A MACKINAC CENTER REPORT

Heaphy v. Department of Environmental Quality

An Amicus Curiae Brief to the Michigan Supreme Court

Patrick J. Wright

A Mackinac Center "friend of the court" filing to the Michigan Supreme Court in a case involving a state regulatory taking of private land

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ABOUT THIS DOCUMENT: A BRIEF OF AMICUS CURIAE

On Oct. 23, 2006, the Mackinac Center for Public Policy filed a brief of amicus curiae* with the Michigan Supreme Court in the case *Heaphy v Dep't of Environmental Quality*. This case concerned three lots contiguous to Lake Michigan. Due to the enactment of the Sand Dune Management and Protection Act (SDMPA), the Michigan Department of Environmental Quality (DEQ) refused to allow the plaintiff owners to build a home on these lots. In the Mackinac Center's brief, Patrick J. Wright, the Center's Senior Legal Analyst, argues that when a regulation or law limits the use of property in a way that diminishes its value, the owner of that property is entitled to full compensation.

Plaintiffs acquired two of the beachfront lots before the enactment of the SDMPA and acquired the third lot after the enactment of the SDMPA. They also owned various other lots nearby, including two that are directly across the street.

At trial, it was determined that the value of the owners' three lakeside parcels was $1.7 million if they were allowed to build on these lots. But because the 1995 SDMPA prohibited building in "critical dunes" and plaintiffs' property was within such dunes, the property was economically worthless.

Both the trial court and the Michigan Court of Appeals applied the Michigan Supreme Court's 1998 *K & K Const, Inc v Dep't of Natural Resources case*, which adopted the federal takings model. Under this model, there are generally two types of takings: physical takings, and regulatory takings. Physical takings occur when the government takes full title to the property interest in question. Regulatory takings occur when the government leaves title in the name of the owner, but restricts the manner in which the owner may use the property. If that restriction leaves the property without any value, a "categorical taking" is said to have occurred, and the owner is entitled to compensation for the lost value. Where there is still some value in the property, the federal

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* "Amicus curiae" means "friend of the court." Thus, the Mackinac Center is not a litigant in *Heaphy v Dep't of Environmental Quality*, but rather an interested observer supplying additional legal reasoning for the Michigan Supreme Court to consider.

courts apply a multifactored balancing test to determine if any compensation is required. Thus, under the federal model, with noncategorical regulatory takings, it is possible for an owner to lose property value and not receive compensation.

The trial court found that under *K & K Const, Inc,* a categorical taking had occurred and that plaintiffs were entitled to the $ 1.7 million value lost due to the regulation. The Michigan Court of Appeals affirmed the trial court's ruling. The DEQ filed an application to the Michigan Supreme Court. In this application, the DEQ argued that the lower courts had improperly determined the "denominator parcel." This determination is a crucial step in the federal regulatory takings model, since the denominator parcel often establishes whether a taking is categorical, thereby leading to compensation, or non-categorical, which almost always means that no compensation is required.

The Center's brief does not discuss the methodology for determining the denominator parcel. Instead, the brief primarily focuses on whether the Michigan Supreme Court erred in adopting the federal takings model in *K & K Const, Inc.* The brief argues that the federal regulatory takings cases are contrary to Michigan's constitutional tradition of compensating for most diminutions in property value due to regulation. Neither the 1963 constitution nor Proposal 4, a 2006 constitutional amendment related to property rights, indicates the people of Michigan meant to abandon this tradition.

On Oct. 31, 2006, the Michigan Supreme Court denied leave to appeal, which has the practical effect of making the Michigan Court of Appeals decision controlling. Thus, plaintiffs were allowed to receive the $1.7 million award as compensation for the categorical taking. Although the property owner was compensated in this case, because the Michigan Supreme Court did not address the *K & K Const, Inc* case many Michigan property owners remain at risk from uncompensated regulatory takings.

EXECUTIVE SUMMARY

The United States Supreme Court's controversial 5-4 decision in *Kelo v New London*, a 2005 physical takings case where in the Supreme Court allowed the taking of homes so that they could be given to a private developer, has led to a judicial re-examination of property rights. Some courts have rediscovered John Locke and the prominent place of his ideas in our Founding Fathers' minds. Under Lockean theory, according to the U.S. Supreme Court, "[T]he purpose of the Takings Clause . . . is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" One contemporary scholar, Richard Epstein, in his 1985 seminal work "Takings: Private Property and the Power of Eminent Domain," used Lockean theory to criticize the holdings in many federal takings cases. In contrast to federal takings law, Michigan's traditional approach of compensating owners for diminution in value due to regulation is true to Locke.

In interpreting constitutional provisions, the Michigan courts look to the voters' common understanding at the time voters approved that particular provision; at issue in this case was art. 10, § 2 as it existed from 1963 to 2006.[†] In 1998, the Michigan Supreme Court issued the *K & K Const, Inc* decision, which adopted the federal regulatory takings model that often leaves property owners without compensation when regulations significantly diminish the value of their property. But the Michigan Supreme Court did not address the common-understanding doctrine. In two later takings cases, 2004's *Wayne County v Hathcock*, which addressed when a physical taking was for a public use, and 2003's *Silver Creek Drain Dist v Extrusions Div, Inc*, which addressed how to compute what constitutes just compensation, the Michigan Supreme Court applied the common-understanding doctrine. Proper application of the

[†] In the 2006 general election, the voters amended art. 10 § 2 to prevent physical takings abuse.

common-understanding doctrine indicates that *K & K Const, Inc* was improperly decided and should be overruled.

Hathcock is particularly instructive for understanding why *K & K Const, Inc* was improperly decided. In *Hathcock*, the Michigan Supreme Court was deciding whether to overrule its 1981 *Poletown Neighborhood Council v Detroit* decision, wherein the court had upheld the condemnation of an entire neighborhood so that an automobile plant could be constructed. The *Hathcock* court indicated that the *Poletown* court improperly relied on federal takings law to determine that such economic development takings were proper; instead, the proper focus should have been on Michigan history and Michigan case law, both of which showed a strong tradition of narrowly defining "public use" so as to protect property owners from physical takings abuse.

A similar history exists in regard to regulatory takings. Michigan has a long tradition, dating back to Justice Thomas Cooley, whom the Michigan Supreme Court has called the "patron saint of constitutional interpretation," of compensating for diminution in value that occurs when a property owner suffers a loss due to a regulation: As the law has developed since Cooley's time, the only type of regulations that might be exempted from this rule concern zoning. Justice Cooley stated:

> On the other hand, any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation. . . . So a partial destruction or diminution in value of property by an act of the government which directly and not merely incidentally affects it, is to that extent an appropriation.

Thus, *K & K Const, Inc* was improperly decided and should be overruled, so that Michigan can return to the Lockean tradition of providing compensation to owners when society devalues the owner's property for society's benefit. Lockean theory requires that the cost of the regulation be spread through society, not borne just by the property owner.

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JURISDICTIONAL STATEMENT

Amicus curiae does not contest jurisdiction.

