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Eminent Domain -- Public Use in North Carolina

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Eminent Domain—Public Use in North Carolina

The nature and character of "public use" sufficient to justify an exercise of the power of eminent domain has again been considered by the North Carolina Supreme Court. In *State Highway Comm'n v. Batts*,[1] the Highway Commission sought to exercise the power of eminent domain over the lands of the defendant and of a Mrs. Joyner to construct a cul-de-sac[2] to serve three property owners whose property did not abut a public road. There were four families living on these properties. Three of the families were related to the fourth family, that of Mr. W. H. Batts. The lower court, sitting without a jury, held that the proposed road was for a public use. The North Carolina Supreme Court reversed saying the road was for the private use of W. H. Batts and a few of his relatives and thus denied the Highway Commission the right to exercise the power of eminent domain.[3]

A precise definition of public use is impracticable. In *City of Charlotte v. Heath*[4] the court said: "Perhaps none can be devised which is not challengeable, since, with the progressive demands of society and changing concepts of governmental function, new subjects are constantly brought within the authority of eminent domain."[5] The basic problem in defining public use is that the term "use" has been interpreted as having two different meanings: "em-

action was commenced was brought under the protection of the court and was in effect a party to the action and the petitioner as the plaintiff in the action representing the child was in the same position as a guardian ad litem and was without power to dismiss the action without the consent of the court." *Id.* at 298, 171 Cal. App. 2d at 290. See also Evans v. Taylor, 128 S.W.2d 77 (Tex. Ct. App. 1939). There the trial court delayed ruling on a motion for discontinuance in a habeas corpus proceeding for custody until the defendant had filed an answer requesting affirmative relief. The court held that the trial judge was authorized to refuse to act on the motion until the answer had been filed. Stout v. Pate, 208 Ga. 768, 69 S.E.2d 576 (1952). In this case there was an entry of dismissal by the plaintiff before the answer in a habeas corpus proceeding for custody. The court held the dismissal improper. See also Collard v. McCormick, 162 Ga. 116, 132 S.E. 757 (1926); *Ex parte* Welsh, 93 N.J. Eq. 303, 116 Atl. 23 (1922); *Ex parte* Rich, 3 N.Y.2d 689 (App. Div. 1938); Commonwealth *ex rel.* Gimbel v. Gimbel, 94 Pa. Super. 577 (1928); McClendon v. McClendon, 289 S.W.2d 640 (Tex. Civ. App. 1956).

[1] 265 N.C. 346, 144 S.E.2d 126 (1965).

[2] "A blind alley; a street which is open at one end only." BLACK, LAW DICTIONARY (4th ed. 1951).

[3] 265 N.C. at 360, 144 S.E.2d at 136.

[4] 226 N.C. 750, 40 S.E.2d 600 (1946).

[5] *Id.* at 755, 40 S.E.2d at 604.

ployment" or "use by the public" and "advantage" or "public benefit."[6] The "use by the public" test is considered a strict interpretation[7] while the "public advantage" test is considered a broad interpretation of the term.[8]

The North Carolina Supreme Court apparently uses a combination of the two tests as it has not specifically adopted either one. In *Cozard v. Hardwood Co.*,[9] a lumber company wanted to construct a railroad across an individual's land so that a large tract of timber could be harvested. The lumber company pointed out that new land would be open for cultivation, that new tanneries and factories would be established in the area to utilize the byproducts of the logging industry that would otherwise be wasted, that immigration would occur to fill the available jobs, and that many other benefits would accrue to the public.[10] However, the lumber company only wanted its trains to be able to use the proposed tracks. Even though the public advantage would have been immense, the use by the public would have been negligible. After weighing the considerations of both tests, the court denied the company permission to build the railroad. The court seemed to give great weight to whether or not the public would have a full and unrestricted right to use the way, which in turn would determine the public character of the facility.[11]

In *Reed v. State Highway & Pub. Works Comm'n*[12] the court permitted the Highway Commission to condemn property to construct a road that would provide an outlet for five homes from the top of a mountain to the county seat and also would serve as part of a scenic highway. While the number of people actually using the road would be limited, the court did envision some public benefit because it would tend to promote tourism. The court felt having scenic roads would induce tourists to come to an area and spend

[6] 2 NICHOLS, EMINENT DOMAIN § 7.2 (3d ed. 1963).

