

Law School for Legislators: Eminent Domain

March 5, 2009

**Jerome P. Pesick, Esq.
Steinhardt Pesick & Cohen
Professional Corporation**

Fundamentals of Michigan Eminent Domain Law

A. Nature of the Power. As a sovereign government, the State of Michigan inherently possesses the power of eminent domain. The State does not depend on the constitution to grant that power. See *Shizas v City of Detroit*, 333 Mich 44, 50 (1952).

B. Limitations on the Power. Instead, the Michigan Constitution imposes limits on the State's power of eminent domain. It provides that property may only be taken through eminent domain when it is taken for a "public use," and that the property owner must be paid "just compensation" for any taking. See Const 1963, art 10, §2.

1. Public Use. The Michigan Supreme Court has declined to provide one all-encompassing definition of "public use." See, e.g., *Wayne County v Hathcock*, 471 Mich 445, 471 (2004). But the court has explained that "public use" must be construed according to the understanding that would have been held by persons sophisticated in the law as of the 1963 Constitution's adoption. See *id.* Some examples of takings that the courts have concluded are takings for a public use include roads, bridges, parks, and municipal parking structures.

In *Hathcock*, however, the Michigan Supreme Court made clear that the constitution prohibits the government from taking property from one private owner to convey the property to another private owner for purposes of economic development. It held that property may only be taken from one private owner and placed in another private person's ownership in three types of situations: (a) the land is transferred to an owner, like a railroad, that provides services that would be unavailable absent the ability to assemble land; (b) the land is transferred to an institution that remains accountable to the public, like a heavily-regulated pipeline; or (c) the ultimate transfer of the land to a new private owner is incidental because the decision to take the land was based on the land's inherent characteristics, such as genuine blight, and the land is transferred to a new owner once the blight is eliminated. See *id.*, 471 Mich at 473-75.

The Michigan Supreme Court's decision in *Hathcock* overruled its earlier decision in *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616; 304 NW2d 455 (1981), which had held that the "public use" limitation permitted the government to take private property for transfer to another private owner for purposes of economic development.

2. Just Compensation. In contrast with "public use," the courts have provided a general definition of "just compensation." Generally, "just compensation" is the amount of money that will put the property owner in as good a position as it would have been in had its property not been taken. See, e.g., *Dep't of Transp v Van Elslander*, 460 Mich 127, 129 (1999).

Just compensation is usually based on the market value of the property taken. See *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 371 (2003). When calculating market value, courts consider the price that a willing buyer would pay a

willing seller for a property. See *Consumers Power Co v Allegan State Bank*, 20 Mich App 720, 744 (1969). Also, when only part of a property is taken, just compensation is calculated by determining the value of the property before the taking, and the value of the remaining property afterward. The difference generally comprises just compensation. See *Johnstone v Detroit, GH & M Ry Co*, 245 Mich 65, 81 (1928). This way, damage to the remaining property, sometimes known as “severance damage,” is taken into account. But the courts have acknowledged that there is no single formula or measure of damages applicable to all condemnation cases. See *Dep’t of Transp v Van Elslander*, 460 Mich at 129.

In addition to the market value of the property taken, in some instances property owners can recover business damages. Just compensation can include business interruption damages, or the costs incurred to avoid business interruption, that result from a taking. See *City of Detroit v Hamtramck Community Fed Credit Union*, 146 Mich App 155, 158 (1986). It can also include the value of a going business when the business depends on its location at the taken property. See *State Hwy Comm’n v L&L Concession Co*, 31 Mich App 222, 230 (1971).

3. Necessity. A third limitation on the power of eminent domain is that there must be necessity for any taking. Rather than a constitutional limitation, this is a statutory limitation. It is set forth in the Uniform Condemnation Procedures Act (the “UCPA”), which governs all condemnation actions. See MCL 213.75. The UCPA provides that it must be necessary to take “all or part of the property for the purposes stated in” the condemnation complaint. MCL 213.56(1). The necessity for a taking, however, is determined by the public entity that is taking the property. Courts may only review that determination for fraud, error of law, or abuse of discretion. See *id.*; see also *City of Novi v Adell Children’s Funded Trust*, 473 Mich 242, 253 (2005).

