

# ELR

## NEWS & ANALYSIS

### The Public Use Requirement and Doctrinal Renewal

by Steven J. Eagle

For a generation, our view of the scope of government's eminent domain power has been framed by three cases, *Berman v. Parker*,<sup>1</sup> *Hawaii Housing Authority v. Midkiff*,<sup>2</sup> and *Poletown Neighborhood Council v. City of Detroit*.<sup>3</sup>

In *Berman*, the U.S. Supreme Court held that the use of eminent domain to alleviate urban blight could encompass the condemnation of nonblighted commercial structures within the blighted area. Having concluded that slum clearance was a legitimate governmental purpose, the Court accorded the legislature extraordinary latitude in achieving it. Furthermore, the Court swept aside constitutional objections to the use of eminent domain for beautification as well as for slum eradication, and to governmental acquisition of parcels with the intent of reconveying them to profit-seeking redevelopers.<sup>4</sup> "Once the object is within the authority of [the U.S.] Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."<sup>5</sup>

In *Midkiff*, the Court upheld a Hawaiian land reform statute that would permit underlying fee titles to be condemned at the behest of their respective ground lessees, with subsequent reconveyance to the lessees. The Court declared: "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."<sup>6</sup> In *Poletown*, the Michigan Supreme Court upheld as a public use the condemnation of an entire ethnic neighborhood for demolition and replacement by a General Motors (GM) Corporation assembly plant. The court declared: "The 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."<sup>7</sup>

In none of these cases in which the condemned land was reconveyed to other private owners did the federal and Michigan supreme courts give more than cursory review to the requirement of the Fifth Amendment that condemnation was conditioned upon "public use."<sup>8</sup> This expansive view of the eminent domain power seemed to reach its culmination in *City of Oakland v. Oakland Raiders*,<sup>9</sup> where

the California Supreme Court found that the city was not precluded from using eminent domain to acquire the intangible rights in a professional athletic team franchise, even though, among other things, it apparently intended to sell the rights to a new private owner who would keep the team in Oakland.<sup>10</sup>

In the course of reviewing these cases in 1986, Prof. Thomas Merrill observed that, despite the Fifth Amendment's requirements, "most observers today think the public use limitation is a dead letter."<sup>11</sup> Professor Merrill did observe, however, that notwithstanding *Berman* and its progeny, his empirical survey indicated that "state courts are much less deferential to legislative declarations of public use than one would expect in light of *Poletown*, *Oakland Raiders*, and *Midkiff*."<sup>12</sup> One-sixth of state appellate cases decided between 1954 and 1986 held that the proposed taking did not serve a public use.<sup>13</sup>

During the past three years, a number of U.S. district courts and state appellate courts have rejected the highly deferential approach that was driving the public use requirement toward the status of a dead letter. In the most dramatic and perhaps important case of all, the Michigan Supreme Court has retroactively repudiated its iconic *Poletown* doctrine. On the last day of its term, July 30, 2004, the court unanimously held, in *County of Wayne v. Hathcock*,<sup>14</sup> that a taking of private property from one owner for reconveyance to another, for the purpose of enhancing the county's economy, did not constitute a public use.

#### I. The Development of the Public Use Doctrine

The Court always has interpreted the Due Process and Takings Clauses<sup>15</sup> as precluding the exercise of eminent domain for private use. In 1798, Justice Salmon Chase wrote, in *Calder v. Bull*,<sup>16</sup> that "a law that takes property from A. and gives it to B. . . . cannot be considered a rightful exercise of legislative authority."<sup>17</sup> In 1896, in *Missouri Pacific R.R. Co. v. Nebraska*,<sup>18</sup> the Court struck down a state court mandate that the railroad surrender a portion of its right-of-way

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1. 348 U.S. 26 (1954).

2. 467 U.S. 229 (1984).

3. 304 N.W.2d 455 (Mich. 1981).

4. *Berman*, 348 U.S. at 31-35.

5. *Id.* at 33.

6. *Midkiff*, 467 U.S. at 240.

