

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

On Appeal From the Court of Appeals  
O'Connell, P.J., Fitzgerald and Murray, JJ

WAYNE COUNTY,

Plaintiff-Appellee,

Supreme Court Nos. 124070-124078

v.

Court of Appeals Nos. 239438, 239563,  
240184, 240187, 240189, 240190,  
240193, 240194, 240195

EDWARD HATHCOCK, *et al.*,

Defendants-Appellants

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**BRIEF *AMICUS CURIAE* OF  
NATIONAL CONGRESS FOR COMMUNITY ECONOMIC DEVELOPMENT**

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STATEMENT OF QUESTIONS PRESENTED  
BY DEFENDANTS-APPELLANTS

- I. DOES WAYNE COUNTY HAVE THE AUTHORITY, PURSUANT TO MCL §213.23 OR OTHERWISE, TO TAKE DEFENDANTS' PROPERTIES?

Wayne County answers "Yes"  
Defendants-Appellants answer "No"  
The trial court answered "Yes"  
The Court of Appeals answered "Yes"  
Amicus takes no position.

- II. ARE THE PROPOSED TAKINGS, WHICH ARE AT LEAST PARTLY INTENDED TO RESULT IN LATER TRANSFERS TO PRIVATE ENTITIES, FOR A "PUBLIC PURPOSE" PURSUANT TO *POLETOWN NEIGHBORHOOD COUNCIL V. DETROIT*, 410 MICH. 616 (1981)?

Wayne County answers "Yes"  
Defendants-Appellants answer "No"  
The trial court answered "Yes"  
The Court of Appeals answered "Yes"  
Amicus answers "Yes"

- III. SHOULD *POLETOWN* BE OVERRULED BECAUSE THE "PUBLIC PURPOSE" TEST SET FORTH IN IT IS INCONSISTENT WITH CONST. 1963, ART. 10, §2?

Wayne County answers "No"  
Defendants-Appellants answer "Yes"  
The trial court did not address this issue  
The Court of Appeals did not address this issue  
Amicus answers "No"

IV. SHOULD ANY DECISION OVERRULING *POLETOWN* BE APPLIED RETROACTIVELY?

Wayne County answers “No”

Defendants-Appellants answer “Yes”

The trial court did not address this issue

The Court of Appeals did not address this issue

Amicus answers “No”

## **INTERESTS OF AMICUS**

Founded in 1970, the National Congress for Community Economic Development (“NCCED”) is the representative and advocate for the community-based development industry. NCCED’s mission is to promote, support and advocate for the community-based development industry and work to ensure that the resources required for assisting distressed communities are identified and equitably distributed to help families and individuals achieve lasting economic viability. NCCED represents over 3,600 community development corporations (“CDCs”) across America.; its membership encompasses a broad range of geographic, ethnic, racial, political, social and economic interests, including neighborhood housing and community action agencies, farm-worker organizations, public officials, financial institutions, municipalities, businesses and individuals. Community development corporations produce affordable housing and create jobs through business and commercial development activities, and are a vital force in empowering low-income communities across the nation to achieve economic and social progress.

NCCED believes, from its first-hand experience in working with community-based redevelopment efforts across the nation, that the power of eminent domain is an essential tool, albeit a tool of last resort, for achieving communities’ social and economic goals. Without the power of eminent domain, the assembly of land for housing and mixed use development projects urgently needed to revitalize distressed communities would often be impossible.

NCCED and the community-based development organizations it represents recognize that condemnation has in the past been used for urban renewal and slum clearance programs that caused great harm to low-income communities and their residents, and believe strongly that eminent domain must be exercised with great sensitivity to affected communities and

populations, and with broad public involvement. For this reason, NCCED expresses no view regarding the propriety, as a matter of public policy, of the City of Detroit's decision a quarter-century ago to condemn the urban neighborhood at issue in *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

But the issue before this Court is more fundamental than any particular exercise of governmental judgment invoking the power of eminent domain: it is whether, under Michigan's constitutional framework, institutions of public governance have the authority to employ eminent domain at all where the acquired property is intended for reuse by future residents or businesses in the community. If this Court decides that question in the negative, low-income and distressed communities throughout the state will lose an essential mechanism for achieving their goals of economic and social development. Because that outcome would drastically affect the interests of its community-based development members, NCCED files this brief to assist the Court in deciding the issues of great importance raised in this case.

Because the applicability of Michigan caselaw and statutory provisions to the issues before the Court has been thoroughly canvassed by Wayne County and the other *amici* supporting Wayne County, NCCED does not burden this Court with duplicative argument on those matters. Rather, NCCED presents information that will assist this Court in understanding the critical importance of eminent domain to community-based redevelopment efforts, which often encounter obstacles in the assembly of sites for redevelopment projects that can only be overcome through limited use of condemnation, and which often contemplate reconveyance of acquired land to third parties, whether for development or for residential housing. NCCED also addresses the extent to which the United States Supreme Court has affirmed the use of eminent

domain for such redevelopment purposes under the federal counterpart to Michigan's Takings Clause. Finally, NCCED notes that, although the power of eminent domain must be used with sensitivity and as a tool of last resort, the principal responsibility for ensuring appropriate protections for property owners and others who may be affected lies with the legislature, and describes the extent to which the Takings Clause already provides significant and unique protection for property rights within our constitutional framework.

### **SUMMARY OF ARGUMENT**

The power of eminent domain serves an essential societal function, allowing the public to overcome market barriers that would otherwise stymie rational economic and social development. The need for condemnation is particularly acute in urban redevelopment, where the assembly of numerous parcels of land necessary for a redevelopment project can be thwarted by individual holdouts. The government's power of eminent domain has thus been a critically-useful tool for community redevelopment projects in Michigan and across the nation. Efforts to revitalize and redevelop existing urban communities are not only important in their own right, they are also essential to achieving larger goals of "smart growth" in a regional setting. The Court should not impose new constitutional restraints on takings that could destroy the public's ability to take property where necessary to achieve community redevelopment goals.

