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PUTTING THE CARTWAY BEFORE THE HOUSE: STATUTORY EASEMENTS BY NECESSITY, OR CARTWAYS, IN NORTH CAROLINA

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For almost two hundred years, North Carolina has had "cartway" legislation that allows owners of certain landlocked parcels of land to gain access to a public road. However, because the creation of a cartway utilizes the state's power of eminent domain, the situations in which cartways are allowed historically have been limited. In response to the legislature's temporary broadening of the cartway statute in 1995, Professors Joseph and Monica Kalo examine the history and rationale of the cartway in North Carolina and argue that the statute's application should remain limited and that further efforts to broaden the statute should be discouraged.

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On occasion, both in the past and present, title to land has become subdivided in such a manner as to leave some portion of it without an express or implied easement or other right of way to the public road system. To ensure that such land does not remain

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involuntarily unused or unproductive, most states enacted statutes allowing the landlocked landowner to petition the courts for the creation of a statutory easement by necessity, or as it is sometimes termed, a statutory cartway.¹ The person whose land will be burdened by the cartway is entitled to reasonable compensation paid by the petitioner.² In effect, a cartway statute³ delegates the right to use the state's power of eminent domain to a private person or entity.⁴

Although there has been cartway legislation in North Carolina since 1798, North Carolina has amended its cartway statute⁵ many times during the past two hundred years to meet evolving economic conditions and changing public policy considerations. Most recently, during the 1995 legislative session, the General Assembly amended the cartway statute and expanded its scope. However, embodied within the amendments was a "sunset provision" that provided an expiration date of July 1, 1997. After that date, the cartway statute was to revert to its pre-1995 form.⁶ Although the 1995 amendments

1. See, e.g., 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN ¶ 7.07[4][i][f] (rev. 3d ed. 1997). In some states, constitutional amendments were necessary as well. See 2A *id.* ¶ 7.07[4][i][f].

2. See, e.g., N.C. GEN. STAT. § 136-69(a) (Supp. 1996); JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 4.02[4] (rev. ed. 1995).

3. The term "cartway" instead of "statutory easement" will be used in this Article because, historically, "cartway" has been the preferred term.

4. See N.C. GEN. STAT. § 136-68 (Supp. 1996) ("The procedure established under Chapter 40A, entitled 'Eminent Domain,' shall be followed . . . insofar as the same is applicable and in harmony with the provisions of this section."); 2A SACKMAN, *supra* note 1, ¶ 7.07[4][i][f].

5. The current version of the statute is found at N.C. GEN. STAT. §§ 136-68 to -70 (Supp. 1996). In this Article these three sections will be referred to as the "cartway statute" except where a distinction is being made among them.

6. There is an argument that all of the substantive provisions of the cartway statute disappear on July 1, 1997. The Act that was actually passed by the General Assembly and signed into law contains five sections: 1, 2, 3, 3a, and 4. The first, Section 1, states that § 136-68 of the General Statutes (a procedural section) reads as rewritten. This section is followed by a rewritten § 136-68, which includes within its body the 1995 amendments, which are underlined. The next, Section 2, consists of § 136-69 (the heart of the cartway statute), as rewritten, with the 1995 amendments underlined as well. Section 3 consists of § 136-70 (alteration or abandonment of cartways) as rewritten. Section 3a directs that the compensation to the landowner for the establishment of a cartway shall be as provided in Chapter 40A, Article 4 of the North Carolina General Statutes. Then Section 4 states: "This act is effective upon ratification *but sections 2 and 3 shall expire on July 1, 1997,*" not that the *amendments* to §§ 136-69 and 136-70 shall expire on July 1, 1997. Act of July 29, 1995, ch. 513, 1995 N.C. Sess. Laws 1823, 1823-25 (emphasis added) (codified as revised at N.C. GEN. STAT. §§ 136-68 to -70 (Supp. 1996)). If Section 4 is read as it is actually written, there would be no cartway statute after July 1, 1997 because Section 3 (§ 136-69) is the part of the statute that sets forth the grounds upon which a cartway may be imposed

technically are not applicable to post-July 1, 1997 cartway proceedings, the nature of the 1995 amendments raises important questions about the present scope of the statute and its future direction, questions that it is hoped the North Carolina General Assembly will consider when it revisits the cartway statute, as it inevitably will.⁷

This revisitation will occur because, as this Article will explain, there are constant pressures to expand the scope of the statute. One illustration of those pressures is the enactment of the 1995 amendments themselves. While the pre-1995 statute did not authorize the establishment of a cartway for land devoted exclusively to residential use,⁸ the 1995 amendments extended the right to petition for a cartway to landowners lacking a documented or recorded easement or right of way to a public road when the land was to be used solely for a single-family homestead of at least seven acres.⁹ These and other carefully tailored aspects of the 1995 amendments strongly suggest that the amendments were designed to benefit somebody's constituent.¹⁰ With the demise of the 1995

on another landowner's land and the procedures to follow in doing so. However, the Revisor of Statutes, after consultation with the General Statutes Commission, determined that the General Assembly did not intend that the act actually be read literally. Consequently, when the act was codified in the General Statutes, the Revisor of Statutes directed that there should be two versions of §§ 136-69 and 136-70 published. The first version, effective until July 1, 1997, contains the 1995 amendments. The second version, effective after July 1, 1997, contains §§ 136-69 and 136-70 as these sections existed before the passage of the 1995 legislation. In codifying the acts passed by the General Assembly, the Revisor makes technical changes, after consultation with the General Statutes Commission. The question is whether the change that was made is within the authority granted to the Revisor and the General Statutes Commission. *See* N.C. GEN. STAT. §§ 114-9.1, 114-9(3)(c) (1994); *id.* § 164-13(a) (1993).

