A MACKINAC CENTER REPORT

DPG York v. Michigan

An Amicus Curiae Brief to the Michigan Court of Appeals

Patrick J. Wright

A Mackinac Center "friend of the court" filing to the Michigan Court of Appeals in a case involving the preferential sale of state land

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ABOUT THIS DOCUMENT: A BRIEF OF AMICUS CURIAE

On Jan. 12, 2006, the Mackinac Center for Public Policy filed a brief of amicus curiae* with the Michigan Court of Appeals in the case DPG York v. Michigan. The legal dispute concerns Public Act 326 of 2004, a law that authorized the sale of a 690-acre state property that was once the site of the Ypsilanti State Hospital. In the Mackinac Center's brief, Patrick J. Wright, the Center's senior legal analyst, argues that the legislation violates the separation-of-powers and due-process clauses of the Michigan Constitution.

The terms of Public Act 326 are unusually broad, especially compared to the procedures originally established for selling the land under a state law passed in 2002. The 2002 legislation required competitive bidding for the property, and pursuant to that provision, DPG York LLC, a group of Michigan developers, offered $25 million for the land, outbidding their only competitor, Toyota Technical Center USA, which offered $9 million. A state appraisal at the time suggested the property's market value was $11.9 million.

The state accepted neither bid, however, and when the governor and the Legislature passed Public Act 326, they permitted the sale of the land through an open-ended grant of power to the State Administrative Board and the Department of Management and Budget. The new legislation did not require competitive bidding and provided no restrictions on the criteria to be applied by executive branch officials in determining to whom the property would be sold. The state subsequently entered into negotiation with Toyota Technical Center USA and ultimately awarded the property to the firm for $11 million, according to a state Web site.

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* "Amicus curiae" means "friend of the court." Thus, the Mackinac Center is not a litigant in DPG York v. Michigan, but rather an interested observer supplying additional legal reasoning for the Michigan Court of Appeals to consider.

Mackinac Center policy analysts recognized the state's approach to this sale to be unsound public policy (see "Additional Research" on Page 25). The state's actions not only deprived taxpayers of at least $14 million to $16 million in revenue at a time of state budget shortfalls,[†] but sent entrepreneurs the message that high-profile competitors would receive preferential treatment in the conduct of state business. Such a disincentive to general business investment is counterproductive, especially given Michigan's ailing economy.

But Public Act 326 was also dubious on legal grounds, and when it was being passed by the Legislature, DPG York filed suit. The Mackinac Center submitted its amicus curiae brief after the Michigan Supreme Court, specifically citing the case Westervelt v. Natural Resources Commission, remanded the case to the Michigan Court of Appeals for further consideration.

The Center's brief[‡] focuses particularly on the lead opinion in Westervelt and argues that Public Act 326 violates core clauses of the Michigan Constitution (see "Executive Summary" below). Wright requests that the court declare the act unconstitutional, noting that under such a ruling, the land would remain with the state until the Legislature and the governor passed new legislation for administering the sale.

[†] Toyota Technical Center USA also received mineral rights to the land, something DPG York did not request. Moreover, Public Act 326 stipulated that the Legislature would cover the costs of environmental cleanup and any litigation involved in conveying the land, such as the cost to the state of the current lawsuit. Neither of these costs would likely have been borne by the Legislature if the state had accepted DPG York's original bid.

[‡] Small typographical errors in the original brief have been corrected in the pages that follow. The edited text is inserted in braces ("{" and "}").

EXECUTIVE SUMMARY

In Public Act 326 of 2004, the Michigan Legislature granted broad authority to the State Administrative Board and the Department of Management and Budget to sell the former site of the Ypsilanti State Hospital. This delegation of the Legislature's power was, in fact, unconstitutional under the conditions stated in the lead opinion of the 1978 Michigan Supreme Court case Westervelt v. Natural Resources Commission, a ruling cited specifically by the Michigan Supreme Court in its order to the Michigan Court of Appeals to reconsider DPG York v. Michigan.

The Westervelt lead opinion posited a two-part test for the constitutionality of a delegation of legislative authority:

> (1) The authorizing legislation must contain "standards … as reasonably precise as the subject matter of the legislation 'requires or permits.' " Failure to provide such standards would produce a delegation of legislative authority to an executive agency in violation of the Michigan Constitution's requirement of a separation of powers between the branches of government.
>
> (2) The authorizing legislation must provide safeguards "assuring that the public will be protected against potential abuse of discretion at the hands of administrative officials." The absence of such safeguards violates the Michigan Constitution's "due process clause," which protects citizens, businesses and organizations from arbitrary exercises of government power.

