STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY,
Plaintiff-Appellee,

v.

EDWARD HATHCOCK,
Defendant-Appellant.

Supreme Court No. 124070
Court of Appeals No. 239438
Wayne Circuit Court No. 01-113583-CC

WAYNE COUNTY,
Plaintiff-Appellee,

v.

AARON T. SPECK, and
DONALD E. SPECK, individuals,
Defendant-Appellant.

Supreme Court No. 124070
Court of Appeals No. 239563
Wayne Circuit Court No. 01-114120-CC

WAYNE COUNTY,
Plaintiff-Appellee,

v.

AUBINS SERVICE, INC., DAVID R. YORK,
Trustee, David R. York, Revocable Living Trust,
Defendants-Appellants.

Supreme Court No. 124070
Court of Appeals No. 240184
Wayne Circuit Court No. 01-113584-CC

WAYNE COUNTY,
Plaintiff-Appellee,

v.

JEFFREY J. KOMISAR,
Defendant-Appellant.

Supreme Court No. 124070
Court of Appeals No. 240187
Wayne Circuit Court No. 01-113587-CC
01-114116-CC
01-114118-CC
01-114127-CC

WAYNE COUNTY,
Plaintiff-Appellee,

v.

ROBERT WARD and LELA WARD,
Defendants-Appellants,

and

HENRY Y. COOLEY,
Defendant.

Supreme Court No. 124070
Court of Appeals No. 240189
Wayne Circuit Court No. 01-114113-CC

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WAYNE COUNTY,
Plaintiff-Appellee,

v.

MRS. JAMES GRIZZLE and
MICHAEL A. BALDWIN,
Defendants-Appellants,

and

RAMIE FAKHOURY,
Defendant.

Supreme Court No. 124070
Court of Appeals No. 2401190
Wayne Circuit Court No. 01-114115-CC

WAYNE COUNTY,
Plaintiff-Appellee,

v.

STEPHANIE A. KOMISAR,
Defendant-Appellant.

Supreme Court No. 124070
Court of Appeals No. 240193
Wayne Circuit Court No. 01-114122-CC

WAYNE COUNTY,
Plaintiff-Appellee,

v.

THOMAS L. GOFF, NORMA GOFF,
MARK A. BARKER, JR. and
KATHLEEN A. BARKER,
Defendants-Appellants.

Supreme Court No. 124070
Court of Appeals No. 240194
Wayne Circuit Court No. 01-114123-CC

WAYNE COUNTY,
Plaintiff-Appellee,

v.

VINCENT FINAZZO,
Defendant-Appellant,

and

AUBREY L. GREGORY and DULCINA GREGORY,
Defendants.

Supreme Court No. 124070
Court of Appeals No. 240195
Wayne Circuit Court No. 01-114124-CC

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BRIEF OF AMICUS CURIAE
CITY OF DETROIT
IN SUPPORT OF PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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AMICUS BRIEF OF CITY OF DETROIT AND COUNTY OF WAYNE

Introduction and Summary of Argument

Proposed amicus City of Detroit (the "City") submits this Brief by invitation of the Court in its Order of November 17, 2003. In that Order, the Court welcomed the participation of amicus parties on the four questions posed by this Court, including the question of whether *Poletown Neighborhood Council v City of Detroit,* 410 Mich 616, 304 NW2d 455 (1981) should be reversed.

The City presents a legitimate and important perspective in this matter because its actions were the genesis for the *Poletown* decision. Further, as duly noted by many of the amicus parties filing briefs in support of the Defendants-Appellants in this case, the City, has been an active condemnor over the past two decades.[1] Moreover, the City brings the perspective of a municipality suffering through an exodus of citizens, a massive loss of jobs, a regressive tax burden that weighs heavily on its remaining residents, and a decreasing level of State and Federal support (from revenue sharing to day care and mental health for its citizens and for the City as a whole). Today, over twenty years after *Poletown*, the City still finds itself in trying times with staggering unemployment rates for its residents, large segments of land in the City that are idle, vacant and underutilized, and a myriad of circumstances that Michigan's Legislature concluded justified legislative action in 1974 when it considered and adopted the *Economic Development Corporations Act ("EDCA"), MCL 125.1601 et. seq.*, and other economic development statutory provisions.

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[1]Contrary to one Amicus Curiae's contentions, the City does not believe it can be fairly characterized as the condemnor for dual Stadia Project where the Detroit/Wayne County Stadium Authority was the condemnor or in the instant case where Wayne County was the condemnor.

Although the circumstances of the City may have gone through cyclical upswings, conditions have remained relatively consistent for the past three decades. The City is only left to wonder where it might have found itself had not the economic development tools employed in *Poletown* and *City of Detroit v Vavro,* 177 Mich App 682, 442 NW2d 730 (1989), been available to the City in its efforts to retain some core of jobs, tax revenues and economic hope. Given that perspective the City presents an enlightened view of the circumstances of this case and this action given the intended goals of the economic development statutory vehicles created by Michigan's Legislature, and the circumstances of local municipalities struggling with the general health, safety and welfare of its citizenry against an onrushing tide of fiscal constraints, cutbacks, downsizing, and budget reductions.

Condemnation is, and always has been, a tool that recognized that the assembly of property is a difficult task. Any person engaged in assembling property in an urban area will discover that, in many instances, the cost is frequently overwhelming and almost unconscionable, some parties will never sell, and, in most cases, user value greatly exceeds fair market value and often precludes any form of rational negotiation. In addition, a complex array of title issues frequently plague urban areas which both ensure, and yet are complicated by, blighting conditions, tax delinquencies and unrecorded land transfers. Condemnation is, therefore, a recognition of the power of the sovereign, when faced with these realities and difficulties, to acquire property while paying just compensation.

In *Swan v Williams,* 2 Mich 427, 1852 WL 3103 (1852), this Court, quoting *Chancellor Walworth*, stated as follows with respect to the power of eminent domain:

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> Chancellor Walworth, in *3 Paige R., 73,* says this right, denominated the *eminent domain* 'is the highest and most exact idea of property, and remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of property in the manner directed by the Constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised not only when the safety, but also when the interests, or even the expediency of the State, is concerned.' *Id* at p. 4. (Emphasis added).

Much has been written to this Court about the absence of balance in the condemnation process. While policy considerations should not be factored into this Court's decision, some of the amicus briefs have contended that legal representation and attorneys fees are an issue to be considered in this Court's evaluation of the impact of *Poletown* on condemnation cases in Michigan. This issue is tangential; it is addressed here because it is illustrative of their flawed misconstruction of Michigan law. The amicus parties for Defendants-Appellants have couched this matter as the government behemoth and the corporate demon against the downtrodden property owner:

> Because a condemnee rarely can afford good legal representation, she will generally acquiesce in the condemnation without bringing a serious challenge to the law." *Amicus Brief, Pacific Legal Foundation and ACLU Fund of Michigan* at p. 15.

Without debating the truth of this mischaracterization, Michigan is unique in one sense - Michigan law has evolved in a manner that provides the maximum protection to property owners. It is not true that the property owners are generally hapless souls whose rights have been laid bare to the power of the sovereign and who are unprotected by the law in most condemnation cases.

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If a property owner successfully challenges the necessity or the legitimacy of an acquisition, the owner's actual attorneys fees are reimbursed by statute. *MCL 213.66(2)* and *(3)*. If the case proceeds beyond necessity and the property owner receives an increased value for the property above the condemnor's appraised value, in Michigan, not only does the condemnor pay for its own attorneys and deposit and pay the estimated just compensation before filing an action, it also pays the actual reasonable attorney fees of the property owner. *Id.* These attorneys fees are capped at one-third of the amount by which the ultimate award (the trier of facts' determination of fair market value) plus interest exceeds the condemnor's estimated just compensation. *Id.* In most instances, the mistakes of negotiation on the part of the condemnor not only result in large and extensive increases in just compensation, they also include large and extensive attorneys fees, expert fees and other related costs attendant to a poorly planned and implemented condemnation case.

Condemnation remains an important tool in most urban areas. In fact, by definition, it can only be used when it is necessary that it be used. *Kalamazoo Road Commission v Dosca,* 21 Mich App 546, 548, 175 NW2d 899 (1970). The complex quilt of ownership associated with urban communities (i.e., multiple parcels with a myriad of different owners, interests and claims) often make condemnation the only option for the acquisition of property. Assembly of a multi-parcel, multi acreage site can be easily frustrated in these circumstances. Condemnation, therefore, has always been, and will always remain a very important government tool.

Hathcock, however, is not a *Poletown* case. There is not a challenge to the constitutionality of a State statute. *Poletown*, as applied by the appellate courts, is working and

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creating correct results. Policy considerations regarding the Legislative underpinnings of *Poletown* should not result in its reversal. The realities of an elastic definition of public use do support *Poletown*. Any reversal of *Poletown* should only be prospective.