7. 304 N.W.2d at 459.

8. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

9. 646 P.2d 835 (Cal. 1982). After extensive subsequent proceedings, the court of appeal ultimately held that the proposed taking violated

the Commerce Clause. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153 (Cal. Ct. App. 1985).

10. 646 P.2d at 843-44.

11. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 62 (1986).

12. *Id.* at 65.

13. *Id.* at 96.

14. 684 N.W.2d 765 (Mich. 2004).

15. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

16. 3 U.S. (3 Dall.) 386 (1798) (opinion of Chase, J.).

17. *Id.* at 388.

18. 164 U.S. 403, 416 (1896).

to private individuals so that they could build a private grain elevator. “The taking by a state of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the [C]onstitution of the United States.”<sup>19</sup> In *Midkiff*, the Court acknowledged that it had “repeatedly stated that ‘one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.’”<sup>20</sup>

While it is uncontested that a taking for purely private benefit would be unconstitutional, it is equally clear that the presence of some private benefit does not invalidate an otherwise valid taking.<sup>21</sup> *Midkiff* broadly expounded that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”<sup>22</sup>

In both *Berman* and *Midkiff*, the Court did not distinguish between legitimate governmental objectives and the means used to achieve those objectives. As *Berman* put it:

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.<sup>23</sup>

Likewise, in *Midkiff*, the Court once it was ascertained that land reform was a legitimate governmental goal, the appropriateness of eminent domain as a means to achieve the end was simply left to legislative discretion:

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 kinds of socioeconomic legislation—are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.<sup>24</sup>

On the question of private use, too, the Court was casual, if not perfunctory. In *Berman*, the Court said:

Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and

Congress alone to determine, once the public purpose has been established.<sup>25</sup>

This language was quoted in *Midkiff*, which added that the Court “has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”<sup>26</sup>

## II. Recent Decisions Question Whether Condemnation Is for Private Use

### A. The Use of Condemnation for Private Redevelopment Grows

Judicial skepticism regarding condemnation for private redevelopment is growing, likely in response to increasing public awareness of its aggressive use. A catalyst for concern about possible eminent domain abuse by localities was a 1998 front-page article in the *Wall Street Journal*:

Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business.<sup>27</sup>

Archetypal instances include the order to the “maker of cosmetics packaging that employs 200 people, to make way for a shopping center that will include a multiscreen movie theater,” and the displacement of the used car lot by the BMW dealer that told local officials it would spend \$8 million to enhance its dealership.<sup>28</sup>

A more comprehensive report from the Institute for Justice has documented this practice.<sup>29</sup> According to this survey, during the five-year period 1998 to 2002, condemnation actions for the benefit of private parties were filed in at least 3,722 instances and threatened in at least 6,560 instances. These activities took place in 41 states.<sup>30</sup>

### B. Recent Challenges Alleging Private Use

In several recent cases, courts have rejected the contention that the use of eminent domain for redevelopment would constitute a public use. Probably the most notable are *Southwestern Illinois Development Authority (SWIDA) v. National City Environmental, L.L.C.*,<sup>31</sup> and *99 Cents Only Stores v. Lancaster Redevelopment Agency*.<sup>32</sup> In *SWIDA*, the Supreme Court of Illinois adjudicated the condemnation of a recycling plant for use as an additional parking area for an

19. *Id.* at 417.

20. *Midkiff*, 467 U.S. at 241 (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)).

21. *See, e.g.*, *Manufactured Hous. Communities of Wash. v. Washington*, 13 P.3d 183, 195 n.13 (Wash. 2000) (“condemnation for both public and private use is permissible under the state constitution if the proposed private use is subordinate and incidental to the public use, requiring no more property be condemned than necessary for the public use”).

22. *Midkiff*, 467 U.S. at 241 (citing *Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923) (holding public road terminating within private ranch had public recreational value), and *Block v. Hirsh*, 256 U.S. 135 (1921) (upholding World War I emergency rent control)).

23. *Berman*, 348 U.S. at 35-36.

