



Eminent Domain

CALCULATING JUST COMPENSATION IN
PARTIAL TAKING CONDEMNATION CASES

By Jerome P. Pesick



Under the Michigan and United States constitutions, a condemning agency must pay a property owner “just compensation” when the agency takes the owner’s property for a public purpose.¹ Generally, just compensation is measured by determining the market value of the property that is taken. But when only part of a property is taken, the part that is not taken, sometimes called the “remainder,” can experience a decrease in value attributable to the taking. The condemning agency must compensate the owner for any such decreases, because just compensation must leave the property owner in as good a position as the owner would have been had the taking never occurred.² Numerous Michigan decisions have discussed the decreases in value attributable to partial takings that must be part of just compensation, and on occasion have discussed using the “cost to cure” some or all of the negative effects of a partial taking as an appropriate measure of compensation. Regardless of the approach that is taken to the problem, the property owner must always receive “just compensation” for losing its property.

THE GENERAL MEASURE: THE “BEFORE-AND-AFTER” RULE

As early as the nineteenth century, the United States Supreme Court made clear that just compensation in partial taking cases must include compensation for loss in value to any property not taken. In *Bauman v Ross*, it stated that, “when the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.”³ Not long afterward, the Michigan Supreme Court adopted a similar formula,⁴ which has over the years come to be known as the “before-and-after” rule. This rule requires that the property’s market value before the taking be compared with its market value afterward, and the difference serves as the amount of just compensation.⁵

As the Michigan Court of Appeals explained in *State Highway Commission v Minckler*, there are no “formulas or artificial rules” to determine changes in value before and after a partial taking.⁶ Instead, the change in value must be determined by accounting for all factors and possibilities that might result in a decrease in value:

*In cases like the present one, where there is a partial taking, just compensation is measured by the amount that the value of the remainder of the parcel has been diminished. This loss is usually expressed in terms of the diminution of the fair market value of the remainder of the property. And, fair market value is found by considering and evaluating all the factors and possibilities that would have affected the price that a willing buyer would have offered to a willing seller for the land under the circumstances.*⁷

Though there is no “easy mechanistic” approach to the factors and possibilities that might result in a decrease in value, several factors and possibilities regularly cause losses to remainder values in partial taking cases.

FAST FACTS:

Just compensation in partial taking condemnation cases must include compensation for the part of a property that is actually taken, as well as compensation for any damage that the taking causes to the part of the property that is not taken.

Under the constitutional definition of “just compensation,” all factors that make up market value must be taken into account in determining just compensation in direct condemnation cases.

FACTORS THAT CAN REDUCE REMAINDER VALUE

One example of a factor that frequently results in a decrease in remainder value in partial taking cases is loss of frontage. Frontage on a road, for example, can add value to a property because it increases access and visibility, and frontage-to-depth ratios can affect a property’s suitability for particular uses.⁸ If road frontage is lost, or a taking results in a less advantageous frontage-to-depth ratio for a property, that property can lose value. The Michigan Court of Appeals discussed loss of frontage in *State Highway Commissioner v Snell*.⁹ There, part of the defendant’s property was being taken for a highway. As a result, her remainder property was losing road frontage. When her right to recover for loss of that frontage was contested on appeal, the Michigan Court of Appeals held that the trial court properly allowed her to present her claim for loss of road frontage as part of her before-and-after analysis.

Numerous other factors can cause a reduction in a remainder’s value, depending on the property affected and the condemnation project. As the Michigan Supreme Court recently stated, just compensation must consider “all the multiplicity of factors that go into making up value.”¹⁰ With respect to partial takings, one authority aptly stated that “a wide range of factors is relevant” to determining any change in value, and identifying those factors is “essentially [an] ad hoc factual inquiry.”¹¹ Nevertheless, several common factors that reduce remainder values are identified in the Michigan Supreme Court’s Model Civil Jury Instruction for partial taking cases:

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.

The measure of compensation is the difference between (1) the market value of the entire parcel before the taking and (2) the market value of what is left of the parcel after the taking.

In valuing the property that is left after the taking, you should take into account various factors, which 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, (5) the effect of the applicable zoning ordinances on the remaining property, and (6) the use that the condemning agency intends to make of the property it is acquiring and the effect of that use upon the owner’s remaining property.

