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Picking up the Remnants Post-*Waller*: Properly Limiting the Scope of Uneconomic Remnant Claims in Wisconsin Eminent Domain Proceedings

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**PICKING UP THE REMNANTS POST-
WALLER: PROPERLY LIMITING THE
SCOPE OF UNECONOMIC REMNANT
CLAIMS IN WISCONSIN EMINENT
DOMAIN PROCEEDINGS**

Statutory interpretation often requires a court to review the legislative intent behind the statute. However, this task is not always easily undertaken when the intent of the legislature is itself unclear. A recent Wisconsin Supreme Court case illustrates the difficulty in properly interpreting arguably ambiguous statutory language. Nevertheless, this Comment hopes to demonstrate that by examining the history of remnant theory, it should be clear that uneconomic remnant claims in eminent domain proceedings were intended to be limited to situations where the partial taking creates either a physical remnant or a financial remnant. Furthermore, this Comment argues that the Wisconsin Supreme Court's recent interpretation of Wisconsin's uneconomic remnant statute has created a hybrid remnant claim that may burden public utility companies and the Wisconsin Department of Transportation in initiating eminent domain proceedings if the statute is not adequately modified.

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I. INTRODUCTION

The Fifth and Fourteenth Amendments to the U.S. Constitution require that the government pay just compensation for the taking of private property for public use.¹ Despite this requirement, state and local municipalities have on occasion successfully argued that they should be permitted to condemn more land than is physically necessary for a public improvement under the principle of “excess condemnation.”² However, what happens when the landowner argues not that the government is condemning too much land, but that the government is condemning too little?³ Can the landowner force the government to take more land than it needs for a public works project? What if the government desires to condemn only easements? Can the

1. U.S. CONST. amends. V, XIV; *see also* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (holding that the Just Compensation Clause applies to the states through the Fourteenth Amendment).

2. Robert C. Bird & Lynda J. Oswald, *Necessity and Excess Condemnation Under Eminent Domain*, 38 REAL EST. L.J. 304, 305 (2009). Excess condemnation does not mean the taking of land beyond what is legally permitted but instead means the taking of land in excess of the area specifically needed to construct the public project. Gary P. Johnson, Comment, *The Effect of the Public Use Requirement on Excess Condemnation*, 48 TENN. L. REV. 370, 370 n.1 (1981). As Part II.A will discuss in more detail, remnant theory is the theory that the government has most successfully advanced to justify excess condemnation. However, this Comment focuses on the reverse scenario, where a landowner brings an uneconomic remnant claim in order to require an agency exercising its eminent domain power to acquire more land than is necessary for the project.

3. *See* Waller v. Am. Transmission Co., 2013 WI 77, ¶ 26, 350 Wis. 2d 242, 833 N.W.2d 764. Justice Prosser, writing for the majority, summarized the Wallers’ complaint in this manner: “In short, the Wallers did not argue that the ATC was taking too much, but that ATC was trying to get away with taking too little.” *Id.*

landowner force the government to take fee simple title to the entire property?

A recent Wisconsin Supreme Court decision, *Waller v. American Transmission Co.*, held that under Wisconsin's uneconomic remnant statute,⁴ a landowner may compel a public utility company that has government authorization to condemn only easements for high-voltage transmission lines to take fee simple title to the entire property.⁵ While the public utility company did not need to condemn the entire property for the project, the landowners successfully argued that as a result of the condemnation, they were left with a property that was of "substantially impaired economic viability" and was therefore an uneconomic remnant.⁶ Wisconsin appears to be the first state to find that an easement condemnation, other than for a permanent highway easement, has created an uneconomic remnant.⁷ Likewise, *Waller* appears to be the first case nationwide where a landowner has successfully brought an uneconomic remnant claim requiring the condemnor to take fee simple

4. See WIS. STAT. § 32.05(3m) (2011–2012); *id.* § 32.06(3m). These two statutory provisions are identical, but the duplicity is necessary because condemnation proceedings are divided into two categories in Wisconsin. *Waller*, 2013 WI 77, ¶ 56. Wisconsin Statutes section 32.05 is a "quick-take" statute for condemning property for sewer and transportation projects. *Id.* ¶ 57. Section 32.06 is a "slow-take" statute, which covers any other condemnations, including high-voltage transmission line easement condemnations. *Id.* ¶¶ 1–2, 57. In this Comment, all references to the Wisconsin Statutes as discussed by the court in *Waller* are cited to the 2011–2012 version; however, the statute has not changed in the publication of the 2013–2014 Wisconsin Statutes.

5. See *Waller*, 2013 WI 77.

6. *Id.* ¶ 119.

7. Very few courts have even considered uneconomic remnant claims in easement cases other than for a permanent highway easement, and none have found that an uneconomic remnant exists. See *Hendricks v. United States*, 14 Cl. Ct. 143, 147, 154 (1987) (flowage easements); *Nelson Drainage Dist. v. Filippis*, 436 N.W.2d 682, 683, 686 (Mich. Ct. App. 1989) (box drain easement), *abrogated on other grounds by City of Novi v. Robert Adell Children's Funded Trust*, 701 N.W.2d 144, 149 n.4 (Mich. 2005); *City of Lake Oswego v. Babson*, 776 P.2d 870, 871, 873 (Or. Ct. App. 1989) (drainage easements). A non-precedential Wisconsin case following the first court of appeals decision in *Waller*, 2009 WI App 172, ¶ 17, 322 Wis. 2d 255, 776 N.W.2d 612, indicated that a permanent limited easement for a driveway access may leave a landowner with an uneconomic remnant. See *Husar v. City of Brookfield*, Nos. 2009AP326, 2009AP327, ¶¶ 1, 3, 327 Wis. 2d 797, 788 N.W.2d 383 (Wis. Ct. App. June 9, 2010) (unpublished table decision). This case in itself helps demonstrate the potential impact of the *Waller* precedent on Wisconsin eminent domain proceedings. See *id.* ¶ 13; *cf. Winkel v. Miller*, 205 P.3d 688, 691, 694, 696 (Kan. 2009) (holding that the Kansas Department of Transportation was permitted to acquire a permanent easement for an asphalt mixing strip without taking fee simple title to the entire property, and any decrease in value to the remainder was appropriately remedied in the form of severance damages).

title to the entire property when the property was not fragmented into multiple parcels.⁸

This Comment argues that, based on the history of remnant theory, the scope of uneconomic remnant claims was intended to be limited to either “physical” or “financial” remnants and that the definitions of each should not be combined as one inquiry. However, in *Wisconsin*, a combination of questionable statutory construction of Wisconsin Statutes section 32.06(3m), a unique set of facts in the *Waller* case, and the Wisconsin Supreme Court’s apparent failure to recognize the difference between the physical and financial remnant inquiries has resulted in a confusing and undesirable hybrid remnant. Nevertheless, three modifications to Wisconsin’s uneconomic remnant statute could greatly diminish the adverse impact of *Waller*, especially in regard to easement condemnation proceedings for high-voltage transmission and natural gas lines, as well as some highway projects. These modifications include limiting uneconomic remnants to physical remnants and financial remnants, providing severance damages as the remedy for devaluation of property where neither type of remnant is created, and relying on a valuation proceeding to validate whether a physical or financial remnant exists.

Part II of this Comment traces the history of remnant theory in the context of excess takings, highlights early case law that created different types of remnants, and explores the codification of remnant theory, including the enactment of Wisconsin’s uneconomic remnant statute in 1977. Part III introduces the *Waller* case and discusses the key issues that the Wisconsin Supreme Court had to wrestle with in interpreting Wisconsin Statutes section 32.06(3m). Part IV focuses on the *Waller*

8. Very few cases have even afforded a landowner the right to successfully bring an uneconomic remnant claim, and each has involved a property that was severed in two or more parcels following the condemnation. See *State v. William G. Rohrer, Inc.*, 404 A.2d 29, 30, 32 (N.J. 1979); *Twp. of Wayne v. Kosoff*, 372 A.2d 289, 291, 294 (N.J. 1977); *Comm’r of Highways v. W. Dulles Props., L.L.C.*, 86 Va. Cir. 284, 284, 289 (Va. Cir. Ct. 2013); *W. Va. Dep’t of Transp. v. Dodson Mobile Homes Sales & Servs., Inc.*, 624 S.E.2d 468, 470–71, 473 (W. Va. 2005). West Virginia’s highest state court resolved the issue of attorneys’ fees when a landowner successfully brings a counterclaim for an uneconomic remnant in an inverse condemnation proceeding. *Dodson Mobile Homes*, 624 S.E.2d at 474. Although the landowner’s right to bring an uneconomic remnant claim was not specifically at issue, this case was the most recent, prior to *Waller*, in which a state supreme court has required the state to take fee simple title to an entire property in a partial taking because the landowner was left with an uneconomic remnant. See *id.* at 473. However, unlike *Waller*, the highway project severed the landowner’s parcel in two, and the state did not dispute the jury verdict that the landowner’s property was an uneconomic remnant. *Id.* at 470–71.

court's interpretation of the phrase "substantially impaired economic viability" in section 32.06(3m). This Part explains why even though the phrase was prone to misinterpretation, the court's interpretation has created a new hybrid remnant that combines the inquiry for physical remnants with the inquiry for financial remnants.

Part V focuses on another key aspect of the *Waller* decision—the circumstances in which an uneconomic remnant claim is appropriate. This Part asserts that, while allowing a landowner to bring an uneconomic remnant claim properly reflects legislative intent, an uneconomic remnant should be found to exist only if the remainder after a partial taking is a physical remnant or financial remnant. Additionally, Part V explains why the proper remedy for devaluation of property when the easement condemnation creates neither type of remnant is severance damages. Finally, Part VI summarizes the significance of *Waller* and proposes three key modifications to Wisconsin's uneconomic remnant statute, which should prevent unwarranted uneconomic remnant claims by either a landowner or the condemning agency in circumstances where it is clear that neither a physical remnant nor a financial remnant exists.⁹ Properly limiting the scope of uneconomic remnant claims will ensure that the public good is promoted by diminishing the administrative and financial burden on Wisconsin public utility companies and the Wisconsin Department of Transportation in initiating eminent domain proceedings.

II. HISTORY OF REMNANT THEORY AND STATUTORY ENACTMENTS

Understanding the broader history of remnant theory is critical to recognizing the purpose behind Wisconsin's uneconomic remnant statute and the type of circumstances where an uneconomic remnant claim is appropriate. This history includes early remnant theory case law in the context of excess takings, and the enactment of uneconomic remnant statutes, including Wisconsin's uneconomic remnant statute in

9. It is beyond the scope of this Comment whether financial remnant theory should be considered a proper exercise of eminent domain power or whether remnant theory should instead be confined to physical remnants, as is the case under some state statutes. *See infra* notes 27, 38 and accompanying text. Instead, this Comment will argue that the Wisconsin Supreme Court in *Waller* interpreted "substantially impaired economic viability" to refer to language regarding financial remnants but then applied it as a broader version of physical remnants when the *Waller* property was neither a physical remnant nor a financial remnant. Therefore, *Waller* has created a confusing hybrid remnant, which could impact certain eminent domain proceedings in Wisconsin if the state's uneconomic remnant statute is not modified.

1977. Because section 32.06(3m) was based on a model statute, and the model statute was based on federal legislation, this Part will introduce each statutory enactment in order to properly interpret the legislative history behind Wisconsin's uneconomic remnant statute.

A. *Excess Condemnation and Remnant Theory*

In order to understand the history of remnant theory, one must first recognize that remnant theory has traditionally fallen under the broader concept of excess condemnation.¹⁰ Excess condemnation occurs when the government uses its power of eminent domain to acquire more land than is absolutely necessary for a public improvement.¹¹ Originally, courts were reluctant to sanction a condemnation of property that was not specifically needed for the public project.¹² Furthermore, federal and state constitutions require that property taken through eminent domain be taken only for a public use.¹³ However, as the concept of public use expanded, excess condemnation became more and more acceptable.¹⁴ Thus, the question of “what is a public use?” became the critical factor for excess condemnation, with courts determining that this question is “judicial in nature.”¹⁵ Courts began to accept the argument that the condemnation of land in excess of what was needed for the public improvement was nevertheless needed to accomplish the public use or benefit, as long as a statute expressly authorized this excess condemnation.¹⁶

10. Bird & Oswald, *supra* note 2, at 306; Johnson, *supra* note 2, at 382; Thomas F. Nelson, Note, *An Expanded Use of Excess Condemnation*, 21 U. PITT. L. REV. 60, 62 (1959); *see also* ROBERT EUGENE CUSHMAN, EXCESS CONDEMNATION 24 (1917).

