

USING EMINENT DOMAIN TO ADDRESS DETROIT'S VACANT LAND PROBLEM: A PROPOSED AMENDMENT TO THE MICHIGAN STATE CONSTITUTION

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I. INTRODUCTION

Michigan State Constitution article X section 2 prohibits “the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.”¹ The current language of article X section 2 reflects a line of development in Michigan eminent domain law that began with *Poletown*,² continued

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1. MICH. CONST. art. X, § 2.

2. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

with *Hathcock*³ and *Kelo*,⁴ and ultimately culminated in voter approval of Proposal 4 of 2006.⁵

This Note argues that, in light of the circumstances facing Detroit, article X section 2 should be amended. Detroit's population has been in decline for decades.⁶ In 2014, the population of Detroit was around 680,000 people.⁷ This represents a roughly 63% decrease in its population from a high point of around 1,850,000 in 1950.⁸ The decline in population has left areas of Detroit largely vacant and nonproductive.⁹ Much of Detroit's vacant land cannot be effectively redeveloped due to the fact that the vacant parcels are not contiguous.¹⁰ Article X section 2's strict limitation on the use of eminent domain prevents the ability to carry out the large-scale land assembly projects needed to revitalize Detroit and other cities in Michigan.¹¹ The City of Detroit owns many vacant parcels, however it cannot combine these parcels into large developable sites because the city cannot obtain the interspersed parcels that it does not own.¹² Loosening article X section 2's constraints on the use of eminent domain would allow the City of Detroit to combat its

3. *Cty. of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

4. *Kelo v. City of New London*, 545 U.S. 469 (2005).

5. Laura M. Bassett, Note, *Taking(s) In The Big Picture: The Impact Of Prop. 4's Eminent Domain Restrictions On Urban Redevelopment In Michigan*, 53 WAYNE L. REV. 899, 899-90 (2007); MICH. SEC'Y OF STATE, NOTICE STATE PROPOSALS (2006), http://www.michigan.gov/documents/sos/ED-138_State_Prop_11-06_174276_7.pdf [hereinafter MICHIGAN NOTICE STATE PROPOSALS].

6. Christine MacDonald, *Detroit population rank is lowest since 1850*, DET. NEWS (May 20, 2016), <http://www.detroitnews.com/story/news/local/detroit-city/2016/05/19/detroit-population-rank-lowest-since/84574198>.

7. U.S. CENSUS BUREAU, QUICK FACTS DETROIT CITY, MICHIGAN, <http://www.census.gov/quickfacts/table/PST045215/2622000> (last visited Apr. 20, 2017).

8. U.S. CENSUS BUREAU, POPULATION OF THE 100 LARGEST URBAN PLACES: 1950 (June 15, 1998), <http://www.census.gov/population/www/documentation/twps0027/tab18.txt>.

9. Kate Davidson, *Detroit Has Tons of Vacant Land. But Forty Square Miles?* MICH. RADIO (Apr. 18, 2012), <http://michiganradio.org/post/detroit-has-tons-vacant-land-forty-square-miles>.

10. John Mogk, *Use of eminent domain would help revive Detroit*, CRAIN'S DET. BUS., (April 12, 2015, 8:00 AM), <http://www.crainsdetroit.com/article/20150412/BLOG200/304129972/use-of-eminent-domain-would-help-revive-detroit> (stating Detroit's "substantially vacant 138.9 square miles begs for new large economic development project[s], but] . . . Detroit does not have the ability to quickly assemble land in large enough tracts to support major projects"); see also Davidson, *supra* note 9.

11. *Id.* (stating "Michigan should amend its constitution . . . [to] allow eminent domain to be used for economic development").

12. *Id.*; DET. FUTURE CITY, THE LAND AND BUILDING ASSETS ELEMENT: A STRATEGIC APPROACH TO PUBLIC ASSETS 269 (2012), http://detroitfuturecity.com/wp-content/uploads/2014/02/DFC_LandBuildingAssets_2ndEd.pdf.

problem with vacant land.¹³ With greater leeway to use the power of eminent domain, the City of Detroit would be able to promote economic development by assembling the sites necessary to attract industry.¹⁴

This Note takes the position that an amendment to article X section 2 would benefit the City of Detroit and the State of Michigan by allowing for needed economic development. However, this Note also recognizes that eminent domain for the purpose of economic development is controversial.¹⁵ Therefore, any amendment to article X section 2 would have to strike a balance between loosening the current restrictions on the use of eminent domain, and maintaining/enhancing the current protection provided to principal residences in order to be politically palatable. In order to accomplish such a balance, this Note recommends an amendment to article X section 2 that incorporates language from California's state constitutional provision governing the use of eminent domain.¹⁶

Article I section 19 of the Constitution of the State of California controls the use of eminent domain in California.¹⁷ Article I section 19 does not completely prohibit the taking of private property for the purpose of transferring it to a private entity for the purpose of economic development.¹⁸ However, Article I section 19 does restrict the use of eminent domain to transfer private property to a private entity if the property to be taken is an "owner-occupied residence."¹⁹

Michigan State Constitution article X section 2 should be amended to allow the use of eminent domain for economic development because it is necessary for the redevelopment of Detroit.²⁰ The amendment should incorporate the special protection provided to owner-occupied residences contained in California's Article I section 19.²¹ This would help to lessen

13. See Mogk, *supra* note 10 (stating "Detroit leads the nation in the percentage of vacant land, blighted properties, unemployment and poverty. The city's revival requires major redevelopment of industrial and commercial projects . . . Without the renewed use of eminent domain, however, it is unlikely to occur").

