COUNTY OF WAYNE v. HATHCOCK

684 N.W. 2d 765 (Mich. 2004)

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Young, J.

We are presented again with a clash of two bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property, on the one hand and, on the other, the state's authority to condemn private property for the commonweal. In this case, Wayne County would use the power of eminent domain to condemn defendants' real properties for the construction of a 1,300-acre business and technology park. This proposed commercial center is intended to reinvigorate the struggling economy of southeastern Michigan by attracting businesses, particularly those involved in developing new technologies, to the area.

Defendants argue that this exercise of the power of eminent domain is neither authorized by statute nor permitted under article 10 of the 1963 Michigan Constitution, which requires that any condemnation of private property advance a "public use." Both the Wayne Circuit Court and the Court of Appeals rejected these arguments -- compelled, in no small measure, by this Court's opinion in Poletown Neighborhood Council v. Detroit.

We conclude that, although these condemnations are authorized by MCL 213.23, they do not pass constitutional muster under art. 10, § 2 of our 1963 constitution. Section 2 permits the exercise of the power of eminent domain only for a "public use." In this case, Wayne County intends to transfer the condemned properties to private parties in a manner wholly inconsistent with the common understanding of "public use" at the time our Constitution was ratified.

Therefore, we reverse the judgment of the Court of Appeals and remand the case to the Wayne Circuit Court for entry of summary disposition in defendants' favor.

B. Art 10, § 2

Art. 10, § 2 of Michigan's 1963 Constitution provides that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." Plaintiffs contend that the proposed condemnations are not "for public use," and therefore are not within constitutional bounds. Accordingly, our analysis must now focus on the "public use" requirement of Art. 10, § 2.

1. "Public Use" as a Legal Term of Art . . .

This case does not require that this Court cobble together a single, comprehensive definition of "public use" from our pre-1963 precedent and other relevant sources. The question presented here is a fairly discrete one: are the condemnation of defendants' properties and the subsequent transfer of those properties to private entities pursuant to the Pinnacle Project consistent with the common understanding of "public use" at ratification? For the reasons stated below, we answer that question in the negative.

2. "Public Use" and Private Ownership

When our Constitution was ratified in 1963, it was well-established in this Court's eminent domain jurisprudence that the constitutional "public use" requirement was not an absolute bar against the transfer of condemned property to private entities. It was equally clear, however, that the constitutional "public use" requirement worked to prohibit the state from transferring condemned property to private entities for a *private* use. Thus, this Court's eminent domain jurisprudence -- at least that portion concerning the reasons for which the state may condemn private property -- has focused largely on the area between these poles.

Justice Ryan's Poletown dissent accurately describes the factors that distinguish takings in the former category from those in the latter according to our pre-1963 eminent domain jurisprudence. Accordingly, we conclude that the transfer of condemned property is a "public use" when it possess[es] one of the three characteristics in our pre-1963 case law identified by Justice Ryan.

First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved "public necessity of the extreme sort otherwise impracticable." The "necessity" that Justice Ryan identified in our pre-1963 case law is a specific kind of need:

> [T]he exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land

that can be assembled only by the coordination central government alone is capable of achieving.

Justice Ryan listed "highways, railroads, canals, and other instrumentalities of commerce" as examples of this brand of necessity. A corporation constructing a railroad, for example, must lay track so that it forms a more or less straight path from point A to point B. If a property owner between points A and B holds out -- say, for example, by refusing to sell his land for any amount less than fifty times its appraised value -- the construction of the railroad is halted unless and until the railroad accedes to the property owner's demands. And if owners of adjoining properties receive word of the original property owner's windfall, they too will refuse to sell.

The likelihood that property owners will engage in this tactic makes the acquisition of property for railroads, gas lines, highways, and other such "instrumentalities of commerce" a logistical and practical nightmare. Accordingly, this Court has held that the exercise of eminent domain in such cases -- in which collective action is needed to acquire land for vital instrumentalities of commerce -- is consistent with the constitutional "public use" requirement.

Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution's "public use" requirement when the private entity remains accountable to the public in its use of that property. . . .

Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan's words, the property must be selected on the basis of "facts of independent public significance," meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement.

The primary example of a condemnation in this vein is found in In re Slum Clearance, a 1951 decision from this Court. In that case, we considered the constitutionality of Detroit's condemnation of blighted housing and its subsequent resale of those properties to private persons. The city's *controlling purpose* in condemning the properties was to remove unfit housing and thereby advance public health and safety; subsequent resale of the land cleared of blight was "incidental" to this goal. We concluded, therefore, that the condemnation was indeed a "public use," despite the fact that the condemned properties would inevitably be put to private use. In re Slum Clearance turned on the fact that the act of condemnation *itself,* rather than the use to which the condemned land eventually would be put, was a public use. Thus, as Justice Ryan observed, the condemnation was a "public use" because the land was selected on the basis of "facts of independent public significance" -- namely, the need to remedy urban blight for the sake of public health and safety.

The foregoing indicates that the transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of our 1963 Constitution, would be appropriate in one of three contexts: (1) where "public necessity of the

extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.

