Statutory Restrictions on the Exercise of Eminent Domain in Wisconsin: Dual Requirements of Prior Negotiation and Provision of Negotiating Materials

Ross F. Plaetzer

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ness or financial affairs of the debtor and the transferee;
(B) made not later than 45 days after such debt was incurred;
(C) made in the ordinary course of business or financial affairs of
the debtor and the transferee; and
(D) made according to ordinary business terms;
(3) of a security interest in property acquired by the debtor—
(A) to the extent such security interest secures new value that
was—
(i) given at or after the signing of a security agreement that
contains a description of such property as collateral;
(ii) given by or on behalf of the secured party under such
agreement;
(iii) given to enable the debtor to acquire such property; and
(iv) in fact used by the debtor to acquire such property; and
(B) that is perfected before 10 days after such security interest
attaches;
(4) to or for the benefit of a creditor, to the extent that, after such trans-
fer, such creditor gave new value to or for the benefit of the debtor—
(A) not secured by an otherwise unavoidable security interest;
and
(B) on account of which new value the debtor did not make an
otherwise unavoidable transfer to or for the benefit of such creditor;
(5) of a perfected security interest in inventory or a receivable or the
proceeds of either, except to the extent that the aggregate of all such trans-
fers to the transferee caused a reduction, as of the date of the filing of the
petition and to the prejudice of other creditors holding unsecured claims, of
any amount by which the debt secured by such security interest exceeded
the value of all security interest for such debt on the later of—
(A) (i) with respect to a transfer to which subsection (b)(4)(A) of
this section applies, 90 days before the date of the filing of the petition; or
(ii) with respect to a transfer to which subsection (b)(4)(B)
of this section applies, one year before the date of the filing of the peti-
tion; and
(B) the date on which new value was first given under the secur-
ity agreement creating such security interest; or
(6) that is the fixing of a statutory lien that is not avoidable under sec-
tion 545 of this title.
(d) A trustee may avoid a transfer of property of the debtor transferred
to secure reimbursement of a surety that furnished a bond or other obliga-
tion to dissolve a judicial lien that would have been avoidable by the trustee
under subsection (b) of this section. The liability of such surety under such
bond or obligation shall be discharged to the extent of the value of such
property recovered by the trustee or the amount paid to the trustee.
(e)(1) For the purposes of this section—
(A) a transfer of real property other than fixtures, but including
the interest of a seller or purchaser under a contract for the sale of real
property, is perfected when a bona fide purchaser of such property
from the debtor against whom applicable law permits such transfer to
be perfected cannot acquire an interest that is superior to the interest
of the transferee; and

(B) a transfer of a fixture or property other than real property is
perfected when a creditor on a simple contract cannot acquire a judicial
lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph
(3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor
and the transferee, if such transfer is perfected at, or within 10 days
after, such time;

(B) at the time such transfer is perfected, if such transfer is per-
fected after such 10 days; or

(C) immediately before the date of the filing of the petition, if
such transfer is not perfected at the later of—

(i) the commencement of the case; and

(ii) 10 days after such transfer takes effect between the trans-
feror and the transferee.

(3) For the purposes of this section, a transfer is not made until the
debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been
insolvent on and during the 90 days immediately preceding the date of the
filing of the petition.
COMMENT

STATUTORY RESTRICTIONS ON THE EXERCISE OF EMINENT DOMAIN IN WISCONSIN: DUAL REQUIREMENTS OF PRIOR NEGOTIATION AND PROVISION OF NEGOTIATING MATERIALS

I. INTRODUCTION

It is a fundamental concept that property derives much of its value and stability from the protection which it receives from the state,¹ and from the laws by which its ownership, acquisition, enjoyment, transfer, and devolution are ascertained and controlled. Equally basic is the right of the state, in return for that protection, and by virtue of the same source of power by which it protects, to take so much of the property of its citizens as may be necessary for its own maintenance. This power is usually referred to as "eminent domain."² All private property is held subject to this demand.³ The states have seen fit, however, to limit and regulate the exercise of this power by constitutional and statutory means. Once such restrictions have been placed on the power, it is most often held that the conditions thereby imposed must be strictly construed.

This comment examines two such statutory restraints placed on the exercise of eminent domain in Wisconsin. The first is the requirement that the state conduct negotiations with the property owner prior to the institution of eminent domain proceedings.⁴ The second is a requirement that the state provide to the property owner, as an aid to the negotiag-

¹. That is to say, the "sovereign." See, e.g., Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893).
⁴. Wis. Stat. §§ 32.05(2a) and 32.06(2a) (1977).
tion process, a map of the area sought to be taken and a list containing the names of other property owners similarly situated. This study also examines the role of the court in determining whether sufficient “negotiations” have been conducted.

II. THE POWER TO TAKE

A. Definition and Source

“Eminent domain” is usually defined as the power of the sovereign to take property for public use without the consent of the owner upon the payment of just compensation. The essence of eminent domain involves a power which can be exercised without regard to the consent of private landowners, limited only by the constitutional requirements that the power be exercised for a “public use” and upon the payment of “just compensation.”

