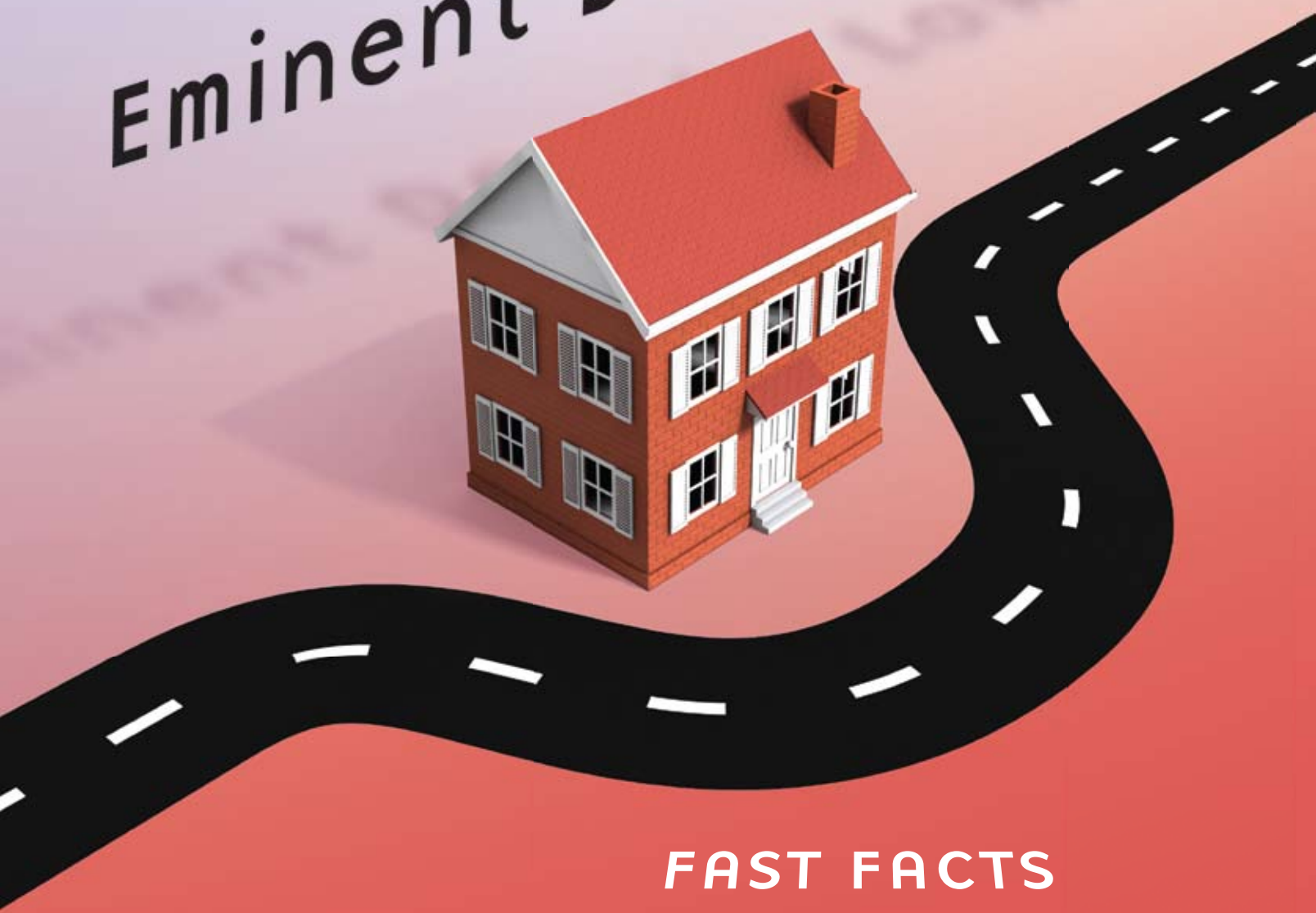
Recent Changes in Eminent Domain Law



FAST FACTS

- Michigan voters "overruled" the United States Supreme Court's decision expanding the use of eminent domain to benefit private developers.
- The Uniform Condemnation Procedures Act was amended to make the process for the determination of just compensation more fair.

