

From: Beggs, Tauren R - DNR
Sent: Tuesday, March 29, 2022 10:07 AM
To: CHaese@ci.neenah.wi.us
Cc: lynelle.caine@stantec.com; jgodlewski@ci.neenah.wi.us; Borski, Jennifer - DNR; Ashenfelter, Barry J - DNR; Peotter, Jodie M - DNR; 'jeff.brand@stantec.com'
Subject: LGU Liability Clarification Letter for Donaldons One Hour Cleaners (Former), BRRTS # 07-71-589172
Attachments: 20220329_651_GLC_Ltr_LGU.pdf

Hi Chris,

Attached is the LGU Liability Clarification Letter for the above referenced site. If you have any questions in regard to the letter, please feel free to contact me.

Regards,

We are committed to service excellence.

Visit our survey at <http://dnr.wi.gov/customersurvey> to evaluate how I did.

Tauren R. Beggs

Hydrogeologist & Northeast Region Land Recycling Expert

Remediation and Redevelopment Program

Wisconsin Department of Natural Resources

2984 Shawano Ave

Green Bay, WI 54313

Phone: (920) 510-3472

Tauren.Beggs@wisconsin.gov (preferred contact method during work at home)

dnr.wi.gov



March 29, 2022

Community Development Authority of the City of Neenah
Attn: Chris Haese
211 Walnut Street
Neenah, WI 54956
Via Electronic Mail Only to chaese@ci.neenah.wi.us

Subject: Applicability of the Local Government Unit Environmental Liability Exemption for the Property located at 110 West Cecil Street, Neenah, WI
DNR BRRTS Case Number: 07-71-589172
County Parcel Number: 80204150100

Dear Mr. Haese:

On February 1, 2022, the Wisconsin Department of Natural Resources (“DNR”) received a request for a general liability clarification letter from Lynelle Caine of Stantec Consulting Services Inc. (Stantec), on behalf of the Community Development Authority of the City of Neenah (the “CDA”) for the property located at 110 West Cecil Street, Neenah, Wisconsin (the “Property”). A map of the Property is included with this letter as Figure 2, Site Layout, dated November 12, 2021.

This letter provides an explanation of the local governmental unit (“LGU”) liability exemption authorized by Wis. Stat. § 292.11(9)(e), the DNR’s determination about the applicability of the LGU liability exemption at the Property, notice of conditions required to maintain the exemption, and a reminder of the LGU’s responsibilities if the LGU undertakes any demolition, cleanup, or redevelopment activities at the Property.

Documents Submitted and Reviewed

To assist in making a determination about the applicability of the LGU liability exemption for the Property, the DNR requested documentation demonstrating compliance with the relevant statute. The DNR received and reviewed the following document provided by the CDA:

Technical Assistance, Environmental Liability Clarification or Post-Closure Modification Request (Form 4400-237) with attachments, signed by Lynelle Caine on December 23, 2021, received by DNR on February 1, 2022.

Information about the Property and Environmental Activity Summary

The Property consists of an approximately 0.37-acre commercial lot in the city of Neenah and is currently vacant with a building slab and foundation and asphalt pavement. The Property formerly contained a single-story building which housed multiple commercial businesses including Donaldson’s One Hour Cleaners. Chlorinated solvent contamination was identified in an environmental assessment report in November 1995 and was reported to the DNR in February 1996. As a result, the DNR opened the Donaldson’s One Hour Cleaners (Former), BRRTS # 02-71-110797, contamination case. Sampling completed as part of the site investigation identified chlorinated solvent contamination in soil, groundwater, and vapor on and off-site.

Community Development Authority of the City of Neenah, Chris Haese
Local Government Unit Environmental Liability Exemption for the Property located at 110 West Cecil Street, Neenah, WI
Donaldson's One Hour Cleaners (Former), BRRTS #: 07-71-589172