STATEMENT OF QUESTION INVOLVED

Since this Court's most recent case on regulatory takings, *K & K Const, Inc v Dep't of Natural Res*, 456 Mich 570 (1998), improperly relies on federal precedent that diminishes property rights and impermissibly allows government on behalf of the public to shift the high costs of regulations and laws to a few individuals, this Court should examine the following question if leave to appeal were granted in this case: Does *K & K Const, Inc* violate the common understanding of art. 10, § 2 of the Michigan Constitution as articulated by Michigan Supreme Court Justice Thomas Cooley and by pre-1963 Michigan case law?

Amicus curiae's answer: Yes

Plaintiffs' answer: Unknown

Defendant's answer: Unknown

Minor changes were made to the original brief in the pages that follow. These changes correct small typographical errors and adjust the brief's page references to match the page numbers of this study.

INTRODUCTION

The trial court held that plaintiffs' three Lake Michigan beachfront lots were worth approximately $1,700,000 if plaintiffs would have been allowed to erect a home on them. But the elected representatives of the people of Michigan decided that it was important to prevent development on sand dunes and passed the Sand Dune Management and Protection Act (SDMPA), MCL 324.35301-26. This act made it unlawful for plaintiffs to build a home on their three beachfront lots, which made those lots financially worthless. The fundamental public policy question presented is who should bear the brunt of the loss. Should plaintiffs, who benefit only as much as any other Michigan citizen from protected sand dunes, pay the entire $1.7 million loss in value? Or should the cost of the $1.7 million be shouldered equally by all who benefit from the law and who, by enacting the law, took the plaintiffs' property?

The answer seems obvious; Michigan's citizens should not be able to enrich themselves through laws and regulations that diminish the value of an owner's property without paying for the cost of those regulations. But, as will become apparent below, Michigan's citizens are currently able to do just that, despite much Michigan case law to the contrary that predates 1963, a key date for determining the common understanding of the Michigan Constitution.

The public's clear revulsion to the United States Supreme Court's decision in *Kelo v New London*, 545 US 469, 125 SCt 2655 (2005), wherein the Supreme Court upheld the taking of homes so that private developers could acquire the land, has lead to a re-examination of the role of property rights in our system of government. For example, in *Norwood v Horney*, 853 NE2d 1115 (2006), the Ohio Supreme Court discussed natural law and John Locke before eventually deciding that Ohio's constitution does not allow economic development takings.[1]

[1] This re-examination is occurring not only in the courts, but is also being brought through the initiative process and by legislative

The Ohio Supreme Court specifically cited the Lockean

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action. Michigan's Proposal 4, a proposed constitutional amendment, is discussed below in footnote 3. The property rights issues being examined in the other states include both physical takings and regulatory takings.

On September 30, 2006, the voters in Louisiana approved a constitutional amendment (Act 851) that prohibits physical takings for economic development. *http://www.legis.state.la.us/billdata/streamdocument.asp?did=407125*.

In November 2006, the electors in the following states are will be voting on constitutional amendments that concern property rights. In California, Proposition 90, a citizen initiative, would both prevent economic-development physical takings and compensate property owners for regulatory takings. *http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf*. In Florida, House Joint Resolution 1569, would prevent a physical taking whereby the property was turned over to another private owner, unless a general law allowing such a transfer had been passed by 3/5s of both houses. *http://election.dos.state.fl.us/initiatives/fulltext/pdf/10-66.pdf*. In Georgia, House Resolution 1306 would require each individual taking be voted on by a legislative body. *http://www.legis.state.ga.us/legis/2005_06/pdf/hr1306.pdf* In Nevada, the citizens circulated a petition similar to California's Proposition 90, that concerned both physical takings and regulatory takings. Due to a statute that limited initiatives to a single subject, the Nevada Supreme Court struck the regulatory takings provisions and held that only the physical takings provision would appear on the ballot. *Nevadans for the Protection of Property Rights, Inc v Heller*, 141 P3d 1235 (Nev 2006).). *http://www.sos.state.nv.us/nvelection/2006BallotQuestionGuide.pdf* (question 2). In New Hampshire, Constitution Amendment Concurrent Resolution 30 was placed on the ballot by the legislature. It would prohibit physical takings that are for private development. *http://www.sos.nh.gov/concon-2006.htm* (question 1). In North Dakota, the voters initiated Measure 2, which would prohibit physical takings for economic development. *http://www.nd.gov/sos/electvote/elections/docs/initiated-constitutional-measure-2-text.pdf*. In South Carolina, the legislature proposed an amendment that would prevent physical takings for economic development. *http://www.scvotes.org/election_information/2006/08/07/2006_statewide_constitutional_amendments* (question 5).

There are also initiatives to amend state statutes related to property rights. In Arizona, Proposition 207 would prohibit some physical takings and require compensation for regulatory takings. *http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop207.htm*. In Idaho, Proposition 2 would prevent physical takings for economic development and require compensation for regulatory takings. *http://www.idsos.state*

theory set forth in Richard Epstein's seminal work *Takings: Private Property and the Power of Eminent Domain* (1985). Epstein noted that Locke believed that "individual natural rights, including rights to obtain and hold property, are not derived from the sovereign but are the common gift of mankind." *Id*. at 10. The common property that existed in a state of nature could be reduced to individual ownership as a reward for an individual's talent and labor. The need for a sovereign arises in order to prevent individuals from being in a constant state of war with each other; by forming a government, it becomes possible to resolve private disputes "in an impartial forum, free from personal bias and animosity." *Id*. at 9.

But Epstein notes that Locke, in contrast to Thomas Hobbes, did not believe the creation of a sovereign required an individual to surrender all of his natural rights to that sovereign and "the state itself does not furnish new or independent rights, qua sovereign, against the persons subject to its control." *Id*. at 12. Thus "a state must justify its claims in terms of the rights of the individuals whom it protects." *Id*. Epstein explains:

> The private rights of individual relationships are thereby preserved as much as possible even after the formation of civil society, modified only to secure the internal and external peace for which the police power is necessary. The sovereign is demystified; at every stage he is required to justify his own assertion of power. Every transaction between the state and the individual can thus be understood as a transaction between private individuals, some of

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.id.us/ELECT/INITS/06init08.htm. In Montana, Initiative 154 would prevent physical takings for economic development and require compensation for regulatory takings. *http://sos.mt.gov/ELB/archives/2006/I/I-154.asp*. In Oregon, Initiative 57 would prohibit physical takings that would benefit a private party. *http://www.sos.state.or.us/elections/irr/2006/057text.pdf*. In Washington, Initiative 933 would require compensation for regulatory takings. *http://www.secstate.wa.gov/elections/initiatives/text/I933.pdf*.

> whom have the mantle of sovereignty while others do not.