By Jerome P. Pesick and Ronald E. Reynolds

Historically, most people do not pay attention to the potential impact of eminent domain until it affects their property directly. However, in 2005, the United States Supreme Court ignited a firestorm of public debate on the topic as a result of its decision in *Kelo v City of New London,*[1] which effectively confirmed the ability of individual states to utilize eminent domain to transfer property from one private owner to another to advance economic development. In Michigan, and many other states, this resulted in legislation limiting the government's exercise of the eminent domain power. The authors participated in the legislative hearings and drafting committee meetings addressing eminent domain that took place in the 2005–2006 legislative session. This article summarizes the resulting changes, including amendment of the Michigan Constitution Takings Clause, as well as eminent domain-related legislation.

Public Use

In 2004, in *County of Wayne v Hathcock,*[2] the Michigan Supreme Court held that eminent domain cannot be used to take property from one private owner to convey the property to another private owner except in very limited circumstances involving takings for uses like privately owned railroads, highly regulated uses such as pipelines, and takings to eliminate genuine blight. In so holding, the Supreme Court reversed its landmark decision in *Poletown Neighborhood Council v City of Detroit,*[3] which had permitted the City of Detroit to take property from various private owners under the pretense of economic development and convey the properties to General Motors to construct an auto assembly plant. *Hathcock* therefore substantially limited the instances when the government can take property through eminent domain.

Like *Poletown, Hathcock* was anticipated to be the harbinger of a new national standard for public use. When *Hathcock* was decided, the United States Supreme Court was considering *Kelo v City of New London.*[4] There, a Connecticut city argued that taking non-blighted property to convey it to a real-estate developer for a new development intended to create jobs and boost the city's tax base qualified as a "public use" of the taken property. To the surprise of many, and in accord with precedents like *Berman v Parker*[5] and *Hawaii Housing Authority v Midkiff,*[6] the United States Supreme Court in *Kelo* held that although the federal Constitution's "public use" limitation prohibits takings for private purposes, it permits takings to promote economic development, even if property is taken for transfer between private owners. The Court seemed to view the federal Constitution as setting the "minimum" requirements for public use, noting that each state is free to adopt standards that require greater public uses to authorize taking property through eminent domain. Indeed, *Kelo* cited *Hathcock* as an example for states to follow should they desire a more restrictive interpretation of "public use."

Michigan's Constitutional Amendment

As a result of the heightened national attention given to the public-use issue after the Supreme Court's decision in *Kelo,* and notwithstanding the protections advanced by *Hathcock,* the Michigan legislature took on the public-use issue, as well as other eminent domain issues, in its 2005–2006 legislative session.

The Michigan Senate adopted Senate Joint Resolution E, presenting a ballot initiative in November 2006 to codify *Hathcock* into Const 1963, art 10, §2, the takings clause of the of the Michigan Constitution. Historically, that clause simply provided: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." The original draft of Senate Joint Resolution E proposed a dramatic change in this straightforward constitutional provision, and actually incorporated a standard governing public use that would have been similar to the analysis that the Michigan Supreme Court had applied to approve the taking in *Poletown*. The Senate ultimately amended the resolution to provide that "public use" does not include takings for purposes of economic development:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.

Because the Michigan legislature has enacted new, enhanced constitutional and statutory protections against eminent domain abuses, property owners in Michigan enjoy greater rights and protections than those in most other states.

> "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.
>
> In a condemnation action, 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.
>
> Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

Both the Michigan House and Senate adopted this resolution with broad bipartisan support. Michigan voters in the 2006 general election similarly adopted the resolution as an amendment to the Michigan Constitution by an overwhelming margin.

As the language makes plain, this constitutional amendment went well beyond simply codifying *Hathcock*. Not only does the amendment preclude takings for economic development or tax enhancement, it also allocates the burden of proof in a public-use challenge, adopts a heightened burden for takings involving blighted properties, requires payment of 125 percent of fair market value as just compensation for the taking of an individual's principal residence, and preserves all rights and benefits afforded to property owners under the law as of November 1, 2005.

Legislative Amendments

In addition to presenting the ballot initiative that resulted in amendments to the Michigan Constitution, the Michigan legislature also amended a number of eminent domain-related statutes. The amendments altered the Uniform Condemnation Procedures Act[7] (UCPA), which governs all condemnation actions in Michigan,[8] as well as the Allowances for Moving Personal Property from Acquired Real Property Act[9] (Relocation Act), and the Acquisition of Property by State Agencies and Public Corporations Act, MCL 213.21 *et seq.* (State Agencies Act).

