**IN THE SUPREME COURT OF IOWA**

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**No. 18-0984**

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**DUBUQUE COUNTY NOS.**
**01311 CVCV 103387**
**& 01311 CVCV 103381**

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**JON D. LUCKSTEAD**

**Plaintiff-Appellant**

**vs.**

**THE IOWA DEPARTMENT OF TRANSPORTATION**

**Defendant-Appellee**

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# PLAINTIFF-APPELLANT'S FINAL BRIEF

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## STATEMENT OF THE CASE

Plaintiff-Appellant, Jon D. Luckstead ("Luckstead") filed appeals to the District Court for just compensation awarded by the Dubuque County Condemnation Commission on two parcels, Parcel 184 (Court File No. 01311 CVCV 103387) and Parcel 187(Court File No. 01311 CVCV 103381), he owned in Tamarack Business Park located on the west side of US Highway 151/61 south of Dubuque, Iowa.

Defendant-Appellee the State of Iowa Department of Transportation ("DOT") answered Luckstead's petitions and both matters were tried together to the bench in Dubuque County District Court on May 23 and 24, 2017. Prior to the trial, the DOT moved to bifurcate the trial so that the issue as to whether Luckstead's claims for damages resulting from a change in access was a compensable taking that could be heard with Luckstead's other damage claims. The DOT also asserted that any claims as to the taking creating an uneconomic remainder had been waived. The Trial Court took all motions under advisement stating that it would rule on them after post-trial briefing.

After trial concluded, and on the day Luckstead's post trial brief was due, the Trial Court issued its order granting the DOT's motion before Luckstead timely filed his post-trial briefing. In granting the motion on June 1, 2017, the Trial Court

concluded “there is no compensable taking as a result of the relocation of the access to the Plaintiff’s property”. On May 8, 2018, the Trial Court rendered its judgment in the case that “[t]he decision of the commission is proper in its damage determination and supported by the report of the Iowa Department of Transportation appraisers” and upheld the amounts of compensation awarded by the commission for Parcels 184 (Court File No. 01311 CVCV 103387) and 187 (Court File No. 01311 CVCV 103381).

A timely notice of appeal was filed in both cases on June 5, 2018.

## STATEMENT OF THE FACTS

The Tamarack Business Park is a light industrial business park with retail, office, service, light manufacturing, warehousing, and contractor yard uses. *See App. p. 309, Trial Exhibit 1, the Appraisal of David Reach ("Reach").* Tamarack Business Park is located in Table Mound Township in Dubuque County, Iowa, just south of the City of Dubuque corporate limits on the west side of US Highway 151/61. *Id*. Prior to the condemnation taking, the Luckstead Property had direct access to both the north and southbound lanes of Highway 151/61. *Id*. Plaintiff Jon Luckstead ("Luckstead") developed the business park in the 1970's and still owns many of the lots in the business park as well as the surrounding land. *Id*.

In his appraisal report, appraiser Reach identified all the land owned by Luckstead. *See App. pp. 309-11, Tr. Ex. 1*. This land includes:

> • Property 1 is a commercial / industrial development land parcel along U.S. Highway 151/61 with direct access to the highway. This site could have been developed by itself or subdivided into several smaller parcels. It is likely that the site would have been developed in conjunction with the area identified as Parcel 2D to the west. Mr. Luckstead planned to extend Tamarack Drive northerly along the highway frontage, or use the existing highway access for the entrance to this area. The service road taking is bisecting this property.
> • Property 2 is one tax identification number but is four distinct parcels that have not been replatted due to project influence (platting moratorium since 2009). We have been instructed to appraise the four lots separately. Property 2A and 2B are finished commercial / industrial lots. Property 2C is a semi-finished commercial /industrial lot that needs the road to be extended a short distance and re-grade the site. Property 2D is the development land adjacent to Property 1.
> • Property 3 and 4 are finished commercial / industrial lots.

> • Property 5, 6, & 7 are improved properties located near the entrance to the business park. Properties 5 and 6 have retail oriented uses that may be effected by the indirect access after the taking. Property 7 is an office warehouse at the rear of the business park that enjoys very good visibility to the highway due to the terraced elevations.

*Id., see also plat map on the cover of Trial Exhibit 1 (Reach Appraisal) identifying all the properties by number e.g. Property 1 = P-1 at App. p. 292 (cover) and App. p. 310*. Luckstead does not own all the property within business park, having sold some lots throughout the years. *Id., at App. pp. 311-12, properties numbered 13-20*.

In July 2015, Defendant Iowa Department of Transportation exercised the power of eminent domain and took land in fee from Luckstead, imposed temporary easements on the property, and took all access to Highway 61/151 including the business park's direct access to the highway. The taking has resulted in two condemnation cases in Dubuque County (Court File Nos. 01311 CVCV 103387 & 01311 CVCV 103381) which were tried together beginning May 23, 2017.

The DOT labeled its takings from Luckstead's property Parcel 184 (Court File No. 01311 CVCV 103387) and Parcel 187 (Court File No. 01311 CVCV 103381).

Parcel 187 (Court File No. 01311 CVCV 103381)

The corresponding parcel in Reach's report to the DOT's labeled 187 is Property 1. *Compare shaded aerial for Property 1 at App. p. 310 to App. pp. 392-*

*3*. Before the taking, this highway frontage development property had 14.82 acres, but after the taking of a large swath through the center of the parcel (6.36 acres) in addition to all access rights to Highway 61/151, the remaining land to the west of the taking is 1.68 acres with 6.78 acres remaining to the east. *Id*. In addition, Property 1 will no longer have direct access to northbound and southbound Highway 61/151 through the Tamarack Business Park access, instead having to travel north of the property to the new SW Arterial Interchange with Highways 61/151.

