

The Refuge

PROPERTY RIGHTS
NETWORK

A publication of the Mackinac Center for Public Policy SPRING 2009
"A man's house is his castle — et domus sua cuique est tutissimum refugium" — Sir Edward Coke

HOBBS
VS.
LOCKE
PAGE 6

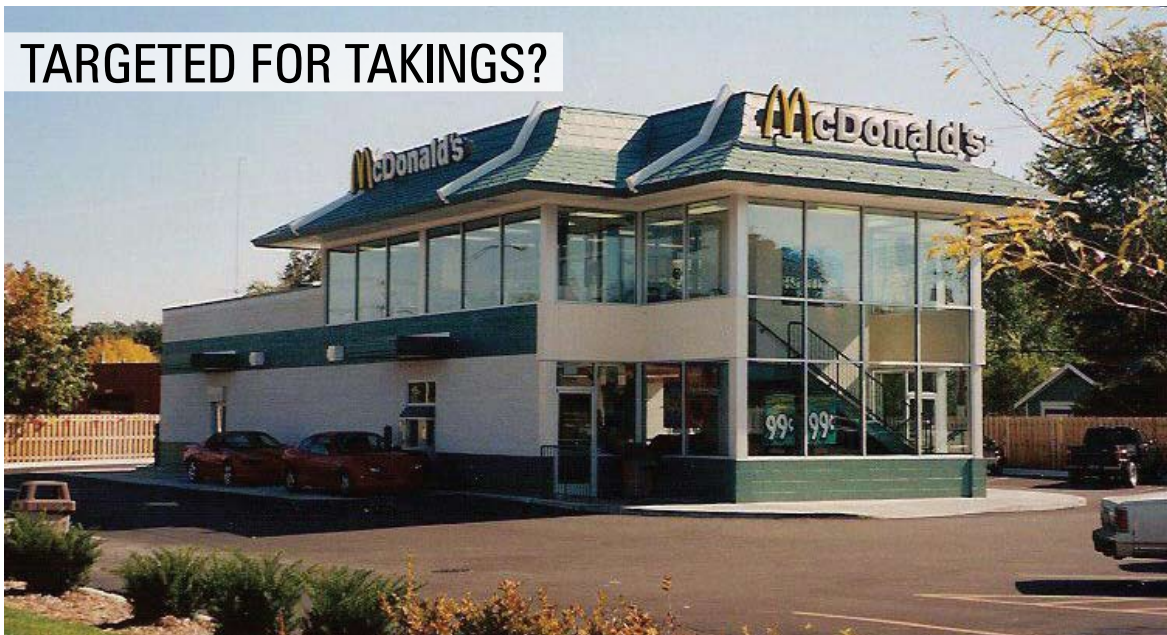


Where's the brownfield?

BY RUSS HARDING

JOE MAGUIRE, PRESIDENT of Wolverine Development and a Mackinac Center board member, was dumbfounded when he received a letter last December from an environmental consulting firm requesting his consent for access to conduct an environmental assessment on property he owns in East Lansing. Maguire's well-maintained property features a McDonald's restaurant in the East Village area adjacent to the Michigan State University campus.

Maguire was not aware of any environmental pollution on his property and certainly had not requested an assessment. After some research, he quickly



discovered this was not an administrative blunder, but rather an attempt by East Lansing officials to reclassify his property as a brownfield site.

A brownfield is property that is abandoned or underutilized due to environmental contamination. Frequently, the parties responsible for the contamination are no longer around or have gone out of business.

Environmental cleanups are often expensive and generally require several years to complete. While serving as deputy director of the Department of Natural Resources in the early 1990s, I worked with municipalities to modify state cleanup laws in order

See "Brownfield," Page 2

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Private property rights under attack in Michigan

BY RUSS HARDING

THE RIGHT TO own private property and to use it free from excessive governmental control is under attack in Michigan. Private property is a fundamental right that distinguishes us as a free people. The framers of both our national and state constitutions understood the importance of protecting private property rights. The Fifth Amendment of the Bill of Rights states, "No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Article 1, Section 17, of the Michigan Constitution declares, "No person shall be ... deprived of life, liberty or property, without due process of law," and Article 10, Section 2, holds, "Private property shall not be taken for public use without

just compensation. ..."

Despite federal and state constitutional protections against property confiscation, state and local governments have found a subtler way to limit private property rights: regulatory takings. Regulatory takings are an effective way for lawmakers and bureaucrats to pursue their policy goals without having to pay for them.

Such takings are often achieved through laws that restrict the right of landowners to use their property. These laws ostensibly benefit the general public, though there is often disagreement as to the extent or even the existence of the benefit. These benefits must be paid for by someone, and since government officials usually possess more good intentions than they do money, they use regulatory takings to shift the expense to private property owners.

See "Under Attack," Page 2

Lessons From Other States

Measuring Oregon's property rights law

BY KURT BOUWHUIS

THE U.S. SUPREME Court's *Kelo v. New London* decision determined that it is legal under the federal constitution for the govern-

ment to use eminent domain to seize private property and transfer it to private individuals or private economic development firms. The court justified this decision by

See "Oregon," Page 7



A supporter of Measure 37 in Dundee, Ore., points to the property the proposal allows him to develop. (AP Photo/Greg Wahl-Stephens)

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Mackinac Center for Public Policy
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Midland, Michigan 48640

UNDER ATTACK

from Page One

The following are examples:

Wetland Laws: A property owner is denied the use of her property to develop a homesite because she would have to fill wetland. The courts have generally ruled that unless the loss of the use of her property approaches 100 percent, she is entitled to no compensation, even though her property may be virtually useless for its intended purpose. The benefit of protecting wetland may or may not be realized by the general public, but the entire cost of the loss of use of the property is borne by the landowner.