Facts

The City will not reiterate or offer details regarding the facts of this matter. The parties to this appeal have accurately and adequately briefed that issue. However, the City believes that certain facts associated with this case are salient and critical to any analysis of *Poletown* within the framework of these proceedings. Among those facts are these critical issues:

1. The County proceeded under what it characterizes as a general grant of authority under *MCL 213.23* and *MCL 213.24*. The County also referenced the *Michigan Aeronautics Code (MCL 259.1 et seq.)*; the *Drain Code of 1956 (MCL 280.1, et seq.)* and *State Highway Acts (MCL 213.71 et seq.* and *MCL 220.1 et seq.)*, as part of its resolution of necessity in this matter. However, the principal bases asserted by the County for this condemnation were *MCL 213.23* and *MCL 213.24*. One of the County's goals for acquiring the acreage in question was to avoid the creation of basically a large wasteland of unused or underutilized property around Detroit Metropolitan Airport stemming from acquisition activity undertaken by Wayne County as part of a noise reduction program funded by the Federal Aviation Administration and required by Federal Aviation Administration regulations.

2. This case does not, and did not, involve the development of a project plan and the adoption and implementation of procedures under the EDCA. The constitutionality of the EDCA was never part of the issues raised in the trial court or the Michigan Court of Appeals.

3. None of the other typical statutory vehicles associated with economic development projects are at issue in these proceedings, including such statutes as the *Blighted Areas Redevelopment Act, MCL 125.71, et seq.* ("*BARA*"), the *Downtown Development Authority Act, MCL 125.1651 et seq.* ("*DDAA*"), and the *Brownfields Redevelopment Financing Act, MCL 125.2651 et seq.* ("*BRFA*").

4. In *Poletown*, the issue was not necessity, *per se*; the question at issue was whether the Michigan Legislature's determination that economic development

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> was a public use was a constitutional pronouncement. This was the ultimate question posited in and answered by the *Poletown* decision. *Poletown* was in fact a preemptive strike by a group of concerned citizens before a condemnation action was actually filed. *Poletown* was, therefore, unique and distinguishable from the facts of the instant case. In *Poletown* this Court ruled that it could not second guess the Legislative determination of public use under the EDCA. This Court then analyzed the consequences of the State Legislative decision to make economic development a public use (i.e., whether an Economic Development Corporation ("EDC") established under the statute had in fact complied with the statute). The *Poletown* heightened scrutiny analysis was the test adopted by this Court for analyzing the actions of condemning authorities pursuant to legislation in which the alleviation of unemployment, preservation of the tax base and property values, eradication of economic malaise and redevelopment had been declared public uses but were associated with some incidental private benefit.

In that regard, perhaps in recognition of the potential existence of an incidental private benefit, the EDCA incorporated a series of protections crafted by the State Legislature. First, Michigan's Legislature made express and specific findings as to the conditions (public purposes) necessitating its decision to make economic development a public use. *MCL 125.1602.* Second, the State Legislature required the formation of an EDC. *MCL 125.1612* and *MCL 125.1605.* The State Legislature mandated that the EDC and the City create a plan for the use of the property, the relocation of displaced persons and identification of the public benefits to be realized from the project. *MCL 125.1608 - MCL 125.1610.* The EDCA also provides for creation of a citizen's district council to offer comments on the impacts of the project on the affected project area. *MCL 125.1612-MCL 125.1616.* The majority of the decisions associated with these various steps are all undertaken in public forums in which the public has an opportunity to hear and participate in the proceedings. *MCL 125.1617.* The plan is subject to a vote by the Board of the EDC, as well as the local legislative body (in *Poletown*, the Detroit City Council). *MCL 125.1608* and *MCL 125.1610.*

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The local legislative body (e.g., the city council) is charged with finding that there are real and tangible public benefits flowing from the project and evaluating whether the conditions necessitating the adoption of the plan and the implementation of the project serve the public interest, benefit the public, and are consistent with the findings of the State Legislature with respect to the conditions necessitating adoption of the Act. Any ultimate transfer of property to a private party is not the first step, the middle step nor the most important step in the process. It is often the last, and a necessary, step in an overall process of local legislative determinations that permits the declared public benefit to be achieved. The "taking, transfer and use" of property is "considered necessary for public purposes and for the benefit of the public." *MCL 125.1622.*

The transfer to a private party, done in accordance with EDCA, is not the primary purpose of the statute or of an EDC plan duly adopted pursuant to the statute. This transfer is incidental to the purpose of the statute and the plan. The purpose of the statute and the plan is articulated in the statute (i.e., the protection of, or remediation of injury to, the economy). This is the statutorily created public purpose *Poletown* held was constitutional. In light of the existence of a private benefit, this Court employed heightened scrutiny to ensure that the public benefits were clear and significant and that the private benefit was only incidental. Surely this determination and declaration of public purpose has a rational basis. For example, in a blighted area project, the public purpose of that project is the elimination of blight. Any transfers to private parties are incidental to that public purpose. The concomitant benefit to the private party is not the objective of a blighted areas project.

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The primary objective of an EDCA project is not to benefit the private transferee, which is only a necessary consequence to achieving the plan's overall economic and other public benefits for the community.

The private party does not drive the decision-making regarding the adoption of the plan, the evaluation of the plan or the decision to implement the plan. Those actions are relegated to government elected officials who are charged with assuring that the goals of the EDCA are being fairly evaluated and realized. This process is statutorily mandated. Finally, the EDCA gives the incorporating municipality a right of action against a transferee that does not comply with a project plan or meet the timelines in a project plan. Citizens residing in a project district area are given the same right. *MCL 125.1621.*

While Plaintiff-Appellee County may have followed an approach in this case that was very similar to the legislative process established in the EDCA, the actions the County took were not prescribed by a State statute such as the EDCA. The City takes no position on whether those actions were consistent with, or needed to be consistent with, EDCA or *Poletown.* For all apparent purposes, it appears that the County, in fact, did employ a number of protections and failsafes in this case. Although the validity of *Poletown* has become the fulcrum of this case, there is no statute whose constitutionality was being challenged in *Hathcock.*

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Argument

A. The Legislature, the Judiciary and Public Use.

1. The Misconstruction of Public Use Should Not Compel the Decision in this Case.

The genesis of the legal discussion is *Michigan's Constitution of 1963*, which states:

> Sec. 2. Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record. *Const 1963, art 10 § 2.*

Little has been said about the Convention Comment to this Section, which provides in relevant part:

* * * *

> This section clearly indicates that proper procedures for the acquisition of private property for public use are to be determined by the legislature and that compensation for such property must be determined in proceedings in a court of record. *Convention Comment, Const 1963, art 10 § 2.* (Emphasis added).

Seemingly, this assertion should be the end of the story, but it is only the beginning.

Self-serving axioms appear to be the order of the day in much of the briefing and much of the discussion regarding this issue. These axioms notwithstanding, most of the Appellant-side arguments are policy arguments to be debated on the floor of the State Legislature.[2] Yet, it is axiomatic that:

> All agree that condemnation for public use or purpose is permitted. All agree that condemnation for private use or purpose is forbidden. Similarly, condemnation for a private use

[2]See discussion in Section A.7, *infra*.

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> cannot be authorized whatever its incidental public benefit and condemnation for public purpose cannot be forbidden whatever the incidental private gain. *Poletown* at 410 Mich 632.

Much of the discussion to date is centered on Justice Ryan's dissent in *Poletown* and the distinction that he made between public use and public purpose.

Both Justice Ryan and the amicus briefs for Defendants-Appellants take issue with the *Poletown* Court's reliance on *Gregory Marina, Inc. v City of Detroit,* 378 Mich 364, 144 NW2d 503 (1966), on the grounds that the public purpose discussion contained therein was suspect because it was a case about taxation. It is clear that Justice Kavanaugh did not place much weight on this distinction (public purpose for taxation *vis-a-vis* public purpose for eminent domain). In *Gregory Marina, supra*, his decision on the deference to be afforded a State or Federal pronouncement of public purpose or use was founded on a federal condemnation case – *United States ex rel Tennessee Valley Authority v Welch*, 324 US 546, 552, 66 S Ct 715, 718, 90 L Ed 843 (1946) and a Michigan condemnation case, *In re Hartwell, 2 Brown's, Michigan Nisi Prius Reports 97*. This latter case, Justice Kavanaugh concluded, was the only Michigan case to truly discuss the issue of who determined what was a public use as an initial matter, and provided in part that:

> It therefore follows that the people, through their representatives are to determine the question as to the propriety and expectancy of exercising this right – they are to say what property may be taken for a public use and to declare what shall be deemed public and private uses, limited only by the Constitution.

* * * *

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> But what branch of government is to determine what enterprises are of a public and what of a private character? In the case of *Beekman v S&SRR Co., 3 Paige 73*, Chancellor Walworth said:
>
> > If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the Legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain. [Citations omitted]. *Gregory Marina, supra* at 144 NW2d 515 and 516.

While the above-referenced discussion is interesting and perhaps intellectually stimulating, it may ignore the more basic question that the *Poletown* court wrestled with and that still appears to trouble many appellate court justices and trial court judges today. At the heart of this debate is whether a determination of public use (or public purpose) is a judicial or a legislative decision.