14. *Id.*

15. See generally ILYA SOMIN, *THE GRASPING HAND: "KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN"* (2015).

16. See Mogk, *supra* note 10.

17. CAL. CONST. art. I, § 19.

18. *Id.*

19. *Id.*

20. See Mogk, *supra* note 10; MICH. CONST. art. X, § 2.

21. See Mogk, *supra* note 10 (stating "Michigan should amend its constitution and follow the lead of California in allowing eminent domain to be used for economic development, but protecting homeowners who have lived in their homes for at least one year"); CAL. CONST. art. I, § 19.

the politically controversial nature of such an amendment.²² Under the proposed amendment, all property that is not an owner-occupied residence would be subject to the use of eminent domain for the purpose of economic development. This would give the City of Detroit and other municipalities in the State of Michigan considerably more power to promote economic growth by helping to assist in the assembly of the large parcels necessary for the construction of new industrial and business developments.²³

II. BACKGROUND

A. Michigan State Constitution Article X Section 2

The current language of Michigan State Constitution article X section 2, which controls the government's use of eminent domain, can be traced to three major contributing factors.²⁴ First, the Michigan Supreme Court's controversial decision in *Poletown* motivated those that did not support the government's use of eminent domain for the purpose of promoting economic development to organize and push for restrictions on the use of eminent domain.²⁵ The next contributing factor was the Michigan Supreme Court's decision in *Hathcock*, which responded to the repercussions of the *Poletown* holding.²⁶ The third major contributing factor was the United States Supreme Court's decision in *Kelo*.²⁷ All three factors resulted in Michigan voters' 2006 passage of Proposal 4, which amended article X section 2 to its current language.

Article X section 2 of the Michigan State Constitution currently allows the use of eminent domain only after the government shows by a preponderance of the evidence that the property being taken will be put to a proper public use.²⁸ Economic development is specifically excluded from the definition of "public use" for taken property.²⁹ When the government seeks to use condemnation to take a blighted property, it must be able to show that the property is blighted by clear and

22. *Id.*

23. *Id.*

24. MICH. CONST. art. X, § 2.

25. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

26. *Cty. of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

27. *Kelo v. City of New London*, 545 U.S. 469 (2005).

28. MICH. CONST. art. X, § 2.

29. *Id.* (stating "'public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development").

convincing evidence.³⁰ Additionally, if the government takes a principal residence, it must pay 125% of the fair market value of the property.³¹ The current language of article X section 2 makes Michigan one of the most restrictive states when it comes to the use of eminent domain.³²

B. Hathcock's Response to Poletown

In 1981, the Michigan Supreme Court decided *Poletown*, where the issue before the court was whether the taking of private property for the purpose of transferring it to General Motors for a new factory was a taking for public use.³³ The court was aware of the importance of the matter it was deciding for the future of the state.³⁴ At the time *Poletown* was decided, article X section 2 of 1963 stated, "property shall not be taken for public use without just compensation."³⁵ The *Poletown* court noted that the general understanding of article X section 2 was that it restricted the use of eminent domain only to situations that advanced a "public use or purpose."³⁶

The plaintiffs in *Poletown* argued that the taking at issue constituted a taking for private, not public, use because the public benefits would only be "incidental" while General Motors would be the "primary beneficiary."³⁷ However, the defendants, the City of Detroit and the Detroit Economic Development Corporation, argued it was a taking for public use because of the employment and economic benefit that would result from the construction of a new factory.³⁸ Noting "evidence of severe economic conditions," and the need for a new plant to provide an "economic boost,"³⁹ the court recognized that using eminent domain to enable General Motors to build a new factory would "alleviat[e]

30. *Id.* (stating if a "condemnation action involves a taking for the eradication of blight . . . the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use").

31. *Id.* (requiring that "[i]f private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall not be less than 125% of that property's fair market value").

32. *Id.*

33. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 629, 304 N.W.2d 455, 457 (1981).

34. *Id.* (stating "[Poletown] raises a question of paramount importance to the future welfare of this state and its residents").

35. MICH. CONST. article X § 2 (amended 2006).

36. *Poletown*, 410 Mich. at 629, 304 N.W.2d at 457.

37. *Id.* at 631–32, 304 N.W.2d at 458.

38. *Id.* at 632, 304 N.W.2d at 458.

39. *Id.* at 633, 304 N.W.2d at 459.

unemployment and revitalize the economic base of the community.”⁴⁰ The court found that “alleviating unemployment and revitalizing the economic base of the community” presented a “clear and significant” benefit to the public, and therefore the land was being put to a public use within the meaning of article X section 2.⁴¹ The *Poletown* court deemed the benefit to General Motors to be “incidental” in comparison to the benefit gained by the community.⁴²

In 2004, the Michigan Supreme Court in *Hathcock* expressly overruled its earlier decision in *Poletown*.⁴³ The justices sitting on the Michigan Supreme Court had changed completely between the time *Poletown* and *Hathcock* were decided.⁴⁴ The *Hathcock* court was faced with determining the constitutionality of the use of eminent domain for the purpose of creating a business and technology park.⁴⁵ Wayne County was attempting to create what came to be known as “the Pinnacle Project” in the hopes of creating jobs and raising tax revenues.⁴⁶ Of the 1,300 acres Wayne County originally sought to obtain for the project, only nineteen parcels, constituting less than 300 acres, were at issue.⁴⁷ These disputed parcels were distributed in a “checkerboard” throughout the proposed development.⁴⁸ The *Hathcock* decision notes that an expert estimated the project could “create thirty thousands jobs and add \$350

40. *Id.* at 634, 304 N.W.2d at 459.

41. *Id.* (stating “the 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 Court then noted that, “if the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project”).

42. *Id.*

In the instant case the benefit to be received by the municipality invoking the power of eminent domain is a clear and significant one and is sufficient to satisfy this Court that such a project was an intended and legitimate object of the Legislature when it allowed municipalities to exercise condemnation powers even though a private party will also, ultimately, receive a benefit as an incident thereto.

