

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 2004AP1449

Cir. Ct. Nos. 2003CV112
2003CV304
2003CV593

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

EXXONMOBIL OIL CORPORATION,

PLAINTIFF-APPELLANT,

v.

**REDEVELOPMENT AUTHORITY OF THE CITY OF LA CROSSE,
WISCONSIN,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 DEININGER, P.J. ExxonMobil Oil Corporation appeals an order that dismissed its three actions challenging the condemnation by the Redevelopment Authority of the City of La Crosse of lands Exxon owned in the

city. Exxon claims the circuit court erred by (1) permitting the Authority to amend its jurisdictional offer, (2) not awarding Exxon the costs it incurred in challenging the first offer, (3) permitting proceedings before the condemnation commission to go forward prior to resolving the taking challenge, and (4) permitting the condemnation to proceed on the basis of the second jurisdictional offer. We reject Exxon's claims and affirm the appealed order.

BACKGROUND

¶2 The circuit court disposed of the three consolidated cases on the parties' cross-motions for summary judgment. The court denied Exxon's motion and granted the Authority's. Exxon does not argue on appeal that disputes of material fact preclude summary judgment in the Authority's favor. Rather, Exxon disputes the trial court's conclusions that its challenges to the condemnation lacked merit and that the Authority was entitled to judgment as a matter of law. When both parties move for summary judgment and neither argues that factual disputes bar the other's motion, the "practical effect is that the facts are stipulated and only issues of law are before us." See *Lucas v. Godfrey*, 161 Wis. 2d 51, 57, 467 N.W.2d 180 (Ct. App. 1991) (citation omitted). Accordingly, we accept the following facts as undisputed.

¶3 Exxon owned a parcel of real estate comprising just under 26 acres in the City of La Crosse that it had used as a bulk oil terminal. As a result of its operations there, the site was contaminated with petroleum byproducts and other substances. Exxon had commenced remediation activities on the property. The

Authority, exercising its authority under WIS. STAT. § 66.1333 (2003-04),¹ declared the property blighted in 1995 and later proceeded with measures to acquire it in furtherance of a redevelopment plan.

¶4 The Authority presented Exxon an appraisal of the property in October 2002 and a jurisdictional offer to purchase it on January 14, 2003. In February, the Authority petitioned for referral to the La Crosse County Condemnation Commission for a determination of the amount to be awarded Exxon for the property. In response, Exxon filed the first of three separate actions challenging the taking. The Authority served an amended jurisdictional offer in March, and Exxon countered in April with its second lawsuit to avoid the condemnation. Exxon also (1) moved to dismiss its first action as moot, (2) sought an award of its litigation expenses for the first action, and (3) opposed referral of the compensation issue to the condemnation commission.

¶5 The circuit court denied Exxon's motion to dismiss the first action and declined to award Exxon its litigation expenses for the first action. In a May 7, 2003 bench decision, the court concluded that WIS. STAT. § 32.14 authorized it to permit an amendment to the jurisdictional offer, further concluding that the Authority's second offer contained no "really substantive" changes from its original offer. The judge also ordered proceedings before the condemnation commission to go forward. The commission proceedings, which are not at issue in this appeal, were completed in July and produced an award to Exxon in August that significantly exceeded the Authority's first and second jurisdictional offers.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶6 As the compensation proceedings drew to a close, but before the commission's award, the Authority served Exxon with a second amended (third overall) jurisdictional offer. Exxon again responded by filing a new action to challenge the taking. Exxon's three lawsuits were subsequently consolidated and the parties each moved for summary judgment. In a February 2004 written decision, the circuit court granted the Authority's motion and denied Exxon's. In its ruling, the court (1) declined to approve the Authority's third jurisdictional offer and gave it no effect, (2) concluded the second jurisdictional offer was "valid and in compliance with Wisconsin law"; and (3) awarded Exxon \$113,548.64 in litigation expenses under WIS. STAT. § 32.28 because the condemnation commission award had exceeded the jurisdictional offer by at least \$700 and 15%.²

¶7 The court subsequently entered an order dismissing the consolidated actions challenging the condemnation. Exxon appeals.

ANALYSIS

¶8 Exxon appeals the circuit court's dismissal of its three actions on summary judgment. It also challenges the court's earlier ruling that denied Exxon a recovery of its litigation expenses incurred in bringing its first action and permitted the condemnation commission proceedings to go forward while Exxon's challenge to the taking remained unresolved. The court's summary judgment ruling, as well as most aspects of its earlier decisions, present questions of law that

² The court's decision notes that the Authority's jurisdictional offer was for "between \$328,000-\$510,000," the commission awarded \$1,050,000, and neither party appealed the award to circuit court. Neither the commission's compensation award nor the court's award of litigation expenses to Exxon are before us in this appeal.

we decide de novo. *See, e.g., Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). To the extent the court exercised discretion in allowing the Authority to proceed with an amended jurisdictional offer and in directing proceedings before the condemnation commission to go forward, we review the same for an erroneous exercise. In so doing, however, we decide de novo whether the circuit court applied the correct law in making these decisions. *See Kerkvliet v. Kerkvliet*, 166 Wis. 2d 930, 939, 480 N.W.2d 823 (Ct. App. 1992).