Further, in valuing what is left after the taking, you must assume that the condemning agency will use its newly acquired property rights to the full extent allowed by the law.¹²

The note on use to this model instruction emphasizes that this is not an exclusive list of factors that reduce a remainder’s value, but merely illustrates the factors that can reduce value. Again, when weighing reduction in a remainder’s value, “all the factors and possibilities that would have affected the price that a willing buyer would have offered to a willing seller for the land under the circumstances” have to be taken into account.¹³ Those factors must then be quantified and included in the property owner’s just compensation award.

COST TO CURE

Under certain circumstances, Michigan courts have considered another approach to just compensation in partial taking cases. When a partial taking damages the remainder’s value, if it is possible for the property owner to take some action to rectify some or all of the injuries to the remainder caused by the taking, then the cost of those actions can be awarded in addition to compensation for the property actually taken. The Michigan Supreme Court stated this rule in *City of Detroit v Loula*,¹⁴ where the city took ten feet of depth all the way across defendant’s property, including six feet of her home, for a road widening project. Even though six feet had been taken from the front of defendant’s home, the structure was still valuable and could be altered to remain useful after the taking. Thus, the Court measured defendant’s compensation by determining the cost of the

alteration, any consequential damages due to the alteration, and the value of the property actually taken:

Only a part of the building is taken, and, if the remaining portion is of great value and there can be advantageous reconstruction, rearrangement, and new adjustment, then the cost of altering the building and all consequential damages because of such alteration, plus the value of the part taken, furnishes the rule for measuring the compensation to be awarded for taking a part of the building.¹⁵

Calculating compensation in this manner has come to be called a “cost-to-cure” calculation.¹⁶

COMPENSATION FOR NONCONFORMITY RESULTING FROM PARTIAL TAKINGS

Another important aspect of compensating property owners for partial takings is addressing the instances when a partial taking results in the remainder failing to conform to zoning requirements. For example, if a condemning agency takes a portion of a property for a road widening, the remainder may be left with a setback area that does not comply with the applicable zoning ordinance. Because in such a scenario the violation of the setback requirement would arise after the ordinance was adopted, the resulting remainder would be an illegal nonconforming property. Illegal nonconforming properties are subject to various legal restraints, including possible abatement, reducing their market value.¹⁷ Thus, if a partial taking rendered a remainder an illegal nonconforming property, that would be another factor reducing the remainder’s value and contributing to the difference between the property’s value before and after the taking, that must be compensated.

A 1996 amendment to the Uniform Condemnation Procedures Act (UCPA),¹⁸ however, provides condemning agencies the ability to request a remedy for nonconformity resulting from a partial taking. Under the UCPA, when a partial taking will result in a nonconforming remainder, the condemning agency can request a variance to have the remainder “considered by the [relevant municipality] to

be in conformity with the zoning ordinance for all future uses with respect to the nonconformity for which that variance was granted.”¹⁹ The UCPA does not require the municipality to grant such a variance. If such a variance is granted, though, that may reduce the difference between the property’s value before and after the taking.

THE NON-RELATIONSHIP BETWEEN LIABILITY IN INVERSE CONDEMNATION CASES AND DAMAGES IN DIRECT CONDEMNATION CASES

While obtaining a variance may be a valid means for a condemning agency to reduce losses in a remainder’s value attributable to a partial taking, condemning agencies often propose an invalid analogy to inverse condemnation cases in attempts to lower just compensation awards. They argue that certain damages are suffered in common, are “damnum absque injuria,” and therefore need not be taken into account in just compensation awards.

This proposition is invalid because it confuses a rule of liability in inverse condemnation cases with a principle of just compensation in direct condemnation cases. Inverse cases, of course, allege that some governmental activity has resulted in a taking of property. For the government to be liable for a taking in an inverse condemnation case, the property owner generally must show that the governmental activity has damaged the property to such a degree that the property’s economic value has effectively been destroyed.²⁰ Only once that liability is established does the owner have a right to compensation. In direct condemnation cases filed under the condemning agency’s power of eminent domain, on the other hand, there is no question that the condemning agency is taking land. In that instance, liability is admitted. The only issue in such a case is compensation, which constitutionally must place the property owner in as good a position as it would have been in had the taking never occurred.²¹ These differences between the rules of liability in inverse condemnation cases and the rules of compensation in direct



condemnation cases are generally recognized, and are recited in the leading condemnation treatise:

