Citizens Research Council of Michigan

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Statewide Issues on the November General Election Ballot Proposal 2006-04: Eminent Domain

September 2006

Report 342

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CITIZENS RESEARCH COUNCIL OF MICHIGAN

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Proposal 2006-04: Eminent Domain

Contents

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Proposal 2006-04: Eminent Domain

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. Drafters of the United States and Michigan constitutions recognized these inherent powers and attempted to balance them with protections such as due process provisions and property rights. Over the years, the balance of governmental powers and people's rights has shifted back and forth. Proposal 2006-04 is an attempt to shift the balance to the property owners and their right to acquire, own, use and protect private property.

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. The U.S. Constitution limits the power of eminent domain in the Takings Clause of the Fifth Amendment, which states in pertinent part: "… nor shall private property be taken for public use, without just compensation." Every state has constitutional provisions that echo the Takings Clause of the U.S. Constitution. Some states also have constitutional provisions that create procedures for the use of eminent domain. Article X, Section 2 of the Michigan Constitution limits the power of the state and its political

[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.

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 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.

subdivisions to use eminent domain and vests determination of just compensation with the courts.

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

Proposal 2006-04 seeks to change Article X, Section 2 in four ways:

1. If the government seeks to use condemnation to take an individual's principal residence, the amount of compensation paid must at least equal 125 percent of that property's fair market value.
2. While the amendment does not attempt to define "public use," it would make clear that public use is not to include takings of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.
3. The proposed amendment would shift the burden of proof that the taking is for a public use from the owner objecting to the taking to the government proposing the taking.
4. Proposal 2006-04 protects against future legislative actions or judicial decisions that would reduce the rights, grants, or benefits afforded to property owners.

These proposed changes are analyzed following the background description.

Background

It has long been recognized that eminent domain permits government to overcome market barriers that would otherwise serve to halt the functioning of that government in conducting an economic activity. Operation of the marketplace without barriers requires willing buyers and willing sellers. A government, when it needs land for a project, acts as a willing buyer, but private property owners are not always inclined to serve the role of willing sellers. A typical market remedy for an unwilling seller would be to seek an alternative seller, but this is not possible for most government projects. Roads and railroads are generally built in as straight a line as possible. Governments place parks, airports, and dams on stretches of contiguous land. Alternative sellers would not serve the needs of governments when embarking on such activities. The power of eminent domain allows governments to force the owner to become a seller and requires that the owner be compensated for the taking of the property.

Courts have accepted the necessity of eminent domain. Historically, the courts have reasoned that all private property rights were subordinate to the paramount power of eminent domain.[2] Courts also have typically accepted that the determination of public use is a legislative decision that courts should debate only if the party opposing the condemnation demonstrates "fraud, error of law, or abuse of discretion."[3]

The commonly accepted uses of eminent domain include public works projects such as roadways, railroads, airports, ports, dams, public buildings, and parks. It is important to note that these uses sometimes include takings in which the property is transferred to a private entity. For instance, railroads are typically privately owned and dams often are constructed for private electric companies. In these instances, it is necessary for the government to facilitate the operation of private entities on the basis that those entities operate as instruments of public commerce.

Courts have given governments wide latitude to use the power of eminent domain. In the past couple of decades, the purposes for which eminent domain has been determined to be appropriate public uses has expanded. Some uses in recent years have involved the taking of private property so that it can be transferred to another private entity for an economic development purpose. The stated public uses in these cases have included job creation, expansion of the municipal tax base, and uses deemed by the govern-

[2] *West River Bridge Co. v. Dix*, 6 How. (47 U.S.) 507 (1848).

[3] MCL 213.56(2).

ments as "better" than those to which the property was previously put. The idea that governments are using eminent domain for such purposes has riled some people, led to several lawsuits, and has led to the introduction of this proposed constitutional amendment.

Early Federal Cases

Berman v. Parker was one of the earliest notable federal cases to allow a condemnation in which condemned property was transferred to a private entity.[4] In the 1950s the Washington, D.C., city government created a redevelopment plan targeting a blighted area in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it used for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of affordable housing. The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use.