I. Allowance of Authority's Amended Jurisdictional Offer

¶9 Exxon contends the Authority's original (January) jurisdictional offer "contained multiple jurisdictional defects" which should have resulted in its being declared "void." Exxon argues that the circuit court should thus have ordered the Authority to "start over" instead of permitting it to amend the offer and referring the Authority's petition to the condemnation commission for a determination of the amount of compensation to be awarded to Exxon for the property. Whether the first jurisdictional offer was defective and therefore void, and whether the circuit court was authorized to permit the Authority to amend its jurisdictional offer, raise questions of statutory interpretation. Specifically, we must interpret provisions in WIS. STAT. ch. 32 that govern condemnation and set forth procedures for accomplishing it. We are thus called upon to address questions of law that we decide de novo. *See Truttschel v. Martin*, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315 (Ct. App. 1997).

¶10 When we construe a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions.

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used, not in isolation, but as part of a whole, in relation to the language of surrounding or closely related statutes, and reasonably to avoid absurd or unreasonable results. *Id.*, ¶46. We also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. *Id.*, ¶48.

¶11 The Authority sought to acquire Exxon’s property in order to implement a blighted area redevelopment plan. The project was thus one for “other than” transportation or sewer purposes, and the provisions of WIS. STAT. § 32.06 applied. That section, however, incorporates by reference several subsections of WIS. STAT. § 32.05, which generally applies to condemnations for transportation and certain other purposes.³ One of the incorporated subsections is § 32.05(3), which sets out the formal requirements for a jurisdictional offer. *See* § 32.06(3) (incorporating the “form (insofar as applicable)” for a jurisdictional offer set out in § 32.05(3)). The Authority’s jurisdictional offer was thus required to comply with the following:

³ The most significant difference between the condemnation procedures set forth in WIS. STAT. §§ 32.05 and 32.06 is this: In the former, governing condemnations for “sewers and transportation facilities,” if an owner does not accept a jurisdictional offer, the condemnor may proceed to “make an award of damages” that is “at least equal to the amount of the jurisdictional offer,” and it must tender the amount of the award to the owner or the court on or before the “date of taking.” *See* WIS. STAT. § 32.05(7). If an owner wishes to contest the amount of the award, the owner may appeal within two years of the date of taking by applying “to the judge of the circuit court” for assignment to the county condemnation commission. *See* § 32.05(9). By contrast, under § 32.06, which governs the present condemnation, when an owner does not accept the condemnor’s jurisdictional offer, it is the *condemnor* who may petition for proceedings before the condemnation commission. *See* § 32.06(7). The commission then proceeds to make “the award” of compensation, *see* § 32.06(8), which the condemnor must then pay in order to acquire title on the date of payment. *See* § 32.06(9)(b).

Jurisdictional offer to purchase. Condemnor shall send to the owner ... a notice:

(a) Stating briefly the nature of the project ... and that the condemnor in good faith intends to use the property sought to be condemned for such public purpose.

(b) Describing the property and the interest therein sought to be taken.

(c) Stating the proposed date of occupancy regardless of the date of taking.

(d) Stating the amount of compensation offered, itemized as to the items of damage as set forth in s. 32.09 and that compensation for additional items of damage as set forth in s. 32.19 may be claimed under s. 32.20 and will be paid if shown to exist.

(e) Stating that the appraisal or one of the appraisals of the property on which condemnor's offer is based is available for inspection at a specified place by persons having an interest in the lands sought to be acquired.

(g) Stating that the owner has 20 days from date of completion of service upon the owner of the offer ... in which to accept or reject the offer.

(h) Stating that if the owner has not accepted such offer ... the owner has 40 days from the date of completion of service upon the owner of the offer to commence a court action to contest the right of condemnation

Section 32.05(3).⁴

¶12 We turn to the defects Exxon alleges were contained in the Authority's first jurisdictional offer. Exxon first complains that the offer "was sent on behalf of both the City of La Crosse and [the Authority]," even though

⁴ WISCONSIN STAT. § 32.05(3) also contains an additional paragraph, (i), which is not applicable to a condemnation under WIS. STAT. § 32.06. Paragraph (i) requires information relating to an owner's appeal under § 32.05(9) of the amount of a condemnor's award made under § 32.05(7), an event that does not occur in a § 32.06 condemnation. (See footnote 3.)

only the Authority was the authorized condemnor. The Authority's first offer refers to the City and its Common Council in describing the nature of the project, and it notes that the City "in cooperation with" the Authority may or will acquire certain interests in the property. We reject the contention that the references to the City render the offer defective.

¶13 The document begins by identifying it as "a Jurisdictional Offer of the Redevelopment Authority of the City of La Crosse," making plain the identity of the condemning entity. Exxon neither points to a specific requirement under WIS. STAT. § 32.05(3) that the references to the City allegedly violate, nor does it explain what confusion or harm to its interests the references might have engendered. In short, we conclude the references to the City in the first jurisdictional offer did not render it "void."

