CRC Memorandum

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Statewide Issues on the November General Election Ballot

Proposal 2006-04: Eminent Domain

This CRC Memorandum is a summary of Report 342, a more detailed analysis of the statewide ballot proposal.

The Michigan Legislature has placed on the November 7, 2006, ballot a proposed constitutional amendment that would more precisely define the balance between property ownership and the governmental power of eminent domain. Eminent domain is "the power of a government to compel owners of real or personal property to transfer it, or some interest in it, to the government."[1] Like police powers and the power to tax, the power of eminent domain has long been considered inherent in government. As an inherent power of government, drafters of American constitutions typically have not felt the need to enumerate the power of eminent domain, but rather have sought to place limits on government's use of this power. This proposed constitutional amendment is an attempt to shift the balance between this governmental power and property owners toward property owners and their right to acquire, own, use and protect private property.

Michigan is one of several states that are addressing this issue. Most have done so legislatively. Five other states – Florida, Georgia, Louisiana, New Hampshire and South Carolina – have proposals to amend their state Constitutions and at least five other states – California, Idaho, Montana, Nevada, and Oregon – have initiatives to amend state laws scheduled to appear on the November 2006 ballots.

Background

Federal Cases

In 2005, the U.S. Supreme Court ruled in *Kelo v. City of New London* that it is permissible for land to be condemned and then transferred to a private entity. The City of New London, Connecticut, proposed to use eminent domain to convert an area that comprised privately-owned properties and land formerly occupied by a naval facility into a state park and a "small urban village." The land would be used for a waterfront conference hotel, restaurants and shopping; new residences; a new U.S. Coast Guard Museum; and a commercial facility for research and development office space.

To decide the *Kelo* case, the Court relied heavily upon two previous decisions: *Berman v. Parker*[2] and *Hawaii Housing Authority v. Midkiff*[3]. Both of these decisions stated that courts must play a very limited role in reviewing the legislature's judgment of what constitutes a public use for purposes of eminent domain. "Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable on other fields." The Court should not "substitute its judgments for a legislature's judgment as to what constitutes a public use unless the 'use be palpably without reasonable foundation.'"[4]

Based on these precedents, the Court in a 5-4 decision found that there can be "no principled way of distinguishing economic development from other public purposes that [the court has] recognized as legitimate

[1] *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall, (Oxford University Press, Inc., New York, NY, 1992) p. 253.

[2] *Berman v. Parker*, 348 U.S. 26 (1954).

[3] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

[4] Ibid., p. 6.

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Proposed Constitutional Amendment

If adopted by the voters, Article X, Section 2 of the 1963 Constitution would be amended to read as follows (Alterations to existing provisions of law are set forth below in UPPERCASE LETTERS to indicate new language.):

> Private property shall not be taken for public use without just compensation therefore [sic] 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.

purposes for eminent domain"[5] and such uses of eminent domain are permissible. In handing down the decision of the court, Justice Stevens observed that each state is free to set limits on the legislative powers of its state legislature and municipalities. States have the latitude to decide the wisdom of using condemnation for purposes of economic development and have the leeway for setting restrictions on its use.

Berman v. Parker set another precedent that is relevant to Proposal 2006-04. The Court accepted the notion that dealing with blight on a parcel-by-parcel basis would not allow the government to get to the root of the problem and therefore an area-wide approach to eradicating blight was acceptable.

Michigan Cases

Poletown Neighborhood Council v Detroit. In Michigan, the use of eminent domain in which condemned property was transferred to a private entity was defined by *Poletown Neighborhood Council v Detroit* for many years.[6] Condemnation was used to acquire homes, businesses, and other property to transfer to a private entity to build an automotive plant. Although the taking involved granting the land to a private corporation, the defined public purposes of expanding the city's tax base, creating new jobs to spur the economy, and the spin-off benefits resulting from suppliers and other businesses locating around the new plant were accepted by the Michigan Supreme Court to fit the public use needed for legal condemnation.

To decide the permissibility of the taking of private property to grant land to a private entity the Court set forth a test to examine whether the public interest is the predominant interest being advanced. Under this heightened scrutiny test there must be substantial proof that the public is the primary beneficiary of the project.