Despite the loose language of many cases and many authors and commentators, clearly no one can legitimately argue that the determination and declaration of public use is a judicial function. The judiciary is not authorized to unilaterally declare a public use. Any conclusion to the contrary would seemingly strike at the very foundation of the Separation of Powers doctrine. Clearly, the declaration of public use could initially only come from the legislature. In *Swan, supra*, this Court explained the concept as follows:

> The power of government respecting public improvements is a sovereign power. It rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require the exercise, and with the reasonableness of the exercise of that discretion Courts will not interfere. See *Charles River Bridge v Warren Bridge,* 11 Peters, 420, 605. These necessities change with the progress of society. That which would have satisfied the public demands a few years hence, may perhaps

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> now be wholly inadequate or useless. As new discoveries are made in science and adapted by art to the uses and wants of community, and its ever-changing condition, laws must adapt themselves to the existing state of things, not arbitrarily, but by natural gradations. *Id* at p. 8. (Emphasis added)

The role of the court after a State Legislature has declared a public use is to evaluate and determine, when called upon, whether that declaration of public use is, in fact, constitutional. What the *Poletown* court recognized was the role and responsibility of the courts in performing their governmental function of assessing the constitutionality of the State legislative declaration of public use.

There has been an almost esoteric discussion and conclusion that the judiciary, in the course of developing eminent domain law, has routinely declared a breadth of public uses that condemnors can employ to implement their power of eminent domain. As demonstrated below, this is untrue. This concept is apparently triggered by a series of older Michigan cases, including *Ryerson v Brown,* 35 Mich 333, 24 Am Rep 564 (1877) and *People ex rel The Detroit and Howell Railroad Company v Township Board of Salem*, 20 Mich 452, 4 Am Rep 400 (1870). Both of these decisions were written by the well-respected Justice Cooley. Commentators, and many authors, have taken snippets from these opinions as the basis on which to argue that the judiciary has always been imbued with the power to declare public use and that it has never declared that economic development is a public use. This analysis of *Ryerson* and *Howell Railroad* is simply self-serving and wrong.

These cases clearly manifest the complementary roles of the judiciary and the legislature. Except in the instance of three very recent decisions, including the instant case and *City of Lansing v Edward Rose Realty,* 442 Mich 626, 502 NW2d 638 (1993), the judicial role

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with respect to this public use analysis has been evaluating the constitutionality of a statutory declaration of public use by a State or Federal legislative body.[3] A thorough analysis of the case law clearly demonstrates this reality. However, first assuming that the often-quoted Justice Cooley could have unilaterally declared a public use, in *Ryerson*, Justice Cooley did not seem to foreclose economic development as a potential public use as is so often asserted:

> Undoubtedly there may arise circumstances under which it would be convenient if a power to condemn lands for mill purposes might be exercised, but they are so rare that a stretch of governmental power in order to provide for them would be more harmful than beneficial. <u>It would under any circumstances be pushing the authority of government to extreme limits; and unless the reasons for it were imperative,</u> would be likely to lead to abuses rather than tend to the promotion of general interest, and to breed discords where, in the absence of such legislation, moderate counsel and final agreement might have prevailed. *Ryerson* at 1877, WL 7142, p. 5. (Emphasis added).

The language cited above certainly suggests that Justice Cooley did find that in instances where it was deemed imperative, condemnation for economic activity, such as mill purposes, might indeed be justified. This quote does not endorse an absolute foreclosure of community enhancing economic benefits as a public use because it results in some incidental private benefit.

Likewise, in *Detroit and Howell Railroad Co., supra*, Justice Cooley also made the following statement:

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[3]While the declaration may not always be express, it is always either express or implied when a legislative body authorizes the use of eminent domain to effectuate the purposes of any statute. Because municipalities and counties and other subdivisions of the State do not have an inherent authority to condemn and must be statutorily authorized to use the power, a political subdivision does not declare a public use, it declares that its exercise of the power of eminent domain is consistent with and authorized by some general or specific statute. *City of Lansing v Edward Rose Realty, supra.*

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> It is proper, however, to add the remark, that even where the necessity is conceded, I do not understand that the right of eminent domain can be exercised on behalf of private parties or corporations, unless the State in permitting it reserves to itself a right to supervise and control the use by such regulations as shall ensure to the public the benefit promised thereby, and as shall preclude the purpose which the public had in view in authorizing the appropriation being defeated by partiality or unreasonably selfish action on the part of those who only on the ground of public convenience and welfare, have been suffered to make the appropriation. *Id* at 1870, WL 4149, p. 17.

Again, this language does not appear to foreclose the acquisition of property when it benefits private corporations, that conclusion apparently being more extreme than Justice Cooley was willing to endorse. Justice Cooley appears to want the boundaries and controls of such action to be clearly demarcated and preserved. A well-crafted and legally enforceable project plan under the EDCA, for example, achieves this end. *MCL 125.1621*.

In further illustration of the concept of the role of the judiciary and the accuracy of the City's analysis of this issue, three other often cited cases also demonstrate that the role of the judiciary was one of evaluating a State Legislature's declaration of public use for constitutionality. In *Berrien Springs Water Company v Berrien Circuit Judge,* 133 Mich 48, 94 NW 379 (1903), this Court found unconstitutional a statute allowing the construction of dams for the generation of electrical power and creating navigable waterways. It was the State legislative declaration of public use that was at issue.

In *Board of Health of Township of Portage v VanHosen*, 87 Mich 553, 49 NW 894 (1891), this Court found unconstitutional a statute allowing for the creation of private cemetery companies and the exercise of the power of eminent domain by those cemetery companies in

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rural areas. Again, a State legislative determination and declaration of public purpose (express or implied) was at issue in the statutory scheme being challenged before the court.

Finally, more recently, in *Shizas v City of Detroit*, 333 Mich 44, 52 NW2d 589 (1952), this Court struck down as unconstitutional a State statute allowing for the acquisition of property for the construction of automobile parking facilities and the leasing of space in those facilities to private parties for commercial enterprises. Again, there was a State legislative declaration of public use (express or implied) that was at issue. The court's role in addressing that declaration was to evaluate its constitutionality under Michigan's State Constitution in place at that time.

2. Public Use Has to Be a Legislative Determination.

Poletown recognized that public use is an elastic concept. It has to account for the changes of circumstances and times. "[Public] necessities change with the progress of society." *Swan, supra* at p. 8. Society is fluid; it moves and it evolves. The circumstances Justice Cooley faced in 1870 and 1881 are not the circumstances that the City of Detroit, the County of Wayne and the State of Michigan face 134 years later. Justice Cooley did not live in a time in which it was necessary to address economic blight or slum clearance efforts. Indeed, the private sector's shortcomings had not yet accumulated and manifested themselves in a way that illuminated the need for comprehensive government action. Much of what happens in today's society Justice Cooley could not, or would not, have anticipated. Given that reality, public use, as this Court recognized in *Poletown*, has to be an elastic and a vibrant concept. In *Cincinnati v Vester,* 281 US 439, 50 S Ct 360, 74 L Ed 950 (1930), the United States Supreme Court noted as follows:

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> It is well established that, in considering the application of the Fourteenth Amendment, to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in light of the local exigencies. 281 US 446. (Emphasis added)[4]

Again, the declaration of public use is made by the State or Federal Legislature. The evaluation of the constitutionality of that declaration falls to the judiciary, giving due deference based upon the nature of the declarant.

In *Southwestern Illinois Development Authority v National City Environmental, LLC*, 304 Il App 3d 542, 547, 710 NE2d 896 (1999), the Illinois Supreme Court made an interesting and poignant observation regarding the elasticity of public use:

> The uses of eminent domain expanded as the economy expanded. In the 1840s and 1850s, eminent domain was used to condemn property for the construction of railroads. The surge in industrial growth created a major drive to exploit western resources and open western markets. *11 Envtl. L* at 29. In the 20th century, the public-use clause has enabled governing bodies to further economic development, including the use of eminent domain to alleviate economic malaise. *See People ex rel City of Urbana v Pauley,* 68 Il 2d 62, 11 Il Dec 307, 368

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[4]In reality, the proper reading of *Vester, supra,* is that the constitutionality of the public use asserted by a local legislative body is a judicial question. See also *Rindge Co. v City of Los Angeles*, 262 US 700, 705, 43 S Ct 869, 67 L Ed 1186 (1922), where the Supreme Court held that:

> The nature of the use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions... .

The declaration of a public use is initially a legislative function. The determination of constitutionality of the nature of the use is a judicial function.

