

CHAPTER 32.

EMINENT DOMAIN.

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32.01 Definitions. In this chapter unless the context or subject matter otherwise requires:

(1) "Person" includes the state, a county, town, village, city, school district or other municipal corporation, a board, commission or corporation, or housing authority created under sections 66.40 to 66.404.

(2) "Property" includes estates in lands, fixtures, and personal property directly connected with lands.

32.02 Who may condemn; purposes. The following municipalities, boards, commissions, public officers and corporations may acquire by condemnation any real estate and personal property appurtenant thereto or interest therein which they have power to acquire and hold, for the purposes specified, in case such property cannot be acquired by gift or purchase at an agreed price:

(1) Any county, town, village, city including villages and cities incorporated under general or special acts, school district, the state department of public welfare, the regents of the University of Wisconsin, the board of regents of normal schools, or any public board or commission, for any lawful purpose, provided that in the case of city and village boards or commissions approval thereof shall have been granted by the governing body.

(2) The governor and adjutant general for land adjacent to the Wisconsin state military reservation at Camp Douglas for the use of the Wisconsin national guard.

(3) Any railroad corporation, any street or interurban railway corporation, any grantee of a permit to construct a dam to develop hydroelectric energy for sale to the public or for the operation of a street or interurban railway, any Wisconsin plank or turnpike road corporation, any drainage corporation, any interstate bridge corporation, or any corporation formed under chapter 288, laws of 1899, for any public purpose authorized by its articles of organization.

(4) Any Wisconsin telegraph or telephone corporation for the construction and location of its lines.

(5) Any Wisconsin corporation engaged in the business of transmitting or furnishing heat, power or electric light for the public, for the construction and location of its lines or for ponds or reservoirs or any dam, dam site, flowage rights or undeveloped water power.

(6) Any Wisconsin corporation furnishing gas, electric light or power to the public, for additions or extensions to its plant.

(7) Any Wisconsin corporation formed for the improvement of any stream and driving logs therein, for the purpose of the improvement of such stream, or for ponds or reservoir purposes.

(8) Any Wisconsin corporation organized to furnish water or light to any city or village or the inhabitants thereof, for the construction and maintenance of its plant.

(9) Any Wisconsin corporation transmitting gas, oil or related products in pipe lines for sale to the public directly or for sale to one or more other corporations furnishing such gas, oil or related products to the public.

(10) Any rural electric co-operative association organized under chapter 185 which operates a rural electrification project to:

(a) Generate, distribute or furnish at cost electric energy at retail to 500 or more members of said association in accordance with standard rules for extension of its service and facilities as provided in the by-laws of said association and whose by-laws also provide for the acceptance into membership of all applicants therefor who may reside within the territory in which such association undertakes to furnish its service, without discrimination as to such applicants; or

(b) Generate, transmit and furnish electric energy at wholesale to 3 or more rural electric co-operative associations furnishing electric energy under the conditions set forth in (a) above, for the construction and location of its lines, or substation or generating plants, or for ponds or reservoirs, or any dam, dam site, flowage rights or undeveloped water power, or for additions or extension of its plant.

(11) Any housing authority created under sections 66.40 to 66.404.

(12) Any person operating a plant which creates waste material which, if released without treatment would cause stream pollution, for the location of treatment facilities.

(13) Any corporation licensed to do business in Wisconsin that shall transmit oil or related products in pipe-lines in Wisconsin, and shall maintain terminal or product delivery facilities in Wisconsin, and shall be engaged in interstate or international commerce, subject to the approval of the public service commission upon a finding by it that the proposed real estate interests sought to be acquired are in the public interest.

History: 1951 c. 119.

See note to 36.06, citing Wisconsin Chapter House Asso. v. Regents, 260 W 206, 50 NW (2d) 469.

An agreement by a city, acquiring an easement for the construction and maintenance of storm and sanitary sewers over certain land, that the city would not open streets through such property without the consent of the grantors, did not prevent the city from subsequently taking the land by

condemnation for the purpose of opening streets, without first either returning the land covered by the easement or restoring it to its original condition or paying for the easement granted. The power of eminent domain is inalienable and cannot be surrendered, even by the legislature, and it cannot be impaired or bargained away by other governmental agencies. Milwaukee v. Schomberg, 261 W 166, 52 NW (2d) 151.