Id.

43. *Cty. of Wayne v. Hathcock*, 471 Mich. 445, 482, 684 N.W.2d 765, 787 (2004).

44. MICH. SUPREME COURT HISTORICAL SOC’Y, JUSTICE BIOGRAPHIES, <http://www.micourthistory.org/justices/> (Justices on the *Poletown* court: Mary S. Coleman, John W. Fitzgerald, Thomas G. Kavanagh, Charles Levin, Blair Moody, Jr., James L. Ryan, G. Mennan Williams. Justices on the *Hathcock* court: Michael Cavanagh, Maura Corrigan, Marilyn J. Kelly, Stephen Markman, Clifford W. Taylor, Elizabeth Weaver, Robert Young, Jr.).

45. *Hathcock*, 471 Mich. at 451–52, 684 N.W.2d at 770.

46. *Id.* at 452, 684 N.W.2d at 770–71.

47. *Id.* at 453, 684 N.W.2d at 771.

48. *Id.*

million in annual tax revenue for the county.”⁴⁹ However, the *Hathcock* majority was not persuaded by the public benefits forecasted by the county’s expert.⁵⁰

Hathcock rejected the government’s use of eminent domain for economic development.⁵¹ The *Hathcock* majority characterized *Poletown* as having held “that a vague economic benefit stemming from a private profit-maximizing enterprise is a ‘public use.’”⁵² The decision in *Hathcock* has been criticized as a misinterpretation of Michigan’s historical takings jurisprudence, and an undue constraint on the legislative province of determining what constitutes a public use.⁵³

Hathcock represented a major transition from the court’s reasoning in *Poletown*.⁵⁴ The *Poletown* court recognized a substantial benefit for the public could be achieved by using the power of eminent domain for economic development.⁵⁵ However, the court in *Hathcock*, while recognizing there would be some public benefit, instead focused on the benefit that would be gained by private parties as a result of a taking for economic development.⁵⁶ After the holding in *Hathcock*, property could no longer be taken by governments in Michigan for the purpose of economic development. Economic development had been found to be outside the public use necessary for a taking under article X section 2 of the Michigan State Constitution.⁵⁷

C. *Kelo* Comes Into the Picture

Another development in eminent domain law that contributed to the current state of the law in Michigan was the 2005 decision of the United States Supreme Court in *Kelo v. City of New London*, which represented

49. *Id.* at 452, 684 N.W.2d at 771.

50. *Id.* at 482–83, 684 N.W.2d at 786–87 (characterizing the argument made by Wayne County as “justify[ing] the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy”).

51. *Id.* at 482, 684 N.W.2d at 786 (“*Poletown*’s economic benefit rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity”).

52. *Id.* at 482, 684 N.W.2d at 786.

53. John Mogk, *Eminent Domain and The “Public Use”: Michigan Supreme Court Legislates An Unprecedented Overruling of Poletown in County of Wayne V. Hathcock*, 51 WAYNE L. REV. 1331, 1332–35 (2005).

54. *See id.*

55. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 634, 304 N.W.2d 455, 459 (1981).

56. *Hathcock*, 471 Mich. at 482–83, 684 N.W.2d at 786.

57. *Id.*

a distressing precedent for those opposed to the use of eminent domain for economic development.⁵⁸ The City of New London, Connecticut, was attempting to redevelop its Fort Trumbull Area to address economic decline in the city.⁵⁹ The city was unable to acquire all of the land needed for the development plan through negotiated sale, and as a result began using eminent domain to complete the acquisition process.⁶⁰ *Kelo* dealt with the limitations placed on the use of eminent domain by the Fifth Amendment of the United States Constitution.⁶¹ *Kelo* held that condemnations for the purpose of economic development are within the public use exception outlined in the Fifth Amendment.⁶² The petitioners in *Kelo* asked the Court to establish a “bright-line rule that economic development does not qualify as a public use.”⁶³ However, the Court found that there was no reason to exclude economic development from the “traditionally broad understanding of public purpose.”⁶⁴

Additionally, the *Kelo* Court was not disturbed by the fact that private parties would also benefit from the economic development.⁶⁵ Quoting an earlier decision of the Supreme Court in *Berman*, the *Kelo* Court explained that when trying to accomplish economic development “the public end may be as well or better served through an agency of private enterprise than through a department of government.”⁶⁶ *Kelo* recognized that there are potential problems with the governmental transfer of property from one private party to another private party.⁶⁷

58. *Kelo v. City of New London*, 545 U.S. 469 (2005); Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 *ECOLOGY L. Q.* 703 (2011).

59. *Kelo*, 545 U.S. at 473–74, (noting “[d]ecades of economic decline led a state agency in 1990 to designate [New London] a ‘distressed municipality,’” and that the development would result in “creating jobs, generating tax revenue, and helping ‘build momentum for the revitalization of downtown New London’”).

60. *Id.* at 475.

61. *Id.* at 477 (stating certiorari was granted “to determine whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment”).

62. *Id.* at 489–90.

63. *Id.* at 484.

64. *Id.* at 484–85 (noting that “economic development is a traditional and long-accepted function of government”).

65. *Id.* at 485–86 (stating “the government’s pursuit of a public purpose will often benefit individual private parties”). The Supreme Court then went on to quote its earlier decision in *Berman*: “The public end may be as well or better served through an agency of private enterprise than through a department of government[.]” *Id.* at 486 (quoting *Berman v. Parker*, 348 U.S. 26, 33–34 (1954)).

66. *Id.* at 486 (quoting *Berman v. Parker*, 348 U.S. 26, 33–34 (1954)).

67. *Id.* at 487 (stating, “one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot”).

