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An Executive's Guide to Legal Topics

Eminent Domain

How PUBLIC IS THE PURPOSE?

By Frederick D. Steinhardt, Jerome P. Pesick

EMINENT DOMAIN IS THE INHERENT RIGHT OF GOVERNMENT TO ACQUIRE PRIVATE PROPERTY FOR A PUBLIC PURPOSE WITHOUT THE CONSENT OF THE OWNER. CONDEMNATION IS THE PROCESS BY WHICH EMINENT DOMAIN IS EFFECTUATED. THE FIRST RECORDED CONDEMNATION OCCURRED WHEN KING AHAB WANTED TO PAY HIS NEIGHBOR NABBOTH TO ACQUIRE NABBOTH'S VINEYARD. WHEN NABBOTH REFUSED TO SELL, HE WAS STONED TO DEATH (1 KINGS 21). OBVIOUSLY, BOTH CONDEMNING AUTHORITIES AND PROPERTY OWNERS HAVE COME A LONG WAY SINCE THEN.



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1940s. Before then, in virtually all instances in which eminent domain was utilized, the government agency acquiring the property was also the government agency that ultimately utilized the property for the "public purpose." When the Michigan Department of Transportation acquired private property, it was for right-of-way for MDOT to construct and maintain a public road. If the city of Detroit acquired private property for a park or a city hall, the city would develop and operate the park or city hall. Life was uncomplicated.

The first departure from the simple purity of this definition was the use of eminent domain to allow government agencies to develop and operate facilities that directly competed with the private sector. A ready example of this use of eminent domain is public parking. In this scenario, the government agency continued to be the ultimate developer/owner of the property. However, the public parking facility competed with privately owned parking lots. Owners of private parking lots were — perhaps justifiably — unhappy to lose their property to enable the government agency to go into competition with other private parking facilities. The courts, nevertheless, permitted this use of the eminent domain power.

The next step in the expansion of the "public purpose" threshold was the urban renewal projects of the 1950s and 1960s. The stated objective of these projects was to rebuild slums by wholly clearing massive areas that would then be newly developed. The major departure from past applications of eminent domain was that the ultimate users of the property would be private developers or their customers. The government agency would acquire and clear the property, then sell it to a private developer. The underlying public purpose justifying these projects was elimination of blight. If an individual parcel of property was not "blight-

The most controversial element of this working definition is what constitutes a sufficient "public purpose" to justify the exercise of eminent domain. The courts have the last word.

This issue is critically important in today's development climate when:

- Municipalities aggressively seek new development — which brings newer improvements, jobs, an increased tax base and momentum for further development.
- Developers want to acquire land at the least possible cost and delay.
- Owners of property in an area the municipality wants to acquire want their rights protected.

The concept of "public purpose" in eminent domain has shifted or expanded since the

it knew exactly how the property would be used, or who the ultimate developer would be. An example of these projects is the Lafayette Park-Elmwood Park neighborhood just east of downtown Detroit.

In 1980, Michigan was the location for a project that became a leading case nationwide for further broadening of the public purpose threshold. This was the Poletown project, in which the cities of Detroit and Hamtramck acquired more than 1,600 parcels of private property on 465 acres to turn over to General Motors Corp. for the development and operation of an assembly plant. Unlike the urban renewal cases, 1) There was no claim that the area was blighted, and 2) General Motors worked hand-in-hand with city officials from the beginning to create and implement the project.

The Poletown project was highly controversial. It required the acquisition of private property to turn over to another private entity, General Motors. In a context of crowded courts and cases that take years to come to fruition, the case in which the public purpose issue was litigated went from being filed in Wayne County Circuit Court in November 1980 to a 29-page Michigan Supreme Court decision — and 39-page dissent — in March 1981, four months later.

Poletown was decided in a setting of urgency, in which the domestic automobile industry was reeling from foreign competition and the economy of the Detroit area was in a virtual depression. Both General Motors and the UAW vigorously campaigned in favor of the project.

The stated public purpose of Poletown was to create and preserve jobs. The court permitted the project to proceed, but stated that cases in which property was turned over to a private developer should be reviewed by the courts with "heightened scrutiny" to avoid abuses.

In Poletown, the court placed reliance upon a 1954 U.S. Supreme Court case, *Berman vs. Parker*, in which the condemning agency sought to acquire a department store along with other properties to implement its redevelopment plan for a largely blighted area. The department store owners

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objected on the basis that their property was commercial and not a cause of blight. The store owners further objected because their property was to be placed under the management of a private agency for private use.

