What to Make of the Proposed State Constitutional Amendment Limiting the Exercise of Eminent Domain by Governmental Agencies?

by Thomas R. Schultz

On Tuesday, November 7, 2006, Michigan voters will head to the polls to participate in the mid-term congressional elections and to vote for governor and other state and local offices. Also on the ballot will be several proposals and initiatives on various issues, including affirmative action, dove hunting, conservation, and – relevant to the municipal law practice, and to constitutional and real property law generally – an amendment to the state constitution placing new limitations on the exercise of eminent domain by governmental agencies.

The sheer number of ballot issues gives this election a "something for everybody" feel and could well lead to a healthy turnout. While some of the elective offices seem up in the air and some of the ballot issues too close to call, the conventional wisdom is that the eminent domain question, placed on the ballot with genuine bipartisan congressional support, is not.

Joint Senate Resolution E, as it is currently designated, is a direct response to the U.S. Supreme Court's much-maligned decision last summer in *Kelo v. New London*.[1] Its purpose is to make sure that what happened in that case – a city allowed to condemn occupied, non-blighted single-family homes to clear land for private, commercial economic development – can't happen here in Michigan. The ink was barely dry on the *Kelo* decision before the Michigan Legislature had approved, and the governor had signed, the country's first proposed state constitutional amendment attributable to opposition to the result in *Kelo*.

There will be plenty of publications and discussions in the weeks and months leading up to the election that will hail the proposed amendment for primarily that reason. The point of this short article is not to criticize the proposal –or the sentiments behind it – but rather to take a step back and suggest a wider view of what the amendment does (or at least might do) besides simply clarifying that eminent domain cannot be used to foster private economic development under the Michigan constitution.

The Inspiration for the Proposed Amendment – Kelo *and* Hathcock

First, a little background on the *Kelo* case and the reaction it inspired. In 1990, the City of New London, Connecticut, was designated as a "distressed municipality" by a state agency. In the late 1990s, with its prospects worsening, the city asked its economic development arm, the New London Development Corporation (NLDC), to assist in planning the redevelopment of the area around and including Fort Trumbull, a former U.S. naval base. The city ultimately settled on a plan that called for the establishment of a mixed-use, mostly private development on about 90 acres of property – including 32 acres of the naval facility and approximately 115 privately owned properties – with a waterfront conference hotel at the center of an "urban village" area, marinas, a river walk, new residences, research and development office space immediately adjacent to a brand new facility built by Pfizer, and various other uses.

While most of the privately owned real estate was acquired by voluntary sale, negotiations with some property owners eventually failed, and the NLDC initiated condemnation proceedings under the city's eminent domain authority. The owners sought an injunction against the taking of their properties in part as a violation of the "public use" restriction in the 5th Amendment of the U. S. Constitution (applicable to the states through the 14th Amendment), which states "[N]or shall private property be taken for public use, without just compensation."

The Connecticut Supreme Court found that the proposed takings were authorized by the state's municipal development statute, and that the "economic development" proposed by the city qualified as a public use under both the federal and state constitutions. In a 5-4 decision, the U.S. Supreme Court agreed. While the Court acknowledged the constitutional principle that a government agency may not take the property of one private owner for the sole purpose of transferring it to another private owner, even if the original owner is paid just compensation, it also concluded that, once taken, property may be transferred to another private party by the state so long as the use of the property by the public is the "purpose" of the taking. According to the Court, then, the disposition of the case "turns on the question whether the city's development plan serves a 'public purpose.'"[2]

Relying primarily on the two best-known public use cases decided by the Court in the last half-century or so, *Berman v. Parker*[3] and *Hawaii Housing Authority v. Midkiff*,[4] the Court noted that the concept of public purpose under the U.S. Constitution had historically been applied broadly. In *Berman*, the Court upheld the taking of private property for immediate transfer to another private owner for pur-

poses of blight removal and redevelopment, finding that Congress had specifically authorized the taking of land for urban revitalization and had explicitly determined by statute that urban revitalization was a public purpose. In *Midkiff*, the Court upheld legislation passed by the Hawaii Legislature allowing the state to take land from owners/lessors and transfer it to lessees, indicating 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.'"[5]

On the basis of these and other cases, the *Kelo* majority concluded that it would be "incongruous to hold that the city's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose."[6]

A firestorm erupted after the decision. The case was denounced from the right as an affront to the very notion of private property and from the left as just another example of a government agency collaborating with rich developers to trample the rights of the underprivileged. Nor was the discussion confined to legal circles – major newspapers and local weeklies alike weighed in on their editorial pages, and the networks carried coverage of the response well beyond the usual two-minute sound bite. While the motivations might have been diverse, the message was universal (if not exactly true): No one's house is safe anymore.

Here in Michigan, the reaction was somewhat muted by the fact that, several months before *Kelo* was issued, the Michigan Supreme Court released an opinion in a case called *Wayne County v. Hathcock*[7] that addressed the same issue – whether eminent domain can be used to condemn property for the purpose of transferring it to a private third party for economic development purposes – but answered the question in the negative, with only a few limited (and historically recognizable) exceptions.

Hathcock involved a 1,000-acre proposed development by Wayne County to create a state-of-the-art business and technology park with a conference center, hotel accommodations, and a recreational facility that the county hoped would create as many as 30,000 new jobs and raise some $350 million in tax revenues. When the county brought eminent domain proceedings to condemn a few holdout parcels, the property owners argued that the condemnations were unlawful because their properties would not be put to a public use, but would eventually be transferred to private developers.