¶14 Next, Exxon claims the Authority's first offer "purported" to seek condemnation of its property "under both Sections 32.05 and 32.06 ... although those sections provide inconsistent procedures for how and at what price the taking occurs." The offer's introductory paragraph recites that it is "in accordance with Subsections 32.06(3) and 32.05(3)" of the statutes, which, as we have explained above, are the governing and cross-referenced provisions for the Authority's offer. Again, Exxon does not tell us what requirement under WIS. STAT. § 32.05(3) was violated by the Authority's correct statutory citation or how Exxon may have been adversely affected by it. As with its first claimed defect, we find Exxon's second claim meritless.

¶15 As a third alleged defect in the first offer, Exxon asserts that the offer "[p]urported to demand that the matter proceed to the Condemnation Commissioners for determination of the taking price, yet referred to appeal

procedures of Section 32.05 which do not require a Condemnation Commission's determination of value." The City's first offer correctly informed Exxon that, if it did not accept the offer, it had forty days to "commence a court action to contest the right of condemnation as provided in Subsection 32.06(5)." The offer also informed Exxon that if it did not accept the offer in twenty days, the Authority "may petition for a determination of just compensation by the La Crosse County Condemnation Commissioners," and that either party thereafter could appeal that determination to the circuit court "as provided in Subsection 32.06(10)." These were correct statements, and they were included in the offer in compliance with WIS. STAT. §§ 32.05(3)(g) and (h).

¶16 What Exxon appears to be challenging is the last numbered paragraph of the first offer, which informs Exxon that "in case of any appeal under Section 32.05(9), Wis. Stats., any parties having an interest in the property ... may initiate such appeal by filing with the [Authority, address] a letter requesting that the issue of the amount of such compensation be determined by the Condemnation Commission." The last paragraph of the Authority's first jurisdictional offer appears to be intended to comply with WIS. STAT. § 32.05(3)(i), which, as we have noted, does not apply to jurisdictional offers in condemnations under WIS. STAT. § 32.06. (See footnote 4.) The question thus becomes whether, as Exxon contends, this "defect" in the Authority's first offer was "jurisdictional" such that the first offer was "void" and could not form the basis for the condemnation proceedings the Authority sought and was granted under § 32.06(7).

¶17 Exxon principally relies on the supreme court's holding in *Wisconsin Town House Builders, Inc. v. City of Madison*, 37 Wis. 2d 44, 154 N.W.2d 232 (1967), to argue that the defects it cites in the Authority's first offer were of a kind that required the circuit court to declare it void and to order the

Authority to start over with a new jurisdictional offer. The supreme court was critical in *Wisconsin Town House Builders* of several aspects of the City's jurisdictional offer, *id.* at 53-55, the most significant of which was that the offer misinformed the owner of what was being taken by condemnation. *See id.* at 53-54. The court found the description in the offer to be "confusing and misleading," and it emphasized that the defective description was compounded by other omissions, most notably the failure to itemize the damages offered. *Id.* at 54. The cumulative effect of the defects, in the court's view, were such that the "jurisdictional offer is so defective that it cannot stand and must be declared void." *Id.* at 55.

¶18 The supreme court did not conclude in *Wisconsin Town House Builders*, however, that the City had forfeited its right to condemn as a result of the defective jurisdictional offer. The court ordered only that the City must "make a new and proper jurisdictional offer to purchase the plaintiff's land and the condemnation proceeding should continue from that point." *Id.* at 55.

¶19 We conclude that the erroneous inclusion in the Authority's first offer of information regarding an appeal procedure that did not apply to this condemnation does not rise to the level of the misdescription of the property rights to be acquired, compounded by other omissions, that prompted the supreme court to void the offer in *Wisconsin Town House Builders*. Exxon has pointed to no harm or prejudice to its rights that it claims to have suffered as a result of the erroneous inclusion in the first offer of inapplicable procedural information. Furthermore, we note that the Authority's second jurisdictional offer did not contain the paragraph referring to an "appeal under Section 32.05(9)," thereby

providing essentially the remedy that was ordered in *Wisconsin Town Home Builders*.⁵

¶20 Finally, Exxon asserts that the Authority’s first jurisdictional offer must fail because the Authority’s appraisal that preceded it, according to Exxon, “intentionally did not appraise the value of (1) 1.93 acres which [the Authority] claimed to be subject of claims of adverse possession, and (2) the environmental remediation system which was affixed to the property.” We agree with Exxon that the Authority was required to obtain an appraisal of the property and to share it with Exxon prior to serving its jurisdictional offer. *See* WIS. STAT. § 32.06(2). The Authority did so. Exxon’s claim is not that the Authority failed to obtain and provide it with an appraisal, but that the appraisal was inadequate.

¶21 Exxon’s claim is essentially that the value established by the Authority’s appraisal was too low because it failed to take into account all of the

⁵ As we discuss below, Exxon had more than twenty days within which to accept the Authority’s second jurisdictional offer, had it been of a mind to do so. The first commission hearing was not conducted until some sixty days after the service of the second offer, and more than twenty days elapsed between the circuit court’s May 7, 2003 allowance of the amended offer and the first commission hearing date.