The Uniform Condemnation Procedures Act

First, the legislature made several changes to the UCPA, which governs rights and procedures in all Michigan condemnation actions.[10] Perhaps the most extensive changes involved UCPA §5, MCL 213.55, and specifically §5(3). Generally, UCPA §5 requires a condemning agency to submit a good-faith written offer to purchase the property that it desires before filing a condemnation action.[11] Under a 1996 amendment, property owners were required to inform the condemning agency of items of property or damage omitted from the condemnor's offer within a short time after the agency submitted its offer or filed its condemnation action. The amendment's original purpose was to allow the government an opportunity to evaluate the owner's claims and to increase the amount of just compensation offered without having to incur additional attorney fees. In practice, however, the 1996 amendment was used by some governmental agencies to deny payment for items of just compensation. For example, in *City of Novi v Woodson,*[12] the court of appeals determined that the owner's notification that she would claim just compensation for either business interruption damages or the value of her going concern was not sufficient under the statute. As a result, the owner recovered approximately $40,000 as just compensation for her land, with her otherwise compensable business damages thrown out. Later, in *Carrier Creek Drain Dist v Land One, LLC,*[13] the court of appeals ruled that the 1996 amendment required the owner to disclose portions of its appraisal theory to the government within the notice period. The property owner in *Carrier Creek* sought leave to appeal to the Michigan Supreme Court, the Real Property Law Section filed an amicus brief in support of the property owner's position, and the Supreme Court held oral argument on the application. While the application was pending, however, the legislature amended UCPA §5(3). As a result, although a majority of the Supreme Court explained that it disagreed with the court of appeals' decision in *Carrier Creek,* the Supreme Court denied leave expressly acknowledging the legislature's fix.[14]

The Relocation Act was amended to allow a renter to recover attorney fees incurred in seeking to recover moving expenses when the renter must move from a taken property.

The September 2006 amendments to UCPA §5(3) alter the notice requirements, meaning that it should be less likely that an owner will lose his or her claim to just compensation altogether, yet the 2006 amendments retain the government's right to receive notice of property or damages omitted from the good-faith written offer. They also allow an owner to give notice of unaccrued or continuing claims, and subject the owner to a continuing duty to supplement information relative to any such claim. This amendment in particular, which received broad bipartisan support, restored needed balance to the UCPA.

But this was not the only change to UCPA §5. An additional amendment now requires the government to provide the property owner with notice of the owner's basic legal rights when the

government first submits a good-faith offer to acquire the property. On the other hand, UCPA §5(3)(f), MCL 213.55(3)(f) was added to provide that tenants may not claim just compensation for short-term leaseholds. The new language states: "A residential tenant's leasehold interest of less than 6 months in the property is not a compensable claim under this Act." A new subsection 6 was also added to UCPA §5, MCL 213.55(6), to provide residential owners an upfront payment for increases in their property taxes due to "uncapping," in part addressing the problem of an owner losing his or her property (with an advantageous "capped" value) to eminent domain, then having the new residence's taxes "uncapped" due to the change in ownership. The subsection provides a formula for determining the amount that will be paid as compensation to owners for the effective increase in property taxes that the taking caused. Non-residential property owners often include a similar claim for "uncapping" of property taxes within their claim for just compensation.

The next amendment to the UCPA involved §8, MCL 213.58. The amendment prohibits the condemning agency from escrowing any estimated just compensation for an owner's principal residence, if the residential structure is taken or the taking creates certain types of non-conformities with the local zoning ordinance.

Section 9 of the UCPA was also amended to require payment of estimated just compensation no later than 30 days before any physical dispossession of the taken property occurs.[15] A further amendment provides that when an individual's residence is taken, the individual is not required to move from the residence without having had a reasonable opportunity to relocate to a comparable replacement dwelling, although a "reasonable opportunity" cannot exceed 180 days after moving expenses have been paid.[16] These reforms garnered broad bipartisan support and went into effect in December 2006.

A final amendment to the UCPA involves fee reimbursements. Specifically, the legislature amended UCPA §16 to create subsection 7, MCL 213.66(7) granting indigent persons the right to recover reasonable attorney and expert fees in an unsuccessful challenge to the validity of a taking, if the Court determines there was a reasonable good-faith claim that the property was not being taken for public use, and the taking is not for a governmentally owned transportation project. Before this special amendment for indigent persons, the UCPA provided no fee reimbursements for unsuccessful challenges to the validity of a taking. Even this provision is limited, however, as it "does not apply after December 31, 2007."[17]

The State Agencies Act

The legislature also amended the State Agencies Act, which grants certain governmental entities the power of eminent domain.[18] The amendment's apparent purpose was to render the State Agencies Act consistent with the amendments to the Michigan Constitution. In fact, the amendments replicated in statutory form the constitutional amendments: the statutory amendments prohibit state agencies and public corporations from exercising eminent domain for economic development purposes or to enhance the municipal tax base; they allocate the burden of proof in public-use challenges; they require the condemning agency to pay 125 percent of the taken property's fair market value when the taken property is a principal residence; and they preserve property owners' existing rights as of November 2005.

