SESSION 408

Hot Topics in Eminent Domain

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2017 Real Estate Institute – November, 2017

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I. REGULATORY TAKINGS, *MURR V. WISCONSIN*, INVERSE CONDEMNATION, *HARSTAD V. CITY OF WOODBURY*.

by Gary A. Van Cleve

A. <u>Taking Primer and Overview</u>.

1. <u>Purpose of the Takings Clause</u>. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn., July 12, 2007): "The purpose of the Takings Clause 'is to ensure that the government does not require 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998) (quoting *Zeman*, 552 N.W.2d at 552)."

2. *Lingle* <u>Summary of Possible Types of Takings</u>: *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the Court engaged in a brief discussion of four recognized types of takings. *Lingle* clarified that the past decisions of the Court recognize four independent tests that a property owner may use to obtain compensation from the government for a taking:
   a. Permanent physical invasion: an actual physical taking or invasion of private property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (taking where state law required landlords to allow cable companies to install cable facilities in apartment buildings).
   b. "Total" categorical taking: where a regulation deprives a property owner of all economically beneficial uses of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014.
      i. Example: requiring property to be set aside for open space.
      ii. In *Wensmann*, the court clarified that to successfully claim a categorical taking under Lucas, "a property owner must demonstrate that a regulatory action resulted in 'a 100% diminution in value.'".
   c. <u>Regulatory Takings Under a Balancing Analysis</u>: Must balance several factors as articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), relating to the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with the claimant's "distinct investment-backed expectations." *Wensmann* states that there must be a balancing of the following three *Penn Central* factors:
      i. The economic impact of the regulation.
      ii. The extent to which the regulation interferes with the property owner's distinct investment-back expectations.
      iii. Character of the governmental action.
   d. <u>Onerous Land Use Exactions Imposed as Conditions of Obtaining a Development Permit</u>. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
      i. Fifth Amendment takings challenges to land-use exactions.
      ii. *Nollan*: permit to build larger residence on beachfront property conditioned on dedication of easement allowing public to traverse property between owner's seawall and mean high-tide line.

iii. *Dolan*: permit to expand hardware store and parking lot conditioned on dedication of portion of the property for a "greenway," including bike path.

iv. Issue in both cases was whether government could demand the easement as a condition for granting a development permit that the government was entitled to deny.

v. *Dolan* refines test to require **rough proportionality**: an exaction requiring dedication of private property must also be "'rough[ly] proportiona[l]' … both in nature and extent to the impact of the proposed development." 512 U.S. at 391.

vi. *Lingle* explains/emphasizes several points about nexus/proportionality under *Nollan/Dolan*:

- Premise in both cases was that there would have been a per se physical taking had the government simply appropriated the easement.
- In neither case did the Court question whether the exaction would substantially advance some legitimate state interest.
- **Nexus**. Rather, issue was whether the exactions substantially advanced the same interests that land use authorities asserted would allow them to deny the permit altogether.
- **Proportionality**. Moreover, there must not only be such a nexus, there must also be rough proportionality between the conditions imposed and the nature and extent of the impact of the proposed development.

B. Recent Regulatory Taking Decision: *Murr v. Wisconsin*, U.S. Supreme Court No. 15-214 (June 23, 2017).

1. Background. Review of a trial court grant of summary judgment to Defendant in a regulatory takings case.
   a. Plaintiffs had separately acquired two adjacent parcels from family members or entities connected with those members, neither of which could be developed for residential use separately under the local zoning regulations, and built a cabin on one of them.
   b. Local merger regulation. The zoning regulations allowed for residential development of undersized lots in certain circumstances, but also required (before Plaintiffs acquired the lots), that adjacent parcels under the same ownership were considered "merged" so that only one house could be placed on them.
   c. Plaintiffs' application for a hardship variance for an additional dwelling was denied; denial was affirmed on appeal. Plaintiffs claimed a regulatory taking as a result of the imputed merger land use regulation.

2. Trial court ruling. The trial court granted Defendant's summary judgment motion on the taking claim, finding Plaintiffs had other options for the use of the vacant

lot in conjunction with the existing cabin, which could be moved or replaced and that they had not been deprived of all economic value of their property.

3. Wisconsin Court of Appeals ruling. The state Court of Appeals affirmed, using a "parcel as a whole rule" that analyzed the taking claim with reference to both parcels under common ownership. That court noted the merger provision existed before Plaintiffs acquired either property, so that they were on notice of that limitation so that it was unreasonable to expect otherwise and observing the difference in value of the merged parcel and the two parcels separately was less than 10%. The state Supreme Court denied discretionary review and the U. S. Supreme granted certiorari.

4. U.S. Supreme Court majority opinion.
    a. Justice Kennedy's majority opinion noted that regulatory takings may occur when all economic value is deprived or under the three-factor test of *Penn Central Transp. Co.. v. New York City,* 438 U.S. 104, 124 (1978), i.e. economic impact of the regulation, interference with distinct investment backed expectations and the character of the regulation.
    b. Terming the use of the *Penn Central* analysis as involving a "complex series of factors" and noting that even deprivation of all viable economic use was not always dispositive in a taking claim, Justice Kennedy concluded that the "central dynamic" of the court's regulatory takings jurisprudence was the "flexibility" to reconcile property rights with a public agency's power to adjust rights for the public good.
    c. The majority noted previous cases used a "parcel as a whole" rule to evaluate certain takings claims involving multiple property interests, such as in *Penn Central*, where Plaintiff attempted to segregate "air rights" to build to a greater height within the zoning envelope. The Court did not consider this potential interest separately but looked to the effect of the regulation on the entire property, where the "denominator" of full value would often reduce its impact, and thus its constitutional significance.
    d. The majority also stated that it was the purpose of the Takings Clause that was important, i.e., preventing the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."
    e. Three factors announced for defining "property." The majority refused to define property for constitutional purposes as always coextensive with state law, which could allow that interest to be altered to defeat an otherwise legitimate Takings claim, choosing three new "factors" to determine the denominator, the parcel as a whole, as follows:
        i. the treatment of the land under state law (a landowner must recognize reasonable expectations that legitimate restrictions may be imposed),
        ii. the physical characteristics of the land (i.e., human, topographic and environmental limits on its use), and
        iv. the effect of regulations on other lands held by the same owner.

f. Application of three factors. The majority accepted the merger provisions as a reasonable exercise of state policy under the first factor. The shape of the parcels, their rough terrain and significantly undevelopable portions added to the rationality of the merger provisions under the second factor. Finally under the third factor, the lack of separate residential use on one of the two parcels is offset by the use of the property as an integrated whole, with additional open space and privacy and additional flexibility locating improvements. The market value differential in the value of the parcels separately and as merged also contributed to the rationality of the regulations.

g. The majority found no denial of all viable economic use, as the parcel as a whole may be still used for residential purposes. Nor do the merger requirements fail the *Penn Central* factors, as the loss in value was less than 10%, Plaintiffs could have expected these rules under the circumstances, and the regulation was part of an intergovernmental effort to preserve the river and surrounding land. The majority concluded:

h. Like the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. * * * Courts must instead define the parcel in a manner that reflects reasonable expectations about the property. * * * Treating the lot in question as a single parcel is legitimate for purposes of this taking inquiry, and this supports the conclusion that no regulatory taking occurred here.

