What is all the talk about 'public use'?

By Jerome P. Pesick and H. Adam Cohen

SPECIAL FEATURE
Real Property

Condemnation actions filed in Michigan's state courts will be governed by the more restrictive *Hathcock* view of public use, whereas federal condemnation actions, filed in federal courts, will be subject to *Kelo*'s deferential standards.

Chances are, during the past year you have seen a television news story, read a newspaper article, or perhaps even participated in a dinner table discussion, regarding the government's constitutional power to take private property for public use, without the owner's consent, known as "eminent domain."

While the recent torrent of media coverage may have elevated peoples' consciousness about "public use" generally, few are truly familiar with the legal evolution that caused all the fanfare in the first place.

This article will attempt to put some flesh on the bones, explaining where we came from, where we are — and where we may be headed — on the law of public use in Michigan and abroad.

In the beginning, there was no 'Poletown'

Michigan's Constitution states that, "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." (See, Const 1963, art 10, § 2.)

Thus, while no one debates that private property may be taken by eminent domain for a "public use," the meaning of that term has provoked judicial controversy. Prior to 1981, Michigan courts typically interpreted "public use" to mean those traditional uses most associated with public infrastructure — roads, bridges, public schools, municipal buildings, utilities. And, under certain circumstances, "elimination of blight" would satisfy the public use inquiry, as well.

While governmental agencies could, in limited instances, delegate their power of eminent domain to others, one's property would not, and could not, be expropriated without one's consent unless the proposed use was fundamentally public in nature. Then came *Poletown*.

Sea Change #1: 'Poletown'

In the late 1970s, and stretching into the early 1980s, the economics of the automobile industry in general — and the City of Detroit in particular — teetered on the edge of collapse. Unemployment in Detroit exceeded 18 percent, gas lines stretched for city blocks, and General Motors began looking wayward, to other states, as potential sites for a major assembly plant. Such a relocation may well have served as the straw to break the camel's back that was Detroit's foundering economy.

What was the City of Detroit to do? Take a neighborhood, of course. Indeed, the City of Detroit passed a resolution of necessity to acquire, non-consensually by power of eminent domain, an entire culturally prominent neighborhood known as "Poletown," which the city intended to convey to General Motors for development of the much-ballyhooed assembly plant. Such a conveyance would, after all, keep General Motors in the city's backyard, and forestall any move to the American south or west. The city contended that the taking was for a proper public use — reversing the city's economic (mis)fortunes by generating tax revenues, increasing jobs, and keeping GM local.

One year after the United States Olympic hockey team shocked the sports world, the Michigan Supreme Court equally startled the legal community when the court issued its decision in *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616; 304 N.W.2d 455 (1981).)

Deeply influenced by the economic plague confronting the city, the *Poletown* court — over vigorous dissents by Justices James L. Ryan and John W. Fitzgerald — decided that, on the facts of that case, a taking of one person's private property, for later transfer to another private entity for purposes of economic development, satisfied the constitutional requirement of "public use."

Poletown snowballed. Cited in judicial opinions throughout the land, courts relied upon the *Poletown* precedent in permitting governmental agencies to take private property for a smorgasbord of private purposes, including stadia, retail and mixed-use developments, and other private enterprises.

In Michigan, this profundity lasted for precisely 23 years.

Sea Change # 2: Goodbye 'Poletown,' hello 'Hathcock'

Several years ago, Wayne County implemented a noise attenuation program in the area surrounding Detroit Metropolitan Airport. Homeowners were presented with options that included "sound attenuating" their homes against airplane noise, or selling their homes outright.

When some of the homeowners elected the latter alternative, the result was a tapestry in which various properties remained privately owned and many others interspersed throughout the area were owned by the county.

Accordingly, the county devised a plan to convert this patchwork area into a large, mixed-use real estate project including research and development, industrial, and other operations. In order to fulfill the plan, and pursuant to the blueprint sanctioned by *Poletown* and its progeny, the county filed condemnation actions to acquire the private properties in the patchwork area, for later conveyance or lease to private developers and operators. The county's development project was to be called "Pinnacle Aeropark."

As expected, the Wayne County Circuit Court, and then the Michigan Court of Appeals, dismissed the landowners' challenges to public use, citing *Poletown* and related case law to support the county's program.

The Michigan Supreme Court, however, not only reversed the lower courts' decisions, but affirmatively overruled the *Poletown* precedent.

In *Wayne County v. Hathcock*, 471 Mich. 445; 684 N.W.2d 765 (2004), the court refused to define the meaning of "public use," declaring that it would not "cobble together a single, comprehensive definition of 'public use' from our pre-1963 precedent and other relevant sources." (See, *Hathcock*, 471 Mich. at 471.)

Rather, explaining that "public use" was a "legal term of art" known to "those sophisticated in the law at the time of the Constitution's ratification," the court decreed what public use is not:

> "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." (Id. at 482.)

Sensing that it may be accused of violating stare decisis, the *Hathcock* court asserted that it was the 1981 *Poletown* case, not its *Hathcock* opinion, which really deviated from established precedent:

> It is true, of course, that this court must not 'lightly overrule precedent.' But 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. (Id. at 483.)

Poletown is dead.

So why all the ruckus?

By overruling *Poletown*, the *Hathcock* court increased the protections afforded to landowners in Michigan. Confusion has arisen anew, however, because the U.S. Supreme Court does not share the Michigan high court's views.

In *Kelo v. City of New London*, __ US __; 125 S. Ct. 2655; __ LEd2d__ (2005), the City of New London filed actions to take various private properties by eminent domain for later conveyance to private developers, who wished to redevelop the area for profit-making enterprises. Like the City of Detroit in *Poletown*, the City of New London faced declining population, rising unemployment, and a general economic malaise.

Citing long-standing federal precedent, in a 5-4 opinion the U.S. Supreme Court declared the taking constitutional, expressing great deference for local legislative determinations of public use and reaffirming its earlier pronouncements that, "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." (See, *Kelo*, 125 S. Ct. at 2655, citing *Berman v. Parker*, 348 U.S. 26, 35-36 (1954))

Clearly, as evidenced by the Michigan Supreme Court's decision in *Hathcock*, and the U.S. Supreme Court majority's decision in *Kelo*, those courts are diametrically opposed to one another on the fundamental constitutional question of "public use." This apparent tension, however, is partially resolved in the federal *Kelo* decision itself:

> 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. Some of these requirements have been established as a matter of constitutional law [see *Hathcock*], while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. (See, *Kelo*, 125 S. Ct. at 2668 (footnote omitted).)

Therefore, condemnation actions filed in Michigan's state courts will be governed by the more restrictive *Hathcock* view of public use, whereas federal condemnation actions, filed in federal courts, will be subject to *Kelo*'s deferential standards.

It is clear that Michigan's courts will permit condemning agencies to exercise eminent domain for traditional public uses. But the days of seizing property from one private person, for direct transfer to another, have been halted in Michigan.

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