

WORKSHEET & SAMPLE DOCUMENTS FOR ESTABLISH- ING, ALTERING, OR VACATING ROADS

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WORKSHEET FOR ESTABLISHING, ALTERING, OR VACATING ROADS

The following provides an overview of the procedure contained in Minn. Stat. § 164.07 to establish, alter, or vacate a town road. Carefully follow the statutory requirements and always seek appropriate legal assistance when using this procedure.

This process and attached forms assumes the process was initiated by petition. If the board is working through this procedure based upon an authorizing vote of the town electors, various wording changes would be needed.

(1) _____ The process may be initiated by *either* of the following methods:

(1) Upon elector authorization received at an annual or special town meeting; (Minn. Stat. § 164.06, subd. 1) (See Attachment 1)

or

(2) Upon a petition signed by at least eight voters of the town who own land within three miles of the road. (Minn. Stat. § 164.07, subd. 1) (See Attachment 1a)

- The petition may have less than eight signatures if there are not eight resident owners within the three-mile area. If the board accepts a petition with less than eight signers as complete, the board should set out in the minutes of the meeting it determined there are less than eight residents living within three miles of the road.
- The petition must include a description of the road and the portion to be altered or vacated. A petition to establish a road must include the names of the owners of land over which the road passes and the road's point of beginning, the general course, and termination.
- The petition to establish or alter a road must also contain a statement of the purpose and necessity for establishing or altering a road.
- Regardless of which method is used to initiate the process, the procedure in Minn. Stat. § 164.07, subd. 2-12 is used to establish, alter, or vacate the road.
- Although an alternative procedure to vacate a road is available to urban towns under Minn. Stat. § 368.01, subd. 25, it is recommended the Minn. Stat. § 164.07 procedure be used.

(2) _____ The petition must be filed with the town clerk who must present it to the town board.

(3) _____ Within 30 days of being presented with the petition, the board must make an order setting a date, time, and place for a road hearing. The order must describe, as nearly as practicable, the road proposed to be established, altered, or vacated, and the several tracts of land through which it passes. Minn. Stat. § 164.07, subd. 1.

- The order must also contain a notice indicating the affected landowners are entitled to judicial review of damages, need, and purpose as provided by law if the board establishes or alters the road. (See Attachment 2)
- If the procedure was initiated by a vote of the electors rather than by a petition, be sure the order contains a statement of public purpose and necessity required of a petition.

(4) _____ The *petitioners* must *personally serve* the order and a copy of the petition upon each owner and occupant of the land affected at least ten days before the hearing, and for providing ten days *posted notice* of the hearing. Minn. Stat. § 164.07, subd. 2.

- The town board should provide at least ten days' *published notice* of the hearing. (See Attachment 3)
- Inform the petitioners they are responsible for completing the affidavit of service, which will serve as proof the appropriate owners were served notice. An affidavit of posted notice is also required.
- If the process was initiated by the board with elector authorization, the board is responsible for providing all the notices required in the process since there are no petitioners.

(5) _____ If the road to be vacated terminates at, abuts upon, or is adjacent to any public water, the *petitioners* must also serve notice of the order by certified mail upon the commissioner of natural resources at least **60 days** before the hearing.

- Keep this in mind when selecting a hearing date.
- A copy of the notice should also be sent to the regional DNR office.

(6) _____ If the road to be vacated terminates at, abuts upon, or is adjacent to any public water, at least 15 days before the hearing the town board or its designee "must consult with the commissioner of natural resources to review the proposed vacation." Minn. Stat. § 164.07, subd. 2(c). The commissioner must evaluate the proposed vacation and advise the town board or its designee of its evaluation.

- It is not clear what consultation the town board will need to have with the DNR to satisfy this requirement, but it is required, so the board must designate someone to contact the commissioner's office at least 15 days before the hearing and keep notes about the conversation as support for satisfying its consultation requirement.

(7) _____ At the hearing, petitioners must present affidavits of personal service and posting. This proof is important to establish the board's jurisdiction to continue with the process.

