3.9 CONDEMNATION/LEGAL ASSISTANCE

The provisions of this section are applicable in the acquisition of real property and property interests for highway purposes or a highway related project in which federal and/or state funds will participate in any part of the costs of the project. All questions and comments on the information contained herein should be directed to the Bureau of Technical Services-Real Estate (BTS-RE) acquisition/litigation coordinator.

3.9.1 Requests for Legal Assistance

Requests for assistance and/or opinions on legal matters, other than routine litigation situations, are to be directed in writing only to the BTS-RE acquisition/litigation coordinator. These requests will be reviewed and approved by the Real Estate supervisor or Technical Services/Real Estate manager prior to submittal to the acquisition/litigation coordinator. Subsequently, such requests will be transmitted to the WisDOT Office of General Counsel for processing and handling as deemed necessary.

3.9.2 Authority

Basic legal authority given to the department in all highway matters can be referenced in Chapters 32, 83, and 84 of the Wisconsin Statutes. All WisDOT Real Estate personnel are required to read and be knowledgeable of the contents of these chapters. Section 32.05, Wisconsin Statutes establishes the procedure for the condemnation process and the legal requirements that must be met to successfully institute, conduct and conclude the condemnation action.

3.9.3 When Condemnation is Necessary

When any required lands or interests cannot be purchased expeditiously for state highway purposes, for a price deemed reasonable, agencies may acquire the same by condemnation.

- County - Chapter 32, and s. 84.09(3)(a), Wis. Stats.
- Municipal - Chapter 32, and s. 84.09(3m), Wis. Stats., in the name of the State.
- State - Chapter 32, and s. 84.09(2), Wis. Stats.

3.9.4 Condemnation of Federal Bankruptcy Property

If the property to be condemned is the subject of a federal bankruptcy action, special procedures must be followed. These procedures are lengthy and time consuming. The condemnation of these types of parcels must be coordinated through a BTS-RE acquisition/litigation coordinator.

3.9.5 Revisions to Offering Price

Before issuing the Jurisdictional Offer (RE1786), consideration should be given to administratively revising the offer. When considering if a revision is in the best interest of the state, the regional Real Estate manager must give full consideration to the:

- Capabilities of appraisers and attorneys for court presentation.
- Degree of risk, probability of appeal.
- Divergence of opinions of value.
- History of awards and previous court decision on project, and ramification of revised offer on other parcels under negotiation or appeal.
- If successfully appealed, dollar amount state would be at risk as to additional administrative costs, attorney fees, and related court costs.
- New, relevant market evidence.

The BTS-RE/Acquisition Section may be consulted to assist in the analysis of the facts considered above. Before the approved administrative revision is presented in writing to the property owner, the original offer must be rescinded. Including a short sentence in the cover letter to the owner that accompanies the new offer can do this. This revised written offer must contain an allocation of the offer. The property owner must be given a reasonable amount of time to accept. If the offer is not accepted, the Jurisdictional Offer will be issued in the amount of the administrative revision.

3.9.6 Jurisdictional Offer (JO) to Purchase

When unable to negotiate to a satisfactory conclusion, the condemnor shall send "to the owner, or one of the owners of record, and to the mortgagee, or one mortgagee of each mortgage of record" under s. 32.05(3) Wis. Stats., a notice called the Jurisdictional Offer (JO) (RE1786). It is a WisDOT policy to name and serve all of the parties of interest on the JO. Preparation of Jurisdictional Offer (JO) (RE1786):

- Any error in description, amount of offer, dates, or other pertinent information can only be corrected by service of a revised JO. New deadline for acceptance will be 20 days thereafter. Original Lis Pendens must be discharged and revised Lis Pendens with revised JO must be filed.
- JO is not served until after owner's 60-day appraisal period has expired.
- Title report must be updated before issuance of JO.

3.9.7 Notice of Jurisdictional Officer (s. 32.05(4) Wis. Stats.)

The notice may be given by personal service similar to the service of a circuit court summons, or it may be transmitted by certified mail. If service is by mail, "service" shall be deemed completed on the date of mailing. The 20-day performance period is computed by excluding the first day and including the last day. If the 20th day falls on a weekend or legal holiday, the due date is the next regular business day. Note: Prior to issuing the JO, it should be reviewed by the regional litigation coordinator for accuracy. When the owner is a minor or incompetent person, the JO shall be served upon his/her legal guardian. If there is no guardian, proceed under s. 32.15, Wis. Stats., to have a guardian to be appointed. The condemnor is liable for the reasonable fees of such special guardian. If the owner or mortgagee is unknown or cannot be found, these procedures must be followed:

1. Ask Clerk of Courts in county where property is located if there is an official county newspaper.
2. Request publication of a legal notice in that newspaper. A JO is a Class 1 notice, meaning it requires one insertion.
3. Get “affidavit of publishing” from newspaper.
4. Coordinate date of publication to ensure that date of JO is same as date of publication. Ensure manager/supervisor’s name is printed on JO as issuer.
5. Wait 20 days.