32.03 When condemnation not to be exercised. (1) The general power of condemnation conferred in this chapter does not extend to property owned by the state, a municipality, public board or commission, nor to the condemnation by a railroad, public utility or electric co-operative of the property of either a railroad, public utility or electric co-operative unless such power is specifically conferred by law, provided that property not to exceed 100 feet in width owned by or otherwise under the control or jurisdiction of a public board or commission of any city may be condemned by a railroad corporation for right of way or other purposes, whenever such city by ordinance consents thereto. This chapter does not apply to the acquisition by municipalities of the property of public utilities used and useful in their business, nor to any city of the first class, except that every such city may conduct any condemnation proceeding either under this chapter or, at its option, under other laws applicable to such city.

(2) Any railroad corporation or street or interurban railway corporation, or pipe-line corporation may acquire by condemnation lands or interests therein which are held and owned by another railroad corporation, street or interurban railway or pipe-line corporation. In the case of a railroad corporation or street or interurban railway corporation no such land shall be taken so as to interfere with the main track of the railroad first established except for crossing, and in the case of a pipe-line corporation no such land shall be taken except for crossing or in such manner as to interfere with or endanger railroad operations.

(3) Any public utility corporation, or co-operative association mentioned in section 32.02 (10), upon securing from the public service commission, pursuant to written application and upon due notice to all interested parties, an order determining that lands or interests therein sought to be acquired by the applicant are owned by a public utility corporation or such rural electric co-operative and are not then being used by the owner for service to the public by the public utility or to its members by such co-operative association and will not be required in the future for such purposes to an extent and within a period which will be interfered with by the appropriation of the lands or interests sought to be condemned, may acquire by condemnation such lands or interests therein. Provided, however, that no lands, or interests therein, belonging to a public utility corporation or to any such co-operative association which is being held by such owner as a site for an electric generating plant, and no other property so owned, or any interest therein, which is used or suitable for the development of water power, shall be subject to condemnation under this subsection; except that an undeveloped water power site, belonging to any such public utility corporation or to any such co-operative association and which is within the flowage area of any other undeveloped water power site, may be condemned pursuant to this subsection, but only if, upon application to it, the public service commission, after hearing held upon notice to such owner and all parties interested, shall by order determine the necessity of taking such lands or interest therein. Such order shall be subject to review in the manner prescribed by chapter 227. Any condemnation of lands pursuant to the provisions of this subsection shall be conducted in accordance with the procedure and the requirements prescribed by sections 32.04 to 32.14, inclusive.

History: 1951 c. 235.

See note to 84.09, citing 41 Atty. Gen. 229.

32.04 Petition. Any person desiring to acquire any property by condemnation shall present a verified petition therefor to the county or circuit judge of the county where such property is situated. Such petition shall contain a description of the property desired to be condemned, which in the case of a city, village or town may include lands for one or more streets or alleys; the purpose for which it is intended to be used; the names of the parties who own or occupy it or have any interest therein, as near as may be, and if any such persons are infants, their ages as near as may be, and if any are persons of unsound mind or unknown, these facts shall be stated. In case such petition is made by a corporation it shall also state that the petitioner is duly incorporated; that the property described is required for the purposes of such corporation and that it is the intention of the corporation in good faith to use it therefor. If such petition is made for the right of way of a railroad or street railway or interurban railway corporation, it shall also state that the right of way sought to be acquired has been located as required by law and that it has been duly surveyed and staked out, and if a width of more than one hundred feet is desired to be taken across any track it shall specify the width desired across said track and the reasons therefor; and a map showing the route of the line and the lands desired to be taken shall be attached to the petition. If the certificate of the public service commission is required before the property may be acquired the petition shall state that such certificate has been obtained. If any owner of property desires to institute condemnation proceedings, he shall present his verified petition therefor to the county or circuit judge of the county where the land is situated. Such petition shall describe the land, state the board, commission or corporation against which the condemnation proceedings are instituted, and use to which it has been put or is designed to have been put by the board, commission or corporation against which the proceedings are instituted. The petition and all subsequent papers in the proceeding shall be filed in the office of the clerk of the circuit court.

Cross Reference. See 281.03, making its provisions apply to eminent domain proceedings. See 330.17 as to right of landowner to sue for damages.

