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DO JUDICIAL CHALLENGES TO TAKINGS STILL EXIST?

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Introduction

This article describes the historical standard for challenges to the necessity of eminent domain takings, the effects of the 1963 Michigan Constitution on necessity challenges, application of necessity standards pursuant to the 1963 Michigan Constitution, and the problems created by the interplay of the Uniform Condemnation Procedures Act (UCPA)[1], in the 20th century. This article will also review the surprising shift in the necessity challenge standard recently applied by the Michigan courts in the decisions of *Village of Oxford v Nathan Grove Family, LLC*,[2] *City of Novi v Robert Adell Children's Funded Trust*,[3] and *Township of Grosse Ile v Grosse Ile Bridge Co*.[4]

Last, the UCPA (the procedural statute applicable to all condemnation actions in Michigan) provides that a condemning agency's finding of necessity will only be reversed for "abuse of discretion, error of law, or fraud."[5] This article examines whether the statute establishes any real standard of review that may be taken into consideration in judicial review of necessity.

1 Act 87 of 1980, MCL 213.51 *et seq.*

2 477 Mich 894; 722 NW2d 421 (2006).
3 473 Mich 242; 701 NW2d 144 (2005).
4 477 Mich 890; 722 NW2d 220 (2006).
5 MCL 213.56(2).

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I. The Historical Context

A. Determination of Necessity and Just Compensation

The 1850[6] and 1908[7] Michigan Constitutions provided that necessity and just compensation were questions of fact. Under these Constitutions, the jury was charged with determining the necessity of the proposed improvement and the necessity for taking the particular property in question.[8]

The jury acted as a "jury of inquest" authorized to determine issues of both law and fact. Juries had great discretion regarding all evidentiary issues, testimony, and any other type of evidence proffered during the trial. The jury in a condemnation proceeding was not bound by strict rules of evidence or normal civil trial procedures. [9]

6 Const 1850, art 18, § 2 stated:

> When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law: *Provided*, The foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duty as highway commissioners.

7 Const 1908, art 13, § 1 provided:

> When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: *Provided*, That the foregoing provision shall not be construed to apply to the action of commissioners of highways *or road commissioners* in the official discharge of their duties.

8 *See Bd of Water Comm'rs of City of Detroit v Lorman*, 158 Mich 608, 612; 123 NW 52 (1909). *See also Comm'rs of Parks & Boulevards of City of Detroit v Moesta*, 91 Mich 149, 152-53; 51 NW 903 (1892); *In re Edward J. Jeffries Homes Housing Project*, 306 Mich 638, 647-48; 11 NW2d 272 (1943); *Grand Rapids Bd of Ed v Baczewski*, 340 Mich 265, 270-71; 65 NW2d 810 (1954); *Dep't of Conservation v Connor*, 316 Mich 565, 576-78; 25 NW2d 619 (1947).

9 *See Chicago, Detroit, etc v Jacobs*, 225 Mich 677; 196 NW 621 (1924); *Michigan Air Line Ry v Barnes*, 44 Mich 222; 6 NW 651 (1880); *Toledo, etc R Co v Dunlap*, 47 Mich 456; 11 NW 271 (1882); *Detroit, etc R Co v. Crane*, 50 Mich 182, 15 NW 73 (1883); *Grand Rapids, etc R Co v Cheseboro*, 74 Mich 466; 42 NW 66 (1889); *Union Depot Co v Backus*, 92 Mich 34; 52 NW 790 (1892).

The judicial interpretation of the 1908 Michigan Constitution provided the jury with such absolute discretion that a court would have less likelihood of reversal if it gave no instruction at all than if an improper instruction was given.[10] Under the 1908 Constitution, the jury could be provided with the cost of the total project, including those amounts of the parcels that settled, to determine whether there was a necessity for the project.

Under the 1850 and 1908 Michigan Constitutions, title to the condemned property did not vest in the condemning agency until after the jury's award, delaying the condemnation process and creating uncertainty for the owner as to whether the property would be condemned. If a condemning agency felt the award was too high, the agency could discontinue the condemnation action and withdraw from the acquisition. A jury could also conclude a lack of necessity, which would foreclose the agency's ability to acquire the property. In either event, title would not pass to the condemning agency unless and until a verdict favorable to the agency was rendered. This procedure placed both parties at serious risk.

B. 1963 Michigan Constitution and Subsequent Court Rules

The 1963 Constitution deleted the provision that a jury would have the right to review "the necessity for using such property" that existed in the prior constitutions. However, every legislative act authorizing condemnations following the 1963 Constitution provided a right of judicial review of necessity based on the "fraud or abuse of discretion" standard that currently exists.[11]

1. Supreme Court Rule 37

The Michigan Supreme Court promulgated Rule 37 in 1961, which was restated in General Court Rule (GCR) 1963, 516.5, as follows: "Judges of courts of record in which condemnation proceedings have been instituted shall advise the jury or commissioners on questions of law and admissibility of evidence." This modified the old rules and constitutional application in which the jury or commissioners were judges of the law and the facts.

10 *In re Public Highway in Elba Twp*, 236 Mich 282, 284; 210 NW 297 (1926).

11 A precise discussion of the changes in the constitution appears in *State Hwy Comm v Vanderkloot*, 392 Mich 159, 169-176, 191; 220 NW2d 416 (1974).

2. General Court Rules

Article 10, § 2 of the 1963 Constitution requires that "compensation shall be determined in proceedings in the court of record." GCR 1963, 516.5 required that civil procedure rules be followed.[12] The issue of whether the court rules were to apply to condemnation cases has been relitigated and affirmed on numerous occasions.[13]

C. Effect of the UCPA

Prior to the enactment of the UCPA in 1980, procedural requirements for condemnation actions were based, in significant part, on the statutory act that authorized the particular condemnation. By contrast, Section 2 of the UCPA provides that the Michigan Court Rules shall be used unless specifically rejected by the UCPA itself.[14]

Section 13 of the UCPA provides that a jury or the court may award the verdict.[15] However, a jury is no longer required by the constitution. A party must request a jury trial pursuant to the Michigan Court Rules. The jury's only function is to determine the amount of just compensation for the taking.