The DNR referred Donaldson's One Hour Cleaners and Brett Donaldson to the Department of Justice (DOJ) in August 2019 due to a lack of cleanup progress and non-compliance issues. Some limited remediation (e.g., excavation, and a remedial system consisting of groundwater extraction and treatment, and soil vapor extraction) and interim action (e.g., installation of an on-site vapor mitigation system) occurred on-site. The city of Neenah issued a raze order for the building on November 19, 2019. The building, vapor mitigation system and remedial system were demolished in late March 2020. Following the demolition, the DNR conducted off-site vapor sampling to assess risk to neighboring property owners. Vapor sampling for an off-site apartment complex at 1015 and 1019 South Commercial Street did not identify results above indoor air vapor action levels (VALs) or sub-slab vapor risk screening levels (VRSLs). Additional sampling is intended pending funding. Sampling results for the Cranky Pats building at 905 South Commercial Street identified chlorinated solvents above VALs in the sump head space and side-wall soil gas VRSLs; however, the DNR was not granted permission by the property owner to install a vapor mitigation system at this property. For additional information please see the case file for BRRTS #02-71-110797. The site investigation and remediation remain incomplete at this site, and the DOJ enforcement case continues.

Method and Purpose of Property Acquisition

The Property is currently owned by H&J Investments, LLC. The CDA is considering acquiring the Property and requests information from the DNR on whether the CDA would acquire the state's statutory LGU environmental liability exemption if the CDA takes title to the Property via a deed in lieu of condemnation or for the purpose of blight elimination.

Liability Determinations

The DNR provides the following statutory responsibility clarifications and assurances to the CDA, concerning its proposed purpose for, and methods of, acquiring the Property. Intended property reuse plans are also addressed in the section below that includes the DNR's responses to other liability questions posed by the CDA.

1. The CDA meets the definition of a "local government unit" as described in Wis. Stat. § 292.11(9)(e)(1).
2. The CDA is considering acquiring the Property via a deed in lieu of condemnation and/or for the purpose of blight elimination.
3. It is the DNR's opinion that the CDA will acquire the Wis. Stat. § 292.11(9)(e) LGU environmental liability exemption if the CDA takes title to the Property for the purpose of blight elimination, as evidenced by a CDA blight determination resolution that is approved before the title transfer occurs. Once a CDA blight determination is approved, the CDA can use any legal method to obtain title and the CDA will obtain the LGU exemption. The CDA will also obtain the Wis. Stat. § 292.23 LGU exemption from various solid waste management requirements related to pre-existing unlicensed solid waste disposal, if any, on the Property.
4. It is the DNR's opinion that the CDA will not acquire the Wis. Stat. § 292.11(9)(e) LGU environmental liability exemption if the CDA does not first approve a blight determination resolution or follow required procedural steps identified in Wis. Stat. ch. 32 prior to executing a title transfer instrument referred to as a "deed in lieu of condemnation." At a minimum, the procedural steps in Wis. Stat. ch. 32 that a government entity must take to condemn property include the following: A determination of necessity; Appraisal of the property; Negotiation prior to commencing condemnation; and potentially issuing a jurisdictional offer. See page 5 of the attached Wisconsin Legislative Council Information Memorandum titled "*Eminent Domain: Statutory Authority and Procedures*" and Wis. Stat. ch. 32 for additional information.

Community Development Authority of the City of Neenah, Chris Haese
Local Government Unit Environmental Liability Exemption for the Property located at 110 West Cecil Street, Neenah, WI
Donaldson's One Hour Cleaners (Former), BRRTS #: 07-71-589172

5. For the CDA to obtain the LGU environmental liability exemption via condemnation the CDA must demonstrate that it acquired the property through "condemnation or other proceedings under ch. 32" and that the statutory process was followed per Wis. Stat. § 292.11(9)(e)(1m)(c).

Responses to Other Liability Questions from the City

In addition to your request to the DNR for liability clarification related to acquisition of the Property, your cover letter included several additional questions, listed below with the DNR's replies.

1. **CDA Question: Does the CDA's process for acquiring the Property via blight elimination or deed in lieu of condemnation qualify the CDA for the LGU Liability Exemption in accordance with s. 292.11(9)(e) and 292.23(2), Stats?**

DNR Response: See information in the "Liability Determinations" section above.

Once the CDA takes title to the Property, the CDA must submit documentation to DNR that verifies the method of acquisition, as outlined in the DNR's Guidance Document, *Local Government Liability Exemptions in Wisconsin* (RR-055); go to dnr.wi.gov and search "RR-055."

