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An Electoral Uprising Dramatically Increases Property Owner Rights in Condemnation Cases.

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Introduction

Prussian statesman Otto von Bismarck's famous quotation is that "laws are like sausages. It's better not to see them being made." Perhaps the same could be said of large scale economic developments that require the use of eminent domain to dispossess residents. When the Michigan voting public observed that the process of making such a development in New London, Connecticut led to the approval by the United States Supreme Court of the dispossession of homeowners in favor of large business interests, the voting public reacted by overwhelmingly passing Proposal 4 on the November, 2006 ballot.[2] The electoral climate that resulted in the passage of Proposal 4 also spurred the legislature to amend the Uniform Condemnation Procedures Act ("UCPA") in a manner favorable to owners. This article addresses the substantive changes resulting from both the passage of Proposal 4 and the amendments to the UCPA.[3]

Public Use

The greatest impetus for the passage of Proposal 4 was the desire by the electorate to repudiate the United States Supreme Court decision in *Kelo v City of New London.*[4] Kelo authorized the City to use eminent domain to acquire property, including homes, to construct an office, retail and marina development. Although individual properties were not blighted, the Court deferred to the City's determination that the takings were justified to allow a general economic rejuvenation. Ironically, *Kelo* is generally irrelevant in Michigan. Shortly before Kelo, the Michigan Supreme Court issued *Wayne v Hathcock,*[5] overruling *Poletown Neighborhood Council v Detroit.*[6]

Per Hathcock, public use includes (a) "public necessity of the extreme sort otherwise impractical,"[7] (b) "developments where the private entity remains accountable to the public in its use of that property,"[8] and (c) "allowing transfer[] to a private entity when the selection of the land to be condemned is itself based on public concern,"[9] primarily to alleviate blight. *Kelo* explicitly acknowledged the right of states to create more stringent requirements for the exercise of eminent domain than those found in federal law.[10] Proposal 4 constitutionally codified Hathcock.[11]

The biggest effect on public use standards contained in Proposal 4 involves blight removal. Following *Hathcock*, most condemnation

Continued on pg 2

Continued from pg 1

experts believed that the next major battleground in public use jurisprudence would involve agencies recasting the justification for projects as blight removal instead of economic development. Further, the Michigan Supreme Court's next major takings decision following *Hathcock* signaled continued deference to agencies, where one of the three tests for public use was established.[12] However, Proposal 4 placed the burden of proof on agencies and created a new, non-deferential standard for evaluating blight determinations. "The burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use."[13]

Notice of Claims

The UCPA requires reimbursement of owners' attorney fees, consistent with the traditional contingency fee arrangement of one-third of the ultimate award above the good faith offer.[14] In 1996, the UCPA was amended to address complaints made by agencies that they were forced to reimburse attorney fees, where they would have voluntarily tendered good faith offers encompassing certain issues had they received notice. A procedure was implemented requiring owners to provide written notice if they believed that the good faith written offer "did not fully include 1 or more items of compensable property or damage.[15] "Failure to tender notice resulted in waiver of the claim and, upon receipt of the notice, the agency could amend its good faith offer and avoid reimbursing attorney fees on the increase.[16]

However, rather than using the amendments to the UCPA as a shield against attorney fees where lack of information caused agencies to tender good faith offers that they acknowledged were deficient, agencies wielded the procedure as a sword to bar owners from pursuing just compensation. These types of arguments reached their zenith in *Carrier Creek v Land One, LLC,*[17] where the Court of Appeals barred the owner from proffering evidence of the possibility of rezoning after the owner failed to tender a notice, holding that the "plain and ordinary meaning of 'compensable damage' is loss, harm, or injury that is eligible for compensation," including "factor[s]" that impacted the value of the property. Critics of this decision asserted that it went far beyond that which the statute encompassed because the possibility of rezoning is merely one factor impacting the value of property, indistinguishable from other attributes of the property such as access, location and size, and is not a discreet "item[] of compensable property or damage.[18] "The legislature apparently agreed. The statute was amended to strike the language "items of compensable property," limit the issues addressed by notice to only "damage[] caused by the taking," and specifically exclude "the value of the property taken" from the notice obligations.[19] Thus, *Carrier Creek* is no longer applicable.[20]

Other very significant changes were made to the notice process. The deadline for tendering notice was extended from 60 days after the filing of the Complaint to at least 180 days after service and an appraisal exchanged within the deadline could serve as notice.[21] The trial court is now vested with greater discretion to extend claim filing deadlines.[22] Finally, the owner is entitled to file supplementary claims to the extent that "any claim… has not fully accrued or is continuing in nature when the claim is filed."[23]

Increased Compensation to Homeowners

Proposal 4 added a constitutional requirement that if "an individual's principal residence is taken for public use, the amount of compensation made and

Continued on pg 3

Continued from pg 2

determined for that taking shall not be less than 125% of that property's fair market value.[24] "While the use of eminent domain has always been acknowledged as a "harsh remedy," [25] owners were limited to receipt of just compensation that "should enrich neither the individual at the expense of the public nor the public at the expense of the individual."[26]

Conceptually, there is an economic justification for paying homeowners more than the market value of their property, where forced relocation results in that owner losing the benefit of capped real estate taxes. However, those concerns are addressed in the amendments to the UCPA. A newly-added subsection requires agencies to pay homeowners up to five times the amount of any savings enjoyed due to capped property taxes. Therefore, the language in Proposal 4 appears to simply add a liquidated element of the equivalent of pain and suffering damages when homeowners are dispossessed.