County of Wayne v. Hathcock. The role of *Poletown* as a precedent for the use of eminent domain to transfer property to a private entity ended in 2004 with the decision in *County of Wayne* v.

[5] *Kelo v. City of New London*, 125 S. Ct. 2655, 2673 (2005).

[6] *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616 (1981).

Hathcock.[7] The Court reasoned that it must rely upon the meaning of the language in Article X, Section 2 as understood by the ratifiers of the Constitution – the people at the time of ratification. It was the Court's opinion that the people at the time of adoption of the Michigan Constitution in 1963 did not contemplate the use of eminent domain in which condemned property would be transferred to a private entity for economic development purposes. The Michigan Supreme Court created a three-part test for determining permissible public uses based upon the reasoning of Justice Ryan in his dissent from the *Poletown* decision. This three-part text is explained below.

Proposed Constitutional Language

Under each of Michigan's four constitutions, the majority of cases regarding eminent domain concerned interpretation of concepts such as "just compensation," "public use," and the "necessity" of the property for the project. The changes proposed in this amendment relate to each of these terms.

Just Compensation

The "just compensation" requirement – that those losing their property because of the exercise of eminent domain should be compensated – recognizes that the cost of public improvements should not be borne solely by one or a few property owners. Eminent domain imposes economic and social costs on the property owners and on communities. The proposed amendment recognizes these economic and social costs by requiring, when eminent domain is used to take an individual's principal residence, that compensation is paid of at least 125 percent of the property's fair market value.

In attempting to end the perceived abuse of eminent domain, this proposal makes it more difficult to use eminent domain for any purpose, even those uses commonly seen as legitimate. An argument in favor of such an approach is that condemnation imposes disruption and creates economic and social costs whether it is used for a commonly accepted public use, such as a road or school building, or a less commonly accepted public use, such as transfer to another private entity for economic development.

Condemnation typically is employed only for the few property owners that refuse to participate in the land assembly process or demand more than the condemning governmental unit is willing to pay. This provision could complicate the land assembly process by leading more property owners to hold out for court settlements that would promise at least 125 percent of each property's fair market value. If this occurs, the condemning governmental units will face increased costs for legal fees as well as the higher cost of compensating the owners for their properties. The cost of paying legal fees and compensation to property owners will come out of the coffers of the condemning governmental units, who get their funding from taxes levied at the state or local levels.

While "fair market value" has long been associated with the provision of "just compensation," neither government nor the courts have devised a universal metric for determining "fair market value" — artificially replicating what Adam Smith termed the "invisible hand" of the market. This proposed amendment does not provide greater guidance for determining "fair market value." It remains an ambiguous term, whether the requirement is to pay 100 percent or 125 percent of that amount.

Public Use

The proposed amendment would prohibit governments from using eminent domain to take a private property for transfer to another private entity for the purposes of economic development or to bolster their tax bases. It also would define when the taking of private property to transfer to another private entity is within the understanding of "public use."

The first aim of this provision is to end the uses of eminent domain in which private property is condemned for transfer to a private entity for the purposes of economic development or the enhancement of tax revenues. That process will be aided by establishing the acceptable public uses for which private property may be taken through eminent domain for

[7] *County of Wayne v. Hathcock*, 471 Mich. 415 (2004).

Constitutional Amendment by Reference to Case Law

A significant element of value in a written constitution is that it is a document with which citizens should be acquainted, which they are ready and willing to read, and which they can understand. To achieve this end, it is readily accepted that a constitution should be relatively compact and economical in its general arrangement and draftsmanship; that details should be avoided; and that matters appropriate for legislation should not be incorporated into the organic document.

The general trend since its ratification has been to make the 1963 Michigan Constitution, through the amendment process, much more detailed and elaborate and in many cases a prolix document which incorporated matters that could well have been left for the ordinary law-making processes.

The second paragraph of this proposed amendment works quite the opposite of this trend. Rather than including details that are better suited to legislative implementation, this proposal does not spell out what it proposes should be the organic law of the State. Instead, it references the understanding that exists due to a court case. It is an understanding that is known to jurists and policymakers in Lansing, but is not readily known or easily explainable to the people asked to adopt this amendment.

