl. 150 (2012).

Outdoor Advertising Signs

- *Vivid v. DOT*, 174 Wis. 2d 142 (1993)
 - *Owner of personal property may institute condemnation proceedings.*
 - *DOT's condemnation proceedings for underlying land does not bar inverse condemnation claim.*
 - *Signs are "property" requiring just comp.*

Outdoor Advertising Signs



- *Current Case with interesting fact pattern:*
 - Property has two advertising signs and owners were not paying annual fees.
 - In 2005 and 2009 DOT issued a removal order for the Small Sign, requiring payment of the unpaid fees or DOT would remove the sign.
 - DOT never acted on either order.
 - In 2010 the current owners purchased the property and the two signs.
 - In 2013 DOT issued a removal order for the Large Sign, requiring payment of the unpaid fees or DOT would remove the sign.
 - DOT never acted on the 2013 order, but subsequently the property owners tendered payment of all unpaid fees for both signs.

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Outdoor Advertising Signs



- *Current Case with interesting fact pattern:*
 - Now realizing that a pending construction project would require removal of the Large Sign, DOT accepted the unpaid fees for the Small Sign, but not the Large Sign.
 - BUT, DOT then proceeded to send invoices for the annual fees for the Large Sign and accepted payment of the annual fees for 2014, 2015 and 2016 for the Large Sign.
 - THEN, despite the acceptance of the annual fees, in November of 2015 DOT removed the Large Sign BEFORE acquisition of the land on which the sign was located, under the guise of the 2013 removal order.
 - DOT has been sued for Inverse Condemnation and it is pending.

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Regulatory

- Taking can occur when there is a "legally imposed restriction upon the property's use" *Howell Plaza II*, 92 Wis. 2d at 87 (1979), which deprives the landowner of "all or substantially all practical uses of property." *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374.
- " 'taking' need not arise from an actual physical occupation of land by the government" *Howell Plaza II*.

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Regulatory

- *Zinn v. State*, 112 Wis. 2d 417 (1983).
 - DNR ruling effectively reset the ordinary high water mark on the lake abutting Zinn's property.
 - Essentially putting 200 acres in the public trust.
 - After two years, DNR rescinded the ruling and Zinn had title to her 200 acres again.
 - Zinn sued, under the Constitution, for a temporary taking during the 2 year period.
 - Court ruled that a taking occurred and just compensation owed.

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Regulatory



- *Eberle v. Dane County Bd. Of Adjustment*, 227 Wis. 2d 609 (1999).
 - Inverse Condemnation "Taking", under the Constitution, arose from denial of special exemption permit because it denied the property any legal access, removing all practical use.
 - Court stated that "The Eberles could hardly be expected to parachute onto their property in order to use it." *Id.* at 740.

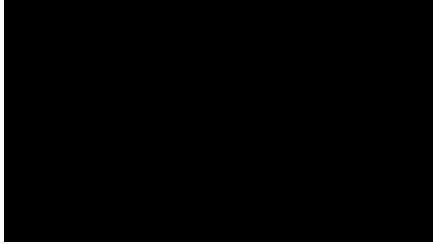
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Water Management / Flooding

- *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431.
 - Inverse condemnation action was appropriate where City's sewer system collected rain water and discharged onto owner's land, rendering some of the land unfit for use and the remainder unfit for a golf course.
 - Regulatory standard applied, as it deprived owner of practically all beneficial use.

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Water Management / Flooding



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Water Management / Flooding

- *Fromm v. Village of Lake Delton*, 2014 WI App 47.
 - Court concluded that loss of home did not result from "government action" and therefore inverse condemnation did not lie.
 - NEED either (1) actual physical occupation by government or (2) restriction the deprives owner of all or substantial all beneficial use.
 - Essentially this was an act of God that owner did not prove Village could have prevented.

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**Inverse Condemnation
vs. Eminent Domain**

- Eminent domain refers to the legal proceeding in which government asserts its authority to condemn property and property owners receive just compensation.
- Inverse condemnation is applied when a property owner recovers just compensation for a taking of his property when no condemnation proceedings have been applied.
- As a general rule, any sort of physical impact to a property is more easily identified as a taking with normal condemnation proceedings will occur.




Inverse Condemnation

- Inverse condemnation matters usually involve regulatory takings, which are less obvious than a traditional physical taking or invasion of use.
- Actual inverse condemnation cases are fairly rare. And most property owners lose their cases.
- The burden of proof falls on the landowner. Every regulation has a presumption of validity unless the challenger proves that the legislation or action is unconstitutional or illegal.



