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Spring 2005

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Recommended Citation

33 Real Est. L.J. 478 (Spring 2005)

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Zoning and Land Use Planning

PATRICIA E. SALKIN*

Michigan Supreme Court Overturns Landmark Eminent Domain Case

I. Introduction

In 1981 when the Michigan Supreme Court handed down *Poletown Neighborhood City Council v City of Detroit*,¹ they allowed the City of Detroit to condemn private property and to transfer the land to the General Motors Corporation for the construction of an automobile assembly facility. This decision set in motion a national

precedent that supported the use of eminent domain in blighted areas for economic development purposes. The Michigan high court brought this precedent to a screeching halt in late 2004 with their decision in *County of Wayne v Hathcock*.² While the *Hathcock* case, discussed below, was decided strictly on Michigan state constitutional grounds, it has garnered national attention in part because the United States Supreme Court has granted *certiorari* this term in another eminent domain case, arising out of Connecticut, where the Court will have an opportunity to review the public purpose clause of the Fifth Amendment to the U.S. Constitution.³ While the U.S. Supreme Court case will be discussed in detail in a forthcoming column following the Court's decision, this column may help readers better understand the raging national

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¹40 Mich. 616, 304 N.W. 455 (1981).

²471 Mich. 445, 684 N.W.2d 765 (2004).

³The Connecticut case is *Kelo v City of New London*, 268 Conn. 1, 843 A.2d 500 (2004). Oral arguments are scheduled for February 22, 2005 before the U.S. Supreme Court. This case has attracted an unusually large number of amicus curiae briefs for more than thirty organizations and individuals on both sides of the debate. These briefs will be discussed in the forthcoming column.

debate over the appropriate use of eminent domain powers.

II. *County of Wayne v Hatchcock* – Background

After investing approximately \$2 billion to renovate the county airport, in an effort to obviate perceived problems related to noise from increased air traffic, Wayne County began a program of purchasing neighboring properties through voluntary sales to accomplish noise abatement.⁴ The County purchased approximately 500 acres in scattered, nonadjacent plots throughout an area south of the airport.⁵ The agreement between the County and the FAA (which had provided approximately \$21 million in funding towards the renovations) provided that any properties acquired through this program were to be put to economically productive use.⁶ To meet this mandate, the county supported the concept of developing a large business and tech-

nology park with a conference center, hotel accommodations and a recreational facility, known as the “Pinnacle Project.”⁷ Construction of this state-of-the-art business and technology park was proposed in a 1,300-acre area adjacent to the airport, and it was believed that it would create thousands of jobs, millions of dollars in tax revenue, and would accomplish the goal of broadening the County’s tax base from predominantly industrial to a mixture of industrial, service and technology.⁸ In an effort to acquire more land needed to assemble the 1,300-acre site, the County again sought voluntary sales from landowners, resulting in the purchase an additional 500 acres.⁹

The County determined that an additional 46 parcels, distributed in a checkerboard fashion throughout the project area were needed, and that these parcels were not likely to be acquired through the voluntary

⁴471 Mich. 445 at 451, 684 N.W.2d 765 at 770.

⁵Id.

⁶Id. at 452.

⁷Id.

⁸Id. According to expert testimony at trial, it was asserted that the Project would create thirty thousand jobs and add \$350 million in tax revenue for the county.

⁹Id. at 452.

program.¹⁰ Therefore, in July 2000, the County Commission adopted a Resolution of Necessity and Declaration of Taking, authorizing the acquisition of the remaining 300 acres.¹¹ Twenty-seven property owners accepted written offers of purchase from the County, leaving 19 additional parcels still needed for the project.¹² In April 2001, the County formally initiated condemnation actions for each of these parcels,¹³ resulting in the litigation challenging the public necessity for the eminent domain action and challenging the constitutionality of the action on the

grounds that this project would not serve a public purpose.¹⁴

Both the trial court and appeals court upheld the County's actions and, relying on the *Poletown* decision, found that there was a valid public purpose served by the Pinnacle Project.¹⁵ The State Supreme Court directed the parties to brief the following three issues (which were also briefed by the fourteen amicus curiae): 1) Whether the County has the authority to take the property under state statute;¹⁶ 2) Whether the proposed takings were for a public purpose given that property was likely to be

¹⁰Id. at 453.