In the opinion of the appraiser Reach, the taking of the direct access to Highway 61/151 and replacing it with the new access road (which the taking of land is for) substantially impairs the access to Property 1 (and all of the Tamarack Business Park property) because the access is no longer suited for commercial retail uses. As stated in the Reach report:

> Property 1 lost direct access to the highway as well as future direct access through the existing Tamarack Business Park entrance. The new Connector Road A, intersects SW Arterial near the interchange located north of the subject. The public may easily miss the exit to access site requiring the owner to purchase signage north of the interchange. Connector Road A will be at an elevation that will provide no exposure to future development on the east remnant.
>
> The loss of direct highway access fundamentally alters the market in which the subject operates. The subject, no longer has direct access to the highway, such access commands a premium for retail and commercial uses. Direct access is a strong feature of retail, commercial, auto related uses, and heavy truck or equipment

> maintenance. After losing direct access to the highway, the subject has limited the market in which it operates.

*See App. p. 396 from Tr. Ex. 1.*

According to Reach, given the loss of direct access and loss of commercial retail uses, Property 1 suffers from severance damages when comparing the before and after values of Property 1 given the value has been reduced from $45,000/acre to $28,000/acre for the remaining development land. *See App. p. 398 from Tr. Ex. 1*. According to Reach, given the loss of commercial uses: "The value of the subject 'After the Taking' is calculated by taking a 25-percent deduction for the loss of direct access and limiting exposure to the highway north bound lanes." *Id*. Twenty-five percent of $45,000 is $11,250 which means this factor alone reduces the development property to $33,750. The remaining $5,750 ($33,750-$28,000) loss per acre to the developable land on the east parcel is attributable to the irregular shape, less desirable topographical features, in addition to the loss of usable area for Property 1. Not all of the severance damages are directly attributed to the direct loss of highway access (indirectly, they are which can cause confusion because the new connector road the irregular shape, less desirable topographical features, in addition to the loss of usable area for Property), but there has been substantial impairment given the change in highest and best use from the change in access.

Consequently, with a before value of $45,000/acre, Property 1 is valued in the before taking condition as $666,900. After the fee taking and considering severance damages described above, Property 1 is valued at $210,000. This results in a loss in value to Property 1 of $456,900.

Parcel 184 (Court File No. 01311 CVCV 103387)

The DOT's appraiser Lock labeled[1] his Parcel 184 (Court File No. 01311 CVCV 103387 Exhibit A) as the same as Reach's Property 2[2]:

- Reach's Lot 2A 3.61 acres is Lock's pink property;
- Reach's Lot 2B 3.16 acres is Lock's orange property;
- Reach's Lot 2C 2.91 acres is Lock's yellow property; and,
- Reach's 2D 17.23 acres is Lock's blue property.

*See App. p. 402, 409 and 410 from Trial Exhibit 1 and App. p. 54 and App. p. 130, from Trial Exhibits A Part 1 and Part 2 for Parcel 184*. Given their different stages of development, Reach valued 2A, 2B, 2C, and 2D as their own separate larger parcels with the following before values:

- Reach's Lot 2A at $115,000/ac for $415,200;
- Reach's Lot 2B at $100,000/ac for $316,000;

[1] See Trial Exhibit A Part 1 and Exhibit A Part 2 Supplement for Parcel 184 at page 12 in both reports *(App. p. 54 & p. 130)*.

[2] This evidence is undisputed and complete contradicts the Trial Court's baseless finding that "Additionally, Plaintiff's expert separated out the parcels into different and distinct pieces of property, which they are not. The parcels are identified on the assessor's roll as two parcels." *See App. p. 788, Judgment*. See below at Argument IV A.

- Reach's Lot 2C at $62,000/ac for $180,400; and,
- Reach's 2D at $20,900/ac for $360,100.

*See App. pp. 420- 431, Tr. Ex. 1*. In the after condition, with the new access in place, Reach has:

- Reach's Lot 2A at $92,000/ac for $315,600;
- Reach's Lot 2B at $80,000/ac for $252,800;
- Reach's Lot 2C at $49,600/ac for $144,300; and,
- Reach's 2D at $12,000/ac for $204,100.

*See App. pp. 435- 443, Tr. Ex. 1*. Parcels 2A and 2D also suffer from temporary easement damages in the amount $7,200 and $2,500 respectfully. *See App. p. 443, Tr. Ex. 1*.

Again, Reach opined that Property 2 suffered from the taking of the direct access to Highway 61/151 and replacing it with the new access road substantially impairs the access to Property 2 because the highest and best use has been downgraded with the loss of commercial-retail uses. *See App. p. 437, Tr. Ex. 1*. The after condition in Parcels 2A and 2D are also impacted by the loss of land, the irregular shape, less desirable topographical features, in addition to the loss of usable area for Property and the limited uses of the "hook". *Id*.

As far as the uneconomic remnant issue to Property 2, this is a red herring. Reach identifies a .5 acre "hook" (*See App. p. 433-4, Tr. Ex. 1*) as an "uneconomic

remnant" in his appraisal. It is not an uneconomic remnant in the statutory sense. Under 6B.54.8, an uneconomical 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, where the acquiring agency determines that the parcel has little or no value or utility to the owner." This is not what Reach claims in his report with regards to the "hook" parcel, nor what Luckstead claimed at trial. Reach stated that the hook does have value and "may be used for ponding, landscaping or monument sign". There was no claim that the hook had no value and was an uneconomic remnant under Iowa statutes. Reach just called it an uneconomic remnant because it cannot be developed.

