



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### **Eminent Domain: Statutory Authority and Procedures**

Eminent domain is the power of the government to condemn (i.e., “take”) private property for public use. Chapter 32 of the Wisconsin Statutes sets forth the general authorities and procedures governing the exercise of eminent domain in Wisconsin, including procedures governing negotiations with property owners, the commencement of condemnation proceedings, the calculation of compensation owed to property owners, and judicial review. This Information Memorandum describes those general authorities and procedures and briefly summarizes the historical development of the law of eminent domain.

#### **HISTORICAL DEVELOPMENT OF EMINENT DOMAIN LAW**

“Eminent domain” refers to the power of a sovereign state over property within its borders. The U.S. Supreme Court has described the power of eminent domain as an inherent “attribute of sovereignty” rather than a power which must be constitutionally conferred.<sup>1</sup>

The law of eminent domain, developed over time through constitutions, case law, and legislation, reflects an attempt to balance that power with private rights of ownership. In feudal times, when nearly all land in England was the property of the king, private rights in property were seen to be conditional and merely possessory. A more enduring concept of private ownership emerged over time. Limitations on the seizure of property by the king appeared in the Magna Carta and developed alongside conceptions of individual ownership.

In the colonial era in what became the United States, colonial governments seized property relatively often, typically without compensation. Such condemnations commonly supported the development of infrastructure such as highways, including private highways, and drainage systems.

The extent of the government’s power to seize property was a subject of debate in the writing of the U.S. Constitution. The takings clause of the Fifth Amendment, which prohibits the taking of private property “for public use without just compensation,” was a compromise approach authored by James Madison. The Wisconsin Constitution, ratified in 1848, similarly provides that “[t]he property of no person shall be taken for public use without just compensation therefor.” [Wis. Const., art. I, s. 13.]

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<sup>1</sup> *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879).

Over time, courts and legislatures have refined the parameters of the purposes for which property may be condemned. The phrase “public use” under the U.S. Constitution has been interpreted to be synonymous with “public purpose.” Expanding on past precedents, a 2005 U.S. Supreme Court decision, *Kelo v. City of New London*, 545 U.S. 469 (2005), upheld a city’s condemnation of property for a downtown economic development project involving private partners. Although the specific property at issue was transferred to a private, nonprofit redevelopment corporation, the Court held that the transfer effectuated a legitimate public purpose under the takings clause. The *Kelo* decision garnered significant public attention. Some commentators argued that condemnations in which property is transferred from one private owner to another private owner should be prohibited, regardless of any public benefits that might result.

The phrase “public use” has been interpreted more narrowly under Article I, Section 13 of the Wisconsin Constitution than under the Fifth Amendment to the U.S. Constitution. In various cases predating the *Kelo* decision, the Wisconsin Supreme Court made clear that “public use” under the Wisconsin Constitution does not mean merely a public benefit. Instead, “public use” implies that condemned property will be actually possessed by the public, and that it is not sufficient that the public will receive “incidental benefits” from condemnation. [See, e.g., *David Jeffrey Co. v. City of Milwaukee*, 66 N.W.2d 362 (1954).] In addition, the Wisconsin Legislature responded to the *Kelo* decision by enacting legislation, described below, to limit the use of eminent domain to transfer property to a private owner.

### **AUTHORITY TO CONDEMN**

Wisconsin law empowers a range of entities, public and private, with condemnation authority. Counties, towns, villages, cities, school districts, and certain state entities may exercise condemnation authority for “any lawful purpose” and thus have the broadest condemnation authority. [s. 32.02 (1), Stats.] Other entities have condemnation authority for more limited purposes.

