

CHAPTER 32

EMINENT DOMAIN

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32.01 Definitions. In this chapter unless the context clearly requires otherwise:

(1) "Person" includes the state, a county, town, village, city, school district or other municipal corporation, a board, commission, including a commission created by contract under s. 66.30, corporation, or housing authority created under ss. 66.40 to 66.404, or redevelopment authority created under s. 66.431.

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

History: 1965 c. 238.

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 or transfer to the state, 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, soil conservation district, the state department of public welfare, the regents of the university of Wisconsin, the board of regents of state colleges, a commission created by contract under s. 66.30, with the approval of the municipality in which condemnation is proposed, or any public board or commission, for any lawful purpose, but 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, or any corporation holding a valid permit issued under s. 107.05, 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 pipelines for sale to the public directly or for sale to one or more other corporations furnishing such gas, oil or related products to the public.

(10) Any rural electric co-operative association organized under ch. 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 bylaws of said association and whose bylaws 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 par. (a), 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 ss. 66.40 to 66.404, or redevelopment authority created under s. 66.431.

(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 including all hydrocarbons which are in a liquid form at the temperature and pressure under which they are transported in pipelines 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: 1965 c. 238; 1967 c. 27.

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 1st class, except that every such city may conduct any condemnation proceedings 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 interest 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 s. 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. 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 as prescribed by ch. 227. Any condemnation of lands pursuant to this subsection shall be conducted in accordance with the procedure and requirements prescribed by ss. 32.04 to 32.14.

32.04 Procedure in condemnation. All acquisition of property in this state by condemnation, except as hereinafter provided, commenced after April 6, 1960 shall be accomplished in the following manner:

32.05 Condemnation for streets, highways, storm or sanitary sewers, watercourses, alleys, airports and mass transit facilities. This section does not apply to town highways created or altered under ch. 80 except as to jury trials on appeals under ss. 80.24 and 80.25, nor to proceedings in cities of the 1st class under chapter 275, laws of 1931, as amended (Kline Law). In cities of the 1st class, condemnation for housing under ss. 66.40 to 66.404, or for urban renewal under s. 66.431 may proceed under this section or under s. 32.06 at the option of the condemning authority. All other condemnation of property for public alleys, streets, highways, airports, mass transit facilities or storm sewers and sanitary sewers or watercourses shall proceed as follows:

(1) **RELOCATION ORDER.** The state highway commission, turnpike commission, county board of supervisors (or the county highway committee when so authorized by said board), county expressway and transportation commission, city council, village board, sewerage commission governing metropolitan sewerage district created by s. 59.96 or s. 66.20, state aeronautics commission, a commission created by contract under s. 66.30, housing authority under ss. 66.40 to 66.404 or redevelopment authority under s. 66.431 shall make an order providing for the laying out, relocation and improvement of the public highway, street, alley, storm and sanitary sewers, watercourses, mass transit facilities, airport, housing project or redevelopment project which shall be known as the relocation order.

This order shall include a map or plat showing the old and new locations and the lands and interests required. A copy of the order shall, within 20 days after its issue, be filed with the county clerk of the county wherein the lands are located.

(2) **APPRAISAL.** The condemnor shall cause at least one, or more in his discretion, appraisal to be made of all property proposed to be acquired. In making any such appraisal the appraiser shall confer with the owner or one of the owners, or his personal representative, if reasonably possible.

(2a) **NEGOTIATION.** Before making the jurisdictional offer provided in sub. (3), the condemnor shall attempt to negotiate personally with the owner or one of the owners or his personal representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor is authorized to contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 as may be applicable to the property in one or more instalments on such conditions as the condemnor and property owners may agree.

(3) **JURISDICTIONAL OFFER TO PURCHASE.** Condemnor shall send to the owner, or one of the owners of record, and to the mortgagee, or one of the mortgagees of each mortgage of record, a notice:

(a) Stating briefly the nature of the project with reference to the relocation order and that the condemnor in good faith intends to use the project sought to be condemned for such public purpose.

(b) Describing the property and the interest therein sought to be taken.

(c) Stating the proposed date of occupancy regardless of the date of taking.

(d) Stating the amount of compensation offered, itemized as to the items of damage as set forth in s. 32.09 and that compensation for additional items of damage as set forth in s. 32.19 may be claimed under s. 32.20 and will be paid if shown to exist.

(e) Stating that the appraisal or one of the appraisals of the property on which condemnor's offer is based is available for inspection at a specified place by persons having an interest in the lands sought to be acquired.

(g) Stating that the owner has 20 days from date of completion of service upon him of the offer, as specified in sub. (6), in which to accept or reject the offer.

(h) Stating that if the owner has not accepted such offer as provided in sub. (6) he has 40 days from date of completion of serv-

ice upon him of the offer to commence a court action to contest the right of condemnation as provided in sub. (5); provided that the acceptance and retention of any compensation resulting from an award made prior to the commencement of such an action shall be an absolute bar to such action.

(i) Stating that the owner, subject to subs. (9) (a) and (11), will have 2 years from the date of taking his property by award in which to appeal for greater compensation without prejudice to his right to use the compensation given him by the award. If the condemning authority is a housing authority organized under ss. 66.40 to 66.404 or a redevelopment authority organized under s. 66.431, the notice shall also state that in the case of an appeal under sub. (9) (a) the parties having an interest in the property who are taking the appeal may initiate such appeal by filing with the condemning authority a letter requesting that the issue of the amount of such compensation be determined by the condemnation commission.

(4) HOW NOTICE OF JURISDICTIONAL OFFER IS GIVEN. The giving of such notice is a jurisdictional requisite to a taking by condemnation. Such notice may be given by personal service in the manner of service of a circuit court summons, or it may be transmitted by certified mail. If service is by mail, service of the papers shall be deemed completed on the date of mailing and the use of mail service shall not increase the time allowed to act in answer to or in consequence of such service. If such owner or mortgagee is unknown or cannot be found there shall be published in the county wherein the property is located a class 1 notice, under ch. 985. If such owner is a minor, or an incompetent person, the condemnor shall serve such notice upon the legal guardian of such minor or incompetent, and if there is no such guardian the condemnor shall proceed under s. 32.15 to have a special guardian appointed to represent such minor or incompetent in such proceeding. The reasonable fees of such special guardian as approved by the court shall be paid by the condemnor. Such notice shall be called the "jurisdictional offer." The condemnor shall file a lis pendens on or within 14 days of the date of service or mailing of the jurisdictional offer or within 14 days of the date of publication if publication is necessary. The lis pendens shall include a copy of the jurisdictional offer. From the time of such filing every purchaser or encumbrancer whose conveyance or encumbrance is not recorded or filed shall be

deemed a subsequent purchaser or encumbrancer and shall be bound by the terms of the jurisdictional offer and it shall not be necessary to serve other jurisdictional offers on such subsequent purchaser or encumbrancer. In the award the condemnor may name and make payment to parties who were owners or mortgagees at the time of the filing of the lis pendens unless subsequent purchasers or encumbrancers give written notice to the condemnor of their subsequently acquired interests in which event such parties shall be named in the award as their interests may appear.