Reach further opined that his Properties 3, 4, 5, 6, and 7 all suffer from the taking of the direct access to Highway 61/151 and replacing it with the new access road (which the taking of land is for) which substantially impaired the access to these properties. The change in access caused a change in use (loss of commercial-retail uses). *See Trial Exhibit 1, at App. pp. 468-9 (Property 3);App. pp. 496-7 (Property 4); App. pp. 535-6 (Property 5); App. pp. 578-9 (Property 6); and, App. pp. 618-19 (Property 7).*

The evidence at trial showed loss of value directly related to the substantial impairment to the access was approximately $932,628 to Properties 1, 2, 3, 4, 5, 6, and 7. Obviously, Jon Luckstead believes an almost million dollar loss to his

property directly caused by the change in access changing the highest and best use of the Luckstead property is a substantial impairment to the access.

Using a change of use standard to determine whether there is a substantial impairment of access is also consistent with the DOT's official position outside of this case. In the IDOT Appraisal Manual for condemnation cases, the DOT states:

> 13.3.1 Access
> Access to an established roadway is considered a property right. Every property has the right to free and convenient access to a public road system. However, the right of access associated with a property abutting a public roadway does not include the privilege of unrestricted entry at each and every point along the frontage. Through exercise of police power, state and local governments are authorized to control access. **Abutting owners are not entitled to compensation for certain restricted access if their property retains or is provided with reasonable access that is compatible with highest and best use**.
>
> …**Frontage roads present an additional access question. If direct access is impaired, the property may be damaged even though the frontage system is a substitute for direct access, although the frontage road may reduce or eliminate such damage**.

*See Record at May 5, 2017 Affidavit of David Reach at ¶¶ 3-8 and Reach Affidavit Exhibit 1, excerpts from the IDOT Appraisal Manual see at pp.36-37 (emphasis added).*

Even though at the time of trial the direct access had yet to be removed, the change in use of the business park was measurable. According to Reach's report and testimony, a retail store, USA Furniture, closed its doors as a direct result of the loss of access. *Transcript Vol. I, p. 115, l.21-25, p. 116 l. 1-6*. Their liquidating

sales advertising even states, “Why the sale? As published, the City and DOT have condemned and are closing our direct highway access to our store. This uncompensated action spells disaster!” *See App. p. 691, Tr. Ex. 1, Addendum*.

Also, there is another retail tenant, Martin Equipment who said the access was not suitable for retail use. This retail tenant in Property 6 (Tab 9 in the Reach report) maintains that it is “essential” for their retail business to have some direct access to Highway 61/151. *See App. p. 692, Tr. Ex. 1, Addendum*

In addition, there is Reach’s testimony and evidence concerning his Highway Access Market Analysis. *See App. 754-779, Tr. Ex. 1*. His first study analyzed properties impacted by the Belle Plaine, MN Interchange Project. *See App. p. 755-762, Tr. Ex. 1*. The resale of properties that lost direct or convenient access by the Belle Plaine, MN Interchange Project indicated a loss in value that ranges from ten percent to forty percent due to properties changing their use from the loss of direct highway access. Loss of convenient access for retail and commercial properties (like some of the subject’s uses) were in the middle of the range at 20-percent to 28-percent loss in value. There also was a vacant commercial site that lost convenient access is now listed at 40-percent less than the previous sale. *See App. p. 762, Tr. Ex. 1*. As for Maquoketa, Iowa, Reach analyzed 15 properties’ county assessment records and found that the properties that lost either direct or convenient access to the highway have not increased in assessed

market value at the same rate as properties with convenient highway access. *See App. pp. 763-771, Tr. Ex. 1.* Reach found that the difference in assessed market growth is 100-percent or greater. *See App. p. 771, Tr. Ex. 1.* Reach did two additional studies that also supported his conclusions that changes in use occur because of the taking of direct, convenient highway access. *See App. pp. 772-779, Tr. Ex. 1; see also App. pp. 915-20, Transcript Vol. I.*

The DOT offered no testimony on the change in use issue. The only evidence offered on the issue were conclusory statements in the appraisal reports. No analysis, no explanation, just the conclusory statements. *See Parcel 187 (Court File Nos. 01311 CVCV 103381) Trial Ex. A, at App. p. 217; Parcel 184 (Court File Nos. 01311 CVCV 103387) Trial Ex. A, at App. p. 64* ("The highest and best use of the property will not change after the proposed acquisition" which is also found on App. pp. 70-83 even though admittedly no appraisal work was ever done on these parcels by the appraiser and Luckstead objected to its admissibility in his motion in limine and at trial); *Parcel 184 (Court File Nos. 01311 CVCV 103387) Trial Ex. A Supplement* has the exact same statements at App. p. 140 and App. pp.146-159 (which again are inadmissible and Luckstead objected to its admissibility in his motion in limine and at trial).

## ROUTING STATEMENT

The issue on appeal filed by Appellants constitutes a substantial issue of first impression on the meaning and interpretation of Iowa Code chapters 6A and 6B. Under Iowa Rule of Appellate Procedure 6.1101(2)(c), the underlying appeal should be retained by the Supreme Court.

## ARGUMENT

### I. THE TRIAL COURT'S IMPROPER CONSIDERATION OF THE CONDEMNATION COMMISSIONER'S AWARD IS A REVERSIBLE ERROR REQUIRING A NEW TRIAL.

