

# THE BAR IS RAISED?

AN ANALYSIS OF *CITY OF NOVI v. ROBERT ADELL CHILDREN'S FUNDED TRUST, et al.*

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In no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned.<sup>1</sup>

The roots of taking private property for public use were put down long before the creation of this nation and our founding fathers recognized that an occasional need to confiscate private property to build public projects would arise. As a result, the Fifth Amendment to the United States Constitution provides for the taking of private property for a public use while guaranteeing the right to just compensation.<sup>2</sup> Article 10, section 2 of the Michigan Constitution reads in part: “Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.”<sup>3</sup> Both Constitutions make it clear that a taking of private property must be for a **public use** and not a private use. However, defining the limits of “public use” has sometimes proven nothing short of labyrinthine.

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## *CLEARING THE FOG*

The terms associated with condemnation proceedings are well known: public purpose, public use and public necessity. However, differentiating the three has proven difficult. The Uniform Condemnation Procedures Act<sup>4</sup> (“UCPA”) provides some guidance. MCL 213.56 reads in part:

Within the time prescribed to responsively plead after service of a complaint, an owner of the property desiring to challenge the **necessity** of acquisition of all or part of the property for the **purposes** stated in the complaint may file a motion in the pending action asking that the **necessity** be reviewed. (emphasis added)

The Michigan Court of Appeals in *City of Novi v. Robert Adell Children’s Funded Trust, et al.*, reaffirmed the distinction between necessity and purpose, as described in the UCPA.<sup>5</sup> In doing so, the court rejected the theory presented in *Detroit v Lucas*<sup>6</sup>, where the court declared the terms public purpose and public necessity to be interchangeable. *Novi* reaffirmed the holding in *Poletown Neighborhood Council v. City of Detroit*,<sup>7</sup> to the extent it combined and made interchangeable the terms public purpose and public use,<sup>8</sup> and adopted the somewhat awkward, but accurately descriptive term, “public purpose/public use” in its opinion.<sup>9</sup>

The *Novi* court also identified the burdens associated with the public purpose/public use concept and the public necessity concept.<sup>10</sup> According to the court, MCL 213.56(2) removes the condemning authority’s burden of proving public necessity and places the burden on the property owner to disprove the presence of public necessity.<sup>11</sup> The court found MCL 213.56(2) to be silent as to the burden associated with proving or disproving public purpose/public use.<sup>12</sup> The court held that “the UCPA does not place a burden on the property owner to disprove the agency’s assertion that the taking serves a public purpose/public use, implicitly suggesting that the agency must positively demonstrate the public purpose/public use.”<sup>13</sup> According to *Novi*, the condemning authority has the

burden of proving public purpose/public use, consistent with the language in Constitution 1963, art 10, §2, and the property owner bears the burden to disprove the claim of public necessity.<sup>14</sup> *Novi* acknowledged that when reviewing “public use/public purpose” courts must apply “heightened scrutiny” to any claim of private benefit.<sup>15</sup>

### ***APPLYING HEIGHTENED SCRUTINY?***

In *Poletown*, the Michigan Supreme Court stated that “whether the proposed condemnation is for the primary benefit of the public or the private user” determines the constitutionality of a taking.<sup>16</sup> In acknowledging that a taking must be for a public use, the court held that: “condemnation for a private use cannot be authorized whatever its incidental public benefit and condemnation for a public purpose cannot be forbidden whatever the incidental private gain.”<sup>17</sup>

The *Poletown* court was asked to determine the primary benefactor of a condemnation proceeding: the public or private interests. At the time of the *Poletown* decision, the City of Detroit was in the midst of an economic crisis. Not only was the City of Detroit in a state of emergency, but the automobile industry was particularly suffering. Unemployment in the City of Detroit was at an astounding 18%.<sup>18</sup> In an effort to spur the economy, the City of Detroit proposed condemning a substantial piece of property so that General Motors could build a new automotive plant.<sup>19</sup> Underlying the condemnation action was a threat from General Motors that it would close an existing plant if adequate property was not condemned for a new plant, which would have removed an additional 6,000 jobs from the City of Detroit.<sup>20</sup>

In *Poletown*, the court declared that when “condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with *heightened scrutiny* the claim that the public interest is the predominant interest being advanced” (emphasis added).<sup>21</sup> The

court held: “[a] public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the legislature.”<sup>22</sup>

The asserted public purpose in *Poletown* was that the land would create an industrial site that would bring many new jobs and alleviate fiscal distress.<sup>23</sup> The court began its analysis by stating that: “[t]his case raises a question of paramount importance to the future welfare of this state and its residents...”<sup>24</sup> The *Poletown* court, apparently reacting to the extreme economic circumstances existing at the time, determined that the public benefit outweighed any private benefit.