> NE2d 915 (1977); *City of Chicago v Barnes,* 30 Il 2d 255, 195 NE2d 629 (1964). (Emphasis added).[5]

Poletown is part of the evolution of public use. In the 1870s, before the automobile, the country's economic focus was on waterways and railroads. The courts upheld takings to facilitate those uses. *Swan, supra; Ryerson, supra*, and *Berrien Springs, supra.* During the great depression, public works projects were the order of the day and takings for those uses were upheld. In *Welch, supra*, In the 1950s and 1960s, slum clearance became an issue and public use evolved again. *Sinas v City of Lansing,* 407, 382 Mich 170 NW2d 23 (1960)*; In re Slum Clearance, etc.,* 331 Mich 714, 50 NW2d 340 (1951). Now, in the 1980s, 1990s and the new millennium, *Poletown* is a natural evolution in a world where a butterfly flaps its wings in Beijing and Wall Street loses 300 points and/or the NASDAQ evaporates because of the integrated reality of the global economy. Public use has to evolve and adapt to recognize and capture this reality.

In *Poletown*, the issue was phrased as follows:

> The term 'public use' has not received a narrow or inelastic definition by this court in prior cases. Indeed, this court has stated that ''(a) public use changes with changing conditions of society'' and that ''[t]he right of the public to receive and enjoy the benefit of the use determines whether the use is public or private''. *Poletown* at 410 Mich 630.

The concept of public use is universally recognized as flexible. Given that reality, what is the judiciary's role? It cannot be one of trying to predetermine and initially declare the degree of

[5]The Amicus Briefs for Defendants-Appellants merely misapprehend this decision. The specifics of taking at issue were invalidated because it simply was to enhance the profits of a private racetrack enterprise. The taking was authorized expressly for that purpose. The Illinois Supreme Court, however, recognized the general validity of economic redevelopment legislation.

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elasticity. The boundaries may be set by the judiciary but only in view of declarations proposed by the State or Federal Legislatures:

> The exercise of such power is a matter entirely under the control of the Legislature, subject to such restrictions as are found in the Constitution. The necessity, the occasion, time and manner of its exercise are wholly legislative questions with the exception just stated. *Loomis v Hartz,* 165 Mich 662, 665, 131 NW 85 (1911).

How then, does the judiciary accomplish its role?

3. Judiciary Review of Public Use Requires Deference.

In the scintillating debate over Justice Ryan's dissent regarding the melding of the terms "public use" and "public purpose" and the ills allegedly associated with that supposed meld, parties frequently gloss over one very important holding in *Poletown. Poletown,* relying on United States Supreme Court authority, recognized the deference paid to a State Legislature's declaration of public use, *citing Berman v Parker,* 348 US 26, 75 S Ct 98, 99 L Ed 27 (1954). In *Berman,* the United States Supreme Court addressed a legislative scheme that was much like the EDCA in the *Poletown* decision. In addressing the United States Legislature's conclusions that this scheme was necessary for a public use and that condemnation could be employed to further that use, the United States Supreme Court noted:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia...or the States legislating concerning local affairs...This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether the power is being exercised for a public purpose is an extremely narrow one.

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> ...Public safety, public health, morality, peace, and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet, they merely illustrate the scope of the power and do not delimit it. *Berman v Parker* at 348 US 32. [*citations omitted*].

Poletown deferred to this conclusion. *Poletown* also deferred to the earlier decisions of this Court on the same subject in *Gregory Marina, Inc. v City of Detroit, supra*, where this Court, quoting *Tennessee Valley Authority v Welch*, 327 US 546, 552, 66 S Ct 715, 718, 90 L Ed 843 (1946), held:

> The United States Supreme Court reasoning is flawless. For a determination of what constitutes a public purpose involves considerations of economic and social philosophies and principles of political science and government. Such determinations should be made by the elected representatives of the people. This seems so obvious that it is surprising to see so many Michigan cases which apparently take the opposite view.
>
> * * * *
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> ...Any authority in Michigan, supporting the proposition that public purpose is a judicial question, rests, ultimately, on dicta of ancient vintage. 378 Mich at 394. (Emphasis added)

In *Michigan State Highway Commissioner v VanderKloot*, 392 Mich 159, 176, 22 NW2d 416 (1974), this Court likewise held as follows:

> There can be no judicial review of the decision to make such an 'improvement'. But the determination of the property on which such 'improvement' is made is subject to judicial review for 'fraud or abuse of discretion.'[6]

[6]The *1908 Michigan Constitution* had included a reference to the determination of necessity by a jury. The *1963 Michigan Constitution* deleted this requirement. *1963 Const, art 10 § 2*. Thus, the question of necessity was divided into the judicial inquiry of necessity and the jury inquiry which was only related to the determination of just compensation, as provided by statute..

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In *Poletown*, Justice Ryan distinguished *Berman* and the notion of judicial deference on the grounds that it involved a federal statute. 410 Mich at 668 (Ryan J. dissenting). After Justice Ryan's dissenting opinion, the United States Supreme Court, in 1984, offered some clarification on the validity of the distinction drawn by Justice Ryan. In *Hawaii Housing Authority v Midkiff,* 467 US 229, 104 S Ct 2321, 81 L Ed 2d 186 (1984), the United States Supreme Court dealt with a State legislative act that basically redistributed large plots of land in Hawaii from the oligarchies that controlled them to individuals under the *Hawaii Land Reform Act of 1967.* Justice Sandra Day O'Connor, delivered the opinion of the United States Supreme Court in *Midkiff,* which held:

> Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate. Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. Such legislatures are as capable as Congress of making such determinations within their respective spheres of authority. *See Berman v Parker,* 348 US at 32, 75 S Ct, at 102. Thus, if a legislature, state or federal, determines there are substantial reasons for the exercise of the taking power, courts must defer to its determination that the taking will serve a public use.[7] *Id* at 466 US 244. (Emphasis added).

This is the law of the land as of this moment as enunciated by the United States Supreme Court. *Midkiff* has not been overturned. There is simply no reason to overturn *Poletown* in light of its consistency with the determination of the constitutionality of a State legislative determination of public use under the EDCA. According to *Midkiff*, that

[7] *Midkiff* raises an interesting question of whether the law of the land creates a federally enforceable obligation of deference that would have to be ignored or invalidated to overturn *Poletown.*

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determination is entitled to the utmost deference. That deference was the issue in *Poletown*. However, the deference to be accorded the legislative determination of public use in the EDCA was never at issue in the instant case. The question in *Hathcock* is what deference is afforded a solely local decision under *MCL 213.23*?

4. The *Edward Rose Realty* Decision by this Court Supplies the Analysis Applicable to the Instant Matter.

This case is not *Poletown*. The facts of this case are more analogous to *City of Lansing v Edward Rose Realty, supra*. If any decision should be visited by this Court as a result of the circumstances arising out of this expropriation project, it is *Edward Rose Realty*. *Poletown* is not at issue. *Edward Rose Realty* in fact established a different test for the particular circumstances of cases like *Hathcock, City of Center Line v Chemelko,* 164 Mich App 251, 416 NW2d 401 and *City of Novi v Robert Adell Children's Funded Trust,* 253 Mich App 330, 659 NW2d 615 (2002) where there was no express or implicit State legislative declaration of public purpose and an attendant grant of the authority to condemn to implement it. This test is consistent with the analysis set forth above regarding the respective roles of judicial (i.e., evaluating the constitutionality of a use as declared) and the legislative (i.e., declaring a public use) branches of government .

In *Edward Rose Realty*, this Court was faced with determining the validity of the exercise of the general power of condemnation under *MCL 213.23* and *MCL 213.24*, to implement a City-ordained ordinance which compelled access for a private cable television franchise under contract to the City of Lansing to apartment complexes in the City of Lansing. The Lansing City Council asserted that its general police powers authorized the ordinance and

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created a public use that was constitutional. Actually, like the circumstances of *Hathcock* today, there was no express economic development statute at issue in *Edward Rose Realty*. The EDCA was not at issue; the DDAA was not at issue; the BARA was not at issue; nor was the BRFA. The issue was the application of *Public Act 149 of 1911, MCL 213.23* and *MCL 213.24*, to a decision to implement an ordinance adopted by the City of Lansing and the constitutionality of the local legislative body's assertion of public use attendant to that ordinance.

This Court analyzed the general power of condemnation of the City of Lansing under its *Home Rule Cities Act MCL 117.1 et. seq.* and *MCL 213.23* and recognized that there was no specific statute authorizing the condemnation in *Edward Rose Realty*. Similarly, no specific statutory power has been asserted by the Wayne County in this case other than its general authority under *MCL 213.23* as a basis for the acquisition of property. *Edward Rose Realty* is rife with declarations by this Court that are consistent with the City of Detroit's analysis of the roles of the legislature and the judiciary regarding who has the authority to declare a public use and which arm of government is vested with power to determine the constitutionality of public use after it is declared or asserted.

First, this Court stated as follows:

> The cited enabling statutes, however, do not specifically authorize the takings in the present case. There is no state statute identifying as a public use or purpose the mandatory access onto private property by a city-franchised cable television provider. <u>Ordinances passed under such general authority are open to inquiry by the courts and, in order to be held valid, must be reasonable and not oppressive</u>. <u>Powers implied by general delegations of authority must be 'essential</u>

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> or indispensable to the accomplishment of the objects or the purposes of the municipality.'
>
> * * * *
>
> We are therefore required to determine whether Ordinance 753 is reasonable and serves a public purpose. *Edward Rose Realty* at 442 Mich 634 and 635. (Emphasis added).