6. File Lis Pendens within 14 days of JO publication.

3.9.8 Lis Pendens

A notarized Notice of Lis Pendens (RE1547) shall be filed or recorded in the office of the Register of Deeds on or within 14 days of the date of mailing (or date of publication) of the JO. The Notice of Lis Pendens shall include a copy of the JO.

3.9.9 Rights of Subsequent Parties in Interest

From the time of filing the Notice of Lis Pendens (RE1547), every purchaser or encumbrancer whose conveyance or encumbrance is not recorded shall be deemed a subsequent purchaser or encumbrancer and shall be bound by the terms of the JO. It is not necessary to serve other JO's on such subsequent parties in interest. The names of subsequent purchasers or encumbrancers, referred to above, may not be named in the Award of Damages unless they have given written notice to the condemnor of the subsequently acquired interests, in which event such parties shall be named in the award as their interests may appear. For more information, consult s. 32.05(4), Wis. Stats.

3.9.10 Contested Right to Take

An owner may contest the acquisition by commencing an action in circuit court of the county where the property is located within 40 days from the day of service or date of publication of the JO. This action shall not prevent the condemnor from proceeding with the condemnation. The acceptance and retention of any compensation resulting from an award made prior to the commencement of such an action shall be an absolute bar to such action, s. 32.05(3)(h), Wis. Stats.

3.9.11 Award of Damages

An Award of Damages by County Highway Committee (RE1545) may be prepared if the JO is rejected by all owners within the 20-day time frame. In preparing awards, great care should be used in listing the names of interested parties as errors are not easily remedied once the award is served. Such description should be proofed and checked for accuracy and completeness by the regional litigation coordinator before submitted for approval.

3.9.12 Approval of Awards of Damages

The regional director or their designate must approve all awards for state highway systems acquisition. Under the terms of the delegation order, this delegation must remain in house. It cannot be delegated to consultants and cannot be delegated further than the supervisory level. We recommended that the regional litigation coordinator (or designee) be provided with condemnation documents for review prior to issuance or submittal for approval. Two weeks prior to the expiration of the JO, the regional office will submit an award package to the BTS-RE for processing. The expiration date of the JO shall be stated on the Payment Request. The region is responsible for entering the award approval date into READS. This package shall contain:

1. Copy of Award of Damages, signed and undated.
2. Copy of Closing Statement (RE1617).
3. Payment Request (RE1630).

3.9.13 Service of Award

A copy of the Award of Damages shall be served on or mailed by certified mail to all parties of interest. The service of the award is completed, only after payment of the award has been made and recording of the award in the office of the Register of Deeds of the county wherein the property is located. Payment must be prior to recording. Whenever any of the persons named in the award cannot be found or their address is unknown, these procedures must be followed:

1. Publish in same newspaper as JO (official county newspaper).
2. An award is a Class 3 notice, requiring three (3) insertions.
3. First publication can be anytime after 20 days has expired (the 21st day or later). Next publication follows one week later, with last publication the week after that.
4. Get "affidavit of publishing" from newspaper to document publication.
5. Make check payable to last owner of record (and other parties of interest), to be held in trust by Clerk of Courts.
6. After receipt of affidavit and after payment has been made, record award.

3.9.14 Waiting Period Before Award of Damages

The Award of Damages shall not be issued unless all owners of record have rejected the JO in writing, or until 20 days have expired from the date of personal service, date of postmark of the certified mail letter, or date of publication of the JO. The 20-day waiting period may be extended only by mutual written consent of the condemnor and condemnee. If the JO is rejected in writing by all owners of record, the condemnor may proceed to make an award forthwith s. 32.05(6), Wis. Stats.

3.9.15 Award of Damages Payment

A check naming the parties in interest as payees, for the amount of the award, less any outstanding delinquent tax liens and less prorated taxes of the same year, shall at the option of the condemnor be mailed by certified mail to the owner or one of the owners of record or be deposited with the clerk of the circuit court of the county for the benefit of the persons named in the award. Consult s. 32.05(7)(d), Wis. Stats. If an owner refuses to accept the check served with the award, the check shall be canceled. A new check will then be issued to the Clerk of Court to be held for benefit of the person or persons named on the original check. Note: If there is a federal or IRS tax lien against the property, the nature of this lien must be ascertained and appropriate action must be taken before the release of any funds.

