STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

EDWARD HATHCOCK,

Defendant-Appellant.

UNPUBLISHED
April 24, 2003

No. 239438
Wayne Circuit Court
LC No. 01-113583-CC

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

AARON T. SPECK and DONALD E. SPECK,

Defendants-Appellants.

No. 239563
Wayne Circuit Court
LC No. 01-114120-CC

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

AUBINS SERVICE, INC. and DAVID R. YORK, Trustee of the DAVID R. YORK REVOCABLE LIVING TRUST,

Defendants-Appellants.

No. 240184
Wayne Circuit Court
LC No. 01-113584-CC

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

JEFFREY J. KOMISAR,

Defendant-Appellant.

No. 240187
Wayne Circuit Court
LC No. 01-113587-CC

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

ROBERT WARD and LELA WARD,

Defendants-Appellants,

and

HENRY Y. COOLEY,

Defendant.

No. 240189
Wayne Circuit Court
LC No. 01-114113-CC

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

MRS. JAMES GRIZZLE and
MICHELLE A. BALDWIN,

Defendants-Appellants,

No. 240190
Wayne Circuit Court
LC No. 01-114115-CC

and

RAMI FAKHOURY,

Defendant.

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

STEPHANIE A. KOMISAR,

Defendant-Appellant.

No. 240193
Wayne Circuit Court
LC No. 01-114122-CC

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

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

Defendants-Appellants.

No. 240194
Wayne Circuit Court
LC No. 01-114123-CC

COUNTY OF WAYNE,

Plaintiff-Appellee,

v

VINCENT FINAZZO,

Defendant-Appellant,

and

AUBREY L. GREGORY and DULCINA GREGORY,

Defendants.

No. 240195
Wayne Circuit Court
LC No. 01-114124-CC

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

MURRAY, J. (concurring).

I concur in the reasoning and result of the Court's opinion because I believe that it is compelled by the binding precedent which we are required to apply to the facts as found by the trial court. See *People v Kevorkian*, 205 Mich App 180, 191; 517 NW2d 293, vacated on other grounds, 497 Mich 436; 527 NW2d 714 (1994) (recognizing that this Court must follow Supreme Court precedent until it is overturned by that Court). I write separately, however, because I believe with all due respect, as have other panels of this Court,[1] that the Supreme Court's decision in *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981) was wrongly decided with respect to its constitutional determination that the power of eminent domain can be utilized to take private property and convey it for the use of other private entities in the name of improving the economy. In *Poletown*, Justices Fitzgerald and Ryan submitted dissenting opinions outlining the procedural irregularities and substantive errors in the majority opinion. See *Poletown*, *supra*, 410 Mich at 636-645 (Fitzgerald, J., dissenting) and at 645-684 (Ryan, J., dissenting). Although both of these dissenting opinions more than adequately explain why the *Poletown* majority's decision is flawed and out of step with prior Supreme Court precedent, Justice Ryan's dissent in particular delineates in great detail and precision why the majority opinion was wrongly decided.

Setting aside Justice Ryan's discussion of how the *Poletown* majority blurred the previously bright distinction in the case law between what constitutes a "public purpose" for tax purposes and a "public use" for condemnation purposes, see *Novi v Robert Adell Children's Funded Trust*, 253 Mich App 330, 342; ___ NW2d ___ (2002), Justice Ryan set forth the clear line of authority in existence prior to *Poletown* which had held that the government cannot constitutionally exercise its power of eminent domain by taking land for the ultimate conveyance to a private corporation despite incidental economic benefits to the public:

> As a general rule, when the object of eminent domain is to take land for ultimate conveyance to a private corporation to use as it sees fit, the State Constitution will forbid it as a taking for private use.
>
> > "Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it." *Berrien Springs Water-Power Co v Berrien Circuit Judge*, 133 Mich 48, 53; 94 NW 379 (1903).

[1] See *Detroit v Vavro*, 177 Mich App 682, 685-687; 442 NW2d 730 (1989). See also *Detroit v Lucas*, 180 Mich App 47, 54; 446 NW2d 596 (1989) (Beasley, P.J., dissenting, indicating that "[h]opefully, the Supreme Court will, in due course, accept the challenge to reexamine the basis for the *Poletown* decision").

