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Eminent Domain: The constitutionality of Condemnation Quick-Take Statutes - University of Detroit Journal of Urban Law, Fall, 1982, Volume 60, Issue 1 - by Alan T. Ackerman and Noah Yanich

I. INTRODUCTION

Eminent domain proceedings are set against a constitutional framework that imposes certain limits on the procedures. The most important constitutional limitation is derived from the fifth amendment of the U.S. Constitution, made applicable to the state and its instrumentalities through the fourteenth amendment,[1] which prohibits deprivations of property without due process of law.[2] In 1897, the U.S. Supreme Court held that under the due process clause of the fourteenth amendment, a state could exercise its power of eminent domain only for a public use, and the owner of property "taken" had to be compensated for his loss.[3]

Traditionally, municipal agencies have followed a general pattern to acquire property.[4] Initially, a public project is administratively proposed or legislatively established. The appropriate property is physically located and the financial requirements are ascertained. Funding from federal and other sources is then sought. After several years, portions of the necessary funding may be received and the actual acquisition of the property begins.[5] In the event the municipal agency is unable to gain title through a negotiated purchase, a lawsuit may be initiated to acquire the property through the power of eminent domain.[6] A judicial hearing is held to determine the necessity of and the compensation for taking by condemnation.[7] Depending on the appropriate court's docket, the trial may not be concluded for several years. This time-consuming process, although once acceptable, has gradually

become an inadequate means to meet the requirements of many contemporary public projects.[8]

Municipal agencies have countered the inadequacies of the traditional method by employing an alternative "quick-take" statute which permits the acquiring agency to take possession of the private property prior to a final determination of compensation for the property.[9] This statutorily enforced transfer of not only title but possession of the property prior to a final adjudication of the respective rights arguably constitutes a deprivation of private property without due process of law.[10] This article is intended to review the validity of such statutes under the due process clause and to suggest certain alternatives which reflect a more appropriate reconciliation of governmental needs and constitutional requirements.

II. HISTORICAL PERSPECTIVE

The 1850 and 1908 Michigan Constitutions provided for a board of commissioners to be the triers of both necessity and just compensation[11] as well as fact and law.[12] Inasmuch as the commission determined the necessity and just compensation issues simultaneously, possession and title to the property passed upon payment of just compensation.[13] Under the 1963 Constitution,[14] and General Court Rule 1963, 516.5,[15] a condemnation case is tried in the same manner as any other civil action.[16]

Michigan municipal urban renewal agencies have employed the Urban Renewal Act (Act)[17] in condemning residential property under the traditional method.[18] The Act requires the jury to decide both necessity for the project and the compensation issue.[19] An agency has no right to possession absent a finding of necessity. Since necessity and compensation are determined at the same time, and the agency has no right to possession absent a finding of necessity, a property owner need not relinquish possession until final resolution of the compensation issue.[20]

In contrast, under the "quick-take" provisions of Act 295[21] and Act 87,[22] the condemnor is authorized to take possession of the property

prior to a final determination of compensation. This statutory scheme is authorized by a 1963 constitutional provision enabling the condemning authority to take property after "securing" the amount of just compensation.[23]

Historically, governmental power to obtain possession of property prior to a final adjudication of compensation has prompted relatively little judicial concern, ostensibly because immediate possession was rarely required by governmental agencies.[24] However, the modern requirements of our industrialized society have prompted a number of proposals for massive urban renewal. The success of such large-scale projects often hinges upon the availability of expedited condemnation procedures that permit the condemning authority to take immediate possession of condemned property.[25] These concerns presumably led to the enactment of Public Act 87 of 1980.

III. POSSESSION PROVISIONS OF PUBLIC ACT 87 OF 1980

Under the Michigan "quick-take" acts,[26] the condemnor may enter upon property to make an appraisal.[27] The agency must then "submit" to the owner "a good faith offer" to acquire the property for "an amount which it believes to be just compensation for the property."[28] Implicit in the good faith offer procedure is an attempt by the agency to "negotiate" with the owner.[29] If "negotiation" fails, a complaint may be filed. Upon filing the complaint, the condemnor must deposit the amount it estimates to be just compensation for the property interest with a bank, trust company, escrow agent, or a state, municipal or county treasurer.[30] The condemnee then may challenge the necessity of the project by filing a motion asking that necessity be reviewed.[31] The court is bound by the public agency's determination of public necessity absent "a showing of fraud, error of law, or abuse of discretion.[32] If the condemnee fails to challenge the necessity of the project within the prescribed time, the right to have the decision reviewed is waived.[33] After the conclusion of the necessity review, ". . . the court shall determine the method for surrender of the property."[34] If the trial court's determination of necessity is appealed, the court may still require surrender prior to the appellate

decision upon a showing of "reasonable need" by the agency.[35]

If interim possession is granted, the court may require the agency to file an indemnity bond "in an amount determined by the court as necessary to adequately secure just compensation to the owner . . ."[36] The condemnee may recover damages sustained as the result of an immediate possession only if necessity is successfully challenged after possession is granted.[37]

Administrative agencies have construed Act 87 to mean that the condemnee is a month-to-month tenant who may be evicted upon the same notice that would be required in a landlord-tenant relationship. When using federal funds, the condemnor is required to give a ninety-day notice to vacate.[38]

IV. CONFLICT OF POSSESSION PROVISION WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Although Michigan's "quick-take" statute requires the condemning authority to place in escrow the amount it estimates to be just compensation for the condemned property, the authority may obtain possession of the property without a prior judicial assessment of the adequacy of this amount. In the following section we will examine three lines of authority bearing on the constitutionality of Michigan's "quick-take" statute.

A. Historical Development of Procedural Due Process In Eminent Domain Proceedings

The fifth amendment provides that private property shall not be "taken for public use, without just compensation."[39] In Cherokee Nation v. Southern Kan. Ry. Co.,[40] the condemnee Indian tribe argued that the just compensation clause required the government to pay compensation before taking possession of condemned property. The Supreme Court rejected this contention: "[The fifth amendment] does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed.[41] The Court then held

that the "adequate provision" requirement had been satisfied in that case by a procedure providing for a deposit in court by the condemning authority of "double the amount awarded by three disinterested referees" prior to taking possession.[42]

The Cherokee Nation holding was modified to some extent five years later in Sweet v. Rechel.[43] In Sweet, the Supreme Court held that the "adequate provision" requirement was satisfied where the statute under which property was condemned by a municipal corporation

... or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation.[44]

The Court went on to hold that the provision for compensation in Sweet was "certain and adequate," since the condemnee "became from the moment the property was taken absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city, which could effectively be enforced.[45] The Sweet Court appeared to abandon any requirement of a security deposit; rather, "effective enforcement" of a subsequent decree was sufficient.[46]