We note further, as we also discuss below, that one of Exxon’s challenges to the second jurisdictional offer is that it failed to include the information set forth in WIS. STAT. § 32.05(3)(i), the very information it claims was wrongly included in the first offer. Exxon makes these contradictory arguments without acknowledging the contradiction or denominating them as being in the alternative. We find this to be not only somewhat disingenuous but also an indication that Exxon’s challenges are based on its effort to “flyspeck” the Authority’s jurisdictional offers rather than on any fundamental or prejudicial flaw in the condemnation proceeding. As we noted in *City of Racine v. Bassinger*, 163 Wis. 2d 1029, 1036, 473 N.W.2d 526 (Ct. App. 1991), “not all procedural steps associated with the condemnation proceedings are considered jurisdictional requirements.” We cannot conclude that WIS. STAT. ch. 32 expressly or impliedly denies a condemnor the right to condemn on account of what can only be described as minor or technical defects in the form of the jurisdictional offer, unaccompanied by some showing that the defects prejudiced the owner’s exercise of the rights accorded by the chapter.

property that Exxon claims the Authority was seeking to acquire from it. The appraisal in question specifies that, within the property's description, "there are two encroachments and two adversely possessed areas totaling 1.93 acres," whose value was neither determined by the appraiser nor included within the appraised value for the parcel. The appraisal also recites that "personal property is not included in this report."

¶22 We conclude that the alleged inadequacy of the Authority's appraisal is not a basis for challenging the Authority's right to condemn. *See* WIS. STAT. § 32.06(5) (specifying that a court challenge to the condemnor's right "to condemn the property described in the jurisdictional offer" encompasses "any reason *other than that the amount of compensation offered is inadequate*") (emphasis added)). Any claim by Exxon that it rightfully owned the disputed 1.93 acres, or that the remediation equipment constituted fixtures that could not be economically removed from the property, were issues going to the amount of compensation to which Exxon was entitled, a question to be decided by the condemnation commission. We thus reject Exxon's attempt to refashion its disagreement with the adequacy of the Authority's appraisal, and with the price offered for its property based on it, into a jurisdictional claim that the Authority failed to comply with the requirement that it obtain an appraisal and disclose it to the owner.⁶

⁶ We do not wish to suggest that a condemnor's obligation under WIS. STAT. § 32.06(2)(a) to obtain an appraisal can be fulfilled by intentionally omitting from the appraisal items of value that the condemnor knows it will necessarily acquire from the owner in the taking. Our conclusion is simply that the condemnation statutes allow for good faith disputes between the owner and the condemnor over the scope and validity of the condemnor's appraisal to be determined during proceedings before the condemnation commission. Such disputes, however, do not implicate the condemnor's "right to condemn" for purposes of a challenge under WIS. STAT. § 32.06(5).

¶23 We thus conclude that Exxon has not brought to our attention any fundamental or jurisdictional defect in the Authority's first jurisdictional offer, or in the appraisal that preceded it, that would require us to direct the circuit court to set aside the taking of Exxon's property.

¶24 Exxon next argues that the circuit court erred by "permitting" the Authority to amend its jurisdictional offer prior to the commencement of the condemnation commission proceedings. Exxon acknowledges that the court could have permitted the Authority to amend its *petition* for condemnation proceedings "under the plain language of Section 32.14."⁷ Exxon contends, however, that a defective jurisdictional offer should not be deemed a "defect or informality in any of the proceedings" that may be cured by amendment under WIS. STAT. § 32.14. Exxon argues that, if a jurisdictional offer can "be amended to correct jurisdictional defects, then a jurisdictional defect in a jurisdictional offer has no significance." We have concluded above, however, that Exxon has not identified on appeal any jurisdictional defect in the Authority's first offer, and thus, the question of whether an amendment could be permitted to cure such a defect is not before us in this appeal.

¶25 Exxon's remaining arguments as to why the circuit court should not have permitted the condemnation proceedings to go forward are also without merit. Exxon claims that, because the court "retroactively" approved the amended jurisdictional offer, it was denied "the statutory time to accept or reject" the

⁷ WIS. STAT. § 32.14 provides as follows: "The court or judge may at any time permit amendments to be made to a petition filed pursuant to s. 32.06, amend any defect or informality in any of the proceedings authorized by this subchapter and may cause any parties to be added and direct such notice to be given to any party of interest as it deems proper."

Authority's second offer. Given Exxon's repeated challenges to the Authority's condemnation, we doubt that Exxon ever seriously considered accepting the March 28th jurisdictional offer, or, given the favorable outcome it obtained before the condemnation commissioners, that it now wishes it would have done so. In any event, we fail to see how Exxon's opportunity to accept the March 28th offer, had it been of a mind to do so, was impaired.

