



Condemnation as a Tool of Brownfield Redevelopment After *Hathcock*

In recent years, “brownfield” redevelopment has expanded its focus from exclusively addressing the cleanup and redevelopment of contaminated properties to include projects focused more broadly on economic development. Because of these changes and developments in the law pertaining to eminent domain, municipalities using the power to “take” privately owned property with the intent to redevelop it using brownfield incentives are in the middle of a fast-changing area of constitutional law.

By JACLYN SHOSHANA LEVINE AND POLLY A. SYNK

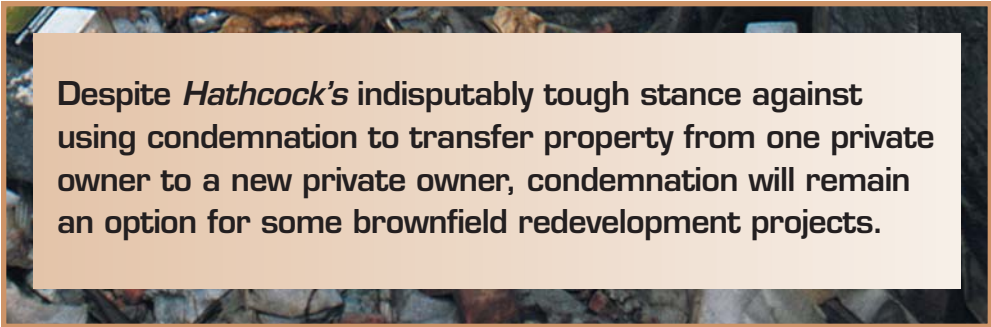
The law on eminent domain drew national attention in 2004 when the Michigan Supreme Court issued its decision in *Wayne County v Hathcock*,¹ involving limits that Michigan's Constitution² imposes on the power of a governmental entity to take private property for transfer to a developer for purposes of economic development.³ The Court unanimously held that takings for economic development are not a "public use" and thus contravene Article 10, § 2. One year later, the United States Supreme Court issued its opinion in *Kelo v City of New London, Connecticut*,⁴ concluding that the United States Constitution permits condemnation for economic development, the very purpose for condemnation disapproved in *Hathcock*. *Kelo*, however, was decided under the Fifth Amendment, and the decision expressly confirms that states are free to adopt their own constitutional provisions affording more protection than the United States Constitution grants.⁵ *Hathcock*, therefore, defines the minimum constitutional standard for Michigan municipalities wishing to condemn property to assist brownfield redevelopment efforts.

Hathcock, often called the Pinnacle Case, involved Wayne County's efforts to condemn land near Detroit Metropolitan Airport to assemble the last acres needed to create the Pinnacle Aeropark, a cutting-edge business and technology development. Federal Aviation Administration funding for noise abatement related to a new jet runway was part of the reason Wayne County decided to pursue the Pinnacle Project. However, Wayne County projected that it would also create 30,000 new jobs, generate \$350 million in taxes, and diversify the economy. In short, the Pinnacle Project's greatest promise was its potential to provide economic development. Yet, this benefit to the public would involve private enterprise—the businesses that would ultimately purchase or lease property in the Pinnacle Project. Consequently, the Pinnacle Project brought to a head the debate regarding whether private property can be taken for a purpose that benefits the public if the land will ultimately be transferred to a different private owner.

When Wayne County filed its condemnation actions, *Poletown Neighborhood Council v Detroit*⁶ defined the limits of the power of eminent domain under the Michigan Constitution. *Poletown* allowed takings for the purpose of economic development for projects that provided a clear, significant, and predominant public benefit even if the property that was condemned was ultimately transferred to a new private owner. The *Poletown* court reached this conclusion because it viewed the reference to takings for "public use" in Article 10, § 2 of the Michigan Constitution to include takings that are also for a "public purpose" or "public benefit." Accordingly, the lower courts in *Hathcock*, after considering extensive evidence provided in a lengthy hearing and *Poletown*, determined that the takings satisfied the public use standard because the public would benefit from the dramatic economic development the Pinnacle Project offered.