(8) _____ At the hearing, the board must examine the road, hear all interested parties, and decide whether to grant or refuse the petition. Minn. Stat. § 164.07, subd. 3. (See Attachment 4)

- Occasionally, the board will hold the entire hearing at the road site. Others will start the hearing at the road, conduct the examination, recess the hearing to a specific time back at the town hall, and then reconvene hearing at the specified time. The board must decide how it will accomplish the road examination in each case.
- If the petition calls for vacation of a road that is the only means of access to property or properties containing five or more acres, ***the road may not be vacated*** without the consent of the property owner(s), unless the town provides the owner(s) with other means of access. Minn. Stat. § 160.09, subd. 3. Owner permission should be in writing and the signature notarized by at least the town clerk. Before landlocking anyone, be sure they consult with an attorney about creating a private easement so their property has some legal access. The easements should be put in place and recorded in conjunction with the vacation order; however, the owners seeking the vacation are entirely responsible for the work and cost association with establishing the private easements.
- A town may not condemn land to construct or designate a minimum-maintenance road without the owner's consent unless it is necessary for drainage or public safety. (Minn. Stat. § 160.095, subd. 3)

(9) _____ If the petition is approved, the board must develop a road order that must be recorded with the county. (See Attachment 5)

- It is recommended the town bring a draft of the road order into the county recorder's office for an indication of whether it is in the proper form (e.g., correct margins, etc.).

(10) _____ If the petition is denied, note the fact on the back of the petition (i.e., "petition denied").

(11) _____ If vacating a road, the board must determine whether the ditches lateral to the road should continue to be maintained for the general health and welfare of the public. Minn. Stat. § 164.07, subd. 3a.

- If so, the town may insert a provision in the road order retaining a right of access for that purpose. (*See also* Minn. Stat. §§ 160.09 & 160.29) The adjacent owners are prohibited from interfering with the functioning of the drainage facilities.

(12) _____ If vacating a road in which there are utilities, the board has adopted an ordinance to regulate utilities placing facilities in its rights of way, and the vacation does not require the relocation of the facilities, then the board must reserve to and for itself and all right-of-way utilities having facilities in the vacated right of way the right to install, maintain, and operate facilities in the vacated right of way and the right

to enter the right of way to reconstruct, inspect, maintain, or repair facilities. The exception is if reserving these rights would not be “in the public interest.” Minn. R. 7819.3200, subp. 1.

- If the relocation necessitates moving the facilities, there are factors to be considered in determining who must pay for the relocation. Minn. R. 7819.3200, subp. 2.
- If the board has not adopted an ordinance regulating utilities in the right of way, then this requirement does not apply. However, it is recommended boards give notice of the hearing to any know utility with facilities in the road proposed for vacation so they can raise any concerns they may have.

(13) _____ If the petition is granted, and the board deems it necessary, it may require a survey to be made of the road. Minn. Stat. § 164.07, subd. 4. A survey is recommended and is vital to the development of the establishment resolution and road order.

(14) _____ The board must determine the amount of damages sustained by the establishment, alteration, or vacation. Damages may be determined by agreement between the board and the owner (See Attachment 6), or waived by the owner in writing, (See Attachment 7). If an agreement is not reached or a waiver obtained, the board must determine the amount of damages, if any, which must be awarded to each of the affected owners. Minn. Stat. § 164.07, subd. 5.

- Many factors have been considered when determining the amount of damages, but the general rule says the measure of damages for a partial taking “is the difference between the fair market value of the entire piece of property immediately before the taking and the fair market value of the remainder of the property after the taking.” *State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992) (citations omitted).
- The board must also determine the monetary value of the benefits, if any, conferred by the board’s action and subtract that amount from the damages. Determining benefits is most significant when vacating a road because the property will revert to the adjacent owners (i.e., the property will be cleared of the public easement). For information on reducing damage awards by benefits for condemnation refer to Attachment 9.
- If the board sets damages by agreement with an owner, or an owner releases his or her claim to damages in writing, the agreement or release must be filed with the town clerk and are final.

