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Real Property -- Eminent Domain -- The Public Use Requirement

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Real Property—Eminent Domain—The Public Use Requirement

It is axiomatic that a governmental taking of private property must be for a public use.[1] However, when "we come to seek for the principles upon which the question of public use is to be determined, or to define the words, 'public use,' in the light of judicial decisions, we find ourselves utterly at sea."[2] Recently the North Carolina Supreme Court encountered this difficulty in dealing with an exercise of the power of eminent domain to induce industry to settle in a certain locale. In *Highway Commission v. Thorton*[3] the court stated that

> [t]he home or other property of a poor man cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community, even though he or it threatens to settle elsewhere if this is not done. This the Constitution forbids.[4]

Despite other like assurances to North Carolina landowners, however, the court upheld a condemnation of private property for the purpose of constructing a road running from a public highway across the condemned property to a private trucking terminal. In so holding the court has apparently adopted a more liberal and, from the condemnee's point of view, less protective theory of public use. Indeed, the decision may well have sounded the death knell for a meaningful public use limitation on the power of eminent domain in North Carolina.

The history of the public use requirement is largely one of judicial struggling to define the concept in light of earlier ideas and needs of society that may not have validity today.[5] Two conflicting views have emerged.[6] Prior to the mid-nineteenth century

[1] 2 P. NICHOLS, EMINENT DOMAIN § 7.1 (3d rev. ed. 1963) [hereinafter cited as NICHOLS]; 26 AM. JUR. *Eminent Domain* § 25 (1966). For a North Carolina case see, City of Charlotte v. Heath, 226 N.C. 750, 40 S.E.2d 600 (1946).

[2] 1 J. LEWIS, EMINENT DOMAIN 410 (2d ed. 1900).

[3] 271 N.C. 227, 156 S.E.2d 248 (1967).

[4] *Id.* at 243, 156 S.E.2d at 260.

[5] *See* 2 NICHOLS § 7.21; Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Benbow, *Public Use As a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966); Note, 13 DRAKE L. REV. 95 (1963); Note, 50 IOWA L. REV. 799 (1965).

[6] *See* 2 NICHOLS § 7.2.

there was little need for stringent limitations on the power of eminent domain. With the advent of huge corporations and the growing scarcity of land, however, the necessity of insuring against an arbitrary exercise of the power became manifest. The "use by the public" test was developed to fill this gap in property protection. Under this theory "use" is defined as employment by the public.[7] Thus the public must use or employ the facility for which the taking was made. In addition, the private benefits which usually attend the construction of a road or other project must be incidental to the benefit intended for and received by the public.[8] A determination that the taking is primarily for the advantage of a private individual or that the public has no right of user in the facility will invalidate the taking.

When new ideas developed that involved government as a positive instrument of social and economic reform, the courts were confronted with the narrowness of the public use test. The response was a determination that "use" could mean not only employment, but also benefit or advantage. In jurisdictions accepting this definition, a taking which tends to promote the welfare or productivity of the community is deemed to be for a public use.[9] It is immaterial that the benefit results directly to a private individual or corporation or that the public has no right to use the facility.

While various statements of the supreme court would seem to indicate that the benefit theory is familiar to North Carolina law,[10] a review of several cases shows the contrary to be true. *Stratford v. City of Greensboro*[11] involved a proposed condemnation to link

[7] *See, e.g.*, Cozard v. Hardware Co., 139 N.C. 283, 51 S.E. 932 (1905).

[8] *See, e.g.*, Stratford v. City of Greensboro, 124 N.C. 127, 32 S.E. 394 (1899). *See also* Annot., 53 A.L.R. 9, 24 (1928).

[9] For a collection of authorities which support this doctrine *see* 2 NICHOLS § 7.2(2) n.9.

