

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP163

Cir. Ct. No. 2006CV584

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TOWN OF PERRY,

PETITIONER-RESPONDENT,

v.

DSG EVERGREEN FAMILY LTD. PARTNERSHIP,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

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

¶1 LUNDSTEN, J. DSG Evergreen Family Limited Partnership appeals a circuit court order assigning the Town of Perry's condemnation petition

to the county condemnation commission. The primary issue is whether the Town violated the negotiation requirement in WIS. STAT. § 32.06(2a),¹ causing a “fundamental” defect in the condemnation proceedings. DSG argues that such a defect arose because, after the time for negotiations, the Town changed the legal description of the property to be acquired in order to relocate an access easement.

¶2 We conclude that there was no violation of the negotiation requirement and, therefore, no fundamental defect. We also resolve other issues that DSG raises against DSG. Accordingly, we affirm the circuit court’s order.

Background

¶3 The Town sought to condemn a 12.13-acre parcel of DSG’s land pursuant to WIS. STAT. § 32.06. Following the statutory procedure, the Town served DSG with an appraisal, which included a legal description of the 12.13-acre parcel. According to the legal description in the appraisal, DSG was to retain an easement over the 12.13-acre parcel, providing highway access to its remaining lands. The parcel was part of a larger, 132-acre tract of land.

¶4 DSG and the Town met to conduct negotiations over the price of the 12.13-acre parcel. *See* WIS. STAT. § 32.06(2a). At that time, DSG informed the Town that it had exchanged a portion of its remaining lands with a neighbor. One effect of the exchange of land was to disconnect the access created by the proposed easement over the 12.13-acre parcel. DSG’s position during the

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

negotiations was that its land swap was proper and that the Town's condemnation now amounted to a "total take" of DSG's remaining land.

¶5 The parties failed to agree on a negotiated price, and the Town made a jurisdictional offer. In the jurisdictional offer, the Town changed the location of the easement within the 12.13-acre parcel so that DSG would retain highway access to its remaining lands despite the land exchange. Thus, the legal description in the jurisdictional offer was different than the legal description in the appraisal because the two documents described different easements.

¶6 The Town petitioned the circuit court for assignment to the county condemnation commission. DSG contested the petition, arguing that the legal description of the property in the appraisal had to match the legal description in the jurisdictional offer. The circuit court initially ruled for DSG, concluding that the change in legal description rendered the Town's jurisdictional offer fundamentally defective. After the Town moved to reconsider, however, the court reversed itself and allowed the condemnation to proceed. With the court's permission, the Town filed an amended jurisdictional offer separating out the easement from the legal description, which showed that the 12.13-acre parcel would be acquired in fee simple.

¶7 DSG moved for reconsideration, arguing that the amended jurisdictional offer did not correct the defect in the original jurisdictional offer because the legal description of the 12.13-acre parcel in the amended jurisdictional offer did not, at least technically speaking, include an easement and, therefore, did not match the appraisal's legal description. The circuit court denied DSG's motion and assigned the Town's petition for condemnation to the county condemnation commission. DSG appeals.

Discussion

¶8 This case requires us to interpret and apply condemnation statutes to undisputed facts. This is a question of law for our *de novo* review. See *Warehouse II, LLC v. DOT*, 2006 WI 62, ¶4, 291 Wis. 2d 80, 715 N.W.2d 213.

A. Whether The Change In Legal Description Caused A Fundamental Defect

¶9 Before addressing DSG’s arguments, we briefly summarize the pertinent condemnation procedures under WIS. STAT. § 32.06. This summary is not intended to be complete, but is sufficient for our purposes here.

¶10 The condemning authority must obtain an appraisal of the land to be acquired and must provide a “full narrative appraisal” to the landowner. WIS. STAT. § 32.06(2). Before the condemnor makes a jurisdictional offer, it must “attempt to negotiate ... with the owner” for a purchase price. WIS. STAT. § 32.06(2a). Only after the statutory negotiation requirement is met may the condemnor serve the jurisdictional offer. WIS. STAT. § 32.06(2a) and (3). The failure to negotiate before issuing a jurisdictional offer has been deemed a “fundamental” or “jurisdictional” defect. *Warehouse II*, 291 Wis. 2d 80, ¶¶6-7, 10.

¶11 According to DSG, a “fundamental” defect arose here because, after the Town’s appraisal and the time for negotiations, the Town changed the legal description of the property to be acquired and, therefore, there was never a meaningful negotiation over the property the Town proposed to take. DSG states the primary issue as whether WIS. STAT. § 32.14 authorizes the circuit court to

allow the Town to correct a “fundamental” defect in condemnation proceedings.² DSG also argues, however, that even if § 32.14 provides such authority, the defect here was never cured because the legal description in the Town’s *amended* jurisdictional offer did not precisely match the legal description in the appraisal. DSG argues that, if the legal description of the property changes after the appraisal and negotiations, the landowner’s right to negotiations based on the appraisal is rendered meaningless.

