

2002 Annual Meeting



Condemnation: Overview & Pointers *(Real Estate & Business Law Track)*

10:15-11:15 a.m.

Presentation by:

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CONDEMNATION

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for the

Iowa State Bar Association - 2002 Annual Meeting

Takings clause - U.S. Constitution:

Fifth Amendment "... nor shall private property be taken for public use, without just compensation"

Iowa Constitution - Article I, Section 18 of the Constitution of the State of Iowa provides:

"Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, *who shall not take into consideration any advantages that may result to said owner on account of the improvement of which it is taken.*" [Emphasis supplied.]

State Law Determines the Property Right

State law determines what constitutes a property right. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358, 362 (1980).

The Power to Condemn - Iowa Code Chapter 6A

While not exclusive (see Iowa Code 6A.19 and separate provisions of the Iowa Code relating to eminent domain for utilities), the provisions relating to the right to exercise eminent domain are found in Iowa Code Chapter 6A. Chapter 6A deals with the authority of the State to exercise eminent domain for

its own public improvements or to exercise the right for the benefit of the Federal Government and by railroads. Iowa Code Section 6A.4 specifically provides:

6A.4 - Right conferred.

The right to take private property for public use is hereby conferred:

1. *Counties.* Upon all counties for public purposes which are reasonable and necessary as an incident to the powers and duties conferred upon counties.

2. *Owners of land without a way to the land.* Upon the owner or lessee of lands, which have no public or private way to the lands, for the purpose of providing a public way, not exceeding forty feet in width, which will connect with an existing public road. The condemned public way shall be located on a division, subdivision or "forty" line, or immediately adjacent thereto, and along the line which is the nearest feasible route to an existing public road, or along a route established for a period of ten years or more by an easement of record or by use and travel to and from the property by the owner and the general public. The public way shall not interfere with buildings, orchards, or cemeteries. When passing through enclosed lands, the public way shall be fenced on both sides by the condemner upon request of the owner of the condemned land. The condemner or the condemner's assignee, shall provide easement for access to the owner of property severed by the condemnation. The public way shall be maintained by the condemner or the condemner's assignee, and shall not be considered any part of the primary or secondary road systems. A public way condemned under this subsection shall not be considered an existing public road in subsequent condemnation to provide a public way for access to an existing public road.

3. *Owners of mineral lands.* Upon all owners, lessees, or possessors of land, for a railway right of way thereto not exceeding one hundred feet in width and located wherever necessary or practical, when such lands have no railway thereto and contain coal, stone, gravel, lead, or other minerals and such railway is necessary in order to reach and operate any mine, quarry, or gravel bed on said land and transport the products thereof to market. Such right of way shall not interfere with buildings, orchards, or cemeteries, and when passing through enclosed lands, fences shall be built and maintained on both sides thereof by the party condemning the land and by that party's assignees. The jury, in the assessment of damages, shall consider the fact that a railway is to be constructed thereon.

4. *Cemetery associations.* Upon any private cemetery or cemetery association which is incorporated under the laws of this state relating to corporations not for pecuniary profit, and having its cemetery located outside the limits of a city, for the purpose of acquiring necessary grounds for cemetery use or reasonable additions thereto. The right granted in this subsection shall not be exercised until the board of supervisors, of the county in which the land sought to be condemned is located, has on written application and hearing, on such reasonable

notice to all interested parties as it may fix, found that the land, describing it, sought to be condemned, is necessary for cemetery purposes. The association shall pay all costs attending such hearing.

5. *Subdistricts of soil and water conservation districts.* Upon a subdistrict of a soil and water conservation district for land or rights or interests in the land as reasonable and necessary to carry out the purposes of the subdistrict.

6. *Cities.* Upon all cities for public purposes which are reasonable and necessary as an incident to the powers and duties conferred upon cities.

Challenge to condemnation based upon "landlocked"

Assertion that land was "landlocked" in application for condemnation of access could not be challenged in condemnation proceeding but could be challenged in a separate proceeding by injunction, mandamus, or certiorari. If the landlocked party had and or could reasonably create access, i.e., if the cost to do so was not wholly disproportionate, the eligibility to condemn access might fail; however, the burden of proof on the issue rested with the condemnee. Owens v. Brownlie, 610 N.W.2d 860, 866 (Iowa 2000). Where only a portion of the landowner's land was landlocked, the court found that "the language and purpose of our condemnation statute reveal a landowner is authorized to condemn land when any portion of the entire tract of land has no public or private way." Owens v. Brownlie, 610 N.W.2d at 867.

Changes to Historic Procedure Made in 1999 and 2000

The Legislature in the 1999 and 2000 Legislative session made a number of fundamental changes to the historic procedure, particularly condemnation of "agricultural land."

6A.21 Condemnation of agricultural land--definitions.

1. Except as otherwise provided, for purposes of this chapter and chapter 6B:

a. "Agricultural land" means real property owned by a person in tracts of ten acres or more and not laid off into lots of less than ten acres or divided by streets and alleys into parcels of less than ten acres, and that has been used for the production of agricultural commodities during three out of the past five years. Such use of property includes, but is not limited to, the raising, harvesting, handling, drying, or storage of crops used for feed, food, seed, or fiber; the care or feeding of livestock; the handling or transportation of crops or livestock; the storage, treatment, or disposal of livestock manure; and the application of fertilizers, soil conditioners, pesticides, and herbicides on crops. Agricultural land includes land on which is located farm residences or outbuildings used for agricultural purposes and land on which is located facilities, structures, or equipment for agricultural purposes. Agricultural land includes land taken out of agricultural production for purposes of environmental protection or preservation.

b. "Private development purposes" means the construction of, or improvement related to, recreational trails, recreational development paid for primarily with private funds, housing and residential development, or commercial or industrial enterprise development.

c. "Public use" or "public purpose" or "public improvement" does not include the authority to condemn agricultural land for private development purposes unless the owner of the agricultural land consents to the condemnation.

