Briefly

A Publication of the Government Law Section of the State Bar of Michigan

December 2018 ■ Steve Joppich, Chair ■ Helen Lizzie Mills, Editor

A Brief Message from Incoming Chair Steve Joppich

Steve Joppich

As practitioners in the area of municipal law, we experience first-hand the waves of new case law and new legislation that seem to relentlessly crash on the shores of the governmental entities with whom we work. Our clients turn to us for answers as each new wave of law rolls in. Keeping up with it all can be challenging for even the most seasoned lawyers among us. It is for this reason that the Government Law Section (GLS) provides its members with annual winter seminars and summer conferences that are second to none.

Knowing that time away from the office can often be difficult, our objective in organizing these events is to make sure that you will receive valuable, high-level information and input from experts on topics that are relevant, timely, and useful in your daily efforts to serve your clients. Our reputation for achieving these objectives is evidenced by the high rate of attendance and positive feedback we routinely receive at these events.

Having regularly attended GLS conferences for nearly a quarter century, I can personally attest that—from my earliest years in the practice, to these later years—I have walked away from each event much better equipped to more knowledgably and confidently serve my clients. As an added bonus, these get-togethers also provide an excellent opportunity to meet and socialize with an extraordinary group of colleagues from across the state.

So, as we come to the close of another year, I would encourage all GLS members to open your 2019 calendars and, before you forget, block-off the dates for the annual *GLS Winter Seminar* on **February 8, 2019** at the ornately decorated Henry Hotel in Dearborn and the *GLS-MAMA Summer Conference* scheduled for **June 21-23, 2019** at the scenic Bay Harbor Village Hotel & Conference Center in Bay Harbor.

After putting these dates in your calendar, watch for the line-up of topics and registration information for the Winter Seminar "*From Marihuana to Micro-Breweries & Everything in Between*" at this link: http://connect.michbar.org/govlaw/events/recentcommunityeventsdashboard.

I look forward to seeing you.

Steve Joppich
Chair, Government Law Section

View from the Other Side: Partial Taking Eminent Domain Tips from an Owners' Attorney

By Stephon B. Bagne, Clark Hill PLC

Introduction

Eminent domain law focuses on the determination of just compensation. Most takings are partial takings, meaning that the agency takes less than fee simple rights over an entire property. Partial taking cases are often the most contentious because owners sometimes assert just compensation claims for damages not contemplated by agencies. This article identifies a few examples of issues that agencies typically miss, generating significant increases in just compensation.

Underlying Legal Principles Regarding Partial Takings

The Michigan Standard Jury Instructions are an excellent source for simplified eminent domain principles. Indeed, virtually all real estate appraisers quote the Instructions in their appraisals to comply with technical appraisal requirements.

> Just compensation is the amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred…. Just compensation should enrich neither the individual at the expense of the public nor the public at the expense of the individual.[1]

When an agency acquires less than a full property, it is a partial taking. "When only part of a larger parcel is taken, as is the case here, the owner is entitled to recover not only for the property taken, but also for any loss in the value to his or her remaining property."[2] The loss in value to the remaining property is called damages to the remainder. Several examples that could trigger damages to the remainder are identified in the Partial Taking Jury Instruction. The factors "may include: (1) its reduced size, (2) its altered shape, (3) reduced access, (4) any change in utility or desirability of what is left after the taking, [and] (5) the effect of the applicable zoning ordinances on the remaining property . . . ."[3] Because just compensation "is not a matter of formulas or artificial rules,"[4] the specifically identified factors "may" be considered along with a broad catch-all that includes "the use which the [condemning authority] intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property."[5]