11. 2A NICHOLS ON EMINENT DOMAIN § 7.06[6][a] (3d ed. 2014); *see also* Cincinnati v. Vester, 281 U.S. 439, 441 (1930); CUSHMAN, *supra* note 10, at 2–3.

12. *See, e.g.*, Gregg v. Mayor & City Council of Baltimore, 56 Md. 256, 272 (1881); *In re* Opinion of the Justices, 91 N.E. 405, 406–07 (Mass. 1910); *In re* Albany St., 11 Wend. 149, 149 (N.Y. Sup. Ct. 1834); Pa. Mut. Life Ins. Co. v. City of Philadelphia, 88 A. 904, 908 (Pa. 1913); *see also* Comment, *Public Land Ownership*, 52 YALE L.J. 634, 650 (1943).

13. Johnson, *supra* note 2, at 370; *see also, e.g.*, WIS. CONST. art. I, § 13 (“The property of no person shall be taken for public use without just compensation therefor.”); *supra* note 1 and accompanying text.

14. John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1435 (1974); Nelson, *supra* note 10, at 69–70.

15. NICHOLS, *supra* note 11, § 7.06[6][a]; *see also* People *ex rel.* Dep’t of Pub. Works v. Superior Court, 436 P.2d 342, 348 (Cal. 1968) (“The issue of whether a taking is for a public use, however, is justiciable.”).

16. Bird & Oswald, *supra* note 2, at 305; Johnson, *supra* note 2, at 379; *see also, e.g.*, Kern Cnty. Union High Sch. Dist. v. McDonald, 179 P. 180, 184 (Cal. 1919); Forest Pres. Dist.

Government authorities typically have justified the taking of land in excess of what is needed under three theories: remnant theory, protective theory, and recoupment theory.¹⁷ Remnant theory, which is the focus of this Comment, was the first theory to justify excess condemnation and is the most widely accepted theory.¹⁸ Remnant theory was originally limited to physical remnants.¹⁹ However, some courts judicially expanded remnant theory to include financial remnants and economic remnants.²⁰ While it is important to understand the difference between each type of remnant, this Comment will ultimately focus on physical and financial remnants in the context of interpreting Wisconsin's uneconomic remnant statute.²¹

B. Types of Remnants

Remnant theory was originally developed to address physical remnants,²² and it appears to have developed out of dicta from early twentieth century case law.²³ A physical remnant is created “when the remainder of a condemned parcel is left in such a condition that it will be of little value to the owner.”²⁴ In other words, physical remnant theory authorizes excess condemnation when “the fraction remaining after a taking of part of a parcel of land is so small and of such shape

of Cook Cnty. v. Wike, 119 N.E.2d 734, 738 (Ill. 1954); City of Tulsa v. Williams, 227 P. 876, 880 (Okla. 1924).

17. Bird & Oswald, *supra* note 2, at 305–06. Protective theory is a theory under which excess land is justified in order to protect the land surrounding the public improvement. NICHOLS, *supra* note 11, § 7.06[6][c][i]. Recoupment theory is a theory under which the government may finance a public project by condemning excess land and then selling it at a surplus because the project enhances its value. *Id.* § 7.06[6][d]. These two theories are not relevant to the discussion of this Comment.

18. Bird & Oswald, *supra* note 2, at 304, 306.

19. NICHOLS, *supra* note 11, § 7.06[6][b][i].

20. *Id.*; see also *Pub. Works*, 436 P.2d at 346 (expanding remnant theory to include financial remnants); State v. Buck, 226 A.2d 840, 842 (N.J. Super. Ct. App. Div. 1967) (expanding remnant theory to include economic remnants).

21. See *infra* Part IV.

22. NICHOLS, *supra* note 11, § 7.06[6][b][i].

23. Nelson, *supra* note 10, at 62 & n.14 (describing early case law that implied or referenced the authorization of remnant theory); see also, e.g., City of Cincinnati v. Vester, 33 F.2d 242, 243–44 (6th Cir. 1929), *aff'd*, 281 U.S. 439 (1930); Excelsior Needle Co. v. City of Springfield, 108 N.E. 497, 497 (Mass. 1915); Salisbury Land & Improvement Co. v. Commonwealth, 102 N.E. 619, 621 (Mass. 1913); *In re Opinion of the Justices*, 91 N.E. 578, 580 (Mass. 1910); see also E.L. Stobin, Annotation, *Right to Condemn Property in Excess of Needs for a Particular Public Purpose*, 6 A.L.R.3d 297, § 6[d] (1966).

24. NICHOLS, *supra* note 11, § 7.06[6][b][ii].

that it is separately of negligible value.”²⁵ Physical remnant theory has often been advanced in highway condemnation projects where the creation or widening of a public road or highway would sever a parcel of land and leave small fragments of land, which were of little value to the landowner.²⁶ State statutes authorizing excess condemnation under remnant theory – at the very least – authorize the acquisition of physical remnants.²⁷

A financial remnant exists when the severance damages for the remaining portion, after a partial taking, would equal the value of condemning the entire property.²⁸ The California Supreme Court was the first court to adopt financial remnant theory as a valid exercise of eminent domain power.²⁹ In *People ex rel. Department of Public Works v. Superior Court*, the California Department of Public Works condemned 0.65 acres of a landowner’s property to build a freeway.³⁰ Additionally, the state sought to condemn the remaining fifty-four acre parcel, which would be landlocked after the construction of the highway.³¹ The landowners challenged the condemnation of the fifty-four acre property and demanded severance damages instead.³² However, the court determined that although the fifty-four acre parcel

25. Nelson, *supra* note 10, at 62.

26. CUSHMAN, *supra* note 10, at 25 (discussing highway projects that leave fragments of land that are not usable); Paul C. Droz, *Eminent Domain for Highway Purposes—Limitations on Excess Condemnation*, 6 UTAH B.J. 34, 34 (1978).

27. See, e.g., DEL. CODE ANN. tit. 29 § 9505(9) (2003); HAW. REV. STAT. ANN. § 113-5(9) (LexisNexis 2013); IOWA CODE ANN. § 6B.54(8) (West 2010); ME. REV. STAT. ANN. tit. 23, § 154-C (1992); MISS. CODE ANN. § 43-37-3(i) (2009); N.C. GEN. STAT. § 40A-7(a) (2011); OHIO REV. CODE ANN. § 163.59(K) (LexisNexis 2014); OKLA. STAT. ANN. tit. 27, § 13(9) (West 1997); TENN. CODE ANN. § 13-11-118(a) (2011); WASH. REV. CODE ANN. § 8.26.180(9) (West 2007).

28. NICHOLS, *supra* note 11, § 7.06[6][b][iv].

29. See *People ex rel. Dep’t of Pub. Works v. Superior Court*, 436 P.2d 342 (Cal. 1968); see also Johnson, *supra* note 2, at 386 (discussing that the California Supreme Court created financial remnant theory in *Public Works*).

30. *Pub. Works*, 436 P.2d at 343.

31. *Id.*

32. *Id.* at 344. The landowners sought a remedy of severance damages so that they could retain title to the property even though the severance damages might have been equal to the fair market value of the entire property. *Id.* They argued that excess condemnation of the landlocked parcel to avoid paying excessive severance damages was not a taking for a public use. *Id.*

was not a physical remnant, it was a financial remnant.³³ The court held that as long as the state could prove that taking the portion of the land not needed for the public improvement would prevent the state from paying excessive severance or consequential damages, then the excess condemnation met the public use requirement and was, therefore, a constitutional taking.³⁴

Excessive severance damages become a factor only when the condemner would be required to pay for the whole property while only receiving a part.³⁵ Thus, the determining factor in whether the government can take excess land under financial remnant theory is the amount of compensation that would be required to be paid in severance damages.³⁶ While “[f]inancial remnant theory has become more acceptable as the meaning of public use has expanded,”³⁷ not all state statutes that authorize the acquisition of physical remnants support financial remnant theory.³⁸ However, the model statute on which Wisconsin’s uneconomic remnant statute was based explicitly authorized the condemnation of both physical and financial remnants.³⁹

An economic remnant is created when the cost to acquire the entire property is only a little more than the cost to acquire the portion

33. *Id.* at 346. The court held that “[t]here is no reason to restrict [remnant] theory to the taking of parcels negligible in size and to refuse to apply it to parcels negligible in value.” *Id.*

34. *Id.* at 344–45.

35. Droz, *supra* note 26, at 44; *see also* NICHOLS, *supra* note 11, § 7.06[6][b][iv].

36. NICHOLS, *supra* note 11, § 7.06[6][b][iv].

37. *Id.* For states adopting language from section 208 of the Model Eminent Domain Code regarding financial remnants, *see, for example*, Alabama Eminent Domain Code, Act No. 85-548, § 208, 1985 Ala. Acts 802, 806 (codified at ALA. CODE § 18-1A-27 (LexisNexis 2007)); Eminent Domain Procedure Act, No. 173, sec. 1, § 28-2-100, 1987 S.C. Acts 2074, 2082 (codified at S.C. CODE ANN. § 28-2-100 (2007)). For states authorizing the acquisition of land in excess of what is needed for the condemnation project to avoid paying severance damages that equal the cost of acquiring the entire parcel, *see* Act of Apr. 14, 1960, ch. 122, § 3, 1960 Alaska Sess. Laws 172, 173 (codified as amended at ALASKA STAT. § 35.20.030 (2012)); Act of May 19, 1998, ch. 126, § 2, 1998 Ariz. Sess. Laws 775, 775 (codified as amended at ARIZ. REV. STAT. ANN. § 28-7092(C) (2013)); Act of May 10, 1967, ch. 56, § 2, 1967 Neb. Laws 191, 192 (codified as amended at NEB. REV. STAT. § 15-229.01 (2012)); Act of Mar. 9, 1961, ch. 145, § 1, 1961 S.D. Sess. Laws. 161, 161 (codified as amended at S.D. CODIFIED LAWS § 31-19-42 (2004 & Supp. 2013)); Act of Mar. 9, 1963, ch. 160, art. 1, § 18, 1963 W. Va. Acts. 760, 768–69 (codified at W. VA. CODE ANN. § 17-2A-18 (LexisNexis 2013)).

38. *See supra* note 27 for a non-exhaustive list of state statutes that do not authorize the taking of the excess portion of a property in a partial taking in order to avoid paying excessive severance damages.

39. *See* MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22 (1974); *see also id.* § 208 cmt.

needed.⁴⁰ Economic remnant theory has been authorized under a few state statutes to allow a condemnor to take an entire parcel of land when it is economically advantageous to the condemnor to take the remaining portion after a partial taking.⁴¹ In *State v. Buck*, a New Jersey court held that “when, as here, the value of the whole is little more than the value of the major part, it is sound business judgment and in the public interest to take the entire parcel.”⁴² For purposes of this Comment, only physical remnants and financial remnants will be discussed because Wisconsin’s uneconomic remnant statute does not refer to economic remnants and the model statute on which it was based applied only to physical remnants and financial remnants.⁴³

C. Codification of Remnant Theory

Remnant theory in its “strictest view” was essentially a “de minimus” rule to justify excess condemnation.⁴⁴ However, as late as the 1960s, very few statutes explicitly authorized excess condemnation under remnant theory.⁴⁵ Nevertheless, there were no cases that suggested that condemning excess land under remnant theory was an invalid exercise of eminent domain power.⁴⁶ The first federal regulation endorsing remnant theory specifically addressed “uneconomic remnants” as part of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Federal Act).⁴⁷ Section 301(9) of the Federal Act gave the head of the federal agency

40. Johnson, *supra* note 2, at 384.

41. NICHOLS, *supra* note 11, § 7.06[6][b][iii]; *see also, e.g.*, DEL. CODE ANN. tit. 17 § 175 (2003); N.J. STAT. ANN. § 27:7A-4.1 (West 1998); WASH. REV. CODE ANN. § 47.52.050(2) (West 2013) (authorizing the condemnation of an entire parcel to serve the public interest even though only a portion is needed for the project).