However, despite these concerns, the Court expressed that it was better to deal with such cases on an individual basis than to categorically restrict the use of eminent domain for the purposes of economic development.⁶⁸

The *Kelo* Court specifically noted that, while economic development is a proper reason for invoking eminent domain under the Fifth Amendment of the United States Constitution, states are free to adopt more restrictive approaches to the use of eminent domain.⁶⁹ After the Supreme Court's decision in *Kelo*, many states did just that and passed restrictions on the use of eminent domain beyond those prescribed in *Kelo*.⁷⁰

D. Proposal 4 and Proposition 99

1. Michigan's Proposal 4 of 2006

The Michigan Legislature responded to *Kelo* by placing proposed amendments to the state's constitution on the ballot for voter approval, which would restrict the government's use of eminent domain to a greater degree than *Kelo* said the Fifth Amendment required.⁷¹ The intent of Proposal 4, which was presented to voters in November 2006 as the result of Senate Joint Resolution E of 2005, was to "prohibit government taking private property for transfer to another private individual or business for purposes of economic development . . . [and] provide that if an individual's principal residence is taken . . . the individual must be paid at least 125 [%] of [the] property's fair market value."⁷² Additionally, Proposal 4 "require[d] a government that takes a private property to demonstrate that the taking is for a public use; [and] if taken to eliminate blight, require[d] a higher standard of proof to demonstrate that the taking of that property is for a public use."⁷³

The history of Senate Joint Resolution E reflects arguments advanced both in favor of further restrictions on the use of eminent

68. *Id.*

69. *Id.* at 489. In order to be a permissible taking a condemning authority's actions must meet both U.S. and state constitutional conditions. *Id.*

70. Mihaly, *supra* note 58 at 707 (noting "the intensity of the ensuing public outcry [from *Kelo*] produced a welter of political, legislative, and judicial reactions" resulting in "forty states hav[ing] enacted legislation to limit eminent domain authority since *Kelo*").

71. See MICHIGAN NOTICE STATE PROPOSALS, *supra* note 5.

72. SENATE FISCAL AGENCY, ENROLLED ANALYSIS EMINENT DOMAIN S.B. 693, S.J.R. E, & H.B. 5060, at 3 (2006), <https://www.legislature.mi.gov/documents/2005-2006/billanalysis/Senate/htm/2005-SFA-0693-E.htm>.

73. *Id.* at 3.

domain, and against them.⁷⁴ Those against placing further limits into the Michigan State Constitution took the position that the government needs to be able to use eminent domain to accomplish the important task of promoting economic development.⁷⁵ The opposition maintained that the bill's additional restrictions would hurt Michigan by stopping local governments from dealing with distressed communities and attracting jobs.⁷⁶ Additionally, opponents argued the provision of Senate Joint Resolution E, that required the government to pay of 125% of the fair market value when a primary residence is taken, was without merit due to the lack of a clear reason why these properties should be treated differently, even if a clear public use was the purpose of the taking.⁷⁷ Furthermore, the opposition noted that *Hathcock* was the controlling interpretation of public use in the state, and as a result there was no reason to pass a redundant constitutional amendment.⁷⁸

Supporters of an amendment to Michigan's constitution restricting the use of eminent domain argued that eminent domain's use for economic development did not clearly meet the "public use test" in the same way that infrastructure projects do.⁷⁹ Supporters felt that despite the fact that *Hathcock* meant that eminent domain could not be used for economic development, this precedent could be changed by a later court's interpretation of what constitutes a public use.⁸⁰ As an example of a shift in the Michigan Supreme Court's precedent regarding the definition of a public use, supporters pointed directly to the shift that took place between *Poletown* and *Hathcock*.⁸¹

74. *Id.* at 6–8.

75. *Id.* at 7 (arguing "a primary function of government is economic development . . . [and] eminent domain sometimes must be employed . . . in order for a governmental entity to proceed with development plans that can create jobs and help revitalize communities").

76. *Id.* (arguing the proposed restrictions on the power of eminent domain "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").

77. *Id.* at 7–8.

78. *Id.* at 8.

79. *Id.* at 7 (arguing "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").

80. *Id.* at 8.

81. *Id.* (arguing "although the Supreme Court generally follows precedent, there is no guarantee that the [*Hathcock*] decision will not be overturned in the future, as happened with the *Poletown* decision").

Those supporting Senate Joint Resolution E also maintained that to prevent abuse, it was necessary to limit the use of eminent domain for blight removal.⁸² They argued that the proposed amendment's requirement for a showing of blight by clear and convincing evidence on a parcel by parcel basis would restrict the use of eminent domain for blight removal while still leaving this power intact when it could be shown to be truly necessary.⁸³

Michigan State Senator Raymond Basham's statement on the Senate floor, following a vote approving an amendment to the proposal which required that 125% of fair market value be paid when a principal residence is taken, provides insight into the thinking behind the support for this provision.⁸⁴ According to Senator Basham, the homes that are most often taken by eminent domain do not have a high market value, and are likely more valuable to their owners than the market value would reflect.⁸⁵ Senator Basham claimed, "where well-off people lose their homes, they . . . hire lawyers and fight . . . for a higher payout. This amendment gives the higher payout to the person who can't afford a lawyer."⁸⁶ This statement from Senator Basham is telling for two reasons. First, it shows that part of the intent behind the required payment above market value for a residence was to compensate for value that was not accounted for by market value. When determining market value, the homeowner's personal connection with the home and their connection with the surrounding community is not considered. Second, it shows a failure to acknowledge that when those with the means to do so hire lawyers to dispute fair market value, they will receive not only the market value they have fought to achieve but also a premium above the market value. Additionally, it is important to note that Senator Basham failed to recognize that under Michigan's Uniform Condemnation Procedure's Act, property owners that successfully challenge the government's offered price for their land in court are entitled to have their attorney's fees paid by the condemning authority.⁸⁷ Therefore, even

82. *Id.*

83. *Id.* at 7.

