STATE OF MICHIGAN
IN THE SUPREME COURT

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Appeal from the Court of Appeals
The Honorable William C. Whitbeck, Peter D. O'Connell
and Patrick M. Meter

****

CITY OF NOVI, *a Michigan municipal corporation*,

Plaintiff-Appellant,

v

ROBERT ADELL CHILDREN'S FUNDED TRUST, *et al*,

Defendants-Appellees.

Supreme Court No. 122985

Court of Appeals No. 223944

Lower Court No. 98-008863-CC

MICHIGAN MUNICIPAL LEAGUE'S BRIEF AMICUS CURIAE (PROPOSED)

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ROBERT ADELL CHILDRENS FUNDED TRUST, FRANKLIN ADELL CHILDRENS FUNDED TRUST and NOVI EXPO CENTER, INC., *a Michigan corporation*,

Defendants-Appellees.

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Lower Court No. 98-008863-CC

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STATEMENT OF QUESTIONS INVOLVED

Amicus Curiae submits that the legal issues before the Court are as follows:

Is a public road which will be owned and maintained by a municipality and which will be open for use by the general public a "public use" as a matter of law, allowing acquisition by eminent domain?

The lower court answered "no."
The Court of Appeals answered "no."
The City of Novi answered "yes."
The Adell Trust answers "no."
Amicus curiae submits the answer must be "yes."

Should the "heightened scrutiny" test used by this Court in *Poletown* v *City of Detroit*[1] be confined to those acquisitions of property by a governmental agency through the power of eminent domain where the property will thereafter be transferred to or used exclusively by a private interest, or where the proposed taking is not supported by a state statute recognizing the public purpose?

The lower court answered "no."
The Court of Appeals answered "no."
The City of Novi answered "yes."
The Adell Trust answered "no."
Amicus curiae submits the answer must be "yes."

Does a governmental agency have the burden of proving that a public project will not "predominantly" benefit private interests more than the public at large before it may exercise the power of eminent domain?

The lower court answered "yes."
The Court of Appeals answered "yes."
The City of Novi answered "no."
The Adell Trust answered "yes."
Amicus curiae submits the answer must be "no."

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[1]410 Mich 616; 304 NW2d 455 (1981).

INTRODUCTION AND INTEREST OF AMICUS CURIAE MICHIGAN MUNICIPAL LEAGUE

On October 4, 2002, the Court of Appeals released a published decision in this case entitled *City of Novi* v *Adell Trusts*, 253 Mich App 330; – NW2d – (2003).[2] This is a case which is expected to have a profound impact on the law of eminent domain in Michigan. This decision will make acquisitions of property by eminent domain far more cumbersome for municipalities. It will encourage lengthy and time consuming challenges by property owners when their property is condemned in order to delay projects and thereby leverage additional compensation from the municipality. The decision will require courts to conduct lengthy evidentiary hearings in condemnation cases to make a factual determination about who will benefit more by a public project – the public at large or private interests.[3]

Because of the dramatic impact which this case will have upon municipalities throughout this state, the Michigan Municipal League is requesting the Court to allow it to appear as amicus curiae and to submit this brief which will highlight why this decision goes far beyond the unique facts presented in the case and will potentially affect every public project where a municipality must exercise the power of eminent domain to acquire land for the project.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 511 Michigan cities and villages, of which 430 are also members of the Michigan Municipal League Defense Fund. The Michigan Municipal League operates the Defense Fund through

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[2]The case was updated on January 3, 2003.

[3]The evidentiary hearing in this case to determine whether the road which the City of Novi sought to construct was a "public use" took three days and involved testimony by 12 witnesses.

a board of directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

This brief amicus curiae is authorized by the Board of Directors of the Legal Defense Fund. The board includes the president and executive director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys; Philip A. Balkema, Grand Rapids City Attorney; William B. Beach, Rockford City Attorney; John E. Beras, Southfield City Attorney; Randall L. Brown, Portage City Attorney; Ruth Carter, Dearborn Corporation Counsel; Catherine R. Ginster, Saginaw City Attorney; Andrew J. Mulder, Holland City Attorney; Clyde J. Robinson, Battle Creek City Attorney; Debra A. Walling, Dearborn Corporation Counsel; Eric D. Williams, Big Rapids City Attorney; and William C. Mathewson, Michigan Municipal League General Counsel.

The decision of the Court of Appeals is one that will not be limited to the unique facts which exist in this case. The Court of Appeals made broad pronouncements of law that will apply to every case where a municipality exercises its power of eminent domain. The Court of Appeals relied primarily upon this Court's 1981 decision in *Poletown Neighborhood Council* v *City of Detroit*.[4] In *Poletown*, the Court said at p 629:

> This case raises a question of paramount importance to the future welfare of this state and its residents: Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce. . . .

The *Poletown* Court upheld the City of Detroit's exercise of its eminent domain power to acquire a large tract of land to convey to General Motors for an assembly plant site. The City successfully argued

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[4]410 Mich 616; 304 NW2d 455 (1981).

that the acquisition served economic revitalization interests recognized by the Michigan Legislature in the Economic Development Corporations Act, and therefore served a "public interest" or a "public purpose."

In this case, unlike the *Poletown* case, the City of Novi sought to condemn private property to construct a street which it would own and maintain and which would be open for travel by the general public.[5] The Court of Appeals was apparently troubled by the fact that most of the members of the general public who would travel this road would be persons coming to or from two businesses. Hence, it declared the acquisition unconstitutional.

The Court of Appeals premised its decision on the following statement by the majority in *Poletown* at p 634-635:

> Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest to be advanced. Such public benefit cannot be speculative or marginal, but must be clear and significant *if it is to be within the legitimate purpose as stated by the Legislature.* (Emphasis added.)

