CONDEMNATION LAW AND PROCEDURE - MICHIGAN STYLE

THE EVOLUTION OF EXPROPRIATION IN MICHIGAN

By

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The American experience in condemnation is one that is really 51 experiences. The concepts of condemnation vary from state to state, and each is distinct from the Federal procedure. Further, in each state the variations for different condemning authorities creates a different process for condemnation. This article will cover the Michigan framework.

The 1850 and 1908 Michigan Constitutions provided for a jury of freeholders to determine whether there was necessity for the taking and just compensation to be paid for the property. In this manner, the local court clerk would choose "proper" property owners to act as jury members.

The 1908 Constitution was replaced by the 1963 Constitution in Michigan. It should be noted that each state has its own constitution, allowing for a wide variation in the process and what is to be paid for as just compensation.

The 1908 Constitution provided a number of basic methods for condemnation. Because jurors were the finders of necessity and just compensation (damages) under the 1908 Constitution, a judge was not even present during the proceedings. This allowed the condemning authority the opportunity to condemn large areas at one time with one attorney acting on behalf of the condemning authority and numerous attorneys representing different owners. This also allowed for too warm a relationship between

the condemnor's attorney and the jury. The hearings were informal at best, often times raucous; all generally to the benefit of the condemning authority.

The public condemning agencies paid just compensation through the award of freeholder juries. Generally, the Probate Court Judge was responsible for selecting the panel of jurors.

Under only the Public Utility Condemnation Act, the owners' attorneys were paid on an hourly fee for any challenges to necessity or compensation.

A third method used under the 1908 Constitution involved the appointment by the circuit court of commissioners for highway condemnations. Frequently, the three commissioners would be A, B, and C, with an out-of-town attorney representing the State of Michigan Highway Department and a local attorney D representing the owner. In the next hearing, D and A would change places. The end result of this was that in certain counties nearly every farm in the path of a proposed expressway maintained a highest and best use as a shopping center.

In 1961, the Michigan Supreme Court promulgated a court rule which was subsequently incorporated in the 1963 Michigan Constitution requiring a complete court record with a judge at all proceedings. Rather than having no evidentiary rules as previously existed under the 1908 constitutional framework, constitutional proceedings would be the same as in any other type of civil proceeding. This changed the system and specialization was created in the area of condemnation law because of the difficulty in understanding and analyzing the concepts underlying the intricacies of the valuation process. In Detroit and other metropolitan areas, condemnation has been elevated as a highly specialized practice of law. This

is true both with respect to the state and federal procedure. The basic federal procedure allows the appointment by the Federal Court Judge of a three member commission or a jury trial of twelve jurors.

Condemnation is considered to be a constitutional remedy which may occur only by specific legislation designating the purpose and procedure for condemnation. Because it is considered a "harsh remedy" under the American judicial system, the courts have consistently required strict construction of condemnation actions. The delegation is to be strictly complied with and the procedures precedent to a condemnation action are strictly construed against the condemning authority. Whenever there is an ambiguity in any condemnation activity, the ambiguity has always been strictly construed against the condemnor.

Prior to Act 87 of 1980 (MCL 213.52 et. seq.), Michigan had 37 separate acts, each with its own procedure and substantive law, granting authority to different agencies to condemn. The acts included both substantiative determinations such as the definition of a parcel, damages for partial takings and inverse (reverse) condemnation, and a myriad of other dispositive clauses, each which may have created a separate result in a similar factual setting.

Attached is a copy of Act 87 of 1980, MCLA 213.51 et seq in its original form. (Attachment A). This act was intended to be a uniform condemnation procedural act to apply to all condemnation activity by any agency or utility in the State of Michigan. The authority to condemn continues to be derived from the act delegating the condemning agency the authority to condemn. Act 87 prescribes a specific procedure used to condemn. Although the act is called procedural only, many parts of the act either created a substantive result or codified existing precedent. Since the date of enactment there have been

a number of changes in the statute, particularly in Section 4, MCLA 213.54 as it relates to the environmental contamination consideration and entry prior to the filing of an action. (Attachment B).

Act 87 maintains the constitutional underpinning of "property" being taken requiring compensation as part of the State and Federal Constitutions. An example of the codification in the act is the definition of an "owner" as contained in Section 1(e). Any party with any interest in the property becomes an "owner" and must receive service and have his interest condemned. This fulfills the previous notion that a property interest includes tenancies and lienholders as well as fee owners of property. Further, the definition of property in Section 1(h) includes tangible and intangible property whether of a real, personal or mixed nature.

The condemning authority must specifically state that it desires the mineral rights to the property as part of the taking if it desires such mineral rights. Section 3, MCL 213.53.

Section 5 of Act 87 prescribes a very specific procedure to condemn property. First, the condemning authority must obtain an appraisal. Then it must make an offer of not less than the appraised value. Upon receipt of the offer, the owner then may have the opportunity to "review" the appraisal, generally defined as having a copy of the appraisal in possession to review the appraisal, and then be allowed to negotiate. MCL 213.55.

The definition of a "good-faith negotiation" is open to question. However, there is no dispute that nothing less than the appraised value may be included as part of the offer. If the parties do not agree, only then may the agency file a complaint to acquire the property. MCL 213.55.

As part of the complaint, the agency must specifically describe what it is taking, the purpose that the property is being taken for, the name of all owners, and a declaration by a member of the condemning agency declaring that the property is within the county in which the condemnation action has been filed. Finally, the sum of not less than the good-faith written offer must be deposited with a proper trust company, title company, or State-authorized treasurer. Section 5, MCL 213.55.

The owner has 21 days, being the time allowed to respond to complaints, to file a motion to challenge the condemnation. Otherwise, the owner is permanently precluded from challenging the condemnation. MCL 213.56.

Especially interesting is Section 4(1), which maintains that if the taking of part of the parcel destroys the "practical value or utility" of the remainder of that parcel, the agency shall acquire the fee to the whole of the particular parcel of land. MCL 213.54(2). This is premised upon the American desire to limit condemning authorities from acquiring more than they need for a project itself. Unless a statute specifically authorizes an agency to take more than it needs in a partial taking setting, the agency's actions are limited to only the portion of the parcel needed.

If there has not been a challenge to necessity or if a challenge is made and denied, possession will then be granted to the agency. MCL 213.50. Although possession is discretionary with the Court, generally possession is granted within 90 days. The condemning authorities normally allow owners to remain in possession for 90 days because the Uniform Relocation Act prescribing standards and policies for condemnations in which United States funds are used, requires a 90 day notice to owners. 42 USCA §4651.

As set forth above, under the prior city condemnation statutes, cities would frequently condemn large areas at one trial and present their case in front of the same jury as to each of the individual parcels. Because of the abuses which occurred, Section 12 (2) provides for separate trials with respect to each parcel unless good cause is shown to the contrary. MCL 213.62(2).

Under previous condemnation acts, as the jury was the arbiter of necessity and just compensation, any dispute involving title or ownership between the parties had to be tried in a separate apportionment action. Section 13 of Act 87 provides that the Court shall apportion or divide, the award after the jury renders its verdict. MCL 213.63.

For a lengthy period of time, the normal judgment statute allowed for a 6% interest rate. Because this was so much lower than the existing market rates and condemnation values and losses are based upon a market economy, Act 87 prescribes that the income tax deficiency rate be applied from the date of surrender of possession. Section 15, MCL 213.65. This has been lower than the civil judgment rate in many instances since the passage of the variable rate. However, the interest has been far lower than the 6%, and Michigan has changed the 6% rule for accident cases and all other cases to a Treasury Bill rate.

Typically, in civil cases, attorney fees are not paid unless specifically prescribed by statute. Under Act 87, Section 16 (3) provides a standard by which an attorney will receive up to one-third of the increase from the good-faith written offer as reimbursement. This is based upon the traditional fee of one-third of the increase being the standard attorney fee in condemnation cases. Generally, the attorney fees of one-third are totally reimbursed to the owners by the government. The condemning agencies recognize that owners should be thoroughly recompensed, and if the offer was less than the final resolution, the attorney

fee is to be reimbursed to the owner. Costs and expert witness fees are also reimbursed to the owners. MCL 213.66. Condemning authorities occasionally contest the costs being charged by expert witnesses. Generally, complete reimbursement is obtained. Costs and expert witness fees are paid without regard to the success or failure of the condemnation action. Section 16 (1), (4).

Once title vests in the government, the action may not be discontinued. Section 17, MCL 213.67. If the condemning authority discontinues the action before title vests, the agency, as a condition of discontinuance, shall pay the actual expenses, reasonable attorney fees, and actual damages to all of the parties effected by the discontinuance, as determined by the court. Section 17, MCL 213.67. The Michigan rule that bars discontinuance is the exception to the general rule allowing most governmental agencies to abandon a case at any point in time. Some jurisdictions allow for payment of attorney fees and costs while many jurisdictions bar a required payment to the owners even if the case is voluntarily dismissed by the condemning authority long after the filing.