A number of subsequent cases, although often employing somewhat different language, appear nevertheless to adhere to the "adequate provision" standard. The first of these cases, Fort St. Union Depot Co.[47] merely reaffirmed this approach.. In Williams v. Parker,[48] the Court placed some emphasis on the fact that the defendant condemning authority (the City of Boston) was unquestionably a "solvent debtor" in holding that "adequate provision had been made.[49] The "adequate provision" standard was restated in Crozier v. Fried, Drupp

Akteingesellschaft,[50] but this time the Court formulated a two-part test. First, the condemning authority must provide adequate means for a reasonably just and prompt determination and payment of the compensation. Secondly, there must be "an assumption on the part of government of the duty to make prompt payment of the ascertained compensation--that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end.[51] In Bragg v. Weaver[52] the Court held that due process required "adequate provision . . . for the certain payment of the compensation without unreasonable delay."[53] Four years later, in Joslin Mfg. Co. v. City of Providence,[54] the Court stated that "the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge."[55]

The final case in this line of authority was Bailey v. Anderson[56] in which the Supreme Court announced,

[I]t has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.[57]

It is unclear whether the Court in Bailey was formulating a new, broader due process standard, or merely restating prior holdings. The Bailey test seems to require only that the condemnee be provided an opportunity to be, heard "in the course of the condemnation proceedings."[58] However, since the Court cited Bragg and Joslin in support of its position, it is quite possible that the Court still intended to require either an adequate provision for definite compensation and payment without unreasonable delay;[59] or "reasonably prompt ascertainment and payment," and "adequate provision for enforcing the pledge."[60] For more than 25 years, the Bailey standard remained undisturbed. Recent developments, however, have thrown into doubt the vitality of Bailey and its predecessors.

B. Modern Trends in Procedural Due Process

Under the due process clause of the fourteenth amendment, a person is generally entitled to an opportunity to be heard "at a meaningful time and in a meaningful manner," in connection with any deprivation of property by the state.[61] In certain situations, the Supreme Court has held that the due process clause requires a hearing prior to the deprivation;[62] in other areas, the Court has held that a subsequent hearing is sufficient.[63]

In Fuentes v. Shevin,[64] the Court held that the due process clause ordinarily requires a hearing prior to any deprivation of property by the state.[65] Fuentes involved a challenge to the validity of two state replevin procedures under which a seller could obtain possession of property sold under a conditional sales contract after seizure from the buyer, without affording the buyer an opportunity to be beard prior to the seizure.[66] The Court defined the issue as "whether procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize the property in the possession of a person upon the application of another."[67] The Court's answer was an emphatic yes: "If the right to notice and a hearing is to serve its full purpose.... it is clear that it must be granted at a time when the deprivation can still be prevented."[68]

The Fuentes holding was undercut two years later. by Mitchell v. W.T. Grant,[69] in which the Court upheld a Louisiana sequestration procedure remarkably similar to the replevin procedures struck down in Fuentes.[70] Indeed, at least four members of the Court suggested that Fuentes had been sub silentio overruled.[71]

Less than a year after the Mitchell decision, the Supreme Court, in North Georgia Finishing v. Di-Chem,[72] made it clear that Fuentes remained a viable precedent.[73] The Court held that a Georgia prejudgment garnishment procedure failed to measure up to the due process standards set forth in Fuentes.[74] The Court distinguished Mitchell, stating that "[t]he Georgia garnishment statute [had] none of the saving characteristics of the Louisiana statute" upheld in Mitchell[75] The Court relied on four factors to support its finding

of unconstitutionality. First, the writ of garnishment was issued on the affidavit of the creditor's attorney. Personal knowledge of the facts was not required.[76] Second, the affidavit contained only conclusory allegations.[77] Third, the writ was issued without participation by a judge.[78] Fourth, a provision providing an early hearing where the creditor is required to demonstrate probable cause for the garnishment was not available.[79]

Although it is uncertain whether the Court would treat the presence or absence of any single saving characteristic as dispositive, it appears likely that the "early hearing" and "participation by a judicial officer" factors are the most significant.[80] In explaining the vulnerability of the Georgia statute under Fuentes, the Court did not refer to the "lack of personal knowledge" or "conclusory allegations" factors: "Here, a bank account ... was impounded ... without notice or opportunity for an early hearing and without participation by a judicial officer."[81]

Under the assumption that judicial participation and the opportunity for an early hearing are the "core" factors relied upon in North Georgia Finishing, a further question remains as to whether the presence or absence of either of these factors is conclusive in determining the validity of a particular procedure under the due process clause. In interpreting North Georgia Finishing, most courts have assumed that the absence of either factor compels a finding of unconstitutionality.[82] Although there are suggestions in the North Georgia Finishing concurring and dissenting opinions that judicial supervision is not an absolute requirement,[83] the case law has not favored this position.[84]

Two additional due process requirements have been recognized by the courts in applying Fuentes, Mitchell, and North Georgia Finishing: a requirement that a creditor seeking an ex parte writ of attachment post a bond to indemnify the debtor against damages resulting from a wrongful taking and a requirement that the debtor be permitted to dissolve the writ by posting a bond.[85] These factors were not at issue in North Georgia Finishing since the procedure struck down by the Court provided these protections. However, the Mitchell Court appeared to rely to some extent on

the bond requirement[86] in holding that the Louisiana sequestration procedure "effected a constitutional accommodation of the conflicting interests" of debtor and creditor.[87]

In summary, Fuentes, Mitchell and North Georgia Finishing made it clear that a person was entitled to a hearing prior to or shortly after any state-sponsored deprivation of property. Since Sweet and its progeny seemed to contradict this more recent line of authority, courts were soon forced to resolve the conflict.

C. Effect of Fuentes/Mitchell/North Georgia Finishing on Due Process In Eminent Domain Proceedings

The due process requirements developed in Fuentes, Mitchell, and North Georgia Finishing resulted in the invalidation of many procedures held valid under prior case law. After the Fuentes decision, it was unclear whether "quick-take" condemnation proceedings, permitting government seizure of property without a prior hearing, would still pass constitutional muster.

Joiner v. City of Dallas[88] made it clear that a prior hearing is not constitutionally required in eminent domain proceedings. In Joiner, the plaintiff landowners sought an injunction against condemnation proceedings on the ground, inter alia, that the Texas condemnation statute permitting acquisition of the property based on the right of and necessity for condemnation, or of the amount of compensation to be paid, constituted a denial of due process of law.[89] Plaintiffs argued that such a condemnation scheme violated "modern" standards of due process developed in Mitchell and Fuentes.[90] Although the judges found the argument "interesting," they felt that the issue was squarely controlled, by the Sweet/Bragg/Bailey[91] line of authority.[92]

Despite the Supreme Court's summary affirmance of the Joiner decision, there are three reasons why the Court could hold that the due process clause requires, if not a pre-seizure hearing, a prompt post-seizure hearing on the "public purpose" and "just compensation" issues.