C. <u>How Regulatory Takings are Raised in Minnesota</u>.

1. Inverse condemnation. *See* Minn. Stat. § 117.045.

117.045 COMPELLING ACQUISITION IN CERTAIN CASES.

Upon successfully bringing an action compelling an acquiring authority to initiate eminent domain proceedings relating to a person's real property which was omitted from any current or completed eminent domain proceeding, such person shall be entitled to petition the court for reimbursement for reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred in bringing such action. Such costs and expenses shall be allowed only in accordance with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Statutes at Large, volume 84, page 1894 (1971), any acts amendatory thereof, any regulations duly adopted pursuant thereto, or rules duly adopted by the state of Minnesota, its agencies or political subdivisions pursuant to law.

2. Mandamus action is appropriate procedure for raising a regulatory taking claim in district court.

a. In *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 176-80 (Minn. 2006), the Minnesota Supreme Court clarified the types of actions for which mandamus was the proper procedure for bringing the issue before the court.

b. The court said that actions for inverse condemnation may appropriately be brought by writ of mandamus. Id. (*citing N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 491 (Minn. 2004)).

c. *Wensmann Realty v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007).

   i. Provides a comprehensive survey of federal regulatory takings theories and recognizes the applicability of these theories not only under federal, but also the Minnesota State Constitution.

   ii. Suggests that Minnesota Taking Clause, which is broader on its face than the Fifth Amendment to the U.S. Constitution, possibly ought to be more broadly applied.

   iii. Supreme Court holdings.

      (1) City had rational basis for denying application for amendment to comprehensive plan;

      (2) Genuine issue of material fact as to whether city's denial of application for proposed amendment to city's comprehensive plan deprived golf course owner of any reasonable, economically viable use of the property, precluded summary judgment on takings claim;

      (3) Knowledge of current owner when it had purchased golf course, that city's comprehensive plan did not allow for residential development of the property, did not automatically preclude a regulatory takings claim by owner, overruling *Myron v. City of Plymouth*, 562 N.W.2d 21.

   iv. Upon remand, City adopted moratorium and rezoned the property to allow essentially the same development that *Wensmann* had proposed. By then, the market had changed, *Wensmann* was in no economic position to proceed with development and a national homebuilder developed the site.

D. <u>*Harstad Properties, LLC v. City of Woodbury*, Appellate Case No. A16-1937, Filed Sept. 18, 2017, Minnesota Court of Appeals</u>.

1. <u>Facts</u>.

   a. Harstad sought to develop 77-acre parcel in City of Woodbury into 183 homesites to be called “Bailey Park.”

   b. City had adopted a resolution to collect offsite roadway improvement costs at time properties develop, called “major roadway assessment.”

   c. Harstad challenged City actions as (a) illegal impact fee, (b) untimely decisionmaking under 60 day rule (Minn. Stat. § 15.99) and (c) a temporary taking regulatory taking represented by project delays arising from the City’s refusal to approve the development.

2. <u>District Court Ruling</u>.
    a. Court concluded that the major roadway assessment was essentially a development impact fee.
    b. Further concluded that the City was without statutory authority under state enabling legislation, Minn. Stat. § 462.358, subd. 2a, to impose the assessment as a condition of development approval.
    c. Court dismissed 60 day rule claim on the basis that Harstad's application was incomplete (although he received conflicting messages on this from the City).
    d. Court dismissed temporary taking claim because the major roadway assessment was "neither imposed nor collected"; accordingly, the court believed there was no taking.

3. <u>Court of Appeals Ruling</u>.
    a. Affirmed 60 day rule dismissal, agreeing with district court that application was not fully complete.
    b. Affirmed temporary taking dismissal on same basis as district court—no fee was actually paid by Harstad. Court rejected *Koontz v. St. Johns River* reasoning. 133 S.Ct. 1933, 1942-43 (2017).
        i. Harstad argued the City's mere demand of the fee was a temporary regulatory taking from the time of the demand to the time it was declared illegal.
        ii. Court of appeals relied on the statement in *Koontz* that "where the permit is denied and the condition is never imposed, nothing has been taken."
        iii. Here, the court of appeals reasoned, the City has not denied Harstad's Bailey Park application, nor has it imposed the impact fee; accordingly, nothing was taken.
    c. Affirmed district court ruling that the major roadway assessment was illegal, but avoided the question of whether it was an illegal impact fee.
        i. Court relied on the municipal enabling legislative provision, Minn. Stat. § 462.358, subd. 2a as unambiguous in failing to provide any authorization to collect such a fee—"Rather, subdivision 2a authorizes city planning."
        ii. Court also rejected the City's argument that the enabling statute implied the power to collect such a fee, because other statutory provisions allow for city collection of fees; namely, the special assessment power under Minn. Stat. Ch. 429 and the authority to assess water and sewer connection charges for these infrastructure improvements under Minn. Stat. § 444.075, subd. 3.
        iii. The court also looked to *Country Joe v. City of Eagan,* 560 N.W.2d 681 (Minn. 1997), which struck down a city road connection charge that was without statutory authority, to emphasize that the legislature's conferring of broad planning power does not translate into broad financing power.
    d. Did not reach issues of whether the major road assessment was an impact fee and whether the assessment was an illegal tax.

II. MOTIONS TO LIMIT EVIDENCE BEFORE THE COMMISSIONERS.

by Leland J. Frankman

A. Statutory Procedure.

1. Minnesota Statutes, Chapter 117, which includes the procedural requirements for the commencement of a condemnation action, has several provisions which describe what the condemning authority must do to start an eminent domain or condemnation action in the district court. It is a very simple procedure since the basic issue is first to determine if a taking is for a public purpose and necessary to accomplish that purpose. Although the statutes spell out the requirements for a condemnation petition in M.S.A. §117.055 and sets out the what is necessary for the condemnor to establish at a hearing before the court in M.S.A. §117.075 to have its petition accepted, it is not until we get to the commissioners' statute, M.S.A. §117.085, that the statutes discuss the procedure for evidentiary hearings on damages, to be awarded to affected landowners. In short, it is the commissioners who hear the damage issues that will be debated by condemnor and landowner. Our commission system was originally adopted by the Mill Dam Act way back before Minnesota was a state. It was adopted by the Territorial Legislature to be quick, efficient and somewhat informal and without formal discovery.

2. M.S.A. § 117.055. Petition and Notice. In this section of Chapter 117, the statute describes what must be in a condemnation petition and states that the petition must be served on all interested parties within 20 days before the presentation of the petition in district court. If a party wants to challenge the public use or public purpose, or necessity for the taking, they must appear at the hearing of the petition. The statute does not give the condemnor or landowner any right to avail themselves of motion practice. However, if the landowner believes that there are affected parcels that should be in the condemnation, it is a good idea to mention that at the hearing on petition and ask that these parcels be added to the taking. It is to be noted, however, that usually whether contiguous or non-contiguous parcels not mentioned in the petition are claimed by the owner to be damaged, the commissioners have jurisdiction to hear those damages, and often, when the parties go back to the court to have this decided, the court will say these are evidentiary matters for the commissioners, and just send it back to the commissioners.

3. M.S.A. § 117.075 Hearing; Commissioners; Order for Taking. This section just provides that the court will hear all competent evidence offered for or against granting the petition, and if approving the petition, which is almost never denied, shall appoint three commissioners and two alternates "… ascertain and report the amount of damages that will be sustained by the several owners on account of such taking". It goes on to talk about the qualifications for the commissioners. The commissioners all must be

experienced in real estate and/or condemnation such as brokers, or appraisers, and an attorney can be on the commission as well if he/she is knowledgeable in eminent domain matters. For instance, in Hennepin County, an attorney is always put on the commission as chairman, and the other counties frequently do that as well if attorneys that qualify are available. It is assumed that these experts will sort out the evidence at the commission hearings. Again, there is nothing in that section that provides for discovery or for motions by either side to limit the evidence to be submitted to the commissioners at a later date.