¶12 Given DSG’s arguments, we conclude that the dispositive issue is whether the Town violated the negotiation requirement in WIS. STAT. § 32.06(2a), causing a “fundamental” defect in the condemnation proceedings. Because we conclude that the Town did not violate that requirement, we need not address whether or under what circumstances WIS. STAT. § 32.14 authorizes the circuit court to amend fundamental defects.³

¶13 DSG relies primarily on *Warehouse II*. There, the court explained that negotiation is a necessary condition to “conferring jurisdiction” on the condemnation commission and the court. *See Warehouse II*, 291 Wis. 2d 80, ¶6 (quoting *Arrowhead Farms, Inc. v. Dodge County*, 21 Wis. 2d 647, 651-52, 124

² WISCONSIN STAT. § 32.14 provides:

Amendments. 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.

³ The parties dispute whether DSG’s argument regarding the negotiation requirement was timely raised with sufficient clarity in the circuit court. Because we address the merits of this argument, we need not resolve this dispute over waiver.

N.W.2d 631 (1963)). *Warehouse II* says nothing, however, about what types of circumstances constitute a violation of the negotiation requirement. It was undisputed in *Warehouse II* that the condemning authority failed to negotiate. *Warehouse II*, 291 Wis. 2d 80, ¶5. The issue was whether, given that failure, the landowner was entitled to litigation expenses. *See id.*, ¶¶1, 35.⁴

¶14 Here, we are not persuaded that the change in the location of the proposed access easement after the appraisal and negotiations undermined the negotiation requirement. We see no basis to conclude that the change in the location of the access easement deprived DSG of a meaningful opportunity to negotiate for the price of the land to be taken.

¶15 There is no dispute that the shape and size of the 12.13-acre parcel that the Town sought to take remained the same. What changed was the location of the easement, as necessitated by DSG's intervening land exchange with its neighbor.⁵ The circuit court concluded that the change to the easement did not affect the validity of the Town's appraisal. This conclusion is supported by the appraisal, which values the 12.13-acre parcel based on a per-acre price for the

⁴ DSG also relies on *Warehouse II, LLC v. DOT*, 2006 WI 62, 291 Wis. 2d 80, 715 N.W.2d 213, for its argument that WIS. STAT. § 32.14 does not authorize the circuit court to amend fundamental defects. DSG's argument seems to be that, under *Warehouse II*, the circuit court is without jurisdiction once a fundamental defect arises and that a court without jurisdiction is a court without power to act under § 32.14. DSG is correct that there is language in *Warehouse II* suggesting that a fundamental defect in a condemnation proceeding deprives a court of jurisdiction. But DSG's interpretation of *Warehouse II* is not easily reconciled with the plain language of § 32.14, which refers to the amendment of "any defect or informality" (emphasis added). Because we do not address whether the court may use § 32.14 to amend fundamental defects, we need not decide how any apparent conflict between *Warehouse II* and § 32.14 might be resolved.

⁵ The parties dispute whether DSG had a legitimate purpose for the land exchange or, instead, engaged in the land exchange in order to thwart the condemnation. We do not resolve this dispute; rather, we assume without deciding that DSG had a legitimate purpose.

land, not on the location of the easement. DSG does not challenge the circuit court's underlying factual findings as clearly erroneous.

¶16 We recognize that there may be instances when a change to a legal description after negotiations would circumvent or undermine the negotiation requirement. That was not the case here. Accordingly, we conclude that the Town did not violate the negotiation requirement. As a consequence, DSG's argument that there was a fundamental defect fails.⁶

¶17 DSG makes an additional argument relying on *Kluenker v. DOT*, 109 Wis. 2d 602, 327 N.W.2d 145 (Ct. App. 1982), and we are uncertain whether that argument is resolved by our conclusion that there was no fundamental defect. Accordingly, we address the argument. We stated in *Kluenker* that “there were no ‘actual’ proceedings before the commission or court” prior to the date of a jurisdictional offer. *Id.*, 109 Wis. 2d at 606. DSG argues that the circuit court could not amend the Town's jurisdictional offer under WIS. STAT. § 32.14 because there were no “proceedings” to amend. DSG's argument assumes that, in order for a jurisdictional offer to trigger “proceedings,” the jurisdictional offer must have no defects, fundamental or otherwise. We did not impose such a requirement in *Kluenker*, and we do not impose the requirement here. Such a requirement would contravene the statutory language, which contemplates that a circuit court may amend at least some types of defects.