The following entities may exercise condemnation authority, for the purposes specified:

- Any county, town, village, city, or school district; the Department of Health Services (DHS); the Department of Corrections (DOC); the Board of Regents of the University of Wisconsin (UW) System; the Building Commission; and certain other boards and commissions, for any lawful purpose.
- The Governor and the Wisconsin Adjutant General, for land adjacent to the Wisconsin State Military Reservation at Camp Douglas for the use of the Wisconsin National Guard.
- Any railroad corporation, any grantee of a permit to construct a dam to develop hydroelectric energy for sale to the public, any Wisconsin plank or turnpike road corporation, any drainage corporation, any interstate bridge corporation, and certain corporations formed under former laws for the improvement of streams, for any public purpose authorized by its articles of incorporation.
- Any Wisconsin telegraph or telecommunications corporation, for the construction and location of its lines.

- Any Wisconsin corporation engaged in the business of transmitting or furnishing heat, power or electric light for the public or a foreign transmission provider, for the construction and location of its lines or for ponds or reservoirs or any dam, dam site, flowage rights, or undeveloped water power.
- Any Wisconsin corporation furnishing gas, electric light, or power to the public, for additions or extensions to its plant and for the purpose of conducting tests or studies to determine the suitability of a site for the placement of a facility.
- Any Wisconsin corporation formed for the improvement of any stream and driving logs therein, for the purpose of the improvement of such stream, or for ponds or reservoir purposes.
- Any Wisconsin corporation organized to furnish water or light to any city, village, or town or the inhabitants thereof, for the construction and maintenance of its plant.
- Any Wisconsin corporation transmitting gas, oil, or related products in pipelines for sale to the public directly or for sale to one or more other corporations furnishing such gas, oil, or related products to the public.
- Certain rural electric cooperative associations, for the construction and location of lines, substation or generating plants, ponds or reservoirs, any dam, dam site, flowage rights or undeveloped water power, or for additions or extension of plants and for the purpose of conducting tests or studies to determine the suitability of sites for the placement of facilities.
- Certain housing authorities, redevelopment authorities, community development authorities, local cultural arts districts, and local exposition districts.
- The Wisconsin Aerospace Authority.
- Any person (except a person with a ferrous or nonferrous metallic mining permit) operating a plant which creates waste material which, if released without treatment, would cause stream pollution, for the location of treatment facilities.
- Any corporation licensed to do business in Wisconsin that must transmit and maintain facilities for certain oil or related products, subject to a determination by the Public Service Commission (PSC) that the condemnation is in the public interest.
- The Department of Transportation (DOT), for the acquisition of abandoned rail and utility property.
- The Department of Natural Resources, with the approval of the appropriate standing committees of each house of the Legislature and as authorized by law, for acquisition of lands.

**PROHIBITION REGARDING USE OF EMINENT DOMAIN TO TRANSFER PROPERTY TO A PRIVATE ENTITY**

In the wake of the *Kelo v. City of New London* decision, mentioned above, the Wisconsin Legislature clarified the purposes for which eminent domain authority may be exercised in the

state. Specifically, under Wisconsin law, municipal governments and certain other government entities<sup>2</sup> are statutorily prohibited from acquiring property, other than blighted property, by condemnation if the condemnor intends to convey or lease the acquired property to a private entity.

Before commencing the condemnation of property that a political subdivision or a housing authority intends to convey or lease to a private entity, the condemnor must make written findings to the owner of the property. These findings must include a finding that the property is blighted and the reasons for that finding. To make a finding that a property is “blighted,” it must be shown that the property is detrimental to the public health, safety, or welfare, by reason of any of the following:

- Abandonment, dilapidation, deterioration, age, or obsolescence.
- Inadequate provision of ventilation, light, air, or sanitation.
- High density of population and overcrowding.
- Faulty lot layout in relation to size, adequacy, accessibility, or usefulness.
- Unsanitary or unsafe conditions.
- Deterioration of site or other improvements.
- The existence of conditions that endanger life or property by fire or other causes.
- Any combination of the above factors.

