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' AMENDED REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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Issue I
Section 6A.24, Code of Iowa, Is Not Brendelands' Exclusive Remedy

A. Preservation of Error: This issue was preserved for appellate review by the Plaintiffs' Notice of Appeal. Iowa R. App. P. 6.101(4) provides: "The time for filing a notice of appeal is tolled when the notice is served, provided the notice is filed with the district court clerk within a reasonable time. *See Iowa R. Civ. P. 1.442(4)*."

Iowa R. Civ. P. 1.442(4) in pertinent part also provides:

> "Whenever these rules or the rules of appellate procedure require a filing with the district court or its clerk within a certain time, the time shall be tolled when service is made, provided the actual filing is done within a reasonable time thereafter."

The District Court Ruling On Defendants' Motion To Dismiss, which is appealed in this case, was filed August 1, 2023. The thirty (30) days to file a Notice of Appeal was August 31, 2023. The Brendelands filed their Notice of Appeal with the Clerk of the Iowa Supreme Court on August 23, 2023. Brendelands' attorney

prefers to not wait until the final date to file documents, just in case some unknown matter arises that would interfere with timely filing of the document. On August 24, 2023, Brendelands received an Efiling stating that their appeal was assigned Supreme Court Case No. 23-1356.

The below signed attorney for the Brendelands thought and assumed his secretary had also filed the Notice of Appeal with the Story County Clerk of Court. For unknown reasons, the notice of appeal was not also filed with the Story County Clerk of Court. The failure to file the notice of appeal with the Story County Clerk of Court was inadvertent and unintentional.

Brendelands' below signed attorney received copies of (a) Reporter's Certificate of Filing A Transcript filed with the Clerk of the Iowa Supreme Court filed September 6, 2023, and (b) Notice of Transcript Redactions filed with the Story County Clerk of Court on September 6, 2023.

Having not received a Notice of Briefing Deadline, Brendelands' below signed attorney had his secretary call the office of the Iowa Supreme Court to see if a Notice of Briefing Deadline had been issued because none had been received. The secretary to Brendelands' below signed attorney was told 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.

On September 27, 2023, Brendelands' below signed attorney received Justice Zager's Order dated September 26, 2023. On September 27, 2023, Brendelands' below signed attorney immediately filed their Notice of Appeal and Combined Certificate with the Story County Clerk of Court.

The Brendelands respectfully submit that their Notice of Appeal was timely submitted on September 27, 2023 by their below signed attorney acting reasonably under the circumstances by immediately filing the Notice of Appeal with the Story County Clerk of Court, which tolled the filing of the Notice of Appeal to September 27, 2023. September 27, 2023 is twenty-seven (27) days from the 30 days to file a Notice of Appeal in regard to the District Court's August 1, 2023 Ruling.

Iowa Rule of Appellate Procedure 6.101(4) provides:

> "The time for filing a notice of appeal is tolled when the notice is served, provided the notice is filed with the district court clerk within a reasonable time. See Iowa R. Civ. P. 1.442(4)."

In Cook v. City of Council Bluffs, 264 N.W.2d 784 (Iowa 1978), 26 days after service was due was reasonable. In Thayer v. State, 653 N.W.2d 595 (Iowa 2002), 32 days was found reasonable. In S.C. v. K.W. (In Re Interest of K.C.), 957 N.W.2d 720 (Table) (Iowa App. 2021), 43 days was found reasonable.

The concern is whether the Notice of Appeal was filed with the Story County Clerk of Court within a reasonable time" "under the circumstances". Brendelands' Notice of Appeal was filed with the Story County Clerk of Court immediately, the

same day, it was known that the Notice of Appeal, inadvertently and unintentionally, had not yet been filed with the Story County Clerk of Court.

IDOT's Brief on page 24 urges that "Lack of prejudice should be rejected, and cites Hawkeye Security Insurance Co. v. Ford Motor Co., 199 N.W.2d 373, 378 (Iowa 1972). The Hawkeye Security case states:

> "There is no assertion of prejudice to any party in the instant action resulting from the claimed lack of exacting compliance with rule 336. R.C.P." Id., 199 N.W.2d 378.

The Hawkeye case also states as follows:

"This more liberal rule of construction is consistent with our oft repeated preference for disposition on the merits and not on mere technicalities." Id., 199 N.W.2d 378.