First, the Joiner affirmance came down six weeks

before the North Georgia Finishing decision. Prior to the North Georgia Finishing decision, it had been widely assumed that Mitchell had overruled the Fuentes "pre-seizure hearing" requirement.[93] Viewed in that context, a summary affirmance is not surprising, since the Joiner plaintiffs' due process claims would have seemed much less substantial prior to North Georgia Finishing.

Secondly, the Texas condemnation scheme upheld in Joiner did afford landowners an opportunity to obtain a hearing on the propriety of condemnation prior to losing possession by filing a collateral injunctive action in district court.[94] In this proceeding, the district court could determine all matters in dispute between the parties including the compensation issue.[95] Therefore, the Supreme Court's summary affirmance is consistent with the proposition that an opportunity to obtain a pre-seizure or prompt post-seizure hearing is constitutionally required in condemnation proceedings, since the Texas scheme actually provided such an opportunity.[96]

Finally, the condemnation scheme upheld in Joiner provided landowners with a hearing, before a panel of Special Commissioners, to present evidence on the compensation issue, prior to losing possession.[97] Either party had the right to appeal the panel's award.[98] During the, pendency of the appeal, the condemnor could take possession of the property upon payment. to the landowner or into the court registry of an amount equal to the panel's award.[99] Therefore, the Joiner rationale, may not require constitutional approval of condemnation proceedings providing landowners with no hearing of any kind on the compensation issue prior to losing possession.

Less than a year after Joiner, the First Circuit faced very similar issues in Vazza v. Campbell.[100] In Vazza, the plaintiff landowner attacked the validity of the Massachusetts eminent domain statutes under the "just compensation" and "due process" clauses[101] The Massachusetts "quick take" statute permitted the state to take possession of condemned property prior to an adjudication of damages, and provided,for a pro tanto payment to the landowner of "a reasonable amount which [an appropriate board of officers] is willing to pay."[102]

Plaintiff argued that the Massachusetts procedure did not provide landowners with a meaningful opportunity to show that the pro tanto payment was not "reasonable," and that this amounted to a denial of due process.[103] Citing the possibility of a long delay before final determination of damages, "the inadequacy of legal interest in an inflationary period, the possibility of lost special damages and ... hardship on dispossessed homeowners," plaintiff argued that the procedure "render[ed] illusory the objective of fair compensation.[104]

The Vazza court, relying primarily on the Supreme Court's summary affirmance of Joiner, rejected these arguments, stating that it found the Joiner opinion "comprehensive," "thoughtful," and, "persuasive."[105] Citing Sweet and Bragg, the court indicated that it would "continue to measure eminent domain proceedings against ... [the standard of those cases] rather than against the procedural requirements of such cases as Fuentes.[106]

Similar to the decision in Joiner, the Vazza holding supports the proposition that the due process clause requires a prompt post-seizure hearing in eminent domain proceedings. First, in Vazza the plaintiff apparently claimed that due process entitled landowners to a pre-seizure hearing and not merely a prompt post-seizure hearing.[107] Secondly, the Massachusetts scheme actually permitted a landowner to obtain an expedited hearing on damages, providing him with "as prompt a determination as the judicial process affords."[108] In addition, the Vazza court considered it likely that extraordinary relief would be available "in a case where an egregiously low pro tanto offer is demonstrated to cause substantial and irreparable injury. . ."[109]

A federal district court's determination that the Sweet/Bragg/Bailey due process standards had been implicity overruled by Fuentes, Mitchell, and North Georgia Finishing was reversed by the Third Circuit in Virgin Islands v. 19.623 Acres of Land.[110] Although conceding that "it may be contended that there is considerable persuasiveness to the rationale utilized by the district court, the court felt that the Supreme Court's summary affirmance of Joiner required its rejection."[111] The Virgin Islands court addressed only the question of whether landowners are

entitled to a pre-seizure hearing on the necessity of a taking. Therefore, the Virgin Islands case is germane to present inquiry only as it provides support for the continued viability of Sweet, Bragg, and Bailey.

V. CONSTITUTIONALITY OF THE MICHIGAN "QUICK-TAKE" STATUTES

There are three different approaches that could be employed in attacking the constitutionality of the Michigan "quick-take" statutes. First, it can be argued that the statutes fail to measure up to the Sweet/Bragg/Bailey standards.[112] Second, it can be argued that Sweet, Bragg, and Bailey have been modified or overruled by Fuentes, Mitchell, and North Georgia Finishing,[113] and that the Michigan statutes are invalid under the "modern" due process standards developed in those cases. Finally, one could argue that Sweet and its progeny should be overruled and that the Michigan statutes should be struck down for denial of due process under the Fuentes/Mitchell/North Georgia Finishing standards.

Turning to the first approach, the Bragg standard requires "adequate provision ... for certain payment ... without unreasonable delay."[114] The Joslin standard requires a "reasonably prompt ascertainment and payment.[115] Neither Bragg nor Joslin appear to have been overruled by Bailey v. Anderson, since the Bailey Court cited those cases in support of its holding.[116] Therefore, it can be argued that crowded dockets prevent the present Michigan court system from providing "reasonably prompt ascertainment and payment," thus denying landowners due process of law. Under this rationale, Michigan would be required to provide "quick-take" condemnees with an expedited hearing on damages as does Massachusetts."[117] In the event that such a provision did not substantially speed up the "ascertainment" process, e.g., if the courts were flooded with thousands of requests for expedited bearings due to a massive urban renewal project, Michigan would be required to provide "quick-take" condemnees with an immediate preliminary hearing for the purpose of reviewing the adequacy of the amount of "estimated compensation" deposited by the condemning authority.