Zoning Ordinances: A small-business man purchases property and opens a coffee shop. The township zoning commission passes an ordinance that prohibits him from placing a sign on his property advertising his business. His ability to operate his business and generate a profit has been seriously harmed. Even though the value of his property is substantially diminished, he receives no compensation and is expected to bear the cost of the supposed aesthetic value realized by local citizens and visitors to the area.

No-Smoking Laws: A family-owned restaurant has been operating successfully for years, providing for the needs of its customers with both smoking and nonsmoking areas. The city council passes a law that bans smoking in all restaurants. The cost of that law is borne by the restaurant owner, who loses some business from customers who smoke. The government is now making business decisions for him, thereby eroding his private property rights.

While it is politically expedient to pass laws that promise benefits for the majority at the expense of individual property owners, our elected officials should be committed to protecting individual freedom by strengthening private property protections.

In the absence of leadership by elected officials, residents of a state may be forced to promote ballot initiatives so voters can decide if they want their private property protected from regulatory takings. For example, voters in both Oregon and Arizona recently approved protections

against regulatory takings. Oregon voters overwhelmingly approved a ballot measure that is elegant in its simplicity (see “Measuring Oregon’s property rights law” on Page One). The measure stipulates that when the government imposes a restriction on the use of private property, it has to pay the landowner for the value lost as a result of that restriction. If the government chooses not to — or cannot afford to — pay the landowner, the restriction does not take effect.

Citizens often are not concerned about protecting private property rights until the government takes an action that affects them directly. By then, however, it may be too late. Michigan property owners should demand that their private property be protected from regulatory takings. ■

BROWNFIELD

from Page One

to encourage the reuse of brownfield sites. The Legislature overwhelmingly adopted changes to Michigan law that included revising legal liability standards and adopting more realistic health-based cleanup standards. As a result, Michigan was the first state to replace the federal standard of strict liability with a causation standard.

Under the old law, a party that purchased a brownfield site could be forced to pay to clean up the property even though they did not cause the contamination. A property owner was deemed guilty by just being in the chain of title — a serious impediment to attracting the necessary capital to develop brownfield sites.

The new law’s causation standard — if you caused the contamination you pay to clean it up, and conversely, if you didn’t cause the pollution you don’t pay — opened up a flood of investment in brownfield sites.

But is the city of East Lansing truly concerned that the properties belonging to Maguire and other East Village business owners are environmentally contaminated? Or could there be another motive? A look at the city’s own words is revealing.

The city applied for and received a grant from the U.S. Environmental Protection Agency to inventory and

DEQ denial sets dangerous precedent

BY RUSS HARDING

ON JULY 1, 2008, The Michigan Department of Environmental Quality denied a permit to Bustorf Dairy for a concentrated animal feeding operation (known as a “CAFO”) in St. Joseph County’s Leonidas Township. What is troubling in this case is not the permit denial itself, but rather the basis of the DEQ’s decision, which relies more on social engineering than environmental science.

In response to Bustorf’s claims that its operation would create jobs, the DEQ countered in a press release, “(F)igures provided during the public comment period showed that any jobs provided by the CAFO will lower the median wage level in the township and replace higher paying jobs and family income at smaller farms.” In other words, instead of basing its decision on the agency’s charter to preserve and improve the quality of the state’s environment, the DEQ positioned itself as an advocate for the best interests of one business over another.

If left to stand, the decision sets a dangerous precedent, opening the door for the DEQ to deny permits for virtually any reason. Thus emboldened, the agency would be free — as it did in this case — to make further arbitrary judgments. For example, using the same rationale used to deny Bustorf the CAFO permit, the DEQ also could deny permits for a Home Depot because it might reduce income at a local hardware store. Similarly, it could deny a permit for a Gander Mountain

conduct environmental assessments on so-called brownfield sites in the East Village. In the grant application, the city states: “One of the more significant challenges for the City of East Lansing is the lack of property tax revenue from the over 5,200 acres of MSU land within its boundaries.” The application goes on to indicate: “The city has designated East Village as a redevelopment area and through its extensive public planning process had developed a vision of a mixed-use commercial and residential neighborhood that includes not just students, but residents of all ages and lifestyles. ... East Village is an area that cannot be redeveloped



Sonja and Juergen Bustorf speak at a public hearing. (Photo by River Country Journal.)

store because it might compete with a local sporting goods store.

With the Bustorf decision, the DEQ apparently believes that it is uniquely qualified to centrally plan Michigan’s economy. Put a different way, the agency is using its considerable weight to pick winners and losers in the marketplace. Mackinac Center scholars have provided considerable research into the poor track record of government agencies, such as the Michigan Economic Growth Authority, that attempt to do just this and ignore market realities. It is frightening to contemplate the DEQ also taking on this formidable task.

CAFOs have become increasingly common in modern U.S. agriculture due largely to economies of scale. Environmental groups are often critical of CAFOs, claiming they produce large quantities of animal waste that can potentially pollute surface and ground water. While it is true that CAFOs can

without extensive environmental investigation. ...”

In other words, in an effort to generate more tax revenue, the city is hoping to remove existing businesses and use a brownfield designation to secure special state tax credits to lower the cost of the property to a new commercial developer.

It is clear from a reading of the grant application that city officials believe everything would be better if MSU were not located in East Lansing, ignoring the fact that students who live there support the many taxpaying businesses in the East Village area. One can speculate that were it not for MSU’s presence in

and sometimes do cause environmental problems, the same can be said for other agricultural activities. However, the trend in animal agriculture is towards CAFOs that are usually more efficient and can produce more animals on less acreage. In my experience as an environmental regulator, large CAFOs have more resources to prevent or correct environmental problems than do small operations, which are often strapped for cash.

