Recent Cases Clarify Eminent Domain Litigation Questions

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This article analyzes two recent cases that directly impact eminent domain litigation in Michigan. The first case, *Michigan Department of Transportation v. Randolph*, 461 Mich. 757; 610 N.W.2d 893 (2000), confirms the two-part test that governs statutory reimbursement of condemned property owners' attorneys' fees. In light of *Randolph*, the amount of reimbursement in any given case will remain largely within the trial court's discretion, and will not be limited to a rigid "lodestar" formula.

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In the second case, *Silver Creek Drain District v. Extrusions Division, Inc., et. al.*, 245 Mich. App. 556; 2001 Mich. App. LEXIS 86 (2001), the Michigan Court of Appeals held that trial courts may not reduce property owners' just compensation by the estimated cost to remediate environmental contamination on the condemned land. As set forth below, both decisions turned upon important statutory and practical considerations.

'Randolph'

In *Randolph, supra*, the plaintiff, Michigan Department of Transportation (MDOT), filed a condemnation action in the Clinton County Circuit Court, seeking to acquire the defendants' property by eminent domain for a public project. The defendant landowners entered into a fee agreement with their attorney containing terms that were, and are, standard in the industry — the defendants would pay their attorney one-third of all increased compensation obtained over and above MDOT's first written offer.

Following a lengthy trial, the jury rendered a verdict which, together with interest, resulted in an increase over MDOT's first written offer in the amount of $1,098,960. Accordingly, defendants paid their attorney a one-third fee in the amount of $366,319.90, and then filed a motion for reimbursement of that fee pursuant to §16(3) of the Uniform Condemnation Procedures Act, MCL 213.66(3); MSA 8.265(16)(3) ("UCPA §16(3)"). UCPA §16(3) requires Michigan condemning agencies to reimburse condemned property owners' reasonable attorneys' fees, not to exceed one-third of the increase over the first written offer:

"If the amount finally determined to be just compensation for the property acquired exceeds the amount of the written offer under 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."

The quoted language is taken from UCPA §16(3) as it existed at the time that the *Randolph* action was filed. In 1996, UCPA §16(3) was amended in several respects, but those amendments were irrelevant to both the *Randolph* analysis and this article.

Thus, the *Randolph* defendants moved for statutory reimbursement of the entire one-third fee that they had paid to their attorney. MDOT opposed that motion. It contended that the defendants' attorney had expended 728.2 hours on the case and, multiplying those hours by $165 (the hourly rate that defendants' lawyer charged in matters where she was retained on an hourly basis), MDOT theorized that it should be required to reimburse only $120,153. In other words, MDOT argued that the defendants' one-third attorney's fee was not "reasonable," but rather, the "reasonable" fee should be based upon the lodestar formula, which multiplies the actual hours expended by a reasonable hourly rate.

The trial court adopted MDOT's lodestar position wholesale — rather than ordering MDOT to reimburse the actual fee that the defendant landowners had paid to their attorneys ($366,319.90), the trial court ordered MDOT to reimburse only $120,153. On appeal, the Michigan Court of Appeals' majority found no abuse of discretion in the trial court's order. The dissent disagreed, urging that UCPA §16(3) codifies a critical policy concern by ensuring that condemned property owners are made whole, and are not forced to diminish their just compensation through payment of unreimbursed attorneys' fees.

In a per curiam opinion, the Michigan Supreme Court reversed the Court of Appeals' majority and the trial court. The Supreme Court established a broad, two-part test to apply when calculating reimbursement of a property owner's attorney's fee in a condemnation action. First, the trial court "must determine whether the owner's attorneys' fees are reasonable." (See, *Randolph*, 461 Mich. at 765.)

In making this reasonableness determination, the trial court shall consider the eight factors listed in MRPC 1.5(a):

- the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent.

The Supreme Court not only ruled that the trial court enjoys discretion when deciding the particular weight to attribute to each factor (*Id.* at 766, n11), but further stated that, "We likewise reject the MDOT's argument that the 'lodestar' method is the 'preferred' way of determining the reasonableness of requested attorney fees." (*Id.*)

Finally, once the trial court has determined that the owner's attorney's fees are reasonable, the court should further decide whether the condemning agency should be required to reimburse the entire amount of those reasonable attorney's fees. This constitutes the second, and final, step in the reimbursement equation. Importantly, the trial court must articulate the reasons for its decision in order to facilitate appellate review. (*Id.* at 767.) In this regard, the Supreme Court observed that trial courts can, and will, reach different decisions concerning reimbursement of attorney's fees, but indicated that such disparity "is the nature of discretionary decisions." (*Id.*)

Recognizing that the trial court failed to adhere to this two-tier approach in its reimbursement analysis, the Supreme Court vacated the trial court's order and remanded the case for reconsideration based upon the Supreme Court's opinion.

