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THE PUBLIC PURPOSE DOCTRINE AS IT RELATES TO DEVELOPMENT RIGHTS

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Recently it has become apparent that the usual methods of governmental supervision of land use are unable to cope with some problems of unplanned urban growth. An especially difficult problem is planning for sufficient open space in spreading urban areas. The traditional solution of condemnation by eminent domain has not proved capable of allowing cities to insure far in advance that future development will provide needed parks and public use areas. Courts have resisted such condemnation either by refusing to find a specific enough public purpose in the projected condemnation or in finding that the use is too far in the future to justify present condemnation or by finding an insufficient public purpose to permit expenditure of public funds, even for a voluntary sale.

Legislation permitting condemnation only of development rights may be the answer to this problem. State governments or other appropriate agencies would be granted the power to condemn the development rights in presently undeveloped land. Upon condemnation the owner of the undeveloped land would be paid the fair market value of the right to develop, the value of which right would presumably be substantially less than the value of the land if acquired in fee simple absolute.[1]

Such mini-condemnation would preserve the open space character of the land, permit continued use by the fee owner (presumably such use would ordinarily be agricultural), and would avoid the limitations

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An earlier version of this note appeared in 6 HARV. J. LEGIS. 86 (1968). Reprinted in part by permission of the Harvard Student Legislative Research Bureau.

1. A model open space land statute appears at 6 HARV. J. LEGIS. 57 (1968). It contains, among other things, provisions for the condemnation of development rights.

which the public purpose doctrine has erected around eminent domain efforts at total condemnation.

The public purpose doctrine imposes restraints on state action both in condemning land by eminent domain and in spending funds raised by taxation of the public. Though some theoretical differences may exist between the nature of the restraints imposed, for all practical purposes one may assume that the same objections that can be made to a program to acquire land by condemnation will also apply to a program to acquire land by purchase. In most states the doctrines have not been clearly distinguished with the result that identical results can be expected under either theory. A more pragmatic consideration is that any legislation which could be sustained under one theory but not the other would not be feasible.

The general rule is that the state can condemn land only for a public use. Some courts have construed a public use as use by the public, others as public advantage. Under either the narrow or the broad view the fact that private individuals will incidentally benefit from the taking will not invalidate the taking as long as the use for which the land is taken is public. [Connecticut, New Jersey, and New York, for example, apparently adhere to the broad view of what constitutes a public use.] Adequate precedent exists to sustain the use of of the condemnation and taxing powers to acquire blighted slum land, and even unblighted land, if necessary to the redevelopment of an area which considered as a whole is blighted. However, no court has squarely faced the problem of the acquisition of open-space land in a rural or suburban area, presently undeveloped, and its development by the state as part of a comprehensive plan for ultimately private uses.

Although such development by the state of open space land seems at first blush unconstitutional, at least two alternate theories might sustain it. The first is an extension of the doctrine of *Berman v. Parker*,[2] that even unblighted property may be condemned by an urban renewal agency if the redevelopment of an area as a whole requires it. Obviously this rationale can cover a great many cases depending on how widely you define the relevant area. The second is the theory of excess condemnation. This long recognized exception to the public use doctrine permits the state to go slightly beyond the strict limits of necessity in condemning land if the additional land acquired is necessary for the complete fulfillment of the state's purpose. For ex-

2. 348 U.S. 26 (1954).

ample, in condemning land for a parkway, the state may condemn the land adjacent to the parkway and then insert deed restrictions that prevent any use of the land that would detract from its scenic beauty. The state is then free to resell the adjacent land to private owners as restricted.

Section 1(e) of Article IX of the New York State Constitution, for example, authorizes quite broad powers of excess condemnation for local governments. Local governments may take excess land, abutting on land taken for public use, in order "to provide for appropriate disposition or use" of such land. This may be constitutionally sufficient authorization for the taking of land for low density residential development adjoining public open spaces; even if public construction or subsidy of such residential development is not a public use. Even excess condemnation for private residential development adjoining public open space seems authorized by section 1(e), since the section goes on to empower local government "to sell or lease that land not devoted to such public (open space) use." Section 7(e) of Article I also provides for narrower legislative authorization of local excess condemnation of lands abutting on parks, streets, and other public places, for suitable building sites.