The power of eminent domain is at the very center of the concept of sovereignty. The now-accepted theory is that eminent domain is an inherent power, an attribute of sovereignty, and an undeniable political necessity of any civilized state. As one author has commented, the power “comes into

5. Id.
7. U.S. CONST. amend. V.
10. According to the treatises, the inherent power to take private property for public use has been exercised at least since the time of Roman civilization, but the peace time exercise of such power did not begin until much later. It was not until approximately the 16th century that the taking of private property for public use as a distinct and separate governmental power began to be discussed. As civilizations became more advanced and complex, the necessity for governmental action in times of peace increased, and concurrently the rights of the individual property owner began to be recognized in greater detail. 1 Nichols, The Law of Eminent Domain § 1.12[1], at 1-12 (rev. 3d ed. 1976) [hereinafter cited as 1 Nichols].

The first use of the modern day term “eminent domain” (“dominium eminens,” lit. “outstanding absolute ownership”) apparently appeared in the book Laws of War and Peace, De Iuri Belli ac Pacis (1625), cited in 1 Nichols, supra, § 1.12[1], at 1-12 by Hugo Grotius. Even in this apparent first use of the term, the author recognized the concomitant duty of the state to provide a just compensation to the individual property owner upon a taking from him:
being *eo instante* with the establishment of the government and continues as long as the government endures."\(^{21}\) Being an inherent power of sovereignty, eminent domain need not be recognized either by a constitutional or statutory provision to be validly exercised.\(^{12}\) The power of eminent domain is an absolute and unlimited power.\(^{13}\) But, as is the case in all of the fifty states and at the federal level, this unlimited, absolute power has been restricted by constitutional and statutory provisions.\(^{14}\)

B. Limitations on the Power to Take Imposed by the Constitution

When unfettered by law, the sovereign has the absolute right to *take* property. This unbridled power, however, has been limited by the requirements of "due process," "public use," and "just compensation."\(^{15}\) The fifth amendment provides that no person shall be deprived of property without due process of law.\(^{16}\) Further, the same amendment requires

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[T]he property of subjects is under the eminent domain of the state, so that the state . . . may use and even alienate . . . such property . . . for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done, the state is bound to make good the loss to those who lose their property . . . .

*De Jure Belli ac Pacis*, Lib. 3, ch. 20 (1625), quoted in 1 *Nichols*, *supra*, § 1.12[1], at 1-12.

The term "eminent domain" was unknown to the common law, *George v. Consol. Lighting Co.*, 87 Vt. 411, ___, 89 A. 635, 637 (1914), although its exercise was not. And while Grotius coined the term, his idea of the theory upon which the power was founded, namely, that the state has an original and absolute ownership of all the property possessed by its individual members, is not now generally considered to be the correct one. 1 *Nichols*, *supra*, § 1.13, at 1-15. Instead, the better view appears to be that the power derives from the very nature of sovereignty itself. *Id.*, § 1.14[2] at 1-20.

11. 1 *Nichols*, *supra* note 10, § 1.14[2], at 1-23.
15. U.S. CONSTIT. amend. V.
16. *Id.*
that no private property "be taken for public use, without just compensation." These three limits are imposed on the federal government through the direct application of the fifth amendment, and on the state through the fifth and fourteenth amendments. These restrictions prohibit the state from utilizing its sovereign power upon the property of any private person without the availability of proper safeguards. Thus, proceedings to condemn property by the use of eminent domain must conform to the requirements of the constitutional provisions imposed.

It has been stated that the due process clause restriction does not guarantee any particular form or method of statutory procedure for the exercise of eminent domain. The requirements of due process are said to be satisfied when there is reasonable notice and a reasonable opportunity to be heard on the issue of "just compensation." Such a hearing need not be conducted prior to the actual taking of the property. Also, the due process clause does not require an exact uniformity of procedure within a state; a legislature may adopt one type of procedure for one type of property or class of property owners, and a different type of procedure for others. The right to exercise the power of eminent domain for a "public use" is usually satisfied when that power is reasonably related or inci-

17. Id.
24. This has been done in Wisconsin. The legislature enacted one procedure for the condemnation of sewers and transportation facilities; Wis. Stat. § 32.05 (1977); another for the condemnation of almost all of the property not covered by the procedures for sewers and transportation facilities; Wis. Stat. § 32.06 (1977); and a third separate and expedited procedure for the condemnation of abandoned and blighted residential property in urban areas. 1979 Wis. Laws ch. 37, to be codified at Wis. Stat. § 32.22. Further, the City of Milwaukee is expressly authorized to conduct condemnation proceedings under either chapter 32 or the Kline Law, 1931 Wis. Laws ch. 275, as amended. See, Wis. Stat. § 32.03(1) (1977); State ex rel. Allis v. Circuit Court for Milwaukee County, 189 Wis. 265, 207 N.W. 252 (1926).
dental to other powers of the state.  