24. 467 U.S. at 243-44.

25. 348 U.S. at 33.

26. 467 U.S. at 240-41 (quoting *United States v. Gettysburg Elec. R.R. Co.*, 160 U.S. 668, 680 (1896)).

27. Dean Starkman, *Condemnation Is Used to Hand One Business Property to Another*, WALL ST. J., Dec. 2, 1998, at A1.

28. *Id.*

29. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (Institute for Justice 2003), available at <http://ij.org/publications/castle/> (last visited Sept. 24, 2004).

30. *Id.* at 2.

31. 768 N.E.2d 1 (Ill. 2002).

32. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

adjoining private motor speedway. The court found that the development agency, “advertised that, for a fee, it would condemn land at the request of ‘private developers’ for the ‘private use’ of developers.” Its contract with the speedway provided that it would “condemn whatever land ‘may be desired’ by it.”<sup>33</sup> On this record, the court had little trouble finding that the agency went beyond its mission of fostering economic development by “blur[ring] the lines between a public use and a private purpose.”<sup>34</sup>

In *99 Cents Only Stores*, a U.S. district court in California enjoined the condemnation of a discount “big box” store that was undertaken at the behest of the larger competitor to which the land was to be reconveyed. The court held that the evidence was “clear beyond dispute” that the condemnation efforts were not premised upon a public use, but were based on “nothing more than the desire to achieve the naked transfer of property from one private party to another.”<sup>35</sup>

### C. Recent Cases Distinguish “Public Purpose” and “Public Use”

A number of recent cases have drawn a sharp distinction between “public purpose,” in the sense that a permissible governmental end is permissible under the police power, and “public use,” in the sense that an acceptable means to achieve the end is condemnation. In *Manufactured Housing Communities of Washington v. Washington*,<sup>36</sup> for instance, the Supreme Court of Washington struck down, on state constitutional grounds, a statute giving mobile home park tenants a right of first refusal to buy the park where they lived. The court noted that the state “apparently assume[d] that ‘public purpose’ and ‘public use’ are always the same thing,” so that “preserving a declining housing resource so greatly benefits the public that [the statute] plainly converts the private use to a public use. It does not.”<sup>37</sup>

In *Town of Beloit v. County of Rock*,<sup>38</sup> the town earlier had acquired river-front land from farmers and resold it to the Caterpillar Company for industrial development. When that project did not work out, the town reacquired the land and attempted to sell it to other developers. After that proved unsuccessful, the town itself undertook to develop the residential Heron Bay Subdivision. The court found this exercise of municipal industrial policy legitimate, since land development by municipalities did not violate state law and the approach was predicated on the creation of jobs and economic development. However, *Town of Beloit* very carefully quoted from the landmark Illinois *SWIDA* decision:

While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists and is essential to this case . . . . [The] flexibility [in terminology] does not equate to unfettered ability to exercise takings beyond constitutional boundaries.<sup>39</sup>

It appears that the Supreme Court of Wisconsin is serving notice that its liberal “public purpose” doctrine regarding the expenditure of public funds would not automatically translate into a liberal “public use” doctrine justifying the exercise of eminent domain. The Illinois court itself drew the same distinction in *Friends of Parks v. Chicago Park District*,<sup>40</sup> in which it upheld the use of public funds in financing the renovation of Soldier Field, largely for the benefit of the Chicago Bears football team. *SWIDA* was “inapposite,” it declared, since it involved eminent domain, and its “holding is not a retreat from [its *SWIDA*] analysis.”<sup>41</sup>

The “public use” concern was raised directly in *Georgia Department of Transportation v. Jasper County*,<sup>42</sup> in which the defendant had attempted to condemn undeveloped land owned by the Georgia Department of Transportation (GDOT) on the South Carolina shore of the Savannah River. Since GDOT had no extraterritorial power of eminent domain, it was treated as a private landowner. The county intended to lease part of the parcel after condemnation to a private company to develop a large maritime terminal, which would operate in conjunction with a business park the county would itself develop on the rest of the condemned parcel. The trial court found that eminent domain would be for “public use,” since the evidence indicated that the majority of the county’s population had low-paying jobs in tourism and service industries and that 25% lived below the poverty line. The proposed project would add about 40% of the county’s current tax base and would diversify its job base.

