IN THE SUPREME COURT OF IOWA

Supreme Court No. 23-1356
Story County Case Nos. CVCV053090 and CVCV053167

MERLE BRENDELAND, JANIS BRENDELAND, MEGAN RUSSELL, AND JOSEPH RUSSELL,
Plaintiffs-Appellants
vs.
IOWA DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF STORY COUNTY
HONORABLE JUDGE JENNIFER A. MILLER

APPELLANTS' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case should be retained by the Supreme Court because this case presents a substantial question of whether Section 6A.24, Code of Iowa, is a property owner's exclusive remedy to challenge a condemnation as being excessive, with the District Court applying a decision of this Court contrary to prior decisions of this Court.

OVERVIEW OF CASE

Since 1948, the Common Law of Iowa, i.e., Iowa Case Law rather than statutory law, as shown in the case of De Penning v. Iowa Power & Light Co., 33 N.W.2d 503, 507 (Iowa 1948), is that a property owner has the right to challenge a condemnation as being excessive, that the condemning authority is attempting to acquire more property rights than is necessary for the project.

On July 14, 2006, the Laws Of The 81st G. A. 1st Extraordinary 2006 was passed by the Iowa Legislature which includes what is now Section 6A.24, Code of Iowa. Section 6A.24, Code of Iowa, did not create a new right unknown at Iowa Common Law of a property owner being able to challenge a condemnation as being excessive. Section 6A.24, Code of Iowa, does not say that it abrogates or supersedes the Iowa Common Law right of a property owner to challenge a condemnation as being excessive. Section 6A.24, Code of Iowa, does not say that it is a property owner's exclusive right to challenge a condemnation as being excessive. Section

6A.24, Code of Iowa, is cumulative to the existing Iowa Common Law right to challenge a condemnation as being excessive, and prescribes a new remedy with said right to (a) shift the burden onto the condemning authority, and (b) recovery of attorney fees by the property owner if successful.

The District Court erred in relying upon the case of Johnson Propane Heating and Cooling, Inc. v. Iowa Dep't of Transp., 891 N.W.2d 220 (Iowa 2017) as authority that Section 6A.24(1), Code of Iowa, is the Brendelands' exclusive remedy to challenge a condemnation as being excessive. The Johnson case involved the issue of an "uneconomical remnant requiring the IDOT to condemn the property in its entirety." Id. at 891 N.W.2d 225. The Johnson case involves an issue where there is no preexisting Iowa Common Law right.

The Brendeland case does not involve an uneconomic remnant issue. The Brendeland case involves the issue that the IDOT's condemnation is excessive.

The significant and controlling factor in the Johnson case is that there is no Iowa Common Law, no existing Iowa Case Law, that gives a property owner a right to claim that an uneconomical remnant would require the IDOT to condemn the entire property.

However, the existing Iowa Common Law gives a property owner the right to challenge a condemnation as being excessive. Therefore, Section 6A.24(1), Code of Iowa, is not Brendelands' exclusive remedy to challenge the Iowa Department of

Transportation's (IDOT's) excessive condemnation, to acquire more property rights than are necessary for its project.

STATEMENT OF CASES

Case No. CVCV053090

Plaintiffs' Petition was filed March 20, 2023.

Defendant's Motion To Dismiss or Strike was filed April 17, 2023.

Plaintiffs' Resistance To Defendant's Motion To Dismiss was filed April 26, 2023.

Defendant's Reply to Plaintiffs' Resistance To Defendant's Motion To Dismiss Or Strike was filed May 3, 2023.

Plaintiffs' Response To Defendant's Reply To Plaintiffs' Response To Defendant's Motion To Dismiss Or Strike was filed May 10, 2023.

Defendant's Motion To Strike Plaintiffs' Response was filed May 12, 2023.

Plaintiffs' Resistance To Defendant's Motion To Strike was filed May 15, 2023.

Defendant's Supplement To Its Motion To Dismiss Or Strike was filed June 20, 23023.

Plaintiffs' Response To Defendant's Supplement To Its Motion To Dismiss Or Strike was filed June 27, 2023.

Defendant's Reply To Plaintiffs' Response To IDOT's Supplement To The Motion To Dismiss Or Strike was filed June 29, 2023.

Dismissal of Court was filed August 1, 2023.

Notice of Appeal was filed September 27, 2023.

Combined Certificate was filed September 27, 2023.

Case No. CVCV053167

Plaintiffs' Petition was filed May 2, 2023.

Defendant's Motion To Dismiss Or Strike was filed May 24, 2023.

Defendant's Certified Record.

Plaintiffs' Resistance To Defendant's Motion To Dismiss Or Strike was filed June 2, 2023.

Defendant's Reply To Plaintiffs' Resistance To Defendant's Motion To Dismiss Or Strike was filed June 8, 2023.

Defendant's Supplement To Defendant's Motion To Dismiss Or Strike was filed June 20, 2023.

Plaintiffs' Response To IDOT's Supplement To Its Motion To Dismiss Or Strike was filed June 27, 2023.

Defendant's Reply To Plaintiffs' Response To IDOT's Supplement To Defendant's Motion To Dismiss Or Strike was filed June 29, 2023.

Dismissal of Court was filed August 1, 2023.

Notice of Appeal was filed September 27, 2023.

Combined Certificate was filed September 27, 2023.