B. Recent Attempts by Condemnors to Limit Landowner's Evidence at Commission Hearings.

1. In a Dakota County case in which this writer represented several landowners, *City of West St. Paul v. Dimmen, et.al.*, the City/condemnor sought to obtain an order soon after the commissioners were appointed to have District Judge Abrams order the commissioners to not consider certain evidence pertaining to construction-related interference damages. He declined to do so in his order of May 2015 saying that Chapter 117 does not provide a procedure for instructing Commissioners. He cited *Board of Park Commissioners of City of Minneapolis v. Bremner*, 190 Minn. 534, 536, 252 N.W. 451,452 (1934) for this proposition. Judge Abrams states that our cases allow motions when they are: "matters of importance and by *agreement of counsel*". He stated that the court declined to exercise its discretion to instruct the commissioners in absence of agreement among the parties. We find it significant that he also stated that the legal issue on which the condemnor requested an instruction was not whether or not there was a compensable interest. No one was questioning whether a taking had occurred or whether the landowner had a compensable interest as occurs in an inverse (mandamus) condemnation case.

2. In a recent order by Judge McGill in the case of *State of Minnesota, by its Commissioner of Transportation vs. Laurel Hill, LLC, et al.*, (a copy of which is attached) in Hennepin County dated August 9, 2017 the court declined to give MNDOT's requested instruction to the commissioners citing the Fourth Judicial District Judicial Policy on Condemnation, p.4 §B.9 which provided that the attorney commissioner could come to the court for advice if he was unable to resolve a question of law and reasonable notice was given to both sides. The chairman of the commission had not requested advice and the court also stated that the attorney/chairman was knowledgeable and experienced in eminent domain matters and could handle the matter. The Hennepin County rules, as well as the Ramsey County rules also provide that discovery is not available at commissioners' hearings. Hennepin County rules allow it only if expressly granted by the court (that almost never happens).

3. This writer has practiced in the area of eminent domain for many years, and has found the district courts are very reluctant to get into advising the commissioners on issues on what the condemning authority lawyers perceive

are questions of law, since many condemnation issues are a combination of law and fact, and it is the commissioners that are the finders of fact as to damages in the first instance, even if these issues are sometimes a combination of law and fact. Judge Abrams addressed this in his order cited above. He said:

"While the Court, rather than the commissioners or a jury on appeal, must decide 'difficult questions of law' decisions on questions of law are not decided within a vacuum. *State by Mattson v. Prow's Motel, Inc.*, 285 Minn. 1,5-6, 171 N.W.2d 83,85-86 (1969). See also Stat. § 117.085 (setting forth commissioners' duties). They are decided within a factual context which provides meaning. The legal issue upon which Petitioner requests instruction is not whether a taking has occurred or there is a compensable interest."

4. Access issues are often a question of law and fact, but unless there is no partial taking which would then require a court to decide whether there is a taking in a mandamus case, the damages are for the commission to decide. An example is whether an access closing leaves the landowner with "reasonably convenient and suitable access in at least one direction. Even when there is a partial taking, recently some condemning authorities think that an access case needs a court to decide whether the landowner can present evidence of damages, usually by bringing a mandamus. But we believe once the court has jurisdiction because of a partial taking and the landowner is put into condemnation for a taking by the condemnor, that it is the commissioners who should hear the facts of how the property is damaged on the traditional before and after basis, and decide how the property is damaged, if indeed, damages are appropriate.

   See CIVJIG 52.45 Taking of Access Rights in which the case of *Lord v. Kohler*, 128 N.W. 2d 90,93 (1964) is cited as Authorities: "Whether an owner has sustained damages by way of a condmnor's denial of or interference with access is a fact question."

III. ACCESS: THE INTERSECTION OF POLICE POWERS AND EMINENT DOMAIN.

by Daniel J. Biersdorf

A. <u>Existing State of the Law in Minnesota</u>.

In general, an abutting landowner may be entitled to damages when a highway modification project substantially impairs "reasonably convenient and suitable access to the main thoroughfare." *Beer v. Minn. Power & Light Co.*, 400 N.W.2d 732, 734 (Minn. 1987). Whether there has been a taking of reasonably convenient and suitable access is a mixed question of fact and law. *Grossman Invs. v. State by Humphrey*, 571 N.W.2d 47, 50 (Minn. App. 1997), review denied (Minn. Jan. 28, 1998). Whether reasonably convenient and suitable access exists is a question of fact that is determined based on the particular circumstances of each case. *Id*. But whether a change in access constitutes a taking is a matter of law. *Oliver v. State ex rel. Comm'r of Transp*., 760 N.W.2d 912, 916 (Minn. App. 2009) (quotation omitted), review granted (Minn. Apr. 29, 2009), and appeal dismissed (Minn. Nov. 16, 2009).

The state public-highway system is addressed expressly within the Minnesota Constitution. Minn. Const. art. XIV. The constitution mandates construction and maintenance of a public-highway system:

> A county state-aid highway system shall be constructed, improved and maintained by the counties as public highways in the manner provided by law. The system shall include streets in municipalities of less than 5,000 population where necessary to provide an integrated and coordinated highway system and may include similar streets in larger municipalities.

Minn. Const. art. XIV, § 3. In examining how the state may satisfy this constitutional mandate,

> it should not be overlooked that it is generally accepted that municipalities [and counties] possess extensive and drastic police powers with respect to the care, supervision, and control of streets. The exercise of such powers by municipalities has been upheld and sustained by the courts in a great variety of situations.

The Alexander Co. v. City of Owatonna, 222 Minn. 312, 324, 24 N.W.2d 244, 251–52 (1946), *overruled in part on other grounds by Johnson v. City of Plymouth*, 263 N.W.2d 603 (Minn.1978).

This police power is the ability of the state and its political subdivisions to impose restraints on private rights that are necessary for the general welfare. *In re 1994 & 1995 Shoreline Improvement Contractor Licenses of Landview Landscaping, Inc*., 546 N.W.2d 747, 750 (Minn.App.1996) (*citing The Alexander Co*., 222 Minn. at 322, 24 N.W.2d at 250), *review denied* (Minn. June 11, 1996). Use of police power must be within the legitimate concern of the state and not otherwise reserved to the individual. *State v. Edwards*, 287 Minn. 83, 85, 177 N.W.2d 40, 42 (1970). Furthermore, the method of controlling the private right must be reasonably related to a legitimate government end. *Id*. “Both the state and its municipalities have a wide discretion in resorting to that [police] power for the purpose of preserving public health, safety, and morals, or abating public nuisances.” *State v. The Crabtree Co.,* 218 Minn. 36, 40, 15 N.W.2d 98, 100 (1944).

Under art. 1, § 13, the Minnesota Constitution also provides that “(p)rivate property shall not be taken, destroyed or damaged for public use without just compensation ….”

This constitutional provision imposes a condition on the exercise of the state's inherent supremacy over private property rights. One such property right is the right of access. “Owners of property abutting a public roadway have a right to reasonably convenient and suitable access to the roadway.” *Oliver v. State ex rel. Comm'r of Transp*., 760 N.W.2d 912, 916 (Minn. App. 2009) (quotation omitted), *review granted* (Minn. Apr. 29, 2009*), and appeal dismissed* (Minn. Nov. 16, 2009). This access right is “a property right in the nature of an easement.” *State by Mondale v. Gannons, Inc*., 275 Minn. 14, 24, 145 N.W.2d 321, 329 (1966). As for access, when an abutting property owner's access to a roadway is altered, a taking may occur even if no property is physically appropriated. *Grossman*, 571 N.W.2d at 50.

