

CONSTRUCTION LAW NEWS

FROM THE FOSTER SWIFT CONSTRUCTION LAW SECTION

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Construction Law Newsletter

February 2009

A MICHIGAN CONDEMNATION LAW PRIMER

By: Brian J. Renaud, Esq.

A. Introduction

“Eminent domain,” or “condemnation,” gives units of government the power to take private property for public purposes, without the property owner’s consent. Units of the federal government receive this power from the Fifth Amendment to the United States Constitution. Units of state government within Michigan receive it from Article X, Section 2 of the Michigan Constitution. Both constitutional provisions require the condemning authority (“authority”) pay to the owner “just compensation” for the property taken.

In determining just compensation, the property must be valued as though its acquisition by the authority had not been contemplated. In most condemnation cases, just compensation is determined by reference to the fair market value of the property actually acquired by the authority, as of the date of the taking. In other cases, such as those involving a “partial” taking of an owner’s property for a highway right-of-way easement, the resulting reduction in value of any property remaining with the owner is also taken into consideration.

In Michigan, numerous governmental and “quasi governmental” authorities have the power to take private property for public purposes that are consistent with their statutory mission. These include, among others, the State of Michigan and its agencies; public corporations, including counties, cities, villages, boards and commissions; townships; public utility companies; boards of county road commissioners; drainage districts; airports and telephone companies. All such authorities

must observe strict procedural requirements in taking private property. These requirements are set forth in the “Uniform Condemnation Procedures Act” (Act), which Michigan and most other states have adopted. The Act’s requirements are complex, and the court cases interpreting both the Act and pre-act condemnation law are numerous. However, the following discussion should enable parties who become involved in condemnation actions to know what the likely next steps will be.

B. Preliminary Procedural Requirements

Prerequisite to any taking of private property through condemnation is a formal resolution, made by the authority’s duly authorized representatives (such as a township board or a board of county road commissioners), that the proposed taking is “necessary” to accomplish the stated public purpose. Thus, the board of a county road commission seeking to widen a congested public highway will usually formally resolve, after conducting engineering and feasibility studies, that both the road widening project and the taking of some or all of a particular parcel or parcels of property fronting the roadway are necessary. Once this public necessity determination is made, the authority must establish a value for the property to be taken. The amount for which the property is valued by the authority is referred to as the “estimated just compensation” for the taking. An appraisal conducted by a certified appraiser is the method by which most authorities establish just compensation.

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After just compensation has been established, the authority must then make to the owner a “good faith offer” to purchase the property for an amount which is not less than the amount reflected in its appraisal. The good faith offer is usually transmitted to the owner by letter. It must state, among other things, whether any relocation assistance as may be required by law will be provided, and whether the authority reserves or waives its rights to bring an environmental cost recovery action with respect to the property, such as where the authority will be taking property which it knows or believes to be environmentally contaminated.

The Act defines “owner” very broadly, to include “any person, fiduciary, partnership, association, corporation or governmental unit or agency having an estate, title or interest”, of virtually any type, in a property sought to be condemned. Thus, lienholders such as banks, as well as holders of easements in the subject property, among others, are considered to be “owners.” All such owners must receive a good faith offer from the authority. An authority may elect to make a single sum, blanket offer where multiple such owners are involved.

C. The Condemnation Litigation Process

If the authority and the owner are unable to agree on the price to be paid for the property, the authority may formally “declare” a taking and then commence suit against the owner, in the Michigan circuit court for the county in which the property is located. The Act’s pleading requirements are very specific. Among other things, the authority must attach to its complaint copies of the declaration of taking, the good faith offer letters, a schematic diagram of the property sought to be taken, and an affidavit stating that the estimated just compensation has been deposited with a designated escrow agent or the county treasurer.

