Property

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a judicial determination of unconstitutionality,\textsuperscript{47} and concluded that,

where there has been no specific prior adjudication of unconstitutionality, the electorate under the direct legislation statutes, may compel placement on the ballot regardless of grave doubts in respect to constitutionality and statutory validity. Only after the measure has passed and a controversy arises may a court of this state pass upon the question of constitutionality.\textsuperscript{48}

Section 9.20 is based upon the reserved legislative powers of the electorate\textsuperscript{49} and has priority over the legislative discretion of the city council. The city council may take into account the possibility of conflict with state statutes or of unconstitutionality of the proposal when it initiates legislation. However, the council is statutorily obligated to either enact the measure itself or to submit it to a public vote when, as in this case, the reserved powers of the electorate are involved.\textsuperscript{50} Thus, under the direct legislation statute, no determination of constitutionality is appropriate before the electorate has voted.\textsuperscript{51} Issues of statutory conflict and constitutionality are to be dealt with by the judiciary if the measure is enacted and later challenged.\textsuperscript{52}

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\textbf{CORNELIA GRIFFIN FARMER}
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\section*{PROPERTY}

\section*{I. EMINENT DOMAIN}

In \textit{Falkner v. Northern States Power Co.},\textsuperscript{1} the court affirmed the controversial taking of farm land by a Wisconsin public corporation\textsuperscript{2} for the future construction\textsuperscript{3} of a large nu-

\begin{itemize}
\item \textsuperscript{47} \textit{Id.} at 110, 255 N.W.2d at 455.
\item \textsuperscript{48} \textit{Id.} at 117-18, 255 N.W.2d at 458.
\item \textsuperscript{49} \textit{Id.} at 118-19, 255 N.W.2d at 459.
\item \textsuperscript{50} \textit{Id.} at 110, 255 N.W.2d at 455.
\item \textsuperscript{51} \textit{Id.} at 119, 255 N.W.2d at 459.
\item \textsuperscript{52} \textit{Id.}
\end{itemize}

1. 75 Wis. 2d 116, 248 N.W.2d 885 (1977).
2. Power of eminent domain is an attribute of sovereignty which may be delegated to a corporation by the legislature. Wisconsin Water Co. \textit{v. Winans}, 85 Wis. 26, 39, 54 N.W. 1003 (1893); Wis. \textit{Stat.} § 32.02(6) (1975).
3. At trial the estimated completion dates of the units were April 1982, and October
clear generating station. Pursuant to statute, jurisdictional offers were served on the appellants, owners of the Dunn County land, on January 25, 1974. The offers were refused. Appellants commenced actions to contest the condemnation, citing various uncertainties and contingencies which could prevent the construction of the power plant, and contending that these uncertainties evidenced a lack of public use or necessity. Simultaneously, Northern States instituted condemnation proceedings pursuant to Wisconsin Statutes section 32.06(7). All actions were tried together on July 29 and 30, 1974.

Three months after the trial court rendered its decision in favor of the condemnation, chapter 68, Laws of 1975 was enacted. Under chapter 68, construction of all bulk generating facilities is prohibited without a certificate of public convenience from the Public Service Commission. The appellants’ subsequent motions to restrain further condemnation proceedings

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4. The station, Tyrone Energy Park, will consist of two independent units, each with a generative capacity of 1150 megawatts. 75 Wis. 2d at 118 & 136 n.11, 248 N.W.2d at 890 & 896 n.11.

5. Wis. STAT. § 32.06(3) (1975).

6. The appeal was taken pursuant to Wis. STAT. § 32.06(5) (1975). See Weeden v. Beloit, 22 Wis. 2d 414, 126 N.W.2d 54 (1964). Under prior law, the owner had two alternatives: (1) to appeal from the award of the commissioner, or (2) to seek an independent award in equity. Ferguson v. Kenosha, 5 Wis. 2d 556, 93 N.W.2d 460 (1958).

7. Appellants alleged the following problems:
   (a) Funds had not been obtained, nor had the specific source been identified.
   (b) Sufficient testing to apply for necessary permits had not been performed.
   (c) Building plans and environmental reports had not been completed.
   (d) A final decision to go through with the plan construction had not been made by the defendant’s Board of Directors.