(15) _____ The award of damages must be filed with the town clerk who, ***within seven days***, must notify each of the affected owners and occupants of the award in writing. Minn. Stat. § 164.07, subd. 6.

- The notification must set out the date of the award, the amount, and any terms or conditions of the award. It must also include a clear and coherent explanation, using common language, of the requirements for appealing the award of damages. (See Attachment 8)

(16) _____ Once the award of damages has been filed, the board may proceed to open, construct, alter, or change the highway. Minn. Stat. § 164.07, subd. 10. However, the alteration or establishment of a road must be suspended if a notice of appeal challenging the public purpose or necessity of the action is filed within ten days. While the statute does not mandate construction be stopped if the appeal happens after ten days, affected owners have 40 days to file an appeal. It is best to wait until after the 40 days appeal time frame before starting construction if possible.

- If the board is changing the location of a road, the old road must remain open until the new road is opened for travel. The old road or any portion thereof does not revert to the abutting owners until vacated by the board. Minn. Stat. § 160.09, subd. 1.
- If the only access to a property will be cut off by moving the road, the old road must remain open and maintained by the town until other acceptable access is provided. Minn. Stat. § 160.09, subd. 2.

(17) _____ The owner or occupant may appeal the award of damages within 40 days of when the board filed the award of damages with the clerk. The appeal is initiated by filing a notice of appeal with the court administrator in the district court of the county where the land is located. Minn. Stat. § 164.07, subd. 7.

- The notice must include a bond of at least \$250, with sufficient surety, approved by the judge or the county auditor, conditioned to pay all costs arising from the appeal in case the award is sustained.
- Process and papers regarding the appeal must be served on the town board chair or the town clerk. Minn. Stat. § 365.40, subd. 2.
- The notice must specify the award appealed from, the land it relates to, the nature and amount of the claim, and the grounds of the appeal.
- The trial is carried out under certain procedures. Minn. Stat. § 164.07, subd. 8.
- If no appeal is entered within the 40 days, the assessed damages are considered the same as a judgment and are final. Minn. Stat. § 164.07, subd. 9.
- An appeal does not delay or prohibit the town from making improvements on the road unless it was filed within ten days and challenges the public purpose or necessity of a road alteration or establishment. Minn. Stat. § 164.07, subd. 10.

(18) _____ A certified copy of the final town road order must be presented to the county auditor, who must enter it in the transfer records and note on it, over the auditor's official signature, the words "entered in the transfer record." Minn. Stat. § 164.07, subd. 11.

(19) _____ A certified copy of the order must also be recorded with the county recorder.

- (20) _____ The board's decision to deny a petition is final, unless appealed from, for one year (i.e., a similar petition may not be brought for one year). If appealed, a similar petition may not be brought within one of the court's decision. Minn. Stat. § 164.07, subd. 12.

_____ Township
_____ County, Minnesota

RESOLUTION AUTHORIZING THE TOWN BOARD TO INITIATE THE [ESTABLISHMENT / ALTERATION / VACATION] OF A TOWN ROAD

WHEREAS, the issue of [establishing / vacating / altering] the following described [proposed] road was raised and discussed at the annual town meeting or special town meeting of the electors of _____ Township, _____ County, Minnesota on _____, 20__;

General Description of the [Proposed] Town Road:

WHEREAS, Minn. Stat. § 164.06, subd. 1 allows a town board to initiate the town road establishment, vacation, or alteration procedure contained in Minn. Stat. § 164.07 upon receiving authorization of the town electors;

WHEREAS, the town electors determined it is in the best interests of the town to authorize the town board initiate the road procedure in Minn. Stat. § 164.07 without having to obtain the petition described in Minn. Stat. § 164.07, subd. 1;

NOW, THEREFORE, BE IT RESOLVED, the electors of _____ Township, _____ County, Minnesota hereby authorize the town board to initiate the road [establishment / vacation / alteration] procedure in Minn. Stat. § 164.07 regarding the above referenced [proposed] road.

Adopted this _____ day of _____ 20__.