2. The limitation on the definition of public use, public purpose, or public improvement does not apply to a slum area or blighted area as defined in section 403.17, or to agricultural land acquired for industry as that term is defined in section 260E.2, or to the establishment, relocation, or improvement of a road pursuant to chapter 306, or to the establishment of a railway under the supervision of the department of transportation as provided in section 327C.2, or to an airport as defined in section 328.1, or to land acquired in order to replace or mitigate land used in a road project when federal law requires replacement or mitigation. This limitation also does not apply to utilities or persons under the jurisdiction of the Iowa utilities board in the department of commerce or to any other utility conferred the right by statute to condemn private property or to otherwise exercise the power of eminent domain.

Initiation of Condemnation Proceedings

The pre-condemnation procedures are also more stringent with respect to agricultural land taken. Section 6B.2A of the Code requires that a governmental body give notice to all owners of agricultural land whose properties may be acquired under power of eminent domain for a public improvement project, and that a hearing be held regarding the project and the proposal to acquire property for the project, before the decision is made to fund the final site-specific design for the public improvement, or before the final route or location of the public improvement is selected.

Additionally, the legislative changes included the statutory provision that, prior to filing for condemnation, the condemning authority was required to negotiate in good faith the acquisition with the property owner prior to filing any application for condemnation. Also, the condemning authority "shall not" make an offer to purchase the property interest for less than the fair market value established for the property. Iowa Code Section 6B.2B. The "fair market value" must – pursuant to Iowa Code Section 6B.2B "be established" by the acquiring agency. As a practical matter, that means that the acquiring agency adopt by resolution the value set by an independent appraiser. The appraiser's entire report must be provided to the landowner and it must be mailed or presented ten days before the condemning authority's agent contacts the property owner to begin negotiations. Iowa Code Section 6B.45.

Basic Procedure

Condemnation proceedings are initiated by the filing of an Application for Condemnation with the Chief Judge for the district in which the property is located. The requirements for the written application are found in Iowa Code 6B.3. The Application is presented to the Chief Judge. No prior notice is required to the condemnee of when the application will be presented.

The assessment of damages is made by a sheriff's jury referred to in the code as the "compensation commission." The individuals who may serve on the compensation commission are appointed by the board of supervisors for the county. At least 28 residents must be appointed to the list annually. One-fourth of them must "be owner-operators of agricultural property," one-fourth "shall be owners of city property," one-fourth "shall be licensed real estate salespersons or real estate brokers," and one-fourth "shall be persons having knowledge of property values in the county by reason of their occupation, such as bankers, auctioneers, property managers, property appraisers, and persons responsible for making loans on property." Iowa Code Section 6B.4.

When the Chief Judge approves the Application for Condemnation, the Chief Judge will select six from the list to serve as commissioners. If the property to be condemned is agricultural, two of the commissioners must be owner-operators of agricultural property and if the property to be condemned is city property, two of the commissioners must own city property. Two each of the other representative groups will be selected. Iowa Code Section 6B.4.

Once the Application is approved and the Order Appointing the Commissioners is issued, the Application and proceedings are referred to and proceed under the jurisdiction of the sheriff. The sheriff schedules the date of the meeting and a Notice of Assessment giving notice of that date – which allows at least thirty days' notice – is issued. Iowa Code Section 6B.8. It is the duty of the condemning authority to effect service of the Application, the Order appointing the commissioners, and the Notice of Assessment. They can be served together.

Challenges to Condemnation

Challenge on the "Public Purpose" basis

Generally, the decision regarding need, identification of the property to be taken, and extent of the property that should be taken is considered to be legislative. Porter v. Board of Sup'rs of Monona County, 28 N.W.2d 841, 238 Iowa 1399 (1947); CMC Real Estate Corp. v. Iowa Dep't of Transp., Rail and Water Div., 475 N.W.2d 166 (Iowa 1991); Milligan v. City of Red Oak, 230 F.3d 355, 361 (8th Cir. 2000).

Whether the planned use represents a wise or unwise purpose is generally not a question that the courts will review. Aplin v. Clinton County, 129 N.W.2d 726, 256 Iowa 1950 (1964).

Courts are loathe to sustain challenge based on "public purpose"

Such a challenge will not succeed "unless it is clear, plain and palpable that uses are private in character." Abolt v. City of Fort Madison, 108 N.W.2d 263, 252 Iowa 626 (1961); Simpson v. Low Rent Housing Agency, 224 N.W.2d 624 (Iowa 1974); Vittetoe v. Iowa Southern Utilities Co., 123 N.W.2d 878, 255 Iowa 805 (1963). Or, "...unless it manifestly appears from the provisions of the act that they can have no tendency to advance and promote such public use." Bankhead v. Brown, 25 Iowa 540 (1868); Ermels v. City of Webster City, 71 N.W.2d 911, 912, 246 Iowa 1305, 1307 (1955).

The Condemnation proceeding is not the appropriate proceeding in which to challenge the taking on the basis that it is not for a "public purpose" -- the condemnation proceeding is instituted for the purpose of establishing the compensation to be paid. That challenge should be raised by a court proceeding to enjoin the condemnation. See Hoover v. Iowa State Highway Commission, 222 N.W.438, 207 Iowa 56 (1928). Or, by certiorari proceeding challenging the decision as exceeding legal authority. Reter v. Davenport, R.I. & N.W. Ry.Co., 54 N.W.2d 863 (Iowa 1952). Owens v. Brownlie, 610 N.W.2d 850, 865-66 (Iowa 2000) - challenge by injunction, mandamus, and certiorari.

Injunctive relief cannot be based upon claims that a municipality's action "is unwise, extravagant or a mistake of judgment." Douglass v. Iowa City, 218 N.W.2d 908, 913 (Iowa 1974).

In Comes v. City of Atlantic, 601 N.W.2d 93, 96 (Iowa 1999), the Court set forth the required showing for a property owner whose property is subject to condemnation to be entitled to a permanent injunction halting condemnation. The Court quoted Mann v. City of Marshalltown, 265 N.W.2d 307, 314 (Iowa 1978) for the proposition that the landowner must show "fraud, abuse of discretion, or other gross impropriety" or that "the owner is in some way illegally deprived of his rights in violation of the constitutional or statutory provisions governing the exercise of the power of eminent domain." Moreover, the Court stated:

In addition to a showing of fraud, oppression, illegality or abuse of power, the person seeking to enjoin a condemnation must demonstrate 'irreparable injury and the inadequacy of any legal remedy.' [*In re Luloff*, 569 N.W.2d 118, 123 (Iowa 1997)].