(5) COURT ACTION TO CONTEST RIGHT OF CONDEMNATION. When an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer, for any reason other than that the amount of compensation offered is inadequate, such owner may within 40 days from the date of personal service of the jurisdictional offer or within 40 days from the date of postmark of the certified mail letter transmitting such offer, or within 40 days after date of publication of the jurisdictional offer as to persons for whom such publication was necessary and was made, commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant. Such action shall be the only manner in which any issue other than the amount of just compensation, or other than proceedings to perfect title as provided in ss. 32.11 and 32.12, may be raised pertaining to the condemnation of the property described in the jurisdictional offer. The trial of the issues raised by the pleadings in such action shall be given precedence over all other actions in said court then not on trial. If the action is not commenced within the time limited the owner or other person having any interest in the property shall be forever barred from raising any such objection in any other manner. Nothing in this section shall be construed to limit in any respect the right to determine the necessity of taking as conferred by s. 32.07 nor to prevent the condemnor from proceeding with condemnation during the pendency of the action to contest the right to condemn.

(6) ACCEPTANCE OF JURISDICTIONAL OFFER. The owner has 20 days from the date of personal service of the jurisdictional offer or 20 days from the date of postmark of the certified mail letter transmitting such offer, or if publication of the jurisdictional offer was necessary and was made, 20 days after the

date of such publication, in which to accept the jurisdictional offer unless such time is extended by mutual written consent of the condemnor and condemnee. If such offer is accepted, the transfer of title shall be accomplished within 60 days after acceptance including payment of the consideration stipulated in such offer. If the jurisdictional offer is rejected in writing by all of the owners of record the condemnor may proceed to make an award forthwith. At any time prior to acceptance of the jurisdictional offer by the condemnee the same may be withdrawn by the condemnor.

(7) AWARD OF COMPENSATION. If the owner has not accepted the jurisdictional offer within the periods limited in sub. (6) or fails to consummate an acceptance as provided therein, the condemnor may make an award of damages in the manner and sequence of acts as follows:

(a) The award shall be in writing. It shall state that it is made pursuant to relocation order of (name of commission, authority, board or council having jurisdiction to make the improvement) No. dated filed in the office of the County Clerk, County of It shall name all persons having an interest of record in the property taken and may name the other persons. It shall describe such property by legal description and state the interest therein sought to be condemned and the date when actual occupancy of the property condemned will be taken by condemnor. The award shall also state the compensation for the taking which shall be an amount at least equal to the amount of the jurisdictional offer. The award shall state that the condemnor has complied with all jurisdictional requirements. An amended award for the purpose of correcting errors wherein the award as recorded differs from the jurisdictional offer may be made, served and recorded as provided by this section.

(b) Copy of such award shall be served on or mailed by certified mail to all persons named therein. If any such person cannot be found or his address is unknown, the award shall be published in the county wherein the property is situated as a class 3 notice, under ch. 985, and completed publication as shown by affidavit shall constitute proper service. Such award shall be known as the "basic award".

(c) When service of the award has been completed, and after payment of the award as provided in par. (d), the award shall be re-

corded in the office of the register of deeds of the county wherein the property is located. Thereupon title in fee simple to the property described in the award, or the lesser right in property acquired by the award shall vest in the condemnor as of the time of recording. The date of such recording is the "date of evaluation" and also the "date of taking". If the condemning authority is a housing authority organized under ss. 66.40 to 66.404 or a redevelopment authority organized under s. 66.431, the award shall not be recorded sooner than 60 days after service of the award has been completed.

(d) On or before said date of taking, a check, naming the parties in interest as payees, for the amount of the award less outstanding delinquent tax liens, proportionately allocated as in division in redemption under ss. 74.06, 74.32 and 75.01 when necessary and less prorated taxes of the same year, if any, likewise proportionately allocated when necessary against the property taken, shall at the option of the condemnor be mailed by certified mail to the owner or one of the owners of record or be deposited with the clerk of the circuit court of the county for the benefit of the persons named in the award. The persons entitled thereto may receive their proper share of such award by petition to and order of the circuit court of the county. Such petition shall be filed with the clerk of such court without fee.

(8) WRIT OF ASSISTANCE; LIABILITY FOR WASTE; RENT. If all jurisdictional requirements necessary to making the award have been complied with and if the amount of such award has been paid or tendered as required, the circuit court of the county wherein such property is located shall upon 48 hours' notice of hearing of a petition therefor, grant a writ of assistance to the condemnor to be put in possession of such interest in the property condemned as is taken by the award. Any person occupying the property after title has vested in the condemnor shall be liable to the condemnor for all waste committed or allowed by such occupant during such occupancy, and shall also, at the condemnor's option, be liable to pay to condemnor a reasonable rental of land improved by buildings for all periods of occupancy after the date of taking or the date of occupancy indicated in the jurisdictional offer, which ever is later.

(9) APPEAL FROM AWARD BY OWNER OR OTHER PARTY IN INTEREST. (a) Any party having an interest in the property condemned may, within 2 years after the date of taking,

appeal from the award, except as hereinafter limited by applying to the judge of the circuit or county court of the county wherein the property is located for assignment to a commission of county condemnation commissioners as provided in s. 32.08, except that if the condemning authority is a housing authority organized under ss. 66.40 to 66.404, or a redevelopment authority organized under s. 66.431, the appeals may be initiated by filing with the condemning authority a letter requesting that the issue of the amount of such compensation be determined by the condemnation commission. The condemning authority shall, upon receipt of such letter, apply to the judge of the circuit or county court of the county wherein the property is located for assignment to a commission of county condemnation commissioners as provided in s. 32.08. Such application shall contain a description of the property condemned and the names and last known addresses of all parties in interest but shall not disclose the amount of the jurisdictional offer nor the amount of the basic award. Violation of this prohibition shall nullify such application. Notice of such application shall be given to the clerk of the court and to all other persons other than the applicant who were parties to the award. Such notice may be given by certified mail or personal service. Upon proof of such service the judge shall forthwith make such assignment. Where one party in interest has appealed from the award, no other party in interest who has been served with a notice of such appeal may take a separate appeal, but may join in the appeal by serving notice upon the condemnor and the appellant of his election to do so. Such notice shall be given by certified mail or personal service within 10 days after receipt of notice of the appeal and shall be filed with the clerk of the court. Upon failure to give and file such notice all other parties of interest shall be deemed not to have appealed. The result of such appeal shall not affect parties who have not joined in the appeal as hereinabove provided. In cases involving more than one party in interest with a right to appeal, the first of such parties filing an appeal under this subsection or under sub. (11) shall determine whether such appeal shall be under this subsection or under sub. (11). No party in interest may file an appeal under this subsection if another party in interest in the same lands has filed a prior appeal complying with the requirements of sub. (11). Thereafter the procedure shall be as prescribed in s. 32.08. In cases involv-

ing multiple ownership or interests in lands taken the following rules shall also apply:

1. Where all parties having an interest in the property taken do not join in an appeal, such fact shall not change the requirement that a finding of fair market value of the entire property taken and damages, if any, to the entire property taken, shall be made in determining compensation. Determination of the separate interests of parties having an interest in property taken shall, in cases of dispute, be resolved by a separate partition action as set forth herein.