See note to 280.01, citing *Briggson v. Viroqua*, 264 W 47, 58 NW (2d) 546. In an action by the owners of a farm for damages to their land from the flowage above a dam, the defendant's counterclaim, asking for relief as in a condemnation proceeding, asked the court to grant relief which the court was not authorized to grant in this action, so that, on a demurrer to the reply to the counterclaim, the counterclaim must be set aside and the reply is of no effect. If damages to farmland from the flowage above a dam are of a temporary nature, the landowners may bring successive actions for such damages; but if the damages are permanent, so that there is a "taking," the owners' exclusive remedy is under this section to have the damages or compensation assessed once and for all. *Peterson v. Wisconsin River Power Co.* 264 W 84, 58 NW (2d) 287.

32.05 Notice of hearing. Upon the filing of such petition the judge shall fix a time and place for the hearing thereon. Notice of such hearing shall be served upon all interested parties at least twenty days before said hearing or if any party cannot be found then by publication once a week for three weeks in a newspaper to be designated by the judge.

32.06 Guardians ad litem. If any party interested is an infant or under disability, the judge shall, upon notice to the general guardian, if any, appoint a guardian ad litem for such party. The judge may require security from such guardian ad litem.

32.07 Necessity, determination of. The necessity of the taking shall be determined as follows:

(1) If the application be by a municipal corporation, the filing of the petition under section 32.04 shall be deemed the commencement of an action for the determination of the necessity of the taking. Within 20 days after the service of notice, as provided in section 32.05, any person owning or interested in any property proposed to be condemned, may serve and file an answer. After the expiration of the time for answering, the action may be brought on for hearing on a 3 days' notice to all parties who have answered and shall have precedence over all other matters not on trial. The court shall thereupon impanel a jury and the question of the necessity of the taking shall thereupon be tried as a question of fact. Juries shall be obtained in the manner provided for circuit courts, except that in county courts having extra civil jurisdiction the method prescribed by the law creating the court shall be followed. If no answer to the petition is interposed the trial by jury shall proceed ex parte. The costs in such proceedings shall be paid by the municipality. The court may, in its discretion, submit to a single jury the determination of such necessity as to one or more than one or all of the parcels of land sought to be taken for the same purpose, or for one or more streets or alleys. If the jury find that the taking of such lands is not necessary the owner thereof shall recover from the municipality his necessary disbursements and taxable costs not to exceed \$25.

(2) If the application be by a town or county, or by a board, commission, public officer or housing authority created under ss. 66.40 to 66.404; or for the right of way for a railroad or a street or interurban railway up to 100 feet in width, or a telegraph, tele-

phone or electric line; or for the right of way for a gas-pipe line, main or service; or for easements for the construction of any elevated structure or subway for railroad, street, or interurban railway purposes, the petitioner shall determine the necessity.

(3) In all other cases, the judge shall determine the necessity.

(4) The determination of the public service commission of the necessity of taking any undeveloped water power site made pursuant to the provisions of section 32.03 (3) shall be conclusive.

History: 1953 c. 91.

The board of regents of the university of Wisconsin, authorized by 32.02 (1) and 36.06 (5) to acquire land by condemnation proceedings, is a "board" within the meaning of 32.07 (2), so that it is thereby authorized to determine the necessity of the taking. Wisconsin Chapter House Asso. v. Regents, 260 W 206, 50 NW (2d) 469.

32.08 Commissioners. If the petitioner be entitled to condemn the property or any portion thereof the judge shall appoint three freeholders, residents of the county, or some adjoining county, commissioners to ascertain the compensation to be made for the property taken, fix the time and place for their first meeting, and may limit the time of their appointment, which shall not in any case exceed one year.

32.09 Appraisal, notice of. Such commissioners shall, before entering on their duties, take and subscribe an oath that they will faithfully and to the best of their ability examine the property and impartially estimate and appraise the value of the same. Whenever requested in writing by the petitioner or any party interested they shall proceed to appraise the property mentioned in the request. They shall give notice of the time and place of meeting to each person interested, which notice shall be served personally or upon the attorney of the party at least ten days before the hearing, or if a party cannot be found and has not appeared in the proceedings then by publication once a week for three weeks in such newspaper as the judge appointing the commissioners shall direct. In case the proceeding is one to acquire streets or highways, a notice of the time and place of such hearing addressed "To Whom It May Concern" shall be published once a week for three successive weeks prior to such hearing in such newspapers.