Public Act 326 satisfies neither part of the Westervelt test:

> (1) The act violates the separation-of-powers component by providing only general criteria that the State Administrative Board and the Department

of Budget "may consider" in the course of the sale, but need not follow. Despite the absence of binding standards, the act further welcomes the SAB and the DMB to determine the "best interests of the state" — a patently legislative function.

(2) The act fails to protect due process, since no legislative checks, provisions of the Administrative Procedures Act or other due-process safeguards restrain the SAB and the DMB in their dealings with potential buyers. Indeed, rather than discouraging administrative favoritism, the act openly invites it, allowing the SAB and the DMB to award the land to a bidder through one-on-one negotiations and to approve the sale without considering competing bids or the appraised value of the land.

The Michigan Court of Appeals should declare the act unconstitutional.

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Amicus curiae does not contest jurisdiction.

STATEMENT OF QUESTION INVOLVED

Did the Legislature fail to provide sufficient standards and safeguards in its delegation of legislative power to the State Administrative Board and the Department of Management and Budget in PA 2004 326, thereby rendering the act unconstitutional?

- Plaintiffs'/Appellees' answer: Yes.
- Defendants'/Appellants' answer: No.
- Trial Court answer: Yes.
- Amicus curiae answer: Yes.

STATEMENT OF FACTS

This case concerns the State of Michigan's attempt to sell the land that is the former site of Ypsilanti State Hospital. The Legislature has enacted two statutes authorizing the sale of the disputed property. The first was 2002 PA 671, which directed the State Administrative Board (SAB) to sell to the highest bidder if it chose to sell the property. The state subsequently put the property up for sale and received two bids: one from appellee DPG York LLC, and the other from Toyota Technical Center, USA. DPG York claims that its bid was $25,000,000, and that Toyota's bid was $9,000,000.

The state Department of Management and Budget (DMB) decided to reject both bids. Afterward, the Legislature eventually enacted 2004 PA 326, which repealed 2002 PA 671 and gave unlimited discretion to the SAB and the DMB

to sell the property to any entity. According to the DMB Web site, the state has since agreed to sell the land to Toyota for $11,000,000.

DPG York filed the instant suit days before 2004 PA 326 was enacted. Originally, the sole cause of action was a writ of mandamus. DPG York sought to force the state to accept the bid that the firm had made under the criteria of 2002 PA 671. After 2004 PA 326 was enacted, DPG York added various constitutional claims, including an allegation that the new act was unconstitutional because it was an improper delegation of legislative power.

The sole claim still at issue in this case is whether 2004 PA 326 improperly delegates legislative authority.[1] If this Court were to rule in favor of DPG York, the $11,000,000 State of Michigan-Toyota agreement would be void, and the land would remain with the state. The Legislature would then need to enact new legislation in order to sell the property.

This case was assigned to Ingham Circuit Judge Draganchuk, who held a hearing on January 10, 2005. She dismissed all of DPG York's claims against the state parties except for the claim that 2004 PA 326 was an improper delegation of legislative power.

The state parties filed an interlocutory appeal seeking a peremptory reversal. On February 15, 2005, this Court entered a short order reversing Judge Draganchuk's ruling that the improper delegation claim could proceed. DPG York then filed an application for leave to appeal to the Michigan Supreme Court, and on December 28, 2005, the Michigan Supreme Court remanded the action to this Court to consider whether "among other issues to be addressed," 2004 PA 326 "affords due process protection against unnecessary and uncontrolled discretionary power." In this remand order, the Michigan Supreme Court cited *Westervelt v Nat Resources*

[1] The other claims have all been resolved.

Comm'n, 402 Mich 412; 263 NW2d 564 (1978), and *State Highway Comm'n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974) as precedents to be considered by this Court.

Pursuant to the Michigan Supreme Court's order, this Court set forth an expedited briefing schedule, and this Court is supposed to enter its decision by February 13, 2006.[2]

ARGUMENT

In *Westervelt*, the lead opinion stated that all delegation legislation must satisfy a test with two components: a separation-of-powers {component}, which requires that the legislation provide sufficient standards to regulate an executive agency's conduct; and a due-process component, which is meant to limit the opportunities for administrative favoritism. 2004 PA 326 simply states that the State Administrative Board and the Department of Management and Budget "may" sell the disputed property if that sale is in the "best interest of the state." The statute is both without meaningful standards and an invitation to favoritism. It is therefore unconstitutional.

A. Standard of Review

The constitutionality of a legislative act is a question of law that is reviewed de novo. *DeRose v DeRose*, 469 {Mich} 320, 326; 666 NW2d 636 (2003).

[2] The Michigan Supreme Court's December 28, 2005 order required that this Court's decision be entered within 45 days of December 28, 2005. This deadline for the decision would be February 11, 2006, but this date falls on a Saturday, so the effective date is February 13, 2006.