Regulatory certainty is at the top of the list for businesses seeking to invest in Michigan. Businesses will not invest in the state unless they know that if they comply with environmental requirements, they can be assured of obtaining the necessary permits. It is impossible to provide the certainty required for investment when DEQ goes beyond adjudicating environmental regulations and becomes an arbitrator of social justice, as it has in the Bustorf permit decision.

The Michigan Legislature needs to move aggressively to stop regulatory overreach by the DEQ. A good place to start would be to move all regulatory authority over agriculture from the DEQ to the Department of Agriculture. Following that, legislation is needed that specifically limits DEQ’s authority to considering only technical environmental regulatory issues. In the absence of such action, economic investment in Michigan — and the much-needed jobs that come with that investment — will flee to other states with stabler regulatory environments. ■

East Lansing, the city might not even exist. There are probably several cities in Michigan facing declining revenues that would love to have a major state university within their boundaries.

Using the brownfield program as a tool to justify taking private property is a serious misuse of what was intended to spur economic development and environmental cleanup. The brownfield program was never meant to be a tool for central planners to take private property to pursue their utopian dreams. The city of East Lansing should return the grant money to the EPA and respect the private property rights of its residents and businesses. ■

THE MACKINAC CENTER'S

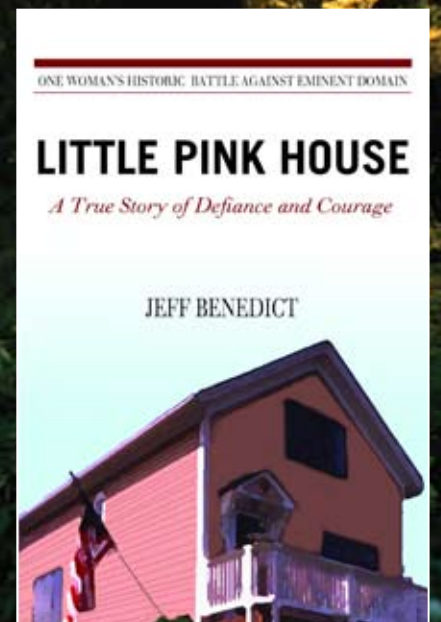
Property Rights Network

PROUDLY WELCOMES

Susette Kelo and Jeff Benedict

FEB. 10, 2009 – EAST LANSING (see www.mackinac.org)

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with conscience ... will leave
readers indignant and inspired.”
—Publishers Weekly (Starred Review)



‘Smart growth’ is neither

BY RUSS HARDING

“SMART GROWTH” HAS been the orthodoxy of overzealous urban planners for some time. Although it sounds appealing at first blush, smart growth is nothing more than an anti-suburban policy. According to the tenets of smart growth, the perceived ills of urban sprawl can be cured if people abandon their automobiles, live in densely populated urban areas and travel by walking or mass transit. These actions would supposedly foster a sense of community and promote healthier lifestyles.

No matter how much smart growth is extolled as the preferred land-use policy, it will not succeed. Smart growth suffers from the same fatal flaw that plagues all central planning: a misguided belief that the planners somehow know what choices people should make and that people will make those “correct” choices if the planners institute the

proper incentives.

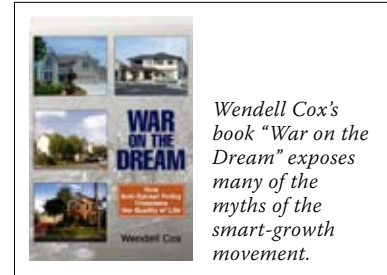
However, a free people making free choices will vote with their feet. People in the United States and throughout the developed world are choosing suburbia over the city. In his book “War on the Dream,” Wendell Cox noted: “Among metropolitan areas of more than 1,000,000 population in the

“THERE ARE TWO MAJOR REASONS TO WORRY ABOUT SMART-GROWTH POLICIES: LESS AFFORDABLE HOUSING AND LOSS OF PRIVATE PROPERTY RIGHTS.”

high-income world, approximately 95 percent of urban growth has been in the suburbs. In the United States, Canada, Japan, and Oceania (Australia and New Zealand), more

than 90 percent of the growth has been in the suburbs since 1965. In Western Europe the share of growth in the suburbs has been even greater, at 114 percent, reflecting the continued central city population losses.”

Another major reason smart-growth policies fail is that they try to solve a nonexistent problem by preserving limited open space. According to Cox: “The human footprint (urban development, rural development, and agricultural land use) has decreased in the United States, Canada, and Australia, as significant amounts of agricultural land have been withdrawn and turned back into open space. In the United States, the human footprint has been reduced by 15 percent since 1950, an amount equal to the land areas of Texas and Oklahoma combined.” Michigan follows this trend. The amount of urbanized land in Michigan comprises less than 10 percent of the state. Forestland in Michigan has actually grown by 2 million acres in the last



Wendell Cox's book "War on the Dream" exposes many of the myths of the smart-growth movement.

20 years (see www.mackinac.org/5653).

If smart-growth policies have largely been a failure, why should we worry about their future implementation? There are two major reasons: less affordable housing and loss of private property rights. Land-use restrictions that attempt to confine development to a core area increase the cost of property, a key component of housing prices. This may provide a windfall for developers, but increases the cost of owning or renting housing. Unaffordable housing disproportionately impacts lower-income residents, who often have a limited ability to relocate.

According to Cox, there is a direct correlation between zoning restrictions and the affordability of housing. In fact, from 1995 to 2005, the unaffordability of housing increased five times more in urban areas with the most restrictive land-use policies than in cities without such restrictive policies.

Furthermore, implementation of smart-growth policies frequently results in the loss of private property rights. Landowners who purchased property prior to smart-growth restrictions are particularly affected. As noted previously, smart-growth policies frequently place restrictions on the use of private property, and affected landowners receive no monetary compensation for their loss. This has led Oregon and Arizona voters to pass citizen ballot initiatives to limit this abuse.