Id. at 12-13. Government, for public purposes, is allowed to take things from an individual, but that individual "must receive from the state (that is, from the persons who take it) some equivalent or greater benefit as part of the same transaction." *Id*. at 15. Epstein claims that it is in this spirit that the federal Fifth Amendment was enacted. It states in pertinent part "nor shall private property be taken for public use, without just compensation." All state constitutions are currently consistent with the basic Lockean design, since every state has some version of the eminent domain clause. *Id*. at 18.[2]

Michigan's current eminent domain clause is found in Const 1963 art 10, § 2, which states "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."[3]

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[2] In *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992), Justice Blackman noted in his dissent that while "there was an obvious movement toward establishing the just compensation principle during the 19th century," at the time of this country's founding, some of the states believed it was proper to take property without compensation. *See, id*. at 1056-57 (Blackman, J., dissenting).

[3] Proposal 4, which is before the electorate this November, would amend Const 1963, article 10, § 2 to read:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.
>
> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may

A review of the federal and Michigan case law reveals

> be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.
>
> In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.
>
> Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

Assuming that Proposal 4 were to become law, it appears that all of the changes were meant to apply to physical takings and that there would have been no intent to modify existing law on regulatory takings.

As will be discussed below, there is a strong argument that Michigan has a long legal tradition of recognizing diminution-of-value claims, which significantly overlap the arguments related to regulatory takings. If, as is suggested here, *K & K Const, Inc* failed to recognize that legal tradition, it should not be incumbent on the people to rectify this Court's mistake through a constitutional amendment.

This Court's jurisprudence regarding the doctrine of stare decisis underscores this point. In *Robinson v Detroit*, 462 Mich 439, 463 n. 22 (2000), this Court stated "the doctrine of stare decisis does not tie the law to past, wrongly decided cases solely in the interest of stability and continuity." Further, this Court rejected the argument that the Legislature can acquiesce in an improper judicial decision, "'legislative acquiescence' is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence." *Id*. at 465 n. 25. It is true that *Robinson* is a statutory construction case and that this case concerns constitutional interpretation, but that distinction should not lead to different results; in both cases it makes little sense to require either the people or their elected representatives to correct judicial mistakes. There are dozens of Michigan Supreme Court decisions each year and many more Michigan Court of Appeals decisions. It is not possible for the Legislature to correct all the perceived mistakes the courts make.

that the Lockean model has not been consistently followed. As the law currently stands, there are two general types of takings: (1) physical; and (2) regulatory. Physical takings are where the government takes physical possession of an individual property; *Kelo* was a physical takings case. In contrast, this case concerns a regulatory taking.

This Court stated that a regulatory taking occurs when the state takes a property for public use "by overburdening that property with regulations." *K & K Const, Inc v Dep't of Natural Res*, 456 Mich 570, 576 (1998). Regulatory takings are further broken down into two subcategories: (1) categorical takings "where the owner is deprived of 'all economically beneficial or productive use of land,' [*Lucas v South Carolina Coastal Council*, 505 US 1003, 1015 (1992)]," *K & K Const Inc*, 456 Mich at 576-77; and (2) "a taking recognized on the basis of the application of the traditional 'balancing test' established in [*Penn Central Transp Co v New York City*, 438 US 104 (1978)],")]," *K & K Const Inc*, 456 Mich at 577.

This Court explained that the first step in a taking analysis is determining the denominator parcel:

> Before we decide whether the regulations imposed on plaintiffs' property constitute a taking, we must first address an important preliminary matter. The first step in our analysis is to determine which parcel or parcels owned by plaintiffs are relevant for the taking inquiry. The determination of what is referred to as the "denominator parcel" is important because it often affects the analysis of what economically viable uses remain for a person's property after the regulations are imposed.

Id. at 578. The denominator parcel is based on the "'nonsegmentation' principle," which "holds that when

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Therefore, the fact that Proposal 4 does not address regulatory takings should not influence the decision whether *K & K Const, Inc* was correctly decided.

evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole." *Id.* This Court stated that courts should not "divide a single parcel into discrete segments and attempt to determine whether the rights in a particular segment have been entirely abrogated." *Id.* (quoting *Penn Central*, 438 US at 130).

This Court adopted a vague and amorphous test for determining the denominator parcel:

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.

Id. at 580 (quoting *Ciampitti v United States*, 22 Cl Ct 310, 318-19 (1991)).

The denominator-parcel approach is flawed, as the following example shows. Assume that A owns 10 acres, that B owns an adjacent 60 acres, and that each acre is worth $2000. The state then enacts a law which has the practical effect of prohibiting A from using any of his 10 acres, while that same law prohibits B from using 35 of the 60 acres of his land. A's denominator parcel will be 10 acres. His numerator parcel will also 10 acres; therefore, he has suffered a categorical taking and will receive $20,000 in compensation ($2,000/acre x 10 acres lost). With B, it is likely that his denominator parcel will be 60 acres. His numerator parcel is 35 acres. B has lost use of "only" 58.33% of his property. Therefore, despite the fact that his property has been diminished $70,000

in value, B will likely receive nothing, unless he is one of the fortunate few who receive an award under the federal courts' arbitrary *Penn Central* balancing test. The general public thus gets to shift $70,000 of the cost of the regulation to B, even though he is bearing more of the regulation's cost than A. This is particularly perverse if A is in fact much wealthier than B in both land and capital.

Vague and amorphous standards create a host of problems. For example, such standards expose members of the judiciary to the charge that they are manipulating the factors to achieve their desired political result. More importantly, those standards breed litigation. Both the property owners and the government will be able to find some case law that supports their respective best outcomes. Thus, both sides will be willing to both go to court and to file appeals. Further, as Epstein notes in discussing regulatory takings: "The courts that are unable — or unwilling — to demarcate clear principles of judgment are more likely to retreat into the frame of mind that allows the legislature free rein." Esptein, *Takings* at 103. But the protection of individuals against legislative whims is why both the federal and state eminent domain clauses were enacted.

Michigan has a long tradition of recognizing diminution-in-value claims, and there is ample case law to support a holding that such claims are recognized under the common understanding of art 10, § 2. *K & K Const, Inc* relies almost exclusively on federal law that postdates 1963. In *Wayne County v Hathcock*, 471 Mich 445 (2004), this Court overturned *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981), which erroneously relied on federal precedent to allow for economic development takings. In *Hathcock*, this Court held that the federal precedent was contrary to the common understanding of art 10, § 2. In *K & K Const, Inc*, common understanding was not discussed. If this Court were to grant leave to appeal, it should ask the parties and interested amici to brief whether the *K & K Const, Inc* holding properly reflects the common understanding of art 10, § 2.

STATEMENT OF FACTS

In 1913, a piece of property located in Ottawa County was platted. The platted property was named the First Addition to Port Sheldon Beach ("First Addition"). Immediately to the north of this property is a platted area known as Port Sheldon Beach ("PSB"). The lower courts have found that a categorical taking occurred when plaintiffs were not allowed to build a home on First Addition Lots 1-3, which are adjacent to Lake Michigan.[4]

Defendant's pertinent claim is that the lower courts should not have found a categorical taking. Defendant argues the lower courts should have considered additional properties that the plaintiffs own in the First Addition including (at least) lots 15-17, which are both immediately to the east of lots 1-3 and separated from lots 1-3 by Helena Ave. The inclusion of these lots would change the "denominator parcel," which would thereby prevent a finding of a categorical taking. To provide the proper context to this issue, a brief history of the plaintiffs' various ownership interests in both the First Addition and PSB is necessary.