C. Further Statutory Limitations

In determining what shall constitute due process, public use, and just compensation, the legislature, in the exercise of its discretion, must necessarily prescribe procedures through detailed statutory enactments. These statutes are a further restriction on the absolute and unlimited power of the sovereign to take private property.

It is usually said that, for the proper maintenance of condemnation proceedings, it is essential that all preliminary conditions and events prescribed by the legislature through the governing statutes be carried out fully, as they are considered to be jurisdictional in nature. In a shorthand manner the courts usually state that statutes dealing with the exercise of eminent domain must be closely followed and strictly construed.

III. The Wisconsin Statutory Scheme

In Wisconsin, the legislature has established a general scheme for the proper maintenance of condemnation proceedings under the provisions of sections 32.01 to 32.28 of the statutes. The statutory scheme requires that, before the commencement of condemnation proceedings, there be a determination of the necessity for the taking. Next, the condemnor must make at least one appraisal of all the property proposed to be acquired, and the appraiser must, if reasonably possible, confer with the owner of the property on this matter. The statute then requires that the condemnor attempt


26. See, e.g., Wis. Stat. §§ 32.01 to 32.28 (1977).


31. Wis. Stat. §§ 32.05(2) and 32.06(2) (1977).
to personally negotiate with the owner of the property sought to be taken in an effort to effect a voluntary sale of the property.\textsuperscript{32} Thereafter, the condemnor must make a jurisdictional offer.\textsuperscript{33} This offer must be sent to the landowner and must contain a notice briefly stating the nature of the project and that the condemnor intends, in good faith, to use the property for a public purpose. It must describe the property and the interest sought to be taken, state the proposed date of occupancy, and contain an itemized statement of the amount of compensation offered. The offer must also include a full narrative appraisal upon which the jurisdictional offer is based, and must apprise the owner of his right to obtain an appraisal by another qualified appraiser at the condemnor's expense. The offer should state that the owner has twenty days to accept the offer, forty days in which to contest the right of condemnation if he does not accept the compensation offer, and two years in which to appeal for greater compensation.\textsuperscript{34}

If the jurisdictional offer is accepted within the requisite twenty day period, the transfer of title must be accomplished within sixty days thereafter.\textsuperscript{35} If the jurisdictional offer is not accepted, section 32.06(7) provides that the condemnor may present a verified petition to the circuit court stating that the jurisdictional offer has been made and rejected, and that the condemnor in good faith intends to use the property described for a specified public purpose. The petition to the circuit court must not disclose the amount of the jurisdictional offer.

If the circuit court finds that the condemnor is entitled to condemn the property or any portion of it, the court must immediately assign the matter to the chairman of the county condemnation commission for a hearing.\textsuperscript{36} The commission then holds a hearing to determine what compensation should be made for the taking of the property.

The provisions to be focused on in this article are contained in both Wisconsin Statute section 32.05(2a) and its companion, section 32.06(2a). These sections are almost identical. Both require that the condemnor attempt to "negotiate

\begin{itemize}
\item 32. Wis. Stat. §§ 32.05(2a) and 32.06(2a) (1977).
\item 33. Wis. Stat. §§ 32.05(3) and 32.06(3) (1977).
\item 34. Wis. Stat. §§ 32.05(3) and 32.06(3) (1977).
\item 35. Wis. Stat. §§ 32.05(6) and 32.06(6) (1977).
\end{itemize}
personally” with the owner of the property sought to be taken, that he provide the owner with copies of a required pamphlet, the names of at least ten neighboring landowners to whom offers are being made, and a map showing all the property proposed to be acquired by the condemnation proceedings. The major questions created are: (1) What constitutes “negotiation” under the statute? (2) What does it mean to negotiate “personally”? and (3) Does the failure to provide the required list of neighboring landowners and a map showing all the property affected by the project have any effect on the condemnation proceedings?

A. Requirement of Negotiation

Because condemnation proceedings pit the power and authority of the state directly against one or a few individual property owners, the court has stated:

[37]there is a reluctance on the part of the courts to the exercise of eminent domain, when the same end may be accomplished by the agreement of the parties. The remedy is harsh in its nature, liable to gross perversion, and one which, in practice as in theory, encroaches upon the rights of the individual.37

In order to obviate an initial, direct, and unyielding exercise of the state’s power, many condemnation schemes required a prior attempt to negotiate a voluntary sale and purchase of the desired property from the owner.38 Although by their nature, condemnation proceedings are sui generis, and a type of special proceeding, they are nonetheless adversary in nature.39 Thus, there is a general reluctance to engage in a type of adversary proceeding when the same end, the acquisition of the property, can be accomplished by voluntary and consensual means. This reluctance to engage directly and initially in adversary proceedings is embodied within the general policy of

37. City of Milwaukee v. Diller, 194 Wis. 376, 384, 216 N.W. 837, 840 (1927) (quoting MILLS, EMINENT DOMAIN at 258, 259 (2d. ed.)).
38. See, e.g., Wis. Stat. §§ 32.05(2a) and 32.06(2a) (1977).
eminent domain as set out in Wis. Stat. section 32.02, which makes an attempt at agreement between the condemnor and the property owner a condition precedent to the exercise of any condemnation powers. The section states that a proper governmental body is empowered to “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 any property cannot be acquired by . . . purchase at an agreed price . . . .” As one commentator has stated, under a statute such as this,

unless there is a *bona fide* attempt on the part of the condemnor to induce the owner to sell the land at a reasonable figure, the condition under which the power is granted is not fulfilled and in such case any attempted exercise of eminent domain is unauthorized and consequently void and of no effect.