To be constitutionally compensable, the taking or damage need not occur in a strictly physical sense and can arise out of any interference by the state with the ownership, possession, enjoyment, or value of private property. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn.1978) *citing, Burger v. City of St. Paul*, 241 Minn. 285, 293, 64 N.W.2d 73, 78 (1954); 2 Nichols, Eminent Domain, (3 ed.rev.) ss 6.1, 6.3. In either case, the analysis is the same. *Dale Props., LLC*, 638 N.W.2d 763 (Minn.2002),

In determining whether a compensable interest has been taken by a loss of access, Minnesota law distinguishes between the status of the general public and that of an abutting landowner. *Hendrickson v. State*, 267 Minn. 436, 441–43, 127 N.W.2d 165, 170–71 (1964). Through its police power, the state may, without compensation, regulate traffic by imposing restrictions governing all motorists, such as establishing one-way streets, placing median strips, and restricting U-turns and left and right turns. *Id*. at 441, 127 N.W.2d at 170. Thus, persons who are not abutting landowners have no right to damages “merely because access to a conveniently located highway may be denied, causing them to use a more circuitous route.” *Id*. at 442, 127 N.W.2d at 170–71.

The Supreme Court has stated that there should be a limit on the use of police power relative to property rights:

> [W]hen the legislative power attempts to forbid the owner from making use of his property which is not harmful to the public and does not interfere with the rightful use and enjoyment of their own property by others, it invades property rights secured to the owner by both the state and Federal constitutions.

State ex. rel. Lachtman v. Houghton, 134 Minn. 226, 230, 158 N.W. 1017, 1019 (1916). The Supreme Court has also addressed the relationship between police power and eminent domain when loss of access is at stake. This was stated in the dissenting opinion in *Alexander Co. v. City of Owatonna*, 222 Minn. 312, 24 N.W.2d 244 (1946):

> While it is said that the right of access may be regulated by public authority, that does not mean ... that under the guise of regulation the right

> may be taken away from the owner. The power to regulate the right of access does not include that of taking it.... If there is to be a denial of plaintiff's right of access, it should be the result of a compensated taking under condemnation and not an uncompensated one under the guise of a police regulation.

This dissenting opinion was later adopted by the Supreme Court as the correct rule of law in *Johnson*, 263 N.W.2d at 608 (quotation omitted). This passage evokes a clear preference by the Supreme Court that the loss of access should be construed as a taking rather than the exercise of police power.

In spite of that preference, the Minnesota Supreme Court has recognized that reasonable-access cases have created confusion. *Johnson*, 263 N.W.2d at 606:

> [I]f a governmental action has been found not to infringe the right of access, such action has been deemed a "reasonable" assertion of the police power and therefore noncompensable. On the other hand, where courts have determined that official action has eliminated a right of access, the action has been characterized as a constitutional "taking." The result has been the creation of an unfortunate rhetorical device: Reasonable assertions of the police power are not compensable but the "taking" of a reasonable right of access is compensable. There is an obvious difficulty, however, with any attempted application of this statement as a rule of law. The statement itself provides no principled means for distinguishing a due process "taking" from a noncompensable exercise of police powers.

Id. (footnotes omitted). The Supreme Court also recognized that distinguishing police power from eminent domain may be difficult.

> The dividing line between… police power and … the constitutional provisions that [] property shall not be taken or damaged without compensation … has never been distinctly marked out, and probably cannot be.

Id. at 606 (*quoting State ex rel. Lachtman v. Houghton*, 134 Minn. 226, 230, 158 N.W. 1017, 1019 (1916)).

The Supreme Court concluded its ruling on this issue by explaining that the line separating police power from eminent domain is determining whether the property owner is left with reasonable access:

> [T]he operative question is … whether the city's admittedly legitimate police power action unduly restricted vehicular access to the subject property and thereby deprived appellants of their right of reasonable access.

Johnson, 263 N.W.2d. at 607. The reasonable access issue is also a question of fact for the factfinder. *Id.* "If the [fact-finder] decides that the [regulation] substantially impairs [respondents'] right to reasonably convenient and suitable access," then respondents are entitled to damages. *Hendrickson*, 267 Minn. at 445–46, 127 N.W.2d at 172–73. However, the imposition of even substantial inconvenience has been held to not be a denial of the right of reasonable access. *Johnson*, 263 N.W.2d at 607.

The opportunity to address access in relation to police power and eminent domain arose again in *C and R Stacy, LLC v. Cty. of Chisago*, 742 N.W.2d 447, 457 (Minn.App.2007). There the Court of Appeals reaffirmed the ruling from *Hendrickson* that the exercise of police power which merely affects the roadway itself (establishing one-way streets, restricting U-turns, parking, etc.) does not require any compensation. Citing both *Hendrickson* and *Johnson*, the Court of Appeals stated that compensation for the taking of access is required where reasonable alternative access is not provided. *Id.* at 458.

B. <u>Could *Hoffer* Impact Minnesota Law</u>?

Recently in *Hoffer Properties, LLC v. Dept. of Transp*, 874 N.W. 2d 533 (Wis.2016) the Wisconsin Supreme Court issued a decision that addressed the intersection of eminent domain and police powers relative to access rights. The case involved a 9.90 acres property along Highway 19 with direct access to that highway. In 2002, the DOT designated the section of Hwy 19 where the property was located as a controlled access highway. The DOT took all access rights from properties fronting the highway, including the subject property. Nevertheless, while the DOT took the access rights, it allowed the property owner to keep the existing physical driveways from the subject property to Highway 19, which he used as his residence and business.

Six years later, as part of the rerouting of Highway 26, the DOT closed the property's access to Highway 19 because the new intersection of Highway 19 and 26 was very close to the subject property. In order to provide access for the subject property, the DOT acquired a portion of the rear of the property to construct a new local street that went to another local street that then went back to the main highway. This new access was now about 1000 feet from the main highway compared to direct access before the taking.

In the appeal of the condemnation award, the property owner sought severance damages due to the circuitous access that the taking created. The property owner relied on several cases whose holdings were particular to Wisconsin statutes. The owner, however, also relied on *National Auto Truckstops, Inc. v. State, Dept. of Transp*., 665 N.W. 2d 198 (2003), which had a factual scenario that could easily be found in other jurisdictions.

In many ways the *Hoffer* factual scenario has similarities to *Hendrickson*. The primary difference is that the establishment of access controls and change in access to the main highway occurred simultaneously in *Hendrickson* (127 N.W. 2d at 168) while those events were 6 years apart in *Hoffer*. This is a distinction without significance since the Wisconsin Supreme Court stated that the exercise of the police power occurred and the owner loses the right to compensation at the moment when the access control was imposed. *Hoffer*, 366 Wisc. 2d at 400.

Prior to *Hoffer*, the Wisconsin Supreme Court issued the decision of *National Auto*. That case involved moving the access for the affected property to a new location. The material difference between *National Auto* and *Hoffer* was that the right of way in *National Auto* had no access controls in place. In this sense the material facts of *National Auto* are similar to the facts in *Johnson*.

As we noted above, the Minnesota Supreme Court in *Johnson* ruled that it was a factual question if the access imposed on the property was reasonable. 263 N.W. 2d at 607. If the new access was not reasonable, the change in access would be a taking (requiring compensation) versus a designation of an exercise of police power (not requiring compensation). *Hendrickson* mandates the same factual determination where the right of way is subject to access controls. 127 N.W. 2d at 172, 173.