Town Meeting Moderator

Attest: _____

Town Clerk

**TOWN ROAD [ESTABLISHMENT / ALTERATION / VACATION] PETI-
TION**

To the Town Board of _____ Township, _____
County, Minnesota:

The undersigned legal voters of the Town who own real estate or occupy real estate under the homestead or preemption laws or under contract with the state within three miles of the road described below hereby petition you to [establish, alter, or vacate] the following described road:

[describe the road]

[a petition to establish a road must at least include the road's point of beginning, its general course, and its termination]

[a petition to alter or vacate a portion of a road must include a specific description of the portion to be altered or vacated]

[a petition to establish or alter a road must contain the following statements of purpose and necessity:

The purpose and necessity of the requested road establishment or alteration are:

The description of the several tracts of land over which the road passes and their owners are as follows:

Owners	Description of Land
_____	_____
_____	_____

[add lines as needed]

We ask you proceed with such [establishment, alteration, or vacation] pursuant to Minn. Stat. § 164.07.

Dated this ____ day of _____, 20__.

Petitioners	Address/Land Owned
_____	_____
_____	_____

[add lines as needed]

(**Note:** Only legal voters of the Town who own real estate or who occupy real estate under the homestead or preemption laws or under contract with the state within three miles of the road may sign the petition. At least eight signatures are required. If a husband and wife are both on the title to their property, and are voters of the town, then each can sign separately.)

ORDER SETTING FORTH INITIAL DESCRIPTIONS AND SETTING HEARING DATE

WHEREAS, the town board of _____ Township, _____ County, Minnesota was presented a petition at its meeting on the _____ day of _____, 20__ requesting the [establishment, alteration, or vacation] of a road;

WHEREAS, the petition contained a description of the road, [a description of the portion to be altered or vacated], the names of the owners over which the [proposed] road passes, [and the point of beginning, general course, and termination of the proposed road];

WHEREAS, Minn. Stat. § 164.07, subd. 2 requires the town board to make an order describing as nearly as practicable the road to be [established, altered, or vacated], describing the several tracts of land through which the road passes, and fixing a time and place when and where the town board will meet and act upon the petition;

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The road proposed to be [established, altered, or vacated] is described as: [describe the road]

A more specific description may be developed if the petition is granted.

2. The several tracts of land through which the road passes and their owners are:

Owners	Description of Land
_____	_____
_____	_____

[add lines as needed]

3. The _____ Town Board will conduct a hearing at _____ p.m. on the _____ day of _____, 20__, at _____ to examine the road, receive public comment, consider the proposed action, and act on the petition.

NOTICE OF RIGHT TO APPEAL

Affected landowners have right of appeal as provided in Minn. Stat. § 164.07, subd. 7 to seek judicial review of damages, need, and purpose if the town board does decide to establish or alter a town road.

Dated: _____

BY THE TOWN BOARD

Town Clerk

Chair

Town Board

**NOTICE OF ROAD [ESTABLISHMENT, ALTERATION, OR VACATION]
HEARING**

_____ TOWNSHIP
_____ COUNTY

NOTICE IS HEREBY GIVEN, the town board of _____ Township,
_____ County, Minnesota will conduct a public hearing on the _____ day
of _____, 20__ at _____ p.m. at the _____ Town Hall located at
_____ for the purpose of considering and acting upon
a petition it received calling for the [establishment, alteration, or vacation] of the following de-
scribed road:

[describe the road]

All persons interested in this matter are encouraged to attend the hearing.

The tracts of land through which said road passes and the owners and occupants thereof, as nearly
as we can determine, are as follows:

Owners

Description of Land

[add lines as needed]

Dated: _____

(clerk's printed name)

_____ Township Clerk

RESOLUTION [ESTABLISHING / ALTERING / VACATING] A TOWN ROAD

WHEREAS, the Town Board of _____ Township, _____ County, Minnesota received a petition calling for the [establishment, alteration, vacation] of the following described road pursuant to Minn. Stat. § 164.07:

[describe the road]

WHEREAS, said petition was signed by not less than eight voters of the town who own real estate, or occupy real estate under the homestead or preemption laws or under contract with the state, within three miles of the road;