42. *State v. Buck*, 226 A.2d 840, 842 (N.J. Super. Ct. App. Div. 1967). The New Jersey State Highway Commission was allowed to condemn five acres when only four were needed for the highway project because the cost to acquire the parcel needed was \$45,000 and the entire property cost only \$46,000. *Id.* at 841–42. The court also provided in dicta that the state may “incidentally seek to avoid creating or leaving a landlocked parcel or parcels that do not comply with local zoning requirements.” *Id.* at 842. The drafters of the Model Eminent Domain Code cited this dicta as examples of some types of remnants that section 208 references. *See* MODEL EMINENT DOMAIN CODE § 208 cmt., 13 U.L.A. 22 (1974).

43. *See infra* notes 54, 65 and accompanying text.

44. Nelson, *supra* note 10, at 62.

45. *Id.* (noting that only two statutes existed in 1959 that expressly authorized excess condemnation under remnant theory).

46. *Id.*

47. *See* Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, § 301, 84 Stat. 1894, 1904–05 (1971).

responsible for acquiring the condemned property the authority to acquire an uneconomic remnant.⁴⁸ Codified as 42 U.S.C. § 4651(9), “uneconomic remnant” was not defined until 1987 when the statute was amended to define an “uneconomic remnant” as “a parcel of real property . . . after the partial acquisition of the owner’s property . . . which the head of the Federal agency concerned has determined has little or no value or utility to the owner.”⁴⁹

In 1974, the Uniform Law Commissioners created the Model Eminent Domain Code (Model Code).⁵⁰ Section 208 of the Model Code addressed uneconomic remnants and was based on section 301(9) of the Federal Act.⁵¹ However, because the Federal Act did not define an uneconomic remnant at the time the Model Code was drafted, the drafters provided their own definition.⁵² Section 208 reads as follows:

(a) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents. (b)

48. *Id.* § 301(9), 84 Stat. at 1905 (“If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property.”).

49. *See* Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 416, 101 Stat. 132, 255–56. This session law amended section 301(9) of the Federal Act (42 U.S.C. § 4651(9)) to read as follows:

If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this Act, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner’s property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.

Id. (codified as amended at 42 U.S.C. § 4651(9) (2012)).

50. *See* MODEL EMINENT DOMAIN CODE, 13 U.L.A. 1 (1974). The Model Eminent Domain Code was approved by the National Conference of Commissioners on Uniform State Laws as the Uniform Eminent Domain Code. *Waller v. Am. Transmission Co.*, 2013 WI 77, ¶ 75, 350 Wis. 2d 242, 833 N.W.2d 764 (citing MODEL EMINENT DOMAIN CODE, prefatory note, 13 U.L.A. 3 (1974)). While the language remained the same, it was officially changed to a Model Code in 1984. *Id.* ¶ 74 n.21 (citing MODEL EMINENT DOMAIN CODE, prefatory note, 13 U.L.A. 1 (1974)). Because Wisconsin did not adopt section 208 of the Uniform Eminent Domain Code word-for-word, *see infra* note 57, and the Uniform Eminent Domain Code was renamed as a Model Eminent Domain Code, this Comment will reference it only as the Model Code.

51. MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22 (1974); *id.* § 208 cmt.

52. *See id.* § 208 cmt. Subsection (b) defines an “uneconomic remnant,” and the drafters stated that while “[s]ubsection (b) is not based upon the Federal Act, [it] is believed to be consistent with its intent.” *Id.*

“Uneconomic remnant” as used in this section means a remainder following a partial taking of property, of such size, shape, or condition as to be of little value or that gives rise to a substantial risk that the condemnor will be required to pay in compensation for the part taken an amount substantially equivalent to the amount that would be required to be paid if it and the remainder were taken as a whole.⁵³

The drafters of section 208 provided a clear explanation for the specific provisions of the statute:

Subsection (a) of Section 208, which is based upon section 301, par. (9) of the Federal Acquisition Policies Act, goes beyond the federal act and expressly authorizes a condemnor to acquire an uneconomic remnant—a power which, under the language of the Federal Act, is only implied.

Subsection (b) is not based upon the Federal Act, but is believed to be consistent with its intent. Subsection (b) limits the operative effect of paragraph (a) to instances in which a partial taking results in one or more “*physical*” or “*financial*” remnants.⁵⁴

D. Drafting Wisconsin’s Uneconomic Remnant Statute

While only one state adopted the entire Model Eminent Domain Code,⁵⁵ many states enacted statutory provisions to address uneconomic remnants in a manner similar to section 301(9) of the Federal Act and section 208 of the Model Code.⁵⁶ Wisconsin became one such state

53. *Id.* § 208.

54. *Id.* § 208 cmt. (emphasis added).

55. See *Legislative Fact Sheet—Eminent Domain Code*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Eminent%20Domain%20Code>, archived at <http://perma.cc/QJ3T-CKXA> (last visited June 2, 2015) (indicating that Alabama is the only state that enacted the entire Uniform Eminent Domain Code).

56. See, e.g., Act of May 7, 1971, ch. 41, § 1, 1971 Alaska Sess. Laws 1, 7 (codified at ALASKA STAT. § 34.60.120(9) (2012)); Act of May 27, 1972, ch. 413, § 3, 58 Del. Laws 1216, 1229 (codified at DEL. CODE ANN. tit. 29 § 9505(9) (2003)); Act of May 3, 1971, Act 32, § 5, 1971 Haw. Sess. Laws 33, 35 (codified at HAW. REV. STAT. ANN. § 113-5(9) (LexisNexis 2013)); Act of May 20, 1971, ch. 333, § 4, 1971 Me. Laws 573, 580 (codified at ME. REV. STAT. ANN. tit. 23, § 154-C (1992)); Act of June 25, 1971, ch. 3, § 11, 1971 Mont. Laws 1825, 1834 (codified at MONT. CODE ANN. § 70-31-301 (2013)); Act of June 24, 1971, ch. 355, § 5, 1971 Okla. Sess. Laws 1000, 1002 (codified at OKLA. STAT. ANN. tit. 27, § 13(9) (West 1997)); Utah Relocation Assistance Act, ch. 24, § 13, 1972 Utah Laws 95, 101 (codified at UTAH CODE ANN. § 57-12-13(9) (LexisNexis 2010)); Act of May 20, 1971, ch. 240, § 18, 1971 Wash. Sess. Laws. 1074, 1084 (codified at WASH. REV. CODE ANN. § 8.26.180(9) (West 2007)) (enacting

when it enacted legislation to address “uneconomic remnants” based on section 208 of the Model Code.⁵⁷ In 1977, Wisconsin’s uneconomic remnant statute was codified both as Wisconsin Statutes section 32.05(3m) for quick-take proceedings and as Wisconsin Statutes section 32.06(3m) for slow-take proceedings.⁵⁸ The duplicity of this statute was necessary because Wisconsin has a two-track system for eminent domain proceedings.⁵⁹ Condemnation proceedings for sewers and highways are quick-take proceedings.⁶⁰ All other condemnation proceedings are slow-take proceedings.⁶¹ For purposes of this Comment, only section 32.06(3m) will be referenced in detail because this was the statutory provision relevant in *Waller* due to the fact that a high-voltage transmission line condemnation proceeding is a slow-take proceeding.⁶²

The Wisconsin Legislative Council Special Committee on Eminent Domain drafted the relevant language of the statute.⁶³ The summary of the committee’s proceedings indicates that the draft legislation was intended to “allow[] condemners to acquire uneconomic remnants” and that the statute was specifically based on section 208 of the Model Code.⁶⁴ Section 32.06(3m) reads as follows:

In this section, “uneconomic remnant” means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little

uneconomic remnant statutes with language that mirrored 42 U.S.C. § 4651(9)); *see also* Alabama Eminent Domain Code, No. 85-548, § 208, 1985 Ala. Acts 802, 806 (codified at ALA. CODE § 18-1A-27 (LexisNexis 2007)) (adopting word-for-word section 208 of the Model Code, including the language regarding financial remnants); Eminent Domain Procedure Act, No. 173, § 28-2-100, 1987 S.C. Acts 2074, 2082 (codified at S.C. CODE ANN. § 28-2-100 (2007)) (adopting the section 208 language regarding financial remnants, but giving the state permission rather than a mandate to acquire the remnant—i.e., “may” instead of “shall”).

57. *See Wis. Legis. Council, Summary of Proceedings: Special Comm. on Eminent Domain, 1977–1978 Legis. Sess. 5* (Sept. 9, 1977) [hereinafter *Summary of Proceedings*] (stating that the statute “is based on s. 208 of the Uniform Eminent Domain Code”).

58. *See* Act of June 6, 1978, ch. 440, § 3, 1977 Wis. Sess. Laws 1953, 1954 (codified at WIS. STAT. § 32.05 (2013–2014)); *id.* § 5, 1977 Wis. Sess. Laws at 1956 (codified at WIS. STAT. § 32.06 (1977)); *see also Summary of Proceedings, supra* note 57, at 5 (explaining that the language of the uneconomic remnant provision “applies to both quick taking and regular taking procedures”).

59. *Waller v. Am. Transmission Co.*, 2013 WI 77, ¶ 56, 350 Wis. 2d 242, 833 N.W.2d 764.

60. *Id.* ¶ 57.

61. *Id.*

62. *See id.* ¶¶ 1–2, 57.

63. *See Summary of Proceedings, supra* note 57, at 1, 5.

64. *Id.* at 5.

value or of substantially impaired economic viability. If acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.⁶⁵

As the *Waller* decision discussed in Part III will illustrate, section 32.06(3m) left open to interpretation if and when a landowner could bring an uneconomic remnant claim, and what exactly “substantially impaired economic viability” meant.⁶⁶

III. UNDERSTANDING *WALLER V. AMERICAN TRANSMISSION CO.*

While Wisconsin enacted its uneconomic remnant statute in 1977, the Wisconsin Supreme Court was not asked to interpret the meaning of the statute until recently, in *Waller v. American Transmission Co.*⁶⁷ Although *Waller* produced four significant holdings,⁶⁸ this Comment focuses on the proper interpretation of “substantially impaired economic viability,” a landowner’s right to bring an uneconomic remnant claim, and when such a claim is appropriate.⁶⁹ Because *Waller* was the first Wisconsin case to address the legitimacy of a landowner’s uneconomic remnant claim, it is critical to understand the court’s reasoning regarding these issues in order to properly demonstrate the concerns raised by the *Waller* precedent.

A. Facts of Waller

To recognize the nature of the uneconomic remnant claim at issue in *Waller*, one must understand the facts that gave rise to the landowners’ claim. The plaintiff landowners (the Wallers) purchased a 1.5 acre lot in 1989, which included a single-family residence.⁷⁰ The American

65. WIS. STAT. § 32.06(3m) (2011–2012).

66. See *infra* Part III.

67. See *Waller*, 2013 WI 77, ¶¶ 72–73.

68. See *id.* ¶¶ 118–21 (holding that (1) section 32.06(5), the “right-to-take” provision, was the proper and exclusive way for a property owner to bring an uneconomic remnant claim; (2) the Wallers’ property was an uneconomic remnant; (3) the Wallers were entitled to litigation expenses; and (4) the Wallers were displaced persons under section 32.19(2)(e)1.a).

69. See *infra* Parts IV–V.

70. *Waller*, 2013 WI 77, ¶ 11.

Transmission Company (ATC)⁷¹ sought to condemn easements on two sides of the Waller property for purposes of erecting two high-voltage transmission lines.⁷² While the Wallers expressed concern that the high-voltage lines presented possible health hazards and would impair their property's value, the Wisconsin Public Service Commission found that the proposed easements presented no health and safety concerns and instead issued ATC a certificate of public convenience and necessity for the project.⁷³

Both ATC and the Wallers retained independent appraisers to assess the effect that the easements would have on the value of the Wallers' property.⁷⁴ While the appraisers' before-easement valuations of the parcel were very similar (\$130,000 vs. \$132,000), the appraisers differed greatly as to the effect that the easements would have on the value of the Wallers' property.⁷⁵ The Wallers' appraiser determined the easements would decrease the property value by 88% compared to the 57% reduction that ATC's appraiser determined.⁷⁶ Interestingly, the Wallers' appraiser later supplemented the initial appraisal by stating that the Waller property "suffered substantial[ly] impaired economic viability as a result of the taking of the transmission line easement."⁷⁷

71. ATC is a Wisconsin public utility company regulated by the Wisconsin Public Service Commission. *Id.* ¶ 14. Section 32.02(5)(b) "vests entities like ATC with the power of eminent domain." *Id.*

72. *Id.* ¶¶ 2, 19. The Wallers' property was already encumbered with one transmission line easement. *Id.* ¶ 12. Also, the land surrounding the Waller house had changed drastically since 1989, and by 2008, the surrounding area was an industrial park. *Id.* ¶ 13. Therefore, the diminished value of the Wallers' property appears to have been due partially to external factors besides the proposed easements. See Figure 1, *infra* Part V.B, for a depiction of the Wallers' property after the taking of the easements.