In 1974, plaintiffs William and Anne Heaphy bought lot 132 in PSB. This purchase made them members of the Port Sheldon Beach Association ("Association"). The Association was created under the Summer Resort and Parks Association Act, MCL 455.1 et seq. Most of the Association's members were summer residents. Thus, it is only during the summer months that a quorum exists to do Association business.

In 1985, plaintiffs used their pension money to acquire 20 lots known as the "Swearinga property." According to plaintiffs, at that time there was "an ongoing effort by the Association to acquire undeveloped Association [property] and [other] nearby property to preserve and protect the property from development." Plaintiff's Plaintiffs' Response to Application for Leave to Appeal at 1. The Swearinga property

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[4] Plaintiffs' Response to Application, Appendix B, tab1 contains a useful map.

had come onto the market in the winter and Plaintiffs' intent was to hold the property until the Association could act to repurchase it in the summer of 1986. When plaintiffs acquired the property, the acquisition was with a grant giving the Association the right to purchase the property if plaintiffs' carrying costs and interest were paid. Plaintiffs contend "[t]he acquisition method had been utilized in the past with other undeveloped properties." *Id.*

The twenty-lot Swearinga property included First Addition Lots 1-2, 15-17, and 26-28. It also included PSB Lots 148-158. In the summer of 1986, plaintiffs sought to sell the Swearinga property to the Association. The members of the Association voted to approve the sale, but a successful legal challenge was filed by a dissenting member. At a later meeting to reconsider the purchase, those in favor of the purchase were one vote short of meeting the necessary two-thirds threshold.

Over the next decade, plaintiffs and the Association continued to negotiate. In 1995, while the negotiations were still ongoing, the Legislature passed the Sand Dune Management and Protection Act (SDMPA), MCL 324.35301-26, which placed limits on the development of "critical dune areas."

Plaintiffs and the Association reached an agreement in 1997, which was modified in 2000. Plaintiffs received PSB Lots 164 and 165, which are located across the street from their home in PSB (located on lot 132), along with First Addition Lot 3. In return, plaintiffs gave the Association PSB Lots 148-158. There was a no-development deed restriction placed on PSB Lots 164-165, and a restriction that allowed only a single home to be built on the combined First Addition Lots 1-3.

Plaintiffs then contracted to sell First Addition Lots 1-3, but on the contingency that a building permit could be obtained. In December 2001, plaintiffs filed an application with MDEQ for an exemption from the dune-protection

regulations. According to plaintiffs, this application included a mistaken reference to PSB Lot 166, which has never been owned by plaintiffs. Plaintiffs contend that application was only supposed to include First Addition Lots 1-3.

MDEQ denied the permit in part on the basis that a home did not need to be built on First Addition Lots 1-3 since a home could be built on PSB Lot 166. Plaintiffs began an administrative appeal and disclosed the erroneous inclusion of PSB Lot 166 at a prehearing and offered to reinitiate the application process. Defendant indicated that was unnecessary since plaintiffs owned PSB Lots 164-165; therefore, even though plaintiffs would not have included PSB Lots 164-165 in their application, MDEQ belief was that these lots constituted an alternative home site and building on First Addition Lots 1-3 was viewed as unnecessary. Therefore, MDEQ stated plaintiffs did not need to reinitiate the petition process, since MDEQ employees' believed MDEQ had a valid reason for denying the permit. At this time, MDEQ did not mention First Addition Lots 15-17. On January 9, 2003, MDEQ affirmed its rejection of plaintiffs' request to build on First Addition Lots 1-3.

An action was filed in the Court of Claims and was transferred to Ottawa Circuit Court. Ottawa Circuit Court Judge Calvin L. Bosman presided. Here, defendant for the first time claimed that First Addition Lots 15-17 could be considered part of the denominator parcel (as well as any other property that plaintiffs owned in the First Addition or PSB). On April 28, 2004, the trial court entered an opinion that held that under the SDMPA defendant properly denied plaintiffs' permit request. But Judge Bosman also held that First Addition Lots 1-3 constituted the denominator parcel, and that parcel had been taken in its entirety, which entitled plaintiffs to compensation since it constituted a "categorical taking."

On August 10, 2004, Judge Bosman entered an opinion that awarded plaintiffs $1,160,000 for First Addition Lots

1-2. No compensation was provided for First Addition Lot 3 because it was acquired after the passage of the SDMPA. Plaintiffs filed a motion for reconsideration regarding lot 3, since in *Palazzolo v Rhode Island*, 533 US 606 (2001), the United States Supreme Court had held that the fact that a regulation was enacted before an owner obtained the property in question does not prevent a taking claim. On September 15, 2004, Judge Bosman granted plaintiffs' motion for reconsideration. In light of *Palazzolo*, he held that plaintiffs could be compensated for First Addition Lot 3, despite the fact that plaintiffs acquired it after the enactment of the SDMPA. Plaintiffs' judgment was increased to $1,740,000 so as to include the value of First Addition Lot 3.

On April 18, 2006, the Court of Appeals affirmed. The Court of Appeals rejected MDEQ's argument that the denominator parcel should have included First Addition Lots 15-17:

> Lots 1-3 are properly regarded as the denominator parcel. In applying for a permit, these lots were joined together as a single parcel. Lots 15-17 were treated by plaintiffs as a separate building site. There is no question that were it not for the SDPMA, Lots 1-3 would constitute a separate, suitable building site having no connection to the other lots owned by plaintiffs, including Lots 15-17.

Slip opinion at 3.

On July 13, 2006, defendant filed the instant application. Plaintiffs responded. Defendant filed a reply, and plaintiffs filed a surreply.

ARGUMENT

In *K & K Const, Inc*, this Court wrongly adopted the federal regulatory-takings model. *K & K Const, Inc* should be reconsidered if this court grants leave to appeal.

A. Standard of Review

This Court reviews constitutional issues de novo. *County Road Ass'n v Governor*, 474 Mich 11, 14 (2005).

B. Merits

There are three main issues regarding takings: (1) what constitutes a taking; (2) what constitutes a public use; and (3) what constitutes just compensation. The current members of this Court have discussed the last two questions in *Hathcock* (the public-use question) and *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367 (2003) (the compensation question). In both of these cases, this Court looked to the common understanding of the disputed terms, whether "public use" or "just compensation." In both cases, this Court found that the terms were technical legal terms that should be interpreted in light of the meaning that those sophisticated in the law would have given those terms at the time of enactment. *Silver Creek*, 468 Mich at 376; *Hathcock*, 471 Mich at 470-71.

