



## The Availability of Eminent Domain for the Detroit Works Project



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The Detroit Works Project represents an ambitious effort to harmonize the City's historically declined population numbers, the City's expansive boundaries, and its ability to effectively and efficiently deliver basic services to its residents. To what extent does the power of eminent domain, or condemnation, offer a tool for the City in pursuing the Detroit Works Project? Recent judicial, legislative, and constitutional changes have curtailed the general availability of eminent domain, and likely limit the usefulness of condemnation for projects like the Detroit Works Project.

### The Public Use Limitation

The Michigan Constitution, like the United States Constitution, prohibits the government from taking private property for public use without just compensation.<sup>1</sup> These provisions, each referred to as the "Takings Clause," prevent the government from taking property if there is no public use, whether or not just compensation is paid. What constitutes a valid public use authorizing an exercise of eminent domain, however, has generated controversy both in Michigan and throughout the United States. The Michigan Supreme Court has generated national attention in interpreting the meaning of the public use limitation on the exercise of the power in its decisions in *Pole-*

*town Neighborhood Council v Detroit*<sup>2</sup> and *Wayne County v Hathcock*.<sup>3</sup>

### Poletown

Prior to the 1981 decision in *Poletown*, the Michigan Supreme Court had narrowly construed the public use limitation to prohibit the use of eminent domain for private, not public, uses.<sup>4</sup> In 1980, however, the City of Detroit embarked on an ambitious plan seeking to condemn 465 acres located in Detroit and Hamtramck (an area known as "Poletown"), consisting of homes, neighboring industrial and retail businesses, and other land uses, and to transfer the property to General Motors for use as an automobile plant. The City was acting under the Michigan Economic Development Corporations Act,<sup>5</sup> which authorized condemnation of private property to further economic development to alleviate and prevent economic decline. The City's ability to withstand a public use challenge was considered bleak under existing caselaw interpreting the public use limitation. Yet, in a 5-2 decision,

2 410 Mich 616; 304 NW2d 455 (1981).

3 471 Mich 445; 684 NW2d 765 (2004).

4 See, eg, *Shizaz v Detroit*, 333 Mich 44; 52 NW2d 589 (1952) (private property may not be condemned for partly public and partly private purposes).

5 MCL 125.1601 et seq.

1 Mich Const 1963, art 10, § 2; US Constitution, am V.

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the Michigan Supreme Court approved the City's plan. The Court framed the constitutional issue as whether the taking would primarily benefit the private or the public:

There is no dispute about the law. All agree that condemnation for a public use or purpose is permitted. All agree that condemnation for a private use or purpose is forbidden. Similarly, condemnation for a private use cannot be authorized whatever its incidental public benefit and condemnation for a public purpose cannot be forbidden whatever the incidental private gain. The heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user.<sup>6</sup>

The Court held that General Motors' use of the property was only *incidental* to the public benefits underlying the proposed condemnation project.

The dissenting opinion of Justice Ryan has captured nearly as much attention as the majority opinion. Justice Ryan saw the majority decision as a radical departure from prior Michigan cases interpreting the Takings Clause. Justice Ryan articulated the long-standing precedents limiting the exercise of eminent domain to traditional public uses. Justice Ryan also warned of potential dire consequences from the majority's decision:

The reverberating clang of [this case's] economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations. By its decision, the Court has altered the law of eminent domain in this state in a most significant way and, in my view, seriously jeopardized the security of all private property ownership.

This case will stand, above all else, despite the sound intentions of the majority, for judicial approval of municipal condemnation of private property for private use. This is more than an example of a hard case making bad law—it is, in the last analysis, good-faith but unwarranted judicial imprimatur upon government action taken under the policy of the end justifying the means.<sup>7</sup>

Notwithstanding Justice Ryan's concerns, *Poletown* became the law of the land in Michigan for over 20 years, and also inspired similar decisions by state supreme courts

throughout the country. If left in place by the Court, *Poletown* would likely have extended broad condemnation authority to the City of Detroit to advance its Detroit Works Proposal. However, an economic development plan initiated by Wayne County 20 years after the decision in *Poletown* led to the reversal of the famous decision.

### Return to a Narrow Public Use

In 2001, Wayne County sought to rely on *Poletown* in pursuing an economic development project south of the Detroit Metropolitan Airport, known as the Pinnacle Project. In *Wayne County v Hathcock*, the Wayne County Circuit Court upheld the use of eminent domain for the Pinnacle Project, ruling that there was a valid public use at issue, despite the fact that the condemned property would ultimately be transferred to private interests. The Court of Appeals likewise upheld the project, noting *Poletown's* broad precedential scope.