84. S. JOURNAL, 93rd Leg., 101st Sess. 2164 (Mich. 2005) [hereinafter SENATE JOURNAL].

85. *Id.*

86. *Id.*

87. MICH. COMP. LAWS ANN. § 213.66(3) (West 2016).

If the amount finally determined to be just compensation for the property acquired exceeds the amount of the good faith written offer under section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer.

Id.

indigent property owners that have a meritorious claim that their property has been undervalued by a taking authority should be able to obtain legal representation to bring their claim before a court.

Proposal 4 was ultimately approved with the support of over 80% of the voters.⁸⁸ The approval of Proposal 4 effectively constitutionalized the holding of *Hathcock* by adding language to article X section 2 that expressly categorized economic development as outside of the public use for taken property.⁸⁹ The rest of Proposal 4's language represented an effort to further circumscribe the government's power of eminent domain. By requiring that any taking of a primary residence would result in the government having to pay 125% of the property's value, the Proposal looked to specifically discourage the taking of homes.⁹⁰ Furthermore, the special treatment given to residences was an expression of the feeling that, when a residence is taken for public use, community and emotional ties, whose values are unaccounted for in determining the market price of a property, are broken.⁹¹

2. California's Proposition 99 of 2008

California was among the other states that passed state constitutional amendments in the wake of the *Kelo* decision.⁹² In 2008, California voters passed Proposal 99, an amendment to Article I Section 19 of the Constitution of the State of California.⁹³ The stated intent of Proposal 99 was to "protect . . . homes from eminent domain abuse, prohibit government agencies from using eminent domain to take an owner-occupied home to transfer it to another private owner or developer, and [to] amend the California Constitution to respond specifically to the facts and the decision of the U.S. Supreme Court in [*Kelo*]." ⁹⁴ Proposition 99

88. 2006 *Michigan Election Results*, MICH. DEP'T OF STATE (Nov. 7, 2006), <http://miboecfr.nictusa.com/election/results/06GEN/>.

89. See Bassett, *supra* note 5.

90. SENATE JOURNAL, *supra* note 84.

91. *Id.*

92. Thomas J. Miletic, Note, *One Step Forward, Two Steps Back: How California's 2008 Constitutional Amendment Changed The State's Eminent Domain Power*, 39 SW. L. REV. 209 (2009); CAL. CONST. art. I, § 19.

93. *Supplement to the Statement of Vote Statewide Summary by County for State Ballot Measures*, CAL. SEC'Y OF STATE (2008), http://elections.cdn.sos.ca.gov/sov/2008-statewide-direct-primary/ssov/detail_ballot_measures_x_tab_09102008_v2.pdf [hereinafter CALIFORNIA STATEMENT OF VOTE].

94. *California Statewide Direct Primary Election Tuesday, June 3, 2008: Official Voter Guide*, 18, CAL. SEC'Y OF STATE, (2008) https://web.archive.org/web/20100610173157/http://traynor.uchastings.edu/ballot_pdf/2008p_june.pdf.

contained a definition for the term owner-occupied residences. According to Proposition 99, to qualify as an owner-occupied residence, a property must be a single family home, condo, or townhouse that has been the principal place of residence for the owner for one year prior to the first attempt to purchase the property by the government.⁹⁵

In 2008, California voters were also asked to consider Proposition 98, a rival proposition to Proposition 99 that likewise sought to limit the use of eminent domain. Significant differences existed between the two proposals.⁹⁶ Proposition 98 contained a blanket prohibition on the use of eminent domain for economic development.⁹⁷ In contrast, Proposition 99 specifically targeted its protections to “owner-occupied residences.”⁹⁸ California voters passed Proposition 99 despite the presence of Proposition 98 on the ballot at the same time.⁹⁹

Arguments made by supporters of Proposition 99 included that California should join other states that had responded to the holding in *Kelo* by enacting restrictions on eminent domain.¹⁰⁰ Additionally, proponents pointed to the “straightforward and strong” protection provided to homeowners as the primary reason for supporting Proposition 99.¹⁰¹ Opposition to Proposition 99 pointed to the lack of protections for “farmers, small businesses, [and] rented homes.”¹⁰² Voters ultimately passed Proposition 99 in June 2008 with 62 percent of votes cast.¹⁰³ In contrast, Proposition 98 only received 38.4 percent on the vote.¹⁰⁴ California voters’ support of Proposition 99 as opposed to Proposition 98 shows the importance that voters placed on the protection of homes versus the more generalized protection for all private property.

With Michigan’s Proposal 4 in 2006 and California’s Proposition 99 in 2008, voters in both states passed constitutional amendments that added restrictions to the government’s use of eminent domain.¹⁰⁵ Both Michigan and California’s amendments were spurred by the ruling in

95. CALIFORNIA STATEMENT OF VOTE, *supra* note 93, at 21.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 17.

100. *Id.* at 20 (seeking to “amend the California Constitution to respond specifically to the facts and decision of the U.S. Supreme Court in [*Kelo*]”); Mihaly, *supra* note 58, at 707 (stating “approximately forty states have enacted legislation to limit eminent domain authority since *Kelo*”).

101. CALIFORNIA STATEMENT OF VOTE, *supra* note 93, at 16.

102. *Id.* at 17.

103. *Id.*

104. *Id.*

105. MICHIGAN NOTICE STATE PROPOSALS, *supra* note 5; CALIFORNIA STATEMENT OF VOTE, *supra* note 93.

Kelo.¹⁰⁶ However, the two amendments contain critical differences. Michigan's Proposal 4, which prohibited government taking of all private property for the purpose of economic development, more closely resembles California's Proposition 98, which was rejected by voters in California.