Citing the well-known decision in *Poletown Neighborhood Council v. City of Detroit*,[8] the trial court and Court of Appeals upheld the condemnations as being for a public use because of the "generalized" economic benefit of the

project to the county. The Michigan Supreme Court not only disagreed, it expressly overruled *Poletown*, holding that the case had been "a radical departure from fundamental constitutional principles and over a century of [the] Court's eminent domain jurisprudence."[9] The *Hathcock* Court held that a ***transfer*** of condemned property to a private entity is appropriate in only three limited circumstances – none of which include economic development:

(1) where public necessity of the extreme sort requires collective action; e.g., where long corridors of land must be obtained for the construction of a highway, railroad, canal, or other instrumentality of interstate commerce;
(2) where the property remains subject to public oversight after transfer to a private entity; or
(3) where the property is condemned because of facts of independent public significance; e.g., for the purpose of clearing slums or dilapidated and blighted housing.

By relying only on the Michigan constitution to reach the exact opposite conclusion from the *Kelo* Court (though the language of the two constitutions are essentially the same), *Hathcock* had rendered *Kelo* pretty much irrelevant in Michigan before the later case was even decided.

The Proposed Amendment

Despite being perhaps the only state in the nation with no particular need to amend its constitution in response to *Kelo* (given *Hathcock*) the Michigan Legislature quickly put that process in motion. By August 2005, a constitutional amendment had been proposed. By November 2005, both houses had considered the legislation and, after minor amendments, adopted it. By December 2005, the governor had signed the bill into law, readying it for consideration by the voters.

It is not difficult to see the basic objection to the result (and maybe even the legal reasoning) of *Kelo*. It is also easy to see merit in *Hathcock's* three-part test when the intention of the government is to transfer the property to a third party. People of all legal and political persuasions have decried *Kelo* and praised *Hathcock*. At the same time, though, it is also easy enough to construct legal, political and social arguments in favor of *Kelo* and against *Hathcock*, which helps to explain why both cases have captured the imagination of people who might not otherwise care much about eminent domain.

But the state constitutional amendment now proposed does not just codify *Hathcock*, and would do much more than simply overturn the *Kelo* decision. Here is the text of the proposed amendment, with the new language shown in bold and italics.

> Sec. 2. Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. ***If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law.*** Compensation shall be determined in proceedings in a court of record.
>
> "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 revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.
>
> 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 which 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.
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> ***Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.***

Questions as Well as Answers

Several practical issues relating to the specific language of the proposed amendment are likely to cause debate (or more

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formal dispute, whether meritorious or not) if it's adopted:

- **What is private property "consisting of" an individual's principal residence**? Does it include only the physical confines of the building itself, or could it include some of the property on which it is located? What about commercial apartments?
- **What does "no less than" 125% of fair market value mean**? The case law regarding valuation and just compensation is well-established here in Michigan. Jury instructions about how to determine value have been finely honed over the years and, for the most part, juries understand them. Could juries be asked to award ***more than*** 125% of fair market value?
- **What do "burden of proof" and "preponderance of the evidence" mean in the context of public use**? Under the law as it stands now in Michigan, after *Hathcock*, there is a two-part inquiry: First, is the property being taken for a ***public use*** (a road, a sewer, a library, a park – but not for transfer to a third party)? If so, the second inquiry is whether there is a ***public necessity*** for the taking (that is, is the property taken necessary for the public improvement)? The courts have said unequivocally that the public use issue is a ***legal*** question. The public necessity issue, though, is a ***factual*** question, with the standard for a court's review being quite deferential – fraud, error of law, or abuse of discretion. Does this proposal turn the public use legal issue into a factual question? Does it raise the standard of review for the factual necessity determination?
- **What practical effects will changing the burden of proof have**? It would seem that, at the very least, additional changes to the statutes governing condemnation procedures would be required.
- **Why the higher standard for eradication of blight?**

The strong negative public reaction to the *Kelo* decision was genuine enough, and corresponding legislative reaction to it – even a constitutional response – is not surprising. But the amendment as written does not confine itself to clarifying that private economic development is not a public use under our state constitution, or to "protecting" property owners from *Kelo*. The changes to the amount of compensation required in certain cases and, potentially, to the burden of proof in at least some cases can't be ascribed to the *Kelo* debate, and haven't gotten nearly the same kind of deliberation that many have already given the economic development issue. These new and additional rules are very significant policy changes that deserve more attention as the election nears.

Certainly, the amendment gives additional protection to property owners; but will it also saddle those same property owners as taxpayers with higher costs for public improvements by causing more frequent challenges to what are now unquestionably valid public "uses," like roads or sewers or public buildings, or by simply raising the cost of acquiring the land? The Oakland Press recently ran a story (November 20, 2005) citing two instances in which the cost of acquiring property far exceeded the cost of performing some fairly extensive road improvements. This amendment is not likely to make property acquisition for such necessary projects any cheaper.

The proposed constitutional amendment provides a lot more detail than one might typically expect in a constitutional provision. It reads more like a statute than a constitution, but if adopted would be much harder to "fix" should it turn out to accomplish more and different things than the voters ever expected. With no political opposition to the amendment itself, and no incontrovertible objections to the general intentions behind the amendment, it seems likely to pass. As voters, however, we could all benefit from more discussion of both its causes and effects in a full public forum.

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Footnotes

1 __ US __; 125 S Ct 2655 (2005).
2 *Id.* at 2563.
3 348 US 26 (1954).
4 467 US 229 (1984).
5 *Id.* at 217.
6 125 S Ct at 2665.
7 471 Mich 445 (2004).
8 410 Mich 616 (1981).
9 471 Mich at 456.