In an opinion released the very last day of its term in July 2004, the Michigan Supreme Court reversed the *Hathcock* Court of Appeals' decision on the public use issue, overturned *Poletown*, and garnered national media attention on the controversial issue involving the proper scope of the public use limitation on takings of property for economic development. One remarkable aspect of the decision is that all seven justices voted to reverse the *Poletown* decision handed down by the Court 23 years earlier.

In its majority opinion, written by Justice Young, the Court agreed with the Court of Appeals that the Legislature's general grant of the power of eminent domain in the Acquisition of Property by State Agencies and Public Corporations Act ("Acquisition of Property Act")<sup>8</sup> provided a sufficient basis for Wayne County's exercise of the power, without the need for more specific legislation such as the Michigan Economic Development Corporation Act. The Court found that the Legislature intended to provide broad authority to municipalities for the exercise of eminent domain under Section 3 of the Act.<sup>9</sup> The Court ruled that the Acquisition of Property Act broadly allowed for the use of eminent domain where it was necessary for a public purpose (not use), and was "for the use or benefit of the public."<sup>10</sup> Under this broad legislative standard, the use of eminent domain for the Pinnacle Project was valid.

8 MCL 213.21 et seq.

9 MCL 213.23

10 *Hathcock*, 471 Mich at 466.

6 *Poletown*, 410 Mich at 632.

7 *Id* at 645-46 (Ryan, J., dissenting).

## The New Standard

The Court ruled, however, that despite the broad grant of authority contained in MCL 213.23, Wayne County's proposed taking was also subject to the narrower limitations contained in the Michigan Constitution's Takings Clause:

On the basis of the foregoing analysis, we conclude that the condemnations sought by Wayne County are consistent with MCL 213.23 and that this statute is a separate and independent grant of eminent domain authority to public corporations such as Wayne County. If the authority to condemn private property conferred by the Legislature lacked any constitutional limits, this Court would be compelled to affirm the decisions of the circuit court and the Court of Appeals. But our state Constitution does, in fact, limit the state's power of eminent domain. Therefore, it must be determined whether the proposed condemnations passed constitutional muster.<sup>11</sup>

The Court's focus then turned to the Takings Clause enacted in the Michigan Constitution of 1963. The Court relied upon Justice Ryan's dissent in the original *Poletown* decision in describing the state of eminent domain jurisprudence as of the passage of the 1963 Constitution. Justice Ryan identified three categories where the Constitution authorized condemnations in which private land was transferred by the condemning authority to a private entity. The first involved "public necessity of the extreme sort otherwise impracticable."<sup>12</sup> The building of railroads, highways, and other "vital instrumentalities of commerce" are examples that fall under this category.<sup>13</sup>

The second category of constitutionally authorized condemnations is where the private entity remains accountable to the public in its use of the property. The Court cited to its prior decision in *Lakehead Pipeline Co v Denn*<sup>14</sup> wherein it approved the transfer of property to a pipeline company regulated by the Michigan Public Service Commission.<sup>15</sup>

The third and final category of constitutionally authorized transfers of property to private entities is where

the "selection of the land to be condemned is itself based on a public concern."<sup>16</sup> The most common type of condemnation in this category involves the taking of property to eliminate blight. The elimination of blight forms the basis of the "public use" underlying the condemnation, even though that property, once condemned and the blight eliminated, is ultimately transferred to a private entity for redevelopment. The Court explained:

Thus, as Justice Ryan observed, the condemnation was a "public use" because the land was selected on the basis of "facts of independent public significance—namely the need to remedy urban blight for the sake of public health and safety."<sup>17</sup>

Importantly, the Michigan Supreme Court in *Hathcock* sanctioned the historic use of condemnation for the elimination of blight.

