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BILL ANALYSIS



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Senate Bill 693 (Substitute S-3 as reported)
Senate Joint Resolution E (Substitute S-2 as reported)
Sponsor: Senator Cameron S. Brown (S.B. 693)
Senator Tony Stamas (S.J.R. E)
Committee: Transportation

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RATIONALE

Under the United States and Michigan Constitutions, the government may take, or "condemn", private property for a public use--that is, exercise its power of eminent domain--as long as the government provides the owner with just compensation. The question of what constitutes "public use" has been the subject of litigation at the State and Federal levels. In 2004, the Michigan Supreme Court issued an opinion in *County of Wayne v Hathcock* (471 Mich 445) overturning its 1981 decision in *Poletown Neighborhood Council v Detroit*, which had allowed the condemnation and transfer of private property to a private entity for the purpose of economic development--in that case, a General Motors plant. In 2005, the U.S. Supreme Court decided *Kelo v City of New London, Connecticut* (545 U.S. ___), affirming that economic benefit constitutes "public use" or "public benefit", and determining, therefore, that a city's taking of private property for that purpose is constitutional. (Both *Hathcock* and *Kelo* are described below, under **BACKGROUND.**) The U.S. Supreme Court noted, however, "...nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." Some people believe that the *Hathcock* decision should be codified in State statute, and incorporated in the State Constitution, in order to prohibit a unit of government from taking and transferring private property to a private entity by eminent domain solely for the public benefit of economic development or increased tax revenue.

CONTENT

Senate Bill 693 (S-3) would amend Public Act 149 of 1911, which regulates the acquisition of property by State agencies and public corporations, to prohibit the taking of private property for transfer to a private entity unless the proposed taking were for the eradication of blight, or the proposed use of the land were invested with public attributes sufficient to deem the entity's activity governmental.

Senate Joint Resolution E (S-2) would amend the State Constitution to provide that the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue would not be considered to be for public use.

Senate Bill 693 (S-3) would take effect on January 1, 2006. The proposals are described below in further detail.

Senate Bill 693 (S-3)

Section 3 of Public Act 149 authorizes any public corporation or State agency to take private property necessary for a public improvement, for the purposes of its incorporation, or for public purposes within the scope of the corporation's or agency's powers for the public's use or benefit and to institute and prosecute proceedings for that purpose. When the Legislature appropriates funds to a State agency or the Office of the Governor to acquire land or property for a designated public purpose, the unit to which the appropriation has been made is authorized on behalf of the people of the

State to acquire the property either by purchase, condemnation, or otherwise, and may proceed under the Act for the purpose of condemnation.

Under the bill, any other public corporation could proceed only pursuant to its specific delegated statutory powers of condemnation. Within those statutory powers, a public corporation would have to commence proceedings under Section 4 of the Act (which authorizes condemnation proceedings by a public corporation or State agency).

(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.)

The bill would prohibit the taking of private property for transfer to a private entity unless the proposed taking were for the eradication of blight or the proposed use of the land were "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 would remain subject to public oversight and accountability after the transfer of the property and would be devoted to the public use, independent from the will of the entity taking it.
- The property was selected on facts of independent public significance or concern rather than the private interests of the entity to which the property eventually was transferred.

The bill specifies that "public use" would not include the taking of private property for

transfer to a private entity for either general economic development or the enhancement of tax revenue. The term would include the taking of private property for the eradication of blight or due to the presence of hazardous substances, even if the property subsequently were transferred to a private entity, and would include the taking of property necessary for a public utility or a State or Federally regulated common carrier.

Under the bill, when private property was taken for the eradication of blight or due to the presence of hazardous substances, the burden of proof would be on the condemning authority to show, by a preponderance of the evidence, that the area was blighted or contained hazardous substances and, if any rehabilitation project were planned, that the project was based on reasonable planning perspectives.

A taking of private property for public use, as allowed under Section 3, would not include a taking for a public use that was a pretext to confer a private benefit on a particular private entity.

The bill specifies that any existing right, grant, or benefit afforded to property owners as of September 1, 2005, whether provided by the State Constitution, by Section 3 or another statute, or otherwise, would not be abrogated or impaired by the bill.

Senate Joint Resolution E (S-2)

Article X, Section 2 of the State Constitution prohibits the taking of private property for public use without just compensation first being made or secured in a manner prescribed by law.

The joint resolution would amend Section 2 to provide that "public use" would not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue. "Public use" would include the taking of private property for the eradication of blight, even if the property subsequently were transferred to a private entity, and would include the taking of property necessary for a public utility or a State or Federally regulated common carrier. When private property was taken for the eradication of blight, the burden of proof would be on the condemning authority to show, by a preponderance of the evidence, that the area was blighted.