WHEREAS, the road passes over the following described tracts of land in _____ County, Minnesota, owned by the following named owners:

<u>Owners</u>	<u>Description of Land</u>
_____	_____
_____	_____

[add lines as needed]

WHEREAS, the town board conducted a public hearing on the petition on the ____ day of _____, 20____, after personal and posted notice provided by the petitioners pursuant to Minn. Stat. § 164.07, subd. 2, and published notice provided by the town board;

WHEREAS, the petitioners presented the town board with affidavits at the hearing as proof the required notice was given;

WHEREAS, the town board examined the road, heard the interested parties, and considered the matter;

WHEREAS, the town board determined the petitioned for action is consistent with the public interest;

[If vacating add: WHEREAS, the town board has examined the ditches lateral to the road and determined said ditches (are/ are not) essential for surface drainage of adjacent lands or highways in support of the general health and welfare of the public;]

WHEREAS, the Owners listed in Appendix A have released in writing all claims for damages from such [establishment, alteration, or vacation];

[create an Appendix A listing these owners' names and the date they signed the release.]

WHEREAS, the Owners listed in Appendix B have reached an agreement with the town board ascertaining their damages for the [establishment, alteration, or vacation] of the road;

[create an Appendix B listing these owners and the agreed upon amounts.]

WHEREAS, the town board has determined damages sustained and benefits conferred by said [establishment, alteration, or vacation] in the amounts and for the Owners listed in Appendix C, who did not release their claim for damages and did not ascertain the amount of damages by agreement with the town board;

[create an Appendix C that lists these owners and the amount of damages awarded to each]

NOW, THEREFORE, BE IT RESOLVED, the town board of _____ Township, _____ County, Minnesota hereby [establishes, alters, or vacates] a town road legally described as follows: *[provide legal description]*

[If vacating and board decided to preserve the ditches add: BE IT FURTHER RESOLVED, the town board does hereby preserve all rights and interests in the ditches lateral to the road as provided in Minn. Stat. § 164.07, subd. 3a and retains the rights to access the adjacent properties as needed to maintain said ditches;]

BE IT FURTHER RESOLVED, the town board chair and town clerk are hereby authorized and directed to execute and record a town road order [establishing, altering, or vacating] said town road and to record the same with the county recorder of _____ County;

BE IT FINALLY RESOLVED, the town clerk is authorized and directed to provide a copy of this resolution to each of the affected owners listed above.

Adopted this ____ day of _____, 20__ by the following vote:

<u>Town Supervisor</u>	<u>Yes / No</u>
_____	_____
_____	_____
_____	_____

Attest: _____

Town Board

TOWN CLERK

Board Chair

State of Minnesota)
) ss.
County of _____)

I, _____, clerk of _____ Township,
_____ County, Minnesota, hereby certify I have compared the foregoing copy of the res-
olution of the Town Board of said Township with the original record thereof on file with the town clerk,
as stated in the minutes of the proceedings of said Board at a public hearing held on the _____ day of
_____, 20____, and the same is a true and correct copy of said original record and of the
whole thereof, and said resolution was duly passed by said Board at said hearing.

Witness my hand and seal this _____ day of _____, 20____.

Signature

Printed Name

_____ Township Clerk

ORDER [ESTABLISHING / ALTERING / VACATING] A TOWN ROAD

_____ TOWNSHIP

_____ COUNTY

WHEREAS, the Town Board received a petition calling for the [establishment, alteration, or vacation] of a town road under Minn. Stat. § 164.07;

WHEREAS, the Town Board held a hearing on said petition on the ____ day of _____, 20____, notice thereof having been given;

WHEREAS, the Town Board passed a resolution on the ____ day of _____, 20____ [establishing, altering, or vacating] the road;

NOW, THEREFORE, IT IS HEREBY ORDERED the following described road is hereby [established, altered, or vacated]: *[describe the road]*

Dated this _____ day of _____, 20____.

