**Appeal No. 2020AP307** **Cir. Ct. No. 2018CV1379**

**WISCONSIN COURT OF APPEALS**
**DISTRICT II**

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**GREGORY M. BACKUS,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WAUKESHA COUNTY,**

**DEFENDANT-APPELLANT.**



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## CERTIFICATION BY WISCONSIN COURT OF APPEALS

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Before Neubauer, C.J., Gundrum and Davis, JJ.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

In light of the supreme court's decision in ***118th St. Kenosha, LLC v. DOT***, 2014 WI 125, 359 Wis. 2d 30, 856 N.W.2d 486, is a temporary limited easement compensable under WIS. STAT. § 32.09(6g) (2019-20)[1]?

[1] All references to the Wisconsin Statutes are to the 2019-20 version.

## *Background*

A long-planned highway reconstruction project (the "project") expanded a highway east of Gregory Backus' back yard from two lanes to four, which brought the highway closer to Backus' property, created more traffic and noise, and added a sidewalk between the new four-lane highway and Backus' property. The completed project includes a slope of the land leading down from the sidewalk onto Backus' property. The easternmost portion of this slope—immediately next to the sidewalk—is on County property, and the westernmost portion is on Backus' property; thus, some of Backus' back yard is now sloped, and it was not prior to the project.

As part of the project, in 2016 Waukesha County acquired a temporary limited easement (TLE) over a strip of land at the easternmost edge of Backus' back yard, in the area of the slope. According to an affidavit of a County engineer, the TLE "was acquired for grading and sloping to match [Backus'] land to the construction of the road." The TLE itself states that it is for:

> the public purpose and right to construct a highway project, including the placement or removal of soil, grading of roadway slopes, and the creation of full or cut slopes in the temporary limited easement area to match the new roadway grade, as well as the right of ingress and egress as long as required for the construction of the highway project, including the right to operate the necessary equipment thereon, and the right to preserve, protect, remove or plant thereon any vegetation that the highway authorities may deem necessary or desirable....
>
> ….
>
> **The above temporary limited easement is to terminate upon the completion of this project or on the day the highway is open to the traveling public, whichever is later.**

The record confirms that the project is now complete as to the Backus property, and Waukesha County has released the TLE.

The Waukesha County Condemnation Commission determined an award amount to compensate Backus for the TLE. Dissatisfied with this amount, Backus appealed the award to the Waukesha County Circuit Court. The County moved for summary judgment. Backus opposed the motion and also filed his own motion to exclude the County's expert appraiser's report and testimony on legal bases largely intertwined with the summary judgment issues. The court denied both motions. The County filed an interlocutory appeal, which we accepted.[2]

On appeal, the County asserts that Backus is only entitled to compensation for the rental value of that portion of Backus' property covered by the TLE and while the TLE was in effect. The County further argues that the TLE did not cause the proximity and severance damages Backus seeks under WIS. STAT. § 32.09(6g) and (6)(e) and that para. (6)(e) damages are not appropriate here in any event because they only apply where there is an "actual severance of land" and, the County asserts, there was no such severance in this case.

Backus contends he is entitled to the damages afforded by WIS. STAT. § 32.09(6g), which basically amounts to the difference between the value of his entire property before the project and the value of it after the project, a

[2] Only the County's motion is before us; Backus did not file an interlocutory appeal as to the circuit court's ruling on his motion, and thus we do not address it.

reduction in value of approximately $90,000, according to Backus.[3] He also claims he is entitled to severance and proximity damages afforded by § 32.09(6)(e).

***Discussion***

This certification focuses on WIS. STAT. § 32.09(6g), which provides:

> In the case of the taking of *an easement*, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in [paras.] (6)(a) to (g) where shown to exist.

(Emphasis added.)

In ***118th St.***, 359 Wis. 2d 30, ¶5, our supreme court had before it a case in which the property owner, 118th St. Kenosha, LLC ("the LLC"), sought damages under WIS. STAT. § 32.09(6g) for the property's "diminution in value caused by its loss of direct access and proximity to 118th Avenue due to that road's relocation." As part of the larger overall reconstruction project that included the relocation of 118th Avenue, DOT procured a temporary limited

[3] In his appellate briefing, Backus at times appears to acknowledge the issue on appeal as being about the TLE, at times asserts that the County has taken a permanent easement because of the sloping of his property, and at times asserts that the County actually took a portion of his property because of the sloping. Neither the record nor argument before the circuit court or us is sufficiently developed on the issue of whether there has been a taking of Backus' property or a permanent easement.

easement on the LLC property, which easement was used to expand the entry/exit driveway area between the LLC property and a side street (which side street connected to 118th Avenue). ***118th St.***, 359 Wis. 2d 30, ¶¶2, 10-11. The ***118th St.*** court ruled against the LLC on the basis that the TLE did not cause the LLC's loss of direct access and proximity "to 118th Avenue." ***Id.***, ¶¶10-11, 35-36.