2. **CDA Question: The City would like the WDNR to provide its opinion as to whether the pending acquisition satisfies the criteria for the Bona Fide Prospective Purchaser Defense under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) s. 107(r) and 101(40), for protection against liability under CERCLA s. 107(a)(1)?**

DNR Response: The DNR is not able to provide determinations related to federal liability. The CDA should contact the U.S. Environmental Protection Agency (EPA) for information regarding federal liability. See the section of this letter titled **Federal Liability Protections** for more information. At a minimum, the DNR recommends the CDA conducts All Appropriate Inquiries according to 40 C.F.R. Part 312, which includes the preparation of a Phase I Environmental Site Assessment, within 180 days prior to acquiring the property.

3. **CDA Question: The CDA understands that continued groundwater monitoring is needed at the Site. If the CDA qualifies for a LGU exemption, would the additional groundwater monitoring still be required? If yes, who would be responsible to pay for these activities?**

DNR Response: Wis. Stat. § 292.11(9)(e)4. and Wis. Admin. Code § NR 708.17(1)(a) indicate that the DNR may require action by the LGU if, after considering the intended development and use of a property, the DNR determines that action is necessary to reduce to acceptable levels any substantial threat to public health or safety when the property is developed or put to that intended use. Continued groundwater monitoring would not be considered necessary to reduce a substantial threat, so the DNR would not require the LGU to take this action. However, in accordance with Wis. Stat. § 292.11(9)(e)6., the LGU must allow the DNR, any authorized representatives of the DNR, any party that possessed or controlled the hazardous substance or caused the discharge of the hazardous substance and any consultant or contractor of such a party to enter the property and take action to respond to the discharge.

4. CDA Question: If the CDA invokes their LGU exemption, would any further work including, but not limited to, a site investigation, vapor monitoring, remedial activities, or continuing obligations be required by the CDA/City to maintain the LGU exemption once it is achieved?

DNR Response: Wis. Stat. § 292.11(9)(e)4. and Wis. Admin. Code § NR 708.17(1)(a) state that the DNR may require action by an exempt LGU if, after considering the intended development and use of a property, the DNR determines that action is necessary to reduce to acceptable levels any substantial threat to public health or safety when the property is developed or put to that intended use. In addition, per Wis. Admin. Code § NR 708.17(2), the DNR may direct an exempt LGU to take actions, such as requiring maintenance of an engineering control, if any, on the site to prevent further migration of contaminants (e.g., a continuing obligation to maintain an impervious surface over the source area to prevent infiltration). If the LGU fails to take action directed by the DNR, or if the LGU's actions (or inactions) result in a discharge or exacerbation of pre-existing conditions, the LGU may no longer qualify for the exemption (Wis. Stat. § 292.11(9)(e)2.a.).

Based on the current conditions and the DNR's understanding that the city and CDA intend to utilize the Property for a parking lot, if the CDA acquires and maintains the Wis. Stat. § 292.11(9)(e) LGU environmental liability exemption for this Property:

- Site investigation. The CDA would not be required to complete a site investigation.
- Vapor monitoring. The CDA would not be required to monitor vapor.
- Remedial action. Unless additional remediation is conducted in the source area of chlorinated solvent contamination, an impervious surface cover would need to be maintained to prevent additional migration of contaminants. Therefore, if the existing impervious surface cover is removed, an impervious surface cover would need to replace the existing cover in a short timeframe to prevent migration and therefore, exacerbation of existing contamination. The CDA would need to take this action to maintain the exemption.
- Continuing obligations. The CDA would be required to maintain existing continuing obligations to the extent that they prevent a discharge or exacerbation of a discharge.
- The CDA must properly abandon existing monitoring wells during redevelopment; improperly abandoned monitoring wells may result in a discharge to the environment. The CDA would not be required to replace them if it was determined unfeasible to keep them in place. If the causer responsible party (RP) is trying to resume work during the time of redevelopment, the DNR encourages the CDA and causer RP to work together to protect the monitoring wells, if possible.
- If contaminated materials are disturbed during redevelopment, the CDA must determine if the material is considered solid waste and ensure that any storage, treatment or disposal complies with applicable standards and rules. Contaminated soil may be managed under Wis. Admin. Code ch. NR 718 with prior DNR approval.
- Other general obligations of the LGU to maintain the exemption are identified below and throughout this letter.

