



CRC SPECIAL REPORT MICHIGAN CONSTITUTIONAL ISSUES



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ARTICLE X – PROPERTY

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

Eminent domain ranks as one of the governmental powers most likely to create sentiments of expanded government. The perceived abuse of that power—when governments use of that power was permitted to extend to economic development—resulted in a 2006 constitutional amendment curtailing such uses. A constitutional convention would likely be asked to reexamine the proper balance between the governments' authority to exercise this power and the rights of property owners.

Additionally, a constitutional convention may find it proper to reexamine Section 6 that provides for the rights and privileges in property of aliens.

Introduction

Article X of the current Michigan Constitution contains provisions relating to public and private property. Section 1 abolishes the disabilities of coverture (the condition or status of a married woman considered as being under the protection and influence of her husband). Section 4 authorizes state law to provide for procedures relating to escheats (the reversion of property to the state when there is a failure of persons legally qualified to inherit or to claim that property). Section 5 provides the legislature general supervisory jurisdiction over all state owned lands useful for forest

preserves, game areas, and recreational purposes. It can be expected that these would carry forward to a revised constitution largely unchanged.

Nothing in Article X has become obsolete nor in violation of provisions in the U.S. Constitution.

Article X has remained largely unchanged since adoption of the 1963 Constitution. The 2006 amendment of Section 2, dealing with eminent domain, has been the only amendment to Article X.

Constitutional Convention Issues

Two provisions that might draw the attention of a constitutional convention are found in Section 2 (Eminent Domain) and Section 6 (Resident Aliens, Property Rights).

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Eminent Domain

Eminent domain is “the power of a government to compel owners of real or personal property to transfer it, or some interest in it, to the government.”¹ Like police powers and the power to tax, the power of eminent domain has long been considered inherent in government. As such, drafters of American constitutions typically have not felt the need to enumerate the power of eminent domain, but rather have sought to place limits on government’s use of this power. The U.S. Constitution limits the power of eminent domain in the Takings Clause of the Fifth Amendment, which states in pertinent part: “... nor shall private property be taken for public use, without just compensation.” Every state has constitutional provisions that echo the Takings Clause of the U.S. Constitution. Some states also have constitutional provisions that create procedures for the use of eminent domain.

Courts have accepted the necessity of eminent domain. Historically, the courts have reasoned that all private property rights

were subordinate to the paramount power of eminent domain.² Courts also have typically accepted that the determination of public use is a legislative decision that courts should debate only if the party opposing the condemnation demonstrates “fraud, error of law, or abuse of discretion.”³

The commonly accepted “public uses” for which eminent domain is properly employed include public works projects such as roadways, railroads, airports, ports, dams, public buildings, and parks. Eminent domain permits government to overcome market barriers that would otherwise serve to halt the functioning of that government providing those services. Operation of the marketplace without barriers requires willing buyers and willing sellers. A government, when it needs land for a project, acts as a willing buyer, but private property owners are not always inclined to serve the role of willing sellers. A typical market remedy for an unwilling seller would be to seek an alternative seller, but this is not possible for most government projects. Roads and railroads are generally built in as straight a line

as possible. Governments place parks, airports, and dams on stretches of contiguous land. Alternative sellers would not serve the needs of governments for such projects. The power of eminent domain allows governments to force the owner to become a seller and requires that the owner be compensated for the taking of the property.

It is important to note that these uses sometimes include takings in which the property is transferred from a private party to another private entity. For instance, railroads are typically privately owned and dams often are constructed for private electric companies. In these instances, it is necessary for the government to facilitate the operation of private entities on the basis that those entities operate as instruments of public commerce.

In the past couple of decades, the public uses for which eminent domain has been determined to be appropriate have expanded. In recent years, some uses of eminent domain have involved the taking of private property so that it can be transferred to another private entity for an economic development purpose. The idea that governments are using eminent domain for such purposes is controversial. The root of the disagreement rests with differing opinions of whether

¹ *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall, (Oxford University Press, Inc., New York, NY, 1992) p. 253.

² *West River Bridge Co. v. Dix*, 6 How. (47 U.S.) 507 (1848).

³ MCL 213.56(2).

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economic development can be properly classified as a “public use.”

Major Court Cases

Two key court decisions led to a 2006 amendment that creates the current limitations on the use of eminent domain. The 2004 Michigan Supreme Court ruling in *County of Wayne v. Hathcock*⁴ ended the state’s reliance on *Poletown Neighborhood Council v. Detroit*⁵ as a precedent that permitted Michigan state and local governments to take property from one owner to give to another private owner in the name of economic development.