This requirement of prior dealing between the parties is in large measure an attempt to avoid an imposition of the condemnation powers of the state upon the individual without a discussion of the matter between the governing body and the property owner. The requirement of prior negotiation has been labeled a material and valuable right of the property owner. Since the general policy of the state places a premium on a voluntary and consensual arrangement between the governing body and the private property owner, a great deal of importance must be placed on exactly what the “negotiation process” is to encompass. Thus, because condemna-

41. Id. (emphasis added).
42. 6 NICHOLS, THE LAW OF EMINENT DOMAIN § 24.62, at 24-155 to 24-158 (rev. 3d ed. 1976)[hereinafter cited as 6 NICHOLS].
44. Wis. Stat. §§ 32.05(2a) and 32.06(2a) (1977) require that an attempt be made to reach an agreement between the governmental authority and the private property owner prior to institution of any condemnation proceedings. It is there stated that the “condemnor shall attempt to negotiate personally with the owner or one of the owners or his or her representative of the property sought to be taken for the purchase of the same.” Id. (emphasis added). This statutory requirement of a prior attempt to negotiate personally was added to the statutory scheme in 1959. 1959 Wis. Laws ch. 639. The original bill, Assem. Bill 483 (1959), introduced to revise the con-
tion statutes are strictly construed and an attempt at prior negotiation is a prerequisite to the jurisdiction of the administrative agency, all appears to hinge on what constitutes "negotiation." The word itself is nowhere defined in any relevant section of the condemnation statutes.

B. The Meaning of "Negotiate"

Courts have generally formulated broad and undetailed definitions of the term "negotiation." It is usually said that each case must be evaluated in light of the unique circumstances presented. This, of course, provides scant guidance. However, several factors are consistently mentioned and from these one may glean a more or less uniform and comprehensive definition of what the courts consider adequate "negotiation." It should be stated that Wisconsin is not alone in leaving adequate "negotiation" statutorily undefined. In both the uniform law, dealing with the subject of eminent domain, promulgated by the National Conference of Commissioners on Uniform State Laws and in the federal Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, there is no definition nor even a hint of what consti-
tutes this required negotiation. The elements and factors which the courts consider when they evaluate the adequacy of a prior attempt to agree between the parties would, perhaps, yield a definition substantially along the following lines:

"Negotiation" means the performance of the obligation of the condemnor to meet and, if necessary, confer personally with the landowner in a good faith attempt to determine a fair and just purchase price for the subject land. Such good faith "negotiation" shall be conducted at a reasonable time with the intent of reaching a fair and just agreement as to the price to be paid for the property. The duty to negotiate does not, however, compel the condemnor to agree to a proposal or require the making of a concession.

The elements most commonly mentioned might conveniently be divided into three stages of the negotiation process: (1) the effort made by the condemnor to reach agreement with the landowner; (2) the nature of the offer or offers made; and (3) the extent to which negotiations must be carried out before a statutory condemnation proceeding may be commenced.

1. The Effort

The condemnor must make an effort to induce the owner to sell the land at a reasonable figure. It is usually stated that the condemnor must do more than simply make an offer; he must attempt to move the party along the road to a voluntary agreement. The effort to purchase must also be made in good faith. This, of course, is a general rule of modern contract law and has been carried over by the courts into the area of condemnation proceedings.

A bona fide effort to purchase the property involves a will-


As noted earlier, one of the underlying principles of eminent domain is that a private property owner should not be forced to subsidize a public project. Just compensation, therefore, requires that he get a fair deal for his property.

The effort to purchase must be made without duress. There can be no voluntary and consensual agreement if undue pressure is put upon the private property owner. Allowing the condemnor to use duress in extracting an agreement between the parties would produce no more than a capitulation by the private property owner and would be, in effect, a “taking” by the condemnor in an almost quasi-condemnation proceeding, but without the safeguards imposed by the chapter on such proceedings.

2. The Offer

A merely perfunctory or formal offer is not sufficient. A perfunctory offer is inadequate because it evidences both a lack of effort to induce the owner to sell and the absence of good faith on the part of the condemnor. Such an offer is considered to be, in essence, no offer at all.

