

DE FACTO TAKING AND MUNICIPAL CLEARANCE PROJECTS: CITY PLAN OR CITY SCHEME?

In *Amen v. City of Dearborn*¹ plaintiff property owners in two sections of Dearborn, Michigan, brought a class action suit alleging that certain activities of defendant-City constituted a taking of plaintiffs' property without due process of law.² The challenged activities involved the clearance of a residential area for future industrial use. A federal district court found that the City's tactics constituted a taking of property for which plaintiffs were entitled to just compensation.³ In addition, the court found that plaintiffs were entitled to injunctive relief because the City failed to show a valid public purpose for the project.⁴

Governmental units may acquire private property for public use either by condemnation under the power of eminent domain or by outright purchase from the owner.⁵ In some situations, however, a government planning to redevelop an area may delay directly and openly taking such property even though it eventually intends to do so.⁶ Absent a de jure taking involving formal condemnation proceedings, all

1. 363 F. Supp. 1267 (E.D. Mich. 1973).

2. *Id.* at 1269.

3. *Id.* at 1278. The court held:

Although none of the activities of the City standing alone may have constituted a taking of plaintiffs' property, this court finds that the combination of the City's announcement and attendant publicity of the clearance projects, the City's refusal to issue certain repair and building permits coupled with its efforts to discourage repairs, the lack of care of City-owned property, the posting of signs on vacant buildings which invited vandalism, the posting of large signs in the area offering to buy property, the solicitation of sales to the City, the City's lack of initiative to control pollution in the South End, and the gradual acquisition of properties in both areas resulted in the taking of property in these areas for which homeowners are entitled to just compensation.

Id. at 1277-78.

4. *Id.* at 1279, 1283-84.

5. 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 6.1[1] (rev. 3d ed. 1974) [hereinafter cited as NICHOLS].

6. *See, e.g., Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970); *Gordon v. City of Warren Planning & Urban*

courts will recognize a de facto taking in the classic situation "involving a direct invasion of the condemnee's property or a direct legal restraint on its use."⁷ Adhering to the spirit of constitutional restraints,⁸ courts have used four basic "theories" to decide whether a constitutional taking requiring compensation has occurred:⁹ physical invasion,¹⁰

Renewal Comm'n, 388 Mich. 82, 199 N.W.2d 465 (1972); *In re* Urban Renewal, Elmwood Park Project (City of Detroit v. Cassese), 376 Mich. 311, 136 N.W.2d 896 (1965); *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971); *Empire Constr., Inc. v. City of Tulsa*, 512 P.2d 119 (Okla.), cert. denied, 414 U.S. 1094 (1973).

7. *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 253, 269 N.E.2d 895, 902, 321 N.Y.S.2d 345, 356 (1971).

8. The fifth amendment guarantees that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Similarly, the fourteenth amendment guarantees that "nor shall any state deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 2, and applies the fifth amendment to state governments and their agencies. See *Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226 (1897); *City of Cincinnati v. Vester*, 33 F.2d 242 (6th Cir. 1929), *aff'd*, 281 U.S. 439 (1930). See also *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

9. See Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1183-1201 (1967) [hereinafter cited as Michelman]; Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 46-60 (1964) [hereinafter cited as Sax]. See also COUNCIL ON ENVIRONMENTAL QUALITY, FOURTH ANNUAL REPORT 125-50 (1973); Comment, *A Redefinition of Just Compensation for Takings in Urban Redevelopment*, 6 WAKE FOREST INTRA. L. REV. 84, 91 n.38 (1969).

10. The physical invasion theory turns on a determination "whether or not the public or its agents have physically used or occupied something belonging to the claimant." Michelman, *supra* note 9, at 1184; see *id.* 1184-90; Sax, *supra* note 9, at 46-48. See also 4 NICHOLS, *supra* note 5, at § 12.3151[5]. "Ordinarily, a de facto taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property, or a legal interference with the owner's power of disposition of the property." *Id.* at 58 (Supp. 1974). The exceptions to this general rule have become so numerous that Professor Sax has suggested that the "formal appropriation or physical invasion theory should be rejected once and for all." Sax, *supra* note 9, at 48.