IDOT is not prejudiced by the Brendelands' attorney in filing their Notice of Appeal with the Story County Clerk of Court being tolled to September 27, 2023. This is 27 days after the 30 days from August 1, 2023. Significantly, IDOT in this case wants to invalidate on a technicality the Iowa Common Law/Iowa Case Law that gives a property owner the right and remedy to challenge a condemnation as being excessive without Appellate Review of the issue on its merits. Section 6A.24, Code of Iowa, does not abrogate or supersede Iowa Common Law/Iowa Case Law that give a property owner the right and remedy to challenge a condemnation as being excessive.

Existing Common Law

B. Argument: The Iowa Common Law is the body of law based on court decisions rather codes or statutes. The polestar and controlling legal principle in this case is that if a statute grants a new right and creates a new liability unknown at common law, then that statute is the exclusive remedy. IDOT's Brief on page 29 speaks disparagingly of the cases cited by Brendelands in their Brief on pages 18 through 21. On those pages are the cases of DePenning v. Iowa Power & Light Co., 33 N.W.2d 503, 507 (Iowa 1948), Vittetoe v. Iowa Southern Utilities Co., 123 N.W.2d 878, 881-882 (Iowa 1963), Mann v. City of Marshalltown, 265 N.W.2d 307, 314 (Iowa 1978), Comes v. City of Atlantic, 601 N.W.2d 93, 95-96 (Iowa 1999), In Re Condemnation of Certain Rights, 666 N.W.2d 137, 138-139 (Iowa 2003), Thompson v. City of Osage, 421 N.W.2d 529, 531 (Iowa 1988), and Owens v. Brownlie, 610 N.W.2d 860, 865-866 (Iowa 2000). These cases establish the Iowa Common Law/Iowa Case Law that a property owner has the right and remedy to challenge a condemnation as being excessive. Those seven (7) cases also establish that the liability of a condemning authority is that it cannot condemn more property rights than are necessary for the project in question.

The cases of Lodge v. Drake, 51 N.W.2d 418, 419-420 (Iowa 1952), Snyder v. Davenport, 323 N.W.2d 225, 227 (Iowa 1982), Van Baale v. City of Des Moines, 550 N.W.2d 153, 155 (Iowa 1996), Lamb v. Time Ins. Co., (Iowa App. 2011), p. 9,

and Dautovic V. Bradshaw, No. 0-937 No. 1763 (Iowa App. Mar. 21, 2011), p. 6 hold if a statute grants a new right unknown at common law, then that statute is the exclusive remedy.

Section 6A.24, Code of Iowa, did not create a new right/remedy unknown at common law for a property owner to challenge a condemnation as being excessive. A property owner's right/remedy to challenge a condemnation is established by the above seven (7) cases. A condemning authority's liability to not condemn property rights other than those necessary for the project at hand is also established by the above seven (7) cases.

Furthermore, if a statute prescribes a new remedy for a preexisting right or liability, such new remedy is deemed cumulative, unless the statutes show that it abrogates or supersedes the common law right/remedy.

> "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, 242 Iowa 628, 531, 51 N.W.2d 418, 419-420 (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).

Section 6A.24, Code of Iowa, does not grant a new right and does not create a corresponding liability unknown at common law. Section 6A.24 prescribes a new remedy for the common law right and remedy of challenging a condemnation as

being excessive, of the possibility of recovering attorney fees if successful, and placing the burden of proof on the condemning authority. Section 6A.24, Code of Iowa, is therefore deemed cumulative to the property owner's common law right to challenge a condemnation as being excessive because Section 6A.24 does not show an intention to abrogate or supersede the common law right of a property owner to challenge a condemnation as being excessive.

The case of Castles Gate Homeowner's Ass'n v. K & L Props., 22-0286 (Iowa App. Feb. 2023) affirms that Section 6A.24, Code of Iowa, does not create a new right or remedy unknown at common law of a property owner being able to challenge a condemnation as being excessive, and that Section 6A.24, Code of Iowa, does not abrogate or supersede Iowa Common Law/Iowa Case Law that a property owner has a right/remedy to challenge a condemnation as being excessive.

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.'" (Emphasis added.) Id., p. 7.