¶26 Some forty days elapsed between the date of the second jurisdictional offer and the circuit court's May 7th order referring the Authority's petition to the condemnation commission. Exxon's twenty-day acceptance period ran until mid-April, after which the Authority could have petitioned for condemnation proceedings under WIS. STAT. § 32.06(7) on the basis of its second jurisdictional offer, all prior to the court's May 7th referral to the commission. Moreover, even though the statute provides an owner twenty days to accept a jurisdictional offer before a condemnor may file for condemnation proceedings, *see* § 32.06(6), nothing in the statute prohibits an owner from communicating an acceptance after the twenty days have expired. Thus, we conclude Exxon could have communicated its willingness to accept the terms of the Authority's amended offer even after the May 7th hearing at which the circuit court "permitted" the amended offer.⁸ The commission did not conduct its first hearing until May 29th, which means that Exxon had another twenty days after the court permitted the amendment during which it could have agreed to the Authority's amended terms,

⁸ The Authority's second jurisdictional offer, dated March 28, 2003, recites that Exxon "shall have twenty (20) days from the date of personal service of this Amended Jurisdictional Offer ... to accept or reject" it. We thus recognize that any attempt by Exxon to accept the terms of the second offer more than twenty days after receiving it would arguably be an offer on its part to sell on those terms, which the Authority, in turn, could choose to accept or reject.

thereby avoiding condemnation proceedings. We conclude that, for all intents and purposes, the condemnation proceedings did “start over” with the Authority’s March 28th jurisdictional offer.

¶27 Finally, we fail to see how the fact that the court “permitted” the Authority’s amended jurisdictional offer adversely affected Exxon in any way during the condemnation proceeding. WISCONSIN STAT. § 32.06(7) provides that a condemnor’s petition for proceedings before the condemnation commission “may not disclose the amount of the jurisdictional offer,” and WIS. STAT. § 32.08(6)(a) adds that the “amount of a prior jurisdictional offer or award shall not be disclosed to the commission.” Thus, the fact that the amount or composition of the Authority’s jurisdictional offer had changed before commission proceedings began had no impact on those proceedings. We agree in principle with Exxon that a condemnor should not be permitted to amend its offer on the eve of commission proceedings or after they begin in order to avoid paying the owner’s litigation expenses. *See* WIS. STAT. § 32.28(3)(d). That did not happen here, however, because the commission’s award substantially exceeded the Authority’s second offer and Exxon received its requested litigation expenses in the amount of \$113,548.64.

¶28 In summary, we find no reversible error in the circuit court’s May 7, 2003 decision to permit the Authority’s March 28th amended jurisdictional offer.

II. Litigation Expenses for Exxon’s Challenge to Original Offer

¶29 Exxon next claims the circuit court erred in failing to grant its motion to dismiss as moot its action challenging the first jurisdictional offer and to award it litigation expenses for that action. It cites two bases for this claim. The first is that the Authority “abandoned” its first jurisdictional offer, which Exxon’s

first suit challenged, by serving a second jurisdictional offer. Exxon relies on WIS. STAT. § 32.28(3)(a), which provides that “litigation expenses shall be awarded to the condemnee if ... [t]he proceeding is abandoned by the condemnor.” Alternatively, because the Authority served an amended jurisdictional order, Exxon claims the Authority “implicitly admitted” that it had no right to condemn Exxon’s property on the basis of its first jurisdictional offer. Thus, in Exxon’s view, it was also entitled to recover its litigation expenses for its first action under § 32.28(3)(b), which requires a court to award litigation expenses to an owner when it “determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer.”

¶30 We will accept, for the purposes of Exxon’s present argument, that the circuit court could have, and perhaps should have, dismissed Exxon’s first action when the court permitted the Authority’s second jurisdictional offer. We reject, however, Exxon’s claim that dismissal of its first action would have entitled it to an award of litigation expenses.

¶31 We first conclude that the Authority did not “abandon” the condemnation proceeding within the meaning of WIS. STAT. § 32.28(3)(a). “Abandonment of proceedings” has a particular meaning within the context of WIS. STAT. ch 32. WISCONSIN STAT. § 32.06(9)(a) provides that, following an award by the condemnation commission, if a condemnor so chooses, it may petition the circuit court within thirty days of the award for “leave to abandon the petition,” and the court “shall grant the petition upon such terms as it deems just.”

*Id.*⁹ The condemnor must otherwise pay the award to the owner or into court within seventy days of the award. *See* § 32.06(9)(b).

¶32 We thus conclude that an owner may not obtain litigation expenses under WIS. STAT. § 32.28(3)(a) unless the condemnor obtains court approval for “abandonment of the proceeding” under WIS. STAT. § 32.06(9)(a); or, at a minimum, the condemnor voluntarily terminates its efforts to acquire the property at some point after condemnation proceedings under § 32.06(7) and (8) have begun. Neither happened in this case. A condemnor cannot be deemed to have “abandoned” the condemnation of a given property when, as here, it pays the amount awarded by the Commission to acquire the property.¹⁰

¶33 Similarly, we conclude that Exxon is not entitled to recover its expenses for its first lawsuit under WIS. STAT. § 32.28(3)(b). The circuit court did *not* determine that the Authority “does not have the right to condemn part or all of the property described in the jurisdictional offer,” *id.*, nor do we. In short, Exxon has not prevailed in its challenge to the Authority’s right to take the property at issue. Having lost in its action(s) under WIS. STAT. § 32.06(5), Exxon should not be able to recover a portion of its litigation expenses simply because it chose to

⁹ Presumably, a condemnor might choose this option when the condemnation commission awards considerably more in compensation than the condemnor is willing or able to pay for the property.