The U.S. Supreme Court established several precedents in this case that provide background for Proposal 2006-04. The Court said that eminent domain falls within the police powers of government and it is a legislative decision as to how that power should be executed. The definition of those powers "essentially is the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."[5] The Court went on to state that once the object is within the authority of the legislative body, the right to realize it through the exercise of eminent domain is clear. "For the power of eminent domain is merely the means to the end…." The means by which it will be attained is also for the legislative body to determine. In this case, the means chosen was the use of private enterprise for redevelopment of the area.[6]

The Court also addressed the issue of an area-wide approach to redevelopment rather than a parcel-by-parcel approach. This, too, the Court said was a matter of legislative discretion. "It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, ad shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented… It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."[7]

The U.S. Supreme Court made two determinations in the *Berman* case that are relevant to the proposed amendment to the Michigan Constitution. First, the Court rejected the idea of involving itself with a legislative decision to use eminent domain. If the people have said that the legislative action, the public purpose, is a proper purpose of government, the use of eminent domain is seen merely as a means toward achieving that end. There can be no objective method for courts to oversee this legislative function and involve itself in all legislative actions on the basis of their own view. In this case, if the people accept the eradication of blight as a proper power of government, the courts should not involve themselves in how that aim is achieved. Second, 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

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

[5] Ibid., p. 3.

[6] Ibid., p. 3.

[7] Ibid., p. 3.

the problem and therefore an area-wide approach to eradicating blight was acceptable.

Hawaii Housing Authority v. Midkiff was another important federal case that permitted condemnation to transfer property to a private entity for a "public purpose."[8] This case involved a land oligopoly resulting from the monarchy that predated statehood in Hawaii. At that time, the State and Federal governments owned nearly 49 percent of the state's land, and another 47 percent was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5 percent of the fee simple titles.[9] The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing titles.[10] The Hawaii Housing Authority was created to act as the condemning authority and to facilitate financing for those lessees that wished to acquire ownership of their homes but did not have the financial wherewithal to afford the purchase. Condemned properties would serve no public use under the traditional uses associated with eminent domain, they were transferred from one private property owner to another for the "public purpose" of breaking up the oligopoly and creating a more vibrant housing market.

Here again the Court affirmed that the "public use" requirement is coterminous with the scope of a sovereign's police power. The decision stated that courts must play a very limited role in reviewing the legislature's judgment of what constitutes a public use. "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.'"[11] The courts have not invalidated any compensated takings, as long as the exercise of eminent domain was rationally related to a conceivable public purpose, regardless of the ultimate use by a public or private entity.

The U.S. Supreme Court in each of these cases chose not to interject its opinion on whether the governments' use of condemnation for the public purposes of eradicating blight or breaking up an oligopoly violated the Takings Clause of the Fifth Amendment. Rather, since each was seen as a legitimate interest of government, the Court deferred to the judgment of legislative bodies and their agencies the wisdom of using eminent domain to achieve those ends.

Michigan Cases

Poletown Neighborhood Council v Detroit. For many years in Michigan the use of eminent domain to transfer condemned property to another private entity was defined by *Poletown Neighborhood Council v Detroit*.[12] In the heart of the recession of the late 1970s and early 1980s, the City of Detroit used eminent domain in an effort to accommodate a new assembly plant for General Motors Corporation. Condemnation was used to acquire the homes of more than 4,200 people, 600 businesses, and other property, including 16 churches. 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.

As had the U.S. Supreme Court, the Michigan Supreme Court ruled that determination of public use is a legislative decision. Certainly the Michigan legislature had empowered cities to engage in economic development activities. The use of eminent domain was viewed merely a means to the ultimate goal of economic development.

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

[9] Ibid., p. 3.

[10] Ibid., p. 3.

[11] Ibid., p. 3.

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

The Michigan Supreme Court then weighed in on whether a taking that would directly benefit a private interest such as this was permissible.

> 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 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 use.[13]

To decide this question, the Court set forth a test for cases in which the condemnation power is exercised in a way that benefits specific and identifiable private interests 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. It must be shown that the benefits are not speculative or marginal, but are clear and significant. The Court found the taking in the *Poletown* case to be so.

Since the *Poletown* case was decided in 1981, eminent domain for the public purpose of economic development has been used on numerous occasions in Michigan. Like the *Poletown* case, it was not uncommon for private entities to receive incidental benefit from these takings in addition to the public benefit of the development.

