

**LEGISLATION AND LEGAL UPDATE
INTERNATIONAL RIGHT-OF-WAY ASSOCIATION
BADGER CHAPTER 17**

<p>J.J. ROLLING VON BRIESEN & ROPER, S.C. 10 EAST DOTY STREET, SUITE 900 MADISON, WI 53703 DIRECT: 608.661.3974 JROLLING@VONBRIESEN.COM</p>	<p>BOB TRAPP ARGIANAS & ASSOCIATES 29412 SILVER LAKE ROAD SALEM, WI 53168 DIRECT: 630.487.2146 BTRAPP@ARGIANAS.COM</p>
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LEGISLATION

**I. NEW RULES FOR FUNDING CERTAIN
TRANSPORTATION PROJECTS — 2017 WISCONSIN
ACT 368**

Legislation related to funding for WisDOT and local road projects are funded was included in one of the “lame duck” bills, which was signed on December 14, 2018, as 2017 Wisconsin Act 368. The legislation affects a few major topics:

A. Use of Federal Funds

The Act requires that WisDOT expend federal funds on at least 70% of the aggregate project components eligible for federal funding each fiscal year for the following types of projects: (1) Southeast Wisconsin freeway megaprojects; (2) Major highway development projects; and (3) State highway rehabilitation projects with a total cost of less than \$10 million.

The act also creates an exception to this requirement through review by the Joint Committee on Finance. The review procedure is outside the scope of this report, but members can review the act at the following address:

<https://docs.legis.wisconsin.gov/2017/related/acts/368.pdf>

B. Local Projects

The Act mandates that WisDOT notify political subdivisions when aid WisDOT disburses to them includes federal funds. WisDOT must further specify which project components must be covered by federal funds.

The Act bars WisDOT from requiring political subdivisions to comply with the Facilities Development Manual (FDM) (but for design standards) when (1) the project proposal is reviewed and approved by a professional engineer or by the county's highway commissioner and (2) the project is conducted by the political subdivision without federal funds.

The Act also imposes low-bid requirements for local projects funded through certain programs. These provisions first apply to projects let and aid disbursed on July 1, 2019.

C. Transfers of State and Federal Moneys

The Act eliminates WisDOT's authority to make transfers of state and federal moneys between the highway program, as well as a related appropriation. The repeal takes effect on July 1, 2019.

CASE LAW

I. WISCONSIN COURT OF APPEALS

A. *Aamaans Properties, Inc. v. Wisconsin Dep't of Transp.*, No. 2017AP1220, unpublished slip op. (Wis. Ct. App. Dec. 26, 2018)(per curiam)¹ *petition for review filed (Wis. Jan. 25, 2019).*

This per curiam opinion, which generally may not be cited in Wisconsin courts, addressed whether WisDOT's road relocation amounted to a compensable taking.

In 2002, Aamaans paid \$975,000 for a property in Rock County along Arthur Drive, which intersected with State Trunk Highway 26 near the property's southwest

¹ Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in Wis. Stat. § (Rule) 809.23(3).

corner. Aamaans improved the property, and by 2011, it contained a McDonald's restaurant, convenience store, fuel pumps, and a car wash.

Between 2011 and 2013, WisDOT relocated a portion of STH 26, which left the highway no longer intersecting with Arthur Drive. There was neither a direct taking, nor (as the opinion notes) "did the relocation of the highway affect the property's access to or from Arthur Drive." Whether driving northbound or southbound along the newly-relocated STH 26, drivers saw only 0.2 additional miles of travel to the subject property in the after condition.

Even so, after the highway's relocation, McDonald's closed its restaurant on the property and nothing else occupied the building shell. By 2013, the opinion notes an appraiser concluded the property's fair market value had fallen to \$332,500. Aamaans' property was foreclosed.

Aamaans brought an inverse condemnation action, alleging that the highway's relocation amounted to taking. The circuit court rejected Aamaans' arguments, concluding that no taking had occurred. Aamaans appealed.

On appeal, the court of appeals seemed to fix on whether Aamaans had demonstrated that "there is a legally imposed restriction upon the property's use" rather than a harm arising as "an indirect result of government action."

Aamaans argued that the relocation of STH 26 frustrated Aamaans' investment-backed expectations of having a multi-faceted travel center, which was dependent on convenient access to the highway. Implied in this argument appears to have been that the relocation of STH 26 was such an action that could give rise to a regulatory taking in certain circumstances. However, the court of appeals disagreed with this premise, concluding that "Aamaans is not restricted by any governmental regulation dictating how Aamaans may use or develop its property." The court of appeals found binding Aamaans' previous admission that Aamaans "had not lost all, or practically all of the beneficial use of [the] property."