D. Practice Under Michigan Court Rules of 1985

As the Michigan Court Rules of 1985 were promulgated after the adoption of the UCPA, the Michigan Supreme Court recognized the UCPA's effect expressly excluded from the Court Rules the GCR provisions regarding condemnation cases. The commentary to MCR 2.516 states: "former GCR 1963, 516.5, regarding condemnation proceedings, is omitted. Under MCLA 213.62(1); MSA 8.265(12)(1), jury procedure in condemnation cases is governed by the same rules as are other civil actions."

E. Underlying Policy in Favor of Owner

Underlying the strong tendency to favor property owners, visible throughout Michigan judicial precedent, is the requirement that owners must be treated fairly. For example, when a state agency rescinded a contractual agreement with an owner, the Michigan Supreme Court determined that the rescission created a constitutional right to compensation.[16] The strong continuing propensity to support the position of property owners who are dispossessed of their property interest is described more fully in Section II below.

1. Necessary to Promote the Public Good

The Michigan Courts have narrowed the common understanding of necessity over time. For example:

- The constitutional authorization providing that the University of Michigan Regents would be a separate entity to control and manage the university, and providing that the Regents could take such actions as necessary to promote education, provided the basis for the Regents to take private property for the Lawyers Club as an accessory public use.[17]

- When an international bridge was considered a public purpose for condemnation, the approaches to the bridge were treated as part of the public purpose.[18]

One of the primary cases challenging the right to take property for a quasi-public use is *Pere Marquette R Co v United States Gypsum Co*.[19] In *Pere Marquette*, a railroad operator sought to condemn land for its own use as a railroad spur.[20] The Michigan Supreme Court affirmed a Probate Court decision that because the intended use would benefit only a single user, the railroad operator had not shown a public purpose for the taking.[21]

2. The Inherent Power of the Sovereign to Condemn

The power of eminent domain is inherent in every sovereign. In *West River Bridge Co v Dix*,[22] the U.S. Supreme Court recognized that the power of eminent domain was superior to other rights and obligations created by the sovereign:

12 *Id* at 154.
13 *Consumers Power Co v Allegan State Bank*, 20 Mich App 720; 174 NW2d 578 (1969), *aff'd* 388 Mich 568; 202 NW2d 295 (1972); *Delta Twp v Eyde*, 40 Mich App 485; 198 NW2d 918 (1972).
14 MCL 213.52(1).
15 MCLA 213.63.
16 *Highway Comm'r v Flanders*, 5 Mich App 572; 147 NW2d 441 (1967).
17 *People, for use of Regents of the Univ of Mich v Brooks*, 224 Mich 45; 194 NW 602 (1923).
18 *Detroit Int'l Bridge Co v Am Seed Co*, 249 Mich 289; 228 NW 791 (1930).
19 154 Mich 290; 117 NW 733 (1908).
20 *Id* at 296-98.
21 *Id* at 296-300.
22 47 US 507 (Howard 1848).

> No state shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power, and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments . . . . This power, denominated eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.[23]

The Michigan Supreme Court recognized this power in *Woodmere Cemetery v Roulo*,[24] where the Court stated: "the right of eminent domain is an incident that attaches to every sovereignty, and constitutes a condition upon which all property is holden."[25]

F. Burden of Proof

Traditionally, under the predecessor acts to the UCPA, the property owner had the burden of proving that a taking was not necessary. In *Nelson Drainage Dist v Fillippis*,[26] the Michigan Court of Appeals concluded that the presentation of a resolution of necessity is prima facie evidence of necessity:

> Defendants, as the moving party asking for a review of the finding of necessity, had the burden of coming forward with evidence to support their claim of abuse of discretion. . . . This is consistent with the general rule regarding presumptions and the opposing party's duty to go forward with evidence to rebut or meet the presumption. MRE 301. Under that rule, this shift in the burden of going forward does not shift the plaintiff's risk of nonpersuasion. Similarly, the comment to SJI 2d 90.03 concerning the burden of proof in condemnation proceedings explains that the plaintiff has the burden of proof and that the plaintiff's resolution of necessity is sufficient only in the absence of evidence to the contrary.[27]

G. Cases Decided Post-1963 Constitution

1. Due Process and Requirement of Full Hearing

In challenging the necessity of takings, the courts have liberally allowed an owner to produce evidence relevant to the issue of necessity, with the caveat that challenging an effort to introduce unfavorable evidence, which may become necessary to protect the project, will be limited.[28]

The appellate courts have construed the owner's opportunity to challenge necessity as one which should provide the owner a full hearing to present the factual basis for the challenge:

> We believe that trial court should in the future liberally allow the property owner to present such evidence as is relevant to the issue of necessity in determining fraud or abuse of discretion up to the time condemnation is authorized, restricting such evidence, however, to prevent jeopardizing the success of such urban renewal projects in revealing negotiations with developers and others who insist on secrecy until contracts have been completed.[29]

2. Benefit For Private Owners

In *White Pine Hunting Club v Schalkofski*,[30] a statute providing for establishment of private roads through property for the benefit of individual landowners[31] was declared unconstitutional. The statute had allowed a party to apply to the township supervisor to present a notice to a third party property owner so that a proposed road may be constructed through the third party's property.[32] A jury would then determine just compensation for the taking of the property under the statute.[33] Relying on *Shizas v Detroit*[34] and the authority