In a somewhat ironic twist of fate, approximately one year after the decision in *Hathcock*, the Court upheld a taking that had been stricken under the *Poletown* test for public use in *City of Novi v Adell Trust*.<sup>18</sup> *Adell Trust* involved whether the requirements of the public use test were met with respect to the construction of a road "available for use by the public but . . . primarily used by a private entity that has contributed funds to the project."<sup>19</sup> The Court of Appeals, in a ruling which predated the *Hathcock* reversal of *Poletown*, held that the taking could not survive the public use test even as broadly defined under *Poletown*:

Here, the City has not demonstrated that the public is primarily to be benefited from the construction of A.E. Wisne Drive. Rather, the spur benefits specific and identifiable private interests, those of Wisne/PICO. The trial court correctly applied heightened scrutiny and we agree with its analysis. The public benefit here is not clear and significant; rather, it is speculative and marginal. The fact that A.E. Wisne Drive is to be a public road does not, standing alone, automatically mean that the public purpose/public use would be advanced by its construction.<sup>20</sup>

11 *Id* at 467.

12 *Id* at 473.

13 *Id* at 473-74.

14 340 Mich 25; 64 NW2d 903 (1954).

15 *Hathcock*, 471 Mich at 474-75.

16 *Id* at 475.

17 *Id* at 476.

18 473 Mich 242; 701 NW2d 144 (2005).

19 *Id* at 244.

20 253 Mich App 330, 356; 659 NW2d 615 (2003).

In re-examining the case under its new standard enunciated in *Hathcock*, the Michigan Supreme Court reversed the Court of Appeals and ruled that there was a valid public use supporting the construction of the road. The Court focused on the fact that the public would own the road and that the public had access to the road, despite the fact that there was no dispute that a private entity would make primary use of the road. Moreover, the fact that the private entity was paying for all or part of the road did not change the Court's analysis: "In sum, when the public body that establishes a road retains ownership and control of it, and the public is free to use and occupy it, that proposed use is a public use."<sup>21</sup>

### The Blighted Area Rehabilitation Act

Historically, urban renewal projects in major Michigan cities were commonly undertaken pursuant to the Blighted Area Rehabilitation Act.<sup>22</sup> This Act authorized municipalities to remedy conditions found in a blighted area:

"Blighted area" means a portion of a municipality, developed or undeveloped, improved or unimproved, with business or residential uses, marked by a demonstrated pattern of deterioration in physical, economic, or social conditions, and characterized by such conditions as functional or economic obsolescence of buildings or the area as a whole, physical deterioration of structures, substandard building or facility conditions, improper or inefficient division or arrangement of lots and ownerships and streets and other open spaces, inappropriate mixed character and uses of the structures, deterioration in the condition of public facilities or services, or any other similar characteristics which endanger the health, safety, morals, or general welfare of the municipality, and which may include any buildings or improvements not in themselves obsolescent, and any real property, residential or nonresidential, whether improved or unimproved, the acquisition of which is considered necessary for rehabilitation of the area. It is expressly recognized that blight is observable at different stages of severity, and that moderate blight unremedied creates a strong probability that severe blight will follow. Therefore, the conditions that constitute blight

are to be broadly construed to permit a municipality to make an early identification of problems and to take early remedial action to correct a demonstrated pattern of deterioration and to prevent worsening of blight conditions.<sup>23</sup>

The Legislature made clear that it intended a broad interpretation of what amounted to a blighted area, first by identifying broad categories of conditions giving rise to blight, and then following up by directly expressing that "the conditions that constitute blight are to be broadly construed..."<sup>24</sup> The Legislature also liberally empowered municipalities to use condemnation, among other powers, in eliminating blighted areas:

A municipality may bring about the rehabilitation of blighted areas and the prevention, reduction, or elimination of blight, blighting factors, or causes of blight, and for that purpose may acquire real property by purchase, gift, exchange, or condemnation, and may lease, sell, renovate, improve, or exchange such real property in accordance with the provisions of this act.<sup>25</sup>

The Michigan Supreme Court has likewise given a liberal interpretation of the scope of public purpose in takings for blight. In *Sinas v Lansing*, decided in 1951, the Court approved of the transfer of the condemned property by the municipality to a private person or entity under the Act:

The underlying public purpose of that act is to eliminate urban blight. The elimination of urban blight is an adequate justification for the exercise of the power of eminent domain, even where the acquisition is followed by sale to private individuals.<sup>26</sup>

The Michigan Supreme Court focused on the public use of eliminating blight, rather than the fact that there were third-party private beneficiaries to the blight elimination process. Thus, the Michigan Supreme Court historically allowed for broad use of the power of eminent domain in eliminating blighted areas, notwithstanding the fact that the property would ultimately be transferred to private uses. Prior to *Sinas*, the Court had ruled in

<sup>23</sup> MCL 125.72.

<sup>24</sup> *Id.*

<sup>25</sup> See MCL 125.73 (former section).

