Litigating A Public Infrastructure Eminent Domain Case

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20th Annual Michigan Association of Municipal Attorneys (“MAMA”) / Government Law Section (“GLS”) Summer Education Conference
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Crystal Mountain Resort
Background

• Theme - Navigating the Water of Public Infrastructure Projects – 12 years after the Constitutional Amendments
• Like Michigan Supreme Court, Waive “Fire Free Zone” - Ask Questions At Any Time
• Note “Infrastructure” and not just “Project”
  — “Infrastructure” assumes public use and necessity
  — Constitutional Amendment and Hathcock limited use of eminent domain
• Eminent Domain Litigation
  — Uniform Condemnation Procedures Act (“UCPA”), MCL 213.51 et seq.
  — Relatively expensive
  — Time consuming
  — Often essential
Life of an Eminent Domain Case

- Complaint
- Possession / Necessity
- Jurisdiction
- Experts
- Discovery
- Case Evaluation / Settlement
- Pre-trial and Trial Issues
- Post-trial and Appeal
Complaint

• The UCPA mandates contents of complaint, requiring all of the following:
  — A plan showing the property to be taken
  — A statement of purpose for which the property is being acquired
  — The name of each known owner of the property being taken
  — A statement setting forth the time within which motions for review under [MCL 213.56] shall be filed; the amount that will be awarded and the persons to whom the amount will be paid in the event of a default; and the deposit and escrow arrangements made under [MCL 213.55]
Complaint (cont’d)

— A declaration of taking which includes all of the following:
  i. A description of the property to be acquired sufficient for its identification and the name of each known owner
  ii. A statement of the interest being taken
  iii. A statement of the sum of money estimated by the agency to be just compensation for each parcel of property being acquired
  iv. Whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property

MCL 213.55(4)
Possession / Necessity

- Two main parts of a case – (1) possession / necessity and (2) just compensation

- While UCPA is a “quick statute,” can be months between authorization to make a written good faith offer (“GFO”) and order of possession

- Landowner must timely challenge necessity
Possession / Necessity (cont’d)

- Possession timeline
  - “GFO”
  - Complaint
  - Answer
  - No Necessity Challenge
    - Stipulation
    - No Stipulation
  - Necessity Challenge
    - Hearing / Appeal
Jurisdiction

- Increasingly, the obstacle to possession is not Public Use or Necessity, but rather jurisdiction.
- Challenge to jurisdiction is based on failure to meet specific preconditions of the UCPA.
  - Agency offer not a GFO – MCL 213.55(1)
  - GFO not made to all known owners – MCL 213.51
Experts

- Appraiser
  - Sales comparison / income / cost approaches
- But, not just appraiser, may need the following:
  - Site Engineer
  - Planner
  - Business Interruption / Avoidance Expert
  - Relocation Expert
  - Project Engineers
Discovery

• Increasingly, electronically stored information ("ESI") is an issue
  — ESI sweep – when, where, who and how
  — Document retention policy
• ESI protocols
• Litigation hold requirements
• IT in-house and / or outside contractors
• Third party discovery
• Federal trend to cost shifting / balancing clashing with UCPA cost provisions
Incentive and disincentives to settle

Costs, interest, and attorney fees
Pretrial and Trial Issues

• Date of Valuation
  — Early date of taking

• Purchase price as evidence of value

• “Scope of the Project” rule
  — Appraiser conclusion of what would have been developed but for the taking

• Partial Taking – Damage to Remainder
  — Creating expanding nonconformities
  — Access
  — Inconvenience of project
Pretrial and Trial Issues (cont’d)

- CVT Land Use Decisions
  - Where condemning agency is a CVT
- Hearsay
  - Documents
  - Expert testimony
- Motions in Limine
- Trial Attendance
- Jury Voire Dire
- Jury View
$3.81M Agency Offer
$18.50M Landowner Demand
Trial Issues – Impact of Taking Example
Trial Issues – Impact of Taking Example
Post-Trial and Appeal

• Appeal jurisdiction of dismissal, agency potentially liable for landowner fees on appeal including fees to chase fees

• Appeal
  – Appeal of jury verdict more difficult
  – Appeal of jury instruction less difficult

• Interest runs during appeal
  – For every $3 in interest, pay additional $1 in attorney fees
Questions?

Thank you for your attention.

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