[7] *Id.* § 7.2[1]. Thus if a sufficient number of people will use the subject of the power of eminent domain, it will be a permitted public use.

[8] *Id.* § 7.2[2]. Thus if people generally in the community or state will benefit from the exercise of the power of eminent domain, regardless of whether they use the subject the power is exercised upon, it will be a permitted public use, *i.e.*, if it will create a better economy or if the general welfare will be improved, it is for the public advantage.

[9] 139 N.C. 283, 51 S.E. 932 (1905).

[10] *Id.* at 290, 51 S.E. at 935.

[11] *Id.* at 288, 51 S.E. at 934.

[12] 209 N.C. 648, 184 S.E. 513 (1936).

the summer and put money into circulation, which would benefit all the people in the area.[13] The fact that more money is put into circulation and thus a public benefit results, standing alone, should be insufficient to qualify as a public use that would support condemnation of private property. However, when coupled with the fact that it will be used by the public, though limited in number, the condemnation is more reasonable. Thus it seems the court has used a combination of both tests to support a public use in *Reed.*

In *City of Charlotte v. Heath*[14] the court recognized that a public convenience would constitute a public use when the public has a legal right to make use of the convenience.[15] Seventeen families were to be served by a sewer line extension. The court said: "The public nature of the project cannot be made to depend on a numerical count of those to be served or the smallness or largeness of a community."[16] While the number of the public actually using the proposed sewer line was limited, there was some general public advantage in that odors and insect growth were controlled. Again public advantage and use by the public tests were used in conjunction with each other and the condemnation was sustained.

Perhaps the *Batts* decision can be explained in that it failed one if not both of these tests. The court apparently did not think there would be any general public advantage because it felt "that any use by, or any benefit for, the general public will be only incidental and purely conjectural. . . ."[17] The number of the public that would have actually used the road would have been limited since it would have served only four families and would have been a dead-end road also. But, the court did not discuss the *right* of the general public to use the road that was considered in *Cozard v. Hardwood Co.*[18]

Many courts declare that if the public has a right to use the road, it is immaterial that some people will benefit from the road more than others, or that only a few people will use the road, or that one end does not terminate at a public place, or that it is very

[13] *Id.* at 654, 184 S.E. at 516.
[14] 226 N.C. 750, 40 S.E.2d 600 (1946).
[15] *Id.* at 755, 40 S.E.2d at 604.
[16] *Ibid.*
[17] 265 N.C. at 360, 144 S.E.2d at 136.
[18] 139 N.C. 283, 51 S.E. 932 (1905).

short in length.[19] While usually the courts are concerned with a landlocked party's right to reach a public road, some courts attach importance to the right of the public to reach the landlocked party in the event he is summoned as a witness or to sit on a jury.[20] A court recently recognized that a public road to a landlocked property owner could be justified because it might be used by doctors, nurses, ambulances, salesmen or farm organization representatives.[21] Nor is the public road allowed only when there is no other means available for access to the landlocked property.[22]

Perhaps the court considered that the landlocked parties in *Batts* had an adequate remedy under the cartway statute[23] if they proved such a way was necessary, reasonable and just. While the court did not comment on this provision in its opinion, the appellant did raise this issue on appeal.[24] Apparently weight was given to the fact that all of the interested parties were related to one of the property owners. Throughout the opinion the court referred to the proposed road serving "W. H. Batts and a few of his relatives." It should be immaterial that these families were related to each other, but the court did not intimate it would have held otherwise had they not been related.