7. In fact, as this article was being edited, two attempts were made in the 1997 General Assembly to further amend the cartway statute. House Bill 501—A Bill To Be Entitled An Act To Amend The Laws Relating To The Opening Of Cartways—proposed a reduction of the acreage requirement for qualifying homesteads from seven acres to two. Senate Bill 456—A Bill To Be Entitled An Act To Remove The Sunset From The 1995 Amendments To The Laws Providing For The Establishment Of Cartways—proposed a removal of the 1995 sunset provision. Neither bill was enacted into law.

8. *See* N.C. GEN. STAT. § 136-69 (1993) (amended 1995).

9. *See id.* § 136-69(a) (Supp. 1996).

10. Although the 1995 minutes of the Senate Judiciary II/Elections Law Committee do not contain any explanation of the legislation amending the cartway statute, the narrow, carefully tailored language of the amendments is strong circumstantial evidence that it was designed to solve a particular individual's problem. The primary change was to allow acquisition of a cartway to access a "single-family homestead . . . consist[ing] of at least seven acres." *Id.* Why was the change limited to "seven acres" and not some other acreage? Why not cover any residential use or any single-family homestead? Why did the amendment expire in less than two years? The legislation was signed on July 29, 1995, and the changes applied only to petitions for a cartway filed on or after July 29, 1995, but

amendments, it seems inevitable that other owners of landlocked parcels who seek to make uses of land not included within the present cartway provisions will pressure legislators to include their proposed uses within the ambit of the statute. But before the General Assembly engages in additional ad hoc, band-aid modifications of the cartway statute, perhaps some thought should be given to the present nature of the cartway, the reasons for past limitations on the scope of the cartway statute, and what circumstances must exist before a cartway can be established under the current legislation. This Article hopefully will assist in that process.

The first section of the Article discusses the constitutional underpinnings of the cartway statutes and the related question of whether, once established, a cartway constitutes a private or a public way.¹¹ The second section discusses what land uses should justify the imposition of a cartway.¹² The final section discusses what showing of need for the cartway must be made by the petitioning landowner.¹³ At the core of all the cartway discussions is the fundamental question of what circumstances justify using the state's power of eminent domain to impose a burden on another person's land.

I. CARTWAYS: PRIVATE OR PUBLIC WAYS?

Historically, the cartway statute's invocation of the power of eminent domain was grounded in the fact that, once established, a cartway was a *quasi-public* road that was generally open to public use and not a private way reserved for the sole and exclusive use of the petitioner, his business invitees, and guests.¹⁴ Although it was

before July 1, 1997. A logical response is that someone's constituent—someone with a single-family homestead sitting on at least seven acres—had an access problem, was not eligible for a cartway under the then-existing law, and persuaded his or her legislator to put through an amendment. The less-than-two-year limit on the availability of cartways for this purpose suggests that there was a willingness to allow the needs of someone to be satisfied, but sufficient doubt as to the wisdom of the change that the committee and General Assembly were not willing to give it a longer life than necessary. When the bill was first introduced, the sunset provision was not in it. See H. 545, 1995 N.C. General Assembly, Regular Sess. 1995 (version dated March 27, 1995).

11. See *infra* notes 14-48 and accompanying text.

12. See *infra* notes 49-98 and accompanying text.

13. See *infra* notes 99-144 and accompanying text.

14. The constitutionality of the use of the state's power of eminent domain to establish cartways or, as they are also known, statutory easements by necessity, has long been a subject of debate. In some states, the courts determined it was constitutional to allow the use of the state's power of eminent domain to establish a private road to connect landlocked property to the nearest public road. See 2A SACKMAN, *supra* note 1, ¶ 7.07[4][i][j]. However, in a number of other states, the courts held that such a use of the

created at the initiation of a private party, paid for by the private party, maintained by the private party, and provided a significant private benefit, it was the public's right to use the cartway for access to and from the landlocked parcel that justified this taking of one person's land to provide access to the lands of another person.

At first glance, § 136-69 of the North Carolina General Statutes appears to authorize the condemnation of a person's¹⁵ property to establish a road for the petitioner's private use by providing that a cartway is to be laid off when it appears to the court "necessary, reasonable and just that [the petitioner] shall have a *private way* to a public road . . . over the lands of other persons."¹⁶ However, when this provision is read in its historical and interpretative context, the *quasi-public* character of a statutory cartway remains undisturbed. "Private way" should be read as simply a grammatical device to distinguish statutory cartways from public roads established and maintained by public authorities.

Our cartway legislation dates back to the earliest days of the state. The first cartway legislation was enacted in 1798,¹⁷ when there were few public roads and the state lacked the fiscal resources to construct an adequate public road infrastructure.¹⁸ As evidenced

power of eminent domain was unconstitutional on the basis that it was not for a public use. See *id.* These states include Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New York, Oregon, Tennessee, Washington, West Virginia, and Wisconsin. See *id.* Some states have amended their constitutions to allow such a use of the eminent domain power (Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Kansas, Michigan, Mississippi, Missouri, Montana, New York, Oklahoma, Oregon, Washington, and Wyoming). See *id.* ¶ 7.07[4][i][ii]. "The justification . . . , however, was not simply [the] convenience of the owner, but some necessity, including the transportation of products . . . to market." *Id.* (footnotes omitted). In some states, such as North Carolina, courts have held cartway statutes to be constitutional because such roads are private in name only. See *Cozard v. Hardwood Co.*, 139 N.C. 283, 287-88, 51 S.E. 932, 934 (1905); 2A SACKMAN, *supra* note 1, ¶ 7.07[4][i][i]. The United States Supreme Court has not addressed this constitutional issue. See 2A SACKMAN, *supra* note 1, ¶ 7.07[4][i][ii].