'Silver Creek'

In *Silver Creek*, the Silver Creek Drain District (Drain District) wished to acquire the defendant property owners' vacant land for drain purposes. The Drain District estimated the owners' just compensation to be $211,300, and tendered an offer in that amount. Within that offer, the Drain District indicated that it reserved its right to bring a federal or state cost recovery action against the landowners regarding the release of hazardous substances on the property. That reservation was made in accordance with §5(1) of the UCPA, MCL 213.55(1); MSA 8.265(5)(1). The landowners rejected the offer and, consequently, the Drain District filed a condemnation action to acquire the property. Per statute, the Drain District deposited its own estimate of the defendants' just compensation with the county treasurer.

The parties stipulated that the subject property was, in fact, contaminated. But in a contentious dispute over the escrowed estimated just compensation, the defen-

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SPECIAL FEATURE

Real Property

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dant landowners asserted that they did not "cause," and thus could not be held liable for, the contamination, citing the then-newly-amended Natural Resources and Environmental Protection Act, MCL 324.20102 and 324.20126; MSA 13A.20102 and 13A.20126 (NREPA). Ultimately, the Drain District agreed to release the estimated just compensation to the landowners, contending that it did not wish to incur the expense of proving that the defendants actually caused the environmental contamination of the property, as required by the NREPA.

Two years later, the parties proceeded to a trial on the issue of the property's valuation, and therefore just compensation for the taking. The court determined that, absent environmental contamination, the property's value was $278,800. The court ruled, however, that the reasonable cost of securing a formal, type-C closure from the (then) Department of Natural Resources was $237,768. Accordingly, the court ordered the Drain District to pay just compensation in the amount of only $41,032.

On appeal by the landowners, the Michigan Court of Appeals observed that, "[w]hether environmental contamination and cleanup costs associated with such contamination can be considered in determining just compensation in a condemnation proceeding is an issue of first impression in Michigan." (See, *Silver Creek*, 245 Mich. App. at 564.) And recognizing that, "[t]he purpose of just compensation is to put a property owner in as good a position as it would have been had the taking not occurred" (*Id.* at 562, 567), the Court of Appeals reversed the trial court and ruled in favor of the landowners.

Not until 1993 did the Michigan Legislature amend the UCPA to address the circumstance where a governmental agency acquires environmentally contaminated property by eminent domain for a public project. UCPA §5 was amended to require the condemning agency to either "reserv[e] or waiv[e] 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 ...." (See, MCL 213.55(1); MSA 8.265(5)(1).)

Similarly, UCPA §8 was amended to provide that, "[i]f the agency reserves its rights to bring a state or federal cost recovery claim against an owner, under circumstances that the court considers just, the court may allow any portion of the money deposited under section 5 to remain in escrow as security for remediation costs of environmental contamination on the condemned parcel." (See, MCL 213.58(2); MSA 8.265(8)(2).)

In light of these statutory provisions, the Court of Appeals in *Silver Creek* held that "the UCPA does not vest courts with the authority to account for estimated remediation costs of contaminated property when calculating the amount of just compensation due a property owner." (*Id.* at 565.)

It based that ruling upon several points:

- UCPA §5 requires the condemning agency to either reserv[e] or waiv[e] its rights to bring federal or state cost recovery actions. Therefore, the UCPA's language establishes that any effort to obtain cost recovery must be pursued in a separate cause of action, not within the context of the condemnation action itself. Indeed, the statutory amendments themselves would be superfluous if a court (or presumably a jury) could simply deduct remediation costs when determining just compensation.
- By deducting estimated cleanup costs from a landowner's just compensation, a court would effectively strip the landowner, and its lawyer, of defenses as to both liability and damages that could otherwise be fully developed in an environmental cost recovery action. In fact, as noted above, the *Silver Creek* landowners actually stipulated that environmental contamination was present on the subject property, but certainly would not have done so if the trial court possessed the power to transform their condemnation action into an environmental cleanup contest.
- Moreover, the traditional approach to just compensation, namely, "placing the landowner in as good a position as it would have been had the taking not occurred" (supra), is typically determined by establishing the property's "market value." (See, SJI2d 90.06.) A property's market value is often derived from an examination of "comparable properties," yet, in the view of the Court of Appeals, "[c]ontaminated properties are like snow flakes; no two are alike. Thus, it is virtually impossible to find a comparable parcel of property on which to base an estimation of value." (*Id.* at 567.)

Therefore, the Court of Appeals held that the trial court erred as a matter of law in deducting estimated cleanup costs from the defendant landowners' just compensation, and reversed the trial court's judgment on that basis.

Conclusion

Both *Randolph* and *Silver Creek* represent important cases in the landscape of eminent domain jurisprudence. In the wake of *Randolph*, trial courts will engage in a two-tier analysis aimed at 1) determining the reasonableness of the property owner's attorney's fee, and 2) then deciding whether the condemning agency should be permitted to reimburse any amount less than that reasonable fee. Reimbursement will not be limited to a strict lodestar formula.

Under *Silver Creek*, trial courts, and presumably juries, will not be permitted to reduce property owners' just compensation awards by the amount of estimated environmental cleanup costs. Rather, such cost recovery, if any, must be pursued in a separate action altogether.