¹¹Id.

¹²Id.

¹³The County condemned the properties for the following purposes: "(1) the creation of jobs for its citizens, (2) the stimulation of private investment and redevelopment in the county to insure a healthy and growing tax base so that the county can fund and deliver critical public services, (3) stemming the tide of disinvestment and population loss, and (4) supporting development opportunities which would otherwise remain unrealized." Id.

¹⁴Id. at 453.

¹⁵Id. at 454.

¹⁶The following statutory provisions were relevant: To be constitutional, a condemnation must be authorized, necessary, and for a public purpose. MCL 213.25; MCL 213.56(1), (2); Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the

transferred to private entities; and 3) Whether the “public purpose” test in *Poletown* is consistent with the State Constitution,¹⁷ and if not, whether the case should be overturned. The case was argued before the Supreme Court of Michigan on April 21, 2004, and on July 30, 2004 the Court handed down their decision.

III. The Decision

A. Review under the Michigan Statutes

In reviewing the statutory authority for condemnation, the Court noted that it must “determine only whether the proposed condemnations are *necessary for public purposes*, whether those purposes are *within the scope of the county’s powers*, and whether the takings are *for the use or benefit of the public . . .*”¹⁸ Turning first to the question of whether the statute authorizes the county to exercise the power of eminent domain in general, the

Court quickly concluded that it does.¹⁹ The second inquiry focused on whether the particular condemnation action was within the scope of the County’s powers, and the Court again concluded that it was.²⁰

The Court next examined whether the County exercised its power in accordance with the statutory requirement of advancing a “public purpose.” Concluding that they did, the Court found, “A transition from a declining rustbelt economy to a growing, technology-driven economy would, no doubt, promote prosperity and general welfare. Consequently, the county’s goal of drawing commerce to metropolitan Detroit and its environs by converting the subject properties to a state-of-the-art technology and business park is within this definition of public purpose.”²¹

Under Michigan statute, the exercise of eminent domain must also be found to be

purpose of condemnation the unit may proceed under the provisions of this act. MCL 213.23.

¹⁷Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Mich. Const. Art 10 § 2 (1963).

¹⁸Id. at 684 N.W.2d 765 at 773.

¹⁹Id. at 772-3.

²⁰Id. at 773-4.

²¹471 Mich. 445 at 462, 684 N.W. 2d 765 at 776.

“necessary.”²² The condemning authority must make the determination of public necessity which can only be overturned with a showing of “‘fraud, error of law, or abuse of discretion.’”²³ The defendants advanced the following three arguments: 1) That the county is impermissibly stockpiling land for speculative future use since specific purchasers were not identified for the parcels to be condemned and there was no proof that these parcels would be put to productive use.²⁴ The Court found this argument unpersuasive because the County had a definite plan of erecting a “business and technology park as soon as possible,” and the acquisition of the needed parcels would enable the County to assemble the

critical mass of property needed.²⁵ 2) That the condemnations were not necessary because the County had not cleared all procedural hurdles for the project.²⁶ The Court found that this argument does not relate to what is “‘necessary’” to advance one of the specified purposes.²⁷ 3) The county did not prove that a business and technology park was necessary for the public.²⁸ The Court determined that this argument too was unpersuasive and it impermissibly shifted the burden of proof to the County.²⁹

Next the Court addressed the statutory requirement that condemnation powers must also be for the “‘use or benefit of the public.’”³⁰ The Court had no difficulty in finding that the Pinnacle Project would benefit the public, noting that the project

²²Id. at 463.

²³Id. citing to MCL 213.56(2) (“With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.”)

²⁴471 Mich. 445 at 463, 684 N.W.2d 765 at 777.

²⁵Id. at 465.