E. Detroit's Land Problem

Among the numerous challenges facing the City of Detroit, the issue of vacant land is of primary importance. Figures on the amount of vacant land within the city currently range from twenty to forty square miles.¹⁰⁷ Other major American cities, such as Miami and San Francisco, could fit their entire footprint within Detroit's vacant land.¹⁰⁸ While there has been a major decline in the population of Detroit, the city is not entirely empty, and density remains relatively high in comparison to other American cities such as "Sacramento, Denver, Austin, Atlanta, and Salt Lake City."¹⁰⁹ Currently, much of Detroit represents a mix of unused land interspersed with functioning businesses and occupied homes.¹¹⁰

In order to put the vacant land in the City of Detroit back into viable economic use, parcels must be assembled that allow for meaningful development.¹¹¹ Modern manufacturing plants create hundreds of jobs, but companies building them require many contiguous acres in order to build.¹¹² An inability to put together large contiguous tracts of land for the purpose of economic development is one factor that holds Detroit back from being able to efficiently deal with its vacant land problem.¹¹³

106. See Bassett, *supra* note 5.

107. See Davidson, *supra* note 9 (explaining that the notion that Detroit has 40 square miles of vacant land is likely an exaggeration by the media and that the real number may be closer 20 depending on how areas like parks and cemeteries are accounted for in the total).

108. *Id.*

109. Kelsey Nowakowski, *These Charts Show That Detroit Is Surprisingly Crowded*, NAT'L GEOGRAPHIC (Apr. 24, 2015, 2:27 PM), <http://news.nationalgeographic.com/2015/04/150424-detroit-cities-population-density-charts/> (noting "Detroit is often described as sparsely inhabited . . . but its population density—the number of people per square mile—ranks 69th among the nearly 300 U.S. cities with more than 100,000 residents").

110. DET. FUTURE CITY, *THE LAND USE ELEMENT: THE IMAGE OF THE CITY* 99 (2014), http://detroitfuturecity.com/wp-content/uploads/2014/02/DFC_LandUse_2ndEd.pdf.

111. See Mogk, *supra* note 10.

112. Sarah Cwiek, *Sakthi Automotive Breaks Ground On Detroit Manufacturing Center*, MICH. RADIO (Oct. 19, 2015), <http://michiganradio.org/post/sakthi-automotive-breaks-ground-detroit-manufacturing-center#stream/0>.

113. DET. FUTURE CITY, *supra* note 110, at 273.

III. ANALYSIS

A. Michigan Constitution Article X Section 2 Compared to California Constitution Article I Section 19

Both Michigan and California passed amendments to their state constitutional provisions governing eminent domain in the wake of the Supreme Court's decision in *Kelo*.¹¹⁴ However, despite the similar underlying motivation behind the amendments, each state used different approaches to restraining the use of eminent domain.¹¹⁵ Specifically, while each state sought to limit the use of eminent domain for economic development, the extent of that limitation varies dramatically between the two states.¹¹⁶ Another variation between the two amendments was how they sought to protect homeowners from the use of eminent domain.¹¹⁷

Michigan's Proposal 4 of 2006 limited the use of eminent domain for economic development purposes by specifically excluding economic development from being a public use for a taken piece of property.¹¹⁸ An eminent domain taking can only be constitutional under article X section 2 of the Michigan State Constitution if the land taken will be put to a public use.¹¹⁹ By removing economic development from the scope of proper public uses, Proposal 4 effectively made any use of eminent domain for the purpose of economic development unconstitutional in Michigan. In contrast, California's Proposition 99 did not prohibit all use of eminent domain for economic development.¹²⁰ While Proposition 99 prohibited the use of eminent domain to take a primary residence for economic development, it left open the possibility of using eminent domain for economic development to take other forms of property.¹²¹

Another aspect of the current Michigan State Constitution article X section 2 that differs from California State Constitution article I section 19 is the additional protection article X section 2 provides to

114. Mihaly, *supra* note 58.

115. MICHIGAN NOTICE STATE PROPOSALS, *supra* note 5; CALIFORNIA STATEMENT OF VOTE, *supra* note 93.

116. *Id.*

117. *Id.*

118. MICHIGAN NOTICE STATE PROPOSALS, *supra* note 5; MICH. CONST. art. X, § 2 (stating "public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development").

119. MICH. CONST. art. X, § 2 (stating "private property shall not be taken for public use without just compensation therefore").

120. CALIFORNIA STATEMENT OF VOTE, *supra* note 93.

121. *Id.*

homeowners from the use of eminent domain for any purpose.¹²² Article X section 2 dictates that if a primary residence is taken, the government must pay 125% of the fair market value for the property.¹²³ While California's Article I Section 19 does protect homeowners by limiting the use of eminent domain for economic development, it does not contain a provision that requires primary residences be treated differently for compensation purposes as compared to other types of property.¹²⁴

B. The Special Significance of the Home

The owner-occupied residence has been given special consideration in both Michigan's article X section 2 and California's article I section 19.¹²⁵ That both states treat primary residences differently from other types of property demonstrates the special status that primary residences are often considered to have.¹²⁶ The perceived need for the special legal protection of homes comes from the notion that the taking of an individual's home brings with it distinct psychological damages.¹²⁷ The psychological importance of the home is said to come from the fact that the home "represent[s] a person's security, self-identity, and center for social interaction."¹²⁸ Additionally, it has also been argued that the protection of homes is of special importance because of the community ties that are developed through home ownership.¹²⁹ This belief in the importance of protecting community ties was one of the central arguments made by those opposing the development of the General Motors Detroit/Hamtramck Plant, also known as the Poletown Plant.¹³⁰

It has been argued that the special legal protections granted to primary residences are misguided because they lead to problems that are disproportionate to the benefits received.¹³¹ One of the major issues that

122. MICH. CONST. art. X, § 2; CAL. CONST. art. I, § 19.

123. MICH. CONST. art. X, § 2.

124. CAL. CONST. art. I, § 19.

125. MICH. CONST. art. X, § 2; CAL. CONST., art. I, § 19.

126. Stephanie M. Stern, *Residential Protectionism and The Legal Mythology of Home*, 107 MICH. L. REV. 1093 (2009).

127. See *id.* at 1095 (citing MINDY THOMPSON FULLILOVE, *ROOT SHOCK* 11–20 (2004); Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 285 (2006); Lorna Fox, *Re-Possessing "Home": A Re-Analysis of Gender, Homeownership and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 434 (2008)).