The proper standard to apply has been clearly enunciated from *Poletown* to *Freda Alibri v. Detroit Wayne County Stadium Authority*<sup>25</sup> – condemnation is proper if, after applying heightened scrutiny, the public is the primary or predominant benefactor. The *Poletown* court identified the general standard, but did not apply any specific standards of heightened scrutiny. The *Poletown* holding is an anomaly in that it did not change the law, but changed the way the law was applied. Since *Poletown*, the concept of heightened scrutiny has seemed little more than subjective words without specific meaning.

*QUERY: Was the requirement of heightened scrutiny meant to produce a burden above and beyond the burden of demonstrating that public benefit predominates over private benefit?*

Because *Poletown* seemingly did nothing more than pay lip service to the concept of heightened scrutiny, courts have struggled with applying it as precedent. In 1987, the Court of Appeals decided *City of Center Line v. Chmelko, et al.*<sup>26</sup> The *Chmelko* court held that condemnation of private property for anything other than a public use is unconstitutional.<sup>27</sup> According to the court, the power of eminent domain is not to be exercised where the intention to confer a private benefit “forms the purpose or a part of the purpose for the taking.”<sup>28</sup>

In *Chmelko*, the City of Center Line instituted proceedings to condemn two parcels of property for a car dealership.<sup>29</sup> The proposed public use was to improve the economic viability of the city, stabilize property values, and improve the tax base.<sup>30</sup> The court purported to apply the heightened scrutiny standard in holding that the condemnation predominantly benefited a private party; however, the court's opinion appeared to do nothing more than balance the competing interests in arriving at that conclusion.

In 1993, the Michigan Supreme Court had another opportunity to apply the public purpose versus private benefit standard in *City of Lansing v Edward Rose Associates, Inc.*<sup>31</sup> The court reviewed the constitutionality of a city ordinance providing mandatory access to private property for the installation of cable television services.<sup>32</sup> The city asserted that the availability of cable would benefit the public by providing access to public, education, and government channels, as well as universal service and an emergency override.<sup>33</sup> The court claimed to have applied heightened scrutiny in holding that the private benefit outweighed the public purpose. The court held that “[b]ecause a private party would benefit from the city’s proposed project, eminent domain would not be proper without substantial proof that the public would be the primary beneficiary of the project.”<sup>34</sup>

The Supreme Court, once again, simply balanced the competing interests and held that: “[a]lthough we assume the validity of the public interest advanced by the city, we find that the private interest to be benefited predominates over the asserted public interest. The asserted public interest therefore does not justify the proposed taking of private property by the city.”<sup>35</sup> In *Lansing*, as in *Centerline* and *Poletown*, when a private interest is on course to benefit, the court purported to weigh the benefit with heightened scrutiny to determine the predominant benefactor. Yet, the concept of heightened scrutiny was not defined in any meaningful manner.

While the general standard has remained consistent, the application of the heightened scrutiny standard has failed to provide definitive guidance for future cases. The lack of defined standards for heightened scrutiny has left the courts with wide latitude with which to measure public benefit and private benefit.

### ***APPLYING HEIGHTENED SCRUTINY!***

On October 4, 2002, in *Novi*, the Court of Appeals followed the long standing rule that when a private benefit is involved in a taking, heightened scrutiny is applied to determine whether the public benefit predominates over the private benefit. The court in *Novi*, however, has done more than pay lip service to the term “heightened scrutiny” and created a standard to apply to a limited category of takings.