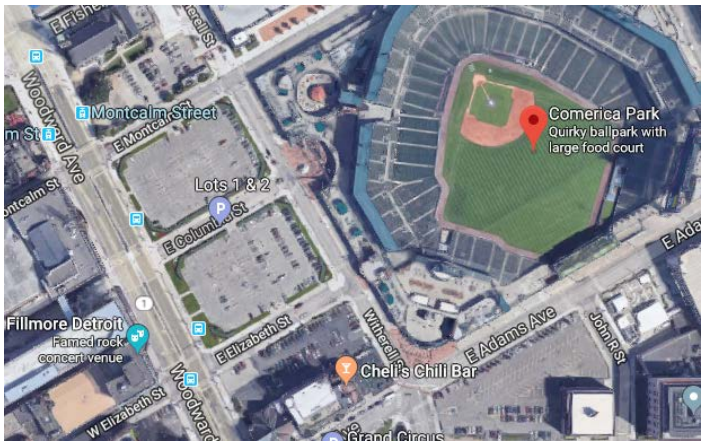
One of the fundamental tenets of condemnation requires that "in valuing what is left after the taking, you must assume that the [condemning authority] will use its newly acquired property rights to the full extent allowed by the law."[6] This means that an agency should evaluate whether the rights it seeks will actually be needed because, even if the rights are not needed, the agency must pay just compensation as though the rights will be fully used.

Damages to the Remainder Can Include the Impact upon the Larger Parcel

Agencies often underestimate the amount of just compensation owed by evaluating only the particular property being subjected to the taking. However, Michigan recognizes an expansive definition of the parcel that must be evaluated for just compensation purposes. "'Parcel' means an identifiable unit of land, whether physically contiguous or not, having substantially common beneficial ownership, all or part of which is being acquired, and treated as separate for valuation purposes."[7]

The taking of a parking lot that services another building is a classic example of the importance of the definition of parcel. Indeed, early in my career, the Detroit/Wayne County Stadium Authority avoided such a pitfall by revising their plans for the acquisition of the land on which Comerica Park and Ford Field were built. The acquisition footprint for Comerica Park originally

included the parking lot north of Cheli's Chili Bar. That parking lot is owned by the Central United Methodist Church. The parking lot was excluded from the acquisition footprint, presumably due to the requirement that just compensation be paid for the reduction of value of to the church itself.

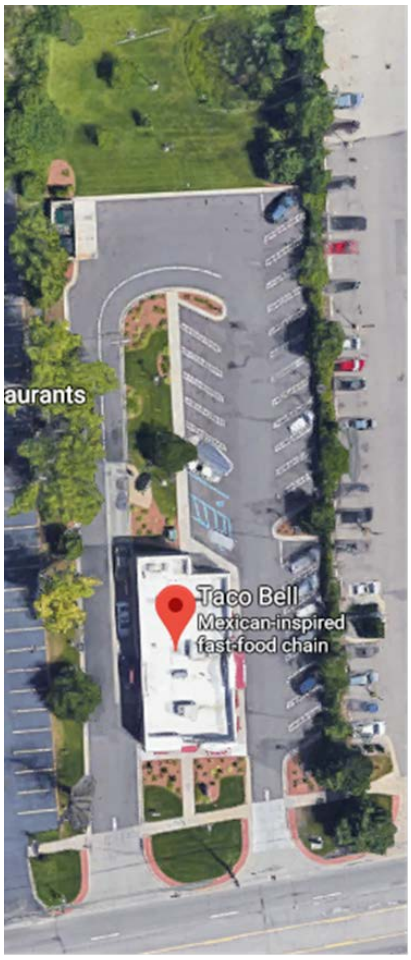


Agencies must be careful that an acquisition will not have unintended consequences that create significant just compensation claims relating to the larger parcel. Given that the properties comprising the parcel need not be contiguous and need not be owned by the same entity so long as common beneficial ownership exists, larger parcel claims may not be readily apparent from title documents.

Agencies Can Obtain "Supervariances" to Mitigate Zoning Impacts

M Civ JI 90.12 specifically identifies "the effect of the applicable zoning ordinances on the remaining property." The most obvious zoning impact involves the creation of a non-conformity for an existing building or reduction of the buildable footprint on vacant property due to non-compliance with setbacks if a strip is acquired. Given the proliferation of landscaping requirements in zoning ordinances, the loss of existing vegetation or the inability to plant new vegetation is another zoning impact.