STATEMENT OF FACTS

The Plaintiffs-Appellants (hereinafter referred to as Brendelands) own land in the southwest quadrant of the intersection of I-35 and Highway 210 (Hwy 210) in Story County, Iowa. CVCV053090 Pet. Par. 1. App. P. 8.

From May 2022 through February 20, 2023, Merle Brendeland had conversations with IDOT personnel that the Brendeland property, after the condemnation of a portion of the Brendeland property for the IDOT ramp reconstruction project for the intersection of I-35 and Hwy 210, would have a commercial entrance to Hwy 210 west of Station 1035 to Hwy 210 which would be 1,000 feet from the ramp's new bifurcation point at said intersection. CVCV053090 Pet. Par. 2. App. P. 8.

Bayer Research and Development Services, LLC owns the land in the northwest quadrant of the intersection of I-35 and Hwy 210 and has a commercial entrance to Hwy 210 which will be 600 feet from the ramp's new bifurcation point at said intersection. CVCV053090 Pet. Par. 20. App. P. 11.

Kum & Go owns the land in the southeast quadrant of the intersection of I-35 and Hwy 210 and has a commercial entrance to Hwy 210 which will be 600 feet

from the ramp's new bifurcation point at said intersection. CVCV053090 Pet. Par. 21. App. P. 11.

Hale Trailer owns the land in the northeast quadrant of the intersection of I-35 and Hwy 210 and has a commercial entrance to Hwy 210 which will be 600 feet from the ramp's new bifurcation point at said intersection. CVCV053090 Pet. Par. 21. App. P. 11.

As part of the IDOT's ramp reconstruction project for the intersection of I-35 and Hwy 210, the IDOT is allowing the commercial entrance to Hwy 210 for the Bayer, Kum & Go, and Hale Trailer properties to still have their commercial entrances which will be at 600 feet from the ramp's new bifurcation point at the intersections. CVCV053090 Pet. Par. 20, 21, 22, and 23. App. P. 11.

As a part of the IDOT's ramp reconstruction project for the intersection of I-35 and Hwy 210, the IDOT is not allowing the Brendeland property to have any commercial entrance to Hwy 210. CVCV053090 Pet. Par. 7. App. P. 9.

As a part of the IDOT's ramp reconstruction project for the intersection of I-35 and Hwy 210, the IDOT is not acquiring the commercial access rights to Hwy 210 at 600 feet from the ramp's new bifurcation point at the intersection of I-35 and Hwy 210 from the Bayer, Kum & Go, and Hale Trailer properties. CVCV053090 Pet. Par. 20, 21, 22, and 23. App. P. 11.

As a part of the IDOT's ramp reconstruction project for the intersection of I-35 and Hwy 210, the IDOT is acquiring all commercial access rights of the Brendeland property to Hwy 210. CVCV053090 Pet. Par. 7. App. P. 9.

The IDOT has a policy against entrances to a primary highway being offset from one and another. CVCV053167 Pet. Par. 15. App. P. 203. IDOT's Declaratory Order, Exhibit 2, P. 6. CVCV053167 Pet. App. P. 215.

As a part of the IDOT's ramp reconstruction project, the IDOT is not allowing the Brendeland property to have a commercial entrance across Hwy 210 from the Bayer commercial entrance which will be 600 feet from the new ramp's bifurcation point, and which would be in accord with the IDOT's policy of not having offsetting entrances. CVCV053167 Pet. Par. 15, Exhibit 1 IDOT's Declaratory Order and Defendant's Motion To Dismiss Or Strike, PP. 11-12 and Exhibit D. § 112.5(3)(c). App. PP. 203, 215, 28-29, and 81-82.

The Brendelands also raise the issue of an excessive taking, attempting to take more property rights than is necessary for the IDOT ramp reconstruction project in Case No. CVCV053167 as follows:

> "7. The DOT's Declaratory Order fails to apply the requirement that a condemning authority is to condemn/take only the minimum property rights necessary for the project at hand.
>
> Section 6A.3(1)(g), Code of Iowa, requires 'A showing of the minimum amount of land necessary to achieve the public purpose and the amount of land to be acquired by condemnation for the public improvement.'

> '[T]he company (condemnor) is not the judge of the existence of the necessity, or of the character of the use;
> . . .
> The principle upon which such companies (the DOT in this case) are allowed to condemn is not that they may do what they please but that they may do what is (the minimum) reasonably necessary to carry out the public purpose for which the land is taken.
> . . .
> The law does not favor the taking of property for public use beyond the necessity of the case.' (Parentheses added in second paragraph.) Vittetoe v. Iowa Southern Utilities Co., 123 N.W.2d 878, 882 (Iowa 1963).

The issue is what is the minimum taking that is necessary 'for the public improvement'. The issue is what is the minimum taking that is necessary for the project subject public improvement, i.e., what is the minimum taking necessary to reconstruct the I-35 and Highway 210 interchange. The condemning authority, the DOT, cannot acquire what might be desirable at some time in the future.

The issue in this matter is what is the minimum taking of the Petitioners' property rights by condemnation that is necessary for the DOT's Interstate 35 (I-35) / Highway 210 intersection reconstruction project. The issue is not what the DOT is compelled to provide to the Petitioners, which is what the DOT's Declaratory Order talks about.

