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EXCESS CONDEMNATION IN WISCONSIN

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IT IS the purpose of this article to deal with the subject of excess condemnation in this state in its legal aspects, and not to consider its practical value from the standpoint of the city planner. Lest any reader make the mistake of deeming the subject one having merely an academic interest and value, however, it should be clearly stated at the outset that excess condemnation possesses very important practical possibilities in the development of any large city.

Let us take as an illustration the creation of a major highway through the center of a city, such as the contemplated improvement of Cedar-Biddle street in Milwaukee. The cost of this improvement, arising from the acquisition of the land necessary for the widening of the street and from the actual work of constructing the widened street, is, of course, very large. The effect of such an improvement ordinarily is to increase greatly the value of abutting property. While the abutting owner, under the present system, may be assessed to help defray the cost of the improvement, such assessment in practice does not usually exceed about fifty per cent of the cost of the widened street. This usually means that a very substantial portion of the increment in the value caused by the improvement is realized by the private owner.

If the city, instead of taking only the land actually required to construct the new highway, were permitted legally to take additional land on each side to the extent, let us say, of the depth of an ordinary lot facing the improved highway, and could then sell these lots to private persons with restrictions as to their development and use, two most important results would follow:.

1. The major portion of the profit resulting from the improved highway would be realized by the city, rather than by private owners.

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It has been estimated in the case of Cedar-Biddle street that this profit would have been substantially in excess of the entire cost of the land required for the improvement.

2. The city could control absolutely through conditions imposed in the resale of the abutting property the character of the development of a major highway, a vital consideration from a city planning viewpoint.

With this brief statement designed merely to emphasize the outstanding importance to a city like Milwaukee of the subject of excess condemnation, let us proceed to a consideration of the legal questions it presents. I feel that it is proper, in so doing, to present both the favorable and the adverse aspects as fairly as possible, leaving the reader to form his own conclusions.

At the outset I wish to be understood as using the term "excess condemnation" in the sense of an adverse taking by the municipality of a *substantial amount of land,* a parcel large enough to be capable of advantageous private use or development, as distinguished from what is sometimes referred to as a "remnant."

Until the year 1912, there were but two provisions of the constitution of Wisconsin directly relating to condemnation of land by cities.

The first was Section 13 of Article I,—the "Declaration of Rights," and read as follows:

> The property of no person shall be taken for public use without just compensation therefor.

The second was Section 2 of Article XI:

> No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity therefor being first established by the verdict of a jury.

In November, 1912, there was added to Article XI, a section known as Section 3a, sometimes referred to as the "excess condemnation amendment," which provided:

> The state or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works.

A mere reading of this amendment suggests at the outset the ques-

tion of whether it is open to a construction authorizing excess condemnation, as that term is defined for the purposes of this article. I shall assume, however, that the amendment was designed to and does in terms attempt to authorize a municipality to take by eminent domain a substantial amount of land in excess of that actually required for the contemplated improvement, and thereafter to resell the same to private persons. I shall also assume that this amendment would be deemed amendatory of Section 2, Article XI, above quoted, so that, if the jury believed the taking of the land actually required for the proposed improvement necessary within the meaning of that section, they might also find such necessity as to a reasonable amount of excess land proposed to be taken.

Making these assumptions, excess condemnation would be constitutional, of course, so far as the state constitution is concerned. But how about the federal constitution? For it is settled law that a provision of a state constitution which contravenes the federal constitution will be declared null and void by the courts just as promptly as though a mere state statute were involved.[1]

The federal Supreme Court has held uniformly that an attempt to exercise the power of eminent domain for the purpose of taking private property for a use essentially *private* in character constitutes a deprivation of property without due process of law, thereby raising a federal question, even where all requirements of state statutory procedure have been met.[2]

Plainly, therefore, unless excess condemnation can be justified as a taking of the excess for a public use or purpose, Section 3a, Article XI of the Wisconsin constitution, as herein construed and applied, will meet condemnation as violative of the federal guaranty of due process of law. Thus the specific question to be answered is this:

Is the taking by a municipality of a substantial parcel of land by excess condemnation a taking for a public use or purpose?

The definition of what constitutes a "public use" is a difficult matter.[3] It is a question of law for the court, even in the face of a legislative assertion or finding that a certain use is "public."[4]

In determining whether a certain use is public or private, the federal courts accord marked deference, however, to the determination of that

[1] 12 C. J. (Const. L.) p. 743; 6 R. C. L. (Const. L.) p. 37-38; *Gunn vs. Barry*, 21 L. ed. 213, 215.