In *K & K Const, Inc*, in contrast, there was no discussion about the common understanding of those sophisticated in the law about whether regulatory takings are compensable and whether the denominator-parcel approach is appropriate. If this Court were to grant leave in this case, it should make the common understanding an explicit issue and solicit amicus briefs. The question of whether the general public or just a few unfortunate individuals should pay for the cost of regulations like the one at issue here is fundamental, and the question should be properly examined by this Court.

In order to understand the *K & K Const, Inc* opinion, a discussion of federal regulatory takings law is necessary.

Michigan case law, both before and after 1963, will then be discussed.

1. Federal law

In *Lucas*, the Supreme Court indicated that the genesis of the concept of regulatory takings occurred in *Pennsylvania Coal Co v Mahon*, 260 US 393 (1922):

> Prior to Justice Holmes's exposition in [*Pennsylvania Coal Co v Mahon*, 260 US 393 (1922)] it was generally thought that the Takings Clause reached only a "direct appropriation" of property, [*Legal Tender Cases*, 12 Wall 457, 551 (1871)], or the functional equivalent of a "practical ouster of [the owner's] possession," [*Transportation Co v Chicago*, 99 US 635, 642 (1879)]. See also [*Gibson v United States*, 166 US 269, 275-76 (1897)]. Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. [*Mahon*, 260 US at 414-15]. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." [*Id.* at 415]. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." [*Id.*]

Lucas, 505 US at 1014.

The *Lucas* court admitted that in considering the question of whether a particular regulation had gone "too far," the federal courts have generally engaged in "essentially ad

hoc, factual inquiries." *Id*. at 1015 (citing *Penn Central*, 438 US at 124).[5] *Penn Central* involved the question of whether the application of a New York City historical landmark law constituted a taking when that law was applied to prevent the construction of an office building atop Grand Central Terminal. The Supreme Court indicated that the following factors have "particular significance" in deciding whether there was a taking: (1) the economic impact of the regulation; (2) the extent to which the regulation interfered with investment-backed expectations; and (3) the character of the government action. *Penn Central*, 438 US at 124. The court rejected the claim that "diminution in property value, standing alone, can establish a 'taking.'" *Id*. at 131.

While noting that the majority of takings claims were decided on the *Penn Central* ad hoc basis, the *Lucas* court indicated it had "described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 US at 1015. The first, which is not at issue here, involve regulations that require an owner to suffer even minute physical invasions, like requiring apartment owners to allow cable lines to be laid. The second, which is at issue here, is a categorical taking.

A categorical taking was described as occurring "where regulation denies all economically beneficial or productive use of the land." *Id*. But the Supreme Court admitted that it had not solved the denominator-parcel issue:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would

[5] As a reminder, *Penn Central* was decided in 1978, which is, obviously, 15 years after Const 1963 art 10, § 2 became law.

analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme — and, we think, unsupportable — view of the relevant calculus, see [*Penn Central Transportation Co v New York City*, 366 NE2d 1271, 1276-77 (1977), aff'd, 438 US 104 (1978)], where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare [*Pennsylvania Coal Co v Mahon*, 260 US 393, 414 (1922)] (law restricting subsurface extraction of coal held to effect a taking), with [*Keystone Bituminous Coal Assn v DeBenedictis*, 480 US 470, 497-502 (1987)] (nearly identical law held not to effect a taking); see also [*id.*, at 515-20 (Rehnquist, C.J., dissenting); Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 SCalLRev 561, 566-69 (1984)]. The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

Lucas, 505 US at 1016 n. 7.

The majority in *Lucas* responded to dissenting Justice Stevens' claim that the categorical rule was arbitrary by noting that much of takings law is arbitrary in regard to which owners qualify for compensation:

> Justice STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary," in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." Post, at 2919. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. [*Penn Central Transportation Co v New York City*, 438 US 104 (1978)]. It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

Lucas, 505 US at 1019 n. 8.

In *Lucas*, Justice Stevens claimed that it was impossible to create a neutral system for defining the denominator parcel:

> As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction," ante, at 2894, n. 7, is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. "We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. . . . Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation. . . ." Michelman, Takings, 1987, 88 ColumLRev 1600, 1614 (1988).

Lucas, 505 US at 1054 (Stevens, J., dissenting) (footnote omitted).

In 2001, the Supreme Court decided *Palazzolo v Rhode Island*, 533 US 606 (2001), which concerned a landowner's claim that his property had been taken through the application of wetlands regulations. In that case, the Supreme Court discussed the purpose of the Takings Clause and the Lockean view of property. It also noted that it not been able to resolve the denominator-parcel issue.

The Supreme Court stated "the purpose of the Takings Clause. . . . is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 618 (citing *Armstrong v United States*, 364 US 40, 49 (1960)). The court then discussed whether a property owner who obtained a property after a potentially confiscatory regulation had been promulgated could maintain a takings claim, and it rejected a Hobbesian view in favor of a Lockean view:

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State.

> So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. See [*Pennsylvania Coal Co*, 260 US at 413] ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 US at 626-27 (citation omitted and emphasis added).

The Supreme Court recognized the difficulty inherent in determining denominator parcels, but it held that the denominator-parcel issue would not be decided because the plaintiff had failed to preserve the issue:

> In his brief submitted to us petitioner attempts to revive this part of his claim by reframing it. He argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv LRev 1165, 1192 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, e.g., [*Keystone Bituminous Coal Assn v DeBenedictis*, 480 US 470, 497 (1987)]; but we have at times expressed discomfort with the logic of this rule, see [*Lucas*, 505 US at 1016-17, n. 7] a sentiment echoed by some commentators, see, e.g., Epstein, Takings: Descent and Resurrection, 1987 SCt Rev 1, 16-17 (1987); Fee, Unearthing the Denominator in Regulatory Takings Claims, 61 U Chi LRev 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari.

Palazzolo, 533 US at 631.

Thus, under United States Supreme Court precedent, the concept of regulatory takings was recognized in 1924. The multifactored, ad hoc *Penn Central* test was created in 1978. In that same case, the U.S. Supreme Court held that a diminution of value alone could not constitute a

compensable taking. The concept of a categorical taking was formalized in the 1992 *Lucas* case. In order to determine whether a categorical taking has occurred, the courts need to decide what constitutes a denominator parcel. The *Lucas* majority admitted this was a vexing question, but deemed the issue irrelevant in that case because the regulation at issue meant that none of the landowner's property could be developed. In *Palazollo*, which was decided in 2001, the Supreme Court admitted that it still had not resolved the denominator issue. No United States Supreme Court case since then has solved the problem.

In *Lucas*, the Supreme Court recognized that it might be arbitrary that a person who lost 100% of the value of his or her property received compensation, while a person who lost 90% of the value of his or her property might receive nothing. But the *Lucas* majority noted that arbitrary results are a hallmark of takings law.

Thus, while paying lip service to the Lockean model, the federal courts have allowed a Hobbesian model to become ascendant. Under a Lockean model, the costs of a regulation to benefit the general public should not be borne by a select few individuals; rather, the costs should be distributed equally throughout society. But where arbitrary deprivations of individual rights are accepted, as in federal regulatory takings law, the Lockean model is not being followed, and the Hobbesian model predominates.