However, an agency can cure a nonconformity by acquiring (or granting, if the municipality with zoning authority is also the taking agency) a variance. "If the acquisition of a portion of a parcel of property actually needed by an agency would leave the remainder of the parcel in nonconformity with a zoning ordinance, the agency, before or after acquisition, may apply for a zoning variance for the remainder of the parcel."[8] While it is not a legally recognized term, a variance granted under these circumstances is really a "supervariance" because it continues to remain effective if the improvements on or use of the property changes.[9]



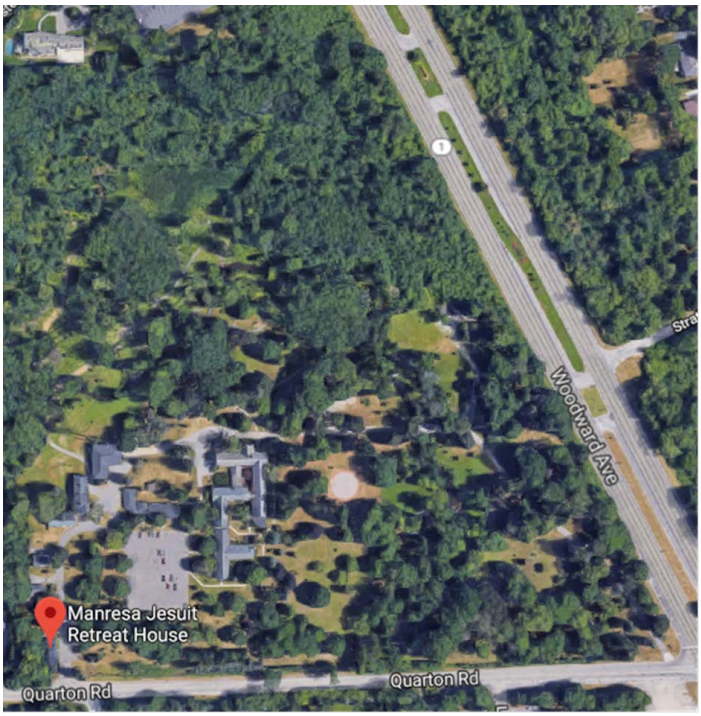
I was recently involved in a case in which acquisition of a supervariance allowed the agency and owner to reach a mutually beneficial resolution of a significant just compensation claim. A utility company imposed an easement allowing all vegetation in the rear of a Taco Bell to be cleared. The City of Walled Lake required trees to be planted in the rear both to comply with a development agreement and its generally applicable ordinances. Because screening trees could not be planted in the easement and the easement extended into the parking lot, the existing building became legally non-conforming and the future buildable footprint was reduced, resulting in very significant just compensation claims. The case was resolved in part when the utility company acquired a variance pursuant to MCL 213.54.

Easements Should Be Limited to Include Only Rights that Are Actually Required to Implement the Project

As noted, just compensation must be evaluated based upon the assumption that the agency will use the rights it acquired fully. This means that an agency should not simply impose form easements without first evaluating whether it actually desires to use the rights acquired and how the

use of those rights will impact the remaining property.

I was recently asked to assist with the acquisition of a sewer easement over an institutional property that was actually being used as a religious retreat. However, just compensation must be based on the highest and best use of the property[10] and this property, which, consisted of approximately 40 acres on the corner of Woodward and Quarton in Bloomfield Hills, was extremely valuable if used more intensively.



A sewer easement running most of the length of the Woodward frontage was required, which would have resulted in very significant just compensation claims if access to Woodward was curtailed. Therefore, the standard form easement was amended to explicitly recognize the owner's right to build driveways allowing access to Woodward over the sewer easement.

Conclusion

Eminent domain is recognized to be a highly technical area of the law. It is critical to understand partial taking concepts to avoid being surprised with significantly increased project expenses resulting from unexpected partial takings claims.