In *Hoffer*, the property owner argued that the reasonableness standard from *National Auto* (like *Johnson*) should also be applied to its case (like *Hendrickson*). Unlike the Minnesota Supreme Court in *Hendrickson*, the Wisconsin Supreme Court set a different standard in *Hoffer*. The Wisconsin Supreme Court stated that the police power was exercised at the instant the controlled access was applied (i.e. the separation of time between the driveway removal and the imposition of the controls was immaterial). The Minnesota Supreme Court views the relationship of police power and eminent domain as a continuum where there is no easy way to mark the line where they separate other than using the reasonableness test for the access that remains. See *Johnson*. For the Wisconsin Supreme Court, however, where police power is exercised, there is no consideration of reasonableness. The Court stated that "no compensable taking occurs when DOT changes an abutting property owner's access to a controlled-access highway if other access is provided that does not deprive the owner of all or substantially all beneficial use of the property." *Hoffer*, 874 N.W.2d at 548.

This standard in *Hoffer* is the classic regulatory taking standard from the *Lucas/Penn Central* analysis. In fact, in *Hoffer*, where the physical taking was from the rear of the property and access removal from the front of the property, the Wisconsin Supreme Court even said the access issue could not be considered as part of the taking for the project even though the driveway removal was part of the project. The Wisconsin Supreme Court said those are separate acts. *Hoffer*, 874 N.W.2d at 552. If access provided to a controlled access highway deprives the abutting property owner of all or substantially all beneficial use of the property, the property owner would need to initiate a separate inverse condemnation case for the access change and bear the burden from the *Lucas/Penn Central* standard to establish a taking. *Hoffer*, 874 N.W.2d at 548.

Although the Wisconsin Supreme Court looked at statutory construction to support its decision, the effect was to state that, absent a statutory provision requiring reasonableness, where access is affected on a controlled access highway, the *Lucas/Penn Central* standard would apply. While Minnesota and Wisconsin agree on a reasonableness standard for alternative access where no access control has been imposed (*Johnson* and *National Auto*), they are very different when it comes to the exercise of police power in the form of access controls. In that circumstance Minnesota still uses the reasonableness standard (*Hendrickson*), while Wisconsin imposes the *Lucas/Penn Central* standard (*Hoffer)*. Given the long running precedent of *Hendrickson* in Minnesota, the *Hoffer* decision should have no impact on the thinking of courts in Minnesota on this issue. It could have an impact in states where this relationship has not yet been fully flushed out. This could exist in many states. Note that Minnesota addressed these two issues in 1964 (*Hendrickson*) and 1978 (*Johnson*), while Wisconsin did not fully clarify this until 2016 (*Hoffer*). *National Auto* was only decided in 2003.

IV. CONSTRUCTION-RELATED INTERFERENCE.

by Gary A. Van Cleve

[Grateful acknowledgement to Bradley J. Gunn of Malkerson Gunn Martin for his substantial input into this outline section.]

A. Background.

1. Courts must determine whether construction-related interferences diminish the value of property in partial taking cases. It is well settled that property owners in partial taking cases are entitled to have their damages or compensation based on the difference between the fair market value of their property before and after the taking, and that any competent evidence may be considered if it legitimately bears on market value. Accordingly, it is up to the finder of fact to determine whether construction related interferences diminish the value of the owner's remaining property, and if so, in what amount.

2. Historical precedent supports this principle. This rule is also consistent with the law in this state that has held, for over 100 years, that in partial taking cases, any damage an owner sustains by reason of "inconvenience" caused by the taking may be considered as an element affecting the market value of the remaining property. See *State v. Hayden Miller Co.*, 263 Minn. 29, 116 N.W.2d 535 (1962); *State v. Mecklenburg*, 273 Minn. 135, 140 N.W.2d 310 (1966); *County Com'rs of Blue Earth Co. v. St. P. & S. C. R. Co.*, 28 Minn. 503, 11 N.W. 73 (1881).

B. *State v. Strom*, 493 N.W.2d 554 (Minn. 1992).

1. The issue of construction related interference is controlled by the Minnesota Supreme Court's decision in *State v. Strom,* 493 N.W.2d 554 (Minn. 1992).

2. Facts. In *Strom*, the State took a portion of Woodbridge Plaza, which was an office building located on the south side of old Highway 12 in Minnetonka. *Id.* at 557. Woodbridge was the fee owner of what was originally a 3.75 acre tract abutting the frontage road that was part of the old Highway 12 right-of-way. *Id.* Due to the conversion of old Highway 12 into Interstate-394, the Woodbridge property experienced a number of construction related problems. *Id.* These problems, "which [were] typical of the problems being experienced by other commercial properties located along the length of the reconstruction," included noise, dust, vibrations and disruptions of access to the property. *Id.* In addition to the construction-related problems experienced, the State's project also "permanently impaired the view and visibility of much of the remaining property." *Id.* at 558. More specifically, old Highway 12 was lowered two to six feet in front of the property, while the south frontage road was elevated nine to twenty-one feet. *Id.* The end result of these changes was a substantial reduction of the visibility of the property to passing motorists. *Id.*

3. Issues. In *Strom*, the Court reviewed two certified questions under accelerated review pursuant to Minn.R.Civ.App.P. 118. 493 N.W.2d 554, 557 (Minn. 1992). The two certified questions were:
   a. Construction-related interference. In a partial taking condemnation action, is evidence of construction-related interferences admissible, not as a separate item of damages, but as a factor to be considered by the finder of fact in determining the diminution in market value of the remaining property?
   b. Loss of visibility. In a partial taking condemnation action, is evidence of loss of visibility to the public traveling on a redesigned highway admissible, not as a separate item of damages, but as a factor to be considered in determining the diminution in market value of the remaining property? *Strom*, 493 N.W.2d at 558.

4. Confusion of issues/outcomes on two issues. Condemning authorities often err because they confuse *Strom's* analysis and holding on the issues of construction-related interference and loss of visibility.
   a. Simply put, in a partial taking condemnation case, evidence of construction related interferences is admissible as a factor to be considered in determining the market value of the remaining property.
   b. The admission of such evidence does not require that the interference arise from the use of the condemned portion of the landowner's property, in order to be compensable. In fact, the opposite is true.
   c. In a partial taking condemnation action, to the extent that loss of visibility to the public traveling on a redesigned highway results from changes in the property taken from the owner, evidence of the loss is admissible, not as a separate item of damages, but as a factor to be considered by the finder of fact in determining the diminution in market value of the remaining property. *Strom*, 493 N.W.2d at 561 (emphasis added).
   d. The Court quoted with approval from Nichols' treatise on eminent domain that "[w]here part of a tract has been taken for a highway [...] the

inconvenience or discomfort resulting from construction and operation of such project is an element which may be considered in ascertaining the extent to which the market value of the remainder has been depreciated." *Id.* at 560 (quoting 4A Julius L. Sackman, Nichols, *The Law of Eminent Domain* § 14.11 (rev. 3d ed. 1989)).

e. In other words, with respect to the issue of loss of visibility, the Court *did* limit the owner's recovery to changes made to the property that was taken from the owner. In contrast, however, the Court imposed *no such limitation* on the owner's right to recover for construction related interferences.

C. County of Anoka v. Blaine Building Corporation, 566 N.W.2d 331 (Minn. 1997), does not limit construction related interferences to "the land actually taken" and does not preclude damages from impact of the construction project as a whole.

1. Blaine Building involved a roadway median and not construction interference.

2. Damages discussion in *Blaine Building* involved damages for a partial loss of traffic access caused by installation of a new median in the middle of a roadway.

3. Importantly, in the *Blaine Building* decision, the Court cites *Strom* for the general rule of evidentiary inclusiveness that "any competent evidence may be considered if it legitimately bears upon market value." *Blaine Building,* 566 N.W.2d at 334. Accordingly, discussion of *Strom* in *Blaine Building* is dicta and did not form the basis for the court's decision.

