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Public Use, Public Policy and Recent Developments in the Law of Eminent Domain

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NOTES AND COMMENTS

PUBLIC USE, PUBLIC POLICY AND RECENT DEVELOPMENTS IN THE LAW OF EMINENT DOMAIN

THE PROBLEM:

Man, by virtue of the passage of time, has come to a point in history where, having donned a cloak of modernism, he is compelled to glance backwards and devote attention to needs by-passed in his rush up the ladder of progress. We stand atop a pinnacle of progress, victors in the crusade for intellectual, economic and political acquisition; but the movement has not been without serious repercussion. Our position has taken on innumerable aspects of complexity to such a degree that the government entity has seen fit to interpose its sovereign prerogative into areas never before contemplated to be within the orbit of political action. This particular course of conduct has been dictated by the necessity of the times; that is, the necessity for large-scaled governmental action to cope with problems of huge proportions whose roots are essentially attributable to the intricacies of present day life. Given the justification and need, still no successful government sponsored operation can be effective if deficient in the requisite adequate tools. Cognizant of this necessity, the state, as the established form of political rule, has maintained an inherently flexible, well equipped legal tool chest consisting of doctrines amenable to its purpose. It is the intention of this effort to examine the maximum efficiency of a particular tool, old in vintage, basic to sovereign power and steeped in doctrine, commonly called "eminent domain". Vastness of the subject matter requires confinement and for that reason this survey shall be concerned not with the positive aspects of condemnation but rather with its nature and the employment of its prime limitation.

NATURE OF EMINENT DOMAIN:

As alluded to above, eminent domain[1] has captured a position of great prestige among legal scholars and authors who describe its characteristics in superlative portrayals. In succinct terms, the concept can be said to be significant of property at its most ultimate degree and significant of a power underlying and superior to all property rights. Furthermore, as the usual statements relate, society possesses the right as an inherent attribute indicative of the highest

1. The term is classically defined as a right or power of a nation to condemn private property for public use upon payment to the owner of a due compensation legally ascertained. For other definitions see 15 C. Y. E. 557, Bouvier L. Dict., 29 C. J. S. 776 Under the Federal Constitution the power of eminent domain designates the right to take property for public use in payment, under the provisions of the Fifth Amendment, of just compensation for the value determined as of the time and place of taking. *Campbell* v. *Chase National Bank of City of New York,* 5 F. Supp. 156, 171 (1933). In England and Canada the proposition is synonymous with the term "expropriation" as used in foreign jurisprudence.

power of government.[2] As a result it is well settled that eminent domain exists independent of constitutional sanctions.[3] Legislative sanction may restrict or condition the right but it is established that legislatures do not confer or promulgate the power. However, administration of eminent domain is vested in law making bodies[4] and these are incapable of contracting away their authority;[5] *a fortiori,* one legislature may not deprive any subsequent legislative body of the power.[6]

State authority to take private property undoubtedly can be traced back to a period in history when formalized governments were first conceived. Early Romans exercised the power to good advantage in constructing roads, viaducts, and similarly related public works.[7] Although the concept was recognized and employed by our early predecessors the term "eminent domain" was not made applicable to the right until a modern concept of private property evolved in Europe during a period marked by the decline of feudalism.[8] Early in the Seventeenth Century the political philosopher Grotius[9] and other notable scholars of natural law coined the phrase to designate the power of a sovereign state to take or to authorize the taking of any property within its jurisdiction for the public

2. A contrary theory, not generally accepted in this country, deems the power a reservation rather than an inherent attribute. The contention is that original state grants to individuals embraced an implied condition that the state might resume dominion over the property whenever the interests of the state made such necessary. See *New York City Housing Authority* v. *Muller,* 270 N. Y. 333, 1 N. E. (2d) 153 (1936). Under either theory the power of eminent domain is characterized as dormant until a description of its exercise has been formulated by legislation *Re Poughkeepsie Bridge Co.,* 108 N. Y. 483, 15 N. E. 601 (1888).

3. *In Re City of Rochester,* 224 N. Y. 386, 121 N. E. 102 (1918); *Kahlen* v. *State,* 223 N. Y. 383, 119 N. E. 883 (1918); *New York Telephone Company* v. *State,* 218 N. Y. 783, 113 N. E. 1061 (1916).