32.10 Appraisal, hearing on. (1) The commissioners shall view the property described in the request and, when said property is acquired for a proposed public improvement, all such other premises as will in their judgment be injured or benefited by said proposed improvement, and hear the evidence produced by the parties and shall determine the value of each parcel, with the improvements thereon, and of each separate estate therein and the damages sustained by the taking, and fix the compensation to be made, or the benefits to be assessed, to each such owner thereof. In fixing the compensation, except in the case of streets or highways, they shall not make any deduction because of any benefit which the parties may derive from the construction of the improvement for which the property is taken, but special benefits to lands adjoining the lands so taken may be allowed in deduction of any damages sustained by the owner to such adjoining land.

(2) In the case of streets or highways, damages and benefits shall be assessed as to each parcel of land proposed to be taken, and the excess of benefits over damages or damages over benefits shall be stated. Benefits or damages may be assessed or allowed against the lands which said commissioners may deem benefited or damaged by the proposed improvement, and the amount of such benefits or damages shall be determined by said commissioners in the manner herein provided.

(3) A majority of the commissioners may adjourn from time to time, but not more than twice or for more than sixty days. A majority of the commissioners, all being present, may determine all matters.

(3a) The commissioners shall, within twenty days after last viewing any of the property so taken, unless the time be extended by the judge, file in the office of the clerk of the circuit court of the county, a report showing the award made for each parcel or separate estate therein. They shall file with the report proof of the service of notice of hearing or appearance of each party. Any report and proof of service made as herein provided since June 29, 1923, shall be as legal and valid as if this subsection had been in force during such time.

(4) In the case of an assessment of benefits and damages for a proposed public improvement, it shall be the duty of the commissioners, after such assessment shall be made and before the same shall be reported by the commissioners to the clerk of the circuit court of the county, to give public notice, at least once in each week for two successive weeks, by publication of such notice in such paper as shall have been designated by the judge appointing the commissioners, or in such paper as such judge may designate, that such assessment has been made and that the same will be open for review and inspection at a place to be named in said notice, for not less than ten days after the last publication thereof, during certain hours, and not less than two hours of each day, and that the commissioners will meet at a time and place mentioned therein not later than two days there-

after to hear such persons as are interested, and to consider all objections to such proposed assessment, and generally, in the matter of review and correction. It shall be sufficient to state in such notice for what said assessments have been made and a general description of the locality of the lands included in said assessments.

(4a) At the time specified in such notice mentioned in the last preceding subsection for such hearing, it shall be the duty of said commissioners to hear all persons interested in the property assessed, or otherwise personally interested in such assessment, in making objection to any part of such assessment, and to hear all evidence which may be produced in support of such objections, and the commissioners shall thereupon have power to review, modify and correct such assessment in such manner as they shall deem just at any time during such review and for three days thereafter, and thereupon it shall be the duty of said commissioners to file in the office of the clerk of the circuit court of the county a report of such assessment in writing, signed by them.

(4b) The commissioners shall also file a copy of such assessment in the office of the clerk of the city or village where the lands against which assessments for benefits or damages have been made, are located.

(5) They shall be paid such compensation as the judge shall direct, by the party by whom the property is taken.

(6) In assessing benefits for lands acquired, the commissioners shall take into account in any assessment of damages and benefits under subsection (2), the reasonable value of any land which the petitioner may previously have acquired by direct purchase, but the assessment of benefits therefor shall in no case exceed the purchase price. In assessing benefits against the land of any owner who has given or dedicated other land, the commissioners shall take into account an amount not to exceed the reasonable value of the land so given or dedicated.

In a proceeding under §4.09, the benefits which may be deducted from or offset against the damages are not limited to special benefits peculiar to the owner of the property, but also may include general benefits accruing to the community in common. (Nowaczyk v. Marathon County, 205 W 536, followed; statement in Schildknecht v. Milwaukee, 245 W 33, 37, so far as to the contrary, is held to be erroneous.) Townsend v. State, 257 W 329, 43 NW (2d) 458.