2. In cases where the amount of the award appealed from is increased on appeal, such amount shall be paid by the condemnor making tender of the amount to one of the appellant owners or appellant parties of interest in the same manner governing the tender of a basic award. In event a determination on appeal reduces the amount of the appealed award those parties who joined in the appeal shall be liable, jointly and severally, to the condemning authority.

3. When the owners or parties having an interest in land taken cannot agree on the division of an award, any of such owners or parties of interest may petition the circuit court for the county wherein the property is located for partition of the award moneys as provided in s. 277.01. When the tender of an award is refused, the condemning authority may pay the award to the clerk of the circuit court for the county wherein the property is located and no interest shall accrue against the condemning authority for moneys so paid.

(b) If the commission's award exceeds the basic award the owner shall recover the excess plus interest thereon until payment from the date of taking less a period which is 14 days after the date of filing the commission's award. If the commission's award is less than the basic award, the condemnor shall recover the difference with interest until payment from the date of taking.

(c) All sums due under this subsection shall be paid within 70 days after date of filing of the commissioner's award unless within such time an appeal is taken to the circuit court. In the event such appeal is later dismissed before trial such payment shall be made within 60 days after the dismissal date.

(d) In the event the award of the county condemnation commissioners is lower than the basic award and tender of the basic award has been accepted by an owner, the condem-

nor shall have a lien against such owner for the amount of the difference. The lien shall give the name and address of the owner or owners, refer to the basic award and the award on appeal and state the difference in amounts. The lien may be filed in the office of the register of deeds and when so filed shall attach to all property of the owner presently owned or subsequently acquired in any county where such lien is filed. Such lien shall remain in force with interest until satisfied or until it is set aside by a judgment of the circuit court in an action pursuant to sub. (10).

(10) APPEAL FROM COMMISSION'S AWARD TO CIRCUIT COURT. (a) Within 60 days after the date of filing of the commission's award, any party to the proceeding before the commission may appeal to the circuit court of the county wherein the property is located. Notice of such appeal shall be given to the clerk of the circuit court and to all persons other than the appellant who were parties to the proceeding before the commissioners. Notice of appeal may be given by certified mail or by personal service. The clerk shall thereupon enter the appeal as an action pending in said court with the condemnee as plaintiff and the condemnor as defendant. It shall thereupon proceed as an action in said court subject to all the provisions of law relating to actions brought therein and shall have precedence over all actions not then on trial. The sole issues to be tried shall be questions of title, if any, under ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor. It shall be tried by jury unless waived by both plaintiff and defendant. Neither the amount of the jurisdictional offer, the basic award, nor the award made by the commission shall be disclosed to the jury during such trial.

(b) The court shall enter judgment for the amount found to be due after giving effect to any amount paid by reason of a prior award. The judgment shall include legal interest on the amount so found due from the date of taking if judgment is for the condemnor, and from 14 days after the date of taking if judgment is for the condemnee. Costs shall be allowed pursuant to s. 271.02 (2). If the appeal was by the condemnor and if the amount of just compensation found under par. (a) exceeds the amount of the basic award, the condemnee shall be deemed the "successful party" under s. 271.02 (2).

(c) All moneys due under this subsection shall be paid within 60 days after entry of

judgment unless within such period an appeal is taken by any party to the supreme court.

(11) WAIVER OF HEARING BEFORE COMMISSION; APPEAL TO CIRCUIT COURT AND JURY. The owner of any interest in the property condemned named in the basic award may elect to waive the appeal procedure specified in sub. (9) and instead, within 2 years after the date of taking, appeal to the circuit court of the county wherein the property is located. The notice of appeal shall be served as provided in sub. (9) (a). Filing of the notice of appeal shall constitute such waiver. The clerk shall thereupon enter the appeal as an action pending in said court with the condemnee as plaintiff and the condemnor as defendant. It shall proceed as an action in said court subject to all the provisions of law relating to actions originally brought therein and shall have precedence over all other actions not then on trial. The sole issues to be tried shall be questions of title, if any, under ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor. It shall be tried by jury unless waived by both plaintiff and defendant. The amount of the jurisdictional offer or basic award shall not be disclosed to the jury during such trial. Where one party in interest has appealed from the award, no other party in interest who has been served with notice of such appeal may take a separate appeal but may join in the appeal by serving notice upon the condemnor and the appellant of his election to do so. Such notice shall be given by certified mail or personal service within 10 days after receipt of notice of the appeal and shall be filed with the clerk of court. Upon failure to give such notice such parties shall be deemed not to have appealed. The appeal shall not affect parties who have not joined in the appeal as herein provided. In cases involving more than one party in interest with a right to appeal, the first of such parties filing an appeal under sub. (9) or under this subsection shall determine whether such appeal shall be under sub. (9) or directly to the circuit court as here provided. No party in interest may file an appeal under this subsection if another party in interest in the same lands has filed a prior appeal complying with the requirements of sub. (9). In cases involving multiple ownership or interests in lands taken the provisions of s. 32.05 (9) (a) 1, 2 and 3 shall govern.

(a) If the jury verdict as approved by the court does not exceed the basic award, the condemnor shall have judgment against the

appellant for the difference between the jury verdict and the amount of the basic award, plus interest on the amount of such difference from the date of taking, plus condemnor's taxable statutory costs and disbursements pursuant to s. 271.02 (2).

(b) If the jury verdict as approved by the court exceeds the basic award, the appellant shall have judgment for the amount of such excess plus legal interest thereon to date of payment in full from that date which is 14 days after the date of taking, plus his statutory taxable costs and disbursements pursuant to s. 271.02 (2).

(c) All moneys payable under this subsection shall be paid within 60 days after entry of judgment unless within such period an appeal is taken to the supreme court.

(12) EFFECT OF DETERMINATION OF COMPENSATION BY THE COURT WHERE JURY WAIVED. If the action is tried by the court upon waiver of a jury the determination of the amount of damages by the court shall be considered in lieu of the words "jury verdict as approved by the court" where such language occurs in this section.

(13) APPEAL TO SUPREME COURT. Either party may appeal to the supreme court within 6 months after date of notice of entry of circuit court judgment.

History: 1961 c. 52, 202, 486, 622, 682; 1963 c. 6; 1965 c. 219, 238, 252, 596; 1967 c. 102, 331, 339.

The attorney for a county highway committee can sign and file a notice of appeal for the committee. *Brausen v. Daley*, 11 W (2d) 160, 105 NW (2d) 294.

A tender of a check to the owner's wife, who had only a dower interest, was not sufficient to stop the running of interest on the award. The fact that the state was paying most of the award through the city does not limit the interest to the city's share of the payment where the state had already paid its share to the city. The fact that lessees may have an interest in the award does not prevent the owner from recovering interest on the whole. *Grant v. Cronin*, 12 W (2d) 352, 107 NW (2d) 153.

When an application is made to the judge for assignment of an award to commissioners for review, the judge is acting in an administrative capacity and no appeal lies from a refusal to make the assignment for error in the application or from a refusal to allow amendment of the application. *Acheson v. Winnebago County Highway Comm.* 14 W (2d) 475, 111 NW (2d) 446.