The United States Supreme Court has expressly recognized that the exercise of eminent domain for urban redevelopment serves legitimate public purposes under the Fifth Amendment, even where property acquired through condemnation is transferred to third parties for development. There is no compelling reason supporting creation of a different standard under

the Michigan constitution. Although NCCED believes strongly that the power of eminent domain must be exercised with care and sensitivity to affected communities and populations, and should be used as a tool of last resort, the restrictions that should properly be placed on the eminent domain power should principally be for the legislature, not the courts, to determine. The inherently self-regulating nature of eminent domain, due to the constitutional requirement of just compensation, ensures greater protection for property rights under the takings clause than exists under other constitutional guarantees, such as due process or equal protection, that constrain the government's powers to regulate or tax.

For these reasons, *amicus* urges this Court to affirm the decision of the Court of Appeals, and to reject defendants' attempt to erect new constitutional limits on the ability of communities to take property for public use.

## ARGUMENT

### **I. PRESERVING THE POWER OF EMINENT DOMAIN AS A POTENTIAL TOOL FOR ASSEMBLING SITES FOR REDEVELOPMENT IS ESSENTIAL TO ACHIEVING RESPONSIBLE COMMUNITY PLANNING**

#### **A. As a Matter of Economic Theory, Condemnation Serves an Essential Function in Overcoming Market Barriers to Voluntary Exchange**

Courts and legal scholars have long recognized that the power of eminent domain serves an essential societal function, permitting government to overcome market barriers that would otherwise stymie rational economic and social development. *See, e.g.*, R. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 3.6-3.7 (3d ed. 1986); Berger, *The Public Use Requirement in Eminent domain*, 57 OR. L. REV. 203, 225-46 (1978); Michelman, *Property, Utility, and Fairness*:

*Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1175-76 (1967); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984) (upholding state law authorizing condemnation to correct effects of oligopoly in land ownership in Hawaii as “a comprehensive and rational approach to identifying and correcting market failure.”). As Northwestern University Law Professor Thomas Merrill explained in his seminal work, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 65 (1986), “[E]minent domain’s purpose is to overcome barriers to voluntary exchange created when a seller of resources is in position to extract economic rents from a buyer.” In a “thin market,” as Merrill terms it – where the seller’s property is uniquely suitable for the buyer’s use, for example, or is situated within a larger site that the buyer needs for a proposed development -- the seller can extract a monopoly price or impose unacceptably high transaction costs, making the exchange economically inefficient, or can refuse to sell for reasons unrelated to objective economic value, blocking a project altogether. *Id.*

The classic situation where such market barriers exist, and can preclude economically rational transactions, is in the assembly of numerous parcels of land needed for a major public or private development project. *Id.* at 75-76. In that setting, as municipal officials, community planners and private developers know all too well, the owner of each required parcel effectively becomes a monopolist, dominating access to a resource needed to complete the project, and able to demand a price that is economically unreasonable. *Id.* Moreover, subjective values may lead individual holdouts to refuse to sell at any price, potentially thwarting a project that promises great economic benefits to the community as a whole.

The courts have long recognized that collective action in the form of governmental

condemnation may be necessary in such circumstances to allow realization of important public ends. As Justice Ryan observed in his dissenting opinion in *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981), the inherent difficulty in siting rights-of-way for transportation projects has historically been recognized as presenting an “extreme” public necessity warranting condemnation: “With regard to highways, railroads, canals, and other instrumentalities of commerce, it takes little imagination to recognize that without eminent domain these essential improvements, all of which require particular configurations of property – narrow and generally straight ribbons of land – would be ‘otherwise impracticable’; they would not exist at all.” 410 Mich. at 675 (Ryan, J., dissenting). As Chief Justice Cooley noted in *Ryerson v. Brown*, 35 Mich. 333, 339 (1877): “A railway cannot run around unreasonable land-owners ....”

The necessity for collective public action may be equally necessary in assembling the parcels of land needed for community redevelopment projects, however, as Justice Ryan also recognized: “‘If each property owner within a chosen [urban renewal] area were allowed to successfully attack the plan as plaintiff attempts to do so here, urban renewal would be stymied and *impossible* of accomplishment.’” *Poletown, supra*, 410 Mich. at 675 (Ryan, J., dissenting), quoting *Ellis v. Grand Rapids*, 257 F. Supp. 564, 568-68 (W.D. Mich. 1966) (emphasis added by Justice Ryan).

The United States Supreme Court broadly upheld the exercise of eminent domain for urban renewal purposes in *Berman v. Parker*, 348 U.S. 26 (1954), affirming the constitutionality of a comprehensive program adopted by Congress for redeveloping the District of Columbia. The Court recognized that comprehensive planning for urban redevelopment legitimately focused

on an area-wide approach, noting: “If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.” 348 U.S. at 35. A comprehensive approach to redevelopment may be necessary to reverse a spiral of decline, where individual property owners in depressed neighborhoods lack incentive to invest in their depreciating properties because of lack of investment by their neighbors. *See* Adam P. Hellegers, *Eminent Domain as an Economic Displacement Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. MICH. ST. U. DET. C.L. 901, 918-19, 934-35 (2001) (describing need for eminent domain to break “market stagnation” where owners of property in declining areas lack incentives for investment).