23 *Id* at 531.
24 104 Mich 595, 599; 62 NW 1010 (1895).
25 *Id*, citing *Kramer v Cleveland & P R Co*, 5 Ohio St 140 (1855).
26 174 Mich App 400; 436 NW2d 682 (1989).
27 *Id* at 408, citing *Livingston Cty v Herbst*, 381 Mich 150; 195 NW2d 894 (1972); *City of Muskegon v Irwin*, 31 Mich App 263, 270; 187 NW2d 481 (1971). *See also City of Lansing v Jury Rowe Realty Co*, 59 Mich App 316; 229 NW2d 432 (1975), citing *State Highway Comm v Taylor*, 41 Mich App 601, 603; 199 NW2d 838 (1972); *Kalamazoo Road Comm'rs v Dosca*, 21 Mich App 546, 548; 175 NW2d 899 (1970).
28 *City of Muskegon v Irwin*, 31 Mich App 263, 268; 187 NW2d 481 (1971).
29 *Jury Rowe Realty Co*, 59 Mich App at 318-19, quoting *Irwin*, 31 Mich App at 269.
30 65 Mich App 147; 237 NW2d 223 (1975).
31 MCL 229.1 *et seq*.
32 *Id.*
33 MCL 229.4.
34 333 Mich 44, 50; 52 NW2d 589 (1952).

cited therein,[35] the *Schalkofski* panel determined the private roads taken under the statute were not a "public use," so the statute was unconstitutional.[36]

3. Future Use and Excess Condemnation

Under the predecessor constitutions, there was no necessity unless the jury determined that the contemplated future use was a "reasonably immediate use."[37] Under the 1908 Constitution, a proposed use 30 years in the future was not a "necessity for using such property" and was therefore held too remote in time to be necessary.[38] The requirement of "necessity for using such property" under the Constitution of 1963 "does not mean an indefinite, remote, or speculative future necessity, but means a necessity now existing or to exist in the near future."[39]

The Michigan Judiciary has consistently held that only property actually necessary for the project should be included in the finding of necessity.[40] *Nelson Drainage District*[41] reaffirmed the precedent that a condemnation in excess of what is needed is prohibited. Authority to condemn property for drain usage, for instance, arises under the applicable drain statute. Taking of property in excess of the area necessary for the drain therefore constitutes an unauthorized taking.

H. Modern Public Use Doctrine

1. *Poletown v Detroit*

The first of the UCPA cases dealing with a review of necessity under MCLA 213.56 was the famous (or infamous case) of *Poletown Neighborhood Council v City of Detroit*.[42] In *Poletown*, General Motors approached the City of Detroit with interest in constructing a new auto assembly plant in the city. At that time, the auto industry in the City of Detroit and its environs was in a state of disarray, if not disintegration. The city searched for available sites within the city limits. When it recognized it could not immediately offer a site, the city looked at the alternate areas in which it would be able to condemn in order to provide General Motors with the necessary space, and concluded that an area commonly referred to as "Poletown" would meet the physical and geographical requirements demanded by General Motors.

The city maintained that the Economic Development Corporation Act[43] authorized Detroit to condemn for the purpose of assembling land, which would then be transferred to a private corporation, thereby fulfilling the Economic Development Act's purpose of bringing jobs and tax dollars to Michigan's cities.

Relying upon *Shizas v Detroit*,[44] the Michigan Supreme Court stated: "Article 10, sec. 2 [of the 1963 Constitution] has been interpreted as requiring that the power of eminent domain not be invoked except as to further a public use or purpose."[45] The Court acknowledged that the concepts of "public use" and "purpose" had "not received a narrow or inelastic definition by this Court in previous cases,"[46] and resolved any confusion by determining that "public use" and "purpose" were interchangeable.[47]

The *Poletown* Court also recognized that, because of society's changing economic conditions, "the right of the public to receive and enjoy the benefit of the use determines whether the use is public or private."[48]

The *Poletown* Court relied on the basic premise underlying the U.S. Supreme Court's decision in *Berman v Parker*[49] that once a legislature has spoken, the public interest has, in effect, been conclusively determined.

The *Poletown* Court also affirmed the standard of review as established by *People ex rel Detroit & Howell R Co v Salem Township Bd*:[50]

> [A]s Justice Cooley stated over a hundred years ago 'the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and . . . the law does not so much regard the means as the need.'

35 *Id*, citing 18 Am Jur, Eminent Domain § 34, pp 657-58.
36 *Schalkofski*, 65 Mich App at 153.
37 *Grand Rapids Bd of Educ v Baczewski*, 340 Mich 265, 272; 65 NW2d 810 (1954).
38 *Id.*
39 *Id.*
40 *Dept of Conservation v Connor*, 316 Mich 565, 576; 25 NW2d 619 (1947).
41 174 Mich App 400 (1989).
42 410 Mich 616; 304 NW2d 455 (1981).
43 MCL 125.1601 *et seq.*
44 333 Mich 44, 50; 52 NW2d 589 (1952).
45 *Poletown*, 410 Mich at 629.
46 *Id* at 630.
47 *Id*, citing *City of Center Line v Michigan Bell Telephone Co*, 387 Mich 260; 196 NW2d 144 (1972); *Gregory Marina, Inc v Detroit*, 378 Mich 364; 144 NW2d 503 (1966); *In re Slum Clearance*, 331 Mich 714; 50 NW2d 340 (1951).
48 *Id*, citing *Hays v Kalamazoo*, 316 Mich 443, 453-54; 25 NW2d 787 (1947), quoting 37 Am Jur, Municipal Corporations § 120, pp 734-35.
49 348 US 26, 32 (1954).
50 20 Mich 452, 480-81 (1870).

> When there is such public need, '[t]he abstract right [of an individual] to make use of his own property in his own way is compelled to yield to the general comfort and protection of community, and to a proper regard to relative rights in others.' Eminent domain is an inherent power of the sovereign of the same nature as, albeit more severe than, the power to regulate the use of land through zoning or the prohibition of public nuisances.[51]

The *Poletown* Court cautioned however, that: "[I]f the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project."[52]

2. *City of Centerline v Chmelko*

The first Michigan Supreme Court case applying the *Poletown* decision was *City of Center Line v Chmelko*.[53] In *Chmelko*, the City of Center Line claimed that it was necessary to condemn parcels as part of an urban renewal project in an attempt to address parking problems and urban blight in a neighborhood. The proofs at trial illustrated that a private entity, an auto dealership, had approached the city and asked it to condemn pieces of property that the dealership had unsuccessfully attempted to purchase. The dealership obligated itself to pay for all costs of acquisition and financially underwrite the total expense in condemning the parcels.