In order to allow governmental attorneys to act without the constraints of the public decision-making process, Section 19 provides that the parties may agree to methodologies and procedures to determine compensation. MCL 213.69. This procedure was initiated because government attorneys frequently wanted to waive juries but could not because the statute delegating the condemnation power to agencies frequently required a jury to determine compensation. Section 19, MCL 213.69.

The determination of "benefits" sets forth a procedure for consideration of an "enhancement". Section 23, MCL 213.73. If the agency claims enhancement, upon demand of the owner before trial, the court may require the agency to acquire that portion of the remainder of the tract which the agency claims

to be enhanced. This provision will not apply if the agency withdraws its claim of enhancement benefits before trial. Section 23(3), MCL 213.73.

Section 24 contains a specific requirement that the condemning agency shall not take any action which will harm the owner of an opportunity to assert the constitutional right to be paid just compensation for takings of property. MCL 213.74.

Michigan Standard Jury Instructions

Except for the introductory instruction, SJI 2d 90.01, the Michigan Standard Jury Instructions are given to the jury after the presentation of the case. The instructions are, for the most part, what we used to call "Black Letter Law" in law school. The instructions set forth the applicability of issues of potential for rezoning, refusals to rezone, and standards for determination of just compensation in inverse (reverse) condemnation actions. The instructions describe the standard for highest and best use, fair market value, and special purpose property. The instructions also illustrate the Michigan application of the minority rules in the use of the assessed valuation in the condemnation procedure as well as the use of a possibility, rather than the probability, of rezoning. The rule of valuing partial takings as a before/after process is now the majority rule. Attachment C of the seminar materials contains a copy of the Michigan Standard Condemnation Jury Instructions SJI 2d 90.01 through SJI 2d 90.24. (Tab C).

Changes in Case Law and Jury Instructions

Introduction

It has been 17 long years since the speaker last addressed the Ontario Expropriation Association at a seminar. It is often said that the law is a living, breathing thing. Since 1993, the Michigan

Expropriation (Eminent Domain) Law has evolved, in some instances for the better, in some instances for the worse. This program will address the significant legal changes which have evolved in what seems like a lengthy period of time. However, in terms of the law, the period is but a fraction of overall jurisprudence evolution.

Public Use

The 1993 Ontario Expropriation Association seminar outline contained very little discussion of public use challenges to the taking. At that time, the standard was straightforward; a delegation of authority to condemn for a particular purpose enabled the taking. In the 1970's, economic development acts provided the condemning authority the legal basis to condemn for economic benefits to the community. The decision of *Poletown Community Council v City of Detroit*, 410 Mich 616 (1981), in which the Michigan Supreme Court, with a blistering dissent, maintained that the taking of private property by the City of Detroit for the establishment of a General Motors Cadillac assembly plant was a valid public use. Id at 634. The Michigan Supreme Court majority held that the additional income to the community was a public purpose. Id at 634-635. The 1981 *Poletown* decision, though maligned, galvanized the notion that economic development, enhancement of the tax base and the creation of jobs were valid justification for takings and was heavily cited throughout the United States in subsequent State Court decisions.

In 2005, the Michigan Supreme Court reversed the *Poletown* rule, finding that the end use was required to be public. (*County of Wayne v Hathcock,* 471 Mich 445 (2004)). *Hathcock* does not limit condemnations for utilities, because they are arguably regulated by the local public service commission or the national Federal Energy Regulatory Commission and have historically been referred to as quasi-public

uses. When the end user is a regulated industry, such as a utility, railroad or toll authority, the user is ostensibly regulated in its profit. The regulated private entity must provide services to the public in general. The reality of the 1980 situation was that General Motors' publicly perceived purpose was to supply jobs and provide substantial taxes to the community. By 2005, the general public and courts were fed up with a situation where, rather than increasing taxes and creating jobs, the economic development projects throughout the country were premised upon the mayor's brother, first cousin or best friend receiving favorable contracts premised upon government subsidization and eminent domain activity to expropriate land which could not otherwise be acquired in the normal market process. The abuses to the eminent domain process were the underlying basis for the skepticism that resulted in the reversal of the *Poletown* decision.

Two years after *Hathcock*, the *Kelo*[1] decision maintained that the question of public use was one within the police power ambit; i.e., the powers reserved for the state in order to protect the public health, safety and welfare under the Tenth Amendment of the Constitution, were decisions to be made by each individual State. The United States Supreme Court specifically noted the Michigan *Hathcock* decision in a footnote[2], in ruling that States could limit acquisition activity.

Michigan Civil Jury Instructions

The Standard Jury Instruction Committee which scribes jury instructions consists of a blue ribbon group of lawyers attempting to provide standards of law so that instructions given at the end of the trial are

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[1] *Kelo v City of New London*, 545 US 469 (2005)

[2] *Kelo v City of New London*, 545 US 469 (2005) Footnote 22 (2005)

relatively certain of being affirmed. If the instructions are accurate reflections of the law, the issue for appellate review is moot.

Attachment D contains the prior jury instructions of 90.20 and 92.21, as well as the new instructions. Under the prior instructions, any item used in the operation of the business was considered to be a fixture for purposes of payment. (Old SJI2d 90.20). Fixtures would be paid for at either value in place or the detach and reattach cost, at the election of the property owner. Since that time, Michigan, as well as a number of other jurisdictions, had reviewed this munificent approach to the payment of Just Compensation for fixtures and equipment. As an example, the problem with valuation under the prior standard, the chair you are sitting on in this room may be $200 new and only 10% used. Under the valuation system used for equipment, the chair would be valued at $180, even though in the auction market, or open market, it would only sell for $20. Because of the opportunity to make profit from equipment being sold "in place", very small operations suddenly had an unbelievable amount of equipment. The "dumping" was an obvious misinterpretation of the notion that just compensation is to place one in the same position as if the condemnation had not occurred.

The basis for the change of fixture law was the challenge to the jury instruction relied upon by an appellate panel. *Wayne County v Britton*, 563 NW2d 674 (1997). The Michigan Supreme Court simply determined the prior jury instruction was incorrect and modifies the law to conform to the traditional fixture standard:

> "1. The item is attached *(or constructively attached) to the land or to a building or structure attached to the land.

*('Constructively attached' means that an item is a fixture even though it is not physically attached if it is a part of something else that is physically attached, and when the item, if removed, either could not generally be used elsewhere or would leave the part remaining unfit for use.)

2. The item is a necessary or useful part, considering the purpose for which the land, building, or structure is used.

3. The surrounding circumstances indicate that the owner intended to make the attachment *(or consecutive attachment) permanent.

**(Improvements made by a tenant are to be valued on the basis of their useful life without regard to the term of the lease.)"

The prior definition was so broad, it allowed for the owner to be arguably overpaid. The Michigan Supreme Court review of the process resulted in an abandonment of the prior instruction and a change in the standard of compensation.

Business Claims

The concept of payment for business losses and lost profits has faced a difficult reception for owners being expropriated in the United States. Few jurisdictions provide any type just compensation for lost income. In the rare instances where payment for a loss is provided, payment is limited to the delegation under a specific statute. For example, in Florida, tenants of partially taken businesses that operated at the location in excess of five years prior to the taking, may receive payment for their lost profits.

Many jurisdictions do allow payments for the destruction of going concern value under specific limited circumstances. Generally, these circumstances are where there is a special purpose type property, either licensed or in some fashion "grandfathered" which cannot be relocated. Common examples of un-

relocatable businesses are scrap yards and urban bars. In most communities, a liquor license may not be moved within 500 yards of a school or church. This limitation in many urban communities serves as a total impediment to the relocation of the liquor license attached to a specific location. In like fashion, scrap yards require special licensing and special use permits in heavy industrial zoned areas. These permits are difficult to obtain. If relocation is impossible, payment for the going concern may be required.

As for the business interruption payment, the Uniform Relocation Assistance Act provides some minor support, allowing for payments of up to $20,000 for the lost business or relocation of the personal property. When a substantial business is involved, the inadequacy of payments is apparent.

In the United States, business losses have had severe limitations because of the judicial decisions and the refusal of legislatures to attempt to protect those expropriated. The rejection of payments for business damages is in stark contrast to the willingness to pay for losses to remainder properties in partial takings. The courts are extremely liberal in construing the parcel in order to maximize the just compensation.

Alan T. Ackerman is a member of the Michigan State Bar Association Condemnation Committee and was the Chairman of the Committee from 1980-1981. From 1987 through 1990 Mr. Ackerman was the Chairman of the American Bar Association Condemnation Law Committee of the Real Property Section. His practice is limited to condemnation law.