Under (2a) negotiation with the property owner by the condemnor of land sought to be taken for highway construction is a necessary condition of conferring jurisdiction on the condemnor and the court to determine just compensation, and failure of the condemnor to negotiate would render the judgment invalid if the property owner raised the issue in timely fashion under (5). *Arrowhead Farms, Inc. v. Dodge County*, 21 W (2d) 647, 124 NW (2d) 631.

A condemnation proceeding becomes a proceeding in court upon filing an appeal from the commissioner's award. Prior to that it is an administrative proceeding. Where the circuit court judgment is for a lesser amount than the commission award, the condemnor is the successful party and may be awarded costs. *Millard v. Columbia County Highway Comm.* 25 W (2d) 425, 130 NW (2d) 861.

Under (10) there is no authority for the imposition of terms on dismissal of an appeal to the cir-

cuit court. *Schrab v. State Highway Comm.* 28 W (2d) 290, 137 NW (2d) 25.

Presence of fill dirt on land condemned discussed as affecting valuation. *Volbrecht v. State Highway Comm.* 31 W (2d) 640, 143 NW (2d) 429.

Since review by the circuit court under (10) is now limited rather than a trial de novo, an order regarding alleged procedural irregularities in invoking the jurisdiction of the claims commission is appealable. *Schroedel Corp. v. State Highway Comm.* 32 W (2d) 305, 145 NW (2d) 217.

In determining whether an appeal under (9) was improperly to the court instead of to the judge, the whole record must be examined. Minor errors are to be disregarded. No filing fee is to be paid on such appeal. Condemnation statutes are in derogation of the common law and must be strictly construed in favor of the condemnee. *Schroedel Corp. v. State Highway Comm.* 34 W (2d) 32, 148 NW (2d) 691.

(4) does not require that personal service be attempted before mailing nor that personal service be made if the mailed notice is not delivered. Service by mail is complete on the date of mailing and risk of miscarriage or nondelivery is on the addressee. *Boeck v. State Highway Comm.* 36 W (2d) 440, 153 NW (2d) 610.

32.06 Condemnation procedure in other than highway, etc., matters. The procedure in condemnation in all matters except streets, highways, storm or sanitary sewers, water-courses, alleys and airport acquisitions, acquisitions under chapter 275, laws of 1931, as amended (Kline Law), acquisitions under ch. 157, and acquisitions under ch. 197, shall be as follows:

(1) DETERMINATION OF NECESSITY OF TAKING. The necessity of the taking shall be determined as provided in s. 32.07.

(2) APPRAISAL. The condemnor shall cause at least one (or more in his discretion) appraisal to be made of the property proposed to be acquired. In making any such appraisal the appraiser shall confer with the owner or one of the owners, or his personal representative, if reasonably possible.

(2a) AGREED PRICE. Before making the jurisdictional offer provided in sub. (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners or his personal representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor may contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 where shown to exist.

(3) MAKING JURISDICTIONAL OFFER. The condemnor shall make and serve the jurisdictional offer and notice in the form (insofar as applicable) and manner of service provided in s. 32.05 (3) and (4), but lis pendens shall not be filed until date of petition under sub. (7). The offer shall state that if it is not accepted within 20 days, the condemnor may petition for a determination of just compensation by county condemnation commissioners and that either party may appeal from the award of the county condemnation commis-

sioners to the circuit court within 60 days as provided in sub. (10).

(4) RIGHT OF MINORS AND INCOMPETENTS. If any person having an ownership interest in the property proposed to be condemned is a minor or an incompetent person, a special guardian shall be appointed for him pursuant to s. 32.05 (4).

(5) COURT ACTION TO CONTEST RIGHT OF CONDEMNATION. When an owner desires to contest the right of the condemnor to condemn the property described in the jurisdictional offer for any reason other than that the amount of compensation offered is inadequate, such owner may within 40 days from the date of personal service of the jurisdictional offer or within 40 days from the date of postmark of the certified mail letter transmitting such offer, or within 40 days after date of publication of the jurisdictional offer as to persons for whom such publication was necessary and was made, commence an action in the circuit court of the county wherein the property is located, naming the condemnor as defendant. Such action shall be the only manner in which any issue other than the amount of just compensation or other than proceedings to perfect title under ss. 32.11 and 32.12 may be raised pertaining to the condemnation of the property described in the jurisdictional offer. The trial of the issues raised by the pleadings in such action shall be given precedence over all other actions in said court then not on trial. If such action is not commenced within the time limited the owner or other person having any interest in the property shall be forever barred from raising any such objection in any other manner. The commencement of an action by an owner under this subsection shall not prevent a condemnor from filing the petition provided for in sub. (7) and proceeding thereon. Nothing in this subsection shall be construed to limit in any respect the right to determine the necessity of taking as conferred by s. 32.07 nor to prevent the condemnor from proceeding with condemnation during the pendency of the action to contest the right to condemn. This section shall not apply to any owner who had a right to bring a proceeding pursuant to s. 66.431 (7) prior to its repeal by chapter 526, laws of 1961, effective on October 7, 1961, and, in lieu of this section, s. 66.431 (7) as it existed prior to such effective date of repeal shall be his exclusive remedy.

(6) ACCEPTANCE OF JURISDICTIONAL OFFER. The owner has 20 days from the date of per-

sonal service of the jurisdictional offer or 20 days from the date of postmark of the certified mail letter transmitting such offer or 20 days from the date of filing the final judgment order or remittitur in the circuit court of the county in an action commenced under sub. (5), if the judgment permits the taking of the land, in which to accept the jurisdictional offer and deliver the same to the condemnor. If the offer is accepted, the transfer of title shall be accomplished within 60 days after acceptance including payment of the consideration stipulated in such offer unless such time is extended by mutual written consent of the condemnor and condemnee. If the jurisdictional offer is rejected in writing by all of the owners of record the condemnor may proceed to petition in condemnation forthwith. If the owner fails to convey the condemnor may proceed as hereinafter set forth.

(7) PETITION FOR CONDEMNATION PROCEEDINGS. If the jurisdictional offer is not accepted within the periods limited in sub. (6) or the owner fails to consummate an acceptance as provided in sub. (6), the condemnor may present a verified petition to the judge of the circuit or county court of the county in which the property to be taken is located, for proceedings to determine the necessity of taking, where such determination is required, and the amount of just compensation. Such petition shall state that the jurisdictional offer required by sub. (3) has been made and rejected; that it is the intention of the condemnor in good faith to use the property or right therein for the specified purpose. It shall name the parties having an interest of record in such property as near as may be and shall name such parties who are minors or persons of unsound mind or unknown. Such petition shall not disclose the amount of the jurisdictional offer, and if it does so it shall be a nullity. Such petition shall be filed with the clerk of such court. Notice of such petition shall be given as provided in s. 32.05 (4) to all persons having an interest of record in such property, including the special guardian appointed for minors or incompetent persons. A lis pendens shall be filed on the date of filing the petition. The date of filing the lis pendens shall be the "date of evaluation" of the property for purpose of fixing just compensation. The hearing on the petition shall not be earlier than 20 days after the date of its filing unless the petitioner has acquired possession of such land pursuant to s. 32.12 (1) in which event this hear-

ing shall not be necessary. If the petitioner is entitled to condemn the property or any portion thereof the judge shall forthwith assign the matter to the chairman of the county condemnation commissioners for hearing pursuant to s. 32.08. An order by the judge determining that the petitioner does not have the right to condemn or refusing to assign the matter to the chairman of the county condemnation commissioners may be appealed directly to the supreme court.