B. Merits

1. The Two-Part Test of the *Westervelt* Lead Opinion

Const 1963, art 4, § 1 declares, "The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 3, § 2 states, "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." This separation-of-powers proposition seems to be straightforward, yet the courts have had difficulty in determining what constitutes legislative power and how much discretion is afforded a body to which the Legislature has delegated legislative power. In the Michigan Supreme Court's remand order in the instant case, the order specifically cited the lead opinion in *Westervelt,* which strongly implies that the Michigan Supreme Court accepts the two-part test expressed in the *Westervelt* lead opinion. Aside from the Separation of Powers Clause, this test also involves the Due Process Clause.[3] This test requires that in order for legislation that delegates legislative powers to be constitutional, the legislative language must contain "standards * * * as reasonably precise as the subject matter of the legislation 'requires or permits,'" and it must provide safeguards "assuring that the public will be protected against potential abuse of discretion at the hands of administrative officials." 402 Mich at 444-45.[4] The standards question is the

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[3] The Due Process Clause is located at Const 1963, art 1, § 17.

[4] *Westervelt* was a 3-3 opinion. All six participating justices held that the delegation was not improper. The three-justice lead opinion stated that the delegation challenge has both a separation-of-powers component and a due-process component, while the remaining three indicated that the sole test was the standards test — i.e., only the separation-of-powers component. As noted above, the Michigan Supreme Court's citation of the lead opinion in the remand order strongly suggests that the Court considers the lead opinion and its two-part test to be controlling in this case.

separation-of-powers component, while the safeguards question is the due-process component. Under either component, 2004 PA 326 does not pass constitutional muster.

2. Guidelines From Two Recent Cases: *Taylor* and *Blank*

The Michigan Supreme Court has explored the nondelegation doctrine in two of its recent decisions. While neither of these cases is perfectly analogous to the instant case, the two rulings provide some useful guidelines.

The nondelegation doctrine was discussed at length in *Taylor v Smithkline Beecham Corp*, 468 Mich 1; 658 NW2d 127 (2003). The Michigan Supreme Court gave a general description of the nondelegation doctrine:

> A simple statement of this doctrine is found in *Field v Clark*, 143 US 649, 692; 12 S Ct 495; 36 L Ed 294 (1892), in which the United States Supreme Court explained that "the integrity and maintenance of the system of government ordained by the Constitution" precludes Congress from delegating its legislative power to either the executive branch or the judicial branch. This concept has its roots in the separation of powers principle underlying our tripartite system of government. Yet, the United States Supreme Court, as well as this Court, has also recognized "that the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches." *Mistretta v United States*, 488 US 361, 371; 109 S Ct 647; 102 L Ed2d 714 (1989).

The *Westervelt* lead opinion refers to its test as the "standards test." But other courts use that same title for a test that does not contain a due-process component. To avoid confusion, the *Westervelt* lead opinion's test will be referred to as such, or it will be referred to as "the two-part test."

Id. at 8 (footnotes omitted). The Michigan Supreme Court explained that there are two general types of nondelegation claims. One type was the claim at issue in *Taylor*, where the Legislature premised government action on findings by an independent body (the U.S. Food and Drug Administration in that case). *Id.* at 10.[5] The other type is the claim at issue in the instant case, where a delegation of legislative power has been made to a state agency or department.

In *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000), the Michigan Supreme Court discussed the constitutionality of the Joint Committee on Administrative Rules (JCAR), a legislative committee. JCAR was created to ensure that the Legislature approved of all rules being promulgated by the agencies. Unless approved by JCAR or the Legislature itself, the rules in question could not be implemented. The lead opinion in *Blank*, which was authored by Justice Kelly and signed by Justices Corrigan and Young, described the question presented:

> The Legislature's statutory delegation of authority to executive branch agencies to adopt rules and regulations consistent with the purpose of the statute does not violate the separation of powers provision. The issue here is whether the Legislature, upon delegating such authority, may retain the right to approve or disapprove rules proposed by executive branch agencies.

Id. at 113. The lead opinion stated that where JCAR does not approve of a rule, it is making a policy determination, and "Policy determinations are fundamentally a legislative function." *Id.* at 116. Justice Weaver joined the lead opinion, but made clear that she was going to "leave to another case

[5] In *Taylor,* the plaintiffs claimed that MCL 600.2946(5), which prohibits product liability lawsuits where the U.S. Food and Drug Administration (FDA) has approved the drug, impermissibly delegated legislative authority to the FDA. The Michigan Supreme Court rejected this claim.

the question of the constitutionality of the delegation of rulemaking authority to agencies." *Id.* at 130 (Weaver, J. concurring). Thus, there were four votes for the proposition that policy determinations are fundamentally a legislative function.[6]

The above guidelines assist in interpreting the *Westervelt* lead opinion's test as it is applied to 2004 PA 326. Of particular importance is the *Blank* court's explanation that policy determinations are fundamentally a legislative function.