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 for economic development purposes ended in 2004 with the Michigan Supreme Court's decision in *County of Wayne* v. *Hathcock*.[14] While it will take some time to sort out all of the repercussions of *Hathcock*, this much is clear: the *Hathcock* ruling will virtually eliminate the ability of Michigan state and local governments to use eminent domain for economic development purposes by taking property from one owner to transfer to another private owner.

In 2001, Wayne County began assembling land adjacent to Detroit Metropolitan Airport as part of a Federal Aviation Administration (FAA) program to deal with the increased noise associated with the new midfield terminal. The FAA program allowed the County to use the program to purchase 500 acres from those who would sell, conditioned on the requirement that the County make the property economically viable. Over time Wayne County's plans became larger in scale, to construct a business and technology park, hotel and conference center, and recreational facility on 1,300 acres that would be attractive because of its proximity to one of the "largest airports in the world." However, a few of the property owners in this 1,300 acre area refused the county's offer to purchase and condemnation proceedings were initiated. As with other uses of eminent domain for economic development that followed the *Poletown* case, Wayne County justified its use of condemnation to transfer property to a private entity to achieve the public purposes of job creation, property tax base expansion, and tax base diversification.

The Michigan Supreme Court chose not to decide this case on the precedent established by the *Poletown* case, but instead relied on the reasoning of Justice Ryan in his dissent from the *Poletown* decision. The Court reasoned in *Hathcock* 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.

In defining what the ratifiers understood the term "public use" to mean, the Court adopted a three-part definition, any one of which would determine when the transfer of a condemned property to a private entity is a "public use."[15] The first part was "public necessity of

[13] Ibid., at 632

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

[15] The three characteristics adopted were taken from Justice Ryan's dissent in the *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981).

[16] Hathcock, p. 33.

the extreme sort otherwise impracticable."[16] The necessity identified is a specific kind of need:

> [T]he exercise of eminent domain for private corporations has been 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.[17]

This brand of necessity would include "highways, railroads, canals, and other instrumentalities of commerce," all of which could potentially suffer from imperfections in the functioning of the market that could make their construction impossible without land condemnation. Airports, roadways, railways, ports, and canals are constructed on fairly large and/or continuous stretches of land. The refusal by a single landowner to sell their property could disrupt that stretch of land, and thus, complicate these projects. The government's use of eminent domain to facilitate land assembly, and avoid the complications caused by a single landowner, in these cases, is seen as legitimate.

Second, the Court said a transfer of condemned property to a private entity is consistent with the Constitution's "public use" requirement "when the private entity remains accountable to the public in its use of that property."[18] 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."[19] Still relying on Justice Ryan's dissent in the *Poletown* case, the Court said, "the property must be selected on the basis of 'facts of independent public significance,' meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement."[20] Based on Michigan case law, the Court cited *In re Slum Clearance*, a 1951 case in which it was ruled that the City of Detroit's condemnation of blighted housing and its subsequent resale of those properties to private persons was constitutional because "the city's controlling purpose in condemning the properties was to remove unfit housing and thereby advance public health and safety; subsequent resale of the land cleared of blight was "incidental" to this goal."[21]

Thus, the Court did not say that all uses of eminent domain in which the condemned property is transferred to a private entity is forbidden. It said that transfer of condemned property to a private entity may be appropriate where:

1. "public necessity of the extreme sort" requires collective action;
2. the property remains subject to public oversight after the transfer to the private entity; or
3. the property is selected because of "facts of independent public significance," rather than the interests of the private entity receiving the property.

Recent Federal Case

Kelo v. City of New London. Shortly after the Michigan Supreme Court handed down the *Hathcock* ruling, the U.S. Supreme Court ruled in a Connecticut case in which condemned land would be transferred to a private entity. The City of New London, Connecticut, proposed to use eminent domain to revitalize a part of the City, hoping to address characteristics that led a state agency to designate the City a "distressed municipality." The City attempted to convert an area that comprised approximately 115 privately-owned properties and 32 acres of land formerly occupied by a naval facility into a state park and a "small urban village." The small urban village would include a waterfront conference hotel, restaurants and shopping; approximately 80 new residences; a new U.S. Coast Guard Museum; and a commercial facility for research and development office space.[22] Landowners challenged

[17] Ibid., p. 33.

