

Sparking a land mine of debate

After a recent state Supreme Court ruling, government faces a tougher time seizing private property

By MICHAEL BETZOLD

Over the past two decades, the City of Detroit has used the expansive power of eminent domain and similar statutes to condemn private property for massive projects such as Comerica Park, Ford Field, the theater district, casinos and hospital expansions. But a recent ruling by the Michigan Supreme Court will make it much harder for Detroit — or any other Michigan city — to seize land for similar projects in the future.

The court's roadblock resulted from the refusal of a cabinetmaker in Romulus to sell his commercial property to Wayne County for a business, hotel and retail development near Metro Airport to be called Pinnacle Aeropark. Ed Hathcock, joined by other local property owners, challenged the county's power to acquire land for a private development. The county argued the project would benefit the public through job creation and economic improvement. That's an argument local governments have used successfully since 1981, when the state's highest court sanctioned Detroit's leveling of an east-side neighborhood to clear the way for General Motors' Poletown assembly plant.

But when the current state Supreme Court last summer unanimously overturned the Poletown standard in ruling for Hathcock, the shocking decision toppled more than 20 years of court-approved authority that allowed local governments in Michigan to snatch up land for projects — even if privately owned — for so-called “public benefit.” With the ruling, the landscape has dramatically altered — with implications that some experts say may be dire for urban development in Detroit.

“This is going to have a very substantial negative effect on the ability of the city to assemble large parcels of land for redevelopment,” says John Mogk, a Wayne State University professor and land-use expert.

Others disagree. Alan Ackerman, a Troy attorney and an expert in eminent domain cases who argued the case for Hathcock and the others, says the new court's ruling will restore marketplace demand for Detroit real estate and end government's role as a special broker for private development projects. Certainly, it will increase the bargaining power of landholders in areas targeted for urban renewal. Under Poletown, municipalities were supposed to pay “fair market value” for land they took, but under the new rules, they could pay much more.

The impact of the Hathcock ruling might even reverberate nationwide, as did the 1981 state high court's milestone Poletown decision. When the courts ruled in favor of the city of Detroit's plan to use condemnation proceedings to level an ethnic Polish neighborhood — including homes, businesses, and a Catholic church — it opened the door for other developers to argue that they deserved similar treatment, and for municipalities nationwide to act more confidently in using their powers to condemn land. Before the Poletown ruling, it was already clear that local governments could use the power of eminent domain to take land for roads, schools, government buildings and utilities. Even today, after the Hathcock ruling, that power remains unchallenged under state law that allows private property to be condemned for “public use.”

The Poletown decision, however, expanded a growing trend under which courts interpreted “public use” to include projects that could arguably produce “public benefit.” In the case of the GM plant, the benefit was retaining 5,000 auto assembly jobs in Detroit and helping to combat the city's severe economic depression. The automaker had threatened to take those jobs out of the city — and it was no idle threat.

Poletown became a famous and influential case nationally. Although states



differ in the degree to which their statutes allow eminent domain to be invoked for projects that ultimately will be privately held, the Poletown ruling provided unprecedented expansion of condemnation powers for urban redevelopment projects. In Detroit, the city, confident its projects would meet the Poletown test of public benefit, used similar statutes to assemble land for the theater district and for new downtown baseball and football stadiums. The city also threatened to use eminent domain to take properties along the riverfront for casinos. In fact, there's hardly a major public project in the last two decades in which the city that hasn't relied on the now-overturned Poletown case, Mogk notes.

During all these projects, Detroit's condemnation powers remained essentially unchallenged. Some property owners in the theater district objected to their land being taken but lost in circuit court, and the case escaped the attention of higher courts when the plaintiffs missed by one day the deadline to file an appeal.

Even while approving the GM project, the Poletown court placed some limits on eminent domain powers by devising a so-called “heightened scrutiny” test. Under this criterion, whether a local government could condemn property depended on whether the “public benefit” of the proposed project outweighed the “private benefit.” Following this logic, the courts ruled against an auto dealership and the city of Center Line, which wanted to condemn property to build a new dealership. Also, a cable-TV firm was prevented by a court decision from stringing exclusive deal with the company. In neither of these cases did the courts find any compelling public benefit.

Wayne County's plans for its Pinnacle Aeropark provided a more difficult test for the Poletown standards. Over a number of years, the county had acquired



STANDING HIS GROUND Ed Hathcock on his land near Metro Airport, which Wayne County wanted for an industrial park. The Michigan Supreme Court sided with Hathcock and his neighbors.

small parcels of land south of the airport under a Federal Aviation Authority noise-abatement program. Under the FAA rules, property owners could choose whether to have homes insulated against noise at government expense or sold at market value plus relocation costs (or simply to remain unimproved). Many homeowners sold to the county.

When former county executive Ed McNamara completed plans for the new Northwest Airlines midfield terminal, the idea for a nearby "aeropark," south of the airport property along Eureka Road, took shape. The county hoped to lure some high-tech companies to place regional headquarters or other offices there, with hotels, shops and a golf course.