The South Carolina Supreme Court reversed, holding that the cases cited below related to “public purpose” under taxation and bond revenue laws. However, “‘public purpose’ discussed in these cases is not the same as a ‘public use,’ a term that is narrowly defined in the context of condemnation proceedings.”<sup>43</sup> The marine terminal would be gated, accessible only to those doing business with the lessee, and “public” only to the extent that different steamship lines would use it. The court emphasized that

[t]he public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it.<sup>44</sup>

In weighing the proportion of public to private benefit that is necessary to legitimate a taking for ensuing private redevelopment, a recent Arizona appellate decision, in *Bailey v. Myers*,<sup>45</sup> held that the condemnation of an automotive repair facility for the relocation of a private hardware store resulted in insufficient public benefit:

[W]hen a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona constitution requires that the anticipated public benefits must substantially outweigh the

33. 768 N.E.2d at 10.

34. *Id.* at 11.

35. 237 F. Supp. 2d at 1129.

36. 13 P.3d 183 (Wash. 2000).

37. *Id.* at 195.

38. 657 N.W.2d 344 (Wis. 2003).

39. *Id.* at 356 (quoting *SWIDA*, 768 N.E.2d at 8).

40. 786 N.E.2d 161 (Ill. 2003).

41. *Id.* at 167.

42. 586 S.E.2d 853 (S.C. 2003).

43. *Id.* at 858 (citing *Edens v. City of Columbia*, 91 S.E.2d 280, 283 (1956)).

44. *Id.* at 856-57 (quoting *Edens*, 91 S.E.2d at 283).

45. 76 P.3d 898 (Ariz. Ct. App. 2003).

private character of the end use so that it may truly be said that the taking is for a use that is “really public.”<sup>46</sup>

On the other hand, a recent unpublished California appellate decision, *Town of Corte Madera v. Yasin*,<sup>47</sup> nicely illustrates that state’s approach to property rights. Upholding the condemnation of a retail store for expansion of shopping center parking, the court distinguished *SWIDA* on the grounds that the Illinois court applied the narrower “more than a mere benefit to the public must flow from the contemplated improvement” standard.<sup>48</sup> “In California, a mere benefit is enough. The use need only promote the general interest in relation to any legitimate object of government.”<sup>49</sup>

Other courts also have continued to apply deferential review to governmental public use decisions. In *City of Las Vegas Downtown Redevelopment Agency v. Pappas*,<sup>50</sup> for instance, the Nevada Supreme Court upheld condemnation for a massive privately owned commercial and shopping project known as the Fremont Street Experience. The court deemed its ruling a straightforward application of *Berman*.<sup>51</sup> Tellingly, it labored to distinguish the case from *SWIDA*<sup>52</sup> and *99 Cents Only Stores*<sup>53</sup> by asserting that alleviation of blight and crime were at the heart of the Las Vegas effort.

In a case of first impression, *Kelo v. City of New London*,<sup>54</sup> the Supreme Court of Connecticut held that economic development constitutes a public use for eminent domain purposes under the federal and state constitutions. The case involved the condemnation of homes adjacent to the site of a major drug company’s new international research facility for compatible corporate use and for residential redevelopment that would link the site to an existing state park. The court described the New London project, for which residential parcels were condemned, as a “significant economic development plan that is projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.”<sup>55</sup>

The court emphasized the legislative findings that

*the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional[,] and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes*

46. *Id.* at 904.

47. 2002 WL 1723997 (Cal. Ct. App. 2002).

48. *Id.* at \*5 (quoting *SWIDA*, 768 N.W.2d at 10).

49. *Id.* (citing *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982)).

50. 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004).

51. 348 U.S. at 33.

