

Court: Remediation Costs are Not to Be Considered in Condemnation Proceedings

The Michigan Court of Appeals has held that the Uniform Condemnation Procedures Act (UCPA) does not allow courts the authority to offset estimated remediation costs against the market value of contaminated property when calculating the amount of just compensation due to a property owner in a condemnation proceeding. In addition, the court held that the proper method for arriving at just compensation is to separate the question of just compensation from the question of liability for environmental cleanup, and, therefore, ruled that a trial court erred when it deducted estimated cleanup costs from fair market value to establish a just compensation amount.

In 1892, Extrusions Divisions, Inc. (Extrusions) purchased a parcel of real estate in Grand Rapids, Michigan commonly known as "Old South Field" (the Field). Originally intending to use it for expansion of its adjacent complex, Extrusions built a fence around the Field but otherwise left it vacant and unimproved.

In 1990, Silver Creek Drain District (the District) began evaluating options for alleviating flooding in the area. Through a series of public meetings it was determined that Old South Field was an excellent location for construction of a storm water detention pond.

In January 1992, the City of Grand Rapids (the City) refused to grant Extrusions a permit to construct a warehouse on the Field. As a result, Extrusions filed an inverse condemnation claim against the City and the Kent County Drain Commission (the Commission) in October 1992. Extrusions claimed that the City's refusal to grant the permit, and the failure of the Commission to "pursue a purchase" of the Field, comprised an unconstitutional taking of private property without just compensation.

In March 1994, the District offered Extrusions "just compensation" for the Field in the amount of \$211,300. The District stated within its offer that it reserved the right to bring a federal or state cost recovery action against Extrusions regarding the release of hazardous substances on the property by the former owners. In May 1994, the District executed a "Declaration of Taking," declaring that the Field was being taken to effect a necessary public improvement. The Declaration was recorded with the Kent County Register of Deeds on June 6, 1994 and on June 21, 1994 the County Treasurer executed an affidavit attesting to the deposit of \$211,300 as estimated just compensation. On June 29, 1994 the District filed its

condemnation action against Extrusions, again reserving its right to bring a cost recovery action regarding hazardous substance releases on the Field.

In February 1995 a trial court ordered the Field conveyed to the District pursuant to stipulation of the parties, and ordered the District to pay Extrusions \$211,300 for the taking. Despite this, in April 1995 the District brought a motion requesting the \$211,300 remain in escrow as security for remediation costs associated with the contamination of the Field. The District estimated the total remediation costs to be \$467,100. Extrusions, citing the newly amended Natural Resources and Environmental Protection Act, claimed it was not liable for remediation costs on the Field, and argued for the release of the escrowed funds. In November 1995, the trial court ordered the District to remove the funds from escrow and pay it to Extrusions, along with accrued interest from the date of conveyance. The District complied.

In November 1997, pursuant to a bench trial, the trial court issued an opinion regarding valuation of the Field, finding that the value of the Field at the time of the taking was \$278,800, without taking the cleanup costs into consideration. The court also found that at the time of the taking, a reasonable purchaser would have required a Type-C Closure from the Michigan Department of Natural Resources (DNR) as a condition for closing. The court determined that the reasonable cost of securing the Type-C Closure was \$237,768. Subtracting that amount from the value of the property, the court arrived at a sum of \$41,032, which it concluded was the net fair market value of the property and constituted just compensation on the date of the taking. The court then issued a final order without explaining the apparent inconsistency with its earlier ruling, which stated that Extrusions was “entitled to keep all amounts previously paid to it [by the Drain District].” Extrusions appealed.

Upon appeal, Extrusions presented three separate arguments to show that the trial court had erred in determining the amount of just compensation for the taking of the Field. First, Extrusions argued that the trial court should not have considered the environmental contamination and potential cleanup costs when it calculated just compensation for the property. Second, Extrusions argued that the trial court erred in its determination that the fair market value of the Field, without consideration of environmental cleanup costs, was \$278,800. Third, Extrusions claimed that the trial court erred by failing to consider and award damages caused to its existing adjacent complex as a result of the condemnation of the Field.

Michigan has adopted the UCPA, which provides procedures for the condemnation, acquisition, or exercise of eminent domain of real property by public agencies. Section 5 of the UCPA provides that a condemnation complaint “shall ask that the court ascertain and determine just compensation to be made for the acquisition of the [condemned] property.” However, the UCPA provides very little guidance regarding the factors a court should consider when determining just compensation.

Both Section 5 and Section 8 of the UCPA were amended in 1993. Section 5 was amended to require the condemning agency to either “reserve or waive its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property....” Section 8 was amended to provide “if the agency reserves its rights to bring a state or federal cost recovery claim against an owner, under circumstances that the court considers just, the court may allow any portion of the money deposited pursuant to section 5 to remain in escrow as security for remediation costs of environmental contamination on the condemned parcel.”

Due to the plain language of the amendments, the court concluded that the UCPA does not give courts the authority to offset the estimated remediation costs against the market value of contaminated property when calculating the amount of just compensation due to a property owner. The amended language also supports the conclusion that any form of cost recovery arising from environmental contamination should be pursued in a separate cause of action. The court believed that these amendments would have no purpose if a court could simply deduct remediation costs from the fair market value of the condemned property. Therefore, the court held that the trial court erred in deducting estimated cleanup costs from the existing fair market value to arrive at a just compensation amount, and reversed the trial court’s ruling that \$41,032 constituted just compensation.

Extrusions next argued that the trial court erred in finding that the value of the Field without consideration of environmental contamination was \$278,800. The District’s expert appraiser estimated the value of the Field on the date of the taking to be \$211,300, while Extrusions’ appraiser estimated the value to be \$346,300. The trial court averaged the two values and found the value of the land at the time of the taking to be \$278,000. The Field value had been assessed at \$264,600 in 1993, and the trial court found that to be relatively consistent with its finding. However, Extrusions claimed upon appeal that the trial

court had erred in its determination of the value of the Field, because the taking occurred in 1994, and the 1993 assessed value was not an accurate indication of value.

The appeals found no error in the trial court's decision because the trial court did not use the assessed value from 1993, but merely compared it to the average of the two separate appraisals. A trial court's findings of fact may not be set aside unless clearly erroneous, and in this case the court could not say that the trial court had clearly erred.

Extrusions next argued that the trial court erred in finding that the taking did not cause damage to its adjacent North Complex. Extrusions claimed that it had intended to use the Field to build additional warehouse facilities or parking spaces. In *State Highway Comm'r v. Walma*, 369 Mich 687, 690; 120 NW2d 833 (1963), the Supreme Court stated that when a partial taking occurs:

The measure of damages is the injury done to the fair market value of the entire tract by the taking of only a part. In other words the owner is entitled to recover the difference between the market value of the entire tract before the taking and the market value of what is left after the taking.

The court found that, at the time of the taking, the Field was a contaminated, vacant plot that was not properly graded for construction. In addition, evidence suggested that Extrusions had sufficient warehouse and parking facilities for the North Complex. Therefore, the appeals court did not find that the trial court had clearly erred in finding that there had been no damage to the North Complex.

The decision of the trial court was reversed on the issue of the amount of just compensation and the case was sent back to the trial court for further proceedings.

Silver Creek Drain District v. Extrusions Division, Inc., MI Ct. App. No. 216182, May 4, 2001

Grant R. Trigger