¹⁰ The condemnation commission proceeding in this case resulted in a sizeable increase in the amount of compensation awarded to Exxon over what the Authority had offered. Neither party appealed the commission’s award to the circuit court under WIS. STAT. § 32.06(10). Although the record does not reflect the fact, inasmuch as neither party has told us otherwise, we presume the Authority has paid the amount of the commission’s award, either to Exxon or to the court pursuant to § 32.06(9)(b).

commence three separate lawsuits instead of amending its pleadings in the first action to address the Authority's amended jurisdictional offers.

III. Commission Proceedings Prior to Resolution of Taking Challenge

¶34 Exxon's third claim is that the circuit court judge erred in referring the Authority's petition for condemnation compensation proceedings to the commission on May 7, 2003, because (1) the taking challenge had not been resolved, and (2) the Authority's first jurisdictional offer was defective. It argues that the proper sequence of events should have been as follows: Exxon's challenge under § 32.06(5) to the Authority's right to condemn the property should have proceeded to final judgment; if the Authority prevailed, Exxon would then have had twenty days from the filing of the final judgment to accept the jurisdictional offer; and, if Exxon did not accept the offer, only then should the Authority have been allowed to present a petition under WIS. STAT. § 32.06(7) for proceedings before the condemnation commission.

¶35 Exxon's argument highlights what it deems to be inconsistent or contradictory language found in WIS. STAT. § 32.06(5), (6) and (7). Exxon maintains that its reading is the only proper one because it gives meaning and effect to all of the provisions. We disagree and conclude that the plain language of the statutes at issue, as well as a prior supreme court interpretation of them, permits only one conclusion: condemnation proceedings under § 32.06(7) and (8) may go forward even though an owner's § 32.06(5) challenge remains pending.

¶36 The language of WIS. STAT. § 32.06(5) plainly provides that an action challenging the right to condemn may *not* interfere with or impede the progress of condemnation proceedings under § 32.06(7) and (8):

The commencement of an action by an owner under this subsection *shall not prevent a condemnor from filing the petition provided for in sub. (7) and proceeding thereon. Nothing in this subsection shall be construed to limit in any respect the right to determine the necessity of taking as conferred by s. 32.07 nor to prevent the condemnor from proceeding with condemnation during the pendency of the action to contest the right to condemn.*

Section § 32.06(5) (emphasis added). The supreme court, in discussing the provisions of § 32.06(5) and (7), as enacted in 1959, explained as follows:

It is apparent that the legislature intended to create two independent proceedings relating to condemnation, an owner's action in circuit court under sec. 32.06(5), Stats., and the condemnation proceeding before a judge under sec. 32.06(7). *From sec. 32.06(5) it is clear that the two proceedings may go on simultaneously*

Falkner v. Northern States Power Co., 75 Wis. 2d 116, 120, 248 N.W.2d 885 (1977) (emphasis added). “[A] judicial construction of a statute becomes part of the statute unless subsequently amended by the legislature.” ***Wenke v. Gehl Co.***, 2004 WI 103, ¶31 n.17, 274 Wis. 2d 220, 682 N.W.2d 405.

¶37 Exxon points, however, to WIS. STAT. § 32.06(6), which gives an owner twenty days from the date of service of the jurisdictional offer within which to accept it, “or 20 days from the date of filing the final judgment order or remittitur in the circuit court of the county in an action commenced under sub. (5), if the judgment permits the taking of the land.” In Exxon’s view, this provision can only mean that no referral of a petition under WIS. STAT. § 32.06(7) may take place until its right to take challenge under § 32.06(5) has been decided. Exxon also notes that § 32.06(7) directs a judge who has received a petition from a condemnor for condemnation proceedings to refer the matter to the county condemnation commission for hearing, “[i]f the petitioner is entitled to condemn the property.” (Emphasis added.)

¶38 We conclude that the provisions Exxon cites do not contradict the plain language of WIS. STAT. § 32.06(5). Nothing in § 32.06(7) requires a condemnor to petition for condemnation proceedings within any specified time after an owner has declined a jurisdictional offer.¹¹ Thus, a condemnor might elect to await the outcome of an owner’s § 32.06(5) challenge before petitioning for condemnation proceedings. A condemnor might also agree with an owner to adjourn a condemnation proceeding to await the outcome of the owner’s right to take action. *See* WIS. STAT. § 32.08(6)(a). We conclude that the circumstance addressed by the alternative language in § 32.06(6) (allowing for acceptance of a jurisdictional offer within “20 days from the date of filing the final judgment order ... in the circuit court ... in an action commenced under sub. (5)”) addresses these possibilities. The clear import of the language in § 32.06(5) that we have quoted and emphasized above, however, is that the option to proceed or not proceed with condemnation before an owner’s § 32.06(5) action has concluded rests solely with the condemnor.

¶39 We are also not persuaded that the language in WIS. STAT. § 32.06(7) that authorizes a judge to refer a condemnor’s petition to the commission, “[i]f the petitioner is entitled to condemn the property,” refers to the outcome of an owner’s challenge to the taking under § 32.06(5). The receipt and referral of the petition under § 32.06(7) are administrative actions by a circuit court “judge,” as is the determination of the “necessity of the taking” under WIS.

