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EMINENT DOMAIN (THE CONDEMNATION OF PRIVATE PROPERTY) IN MICHIGAN

THE ISSUE IN A NUTSHELL

The power of eminent domain permits a government, or an agency authorized by a government, to take and make public use of property held by private ownership. Eminent domain is also known as compulsory purchase since both the federal and state constitutions require that an owner be justly compensated for that which is taken. Eminent domain in Michigan has posed public policy problems in recent years as some local units of government have used it to transfer property to businesses for economic development purposes, in effect transferring ownership from one private party to another.

Questions have also arisen regarding the types of property for which an owner must be compensated. Last year, the City of Detroit acquired property through condemnation at a cost of approximately \$42 million, including an estimated \$34.2 million of personal property in the form of non-compensable inventory. This Council Comments describes the legal basis, both constitutional and statutory, of the eminent domain power in Michigan.

FEDERAL PROVISIONS

The Fifth Amendment to the United States Constitution, which is applicable to the states through the due process clause of the Fourteenth Amendment, prohibits the taking of private property for a public use without just compensation. The United States Supreme Court has held this provision of the federal Constitution to be a confirmation of a pre-existing power rather than a grant of power. **United States v Carmack**, (329 US 230; 1946). The generally accepted legal basis for the eminent domain power is that it is an inherent attribute of sovereignty, but the requirement that a government give compensation for the property taken appears to have been of American origin.

MICHIGAN PROVISIONS

Four provisions of the 1963 state Constitution are directly related to the eminent domain power in Michigan: Section 17 of Article 1 which in pertinent part prohibits the deprivation of life, liberty or property without due process of law; Section 23 of Article 7 which authorizes cities and villages to acquire, own, establish and maintain parks, cemeteries, hospitals and other works related to public health; Section 24 of Article 7 which authorizes cities and villages to acquire, own or operate public utilities; and

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Section 2 of Article 10 which prohibits a taking of private property for a public use, “without just compensation therefor being first made or secured in a manner prescribed by law.”

When the eminent domain power is exercised, three considerations must be addressed: (1) whether the taking is necessary; (2) the amount of compensation due an owner; and (3) whether the taking is for a public use. Section 2 of Article 10 of the state Constitution addresses only the compensation issues stating that it must be determined in proceedings in a court of record. The state Legislature has also addressed these considerations by statute.

Constitutional Provisions

Necessity

Because condemnation of private property is justified by some public need on behalf of which private ownership must yield, a determination of necessity must be made in each instance. Michigan’s four Constitutions have treated this determination as either a legislative or a judicial question. Since the 1835 Constitution was silent on the matter, its resolution was left to the state Legislature. The 1850 Constitution required necessity to be determined by a twelve-member jury composed of other property owners who lived near the property in question, or in the alternative by a three-member commission appointed by a court of record. The state, however, was excepted from this procedure. The 1908 Constitution retained the jury-commissioner approach but added the requirement that necessity be determined before property could be taken; it also added road commissioners to the exception. The 1963 Constitution makes the determination of necessity once again a legislative question subject to narrowed review by the courts.

The state Supreme Court held that the 1908 constitutional provisions also imposed upon a jury or commissioners the duty of determining the necessity for the proposed public improvement which was the basis of the taking. **Board of Water Commissioners of the City of Detroit v Lorman** (158 Mich 608; 1909). Thus, for example, if property was to be taken so that a street could be widened, the jury or commissioners had a duty to determine not only whether the taking of the property in question was necessary but also whether the widening of the street was necessary.

What property may be taken. In general, any private property or property interest, whether tangible or intangible may be taken by eminent domain. Conversely, a local unit of government cannot condemn public property, where the proposed use would materially interfere with the existing use, unless a statute expressly or by necessary implication authorizes such a taking.

Just Compensation

Just compensation has been construed to mean that which leaves the owner of condemned property monetarily in the same position occupied before the property was taken. **In Re Widening of Bagley Avenue**, (248 Mich 1; 1929). It neither enriches the individual at the expense of the public nor the public at the expense of the individual. **In Re State Highway Commissioner**, (249 Mich 530; 1930). It is essentially the fair market value of the property. However, the value for condemnation purposes need not be the same as fair market value for purposes of ad valorem taxation.

