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BILL ANALYSIS

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Senate Bill 693 (as enrolled)
Senate Joint Resolution E (as enrolled)
House Bill 5060 (as enrolled)
Sponsor: Senator Cameron S. Brown (S.B. 693)
Senator Tony Stamas (S.J.R. E)
Representative Glenn Steil, Jr. (H.B. 5060)
Senate Committee: Transportation
House Committee: Government Operations

PUBLIC ACT 368 of 2006

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Date Completed: 10-19-06

RATIONALE

Under the United States and Michigan Constitutions, the government may take, or "condemn", private property for a public use--that is, exercise its power of eminent domain--as long as the government provides the owner with just compensation. The question of what constitutes "public use" has been the subject of litigation at the State and Federal levels. In 2004, the Michigan Supreme Court issued an opinion in *County of Wayne v Hathcock* (471 Mich 445) overturning its 1981 decision in *Poletown Neighborhood Council v Detroit*, which had allowed the condemnation and transfer of private property to a private entity for the purpose of economic development--in that case, a General Motors plant. In 2005, the U.S. Supreme Court decided *Kelo v City of New London, Connecticut* (545 U.S. 469), affirming that economic benefit constitutes "public use" or "public benefit", and determining, therefore, that a city's taking of private property for that purpose is constitutional. (Both *Hathcock* and *Kelo* are described below, under **BACKGROUND**, along with recently enacted and pending Federal eminent domain legislation.) The U.S. Supreme Court noted, however, "...nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." Some people believe that the *Hathcock* decision should be codified in State statute, and incorporated in the State Constitution, in order to prohibit a unit of government from taking and transferring private property to a private entity by eminent domain solely for

economic development or increased tax revenue.

CONTENT

Senate Bill 693 and House Bill 5060 amend Public Act 149 of 1911, which regulates the acquisition of property by State agencies and public corporations, to do the following:

- 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 deem the entity's activity governmental.
- Provide that the burden of proof is on the condemning authority to demonstrate that a taking is for a public use, and, if a proposed taking is for the eradication of blight, require a higher standard of proof.
- Require an individual whose principal residence is taken to be paid at least 125% of the property's fair market value (FMV).

Senate Joint Resolution E proposes to amend the State Constitution to provide that the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue will not be considered to be for public use; and require the payment of at least 125% FMV if a principal residence is taken.

Senate Joint Resolution E will be submitted to the voters at the November 7, 2006, general election.

Senate Bill 693 and House Bill 5060 are tie-barred to each other and to Senate Joint Resolution E. If Senate Joint Resolution E is approved, the joint resolution and the bills will take effect on December 23, 2006. If the joint resolution is not approved, the bills will not take effect. The bills and proposed constitutional amendment are described below in further detail.

Senate Bill 693 and House Bill 5060

Section 3 of Public Act 149 authorizes any public corporation or State agency to take private property necessary for a public improvement, for the purposes of its incorporation, or for public purposes within the scope of the corporation's or agency's powers for the public's use or benefit, and to institute and prosecute proceedings for that purpose. 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 on behalf of the people of the State to acquire the property either by purchase, condemnation, or otherwise, and may proceed under the Act for the purpose of condemnation.

(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.)

The bills prohibit the taking of private property by a public corporation or State agency for transfer to a private entity unless the proposed use of the property 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 property for instrumentalities of

commerce, including a public utility or a state or federally regulated common carrier, whose very existence depends on the use of property that can be assembled only through the coordination that central government alone is capable of achieving."

- The property or use of the property will remain subject to public oversight and accountability after the transfer of the property and will be devoted to the public use, independent from the will of the private entity to which the property is transferred.
- The property is selected on facts of independent public significance or concern, including blight, rather than the private interests of the entity to which the property eventually is transferred.

The bills specify that "public use" does not include the taking of private property for the purpose of transfer to a private entity for either general economic development or the enhancement of tax revenue.

Under the bills, in a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking is for a public use, unless the condemnation action involves a taking because the property is blighted. In that 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.

If private property consisting of an individual's principal residence is taken for public use, the bills require the amount of compensation made and determined for that taking to be at least 125% of that property's fair market value, in addition to any other reimbursement allowed by law. In order to be eligible for reimbursement under this provision, the person's principal residential structure must actually be taken or the amount of his or her private property taken must leave less property contiguous to the principal residential structure than the minimum lot size, if the local governing unit has implemented a minimum lot size by zoning ordinance.

Under the bills, a taking of private property for public use, as allowed under Section 3, does not include a taking for a public use that is a pretext to confer a private benefit

on a particular private entity. The bills specify that, for purposes of this provision, the taking of private property for the purposes of a drain project by a drainage district as allowed under the Drain Code does not constitute a pretext to confer a private benefit on a private entity.