2. Michigan law

The last three Michigan constitutions have had a provision concerning takings. The 1850 constitution stated "The property of no person shall be taken by any corporation for public use, without compensation being first made or secured, in such manner as may be prescribed by law." Const 1850, art 15, § 9. The 1908 constitution stated "Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor

being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law." Const 1908, art 13, § 1. Again, the 1963 constitution states "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.

In *Hathcock*, a physical takings case, this Court's overturned the *Poletown* decision, stating that the *Poletown* court had improperly adopted federal case law that violated the common understanding of 1963 Const art 10, § 2. *Hathcock* concerned Wayne County's attempt to condemn, i.e. physically take, a number of properties for the "Pinnacle Project," a business and industrial park near Wayne County Airport. Applying the *Hathcock* model to regulatory takings, this Court may again need to overturn precedent — in this case *K & K Const, Inc*, which improperly adopted the federal regulatory-takings model. That regulatory-takings model is inconsistent with the common understanding of 1963 Const art 10, § 2.

In *Hathcock*, this Court stated: "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." 471 Mich at 468. This Court explained:

> This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification. But if the constitution employs technical or legal terms of art, "we are to construe those words in their technical, legal sense."

Id. at 468-69 (footnotes omitted, citing *Silver Creek*, 468 Mich at 375). This Court explained that the Michigan takings clause is highly technical: "we have held that the whole of art 10, § 2 has a technical meaning that must be discerned by examining the 'purpose and history' of the

power of eminent domain." *Hathcock*, 471 Mich at 470. Where there is a technical meaning related to the common understanding of a constitutional provision, the courts must "delve into [the] body of case law." *Id.* at 471.

In *Hathcock*, this Court paid particular attention to the views expressed by Justice Cooley, who was described as Michigan's "patron saint of constitutional interpretation." 471 Mich at 468 n. 48. Writing between the 1850 and 1908 constitutions, Justice Cooley discussed takings at length in his treatise *Constitutional Limitations* (5th ed, 1998).

He noted that "Every species of property which the public needs may require . . . is subject to being seized." *Id.* at 651. The government may take "legal and equitable rights of every description." *Id.* at 652. A taking occurs when any property interest passes from an owner:

> Nor would it be material to inquire what *quantum* of interest would pass from him: it would be sufficient that some interest, the appropriation of which detracted from his right and authority, and interfered with his exclusive possession as owner, had been taken against his will.

Id. at 658. Justice Cooley further discussed what constitutes a taking. First, he discussed things that were not compensable, such as when a turnpike company loses profits because a railway line is built "along the same general line of travel." *Id.* at 674. Then, Justice Cooley discussed what would entitle an owner to compensation:

> On the other hand, any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation. . . . So a partial destruction or diminution in value of property by an act of the government which directly and not merely incidentally affects it, is to that extent an appropriation.

Id. at 675-76 (emphasis added).

Justice Cooley explained the rationale for requiring compensation when an owner's property interest is taken:

> Eminent domain differs from taxation in that, in the former case, the citizen is compelled to surrender to the public something beyond his due proportion for the public benefit. The public seize and appropriate his particular estate, because of a special need for it, and not because it is right, as between him and the government, that he should surrender it. To him, therefore, the benefit and protection he receives from the government are not sufficient compensation; for those advantages are the equivalent for the taxes he pays, and other public burdens he assumes with the community at large. And this compensation must be pecuniary in its character, because it is in the nature of a payment for a compulsory purchase.

Id. at 693-94.

Justice Cooley indicated that the proper amount of compensation is the change in valuation:

> When, however, only a portion of a parcel of land is appropriated, just compensation may perhaps depend upon the effect which the appropriation may have on the owner's interest in the remainder, to increase or diminish its value."

Id. at 701.

There is considerable case law support for the proposition that takings short of a physical taking require compensation. In *Grand Rapids Booming Co v Jarvis*, 30 Mich 308 (1874), a tort case, this Court discussed whether a taking would occur when a property was flooded as a result of a government action:

> If the land of a riparian owner may be overflowed, and he may, for such purposes, be deprived

of its beneficial use and enjoyment, I confess I can see no reason why, upon the same principle, his land may not equally be used for the storing of logs upon it. It is a transparent fallacy to say that this is not a taking of his property, because the land itself is not taken, and he utterly excluded from it, and because the title, nominally, still remains in him, and he is merely deprived of its beneficial use, which is not the property, but simply an incident of property. Such a proposition, though in some instances something very like it has been sanctioned by courts, cannot be rendered sound, nor even respectable, by the authority of great names. Of what does property practically consist, but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as "the stuff that dreams are made of?" Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practicably valuable to him? And among the incidents of property in land, or anything else, is not the right to enjoy its beneficial use, and so far to control it as to exclude others from that use, the most beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents? This use, or the right to control it with reference to its use, constitutes, in fact, all that is beneficial in ownership, except the right to dispose of it; and this latter right or incident would be rendered barren and worthless, stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed,--of which we know nothing,-- but of those properties of mat-

> ter which can be rendered manifest to our senses, and made to contribute to our wants or our enjoyments.

Id. at 319-20.

In *Pearsall v Eaton Cnty Bd Supervisors*, 74 Mich 558 (1889), a landowner, Mrs. Pearsall, challenged a governmental decision to discontinue maintenance of a road. The landowner claimed that the discontinuation of that road would cause a diminution of the value of her property. This Court stated:

> The value of Mrs. Pearsall's property may have become very greatly enhanced by the location of her buildings and orchard where they are now situate, upon this road. Of this enhanced value she may become completely deprived by taking up this road, and, if so, she will be deprived of her property to that extent, and it will have been taken from her by the authorities for public use and necessity. Certainly on no other ground could she be deprived of such property rights. "The constitutional provision is adopted for the protection of and security to the rights of the individual as against the government," and the term "taking" should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto. In either of these cases it is a taking within the meaning of the provision of the constitution.

Id. at 561 (emphasis added).

In the "Address to the People," which explained the proposed changes from the 1850 constitution to the 1908 constitution, there was no indication that the convention

delegates proposed to fundamentally alter the law regarding takings. The 1908 Address to the People discussed the changes related to the proposed 1908 Const, art 13 § 1:

> This section is a substitute for Secs. 9 and 15, Art XV of the present constitution. The amendment consists in the insertion of the language "without the necessity therefore being first determined" and the requirement for "just compensation."

2 Proceedings & Debates, Constitutional Convention 1907, p 1585.

In *Allen v Detroit*, 167 Mich 464 (1911), a private owner had placed a restrictive covenant on a group of contiguous properties. The restriction allowed for the construction only of single-family residences. The city bought one lot and one-half of another one and set about to build a firehouse on that property. This Court construed the 1908 constitution and held that the city of Detroit could not destroy the property right (the building restriction) without compensation, even when the city was acting under its police power:

> Building restrictions are private property, . . . go with the land, <u>and</u> are <u>a property right of value, which cannot be taken for the public use without due process of law and compensation therefor</u>; the validity of such restriction not being affected by the character of the parties in interest.
>
> The contention that the city under its general police power may ignore this building restriction, and erect its fire engine house within the restricted district because it is necessary for the public good and to protect the lives and property of citizens in that locality, is not tenable. When such action deprives the individual of a vested right in property, it goes beyond regulation under police power, and becomes an act of eminent domain governed by the appropriate condemnation laws.