8. The DOT's Declaratory Order attempts to distort the issue to what the DOT is 'compelled' to provide to the Petitioners. The issue is what is the minimum taking of property rights from the Petitioners' property adjoining Highway 210 in the southwest quadrant of the intersection of I-35 and Highway 210 necessary for the DOT's I-35 and Highway 210 intersection reconstruction project.
The Bayer, Kum & Go, and Hale Trailer properties adjoining Highway 210 in the other three quadrants of the intersection of I-35 and Highway 210 all have commercial accesses 600 feet from the ramp bifurcation point.

The Petitioners understand that the minimum acquisition of access rights necessary to the DOT's I-35 and Highway 210 intersection reconstruction project is 600 feet from the ramp bifurcation point. 761 IAC § 112.5(5)(f) provides:

> 'For any new interchange reconstruction, access rights should be acquired and extend a minimum of 600 feet away from the ramp bifurcation point.' It is noted that 600 feet is the length of two football fields.
>
> If more than 600 feet of access rights is necessary for the reconstruction of the I-35 and Highway 210 intersection, the DOT should and would be acquiring additional access rights from the Bayer, Kum & Go, and Hale Trailer properties." App. PP. 199-200.
>
> "The DOT can reconstruct the I-35 and Highway 210 interchange with the acquisition of 600 feet of access rights from the ramp bifurcation point from the Petitioners' land that adjoins Highway 210. This is true because the DOT can, and will, reconstruct the I-35 and Highway 210 interchange with the adjoining Bayer, Kum & Go, and Hale Trailer lands that adjoin Highway 210 having commercial accesses that are 600 feet from the ramp bifurcation point.
>
> 1,000 feet of access rights from the Petitioners' property is not needed to reconstruct the I-35 and Highway 210 interchange. The acquisition of 1,000 feet of access rights from the ramp bifurcation point from the Petitioners' land is invalid because it is in excess of the minimum amount of 600 feet of access rights necessary for the reconstruction of the I-35 and Highway 210 interchange." CVCV053167 Pet. Par. 11, P. 6. App. P. 202.

The IDOT served Brendeland on January 29, 2023 with a Notice of Condemnation scheduled for March 21, 2023 at 9:00 AM. CVCV053090 Pet. Par. 3. App. P. 8.

The IDOT Notice of Condemnation does not state that all commercial access to Highway 210 will be taken from the Brendeland property. IDOT's Notice of Condemnation shows an intent to take 1,000 feet of access right up to Station 1035+00.00 from the Brendeland property, which is consistent with Merle Brendeland's understanding that the Brendeland property will have commercial

access to Highway 210 immediately west of Station 1035+00.00. The IDOT Notice of Condemnation does not state that the Brendeland property will not be allowed to have any commercial access to Highway 210. Case No. CVCV053167 Pet. Exhibit 2. App. PP. 230-236.

On February 21, 2023, Merle Brendeland happened to be speaking with Brian Whaley with the IDOT, who told Merle that the Brendeland property would not be allowed to have a commercial entrance to Hwy 210, which was a surprise to Merle. CVCV053090 Pet. Par. 5. App. P. 9.

On February 23, 2023, an email was sent to the IDOT asking to meet to discuss the commercial entrance issue to see if it was true that the Brendeland property was not going to be allowed to have any commercial access to Hwy 210, and to discuss other issues. CVCV053090 Pet. Par. 6. App. P. 9.

It was not until March 8, 2023, 36 days after Brendeland was served with the Notice of Condemnation on January 29, 2023, that the IDOT responded to the February 23, 2023 email that the IDOT was not going to allow the Brendeland property to have a commercial entrance to Hwy 210. CVCV053090 Pet. Par. 6. App. P. 9.

ARGUMENT

Issue I
The District Court Erred in Ruling That Section 6A.24, Code of Iowa, Is Brendelands' Exclusive Remedy

A. Preservation of Error: This issue was preserved for appellate review by the Plaintiffs' Notice of Appeal. The District Court Ruling being appealed was issued August 1, 2023. The Notice of Appeal was filed with the Clerk of the Iowa Supreme Court on August 23, 2023. The Appellants received the Iowa Supreme Court Case No. 23-1356 on August 29, 2023 from the Supreme Court. Appellants' attorney was not aware that the Notice of Appeal had not also been filed with the District Court Clerk of Court at the same time the Notice of Appeal was filed with the Clerk of the Iowa Supreme Court. It is unknown why the Notice of Appeal was not filed with the District Court Clerk that same date that the Notice of Appeal was filed with the Clerk of the Iowa Supreme Court.

Appellants' attorney, on September 18, 2023, had his secretary call the office of the Clerk of Court of the Iowa Supreme Court about a Notice of Briefing Deadline because none had been received. The secretary of Appellants' attorney was told that no Notice of Briefing Deadline had been issued but one should be issued soon. There was no mention of any issue pertaining to this appeal.

Appellants' attorney was unaware that the Notice of Appeal had not been filed with the District Court Clerk until September 27, 2023 when this Court's

September 26, 2023 Order was received. Immediately on September 27, 2023, the Notice of Appeal was filed with the District Court Clerk.

Not filing the Notice of Appeal with the District Court Clerk until September 27, 2023 was unintentional and inadvertent.

Iowa r. App. P. 6.101(4) and Iowa R. Civ. P. 1.442(4) provide that the time for filing a notice of appeal with the district court clerk is tolled when the notice is served, provided the notice is filed with the district court clerk within a reasonable time.

The Notice of Appeal was filed with the District Court Clerk the same day that the Supreme Court Order was received. The Notice of Appeal was filed with the District Court Clerk on September 27, 2023, which is 27 days after the last day provided for filing a Notice of Appeal from the District Court's August 1, 2023 Ruling.