The offer must be on reasonable terms. It is evident that an unreasonable offer in light of the circumstances would in no way promote a voluntary and consensual agreement between the parties. Thus the offer must be reasonable because it will merely frustrate the proceedings if it is not.

3. The Extent of Negotiations

A mere difference in amount between the parties does not

51. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979); Boom Co. v. Patterson, 98 U.S. 403, 408 (1878); United States v. 320.0 Acres of Land, 605 F.2d 762, 781 (5th Cir. 1979); In re Rogers, 243 Mich. 517, ——, 220 N.W. 808, 811 (1928). See also, Wis. Stat. § 32.09(5) (1977).


54. Dantzler v. Mississippi State Highway Comm’n, 190 Miss. 137, ——, 199 So. 367, 369 (1941).
determine whether a bona fide attempt to agree has been made. In not requiring the parties to negotiate to impasse, the courts have not, however, allowed a difference in amount between the respective offers and counteroffers to be in and of itself sufficient to show that a good faith effort has been made to induce the owner to sell on reasonable terms.

If it becomes apparent that no agreement can be made at a price that is satisfactory to the condemnor, the effort to agree may be dropped. That is to say, the condemnor need not make any further effort to procure an agreement when the attitude of the owner is such that it is clear that he will not accept an offer which the condemnor deems reasonable. Although the condemnor must negotiate in good faith, it need not make any concession to the private property owner on terms which it considers in good faith to be unreasonable.

No lengthy series of negotiations, offers, and counteroffers is needed to meet the requirement of the statute. It is not the length or quantity of the negotiations which determines whether or not they are adequate, but, instead, whether the quality of the negotiations is adequate and sufficient to show a good faith and vigorous attempt to induce a voluntary and reasonable settlement.

Condemnation requires an effort to purchase the property and a showing that the parties are unable to agree. It does not require an absolute inability but merely a bona fide effort to purchase under reasonable terms. To show good faith in the negotiating process, the condemnor need not demonstrate that it has inadequate funds on hand or is unable to procure adequate funds within a reasonable time to meet the demands.

put forth by the private property owner. It is necessary only that the condemnor show that the offer of the private property landowner is unreasonable or, if it is reasonable and is still not accepted by the condemnor, that there is sufficient evidence to show why the condemnor has not, in fact, accepted such reasonable offer.

It is difficult to synthesize these elements into a compact and understandable format. Varying stress can be put by either party on any of the above-stated general rules. An attempt has been made above to summarize and synthesize these rules into a concise definition but whether or not any two parties would agree on such a definition is not altogether certain.

The leading Wisconsin case in this area is Herro v. Natural Resources Board, which dealt with the meaning of the term "negotiate" under Wis. Stat. section 32.06(2a). As stated above, this section is identical to the terms of section 32.05(2a). The Wisconsin Supreme Court, relying heavily on Nichols' treatise and American Jurisprudence, stated the following rule:

In our judgment the statute [Wis. Stat. section 32.06(2a)] does not contemplate an impossibility to purchase at any price, however large, but merely an unwillingness on the part of the owner to sell only at a price which in the condemnor's judgment is excessive. In such an event, the attempt to agree need not be pursued further than to develop the fact that an agreement to purchase is not possible at any price which the condemnor is willing to pay.

This is the extent of the court's explication of the requirement that there be personal negotiations between the parties. It does not contribute much new insight into the meaning of the term "negotiate," but as one commentator has stated, "[n]o general rule can be set forth . . . ."

Before the facts of any given controversy about adequate prior negotiation can be analyzed under the general rules to

59. 53 Wis. 2d 157, 192 N.W.2d 104 (1971).
61. 53 Wis. 2d at 173, 192 N.W.2d at 112.
62. 6 Nichols, supra note 42, § 24.621, at 24-171.
determine whether or not there has been sufficient and adequate "negotiation" theretofore, one additional factor regarding the Wisconsin statute dealing with the negotiation requirement must be discussed. This is the requirement of personal negotiation.

C. The Requirement of Personal Negotiations

By their terms, Wis. Stat. sections 32.05(2a) and 32.06(2a) require that before the jurisdictional offer be made, the condemnor shall attempt to "negotiate personally" with the private property owner. The above has attempted to outline the meaning of the word "negotiate" and, thus, the inquiry under either of the sections becomes what is meant by the term "personally"? When a statute requires simply that there be "negotiation," it is generally stated that the question of whether or not there must be personal negotiations with the owner or his agent must depend upon the statute itself and the circumstances surrounding the condemnation proceedings. There are cases from other jurisdictions on both sides of this point. Some hold that there must be face-to-face discussions prior to the initiation of adversary condemnation proceedings, while others hold that there is no such requirement. As has been stated, "There is no simple answer. A great deal depends upon the surrounding circumstances and upon the answer to the further question, what would common sense dictate in this situation?"