The responses above are based on the information currently available to the DNR. If the intended use and redevelopment of the Property should change (e.g., an occupied building on the Property is proposed), additional actions (e.g., vapor mitigation) may be needed to address substantial threats to public health or safety.

5. CDA Question: Will the CDA/City be eligible for brownfield grants and loans while the liability case is at Department of Justice and/or how may the personal bankruptcy affect a court decision on liability?

Community Development Authority of the City of Neenah, Chris Haese
Local Government Unit Environmental Liability Exemption for the Property located at 110 West Cecil Street, Neenah, WI
Donaldson's One Hour Cleaners (Former), BRRTS #: 07-71-589172

DNR Response: Many factors are evaluated to determine project eligibility for brownfields grants and loans administered by the DNR's Remediation and Redevelopment Program, including availability of funding, the type of property, etc. To determine eligibility for the project, the CDA should submit a complete application.

The DNR cannot comment on eligibility for programs it does not administer (e.g., Wisconsin Economic Development Corporation or EPA). The CDA should contact other agencies directly for eligibility criteria for brownfields grants and loans outside the DNR (e.g., Wisconsin Economic Development Corporation or EPA). Information on brownfield grant and loan programs administered by the DNR may be found by visiting dnr.wi.gov and searching "brownfield financial assistance."

The DNR cannot opine on potential outcomes of pending enforcement or bankruptcy cases or how they may impact the disposition of the Property. However, assuming the Property is not sold or transferred to a third party as part of the legal actions, the fact that a responsible party is party to an enforcement case or bankruptcy case is unlikely to have a direct impact on the CDA/city's ability to be eligible for grants and loans administered by the DNR's Remediation and Redevelopment Program (Wisconsin Assessment Monies, Ready for Reuse).

Local Governmental Unit Exemption – Statutory Conditions and Obligations

When applicable at a specific property, Wis. Stat. § 292.11(9)(e), exempts a LGU from the following responsibilities of owners of property with environmental contamination:

- The responsibility to take actions necessary to restore the environment and minimize harmful effects of hazardous substance discharges to soil, sediment, groundwater, surface waters and air of the state.
- The responsibility to comply with DNR orders to take action to prevent hazardous substance discharges.
- The responsibility to reimburse the DNR for activities it takes on the property to identify, locate, monitor, contain, remove, or dispose of hazardous substances.

The primary practical impact of an exemption from these legal responsibilities is that an exempt LGU is not required to complete a Wis. Admin. Code. ch. NR 716 site investigation or a remedial response action. An exempt LGU can voluntarily move forward with site investigation and cleanup efforts, but it is not required to do so.

Wis. Stat. § 292.11(9)(e)2. says that the exemption does not apply to hazardous substance discharges caused by the LGU. In addition to directly spilling or dumping hazardous substances on a property, before or after acquisition, demolition and soil disturbing activities on a property with environmental contamination have the potential to make pre-existing contamination worse. These types of activities should be discussed with DNR before they occur to prevent the inadvertent cause of other contamination.

Wis. Stat. § 292.11(9)(e)2. also states that an LGU will not be exempt from legal responsibility for any contamination caused by the following LGU actions or inactions:

- A failure to take appropriate action to restrict access to the property in order to minimize costs or damages that may result from unauthorized persons entering the property.
- A failure to sample and analyze unidentified substances in containers stored aboveground on the property.
- A failure to remove and properly dispose of, or to place in a different container and properly store, any hazardous substances on the property in a container that is leaking or is likely to leak.

Community Development Authority of the City of Neenah, Chris Haese
Local Government Unit Environmental Liability Exemption for the Property located at 110 West Cecil Street, Neenah, WI
Donaldson's One Hour Cleaners (Former), BRRTS #: 07-71-589172

The LGU exemption is only available to local units of government as defined in Wis. Stat. § 292.11(9)(e)1. This liability exemption is not transferrable from the exempt LGU to future property owners, except to other eligible LGUs. This liability exemption is not transferrable to past or current property owners. Nonexempt LGUs and other owners are subject to full environmental responsibility and regulation by, at a minimum, Wis. Stat. ch. 292 and the Wis. Admin. Code chs. NR 700-799.