**B. In Practice, Eminent Domain Has in Fact Proven to be a Critically-Necessary Tool For Urban Redevelopment**

The power of eminent domain has in fact proven to be a critically-necessary tool in urban redevelopment, permitting municipalities and economic development corporations to overcome market barriers that would otherwise make it impossible or unreasonably costly to assemble complex sites for redevelopment projects. Eminent domain has been essential in the development of projects of immense public value here in Michigan and across the nation.

The facts of the present case effectively demonstrate the “extreme” public necessity that justifies the exercise of eminent domain in assembling land for economic redevelopment. Wayne County’s brief describes the trial testimony on this point: “Of the many elements needed to make [the County’s proposed Pinnacle Project] a reality, County officials realized that a contiguous

land mass of sufficient size to make the development attractive was most important, because without a complete assemblage any type of meaningful development was impossible.”

Plaintiff/Appellee Wayne County’s Brief on Appeal, at 2-3. The refusal of the defendants to sell their land would have blocked rational development, because their properties were scattered throughout the proposed site. *Id.* For these reasons, the Court of Appeals, invoking Justice Cooley’s recognition that “a railway cannot run around unreasonable landowners,” found that

taking defendants’ property is “necessary” to the Pinnacle Project simply because the project area encompasses defendants’ property. It would appear to be strategically difficult to build this complex commercial development literally *around* defendants’ largely vacant properties. ... Put another way, the developers likely will not go through with the project if plaintiff does not acquire defendants’ property, and the entire project might be lost.

*County of Wayne v. Hathcock*, 2003 WL 1950233, at n.7 (Mich. Ct. App. 2003).

Condemnation has been a crucial tool in developing other valuable public projects in Michigan (apart from the General Motors plant at issue in *Poletown*). In upholding the necessity for taking certain parcels of land for the nationally-recognized Fox Theatre District in Detroit, the Michigan Court of Appeals noted:

As the trial court’s review of the testimony showed, the Lucases’ two parcels were an essential bridge between the two historic theatre properties, and the plan of the city called for the construction of a structure to house retail transition businesses related to, and adjacent to and between, the two theatres. ... The Lucases’ parcels, along with another parcel, are at the very center of the planned social and economic traffic pattern between the two theatres. ... Thus, on the record before this Court, no abuse of discretion has been shown.

*City of Detroit v. Lucas*, 180 Mich. App. 47, 446 N.W.2d 596, 599 (Mich. Ct. App. 1989).

The power of eminent domain has been similarly instrumental in assembling sites for major redevelopment projects across the nation. The Dudley Street Neighborhood Initiative in

Boston, Massachusetts is an innovative effort to reclaim and redevelop a once-thriving urban neighborhood that had fallen into decay. One-third of the land in the Dudley neighborhood was vacant or abandoned, the area had become a magnet for the dumping of trash, and minority residents and local businesses faced severe constraints, including discriminatory loan policies, in obtaining capital for reinvestment in the area. *See* Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1077-78 (1996). A grass-roots community organization developed a bold plan for reclaiming the area as an “urban village,” with a town common and park, retail shops, and community center, as well as affordable, high quality housing. *Id.* To assemble the land necessary to achieve “critical mass,” permitting the community to overcome destructive market forces, the organization needed to consolidate ownership of the extensive tracts of vacant land in the heart of the neighborhood. *Id.*

As the author of a law review article examining the Dudley Street Neighborhood Initiative concludes, the power of eminent domain was a critical tool for achieving the community’s plans for restoring the neighborhood:

DSNI could not practicably purchase these lots on the open market. The owners of the lots presumably would be reluctant to sell to DSNI at a fair price because their land would greatly increase in value after DSNI completed its projects. Furthermore, even if some owners would be willing to sell at a fair price, this would not guarantee that DSNI would attain critical mass. Eminent domain would be the only way to assure that DSNI obtained the land required to implement its redevelopment plan in a comprehensive fashion.

*Id.* at 1082 (footnotes omitted). The community organization accordingly persuaded the City of Boston to exercise its powers of eminent domain, permitting the achievement of its visionary project for community redevelopment. *Id.* 1080.

The power of condemnation has similarly been necessary to overcome property owner resistance to the City of Newark, New Jersey's Mulberry Street Redevelopment, a comprehensive urban downtown neighborhood development featuring 2,000 market-rate condominium units in a city that has little vacant land to meet housing needs. Hailed by its architect as "New Jersey's poster child for smart growth" and "the antidote to suburban sprawl," the Mulberry Street project promises to attract thousands of professionals now commuting from other places, boosting Newark's population and tax base. Smart Growth Network, *Newark's Proposed Mulberry Street Development Moves Closer to Property Acquisition*, at <http://smartgrowth.org/news/article.asp?art=3733>.

In Lakewood, Ohio, an older, inner-ring suburb of Cleveland, Ohio suffering, as many older suburban communities are, from decline and from the pressures of outward sprawl that direct economic development toward suburbs farther out from the city, a \$151 million mixed use project in the depressed West End intended to revitalize the community has faced similar resistance from individual property owners. As Professor Thomas Bier of Cleveland State University's Levine College of Urban Affairs has noted, "If suburbs like Lakewood cannot use eminent domain, they are trapped in decline." Smart Growth Network, *First Tier Cleveland Suburb Suffers From Draw of Newer Fringe Development*, at <http://www.smartgrowth.org/news/article.asp?art=3651>. Similarly, city fathers in Birmingham, Alabama have been forced to resort to condemnation to assemble lands for an innovative revitalization plan for the city's most neglected downtown residential neighborhood. Smart Growth Network, *Birmingham leaders expect an innovative revitalization plan ...*, at <http://www.smartgrowth.org/news/article.asp?art=800>.