The court adopted the standard created by Justice Ryan in his somewhat famous *Poletown* dissent. In his dissent, Justice Ryan stated: “[i]t is plain . . . that condemnation of property for the transfer to private corporations is not wholly proscribed.”<sup>36</sup> The standard adopted in *Novi* permits condemnation for “avenues of commerce,” i.e., highways, railroads and canals, even when private individuals benefit, but only if three elements are present: (1) the public necessity involved is of the “extreme sort,” (2) there exists a continuing accountability to the public, and (3) the land was selected according to facts of independent public significance.<sup>37</sup> Justice Ryan identified this standard as the “instrumentality of commerce” exception.

In *Novi*, the City of Novi proposed to create two roads adjacent to the major intersection where Novi Road crosses Grand River Avenue.<sup>38</sup> According to the city, the purpose of the two roads was to alleviate traffic congestion in the area.<sup>39</sup> The first road, known as Ring Road, would form a ring around the congested intersection.<sup>40</sup> The second road would serve as an “industrial

spur” that would traverse private property to serve as a means of ingress and egress for two private industrial property owners, Wisne and General Filters.<sup>41</sup>

In order to acquire the desired property, the city commenced a condemnation action pursuant to the Michigan Home Rule City Act<sup>42</sup> and the UCPA. The private property owner subsequently challenged both the public purpose and public necessity of the condemnation with regard to the “industrial spur.”<sup>43</sup> The heart of the dispute was centered on whether the proposed condemnation for the “industrial spur” was for the primary benefit of public or private interests.

The record in *Novi* revealed that, prior to the condemnation action, a County Road Commission project was scheduled that would cut off Wisne’s driveway onto Grand River Avenue, effectively denying Wisne public road access to Grand River Avenue, although it had an easement to reach its facilities.<sup>44</sup> The city initially sought, and received, private funding from Wisne to construct the proposed “industrial spur.”<sup>45</sup> Upon receipt of some of the private funding, the city promised to declare the “industrial spur” a public street and accept all maintenance responsibilities.<sup>46</sup>

The court held that the road forming a ring around the intersection was important to eliminate congestion, but that it could be built without taking private property for the “industrial spur.”<sup>47</sup> The court noted that “[n]either the City nor the County had seriously considered alternative access routes to the [“industrial spur”] other than taking the [private] property...”<sup>48</sup>

To support its allegation that the taking primarily benefited the public, the city declared that the public purpose of the “industrial spur” was to “aid traffic congestion problems in the area...”<sup>49</sup> The city further contended that, because the “industrial spur” would be a public road and would aid traffic congestion, concrete proof existed that the condemnation was “primarily for the public’s benefit.”<sup>50</sup> The city also alleged that condemning private property for a public road is *always* a

predominantly public purpose irrespective of the level of private benefit.<sup>51</sup> The court reviewed and decisively rejected each of the city's theories.

In an attempt to give heightened scrutiny to its analysis, the court applied Justice Ryan's three-pronged "instrumentality of commerce" test in order to determine the primary benefactor of the road. The court refused to follow the past history of subjectively balancing benefits and finally added teeth to the term "heightened scrutiny."

The *Novi* court held that condemnation resulting in a private benefit is permissible for public "avenues of commerce," but only if the three-pronged "instrumentality of commerce" test is satisfied. When a private interest will benefit, this new standard does not simply weigh the competing benefits; it applies a stricter test to the facts.

First, before such a condemnation benefiting private individuals is constitutional, there must be a public necessity of the "extreme sort." The Court of Appeals in *City of Novi* found this reasoning "perfectly applicable" to Ring Road and not at all applicable to the "industrial spur."<sup>52</sup> The court held that the "industrial spur" is "not an essential improvement that requires a particular configuration" and the necessity must be such that an alternative route or configuration would be impracticable or non-existent.<sup>53</sup> The court held that the "industrial spur" is not essential enough to require a particular configuration.<sup>54</sup> Absent the level of necessity making a certain configuration crucial, the public interest will not override the private interest.