[10] An example is found in Reed v. Highway Comm'n, 209 N.C. 648, 184 S.E. 513 (1936), wherein the court stated

> [i]t is a matter of common knowledge, shall we term it, "the tourist industry" is now in the mountain sections of this State one of its most valuable assets to the people of that section. These scenic roads do much to encourage tourists to come into this "land of the sky," locate and spend the summer, and put into circulation money which is of great benefit to the people. In taking over a road to be part of the highway system, this purpose can be considered on the aspect of the road being taken over for a public and not a private purpose. These beautiful mountains ought not to be shut off from the public by selfish persons or interests.

Id. at 654, 184 S.E. at 516-17. It might be noted that the road in *Thorton* had no scenic appeal.

[11] 124 N.C. 127, 32 S.E. 394 (1899).

two major streets by a third. There was evidence showing a contract between the condemnor-municipality and a landowner who stood to gain from the new street whereby the latter agreed to pay for the rights-of-way and to move certain businesses to the city.[12] The court stated that "[i]f the substantial benefit was for the defendant . . . as an individual, and the benefit to the city only incidental and purely prospective, then the proceedings of the board were *ultra vires* and void."[13] In holding unconstitutional a statute which authorized owners of timber lands to condemn private rights-of-way, the court in *Cozard v. Hardware Company*[14] expressly rejected the public benefit theory. The court noted "[t]hat great and dangerous monopolies have been fostered by the liberal construction put upon the term 'public use' "[15] and questioned whether meaningful limits could be devised under such a definition. In *Highway Commission v. Batts*[16] the court reversed a lower court determination that a public use existed in relation to a proposal to widen and pave an existing dirt road which served several rural landowners. Although the court conceded that there would be a right of user on the part of the public, the main benefit was found to be in the landowners who desired the new road. As in *Stratford* the court seemed to rely on elements indicating something less than a good faith concern with the public interest. In *Stratford* it was the contract,[17] while here a shell house had been erected to meet a Commission requirement that four houses front a rural road and certain misrepresentations had been made to the County Board of Commissioners.

In *Thorton* the property purchased by Associated Transport for its terminal was landlocked at the time of purchase. It appears that Associated was persuaded to select this particular site through the assurances of the Burlington-Alamance County Chamber of Commerce that the Highway Commission would secure a right-of-way across defendant's land and construct an access road thereon. The Chamber of Commerce was apparently able to guarantee the High-

[12] The fact that in their respective answers the city denied while the private citizen admitted the contract was noted by the court. *Id.* at 131, 32 S.E. at 395-96.

[13] *Id.* at 134-35, 32 S.E. at 397.

[14] 139 N.C. 283, 51 S.E. 932 (1905).

[15] *Id.* at 291, 51 S.E. at 935.

[16] 265 N.C. 346, 144 S.E.2d 126 (1965).

[17] That the contract indicated a promotion of a private interest was recognized in Allen v. Town of Reidsville, 178 N.C. 513, 101 S.E. 267 (1919).

way Commission's action,[18] for construction was begun shortly thereafter. The road was to be constructed upon an existing private graveled road built by the defendant to provide a means of ingress and egress to his own home and to two rented dwellings.[19] Ten months later and after completion of ninety-six per cent of the work the defendant filed his answer denying that the taking was for a public use.[20] The evidence presented by the plaintiff showed Associated to be a large trucking concern with a substantial local employment. The road would serve these employees, suppliers, customers and visitors. The lower court, relying on *Batts,* found that any benefit to the public was incidental to that received by Associated and enjoined completion of the road.