In discussing the facts of the case, the Trial Court noted in its order that "the property has been valued by the DOT pursuant to condemnation hearing compliance officer's report in the amount of $217,954.00 for parcel 187 and $45,000.00 for parcel 184." *See* Record at page 1 of, Order for Judgment dated and filed May 8, 2018. These $217,954.00 for parcel 187 and $45,000.00 for parcel 184 amounts are the same amounts awarded by the condemnation commissioners. See Notice of Appraisement of $217,954.00 for parcel 187 and Notice of Appraisement of $45,000.00 for parcel 184. The Trial Court then held, "[t]he decision of the commission is proper in its damage determination." *See Judgment at App. p. 788*.

The Trial Court's review of the amounts awarded by the commission and upholding "the decision of the commission" is reversible error since evidence relating to the compensation commission's award is inadmissible at the appeal of the decision in the district court.

Iowa Statute 6B.21 covers appeals relating to the compensation commission's award and specifically states:

> "The appeal shall be docketed in the name of the person appealing and all other interested parties to the action shall be defendants. In the event the condemner and the condemnee appeal, the appeal shall be docketed in the name of the appellant which filed the application for condemnation and all other parties to the action shall be defendants. *The appeal shall be tried as in an action by ordinary proceedings*."

Iowa Code Chapter 6B.21 (Transferred from § 472.21 by the Code Editor for Code 1993. Amended by Acts 1999 (78 G.A.) ch. 171, § 13.). In an appeal from an award of a condemnation commission the district court hears the matter under de novo review. *Wilkes v. Iowa State Highway Commission*, 172 N.W.2d 790, 792 (Iowa 1969).

Luckstead recognizes that Iowa Code § 472.21 and 6B.21 previously stated:

> 6B.21. Appeals—how docketed and tried
> The appeal shall be docketed in the name of the person appealing and all other interested parties to the action shall be defendants. In the event the condemner and the condemnee appeal, the appeal shall be docketed in the name of the appellant which filed the application for condemnation and all other parties to the action shall be defendants. The appeal shall be tried as in an action by ordinary proceedings. *The appraisement of damages by the compensation commission is admissible in the action*.

However, the sentence "The appraisement of damages by the compensation commission is admissible in the action" was stricken in 1999. *See* 1999 Iowa Acts, ch. 171, § 13 (striking from section "6B.21 Appeals" the following: "The appraisement of damages by the compensation commission is admissible in the action." (codified at Iowa Code § 6B.21 (2001)).

The repeal of a statute destroys the effectiveness of the statute, and the repealed statute is deemed never to have existed. *Iowa Dep't of Transp. v. Iowa Dist. Ct. for Buchanan County*, 587 N.W.2d 774, 777 (Iowa 1998); *Wieslander v. Iowa Dep't of Transp*., 596 N.W.2d 516, 522 (Iowa 1999) ("The repeal of a statute typically destroys the effectiveness of the statute, and the repealed statute is deemed never to have existed."). The repeal of this line in 6B.21 is a clear indication that our legislature no longer wanted evidence of the condemnation commission to taint the de novo proceedings in district court.

If you treat the language as to having never existed, one returns to the common law. Under Iowa common law, evidence relating to the compensation commission's award is inadmissible. *Gregory v. Kirkman Consolidated Independent School Dist*., 187 N.W. 553, 554 (1922). Given the Trial Court noted the exact amounts awarded by the condemnation commissioners, awarded the same amount as the commissioners, and even confirmed it was upholding those amounts in stating "[t]he decision of the commission is proper in its damage determination", the Trial Court must be reversed as relying on inadmissible evidence, and a new trial granted.

## II. THE TRIAL COURT'S DETERMINATION THAT THERE WAS NO COMPENSABLE TAKING RESULTING FROM THE CHANGE IN ACCESS IS CONTRARY TO BOTH THE LAW AND THE UNDISPUTED EVIDENCE ON THE RECORD.

The Trial Court was charged with determining whether taking of direct access to Highway 60/151 and the replacement with the new connector/frontage road substantially impaired Plaintiff Jon Luckstead's access to his property. The Trial Court held on June 1, 2017, "there is no compensable taking as a result of the relocation of the access to the Plaintiff's property." *See App. p. 783, of the June 1, 2017, Order Granting Motion to Bifurcate*. In support of its ruling, the Trial Court stated:

> The SW Arterial project does not take away all access to the Tamarack Business Park. There will be an access off the highway, as indicated, through a circuitous loop type of traverse from the highway that is very close in proximity to the prior access road. "[W]hile access may not be entirely cut off, an owner is not entitled, as against the public, to access to his land at all points between it and the highway. If he has free and convenient access to his property and the improvements on it and his means of ingress and egress are not substantially interfered with by the public he has no cause for complaint." *Id*. at 759 (citations omitted). Based on this analysis Mr. Luckstead has no compensable issue.
>
> Additionally, the commissioner (DOT here) "has the undoubted right, in the interest of public safety, to regulate the means of access to abutting property provided its regulations are reasonable and strike a balance between the public and private interest. And an abutting owner may make only such use of his right of access as reasonable regulations permit." *Id.* The arterial will present more traffic flow at highway speeds of at least 45, if not 55 miles per hour. Public

> safety having been considered in the design, the new access is not unreasonable. See generally *Warren v. Iowa State Highway Commission*, 93 N.W.2d 60 (Iowa 1958).

*Id*.

The above is the entire analysis the Trial Court devoted to the access issue in its June 1st order. The second paragraph offers no relevant analysis since at trial the public purpose of the access disclosure was not at issue (only the impact on Luckstead's property was at issue). Therefore, the sole basis for determining that the access evidence was inadmissible was that not all access had been taken and there remained a circuitous access to the Luckstead Property.