(8) COMMISSION HEARING. Thereafter the commission shall proceed in the manner and with the rights and duties as specified in s. 32.08 to hear the matter and make and file its award with the clerk of the circuit court, specifying therein the property or interests therein taken and the compensation allowed the owner, and the clerk shall give certified mail notice with return receipt requested of such filing, with a copy of the award to condemnor and owner.

(9) ABANDONMENT OF PROCEEDINGS; OR PAYMENT OF AWARD. (a) The condemnor must within 30 days after the date of filing of the commission's award, if it desires to abandon the proceeding, petition the judge of the circuit court of the county wherein the property is situated, upon 5 days' notice by certified mail to the owner, for leave to abandon the petition for taking. The circuit judge shall grant such petition upon such terms as he deems just, which terms may include reasonable expert witness fees incurred by condemnee for not to exceed 3 expert witnesses and a reasonable attorney's fee both as approved by the judge. Upon payment of such amount into court for the benefit of the owner, the judge shall make a formal order discontinuing said proceeding which order shall be recorded in the judgment book of the court after the record of the commission's award. The order shall operate to divest any title of condemnor to the lands involved and to automatically discharge the lis pendens.

(b) If condemnor does not elect to abandon the condemnation proceeding as provided in par. (a), it shall within 70 days after the date of filing of the commission's award, pay the amount of the award, plus legal interest from the date of taking but less delinquent tax liens, proportionately allocated as in division in redemption under ss. 74.06, 74.32 and 75.01 when necessary and less prorated taxes of the year of taking, if any, likewise proportionately allocated when necessary, to the owner and take and file his receipt therefor with the clerk of the circuit court, or at the

option of the condemnor pay the same into the office of the clerk of the circuit court for the benefit of the parties having an interest of record on the date of evaluation in the property taken and give notice thereof by certified mail to such parties. If the condemnor pays the amount of said award within 14 days after the date of filing of the commission's award, no interest shall accrue. Title to the property taken shall vest in the condemnor upon the filing of such receipt or the making of such payment.

(c) Condemnor shall have the right to possession on the date of payment of the award as hereinabove provided, or as provided by an order of the court entered under s. 32.12, or on such later date as he has specified in the jurisdictional offer. If the condemnor is denied such right of possession he may upon 48 hours' notice to the occupant apply to the circuit court for a writ of assistance to put him in possession, and if the condemnor has complied with all jurisdictional requirements the court shall grant such writ. Any person occupying the property after title has vested in the condemnor shall be liable to the condemnor for all waste committed or allowed on the lands condemned after the date of such vesting of title. An occupant of said lands after said date of vesting of title or the date of occupancy indicated in the jurisdictional offer, whichever is later, if said lands are improved by buildings, shall be liable to condemnor at his option for the reasonable rental of said lands.

(10) APPEAL TO CIRCUIT COURT. Within 60 days after the date of filing of the commission's award either condemnor or owner may appeal to the circuit court by giving notice of appeal to the opposite party and to the clerk of the circuit court as provided in s. 32.05 (10). The clerk shall thereupon enter the appeal as an action pending in said court with the condemnee as plaintiff and the condemnor as defendant. It shall thereupon proceed as an action in said court subject to all the provisions of law relating to actions brought therein, but the only issues to be tried shall be questions of title, if any, as provided by ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor, and it shall have precedence over all other actions not then on trial. It shall be tried by jury unless waived by both plaintiff and defendant. The amount of the jurisdictional offer or of the commission's award shall not be disclosed to the jury during such trial.

(a) If the jury verdict as approved by the court exceeds the commission's award the owner shall have judgment increased by the amount of his statutory taxable costs and disbursements, together with legal interest from the date title vests in condemnor to date of entry of judgment on the excess of the verdict over the compensation awarded by the commission.

(b) If the jury verdict as approved by the court does not exceed the commission's award the condemnor shall have judgment against the owner for the difference between the verdict and the amount of the commission's award with legal interest on such difference from the date condemnor paid such award, plus condemnor's statutory taxable costs and disbursements.

(c) If the jury verdict as approved by the court exceeds the amount of the jurisdictional offer, the condemnor may within 40 days after filing of such verdict petition the court for leave to abandon the proceeding and thereafter sub. (9) (a) shall apply.

(d) All judgments required to be paid shall be paid within 60 days after entry of judgment unless within this period appeal is taken to the supreme court or unless condemnor has petitioned for and been granted an order abandoning the condemnation proceeding. Otherwise such judgment shall bear interest from the date of entry of judgment at the rate of 10% per annum until payment.

(11) WITHDRAWAL OF COMPENSATION PAID INTO COURT; BOND. If either party appeals from the award of the commission, the owner shall not be entitled to receive the amount of compensation paid into court by condemnor unless the owner files with the clerk of the court a surety bond executed by a licensed corporate surety company in an amount equal to one-half of the commission's award, conditioned to pay the condemnor any sums together with interest and costs as allowed by the court, by which the award of the commission may be diminished.

(12) EFFECT OF DETERMINATION OF COMPENSATION BY THE COURT WHERE JURY WAIVED. If the action is tried by the court upon waiver of a jury, the determination of the amount of the damages by the court shall be considered in lieu of the words "jury verdict as approved by the court" where such language occurs in this section.

(13) APPEAL TO SUPREME COURT. Either party may appeal to the supreme court within 6 months after date of notice of entry of circuit court judgment.

History: 1961 c. 202, 486; 1963 c. 6; 1965 c. 219; 1967 [13.93 (1) (e), (h)].

Revisor's Note, 1963: 32.06 (10), which spells out the appeal procedure, was amended in 1961 to cut the appeal time to 60 days. The parallel provision in sub. (3) was overlooked. Amendment approved by C. Stanley Perry and Richard Barrett, two members of the original committee. (Bill 44-S)

Where plaintiff did not start an action within 40 days to contest the right to condemnation, his action will be dismissed on the merits and an adverse examination necessary to plead denied. *Weeden v. Beloit*, 22 W (2d) 414, 126 NW (2d) 54.

The party who appeals from the award of the commissioners has the burden of proof. *Loeb v. Board of Regents*, 29 W (2d) 159, 138 NW (2d) 227.

See note to 32.05, citing *Schroedel Corp. v. State Highway Comm.* 32 W (2d) 305, 145 NW (2d) 217.

Question whether property owners can recoup expenses incurred in proceedings before commissioners not decided where abandonment is asked under (10) (c). Fees of only 3 expert witnesses may be taxed; this does not refer only to appraisal witnesses. Attorney's fees based on a contingent fee contract, if approved by the trial court, may be awarded plus an allowance for fees on the appeal. *Hutterli v. State Conservation Comm.* 34 W (2d) 252, 148 NW (2d) 849.