In proceedings to assess compensation for a strip of land on a farm, condemned for the construction of a power line, the rejection of the landowners' offer to prove how much they would make in a season selling melons

at a roadside stand was not error, the rule that loss of profits is not recoverable or provable in condemnation of an owner's interest being particularly applicable here where the location of the stand was not disturbed by the construction, and its operation was affected only by the fact that an elm tree previously shading the stand was removed. An award of \$1,200 for the land taken in this case, where the testimony as to the loss sustained varied from \$500 to \$6,500, and the jury had viewed the premises, will not be disturbed as inadequate. Dusevich v. Wisconsin Power & Light Co. 260 W 641, 51 NW (2d) 732.

32.11 Appeal. Any party to a condemnation proceeding, and any persons against whose lands assessments for benefits or damages shall have been made, may appeal from the award of the commissioners to the circuit court of the county by filing a notice of appeal in the office of the clerk of such court. Such notice must be filed within thirty days from the filing of the report of the commissioners. The clerk shall thereupon enter the appeal as an action pending in said court with the owner or owners of the property for which the award was made and who are parties to the appeal as plaintiffs and the party by whom the property is taken as defendant. It shall thereupon proceed as an action in said court subject to all the provisions of law relating to actions originally brought therein. It shall be tried by jury unless waived. Costs shall be allowed to the successful party on the appeal. If in favor of the plaintiff they shall be added to the verdict. If in favor of the defendant, they shall be deducted therefrom.

32.12 Report to be recorded; possession. The report of the commission shall be recorded by the clerk in the judgment book of such court. The person by whom the property is taken may pay to the owners of the property taken or to the clerk of the court for the use of such owners the amounts awarded by the commissioners and thereupon may enter upon, take and use the property for the purposes for which it was condemned. A writ of assistance may be granted by the court or a judge thereof upon twenty-four hours' notice to put such person in possession of the land. If a corporation applies for said writ the court or judge may require security in such additional amount as may be deemed necessary to pay any judgment that may be recovered on appeal. If the person be in possession or be put in possession of the property pending an appeal the owners or parties entitled thereto shall receive the money paid into court on account of the award appealed from without prejudice to the appeal. If the person condemning the property appeals, the money shall only be so withdrawn upon filing a bond to be approved by the court or judge to repay the amount by which such award may be abated on such appeal with costs.

32.13 Trial of title. If any defect of title to or incumbrance upon any parcel of land is suggested upon any appeal, or if any person petitions the court in which an ap-

peal is pending setting up a claim adverse to the title set out in said petition to said premises and to the money or any part thereof to be paid as compensation for the property so taken, the court shall thereupon determine the question so presented. Judgment shall be entered on such determination, with costs to the prevailing party. An appeal from such judgment may be taken as from a judgment in an action.

32.14 Use, when to vest. When no appeal is taken from any award by the commissioners within the time provided by law, the party condemning the property shall pay the amount thereof into court, or file a receipt therefor in the office of the clerk of the court duly signed by the owners and acknowledged before an officer authorized to take acknowledgments of deeds. After the determination of an appeal, the person condemning the property shall pay into court the amount of the judgment rendered thereon or file a receipt therefor as aforesaid. Upon such payment or the filing of such receipt, the clerk of the said court shall make a minute of such payment or the filing of such receipt at the foot of the record of the report of such commissioners in the judgment book of said court. If the condemnation be for streets, boulevards or highways, an easement for the purpose for which the condemnation was instituted shall thereupon vest in the person condemning without any other or further act, deed or conveyance. In other cases if the person condemning be a municipality, board or commission with power to take and hold real property, the exclusive use of said property shall so vest in such municipality, board or commission in fee simple. If the condemnation be by a public officer or by a board or commission not authorized to take and hold real property such use shall so vest in the state, county, town or municipality under whose jurisdiction said officer, board or commission is acting. If the person condemning be a corporation the use of such property shall so vest in such corporation, its successors and assigns so long as used for purposes for which condemnation might be instituted. Said record or a verified copy thereof shall be prima facie evidence of such title in all courts and places.