⁶ WISCONSIN STAT. § 32.06(2)(b) requires that the condemnor provide the landowner with a “full narrative appraisal upon which the jurisdictional offer *is based*” (emphasis added). We read this as a requirement that the jurisdictional offer be “based” on the appraisal. Although DSG asserts that the Town's jurisdictional offer was not “based” on the Town's appraisal, DSG does not develop a separate argument along these lines. In any event, we are satisfied, for the reasons already stated, that the Town's jurisdictional offers were “based” on its appraisal within the meaning of § 32.06(2)(b).

¶18 DSG also argues that, although the circuit court reversed its initial ruling that favored DSG, the court never specifically reversed its conclusion that the change in legal description resulted in a fundamental defect. DSG asserts that the court's initial ruling remains the law of the case and that the Town had to appeal that ruling. DSG's argument lacks merit for several reasons, but it is enough to say that we reject the argument because DSG fails to explain why law of the case doctrine applies in a situation where it would appear to be inapplicable. Circuit courts routinely revisit their rulings during the pendency of a case and, here, the circuit court necessarily, albeit implicitly, changed its fundamental defect ruling. The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an *appellate* court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." *State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (emphasis added; citation omitted).

B. Other Issues

¶19 DSG raises four additional issues. We address each in turn.

1. Evaluation Date Based On Town's Original Petition And Lis Pendens

¶20 The Town filed its petition for condemnation on February 23, 2006. The Town contemporaneously filed a *lis pendens*, as required by statute. *See* WIS. STAT. § 32.06(7). The circuit court's initial ruling that the Town's jurisdictional offer contained a fundamental defect occurred on October 18, 2006. The circuit court's decision reversing itself occurred on May 7, 2007. The parties agree that the Town was, in effect, then permitted to proceed on its original petition and *lis pendens*, although in DSG's view the petition was "refiled" on November 9, 2007,

the date the circuit court assigned the petition to the county condemnation commission.

¶21 DSG points out that the date of the *lis pendens* establishes the “date of evaluation” for purposes of fixing just compensation. WIS. STAT. § 32.06(7). DSG asserts that it is contrary to established condemnation procedures and unfair to set the value of the property as of February 23, 2006, given the circuit court’s initial ruling on October 18, 2006, that the proceedings were jurisdictionally defective. According to DSG, the date of evaluation should be November 9, 2007, and the Town should have filed a new *lis pendens* on that date.

¶22 The details of DSG’s argument are not well developed. DSG assumes without explanation that, after the circuit court reversed itself, the Town was required to start over with a new petition and *lis pendens* because the original petition was, in effect, a nullity. DSG does not explain why the circuit court’s reversal of its initial decision would not have instead revived the Town’s original petition. The most sensible way to view the court’s action was that it concluded that the original petition was proper after all. In addition, DSG fails to offer any reason why the difference in valuation dates makes a difference. DSG does not assert that the value of the 12.13-acre parcel in question was greater on either May 7 or November 9, 2007, than on February 23, 2006. For these reasons, we conclude that DSG’s argument is insufficiently developed and address it no further. See *Barakat v. DHSS*, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not address “insufficiently developed” argument).

2. *Effect Of Inverse Condemnation Action*

¶23 DSG argues that the Town’s condemnation proceeding is void because DSG has, at all times relevant to this case, pursued claims for inverse

condemnation and regulatory takings. As support for this argument, DSG cites a related appeal and that appeal's underlying circuit court decision. We recently decided that appeal and concluded that the issue was moot because the circuit court dismissed the inverse condemnation action and no appeal has followed. *See State ex rel. Gehl v. Town Board of Town of Perry*, No. 2007AP1067, unpublished slip op. ¶¶58-60 (WI App Mar. 12, 2009). The same analysis applies here. Moreover, we conclude that, if DSG wished to preserve its voidness argument based on the related proceedings in *Gehl*, it was incumbent on DSG to write this court addressing the effect of *Gehl* on the instant appeal within a reasonable time of our *Gehl* decision. DSG has not done so. Accordingly, DSG has waived further argument on this issue.

3. Amendment Of The County Condemnation Commission's Award

¶24 After DSG filed the instant appeal, the county condemnation commission proceeded on the Town's condemnation petition and awarded DSG condemnation damages. The commission failed, however, to include a complete legal description of the condemned property in the award document.

¶25 The Town moved the circuit court to correct the description of the property in the award under WIS. STAT. § 32.14 and other authority. In addition, the chairman of the commission wrote the court, explaining that the commission's failure to include a complete legal description was inadvertent. The commission chairman stated that the commission would be willing to either enter an amended award that included a complete description or testify in court that the award was meant to cover the property described in the Town's petition. Relying on its inherent authority, the circuit court granted the Town's motion, and ordered the

commission to amend its award to include the complete legal description of the parcel.