For examples of cases employing the physical invasion theory to require compensation see *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (low-flying aircraft constituted a compensable taking of an air easement); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (property seized by federal government during wartime); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) (government dam raised the water table of land rendering it useless); *United States v. Causby*, 328 U.S. 256 (1946) (low-flying aircraft); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (smoke driven across land by exhaust fan); *United States v. Welch*, 217 U.S. 333 (1910) (destruction of private road); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) (backing up of water flow over plaintiff's land); *Eyherabide v. United States*, 345 F.2d

nuisance abatement,¹¹ diminution of value,¹² and balancing of interests.¹³

The *Amen* decision rests primarily on the diminution of value and balancing of interests theories. A dual approach is possible because

565 (Ct. Cl. 1965) (plaintiff's land shelled by artillery when mistaken for part of naval gunnery range).

The restriction of compensable takings to actual physical occupation can lead to an inequitable result if it is the only criterion considered. As long as the government refrains from an actual conversion of the property to a public use, it can claim that the property has not been "taken" in the narrowest sense of the word:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government . . . , it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use.

Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1871).

The seeming disparity in the airplane overflight cases illustrates the possibility of an inequitable application of the physical invasion theory. Compare *United States v. Causby*, 328 U.S. 256 (1946) (low-flying government aircraft—compensation required under the physical invasion and diminution of value theories), with *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) (noise, smoke, and vibration from aircraft in the absence of overhead flight does not require compensation under either theory). The *Batten* court seems to have based its decision on the premise that physical trespass defines the taking. One commentator has pointed out the irony that results when a court will compensate for sound waves emanating from a "vertical" but not from a "lateral" source. Russell, *Recent Developments in Inverse Condemnation of Airspace*, 39 J. AIR L. & COM. 81, 83 (1973). See also Gandal, *Governmental Liability for Nonphysical Damage to Land*, 2 URBAN LAW. 315, 319-23 (1970).

11. The nuisance abatement theory rests on the governmental police power and applies a noxious use test. The uses that can be destroyed without compensation are those that are in some sense wrongful or harmful. See Sax, *supra* note 9, at 48. Judicial consideration focuses on "whether the claimant has sustained any loss apart from the restriction of his liberty to conduct some activity considered harmful to other people." Michelman, *supra* note 9, at 1184; see *id.* 1196-1201; Sax, *supra* note 9, at 48-50. When private property is used in a manner harmful to the public, compensation is *not* required if the government acts to protect the public from the nuisance-like action. This is true regardless of whether the owner is to blame for the harm caused by the use of his property and regardless of whether the regulation effectively destroys the entire value of the property. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (ordinance prohibiting excavation below the water table upheld); *Mugler v. Kansas*, 123 U.S. 623 (1887) (law prohibiting manufacture of intoxicating liquors upheld). In both cases the regulations were held to be valid exercises of the police power.

12. See notes 16-18, 39 and accompanying text *infra*.

13. See text at notes 41-43 *infra*.

standard judicial consideration of the taking issue relies on "no set formula."¹⁴ In fact, it may be said that whether a taking has occurred must be decided on a case-by-case basis.¹⁵ Consequently, the particular facts of the Dearborn project were crucial to the court's decision.

Application of the diminution of value theory is difficult. The criterion for evaluation is "the size of the harm sustained by the claimant or the degree to which his affected property has been devalued" by governmental action.¹⁶ Generally, a taking will be found under this theory only when the government has caused a *significant* decline in the value of private property.¹⁷ Difficulty arises from the impossibility of devising a rigid test to determine how much economic harm must occur before a taking is found.¹⁸ The issue is further

14. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). *See also* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

15. *See* 2 NICHOLS, *supra* note 5, at § 6.1[1]:

[J]ust how severe the interference with the owner's enjoyment of his property must be to constitute a taking . . . is not a question which can be answered in such a way as to furnish a concise rule readily applicable to all cases likely to arise. Each case must be decided on its own merits until, by the gradual process of judicial exclusion and inclusion, it is possible to say on which side of the line any given injury to private property rights may be said to fall.

Id. at 6-14 to -15.