In *Edward Rose Realty*, this Court drew an important distinction between the deference afforded a condemnation premised on State and Federal Legislative declarations of public use and the deference accorded takings pursued by a local legislative body asserting a public use based upon an authority vested in the local subdivision in its general enabling statutes, stating as follows:

> Because the City passed Ordinance 753 without express delegation of authority by the State, we may review the City's asserted public purpose. Judicial deference granted State legislative determinations of public use is not similarly employed when reviewing determinations of public purpose made by a municipality pursuant to broad, general enabling statutes. (*citing Berman v Parker, supra* and *Hawaii Housing Authority v Midkiff, supra* and *Poletown, supra*). *Edward Rose Realty, supra* at 637. (Emphasis added).

This Court went on to discuss the meaning of the *Poletown* decision in *Edward Rose Realty*. This Court summarized the impact of *Poletown* in this context as:

> The role of this Court to review whether the project was for the primary benefit of the public was limited, mainly because of three circumstances: (1) the Legislature had determined that the government conduct proposed by the city served 'an essential public purpose,' (2) the Legislature expressly delegated to municipalities the authority to determine if a proposed project constituted a public purpose, and (3) the city followed all procedures established in the legislative enabling statute. *Id* at 442 Mich 638.

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More importantly, this Court, in *Edward Rose Realty*, made the following statement which should be dispositive of whether it is *Edward Rose Realty* or *Poletown* that is at issue in these proceedings:

> In the present case, as discussed above, there is no determination by the Legislature that the city's proposed action serves an essential public purpose. The Legislature did not delegate to the city the power to condemn private property for the purpose of mandatory access by a city-franchised cable system. *Id* at 639.

The *Edward Rose Realty* test is different than the *Poletown* test because of the nature of, and the authority granted to, the declarant. In short, the judiciary does not have to defer as much to local legislative pronouncements of public purpose. By *Edward Rose Realty, supra,* the deference test in *Poletown* was made no longer readily applicable to a local legislative pronouncement of public use.

Edward Rose Realty thus outlined the analysis to be applied in a condemnation case based upon an assertion of public use by a local legislative body using a general enabling statute. It should be distinguished from the test set forth in *Poletown* for the evaluation of the constitutionality of an express State or Federal legislative declaration of public use. This distinction is at the heart of this case. *Poletown* is not the case before this Court. The conclusions of the Court of Appeals, the trial court and all other parties as to the true test applicable in this case does not derive from *Poletown.* The decision to overrule *Poletown* in this context is a decision that does not need to be made and should not be made in these proceedings. The effect of overruling *Poletown* and the understanding of the impact of that decision on legislation like the EDCA, the BRFA or the DDAA cannot be determined at this

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juncture. The statutes in question are simply not before the Court. What is before the Court is a decision to use a general enabling statute for purposes of condemnation without any State or Federal statutory pronouncements of public use. The Court's focus should be on that issue (*Edward Rose Realty)* and not *Poletown.*

5. When Applied to Current Case Law, the City's Analysis is Demonstrably Correct.

a. Public Use Not Found in *Tolksdorf v Griffith,* 464 Mich 1, 626 NW2d 163 (2001).

This Court overturned *Michigan's Private Roads Act, MCL 229.1 et. seq.*, in *Tolksdorf.* In this case, the only public use declared by the legislature was creating access to landlocked property. This Court reviewed the constitutionality of the use declared by the legislature and the use of the power of eminent domain to effectuate that use. Importantly, this Court noted as follows:

> We note that the Act does not impose a limitation on land use that benefits the community as whole. Instead it gives one party an interest in land the party could not otherwise obtain. *Id* at 464 Mich 10.

This Court appeared to recognize that there was no State legislative finding of a general public need for this Act. There was no statutory requirement to, and, therefore, no determination at a local level, by any legislative body that the decision to impose a private easement over an adjoining piece of property for the benefit of a landlocked parcel had a general benefit to the community. These facts certainly distinguish the *Private Roads Act* from the EDCA which was the subject matter of the *Poletown* decision. While like most condemnation necessity decisions, *Poletown* is referenced in this case, the reality is *Poletown* is only generally related

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to the determination of the constitutionality of the *Private Roads Act*. (See discussion in Section A.7, *infra*).

b. Public Use Not Found in *City of Novi v Robert Adell Trust*

In *City of Novi v Robert Adell's Children's Funded Trust, supra*, the Michigan Court of Appeals invalidated the acquisition of a ring road acquired under the general police power authority vested in the City of Novi by the *Home Rule Cities Act, MCL 117.1 et seq.* Much like the instant case, the acquisition of property for this ring road was allegedly justified under the city's power of condemnation grounded in public uses inherent in the city's general enabling statutes. There was no express State legislative statutory declaration of public use associated with the development of the ring road. In fact, the bulk of the decision focused on the shifting burdens of proof in necessity proceedings under the *Uniform Condemnations Procedures Act, MCL 213.51 et seq.*, and whether in fact the property owner actually bore the burden of establishing fraud, error of law or abuse of discretion with respect to the determination of public use versus a determination of public necessity. That issue is not before this Court in the instant case.

Ultimately, the Court of Appeals concluded that the primary beneficiary of the taking was not the public but was a private company, Wisne/PICO. The court's ultimate decision was premised on *Lansing v Edward Rose Realty, supra*, employing a historical test articulated in *Poletown* that when a project has an identifiable private benefit, the public use must be clear and significant and the private benefit must be incidental.[8] In *City of Novi, supra*, the

[8]As is discussed in Section A.7, *infra*, *Poletown* reiterated a historical test to be employed determining the legitimacy of the public use where incidental private benefit exists.

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Michigan Court of Appeals did not invalidate a statutory declaration of constitutionality – public use – but evaluated the acquisition more in the framework contemplated by *Edward Rose Realty* as set forth above. Again, this was the proper analysis.

c. <u>*Center Line* Is Not Inconsistent with *Poletown*.</u>

In *City of Center Line v Chemelko, supra*, the Michigan Court of Appeals invalidated a condemnation that was in essence a sham. Even though the City of Center Line had a downtown development authority, it did not acquire property using its downtown development authority. The city elected to acquire the property, on the basis of blight, at the advice of a consultant hired by its downtown development authority. The acquisition was not done pursuant to the *BARA, MCL 125.71 et seq.* either. The Michigan Court of Appeals invalidated a purely local assertion of the basis for the acquisition and of public use. No State Legislative declaration of a public use was at issue. In fact, the Court of Appeals contrasted the *Midkiff, supra,* and *Berman, supra,* decisions with those of *Cincinnati v Vester, supra,* and *Rindge Company v Los Angeles, supra*, by distinguishing the deference paid to State legislative decisions as opposed to local legislative decisions, stating as follows:

> We note the cases upholding the deference given to legislative determinations involve a congressional decision or a state legislative determination upheld by a *state court*. However, in *Cincinnati v Vester, supra*, the case most similar to our facts, the Court rejected a city resolution of public purpose. While concluding that legislative declarations of local factors was due great deference, the Court ruled that public use is ultimately a judicial question. *City of Center Line* at 416 NW2d 405.
>
> * * * *
>
> We read the factual context of *Poletown* as extremely significant to the holding in that case. We do not take *Poletown*

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> to be a complete repudiation of the judiciary's *ultimate* power to review a city council's determination of public purpose. Rather we believe the situation illuminates the deference which must be accorded the state Legislature in the context of the Economic Development Corporations Act. *City of Center Line* at 462 NW2d 406. (Emphasis added).

The Court of Appeals went on to apply the *Poletown* heightened scrutiny analysis to the specific facts of this case and found that this condemnation was driven by threats from Rinke Toyota more than a determination on the merits of the public benefits flowing from the project as was demonstrated in *Poletown.* Therefore, applying *Poletown's* historical clear and significant public benefits test, because of existence of private interest, the Michigan Court of Appeals found that there was simply not substantial proof of a clear and significant public benefit that made the benefit to the private corporation (Rinke Toyota) only incidental.

6. Public Use Exists.

a. *City of Detroit v Lucas*.

In *City of Detroit v Lucas,* 180 Mich App 47, 446 NW2d 598 (1989), the court addressed a declaration of public use under the DDAA and upheld the constitutionality of that declaration of public use. Again, there was specific language in the *DDAA, MCL 125.1660*, authorizing the acquisition. In dicta, the Michigan Court of Appeals relied on that State legislative declaration of public use and deferred to the determination and declaration of public use in the DDAA. *Poletown* was properly applied and implemented in this case. The analysis of deference afforded the State Legislature's determination of public use was correctly applied in *City of Detroit v Lucas, supra.*

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b. *City of Detroit v Vavro*.

