

# Ballot Proposal #4 of 2006



## EMINENT DOMAIN

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**Ballot Proposal 06-04**  
**November 2006 General Election**  
**Placed on the ballot by the Legislature**

**Complete to 10-20-06**

### ***THE CONTENT OF THE BALLOT PROPOSAL:***

The following is the official language as it will appear on the ballot.

**A PROPOSED CONSTITUTIONAL AMENDMENT TO PROHIBIT GOVERNMENT FROM TAKING PRIVATE PROPERTY BY EMINENT DOMAIN FOR CERTAIN PRIVATE PURPOSES**

The proposed constitutional amendment would:

- Prohibit government from taking private property for transfer to another private individual or business for purposes of economic development or increasing tax revenue.
- Provide that if an individual's principal residence is taken by government for public use, the individual must be paid at least 125% of property's fair market value.
- Require government that takes a private property to demonstrate that the taking is for a public use; if taken to eliminate blight, require a higher standard of proof to demonstrate that the taking of that property is for a public use.
- Preserve existing rights of property owners

Should this proposal be adopted?

Yes

No

***BRIEF SUMMARY:*** The ballot proposal was placed on the ballot by the passage of Senate Joint Resolution E by a two-thirds vote of each house of the Legislature on December 13, 2005. SJR E would amend Article X, Section 2 of the State Constitution. At the same time, the Legislature passed two bills that will only take effect if the ballot proposal is supported by the voters. Generally speaking, the proposal and accompanying legislation would place into the constitution and into statute the Michigan Supreme Court's interpretation of the state's eminent domain law as laid out in County of Wayne v. Hathcock (2004) in order to prevent more expansive future state court rulings or legislation.

The term "eminent domain" is defined in Black's Law Dictionary as "the power to take private property for public use."

The ballot proposal is understood to be, in part, a reaction to a 2005 U.S. Supreme Court decision, Kelo v. the City of New London, which upheld Connecticut's more expansive interpretation of the permitted uses of eminent domain. In that case, a city condemned private property to be transferred to other private entities for the purpose of economic development. At the same time, the U.S. Supreme Court said that other states were free to impose greater restrictions on eminent domain than the federal baseline, and specifically cited Michigan's Hathcock decision as an example.

The ballot proposal seeks, at the very least, to "freeze" the state's eminent domain law to prevent rulings similar to Kelo by Michigan courts. It also goes beyond that in requiring 125 percent of market value as compensation for the taking of private residences and in establishing certain burdens of proof on governments proposing the taking of property.

**FISCAL IMPACT:** The fiscal impact of land acquisition costs on state and local governmental entities from passage of Proposal 06-04 cannot be determined, because the number of purchases and the prices at which these purchases would occur are not known.

***A DESCRIPTION OF SENATE JOINT RESOLUTION E, HOUSE BILL 5060, AND SENATE BILL 693:***

Senate Joint Resolution E

Article 10, Section 2 of the 1963 State Constitution provides, "[p]rivate property shall not be taken for **public use** without **just compensation** therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." (The bolded words are those most susceptible to judicial interpretation.) This provision mirrors the Takings Clause found in the Fifth Amendment to the United States Constitution.

Senate Joint Resolution E would amend the State Constitution in the following ways.

Public Use. It would specify that the term "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. The resolution goes on to say that, "Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of [the proposed constitutional amendment]." This provision has been described as incorporating by reference into the State Constitution the County of Wayne v. Hathcock decision.

Private Residence. If an individual's principal residence is taken for a public use, the amount of compensation for that taking would have to be at least 125 percent of the property's fair market value, in addition to any other reimbursement allowed by law.

Burden of Proof. In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by a **preponderance of the evidence**, that the taking of a private property is for a public use. If, however, the action involves the taking of property for the purposes of eradicating blight, the condemning authority would have to demonstrate by **clear and convincing evidence** that the taking of that property is for a public use. ("Clear and convincing evidence" is a higher standard than "preponderance of the evidence.") Currently, the burden of proof is understood to be on the property owner contesting the taking, not the condemning authority.

The joint resolution further provides that any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by the constitution, by statute, or otherwise, could not be abrogated or impaired by the proposed amendment to the constitution.

### House Bill 5060 and Senate Bill 693

These bills are companion legislation to the proposed constitutional amendment. They amended Public Act 149 of 1911 in nearly identical ways. House Bill 5060 became Public Act 367 of 2006. Senate Bill 693 became Public Act 368 of 2006. They each contain a December 23, 2006, effective date. However, neither act will take effect unless the constitutional amendment proposed by Senate Joint Resolution E is approved by voters and becomes part of the constitution.

Public Act 149 of 1911 permits state agencies and other public corporations to take private property, when necessary, under the following circumstances: (1) for a public improvement; (2) for the purposes to be advanced by the corporation's or agency's incorporation; or (3) for public purposes within the scope of the corporation's or agency's powers for the use or benefit of the public. The underlined portion would be replaced by the phrase, "for public use."

Generally speaking, the bills limit the instances that eminent domain can be used for the benefit of private entities. In large part, they place in statute the allowable uses of eminent domain as specified in the Michigan Supreme Court's Hathcock ruling.