52. 768 N.E.2d at 1.

53. 237 F. Supp. 2d at 1123.

54. 843 A.2d 500 (Conn. 2004). The Court granted certiorari as this Article went to press, 2004 WL 2069452 (Sept. 28, 2004) (No. 04-108).

55. *Id.* at 507.

*... are public uses and purposes for which public moneys may be expended.*<sup>56</sup>

It concluded that the project was primarily for public, as opposed to private, benefit.

*Kelo* specifically rejected the *Manufactured Housing Communities* approach on the ground that the Washington court “expressly has stated that the courts of its state ‘have provided a more restrictive interpretation of public use’ than have the federal courts.”<sup>57</sup> It devoted a long discussion to *SWIDA*, concluding that the case was “an illustration of when an economic development plan cannot be said to be for the public’s benefit. [Its facts] merely demonstrate the far outer limit of the use of the eminent domain power for economic development. . . . [I]t merely assailed the agency’s exercise of that power within a particularly egregious set of facts.”<sup>58</sup>

### III. *Hathcock*

#### A. *Background and Facts*

In *Poletown*,<sup>59</sup> the Michigan Supreme Court upheld the condemnation of an entire vibrant and close-knit ethnic neighborhood, replete with 1,600 homes, shops, and churches. The condemnation was undertaken at the behest of GM, to which the land was to be conveyed for construction of a Cadillac assembly plant. GM had threatened to build the plant outside of the city at a time of high unemployment, which the court said made the public the primary beneficiary of the condemnation. *Poletown* has been the emblematic case permitting condemnation of nonblighted areas for private commercial redevelopment.

In *Hathcock*, the county sought to condemn land for its planned 1,300-acre Pinnacle Aeropark Project (Pinnacle Project), to be located south of Detroit Metropolitan Airport. The project had its genesis in the expansion of the airport and ensuing concerns about noise. The Federal Aviation Administration (FAA) contributed some \$21 million for the purchase of nearby parcels, with the provision that the land be put to an economically productive use. The county conceived of constructing a “large business and technology park with a conference center, hotel accommodations, and a recreational facility.”<sup>60</sup> According to the county, this “cutting-edge development will attract national and international businesses, leading to accelerated economic growth and revenue enhancement.”<sup>61</sup> Its expert testimony “anticipated that the Pinnacle Project will create [30,000] jobs and add \$350 million in tax revenue for the county.”<sup>62</sup>

The court concluded that the condemnation would be legal under applicable state law,<sup>63</sup> and went on to review its constitutionality.

56. *Id.* at 520 (emphasis in original).

57. *Id.* at 533 n.43 (quoting *Manufactured Hous. Communities*, 13 P.3d at 189).

58. *Id.* at 535.

59. 304 N.W.2d at 455.

60. 684 N.W.2d at 770.

61. *Id.* at 771.

62. *Id.*

63. *Id.* at 772-78.

### B. *Poletown Abrogated as Unconstitutional*

The Michigan Supreme Court in *Hathcock* based its constitutional analysis on the text's original meaning to the people, who ratified the Public Use Clause of Michigan's 1963 Constitution.<sup>64</sup> Since "public use" is a legal term of art "derived from the great charters of English liberty," the people would have been aware that it had a technical meaning.<sup>65</sup> From this premise, the court analyzed in some detail what it deemed the flaws in its earlier *Poletown* opinion.<sup>66</sup> *Poletown* had incorrectly applied a minimal standard of judicial review in eminent domain cases, supported by no authority except a plurality opinion.<sup>67</sup> "Before *Poletown*, we had 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."<sup>68</sup> The court quoted the eminent jurist, Michigan Supreme Court Justice Thomas M. Cooley, who opined that a statute permitting condemnation for private power mills, with no subsequent constraint on the owner, "will in some manner advance the public interest. But incidentally every lawful business does this."<sup>69</sup> It reasoned that

[b]ecause *Poletown*'s conception of a public use—that of "alleviating unemployment and revitalizing the economic base of the community"—has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of "public use" in art. 10, §2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the *Poletown* analysis provides no legitimate support for the condemnations proposed in this case and, for the reasons stated above, is overruled.<sup>70</sup>

The court concluded that

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.<sup>71</sup>

Given that *Poletown* was such a "radical departure" from the court's constitutional jurisprudence, it was to apply retroactively to all pending cases in which a challenge to it had been made and preserved.<sup>72</sup>

64. *Id.* at 779 (discussing MICH. CONST. art. 10, §2, which provided that "[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").