128. See Ballard, *supra* note 127, at 277, 285.

129. See Stern, *supra* note 126, at 1095–96.

130. Timothy Sandefur, *A Gleeeful Obituary For Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL'Y 651–53.

131. See Stern, *supra* note 126, at 1095–96.

results from the special protections granted to primary residences is the difficulty they create for new land use planning and redevelopment.¹³² Furthermore, the perceived psychological impact of the taking of a primary residence is overblown, as it has been shown that such a taking produces primarily short-term effects on those whose homes are taken.¹³³ Despite this evidence to the contrary, there is still a “widely held belief that homes are psychologically vital to their owners.”¹³⁴ The continuation of this belief contributes to the perceived “moral legitimacy” of protecting homes in the law.¹³⁵ This “moral legitimacy” makes the legal protection of primary residences an attractive cause for politicians, as it is likely to win them favor with their constituents.¹³⁶

C. Addressing the Michigan Supreme Court's Holding in Hathcock

As a result of Michigan's Proposal 4, *Hathcock's* holding that economic development is not a proper public use for land taken by eminent domain has been constitutionalized in article X section 2 of the Michigan State Constitution.¹³⁷ Because of this, *Hathcock* no longer presents the primary restriction to the use of eminent domain for economic development purposes.¹³⁸ However, if article X section 2 were amended to remove the explicit language that restricts the use of eminent domain for economic development purposes, the *Hathcock* holding would again become relevant. Therefore, any attempt to amend article X section 2 for the purpose of allowing the use of eminent domain for economic development would also need to directly address the holding in *Hathcock*.

[T]he mythology of home and residential protectionism are self-perpetuating. If property law treats the loss of home as the amputation of one's very identity and ability to thrive, then owners are likely to construe dislocation as a dire event . . . creat[ing] the very demoralization costs it seeks to redress and increases political demand for home protective legislation.

Id.

132. See *id.* at 1095.

133. See *id.* at 1115 (stating the taking of a residence “causes short-term stress but typically does not affect long-term psychological functioning.” (citing Marc Bolan, *The Mobility Experience and Neighborhood Attachment*, 34 DEMOGRAPHY 225, 226 (1997); Peter Steinglass & Ellen Gerrity, *Forced Displacement to a New Environment*, in STRESSORS AND THE ADJUSTMENT DISORDERS 399, 410 (1990)).

134. See Stern, *supra* note 126, at 1096.

135. See *id.* (stating “the widely held belief that homes are psychologically vital to their owners has added a gloss of moral legitimacy to home-protective legislation”).

136. See *id.*

137. See Bassett, *supra* note 5.

138. See *id.*

In order to address the holding in *Hathcock*, any amendment removing the language from article X section 2 that restricts the taking of property for economic development purposes would also have to add new language. This new language would need to directly address *Hathcock* by expressly placing economic development within the scope of proper public use for taken property.

D. The Need to Use Eminent Domain for Economic Development

One of the biggest hurdles to overcome whenever development projects are undertaken is the acquisition of land for the development.¹³⁹ Most often, this involves the purchase of individual parcels from various owners in order to be able to form one large contiguous piece of property under common ownership on which development can be undertaken.¹⁴⁰ Major development projects, like an industrial facility, can require hundreds of acres of land.¹⁴¹ In an urban area, where land has been divided into relatively small parcels, obtaining ownership over hundreds of contiguous acres of land often requires purchasing that land from numerous different owners.¹⁴²

The problem that results from having to deal with multiple landowners is that once land acquisition begins, the landowners that have yet to sell are in a position to demand higher and higher prices.¹⁴³ A developer that has already begun land acquisition is then faced with having to pay the prices demanded by the holdout landowners, or starting the acquisition process on another site with the additional costs that would entail.¹⁴⁴ In this situation, the landowners are able to demand increasingly high prices because they essentially "become monopoly suppliers" of the land that is to be assembled.¹⁴⁵ Speculators that come in and purchase land within the site to be developed, before the existing

139. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008).

140. *Id.* at 1472.

141. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 636, 304 N.W.2d 455, 460 (1981) (Fitzgerald, J., dissenting) (explaining that General Motors required a site of 450 to 500 acres for the development of a new factory).

142. See Heller & Hills, *supra* note 139, at 1472.

143. *Id.* at 1473 (stating "The familiar collective action problem arises, however, as soon as the landowners realize that a purchaser is attempting to assemble a larger parcel by combining several smaller lots").

144. *Id.* at 1473.