The Appellant's attorney, on October 3, 2023, requested that this Court toll the time to September 27, 2023 for filing the Notice of Appeal and Combined Certificate with the Story County Clerk of Court.

The Brendelands have a significant legal issue of their property rights that needs to be protected and ruled upon by this Court.

B. Scope of Review: On review of a motion to dismiss, the appellate court reviews for corrections of errors at law. Wertzberg v. City of Des Moines, 923 N.W.2d 200, 211 (Iowa 2018).

Iowa Common Law

C. Argument: The Iowa Common Law is the body of law based on court decisions rather codes or statutes. The Iowa Common Law / the Iowa Case Law since at least 1948 has been that a property owner has the right to challenge a condemnation as being excessive, that the condemning authority is attempting to take more property rights than is necessary for the project. The following cases establish the Iowa Common Law right of a property owner to challenge a condemnation as being excessive.

> "Under Code section 489.14 defendant is 'vested with the right of eminent domain to such extent as may be necessary ***.'
> The principle upon which such companies are allowed to condemn is not that they may do what they please but that they may do what is reasonably necessary to carry out the public purpose for which the land is taken. Anything beyond this is not the taking of private property for public use but for private use.
> . . .
> The law does not favor the taking of property for public use beyond the necessities of the case." (Emphasis added.) De Penning v. Iowa Power & Light Co., 33 N.W.2d 503, 507 (Iowa 1948).

> "But we think that the constitution impliedly forbids the taking for public use of what is not necessary for such use and, therefore, though the constitution and statute are silent on the subject of necessity, that the power to take is, in every case, limited to such and so much property as is necessary for the public use in question, and that the owner is entitled, either in the proceedings to condemn or otherwise, to be heard upon this question. 'Necessity and a public

use must, in all cases, exist as a condition precedent to the legal right to enforce the remedy given to condemn, and the company (condemnor) is not the judge of the existence of the necessity, or of the character of the use; ***'
. . .
This from De Penning v. Iowa Power & Light Co., 239 Iowa 950; 956-957, 33 N.W.2d 503, 507, 5 A.L.R.2d 716, has some application: 'Under Code section 489.14 defendant is "vested with the right of eminent domain to such extent as may be necessary ***.'
'The principle upon which such companies are allowed to condemn is not that they may do what they please but that they may do what is reasonably necessary to carry out the public use for which the land is taken. Anything beyond this is not the taking of private property for public use but for private use. (citations) ***.'
'The law does not favor the taking of property for public use beyond the necessities of the case ***.'" Vittetoe v. Iowa Southern Utilities Co., 123 N.W.2d 878, 881-882 (Iowa 1963).

"In Vittetoe v. Iowa Southern Utilities Co., 255 Iowa at 809-810, 123 N.W.2d at 880-881, this court stated:
'This disagreement between the parties here is not over the question whether distribution of electricity to the public is a public use. Their disagreement relates to whether the particular property sought to be condemned is necessary for the proposed use. To authorize the condemnation of any particular land by a grantee of the power of eminent domain, a necessity must exist for the taking thereof for the proposed uses and purposes.'
. . .
Here plaintiffs alleged the taking of their land was not necessary for the public use at the time plaintiffs instituted this action seeking an injunction. Since it was unnecessary its taking deprived them of their property without due process of law in violation of the constitutions of the United States and Iowa. They alleged defendant had no legal or constitutional right to take property by condemnation unless the property is shown to be necessary for the governmental purposes of defendant. These two allegations coupled with plaintiffs' factual allegations are sufficient to allow a suit for injunction under the reasoning of Gardner, Vittetoe and section 471.4, The Code.

It is clear the trial court did not consider plaintiffs' necessity issue." Mann v. City of Marshalltown, 265 N.W.2d 307, 314 (Iowa 1978).

"Thus, Iowa law imposes two requirements before a city may invoke its powers of eminent domain: (1) the property must be taken for a public use; and (2) the taking must be reasonable and necessary. See Vittetoe v. Iowa S. Utils. Co., 255 Iowa 805, 809-10, 123 N.W.2d 878, 880-81 (1963)." Comes v. City of Atlantic, 601 N.W.2d 93, 95-96 (Iowa 1999).

"At the urging of the county, we first consider whether this case may be decided entirely on the basis that the plaintiff did not sustain an irreparable injury. We are convinced that it may not.
The district court believed that the payment of compensation (subject to challenge by a court or jury) was the legally established 'certain pecuniary standard' for measuring plaintiffs' loss and thus must be considered to be an adequate remedy. We disagree. The need to show an irreparable injury in order to obtain injunctive relief involves the balancing of interests by a court of equity. Meyers v. Caple, 258 N.W.2d 301, 304-05 (Iowa 1977) Irreparable injury for such purposes is equated with the threat of substantial damage unless an injunction is granted. Id. at 305. We are satisfied that because land is unique the taking of real property with which the owner does not wish to part is a matter of substantial damage.
This court has invited the use of injunction action as a vehicle for challenging eminent-domain proceedings on the ground that they are contrary to law because such contentions may not be raised in the statutory appeal of the award. Thornberry v. State Bd. of Regents, 186 N.W.2d 154 (Iowa 1971). In Thornberry we held that a challenge to the condemning entity's authority to invoke eminent domain could not be raised in the appeal of an award. Id. at 157. We went on to state:
This does not mean, however, there is no available avenue by which a condemnee may test the initiatory action of a condemning public body.
On several occasions we have held, injunctive relief is available." In Re Condemnation of Certain Rights, 666 N.W.2d 137, 138-139 (Iowa 2003).