Chmelko reviewed many of the issues not fully discussed in *Poletown*. With regard to the issue of the burden of proof in necessity challenges, the Court of Appeals upheld the trial court's determination "that it could not find a clear and significant public interest in the taking" after applying *Poletown*'s "heightened scrutiny" test.[54] The *Chmelko* court quoted *Poletown* as follows:

> [I]n *Poletown* our Supreme Court ruled: "Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature."[55]

The courts continue to have apparent problems in determining their scope of review of a legislative determination. On one hand, the courts recognize that the legislative determination and delegations of authority should be strongly affirmed because of the policy that the judiciary should not enact legislation. At the same time, our judiciary recognizes that it is the ultimate arbiter of decisions that do not fulfill the framework outlined by the Constitution. In *Chmelko*, the court relied on *Shizas v Detroit*[56] in support of the rule that the power of eminent domain may not be exercised where the taking is, in part, intended to confer a private use or benefit. At the same time, the court acknowledged that General Motors would benefit from the *Poletown* condemnation. Yet, the underlying factor and sole purpose of the government's activity was to retain a major industrial facility within the city limits. The fact that General Motors benefitted was purely incidental to the government's intent in *Poletown*. In *Chmelko*, by contrast, the real beneficiary in the end was the auto dealership and not the City of Center Line.

The *Chmelko* panel recognized that, in Michigan, the determination of the validity of an eminent domain proceeding belongs to the judiciary.[57] After a lengthy review of the judicial right to review condemnation for public purposes, the court carefully distinguished the factual basis for the necessity of a *Poletown* condemnation against the need to help with the expansion of a local car dealership.[58]

An interesting distinction made in *Chmelko* suggests that a different standard for public use may apply when a local governmental authority is condemning than when a state or federal authority is condemning. The court reviewed *Hawaii Housing Authority v Midkiff*,[59] *Berman v Parker*,[60] and *United States ex rel Tennessee Valley Authority v Welch*,[61] in holding that the congressional determination is entitled to complete deference. The Court of Appeals then reviewed a number of Michigan Supreme Court cases holding that the judiciary, not the legislature, should determine whether a particular use is public or private. The Court of Appeals' implication is

51 *Poletown*, 410 Mich at 633 (citing *People ex rel Detroit & Howell R Co v Salem Twp Bd*, 20 Mich 452, 480-81 (1870)).
52 *Id.*
53 164 Mich App 251; 416 NW2d 401 (1987).
54 *Id* at 256.
55 *Id* at 257-58, quoting *Poletown*, 410 Mich at 634-35.
56 333 Mich 44, 59-60; 52 NW2d 589 (1952).
57 "In Michigan, a long line of eminent domain cases have held that the 'public use' question is ultimately a judicial one." *General Dev Corp v Detroit*, 322 Mich 495, 498; 33 NW2d 919 (1948). *See also Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 39-40; 64 NW2d 903 (1954); *Cleveland v Detroit*, 322 Mich 172, 179; 33 NW2d 747 (1948); *Portage Twp Bd of Health v Van Hoesen*, 87 Mich 533, 539; 49 NW 894 (1891).
58 *Chmelko*, 164 Mich App at 260-64.
59 467 US 229 (1984).
60 348 US 26 (1954).
61 327 US 546 (1946).

that the U.S. Supreme Court will give greater deference to a determination involving a congressional decision, or a state legislative determination upheld by a state court. *Chmelko* also implies the right of state courts to determine whether a use within their own jurisdiction is public or private.

II. The Downhill Slope: Limitation of the Owner's Opportunity to Challenge the Right to Take

A. From *Poletown* to *Hathcock* and Beyond

Angst caused by *Poletown* reverberated in a number of opinions,[62] culminating with the reversal of *Poletown* by the Michigan Supreme Court in *County of Wayne v Hathcock*.[63] *Hathcock* limited the take unless one of four restrictions was in place.[64] However, in order to address *Poletown* on constitutional grounds, *Hathcock* dramatically expanded the power to take. The long-standing case requirements of "immediate need,"[65] "need in the future,"[66] and "funding"[67] were basically thrown out with the bathwater. Further, *Hathcock* was the first decision specifically allowing the acquisition of property by the State Agencies and Public Corporations Act[68] (the State Agencies Act),[69] as a delegation of the power to condemn. Prior to the UCPA, the delegation of the power to acquire was a statutory delegation specific to the acquiring party, separate and apart from the procedural authority under the State Agencies Act, except for departments of the State of Michigan. However, *Hathcock* now allows local governmental agencies, lacking in a "coupler" enabling delegation of a separate statute, to acquire under the State Agencies Act alone.[70]

After *Hathcock* expanded the power to condemn under the State Agencies Act, the Michigan Supreme Court in *City of Novi v Robert Adell Children's Trust Fund*,[71] *Township of Grosse Ile v Grosse Ile Bridge Co*,[72] and *Village of Oxford v Nathan Grove Family LLC*[73] applied *Hathcock*'s broad ruling to seemingly eliminate judicial review of necessity determinations under UCPA § 6(2)'s already-limited "fraud, error of law, or abuse of discretion" review standard. The recent precedent may entirely deprive owners of any judicial review of necessity. Further, if Michigan's courts allow the limitation on necessity challenges as contemplated in judicial opinions through 2003, the precedent of the *Goodwill Community Chapel v General Motors Corp* holdings, discussed below, may make any right to challenge irrelevant because of the "vesting" provisions of UCPA § 7(2).

