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A Judicial Balancing of Values Between Conflicting Public Uses in Condemnation Proceedings

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A JUDICIAL BALANCING OF VALUES BETWEEN CONFLICTING PUBLIC USES IN CONDEMNATION PROCEEDINGS

On June 25, 1963, the city council of Rochester, New York, unanimously adopted resolution No. 63-79 wherein they decided that a neighborhood known as Genessee Crossroads was a "[S]ubstandard, insanitary slum, blighted decadent area. . . ."[1] Taking advantage of New York General Municipal Law,[2] an urban renewal agency was created, known as the Genessee Crossroads Urban Renewal Project. At the time of creation, the councilmen apparently realized that there might be potential prior public use problems because the resolution specifically provided that the project would require "[T]he location and relocation of sewer and water mains and other public facilities. . . ."[3]

The case of *City of Rochester v. Rochester Gas and Electric Corp.*[4] concerns itself with such a "public facility." The plot of land which is the subject matter of the litigation was owned by Rochester Gas and Electric Corp., and had been purchased in 1930 as the site of a future electric sub-station. Although the company held the land for thirty-seven years prior to the suit, it had never employed it for this sub-station use. Instead, the land was used as a parking lot for company-owned vehicles. Litigation arose when the city brought a condemnation suit on behalf of the urban renewal agency seeking the company land. Condemnation was allowed.

The court in *Rochester* correctly states the *classic doctrine,* that land already in the public use may be taken if ". . . 'the intention of the legislature that such lands should be taken is shown by express terms or necessary implication' [cites cases] which principle applies even though the property devoted to a prior 'public use' was acquired by purchase and not by condemnation [cites cases]."[5] This constantly

1. Rochester, N.Y., Resolution 63-79, City Council Proceedings, June 25, 1963, at 188 [hereinafter cited as Resolution 63-79].

2. N.Y. GEN. MUNIC. LAW § 503 (McKinney 1965).

3. Resolution 63-79 at 189.

4. 54 Misc. 2d 855, 283 N.Y.S.2d 631 (Sup. Ct. 1967).

5. *Id.* at 856, 283 N.Y.S.2d at 633.

repeated doctrine has been the law of New York since it was first stated in *Ex Parte The Manhattan Co.*[6] Similar reverence is paid to the doctrine in other jurisdictions.[7]

In examining the enabling statute under which the urban renewal project was created, it is found that the agency has the power to "acquire [land] by . . . condemnation or otherwise, *in accordance with the provisions of appropriate general, special or local law applicable to the acquisition of real property. . . .*"[8] (Italics supplied.) Obviously, the prior public use rule is a part of "general law . . . applicable to the acquisition of real property."

Thus, if the court was correct in its determination that this land was already being employed as a public use, and if the court did not adopt the "more necessary use doctrine," it will be shown that condemnation could not have been allowed.

There are certain exceptions to the classic doctrine which are well recognized by the courts.[9]

In the 1st exception the sovereign itself is the condemnor.[10] Since the right of eminent domain is an attribute of sovereignty,[11] the sovereign (state or federal government) from which the power originally flows can decide to reclaim the previously granted right of eminent domain. An excellent statement of the exception appears in *United States v. Carmarck*:[12]

> In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists, however, in the case of statutes which grant to others, such as public utilities [or urban renewal projects] the

6. 22 Wend. 653 (N.Y. Sup. Ct. 1840).

7. "As a general proposition property already legally appropriated to a public use cannot be taken for another public use without legislative authority—express or implied." Dau, *Problems in Condemnation of Property Devoted to Public Use,* 44 TEXAS L. REV. 1517 (1966). *See also* Inhabitants of Springfield v. The Conn. River Ry. Co., 58 Mass. (4 Cush.) 63 (1849).

8. N.Y. GEN. MUNIC. LAW § 506 (McKinney 1965).

9. Anton, *Private Partipication in Non-Residential Urban Renewal Projects in New York,* 12 BUFFALO L. REV. 538, 580-83 (1963).

10. Linnig v. United States, 328 F.2d 603 (5th Cir. 1964); United States v. Certain Tracts of Land and Portions of the Right-of-Way of the Union Pacific R.R., 225 F. Supp. 549 (D.C.D. Kan. 1964).

11. 1 NICHOLS, EMINENT DOMAIN § 1.14 (rev. 3d ed. J. Sackman 1964).

12. 329 U.S. 230 (1946).

> power of eminent domain on behalf of themselves. . . . They do not include sovereign powers greater than those expressed or necessarily implied. . . . In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority.[13]

Obviously this exception could not have been utilized in *Rochester* because the state was not even a party to the suit.

A corollary to the sovereign power exception exists in situations when a sovereign-created agency is seeking to exercise the sovereign's eminent domain power.[14] This is accomplished by treating the agency as the "alter ego" of the state, and as such, endowed with all of the power which the state itself would possess.

May the granting of condemnation in *Rochester* be justified on the basis of this "alter ego" exception? The answer must be "No" because the Genessee Crossroads Urban Renewal Project was created by the City of Rochester,[15] not the state legislature.[16]

There is another exception, known as the doctrine of "more necessary use," which had not previously been recognized in New York. Under this doctrine, the court will look at the relative uses of land and will decide which is the more beneficial.[17] A doctrine such as the "more necessary use" doctrine seems to be clearly superior to the New York method of requiring specific language of the legislature in order to obtain land devoted to a prior public use. Of course, express legislative wording will still prevail, but in its absence, an efficient way of judicially determining whether or not condemnation shall lie seems

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13. *Id.* at 243.