An expert witness testifying to the value of property which he has examined should base his opinion on comparable sales as an element of value if such sales exist; the sales used as a foundation or partial foundation of an expert's opinion of value are admissible and, if not comparable, go to the weight of his opinion, not to its admissibility. *Besnah v. Fond du Lac*, 35 W (2d) 755, 151 NW (2d) 725.

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

(2) If application is by the state or any commission, department, board or other branch of state government; or by a city, village, town, county, board, commission, public officer, commission created by contract under s. 66.30, redevelopment authority created under s. 66.431 or housing authority created under ss. 66.40 to 66.404; or by a soil and water conservation district created under ch. 92; or for the right of way of a railroad or a street or interurban railway up to 100 feet in width; or a telegraph, telephone or other electric line; or for the right of way for a gas pipeline, 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 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 s. 32.03 (3) shall be conclusive.

History: 1961 c. 202; 1963 c. 476; 1965 c. 238.

32.075 Use after condemnation. Whenever the public service commission has made a finding, either with or without hearing, (1) that it is reasonably certain it will be necessary for a public utility, as defined in ch. 196, to acquire lands or interests therein for

the purpose of the conveyance of telegraph and telephone messages, or for the production, transformation or transmission of electric energy for the public, or for right of way for a gas pipe line, main or service, and (2) that such public utility is unlikely to commence construction of its facilities upon such lands within 2 years of such finding, such public utility may file its petition and proceed with condemnation as prescribed in s. 32.06 and no further determination of necessity shall be required. When the lands to be condemned under the provisions hereof are needed for rights of way for telegraph, telephone or electric lines or pipe lines, it shall not be necessary that the particular parcel or parcels of land be described in the commission's finding, but it shall be sufficient that such finding described the termini of any such lines and the general direction or course of the lines between the termini, but when the utility files its petition under s. 32.06 it shall specifically describe therein the lands to be acquired. Notwithstanding the completion of the condemnation proceedings and the payment of the award made under this chapter, the owner may continue to use the land until such time as the utility constructs its facilities thereon.

32.08 Commissioner of condemnation. (1) The office of commissioner of condemnation is created. In counties having a population of less than 100,000 there shall be 6 commissioners; in counties having a population of 100,000 or more and less than 500,000 there shall be 9 commissioners; in counties having a population of 500,000 or more there shall be 12 commissioners. Each such commissioner must be a resident of the county or of an adjoining county in the same judicial circuit prior to his appointment and remain so during his term of office. Not more than one-third of such commissioners shall be attorneys at law, licensed for active practice in this state.

(2) Such commissioners shall be appointed by the circuit judge or judges of the circuit court for such county and may be removed by said judge or judges at their pleasure. Where any county has more than one circuit judge, the affirmative vote of a majority of such judges shall be necessary to an appointment or a removal. All appointments and removals shall be filed with the clerk of the circuit court for the county. Each commissioner shall take and file the official oath. The first appointments after April 6, 1960 shall be made for staggered terms of 1, 2 and 3 years as fixed by the circuit judge. Thereafter all

appointments shall be made for 3-year terms. Vacancies shall be filled for the remainder of the unexpired term.

(3) The commissioners in each county shall annually elect one of their number as chairman, and he shall select and notify the commissioners to serve on each commission of 3 required to sit in condemnation.

(4) Commissioners shall receive no salary but shall be compensated for actual service at an hourly rate to be fixed by the county board of such county. Commissioners shall also receive mileage at 7 cents per mile for necessary and direct round trip travel from their homes to the place where the condemnation commission conducts its hearings. The chairman of the county commission shall receive such reasonable sum, computed at the hourly rate as fixed by the county board, as shall be allowed by the circuit or county judge having jurisdiction over the hearing, for his administrative work in selecting and notifying the commissioners to serve in such condemnation hearing and his necessary out-of-pocket expenses in connection therewith. All such compensation and expenses shall be paid by the condemnor on order approved by the circuit or county judge as the case may be.

(5) If the petitioner under s. 32.06 is entitled to condemn the property or any portion thereof or interest therein, the circuit or county judge having jurisdiction of such petition, or to whom an application for county commissioner of condemnation review is taken from a highway taking award, shall assign the matter to the chairman of the county condemnation commissioners who shall within 7 days select 3 of said commissioners to serve as a commission to ascertain the compensation to be made for the taking of the property or rights in property sought to be condemned, fix the time and place of the hearing before the commission, which time shall not be less than 20 nor more than 30 days from such assignment date, and notify the parties in interest thereof. The judge's order of assignment shall be accompanied by a copy of the petition for condemnation. Notice shall be given to each interested person or, where such persons have appeared in the proceeding by an attorney then to such attorney, by certified mail with return receipt requested, postmarked at least 10 days prior to the date of hearing. If any party cannot be found and has not appeared in the proceedings a class 3 notice shall be published, under ch. 985, in the community which the chairman of the condemnation commission directs. Costs of notification shall

be paid by the petitioner upon certification by the commission chairman.

(6) (a) At the hearing the commissioners shall first view the property sought to be condemned and then hear all evidence desired to be produced. The condemnee shall present his testimony first and have the right to close. In conducting said hearing the commission shall not be bound by common law or statutory rules of evidence. It shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant and unduly repetitious testimony. The amount of a prior jurisdictional offer or award shall not be disclosed to the commission. It shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force, as recognized in equitable proceedings, shall govern the proof of all questions of fact. The commission may on its own motion adjourn such hearing once for not more than 7 days, but may by stipulation of all parties grant other adjournments. A majority of the commissioners, being present, may determine all matters.

(b) If either party desires that the proceedings by the commission be transcribed, the commission may order the same and the applicant shall pay the cost thereof. Within 10 days after the conclusion of such hearing the commission shall make a written award specifying therein the property taken and the compensation, and file such award with the clerk of the circuit court, who shall cause a copy thereof to be mailed to each party in interest and record the original in the judgment book of such court. The commission shall file with the clerk of the court a sworn voucher for the compensation due each member, which sum, upon approval by the circuit judge, shall be paid by the condemnor.

History: 1961 c. 486; 1965 c. 252.

32.09 Rules governing determination of just compensation. In all matters involving the determination of just compensation in eminent domain proceedings, the following rules shall be followed:

(1) The compensation so determined and the status of the property under condemnation for the purpose of determining whether severance damages exist shall be as of the date of evaluation as fixed by s. 32.05 (7) (c) or 32.06 (7).

(2) In determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value.

(3) Special benefits accruing to the property and affecting its market value because of the planned public improvement shall be considered and used to offset the value of property taken or damages under sub. (6), but in no event shall such benefits be allowed in excess of damages described under sub. (6).

(4) Where a depreciation in value of property results from an exercise of the police power, even though in conjunction with the taking by eminent domain, no compensation shall be paid for such depreciation except as expressly allowed in sub. (6) and s. 32.19.

(5) In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 if shown to exist.

(6) In the case of a partial taking, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal nonconforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land.

(f) Damages to property abutting on a highway right of way due to change of grade where accompanied by a taking of land.

(g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par. (a), but no such damage shall be allowed where the public improvement includes fencing of right of way without cost to abutting lands.