BY THE TOWN BOARD

Attest: _____

Town Clerk

Town Board Chair

AGREEMENT OF DAMAGES AND WAIVER OF IRREGULARITIES AND APPEAL

THIS AGREEMENT, is made this ____ day of _____, 20__, between _____ Township, _____ County, Minnesota, hereinafter referred to as the Town, and _____ and _____, hereinafter referred to as Owners.

WHEREAS, the Owners own real property in _____ County, Minnesota, more particularly described as follows: *[describe the property]*

WHEREAS, the town has undertaken the procedure contained in M.S. § 164.07 to [establish, alter, or vacate] the following described road: *[describe the road]*

WHEREAS, said road passes through the owners' above described property;

WHEREAS, the owners will sustain damages by reason of [establishing, altering, or vacating] said road;

WHEREAS, the amount of damages sustained may be ascertained by agreement pursuant to Minn. Stat. § 164.07, subd. 5, taking into consideration and reducing the amount of damages by the money value of the benefits conferred;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Town and Owners hereby agree:

1. The amount of damages sustained by the Owners by reason of [establishing, altering, or vacating] the above described road shall be _____ (\$_____).
2. The Town shall pay Owners the amount of damages set out above, receipt of which is hereby acknowledged.

3. Owners expressly waive any claim the amount of damages set out herein are not adequate, waive objection to any irregularity about said [establishment, alteration, or vacation] procedure, and waive all rights to appeal in the courts.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date indicated above.

_____ Township

Owners

By: _____

Town Board Chair

signature

signature

Attest: _____

Town Clerk

RELEASE OF DAMAGES

WHEREAS, the town board of _____ Township, _____ County, Minnesota has undertaken the procedure set out in Minn. Stat. § 164.07 to [establish, alter, or vacate] the following described road:

[describe the road]

WHEREAS, said [establishment, alteration, or vacation] will benefit the property owners adjacent to the road by [improving access to the property, eliminating the encumbrance of an unneeded public road easement from the property, or a more specific description of benefit];

NOW, THEREFORE, We _____ and _____ being the owners of the a parcel of land in _____ Township, _____ County, Minnesota, and more particularly described as:

[*property description*]

hereby waive and release all claims to damages sustained by us from the [establishment, alteration, or vacation] of the above described road which runs through our land.

Date: _____

Owner

Owner

Signed before me by the names owners on
the date stated

Clerk Signature

AWARD OF DAMAGES

STATE OF MINNESOTA)

COUNTY OF _____) ss.

TOWNSHIP OF _____)

WHEREAS, the town board of _____ Township, _____ County, Minnesota did on the ____ day of _____, 20__ [establish, alter, or vacate] the road described on the attached order pursuant to Minn. Stat. § 164.07;

WHEREAS, the [establishment, alteration, or vacation] affects a tract of land in _____ County, Minnesota, owned by _____ and _____, and more particularly described as follows:

[describe owners' property]

WHEREAS, no prior written agreement ascertaining the damages or releasing all claims to damages were obtained from the owners;

WHEREAS, the town board has determined the amount of damages sustained by the owners because of the [establishment, alteration, or vacation] and have subtracted from that amount the money value of the benefits the board has determined will be conferred by said [establishment, alteration, or vacation];

YOU ARE HEREBY NOTIFIED, in the matter of the [establishment, alteration, or vacation] of the above described road the town board on the ____ day of _____, 20__, has awarded _____ and _____, as the owners of the above described tract of land, damages in the amount of: _____ (\$_____), a check for which is enclosed, subject to the following terms and conditions:

[list any terms & conditions]

NOTICE OF RIGHT TO APPEAL

PLEASE TAKE NOTICE you have an opportunity under Minn. Stat. § 164.07 to appeal this award of damages. To appeal the award, notice of appeal must be filed with the court administrator of the district court of _____ County [the county in which your tract of land is located] within **40 days** of _____, 20____ [the day the town board filed the award of damages with the town clerk]. Filing a notice of appeal will not prevent the town board from carrying out the action set out above unless the appeal challenges

Attachment 8
of Appendix A

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the public purpose or necessity of a road alteration or establishment and is filed within **ten days**.