In *City of Detroit v Vavro,* 177 Mich App 682, 442 NW2d 730 (1989), the Michigan Court of Appeals addressed another condemnation arising under the EDCA. The Court of Appeals properly deferred to this Court's decision in *Poletown.* The panel in *Vavro, supra,* felt compelled by the doctrine *stare decicis* to follow the *Poletown* decision although, like a number of commentators, they disagreed with that decision on a policy basis. *Vavro, supra* at 685. The basis for their disagreement in the case at issue and the legal distinctions between the two cases were never made clear. In essence, the Michigan Court of Appeals found that the City had complied with the minimum legal requirements set forth under the EDCA and therefore, the Court was required to follow the *Poletown* rationale. This decision, likewise, was properly decided under *Poletown.*

The decision is also noteworthy in its analysis because although the Court of Appeals first deferred to the declaration of public use under the EDCA and was compelled by *stare decisis* to adhere to this Court's determination of the constitutionality of that declaration; it went on to consider the merits of the facts of the case, as it should have because of the existence of an incidental private benefit and, under the test in *Poletown*, the court found that the proofs existed to validate the local determination that public benefit was predominate and the private benefit was only incidental. Under *Poletown*, these two inquiries were appropriate.

7. What Is Really at Issue in the Instant Case Is an Advisory Opinion on the Merits of *Poletown* and an Invalid Attempt at Policymaking.

As demonstrated above, *Poletown* is really not at issue in the current action. What is really being sought is an advisory opinion on the merits and continuing viability of *Poletown.*

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There is no actual controversy on *Poletown* at issue in these proceedings. The decision to "show cause" *Poletown*, in the words of Justice Kavanagh, seems to, in effect, contradict a long tradition of this Court against issuing advisory opinions, particularly on the constitutionality of statutes. See *In re Request for Advisory Opinion re Constitutionality of 1977 PA 108,* 402 Mich 83, 260 NW2d 436 (1977); *In re Request for Advisory Opinion, 1975 PA 222,* 395 Mich 361, 235 NW2d 745 (1975).

In the instant case, this proposed advisory opinion will have the effect of eradicating the constitutionality of a number of statutes where the interests of the litigants have not been committed and the issues have not been developed in adversary proceedings. Among the legislatively declared pronouncements of public use whose constitutionality may be directly affected by a decision over-ruling *Poletown* (*Poletown* merely validated the legislative declaration of public use in the EDCA), are:

> *1929 PA 190 (MCL 213.221 et seq.)* (authorizing municipalities to acquire property for boulevards, streets or alleys);
>
> *1933 PA (Ex Sess) 18 (MCL 125.651 et seq.)* (authorizing acquisitions for housing facilities);
>
> *1941 PA 250 (MCL 125.901 et seq.)* (authorizing the establishment of urban redevelopment corporations and empowering them to condemn property);
>
> *1945 PA 140 (MCL 213.251 et seq.)* (authorizing public corporations or state agencies to acquire overhead and underground utility rights);
>
> *1945 PA 344 (MCL 125.71 et seq.)* (authorizing condemnation and redevelopment of blighted areas);
>
> *1966 PA 295 (MCL 213.361 et seq.)* (authorizing municipalities, counties, drainage districts, county road

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commissions, and the State Highway Commission to acquire property including residential property for public highway purposes);

1974 PA 338 (MCL 125.1601 et seq.) (authorizing the acquisition of property for purposes of economic development under the EDCA);

1975 PA 197 (MCL 125.1651 et seq.) (authorizing the use of eminent domain in the transfer of property for purposes of downtown development authorities);

1992 PA 173 (MCL 125.2451 et seq.) (authorizing condemnations for land reclamation and improvement authorities);

1986 PA 291 (MCL 125.2151 et seq.) (authorizing condemnations for local development financings)[9]

1996 PA 381 (MCL 125.2651 et seq.) (authorizing use of eminent domain for purposes of brownfield redevelopment).

Each of these statutes has an express or implied legislative declaration of public use that either should be considered or has to be addressed by this Court in making a determination that *Poletown* should be overruled. There simply is no factual development, no actual controversy and no parties litigating the constitutionality of each and all of these acts in the instant matter. None of the statutes in question was used as the basis for the County's acquisition in the instant case. Query then how this current appeal is something other than, in effect, an advisory opinion on the constitutionality of the public use declarations in a multitude of statutes given the procedural framework of the decisions in the cases that have served as the historical backdrop against which this present decision has to be made?

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[9]Interestingly, this Act was implicated in *Hathcock* because *MCL 125.2151 et seq.* was amended to allow for certified technology parks in 1998. Wayne County contends that the project area for this project is the first such certified technology park.

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This Court has often held that proper role of the judiciary is to interpret and not to write the law. *State Farm Fire and Cas Co. v Old Republic Insur. Co.*, 466 Mich 142, 146, 644 NW2d 715 (2002). In fact, this Court recently held that:

> Statutes are presumed to be constitutional and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.... Further, when considering a claim that a statute is unconstitutional, the court does not inquire into wisdom of the legislation.... *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 658 NW2d 127, 130 (2003). (Citations omitted).

The statutes that could be affected (as described above) are legislative pronouncements arising out of the police power of the State. This Court has also held that:

> Where legislation is within the scope of the police power, its wisdom and propriety are for legislative and not judicial determination. *People v Breen,* 326 Mich 720, 40 NW2d 778, 779 (1950).

The arguments that *Poletown* and, by implication, the EDCA and the other economic revitalization statutes set forth above are bad policy, should be addressed to the Legislature. *People v Kirby,* 440 Mich 485, 487 NW2d 404 (1992). Much of the argument by the Amicus Briefs for Appellant are policy arguments decrying the unfair and unjust results of a statutory scheme regularly employed by the State Legislature and upheld in *Poletown.* These are legislative arguments and, as this Court has held, are not generally collaterally attacked on policy grounds because:

> That the legislative solution appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature and substitute its own solution. *Manistee Bank & Trust Co. v McGowan,* 394 Mich 655, 232 NW2d 636, 640 (1975).

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B. Does a Proposed Taking That Contemplates Later Transfer to Private Entities Constitute a Public Use under *Poletown Neighborhood Council v City of Detroit*?

1. Making Sense of the Statutory Framework.

The question as posed generically may not appropriately frame the issue. The City does not accept that the transfer is really the issue:

> If the acquisition of urban renewal property is sustainable *per se*, irrespective of its disposition, then the validity of the disposition must be measured without reference to the acquisition. *Sinas v City of Lansing, supra,* 170 NW2d at 26.

The ultimate question is whether the public use is clear, significant and predominate, such that any benefit to a private transferee is only incidental. Some discussion of the statutory frameworks under which such transfers may routinely be accomplished in certain cases is appropriate here. Obviously, the acquisition of private property from one private person for transfer of that property to another private person for unfettered use by the transferee in any fashion it deems fit without any assessment of the public benefit would not be appropriate. The more appropriate question is whether a statutory or other legislatively established framework, where a public benefit has been declared by the State Legislature, and there are public benefits that are clear, significant and substantial and private benefits that are only incidental as necessary, continues to pass constitutional muster under this Court's analysis of constitutionally permitted public uses?

In this regard, Amicus City of Detroit believes it is important that the Court first take note of the conceptual arrangements presently extant under some legislative vehicles declaring the preservation of jobs, tax base and other economic goals to be a public benefit and use. For

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example, the *BARA, MCL 125.71 et seq.* permits the condemnation of property pursuant to a development plan, and ultimately the transfer of that property by the City after acquisition consistent with the duly adopted development plan. *MCL 125.74* and *MCL 125.75.* The acquisition and transfer has been legislatively deemed a public purpose and use for benefit of the public. *MCL 125.75.*

Second, likewise, the EDCA also establishes a framework in which the Board of the EDC adopts a project plan. *MCL 125.1608* and *MCL 125.1609.* This project plan is subjected to public hearings before the EDCA's board, a citizens district council, and before the local legislative body – in the case of the City of Detroit – its City Council. *MCL 125.1610.* After the requisite findings have been made that the project plan is for public purposes and public use, the project is implemented. The State legislative scheme adopted under the EDCA expressly contemplates that the property is not transferred from the condemning authority (normally the municipality) directly to a private party. *MCL 125.1622.* Instead, the property is transferred to the EDC for transfer and use consistent with the duly adopted project plan. *MCL 125.1622.* The State Legislature has declared that the taking, use and transfer of property in accordance with the purposes of the EDCA and a duly adopted project plan "as necessary for public purposes and for the benefit of the public." *MCL 125.1622.*

Similarly, the *DDAA, MCL 125.1651 et seq.*, also provides for the acquisition and transfer of property for purposes and uses consistent with a duly adopted DDA plan. Like the process under the EDCA, the local municipality first creates a DDA (*MCL 125.1652* and *MCL 125.1653*), and then, on a project-by-project basis, adopts specific project plans for projects to be furthered by that DDA. *MCL 125.1664* and *MCL 125.1667.* DDA plans, like the EDCA

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plans, go through rigorous scrutiny by the DDA's board, a citizens district council, the public and the local legislative body. Only after hearing, evaluation and determination of whether the public benefits associated with the plan will be realized is it ultimately implemented. *MCL 125.1668* and *MCL 125.1669*. The State Legislature has declared, in this instance, that the taking, use and transfer of property consistent with these duly adopted project plans under the DDAA are "considered necessary public purposes and for the benefit of the public." *MCL 125.1660*.[10]

The *BRFA, MCL 125.2651*, sets up an approach and scheme that tracks and mirrors the schemes utilized under the EDCA and the DDAA.[11] A brownfield development authority is first created. *MCL 125.2653*. That brownfield development authority considers individual projects consistent with project plans proposed by the authority. *MCL 125.2663*. Those project plans are scrutinized by the brownfield authority's board and the public and the local legislative body. Only after it is determined that the benefits to be realized by the plan are indeed public if the plan is implemented. *MCL 125.2663* and *MCL 125.2664*. The legislature has declared that the taking, use and transfer of property consistent with the BRFA and a duly adopted project plan under the BRFA are "considered necessary for public purposes and for the benefit of the public." *MCL 125.2660*.