15. In *Davis v. Forsyth County*, 117 N.C. App. 725, 453 S.E.2d 231 (1995), the North Carolina Court of Appeals held that the cartway statute could be invoked to establish a cartway over land owned by a county. See *id.* at 727, 453 S.E.2d at 232.

16. N.C. GEN. STAT. § 136-69(a) (Supp. 1996) (emphasis added).

17. See Act of 1798, ch. 26, § 1, 1798 N.C. Sess. Laws 126, 126.

18. See HUGH T. LEFLER & ALBERT RAY NEWSOME, JR., NORTH CAROLINA: HISTORY, GEOGRAPHY, GOVERNMENT 213, 218, 347 (1959) (stating that although there was an economic need for good roads, the state was unwilling to tax and spend to improve the road system); ISAAC LIPPINCOTT, ECONOMIC DEVELOPMENT OF THE UNITED STATES 238-41 (3d ed. 1933) (noting the lack of good roads in the United States); REGINALD C. MCGRANE, THE ECONOMIC DEVELOPMENT OF THE AMERICAN NATION 62, 167-68 (1942) (describing the poor condition of roads in the United States); see also S. HUNTINGTON HOBBS, JR., NORTH CAROLINA: AN ECONOMIC AND SOCIAL PROFILE 133 (1958) (observing that sectional politics also played a role in the lack of road construction

both by the title of the Act and its specific language, the objective of the 1798 legislation was to supplement the limited public funds available for road construction with private funds by allowing persons without access to a public road to acquire a cartway to the public road, which then became part of the larger system of roads available for use by the public. Entitled in relevant part "An act to amend an act entitled 'An act to empower the several County Courts of Pleas and Quarter-Sessions of the several counties in this state, to order the laying out [of] public roads,'"¹⁹ the 1798 Act expressly stated that the cartways to be established under it were to be "kept open for the free passage of persons on horse-back, carts and [wagons]."²⁰ Through numerous amendments of the cartway legislation from 1821 to 1938,²¹ this language remained an integral part of the cartway statute, infusing it with a public character. Between 1798 and 1931, the only change to this language in this section of the cartway statute was expansive in nature, with "persons on foot" being specifically included in 1854.²²

The phrase "private way" first appeared in 1883.²³ At the same

in North Carolina). Until the 20th century, the main source of state revenues was the property tax. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 567 (2d ed. 1985). In fact, for many years North Carolina citizens, unless exempt, could be ordered to work on public roads. See, e.g., Act of 1798, ch. 26, § 1, 1798 N.C. Sess. Laws at 127.

19. Act of 1798, ch. 26, preamble, 1798 N.C. Sess. Laws at 126.

20. *Id.* § 1, 1798 N.C. Sess. Laws at 126.

21. The deletion of the language in 1938 does not affect the public character of a cartway for the reasons discussed in this section of the Article.

22. See CODE OF N.C., ch. 101, § 37 (recorded in REVISED CODE OF N.C., Moore-Biggs 1854).

23. See CODE OF N.C., vol. I, ch. 50, § 2056 (1883). The identification of cartways with "private ways" began in 1883 and in fact may have been predicated on the subsequently repudiated view that the power of eminent domain could be invoked to allow one individual to condemn a purely private way across another person's land. In the 1857 case of *Jacocks v. Newby*, 49 N.C. 266 (1857), the North Carolina Supreme Court upheld, over the objection of a person using the cartway, the right of the defendant—a person for whose benefit a cartway had been established—to close the cartway when he acquired the lands over which the cartway passed. See *id.* at 269-70. In *Newby*, the court gave a limited construction to the words "shall be free for the passage of any person, or persons." *Id.* at 269 (quoting CODE OF N.C., ch. 104, § 35 (recorded in REVISED STATUTES OF N.C. vol. I, 1836-37)). According to the court, the intent of the legislature was to give certain persons, with no convenient way to and from markets and other places, the means to reach such places. See *id.* Such purpose, the court said,

would not be fully accomplished without giving to others, besides the [cartway petitioner], the right of passing over the cart, or wagon-way. He might wish to buy as well as sell, and to be visited as well as to visit, and he would often be put to serious inconvenience if other persons could not come to his land . . . without being guilty of a trespass. . . . [I]t was his interest alone which the law-makers had mainly, if not altogether, in view; because the way was to be opened, and kept

open, at his sole expense

Id. Thus, when the defendant acquired the lands over which the cartway passed, the right to use it was extinguished as to all other persons. *See id.* Although the result in *Newby* was correct on its facts, the court's interpretation of the law appears historically inaccurate and its implication that a cartway is a purely private way subsequently was repudiated.

First, in *Newby*, the defendant had acquired a cartway over two neighboring parcels. *See id.* at 267. When he opened the cartway, upon reaching his land, he extended it for his own convenience across his land to a point where it reached the land of his neighbor, the plaintiff, who took advantage of the road for his own use. *See id.* The neighbor had another means of access to a public road, but it was considerably less convenient, and thus the neighbor objected when the defendant closed the cartway after acquiring the parcels over which it ran. *See id.* On these facts, the cartway existed only over the two neighboring lands over which it passed. There was no cartway on the defendant's land since one does not have a cartway established over one's own land. The cartway ended when it reached defendant's land. The cartway was not the road as extended by the defendant. If the plaintiff had a right to cross defendant's land, it appears to have been a purely permissive one. Thus, if plaintiff's access to the public road was being cut off by the defendant's closing a permissive way across defendant's land, the plaintiff really had no legal grounds upon which to object.