Comes v. City of Atlantic, 601 N.W.2d at 96.

The Code does not provide for attorneys fees in such proceedings and the plaintiff bears the burden of proof.

Amount and Selection of Land Taken

Site:

A challenge to public purpose and necessity may be directed to the site selected and the necessity for the project. Vittetoe v. Iowa Southern Utilities Co., 123 N.W.2d 878, 880-881 (Iowa 1963). However, the plaintiff carries a difficult burden in order to succeed in such a challenge.

“We recognize that, in choosing among various sites which might be utilized for the construction of a public improvement, a city council, acting as a legislative body, is vested with considerable discretion. Many factors must be considered in selecting a suitable site, some fiscal, some technical, and doubtless some which may only be characterized as political. There will often not be a clearly identifiable superior site. *In choosing among alternative sites, all that is required is that the legislative determination not totally disregard the facts before the body or otherwise constitute a clearly arbitrary selection. See 11 E. McQuillin, The Law of Municipal Corporations § 32.25 n. 4 (3d rev. ed. 1983).*”

Banks v. City of Ames, 369 N.W.2d 451, 455 (Iowa, 1985). [Emphasis supplied.]

Iowa Code Section 6B.3 (g) provides that the application for condemnation shall include:

“(g) A showing of the minimum amount of land necessary to achieve the public purpose and the amount of land to be acquired by condemnation for the public improvement. Any land to be acquired by condemnation beyond the necessary minimum to complete the project shall be presumed not to be necessary for a public use or public purpose unless the applicant can show that a substantial need exists for the additional property to achieve the public use of public purpose, or that the land in question constitutes an uneconomical remnant that has little or no value or utility to the owner, or that the owner consents to the condemnation.”

Selection of the land would be a legislative decision. If the condemnee takes issue with amount of land sought to be taken, that challenge should be made in a separate proceeding brought in district court, not before the compensation commission or in an appeal thereof.

Exception to Challenging Condemnation – Where Agricultural Land is Sought to be Condemned for Industry

In the case of agricultural land sought to be condemned for industrial use, the application for condemnation – including the amount of land sought to be taken – is subject to review by the compensation commission pursuant to Iowa Code Section 6B.4A. Pursuant to Iowa Code 6B.4A (2), the landowner must apply “before the 30-day notice of assessment expires” – in other words, before the date the Commissioners are to meet to view the property and assess damages – to the compensation commission “to determine whether the use of condemnation is necessary for the placement of an industry in the community” and that section sets forth factors to be considered.

N.B. If appealing a decision under this section, it is important to note that this section provides a procedure for appeal that is different than the new procedure for filing an appeal from the assessment of damages. The procedure for appealing this section was not changed when the procedure for appealing an award was changed by the 2002 Legislature. See attached changes to Iowa Code Section 6B.18 made by the 2002 Legislature in attached SF 2192. To appeal this section, you must effect service of the notice of appeal within thirty days.

Standing to challenge condemnation

Any interested person may challenge a condemnation. That includes taxpayers. MidAmerica Pipeline Co. v. Iowa State Commerce Commission, 114 N.W.2d 622 (Iowa 1962).

No requirement under 5th and 14th Amendments to U.S. Constitution that legislature afford potential condemnees an opportunity to be heard on the appropriateness of the taking

Op. Atty. Gen. (Hougen) March 26, 1970. *See also* Rex Realty, Co. v. City of Cedar Rapids, No. Dist. Iowa, No. C99-103 MJM (1-29-02)– finding no due process requirement to give notice before condemnation.

Condemnation not required in order to acquire any property right; the acquisition may be made by voluntary purchase by paying fair market value

Iowa Code Section 6A.5

Any Interest may be acquired, including easement, lateral support, fee, right of entry and inspection, temporary construction easement, etc.

Right to renegotiate construction or maintenance damages

Under Iowa Code Section 6B.52 – whether the interest was acquired by condemnation or purchase – the owner shall have five years from the date of settlement to renegotiate construction or maintenance damages not apparent at the time of the settlement.

Proceeding to assess damages

On the date set for the Assessment, the commissioners will be convened by the sheriff, put under oath, read the instructions prepared by the Chief Justice, hear evidence, and view the land. The proceedings are fairly informal. The witnesses are not required to be sworn; however, any party has a right to have a reporter at the hearing. The commissioners may hear some or all of the evidence before adjourning to “view” the property. Although all evidence is to be presented in open meeting and minutes are to be taken, the commissioners deliberate the assessment of damages in a closed session.

Eligibility of condemnee for attorneys fees and costs in proceeding before compensation commission

If the compensation commission's award exceeds the “highest and best offer” of the condemning authority by 110%, the property owner is entitled to reasonable attorneys fees and costs as determined by the commission. Iowa Code Section 6B.33.

Note that the commission – at least in Des Moines – comes in that morning, takes their oath, hears the instructions, takes some preliminary testimony, goes out to actually “view” the site, reconvenes to hear additional testimony and any argument and then goes into executive session. When it goes into executive session, generally the parties leave. In executive session, the commission makes the assessment of damages. They present their report to the sheriff, who generally mails the assessment that same day. Before the hearing, the condemnor has presented to the sheriff in camera its “highest and best offer” in writing. When the commission calls the sheriff in to report the commission’s assessment of damages, the sheriff will – by comparing the highest and best offer to the compensation commission’s award – determine whether the condemnee is eligible for attorneys fees and costs. If the condemnee has filed an application for fees and costs with the sheriff, the commission will consider it. If the condemnee is not prepared to make the attorney fee and cost application at that time, the opportunity to do so is lost as a practical matter because the commission generally recesses permanently as soon as they have made their appraisal of damages unless (1) the sheriff has determined the condemnee is eligible for attorneys fees and costs and (2) the sheriff knows that a request for fees and costs is being made. An application for fees and costs is not timely until the sheriff has determined

eligibility based upon the comparison of the highest and best offer and the award; accordingly, no application should be presented to the commissioners until the award has been established. The amendment to Iowa Code Section 6B.33 made by the 2002 Legislature appears to recognize that some condemnees' counsel was unaware of the need to be prepared at the time of the hearing to present the claim for fees and costs.