Each bill states that any existing right, grant, or benefit afforded to property owners as of December 22, 2006, whether provided by the State Constitution, by Section 3 or another statute, or otherwise, will be preserved and will not be abrogated or impaired by the bill.

Under House Bill 5060, "blighted" means property that meets any of the following criteria:

- Has been declared a public nuisance in accordance with a local housing, building, plumbing, fire, or other related code or ordinance.
- Is an attractive nuisance because of physical condition or use.
- Is a fire hazard or is otherwise dangerous to the safety of people or property.
- Has had the utilities, plumbing, heating, or sewerage disconnected, destroyed, removed, or rendered ineffective for at least one year so that the property is unfit for its intended use.
- Is improved real property that has remained vacant for five consecutive years and is not maintained in accordance with applicable local housing or property maintenance codes or ordinances.
- Has code violations posing a severe and immediate health or safety threat and has not been substantially rehabilitated within one year after the receipt of notice to rehabilitate from the appropriate code enforcement agency or final determination of any appeal, whichever is later.
- Is tax reverted property owned by a qualified local governmental unit, a county, or the State.
- Is owned or under the control of a land bank fast track authority under the Land Bank Fast Track Act, whether or not located within a qualified local governmental unit.

Under the definition, the sale, lease, or transfer of tax reverted property or property owned or under the control of a land bank

fast track authority will not result in the loss to the property of the status as blighted for the purposes of Public Act 149.

(Since Senate Bill 693 and House Bill 5060 amend the same section of law and the Senate bill, which does not include this definition, was signed into law after the House bill was signed, Public Act 149 will not include the definition if the bills take effect.)

Senate Joint Resolution E

Article X, Section 2 of the State Constitution prohibits the taking of private property for public use without just compensation first being made or secured in a manner prescribed by law.

The joint resolution proposes to amend Section 2 to provide that "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 revenue. The joint resolution specifies that private property otherwise may be taken for reasons of public use as that term is understood on the joint resolution's effective date.

If private property consisting of an individual's principal residence is taken for public use, the joint resolution requires the amount of compensation to be at least 125% of the property's fair market value, in addition to any other reimbursement allowed by law.

Under the joint resolution, 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 that 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 joint resolution 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, will be preserved and will not be abrogated or impaired by the constitutional amendment.

The joint resolution will be submitted to the voters at the general election on November 7, 2006.

MCL 213.23 (S.B. 693 & H.B. 5060)

BACKGROUND

County of Wayne v Hathcock

Several years ago, Wayne County proposed to construct a large business and technology park (the Pinnacle Project) on land it had purchased through voluntary sales for a noise abatement area adjacent to Metropolitan Airport. The county initiated condemnation proceedings against the owners of 19 parcels of property who refused to sell their land. The property owners filed a motion to review the necessity of the proposed condemnations, arguing that the county lacked the statutory authority to exercise the power of eminent domain in this manner; that the property acquisition was not necessary, as the statute requires; and that the condemnations violated the State Constitution because the Pinnacle Project would not serve a public purpose. The trial court and, subsequently, the Court of Appeals, citing the 1981 *Poletown* decision, affirmed the county's position, and the property owners appealed to the Michigan Supreme Court.

The Supreme Court ultimately determined, in 2004, that the condemnations were authorized under State statute, but did not pass State constitutional muster because the county intended to "...transfer the condemned properties to private parties in a manner wholly inconsistent with the common understanding of 'public use'...".

The Court pointed out that when the State Constitution was ratified in 1963, it was well established that the constitutional "public use" requirement was not an absolute bar against the transfer of condemned property to private entities, although it was equally clear that the requirement worked to prohibit the State from transferring condemned property to private entities for a *private use*. Accordingly, the Court concluded that the transfer of condemned property is a "public use" if it possesses one of three characteristics identified in case law before 1963.

In the first type of constitutional transfer of condemned property to a private entity, a "public necessity of the extreme sort" is involved and addresses a specific need: "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". Examples include highways, railroads, and other instrumentalities of commerce.

In the second type of constitutional transfer of condemned property to a private entity, the acquiring private entity "remains accountable to the public in its use of that property". That is, the land "...will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*"

Finally, condemned land may be constitutionally transferred to a private entity when the selection of the land to be condemned is itself based on public concern. "[T]he 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."