4. Moreover, the court in *Blaine Building* noted that "[w]e held [in *Strom*] that evidence of construction-related interferences are admissible as a factor affecting market value even though such interferences are temporary in nature and of the kind affecting all properties abutting major road construction projects." *Id.* at 335, n.1.

5. The better argument is that *Blaine Building* did not limit the ruling of *Strom*, nor even suggest that evidence of construction related interference damages may be admitted only when related to physical changes on the property taken.

V. A PERSPECTIVE ON RECOVERY OF ATTORNEYS' FEES, APPRAISAL AND LITIGATION COSTS IN MINNESOTA EMINENT DOMAIN CASES.

by Leland J. Frankman

A. Introduction.

A number of the fifty states such as New York, California and Florida have had fee and cost shifting statutes for many years prior to the adoption of our Minn. Stat. § 117.031 in 2006. Most of the 50 states have now passed statutes with a more restrictive definition of "public purpose" in reaction to *Kelo v. New London*, 545 U.S. 469 (2005), involving a taking for economic development in Connecticut. By 2012, 44 states had passed laws restricting takings for economic development. Many of these new statutes now provide for awarding fees and costs to the landowners not provided previously. Despite the command in the 5th Amendment of the U.S Constitution to pay “just compensation’’ and the command in Article I, Section 13 of the Minnesota Constitution to pay “just compensation” for property “taken, destroyed or damaged”, prior to 2006 Minnesota did not award attorney’s fees to landowners except when a condemnation was discontinued or in cases where the landowner successfully brought an inverse condemnation (mandamus) case.

> **Minn. Stat. § 117.031 ATTORNEY FEES.**
> (a) If the final judgment or award for damages, as determined at any level in the eminent domain process, is more than 40 percent greater than the last written offer of compensation made by the condemning authority prior to the filing of the petition, the court shall award the owner reasonable attorney fees, litigation expenses, appraisal fees, other experts fees, and other related costs in addition to other compensation and fees authorized by this chapter. If the final judgment or award is at least 20 percent, but not more than 40 percent greater than the last written offer, the court may award reasonable attorney fees, expenses, and other costs and fees as provided in this paragraph. The final judgment or award of damages shall be determined as of the date of taking. No attorney fees shall be awarded under this paragraph if the final judgment or award of damages does not exceed $25,000.00 For the purposes of this section, the "final judgment or award for damages" does not include any amount for loss of a going concern unless that was included in the last written offer by the condemning authority.
> (b) In any case where the court determines that a taking is not for a public use or is unlawful, the court shall award the owner reasonable attorney fees and other related expenses, fees, and costs in addition to other compensation and fees authorized by this chapter.

B. <u>Some History before *Cameron*</u>.

1. Lodestar applicable in 1971, but is it controlling then or now? The “lodestar method” mentioned in *County of Dakota v Cameron,* 839 N.W. 2d 700 (Minn. 2013) in 2013 is not really new in Minnesota. Actually, the reasonableness of attorney fees was considered in 1971 in *State, by Head v. Paulson,* 188 N.W. 2d 424 (1971) in which a 6 factor test was considered. In that case, the court enunciated a 6 prong test now basically the same as enunciated in *Cameron*. In that case involving fees due upon a dismissal of a condemnation pursuant to statute, the Supreme Court affirmed the district court’s fee award saying: “… the court properly did not regard the contingent fee arrangement as the most controlling factor, as urged by defendants, but considered it along with all other relevant factors, including counsel’s reputation and standing, in determining the value of the legal services”. Also, in 1980, in *City of Minnetonka v. Carlson,* 298 N.W. 2d 763 (1980*)*, the Minnesota Supreme Court used that *Paulson* test for

awarding an attorney's fee in a condemnation which was also abandoned by the city after a commissioners' award, pursuant to Minn. Stat. § 117.195 (1976). The 6 prong test used in *Paulson* was basically the 6 prong test lodestar method used by the *Cameron* Court. The test for fees was: 1. Time and labor involved, 2. The nature and difficulty of responsibility assumed, 3. The amount involved and the result obtained, 4. The fee customarily charged, (the Court in *Carlson* acknowledged that the contingent fee arrangement was the "normal" arrangement in condemnation cases), 5. The experience, reputation and ability of counsel, and 6. The fee arrangement between counsel and client.

2. Risk taken by lawyer in contingent fee arrangement. Between the enactment of the fee shifting statute in 2006 and the *Cameron* case in 2013, we find that even when the Minnesota courts awarded the contingent fee amount to the landowner, that they justified those awards by looking at the *Paulson* test and by coming up with an hourly rate award that happened to equal the contingent fee. A good example of this is the order of District Court Judge Bueltel in *County of Waseca v. Neid*, Ct. File No. 81-CV-06-986 on July 24, 2008. The Judge, who made the comment on the bench, that "the contingent fee is the poor man's gateway to the courthouse" awarded the landowner the requested fee of $84,920.00, based on a rate of $540.00 per hour which exactly equaled the contingent fee provided in the landowner's retainer with attorney, Frankman law firm. The court stated that the fee was justified because the attorney took a "financial risk" and the "attorney could have made $25.00 per hour if a lessor commissioners' award had been obtained".

C. <u>*Cameron* and its Aftermath</u>. *County of Dakota v Cameron,* 839 N.W. 2d 700 (Minn. 2013). *County of Dakota v Cameron,* 839 N.W. 2d 700 (Minn. 2013) is a decision of the Minnesota Supreme Court that construed Minnesota's minimum-compensation statute, Minn. Stat. § 117.187. It also held that "The Lodestar method applies to an award of attorney fees under Minn. Stat. § 117.031 (a)". The county did not challenge the district court's award of attorney fees. The district court reduced the owner's requested fee of $217,991.45 to $161,964.50, which was an amount equal to one-third of the difference between the damage award and the last amount offered by the county-to account for the fact that the court "did not go along with the bulk of Cameron's arguments, and Cameron did not recover nearly the amount that he was seeking". The Supreme Court said that the district court "… therefore relied on the 'results obtained' by Cameron's attorneys to justify its conclusion that Cameron was not entitled to recover the full $217,991.45 that he sought in attorney fees. "

The Supreme Court in defining how the federal lodestar method should be applied stated that a district court is first required to determine the number of hours reasonably expended on the litigation and multiply that number by a reasonably hourly rate. The court must consider "all relevant circumstances when evaluating the reasonableness of the hours expended by attorneys and their hourly rates". A court then evaluates the overall reasonableness of the award by considering such factors as the time and labor required; the nature and difficulty of the responsibility assumed;

the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client. It quotes *State v. Paulson*, 188 N.W. 2d 424 (1971) and a civil rights case, *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and says that “The product of reasonable hours multiplied by a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward…”

Note that the *Cameron* decision did not really set forth a standard different than that used by the *Paulson* court in 1971 described above. We have quoted the Court saying there are “other considerations” that could lead the district court to adjust the fee “upward or downward”. In *Cameron*, the court says the district court “opted” to reduce the fee for the “limited success” of the owner and “therefore did not abuse its discretion.”