Further detail is provided for single-family properties. Specifically, property that consists of only one dwelling unit is not blighted property unless at least one of the following also applies:

- The property is not occupied by the owner of the property, his or her spouse, or an individual related to the owner by blood, marriage, or adoption within the fourth degree of kinship.
- The crime rate in, on, or adjacent to the property is at least three times the crime rate in the remainder of the municipality in which the property is located.

[s. 32.03 (6), Stats.]

A limited exception to the general statutory prohibition also applies to certain property intended for use as a solid or hazardous waste facility. Such property may be condemned notwithstanding the general prohibition, if the property is intended for use as a solid or hazardous waste facility and certain conditions are satisfied. [s. 289.36 (2), Stats.]

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<sup>2</sup> Specifically, the restriction applies to counties, towns, villages, cities, and school districts; DHS; DOC; the Board of Regents of the UW System; the Building Commission; certain other public boards and commissions; certain housing, redevelopment, and community development authorities; local cultural arts districts; and local exposition districts.

## **GENERAL CONDEMNATION PROCEDURES**

A government or other entity (“condemnor”) generally must follow certain procedural steps to condemn property in Wisconsin. The general statutory condemnation procedures set forth under ch. 32, Stats., are described below.<sup>3</sup>

### ***DETERMINATION OF NECESSITY***

Before a condemnation may proceed, it must be determined to be necessary. In Wisconsin, most state and local government entities are empowered to determine the necessity of the condemnations they pursue, as are condemnors of certain railroad and utility right-of-ways. The PSC determines the necessity of proposed condemnations in cases involving a public utility as a condemnor. The circuit courts determine the necessity of condemnations involving certain other types of condemnors. [ss. 32.06 (1) and 32.07, Stats.]

### ***APPRAISAL OF THE PROPERTY***

A condemnor must cause at least one appraisal to be made of property proposed to be acquired through condemnation. If reasonably possible, the condemnor must confer with the property owner in making an appraisal. The condemnor must provide property owners with a full, narrative appraisal upon which the jurisdictional offer to purchase, described below, is based.

A property owner may also obtain his or her own appraisal of property proposed to be condemned. If the owner does so, the owner must provide a full narrative appraisal to the condemnor within 60 days after the owner receives the condemnor’s appraisal. [s. 32.06 (2), Stats.]

### ***NEGOTIATION PRIOR TO COMMENCING CONDEMNATION***

Before initiating direct condemnation proceedings, a condemnor must first attempt to purchase the property by negotiating with the property owner. [s. 32.06 (2a), Stats.] The Wisconsin Supreme Court has held that such negotiation is more than a technical obligation; negotiation must be attempted in good faith. [*Warehouse II, LLC v. State Department of Transportation*, 2006 WI 62, ¶ 6.]

A condemnor must provide the following information to a property owner during negotiations to purchase property:

- A pamphlet prepared by the Department of Administration (DOA) that explains property owners’ rights in condemnation proceedings.
- At least 10 names (or, if the project affects fewer than 10 properties, all names) of other property owners affected by the proposed project.

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<sup>3</sup> Chapter 32, Stats., provides modified condemnation procedures for certain transportation and sewer projects and for condemnations by the City of Milwaukee. This Information Memorandum does not comprehensively describe those modified procedures. In addition, alternate procedures may apply where specific provisions are set forth elsewhere in the statutes. [See, e.g., *Vivid, Inc. v. Fiedler*, 580 N.W.2d 644 (1998) (holding that special provisions governing the calculation of just compensation for the removal or realignment of billboards apply in lieu of the procedures in ch. 32, Stats.).]

- A map showing all property affected by the project.
- Upon request of the property owner, the names of any other affected property owners and access to any maps possessed by the condemnor that show the property affected, if the owner pays for the reasonable and necessary costs of preparing copies of the maps.

[s. 32.06 (2a), Stats.]

In some cases, a condemnor might reach an agreement with a property owner, but other persons with an interest in the property (for example, mortgagors or other creditors) might object to that agreement. Wisconsin law protects the interests of those third parties by ensuring that they have notice of the agreement and a right to challenge it.