Within the context of these statutory frameworks, this Court's analysis should indeed track the analysis in *Poletown* and the step-by-step approach outlined in Section A above.

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[10]The Local Development Financing Act employs a very similar approach and makes the same findings. See *MCL 125.2151 et seq.* and specifically *MCL 125.2159*.

[11]The Legislature adopted this Act in 1996. Justice Cooley could not have anticipated the plethora of environmental issues that gave rise to this legislation.

There is a State Legislative finding that the acquisition, use and transfer of property consistent with these plans "constitute public purposes and are for the use and benefit of the public." Great deference should, in fact, be paid to this determination and the assertion of the local legislative body as to the public use of proposed acquisitions under these acts. In the words of *Poletown*, *citing Gregory Marina, supra* at 378 Mich 364, 396:

> The 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. *Poletown, supra* at 410 Mich 632.

The real question in these circumstances is not whether the transfer to a private party has ultimately driven the local legislative decision; the basic question is the constitutionality of the declaration of the State Legislature regarding the proposed acquisition, use and transfer under the relevant statutory scheme. The court should determine the deference to be paid to that legislative determination and declaration. As determined by the decisions of this Court, there is a sliding scale of deference afforded these legislative determinations with Federal legislative determinations receiving the most weight, State legislative determinations receiving considerable weight and ultimately, solely local legislative assertions of public use flowing from its general enabling statutes being relegated to a state of less deference by the courts. Irrespective of this first test (if there is a private benefit associated with the proposed use), the Court must assure itself that the public benefits are clear, significant and predominate and that the private benefit is only incidental.

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As discussed, *infra*, this second test is employed giving due deference to the legislative determination in light of which legislative body has made the determination. In *Berman v Parker*, great deference was paid to a Federal legislative determination. In *Poletown*, great deference was paid to a State legislative determination. In *Hawaii Housing Authority v Midkiff*, the United States Supreme Court re-affirmed that great deference should be paid to a State legislative determinations. In *Cincinnati v Vester*, deference was paid to a local legislative assertion of public use under the City's general police powers, but to a lesser extent than a State or Federal legislative determination.

2. *Poletown* Properly Identifies a Second General Test in Instances of Identifiable Private Benefit.

What *Poletown* says, without much fanfare, and with little recognition, is that even in the instance of a State or Federal legislative declaration of public use, the role of the courts is not foreclosed. The court, using the appropriate level of deference, given the nature of the legislative determination (Federal, State or local), assesses whether the public use as applied on a case-by-case basis and is in fact consistent with the statutory framework as the Court enunciated in *Poletown*:

> 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 a 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. 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 benefit to a private interest is merely incidental.

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> [If] the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project. The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefitted. Where, as here, the 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. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legislative purpose as stated by the legislature. We hold this project as warranted on the basis that its significance to the people of Detroit and the state has been demonstrated. *Poletown, supra* at 410 Mich 634 and 635.[12] (Emphasis added).

In an instance where the proposed project creates a private benefit, the court must ensure that the public benefit is clear and significant and not speculative and marginal. The court should look with heightened scrutiny for substantial proof that the public is primarily to be benefitted. The private benefit must be only incidental.

In cases before the appellate courts of this State, Justices have been correctly applying the deference test and the substantial proof and clear and significant public benefits test without ever clearly articulating the proper procedure and process. Therefore, in *Edward Rose Realty*, this Court, giving less deference to a local legislative assertion of public use in a City ordinance, overturned a condemnation action when it determined that the declared public

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[12]The City believes that heightened scrutiny is employed when it is clear that some private benefit is attached to the project. It does not mean that the alleged private beneficiary has to be specifically identified. Heightened scrutiny is employed to assess whether the public use and benefit is clear and substantial and not merely speculative and marginal, and whether the known private benefit is only incidental.

benefit was not clear and significant and the benefit to the private cable franchise was more than incidental.

In *Adell Trust*, giving less deference to a city's assertion of public use for the creation of what has normally been defined as a public use, a roadway, the Michigan Court of Appeals overturned an acquisition for construction of a road applying the historical public benefits analysis reiterated in *Poletown* and determining that the public interest was not the predominant interest being advanced and that the public benefit was more speculative and marginal than it was clear and significant. Therefore, it was determined that the private benefits of the proposed acquisition were not merely incidental to the asserted public benefits.

Notably, both of the foregoing decisions, like the instant case, involve judicial review of legislative determinations at a local level absent any express statutory assertion or declaration of public use associated with the proposed activity. These decisions establish a framework for review of such cases. For each case, using the requisite level of deference, the appellate courts or trial courts reviewing the action should determine whether any specific private benefit is only incidental to clear and significant public benefits to be realized from the project. This test is consistent with longstanding Michigan precedent and is not out of the ordinary. From this analytical perspective, *Poletown* affords a useful contribution and natural evolutionary step in the state judicial analytical framework and is not an ultra-liberal and ill-conceived decision. *Poletown* actually employed a very meaningful, thorough and conservative test and process for evaluating the public use question where there are incidental private benefits that flow from a particular project. The City agrees with Wayne County that

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this second test must be employed on a case-by-case basis where private benefit inures from a proposed acquisition.

This second level of inquiry that was noted in *Poletown* is not new. In fact, in *Cleveland v City of Detroit,* 322 Mich 172, 33 NW2d 747 (1948), the interface of the public use question and the incidental private benefit test are discussed:

> The question of whether the proposed use is a public use is a judicial one. We hold that use of property for terminals for defendant's street railway system is a public use. The use thus having been judicially determined to be public, the question of the necessity of acquiring certain property for that public use is one for a jury of freeholders. In acquiring property for public use it is not permissible for the city to take additional property not necessary for the public use for private purposes. However, condemnation proceedings for the acquisition of so much and no more property than is necessary for a permissible use will not be defeated by the mere fact that an incidental private benefit or use of some portion of such property will result. *Id* at 322 Mich 179.

In *Cleveland v Detroit*, it is interesting to note that the stated use was declared by a local legislative body, the then Detroit Common Council, under its general police powers. See *In accord Lakehead Pipeline Company v Dehn,* 340 Mich 25, 64 NW2d 903.

C. Does *MCL 213.23* or Other Authority Grant Wayne County the Authority to Acquire Property in this Instance?

The City is not in a position to look beyond the public benefits asserted in Wayne County's Resolution of Necessity. These benefits included jobs, the development of storm and sewer drains in the area and the development and improvement of public roadways. The County's Resolution referenced a number of statutory bases related to these stated purposes.

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The trial court, however, culled the statement of public use in the Resolution of Necessity down to four basic reasons:

> (i) creation of jobs for its citizens; (ii) the stimulation of private investment and redevelopment in the County to ensure a healthy and growing tax base so that the County can fund and deliver critical public services, *(sic)*; (iii) stemming the tide of disinvestment and population loss; and (iv) supporting development opportunities that would otherwise remain unrealized. *Trial Court Opinion* at p. 2, Plaintiffs-Appellants' Apx. 916a.

The County of Wayne has not asserted any statutory authority for this acquisition beyond *MCL 213.23*, and the general authority stated by Wayne County in its Resolution of Necessity. *MCL 213.23* has been debated at length in these proceedings and states as follows:

> Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act.

As literally written, this statutory provision does authorize condemnation activity for (1) public improvements (which are not at issue in these proceedings except for the drains and roadways attendant to the project)[13]; (2) for the purposes of its incorporation (which requires detailed review of the Charter of Wayne County and the enabling legislation of Wayne County

[13]Presumably all of the parties would concede that these are public uses.

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for a determination as to whether this condemnation is in fact for purposes of Wayne County's incorporation although record below seems to suggest that all parties concede that this is not the case); and (3) finally, for public purposes within the scope of its powers; all of which are modified by the concept that these things must be for the use and benefit of the public.

The trial court determined that Wayne County, as a governmental entity, did have an interest in the benefits that it determined at a local legislative level were going to be realized for the public benefit as a result of this project. The trial court also determined that these benefits were clear and significant and not speculative and marginal and that the Wayne County Commission properly asserted these benefits as public uses and public purposes. These uses, therefore, fell within the general health, safety and welfare of the citizens of Wayne County and Wayne County's inherent general police powers.