4. *Re Poughkeepsie Bridge Co.* v. *Davis,* Supra; *Re Union Elevated R.R. Co.,* 113 N. Y. 275, 21 N. E. 81 (1889).

5. "The power of eminent domain is inalienable; and being an essential attribute of sovereignty cannot be even partially bargained away." Nichols on Eminent Domain (Vol. 1) 75; Also, see *People* v. *Adirondack R. Y. Co.,* 160 N. Y. 225, 54 N. E. 689 (1899).

6. *Backus* v. *Lebanon,* 11 N. H. 19, 35 Am. Dec. 466 (1840); *Lockhaven Bridge Co.* v. *Clinton County,* 157 Pa. St. 379, 27 Atl. 726 (1893).

7. 18 Am. Jur. 631; 10 R. C. L. 7; But see Nichols on Eminent Domain (Vol. 1) 4, 5.

8. The doctrine first took shape in Holland; it was not recognized in France until the French Revolution. Nichols, on Eminent Domain (Vol. 1) 5.

9. The same Grotius who is noted for his explanation of and sanction for international law. Other notables in the field of the "higher law" are Plato, Cicero, Aristotle and Coke.

use.[10] In the United States the power of eminent domain was a relatively unimportant legal topic until the advent of the Industrial Revolution.[11] Before that period exercise of the doctrine was confined almost entirely to cases involving roads and grist mills. Application of the condemnation power in these areas aroused little unfavorable reaction due to the fact that land taken for such use was generally unsuitable agriculturally and consequently of relatively slight value.[12] But this was a situation not long in existence. Contemporaneously with the rise of industrialism and the solidification of the land supply the ancient concept became a recognized branch of legal concern and since that time has gained import with much of the rapidity experienced by the business phenomenon responsible for its growth.[13]

LIMITATION OF PUBLIC USE:

For the most part the bounds of eminent domain in respect to its substantive limitations have become well fixed. Private property may not be expropriated unless for a public use with due compensation.[14] To the careful analyst this statement of governmental power is "loaded" with possibilities of limitation.[15] However, the words "public use" constitute by far the most impressive and far-reaching limitation to the sovereign right of condemnation. It is in the area of this limitation that the key to effective, intelligent use of the doctrine lies.

The Public Use Concept is plagued with knotty considerations and nice legal distinctions. Unfortunately, decisions fail hopelessly in conveying the exact import

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10. *Grotius, De Jure Belli Et Pacis,* lib 111, C. 20. See for an account of the degree to which the natural law philosophy influenced the evolution of eminent domain Lenhoff, *Development of the Concept of Eminent Domain,* 42 Col. L. R. 596; Grant, *The "Higher Law" Background of the Law of Eminent Domain,* 6 Wisc. L. R. 67; for constitutional influences in general see 42 Harv. L. R. 149, 152; Haines, The Revival of Natural Law Concepts (Harvard Studies in Jurisprudence IV, 1930). John Adams crystallized the natural law theory when he wrote, "There are rights antecedent to all earthly government—rights that cannot be repealed or restrained—rights that are derived from the Great Legislator of the Universe . . .," Works of Adams (Charles Francis Adam's Ed.) 440. Also see Beck, The Constitution of the United States.

11. The Federal Government first asserted the right in 1875; see *Kohl* v. *United States,* 91 U. S. 367 (1875). Prior to this assertion federal condemnation was accomplished indirectly by the states, i.e., a state would undertake the condemnation and then turn over to the United States the property which it acquired.

12. 10 R.C.L. 6.

13. See 51 Col. L. R. 595.

14. Such provision is found in the Fifth Amendment to the Constitution of the United States and also, in substance, in the Constitution of nearly every state.

