

CONFIDENTIAL LEGAL MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED

TO: Dave DeAngelis, Village Manager of the Village of Elm Grove

C: Casey Griffiths, Village Zoning Administrator of the Village of Elm Grove

FROM: von Briesen & Roper, s.c.
By: Hector de la Mora & Christopher T. Koehnke

DATE: March 2, 2016

RE: DOT Authority to Control Land Not Currently Under Its Jurisdiction

You have asked our office to research what authority, if any, the Department of Transportation (“DOT”) may have to exercise its jurisdiction with respect to land outside of its control or outside of its already established right-of-way. Specifically, you have asked if the DOT has the ability to eliminate left turns on westbound Watertown Plank Road for southbound access onto Pilgrim Parkway as a means of managing traffic on Pilgrim Parkway proceeding south into the intersection at Bluemound Road.

Wisconsin Avenue is an east to west thoroughfare located in the City of Brookfield (“City”) which extends from Calhoun Road in the west to Main Street in the east. The City has sought extending Wisconsin Avenue to Pilgrim Parkway to create an alternative east to west thoroughfare in the City and to allow traffic flow to bypass portions of Bluemound Road (U.S. 18) through a connection to Pilgrim Parkway. The segment of Pilgrim Parkway that would be impacted by a possible extension of Wisconsin Avenue is under the jurisdictional control of the Village.

In order for the City to complete the connection of Wisconsin Avenue to Pilgrim Parkway, the City would need to obtain use of the undeveloped parcel of land between Main Street and Pilgrim Parkway. This parcel is identified as tax key BR C1113996002 and is currently owned by North Shore Bank.

Bluemound Road is part of the State Trunk Highway system and thus under the jurisdiction of the DOT. Pilgrim Parkway is a two-lane roadway which traverses the western edge of the Village. The portion of Pilgrim Parkway which is located in the Village includes the area between the Watertown Plank Road and Pilgrim Parkway intersection and the northernmost boundary of the Village.

Although four roadways (Bluemound Road, Pilgrim Parkway, Wisconsin Avenue and Watertown Plank Road) would be impacted by a possible extension of Wisconsin Avenue, only Bluemound Road is currently under the jurisdictional control of the DOT.

Our office has sought to determine the locations of the right-of-way for Bluemound Road under DOT control in relation to the Village's right-of-way for Pilgrim Parkway without seeking this information directly from the DOT. Unfortunately, neither our office nor the Village has succeeded in obtaining any documentation showing the DOT's right-of-way in relation to the Village's right-of-way in this regard.

Because Bluemound Road is a part of the State Trunk Highway system, the DOT appears to have substantial authority to gain control over territory with roadways that connect to Bluemound Road and influence the flow of traffic on a State Trunk Highway (i.e. Bluemound Road).

Specifically, Wis. Stat. § 84.09 broadly provides the authority for the DOT to acquire lands for a transportation related purpose.

Wis. Stat. § 84.09(1) states in pertinent part:

*The department may acquire by gift, devise, purchase or **condemnation** any lands for establishing, laying out, widening, enlarging, extending, constructing, reconstructing, improving and maintaining highways and other transportation related facilities, or interests in lands in and about and along and leading to any or all of the same; and after establishment, layout and completion of such improvements...For the purposes of this section the department may acquire private or public lands or interests in such lands....*(Emphasis added.)

The Wisconsin Supreme Court has stated that:

Sec. 84.09(1), Stats., gives the DOT authority to condemn land for transportation related purposes. The statute limits that authority, however, to situations in which the DOT deems it necessary to acquire any such lands or interest therein for any transportation related purpose. Mitton v. Wisconsin Dept. of Transportation, 184 Wis.2d 738, 516 N.W.2d 709 (1994) (copy attached).

The Court went on to state that “[t]he statute (Wis. Stat. § 84.09), however, does not give them (the DOT) unfettered discretion: no more property can be taken than the public use requires.” *Id* at 748.

While the *Mitton* decision pertains to the condemnation of privately owned land, there is little reason to believe that the DOT could not undertake a similar process with public land considering the language found in Wis. Stat. § 84.09 states that “the department may acquire private or public lands or interests in such lands....” (Emphasis added.)

Since the authority given to the DOT in relation to its management of the State Trunk Highway system under Chapter 84 is so broad, it is likely that the DOT would be able to change, alter, or take control of land currently under the control of the Village if the DOT asserts and demonstrates that public use requires it to take such control or action for a transportation related purpose.

Please do not hesitate to contact our office should you have any additional questions or wish to discuss this matter further.