Additional Miscellaneous Revisions

Proposal 4 included language "preserv[ing]" any "existing right, grant or benefit afforded to property owners as of November 1, 2005." At a minimum, this language converts the UCPA's reimbursement of attorney fees and costs[27] and its award of interest following dispossession at a rate greater than normal judgment interest rates[28] from statutory benefits to constitutional mandates.

The UCPA has been amended to require that homeowners be given at least "a reasonable opportunity not to exceed 180 days after the payment date of moving expenses or moving allowance"[29] to vacate and all property owners are given at least 30 days after payment.[30] Furthermore, any dispute about apportionment of proceeds among owners, where an agency exercises its right to tender a unified good faith offer to all property owners, must be resolved by the trial court "before physical dispossession."[31] This new requirement will presumably discourage agencies from exercising the right to "make a single, unitary good faith written offer," [32] where there are multiple owners of the same parcel.

Good faith offers requiring relocation must include an outline of "the occupants' basic legal rights" and the revisions provide for additional relocation rights to tenants with leases of less than six months with particularity and all occupants generally.[33]

Immediate Applicability

When the UCPA was amended in 1996, language was added making clear that the new amendments applied prospectively. "Amendments made to this act by the amendatory act that added this sentence shall apply to all good faith written offers made after the effective date of the amendatory act that added this sentence."[34] No such language was added to the UCPA relative to the 2006 amendments. Therefore, there is no indication from the clear language of the act that the legislature intended something other than immediate applicability.

Conclusion

Proposal 4 and the amendments to the UCPA reflect a desire to provide significant, additional protections to owners. Some of those protective measures, as found in the UCPA, could be amended in the future through legislative action. However, many changes are now embedded in the Constitution. Further, the language of Proposal 4 guaranteeing the preservation of rights existing as of 2005 insures that any future changes could only be a retrenchment to those rights that existed as of November 1, 2005.

Continued on pg 4

Continued from pg 3

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2. *Proposal 4 passed by a vote of 80% to 20%.*

3. *The changes to the UCPA are found in MCL 213.55, 213.58, 213.59 and 213.66. This article is not exhaustive and addresses only the most substantive changes.*

4. *545 US 469; 125 S.Ct. 2655, 162 L. Ed. 2d 439 (2005).*

5. *471 Mich 445; 684 NW2d 765 (2004).*

6. *410 Mich 616; 304 NW2d 455 (1981).*

7. *Examples include "straight path" improvements such as "highways, railroads, canals, and other instrumentalities of commerce." Hathcock at 473.*

8. *Id at 474.*

9. *Id at 475.*

10. *"We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law… [footnote citation to Hathcock]." 545 US 457-458.*

11. *"'Public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph."*

12. *Novi v Adell Trust, 473 Mich 242; 701 NW2d 144 (2005) explicitly rejected the strict scrutiny test found in Poletown and authorized the use of eminent domain to construct a public road, where the trial court engaged in an evidentiary hearing and determined that the benefit to a specifically identifiable, private interest predominated the public interest.*

13. *Article X, § 2, Const. 1963.*

14. *MCL 213.66(3).*

15. *MCL 213.55(3).*

16. *Id.*

17. *269 Mich App 324, 329; 712 NW2d 168 (2005), leave denied, ___ Mich ___; 723 NW2d 907 (2006).*

18. *MCL 213.55(3), as it existed prior to the 2006 amendment.*

19. *MCL 213.55(3)(a).*

20. *On December 1, 2006, leave was denied by the Michigan Supreme court. Justice Young, in concurring with the denial, and Justice Cavanaugh, in dissenting, both agreed that the recent legislative amendments "limit[] the jurisprudential significance of this case." _____ Mich ___, 723 NW2d 907 (2006).*

21. *Compare MCL 213.55(3) as previously written to MCL 213.55(3)(a).*

22. *Id.*

23. *MCL 213.55(3)(c).*

24. *Article X, § 2, Const. 1963.*

25. *Consumers Power v Allegan State Bank, 20 Mich App 720, 741; 2002 NW2d 295 (1969).*

26. *SJI 2d 90.05.*

27. *MCL 213.66.*

28. *MCL 213.65.*

29. *MCL 213.59(7)(a).*

30. *MCL 213.59(6).*

31. *Id.*

32. *MCL 213.55(1).*

33. *Id.*

34. *MCL 213.75.*

Stephon B. Bagne has specialized in representing property owners involved in condemnation proceedings during his entire career. His expertise in representing property owners in condemnation cases is widely recognized. Stephon has represented all types of property owners in a variety of situations including vacant and improved property, partial and total takings, easement and fee acquisitions, involving commercial and residential properties. Stephon has successfully challenged the necessity of takings and negotiated less onerous acquisitions in partial taking matters. He regularly speaks and writes about eminent domain and other real estate law issues for a variety of professional organizations. **Contact him at: sbagne@clarkhill.com or 313-965-8897**