

A Comparative Analysis of the Michigan Constitution

Volumes II

Articles XIII



Citizens Research Council of Michigan

1526 David Stott Building
Detroit, 26, Michigan

Report Number 208

204 Bauch Building
Lansing 23, Michigan

October 1961

Citizens Research Council of Michigan

TABLE OF CONTENTS

CHAPTER XIII EMINENT DOMAIN

	Page
Taking of Property	xiii - 1
Determination of Necessity and Compensation	xiii - 2
Private Roads	xiii - 4
Eminent Domain – University of Michigan	xiii - 5
Eminent Domain for Municipalities for Streets	xiii - 6

Section Detail

	Page
Article XIII, Section 1	xiii - 1
2	xiii - 2
3	xiii - 4
4	xiii - 5
5	xiii - 6

XIII EMINENT DOMAIN

by
Legal Division, Wayne County Road Commission*

Article XIII: Section 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.

Constitution of 1835 and 1850

In the 1835 constitution (Article I, Section 19) the only prerequisite to the taking of property for public use was that just compensation be paid therefor. The requirement that just compensation be “first made or secured” originated in the 1850 constitution (Article XV, Section 9 and Article XV, Section 15). The requirement that necessity be first determined; did not appear in either the 1835 or 1850 constitutions.

Constitution of 1908

The prohibition against taking private property “without the necessity therefor being first determined” was a significant change in the Michigan constitutional provision. Section 1 has not been amended since the adoption of the present constitution.

Judicial Interpretation

This section has given rise to voluminous litigation, the majority of which concerns the interpretation of such words as “public use,” “necessity” and “just compensation.” One notable decision is that of Hendershott vs. Rogers, 237 Mich. 338, in which the court held, after a lengthy discussion of the history of this section and Section 2 following, that the determination of necessity was thereby made a judicial question, even though prior to the adoption of the section, it had been a legislative

* This material was prepared by Daniel J. Horgan, Jr., James N. Garber, John P. Cushman, and John C. Jacoby, all of whom are attorneys on the staff of the Wayne County Road Commission.

question—that is, the condemning authority determined the necessity for the improvement and the taking.

Other State Constitutions

The vast majority of other state constitutions as well as the Constitution of the United States include a section granting a general power of eminent domain which allows the taking of private property for public use. Those states whose constitutions do not include such a section apparently rely on the inherent right of the state to exercise the power of eminent domain, which right was recognized by common law. It should be noted that while these states do not have a general grant of eminent domain power, they do have sections in their constitutions pertaining to specific delegations of the power and the procedures involved therein.

All states, without exception, recognize that just compensation must be made for the private property which is to be taken. They do, however, differ as to the procedures to be used in the determination of that compensation and the time of payment of such compensation, in relation to the passage of title. The states also differ as to what type of things must be compensated for; for example, some states including Michigan limit compensation only to payment for the land actually acquired; others, either by express language in the constitution or by judicial interpretation, require that compensation must also be made for any damage which is a consequence of the use to which the private property so taken is to be put. With the exception of Wisconsin, Michigan is the only state in which the determination of necessity is required to be made by a body or group other than the condemning authority itself, as more particularly discussed under Section 2, below.

Comment

Except where it has been noted above, this section of the constitution is similar both in language and intent to those of other states.

* * *

Article XIII: Section 2. When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property, or by not less than 3 commissioners appointed by a court of record, as shall be prescribed by law: Provided, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.

Constitutions of 1835 and 1850

The 1835 constitution did not contain any requirement similar to this section. The section originated in the 1850 constitution (Article XVIII, Section 2) and was carried in toto into the present document.

Constitution of 1908

Section 2 has not been amended since the adoption of the present constitution.

Judicial Interpretation

There has been much litigation relative to the interpretation of this section, a large part of which dealt with the qualifications, duties and functions of the jury or commission. One judicial decision of note, which has been followed in all condemnation cases to date, holds that the jury members are the triers of both the law and the fact. This, of course, is a substantial divergence from the normal courtroom situation, in which the jury is the trier of the facts only. The rationale behind this interpretation is that the jury, as contemplated by this section of the constitution, is a jury of special inquest in which all of the power of the tribunal is vested. In re Widening of Bagley Avenue 248 Mich. 1 and in re Board of Education, City of Grand Rapids 249 Mich. 550.

Other State Constitutions

Approximately one-half of the constitutions of other states contain a section similar to Michigan's Section 2, relating to the procedure by which private property is acquired for a public use. These states, in addition, require a judicial determination of compensation. Some few also specifically empower the jury or commissioners, as the case may be, to determine whether or not the use to which the property is to be applied is public or private in nature.

Comment

The delegates may desire to consider the possibility of deleting the words "the necessity for using such property and." The deletion of these words would have the effect of making the determination of necessity a legislative or administrative question rather than a judicial question as is presently the case when the state condemns property. This would once again put Michigan in line with all the other states, except Wisconsin, as pointed out above.