The *Poletown* Court was clearly analyzing a condemnation brought under the Economic Development Corporations Act. Notwithstanding the very narrow issue before the Court in *Poletown* concerning the constitutionality of a taking when the property will be *turned over to* a private interest, the Court of Appeals interpreted this language to apply to every condemnation case. This would be the case even when, as here, the government condemns land for a public project that it would own, operate and

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[5]The repeated reference to this road as a "driveway" by counsel for Appellees in their brief is merely advocacy. The record is clear that the proposed road would be owned and maintained by the City of Novi and open to the general public.

maintain. In turn, this overly-broad reading of *Poletown* allowed the Court of Appeals to reach this erroneous conclusion:

> *Although we assume the validity of the public interest advanced by the city*, we find that the private interest to be benefitted predominates over the asserted public interest. The asserted public interest therefore does not justify the proposed taking of private property by the City. The taking was thus unconstitutional. (Emphasis added.)

Put simply, the Court of Appeals has adopted a new test for analyzing the constitutionality of a taking of private property for a public project: if a private interest receives a benefit from a public project which exceeds the benefits received by the public at large, the taking is unconstitutional.

The Court of Appeal's conclusion is not supported by prior decisions of this Court, including *Poletown*. The test created by the Court of Appeals is unworkable and will potentially invalidate important public projects where, even though the municipality asserts a completely valid public interest, a "private interest" stands to benefit by the project more, whether intentionally or by happenstance. It will transfer the role of determining what is and what is not a public use from legislative bodies to circuit court judges.

For the reasons which follow, this Court is urged to grant the City of Novi's application for leave to appeal, vacate the decision of the Court of Appeals, and return the law of takings in Michigan to its status prior to the decision of the Court of Appeals.

FACTS

Amicus Curiae notes that the parties appear to have accurately cited the facts supporting their respective positions in their briefs, although they obviously rely upon different parts of the record to support their positions.

Judges in future condemnation cases, however, will not have the benefit of those briefs and accompanying factual references to the record when applying the Court of Appeals published decision in this case [*City of Novi* v *Adell Trust*, 253 Mich App 330; – NW2d – (2003)] to condemnation cases before them. They will only have the following facts as cited by the Court of Appeals at p 332 and pp 344-346 of that opinion:

> **The city of Novi has long experienced traffic congestion at the intersection of Grand River Avenue and Novi Road. . . . [T]he city proposed to construct two roads to deal with this situation.** The first was to be the "Ring Road" or "Crescent Boulevard," that would form a ring around the congested intersection. The second was to be A.E. Wisne Drive that was to serve as an "industrial spur" and that would traverse the Adell trusts' property. (Emphasis added.)
>
> As part of this road project, the city commenced a condemnation action pursuant to the Michigan Home Rule City Act and the Uniform Condemnation Procedures Act, principally to acquire property for the A.E. Wisne Drive. The Novi Expo Center sits on the Adell trusts' property, which they rent to the Novi Expo Center, Inc. When the Adell trusts filed their answer to the complaint, they also filed a motion that . . . challenged both the public purpose and the necessity of the condemnation as it related to the A.E. Wisne Drive. The Novi Expo Center did not join in the motion. The Adell trusts argued that the city abused its discretion and committed clear legal error as well as fraud in seeking to condemn the property for the benefit of two private property owners, Wisne Corporation and General Filters, Inc.
>
> * * *
>
> The evidence demonstrated that a scheduled Oakland County Road Commission project would cut off Wisne's driveway onto Grand River Avenue. If this were to be done, Wisne's would have no public road

access to its property, although it had an easement over the Novi Expo Center property to reach its facilities. Therefore, if the city did not complete the Ring Road, Wisne would have to build a new driveway connecting to Grand River Avenue.

The city contacted Wisne in the early 1990s, seeking private funding for A.E. Wisne Drive, which would run from the Ring Road onto the Wisne property. Wisne committed $200,000 to the project. In 1995, the city's manager asked Wisne for an additional $174,000, in exchange for which the city would declare the drive a public street and accept all maintenance responsibilities. Although Wisne/PICO ultimately did not give the city the extra money, the city proceeded toward developing A.E. Wisne Drive as a public road.

Juliet Rowley, a civil engineer involved with the project, testified that the purpose of A.E. Wisne Drive was to give better access to Grand River Avenue from Wisne and General Filters. According to Rowley, if A.E. Wisne Drive were not built, the Oakland County Road Commission would have to investigate another location as an alternative access for Wisne and General Filters. Although the road commission could condemn property owned by Wisne or General Filters for access onto Grand River, such an action could add months to the construction of the Grand River bridge.

There was also evidence, which defendants stipulated, that the current exit from the Wisne property onto Grand River Avenue created a hazardous situation for Grand River traffic. However, the Oakland County Road Commission planned to eliminate this access road as part of the Grand River Bridge Improvement Project. The evidence indicated that the county had not planned an alternative access because it was relying on the city's taking of the Adell trusts' property to create A.E. Wisne Drive. The Wisne property would not be landlocked after the county bridge project eliminated the current access road to Grand River Avenue because Wisne had an easement to its property over the Novi Expo Center property. While the Ring Road was important to eliminate traffic congestion, it could be built without taking the Adell trusts' property to create A.E. Wisne Drive. . . . Neither the city nor the county had seriously considered alternative access routes to the Wisne property other than taking the Adell Trusts' property for A.E. Wisne Drive. (Emphasis added.)

Accepting these facts as the basis upon which the Court of Appeals ruled, Amicus Curiae Michigan Municipal League urges the Court to grant the City of Novi's application for leave to appeal and reverse the decision of the Court of Appeals.

