8
Eminent Domain

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I. Overview

§8.1 The power of the government to take property through eminent domain has been described as one of the most "awesome" and "severe" powers that government may exercise. *See Alibri v Detroit/Wayne County Stadium Auth*, 254 Mich App 545, 554, 658 NW2d 167 (2002), *rev'd,* 470 Mich 895, 683 NW2d 147 (2004); *see also Poletown Neighborhood Council v Detroit*, 410 Mich 616, 634, 304 NW2d 455 (1981), *overruled, Wayne County v Hathcock*, 471 Mich 445, 483, 684 NW2d 765 (2004). It is no surprise, then, that there are many substantive and procedural rules and restraints that apply when the government exercises that power.

This chapter covers the power of eminent domain and its delegation to municipal governments (see §§8.2–8.5). It discusses limits on that power, including the requirements for "public use" and "just compensation" (see §§8.6–8.37). It also discusses persons entitled to just compensation (see §§8.38–8.41) and the procedures that apply when the government seeks to exercise its power of eminent domain to acquire property (see §§8.42–8.89).

II. The Power of Eminent Domain

A. Definition

§8.2 Eminent domain, also known as condemnation, is the government's power to acquire private property regardless of the owner's willingness to allow the acquisition. As the Michigan Supreme Court stated in *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 373, 663 NW2d 436 (2003), the "power arises from the sovereign power of the state and is of ancient provenance." In other words, the power of eminent domain is inherent in every sovereign government, including both the federal government and the government of the state of Michigan. *See id.; see also People ex rel Trombley v Humphrey*, 23 Mich 471, 474 (1871). The power allows the government to "appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand." *Trombley,* 23 Mich at 474.

B. Application to All Forms of Property

§8.3 The government may exercise the power of eminent domain against "private property of every kind." *Petition of Mackie*, 2 Mich App 698, 702, 141 NW2d 312 (1966). Thus, the government may take real property, including varying interests in real property such as fee title, leases, or easements. *See, e.g., Lookholder v Ziegler*, 354 Mich 28, 36, 91 NW2d 834 (1958) (holding that state's

power of eminent domain extended to "leasehold interests and rights derived therefrom"). The government may also take personal property, including intangible property. *See, e.g.,* MCL 213.51(i) (defining *property* that may be taken to include personal or mixed property as well as intangible property).

C. Delegation to Political Subdivisions

§8.4 The power of eminent domain is inherent in sovereign governments such as the federal government and the State of Michigan, but it is not inherent in political subdivisions such as cities, townships, and other local units of government. Instead, political subdivisions of the state possess the power of eminent domain only to the extent that it is explicitly granted to them. Cities, townships, road agencies, and other municipal governmental bodies in Michigan possess the power of eminent domain only to the extent that the state constitution or legislation grant them the power. *See City of Lansing v Edward Rose Realty*, 442 Mich 626, 631–632, 502 NW2d 638 (1993) (holding that "a municipality has no inherent power to condemn property even for public benefit or use," so "the power of eminent domain must be specifically conferred upon the municipality by statute or the constitution").

The legislature has adopted statutes authorizing various governmental bodies to exercise the power of eminent domain. For example, even though the State of Michigan inherently possesses the power of eminent domain, the legislature has adopted legislation authorizing the state and its agencies to exercise that power. *See* MCL 213.1 et seq.; *see also* MCL 213.21 et seq. The same legislation authorizes other "public corporations," including "counties, cities, villages, boards, commissions and agencies made corporations for the management and control of public business and property," to exercise the power. MCL 213.21. The legislature has authorized home rule cities to incorporate the power of eminent domain into their charters, MCL 117.4e, and has authorized fourth-class cities to exercise the power for enumerated purposes, MCL 105.1. Both charter townships (MCL 42.14) and other townships (MCL 41.2(3)) have also been granted the power of eminent domain.

Specific legislation also grants the power of eminent domain to other entities, including the following:

- airport authorities (*see* MCL 259.126)
- community college districts (*see* MCL 389.103)
- community hospital authorities (*see* MCL 331.9)
- drainage boards (*see* MCL 280.470 (authorizing drainage boards to operate under MCL 213.21 et seq.))
- first-class school districts (*see* MCL 380.431a)
- metropolitan districts (*see* MCL 119.4)
- public school academies (*see* MCL 380.504a)
- public utilities (*see* MCL 486.251 et seq.)

- railroad, bridge, and tunnel companies, as long as the company owns a railroad (*see* MCL 462.241; MCL 462.337; *see also Detroit Int'l Bridge Co v Commodities Exp Co*, 279 Mich App 662, 670, 760 NW2d 565 (2008))
- road agencies (*see* MCL 213.151 et seq., .171 et seq., .361 et seq., 224.12)
- urban high school academies (*see* MCL 380.525)
- villages (*see* MCL 73.1; *see also* MCL 213.361 et seq.)

There are many other grants of the power of eminent domain to other public agencies, as well as additional grants to some of the enumerated entities for specific purposes. *See, e.g.,* MCL 125.3208(4) (authorizing townships to exercise eminent domain to take properties that do not conform with zoning ordinance).

When reviewing an attempt to exercise eminent domain, it is important to ensure that the agency seeking to acquire property possesses a sufficient grant of the power to proceed with the acquisition. Michigan courts have held that the "law of eminent domain permitting the taking of private property for public use is a harsh remedy and, therefore, the courts have required strict compliance with the particular provisions of the law upon which the action was based." *People on behalf of State Bd of Educ v Von Zellen*, 1 Mich App 147, 155, 134 NW2d 828 (1965). That "strict compliance" can affect delegations of the power of eminent domain, as "[l]ocal governments have the limited powers 'expressly conferred upon them by the Constitution of the State of Michigan, by acts of the Legislature, or necessarily implied therefrom.' " *Edward Rose,* 442 Mich at 632 n5. Therefore, more specific delegations of the power of eminent domain are preferable when available to be invoked by a governmental agency seeking to acquire property through eminent domain.

D. Procedures Governing the Exercise of Eminent Domain

§8.5 Although many different statutes delegate the power of eminent domain to many different governmental bodies, one statute controls the procedures in all eminent domain actions in Michigan courts. The Uniform Condemnation Procedures Act (UCPA), MCL 213.51 et seq., provides that "[a]ll actions for the acquisition of property by an agency under the power of eminent domain shall be commenced pursuant to and be governed by" the UCPA. MCL 213.75. This contrasts with the practices in place before the UCPA was adopted in 1980; before that time, many of the statutes granting the power of eminent domain provided their own procedural steps, which varied widely depending on the delegation statute and, therefore, which governmental agency was acquiring property. *Compare* MCL 213.361 et seq. (governing acquisition for road purposes) *with* MCL 280.470 (governing acquisition for drain purposes). In fact, the "Uniform" in the UCPA's title refers to the act's purpose of rendering procedures uniform across all exercises of eminent domain in Michigan rather than to the act being an instance of a uniform law, such as the Uniform Commercial Code. *See Michigan Law Revision Commission, Third Annual Report* 11–12 (1968). See §§8.42–8.89 for a detailed discussion of the procedures that apply under the UCPA.

III. Limits on the Power of Eminent Domain

A. The "Public Use" Requirement

1. In General

§8.6 The first and perhaps most significant constitutional limitation on the power of eminent domain is that the government may exercise the power to take private property only for public use. The public use requirement arises under the Fifth and Fourteenth Amendments of the United States Constitution. In addition, each Michigan constitution has included a "public use" restriction as a "positive limit on the state's power of eminent domain." *Wayne County v Hathcock*, 471 Mich 445, 471, 684 NW2d 765 (2004); *see also* Const 1850 art 15, §9; Const 1908 art 13, §1; Mich Const 1963 art 10, §2. The current provisions in the Michigan Constitution begin with the following limitation: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Mich Const 1963 art 10, §2. As the *Hathcock* court explained, "each invocation of 'public use' has been followed by litigation over the precise contours of this language." *Hathcock,* 471 Mich at 471.

2. Historic Michigan Public Use Standards

§8.7 The "public use" limitation did not historically serve as "an absolute bar against the transfer of condemned property to private entities. It was equally clear, however, that the constitutional 'public use' requirement worked to prohibit the state from transferring condemned property to private entities for a *private* use." *Wayne County v Hathcock*, 471 Mich 445, 472, 684 NW2d 765 (2004). In its historic decisions, the Michigan Supreme Court therefore permitted the exercise of eminent domain when the property would be transferred to railroad companies, *see, e.g., Swan v Williams*, 2 Mich 427 (1852); for clearance of slum properties for the protection of the public safety, *In re Slum Clearance in Detroit*, 331 Mich 714, 50 NW2d 340 (1951); and for construction of a pipeline, *see Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 42, 64 NW2d 903 (1954). On the other hand, it rejected the use of eminent domain for construction of a power plant that would be under private control, *see Berrien Springs Water Power Co v Berrien Circuit Judge*, 133 Mich 48, 51, 94 NW 379 (1903); for construction of a parking deck that would include private storefronts, *see Shizas v Detroit*, 333 Mich 44, 50, 52 NW2d 589 (1952); and for creation of a private cemetery, *see Board of Health v Van Hoesen*, 87 Mich 533, 49 NW 894 (1891). As the Michigan Supreme Court would later summarize, the public use requirement restricted the government's ability to take private property from its owner for transfer to another private entity in only limited circumstances. *Hathcock,* 471 Mich at 476.

Those circumstances were significantly broadened, however, by the Supreme Court's decision in *Poletown Neighborhood Council v Detroit*, 410 Mich 616, 304 NW2d 455 (1981). Under a Michigan statute allowing the use of eminent domain to provide for the general health and welfare by assisting industry and economic development, the City of Detroit resolved to take an entire neighborhood, known as "Poletown," due to many of its residents' Polish ancestry, and convey it to General Motors for the construction of a new assembly plant. *Id.* at 629–630. While purporting to apply "heightened scrutiny" to the city's taking, the court cited the

United States Supreme Court's decision in *Berman v Parker*, 348 US 26 (1954), which had allowed an entire area of Washington, D.C., to be taken to eliminate "blight," for the principle that the court was required to defer to the legislative judgment that such a taking was for a "public use." Citing cases that involved the government's power to impose taxes for "public purposes" rather than the "public use" limitation on eminent domain, the court held that the constitutional term *public use* was synonymous with *public purpose* and that both were efforts to "describe the protean concept of public benefit." 410 Mich at 630. Because the new assembly plant would provide jobs and alleviate unemployment, the court concluded that the plant would provide a public benefit and, therefore, approved the constitutionality of the city's use of eminent domain. *Id.* at 635.

In the wake of *Poletown,* governmental agencies used eminent domain to acquire property for the "Jefferson/Conner Industrial Revitalization Project," which resulted in the transfer of land to Chrysler for an assembly plant, *see Detroit v Vavro*, 177 Mich App 682, 683, 442 NW2d 730 (1989); condemnation of property for transfer to a private developer for a theater district, *see Detroit v Lucas*, 180 Mich App 47, 51, 446 NW2d 596 (1989); and condemnation of property to build stadiums for professional sports teams, *see Detroit/Wayne County Stadium Auth v 7631 Lewiston, Inc*, 237 Mich App 43, 45, 601 NW2d 879 (1999). Governmental agencies undertook many other such projects, though not all resulted in reported cases.

3. Return to More Restrictive Standard in *Wayne County v Hathcock*

§8.8 After 20-some years of the public use approach under *Poletown Neighborhood Council v Detroit*, 410 Mich 616, 304 NW2d 455 (1981), the Michigan Supreme Court returned to a more restrictive public use standard in *Wayne County v Hathcock*, 471 Mich 445, 476, 684 NW2d 765 (2004). Wayne County had attempted to acquire property through eminent domain for an economic development plan known as the "Pinnacle Project." During the 1990s, Wayne County worked with the Federal Aviation Administration (FAA) to acquire properties around Detroit Metropolitan Airport as part of a noise abatement program. As a result, Wayne County owned some 500 acres of land scattered south of the airport. Under its agreements with the FAA, the county was required to return those properties to productive use; the county's vision was to establish a business and technology park encompassing that land, which came to be known as the "Pinnacle Project." Pinnacle was designed to cover more than 1,200 acres, which the county planned to acquire and convey to businesses that would locate in the park. The county acquired some of this land through the abatement program and purchased other land. But certain owners did not wish to sell, so the county filed eminent domain actions to take their properties. The owners challenged the proposed "public use" for the taking, as the county intended to take the land and convey it to other private owners. Both the trial court and the court of appeals concluded that *Poletown* authorized the takings. *Hathcock,* 471 Mich at 451–454.

The supreme court granted leave to appeal, explicitly asking whether *Poletown* should be overruled. *Wayne County v Hathcock*, 469 Mich 959, 671 NW2d 40 (2003). The court went on to conclude that *Poletown* had erroneously expanded

the scope of the constitutional public use limitation. In reaching that conclusion, the court observed that it generally seeks the "common understanding" of constitutional terms but explained that when the constitution uses "technical words, and words of art," the court must presume that the words are used in their technical sense. *Hathcock,* 471 Mich at 469, 471. It held that "public use" is a technical term. Thus, the term's "common understanding" had to be determined by "determining the 'common understanding' among those sophisticated in the law at the time of the Constitution's ratification." *Id.* at 471.

Nevertheless, the court concluded it did not need to "cobble together a single, comprehensive definition of 'public use' from [its] pre-1963 precedent and other relevant sources." *Id.* Rather, it only had to determine whether condemning property for transfer to private owners as part of an economic development project was consistent with the historic understanding of the public use limitation. The court held that it is not.

In overruling *Poletown,* the supreme court explained that the public use limitation is not an absolute bar against the government taking private property for transfer to another private owner. Rather, persons sophisticated in the law at the time that the constitution was adopted would have understood that taking property for such transfers is permissible only in limited circumstances, which were summarized in Justice Ryan's *Poletown* dissent. The first such circumstance is when the taking rests on "public necessity of the extreme sort otherwise impracticable." *Id.* at 473. The court provided as examples highways, railroads, canals, and other similar "instrumentalities of commerce" that generally run in straight lines between two points, making holdout owners a "logistical and practical nightmare" that justifies permitting railroads and other private entities to employ the public's power of eminent domain. *Id.* The second is when the new private owner remains accountable to the public in its use of the property, or, as the court stated, when the land taken "will be devoted to the *use* of the public, *independent of the will of the corporation taking it." Id.* at 474. The court offered a pipeline subject to extensive regulation as an example of such a use. Third, the government may take property through eminent domain and transfer the property to a private owner when the selection of the land taken is itself based on matters of public concern. *Id.* at 475. The court gave the example of taking a property to eliminate a blighted building: the blighted building itself is the reason for the taking, but once the blight is eliminated, the government need not retain the property to ensure that the taking was for a public use. The court explained that in such a circumstance, transferring the property after the taking would in fact be "incidental" to the primary purpose of taking the property to eliminate the blight. *Id.* The county's proposed takings in *Hathcock* did not fit within any of these categories, so the court held that the takings violated the constitution and could not be completed. *Id.* at 476–478.