Smart growth is neither smart nor growth. Property owners seem to understand this. Perhaps it is too much to expect urban planners to get it, but let us hope state and local elected officials do. ■

Post of environmental ombudsman vetoed

State officials dispute details

BY KURT BOUWHUIS

IN SEPTEMBER, GOV. Jennifer Granholm used a line-item veto to nix the \$250,000 post of environmental ombudsman approved in Senate Bill 1097. In her veto letter she stated, “(It) is inappropriate to fund a legislative position using funds appropriated to a principal department of the Executive Branch.” Nevertheless, the bill offered more efficient environmental protection and greater responsiveness to valuable input from citizens and businesses.

Although the duties of the environmental ombudsman were not defined under the legislation, they would likely have been those described in House Bill 4952 of 2007. H.B. 4952 stated that the environmental ombudsman would

primarily manage complaints from citizens regarding the Michigan Department of Environmental Quality. The ombudsman would not be able to take legal action, but could conduct investigations, hold hearings and report findings.

The environmental ombudsman would act as a check on state power and help integrate common sense into the statutes the DEQ enforces. Under

[*web link
MICHIGANVOTES.ORG/2007-HB-4952](http://MICHIGANVOTES.ORG/2007-HB-4952)

the current law, the DEQ is required to enforce existing state statutes, even if there are portions not functioning well. An environmental ombudsman would shed light on these problems, providing additional credibility to the DEQ, and give citizens some place to



“(It) is inappropriate to fund a legislative position using funds appropriated to a principal department of the Executive Branch.”
—GOV. JENNIFER GRANHOLM

go with complaints. As it stands now, citizens and businesses have no one to turn to.

Steve Chester, director of the DEQ, sided with Gov. Granholm and said: “I’m not objecting to the concept of an ombudsman, but as proposed by the Legislature as being a legislative function, I don’t think it’s something that would work effectively.”

Robert McCann, DEQ press secretary, told The State News: “We’re opposed to the bill solely because it would interfere with our

job as environmental regulators. ... (An ombudsman) would basically disrupt processes designed to ensure we are protecting the environment.”

As written in H.B. 4952, the ombudsman’s responsibilities would cover an array of important areas. These include submitting investigative reports and making “recommendations to the (legislative) council,” a bipartisan panel of legislators established under the Michigan Constitution to carry out “bill drafting, research and other services for the members of the Legislature” and to “periodically examine and recommend to the legislature revision of the various laws of the state.” The council would be contacted “if the ombudsman finds any of the following:

“(a) A matter that should be considered by the department.

“(b) An administrative act that should be modified or canceled.

“(c) A statute or rule that should be altered.

“(d) Administrative acts for which

justification is necessary.

“(e) Significant health and safety issues as determined by the (legislative) council.

“(f) Any other significant concerns as determined by the (legislative) council.”

The ombudsman would have access to all DEQ information, records and documents that the ombudsman considered necessary to any investigation. The ombudsman could inspect the premises under control of the DEQ without notice. Last, the ombudsman could hold informal hearings and request any person to appear and produce evidence for a case.

An environmental ombudsman could help resolve controversies involving the DEQ. The ombudsman would not have an incentive to pick sides in an argument and would be a valuable resource for resolving DEQ disputes. If DEQ representatives believe people are satisfied with the service they provide, they should support this accountability measure. ■

DEQ ruling threatens retirees' dream

Tiny fraction of wetland in question

BY KURT BOUWHUIS

DAVID AND BEVERLY Wolf always wanted to retire to a beautiful waterfront home. In 1984 they purchased their dream property in Presque Isle, Mich., with plans to develop it. The upland area adjacent to the shore seemed ideal for building.

Following their retirement in 2000, the Wolfs requested a wetland permit to construct a driveway, since the driveway would have crossed 197 feet of wetland on their property between a nearby road and their proposed homesite (see diagram). Although the driveway would have filled just 0.22 percent of the 36-acre wetland, the Michigan Department of Environmental Quality denied the permit.

The Wolfs were taken aback. As long-term members of the Sierra Club, they were committed to protecting the environment, and they had actively lobbied on behalf of environmental issues in both Lansing and Washington, D.C.

Feeling the DEQ had failed to appreciate the soundness of their approach, the Wolfs appealed. After three days of testimony, Administrative Law Judge Thomas Woods issued a "proposal for decision" in the Wolfs' favor and recommended that the

department grant the permit. His recommendation, however, was overturned by the DEQ.

The Wolfs then appealed to the Oakland County Circuit Court, where Judge Colleen O'Brien upheld the DEQ's decision. O'Brien indicated, however, that she had ruled based on a technicality. The Wolfs' permit application had in passing "mentioned construction of a residence" on the existing upland, making the residence's location a part of the permit and allowing the state to successfully argue that there was no need for the driveway, because it was feasible to construct the house elsewhere on the property.

The DEQ's proposed alternative was to build a residence in the upland adjacent to the road — over 400 feet from the lakefront. Testimony during the appeal established that a home built that far from the water would likely be worth less than the cost to construct it. A real estate broker and former supervisor for Presque Isle Township testified before Judge Woods that a home built where the DEQ suggests would be worth at least 40 percent less than the same home constructed on the existing lakefront upland.