The Castles Gate case does not hold that Section 6A.24(1) is:

- The avenue to bring an action.
- The exclusive avenue to bring an action.

- The sole avenue to bring an action.

Footnote 2 of the Castles Gate case states as follows:

> "This statutory right was added by amendments to the condemnation statutes 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' (remedies) of injunction, mandamus, and certiorari are abrogated or superseded, nor that they are no longer available to property owner. To the contrary, the footnote states "accord Owens, 610 N.W.2d at 865-66.", which shows that the Owens case and the Iowa Common Law right and remedy of a property owner to challenge a condemnation as being excessive are still 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 865-66.

The Owens case clearly affirms that the remedies of injunction, mandamus, and certiorari for a property owner to challenge a condemnation as being excessive are in full force and effect.

IDOT's Brief on page 42 recognizes that Section 6A.24 provides for the possibility of a landowner recovering attorney fees under Section 6A.24(3) if successful in challenging the proposed condemnation. The Van Baale case recognizes the difference and distinction between a right and a remedy. Section 6A.24 does not create a new right unknown at common law to challenge a condemnation as being excessive. That common law right is established by the DePenning, Vittetoe, Mann, Comes, In Re Condemnation, Thompson, and Owens cases. As held in the Van Baale case, when a statute (6A.24) prescribes a new remedy, i.e., recovery of attorney fees for a preexisting right known at common law (to challenge a condemnation as being excessive), such new remedy is deemed cumulative (in addition to, additive) and does not abrogate nor supersede the common law right to challenge a condemnation as being excessive, but without recovery of attorney fees. Id., 550 N.W.2d 155.

Again, the Castles Gate case shows that the common law right to challenge a condemnation is in full force and effect when it refers to "the traditional procedural vehicles (remedies) of injunction, mandamus, and certiorari … accord Owens, 610 N.W.2d at 865-66". Again, the Owens case holds that a condemnee may challenge a condemnation by the remedies of injunction, mandamus, and certiorari. Id., 610 N.W.2d 865-66. The common law remedies of injunction, mandamus, and certiorari are not abrogated nor superseded by Section 6A.24.

IDOT's Brief on page 29 states:

> "Judge Miller also noted this (the existing common law/Iowa Case Law) Ruling, p. 8 ("The cases cited by Plaintiffs all occurred before the enactment of the Iowa Code Section (sic) 6A.24(1) in 2006")."

This highlights the error in the District Court's Ruling. Section 6A.24, Code of Iowa, is not the Plaintiffs' exclusive remedy because Section 6A.24, Code of Iowa, did not create a new right or remedy unknown at common law. Also, Section 6A.24, Code of Iowa, does not abrogate or supersede the Plaintiffs' right and remedy under Iowa Common Law/Iowa Case Law to challenge a condemnation as being excessive.

Furthermore, the District Court erred in relying upon Johnson Propane, Heating & Cooling, Inc. v. Iowa Department of Transp., 891 N.W.2d 220 (Iowa 2017) as authority that Section 6A.24, Code of Iowa, is the Brendelands' exclusive remedy to challenge IDOT's condemnation as being excessive. Iowa Common Law/Iowa Case Law holds that a property owner has the right and remedy by injunction, mandamus, and certiorari to challenge a condemnation as being excessive per the DePenning, Vittetoe, Mann, Comes, In Re Condemnation, Thompson, and Owens cases. Section 6A.24 did not create a new remedy to challenge a condemnation unknown at common law, and therefore is not Brendelands' exclusive remedy. See the Lodge, Snyder, Van Baale, Lamb, and Dautovic cases.

In the Johnson Propane case, there is no common law right or remedy that gives a property owner a right to claim that an uneconomic remnant would require IDOT to condemn the entire property. The Seventy-Third G. A. 1989 Session established the statutory right for an owner to claim that an uneconomic remnant requires IDOT to condemn the entire property.

Unlike the Johnson Propane case where there was no existing common law right, Iowa Common Law/Iowa Case Law gives a property owner the right and remedy to challenge a condemnation as being excessive. Section 6A.24, Code of Iowa, did not create the right of a property owner to challenge a condemnation as being excessive. That right has existed at Iowa Common Law/Iowa Case Law since at least the 1948 DePenning case. Section 6A.24 does not abrogate or supersede that common law right and remedy.