In its judgment order dated May 5, 2018, the Trial Court further stated:

> The Court has previously ruled that there is no compensable taking as a result of the relocation of the direct access to the Plaintiff's property. The ruling was based on the fact there is a planned egress and ingress pursuant to the current highway plans and the fact that the DOT had previously reserved the right to revoke the primary access at any time pursuant to an agreement entered into in 1969. The Court relied on the following: "[W]hile access may not be entirely cut off, an owner is not entitled, as against the public, to access to his land at all points between it and the highway. If he has free and convenient access to his property and the improvements on it and his means of ingress and egress are not substantially interfered with by the public he has no cause for complaint." *Iowa State Highway Commission v. Smith*, 248 Iowa 869, 82 N.W.2d 755, 759 Iowa 1957) (citations omitted).

*See App. pp. 785-6, Judgment*. The Trial Court goes on to state:

> This direct access loss has to be analyzed in light of the goals of safety and proper movement of traffic. The Iowa Primary Highway Access Management Policy cites goals to provide a safe environment for the highway user, increase free and efficient movement of through traffic

> and reduce highway accidents by minimizing the number of conflict points or entrances located on a highway. §726 – 112.11(1). No permanent at-grade access is permitted if this policy it to be adhered to in light of the traffic that will be accessing Highway 61/151 from the SW Arterial. The Plaintiff had a great deal of input into the final design of the access to accommodate his vision for the area. His adaptations permitted a larger area to be available on the highway side of the property for development; permitted development on both sides of the new frontage road, avoided impacting the "monument" sign and avoided impacting the advertising billboards on the property.

*Id., at App. p. 787.*

The analysis in the first paragraph quoted above from the Judgment refers to the same remaining circuitous reasoning as in the June 1st Order. The second paragraph from the above quoted language again discusses irrelevant public purpose information as to why the DOT closed the access (again, this is irrelevant to the impact of the access to the Luckstead Property).

The same second paragraph then discusses how Luckstead participated in determining the location of the new access and then how Luckstead benefits from the new access placement. First of all, Luckstead did not approve of the new placement of the access as shown by the undisputed evidence below in Argument IV, A. Second, Luckstead disputes that he benefitted from the placement of the new access and the Record agrees (see Argument IV, A). And finally, whether or not Luckstead benefitted from the new access placement is irrelevant given under Iowa Constitution and caselaw the factfinder in a condemnation action "shall not take into consideration any advantages that may result to [the] owner on account of

the improvement for which it is taken." Iowa Const. art. I, § 18; *Danamere Farms, Inc. v. Iowa Dep't of Transp.*, 567 N.W.2d 231, 233–34 (Iowa 1997); *In Britton v. Des Moines,* O. & S.R. Co., 13 N.W. 710 (1882).

So, in determining whether taking of direct access to Highway 60/151 and the replacement with the new connector/frontage road substantially impaired Luckstead's access to his property, really only relied on finding that the Luckstead Property had access, albeit circuitous, after the Project.

Luckstead maintains that this is not enough to deny Luckstead's constitutional right to just compensation.

The law on this issue is clear to a point. The Iowa Supreme Court has held "if there is a substantial or material impairment or interference with the right of access the abutting owner or owners are entitled to just compensation therefor" *Simkins v. City of Davenport*, 232 N.W.2d 561, 566 (1975). But then the factfinder is left with the question, "what is substantial or material impairment or interference with the right of access?" Or, as phrased by the DOT, "what is reasonable access?"

It is Luckstead's position that the answer is the same for both questions:

- If the change in access changes the highest and best use of the impacted property, then there has been a substantial or material impairment or interference with the right of access; or,
- If the change in access changes the highest and best use of the impacted

property, then the remaining access is not reasonable.

There are numerous cases that support Luckstead's "change in use" standard.

In *Columbus Holding Corp. v. State*, 302 N.Y.S.2d 407 (Ct. Cl. 1969), the court found as fact that the taking destroyed suitability of access and thus destroyed highest and best use requiring compensation. The *Columbus* court stated that circuity of access and/or impairment of access without resulting change in highest and best use does not create compensable consequential damage, but circuity of access and/or impairment of access which causes change in highest and best use may create compensable consequential damage. In so holding, the court restated the standard, "[i]n our opinion, the cases clearly hold that **suitability of access is directly related to the highest and best use of claimants' property and that, when the highest and best use is changed as a result of the remaining access, any resulting consequential damages is a compensable damage**" *Columbus Holding Corp.*, 302 N.Y.S.2d 407, 411 *citing*, *Priestly v. State of New York*, 242 N.E.2d 827, 295 N.Y.S.2d 659 (1968); *Argersinger v. State of New York*, 32 A.D.2d 708, 299 N.Y.S.2d 882 (3rd Dept., 1969); *Taylor v. State of New York*, 32 A.D.2d 884, 302 N.Y.S.2d 174 (4th Dept., 1969); *King v. State of New York*, 29 A.D.2d 604, 285 N.Y.S.2d 741 (3rd Dept., 1967); *Laken Realty Co. v. State of New York*, 29 A.D.2d 1027, 1028, 289 N.Y.S.2d 570 (3rd Dept., 1968) ; *Red Apple Rest v. State of New York*, 46 Misc 2d 623, 629, affd. 27 A.D.2d 417, 280 N.Y.S.2d 229 (3rd Dept.,

1968).

Citing many of the above cases in *State ex rel. Dep't of Highways v. Linnecke*, 468 P.2d 8 (Nevada, 1970), the Nevada Supreme Court agreed that such changes to the property's highest and best use caused by a loss of access are compensable: "In this case, the trial court decided that there was substantial impairment due to the taking away of the direct access to the Linnecke's property". *Linnecke*, 468 P.2d at 11. The Nevada Supreme Court agreed that substantial impairment existed where property owners "had direct access from their land onto Highway 40, but after the taking their access from the land was by a frontage road which required them to travel one and one half miles farther in order to reach their land from the highway or to get to the highway from their land". *Linnecke*, 468 P.2d at 9.

