

Legislative Analysis



EMINENT DOMAIN: PROHIBIT CONDEMNATION FOR THE PRIMARY BENEFIT OF A PRIVATE ENTITY

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House Bill 5060

Sponsor: Rep. Glenn Steil, Jr.

Committee: Government Operations

Complete to 9-9-05

A SUMMARY OF HOUSE BILL 5060 AS INTRODUCED 7-20-05

Public Act 149 of 1911 permits state agencies and other public corporations to take private property, when necessary, under the following circumstances: (1) for a public improvement; (2) for the purposes to be advanced by the corporation's or agency's incorporation; or (3) for public purposes within the scope of the corporation's or agency's powers *for the use or benefit of the public*.

House Bill 5060 would amend the act to specify that a taking of private property would not be considered to be *for the use or benefit of the public* if the property is to be transferred to a private entity for the primary benefit of a private entity.

MCL 213.23

FISCAL IMPACT:

The bill would have an indeterminate fiscal impact.

BACKGROUND INFORMATION:

Kelo v. City of New London

In June 2005, the United States Supreme Court, in *Kelo v. City of New London*, upheld as consistent with the "public use" requirement under the 5th Amendment to the U.S. Constitution the condemnation of private property by the City of New London, Connecticut, for the purposes of redeveloping a distressed area of the city in order to create jobs, generate tax revenue, and revitalize the community. The court substituted the phrase "public purpose" for the phrase "public use" (citing precedents) and gave deference to the city's determination regarding the need for and justification of the condemnation, in opining that, "[b]ecause that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment."

The court said, "Though the city could not take petitioners' land simply to confer a private benefit on a particular private party . . . , the takings at issue here would be executed pursuant to a carefully considered development plan, which was not adopted 'to

benefit a particular class of identifiable individuals.'" It added, "Moreover, while the city is not planning to open the condemned land . . . to use by the general public, this 'Court long ago rejected any literal requirement that condemned property be put into use for the . . . public.' Rather it has embraced the broader and more natural interpretation of public use as 'public purpose.' Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power."

Of note, the U.S. court specifically referred to a recent Michigan decision (*County of Wayne v. Hathcock*) in the *Kelo* decision, in saying that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised." The *Hathcock* decision was cited as an example of state constitutional law restricting the takings power.

County of Wayne v. Hathcock and Poletown Neighborhood Council v. City of Detroit

In the 2004 *Hathcock* decision, the Michigan Supreme Court prohibited Wayne County from condemning property south of Detroit Metropolitan Airport for the purposes of redeveloping the area into a high-tech industrial park. In doing so, the court unanimously overturned its 1981 decision in *Poletown Neighborhood Council v. City of Detroit*.

The basic question the court sought to address in *Wayne v. Hathcock* was whether the county's proposed condemnation and subsequent transfer of property to a private entity was consistent with the understanding of "public use" among those sophisticated in the law at the time of the 1963 state constitution's ratification. The court held that the condemnation of property to a private entity is considered to be a permissible "public use" when it possesses one of three characteristics (originally identified as part of Justice Ryan's dissenting opinion in *Poletown*): (1) public necessity of the extreme sort requires collective action; (2) the property remains subject to public oversight after transfer to a private entity; and (3) the property is chosen because of facts of independent public significance rather than the interests of the private entity. The court said that the proposed condemnation in *Wayne* did not possess any of those characteristics and, therefore, was unconstitutional.

The court critiqued its earlier ruling in *Poletown*, finding that decision to be a "radical and unabashed departure from the entirety of [its] pre-1963 eminent domain jurisprudence." The court held that "the *Poletown* majority concluded, for the first time in the history of our eminent domain jurisprudence, that a generalized economic benefit was sufficient under Article 10, Section 2 to justify the transfer of condemned property to a private entity." Prior to *Poletown*, the court continued, "we have never held that a private entity's pursuit of profit was a 'public use' for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy."

In *Poletown*, the 1981 court had permitted the City of Detroit to clear the Poletown neighborhood of 1,300 homes and 140 businesses to assemble land for a new General Motors plant. The court found, generally speaking, that the expected economic benefit (including an anticipated 6,150 jobs) to be a valid public use as required by the state constitution when property is condemned. The court said, "[t]he power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental."

The Hathcock court in 2004 rejected this reasoning, saying "[e]very business, every productive unit in society, does...contribute in some way to the commonweal. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown's* 'economic benefit' rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore', and the like."

State Constitutional Provisions

Article 10, Section 2 of the 1963 Michigan State 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. Compensation shall be determined in proceedings in a court of record." Additionally, the 5th Amendment of the U.S. Constitution provides that private property shall not be taken for public use without just compensation.

Eminent Domain Legislation in Other States

The National Conference of State Legislatures (NCSL) maintains a website on the *Kelo* decision and state legislation introduced in response to that decision. Through early August, at least 11 other state' have introduced legislation that would, in large part, prohibit the use of eminent domain for economic development purposes that primarily benefit a private entity. Thus far, Alabama (SB 68), Delaware (SB 217), and Texas (SB 7) have enacted legislation directly in response to the *Kelo* decision, while three other states – Utah, Nevada, and Colorado – passed legislation prior to the *Kelo* decision. Other states, including California, are contemplating constitutional amendments. Additionally, legislation was recently introduced in Ohio to place a moratorium on the use of eminent domain to take private property (except property located in a blighted area and except in certain limited circumstances) for economic development purposes through December 31, 2006. The bill (SB 167) would also establish a 25-member legislative taskforce to study eminent domain and its impact on land use planning in the state.

The website address is at www.ncsl.org/programs/natres/EMINDOMAIN.htm

Further Reading

-- The state Supreme Court's opinion in *County of Wayne v. Hathcock* is available on the court's website at:

www.courts.michigan.gov/supremecourt/Clerk/Opinions-03-04-Term/124070.pdf

-- Briefs submitted to the court in *County of Wayne v. Hathcock* are also available on the court's website at:

www.courts.michigan.gov/supremecourt/Clerk/04-04/124070-78/124070-78-index.htm

-- The Michigan State Law Review (2004, Volume 4) includes a series of articles taken from a symposium on the *Hathcock* decision including the following:

The Changing Landscape and Recognition of the Public Use Limitation: Is Hathcock the Precursor of Kelo? (Alan T. Ackerman, 2004 Mich. St. L. Rev. 1041)

Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use. (Ilya Somin, 2004 Mich. St. L. Rev. 1005)

-- For a discussion on the Poletown neighborhood and the court's decision see the following articles:

John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 Washington and Lee Law Review 49 (1984)

Emily Lewis, *Corporate Prerogative, "Public Use" and a People's Plight: Poletown Neighborhood Council v. City of Detroit*, 1982 Detroit College of Law Review 907.

-- For the Connecticut Supreme Court's opinion and briefs filed with the U.S. Supreme Court for the *Kelo* case see the following website:

http://supreme.lp.findlaw.com/supreme_court/docket/2004/february.html#04-108

-- The U.S. Supreme Court's *Kelo* decision and transcripts of oral arguments are available on the Court's website at <http://www.supremecourtus.gov>

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.