After an agreement is negotiated between the condemnor and a property owner, the condemnor must record the certificate of compensation with the county register of deeds and provide a copy of the certificate to all persons with an interest in the property by service or certified mail. Any person named in the certificate may appeal the amount of compensation within six months of the date that the certificate was recorded. [s. 32.06 (2a), Stats.]

#### ***JURISDICTIONAL OFFER TO PURCHASE***

If the attempt to negotiate the purchase of a given property is unsuccessful, the condemnor must then prepare a “jurisdictional offer to purchase” the property. A jurisdictional offer to purchase is a notice that a condemnor sends to the property owner. The jurisdictional offer to purchase must include all of the following:

- A brief statement of nature of the project and a statement that the condemnor, in good faith, intends to use the property sought to be condemned for a public purpose.
- A description of the property to be condemned.
- The proposed date of occupancy regardless of the date of taking.
- The amount of compensation offered, including an itemized list of damage for which compensation might be owed.
- Notice that the appraisal or one of the appraisals of the property on which the condemnor’s offer is based is available for inspection by the property owner(s).
- Notice of certain procedures regarding the offer, including the deadline for accepting or rejecting the offer and deadlines for commencing a court action and appeal.

[s. 32.06 (3), Stats.]

Notice of a jurisdictional offer may be given either by certified mail or in the same manner that notice of a court action must be given.

#### ***RESPONSE TO A JURISDICTIONAL OFFER TO PURCHASE***

A property owner generally may take one of several actions in response to a jurisdictional offer to purchase: accept the offer, bring an action to challenge the offer, or do nothing (i.e., effectively reject the offer). If the owner chooses to accept the jurisdictional offer, the owner must do so within 20 days of the date on which notice of the offer was served or postmarked. Unless the

owner and condemnor agree otherwise, the title to the property is then transferred, and payment made, within 60 days of the acceptance of the offer. [s. 32.06 (6), Stats.]

If an owner does not accept a jurisdictional offer to purchase, the owner may bring an action to contest the offer on any other grounds other than that the offer does not include just compensation. Such actions must be brought in the circuit court for the county in which the property is located within 40 days of the jurisdictional offer to purchase. [s. 32.06 (5), Stats.]

Alternatively, the owner may do nothing. In that situation, after the statutory time period for acceptance of the offer has elapsed, a condemnor may take the steps described below to initiate condemnation.

***STEPS TO COMMENCE CONDEMNATION IF A JURISDICTIONAL OFFER IS REJECTED OR NOT ACCEPTED***

If a property owner rejects a jurisdictional offer to purchase (either by outright rejection or lack of acceptance), the next steps toward condemnation differ depending on the type of condemnation involved. Special procedures apply to condemnations for certain transportation projects, sewers, and solid waste disposal facility projects, whereas general procedures apply to other condemnations.

***Condemnations for Certain Transportation, Sewer, and Solid Waste Disposal Projects***

Special procedures apply to condemnations of property for public alleys, streets, highways, airports, spaceports, mass transit facilities, or other transportation facilities; gas or leachate extraction systems for solid waste disposal facilities; storm and sanitary sewers; and watercourses or water transmission and distribution facilities. For those condemnations, if a property owner has rejected a condemnor's jurisdictional offer to purchase, the condemnor may make an award of damages for the condemnation of the property. In general, the award must be made pursuant to a relocation order, which is an order by DOT, municipal government, or one of several other specified entities, that includes a map showing the old and new locations and the lands and interests required for a given public project. The award for compensation must include all of the following components:

- The names of all persons having an interest of record in the property.
- A legal description of the property.
- The property interest sought to be condemned.
- The date when actual occupancy of the property condemned will be taken by the condemnor.
- The amount of compensation for the taking of property, which must be at least as much as the amount offered in the jurisdictional offer to purchase.
- A statement that the condemnor has complied with all jurisdictional requirements.