The court made it clear it was not holding that the proposed road was not for a public use merely because it was a cul-de-sac.[25] In effect the court overruled *State v. M'Daniel*,[26] which had held that a cul-de-sac that did not terminate at a public place was not a public road.

[19] *E.g.*, Sherman v. Buick, 32 Cal. 241, 255 (1867); Leach v. Manhart, 102 Colo. 129, 133, 77 P.2d 652, 653 (1938); Hightower v. Chattahoochee Industrial R.R., 218 Ga. 122, 125, 126 S.E.2d 664, 666 (1962); Taylor v. Wentz, 15 Ill. 2d 83, 89, 153 N.E.2d 812, 816 (1958); Law v. Neola Elevator Co., 281 Ill. 143, 150, 117 N.E. 435, 437 (1917); Butte, A. & Pac. Ry. v. Montana Union Ry., 16 Mont. 504, 523, 41 Pac. 232, 238 (1895); Phillips v. Stockton, 270 S.W.2d 266, 270 (Tex. Civ. App. 1954); Heninger v. Peery, 102 Va. 896, 899, 47 S.E. 1013, 1014 (1904).

[20] *E.g.*, Leach v. Manhart, *supra* note 19; Pagels v. Oaks, 64 Iowa 198, 203, 19 N.W. 905, 907 (1884); Johnson v. Supervisors of Clayton County, 61 Iowa 89, 91, 15 N.W. 856, 857 (1883).

[21] Tracey v. Preston, 114 Ohio App. 206, 181 N.E.2d 479 (1960).

[22] Denham v. County Comm'rs of Bristol, 108 Mass. 202 (1871). The party seeking the public road already had two other accesses to public roads.

[23] N.C. GEN. STAT. § 136-69 (1964).

[24] Brief for Appellant, p. 13.

[25] 265 N.C. at 357, 144 S.E.2d at 135.

[26] 53 N.C. 284 (1860).

If the *Batts* decision holds that a cul-de-sac serving only four families is not a road for a public use, it would seem the State Highway Commission may encounter problems of using public funds to maintain other dead-end roads on the Secondary Road System that serve only a limited number of families. Any taxpayer would have standing to bring suit to prevent misuse of agency [State Highway Commission] power.[27] The court said: "To sustain the proposed condemnation . . . under the facts and circumstances here would set a dangerous precedent for the expenditure of public funds by the State Highway Commission. . . ."[28] However, there was not an expenditure of public funds under the facts and circumstances here because the landlocked parties had given the Highway Commission an indemnity bond to cover any damages to the defendants' property. The only expenditure of funds would be for the construction and maintenance of the road, not acquiring the right of way.

Also in the light of the *Batts* decision, it seems that the State Highway Commission will have to alter its administrative policy of adding roads and streets to the Secondary Road System which is maintained by the Commission. At the present time the Commission policy requirements are: "(2) Roads less than one mile in length must have at least four occupied residences fronting the road. . . . (4) There must be at least two individual property owners on the road."[29] The proposed road in *Batts* met both these requirements.

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Evidence—Admissibility of Agent's Declaration Against His Principal

The plaintiff's decedent in *Branch v. Dempsey*[1] was fatally injured in a head-on collision with the defendant owner's truck being operated by the defendant driver in the scope of his employment.[2]

[27] Stratford v. City of Greensboro, 124 N.C. 127, 32 S.E. 394 (1899).
[28] 265 N.C. at 360, 144 S.E.2d at 137.
[29] N.C. STATE HIGHWAY COMM'N, SECONDARY ROADS 14.

[1] 265 N.C. 733, 145 S.E.2d 395 (1965).
[2] The agency relationship between the owner and his driver was presumptively established by N.C. GEN. STAT. § 20-71.1(b) (Supp 1965), which provides:

Proof of the registration of a motor vehicle in the name of any