(7) In addition to the amount of compensation paid pursuant to sub. (6), the owner shall be paid for the items provided for in s. 32.19, if shown to exist, and in the manner described in s. 32.20.

(8) A commission in condemnation or a court may in their respective discretion require that both condemnor and owner submit to the commission or court at a specified time in advance of the commission hearing or court trial, a statement covering the respective contentions of the parties on the following points:

- (a) Highest and best use of the property.
 - (b) Applicable zoning.
 - (c) Designation of claimed comparable lands, sale of which will be used in appraisal opinion evidence.
 - (d) Severance damage, if any.
 - (e) Maps and pictures to be used.
 - (f) Costs of reproduction less depreciation and rate of depreciation used.
 - (g) Statements of capitalization of income where used as a factor in valuation, with supporting data.
 - (h) Separate opinion as to fair market value, including before and after value where applicable by not to exceed 3 appraisers.
 - (i) A recitation of all damages claimed by owner.
 - (j) Qualifications and experience of witnesses offered as experts.
- (9) A condemnation commission or a court may make regulations for the exchange of the statements referred to in sub. (8) by the parties, but only where both owner and condemnor furnish same, and for the holding of prehearing or pretrial conference between parties for the purpose of simplifying the issues at the commission hearing or court trial.

History: 1961 c. 486, 682.

When a portion of an owner's real estate is seized by the state by eminent domain, here for highway purposes, damages resulting from the inconvenience occasioned by the construction work, although not constituting a separate compensable item of damage, is an item properly considered by the jury in determining the value of the remaining property after the taking. *Richards v. State*, 14 W (2d) 597, 111 NW (2d) 505.

(8) does not limit the applicability of 326.12 as to discovery proceedings in condemnation cases. *State ex rel. Reynolds v. Circuit Court*, 15 W (2d) 311, 112 NW (2d) 686, 113 NW (2d) 537.

Severance damages to several parcels not in same ownership discussed. *Jonas v. State*, 19 W (2d) 638, 121 NW (2d) 235.

See note under 84.29, citing *Stefan Auto Body v. State Highway Comm.* 21 W (2d) 363, 124 NW (2d) 319.

In a case of partial taking evidence is admissible that the remaining area is no longer capable of use for a particular purpose or that its usefulness has been impaired and the cost of construct-

ing additional facilities to restore the usefulness can be considered in determining the aftertaking value. *Ken-Crete Products Co. v. State Highway Comm.* 24 W (2d) 355, 129 NW (2d) 130.

Special, as distinguished from general, benefits discussed. It was not error to refuse to instruct the jury that special benefits cannot be allowed in excess of damages. *Petkus v. State Highway Comm.* 24 W (2d) 643, 130 NW (2d) 253.

The question of whether special benefits accrue to property and affect its value because of the planned improvements and the extent thereof is a factual determination to be made by the jury and not a question of law. While the burden of proof as to damages rests upon the landowner, the existence of special benefits is a matter of affirmative defense as to which the burden is upon the condemnor, and it must show that the claimed special benefits are direct, immediate, and certain, both as to time and place, not remote or speculative. *Hietpas v. State*, 24 W (2d) 650, 130 NW (2d) 248.

In order to lay a proper foundation for the admission of testimony showing special benefits by reason of changed use to the land remaining after the taking, it is necessary for the party claiming the special benefit to show that zoning regulations governing the land in question presently permit the changed use or that a reasonable probability exists that zoning in the near future will accommodate such use; but a mere possibility, or an assumption on the part of the witness is not enough and must be rejected as being speculative. *Hietpas v. State*, 24 W (2d) 650, 130 NW (2d) 248.

Compensation for damages caused by loss of existing rights of access constitute remuneration for a partial taking of premises under the power of eminent domain pursuant to 84.09 and ch. 32. A contention that the taking of an access right was ipso facto an exercise of police power and not compensable under the power of eminent domain (and hence the contention that the latter procedure was mistakenly utilized), could not be successfully maintained, where the highway from which access rights to the leased premises were eliminated was not declared a controlled-access road pursuant to law. *Hastings Realty Corp. v. Texas Co.* 28 W (2d) 305, 137 NW (2d) 79.

In case of partial taking which affects income of the remainder, it is not error to admit testimony as to value calculated to a substantial degree on capitalized income. *Lambrecht v. State Highway Comm.* 34 W (2d) 218, 148 NW (2d) 732.

Valuation problems discussed. *Crouch*, 1959 WLR 608.

Compensation for a lessee's trade fixtures. 1966 WLR 1215.

Just compensation; special benefits. 1966 WLR 1225.

32.10 Condemnation proceedings instituted by property owner.

Whenever any property has been occupied by a body possessing the power of condemnation but where such body has not exercised said power, the owner, if he desires to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced. Such petition shall describe the land, state the board, commission or corporation against which the condemnation proceedings are instituted and the 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. A copy of said petition shall be served upon the board, commission or corporation which has occupied petitioner's land, or interest in land. The petition shall be filed in the office of the clerk of the circuit court and there-

upon the matter shall be deemed an action at law and at issue, with petitioner as plaintiff and the board, commission or corporation as defendant. The court shall thereupon make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions contained in this chapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied.

History: 1961 c. 486.

Inverse condemnation; the constitutional limits of public responsibility. Mandelker, 1966 WLR 3.

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

32.12 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, or if not in possession, has petitioned the judge of the circuit or county court as provided by s. 32.06 (7) and for an order as herein authorized either at the time of filing the petition for condemnation or thereafter, and the necessity for taking has been determined as authorized by law, such person may proceed to acquire or perfect such title as provided in this chapter or be authorized to enter into possession as provided in this section. 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. The "date of taking" in proceedings under this section shall be the date on which the security required by the order for such security is approved and evidence thereof is filed with the clerk of court. 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, or to any owner, lien holder, mortgagee or other person entitled to any award or part of any award in satisfaction of the whole or any part of such award to which such owner, lien holder, mortgagee or other person may become entitled upon completion of such condemnation proceedings in the manner authorized by this chapter, such sum with interest thereon from the date of such payment at the rate of 5% per annum shall be deducted from the award made by said commissioners to such owners or other person.

(4) In case there is 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 as issues of fact in said court and an appeal from the judgment thereon may be taken in the same manner as from any judgment.

History: 1961 c. 486.

32.13 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 3 commissioners from among the county commissioners created by s. 32.08 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 encumbrance 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 county condemnation commissioners under this chapter and the action to enforce such mortgage or lien shall in the meantime be stayed.

32.14 Amendments. The court or judge may at any time permit amendments to be made to a petition filed pursuant to s. 32.06, amend any defect or informality in any of the proceedings authorized by this chapter and may cause any parties to be added and direct such notice to be given to any party of interest as it deems proper.

Under 269.44, authorizing the "court" to amend any process, pleading, or proceeding, and 32.14, authorizing a "court or judge" to permit amendments to a petition "filed pursuant to s. 32.06," but which latter expressly withheld that authority in matters of condemnation for highways, neither the county court nor the judge thereof could have granted a landowner's motion to amend his application for assignment to a commission of county condemnation commissioners in a highway condemnation matter. *Acheson v. Winnebago County Highway Comm.* 14 W (2d) 475, 111 NW (2d) 446.