Hathcock held that the proposed taking for development of a privately-owned industrial park would violate the 1963 Constitution because "no facts of independent public significance . . . might justify the condemnation,"[74] but acknowledged that the UCPA "limits [judicial] review of a public agency's determination that a condemnation is necessary,"[75] except where the government's finding "is predicated on 'fraud, error of law, or abuse of discretion.'"[76] By applying the standard of "fraud, error of law, or abuse of discretion," *Hathcock* implicitly acknowledged the constitutionality of UCPA § 6(2), and thereby eroded the necessity doctrine to leave no room for Michigan courts to vacate any condemnation in the future.

Under *Hathcock*, it appears that when the end use is a public use, the limitations of the UCPA are irrelevant, and the only remaining question is whether proper delegation exists. In effect, "review of necessity" does not exist.

Highway Comm v Vanderkloot[77] illustrates the breadth of municipal powers given *Hathcock*'s tacit approval of the UCPA. In *Vanderkloot*, the Michigan

62 *See Sinas v City of Lansing*, 382 Mich 407; 170 NW2d 23 (1969); *City of Detroit v Vavro*, 177 Mich App 682; 442 NW2d 730 (1989); *City of Detroit v Lucas*, 180 Mich App 47; 446 NW2d 596 (1989); *County of Wayne v Hathcock*, No. 239438, 2003 Mich App LEXIS 1042, at *23-29 (Murray, J concurring).
63 471 Mich 445; 684 NW2d 765 (2004).
64 *Id* at 464.
65 *Id.*
66 *Id* at 464-65.
67 *Id* at 465.
68 Act 149 of 1911.
69 MCL 213.21 *et seq.*
70 *Hathcock*, 471 Mich at 774
71 473 Mich 242; 701 NW2d 144 (2005).
72 477 Mich 890; 722 NW2d 220 (2006).
73 477 Mich 894; 722 NW2d 421 (2006).
74 *Id* (citing *In re Slum Clearance*, 331 Mich 714; 50 NW2d 340 (1951)). The *Hathcock* court distinguished *Slum Clearance* because, in that case, "the city's *controlling purpose* in condemning the properties was to remove unfit housing and thereby advance public health and safety; subsequent resale of the land cleared of blight was 'incidental' to this goal . . . despite the fact that the condemned properties would inevitably be put to private use." 471 Mich at 475-76. Simply knocking down the buildings had independent public significance. In *Hathcock*, on the other hand, no public benefit would accrue until the private owner established a profitable business on the property.
75 471 Mich at 455.
76 *Id* ("We may vacate an agency's finding that a condemnation serves a public necessity only if a party establishes that the finding is predicated on "fraud, error of law, or abuse of discretion.").
77 392 Mich 159, 220 NW2d 416 (1974).

Supreme Court established a standard of judicial review of necessity where alternative properties exist, each with a number of useful attributes, or "variables," that make it suitable for fulfillment of the underlying public need.[78] In such a case, the condemning authority may secure its intended public use by condemning one of several parcels.[79] According to *Vanderkloot*, the "variables" to consider include "both whether the land in question is reasonably suitable and necessary for the 'improvement' and whether there is the necessity for taking any particular property rather than other property for the purposes of accomplishing the 'improvement,'" but the standard's "essential flexibility" allows the court to consider "whatever factors are relevant to particular determinations of highway necessity."[80] Where alternatives are available, the condemning authority must show that its decision to take one parcel instead of another was not the result of fraud or abuse of discretion.[81]

The *Adell Trust* court incorrectly applied the *Vanderkloot* standard of judicial review. *Vanderkloot* held that the authority's failure to reasonably comply with the Michigan Environmental Protection Act, Act 127 of 1980[82] (MEPA) can support a finding of fraud or abuse of discretion.[83] That is, where the condemned parcel is protected under MEPA, and another equally useful parcel is not, the reviewing court can find fraud or abuse of discretion based solely on the authority's decision to condemn the protected property.[84] This outcome alone, condemnation of protected land, indicates fraud or abuse of discretion regardless of the underlying processes guiding the decision to condemn.

In *Adell Trust*, the Michigan Supreme Court extended *Vanderkloot*'s narrow holding to cover all cases involving alternative suitable parcels.[85] According to the court in *Adell Trust*, as long as the proposed condemnation is within the "principled range of outcomes,"[86] the authority's decision-making process is not subject to judicial review.[87] This interpretation distorts *Vanderkloot* and incorrectly expands its holding, which was intended to apply only to a violation of express statutory requirements, to cover every case where an agency had to decide between two or more alternative properties.

In any future case where a court could, on review, find clear error in the factual basis of the resolution to acquire, one wonders whether the Michigan judiciary will have the power to review the issue and disturb the authority's decision to condemn. In the interim, given the present statutory framework, any jurisdictional challenge has to be a challenge to necessity. It is arguable that the Michigan Supreme Court considers a failure to fulfill the statutory delegation requirements to be an "error of law" under UCPA § 6(2). However, the concept of "fraud" or "abuse of discretion" has no effective meaning given the recent decisions. As the courts have consistently maintained, specific statutory language should never be ignored; all parts of an enactment should be treated as if they had meaning.[88]

B. The End of Judicial Review

In *Grosse Ile*[89] and *Village of Oxford*,[90] two trial courts made determinations of the need for public use in an attempt to ascertain whether "necessity" pursuant to UCPA § 6 had been fulfilled. In each of the cases, the trial court and the Michigan Court of Appeals determined that public use did not exist.[91] The Michigan Supreme Court's opinion in *Grosse Ile* acknowledged the limited review of necessity under the UCPA, but

78 *Id* at 175-77.
79 *Id.*
80 *Id* at 176-77. As *Vanderkloot* points out:
> the judiciary has had no difficulty in the past in applying the concept of 'abuse of discretion' to administrative determinations concerning the specific issue which lands should or should not be taken by eminent domain for public purposes. *In re Huron-Clinton Metropolitan Authority's Petition As To Belleville Lake Park Project*, 306 Mich. 373, 385-86; 10 N.W.2d 920 (1943); *Panfil v. Detroit*, 246 Mich. 149, 157; 224 N.W. 616 (1929); *New Products Corp v. State Highway Commissioner*, 325 Mich 73, 82; 88 N.W.2d 528 (1958).