Planners and city officials in Arizona, concerned that proposed state legislation might hamper their ability to redevelop their cities, warn that without eminent domain, they would not be able to clean up contaminated, trash-strewn urban lots or afford to assemble properties for redevelopment projects. Smart Growth Network, *Arizona Property Rights Bill Could Hamper Redevelopment of Blighted Sites*, at <http://www.smartgrowth.org/news/article.asp?art=3304>. As Yuma neighborhood services manager Bill Lilly explains, “Without eminent domain, our hands are tied. The property owner knows what we’re doing is going to shoot the price up. And we’re not going to pay a million and a half bucks for something that should cost \$300,000.” *Id.*

In fact, the exercise of eminent domain has been instrumental in achieving virtually every major civic renewal project, from Boston’s Prudential Center to the mixed use retail, entertainment and housing projects that have restored vitality and beauty to our cities’ riverfronts and harbors across the nation. And such projects have necessarily relied upon public-private partnerships, combining the development expertise and entrepreneurial skills of private companies with the vision of community leaders. To make such mixed-use developments viable, lands and buildings must be sold to new residents and businesses. If the power of eminent domain were limited to facilities actually occupied by the public, as defendants argue in this case, virtually no major urban renewal or community redevelopment project could be achieved.

The power of eminent domain, and the use of that power in conjunction with public-private partnerships, are thus essential for the revitalization of urban neighborhoods and for effective planning for community growth and economic redevelopment. The “extreme” public necessity that underlies the assembly of complex sites, where holdouts can block rational development, fully justifies the exercise of condemnation. As Justice Cooley observed in *People*

*ex rel Detroit & Howell R. Co. v. Salem Twp. Bd.*, 20 Mich. 452, 480-81 (1870), “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.” The government’s power to compel the sale of private property should be exercised with sensitivity to affected communities, as *amicus* points out below, and is, as it should be, a tool of last resort. In the face of intractable market barriers that preclude the assembly of sites through voluntary transactions alone, however, the visions of many communities for a brighter future simply could not be realized without eminent domain.

**C. The Revitalization of Our Cities is in Turn Directly Linked to Smart Growth Policies at the Heart of Responsible Regional Planning**

Communities across Michigan and across the nation have increasingly embraced the concepts of “smart growth” – the recognition that how and where new economic development and community growth take place can have enormous impacts on the quality of life, and the commitment therefore to provide responsibly for such development and growth. The public’s concern for “smart growth” has been driven by overwhelming changes in land use in the United States, made possible by the mobility of the automobile and by the increasing affluence of the American people. As the United States Environmental Protection Agency notes:

Development patterns have changed dramatically over the past century. In the early 1900s, urban areas tended to be compact, with a strong central business district and industrial facilities serving as large employment centers. Communities tended to be walkable and contained a mix of houses and convenience services such as shops. Today’s metropolitan areas extend over large areas and employment is frequently scattered. People must rely on automobiles for access to jobs and services, as residential and commercial areas are separated, and the pedestrian environment is increasingly inhospitable.

In many regions, urbanized areas have expanded dramatically. Urbanized land area in the United States has quadrupled since 1954. From 1992 to 1997, the national rate of development more than doubled to 3 million acres per year. In most large metropolitan areas, urban land area rose more than twice as fast as population did between 1950 and 1990. The reasons for these dramatic changes in urban form are numerous, including income increases, living style preferences, and public policy on transportation investment, housing, and taxes that have facilitated these trends.

U.S. EPA, *Our Built and Natural Environments, A Technical Review of the Interactions between Land Use, Transportation, and Environmental Quality*, EPA 231-R-01-002 (2001), at i.

The dramatic expansion of urbanized land, and the increase in vehicle use in response to dispersed development patterns, create or exacerbate significant environmental problems: habitat loss and fragmentation, degradation of water resources and water quality, destruction of wetlands, loss of prime farmland, degradation of air quality, greenhouse gas emissions and increased threat of global climate change, and noise. *Id.* at i-ii. Dispersed development patterns also have profound impacts on the quality of life, overburdening transportation systems, leading to increased commutes and psychological stress, and destroying the sense of livable neighborhoods. Vehicle miles traveled in the United States, for example, are increasing at three times the rate of population growth, and the average commute has increased by 36% from 1983 to 1995. U.S. Environmental Protection Agency, *About Smart Growth*, at [http://www.epa.gov/livability/about\\_sg.htm](http://www.epa.gov/livability/about_sg.htm).

Although much of the discussion of smart growth has accordingly centered on suburban development patterns and the need to control burgeoning “sprawl,” the redevelopment and revitalization of the built environments in our urban neighborhoods is an integral element in smart growth policies. As the United States EPA observes:

Though supportive of growth, communities are questioning the economic costs of abandoning infrastructure in the city and rebuilding it further out. They are questioning increasing commute times and longer distances to stores, schools, and other daily needs. They are questioning the practice of abandoning older communities while developing open space and prime agricultural lands at the suburban fringe.

Smart growth recognizes the many benefits of growth. It invests time, attention, and resources in restoring community and vitality to existing cities and older suburbs.

*Id.*

For this reason, brownfields redevelopment – the recycling of contaminated urban industrial and commercial properties – is a key element in smart growth. As EPA notes, “By redeveloping a brownfield in an older city or suburban neighborhood, a community can remove blight and environmental contamination, create a catalyst for neighborhood revitalization, lessen development pressure at the urban edge, and use existing infrastructure.” *Id.* Principles of smart growth also focus on the benefits of compact building design within cities and existing suburbs, seeking to construct neighborhoods that are accessible by foot and by urban transportation systems, and that lessen the pressure on undeveloped “green fields” at the urban edge.