¶26 DSG argues that the circuit court exceeded its authority by ordering the commission to amend its award. The Town responds that we have no jurisdiction to decide the issue because the issue arose after DSG's notice of appeal. In the alternative, the Town renews its argument that WIS. STAT. § 32.14 and other authority allowed the circuit court to order the commission to amend its award.

¶27 We conclude that WIS. STAT. § 32.14 authorized the circuit court's order to amend the award. Accordingly, we do not resolve the jurisdictional question. The Town would prevail either way.⁷

¶28 As relevant here, WIS. STAT. § 32.14 states that “[t]he court or judge may ... amend any defect or informality in any of the proceedings authorized by this subchapter.” DSG does not dispute that the proceedings before the county condemnation commission are “proceedings” under the statute. In addition, DSG does not develop an argument that the commission's failure to include a complete legal description in its award was a fundamental defect. Nor does DSG argue that the commission considered the wrong property interest. Rather, DSG argues that

⁷ We recognize that, by not resolving the jurisdictional question, DSG might in the future argue that our conclusion on the merits on this issue somehow does not bind DSG. We caution DSG that such an argument would likely be frivolous. DSG undeniably has taken the position here that we have jurisdiction over the issue and DSG has also taken full advantage of the opportunity to brief the issue on the merits. Thus, DSG has sought a decision on the merits of this issue, and this is what we have done. Any future argument by DSG in any context that our conclusion does not bind DSG would likely run aground on one or more of the following: preclusion, waiver, judicial estoppel, other estoppel, or similar equitable principles.

the circuit court's action runs afoul of *Rusch v. Milwaukee, Lake Shore & Western Railway Co.*, 54 Wis. 136, 11 N.W. 253 (1882). We are not persuaded.

¶29 In *Rusch*, the court addressed the validity of condemnation proceedings when a condemnation commission had awarded a lump sum to joint owners without specifying the amount to which each owner was entitled. *See id.* at 137-39. DSG relies on the following paragraph from the *Rusch* decision to argue that the circuit court here had no power to order the condemnation commission to amend its award:

We do not think the condemnation proceedings are pending, but that the same are determined and at an end. We are aware of no statute which authorizes the circuit court or judge to recall the commissioners and require them to apportion the sum awarded between the owners of the land sought to be condemned, and to amend their award by specifying therein the sum to which each owner is entitled. Such a practice would be like recalling a jury after they have been discharged, and their verdict recorded, to correct their verdict. Indeed, it would be more nearly analogous to recalling the jury for such purpose after judgment has been entered on the verdict, and after the trial term has adjourned. Probably such a practice was never heard of; certainly no such practice can be upheld. We think, and so hold, that the condemnation proceedings are at an end, and that, because they resulted in an award which fixed no rights and bound no one, they have ceased to have any effect for any purpose whatever, and the rights and liabilities of the parties are the same as though the proceedings had not been instituted.

Id. at 139.

¶30 There are several grounds on which we might question the applicability of *Rusch* or distinguish it. One will be sufficient. *Rusch*, unlike here, involved a situation in which a condemnation commission had failed to decide all of the issues before it. This is apparent from the facts and from the court's observation elsewhere in its opinion that "no rule is given and none exists

by which the proportionate share of each [owner could] be ascertained.” *Id.* at 138. Here, in contrast, the commission made all of the decisions it needed to make, and there is no serious dispute that the commission inadvertently failed to include the complete legal description of the condemned property.

¶31 DSG argues that, although WIS. STAT. § 32.14 may authorize circuit courts to “permit” amendments to condemnation awards, the statute does not allow courts to “order” condemnation commissions to exercise their powers. Assuming without deciding that this argument has merit in some situations, it has no merit here. We see no point in distinguishing between the circuit court “permitting” and the circuit court “ordering” in a situation, like that here, where the commission made its own request to the court that the error be corrected and the court obliged.

4. *Order Enjoining Further Transactions Involving DSG’s Land*

¶32 DSG argues that the circuit court erred when it enjoined DSG from making any further transfers of its land or undertaking other transactions involving its land. Specifically, the court prohibited “any further modifications, easements, transfers, mortgages or any other transaction or action on the *subject parcel* pending final resolution of the condemnation proceedings.” DSG argues that the circuit court lacked authority to issue such an order.

¶33 We reject this argument because DSG fails to explain how the court’s order actually affected DSG’s rights. DSG asserts that the order prevented it from leasing any of its farm land, using the land as collateral, or renewing farm subsidies. However, DSG does not make clear, with record citations or otherwise, whether this is a hypothetical scenario or a problem that DSG actually faced. Accordingly, we address the issue no further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (arguments supported only by general

statements, unsupported by citations, or otherwise inadequately briefed need not be addressed).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