Article 4, section 6, paragraph 3, of the New Jersey Constitution authorizes any agency or political subdivision of the state "to take interests in abutting property" to preserve and protect public facilities for which the state agency is authorized to acquire lands. This provision seems also to sustain excess condemnation for low density residential development adjacent to state owned property previously taken for some public purpose. The Appellate Division of the New Jersey Superior Court has sustained a highway authority condemnation of lands abutting on a parkway, in part as "insurance against unsightly structures."[3]

Nonetheless, there will still be some cases to which neither of these alternative theories would apply; therefore, it is necessary to discuss in greater detail some legislative and judicial precedents.

The Housing Act of 1949 in authorizing urban renewal projects expressly includes:

> . . . land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially

3. N.J. Highway Authority v. Currie, 35 N.J. Super. 525, 114 A.2d 587, 590 (Super. Ct., App. Div. 1955).

> impairs or arrests sound growth of the community, or (iii) open land necessary for sound community growth which is to be developed for predominantly residential . . . uses . . . .[4]

However broad this authorization may appear, it must be remembered that it is implicitly limited by prior language which refers to an urban renewal area. It seems obvious that you cannot renew something that was never developed to begin with. At most this section of the Housing Act is merely authority for the area wide concept of *Berman v. Parker, supra.* However, in examining the legislative history of the Housing Act, its objectives seem far broader than any action taken to date by the federal government.

> It is, of course, perfectly apparent that the elimination of residential slums in central city areas and their redevelopment in accord with a plan for the most appropriate use of the land therein (i.e., for public use, for industry, for housing at more appropriate density, etc.) makes necessary a dispersion of the families now living in such slums. Federal loan assistance for the acquisition and preparation of open unplatted urban or suburban land to be developed for predominantly housing use, so that adequate provision can be made for the necessary dispersion of some portion of the central city population, is therefore essential to any effective slum clearance operation, and is entirely appropriate.[5]

It can thus be seen that Congress has a very broad view of its powers to tax and spend for residential development outside the central city, and, though no judicial precedent exists which tests this interpretation of the Housing Act, the very fact that Congress would pass legislation of this nature raises a presumption in favor of its constitutionality.

The closest the state courts have come to deciding this question is in litigation over the constitutionality of urban redevelopment. The reasoning in many of these cases would support urban development equally well. In *N.Y. City Housing Authority v. Muller,*[6] the court stated,

> It is also said that since the taking is to provide apartments to be rented to a class designated as "persons of low income," or to be leased or sold to limited dividend corporations the use is private and not public. This objection dis-

4. 42 U.S.C. 1460 (1970).
5. Senate Report No. 84, Feb. 25, 1949, U.S. CODE CONG. SERV., 81st Cong. 1st Sess. (1949), p. 1564.
6. 270 N.Y. 333, 1 N.E.2d 153 (1936).

> regards the primary purpose of the legislation. Use of a proposed structure, facility, or service by everybody and anybody is one of the abandoned universal tests of a public use.[7]

In *Murray v. La Guardia*,[8] the court of appeals found no difficulty in the fact that a private corporation may ultimately reap a benefit. "If, upon completion of the project the public good is enhanced, it does not matter what private interests may be benefitted."[9]

Two cases indicate the limits which the public use doctrine places on the state. In *Denihan Enterprises v. O'Dwyer*,[10] the facts indicated the purpose behind the condemnation proceeding was to provide parking facilities for a private apartment building. The end result of the project would be to provide parking spaces for 308 tenants of one apartment building, while only 17 spaces would be available for the general public. The court of appeals invalidated the action because there was no public purpose involved, stating:

> . . . the public use here may be only incidental and in large measure subordinate to the private benefit to be conferred on the Company and not for the purposes authorized by the statute. Of course, an incidental private benefit, such as a reasonable proportion of commercial spaces is not enough to invalidate a project which has for its primary object a public purpose . . . but the use is not public where the public benefit is only incidental to the private.[11]

In *Courtesy Sandwich Shop v. Port of New York Authority*,[12] the majority of appellate division justices, though agreeing that the World Trade Center represented a public purpose, found the statute on its face unconstitutional since it granted a power to condemn property for no other purpose than the raising of revenue for the expenses of the project. The court of appeals, 6-1, saved the statute by a limited interpretation of the power of eminent domain. The dissent would have held the statute unconstitutional.