Advancing to the second theory, the Joiner panel held that Sweet, Bragg, and Bailey had not been overruled by Fuentes and Mitchell by finding the Fuentes/Mitchell standards not applicable to the condemnation of property.[118] The Supreme Court's summary affirmance of Joiner may have reflected the Court's view that the Fuentes "pre-seizure hearing" requirement had been overruled by Mitchell,[119] a view repudiated six weeks later in North Georgia Finishing. North Georgia Finishing established that even where a state is permitted,to seize property without a prior hearing, it must provide an "early hearing" at which it must demonstrate "at least probable cause."[120]

Under this rationale, shortly after a "quick-take" seizure, Michigan would have to provide a preliminary hearing at which it would be required to demonstrate "at least probable cause" that the amount deposited, as "estimated compensation" approximated the actual market value of the condemned property. In support of its conclusion that due process standards developed in "creditors' rights cases" are not applicable to the condemnation of property,[121] the Joiner panel cited differences in the origins of the methods of appropriation,[122] in the nature of the parties,[123] and in the purpose of the appropriation.[124]

It may be conceded that these arguments have some force in determining whether landowners are entitled to a Fuentes/Mitchell "prompt post-seizure hearing" on the "necessity" and "public use" issues. However, the panel's distinctions are hardly relevant to our present inquiry: whether landowners must be provided with such a hearing on the "just compensation" issue.[125] The first of the above two distinctions--origins and nature of power--involve the necessity for judicial supervision of relationships "frequently aris[ing] through unequal bargaining powers and creat[ing] thereby the potential for abuse of the judicial process. . . .[126] With respect to the compensation issue, surely the bargaining positions of the state of Michigan and individual landowners are grossly unequal. A "quick-take" condemnee has virtually no power to prevent the seizure of his property, and if he receives a substantially inadequate compensation offer, it may be many years before he receives just compensation. Without an opportunity to contest the adequacy of the "estimated compensation" deposited by the

state, landowners will often be unable to obtain sufficient financing to continue their businesses or to obtain replacement housing in a rising market. Moreover, unlike a debtor who can obtain damages for wrongful attachment, a Michigan "quick-take" condemnee has no statutory remedy for damages incurred as a result of a grossly inadequate deposit of "estimates compensation."[127] Although the Michigan "quick-take" statute requires that the offer of "estimated compensation" be made in "good faith,"[128] judicial reluctance to find that any offer--no matter how inadequate--was not made in good faith has effectively foreclosed the existence of a remedy. Under these circumstances it is clear that judicial supervision is necessary to prevent irreparable harm flowing from unequal bargaining power.

The third distinction set forth above--the nature of the parties requires the characterization of creditors as "interested parties" and the state as a "totally disinterested" party.[129] This may be an accurate description with respect to the "public use" issue, since it may be argued that absent corruption, a state would not wish to condemn property except for public use. However, the state is unquestionably an interested party with respect to the compensation issue, since it must aggressively seek to minimize the burden on its taxpayers. Consequently, judicial supervision is necessary to prevent a state, whether acting in good faith or not, from employing the "quick-take" procedure in an inequitable manner by forcing landowners to accept inadequate compensation for their property.

The fourth distinction cited by the Joiner panel--purpose of appropriation--reflects a belief that private interests are entitled to less judicial protection than public interests.[130] With respect to the "public use" issue, this is a circular argument, since the very issue to be decided is whether a particular appropriation is for the use of the general public or merely for the benefit of private interests. This argument also fails when addressed to the compensation issue, since the purpose of the just compensation clause is to prevent the imposition of undue private sacrifice for the benefit of the public. Thus, the Joiner panel's fourth argument sweeps too broadly; uncompensated "takings" cannot be sanctioned merely because they benefit the public. This analysis suggests that the Fuentes/Mitchell/North Georgia Finishing standards should be applied to

the determination of compensation in Michigan's "quick-take" condemnation proceedings.

The third constitutional attack contends that Sweet should be expressly overruled in light of Fuentes, Mitchell, and North Georgia Finishing. It is not necessary to contend that Sweet, Bragg, and Bailey were incorrectly decided. Rather, it should be argued that changed conditions make it unwise to continue to adhere to the constitutional doctrines expounded in those cases. These decisions rested on two fundamental assumptions: the court system was capable of affording most condemnees a prompt resolution of the compensation issue; and state and municipalities were extremely unlikely to become insolvent.[131]

It is difficult to say whether the Sweet Court would have reached the same decision against the background of court congestion and long delays confronted by present-day litigants.[132] In any event, there are at least three formidable reasons why the Supreme Court should modify the Sweet standards. First of all, under the "quick-take" statutes, a state can obtain possession of condemned property, but need not make full payment until many years later, at the conclusion of litigation. Thus, the state has every incentive to make inadequate offers of just compensation and to protract litigation as long as possible, because the legal rate of interest is considerably lower than the rate the state would have to pay on the open market. Secondly, since court congestion and the "quick-take" statutes effectively permit a state to obtain possession of property for many years prior to payment of compensation, the state has little incentive to enact remedial measures to ease the burden on the court system as a whole. Consequently, the availability of "quick-take" condemnation, absent a procedure to review the adequacy of the "estimated compensation" deposited by the state, may be an important cause of legislative failure to provide adequate relief for court congestion.

Finally, the Sweet doctrine may be founded on the premise that states and municipalities are extremely unlikely to become insolvent.[133] Although this may have been a safe assumption in 1905, it is undoubtedly an unsound proposition today. Clearly, under the just compensation clause, the possibility of a considerable delay in receiving compensation cannot be equated with

the prospect that a landowner may never receive compensation at all. Although it is impractical to require an immediate ascertainment of damages, a landowner's interests cannot be sufficiently protected without a preliminary hearing to assess the adequacy of the compensation offered by the state. Such a hearing would not guarantee that a landowner would eventually receive full compensation, because the reviewing court could only attempt a reasonable approximation of damages. In the event a municipality became insolvent, a landowner would probably receive less than the fair market value of the seized property to the extent that its value exceeded the deposit of estimated compensation. Without any hearing, however, a landowner could eventually receive much less.[134]

If such a preliminary review were available, a landowner who preferred not to gamble on a municipality's solvency would have the option of accepting a compensation offer that represented at least a fair approximation of the value of his land. In contrast, without such a preliminary review mechanism, a landowner may be faced with the dilemma of accepting an egregiously low offer of compensation or gambling on the insolvency of the state. It is difficult to conclude that the Sweet Court would have held that such a scheme satisfied the fifth amendment requirement of "just compensation."

Although it may be argued that the majority of municipalities are in little danger of insolvency, it also seems probable that cities with declining tax bases are more likely to employ "quick-take" procedures in last ditch efforts to revitalize decaying urban areas. If so, it would appear that "quick-take" condemnees are more likely to harbor legitimate concerns about the solvency of condemning authorities.

One further point should be made in regard to the solvency of condemning authorities. Municipalities must incorporate anticipated liabilities from "quick-take" condemnations in their budget forecasts. Absent a procedure to review the adequacy of compensation offers, a municipality may seriously underestimate the liability it will face after a final adjudication of just compensation. Thus, the employment of "quick-take" condemnation procedures may in and of itself, lead to the eventual insolvency of a municipality.