"A condemnee may test the initiating action of the condemnor by injunctive action, mandamus, and certiorari." Thompson v. City of Osage, 421 N.W.2d 529, 531 (Iowa 1988).

"Additionally, a condemnee may challenge the initiating action of the condemner by injunction, mandamus, and certiorari. Thompson v. City of Osage, 421 N.W.2d 529, 531 (Iowa 1988). These remedies give the condemnee a procedural vehicle to promptly challenge the propriety of the condemnation, including the issue whether the property sought to be

condemned is necessary for public use. Id. at 532. ." Owens v. Brownlie, 610 N.W.2d 860, 865-866 (Iowa 2000).

As shown by the above Iowa Case Law, the Iowa Common Law, since at least 1948, has been that a property owner has the right to challenge a condemnation as being excessive.

No Abrogation of Common Law

A statute that creates a right not known at Common Law, is an exclusive right. If a statute states that it abrogates or supersedes the existing Common Law right, it would be the exclusive remedy.

Section 6A.24, Code of Iowa, was enacted by the Iowa Legislature effective July 14, 2006. Section 6A.24, Code of Iowa, does not state that it abrogates or supersedes the Iowa Common Law right of a property owner to challenge a condemnation as being excessive, that the condemnation is attempting to acquire more property rights than is necessary for the project. Section 6A.24, Code of Iowa, does not create a right that was unknown at common law.

> "This section does not create a new right or a new liability. It merely provides a new remedy for an already existing right. *** The general rule is that such remedy is not to be regarded as exclusive, but as an additional remedy. When a statute gives a new and affirmative remedy, but does not negate, expressly or impliedly, any existing remedies, the new remedy is to be considered merely cumulative.'
> In C.J.S., Actions, § 6c, the rule is stated: 'Where a statute merely prescribes a new remedy for a preexisting right or liability, such new remedy is merely cumulative, unless the statute shows an intention to abrogate or supersede the old remedy.'" Lodge v. Drake, 51 N.W.2d 418, 419-420 (Iowa 1952).

"Secondly, a further reason that justifies our holding today is the rule of construction that when a statute gives a right and creates a liability unknown at common law and at the same time points to a specific method by which that liability can be ascertained and the right assessed, this method must be strictly pursued.

. . .

This section provides a specific remedy for a right that was not recognized at common law." (Emphasis added.) Snyder v. Davenport, 323 N.W.2d 225, 227 (Iowa 1982).

"According to another rule, when a statute grants a new right and creates a corresponding liability unknown at common law and at the same time points to a specific method for enforcement of the new right, this method must be pursued exclusively. Snyder v. Davenport, 323 N.W.2d 225, 227 (Iowa 1982); Lodge v. Drake, 243 Iowa 628, 531, 51 N.W.2d 418, 419-20 (1952) (stating the converse rule that when a statute merely prescribes a new remedy for a preexisting right or liability, such new remedy is deemed cumulative, unless the statute shows an intention to abrogate or supersede the old remedy)." (Emphasis added.) Van Baale v. City of Des Moines, 550 N.W.2d 153, 155 (Iowa 1996).

'"[W]hen a statute grants a new right and creates a corresponding liability unknown at common law, and at the same time points to a specific method for enforcement of the new right, this method must be pursued exclusively.' Van Baale, 550 N.W.2d at 155." (Emphasis added.) Lamb v. Time Ins. Co., (Iowa App. 2011), p.9.

'"[W]hen a statute grants a new right and creates a corresponding liability unknown at common law, and at the same time points to a specific method for enforcement of the new right, this method must be pursued exclusively.' Walthart v. Bd. of Dirs. Of Edgewood-Colesburg Cnty. Sch. Dist., 667 N.W.2d 873, 878 (Iowa 2003) (quoting Van Baale v. City of Des Moines, 550 N.W.2d 153, 155 (Iowa 1996))." (Emphasis added.) Dautovic v. Bradshaw, No. 0-937, No. 09-1763 (Iowa App. mar. 21, 2011), p. 6.

Section 6A.24, Code of Iowa, does not create a new right that was unknown at common law. Again, since 1948 the cases of De Penning, Vittetoe, Mann, Thompson, Comes, Owens, and In Re Condemnation hold that the Iowa Common

Law is that a property owner has the right to challenge a condemnation as being excessive. Also, Section 6A.24, Code of Iowa, does not state that it abrogates or supersedes the existing Iowa Common Law that it is a property owner's right to challenge a condemnation as being excessive, which the Lodge and Van Baale cases require for a statute to become the exclusive right.

The case of Castles Gate Homeowner's Ass'n v. K. & L. Props., 22-0286 (Iowa App. Feb. 2023) affirms (a) that Section 6A.24 does not create a new right unknown at common law; (b) that Section 6A.24 does not abrogate or supersede Iowa Common Law that a property owner has the right to challenge a condemnation as being excessive; and (c) that Section 6A.24 is merely a new remedy for a preexisting right to challenge a condemnation as being excessive, with the cumulative remedies of (1) shifting the burden of proof onto the condemning authority, and of (2) the possibility of recovering attorney fees under Section 6A.24(3), Code of Iowa, if the property owner is successful in the challenge.