3. *Westervelt v Nat Resources Comm'n*

In *Westervelt*, the Michigan Supreme Court considered the constitutionality of legislation that delegated the authority to devise rules concerning the use of some Michigan rivers to the Department of Conservation, which later became the Department of Natural Resources (DNR), and the Commission on Conservation, which later became the Natural Resources Commission (NRC). The DNR promulgated rules that divided the rivers into sections and limited what types of watercraft could use these rivers at different times of the year. The plaintiffs in *Westervelt* contended that the delegation was improper.

The *Westervelt* lead opinion noted that the "important and ever-occurring legal question of whether particular legislation constitutes an unconstitutional 'delegation of power' to administrative agencies is, and has been, the subject of extensive critical debate among some of our most eminent scholars." 402 Mich at 426. The lead opinion further observed that this issue was "difficult and relatively controversial." *Id.*

The lead opinion then discussed the histories of the various tests that have been applied in the nondelegation

[6] Having found that the decision regarding whether to adopt administrative rules was legislative, the Michigan Supreme Court held that JCAR could not prevent implementation of such rules.

context, noting that what had emerged was a test including both a separation-of-powers component and a due-process component. Under the separation-of-powers component, delegation legislation that contains sufficient standards does not constitute a violation of the constitutional separation-of-powers requirement:

> when legislation contains "defined legislative limits" and "ascertained conditions" (i.e., "standards"), agency rule-making within these "limits" and in accord with these "conditions" is not, in fact, "law-making" and is therefore not an unconstitutional violation of the separation of powers.

Id. at 431.

The *Westervelt* lead opinion noted that these standards "need only be 'as reasonably precise as the subject matter requires or permits.' " *Id.* at 435 (citation omitted). It claimed (without support) that "a flexible, adaptable rule regarding 'standards' is necessitated by the exigencies of modern day legislative and administrative government." *Id.* at 436.[7] It stated, "The preciseness of the standard will vary with the complexity and/or degree to which [sic] subject regulated will require constantly changing regulation." *Id.*

The *Westervelt* lead opinion indicated that a primary concern in the due process analysis was to prevent administrative favoritism: "[without] definite standards

[7] This assertion is dubious. Legislatures are capable of writing detailed statutes based on expert testimony; in fact, they already do. Thus, the "standards" component needs to be re-evaluated by the Michigan Supreme Court with a recognition that representative government is weakened when policy decisions are not made solely by those who are directly politically accountable to the people of Michigan. There is no justification for creating a doctrine that simply promotes government's control over individuals' lives, particularly when there are only indirect and tenuous democratic checks on the government agency in question.

an ordinance becomes an open door to favoritism and discrimination, a ready tool for the suppression of competition through granting of authority to one and the withholding from another." *Id*. at 434 (internal citations omitted).[8] The opinion also explained that even though there may be sufficient standards to satisfy the separation-of-powers component, these standards may be too general to meet the due-process component:

> [T]he "standards test" as presently expressed, i.e., "standards" need be only "as reasonable as the subject matter requires or permits," implies the judicial recognition that in some instances it is not possible, nor even desirable, to require legislative standards of a carefully detailed nature. ...
>
> This judicial recognition, inherent in the present "standards test," exposes a profound legal paradox: the broader, the more "flexible" the legislative "standards" permitted in given legislation (for valid reasons), the less the people are protected from potential discretionary abuse at the hands of administrative officials.

Id at 442. The *Westervelt* lead opinion indicated that the important question is whether there are important safeguards, with standards representing just a single factor

[8] In this quote, the *Westervelt* lead opinion used the term "standards" in reference to due process protections. This usage is an example of the ambiguity discussed in footnote 4. When standards are sufficiently specific, they not only maintain an adequate separation of powers, but provide in and of themselves the due process safeguards that are part of the second component of the *Westervelt* nondelegation test. Thus, the *Westervelt* lead opinion can speak of "standards" that protect due process. When legislative standards are more general, however, additional safeguards are necessary to protect due process rights, leading to the distinction between "standards" and "safeguards" maintained for the purposes of clarity throughout this brief.

in that consideration. This point was discussed in footnote 20 of *Westervelt*, which the Michigan Supreme Court explicitly referenced in its remand order to this Court:

> This emphasis on the "safeguards, including 'standards' which the legislation affords" in order to best effectuate the due process foundation of the "delegation doctrine" echoes the judicial approach argued by Professor Davis:
>
> > The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards; its purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power. The focus should no longer be exclusively on standards; it should be on the totality of protections against arbitrariness, including both safeguards and standards. The key should no longer be statutory words; it should be the protections the administrators in fact provide, irrespective of what the statutes say or fail to say. Davis, Administrative Law Treatise, 1970 Supplement, pp 40-41.