Hathcock explained that *Poletown* had relied on inapplicable tax cases as precedent and engaged in flawed reasoning in concluding that a generalized public benefit resulting after a taking is sufficient for the taking to satisfy the constitutional standard. 471 Mich at 479. The court explained that under the reasoning in *Poletown,* any taking would be permissible if the government could demonstrate that a new owner could put a property to more productive use than could its current

owner; this would leave the "public use" limitation meaningless and subject all property owners' rights to the possibility that the government could find an owner to put their properties to "better" uses. Because *Poletown* was grounded in neither valid precedent nor persuasive reasoning, it was overruled. *Hathcock* now sets the standard for public use in Michigan.

4. Public Use and the 2006 Amendments to the Michigan Constitution

§8.9 Although the court in *Wayne County v Hathcock*, 471 Mich 445, 684 NW2d 765 (2004), adopted a much more restrictive public use standard than under prior law, approximately one year after the *Hathcock* ruling, the United States Supreme Court decided a case that brought the essence of the public use requirement to the forefront of national attention: *Kelo v City of New London*, 545 US 469 (2005). In *Kelo,* the Court held that although the federal Constitution's "public use" limitation prohibits takings for private purposes, the Court had a longstanding policy of deference to the legislative branch (federal and state) on whether a particular exercise of eminent domain meets the federal test for "public use," and that such deference fully applied in this situation. The Court seemed to view the federal Constitution as setting the minimum requirements for public use, noting, however, that each state is free to adopt standards that require greater public uses to authorize taking property through eminent domain. Indeed, *Kelo* cited *Hathcock* as an example for states to follow should they desire a more restrictive interpretation of public use.

As a result of the heightened national attention given to the public use issue flowing from *Kelo,* and notwithstanding the protections advanced in *Hathcock,* the Michigan legislature addressed public use, as well as other eminent domain issues, in its 2005–2006 legislative session. The Michigan Senate initiated Senate Joint Resolution E with the goal of presenting a ballot initiative to the voters in November, 2006. The stated goal behind the resolution was to codify the Michigan Supreme Court decision in *Hathcock* into Mich Const 1963 art 10, §2, which at that time provided a straightforward requirement: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

The resolution (http://legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/Senate/pdf/2005-SNJR-E.pdf) that the senate ultimately approved contained a much more extensive provision:

> Sec. 2. Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.
>
> "Public use" 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. Private property otherwise may be taken for reasons of public use as that

> term is understood on the effective date of the amendment to this constitution that added this paragraph.
>
> In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.
>
> Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

The resolution passed both the senate and the house with broad bipartisan support and was overwhelmingly approved by the voters in November, 2006. *See* Mich Const 1963 art 10, §2.

This constitutional amendment went well beyond simply codifying the *Hathcock* decision. In addition to precluding takings for economic development or tax enhancement, the amendment confirms the burden of proof in a public use challenge generally, adopts a heightened burden for takings involving blighted properties, requires payment of 125 percent of fair market value as just compensation for the taking of property consisting of the property owner's principal residence, and preserves all rights and benefits afforded to property owners under the law as of November 1, 2005.

5. Legislative Limitations on the Power of Eminent Domain

§8.10 In addition to the ballot initiative amending the Michigan Constitution, the Michigan legislature also amended a number of eminent domain statutes in response to the United States Supreme Court decision in *Kelo v City of New London*, 545 US 469 (2005). For example, the legislature amended the Acquisition of Property by State Agencies and Public Corporations Act, MCL 213.21 et seq., to mirror the new constitutional provisions and the decision in *Wayne County v Hathcock*, 471 Mich 445, 684 NW2d 765 (2004), pertaining to transferring taken property:

> The taking of private property by a public corporation or a state agency for transfer to a private entity is not a public use unless the proposed use of the property is invested with public attributes sufficient to fairly deem the entity's activity governmental by 1 or more of the following:
>
> (a) A public necessity of the extreme sort exists that requires collective action to acquire property for instrumentalities of commerce, including a public utility or a state or federally regulated common carrier, whose very existence depends on the use of property that can be assembled only through the coordination that central government alone is capable of achieving.
>
> (b) The property or use of the property will remain subject to public oversight and accountability after the transfer of the property and will be devoted to the use of the public, independent from the will of the private entity to which the property is transferred.

> (c) The property is selected on facts of independent public significance or concern, including blight, rather than the private interests of the entity to which the property is eventually transferred.

MCL 213.23(2). The amendments to this act also prohibit taking "private property for the purpose of transfer to a private entity for either general economic development or the enhancement of tax revenue," which are legislatively excluded from satisfying the requirements of "public use." MCL 213.23(3). Takings for a public use that are "a pretext to confer a private benefit on a known or unknown private entity" are prohibited as well, although "the taking of private property for the purposes of a drain project by a drainage district as allowed under the drain code" is not a pretextual taking. MCL 213.23(6).

Like the amendments to the Michigan Constitution, the legislative amendments also placed the burden of proof in a condemnation action on the condemning agency, with a heavier burden applying in "blight" cases:

> In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking of private property because the property is blighted, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.

MCL 213.23(4). The legislature also adopted a new definition of *blight* for use in the eminent domain context. Previously, *blight* could be based on factors seemingly as superficial as errors in legal description and could be determined to affect an entire area. *See, e.g.,* MCL 125.72 (amended in 2006). The new definition of *blighted,* for purposes of eminent domain, is focused on individual properties and is akin to the standards for determining whether a property may be a nuisance. *See* MCL 213.23(8). The legislature also amended other legislation, such as the Blighted Area Rehabilitation Act, MCL 125.71 et seq., to incorporate a similar definition of *blight* and to remove the older and broader definition.

The amendments also reiterated the constitution's provision that when a property owner's principal residence is taken, "just compensation" shall equal 125 percent of the property's fair market value, subject to certain limitations. *See* MCL 213.23(5). In *Kelo's* wake, the legislature approved several other amendments to Michigan's eminent domain statutes. See §8.9.

B. The "Necessity" Requirement

§8.11 Although the constitution requires that a taking must be for a public use, the UCPA requires that the taking must additionally be necessary. Historically, the "necessity" requirement had been set forth in the Michigan Constitution. *See, e.g.,* Const 1908 art 8, §1 ("Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined."). But the 1963 Constitution did not include a necessity requirement. Instead, that requirement is now set forth in the UCPA. Under MCL 213.56, the UCPA requires that there must be a public necessity for the taking to

specifying that necessity may be reviewed only for fraud, error of law, or abuse of discretion:

> (1) Within the time prescribed to responsively plead after service of a complaint, an owner of the property desiring to challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint may file a motion in the pending action asking that the necessity be reviewed. The hearing shall be held within 30 days after the filing of the motion.
>
> (2) With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.

MCL 213.56; *see also City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 252–253, 701 NW2d 144 (2005). The UCPA provides that the condemning agency first determines whether the taking is necessary, which means that a particular property is needed for the public project that the agency is attempting to implement. *See* MCL 213.56.

Once the condemning agency determines that a taking is necessary—a determination that the supreme court has described as "legislative"—the determination is "entitled to a highly deferential standard of judicial review, and will not be disturbed except where there is evidence of fraud, error of law, or an abuse of discretion." *Adell,* 473 Mich at 255 n11. For abuse of discretion, the court has used the same standard that applies to an appellate court's review of lower court decisions, holding that there is an abuse of discretion when the resulting decision is outside the "principled range of outcomes." *Id.* at 254. It is not enough for a condemned owner to demonstrate that there were other or better alternatives for a public project than including the owner's property. Rather, the owner must show that there is "no justification or excuse" for the decision that it is necessary to take the property. *Id.* The court's only discussion of "fraud," under MCL 213.56, is found in *Adell,* in which a prompt conclusion was reached that the record lacked evidence to support a fraud claim; thus, there is little authority concerning fraud in this context. As for "legal error," the court in *Adell* held that because the Home Rule City Act delegated the power of eminent domain to the City of Novi, there was no legal error undermining the necessity for the taking. 473 Mich at 253. Overall, necessity is a difficult basis for a property owner to challenge a taking; a condemning agency has broad discretion in determining to take a property, and that discretion is difficult to overturn in court.

C. The "Just Compensation" Requirement

1. In General

§8.12 The second constitutional limitation on eminent domain after the public use requirement requires that when the government takes private property for public use, it must pay the property's owner "just compensation." Like the "public use" limitation on the power of eminent domain, the "just compensation" limitation has been included in every Michigan Constitution. *See Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 374 n7, 663 NW2d 436 (2003).

As *Silver Creek* explained, the meaning of *just compensation* is "not generally self-evident from a mere reading of the words or an assessment of their definitions in a dictionary." 468 Mich at 376. Instead, "just compensation" falls within the category of "technical legal terms or phrases of art in the law." *Id.*

The concept behind "just compensation" is that the owners from whom property is taken should be put in as good a position as they would have been in had the taking never occurred. In other words, the owners should lose nothing, but neither should the owners gain at the public's expense:

> The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. The public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public's expense.

Department of Transp v VanElslander, 460 Mich 127, 129, 594 NW2d 841 (1999). In *Commissioners of Parks & Boulevards v Moesta*, 91 Mich 149, 51 NW 903 (1892), the Michigan Supreme Court analogized "just compensation" to the damages available in a tort action:

> The constitutional provision entitling the owner of private property, taken for public use, to just compensation, has uniformly been construed to require full and adequate compensation. The rules to be applied in fixing the compensation are not necessarily the same as obtain in fixing damages in actions upon contracts. The correct rule of compensation in such cases is more nearly analogous to the remedy afforded in an action in tort in which property rights have been interfered with without the owner's assent.

Although *Moesta* dates to the 19th century, Michigan courts have refused to disavow its tort standard despite having been urged to do so. *See In re Grand Haven Highway*, 357 Mich 20, 31, 97 NW2d 748 (1959) (declining to overrule *Moesta*); *see also Poirier v Grand Blanc Township*, 192 Mich App 539, 545, 481 NW2d 762 (1992) (applying *Moesta* in an inverse condemnation action).

2. The One Recovery Rule

§8.13 It is important to note that "just compensation" must include compensation for every possible type of damage resulting from the condemning agency's acquisition of the owner's property. Known as the "one recovery rule," this principle requires that property owners must "be compensated in the [eminent domain] litigation for all injury possible to arise in the future from the [condemning agency's] acquisition of rights." *Mackie v Watt*, 374 Mich 300, 312, 132 NW2d 113 (1965); *see also Barnes v Michigan Air-Line R Co*, 65 Mich 251, 253, 32 NW 426 (1887) ("the jury should consider … all the consequences of the appropriation of the land"). Thus, "just compensation" is determined based on the presumption that the government will use "every one of the quantum of rights it [has] arguably taken" to the fullest extent allowed by the law. *Michigan State Highway Comm'n v Great Lakes Express Co*, 50 Mich App 170, 175, 213 NW2d 239 (1973).

3. Fair Market Value

a. In General

§8.14 When the government exercises its power of eminent domain to take property, "just compensation" for the property is based on the property's fair market value. Market value takes into account "every … element entering into [the property's] cash or market value, as tested by its capacity for any and all uses." In other words, determining a property's market value requires taking into account "any element of value that [property] might have by reason of special adaptation to particular uses." Thus, a property's market value will account for "all elements of value that inhere in the property." *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 377–378, 663 NW2d 436 (2003) (internal quotations omitted).

Michigan courts acknowledge that this is a somewhat amorphous standard. But they have further explained that no precise definition is possible, because every property is different, and determining the value of any given property will require judgment and an accounting for the facts surrounding that property:

> Many technical rules have been promulgated for determining value, none of which is important. The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case. It is in the final analysis only the effect of the relative human desire for compared objects expressed in terms of a common denominator.

In re Gratiot Ave, 294 Mich 569, 574–575, 293 NW 755 (1940) (internal quotations omitted).

b. Determined as of the Time Title to the Taken Property Transfers

§8.15 Despite the general nature of the market value standard, Michigan law does include some specifics for determining the market value of property in eminent domain. First, the UCPA provides that a property's value for purposes of establishing just compensation is generally determined as of the date that title to the taken property transferred to the condemning agency. *See* MCL 213.70(3). The UCPA allows the parties in a condemnation action to stipulate to another date and provides for the possibility that the owner can prove that the taking actually occurred at an earlier time. *See* MCL 213.70(3); *see also* MCL 213.71. Under MCL 213.70(3), Michigan courts have refused to admit evidence of posttaking events such as changes in zoning, *see Michigan Dep't of Transp v Haggerty Corridor Partners Ltd P'ship*, 473 Mich 124, 127, 700 NW2d 380 (2005); although evidence concerning posttaking sales of comparable property has been viewed differently, and such evidence is subject to certain thresholds regarding admissibility. *See City of Detroit v Detroit Plaza Ltd P'ship*, 273 Mich App 260, 282–283, 730 NW2d 523 (2006) (approving admission of evidence concerning posttaking sales of comparable property); *see also Petition of Michigan State Highway Comm'n v McGuire*, 29 Mich App 32, 34, 185 NW2d 187 (1970) (holding that sales of comparable property must have occurred within reasonable time of date of taking to be admissible as evidence).

c. "Cash Price" Basis

§8.16 Second, the "common denominator" in determining just compensation that the court mentioned in *In re Gratiot Ave*, 294 Mich 569, 574–575, 293 NW 755 (1940), is a "cash price." Under Michigan law, a property's market value must be determined based on the property's value "in terms of money." *See Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 633, 705 NW2d 549 (2005). In fact, Michigan courts have refused to admit evidence of property exchanges, even when the parties to the exchange assigned a "nominal price" to their properties, to demonstrate the value of property that was taken. The "just compensation" for the taken property must be determined "in terms of money," and a property exchange was held to present too many distractions to that determination. *See City of Detroit v Detroit Plaza Ltd P'ship*, 273 Mich App 260, 270–271, 730 NW2d 523 (2006).

d. Property's "Highest Price"

§8.17 The "cash price" standard that Michigan courts apply in the context of eminent domain differs from that used in other contexts. In eminent domain, "market value" means "the highest price" that the property would bring in cash if offered for sale:

> "Fair market value" is
>
> > "the *highest price* estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is adapted."

Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc, 267 Mich App 625, 633, 705 NW2d 549 (2005) (emphasis added and citations omitted). This differs from the market value standard used in ad valorem taxation, for example, which is the property's "*usual* selling price." *See* MCL 211.27(1) (emphasis added). Indeed, the standard in eminent domain is different than the standard that Michigan courts have described as the "common understanding" of market value, which is "the amount of money that a ready, willing, and able buyer would pay for the asset on the open market." *Estate of Wolfe-Haddad v Oakland County*, 272 Mich App 323, 325–326, 725 NW2d 80 (2006). Granting condemned property owners the "highest price" for which a property would sell is one means of granting owners the benefit of the doubt in recognition that owners who are losing their properties to eminent domain are having properties taken from them without their consent.

e. Property's "Highest and Best Use" and the Possibility of Rezoning

§8.18 The condemned owner is generally entitled to compensation based on the "highest and best use" of his or her property. *St Clair Shores v Conley*, 350 Mich 458, 462, 86 NW2d 271 (1957). "Highest and best use" is a real property and appraisal concept that "recognizes that the use to which a prospective buyer would put the property will influence the price that the buyer would be will-

ing to pay." *Michigan Dep't of Transp v Haggerty Corridor Partners Ltd P'ship*, 473 Mich 124, 127 n3, 700 NW2d 380 (2005). A property's highest and best use is based on whether any given use of property is physically possible, legally permissible, maximally productive, and supported by market demand. *See City of Lansing v Edward Rose Realty*, 442 Mich 626, 633, 502 NW2d 638 (1993). A proposed use must satisfy all four of these requirements to be a property's "highest and best use."