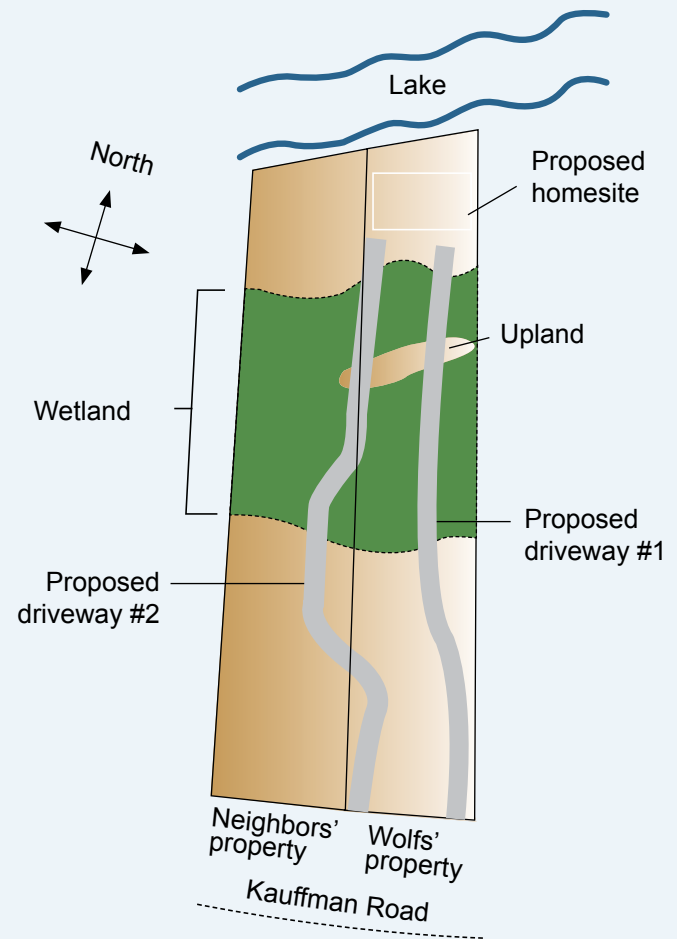
After the first matter was concluded, the Wolfs became acquainted with the owners of the

lot to the west. The neighbors had the same problem as the Wolfs, with a similar upland area that required access. They partnered with the Wolfs and submitted a joint application to construct a shared driveway. Due to the layout of the lots and the wetland areas, the single path along the shared property line would reduce the impact to the wetland area by approximately 28 percent, while also servicing both lots. This time the permit application was carefully written to omit a reference to a residence and to address only the construction of a driveway to access the lakefront.

The second permit was also denied by the DEQ. The Wolfs once again appealed the decision in an administrative hearing and called numerous experts to their property at that time, including wetland consultant Chuck Wolverton of King & MacGregor Environmental Inc. Wolverton has more than 35 years of experience in wetland and environmental consulting and helped establish the very wetland program that the DEQ now administers. Here is how David Wolf describes Wolverton's visit:

"When Chuck and I walked the project site, he got to the first wetland boundary and noted its characteristics. We proceeded on for the length of the wetland(,) crossing about 170 feet. When we arrived at the other boundary, he stopped, looked around with a quizzical expression, and exclaimed(,) 'This is it? You've

DAVID WOLF'S PRESQUE ISLE PROPERTY



got to be kidding me!' He could not believe that the permit had not issued, as it was such a small impact."

Unfortunately, the Wolfs' appeal was once again denied. They continue to pursue their legal options, but roughly eight years have passed since their initial driveway proposal.

The Wolfs have lost some of their retirement years to endless legal wrangling, and while they yearn to build their dream home, their property remains vacant. To learn more about this travesty of property rights and environmental protection, see www.mackinac.org/9820. ■

The Refuge

PROPERTY RIGHTS NETWORK

Editor: Bruce Edward Walker

Senior Managing Editor: Russ Harding Graphic Designer: Daniel E. Montgomery

The Refuge is published three times a year by the Property Rights Network, a nonpartisan statewide organization established to protect and advance property rights in Michigan, and affiliated with the Mackinac Center for Public Policy, a nonprofit, nonpartisan, tax-exempt research and educational institute dedicated to analyzing Michigan public policy issues.

The Refuge is distributed to Michigan residents who have expressed an interest in property rights matters, as well as members of the media and lawmakers and policy staff in the Michigan House, Michigan Senate and Office of the Governor. All rights reserved. Permission to excerpt or reprint is hereby granted provided that the author, Property Rights Network and Mackinac Center for Public Policy are properly cited.

140 West Main Street, Midland, Michigan 48640

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Russ Harding is director of the Mackinac Center's Property Rights Network and a former director of the Michigan Department of Environmental Quality.



Kurt Bouwhuis is an intern with the Mackinac Center's Property Rights Network.



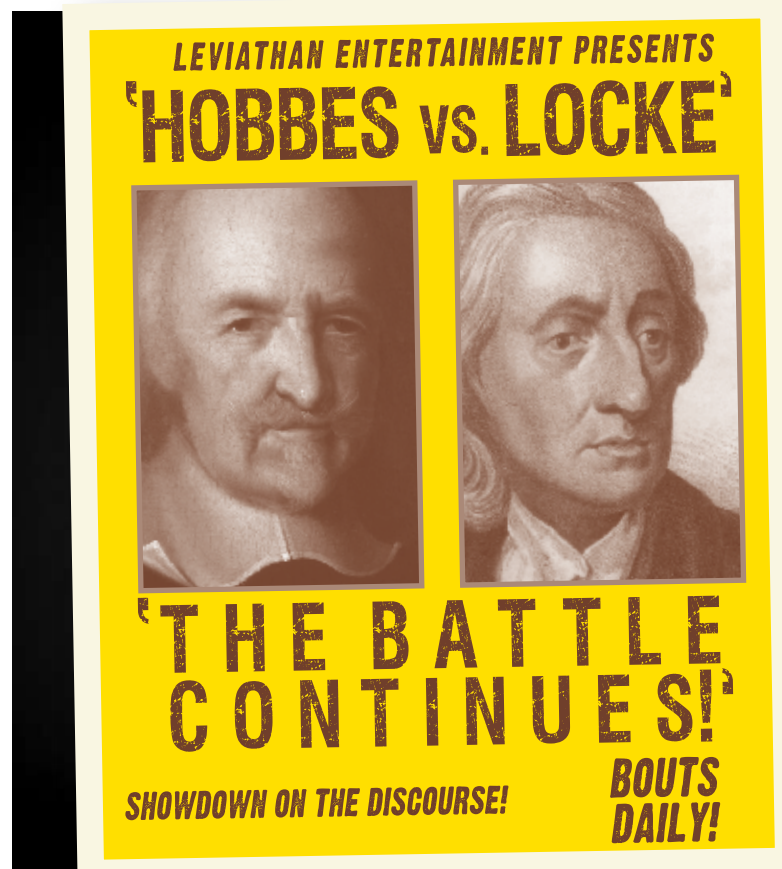
Bruce Edward Walker is communications manager for the Mackinac Center's Property Rights Network and editor of *The Refuge*.