402 Mich at 442 n. 20.

In applying the test, the *Westervelt* lead opinion looked at a statute that said that the Department of Conservation should conserve the resources of the state, including protecting lakes and streams from pollution. Another statute directed that department to make rules "for the protection of lands and property under its control." 402 Mich at 445. The *Westervelt* lead opinion stated that these statutes provided sufficient standards to meet the separation-of-powers

component. *Id*. But these standards alone did not provide a sufficient safeguard under the due-process component. *Id*. Having made that determination, the *Westervelt* lead opinion then reviewed other safeguards. It noted that the Administrative Procedures Act applied, which it believed provided "extensive due process safeguards to those persons affected by the agency's rule-making." *Id*. at 448. A second safeguard was that all of the members of the Commission on Conservation had to be appointed by the Governor and approved by the Michigan Senate. *Id*. Taken together, these two safeguards met the due-process component.

4. *State Highway Comm'n v Vanderkloot*

In its remand order, the Michigan Supreme Court also cited *State Highway Comm'n v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974). In that case, a landowner challenged the Michigan State Highway Commission's decision to take his property so that portions of US-24 could be improved or replaced. A statute allowed property owners to challenge as fraudulent or abusive the highway commission's ruling that a particular taking was necessary.

The landowner claimed that there were insufficient legislative standards established to guide the highway commission in determining that a particular piece of property was necessary. The Michigan Supreme Court held that the necessity standard provided sufficient guidance. *Id*. at 170. Both the 1850 Constitution and the 1908 Constitution had required a necessity determination before a taking could be effectuated (the 1963 Constitution does not contain this requirement). The fact that this standard had been used for decades was significant in the Court's view. Further, the Court noted that many other states were using the same standard, and that the necessity standard gave the Highway Commission the ability to adapt to changing conditions. The Court therefore determined that the Legislature had provided sufficient standards to guide the Highway Commission.

The Michigan Supreme Court then considered the landowner's due-process challenge. Specifically, the landowner claimed that "necessity" did not provide sufficient guidance for the courts when they reviewed a taking challenge. The Michigan Supreme Court indicated that the trial courts should look at the takings petition, which was supposed to set out the Highway Commission's purpose, and then determine whether the property in question was necessary for that purpose. In *Vanderkloot*, due to the procedural posture of the case, there were not sufficient facts in the record to make such a determination. The case was thus remanded to a lower court so that this determination could occur.

The due-process issue in *Vanderkloot* differs from the due-process issue in *Westervelt*. *Westervelt* involved a due-process challenge concerning safeguards for preventing an arbitrary decision by an agency, while *Vanderkloot* focused on whether a landowner could receive due process in the courts. To the extent that there are differences between the two rulings, the Michigan Supreme Court probably intended the *Westervelt* lead opinion's framework to guide judicial review in the current case, since the Court specifically cited footnote 20 of the *Westervelt* lead opinion in the remand order.

5. Delegation Challenges Since the *Westervelt* Ruling

The Michigan Supreme Court has entertained a number of delegation challenges since the *Westervelt* ruling. The cases will be discussed chronologically.

In *Dukesherer Farms v Director, Dep't of Agriculture*, 405 Mich 1; 273 NW2d 877 (1979), a cherry farmer challenged a statute that set up a mandatory marketing program for cherries. The program was upheld, and *Westervelt* was cited but not applied because *Westervelt* was a 3-3 opinion and the Michigan Supreme Court did not see the need to determine which *Westervelt* opinion set forth the proper test.

In *Underhill v Safeco Ins Co*, 407 Mich 175; 284 NW2d 463 (1979), a motorcyclist challenged legislation that allowed the Insurance Commissioner to approve motorcycle insurance policies that contained deductibles. The motorcyclist claimed the legislation contained insufficient standards. In the ruling on the case, the Michigan Supreme Court mentioned the two *Westervelt* opinions, along with other delegation tests. Without much analysis, the Court held that the delegation was proper under any of the tests.

Detroit v Detroit Police Officers Ass'n, 408 Mich 410; 294 NW2d 68 (1980), provides little guidance since it was a 3-3-1 decision. The city of Detroit was unhappy with an arbitrator's decision following the city's failed negotiations with the Detroit police union, and the city challenged the constitutionality of state legislation that required labor impasses between municipalities and firefighters or police officers to be submitted to arbitration. Detroit claimed that these important labor questions needed to be decided by politically accountable agents, not politically unaccountable arbitrators.