73. *Waller*, 2013 WI 77, ¶¶ 15–16. The Wisconsin Public Service Commission (PSC) determined that the transmission lines "[would] not have undue adverse impacts on [the] public health and welfare." *Id.* ¶ 16 (first alteration in original).

74. *Id.* ¶¶ 20–21. ATC retained John Rolling of Rolling & Co. as its appraiser, and Mr. Rolling appraised the Wallers' property before the taking of the easements at \$130,000. *Id.* ¶ 20. The Wallers retained Arthur Sullivan and Kurt Kielisch of Group One as their appraisers, and Group One valued the property at \$132,000 prior to the taking of the easements. *Id.* ¶ 21.

75. *See id.* ¶¶ 20–22.

76. *Id.* ATC's appraiser concluded that after the high-voltage transmission line easements were installed, the value of the property would decrease to \$55,500. *Id.* ¶ 20. However, the Wallers' appraiser concluded that the easements would decrease the property value to \$15,500. *Id.* ¶ 22.

77. *Id.* ¶ 23 (alteration in original) (internal quotation marks omitted). This supplemented language appears to be an attempt to mirror the language in section 32.06(3m)

The appraiser indicated that “public perceptions of the dangers of electric magnetic fields” and the locations of the transmission lines were partly responsible for his low valuation.⁷⁸

After the parties failed to reach an agreement through negotiations,⁷⁹ ATC made a jurisdictional offer to the Wallers of \$99,500 for the two easements.⁸⁰ However, the Wallers refused this offer and instead brought a right-to-take action against ATC.⁸¹ In Wisconsin, a right-to-take action is a separate cause of action from a claim of a taking without just compensation and addresses any issue related to the taking other than the adequacy of the compensation.⁸² However, the Wallers did not challenge ATC’s right to take the transmission line easements but instead argued that they would be left with a property that was an

regarding uneconomic remnants. See WIS. STAT. § 32.06(3m) (2011–2012). The Waller appraiser’s low valuation was based in part on the following assessment:

ATC’s jurisdictional offer indicated a value of \$30,500 for the property, reflecting a loss of value of more than 76 percent; the easement area covered more than half of the property; “public perceptions of the dangers of electric magnetic fields”; the appearance and proximity of the high-voltage transmission lines; the highest and best use of the property after the taking would be vacant industrial; and the inability of the parcel to be utilized for industrial purposes in the absence of municipal sewer and water.

Waller, 2013 WI 77, ¶ 23.

78. *Id.*; see also KURT C. KIELISCH, VALUATION GUIDELINES FOR PROPERTIES WITH ELECTRIC TRANSMISSION LINES, available at <http://headwaterseconomics.org/library/files/AppraisalGroupOne;ValuationGuidelines.pdf>, archived at <http://perma.cc/7GNU-MKV2>. This article was written by one of the appraisers the Wallers hired, and he clearly indicates that he considers the public’s perceived fear of high-voltage transmission lines in valuating properties that will be encumbered with these transmission line easements. See *id.* at 12.

79. Section 32.06(2a) requires a condemnor to negotiate with the property owner before making a jurisdictional offer. *Waller*, 2013 WI 77, ¶ 24. ATC initially offered \$49,000 for the two easements. *Id.* ATC then raised its offer twice, first to \$84,600 and finally to \$99,500. *Id.* Alternatively, ATC offered to acquire the entire Waller property for \$132,000 if the Wallers waived any right to relocation benefits. *Id.* The Wallers rejected each of these offers. *Id.*

80. *Id.* ¶ 25. If negotiations are unsuccessful, a condemnor is required to make a jurisdictional offer to the landowner, which includes a description of the property sought, the proposed date of condemnation, and the amount of compensation offered. WIS. STAT. § 32.06(3) (2011–2012); see also *id.* § 32.05(3) (describing the contents of a jurisdictional offer, which are also applicable to condemnation proceedings under section 32.06).

81. *Waller*, 2013 WI 77, ¶¶ 25–26.

82. *Id.* ¶¶ 66–67; see also WIS. STAT. § 32.06(5). Any claim regarding just compensation is brought before the county condemnation commission. *Waller*, 2013 WI 77, ¶ 66. However, if a landowner seeks to contest the condemnor’s right to take the property for any reason other than compensation, a separate “right-to-take” action is filed. *Id.*; see also WIS. STAT. § 32.06(5).

uneconomic remnant under section 32.06(3m).⁸³ Thus, the Wallers claimed that ATC should be required to acquire the entire Waller property as a fee simple taking with a right to relocation benefits.⁸⁴

B. Key Issues Addressed in Waller

While this litigation continued for several years, including three circuit court proceedings and two appeals before the court of appeals,⁸⁵ ultimately the Wisconsin Supreme Court was asked to interpret section 32.06(3m) and to apply the statute to the Wallers' uneconomic remnant claim.⁸⁶ Because statutory interpretation is a question of law, the Wisconsin Supreme Court was not bound by the lower courts' interpretation of section 32.06(3m) or by the application of the statute to the Wallers' case.⁸⁷ The key issues that the court addressed included whether a landowner could bring an uneconomic remnant claim and, if so, when such a claim could be brought.⁸⁸ The court then had to interpret the meaning of "substantially impaired economic viability" and determine whether the Wallers' property was indeed an uneconomic remnant.⁸⁹

83. *Waller*, 2013 WI 77, ¶ 26.

84. *Id.*

85. *Id.* ¶ 10. The first appeal to the Wisconsin Court of Appeals (*Waller I*) produced the holding that an uneconomic remnant claim was properly raised in a separate right-to-take action. *Waller v. Am. Transmission Co.*, 2009 WI App 172, ¶ 17, 322 Wis. 2d 255, 776 N.W.2d 612. The circuit court had previously determined that an uneconomic remnant claim should be decided in a valuation proceeding and had dismissed the Wallers' right-to-take action. *Id.* ¶ 9. In the second appeal to the Wisconsin Court of Appeals (*Waller II*), the court concluded that the circuit court on remand erred in basing its conclusion that the Waller property was not an uneconomic remnant on the just compensation jury verdict, which determined the after-taking value of the Wallers' property was \$38,000. *Waller v. Am. Transmission Co.*, 2011 WI App 91, ¶¶ 10, 15, 334 Wis. 2d 740, 799 N.W.2d 487. In *Waller II*, the court of appeals decided that the circuit court "failed to address whether the Wallers' remaining property was 'substantially impaired' as to its economic viability," *id.* ¶ 14, and that "the inquiry does not end once the dollar value of the remaining property is determined," *id.* ¶ 15.

86. *See Waller*, 2013 WI 77. This case reached the Wisconsin Supreme Court on a petition for bypass of the court of appeals. *Id.* ¶ 1. The case consolidated the Wallers' relocation benefits case and the Wallers' right-to-take action. *See id.*

87. *Id.* ¶ 51. "Statutory interpretation and application present questions of law that . . . [are] review[ed] de novo while benefiting from the analyses of the court of appeals and circuit court." *Weborg v. Jenny*, 2012 WI 67, ¶ 41, 341 Wis. 2d 668, 816 N.W.2d 191 (citing *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 24, 339 Wis. 2d 125, 810 N.W.2d 465).

88. *See Waller*, 2013 WI 77, ¶¶ 70–71.

89. *See id.* ¶¶ 75, 93.

1. A Landowner's Right to Bring an Uneconomic Remnant Claim

The court began its interpretation of section 32.06(3m) by addressing the question of whether a landowner even had a right to bring an uneconomic remnant claim.⁹⁰ ATC argued that the legislative history of the Wisconsin uneconomic remnant statute supported the conclusion that “the decision to acquire an uneconomic remnant should be determined by the condemnor, and thus, property owners do not have a cause of action for an uneconomic remnant.”⁹¹ ATC also argued that if such a claim were allowed, the claim should be brought in a valuation proceeding to determine just compensation, not in a separate right-to-take action.⁹²

In determining that a landowner had a right to bring an uneconomic remnant claim, the court concluded that the legislative history of section 32.06(3m) indicated that the statute was intended to give condemnors the authority to acquire uneconomic remnants, but not “sole authority,” and that the landowner “must have some recourse to assert and prove the uneconomic remnant claim.”⁹³ The court cited a 1977 Wisconsin Legislative Council report that stated, “[The legislation] provides landowners with a means of disposing of portions of their property which would be substantially reduced in value by a condemnation project.”⁹⁴ While other comments from a 1977 eminent domain special committee meeting did suggest the statute was designed simply to give condemnors authority to acquire economic remnants,⁹⁵ the court resolved the ambiguity in the statute as to whether a landowner could bring a claim by pointing out that because eminent domain power is extraordinary, the court was obligated to “strictly construe the

90. *Id.* ¶¶ 70–71.

91. *Id.* ¶ 77.

92. *Id.* ¶ 70. ATC also argued that if an uneconomic remnant claim could not be raised in a valuation proceeding, then an inverse condemnation proceeding would also be more appropriate than a right-to-take action. *See id.* However, because this Comment argues that the proper place for an uneconomic remnant claim is in a valuation proceeding, the inverse condemnation argument is not relevant to this discussion.

93. *Id.* ¶ 77.

94. *Id.* ¶ 78 (alteration in original) (emphasis omitted) (quoting WIS. LEGIS. COUNCIL, REP. NO. 28 TO THE 1977 LEGISLATURE: LEGISLATION RELATING TO EMINENT DOMAIN, 1977–1978 Sess., at 4 (1977)) (internal quotation marks omitted).

95. The summary of proceedings from a 1977 Legislative Council Special Committee on Eminent Domain meeting provides commentary from staff attorneys for the Wisconsin Legislative Council asserting that the uneconomic remnant statute would “allow[] condemnors to acquire uneconomic remnants” and give them “authority to acquire uneconomic remnants in a few cases.” *Summary of Proceedings, supra* note 57, at 5.

condemnor's power . . . while liberally construing provisions favoring the landowner, including available remedies and compensation."⁹⁶

2. Right-to-Take Action vs. Just Compensation Hearing

Once the court in *Waller* determined that the Wallers had a cause of action under Wisconsin's uneconomic remnant statute, the court then determined that the proper way for a landowner to raise an uneconomic remnant claim was in a separate right-to-take action, not in a just compensation valuation hearing.⁹⁷ The court reasoned that while determining the existence of an uneconomic remnant was related to the just compensation issue, it was "fundamentally different from a calculation of the fair market value of an easement."⁹⁸ The court rationalized that "if a court finds that a property would become an uneconomic remnant if the condemnor took an easement, the condemnor might not have a right to take the easement without offering to purchase the entire property."⁹⁹ Therefore, the court determined that an uneconomic remnant claim must be brought in a separate right-to-take action prior to any claim of inadequate compensation.¹⁰⁰

3. The Wallers' Property As An Uneconomic Remnant

The court then analyzed whether the Wallers' property after the taking of the two transmission line easements was indeed an uneconomic remnant.¹⁰¹ The court focused on whether the Wallers' property after the taking of the two easements was "*of such size, shape or condition as to be of little value or of substantially impaired economic viability.*"¹⁰² The court analyzed the uneconomic remnant inquiry by combining the language before the "or" with the language after the "or" and ultimately concluded that the property was "of such size, shape, and

96. *Waller*, 2013 WI 77, ¶ 72 (alteration in original) (quoting *TFJ Nominee Trust v. Wis. Dep't of Transp.*, 2001 WI App 116, ¶ 10, 244 Wis. 2d 242, 629 N.W.2d 57) (internal quotation mark omitted).

97. *Id.* ¶ 90.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* ¶ 93.