The close relationship between growth management in the outer urban fringe and redevelopment of urban core neighborhoods has increasingly been recognized both by community development organizations and by more-typically suburban advocates of smart growth. As Tony Proscio, a writer and consultant on urban redevelopment who served from 1995 to 1997 as New York City’s Deputy Commissioner of Homeless Services, observes: “To anyone who views the two movements closely, they would seem to be natural allies. Both are devoted to reducing the outward population pressure in urban areas, a pressure that propels

development away from poorer, central-city neighborhoods toward a more and more distant, undeveloped hinterland.” Tony Proscio, *Smart Communities: Curbing Sprawl at its Core*, Local Initiatives Support Corporation (2002), at 1.

A white paper by two major non-profit organizations engaged in community development and smart growth, authored by Proscio, explains the intimate connection between those movements:

Some of the worst aspects of sprawl – including much of the harm it does to the environment and to the effective delivery of public services – come from the wasteful, hasty depopulation of older places that could have held their residents’ loyalty, but instead were left to crumble. Scatter-shot development of new locales, poorly connected with other parts of the social and economic landscape, is not the result of a deliberate consumer choice for inefficient growth. It happened partly because of the speed of population movements, outpacing the ability of governments to recognize or prepare for them. Some of that rush, in turn, was an outgrowth of desperate population *flight* – away from more efficient but poorly maintained neighborhoods, and into alternatives that were not always carefully planned or well coordinated with other aspects of regional development.

Preserving or rebuilding older, core communities is therefore one essential strategy for bringing reason and order to the development of whole metropolitan areas. ... Virtually every sprawling metropolitan area in the United States has centers of outward flight at or near its core – population centrifuges that disperse residents outward as if by irresistible force. So long as such communities continue to lose the confidence of their residents, the ruin will spread, with each successive wave of deterioration and depopulation sending more residents to seek a safe haven far away.

That principle is where the interests of community development and smart growth meet. Community developers, at their best, preserve and rebuild older homes, strengthen businesses and business districts, promote employment, improve security, restore parks and public spaces, and work with governments to raise the quality of public services and infrastructure. By restoring amenities and the quality of life, and by pursuing mixed-income communities, they regain or hold onto population and investment, and thus help calm the ripples of disinvestment, decay, and flight. Arguably, any realistic approach to smart growth (in fact, the very thing that makes it “smart”) starts with the assumption that neighborhoods at the core of metropolitan areas need to maintain or increase their population levels

if the whole region isn't just going to sprawl into eternity.

Funders' Network for Smart Growth and Livable Communities and Local Initiatives Support Corporation, *Community Development and Smart Growth: Stopping Sprawl at its Source*, at 3-4.

Community redevelopment is thus inextricably intertwined with larger principles of regional growth planning. Improving the economic and structural fabric of our urban neighborhoods requires prudent use of eminent domain, as *amicus* has noted, and preservation of that authority is equally essential for "smart growth" to succeed in the larger regional setting.

## **II. RECOGNIZING THE IMPORTANCE OF EMINENT DOMAIN TO COMMUNITY REDEVELOPMENT, THE UNITED STATES SUPREME COURT HAS CLEARLY CONFIRMED THAT CONDEMNATION TO SERVE SUCH PURPOSES IS CONSTITUTIONAL**

### **A. The United States Supreme Court Has Expressly Held That Condemnation Serves a Public Use Where Property is Intended to be Reconveyed to Third Parties as Part of an Economic Redevelopment Project**

As this Court has repeatedly observed, "The Taking Clause of the state constitution is substantially similar to that of the federal constitution." *Tolksdorf v. Griffin*, 464 Mich. 1, 2, 626 N.W.2d 163, 165 (2001). *Accord, e.g., City of Kentwood v. Estate of Sommerdyke*, 458 Mich. 642, 656, 581 N.W.2d 670, 676 (1998). The Court has held that other counterpart provisions of the Michigan and federal constitutions should be construed in parallel absent a "compelling reason" to interpret the state constitution to provide more stringent protections. *People v. Collins*, 438 Mich. 8, 475 N.W.2d 684 (1991) (revising the Court's prior interpretation of the state constitution's protection against search and seizure to make it consistent with subsequent U.S. Supreme Court interpretation of the Fourth Amendment). This Court has never found that a

compelling reason exists to construe the taking clause of the Michigan constitution differently from its federal counterpart, and has relied extensively upon the decisions of the United States Supreme Court interpreting the Fifth Amendment in resolving takings challenges under the state constitution. *E.g., K & K Construction, Inc. v. Department of Natural Resources*, 456 Mich. 570, 575 N.W.2d 531 (1998) (relying exclusively upon U.S. Supreme Court jurisprudence to resolve regulatory takings claim).

It is of considerable significance, therefore, that the United States Supreme Court has spoken definitively, and unanimously, on the question now being considered by this Court: whether a taking of property for conveyance to third party in the context of an urban redevelopment project constitutes a “public use” within the scope of the government’s power of eminent domain. In *Berman v. Parker*, 348 U.S. 26 (1954), the United States Supreme Court addressed the constitutional validity of a comprehensive program established by Congress to improve substandard housing conditions in the District of Columbia. Congress had made legislative findings that the restoration of these areas of the city could not be attained by private enterprise alone, that “sound replanning and redevelopment” of declining areas within the city could not be accomplished without “comprehensive and coordinated planning” for the entire city, and that acquisition and assembly of real property and the leasing and sale of such property for redevelopment pursuant to a project area redevelopment plan constituted a public use. *Id.* at 29. The federal redevelopment program relied heavily the actions of private developers to achieve the contemplated improvements in the city’s residential communities, and explicitly authorized the sale of acquired property to such developers. *Id.* at 30.