8. A taking for a nonpublic use is unconstitutional. Schumm v. Milwaukee County, 258 Wis. 256, 45 N.W.2d 673 (1951).

9. Clearly, Wis. STAT. ch. 32 (1975) provides for two independent, yet procedurally simultaneous actions by the condemnor and condemnee. The curious effect at trial is to combine the property owner’s action contesting the right to condemn with the judicial determination of the necessity of the taking—a determination that logically would have occurred before the institution of condemnation proceedings. Neither party objected to the proceeding. 75 Wis. 2d at 119, 248 N.W.2d at 888. See REPORT AND RECOMMENDATIONS, WISCONSIN GOVERNOR’S STUDY COMMITTEE ON THE PROBLEMS OF LAND ACQUISITION (1958).

10. The memorandum decision was dated June 2, 1975. On Sept. 30, 1975, ch. 68 (Wis. STAT. § 196.491) became law.
on the grounds that Northern States had failed to obtain the requisite certificates were denied. Appeals were taken from these orders.

Consistent with the presumption of validity usually accorded legislative actions, the Wisconsin legislature or its delegate has inherent power to determine the necessity of taking for a public purpose. Thus, the majority of Wisconsin's eminent domain litigation centers around procedural and evaluation issues rather than questions of necessity and public usage, and the courts are limited to a narrow scope of judicial review. Under Falkner, a right to condemnation is established when the following two criteria are met: 1) There is a reasonable probability that the public improvement "will meet all requirements for the issuance of necessary permits, and will not otherwise fail or be unable to prosecute its undertaking to completion"; and 2) The taking of the land is reasonably necessary to fulfill the public purpose.

11. 75 Wis. 2d at 119-20, 248 N.W.2d at 888.
12. The court noted that "at first blush" the review standard mandated by ch. 32 would seem to be necessity. However, since the chapter has no clear criteria for measuring necessity, the standard is a difficult one to apply. Invoking the power of eminent domain constitutes an implicit decision that the taking is necessary for public purposes. This decision is reviewable. Wis. Stat. § 32.06(5) (1975). The standard applied is whether the decision constitutes fraud, bad faith or a gross abuse of discretion on the part of the condemnor. 75 Wis. 2d at 132, 248 N.W.2d at 894.
14. For example, in Aero Auto Parts, Inc. v. Dep't of Transp., 78 Wis. 2d 235, 253 N.W.2d 896 (1977), the court addressed the question of whether compensation for realigning the personal property of a tenant is allowed in a partial taking. Wisconsin Pub. Serv. Corp. v. Marathon County, 75 Wis. 2d 442, 249 N.W.2d 543 (1977) held that compensation was constitutionally required only for a taking and not for damages to property resulting from an exercise of the state's police power. See Orgel, Valuation Under Eminent Domain (1953); Nichols, supra note 13.
15. See Annot., 6 A.L.R.3d 297 (1966) for public usage and necessity requirements in other jurisdictions.
16. Klump v. Cybulski, 274 Wis. 604, 81 N.W.2d 42 (1957). The court said that: [A] court will not interfere with the choice of particular lands by a power company unless necessary to prevent an abuse of discretion by an attempted taking in utter disregard of necessity for it. . . . Judicial interference. . . .would at most be warranted only by a convincing showing that the determination is unreasonable, arbitrary, or not made in good faith.
274 Wis. at 612, 81 N.W. at 47.
17. 75 Wis. 2d at 129, 248 N.W.2d at 893.
18. To support condemnation, only reasonable, not absolute or imperative, necess-
The court did not expressly establish new public use or necessity criteria for a taking of private land.\(^9\) However, the *Falkner* decision unquestionably limits previous language\(^0\) of the court by liberalizing the degree of uncertainty acceptable in determining necessity or public use.\(^2\) In *Falkner*, the completion date for the second unit of the plant was indefinite, and a number of the required tests, reports and permits had yet to be completed.\(^2\) Yet, impressed with the fact that twelve million dollars had been expended to date on the project, the court stated:

There will always be some possibility that a planned improvement will not be completed and put to the use intended. The test cannot be whether it is possible, whether it is conceivable that the project would fail. The test must be whether there is a reasonable assurance that the intended use will come to pass.\(^3\)

Twelve million dollars, coupled with the time lag between completion and planning a project of this magnitude, indicated to the court Northern States' commitment to the project and constituted reasonable assurance of the project's completion.