¹¹ Even though a condemnor makes a jurisdictional offer under WIS. STAT. § 32.06, it apparently need not ever file a petition requesting condemnation proceedings. *See Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 394, 288 N.W.2d 794 (1980) (“The condemnor is not required to proceed with its condemnation merely because a jurisdictional offer has been made.”).

STAT. § 32.07(3), when that step applies (which it does not here). See *Falkner*, 75 Wis. 2d at 121-22, 133-34; cf. *Schoenhofen v. Wisconsin Dep't of Transp.*, 231 Wis. 2d 508, 521, 605 N.W.2d 249 (Ct. App. 1999). By contrast, an owner's challenge to the condemnor's "right to condemn" under WIS. STAT. § 32.06(5) is brought by an "action in the circuit court." *Id.* We conclude that the only reasonable reading of the condition in § 32.06(7), "[i]f the petitioner is entitled to condemn the property," is that it refers to the judge's administrative determination under § 32.06(7) of the necessity of the taking, where applicable, *not* to the outcome of an action commenced in the circuit court under § 32.05. See *Falkner*, 75 Wis. 2d at 122.¹²

¶40 It is true, as Exxon argues, that a condemnation proceeding conducted under WIS. STAT. §§ 32.06(7) and 32.08 prior to the conclusion of an

¹² The supreme court explained in *Falkner*:

At the hearing, the judge will determine the necessity of taking if that duty is assigned to the judge under secs. 32.06(1) and 32.07, as it was in the instant case. From the last two sentences of sec. 32.06(7) it appears that the end result of this hearing will be an order that either (1) determines that the petitioner is entitled to condemn the property or some portion thereof and assigns the matter to the condemnation commissioners for assessment of damages, or (2) determines that the petitioner does not have the right to condemn and refuses to assign the matter to the commissioners. This determination ends the judge's role in condemnation proceedings. If the judge rules against the condemnor, the order may be appealed directly to this court under the last sentence of sec. 32.06(7). If the judge rules the other way and assigns the matter to the commissioners, no provision is made for appeal of this decision. The commissioners are to hear the matter as provided in sec. 32.08, make an award of damages, and file it with the clerk of the circuit court.

Falkner v. Northern States Power Co., 75 Wis. 2d 116, 121-22, 248 N.W.2d 885 (1977).

owner's right to take challenge under WIS. STAT. § 32.06(5) may ultimately turn out to have been for naught if the owner prevails in the § 32.06(5) action. As we have noted, however, if both parties so stipulate, the condemnation proceeding may be adjourned to await the outcome of the litigation under § 32.06(5). *See* WIS. STAT. § 32.08(6)(a). If a condemnor wishes to forge ahead with its condemnation proceeding, however, the language of WIS. STAT. § 32.06(5) expressly permits it to do so. If an owner ultimately prevails by obtaining a judgment under § 32.06(5) that the condemnor did not have the right to condemn the property, the owner may recover its litigation expenses incurred in both the circuit court and the commission proceedings. *See* WIS. STAT. § 32.28(1) and (3).

¶41 Exxon offers one additional reason why, in its view, the circuit court erred in permitting condemnation commission proceedings to go forward. In the caption of this argument, Exxon maintains that the Authority's petition for proceedings before the commission was invalid because it was "Based On the Invalid First Jurisdictional Offer." In the argument that follows, however, Exxon's focus shifts to an assertion that the Authority could not unilaterally amend its first jurisdictional offer, and thus, the second offer could not have been "effective" until the court's ruling on May 7, 2003, following which it was entitled to twenty days in which to accept the second offer before the referral of the petition to the commission. We reject both arguments. As we have discussed, the Authority's first offer was not jurisdictionally infirm for any of the reasons Exxon advances on appeal. And, as we have also noted, Exxon in fact had twenty days after the May 7th referral before the commission held its first hearing, during which time, had it been of a mind to, it could have communicated its willingness to convey the property on the terms set forth in the Authority's amended offer,

thereby avoiding the necessity of a proceeding before the condemnation commission.

IV. Validity of Second Jurisdictional Offer

¶42 Finally, Exxon argues that the circuit court erred in its February 26, 2004, decision by affirming the validity of the Authority's second jurisdictional offer. By the time of the court's February 26th decision, however, the Authority's first and second jurisdictional offers had been superseded by the commission's compensation award, for which Exxon did not seek circuit court review. We have already concluded that, because the Authority's first jurisdictional offer was not fundamentally or prejudicially flawed, the judge did not err in referring the Authority's petition for condemnation proceedings to the condemnation commission. Thus, we question whether any of the defects Exxon asserts in the Authority's second offer provides grounds for a judgment under WIS. STAT. § 32.06(5) that the Authority had no right to condemn the property at issue. We nonetheless briefly consider Exxon's challenges to the second offer. We conclude none have merit.

¶43 Exxon first argues that, because the second offer contained a contingency for contamination cleanup costs, it did not state "the amount of compensation offered," as required under WIS. STAT. § 32.05(3)(d). The second offer recited that the Authority would pay \$510,000 for the property as follows: \$327,000 "for lands to be taken not adversely possessed by others"; \$10,000 for 1.93 acres "that is adversely possessed"; \$1,000 for "salvage value with respect to remediation equipment"; and \$172,000 "to be escrowed in an interest-bearing account and given to ExxonMobil if the cost of clean up does not exceed the estimate provided by Envirogen under date of July 31, 2202."