The Michigan Supreme Court in *Hathcock* overruled *Poletown*, rejecting the conclusion that "public use," "public benefit," and

"public purpose" are interchangeable terms used to describe when the power of eminent domain may be used. Following Justice Ryan's dissent in *Poletown*, the *Hathcock* Court concluded that there are three circumstances when a taking that ultimately transfers condemned property to a new private owner is permissible under the Michigan Constitution. The government can take private property and transfer it to a new private owner when: (1) there is extreme necessity and no practical alternative to the government playing a central coordinating function, such as when assembling property to create railroads, canals, highways, and other instrumentalities of commerce; (2) the new private owner will remain accountable to the public, such as when the property will be subject to regulation by a state agency; or (3) there is some public concern of "independent significance" that acts as the basis of the taking. After reviewing the record, the Court held that the takings did not meet any of these three categories and, therefore, were unconstitutional.



Despite *Hathcock's* indisputably tough stance against using condemnation to transfer property from one private owner to a new private owner, condemnation will remain an option for some brownfield redevelopment projects.

Municipalities attempting to bolster their economies through brownfield redevelopment involving takings must meet the public use standard in Article 10, § 2 as interpreted by *Hathcock*. What constitutes public use can be determined only by analyzing more than 100 years of case law, a task not even the *Hathcock* Court felt compelled to undertake. As a result, the facts of every taking must be evaluated independently and courts will inevitably reject some takings for brownfield redevelopment as unconstitutional.

Nevertheless, *Hathcock* leaves room for municipalities to condemn property for select brownfield redevelopment projects even when it results in the transfer of property to a new private owner. For instance, the current proposal to build a third bridge or tunnel connecting southeast Michigan to Canada to facilitate international trade would likely be an instrumentality of commerce that would require government coordination to assemble the property for the project because of cross-border issues. Therefore it would fit the first *Hathcock* exception. Given the large number of brownfield properties in southeast Michigan, it would be no surprise if a third border crossing were built on property eligible for brownfield incentives. At the same time, even if the third border crossing were privately owned, the purpose of the project (facilitating trade) would likely permit condemnation to acquire the property if voluntary purchases were not possible.

There are also likely to be times when brownfield redevelopment may permit a taking under the second exception in *Hathcock*, which applies when the new private owner will remain accountable

to the public. Michigan regulates various privately-owned facilities, such as nursing homes, hospitals, and public school academies. These facilities and the jobs they provide might be businesses a municipality would favor when deciding which private businesses to court for a brownfield redevelopment project. Consequently, a redevelopment project that involves condemnation for one of these types of facilities may become a test case for the second exception.

The third exception holds the most promise for brownfield redevelopment projects. This exception applies when there is public concern of independent significance for the taking. Put differently, when the taking itself addresses a public concern that meets the public use standard, the later transfer of the property to a new private owner is irrelevant to the constitutionality of the condemnation. *Hathcock* cited blight and slum clearance as examples of this type of permissible taking. Ostensibly, the condemnation in those cases achieved the purpose of removing the blight or clearing the slum, making the property's subsequent redevelopment and transfer to new private owners irrelevant to the constitutionality of the takings.

Municipalities must understand the attributes of the blight and slum clearance cases that led the *Hathcock* Court to find those takings constitutional despite the subsequent transfer of property to new private owners. Notably, there is no rigid legal framework for determining what constitutes blight or makes a slum. Both Michigan's courts and its legislature have used flexible approaches focusing on conditions that endanger the health, safety, or general welfare of a municipality.⁷ This suggests that when a municipality is properly exercising its police powers, it may use condemnation to meet special public needs, i.e., the facts of independent public significance.