102. *Id.* (emphasis added) (quoting WIS. STAT. § 32.06(3m) (2011–2012)) (internal quotation mark omitted).

condition as to be of substantially impaired economic viability as either a residential or an industrial parcel.”¹⁰³

IV. “SUBSTANTIALLY IMPAIRED ECONOMIC VIABILITY” AS INTERPRETED IN *WALLER* CREATES A CONFUSING HYBRID REMNANT

Even though the Wallers’ amended appraisal included language indicating that the property suffered “substantially impaired economic viability” as a result of the taking of the transmission line easements,¹⁰⁴ section 32.06(3m) had never been interpreted.¹⁰⁵ Therefore, such a conclusion was without merit until the court determined exactly what “substantially impaired economic viability” meant. In critiquing the *Waller* court’s interpretation of “substantially impaired economic viability” and its significance, it is also important to recognize that the confusion regarding the proper interpretation of this phrase was largely created by the Wisconsin legislature’s unexplained modification of section 208 of the Model Code.

A. *Ambiguity Created in Drafting Wisconsin’s Uneconomic Remnant Statute*

The legislative history behind the drafting of Wisconsin’s uneconomic remnant statute leaves no question that the drafters relied on section 208 of the Model Code to draft the statute.¹⁰⁶ What is less clear is why the drafters did not simply adopt the statute word-for-word.¹⁰⁷ As introduced in Part II, section 208 of the Model Code contains two subsections.¹⁰⁸ Subsection (a) is the operative section, authorizing and requiring a condemnor to acquire a remnant when one exists.¹⁰⁹ Subsection (b) limits the operative effect of subsection (a) to physical remnants and financial remnants.¹¹⁰ Subsection (b) contains two clauses.¹¹¹ The first clause — “a remainder following a partial taking

103. *Id.* ¶ 119.

104. *See supra* note 77 and accompanying text.

105. *See Waller*, 2013 WI 77, ¶¶ 72–76, 93–105.

106. *See supra* note 57 and accompanying text.

107. *Compare* Act of June 6, 1978, ch. 440, § 5, 1977 Wis. Sess. Laws 1953, 1956 (codified at WIS. STAT. § 32.06(3m) (2013–2014)), *with* MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22 (1974).

108. MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22.

109. *Id.* § 208 cmt.

110. *Id.*

111. *Id.* § 208.

of property, of such size, shape, or condition as to be of little value”¹¹²— is the traditional definition of a physical remnant.¹¹³ The second clause— “[a remainder] that gives rise to a substantial risk that the condemnor will be required to pay in compensation for the part taken an amount substantially equivalent to the amount that would be required to be paid if it and the remainder were taken as a whole”¹¹⁴— is the traditional definition for financial remnants like those in *Public Works*.¹¹⁵ When the Wisconsin legislature drafted section 32.06(3m), the legislature did not alter the language of subsection (b) of the Model Code regarding physical remnants but inexplicably altered the language of subsection (b) regarding financial remnants to read “or of substantially impaired economic viability.”¹¹⁶ The summary of legislative proceedings regarding the drafting of the provision indicates that the phrase was simply added on motion.¹¹⁷

B. Two Potential Meanings of “Substantially Impaired Economic Viability”

There are two possible explanations as to why the Wisconsin legislature chose to modify the language from the Model Code regarding financial remnants to instead include the phrase “substantially impaired economic viability.” The drafters of section 32.06(3m) could have intended that the phrase did not apply to financial remnants at all but instead broadened the definition of physical remnants by requiring that a physical remnant just be of “substantially impaired economic viability” even if it is not of “little value.” In contrast, the legislature could have intended that the phrase was simply a more concise

112. *Id.*

113. *See supra* notes 24–25 and accompanying text.

114. MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22 (1974).

115. *See supra* notes 28–39 and accompanying text.

116. *Compare* Act of June 6, 1978, ch. 440, § 5, 1977 Wis. Sess. Laws 1953, 1956 (codified at WIS. STAT. § 32.06(3m) (2013–2014), *with* MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22; *see also* Waller v. Am. Transmission Co., 2013 WI 77, ¶ 75, 350 Wis. 2d 242, 833 N.W.2d 764 (discussing the modification of Wisconsin Statutes section 32.06(3m) from section 208 of the Model Eminent Domain Code).

117. *See Summary of Proceedings, supra* note 57, at 5 (providing that “substantially impaired economic viability” was added on motion but without any further discussion or explanation of the matter).

reference to the financial remnant language in section 208 of the Model Code it replaced.¹¹⁸

The court in *Waller* could have potentially adopted the first interpretation that “substantially impaired economic viability” was intended to broaden the definition of physical remnants by focusing on the following commentary from a 1977 Wisconsin legislative report: “The Bill provides landowners with a means of disposing of portions of their property which would be substantially reduced in value by a condemnation project.”¹¹⁹ This commentary arguably could be interpreted to suggest that the legislature did not intend for a physical remnant to be of “little value” but instead just to be “substantially reduced in value.”¹²⁰ However, the legislature could have easily clarified such an interpretation by replacing “little value” with “substantially reduced in value” in the statutory language. Furthermore, interpreting “substantially impaired economic viability” as a broader version of “little value” would mean that the legislature did not intend for the statute to include any language from the Model Code regarding financial remnants, and therefore, uneconomic remnants would be limited to physical remnants.¹²¹

Instead, the court in *Waller* adopted the second interpretation that “substantially impaired economic viability” was a “more succinct” version of the Model Code language it replaced.¹²² By adopting this interpretation, the court should have recognized that “substantially

118. The language prior to “or” in section 208 of the Model Eminent Domain Code referenced physical remnants, and the language after “or” referenced financial remnants. *See supra* notes 53–54, 110–15 and accompanying text. “Substantially impaired economic viability” comes after “or” in section 32.06(3m), indicating that it refers to financial remnants.

119. *See* WIS. LEGIS. COUNCIL, REP. NO. 28 TO THE 1977 LEGISLATURE: LEGISLATION RELATING TO EMINENT DOMAIN, 1977–1978 Sess., at 4 (1977).

120. Such an interpretation would mean that “substantially impaired economic viability” was intended to be combined with the language prior to “or.”

121. *See supra* notes 112–15 and accompanying text.

122. *Waller v. Am. Transmission Co.*, 2013 WI 77, ¶ 75, 350 Wis. 2d 242, 833 N.W.2d 764 (“The Special Committee replaced the above emphasized language with the more succinct phrase ‘substantially impaired economic viability.’”). The “above emphasized” language that the Wisconsin Supreme Court references in *Waller* is the language from section 208 of the Model Eminent Domain Code regarding financial remnants. *See supra* notes 53–54, 114–15 and accompanying text. The majority makes this clear in its opinion by placing emphasis on the following language: “that gives rise to a substantial risk that the condemnor will be required to pay in compensation for the part taken an amount substantially equivalent to the amount that would be required to be paid if it and the remainder were taken as a whole.” *Waller*, 2013 WI 77, ¶ 75 (emphasis omitted) (quoting MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22–23 (2002)).

impaired economic viability” applied only to financial remnants. Therefore, the Wallers’ property would have been of “substantially impaired economic viability” only if the severance damages equaled the cost of acquiring the entire property.¹²³ In *Waller*, the severance damages were originally determined to be only \$90,000 and were raised to only \$94,000 after a jury verdict.¹²⁴ Both amounts were much less than the cost to acquire the entire property and were actually less than ATC’s jurisdictional offer, proving that the Wallers’ property, with a still “habitable home,” was not a financial remnant.¹²⁵ This finding should have ended the analysis of whether the Wallers’ property was an uneconomic remnant and established precedent in Wisconsin that “substantially impaired economic viability” references only financial remnants.

C. *Waller’s Creation of a Hybrid Remnant*

Whether the Wisconsin legislature truly intended for “substantially impaired economic viability” to mean the same as the Model Code language it replaced is somewhat debatable.¹²⁶ However, such an interpretation is reasonable considering the language this phrase replaced involved similar “substantial risk” and “substantially equivalent” language from section 208 of the Model Code.¹²⁷ What is clear is that because the court determined that “substantially impaired economic viability” equaled language from the Model Code regarding financial remnants, this phrase should not have been combined with the language from section 32.06(3m) referencing physical remnants. Nevertheless, both the majority and the dissent in *Waller* combined “substantially impaired economic viability” with the language regarding physical remnants, disagreeing only as to whether the property’s “size, shape, and condition [was] of substantially impaired economic viability.”¹²⁸

123. See *supra* notes 35–36 and accompanying text.

124. *Waller*, 2013 WI 77, ¶¶ 28, 35.

125. See *id.* ¶ 103. The cost to acquire the entire property was \$132,000, ATC’s jurisdictional offer was \$99,500, and severance damages, even after the jury verdict in the valuation case, were only \$94,000. *Id.* ¶¶ 24–25, 35.

126. See *supra* Part IV.B.

127. See MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22 (1974).

128. *Waller*, 2013 WI 77, ¶ 119. The majority held that the Wallers’ property was an uneconomic remnant because “it [was] of such size, shape, and condition as to be of substantially impaired economic viability.” *Id.* Justice Bradley disagreed, stating, “[T]he Wallers have failed to establish that the size, shape or condition of the property remaining

As Part V will discuss in further detail, after the taking of the high-voltage transmission line easements, no physical remnant existed because the easements formed a border around the property instead of severing the property into multiple fragments.¹²⁹ Moreover, the court conceded that the property after the taking was not “valueless.”¹³⁰ Nevertheless, the court concluded that, after the taking of the two transmission line easements, the Wallers’ property was an uneconomic remnant because “it [was] of such size, shape, and condition as to be of substantially impaired economic viability as either a residential or an industrial parcel.”¹³¹ This conclusion creates a confusing hybrid remnant because, post-*Waller*, a property now does not have to be either a physical remnant or a financial remnant to be an uneconomic remnant. The entire property only has to be of “substantially impaired economic viability.”¹³² This conflicts squarely with the legislative intent of section 208 of the Model Code, on which section 32.06(3m) was based and which limited uneconomic remnants to physical remnants and financial remnants.¹³³ This hybrid remnant classification is more of a totality-of-the-circumstances inquiry than the black and white physical or financial remnant inquiry.¹³⁴

V. NO PHYSICAL REMNANT — NO FINANCIAL REMNANT — NO
UNECONOMIC REMNANT: SEVERANCE DAMAGES ARE THE PROPER
REMEDY INSTEAD.

While ATC argued that the legislative intent behind section 32.06(3m) did not give a landowner a right to bring an uneconomic remnant claim, the supreme court disagreed.¹³⁵ This Comment does not

after the taking is of ‘substantially impaired economic viability.’” *Id.* ¶ 181 (Bradley, J., dissenting).

129. *See infra* Part V.B.

130. *Waller*, 2013 WI 77, ¶ 103 (majority opinion) (distinguishing *Waller* from two other cases where that state’s uneconomic remnant statute required the property to be of little value).

131. *Id.* ¶ 119.

132. *See id.*

133. *See* MODEL EMINENT DOMAIN CODE § 208 cmt., 13 U.L.A. 22 (1974).

134. On remand after the second court of appeals decision, the circuit court’s determination that the Wallers’ property suffered “substantially impaired economic viability,” which was upheld by the Wisconsin Supreme Court, was based on multiple factors instead of simply determining if the property was a physical or financial remnant. *See Waller*, 2013 WI 77, ¶ 42.

135. *Id.* ¶ 77.

take issue with the landowner's right to bring an uneconomic remnant claim in certain situations. Rather, if the scope of uneconomic remnant claims were properly limited to physical remnant and financial remnants, the confusing hybrid remnant created in *Waller* would have been avoided. However, this does not mean the landowner will not have an appropriate remedy in cases where an easement devalues property without creating a physical remnant or a financial remnant.

A. Landowners Do Have a Right to Bring an Uneconomic Remnant Claim . . . In Proper Circumstances

Before the enactment of any federal or state legislation regarding uneconomic remnants, one could seriously question whether a landowner even had the right to bring an uneconomic remnant claim.¹³⁶ After all, remnant theory was historically viewed as one justification for a government agency to acquire excess land in a partial taking.¹³⁷ Authorizing a condemnor to acquire land in excess of what is specifically needed for a public project does not necessarily imply that a condemnor must take a remnant when one exists.