Daniel Montgomery is the Mackinac Center's graphic arts manager.



Patrick J. Wright is the Mackinac Center's senior legal analyst.



BY PATRICK J. WRIGHT

Property rights form the foundation of our political system; without them we have no freedom. Thus it is disturbing to see these rights eroded both in our courts and through bureaucratic action. The central role of property rights in our system of government must be reinforced.

The importance of personal property has been recognized by both friend and foe. James Madison, who has been called “the father of the U.S. Constitution,” set forth government’s duty concerning property as follows: “Government is instituted to protect property of every sort. ... This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.” In “The Communist Manifesto,” Karl Marx and Friedrich Engels reduced their political beliefs to one central point. “The theory of the Communists,” they wrote, “may be summed up in the single sentence: Abolition of private property.”

While the conflict between communist and democratic states has had a monumental effect on the

history of the last century, the current clash over the role of property rights in the United States and Michigan is less a vestige of those conflicts than of the philosophical battle between Thomas Hobbes and John Locke.

Hobbes’ “Leviathan” was published in 1651. In it, he described the state of nature as one where, “(T)here be no propriety, no Dominion, no Mine and Thine distinct; but (only) that to be every man’s that he can get; and for so long as he can keep it.” Hobbes viewed the state of nature as one of war “of every man, against every man.” He believed that in this natural state, “(E)very man has a Right to every thing; even to one another’s body” and that a man’s life would be “solitary, poor, nasty, brutish, and short.”

Hobbes theorized that in order to escape this state of war, men needed to enter into a social contract that would guarantee each man’s safety. He called this contractual entity a commonwealth and believed that it would allow men to repel “the invasion of (foreigners)” and “injuries of one another.” The power to lead this commonwealth was placed in a sovereign. Hobbes recognized three

types of sovereigns — monarchies, aristocracies and democracies — but he expressed a clear preference for monarchies.

Whichever form the sovereign took, Hobbes recognized certain fundamental attributes. A few examples follow: Once the government was in place, the people had no right to change the form of government; the people did not have the right to criticize it, nor could the people claim to be injured by the sovereign, because each man “is Author of all the (sovereign) doth”; and the sovereign had the right to “examine the Doctrines of all books before they are published.” Most important to us here, Hobbes believed that the concept of individual property rights would lead to the destruction of the commonwealth and a return to the state of war:

“A ... doctrine that tendeth to the Dissolution of a Common-wealth, is ‘That every private man has an absolute Propriety in his Goods; such, as excludeth the Right of the (sovereign).’ Every man has indeed a

Propriety that excludes the Right of every other subject: And he has it (only) from the (sovereign power); without the protection whereof every other man should have right to the same. But the right of the sovereign also be excluded, he cannot perform the office they have put him into, which is to defend them both from foreign enemies and from the injuries of one another; and consequently there is no longer a Common-wealth.”

In sum, Hobbes believed in an almost infallible sovereign with nearly limitless power to take and use any and all property for the good of society. Individual rights did not exist; whatever “rights” an individual had were merely at the discretion of the sovereign and could be revoked at any time.

John Locke published his Second Treatise of Government in 1690. He viewed the state of nature quite differently from Hobbes. Locke believed that the state of nature was not one of continual war; rather, there is natural law “which obliges every one” not “to harm another in his life, health, liberty, or possessions.” Locke continued, however, “(E)njoyment of the property he has in this state is very unsafe, very insecure.” This explains why men would willingly leave the state of nature to join a political society: “The great and chief end, therefore, of men’s uniting into commonwealths and putting themselves under government is the preservation of their property.”

Locke believed that even in the state of nature an individual could own property — in other words, property rights pre-exist government; they are not merely a grant of government. In a natural state, man has a sole right to his own person and shares a right to all resources, but in applying his labor, he could convert common resources into his private property:

“Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this no body has any right to but himself. The labor of his body and the work of

his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labor something annexed to it, that excludes the common right of other men. For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.”

Thus, “As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property.” This improved land actually benefits society since cultivated land is much more productive than land “lying waste in common.”

The creation of this property eventually allowed for exchange. As Locke noted, a farmer could trade plums for nuts and nuts for a piece of metal, or sheep for shells and wool for a diamond. The desire for profit was a powerful motivator to make man improve his condition (and thereby mankind’s in general).

Locke believed that when a man in the state of nature joined society he did so “the better to preserve himself, his liberty and property — for no rational creature can be supposed to change his condition with an intention to be worse.” He rejected the concept of an absolute sovereign; specifically, Locke repeatedly indicated that the government, no matter how constituted, could not take an individual’s property without his consent. He accepted the concept of taxation, but only as a proportional share necessary to maintain government. Locke’s sovereign could be challenged by the people, and the people maintained the right to overthrow a tyrannical government.