[2] 10 R. C. L. (Em. Dom.) p. 47; *O'Neill vs. Leamer*, 60 L. ed. 249; *Hairston vs. Danville and Western Railway Co.*, 52 L. ed. 637; 13 Anno. Cas. 1008.

[3] 20 C. J. p. 552.

[4] *Sears vs. Akron*, 62 L. ed. 246; *Water Power Cases*, 148 Wis. 124, 148.

question by the state immediately concerned, through its supreme court, it legislature or vote of its people, for the problem is essentially one of public policy and is legitimately influenced by local conditions.

Thus, in a case in which an act of the State of Maine authorizing the establishment of a public coal yard was challenged, the federal Supreme Court said:

While the ultimate authority to determine the validity of legislation under the 14th Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect.[5]

And in a celebrated decision involving the constitutionality of the Mill and Elevator Association and the Home Building Acts of North Dakota, expression even more emphatic was given by the court to the same principle.

With this united action of people, legislature and court we are not at liberty to interfere unless it is clear, beyond reasonable controversy, that rights secured by the federal Constitution have been violated. What is a public purpose has given rise to no little judicial consideration. Courts as a rule have attempted no judicial definition of a "public" as distinguished from a "private" purpose, but have left each case to be determined by its own peculiar circumstances.

Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its constitution, and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the 14th Amendment, to set aside such action by judicial decision.[6]

Two striking illustrations of the interpretation by the federal Supreme Court of the term "public use" in the light of local conditions are furnished by the cases of *Clark vs. Nash,* 49, L.ed. 1085 and *Strickley vs. Highland, etc., Mining Co.,* 50 L.ed. 581.

In the first of these cases the court upheld the taking by eminent domain of a right of way for an enlarged irrigation ditch, in order to enable a single land owner to obtain from a stream in which he had an interest water to irrigate his land which otherwise would have been absolutely valueless. The court stated that what constitutes a public use "may frequently and largely depend upon the facts surrounding the subject" and riparian rights in flowing water "are not the same in the

[5] *Jones vs. Portland,* 62 L. ed., 252, 255.

[6] *Green vs. Frazier,* 64 L. ed., 878.

arid and mountainous states of the West as they are in the states of the East."

And in the *Strickley* case the court upheld condemnation of a right of way for an aerial bucket line of a mining corporation across a placer mining claim as being a taking for public use, where the statute had been so construed by the California court, and supported its conclusion in part as follows:

> While emphasizing the great caution necessary to be shown, it (the decision in the *Clark* case) proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. In such unusual cases, there is nothing in the 14th Amendment which prevents a state from requiring such concessions.

It may be taken as settled, therefore, that we must approach the determination of whether a given use is public, prepared to defer to the judgment of the highest legislative and judicial authorities of the state on the subject, and ready to give due recognition to any special justification for the use, inherent in the surrounding circumstances. And it is only where, after giving due weight to these considerations, it is clear beyond reasonable controversy that the use is private rather than public that the proposed taking can be condemned as violative of the federal Constitution. With these considerations in mind, we pass to a consideration of authorities defining "public use."

These cases are far from harmonious. They are usually divided into three classes (10 R. C. L. 25; 20 C. J. 553-557; *Fountain Park Co. vs. Hensler,* 155 N.E. (Ind.) 465; 50 A. L. R. 1518, 1526):

1. Those holding that "public use" means "use by the public," or a substantial part thereof.

2. Those holding that it means "public benefit, advantage or utility, and is any use which tends to enlarge the resources, industrial energies or productive power of a number of the inhabitants of the state, or contributes to the welfare or prosperity of the community."

3. Those holding that the true definition lies somewhere between the two foregoing views.

The text writers customarily classify Wisconsin as subscribing to the first definition.[7]

Assuming that the Wisconsin definition of "public use" is use by some substantial part of the public and that the term "is not synonymous with *public benefit,*" but at the same time realizing that this defini-

[7] 20 C. J. 554; *Wisconsin River Improvement Co. vs. Pier,* 137 Wis. 325, 337-338.

tion was announced by our Supreme Court before the adoption of the so-called "excess condemnation amendment," to our constitution, we proceed with the consideration of the ultimate question. What will be the view (1) of the Supreme Court of this state and (2) of the federal Supreme Court as to whether excess condemnation involves a taking for a public, as distinguished from a private purpose?