ARGUMENT I

A PUBLIC ROAD WHICH WILL BE OWNED AND MAINTAINED BY A MUNICIPALITY AND WHICH WILL BE OPEN FOR USE BY THE GENERAL PUBLIC IS A "PUBLIC USE" AS A MATTER OF LAW, ALLOWING ACQUISITION BY EMINENT DOMAIN.

The United States Supreme Court could not have expressed this fundamental proposition more clearly than it did in *Rindge Co* v *Los Angeles County*, 262 US 700, 709; 43 S Ct 689, 693; 67 L Ed 1186 (1923):

> That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial.

In *Mississippi & Rum River Boom Co* v *Patterson,* 98 US 403, 405; 25 L Ed 206 (1878), the Supreme Court described the broad power of eminent domain and the limited role of the judiciary when a proposed use is public:

> The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. **When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance.** The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. (Emphasis added.)

The Michigan Constitution, Mich Const 1963, art 10, § 2, provides that "private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." The Fifth Amendment to the United States constitution has a similar provision.[6]

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[6]". . . . nor shall private property be taken for public use without just compensation"

This right of a government to take private property for public use has long been recognized and applied. To be sure, both of these constitutional provisions presume that the private property taken will be for *public use*. Where the condemned property is retained by the municipality to be used for a public roadway, however, the public use has been unquestioned "from time immemorial."[7] After the decision of the Court of Appeals, however, "time immemorial" has come to an end.

The brief filed by the City of Novi ably and thoroughly outlines the historical framework of eminent domain, both under the United States Constitution and the corresponding Michigan Constitutional provision. Amicus Curiae will not attempt to restate that history, but joins in the analysis used by the City of Novi.

In addition to its being "an attribute of sovereignty,"[8] a city's right to acquire land by eminent domain, and to regulate the streets and highways within its confines, is firmly based in statute. Various Michigan statutes establish not only a city's right to take property for the use of a street or highway, but also establish that the taking of private property for such a use is a public purpose.

MCL 213.23; MSA 8.13 grants the authority to a public corporation (which includes cities) "to take private property necessary for a public improvement . . . for the use and benefit of the public . . ." The Home Rule Cities Act specifically empowers a city to provide in its charter for the following:

> (1) Public buildings, grounds, acquisition. **For the acquisition by** purchase, gift, **condemnation**, lease, construction or otherwise, either within or without its corporate limits of the county in which it is located, of the following improvements including the necessary lands therefor, viz.: City hall, police stations, fire stations, **boulevards, streets, alleys**. . .[9] (Emphasis added).

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[7]*Rindge Co* v *Los Angeles County*, *supra*.

[8]*Mississippi & Rum River Boom Co* v *Patterson*, *supra*.

[9]MCL 117.4e; MSA 5.2078.

The Home Rule Cities Act further provides:

> Each city may in its charter provide:
>
> (1) Public Ways. **For the use, regulation, improvement and control of the surface of its streets, alleys and public ways**, and of the space above and beneath them. . .
>
> (3) Street and alley plan. For a plan of streets and alleys within and for a distance of not more than 3 miles beyond its limits. . .[10] (Emphasis added).

MCL 213.221; MSA 8.211 expressly declares that the taking of private property for the purpose of acquiring, opening or widening any street is for a public purpose:

> Whenever the legislative body of any municipality shall determine that it is necessary to acquire, open or widen and boulevard, street or alley within said municipality, and whenever such legislative body shall determine that in order to carry out such proposed improvement most advantageously that it is necessary to take private property adjacent to the proposed improvement, the fee to such private property may be purchased or taken by condemnation proceedings and **the taking of such private property for the purpose of advantageously carrying out the proposed improvement contemplated is hereby declared to be a taking for a public purpose.** (Emphasis added).

MCL 213.361; MSA 8.261(1) authorizes cities to acquire property to lay out, alter or widen highways. MCL 213.171; MSA 8.171 allows county road commissioners or state highway commissioners to secure property for a highway.

The Uniform Condemnation Procedures Act (UCPA)[11] establishes the procedure which must be followed to invoke the city's power of eminent domain. The UCPA creates a high standard for a private property owner who disagrees with a city's determination of public necessity, because it makes

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[10]MCL 117.4h; MSA 5.2081.

[11]MCL 213.51 *et seq*; MSA 8.265(1) *et seq*.

the city's determination of public necessity binding on the court in the absence of a showing of "fraud, error of law or abuse of discretion."[12]

It is clear from the framework that is established by these statutes that the Legislature contemplated that the establishment of public roadways would be undertaken by cities and that such undertakings would be for a public purpose. There is simply no other way to read the statues cited above without reaching this conclusion.

There are no Michigan cases which specifically address the issue of whether a taking of private property for a public roadway is a taking for a public use *as a matter of law*. There are a number of cases where it appears to be assumed that a public highway is always a public use,[13] but the issue does not appear to have been squarely decided.

The dearth of Michigan cases determining this issue presumably results from a recognition that the use of private land for a public roadway was a public use by definition. In the dissenting opinion of Justice Ryan in *Poletown,* upon which the Court of Appeals significantly relies, even Justice Ryan quoted with approval from *Rindge Co* v *Los Angeles County, supra,* the United States Supreme Court case "where the Court observed '[t]hat a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial.'" *Rindge* upheld a taking of private property for a road which the property owner claimed served no public use because it primarily benefitted a private party. Headnote 3 of the opinion summarizes the facts and conclusion of the Supreme Court in that case:

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[12]MCL 213.56; MSA 8.265(6).

