Take a Closer Look at "Recent Changes in Eminent Domain Law"

To the Editor:

I have been urged to comment on the article entitled "Recent Changes in Eminent Domain Law" [in Michigan] contained in the November 2007 issue of the *Bar Journal*. While it provides a helpful guide to the straightjacket in which Michigan, the most economically depressed state in the nation, now finds itself in promoting economic development, its explanation of the *Poletown* and *Hathcock* cases forming the backdrop of the recent restrictive amendment of Article X, Section 2 of the state's Constitution needs correction.

> Michigan has never followed a strict application of the "public use" clause.

First, the authors characterize the *Poletown* case as follows: "[In *Hathcock,*] the Supreme Court reversed its landmark decision in *Poletown Neighborhood Council v City of Detroit,* which had permitted the City of Detroit to take the property from various private owners under the pretense of economic development and convey the properties to General Motors to construct an auto assembly plant."

There was no pretense and the record of the case does not support the authors' contrived characterization. In his *Poletown* dissent, Justice Ryan described the unemployment rate in Detroit at the time as 18 percent and nearly 30 percent for African Americans. He commented that it was difficult to describe the magnitude of the economic crisis. The *Poletown* court expressly found that the benefits to the public in taking land for a manufacturing plant were primary and to a private interest (General Motors) only incidental.

The plant was built on schedule and has provided 3,500 manufacturing jobs in Detroit and many thousands of additional related jobs for the past quarter century. The construction of the Poletown plant was followed by the taking of land for the development of the Chrysler Jefferson Avenue Assembly Plant to the same beneficial effect of preserving thousands of manufacturing jobs in the city.

Second, in referring to the overruling of *Poletown,* the authors describe the *Hathcock* holding as substantially limiting "the instances when the government can take property through eminent domain." It did much more than that. More precisely, the court prohibited the use of eminent domain to alleviate unemployment and revitalize the economic base of the state. As it stated in its overruling:

> Because 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 [1963] ratification, its interpretation of "public use" in Article X, section 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 condemnation proposed in this case and, for the reasons stated above, is overruled.

Third, the authors wrongly characterize 150 years of Michigan takings law before the *Hathcock* holding in stating: "It took over 20 years for the Michigan Supreme Court to reverse its holding in *Poletown* and reinstate a strict application of the 'public use' clause in *Hathcock*."

Michigan has never followed a strict application of the "public use" clause. There is not a single Michigan case decided before *Hathcock* and beginning with the Northwest Ordinance that prohibits the taking of land from one private person for transfer to another when the court found that a public necessity existed and any private benefit was merely incidental, as was found in *Poletown*. In fact, the "public use" clause of the Michigan Constitutions of 1850 and 1908 referred to the taking of property for the "use or benefit" of the public.

In its rush to "codify" the *Hathcock* decision by placing a constitutional amendment before the people in the form of proposition 4, the legislature included the requirement that in taking property for the elimination of blight, a condemning authority must demonstrate by "clear and convincing evidence" that the taking of "that" property is for a public use. Raising the standard of proof over a "preponderance of the evidence" for other takings and requiring that blight be separately proved for each parcel in a decimated area effectively halts the assembly of large parcels of land in distressed communities such as Detroit, Highland Park, Flint, Saginaw, and Benton Harbor.

While the authors are correct in stating that "property owners in Michigan enjoy greater rights and protections than owners in most other states," more accurately it might be described as greater rights than in all other states. This is heralded as good news, but a closer look reveals that it is not. The recent change in eminent domain law in Michigan will cripple the ability of Detroit and other distressed cities to be redeveloped, fuel urban sprawl with the destructive elimination of farmland and environmental habitats, strengthen the hand of land speculators, and put the state at a disadvantage with surrounding states in attracting new economic investment, since there will be fewer development sites available to locate major job and research centers.

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Handling of Fieger Investigation is Cause for Great Concern

To the Editor:

We the undersigned are gravely concerned about the apparently selective, vindictive,

and politically motivated federal prosecution of members of the Fieger, Fieger, Kenney, Johnson & Giroux firm and their families.

Pleadings filed in the case suggest the U.S. Department of Justice undertook the largest criminal investigation of alleged campaign finance violations in U.S. history against the Fieger firm in disproportionate reaction to allegations of technical violations usually handled in a civil manner.

Utilizing an army of dozens of federal agents, investigators raided firm members' homes and harassed their families, seized bank records without proper warrants, attempted to compel firm members and their families to reveal who they voted for in presidential elections, and engaged in other such apparently unconstitutional and illegal acts.

These tactics of intimidation and harassment aimed at attorneys and their families are cause for great concern among the collective bar in Michigan, and among all Americans who value the rule of law and our political freedoms.

We firmly believe that the ongoing investigation of the Fieger firm is required to be conducted strictly according to the rule of law. The investigation should certainly be undertaken in proportion and of a kind with similar investigations of similar allegations. Furthermore, this investigation should be undertaken in such a transparent and public fashion that the cloud of partisan impropriety that now taints this investigation can be lifted and the truth of the allegations can be determined according to the Constitution and laws of these United States.

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Thanks, Judge

To the Editor:

Thank you to the Honorable Kenneth L. Tacoma for his article entitled "Thanks, Mike" in the November 2007 *Bar Journal.* Off-the-record meetings that take place in judges' chambers without clients present should not be permitted, period. These backroom deals are another reason that attorneys have a bad reputation, and the State Bar should take action to prohibit the all-too-common practice. Cases should be heard and decided out in the open as Judge Tacoma states.

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