Because of the FAA program, the county already owned scores of small parcels in a checkerboard pattern, and it began to acquire others for the Pinnacle project. When some landholders refused to sell, the county moved to condemn the properties. Hathcock, owner of Gem Products, and 19 other property owners or groups then turned for help to Ackerman, who has a long track record defending private property owners under eminent domain threats. The county enlisted an equally experienced firm — Zausmer, Kaufman, August & Caldwell, of Farmington Hills — which had represented the City of Detroit in its theater district, stadium, and casino projects.

The county's plan was to complete its purchase of a large tract of contiguous land, put in infrastructure, and then sell the parcel to a private developer or developers, as yet unidentified. Its legal briefs claimed the public benefit of the project would include a bigger tax base that would enable the county to expand and improve public services. This circuitous concept of public benefit — which presumably could be used to justify any private development that would pay taxes — was a new test of the Poletown standards and virtually invited Supreme Court review.

However, the property owners lost in circuit court and in the court of appeals. They argued that, unlike Poletown, the airport area was not an economically depressed neighborhood in a city with skyrocketing unemployment, and thus the taking had no demonstrable public economic benefit. The county, Ackerman's briefs contended, was using its eminent domain powers inappropriately to avoid paying market values and then to turn over the real estate it assembled to private interests, acting as a very privileged real-estate broker.

In a strange alliance of bizarre political bedfellows, both the Mackinac Center for Public Policy, a conservative think tank, and the American Civil Liberties Union filed amicus briefs in support of Hathcock and his neighbors' refusal to allow their property to be taken for the Pinnacle project. They argued the county was usurping constitutional rights to private property.

Mischa Gibbons, of the Zausmer firm, however, sees the Pinnacle project as

in some ways more benign than what General Motors did with the city's help in Poletown. She points out that no private company was calling the shots behind the scenes at Pinnacle, since the county was basically assembling the land on speculation that developers could be found. It wasn't corporate blackmail coupled by a threat to leave town, but a governmental body's vision of a greater public good.

After three years, the case reached the state Supreme Court, and in July 2004 the seven judges all ruled in Hathcock's favor, striking down the Poletown decision, which they said was a "disingenuous" interpretation of the state and U.S. constitutions. "Public use," the court ruled, meant exactly what it said. In order for a government to use eminent domain, the land taken must be available for public use — as a park, for example — clearly not what was envisioned in the Pinnacle project. In its court briefs in the case, the county had argued that it couldn't proceed with Pinnacle without condemning the holdout properties. But, under the successor administration of executive Robert Ficano, Wayne County is going ahead with the project anyway.

"It would have been preferable to have eminent domain upheld," says Ficano, "but we're not going to be deterred. We're going to move forward with it."

Ficano says Pinnacle is a vital engine for area growth and will fit in well with other ventures planned by Toyota and Visteon along the I-94 corridor. The county plans to start infrastructure improvements soon — the area currently has no public sewer or other utilities. Ficano says several investors have expressed interest in the project. The holdout property owners represent only about 2 percent of the project area, and the county or the developers who later buy the land from the county will either build around them or try again to negotiate settlements.

Ackerman says he doesn't believe the Hathcock ruling will impede local governments' economic development plans but instead will restore the primacy of the market. He says Detroit's extensive use of eminent domain powers in its redevelopment projects "killed market demand in the city."

Others, however, say the ruling puts Detroit and Michigan at a competitive disadvantage when trying to lure corporations to build offices and plants here. Since Poletown, the state was among the most lenient in allowing eminent domain takings for private development, but now it is one of the most restrictive. Critics also say the public will end up paying more in the end. Developments brokered by governments will continue, but municipalities may have to pay exorbitant amounts for parcels of land, driving up costs to taxpayers, says Bill Mathewson of the Michigan Municipal League, which supported Wayne County in the Hathcock case.

Whether Hathcock has as big an influence in stemming government land assembly as the Poletown decision had in promoting it depends in part on the outcome of a U.S. Supreme Court ruling on a related Connecticut case, *Kelo v. New London*. Another ruling for property owners in that case may make local governments more hesitant to embrace development projects. No matter what the high court does, however, state law is expected to remain the overriding factor in eminent domain cases.

Mathewson says municipalities still have options for using eminent domain powers in certain cases but agrees the Hathcock ruling is "a restriction on their ability to pursue important economic initiatives. It will make the siting of a large plant like GM Poletown more difficult than in the past."

Cities like Detroit can still use eminent domain in a case where they can show a project area is blighted, and Ackerman says such projects are still sorely needed in Detroit and should go forward. However, Mogk, of Wayne State, says that what constitutes "blight" — a test that came out of a 1954 U.S. Supreme Court decision — has never been legally clarified.

"If the entire city of Detroit is deemed to be blighted, then this ruling [Hathcock] would have no discernible effect on Detroit," he says.

Attorney Jaclyn Levine, of Miller, Canfield, Paddock & Stone, another expert in eminent domain, says local governments have a thread of hope in a line from the Hathcock ruling that allows condemnation for private development in cases where "the public entity remains accountable to the public in its use of that property." Levine says the meaning of the phrase is unclear, but "it's up to the public to come up with creative uses of that language." ■

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