[13]*Detroit International Bridge Co* v *American Seed Co*, 249 Mich 289; 288 NW 791 (1930); *Fields v Highway Commissioner (Colby)*, 102 Mich 449; 60 NW 1048 (1894); *Fitzsimons & Galvin, Inc* v *Rogers*, 243 Mich 649; 220 NW 881 (1928).

> A taking of land for a highway extension is a taking for a public use, even though the extension lie wholly within the tract of a single landowner, and terminate at his boundaries and connect with no public road save at its beginning, if it be susceptible of present use not only by those gaining access from the highway but by persons living on or adjacent to the tract with access by private ways, and of future use by those living beyond its terminus, through future road construction.

Under this standard, the taking for the proposed Wisne road would be a taking for a public use.

In the very recent case of *Township of West Orange* v *769 Associates*,[14] a case which was not addressed in the briefs submitted by the parties due to its recent release, the New Jersey Supreme Court considered a case which is remarkably similar to this case. In *769 Associates*, the issue was whether the Township of West Orange should be permitted to acquire a 30 foot strip of property owned by 769 Associates by eminent domain, and utilize it to construct a public street leading to a piece of property owned by a developer. 769 Associates contested the proposed taking, arguing that there was no valid public purpose served by the taking, and that the condemnation was primarily to serve the interests of the private developer. The lower court found that the condemnation was proper, but the appellate court reversed and, as did the Court of Appeals in the instant case, held the taking unconstitutional. The New Jersey intermediate appellate court applied the "heightened scrutiny" test and concluded that the township's proposed taking was primarily for a private purpose.

In deciding the *769 Associates* case on appeal from the appellate division, the New Jersey Supreme Court reversed and found the taking to be for a public use. It first analyzed the general concepts of eminent domain and public use and noted that "courts have long held that condemnation of private property for use as a public road fulfills the public use requirement."[15] In overturning the

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[14]172 NJ 564; 800 A2d 86 (2002).

[15]*769 Associates*, *supra*, p 573.

appellate division's ruling, the Court found that the proposed taking would not serve principally private interests, but would serve an important public purpose. It further stated that "the fact that a private party may benefit from the taking does not render the taking private and not for a public use."[16] The Supreme Court cited an earlier New Jersey case[17] which had held that "because the 'roadway is open to the general public and is not limited to a private use,' the condemnation was for a valid public use." Finally, it relied upon this often-cited quote from Julius L. Sackman, 2A *Nichols The Law of Eminent Domain* (3d ed rev 1990):

> "A public highway is a road or street of any description and, however established, over which any member of the public may lawfully pass. It has never been doubted that land might be taken for the purpose of laying out, extending or widening a public highway." Nichols, supra at §7.22.

In its ruling, the *769 Associates* Court gave no weight to the fact that a viable alternative had been noted by the Township's engineer which would not have required the taking of 769 Associates' property:

> That the Hamal study considered Cedar Avenue a viable alternative is of no moment. The Township's decision is entitled to deference and West Orange is under no affirmative obligation to show that the proposed road is superior to the Cedar Avenue right-of-way.[18]

Similarly, to the extent that the property owners in this case argue that the City of Novi could have found an alternate means of alleviating traffic congestion without taking their property, this should not be a factor in the legality of the City's proposed condemnation.

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[16]Id.

[17]*State Highway Commissioner* v *Davis*, 87 NJ Sup 377, 380; 209 A2d 633 (1965).

[18]*Id,* p 579.

The *769 Associates* case mirrors the instant case in another important respect. The road project was to be privately funded by a developer who would benefit by the new road. The New Jersey Supreme Court quickly dispatched the property owners' argument that this was evidence that showed the taking would benefit private instead of public interests. After reviewing cases from several other jurisdictions, the Court held:

> The above cases affirm the principle that "even though the persons who expect to be benefitted agree to defray the whole cost of the work, if the use is public the taking is valid." Nichols', supra, at § 7.08[5]. See also *North Baptist Church, supra*, 54 NJL at 114-15 (holding that promise by individual to pay part of condemnation expense for proposed public street does not contravene public policy); *United States* v *32.9129 Acres of Land*, 192 F Supp 101, 103 (ND Cal. 1961) ("It is not necessary that the road be built and operated by public agencies. The only requirement is that it be built for a public purpose."); *Nicrosi* v *City of Montgomery*, 406 So2d 951, 952 (Ala Civ App 1981) ("That the expense incident to condemnation and the award itself are to be paid by private parties is immaterial when the property . . . being acquired . . . is to be used for a public benefit.").

This holding is consistent with *Alibri* v *Detroit/Wayne County Stadium Authority*, 254 Mich App 545, 557; – NW2d – (2003), a decision issued by the Court of Appeals after its decision in the instant case. There, the Court of Appeals agreed that financing by a private entity does not affect the nature of a public use:

> Indeed, "the mere fact that the taking of property for a public use will result in greater benefit to some persons than to others, or that private individuals contribute to the expense of such a taking, does not affect the character of such use, or render it any the less public, within the meaning and scope of the law of eminent domain." *In re Condemnations for Improvement of River Rouge*, 266 F 105, 114 (ED Mich, 1920).

See also *Nicrosi* v *City of Montgomery*,[19] holding that a taking of property to construct a drainage channel was for a public use, and that the fact that the cost of the taking was to be borne by a private party "is immaterial when the property thus being acquired by the City is to be used for a public benefit, and such an arrangement is not inconsistent with the Constitution or the laws of Alabama." Accordingly, the fact that Wisne committed financial assistance to the City of Novi for construction of the proposed road is of no significance and does not convert a public road into a private use.