Id.
81 *Vanderkloot*, 392 Mich at 177-78.
82 MCL 691.1201 *et seq.*
83 392 Mich at 189-90.
84 *Id* at 186 (MEPA "proscribes pollution, impairment or destruction of natural resources unless it is demonstrated that 'there is no feasible and prudent alternative'. As a consequence, the Commission in exercising its discretion in taking one particular piece of property rather than another in effectuating its pertinent highway purpose must take into consideration that 'there is no feasible and prudent alternative' choice if the taking of a particular piece of property involves environmental 'pollution, impairment [or] destruction'.").
85 *Adell Trust*, 473 Mich at 254-55.
86 *Id* at 254, quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).
87 *Id* at 254.
88 *See, e.g.*, *People v Couzens*, 480 Mich 240, 250; 747 NW2d 849 (2008).
89 477 Mich at 890-91. *See also Twp of Grosse Ile v Grosse Ile Bridge Co*, (No. 255759), 2006 Mich App LEXIS 952 (April 4, 2006) (per curiam).
90 477 Mich at 894.
91 *Grosse Ile*, 477 Mich at 890-91; *Grosse Ile*, 2006 Mich App LEXIS 952, at *3-6; *Village of Oxford*, 477 Mich at 894; *Village of Oxford v Nathan Grove Family, LLC*, 270 Mich App 685; 717 NW2d 400 (2006);

the court's holding turned on the Township's lack of authority to condemn property located outside its borders.[92] However, *Village of Oxford* established a precedent barring future judicial review of the necessity of a particular use.[93]

1. *Township of Grosse Ile v Grosse Ile Bridge Co*

In *Grosse Ile*, the Township of Grosse Ile sought to condemn a bridge owned by the Grosse Ile Bridge Company, a private company that had operated the bridge for nearly 100 years.[94] The property owner contended that the Township had given factually incorrect reasons supporting the necessity to condemn the property, and the taking therefore amounted to an abuse of discretion by the condemning authority.[95] The Court of Appeals panel reviewed the Township's alleged factual basis under a clear error standard, and reviewed *de novo* the trial court's legal conclusions.[96] The court considered the specific reasons set forth in the Township's resolution statement of necessity, and found that each reason was speculative and had no firm factual support.[97] Addressing the legal question of necessity, the court stated that although the Township had the power to own and construct bridges,[98] as well as a "general authority to condemn for public purposes,"[99] it still must satisfy UCPA § 6(2) by showing a necessity that is not "indefinite, remote or speculative."[100] Because the Township alleged only speculative reasons in support of necessity, the court held it could not take the property.[101]

92 *Grosse Ile*, 477 Mich at 891 ("plaintiff has revealed no authority that would allow the Township to acquire property by extraterritorial condemnation").
93 *Village of Oxford*, 477 Mich at 894 ("By independently reconsidering the Village's decision that the public parking had to be free of charge, the Court of Appeals and circuit court erroneously reviewed the wisdom of the plaintiff's decision to make the improvement, rather than the necessity of acquiring defendant's property to accomplish the improvement.").
94 *Grosse Ile*, 2006 Mich App LEXIS 952, *1.
95 *Id* at *3-7; MCL 213.56(2).
96 *Id* at *1, citing *Adell Trust*, 473 Mich at 249.
97 *Id* at *4-7.
98 *Id* at *2, citing MCL 41.411(1)(a); MCL 41.722(1)(c).
99 *Id*, citing MCL 41.2(3).
100 *Id*, quoting *City of Troy v Barnard*, 183 Mich App 565, 572; 455 NW2d 378 (1990), abrogated in part on other grounds, *Adell Trust*, 473 Mich at 249 n4; *Grand Rapids Bd of Ed v Baczewski*, 340 Mich 265, 272; 65 NW2d 810 (1954) ("necessity" under Const 1908, art 13, § 1, cannot be indefinite, remote, or speculative); *Vanderkloot*, 392 Mich at 172 ("The fact that in Michigan the term, 'necessity,' is now of statutory rather than constitutional dimension in this context, does not abrogate its traditional sufficiency under the Michigan or United States Constitution.").
101 *Id* at *7-8.

In keeping with its decision in *Hathcock* to allow broad delegation under the State Agencies Act, the Michigan Supreme Court in *Grosse Ile* found heretofore unknown powers of general taking, arising from the basic statutory investment of township powers in the Revised Statutes of 1846[102] and the Township and Village Public Improvement and Public Service Act.[103] Contravening 150 years of Michigan precedent, which had strictly construed a delegation against the condemning authority and had required specific delegations prior to takings, the *Grosse Ile* court found a broad, unfettered legislative power to delegate, based upon *Vanderkloot*'s distinction between review of "the decision to make . . . an 'improvement'" and "the determination of the property on which such an 'improvement' is made."[104]

In reading the *Adell Trust* decision and the per curium opinion in *Grosse Ile,* one recognizes that at least four of the then-sitting Supreme Court justices believe that there is no right to challenge a taking if the end result is, in and of itself, a public use. As such, the relevance of the necessity may have been rendered meaningless and moot.