Appeal of the Compensation Commission's Award

The sheriff has jurisdiction of the condemnation proceeding from the time it is referred by the Chief Judge. Appellate jurisdiction is by statute and strict compliance with the statute is required to confer jurisdiction on the district court to hear an appeal. "Appeals from condemnation awards invoke the appellate jurisdiction of the district court." Chao v. City of Waterloo, 346 N.W.2d 822, 824 (Iowa 1984). The Court has held that strict compliance with the statutory notice requirements is required in order to invoke jurisdiction of the district court. Burnham v. City of West Des Moines, 568 N.W.2d 808, 811 (Iowa 1997).

Historically, the party appealing was required to serve all adverse parties within 30 days of the mailing by the sheriff of the notice of the appraisal of damages. Service of that notice of appeal in the manner of an original notice was the critical act to confer jurisdiction on the district court. Note that the procedure will be modified when the amendments to Iowa Code 6B.18 go into effect. With respect to the procedure in effect prior to the effective date of the 2002 Legislative amendments, See Burnham v. City of West Des Moines, 568 N.W.2d 808 (1997); Harrington v. City of Keokuk, 141 N.W.2d 633, 258 Iowa 1043 1966).

The 2002 Legislative changes are attached. The revisions to Iowa Code Section 6B.18 provide that "an appeal of appraisal of damages is deemed to be perfected upon filing of a notice of appeal with the district court within thirty days from the date of mailing the notice of appraisal of damages." The revision then provides that service of that notice in the same manner as an original notice is to be effected within thirty days of filing the notice with the district court.

The 2002 Legislative change also amends Iowa Code Section 6B.22 to extend the time for filing the petition on appeal from 20 to 30 days after the perfection of the appeal.

Title and possession of the property

"Title to the property or the interest in property passes to the applicant when damages have been finally determined and paid." Iowa Code Section 6B.25.

The condemning authority has the right of possession as soon as the commissioner's report is filed with the sheriff and the condemning authority has deposited the amount of the award with the sheriff. Iowa Code Section 6B.25. But there are exceptions to the right of immediate possession by the condemning authority upon deposit of the award. Possession is delayed or forestalled if a landowner's residence, dwelling house, and outbuildings and orchard or garden are taken, if the landowner's house is also taken. See Iowa Code Sections 6B.26 and 6B.27.

Funds Deposited with the Sheriff

The condemning authority may deposit a check with the sheriff for the amount of the award pursuant to Iowa Code Section 6B.25. If the property is mortgaged, that check may be made payable to the condemnee and mortgagee, so that the endorsement of the mortgagee is required to negotiate the check. Also, the check may include the county as an additional payee so that the endorsement of the county (in exchange for the payment of taxes due to the date of condemnation) is required. If an appeal is filed, the sheriff will not release the check without an order of the district court. Accordingly, an application to the district court is necessary in the case of an appeal. The condemning authority may consent to or object to release of the whole or any portion of the award. The court may order that portion of the award that the court finds "just and proper" be released. Iowa Code Section 6B.25.

Proceedings on appeal

On appeal, the case is tried as an ordinary proceeding. The Petition alleges the taking and should "[state] specifically the items of damage and the amount thereof." Iowa Code Section 6B.22. The trial is a de novo proceeding. It becomes a judicial proceeding subject to the Rules of Evidence. Jury trial is available as are the discovery procedures. Because that appeal is heard de novo, the award on appeal may be greater than or less than the award made by the compensation commission, regardless of who initiated the appeal.

The question to be determined is the amount of damages. "[N]o judgment shall be rendered except for costs, but the amount of damages shall be ascertained and entered of record." Iowa Code Section 6B.23. See Stellingwerf v. Lenihan, 85 N.W.2d 912, 249 Iowa 179 (1957); State ex rel. Iowa State Highway Comm'n v. Read, 228 N.W.2d 199, 202 (Iowa 1975) Chao v. City of Waterloo, 346 N.W.2d 822, 236 (Iowa 1984).

The Issue: Fair market value on the date of taking

The issue for any condemnation proceeding is the establishment of the fair market value. In the case of a partial taking, it is the difference in value

immediately before and after the taking. The valuation date is always the date the Condemnation Commission meets -- that date establishes the date of the taking. Crist v. Iowa State Highway Commission, 123 N.W.2d 424, 255 Iowa 615 (1963). Note that the valuation date, even when tried de novo on appeal in the district court remains the date that the Compensation Commission originally convened and viewed the property. Heldenbrand v. Executive Council of Iowa, 218 N.W.2d 628 (Iowa 1974).

Condemning authority is styled as the plaintiff on appeal if the condemning authority also appeals

If both the landowner and the condemning authority appeal, the condemning authority is by law made the plaintiff and all other parties become defendants. Iowa Code Section 6B.21. This does not require a "race to appeal"; it only requires that both appeals are timely. If both parties have perfected their respective appeals, the appeal cannot be dismissed without consent of the other.

Representation regarding need to appeal

Informal assurance from council members that property owner did not need to appeal because city would return property to owner was not binding so as to give rise to action [based either on fraudulent misrepresentation sounding in tort or contract] against the city. City of McGregor v. Janett, 546 N.W.2d 616 (Iowa 1996).

Reference to compensation commission's award on appeal in district court

The amount of the compensation commission's award is not admissible as evidence. Identity of members of the compensation commission and their qualifications are not admissible. Mills v. Iowa Department of Transp., 462 N.W.2d 300 (Ia.App. 1990).

Condemnee's eligibility for attorneys fees and costs on appeal

The condemnee is eligible for an award of its attorneys fees and court costs if it receives *any* increase in award over the amount established by the compensation commission; it does not have to exceed it by 110%. Iowa Code Section 6B.33.