Since changed conditions have undermined the premises of Sweet and its progeny, the "adequate provision", doctrine should be overruled entirely or modified to require a pre-or post-seizure hearing to determine whether a condemnor's offer of estimated compensation represents a reasonable approximation of the actual market value of the property.

IV. ALTERNATIVES

In Michigan, the condemning agency is required to make a "good faith offer" to the landowner prior to instituting condemnation proceedings.[135] The purpose of the "good faith offer" requirement is to effectively limit a condemnor's opportunity to offer the landowner substantially less than the fair market value of his property. The landowner is purportedly protected against unreasonably low offers by the statutory requirement that the "good faith offer" be for an amount not less than the condemnor's appraisal, if it has a secured one.[136] A challenge to an unreasonably low offer would necessarily take the form of a pre-seizure attack upon the condemnor's "good faith."

The court has the power to fix the time and terms for the surrender of possession of the property.[137] Under such power the judiciary has the inherent power to order the deposit of an increment to the estimated compensation prior to mandating surrender of possession.[138] Employment of this framework would eliminate many unconstitutional flaws in the quick-take framework. However, the fundamental difficulty with the Michigan "good faith offer" procedure has been the liberal construction given to the term "good faith" by the state judiciary. The courts have recently manifested a willingness to conclude that any offer, no matter how insubstantial, was made in good faith.[139] In Kalamazoo Road Commission v. Dosca, the trial court felt that a one dollar offer for a partial taking was made in "good faith" even though recognizing that it was "bordering on the ridiculous." The Michigan Court of Appeals affirmed on the ground that the trial court properly found no error, fraud, or abuse of discretion by the condemnor, since the offer was made "on the basis of an appraisal obtained.[140] The Dosca case may mark a change in the attitude of the state judiciary and a divergence from earlier logic. For instance, the Michigan Supreme Court in 1928 dismissed a condemnation action upon

determining that the condemnor's offer was so disproportionate to the market value of the property as to be merely formal, thereby constituting a failure of the condemnor to make a bona fide effort to purchase prior to condemning.[141] The Michigan Supreme Court ruled as a matter of law that a merely formal or colorable offer is insufficient to meet the standard of good faith.[142] New York has held that the condemnor has the affirmative burden to show it acted in good faith.[143]

Though the concept of "good faith" in condemnation proceedings seems to necessarily require something more than a unilateral belief on the part of the condemning agency, trial courts have seemed willing to impose upon the government only a subjective standard. Trial courts have displayed a tendency to determine the issue in terms only of "honesty of intention," while eliminating the generally accepted second half of the good faith" test, i.e., knowledge of facts which ought to put a reasonable man on notice that he should seek further inquiry.[144] This judicial interpretation suggests that a landowner is under some obligation to demonstrate fraud or "bad faith," in order to show a lack of good faith. This distinction may be at odds with some "quick-take" statutes, in that the issue of fraud comes into play only with respect to challenges to the taking proper, whereas the issue of good faith arises with respect to compensation questions.[145] Had the legislature desired to use the standard propounded by trial courts, it could easily have required the condemnor only to make a "non-fraudulent offer" prior to filing its declaration of taking. The plain language of the statute implies a higher standard of care or responsibility from the condemning agency and an objective determination of its "good faith." Continued reliance upon ex parte belief as fulfilling the "good faith offer" requirement without a pre-seizure hearing could lead to a pro forma substantiation of compensation offers by "affidavits of sincerity."

In instances where an immediate transfer of possession is necessary to further the public interest, a prompt post-seizure hearing on the adequacy of the state's offer of compensation would appear to be constitutionally permissible. This alternative may represent the most reasonable reconciliation of the conflicting interests of the state and the individual. To further confuse the determination of "good faith,"

especially in "post-seizure settings, courts have not developed a consistent form of relief in situations where the condemnor's offer has not been up to "par." Some courts have employed dismissal of the action as a remedy,[146] while other courts have suggested that permitting condemnors to amend and increase their offer is the proper approach.[147] The more reasonable alternative would be to permit liberal amendment of the compensation offer, as the landowner attacking "good faith" is more concerned with valuation than presenting a total challenge to the taking itself.

VII. SUMMARY AND CONCLUSION

Michigan's "quick-take" statute permits the state to obtain possession of condemned property prior to a final adjudication of just compensation. Although the state is required to make a good faith offer of compensation to the landowner before taking possession, there is no provision for judicial review of the adequacy of the state's offer. Consequently, in the event that the actual value of condemned property greatly exceeds the state's offer, it may be many years before a landowner can obtain suitable substitute property due to inability to obtain sufficient financing until a final determination of damages.

A line of authority nearly a century old permits, under the due process clause, the seizure of condemned property prior to a final adjudication of just compensation. However, more recent cases have cast considerable doubt on the vitality of the earlier holdings and suggest that the state must provide a prompt post-seizure hearing on the compensation issue. Although lower courts in attempting to reconcile the two lines of authority have concluded that the earlier cases remain viable precedents, these courts have not addressed the necessity of a prompt post-seizure hearing.

In conclusion, it is hoped that the legislature and judiciary will recognize the need to achieve a more satisfactory reconciliation of the public and private interests at stake.

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1. See Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896)(property must be taken for public use).

2. The fifth amendment provides that a person will not "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fourteenth amendment states that no state shall "deprive any person of life, liberty, or property, without due process of law;. . ." U.S. CONST. amend. XIV.

3. Chicago, B. & Q.R.R. Co. v. Chicago, 166 U.S. 226 (1897).

4. See generally J.L. SACKMAN & P.J. VAN BRUNT, NICHOLS ON EMINENT DOMAIN, §§ 4.101, 24.11, 24.112, 25.1 (J.L. Sackman 3d ed. 1981).

5. The City of Detroit's Elmwood Urban Renewal Project was formulated in the mid 1940s but not completed until the mid 1970s. For an illustration of the problems and abuses of the project, see Foster v. Herley, 330 F.2d 87 (6th Cir. 1964). See also In re Urban Renewal, Elmwood Park Project, 376 Mich. 311, 136 N.W.2d 896 (1965).

6. This type of procedure usually results in massive inverse condemnation problems. See In re Urban Renewal, Elmwood Park Project, 376 Mich. 311, 136 N.W.2d 896 (1965). See also Detroit Bd. of Educ. v. Clark, 89 Mich. App. 504, 280 N.W.2d 574 (1979).

7. Cf. Foster v. Herley, 330 F.2d at 87. This condition is prevalent in most if not all major American urban centers.

8. The instability of the nation's general finances and the urban blight experienced on the local level has forced municipalities to take prompt action geared towards city "survival." The compelling and immediate necessity for urban redevelopment is dramatically demonstrated by the City of Detroit's Central Industrial Park Project, an undertaking of unprecedented size and speed. This reindustrialization project involved the simultaneous condemnation of over 1,600 residential, commercial, and industrial parcels--covering almost one square mile--at the intersection of two major interstate highways near the city's downtown area.