Second, as the court pointed out, at the time the lawsuit was filed, no statutory provision existed for terminating a cartway. *See id.* at 269. Procedures were available to alter or discontinue a public road, but not a cartway. *See id.* Not allowing the defendant to discontinue the cartway would mean that the public had a greater interest in a cartway than it had in a public road. *See id.* Furthermore, since no one else would be served by the cartway once defendant acquired the neighboring parcels, it really made no sense for this cartway as such to continue to exist. *See id.*

During the pendency of the *Newby* litigation, the statutory deficiency was remedied and a provision added giving a public authority the right to discontinue cartways. *See id.* at 269; CODE OF N.C., ch. 101, § 38 (recorded in REVISED CODE OF N.C., Moore-Biggs 1854). Implicit in this addition to the statutes, an addition that continues today, *see* N.C. GEN. STAT. § 136-70 (Supp. 1996), is the recognition that there are interests, in addition to those of the person for whose benefit a cartway was established, that must be taken into account before a cartway may be discontinued. This does not mean the result would be any different today on the *Newby* facts; but if, for example, others gain legitimate means of access to a cartway, then it may be in the public interest to continue the cartway despite the contrary wishes of the person for whom it was originally established and even if the other people have other means of access to a public road.

Third, the court's interpretation of the "free passage" language is questionable. *See Newby*, 49 N.C. at 268 (opining that a cartway is primarily for the use of the petitioner and the "free passage of any persons" language refers to use by the petitioner's guests and business invitees). The historical circumstances necessitating the creation of a statutory cartway and its placement in the provisions authorizing the county courts to lay out public roads strongly suggest that the legislature had more in mind than just the interest of the owner of the landlocked parcel. It is unlikely that the free passage language was included simply to ensure that the guests and business invitees of the person for whose benefit the cartway was established could travel the road. More likely is the view that others would connect to such privately built cartways and use them. Such cartways would then expand the road system of the state.

Finally, the *Newby* case was decided without any consideration of the relationship of the nature of the way established to the right to use the power of eminent domain to establish it. When the North Carolina Supreme Court faced this question directly, it reached a conclusion directly contrary to *Newby*. *See* Cozard v. Hardwood Co., 139 N.C. 283, 297, 51 S.E. 932, 937 (1905); *infra* notes 27-31 and accompanying text (discussing

time, any specific reference to the right of the public to use a statutory cartway disappeared. But even in the absence of this language, the North Carolina Supreme Court continued to characterize cartways as *quasi-public roads*. For example, in *Parsons v. Wright*,²⁴ the court unequivocally stated that

[c]artways are public roads in the sense that *they are open to all who see fit to use them* The term is used merely for the purpose of classification and to distinguish a class of roads benefiting private individuals who, instead of the public at large, should bear the expense of their establishment and maintenance. . . . *They are properly considered an auxiliary part of the public road system . . . although they are distinguished from public highways proper.*²⁵

Such has been a consistent interpretation of the cartway statute.²⁶

Furthermore, as a matter of North Carolina constitutional law, when a cartway is established through the condemnation of private property using the state's power of eminent domain, the way must be open for general public use and cannot be solely for the private use of the party initiating the cartway condemnation proceeding. As discussed below, this view has long been the unequivocal position of the North Carolina Supreme Court.

The constitutional issue was first addressed in *Cozard v. Hardwood Co.*,²⁷ a 1905 case. *Cozard* was an action for a temporary restraining order to prevent the defendants from threatening to invoke the cartway statute to enable them to put a railway through

Cozard).

24. 223 N.C. 520, 27 S.E.2d 534 (1943).

25. *Id.* at 521-22, 27 S.E.2d at 536-37 (emphasis added).

26. In *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964), the court held that the petitioner was not entitled to a cartway. *See id.* at 457, 127 S.E.2d at 837. In the cartway proceeding, the petitioner requested that the sought-after cartway be established over an existing road on the respondent's land. In discussing that aspect of the case, Justice Sharp noted that, even if petitioner had been entitled to a cartway, the respondent's existing private road could serve as the cartway only if it were the only avenue over respondent's land that could serve as reasonable access to petitioner's land. *See id.* at 456-57, 137 S.E.2d at 836. Justice Sharp noted that use of the road by petitioner as a cartway "would increase both maintenance and supervision costs for respondent (pulp and paper company) and, *once established as a cartway for petitioner's use, it would also become a quasi-public road.*" *Id.* at 456, 137 S.E.2d at 836 (emphasis added); *see also* Waldroup v. Ferguson, 213 N.C. 198, 201, 195 S.E. 615, 617 (1938) (noting that cartways are quasi-public roads intended "to some extent for the use of the public").

27. 139 N.C. 283, 51 S.E. 932 (1905) (appearing in the South Eastern Reporter as *Cozad v. Kanawha Hardwood Co.*).

plaintiff's lands.²⁸ The defendants proposed "to construct and use the [railway] for their sole and exclusive use in removing their timber and timber products from their lands . . . to the railroad station at Andrews and to the markets."²⁹ Despite the defendants' thoroughly modern public policy arguments about the importance of the timber industry to the economy of western North Carolina and the necessity of such private roads for the exploitation of timber, the court held that the use of the power of eminent domain for the purpose of establishing such a private road for the defendants was unconstitutional.³⁰ In explaining its decision, the court stated:

"It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified."