<sup>26</sup> 382 Mich 407, 412 (1969) (citing *In re Slum Clearance* 331 Mich 714 (1951)).

<sup>21</sup> *Adell Trust*, 473 Mich at 252.

<sup>22</sup> MCL 125.71 et seq.

In *re Edward J. Jeffries Homes Housing Project* that even non-blighted property could be taken within an otherwise blighted area:

The fact that some desirable homes will be destroyed by the project does not affect the public character of the proceedings. Since slums can be eradicated only by the replanning of entire neighborhoods, the few exceptions cannot be held to change the general condition.<sup>27</sup>

Since this broad interpretation of public use for the elimination of blighted areas, including condemnation of non-blighted property in the area, predated the 1963 Michigan Constitution, the Michigan Supreme Court's decision in *Hathcock* would likely not restrict the City of Detroit's use of eminent domain in clearing and repurposing for other private use blighted areas in the city. The City of Detroit likely could make a strong argument that one of the purposes of the Detroit Works Project is the elimination of blight, thus arguably making the use of the power of eminent domain available even under the Court's restrictive decision in *Hathcock*, based upon the pre-1963 precedents broadly interpreting the Blighted Areas Act. However, a later decision by the United States Supreme Court put into motion legislative and constitutional changes in Michigan that restricted the use of eminent domain in blighted areas.

### The Impact of the U.S. Supreme Court's Decision in *Kelo v City of New London*

As *Poletown* had been, *Hathcock* was anticipated to be the harbinger of a new national standard for public use: when *Hathcock* was decided, the United States Supreme Court was considering *Kelo v City of New London*.<sup>28</sup> There, a Connecticut city argued that taking non-blighted property to convey it to a real estate developer for a new development intended to create jobs and boost the city's tax base qualified as a "public use" of the taken property. To the surprise of many, and in accord with precedents like *Berman v Parker*<sup>29</sup> and *Hawaii Housing Authority v Midkiff*,<sup>30</sup> the United States Supreme Court held that although the federal constitution's "public use" limitation prohibits takings for private purposes, it per-

mits takings to promote economic development, even if property is taken for transfer between private owners. The Court seemed to view the federal constitution as setting the "minimum" requirements for public use, noting 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."<sup>31</sup>

As a result of the heightened national attention given to the public use issue after the Supreme Court's decision in *Kelo*, and notwithstanding the protections advanced by *Hathcock*, the Michigan Legislature took on the public use issue, as well as other eminent domain issues, in its 2005-2006 Legislative Session.

The Michigan Senate adopted Senate Joint Resolution E with the goal of presenting a ballot initiative in November, 2006 that would incorporate *Hathcock* into the Takings Clause of the Michigan Constitution. Historically, that clause simply provided in one sentence that "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 substantially enlarged the Takings Clause well beyond one sentence:

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

27 *In re Edward J. Jeffries Homes Housing Project*, 306 Mich 638, 647 (1943).

28 545 US 469 (2005).

29 348 US 26 (1953).

30 467 US 229 (1984).

31 *Id* at 489, n22.



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.

Both the Michigan House and Senate adopted this Resolution with broad bipartisan support. The voters in the 2006 general election similarly supported the Resolution, electing to adopt it as an amendment to the Michigan Constitution by an overwhelming margin.<sup>32</sup>

As the language makes plain, this constitutional amendment went well beyond simply codifying *Hathcock*. Not only does the amendment preclude takings for economic development or tax enhancement, but it also allocates the burden of proof in a public use challenge, requires payment of 125% of fair market value as just compensation for the taking of property consisting of an individual's principal residence, and preserves all rights and benefits afforded to property owners under the law as of November 1, 2005. Further, beyond simply allocating the burden of proof generally for determining public use challenges, the amendment adopts a heightened burden for takings involving blighted properties:

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.

In addition to presenting the ballot initiative that resulted in amendments to the Michigan Constitution, the Michigan Legislature also amended a number of eminent domain-related statutes. For example, the Legislature amended the Acquisition of Properties Act, which grants state agencies and municipalities the power of eminent

domain.<sup>33</sup> The apparent purpose of the statutory amendments was to render the Act consistent with the amendments to the Michigan Constitution. In fact, the amendments replicated in statutory form the constitutional amendments: the statutory amendments prohibit state agencies and public corporations from exercising eminent domain for economic development purposes or to enhance the municipal tax base; they allocate the burden of proof in public use challenges; they require the condemning agency to pay 125% of the taken property's fair market value when the taken property is a principal residence; and they preserve property owners' existing rights as of November, 2005.