In sum, Locke believed that we all have certain inalienable rights and that these include rights over the physical goods and realty that constitute our property. Again, these rights exist

with or without government, and government's job is to make this property more, not less, secure.

Our nation's founders clearly chose Locke over Hobbes. Madison's quote is Lockean, and Locke's ideals were embodied in the Fifth Amendment, which requires that takings be for a public use and that the owner be compensated, as well as requiring due process before an owner can be deprived of property.

At times, the federal courts have recognized our Lockean tradition and the centrality of property rights to all of our individual rights. In a 1972 case, the United States Supreme Court stated:

"(T)he dichotomy between personal liberties and property

rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation is in truth, a 'personal' right. ... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

Despite this hortatory language, the federal courts have far too often failed to protect property rights. The 2005 *Kelo v. City of New London* decision is but one example; in that

case, the United States Supreme Court essentially held that the government may take an individual's property and give it to another individual so long as the government believes that tax revenue might increase as a result.

The *Kelo* decision led many states to enact responses. Some, including Michigan's Proposal 4, do a good job at preventing physical takings abuse, while others do not. Even where property owners are protected against physical takings abuse, however, almost all property owners are still vulnerable to regulatory takings abuse.

Regulatory takings are more insidious than physical takings. With physical takings, the owner receives

"just compensation" for the taken land. (The extent to which there can ever be "just compensation" in a forced sale is a question for another day.) But with regulatory takings, the property owner almost never receives any compensation.

The federal courts have held that the Fifth Amendment only requires a property owner to be compensated when regulation destroys almost all of a property's economic value. If some value remains, however, the state generally does not have to pay. Take for example a property owner who has a parcel that is worth \$100,000. If the state enacts a law or regulation limiting the uses of that land and thereby lowers the land's value to \$30,000, the landowner

ends up paying a one-person tax of \$70,000. But as Locke noted, only a proportional tax is fair and appropriate.

Over the coming weeks, months and years, we will endeavor to highlight the abuses and absurdities currently distorting our property rights. Clearly multiple actions are needed in order to achieve reform. One of the methods of effectuating change must be to re-examine first principles and ensure that policymakers and the public understand how far we have strayed from these principles. This country is rooted in Lockean ideas, but far too often embraces Hobbes' ideology, thereby inviting the authoritarianism and tyranny that come with it. ■

OREGON *from Page One*

interpreting "public use" to include private economic development projects that increase tax revenues and improve an area, thereby "benefiting" the public. After *Kelo*, many states passed legislation and amended their constitutions to define "public use" more narrowly in cases involving

state and local government.

Voters in Oregon had already done exactly that with Measure 37, which won with 60 percent of the vote on a popular ballot in 2004. Measure 37 requires the government to compensate individuals when government

intervention reduces the value of their property. Furthermore, the government must compensate the property owner for the true loss in the property's market value, instead of choosing an arbitrary amount, as in many past eminent domain cases.

Measure 37 also states that the government must compensate individuals whose property loses value due to government regulation. Imagine, for example, that Smith owns property with a market value of \$150,000, and that the government passes a regulation that reduces the property's market value to \$100,000. Under Measure 37, the government must pay Smith \$50,000. If the government cannot afford to pay Smith, then he does not have to abide by the regulation.

Before Measure 37, the \$50,000 cost would have fallen entirely on Smith. Now the cost is borne by the public, the supposed beneficiaries of the regulation.

Measure 37 has great potential, though there have been mixed reactions to its performance. One issue relates to seniority and a property's date of purchase. In Oregon, land-use (zoning) rules were adopted in 1973. Under Measure 37, the government can hold a citizen to zoning regulations only if it can afford to pay compensation, but the government cannot generally afford the compensation required to keep all



"Measure 37 is a piece of legislation that should be examined for both its strengths and weaknesses. It has potential as a template for use in Michigan."
—RUSS HARDING

the zoning regulations passed since 1973 in effect. As a result, properties purchased prior to 1973 potentially face no zoning restrictions.

This outcome occurs most frequently with farmland, which in some cases jumps millions of dollars in value because of its potential to be subdivided and developed. Imagine, for instance, that Smith owned a 40-acre farm with a market value of \$300,000 just prior to the passage of Measure 37, and that he purchased the farm in 1970, prior to the existence of land-use rules. After Measure 37 passed, the value of Smith's land increased to \$3.6 million, because it can potentially be subdivided and developed. The government must then decide whether to compensate Smith \$3.3 million or waive the zoning

regulations on his property. In most cases, the government will not be able to make such payments, allowing Smith to develop the land however he pleases.

Situations like these have been common since the passage of Measure 37, leading some Oregonians to argue that Measure 37 is not fair to those who purchased land after 1973. It is worth noting, however, that people whose property ownership predates 1973 have watched zoning ordinances and other regulations repeatedly compromise the value of their land. Restoring that wealth to them may give them an advantage over their neighbors, but it is also arguably the right thing to do.

Several of the provisions of Measure 37 were subsequently overturned by Oregon's 2007 Measure 49, which reinstated some zoning restrictions that Measure 37 had otherwise nullified. Regardless, Measure 37 generally embodies common-sense principles. As Russ Harding, director of the Mackinac Center's Property Rights Network, observes: "Measure 37 is a piece of legislation that should be examined for both its strengths and weaknesses. It has potential as a template for use in Michigan." New legislation like Measure 37 would correctly allocate costs created by government intervention and protect the property rights of the people. ■

Ending a regulatory excess in Michigan? *Two bills may help reduce wetland chaos*

In the 2007-2008 legislative session, two bills were introduced in the Michigan Legislature that would have potentially reduced costs to taxpayers. Senate Bill 1112, sponsored by Sen. Roger Kahn, R-Saginaw, and House Bill 4901, sponsored by former Rep. John Moolenaar, R-Midland, would have stripped the Michigan Department of Environmental Quality of its authority to grant building permits near wetlands. The oversight of Michigan wetlands would return to the U.S. Army Corps of Engineers.