3. Poletown, the Pinnacle Project, and Public Use

The exercise of eminent domain at issue here -- the condemnation of defendants' properties for the Pinnacle Project and the subsequent transfer of those properties to private entities -- implicates none of the saving elements noted by our pre-1963 eminent domain jurisprudence.

The Pinnacle Project's business and technology park is certainly not an enterprise "whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving." To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.

Second, the Pinnacle Project is not subject to public oversight to ensure that the property continues to be used for the commonweal after being sold to private entities. Rather, plaintiff intends for the private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise. The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy.

Finally, there is nothing about the *act* of condemning defendants' properties that serves the public good in this case. The only public benefits cited by plaintiff arise after the lands are acquired by the government and put to private use. Thus, the present case is quite unlike *Slum Clearance* because there are no facts of independent public significance (such as the need to promote health and safety) that might justify the condemnation of defendants' lands.

We can only conclude, therefore, that no one sophisticated in the law at the 1963 Constitution's ratification would have understood "public use" to permit the condemnation of defendants' properties for the construction of a business and technology park owned by private entities. Therefore, the condemnations proposed in this case are unconstitutional under art. 10, § 2.

Indeed, the only support for plaintiff's position in our eminent domain jurisprudence is the majority opinion in Poletown. In that opinion per curiam, a majority of this Court concluded that our Constitution permitted the Detroit Economic Development Corporation to condemn private

residential properties in order to convey those properties to a private corporation for the construction of an assembly plant.

As an initial matter, the opinion contains an odd but telling internal inconsistency. The majority first acknowledges that the property owners in that case "urge[d the Court] to distinguish between the terms 'use' and 'purpose', asserting they are not synonymous and have been distinguished in the law of eminent domain." This argument, of course, was central to plaintiffs' case, because the Constitution allows the exercise of eminent domain only for a "public *use.*" The Court then asserted that the plaintiffs *conceded* that the Constitution allowed condemnation for a "public use" *or* a "public purpose," despite the fact that such a concession would have dramatically undermined plaintiffs' argument:

> There is no dispute about the law. All agree that condemnation for a public use or purpose is permitted. . . . The heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user.

The majority therefore contended that plaintiffs waived a distinction they had "urged" upon the Court. And in so doing, the majority was able to avoid the difficult question whether the condemnation of private property for another private entity was a "public use" as that phrase is used in our Constitution.[78]

This inconsistency aside, the majority opinion in *Poletown* is most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence. The opinion departs from the "common understanding" of "public use" at the time of ratification in two fundamental ways.

First, the majority concluded that its power to review the proposed condemnations is limited because

> [t]he determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect.

The majority derived this principle from a *plurality* opinion of this Court and supported the application of the principle with a citation of an opinion of the United States Supreme Court concerning judicial review of congressional acts under the Fifth Amendment of the federal

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[78]Moreover, as Justice Ryan noted, the majority also conflated the broad construction of "public purpose" in our taxation jurisprudence with the more limited construction of "public purpose" in the eminent domain context.

constitution.[81] Neither case, of course, is binding on this Court in construing the takings clause of our state Constitution, and neither is persuasive authority for the use to which they were put by the Poletown majority.

It is not surprising, however, that the majority would turn to nonbinding precedent for the proposition that the Court's hands were effectively tied by the Legislature. As Justice Ryan's dissent noted:

> In point of fact, this Court has *never* employed the minimal standard of review in an eminent domain case which is adopted by the [Poletown] majority. . . . Notwithstanding explicit legislative findings, this Court has always made an *independent* determination of what constitutes a public use for which the power of eminent domain may be utilized.

Our eminent domain jurisprudence since Michigan's entry into the union amply supports Justice Ryan's assertion. Questions of public *purpose* aside, whether the proposed condemnations were consistent with the Constitution's "public use" requirement was a constitutional question squarely within the Court's authority. The Court's reliance on Gregory Marina and Berman for the contrary position was, as Justice Ryan observed, "disingenuous."

Second, the Poletown majority concluded, for the first time in the history of our eminent domain jurisprudence, that a generalized economic benefit was sufficient under art. 10, § 2 to justify the transfer of condemned property to a private entity. Before Poletown, we had never held that a private entity's pursuit of profit was a "public use" for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy. . . .

Because Poletown's conception of a public use -- that of "alleviating unemployment and revitalizing the economic base of the community" -- has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of "public use" in art. 10, § 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the Poletown analysis provides no legitimate support for the condemnations proposed in this case and, for the reasons stated above, is overruled.

We conclude that the condemnations proposed in this case do not pass constitutional muster because they do not advance a public use as required by Const. 1963, art. 10, § 2. Accordingly, this case is remanded to the Wayne Circuit Court for entry of summary disposition in defendants' favor.

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[81]Berman v. Parker, 348 U.S. 26 (1954). Justice Ryan noted in his Poletown dissent that the majority's reliance on this case "[was] particularly disingenuous." Poletown, supra at 668, 304 N.W.2d 455.