16. Michelman, *supra* note 9, at 1184; *see id.* 1190-93; Sax, *supra* note 9, at 50-60.

17. The landmark case decided under the diminution of value theory is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in which, under a statute forbidding mining below homes, a compensable taking was found because the statute acted to the detriment of a mining company that had reserved such rights in its sale of the surface land to homeowners. The Court stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415; *see* *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970), in which a taking was found when the government delayed so long in the planned condemnation of plaintiff's land that it effectively destroyed its market value through the threat of imminent condemnation. *But see* *Empire Constr., Inc. v. City of Tulsa*, 512 P.2d 119 (Okla. 1973) (destruction of market value through delay not compensable).

The soundness of the diminution of value theory has been called into question by both practitioners and academicians. *See, e.g.*, F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 124-38 (1973); Sax, *supra* note 9, at 50-60.

18. *See* Sax, *supra* note 9, at 50:

Essentially the [diminution of value] theory appears to express two inter-related ideas: (1) that all legally acquired existing economic values are property, and (2) that while such values may be diminished somewhat without compensation, they may not be excessively diminished; the meaning of "excessive" is necessarily imprecise, but it is fairly clear under the theory that it would be unconstitutional to deprive a property of all or substantially all its economic value.

complicated in municipal clearance project cases by the confusion that exists between de facto taking and the closely related phenomenon of "precondemnation blight."¹⁹

The factor that distinguishes *Amen* from precondemnation blight cases and most de facto taking cases is that the City never intended to condemn the residential properties in the areas it chose to clear for commercial and industrial use.²⁰ The court concluded that the City clearance plan had become a City *scheme* consisting of a combination of governmental activities designed to *force* the residents

19. See, e.g., *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971):

"[C]ondemnation blight" relates to the impact of certain acts upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits a more realistic valuation of the condemned property in the subsequent *de jure* proceeding. In such a case, compensation shall be based on the value of the property at the time of taking, as if it had not been subjected to the debilitating effect of a threatened condemnation.

Id. at 255, 269 N.E.2d at 903, 321 N.Y.S.2d at 357. The court declined to find that a de facto taking had occurred, yet allowed increased compensation for condemnation blight. See 1973 URBAN L. ANN. 343: "An award for condemnation blight compensates a property owner for the devaluation caused by the condemning authority's "affirmative value-depressing acts" such as a threat of condemnation. . . . The governmental prerogative of eminent domain can preclude private use of land, rendering it virtually valueless at market." *Id.* at 345. See also 4 NICHOLS, *supra* note 5, at § 12.3151[5]: "A great deal of the confusion which exists has arisen by reason of the fact that 'condemnation blight' has been equated with de facto taking, but it has been held that all that results from condemnation blight is an impact upon value which should be disregarded regardless of whether the impact is appreciative or depreciative in character. . . ." *Id.* at 58 (Supp. 1974); see note 72 *infra*.

Despite the distinction drawn by the New York Court of Appeals in *J.W. Clement Co.*, the idea that a de facto taking exists in the absence of a physical invasion or direct legal restraint is not without current support and finds some viability in the pronouncements of other courts. See, e.g., *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968); *In re Urban Renewal, Elmwood Park Project (City of Detroit v. Cassese)*, 376 Mich. 311, 136 N.W.2d 896 (1965); *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E.2d 52 (1963).

20. 363 F. Supp. at 1272. In *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965), the court stated that "although there may be no official intention to acquire any property interest, certain governmental actions entail such an actual invasion of private property rights that a constitutional taking must be implied." *Id.* at 567; accord, *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 371 (E.D. Mich. 1970) ("Initiation of eminent domain proceedings is not a requisite to a finding that a 'taking' has in fact occurred allowing for recovery by a property owner").

to sell to the City.²¹ If the City had taken plaintiffs' properties through its power of eminent domain, it would have had to provide an opportunity for hearings on the prices it was to pay.²² The City chose instead to acquire the property by forcing the owners to sell directly to the City. As the court explained: "The term 'taking' implies the acquisition of property by the government without regard to the wishes of the owner. A taking can be accomplished by use of governmental powers of eminent domain or it can be accomplished by other kinds of governmental action."²³ The court found such "other kinds of governmental action" in this case: the City was not paying a fair price for the property it acquired, the City actually contributed to the decline of property values in the area, and certain actions by the City seemed specifically designed to make the area undesirable for residential use.²⁴ The combined result was a diminution in value that constituted a taking of these properties.