If there is a further appeal to the Supreme Court, the prevailing condemnee is also entitled to a reasonable attorneys fee on appeal. LeHigh Clay Products, Ltd. v. Iowa Dept. of Transp., 545 N.W.2d 526 (Iowa 1996) [note that this case overruled prior case law that had found that the condemnee was

not entitled to attorneys fees incurred for services on appeal to Supreme Court].

Challenges to condemnee's attorneys fee and cost claims

The attorneys fee issue is not presented with the issue of damages. It is decided after the damages have been ascertained. When on appeal in the district level, the court establishes the amount of attorneys fees and costs to be awarded after the verdict is returned.

The award is for the client but evidentiary hearing may be necessary if the fee application is sketchy. See Rouse v. Iowa Dept. of Transp., 408 N.W.2d 767 (1987); Sunrise Development Co. v. Iowa Dep't of Transp., 540 N.W.2d 465, 467 (Iowa Ct. App. 1995).

The court itself is an expert on attorneys fees. Sunrise Development Co. v. Iowa Dept. of Transp., 540 N.W.2d 465 (Ia. App. 1995).

The fees must be reasonable. The court can take into account the results achieved; simple comparison of the results before compensation commission and in court are not determinative. Henderson v. Iowa State Highway Commission, 151 N.W.2d 473, 260 Iowa 891 (1967). However, that is one matter to consider. Nelson v. Iowa State Highway Commission, 115 N.W.2d 695, 253 Iowa 1248 (1962); Sykes v. Iowa Power & Light Co., 263 N.W.2d 551, 554 (Iowa 1978) quoting Nelson.

Offer to confess judgment

A condemning authority may file an offer to confess judgment while the case is pending on appeal to the district court. An offer that includes the offer to pay the costs as set by the court is sufficient to include the required attorneys fees that would be payable under Iowa Code Section 6B.33. As in any other case where an offer to confess is filed, the condemnee would not be entitled to attorneys fees for work after the offer was made, if the jury ultimately awarded an amount equal to or less than the amount offered. See Kenney v. Iowa Power & Light Co., 96 N.W.2d 918, 250 Iowa 887 (1959); Brockhouse v. State, 449 N.W.2d 380 (Iowa 1989).

Payment of award on appeal

If a higher award is made by the jury on appeal, the greater amount must be paid plus interest from the date of condemnation. Iowa Code Section 6B.24.

To be entitled to continued possession, the condemning authority must deposit the difference between what was originally deposited and the award on appeal. Iowa Code Section 6B.31.

Condemning authority may refuse to pay the award and abandon the condemnation

Because under Iowa Code Section 6B.25, title does not pass until damages have been finally ascertained and paid, the condemning authority may abandon the condemnation. However, when the condemnation is abandoned, the condemning authority is liable for fees, costs, and damages. Iowa Code Section 6B.34. Goodwin v. Iowa State Highway Comm'n, 369 N.W.2d 816 (Iowa 1985)

If a lower award is made by the jury on appeal, the difference between the award on appeal and the award of the compensation commission must be repaid.

Where condemnees apply to court for release of funds deposited with the sheriff subject to Section 6B.25 pending appeal, the “condemnees subject themselves to the possibility of personal judgment” for the difference in the event of a lesser award in the district court. Iowa State Highway Commission v. Read, 228 N.W.2d 199, 203 (Iowa 1975).

Continuing “rights” of landowner in condemned land

Iowa Code Section 6B.56 -Disposition of condemned property.

1. If real property condemned pursuant to this chapter is not used for the purpose stated in the application filed pursuant to section 6B.3 and the condemner seeks to dispose of the real property, the condemner shall first offer the property for sale to the prior owner of the condemned property as provided in this section. For purposes of this section, the prior owner of the real property includes the successor in interest of the real property.
2. Before the real property may be offered for sale to the general public, the condemner shall notify the prior owner of the real property condemned in writing of the condemner's intent to dispose of the real property, of the current appraised value of the real property, and of the prior owner's right to purchase the real property within sixty days from the date the notice is served at a price equal to the current appraised value of the real property. The notice sent by the condemner as provided in this subsection shall be filed with the office of the recorder in the county in which the real property is located.
3. If the prior owner elects to purchase the real property at the price established in subsection 2, before the expiration of the sixty-day period, the prior owner shall notify the condemner in writing of this intention and file a copy of this notice with the office of the recorder in the county in which the real property is located.
4. The provisions of this section do not apply to the sale of unused right-of-way property as provided in chapter 306.

And with respect to state highway construction projects approved for commencement by the transportation commission on or after July 1, 1999, and to all other condemnation proceedings in which the application for condemnation is filed on or after July 1, 1999, *see Iowa Code Section 6B.59*.

Iowa Code Section 6B.59 Sale of acquired property-- reimbursement to landowner.

If an acquiring agency acquires property by condemnation, or by otherwise exercising the power of eminent domain, and that property is later sold by the acquiring agency for more than the acquisition price paid to the landowner, the acquiring agency shall pay to the landowner from whom the property was acquired the difference between the price at which it was acquired and the price at which it was sold by the acquiring agency less the cost of any improvements made to or benefiting the land by the acquiring agency. This section does not apply to property acquired by the state department of transportation.

Inverse Condemnation

“The term ‘inverse condemnation’ is a generic description of the manner in which a landowner recovers just compensation for a taking of the owner’s property when condemnation proceedings have not been instituted. *Scott v. City of Sioux City*, 432 N.W.2d 144, 145 n.1 (Iowa 1988)” *Iowa Coal Mining co., Inc. v. Monroe County*, 555 N.W.2d 418, 431 (1996).

Mandamus is the appropriate action to require a government body to institute condemnation proceedings

If the governmental body has neither instituted a condemnation proceeding nor purchased the property but has commenced use of the property, the property owner may bring a mandamus proceeding to compel the governmental body to initiate a condemnation proceeding. *Harrison v. Pottawattamie Drain. Dist. No. 1 v. State*, 156 N.W.2d 835, 839 (Iowa 1968); *Schaller v. State*, 537 N.W.2d 738 (Iowa 1995); *Bellon v. Monroe County*, 577 N.W.2d 877, 879 (Iowa Ct. App. 1998).