3.9.16 Date of Acquisition/Evaluation

When service of the Award of Damages has been completed and payment has been made, the Award shall be recorded at the Register of Deeds in the county where the property is located. Title in fee simple to the property described in the Award, or such lesser right is transferred to the condemnor at the time of recording. The date of recording is also the "date of acquisition/evaluation."

3.9.17 Disputed Payments

Where condemnees cannot agree as to how the sum received in payment for land sold or taken by Award is to be divided, the check shall be returned to WisDOT. A new check will be re-issued made

payable to the Clerk of Court. The check will then be deposited with the Clerk of Court, to be held in trust for the persons named on the award pending a petition for appointment. The petition shall be filed with the clerk of such court without fee (s. 32.05 (7)(d); s. 32.05(9)(3); and, s. 820.01, Wis. Stats.). Note: Department employees are cautioned not to get involved with the property owners disputes over the division of payments.

3.9.18 Amended Awards

An amended award for the purpose of correcting an error wherein the award as recorded differs in description of parcel, interest required, parties of interest, amount of compensation, area or other pertinent data, from that stated in the JO, may be made, served and recorded in the same manner as the original award. The following clause shall appear on the amended award:

> "It is the intent of this document to correct an error in the legal description etc… of the original award of damages as recorded on __ in Volume __, Page __ as Document No. __ in the Office of the Register of Deeds for __ county. The consideration stated upon this award has been paid with the original award by check number __ dated __."

3.9.19 Occupancy Writ of Assistance (s. 32.05(8), Wis. Stats.)

Upon proper service of the JO and payment of the award, the condemnor may, upon 48 hours notice, make a request to the circuit court for possession of the interest acquired. Requests for Writ of Assistance must be coordinated through the BTS-RE acquisition facilitator.

3.9.20 Inverse Condemnation by Owner (s. 32.10, Wis. Stats.)

Inverse condemnation is a condemnation proceeding instituted by the property owner rather than WisDOT. If the property owner believes his or her property has been taken or damaged by the actions of the WisDOT, without receiving just compensation, he/she may commence an inverse condemnation action. See s. 32.10 of Wis. Stats., for details. To be handled the same as an appeal from a deed or Award of Damages, see sub-section 4.3.1 of this manual.

3.9.21 Trial of Title (s. 32.11, Wis. Stats.)

If upon an appeal, any defect of title to a parcel of land or encumbrance upon a parcel of land is suggested; or, any person, in a petition to the court, sets-up a claim which is adverse to title and the money or any part of the compensation paid for the property, the court shall enter a judgment with costs to the prevailing party. An appeal of such a judgment may be taken, just as it is with a judgment in an action.

3.9.22 Acquiring Title in Trustee (s. 32.15, Wis. Stats.)

Such conveyance or release shall have the same effect as if executed by one having legal power to sell and convey the land. In the case of a minor or a person adjudged mentally incompetent or if authority has been vested in an unauthorized trustee, the circuit court may, in its summary proceedings:

- Authorize and empower a trustee or appoint a special guardian - if none had already been authorized to sell, release and convey title or interest in real estate.
- Determine that terms are just to interested real estate party, and direct conveyance or release to be executed.
- Require from trustee or guardian, such security (as it deems proper) before conveyance or authorized release is executed. These terms shall be reported to court on oath.

3.9.23 Emergency Condemnation (s. 32.21, Wis. Stats.)

The Governor will make the determination, in these emergency situations, whether or not such an award shall be issued. Whenever any lands or interest are urgently needed by the department and a contract for purchase or use of property cannot be made for a reasonable price; or, the owner or owners are unavailable; or, the property cannot be purchased for any other reasons, the department may, with the approval of the Governor:

- Issue an Award of Damages.
- Serve award and make payment to owner(s), (or deposit in a court of record).
- Record award and take immediate possession of said property.

3.9.24 Direct Acquisition by Local Public Agency

When federal funds are involved in any part of a project:

- District attorney and/or city attorney acts as counsel with local Acquisition Board, commission or department as client.
- When federal funds are involved in right of way purchases made by a city or county, BTS-RE acquisition/litigation coordinator acts for Federal Highway Administration as overall approving authority for any litigation payments.

3.9.25 Acquisition by Agent/Department

When a county, city or other municipality acts as agent for the department:

- WisDOT is approving authority (client) with acquiring agency consulted on all matters of interest.
- One Assistant Attorney General is counsel, except where fee counsel is employed. When city acts as agent, city attorney may act as counsel.

3.9.26 Utilities Condemnation

The approval of the director is needed to initiate eminent domain procedures. The amount of the JO should be equal to the "lump sum" estimate for altering the facilities plus the estimated value of the real estate. Design Services of the Bureau of Highway Development will provide the lump sum costs.