In addition to using verbal coercion,²⁵ the City enhanced its bargaining position by changing the formula used to determine the price it would offer. The determination, now based upon comparable sales in the area, the assessed value, and the price originally paid by the owner for the property,²⁶ clearly operated to the detriment of the

21. 363 F. Supp. at 1272. The court listed twenty separate activities that it found "forced" sales to the city. *Id.* at 1272-74; *cf.* Post-Trial Brief for Defendant City at 15-34, *Amen v. City of Dearborn*, 363 F. Supp. 1267 (E.D. Mich. 1973). For a discussion of "bad faith" on the part of a condemning authority see Note, *The Condemnor's Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings*, 1967 *UTAH L. REV.* 548, 552.

22. 363 F. Supp. at 1281. The Supreme Court has held: "It is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." *Bragg v. Weaver*, 251 U.S. 57, 59 (1919). See generally Roswig, *Some Current Issues in Eminent Domain*, 40 *N.Y. Sr. B.J.* 44 (1968).

23. 363 F. Supp. at 1276.

24. *Id.* at 1272, 1277-78.

25. The City Director of the Community Development Department told people in the area that the prices paid by the City for their properties would be going down and that their homes had a fixed maximum price. *Id.* at 1272. As one commentator has noted: "It would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . and then to take advantage of this depression in the price which it must pay for the property." 1 *L. ORGEL, VALUATION UNDER EMINENT DOMAIN* 447 (2d ed. 1953).

26. 363 F. Supp. at 1274. From 1965 to 1969 the City's offering price was based on the property's assessed value, the price of comparable homes in the

homeowner since each of the three factors contained latent value-diminishing aspects. First, the comparable sales in the area brought lower prices as the City continued to publicize the clearance project.²⁷ Secondly, the percentage ratio of the assessed value to the actual cash value of homes in the clearance area was purposely reduced by the City to depress values further.²⁸ Lastly, since many people in the area had owned their homes for more than ten years, the original price did not reflect present value. The original purchase price ignored the rise in market value due to inflation and physical improvements.²⁹ The prices offered by the City were frequently as much as \$5,000 less than what the owner originally asked.³⁰

The court also concluded that the effect of the City's actions was "to depress the value of the property for the immediate future."³¹

area and other sections of the city, and the condition of the house. This formula, if applied in the absence of coercive pressure, would have been a reasonable test for determining fair market value. In 1968, however, the Mayor told the Director of the Department of Urban Renewal to use only comparable property from the area to be cleared in computing value, and, in following this directive, he found that he did not reach a price high enough to entice the owners to sell. *Id.* at 1275. See generally Roswig, *supra* note 22; Vallone, *The Urban Renewal Condemnation System: Scandal and Other Related Practical Problems of Local Government*, 33 ALBANY L. REV. 519 (1969).

27. 363 F. Supp. at 1275.

28. *Id.* Property was assessed at the following percentages of true cash value: 1969 — 20.51%; 1970 — 19%; 1971 — 18%; 1972 — 17.8%. "Thus the use of the assessed value by the City in determining the value of homes could also contribute to computation of a low price." *Id.*

29. *Id.*

30. *Id.* at 1274. In *United States v. Miller*, 317 U.S. 369 (1943), the Supreme Court stated that just "compensation means the full and perfect equivalent in money of the property taken [whereby] [t]he owner is . . . put in as good position pecuniarily as he would have occupied if his property had not been taken." *Id.* at 373; *accord*, *City of Cleveland v. Carcione*, 118 Ohio App. 525, 530, 190 N.E.2d 52, 55-56 (1963).