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Act No. 87
Public Acts of 1980
Approved by Governor
April 8, 1980

STATE OF MICHIGAN
80TH LEGISLATURE
REGULAR SESSION OF 1980

Introduced by Reps. Wilson, Virgil C. Smith, Fessler, Kirksey, Hertel, Cushingberry, Joe Young, Jr., Bullard, Cropsey, Nash and Andrews

ENROLLED HOUSE BILL No. 4652

AN ACT to provide procedures for the condemnation, acquisition, or exercise of eminent domain of real or personal property by public agencies or private agencies; to provide for damages; to prescribe remedies; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

Sec. 1. As used in this act:

(a) "Acquire" or "take" means to secure transfer of ownership of property to an agency by involuntary expropriation.

(b) "Acquisition" or "taking" means the transfer of ownership of property to an agency by involuntary expropriation.

(c) "Agency" means a public agency or private agency.

(d) "Constructive taking" or "de facto taking" means conduct, other than regularly established judicial proceedings, sufficient to constitute a taking of property within the meaning of section 2 of article 10 of the state constitution of 1963.

(e) "Owner" means a person, fiduciary, partnership, association, corporation, or a governmental unit or agency having an estate, title, or interest, including beneficial, possessory, and security interest, in a property sought to be condemned.

(f) "Parcel" means an identifiable unit of land, whether physically contiguous or not, having substantially common beneficial ownership, all or part of which is being acquired, and treated as separate for valuation purposes.

(g) "Private agency" means a person, partnership, association, corporation, or entity, other than a public agency, authorized by law to condemn property.

(h) "Property" means land, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and property rights whether real, personal, or mixed, including fluid mineral and gas rights.

(i) "Public agency" means a governmental unit, officer, or subdivision authorized by law to condemn property.

Sec. 2. (1) This act provides standards for the acquisition of property by an agency, the conduct of condemnation actions, and the determination of just compensation. It does not confer the power of eminent domain, and does not prescribe or restrict the purposes for which or the persons by whom that power may be exercised. All laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act.

(2) If property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action for that purpose. An agency shall not intentionally make it necessary for an owner of property to commence an action, including an action for constructive taking or de facto taking, to prove the fact of the taking of the property.

(3) If a private agency is required by law to secure a certificate of public necessity from the public service commission or other public agency before it may acquire property, the private agency shall not institute judicial proceedings to acquire the property until it has secured the required certificate.

Sec. 3. Fluid mineral and gas rights shall be considered excluded from an instrument by which an agency acquires an interest in land unless specifically included in the instrument. The exercise of the fluid mineral and gas rights, as permitted by law, shall not interfere with the use of the property acquired for a public purpose.

Sec. 4. (1) If the acquisition of a portion of a particular parcel of land actually needed by an agency would destroy the practical value or utility of the remainder of that particular parcel, the agency shall acquire the fee to the whole of the particular parcel of land. The question as to whether the practical value or utility of the remainder of the parcel of land is in fact destroyed shall be determined by the court or jury and incorporated in its verdict.

(2) An agency may enter upon land before filing an action for the purpose of making a survey, appraisal, measurement, or for the purpose of photography, upon reasonable notice to the owner and at reasonable hours. An entry made pursuant to this subsection shall not be construed as a taking. The owner or his or her representative shall be given a reasonable opportunity to accompany the appraiser during the inspection of the property. The agency shall make restitution for actual damage resulting from the entry which may be recovered by special motion before the court or by separate action if an action for condemnation has not been filed.

Sec. 5. (1) Before initiating negotiations for the purchase of property, the agency shall establish an amount which it believes to be just compensation for the property and promptly shall submit to the owner a good faith offer to acquire the property for the full amount so established. The amount shall not be less than the agency's appraisal of just compensation for the property. The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property. If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located. If a parcel of property is situated in 2 or more counties and an owner resides in 1 of the counties the complaint shall be filed in the county in which the owner is a resident. If a parcel of property is situated in 2 or more counties and an owner does not reside in 1 of the counties, the complaint shall be filed in any of the counties in which the property is situated. The complaint shall ask that the court ascertain and determine just compensation to be made for the acquisition of the described property.

(2) In addition to other allegations required or permitted by law, the complaint shall contain or have annexed to it all of the following:

(a) A plan showing the property to be taken.

(b) A statement of purpose for which the property is being acquired, and a request for other relief to which the agency is entitled by law.

(c) The name of each known owner of the property being taken.

(d) A statement setting forth the time within which motions for review under section 6 shall be filed; the amount which will be awarded and the persons to whom the amount will be paid in the event of a default; and the deposit and escrow arrangements made pursuant to subsection (3).

(e) A declaration signed by an authorized official of the agency declaring that the property is being taken by the agency. The declaration shall be recorded with the register of deeds of each county within which the property is situated. The declaration shall include:

(i) A description of the property to be acquired sufficient for its identification and the name of each known owner.

(ii) A statement of the estate or interest in the property being taken. Fluid mineral and gas rights and rights of access to and over the highway are considered excluded from the rights acquired unless the rights are specifically included.

(iii) A statement of the sum of money estimated by the agency to be just compensation for each parcel of property being acquired.

(3) At the time the complaint is filed, the agency shall deposit the amount estimated to be just compensation with a bank, trust company, or title company in the business of handling real estate escrows, or with the state treasurer, municipal treasurer, or county treasurer. The deposit shall be set aside and held for the benefit of the owners, to be disbursed upon order of the court as provided in section 8.

Sec. 6. (1) Within the time prescribed to responsively plead after service of a complaint, an owner of the property desiring to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint may file a motion in the pending action asking that the necessity be reviewed. The hearing shall be held within 30 days after the filing of the motion.

(2) With respect to an acquisition by a public agency, the determination of public necessity by that agency shall be binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.

(3) With respect to an acquisition by a private agency, the court at the hearing shall determine the public necessity of the acquisition of the particular parcel. The granting of a permanent or temporary certificate by the public service commission shall constitute a prima facie case that the project, in furtherance of which the particular parcel would be acquired, is required by the public convenience and necessity.

(4) The court shall render a decision within 60 days after the date on which the hearing is first scheduled.

(5) The court's determination of a motion to review necessity shall be considered as a final judgment.

(6) Notwithstanding section 309 of Act No. 236 of the Public Acts of 1961, being section 600.309 of the Michigan Compiled Laws, an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable to the court of appeals only by leave of that court pursuant to the general court rules. In the absence of appeal of the order timely filed, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation.

(7) If a motion to review necessity is not filed as provided in this section, necessity shall be conclusively presumed to exist and the right to have necessity reviewed or futher considered is waived.

Sec. 7. If a motion to review necessity is not filed within the time specified in section 6, the title to the property described in the petition shall vest in the agency as of the date on which the complaint was filed. The right to just compensation shall then vest in the persons entitled to the compensation and be secured as provided in this act. Title to the property shall also vest in the agency, as provided in this act, if the motion to review necessity is denied after a hearing and after any further right to appeal has terminated.

Sec. 8. If a motion for review as provided in section 6 is not filed or is denied and the right to appeal has terminated or if interim possession is granted, the court shall order the escrowee to pay the money deposited pursuant to section 5, for or on account of the just compensation which may be awarded pursuant to section 13. Upon motion of any party, the court shall apportion the estimated compensation among the claimants to the compensation.

Sec. 9. (1) Upon filing of a complaint and making the deposit as provided in section 5 and after opportunity is given for a person to file a motion for review under section 6 or, if motion for review is filed, upon final determination of the motion, the court shall fix the time and terms for surrender of possession of the property to the agency and enforce surrender by appropriate order or other process. The court also may require surrender of possession of the property after the motion for review filed under section 6 has been heard, determined and denied by the circuit court, but before a final determination on appeal, if the agency demonstrates a reasonable need.

(2) If interim possession is granted to a private agency, the court, upon motion of the owner, may order the private agency to file an indemnity bond in an amount determined by the court as necessary to adequately secure just compensation to the owner for the property taken.

(3) If an order granting interim possession is entered, an appeal from the order or any other part of the proceedings shall not act as a stay of the possession order. An agency shall be liable for damages caused by the possession if its right to possession is denied by the trial court or on appeal.

(4) Repayment of all sums advanced shall be a condition precedent to entry of a final order setting aside a determination of public necessity.

Sec. 10. Upon filing the complaint, the court shall enter an order fixing a day for a hearing which shall not be less than 21 days after the complaint is served. The order shall recite or have annexed to the order the names of the persons mentioned in the complaint as owners, reasonably describe the property to be taken, state the purpose of the complaint, and order the persons to appear before the court at the time fixed in the order for the hearing on the complaint.

Sec. 11. On the date of the hearing the court shall set a date certain for the pretrial as to parcels not previously disposed of.

Sec. 12. (1) A plaintiff or defendant may demand a trial by jury as to the issue of just compensation pursuant to applicable law and court rules. The jury shall consist of 6 qualified electors selected pursuant to chapter 13 of Act No. 236 of the Public Acts of 1961, as amended, being sections 600.1301 to 600.1376 of the Michigan Compiled Laws, and shall be governed by court rules applicable to juries in civil cases in circuit court.

(2) Unless there is good cause shown to the contrary, there shall be a separate trial as to just compensation with respect to each parcel.