The similarities between conditions inherent in blight or a slum and circumstances that make property eligible for the incentives offered by the Brownfield Act⁸ provide a natural link between condemnation and brownfield redevelopment. For example, functional obsolescence is evidence of blight under the Blighted Area Rehabilitation Act,⁹ and evidence that an area is a slum under eminent domain case law.¹⁰ At the same time, functional obsolescence qualifies property for the financial incentives of the Brownfield Act.¹¹ There is also broad recognition in the law that property conditions that are dangerous to human health, such as some types of contamination, signify blight.¹² Likewise, the Brownfield Act states that property is blighted when it is "a fire hazard or otherwise dangerous to the safety of persons or property."¹³ The Brownfield Act then takes this concept one step further, equating property contaminated with a hazardous substance, i.e., a "facility," with blighted or obsolete property for the purpose of identifying which property is eligible for brownfield redevelopment incentives.¹⁴

Still, not every property that is an "eligible property" under the Brownfield Act can also be condemned and transferred to a new private owner. Property that is a "facility" under Michigan law may not involve circumstances that require municipalities to exercise their police powers. For example, an industrial property with an on-site landfill may be a "facility" under Michigan law and may be an eligible property under the Brownfield Act. Yet, that property might not threaten public health, safety, or welfare if there are no relevant pathways of exposure for the public or appropriate institutional

controls are in place. Amendments to the Brownfield Act in 2000 also broadened the definition of "eligible property" to include commercial, industrial, or residential property within qualified units of government that is contaminated, blighted, or functionally obsolete.¹⁵ The terms "blighted" and "functionally obsolete" in the amendments are similar to the terminology used in condemnation case law, but their definitions differ depending on the context in which they are used. As a result, though the recent amendments to the Brownfield Act allow more communities to benefit from economic incentives for brownfield redevelopment, this expansion also makes it less likely that factors qualifying the property for brownfield incentives will also constitute facts of independent public significance under the more literal and restrictive meaning *Hathcock* gave to the public use standard.

In the end, Michigan municipalities considering brownfield redevelopment projects must scrutinize the purposes behind their projects to determine whether they satisfy *Hathcock's* interpretation of public use under the Michigan Constitution before deciding whether to condemn property as part of a project. Municipalities redeveloping brownfield property with contamination that threatens the public's health, safety, or welfare will likely be able to use condemnation to acquire property for the project. Alternatively, municipalities redeveloping brownfield property with characteristics traditionally recognized as blight or slum-like under Michigan constitutional law may also consider using condemnation to acquire property that cannot otherwise be acquired. Therefore, despite *Hathcock's* indisputably tough stance against using condemnation to transfer property from one private owner to a new private owner, condemnation will remain an option for some brownfield redevelopment projects. ◆

Polly A. Synk and Jaclyn Shoshana Levine are attorneys at Miller, Canfield, Paddock & Stone, P.L.C. in Lansing, where they are part of the environmental and regulatory practice group. They represent municipalities and private-sector clients in virtually all areas of state and federal environmental law, including permitting issues, transactional matters, and litigation.

Footnotes

- 471 Mich 445, 684 NW2d 765 (2004).
- Article 10, § 2 of Michigan's Constitution states, "Private property shall not be taken for public use without just compensation being first made or secured in a manner prescribed by law."
- Miller, Canfield submitted an amicus curiae brief to the Supreme Court in *Hathcock* on behalf of the Michigan Municipal League. This article represents the opinions of the authors, not the League.
- ___ US ___, 125 S Ct 2655; ___ L Ed 2d ___ (2005).
- See *Kelo*, 125 S Ct at 2668.
- 410 Mich 616; 304 NW2d 455 (1981).
- See, e.g., *In re Slum Clearance in City of Detroit*, 331 Mich 714, 720-721; 50 NW2d 340 (1951); Blighted Area Rehabilitation Act, MCL 125.71 et seq.
- Brownfield Redevelopment Financing Act, MCL 125.2561 et seq.
- MCL 125.71(1).
- In re Edward J Jeffries Homes Housing Project*, 306 Mich 638, 644-645; 11 NW2d 272 (1943).
- MCL 125.2652(m).
- See MCL 125.71(1); MCL 125.2802(b)(vii); *City of Kalamazoo v KTS Industries, Inc*, 263 Mich App 23; 687 NW2d 319 (2004).
- MCL 125.2652(e)(iii).
- MCL 125.2652(m) and (n).
- See 2000 PA 145.