A Comparative Analysis of the Michigan Constitution

xiii - 4

* * *

Article XIII: Section 3. Private roads may be opened in the manner prescribed by law; but in every case the necessity for the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of 6 freeholders or by not less than 3 commissioners, and such amount, together with the expense of proceedings, shall be paid by the person or persons to be benefited.

Constitutions of 1835 and 1850

There was no section in the 1835 constitution which provided for the acquisition of property through eminent domain for the opening of a private road. This provision originated with the 1850 constitution (Article XVIII, Section 14) and with slight change was carried into the present constitution—the change being that the commissioner system was authorized in the 1908 provision.

Constitution of 1908

This section has not been amended since the adoption of the present constitution.

Judicial Interpretation

There is but one Michigan case which has arisen under this section, Leighton v. The Elysium Hunting and Fishing Club, 318 Mich. 146. In actuality this case interprets a statute (Section 9, 281 et seq. M.S.A.) which is the legislation designed to implement the authority contained in this Section 3. The case was decided on the basis of the facts involved and did not really delve deeply into areas of constitutional or statutory interpretation.

Other State Constitutions

Approximately one-half of the other state constitutions have sections similar in nature to Section 3. The language of these sections is surprisingly similar to that used in the instant case. There are, of course, some differences in the method of procedure. These differences however, are superficial rather than basic.

Comment

In view of the similarity of this language with that of other states and in view of the fact that it has been present in the Michigan constitution for well over 100 years, there would undoubtedly be some reluctance to make a change of language at this time, and little benefit to be derived therefrom.

A Comparative Analysis of the Michigan Constitution

xiii - 5

* * *

Article XIII: Section 4. The regents of the university of Michigan shall have power to take private property for the use of the university, in the manner prescribed by law.

Constitutions of 1835 and 1850

This section originated with the 1908 constitution and consequently does not appear in either of the prior constitutions.

Constitution of 1908

This section has not been amended since the adoption of the present constitution.

Judicial Interpretation

There is but one case which has interpreted this section, People for use of Regents of University of Michigan vs. Brooks, 224 Mich. 45. In actuality this case interpreted enabling act (Section 8.1 et seq. M.S.A.) contemplated by this section and held that any proceeding to condemn land for the use of the board of regents must be brought in the name of the state and that although the property was held subject to the exclusive control and management of the board of regents, title was to vest in the state.

Other State Constitutions

The present section is unique in that it empowers a specific university to acquire property by virtue of eminent domain. However, the nature of the section is by no means unique in that a majority of the other states have seen fit to delegate eminent domain power to specific boards or groups.

Comment

The delegates may desire to consider the possibility of deleting this section since the regents of the University of Michigan as well as those of the other state colleges and universities do not require a specific delegation of eminent domain power. The taking of property for educational purposes has been judicially interpreted to be a taking for a public use. Therefore, such colleges and universities would fall well within the authority granted by Article XIII, Section 1. However, if this section is to be retained, the delegates may wish to investigate the possibility of expanding it to include the other state colleges and universities. This is especially true in view of the fact Section 8.1 et seq. M.S.A, presently allows the use of the eminent domain power by other colleges and universities.

* * *

Article XIII: Section 5. In exercising the powers of eminent domain and in taking the fee of land and property that is needed for the acquiring, opening and widening of boulevards, streets and alleys, municipalities shall not be limited to the acquisition of the land to be covered by the proposed improvement, but may take such other land and property adjacent to the proposed improvement as may be appropriate to secure the greatest degree of public advantage from such improvement. After so much of the land and property has been appropriated for any such needed public purpose, the remainder may be sold or leased with or without such restrictions as may be appropriate to the improvement made. Bonds may be issued to supply the funds to pay in whole or in part for the property so appropriated, but such bonds shall be a lien only on the property so acquired and they shall not be included in any limitation of the bonded indebtedness of such municipality.

Constitutions of 1835 and 1850

This section does not appear in either the 1835 or 1850 constitution.

Constitution of 1908

This section originated as a constitutional amendment to the 1908 constitution, pursuant to joint resolution of the legislature, and was ratified at the November election of 1928.

This section has not been amended since its original adoption.

Judicial Interpretation

There is but one case which has interpreted this section, Emmons vs. Detroit, 261 Mich. 455, which held that under this section a municipality is not limited to the acquisition of land actually necessary for a proposed improvement but may take any other land which may be appropriate in order to secure the greatest degree of public advantage from the improvement.

Other State Constitutions

Approximately one-half of the other state constitutions have similar provisions allowing the acquisition of property in excess of that actually needed for the proposed public use and further allow the resale of this property at some future time. The bonding provision of this section is also a part of those constitutions having a similar provision.

Comment

This section is seemingly entirely in line with a great number of other states insofar as it pertains. The question will undoubtedly be raised as to the desirability of expanding this section and specifically granting this power in the constitution to other levels of government, such as those county and state authorities having the eminent domain power (which at the present time rely on statutory law for excess condemnation).

A Comparative Analysis of the Michigan Constitution
xiii - 8