Where, however, statutes such as those in Wisconsin require that negotiations be conducted "personally," it would appear that the answer to the question whether there must be face-to-face discussions could be more easily and readily answered. "Negotiate" means to have some sort of communication, either oral or written, with the initial intent that such

communication will lead to agreement between the parties.\textsuperscript{67} When the word "personally" is used in conjunction with the word "negotiate" it must be admitted that the legislature meant to delineate more specifically and explain the sort of negotiations that it contemplated in condemnation proceedings.

In attempting to resolve what is required by the term "negotiate personally," one must remember that it is an elementary rule of statutory construction that every word and clause contained in a statute must, if possible, be given effect.\textsuperscript{68} The law is well settled in this area.

[I]t is "... a maxim of statutory construction that a law should be so construed that no word or clause shall be rendered surplusage." Thus every word appearing in a statute should contribute to the construction of the statute in accordance with its ordinary and customary meaning. As this court has held, "... a separate meaning must attach to each individual term in a legislative act."\textsuperscript{69}

The sound reasoning behind a rule of statutory construction such as this is especially evident in an inquiry such as the one required here. If it were unnecessary that every word and clause be given effect and no word be considered to be inoperative or insignificant, an unavoidable and often irresolvable conflict would occur. Where there had been some attempt to negotiate under a statute but no agreement had been reached, a private property owner would contend that, although there had been some negotiations, the negotiations were inadequate because they were not "personal." The private property owner

\textsuperscript{67} One authority defines "negotiate" to mean: "to bargain with another respecting a purchase and sale; to conduct communications or conferences with a view to reaching a settlement or agreement." \textsc{Black's Law Dictionary} 934 (5th ed. 1979). Another source puts the term as meaning: "To hold communication (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to some settlement or compromise." \textsc{7 Oxford English Dictionary} 81 (1933). Whether this particular meaning is accepted as the relevant one under §§ 32.05(2a) and 32.06(2a) or not, it must be conceded that the word "negotiate" has a full and distinct meaning.

\textsuperscript{68} 2A \textsc{Sutherland, Statutes and Statutory Construction} § 46.06, at 63 (4th ed. C.D. Sands ed. 1973). \textit{See also} County of Columbia v. Bylewski, 94 Wis. 2d 153, 164, 288 N.W.2d 129, 135 (1980).

\textsuperscript{69} \textsc{Johnson v. State}, 76 Wis. 2d 672, 676, 251 N.W.2d 834, 836 (1977) (footnotes and citations omitted).
would thus put emphasis on the word "personally." The condemning authority, on the other hand, would stress that there had been negotiations and that thus the operative and primary word in the statute, "negotiate," had been satisfied. Under this view, the word "personally" would be relegated to an insignificant role, suggesting merely one mode of conducting negotiations. To avoid such a winnowing and sifting of the words of a relevant statute, the courts have prudently fashioned a rule of statutory construction which requires that every word and clause be given effect, if possible.

Thus, it must be assumed that when the legislature used the word "personally," it did not intend to be redundant or superfluous. If the legislature had deemed the word "negotiate" to have implied and carried within its definition the requirement of a face-to-face meeting between the parties, it would not have used the word "personally" to further amplify this already implicit and inherent meaning. But the legislature did use the word "personally" and thus it must be given its "ordinary and customary" meaning which, in this situation, can mean only face-to-face meeting. If the word "personally" is allowed to be so broadly defined that it includes any act of communication including mail, telegraph or telex, the word becomes redundant since it must be conceded that the term "negotiate" already has within its meaning the implication that some sort of communication will occur between the parties. It thus appears that sections 32.05(2a) and 32.06(2a) require that the condemnor hold at least one face-to-face meeting with the private property owner in an attempt to agree on a purchase price prior to the making of any jurisdictional offer.

D. The "List" and "Map" Requirements

Sections 32.05(2a) and 32.06(2a) state that, during the negotiation process, the condemnor must provide the owner with a list containing the names of at least ten neighboring landowners to whom offers are being made. In addition, the condemnor must provide the owner with a map showing all property affected by the project.

These provisions were added to chapter 32 in 1977. The Legislative Council notes to the original bill show that the committee was concerned that the landowner have adequate
information and sufficient means to acquire additional information in regard to his negotiations with the condemnor.\textsuperscript{70} Accurate information is essential if a landowner is to make a fair and reasonable offer, since to do so he must know what the condemnor is generally offering the neighboring landowners and what the neighboring landowners are offering in return. This information can be most easily obtained by contacting the landowners directly and, thus, it is important that the landowner know how to identify and contact such property owner.

As the Wisconsin court has said, the requirement of prior dealing between the condemnor and the landowner is considered a material and valuable right of the owner of the prop-

\textsuperscript{70} 1977 Wis. Laws ch. 438. Section 4 and 8 of Assembly Bill 969 first proposed these changes. This bill was the product of a Legislative Council study and each section was explained by notes drafted by that committee.