When answering the complaint, an owner who wishes to challenge the alleged public necessity of the taking must also file a motion challenging it. If the motion is not timely filed, the issue of public necessity is conclusively determined in favor of the authority. When this occurs, title to the property sought to be condemned “vests” in the authority retroactively to the date of the filing of the complaint, the estimated just compensation is then released from escrow to the owner(s), and the case proceeds forward only on the issue of monetary damages, i.e., whether the estimated just compensation is sufficient to compensate for the value of the property taken. The Act is thus often referred to as a “quick

take” statute, since an owner’s failure to timely raise a necessity challenge allows the condemning authority to quickly take the property and then have the court or a jury later determine the proper valuation of the property taken. These provisions of the Act serve to prevent owners from delaying public work projects by filing late or procedurally improper challenges to necessity.

If an owner challenges necessity, only the court may determine that issue. A legal presumption of public necessity exists in favor of the authority. Therefore, successful necessity challenges are difficult to mount.

Once necessity has been decided in favor of the authority (or objection to it has been waived), the case then proceeds to trial on the issue of just compensation, usually after a period of “discovery” of facts known and opinions to be expressed by each party’s fact and expert witnesses. In this regard, the Act allows the court to establish for the parties a mutual appraisal exchange date. This serves to prevent parties from “shopping” the other party’s appraisal to a valuation expert who might, based on that appraisal, be tempted to establish an abnormally high or low contrary opinion of value for the property.

D. Who Pays For Condemnation Litigation?

The Act provides for the payment to the owner, in the majority of cases, of certain reasonable and necessary expert witness fees incurred by the owner in defending against the condemnation lawsuit. It also provides for the authority’s payment to the owner of the owner’s attorney fees incurred in successfully defending against the lawsuit. This is based on a formula. Under the formula, the owner must, on final verdict or other final judgment entered in the case, establish that it is entitled to more money than was offered by the authority as the estimated just compensation for the taking. When this threshold is met, the authority must additionally pay to the owner, as an attorney fee, an amount equal to up to one-third of the “increase” of the final verdict or judgment over the amount of the estimated just compensation. The Legislature’s inclusion of these expert witness and attorney fee provisions in the Act is consistent with the constitutional mandate that the private property rights of citizens and others subject to the power of eminent domain are to be protected to the fullest extent possible.

Several other significant payment provisions of the Act and related condemnation laws should also be noted.

First, the Act requires the authority pay relocation assistance benefits to certain persons displaced as a result of a taking. This is usually in addition to any federal relocation assistance available to such persons. Second, recent amendments to Michigan's Constitution and other of its condemnation laws provide for the payment to an owner whose "principal residence" is taken a sum equal to 125% of the fair market value of the property taken. Third, though an authority and an owner may settle a condemnation lawsuit on mutually agreeable terms, the Act prohibits an authority from unilaterally discontinuing a condemnation lawsuit once possession or title to the subject property has vested in it, unless the

authority pays the actual expenses, reasonable attorney fees and actual damages to all parties affected by the discontinuance.

E. Conclusion

The condemnation process in Michigan can be complex and confusing. Authorities and owners are thus well advised to seek the assistance of experienced condemnation counsel in any situation in which condemnation is or is likely to become an issue.

COMPARISON OF THE VARIOUS TYPES OF ALTERNATIVE DISPUTE RESOLUTION SPECIFIED IN THE AIA AND CONSENSUSDOCS CONTRACT DOCUMENTS

By: Dirk H. Beckwith, Esq.

In the fall of 2007, the Associated General Contractors of America (AGC), along with twenty other construction and trade organizations, created and endorsed the new ConsensusDOCS documents to be used as contracts for construction projects. "DOCS" is an acronym for designers, owners, contractors, and sureties. The ConsensusDOCS can be compared and contrasted with the similar American Institute of Architects (AIA) construction contract documents. These documents now provide parties with two sets of contract documents to choose from in construction projects. Likely, the nature of the project may determine which set of documents is utilized. This article discusses the major differences between types of alternative dispute resolution called for in the AIA A201 General Conditions Document and the ConsensusDOCS 200 General Conditions Document.