Inverse Condemnation

- The most common defense of an inverse condemnation argument is that the action is not compensable. For example, the closing of an access point or median cut or anything that significantly changes traffic flow may be argued to be a proper exercise of police power and, therefore, is generally not compensable.
- The courts consider whether the action would “force some people alone to bear public burden which, in all fairness and justice, should be borne by the public as a whole.”
- In other words, does the cost of an action get unfairly applied to a single party.




Types of Regulatory Takings

1. Government’s “physical” occupation or invasion of an owner’s property

Examples of Physical Invasion:


- Cable television installed a ½ inch cable 30 feet in length and two silver boxes along the roof cables.
- The frequent and regular flights of the government’s low-flying aircraft over the property owner’s land destroyed the property’s use as a chicken farm, and was a taking within the meaning of the Fifth Amendment.



Types of Regulatory Takings


1. Government's "physical" occupation or invasion of an owner's property
2. Government action that deprives the owner of all economically beneficial use of property

One example of an inverse condemnation claim that lost involved the banning of commercial air traffic in downtown Washington DC. The FAA banned all commercial air traffic nationally following the terrorist attacks of September 11, 2001. The FAA extended the ban permanently to cover much of the airspace in Washington DC. This forced Air Pegasus to shut down a heliport. Air Pegasus lost its claim alleging a regulatory taking of its property. Courts decided the navigable airspace is part of the public domain and that Air Pegasus had no property interest in that airspace. Therefore, there was no taking requiring just compensation.




Types of Regulatory Takings

1. Government's "physical" occupation or invasion of an owner's property
2. Government action that deprives the owner of all economically beneficial use of property
3. Government action that, under the fact-based inquiry of Penn Central Transportation Company vs. City of New York, otherwise economically burdens the property owner, including investment-backed expectation, and the nature of the government action effects a taking



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4. "Land use expectation," whereby the government conditions a permit or other approval on the owner's agreement to dedicate all or part of its property to a public use.



Regulatory Taking Examples

- Being denied a development approval
- Being denied a building permit
- Rezoning denials
- Denial of conditional use permit
- Denial of liquor license
- Rezoning of neighboring properties that may negatively impact adjacent or nearby properties
- Development permit conditions
- Denial to fill wetlands



Regulatory Limits?

In 1922, Supreme Court Justice Oliver Wendall Holmes Jr. said “The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”



BUT WHAT IS TOO FAR?

The best the Court has been able to clarify that rule is to identify two sets of factors:


- The economic impact of the regulation, its interference with **reasonable investment backed expectations**, and the character of the governmental action.
- The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... or denies an owner **economically viable** use of his land.



Appraisal Issues

¹
The overall appraisal process and analysis in an inverse condemnation is essentially the same as a regular condemnation appraisal.


Date of value an important question. There is no acquisition date. The date of value is the beginning of the project or regulatory impact.



Appraisal Issues

²
When appraisers get contacted to do an inverse condemnation appraisal, they do not need to form an opinion as to whether a compensable taking has taken place.


Appraisers should limit their work to the “simple” task of estimating the value of the property before the alleged taking and after the government action.



Appraisal Issues

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Inverse condemnation actions are generally a long, drawn out process. Lawyers may get appraisers involved early to get an opinion or estimate of the amount of potential damages.


The actual appraisal may or may not be ordered immediately as they may first have hearings to determine whether the event qualifies as an inverse condemnation and a compensable damage has occurred.



Appraisal Issues

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- Inverse condemnation damages are often viewed as a temporary rather than a permanent damage.
- The measure of compensation is the owner's loss, not the taker's gain; essentially the same as a temporary easement.
- "A landowner has no right to insist a temporary taking be deemed a permanent taking."
- As such, many inverse condemnation cases are treated as temporary takings.



Appraisal Issues

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- In temporary takings, the Court rules the constitution requires that the government pay the landowner for the value of use of the land during the temporary period.
- The diminution in value resulting from a temporary taking is usually based on the economic rent of the affected for the term of the temporary taking. Measurement is often similar to a Temporary Easement or TLE.



Appraisal Issues

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- Just compensation is assumed to be paid as of the date of taking in one lump sum.
- However, rent (or an appropriate return) would be paid periodically over the term of the lease (or project).
- The appraiser must convert the rental payments lost due to the temporary taking into a lump sum value as of the date of taking.



Severance Damages

- Per Eaton, severance damages are the "diminution of the market value of the remainder, in the case of a partial taking, which arise (a) by reason of the taking (severance) and/or (b) the construction of the improvement in the manner proposed."
- Appraisal Institute Dictionary of Real Estate says severance damages are "generally used to mean those damages to a remainder property that are compensable."
- WI Jury instructions state "Severance damages reduce the fair market value of the remaining property because of the partial taking."





The End ... Thank You

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