Under House Bill 5060 and Senate Bill 693, the taking of private property by a public corporation or a state agency for transfer to a private entity would not be considered a "public use" unless the proposed use of the land is "invested with public attributes sufficient to fairly deem the entity's activity governmental by one or more of the following":

- A public necessity of the extreme sort exists that requires collective action to acquire land for instrumentalities of commerce, including a public utility or a state or federally regulated common carrier, whose very existence depends on the use of land that can be assembled only through the coordination that central government alone is capable of achieving.
- The property or use of the property will remain subject to public oversight and accountability after the transfer of the property and will be devoted to the public use, independent from the will of the private entity to which the property is transferred.
- The property is selected on facts of independent public significance or concern, including blight, rather than the private interests of the entity to which the property is eventually transferred.

The bills repeat the language being added to the constitution that the term "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 revenue, and that in a condemnation action, the burden of proof is on the condemning authority to demonstrate that the taking of private property is for a public use. The bills also mirror the constitutional language by specifying that any existing right, grant, or benefit afforded to property owners as of December 22, 2006, whether provided by the State Constitution, by Section 3 of the act or another statute, or otherwise, would be preserved and not be abrogated or impaired by the bills.

The bills add, moreover, that the taking of private property for a public use does not include a taking for a public use that is a pretext to confer a private benefit on a known or unknown private entity. (However, the taking of private property for a drain project as allowed under the Drain Code of 1956 would not be considered such a pretext; in other words, such a taking would be allowed.)

The bills elaborate on the constitutional provision that requires compensation of at least 125 percent of fair market value for the taking of a principal residence. They say that to be eligible for such reimbursement, the principal residential structure must be actually taken or else the amount taken must leave less property contiguous to the structure that is required by local ordinance for a minimum lot size.

[Under the act, the term "public corporations" includes all counties, cities, villages, boards, commissions, and agencies made corporations for the management and control of public business and property. "State agencies" includes all unincorporated boards, commissions, and agencies of the state given by law the management and control of public business and property, and the Office of Governor or a division of the Office of Governor.]

## ***BACKGROUND INFORMATION:***

### **Kelo v. City of New London**

This case involved a Connecticut city's taking of private property in order to transfer it to other private entities to promote economic development. In June 2005, the United States Supreme Court upheld as consistent with the "public use" requirement under the Fifth Amendment to the U.S. Constitution the condemnation of private property by the City of New London, Conn., with the aim of redeveloping a distressed area of the city to create jobs, generate tax revenue, and revitalize the community.

The court said, "Though the city could not take petitioners' land simply to confer a private benefit on a particular private party . . . , the takings at issue here would be executed pursuant to a carefully considered development plan, which was not adopted 'to benefit a particular class of identifiable individuals.'" It added, "Moreover, while the city is not planning to open the condemned land . . . to use by the general public, this 'Court long ago rejected any literal requirement that condemned property be put into use for the . . . public.' Rather it has embraced the broader and more natural interpretation of public use as 'public purpose.' Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power."

In its decision, however, the court also said "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised." The Michigan Supreme Court's County of Wayne v. Hathcock decision was specifically cited as an example of an acceptable, more restrictive state approach to the takings power.

### **County of Wayne v. Hathcock**

In the 2004 Hathcock decision, the Michigan Supreme Court prohibited Wayne County from condemning property south of Detroit Metropolitan Airport in order to redevelop the area into a high-tech industrial park. In doing so, the court unanimously overturned its 1981 decision in Poletown Neighborhood Council v. City of Detroit.

In the 1981 decision, the court permitted the City of Detroit to clear the Poletown neighborhood of 1,300 homes, 140 businesses, six churches, and a hospital to assemble land for a new General Motors plant. The court found, generally speaking, that the expected economic benefit (including an anticipated 6,150 jobs) to be a valid public use as required by the state constitution when property is condemned. The court said, "[t]he power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental."

The basic question the court sought to address in Hathcock was whether the county's proposed condemnation and subsequent transfer of property to a private entity was consistent with the understanding of "public use" among those sophisticated in the law at the time of the ratification of the 1963 State Constitution. The Hathcock court held that the condemnation of property to a private entity is considered to be a permissible "public use" when it possesses one of three characteristics (as originally identified in Justice Ryan's dissenting opinion in Poletown): (1) public necessity of the extreme sort requires collective action; (2) the property remains subject to public oversight after transfer to a private entity; and (3) the property is chosen because of facts of independent public significance rather than the interests of the private entity. The court said that the proposed condemnation in Wayne did not possess any of those characteristics and, therefore, was unconstitutional.

In its Hathcock ruling, the court critiqued its earlier ruling in Poletown, finding that decision to be a "radical and unabashed departure from the entirety of [its] pre-1963 eminent domain jurisprudence." The court held that "the Poletown majority [had] concluded, for the first time in the history of our eminent domain jurisprudence, that a generalized economic benefit was sufficient under Article X, Section 2 to justify the transfer of condemned property to a private entity." Prior to Poletown, the opinion noted, "[the court had] never held that a private entity's pursuit of profit was a 'public use' for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy."

The Hathcock court said that to justify the exercise of eminent domain solely because the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."

#### ***ARGUMENTS FOR AND AGAINST THE BALLOT PROPOSAL:***

##### ***For:***

Proponents say the ballot proposal will protect private property that is not blighted or neglected or hazardous from being taken by a governmental entity that wants to transfer it to other private parties to promote economic development or increase tax revenue.

***Against:***

Opponents say the proposal will make it harder and more expensive for government to acquire property through condemnation, and will hinder efforts to aggregate parcels of property to attack blight, by imposing higher legal standards on those efforts.

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