2. *Village of Oxford v Nathan Grove Family LLC*

In *Village of Oxford*, the Village sought to take property, which the owner already operated as a paid parking lot, for use as free public parking.[105] The parties agreed that parking was necessary for the area, and that the property at issue satisfied much of that need.[106] However, the trial court found that the owner intended to continue to provide parking; the public was in no danger of losing the necessary use of the property.[107] Thus, the only issue was the necessity that the parking be free.[108] The trial court found abuse of discretion, and the Court of Appeals agreed, holding "plaintiff's determination that paid parking was detrimental to the public was based on pure speculation."[109]

102 MCL 41.2(3) ("By resolution of the township board, a majority of the members serving may acquire property for public purposes by purchase, gift, condemnation, lease, construction, or otherwise and may convey or lease that property or part of that property not needed for public purposes.").
103 Act 116 of 1980, § 1, MCL 41.411(3).
104 *Grosse Ile*, 477 Mich at 890-91.
105 *Village of Oxford*, 270 Mich App at 686.
106 *Id.*
107 *Id* at 687.
108 *Id.*
109 *Id.* The court saw the detriment as speculative in part because "[n]o study or other objective evidence showed that citizens would drive around neighborhoods or crowd into other areas of the village to avoid paid parking, or would cease patronizing businesses in the are altogether if parking were not free."

The Michigan Supreme Court reversed, again quoting *Vanderkloot*'s prohibition on "judicial review of the purposes stated in the [condemnation] complaint," and its allowance of review of a condemning authority's choice of property.[110] Because the Court of Appeals had "independently reconsider[ed] the Village's decision that the public parking had to be free of charge," it had "erroneously reviewed the wisdom of the plaintiff's decision to make the improvement, rather than review the necessity of acquiring the defendant's property to accomplish the improvement."[111]

C. The Challenge of Challenging Necessity in the Future

1. *Future Review*

The final question is which standard of review is to apply, if any. The recent decisions of the Supreme Court leave one to understand that if the final use is a public use, the actions and real reasons for the condemnation are irrelevant. The "final use" standard vitiates any meaning to the standard of review of fraud, error of law, or abuse of discretion as provided by Act 87.

2. Goodwill Community Chapel v General Motors Corp

Michigan precedent, possibly premised upon the specific facts of the case, has determined that a failure to challenge necessity at the trial court level waives the right of an owner to obtain the return of the property, even if the trial court lacks subject matter jurisdiction. This arises out of the first post-*Poletown* UCPA jurisdictional dismissal case, wherein the City of Detroit condemned the Goodwill Community Chapel's property without purchasing the appurtenant fixtures or paying the cost of detaching the fixtures and reattaching them in another location.[112] The City had not made an offer that would have restored the owner to the position he occupied before the taking; that is, the City had not offered compensation greater than or equal to the appraised value of the property.[113] The owner subsequently settled for an amount more than the real estate and fixture detach-reattach cost, and the trial court accepted the settlement as enforceable.[114]

The Court of Appeals disagreed, holding that the owner's request to set aside the settlement as fraudulently induced required a review of whether a good faith written offer had been made.[115] On remand, the trial court found that the good faith written offer was less than the appraisal made as required by UCPA § 5(1), set aside the settlement, and scheduled the case for trial.[116] Throughout this process, the owner challenged subject matter jurisdiction, and after two jury trials and two appeals, the Court of Appeals determined that the trial court lacked jurisdiction and should have dismissed the action.[117]

After the second appeal, the City did not re-file the case. However, the City had long before conveyed the property to General Motors, which razed the site and incorporated it into the Poletown assembly plant.[118] Nonetheless, in the last of the three actions arising from this condemnation, the owner filed an action for ejectment, claiming that because the original filing was defective, the attempted conveyance to General Motors was void *ab initio*, and the City therefore had no interest to convey.[119] The Court of Appeals disagreed with the owner's theory, noting that UCPA § 7(1) provides:

> [T]he title to the property described in the petition [for condemnation] shall vest in the [public] agency as of the date on which the complaint was filed. The right to just compensation shall then vest in the persons entitled to the compensation and be secured as provided in this act.[120]

The *Goodwill Community Chapel* appellate panel acknowledged that, under UCPA § 7(1), title vests in the condemning authority "as of the date in which the complaint was filed."[121] Due to the federal takings provisions under the Declaration of Taking Act,[122] which allowed for the vesting of title despite the lack of proper notice to the owner, the court concluded that it had no choice but to hold that title had transferred.[123] As key dicta, the *Goodwill Community Chapel* court stated: "Where the government's authority to acquire property is not at issue, the condemnation statute vests indefeasible or absolute title in the government."[124]

In light of *Goodwill Community Chapel*, when a township acts without authority to take, an owner is

110 *Village of Oxford*, 477 Mich at 894.
111 *Id.*
112 *In re Acquisition of Land for the Central Industrial Park Project*, 127 Mich App 255, 260-61; 338 NW2d 204 (1983).
113 *Id.*
114 *Id.*
115 *Id.*
116 *In re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11, 13; 441 NW2d 27 (1989).
117 *Id.*
118 *Goodwill Community Chapel v General Motors Corp*, 200 Mich App 84, 86; 503 NW2d 705.
119 *Id.*
120 *Id*, quoting MCL 213.57.
121 *Id* at 89, quoting MCL 213.57.
122 40 USC 258(a).
123 *Id* at 90-91.
124 *Id* at 90, quoting *US v Herring*, 750 F.2d 669, 671-72 (CA8 1984).

required to challenge necessity in the taking to avoid losing title to the property. For example, if the Grosse Ile Bridge Company had not challenged the "necessity" of the taking, its right to challenge the jurisdictional defect created by a township acting without authority would have led to a vesting of title and resulting dispossession despite the jurisdictional failure.

This leaves the owner in the unenviable conundrum of being required to challenge necessity, although necessity may no longer have meaning under *Grosse Ile* and *Oxford*. Now, the concept of necessity may be limited to "error of law," meaning failures to fulfill the jurisdictional requirements.

3. From Heightened Scrutiny to No Scrutiny

In *Poletown*, the Supreme Court applied a "heightened scrutiny." This leaves one to believe that, at least as of 1981, all condemnations were subject to some scrutiny. A general economic benefit was, at the time and under the circumstances of *Poletown*, considered to be a public use. During the ensuing twenty-nine years, a number of appellate cases considered this "necessity formula," until the *Hathcock* Court concluded that "necessity" merely required an end public use of any kind.