15. Namely, (1) to what powers does it apply, (2) what is a "public use," (3) what is a "taking," (4) what is "property," (5) what is "just compensation." 18 Am. Jur. 632.

of public use; they lead only into a most hopeless confusion.[16] Nevertheless, two principle lines of demarcation may be extracted from the case authority. The dichotomy in outlook is in part due to the fact that "use" in legal terms is capable of two entirely different meanings.[17] One line of decisions holds that "use" is synonymous with advantage while another claims a connotation which essentially involves considerations of employment. Those jurisdictions which advocate a public employment criterion insist that a public use must impose upon the holder of the appropriated property a duty to furnish the public with the use intended and that the public should be entitled to this use as a matter of right.[18] The contravailing doctrine is that public use implies public advantage. Under such a theory any expropriation tending towards increased utilization of resources and productive power or manifesting a service to social prosperity is a public use.[19] Each of these theories has been subject to a hailstorm of criticism. The view supporting a use by the public criterion has been declared both too narrow [20] and, conversely, too broad[21]—its counterpart, the Public Benefit Doctrine, has faired

16. "No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words, "public use," as found in different state constitutions regulating the right of eminent domain. The reasoning is, in many of the cases, as unsatisfactory as the results have been uncertain . . . The authorities are so diverse and conflicting that, no matter which road a court may take, it will be sustained and opposed by about an equal number of the decided cases. In this dilemma the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it." *Dayton Gold and S. Min. Co. v. Seawell,* 11 Nev. 394 (1846). "The reason courts have failed to define a public use doubtlessly arises from the fact that the definition must be such as to give it a degree of elasticity capable of meeting new conditions and improvements and the ever-increasing needs of society." *Tanner* v. *Treasury Tunnel Min. and Reduction Co.* 35 Colo. 593, 83 Pac. 464 (1906). See for similar authority 22 L. R. A. (N. S.) 35, 10 R. C. L. 24.

17. "Use" is also ambivalent when its definition is attempted in a non legal manner. See Webster's New International Dictionary. (Second Ed.).

18. This has been described as the majority view. *In Re New York,* 135 N. Y. 253, 31 N. E. 1043 (1892); *Healy Lumber Co.* v. *Morris,* 33 Wash. 490, 74 Pac. 681 (1904); *Scholl* v. *German Coal Co.,* 118 Ill. 427, 10 N. E. 199 (1887); *Chesapeake Stone Co.* v. *Moreland;* 126 Ky. 656, 104 S. W. 762 (1907); *Minnesota Canal, Etc. Co.* v. *Koochiching Co.,* 97 Minn. 429, 107 N. W. 405 (1906). Also see 10 R. C. L. 24, 2 L. R. A. 681, 22 L. R. A. (N. S.) 39, 18 Am. Jur. 36. For a description of the evolution of this so-called "narrow doctrine" see Nichols, *Public Use In Eminent Domain,* 20 Bul. Rev. 615. The doctrine at present is substantially repudiated. *New York City Housing Authority* v. *Muller,* supra.

19. *Board of Water Commissioners* v. *Manchester,* 87 Conn. 193, 87 Atl. 870 (1913); *Potlach Lumber Co.* v. *Peterson,* 12 Idaho 769, 88 Pac. 426 (1907); *Jacobs* v. *Clearview Water Supply,* Col., 220 Pa. St. 388, 69 Atl. 870 (1908); *Nash* v. *Clark,* 27 Utah 158, 75 Pac. 371 (1904).

20. *Clark* v. *Nash,* 198 U. S. 361 (1905); *Olmstead* v. *Camp,* 33 Conn. 532 (1866); *Potlach Lumber Co. v. Peterson,* supra; *Aldridge v. Tusecumbia, C. & D. R. Co.,* 2 Stew. & P. 199, 25 Am. Dec. 307 (1833).

21. "If public use is use by the public, eminent domain might be employed to secure sites for hotels and theaters, to which places in many states the public has by custom or statute the right of access without discrimination." 18 Am. Jur. 666.

