

# Detroit Legal News

August 22, 2013

## ASKED AND ANSWERED

### Steven D. Sallen on Phoenix Center Condemnation

By Steve Thorpe [sthorpe@legalnews.com](mailto:sthorpe@legalnews.com)

Pontiac Emergency Manager Lou Schimmel enacted an ordinance recently condemning the adjacent Ottawa Tower's easements on the Phoenix Center complex in downtown Pontiac. He said that the eminent domain action is in the public interest because of criminal activity in the complex, repairs and maintenance the city can't afford and safety concerns. Ottawa Towers has filed a lawsuit before Oakland County Circuit Judge Michael Warren, contending that a demolition would take away the office buildings' parking, violate their easement rights and damage their structures. The suit asks for \$9 million in damages in the event of a demolition. Steven D. Sallen began his career at Maddin Hauser in 1983, as a law clerk. Today, he is the president and chief executive officer of the firm. Sallen received his undergraduate degree from the University of Michigan, and his law degree, cum laude, from the University of Detroit School of Law. He concentrates his practice in the areas of real estate law, environmental law and corporate law. Sallen is also the head of Maddin Hauser's environmental law practice group.

**Thorpe:** Schimmel insists that the well being of Pontiac will be protected by this demolition. Response?

**Sallen:** Protected in what way? Why does Pontiac need protection from investment and revitalization of the office towers and the Phoenix Center? Despite opposition from the city and EM, the tower owners have spent significant sums cleaning and repairing the structure and renovating the buildings, all with the intent of bringing more business and commerce into the city. The EM claims that demolition will be "good" for the City of Pontiac, but he never explains those benefits. Certainly there is no benefit to the Ottawa Towers buildings, and they are one of the largest property tax payers in the city.

The EM hasn't divulged (nor even admitted that he has) any plans for what happens after he demolishes the PC. Although he previously promised, that the

city would construct a surface parking lot on the footprint, he now appears to have “changed his mind.”

He’s also sold nearly all of the city’s parking lots. This means that he plans to demolish the Center with no plan for where the Towers’ tenants will park. The EM has also claimed “safety” and “crime” problems justify demolition of the PC. The structure is safe as proven by the city’s own expert.

Also, the Towers owners are paying for upkeep and maintenance, even though it is the city’s responsibility. In fact, in his deposition, the EM admitted that the condition of the PC has nothing to do with his desire to demolish it. So even though the Towers’ owners have eliminated much of the city’s costs related to the structure and performed the previously neglected maintenance and upkeep, the EM remains intent on spending millions of dollars to demolish the structure, despite the lack of financial need.

The EM’s claim that demolishing the center is necessary because of “crime” is baseless. The PC is as safe as any street in Pontiac, and given the recently upgraded lighting and other improvements, safer.

So, if the EM thinks that demolition of the PC will be good for Pontiac, then he should put his cards on the table so that the citizens of Pontiac can decide if he’s got a real plan, or whether a different (hidden) agenda is really at work in his push to demolish the PC.

**Thorpe:** What harm do you believe Ottawa Towers will receive if the plan moves forward?

**Sallen:** Demolition of the PC will be catastrophic for the Towers buildings. If the EM and Mayor proceed with their plans, the buildings will be worthless.

Demolition will damage the exterior of the buildings and leave them with nowhere to park. The buildings and the PC were designed together. They are meant to function as an integrated unit.

The main Towers building entrances are into the PC parking structure on the second and third floors and the plaza deck on top of the PC, which is an important and valuable urban amenity. If the PC structure is demolished, then the buildings main entrances will lead to nowhere. The entrances would have to be permanently closed, or giant stairways and elevators would have to be constructed on the buildings’ exteriors (at the city’s expense).

The buildings will be left with huge holes and large areas of missing aesthetic façade. The buildings would be an eyesore. And both the city and their demolition contractor admit that there is no money set aside to repair the damage to the two buildings.

The two buildings have approximately 400,000 square feet of rentable office area. Where would the occupants, both current and future, park? What value would these office buildings have without sufficient numbers of safe, lighted parking spaces, located within a reasonably close distance? The answer is simple: the buildings will be worthless. On top of all that, the City has sold its other downtown parking lots in the vicinity. So there would literally be nowhere for the Towers' tenants (or their clients and customers) to park if the PC is torn down.

Finally, it's important to point out that the \$2,000,000 that the city has set aside to demolish the PC comes from capital improvement millages. I presume that the citizens of Pontiac would have expected that in exchange for approving a \$2,000,000 capital improvement millage that they would get more than merely demolition of a structure that cost the city \$23,000,000 to build in 1981.

Given that the owners of the Towers have demonstrated a willingness to undertake most of the costs associated with maintaining, cleaning, and operating the PC, shouldn't the EM be using the \$2 million of taxpayer money for legitimate "capital improvements"? Are there no public works projects that the Citizens of Pontiac might have expected to better their city, other than demolition of the PC?

