



# Litigating A Public Infrastructure Eminent Domain Case

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3:05 – 3:45 p.m.

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

June 22-24, 2018  
Crystal Mountain Resort

# Background

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

# Life of an Eminent Domain Case

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

# Complaint

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

# Complaint *(cont'd)*

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

MCL 213.55(4)

# Possession / Necessity

- Two main parts of a case – (1) possession / necessity and (2) just compensation
- While UCPA is a “quick statute,” can be months between authorization to make a written good faith offer (“GFO”) and order of possession
- Landowner must timely challenge necessity

# Possession / Necessity *(cont'd)*

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

# Jurisdiction

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

# Experts

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

# Discovery

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

# Case Evaluation / Settlement

- Incentive and disincentives to settle
- Costs, interest, and attorney fees

# Pretrial and Trial Issues

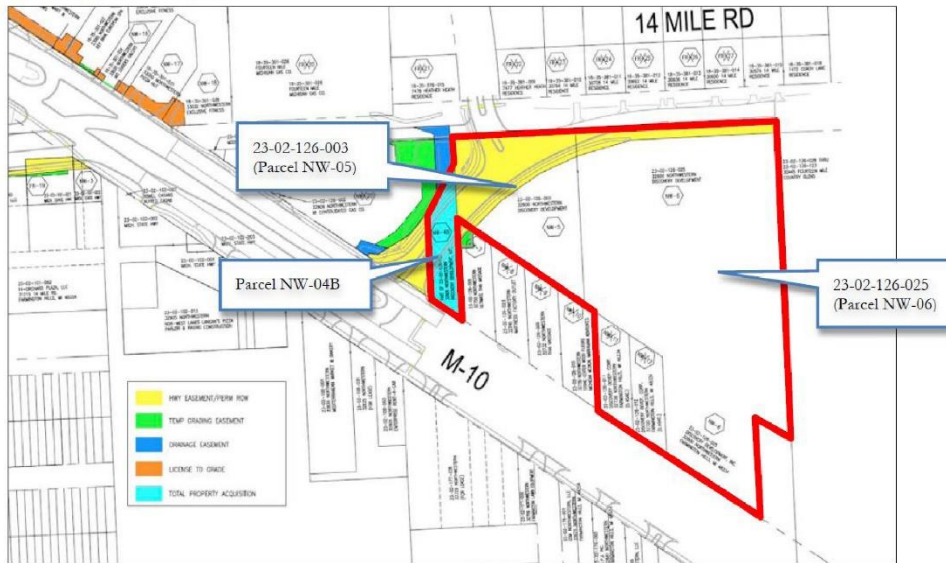
- Date of Valuation
  - Early date of taking
- Purchase price as evidence of value
- “Scope of the Project” rule
  - Appraiser conclusion of what would have been developed but for the taking
- Partial Taking – Damage to Remainder
  - Creating expanding nonconformities
  - Access
  - Inconvenience of project

# Pretrial and Trial Issues *(cont'd)*

- CVT Land Use Decisions
  - Where condemning agency is a CVT
- Hearsay
  - Documents
  - Expert testimony
- Motions in Limine
- Trial Attendance
- Jury Voire Dire
- Jury View