somewhat better in that the accusations urged against it have been concerned only with its broadness.[22] It is submitted that the basic difficulty has arisen by virtue of the judiciary's attempt to reconcile two conflicting interests. Namely, the desire to maintain a dynamic quality about the Public Use Concept so as to preserve its role as a soundboard for public sentiment concerning the invasion of private property rights and, coexistent with that, to establish as definitive a test as possible for the legality of a given condemnation proceeding. The Use by the Public Concept is essentially grounded in considerations of certainty; the Public Benefit Rule in considerations of fluidity.[23] Each criterion viewed as a bald statement represents an extreme viewpoint; ergo, in an attempt to find a desirable balance for the above mentioned considerations each has extended itself in the dirction of the other. Thus it has been that the Public Benefit Doctrine, although capable of almost unlimited application has been severely tempered.[24] The courts have refused to give the doctrine any resemblance to a universal standard[25] on the ground that its employment basically compels speculation as to resulting benefits; and therefore results in instability of principle.[26] When applicable, the test has usually been qualified to the extent that the judiciary has demanded a certain directness of benefit and great necessity for benefit. The Use by the Public Test which on its face lacks in extensive linguistic vagueness so as to justify broad interpretations has proved to be less amenable to judicial surgery than its counterpart. However this difficulty has neither dismayed nor discouraged the courts. In troublesome situations where the test if applied would produce inadequate results in terms of public policy, the courts have stricken out[27] or isolated[28] or amelior-

22. *Rockingham County Light & P. Co.* v. *Hebbs,* 72 N. H. 531, 58 Atl. 46 (1904); *Arnsberger* v. *Crawford,* 101 Md. 247, 61 Atl. 413 (1905); *Shasta Power Co. v. Walker,* 149 Fed. 568 (1906); *Board of Health* v. *Van Hoesen,* 87 Mich. 533, 49 N. W. 894 (1891).

23. "The struggle to meet changing conditions through new legislation continually goes on. The final question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law." *People Ex. Rel. Durham Realty Corp.* v. *Edward B. La Fetra,* 230 N. Y. 429, 130 N. E. 601 (1921).

24. *Fountain Park Co.* v. *Hansler,* 199 Ind. 95, 155 N. E. 465 (1927); *Healy Lumber Co.* v. *Morris,* supra; *Bloodgood* v. *Mohawk & H. River R. Co.,* 18 Wend. (N. Y.) 9, 31 Am. Dec. 313 (1837).

25. " . . . the doctrine that public benefit and utility justify the exercise of the right of eminent domain has been asserted more especially in four classes of cases: those relating to the development of water power for mills, under general mill or flowage acts; those arising under drainage act for the reclamation of wet and marshy lands; those relating to the irrigation of arid lands; and those relating to the promotion of mining." *Brown* v. *Gerald,* 100 Me. 351, 61 Atl. 785 (1905).

26. Supra N. 24.

27. See *New York City Housing Authority* v. *Muller* (condemnation for rehabilitation of slum areas) supra.

28. See 18 Am. Jur. 666.

ated[29] its applicability and have plugged the gap with assertions in terms of the more pliable Public Benefit Standard or in terms of sovereign police power.

The entire problem which resolves itself about the Test of Public Use—wrought as it is with a mass of conflicting authority—may well be circumvented in the light of recent developments. It has been illustrated that the confusion and irreconcilable viewpoints resultant from the attempt to apply extreme criteria of a universal nature to dynamic factual situations could readily be precluded in a simple but drastic mode; i. e., by taking the determination of public use out of judicial hands and placing it squarely under legislative auspices. The net effect of such a transmission would be the destruction of any justiciable issue as to the existence of a public use. Under the terms of this arrangement legislative declaration concerning a certain condemnation proceeding's public purpose would constitute an irrebutable presumption in law that the requisite public use or purpose is fulfilled.

The most recent tendencies in this area have been indicated in New York State. *General Municipal Law* P. 72-J provides that a condemnation of land for a public parking garage to be built by the city but leased to a private operator is for a public purpose. New York City entered into a contract with an insurance company whereby the city agreed to condemn certain lands under General Municipal Law P. 72-J and to offer the same at public aution. The insurance company agreed to bid for the lease and to construct a public parking garage. In a taxpayer's action to restrain the city from performance under the contract on grounds that the contract was illegal because the use contemplated was not public but private, the Supreme Court, Special Term, New York County, rendered judgment for defendants.[30] On appeal the Appellate Division reversed[31] and the New York Court of Appeals subsequently affirmed the Appellate Division.[32] In a 4-3 decision the court indicated that public use is still a matter of judicial concern. However, the marginal manner in which this point was decided indicates some degree of

29. "For a use to be public it is not essential that the entire community, or any considerable portion of it, should directly enjoy or participate in it." *Albright* v. *Sussex County Lake and Park Commission*, 71 N. J. L. 303, 57 Atl. 398 (1904). "It is not even necessary that all the inhabitants of the limited area to which the operations of an enterprise is confined should be equally benefited by it, in order to make it a public use." *Lake Koen Nav. Reservoir & Irrig. Co.* v. *Klein*, 63 Kan. 484, 65 Pac. 684 (1901). A collection of a case authority in this point is collected at 22 L. R. A. (N. S.) 48.