In *Schaller v. State*, 537 N.W.2d at 743, the Court noted that in an action for inverse condemnation, “The court’s duty is to ‘determine whether a factual issue exists that would permit a condemnation commission or a jury on appeal of an award to find an intrusion that produced a measurable decrease in the property’s market value.’ *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659, 663 (Iowa 1992).”

For inverse condemnation action to be sustained, there must be a taking. *Water Dev. Co. v. Board of Water Works*, 488 N.W.2d 158, 160 (Iowa 1992).

Taking found: Schaller v. State, 537 N.W.2d 738 (Iowa 1995) (A taking” by DNR when public continued to use roadway after county vacated its easement that had authorized public use).

Taking not found: Water Development Company v. Board of Water Works, 488 N.W.2d 158 (1992) (Not a taking where public water company expanded its territory into area already served by a private water company where none of private company facilities were appropriated and basically only loss was right to be sole supplier of water.) Grove v. Burke, Inc. v. City of Fort Dodge, 469 N.W.2d 703, 705-06 (Iowa 1991)(No “taking” for loss of traffic by property when city changed street system because no right to have continued flow of traffic.)

Regulatory Takings

Regulatory takings can occur either when

- (1) the law permits actual physical occupation of the private property Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); or
- (2) the law denies the owner all economically beneficial or productive use of the land. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

The most recent Iowa case finding a taking by regulation is Bormann v. Kossuth County Board of Supervisors, 584 N.W.2d 309 (Iowa 1998), *cert. denied*, Girres v. Bormann, 525 U.S. 1172, 119 S.Ct. 1096, 143 L.Ed.2d 96 (1999). The Girres’ application for establishment of an “agricultural area” was granted by Kossuth. That designation brought into play a state statute that purported to grant the Girres immunity from nuisance suits by neighboring landowners if the Girres’ operation constituted certain kinds of nuisances, including odor. The neighboring landowners challenged the Supervisors’ action claiming that granting immunity would constitute a “taking” because it was taking a constitutionally protected private right of action without compensating them. The Court gave this outline for its analysis of whether there was a taking:

- (1) Is there a constitutionally protected private property interest at stake?
- (2) Has this private property interest been “taken” by the government for public use?
- and (3) If the protected property interest has been taken, has just compensation been paid to the owner?

Bormann, 584 N.W.2d at 315.

Citing Churchill v. Burlington Water Co., 62 N.W.646, 647 (Iowa 1895), the Court noted the long-standing rule that “the right to maintain a nuisance is an

easement.” Bormann, 584 N.W.2d at 314. Accordingly, the designation of Girres’ operation as an “agricultural area” and state law it triggered effectively granted an easement over the neighbors’ land to the Girres. The Court then noted that in cases involving “regulatory takings,” the United States Supreme Court had employed an ad hoc test focusing on “reasonableness.”

The test focuses on three factors: (1) the economic impact of the regulation on the claimant’s property; (2) the regulation’s interference with investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978). According to some commentators, a court must first find that the regulation substantially advances legitimate state interests before the court may test the regulation against the three factors in *Penn Central*. See, e.g., Craig A. Peterson, *Land Use Regulatory “Takings” Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 351 (1988).

Bormann, 584 N.W.2d 316-7.

Because the statute granted immunity from nuisance suits to agricultural area users, the Iowa Supreme Court found it invalid because it unconstitutionally infringed on the rights of neighboring landowners without payment of compensation. The Court noted in Bormann that the neighbors had not requested compensation; however, the Court suggested that – based upon the United States Supreme Court decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,_ 482 U.S. 304, 319-21, 107 S.Ct. 2378, 2388-89, 96 L.Ed.2d 250, 266-68 (1987) – the neighbors would have been entitled to damages for the temporary taking from the time the taking had occurred until the challenged legislation was invalidated. Bormann, 584 N.W. 2d at 321.

Valid – i.e., reasonable – exercise of police power not a “taking”

The case of Kelley v. Story, 611 N.W.2d 475 (Iowa 2000) presents a good discussion of the difference between a “taking” in the Constitutional sense and exercise of police power. Kelley was a small claims action for damages caused by the action of sheriff’s deputies in forcible entry to effectuate a valid arrest warrant. The Court found the deputies’ actions were a reasonable exercise of police power. The Court found that

“[t]he damage caused to plaintiff’s property in this case would seem to be more in line with those cases where property owners have

been forced to bear some burden 'for the public good,' but where no taking of private property was found."

Kelley v. Story, 611 N.W.2d at 479.

In concluding that the action in Kelley was a valid exercise of police power in which some bore the burden, the Court referred to a number of prior instances in which a valid exercise of police power, rather than a "taking" was found, for example:

Goodenow v. City Council, 574 N.W.2d 18, 25 (Iowa 1998) – where ordinances requiring landowners to mow vegetation in city-owned property at the landowner's expense.

Kent v. Polk County Bd. Of Supervisors, 391 N.W.2d 220 (Iowa 1986) – ordinance prohibiting "dangerous and vicious animals"

Woodbury County Soil Conservation Dist. V. Ortner, 279 N.W.2d 276 (Iowa 1979) – legislation requiring terracing at landowners' expense

Iowa Dept. of Transp. v. Neb.-Iowa Supply, 272 N.W.2d 6 (Iowa 1978) – uncompensated removal of billboards not complying with law

Loftus v. Dept. of Agriculture, 232 N.W. 413 (Iowa 1930) – slaughter of diseased animals

It should be noted that Kelley was not decided by a unanimous court.

Land use regulation – "Taking" alleged

The most recent case on land use regulation constituting a "taking" in the United States Supreme Court is Tahoe-Sierra Preservation Council, Inc., et al v. Tahoe Regional Planning Agency, Supreme Court No. 00-1167 (decided April 23, 2002). In that case, owners of land in the Lake Tahoe Basin brought an action alleged moratoria on building – totaling 32 months as enacted but lasting almost 6 years due to court injunctions – was a "taking." The Court – using the ad hoc approach of Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) found that the exercise of police power in adopting the moratoria was not unreasonable under the circumstances and did not rise to the level of a "taking." This case provides – both in the majority decision and in the dissents – an analysis and discussion of the history of Supreme Court regulatory takings cases.

