

## **CONDEMNATION: WHAT ARE MY RIGHTS?**

### **Introduction**

Condemnation is a legal process by which private property can be acquired for public use. The information provided in this article is based upon the law of the State of Michigan. Property can also be condemned by the Federal government. Federal law differs from Michigan law in some respects, primarily in the areas of procedure and reimbursement of attorneys and experts fees. However, the general principles of condemnation are similar under both state and federal law.

Each piece of property is unique. This article cannot and is not intended to cover all issues that could arise in a condemnation case. Careful review of each individual property is crucial in any condemnation action.

### **Can the government really take my property against my will?**

Yes. The government has the power of eminent domain, which is exercised through a process known generally as condemnation. Public bodies and, in certain instances, private corporations such as utility companies, have the right to acquire private property for a public purpose. However, the United States and Michigan Constitutions guarantee that a property owner shall be paid “just compensation” for any property taken for a public purpose.

### **Who has the power of condemnation?**

In addition to agencies and departments of the United States and the State of Michigan, cities, villages, townships, counties, and certain other public and private bodies have the power to condemn private property.

### **How does a condemnation action normally begin?**

In order to condemn property, a condemning authority must file a lawsuit. The condemnation process normally begins, however, long before a lawsuit is filed. To start the process of condemnation, representatives of the condemning authority normally contact property owners regarding background information. The condemning authority may request copies of tax returns, financial statements and other financial information it deems relevant to the determination of just compensation for your property. Upon receiving such a request, you

should consult with an attorney specializing in condemnation matters in order to determine your rights and obligations in such a situation. One of the earliest contacts is often made by a real estate appraiser hired by the condemning authority. You should keep the written notices or letters you receive from the condemning authority and any notes made by you of any meeting with a representative of the condemning authority. It is recommended that you not sign any document without first consulting with an attorney specializing in condemnation matters.

### **May a condemning authority enter my property?**

A condemning authority may enter your property before filing a lawsuit for the purpose of determining whether the property is suitable for public purposes. Such entry may be for the purpose of conducting a survey, appraisal, or environmental or geotechnical investigation. Ordinarily, you will also be asked to permit an inspection of the inside of any building on your property. You must be given reasonable notice of and an opportunity to be present during any such inspection. The condemning authority is responsible for any damage to your property as a result of its entry onto your property. Wherever possible, you should be present during such inspections.

### **Will I have a chance to negotiate a settlement before a condemnation lawsuit is filed?**

Yes. A condemnation lawsuit cannot begin until after you have been provided a good faith written offer. This is an important document and should be retained. The good faith written offer cannot be for less money than the condemning authority's appraisal. You must receive either a copy of the written appraisal or a written summary of the basis for the good faith written offer.

After the good faith written offer is delivered, there is normally an opportunity to negotiate a settlement. You are under no obligation to accept the condemning authority's offer. If you have not already sought the advice of an attorney specializing in condemnation matters, you should do so upon receipt of the good faith written offer. Important deadlines occur shortly after the good faith written offer is received. For instance, if the good faith written offer does not include or fully include compensation for an item of property or include an element of damages to your property, you are required to notify the condemning authority within 90 days of such omission and provide information to support your claim for such additional compensation. The failure to provide such information in an appropriate and timely manner may result in your inability to ever make a claim for such additional compensation.

### **What if I am able to negotiate an acceptable price?**

If this occurs, sale of the property to the condemning authority may proceed as a normal real estate transaction, however, you should consult your attorney regarding any special tax considerations that may exist. It usually is beneficial to document that your sale was made under the threat of condemnation.

Even with such a negotiated agreement, you must be reimbursed for your reasonable expenses incurred in evaluating the condemning authority's good faith written offer or in negotiating a settlement. These expenses are also recoverable if the condemning authority abandons its efforts to acquire your property. You must submit a claim for reimbursement of

such expenses within one year after the date the property is acquired or the date on which the condemning authority notifies you that they are abandoning their efforts to acquire your property.

### **What if I am unable to negotiate an acceptable price?**

If an acceptable price is not negotiated, the condemning authority will need to file a lawsuit. The lawsuit will be filed in the county where the property is located. You will be served with a summons and complaint which will show the condemning authority as the “plaintiff” and you as the “defendant.” This does not mean that you have done anything wrong. You have an absolute constitutional right to insist upon “just compensation” for the taking of your property and you are under no obligation to accept any offer containing terms which are unacceptable to you.

At the time the lawsuit is filed, the condemning authority must deposit its estimate of “just compensation.” Those funds are available to you and can be withdrawn as soon as certain procedural matters have been completed in the lawsuit. Withdrawing the funds on deposit will have no effect on your right to make a claim for additional just compensation.

### **Can I fight the “taking” of my property?**

In order to condemn property, a condemning authority must follow certain rules. If they fail to do so, a condemnation lawsuit may be dismissed. For example, a condemning authority must make a good faith written offer. If it fails to make a written offer or if you are successful in proving that the offer was not made in good faith, the case could be dismissed.

