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# THE DIMINUTION OF THE GOOD FAITH OFFER PROTECTIONS IN EMINENT DOMAIN PROCEEDINGS

By Alan T. Ackerman

This article explores whether the minimum constitutional and statutory requirements are being fulfilled by condemning agencies in the "good faith written offer" process.

## Statutory Framework

All condemnation proceedings in Michigan can only be initiated by an agency under the procedure provided in the Uniform Condemnation Procedures Act of 1980 ("the Act").

The Act presents a specific procedural framework, which must be followed by condemning authorities in order for the agencies to obtain jurisdiction of the court necessary to acquire property. Section 5 of the Act requires the establishment of a value estimate and presentation of the value and an appraisal if one has been prepared "before initiating in negotiations." Only after presentation of the appraisal and the opportunity to negotiate may the agency file a condemnation complaint.

The good faith written offer is the effective "trigger point" in which the negotiation process is contemplated. Section 18 of the Act provides that costs and fees will be awarded to a landowner for any efforts expended after the good faith written offer is presented. The jurisdictional good faith written offer process as contemplated in Sections 5 and 18 of the Act follows the American legal principle supporting resolution without the filing of actions. Given the public policy, one can readily understand how negotiation after the good faith written offer is favored as a method to avoid litigation.

The confusion in the process has escalated due to actions of some private utilities in

dealing with whether the property is "under a threat of institution of judicial proceedings" as contemplated by Section 18. When an agency with the authorized power to condemn exhibits its interest in purchasing property by making an offer in writing, how is this to interplay with the jurisdictional "good faith written offer" process? Does an offer need to state "we are going to condemn you" in order to be a threat of institution of judicial proceedings? When an agency has the *per se* ability to obtain the statutory delegation with a simple resolution or public service commission authorization, is that not enough?

Attempting to purchase properties by an entity, which has the statutorily-delegated authority to condemn and only needs to await the approval of the MPSC, renders the procedural requirements moot. This allows any condemnor to claim that it can make offers without appraisals and have a resolution to condemn as the starting point of the "threat" contemplated by the statute. This is counter-intuitive given the fact that the resolution to acquire property is premised upon the failure to make and/or arrive at a resolution by a negotiation.

**Activity**

If public agencies such as road commissions had the opportunity, they would acquire property without resolutions and without good faith offers. This is exactly the opposite of what public agencies have done over the years. Since initiation of the Act, public agencies have made good faith written offers, and only after the good faith offers are rejected, is road commission approval sought.

An example of the problem can best be illustrated by a recent set of offers in Monroe County by a utility seeking to acquire property. The utility brought in Oklahoma right-of-way agents who generally purchase oil and mineral rights in circumstances where there is

no eminent domain power to acquire. The right-of-way agents provided "statements of value" and entered into negotiations based on those statements of value.

However, once full appraisals were prepared, the "statements of value" amounts fell far short:

| | **Condemnor's "Statement of Value"** | **Condemnor's Own Appraisal** |
|---|---|---|
| Parcel A | $30,000.00 | $45,000.00 |
| Parcel B | $47,430.00 | $83,000.00 |
| Parcel C | $ 8,742.00 | $32,500.00 |

MCL 213.55 maintains no appraisal requirement. Rather, if one is prepared, it must be provided to the owners. What was troubling in the Monroe County situation was that some appraisals were already prepared at the time that the "statements of value" were provided to owners after appraised values for other properties at the much higher estimates had already been provided to their neighbors.

One might ask why an appraisal is not a requirement under the statute. The answer is relatively simple: the appraisal process can be expensive making it cost prohibitive for agencies to acquire for relatively minor takings. Examples are water and sewer line extensions in many communities.

A number of the cases listed above have been resolved in an amount far in excess of the condemnor appraisals, let alone the "statements of value." Other cases are still pending, even though the appraisals prepared by the condemning authority are far higher than its own statements of value. However, one has to wonder whether this process has provided fairness to owners who may not understand Michigan eminent domain procedure, their rights under the prevailing statutes, and whether the estimates of value have any

relationship to the just compensation owing. If one were to ask the Monroe County condemnor, the agency would simply state that it was dealing with a simple arm's-length transaction with individual owners. Yet, the condemnor recognized it had the ability to go to the MPSC for authority to acquire. Certainly, from the moment that the condemnor recognized that it would have the ability to go to the MPSC, the notion of arm's-length bargaining falls by the wayside.

## Remedy

If a remedy is necessary, there are a number of alternatives. One lesson taught from the *City of Detroit v Goodwill Community Chapel* cases is that the condemnor may not acquire for less than its own appraised value. In a situation such as Monroe, where the appraisals are so far in excess of the statement of value, one has to wonder whether the owners could set aside settlements as a violation of the statute. Such an action would require a clear and convincing presentation that the owners have been deprived of their Due Process to property.

Another possible resolution may be to amend the statute. Possibly, consideration should be given to requiring an appraisal as part of any negotiation process. Given that appraisals are required as part of any trial, simply requiring appraisals as part of the offer process probably would make sense. This may be too harsh a remedy because it may cost government too much money for *de minimus* acquisitions.

A third, and possibly the most reasonable way to resolve this problem, would be to provide some type of statutory notice as part of the offer, fully including a description of whether or not the offer is premised upon an appraised value and the basis for the appraised value and a further and complete delineation of the rights of the owner. This

procedural format, in which a notice is given to an owner, is already part of the Uniform Condemnation Procedures Act, in MCL 213.55(2), which requires the condemnor to include a copy of the section of the Act itself when seeking to obtain financial records from the owner prior to the initiation of a condemnation complaint.

This is a difficult balancing process. On one hand, the Act contemplates that something less than an appraisal may be presented as an offer. However, what is being presented is not a good faith offer accompanied by a statement of valuation, but a recognition that an appraisal is avoided with a simple "statement of value" which is a fraction of the condemning authority's subsequent recognition of fair market value when an appraisal is finally prepared. This offers a horrible predicament for owners who have no understanding of the process.

Counter-balancing this process is a recognition that many people simply accept the offers. One may think that the owners were simply under a sense of compulsion, but it may simply be that the owners had knowledge of what was being taken and were satisfied with the offers. In any event, to burden a condemning authority with an appraisal in the smallest of cases may create an undue increased expense. Counter-balancing the expense of the effort to obtain an appraisal is the underlying notion that just compensation must be paid to owners so that the owners are made whole.

The present process is one in which owners are at risk of facing an eminent domain proceeding without the full opportunity to understand their rights. Michigan courts have been consistent in their recognition that eminent domain is a harsh remedy and should be strictly construed against the condemnor. However, a procedure which allows the condemnor to avoid notification to the prospective condemnee of the potential rights

available is less than what our Constitution and statutory framework contemplate.

**Alan Ackerman is the managing partner of the Bloomfield Hills-based condemnation and eminent domain law firm Ackerman Ackerman & Dynkowski. Since the early 1940's, the firm has helped property owners collect hundreds of millions of dollars in fair compensation from settlements, mediation and jury verdicts related to property takings. Alan can be reached at aackerman@sbcglobal.net.**