In addressing this issue, the Court adopted a three-part definition, any one of which would determine when the transfer of a condemned property to a private entity is a “public use.”⁶ The first part of the definition was “public necessity of the extreme sort otherwise impracticable.”⁷ It specified that, “[T]he exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the

coordination central government alone is capable of achieving.”⁸

This brand of necessity would include “highways, railroads, canals, and other instrumentalities of commerce,” all of which could potentially suffer from imperfections in the functioning of the market that could make their construction impossible without land condemnation. The government’s use of eminent domain to facilitate land assembly, and avoid the complications caused by a single landowner, in these cases, is seen as legitimate.

Second, the Court said a transfer of condemned property to a private entity is consistent with the Constitution’s “public use” requirement “when the private entity remains accountable to the public in its use of that property.”⁹ Land condemned for a public utility, for instance, would still remain accountable to the public through regulations of the Public Service Commission.

Finally, the Court said that condemned property may be transferred to a private entity “when the selection of the land to be condemned is itself based on public concern.”¹⁰ The Court said, “the property must be selected on the basis of ‘facts of independent public significance,’ meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned

land, must satisfy the Constitution’s public use requirement.”¹¹

Thus, the Court did not say that all uses of eminent domain in which the condemned property is transferred to a private entity is forbidden. It said that transfer of condemned property to a private entity may be appropriate where:

1. “public necessity of the extreme sort” requires collective action;
2. the property remains subject to public oversight after the transfer to the private entity; or
3. the property is selected because of “facts of independent public significance,” rather than the interests of the private entity receiving the property.

Shortly after the Michigan Supreme Court ruled in the *Hathcock* case, the U.S. Supreme Court ruled on the case of *Kelo v. City of New London*¹² in which condemned land would be transferred to a private entity. The City of New London, Connecticut, proposed to use eminent domain to revitalize a part of the City, hoping to address characteristics that led a state agency to designate the City a “distressed municipality.” In handing down the court’s decision, Justice Stevens observed that each state is free to

⁴ *County of Wayne v. Hathcock*, 471 Mich. 415 (2004).

⁵ *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981).

⁶ The three characteristics adopted were taken from Justice Ryan’s dissent in the *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981).

⁷ *Hathcock*, p. 33.

⁸ *Ibid.*, p. 33.

⁹ *Ibid.*, p. 34.

¹⁰ *Ibid.*, p. 36.

¹¹ *Ibid.*, p. 36.

¹² *Kelo v. City of New London*, 125 S. Ct. 2655, 2673 (2005).

set limits on the legislative powers of its legislature and municipalities. States have the latitude to decide the wisdom of using condemnation for purposes of economic development and have the leeway for setting restrictions on its use.

2006 Amendment

Michigan and many other states reacted to Justice Stevens statement by creating new limits on the governments' use of eminent domain either by changing state laws or by amending state constitutions. The 2006 amendment to the Michigan Constitution incorporated the standards laid out by the Michigan Supreme Court in the *Hathcock* ruling to shift the balance to the property owners and their right to acquire, own, use and protect private property in four ways.

1. If the government seeks to use condemnation to take an individual's principal residence, the amount of compensation paid must at least equal 125 percent of that property's fair market value.
2. While Section 2 does not define "public use," it makes clear that public use is not to include takings of private property for

Section 2, eminent domain, is the section of Article X most likely to become the subject of revision if a constitutional convention is convened. Depending on the ideological leanings of the convention

transfer to a private entity for the purpose of economic development or enhancement of tax revenues.

3. The burden of proof that the taking is for a public use is placed on the government proposing the taking instead of the owner objecting to the taking.
4. Section 2 protects against future legislative actions or judicial decisions that would reduce the rights, grants, or benefits afforded to property owners.

Issues to Consider

A constitutional convention could examine the issue of eminent domain and the difficulty of balancing the legitimate need for government taking with the protection of property owners rights. Changes that create more protections for property owners could make it more difficult and more expensive for governments to exercise eminent domain. Some might attempt to lessen the cost to governments in exercising eminent domain without creating additional opportunities for its use in economic development. Many might feel that it is too soon to judge whether the 2006 amendment created a proper balance

Conclusion

delegates, attempts could be made to shift the balance between the government's power to use eminent domain and the rights of property owners in either direction. On the other hand,

and suggest it should be given more time as is.

Property Rights of Aliens

Section 6 provides that, "Aliens who are residents of this state shall enjoy the same rights and privileges in property as citizens of this state." This provision originated in the 1850 Constitution and has carried forward with some changes on phraseology to the 1908 and 1963 Constitutions.

At first blush, it would seem that such a provision creates little controversy and is an important provision for attracting economic development from persons and businesses outside the United States. Unlike some countries, where ownership of assets by foreign interests have been nationalized during times of unrest, respect for the rights of property owners, whether domestic or foreign, provides trust that the investments made will be secure. However, in wake of the Arizona immigration law and sentiments of others that would treat aliens differently than U.S. citizens, it is possible that a constitutional convention might be seen as an opportunity to weaken the language in this provision in an attempt to weaken the rights of aliens.

the recent adoption of the eminent domain amendment may create an interest in preserving the status quo.