No Misrepresentation Claim

IDOT's Brief on pages 61-65 incorrectly asserts that the Brendelands are making a claim of misrepresentation by IDOT personnel. The issue in this case is when the Brendelands first knew that IDOT would not allow their property to have any commercial access to Highway 210.

The Brendelands had understood since May 2022 that their property would be allowed to have commercial access to Highway 210 at 1,000 feet from the ramp bifurcation point after IDOT's ramp reconstruction project for the intersection of I-

35 and Highway 210. The Notice of the March 21, 2023 condemnation was served on the Brendelands on January 29. 2023. The Notice of Condemnation showed the intended acquisition of 1,000 feet of access from the Brendeland property, which was consistent with the Brendeland property having commercial access to Highway 210 at 1,000 feet from the ramp bifurcation point. The Notice of Condemnation did not say nor indicate that the Brendeland property would not be allowed any commercial access to Highway 210.

On February 21, 2023, Merle Brendeland was verbally told by Brian Whaley, an IDOT employee, that the Brendeland property was not going to be allowed to have any commercial access to Highway 210. An email was sent to IDOT on February 23, 2023 asking for a meeting to discuss whether the Brendeland property would indeed not be allowed to have any commercial access to Highway 210.

On March 8, 2023, which is 38 days after the Brendelands were served with the Notice of Condemnation set for March 21, 2023, the IDOT sent an email stating that the Brendeland property would not be allowed any commercial access to Highway 210.

The Brendelands make no misrepresentation claim under Chapter 669, Code of Iowa.

Discovery Rule

The March 8, 2023 IDOT email was sent after the 30-day time period in Section 6A.24. That is why the Brendelands petition in Case No. CVCV053090, filed March 20, 2023, has Count II for injunction of an excessive taking pursuant to common law/Iowa Case Law, and Count II to be able to proceed under Section 6A.24, Code of Iowa, based on the discovery rule using March 8, 2023 when the 30 days' time period in Section 6A.24, Code of Iowa, should commence.

The Discovery Rule is appropriate in this case. The Plaintiffs learned in writing on March 8, 2023 that as a result of the DOT's condemnation their property would not be allowed any commercial access to Highway 210. The Plaintiffs filed Case No. CVCV053090 on March 20, 2023 – before the condemnation hearing on March 21, 2023, which is 12 days after being informed by Mr. Gustafson's March 8, 2023 email that their property would not be allowed any commercial access to Highway 210. Case No. CVCV053090 was filed 28 days after Brian Whaley verbally spoke with Mr. Brendeland.

Under the Braun v. Public Employment Relations Bd., 345 N.W.2d 88, 96 (Iowa 1984) and the Midwestone Bank v. Heartland Co-Op, 941 N.W.2d 876, 884 (Iowa 2020) cases the discovery rule should be applied to the Plaintiffs which would allow them the cumulative remedy of recovering attorney fees under Sections

6A.24(3), Code of Iowa, if they are successful in their challenge that IDOT's intended taking of all commercial access to Highway 210 is excessive.

> "We have recognized such a discovery-rule exception to the running of other statutes of limitation in several recent cases ." Id., 345 N.W.2d 96.
>
> "Under the discovery rule, the statute of limitations is tolled 'until the plaintiff knows or in the exercise of reasonable care should have known bot the fact of the inquiry and its cause.' K & W Elec. Inc. v. State, 712 N.W.2d 107, 116 (Iowa 2006) (quoting Rieff v. Evans, 630 N.W.2d 278, 291 (Iowa 2001) (en banc))." Id., 941 N.W.2d 884.

Certiorari

The cases of Thompson v. City of Osage, 421 N.W.2d 529, 531 (Iowa 1988) and Owens v. Brownlie, 610 N.W.2d 860, 865-66 (Iowa 2000) hold that a condemnation can be challenged by injunctive action, mandamus, and certiorari. Brendelands' Petition in Case No. CVCV053090 Count IV is in certiorari. Ia. R. Civ. P. 1.402(3) provides in pertinent part as follows:

> "The petition must be filed within 30 days from the time the tribunal, board or officers exceeded its jurisdiction or otherwise acted illegally."