Id. at 473-74 (citations omitted and emphasis added).

In *Big Rapids v Big Rapids Furniture Mfg Co*, 210 Mich 158 (1920), this Court held that a landowner could recover for diminution of value related to the grade of a street being changed despite the fact that his property was not physically invaded. Citing *Pearsall*, this Court stated that "takings" should be construed broadly and that diminution of value constituted a proper legal claim.

In the 1962 "Address to the People," which explained the proposed changes from the 1908 to the 1963 constitution, there was no indication that the convention delegates proposed to fundamentally alter the law regarding takings. The 1962 Address to the People discussed the changes related to the proposed 1908 Const, art 10 § 2: "This is a revision of Sec. 1, Article XIII, of the present constitution which, in the judgment of the convention, is sufficient safeguard against taking of private property for public use." 2 Official Record, Constitutional Convention 1961, p 3403.

In *Thom v State*, 376 Mich 608 (1965), a plurality of the Michigan Supreme Court discussed what constituted a taking under the 1908 Constitution. At the time that *Thom* was decided, there were still eight Michigan Supreme Court justices, instead of the current seven. Justice Souris wrote the plurality opinion, which was joined by two other justices. Justice Kelly concurred in the result and did not write an opinion. Justice Black concurred in the result and wrote an opinion. Finally, Justice O'Hara, joined by two other justices, concurred in the result and wrote an opinion.

Thom concerned whether a farmer could receive compensation when a highway grade was changed. The change in grade made it dangerous for the farmer to operate his farm machinery. The farmer's case had been dismissed by the court of claims.

Justice Souris' plurality stated:

> [T]he term "taking" should not be used in an unreasonable or narrow sense. It should not be limited

> to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto. In either of these cases it is a taking within the meaning of the provision of the constitution. "A partial destruction or diminution in value is a taking." Mills, Em. Dom. § 30; *Grand Rapids Booming Co v Jarvis*, 30 Mich 308 [(1874)]. "If the public in taking any action which becomes necessary to subserve public use, and valuable rights of an individual are thereby interfered with, and damaged or destroyed, he is entitled to the compensation which the constitution gives therefor, and such damage or destruction must be regarded as a 'taking.'"

Id. at 612 (quoting [*Pearsall*, 74 Mich at 561-62]). Justice Souris' plurality indicated that it was impermissible for society to "benefit itself at the expense of an individual by failing to compensate him for damage done to him in order to procure society's benefit." *Id.* at 623. It stated "If the work is of great public benefit, the public can afford to pay for it." *Id.* (citation omitted).

The concurring opinions did not contain any criticism of the plurality's view of what constitutes a taking. Instead, the main point of contention was whether a particular precedent needed to be overruled (the plurality's view) or was factually distinguishable (the concurring opinions' view).

Thus, both before 1963 and in the years immediately following it, there is ample case law indicating that diminution of value leads to a takings claim. It must be admitted, however, that this was not the rule in all cases. Regarding zoning, for instance, this Court has held that diminution in value does not necessarily lead to a compensable takings claim.

In *Scholnick v Bloomfield Hills*, 350 Mich 187 (1957), a property owner challenged a zoning ordinance that allegedly diminished the value of his property from $100,000 to $50,000. The property owner did not seek compensation for the difference; rather, he sought an injunction against the enforcement of the ordinance. This Court held that the zoning ordinance was a valid exercise of the police power and could be enforced.

In *Robinson v Bloomfield Hills*, 350 Mich 425 (1957), property owners brought suit to build an office building on a lot that was zoned as residential. This Court held that the regulation was proper and did not constitute a taking:

> One of plaintiffs' witnesses testified that the office building site was worth $32,400 for commercial use but only $15,000 for multiple dwelling use. . . . It is urged . . . that "such zoning is confiscatory," that it is unreasonable, and that the property is not being put to its best use. Disparity in values between residential and commercial uses will always exist. In the leading case of [*Village of Euclid, Ohio v Ambler Realty Co*, 272 US 365 (1926)] Mr. Justice Sutherland, in upholding the ordinance, noted that the property involved was worth about $10,000 per acre for industrial use, as compared with $2,500 per acre for residential use. If such a showing serves to invalidate an ordinance the efforts of our people to determine their living conditions will be hopeless. To avoid 'confiscation' in this sense (the obtaining of the highest dollar for one particular lot) will result in confiscation of far greater scope in property values in the municipality as a whole due to its inability to control its growth and development.

Id. at 433-34.

Post-1963 case law also supports an argument that losses due to zoning regulations are not compensable. In *Bevan v Brandon Twp*, 438 Mich 385 (1991), a property

owner challenged a zoning restriction related to the need for a right of way of a particular width. This Court discussed regulatory takings and zoning:

> Zoning laws are a classic example of regulation that may amount to a "taking," if application "goes too far" in impairing a property owner's use of his land. [*Mahon*, 360 US at 415]. Generally speaking, however, zoning regulation has been upheld where it promotes the health, safety, morals, or general welfare even though the regulation may adversely affect recognized property interests. As the United States Supreme Court has explained, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id*. at 413.

Bevan, 438 Mich at 390-91. This Court then broadened the discussion to include all land-use regulations (not just zoning), and it intimated that a property owner is only entitled to compensation when the regulation leaves no economically viable use of the land:

> The [U.S.] Supreme Court has declared that "land-use regulation does not effect a taking if it "'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" [*Nollan v California Coastal Comm*, 483 US 825, 834-85 (1987), citing *Agins v Tiburon*, 447 US 255 (1980)]. Although the Supreme Court has provided little guidance regarding what it considers a legitimate state interest and the type of connection required between that interest and the regulation, [*Nollan*, 483 US at 834], it has made clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains. [*Keystone*

> *Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 497 (1987)].

Bevan, 438 Mich at 391. This Court held that the *Bevan* plaintiffs' two lots would both be considered, i.e. would not be segmented, in determining whether any value remained. This Court stated "we conclude that plaintiffs' land, and the full bundle of property rights associated with it, must be viewed in its entirety." *Id*. at 397. Citing *Penn Central*, but not any Michigan cases, this Court also rejected a claim based on diminution of value:

> The United States Supreme Court has ruled that a mere diminution in property value which results from regulation does not amount to a taking, [*Penn Central*, 438 US at 131], and that a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned.

Bevan, 438 Mich at 402.