. . . [The defendants] invite [the] courts to find in the term "public use" a broader and larger meaning. . . [G]reat and dangerous monopolies have been fostered by the liberal construction put upon the term "public use." It has sometimes happened that a stubborn and possibly sentimental owner of land has stood in the way of the development of the country and of the impatient, strenuous promoter and industrial pioneer. It may be that his rights have not received . . . in the Legislature . . . the consideration to which they were entitled.

. . . .

. . . [W]e are urged to announce a broad and statesmanlike principle in determining this question, and one which would further business prosperity of the State, rather than one which would hamper and retard it. . . To the argument that a liberal construction should be given to [the] term "public use," . . . the answer is that "The Constitution is the fundamental law."³¹

28. See *id.* at 283-84, 51 S.E. at 932. By 1905 the cartway statute had been amended to allow a person who owned standing timber "to which there is leading no public road, or which is not convenient to water" to have "a private way to a . . . railroad over the lands of other persons." CODE OF N.C., ch. 65, § 2686 (recorded in REVISAL OF 1905 OF N.C. vol. 1).

29. *Cozard*, 139 N.C. at 285, 51 S.E. at 933.

30. See *id.* at 297, 51 S.E. at 937.

31. *Id.* at 289-93, 51 S.E. at 934-36 (citations omitted) (quoting 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 167, at 428 (2d ed. 1900)); see also *City of Statesville v. Roth*, 77 N.C. App. 803, 807, 336 S.E.2d 142, 144

Cases decided subsequent to *Cozard* have done nothing to undercut the proposition that a cartway is not "private" in the sense of a road that is solely for the benefit and use of the petitioner.³² Rather, the North Carolina Supreme Court's continued characterization of cartways as *quasi-public* means that such roads are open to the general public.³³

Nonetheless, some may argue that, despite the *Cozard* opinion, it is still an open question as to whether today the General Assembly constitutionally has the power to authorize the use of the power of eminent domain to establish a purely private way. Constitutional theory has evolved and what was considered not to be an appropriate use of the power of eminent domain in 1905 may be considered to be acceptable in the 1990s. Both federal and state constitutional standards for making that judgment have expanded.³⁴ Despite these modern, more expansive views, it is submitted that, as a matter of North Carolina law, the cartway statute still cannot be used to condemn a purely private way. This conclusion is predicated on the North Carolina Supreme Court's opinion in *Carolina Telephone & Telegraph Co. v. McLeod*.³⁵

McLeod involved an attempt by the telephone company to use § 40A-19 of the North Carolina General Statutes, the statutory

(1985) (presenting a similar holding). In *Roth*, the city attempted to condemn a portion of some land for the purpose of constructing and installing water and sewer lines solely for the benefit of a manufacturing plant located on an adjacent parcel. See *Roth*, 77 N.C. App. at 806-07, 336 S.E.2d at 144. The plant could have been reached by a different route, which crossed other land owned by the owner of the plant or his company; however, because of the topography, this route was considerably more costly. See *id.* at 805, 336 S.E.2d at 143. The trial court found that such a use of the power of eminent domain was unconstitutional, a finding sustained by the court of appeals. See *id.* at 807, 336 S.E.2d at 144. Before the court of appeals, the city argued that providing such a service to the plant was a public benefit because the plant would employ 30 people and thus contribute to the general welfare. See *id.* The court rejected that argument, stating that "[t]he home or other property of a poor man cannot be taken from him by eminent domain and turned over to the . . . wealthy individual or corporation merely because the latter may be expected to spend more money in the community." *Id.* (quoting *Highway Comm'n v. Thornton*, 271 N.C. 227, 243, 156 S.E.2d 248, 260 (1967)).

32. See *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 456, 137 S.E.2d 833, 836 (1964); *Parsons v. Wright*, 223 N.C. 520, 521-22, 27 S.E.2d 534, 536-37 (1943); *Waldroup v. Ferguson*, 213 N.C. 198, 201, 195 S.E. 615, 617 (1938).

33. See *Waldroup*, 213 N.C. at 201, 195 S.E. at 617; see also *Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 431-34, 364 S.E.2d 399, 402-04 (1988) (discussing the public benefit and the characterization of the private use as incidental to the paramount public use).

34. See *McLeod*, 321 N.C. at 429-30, 364 S.E.2d at 401; see also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 231-32 (1984) (holding that the mere fact that property, taken by the state by eminent domain, is ultimately transferred to private parties does not violate the "public use" requirement of the Fifth Amendment to the United States Constitution).

35. 321 N.C. 426, 364 S.E.2d 399 (1988).

provision for private condemnation of privately owned real property, to acquire an easement over the defendant's land in order to provide service to a single customer.³⁶ The defendant asserted that the use of the statute in such circumstances was not for the statutorily required "public use or public benefit," a contention the court firmly rejected.³⁷ In addressing the issue of the proper standard for determining if the eminent domain power is being used for a "public use or public benefit," the court identified three different tests, without settling on any one of them because in the court's view the use of the power of eminent domain in this instance satisfied each test.³⁸

The first test in *McLeod* was the "public use" test, which asks "whether the general public has a right to a definite use of the [condemned] property."³⁹ It is the public's right to use, rather than the public's actual use, that is controlling. According to the court, that test was satisfied because every member of the public could use the telephone to reach the person whose telephone was connected to the line.⁴⁰ Applying this test to a cartway, it clearly would mean that the cartway must be available for use by any member of the general public.