9. Quick-take" statutes provide for determination of and challenges to necessity as part of the initial proceeding. The two which will be referred to in this article are: Property for Public Highway Purposes (Highway Act), MICH. COMP. LAWS ANN. § 213.361 (amended 1971) and Uniform Condemnation Procedure Act, MICH. COMP. LAWS, ANN § 213.51 (1967). The pertinent provisions of Michigan's "quick-take" statute are discussed at length in section III, infra.

10. U.S. CONST. amend. XIV. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950)(notice). See, e.g., Bowen v. Story County Bd. of Supervisors, 209 N.W.2d 569 (Iowa 1973); Baltimore v. Mano Swartz, Inc., 299 A.2d 828 (Md. 1973)(opportunity to be heard).

11. MICH. CONST. art. 18,§ 2 (1850) and MICH. CONST. art. 13, § 2 (1908) states:

When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor[e], except when to be made by the state, shall be ascertained by a jury of twelve freeholders residing [sic] in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law ....

12. Under the 1850 and 1908 Constitutions, condemnation proceedings were regarded as "non-juridicus" proceedings because the judge acted only in an advisory capacity. The

Constitution provided that the jury was the final arbiter of both law and fact. See In re Widening of Mich. Ave., 280 Mich. 539, 273 N.W. 798 (1937); see also In re Huron-Clinton Metropolitan Auth., 306 Mich. 373, 10 N.W.2d 920 (1943).

13. To justify the taking of private property, under many of the Acts prior to the use of Act 87 of 1980, the government condemning agency would have to show that the proposed project must clearly be of sufficient importance to warrant its cost. Commissioner v. Moesta, 91 Mich. 149, 51 N.W. 903 (1892). The cost must be weighed against the need for the project. See Ray v. Mason County Drain Comm'r, 393 Mich. 294, 224 N.W.2d 883 (1975) and Michigan State Highway Comm'r v. Vanderkloot, 43 Mich. App. 56, 204 N.W.2d 22 (1972), aff'd, 392 Mich. 159, 220 N.W.2d 416 (1974).

14. Article 10, Section 2 of the 1963 Constitution states: "Private property shall not be taken for public use without just compensation therefor[e] being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." (Emphasis supplied).

15. Mich. G.C.R. 516.5 states: "Judges of courts of record in which condemnation proceedings have been instituted shall preside over the proceedings in person and shall instruct the jury or commissioners on questions of law and admissibility of evidence."

16. State Highway Comm'r v. Gulf Oil Corp., 377 Mich. 309, 312, 140 N.W.2d 500 (1966). The Michigan Supreme Court noted the remarks of Delegate Erickson who stated that the intent of Article 10, Section 2 of the 1963 Constitution was to make condemnation proceedings the same as all other civil actions by eliminating the right of the jury to be a trier of law and fact. "It is the desire and intent of the committee to correct this situation and have the judge act as such in condemnation cases with the same powers he has in other civil matters." (quoting 2 Official Record, Michigan Constitutional Convention 2581 (1961)). See also State Highway Comm'r v. Lindow, 4 Mi& App. 496,145 N.W.2d 223 (1966).

17. MICH. COMP. LAWS ANN. § 125.71 (1967) (Supp. 1982).

It is hereby found and declared that large areas in the municipalities of the state have become blighted, with the consequent impairment of taxable values upon which, in large part, municipal revenues depend; that such blighted areas are detrimental or inimical to the health, safety, morals, and general welfare of the citizens, and to the economic welfare of the municipality; that in order to improve and maintain the general character of the municipality, it is necessary to rehabilitate such blighted areas; that the conditions found in blighted areas can not be remedied by the ordinary operations of private enterprise, with due regard to the general welfare of the public, without public participation in the planning, property, acquisition, disposition and financing thereof; that the purposes of this act are to rehabilitate such areas by acquiring and developing properties within such areas for the protection of the health, safety, morals and general welfare of the municipality, to preserve existing values of other properties within or adjacent to such areas, and to preserve the taxable value of the property within such areas; and the necessity in the public interest for provisions herein enacted is hereby declared as matter of legislative determination to be a public purpose and a public use.

18. The municipal urban renewal agencies have used the Urban Renewal Act because the Highway Act specifically prohibits cities and villages from using the Act to condemn residential property, MICH. COMP. LAWS ANN. 5 213.361 (1967)(Supp. 1982).

19. Id. § 213.30.

20. Id. § 213.36.

21. MICH. COMP. LAWS ANN.§ 213.371, repealed by MICH. COMP. LAWS ANN. § 213.76 (effective April 1, 1983), provides:

Upon filing of a declaration of taking and making the deposit as provided in section nine, or if motion for review is filed, upon final determination thereof, the court shall fix the time and terms for surrender of possession of the property to the petitioner, and to enforce surrender by appropriate order or writ of assistance.

22. MICH. COMP. LAWS ANN. § 213.59 (9)(1)

provides:

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.

23. MICH. CONST. art. 10, § 2.

24. MICH. Comp. LAWS ANN. 5 213.30.

25. In the recent Central Industrial Park ("Poletown") Project, the City of Detroit announced its intention to condemn the area on June 28, 1981. The local Citizens District Counsel, formed in August 1980, approved the project in October 1980. After litigation of the constitutionality of Act 87 produced a favorable result for the condemning authority (Wayne County Circuit Court, Docket No. 80-040291), the condemnation complaint was filed on November 24, 1981. Some owners were required to move by April 21, 1981, and all buildings were to be razed by October 1981. The condemnor was placed under severe time constraints by General Motors and took possession of all property long before any contemplated just compensation trial date. Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

26. MICH. COMP. LAWS ANN. § 213.51 et seq. Many other states have very similar "quick-take" condemnation statutes. See, e.g., ARIZ. REV. STAT. ANN. § 12.1127 (1956); CAL. CIV. PROC. CODE § 1263.210 (West 1962); N.M. STAT. ANN. § 42A-1-22 (1978); OHIO REV. CODE ANN.§163.51 (Page 1971); OR. REV. STAT. § 741.38 (1971); PA. STAT. ANN. tit. 26, § 1-407 (Purdon 1969).

27. MICH. COMP LAWS ANN. § 213.54(2) provides:

(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.