However, once statutes were enacted, the plain language suggested that the statutes did not simply grant a condemning agency permission to acquire a remnant, but instead required the agency to acquire a remnant when one existed. Specifically, uneconomic remnant statutes that used the word "shall" instead of "may" strongly suggested that the statutes were intended as mandates for the condemning agency to acquire a remnant.¹³⁸ As noted in Part II, 42 U.S.C. § 4651(9), section 208 of the Model Code, and Wisconsin Statutes section 32.06(3m) all provide, in part, that the condemning agency "shall" acquire an

136. See CUSHMAN, *supra* note 10, at 45 & n.17 (suggesting that a city could purchase a remnant from a landowner if the landowner consents, but only if a state statute authorized such a practice, while also stating that an owner of a remnant can neither be forced to sell nor compel the state to purchase the remnant).

137. See *supra* Part II.A.

138. The use of the word "may" is ordinarily permissive, whereas the use of word "shall" is presumed to be mandatory. *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 32, 339 Wis. 2d 125, 810 N.W.2d 465; see also *Winkel v. Miller*, 205 P.3d 688, 694 (Kan. 2009) (reasoning that the use of the word "may" instead of "shall" creates a presumption that the legislature intended to make the acquisition of fee simple interest rather than an easement permissive). *But see City of Dover v. Cartanza*, 541 A.2d 580, 582–83 (Del. Super. Ct. 1988) (holding that, while "it is generally presumed that the word 'shall' indicates a mandatory requirement," because courts have interpreted Delaware laws containing "shall" as either mandatory or directory, compliance with the provisions of Delaware's Real Property Acquisitions Act is directory rather than mandatory).

uneconomic remnant.¹³⁹ Nevertheless, courts have not universally agreed that a landowner ever has a right to bring an uneconomic remnant claim.¹⁴⁰

Because section 208 of the Model Code and section 32.06(3m) did not expressly provide that a landowner had the right to bring an uneconomic remnant claim, the court in *Waller* properly looked to the intent of the legislature to determine that the drafters intended for the statute to give landowners a means to dispose of a remnant and, therefore, a landowner had the right to bring an uneconomic remnant claim.¹⁴¹ Likewise, the drafters of the Model Code drafted section 208 with the intent that a landowner would be able to bring an uneconomic remnant claim if the state agency failed to comply with the statutory provision by not properly recognizing the existence of a remnant.¹⁴² However, the drafters also indicated that section 208 was more of a “clean-up” provision, authorizing the state to acquire an uneconomic remnant rather than a provision meant to increase uneconomic remnant claims by landowners.¹⁴³ If uneconomic remnant claims were properly

139. See 42 U.S.C. § 4651(9) (2012); MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22 (1974); WIS. STAT. § 32.06(3m) (2013–2014); see also *supra* Parts II.C–D.

140. See *New Mexico ex rel. N.M. State Highway Dep’t v. United States*, 665 F.2d 1023, 1028 (Ct. Cl. 1981) (“Section 301(9) . . . contemplate[s] that the head of the federal agency concerned . . . has the power and duty to make a determination whether or not a remaining part of [the] land would be an uneconomic remnant, not the owner of [the] parcel of land.”); *Nall Motors, Inc. v. Iowa City*, 410 F. Supp. 111, 114–15 (S.D. Iowa 1975), *aff’d*, 533 F.2d 381 (8th Cir. 1976) (holding that 42 U.S.C. § 4651 created no substantive rights for the landowner to argue that the federal agency failed to recognize an uneconomic remnant); *State ex rel. Dep’t of Transp. v. Evans*, 2010 OK Civ App 107, ¶ 1, 241 P.3d 273, 275 (holding that Oklahoma’s uneconomic remnant statute is “an expression of policy directed to the condemning authority concerning uneconomic remnants which is unenforceable by a private party”).

141. See *supra* notes 93–96 and accompanying text.

142. See PROCEEDINGS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, ANNUAL CONFERENCE IN ITS 81ST YEAR: UNIFORM EMINENT DOMAIN CODE 37 (1972) (determining that a question as to whether the condemnor complied with the provisions of the statute would arise only if the condemnor refused to make an offer to acquire the remnant, and therefore, “[u]nder the present contemplated scheme of the act, [the] question [of whether an uneconomic remnant exists] would arise as part of a preliminary objection pleaded by the owner in his answer”).

143. See *id.* at 41–42. The following commentary from the summary of proceedings regarding the drafting of section 208 indicates the statute was not intended to increase uneconomic remnant claims by landowners but rather to authorize a state agency to condemn uneconomic remnants:

MR. TORVINEN: I think the real thrust of this section is to give authority to a public agency as a condemnor, because the remedy, as I see it, to the property

confined to only physical remnants and financial remnants as the drafters of the Model Code envisioned, allowing a landowner a right to bring an uneconomic remnant claim should not have inevitably led to litigation like *Waller*. The reason for this conclusion is that an uneconomic remnant claim would be appropriate only if the remainder of the property after a partial taking was of “little value” or the severance damages equaled the cost of acquiring the entire parcel.¹⁴⁴

B. Uneconomic Remnants Should Be Limited to Physical Remnants and Financial Remnants

Although the *Waller* holding allowing a landowner to bring an uneconomic remnant claim properly reflects the intent of the legislature, limiting uneconomic remnants to physical remnants and financial remnants will eliminate the confusion of applying the hybrid uneconomic remnant definition of *Waller* in easement condemnation proceedings. Wisconsin appears to be the first state to find that an uneconomic remnant exists following an easement condemnation other than for a highway project and the first state to find that an uneconomic remnant exists where the property was not fragmented.¹⁴⁵ Very few courts have even analyzed an uneconomic remnant claim in an easement condemnation proceeding other than for a permanent highway easement.¹⁴⁶ At least one state, Oregon, has questioned whether uneconomic remnant claims ever make sense in the context of such easement condemnations.¹⁴⁷ Whether an uneconomic remnant claim is ever permissible in an easement condemnation should be determined

owner in many states, even to the extent, in the rare case of an inverse condemnation, where the taking is almost complete, and you require full compensation, although it's in a technical sense severance damage, or consequential damage, and on either the theory of inverse condemnation or severance damage the property owner is going to ordinarily receive his full compensation.

So this is really just a clean-up deal for the state agency, or the condemnor, to make his operation more flexible.

MR. DEACON: We agree.

Id.

144. See *supra* notes 110–15 and accompanying text.

145. See *supra* notes 7–8 and accompanying text.

146. See *supra* note 7.

147. See *City of Lake Oswego v. Babson*, 776 P.2d 870, 873 (Or. Ct. App. 1989) (“[This court has] found no case in which [uneconomic remnant] theory has been considered in the taking of an easement. However, even assuming that it does apply to an easement taking, it is not applicable in this case, because the remnants here are not valueless.”).

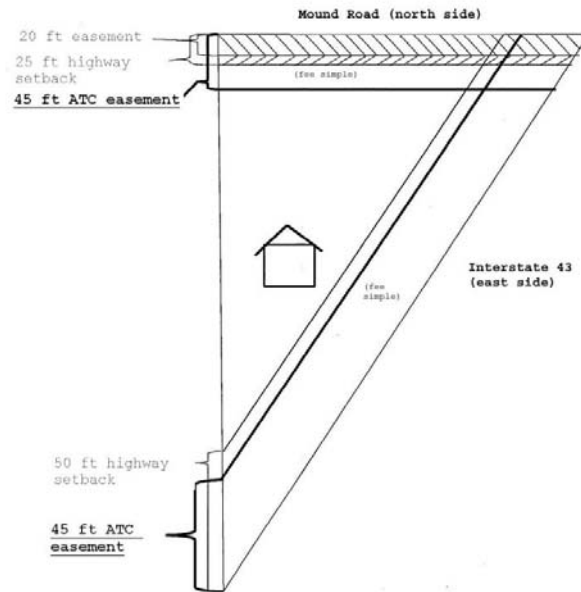
not by the type of condemnation proceeding but instead by whether a physical remnant or a financial remnant is created.¹⁴⁸ When an easement condemnation project simply devalues the landowner's property without creating a physical remnant or a financial remnant, neither the landowner, as was the case in *Waller*, nor the condemning agency should be allowed to argue that the entire property must be acquired.

Understanding the layout of the Wallers' property helps explain why this should be the case, as well as why the proper remedy for the devaluation of a landowner's property created by an easement that does not create a physical remnant or a financial remnant is severance damages. Below is a depiction of the Wallers' property (Figure 1), as provided by Justice Bradley, dissenting in *Waller*.¹⁴⁹ As you can see from Figure 1, the transmission line easements formed a border along two sides of the Wallers' residential property.¹⁵⁰

148. One could argue that an easement condemnation other than for a highway will never create a physical or financial remnant because the easement will likely not sever a property into fragments or result in severance damages equaling the cost of acquiring the entire parcel. However, limiting uneconomic remnants to physical remnants and financial remnants will at least greatly reduce the likelihood that an easement condemnation will create an uneconomic remnant.

149. See *Waller v. Am. Transmission Co.*, 2013 WI 77, ¶ 137, 350 Wis. 2d 242, 833 N.W.2d 764 (Bradley, J., dissenting).

150. See *id.* ¶ 19 (majority opinion) (discussing the proposed layout of the easements along two sides of the Wallers' property).

Figure 1

As Figure 1 illustrates, the high-voltage transmission lines did not divide the Wallers' property in two fragmented parcels. Instead, the property was simply a small parcel to begin with, and the parcel was further reduced in both size and value by the easements bordering the property.¹⁵¹ Thus, the classic definition of a physical remnant is not applicable because, as Justice Bradley points out, the entire property was still "intact."¹⁵² Furthermore, as mentioned previously, the severance damages did not equal the cost of acquiring the entire property, so the Wallers' property was not a financial remnant.¹⁵³ Only the court's creation of a hybrid remnant by combining "substantially

151. See *id.* ¶ 98.

152. See *id.* ¶ 135 (Bradley, J., dissenting). Justice Bradley was correct in asserting that the Wallers' property was not an uneconomic remnant because "a remnant necessarily means something that is remaining or left over." *Id.* ¶ 134. However, Justice Bradley did not go as far as to argue that the reason was because the property was neither a physical remnant nor a financial remnant, and she actually combined the language of each in her analysis as well. See *supra* note 128 and accompanying text (discussing that both the majority and the dissent combined the language for physical remnants and financial remnants in one inquiry).

153. See *supra* notes 124–25 and accompanying text.

impaired economic viability” with “property of size, shape, or condition” allowed the court to conclude that the Wallers’ property was an uneconomic remnant.¹⁵⁴

C. If No Physical Remnant or Financial Remnant Is Created, Devaluation of Property Should Result in Severance Damages

While it may be true that high-voltage transmission lines create a “fear and stigma” that diminishes the value of property,¹⁵⁵ this devaluation of property does not itself create a physical remnant or a financial remnant. While in *Public Works* the court allowed the state to condemn the entire parcel, the reason was not because a physical remnant was created or because the condemnor would be required to pay some severance damages, but because the severance damages would have equaled the cost of acquiring the entire parcel.¹⁵⁶ Financial remnant theory does not allow a condemning agency to acquire an entire property just to avoid paying some severance damages, but instead where the severance damages equal the cost of acquiring the entire property.¹⁵⁷ Likewise, a landowner should not be allowed to compel the condemning agency to acquire an entire property simply because severance damages exist, if the property is neither a physical remnant nor a financial remnant. Instead, the proper remedy in any case, including easement condemnation proceedings where a property is devalued without creating a physical or a financial remnant, is severance damages.

154. See *supra* Part IV.C.

155. See *supra* note 78 and accompanying text. “Fear and stigma” is another way of saying the “public perception of the dangers” created by the high-voltage transmission lines. See *Hoekstra v. Guardian Pipeline, LLC*, 2006 WI App 245, ¶¶ 23–24, 298 Wis. 2d 165, 726 N.W.2d 648 (discussing the “fear and stigma” of natural gas transmission pipelines).

156. See *People ex rel. Dep’t of Pub. Works v. Superior Court*, 436 P.2d 342, 346–47 (Cal. 1968) (noting that California’s uneconomic remnant statute “does not authorize excess condemnation anytime the condemnee claims severance or consequential damages,” but concluding that the taking of the entire parcel in the present case “can probably be condemned for little more than the cost of taking the part needed for the highway and paying damages for the remainder”).

157. See *id.* at 345–47; see also *State Highway Comm’n v. Chapman*, 446 P.2d 709, 713 (Mont. 1968) (distinguishing a parcel where the severance damages do not equal the cost to acquire the entire parcel from *Public Works* and holding that financial remnant theory does not permit the taking of a remaining parcel where the severance damages are not excessive); *Droz, supra* note 26, at 44 (noting that “excessive severance damages seems to be limited to cases where the severance damages nearly equal the value of the fee”).