In *Slepian v State*, 312 N.Y.S.2d 338 (1970), a new trial was directed at which the trial court was instructed to determine whether the access to the remaining portion of the claimant's property was suitable for its highest and best use before the appropriation (which the parties disputed), and if not, to include in its award an amount sufficient to compensate the claimant for such consequential damage. The Slepian court found that **"[w]here change of access leaves property with access unsuitable for its highest and best use, the resulting loss is compensable**." *Slepian*, 312 N.Y.S.2d at 339-40.

In *Hurley v State*, 143 N.W.2d 722 (South Dakota, 1966) the owner's

unoccupied property was situated on the corner of two streets in a commercial zone with free, open, and unobstructed access to both streets. The property's "highest, best and most profitable use" was for an automobile service station given the unobstructed access to two streets. However, the state erected the steel barrier closing all access to the property from one street in addition to some of the access on the other street. *Hurley*, 143 N.W.2d at 726. With the loss of access eliminating the automobile service station highest and best use, the court held that the referee had correctly concluded that the owner's right of access had been materially impaired and that the owner had suffered a compensable loss. *Id*.

In *State ex rel. Morrison v. Thelberg*, 350 P.2d 988 (Arizona, 1960), the landowners' property abutted a conventional highway that the state converted to a controlled-access highway with a slightly raised frontage road. Before the conversion, the landowners had "direct and unlimited access" to the conventional highway from their abutting property. After the taking, the landowners retained access, but only to the frontage road rather than the main highway. *Thelberg*, 350 P.2d at 989–90 The court held that "the damages awarded the abutting landowner for destruction or impairment of access therefore is based, not upon the value of the right of access to the highway, but rather upon the difference in the value of the remaining property before and after the access thereto has been destroyed or impaired. **This in turn is based upon the highest and best use to which the land**

**involved is best suited before and after the right of access is molested**." *Thelberg*, 350 P.2d at 992.

In *Department of Transportation v. Guyette*, 520 A.2d 548 (Pa.Cmwlth.1987) where the access taking required eighteen-wheel trucks to travel more than an additional seven miles in order to enter a commercial property, the court held:

> **An access is not a reasonable one if it is unsuited for its present use and for the highest and best use of its property**. Access is unreasonable where entrance and deliveries cannot be made, except under difficult conditions and at considerable expense. There is a direct relationship between suitable access and highest and best use.

*Guyette*, 520 A.2d at 550.

All of the above cases analyze the "reasonableness" or "substantial impairment" of the access in the same manner, if the change in access impacts the highest and best use of the property after the taking, then the remaining access is not reasonable and there has been a substantial impairment to the access. That is not what the Trial Court did in this case. The Trial Court only analyzed that there was an alternative circuitous access, but no analyses on the impact to the property let alone the highest and best use of the property.

In the present case, it is undisputed that the DOT condemned the access to the Tamarack Business Park and notified all the tenants and property owners, including Luckstead, that they were taking the direct, convenient access to Highway 61/161. *See App. p. 650, Trial Ex 1, Reach Report addendum* listing the

taking as "[t]he access point located at Sta 495+10 on the west side of Primary Road No. U.S. 61…".

As for the highest and best uses of Luckstead Property, they include:

> • Property 1 is a commercial / industrial development land parcel along U.S. Highway 151/61 with direct access to the highway. This site could have been developed by itself or subdivided into several smaller parcels. The service road taking is bisecting this property.
> • Property 2 is one tax identification number but is four distinct parcels that have not been replatted due to project influence (platting moratorium since 2009). Property 2A and 2B are finished commercial / industrial lots. Property 2C is a semi-finished commercial /industrial lot that needs the road to be extended a short distance and re-grade the site. Property 2D is the development land adjacent to Property 1.
> • Property 3 and 4 are finished commercial / industrial lots.
> • Property 5, 6, & 7 are improved properties located near the entrance to the business park. Properties 5 and 6 have retail oriented uses. Property 7 is an office warehouse at the rear of the business park that enjoys very good visibility to the highway due to the terraced elevations.

*See App. pp. 309-11, Tr. Ex. 1.*

As to the loss of access changing the highest and best use of the Luckstead Property, Reach's testimony was consistent with his appraisal which states:

> After the taking, the highest and best use is limited to continued industrial use and development with agriculture use in the outlying areas. The removal of the highway access fundamentally alters the market in which the subject operates. The subject no longer has direct access to the highway. Such highway access commands a premium and is a strong feature of retail, commercial, auto, heavy truck maintenance uses. The loss of direct access to the highway impacts the utility and value of the subject.

*See Tr. Ex. 1, at App. p. 295; App. p. 396 (Property 1); App. p. 437 (Property 2);App.*

*pp. 468-9 (Property 3);App. pp. 496-7 (Property 4); App. pp. 535-6 (Property 5); App. pp. 578-9 (Property 6); and, App. pp. 618-19 (Property 7); see also Transcript Vol. I, App. pp. 907-8.*

As explained by Reach at trial, in the after condition, the retail, commercial, auto related uses, and heavy truck or equipment maintenance are lost with the change in access. *Id*. In fact, this is already happening at the Tamarack Business Park even though the DOT has yet to physically remove the access. According to Reach, a retail store, USA Furniture, closed its doors as a direct result of the loss of access. *Transcript Vol. I, App. pp. 904-5*. Their liquidating sales advertising even states, "Why the sale? As published, the City and DOT have condemned and are closing our direct highway access to our store. This uncompensated action spells disaster!" *See App. p. 691, Tr. Ex. 1, Addendum*. Frankly, it would be hard to find more direct evidence of the change in use and substantial impairment than this retail business going out of business as a direct result of the loss of the direct highway access.