In some instances, however, the amendments to the Act went further than the constitutional amendments. For example, the amendments expressly incorporate the standard for "public use" articulated by Justice Ryan in his *Poletown* dissent, which the Michigan Supreme Court adopted in *Hathcock*.<sup>34</sup> This legislation also limited the 125% multiplier's applicability to those residential takings in which the residential structure is actually taken or the taking renders the remaining property nonconforming under the applicable zoning ordinance. The Legislature added a new protection against pretextual takings for private benefit, but excepted drain projects from its scope.

The amendments also added a new definition for "blighted" property:

As used in this section, "blighted" means property that meets any of the following criteria:

- (a) Has been declared a public nuisance in accordance with a local housing, building, plumbing, fire, or other related code or ordinance.
- (b) Is an attractive nuisance because of physical condition or use.
- (c) Is a fire hazard or is otherwise dangerous to the safety of persons or property.
- (d) Has had the utilities, plumbing, heating, or sewerage disconnected, destroyed, removed, or rendered ineffective for a period of 1 year or more so that the property is unfit for its intended use.

<sup>33</sup> See MCL 213.21.

<sup>34</sup> See *id.*

<sup>32</sup> See Mich Const 1963, art 10, § 2.

(e) Is tax reverted property owned by a municipality, by a county, or by this state. The sale, lease, or transfer of tax reverted property by a municipality, a county, or this state shall not result in the loss to the property of the status as blighted for purposes of this act.

(f) Is property owned or under the control of a land bank fast track authority under the land bank fast track act, 2003 PA 258, MCL 124.751 to 124.774. The sale, lease, or transfer of the property by a land bank fast track authority shall not result in the loss to the property of the status as blighted for purposes of this act.

(g) Is improved real property that has remained vacant for 5 consecutive years and that is not maintained in accordance with applicable local housing or property maintenance codes or ordinances.

(h) Any property that has code violations posing a severe and immediate health or safety threat and that has not been substantially rehabilitated within 1 year after the receipt of notice to rehabilitate from the appropriate code enforcement agency or final determination of any appeal, whichever is later.<sup>35</sup>

This detailed definition was taken from the definition of blight found in the Brownfield Redevelopment Financing Act.<sup>36</sup> The Legislature also added this same definition for blighted property to the Blighted Areas Rehabilitation Act.<sup>37</sup> The Legislature further expressly restricted the Acts' broad authorization of the use of condemnation for the rehabilitation of *blighted areas* to the acquisition of *blighted property* as that term is defined in the Act.<sup>38</sup>

35 MCL 213.23(8).

36 See MCL 125.2652.

37 MCL 125.72(b).

38 MCL 125.73.

## Eminent Domain and the Detroit Works Project

Had the Detroit Works Project been undertaken prior to overruling of *Poletown*, the City would have had a strong argument supporting its use of eminent domain to further the project. Even under the more restrictive *Hathcock* decision, however, the Court appeared not to restrict the historic broad authority allowing for the use of condemnation in eradicating blighted areas, including the taking of non-blighted property for the transfer to other private use. Yet the U.S. Supreme Court's subsequent decision in *Kelo* was a game changer. It triggered action by the Legislature that resulted in not only the codification of the *Hathcock* ruling into the Michigan Constitution, but went further to eliminate the ability of municipalities to condemn properties in blighted areas, whether or not the property itself is blighted, and repurpose the entire area by transferring the property to private interests. Blight eradication may still give the City of Detroit the opportunity to utilize condemnation for the acquisition and transfer to new private use, but only for those specific properties that meet the new Brownfield definition of blight.

The use of eminent domain for traditional public uses (e.g., roads, bridges, parks, municipal facilities, etc.) remains a tool available to the City, but likely has limited use in the Detroit Works Project. It remains to be seen whether the decision in *Adell Trust* offers any ability for the City to condemn and retain ownership of property while repurposing it to a use that remains open to both public and private use, and even so, whether it can effectively aid in furthering the Detroit Works Project.

The availability of eminent domain in pursuing a large public works project has not been tested since the Court's decision in *Hathcock* and the Legislature's broad re-writing of the Takings Clause and related legislation. Nevertheless, these judicial, legislative and constitutional changes unquestionably limit the power for undertakings such as the Detroit Works Project.