[18] Ibid., p. 34.

[19] Ibid., p. 36.

[20] Ibid., p. 36.

[21] *In re Slum Clearance*, 331 Mich. 714; 50 NW2d 340 (1951), was cited in *Poletown*, supra at 680 (Ryan J., dissenting).

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

the takings as a violation the Takings Clause of the Fifth Amendment to the U.S. Constitution.

The U.S. Supreme Court, in a 5-4 decision, focused on whether economic development is a legitimate purpose for eminent domain rather than to concern itself with the wisdom of transferring condemned land to a private entity. As it had done in *Berman* and *Midkiff*, the court asked whether the proposed use – economic development – was a legitimate purpose of legislative action. The Court found that "Promoting economic development is a traditional and long accepted function of government." As such, it said, the Court must show judicial restraint because there can be "no principled way of distinguishing economic development from the other public purposes that [the Court has] recognized" as legitimate purposes for eminent domain.

In handing down the court's decision, Justice Stevens observed that each state is free to set limits on the legislative powers of its 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.

State Actions

The *Kelo* ruling created an opportunity for Michigan and all other states to set the standards for any future uses of eminent domain. As will be explained below, the Michigan Legislature is attempting through this proposed constitutional amendment and legislation to codify the standards laid out in the *Hathcock* decision and provide protection for property owners in future uses of eminent domain. Other states are taking similar actions to define the proper uses of eminent domain through law changes and/or constitutional amendments.

Many of the states have taken action to tighten the use of eminent domain since the U.S. Supreme Court declared its recognition of states' ability to restrict what it found constitutional.[23] States have prohibited the use of eminent domain for economic development or restricted its use for economic development purposes only when there is a finding of blight. Some states enacted legislation during the time in which the *Kelo* case was before the Court. Others have enacted legislation since the *Kelo* decision to restrict the permissible uses of eminent domain. 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 their November 2006 ballots.

[23] www.castlecoalition.org/legislation/passed/index.html (see also www.castlecoalition.org/legislation/passed/await-gov.html) and www.getliberty.org/sites/lg/whatwedo/kelo_state.html.

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 most notable cases in recent years have concerned the proper "public use" of takings under eminent domain. 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. Public funds, collected as taxes, are paid to the landowners, thus spreading the cost across all taxpaying citizens. Proposal 2006-04 would increase the cost to the government of providing just compensation, and thus to the taxpayers that support that government with their taxes.

> 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.

While American law has always provided for "just compensation" when governments use eminent domain, the struggle has been to establish whether compensation should account only for the value of the real property being taken – the land and the buildings upon it – or also should compensate for the inconvenience imposed on the property owners whose property is being condemned. Eminent domain imposes economic and social costs on the property owners and on communities. In instances where large numbers of properties are condemned, the result may be lost communities. Any time condemnation is used to take a person's house, the disruption in an uprooted family is significant. Friendships are affected, children are forced to change schools, and stress is increased. 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 of at least 125 percent of the property's fair market value is paid.

This provision would apply to the use of eminent domain for any purpose. Other provisions in the proposed amendment relate specifically to the use of eminent domain to transfer property to a private entity for economic development. In attempting to end the perceived abuse of eminent domain, Proposal 2006-04 makes it more difficult to use eminent domain for any purpose, even those 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.

The mechanics of ensuring that property owners receive at least 125 percent of the property's fair market value may take some time to sort out. Condemnation typically is employed only for the few property owners that refuse to participate in the land assembly process – a commonly used economic tool – or demand more than the condemning governmental unit is willing to pay. This provision could complicate the land assembly process by leading more residential property owners to hold out for court settlements that would promise at least 125 percent of each property's fair market value.

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. Sales trends, comparable properties, special assets of the property, and location are all used to help determine the market value of a property, whether property owners are placing their properties on the market of their own volition or governments are attempting to value property for purpose of taxation. For the market to truly work, however, it is necessary to have a willing seller and a willing buyer. The lack of a willing seller both removes one half of that

equation and creates the necessity of using eminent domain to obtain property. 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.