At trial, the DOT did not refute Reach's testimony that retail uses, like USA Furniture, are leaving the business park because of the taking of the access.

In addition to USA Furniture, there is the evidence of Martin Equipment, the retail tenant in Property 6 (Tab 9 in the Reach report) that it is "essential" for their

business to have some direct access to Highway 61/151. *See App. p. 692, Tr. Ex. 1, Addendum.*

The DOT cannot and did not at trial refute Reach's testimony that retail uses, like Martin Equipment, require ("essential") direct Highway access and will be detrimentally impacted because of the taking of the access.

In addition, there is Reach's testimony and evidence concerning his Highway Access Market Analysis. *See App. 754-779, Tr. Ex. 1.* His first study analyzed properties impacted by the Belle Plaine, MN Interchange Project. *See App. p. 755-762, Tr. Ex. 1.* The resale of properties that lost direct or convenient access indicate a loss in value that ranges from 10-percent to 40-percent in addition to properties changing their use. Loss of convenient access for retail and commercial properties were in the middle of the range at 20-percent to 28-percent loss in value. The vacant commercial site that lost convenient access is now listed at 40-percent less than the previous sale. *See App. p. 762, Tr. Ex. 1.* As for Maquoketa, Iowa, Reach analyzed 15 properties' county assessment records and found that the properties that lost either direct or convenient access to the highway have not increased in assessed market value at the same rate as properties with convenient highway access. *See App. pp. 763-771, Tr. Ex. 1.* Reach found that the difference in assessed market growth is 100-percent or greater. *See App. p. 771, Tr. Ex. 1.* Reach did two additional studies that also supported his conclusions that

changes in use occur because of the taking of direct, convenient highway access. *See App. pp. 772-779, Tr. Ex. 1; see also App. pp. 915-20, Transcript Vol. I.*

The DOT cannot and did not at trial refute Reach's testimony and Highway Access Market Analysis evidence (*Tr. Ex. 1, App. pp. 754-779*) that retail and commercial uses will continue to leave so because of the access taking resulting in lower property values or stagnant property values. *Tr. Ex. 1, App. p.779.*

What did the DOT offer?

City Engineer and project manager Bob Schiesl described the roundabout way northbound and southbound traffic from Highway 61/151 reaches to and from Tamarack Business Park. Schiesl offered no testimony as to the impact on the Luckstead Property or its highest and best use (he is not an appraiser, so he could not).

The only other evidence is the conclusory statements in the appraisals that the highest and best use of the property did not change after the taking. No analysis, no explanation, just the conclusory statements. *See Parcel 187 (Court File Nos. 01311 CVCV 103381) Trial Ex. A, at App. p. 217; Parcel 184 (Court File Nos. 01311 CVCV 103387) Trial Ex. A, at App. p. 64* ("The highest and best use of the property will not change after the proposed acquisition" which is also found on App. pp. 70-83 even though admittedly no appraisal work was ever done on these parcels by the appraiser and Luckstead objected to its admissibility in his motion in

limine and at trial); *Parcel 184 (Court File Nos. 01311 CVCV 103387) Trial Ex. A Supplement* has the exact same statements at App. p. 140 and App. pp.146-159 (which again are inadmissible and Luckstead objected to its admissibility in his motion in limine and at trial). They are not only void of any analysis or explanation of the highest and best use after the taking, but neither appraisal review report offer an opinion as to the highest and best use after the taking. The DOT offered no testimony at trial to support these conclusory out of court statements in the reports.

Moreover, Reach's testimony and report as to the loss of highway access impacting the change in use went unchallenged, as did the USA Furniture evidence, Martin Equipment evidence, and the Reach studies in Belle Plaine and Maquoketa concerning highest and best use impacts by similar access changes. Given the law holds that if the change in access impacts the highest and best use of the property after the taking, then the remaining access is not reasonable and there has been a substantial impairment to the access. Other than a few conclusory statements in the DOT's reports, the undisputed evidence proved that the loss of highway access changed the highest and best use of the Luckstead Property by eliminating commercial and retail uses. Given this, the Trial Court's ruling that the loss of access was not compensable and inadmissible must be reversed and a new trial granted.

## III. THE UNECONOMIC REMNANT DISCUSSED AT TRIAL IS NOT THE SAME ONE REFERENCED IN IOWA STAT. 6B.54.8.

As far as the uneconomic remnant issue referenced in the Trial Court's judgment, this is a red herring but still needs to be corrected if the case is remanded. Luckstead's appraiser Reach identified a .5 acre "hook" *(Tr. Ex.1, App. 433-4)* as an "uneconomic remnant" in his appraisal. Under 6B.54.8, 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, where the acquiring agency determines that the parcel has little or no value or utility to the owner." The Trial Court excluded the evidence at trial.

However, Reach was not referring to a 6B.54.8 uneconomic remnant. This is not what Reach claims in his report with regards to the "hook" parcel, nor what Luckstead claimed in this case. Reach states that the .5 acre parcel does have value and "may be used for ponding, landscaping or monument sign". He just calls it an uneconomic remnant because it cannot be developed on its own, but he valued it as part of the larger 6.78 acre parcel and attributed only a negative 5% adjustment for the hook. *Transcript Vol. I, App. p. 876, l.10-25, App. p. 877, l. 1-2; App. p. 905, l. 7-12.* Even though Reach explained this in his testimony, the Court ruled that under 6B.54.8 "he cannot make any analysis as to the uneconomic remnant a[s] it

was not part of this damage determination". The ruling was against the undisputed evidence at trial.