> Accordingly, land may not be condemned for private corporations engaged in the business of water-power mills, *Ryerson v Brown*, 35 Mich 333 (1877); cemeteries, *Board of Health v Van Hoesen*, 87 Mich 533; 49 NW 894 (1891); or general retail, *Shizas v Detroit*, 333 Mich 44; 52 NW2d 589 (1952). [*Id.* at 670.]

The *Poletown* decision was, therefore, the first Michigan case to hold that economic benefits emanating from future private developments was a valid exercise of eminent domain despite the land being granted to a private entity. However, as both the majority and dissenting opinions in *Poletown* make clear, that case was based upon the extreme economic and political circumstances faced by the city of Detroit during that specific time period. See *id.* at 633 (majority noting the "severe economic conditions facing the residents") and at 647 (Justice Ryan noting case arose in the context of an "economic crisis"). When *Poletown* was decided unemployment statewide was at 14.2%, the city of Detroit was at 18%, and amongst African-American residents of the city, it was almost 30%. *Id.* at 647. Moreover, General Motors was threatening to *close and move* one of its plants outside the city which would result in the *loss* of some 6,000 additional jobs within the city. *Id.* at 650-651. It was under these drastic economic circumstances that the Court held that the city's taking of private land for use by a specific private entity (General Motors) was for a "public use or purpose," and only had an incidental benefit to private persons (GM) because it would *preserve* the 6,000 General Motor jobs and tax base that would otherwise have allegedly left the city. *Id.* at 634.

However, as Justice Ryan pointed out, the Court's "approval of the use of eminent domain power in this case [took] this state into a new realm of takings of private property; there [was] simply no precedent for this decision in previous Michigan cases." *Id.* at 639-640. Continuing, Justice Ryan noted that although "[t]here were several early cases in which there was an attempt to transfer property from one private owner to another through the condemnation power pursuant to express statutory authority," the Court had previously rejected such proposed takings as unconstitutional. *Id.* at 640. Nonetheless, the *Poletown* majority held as it did, and we are duty bound to apply its holding and rationale to this case. *Kevorkian, supra; Adell Trust, supra* at 343.

However, I believe that this case represents the concerns that Justices Fitzgerald and Ryan had with respect to the jurisprudential impacts of the *Poletown* decision. *Id.* at 645. Specifically, unlike in *Poletown*, in this case there is no abnormally high unemployment rates as there were at the time *Poletown* was decided; nor was there a major employer threatening to leave the confines of Wayne County, as there was in *Poletown*. In other words, there is no evidence in the record to establish that there exists any "economic crisis" in Wayne County which would make this case an "exceptional one" like *Poletown.* Instead, plaintiff has simply decided to create a commercial/industrial park on the basis that it would improve the overall appeal of the county and eventually raise the tax and employment base for the county. Although that is certainly a laudable goal, in my view the precedent established by our Supreme Court prior to its *Poletown* decision would have precluded it on constitutional grounds.[2]

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[2] It is evident that the Legislature deems certain industrial and commercial developments necessary and that private property can be condemned for this public use by an economic development corporation. MCL 125.1601; 125.1622. However, the county did not act pursuant
(continued…)

In light of the foregoing, I agree with our Court's prior decision in *Vavro*, as well as Judge Beasley's dissent in *Lucas*, that our Supreme Court should revisit its holding in *Poletown* as it is an isolated statement based upon exceptional circumstances, which cannot be squared with long standing precedent established in almost a century of case law prior thereto.[3]

/s/ Christopher M. Murray

(…continued)

to such specific statutory authority, but instead acted only pursuant to its resolution. Hence, the "heightened scrutiny" given to such general resolutions is applicable to this case. *Center Line v Chmelko*, 164 Mich App 251, 257-262; 416 NW2d 401 (1987).

[3] *Poletown* was cited with approval as recently as *Tolksdorf v Griffith*, 464 Mich 1, 8-9; 626 NW2d 163 (2001). However, that case involved the validity of a taking under the private roads act. *Id.* at 5. Hence, *Tolksdorf* did not involve an analysis of whether economic benefits constitutionally validates the exercise of eminent domain over private property for the benefit of private economic development.