*web links

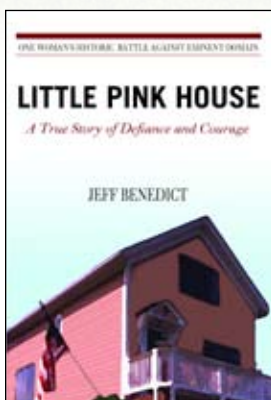
MICHIGANVOTES.ORG/2007-SB-1112 | MICHIGANVOTES.ORG/2007-HB-4901

According to Russ Harding, director of the Mackinac Center's Property Rights Network, federal rather than state oversight is the norm in every state but Michigan and New Jersey. Adopting federal oversight, he argues, would put Michigan on even footing with the rest of the nation and allow the state to implement a clearer wetland standard that most investors would better understand.

Harding believes there are much more efficient ways to preserve our natural resources than having the DEQ's second, unpredictable layer of bureaucracy added to the U.S. Army Corps'. Although the DEQ's lack of budget transparency makes it difficult to estimate what Michigan taxpayers would save if the Legislature terminated the DEQ's redundant wetland regime, Harding notes that the economic benefits alone would probably justify the move. Neither business nor the environment is helped by the arbitrary complexity of Michigan's unusual dual wetland regime.

The Back Forty BOOK REVIEWS

Ain't that America, home of the free?



LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE

BY JEFF BENEDICT
GRAND CENTRAL PUBLISHING
2009

Reviewed by Bruce Edward Walker

THE U.S. SUPREME Court's infamous 2005 decision in the case of *Kelo v. New London, Conn.*, sparked outrage throughout the country. The skeletal facts of the eminent domain story are well-known: The city of New London attempted to seize the homes of Susette Kelo and others in the city's Fort Trumbull neighborhood to provide the property to private developers. Kelo lost her case in a bitterly contested 5-4 decision and eventually compromised with the city by moving her house to a donated parcel of land. The site once containing her home and the homes of many others was never developed, and it is currently a barren wasteland.

Less known, however, are the identities of the real heroes and villains of the story — an oversight remedied by Jeff Benedict's "Little Pink House: A True Story of Defiance and Courage." Benedict masterfully employs a straightforward narrative technique that masks the hundreds of interviews and hours of research he conducted to reconstruct the 10-year struggle between, on the one side, the city, the New London Development Corporation and Connecticut politicians, and, on the other side, Kelo, her neighbors, the press and the Institute for Justice. The result is a compelling drama played out by characters alternately motivated by good intentions, overblown egos, malice and goodwill.

While the outcome of the Kelo case inspired a shelf of books on property rights, "Little Pink

House" is the first to document the human side of the story — the residents' anxiety, grief and resignation as they waged a losing battle to keep their homes. Benedict depicts the difficulties faced by the Kelo plaintiffs as they attempted to navigate the legal waters of eminent domain and maintain jobs, relationships and their daily routines, while being denied the peace of mind that comes from knowing they wouldn't be forcibly evicted from their homes at any moment.

Benedict keeps the story moving forward by humanizing both the protagonists and their antagonists, explaining complex legal issues in easily understood prose that conveys the shock of a grave injustice without blatant editorializing. The result is an engrossing book that should be required reading for all civics and government courses. ■



Susette Kelo's little pink house as demolition begins in the area. (Photo by Sylvia Malizia, courtesy of New London Landmarks.)

An inconvenient right



BULLDOZED: 'KELO,' EMINENT DOMAIN, AND THE AMERICAN LUST FOR LAND

BY CARLA T. MAIN
ENCOUNTER BOOKS
2007

Reviewed by Kurt Bouwhuis

IN "BULLDOZED," CARLA T. Main explores eminent domain abuse in the true story of the Freeport, Texas, property belonging to Wright Gore and his family.

In 1950, Wright Gore Sr. and his wife, Isabel, invested their life savings in a business called Western Seafood. The Gores "worked from can till can't" for many years as they developed the business. Eventually, Western Seafood outperformed all its competitors and became the only shrimping business on the Old Brazos River.

Western Seafood continued to grow, prompting the Gores to spend \$1.7 million on a 30,000-square-foot concrete processing center with custom equipment. The company employed 56 people and became one of the largest sources of tax revenue in Freeport. Upon retirement, the Gores left the business to Wright

Gore Jr. and Wright Gore III.

In the summer of 2002, the Gores received several phone calls expressing an interest in purchasing the Western Seafood property. The Gores informed the callers that the property was not for sale. This ignited a series of events that would cost the Gores three years of their lives and approximately \$450,000 in nonrefundable legal fees.

The city of Freeport, it turns out, wanted the Gores' property for a proposed marina. The marina project would transfer a few pieces of private property, including the Gores', to a private developer. The remainder of the story is a rollercoaster ride of events that led to numerous lawsuits, including an eminent domain case between the city of Freeport and the Gore family. (SPOILER ALERT!) The Gores won the lawsuit, allowing them to keep their property.

The legal battles continue, however. One of the individuals who might have gained from the taking is suing several people for defamation: Main, her publisher, the author of a blurb on the book's back cover, and a journalist who reviewed the book. Main and Encounter Books are being defended by the Institute for Justice, which also represented Susette Kelo in her famous lawsuit.

The Gores' story is only one of many instances of eminent domain abuse. On the bright side, many states have passed legislation, including Michigan's Proposal 4 of 2006, to protect people's property rights and help counterbalance the Kelo decision. But like the Gores, too many property owners who resist abuse of eminent domain find they are defending an inconvenient right. ■