Private property cannot be taken except for a valid public purpose. You have a short period of time after being served with the condemnation complaint to file a motion to review the necessity for the taking of your property. This motion challenges the condemning authority’s determination of the public necessity for your property. It is difficult to prevail on these challenges. The condemning authority is, by law, presumed to have properly determined that public necessity exists.

Before any challenge of this type is undertaken, the situation should be carefully reviewed by an attorney specializing in condemnation matters. Such challenges are often expensive. If you are successful, the law provides for the reimbursement of your expenses by the condemning authority, including attorney fees. If you are unsuccessful, however, you are not entitled to any such reimbursement.

### **When do I lose possession of my property?**

Unless you prevail on a motion to review necessity, the condemning authority will obtain title to your property as of the date the condemnation lawsuit was filed. However, it is up to the court to establish the time and terms for surrender of possession. This is often negotiable and the

court will generally attempt to balance the needs of the property owner and the condemning authority.

When title is transferred to the condemning authority, you should insist that the amount of estimated just compensation be paid to you. Again, payment of the estimated just compensation has no effect on your right to claim that you are entitled to additional just compensation.

### **How does a condemnation case proceed?**

As with any lawsuit, your case will not be scheduled for trial immediately. The court will allow you and the condemning authority some time to learn about each other's case. Interrogatories, depositions and other "discovery" procedures may be used by either party. Also, it is possible that your case could be "settled" at any time prior to trial.

### **How is "just compensation" measured?**

The amount of just compensation to which you are constitutionally entitled is often and generally measured in terms of the fair market value of your property. In the condemnation lawsuit, the determination of fair market value frequently involves a "battle of experts" such as real estate appraisers and other experts. You may also testify at your trial and, in some cases, may express an opinion as to the fair market value of your own property.

Fair market value is determined by looking at factors such as: the cost of replacing your property (less depreciation); the income-producing capacity of your property; and/or the price that has been paid in the market place for comparable properties.

One important aspect in estimating the fair market value of any property is its highest and best use. You are entitled to "just compensation" based upon the highest and most profitable use for which your property is adapted. This is true even if your property is not currently used for that purpose. For example, a residence located at a busy intersection may have a highest and best use as commercial property and the fair market value of the property should then be determined based upon its potential use. That may be true even if the property is not currently zoned for commercial use, if a reasonable possibility of rezoning can be shown. Alternate uses to which your property may be adapted should be carefully reviewed in any condemnation case.

In some circumstances, the condemning authority can claim that the fair market value of your remaining property has been enhanced by the condemnation project. Ordinarily, the condemning authority must claim such an "enhancement" in its complaint and it will have the burden of proof on this issue.

The fair market value of your property is determined as of the date of taking. This is normally the date that the complaint was filed. Since trial of the case generally occurs some time after the case is filed, you are entitled to interest on the difference between the final award and the amount of estimated just compensation deposited when the case was filed.

### **Should I hire my own real estate appraiser?**

You have the right to hire your own expert real estate appraiser. If you decide to hire an attorney specializing in condemnation matters, it is generally beneficial to consult with that attorney before hiring or consulting with an appraiser.

**Who pays the appraiser’s fees?**

The condemning authority is obligated by law to reimburse you for reasonable fees incurred for expert witnesses, including an appraiser. This reimbursement is required regardless of the outcome of the lawsuit. The court will not, however, order reimbursement if it determines that hiring a particular expert witness was not reasonably necessary to allow you to prepare for trial. The court may also review the reasonableness of the fees charged by your expert witness.

**Are attorney fees reimbursed in a condemnation case?**

The condemning authority is obligated to reimburse you for reasonable attorney fees if the final award of just compensation exceeds the amount of the good faith written offer. Reimbursement is generally limited to one-third of the difference between the amount finally awarded as just compensation, including interest, and the amount of estimated just compensation deposited when the lawsuit was filed. Many attorneys specializing in condemnation matters will agree to a fee arrangement based on this same formula. If so, your risk of financial obligation to your attorney can be minimized.

**Am I entitled to a jury trial?**

Yes, however, your case will be tried before a judge if neither party requests a jury.

**Can I appeal if I do not like the result of my trial?**

Yes, although it is very difficult to successfully appeal if your only objection is the amount of just compensation. Most successful appeals in condemnation cases involve issues of law.

**Does a condemning authority always condemn entire parcels of property?**

No. It is possible for a condemning authority to acquire any type of interest in property. For example, an easement could be acquired by condemnation. Similarly, a condemning authority could acquire a tenant’s rights under a lease.

There are also cases known as “partial takings.” These are situations where only part of a property is acquired. For example, a road commission might acquire the front of a property in order to widen a road. In these cases, “just compensation” is measured by the fair market value of the part of the property actually taken plus any damage to the remainder of the property. Alternatively, just compensation may be measured by the difference between the value of the entire property before the taking and the value of the property that remains after the taking of part of the property.