Wilson v. Long Branch,[13] involved an urban redevelopment project of about 100 acres, 28 of which were vacant and unimproved. The New Jersey Supreme Court, relying heavily on *Berman v. Parker*, *supra*, sustained the constitutionality of the program. In *City of Tren-*

7. 1 N.E.2d at 155.
8. 291 N.Y. 320, 52 N.E.2d 884 (1943).
9. 52 N.E.2d at 888.
10. 302 N.Y. 451, 99 N.E.2d 235 (1951).
11. *Id.* at 238.
12. 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.2d 1 (1963).
13. 27 N.J. 360, 142 A.2d 837 (1958).

ton v. Lenzner,[14] the New Jersey Supreme Court approved condemnation of property for off-street parking,

> The public use may be proprietary as well as strictly governmental in nature . . . . What constitutes a proper use will depend largely on the social needs of the times and may change from generation to generation.[15]

In Connecticut an urban redevelopment program was sustained in *Gould Realty Co. v. City of Hartford*,[16]

> In this state it is settled that public use means public usefulness, utility, or advantage, or what is productive of general benefit, so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.[17]

While it is apparent from these cases that courts are usually willing to approve condemnations for urban development, it is not clear, because there seem to be no cases exactly in point, whether courts would approve condemnation in an undeveloped area. What is clear is that the objectives and purposes of those urban redevelopment programs that have been approved by the courts are the same as the objectives and purposes of a statute providing for the condemnation of development rights. As Robbins and Yankauer conclude,

> There is no difference, except one of degree, between blighted land which adversely affects health and welfare and open land which, by its non-use, keeps people crowded in unhealthful surroundings . . . . To deal with the problem adequately the courts must find that conditions today require the taking of vacant land for sound community development, which in itself is a public use.[18]

Can the power of eminent domain be used to acquire land if there is no present use for it? (This question is raised by the inherent nature of a development right.)

There is a division of opinion on this issue. In *State ex rel. City of Duluth v. Duluth St. Ry.*,[19] action of a municipality to condemn land for an extension of a street railway was held unconstitutional because

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14. 16 N.J. 465, 109 A.2d 409 (1954).
15. 109 A.2d at 411.
16. 141 Conn. 135, 104 A.2d 365 (1954).
17. 104 A.2d at 368.
18. *Eminent Domain in Acquiring Subdivision and Open Land in Redevelopment Programs: A Question of Public Use*, pp. 463-513 in URBAN REDEVELOPMENT: PROBLEMS AND PRACTICES, (C. WOODBURY ed. 1953).
19. 179 Minn. 548, 229 N.W. 883 (1930).

there was no present need for it. (The population to be served was very small, most of the residents did not want the railway, and the cost was fairly substantial.) The court stated, "Necessity as here used, means now or in the near future." This case could easily have been decided on other grounds, *viz.*, that the real purpose of the extension was to benefit developers of certain lands at the terminus of the extension.

In *State v. O.62033 Acres*,[20] a Superior Court of Delaware invalidated eminent domain proceedings which had been brought by the Highway Department. The court considered that possible future expansion of a two lane to a four lane highway was too remote and speculative to justify condemnation. The time within which actual use as a four lane highway would begin was estimated as thirty years. Possible appreciation of property values during this interval was held not to be an adequate reason for condemnation.

Winger v. Aires,[21] involved condemnation of land for a school site. Much more land was condemned than could be reasonably used.