14. State *ex rel* State Highway Comm'n v. Hoester, 362 S.W.2d 519 (Mo. 1962); State *ex rel* State Highway Comm'r v. Union County Park Comm'n, 89 N.J. Super. 202, 214 A.2d 446 (1965); City of Buffalo v. Day, 8 Misc. 2d 14, 162 N.Y.S.2d 817 (Sup. Ct. 1957).

15. Resolution 63-79 at 188.

16. It is important to note that the state has created over one hundred urban renewal agencies. N.Y. GEN. MUNIC. LAW §§ 570-674 (McKinney Supp. 1969).

17. White Mountain Power Co. v. Maine Cent. R.R. Co., 106 N.H. 443, 213 A.2d 805 (1965); City of Mesa v. Salt River Project Agri. Improvement & Power Dist., 92 Ariz. 91, 373 P.2d 722 (1962); People *ex rel* Pub. Utils. Comm'n v. City of Fresno, 254 Cal. App. 2d 76, 62 Cal. Rptr. 79 (Cir. Ct. App. 1967).

This method is even prescribed by statute in several states. ARIZ. REV. STAT. ANN. § 12-112 (1956), CAL. CIV. PRO. CODE § 1241 (Deering 1967); IDAHO CODE ANN. § 7-703 (1947); MONT. REV. CODES ANN. § 93-9904 (1963); NEV. REV. STAT. § 37.030 (1967); UTAH CODE ANN. § 78-34-3 (1953). *See* Dau, *Problems in Condemnation of Property Devoted to Public Use,* 44 TEXAS L. REV. 1517 (1966).

highy desirable. (This seems to be the direction which the court in *Rochester* is moving.) This direction may well mark the beginning of a trend away from the traditional N.Y. method of dealing in prior public use problems,[18] and toward the more sensible method known as "more necessary use."[19]

The Court in *Rochester* hints that a prime consideration is the relative value to the public of an urban renewal area, as opposed to a parking lot for public utility owned vehicles. This is evidenced by statements to the effect that urban renewal is the official policy of the state of New York and of the federal government,[20] and that "[T]he limitation sought to be applied here is not at all consistent with [an] awakened approach in dealing with the evils of slums. . . ."[21] The court even inserts, as dicta, the following sentence: "[T]his is a situation where the prior 'public use' must yield to the imperative of the greater public need."[22]

Thus the court in *Rochester* goes out of its way to use the "more necessary use" doctrine. Was this necessary to the decision in the case or was the court trying to assure that relative benefit will be compared in future cases? The latter seems to be the controlling factor.

The problem is that *this is not a prior public use, and the court knows it.* The court recognizes that a private parking lot is not a public use.[23] It cites two cases holding this.[24] Likewise, defendant cannot say that it is merely holding the land for future public use. Such future use only exempts the land if it is to be used in the immediate future.[25] But when, as in this case, the land already has been

18. Central Hudson Gas & Electric Corp. v. Morgenthau, 256 N.Y.S. 97 (Sup. Ct. 1932); Board of Educ. of Union Free School Dist. No. 2 v. Pace College, 50 Misc. 2d 806, 271 N.Y.S.2d 773 (Sup. Ct. 1966); City of Buffalo v. Day, 8 Misc. 2d 14, 162 N.Y.S.2d 817 (Sup. Ct. 1957).

19. *See* cases cited *supra* note 17.

20. *Citing* N.Y. GEN. MUNIC. LAW § 501 at 54 Misc. 2d. 855, 858, 283 N.Y.S.2d 631, 634-35.

21. 54 Misc. 2d 855, 859, 283 N.Y.S.2d at 635.

22. *Id.*

23. ". . . a purely private proprietary purpose to the exclusion of the public . . . ." *Id.* at 633.

24. Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235 (1951); *In re* Parking Fields 11 and 11A in the Inc. Village of Garden City, 217 N.Y.S.2d 827 (Sup. Ct. 1961), *aff'd* 15 App. Div. 2d 513, 222 N.Y.S.2d 413 (1961).

25. Bolin Lumber Co. v. Chicago & N.W. Ry. Co., 270 Minn. 516, 134 N.W.2d 312 (1965); Pittsburg Ry. Co. v. Castle Shannon Borough, 105 Pittsburgh 243 (Pa. 1957).

held for thirty-seven years, and when there are still no plans to use it, it cannot be exempted from an authorized use of the eminent domain power of a municipality.

The decision in the case (allowing condemnation) was unavoidable because (a) no prior use was involved and (b) the taking was authorized by statute.[26] However, although the court was aware that the prior public use doctrine was not needed in this case, it nevertheless discussed that very doctrine. In reaching this decision the court implicitly says even if it is admitted that this is a public use, the "more necessary use" test will allow condemnation.

Clearly, the only conceivable reason the court would go through this involved solution to this simple problem is a desire to make the "more necessary use" doctrine a part of the New York law, thus providing an efficient way for judicially determining when condemnation is desirable.

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26. N.Y. GEN. MUNIC. LAW § 506 (McKinney 1965).