It was not until the March 8, 2023 email from Tony Gustafson that the Brendelands were aware that the IDOT's intended condemnation was excessive. The Brendelands' Petition filed March 20, 2023 in accord with Ia. R. Civ. P. 1.402(3) was 12 days after the March 8, 2023 action of Mr. Gustafson sending his email stating Brendelands' property would not be allowed commercial access to Highway 210.

Certiorari also is an existing right and remedy to challenge a condemnation as being excessive which is not created by nor abrogated or superseded by Section 6A.24, Code of Iowa.

No Issue Preclusion

After receiving IDOT's March 8, 2023 email, an Application For Stay Or Temporary Injunction by the Brendelands was filed March 10, 2023 in an effort to have time to discuss the issue of commercial access for the Brendeland property with IDOT. Judge Ellefson's Order in Case No. CVCV053078, issued March 15, 2023, states:

> "The sole issue before the court at this hearing is whether or not the court should order a delay, or postponement, of the compensation commission hearing now set for March 21, 2023." App. P. 68.

Judge Ellefson did not make any final judgment on the merits of whether IDOT's condemnation of a portion of the Brendelands' property is excessive. The Brendelands, on March 20, 2023, before the March 21, 2023 condemnation hearing, filed its Petition in Case No. CVCV053090, and on March 21, 2023 filed a Petition For Declaratory Order with the IDOT, which is the subject of Case No. CVCV053167.

Judge Ellefson, in Case No. CVCV053078, had dicta that a compensation commission's award will be de novo and "Thus, there will be no irreparable damage if the stay or injunction is denied." The case of In Re Condemnation of Certain

Rights, 666 N.W.2d 137 (Iowa 2003) holds that the very threat of condemnation is an irreparable injury, and that payment of compensation is not an adequate remedy. Judge Ellefson's dicta is contrary to the case of In Re Condemnation of Certain Rights.

> "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 injunctive 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." (Emphasis added.) In Re Condemnation of Certain Rights, 666 N.W.2d 137, 138-139 (Iowa 2003).

IDOT's Brief on page 41 denies 'irreparable' harm. The In Re Condemnation case holds that the threat of condemnation is an irreparable injury. "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." Id., 666 N.W.2d 139.

The In Re Condemnation case furthermore recognizes the common law right and remedy to challenge a condemnation by injunction.

The Brendelands have the common law right and remedy to challenge IDOT's condemnation as being excessive which will prevent their property from having commercial access to Highway 210, when the Bayer, Kum & Go, and Hale Trailer properties in the other three (3) quadrants of I-35 and Highway 210 still have commercial access to Highway 210 at 600 feet from the ramp bifurcation point after IDOT' ramp reconstruction project at I-35 and Highway 210.

IDOT's Brief on page 67 asserts that "there is no mechanism to stop the highway project, or to give back to Plaintiff the land acquired." That is an inaccurate misleading statement. IDOT's ramp reconstruction project will not be affected by Brendelands' case. The Brendeland case is a simple matter of not taking 1,000 feet of access rights from the Brendeland property. It is a simple matter of not taking more than 600 feet of access rights which will allow Brendelands' property to have commercial access at 600 feet from the ramp bifurcation point just as the Bayer, Kum & Go, and Hale Trailer properties have in the other three (3) quadrants of the intersection of I-35 and Highway 210.

IDOT's Brief on page 56 raises the issue of issue preclusion. IDOT cites the case of Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981). Issue preclusion is not applicable unless the issue of fact and/or law is actually litigated and determined by a final judgment. There has been no litigation on the merits of the issue of whether IDOT's condemnation to take all commercial access to Highway 210 from the Brendeland property for its ramp reconstruction project for the intersection of I-35 and Highway 210 is excessive.

> "In general, the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action. 'When an issue of a fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' Restatement (Second) of Judgments § (Tent. Draft No. 4, 1977)" (Emphasis added.) Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981).

In accord are Harrison v. State Bank of Bussey, 440 N.W.2d 398, 401 (Iowa 1989), Fisher v. City of Sioux City, 654 N.W.2d 544, 546 (Iowa 2002), and Grant v. Iowa Dep't of Human Servs., 722 N.W.2d 169, 173-174 (Iowa 2006).