Even though a property's highest and best use must be legally permissible, the highest and best use can be different than the use for which the property is zoned. This is because market value must take into account the possibility that the local government will change the zoning classification of the property, either on its own or at the request of the property owner. To be considered, the property must have a reasonable possibility of a zoning change. *See State Highway Comm'r v Eilender*, 362 Mich 697, 699, 108 NW2d 755 (1961). Thus, the possibility cannot be "remote," but describing the possibility of a change as a "real probability" has been held to set too high a burden. *Michigan State Highway Comm'n v Haehnle*, 69 Mich App 336, 337, 244 NW2d 470 (1976). To have the possibility of a zoning change considered, the property owner must demonstrate that the possible change "would have affected the price which a willing buyer would have offered for the property just prior to the taking." *Department of Transp v VanElslander*, 460 Mich 127, 130, 594 NW2d 841 (1999) (internal quotation omitted).

f. Effect of the Project

§8.19 Another specific principle is that just compensation must be calculated disregarding the effect that the impending condemnation had on property values. In some instances, anticipated condemnation will increase or decrease values in the project area and its surroundings. Michigan courts have long interpreted "just compensation" to provide that when a pending condemnation depresses values, "the property owner should not be obliged to suffer the reduced value of his property." *See In re Elmwood Park Project, etc*, 376 Mich 311, 318, 136 NW2d 896 (1965). Likewise, the supreme court has explained that when "condemnation proceedings tend to increase the value of property, the property owner is not entitled to the increased value." *Id.* Just compensation is calculated presuming that the pending exercise of eminent domain did not exist.

The legislature incorporated this principle into the UCPA in 1996. The UCPA provides that if a party can demonstrate that a change in value resulted from knowledge that the government would take property, the change in value must be factored out of just compensation:

> A change in the fair market value before the date of the filing of the complaint which the agency or the owner establishes was substantially due to the general knowledge of the imminence of the acquiring by the agency, other than that due to physical deterioration of the property within the reasonable control of the owner, shall be disregarded in determining fair market value … the property shall be valued in all cases as though the acquisition had not been contemplated.

MCL 213.70(2). Note that the UCPA requires a party to demonstrate that values changed substantially due to knowledge of the imminent taking, not just to the

imminence of the public project. Accordingly, in *City of Detroit v Detroit Plaza Ltd P'ship*, 273 Mich App 260, 277–278, 730 NW2d 523 (2006), the court of appeals explained that MCL 213.70's limitations on just compensation require the fact-finder to decide the extent to which noncompensable changes in value due to anticipation of condemnation affected value and how to account for those non-compensable changes:

> [T]he question whether, and if so to what extent, a property's value has been enhanced by a condemnation project is a factual question to be deliberated on and decided by the trier of fact.

273 Mich App at 278. The court of appeals went on to hold that the UCPA does not prohibit "admission of evidence reflecting non-compensable" elements of value; it only provides that noncompensable elements must "be excluded from compensation." *Id.* at 277 (approving admission of comparable property sales that were allegedly influenced by government project). Because compensation is decided by the fact-finder, the fact-finder must be permitted to decide the amount of value, if any, that resulted from the anticipation of the taking and factor that amount out of the owner's compensation. *Id.* at 278.

g. Principal Residences

§8.20 As part of the amendments adopted during 2006, the Michigan Constitution was revised to provide that when a person's principal residence is taken, "just compensation" equals 125 percent of the property's market value:

> If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law.

Mich Const 1963 art 10, §2. This provision was also incorporated into statutes authorizing government agencies to exercise eminent domain. *See, e.g.,* MCL 213.23(5). The legislation provides that to qualify for 125 percent compensation, "the individual's principal residential structure must be actually taken or the amount of the individual's private property taken leaves less property contiguous to the individual's principal residential structure than the minimum lot size if the local governing unit has implemented a minimum lot size by zoning ordinance." MCL 213.23(5). The legislation did not attempt to define *principal residence,* but that term has an established meaning under Michigan property tax law. In that context, an individual's principal residence is "the 1 place where an owner of the property has his or her true, fixed, and permanent home to which, whenever absent, he or she intends to return and that shall continue as a principal residence until another principal residence is established." MCL 211.7dd(c). Note that in the tax context, a property owner's "principal residence" includes all unoccupied land adjoining the residential structure so long as the land is classified "residential" or "timber cutover" for tax purposes. *Id.* It would be a fair argument that these statutory clarifications from property tax law should be imported into condemnation law if they have acquired the status of being terms of art (see MCL 8.3a);

otherwise, the undefined terms should be given their plain and ordinary meanings. *People v Hill*, 486 Mich 658, 668, 786 NW2d 601 (2010).

h. Fixtures

§8.21 When the government takes real property through eminent domain, it has no obligation to pay just compensation for personal property that it is not taking. This seemingly simple principle can become complicated when fixtures are involved. Under Michigan law, a fixture is an item "having a possible existence apart from realty, but which may, by annexation, be assimilated into realty." *Wayne County v Britton Trust*, 454 Mich 608, 614–615, 563 NW2d 674 (1997). An item qualifies as a fixture if it satisfies a three-part analysis addressing whether the item is annexed to the real property, adapted to the real property, and intended to become a permanent part of the real property. 454 Mich at 615.

In *Britton Trust,* the supreme court discussed each step of the three-part fixture analysis in the context of eminent domain. First, the court held that annexation can occur either actually or constructively. Actual annexation is "the act of attaching or affixing personal property to real property." *Id.* Citing *Colton v Michigan Lafayette Bldg Co*, 267 Mich 122, 255 NW 433 (1934), the court stated that an item may be constructively annexed to real property when its removal would impair both its own value and the value of the real property. Emphasizing that other jurisdictions follow similar reasoning, the court considered constructive annexation to be a well-settled facet of Michigan fixture law.

Second, the court turned to the adaptation prong of traditional fixture qualification. No prior Michigan cases considered adaptation to the use of the real property, so again the court looked to informative authorities. Following a Wisconsin Supreme Court case, *Premonstratensian Fathers v Badger Mut Ins Co*, 175 NW2d 237 (1970), the court defined *adaptation* as "the relationship between the chattel and the use which is made of the realty to which the chattel is annexed." Further, the court asserted that an object can become adapted if it is a necessary or at least useful adjunct to the real property, considering the purposes for which the real property is used. *Britton Trust,* 454 Mich at 618.

Third, the court examined intent. The objective visible facts determine whether there is an intent to make the item a permanent accession to the real property. Thus, the intent is measured by the surrounding circumstances and not the annexor's subjective intent. Circumstances the *Britton Trust* court gave as considerations in analyzing intent included the nature of the item annexed, the purpose for which it was annexed, and the manner of annexation. *Id.* at 619–620.

If an item satisfies all three of these requirements, then "it is a fixture. If it does not," then "it is not a fixture." *Id.* at 612 n2. Items that are not fixtures are personal property; unless the government is specifically taking the personal property, the government does not owe the property owner compensation for such items. But the government must pay compensation for items that qualify as fixtures because fixtures are part of the real property. *Id.* at 622–623.

Note that the property owner can elect the compensation that it will receive for its fixtures. The property owner can choose to leave the fixtures as part of the

real property and receive compensation for the real property, including the fixtures; or the property owner can choose to receive the cost to detach the fixture from the taken property and re-attach it at a new property, although the value of the taken property, and thus the owner's compensation for that property, will be reduced by whatever amount the fixture may have contributed to the taken property's market value. *Id.* at 623.

i. Property Taxes

§8.22 The UCPA provides compensation for property owners who lose their taxable value "cap" under Michigan property tax law when their property is taken through eminent domain. The Michigan Constitution and the General Property Tax Act provide that properties have two values placed on them for tax purposes: a state equalized value and a taxable value. Mich Const 1963 art 9, §3; MCL 211.27a. The state equalized value should equal 50 percent of the property's market value; taxable value will equal 50 percent of the property's value only in a year after the property is *transferred,* which in general means a conveyance. *See* MCL 211.34d. Otherwise, the property's taxable value, which, it is critical to note, is the value on which ad valorem taxes are calculated, may not increase from year to year by more than 5 percent or the rate of inflation, whichever is less. This cap on taxable value can be a significant benefit for a property owner that has owned its property for many years, as the property's market value and therefore its state equalized value may have increased well beyond the limitations that the taxable value cap imposed. A property owner whose property is taken through eminent domain loses the benefit that it enjoyed under the taxable value cap.

One of the legislature's 2006 amendments to the UCPA attempted to provide compensation for this loss for residential properties. The UCPA now provides that when a property identified as the owner's principal residence is taken, the owner is entitled to a payment to compensate the owner for the loss of its taxable value cap that is based on the difference between the taken property's state equalized value and taxable value:

> If the property being taken is a principal residence … under section 7cc of the general property tax act … the agency is obligated to pay an additional amount to the owner or owners … . The additional amount shall be determined by subtracting the taxable value from the state equalized value, multiplying that amount by the total property tax millage rate applicable to the property taken, and multiplying that result by the number of years the owner or owners have owned the principal residence, but not more than 5 years.

MCL 213.55(6).

Outside of the context of a property owner's principal residence, Michigan courts have allowed compensation for the lost property tax "cap" as part of "just compensation." In *Department of Transp v Gilling*, 289 Mich App 219, 796 NW2d 476 (2010), the property owner, a business, sought "just compensation" for having lost its property tax cap when it had to leave its longtime location and move to another location. The trial court permitted the property owner to seek such compensation, the jury awarded the compensation, and the court of appeals

allowed the award to stand even though it reversed certain other components of the owner's just compensation award. In light of this allowance for constitutional "just compensation" for the loss of a property tax cap, the legislature's effort to limit compensation for principal residences to five years may be argued to be invalid.

4. Partial Takings

a. In General

§8.23 The market value standard also applies when only part of a property is taken through eminent domain. Partial takings are common in road cases, for example, where a condemning agency exercises its power of eminent domain to obtain a portion of a property to widen a road or intersection, leaving the remainder of the property with the owner. No matter the context, the market value standard continues to apply in partial taking cases, though it can come in several different forms.

b. The "Before and After" Standard

§8.24 The primary means for determining a property owner's just compensation for a partial taking is estimating a property's market value before the taking and the value of the property's remainder after the taking. The difference between the two represents the owner's just compensation. *See, e.g., Johnstone v Detroit, GH & M Ry Co*, 245 Mich 65, 81, 222 NW 325 (1928). In granting the difference in the property's value before and after the taking as just compensation, Michigan law provides compensation for the land taken as well as compensation for the consequences of the taking on the land that remains afterward. As the supreme court summarized, "just compensation" therefore includes both direct and consequential effects of a taking:

> Where only part of a parcel is taken, just compensation is not measured by proportionate acreage but by the amount to which the value of the property from which it is taken is diminished. The value of the part actually taken is allowed as direct compensation; but the decreased value of the residue of the parcel, on account of the use made of the land taken, is also allowable as compensation even though it is strictly consequential damage in nature.

Id. (citations omitted).

When determining the property's value before the taking in the before-and-after analysis, all the principles governing just compensation generally, such as highest and best use, ignoring the condemnation project, and estimating the property's highest price, are applicable. After all, the valuation is "before" the taking and must be as if the taking were not happening. *See* MCL 213.70(1).

In the after-taking analysis, however, the "one recovery" rule requires that the taking's full effect must be considered in estimating value. *See Michigan State Highway Comm'n v Great Lakes Express Co*, 50 Mich App 170, 175, 213 NW2d 239 (1973). The taking can affect the remainder property in any number of ways, many of which may not be identifiable in the abstract. Nevertheless, the Michigan Model Civil Jury Instructions (M Civ JI) provide a useful starting point for the

types of effects a taking can have, all of which must be considered in determining a remainder property's value after a 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 which the *[name of condemning authority]* intends to make of the property it is acquiring and the effect of that use upon the owner's remaining property.

M Civ JI 90.12. The model instruction also reiterates that the jury must award compensation for all the taking's effects in the condemnation action, directing the jury that, "in valuing what is left after the taking, you must assume that the *[name of condemning authority]* will use its newly acquired property rights to the full extent allowed by the law." *Id.* Once the jury determines the value of the property remaining after the taking, that value is subtracted from the value before the taking to reach a conclusion of "just compensation" for the taken property.

c. Other Measures of Compensation

§8.25 Though the before-and-after analysis may be the most common and most reliable means of measuring just compensation for a partial taking from property, Michigan law does not require that analysis. Indeed, in some circumstances other analyses may prove more useful for measuring the amount of money that will put the property owner in as good a position as it would have been in had the taking never occurred. The most basic expression of an alternative analysis for determining just compensation for a partial taking is that the owner is entitled to the "fair market value of the property taken plus severance damages to the remaining property if applicable." *Department of Transp v Sherburn*, 196 Mich App 301, 306, 492 NW2d 517 (1992). In more common eminent domain parlance, this is known as a "part taken plus damages" analysis.

Another important type of severance damage is known as a "cost to cure." The court of appeals has explained that a property owner may sometimes be able to mitigate severance damages. The expense to implement the mitigation is the "cost to cure" and is part of just compensation:

> Where severance damages have occurred, it may sometimes prove possible for the property owner to perform certain actions upon the property to rectify the injuries in whole or in part, thus decreasing the amount of severance damages and correspondingly increasing the parcel's market value. These actions constitute a "curing" of the defects, and the financial expenditures necessary to do so constitute the condemnee's cost to cure.
>
> Michigan has for many years recognized that determination of a condemnee's cost to cure is a valid method of appraising the severance damages for which the condemnee is entitled to compensation.

196 Mich App at 305. Michigan law limits the cost to cure, however, to the difference in the property's value that would result if the cure were not implemented. In other words, Michigan law will not award more in compensation to implement

a "cure" than would be available as compensation for the change in the property's value if there were no cure. Thus, a cost to cure cannot exceed the diminution in a property's value due to a taking and should minimize the diminution. *Id.; see also In re Widening of Michigan Ave*, 298 Mich 614, 618, 299 NW 736 (1941) (rejecting proposed "cure" that exceeded diminution in property's value due to taking).

5. Limitations on Market Value and Just Compensation

a. In General

§8.26 Even though the Michigan Supreme Court has held that determining just compensation for taken property requires accounting for "all factors relevant to market value," *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 379, 663 NW2d 436 (2003), special limitations on market value exist that apply in eminent domain. Some of the limitations have long been part of the law of eminent domain, though others were adopted during the 1990s at the urging of condemning agencies. Many of them apply only in the after-taking component of a partial taking.

b. "General Effects"

§8.27 One of the UCPA provisions adopted during the 1990s applies to the after-taking valuation in a partial taking and limits compensation for the "general effects" of the public project for which the property was taken. The UCPA's language provides that "general effects" of a project shall not be taken into account in determining just compensation:

> The general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation.

MCL 213.70(2). In *Michigan Dep't of Transp v Tomkins*, 481 Mich 184, 749 NW2d 716 (2008), the supreme court upheld this limitation against a constitutional challenge, holding that it could find no precedent that foreclosed the legislature's ability to impose this limitation on "just compensation."