Wisconsin law already provides that the remedy for devaluation of property in an easement condemnation proceeding is severance damages.¹⁵⁸ Severance damages are defined as “the diminution in the fair market value of the remaining land that occurs because of [a] taking.”¹⁵⁹ In other words, the landowner is compensated for damages created by the easement but retains title to the property.¹⁶⁰ Even in cases like *Waller*, where the landowner’s devaluation of property is largely due to the “public perception of the dangers” created by the easement,¹⁶¹ severance damages still provide a proper remedy. In *Hoekstra v. Guardian Pipeline, LLC*, the Wisconsin Court of Appeals held that testimony regarding the “fear and stigma” related to a natural gas transmission pipeline easement was admissible in determining the diminished value of the property necessary for computing severance damages.¹⁶²

Therefore, in cases like *Waller*, where the landowner’s appraiser finds that the perceived dangers of the high-voltage power lines lead to diminished value of the property, such a finding will enable the landowner to receive more compensation in the form of severance damages.¹⁶³ Instead of arguing that the transmission line easement has left the landowner with an uneconomic remnant due to decreased value of the property, the landowner’s proper remedy would be to bring a just compensation claim, arguing that the severance damages were

158. See WIS. STAT. § 32.09(6g) (2013–2014) (“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 the evaluation . . .”).

159. *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶ 14, 281 Wis. 2d 173, 696 N.W.2d 194 (alteration in original) (quoting *Alsum v. Wis. Dep’t of Transp.*, 2004 WI App 196, ¶ 12, 276 Wis. 2d 654, 689 N.W.2d 68) (internal quotation marks omitted).

160. See 98 AM. JUR. TRIALS *Dominant Estate Owner’s Abandonment of Easement of Way* § 2 (2005) (defining an easement as a property interest in land that is separated from the land itself and “confers no title to the land on which it is imposed”).

161. See *supra* notes 77–78 and accompanying text.

162. *Hoekstra v. Guardian Pipeline, LLC*, 2006 WI App 245, ¶¶ 23–24, 298 Wis. 2d 165, 726 N.W.2d 648.

163. “Numerous jurisdictions throughout the country have admitted evidence regarding fear and safety concerns of natural gas transmission pipelines, electrical transmission lines and oil and gasoline pipelines [to calculate severance damages] in partial takings cases . . .” *Arents*, 2005 WI App 61, ¶ 17 (citing Vitauts M. Gulbis, Annotation, *Fear of Powerline, Gas or Oil Pipeline, or Related Structure as Element of Damages in Easement Condemnation Proceeding*, 23 A.L.R. 4th 631 (1983)).

inadequate.¹⁶⁴ Nevertheless, as long as Wisconsin law allows for landowners to bring an uneconomic remnant claim in an easement condemnation proceeding in which neither a physical remnant nor a financial remnant is created, courts will be confronted with much confusion as to whether the proper remedy for devaluation of property is severance damages or a mandated acquisition of the entire parcel. This will be the case especially in condemnation proceedings for high-voltage transmission line easements and natural gas line easements, where the “fear and stigma” of these easements may continue to diminish the value of property without fragmenting the property.¹⁶⁵

VI. SIGNIFICANCE OF *WALLER* AND PROPOSED MODIFICATIONS TO WISCONSIN’S UNECONOMIC REMNANT STATUTE

Because *Waller* is the first case to interpret Wisconsin’s uneconomic remnant statute that was enacted more than thirty years ago, it is likely too early to determine exactly how this case will impact Wisconsin eminent domain proceedings. Nevertheless, due to the combination of the *Waller* court’s questionable interpretation of the phrase “substantially impaired economic viability” and its unique application of Wisconsin’s uneconomic remnant statute in an easement condemnation proceeding, it is worth considering the significance of the *Waller* decision and proposed modifications to section 32.06(3m). These statutory modifications to Wisconsin’s uneconomic remnant statute could diminish any negative impact that the *Waller* decision might otherwise have on easement condemnation proceedings, especially those for high-voltage transmission lines and for natural gas transmission lines. Making these same modifications to section 32.05(3m) for quick-take proceedings could also decrease the burden on the Wisconsin Department of Transportation in condemning a portion of land for a highway project.¹⁶⁶

164. “In a partial takings case, . . . the measure of just compensation is the difference between the fair market value of the whole property before the taking and the fair market value of the remaining property immediately after the taking.” *Arents*, 2005 WI App 61, ¶ 14. The difference is referred to as severance damages. *Id.* The combination of these sentences is why it makes sense for an uneconomic remnant claim to be brought in a just compensation proceeding—a calculation of severance damages is necessary in determining if a financial remnant exists.

165. See *Hoekstra*, 2006 WI App 245; see also *Waller v. Am. Transmission Co.*, 2013 WI 77, 350 Wis. 2d 242, 833 N.W.2d 764.

166. See Brief of Defendant-Respondent at 12, *Bailey v. Wis. Dep’t of Transp.*, No. 2014AP1214 (Wis. App. Apr. 23, 2015), 2014 WL 4783145, at *11 (arguing that, based on the

A. Significance of Waller

While the *Waller* decision may appear on its face to be a fact-specific inquiry that would likely not resurface in future easement condemnation proceedings because the Waller property was so small to begin with,¹⁶⁷ the property was already encumbered by easements,¹⁶⁸ and the proposed easements took up more than half of the property,¹⁶⁹ the Wisconsin Supreme Court's holdings in *Waller* nevertheless complicate slow-take easement condemnation proceedings under section 32.06(3m).¹⁷⁰ First, *Waller* has created a new hybrid remnant, which merges language that the court concluded referenced financial remnants with language intended to apply to physical remnants, thereby creating a new classification of remnants that is neither a physical remnant nor a financial remnant.¹⁷¹ Second, *Waller* has established precedent that a landowner has the right to bring an uneconomic remnant claim in a separate right-to-take proceeding even though both physical remnants and financial remnants should be determined based on the value of the

language of Wisconsin Statutes section 32.05(3m), "it is unlikely a change of driveway access alone can ever render a property an uneconomic remnant"). The fact that the Wisconsin Department of Transportation (DOT) was forced to make this argument on appeal after the circuit court judge granted summary judgment in its favor as to whether relocating the landowner's driveway created an uneconomic remnant, *id.* at 1, 11–12, demonstrates the burden that the *Waller* court's interpretation of "substantially impaired economic viability" may place on the DOT, too. By creating a hybrid remnant inquiry that requires the court to examine whether an entire property is "of substantially impaired economic liability" as a result of a partial condemnation, the finder of fact may have a more difficult time determining if a remnant exists, and appeals may also become more common. If, however, uneconomic remnant claims were limited to fragmented parcels that were physical remnants or parcels that were financial remnants because the severance damages equaled the cost of the entire parcel, costly litigation would be avoided, and the landowner would be rightly compensated in the form of severance damages. *See infra* note 183 and accompanying text.

167. The Waller property, before the taking of the easements, was a 1.5 acre triangular lot. *Waller*, 2013 WI 77, ¶ 11.

168. The Waller property, before the taking of the easements, was already encumbered with a twenty-foot transmission line easement on one side of the property, and the property was "subject to highway setbacks." *Id.* ¶ 12.

169. Both appraisers concluded that the easements would cover more than half the property. *Id.* ¶¶ 20, 23.

170. Specifically, slow-take proceedings for high-voltage transmission lines and natural gas lines that are likely to decrease the value of the property could be affected by this new hybrid remnant. *See id.* ¶ 125 (Bradley, J., dissenting) ("[C]ondemnors may now be required to take an increased amount of property that they do not want or need for their projects. Increased costs to ratepayers and taxpayers will accompany these unnecessary takings because now condemnors can be required to pay for the entire property, together with relocation benefits, rather than paying for the taking of only an easement.").

171. *See supra* Parts IV.B–C.

remainder, which would normally be determined in a just compensation hearing.¹⁷² Third, by interpreting Wisconsin's uneconomic remnant statute in an easement condemnation proceeding—where the devaluation of property was partially due to the public's perceived dangers of high-voltage transmission line easements—landowners now may require utility companies to take fee simple title to their entire property instead of just collecting severance damages by successfully arguing that the power lines “substantially impair the economic viability of their property,” even when the property is not fragmented by the easements and the severance damages do not equal the cost of acquiring the entire parcel.¹⁷³

*B. Three Proposed Modifications to Wisconsin's
Uneconomic Remnant Statute*

Given the lack of precedent nationwide regarding uneconomic remnants in the context of easement condemnations,¹⁷⁴ and the fact that *Waller* has broadened remnant theory to apply to situations that create neither physical remnants nor financial remnants,¹⁷⁵ the Wisconsin legislature should consider three modifications to its uneconomic remnant statute to ensure that *Waller* does not lead to abusive litigation in easement condemnation proceedings. These modifications include (1) clearly defining the type of remnant to which “substantially impaired economic viability” refers, (2) clarifying that the remedy for devaluation of property when neither a physical remnants nor a financial remnant exists is severance damages, and (3) expressly overruling one holding in *Waller* by stating that any uneconomic remnant claim is proper only in a just compensation hearing, not in a separate right-to-take proceeding.

172. See *Waller*, 2013 WI 77, ¶ 118 (majority opinion) (holding that “the ‘right-to-take’ provision sets out the proper and exclusive way for a property owner to raise a claim that the owner will be left with an uneconomic remnant after a partial taking by the condemnor”); see also *supra* Part III.B.2 (discussing the court’s rationale for allowing an uneconomic remnant claim to be brought in a separate “right-to-take” action). But see *infra* Part VI.B.3 (discussing why a valuation proceeding would properly decide whether a physical remnant or a financial remnant exists); see also *supra* note 164 and accompanying text.

173. See *Waller*, 2013 WI 77, ¶ 119 (holding that “the Wallers’ property, after ATC took two easements for transmission lines, is an uneconomic remnant because it is of such size, shape, and condition as to be of substantially impaired economic viability as either a residential or an industrial parcel”); see also Part V (discussing why the Wallers’ property was not a physical remnant or a financial remnant and why the proper remedy for devaluation of property where neither type of remnant is created is severance damages).

174. See *supra* notes 7–8 and accompanying text.

175. See *supra* Parts IV–V.

1. Eliminate the Ambiguity of “Substantially Impaired Economic Viability”

Section 32.06(3m) should be modified to limit uneconomic remnant claims to physical remnants and financial remnants either by replacing “substantially impaired economic viability” with the exact language it replaced from section 208 of the Model Code¹⁷⁶ or by drafting similar language requiring that severance damages equal the value of the property in order for the uneconomic remnant statute to be applicable, unless of course a severed parcel is a physical remnant. Either of these modifications would eliminate the confusing hybrid remnant created by the *Waller* interpretation and application of “substantially impaired economic viability.”¹⁷⁷ A court simply would have to consider two questions: (1) Did the condemnation create a fragmented physical remnant that is of little value? (2) Did the condemnation result in severance damages that equaled the value of the entire property? If the answer to both questions were no, then an uneconomic remnant would not exist.¹⁷⁸ This would prevent courts from continuing to merge the language regarding financial remnants with the language regarding physical remnants and applying this interpretation in cases where neither a physical remnant nor a financial remnant exists, like in *Waller*.¹⁷⁹

Alternatively, the Wisconsin legislature could determine that Wisconsin’s uneconomic remnant statute should not apply to financial remnants.¹⁸⁰ The legislature could do this either by redefining

176. The exact language from the Model Code regarding financial remnants that could replace “substantially impaired economic viability” is as follows: “[O]r that gives rise to a substantial risk that the condemnor will be required to pay in compensation for the part taken an amount substantially equivalent to the amount that would be required to be paid if it and the remainder were taken as a whole.” MODEL EMINENT DOMAIN CODE § 208, 13 U.L.A. 22 (1974). This is the language that the Wisconsin Supreme Court concluded that “substantially impaired economic viability” was a “more succinct” version of. *Waller*, 2013 WI 77, ¶ 75; *see also supra* note 122 and accompanying text.

177. *See supra* Parts IV.B–C.

178. This is a much more black-and-white inquiry than *Waller*’s totality-of-the-circumstances inquiry. *See supra* note 134 and accompanying text.

179. *See supra* Parts III–V.