The Court determined that the condemnations related to the Pinnacle Project did not satisfy any of these criteria and thus were unconstitutional. The Court also noted that the only support for the county's position in the Court's eminent domain jurisprudence was the *Poletown* decision, which, it stated, was "...most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence." *Poletown*, according to the Court, was the first case in which it was held that a private entity's pursuit of profit amounted to "public use" because of the residual benefit to the economy. The Court pointed out that virtually any exercise of eminent domain power on behalf of a private entity could be rationalized on the basis of economic benefit. For these reasons, the Court overruled *Poletown*, and directed that its decision to do so should apply to all pending cases in which a challenge to the *Poletown* decision had been raised and preserved.

Kelo v City of New London

In June 2005, the U.S. Supreme Court issued its opinion in this case, addressing whether the City of New London's proposal to use the power of eminent domain to acquire the property of unwilling property owners for a city development plan qualified as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

The Court noted, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." In this case, to effectuate its economic development plan, the city had invoked a state statute specifically authorizing the use of eminent domain to promote economic development.

The Court determined that the city's plan unquestionably served a public purpose, and the takings thus satisfied the public use requirement of the Fifth Amendment. The Court also rejected the petitioners' request to adopt a bright-line rule that economic development does not qualify as a public use, noting that the promotion of economic development "...is a traditional and long accepted function of government". The Court reasoned that the government's pursuit of a public purpose often benefits individual private parties. The Court cited an earlier decision in which it held that public ownership is not necessarily the sole method of promoting the public purposes of community redevelopment projects, and that sometimes, an agency of private enterprise can serve the public end as well as or better than a governmental department.

The petitioners also argued that the Court should require a "reasonable certainty" that the projected benefits of a private development plan actually would occur. The Court disagreed, stating, "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings--no less than debates over the wisdom of other socioeconomic legislation--are not to be carried out in the federal courts."

Although the Court ultimately sided with the city, it stated, "We emphasize 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."

Executive Order

On June 23, 2006, President George W. Bush issued an Executive Order stating, "It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."

The Executive Order requires the U.S. Attorney General to monitor takings by departments and agencies for compliance with the policy, and excludes specifically takings for the purpose of public ownership or exclusive use of the property by the public; projects designated for public, common carrier, public transportation, or public utility use that serve the general public and are subject to regulation by a governmental entity; conveying the property to a nongovernmental entity that makes the property available for use by the general public as of right; preventing or mitigating a harmful use of land that constitutes a threat to public health, safety, or the environment; acquiring abandoned property; quieting title to real property; acquiring ownership or use by a public utility; facilitating the disposal or exchange of Federal property; and meeting military, law enforcement, public safety, public transportation, or public health emergencies.

Federal Legislation

Appropriations. Public Law 109-115, which made appropriations for the U.S. Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, the District of Columbia, and independent agencies for the fiscal year ending September 30, 2006, prohibits any funds appropriated under the Act from being used to support any Federal, state, or local

projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use.

The law specifies that "public use" may not be construed to include economic development that benefits private entities primarily. The law further specifies that the term does include utility and other projects that benefit or serve the general public, structures that are designated for use by the public or have functions that serve the general public and are subject to regulation and oversight by the government, and projects for the removal of an immediate threat to public health and safety or a brownfield.

The appropriations bill for these Departments for the fiscal year ending September 30, 2007, contains similar language.

Private Property Rights Protection Act. Various pieces of legislation have been introduced in the U.S. Congress to restrict the government's eminent domain powers. To date, H.R. 4128, which would create the "Private Property Rights Protection Act", has advanced the furthest in the legislative process. The bill would do the following:

- Prohibit the Federal government or any authority of the Federal government from exercising its power of eminent domain to be used for economic development.
- Prohibit any state or political subdivision of a state from exercising its power of eminent domain over property to be used for economic development if that state or political subdivision received Federal economic development funds during the fiscal year in which it did so.
- Prohibit the Federal government or a state or political subdivision of a state that received Federal economic development funds from exercising its power of eminent domain over property of a religious or other nonprofit organization by reason of the organization's nonprofit or tax-exempt status.
- Provide that a state or political subdivision that violated the Act would be ineligible for any Federal economic development funds for two fiscal years.
- Create a private right of action for any owner of private property who suffered

injury as a result of a violation of the proposed Act.

The bill contains a finding that, in the wake of the Supreme Court's *Kelo* decision, eminent domain abuse is a threat to all private property rights. The bill also states, "It is the sense of Congress that the use of eminent domain for the purpose of economic development is a threat to agriculture and other property in rural America...". Additionally, the bill states, "It is the sense of Congress that any and all precautions shall be taken by the government to avoid the unfair or unreasonable taking of property away from survivors of Hurricane Katrina who own, were bequeathed, or assigned such property, for economic development purposes or for the private use of others."

The bill would require that the proposed Act be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of the proposed Act and the U.S. Constitution.