Note that the UCPA does not describe the kinds of effects that qualify as "general effects of a project for which property is taken." In *Tomkins,* the parties were in agreement that the effects in the case—dust, noise, and vibrations—were "general effects" of a road expansion project. But other authorities provide that whether an effect of a public project is a "general effect," a "special effect," or something else must be determined by the fact-finder. *See* 3 *Nichols on Eminent Domain* §8A.03[53] n219 (3d ed 2006) (discussing whether effect was special or general and stating that such determinations "ordinarily are questions of fact for the jury"). This is due to the difficulty in having courts determine that an effect is a "general effect" as a matter of law. After all, under MCL 213.70(2), such a determination would require a Michigan court to attempt to answer, as a matter of law, how widespread an effect must be for the effect to be a "general effect," how many people must experience it for the effect to be "experienced by the general public," and how similar the effect must be to fall within the effects felt "by prop-

erty owners from whom no property is taken." *City of Detroit v Detroit Plaza Ltd P'ship*, 273 Mich App 260, 277 n6, 730 NW2d 523 (2006). *Detroit Plaza* indicates that these types of decisions should be left to the fact-finder; the court's reasoning that whether values changed in anticipation of a condemnation, thus requiring value to be excluded from compensation, was an issue for the fact-finder, *id.* at 278, would apply with equal force to whether an effect is a "general effect" that must be excluded from compensation.

c. Traffic

§8.28 Several eminent domain principles provide that changes in traffic patterns after a taking also must not be taken into account in determining just compensation. For example, the supreme court addressed a road project that rendered access to a property less convenient in *Mackie v Watt*, 374 Mich 300, 132 NW2d 113 (1965). Before the taking in that case, a main highway abutted the owner's hotel property on the west; the state took a portion of the property to relocate the highway to the property's east, which the evidence demonstrated would significantly diminish the hotel's business prospects by diverting traffic to the new highway. Notwithstanding that, the supreme court held that because the taking did not altogether eliminate access to the owner's property but merely created an "inconvenience caused by the necessity to use a more indirect route to travel in certain directions," the taking was "not a deprivation of access and, hence, not compensable." *Id.* at 313. The owner therefore could not obtain "just compensation" for the effect of diverting traffic away from his property onto the new highway. *Id.; see also In re Michigan State Highway Control, etc.*, 377 Mich 309, 315, 140 NW2d 500 (1966) (holding that gas station owner could not obtain compensation for effect of taking portion of his property to build freeway that would divert traffic from his property).

The supreme court was careful to distinguish situations like that in *Watt,* where access to the owner's property was rendered less convenient, from situations in which access to a property was eliminated. The court explained that "mere inconvenience caused by the necessity to use a more indirect route to travel in certain directions is not a deprivation of access and, hence, not compensable," but that "the injury which results to an abutting owner, or another so situated that the means of ingress and egress to and from his premises are cut off by a discontinuance of a street," is compensable. *Id.* at 313–314 (quotations omitted).

Ultimately, whether a taking results in noncompensable "mere inconvenience" or compensable access to a property being "entirely or materially cut off" will be fact-specific. The supreme court in *Watt* limited its decision to "the evidence disclosed" and acknowledged that certain "additional factors" may have resulted in a different decision. *Id.* at 313, 315. As a respected eminent domain authority summarized this issue, "recovery for diminished access or circuity of travel is case specific and may well turn on a particular phrase." 7A *Nichols on Eminent Domain* §G9A.04 (3d ed 2006 & Supp 2011).

d. Benefits

§8.29 The UCPA also provides that in certain instances, the benefits of a condemnation project can be taken into account in determining a property owner's just compensation. "Enhancement in value of the remainder of a parcel, by laying out, altering, widening, or other types of improvement; by changing the scope or location of the improvement; or by either action in combination with discontinuing an improvement, shall be considered in determining compensation for the taking." MCL 213.73(1). To have this benefit to a property's remainder taken into account, the condemning agency must allege the benefit in its complaint, and, if the construction that is alleged to create the benefit is not completed according to plan, the owner may re-open the issue of compensation. MCL 213.73(2). If a condemning agency alleges enhancement benefits, then anytime before trial the property owner may request that the trial court "require the agency to acquire that portion of the remainder of the tract which the agency claims to be enhanced." MCL 213.73(3). Also, the condemning agency bears the burden of proving "enhancement benefits." MCL 213.73(4).

In a related provision, the UCPA states that, "[t]o the extent that the detrimental effects of a project are considered to determine just compensation, they may be offset by consideration of the beneficial effects of the project." MCL 213.70(2). This provision regarding "beneficial effects" is set forth in a separate section from provisions regarding "enhancement benefits," but because both pertain to benefits, they appear to refer to the same concepts. Moreover, historic Michigan condemnation law did not distinguish between an enhancement and a benefit. *See Petition of Michigan State Highway Comm'n*, 383 Mich 709, 713–714, 178 NW2d 923 (1970) (using "enhancement in value," "enhancement," and "benefits" interchangeably); *Rogers v Breisacher*, 231 Mich 317, 321–322, 204 NW 112 (1925) (referring to deduction of "benefits" from damages); *Custer Township v Dawson*, 178 Mich 367, 371–372, 144 NW 862 (1914) (using "increase in value," "benefits," and "benefited" interchangeably); *Michigan State Highway Comm'n v Frederick*, 32 Mich App 236, 240–241, 188 NW2d 193 (1971) (referring to "benefits" and stating that "the term 'benefits' when in issue is relevant only as it relates to the value of the remainder"); *Mackie v Sabo*, 4 Mich App 291, 294, 144 NW2d 798 (1966) (referring to "offsetting of benefits against damages" and using "increase in value" and "benefits" interchangeably). The terms would therefore be understood to refer to the same concept, and a condemning agency would have to allege whatever benefits it sought to have considered in its complaint. *See* MCL 8.3a ("[T]echnical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"). Accordingly, if a condemning agency desires "consideration of the beneficial effects of the project" in determining a property owner's just compensation, the agency should allege the "benefit" in its complaint to ensure that the agency preserves its right to do so.

6. Business Damages

a. In General

§8.30 In addition to compensating owners for the property that is taken from them, the constitution's "just compensation" clause also ensures that property owners are made whole for certain business damages that they may suffer due to a taking. The business damages available as just compensation can include business relocation costs, certain costs incurred to avoid business interruption, and in certain circumstances the going concern value of a business. Unlike most other areas of Michigan law, however, the law governing just compensation in eminent domain does not permit a business owner to recover lost profits as business damages.

b. Relocation Costs

i. In General

§8.31 Michigan law's allowance for business relocation costs as part of just compensation dates back to the nineteenth century and the supreme court's decision in *Grand Rapids & Indiana RR Co v Weiden*, 70 Mich 390, 38 NW 294 (1888). Two owners appealed from the compensation awarded when their properties, which were each used in "lucrative business," were taken. *Id.* at 394–395. The supreme court explained that, in addition to compensation for their real estate, the property owners were entitled to business interruption damages:

> Apart from the money value of the property itself, [the owners] were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses.

Id. The supreme court went on to reverse the jury's verdict because the verdict did not include compensation for the costs that the owner incurred to move his business.

The supreme court again addressed relocation costs in *In re Grand Haven Highway*, 357 Mich 20, 97 NW2d 748 (1959). The state took a manufacturing property, forcing the owner "to move its entire productive facility" to a new location. *Id.* at 24. The owner sought business interruption damages for the costs to move its business to a new site. *Id.* at 32. Relying on the "tort" standard set forth in *Commissioners of Parks & Boulevards v Moesta*, 91 Mich 149, 51 NW 903 (1892), the supreme court affirmed a verdict awarding the owner compensation for the costs incurred to move its manufacturing operation. *In re Grand Haven Hwy,* 357 Mich at 32.

Other cases have reinforced the longstanding principle that relocation costs can be part of a business owner's just compensation when the government takes

the property where the business is located, including cases where owners had to move their businesses more than once because a suitable new location was not available when the government took the owner's original property. *See Department of Transp v Gilling*, 289 Mich App 219, 225, 796 NW2d 476 (2010) (allowing "just compensation" for the owner's move to an interim site and new permanent site); *Detroit v Hamtramck Cmty Fed Credit Union*, 146 Mich App 155, 379 NW2d 405 (1985) (same); *Michigan State Highway Comm'n v Great Lakes Express Co*, 50 Mich App 170, 178, 213 NW2d 239 (1973); *see also Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 658, 705 NW2d 549 (2005) ("The stadium authority does not dispute that relocation costs are proper business interruption damages.").

ii. Whether Relocation Is Necessary Is an Issue of Fact

§8.32 Relocation costs are available as just compensation, but whether a taking required a business to relocate in the first place is something that must be decided at trial. This may not be an issue when the government takes the entire property where a business is located, but this issue can arise in a partial taking where the business claims that it cannot continue to operate on the remainder property after the taking. For example, in *Michigan State Highway Comm'n v Great Lakes Express Co*, 50 Mich App 170, 213 NW2d 239 (1973), the state took a portion of the property where the owner operated a trucking business. Although the taking did not encompass any of the owner's buildings, the owner argued that it could not operate on the remainder property. In response to the state's arguments that the trial court should not have permitted the owner to seek business relocation costs, the court of appeals held that "[i]t was for the jury to decide whether relocation was necessary in this situation where none of [the owner's] facilities had been physically damaged by the taking." *Id.* at 178–179. Similarly, in cases where owners have sought compensation for a move to an interim location and to a new permanent location, Michigan courts have held that whether more than one move was necessary is a question of fact for the jury. *See Department of Transp v Gilling*, 289 Mich App 219, 243–244, 796 NW2d 476 (2010).

iii. Statutes Providing Relocation Payments Supplement But Do Not Replace Just Compensation for Relocation Costs

§8.33 Federal and Michigan statutes provide relocation and financial assistance to businesses that are displaced by exercises of eminent domain. Under federal law, when a state or local agency is provided federal funds to acquire property, it must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 USC 4601 et seq., which establishes an administrative scheme to provide remedies for business relocation damages. Under that act, states (including Michigan) adopted their own statutes to pay relocation assistance. *See, e.g.,* Relocation Assistance Act, MCL 213.321 et seq.; Relocation Assistance for Persons Displaced by Acquisition of Property for Highways Act, MCL 252.141 et seq.; Allowances for Moving Personal Property from Acquired Real Property Act, MCL 213.351 et seq.

But the relocation benefits available to condemned property owners under these acts are in addition to the just compensation available in condemnation. For example, MCL 252.143 provides: "Relocation and financial assistance allowed under this act are independent of and in addition to compensation for land, buildings or property rights and shall not be the subject of consideration in condemnation proceedings." Moreover, when the state argued that the language providing that relocation and financial assistance "shall not be the subject of consideration in condemnation" meant that the statutory remedies were the sole remedy for business relocation expenses, the court of appeals made clear that the statutes do not take the place of constitutional just compensation. The court in *Department of Transp v Gilling*, 289 Mich App 219, 796 NW2d 476 (2010), held that this legislation cannot supplant the constitutional right to "just compensation" for business interruption damages, including relocation costs:

> We acknowledge that the administrative-reimbursement provisions state that *statutory* relocation and moving allowances "shall not be the subject of consideration in condemnation proceedings." MCL 252.143; *see also* MCL 213.328(1) and MCL 213.355. But this does not mean that *constitutional* moving and relocation expenses, as business-interruption damages, may not be considered in a condemnation proceeding … . "[N]o act of the Legislature can take away what the Constitution has given."

Id. at 241–242. Instead, the court of appeals agreed with cases from Oklahoma (*see State ex rel Dep't of Transp v Little*, 100 P3d 707, 719, 716 (Okla 2004)), Florida (*see Malone v Division of Admin, State Dep't of Transp*, 438 So 2d 857, 861 (Fla Dist Ct App 1983)), and Mississippi (*see Mississippi State Highway Comm'n v Rives*, 271 So 2d 725, 728 (Miss 1972)), holding that the statutory administrative schemes provide relocation benefits that "supplement" rather than "supplant" the remedies available as "just compensation." *See Gilling,* 289 Mich App at 241.

c. Other Business Interruption Damages

§8.34 Relocation costs are often a significant component of the business interruption damages sought as just compensation for a taking, but Michigan law has allowed other types of damages as business interruption. These have included the cost to establish an interim operating location, *Department of Transp v Gilling*, 289 Mich App 219, 239, 796 NW2d 476 (2010); *Detroit v Hamtramck Cmty Fed Credit Union*, 146 Mich App 155, 157, 379 NW2d 405 (1985); advertising expenses to re-establish a business in a new location, *Detroit v Larned Assocs*, 199 Mich App 36, 42, 501 NW2d 189 (1993); labor costs attributable to the taking, *In re Grand Haven Highway*, 357 Mich 20, 33, 97 NW2d 748 (1959); and printed materials rendered obsolete by the move to a new location. *Gilling,* 289 Mich App at 227. The damage that any particular business may suffer when the business's location is taken is likely to be as unique as the business itself, making it impossible to forecast every possible type of business interruption damage. For this reason, Michigan law's guiding principle is that the business owner should suffer "no sacrifice" to the taking and must be placed in "as good a condition as [the owner] would have been if the injury had not occurred." *Grand Haven Highway,* 357 Mich at 28.

d. Going Concern

§8.35 In certain circumstances, Michigan law also allows a business owner to recover the going concern value of its business as "just compensation" when the business's location is taken through eminent domain. Generally, a government entity that takes the property where a business is located does not have to pay for the value of the business because it is not acquiring it. However, as the court of appeals held in *Detroit v Michael's Prescriptions*, 143 Mich App 808, 373 NW2d 219 (1985), which arose out of the City of Detroit taking an entire area for the Poletown General Motors plant project, when the business cannot be transferred because it is dependent on its location or because of other reasons, such as the size of the condemnation project, the business owner may seek the business's going concern value as just compensation:

> [I]t is clear that recovery of the going concern value of a business lost to condemnation will depend on the transferability of that business to another location. If the business can be transferred, nothing is taken and compensation is therefore not required. … Generally, however, recovery will be allowed where the business derives its success from a location not easily duplicated or where relocation is foreclosed for reasons relating to the entire condemnation project. In large scale condemnation projects such as Poletown, involving the elimination of an entire segment of the residential and business community, transferability of neighborhood businesses is often foreclosed.

Id. at 819–820 (footnote omitted); *see also Detroit v Hospital Drug Co*, 176 Mich App 634, 644, 440 NW2d 622 (1988). The *Michael's Prescriptions* court also explained that "[w]hether a business is transferable will be decided on a case by case basis inasmuch as a specific factual analysis is required." *Id.* at 819. Whether a business is transferrable, and therefore whether a condemned owner may seek the going concern value of a business as just compensation, is a fact-intensive question that would likely fall within the province of the fact-finder.