Other state courts have considered public use issues similar to those presented in *769 Associates* and the present case. In *Matter of Duryea* v *Town of East Hampton*,[20] the Appellate Division of the New York Supreme Court permitted the acquisition of certain land to create a public road where a private road had been. The purposes of the road were to clarify the status of the road (there had been some dispute whether the road was public or private), to improve access to a private developer's property and to bring the road up to town standards. The Court ruled:

> We reject the petitioner's contentions that the proposed acquisition would only benefit Dune, and thus lacks a public purpose, and that by entering into the Agreement the Town impermissibly contracted away its discretion to condemn to a private party. . . . **The acquisition of private lands to establish public roads is perhaps one of the best examples of acquisitions which confer a public benefit.** . . . The fact that the acquisition may benefit one person, or a class of persons more than others does not mean the acquisition is improper. (Emphasis added).[21]

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[19]406 So2d 951, 952 (Ala Civ App 1981).

[20]172 AD2d 752; 569 NYS2d 139 (1991).

[21]*Duryea, supra*, p 753.

In *Green* v *High Ridge,*[22] the Maryland Court of Appeals, in a consolidated appeal involving two circuit court decisions which had prevented the condemnation of certain property to build two different public roads, reversed the prior decisions. It concluded that the taking of property for a public road was for a public use. The Maryland Court found that "....when the general public is entitled to physically use the condemned property, the use is 'public' for purposes of the constitutional provision."[23] The Court cited prior Maryland case law which "made it clear that the critical factor is the general public's *entitlement* to use the property, and not whether a large segment of the general public would likely use the property."[24]

The City of Novi here sought to create a public roadway that will traverse from Ring Road to the General Filter and A. E. Wisne properties. Although the roadway at issue in this case would take traffic to and from General Filter and A.E Wisne companies, these companies would not own the land upon which the roadway would lie. The City of Novi would own the underlying land and would be responsible for the maintenance of the road, both financially and legally. The road would become a part of the highway system laid out and maintained by the City of Novi and the City would have the ability to modify the road in the future as it sees fit, without permission from A. E. Wisne or General Filter. Members of the general public would be able to use the roadway without approval from any private company.

The fact that the roadway that is proposed by the City of Novi benefits the property holders along the path of the roadway is neither unusual nor significant. The property owners along the path

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[22]346 Md 65; 695 A2d 125 (1997).

[23]*Green, supra,* p 74.

[24]*Green, supra,* p 74.

of the road and the terminus of the road are always the ones most significantly affected by the creation of the road, either because a portion of their property may have to be taken to create the roadway, or because they will be the ones primarily driving upon the road once it is created. This is intrinsic to the nature of the roadway itself: persons not having business in the area do not drive on the road. It does not suggest that a roadway otherwise open to the public becomes private simply because too few members of the general public use it – it is sufficient that members of the general public *may* use it, whether they choose to or not. To decide otherwise would be contrary to logic, contrary to the statutory framework created by the legislature, and flies in the face of established concepts in place for "time immemorial."

This Court should make clear that a municipality may properly exercise its power of eminent domain to acquire private property over which it intends to establish a public road as a matter of law.

ARGUMENT II

THE "HEIGHTENED SCRUTINY" TEST USED BY THIS COURT IN *POLETOWN* V *CITY OF DETROIT*[25] SHOULD BE CONFINED TO THOSE ACQUISITIONS OF PROPERTY BY EMINENT DOMAIN WHERE (1) THE PROPERTY WILL THEREAFTER BE TRANSFERRED TO A PRIVATE PARTY OR (2) WHERE THE PROPOSED TAKING IS NOT SUPPORTED BY A STATE STATUTE RECOGNIZING THE PUBLIC PURPOSE.

In *Poletown* v *City of Detroit*, this Court decided a very narrow issue:

> Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?[26]

The Court was presented with an exercise of eminent domain that involved the transfer of condemned property to a private owner. The Economic Development Corporations Act, under which the transfer was to occur, purported to extend to a municipality the right to condemn private property, not for direct public use, but for transfer to a different private owner to build a factory, to bolster the economy and thereby promote the public welfare. The Court, in examining the narrow issue before it to determine if the public use requirement was met, applied a "heightened scrutiny." This heightened scrutiny test required the Court to consider whether the public interest was the predominant interest being advanced.

The heightened scrutiny analysis utilized in *Poletown* has been subsequently applied in other cases decided by this Court and by the Court of Appeals. In each case, however, the Court looked to the action proposed by the municipality and the basis for the action, and applied the "heightened

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[25] 410 Mich 616; 304 NW2d 455 (1981).

[26] *Poletown*, *supra*, p 629.

scrutiny" test only where either (1) the property was to be transferred to a private party; or (2) where there was no state statute determining the public purpose of the proposed action.

In *Tolksdorf* v *Griffin*,[27] the issue was the constitutionality of the Opening of Private Roads and Temporary Highways Act.[28] This Act allowed a private landowner to petition the township supervisor to create a private road across another landowner's property. The Court found that "[t]he private roads act uses the state's power of eminent domain to convey an interest in land from one private person to another."[29] This taking was declared unconstitutional under the *Poletown* test. The road to be created in *Tolksdorf* was private, not public. It would not be owned by the municipality, nor would the municipality have control over it.

Likewise, in *City of Centerline* v *Chmelko*,[30] the Court of Appeals examined a proposed condemnation of private land for the purpose of transfer to another private corporation. The Court concluded that "the instant case is one in which 'heightened scrutiny' should apply since the record readily indicates that the land, if condemned, would be made available to a private party, Rinke Toyota."[31] The Court further found that "the reasons given by the city for the condemnation were revealed to be a complete fiction. The record reveals that the city acted as an agent for a private

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[27]464 Mich 1; 626 NW2d 163 (2001).

[28] MCL 229.1 *et seq*; MSA 9.281 *et seq*.

[29]*Tolksdorf, supra,* p 9.