Condemnation Practical “Tips”

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Iowa State Bar Association - 2002 Annual Meeting

- Increasing the “established” Fair Market Value

- Requires that any increase over what the independent appraiser’s valuation be justified by the city/county acquisition agent both (1) to the local governing body to support an increase in the established fair market value (FMV), and, if state or federal funds are involved, to the State or Federal authority.
 - Provide your appraisals
 - Provide review of the appraisal leading to the determination FMV
 - Point out “flaws” or issues of subjective judgment (ex., capitalization rates) that might result in undervaluation
 - If you don’t supply your appraisal, at least supply comparables that you believe support a price higher than the established FMV
 - Share your arguments of why settlement at a higher FMV is appropriate
 - Provide written documentation that supports your position for a higher FMV – remember that all expenditure of public funds are audited and documentation supporting departure from the FMV established will be required at the city/county, State, or Federal levels

Where State or Federal funding is used for a project, the city/county acquisition agent must present your case for a higher FMV in the most persuasive manner to the State or Federal funding agency. Thus, in essence,

the local representative becomes the advocate for your position in seeking additional funding for the acquisition.

- **Don't assume that the acquisition cannot be agreeably settled.** The acquiring agency would prefer that the property owner be fully compensated rather than expending the time and money to acquire the property by condemnation.

- **Understand the relationship between residential relocation and FMV.**

- When Federal Funds are used, Federal Regulations must be followed.
- When residential property occupied for at least 180 days prior to the offer is condemned using Federal Funds, the resident owner of that property is entitled to an amount that will enable them to move into comparable property that the agency determines is "decent, safe, and sanitary." They are entitled to be compensated the cost of that replacement dwelling (conditioned on their acquiring it) even if that replacement dwelling exceeds the FMV of their current dwelling.

- The property owner will receive an IRS Form 1099 for the FMV of the residence; the owner will not be taxed on the amount paid for the replacement dwelling to the extent that it exceeds the FMV of the acquired dwelling.

- The total amount is equal to the greater of the relocation (cost of the comparable replacement dwelling) or the FMV. Accordingly, the higher the amount paid for the dwelling taken, the less they will receive for relocation.

- **Condemnation may be a positive event for a business**

- When Federal Funds are used, the condemnee may be entitled
 - to relocation benefits,
 - to reestablishment benefits
 - or, to "in lieu of" benefits

- If the business were considering expansion, it may present a good opportunity to approach the local or state government for business expansion loans or grants for which they would be eligible if jobs were created. While condemnation will not pay for a "betterment" for the condemnee, the timing of the business' need to relocate with potential business growth presents the opportunity to seek loans or grants that will result in a betterment

- The business can work with the condemning authority for a cooperative acquisition that will allow the business owner

- to "close" on the sale of the property to the condemning authority and thus have the funds available to acquire or build new facilities, and
- to continue to occupy the "condemned" facilities while building or renovating new facilities

- While the condemning authority's employees may offer some help in finding a new site to which to relocate, do not wait on the condemning authority to provide a relocation facility. Finding a relocation site will remain the condemnee's responsibility. As soon as notice is received that acquisition has been approved, start the process of finding a relocation site. Develop a business plan, a budget, and determine how much the business wants to invest in new facilities. Keep track of the time and expenses involved in the process. While the condemning authority may

be available to assist in looking for new sites, the business will have to know what they are looking for in a new location.

- When the business gets notice that their property will be acquired, contact the condemning authority to learn what benefits relating to moving/relocation will be available. The City of Des Moines' Real Estate Division Relocation Specialists are there to assist the condemnee and they are very good about pointing every benefit to which the condemnee might be entitled. If in doubt, ask if Federal funds are being used for the project and what Federal Regulations govern the relocation process.

- The move can be a great opportunity for good publicity for the business

- Mediation is Useful when the Property owner feels powerless and needs to have a target (other than his own attorney) on whom to vent.

- Settlements can be beneficial to the property owner

- Agree to the timing of the transfer and thus when IRS Form 1099 will be issued

- Agree to terms and conditions of occupancy after transfer

- May be able to negotiate

- change in property or extent of property taken

- modification of design of improvement of public improvement (finish of landscape, etc.)

- property interest taken

- terms and extent of return of excess property

- access

- future commitments

- Remember that members of the compensation commission are paid by the day

- Make your presentation concise

- The strict rules of evidence do not apply

- Be prepared to present your claim for attorneys fees and costs if the award exceeds the "highest and best offer" by more than 110 % .

-Remember that condemnation law is strictly defined by statute. Take the time to read it through to reduce the chance that you will miss a deadline or requirement.

- Check to ensure that the law has not changed (it seems that the Legislature changes something in this area annually)

- Be wary of winning "too much" at the compensation commission level

- You will have to "beat" that amount to be entitled to attorneys' fees on appeal

Text: SF02191
Text: SF02100 - SF02199
Bills and Amendments: General Index

Text: SF02193
Text: SF Index
Bill History: General Index

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Senate File 2192

Partial Bill History

- Bill Introduced: [S.J. 289](#)
- Committee Report Issued: [S.J. 291](#) [H.J. 761](#)
- Passed House: [H.J. 835](#)
- Passed Senate: [S.J. 432](#) [S.J. 735](#)
- Signed by Governor: [S.J. 981](#)
- [Complete Bill History](#)

Bill Text

PAG LIN

1 1 SENATE FILE 2192
1 2
1 3 AN ACT
1 4 RELATING TO HIGHWAYS AND MOTOR VEHICLES AND CONDEMNATION,
1 5 INCLUDING CONDEMNATION OF PROPERTY BY THE STATE DEPARTMENT
1 6 OF TRANSPORTATION, REGISTRATION, SALE, AND OPERATION OF
1 7 CERTAIN VEHICLES, ISSUANCE OF DRIVER'S LICENSES AND NON-
1 8 OPERATOR'S IDENTIFICATION CARDS, REGULATION OF OVERSIZE
1 9 VEHICLES, AND VEHICLE MANUFACTURERS, DISTRIBUTORS, AND
1 10 DEALERS, AND PROVIDING PENALTIES AND EFFECTIVE DATES.
1 11
1 12 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
1 13
1 14 DIVISION I
1 15 HIGHWAYS
1 16 Section 1. Section 6B.2A, subsection 4, Code 2001, is
1 17 amended to read as follows:
1 18 4. This section shall not apply to a condemnation of
1 19 property by the state department of transportation or a county
1 20 for right-of-way that is contiguous to an existing road right-
1 21 of-way and necessary for the maintenance, safety improvement,
1 22 ~~or~~ repair, or upgrade of the existing road. Notwithstanding
1 23 section 6B.2C, a condemnation of property by the state
1 24 department of transportation pursuant to this subsection shall
1 25 be approved by the director of the department of
1 26 transportation. For purposes of this subsection, "upgrade"
1 27 means to bring a road or bridge up to currently acceptable