The notice of appeal must specify: (1) the award of damages or failure to award damages being appealed from; (2) the land to which the appeal relates; (3) the nature and amount of the damages you are claiming; and (4) the grounds of the appeal. The notice of appeal must also be accompanied by a bond of at least \$250, with sufficient surety approved by the judge or the county auditor conditioned to pay all costs arising from the appeal in case the award is sustained. A copy of the notice of appeal must be mailed by registered or certified mail to the _____ Township clerk or other member of the town board.

Date

Town Clerk

REDUCING DAMAGE AWARDS BY BENEFITS

I. Introduction

When the state or a local unit of government takes private property it is required to pay the owner damages.¹ Occasionally, the public project required the taking specially benefits the remaining portions of the owner's property. Unlike some states, Minnesota recognizes this potential windfall to the owner and allows the reduction of the damage award by the amount of the special benefits.

While this rule seems clear, as the courts have applied it over the years its scope has been greatly limited. To help understand this narrow aspect of condemnation, the following will provide a general review of the rule and then specific examples of how it has been applied.

II. General Rule For Condemnation Damages

The owner is "entitled to the difference in market value immediately before the taking and the market value of the remaining tract after the taking, excluding from consideration general benefits and deducting special benefits."² "An increase in market value is the difference between what a willing buyer would pay a willing seller for the property before the improvement and then after the municipality completes the improvements."³ The "estimate of market value can be based upon the highest and best use to which the property can reasonably be put in the foreseeable future or for which the property is best suited even if that use is not the present use at the time of the condemnation proceeding."⁴

Minnesota has taken a more aggressive stance than many other states by allowing the deduction of special benefits from both the damages to the remaining land as well as from the value of the land taken.⁵

III. Special Benefits

Special benefits from condemnation are measured in the same way as special benefits in special assessment levies.⁶ The "value of special benefits is found by determining what increase, if any, there has been in fair market value of the benefited land."⁷ General benefits may not be deducted from the award of damages.⁸

¹ Minn. Const. Art. 1, sec. 13.

² *City of Chisago City v. Holt*, 360 N.W.2d 390, 392 (Minn. App. 1985).

³ *EHW Properties v. City of Eagan*, 503 N.W.2d 135, 139 (Minn. App. 1993).

⁴ *City of Chisago City*, 360 N.W.2d at 392.

⁵ *State, by Mattson v. Colon*, 194 N.W.2d 574, 579 n. 8 (Minn. 1972).

⁶ *City of St. Louis Park v. Engell*, 168 N.W.2d 3, 8 (Minn. 1969).

⁷ *Id.*

⁸ *State, by Mattson v. Colon*, 194 N.W.2d 574, 577 (Minn. 1972).

For the most part, a special benefit requires a “physical change” in the subject property.⁹ For instance, a new access to the remaining land where none had previously existed.¹⁰

IV. Condemnation as part of an Improvement Project

“Special benefits are not offset where the condemning authority has the power to require property owners to pay for improvements through the levy of special assessments.”¹¹ Otherwise, the owner would be paying twice for the same special benefit.¹² At the time the court adopted this rule, it suggested the mere power to levy an assessment for the improvements is enough to prohibit offsetting the damages even if the condemning authority never actually imposes the assessment.¹³ Furthermore, the prohibition remains even if the total market value of the special benefits is not recovered in the special assessment since no authority requires “each and every cent of market value of special benefits be charged against the landowner.”¹⁴ A long established rule the court recognizes is that “it is better to provide that special benefits be determined only once, in the statutory special assessment proceeding where all landowners and other interested parties will be represented and heard, rather than in a condemnation proceeding where only the specific property owner is a party.”¹⁵ Application of this rule has received little discussion since it was adopted in 1969. Two cases in 1972 stated this rule as an exception to the general rule that special benefits may be deducted from the award of damages.¹⁶ However, in both instances the court found there was no special benefit and so did not address whether a deduction was appropriate.

In another case an owner lost his three direct accesses to a highway through a condemnation by a city. Once the land was condemned, the city built a service road and provided the owner with three accesses. The new accesses on the service road were not as convenient as those providing direct access to the highway.