> One witness testified, for instance, that the vice president of the Board said that the Board could take more land than it needed for the school building and then sell what remained over. Obviously no school board can, even in this indirect fashion, go into the real estate business.[22]

Grand Rapids Board of Education v. Baczewski,[23] was similar. There was no present need for the land. The present high school was estimated to be adequate for the next thirty years. The Board's main purpose in buying early was to save money. "Such a practice could be highly commended in the Board's purchasing of property, but does not meet the test of necessity in condemnation proceedings."[24] There is some hint that this result depends on the specific language in Michigan's Constitution rather than the public purpose doctrine.

In neither of the preceding two cases, apparently, was there a showing that the added acquisitions were necessary either (1) to protect the value of the school grounds for school purposes, or (2) to conserve otherwise unavailable open space for expansion purposes.

On the other side, *New Orleans v. Moeglich*,[25] was a condemna-

20. 49 Del. 90, 110 A.2d 1 (1954).
21. 971 Pa. 242, 89 A.2d 521 (1952).
22. 89 A.2d at 522.
23. 340 Mich. 265, 65 N.W.2d 810 (1954).
24. *Id.* at 269.
25. 169 La. 1111, 126 So. 675 (1930).

tion proceeding to extend a street. One of the reasons for the condemnation was to save money in putting in the street early, i.e., before development. The court sustained the action. It indicated that cities might plan ahead for the "near future."

Carlor v. City of Miami,[26] sustained condemnation of land for a port and airport even though there were only very vague plans when the condemnation took place and nothing had been done for seven years thereafter. The decision referred to the duty of public officials to look to the future and to plan not only for the present but for the "foreseeable future." These remarks were probably mere dictum since the court could have decided the case on the ground that it was too late for a collateral attack of the original condemnation proceedings. (The action was brought several years after the land was condemned. It had risen in value in that time due to improved access.)

All of the cases which invalidate the taking of land for future use base the denial on one of three grounds: (1) that the taking exceeds the powers granted by statute; or (2) that no actual public purpose is served (where the real intent of the condemning authority is to benefit a private person); or (3) the taking constituted use of the condemnation power to appropriate the owner's appreciation of value.

A legislative program providing for condemnation of development rights is less susceptible to these objections because the taking is less severe. The only possible problem is with the appropriation of the appreciation in value. This does not go to the constitutionality of the *acquisition* of a development right, which is supported by an independent public policy of conserving open space, but only to the *exercise* of such an interest.

While there are decisions (e.g., *Courtesy Sandwich Shop v. Port of New York Authority, supra)* which seem to suggest that if the state benefits as a land speculator the taking must be disallowed, they are not really in point. They indicate that the cost of essential public programs cannot be financed by acquiring revenue-producing private property to make up deficits arising from unprofitable governmental programs. This line of cases imposes a limit on the types of property the state may acquire under the statute. All property condemned must be strictly related to accomplishing the purposes of a comprehensive plan, not just thrown in so that the state can make a profit as a land speculator. If those bounds are exceeded, then constitutional

26. 62 So. 2d 897 (1953), *cert. den.* 346 U.S. 821.

doubts begin to arise. The import of the New York cases is that condemnation of private property so that the state may acquire profitable sources of revenue is no proper public purpose.

Because of this possible objection, a state's power to develop land in which it holds interests should probably be restricted. Making a profit on land development is not the purpose behind the suggested development rights legislation. If, in fact, a development rights program is a net revenue-producing operation, that is completely incidental to the accomplishment of other valid public purposes. If primary weight is put on the revenue-producing operations of a development rights program, then more complex constitutional problems arise. For example, consider the case of development of land in which interests are held when such development becomes necessary because of a shortage of middle income housing in an area where there is a surplus of open space.

It should be noted that in taking an interest in land, the state is not interfering with the owner's present use of the land; hence, there should be less reason to object to takings that are necessary to provide for the foreseeable future. In balancing the owner's right to retain any interest in his land at all against the state's right to provide for the future, one might reasonably define public purpose very strictly. In contrast, condemning development rights in land avoids this balancing through a limited taking which allows the owner to continue his present use of the land.