[30]164 Mich App 251; 416 Mich App 401 (1987).

[31]*Id,* p 262.

interest, a local car dealership, Rinke Toyota." See also *City of Detroit* v *Vavro*[32] (taking of private property for transfer to Chrysler Corporation upheld upon application of *Poletown* test).

In *City of Lansing* v *Edward Rose Realty*,[33] this Court found a City of Lansing ordinance providing for mandatory access to private property by a city franchisee for provision of cable television service to be unconstitutional. In that case, the City of Lansing intended to retain title to an easement that would be created, but would delegate to its franchisee, Continental Cablevision, the right to use the easement to provide cable television service to private properties. In *Edward Rose,* this Court based its analysis on the lack of a public purpose behind the city's action. The Court reviewed the basis for the city's utilization of eminent domain and concluded that:

> **The city's proposed conduct** to require mandatory access by its franchised cable operator, Continental, onto Rose's private property **does not result from a state legislative pronouncement of public purpose, nor has the Legislature specifically delegated to municipalities the authority to undertake the actions proposed by the city.** Rather, the city enacted resolutions 446 and 557 on the basis of its own general assertion that mandatory access by its only franchisee furthers a public purpose.[34] (Emphasis added.)

The Court struck down the City of Lansing's ordinances, finding that there was no predominantly public purpose served. In *Edward Rose*, the Court looked to the reasonableness of the ordinances:

> Because the city passed ordinance 753 without an express delegation of authority by the state, we may review the city's asserted public purpose. Judicial deference granted state legislative determinations of public use is not similarly employed when reviewing determinations of public

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[32]177 Mich App 682; 442 NW2d 730 (1989).

[33]442 Mich 626; 502 NW2d 638 (1993).

[34]*Edward Rose, supra, p. 643*

> purpose made by a municipality pursuant to broad, general enabling statutes. (footnotes omitted)[35]

The *Edward Rose* case refers to *Poletown*, but analyzes *Poletown* in terms of the Legislature's determination of a public purpose, rather than relying solely on the question of heightened scrutiny and public versus private benefit. This Court stated specifically in *Edward Rose* that its role in deciding whether the *Poletown* taking "was for the primary benefit of the public was limited"[36] due to the legislature's determination that the city's conduct was an essential public purpose, the legislature's express delegation to the city, and the fact that the city complied with all the procedures set forth in the legislature's enabling statute. The taking proposed in *Edward Rose* did not have the presumption of legitimate public purpose that this Court found to exist in *Poletown,* because it was not accomplished under a state statute which declared the taking to be for a public use.

What the Court did in *Edward Rose* was exactly what it had done in other cases: (1) examined what the municipality proposed to do: either take private property to transfer to a private entity or retain the property as public; (2) analyzed the statutory basis for the action: whether approved by the state legislature or not; and (3) applied heightened scrutiny where either the property was to be transferred to a private entity, or where there was no state legislative approval of the action.

In *Poletown*, the Court determined that the proposed transfer of private property to another private company, pursuant to a specific state statute determining a public purpose, warranted heightened scrutiny of the action. In determining the public versus private benefits, the Court concluded that the public benefit was predominant.

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[35]*Edward Rose, supra, p. 637*

[36]*Edward Rose, supra, p. 638*

In *Edward Rose*, the Court determined that the city's taking of an easement, to be held by the city but used by the city's franchisee pursuant to a city-determined public purpose, not supported by state statute, warranted heightened scrutiny and a close look at the public purpose served. There the Court found that the public benefit was not predominant.

Ironically, in *Township of West Orange* v *769 Associates*, discussed in more detail *infra*, the New Jersey Supreme Court noted that the intermediate appellate court had incorrectly applied a "heightened scrutiny" test in reliance upon this Court's decision in *Poletown* v *City of Detroit*, *supra*. In rejecting the heightened scrutiny test in takings for a public road, the New Jersey Supreme Court specifically distinguished *Poletown* on the basis that it involved a transfer of condemned property to a private party, a situation which was not before that court and which is not before this Court.

In the present case, the City of Novi wishes to take private property for the purpose of creating a public roadway, a public use which the legislature has specifically approved and described as a public purpose. There is no transfer of ownership to a private party, nor does the situation involve a public purpose not approved by the state legislature. To the contrary, the Legislature has specifically approved the taking of private property for a roadway as a public purpose.[37] This action proposed by the City of Novi does not warrant the heightened scrutiny applied in *Poletown*. The Court is requested to clarify that the heightened scrutiny test has no application in these circumstances.

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[37]MCL 213.221; MSA 8.211.

ARGUMENT III

AS A MATTER OF PUBLIC POLICY, THIS COURT SHOULD CLARIFY THAT THE TEST OF WHAT IS A "PUBLIC USE" IS NOT DEPENDENT SOLELY UPON A COMPARISON BETWEEN THE RESPECTIVE BENEFITS TO THE PUBLIC AT LARGE VERSUS INDIVIDUAL MEMBERS OF THE GENERAL PUBLIC.

The decision of the Court of Appeals contains the following statement, which was apparently outcome determinative:

> **Although we assume the validity of the public interest advanced by the city**, we find that the private interest to be benefitted predominates over the asserted public interest. The asserted public interest therefore does not justify the proposed taking of private property by the City. The taking was thus unconstitutional. (Emphasis added.)

This language, which makes it clear that the Court made a "finding" of fact, inserts a judicial balancing test into the inquiry of what is a public use. The Court expressly accepted the validity of the public interest of the proposed project, but substituted its judgment for that of the City and concluded that private interests outweigh the public interest. This conclusion is a complete rejection of the judicial deference which the United States Supreme Court endorsed in *Hawaii Housing Authority* v *Midkiff*:[38]

> Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.