Sec. 13. The jury or the court shall award in its verdict just compensation for each parcel. After awarding the verdict, on request of any party, the court shall divide the award among the respective parties in interest, whether the interest is that of mortgagee, lessee, lienor, or otherwise, in accordance with proper evidence submitted by the parties in interest.

Sec. 14. To assist the jury in arriving at its verdict the court may allow the jury when it retires to take with it notes and any map, plan, or other exhibit admitted in the case as an exhibit.

Sec. 15. The court shall award interest on the judgment amount from the date of the filing of the complaint to the date of payment of the amount, or any part of the amount. Interest shall be computed at the interest rate applicable to a federal income tax deficiency or penalty. However, an owner remaining in possession after the date of filing shall be considered to have waived the interest for the period of the possession. If it is determined that a de facto acquisition occurred at a date earlier than the date of filing, interest awarded pursuant to this section shall be calculated from the earlier date.

Sec. 16. (1) A witness, either ordinary or expert, in a proceeding under this act shall receive from the agency the reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial.

(2) If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition.

(3) If the amount finally determined to be just compensation for the property acquired exceeds the amount of the written offer as defined in section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney's fees shall be determined by the court.

(4) Expert witness fees provided for in subsection (1) shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial. The agency's liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned.

Sec. 17. The agency shall not discontinue the action after the granting of possession or vesting of title to the property taken. In case of a discontinuance, the agency, as a condition of discontinuance, shall pay the actual expenses, reasonable attorney fees, and actual damages to all the parties affected by the discontinuance as determined by the court.

Sec. 18. (1) If any agency acquires property without commencement of an action or abandons its efforts to acquire property after making the jurisdictional written offer required by section 5 to the owners of the property and if the owners of the property reasonably relied upon the agency's action, the owners shall be reimbursed by the agency for the reasonable expenses incurred in evaluating the agency's offer, in preparing for trial, or in negotiating a settlement, if those expenses would have been taxable as costs under section 16. For the purpose of this section the jurisdictional written offer shall include only written offers made under threat of institution of judicial proceedings to acquire the property.

MCLA 213.66

(2) The rights created by this section may be enforced in a court having jurisdiction over claims for damages against the agency, or in a court in which an action under this act for the acquisition of the property could have been filed.

(3) The claim for reimbursement of expenses shall be filed within 1 year after the date on which the property is acquired or after the date on which notice of abandonment of the intention to acquire the property is mailed to the owner.

Sec. 19. At any stage of the proceedings, the agency and the owner may agree upon all or part of the compensation, or upon a method for determining all or a part of the compensation, and may proceed to have those parts not agreed upon determined as provided in this act. The agency may make payment of a part of the compensation agreed upon, or enter into a contract to pay in the future based upon an agreed method of determining the compensation.

Sec. 20. A change in the fair market value before the date of the filing of the complaint which the agency or the owner establishes was substantially due to the general knowledge of the imminence of the acquiring by the agency, other than that due to physical deterioration of the property within the reasonable control of the owner, shall be disregarded in determining fair market value. The property shall be valued in all cases as though the acquisition had not been contemplated. The date of acquiring and of valuation in a proceeding pursuant to this act shall be the date of filing unless the parties agree to a different date, or unless a different date is determined by a counterclaim filed pursuant to section 21. The value of each parcel, and of a part of a parcel remaining after the acquisition of a part of the parcel, shall be determined with respect to the condition of the property and the state of the market on the date of valuation.

Sec. 21. A defendant may assert as a counterclaim, any claim for damages based on conduct by an agency which constitutes a constructive or de facto taking of property.

Sec. 22. If property is acquired by an agency, the agency may lease, sell, or convey any portion not needed, on whatever terms the agency considers proper. A record of the leases and sales, showing the appraised value, the sale price, and other pertinent information, shall be kept in the office of the agency.

Sec. 23. (1) Enhancement in value of the remainder of a parcel, by laying out, altering, widening, or other types of improvements; by changing the scope or location of the improvement; or by either action in combination with discontinuing an improvement, shall be considered in determining compensation for the taking.

(2) When enhancement in value is to be considered in determining compensation, the agency shall set forth in the complaint the fact that enhancement benefits are claimed and describe the construction proposed to be made which will create the enhancement. If the construction is not completed in substantial compliance with the plan upon which the agency based its claim of enhancement benefits, the owner may reopen the question of compensation within 1 year after the termination of construction. If the construction is not in substantial compliance, the owner is entitled to the difference between the value of the property as affected by the actual construction and the value of the property as it would have been, had construction been completed according to plan. The owner shall not recover more compensation than would have been payable if there was not a claim of enhancement benefits.

(3) Upon demand of the owner before trial, the court may require the agency to acquire that portion of the remainder of the tract which the agency claims to be enhanced if the agency claims enhancement. This subsection shall not apply if the agency withdraws its claim of enhancement benefits before trial.

(4) The agency has the burden of proof with respect to the existence of enhancement benefits.

Sec. 24. In order to compel an agreement on the price to be paid for the property, an agency may not advance the time of condemnation, defer negotiations or condemnation, defer the deposit of funds for the use of the owner, nor take any other action coercive in nature.

Sec. 25. (1) Except as otherwise provided by subsections (2) and (3), effective May 1, 1980, all actions for the acquisition of property by an agency under the power of eminent domain shall be commenced pursuant to and be governed by this act.

(2) Actions for the acquisition of property by an agency under Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41 of the Michigan Compiled Laws, Act No. 238 of the Public Acts of 1923, as amended, being sections 456.251 to 456.254 of the Michigan Compiled Laws, and Act No. 295 of the Public Acts of 1966, as amended, being sections 213.361 to 213.391 of the Michigan Compiled Laws, may be commenced pursuant to and be governed by this act, effective May 1, 1980.

(3) [All actions for the acquisition of property by an agency under Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41 of the Michigan Compiled Laws, Act No. 238 of the Public Acts of 1923, as amended, being sections 456.251 to 486.254 of the Michigan Compiled Laws, and Act No. 295 of the Public Acts of 1966, as amended, being sections 213.361 to 213.391 of the Michigan Compiled Laws] shall be commenced pursuant to and be governed by this act, effective April 1, 1983.

Sec. 26. The following acts and parts of acts are repealed, effective April 1, 1983:

(a) Sections 6 to 21 of Act No. 149 of the Public Acts of 1911, being sections 213.26 to 213.41 of the Compiled Laws of 1970.

(b) Sections 6 to 30 of Act No. 295 of the Public Acts of 1966, as amended, being sections 213.366 to 213.390 of the Compiled Laws of 1970.

Sec. 27. Sections 2a to 2j of Act No. 238 of the Public Acts of 1923, being sections 486.252a to 486.252j of the Compiled Laws of 1970, are repealed effective April 1, 1985.

This act is ordered to take immediate effect.

T. Thos. Thatcher

Clerk of the House of Representatives.

William C. Landon

Secretary of the Senate.

Approved .....

.....

Governor.

EXHIBIT B

THE UNIFORM CONDEMNATION PROCEDURES ACT (EXCERPT)
Act 87 of 1980

213.54 Payment of just compensation for property if practical value or utility of remainder destroyed; zoning variance; entry upon property; purpose; notice; restitution for actual damages; "actual damage" defined; civil action for order permitting entry; contents of complaint; granting limited license for entry; terms; manner of entry under subsection (3); "environmental inspection" defined.

Sec. 4.

(1) If the acquisition of a portion of a parcel of property actually needed by an agency would destroy the practical value or utility of the remainder of that parcel, the agency shall pay just compensation for the whole parcel. The agency may elect whether to receive title and possession of the remainder of the parcel. The question as to whether the practical value or utility of the remainder of the parcel of property is in fact destroyed shall be determined by the court or jury and incorporated in its verdict.

(2) If the acquisition of a portion of a parcel of property actually needed by an agency would leave the remainder of the parcel in nonconformity with a zoning ordinance, the agency, before or after acquisition, may apply for a zoning variance for the remainder of the parcel. In determining whether to grant the zoning variance, the governmental entity having jurisdiction to grant the variance shall consider the potential benefits of the public use for which the property would be acquired, in addition to those criteria applicable under the relevant zoning statute, ordinance, or regulation. The agency must actually acquire the portion of the parcel of property for the proposed public use for the zoning variance to become effective for the remainder. If a variance is granted under this subsection, the property shall be considered by the governmental entity to be in conformity with the zoning ordinance for all future uses with respect to the nonconformity for which that variance was granted. However, if the property was also nonconforming for other reasons, the grant of that variance has no effect on the status of those other preexisting nonconformities. An owner shall not increase the nonconformity for which a variance is granted under this section without the consent of the governmental entity. An agency has the same right to appeal action on a zoning variance as would a property owner seeking a zoning variance. This section does not deprive a governmental entity of its discretion to grant or deny a variance.