The three-justice lead opinion began its analysis by looking at the standards component — i.e., the separation-of-powers component from *Westervelt*. It cited a lengthy litany of standards from the arbitration statute that included to whom the act applied, the procedures to control the arbitration process, time limits for filing, and eight specific factors that the arbitrators were to consider in making their decisions. This portion of the lead opinion was joined by a fourth justice.

The *Detroit Police Officers Ass'n* lead opinion did not stop after its discussion of the arbitration statute's standards, but rather continued on to a discussion of "public accountability," which is in some ways analogous to a due-process concern. It sought to determine whether there were sufficient political controls over the arbitrators. Three justices held that sufficient political controls were present; three held the contrary; and the remaining justice held that the question

was irrelevant. The statute was therefore upheld, since four justices agreed that the statute was constitutional, although they did not agree on the analysis to be applied.

In *Blue Cross & Blue Shield of Michigan v Milliken*, 422 Mich 1; 367 NW2d 1 (1985), the Michigan Supreme Court struck down a legislative delegation of powers because the delegation provided insufficient standards. The test set forth by the Michigan Supreme Court in *Blue Cross & Blue Shield* bears a strong resemblance to the *Westervelt* lead opinion's test:

> The criteria this Court has utilized in evaluating legislative standards are set forth in *Dep't of Natural Resources v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976): 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits. The preciseness required of the standards will depend on the complexity of the subject. Additionally, due process requirements must be satisfied for the statute to pass constitutional muster. *State Highway Comm v Vanderkloot*, 392 Mich 159, 174; 220 NW2d 416 (1974). Using these guidelines, the Court evaluates the statute's safeguards to ensure against excessive delegation and misuse of delegated power.

{422 Mich} at 51-52 (some citations omitted).

The provisions in question in *Blue Cross & Blue Shield* concerned the process for setting a "risk factor" in insurance policies concerning various business activities. This "risk factor" was defined as the "the relative probability of loss associated with a given line of business, expressed as a percentage of incurred claims and incurred expenses for a calendar year." *Id.* at 52. After the health care corporation (in this case, Blue Cross & Blue Shield) assigned a risk factor for each line of a company's business, the Insurance Commissioner was to either approve or disapprove the risk

factors. When the factors were disapproved, the question of the risk factor to be used instead would then be sent to a panel of three actuaries. There was no judicial or administrative review of either the Insurance Commissioner or the actuaries. The Michigan Supreme Court held that there were insufficient standards for the Insurance Commissioner's exercise of legislative power:

> [T]he power delegated to the Insurance Commissioner is completely open-ended. The commissioner is starkly directed to "approve" or "disapprove" the proposed risk factors; the basis of the evaluation is not addressed. In fact, it is impossible to determine even the nature of the Insurance Commissioner's inquiry — whether the commissioner is deciding (1) that the health care corporation's proposed risk factors are actuarially sound, or (2) that, although the proposed factors are actuarially sound, a different set of actuarially sound risk factors are preferred by the commissioner.
>
> This ambiguity is central to the dispute; the nature of the inquiry considerably alters the standards required to prevent an abuse of discretion. For instance, if the Insurance Commissioner merely reviews the proposed factors to ensure that they are in accordance with sound actuarial practices, it is unlikely that any further standard is required. If, however, the Insurance Commissioner may reject actuarially sound risk factors proposed by the health care corporation simply because of a preference for alternate risk factors, some criteria must be included to guide the Insurance Commissioner's preference of one risk factor over another. Without additional standards, the Insurance Commissioner has de facto veto power over the health care corporation's risk factors. This lack of clarity regarding the Insurance Commissioner's function permits the Insurance Commissioner to define the authority of the commissioner.

Id. at 53-54 (footnote omitted).

The last delegation case relevant to the use of the *Westervelt* ruling is *Livonia v Dep't of Social Services*, 423 Mich 466; 378 NW2d 402 (1985). The plaintiffs were landowners trying to prevent foster care homes for the mentally ill from being located in their neighborhoods. There was a provision in state law prohibiting an excessive concentration of these facilities in any one community. The plaintiffs claimed that because the term "excessive concentration" was not defined, the statute was insufficiently precise and therefore unconstitutional in its entirety.

The Michigan Supreme Court rejected this argument. It noted, for example, that the statute provided specific standards to prevent foster homes from being placed closely together; the facilities generally had to be at least 1500 feet apart.