32.15 Proceedings to perfect title, owner may bring. (1) If any person having the power to acquire property by condemnation has entered into the possession of any property and is using the same for a purpose for which condemnation proceedings might be instituted but has not acquired title thereto, or if such title is defective, such person may proceed to acquire or perfect such title in the manner provided in this chapter. At any stage of such proceedings the court in which they are pending or the judge thereof may authorize such person, if in possession, to continue in possession, and if not in possession, to take possession and have and use such lands during the pendency of such proceedings and may stay all actions or proceedings against such person on account thereof on the paying in court of a sufficient sum or the giving of such securities as such court or judge may direct to pay the compensation therefor when finally ascertained. In every such case the party interested in such property may institute and conduct at the expense of such person the proceedings to a conclusion if such person delays or omits to prosecute the same.

(2) No injunction to restrain such person in his possession of said lands or his use thereof or the operation thereon of any plant, line, railroad or other structure, shall be granted until such compensation has been fixed and determined.

(3) In case such person or the person through or under whom he claims title has paid to the owner of such lands or to any former owner thereof, or to any other person having any valid mortgage or other lien thereon, any sum of money on account of such lands, such sum with interest thereon from the date of such payment at the rate of seven per cent per annum shall be deducted from the award made by said commissioners to such owners or other person.

(4) In case there shall be a dispute in relation to the payment of any sum as aforesaid or the amount or date of any payment that may have been made, the court or judge thereof shall at the request of any party, award an issue which shall be tried in the same manner of issues of fact in said court and an appeal from the judgment thereon may be taken in the same manner as from any judgment.

Cross Reference: As to right of landowner to sue for damages within twenty years, see 330.17.

32.16 Proceedings when land mortgaged. Whenever any person has acquired title to any property for which it could institute condemnation proceedings and said property is subject to any mortgage or other lien and proceedings have been afterwards commenced by the holders of any such mortgage or lien to enforce the same, the court in which such proceedings are pending may on due notice appoint three commissioners to appraise and value said property in the manner prescribed in this chapter as of the time when such person acquired title. Such appraisal shall be exclusive of the improvements made by such person or his predecessors. Said appraisal, with interest, when confirmed by said

court shall stand as the maximum amount of the incumbrance chargeable to the property so taken and judgment shall be rendered according to equity for an amount not exceeding such appraisal, with interest, against such person and may be enforced as in other cases. On the payment of such amount such person shall hold said property free and discharged from said mortgage or lien. An appeal may be taken from the award of such commission by the plaintiff and tried and determined as an appeal from the commissioners under this chapter and the action to enforce such mortgage or lien shall in the meantime be stayed.

32.17 Amendments; vacancies. The court may at any time amend any defect or informality in any of the proceedings authorized by this chapter and may cause new parties to be added and direct such notice to be given to any party of interest as it deems proper and appoint other commissioners to fill any vacancies which may occur.

32.18 How title in trustee acquired. In case any title or interest in real estate lawfully required by any person having the power of condemnation is vested in any trustee not authorized to sell, release and convey the same or in any infant, idiot or person of unsound mind, the circuit court may in a summary proceeding authorize and empower such trustee or the general guardian of such infant, idiot or person of unsound mind to sell and convey the same for the purposes required on such terms as may be just. If such infant, idiot or person of unsound mind has no general guardian, the court may appoint a special guardian for such sale, release or conveyance. The court may require from such trustee or general or special guardian, such security as it may deem proper before any conveyance or release herein authorized is executed. The terms of the same shall be reported to the court on oath. If the court is satisfied that such terms are just to the party interested in such real estate, it shall confirm the report and direct the conveyance or release to be executed. Such conveyance or release shall have the same effect as if executed by one having legal power to sell and convey the land.

32.19 Abandonment of proceedings. If any person instituting condemnation proceedings, shall deem it inadvisable to take the real estate at the price fixed by the commissioners or by a jury upon appeal, it may, within sixty days after filing the award of the commissioners or within sixty days after assessment of damages by the jury, discontinue the proceedings upon such terms as to the court shall seem just.

32.20 General provisions. (1) Where power of condemnation is given to a state officer or officers the title acquired shall be in the name of the state. Payments of the costs and expenses of such condemnation shall be paid from the appropriation covering the purpose for which the property is acquired.

(2) Any condemnation proceedings authorized under any local or special law of the state, except those applicable to cities of the first class shall be conducted under the procedure provided in this chapter.