The supreme court reversed. Denying adoption of the public benefit test of a public use, the court found the facts sufficient to bring the case within the "use by the public" test because of the large number of users disclosed by the evidence. The dissenters, however, strongly protested the decision and analyzed its implications by stating that

> [t]his decision . . . establishes the power of the State Highway Commission to condemn a right-of-way for a road to the plant of any private industry with a payroll which the Chamber of Commerce, or some other group able to influence the Highway Commission, decides is large enough to benefit the economy of the community. It is a decision which will rise to haunt not only this Court but the Highway Commission, for any private corporation can now say to it, "Condemn us a road and we will employ enough people so that you can justify it as a public road." But how many employees are enough to make "a public?" And surely the applicant for a "public road" must be a business big enough and so well established as to justify confidence in its continuing payroll. But what of the rights of the entrepreneur in this land of

[18] It is puzzling how a Chamber of Commerce was able to guarantee the Commission's action with such assurance and certainty. The court does not give this fact any attention, and a further discussion would be beyond the purposes of this note.

[19] The Highway Commission's argument that its action was an acceptance of defendant's dedication of this road to the public use was rejected.

[20] On the basis of this fact the Highway Commission contended that the defendant was guilty of laches. The court pointed out, however, that N.C. GEN. STAT. § 136-107 (1964) gives the condemnee twelve months within which to answer the Commission's complaint. For a discussion of North Carolina's complex statutory scheme of eminent domain see Phay, *The Eminent Domain Procedure of North Carolina: The Need for Legislative Action,* 45 N.C.L. REV. 587 (1967).

> equal opportunity? Is only Big Business to be thus "encouraged to locate" here?[21]

Notwithstanding the majority's declaration to the contrary, the dissenters saw an unqualified adoption of the public benefit test.

On the basis of *Stratford* and *Batts* it is difficult to find fault with the dissenters' conclusion. *Stratford* presented a much clearer public use as the proposed street would link two major arteries in a large city, whereas in *Thorton* the road ended in a *cul de sac* at a private business enterprise.[22] The *Batts* case, it is submitted, cannot be reconciled with *Thorton* on the basis of the public use test. There are three main grounds upon which it could be contended that the cases are distinguishable, but none suffice to explain the different results under the public use test. The first difference is that in *Thorton* Associated was landlocked. The court pays little attention to this fact, however, for the situation was the fault not of Mr. Thorton but of Associated and the Chamber of Commerce.[23] Secondly, in *Batts* only several citizens stood to gain while a large corporation was the beneficiary of the new road in *Thorton.* If this distinction accounts for the difference in results, then clearly the benefit test is being applied; for, as noted above, the narrow doctrine was developed to prevent takings for the benefit of industrial giants at the expense of the small landholders. The number of persons who would use the road in each case suggests the third major difference. In *Batts* only the owners of the abutting land and a few of their friends would have occasion to use the road, while in *Thorton* a number of employees and others having business with Associated would traverse the road. If numbers are so important to the court, then the decision may well stand for its definition of "public." The dissent counters the majority's reliance on the difference in numbers by pointing out that the road was not con-

[21] Highway Comm'n v. Thorton, 271 N.C. 227, 245, 156 S.E.2d 248, 262 (1967).

[22] The mere fact that a road ends in a *cul de sac* does not, however, make it a private road. Highway Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

[23] It could be contended that the assurances by the Chamber of Commerce and the diligent efforts by that body in Associated Transport's behalf could serve to indicate a motive unacceptable under the public use test as did the contract in *Stratford* and sham dwelling and false representations in *Batts.* It is also interesting to speculate whether an action would lie against the Chamber of Commerce if the Highway Commission failed to act as guaranteed.

structed for the public as that term is generally understood."[24] Even if it were conceded that only persons having business with Associated can constitute "a public," it is almost impossible to find the benefit to Associated purely incidental to the use by such a public as is required under the public use test.[25]

If North Carolina has now adopted the public benefit theory, it is not alone in its choice.[26] In fact, many writers applaud such a move as the shedding of the shackles of a past age.[27] These commentators see in the public use test a potential for judicial stifling of needed social and economic reform. It must be pointed out, however, that sweeping aside such impediments to reform as the right of private property may present a case where the cure is worse than the disease. Neither the state's need for new industry nor the rights to private property should be so exalted as to preclude recognition of the other. A fair balance must be struck and from this it follows that neither test alone is sufficient in all cases. Carried to their logical extremes either test would validate takings clearly beyond constitutional permissibility.[28]