Although the ***118th St.*** court decided the case on the ground of lack of causation, the court raised a significant question as to whether "a temporary limited easement is [even] compensable under WIS. STAT. § 32.09(6g)." ***118th St.***, 359 Wis. 2d 30, ¶38. Despite stating that it was "assum[ing], without deciding, that a [TLE] is compensable under [§] 32.09(6g)," it did more than just "assume, without deciding"—it actually made the case for why subsec. (6g) should not apply to a TLE, yet did not make such a holding. *See* ***118th St.***, 359 Wis. 2d 30, ¶¶36 n.12, 38. The court wrote:

> We note that the plain language of [§] 32.09(6g) also causes us to pause when considering whether that statutory subsection is designed to apply to temporary limited easements in the first instance. First, the plain language of the statute references easements, not temporary limited easements. Second, the before and after valuation approach arguably creates confusion in temporary limited easement cases because it does not consider the temporary nature of the easement. Third, this statutory subsection may not apply to a temporary limited easement because a temporary limited easement often will terminate upon completion of the project. Thus, a benefit, rather than a detriment, may accrue to the property. Thus, the before and after valuation leaves no room for compensation for many temporary easements. As a result, Wisconsin Constitution, Article I, Section 13, and ***W.H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 631, 460 N.W.2d 787 (Ct. App. 1990), instruct that rental value may be the appropriate measure, rather than § 32.09(6g), when a temporary easement occurs. The $21,000 awarded in this case seems to compensate for the temporary limited easement's rental value and resulting loss of landscaping.

***118th St.***, 359 Wis. 2d 30, ¶36 n.12 (citation omitted).

As Backus points out in his briefing, the plain language of WIS. STAT. § 32.09(6g) refers to "easements" generically, without limiting that reference to any specific type of easements, e.g., "temporary limited" easements or "permanent" easements. While the ***118th St.*** court wrote in the noted footnote that "the plain language of the statute references easements, not temporary limited easements," ***118th St.***, 359 Wis. 2d 30, ¶36 n.12, the same could be said as to permanent easements—"the plain language of the statute references easements, not [permanent] easements." In her concurrence, Justice Abrahamson hints that reading § 32.09(6g) as applying to TLEs would be "absurd," *see* ***118th St.***, 359 Wis. 2d 30, ¶76 (Abrahamson, C.J. concurring), but would it be *absurd*? Would the legislature actually have been acting unreasonably if by using the term "easement" it intended to include all types of easements, including TLEs?

Because the ***118th St.*** court made the case in footnote twelve for not applying WIS. STAT. § 32.09(6g) to a TLE and yet went ahead and decided the case on the causation issue, it left significant question as to whether a TLE would be compensable in the circumstance where there is a more direct causal link between the TLE and diminution in value damages sought by a property owner. As the concurrence in ***118th St.*** stated, "The majority opinion's assumption that the statute applies, alongside its assertion that the statute seems inapplicable to TLEs, engenders confusion." *See* ***118th St.***, 359 Wis. 2d 30, ¶79 (Abrahamson, C.J., concurring). We ask the court to accept certification to provide a clear answer on this issue and eliminate the "engender[ed] confusion" of ***118th St.*** *See* ***id.*** The gaping question remains as to whether § 32.09(6g) even applies to a TLE, and a clear and definitive holding on this issue by our supreme court would clear

up uncertainty regarding this question that arises from ***118th St.***[4] An answer to this question is critical for Backus' appeal.

[4] WISCONSIN STAT. § 32.09(6)(e) provides:

> Damages resulting from *actual severance of land* including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land. In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.

(Emphasis added.)

Even if damages for a TLE are compensable under WIS. STAT. § 32.09(6g), then the question arises as to whether severance and proximity damages specifically related to § 32.09 (6)(e), by reference in (6g), are appropriate in a case such as this where any taking here related only to the back end portion of Backus' property immediately adjacent to the County property and in no way related to a separation of Backus' property into two pieces owned by Backus. Paragraph (6)(e) damages are limited to circumstances in which there is "an actual severance of land." If the court accepts certification of this case, whether § 32.09(6)(e) would apply in a case with facts such as these would be another important issue for the court to address. *See* ***Southport Commons, LLC v. DOT***, 2021 WI 52, ¶¶8-9, 397 Wis. 2d 362, 960 N.W.2d 17 (appearing to equate "sever[ance]" of property with "bisection" of property).