C. Delegation of the Power. Political subdivisions of the State, like counties, cities, road agencies, and so forth, do not inherently possess the power of eminent domain. Rather, they possess the power of eminent domain only to the extent that the State has delegated the power to them in legislation. See *City of Lansing v Edward Rose Realty*, 442 Mich 626, 632 (1993). Further, the Michigan courts have held in a number of cases that eminent domain legislation must be strictly construed. See, e.g., *State Hwy Comm’r v Jones*, 4 Mich App 420, 426-27 (1966). Therefore, statutes delegating the power of eminent domain are strictly construed, so they should explicitly identify the purposes for which they authorize political subdivisions of the State to exercise eminent domain.

D. Procedures. The UCPA governs the procedures in all condemnation actions in Michigan. See MCL 213.75. It provides that all laws and rules that apply to other civil litigation apply in condemnation actions, except when the UCPA provides otherwise. See MCL 213.52. This means that condemnations actions generally follow the same procedural path as other litigation in the circuit courts.

The UCPA requires that before a condemning agency may file an action to take property through eminent domain, it must have the property appraised to establish an estimate of just compensation, and offer the amount of the appraisal to the property owner. See MCL 213.55(1). Only once the property owner declines to accept the appraised value in exchange for the property may the agency exercise its power of eminent domain. See *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 572 (2006).

Recent Changes in Michigan Eminent Domain Law

A. Constitutional Amendments. As part of the 2006 general election, Michigan voters adopted Proposal 4, which amended Const 1963, art 10, §2. The amendments addressed public use, just compensation, and other rights afforded to condemned property owners.

1. Public Use. In June 2005, the United States Supreme Court issued its decision in *Kelo v City of New London*, 545 US 469 (2005), holding that the federal constitution's public use limitation permits the government to take property from one private owner and transfer it to another private owner for purposes of economic development.

In *Kelo's* wake, a number of states adopted measures rendering their own "public use" provisions more restrictive. Even though *Wayne County v Hathcock* interpreted Michigan's public use limitation to prohibit the kind of takings that *Kelo* permitted, Michigan voters amended Const 1963, art 10, §2 to explicitly prohibit such takings in the text of the constitution itself:

"Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph. Const 1963, art 10, §2.

In addition, the amendment explicitly placed the burden of proving that a taking complies with the public use limitation on the condemning agency. Under the amendment, condemning agencies generally must prove that a taking is for a public use by a preponderance of the evidence. This standard requires the agency to present evidence that the taking is for a public use that outweighs the evidence brought against the taking. See *Hoholik v Metro Life Ins Co*, 289 Mich 242, 249 (1939). When the taking is to eliminate blight, however, the condemning agency must demonstrate by clear and convincing evidence that the taking is for a public use. This is a higher evidentiary standard. See *LoCricchio v Evening News Assoc'n*, 438 Mich 84, 135 (1991) (Cavanagh, J.). As amended, the constitutional section provides:

In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.

Prior law required condemning agencies to prove that a taking was for a public use, but without any specificity about the burden of proof. See *City of Novi v Adell Children's Funded Trust*, 253 Mich App 330, 337 (2002), *rev'd on other grounds*, 473 Mich 242 (2005).

2. Just Compensation. In addition to amending the standards governing the “public use” determination, the 2006 amendment to the Michigan Constitution altered “just compensation” in some instances. Under the amendment, when a person’s “principal residence” is taken, that person is entitled to 125% of the property’s value as just compensation:

If private property consisting of an individual’s principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property’s fair market value, in addition to any other reimbursement allowed by law. Const 1963, art 10, §2.

“Principal residence” is not defined in the condemnation context, but for property tax purposes it means “the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established.” MCL 211.7dd(c).

3. Other Rights. Finally, the constitutional amendment also included language preserving other rights granted to condemned property owners as of November 1, 2005:

Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph. Const 1963, art 10, §2.

By identifying rights provided “otherwise,” aside from those rights provided by the constitution or statutes, this language preserves all rights afforded to property owners through Michigan common law. Future Legislatures will need to be mindful of this preservation when working with Michigan eminent domain law.

B. Statutory Amendments. In addition to the constitutional amendment, *Kelo* motivated a number of amendments to Michigan statutes governing eminent domain. The amendments altered the UCPA, as well as the Allowances for Moving Personal Property from Acquired Real Property Act, MCL 213.351 *et seq.* (the “Relocation Act”), and the Acquisition of Property by State Agencies and Public Corporations Act, MCL 213.21 *et seq.* (the “State Agencies Act”).