28. MICH. COMP. LAWS ANN. § 213.554).

29. The language Of MICH. COMP. LAWS ANN. § 213.55(l) which states, in part, "Before initiating negotiations for the purchase of property . . . " implies, as a condition precedent to initiating a complaint for condemnation, a good faith offer and a negotiation process. However, the section also goes on to state, "If an agency is unable to agree with the owner for the purchase of the property, the agency may file a complaint for the acquisition of the property. . . ." The issue thus raised may only be a matter of semantics. It seems likely that if the condemnee challenged necessity on the basis that the condition precedent was not fulfilled because the condemnor failed to attempt to negotiate, a court would tell the parties to step out of the court and discuss possibilities for settlement. On their return, the court would then certify that negotiations had been attempted and had proved futile, state that all conditions precedent had been fulfilled, and set the case on the trial docket.

30. Id. § 213.550.

31. Id. § 213.56(l).

32. Id. § 213.56(2).

33. Id. § 213.56(7).

34. MICH. Comp. LAWS ANN.§ 213.59(l) states, in part, "[T]he 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."

35. The last sentence of MICH. COMP. LAWS

ANN. § 213.59(l) states, "[T]he court also may require surrender of possession of the property after the motion has been heard, determined and denied by the Circuit Court, but before a final determination on appeal, if the agency demonstrates a reasonable need."

36. Id. § 213.59(2).

37. Id. § 213.59(3).

38. 42 U.S.C. § 4651(5) (1971).

39. U.S. CONST. amend. V.

40. 135 U.S. 641 (1890).

41. Id. at 659.

42. Id. at 660-61.

43. 159 U.S. 380 (1895).

44. Id. at 404.

45. Id. at 407.

46. Id. The statute used by the city of Boston to acquire the property vested title in the city as soon as it filed a description of the land to be taken. Id.

47. Backus v. Fort St. Union Depot Co., 169 U.S. 557 (1898)(taking of land to build tracks and depot). The Court stated that "[I]f adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid before any final determination." Id. at 568.

48. 188 U.S. 491 (1903).

49. Id. at 503. A general statute existed that provided alternatives to recovering damages for land taken "in the laying out of a highway." Id. at 504. A solvent debtor was defined as "one whose solvency is not liable to go up or down . . . but is of substantial permanence." Id.

50. 224 U.S. 290 (1911).

51. Id. at 306.

52. 251 U.S. 57 (1919).

53. Id. at 62.

54. 262 U.S. 668 (1923).

55. Id. at 677.

56. 326 U.S. 203 (1945).

57. Id. at 205.

58. Id.

59. Bragg v. Weaver, 251 U.S. 57, 62 (1919).

60. Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 677 (1923).

61. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

62. See, e.g., Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969)(prejudgment garnishment); Bell v. Burson, 402 U.S. 535, 543 (1970)(termination of welfare benefits).

63. See, e.g., Matthews v. Eldridge, 424 U.S. 319, 349 (1976)(termination of Social Security disability payments); Barry v. Barchi, 443 U.S. 55, 68 (1979)(suspension of race horse trainer's license).

64. 407 U.S. 67 (1972).

65. Id. at 82.

The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' and 'depending upon the importance of the interest involved and the nature of the subsequent proceedings [if any],' the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. Id.

66. Id. at 70-71.

67. Id. at 80.

68. Id. at 81.

69. 416 U.S. 600 (1974).

70. Id. at 629 (5-4 vote).

71. Announcing that Fuentes stood for the proposition that the due process clause "requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property," Powell, J., concurring, asserted that the Mitchell holding represented a significant retreat "from the full reach of that principle, and to this extent I think it fair to say that the Fuentes opinion is overruled." Id. at 623 (Powell, J., concurring). Justices Douglas, Stewart and Marshall were less equivocal, insisting that the Mitchell majority had "unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis." Id. at 635 (Stewart, J., dissenting). Justice Brennan stated only that Fuentes v. Shevin required a reversal. Id. at 636.

72. 419 U.S. 601 (1975).

73. Id. at 607. In the words of Justice Stewart, "It is gratifying to note that my report of the demise of Fuentes v. Shevin seems to have been greatly exaggerated." Id. at 608 (concurring opinion). Justice Powell expressed dissatisfaction at the apparent revival of Fuentes: "I join in the Court's judgment, but I cannot concur in the opinion as I think it sweeps more broadly than is necessary and appears to resuscitate Fuentes v. Shevin. . . Id. at 609.

74. Id. at 607.

75. Id.

76. Id.

77. Id.

78. Id.

79. Id. See MPI, Inc. v. McCullough, 463 F. Supp.

887, 895-97 (N.D. Miss. 1978)(100-day delay between attachment and post-attachment hearing violates "early post-seizure hearing" requirement).

80. But see Aaron Ferer & Sons Co. v. Berman, 431 F.Supp. 847 (D. Neb. 1977), in which a writ of attachment was declared unconstitutional despite issuance by a judge and provision for an immediate hearing, "for the reasons that it issued on a conclusive affidavit, without a bond, and without adequate judicial supervision," and "the judge's participation appear[ed] to have been [only] ministerial." Id. at 853.

81. 419 U.S. at 606 (1975).

82. See, e.g., Johnson v. American Credit Co. of Georgia, 581 F.2d 526 (5th Cir. 1978) (attachment procedures unconstitutional despite provision for an immediate hearing, lack of judicial supervision); see also Hutchinson v. Bank of North Carolina, 392 F.Supp. 888, 896 (M.D.N.C. 1975)(attachment statute upheld despite provision for issuance of writs by a court clerk, because it was clear that the clerk was "a judicial officer and not a mere administrative functionary"); cf. Brown v. Liberty Loan Corp. of Duval, 539 F.2d 1355, 1363-69 (5th Cir. 1976) (post judgment garnishment proceedings held constitutional despite absence of meaningful judicial participation in issuance of writ).

83. 419 U.S. at 609 (Powell, J., concurring); 419 U.S. at 614 (Blackmun, J., dissenting).

84. See, e.g., Johnson v. American Credit Co. of Georgia, 581 F.2d 526, 534 n.16 (5th Cir. 1978) (listing courts which have emphasized judicial supervision in prejudgment seizure).

85. See, e.g., Aaron Ferer & Sons Co. v. Berman, 431 F.Supp. 847, 852 (D. Neb. 1977); Douglas Research and Chemical, Inc. v. Solomon, 388 F.Supp. 433, 437 (E.D. Mich. 1975). In both cases a garnishment or attachment procedure was struck down on the ground, inter alia, that a creditor seeking a writ was not required to post a bond.

86. 416 U.S. at 607.

87. Id.

88. 380 F.Supp. 754 (N.D. Tex. 1974)(per curiam), aff'd mem, 419 U.S. 1042 (1974). The district court case was decided by a panel of three judges.