**What are the rights of a tenant who is leasing property that is condemned?**

A tenant should carefully examine the lease agreement to see if the possibility of condemnation is covered. Many leases automatically terminate in the event of condemnation. Even if your lease does contain such a clause, you could still be entitled to compensation under certain circumstances.

Generally, a tenant is entitled to compensation if the lease is “below market.” In other words, if the rent being paid is less than the fair market rent for the property, the tenant has a valuable property interest for which “just compensation” must be paid. Tenants may also be entitled to relocation expenses.

### **What about my costs of relocating?**

Most condemning authorities provide relocation assistance and benefits. You should make specific inquiry about the availability of such programs. In some instances, relocation expenses may be directly recoverable as a part of just compensation. This is most frequently true for commercial or industrial properties.

### **Are there special issues that are important for commercial and industrial properties?**

Yes. Relocation expenses may be compensable for commercial or industrial property. You may also be entitled to recover damages for the temporary interruption of your business due to the condemnation.

Your business fixtures should be carefully considered. Michigan law provides a broad definition of fixtures. Items which are normally considered fixtures include attached shelving, storage cases, display cabinets, and similar items which are attached to the property.

The condemning authority is obligated to pay either the cost of detaching and reattaching fixtures or their value in place. If detach-reattach costs are paid, the property owner will retain ownership of the fixture. If “value in place” is paid, the condemning authority will acquire the fixture. Issues concerning fixtures should be carefully reviewed with an attorney specializing in condemnation matters.

The owner of rental property may be entitled to lost rentals as a result of the condemnation. Careful records should be kept if tenants are lost due to the threat or pendency of a condemnation action.

In some circumstances, the owner of a business which cannot be relocated may be entitled to compensation for the “going-concern” value of the business.

You should, at the earliest possible stage in the condemnation process, consult with an attorney specializing in condemnation matters concerning relocation benefits, business interruption, lost rentals, moving expenses and the “going concern” value of a business.

### **What if there are environmental issues related to my property?**

During the investigation of your property by the condemning authority, environmental issues, such as the existence of contamination by hazardous substances, may be discovered.

Under Michigan law, there is a set of rules specifically designed to address such situations. Application of these rules may require that the condemning authority alter its approach to the acquisition of your property. In some instances, the condemning authority may choose to reduce its estimate of just compensation by the estimated cost to clean up the contamination or it may assert a claim against you for those costs. Since application of these rules can significantly increase the complexity of a condemnation case, you should consult with an attorney experienced in condemnation matters involving environmental issues.

### **Is it possible for the government to take my property without filing a condemnation action?**

Yes. This is known as a constructive or de facto taking or “inverse condemnation.” This is an extremely complex area of law and cases hinge on the specific facts in a given situation. Many governmental regulations affect the value of property and if you feel that government action has depreciated the value of your property, you should consult an attorney specializing in condemnation matters to determine if you may be entitled to “just compensation.”

### **Conclusion**

You have a constitutional right to “just compensation” for the taking of your property. You are under no obligation to accept any offer from a condemning authority. Before you sign anything or make any decision, you should consult with an attorney specializing in condemnation matters to determine whether: the proposed taking is valid; the offer is fair; your legal rights have been adequately protected; and appropriate accommodations have been made for possession and relocation.

The condemning authority is obligated to reimburse you for reasonable appraisal fees and attorney fees, subject to the limitations discussed above. You are entitled to receive the estimated just compensation that is deposited when the condemnation lawsuit is filed. You are entitled to interest on any additional just compensation you may ultimately be awarded.

You should not be hesitant or embarrassed about insisting that the condemning authority comply with its legal obligations or in asserting rights that are guaranteed to you under the Constitutions of the United States and the State of Michigan.

### **RHOADES McKEE**

Rhoades McKee has had extensive experience in condemnation matters, representing both property owners and condemning authorities. We have successfully represented clients whose property has been acquired under both state and federal law. We have represented property owners in the Pictured Rocks National Lakeshore, the Sleeping Bear Dunes National Lakeshore, and other Federal projects. We have represented persons whose property has been acquired by the State of Michigan, the Michigan Department of Transportation, and numerous counties, cities, road commissions and other municipalities. Several of the attorneys at Rhoades McKee specialize in condemnation matters and have decades of experience.

Rhoades McKee has handled condemnation cases involving virtually every imaginable type of property including residential, commercial, industrial, contaminated sites, gas storage fields and mineral interests, parking structures, warehouses, restaurants, farms, investment lands,

franchises, and businesses of all types. We have successfully handled hundreds of cases over the past 50 years. For additional information on our firm, please visit our website, [www.rhoadesmckee.com](http://www.rhoadesmckee.com).

To further discuss specific questions regarding condemnation of your property, we welcome you to contact either [Arthur C. Spalding](mailto:acspalding@rhoadesmckee.com) at 616.233.5111 or [acspalding@rhoadesmckee.com](mailto:acspalding@rhoadesmckee.com) or [Scott J. Steiner](mailto:sjsteiner@rhoadesmckee.com) at 616.233.5206 or [sjsteiner@rhoadesmckee.com](mailto:sjsteiner@rhoadesmckee.com).