Section 6A.24(3), Code of Iowa, states as follows:

> "3. For any action brought under this section, the burden of proof shall be on the acquiring agency to prove by a preponderance of the evidence that the finding of public use, public purpose, or public improvement meets the definition of those terms. If a property owner or a contract purchaser of record or a tenant occupying the property under a recorded lease prevails in an action brought under this section, the acquiring agency shall be required to pay the costs, including reasonable attorney fees, of the adverse party."

The Castles Gate case states "we also consider the purpose of Section 6A.24(1), see Burnham, 568 N.W.2d at 811, which is to provide a statutory avenue for property owners to 'bring an action challenging the exercise of eminent domain authority or the condemnation proceeding.'" Id. at page 7.

The case does not say that Section 6A.24:

- "is the statutory avenue"; (Emphasis added.)
- "is the exclusive avenue";
- "is the sole avenue".

Instead, the 2023 Castles Gate case is consistent with Iowa Common Law giving a property owner the right to challenge a condemnation as being excessive with Section 6A.24, Code of Iowa, being cumulative to that Iowa Common Law right by adding the remedies of shifting the burden of proof to the condemning authority, and the possibility of the property owner recovering attorney fees if successful.

Footnote 2 of the Castles Gate case states as follows:

> "This statutory right was added by amendments to the condemnation statues in 2006. See 2006 Iowa Acts ch. 1001, §§ 5,11. Before those amendments, owners 'wishing to challenge issues regarding the propriety of condemnation' had to resort to 'the traditional procedural vehicles' of injunction, mandamus, and certiorari. … accord Owens, 610 N.W.2d at 865-66."

The footnote does not say that "the traditional procedural vehicles" of injunction, mandamus, and certiorari are abrogated or superseded, nor that they are

no longer available to a property owner. Instead, the footnote states "accord Owens, 610 N.W.2d at 865-66.", which shows that the Owens case and the Iowa Common Law right of a property owner to challenge a condemnation as being excessive is in full force and effect.

The Owens case holds:

> "Additionally, a condemnee may challenge the initiating action of the condemnor by injunction, mandamus, and certiorari. Thompson v. City of Osage, 421 N.W.2d 529, 531 (Iowa 1988). These remedies give the condemnee a procedural vehicle to promptly challenge the propriety of the condemnation, including the issue whether the property sought to be condemned is necessary for public use. Id. at 532." (Emphasis added.) Id. at 610 N.W.2d 865-866.

The Brendelands are challenging the IDOT's condemnation as being excessive in accord with the Owens, Thompson, and Castles Gate cases, and the other Iowa Common Law cases of De Penning, Vittetoe, Mann, Comes, and In Re Condemnation. This Iowa Common Law right of a landowner to challenge a condemnation as being excessive preexisted Section 6A.24, Code of Iowa, and is not abrogated or superseded by Section 6A.24, Code of Iowa.

Section 6A.24, Code of Iowa, does not show an intention to abrogate or supersede the existing Iowa Common Law right of a property owner to challenge a condemnation as being excessive. Lodge v. Drake, 51 N.W.2d 418, 419-420 (Iowa 1952), Van Baale v. City of Des Moines, 550 N.W.2d 153, 155-156 (Iowa 1996),

Castles Gate Homeowner's Ass'n v. K & L Props., 22-0286 (Iowa App. Feb. 08, 2023), p. 7, and footnote 2.

Section 6A.24 is not the Brendelands' exclusive remedy as erroneously ruled by the District Court.

The District Court erred in relying upon the case of Johnson Propane, Heating, & Cooling, Inc. v. Iowa Dep't of Transp., 891 N.W.2d 220 (Iowa 2017) as authority that Section 6A.24 is the Brendelands' exclusive remedy in this case.

The Johnson case involved the issue of an "uneconomic remnant requiring the IDOT to condemn the property in its entirety". Id. at 891 N.W.2d 225. Our present case does not involve an uneconomic remnant issue. The significant and controlling issue factor in the Johnson case is that there is no existing Iowa Common Law that gives a property owner a right to claim that an uneconomic remnant would require the IDOT to condemn the entire property.

The right of the owner of an uneconomic remnant was created by the Laws of The Seventy-Third G. A. 1989 Session, which has been codified as 1989 Iowa Code Supplement § 472.54, then 1993 Code of Iowa § 6B.54, and now Section 6B.54(8), Code of Iowa. There was no Iowa Common Law right for a property owner claim that an uneconomic remnant required the IDOT to condemn the entire property.

However, to the contrary, the Iowa Common Law gives a property owner the right to challenge a condemnation as being excessive. Section 6A.24 did not create

a new right unknown at Common Law for a property owner to challenge a condemnation as being excessive. Section 6A.24 does not show an intention to abrogate nor supersede the Iowa Common Law right of a property owner to challenge a condemnation as being excessive. Section 6A.24 does not say that it is a property owner's exclusive remedy. Section 6A.24 is cumulative to the Iowa Common Law right of a property owner to challenge a condemnation as being excessive.

Excessive Taking

Beyond the issue of 6A.24, Code of Iowa, not being the Brendelands' exclusive remedy, is the rule of law that the IDOT as a condemning authority cannot condemn more property rights than are necessary for the project, i.e., for the ramp reconstruction project for the intersection of I-35 and Hwy 210.