The second test discussed in *McLeod* was the "public benefit" test, which asks whether the desired use of the property "would contribute to the general welfare and prosperity of the public at large."⁴¹ According to the court, for a benefit to satisfy this test, the taking must " 'furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power, and which is required by the public as such.' " ⁴² This requirement was satisfied in *McLeod* because the provision of telephone service to a single customer helps ensure that the entire community is interconnected and allows each member to use the system to reach any other member of the community.⁴³ In the context of a cartway, although the way connects the party for

36. See *id.* at 426-27, 364 S.E.2d at 399; see also N.C. GEN. STAT. § 40A-19 (1984) (granting the power of eminent domain to railroads, public utilities, and similar entities for the public use or benefit).

37. See *McLeod*, 321 N.C. at 427, 364 S.E.2d at 399.

38. See *id.* at 430-34, 364 S.E.2d at 401-04.

39. *Id.* at 430, 364 S.E.2d at 401.

40. See *id.* at 431, 364 S.E.2d at 402.

41. *Id.* at 432, 364 S.E.2d at 402.

42. *Id.* (quoting *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946) (quoting 18 AM. JUR. *Eminent Domain* § 38 (1938))).

43. See *id.* at 432-33, 364 S.E.2d at 402-03.

whose benefit it is established to the public road system, unless the rest of the community is allowed to use the way, the reciprocal, mutual benefit that was present in *McLeod* is not present and the public benefit test is not satisfied. Of course, if the court accepts the notion that simply connecting landlocked parcels with a public road is a sufficient public benefit—a notion rejected by *Cozard*—then it would be permissible to condemn one person's land to create a purely private road for another.

The last test discussed by the *McLeod* court was whether the "private use . . . is incidental to the paramount public use."⁴⁴ Stated another way, this test asks whether the private use or the public use is paramount. In that context, the court discussed *Highway Commission v. Asheville School*,⁴⁵ a 1970 opinion in which the court upheld the condemnation of land by the highway department to create a purely private way for a person whose access to a public road was being cut off by the construction of a new highway.⁴⁶ In that situation, the parcel became landlocked as a consequence of the highway project, and the provision of a new private means of access was seen as "an incidental part of a comprehensive and complex highway project of national significance."⁴⁷ In *McLeod*, the provision of service to one customer was "a small part of a more important and more far-reaching effort . . . to ensure that, in an era in which the telephone has truly become a necessity, whole communities, as well as members of individual communities, are interconnected."⁴⁸ In a cartway proceeding, unless the way is to be open to the public, such an interconnection is absent and the benefit would be primarily and paramountly to the person seeking the cartway, and thus an impermissible exercise of the power of eminent domain.

Even if our court should decide that the use of the power of eminent domain to condemn a private way is constitutional as a matter of North Carolina law, such a use is not authorized by the present statute when viewed in its historical context. Furthermore, before it takes any steps specifically to authorize the condemnation of land for a purely private way, the General Assembly should carefully consider the interests of all who would be affected by such a change—cartway petitioners, landowners over whose land such a

44. *Id.* at 433, 364 S.E.2d at 403 (citing 26 AM. JUR. 2D *Eminent Domain* § 32 (1966)).

45. 276 N.C. 556, 173 S.E.2d 909 (1970).

46. *See id.* at 563-64, 173 S.E.2d at 915.

47. *Id.* at 562, 173 S.E.2d at 914.

48. *McLeod*, 321 N.C. at 434, 364 S.E.2d at 403.

way would be imposed, and the general public.

II. SHOULD CARTWAYS BE AVAILABLE TO ANYONE WHO WISHES TO MAKE ANY LEGITIMATE USE OF A LANDLOCKED PARCEL?

The right to initiate a cartway proceeding is not available to just any person seeking access to a public road from a landlocked parcel.⁴⁹ Only persons engaged in the following activities may petition to have a cartway established: (a) "the cultivation of land"; (b) "the cutting and removing of standing timber"; (c) "the operating of any industrial or manufacturing plants"; (d) "[the operating of] any public or private cemetery"; and (e) the "taking [of] any action preparatory to the operation of such enterprises."⁵⁰

The obvious question is why the cartway statute is so narrowly drawn. Would it not be more reasonable to amend the statute to allow any residential use to qualify, or, as was unsuccessfully attempted in 1985,⁵¹ to allow any "owner of real property" to petition for a cartway? The initial reaction to such proposals for a more encompassing statute is that they are reasonable. Indeed, any objections to such proposals seem especially unwarranted if, as we submit is the case, once a statutory cartway is opened, its use is not limited to the use that served as the ground for the cartway but may

49. Historically, the right to initiate a cartway proceeding has not been limited to owners of the landlocked parcel, but available to any person who uses the land for a statutorily acceptable purpose. There is a question as to whether the 1995 amendments changed this historical right because the amended statute begins by stating: "In order to ensure all *landowners* who do not have a deeded or documented easement or right-of-way to a public road shall have a legal means of obtaining access to that road[, they may petition for a cartway]." N.C. GEN. STAT. § 136-69(a) (Supp. 1996) (emphasis added). This language suggests that only landowners are entitled to file a cartway petition. However, § 136-69(a) then continues with the traditional language that "any person . . . [who] shall be engaged . . . [in certain activities] may institute a [cartway] proceeding." *Id.* The phrase "any person" has permitted tenants and other users of landlocked parcels, and not just landowners, to initiate a cartway proceeding. Read in light of the cartway statute's history, the first part of the amended statute should be construed as simply a statement of the general legislative purpose that may be effectuated by allowing a cartway proceeding to be initiated by any person making a statutorily acceptable use of the land.