The Supreme Court affirmed the right of the condemning agency to acquire the store owners' property and held that once a public purpose has been established (i.e., redevelopment of a blighted area), the means for executing the project are for the legislative body to determine. The court went on to state that depending on the circumstances, the public good may ultimately be better served through private enterprise than by a department of government.

Three Michigan cases after *Poletown* are significant to government agencies, developers and owners:

- An auto dealer wanted to expand on land improved with a small, family-owned printing shop. The owner was unwilling to sell. The dealer asked the city to acquire the property under *Poletown* and then turn it over to the dealer. The court refused to allow the taking.

- In a project very similar to *Poletown*, the city of Detroit wanted to acquire and clear a large area to turn over to the Chrysler Corp. for expansion and modernization of an old plant on Jefferson Avenue. One owner raised the objection that the taking was not for a public purpose. The Court of Appeals upheld the validity of the taking — but expressly said it was reluctantly doing so only because it was required to by the *Poletown* precedent. The Court of Appeals went on to say it

thought the *Poletown* decision was wrong and that the Supreme Court should revisit the issue in the Chrysler-Jefferson case. The case never went to the Supreme Court because it was settled within weeks of the Court of Appeals' decision. This published Court of Appeals decision remains as a counterpoint — dissent — to *Poletown*.

- The television cable company awarded the city of Lansing franchise wanted the city to utilize eminent domain to acquire the right to wire privately owned apartment complexes to be ready to accept cable service. The apartment owners opposed the imposition of eminent domain. The city argued that providing an opportunity for the cultural and educational enrichment available only on cable was a "public purpose." The Michigan Supreme Court ruled this was not a sufficient public purpose, especially in light of the "heightened scrutiny" required by *Poletown*.

Notwithstanding what appears to be a judicial trend in Michigan toward limiting the scope and application of the *Poletown* decision, *Poletown* and *Berman vs. Parker* remain good law. Every year, numerous municipal bodies utilize eminent domain to acquire property that will ultimately be turned over to the private sector for economic redevelopment. Opinions as to what constitutes a public purpose in such situations varies, and the line that can or cannot be crossed is subject to change based upon the facts of each particular case.

Two possible controversies loom on the immediate horizon. Both arise out of high-profile projects in which the city of Detroit would acquire private property to turn over to private developers. One is the proposed development of three casinos. Like *Poletown*, the public purpose is increased tax revenues and jobs. However, turning over land to MGM Grand to operate a casino may not be viewed in the same way as lending a helping hand to the automobile industry, upon which the economy of the region has been built. The other is development of a single-family residential subdivision in a largely run-down, substandard neighborhood on the east side of Detroit. The public purpose is effectively the same as urban renewal. However, the project was not conceived of by the city, but by the developer. The small number of owners in this area who have maintained their homes object to eminent domain to make way for

a new subdivision conceived of and promoted by a nationally known developer who worked hand-in-hand with the city from the beginning.

Underlying these cases is a philosophical tug of war:

FOR

Proponents of these acquisitions point out that: 1) Increasing cooperation between government and the private sector facilitates orderly and efficient development; and 2) Absent the power of municipalities to condemn and turn land over to private developers, the ability to effectuate redevelopment would be greatly limited. The owner is still protected because just compensation must be paid.

Missouri allows "private condemnation" in which a developer persuades a municipality that a proposed project is desirable; the municipality and developer enter into a development agreement, which the municipality declares to be serving a "public purpose"; the developer is then vested with the authority to hire its own legal-acquisition team to effectuate the taking; and (of course) the developer pays all expenses — including the just compensation. The government plays less of a role as a straw middleman. Under current Michigan law, the concept of "private condemnation" is an oxymoron.

AGAINST

Opponents of these acquisitions believe they abrogate the basic protection of the constitutional right to own and retain private property. The successful developer or the business with the skills and financial wherewithal to bring projects to a municipality can obtain the government seal of approval to use eminent domain to acquire the land needed for those projects. Perhaps overlooked in the government's desire to improve its communities aesthetically and enhance its tax base is the right of the existing owner of the property to continue to live and/or operate his or her business or develop it as he or she sees fit.

Stripped to the essentials, should a basically private development promising jobs and tax revenues — even for the most lofty and redeeming activity (casinos?) — be enabled by the currently elected officials to acquire another person's private property by the power of eminent domain? At what point does the combination of money and political power override the constitution? ■

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