*The most important limitation on this concept [that damages suffered "in common" are not compensable] turns upon whether the damage claim is an element of a "severance damage" case or an independent claim for relief. In the severance damage context, it is occasionally noted that any diminution in value to the remainder parcel is compensable if it is directly attributable to the taking, regardless of the existence or non-existence of similar damage to neighboring properties.*²²

Indeed, any attempt to employ this analogy conflicts with the established meaning of constitutional "just compensation" that requires property owners to be compensated for the difference in a property's value before and after the taking, and runs headlong into the Michigan Supreme Court's requirement that just compensation must take into account "all factors relevant to market value."²³

CONCLUSION

Calculating just compensation in a partial taking case involves numerous factors and possibilities. Not only must the condemning agency compensate the owner for the property that the agency is actually taking, but it must also compensate the owner for any reduction in value that the property not taken experiences as a result of the taking. Identifying and quantifying the factors that affect the property that is not taken can be complex, and that complexity is exacerbated by condemning agencies' arguments that only factors that would establish liability in another context should be included in just compensation in partial taking cases. Nevertheless, the "before-and-after" rule provides a reliable starting point for determining the just compensation due to an owner that has had part of its property taken. ♦



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FOOTNOTES

1. US Const amend v; Const 1963, art 10, § 2.
2. See *City of Detroit v King*, 207 Mich App 169, 182; 523 NW2d 644 (1994).
3. 167 US 548, 574 (1896).
4. See *Johnstone v Detroit, GH & M Ry Co*, 245 Mich 65, 81; 222 NW 35 (1928).
5. See, e.g., *Dep't of Transp v VanElslander*, 460 Mich 127, 130; 594 NW2d 841 (1999). Though the phrase "severance damages" is sometimes used to describe the remainder's loss in value attributable to the taking, "severance damages" are not separate from the before-and-after valuation. If a property is valued before the taking, and then valued afterward, any "severance damage" will be reflected in the difference. An alternative formulation that properly uses "severance damages" is that "the proper measure of damages in a condemnation case involving a partial taking consists of the fair market value of the property taken plus severance damages to the remaining property." *Dep't of Transp v Sherburn*, 196 Mich App 301, 306; 492 NW2d 517 (1992).
6. 62 Mich App 273, 276; 233 NW2d 527 (1975).
7. *Id.* at 277 (internal citations omitted).
8. See Appraisal Institute, *The Appraisal of Real Estate* (11th ed. 1996), p 229.
9. 8 Mich App 299, 310; 154 NW2d 631 (1967).
10. *Silver Creek Drain District v Extrusions Division, Inc*, 468 Mich 367, 377; 663 NW2d 436 (2003).
11. 26 AmJur2d, Eminent Domain, Section 368 (1996).
12. M Civ J12d 90.12.
13. *Id.* at 277 (internal citations omitted).
14. 227 Mich 189; 198 NW 837 (1924).
15. *Id.* at 193.
16. See, e.g., *Sherburn*, *supra* at 305.
17. See generally Clan Crawford, *Michigan Zoning and Planning* Section 5.1-11 (3d ed. 1988).
18. MCL 213.51 et seq.
19. MCL 213.54(2).
20. See *K&K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 577; 575 NW2d 531 (1998). Also, the Michigan Supreme Court explained this in the inverse condemnation case *Hart v City of Detroit*, 416 Mich 488, 501; 331 NW2d 438 (1982): "In an inverse condemnation action, it is not enough for the owner to prove injury to his property by the [government] with resultant damages. Rather, plaintiff must prove that the [government's] actions were of such a degree that a taking occurred."
21. See *King*, *supra* at 182.
22. 2A *Nichols on Eminent Domain* Section 6.08[2] (rev. ed. 1993) (footnotes omitted). One occasion when this difference was noted was in *City of Columbus v Farm Bureau Coop Ass'n*, 273 NE2d 888 (Ohio Ct App 1971). There, when the city condemned part of defendant's property for a drain, defendant sought to recover consequential damages caused by a drain culvert. The city claimed that such damages were suffered in common and not compensable, but the court stated that "consequential damages for which no recovery could be had in the absence of a taking are a part of compensable damages to the residue in the event of an actual partial taking." *Id.* at 891.
23. *Extrusions Division*, *supra* at 379.