In fact, governments often have had to pay more than market value when condemnation proceedings conclude and judgments are rendered. This has not always been the case. Until the past several decades, governments held the upper hand. They could force owners to sell their properties and the compensation rarely reflected what could be obtained on the open market. The swing in recent years has provided "just compensation" above the "fair market value" owners could obtain on the open market. It would seem a likely future question for the courts, should this amendment be adopted, whether compensation already was paid in sums equal to or greater than 125 percent of fair market value prior to appearance of this proposal on the ballot or should an additional 25 percent be added to the amounts that would have been awarded under the current system.

This provision may increase the cost of eminent domain to condemning governmental units, which ultimately translates to higher costs to taxpayers. The requirement that just compensation be paid to home owners at 125 percent of fair market value is likely to cause more property owners to deny purchase offers during land assembly with the hope of receiving more by taking the issue to trial. The condemning governmental units also will pay increased amounts for legal fees and other incidental costs due to more of these cases going to trial. These costs will come out of the coffers of the condemning governmental units, who get their funding from taxes levied at the state and/or local levels.

Public Use

The proposed amendment would prohibit governments from using eminent domain to take a private property for transfer to a 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."

> "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 *Poletown*, *Hathcock*, and *Kelo*, the governmental units stated that the proposed takings were driven by the promotion of economic development, the hope of creating jobs, and a desire to enhance tax revenues. These are just three cases that are prominent in the eyes of Michigan policymakers at this time. Property rights groups have documented other condemnations that transferred property to private entities for economic development.[24]

The first aim of this provision is to end these 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. On its face this appears a rather straight forward prohibition. Ultimately, however, almost every action of state and local government can be tied – directly or indirectly – to economic development and tax base enhancement. Roads are constructed to facilitate commerce, parks created to improve the quality of life, airports, ports, and rail lines are installed to move people and goods, and public safety protection is provided for the benefit of the people and businesses in the community. Read alone, this steadfast prohibition may apply to almost all uses of eminent domain and almost certainly will lead to future litigation to create judicial tests for determining where to draw the line.

[24] Some of the better known property rights groups that have documented less commonly accepted uses of eminent domain. It should be noted that while property rights groups such as these can point to instances where governments have condemned private property for a project in which another private entity is the primary beneficiary, these do not represent the majority of condemnation uses in Michigan. Most government uses of eminent domain in Michigan are for commonly accepted public uses and the majority of these are by the State government.

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."

That process will be aided by the balance of this clause, which would establish the acceptable public uses for which private property may be taken through eminent domain for transfer to a private entity. Although the *County of Wayne v. Hathcock* decision is not specifically referenced in the proposed constitutional amendment, that court case 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* ruling provided a three-part definition of when the transfer of a condemned property to a private entity may be an acceptable "public use."

A constitution establishes the basic framework within which the state and local governments operate. The legislature is charged with creating laws within that framework. Likewise, local governments must operate within that framework and in accordance with the laws enacted by the legislature. When an interpretation of the constitution is challenged, it is incumbent upon the courts to exercise the power of judicial review. When this occurs, the rulings of the courts may create a new constitutional interpretation that the legislature, local governments, and the lower level courts must observe until the constitution again is amended or superseded by a new court ruling.

Such is the case with the powers of eminent domain. When the Michigan Supreme Court ruled in the *Hathcock* case in July 2004 to overturn the *Poletown* precedent, the Court declared that the use of eminent domain to grant property to a private entity for economic development purposes was not acceptable.

In doing so, the Court provided guidelines within which Michigan governments must operate for future applications of eminent domain. These guidelines were laid out in Justice Ryan's dissent from the *Poletown* decision and referenced in whole in the *Hathcock* decision. As such, they are the "reasons of public use as that term is understood" on the date this amendment would become effective.

These guidelines provide that a transfer of condemned property to a private entity may be appropriate where:

1. "public necessity of the extreme sort" requires collective action;

2. the property remains subject to public oversight after the transfer to the private entity; or

3. the property is selected because of "facts of independent public significance," rather than the interests of the private entity receiving the property.

It should be made clear that these guidelines will define permissible public uses of eminent domain in Michigan with or without adoption of Proposal 2006-04. 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 so future Michigan Supreme Court decisions cannot undo *Hathcock* as a precedent, just as the Court did to the *Poletown* precedent in 2004.