When the bill was first introduced on September 13, 1977, it proposed the following additions to these two sections:

Before attempting to negotiate under this paragraph, the condemnor shall provide the owner or his or her representative with copies of applicable pamphlets prepared under s.32.26(6). When negotiating under this subsection, the condemnor shall provide the owner or his or her representative with examples of at least ten offers being made to neighboring landowners, or a list of all offers if less than ten owners are affected, together with a map showing all property affected by the project. \textit{Id.} (emphasis added).

The note to these sections reads in part as follows:

[T]he condemnor \textit{must} provide the owner with examples of offers being made to neighboring landowners and a map of the project. This will give the owner accurate information about the amounts being offered to neighboring landowners and will allow an owner to discover what other properties are affected by the condemnation action. The owner can also obtain copies of any other map of the project in the possession of the condemnor. The owner can request the name of any other property owner affected by the project. \textit{This will give the owner enough information to identify and contact other property owners. Id.} (emphasis added).

On January 31, 1978, the Assembly Committee on Judiciary introduced Substitute Amendment 1 to Assembly Bill 969 which modified the language contained in the original bill. Sub. Amend. 1 to Assem. Bill 969 (1977). Under the substitute amendment, the text of which was passed into law, the proposed addition to §§ 32.05(2a) and 32.06(2a) was altered to read as follows:

Before attempting to negotiate under this paragraph, the condemnor shall provide the owner or his or her representative with copies of applicable pamphlets prepared under s.32.26(6). When negotiating under this subsection, the condemnor shall provide the owner or his or her representative with the names of at least ten neighboring landowners to whom offers are being made, or a list of all offerees if less than ten owners are affected, together with a map showing all property affected by the project. \textit{Id.}
To exercise this valuable right properly, a property owner must have sufficient information to make a reasonable offer to the condemnor. If the landowner does not make a reasonable offer or counteroffer, the condemnor, if it acts in good faith, could deem the landowner's offer excessive and terminate negotiations. This would end the exercise of the property owner's valuable right. It appears that the legislature desired to aid the landowner in the exercise of his right by providing him the means of acquiring sufficient information to effectively exercise that right. The original method was to have the condemnor provide the landowner with examples of offers which the condemnor was making to neighboring landowners and to provide a map showing all the property affected. This method was modified by a substitute amendment whereby the condemnor must now provide the names of neighboring landowners and a map showing all the property affected by the project. The thrust of each of these versions is the same; only the operation is slightly different. Each method is intended to provide the landowner with sufficient information so that he can make a fair and reasonable offer. This being so, the notes of the Legislative Council, which appear in the original bill, are equally pertinent in relation to the purpose and intent of this addition as subsequently modified by the substitute amendment.

This amendment to sections 32.05(2a) and 32.06(2a) is wholly in keeping with the purpose of chapter 32 which favors precondemnation settlement between the parties. By providing the landowner with an easy means of access to pertinent and accurate information as it relates to the amount of the offers that the condemnor is making and, conversely, the type of offers that the neighboring property owners are making, there is a greater likelihood that a precondemnation settlement will be entered into between the parties. But is this enough to make the requirement of the list and the map mandatory instead of merely directory?

Statutes which can be interpreted as implying that something be done can be divided into two different types: mandatory and directory. If a statute is interpreted to be a

mandatory one, then the thing which must be done is considered to be a condition precedent to further action.\textsuperscript{72} If, on the other hand, the statute is interpreted to be merely directory, then that which is contained in the statute can be treated as merely a suggestion that a certain method or mode of procedure be carried out.\textsuperscript{73} The important distinction is that the violation of a directory statute is accompanied by no adverse consequences, while the failure to comply with the requirements of a mandatory statute either invalidates the transaction or imposes affirmative legal liabilities.\textsuperscript{74} The difference between the two types of statutes derives essentially from a difference in the intention of the legislature in enacting a given statute.\textsuperscript{75} It is up to a court to determine whether the legislature considered the provisions sufficiently important that exact compliance is required or whether the legislature merely intended the language of the statute as a guide for conduct. It is thus the intent of the legislature which is controlling; however, there is no set method for determining such intent. As one court has stated:

Consideration must be given to the legislative history, the language of the statute, its subject matter, the importance of its provisions, their relation to the general object intended to be accomplished by the act, and, finally, whether or not there is a public or private right involved.\textsuperscript{76}

The intent of the legislation may be implied by the language used in the statute or inferred on grounds of policy and reasonableness.\textsuperscript{77} "[S]tatutory requirements that are of the essence of the thing required by statute are mandatory, while those things which are not of the essence are directory."\textsuperscript{78}