In a unanimous decision, the Court rejected a variety of objections raised by the owner of

a department store slated for acquisition during the redevelopment program. The Court gave broad deference to Congress's determination that the use of condemnation for the redevelopment program constituted a public use, noting that Congress exercises the full police power over the affairs of the District of Columbia, and that the definition of the purposes of government that fall within that power is largely for legislative determination:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.

*Id.* at 32. The Court found that alleviation of substandard housing was well within the broad scope of the public welfare embraced by the police power, and that Congress could seek to advance aesthetic concerns as well as concerns for sanitation and safety: "It is well within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33.

The Court concluded that the principle requiring deference to the legislature's determination of public purpose "admits of no exception merely because the power of eminent domain is involved," *id.* at 32, and declared: "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." Eminent domain, the Court concluded, is "merely the means to the end." *Id.* at 33. "Once the object is within the authority of Congress," the Court declared, "the right to realize it through the exercise of eminent domain is clear." *Id.*

The *Berman* Court therefore squarely rejected appellants' argument that transfer of condemned lands to third parties for redevelopment made the use of eminent domain

constitutionally impermissible:

Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. ... The public end may be as well or better served through an agency of private enterprise than through a department of government – or so the Congress might conclude. *We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.*

*Id.* at 33-34 (emphasis added).

The Court also rejected appellants' arguments that the D.C. government was required to show that each property being acquired was in defective condition, broadly affirming the authority of the government to adopt a "balanced, integrated plan" for the entire region rather than proceed on a "piecemeal basis." *Id.* at 34-35. The Court noted that "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Id.* at 35-36. Ultimately, the Court declared, "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 36.

*Berman* thus broadly affirms the authority of government to exercise eminent domain to further urban redevelopment projects, and explicitly upholds the constitutionality of condemnation where a public-private partnership, such as that envisioned by Wayne County in this case, will play an integral role in achieving the planned development.

The Supreme Court reaffirmed its holdings in *Berman* thirty years later, in *Hawaii*

*Housing Authority v. Midkiff*, 467 U.S. 229 (1984). *Midkiff* involved a program established by the Hawaii legislature to address adverse social effects of a longstanding land oligopoly. Faced with overwhelming concentration of land ownership in the hands of a handful of owners, and market barriers preventing the free transfer of title to real property, the legislature exercised the power of eminent domain to compel landowners to sell land to lessees holding long-term leases. Because the Hawaii program used condemnation to transfer property from one owner to another, the United States Court of Appeals for the Ninth Circuit found that the Hawaii program violated the “public use” requirement of the Fifth and Fourteenth Amendments. 702 F.2d 788, 798 (9<sup>th</sup> Cir. 1983).

Reversing the Court of Appeals, the Supreme Court unanimously reaffirmed *Berman*’s broad deference to the legislature’s determination of the public purposes underlying the use of eminent domain, and its conclusion that, “[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.” 467 U.S. at 240. “The ‘public use’ requirement,” the Court declared in *Midkiff*, “is thus *coterminous with the scope of a sovereign’s police powers.*” *Id.* (emphasis added). The Court noted that “[t]here is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power.” *Id.* But, as the Court had made clear in *Berman*, that role was “extremely narrow.” *Id.* The Court observed that “[a]ny departure from this judicial restraint would result in courts deciding on what is and what is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.” *Id.* at 240-41, quoting *United States ex rel TVA v. Welch*, 327 U.S. 546, 552 (1946). “In short,”

the Court declared, “the Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’” *Id.* at 241, quoting *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896).

The Court recognized in *Midkiff* that its prior cases had declared that “‘one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.’” *Id.*, quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937). “But where the exercise of the eminent domain power is rationally related to a conceivable public purpose,” the Court concluded, “the Court has never held a compensated taking to be proscribed by the Public Use Clause.” *Id.* (emphases added). The Court accordingly had “no trouble concluding that the Hawaii Act is constitutional,” *id.*, since it represented a “comprehensive and rational approach to identifying and correcting market failure” in the real estate market in Hawaii. *Id.* at 244.

Significantly, the *Midkiff* Court expressly rejected two arguments similar to those advanced by the dissents in *Poletown* and by defendants in this case: that “public use” requires the government to possess and use property at some point during a taking, and that judicial deference to legislative determinations of public purpose extended only to Congress, and not to state legislatures. See *Poletown*, 410 Mich. at 668 (Ryan, J., dissenting). The Court in *Midkiff*, as in *Berman*, squarely rejected the argument that the exercise of eminent domain to transfer property from one private party to another, without public occupation, was impermissible:

The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal

requirement that condemned property be put into use for the general public. “It is not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order [for it] to constitute a public use.” *Rindge Co. v. Los Angeles*, 262 U.S. [700], at 707 [1923]. “[W]hat in its immediate aspect [is] only a private transaction may ... be raised by its class or character to a public affair.” *Block v. Hirsch*, 256 U.S. [135], at 155 [1921]. As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State’s taking actual possession of the land. *In such cases, government does not itself have to use property to legitimate the taking; it is only the takings’ purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.*

*Id.* at 243-44 (emphasis added).

The Court also flatly rejected the 9<sup>th</sup> Circuit’s view (and the view expressed by Justice Ryan in his dissent in *Poletown*) that *Berman* stood only for the proposition that judicial deference must be accorded determinations of public use made by Congress:

Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate. Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. *Berman v. Parker*, 348 U.S., at 32. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the takings power, courts must defer to its determination that the taking will serve a public use.

*Id.* at 244.