Note that if a party recovers the going concern value of its business, it cannot also recover business interruption damages. As the court in *Michael's Prescriptions* explained, "It should be clear that recovery for business interruption damages and recovery for going concern value are mutually exclusive since one assumes the continuation of the business and the other assumes its loss." *Id.* at 819 n2.

e. Lost Profits

§8.36 In contrast with most other areas of Michigan law, Michigan eminent domain law does not permit a business that is subject to a taking to recover lost profits. When a breach of contract results in lost profits, lost profits "are an appropriate element of damages." *See Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390, 385 NW2d 797 (1986). Likewise, in a tort action, "where the amount of profits lost by the injury can be shown with reasonable certainty, they are not only admissible in evidence, but they constitute, thus far, a safe measure of damages." *Couyoumjian v Brimage*, 322 Mich 191, 193, 33 NW2d 755 (1948). But Michigan courts have refused to award just compensation for lost profits when a business's location is taken, despite the similarity of the standards for just compensation and contract damages. *Compare Body Rustproof-*

ing, 149 Mich App at 390 ("The measure of damages for a breach of contract … is that which would place the injured party in as good a position as he would have been in if the promised performance had been rendered") *with In re Grand Haven Highway*, 357 Mich 20, 28, 97 NW2d 748 (1959) ("just compensation" should place the business owner in "as good a condition as [the owner] would have been if the injury had not occurred").

f. Business Interruption Damages Must Be Proved with "Reasonable Certainty"

§8.37 Whatever the business interruption damages that a condemned business intends to claim, the proof of the damages "must not be speculative and must possess a reasonable degree of certainty." *In re Grand Haven Highway*, 357 Mich 20, 32, 97 NW2d 748 (1959). In many instances, this is not an issue because the costs to relocate a business will have already been incurred by the time the issue of the owner's compensation proceeds to trial. However, in some instances, the damages can be ongoing, as when the owner must relocate more than once, *see, e.g., Department of Transp v Gilling*, 289 Mich App 219, 796 NW2d 476 (2010), or the relocation is complex and continues over an extended period, *see Grand Haven Highway,* 357 Mich at 33. In these instances, there may be costs that the owner has not incurred at the time that the owner's just compensation is determined, whether through trial or some other means. Because the one recovery rule allows the property owner only one opportunity to obtain compensation, the owner must seek compensation for any business interruption damages that have not yet been incurred at that time, which can require the owner to forecast certain business interruption damages and costs. *Id.* (discussing the owner "projecting" certain relocation costs). Condemned owners must be certain that any such forecasting is as certain and nonspeculative as possible.

IV. Persons Entitled to Just Compensation

A. In General

§8.38 The UCPA requires that a condemning agency must make an offer to a property's "owners" to take a property through eminent domain. MCL 213.55(1). In turn, the UCPA defines a property's *owner* as any person with an interest in a property:

> "Owner" means a person, fiduciary, partnership, association, corporation, or a governmental unit or agency having an estate, title, or interest, including beneficial, possessory, and security interest, in a property sought to be condemned.

MCL 213.51(f).

Although all such "owners" must receive the condemning agency's offer, whether they are entitled to compensation depends on their specific interests in the property. A property's fee owner may be the primary "owner" entitled to compensation, but other owners may be entitled to compensation as well.

B. Mortgagees

§8.39 The supreme court has held that a mortgagee is entitled to be repaid the outstanding amount of a mortgage loan when a property is taken in total and is entitled to a sufficient amount of the "award to preserve his security against evident or established impairment" in a partial taking. *In re Dillman*, 276 Mich 252, 258, 267 NW 623 (1936). This may result in the mortgagee continuing to hold a lien on the remaining property that was not taken, as well as a lien on the compensation award. *Id.*

C. Tenants

§8.40 Michigan courts have also addressed the rights of a tenant, another "owner" under the UCPA, to just compensation when the leased property is taken through eminent domain. Absent a lease provision governing division of the condemnation proceeds, the tenant, as an "owner" of the premises, will generally possess a right to compensation for the value, if any, of its leasehold interest. Leasehold values will vary depending on various factors. *See In re Gratiot Ave*, 294 Mich 569, 574–575, 293 NW 755 (1940). For example, a tenant with only a month-to-month lease possesses a leasehold interest in a property, but that interest may have no value because it is easily terminable. *See, e.g., Michigan State Highway Comm'n v L&L Concession Co*, 31 Mich App 222, 228 n8, 187 NW2d 465 (1971). On the other hand, a tenant with a long-term lease may be entitled to significant compensation depending on the amount of the contract rent. If the contract rent is less than the prevailing market rent at the time of the taking, the present value of the difference between the market rent and the contract rent through the end of the lease's term represents the value of the tenant's leasehold interest. *See Pierson v HR Leonard Furniture Co*, 268 Mich 507, 521, 256 NW 529 (1934). But if the contract rent exceeds the prevailing market rent, the leasehold may not have value, and the tenant may not be entitled to compensation for its leasehold interest in the property.

Any award to the tenant for the value of the tenant's leasehold interest will likely come at the landlord's expense. Courts have taken the approach that property must be valued based on its fee ownership, and the sum of the values of different interests in the property cannot exceed the value of the property's fee. In other words, the value of the tenant's leasehold interest and the value of the landlord's ownership cannot exceed the value of the property as if it had only one owner. *See* 4 *Nichols on Eminent Domain* §12.05[1] (Rev ed 2007). Therefore, to divide the compensation award between a landlord and a tenant, courts will subtract the value of the tenant's leasehold interest from the value of the property's fee ownership. The tenant is awarded the value of its leasehold interest, and the remaining value is awarded to the landlord as compensation for its fee and reversionary interest. *See, e.g., Muskegon v Berglund Food Stores, Inc*, 50 Mich App 305, 314, 213 NW2d 195 (1973) (dividing award for property's fee value between landlord and tenant).

These general rules can be altered, however, by a lease provision governing the landlord and the tenant's rights in condemnation. Michigan law permits landlords

and tenants to agree in advance about their rights if the leased premises are condemned. *See, e.g., In re John C Lodge Highway*, 340 Mich 254, 263, 65 NW2d 820 (1954). Commonly, the parties to a lease will include a provision terminating the lease on condemnation of the leased premises. In *Muskegon v Lipman Inv Corp*, 66 Mich App 378, 381, 239 NW2d 375 (1976), the court of appeals held that a provision terminating the lease on condemnation of the leased premises leaves the tenant with no leasehold interest for which it can recover compensation.

Such a provision, however, would not prohibit the tenant from seeking compensation for matters separate from its leasehold interest. For example, regardless of whether the tenant may recover compensation for its leasehold interest, the tenant generally will be entitled to compensation for either the value of, or the costs to relocate, any trade fixtures that were on the leased premises. *Id.* at 382; *see also John C Lodge Highway,* 340 Mich at 264. Similarly, a tenant may be entitled to compensation for business interruption damages or for the going concern value of its business, regardless of whether it is entitled to compensation for its leasehold estate in the underlying property. *See Lipman Inv Corp,* 66 Mich App at 382; *see also L&L Concession Co,* 31 Mich App at 230–231.

As part of the 1996 amendments to the UCPA, the legislature included a provision that "[a] residential tenant's leasehold interest of less than 6 months in the property is not a compensable claim under this act." MCL 213.55(3)(f). Instead, such a tenant qualifies for $3,500 in relocation expenses under MCL 213.352. In light of the foregoing authorities interpreting "just compensation" to include the economic value of a below-market lease to the tenant, however, the UCPA's limitation on the tenant's right to seek just compensation may also be invalid, although it may never be challenged as the six-month limitation, and the corresponding $3,500 payment available, would likely render the tenant's lost compensation so small that no tenant would bother to challenge the provision.

D. Other "Owners"

§8.41 Authorities addressing other "owners," which could include parties holding easements, licenses, and other interests in property, are scarce. Under the general principles that apply in eminent domain, however, any such owner should be entitled to just compensation based on the market value of its interest in the taken property. As with other divided interests, though, the owner's compensation will come at the expense of other owners' compensation, as the value of the various owners' interests cannot exceed the value of the property as a whole. See §8.40. *See also* 4 *Nichols on Eminent Domain* §12.05[1] (Rev ed 2007).

V. Procedure for Exercising Eminent Domain

A. In General

§8.42 The following sections discuss procedures that apply when a governmental body or other agency possessing the power of eminent domain seeks to exercise that power. Once a condemning agency adopts a resolution of necessity (see §8.43) determining that the agency needs to acquire certain property for a public use, the UCPA then applies. The UCPA governs the agency's efforts to

actually acquire the property and applies to all condemnation actions in Michigan. *See* MCL 213.52 ("This act provides the standards for the acquisition of property by an agency."); *see also* MCL 213.75 ("All actions for the acquisition of property by an agency under the power of eminent domain shall be commenced pursuant to and be governed by this act."). Its standards apply from the beginning of the acquisition process, including "the precondemnation negotiation process." *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 290, 537 NW2d 258 (1995).

B. Resolution of Necessity

§8.43 Presuming that an agency that possesses the power of eminent domain has already identified the property that it wishes to acquire and all possible owners of that property, the agency must adopt a resolution of necessity for the taking. The resolution of necessity is a document adopted by the agency's executive or legislative body declaring that it is necessary to take the property for public use by the agency. The Condemnation by State Act, MCL 213.1 et seq., provides for resolutions of necessity:

> It shall be lawful for the governor or any other person or persons, or any board of regents, board of control or other governing body of any state educational, penal or reformatory institution, when by law authorized to secure for the state or such institution, land as a site for any state building or buildings, state institution or public use, and for the board of regents, board of control or other governing body of any state institution desirous of obtaining the right of way over lands for the benefit of such state institution, when such persons, board of regents, board of control or other governing body, or a majority thereof shall have by resolution declared the taking thereof necessary for the public use of such state institution … .

MCL 213.1. Other statutes require a condemning agency to determine that a taking is necessary to acquire property. *See* MCL 213.361 (authorizing acquisition of property that agency determines is necessary for highway purposes). Other provisions spell out more specific requirements, such as identifying owners and stating estimated compensation. *See, e.g.,* MCL 213.174 ("the board or commissioner may make a written determination of the necessity of the particular highway construction … for which such property is desired, the necessity for taking the particular property described, and the damages which, in the opinion of the board or the commissioner, should be paid as compensation for the taking of each parcel of such property").

An agency contemplating the exercise of eminent domain must consult all legislation granting that agency the power to take property to determine its requirements for resolutions of necessity. Nevertheless, a condemning agency's resolution of necessity typically not only recites the necessity for taking a particular property but also identifies all the owners of the property, the owners' respective interests in the property, and the amount that the agency estimates to be just compensation for acquiring the property.

C. The Good-Faith Written Offer

1. In General

§8.44 Before attempting to acquire an owner's property, a condemning agency must establish an amount that it believes to be just compensation for the property and offer that amount to the owner in exchange for the property:

> Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and promptly submit to the owner a good faith written offer to acquire the property for the full amount so established.

MCL 213.55(1).

2. Gathering Information to Formulate an Estimate of Just Compensation

a. In General

§8.45 To formulate an estimate of just compensation, the condemning agency may require information from the property owner that could range from a simple tour of a vacant parcel to complex information regarding a business operating on land that the agency has resolved to acquire. To assist condemning agencies in formulating estimates, the UCPA provides agencies with means to obtain information from property owners. The first provision authorizes agencies to enter properties for inspection, with reasonable notice to the property owner:

> An agency or an agent or employee of an agency may enter upon property before filing an action for the purpose of making surveys, measurements, examinations, tests, soundings, and borings; taking photographs or samplings; appraising the property; conducting an environmental inspection; conducting archaeological studies pursuant to section 106 of title I of the national historic preservation act … [16 USC 470f]; or determining whether the property is suitable to take for public purposes. The entry may be made upon reasonable notice to the owner and at reasonable hours. An entry made pursuant to this subsection shall not be construed as a taking. The owner or his or her representative shall be given a reasonable opportunity to accompany the agency's agent or employee during the entry upon the property.

MCL 213.54(3). Any entry onto a property by a condemning agency "shall be made in a manner that minimizes any damage to the property and any hardship, burden, or damage to a person in lawful possession of the property." MCL 213.54(5). If the inspection does result in any "actual damage" to the property, the agency must pay restitution for that damage. *Id.*

The UCPA also provides condemning agencies with a means to obtain other information, though the agency must reimburse the owner for costs to produce the information, limited to $1,000. MCL 213.55(2). Owners receiving requests for information must bear in mind that if an owner "unreasonably fails to timely produce the documents and other information, the owner shall be responsible for all expenses incurred by the agency in obtaining the documents and other information." MCL 213.55(2).

b. Circuit Court Actions to Compel Owners to Provide Information

§8.46 If the owner does not comply with the agency's requests for information to formulate a good-faith offer of just compensation, the UCPA authorizes the agency to file a circuit court action to compel the owner to do so. The first authorization pertains to property inspections:

> If reasonable efforts to enter under [MCL 213.54(3)] have been obstructed or denied, the agency may commence a civil action in the circuit court in the county in which the property or any part of the property is located for an order permitting entry. The complaint shall state the facts making the entry necessary, the date on which entry is sought, and the duration and the method proposed for protecting the defendant against damage. The court may grant a limited license for entry upon such terms as justice and equity require, including the following:
>
> (a) A description of the purpose of the entry.
>
> (b) The scope of activities that are permitted.
>
> (c) The terms and conditions of the entry with respect to the time, place, and manner of the entry.

MCL 213.52(4). Second, the UCPA authorizes the condemning agency to file an action to obtain other information:

> If the owner fails to provide all documents and other information requested by the agency under this section, the agency may file a complaint and proposed order to show cause in the circuit court … . The court shall immediately hold a hearing on the agency's proposed order to show cause. The court shall order the owner to provide documents and other information requested by the agency that the court finds to be relevant to a determination of just compensation.

MCL 213.55(2).

c. Requirement to Maintain Confidentiality of a Property Owner's Information

§8.47 The UCPA requires the agency to keep the owner's information confidential, restricting the information's use to preparing an estimate of just compensation:

> An agency shall keep documents and other information that an owner provides to the agency under this section confidential. However, the agency and its experts and representatives may utilize the documents and other information to determine just compensation, may utilize the documents and other information in legal proceedings under this act, and may utilize the documents and other information as provided by court order.

MCL 213.55(2).

D. Offering Compensation to the Property's Owners

1. In General

§8.48 Generally, an agency's good-faith written offer is submitted in the form of a letter or offer to purchase. Because the condemning agency must offer

an amount of money it believes is at least equal to "just compensation," MCL 213.55(1), it must offer the amount it believes would put the property owner in as good a position as it would be in if its property were not taken. *See, e.g., Department of Transp v VanElslander*, 460 Mich 127, 129, 594 NW2d 841 (1999). The UCPA grants condemning agencies some discretion in determining how to estimate just compensation to offer to the owner. Typically, a condemning agency will commission an appraisal to establish this amount. *See, e.g., Department of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 711 NW2d 453 (2006). But the UCPA does not strictly require appraisals in every circumstance, allowing that a condemning agency could use some other means to establish the amount it believes is just compensation. *See* MCL 213.55(1) ("if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property"). Whatever means the agency uses, the offer must equal an amount that the agency actually "believes" will provide just compensation. *Id.; see also Frankenlust,* 269 Mich App at 580. To ensure proper compliance with the UCPA, it is advisable for the agency to obtain an appraisal to provide the basis for its offer even if the UCPA does not strictly require it.

If there are multiple "owners" of a property, the condemning agency need not formulate a different offer for each owner. Instead, the agency can offer the total estimated compensation jointly to all the owners in what is known as a "unitary good faith written offer." MCL 213.55(1).