180. Because many state statutes authorizing the acquisition of uneconomic remnants do not address financial remnants, Wisconsin could consider modifying its language to reflect the language of statutes that authorize only the acquisition of physical remnants. This modification would mean requiring the remaining portion of the land after the partial taking to be of a “little or no value.” *See, e.g.*, DEL. CODE ANN. tit. 29 § 9505(9) (2003); HAW. REV. STAT. ANN. § 113-5(9) (LexisNexis 2013); IOWA CODE ANN. § 6B.54(8) (West 2010); ME.

“substantially impaired economic viability” as part of the definition of physical remnants or by completely eliminating the phrase from the statute. However, the first alternative would mean concluding that the phrase was not intended to be a more “succinct” version of the Model Code language it replaced,¹⁸¹ and the second would clearly conflict with legislative intent that the phrase be included in the statute.¹⁸²

2. Acknowledge that Severance Damages Are the Proper Remedy for Devaluation of Property When Neither a Physical Remnant Nor a Financial Remnant Is Created

Wisconsin’s uneconomic remnant statute should also be modified to clarify that easement condemnation proceedings, which do not create physical remnants or financial remnants, are governed by Wisconsin Statutes section 32.09(6g), which provides severance damages as the remedy for the devaluation of property in an easement condemnation proceeding.¹⁸³ Such a provision would eliminate the confusion created by *Waller*’s application of the statute in a high-voltage transmission line easement condemnation. As Part V explained, because Wisconsin law already provides for severance damages as a remedy for devaluation of property in an easement condemnation, even if the devaluation is partially due to the “fear and stigma” of the easement, the landowner still has a proper remedy.¹⁸⁴ This provision would eliminate the concern that a high-voltage transmission line easement or a natural gas line easement would require a fee simple taking of the entire property when the property is not fragmented into multiple parcels and the severance damages do not equal the cost of acquiring the entire property.

3. Provide that a Just Compensation Hearing Is the Proper Way to Determine Whether a Physical or Financial Remnant Exists

Finally, the Wisconsin legislature should include a provision that in circumstances where the existence of a physical remnant or a financial remnant is questionable the claim should be brought in a just

REV. STAT. ANN. tit. 23, § 154-C (1992); MISS. CODE ANN. § 43-37-3(i) (2009); N.C. GEN. STAT. § 40A-7(a) (2011); OHIO REV. CODE ANN. § 163.59(K) (LexisNexis 2014); OKLA. STAT. ANN. tit. 27, § 13(9) (West 1997); TENN. CODE ANN. § 13-11-118(a) (2011); WASH. REV. CODE ANN. § 8.26.180(9) (West 2007).

181. *But see supra* note 122 and accompanying text.

182. *See supra* note 116–17 and accompanying text.

183. *See* WIS. STAT. § 32.09(6g) (2013–2014).

184. *See supra* Part V.C.

compensation hearing instead of in a separate right-to-take action. The reason for this provision is quite simply that any determination of a physical remnant or a financial remnant should be based solely on the before and after valuation of the portion of property not taken in the condemnation proceeding. For a physical remnant to exist, the leftover portion would have to be of “little value.” Thus, if a parcel of a property were severed in a condemnation proceeding, the value of the parcel would need to be determined to conclude that it is a physical remnant.

Likewise, a financial remnant would require the severance damages to be equal to the value of taking the entire property. Such a determination could be made only after determining the total amount of severance damages, which would be validated in a just compensation hearing. The only reason the *Waller* court was able to conclude that an uneconomic remnant claim should precede any just compensation claim is because the court created a new classification of remnant that is not a physical remnant or a financial remnant.¹⁸⁵ Therefore, if Wisconsin’s uneconomic remnant statute were modified to be applicable only to physical remnants and financial remnants, it would be impractical for a landowner to bring an uneconomic remnant claim in a right-to-take action because the court would not properly be able to determine if either type of remnant exists without a proper valuation of the portion of the property in question.

VII. CONCLUSION: CHOICE BETWEEN HYBRID OR TRADITIONAL REMNANT THEORY

In an amicus brief in *Waller v. American Transmission Co.*, the Wisconsin Utilities Association (WUA) did not focus on whether the *Waller* property truly was an uneconomic remnant but instead argued that it is in the public’s interest to require that a such a claim be brought in a valuation proceeding, not a separate right-to-take action.¹⁸⁶ WUA reasoned that a valuation hearing would avoid the “extreme inefficiency, delay, and additional expenses created by resolving an uneconomic remnant claim in a [separate] right-to-take proceeding.”¹⁸⁷ WUA noted that its utility members “depend on efficient condemnation procedures to allow them to quickly construct new power lines, gas

185. See Parts IV.B–C.

186. Wisconsin Utilities Ass’n, Inc.’s Amicus Brief at 7, *Waller v. Am. Transmission Co.*, 2013 WI 77 (Nos. 2012AP805 & 2012AP840), 2013 WL 1456756.

187. *Id.* at 15.

pipes, and water pipes to meet Wisconsin's growing utility needs."¹⁸⁸ Furthermore, increased financial expenses related to eminent domain proceedings "directly impact Wisconsin residents, as the costs of doing business as a utility are largely passed on to customers through rates."¹⁸⁹

Within weeks after the *Waller* decision was issued, the Wisconsin legal community was already taking note.¹⁹⁰ Some commentary simply laid out the holdings of the case, while other commentary cautioned that this decision could affect condemnation proceedings within the state.¹⁹¹ The critical commentary basically echoed Justice Bradley's dissent in *Waller*, warning that the decision could have a negative impact on taxpayers and electricity ratepayers because utility companies may be compelled to pay more to acquire an entire property when only an easement is needed in order to avoid costly litigation like in *Waller*.¹⁹² While the WUA and Justice Bradley's concerns seem warranted, both stop short of recognizing that *Waller* has created a new hybrid remnant that merges the inquiry for physical remnants and financial remnants.

While this Comment also argued that a valuation proceeding would be the appropriate vehicle for determining if an easement condemnation creates an uneconomic remnant, the suggested modifications I propose to Wisconsin's uneconomic remnant statute are intended to address the underlying hybrid remnant concern. In reflecting on the history of remnant theory and the enactment of Wisconsin's eminent domain

188. *Id.* at 11.

189. *Id.* at 12.

190. See Timothy D. Fenner & Steven M. Streck, *Condemnation and the Uneconomic Remnant*, AXLEY (Aug. 5, 2013), http://www.axley.com/publication_article/condemnation-and-the-uneconomic-remnant/, archived at <http://perma.cc/6GYN-39D4>; Joe Forward, *Public Utility Loses Takings Case, Court Clarifies "Uneconomic Remnant" Law*, ST. BAR WIS. (Aug. 8, 2013), <http://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=10962>, archived at <http://perma.cc/X5BU-PLNC>; Kevin M. Long & Katherine M. Perhach, *When Taking Part is Taking All: Eminent Domain and Uneconomic Remnants in Wisconsin*, QUARLES & BRADY LLP (Aug. 29, 2013), <http://www.quarles.com/condemnation-eminent-domain-2013/>, archived at <http://perma.cc/3PHA-TNQ4>; Cari Anne Renlund, *Is Supreme Court Victory for Property Owners a Loss for Ratepayers and the Public?*, DEWITT ROSS & STEVENS S.C. (Aug. 1, 2013), <http://www.dewittross.com/news-education/posts/2013/08/01/is-supreme-court-victory-for-property-owners-a-loss-for-ratepayers-and-the-public->, archived at <http://perma.cc/BW36-3BJC>.

191. Compare Forward, *supra* note 190, and Long & Perhach, *supra* note 190, with Fenner & Streck, *supra* note 190, and Renlund, *supra* note 190.

192. See Fenner & Streck, *supra* note 190; Renlund, *supra* note 190; see also *Waller v. Am. Transmission Co.*, 2013 WI 77, ¶¶ 123–125, 350 Wis. 2d 242, 833 N.W.2d 764 (Bradley, J., dissenting) (discussing the potential negative impacts of the *Waller* decision on easement condemnation proceedings in Wisconsin).

statute in 1977, the irony is that financial remnant theory was originally advanced to decrease the burden on the government in eminent domain proceedings, not to increase the administrative and financial expense associated with public projects. While the court in *Public Works* allowed the California Department of Public Works to acquire a landlocked parcel to avoid paying excessive severance damages under financial remnant theory,¹⁹³ the court in *Waller* interpreted “substantially impaired economic viability” in section 32.06(3m) as a more succinct version of financial remnant language in the Model Code but then applied it as a broader version of physical remnant theory.¹⁹⁴ In doing so, the burden on ATC in condemning an easement for high-transmission power lines actually was increased.

Because Wisconsin law already provides severance damages as the proper remedy for devaluation of property due to the “fear and stigma” of the easement,¹⁹⁵ landowners will still be justly compensated in easement condemnations for high-voltage power lines and natural gas transmission lines. At the same time, condemning agencies will not have to worry about creating an uneconomic remnant and, therefore, paying for more property than is needed when the property is not fragmented by the condemnation and the severance damages do not equal the cost of acquiring the entire parcel. Moreover, if Wisconsin courts have to continue to rely on *Waller*, then the courts will be asked to interpret “substantially impaired economic viability” on a case-by-case basis in future easement condemnation proceedings instead of simply determining the before-and-after value of the remaining property and concluding whether a physical remnant or financial remnant exists. Wisconsin Department of Transportation (DOT) projects could also be delayed and unduly burdened because the courts will be asked to

193. *People ex rel. Dep't of Pub. Works v. Superior Court*, 436 P.2d 342, 344–45 (Cal. 1968).

194. The majority in *Waller* determined that the “broader definition [of ‘substantially impaired economic viability’] allows for the conclusion that the Wallers’ property constitutes an uneconomic remnant even though it is not valueless.” *Waller*, 2013 WI 77, ¶ 103. However, as this Comment argued, the “little value” language in section 32.06(3m) was intended to apply to physical remnants, and the *Waller* court had already determined that “substantially impaired economic viability” equaled language from the Model Code regarding financial remnants. Therefore, the inquiries should not have been combined.

195. See *Hoekstra v. Guardian Pipeline, LLC*, 2006 WI App 245 ¶¶ 23–24, 298 Wis. 2d 165, 726 N.W.2d 648 (discussing the “fear and stigma” of natural gas transmission pipelines).

interpret “substantially impaired economic viability” in all quick-take proceedings as well under Wisconsin Statutes section 32.05(3m).¹⁹⁶

However, this confusion as to when a property is considered to be “of substantially impaired economic viability” could be avoided if three modifications were made to Wisconsin’s uneconomic remnant statute. These modifications would ultimately clarify exactly what an uneconomic remnant is: (1) a remaining fragmented parcel of little value, or (2) a remaining parcel where the severance damages equal the cost of acquiring the entire property. The State interest in advancing the public good would also be promoted by decreasing the administrative and financial burden that the DOT and utility companies face in eminent domain proceedings.

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196. A case recently affirmed by the Wisconsin Court of Appeals illustrates the impact of the substantially impaired economic viability inquiry in the context of a DOT eminent domain proceeding. *See* *Bailey v. Wis. Dep’t of Transp.*, No. 2014AP1214, 2015 WL 1824151 at *12 (Wis. App. Apr. 23, 2015) (per curiam). While the issue on appeal was whether summary judgment was properly granted in favor of the DOT in a controlled access highway case, the circuit court judge’s framing of the uneconomic remnant inquiry is worth observing. *See* Brief of Appellant with Attached Appendix at 9–10, *Bailey v. Wis. Dep’t of Transp.*, No. 2014AP1214 (Wis. App. Apr. 23, 2015), 2014 WL 4545975, at *6.

The Court believes that for access to a controlled access highway to become unreasonable, the standard is related to the uneconomic remnant. The inquiry is whether or not the new access . . . creates a parcel of property that is of a substantially impaired economic viability. If the answer is yes, the access is unreasonable and the condemnor must take the entire property.

Id. at 9. While the circuit court judge did not find that any evidence in the record created an issue of material fact that the landowner’s parcel was “of little value or substantially impaired economic viability,” *id.*, the judge’s framing of the issue in the case demonstrates that the *Waller* hybrid remnant no longer may limit uneconomic remnant claims in transportation project condemnations to physical remnants (i.e., a small parcel of little value) and financial remnants (i.e., where the severance damages would equal the cost of acquiring the entire property).

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