The resolution provides that any existing right, grant, or benefit afforded to property owners as of September 1, 2005, whether provided by Section 2, by statute, or otherwise, would not be abrogated or impaired by the constitutional amendment.

The joint resolution would have to be submitted to the voters at the next general election, if two-thirds of the members elected to and serving in each house of the Legislature approved it.

MCL 213.23 (S.B. 693)

BACKGROUND

County of Wayne v Hathcock

Several years ago, Wayne County proposed to construct a large business and technology park (the Pinnacle Project) on land it had purchased through voluntary sales for a noise abatement area adjacent to Metropolitan Airport. The county initiated condemnation proceedings against the owners of 19 parcels of property who refused to sell their land. The property owners filed a motion to review the necessity of the proposed condemnations, arguing that the county lacked the statutory authority to exercise the power of eminent domain in this manner; that the property acquisition was not necessary, as the statute requires; and that the condemnations violated the State Constitution because the Pinnacle Project would not serve a public purpose. The trial court and, subsequently, the Court of Appeals, citing the 1981 *Poletown* decision, affirmed the county's position, and the property owners appealed to the Michigan Supreme Court.

The Court ultimately determined, in 2004, that the condemnations were authorized under State statute, but did not pass State constitutional muster because the county intended to "...transfer the condemned properties to private parties in a manner wholly inconsistent with the common understanding of 'public use'...".

The Court pointed out that when the State Constitution was ratified in 1963, it was well established that the constitutional "public use" requirement was not an absolute bar against the transfer of condemned property to private entities, although it was equally clear that the requirement worked to prohibit the State from transferring

condemned property to private entities for a *private use*. Accordingly, the Court concluded that the transfer of condemned property is a "public use" if it possesses one of three characteristics identified in case law before 1963.

In the first type of constitutional transfer of condemned property to a private entity, a "public necessity of the extreme sort" is involved and addresses a specific need: "enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving". Examples include highways, railroads, and other instrumentalities of commerce.

In the second type of constitutional transfer of condemned property to a private entity, the acquiring private entity "remains accountable to the public in its use of that property". That is, the land "...will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*"

Finally, condemned land may be constitutionally transferred to a private entity when the selection of the land to be condemned is itself based on public concern. "[T]he property must be selected on the basis of 'facts of independent public significance,' meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement."

The Court determined that the condemnations related to the Pinnacle Project did not satisfy any of these criteria and thus were unconstitutional. The Court also noted that the only support for the county's position in the Court's eminent domain jurisprudence was the *Poletown* decision, which, it stated, was "...most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence." *Poletown*, according to the Court, was the first case in which it was held that a private entity's pursuit of profit amounted to "public use" because of the residual benefit to the economy. The Court pointed out that virtually any exercise of eminent domain power on behalf of a private entity could be rationalized on the basis of economic benefit. For these reasons, the Court

overruled *Poletown*, and directed that its decision to do so should apply to all pending cases in which a challenge to the *Poletown* decision had been raised and preserved.

Kelo v City of New London

In June 2005, the U.S. Supreme Court issued its opinion in this case, addressing whether the City of New London's proposal to use the power of eminent domain to acquire the property of unwilling property owners for a city development plan qualified as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

The Court noted, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." In this case, to effectuate its economic development plan, the city had invoked a state statute specifically authorizing the use of eminent domain to promote economic development.

The Court determined that the city's plan unquestionably served a public purpose, and the takings thus satisfied the public use requirement of the Fifth Amendment. The Court also rejected the petitioners' request to adopt a bright-line rule that economic development does not qualify as a public use, noting that the promotion of economic development "...is a traditional and long accepted function of government". The Court reasoned that the government's pursuit of a public purpose often benefits individual private parties. The Court cited an earlier decision in which it held that public ownership is not necessarily the sole method of promoting the public purposes of community redevelopment projects, and that sometimes, an agency of private enterprise can serve the public end as well as or better than a governmental department.

The petitioners also argued that the Court should require a "reasonable certainty" that the projected benefits of a private development plan actually would occur. The Court disagreed, stating, "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the

wisdom of other socioeconomic legislation--are not to be carried out in the federal courts."

Although the Court ultimately sided with the city, it stated, "We emphasize that 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."