1. The UCPA Notice Provisions. Perhaps the most extensive changes to the UCPA involved §5, MCL 213.55, and specifically §5(3). Generally, UCPA §5 requires a condemning agency to submit a good faith written offer to purchase the property that it desires before filing a condemnation action. See MCL 213.55(1). Under language added to the UCPA through a 1996 amendment, property owners were required to inform the agency of items of property or damage for which no offer was submitted within a short time after the agency submitted its offer or filed its condemnation action. The amendment's original purpose was to allow the government an opportunity to evaluate the owner's claims and to increase the amount of just compensation that the government was offering without having to go to trial and incur additional attorney fees if the government agreed to pay increased compensation. In practice, however, the 1996 amendment was used by some governmental agencies to deny payment for items of just compensation. For example, in *City of Novi v Woodson*, 251 Mich App 614 (2002), the Court of Appeals determined that the owner's notification that she would claim just compensation for either business interruption damages or the value of her going concern was deemed not sufficient under the statute. As a result, the owner recovered just compensation for her land, but her otherwise compensable business interruption damage claim was dismissed. Later, in *Carrier Creek Drain Dist v Land One, LLC*, 269 Mich App 324 (2005), the Court of Appeals ruled that the 1996 amendment required the owner to disclose portions of its appraisal theory to the government within the notice period. The property owner in *Carrier Creek* sought leave to appeal to the Michigan Supreme Court, and the Supreme Court held oral argument on the application. While the application was pending, however, the Legislature amended UCPA §5(3). As a result, although a majority of the Supreme Court explained that it disagreed with the Court of Appeals' decision in *Carrier Creek*, the Supreme Court denied leave expressly acknowledging the amendment. See 477 Mich 954 (2006).

The amendments to UCPA §5(3) altered the notice requirements, meaning that it should be less likely that an owner will lose his or her claim to just compensation altogether, yet the amendments retain the government's right to receive notice of property or damages that may have been omitted from the good faith written offer. They also allow an owner to give notice of unaccrued or continuing claims, and subject the owner to a continuing duty to supplement information relative to any such claim.

2. The UCPA's New Advice Provision. Another amendment to the UCPA requires the government to provide the property owner with notice of the owner's basic legal rights when the government first submits a good faith offer to acquire the property.

3. Proposal A Compensation. A new subsection 6 was also added to UCPA §5, MCL 213.55(6), providing residential owners an upfront payment for increases in their property taxes due to “uncapping.” Under property tax provisions commonly known as Proposal A, a property's value for purposes of taxation cannot increase from one year to the next by more than the rate of inflation or 5%, whichever is less. See Const 1963, art 9, §3. The property's value is thus “capped” for tax purposes. But when a property is sold, its value is “uncapped,” and the property’s taxes will again be based on the property’s entire market value. When an owner loses his or her property to eminent domain, and then obtains a new residence, the new residence’s taxes will be “uncapped” due to the change in ownership. The subsection provides a formula for determining the amount that will be paid as compensation to owners for the effective increase in property taxes that the taking caused.

4. Estimated Compensation Payment. UCPA §8, MCL 213.58, was also amended to address the time when the condemning agency must pay estimated just compensation, which is the amount that the agency believes will provide just compensation to the condemned property owner. The amendment prohibits the condemning agency from escrowing any estimated just compensation for an owner’s principal residence, if the residential structure is taken or the taking creates certain non-conformities with the local zoning ordinance. See MCL 213.58.

The UCPA was also amended to require payment of estimated just compensation no later than 30 days before any physical dispossession of the taken property occurs. See MCL 213.59(6). A further amendment to this section provides that when an individual's residence is taken, the individual shall not be required to move from the residence without having had a reasonable opportunity to relocate to a comparable replacement dwelling, although a “reasonable opportunity” cannot exceed 180 days after moving expenses have been paid. See MCL 213.59(7).

5. Amendments to the State Agencies Act. The State Agencies Act grants certain governmental entities the power of eminent domain. See MCL 213.21. This Act was amended to render it consistent with the amendments to the Michigan Constitution. In fact, the amendments replicated in statutory form the constitutional amendments: the statutory amendments prohibit state agencies and public corporations from exercising eminent domain for economic development purposes or to enhance the municipal tax base; they allocate the burden of proof in public use challenges; they require the condemning agency to pay 125% of the taken property's fair market value when the taken property is a principal residence; and they preserve property owners’ existing rights as of November 2005.