31. 363 F. Supp. at 1275. The more recent cases, especially those examining urban renewal procedures in Detroit, have found takings under a diminution of value theory. In *In re Urban Renewal, Elmwood Park Project (City of Detroit v. Cassese)*, 376 Mich. 311, 317, 136 N.W.2d 896, 900 (1965), letters from the defendant-City that caused tenants to move out, coupled with unprecedented and intense building inspections, were found to constitute a taking. *Cf. Conroy-Prugh Glass Co. v. Commonwealth*, Pa., 321 A.2d 598 (1974). Similarly, in *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968), condemnation proceedings lasted ten years before the property was taken. Plaintiffs were told that they would not be compensated for any major improvements, were ultimately forced to raze their buildings, and were finally compensated only for the vacant lots that

Market value is often defined as the price that the property would bring at the time of the taking if offered by a willing seller who is not obliged to sell to a willing buyer who is not obliged to buy.³² In *Amen* not only did plaintiffs sell somewhat unwillingly, but also, with the exception of the City, there were no longer any willing buyers. The City had effectively destroyed the private market for property in the area by a variety of tactics: (1) repeatedly telling residents that the area would be cleared and issuing press releases to that effect, (2) telling willing buyers that there was no mortgage or Federal Housing Authority insurance available, (3) informing the Federal Housing Authority and commercial lenders that the area would be cleared, (4) refusing to put any of the City-owned houses back on the market, and, in one case, (5) discouraging a private buyer and then purchasing the property itself.³³ Thus plaintiffs were obliged to sell to the sole willing purchaser, the City, which had created an artificially depressed market value.

Other municipal policies drove residents from the area. Using its power to issue building, repair, and occupancy permits, the City encouraged abandonment by arbitrarily denying, or by causing unreasonable delays in, the issuance of such permits.³⁴ Some residents were required to sign forms stating that any repairs permitted by the City would not be considered in computing the value of their homes should the City later acquire them. Others were required to perform maintenance and install items not required by the build-

remained at the time of the taking. The district court held that "the actions of the defendant which substantially contributed to and accelerated the decline in value of plaintiffs' property constituted a 'taking' of plaintiffs' property within the meaning of the Fifth Amendment, for which just compensation must be paid." 254 F. Supp. at 665-66; *accord*, *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 371 (E.D. Mich. 1970) (the court found a taking because of the denial of building permits, refusal to reassess property values for tax purposes, continued publication of renewal plans for the area, and denial of some city services); *see* Comment, *A Redefinition of Just Compensation for Takings in Urban Redevelopment*, *supra* note 9, at 87-92.

32. D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 331-32 (1971). "Justice can usually be achieved by valuing the property as it was immediately before the first official step of the project . . ." *Id.* at 336; *accord*, *City of Cleveland v. Carcione*, 118 Ohio App. 525, 533, 190 N.E.2d 52, 57 (1963).

33. 363 F. Supp. at 1273.

34. *Id.* at 1272. *See also* *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367, 371 (E.D. Mich. 1970); *Foster v. City of Detroit*, 254 F. Supp. 655, 662 (E.D. Mich. 1966).

ing code.³⁵ Property owned by the City was often left in disrepair. The City contributed to pollution in the area by selling some of its property to a brick manufacturer and an asphalt processor.³⁶ In addition, the City posted signs throughout the neighborhoods overtly soliciting sales³⁷ and inviting vandalism of vacant and unprotected City-owned property.³⁸

In short, the City's activities added to the depreciation and devaluation of all properties in the project area.³⁹ Such tactics led the court to require that the City submit to any valid claims by individuals alleging a difference between the City's purchasing price and the fair market value of the property acquired.⁴⁰

The injunctive relief granted, which prevented the City from acquiring other properties and from rezoning in the area for five years, brought the clearance project to a halt. If the City had not been enjoined from furthering its clearance of the area, it could then have proceeded to condemn the remaining properties using the power of eminent domain. The City would have had to show, however, a valid public purpose in order to proceed.⁴¹ Here the balancing

35. 363 F. Supp. at 1272. *See also* *Foster v. City of Detroit*, 254 F. Supp. 655, 662 (E.D. Mich. 1966).

36. 363 F. Supp. at 1273.