1 28 standards, including improved geometrics, passing lanes,
1 29 turning lanes, climbing lanes, and improved shoulders.
1 30 "Upgrade" does not include expanding a highway from two lanes
1 31 to four lanes.

1 32 Sec. 2. Section 6B.18, Code 2001, is amended to read as
1 33 follows:

1 34 6B.18 NOTICE OF APPRAISEMENT - APPEAL OF AWARD - NOTICE
1 35 OF APPEAL.

2 1 1. After the appraisalment of damages has been delivered to
2 2 the sheriff by the compensation commission, the sheriff shall
2 3 give written notice, by ordinary mail, to the condemner and
2 4 the condemnee of the date on which the appraisalment of damages
2 5 was made, the amount of the appraisalment, and that any
2 6 interested party may, within thirty days from the date of
2 7 mailing the notice of the appraisalment of damages, appeal to
2 8 the district court by filing notice of appeal with the
2 9 district court of the county in which the real estate is
2 10 located and by giving written notice to the sheriff that the
2 11 appeal has been taken. The sheriff shall endorse the date of
2 12 mailing of notice upon the original appraisalment of damages.
2 13 ~~At the time of appeal, the appellant shall give written notice~~
2 14 ~~that the appeal has been taken to the adverse party, or the~~
2 15 ~~adverse party's agent or attorney, lienholders, and the~~
2 16 ~~sheriff.~~

2 17 2. An appeal of appraisalment of damages is deemed to be
2 18 perfected upon filing of a notice of appeal with the district
2 19 court within thirty days from the date of mailing the notice
2 20 of appraisalment of damages. The notice of appeal shall be
2 21 served on the adverse party, or the adverse party's agent or
2 22 attorney, any lienholders and encumbrancers of the property in
2 23 the same manner as an original notice within thirty days from
2 24 the date of filing the notice of appeal unless, for good cause
2 25 shown, the court grants more than thirty days. If after
2 26 reasonable diligence, the notice cannot be personally served,
2 27 the court may prescribe an alternative method of service
2 28 consistent with due process of law.

2 29 3. In case of condemnation proceedings instituted by the
2 30 state department of transportation, when the owner appeals
2 31 from the assessment made, such notice of appeal shall be
2 32 served upon the attorney general, or the department general
2 33 counsel to the state department of transportation, or the
2 34 chief highway engineer for the department.

2 35 Sec. 3. Section 6B.22, Code 2001, is amended to read as
3 1 follows:

3 2 6B.22 PLEADINGS ON APPEAL.

3 3 A written petition shall be filed by the plaintiff within
3 4 ~~twenty~~ thirty days after perfection of the appeal, stating
3 5 specifically the items of damage and the amount thereof. The
3 6 court may for good cause shown grant additional time for the
3 7 filing of the petition. The defendant shall file a written
3 8 answer to plaintiff's petition, or such other pleadings as may
3 9 be proper.

3 10 Sec. 4. Section 6B.24, Code 2001, is amended to read as
3 11 follows:

3 12 6B.24 REDUCTION OF DAMAGES - INTEREST ON INCREASED AWARD.

3 13 If the amount of damages awarded by the commissioners is
3 14 decreased on appeal, the reduced amount shall be paid to the

3 15 landowner. If the amount of damages awarded by the
3 16 commissioners is increased on appeal, interest shall be paid
3 17 from the date of the condemnation. Interest shall not be paid
3 18 on any amount which was previously paid. Interest shall be
3 19 calculated at an annual rate equal to the ~~coupon issue yield~~
3 20 ~~equivalent, as determined by the United States secretary of~~
3 21 ~~the treasury, of the average accepted auction price for the~~
3 22 ~~last auction of fifty two week United States treasury bills~~
3 23 treasury constant maturity index published by the federal
3 24 reserve in the H15 Report settled immediately before the date
3 25 of the award.

3 26 Sec. 5. Section 6B.33, Code 2001, is amended to read as
3 27 follows:

3 28 6B.33 COSTS AND ATTORNEY FEES.

3 29 The applicant shall pay all costs of the assessment made by
3 30 the commissioners and reasonable attorney fees and costs
3 31 incurred by the condemnee as determined by the commissioners
3 32 if the award of the commissioners exceeds one hundred ten
3 33 percent of the final offer of the applicant prior to
3 34 condemnation. The condemnee shall submit an application for
3 35 fees and costs prior to adjournment of the final meeting of
4 1 the compensation commission held on the matter. The applicant
4 2 shall file with the sheriff an affidavit setting forth the
4 3 most recent offer made to the person whose property is sought
4 4 to be condemned. Members of such commissions shall receive a
4 5 per diem of two hundred dollars and actual and necessary
4 6 expenses incurred in the performance of their official duties.
4 7 The applicant shall reimburse the county sheriff for the per
4 8 diem and expense amounts paid by the sheriff to the members.
4 9 The applicant shall reimburse the owner for the expenses the
4 10 owner incurred for recording fees, penalty costs for full or
4 11 partial prepayment of any preexisting recorded mortgage
4 12 entered into in good faith encumbering the property, and for
4 13 similar expenses incidental to conveying the property to the
4 14 applicant. The applicant shall also pay all costs occasioned
4 15 by the appeal, including reasonable attorney fees to be taxed
4 16 by the court, unless on the trial thereof the same or a lesser
4 17 amount of damages is awarded than was allowed by the tribunal
4 18 from which the appeal was taken.