145. *Id.* ("After the land assembler has purchased a part of the planned larger parcel, the assembler becomes locked into purchasing the rest of it to avoid duplicating the site-specific investment at another site. Thus, existing owners become monopoly suppliers of the assembled land").

property owners become aware of its future increase in value, further exacerbate the problem of assembling land within a planned development site.¹⁴⁶ The resulting increased cost of land acquisition can raise the cost of a development project to the point where it is no longer profitable, thus stalling the project or preventing it from being started in the first place.¹⁴⁷

One of the major contributors to Detroit's inability to redevelop is land speculation.¹⁴⁸ Land speculators create a particular problem because they are not as susceptible to community pressures to sell in order for a development to move forward.¹⁴⁹ The scale of the economic problems in the city contributes to an environment that is attractive for speculators.¹⁵⁰ These speculators have a negative impact on the neighborhoods in which they operate by causing land to stay vacant, and preventing the assembly of parcels that would be viable for economic development.¹⁵¹

E. Proposed Amendment to Article X Section 2

The following is proposed language for an amended article X section 2, which would allow for use of eminent domain for economic development while providing special protections for homeowners. This proposed language represents a combination of Michigan's current article X section 2, California's Article I Section 19, and the author's

146. *Id.*; see also Ngai Pindell, *Fear and Loathing: Combating Speculation In Local Communities*, 39 U. MICH. J.L. REFORM 543 (2006); Louis Aguilar, *Arena Holdout Asks \$3.5 Million For Fire Damaged Home*, DET. NEWS (Sept. 10, 2015, 1:04 PM), <http://www.detroitnews.com/story/business/2015/09/10/detroit-cass-corridorholdout/72008000/>.

147. See Heller & Hills, *supra* note 139, at 1473.

148. See Mogk, *supra* note 10 (stating "Detroit is in a land assembly straitjacket . . . for speculators, no price is too high and no time to negotiate too long"); DET. FUTURE CITY, *supra* note 12, at 283 (noting "in addition to vacant properties, large numbers of occupied but poorly maintained properties, often owned by short-term speculators, are destabilizing the city's neighborhoods").

149. See Heller & Hills, *supra* note 139 at 1473 (citing ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 853-54 (3d ed. 2005) (explaining that "homeowners are reasonably well placed to put informal pressure on their holdout neighbors to accept a good deal from a developer," but that the voluntary approach has a "vulnerability to holdouts")).

150. DET. FUTURE CITY, *supra* note 12, at 283 (explaining that the number of tax foreclosures results in a cycle "through which thousands of properties move through a revolving door of speculation, foreclosure, and ultimate abandonment").

151. *Id.* at 275 (stating "vacant building contribute to crime, have an impact on public health, undermine neighbor's property values, and above all foster a sense of decay and decline"); see also Mogk, *supra* note 10 (noting "there is little or no chance that large industrial projects will happen anytime soon, unless Detroit's land assembly problem is solved").

own suggestions. Current language from article X section 2 that would be removed by the amendment has been placed in *italics*.

Article X Section 2. Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.¹⁵²

[For the purposes of this section, Principal Residence] "means real property that is improved with a single-family residence such as a detached home, condominium, or townhouse and that is the owner or owners' principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property. Owner-occupied residence also includes a residential dwelling unit attached to or detached from such a single-family residence which provides complete independent living facilities for one or more persons."¹⁵³]

"Public use" (remove *does not*) includes the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.¹⁵⁴ (Remove *Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph*).

[Taking of a Principal Residence] for the purpose of conveying it to a private entity is prohibited, unless the Principal Residence is taken] "for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; remedying environmental contamination that poses a threat to public health and safety, . . . public work or improvement,"¹⁵⁵ [or "the eradication of blight"¹⁵⁶].

152. MICH. CONST. art. X, § 2.

153. CA. CONST. art. I, § 19.

154. MICH. CONST. art. X, § 2.

155. CA. CONST. art. I, § 19.

In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight [or “transfer to a private entity for the purpose of economic development or enhancement of tax revenues,”¹⁵⁷] in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.¹⁵⁸

The effect of this proposed language would be that the use of eminent domain for economic development would be available in the State of Michigan as long as the property is not a principal residence. Additionally, the amendment would make the burden of proof for a showing that property could be taken for economic development clear and convincing evidence. By requiring a higher standard of proof for showing a public use when the property is being taken for economic development, the amendment would be able to lessen the fear that this power could be abused when not truly necessary.

IV. CONCLUSION

Article X section 2 of the Michigan State Constitution should be amended to loosen the current restrictions placed on the use of eminent domain for the purpose of economic development. While the use of eminent domain for economic development has been, and continues to be, controversial, according to *Kelo*, it is within a state’s power to take property for such a purpose. Article X section 2 currently restricts Michigan’s use of eminent domain beyond the level required by the Fifth Amendment of the United States Constitution.

One of the biggest problems facing the City of Detroit is the amount of vacant property within its borders. The use of eminent domain would allow the City of Detroit to combat its problem with vacant properties. Detroit would be able to combine vacant property that it already owns with property that is still privately owned within the same area in order to create large developable sites.

In order for eminent domain to be used to redevelop the City of Detroit, article X section 2 would need to be amended to allow for the

156. MICH. CONST. art. X, § 2.

157. *Id.*

158. *Id.*

transfer of property to a private entity for the purpose of economic development. Any amendment would have to expressly allow for a taking for the purpose of economic development in order to overcome the holding in *Hathcock*. Despite the arguments that can be made in favor of the use of eminent domain to redevelop Detroit, eminent domain is likely to remain unpopular. As a result any amendment to article X section 2 would need to be structured in such a way as to overcome this unpopularity. This can be accomplished through the addition of protections for principal residences. Principal residences are the types of property that cause the most backlash when it is taken. Even without the ability to take principal residences for economic development purposes, Detroit would be able to acquire many parcels that are not occupied, but still privately owned. California's Article I Section 19 is an example of a state constitutional provision that strikes the balance between protections for homeowners and the need to use eminent domain for economic development.

In order for Detroit to overcome its economic problems, the vacant land within the city needs to be put to a productive use. One way for this to occur is for the City to make the land available for development. However, because the City-owned vacant land is largely not contiguous, it is difficult to redevelop. By allowing the taking of parcels that are privately owned within areas that are already largely owned by the City, large parcels could be created to encourage development. As it currently stands, article X section 2 of the Michigan State Constitution prohibits the use of eminent domain for this purpose, and therefore it should be amended.