

CONSIDERATION OF ENVIRONMENTAL ISSUES WITHIN A CONDEMNATION PROCEEDING

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INTRODUCTION

In recent years, governmental units have become more concerned about the environmental condition of properties which they seek to acquire by exercise of power of eminent domain. Two significant revisions to the Uniform Condemnation Procedures Act, 1980 P.A. 87, as amended (MCL 213.51, et seq.; MSA 8.265(1), et seq.) ("Act 87"), address this concern.

ORIGINAL FILING PROCEDURES

Section 5 of the original version of Act 87 sets forth the procedures to be followed by a condemning authority prior to initiating condemnation proceedings. The agency must adopt a resolution of necessity setting forth the public purpose for the taking and a declaration of taking stating that the property is to be taken by the agency. The agency must then make a good faith written offer to purchase the property based upon an appraisal.

If the good faith offer is not accepted, the agency may then proceed to file the condemnation case. Upon filing, an initial hearing will be scheduled, usually within thirty days, for the purpose of determining, among other things, the date that possession of the property has to be surrendered to the condemning authority and ordering payment of the estimated just compensation to the property owners.¹ After the initial hearing, the case generally proceeds into the discovery, mediation and trial stages for the purpose of determining final just compensation.

PRE-ACQUISITION ENVIRONMENTAL AUDIT

The original version of Act 87 did not make provision for or anticipate the resolution of environmental disputes within the context of the condemnation case. The first relevant amendment to Act 87 was adopted in 1988, when condemning authorities were granted the right to conduct environmental inspections of properties prior to (or

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after) the filing of a complaint to acquire property to determine "whether the property is suitable to take for public purposes." MCL 213.54(2); MSA 8.265(4)(2). As a result, a property owner can be forced to permit a condemning authority to enter upon the property and obtain information about the environmental condition of the property, even before the condemning authority makes a commitment to acquire title to the property and pay the property owner fair compensation. Some property owners have found this provision particularly troublesome, considering that the condemning authority typically is not under any duty of confidentiality and may intend to share its findings with the Michigan Department of Natural Resources or other governmental authorities.

AUDITS ALONE ARE INADEQUATE

The right to conduct a preacquisition environmental audit sometimes left condemning authorities in a quandary: if the agency discovered contamination of the property, how could it proceed with the condemnation and adequately assure itself that sufficient funds would remain to complete any required cleanup of the contamination? At the same time, property owners were faced with the possibility that their property would be involuntarily taken from them through eminent domain, and that the condemning authority could later come back and seek damages for the cost of environmental activities.

This concern may be best illustrated by a series of cases now pending in Wayne County Circuit Court and the U.S. District Court for the Eastern District of Michigan in which the City of Detroit is seeking recovery of environmental remediation costs from dozens of parties whose property was acquired by eminent domain in the 1980's by the City of Detroit.² Years after "just compensation" was determined and property owners were paid pursuant to the provisions of Act 87, the City of Detroit demanded payments for environmental costs which in many cases were far in excess of the amounts received by the property owners. To the extent the City succeeds in these pending actions, the former property owners could be left in a significantly worse financial condition than prior to the commencement of the condemnation proceedings.

ENVIRONMENTAL PROCEDURES ADOPTED AS PART OF ACT 87

Faced with problems of both condemning authorities and private property owners, the Michigan Legislature adopted another amendment to Act 87 in

the closing hours of 1993. This act, 1993 P.A. 308 ("Act 308"), establishes procedures for the resolution of environmental claims during condemnation proceedings brought under Act 87. While the new law adds some protections for both condemning authorities and property owners, it may also cause many unintended problems, including those described below.

REVISIONS TO GOOD FAITH OFFER REQUIREMENTS

Act 87 requires a condemning authority to provide a property owner with a good faith offer to purchase the owner's property based upon the authority's appraisal of just compensation for the property. Section 5(1) of Act 87, as amended, now requires that the good faith offer state whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property (e.g., under Act 307 and the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, *et seq.*). The appraisal obtained by the authority in connection with the property acquisition must also reflect this reservation or waiver.

Section 5(1) of Act 87 now permits an authority to withdraw a good faith offer made before January 30, 1994 if a complaint has not been filed, and provides for the authority to resubmit a good faith offer complying with amended Act 87. If this is done, statutory attorney fee reimbursement permitted under Act 87 (MCL 213.66(3); MSA 8.265(16)(3)) is calculated based upon the new offer.