30. *Denihan Enterprises, Inc.* v. *William O'Dwyer, as Mayor of the City of New York*, Et. Al. 197 Misc. 950, 97 N. Y. S. 2d 326 (1950).

31. 277 App. Div. 407, 100 N. Y. S. 2d 512 (1950).

32. 302 N. Y. 451, 99 N. E. 2d 235 (1951).

support towards vesting the legislature with extremely broad powers of determination about the employment of eminent domain.[33] Desmond, J., speaking for the minority stated:

> "We all agree that the Legislature has settled the question of whether condemnation of land for a public parking garage, to be built by the city but leased to a private operator is for a public purpose. The public nature of such a use would not be destroyed by a demonstration, on a trial of this action, that this proposed garage will largely benefit, and is principally desired by, the owner of the apartment house across the street for its tenants, . . . or that the project may accomplish only a little alleviation of traffic conditions, or that, in the end, the apartment house tenants across the street, rather than the general public will have principal use of the garage. All those are, on their face, arguments not against the legality, but as to the feasability, or wisdom, or fairness, of the expenditure. *Such arguments, when rejected by the appropriate legislative body, cannot be re-examined by the courts.*"[34]

THE PRACTICABILITY OF PRECLUDING JUDICIAL REVIEW AND THE IMPETUS FOR SUCH A PRECLUSION:

Under the traditional well settled view, the legislature has the first but not the final important duty of determining the existence of a public use.[35] The legislature in its capacity as a body entrusted with the sovereign power of eminent domain has the obligation not to exercise the power unless its motivating purpose is public in nature. Only where the legislature fails in its obligation do the courts exert their ultimate duty to insure obedience to the Constitutional limitation. The problem for the judiciary at this point is not to assume a legislative role and to judge upon a certain use's public nature but rather to decide whether the legislature which authorized the condemnation might reasonably have considered a public use to be in existence. As is the case with any legislative act the usual presumption of constitutionality is present and must be overcome before the act may be upset. However, the constitutional presumption surrounding legislation which declares a certain condemnation activity's public use is somewhat unique due to

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33. The courts have reserved judicial review on the grounds that if they didn't the constitutional restraint would be utterly nugatory and the legislature would make any use public by simply declaring it so, and hence its will and discretion become supreme, however arbitrarily and tyranically exercised, *New York Central Coal Co.* v. *George's Creek Coal Co.*, 37 Md. 537 (1841), or on the grounds that should the legislature transcend its constitutional authority its acts would be void and it is the duty of the court to declare such acts as void. *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Esq. 694, 23 Am. Dec. 756 (1832); *Concord R. Co.* v. *Greely*, 17 N. H. 47 (1845).

34. Italics supplied.

35. 18 Am. Jur. 675, 29 C. J. S. 820, *People Ex. Rel. Horton* v. *Pendergast*, 220 App. Div. 351, 222 N. Y. Supp. 29 (1927); *Board of Black River Regulating Dist.* v. *Ogsbury*, 203 App. Div. 43, 196 N. Y. Supp. 281 (1923).

its vast potency. So potent is the presumption and the court's unwillingness to upset it that the very existence of a judicial right to ultimate determination has come to be questioned. The first noteworthy comment[36] upon the situation was uttered in the federal courts when Justice Black, in considering a case involving the employment of eminent domain by the federal government declared:[37]

> "We think that it is the function of Congress to decide what type of taking is for a public use and that the Agency authorized to do the taking may do so to the full extent of its statutory authority."