The Court then considered plaintiffs' due-process challenge, which was not the type of due-process challenge at issue in *Westervelt*. The question in *Westervelt* was whether proper safeguards existed in a particular legislative delegation to prevent arbitrary government action. In *Dep't of Social Services*, the plaintiffs argued that the license for the foster care home should not have been issued before they had received notice of, and had been given an opportunity to appear at, a hearing on the matter. They further alleged that the Director of Social Services was biased. The Michigan Supreme Court rejected these arguments.[9]

6. Legislative History in the Instant Case

Const 1963, art 10, § 5 states the following:

> The legislature shall have general supervisory jurisdiction over all state owned lands useful for

[9] The notice-of-hearing claims were rejected because the Michigan Supreme Court held that the plaintiffs did not have a property interest. The bias argument was rejected due to a lack of evidence.

> forest preserves, game areas and recreational purposes; shall require annual reports as to such lands from all departments having supervision or control thereof; and shall by general law provide for the sale, lease or other disposition of such lands.

Thus, the sale of {state} land is a legislative power.

In the instant case, it is instructive to set forth the pertinent portion of 2004 PA 326 and to note its differences from the pertinent portion of 2002 PA 671. The pertinent portion of 2004 PA 326, § 2 states:

> (1) The state administrative board, on behalf of the state, and subject to the terms stated in this section, may convey for consideration the board considers a fair exchange of value for value ... all or portions of certain state owned property now under the jurisdiction of the department of community health, known as the Ypsilanti regional psychiatric hospital, located in the township of York, Washtenaw county, Michigan. ...
>
> (2) In determining whether consideration for the property described in this section represents a fair exchange of value for value, the board **may consider the highest return and best value to the state** based on either or both of the following:
>
> (a) The fair market value of the property described in this section as determined by an appraisal prepared for the department of management and budget by an independent appraiser.
>
> (b) The total value to the state of the sale of the property and the **best interests of the state**, including, **but not limited to**, any positive economic impact to the state

> likely to be generated by the proposed use of the property, especially economic impact resulting in the creation of high-technology or highly skilled jobs or increased capital investment for research and development.

Id. (emphasis added). Therefore, the SAB could sell the property based on "total value" and "the best interests of the state," factors that would be determined by any methods chosen by the SAB itself.

In contrast, under 2002 PA 671 the SAB was required to obtain fair market value for the property, *id*. at § 13(1), which would be determined after an appraisal. *Id*. at § 13(2). The sale was also required to "realize the highest price for the sale and the highest return to the state." *Id*. at § 13(3).

The telling differences between 2004 PA 326 and 2002 PA 671 do not end there. Under 2004 PA 326, the sale of the property can occur through a competitive sealed bid process, a public auction, the use of a real estate brokerage system, or a negotiated sale process — i.e., discussions between the DMB and a single entity, such as the entity in the instant case, Toyota. *Id*. at § 2(3)(d). Under 2004 PA 326, the DMB, like the SAB, was permitted by the Legislature to consider amorphous criteria:

> (d) A negotiated sale process conducted by the department of management and budget in a manner to provide the state with consideration for the property representing at least a fair exchange of value for value. In determining whether consideration for the property described in subsection (1) represents a fair exchange of value for value, the **department may consider** the highest return and best value to the state **based on either or both** of the following:
>
> > (i) The fair market value of the property described in subsection (1) as determined by

> an appraisal prepared for the department of management and budget by an independent appraiser.
>
> (ii) The total value to the state of the sale of the property described in subsection (1) and **the best interests of the state**, including, **but not limited to**, any positive economic impact to the state likely to be generated by the proposed use of the property, especially economic impact resulting in the creation or retention of high-technology or highly skilled jobs or increased capital investment for research and development, as determined by the department.

Id. (emphasis added). But under 2002 PA 671, there was no "negotiated sale process" and again, the standard to be applied involved a concrete legislative guideline (the highest price for the land), not the vague and open-ended criteria listed above.

Yet another instructive difference between the two acts was that 2002 PA 671 required the state to retain mineral rights for the property. When Toyota made its unsuccessful $9,000,000 bid under the 2002 act, it did not agree to the state's reservation of these mineral rights. Interestingly, 2004 PA 326 stated that the state "shall not reserve oil, gas, or mineral rights to property conveyed under this section," *id.* at § 2(8), although the state would be provided with one half of the revenue generated from any subsequent extraction of minerals from the property. *Id.*

This provision was not the only change that appears tailor-made for Toyota. The Legislature allowed the DMB to negotiate solely with a single party (in this case Toyota), and the Legislature likewise eliminated the requirement that the DMB obtain the best price for the land. This had the effect of removing DPG York, a demonstrably higher bidder, and other companies that were potentially higher

bidders, from the process. The Legislature also agreed in 2004 PA 326 to pay any costs of preparing the property for sale, environmental remediation of the property, or litigation related to conveyance of the property. *Id.* at § 2(11). While any of these concessions would have been available to any buyer of the land, Toyota in particular faced the likelihood of litigation over conveyance of the property, given that DPG York had already filed suit against the state at the time this legislation was approved.