WHEN A PROPERTY OWNER CAN FORCE THE ENVIRONMENTAL ISSUES TO BE RESOLVED AT THE TIME OF TAKING, RATHER THAN LATER

The City of Detroit litigation discussed above is only one example of the ability of a condemning authority to obtain title and return later to obtain reimbursement for costs to conduct environmental assessment and remediation activities. The Act 308 amendments to Act 87 acknowledge the right of a condemning authority to reserve its rights to seek reimbursement, but add an important set of circumstances which, if satisfied, provide a property owner the right to force the authority to resolve, or forever waive, its environmental claims against the property owner at the time of taking. The principal provisions are:

- The owner must make a demand for waiver within the time prescribed to responsively plead after service of the complaint filed under Act 87. As a result, a governmental authority's granting of an extension of time to answer may give the owner time to think about (or discover) his rights to force a waiver of the condemning authority's cost recovery rights.

- The owner must establish by affidavit, and evidentiary hearing if requested by the authority in the time prescribed to answer a motion, that (1) the property is a single family residence and has been used solely for residential purposes, (2) the property is agricultural property (as defined in Act 307), and that the authority's reservation of rights arises out of a fertilizer, pesticide or similar release in compliance with certain laws governing application of such substances, or (3) the owner is the only identified potentially responsible party, the extent of contamination and cost of remediation have been reasonably quantified, and the cost of remediation does not exceed the authority's appraised value for the property.

Section 6a does not answer many important questions which may arise in a property owner's attempt to force a waiver, such as: (1) When must have the property been used solely for residential purposes to permit the property owner to require a waiver? Is usage by the prior owner relevant? (2) If the property is used for agricultural purposes, how does the property owner establish the reason for the authority's reservation of rights, as the statute does not require the authority to provide a reason for reserving its cost recovery rights, and the authority is not required to have a reason (i.e., it just may want to be cautious)? (3) How is it determined whether historical fertilizer or pesticide releases were in compliance with specified environmental laws? (4) If contamination is identified on the property, who determines whether the owner is the only identified potentially-responsible party under applicable state and federal environmental laws?

PROCEDURES FOR ESCROW OF ENVIRONMENTAL COSTS

Section 8(1) of Act 87, as now amended, allows a condemning authority which reserves its rights to seek an escrow of any portion of the deposited good faith

offer as security for environmental remediation costs on the condemned property. The escrow may be allowed only under circumstances the court considers just. The authority must present an affidavit and environmental report establishing that the escrowed funds are likely to be required to remediate the property in conjunction with filing the complaint.

The amount placed in escrow cannot exceed remediation costs for the highest and best use of the property. This should encourage condemning authorities to quantify the cost of remediating the property prior to commencement of condemnation proceedings so that the authority can seek an escrow of a portion of its good faith offer at the time of filing the complaint.

Although Act 87 contains a statutory attorney fee reimbursement provision (MCL 213.66(3); MSA 8.265(16)(3)), no allowance is contained in Act 308 for the reimbursement of the owner's attorney fees for the cost of contesting the authority's escrow request. As a result, the property owner will have to incur the expense of engaging counsel (which could, but may not, be the condemnation attorney) to monitor and challenge the environmental escrow request, or the condemnation attorney will need to provide these services without additional compensation or reimbursement.

DISBURSEMENT OF ESCROWED FUNDS

Disbursement of escrowed funds may not occur until well into or after what used to be the completion of the condemnation proceeding. The court is authorized to permit release of escrowed funds under circumstances determined just by the court, including: (1) statutory requirements for remediation have changed and the full amount escrowed is not required for remediation; (2) the court determines that the full amount of funds is not required for remediation; (3) the authority does not initiate remediation within two years of surrender of possession of the property and the authority cannot show good cause for delay; (4) costs expended for remediation are less than estimated costs or amount in escrow; or (5) the court issues an order of apportionment responsibility for remediation (MCL 213.58(3); MSA 8.265(8)(3)). Property owners subject to an escrow may need to retain counsel for many months or years beyond their receipt of payment for their property in order to complete the escrow phase of the condemnation proceedings.

NEED FOR ENVIRONMENTAL EXPERTISE IN CONDEMNATION PROCEEDINGS

Condemnation attorneys are now compelled to work with an attorney with environmental expertise in eminent domain cases involving suspected or known environmental impairment of their client's property. Eminent domain proceedings, which typically were limited to issues such as the existence of necessity for the taking of private property and the determination of just compensation, in many cases will now involve the active consideration of environmental issues. Within this new "case within a case," the issues often will be complex, involve additional experts and consultants (e.g., environmental consultants), and may require

consideration of the impact of the often unpredictable mandates of the Michigan Department of Natural Resources, the Environmental Protection Agency, and other governmental agencies.

ENDNOTES

1. If a motion to review necessity is filed within the time to responsively plead pursuant to Section 6 of Act 87, the hearing to determine the dates for surrender of possession and payment of estimated just compensation will be put on hold pending the court's ruling on the necessity challenge.
2. See, for example, **City of Detroit v A. W. Miller, Inc., et al.**, Case No. 93-72939-DT, U.S. District Court for the Eastern District of Michigan (Southern Division).