The beginning clause relating to landowners is subject to the 1995 amendments' sunset provision and thus will not be part of the statute after July 1, 1997. *See id.* Nonetheless, if the statute is amended in the future, care should be taken to avoid similar construction questions.

50. *Id.* Included among the acceptable land uses that the 1995 amendments set forth is the use of land for a single-family homestead comprising seven or more acres of land; this use will no longer be acceptable after July 1, 1997, due to the 1995 amendments' sunset provision. *See id.*

51. *See* S. 654, 1985 N.C. Gen. Assembly, 1st Sess. 1985.

encompass any legitimate purpose.⁵² However, we believe that a careful consideration of all of the relevant public and private interests supports a more conservative approach to any suggestions for expansion.

Most of the history of the cartway statute, it is true, is one of responding to changing economic conditions and new uses of land by expansion of the circumstances under which a person is entitled to seek a cartway to a landlocked parcel. Yet, within that history, there is a balancing of the rights of private property owners, whose land might be burdened by a cartway, with the needs of landlocked landowners and the broader public interest in assuring that land does not remain unused simply due to a lack of access. Landlocked property owners are never given *carte blanche* to petition for cartways.

A. *The Historical Development of the Cartway Statute*

When the General Assembly first added a provision for obtaining a statutory cartway in 1798, the state had few public roads and little in the way of state resources to construct additional roads.⁵³ Land undoubtedly had been carved up and settled without much regard to access to the few roads that existed.⁵⁴ According to the 1798 statute, "it frequently happens that persons settle in remote places, where there is no public road leading to and no way to get to and from, other than by crossing other persons' lands, and it is not necessary to establish a public road."⁵⁵ Allowing private individuals to condemn, at their own expense, the means of reaching a public road solved both problems. *Quasi-public* roads were added to the

52. See *infra* notes 89-91 and accompanying text.

53. See HOBBS, *supra* note 18, at 131-34 (discussing the inadequacy of the road system in North Carolina from colonial times to the early 1800s and the role sectional politics played in defeating efforts to build more, and better, roads); ALBERT RAY NEWSOME & HUGH TALMAGE LEFLER, *THE GROWTH OF NORTH CAROLINA* 91-92 (1947) (discussing the poor quality of roads in colonial North Carolina); see also LEFLER & NEWSOME, *supra* note 18, at 45 ("Most travel and trade in early North Carolina was by water, since the people did not have good roads."); *id.* at 210, 213 (noting absence of good roads).

54. Because "[m]ost travel and trade in early North Carolina was by water," LEFLER & NEWSOME, *supra* note 18, at 45, it would seem logical that a number of people acquiring land would be more concerned about access to a river, a sound, or other waters than with whether the acquired land had access to a public road. Cf. *id.* at 45, 68 (noting the heavy use of waterways for transporting goods). However, both good water routes and adequate roads were lacking in the western mountain region and in the Piedmont, inhibiting the economic growth of those regions. See *id.* at 208-12; see also *infra* note 86 (discussing how higher, less arable mountain land might be left without access to a public road).

55. Act of 1798, ch. 26, preamble, 1798 N.C. Sess. Laws 126, 126.

state road system and landlocked parcels made accessible.

In 1798, most settled land probably would have also been in cultivation; however, some land being cultivated undoubtedly was separated from the land where the person who cultivated it lived. Ever protective of private property rights, the courts strictly construed the statutory right to obtain a cartway.⁵⁶ Land that was cultivated but unsettled would not qualify.⁵⁷ Consequently, by 1836 the legislature amended the cartway statute to allow any person "cultivating any land" that lacked access to a public road to petition for a cartway.⁵⁸ The statute, as amended, probably addressed most of the situations that would have arisen in the agricultural communities that comprised North Carolina during most of the 1800s.⁵⁹

However, as the economy of the state grew and changed, new access needs were recognized. By the late 19th century, the timber industry in the mountains of western North Carolina was booming.⁶⁰ With the industry desirous of logging isolated tracts, the legislature responded to the economics of the times by amending the statute and

56. See *Lea v. Johnson*, 31 N.C. 15, 19 (1848) ("[I]f we depart from the words [of the statute], there is no stopping short of an unlimited discretion by which the land of one man may be taken for the use of another."); see also *Caroon v. Doxey*, 48 N.C. 23, 24 (1855) (construing "settled upon" and "cultivation" narrowly).

57. Cf. *Caroon*, 48 N.C. at 24 (using land as a range for cattle was not construed as "cultivating" it or being "settled upon" it). Cultivation does not include all agricultural uses of land. Hog farm operations, cattle raising, and large chicken operations standing by themselves would not qualify. Cf. *id.* (using land as cattle range is not cultivation). However, most such activities would probably include some cultivation of the land for animal feed. Nonetheless, a narrow construction of "cultivating" would provide a landowner, objecting to a cartway because of the use or proposed use of the land for one of the above or similar activities, with some leverage in opposing such land uses. See *infra* notes 89-92 and accompanying text.

58. See CODE OF N.C., ch. 104, § 33 (recorded in REVISED STATUTES OF N.C. vol. I, 1836-37).

59. But see *Caroon*, 48 N.C. at 24 (interpreting "cultivation" narrowly so as not to include swamp land that was not fenced or cultivated and that petitioner, among others, used as a range for cattle); *supra* note 57.