The quoted language of the Court of Appeals will require municipalities, upon challenge by a property owner, to bear the burden of proving that private interests are *not* the predominant beneficiaries of a public project before they may lawfully exercise the power of eminent domain. It presupposes that a public project is a zero sum game whereby an increase in the benefit to a private

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[38]467 US 229, 244; 104 S Ct 2321; 81 L Ed 2d 186 (1984).

interest necessarily results in a corresponding decrease in the benefit to the public. There is no support in the statutes or in case law, however, for this type of balancing test. In a case discussed earlier in this brief involving the same question now before this Court, the United States Supreme Court in *Rindge Co* v *Los Angeles County*, *supra* at p 709, came to a very different conclusion:

> It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use.

Similarly, in *Alibri* v *Detroit/Wayne County Stadium Authority*, *supra* at 557, a different panel of the Court of Appeals said:

> Indeed, "the mere fact that the taking of property for a public use will result in greater benefit to some persons than to others . . . does not affect the character of such use, or render it any the less public, within the meaning and scope of the law of eminent domain." *In re Condemnations for Improvement of River Rouge*, 266 F 105, 114 (ED Mich, 1920).

To allow the standard used by the Court of Appeals to stand could jeopardize any public project which is narrow in scope merely because it has specifically identifiable beneficiaries.

The Court of Appeals gave no deference to the determination by the City of Novi that a public road would be appropriate to handle traffic traveling between A. E. Wisne and/or General Filter and the newly created Ring Road. Instead of requiring the property owners to show that there was fraud, an error of law or an abuse of discretion by the City of Novi as required by MCL 213.56; MSA 8.256(6), the lower court and the Court of Appeals both appropriated the heightened scrutiny test which has never previously been applied to a taking for construction of a pubic road, then used their own judgments to determine whether the City of Novi's proposed taking predominantly benefitted the public or a private interest.

If the "predominant benefit" test will now be applied in all eminent domain matters, and not merely to takings involving the transfer of title to private entities, local municipalities will be governed by judges, to the extent that public infrastructure and improvements are concerned. All a dissatisfied property owner need allege is that a private or identifiable interest will be significantly benefitted, and the trial court will then be required to make factual determinations over where highways and public improvements shall be placed. This is an unwarranted and ill-advised test, which fails to follow existing law, and should be rejected by this Court.

A determination of whether the proposed taking predominantly benefits the public or a private party may sound reasonable in the abstract, but its application to cases where a taking would be used for a public roads or other publicly-owned improvements is impractical and, in extreme cases, nonsensical.[39] This Court has never previously suggested that a public use might lose its character as a public use merely because private interests might also stand to benefit from the project. Yet this is the only logical reading of the opinion of the Court of Appeals.

In the case currently before the Court, the lower courts concluded that the benefit of a new road to A. E. Wisne and General Filter "predominated" over the benefit of the road to the public, rendering the City of Novi's proposed taking of property to construct the road unconstitutional. The Court of Appeals and property owners have focused on A. E. Wisne and General Filter solely in their capacity as individual private business enterprises, and have ignored their dual roles as part of "the general public." The Court of Appeals never addressed the fact that individual members of the general public

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[39]For example, if Wisne demolished its current facility and constructed the "Wisne Concert Center" which attracted 10,000 patrons at a time for performances, it could be argued that a second means of ingress and egress to the Center would predominantly benefit Wisne's financial interests, making eminent domain unavailable to the City of Novi under the circumstances.

associated with Wisne and General Filter – whether they are employees, vendors, customers, shippers, or contractors – travel to and from these businesses each day. The Court of Appeals did not explain whether, in applying the "predominant benefit" test, such visitors to the property must be viewed together with Wisne and General Filter as elements of "private interests," or whether these persons should be considered members of the general public, who may themselves personally benefit from the proposed public road.

The Court of Appeals' approach fails to take into account the following critical questions: If persons traveling to A. E. Wisne or to General Filter are members of the general public while they are traversing the many streets that may be necessary to take them from their homes to the companies, when do they lose that status? Is it only after they make the final turn onto the road that will take them the final leg of their journey, or does it happen at some earlier point in their travels? What is the justification for altering their status from members of the general public to part of the A. E. Wisne or General Filter "private interests," if they are not the owners of those companies?

In further illustration of the anomaly created, consider whether the decision of the lower courts would have been different if the proposed Wisne road would have served a third business instead of only two? If three would be insufficient, what if the proposed new road would serve five businesses? If the answer is still "no," how many businesses would the public road need to serve in order to "predominantly" serve public as opposed to private interests? Moreover, does it matter whether the businesses are retail businesses which invite members of the public to shop there, or if the business is a factory which does not solicit the public to its premises? Or does the determination depend upon how much traffic the businesses generate?

If the proposed new public road would be expected to carry a traffic volume of 2000 vehicles per day, would the public interest then predominate? What if the traffic volume would be 200 vehicles per day, or only 20 vehicles per day? Where must the line be drawn between benefitting public interests, on the one hand, versus private interests on the other?

These are exactly the kinds of questions which trial courts will face when a property owner elects to challenge a taking for a public road because the road will arguably benefit private interests more than the public interest. In this case, the judicial inquiry into this seemingly simple question took three days and involved 12 witnesses. These kinds of hearings cannot be what the Legislature had in mind when it established that an agency's determination of public necessity would be "binding on the court in the absence of fraud, error of law, or abuse of discretion." MCL 213.56(2); MSA 8.265(6)(2).

If trial courts are required to determine whether a public road will predominantly benefit a private interest as opposed to a public interest, there will be no certainty for municipalities who need to exercise the power of eminent domain to construct a road or other public project which is smaller in scope. Since judges will be called upon to make findings of fact and apply the facts to an amorphous legal standard, the decisions will likely be as diverse as the judges who are required to make them. Public projects could succeed or fail based upon the judge who is drawn to hear the case.