This Court's reliance on federal case law, particularly federal case law that postdated 1963, continued in *K & K Const, Inc*, which was a wetlands case, not a zoning case. This distinction is relevant, since the concept of zoning predates 1963, while both wetlands regulation (the issue in *K & K Const, Inc*) and sand dune regulation (the issue in the instant case) came into existence after 1963. As noted above, the Sand Dune Management and Protection Act was enacted in 1995. The current wetlands statutes, MCL 324.30301 et seq, were enacted in 1995; the prior versions of the wetlands laws, MCL 281.701 et seq (repealed in 1995), were enacted in 1970.

There is some support for an argument that zoning regulations are noncompensable under the common understanding regarding art 10, § 2. But even if that is the case, a point that is not conceded, it does not necessarily follow that these newer types of regulation are also noncompensable.

In *K & K Const, Inc*, this Court intimated that the takings analysis under both the U.S. Constitution's Fifth Amendment and the Michigan constitution's art 10, § 2 is the same. *K & K Const, Inc*, 456 Mich at 576-77. This Court accepted the federal regulatory takings framework that was developed after the 1978 *Penn Central* case. There was no analysis regarding the common understanding of art 10, § 2. This Court adopted the test from the 1991 *Ciampitti v United States* case, a federal court of claims decision, for determining the denominator parcel.

This Court's recent *Hathcock* decision, which concerned physical takings, highlights the flaw in the *K & K Const, Inc* court's assumption that takings analysis under the federal and Michigan constitutions is indistinguishable.

Hathcock was concerned with the propriety of a use of eminent domain that allowed private property to be taken from one private party and given to another. The stated "public use" was that the new private owner would put the property to a better economic use, which would lead to more jobs being created and to enhanced tax revenue for the municipality. This Court began by noting that while there may have been at one time an absolute bar preventing condemned property being transferred to private entities, by 1963 that was no longer the case.

This Court recognized three categories where condemned property could be transferred to a private entity:

> (1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.

Hathcock, 471 Mich at 476. But the fact that some transfers

to a private entity were permissible did not make all such transfers permissible. This Court held that economic development is not a public use and thus does not justify the transfer of condemned property to a private entity.

In making this ruling, this Court overturned a 23-year old precedent, *Poletown*, that had relied on federal case law. *Poletown* accepted the federal model first articulated in *Berman v Parker*, 348 US 26 (1954), that courts should defer to almost any legislative determination that a taking is for a public use. In *Hathcock*, this Court stated that the *Poletown* Court's reliance on *Berman* was "disingenuous." *Hathcock*, 471 Mich at 480. While also rejecting the holding of a Michigan Supreme Court plurality decision, this Court in *Hathcock* indicated that it was not bound to mirror federal interpretations of the Fifth Amendment when construing art 10, § 2:

> The majority derived this principle from a plurality opinion of this Court [*Gregory Marina, Inc v Detroit*, 378 Mich 364 (1966)] and supported the application of the principle with a citation of an opinion of the United States Supreme Court [*Berman*] concerning judicial review of congressional acts under the Fifth Amendment of the federal constitution. Neither case, of course, is binding on this Court in construing the takings clause of our state Constitution, and neither is persuasive authority for the use to which they were put by the *Poletown* majority.

Hathcock, 471 Mich at 479-80.

Having rejected the federal model that courts should defer to almost any legislative claim that a taking is for a public use, this Court addressed the specific question of whether economic development takings were permissible. Relying in large part on Justice Cooley, this Court held that such takings were not a public use.

This Court also made its decision retroactive, despite the reliance that Wayne County had put on *Poletown*. Because

property rights are so fundamental, correcting past judicial missteps like *Poletown* must occur immediately:

> In the process of determining that the proposed condemnations cannot pass constitutional muster, we have concluded that this Court's *Poletown* opinion is inconsistent with our eminent domain jurisprudence and advances an invalid reading of our Constitution. Because that decision was in error and effectively rendered nugatory the constitutional public use requirement, it must be overruled.
>
> It is true, of course, that this Court must not "lightly overrule precedent." But because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule *Poletown* in order to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor — not creator — of fundamental law.
>
> In the twenty-three years since our decision in *Poletown*, it is a certainty that state and local government actors have acted in reliance on its broad, but erroneous, interpretation of art 10, § 2. Indeed, Wayne County's course of conduct in the present case was no doubt shaped by *Poletown*'s disregard for constitutional limits on the exercise of the power of eminent domain and the license that opinion appeared to grant to state and local authorities.
>
> Nevertheless, there is no reason to depart from the usual practice of applying our conclusions of law to the case at hand. Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution

> since it took effect in 1963. Our decision simply applies fundamental constitutional principles and enforces the "public use" requirement as that phrase was used at the time our 1963 Constitution was ratified.
>
> Therefore, our decision to overrule *Poletown* should have retroactive effect, applying to all pending cases in which a challenge to *Poletown* has been raised and preserved.

Hathcock, 471 Mich at 483-84 (footnotes omitted).

Like *Poletown*, *K & K Const, Inc* fundamentally altered the common understanding of art 10, § 2. According to Justice Cooley and pre-1963 case law, diminution-of-value claims were proper under Michigan law. This prevented the government from shifting the high costs of laws and regulations to a select few individuals, which is in line with the Lockean view of property rights. It may (or may not) have come to pass that an exception for zoning regulation became part of the common understanding. But that does not mean that any regulation that diminishes the value of a property is now noncompensable. In 1963, there was no such thing as a sand dune protection regulation or a wetlands protection regulation in Michigan law, while in contrast, there clearly was a common understanding that compensation was required for nonzoning diminutions of property value. If this Court is to honor "fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence leading up to the 1963 Constitution," it should analyze whether *K & K Const, Inc* properly reflects the common understanding of art 10, § 2.

In *K & K Const, Inc*, just as in *Poletown*, this Court accepted a flawed federal model that diminishes the rights of Michigan property owners. In *Hathcock*, this Court corrected its 23-year error. *K & K Const, Inc* was nine years ago; Michigan property owners should not have to wait another 14 years for *K & K Const, Inc* to be corrected.

RELIEF REQUESTED

For the reasons stated above, amicus curiae requests that if leave to appeal is granted, this Court consider the question of whether *K & K Const, Inc* properly reflects the common understanding of art 10, § 2 and solicit amicus briefs on this issue.

Dated: October 23, 2006

Respectfully submitted,

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Patrick J. Wright is senior legal analyst at the Mackinac Center for Public Policy, where he directs the Legal Studies Project. He joined the Center in June 2005 after serving for three years as a Michigan Supreme Court commissioner, a post in which he made recommendations to the court concerning which state appeals court cases should be heard. His writings for the Center have appeared in The Wall Street Journal, The Washington Times, The Detroit News and a variety of other newspapers.

Prior to his work with the Michigan Supreme Court, Wright spent four years as an assistant attorney general for the State of Michigan, where he gained significant litigation and appellate advocacy experience. He joined the state Attorney General's Office after one year as a policy adviser in the Senate Majority Policy Office of the Michigan Senate. Wright also spent two years as a law clerk to the Hon. H. Russell Holland, a U.S. district judge in Alaska.

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