[s. 32.05 (7), Stats.]

A copy of the award must be provided to all people with an interest in the property, either by legal service of process or certified mail. A check for the amount of the award, less the amount

of any outstanding tax liens for the property, must then be provided to the property owners prior to the date when the property is taken. [s. 32.05 (7) (d), Stats.]

### ***Other Condemnations***

For all other condemnations, after a property owner has rejected a jurisdictional offer to purchase, a condemner may file a verified petition for direct condemnation in the circuit court in the county where the property is located. The verified petition must not disclose the amount of compensation proposed in the jurisdictional offer to purchase. The verified petition must include the following information:

- A statement that the jurisdictional offer to purchase has been made and rejected and that it is the condemner's intention, in good faith, to use the property for the purpose specified in the petition.
- The names of all parties having an interest of record in the property, including minors, persons adjudicated incompetent, and persons whose locations are unknown.

A hearing generally must be held on a petition for condemnation no sooner than 20 days after the petition is filed. Notice of the petition must be provided to all persons having an interest in the property.

If the circuit court determines that the condemner is entitled to condemn all or part of the property in question, the court must immediately assign the matter to the chairperson of the county condemnation commission for a hearing, for proceedings described below. If, instead, the circuit court issues an order determining that the condemnation is not authorized, that decision may be appealed. [s. 32.06 (7), Stats.]

A county condemnation commission becomes involved in a proposed condemnation when a circuit court assigns a proposed condemnation to the commission. Within seven days of receiving such an assignment, a county condemnation commission must select three commissioners to serve as a commission for the matter.

The commission must hold a hearing not less than 20 days and no more than 30 days after the matter is assigned to the commission. At the hearing, the property owner must present his or her testimony first and must also have the opportunity to present the closing argument. Typical rules of evidence do not apply to such hearings, but the commission must admit all testimony that has a reasonable probative value and exclude testimony that is immaterial, irrelevant, and unduly repetitious.

Based on the hearing testimony, the commission must determine the amount of just compensation for the property to be condemned. In determining the just compensation award, the commission is supposed to be unaware of the amount of compensation offered for the property as part of a prior jurisdictional offer to purchase. [s. 32.08, Stats.]

### ***CALCULATION OF JUST COMPENSATION***

In general, including awards for compensation for transportation, sewer, and certain waste disposal projects, just compensation must be calculated according to the following requirements:

- **Compensation must be based on fair market value.** If a property is condemned as a whole, the condemner must pay the fair market value of the property. The



determination of fair market value must not take into account the value of improvement to the property caused by the public improvement for which the property is condemned. It also must not take into account the likelihood that the property would be acquired for the public improvement.

- **Determination of fair market value for a partial taking.** Where only part of a given property is condemned, except with respect to the condemnation of an easement, compensation must be the greater of either the fair market value of the property taken as of the “date of evaluation” (typically the date on which the condemnor filed the petition for condemnation in circuit court or, with respect to transportation and sewer projects, the date on which the condemnation award was recorded in the county) 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. This calculation must assume that the public improvement will be completed and must account for costs to the property owner resulting from loss of land, loss of access to a highway, loss of air rights, and other damages resulting from the condemnation.
- **Determination of fair market value for condemnation of an easement.** Where an easement is condemned, compensation is determined by deducting the fair market value of the remainder immediately after the date of evaluation from the fair market value of the whole property immediately before the date of evaluation. This calculation must assume that the public improvement will be completed and must account for certain damages to the property resulting from the condemnation.
- **Prices for comparable property considered.** The price and other terms and circumstances of any good faith sale or contract to sell and purchase comparable property may serve as a basis for determining the value of the property to be condemned. A sale or contract is “comparable” if it was made within a reasonable time before or after the date of evaluation and the property is sufficiently similar in the relevant market, with respect to situation, usability, improvements, and other characteristics, to warrant a reasonable belief that it is comparable to the property being valued.
- **Consideration of property’s most advantageous use.** The property to be condemned must be considered on the basis of its most advantageous use, but only if that use actually affects the present market value.
- **Benefits of condemnation may be taken into account in partial takings.** Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages, but in no event shall such benefits be allowed in excess of damages.
- **Consideration of depreciation in value from exercise of police power not generally allowed.** If a depreciation in value of property results from an exercise of the police power, even though in conjunction with the condemnation, no compensation may be paid for such depreciation except as expressly allowed by statute.