37. *Id.* Examples included: "Whoever wishes to sell to the City of Dearborn, call City Attorney," "Sold to the City of Dearborn," and "Cash for your house. The City will pay a good fair price for any house in this block. See City Attorney, City Hall." *Id.* at 1273-74.

38. *Id.* at 1273. For example: "Free at your risk, take any part of the house. First come, first served. Hurry." These signs precipitated vandalism and the stripping of houses much to the consternation of the remaining property owners.

39. *See In re Urban Renewal, Elmwood Park Project (City of Detroit v. Cassese)*, 376 Mich. 311, 318, 136 N.W.2d 896, 900 (1965) ("If an area has been made a wasteland by the condemning authority, the property owner should not be obliged to suffer the reduced value of his property."); 4 NICHOLS, *supra* note 5, at § 12.3151[5]. *See also In re Appropriation for Highway Purposes*, 18 Ohio App. 2d 116, 247 N.E.2d 315 (1969): "The proper time for valuing the property is before the value 'has depreciated due to the activity of the appropriating authority' or authorities 'in acquiring other properties in the immediate vicinity and demolishing buildings thereon, causing deterioration of the neighborhood and depreciation of the remaining properties.'" *Id.* at 119, 247 N.E.2d at 318, *citing* *Bekos v. Masheter*, 15 Ohio St. 2d 15, 20, 238 N.E.2d 548, 552 (1968). *But cf. Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955, 958 (6th Cir. 1970).

40. 363 F. Supp. at 1283-84. The City was also ordered to maintain its vacant lots properly and to destroy any vacant structures. *Id.*

41. *See* cases cited notes 45-47 *infra*.

of interests theory becomes applicable in determining whether a taking has occurred. The test under this theory is "whether the claimant's loss is or is not outweighed by the public's concomitant gain."⁴² Balancing the two interests, the *Amen* court found that plaintiffs' monetary losses and eviction from the neighborhood outweighed the public's gain in having the City clear the area.⁴³

Michigan statutory law permits a city to make acquisitions only for a public purpose.⁴⁴ Although the power of the courts to review a governmental unit's designation of a public purpose is limited,⁴⁵ no case has entirely prohibited such review.⁴⁶ Judicial review may question whether or not the designation of a public purpose has been made in bad faith.⁴⁷ In *Amen* the City failed to provide any documentation of a public purpose for clearing these areas other than mere indications in the enabling ordinances that they were to be cleared for commercial and industrial use.⁴⁸ Consequently, the court found that the "acquisitions under this program are

42. Michelman, *supra* note 9, at 1184; *see id.* 1190-93; *cf.* *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *La Salle Nat'l Bank v. County of Cook*, 60 Ill. App. 2d 39, 51, 208 N.E.2d 430, 436 (1965); *Rochester Business Institute, Inc. v. City of Rochester*, 25 App. Div. 2d 97, 101-02, 267 N.Y.S.2d 274, 279-80 (1966); *Kratovil & Harrison, Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 626-29 (1954).

43. Plaintiffs also alleged a violation of equal protection because of the predominantly Arab population and low economic status of the neighborhood. *See* Trial Brief for Defendant City at 6, *Amen v. City of Dearborn*, 363 F. Supp. 1267 (E.D. Mich. 1973). The court found it could infer no intent or purpose to discriminate on the basis of race. 363 F. Supp. at 1281; *see Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968). Plaintiffs' allegation of discrimination on the basis of wealth was rejected, partially on the ground that "wealth" is not a "suspect classification." 363 F. Supp. at 1281. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

44. MICH. STAT. ANN. § 5.2078(2) (1949).

45. *See Berman v. Parker*, 348 U.S. 26, 32-33 (1954); *Bragg v. Weaver*, 251 U.S. 57, 58 (1919).

46. *See United States v. Agee*, 322 F.2d 139, 142 (6th Cir. 1963). *See also City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930).

47. *United States v. Agee*, 322 F.2d 139, 142 (6th Cir. 1963); *see D. HAOMAN, supra* note 32, at 316 ("A judicial issue arises as to questions of necessity only when fraud, bad faith, or abuse of discretion in the determination of necessity is involved."). *See also Note, The Condemnor's Liability for Damages Arising Through Instituting, Litigating, or Abandoning Eminent Domain Proceedings*, 1967 UTAH L. REV. 548, 552.