2. Good-Faith Offer Can Exceed the Estimated Just Compensation

§8.49 The UCPA requires that the agency's good-faith offer must be at least in the amount of its estimate of just compensation, MCL 213.55(1), but nothing in the UCPA prohibits a condemning agency from offering a property owner more than its estimate to acquire property. In fact, Michigan law contains examples of condemning agencies offering property owners amounts beyond the agencies' estimates of just compensation as "settlement incentives" to attempt to avoid condemnation litigation. *See Detroit/Wayne County Stadium Auth v 7631 Lewiston, Inc*, 237 Mich App 43, 48, 601 NW2d 879 (1999). It is relevant to consider, however, that just compensation should not "enrich[]" the property owner "at the public's expense." *Department of Transp v VanElslander*, 460 Mich 127, 129, 594 NW2d 841 (1999).

3. Notice Regarding Relocation

§8.50 The UCPA requires that when an agency submits its good-faith written offer to property owners, it must also submit a written notice to the owners and occupants if the taking might require anyone to relocate from the taken property. The notice must outline the occupants' basic legal rights, including that persons with leasehold interests of less than six months are entitled to a $3,500 moving allowance under MCL 213.352, that residential occupants may not be displaced until moving expenses or a moving allowance is provided, and that the person has had a reasonable opportunity, not to exceed 180 days after the payment

date of moving expenses or the moving allowance, to relocate to a comparable replacement dwelling. MCL 213.55(1).

The UCPA defines a "comparable replacement dwelling" in the context of a condemnation action to mean any dwelling that satisfies all the following requirements:

(a) Decent, safe, and sanitary.

(b) Adequate in size to accommodate the occupants.

(c) Within the financial means of the individual.

(d) Functionally equivalent.

(e) In an area not subject to unreasonable adverse environmental conditions.

(f) In a location generally not less desirable than the location of the individual's dwelling with respect to public utilities, facilities, services, and the individual's place of employment.

MCL 213.55(1).

4. Environmental Reservations

§8.51 In addition to offering compensation and providing notice regarding relocation, a condemning agency's offer must state whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the current owner of the property arising out of a release of hazardous substances at the property, and the agency's appraisal of just compensation for the property must reflect the reservation or waiver. MCL 213.55(1).

5. Submitting a Good-Faith Offer Is a Jurisdictional Prerequisite to a Condemnation Action

§8.52 Only after submitting an offer of just compensation may the condemning agency file its complaint to take the property through eminent domain. In construing the UCPA's language providing that "*after* making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located," MCL 213.55(1) (emphasis added), Michigan courts have held that this language means that the agency must submit a good-faith written offer as a jurisdictional prerequisite to the condemnation action. In other words, if the agency does not submit a good-faith written offer, the circuit court will not possess subject matter jurisdiction over a condemnation action. *See In re Acquisition of Land for Cent Indus Park Project*, 177 Mich App 11, 17, 441 NW2d 27 (1989) ("the tendering of a good-faith offer is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action"). Accordingly, if the agency fails to offer compensation for property that it intends to take, the circuit court will lack subject matter jurisdiction over the condemnation action. *See In re Acquisition of Land for Cent Indus Park Project*, 127 Mich App 255, 261, 338 NW2d 204 (1983) (holding that condemning agency's offer was not good-faith offer when it did not include either value of or detachment-reattachment costs of owner's fixtures).

The circuit court will similarly lack jurisdiction if the agency does not submit its good-faith offer to all persons possessing an interest in a property, in light of the UCPA's requirement that the agency must submit its offer to the property's owners and the broad definition of *owner* under the UCPA. *See* MCL 213.55(1) (requiring good-faith written offer to property's "owner"); *see also* MCL 213.51(f) (defining *owner* to include all persons possessing interest in a property). This requires that a condemning agency must conduct a thorough title search for a property that it intends to acquire to identify all persons with a possible interest in the property and to physically inspect the property to identify potential unrecorded interests. The offer must also be submitted to persons holding security interests in a property, as trial courts throughout Michigan have dismissed condemnation actions on jurisdictional grounds when condemning agencies have failed to submit their good-faith written offers to mortgagees and other security holders, all of whom fall within the UCPA's definition of *owner* of the property. *See* MCL 213.51(f).

E. The Declaration of Taking

§8.53 If the owner and the condemning agency cannot agree on compensation for the agency to acquire the property, the agency may file a condemnation action. *See* MCL 213.55(1). To do so, the agency must first adopt a declaration of taking. The declaration of taking is a document that is recorded with the register of deeds in the county where the property is located and that recites that the agency has exercised its power of eminent domain to acquire the property. Its function is like that of a deed or other document of conveyance in that it transfers the title that the agency acquired in the property to the agency.

At a minimum, an agency's declaration of taking must be signed by an authorized official of the agency and include

1. a "description of the property to be acquired sufficient for its identification and the name of each known owner," MCL 213.55(4)(e)(i);
2. a "statement of the estate or interest in the property being taken," MCL 213.55(4)(e)(ii); unless the statement of estate or interest explicitly includes fluid and mineral gas rights and rights of access to and over highways, Michigan law excludes such rights from the estate acquired;
3. a "statement of the sum of money estimated by the agency to be just compensation for each parcel of property being acquired," MCL 213.55(4)(e)(iii); and
4. "[w]hether 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)(e)(iv), that is, whether the agency wishes to preserve its ability to recover from the condemned owner the costs of any environmental remediation necessary on the taken property.

If the agency does reserve its rights, funds that might otherwise be paid as estimated just compensation can instead be escrowed as security for remediation

costs. MCL 213.58(2); *see also Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 371 n3, 663 NW2d 436 (2003).

F. Filing the Condemnation Action

1. In General; Estimated Escrow Requirement

§8.54 After the agency estimates just compensation and offers at least the amount of the estimate to the owner, and the owner does not agree to accept the compensation in exchange for the property, the condemning agency is ready to file its condemnation action. This involves several steps in addition to simply filing the complaint, such as placing estimated just compensation in escrow, MCL 213.55(5), and providing notices to property owners.

2. The Condemnation Complaint

§8.55 The UCPA prescribes the contents of the complaint, requiring that it must state or attach all of the following:

> (a) A plan showing the property to be taken.
>
> (b) A statement of purpose for which the property is being acquired, and a request for other relief to which the agency is entitled by law.
>
> (c) The name of each known owner of the property being taken.
>
> (d) 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].
>
> (e) A declaration signed by an authorized official of the agency declaring that the property is being taken by the agency. The declaration shall be recorded with the register of deeds of each county within which the property is situated. The declaration shall include 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 estate or interest in the property being taken. Fluid mineral and gas rights and rights of access to and over the highway are excluded from the rights acquired unless the rights are specifically included.
>
> (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). In addition, if the condemning agency intends to allege that the taking benefits the remaining property in any way, the agency should include an allegation regarding the benefits in its complaint to avoid arguments that the agency was required to include the allegations under MCL 213.73 but failed to do so.

3. Venue

§8.56 The UCPA prescribes the proper venue for a condemnation action, which is generally the circuit court in the county in which the property is located. If a parcel of property is situated in two or more counties and an owner resides in one of the counties, the complaint must be filed in the county in which the owner is a resident. If a parcel of property is situated in two or more counties and an owner does not reside in one of the counties, the complaint may be filed in any of the counties in which the property is situated. MCL 213.55(1).

G. Responses to the Condemnation Complaint

1. In General

§8.57 As with any other civil action, the Michigan Court Rules apply to condemnation cases, MCL 213.52(1), and require that an owner that receives a condemnation complaint must respond or risk being defaulted. A property owner can respond by filing an answer or a motion that challenges the agency's effort to take the property.

2. Answers

§8.58 An answer in a condemnation action is not significantly different than an answer in any other civil action. A property may admit allegations that it believes to be true and deny those that are not true or state that it lacks sufficient information to form a belief about an allegation's truth. It is most important that the owner deny any allegations concerning the validity of the taking or the court's jurisdiction if the owner intends to challenge such matters and that the owner deny that the agency's estimate of compensation is adequate to satisfy the "just compensation" requirement under Mich Const 1963 art 10, §2. and other Michigan law.

3. Motions

a. In General

§8.59 As in other civil actions, property owners may file motions in response to a condemnation complaint, such as a motion for summary disposition. A motion for summary disposition may be an appropriate means to raise a jurisdictional defense, such as that the agency failed to make a good-faith offer before filing the condemnation action. *See In re Acquisition of Land for Cent Indus Park Project*, 177 Mich App 11, 17, 441 NW2d 27 (1989) (affirming trial court's decision to grant summary disposition that agency had not submitted good-faith offer). It may also be an appropriate means to raise other defenses to the taking, including that the condemning agency lacked authority to exercise the power of eminent domain to take the owner's property in the first place.

b. Challenging Necessity and Public Use

§8.60 A property owner's challenge to the public necessity or public use for a taking generally falls under MCL 213.56. That section provides that an owner that wishes to challenge the necessity for the agency to take the property

for the uses set forth in the complaint must do so within the time to responsively plead to the complaint. MCL 213.56(1). The UCPA is a quick-take statute, meaning that the condemning agency may obtain possession of the taken property while proceedings to determine compensation are pending. *See, e.g., Goodwill Cmty Chapel v GMC*, 200 Mich App 84, 86, 503 NW2d 705 (1993). It also provides for expeditious resolution of whether a taking is necessary and for a public use, requiring the trial court to begin a hearing on a motion challenging necessity or public use within 30 days and to decide the issue within 60 days after the hearing. *See* MCL 213.56(1), (4). These time lines impose limitations on the amount of discovery a property owner will be able to conduct into these issues, so an owner that intends to challenge either issue must move promptly to obtain any discovery that it desires to support the challenge. *See City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254–255, 701 NW2d 144 (2005) ("The statute not only limits the grounds for reversal and by its language places that burden on defendants, but also allows only [30] days between when defendants file a necessity motion and when the hearing is held, implicitly limiting discovery on the issue.").

c. Appellate Rights

§8.61 In addition to limiting an owners' ability to challenge the necessity and public use for a taking in the trial court, the UCPA limits the owner's rights to appeal the trial court's decision. The UCPA provides that a trial court's decision on a motion challenging necessity is a "final judgment," meaning that it must be appealed while the compensation case is pending. MCL 213.56(5). But the appeal is by leave only, and cannot be taken at the end of the case:

> Notwithstanding section … [MCL 600.309], an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable to the court of appeals only by leave of that court pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation.

MCL 213.56(6).

H. Vesting Title in Condemning Agency

§8.62 The UCPA provides that if a property owner does not challenge the taking, or loses a challenge, then title to the taken property vests automatically in the condemning agency as of the date of the complaint. The UCPA allows courts discretion to alter that date and allows property owners to prove that another date should apply:

> If a motion to review necessity is not filed under [MCL 213.56], the title to the property described in the petition shall vest in the agency as of the date on which the complaint was filed. … If the motion to review necessity is denied after a hearing and after any further right to appeal has terminated, title to the property shall also vest in the agency as of the date on which the complaint was filed or such other date as the court may set upon motion of the agency.

MCL 213.57(1). The UCPA goes on to provide that several matters, including challenges to the estimated compensation escrow, cannot delay title vesting in the condemning agency:

> Vesting of title in the agency shall not be delayed or denied because of any of the following:
>
> (a) A motion filed under section 6a, challenging the agency's election to reserve its rights to bring federal or state cost recovery actions.
>
> (b) A motion challenging the agency's escrow under [MCL 213.58].
>
> (c) An allegation that the agency should have offered a higher amount for the property.
>
> (d) An allegation that the agency should have included additional property in its good faith written offer.
>
> (e) Any other reason except a challenge to the necessity of the acquisition filed under [MCL 213.56].

MCL 213.57(2). The UCPA does not identify factors that the court should apply in setting a date that title vests other than the date of filing, leaving courts discretion to address the individual circumstances that may arise in any given case.

In addition, the UCPA allows property owners to demonstrate that the condemning agency's actions resulted in the agency taking the property before the agency actually filed the condemnation complaint. To make such a claim, the property owner must file a counterclaim under MCL 213.71, which provides that a "defendant may assert as a counterclaim, any claim for damages based on conduct by an agency which constitutes a constructive or de facto taking of property." Therefore, a property owner may argue that an agency acquired the property on a date earlier than the date the agency filed the complaint but must demonstrate a de facto taking to do so.

I. Vesting of Right to Compensation

1. In General

§8.63 If there is no challenge to the taking, or the challenge is unsuccessful, the right to just compensation vests at that time in the "persons entitled to the compensation." MCL 213.57(1). Thus, the right to compensation vests at the same time that title (see §8.62) vests in the condemning agency.

2. Payment to Owners; Environmental Reservation

§8.64 Once the right to compensation vests in the property owners, the UCPA requires that the condemning agency must promptly pay the estimated compensation. The estimated compensation should be paid within 30 days after title and the right to compensation vest:

> [I]f a motion for review under [MCL 213.56] is not filed or is denied and the right to appeal has terminated … the court shall order the escrowee to pay the money deposited under [MCL 213.55] for or on account of the just compensation that may be awarded under [MCL 213.63]. … [I]f a motion for review under [MCL 213.56] is not filed, the court shall, within 30 days, order the

> escrowee to pay the money deposited under [MCL 213.55] for or on account of the just compensation that may be awarded under [MCL 213.63].

MCL 213.58(1). Note that payment must be made 30 days before the condemning agency can obtain physical possession of the taken property. MCL 213.59(6).

The UCPA's escrow provision contains exceptions for those instances when a condemning agency reserves its right to assert environmental cost recovery claims against the owner. If the agency reserves its rights to assert federal and state cost recovery claims against the property's owners, the agency may leave a portion of the funds in escrow under circumstances specified in MCL 213.58(2)–(3). Note that a condemning agency may not withhold estimated compensation in escrow for environmental remediation costs when the escrow represents estimated "compensation for an owner's principal residence, if the principal residential structure is actually taken or the amount of the property taken leaves less property contiguous to the principal residential structure than the minimum lot size" under the local zoning ordinance. MCL 213.58(5).

Also, if the condemning agency reserves its environmental cost recovery rights, the trial court can reverse the reservation when the property is residential or agricultural property. The UCPA sets forth the procedure for reversing a condemning agency's environmental reservation, which requires the owner to submit the motion within the time to responsively plead to the complaint. *See* MCL 213.56a(1). If the court reverses the reservation, the agency must submit a new good-faith offer to the owner. MCL 213.56a(2). The UCPA also specifically provides that the agency and the owner may stipulate to reverse the agency's environmental reservation. *See* MCL 213.56a(3).

3. Apportioning Compensation

§8.65 For the trial court to order payment of the estimated compensation, it must be able to identify a payee. The UCPA provides that the court must order payment to "persons entitled to the compensation," MCL 213.57(1), but leaves it to trial courts to identify the persons entitled to compensation in any given case. This is because these persons can include not only fee title holders but also mortgagees, tenants, and other persons that may qualify as "owners" under the UCPA. *See* MCL 213.51(f). To expedite this process, the UCPA provides that any party may bring the issue of apportioning compensation before the court for decision. *See* MCL 213.57(1).