(3) An agency or an agent or employee of an agency may enter upon property before filing an action for the purpose of making surveys, measurements, examinations, tests, soundings, and borings; taking photographs or samplings; appraising the property; conducting an environmental inspection; conducting archaeological studies pursuant to section 106 of title I of the national historic preservation act, Public Law 89-665, 16 U.S.C. 470f; or determining whether the property is suitable to take for public purposes. The entry may be made upon reasonable notice to the owner and at reasonable hours. An entry made pursuant to this subsection shall not be construed as a taking. The owner or his or her representative shall be given a reasonable opportunity to accompany the agency's agent or employee during the entry upon the property. The agency shall make restitution for actual damage resulting from the entry, which may be recovered by special motion before the court or by separate action if an action for condemnation has not been filed. The term "actual damage" as used in this subsection does not include, and an agency shall not make restitution for, response activity, as defined in section 20101 of part 201 (environmental remediation) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.20101 of the Michigan Compiled Laws, or diminution in the value or utility of a parcel that is caused by the discovery of information as the result of a survey, an appraisal, a measurement, photography, or an environmental inspection made pursuant to this section.

(4) If reasonable efforts to enter under subsection (3) have been obstructed or denied, the agency may commence a civil action in the circuit court in the county in which the property or any part of the property is located for an order permitting entry. The complaint shall state the facts making the entry necessary, the date on which entry is sought, and the duration and the method proposed for protecting the defendant against damage. The court may grant a limited license for entry upon such terms as justice and equity require, including the following:

(a) A description of the purpose of the entry.

(b) The scope of activities that are permitted.

(c) The terms and conditions of the entry with respect to the time, place, and manner of the entry.

(5) An entry made under subsection (3) or (4) shall be made in a manner that minimizes any damage to the property and any hardship, burden, or damage to a person in lawful possession of the property.

(6) As used in this section, "environmental inspection" means the testing or inspection including the taking of samples of the soil, groundwater, structures, or other materials or substances in, on, or under the property for the purpose of determining whether chemical, bacteriological, radioactive, or other environmental contamination exists and, if it exists, the nature and extent of the contamination.

History: 1980, Act 87, Imd. Eff. Apr. 8, 1980 ;-- Am. 1988, Act 189, Eff. July 1, 1988 ;-- Am. 1996, Act 58, Imd. Eff. Feb. 26, 1996 ;-- Am. 1996, Act 474, Imd. Eff. Dec. 26, 1996

EXHIBIT C

Chapter 90: Condemnation

Introductory Directions to the Court

The following are standard jury instructions for cases involving the taking of private property by government agencies or utility companies. The taking can occur either (1) through formal action instituted by the condemning authority (de jure) or (2) by extrajudicial conduct on the part of the condemning authority which is inimical to an owner's property interests to such an extreme degree as to constitute a constitutional de facto taking giving rise to an inverse condemnation action. It should be noted at the outset that all eminent domain cases, except inverse condemnation cases, are commenced pursuant to a particular enabling statute which may have some bearing on the jury instructions to be given.

These standard instructions and any supplementary instructions should be preceded by the applicable standard instructions dealing with credibility (M Civ JI 4.01–4.12) and the usual cautionary instructions (M Civ JI 3.01–3.15).

These jury instructions do not purport to cover all situations which may occur in an eminent domain case. There are many issues which do not arise with sufficient frequency to warrant inclusion in a set of standard jury instructions, yet are important or even crucial in those few cases in which they do arise. In addition, eminent domain is a rapidly changing area in which new issues may arise which are not covered by these jury instructions. In either case it is appropriate for additional jury instructions to be given by the trial judge. Some of the issues which arise infrequently and are therefore not covered by these jury instructions are listed below with some important cases. This list does not purport to be exhaustive.

Cost to Cure:

In re Widening of Bagley Avenue, 248 Mich 1; 226 NW 688 (1929)

Detroit v Loula, 227 Mich 189; 198 NW 837 (1924)

Necessity:

Grand Rapids Board of Education v Baczewski, 340 Mich 265; 65 NW2d 810 (1954)

In re Huron-Clinton Metropolitan Authority's Petition, 306 Mich 373; 10 NW2d 920 (1943)

Lansing v Jury Rowe Realty Co, 59 Mich App 316; 229 NW2d 432 (1975)

Leasehold Interest:

Pierson v H R Leonard Furniture Co, 268 Mich 507; 256 NW 529 (1934)

Frustration of Plans for Business Expansion—Loss of Potential Use:

State Highway Commission v Great Lakes Express Co, 50 Mich App 170; 213 NW2d 239 (1973)

Scope of the Parcel in Partial Taking Cases:

State Highway Commissioner v Snell, 8 Mich App 299; 154 NW2d 631 (1967)

Port Huron & S W R Co v Voorheis, 50 Mich 506; 15 NW 882 (1883)

In re Slum Clearance, 331 Mich 714; 50 NW2d 340 (1951)

Denial of Access:

Pearsall v Board of Supervisors, 74 Mich 558; 42 NW 77 (1889)

Violation of Restrictive Covenants:

Bales v State Highway Commission, 72 Mich App 50; 249 NW2d 158 (1976)

Johnstone v Detroit, GH & M R Co, 245 Mich 65; 22 NW 325 (1928)

Allen v Detroit, 167 Mich 464; 133 NW 317 (1911)

Vacation of an Alley:

Forster v Pontiac, 56 Mich App 415; 224 NW2d 325 (1974)

Diversion of Traffic:

State Highway Commissioner v Watt, 374 Mich 300; 132 NW2d 113 (1965)

State Highway Commissioner v Gulf Oil Corp, 377 Mich 309; 140 NW2d 500 (1966)

Special Adaptability of Property to Use for Which It Is Being Taken:

Allegan v Vonasek, 261 Mich 16; 245 NW 557 (1932)

Loss of Light, Air and View:

Gerson v Lansing, 250 Mich 587; 231 NW 125 (1930)

Noise:

Boyne City, G & A R Co v Anderson, 146 Mich 328; 109 NW 429 (1906)

Lost Rentals:

Muskegon v DeVries, 59 Mich App 415; 229 NW2d 479 (1975)

See 2 Michigan Municipal Law (ICLE 1980), ch 13, for further discussion and sources.

History

Amended September 1998.

M Civ JI 90.01 Pretrial Instruction: Nature of Condemnation Action

This is a case in eminent domain, which means the power of the government to take private property for a public purpose upon payment of just compensation to the owner of the property taken. Under the constitution and laws of this state, all private property is held subject to this right of eminent domain.

The right of eminent domain is exercised through proceedings commonly called a condemnation action. This is such an action.

By your verdict, you will decide the disputed [issue / issues] of fact, which in this case [concerns / concern] *(the necessity for the project and) the just compensation to be paid to the [owner / owners] for the property taken.

There are three matters that make this case different from most trials:

†(First, this trial involves several parcels of property owned by several landowners named in the action. All of these parcels are being tried together, but each is separate from the other and each constitutes a separate trial as to each individual parcel and owner. The trials are consolidated for convenience and to save time and expense.)

†(Second, you, as jurors in this case, may make a personal inspection of the property involved in this action. The purpose of the view is to enable you, the jurors, to better understand the evidence and testimony concerning the property. You must not visit or view the property unless and until the Court directs you to do so.)

†(Third, because you will hear witnesses who will testify concerning values of property involving numerous mathematical computations, you will be permitted to take notes as the various witnesses testify. Pads and pencils will be provided for you.)

Note on Use

*The phrase in parentheses should be read to the jury only if necessity for the taking is an issue in the case.

The name of the appropriate condemning authority may be substituted for the term "government."

†Each of the paragraphs in parentheses should be included in the instruction only if applicable.

This is a pretrial instruction which should be read after the jurors are sworn.

Comment

See US Const, Am V; Const 1963, art 10, § 2.

History

M Civ JI 90.01 was added February 1, 1981.

M Civ JI 90.02 Power of Eminent Domain

This case is one in eminent domain, which means the power of the government to take private property for a public purpose upon payment of just compensation to the owner of the property taken. Under the constitution and laws of this state, all private property, real and personal, and any interest therein, is held subject to this right of eminent domain.

The right of eminent domain is exercised through proceedings commonly called a condemnation action. This is such an action.

Note on Use

The name of the appropriate condemning authority may be substituted for the word "government."

History

M Civ JI 90.02 was added February 1, 1981.

M Civ JI 90.03 Burden of Proof [Recommend No Instruction]

Comment

The committee recommends that no instruction on general burden of proof be given in condemnation cases. There is strictly speaking no *general* burden of proof applicable to all issues in all condemnation proceedings.

Neither party has the burden of proof on the issue of damages, except where benefits to the remainder are claimed by the government.

If the government claims an offset for benefits under express statutory authority, it has the burden of proving the existence of such benefits. MCL 213.73(4).

There may be other special issues where there is an express burden of proof, by statute or otherwise.

History

M Civ JI 90.03 was added February 1, 1981.