In determining the damages, the trial court reduced the market value damage award by the amount of the special benefits of the new road and access, then added to the amount the city had specially assessed the property for the road and the additional cost to the owner of having to build a new road to his building from the new accesses. In other words, the trial court apparently did not follow the Minnesota Supreme Court’s rule that no deduction from damage award should occur if the land can be assessed for the special benefits from the improvement. To be in accord with the rule, the trial court should have awarded the full market value damage amount, and left untouched the special assessment levied for the special benefit of the new service road. The numbers in this case demonstrated the owner came out at least \$10,000 ahead by having his damages reduced rather than having to pay the special assessment.

⁹ *Id.* at 579.

¹⁰ *Id.*

¹¹ *City of St. Louis Park v. Engell*, 168 N.W.2d 3, 7 (Minn. 1969).

¹² *Id.* at 8.

¹³ *Id.* at 8-10.

¹⁴ *Id.*

¹⁵ *Id.* at 10.

¹⁶ *State, by Mattson v. Colon*, 194 N.W.2d 574 (Minn. 1972); *State, by Head v. Hendrickson*, 194 N.W.2d 571 (Minn. 1972).

V. General & Special Benefits – Examples

Interstate Highway Interchange: When a portion of property is taken by the state for an interchange, “the enhancement in value of the remainder of the property occasioned by its proximity to the interchange and the expected traffic is not a special benefit and should not be set off against the amount awarded for the land actually taken or the damages, if any, to the land remaining after the taking.”¹⁷

Increased Traffic: A project that merely increases traffic past the remaining land without some physical change that directly benefits the property is not a special benefit.¹⁸ Increased traffic similarly benefits neighboring owners whose land is not taken. An unfair burden would result if the owner whose land is taken is required to pay, through an offset, for a gain the neighbors receive gratis.¹⁹ An owner acquires no vested rights in increased traffic and the gains of increased traffic could be lost by a subsequent change in traffic patterns.

New Road or Access: Creating a new road or access where none previously existed may by a sufficient physical change to create a special benefit.²⁰

Widened Road: A special benefit was conferred by a project that widened a road from two lanes to four lanes, thereby improving access to an interstate highway.²¹

Existing Service Adequate: When a property, even if developed to the extent permitted by local zoning, had adequate access to existing water and sewer mains, no special benefit was received by a project that extended additional sewer and water mains to the property.²²

VI. Conclusions and Recommendations for Townships

The general rule that special benefits may be deducted from condemnation damage awards still exists. The exception is when the condemning authority has the power to specially assess the property for the improvements made as part of the project. The effect of these rules suggests the only time a damage award may be offset by special benefits is when there is either no improvements or when there is no authority to specially assess for the improvements made. In the first instance, the absence of any improvements will make it extremely difficult to show an increase in the property’s market value that would qualify as a special benefit. The second situation is also not very likely given the relatively broad authority to assess for improvements.

As a result, the practical implications seem to be that in most cases of condemnation the town should award the full amount of damages, then specially assess all properties, including those subject to the condemnation, specially benefited by the improvement project.

¹⁷ *State, by Head v. Hendrickson*, 194 N.W.2d 571, 572 (Minn. 1972).

¹⁸ *State, by Mattson*, 194 N.W.2d at 579. *See also State v. Anderson*, 223 N.W. 923 (Minn. 1929).

¹⁹ *Id.*

²⁰ *State, by Mondale v. Mecklenberg*, 140 N.W.2d 310 (Minn. 1966) (created a direct access where none previously existed); *Haynes v. City of Duluth*, 50 N.W. 693 (Minn. 1891) (created a new road).

²¹ *EHW Properties v. City of Eagan*, 503 N.W.2d 135 (Minn. App. 1993)

²² *Southview Country Club v. City of Inver Grove Heights*, 263 N.W.2d 385, 388 (Minn. 1978); *see also Independent Sch. Dist. No. 709 v. City of Duluth*, 177 N.W.2d 812, 815 (Minn. 1970).