7. Application of the *Westervelt* Lead Opinion Test to 2004 PA 326

2004 PA 326 is unconstitutional under both the separation-of-powers component and the due-process component of the *Westervelt* lead opinion's test.

The act does not satisfy the separation-of-powers component because the legislative language fails to provide a single binding standard to guide either the SAB's or the DMB's conduct. The statute merely says that the SAB and the DMB "may consider the highest return and best value to the state," not that they must consider these factors. If they do decide to consider the "highest return and best value for the state," one potential consideration is "the best interests of the state." This unlimited range of options directly violates the test set forth by the *Westervelt* lead opinion, which held that rulemaking is different from legislating because the agency's universe of potential choices is limited by the Legislature. PA 2004 326 provides no such limitation, and the Legislature says so explicitly in the language of the act. The SAB can sell the property to anyone for any price as long as the agency's officials can conjure up some rationale that the sale is in the best interests of the State.

This ability to adjudge the state's best interests without restraint from legislatively mandated standards is by definition a policy determination. And as the Michigan Supreme Court said in *Blank*, "Policy determinations are

fundamentally a legislative function." 462 Mich at 116. Therefore, 2004 PA 326 provides insufficient standards to the relevant executive agencies (the SAB and the DMB), and the act violates the separation-of-powers component of the *Westervelt* lead opinion.

Even assuming that the bare minimum of legislative standards were provided under 2004 PA 326, the act does not contain the safeguards required under *Westervelt* to prevent arbitrary determinations that violate citizens' rights to due process. Indeed, far from discouraging administrative favoritism, 2004 PA 326 is an open invitation to it. Unlike the act's predecessor, 2002 PA 671, 2004 PA 326 does not require the state to obtain the highest price — a bright-line, objective test that tends to discourage administrative cronyism. 2004 PA 326 also allowed the DMB to negotiate with a single entity, thereby removing the open and competitive bidding process that was established in 2002 PA 671, a framework that promoted public scrutiny of questionable decisions that could have violated due process. In fact, the language in 2004 PA 326 is a textbook example of the type of statute the *Westervelt* lead opinion warned against when it stated that an ordinance with a lack of safeguards "becomes an open door to favoritism and discrimination, a ready tool for the suppression of competition through granting of authority to one and the withholding from another." 402 Mich at 434 (internal citations omitted).

True, the Legislature clearly retains the power to include considerations other than the highest price in the sale of state land and to recommend negotiated bidding in its delegations of legislative power. Such legislative determinations do not necessarily violate due-process rights.

Nevertheless, in the instant case, which does not involve rule-making, there are no Administrative Procedures Act protections. DMB was legislatively permitted to negotiate privately with Toyota, and DMB did so. The SAB was then free to approve the sale once an agreement had been reached.

Both bodies were able to take these steps free from legislative checks, the Administrative Procedures Act, or other due-process safeguards. This failure in the administrative process prevented Toyota's competitors, including DPG York, from receiving due-process protections, an outcome that renders 2004 PA 326 unconstitutional.

The unfettered administrative powers at issue in the instant case call to mind footnote 20 of the *Westervelt* lead opinion — the footnote cited by the Michigan Supreme Court in the remand order for the instant case:

> The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards; its purpose should be the much deeper one of protecting against **unnecessary and uncontrolled discretionary power**. The focus should no longer be exclusively on standards; it should be on the totality of protections against arbitrariness, including both safeguards and standards. The key should no longer be statutory words; it should be **the protections the administrators in fact provide, irrespective of what the statutes say or fail to say**. Davis, Administrative Law Treatise, 1970 Supplement, pp 40-41.

402 Mich at 442 n. 20 (emphasis added). Indeed, if the actions of the DMB and the SAB are not those targeted in footnote 20 of the *Westervelt* lead opinion, what administrative actions would ever fail that test? Footnote 20 is dispositive, and 2004 PA 326 fails the due-process component.

For the reasons related above, 2004 PA 326 is unconstitutional under both the separation-of-powers component and the due-process component of the *Westervelt* lead opinion's two-part test.

RELIEF REQUESTED

This Court should declare 2004 PA 326 unconstitutional. This decision would negate the $11,000,000 agreement between Toyota and the State of Michigan.

DATED: January 12, 2006

Respectfully submitted,

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