The Michigan Constitution of 1835 required simply that private property not be taken without just compensation being paid. Beginning under the 1850 Constitution, the question of just compensation was resolved contemporaneously with that of necessity. That Constitution required private property not be taken without just compensation being first made or secured in such manner as prescribed by law and that the necessity for the taking also be determined. The amount of compensation was determined in the same manner as necessity: by a twelve-member jury of other local property owners or by a three-member commission appointed by a court of records a procedure retained in the 1908 Constitution. The present state Constitution deleted the provisions under which necessity and just compensation were determined contemporaneously, requiring only that compensation be determined in a court of record.

What property is compensable. The common law rule is that an owner's cost of removing personal property -- including inventory or stocks of goods -- from condemned premises is not compensable. Conversely, the cost of removing trade fixtures and reinstalling them elsewhere is compensable. A fixture is generally defined as personal property, a furnace or heavy machinery for example, which is so attached to real property as to be considered a part of it; however, this definition is not always clear in practice and has been further blurred by case law. For example, in **State Highway Commissioner v Miller**, (5 Mich App 591; 1967), an appeals court panel held that whether an owner is entitled to compensation for property located on condemned premises depends upon whether the owner intended to permanently use the property in the operation of his or her business, regardless of whether the property would be defined as fixtures.

The state Legislature has modified the common law rule by adopting Public Act 40 of 1965. The act requires a public agency to reimburse an owner for the reasonable expense of moving personal property, exclusive of trade fixtures, from condemned premises. Reimbursement is limited to \$200 per individual or family, and \$3,000 per business.

Statutory Provisions

The state Legislature has adopted numerous statutes authorizing the condemnation of private property. Many of these laws deal specifically with eminent domain, while others confer such powers incidentally. Examples of the former are Public Act 236 of 1911 authorizing the state to condemn private property for its own use and Public Act 149 of

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1911 authorizing the condemnation of property by state agencies and public corporations. An example of the latter would be Public Act 279 of 1909 as amended, the home rule cities act, which sets forth the procedures by which cities may incorporate. Incidental thereto, a home rule city may provide in its charter for the acquisition of property by condemnation.

Since many of these statutes overlap, governmental agencies can often select which act to proceed under when condemning property, a matter of no small consequence since some of the statutes afford a property owner certain rights -- such as a requirement that a condemning authority make a good faith offer of purchase prior to condemnation -- that others do not. State courts have upheld the authority of an agency to institute condemnation proceedings under a statute which does not accord a property owner rights provided by another statute under which an agency might also proceed. For example, in **Warren Consolidated Schools v Froling**, (27 Mich App; 1970), the Court of Appeals upheld the authority of a school district to condemn property under Public Act 149 of 1911, which did not require a condemning authority to first make a good faith offer of purchase even though the school district could have proceeded under the 1955 school code which did contain such a requirement.

In 1980, the Legislature somewhat standardized the procedures to be followed in condemnation matters by passing Public Act 87. Act 87, the uniform condemnation procedures act, required that by April of 1983, the procedures set forth therein be followed by all public and private agencies previously authorized to proceed under Public Act 149 of 1911 (acquisition by state agencies and corporations), Public Act 295 of 1966 (acquisition for public highways), and Public Act 238 of 1923 (electric and gas corporations). Public Act 87 repealed much of the above acts, but left unaffected numerous other eminent domain statutes. The uniform condemnation procedures act will be examined in more detail in the following section.

Quick Take Statutes. As noted, some of the condemnation statutes provide for a jury determination of certain matters. For example, under Public Act 149 of 1911, a jury or commissioners determined both the question of necessity, and the amount of compensation to be paid, if a necessity for taking the property in question was found. This procedure was consistent with state constitutional provisions then in effect. Because these determinations occurred in a trial proceeding, the procedure was victim to the delays which attend trials generally, such as long court dockets. Since such determinations were treated as conditions precedent the government could not take property until they were finally resolved.

Legislatures in a number of states have expedited this process by passing so-called "quick-take statutes." The Michigan Legislature adopted this approach by enacting the uniform condemnation procedures act, Public Act 87 of 1980. Act 87 is procedural rather than substantive in nature; thus, it neither confers eminent domain power nor limits "the purposes for which or by whom that power may be exercised." (The majority of another quick take statute, Public Act 295 of 1966, which authorizes the state highway

commission and local units to acquire property for the limited purpose of public highways, was repealed by Act 87.)