\begin{footnotesize}
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\item[\textsuperscript{72}] 1A Sutherland, Statutes and Statutory Construction § 25.03, at 298-300 (4th ed. C.D. Sands ed. 1972) [hereinafter cited as 1A Sutherland].
\item[\textsuperscript{73}] Id.
\item[\textsuperscript{75}] Karow v. Milwaukee County Civil Serv. Comm'n, 82 Wis. 2d 655, 672-73, 263 N.W.2d 214, 217-18 (1978); City of Wauwatosa v. Milwaukee County, 22 Wis. 2d. 184, 190-92, 125 N.W.2d 386, 389-90 (1963).
\item[\textsuperscript{76}] State ex rel. Laurisch v. Pohl, 214 Minn. 221, ———, 8 N.W.2d 227, 229 (1943), quoted in 1A Sutherland, supra note 72, § 25.03, at 299.
\item[\textsuperscript{77}] Karow v. Milwaukee County Civil Serv. Comm'n, 82 Wis. 2d 655, 570-71, 263 N.W.2d 214, 217 (1978); State ex rel. Werlein v. Elamore, 33 Wis. 2d 288, 293, 147 N.W.2d 252, 264-55 (1967).
\item[\textsuperscript{78}] 2A Sutherland, Statutes and Statutory Construction, § 57.03, at 416 (4th
\end{itemize}
\end{footnotesize}
While there is no set guide for determining whether a statute is mandatory or directory, and any such construction is a result of interpretation, it is said that the word "shall" usually indicates a mandatory intent.79 And, additionally, where the time of performance is important, or the manner of performance is essential to the purpose of the statute, it is usually found that the statute was intended by the legislature to be mandatory in nature.80

In Wisconsin Town House Builders v. City of Madison,81 the condemnor followed the practice used prior to the 1959 amendment82 to chapter 32 and instead of itemizing the damages in the jurisdictional offer, merely listed a total amount. The court responded by stating:

Any fair-minded owner would expect that [sic] amount of money included damages for existing, future and potential rights of access which the offer said the city was taking in addition to the triangular piece of land. To avoid any such misconception, sec. 32.05(3)(d), Stats., requires an itemization of damages; this is not directional but mandatory. In the note to the 1959 revision of ch. 32, we find, "Note [Subsec.4], — The taking of private property for public use is a procedure in which the property owner should be given great consideration. He should be clearly informed with respect to the lettered items in sub. (3)."83

Because the condemnor did not follow the required procedure of the statute and, instead listed the total amount rather than an itemized amount, the court found that the jurisdictional offer was "so defective that it [could not] stand and must be declared void."84


80. Karow v. Milwaukee County Civil Serv. Comm’n, 82 Wis. 2d 565, 573, 263 N.W.2d 214, 218 (1978); Marathon County v. Eau Claire County, 3 Wis. 2d 662, 666, 668, 89 N.W.2d 271, 273, 274 (1958); State v. Industrial Comm’n, 233 Wis. 461, 466, 289 N.W. 769, 771 (1940).
81. 37 Wis. 2d 44, 154 N.W.2d 232 (1967).
82. See 1959 Wis. Laws Ch. 639.
84. Id. at 55, 154 N.W.2d at 237.
The factors which seem to have influenced the court in its findings were that the use of a total amount might tend to create a "misconception" on the part of the landowner and that the legislative intent as evidenced by the committee note to the bill stated that the landowner "should be clearly informed with respect to" the type of money damages the condemnor was making. On the surface, these two factors do not seem to be particularly significant, nor do they seem the sort of consideration which would lead a court to declare that their omission makes a jurisdictional offer void. Nevertheless, the court found that the requirement of the statute that the damages be itemized was a mandatory and not merely a directory provision.

It appears that much the same argument could be made in regard to the condemnor's duty to provide the landowner with the required names and map under sections 32.05(2a) and 32.06(2a). The committee note to the 1977 revision of those sections evinces the same sort of legislative concern that the landowner have sufficient information during the condemnation proceeding. When it is remembered that the court has stated that the right of the landowner to be able to negotiate prior to any condemnation proceeding is a valuable and important one, the provision relating to the condemnor's production of the names of neighboring landowners and the required map can be considered material to the total negotiation process. This being the case, it is not unreasonable to consider that the court would find this requirement mandatory and one which, when omitted, renders the jurisdictional offer void and thus deprives the condemning authority of its statutory jurisdiction to condemn.

IV. Conclusion

The fifth amendment of the U.S. Constitution, the Wisconsin Constitution and chapter 32 of the state statutes all prescribe prerequisites and procedures for the exercise of the state's inherent right to take private property. It cannot be denied that such a power is a fundamental and necessary attribute of a sovereign existence. But equally, it cannot be denied that the indiscriminate and uncontrollable exercise of such a power could well lead to the destruction of a state's existence. Thus, limitations and restrictions have been placed
on the exercise of the power of eminent domain. In most instances, it has been required that these restrictions be complied with exactly or the subsequent taking will be void and of no effect. As has been stated, the twin requirements of an attempt at prior negotiations and the provision of a map and a list containing the names of similarly situated property owners should be considered as a mandatory condition precedent to the exercise of the power to take. Compliance with these requirements, in addition to the constitutional restrictions of due process, just compensation, and a public use, will ensure that an owner, forced to relinquish his property for the common good, will have every possible opportunity to arrive at a fair and equitable settlement with the sovereign to which his own private interests must be subordinated.

ROSS F. PLAETZER