²⁶Id. The defendants cited to the fact that the County needed a special exclusion from the FAA to use the land for the project, that environmental issues had to be reviewed and that a local district financing authority along with a tax increment finance plan had to put in place.

²⁷Id.

²⁸Id.

²⁹Id. Furthermore, the Court noted that the defendants failed to brief this issue so the Court could simply consider it abandoned.

³⁰471 Mich. 445 at 466, 684 N.W.2d 765 at 778.

would bring jobs to a struggling economy, add tax revenues to increase resources available for public services, and it would attract investors and business to the area to reinvigorate the local economy.³¹ The defendants argued that the benefit that private parties would receive under the project outweighs any benefit the public might receive, and that therefore the action is outside the 'public use or benefit' requirement of the statute.³² The court found this argument unpersuasive, stating that the defendants simply did not prove that the condemnations would fail to provide a "public benefit."³³

B. Review Under the Michigan State Constitution

Concluding that Wayne County acted in accordance with applicable statutory provisions, the Court turned to the State Constitution, which also limits the state's power of eminent domain, to determine whether the condemnations

met the constitutional requirement of "public use."³⁴ Determining that the phrase "public use" is a legal term of art, the Court noted that the meaning had to be discerned respecting the intent of the drafters and the meaning of the phrase at the time it was ratified in 1963.³⁵ The Court identified the constitutional issue as whether the condemnation of the subject properties and the subsequent transfer of those properties to private entities were within the common understanding of the "public use" requirement at the time of ratification.³⁶

Noting that the constitutional "public use" requirement does not prohibit the transfer of condemned property to private entities, the Court stated that the constitution does prohibit the transfer of condemned property to private entities for private use.³⁷ Citing to the dissent in *Poletown*, the Court states that there are three factors that have been identified to determine whether a pri-

³¹Id.

³²Id.

³³471 Mich. 445 at 467, 684 N.W.2d 765 at 778.

³⁴Id. Art. 10 § 2 of the Michigan Constitution provides, "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law."

³⁵471 Mich. 445 at 471, 684 N.W.2d 765 at 779.

³⁶Id.

³⁷471 Mich. 445 at 472, 684 N.W.2d 765 at 781.

vate entity is putting the condemned property to public or to private use.³⁸ These are: 1) Whether the exercise of eminent domain involving private enterprises is limited to those enterprises whose very existence depends upon the use of land that can only be assembled by the coordination of governmental body (e.g., “collective action is needed to acquire land for vital instrumentalities of commerce”).³⁹ These have included highways, roads, canals and other instrumentalities of commerce.⁴⁰ 2) Where private entity remains accountable to the public in its use of the condemned property (e.g., where the entity is subject to public oversight).⁴¹ 3) Where the selection of the land for condemnation is based upon a public concern (e.g., where there are “facts of independent signifi-

cance” that turn on the act of condemnation itself rather than on the use to which the property might ultimately be put).⁴²

The Court concluded that the subject condemnations do not meet any of these criteria and are therefore unconstitutional under what the public would have understood the phrase “public use” to mean at the time of the ratification of the 1963 Constitution.⁴³ Specifically, the Court determined that: 1) the business and technology park is “not an enterprise whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.”⁴⁴ 2) The Pinnacle Project is not subject to public oversight, and after the parcels are sold, it is intended that the private entities would use the

³⁸Id.

³⁹Id.

⁴⁰Id.

⁴¹471 Mich. 445 at 474, 684 N.W.2d 765 at 782.

⁴²Id., citing as an example, a condemnation by the City of Detroit where the controlling purpose was to remove unfit housing and thereby advance public health and safety, noting that the subsequent resale of the property cleared of blight, was “incidental” to the goal.

⁴³471 Mich. 445 at 475, 684 N.W.2d 765 at 783.