To properly harmonize the *Hathcock* decision with its precedent, one may conclude that the meaning of a "lack of necessity" is limited to a circumstance in which the government does not have either the delegated authority to take the property or is specifically excluded from the specific activity that bars the agency from taking the object. Under the standard, the historical objections of condemnations for remote, excessive or "pay as you go projects" prohibited prior to 1963 may no longer be improper acquisitions. Clearly, when the end use is a public use, such as a bridge or road, the fact that it is privately owned renders the necessity challenge effectively moot except if there is a complete failure of a jurisdictional delegation.

The premise of a challenge of necessity by "fraud, error of law, or abuse of discretion" as provided by UCPA § 6(2), was also rendered meaningless by the terms of the recent Supreme Court decisions.

One must now contemplate if there can ever be an error of law or abuse of discretion challenge. Are we in the position where governments can make no errors once they make a decision? When there are clear findings of why the property is being taken, such as in *Grosse Ile*, and each is specifically disproven, is there not an abuse of discretion? Clearly, the concept of "abuse of discretion," when the UCPA was written in 1980, arose out of the Michigan Administrative Procedures Act of 1969, which delineated some circumstances in which government can go too far, exceeding its condemning authority and thereby committing an abuse of discretion.[125] *Grosse Ile* is but one prime example.

The commentary of *Chmelko* illuminated the "two lines of authority" as to whether the legislature or judiciary should determine whether the intended use is a public use.[126] The court ultimately rejected the condemning authority's conclusion that its determination was "conclusive on the courts," noting that "a long line of eminent domain cases have held that the 'public use' question is ultimately a judicial one."[127] By acknowledging the conflicting authority on this point, the *Chmelko* court signaled its intent to resolve the split once and for all. However, the *Chmelko* decision was issued from the

125 MCL 24.306.

126 *Chmelko*, 164 Mich App at 259. The *Chmelko* court stated as follows:

> There are two lines of authority on the amount of deference a legislative determination as to "public use" is to be given. We first examine the cases under the federal constitution. The United States Supreme Court has recently taken the view that where the state legislature has determined that there are substantial reasons for an exercise of the taking power the courts must defer to that determination. *Hawaii Housing Authority v Midkiff,* 467 U.S. 229; 104 S Ct 2321; 81 L Ed 2d 186 (1984); see also *Berman v Parker,* 348 U.S. 26; 75 S Ct 98; 99 L Ed 27 (1954) (where Congress has made a determination of public purpose, such determination is "well-nigh conclusive"; the Legislature, not judiciary, is the main guardian of public need); *United States ex rel Tennessee Valley Authority v Welch,* 327 U.S. 546; 66 S Ct 715; 90 L Ed 843 (1946) (congressional determination of public use entitled to deference unless shown to involve an impossibility).
>
> Another line of Supreme Court cases holds that the ultimate determination of whether the nature of a use is public or private is for the judiciary rather than the legislature. See e.g. *Cincinnati v Vester,* 281 U.S. 439; 50 S Ct 360; 74 L Ed 950(1930); *Rindge Co v Los Angeles Co,* 262 U.S. 700; 43 S Ct 689; 67 L Ed 1186 (1923). See generally Anno: *When is taking of property for "public use" so as to be permissible under federal constitution if just compensation is provided — Supreme Court cases,* 81 L Ed 2d 931.

Id.

127 *Id.* at 260, citing *General Dev Corp v Detroit*, 322 Mich 495, 498; 33 NW2d 919 (1948); *Lakehead Pipe Line Co v Dehn*, 340 Mich 25, 39-40; 64 NW2d 903 (1954); *Cleveland v Detroit*, 322 Mich 172, 179; 33 NW2d 747 (1948); *Portage Twp Bd of Health v Van Hoesen,* 87 Mich 533, 539; 49 NW 894 (1891).

Court of Appeals, not the Michigan Supreme Court, and the conflict remains.

Conclusion

In *Grosse Ile*, the Michigan Supreme Court discarded the notion of a review of rights for an individual, instead providing complete deference to the condemning authority given a public end use, without allowing any other considerations.[128] This position reverses the basic underpinnings of eminent domain public use considerations, as so well espoused in *Nelson Drainage District*, *Chmelko*, and the Michigan Supreme Court decisions cited in those opinions.

One is left to wonder whether there can ever be such an outrageous reason for a taking, where the end use is a public use, that the action to take violates the constitutional limitation that property shall only be taken for public use under the current scheme. Arguably, if property is being taken for other than a "public use," the limitations set forth in *Hathcock* might apply. However, what is the propriety of a taking by a political entity that seeks to take an owner's property for a purely political reason? What would happen if a politically connected restaurant owner, in order to eliminate a competitor, arranges to have an adjacent restaurant property taken for a public park? Such a use would be an end public use, and likely would not be considered fraud or abuse of discretion according to the *Grosse Ile* standard.

Has Michigan unintentionally opened the door for "pre-textual" takings in which the end result is a public use?[129] If the motivations are suspect or even blatantly dubious, will the project pass scrutiny when the project confers a private benefit? Judicial review and protection of a landowner's constitutional rights should properly include a review of a challenge to the necessity of the taking.

The reality is that there is a point in which a taking, albeit for a public use, will be for such an egregious reason, courts will have to challenge the legislative act. However, that may not be possible in Michigan.

128 *Grosse Ile*, 477 Mich at 890 ("The Uniform Condemnation Procedure Act permits a resisting property owner to 'challenge the necessity of acquisition of all or part of the property for the purposes stated in the complaint.' MCL 213.56(1). The statutory provision permits judicial review of the necessity of acquiring the property for the purposes stated in the complaint. It does not, however, permit judicial review of the purposes stated in the complaint.").

129 MCL 213.23(6)