65. *Id.* at 779 & n.48. Justices Elizabeth A. Weaver and Michael F. Cavanagh dissented from the court's assertion that the meaning of the legal term "public use" should be evaluated from the perspective of those "sophisticated in the law." *Id.* at 788-99.

66. *Poletown*, 304 N.W.2d at 455.

67. *Hathcock*, 684 N.W.2d at 785.

68. *Id.* at 786.

69. *Id.* (quoting *Ryerson v. Brown*, 35 Mich. 333, 339 (Mich. 1877)).

70. *Id.* at 787 (quoting *Poletown*, 304 N.W.2d at 459).

71. *Id.*

72. *Id.* at 788. Justice Cavanagh dissented from the holding that abrogation should be retroactive. *Id.* at 799.

### C. *Hathcock Established Three Permissible Bases for Exercises of Eminent Domain to Be Followed by Reconveyance to Private Parties*

The court reviewed the history of the term "public use" under the Michigan constitutions, and concluded that "the transfer of condemned property is a 'public use' when it possesses one of the three characteristics in our pre-1963 case law identified by Justice James L. Ryan"<sup>73</sup> in his *Poletown* dissent:

First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved "public necessity of the extreme sort otherwise impracticable."<sup>74</sup>

...

Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution's "public use" requirement when the private entity remains accountable to the public in its use of that property.<sup>75</sup>

...

Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan's words, the 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.<sup>76</sup>

Under the first test, the court found that the nation was "flecked" with "shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce," constructed on land obtained without the exercise for eminent domain. Therefore, the Pinnacle Project was "not an enterprise 'whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.'"<sup>77</sup>

It is arguable that the need for the particular parcels that were condemned was predicated upon the fact that the county previously had purchased "approximately [500] acres in nonadjacent plots scattered in a checkerboard pattern throughout an area south of Metropolitan Airport."<sup>78</sup> But this means only that the necessity for obtaining the condemned parcels to complete the project was based on the fact that the county had started the project without having acquired the necessary land through voluntary sales. Likewise, there was no indication that the county's agreement with the FAA to put parcels acquired with federal noise abatement funds to "economically productive use" necessitated construction of anything like the Pinnacle Project. The typical uses that border major airports—small fabricating

73. *County of Wayne v. Hathcock*, No. 124070 (Mich. July 30, 2004), available at <http://www.michbar.org/opinions/supreme/2004/073004/24048.pdf>.

74. *Hathcock*, 684 N.W.2d at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J. dissenting)).

75. *Id.* at 782 (quoting *Poletown*, 304 N.W.2d at 479 (Ryan, J. dissenting)).

76. *Id.* at 782-83 (quoting *Poletown*, 304 N.W.2d at 480 (Ryan, J. dissenting)).

77. *Id.* at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J. dissenting)).

78. *Id.* at 770.

plants, freight consolidation depots, and the like—are compatible with airport noise. In other words, the Pinnacle Project was a bootstraps operation.

Had the county attempted to acquire only those legal rights that were necessary to proper operation of the expanded airport, such as easements for noise, it is likely that the “public necessity” test of *Hathcock* would have been complied with.