48. 363 F. Supp. at 1278-79.

illegal in that no public purpose has ever been established. . . . Industrial and commercial use by itself does not constitute a public purpose."⁴⁹

The court, viewing the City's tactics with obvious disfavor, found extensive injunctive relief necessary. The City was enjoined from (1) acquiring any property in the project areas except by condemnation of substandard structures,⁵⁰ (2) refusing building, repair, or occupancy permits, (3) requiring owners to agree that the City need not compensate for improvements, (4) interfering with the granting of mortgage money, (5) posting any signs soliciting sales or inviting vandalism, (6) publicizing clearance plans, and (7) rezoning the area for five years.⁵¹

Perhaps the most novel aspect of the decision is the complex set of facts that led to an implicit finding of a "scheme." The court prefaced its holding with the suggestion that none of the City's activities standing alone would constitute a taking.⁵² The finding of a taking seemed to be a direct consequence of the absence of formal plans to condemn the properties in question.⁵³ Apparently the City viewed its informal procedures to be the most profitable course to take. Formal condemnation requires hearings on the amount of compensation the condemnees are to receive.⁵⁴ Doubtless the City would then have had to pay a higher price for each parcel acquired.

The other available course would have been to rezone the area for commercial and industrial uses. A rezoning, however, would not, in and of itself, have cleared the area.⁵⁵ In addition, rezoning would have eliminated the possibility of a middleman profit for

49. *Id.* at 1279.

50. *Id.* at 1283. Note that in this situation the nuisance abatement theory justifies the condemnation. See note 11 *supra*.

51. 363 F. Supp. at 1283-84.

52. *Id.* at 1277; see note 3 *supra*.

53. If the City's plans had included formal condemnation, the remedy available to plaintiffs would not necessarily have been under a de facto taking theory but more likely would have been an adjustment of the condemnation award for "precondemnation blight." See note 19 *supra*.

54. See note 22 *supra*.

55. A pre-existing, non-conforming use cannot be removed from an area by a zoning change unless the use constitutes a nuisance. See, e.g., 8 A. McQUILLIN, MUNICIPAL CORPORATIONS §§ 25.180-183 (3d ed. 1965). If the City had rezoned the area, industry could only have bought the property it needed on a lot-by-lot basis as the owners became willing to sell.

the City when reselling the acquired property to industry at a higher price.

Amen indicates the potential dangers of trying to clear and rezone an urban sector without invoking the power of eminent domain, particularly when no valid public purpose can be demonstrated. *Amen* holds that a city cannot use coercive and value-depressing tactics to clear an area merely because it is the most profitable way to do so.⁵⁶ Residential areas cannot be removed even from a predominantly industrial sector of the city except by formal proceedings in eminent domain. This is *Amen's* caveat to city planners.

Amen v. City of Dearborn significantly extends the application of the de facto taking doctrine in at least two respects. First, it recognized that governmental action resulting in a market-chilling effect could lead to a finding of a constitutional taking.⁵⁷ Secondly, as a result, the district court gave extensive and drastic injunctive relief.⁵⁸ Consequently, defendant-City has appealed the district court decision to the Sixth Circuit.⁵⁹

The Sixth Circuit is unique in its application of the de facto taking doctrine to alleged abuses by local governments.⁶⁰ In the recent case of *Sayre v. City of Cleveland*⁶¹ the Sixth Circuit admitted that in *Foster v. City of Detroit*⁶² it had recognized "that an urban renewal authority, by abusing its power of eminent domain, may

56. See generally *In re Urban Renewal, Elmwood Park Project (City of Detroit v. Cassese)*, 376 Mich. 311, 136 N.W.2d 896 (1965), in which the court commented on similar tactics by stating that "a city may not by deliberate acts reduce the value of private property and thereby deprive the owner of just compensation." *Id.* at 317, 136 N.W.2d at 900.

57. See text at notes 31-33 *supra*.

58. See text at notes 50-51 *supra*. An injunction against rezoning an area for five years is indeed drastic relief.

59. *Amen v. City of Dearborn*, No. 74-1650, (6th Cir., filed, 1974).