M Civ JI 90.04 Absence of Fault

The property owners in this case are not in any way at fault, but are in the position of owning property which the *[name of condemning authority]* has determined to take for public use.

History

M Civ JI 90.04 was added February 1, 1981.

M Civ JI 90.05 Just Compensation—Definition

Whenever private property is taken for a public purpose, the Constitution commands that the owner shall be paid just compensation.

Just compensation is the amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred. The owner must not be forced to sacrifice or suffer by receiving less than full and fair value for the property. Just compensation should enrich neither the individual at the expense of the public nor the public at the expense of the individual.

The determination of value and just compensation in a condemnation case is not a matter of formula or artificial rules, but of sound judgment and discretion based upon a consideration of all of the evidence you have heard and seen in this case.

***(In determining just compensation, you should not consider what the *[name of condemning authority]* has gained. The value of the property taken to the *[name of condemning authority]* and to its customers is not to be considered in any way.)**

Note on Use

*The paragraph in parentheses should be used in public utility condemnation cases.

Comment

See State Highway Commissioner v Eilender, 362 Mich 697; 108 NW2d 755 (1961); *In re Grand Haven Highway*, 357 Mich 20; 97 NW2d 748 (1959); *Fitzsimons & Galvin, Inc v Rogers*, 243 Mich 649; 220 NW 881 (1928); *Consumers Power Co v Allegan State Bank*, 20 Mich App 720; 174 NW2d 578 (1969).

History

M Civ JI 90.05 was added February 1, 1981.
Amended October 1981.

M Civ JI 90.06 Market Value—Definition

Your award must be based upon the market value of the property as of the date of taking.

By "market value" we mean:

a. **the highest price estimated in terms of money that the property will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all of the uses and purposes to which it is adapted and for which it is capable of being used**
b. **the amount which the property would bring if it were offered for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing, but not obliged, to buy**
c. **what the property would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale**
d. **what the property would sell for on negotiations resulting in sale between an owner willing, but not obliged, to sell and a willing buyer not obliged to buy**
e. **what the property would be reasonably worth on the market for a cash price, allowing a reasonable time within which to effect a sale.**

Note on Use

If there is evidence that the property is a special purpose property, M Civ JI 90.07 should be used in addition to this instruction.

Comment

See Consumers Power Co v Allegan State Bank, 20 Mich App 720, 744–745; 174 NW2d 578, 591 (1969).

History

M Civ JI 90.06 was added February 1, 1981.

M Civ JI 90.07 Special Purpose Property

There are certain kinds of properties for which the market value standard is, for one reason or another, inappropriate. These properties are referred to as "special purpose" properties.

The adaptability of the property sought to be taken in eminent domain for a special purpose or use may be considered as an element of value. If the property possesses a special value to the owner which can be measured in money, the owner has a right to have that value considered in the estimate of compensation and damages.

While market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought and sold, such as a church or a college or a cemetery or the fee of a public street, or some other piece of property which may have an actual value to the owner but which under ordinary conditions the owner would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is sometimes said that such property has no market value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. This is not taking the "value in use" to the owner as distinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value.

If you determine that a property is, in fact, a "special purpose" property, you should consider that fact in determining the value of the property.

The value of a "special purpose" property is to be determined by what a purchaser who desired to buy such a "special purpose" property, but did not have to have it, would be willing to give for it, and what a seller who had such a "special purpose" property and desired to sell it, but did not have to sell it, would be willing to take for it.

Comment

See In re Grand Haven Highway, 357 Mich 20; 97 NW2d 748 (1959).

History

M Civ JI 90.07 was added February 1, 1981.

M Civ JI 90.08 Assessed Value

The owners of certain parcels have introduced in evidence the assessed values placed on the property by the *[name of assessing authority]* for real estate taxes. The assessed values are not controlling, but you have a right to consider these assessments in connection with all other evidence in arriving at the market value of the property.

The law requires that assessments for real estate tax purposes be made at 50 percent of the true cash value.

Note on Use

If the property owner has introduced evidence of the condemning authority's assessed valuation of the property, this instruction should be given.

Comment

See In re Memorial Hall Site, 316 Mich 360; 25 NW2d 516 (1947); *Detroit v Sherman*, 68 Mich App 494; 242 NW2d 818 (1976); *Muskegon v Berglund Food Stores, Inc*, 50 Mich App 305; 213 NW2d 195 (1973).

History

M Civ JI 90.08 was added February 1, 1981.

M Civ JI 90.09 Highest and Best Use

In deciding the market value of the subject property, you must base your decision on the highest and best use of the property.

By "highest and best use" we mean the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.

Comment

See St Clair Shores v Conley, 350 Mich 458; 86 NW2d 271 (1957); *In re Condemnation of Lands in Battle Creek*, 341 Mich 412; 67 NW2d 49 (1954); *In re Dillman*, 255 Mich 152; 237 NW 552 (1931); *In re Widening of Fulton Street*, 248 Mich 13; 226 NW 690 (1929); *Ecorse v Toledo, C S & D R Co*, 213 Mich 445; 182 NW 138 (1921).

History

M Civ JI 90.09 was added February 1, 1981.

M Civ JI 90.10 Possibility of Rezoning

The Court has instructed you on the subject of highest and best use. One of the things that must be considered in deciding what the highest and best use of the property was at the time of taking is the zoning classification of the property at that time. However, if there was a reasonable possibility, absent the threat of this condemnation case, that the zoning classification would have been changed, you should consider this possibility in arriving at the value of the property on the date of taking. In order to affect the value of the property, the possibility of rezoning must be real enough to have caused a prudent prospective buyer to pay more for the property than he or she would otherwise pay.

Comment

See State Highway Commissioner v Eilender, 362 Mich 697; 108 NW2d 755 (1961).

History

M Civ JI 90.10 was added February 1, 1981.

M Civ JI 90.11 Refusal to Rezone

You should ignore a refusal to rezone unless you believe that the request to rezone would also have been denied even in the absence of the condemnation and the planned public improvement. It is improper for one agency of government to artificially depress the value of property by unreasonably restrictive zoning so that another agency of government can obtain it by condemnation at a lower price.

Comment

See Gordon v Warren Planning & Urban Renewal Commission, 388 Mich 82; 199 NW2d 465 (1972); *Grand Trunk Western R Co v Detroit*, 326 Mich 387; 40 NW2d 195 (1949).

History

M Civ JI 90.11 was added February 1, 1981.

M Civ JI 90.12 Partial Taking

This case involves what is known as a "partial taking"; that is to say, the property being acquired by the *[name of condemning authority]* is part of a larger parcel under the control of the owner.

When only part of a larger parcel is taken, as is the case here, the owner is entitled to recover not only for the property taken, but also for any loss in the value to his or her remaining property.

The measure of compensation is the difference between (1) the market value of the entire parcel before the taking and (2) the market value of what is left of the parcel after the taking.

***(In valuing the property that is left after the taking, you should take into account various factors, which may include: (1) its reduced size, (2) its altered shape, (3) reduced access, (4) any change in utility or desirability of what is left after the taking, (5) the effect of the applicable zoning ordinances on the remaining property, and (6) the use which the *[name of condemning authority]* intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property.)**

Further, in valuing what is left after the taking, you must assume that the *[name of condemning authority]* will use its newly acquired property rights to the full extent allowed by the law.

Note on Use

*The six factors listed in this paragraph are illustrative, not exclusive. *But see* MCL 213.70(2). If no evidence has been introduced on one or more of the factors, it should be deleted from the instruction.

An alternative test of compensation for a partial taking (*i.e.*, value of the part taken plus damages to the remainder) may be appropriate in certain cases in lieu of this instruction. *State Highway Commissioner v Flanders*, 5 Mich App 572; 147 NW2d 441 (1967); *State Highway Commissioner v Englebrecht*, 2 Mich App 572; 140 NW2d 781 (1966). *Michigan Dep't of Transportation v Sherburn*, 196 Mich App 301; 492 NW2d 517 (1992).

Comment

See State Highway Commissioner v Schultz, 370 Mich 78; 120 NW2d 733 (1963); *State Highway Commissioner v Walma*, 369 Mich 687; 120 NW2d 833 (1963); *State Highway Commissioner v Sabo*, 4 Mich App 291; 144 NW2d 798 (1966).

History

M Civ JI 90.12 was added February 1, 1981.

M Civ JI 90.13 Date of Valuation

In this case, the market value of the property *(both before and after the taking) must be determined as of *[applicable date]* and not at any earlier or later date.

Note on Use

*The parenthetical phrase should be read to the jury in a partial taking case.

Comment

See State Highway Commission v Mobarak, 49 Mich App 115; 211 NW2d 539 (1973).

History

M Civ JI 90.13 was added February 1, 1981.

M Civ JI 90.14 Date of Valuation: Early Date of Taking

The market value of the property is to be determined as of the date of taking which shall be decided by you.