D. Post *Cameron* Cases.

1. Difference between government’s offer and actual result relevant in awarding fees? *County of Scott v. Johnston*, 841 N. W. 2nd 357 (Minn. App. 2013), *County of Scott v. Johnston*, 841 N. W. 2nd 357 (Minn. App. 2013), is a published decision by the Court of Appeals filed on December 30, 2013. *Cameron* was filed on November 27, 2013 but is not cited in the opinion of the court. The case was remanded to the district court since that court had made certain findings regarding attorney and appraisal fees simply based on a pleading by the County opposing the fees without submitting any affidavits, exhibits, or other evidence rebutting the evidence submitted by the landowners. However, the court went to lengths to disagree with the landowner’s assertion that when the owner reaches the 40% threshold and awarding fees is then mandatory that the district court was precluded from considering the difference between the amount sought by the property owner and the final amount awarded as a factor in determining the reasonableness of the fees and expenses requested. The County argued that the owner was limited to recovery of the one-third fee provided by the retainer agreement or $32,100.00, and the owner wanted recovery of the amount billed by the attorney, $40,217.50, based on hours expended. The district court awarded the one-third fee and reduced the appraisal fee submitted by the appraisers by one-half “in view of the results that were obtained in this matter”.

   Since there was no evidence in the court’s record supporting the court’s findings of fact to reduce appraisal and expert witness fees as well as the attorney fees submitted by the county, but there was an affidavit from the landowner’s attorney making out a prima facie case of the fees and expenses, as to the reasonableness of these fees and expenses, the court reversed the reduction of the fees and remanded the case for entry of an amended award consistent with the opinion by the court of appeals.

2. Attorneys' Fees Awarded by court greater than called for in fee agreement, *State v. Great River Resources,* A14-0302 (Minn. App.) Unpublished, filed September 8, 2014. The one-third contingency agreement in this case would have only yielded a fee of less than $7,000 to the attorney. However the Court of Appeals upheld a district court's award of a fee based on hours in the amount of $25,000. This case is significant, though unpublished, in light of the statement made by the Court of Appeals in *County of Scott v. Johnston*, which we have cited above, that "hours not properly bill to one's client are also not properly billed to one's adversary". In this unpublished case, there is no finding that attorney Gary Fuchs modified his one-third contingent fee agreement to provide for an hourly rate that would yield him the $36,646 that was requested in his motion for fees under Minn. Stat. § 117.031 (a). Under his contingent fee agreement, his fee was $6,626.70. There is nothing in the Court of Appeals opinion that states he had the right to bill his client an amount greater than that. That is what the Attorney General argued: "That Cameron is not applicable here and that the lodestar approach is not reasonable when it exceeds the amount that the landowner contracted to pay." The court said "We disagree".

   The Court of Appeals says that the Attorney General is arguing that one factor has *more* weight than all the others, "the fee agreement". The court stated that all 6 lodestar factors must be applied and that the district court considered the contingent fee as one factor but placed little weight on it because it was merely "a way to manage the risk" between the attorney and client. The court's opinion only states the attorney spent 105 hours and received a jury verdict. Much of the procedural history is left out of its opinion. Upon talking to the landowner's attorney we found that the State's appraisal was $21,000 both at the commissioners' stage and at the jury trial. That amount was the last written offer. He remembered that the commissioners only awarded something in the $26,000 range. The owner appealed to the jury since his appraisal testimony was somewhere between $275,000 and $295,000. The jury verdict was $41,000, not a lush amount by any means, but enough to reach the 40% threshold. The Court of Appeals says the district court looked at the results obtained, noting that because the matter went to trial Great River Resources "did much better" than it would have if the owner had accepted the state's original offer. Apparently, the appeals court accepted the district court's finding that it looked at the increase over the offer for results obtained instead at what the owner was seeking. The court of appeals quoted the district court's statement that the attorney's hourly rate of $275 was "probably on the low end of rates charged in similar litigation."

3. Judicial Discretion upheld, not purely Lodestar. *State v. Debra Jean Johnson*, A13-0429, (Minn. App.) Unpublished, filed September 22, 2014. This was a case where the Court of Appeals was asked by MNDOT to reduce the district court's award of attorneys' fees in the amount of $113,531.92, which was the amount set in the contingent fee agreement between the landowner and attorney. The Court of Appeals said that the reasonable value of an attorney's work is a question of fact and the district court's findings will be upheld unless they are clearly

erroneous. The court cited the *County of Scott v. Johnston*, 841 N.W.2d 357 (Minn. App. 2013), discussed above. The Court also relied on the tests and quoted *Paulson* and *Cameron* cases. In this case, the last written offer was $112,600 and the commissioners' award was $425,000. The state challenged the method used by the district court in awarding the $113,531.92, arguing that the district court "… failed to properly apply the lodestar method and instead impermissibly used a contingency rate to determine the attorney-fee award". The Court of Appeals answered saying "Although the state is correct that the district court's attorney-fee award was not based solely on the lodestar method, Minnesota courts have long recognized that other considerations, including the results obtained by the attorney for the prevailing party may lead the district court to adjust the fee upward or downward. This is consistent with the district court's approach here. The district court did not abuse its discretion in considering the *Paulson* factors in its award of attorney fees and using those factors to adjust the attorney-fee award upward."

The state argued that it offered the owners, who were unrepresented at the time, before hiring counsel, $300,000 during settlement negotiations in September 2010 and so their attorney only managed to secure an additional $125,000 for his clients. Since this offer was not reduced to writing pursuant to statute, the court said it could not be considered.

4. Strict Compliance to statute, *In re Condemnation of Right of Way by Minnesota Power***,** A14-1909, (Minn. App.) Unpublished, filed July 20, 2015. Minnesota Power needed an easement over a portion of appellant Robert Ward's property. On December 4, 2012, Minnesota Power sent a letter by certified mail offering to purchase the easement for $44,000 Mr. Ward did not accept the offer. On Friday, March 1, 2013, Minnesota Power extended a written offer by certified mail to purchase the easement for $65,000. The March 1 letter stated: "In the event this offer is not accepted by noon on Tuesday, March 5, 2013, Minnesota Power will proceed with eminent domain proceedings." Ward did not respond and, on March 6, 2013, five (5) calendar days after making the $65,000 offer, Minnesota Power filed its petition. Minnesota Power obtained the easement, and Mr. Ward was awarded $70,000 as compensation for the taking by the court-appointed commissioners. The district court rejected Mr. Ward's request that it require Minnesota Power to pay his attorney and expert fees because the $70,000 award did not exceed the $65,000 offer by more than 20%, the threshold for a discretionary award under Minn. Stat. §117.031.

   Ward argued that the $44,000 offer is the last written offer under Minn. Stat. § 117.031 because Minnesota Power gave him insufficient time to respond to the $65,000 offer before it filed its action. Therefore, the award of $70,000 exceeded the $44,000 offer by more than 40%, he argued that the court must award him his fees under Minn. Stat. §117.031.

   The court of appeals did not interpret the statute to mean anything more than what the legislation stated since the statute was unambiguous. Thus, it refused to read into the statute a requirement of a reasonable amount of time to accept an offer or a fairness provision. The court did not want to exceed its authority.

E. Judicial Discretion and 2017 District Court Orders.

The one rule that the writer of this piece can emphatically state is that any attorney appearing before a District Judge should really present his/her best case since appellate courts in attorney fees motions under Minn. Stat. §117.031 are hesitant to overturn the decision of the lower courts absent some abuse of discretion. There are several recent District Court Orders, and I will mention two such Orders from the Third Judicial District.

1. *State of Minnesota, by its Commissioner of Transportation vs. Susan A. Hansen, et al.* Winona County District Court File No. 85-CV-14-1675, April 28. 2017. In this Third District Court decision from Winona County, Cunningham moved the court, pursuant to Minn. Stat. §117.031 for reimbursement of attorneys' fees and costs. MNDOT condemned three parcels for a bridge project and the final written offers for all three parcels were $596,700. Prior to the Commissioners' Hearing there was a settlement for all three parcel totaling $900,000 (the parties agreed for this motion the parcels' offers and recoveries would be looked at in the aggregate). The Cunningham's attorneys, Fredrikson and Byron, P.A., were paid $101,409.88 and $2,861.88 in costs pursuant to their 1/3 contingent fee agreement and Cunningham moved the court for reimbursement.