The second *Hathcock* test requires that the transferee of the condemned land remain “accountable to the public in its use of that property.” In the case itself, there was no mechanism for accountability, since none had been required under *Poletown*. In the absence of a factual referent, *Hathcock* employed sloppy dicta:

[T]he Pinnacle Project is not subject to public oversight to ensure that the property continues to be used for the commonwealth after being sold to private entities. Rather, plaintiff intends for the private entities purchasing defendants’ properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise. The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners’ collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants’ properties will *continue to contribute to the health of the local economy*.<sup>79</sup>

The word “continue” implies that the project, as approved, would “contribute to the health of the local economy.” But why should that matter? The fact that a successful business enhances the community, which was central in *Poletown*, was precisely what was rejected as overreaching in that part of the *Hathcock* opinion quoting Justice Cooley’s observation that “incidentally every lawful business does this.”<sup>80</sup> The lack of accountability for the continuation of that which was insufficient to begin with should hardly be determinative.

What if the private redevelopers of the Pinnacle Project had entered into formal and recorded covenants requiring them to “broaden[ ] the [c]ounty’s tax base [to include] service and technology,” or “enhance the image of the [c]ounty in the development community,” or “aid[ ] in its transformation from a high industrial area, to that of an arena ready to meet the needs of the 21st century,” or “attract national and international businesses?”<sup>81</sup> Such aspirational and gauzy promises might well be adjudicated as too vague to be enforceable, thus not providing meaningful accountability.

More specific requirements might be more acceptable, but stand a greater risk of becoming obsolescent. Furthermore specific covenants that are in line with the transferee’s contemplated business development are not apt to be needed, and those that subtract from the transferee’s contemplated profits would presumably have to be paid for through some sweetener in the county’s agreement. It might

be that the transferee would have to covenant that the redeveloped land would continue to be put to specified uses benefiting the public.<sup>82</sup>

It seems likely that accountability would be better secured through the project’s governance structure than through performance standards. Thus, one might expect post-*Hathcock* redevelopment agreements to stress the collaborative nature of what would be articulated as a public-private partnership.<sup>83</sup> Under such a structure, the redevelopment agency might have an institutionalized voice in, or veto power over, modifications in the original project. Also, the conveyance to the private redeveloper might be for a limited period rather than in fee, in which case the public agency would gain leverage through the possibility of nonrenewal. The agency and the private redeveloper would have to devise language that would pass the judicial “accountability” standard. At the same time, however, the documentation would have to provide the redeveloper with sufficiently certain rights so as not to discourage prospective lenders or tenants from participating.

The final *Hathcock* standard, the establishment that condemnation is appropriate on account of the present state of the parcel, as opposed to its future possibilities, relates to the original goal of urban renewal, slum clearance. It is unlikely that condemnation based on genuine urban blight would be contestable, although the distinction between genuine blight and pretextual blight might not always be easy to draw.<sup>84</sup>

#### IV. Conclusion

*Hathcock* marks what might be an important turning point in American condemnation law. By abrogating the iconic *Poletown* decision, it both abets and calls sharp attention to the trend toward a closer examination of condemnation to further economic development. Also, its delineation of three permissible bases for the use of eminent domain where the parcel is to be reconveyed to another private party seems susceptible of wide adoption.

*Hathcock* does not require government to curtail urban renewal efforts. Nor, since it is based on the Michigan constitution, does it invoke authority that might be binding on another jurisdiction. However, the case is persuasive authority for the proposition that the diffused benefits thrown off by successful local business should not be sufficient to justify the use of eminent domain, and that a careful case-specific review of the public and private benefits to be derived is required.

79. *Id.* at 784 (emphasis added).

80. *Id.* at 786 (quoting *Ryerson v. Brown*, 35 Mich. 333, 339 (Mich. 1877)).

81. *Id.* at 770-71.

82. *See, e.g., Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. App. Div. 1998) (holding failure of authority to limit reconveyed land to continuing use as casino parking to invalidate condemnation).

83. *See Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 7 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004) (noting briefly that “[b]ecause the [a]gency lacked the financial resources to construct the project alone, it entered into an agreement with a consortium of downtown casinos”).

84. *See 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (rejecting assertions of present and future blight, and observing that “[n]o judicial deference is required, for instance, where the ostensible public use is demonstrably pretextual”).