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.

> 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.

The burden of proof currently rests with the property owner contesting a condemnation proceeding. Because eminent domain and findings of blight are legislative actions and courts are reluctant to engage in judicial actions that second-guess legislative actions, the standings for a property owner to contest condemnation are limited. Governments begin with a presumption that the public use for which condemnation is proposed is legitimate. 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 discretion in initiating condemnation proceedings. Beyond that, property owners may only challenge whether their property is needed for the project, and if so, the amount of property needed.

This amendment would remove that presumption of legitimacy and require the condemning governments to prove that the use is legitimate and the taking of property is necessary. It proposes to do so by setting two standards that governments must meet to demonstrate their needs. First, governments must prove "by the preponderance of the evidence" that the takings are for public uses. Second, if the government takings are for the eradication of blight, then the governments must prove "by clear and convincing evidence" that the takings are for public uses. Each of these is a legal term, typically used in trial law to identify the degree to which the two sides must convince the court and/or a jury.

Illustration 1
Explaining the Proof Concepts

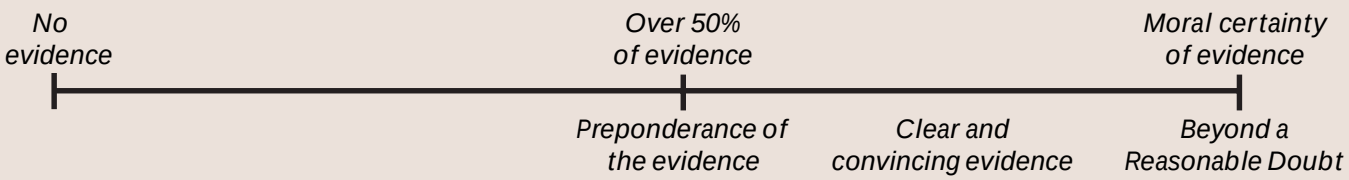

Illustration 1 attempts to explain these concepts.

On the far right of *Illustration 1* is the concept of beyond a reasonable doubt. *Black's Law Dictionary* defines reasonable doubt as, "the doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty."[25] Criminal court cases demand that the prosecution prove the defendant's guilt so that the jury is convinced of such to a moral certainty (the defendant begins with the assumption that they are innocent until proven guilty).

In the middle of *Illustration 1* is the concept of preponderance of the evidence. *Black's Law Dictionary* defines preponderance of the evidence as, "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." Civil courts typically demand that the jury decide for either side based on a finding that over 50 percent of the believable evidence is in that party's favor.

Falling somewhere between these two concepts is a third concept, clear and convincing evidence. *Black's Law Dictionary* defines this to mean, "evidence indicating that the thing to be proved is highly probable or reasonably certain."

Thus, if Proposal 2006-04 is adopted, the burden of proof would shift to the government to show that a condemnation is for a public use, and the governmental unit must do so by meeting the standard of preponderance of the evidence. While there may be evidence that a private entity will benefit from the 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.

Also, if this proposal is adopted, a greater burden of proof would be necessary if the public use for which the takings are necessary is the eradication of blight. In these cases, the governmental unit would have to prove that it is highly probable that the property proposed for condemnation is blighted. Like "art," "blight" is a somewhat ambiguous, relative term. What may be considered blighted in a well-to-do community may be considered perfectly acceptable in less wealthy communities. This proposal would require that the governmental unit proposing condemnation provide clear and convincing evidence that the property is blighted and the application of eminent domain will serve a public use of eradicating blight.

"That" Property. In an initial reading, the modifier "that" for the word "property" toward the end of this paragraph – "… demonstrate, by clear and convincing evidence, that the taking of <u>that</u> 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. This argument is that, by using the word "that," the drafters

[25] Garner, Bryan A., ed. <u>Black's Law Dictionary</u>. 7th ed. 1999.

What is Blight?

Neither the proposed constitutional amendment nor the revisions to Public Act 149 of 1911, the Acquisition of Property by State Agencies and Public Corporations Act provides a definition of "blight." Among existing statutes, Public Act 344 of 1945, the Blighted Area Rehabilitation Act, provides the most definitive legislative description of blight:

> Sec. 2(a) "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 obsolescense [sic] 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.