*Berman* and *Midkiff* thus make clear that the government’s power of eminent domain is co-extensive with its police powers, and that the choice of condemnation as a means to achieve a purpose within its police powers is for the legislature. Contrary to Justice Ryan’s suggestion in his dissent in *Poletown* that there is a fundamental distinction between the concept of public purpose for taxation and public use for condemnation, *see* 410 Mich. at 662-67, the United States

Supreme Court has recently made clear that the power of condemnation for public use is also co-extensive with the government's taxing power. In *Brown v. Legal Foundation of Washington*, \_\_\_ U.S. \_\_\_, 123 S.Ct. 1406 (2003), the Court upheld the constitutionality of the State of Washington's interest on lawyers' trust accounts (IOLTA) program. The Court observed that the program "unquestionably satisfied" the constitutional requirement that a taking be for a public use, *id.* at 1417, expressly relying on the scope of the State's power to impose taxes to achieve similar purposes: "*If the State had imposed a special tax, or perhaps a system of user fees, to generate the funds to finance the legal services supported by the Foundation, there would be no question as to the legitimacy of the use of the public's money.*" *Id.* (emphasis added). The concept of "public purpose" necessary to support any act by the government within its police or taxing powers is thus identical, for purposes of the Fifth Amendment, with the concept of "public use" necessary to sustain the exercise of eminent domain, and the courts should give broad deference to the legislature's judgments in either setting.

The views of the United States Supreme Court on these points should illuminate the issues before this Court. This Court has never identified or even suggested a "compelling reason" why the Takings Clause of Michigan's constitution should be read differently than its federal counterpart, and there is nothing in the circumstances of the present case to warrant creating a constitutional double-standard of profound dimensions regarding the scope of the government's authority to take property with compensation. The Supreme Court's decision in *Berman* squarely recognizes that condemnation may properly be invoked to further urban development, and that the government may reasonably rely upon retransfer of acquired property to private parties for redevelopment to further such programs. The *Berman* decision,

significantly, was the law of the land at the time the Michigan constitution was adopted, and presumably informed the drafting of the takings provision in that document. This Court should not erect new constitutional barriers, long rejected under the federal constitution, to the assembly of lands for vital public programs in Michigan.

**III. ALTHOUGH THE POWER OF EMINENT DOMAIN SHOULD BE EXERCISED WITH CARE AND WITH SENSITIVITY TO AFFECTED COMMUNITIES, THE DETERMINATION OF APPROPRIATE LIMITATIONS UPON CONDEMNATION IS PRINCIPALLY A MATTER FOR THE LEGISLATURE**

**A. Deferential Scrutiny of the Exercise of Eminent Domain is Warranted Because the Requirement of Fair Compensation Provides Broad Protection for Property Rights**

The framers of the Michigan Constitution intended that the legislature have broad authority to determine the procedures applicable to the taking of property for public use. Article 10, § 2 of the Constitution states: “Private 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 Convention Comment to this provision states:

*This is a revision of Sec. 1, Article XIII, of the present [1908] constitution which, in the judgment of the convention, is a sufficient safeguard against taking of private property for public use. Further provisions relative to eminent domain and procedures appearing in Sections 2, 3, 4 and 5, Article XIII, of the present constitution have been eliminated.*

*This section clearly indicates that proper procedures for the acquisition of private property for public use are to be determined by the legislature ....*

Const. 1963, art. 10, § 2, Convention Comment (emphases added).

The Michigan legislature has imposed procedural requirements on the exercise of eminent

domain to ensure that it is properly employed as a tool of last resort and to protect the rights of affected property owners. The Uniform Condemnation Procedures Act, MCL 213.51 *et seq.*, followed by Wayne County in this case, establishes comprehensive procedures to ensure due process in the taking of private property, including requirements for notice to the property owner, public hearing, judicial determination of the necessity of the taking if challenged, and jury trial to determine compensation. The legislature has broadly required government entities exercising eminent domain to demonstrate the necessity of the taking; MCL 213.23, the authority invoked by Wayne County for the taking in this case, for example, authorizes public corporations and state agencies to take private property “necessary for public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers....” The objections raised by defendants to the necessity and public purpose of the taking in this case have received careful review in the courts, as intended by the legislature.

NCCED believes that such procedural protections are appropriate and necessary to ensure that private rights are not unduly impaired by the government’s broad power to take property for public use. Indeed, NCCED believes that the exercise of that power by governmental authorities should always be undertaken with great care and with sensitivity to the impacts of a contemplated taking on affected communities and populations. The impact of well-intentioned “slum clearance” and “urban renewal” programs has often fallen heavily on minority and poor populations, *see, e.g.*, Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1 (2003), and modern understanding of the sociological impacts of displacement of existing residents and businesses highlights the costs that can accompany dramatic change in the fabric of a community. *See, e.g.*,

Hellegers, *Eminent Domain as an Economic Development Tool*, *supra*, at 936-42.

For these reasons, NCCED believes that condemnation should properly be a tool of last resort, employed only where necessary to overcome market barriers that may preclude assembly of sites for public projects. NCCED also believes that the decision to invoke eminent domain should be made with broad public involvement, ensuring that the interests of affected residents and businesses are considered and that public authorities take full responsibility for authorizing condemnation. *See, e.g.*, MCL § 125.1601 *et seq.* (the Economic Development Corporations Act) (requiring broad public involvement, including public hearings, detailed approval by the governing body of a municipality and by the local planning agency, and authorizing creation of citizens' advisory council). In this case, the courts have squarely determined that the taking of defendants' properties is necessary for Wayne County's project, and Wayne County appears to have taken steps to secure broad public support and to maintain public control over the project. *See* Plaintiff/Appellee Wayne County's Brief on Appeal, at 34-35, 37.