## IV. THE TRIAL COURT IMPROPERLY RELIED ON FACTS THAT WERE NOT SUPPORTED BY THE UNDISPUTED EVIDENCE AT TRIAL.

### a. The criticism of Reach's use of more than two parcels in his valuation analysis.

The Trial Court held that, "Plaintiff's expert separated out the parcels into different and distinct pieces of property, which they are not. The parcels are identified on the assessor's roll as two parcels." Judgment at p. 4. This ruling is strange given both experts valued the Property as more than two tax parcels. In fact, for the DOT's appraiser Lock's Parcel 184 (Court File No. 01311 CVCV 103387 Exhibit A), he used exactly the parcels as Reach's Property 2:

- Reach's Lot 2A 3.61 acres is Lock's pink property;
- Reach's Lot 2B 3.16 acres is Lock's orange property;
- Reach's Lot 2C 2.91 acres is Lock's yellow property; and,
- Reach's 2D 17.23 acres is Lock's blue property.

*Compare App. p. 402, 409 and 410 from Trial Exhibit 1 to App. p. 54 and App. p. 130, from Trial Exhibits A Part 1 and Part 2 for Parcel 184*. In fact, Lock has 22 parcels in those same reports. *See App. pp. 70-83, and App. pp.146-159 from Trial Exhibits A Part 1 and Part 2 for Parcel 184*. Given this, a finding questioning

Reach's credibility because his valuation was not limited to valuing the property as just two tax parcels is completely contrary to the undisputed Record.

b. **The finding that Luckstead approved and benefited from the new access.**

The Trial Court held that:

> The Plaintiff had a great deal of input into the final design of the access to accommodate his vision for the area. His adaptations permitted a larger area to be available on the highway side of the property for development; permitted development on both sides of the new frontage road, avoided impacting the "monument" sign and avoided impacting the advertising billboards on the property.

*See App. p. 787, Judgment*. Unfortunately, the Court ignores undisputed evidence on the record in making such a finding.

First of all, whether or not Luckstead benefitted from the new access placement is irrelevant given under Iowa Constitution and caselaw the factfinder in a condemnation action "shall not take into consideration any advantages that may result to [the] owner on account of the improvement for which it is taken." Iowa Const. art. I, § 18; *Danamere Farms, Inc. v. Iowa Dep't of Transp*., 567 N.W.2d 231, 233–34 (Iowa 1997); *In Britton v. Des Moines*, O. & S.R. Co., 13 N.W. 710 (1882). In addition, Luckstead disputes that he benefitted from the placement of the new access. In fact, in his own words the placement of the new access road just "wasted property". *See App. p. 939, Transcript, Vol. I, at l. 5-20*; *see also App. 780, Ex. 9 Luckstead letter to City Engineer Schiesl dated October 29, 2013*

("Alternate A is unreasonable, wasteful, and too costly for both your interest and mine").

Moreover, Luckstead did not approve of the new placement of the access as shown by the undisputed evidence below. Luckstead was only willing to have the access placed in such a location **if** there was still direct access to the highway on a right in right out basis. The testimony and evidence at trial was undisputed that the right in right out access was the only factor he was interested in if there was a new alignment. *See App. p. 938, Transcript, Vol. I, at l. 18-25, App. pp.939-941; App. p. 780, Tr. Ex. 9 Luckstead letter to City Engineer Schiesl dated October 29, 2013* ("I met with you on 2-15-2012 and at that time presented my objection to the alternate layout **unless my present highway entrance could be allowed right in-right out waiver**.")(emphasis added); and *App. p. 781, Tr. Ex. 11 Luckstead letter to City Engineer Schiesl dated December 2, 2013* ("We met almost a year ago on Dec. 15, 2012. At that time, I expressed my preference for the original connector layout along the highway R.O.W. unless my entrance could be preserved by using the alternate route. The Tamarak sign 'saved' by the alternate is worthless if at least a right-in can't be retained off of Highway 61."). The Trial Court's finding ignores the undisputed record which renders this finding as misleading and contrary to the evidence.

## CONCLUSION

Given the Trial Court referenced the exact amounts awarded by the condemnation commissioners, awarded the same amount as the commissioners, and even confirmed it was upholding those amounts in stating "[t]he decision of the commission is proper in its damage determination", the Trial Court must be reversed as relying on inadmissible condemnation commissioner evidence, and a new trial granted.

In addition, it was a reversible error to hold that the trial should be bifurcated and that evidence of loss access was not admissible. The DOT never met its burden under Rule 1.914. Moreover, evidence of loss of access is admissible if the change in access changes the highest and best use. These rulings are reversible error warrant a new trial.

Finally, the Trial Court's findings on uneconomic remnant, Reach's use of parcels, and Luckstead's approval and benefit from the new access either ignore the law completely disregard the undisputed record or both; and therforefore should be reversed on remand.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause or to their attorneys of record whose names and addresses appear below this Certificate on the 20th day of November, 2018, by:

_____US Mail _____Facsimile
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## REQUEST FOR ORAL ARGUMENT

Appellant request to be heard by way of oral argument.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Iowa Rules of Appellant Procedure 6.903(1)(g)(1), Appellant hereby certifies that this brief contains 8,021 words of a 14-point proportionally spaced Times New Roman font and it complies with the 14,000 word maximum permitted length of the brief.

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## CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file Plaintiff-Appellant's Final Brief with the Clerk of the Supreme Court by using the EDMS filing system.

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I, the undersigned, hereby certify that I did serve the attached Plaintiff-Appellant's Brief on counsel for all other parties electronically utilizing the EDMS filing system, which will provide notice to:

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