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 actual use to which the government proposes to put the land is of secondary importance, 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, 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. A run-down, abandoned store front on a major road may meet a definition of blight. Houses on the block running off that major road may be well-kept and beyond any definition of blight. Under current law, governments would be able to condemn those houses if the government's proposed project is intended to eradicate that street-front blight with a major project for which multiple parcels are necessary. This latitude has allowed local governments to condemn nicely maintained, occupied houses, surrounded by abandoned or empty lots, so a developer can erect new housing developments. Owners that have invested in their properties while surrounding properties have become blighted could loose their properties due to the poor decisions of others.

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" (See *What is Blight?* box). 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, may overly restrict government officials in their efforts to make their communities attractive places to live and work. This amendment would weaken government's ability to address moderate blight before it becomes severe.

Clearly eminent domain is not the only economic development tool available to local governments. Municipalities still will be able to use tax incentive programs, infrastructure improvements, and business attraction programs for redevelopment. But users of these tools may hope for only limited success when dealing with absent property owners or areas where multiple redevelopment problems exist. Eminent domain, which has played a legitimate role in the economic redevelopment of many local government units, will play a much more limited role for municipalities if this proposal is adopted.

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 Proposal 2006-04.

> 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.

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 act requires the condemning governmental unit to 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 lessened as a result of voter adoption of this amendment, but could be changed subsequently through the legislative process.

The Impact of Proposal 2006-04

Proposal 2006-04 will not affect all units of government in Michigan equally. The State of Michigan uses eminent domain more than all of the local units of government combined. While the State was not involved in condemning private property for transfer to another private entity in the past, it will face tougher standards and have to pay higher costs for its use of eminent domain.

At the local levels of government, Proposal 2006-04 is likely to affect Michigan urban core cities to a greater extent than suburban or rural communities. Where land assembly is necessary in many of these core cities to facilitate development, developers can often find abundant land for development in the urban fringes and rural parts of Michigan. While blight arguably could be found throughout the state, these older, urban core communities tend to have the greatest concentrations of blight.

The urban core cities share the common task of attempting to reinvent themselves to be attractive, livable places. With the open spaces in the suburbs and exurbs that have led to so much urban sprawl already, these cities face many challenges already. If Proposal 2006-04 does in fact complicate the land assembly process, this proposal could lead more development away from the core cities.

Conclusion

The recent U.S. Supreme Court decision in *Kelo v. City of New London* ruled that the use of eminent domain to transfer property from one private owner to another private entity for economic development purposes is permissible. States have established that economic development is a proper legislative role of government, and eminent domain is a legislative tool available to state and local governments. In handing down this decision, the Court said that states have the latitude to restrict permissible applications of eminent domain.

The use of eminent domain in which private property is transferred to a private entity in Michigan is defined by the Michigan Supreme Court decision in *County of Wayne v. Hathcock*. That decision recognized that governments must at times use eminent domain for the benefit of private entities, but created a three-part definition of when such transfers are permissible. This interpretation of the Michigan Constitution will continue to serve as the guideline for the State, municipalities, and lower courts to use in judging the proper use of eminent domain, whether this proposal is adopted or not, although it could be overturned by a later court.

The proposed amendment would place in the Constitution by reference the three-part definition of when condemnation to transfer property to a private entity is acceptable as established by the *Hathcock* Court to avoid that precedent being overturned by a future court. But it would go beyond a simple codification of the *Hathcock* ruling. It would also amend the eminent domain provision in the Michigan Constitution in several ways to make eminent domain more difficult. It would require compensation to the owner of the condemned property to be paid at 125 percent of the fair market value of the property. It would shift the burden of proof from the property owner to the condemning governmental unit to prove that the taking is for a public use or that proposed use for the eradication of blight is for a public use. It would eliminate the ability of governments to utilize eminent domain in an area-wide approach to blight eradication.

This proposed amendment would end the uses of eminent domain that are seen as abusive by the advocates of property rights, but at the expense of making eminent domain harder to use for even legitimate uses. It would make eminent domain more expensive for the condemning governmental units, which ultimately translates to higher costs for taxpayers, or to foregone projects.