About the Author

Stephon B. Bagne *is a partner in Clark Hill PLC, a national law firm with offices in Detroit, Birmingham, Grand Rapids, and Lansing. He has represented property owners in eminent domain cases throughout Michigan since 1996. He has also represented municipalities when they are subjected to takings by other agencies and owners of vacant or improved commercial, industrial, and residential properties in road, drain, utility, and airport takings. Recently, Mr. Bagne has lent his expertise to Clark Hill's agency clients to "reverse engineer" cases prior to issuance of good faith offers to avoid the type of pitfalls identified in this article.*

Endnotes

1 M Civ JI 90.05 Just Compensation-Definition.

2 M Civ JI 90.12 Partial Taking.

3 *Id.*

4 *Detroit/Wayne County Stadium Authority v Drinkwater, Taylor, and Merrill, Inc*, 267 Mich App 625, 648; 705 NW2d 549 (2005).

5 M Civ JI 90.12 Partial Taking.

6 *Id.*

7 MCL 213.51(g).

8 MCL 213.54(2).

9 "If a variance is granted under this subsection, the property shall be considered by the governmental entity to be in conformity with the zoning ordinance for all future uses with respect to the nonconformity for which that variance was granted." *Id.*

10 "In deciding the market value of the subject property, you must base your decision on the highest and best use of the property. By 'highest and best use' we mean the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use." M Civ JI 90.09 Highest and Best Use.

Legislative Update

By Kester K. So and Eric A. McGlothlin, Dickinson Wright PLLC

Over the course of the last several months, the Michigan Senate and House of Representatives have considered numerous bills of municipal interest. The following are summaries of some of bills that have been enacted in 2018.

Laws Enacted 2018

- Economic development. **SB 393 (2018 PA 57)** recodifies several tax increment finance authority statutes into a single act and establishes certain reporting requirements and penalties for noncompliance. Creates new act (MCL 125.4101 *et seq.*).
- Economic development. **HB 5435 & 5436 (2018 PA 250 & 251)** amends the Commercial Rehabilitation Act and Obsolete Property Rehabilitation Act to allow the legislative body of a qualified local governmental unit to revoke a commercial rehabilitation exemption or obsolete property rehabilitation exemption certificate upon request by certificate holder. Amends section 12 of 2000 PA 146 (MCL 125.2792).
- Cities. **SB 593 (2018 PA 89)** amends the Home Rule City Act to allow the assessed value equivalent of certain revenue to be added to the assessed value of the property in the computation of net indebtedness and include eligible reimbursements under the Local Community Stabilization Authority act in computation of the assessed value equivalent. Amends section 4a of 1909 PA 279 (MCL 117.4a). See also, **SB 590-592 (2018 PA 86-88)**, which make similar amendments to the Charter Township Act (1947 PA 359), the General Law Village Act (1895 PA 3), and the Home Rule Village Act (1909 PA 278).
- Recreation. **SB 596 (2018 PA 69)** amends Part 721 (Michigan Trailways) of the Natural Resources and Environmental Protection Act to allow, among other things, certain trails to include amenities related to trail usage and the establishment of a trail management council by two or more governmental agencies under the Urban Cooperation Act. Amends sections 72103, 72105 & 72106 of 1994 PA 451 (MCL 324.72103 *et seq.*) and adds section 72103a.
- Property. **SB 740 (2018 PA 200)** repeals a section of 1957 PA 185 (County Department and Board of Public Works) providing prima facie evidence of ownership in county department and board of public works when a register of deeds testifies in court. Repeals section 55 of 1957 PA 185 (MCL 123.785). See also, **SB 739 (2018 PA 199)** repealing a similar provision of 1895 PA 215 (MCL 105.27) with respect to fourth class cities.
- Public employees and officers. **SB 699 (2017 PA 208)** exempts members of the municipal stability board from the Incompatible Public Offices Act. Amends section 3 of 1978 PA 566 (MCL 15.183). See also, **SB 686 (2017 PA 202)** (MCL 38.2801 *et seq.*).
- Local government. **SB 522 (2018 PA 61)** requires the governing body of a village or township with a population that does not exceed 10,000 people to determine the compensation for directors of a village or township community center. Amends section 3 of 1929 PA 199 (MCL 123.43).
- Transportation. **HB 5408 (2018 PA 325)** amends the Michigan Transportation Fund Act to require each local road agency responsible for more than 100 certified miles of road to give the Transportation Asset Management Council a three-year asset management plan beginning October 1, 2020, and modifies reporting requirements for local road agencies. Amends section 9a of 1951 PA 51 (MCL 247.659a).