The AIA documents no longer mandate arbitration as the method of binding dispute resolution, and furthermore, if arbitration is not explicitly chosen, the default dispute resolution mechanism will be traditional litigation. Contrarily, while the ConsensusDOCS have a provision for the parties to choose their alternative dispute resolution mechanism, the ConsensusDOCS do not have an express default provision for litigation as the AIA documents do; rather they are silent as to a default mechanism. As a practical and legal matter, the default is likely litigation.

In the AIA documents, mediation is a prerequisite to binding dispute resolution such as arbitration. Arbitration takes place after mediation is proven unsuccessful. Additionally, AIA documents require a third party to assist in the dispute resolution process, whereas the ConsensusDOCS do not require a third party, rather they promote cooperation and fair dealing between the parties. After the AIA 2007 document changes, parties have the right to choose the third party to govern the alternative dispute process, called the "Initial Decision Maker" (IDM), and if the parties do not choose someone other than the architect, the architect will maintain the role as the IDM.¹ Pursuant to the AIA A201, the IDM must render a decision regarding the dispute prior to the issue proceeding to mediation.²

In comparison, the ConsensusDOCS do not have an initial decision requirement prior to proceeding to mediation. The ConsensusDOCS require the parties to attempt to resolve disputes first through informal negotiations referred to as "direct discussions" between representatives of the parties, and if they are unsuccessful, then discussions between senior executives of the parties; if the direct discussions are unsuccessful then the matter will be submitted to dispute

¹ AIA Document, *supra* note 1, at § 15.2.

² *Id.* at § 15.2.5.

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mitigation and/or resolution procedures.³ Furthermore, the ConsensusDOCS allow for the parties to choose a Project Neutral or Dispute Review Board as their dispute mitigation procedure, but if neither is chosen, then mediation will be the next step after the informal negotiations.⁴ If mediation is unsuccessful, the ConsensusDOCS provide that the parties will then proceed to binding dispute resolution such as arbitration.⁵

Moreover, the AIA documents require that alternative dispute resolution processes be administered by the American Arbitration Association ("AAA"). Conversely to the AIA documents, the ConsensusDOCS do not

require that the alternative dispute mechanism be administered by the AAA, rather they only require that the parties attempt to resolve the matter through mediation or arbitration pursuant to the current "Construction Industry Mediation Rules" of the AAA, unless the parties mutually agree to utilize another set of arbitration rules.⁶ The ConsensusDOCS do not specify an organization to administer the alternative dispute resolution procedures, only which rules must apply.

³ ConsensusDOCS, *supra* note 2, at § 12.2.

⁴ *Id.* at ~ 12.3, 12.4.

⁵ *Id.* at ~ 12.4, 12.5.

⁶ *Id.* at § 12.4.

ATTORNEY HIGHLIGHTS



Last month, **Dirk Beckwith** spoke at the 2009 AGC of Michigan's Professional Development Day regarding Alternative Dispute Resolution for the Construction Industry. The daylong conference was held at the James B Henry Center for Executive Development. More than 100 construction professionals attended the conference. **David Lick** and **Eric Doster** were also in attendance on behalf of Foster Swift.

UPCOMING SEMINAR

EMPLOYER PROTECTION BRIEFING - PART I

Join us to learn first-hand how the "Employee Free Choice Act" (also known as the "Card Check Act") could impact your business.

SOUTHEAST MICHIGAN Wednesday, February 25, 2009

8:00 a.m. - 9:30 a.m.

Sheraton Hotel

21111 Haggerty Rd., Novi, MI 48375
(Continental breakfast will be provided)

MID-MICHIGAN Wednesday, February 25, 2009

3:30 p.m. - 5:00 p.m.

Lansing office of Foster Swift

313 S. Washington Square, Lansing, MI 48933
(Refreshments will be provided)

WEST MICHIGAN

Thursday, February 26, 2009

8:00 a.m. - 9:30 a.m.

Frederik Meijer Gardens

(Continental breakfast will be provided)

For seminar and registration information, call 517.371.8116, send an email to reply@fosterswift.com or [click here](#).

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