In some instances, however, the amendments to the State Agencies Act went further than the constitutional amendments. For example, the amendments expressly incorporate the standard for “public use” articulated by Justice Ryan in his *Poletown* dissent, which the Supreme Court adopted in *Wayne County v Hathcock*. See MCL 213.21. This legislation also limited the 125% multiplier’s applicability to those residential takings in which the residential structure is actually taken or the taking

renders the remaining property nonconforming under the applicable zoning ordinance. The Legislature added a new protection against pretextual takings for private benefit, but excepted drain projects from its scope. Finally, the amendments added a definition for “blighted” property that is consistent with that term’s definition under the Brownfield Redevelopment Financing Act. See MCL 125.2652.

6. Amendments to the Relocation Act. The amendments to the Relocation Act increased the maximum payment available under the Act to a displaced individual or family for moving expenses when a property is taken from \$1,000.00 to \$5,250.00. See MCL 213.352. The amendments also extend moving expense reimbursement to renters occupying residential property with a leasehold interest of less than 6 months. Finally, the Relocation Act was amended to allow a renter to recover any attorney fees incurred in seeking to recover moving expenses required when the renter must move from a taken property. See MCL 213.352(3).

Emerging Issues in Michigan Eminent Domain Law

A. Just Compensation for “General Effects.” As part of the 1996 amendments to the UCPA, §20 was altered to provide that when a property is taken, the “general effects” of the taking are not compensable unless they would provide the basis for an inverse condemnation action, in which case they are “special effects” and may be taken into account:

The general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation. A special effect of the project on the owner’s property that, standing alone, would constitute a taking of private property under section 2 of article X of the state constitution of 1963 shall be considered in determining just compensation. MCL 213.70(2).

This provision is applicable in partial takings, when only part of property is taken and the owner is left with a remainder. Partial takings are common in road projects, for example, where only part of a property along its road frontage may be taken so that a road may be widened.

An issue with this provision is that it imposes a standard for determining liability in an inverse condemnation case onto situations that involve only the calculation of damages in a direct condemnation case. “Inverse condemnation” is the kind of case that a property owner may bring when it believes that some governmental activity has effectively taken its property. See, e.g., *Merkur Steel Supply, Inc v City of Detroit*, 261 Mich App 116, 129 (2004). To demonstrate that the government is liable for a taking in an inverse condemnation case, the property owner generally must show that the governmental activity has damaged the property to such a degree that the property’s economic value has effectively been destroyed. See, e.g., *K&K Construction, Inc v*

Dep't of Nat Resources, 456 Mich 570, 577 (1998). Only once liability is established does the owner have a right to “just compensation.” In direct condemnation cases filed under the condemning agency’s power of eminent domain, on the other hand, there is no question that the condemning agency is liable for taking land; that is the reason that the agency files the case at all. See MCL 213.21 (authorizing governmental agencies to file actions to take property through eminent domain). Generally, the only issue in a direct condemnation case is compensation, which constitutionally must place the property owner in as good a position as it would have been in had the taking never occurred.

These differences between the rules of liability in inverse condemnation cases and the rules of compensation in direct condemnation cases are generally recognized, and are recited in the leading condemnation treatise:

The most important limitation on this concept [of “general effects”] turns upon whether the damage claim is an element of a “severance damage” case or an independent claim for relief. In the severance damage context, it is occasionally noted that any diminution in value to the remainder parcel is compensable if it is directly attributable to the taking, regardless of the existence or non-existence of similar damage to neighboring properties. 2A NICHOLS ON EMINENT DOMAIN § 6.08[2] (rev. ed. 1993) (footnotes omitted).

Nevertheless, the Michigan Supreme Court held that because no Michigan case decided before 1963 explicitly allowed consideration of certain “general effects” in determining just compensation for a partial taking, MCL 213.70 prohibits taking such factors into account unless the factors would have provided the basis for liability in an inverse condemnation case. See *Dep't of Transp v Tomkins*, 481 Mich 184, 199 (2008). Notably, the Supreme Court pointed out that its decision did not reflect “what th[e] Court believes ‘just compensation’ *should* encompass in a partial taking.” *Id.* at 211. Rather, the Court’s decision reflected its conclusion that, because there was no case affirmatively establishing that such factors should be considered, the constitution does not limit the Legislature’s ability to adopt a prohibition against their consideration. See *id.*

B. Issues Arising from the 2006 Amendments. To date, the Michigan courts have not yet addressed the various amendments, to both the constitution and the statutes, that were adopted in 2006. Accordingly, there may be many issues arising out of those amendments, including issues dealing with the new limitations on “public use,” the 125% compensation provision for principal residences, and the constitutional preservation of any right, whether granted by the constitution, statutes, or otherwise, that was afforded to condemned property owners as of November 2005.