Such an approach to amending the State Constitution appears to be unprecedented in Michigan history. Never before has the Michigan Constitution been amended simply by referring to an existing law or an understanding of law as interpreted by a Supreme Court decision. The net affect of this approach may be much the same as those amendments that provide too much detail: it is very difficult for citizens to be acquainted with the document, to read through, or to understand what they are reading.

The provision in question reads as follows, "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." Barring adoption of a new constitution or amendment of this provision, a Michigan resident 10, 20, or 50 years from now will have to take the time to research the date of adoption of this amendment and then research case law to learn how the court decision in the *County of Wayne v. Hathcock* case provided the modern day understanding of "public use."

transfer to a private entity. Although the *County of Wayne v. Hathcock* decision is not specifically referenced in the proposed constitutional amendment, this decision provides the "reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph."

The *Hathcock* decision defines a three-part test for deciding when the transfer of a condemned property to a private entity may be an acceptable "public use." The first test says that property may be condemned and transferred to another private entity when it is "public necessity of the extreme sort otherwise impracticable."[8] The necessity identified is a specific kind of need "... limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving."[9] This brand of necessity would include "highways, railroads, canals, and other instrumentalities of commerce."

Second, the Court said a transfer of condemned property to a private entity is permissible when "the private entity remains accountable to the public in its use of that property."[10] Land condemned for a public utility, for instance, would still remain accountable to the public through regulations of the Public Service Commission.

Finally, the Court said that condemned property may be transferred to a private entity "when the selection of the land to be condemned is itself based on public concern."[11] The Court said, "the property must be selected on the basis of 'facts of independent public significance,' meaning that the underlying purposes for resorting

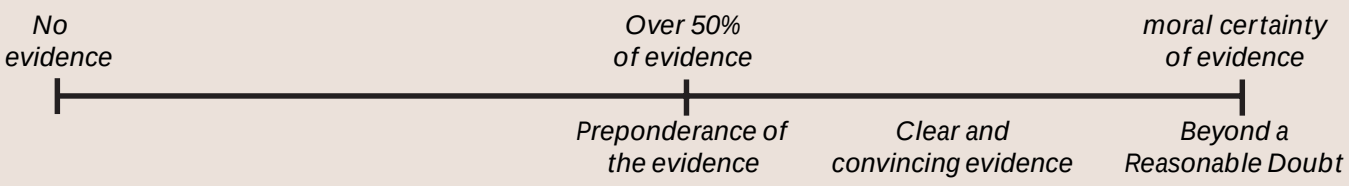
[8] Hathcock, p. 33.

[9] Ibid., p. 33.

[10] Ibid., p. 34.

[11] Ibid., p. 36.

Illustration 1
Explaining the Proof Concepts



to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement."[12]

It should be made clear that these guidelines will define permissible public uses of eminent domain in Michigan with or without adoption of this proposed amendment. The *Hathcock* ruling provides the current interpretation of Article X, Section 2, of the Michigan Constitution. Defeat of this proposed amendment would not change that fact. This amendment acts to place these provisions into the State Constitution by reference so future Michigan Supreme Court decisions cannot undo this as a precedent, as the Court did in 2004 to the *Poletown* precedent.

The Necessity of a Taking

It has long been a complaint of property rights advocates that the burden of proof – the burden of property owners to show that the proposed use for which their property is targeted for condemnation is not a public use or that their property is not necessary for the public use proposed by the governmental unit – has been misplaced in condemnation proceedings. The third part of the proposed amendment would shift the burden of proof from the property owner to the governmental unit to show that the taking is for public use.

Currently, the standings for a property owner to contest condemnation are limited. In general, findings of blight and the public use for which condemnation is proposed may be challenged only if it is alleged that the government engaged in fraud, there was an error in the application of the law, or there was an abuse of the discretion in deciding these actions. Beyond that, property owners may challenge the necessity of taking their property for the proposed public use. These challenges relate to whether their property is needed for the project, and if so, the amount of property needed. Governments begin with a presumption that the public use for which condemnation is proposed is legitimate.