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The right to own property is a fundamental American right. Although the *Kelo* decision provides that the residual economic benefits to the community of transferring private land to a for-profit developer satisfies the public use requirement in relation to the U.S. Constitution, the U.S. Supreme Court made clear that states may set higher standards with regard to the scope of a governmental unit's eminent domain powers.

Although economic development and increased tax revenue are critical to municipalities, it is questionable whether those goals should be understood to fall within the meaning of "public use" as used in the State Constitution and statute. The short-term benefits of increased business activity and revenue can be offset by the insecurity that the exercise of eminent domain creates for property owners about the value of their property.

Governments are afforded eminent domain powers to build highways, railroads, and other infrastructure that clearly serves a common good and unquestionably is meant for public use. Eminent domain powers are not designed to allow government-chosen commercial development. The Michigan Supreme Court's decision in *Hathcock* affirms that the proposed use of a parcel of land is not "public" merely because it would result in some economic benefit to the public, and expressly identifies the criteria that a proposed taking must meet to qualify as "public use". The three-pronged test the Court established in the case should be codified in State statute, and a constitutional

amendment reflecting the Court's decision should be submitted to the voters.

Opposing Argument

A primary function of government is economic development. Eminent domain sometimes must be employed to acquire the final pieces of property from owners who either demand excessive compensation or outright refuse to sell, in order for a governmental entity to proceed with development plans that can create jobs and help revitalize communities. The bill and resolution could interfere with a local government's ability to attract and retain businesses and return economically depressed areas to productive use, putting Michigan at a competitive disadvantage with other states that allow the use of eminent domain to obtain economic benefits.

Opposing Argument

Neither the bill nor the resolution provides any criteria that an area would have to meet in order to be designated "blighted". This could create a loophole by which units of governments could continue to employ eminent domain to take land for projects that primarily benefit private developers and only incidentally provide residual economic benefits for the community.

The Brownfield Redevelopment Act defines "blighted" as property that has been declared a public nuisance in accordance with a local code or ordinance; is an attractive nuisance to children because of physical condition, use, or occupancy; is a fire hazard or is otherwise dangerous to the safety of persons or property; has had the utilities, plumbing, heating, or sewerage permanently disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use; is tax-reverted property owned by a qualified local governmental unit, a county, or the State; or is owned or under control of a land bank fast track authority under the Land Bank Fast Track Authority Act.

Under Public Act 344 of 1945, however, which pertains to the redevelopment of blighted areas, the definition of "blighted area" specifies that it is expressly recognized that moderate blight unremedied creates a strong possibility that severe blight will follow. Therefore, under this statute, the conditions that constitute blight are to be broadly construed to permit a municipality to make an early identification of problems

and take early remedial action to correct a demonstrated pattern of deterioration and prevent worsening of blight conditions.

Using the broad definition under Public Act 344, the City of East Lansing has declared an area it desires to redevelop "blighted" even though the area is fully occupied and still viable. Some see this as an attempt to strengthen the city's position that it is authorized to take the land by invoking eminent domain and turn it over to a for-profit entity for redevelopment.

While eminent domain can be an important mechanism for community revitalization, government entities can misuse the broad authority granted under the definition in Public Act 344 to take and clear land that is not actually blighted, but that the local unit simply feels should be used differently. Without a clear definition of "blight", the bill and resolution would not adequately protect property owners. The proposals also fail to prescribe an appeals process by which residents and business owners in a designated blighted area could contest the designation.

Opposing Argument

Under the bill and resolution, the taking of private property due to the presence of hazardous substances would be considered a "public use". The proposals, however, would not establish a minimum level of contamination that would have to be present; thus, a municipality would be authorized to take land with *any* amount of a hazardous substance. This provision would exclude many buildings, such as gas stations, from protection against condemnation for transfer to a private entity.

Opposing Argument

It is not necessary to codify the criteria established in *Hathcock*, in either statute or the Constitution, because Michigan Supreme Court decisions constitute State law. Furthermore, putting the *Hathcock* language in statute could create ambiguity in interpretation and lead to more litigation about what significant terms mean.

Response: *Hathcock* should be incorporated both in statute and the State Constitution to ensure that property rights are protected into the future. Although the Supreme Court generally must follow precedent, there is no guarantee that the

decision will not be overturned in the future, as happened with the *Poletown* decision.

Legislative Analyst: Julie Koval

FISCAL IMPACT

Senate Bill 693 (S-3)

The impact that this bill would have on the cost of future land acquisitions by State agencies and public corporations is not determinable.

Senate Joint Resolution E (S-2)

The impact of the proposed constitutional amendment on future land acquisitions by State and local units of government is not determinable.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.