⁴⁴471 Mich. 445 at 477, 684 N.W.2d 765 at 783. The Court noted, “To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.”

property to pursue their own financial welfare.⁴⁵ 3) There is nothing about the act of condemning the property here that serves the public good.⁴⁶

Addressing the *Poletown* case, the Court found that the decision was a “radical” departure from the Court’s pre-1963 eminent domain jurisprudence, departing from the “common understanding” or “public use” at the time of ratification.⁴⁷ The Court further determined that *Poletown* inappropriately concluded that a generalized economic benefit was sufficient to justify the transfer of condemned property to a private entity, and consequently the *Poletown* decision

and the proposition that alleviating unemployment and revitalizing the economy of a community constitutes a public use are specifically overruled.⁴⁸ As a result, the Court finally concluded that this decision shall have a retroactive effect upon all pending (Michigan) cases that have raised and preserved a *Poletown* challenge.⁴⁹

IV. Conclusion

One of the practical effects of this ruling is that it will likely cost taxpayers in Michigan more when government exercises its eminent domain power.⁵⁰ Municipalities in Michigan will also face a greater challenge in their ef-

⁴⁵Id. The Court continued, “The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners’ collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendant’s properties will continue to contribute to the health of the local economy.”

⁴⁶Id. The Court found no facts of independent public significance to justify the condemnations, noting that the only public benefits cited by the County arise only after the lands are put to public use.

⁴⁷471 Mich. 445 at 483, 684 N.W.2d 765 at 787.

⁴⁸Id.

⁴⁹Id. In overturning this significant precedent, the Court says, “. . . because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court’s eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule *Poletown* in order to vindicate our Constitution, protect the people’s property rights, and preserve the legitimacy of the judicial branch as the expositor-not creator-of fundamental law.” Two of the judges in their concurring opinions indicate that they would apply this prospectively instead of retroactively. Id.

⁵⁰See, John Gallagher, “*Poletown* seizures are ruled unlawful: State Supreme Court restricts government rights to take land,” Detroit Free Press (July 31, 2004) available at: <http://www.freep.com/news/mich/>

forts to implement sorely needed community redevelopment projects.⁵¹ The effect that this case will have on the national scene is unclear. The precedent from *Poletown* was used to justify and uphold similar governmental activities across the country over the last 20 years. While some predict that Courts will now retreat in light of *Hathcock*, this may not occur as the case was decided pursuant to Michigan state constitutional history and not under the United State constitution. Others predict that this case could influence the U.S. Supreme Court's analysis later this term in *Kelo*, which could lead to, among other things, a different standard of

scrutiny in eminent domain cases, a different formula for appropriate compensation in eminent domain cases, and/or a narrowing of the circumstances under which eminent domain can be used under the public purpose clause of the Constitution. It is also possible that the U.S. Supreme Court will resist the temptation to articulate a bright-line test in eminent domain cases, opting for an ad hoc factual inquiry consistent with the jurisprudence in the area of regulatory takings. Stay tuned for the next column when the discussion focuses on *Kelo v City of New London*.⁵²

[land31_20040731.htm](#) (site visited October 2004) ("What the decision does mean is that the cost of land just went up for municipalities trying to accomplish economic development. Now that governments can no longer use the threat of seizure, private owners and speculators could demand higher prices to get out of the way of projects that government leaders deem essential.").

⁵¹Id., quoting Wayne County Executive Robert Ficano as saying, "the Michigan Supreme Court's decision to change Michigan law and divest municipalities from their ability to create jobs for their citizens is a disappointment not only for Wayne County, but for all of the Michigan communities struggling to address these difficult economic times."

⁵²For more information on the current debate surrounding eminent domain, visit the websites of: The Institute for Justice (www.ij.org) (The Institute has been actively involved in litigation across the country in support of individual property owners challenging the government use of eminent domain. The Institute represents the property owners in *Kelo*.); the American Planning Association (www.planning.org) (The APA recently adopted a policy guide on community redevelopment and suggests appropriate planning strategies to precede the use of eminent domain. APA has also submitted an amicus curiae brief in *Kelo*); and the National League of Cities (www.nlc.org) (The National League of Cities submitted an amicus curiae brief in *Kelo* and helped to coordinate the efforts of other amici on behalf of the City of New London.)