60. See *Foster v. Herley*, 330 F.2d 87, 89 (6th Cir. 1964); *Sayre v. United States*, 282 F. Supp. 175, 182-83 (N.D. Ohio 1967). See generally *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974); *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970); *United States v. Agee*, 322 F.2d 139 (6th Cir. 1963); *Madison Realty Co. v. City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

61. 493 F.2d 64 (6th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3196 (Oct. 15, 1974).

62. 405 F.2d 138 (6th Cir. 1968).

cause such damage to property that it is actually 'taken' within the meaning of the fifth and fourteenth amendments."⁶³ On the other hand, in *Woodland Market Realty Co. v. City of Cleveland*⁶⁴ the court refused to extend its de facto taking doctrine to compensate a landowner whose property declined in value because it was adjacent to an urban renewal project.⁶⁵

The court in *Sayre* relied on *Woodland Market Realty Co.* to find that, absent an abuse of eminent domain power, economic loss caused by urban renewal does not constitute a taking.⁶⁶ The dispositive facts in *Sayre* were that the City had neither initiated eminent domain proceedings against plaintiff's properties, nor evidenced any intent to begin such procedures, nor physically invaded the property.⁶⁷ Diminution of value, standing alone, was held insufficient to constitute a taking.⁶⁸

This is not to say that *Amen v. City of Dearborn* will be reversed on appeal.⁶⁹ There is ample language in *Sayre*⁷⁰ to predict that when

63. 493 F.2d at 69. The court went on to state: "In fact, our reading of the cases indicates that this Court in *Foster* possibly broke new ground when it held that abuse of condemnation authority could constitute a taking." *Id.*

64. 426 F.2d 955 (6th Cir. 1970).

65. *Id.* at 959:

Actions done in the proper exercise of governmental powers which do not directly encroach upon private property, though they may impair its use or value, do not amount to a taking of such property within the meaning of the constitutional provision that private property shall not be taken for public use without just compensation.

Id. at 958.

66. 493 F.2d at 69. The public policy reason underlying this holding is obvious. If every decline in value caused by an urban renewal project was compensable, such projects would become economically unfeasible.

67. *Id.*

68. *Id.*

69. Note that the question of whether actions such as those involved in *Amen* constitute a taking has not been faced by the United States Supreme Court. See *Foster v. City of Detroit*, 254 F. Supp. 655, 664 (E.D. Mich. 1966).

70. 493 F.2d at 69-70. The supporting language is stated conversely: "Absent the abuse of eminent domain found in *Foster*, including some action by the city indicating that *the particular piece of property at issue* is to be appropriated, economic loss caused by urban renewal does not constitute a taking. . . ." *Id.* at 69 (emphasis in original). The court also provided a concise statement of their new and stricter de facto taking rule:

[A]bsent the extreme circumstances present in the *Foster* case, but lacking here, we think the true rule is that there is no de facto taking of properties which have decreased in value because of an urban renewal project unless

faced with the coercive and value-depressing tactics found in *Amen*, the Sixth Circuit will rely on *Amen's* closer similarity to the *Foster* line of cases⁷¹ and affirm the finding of a de facto taking.⁷²

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there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties.

Id. at 70; see text at note 7 *supra*. Since it can be easily argued that the abuse of discretion in *Amen* exceeded the activities that led to the finding of a taking in *Foster*, the Sixth Circuit is likely to affirm, even under the newly articulated rule.

71. See note 6 *supra*.

72. Note also that since *Amen* involved no proposed de jure condemnation and no finding of a valid public purpose, it is a more appropriate example of a de facto taking case than those that might more accurately be termed condemnation blight. See note 19 *supra*. See also 72 COLUM. L. REV. 772 (1972):

The concept of "de facto taking" represents an effort to respond equitably to the actual effects of the condemnation process. The theory of *de facto* taking is simply stated: during the time prior to the signing of transfer documents and the taking of possession by the government, the prospective condemnee is in fact stripped of the incidents of ownership—saleability, usability, leasehold value. At some point in this stripping process a taking occurs, and compensation is then due.

Id. at 774.