The court's opinion went on to discuss and reject Aamaans' other arguments, but it appears the decision was already made. In short, the court of appeals concluded

that there was no error in finding that Aamaans was unable to maintain a claim for inverse condemnation on the record below.

Although the opinion is unlikely to be cited in the future, the case is notable for this court's (1) view of the "regulatory takings" analysis, and (2) avoidance of the "no right to passing traffic" principle.

First, the court's decision relied on a very narrow and literal interpretation as to what kind of an action can amount to a "regulatory taking." Such a reading could possibly suggest that a claim of inverse condemnation would never be available following an act of WisDOT. Regardless of its reading of the Wisconsin Supreme Court's holding in *Hoffer Properties, LLC v. DOT*, the appeals court's understanding of what can amount to a regulatory taking (regulation only) would conflict with the definition used by the Wisconsin Supreme Court in a recent decision, *Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, 2018 WI 70, ¶ 53, 382 Wis. 2d 377, 914 N.W.2d 660 ("A property owner proves a taking when a government regulation **or action** denies him all or substantially all practical uses of his property")(emphasis added). This "or action" point is found elsewhere in Wisconsin case law, including one case cited in this opinion. See *Eberle v. Dane County Board of Adjustment*, 227 Wis. 2d 609, 622, 595 N.W.2d 730 (1999) ("[t]akings which do not involve physical invasions of land are called regulatory takings" and "a **regulation or government action** must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required")

Second, it was surprising that the concept that there is no right to passing traffic was not raised. The landowner has filed a petition for the Wisconsin Supreme Court to grant review of this decision, so it's possible that argument could yet be made.

B. *Manthe v. State of Wisconsin Department of Transportation*, No. 2017AP1598, unpublished slip op. (Wis. Ct. App. Feb. 7, 2019)(per curiam).²

A recent Wisconsin per curiam opinion provides some insight into how courts may view WisDOT's freedom to classify highways as it deems appropriate. *Manthe v. State of Wisconsin Department of Transportation*, No. 2017AP1598, unpublished slip op. (Wis. Ct. App. Feb. 7, 2019) (per curiam).

In *Manthe*, the plaintiff's farm was two non-contiguous parcels divided by U.S. Highway 51. The 250-acre parcel to the west contained the family home, milking operation and all the equipment storage space. The 77-acre parcel to the east housed the farm's stock animals and a 13,200 square foot barn.

As part of a highway improvement project, WisDOT expanded a portion of Highway 51 from two lanes to four and removed the intersection Manthe previously used to get farm equipment from one parcel to the other. WisDOT also acquired a combined 9.99 acres from Manthe through eminent domain. After the acquisition, Manthe's route between his parcels increased by approximately 2 miles.

Manthe challenged the amount of just compensation.

Manthe sought a "writ of mandamus"—essentially asking the circuit court to compel WisDOT to designate Highway 51 as a "freeway." The circuit court denied that request. On appeal, Manthe argued that because the improved portion of Highway 51 met the statutory definition of "freeway," WisDOT should have designated Highway 51 as a freeway.

Examining Wis. Stat. § 84.295(3), the Wisconsin Court of Appeals ("COA") held the statute granted WisDOT discretionary authority to classify highways. Accordingly, WisDOT could not be compelled to reclassify Highway 51 as a freeway.

² As with *Aamaans*, per curiam opinions may not be cited in any court of this state as precedent or authority except for the limited purposes specified in Wis. Stat. § (Rule) 809.23(3).

Manthe argued that Wis. Stat. § 84.295(3) violated his right to equal protection by giving WisDOT discretion to expand a controlled-access divided highway without classifying that highway as a freeway. Of note, a loss of access to a freeway would have entitled Manthe to just compensation while a loss of access to a controlled-access highway would not. Nevertheless, the COA found that equal protection was not a proper claim, because landowners abutting freeways and landowners abutting controlled-access highways were not “similarly situated.” Moreover, the COA stated, “as long as DOT does not leave such a landowner without any access to their land, he or she is not entitled to compensation.” *Manthe*, ¶ 27 (citing *Hoffer Props., LLC v. DOT*, 2016 WI 5, ¶¶ 31–37, 366 Wis. 2d 372, 874 N.W.2d 533).

Lastly, Manthe claimed he was entitled to damages for the lengthened route of travel as a result of the project. He alleged that the new route was more dangerous and that he faced increased travel time when going between the west and east parcels. However, the COA rejected the “increased dangerousness” theory as insufficiently developed. The COA also held that the Wisconsin Supreme Court’s prior decision in *Hoffer* meant Manthe could not claim just compensation for the change to his access under the circumstances.

Thus, the appeals court rejected the sum of Manthe’s arguments and affirmed the decisions of the court below.