In some situations, the government's actions with respect to a particular property have an impact which deprives an owner of the practical benefits of ownership of the property. In such a case, you may find that the government's actions constitute a "taking" of the property at a date earlier than the date legal title is transferred to the government. This does not mean that the government has actually seized or confiscated the property, but merely that the impact of the government's actions on the property is such that the law treats the situation as though a taking has occurred.

The test to be applied in determining whether or not a taking has occurred is whether the actions of the government substantially contributed to and accelerated the decline in value of the property.

You should first determine whether or not such a taking in the legal sense occurred. Then you must determine the date that such taking occurred. Then you must determine the value of the property on that date.

Comment

See In re Urban Renewal, Elmwood Park Project, 376 Mich 311; 136 NW2d 896 (1965); *Heinrich v Detroit*, 90 Mich App 692; 282 NW2d 448 (1979).

History

M Civ JI 90.14 was added February 1, 1981.

M Civ JI 90.15 Effect of Proposed Public Improvement

The process of determining the value on the date of taking may be complicated by the government's actions leading up to the taking, if those actions have had an effect on the market value of the property. In such case, you must disregard any change in value resulting from such actions and grant compensation on the basis of what the market value of the property would be if such actions had not occurred. In other words, in arriving at market value you should disregard any conditions which may exist in this area resulting from the prospect of condemnation for this project and the other proceedings leading up to this condemnation case.

You should determine the value of the property as though this project had not been contemplated.

This does not mean that the announcement of the project acts to insulate the properties concerned from normal economic forces. The market may go up or down, the property may deteriorate or be improved, and you should recognize those factors. However, a change in value directly traceable to the prospect of this condemnation should not penalize either owners or the public. By the same token, you should disregard any increases in value which may have occurred by reason of the prospect of the completion of the project.

Note on Use

This instruction applies in total taking cases and to the before value only in a partial taking case.

In public utility condemnation cases, the word "condemnor's" should be substituted for the word "government's" in the first paragraph.

Comment

See United States v Miller, 317 US 369; 63 S Ct 276; 87 L Ed 336 (1943); *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311; 136 NW2d 896 (1965); *Heinrich v Detroit*, 90 Mich App 692; 282 NW2d 448 (1979); *Detroit Board of Education v Clarke*, 89 Mich App 504; 280 NW2d 574 (1979); *In re Medical Center Rehabilitation Project*, 50 Mich App 164; 212 NW2d 780 (1973); *Madison Realty Co v Detroit*, 315 F Supp 367 (ED Mich, 1970).

History

M Civ JI 90.15 was added February 1, 1981.

M Civ JI 90.16 Comparable Market Transactions

The witnesses who have expressed opinions about market value have relied upon various market transactions to help them arrive at their opinions. These transactions are referred to as "comparables" and may include sales, offers to sell, offers to buy and rentals.

These witnesses have been permitted to testify as to the price and other terms and circumstances of these transactions which they consider to be comparable to the owner's property as shedding light on the value of the owner's property. Generally, the more similar one property is to another, the closer the price paid for the one may be expected to approach the value of the other. *(Thus, in weighing the opinion of a witness as to the value of the subject property based upon other market transactions, you may consider the following matters:

a. **Was the transaction freely entered into in good faith?**
b. **If the transaction was on credit, how much should the price be discounted to reflect the amount which the property would have brought in cash?**
c. **How near is the date of the other transaction to the date of valuation in this case?**
d. **How near is the size and shape of the property to the size and shape of the owner's property?**
e. **How similar are the physical features, including both improvements and natural features?**
f. **How similar is the use to which the other property is, or may be, put, to the use which is, or may be, made of the owner's property?**
g. **How far is the other property from the owner's property, and is the distance important?**
h. **How similar is the neighborhood of the other property to the neighborhood of the owner's property?**
i. **Is the zoning classification the same on both properties?)**

You should also consider the extent to which the witness has taken into account whatever dissimilarities may exist. If you are not satisfied that the transactions being used as comparables are, in fact, comparable, then you may consider that fact in weighing [his / or / her] opinion.

You should bear in mind that comparable sales are not themselves direct evidence of value, but merely the basis on which the witnesses have formed their opinions of value.

You should apply these standards to all witnesses rendering an opinion of value.

Note on Use

*The list of matters that the jury may consider is illustrative, but not exclusive. If there is no evidence as to one or more of the matters, it should be deleted from this instruction.

Comment

See Western Michigan University Board of Trustees v Slavin, 381 Mich 23; 158 NW2d 884 (1968); *In re Brewster Street Housing Site*, 291 Mich 313; 289 NW 493 (1939); *Commission of Conservation v Hane*, 248 Mich 473; 227 NW 718 (1929); *State Highway Commission v McGuire*, 29 Mich App 32; 185 NW2d 187 (1970).

History

M Civ JI 90.16 was added February 1, 1981.

M Civ JI 90.17 Easements

The *[name of condemning authority]* is attempting to acquire through this condemnation proceeding certain limited rights in the owner's lands. The rights being acquired are as follows: *[Describe and define the rights being acquired.]*. The owner will have and retain all the uses of [his / her] land not inconsistent with those easement rights.

Note on Use

On measure of compensation, see M Civ JI 90.12 and the Note on Use thereunder.

Comment

See Cantieny v Friebe, 341 Mich 143; 67 NW2d 102 (1954); *Hasselbring v Koepke*, 263 Mich 466; 248 NW 869 (1933); *Nicholls v Healy*, 37 Mich App 348; 194 NW2d 727 (1971).

History

M Civ JI 90.17 was added February 1, 1981.

M Civ JI 90.18 Total Taking

The *[name of condemning authority]* has the right and duty to acquire and take the entire property whenever the acquisition of the part actually needed would destroy the practical value or utility of the remainder of the property. It is for you to determine whether or not the practical value or utility of the remainder is, in fact, being destroyed.

The burden of proof is on the owner to show by a preponderance of the evidence that the practical value or utility of the remainder of the property has been destroyed.

Comment

See MCL 213.54(1); MCL 213.365; *State Highway Commission v Mobarak*, 49 Mich App 115; 211 NW2d 539 (1973).

History

M Civ JI 90.18 was added February 1, 1981.

M Civ JI 90.19 Benefits

You must disregard any testimony which indicates or implies that because of this taking the remaining property has in any way benefited. You may only consider testimony that bears on damages to the subject property.

Note on Use

This instruction should only be given if the benefits issue has been raised, inadvertently or otherwise, at trial.

The instruction should not be given if the applicable statute authorizes offset of benefit and the issue

has been properly pleaded.

Comment

See Custer Twp v Dawson, 178 Mich 367; 144 NW 862 (1914); *State Highway Commission v McLaughlin*, 16 Mich App 22; 167 NW2d 468 (1969); *State Highway Commissioner v Sabo*, 4 Mich App 291; 144 NW2d 798 (1966).

History

M Civ JI 90.19 was added February 1, 1981.

M Civ JI 90.20 Compensation for Fixtures; Definition

The market value of the property taken includes the value of its fixtures. An item is a fixture if it meets all three of the following criteria:

1. **The item is attached *(or constructively attached) to the land or to a building or structure attached to the land.**

   ***("Constructively attached" means that an item is a fixture even though it is not physically attached if it is a part of something else that is physically attached, and when the item, if removed, either could not generally be used elsewhere or would leave the part remaining unfit for use.)**

2. **The item is a necessary or useful part, considering the purpose for which the land, building, or structure is used.**
3. **The surrounding circumstances indicate that the owner intended to make the attachment *(or constructive attachment) permanent.**

†(Improvements made by a tenant are to be valued on the basis of their useful life without regard to the term of the lease.)

Note on Use

*The parenthetical paragraph in subsection 1 and the phrases in parentheses preceded by an asterisk should be used only when applicable.

†The final paragraph of this instruction should be used only if applicable.

Comment

Wayne County v Britton Trust, 454 Mich 608; 563 NW2d 674 (1997). Stocks of goods and ordinary movable office furniture are not fixtures. *Britton.*

For a discussion of just compensation for improvements made by a tenant, see *Almota Farmers Elevator & Warehouse Co v United States*, 409 US 470; 93 S Ct 791; 35 L Ed 2d 1 (1973).

History

M Civ JI 90.20 was added February 1, 1981.
Amended October 1998.

M Civ JI 90.21 Fixtures: Election to Remove—Compensation

In this case, the owner has elected to remove fixtures from the property. When the owner makes such an election, the market value of the property including the fixtures must be decreased by the value of the fixtures removed. The owner shall be awarded the cost of removing the fixtures, moving them to a new location, and reinstalling them at the new

location.

Note on Use

An owner may not recover moving expenses for the fixtures that have been duplicated by relocation benefits paid under federal, state, or local law. MCL 213.63a.

The condemning authority cannot be required to pay more to move a fixture than its value-in-place. *In re Grand Haven Highway*, 357 Mich 20; 97 NW2d 748 (1959).