The issue of whether IDOT's condemnation of a portion of Brendelands' property is excessive has not been litigated and determined by a final judgment by Judge Ellefson. A determination of that issue was not necessary and essential to deciding whether to postpone the March 21, 2023 condemnation hearing by the compensation commissioners.

Excessive Taking

IDOT's Brief on pages 43-53 argues that its intended taking of all access rights from the Brendeland property is not excessive. The issue in this appeal is that Section 6A.24, Code of Iowa, is not Brendelands' exclusive remedy, because Iowa Common Law/Iowa Case Law holds that a property owner has a right and remedy to challenge a condemnation as being excessive. Section 6A.24, Code of Iowa, did not create a new right or remedy unknown at common law for a property owner to challenge a condemnation as being excessive. Therefore, Section 6A.24 is not Brendelands exclusive remedy.

On page 47 of IDOT's Brief it says, "The Plaintiffs complain they have been unable to gain a commercial entrance in their quadrant of the intersection of Interstate 35 and Highway 210 the way those owning the Bayer, Kum & Go, and Hale Trailer properties did." That is a misleading misstatement. The point is that the Brendelands have the right of access to Highway 210 and that IDOT intends to take and prohibit all commercial access from the Brendeland property to Highway 210 from its ramp reconstruction project at the intersection of I-35 and Highway 210, when, as a part of IDOT's ramp reconstruction project at the intersection of I-35 and Highway 210, IDOT still allows the Bayer, Kum & Go, and Hale Trailer properties to have commercial access to Highway 210 at 600 feet from the ramp bifurcation point of IDOT's ramp reconstruction project at the intersection of I-35

and Highway 210. IDOT's intended taking of all commercial access from the Brendeland property to Highway 210 is excessive.

IDOT is restricted to condemning what is necessary for the reconstruction of the ramps at the intersection of I-35 and Highway 210. It is readily apparent that IDOT does not need to acquire more than 600 feet of access rights from the Brendeland property because it is not acquiring access rights at 600 feet from the ramp bifurcation point from the Bayer, Kum & Go, and Hale Trailer properties to reconstruct the ramps at the intersection of I-35 and Highway 210. The Bayer, Kum & Go, and Hale Trailer properties still have commercial access to Highway 210 at 600 feet from the ramp bifurcation point. That shows that it is not necessary for IDOT's ramp reconstruction project to acquire any more than 600 feet of access rights from the Brendeland property.

The Brendelands in their Petition For Declaratory Order asked IDOT (a) if it would be equal treatment for the Bayer, Kum & Go, and Hale Trailer, and the Brendeland properties to all have commercial accesses to Highway 210 at 600 feet from the ramp bifurcation point; (b) if it would be equal treatment for the Bayer and Brendeland properties to have commercial entrances at 600 feet or at 1,000 feet from the ramp bifurcation point, and (c) 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).

The IDOT Declaratory Order did not answer the above issues. Instead, The IDOT, 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 fact that IDOT is not condemning access rights from the Bayer, Kum & Go, and Hale Trailer properties at 600 feet from the ramp bifurcation point of its ramp reconstruction project at the intersection of I-35 and Highway 210, shows that acquiring access rights at 600 feet and beyond that from the Brendeland property is <u>not</u> necessary for its ramp reconstruction project.

IDOT's March 8, 2023 email from Tony J. Gustafson, P.E., District 1, on page 2, states that "IA 210 is now designated as a Rural 600 category …" App. P. 249.

761 IAC Section 112.5(5)(f) states:

> "For any new interchange or reconstruction, access rights should be acquired and extend a minimum of 600 feet from the ramp bifurcation point." App. P. 245.

761 IAC Section 112.5(3)(c) states in pertinent part as follows:

> "Access types A, B and C may be permitted where the applicant can prove necessity and the access has a minimum spacing distance of 600 feet from other connections."

IDOT prefers accesses to be opposite from each other to a highway. If the accesses are to be offset, this regulation calls for them to be offset by a minimum of 600 feet.

That is why the Brendelands asked IDOT in their Petition For Declaratory Order for the interpretation for:

> "It would be equal treatment for the Bayer and Brendeland properties to have opposite commercial entrances to Highway 210 at 600 feet or at 1,000 feet from the ramp bifurcation point." App. P. 208.