Wis. Stat. § 292.23 authorizes an LGU exemption from certain solid waste management requirements for pre-existing unlicensed solid waste disposal sites. The above-mentioned conditions and limitations of the Wis. Stat. § 292.11(9)(e) exemption apply to the solid waste exemption, along with others that are specific to solid waste. Wis. Stat. § 292.23 should be reviewed and consulted if any unlicensed solid waste disposal areas exist on the Property.

Nothing in this letter limits the DNR's authority to pursue responsible parties under Wis. Stat. § 292.11.

Continuous, Non-Exempt, Responsibilities of a Local Government at the Property

Wis. Admin. Code ch. NR 706 Notification: Neither Wis. Stat. § 292.11(9)(e)1m. or Wis. Stat. § 292.23 exempt an LGU from Wis. Stat. § 292.11(2), titled "Notice of Discharge." Therefore, all LGUs must notify the DNR immediately of any known and newly discovered discharge of a hazardous substance to the environment at the Property. See DNR publication, *Immediate Reporting Required for Hazardous Substance Spills* (RR-560), for additional information about spill and discharge reporting; go to dnr.wi.gov and search "RR-560."

Demolition: Before beginning any demolition work at the Property, a pre-inspection is required, along with filing of DNR Form 4500-113, Notification for Demolition. See DNR publication *Planning Your Demolition or Renovation Project* (WA-651) for additional information about demolition activities; go to dnr.wi.gov and search "WA-651." Storm water management permits may also be necessary for demolition and construction activities. All LGUs must comply with these requirements.

Federal and State Tank Regulations: The LGU exemption statutes do not exempt above ground or underground storage tanks on the Property from compliance with federal and state requirements, including Wis. Admin. Code ch. ATCP 93. If you have questions regarding these requirements, you should contact the Weights and Measures program at the Department of Agriculture Trade and Consumer Protection (DATCP) at (608) 224-4942 or datcpweightsandmeasures@wi.gov. The program's website is located here: https://datcp.wi.gov/Pages/Programs_Services/WeightsAndMeasures.aspx.

Future Use of the Property

If the CDA intends to use or redevelop the Property during or after cleanup activities, the CDA should discuss proposed property uses and improvements with the DNR before proceeding. Wis. Stat. § 292.11(9)(e)4. requires exempt LGUs to take actions the DNR determines are necessary to reduce to acceptable levels any substantial threat to public health or safety when the Property is developed or put into its intended use.

For example, if the LGU excavates soil at the Property, the LGU must determine whether the material is classified as a solid or hazardous waste and ensure that any storage, treatment or disposal is in compliance with applicable state laws. The LGU must also comply with long-term continuing obligations, if applicable, associated with closed environmental case(s) at the Property.

Community Development Authority of the City of Neenah, Chris Haese
Local Government Unit Environmental Liability Exemption for the Property located at 110 West Cecil Street, Neenah, WI
Donaldson's One Hour Cleaners (Former), BRRTS #: 07-71-589172

It is especially important to consult with the DNR before and during any demolition, excavation, and/or other development work on the Property. The LGU exemption can be lost if significant public health or safety threats exist as a result of the new use. Wis. Admin. Code § NR 708.17 describes types of protective actions that DNR may request when a new use is planned for an LGU-exempt property.

Federal Liability Protections

In addition to state liability protections, an LGU is also eligible for the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability protection in certain situations. To determine what specific actions would satisfy the federal liability requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), contact either Thomas Krueger at (312) 886-0562 or krueger.thomas@epa.gov, or Larry Kyte at (312) 886-4245 or kyte.larry@epa.gov at the U.S. Environmental Protection Agency (EPA). The mailing address is U.S. EPA REGION 5, Office of Regional Counsel (C-14J), 77 W. Jackson Blvd., Chicago, IL 60604-3590. The U.S. EPA should be able to provide you with guidance on whether your current and proposed actions concerning the Property are consistent with the federal CERCLA secured creditor liability exemption conditions. EPA information about the federal Bona Fide Prospective Purchaser liability protection is available at <https://www.epa.gov/enforcement/bona-fide-prospective-purchasers>.