With the *Falkner* decision, the court this term has effectively closed the door to a landowner challenging the necessity and public use of an eminent domain taking—at least where the condemnor is a corporation with the resources necessary to
meets environmental impact requirements.\textsuperscript{24} \textit{Falkner} is implicit recognition by the court of the tremendous financial outlay required to obtain the necessary permits and reports at the earliest planning stage.\textsuperscript{25} It is difficult to imagine how the individual landowner will be able to discover and develop evidence sufficient to weigh against a twelve million dollar expenditure in that it appears that the expenditure in itself is "reasonable assurance" that the project will be completed.\textsuperscript{26}

\section*{II. Riparian Rights}

In \textit{DeSimone v. Kramer},\textsuperscript{27} the court distinguished between slow and imperceptible accretions to land and accretions resulting from artificial conditions. In Wisconsin, a riparian owner is entitled to accretions due to either natural conditions or artificial conditions created by a third party.\textsuperscript{28} The accretion is apportioned by drawing right angles to the present shore lot lines. Prior to purchase by the plaintiff, dredging by the Army Corps of Engineers had resulted in altering the shoreline of a lot. The sales contract for that lot referred to 133 feet of shoreline, but as a result of the dredging only 115 feet were actually conveyed.\textsuperscript{29}

In \textit{DeSimone}, the court departed from the traditional geom-

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\item \textsuperscript{24} In \textit{Falkner}, appellants also challenged the necessity of the taking in fee of their land, asserting that an easement would have met project needs. The quantum of an estate taken must be necessary and is not dependent upon what the owner is willing to give up. The analysis as to what estate is reasonably necessary follows the question of the necessity of the project as a whole. Czarnick v. Sampson Enterprises, Inc., 46 Wis. 2d 541, 175 N.W.2d 487 (1970). In \textit{Falkner}, the court found the nature of the nuclear plant and the severity of a possible nuclear accident to require exclusive control, only available with a taking in fee. 75 Wis. 2d at 141, 248 N.W.2d at 899.
\item \textsuperscript{25} See KALTENBACH, \textit{GUIDE TO THE SUCCESSFUL HANDLING OF CONDEMNATION VALUATION} (1972).
\item \textsuperscript{26} As of this writing, the Wisconsin State Bar Association has begun study on the adoption of the Uniform Eminent Domain Code. While the Code would not alleviate the inherent proof problems of the individual landowner pitted against the multi-million dollar public utility company, the Code does provide procedural protections with respect to condemnation proceedings and compensation standards. These protections would correct the problem of judicial review enumerated in note 13, supra, which is inherent in Wis. \textit{STAT.} ch. 32 (1975).
\item \textsuperscript{27} 77 Wis. 2d 188, 252 N.W.2d 653 (1977).
\item \textsuperscript{28} Rondestvedt v. Running, 19 Wis. 2d 614, 121 N.W.2d 1 (1963); Priewe v. Wisconsin State Land Improvement Co., 93 Wis. 534, 67 N.W. 918 (1896). \textit{See also} Note, \textit{Artificial Addition to Riparian Land: Extending the Doctrine of Accretion}, 14 \textit{Ariz. L. Rev.} 315 (1972).
\item \textsuperscript{29} 77 Wis. 2d at 194, 252 N.W.2d at 655.
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Entry and awarded damages rather than land. To award an additional eighteen feet of land would have resulted in interference with future property lines and with the recreational use of the lots. Although not without precedent, the award of damages to the plaintiff in this decision demonstrates the value of presenting evidence as to the type of property, current land values and potential markets for the court's consideration of possible remedies.

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TAXATION*

I. AD VALOREM TAX

In Wisconsin, interstate air carriers who conduct part of their operations within the state are subject to an ad valorem tax exacted under Chapter 76 of the Wisconsin Statutes. The ad valorem tax is assessed in lieu of all other property taxes on an air carrier's property within this state used in the operation of its business. The tax liability of an air carrier subject to the ad valorem assessment in any year is the product of its Wisconsin assessed value multiplied by the average state property tax rate. Included in this assessed value are both the real and personal property of a carrier, and all rights, franchises and

30. Id. at 203, 252 N.W.2d at 659.
31. Id.
32. Id. at 196, 252 N.W.2d at 656.
33. Rondesvedt v. Running, 19 Wis. 2d 614, 121 N.W.2d 1 (1963); Jansky v. Two Rivers, 227 Wis. 228, 278 N.W. 527 (1938).

* An important tax case finding the negative-aid school financing plan unconstitutional will be the subject of a student comment in a later issue of volume 61. Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

1. Wis. Stat. § 76.01 (1975) provides in part: "The department of revenue shall make an annual assessment of the property . . . of all air carriers . . . within this state, for the purpose of levying and collecting taxes thereon, as provided in this chapter."

2. Wis. Stat. § 76.23 (1975). Excepted from this exemption are special assessments for local improvements.

3. Wis. Stat. § 76.12 (1975). The rate is equal to the sum of all general property taxes levied in the prior year divided by the state assessment of all general property within the state for the corresponding year.