The 600 feet is in accord with 761 IAC Section 112.5(5)(f), and the 1,000 feet is where Brendelands' believed they would have commercial access after the IDOT ramp reconstruction project.

However, the IDOT reply was that 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) that only the minimum amount needed is to be taken by condemnation.

Likewise, in regard to the Brendeland property, the taking of 1,000 feet and all commercial access rights to Highway 210 would not serve a public purpose, and it would be violative of Iowa Code Section 6B.3(1)(g) that only the minimum amount needed is to be taken by condemnation.

Again, as the facts show, taking commercial access rights from the Brendeland property at 600 feet (i.e., across from the Bayer property commercial access to Highway 210) is not necessary for the IDOT ramp reconstruction project because the Bayer, Kum & Go, and Hale Trailer properties are allowed to have commercial access to Highway 210 600 feet from the ramp bifurcation point with IDOT's ramp reconstruction project.

IDOT's Brief on page 49 states, "if annual average daily traffic (AADT) will exceed 10,000 within 20 years a minimum of 1,000 feet of access rights should be acquired". (Emphasis added.) IDOT incorrectly and improperly wants to focus on a possible speculative twenty (20) years projection.

IDOT's Brief on page 49 also states, "Simply put, the law changed". The law has not changed. Section 6B.3(1)(g), Code of Iowa, provides that only the minimum amount of property rights necessary for the project at hand is to be taken by condemnation. The cases of DePenning, Vittetoe, Mann, Comes, In Re Condemnation, Thompson, and Owens cases hold that a condemning authority can only condemn h property rights that are necessary for the project at hand.

The Vittetoe case holds as follows:

> "The law does not favor the taking of property use beyond the necessities of the case." Id., 33 N.W.2d 507, Id., 123 N.W.2d 882.
>
> "[A]nd the company (condemnor) is not the judge of the existence of the necessity, or the character of the use …" Id., 123 N.W.2d 882.

The necessities of IDOT ramp reconstruction project do not extend to taking more than 600 feet of commercial access rights from the Brendeland property from the ramp bifurcation point, as shown by the fact that the Bayer, Kum & Go, and Hale Trailer properties all still have their commercial accesses at 600 feet from the ramp reconstruction project.

IDOT's Brief on page 35 asserts that "Plaintiffs astoundingly sought a form of specific performance under which the district court would assume authority to order DOT to give Plaintiffs a commercial access to Highway 210 '600 feet' from the I-35 and Highway 210 interchange …" (Emphasis added.) That is a misleading misstatement of law.

Landowners have a legal property right of access to public roads, because they have an easement right in an adjoining road. IDOT does not give adjoining property owners rights to the adjoining road. Instead, and to the contrary, IDOT can only take away access rights if necessary. When the taking of access rights is necessary for the project at hand, the property must be justly compensated for the damage to the land for the taking of access that is necessary.

The case of Liddick v. City of Council Bluffs, 5 N.W.2d 361 (Iowa 1942) gives a great discourse and background on this issue.

> "We now hold that the destruction of the rights of access, light, air or view, or the substantial impairment or interference with these rights of an abutting property owner in the highways or streets adjacent to his property, by any work or structure [232 Iowa 233] upon such highways or streets, intended for the improvement thereof, done by the state or any governmental subdivision thereof, is a 'taking' of the private property of said owner within the purview and provisions of Section 18, Article I of the Iowa Constitution." (Emphasis added.) Id., 5 N.W.2d 379.

In accord are Anderlik v. Iowa State Highway Commission, 38 N.W.2d 605, 607 (Iowa 1949), and Stom v. City of Council Bluffs, 189 N.W.2d 502, 525 (Iowa 1971).

> "plaintiffs' right of ingress and egress from their premises by way of First Street. This is a property right, an easement in the street which the owner of abutting property has, not common to the public generally and which cannot be taken away without just compensation 64 C.J.S., Municipal Corporations, §§ 1701, 1703; Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361; [244 Iowa 514] 25 Am.Jur., Highways, § 154; 29 C.J.S., Eminent Domain, §§ 121, 122." (Emphasis added.) Hathaway v. Sioux City, 57 N.W.2d 228, 231 (Iowa 1953).