With this statement the judiciary's position as the guardian of public use was put in jeopardy and grave doubts were created as to the state of the law regarding review of federal condemnation proceedings.[38] Although these doubts were subsequently quelled by Supreme Court inferences that no actual change in the law had been effected,[39] the stigma of Black's comment served to highlight the court's loatheness to upset legislative decision upon the propriety and legality of government sponsored expropriations of private properties. The Supreme Court's reaffirmation of ultimate judicial review must be recognized to be without import if the protective walls constructed about the legislative determination in actuality relegate the power into an almost purely theoretical position. A minority of the judges on the New York Court of Appeals evidently are among those who feel that the tremendous burden placed upon a plaintiff who seeks to upset the legis-

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36. There have been earlier comments. Lewis, Eminent Domain. (3rd Ed.) 498, 499. See *Sadler* v. *Langham*, 34 Ala. 311 (1859) in which the court refers to Sedgwick on Stat. & Con. Law at pages 512, 513: "As the power to take is universal so it is absolute; that is to say, the legislature are the sole judges of the existence of the exigency which demands the sacrifice of the rights of individuals. 'I admit,' says Mr. Chancellor Woolworth, 'that the legislature are the sole judges as to the expediency of exercising the right of eminent domain for the purpose of making public improvements, either for the benefit of the inhabitants of the State generally, or of any particular section thereof.' 'It is the undoubted and exclusive province of the legislature,' says the supreme court of the State of Maine, 'to decide when the public exigencies require that private property be taken for public uses."

37. *United States Ex. Rel. Tennessee Valley Authority* v. *Welch*, 327 U. S. 546 (1946). Justices Reed and Frankfurter, separately concurring, insisted that the problem was still ultimately subject to judicial review.

38. " . . . it should be noted that even the judicial power to inquire into the public use question has been placed in doubt by recent decisions." *United States* v. 40.75 *Acres of Land, Etc.* 76 F. Supp. 239 (1948).

39. In a later Supreme Court decision (*U. S.* v. *Carmack*, 329 U. S. 230) (1946) the court at least strongly implied that the Welch case effected no change in the law—that it did not remove from all judicial review the public use for which property may be taken. Also, see Hand, J. dissenting in *U. S. v. State of N. Y.*, 160 F. 2d 479 (1947).

lative determination is so impossible to overcome that it should openly be declared insurmountable.[40]

The over-all feasibility of the above described position demands a concentrated treatment beyond the scope of the survey. Nevertheless, in reiteration it might well be noted that a strict legislative determination of public use would substantially serve to clear the judicially inspired haze which clings to the Public Use Criterion. The so-called extrinsive conflict between fluidity and definitiveness which is basic in the consideration of a definition of public use would be resolved if judicial expression were precluded. Legislative declarations, in that they are not hampered by the stare decisis doctrine, are of utmost sensitivity to public opinion. If endowed with a binding effect they would also provide a legal stability at any given time about the validity of a given public appropriation. These attributes although not predicated on grounds incidental to the main line of reasoning, are not to be dismissed lightly.

CONCLUSION:

Eminent domain is of utmost importance in that it is an avenue facilitating the growing influence of the sovereign power upon private rights. The prime limitation to the exercise of condemnation proceedings is the Constitutional requirement of public use. The public use criterion by its very nature and by the extensive considerations its definition demands has caused a great deal of judicial confusion. Issues concerning the standard of public use could be clarified in a drastic way. Namely, by precluding the judicial authority to dictate the ingredients of public use and reformulating the doctrine so as to be strictly within the legislative framework. Progress in this direction is evidently afoot but probably due to another impetus—the view being that ultimate judicial review is in actuality a negligible right of such inconsequential character that its consideration should be abandoned. Both considerations constitute valid factors towards the establishment of public use as a purely legislative question. It remains to be seen whether their weight is sufficient to overthrow the majority viewpoint.

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40. More recent expressions upon the burden have been voiced in *U. S. Ex Rel and For Use of Tennessee Valley Authority* v. *Russell*, 87 F. Supp. 386 (1948); *U. S. Ex Rel and For Use of Tennesee Valley Authority* v. *Easterly*, 87 F. Supp. 390 (1948). The present generally accepted state of the law is that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts unless the use is palpably without reasonable foundation. See *U. S.* v. *Gettysburg Electric Railway*, 160 U. S. 668 (1896); and also Dillen on Municipal Corporations (4th Ed.) Para. 600.