The EM claims he is trying to stem the fiscal bleeding, and points to the (minimal) cost of keeping the PC open as harming Pontiac. The only cost the city has even incurred in recent years is for insurance; they have ignored their other responsibilities.

You don't stop the bleeding by removing the patient's heart. But that is what the EM is trying to do.

**Thorpe:** You contend that Schimmel lacks the authority to tear down garage and amphitheater under either the former emergency manager law Public Act 4 or under Public Act 72. Explain?

**Sallen:** First, when the EM first issued his order to demolish the Center, the city didn't own it. It was owned by the Oakland County Building Authority. So it was not at all clear that the EM had the power to demolish a County owned structure. And if the county wanted it demolished, why didn't the county undertake that process?

Second, we do not see any provision in the Acts which allows an emergency manager to demolish the assets of the city which he oversees.

**Thorpe:** What are the easement rights issues involved?

**Sallen:** Easement rights are a basic principal of real property law. When someone grants an easement (such as the easements granted to the owners of the Towers), they are conveying an interest in "real property." So the easements are rights in the real estate; that is, they are property rights owned by our clients.

Under the Michigan and U.S. Constitutions, the government cannot take private property without paying just compensation.

So, even if an EM could “take” private property, he cannot take that private property without paying just compensation. And that is what the EM in this case attempted to do. He simply ordered the destruction of the PC without any consideration of the Towers’ property rights in the PC. And, as the court noted, the EM cannot simply terminate an easement as though it was a contract. Interests in real property are more than mere contracts.

And, now that the EM has issued an order that purports to condemn the PC, we intend to challenge the EM’s authority to do so. After all, how can a fiscally insolvent city condemn private property, unless it can afford to pay just compensation? Think of the chaos that would result from EMs in this State condemning property with no ability to pay just compensation.

We also suspect that, given all of the other parts of the city’s budget that the EM has eliminated or cut, the citizens of Pontiac have to be asking themselves why the EM is willing to spend millions of dollars demolishing the PC and attempting to drive out investors, like the owners of the Towers, and their tenants.

**Thorpe:** What effect did the end of Oakland County’s lien on the property have on the issue?

**Sallen:** Initially, the city claimed that it could not sell the PC to the owners of the Towers because the county had a lien on the property. Candidly, we have yet to see any real impact from the removal of the lien, except that the county appears to be trying to distance itself from the EM’s actions.

**Thorpe:** In June, Judge Warren issued an order granting the Tower’s motion to hold the city defendants in civil contempt in regards to the city’s closure of the Center. Tell us about that.

**Sallen:** Judge Warren issued a preliminary injunction in November 2012, prohibiting the defendants from interfering with the Towers’ use and enjoyment of the PC. The defendants asked the Judge to reconsider the injunction. The court not only denied their request in May 2013; the court actually reaffirmed and clarified – beyond any doubt – that the city and county could not interfere with parking in the structure in any way.

Now, by way of background, the city is obligated to maintain and repair the PC. The city has, by its own admission, neglected those obligations for years, claiming it lacked the money to do so.

The city has continued to neglect repairs and maintenance. It serves the purposes of those who want the PC demolished to have the structure in the worst condition possible, to help justify their demolition plans.

The Towers' easement rights include the right to demand that the city perform its maintenance and repair obligations. If the city fails to do so, the Towers' owners can undertake any necessary maintenance and place a lien on the structure to secure reimbursement of the costs incurred to do so.

The Tower owners hired expert contractors — including some who participated in the original design and construction of the PC — to perform routine maintenance, but even then, only after the city failed to respond to the Towers' written requests that the city perform its maintenance obligations. The city and county were fully aware that the Towers' owners intended to perform this maintenance work — to insure a well maintained and safe facility for their tenants — if the city or county refused.

After the repairs had begun, the city — with no prior warning, justification or demand of any kind — had its building department officials, flanked by Oakland County Sheriff's Deputies, show up on the site and order a stop of all maintenance work under threat of arrest. They actually ordered everyone in the building — tenants and their clients, customers, visitors, etc. — to leave their offices immediately, march into the PC, and remove their cars. There were approximately 300 cars in the structure that afternoon. After the forced evacuation in the middle of the business day, city officials barricaded the structure to prevent reentry.

Plaintiffs filed an emergency motion to hold the city defendants in contempt of the court's preliminary injunction. The court agreed with the Towers owners, held the city in contempt of court and — once again — ordered the city not to interfere with parking in the structure. The court also found that the Towers' owners had proven damages from the city's conduct, and invited plaintiffs to file their bill of costs and damages with the court.

**Thorpe:** What happens next?

**Sallen:** When the court found the city and Schimmel in contempt of the injunction due to their unlawful and unjustified evacuation of the Phoenix Center, the court directed plaintiffs to file a motion to fix damages due to their conduct. The court scheduled an evidentiary hearing on plaintiff's motion, which seeks more than \$53,000, for Oct. 9. Plaintiffs continue to prepare for trial, which is scheduled to commence on Dec. 9.