But the determination of what procedures will safeguard the exercise of eminent domain is principally the province of the legislature, as the United States Supreme Court has recognized in *Berman* and *Midkiff*. The standard established by this Court in *Poletown* requires that public benefits be "clear and significant" where a taking may also benefit private interests, committing the Michigan courts to review with care the circumstances of such exercises of eminent domain. 410 Mich. at 635, 304 N.W.2d at 460.<sup>1</sup> There is no call for this Court to erect sweeping new

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<sup>1</sup>NCCED notes that the standard of review established in *Poletown*, together with other constitutional protections, such as the Due Process and Equal Protection Clauses, empower this Court to review with particular care circumstances that suggest that minority and poor residents or other disadvantaged groups may have been effectively excluded from the political process leading to a decision to condemn property in their community, or would bear a disproportionate burden from such a taking.

constitutional restrictions on the use of eminent domain that might bar, permanently, the ability of communities to achieve important goals of economic revitalization and redevelopment. Indeed, this Court may take assurance from the very nature of eminent domain, which inherently imposes sharp constraints on its use and affords a degree of constitutional protection for property rights that is unique to the constitutional scheme.

As scholars and courts have long recognized, the takings clauses of the Fifth Amendment and its state counterparts, including Art. 10, § 2 of the Michigan Constitution, impose a fundamental restraint on government's power to command that private property serve public purposes: any taking must be accompanied by just compensation. As Professor Merrill notes in his comprehensive examination of the economics of eminent domain, condemnation is inherently more expensive than market exchange because it requires extensive governmental authorizations, compliance with extensive procedural requirements to protect due process rights of property owners, appraisals, and opportunities for judicial review. Merrill, *The Economics of Public Use*, *supra*, at 77-78. As Merrill notes, "This conclusion has important implications .... In effect, it means that the decision whether to use eminent domain should be, from an economic perspective, self-regulating." *Id.* at 78. Merrill's comprehensive examination of caselaw involving the exercise of eminent domain confirms the expectation that governments will prefer to use voluntary transactions where possible: "Regardless of courts' conclusions about whether a taking is for public use, condemnors rarely use the power of eminent domain unless it is necessary to overcome barriers to voluntary market exchange – monopoly pricing or strategic

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The facts of this case do not present an occasion for this Court to address the propriety of special constitutional protection for politically disadvantaged groups in the eminent domain process.

bargaining.” *Id.* at 101.

The self-regulating nature of the taking power, ensured by the constitutional requirement of just compensation, provides a degree of protection for private property that is unique to the takings clause. That concrete protection contrasts sharply with the broad latitude the government enjoys to control the uses of private property and to require economic contributions to public purposes under other powers. The government’s broad powers to regulate the use of private property are subject to extremely deferential judicial review under the traditional doctrines applicable to the due process and equal protection clauses. In matters of economics or general social welfare, “the test to determine whether the law comports with due process is whether it bears a reasonable relation to a legitimate governmental interest,” and an ordinance regulating an economic matter therefore “need only rationally relate to a legitimate governmental purpose.” *City of Detroit v. Qualls*, 434 Mich. 340, 365, 454 N.W.2d 374, 386 (1990). Challenges to economic regulation under equal protection are similarly subject to a lenient “rational-basis” standard. As this Court has observed:

“Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with “mathematical nicety,” or even whether it results in some inequity when put into practice.” ... Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. ... To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. ... Thus, to have the legislation stricken, the challenger would have to show that the legislation is based “solely on reasons totally unrelated to the pursuit of the State’s goals,” ... or, in other words, the challenger “must negative every conceivable basis which might support” the legislation.

*TIG Ins. Co. v. Treasury Dep't*, 464 Mich. 548, 557-58, 629 N.W.2d 402 (2001) (internal citations omitted).

The government may thus sharply affect the use and enjoyment of private property through regulation with only the most minimal judicial scrutiny. Indeed, for this reason property rights advocates have strenuously sought the protections of the *takings clause* for such regulations impinging on the use of their property. Only where the economic impact of such regulation is so severe that it is tantamount to confiscation of the property does the more fundamental protection of the takings clause come into play, however, requiring just compensation for a regulatory taking.

Similarly, the power of the government to command economic contribution to public purposes under its taxing authority is almost unlimited. *See, e.g., Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 99-100 (1935) (when power to tax exists, extent of burden is matter for discretion of legislature, even to the point of destroying a business). As Justice Ryan recognized in his dissent in *Poletown*, the Michigan courts historically viewed the taxing power *more restrictively* than the takings power, precisely because the taxing power takes property without any compensation, while the taking power is constrained by the constitutional requirement of just compensation. 410 Mich. at 664-65, 304 N.W.2d at 473-74 (Ryan, J., dissenting). Justice Cooley observed that “the difference between a forced sale for a reasonable compensation paid and a forced exaction without any pecuniary return, is amply sufficient to justify more liberal rules in the former case than in the latter.” *Ryerson v. Brown*, 35 Mich. 333, 339 (1877). Modern decisions have of course “significantly expanded” the scope of the taxing power, as Justice Ryan recognized, 410 Mich. at 665, 304 N.W.2d at 474, giving the government broad

latitude to define the public purposes for taxation.

The power of government to take property for public use is thus comparatively restrained, both by the fundamental requirement of payment of compensation and by the limitations placed by the legislature, permitting condemnation only where necessary. NCCED submits, therefore, that there is no basis for this Court to erect new constitutional limits on the use of the taking power.

### CONCLUSION

For these reasons, *amicus* NCCED urges this Court to affirm the Court of Appeals in this case, and to reject the defendants' attempt to erect new constitutional limits on the ability of communities to take property for public use.

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