Opinions of the Attorney General Bill Schuette

By Assistant Attorney General George M. Elworth

Editor's note: *Assistant Attorney General George M. Elworth of the State Operations Division and a member of the Publications Committee furnished the text of the headnote of the opinion. The full text of the opinion may be accessed at www.mi.gov/ag.*

Opinion No. 7303 (May 17, 2018)

District Library Establishment Act: *Constitutional limits on tax levies for district libraries.*

A millage levied by a district library established under the District Library Establishment Act (DLEA), 1989 PA 24, MCL 397.171 et seq., is not subject to the mill limitations or the 20-year durational limit set forth in article 9, § 6 of the Michigan Constitution. But under section 13 of the DLEA, MCL 397.183, a district library may not levy more than 4 mills and any levy over 2 mills may be authorized only for a period not to exceed 20 years.

Opinion No. 7304 (June 19, 2018)

Firearms Act; Licenses And Permits; Concealed Weapons: *Exemptions for residents and nonresidents from pistol licensing requirements.*

A resident of another state who holds a license to carry a pistol concealed upon his or her person issued by a state other than Michigan is exempt under subsection 12(1)(f), MCL 28.432(1)(f), of the Firearms Act, from obtaining a license to purchase, carry, possess, or transport a pistol as required by section 2, MCL 28.422, of the Act. A Michigan resident who holds a concealed pistol license issued by another state is exempt under subsection 12(1)(f), MCL 28.432(1)(f), of the Firearms Act, from obtaining a license to purchase, carry, possess, or transport a pistol as required by section 2, MCL 28.422, but is not exempt from obtaining a concealed pistol license under section 5b, MCL 28.425b, of the Act, in order to carry a concealed pistol in Michigan.

Opinion No. 7305 (July 20, 2018)

Civil Rights Commission; Elliot-Larsen Civil Rights Act: *Validity of interpretative statement interpreting term "sex" as used in Elliott-Larsen Civil Rights Act.*

The Michigan Civil Rights Commission's Interpretative Statement 2018-1, which concludes that the term "sex" as used in the Elliott-Larsen Civil Rights Act includes sexual orientation and gender identity, is invalid because it conflicts with the original intent of the Legislature as expressed in the plain language of the Act, and as interpreted by Michigan's courts.

Mark Your Calendars

Registration will open soon for the annual Winter Conference to be held February 8, 2018, at The Henry Hotel in Dearborn. This year's event "Marijuana to Microbreweries and Everything in Between" will feature dynamic speakers, timely topics, and great networking. Check your mail for the registration form!

Case Summaries

By Michael D. Hanchett, Rosati Schultz Joppich & Amtsbuechler, PC

In *Michigan Gun Owners v Ann Arbor Pub Sch* (July 27, 2018), the Michigan Supreme Court held that, while the Legislature could preempt school districts' regulation of guns by implication, it has not yet done so. MCL 123.1102 states that "a local unit of government shall not…enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols [or] other firearms…except as otherwise provided by federal law or a law of this state." The Statute defines "local unit of government" as "a city, village, township, or county." The Michigan Supreme Court found that the "Legislature has, expressly, restricted some but not all local governments from regulating firearms. Schools in particular are not on the preempted list, quite possibly for reasons not difficult to imagine." Thus, the Court held that school districts were not preempted from banning firearms on school property.