This Letter is Based on Information Provided to DNR

This state liability determination is based on the information provided in the above-referenced documents. If new or more extensive contamination is discovered at the Property, the LGU is required to notify the DNR in accordance with Wis. Stat. § 292.11(2). The LGU should also know that the LGU exemption from the state Spill Law and Solid Waste Management Requirements will apply to the LGU throughout the LGU's ownership of the Property, but these liability protections are not transferable from the LGU to future owners, except to another eligible LGU.

This letter, site and case-related information and DNR contacts can be found online in the Bureau for Remediation and Redevelopment Tracking System (BRRTS) on the Web (BOTW); go to dnr.wi.gov and search "BOTW." Use the BRRTS ID # found at the top of this letter. The site can also be found on the map view, Remediation and Redevelopment Sites Map (RRSM) by searching "RRSM."

DNR Contact Information

The DNR hopes this letter provides the CDA with the requested clarification concerning the LGU liability exemption and specific questions for the Property. The DNR looks forward to working with you on this project and others.

If you have any questions, please contact the DNR Land Recycling Specialist for the Property, Tauren Beggs at 920-662-5178 or Tauren.Beggs@wisconsin.gov. For questions specific to the LGU exemption, and other local government cleanup tools, contact Barry Ashenfelter at 608-267-3120 or Barry.Ashenfelter@wisconsin.gov.

Sincerely,



Jodie Peotter
Brownfields, Outreach and Policy Section Chief
Remediation & Redevelopment Program

March 29, 2022

Page 8 of 8

Community Development Authority of the City of Neenah, Chris Haese
Local Government Unit Environmental Liability Exemption for the Property located at 110 West Cecil Street, Neenah, WI
Donaldson's One Hour Cleaners (Former), BRRTS #: 07-71-589172

Attachments:

- Figure 2, Site Layout, dated November 12, 2021
- Eminent Domain: Statutory Authority and Procedures

cc: Lynelle Caine, Stantec (lynelle.caine@stantec.com)
Jim Godlewski, City of Neenah (JGodlewski@ci.neenah.wi.us)
Jennifer Borski, DNR (Jennifer.Borski@wisconsin.gov)
Tauren Beggs, DNR (Tauren.Beggs@wisconsin.gov)
Barry Ashenfelter, DNR, RR/5 (Barry.Ashenfelter@wisconsin.gov)



WEST CECIL STREET

DONALDSON'S ONE HOUR CLEANERS (FORMER)
 PARCEL #80204150100
 110 WEST CECIL STREET
 NEENAH, WISCONSIN

SOUTH COMMERCIAL STREET



SCALE IN FEET



LEGEND



APPROXIMATE PROPERTY LINE



1165 Scheuring Road, Green Bay, Wisconsin 54115
 Phone: 920-592-8400 Fax: 920-592-8444

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SITE LAYOUT

DONALDSON'S ONE HOUR CLEANERS (FORMER)
 (PARCEL #80204150100)
 110 WEST CECIL STREET
 NEENAH, WISCONSIN



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Eminent Domain: Statutory Authority and Procedures

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

HISTORICAL DEVELOPMENT OF EMINENT DOMAIN LAW

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

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

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

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

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

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

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

AUTHORITY TO CONDEMN

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

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

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

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

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

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

state. Specifically, under Wisconsin law, municipal governments and certain other government entities² are statutorily prohibited from acquiring property, other than blighted property, by condemnation if the condemnor intends to convey or lease the acquired property to a private entity.

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

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

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

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

[s. 32.03 (6), Stats.]

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

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

GENERAL CONDEMNATION PROCEDURES

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

DETERMINATION OF NECESSITY

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

APPRAISAL OF THE PROPERTY

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

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

NEGOTIATION PRIOR TO COMMENCING CONDEMNATION

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

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

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

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

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

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

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

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

JURISDICTIONAL OFFER TO PURCHASE

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

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

[s. 32.06 (3), Stats.]

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

RESPONSE TO A JURISDICTIONAL OFFER TO PURCHASE

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

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

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

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

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

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

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

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

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

[s. 32.05 (7), Stats.]

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

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

Other Condemnations

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

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

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

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

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

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

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

CALCULATION OF JUST COMPENSATION

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

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

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

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

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

[s. 32.09, Stats.]

CHALLENGES TO COMPENSATION AWARDS

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

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

INVERSE CONDEMNATION

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

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

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

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

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

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

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

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