¶44 Exxon complains that the escrowed funds “may never be paid” to it and whether or how much of the escrowed amount it receives will depend “on unknown events which may take many years to unfold.” It asserts that the creation of “an environmental contingency fund ... does not comport with the statutory requirement [under WIS. STAT. § 32.05(3)(d)] that the jurisdictional offer state ‘the amount of compensation.’” Exxon further argues that the contingency violates a requirement under WIS. STAT. § 32.06(6) that the condemnor pay the offered price within sixty days of an offer’s acceptance. Finally, Exxon insists that, given it did not accept the offer, the contingency might have interfered with a determination of its entitlement to litigation expenses under WIS. STAT. § 32.28 following the commission proceedings.

¶45 Nothing in the language of WIS. STAT. § 32.05(3)(d), however, prohibits the inclusion of a contingency escrow as part of the stated amount of compensation in a jurisdictional offer, and Exxon cites no other authority for such a rule. Exxon does not claim that it did not understand what the Authority was proposing in terms of immediate compensation or the purpose and amount of the escrow for future cleanup costs. That is, Exxon does not assert that it was unable to evaluate whether to accept the second jurisdictional offer because of the inclusion of the escrow provision. Moreover, because Exxon chose not to accept the offer, no violation of the statutorily required time for payment occurred, and because the commission’s award greatly exceeded the gross amount offered with the escrow fully included, the court had no difficulty determining that Exxon was entitled to an award of its litigation expenses for the commission proceedings. Thus, even if the Authority’s right to condemn this property hinged on the validity of the Authority’s second jurisdictional offer, which we have concluded it did not,

we would conclude that the second offer was not invalid for failing to “state the amount of compensation.”

¶46 Next, Exxon complains that the Authority failed to “appraise the remediation equipment” located on the property, which failure it asserts violated the requirement under WIS. STAT. § 32.06(2)(a) that a condemnor “shall cause at least one (or more in the condemnor’s discretion) appraisal to be made of the property proposed to be acquired.” As we have noted, the appraisal the Authority procured expressly stated that it did not include personal property. We conclude that the omission of personal property from the Authority’s appraisal did not deprive it of the right to condemn Exxon’s property. Exxon again cites no authority for such a rule. As we have concluded with respect to the Authority’s first jurisdictional offer, whether the Authority’s appraisal was too low because it omitted items of personal property that Exxon could show were not economically removable is a question that goes to the amount of compensation to which Exxon was entitled, and thus, it was a question to be answered by the condemnation commission.

¶47 Similarly, Exxon again complains that the appraisal did not include a value for the disputed 1.93 acres of “adversely possessed” lands included within the description of the property to be acquired. We have rejected this argument in considering Exxon’s challenge to the Authority’s first offer. To the extent there was a dispute regarding Exxon’s title to some of the land included within the description of the property at issue, its resolution affected the amount of compensation the Authority should be required to pay Exxon, not whether the Authority had the right to condemn. *See* WIS. STAT. § 32.06(5) (noting that an owner’s action to contest the right to condemn encompasses “any issue other than the amount of just compensation or other than proceedings to perfect title”).

¶48 Exxon next points to the fact that the Authority's second jurisdictional offer did not inform Exxon, as set forth in WIS. STAT. § 32.05(3)(i), that it would have two years from the "taking the property by award" to appeal for greater compensation and that it could initiate such an appeal by filing a letter request with the Authority. As we have discussed, paragraph (i) does not apply to jurisdictional offers made as a prelude to a condemnation under WIS. STAT. § 32.06. (See footnote 4.) That is also what the circuit court concluded and what the Authority argues in its response brief. Exxon does not reply to the Authority's response on this issue, and, without further discussion, we accept the response as conceded.

¶49 Returning once again to the Authority's appraisal, Exxon complains that it did not include a separate value for the Declaration of Use Restrictions it had previously recorded relating to the condemned property. Exxon makes no new or additional argument on this claim but refers us to its previous arguments and asks us to conclude that this was a "jurisdictional defect." In response, we refer to our previous rejection of Exxon's claims that the allegedly inadequate scope or content of the Authority's appraisal provides grounds to set aside this condemnation under WIS. STAT. § 32.06(5). As before, Exxon's argument is one for greater compensation than offered by the Authority.

¶50 Finally, Exxon also asks us to declare the second jurisdictional offer "abandoned" because the Authority served a third offer at the conclusion of the condemnation commission proceedings. It notes that the circuit court disallowed this belated attempt by the Authority to amend its offer. Exxon uses the occasion to renew its argument that the court should have similarly disallowed the Authority's second offer and required the Authority to start over "from square one." We have rejected Exxon's claim that the judge's May 7, 2003 referral of the

Authority's petition to the condemnation commission constituted reversible error. As to its present argument, regardless of whether the trial court could have "permitted" the Authority's second attempt to amend its jurisdictional offer, the fact is that the court did not do so. Thus, the Authority's third jurisdictional offer had no impact whatsoever on the outcome of the condemnation proceedings or on the Authority's right to condemn Exxon's property.

CONCLUSION

¶51 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