As already indicated, there seem to be no decisions of either court directly dealing with the problem. But several of the states have passed upon state statutes purporting to authorize excess condemnation, where there was no constitutional provision sanctioning it. They have uniformly discussed the question with a view to determining whether such a taking was for a public use or purpose, and hence are of value, even though no state constitutional authorization was involved. These cases are cited in the margin.[8]

They are in complete harmony in holding that an attempted taking under excess condemnation statutes of substantial amounts of land beyond that directly required for the projected improvement, with power to resell the excess to private persons, *was a taking for a private rather than a public use* and that any statute attempting to authorize such a taking was unconstitutional and void. One of the leading authorities phrases its conclusion in these words:

> An affirmative answer to this question (the constitutionality of the statute) would make it possible for the city to take the home of a resident near the line of thoroughfare, or the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the authorities of the city, some other use of the land would be more profitable and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the power of eminent domain, or the expenditure of public money has been justified on such grounds.[9]

It is thus reasonable to assume that, were it not for the excess condemnation amendment, a statute providing for excess condemnation would meet judicial disapproval on the part of our Supreme Court. Will this amendment serve to save such a statute. Manifestly the question must be answered separately as to the state and federal tribunals.

With reference to the Supreme Court of Wisconsin, it has expressed

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[8] 10 R.C.L. (Em. Dom.) p. 41; *Re Opinion of Justices,* 204 Mass. 607; 91 N.E. 405; 27 L.R.A. (N.S.) 483; *Re Opinion of Justices,* 204 Mass. 616; 91 N.E. 578; *Salisbury Land & Imp. Co. vs. Mass.,* 215 Mass. 371; 102 N.E. 619; 46 L.R.A. (N.S.) 1196; *Re Albany Street,* 11 Wend. (N.Y.) 149; 25 Am. Dec. 618; *Bond vs. Baltimore,* 116 Md. 683; 82 Atl. 978; *Penn. Mut. L. Ins. Co. vs. Philadelphia,* 242 Pa. St. 47; *Richmond vs. Carneal,* 106 S.E. 403; 14 A.L.R. 1341 and note.

[9] (*Re Opinion of Justices,* 204 Mass. 607; 91 N.E. 405; 27 L.R.A. (N.S.) 483.)

itself as favoring the view that public use means use by the public, and that it is not synonymous with "public benefit." But the court is now confronted with an amendment of the State Constitution which, we are assuming, in terms expressly authorizes excess condemnation, and our court must test this expression of the will of the people as to whether it is violative of the federal due process guaranty. If our court adheres to its earlier view that public use means use by the public as distinguished from public benefit, and that a constitutional provision for eminent domain, in order to escape condemnation under the federal constitution, must appear to be limited to a taking for a public use, as thus defined, then it would appear difficult for the excess condemnation to win judicial approval. If our Supreme Court, however, should now subscribe to the view that public use means public benefit, advantage or utility, and includes a use which contributes to the welfare or prosperity of the community, then it would seem quite possible, if not probable, that the constitutional amendment may be upheld. I say this largely because of the strong showing of benefit to the community through uniformity of development of abutting property, improved appearance of the highway, greater utility in the use of private property, and other similar factors resulting from the exercise of excess condemnation.

The determination of the federal Supreme Court, as already indicated, will be influenced by the decision of the Supreme Court of Wisconsin. If the latter court holds the amendment unconstitutional, the entire question would, of course, be settled. If the latter court fails to pass upon the question before it reaches the federal Supreme Court, the amendment would still have in its favor the vote of the people (as well as the favorable action of legislatures) involved in its adoption. If our Supreme Court holds it constitutional, that determination would also weigh strongly in its favor with the Supreme Court of the United States.

As stated at the outset, it is not the purpose of this article to make any prophecy of the result in either court of a test case involving the constitutionality of excess condemnation, but merely to point to and to attempt to evaluate in part some of the factors which must guide either court in reaching a determination. This I have attempted to do.

The matter is of the highest importance to the city of Milwaukee and the various legal problems and economic considerations involved in its determination are intensely interesting. It is to be hoped that the entire question will be brought before the courts for determination in the not distant future.