This brings us back to IDOT on page 49 incorrectly saying, "Simply put, the law changed." The law has not changed. The law is:

- Property rights, including the right of access are constitutionally protected. See the Liddick, Anderlik, Stom, and Hathaway cases.
- Owners of property abutting a street have an easement in the street.

- IDOT's rights and powers "are not absolute or unlimited and unrestricted" and "the courts cannot ignore sound and settled principles of law safeguarding the rights and property of individuals". Liddick at 5 N.W.2d 382.
- Iowa Common Law gives property owners the right and remedy to challenge a condemnation as being excessive. See the DePenning, Vittetoe, Mann, Comes, In Re Condemnation, Thompson, and Owens cases.
- Section 6A.24, Code of Iowa, does not abrogate or supersede the existing Iowa Common Law right and remedy of a property owner to challenge a condemnation as being excessive, because Section 6A.24 does not create a new right or a new liability of a property owner being able to challenge a condemnation as being excessive, and 6A.24 does not state nor show that it abrogates or supersedes that existing common law right. See the Lodge, Snyder, Van Baale, Lamb, and Dautovic cases. Further, the Castles Gate case states Section 6A.24 is in accord with the Owens case which specifically 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.

It is not necessary for IDOT's ramp reconstruction project at the intersection of I-35 and Highway 210 to condemn more than 600 feet of access from the ramp bifurcation from the Brendeland property and all commercial access to Highway 210 when the Bayer, Kum & Go, and Hale Trailer properties are allowed commercial access at 600 feet from the ramp bifurcation point after IDOT's ramp reconstruction project.

IDOT incorrectly, and contrary to law, takes the position in this case that:

- It has total and absolute control over primary highways; and
- It can grant and allow commercial access to some properties at a given distance from the ramp bifurcation point; and
- It can refuse to grant and allow commercial access to Highway 210 for the Brendeland property at any distance from the ramp bifurcation point, but allow the Bayer, Kum & Go, and Hale Trailer properties commercial access to Highway 210 at 600 feet from the ramp bifurcation point.

But, as stated in Section 6B.3(1)(g), Code of Iowa, the controlling factor is that a condemning authority can only condemn the minimum amount necessary for the project at hand. This is stated in the Liddick case:

> "The power of the legislature over highways and streets is plenary in that it may take any needed private property for their establishment, maintenance, or improvement …" (Emphasis added.) Id., 5 N.W.2d 382.

The DePenning, Vittetoe, Mann, Comes, In Re Condemnation, Thompson, and Owens cases hold that a property owner has the right and remedy to challenge a condemnation as being excessive.

Summary

That brings us back to the issue being appealed. Section 6A.24, Code of Iowa, is not Brendelands' exclusive right and remedy to challenge the IDOT condemnation as being excessive. It is a well-established Iowa Common Law/Iowa Case Law right and remedy of a property owner to challenge a condemnation as being excessive. Section 6A.24, Code of Iowa, did not create a new right unknown at common law of a property owner having a right to challenge a condemnation as being excessive. Section 6A.24, Code of Iowa, does not state nor show that it abrogates a property owner's common law right and remedy to challenge a condemnation as being excessive.

The Castles Gates case, citing the Owens case, confirms that Section 6A.24, Code of Iowa, does not abrogate nor supersede the existing Iowa Common Law/Iowa Case Law right and remedy of a property owner to challenge a condemnation as being excessive.

CONCLUSION

The District Court's ruling should be overruled and reversed with this case remanded for trial on the issues pled therein.

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' Amended Reply 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' Amended Reply Brief and Request For Oral Argument contains 6,985 words, excluding the parts of the Appellants' Amended Reply Brief and Request For Oral Argument exempted by Iowa R. App. P. 6.903(1(g)(1).

2. This Appellants' Amended Reply 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' Amended Reply Brief and Request For Oral Argument has been prepared in a proportionally spaced typeface using Microsoft Word in Size 14 font.

Dated this 31st 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' Amended Reply Brief and Request For Oral Argument with the Clerk of the Iowa Supreme Court, on January 31, 2024.

I, Robert W. Goodwin, hereby further certify that on January 31, 2024, I served the foregoing Appellants' Amended Reply Brief and Request For Oral Argument, by the electronic filing system, to the following attorneys of record:

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