Section 6B.3(1)(g), Code of Iowa, requires "A showing of the minimum amount of land necessary to achieve the public purpose and the amount of land to be acquired by condemnation for the public improvement." (Emphasis added.) The De Penning, Vittetoe, Mann, Comes, In Re Condemnation, Thompson, and Owens cases are the Iowa Common Law that gives a property owner the right to challenge a condemnation as being excessive, that the condemning authority is attempting to take more property rights than are necessary for the project.

Since the IDOT is not taking access right to eliminate the commercial entrances to Hwy 210 from the Bayer, Kum & Go, and Hale Trailer properties at 600 feet from the new ramp's bifurcation point at the intersection, it is not necessary for the IDOT to acquire access rights from the Brendeland property at or past 600 feet from the new ramp's bifurcation point at the intersection.

If the acquisition of access rights at or past 600 feet from the ramp's bifurcation point at the intersection was necessary for the IDOT ramp reconstruction project, then the IDOT would have acquired access rights at or past 600 feet from the Bayer, Kum & Go, and Hale Trailer properties.

The acquisition of access rights at or past 600 feet from the Brendeland property, therefore, is not necessary for the IDOT reconstruction project. The IDOT's acquisition of access rights at or past 600 feet from the ramp's new bifurcation point at the intersection is not necessary and is an attempted excessive condemnation.

As stated in Plaintiffs' Resistance To IDOT's Motion To Dismiss Or Strike in Case No. CVCV053167:

> "The Brendelands have had negotiations with Kwik Trip/Kwik Star for it to develop their property in the southwest quadrant of the intersection based on having commercial access to Highway 210."

As shown in paragraph 9 of the Petition in Case No. CVCV053167, Brendeland's Petition For Declaratory Order of the IDOT asked the following:

> "Interpretation Urged
> It would be equal treatment for the Bayer, Kum & Go, and Hale Trailer, and the Brendeland properties to all have commercial access to Highway 210 at 600 feet from the ramp bifurcation point.
> It would be equal treatment for the Bayer and Brendeland properties to have opposite commercial access entrances to Highway 210 at 600 feet or at 1,000 feet from the ramp bifurcation point.
> The minimum access rights to be acquired from the Brendeland property is 600 feet from the ramp bifurcation point as stated in 761 IAC Section 112.5(5)(f)." App. P. 200.

The DOT, on page 10 of its Declaratory Order, which is Exhibit 2 of the Petition in Case No. CVCV053167, states:

> "This (the taking of 1,000 feet of access rights from the Bayer property) would not serve a public purpose and it would be violative of Iowa Code Section 6B.3(1)(g) (only the minimum amount of property needed is to be taken by condemnation)." App. P. 219.

The Brendelands, in paragraph 13 of the Petition in Case No. CVCV053167, state:

> "That is the Petitioners' point in regard to the DOT intending to take 1,000 feet of access rights from the Petitioners' property on the south side of Highway 210 for the DOT's I-35 / Highway 210 reconstruction project – it does not serve a public purpose and it would be violative of Iowa Code Section 6B.3(1)(g) (only the minimum amount of property needed be taken by condemnation)." App. PP. 202-203.

The IDOT admits that the taking of 1,000 feet of access rights from the Bayer property would not serve a public purpose and would be violative of Iowa Code Section 6B.3(1)(g).

Likewise, the IDOT's attempt to condemn access rights from the Brendeland property in excess of 600 feet from the new ramp's bifurcation point at the

intersection is excessive, does not serve a public purpose, would be violative of Sectio 6B.3(1)(g), Code of Iowa, and would be violative of the Iowa Common Law found in the De Penning, Vittetoe, Mann, Comes, In Re Condemnation, Thompson, and Owens cases.

The IDOT incorrectly and improperly wants to focus on a possible twenty (20) year projection in its administrative rule 761 IAC 112.5(5)(f) in regard to the Brendeland property. However, the IDOT ignores 761 IAC 112.5(5)(f) in regard to the Bayer, Kum & Go, and Hale Trailer properties and allows them to still have commercial entrances to Hwy 210 at 600 feet from the new ramp's bifurcation point at the intersection.

The IDOT fails to recognize that it is limited to acquiring what is necessary at this time for its ramp reconstruction project at the intersection of I-35 and Hwy 210. The IDOT is leaving commercial entrances of the Bayer, Kum & Go, and Hale Trailer properties to Hwy 210 at 600 feet from the new ramp bifurcation point. That shows that it is not necessary for the IDOT to acquire commercial access of the Brendeland property to Hwy 210 at or beyond 600 feet from the new ramp bifurcation point for its ramp reconstruction project, because it is not acquiring access from the Bayer, Kum & Go, and Hale Trailer properties at 600 feet from the new ramp bifurcation point for its ramp reconstruction project.

If access rights at 600 feet from the new ramp bifurcation point from the Bayer, Kum & Go, and Hale Trailer properties is not necessary to construct the IDOT's new ramp project, acquiring access rights at or beyond 600 feet from the new ramp bifurcation point from the Brendeland property is not necessary to construct the IDOT's new ramp project.

The IDOT wants Section 6A.24, Code of Iowa, to limit a property owner's preexisting Iowa Common Law right to challenge a condemnation as being excessive. Property rights are protected under Article I Section 18 of the Iowa Constitution. Due process is protected under Article I Section 9 of the Iowa Constitution.

