

# Legislative Analysis

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## EMINENT DOMAIN

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**House Bill 5060 (Substitute H-4)**  
**Sponsor: Rep. Glenn Steil, Jr.**

**Senate Bill 693 (Substitute H-2)**  
**Sponsor: Sen. Cameron S. Brown**  
**House Committee: Government Operations**  
**Senate Committee: Transportation**

**Complete to 5-8-06**

## **A SUMMARY OF HOUSE BILL 5060 AND SENATE BILL 693 AS REPORTED FROM HOUSE COMMITTEE 5-2-06**

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.

Under the act, when the Legislature appropriates funds to a state agency or the Office of the Governor to acquire land or property for a designated public purpose, the unit to which the appropriation has been made is authorized to acquire the property either by purchase, condemnation, or otherwise, and may proceed under the act for the purpose of condemnation

Generally speaking, the bills limit the instances that eminent domain can be used for the benefit of private entities. *In essence, they place, in statute, the allowable uses of eminent domain as specified in the state Supreme Court's 2004 ruling in County of Wayne v. Hathcock.*

### **House Bill 5060**

The bill specifies that public corporations could proceed only under its specific delegated statutory powers of condemnation. Within those statutory powers, a public corporation would have to commence proceedings under the Uniform Condemnation Procedures Act.

The bill would prohibit the taking of private property for transfer to a private entity unless the proposed use of the land is "invested with public attributes sufficient to fairly deem the entity's activity governmental by one or more of the following":

- A public necessity of the extreme sort exists that requires collective action to acquire land for instrumentalities of commerce, including a public utility or a state or federally regulated common carrier, whose very existence depends on the use

of land that can be assembled only through the coordination that central government alone is capable of achieving.

- The property or use of the property would remain subject to public oversight and accountability after the transfer of the property and would be devoted to the public use, independent from the will of the entity taking it.
- The property was selected on facts of independent public significance or concern, including blighted property, rather than the private interests of the entity to which the property eventually was transferred.
- The property or use of the property will provide, after the transfer of the property, a public service, or the property will be substantially occupied by a public entity for a governmental purpose or by the general public for its enjoyment. [This provision was not included as part of the Supreme Court's *Hathcock* decision.]

The bill specifies that taking of property for public use would not include the taking of private property for transfer to a private entity for either general economic development or the enhancement of tax revenue, and also would not include a taking that is a pretext to confer a private benefit on a known or unknown private entity.

The bill provides that in a condemnation action, the burden of proof is on the condemning authority to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use.

The bill specifies that any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by the State Constitution, by Section 3 of the act or another statute, or otherwise, would not be abrogated or impaired by the bill.

Under the act, the term "public corporations" includes all counties, cities, villages, boards, commissions, and agencies made corporations for the management and control of public business and property. "State agencies" includes all unincorporated boards, commissions, and agencies of the state given by law the management and control of public business and property, and the Office of Governor or a division of the Office of Governor.)

MCL 213.23

### **Senate Bill 693**

The bill would amend Public Act 149 of 1911 to specify that public corporations could proceed only pursuant to their specific delegated statutory powers of condemnation. Within those statutory powers, a public corporation would have to commence proceedings under the Uniform Condemnation Procedures Act.

MCL 213.23

## ***BACKGROUND INFORMATION:***

### **Constitutional Provisions**

Article 10, Section 2 of the State Constitution provides, "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." Additionally, the 5<sup>th</sup> Amendment of the U.S. Constitution similarly provides that private property shall not be taken for public use without just compensation.

Also, the legislature recently adopted, and placed on the November 2006 general election ballot, Senate Joint Resolution E. The joint resolution, if approved by voters, would amend Article 10, Section 2 of the State Constitution to add that "public use" would not include the taking of private property for the transfer of ownership to a private entity for the purpose of economic development or enhancement of tax revenue. In addition, if an individual's principal residence is taken for a public use, the amount of compensation would have to be at least 125 percent of the property's fair market value, in addition to any other reimbursement allowed by law.

The joint resolution would further add that in a condemnation action, the burden of proof is on the condemning authority to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use. If, however, the action involves the taking of property for the purposes of eradicating blight, the condemning authority would have to demonstrate by clear and convincing evidence that the taking is for a public use.

The joint resolution further provides that any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by Section 2, by statute, or otherwise, would not be abrogated or impaired by the amendment

### **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, Conn., 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 & 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."

#### **FISCAL IMPACT:**

The bill would have an indeterminate impact on the land acquisition costs of the state and local units of government.

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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.