32.15 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 deems proper before any conveyance or release herein authorized is exe-

cuted. 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.

32.16 Abandonment of easements for public use. An easement for public use acquired by gift or purchase or by condemnation under this chapter shall not be deemed abandoned on the grounds of nonuser thereof for any period less than that prescribed in the applicable statutes of limitations in ch. 893. Nothing contained in this section shall be presumed to adversely affect any highway right possessed by the state or any county or municipality thereof.

32.17 General provisions. (1) Where power of condemnation is given to a state officer 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 purposes for which the property is acquired.

(2) Any condemnation proceedings authorized under any local or special law of this state, except those applicable to cities of the 1st class, shall be conducted under the procedure provided in this chapter.

(3) Where disbursements and costs, including expert witness fees and reasonable actual attorney's fees in case of abandonment of proceedings by the condemnor are recoverable from a condemnor under this chapter, they shall be recoverable from the state or any of its agencies when the state or such agency is the condemnor.

32.18 Damage caused by change of grade of street or highway where no land is taken; claim; right of action. Where a street or highway improvement project undertaken by the state highway commission, a county, city, town or village, causes a change of the grade of such street or highway in cases where such grade was not previously fixed by city, village or town ordinance, but does not require a taking of any abutting lands, the owner of such lands at the date of such change of grade may file with the state highway commission in the case of state trunk highways, a county in the case of county highways or the city, town or village, causing such change of grade to be effected, whichever has jurisdiction over the

street or highway, a claim for any damages to said lands occasioned by such change of grade. Special benefits may be offset against any claims for damages under this section. Such claim shall be filed within 90 days following the completion of said project; if allowed, it shall be paid in the case of the state highway commission, out of the state highway funds, otherwise, out of the funds of the respective county, city, village or town against which the claim is made as the case may be. If it is not allowed within 90 days after such date of filing it shall be deemed denied. Thereupon such owner may within 90 days following such denial commence an action against the state highway commission, the city, county, village or town as the case may be, to recover any damages to his said lands shown to have resulted from such change of grade. Any judgment recovered against the state highway commission shall be paid out of the state highway funds, otherwise out of the funds of city, county, village or town against which the judgment is recovered. Where a grade has been established by ordinance, the property owner's remedy shall be as provided by municipal law. This section shall in no way contravene, limit or restrict s. 88.87.

History: 1961 c. 486; 1963 c. 572; 1967 [13.93 (1) (e)].

In an action to recover damages resulting from the change of the grade of highways the plaintiffs were not entitled to recover interest on the award, since the statute does not provide for interest, and since claims against the state do not bear interest unless its consent thereto has been manifested by lawful contract or legislative act. *Klingselsen v. State Highway Comm.* 22 W (2d) 364, 126 NW (2d) 40.

32.19 Additional items payable. The following items shall be compensable in eminent domain proceedings where shown to exist:

(1) **REALIGNMENT OF PERSONAL PROPERTY.** The cost of realigning personal property on the same site in partial takings or where realignment is required by reason of elimination or restriction of existing used rights of access.

(2) **REMOVAL OF PERSONAL PROPERTY TO ANOTHER SITE.** The cost of removal from the property taken to another site of personal property of land owners, or tenants under an existing unexpired written lease, the full term of which is at least 3 years. Such costs shall not exceed \$150 for removals from each family residential unit or \$2,000 from each farm or nonresidential site.

(3) **REFINANCING COSTS.** All costs incurred by the owner to finance the purchase of another property substantially similar to the property taken provided that: 1) At the

time of the taking the land condemned was subject to a bona fide mortgage or was held under a vendee's interest in a bona fide land contract, and 2) such mortgage or land contract had been executed in good faith prior to the date of the relocation order in condemnation under s. 32.05 or determination of necessity of taking in condemnation under s. 32.06. Such costs shall include:

(a) Reasonable fees, commissions, discounts, surveying costs and title evidence costs necessary to refinance the balance of the debt at the time of taking if actually incurred.

(b) Increased interest cost, if any, above that provided in the former financing. The computation of the increased interest costs, if any, shall be based upon and limited to:

1. A principal amount of indebtedness not to exceed the unpaid debt at the date of taking.

2. A term not to exceed the remaining term of the original mortgage or land contract at the date of taking.

3. An interest rate not to exceed the prevailing rate charged by mortgage lending institutions doing business in the vicinity.

4. The present worth of the future payments of increased interest computed at the same rate of interest as in subd. 3.

(4) **NET RENTAL LOSS.** Net rental losses resulting from vacancies during the year preceding the taking of the property, provided that (a) such loss is limited to the amount that exceeds the average annual rental losses caused by vacancies during the first 4 years of the 5-year period immediately preceding the taking; and (b) such rental loss was caused by the proposed public land acquisition.

(5) **EXPENSE OF PLANS RENDERED UNUSABLE.** Expenses incurred for plans and specifications specifically designed for the property taken and which are of no value elsewhere because of the taking.

History: 1961 c. 486.

See note to 32.09, citing *Richards v. State*, 14 W (2d) 597, 111 NW (2d) 505.

Claims for cost of moving of property, necessitated by a taking of land by a public or private body having the power of eminent domain, may be paid in cases where former landowner performs the work himself. 51 Atty. Gen. 166.

32.20 Procedure for collection of itemized items of compensation. Claims for damages itemized in s. 32.19 shall be filed with the state highway commission or other public body, board, commission or utility, which is carrying on the project through which condemnee's or claimant's claims arise. All such

claims must be filed after the damages upon which they are based have fully materialized but in no event later than 2 years after the condemnor takes physical possession of the entire property acquired. If such claim is not allowed within 90 days after the filing thereof, the claimant shall have a right of action against the condemnor, or in case no condemnation is involved against the highway commission or public body, board, commission or utility, which is carrying on the project through which the claim arises. Such action shall be commenced in a court of record in the county wherein the damages occurred. In causes of action, involving any state commission, board or other agency, excluding counties, the sum recovered by the claimant shall be paid out of any funds appropriated to such condemning agency. Any judgment shall be appealable by either party and any amount recovered by the body against which the claim was filed, arising from costs, counterclaims, punitive damages or otherwise may be used as an offset to any amount owed by it to the claimant, or may be collected in the same manner and form as any other judgment.

History: 1961 c. 486.

32.21 Emergency condemnation. Whenever any lands or interest therein are urgently needed by any state board, or commission, or other agency of the state, and a contract for the purchase or use of the property cannot be made for a reasonable price, or for any other reason, including the unavailability of the owner or owners, the board, commission or agency may, with the approval of the governor, issue an award of damages and upon tender of the award to the owner or owners, or deposit in a court of record in the county where the lands are situated in cases where an owner is not available or tender is refused, take immediate possession of said property. Deposit in a court of record may be made by registered mail addressed to the clerk of the court. The governor shall determine whether or not such an award shall issue. Appeal from said award of damages will lie as in other similar cases and all provisions of the chapter shall govern, except as to the provision herein concerning the immediate issuance of the award tender and immediate possession.

History: 1961 c. 486.