- **Additional payments required for easements on agricultural land for high-voltage transmission lines and fuel pipelines.** Additional compensation requirements apply to certain condemnations for easements on agricultural land for high-voltage transmission lines and petroleum or fuel pipelines. For those condemnations, in addition to a lump sum payment of just compensation, a condemnor must pay an annual payment that represents the fair market value of the easement for one year.
- **Certain additional costs covered.** A compensation award may require a condemnor to pay certain costs in addition to the amounts calculated based on property values. Authorized additional costs are set forth in s. 32.19, Stats., and include certain payments for expenses relating to relocation and expenses arising from the replacement of a farm or business.

[s. 32.09, Stats.]

### ***CHALLENGES TO COMPENSATION AWARDS***

A property owner may challenge the amount of an award of just compensation. With respect to condemnations for certain transportation and sewer projects, a property owner may follow one of two procedures to appeal a compensation award. First, the property owner may submit an application to a circuit court judge for assignment of the award to the relevant county condemnation commission. That application must contain a description of the property condemned and the names and last-known addresses of all parties in interest and must not disclose the amount of the jurisdictional offer to purchase or the award determined by the condemnor. Alternatively, the property owner may waive the right to a hearing before a condemnation commission and may instead appeal the award directly to a circuit court. A two-year deadline from the date that the property was taken applies to both of those alternatives. [s. 32.05 (9), (10), and (11), Stats.]

With respect to other types of condemnations, persons with an interest in the condemned property may appeal a compensation award of a condemnation commission. Those appeals must be brought in the circuit court in which the property is located within 60 days after the date of filing of the condemnation commission's award. [s. 32.06 (10), Stats.]

### **INVERSE CONDEMNATION**

If an entity authorized to exercise eminent domain condemns private property without following the procedures outlined above, including failing to pay just compensation, the owner of the affected property may bring a claim to seek just compensation. That cause of action is commonly referred to as “inverse condemnation.”

The statutory procedures for inverse condemnation claims are set forth in s. 32.10, Stats. A property owner may bring an inverse condemnation claim against a government or other entity that has condemnation authority. To succeed, a claim must show either that the property has been physically occupied or that the condemnation authority has imposed a restriction on the use of the property that deprives the property owner of all, or substantially all, of the beneficial

use of the property.<sup>4</sup> [*E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58.] Wisconsin courts have generally interpreted the statutory inverse condemnation procedures to be inapplicable to situations in which the government's entry is only temporary. [*Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 475 (Ct. App. 1996).]

A property owner must bring an inverse condemnation action in the circuit court in the county in which the property is located. The property owner must file a verified petition that describes the property and states the person against which the condemnation proceedings are instituted and the use to which the property has been put or is designed to be put.

If a circuit court finds that the condemning authority is occupying the property without having the right to do so, the court must treat the matter as if the person bringing the action had received and not accepted a jurisdictional offer of the type described above. It is assumed that the property owner is not challenging the entity's authority to condemn the property.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Anna Henning, on November 6, 2014.

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<sup>4</sup> Article I, Section 13 of the Wisconsin Constitution and the takings clause of the Fifth Amendment to the U.S. Constitution are alternative bases for challenging the taking of property without just compensation. Typically, the remedy for violations of those constitutional provisions is an injunction prohibiting the government's action. In contrast, the typical remedy for an inverse condemnation claim under s. 32.10, Stats., is the payment of just compensation.