   Judge Nancy Buytendorp ordered reimbursement to Cunningham the sum of $28,802.50 for reasonable attorneys' fees and $2,795.78 in related costs. The Judge reiterated that the reasonable value of attorney's work is a question of fact for the district court. She looked at *Cameron* and stated the lodestar method governs the reasonableness of an award of fees under Minn. Stat. §117.031. She then analyzed each of the six *Paulson* factors as it applied to this fact situation. The Judge excluded many hours, including claims for time spent on relocation benefits. However, the Judge did give some reimbursement for time spent on collecting the fees due to the mandatory nature of this process. The Judge allowed 70.25 reasonable hours expended at $410 per hour for a total reimbursement of $28,802.50. In this case, the Judge did not seem persuaded by the contingent fee agreement, which would yield a much higher hourly rate. While she praised the experience and reputation of landowners' attorney, she emphasized the time reasonable spent and hourly rate factors more than the other *Paulson* factors…….**Contrast this Order with the following:**

2. *State of Minnesota, by its Commissioner of Transportation v. Roger D. Krause et al*. Steele County District Court File No. 74-CV-08-2127, June 30, 2017. This is another Third District Court decision from Steele County. MNDOT took nearly 44 acres of property owned by Smith for a road project. MNDOT's last written offer was $362,200, and the settlement called for $1,081,000, plus statutory

interest. The fees and costs under Minn. Stat. § 117.031 were decided by Judge Karen Duncan pursuant to motion.

Judge Duncan stated that the final award in this case was 299% greater than the last written offer prior to filing the Petition. She, too, reiterated that the lodestar approach governs the reasonableness of an award of attorneys' fees under Minn. Stat. § 117.031 and cited *Cameron.* However, this Judge stated that in addition to determining the number of hours reasonably expended on the case multiplied by a reasonable hourly rate, the court must also consider "all relevant circumstances…." She used the six factor *Paulson* test. In addition to affirming the reasonableness of attorney Gunn's hours, due to the time span of the litigation, she mentioned that both hourly and contingent fee agreements are standard in condemnation cases. She rejected the position of MNDOT that only lodestar is controlling, but stated that the law requires a broad analysis as per the *Paulson* factors, and also rejected MNDOT's argument that *Paulson* can only be used to decrease the amount determined by lodestar. The court also ruled that it was proper to consider hours spent on the collateral drainage issues.

Despite the fact that hours were minimal some years, the ruling mentioned: the case spanned several years, the case was a difficult and complex case, counsel had extensive experience, and the result was very good. Finally, the risks associated with contingent fees agreement were into account. Therefore, the court ordered the State to reimburse Smith $168,009.12 in attorneys' fees, $14,025 in appraisal costs, and $438 in other costs.

The writer points out, two different Judges of the same judicial district weighed the *Paulson* factors very differently and had a different approach to the weight of lodestar as it applies to Minn. Stat. §117.031. These may be unanswered questions post *Cameron* or just "judicial discretion" at work.

F. <u>Minn. Stat. §117.045, Attorneys' Fees/ Successful Inverse Condemnation Statute, Standing for Landowner/Plaintiff not Landowner's Attorney</u>.

117.045 COMPELLING ACQUISITION IN CERTAIN CASES.
Upon successfully bringing an action compelling an acquiring authority to initiate eminent domain proceedings relating to a person's real property which was omitted from any current or completed eminent domain proceeding, such person shall be entitled to petition the court for reimbursement for reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred in bringing such action. Such costs and expenses shall be allowed only in accordance with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Statutes at Large, volume 84, page 1894 (1971), any acts amendatory thereof, any regulations duly adopted pursuant thereto, or rules duly adopted by the state of Minnesota, its agencies or political subdivisions pursuant to law.

1. *Vermillion State Bank v. State***,** A16-1284, (Minn. App.) unpublished, filed April 17, 2017.

   MNDOT closed a restaurant’s only access to the highway. The restaurant went out of business and the Vermillion State Bank foreclosed on the property. In 2014, Vermillion retained Faegre Baker Daniels to bring an inverse condemnation. Faegre conducted title work, research, sent demand letters, drafted pleading, and put in much time. However, in 2015 terminated Faegre and hired Larkin Hoffman. Larkin successfully brought an inverse condemnation action and the district court granted summary judgment in favor or Vermillion and ordered MNDOT to initiate a condemnation. As per statute, Minn. Stat. 117.045, Larkin brought a motion for fees and costs in the amount of $55,416.19 and Faegre brought a motion for $63,405.60 in attorneys’ fees and $368.46 in costs. The court ordered MNDOT to pay Faegre and rejected MNDOT’s argument that Faegre lacked standing.

   The Court of Appeals reversed stating it is the “landowner” who has standing to petition the court for attorney’s fees and costs, and the “landowner’s attorney has not standing to petition for fees and costs directly or independently of the landowner. The Court of Appeals rejected Faegre’s claim that “person” and “such person” could mean not only the property owner, but his/her attorney. The Court referenced the Federal Relocation Act as it is mentioned in Minn. Stat. §117.045, also other Minnesota cases where the landowner is the Plaintiff like Vermillion and Faegre does not fall in that category. This was a cases of statutory interpretation where the court stated that the stature was clear and unambiguous and not absurd or unreasonable. The statute’s purpose is to make landowner whole. **Question from writer: what if Vermillion, Plaintiff, included Faegre’s claim in its petition for fees? I think there might be a different result. Also, does this apply to Minn. Stat. §117.031 where landowner is Respondent not Plaintiff? The author thinks not.**

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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT
Case Type: 2-Condemnation

State of Minnesota, by its
Commissioner of Transportation,

Petitioner,

vs.

Laurel Hill, LLC, *et al.*,

Respondents.

Court File No. 27-CV-14-17061

ORDER GRANTING EXTENSION OF TERM OF COMMISSIONERS AND ORDER DENYING MOTION FOR INSTRUCTION TO COMMISSIONERS

The above-entitled matter came on for hearing before the Honorable Francis J. Magill, Judge of District Court, on June 8, 2017 upon Petitioner's Motion for Extension of Term of Commissioners and Petitioner's Motion for Instruction to Commissioners. Erik Johnson, Esq., appeared on behalf of the State of Minnesota ("Petitioner"). David Jann, Esq., appeared on behalf of Laurel Hill, LLC, *et al*. ("Laurel Hill" or "Respondents"). Based on all the files, records, and proceedings herein, the Court makes the following:

ORDER

1. Petitioner's motion to extend the term of the Commissioners is **GRANTED.**

2. The Court **DENIES** Petitioner's motion for instruction to the Commissioners. The Fourth Judicial District Judicial Policy on Condemnation, p. 4, §B.9, provides "If the attorney commissioner feels he is unable to resolve a question of law, it may be brought to the court for advice, but only after reasonable notice to both parties of the time, place, and nature of the request for advice." Commissioner Joel Seltz serves as chair and as the attorney commissioner in this case. Commissioner Seltz has practiced real estate and condemnation law for several years and has served as a commissioner in numerous other condemnation cases. It is clear Commissioner Seltz is knowledgeable and experienced in eminent domain matters and can ask for legal instruction from the Court if needed. Commissioner Seltz has not asked for any such instruction from the Court, and in the absence of

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such a request, the Court declines to provide instruction on matters of authority vested in the Commission.

August 9, 2017

BY THE COURT:

Frank J. Magill 2017.08.09 14:56:08 -05'00'

The Honorable Francis J. Magill
Judge of District Court