The next issue before this Court is whether this local legislative assertion of public use under its general police powers as established by Wayne County on the record below satisfies the test that the City submits should be applied because of the incidental private benefits that may ultimately surface. Wayne County certainly may assert that the benefits found in its resolution are authorized public uses under its general powers flowing from its enabling statutes. The deference afforded that assertion of public use is lesser than the deference afforded a Federal or State legislative declaration of public use in a statutory framework expressly authorizing the use of eminent domain for the purposes declared by Wayne County. If this Court finds that that assertion of public use falls squarely within the powers of the County and satisfies the test for assessing that public benefits are clear, significant and predominate and any private benefit is only incidental, Wayne County's acquisition should be

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upheld. The record below, at least as articulated by Wayne County, seems to substantiate that the public use is clear and significant and not speculative and marginal. However, the City of Detroit leaves the crafting of this argument to Wayne County given its involvement in presenting and preserving the record on this issue. The City asserts that under a proper analysis of the case law discussed above, the applicable test for evaluating the propriety of the County's action and determining the legality of its declaration of the public use in this case is *Edward Rose Realty*. *Poletown* merely reasserted the basic generic test for how the case-by-case decision is made where there is a known ancillary private benefit to the proposed project.

Arguments have been made that from a strictly textualist reading of the State and Federal Constitutions, that public use can only mean use by the public. However, as indicated throughout this Brief, the case law recognizes that public use has a temporal element to it that encompasses the conditions of society at the moment. Moreover, public use in this case, if measured on a purely textural basis, would include uses that had been validated at the time of the adoption of the *1963 Michigan Constitution*.

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D. In the Event That this Court, for Whatever Reason, Overturns *Poletown*, Should the Decision Be Retroactive or Prospective?

In *Pohutski v City of Allen Park,* 465 Mich 675, 641 NW2d 219 (2002), this Court stated as follows:

> We do not lightly overrule precedent. *Stare decisis* is generally "'the preferred course because it promotes the evenhanded predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual perceived integrity of the judicial process.'" *Robinson, supra* at 463, *quoting Hohn v United States,* 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998). Before we overrule a prior decision we must be convinced 'not merely that the case

> was wrongly decided, but also that less injury would result from overruling than from following it.' *McEvoy v Sault Ste. Marie,* 136 Mich 172, 178, 98 NW 1006 (1904). *Id* at 465 Mich 693 & 694.

This Court has expressed a natural reluctance at mindlessly overturning longstanding precedent because of the doctrine of *stare decisis.* This Court in *Pohutski* also went on to recognize circumstances where the court would digress from this general proposition of law. Citing *Robinson v City of Detroit,* 462 Mich 439, 613 NW2d 307 (2000), again, this Court noted as follows:

> In *Robinson, supra at 464*, we set forth four factors that we consider before overruling a prior decision: (1) whether the earlier case was wrongly decided, (2) whether the decision defies 'practical workability,' (3) whether reliance interest would work an undue hardship, and (4) whether changes in the law or facts no longer justify the questioned decision. In considering the reliance interest, we consider ' whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical - real world dislocations. *Id* at 465 Mich 694.

As set forth above, the City submits that *Poletown* was not wrongly decided. The detailed analysis articulated above establishes the framework for the proper and accurate evaluation of the *Poletown* decision and its place within the chain of precedent of Michigan eminent domain decisions. In light of all that has been said, *Poletown* was not wrongly decided. *Poletown* is being correctly applied and is creating the right results.

Poletown clearly does not defy practical workability. The analysis of the decisions that have faced the appellate courts and the trial courts since *Poletown*, illustrate that *Poletown* is workable. Without having clearly synthesized and articulated the proper procedure and

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approach to evaluating a case under *Poletown*, the appellate courts have routinely and consistently applied *Poletown* properly. Deference has been paid to legislative determinations in accordance with a sliding scale and hierarchy of deference accorded the various forms of legislative bodies making the declaration (Federal, State and local). Where private benefit has existed, despite the declaration of public use by a legislative body, the courts have applied heightened scrutiny and looked for substantial evidence that the public benefit is the clear and significant interest being advanced by the condemnation and that the private benefit is only incidental. In light of these facts, it can hardly be stated that *Poletown* defies practical workability.

The reliance question raises many issues in the context of *Poletown*. Does a retroactive reversal of *Poletown* eradicate all of the acquisitions of property that have occurred to date? If so, what impact does it have on the bonds issued for these projects? Does a retroactive eradication of *Poletown* mean that condemnations that are in process at the time of the decision require re-review or re-analysis even if a municipality has relied on existing precedent in undertaking the project? What impact will a retroactive reversal of *Poletown* have in the future on all of the existing statutory frameworks that served as a basis for various projects and decisions by the legislature going forward or that are currently about to be implemented? There is substantial reliance on the current precedent in *Poletown*, and it has been demonstrated above that the test of *Poletown* is consistent with Michigan precedent and is still viable. Does a retroactive decision of *Poletown* eradicate the EDCA, the DDAA, the BARA and the BRFA? Are the projects that were implemented pursuant to those statutes now invalid as a result of a retroactive application of *Poletown*?

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There are no changes in the laws or facts that justified the *Poletown* decision. Financial times are still hard. This Court can take judicial notice of this fact. It has been frequently noted in recent years that Michigan suffers substantially from economic malaise associated with its reliance on a declining manufacturing base for its economic survival. It has also been noted that there is an exodus of jobs from not only Michigan, but the United States. The facts that exist do not suggest that the decision of the trial court in this case, or from the Michigan Legislature's vantage point in the case of all of the statutory vehicles where it has asserted that economic development is a public use since the mid-1970s, should be abandoned. If anything, new ideas, new approaches, new creativity needs to be employed in assuring that economic freedom and opportunity maintains a firm foothold in the United States.

What has changed is that the economic engine has become more complex. Bolts, screws and nuts have been replaced with computers and modules and sophisticated electronic equipment that require a re-education of the workforce, a new understanding and new progressive tools (literally and figuratively) to assure the often sputtering urban economic engine at least starts from time to time. The ever-evolving realities of society are the things that the legislative branch is inherently designed to capture, evaluate and further. In the instant case, the economic development legislation extant continues to serve a valid, viable and realistic purpose in the American governmental landscape. Government is critical to economic survival. Economics, the economy and economic stimulus are now deeply interwoven into the fabric of the general health, safety and welfare of the public. The executive and legislative branches are duty bound as the branches of government that have the task of protecting it:

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> The public health and general welfare of the people of the State are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health. *1963 Const, art 4 § 51.* (Emphasis added).

These realities cannot be ignored. *Poletown* was a recognition of these realities and it should not be overturned lightly. Overturning *Poletown* today would not be correcting judicial legitimacy. It would be a retroactive decision that would effectively usurp legislative power. This decision should not be made lightly or on a record in which the statutory bases for economic redevelopment in the State are deemed unconstitutional without due consideration of the facts and circumstances of each statute in question. The record in *Hathcock* does not present that question. A readily available opportunity to second-guess the State Legislature on a question of public policy should not engender a reversal of *Poletown:*

> In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the bases of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison,* 5 US (1 Cranch) 137, 1777, 2 L Ed 60 (1803), that the duty of the judiciary is to assert what the law "is," not what it "ought" to be. *Terrien v Zwit,* 467 Mich 56, 66, 648 NW2d 602 (2002).

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Conclusion

Unlike *Pohutski*, there is no existing legislative fix in place today to address a retroactive reversal of *Poletown*. There may never be a viable legislative fix for a reversal of *Poletown*. What the Court would be doing in reversing *Poletown* would be asserting its role as both the governmental body responsible for evaluating the constitutionality of a legislative declaration of public use (a judicial function), while deciding that it is also the public body responsible for declaring public use (a policy and legislative function). The mixture of these two functions undermines the most basic notions of civil government and separation of powers inherent in the governmental framework of this country since the ratification of the United States Constitution. As this Court has noted, it is:

> ...bound by the clear and unambiguous statutory text; we lack constitutional authority to impose on the people of this state our individual policy preferences regarding the availability of lawsuits arising from the operation of a sewage system. We must 'seek to faithfully construe and apply those stated public policy choices made by the Legislature'... . *Pohutski, supra* at 690.

The City respectfully requests that *Poletown* not be reversed and that the issue of prospective or retroactive application not be addressed at this time. More importantly, the City asserts while much has been said about the notion of reversing *Poletown*, many appellate justices and commentators have called for its reversal, none have offered a viable alternative solution to the problems that gave rise to the decision. Criticism of one solution, without a constructive proposal as to a viable alternative solution, is generally useless. A reversal of *Poletown* without a constructive substitute would indeed create a vast abyss in the arsenal of both State and local governments wrestling with a more complex society and a myriad of

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problems its citizens face as a result of global economy and an ever-changing economic landscape in which the butterfly effect is all too real.

Respectfully submitted,

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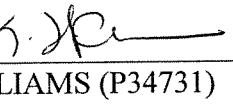
By: 

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