Section 6A.24, Code of Iowa, as shown by the Castles Gate case is "a statutory avenue" to supplement a property owner's Iowa Common Law right to challenge a condemnation as being excessive by the existing procedural vehicles of injunction, mandamus, and certiorari in accord with Owens, 610 N.W.2d at 265-66. The Castles Gate case does not hold that the existing vehicles (in Iowa Common Law) of injunction, mandamus, and certiorari can no longer be used. Neither Section 6A.24, Code of Iowa, nor the Castles Gate case show nor hold that Section 6A.24 abrogates or supersedes a property owner's Iowa Common Law right to challenge a condemnation as being excessive.

Brendeland's Count I in Case No. CVCV053090 is that the IDOT's condemnation is a violation of due process. The IDOT's taking of all commercial access to Hwy 210 from the Brendeland property is a violation of due process when the IDOT allows commercial access to Hwy 210 for the Bayer, Kum & Go, and Hale Trailer properties at 600 feet from the ramp bifurcation point at the intersection of I-35 and Hwy 210. The taking of all commercial access rights to Hwy 210 from the Brendeland property is unnecessary and excessive when the IDOT allows commercial access to Hwy 210 from the Bayer, Kum & Go, and Hale Trailer properties at 600 feet from the ramp bifurcation point, as alleged in Count II of Brendelands' Case No. CVCV053090.

It is noted that the IDOT served notice on the Brendelands on January 29, 2023 of the condemnation hearing on March 21, 2023. The notice did not inform Brendelands that their property would not be allowed any commercial entrance to Hwy 210. On February 21, 2023, Merle Brendeland happened to be told by an IDOT employee that the Brendeland property would not be allowed to have a commercial entrance to Hwy 210. IDOT's Notice of Condemnation served on the Brendelands on January 29, 2023 did not say that the Brendeland property would not be allowed any commercial access to Highway 210. IDOT's Notice of Condemnation stated it intended to acquire access rights to Station 1035+00.00, which is 1,000 feet from the new ramp's bifurcation point. But, IDOT's Notice of Condemnation did not say the

Brendeland property would not be allowed any commercial access to Highway 210. An email was sent to the IDOT on February 3, 2023 asking to meet to see if the IDOT, in fact, was not going to allow the Brendeland property to have a commercial entrance to Hwy 210. No response was made by the IDOT until March 8, 2023, 36 days after the notice of condemnation was served on the Brendelands.

Was the response from the IDOT purposely made more than 30 days after the condemnation notice was served on the Brendelands? Prior to the IDOT's response on March 8, 2023, Brendelands had no factual basis that indeed the IDOT did not intend to allow the Brendeland property to have any commercial access to Hwy 210.

That is why the Brendelands' Petition in Case No. CVCV053090 has the following counts:

> Count I. Unconstitutionality. That the IDOT's proceedings are in violation of the due process clauses of the Federal and State Constitutional provisions of due process.
>
> Count II. Injunction. That the IDOT's attempted condemnation is an excessive taking, citing Vittetoe v. Iowa Southern Utilities Co., 123 N.W.2d 878, 884 (Iowa 1963).
>
> Count III. Discovery Date Rule. A Section 6A.24 Claim based on the discovery date of March 8, 2023, with the 30 days' time period of 6A.24 beginning March 8, 2023. The Plaintiffs' Petition in Case No. CVCV053090 was filed March 20, 2023, one day before the March 21, 2023 condemnation and twelve days after the IDOT's email dated March 8, 2023.
>
> Count IV. Certiorari.
>
> Count V. Jurisdiction. That the Injunction Count is not subject to the administrative remedy rule because that rule is not applicable in this case

because it does not provide an adequate remedy at law. See In Re Condemnation Of Certain Rights, 666 N.W.2d 137, 138-139 (Iowa 2003); Salsbury Laboratories v. Iowa Dept. of Environmental Quality, 276 N.W.2d 830, 837 (Iowa 1979); and City of Des Moines v. City Development Bd., 633 N.W.2d 305, 309 (Iowa 2001).

The Brendelands also on March 20, 2023 filed a Petition For Declaratory Order with the IDOT, which is the subject of Case No. CVCV053167.

CONCLUSION

The Ruling of the District Court that Section 6A.24, Code of Iowa, is the Brendelands' exclusive remedy in this case is erroneous and should be overruled and reversed, with the case being remanded for trial.

REQUEST FOR ORAL ARGUMENT

The Plaintiffs-Appellants reassert their request for oral arguments in this matter.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This Appellants' Final Brief and Request For Oral Argument complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Appellants' Proof Brief and Request For Oral Argument contains 8,657 words, excluding the parts of the Proof Brief and Request For Oral Argument exempted by Iowa R. App. P. 6.903(1(g)(1).

2. This Appellants' Final Brief and Request For Oral Argument complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Appellants' Final Brief and Request For Oral Argument has been prepared in a proportionally spaced typeface using Microsoft Word in Size 14 font.

Dated this 22nd day of January, 2024.

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CERTIFICATE OF FILING AND SERVICE

I, Robert W. Goodwin, hereby certify that I electronically filed the foregoing Appellants' Final Brief and Request For Oral Argument with the Clerk of the Iowa Supreme Court, on January 22, 2024.

I, Robert W. Goodwin, hereby further certify that on January 22, 2024, I served the foregoing Appellants' Final Brief and Request For Oral Argument, by the electronic filing system, to the following attorneys of record:

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