The second requirement mandates that continued accountability for the road be preserved for the public.<sup>55</sup> Maintaining continuing accountability to the public provides a presumption that the public benefit predominates. The court conceded that, because the City of Novi would retain control of the "industrial spur" as a public road, this factor, standing alone, could bolster the argument that the "industrial spur" sufficiently benefits the public.<sup>56</sup> However, the court determined

that just because the “industrial spur” would be a public street “does not, automatically and standing alone, mean that it is for a public purpose/public use.”<sup>57</sup>

The final requirement directs that the land must be selected according to facts of independent public significance.<sup>58</sup> Generally, property lawfully condemned for a predominantly public interest is condemned without regard to private interests. The court held that the decision to condemn the private property for the “industrial spur” was made almost entirely with reference to private interests.<sup>59</sup>

The *Novi* court concluded that the “industrial spur” did not meet the heightened scrutiny test created by Justice Ryan in his *Poletown* dissent. Relying on the “instrumentality of commerce” standard, the court held that: “[a]lthough we assume the validity of the public interest advanced by the City, we find that the private interest to be benefited predominates over the asserted public interest.”<sup>60</sup> Although the court applied the heightened scrutiny test to be used when condemnation allegedly benefits a private interest, unlike past cases, the *Novi* court actually applied definitive standards of heightened scrutiny.

As a result of *Novi*, when a private interest is to benefit from a condemnation and an “avenue of commerce” is implicated, subjectively weighing the competing benefits is not enough to avoid the presumption of unconstitutionality. Under these circumstances, it appears that the days of robbing Peter to pay Paul have come to an end and the bar has been raised to the extent that objective standards have finally been applied to the amorphous term “heightened scrutiny.”

### **QUERY FOR A FUTURE COURT**

Will the instrumentality of commerce test be applied in situations where the use does not involve an “avenue of commerce?” The standards laid down by Justice Ryan in his *Poletown* dissent and the Court of Appeals in *Nov*, to determine whether the public interest or the private interest predominates contain no element that has application only to avenues of commerce. Given

the clear admonition of the Michigan Supreme Court and Court of Appeals to apply “heightened scrutiny” when examining the question of private benefit, there appears to be no good reason not to adopt the “instrumentality of commerce” standards in all cases where private benefit is an issue.

## ENDNOTES

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<sup>1</sup> Alexis de Tocqueville, *Democracy in America*, vol. 2, pt. 3, ch. 21 (1840).

<sup>2</sup> US Const, Am V.

<sup>3</sup> Const 1963, art 10, § 2.

<sup>4</sup> MCL 213.51 et seq.

<sup>5</sup> No. 223944, slip op. at 4, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (October 4, 2002), reh den (December 12, 2002), application for leave to appeal filed January 2, 2003.

<sup>6</sup> *Detroit v. Lucas*, 180 Mich App 47, 446 NW2d 596 (1989).

<sup>7</sup> *Poletown Neighborhood Council v. City of Detroit*, 410 Mich 616; 304 NW2d 455 (1981).

<sup>8</sup> *City of Novi*, slip op at 8.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Poletown* at 632.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 647.

<sup>19</sup> *Id.* at 629.

<sup>20</sup> *Id.* at 650-651.

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<sup>21</sup> Id. at 634-635.

<sup>22</sup> Id. at 635.

<sup>23</sup> Id. at 634.

<sup>24</sup> Id. at 629.

<sup>25</sup> No. 228921, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (December 27, 2002).

<sup>26</sup> City of Center Line v. Chmelko, et al., 164 Mich App 251; 416 NW2d 401 (1987).

<sup>27</sup> Id. at 258-259.

<sup>28</sup> Id. at 259.

<sup>29</sup> Id. at 253.

<sup>30</sup> Id. at 254.

<sup>31</sup> 442 Mich 626; 502 NW2d 638 (1993).

<sup>32</sup> Id. at 628.

<sup>33</sup> Id. at 639-640.

<sup>34</sup> Id. at 638.

<sup>35</sup> Id. at 635.

<sup>36</sup> Poletown at 670.

<sup>37</sup> Id. at 674-675.

<sup>38</sup> City of Novi, slip op. at 1.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> MCL 117.1 et seq.

<sup>43</sup> City of Novi, slip op. at 2.

<sup>44</sup> Id. at 9.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id.

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<sup>49</sup> Id. at 3.

<sup>50</sup> Id.

<sup>51</sup> Id. at 9.

<sup>52</sup> City of Novi at 13.

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id. at 14-15.