# Trial Issues – Impact of Taking Example

## BEFORE THE TAKE

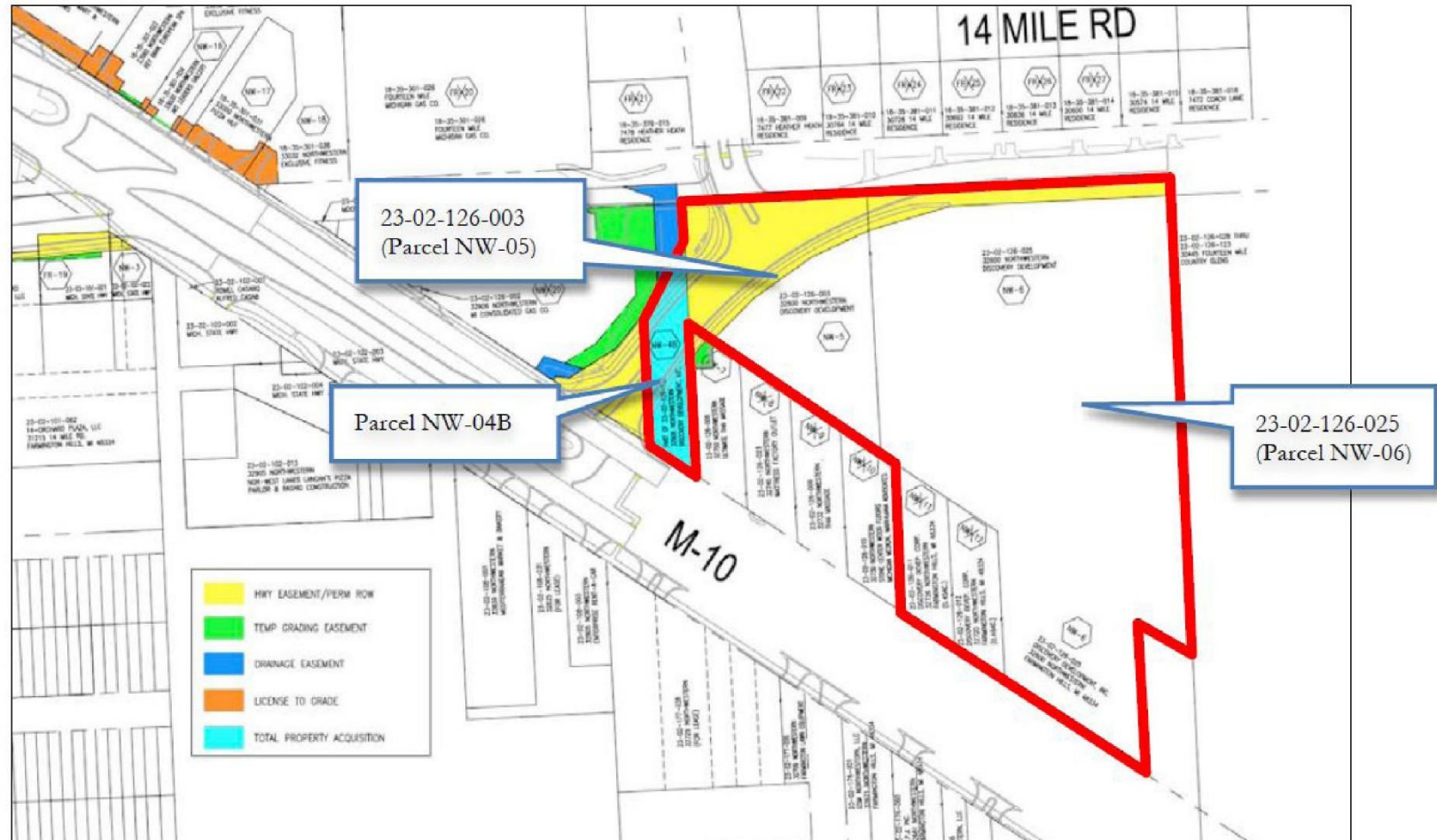


\$3.81M Agency Offer  
\$18.50M Landowner Demand



# Trial Issues – Impact of Taking Example

## BEFORE THE TAKE



# Trial Issues – Impact of Taking Example



# Post-Trial and Appeal

- Appeal jurisdiction of dismissal, agency potentially liable for landowner fees on appeal including fees to chase fees
- Appeal
  - Appeal of jury verdict more difficult
  - Appeal of jury instruction less difficult
- Interest runs during appeal
  - For every \$3 in interest, pay additional \$1 in attorney fees

# Questions?

Thank you for your attention.

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