The bill was approved by the House of Representatives and referred to the Senate Judiciary Committee in November 2005. A similar bill, S. 3873, has been introduced in the Senate.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The right to own property is a fundamental American right. Although the *Kelo* decision provides that the residual economic benefit to the community of transferring private land to a for-profit developer satisfies the public use requirement in relation to the U.S. Constitution, the U.S. Supreme Court made clear that states may set higher standards with regard to the scope of a governmental unit's eminent domain powers.

Although economic development and increased tax revenue are critical to municipalities, it is questionable whether those goals should be understood to fall within the meaning of "public use" as used in the State Constitution and statute. The short-term benefits of increased business

activity and revenue can be offset by the insecurity that the exercise of eminent domain creates for property owners about the value of their property.

Governments are afforded eminent domain powers to build highways, railroads, and other infrastructure that clearly serves a common good and unquestionably is meant for public use. Eminent domain powers are not designed to allow government-chosen commercial development. The Michigan Supreme Court's decision in *Hathcock* affirms that the proposed use of a parcel of land is not "public" merely because it would result in some economic benefit to the public, and expressly identifies the criteria that a proposed taking must meet to qualify as "public use". If Senate Joint Resolution E is approved by the voters, the Constitution will reflect the Court's decision and the three-pronged test the Court established in the case will be codified in State statute.

Supporting Argument

By requiring a higher standard of proof for a taking for the eradication of blight, and prescribing criteria property must meet in order to be declared "blighted", the bills and proposed constitutional amendment should prevent a governmental unit's misuse of its eminent domain powers.

Under Public Act 344 of 1945, which pertains to the redevelopment of blighted areas, the definition of "blighted area" specifies, "It is expressly recognized that...moderate blight unremedied creates a strong possibility 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."

Using the broad definition under Public Act 344, the City of East Lansing has declared an area it desires to redevelop "blighted" even though the area is fully occupied and still viable. Some see this as an attempt to strengthen the city's position that it is authorized to take the land by invoking eminent domain and turn it over to a for-profit entity for redevelopment.

The much narrower definition in House Bill 5060 should close a loophole by which units of governments could continue to employ

eminent domain to take land for projects that primarily benefited private developers and only incidentally provided residual economic benefits for the community.

Additionally, by referring to "the taking of *that* property" (emphasis added) in the provisions requiring a higher standard of proof for blighted property, the bills and joint resolution will prevent a condemning authority from declaring an entire area blighted, and instead require the authority to demonstrate that a proposed taking meets the public use requirement on a parcel-by-parcel basis.

These standards should ensure that government entities are able to continue employing eminent domain, an important mechanism for community revitalization, but only if the land in question actually is blighted, and not simply because the local unit believes it should be used differently.

Response: As noted above, the definition of "blighted" in House Bill 5060 will not take effect even if the joint resolution is approved, because Senate Bill 693 was enacted after the House bill and does not contain the definition.

Opposing Argument

A primary function of government is economic development. Eminent domain sometimes must be employed to acquire the final pieces of property from owners who either demand excessive compensation or outright refuse to sell, in order for a governmental entity to proceed with development plans that can create jobs and help revitalize communities. The bills and joint resolution could interfere with a local government's ability to attract and retain businesses and return economically depressed areas to productive use, putting Michigan at a competitive disadvantage with other states that allow the use of eminent domain to obtain economic benefits.

Opposing Argument

The requirement that a person whose principle residence is taken be compensated at least 125% of the property's fair market value is problematic in several ways. If the condemning authority can demonstrate that the property in question is needed for a clear public use, there is no reason the owner should receive more than the FMV. This requirement could unnecessarily restrict the government's power to exercise eminent

domain, even when a proposed taking unquestionably meets the "public use" standard. In addition, neither the bills nor the joint resolution defines "125% of the property's fair market value". This could lead to costly, time-consuming litigation.

Opposing Argument

It is not necessary to codify the criteria established in *Hathcock*, in either statute or the Constitution, because Michigan Supreme Court decisions constitute State law. Furthermore, putting the *Hathcock* language in statute could create ambiguity in interpretation and lead to more litigation about what significant terms mean.

Response: *Hathcock* should be incorporated both in statute and the State Constitution to ensure that property rights are protected into the future. Although the Supreme Court generally follows precedent, there is no guarantee that the decision will not be overturned in the future, as happened with the *Poletown* decision.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Senate Bill 693 and House Bill 5060

The impact of the bills on the cost of future land acquisitions by State agencies and public corporations is not determinable.

Senate Joint Resolution E

The impact of the proposed constitutional amendment on future land acquisitions by State and local units of government is not determinable.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.