J. Transferring Possession to the Condemning Agency; Relocation

§8.66 Similar to the compensation provisions, the UCPA contains provisions governing possession both in general and for properties that require a resident to relocate. In general, the possession terms provide that, if a motion to review the taking is not filed or is not successful, the trial court must determine when possession of the taken property will be transferred to the condemning agency. *See* MCL 213.59(1). Otherwise, the trial court has discretion over transferring possession from the owners to the agency; the court must require only that

the escrowed estimated compensation be paid before possession transfers. The following matters are not a basis for delaying transfer of possession:

> Although the court shall not order possession to be surrendered to the agency before it orders that the escrow be distributed under [MCL 213.58(1) or (4)] or retained under [MCL 213.58(2)], the court shall not delay or deny surrender of possession because of any of the following:
>
> (a) A motion filed pursuant to section 6a, challenging the agency's decision to reserve its rights to bring federal or state cost recovery actions.
>
> (b) A motion challenging the agency's escrow under [MCL 213.58].
>
> (c) An allegation that the agency should have offered a higher amount for the property.
>
> (d) An allegation that the agency should have included additional property in its good faith written offer.
>
> (e) Any other reason except a challenge to the necessity of the acquisition filed under [MCL 213.56].

MCL 213.59(5). When a taking requires a resident to relocate, the UCPA provides that possession may not be transferred until the resident has a reasonable opportunity to find a comparable replacement dwelling, limited to 180 days and subject to any federal requirements. MCL 213.59(7). The UCPA defines *comparable replacement dwelling* with the same meaning required for notices to tenants under MCL 213.55.

Finally, the UCPA addresses those situations when an owner and condemning agency may have agreed to an interim possession arrangement. An agency that takes interim possession may be liable for damages if possession is later denied, and it may have to post a bond. *See* MCL 213.59(2), (3).

K. Discontinuances

§8.67 If a condemning agency wishes to discontinue the taking, the UCPA imposes certain limitations. For example, the condemning agency may discontinue a taking only before title vests in the agency or the agency takes possession of the taken property, whichever comes first. Once title vests or possession is transferred, the condemning agency no longer possesses authority to discontinue the taking. *See* MCL 213.67. This marks a contrast with historic practice in Michigan, which allowed condemning agencies to discontinue a taking under eminent domain anytime before a jury verdict was confirmed. *See, e.g., Hooper v Board of Educ*, 315 Mich 202, 207, 23 NW2d 692 (1946) (holding that condemning agency could "discontinue the condemnation proceedings before the confirmation of the verdict of the jury"). The result was that after filing an action and proceeding to trial, a condemning agency that found the compensation verdict too great would simply discontinue the taking, and the owner would have gone through the entire ordeal for nothing. That practice was discontinued during the 1960s under the Acquisition of Property for Public Highways Act, MCL 213.361 et seq., *see Michigan State Highway Comm'n v Cronenwett*, 52 Mich App 109, 113, 216 NW2d 597 (1974), and the prohibition is now incorporated in the UCPA.

If a discontinuance occurs before title vests or possession is transferred, the UCPA imposes a potentially severe cost on the agency. It provides that "the agency, as a condition of discontinuance, shall pay the actual expenses, reasonable attorney fees, and actual damages to all the parties affected by the discontinuance as determined by the court." MCL 213.67.

L. The Property Owner's Written Claim

1. In General

§8.68 Once title, estimated compensation, and possession are resolved, any dispute over the property owner's final just compensation begins in earnest. One of the first important steps in a compensation dispute is for the property owner to file a written claim with the condemning agency. A property owner must file a written claim when the "owner claims that the agency is taking property other than the property described in the good faith written offer or claims a right to compensation for damage caused by the taking, apart from the value of the property taken, and not described in the good faith written offer." MCL 213.55(3)(a).

In the past, the written claim requirement has presented some troublesome issues for property owners. The UCPA provides that if a property owner does not submit a "written claim" for property or damages not included in the agency's offer, the owner's claim for compensation for such property or damages is "barred." MCL 213.55(3)(a). This language opened the door for condemning agencies to argue that various property, damages, and components of property or damages all must be included in written claims and that owners' claims should otherwise be barred.

As part of the 2006 amendments, the legislature revised the written-claim requirement. The court of appeals described the amendments as being intended to remedy condemning agencies' ability to avoid paying just compensation based on technicalities under the written-claim requirement and to "enhance" owners' ability to obtain just compensation:

> A careful review of the plain language comprising 2006 PA 439 indisputably reflects the Legislature's intent to remedy a perceived injustice created by this Court's decisions in [*City of Novi v Woodson*, 251 Mich App 614, 623–627, 651 NW2d 448 (2002)], and [*Carrier Creek Drain Drainage Dist v Land One*, LLC, 269 Mich App 324, 327–329, 712 NW2d 168 (2005)], which barred property owners' just compensation claims on the ground that they lacked detail concerning the value of items of damage. By enacting 2006 PA 439, the Legislature intended to enhance a property owner's opportunity to obtain just compensation for a condemning agency's taking of private property, and to cure the mischiefs to which *City of Novi* and *Carrier Creek* gave rise, namely a condemning authority's avoidance of its constitutional just compensation responsibility merely because a property owner makes a claim for compensation and neglects to append sufficient supporting detail."

Department of Transp v Pavlov Props, LLC, No 286926, 2010 Mich App LEXIS 2397 (Dec 16, 2010) (unpublished) (only opinion addressing written-claim requirement since legislature revised it in 2006).

2. Content of Claim

§8.69 The UCPA provides few specifics about the content of the written claim, as the content will vary based on the property and claim involved. But the UCPA does provide that the owner's written claim must state "the nature and substance of that property or damage" for which the owner seeks compensation and that the written claim "shall provide sufficient information and detail to enable the agency to evaluate the validity of the claim and to determine its value." MCL 213.55(3)(a). This description suggests that the owner need not identify its own idea of the claim's value but need merely provide information for the condemning agency to reach its own conclusion of value for the claim. The UCPA provides that if the property owner's "appraisal or written estimate of value is provided within the established period for filing written claims, the owner's appraisal or written estimate of value may serve as the written claim." MCL 213.55(3)(a).

3. Timing

§8.70 The UCPA sets the timing for the written claim but allows trial courts to tailor the timing to the facts in any given case. Under the UCPA, the owner must file the claim within 90 days after the good-faith written offer is made or 180 days after the complaint is served, whichever is later, unless a later date is set by the court for reasonable cause. MCL 213.55(3)(a).

4. The Agency's Requests for Information

§8.71 An agency that believes the owner has filed an insufficiently detailed claim can request more information and have the owner compelled to provide that information. MCL 213.55(3)(b). An owner that does not comply with an order compelling more information can face sanctions in accordance with the Michigan Court Rules for failing to comply with discovery orders, including barring the owner's claim. *Id.*

5. Continuing Claims

§8.72 One of the legislature's 2006 amendments deals with claims that are continuing at the time the written claim is due. Again, claims such as business interruption and relocation may not be fully accrued when the written claim is due, so the legislature amended the UCPA to provide that owners should submit the information that is reasonably available and supplement the information as more becomes available, without facing the bar that had applied in the past. The owner must provide all supplementary information at least 90 days before trial, and the court must afford the agency a reasonable opportunity for discovery once all supplementary information is provided and allow that discovery to proceed until 30 days before trial. For reasonable cause, the court may extend the time for the owner to provide information to the agency and for the agency to complete discovery. MCL 213.55(3)(c).

An owner that does not comply with the UCPA's requirement to provide supplemental information can face sanctions that include barring the claim. *Id.*

6. The Condemning Agency's Response

§8.73 After receiving the owner's written claim, the condemning agency has several options. It can "provide written notice that it contests the compensability of the claim, establish an amount that it believes to be just compensation for the claim, or reject the claim." If the agency wishes to make an offer for the claim, it must establish an "amount it believes to be just compensation for the claim" and submit to the property owner "a good faith written offer for the claim." MCL 213.55(3)(d). If the agency can demonstrate that the owner filed a frivolous claim or filed a claim in bad faith, "the agency is entitled to recover from the owner its actual and reasonable expenses incurred to evaluate the validity and to determine the value of the claim." MCL 213.55(3)(e).

M. Appraisals and the Appraisal Exchange

1. Definition and Content

§8.74 Another important step in condemnation litigation is obtaining and exchanging appraisal reports concerning just compensation. Note that the UCPA defines *appraisal* as any expert analysis pertaining to just compensation:

> "Appraisal" means an expert opinion of the value of property taken or damaged, or other expert opinion pertaining to the amount of just compensation.

MCL 213.51(d). Therefore, an expert's opinion on property value, business interruption costs, or something else pertaining to just compensation would be considered an "appraisal" under the UCPA.

The content of an appraisal may generally be governed by provisions of Michigan law applying to the appraisal at issue. *See, e.g.,* MCL 339.2601 et seq. (pertaining to real estate appraisals). But the UCPA provides a minimum requirement that any appraisal used in a condemnation action must "fairly and reasonably describe the methodology and basis for the amount of the appraisal." MCL 213.61(2).

2. Appraisal Exchanges

§8.75 The UCPA sets a general date for the parties to exchange appraisals after the case begins. Generally, the condemning agency will have provided an appraisal to the property owner in conjunction with the agency's good-faith offer. The agency may obtain an update to that appraisal, and the exchange would then involve the agency's updated appraisal and the owner's appraisal. The UCPA provides that. in general, "parties shall exchange the agency's updated appraisal reports, if any, and the owner's appraisal report within 90 days after the expiration of the period for filing written claims, unless a later date is set by the court in accordance with [MCL 213.61(1)] for reasonable cause." MCL 213.55(3)(b).

In turn, MCL 213.61 provides trial courts with discretion to set a date for the parties to exchange appraisals, requiring only that the court must "assure that the appraisal reports are exchanged and the parties are afforded a reasonable opportunity for discovery before a case is submitted to mediation, alternative dispute reso-

lution, or trial." MCL 213.61(1). If a party does not produce its appraisals as the court requires, the party may not be able to rely on the appraisals unless the court finds good cause for the failure and finds that the interests and opportunity of the other party to prepare have not been prejudiced. MCL 213.61(3).

3. Appraiser Licensure Requirement; Owner's Testimony as to Value

§8.76 The UCPA requires that a real estate appraiser must hold an appraisal license valid in Michigan to provide testimony pertaining to value in a condemnation action. MCL 213.61(2). It is important to note that the UCPA excepts property owners from this requirement. A property owner may testify concerning the value of its property even if the owner is not licensed as an appraiser. Nevertheless, to do so, the owner must demonstrate familiarity with real estate values in the condemned property's area. *See Grand Rapids v HR Terryberry Co*, 122 Mich App 750, 753, 333 NW2d 123 (1983) ("A lay witness will be permitted to testify as to the value of land if he has seen the land and has some knowledge of the value of other lands in the immediate vicinity.").

N. Pretrial Advocacy

1. Motions in Limine

§8.77 In some instances, motions in limine concerning evidence of value arise in condemnation actions. Parties may dispute whether the condemned property's purchase price is "too remote" to be admissible, *see, e.g., State Highway Comm'n v Abood*, 83 Mich App 612, 269 NW2d 247(1978) (addressing five-year-old purchase price); whether certain comparable sales are admissible, *see., e.g., Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 648, 705 NW2d 549 (2005) (addressing admissibility of comparable sales in light of their sale dates); or whether a comparable involved a "cash price" that makes it a reliable indication of market value, *see, e.g., City of Detroit v Detroit Plaza Ltd P'ship*, 273 Mich App 260, 269, 730 NW2d 523 (2006) (addressing evidence of like-kind exchange).

2. Case Evaluation

§8.78 Condemnation actions in which just compensation is the issue are routinely submitted to case evaluation, just like any other civil action. No special court rule applies to condemnation actions, but Michigan courts have acknowledged that literal application of MCR 2.403(O) in condemnation would be illogical, because the condemning agency is the plaintiff and the owner is the defendant, yet the defendant owner is the party seeking greater compensation than the plaintiff agency is proposing. *See Detroit v Kallow Corp*, 195 Mich App 227, 231–232, 489 NW2d 500 (1992). Accordingly, Michigan courts have explained that the case evaluation rule must be applied to the parties in reverse, with the defendant in the position of a normal civil plaintiff, and that for purposes of determining sanctions, the relevant dispute is the difference between the condemning agency's offer and the amount of compensation that the property owner is seeking. *Id.*

In addition, the common practice in case evaluation of condemnation actions is for the case evaluation award to include just compensation only and to not address the property owner's rights to interest and certain reimbursements. The jury in a condemnation action determines just compensation, MCL 213.63, while the trial court applies interest and determines reimbursement. *See* MCL 213.65, .66. Therefore, case evaluation in Michigan generally addresses only just compensation, with the awards stating that they are exclusive of interest and cost and fee reimbursements.

O. Trial and the Right to a Jury

§8.79 A trial in a condemnation action will proceed like one in any other civil litigation. There are a few notable points, however, including that in general there is no burden of proof. *See, e.g.,* M Civ JI 90.03 cmt ("There is strictly speaking no *general* burden of proof applicable to all issues in all condemnation proceedings."). The right to open the proofs at trial generally corresponds to the burden of proof, so this can open the door for property owners to request that trial courts allow them to make the first opening statement and open the proofs at trial. Similarly, the right to rebuttal generally corresponds to the burden of proof, so without any burden, rebuttal may be inappropriate in a condemnation trial. *See* Jason C. Long, *Eminent Domain: Opening and Closing Trial under Michigan's Uniform Condemnation Procedures Act,* 2004 Mich St L Rev 83. The general rule would allow the plaintiff, which is the condemning agency, to proceed first and to have rebuttal, *see* MCR 2.507, so property owners must request to open the proofs or otherwise alter the normal trial order if they desire to do so.

Note that the UCPA grants both condemning agencies and property owners the right to demand that a jury determine the just compensation for a taking. The UCPA provides that the jury consists of six qualified jurors, MCL 213.62(1), and has long authorized courts to permit jurors to take notes and other exhibits into deliberations. *See* MCL 213.64. In addition, each owner's "parcel," which is an identifiable unit of land used together, MCL 213.51(g), is entitled to its own trial. MCL 213.62(2). In the past, Michigan courts sometimes determined the just compensation for many parcels at a common trial.

The UCPA also provides that the jury must award compensation for each "parcel" individually. After the verdict, the trial court may apportion the compensation award if it has not done so already. MCL 213.63; *see also* MCL 213.59(1) (addressing apportionment of estimated compensation).

P. Posttrial Proceedings

1. Interest

§8.80 The UCPA provides for interest on just compensation awards. Generally, interest accrues on unpaid compensation from the date the complaint was filed to the date of payment, except for damages that are incurred after the date of the complaint. For such damages, interest begins to accrue when the damages occur. MCL 213.65(1). Also, no interest accrues on an award for taken property so long as the owner remains in possession of the property. Only once the

owner relinquishes possession does interest begin to accrue on any unpaid compensation. MCL 213.65(2). Finally, if the owner demonstrates an early date of taking through a counterclaim under MCL 213.71, then interest begins to accrue on the date that the property was deemed to have been taken, regardless of the complaint or the owner's continued possession. MCL 213.65(3). The varying dates that can apply to interest on a just compensation award support the courts' practice of addressing it separately in postjudgment proceedings.