In some instances, however, the amendments to the State Agencies Act went further than the constitutional amendments. For example, the amendments expressly incorporate the standard for "public use" articulated by Justice Ryan in his *Poletown* dissent, which the Supreme Court adopted in *Hathcock*.[19] This legislation also limited the 125 percent multiplier's applicability to those residential takings in which the residential structure is actually taken or the taking renders the remaining property nonconforming under the applicable zoning ordinance. The legislature added a new protection against pretextual takings for private benefit, but excepted drain projects from its scope. Finally, the amendments added a definition for "blighted" property that is consistent with that term's definition under the Brownfield Redevelopment Financing Act.[20]

The Relocation Act

The third act amended in 2006 was the Relocation Act, enacting various reforms affecting families, renters, and indigents involved in eminent domain. Most notably, the legislature amended Relocation Act §2, MCL 213.352, to increase the maximum payment to a displaced individual or family for moving expenses from $1,000 to $5,250. The legislature also amended the Relocation Act to extend moving expense reimbursement to renters occupying residential property with a leasehold interest of less than six months. Essentially, this is the counterbalance to the UCPA amendment providing that a tenant with a lease of less than six months cannot claim just compensation for the loss of

its leasehold; instead, that tenant has greater rights to moving expenses. Finally, the Relocation Act was amended to allow a renter to recover attorney fees incurred in seeking to recover moving expenses when the renter must move from a taken property.[21]

Conclusion

It took over 20 years for the Michigan Supreme Court to reverse its holding in *Poletown* and reinstate a strict application of the "public use" clause in *Hathcock*. Yet it took less than two years after the United States Supreme Court decision in *Kelo* for the legislature to enact new, enhanced constitutional and statutory protections for property owners against eminent domain abuses. As a result, property owners in Michigan enjoy greater rights and protections than owners in most other states. ■

Jerome P. Pesick is the managing shareholder of Steinhardt Pesick & Cohen, PC, in Birmingham. He is an officer of the Real Property Law Section Council and the immediate past chair of the Eminent Domain Committee. A graduate of the University of Michigan and the University of Detroit School of Law, Mr. Pesick has been representing clients in condemnation, zoning, and land use litigation for 29 years.

Ronald E. Reynolds is a principal with Berry Reynolds & Rogowski PC, in Farmington Hills. He also serves on the Real Property Law Section Council and is the chair of the Eminent Domain Committee. Mr. Reynolds is a graduate of Hillsdale College and the Northwestern University School of Law, and represents clients in condemnation, zoning, land use, and real property litigation.

FOOTNOTES

1. *Kelo v City of New London,* 545 US 469; 125 S Ct 2655; 162 L Ed 2d 439 (2005).
2. *County of Wayne v Hathcock,* 471 Mich 445; 684 NW2d 765 (2004).
3. *Poletown Neighborhood Council v City of Detroit,* 410 Mich 616; 304 NW2d 455 (1981).
4. *Kelo,* n 1, *supra.*
5. *Berman v Parker,* 348 US 26; 75 S Ct 98; 99 L Ed 27 (1953).
6. *Hawaii Housing Authority v Midkiff,* 467 US 229; 104 S Ct 2321; 81 L Ed 2d 186 (1984).
7. MCL 213.51 *et seq.*
8. See MCL 213.75.
9. MCL 213.351 *et seq.*
10. See MCL 213.75.
11. See MCL 213.55(1).
12. *City of Novi v Woodson,* 251 Mich App 614; 651 NW2d 448 (2002).
13. *Carrier Creek Drain Dist v Land One, LLC,* 269 Mich App 324; 712 NW2d 168 (2005).
14. See Land One, 477 Mich 954; 723 NW2d 907 (2006).
15. See MCL 213.59(6).
16. See MCL 213.59(7).
17. MCL 213.66(7).
18. See MCL 213.21.
19. See MCL 213.21.
20. See MCL 125.2652.
21. See MCL 213.352(3).