On final analysis *Thorton* discloses an attempt by the supreme court to strike this balance within the framework of the older public use theory. But in allowing the Highway Commission to condemn private property as an inducement to new industry the court has, at the least, tacitly relied on the benefit line of reasoning while paying lip service to the public use test. Although this is not *malum in se*,[29] it is not clear why the court chose to do so in a case in which the equities were so heavily in favor of the condemnee.[30]

[24] Highway Comm'n v. Thorton, 271 N.C. 227, 246, 156 S.E.2d 248, 262 (1967).

[25] See note 8 *supra*.

[26] See note 9 *supra*.

[27] Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940); Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

[28] For example the public use test would not be violated by a taking for the purpose of constructing theaters or hotels, while the public benefit theory would allow the government to redistribute property to those who could employ it best. 2 NICHOLS § 7.2[3].

[29] One writer suggests that retention of the public use test in name only may have some deterrent effect on the over zealous use of the power of eminent domain. Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966).

[30] This statement represents the view of the writer. It is not based on any

If industry is to be given so unbridled a hand in locating, the fears expressed by the dissenters may well be realized. The ultimate implications which the decision may have on the power of eminent domain and the existing theories of land ownership cannot be adequately assessed until the court provides clarification in future cases. Such a clarification of the court's position is in order not only for the benefit of the Bar and the Highway Commission, but more importantly for the North Carolina landowner.

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Survivorship—Joint Bank Accounts with the Right of Survivorship in North Carolina

In 1784, North Carolina abolished the right of survivorship as an incident of joint tenancy,[1] but the state supreme court held that oral and written contracts making the rights of the parties dependent on survivorship remained valid.[2] Thereafter, it was generally accepted that joint bank accounts with the right of survivorship could

one fact but on the seeming unfairness of the decision. The Record reveals numerous efforts by individual members of the Burlington-Alamance County Chamber of Commerce to persuade Mr. Thorton to donate or sell his land so that Associated Transport would not move from the area. Mild hints of possible litigation were resorted to when Mr. Thorton indicated that he was not "community-minded" enough to allow large, noisy tractor-trailer trucks to cross his land "24 hours a day." Highway Comm'n v. Thorton, 271 N.C. 227, 233, 156 S.E.2d 248, 253 (1967). At no time did Associated or the Highway Commission approach Mr. Thorton. Here then a small landowner of limited means runs afoul of the desire of a body of non-elective business leaders to keep business within the area. While their purpose is commendable, the methods employed are not.

[1] N.C. GEN. STAT. § 41-2 (1966).

[2] Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895).

The contract theory has been used by a growing number of courts in other states to uphold the joint bank account with the right of survivorship. Hill v. Havens, 242 Iowa 920, 48 N.W.2d 870 (1951); Malone v. Sullivan, 136 Kan. 193, 14 P.2d 647 (1932); Bishop v. Bishop's Ex'rs, 293 Ky. 652, 170 S.W.2d 1 (1943); Chippendale v. North Adams Sav. Bank, 222 Mass. 499, 111 N.E. 371 (1915); Holt v. Bayles, 85 Utah 364, 39 P.2d 715 (1934); Deal's Adm'r v. Merchants and Mechanics Bank, 120 Va. 297, 91 S.E. 135 (1917).

For a discussion of the contract theory and other legal theories by which the courts have tried to test the validity of the joint bank account with the right of survivorship, see Kepner, *The Joint and Survivorship Bank Account—a Concept Without a Name,* 41 CALIF. L. REV. 596 (1953); Kepner, *Five More Years of the Joint Bank Account Muddle,* 26 U. CHI. L. REV. 376 (1959); and Note, 31 N.C.L. REV. 95 (1952).