89. Id. at 771.

90. Id. at 772.

91. Id. at 773.

92. Id. at 772-73.

93. See generally Developments in the Law-Zoning, 91 Har. L. Rev. 1427, 1462-1501 (1978).

94.Id. at 772-74 n.21.

95. Id. at 772.

96. Id.

97. Id. at 767.

98. Id.

99. Id.

100.520 F.2d 848 (1st Cir. 1975).

101. Id. at 850.

102. Id. at 849.

103. Id. at 849-50.

104. Id. at 850.

105. Id.

106. Id.

107. Id.

108. Id.

109. Id.

110. 536 F.2d 566 (3d Cir. 1976).

111. Id. at 570.

112. See supra § IV.A. for the historical development of procedural due process in eminent domain proceedings.

113. See supra § IV.B. for a discussion regarding modern trends in procedural due process.

114. 251 U.S. at 62.

115. 262 U.S. at 677.

116. 326 U.S. at 205.

117. See supra text accompanying notes 100-11 for a discussion of Vazza v. Campbell, 520 F.2d 848 (1st Cir. 1975).

118. 380 F.Supp. 754, 773 (1974).

119. See supra discussion in §§ IV.A. and IV.C.

120. 419 U.S. at 607. See supra § IV.A.

121. 380 F.Supp. at 773. The court stated:

The alleged right of possession by a creditor arises from a private contractual relationship, which the judiciary is requested to enforce. This debtor-creditor relationship and the underlying contract frequently arise through unequal bargaining powers and create thereby the potential for abuse of the judicial process by the creditor. In contrast, the power of eminent domain is a sovereign right that may be exercised by the State in its discretion for any public purpose; it is not contingent upon prior approval by potentially affected property owners. Id. at 773-74.

122. Id.

As to the nature of the power of appropriation, the contract between the debtor and creditor establishes the responsibilities and privileges of each party. In enforcing that contract, the judiciary must be cognizant of recognizing contractual powers in the creditor that are, under traditional equity concepts, unconscionable. The power of eminent domain, however, does not require a balancing of interests, for the power has only two restrictions: that the condemnation be

for a public purpose and that just compensation be paid. It is not necessary, therefore, to initiate an inquiry into the process whereby the power of appropriation originated. Id. at 774.

123. Id. "One further distinction involves the nature of the parties. Clearly the creditor seeking possession is an interested party having a selfish interest in the outcome of the litigation. In contrast, the State pursues condemnation on behalf of the general public and is a totally disinterested party to the proceedings." Id.

124. Id.

As to the purposes of the appropriation, the creditor seeks possession of the property in order to protect his economic investment and preserve the property from destruction, removal to another state or concealment. Condemnation, however, is for the general public--a criteria easily tested in the district court before a loss of possession--and does not require a balancing of the relative interests of the parties.

Id.

125. These distinctions may be summarized as follows:

1. origins: private contractual vs. sovereign right;

2. nature of power: restricted vs. virtually unrestricted;

3. nature of parties: selfish vs. totally disinterested;

4. purpose: protection of private economic investment vs. public welfare.

Id. at 773-74.

126. Id. at 774.

127. Michigan case law has not to date recognized the existence of any such remedy. See Poletown Neighborhood Council v. Detroit, 410 Mich. 616 (1981).

128. MICH. COMP. LAWS ANN.§ 213.55(l).

129. Joiner, 380 F.Supp. at 774.

130. Id.

131. See supra text accompanying notes 64-87.

132. See Foster v. Herley, 330 F.2d 87 (6th Cir. 1964).

133. See supra text accompanying notes 48-49 for a discussion of Williams v. Parker.

134. A hearing would ensure that in most cases, the deposit of estimated compensation would reasonably approximate the actual value of the land. Without such a hearing, however, there is nothing to prevent the condemning authority from making a wholly inadequate deposit of estimated compensation. In this situation, in the event the municipality went bankrupt, the landowner could receive only a small fraction of the actual fair market value of the land.

135. MICH. COMP. LAWS ANN. § 213.55(1).

136. Id.

137. MICH. COMP. LAWS ANN. § 213.59.

138. The California legislature has been less obtuse in providing this type of mechanism for judicial review. California, for instance, explicitly permits a hearing to determine the adequacy of a state's offer of compensation prior to enforcing surrender of possession: (c) If the plaintiff has taken possession of the property and the court determines that the probable amount of compensation exceeds the amount deposited, the court shall order the amount deposited to be increased to the amount determined to be the probable amount of compensation. If the amount on deposit is not increased accordingly within 30 days from the date of the court's order, or such longer time as the court may have allowed at the time of making the order, the defendant may serve on the plaintiff a notice of election to treat such failure as an abandonment of the proceeding. If the plaintiff does not cure its failure within 10 days after receipt of such notice, the court shall, upon motion of the defendant, enter judgment dismissing the proceedings and awarding the defendant his litigation expenses and damages as provided in Section 1268.610

and 1268.620.

(d) After any amount deposited pursuant to this article has been withdrawn by a defendant, the court may not determine or redetermine the probable amount of compensation to be less than the total amount already withdrawn. Nothing in this subdividion precludes the court from making a determination or redetermination that probable compensation is greater than the amount withdrawn.

CAL. CIV. PROC. CODE § 1255.0.30 (West 1982).

139. 21 Mich. App. 546, 175 N.W.2d 899 (1970).

140. Id. at 548, 175 N.W.2d at 901.

141. In re Rogers, 243 Mich. 517, 524, 220 N.W. 808, 811 (1928).

142. Id. at 524.

143. New York State Elec. & Gas Co. v. Schiener, 60 App. Div. 2d 981, 401 N.Y.S.2d 644 (1978).

144. Security Trust Co. v. Tuller, 243 Mich. 570 575-77, 220 N.W. 795, 797-98 (1928).

145. Compare MICH. COMP. LAWS ANN. § 213.56(2) "with MICH. COMP. LAWS ANN.§ 218.55.

146. The district court dismissed the government's condemnation in United States v. 44 Acres of Land, 110 F. Supp. 168 (1953) due to the fact that only $300,000 was offered to the property owner though the U.S. Corp of Engineers previously recommended an offer of $500,000. The district court enforced its order notwithstanding the facts that the government had attempted to amend its offer, and deposited the additional $200,000 prior to the hearing on the motion to dismiss and that the government already had possession of the property. Id. at 172.

147. On appeal to the Second Circuit in United States v. 44 Acres of Land, 234 F.2d 410 (1956), after reinstitution of the condemnation action upon a $500,000 offer, the appellate panel

suggested that the trial court should have granted the government leave to amend its declaration of taking so as to increase the offer of estimated compensation. Id. at 416.

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