http://www.michbar.org/file/opinions/supreme/2018/072718/68436.pdf

In *Vermilya v Delta Coll Bd of Trs* (July 31, 2018), the Michigan Court of Appeals held that the Legislature intended for the public body to identify the name of the specific litigation it would be discussing in closed session on the record to justify its decision to close its meeting to the public. The Court reasoned that while MCL 15.268(e) does not in and of itself require the public body to name the pending litigation, Defendant violated MCL 15.267(1) and MCL 15.268(e) when it failed to identify the "specific pending litigation." The Court held that it is clear that the Legislature intended for public bodies to name the pending litigation because of its use of the word "specific." The Court reasoned that Defendant's argument that the Open Meetings Act (OMA) requires only that there *be* specific pending litigation would render the word "specific" redundant and unnecessary. The COA read the OMA broadly with the intent to further the purpose of government accountability.

http://www.michbar.org/file/opinions/appeals/2018/073118/68443.pdf

In *City of Detroit v City of Detroit Bd of Zoning Appeals* (October 23, 2018), the Michigan Court of Appeals upheld the circuit court's order affirming the City's Board of Zoning Appeals (BZA) decision to grant a use variance to International Outdoor, Inc., for the erection of a billboard. The City argued that the BZA did not have the authority to grant a use variance in an area that banned off-site advertising, and even if it did have such authority, International Outdoor could not prove that the ordinance imposed an unnecessary hardship as it "purchased the hardship." The COA found that because "neither [International Outdoor] nor its predecessor in title created the hardship by partitioning, subdividing, or otherwise physically altering the land after the enactment of the ordinance, the BZA could grant the use variance." The COA held that the BZA had the authority to grant the use variance and it was correct in grating it based on unnecessary hardship.

www.michbar.org/file/opinions/appeals/2018/102318/68922.pdf

In *Concerned Property Owners of Garfield Township, Inc v Charter Township of Garfield* (October 25, 2018), the Michigan Court of Appeals held that because Appellants failed to show that they had a valid prior nonconforming use, their motion for summary disposition was properly denied. Appellants were property owners on Silver Lake who filed suit after the Township updated its zoning ordinance to, among other components, specifically prohibit short-term vacation rentals in this district. The COA reviewed the Township's previous zoning ordinance to determine if short-term rentals were previously allowed. At issue was whether the specific zoning district "One-Family Residential" included short-term rental properties. If so, the appellant's short-term rental use would qualify as a prior nonconforming use that would be allowed to continue after the Township's amendment to its zoning ordinance. The Court found that because short-term rentals are inherently transitory, which the ordinance excluded from the definition of "family" by limiting the use to "family" dwelling units, the ordinance plainly prohibited short-term rentals. Thus, because

Appellants' prior rentals violated the previous ordinance, they did not qualify as a prior nonconforming use.

http://www.michbar.org/file/opinions/appeals/2018/102518/68979.pdf.

In *Mount Lemmon Fire District v. Guido* (November 6, 2018), the United States Supreme Court held that States and their political subdivisions were "employers" covered by the Age Discrimination in Employment Act (ADEA) regardless of whether they met the 20-employee threshold. The Court reviewed the issue of whether the ADEA's numerosity requirements of 20 or more employees, applicable to "a person engaged in an industry affecting commerce," applies as to state entities, including state political subdivisions. The Supreme Court held that § 630(b)'s "two-sentence delineation…and the expression 'also means' at the start of [the] second sentence, combine to establish separate categories: persons engaged in an industry affecting commerce with 20 or more employees; and States or political subdivisions with no attendant numerosity limitation." While reading the ADEA as written to apply to states and political subdivisions regardless of size gives the ADEA, in this regard, a broader reach than Title VII, the Court held that this is a consequence of the different language Congress chose to employ.

https://www.supremecourt.gov/opinions/18pdf/17-587_n7ip.pdf