Comment

A condemnee automatically receives value-in-place for fixtures without the necessity of an election. However, a condemnee may elect to remove fixtures and receive the value of the property as enhanced by the fixtures less the value-in-place of the fixtures that have or will be severed plus the cost of detaching, moving, and reattaching the fixtures in the new location. *Wayne County v Britton Trust*, 454 Mich 608; 563 NW2d 674 (1997).

History

M Civ JI 90.21 was added February 1, 1981.
Amended October 1998.

M Civ JI 90.22 Effect of View

During the course of this trial, you were taken to the subject property. In addition to the testimony which you have heard and the exhibits which you have seen here in the courtroom, you may also consider what you saw when you visited the property if you believe the things you saw would be helpful to you in reaching a decision.

Note on Use

This instruction should be given in lieu of M Civ JI 3.12, since in a condemnation case the view encompasses the item to be valued.

Comment

See In re Grand Haven Highway, 357 Mich 20; 97 NW2d 748 (1959); *In re Widening of Michigan Avenue*, 299 Mich 544; 300 NW 877 (1941); *In re Widening of Bagley Avenue*, 248 Mich 1; 226 NW 688 (1929).

History

M Civ JI 90.22 was added February 1, 1981.

M Civ JI 90.22A Valuation Witnesses

Witnesses have testified as valuation experts to assist you in arriving at a conclusion as to the value of the property taken. In weighing the soundness of such opinions, you should consider the following:

a. **the length and diversity of the witness's experience**
b. **the professional attainments of the witness**
c. **whether the witness is regularly retained by diverse, responsible persons and thus has a widespread professional standing to maintain**
d. **the experience that the witness has had in dealing with the kind of property about which [he / or / she] has testified**
e. **whether the witness has accurately described the physical condition of the property, or has made inaccurate statements about its physical characteristics that may have**

been reflected in the valuation the witness placed on such property

The opinion of a valuation witness is to be weighed by you, but you must form your own intelligent opinion. In weighing the testimony of any witness as to value, you should consider whether [he / or / she] has accompanied [his / or / her] opinion with a frank and complete disclosure of facts and a logical explanation of [his / or / her] reasons that will enable you properly to determine the weight to be given to the opinion the witness has stated.

Comment

See In re Dillman, 256 Mich 654; 239 NW 883 (1932); *George v Harrison Twp*, 44 Mich App 357, 205 NW2d 254 (1973).

History

M Civ JI 90.22A was added October 1981.

M Civ JI 90.23 Range of Testimony

In reaching a verdict, you must keep within the range of the testimony submitted. You may accept the lowest figure submitted as to a particular item of damage, the highest figure submitted, or a figure somewhere between the highest and lowest. You may not go below the lowest figure or above the highest figure submitted.

In this case, the lowest valuation placed in evidence for the property is $_____.____ and the highest valuation is $_____.____. Any award between those two figures would be a proper jury verdict; any award which is not between those two figures would not be a valid jury verdict.

Note on Use

The second paragraph of the instruction is appropriate only in a total taking case without the issues contemplated by M Civ JI 90.12 Partial Taking; 90.14 Date of Valuation: Early Date of Taking; 90.18 Total Taking (destruction of practical value or utility); 90.19 Benefits; 90.21 Compensable Business Property: Measure of Compensation, or other damage claims. Where those issues are involved, the second paragraph of the instruction may require modification.

Comment

See In re Grand Haven Highway, 357 Mich 20; 97 NW2d 748 (1959); *In re Acquisition of Land for Civic Center*, 335 Mich 528; 56 NW2d 375 (1953).

History

M Civ JI 90.23 was added February 1, 1981.

M Civ JI 90.24 Mechanics of Verdict

When you retire to the jury room, your first duty is to elect a jury foreman. You may have all the various exhibits that have been admitted in evidence, and your notes, with you. You will also have a prepared Form of Jury Verdict which will contain a blank line in which you should insert the amount of just compensation as determined by you. I also want to emphasize that your verdict does not have to be unanimous. If any five of you agree on a verdict, that constitutes a legal jury verdict. The foreman must sign the verdict.

Note on Use

If two or more parcels are consolidated for trial, the jury should be instructed: "When any five of you agree on a verdict as to a parcel, that will be the verdict on that parcel. However, the same five members of the jury do not have to agree on all of the parcels."

The uniform condemnation statute of 1980 (MCL 213.51 *et seq.*) does not specify a verdict form. The form of verdict for actions brought under this statute will depend on the nature of the particular case.

History

M Civ JI 90.24 was added February 1, 1981.

M Civ JI 90.30 Going Concern

The defendant claims that condemnation of the property destroyed the business.

If you find that the defendant cannot relocate the business, the defendant is entitled to just compensation for the value of the business as a going concern. If you find that the business can be relocated, the defendant is not entitled to compensation for the value of the business as a going concern.

Comment

City of Detroit v King, 207 Mich App 169; 523 NW2d 644 (1994); *Department of Transportation v Campbell*, 175 Mich App 629; 438 NW2d 267 (1988); *Detroit v Michael's Prescriptions*, 143 Mich App 808; 373 NW2d 219 (1985); *Detroit v Whalings, Inc*, 43 Mich App 1; 202 NW2d 816 (1972).

The Committee has found no Michigan appellate decisions that either permit or deny compensation for a partial taking of a going concern.

A defendant may not recover both going concern and business interruption damages because the theories are mutually exclusive. *Detroit v Larned Associates*, 199 Mich App 36; 501 NW2d 189 (1993).

History

M Civ JI 90.30 was added October 1998.

M Civ JI 90.31 Business Interruption

Just compensation includes damages caused by interruption of a business or avoiding interruption of the business.

Note on Use

Additional instructions may be needed if there are issues about whether specific damages are compensable as business interruption damages. *See Spiek v Department of Transportation*, 456 Mich 331; 572 NW2d 201 (1998); *State Highway Comm'r v Gulf Oil Corp*, 377 Mich 309; 140 NW2d 500 (1966); *Mackie v Watt*, 374 Mich 300; 132 NW2d 113 (1965).

Lost profits are not compensable as business interruption damages. *Detroit v Larned Associates*, 199 Mich App 36; 501 NW2d 189 (1993).

A defendant may not recover both going concern and business interruption damages because the theories are mutually exclusive. *Larned Associates.*

Comment

In re Grand Haven Highway, 357 Mich 20; 97 NW2d 748 (1959); *Grand Rapids & Indiana Railroad Co v Weiden*, 70 Mich 390; 38 NW 294 (1888); *Allison v Chandler*, 11 Mich 542 (1863); Larned Associates; *Detroit v Hamtramck Community Federal Credit Union*, 146 Mich App 155; 379 NW2d 405 (1985).

History

M Civ JI 90.31 was added March 1999.

SJI2d 90.20 Fixtures: Definition

The owner is entitled to be compensated for [*his/her*] fixtures, equipment, machinery and personal property.

The definition of fixtures or equipment or machinery for which compensation may be allowed is very broad. Fixtures are not limited to things actually attached to a building. Fixtures may include small machinery, even hand tools. The test is whether or not it was the intent of the owner to permanently use the item in the operation of [*his/her*] business. If the answer is yes, then the item is considered to be constructively annexed to the freehold, and a part of the owner's equipment and fixtures for which compensation shall be allowed.

M Civ JI 90.20 Compensation for Fixtures; Definition

The market value of the property taken includes the value of its fixtures. An item is a fixture if it meets all three of the following criteria:

1. **The item is attached *(or constructively attached) to the land or to a building or structure attached to the land.**

   ***("Constructively attached" means that an item is a fixture even though it is not physically attached if it is a part of something else that is physically attached, and when the item, if removed, either could not generally be used elsewhere or would leave the part remaining unfit for use.)**

2. **The item is a necessary or useful part, considering the purpose for which the land, building, or structure is used.**
3. **The surrounding circumstances indicate that the owner intended to make the attachment *(or constructive attachment) permanent.**

†(Improvements made by a tenant are to be valued on the basis of their useful life without regard to the term of the lease.)

M Civ JI 90.21 Fixtures: Election to Remove—Compensation

In this case, the owner has elected to remove fixtures from the property. When the owner makes such an election, the market value of the property including the fixtures must be decreased by the value of the fixtures removed. The owner shall be awarded the cost of removing the fixtures, moving them to a new location, and reinstalling them at the new location.

SJI2d 90.21 Fixtures: Measure of Compensation

With regard to fixtures, equipment, machinery and personal property, you are to award the owner the present value-in-place of those items unless the owner has elected to remove some or all of them.

If the owner elects to move some or all of [*his/her*] fixtures, equipment, machinery and personal property, then as to those items moved you should award the total cost of removing those items and reinstalling them in a new location and the loss in value caused by the move.

However, if the cost of moving any particular item to a new location is greater than that item's value-in-place, you cannot award in your verdict more than the value-in-place. In other words, the government cannot be required to pay more to move a particular item than that item is worth.

Improvements made by a tenant are to be valued on the basis of their useful life without regard to the term of the lease.