Amicus Curiae does not suggest that the "predominant interest" test has no place in eminent domain jurisprudence. The predominant interest test is appropriately applied in those cases where property being acquired by a municipality will later be transferred to a private party. This is because the private interest in such a situation is well-defined – it is the entity which will eventually own the land which has been taken from a property owner by eminent domain. In cases involving proposed public roads or other publicly-owned improvements, however, the distinction between private interests

and the public interest is far more elusive. At times, the two interests may even blend into one another. What is good for a private interest is often good for the public as well. Conversely, what may be *good* for the general public may be *great* for a private interest. If that occurs, does that mean that the private interest thereby "predominates" over the public interest, rendering a proposed acquisition unconstitutional? The decision of the Court of Appeals imposes such a result by requiring courts to weigh the respective public and private benefits of a road or other public project and invalidate it whenever the scales can be said to tip in favor of private interests.

In cases involving a public road such as the one proposed in this case, the private interests examined by the lower courts (in this case, A. E. Wisne and General Filter) cannot be totally isolated from those of the general public. The two "private interests" in this case are both destinations to which the general public is entitled to travel. More significantly, both businesses also generate traffic which leaves their respective premises and goes elsewhere. Even if the proposed road would arguably serve A. E. Wisne's and General Filter's private economic interests in bringing traffic to the facilities in order to conduct business, the same conclusion would not necessarily follow for traffic leaving those facilities. Clearly, the public interest would be served if vehicles leaving those properties were no longer required to empty onto an unlighted, congested intersection instead of onto a different road which has been planned, designed and built to alleviate that very congestion.

Finally, this Court should not overlook the practical problem that will be created by using the "predominate interest" balancing test whenever a municipality attempts to acquire property for a public project through its power of eminent domain. It should come as no surprise that, historically, some property owners have used challenges to the validity of condemnation proceedings to leverage additional just compensation from the condemning agency. The Court of Appeals acknowledged the

existence of this strategy in *Lucas* v *City of Detroit,*[40] when it explained the reasoning behind a provision of the Uniform Condemnation Procedures Act [1980 PA 17; MCL 213.51 *et seq*; MSA 8.256(1) *et seq*] which separates the issue of just compensation from the issue of necessity:

> The purpose of this statute was to separate the issue of necessity, while leaving ample time to litigate damages. This was done in order to eliminate the ploy by which one landowner could bring the largest of public improvement programs to a complete halt, and thereby extort exorbitant damage settlements from the public treasury.

Often a public project is on a fast track because of funding or certification deadlines, or because possession of property needed for a project must occur before a construction job can be "let." Prior to the adoption of amendments to the Uniform Condemnation Procedures Act in 1996, it was common for attorneys for property owners to challenge the sufficiency of a good faith offer, which at least one panel of the Court of Appeals had ruled could successfully void the condemnation proceedings.[41] If a judge could be convinced that the agency's offer was too low or left out an item of damages, the case would be dismissed, and the public project would be stopped dead in its tracks, at least temporarily. This, of course, placed agencies in the position of either appealing or offering more money, whether or not it felt the additional amount was justified, in order to allow the project to move forward on a timetable.

This legal strategy was rendered ineffective by the 1996 amendments to the UCPA which, among other things, specifically stated that the vesting of title in the agency will not be delayed or

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[40]180 Mich App 47, 50; 446 NW2d 596 (1989).

[41]*In re Central Ind Park Project*, 177 Mich App 11; 441 NW2d 27(1989).

denied because the agency should have offered a higher amount or included additional property in its initial offer.[42]

The decision of the Court of Appeals in this case, however, reopens the door to this type of legal maneuvering which had effectively been closed by the Legislature in 1996. A property owner can now delay transfer of possession of property being condemned by asserting that private interests will derive a greater interest from a project than the general public. The mere threat of the possibility of a three-day, twelve-witness hearing is liable to cause municipalities to either forgo a legitimate public project which arguably might not meet the "predominant interest" test, or pay the property owner an unwarranted premium in exchange for not asserting such a challenge.

If this Court fails to overturn the Court of Appeals decision, the law of eminent domain in Michigan will have been significantly changed in a way which will have long ranging and serious consequences for every city, town and municipality which tries to exert control over their own public roads, public sewers, and other public improvements authorized by statute. Property owners will be able to challenge and delay improvements which are undeniably a public use, solely because the project may have a greater benefit to an identifiable segment of the general public (characterized by the Court of Appeals as "private interests") than the public at large.

The Michigan Municipal League urges the Court to grant the application for leave to appeal filed by the City of Novi and limit the predominant interest test to those unique situations where it has previously been applied by this Court – to cases where the property is being acquired by a municipality for transfer to a private party, or where the proposed taking is not supported by a state statute which recognizes the public purpose of the project.

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[42]MCL 213.57(2); MSA 8.265(7)(2).

RELIEF

Amicus Curiae, the Michigan Municipal League, requests the Court to:

1. Grant the application for leave to appeal filed by the City of Novi;
2. Reverse and vacate the decision of the Court of Appeals;
3. Hold that the establishment of a publicly owned and maintained road by a municipality is a "public use" as a matter of law;
4. Limit the "heightened scrutiny" test in *Poletown* v *City of Detroit* to those acquisitions of property by a governmental agency through eminent domain where the property will thereafter be transferred to a private party, or where the proposed taking is not supported by a state statute which recognizes the public purpose being advanced by the municipality; and
5. Grant any other relief which the Court believes is appropriate.

Respectfully Submitted,

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