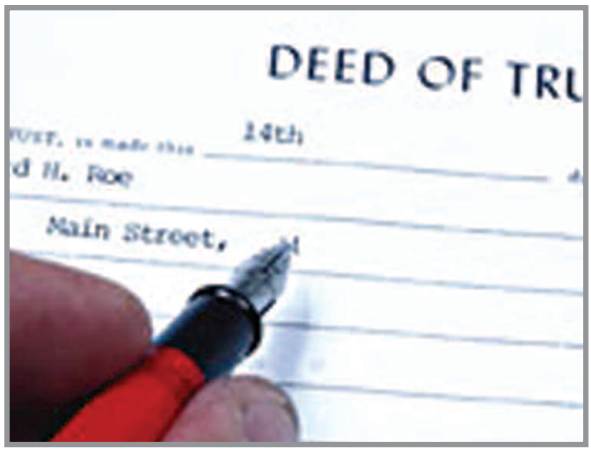
Michigan:



One Year Later for Condemning Authorities...

BY VALERIE FERRERO LAFFERTY

Over the past year, Michigan approved six bills and amended its Constitution to ensure that property can be condemned only for public use, which "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."[1] So how have things changed from before all of this recent legislation to now—one year later? Eminent domain for public use continues as usual, but requires more time and money. Condemning for blight is likely on a dramatically different tangent.

Most roads and utility projects are unambiguously for public use, and transportation and utilities projects, for example, operate as usual. Local government in Michigan, however, must pay 125% of market value[2] for an individual's principal residence and reimburse the homeowner for higher taxable values on replacement homes[3]. Any *occupant of a residential dwelling* (whether legal or not) is paid moving benefits 180 days before possession[4] if "the payment is required" for relocating.[5] The increased likelihood of eviction to gain possession adds time and cost. Attorney fees and expenses are now recoverable for relocation benefit challenges[6] in addition to the fees recoverable for acquisition. Persons now defined as "indigent" may recover attorney's fees/costs to challenge necessity for non transportation projects.[7] Ambiguous new legislation will require more public lawyers' time to sort it out. In sum, for pure public use projects, residential occupants are more than made whole, and condemning agencies must commit more time and money.

Blight is a different matter. Cities must now prove by clear and convincing evidence that the condemnation is for a public use, whereas once there was a presumption of public use. Presumably this will stop abuse of "blight" as a code word for assembling property for economic development. The higher standard means that the *threat* of eminent domain has lost its negotiation value—much less useful to cities and their legal counsel to assuage cooperation towards a negotiated, voluntary purchase agreement. Many practitioners in community development and urban planning would admit that actual condemnation was rarely used before the new legislation last year,[8] albeit the threat of condemnation, even a friendly threat, was useful to have.

What is blight?[9] It is a difficult concept, and city planners find little help in finding a bright line. There are so many ambiguities now in the statutory definition, in the confusion of laws, and the penalty of attorney fees and costs that cities even thinking about blight may be judged irresponsible by taxpayers.

For example, a few years ago, in acquisition/relocation projects for the airport expansion in Benton Harbor, Michigan, neighborhood residents did not dispute the declaration of necessity for public use. Affected owner-occupants and tenants generally accepted the project, some even coming to public meetings with deeds in hand. Following then-current federal and state guidelines, all were compensated and placed in better living arrangements (by health, safety, welfare standards) than before the project. Now, by contrast, an "indigent" resident of targeted property can challenge necessity with the city paying attorney fees and costs on both sides, even if the city prevails on a "reasonable"[10] challenge. Are we protecting the rights of the poor or encouraging over-zealous plaintiff attorneys? Even when public purpose is not in doubt, cities are now more vulnerable to legal challenges, with potentially staggering consequences.

Under the new laws, a city that somehow meets all conditions to condemn for blight must improbably avoid transferring acquired property to any private entity. A "taking of private property for public use … does not include a taking for a public use that is a pretext to confer a private benefit on a known or unknown private entity."[11] If private use cannot be anticipated in project development, what choices are left? In the current economic climate, cash challenged cities will be unable to underwrite a meaningful redevelopment project. Total nonprofit financing with no strings attached is improbable. Some kind of profit motivation has to be in the mix to be realistic. Generally accepted market forces are not recognized in the new laws. Cities are left to redevelop or sell outright only those properties they already own.

The challenges faced by the leadership in Michigan's older, declining inner cities (Benton Harbor, Flint, Detroit, among others) in dealing with the attendant health, safety and welfare of their occupants are overwhelming. Blight still allows for use of eminent domain but the stumbling blocks are many and the risk/reward ratio is woefully unbalanced. If even well-reasoned, proactive initiatives to use eminent domain to reverse further city decline are stopped in their tracks, one of the few tools to combat blight has been legislated into extinction. Will life for older, city-center commercial and residential occupants improve or decline? Time will tell.

"Eminent domain for public use continues as usual, but requires more time and money. "

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[1]MICH.CONST. 1963, Art. X, § 2, effective Jan. 1, 1964; (amendment approved Nov. 7, 2006, effective Dec. 23, 2006).

[2]Id.

[3]MICH.COMP. LAWS § 213.55(6).

[4]MICH.COMP. LAWS § 213.59(7)(a).

[5]MICH.COMP. LAWS § 213.352(d). Generally the individual in a residential dwelling is not required to move "unless he or she has had a reasonable opportunity not to exceed 180 days after the paymentdate of moving expenses…to relocate to a comparable replacement dwelling."

[6]MICH.COMP. LAWS § 213.352(3).

[7]MICH.COMP. LAWS § 213.66(7).

[8]Phone interviews, Oct. 10, 2007: Sue Pigg, Michigan Economic Developers Association, Board of Directors & Economic Development Educator with Ingham County Michigan State University Extension; President and Executive Director of Michigan Association of Planners; City of Ypsilanti.

[9]Michigan legislators have said blight is property declared a public nuisance, an attractive nuisance, a fire hazard, tax reverted property, property under the control of a land bank fast authority, property vacant for five consecutive years plus unable to meet local housing/ maintenance codes, houses that have not substantially rehabilitated within one year after being declared a health/safety threat, and property with inoperable utilities for more than a year. MCL 213.23(8).

[10]MICH.COMP. LAWS § 213.23(8), MICH.COMP. LAWS § 213.66(7).

[11]MICH.COMP. LAWS § 213.23(6).