Condemnation under Act 87 is expedited in part because the necessity for a taking is **presumed** when a public agency is involved and because the necessity issue need not await resolution of the compensation issue. The 1963 Constitution deleted the prior approach of determining necessity and just compensation contemporaneously. Since the Legislature now determines necessity, generally acts which confer the power of eminent domains such as Public Act 344 of 1945, the urban renewal act, or Public Act 338 of 1974, the economic development corporations act, simply restate standard language that a legislative finding of necessity has been made.

Under Public Act 87, an agency must make a good faith offer to purchase the property in question, based on an appraisal of its value. If the agency and the owner are unable to reach agreement, the agency may then file a complaint in circuit court to take the property and must deposit the estimated just compensation in escrow. A property owner wishing to challenge the necessity of the taking must file a motion to that effect in the time allowed by Michigan rules of court to file an answer to a civil complaint (presently twenty-one days). The court is required to hold a hearing within thirty days after the motion is filed and to render a decision within sixty days after the hearing. Section 6 of the act provides that where the acquisition is sought by a public agency, the agency's determination of necessity is binding on the courts, absent a showing of fraud, error of law, or abuse of discretion.

The failure of an owner to respond to the complaint, or a review by the circuit court upholding the necessity, has the effect of vesting title to the property in the agency, retroactively from the date the complaint was filed. Even if the owner appeals the determination of necessity, the circuit court may order that possession of the property be turned over to the agency before the appeal is finally decided. In effect, under a quick-take statute a property owner is faced with the challenge of overcoming the presumption that the taking is necessary -- a determination which may have been made some time ago when the act conferring the eminent domain power was adopted -- and doing so in a shortened time frame.

Public Use

Whether a proposed use constitutes a public use is, according to the courts, primarily a legislative function, but ultimately a judicial question. It would appear that where the determination of public use is congressional or legislative, courts generally defer to that determination, but not so when made by a local unit of government. The state Supreme Court substantially expanded the concept of public use in the case of **Poletown Neighborhood Council v City of Detroit**, (410 Mich 616; 1981).

Poletown posed the question whether a municipality could "use the power of eminent domain granted to it by the economic development corporations act, [Public Act 338 of

19741 to condemn property for transfer to a private corporation to build a plant to promote industry and commerce thereby adding jobs and taxes to the economic base of the municipality and the state.?” (410 Mich at 629.) The Court answered its question in the affirmative. In doing so, the Court rejected a proffered distinction between the terms public use and public purpose, noting that the terms “have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit.” (410 Mich at 630.)

The holding in **Poletown** finds no support in the history of the eminent domain clause itself. In fact, Section 2 of Article 10 as originally introduced at the Constitutional Convention specifically added the phrase “or public purpose,” after the words public use. The reason given for the addition was “to broaden the power of eminent domain and therefore resolve doubts as to the extent of a public use.” 2 Official Record, Constitutional Convention 1961, at 2840. But this addition was later deleted by the Convention.

None of Michigan’s four Constitutions has treated the terms public use and public purpose interchangeably, nor used the latter term in connection with the eminent domain power; rather, the term public purposes appears in Section 21 of Article 7 authorizing cities and villages to levy taxes. It may be presumed that the drafters of the state Constitution selected their words with precision and therefore did not intend two distinct terms to convey an identical meaning.

The Court did in one respect limit the holding in **Poletown** by noting that

Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests a court inspects with heightened scrutiny the claim that the public interest is being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature. (410 Mich at 634-35.)

The above limitation proved important in **Center Line v Chmelko**, (164 Mich App 247; 1987), wherein the Court of Appeals found no such clear and significant public benefit in a proposed condemnation, the purpose of which was to transfer property to a private automobile dealership deemed vital by the city to its economic base. Unfortunately, the law in Michigan with respect to public use remains unsettled. **Poletown** made clear that private property can be condemned and transferred to another private party when the level of economic activity produced thereby provides a clear and significant benefit to the public. However, the question left unanswered by **Poletown**, particularly in light of **Center Line**, is what degree of promised economic activity is deemed sufficient to produce such a benefit.