As for the interest rate, the UCPA provides that interest must be "computed at the interest rate applicable to a federal income tax deficiency or penalty." MCL 213.65(2). This rate is identified in Internal Revenue Service (IRS) publications as the rate applicable to noncorporate overpayments and underpayments. It is generally higher than the standard judgment interest rate, another means by which Michigan law grants a benefit to property owners whose properties are being taken from them without consent. But unlike interest under IRS standards, interest under MCL 213.65 is simple interest rather than compound interest. *See Department of Transp v Joslyn Land Co*, 175 Mich App 551, 554–555, 438 NW2d 260 (1988).

2. Reimbursements

a. In General

§8.81 The UCPA entitles property owners to reimbursement for expert costs and attorney fees. Property owners do not invite condemnation, so the UCPA directs condemning agencies to reimburse owners for the reasonable costs and fees that owners incur defending against takings of their property. As the court of appeals has explained, the UCPA is designed to ensure that property owners do not sacrifice their just compensation to pay litigation costs. *See Department of Transp v Di Matteo*, 136 Mich App 15, 17–18, 355 NW2d 622 (1984). The reimbursements include witness costs and attorney fees, and the reimbursements vary slightly based on whether a condemnation action as a whole was successfully challenged or the owner succeeded in obtaining compensation greater than the condemning agency offered.

b. Witness Reimbursements

i. In General; Limitations for Expert Witnesses

§8.82 The UCPA provides that condemning agencies must reimburse property owners for witness fees, including standard circuit court–type fees for ordinary and expert witnesses. MCL 213.66(1). The court of appeals has explained that reimbursement under this section is "mandatory." *Hartland v Kucykowicz*, 189 Mich App 591, 599, 474 NW2d 306 (1991).

There are limitations on mandatory reimbursement for expert witnesses. First, an expert witness must have been "reasonably necessary" for the owner to prepare for trial. MCL 213.66(5). Another limitation is that each party may present only one witness pertaining to each element of compensation, although the trial court has discretion to allow additional witnesses and reimbursement for those witnesses. *Id.*

A property owner's failure to call an expert witness to testify does not diminish the agency's obligation to pay the witness's fees "if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned." *Id.*

While witness reimbursement is "mandatory" when it is available, it is not available in all cases. The 1996 amendments to the UCPA provided that if a property owner unsuccessfully challenges the public necessity for a taking or otherwise is unsuccessful in challenging the taking's validity, the condemning agency is not obligated to reimburse the owner for witness fees. *See* MCL 213.66(6). That represented a change from prior law, which did allow for expert witness reimbursement even in an unsuccessful challenge to a taking's validity. *See Macomb County Rd Comm'n v Fisher*, 170 Mich App 697, 428 NW2d 744 (1988).

However, in an action that focuses on the amount of the property owner's compensation, the agency will be obligated to reimburse the owner's witness fees even if the property owner is not successful in obtaining greater compensation than the condemning agency offered. The UCPA does not condition witness fee reimbursement on the property owner's success; it conditions reimbursement only on whether the witness's services were "reasonably necessary" for the owner to prepare for trial. MCL 213.66(1). Further, the UCPA provides that the condemning agency must reimburse an owner's expert witness fees even if the issue that the expert would have addressed is resolved through settlement or "other disposition." MCL 213.66(5). Having the issue resolved through summary disposition would be an "other disposition" and would foreclose the owner from even seeking compensation for that issue, let alone obtaining compensation. Yet the UCPA requires the agency to reimburse the owner's fees in such a circumstance. This language demonstrates that the property owner need not prevail in obtaining compensation beyond the agency's offer for a witness's fees to be subject to reimbursement.

ii. Reimbursement Unavailable for Fees Incurred in "Strategy Sessions"

§8.83 In *Detroit v Lufran Co*, 159 Mich App 62, 406 NW2d 235 (1987), the court of appeals affirmed the trial court's decision that the condemning agency is not obligated to reimburse property owners for time that the owner's experts spend educating the owner's attorneys about appraisals, strategizing with the owner's attorneys, or providing critical analyses of the opposing party's expert opinions:

> We believe that, read in the conjunctive, experts are properly compensated under MCL 213.66 for court time and the time required to prepare for their testimony as experts, i.e., as individuals whose specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. … Therefore, we do not regard conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position to be properly compensable as expert witness fees.

Id. at 67 (citations omitted). Note that neither the trial court nor the court of appeals identified any evidence that participating in strategy sessions or providing

critical analyses of an opposing party's expert opinions are not "similar" to the services that expert witnesses provide "in ordinary civil actions in the circuit court." MCL 213.66(1). Instead, the trial court focused on whether an appraiser was becoming an advocate, concluding that a condemning agency should not reimburse fees for appraisers acting as advocates. *But see* J. D. Eaton, *Real Estate Valuation in Litigation* 535 (2d ed 1995) ("after arriving at an unbiased analysis, opinion, or conclusion, the appraiser may defend or advocate the correctness of his or her value estimate"). A property owner seeking to distinguish or alter the *Lufran* decision may argue that, to the extent that an appraiser is assisting in demonstrating that his or her opinion is correct and that some other opinion is not correct, the appraiser is merely acting in accord with longstanding appraisal principles.

c. Attorney Fee Reimbursements

i. In General

§8.84 In addition to providing for condemning agencies to reimburse property owners for the owners' witness fees, the UCPA provides for condemning agencies to reimburse property owners for the attorney fees that the owners incur defending against a condemnation action. The attorney fee reimbursement provisions vary depending on whether the case involved the taking's validity or compensation, as well as the owner's success.

ii. Successful Challenge to the Taking

§8.85 The UCPA provides that if a property owner successfully challenges the taking, the condemning agency must reimburse the owner for the owner's actual reasonable attorney fees as well as other expenses. MCL 213.66(2). Note that Michigan courts have held that even if the property owner engaged its attorney on a contingent fee agreement contemplating a dispute over compensation, which is common in condemnation actions, *see, e.g., Department of Transp v Robinson*, 193 Mich App 638, 645, 484 NW2d 777 (1992), but the action is then dismissed and no contingent fee applies, the condemning agency must reimburse reasonable attorney fees calculated on an hourly basis. *See City of Detroit v Goodwill Cmty Chapel (In re Acquisition of Land)*, 190 Mich App 297, 299, 475 NW2d 379 (1991) (ordering condemning agency to reimburse attorney fees "under a theory of implied contract or quasi contract" between owner and its attorneys).

As with witness fees, the UCPA provides that a condemning agency has no obligation to reimburse a property owner for an unsuccessful challenge to a taking's validity. *See* MCL 213.66(6). For a very brief time, the UCPA allowed an *indigent person,* defined as a person with income equaling not more than 200 percent of the federal poverty guidelines, to recover attorney fees for an unsuccessful but good-faith challenge to the validity of a taking. That provision was adopted during 2006 and expired at the end of 2007. *See* MCL 213.66(7).

iii. Measuring Reasonableness

§8.86 To determine whether attorney fees are reasonable, Michigan courts apply the following eight factors, set forth in MRPC 1.5(a):

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

See Michigan Dep't of Transp v Randolph, 461 Mich 757, 767–768, 610 NW2d 893 (2000). In *Randolph,* the supreme court held that the "weight to be given the factors requires exercise of discretion by the trial court" and that the "existence of a contingent fee agreement may, of course, be considered." 461 Mich at 766 n11. But the supreme court rejected the idea that a one-third contingent fee is inherently reasonable. Likewise, the supreme court explicitly rejected the idea that multiplying a reasonable hourly rate by a reasonable number of hours is the proper means to determine a reasonable attorney fee in a condemnation action. *Id.* Instead, the court requires trial courts to apply the factors in MRPC 1.5(a), recognizing that "trial courts can and will reach different decisions concerning reimbursement of attorney fees." 461 Mich at 767.

iv. Recovery Where Compensation Exceeds Amount Offered

§8.87 It is most significant that the UCPA provides that if a property owner obtains compensation for a taking beyond the amount offered by the agency, the trial court must direct the agency to reimburse the property owner for reasonable attorney fees in whole or in part, "but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer." MCL 213.66(3). The reasonableness of the owner's attorney fees are determined by the court. *Id.* As the supreme court stated in *Michigan Dep't of Transp v Randolph*, 461 Mich 757, 767–768, 610 NW2d 893 (2000), this section requires two discretionary decisions by the trial court. First, the trial court must decide whether the owner's fees are reasonable and, if they are not, how much of the fees are reasonable. Second, the trial court must decide whether to order the condemning agency to reimburse the reasonable fees in whole or in part.

As in other UCPA provisions, reasonableness is determined under MRPC 1.5(a), but whether a court should order an agency to reimburse fees in whole or in part is an issue not found in the UCPA's other reimbursement provisions. Resolution of this issue is within the trial court's discretion, though the supreme court in *Randolph* identified a few illustrative factors that trial courts may take into consideration:

> In determining whether to reimburse the owner's attorney fees "in whole or in part," the trial court may take into account any number of relevant equitable con-

> siderations, including, but not limited to the amount of disparity between the agency's initial good-faith offer and the jury's determination of just compensation, the strength of the evidence supporting the jury's award, the effort the case required of counsel, or whether either party acted to unnecessarily prolong the litigation or make it more difficult.

Randolph, 461 Mich at 767 n15. Therefore, trial courts must tailor their analyses of whether to order reimbursement in whole or in part to the specific facts in an individual case. However, as the court of appeals held in *City of Detroit v Detroit Plaza Ltd P'ship*, 273 Mich App 260, 294, 730 NW2d 523 (2006), the "foremost policy concern" in determining whether to reimburse fees in whole or in part is ensuring that "the property owner receives the full amount of the award" for its taken property and does not need to use its compensation award to pay attorney fees. This further ensures that the owner is placed "in as good a position as that occupied before the taking." *Id.*

v. Calculating the Increased Compensation—Offers and the Ultimate Award

§8.88 A property owner is entitled to attorney fee reimbursement when the "ultimate award" of compensation exceeds the agency's "good faith offer." MCL 213.66(3). The UCPA and Michigan courts address these terms, providing detail on calculating a property owner's maximum attorney fee reimbursement. First, the threshold that the owner must surpass is the agency's good-faith offer. The initial good-faith offer is submitted when the agency begins the condemnation process, MCL 213.55(1), but if the agency formulates an offer in response to a property owner's written claim, the original offer and the offer in response to written claims are added together to provide the "good faith offer" for purposes of calculating the owner's maximum potential attorney fee reimbursement. *See* MCL 213.55(3)(c). Similarly, if a court orders an agency to reverse an environmental reservation, the agency must submit a new offer. That new offer is used for purposes of calculating the owner's potential attorney fee reimbursement. *See* MCL 213.56a(3).

Second, the good-faith offer is compared to the property owner's ultimate award to calculate the maximum reimbursable attorney fee. Michigan courts have held that the property owner's "ultimate award" includes the "final, total recovery" awarded to the owner. *See Michigan Dep't of Transp v Dennis (In re Condemnation of Lands)*, 133 Mich App 207, 211–212, 349 NW2d 261 (1984). This is not necessarily the same as "just compensation," because the UCPA distinguishes "just compensation" from the "ultimate award" in several instances:

> By using the adjective "ultimate", we perceive that the Legislature intended to base the maximum permissible attorney fee on the final, total recovery. This is surely not the same thing as just compensation. We compare the reference to "ultimate award" to a prior unmodified reference to the term "award" in [MCL 213.63]:
>
> ....
>
> The "jury verdict" must amount to just compensation, and "just compensation" is equated with "award" in the above statutory section. Had the Legislature

> intended just compensation to be the sole factor in the attorney fee equation, it could have used any of the above terms (jury verdict, award, or just compensation) to say so. Furthermore, because the term "award" is used to signify just compensation, to hold that the phrase "ultimate award" means the same thing would be to treat the adjective "ultimate" as surplusage.

133 Mich App at 211–212. The *Dennis* court went on to explain that the term "ultimate award" should not include money that is "not immediately generated by the attorney's performance." *Id.* at 212. Further, any benefit that may be part of the "ultimate award" should "be tied to the instant litigation, and should inure directly to the owner." *Id.* at 213. Applying these standards, the court of appeals has held that the interest that accrues on a property owner's increased compensation is part of the "ultimate award" and should be considered in determining the maximum reimbursable attorney fee, but that witness fee reimbursements and attorney fee reimbursements are not part of the ultimate award. *Id.; see also Detroit v J Cusmano & Son, Inc*, 184 Mich App 507, 515–516, 459 NW2d 3 (1989). Accordingly, owners are entitled to reimbursement for attorney fees of as much as one-third on interest on the just compensation but not for witness fees and attorney fees themselves. Other items that may be part of the ultimate award in condemnation cases must be analyzed as set forth in *Dennis.*

d. Case Evaluation Sanctions

§8.89 Case evaluation sanctions apply in eminent domain, *see* MCR 2.403(O); *see also Detroit v Kallow Corp*, 195 Mich App 227, 231–232, 489 NW2d 500 (1992), and the UCPA provides that attorney fees awarded as case evaluation sanctions should be paid to the court absent an agreement between the parties:

> If the agency or owner is ordered to pay attorney fees as sanctions under MCR 2.403 or 2.405, those attorney fee sanctions shall be paid to the court as court costs and shall not be paid to the opposing party unless the parties agree otherwise.

MCL 213.66(3). This avoids duplicate payments to property owners that may be reimbursed for fees in any event. But if a court determines to order reimbursement of a property owner's attorney fees "in part" under the UCPA, case evaluation sanctions can provide a means for the court to otherwise reimburse the fees.

Similarly, case evaluation sanctions may give the court a way to order reimbursement of a property owner's fees and costs that the property owner may not be able to obtain under the UCPA's own reimbursement provisions. The reverse is also true, as a condemning agency may obtain witness costs as case evaluation sanctions from a property owner. *See* MCR 2.403(O)(6).

VI. Eminent Domain in Relation to Inverse Condemnation

§8.90 Inverse condemnation refers to those instances when the government does not file a legal action to acquire property for public purposes but, through its activities, deprives the owner of the possession or use of its property to such an extent that the government must pay "just compensation." *See Electro-*

Tech, Inc v HF Campbell Co, 433 Mich 57, 89, 445 NW2d 61 (1989). This subject is covered in detail in §§2.15–2.17.

As the United States Supreme Court has explained, inverse condemnation is separate from eminent domain:

> Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."

Agins v Tiburon, 447 US 255, 258 n2 (1980) (citations omitted).

In any case alleging inverse condemnation, the UCPA does not apply. As the court of appeals explained in *Lim v Department of Transp*, 167 Mich App 751, 755, 423 NW2d 343 (1988), the UCPA applies only when a condemning agency files a direct condemnation action:

> The UCPA has no application to inverse condemnation actions initiated by aggrieved property owners. Instead, the UCPA only governs actions initiated *by an agency* to acquire property on the filing of a proper complaint and after the agency has made a good-faith written offer to purchase the property.

Accordingly, neither the UCPA's procedures, nor its provisions for property owners to recover litigation costs from the condemning agency, have any application in an inverse condemnation setting. *See id.; see also Jack Loeks Theatres, Inc v Kentwood*, 439 Mich 968, 483 NW2d 365 (1992) (vacating attorney fee reimbursement award under UCPA in inverse condemnation case). The UCPA's inapplicability in inverse condemnation cases is consistent with inverse condemnation's distinction from eminent domain. *See Agins,* 447 US at 258 n2.