Proposal 2006-04 would remove the current presumption of legitimacy and require the condemning governments to prove that the use is legitimate and the taking of property is necessary. Proposal 2006-04 does this by setting two standards that governments must meet to demonstrate necessity. First, governments must prove "by the preponderance of the evidence" that the takings are for public uses. Preponderance of the evidence is "the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."[13] While there may be evidence that a private entity will benefit from a project for which the taking is necessary, as long as the government can show that the majority of benefit will occur to the public at large, the taking may be considered a public use. Second, if the government taking is for the eradication of blight, then the government must prove "by clear and convincing evidence" that blight exists. This is "evidence indicating that the thing to be proved is highly probable or reasonably certain."[14] In these cases, the governmental unit would have to prove that it is highly probable that the property proposed for condemnation is blighted.

"That" Property. In an initial reading, the modifier "that" for the word "property" toward the end of

[12] Ibid., p. 36.

[13] Garner, Bryan A., ed. Black's Law Dictionary. 7th ed. 1999, p. 1201.

[14] Garner, Bryan A., ed. Black's Law Dictionary. 7th ed. 1999, p. 577.

this paragraph – "… demonstrate, by clear and convincing evidence, that the taking of that property is for a public use." [emphasis added] – seems only to refer to the earlier mention of "a private property" – "… the taking of a private property is for a public use..." If this is the case, then this amendment will shift the burden of proving the necessity of a taking and heighten the standard for blight eradication, but will cause no change to the standard governmental tactic of tackling blight on an area-wide basis. In *Berman v. Parker* and court rulings that have followed, the courts have given governments wide latitude to deal with the eradication of blight on an area-wide basis.

However, to some it is noteworthy that the proposed amendment included the word "that" in this way. The argument of these people is that by using the word "that," the drafters of this amendment have established the expectation that governmental entities will be forced to remedy blight on a parcel-by-parcel basis. The reasoning in this line of thinking is fairly straightforward. The *County of Wayne v. Hathcock* decision established three definitions for deciding if the public use for which private property may be taken for transfer to another private entity. The last definition states that condemned property may be transferred to a private entity "when the selection of the land to be condemned is itself based on public concern," such as the eradication of blight. In these cases, a government's decision to condemn property must be driven by the aim to gain control of blighted land. The alternative use to which the government proposes to put the land is secondary, so the governmental unit cannot argue that it needs to tackle blight on an area-wide basis so it can accommodate a big-box store, for a housing project, or any other large scale redevelopment plan.

The implications of blight eradication on an area-wide basis, as governments are currently given latitude, are that private property can be condemned solely because it was located too close to a dilapidated property.

The implications of blight eradication on a parcel-by-parcel basis, as is proposed in the amendment, are very different. It has been legislatively recognized that "blight is observable at different stages of severity, and that moderate blight unremedied creates a strong probability that severe blight will follow."[15] Michigan law authorizes governments' to engage in area-wide blight eradication so that moderate blight can be stopped from becoming severe blight. Requiring governments to use condemnation on only the most severely blighted properties, for which they can prove by clear and convincing evidence that blight exists, would weaken government's ability to address moderate blight before it becomes severe.

[15] Public Act 344 of 1945, the Blighted Area Rehabilitation Act.

Freeze Existing Right, Grant, or Benefit

The final change to Article X, Section 2, proposed by this amendment is meant to ensure that the existing rights, grants, or benefits enjoyed by property owners are not unintentionally altered by this amendment. This provision is aimed at guarding against unintended consequences of adopting and implementing this amendment. As an example, the Uniform Condemnation Procedures Act has provisions that protect property owners against condemnations of portions of properties that would lessen the value of the balance of the properties. The condemning governmental unit must compensate the owner for the value of the whole property, not just the portion that is needed. Provisions such as these are provided in addition to the constitutional protections. The rights, grants, and benefits protected by this provision could not be changed as a result of voter adoption of this amendment, but could be changed subsequently through the legislative process.