60. After the Civil War, there was a high demand for wood. After the lumber industry cut through the large forests of the Great Lakes states, attention turned to the southern and southeastern forests, with extensive cutting in North Carolina beginning after 1880. See LIPPINCOTT, *supra* note 18, at 351-52; MCGRANE, *supra* note 18, at 409; HARVEY PERLOFF ET AL., REGIONS, RESOURCES, AND ECONOMIC GROWTH 135, 215-16 (1960). By 1910, "more than a fifth of the great Carolina forests had been removed." PERLOFF ET AL., *supra*, at 215. The expansion of railroad lines into the forested regions aided in this development. See LEFLER & NEWSOME, *supra* note 18, at 342; MCGRANE, *supra* note 18, at 409; see also *Cozard v. Hardwood Co.*, 139 N.C. 283, 290, 51 S.E. 932, 935 (1905) (noting that the party seeking a cartway called to the court's attention the economic benefits of timbering in western North Carolina).

allowing any person owning "standing timber"⁶¹ to which there was "not leading a public road" or which was "not convenient to water"⁶² to petition for a cartway. By the early 1900s, the needs of the mining and manufacturing industry were added to the statute: in 1917, the statute was amended to include any person "working any mines or minerals,"⁶³ and in 1921, the legislature added any person "conducting . . . any industrial or manufacturing establishment or plant, or taking action looking to the erection, equipment, and operation of any such establishment or plant."⁶⁴ Finally, by 1921 the automobile had arrived and a new and improved state highway system was being developed. The routes of existing roads were altered or changed to cross streams, improve grades, go over and under railroads, and to make other improvements.⁶⁵ One consequence of this was that many existing passage-ways and cartways leading to public roads were rendered either less convenient or impassable. Taking such changing conditions into account, the statute was again amended⁶⁶ to provide that "wherever any private passage-way . . . has become practically impassable or unreasonably inconvenient, a new or improved passage-way or cartway may be opened."⁶⁷

Then, almost inexplicably, a more conservative philosophy, one more protective of individual property rights, appeared in 1931 when the cartway statute suddenly became more restrictive.⁶⁸ Gone from the statute was the provision for "settled" land that had been present since 1798. Beginning in 1931 and continuing for over sixty years,

61. Act of Feb. 1, 1887, ch. 46, § 1, 1887 N.C. Sess. Laws 97, 97.

62. *Id.*

63. Act of Mar. 6, 1917, ch. 187, § 1, 1917 N.C. Sess. Laws 338, 338.

64. Act of Mar. 7, 1921, ch. 135, § 1, 1921 N.C. Sess. Laws 395, 395.

65. See *Brown v. Mobley*, 192 N.C. 470, 474, 135 S.E. 304, 305 (1926) (noting that these types of changes were necessary to improve roads "to meet the new and changing conditions").

66. See Act of Dec. 20, 1921, ch. 73, § 2, 1921 N.C. Sess. Laws 106, 106 (extra session). According to the court in *Brown*, this amended provision was to be construed liberally to provide more convenient access to "farmers and others living off the public highway." *Brown*, 192 N.C. at 474, 135 S.E. at 305. The court also viewed the liberal construction of the statute as consistent with the perceived legislative policy of encouraging home-owning in every way, including the provision of more convenient roads to homes. See *id.* at 474, 135 S.E. at 306.

67. Act of Dec. 20, 1921, ch. 73, § 2, 1921 N.C. Sess. Laws at 106 (extra session).

68. Compare CODE OF N.C., § 3836 (recorded in N.C. CODE OF 1927) (allowing persons "settled upon" land to petition for a cartway), with Act of May 27, 1931, ch. 448, § 1, 1931 N.C. Sess. Laws 760, 760-61 (deleting the "settled upon" language and allowing only those persons using the land for some type of production to petition for a cartway).

only land devoted to particular businesses or agricultural uses⁶⁹ that contributed to economic productivity and generated substantial traffic could qualify for a cartway.⁷⁰ Then, in 1995, the use requirement was broadened once again, but in a somewhat peculiar manner. The General Assembly amended the cartway statute to allow "any person . . . engaged in . . . the use of land as a single-family homestead" that "consist[s] of at least seven acres of land" to petition for an order establishing a cartway.⁷¹ The amendment is peculiar on two counts.⁷² The first is the seven-acre requirement; the other is that the change was effective only until July 1, 1997. After that date, no residential use of any type qualifies and only the limited commercial and agricultural uses that predate the 1995 statute will suffice.⁷³

B. What Uses Should Qualify Under the Cartway Statute?

The obvious question is why the availability of a statutory cartway should be limited to these pre-1995 uses. On first impression, it would seem entirely consistent with the history of the development of the cartway statute to allow any residential use to qualify under the statute, rather than limiting it to homesteads that satisfy an acreage limitation. Permitting residential use to qualify would appear to harken back to versions of the statute that existed prior to 1931, all of which allowed a person "settled upon" land and meeting the other requirements of the statute to petition for the establishment of a cartway. If for 150 years such a situation justified the exercise of the state's power of eminent domain, then, arguably, exercise of the power on the basis of residential use is equally justifiable today. However, there are considerations that might lead one to reach a different conclusion.

A major consideration should be the importance to the state of the proposed use of the petitioner's land. A second consideration should be the resulting burden on the land upon which the cartway will be imposed. In earlier times—when the emphasis was on the settlement of a sparsely populated state, the principal commercial

69. See Act of May 27, 1931, ch. 448, § 1, 1931 N.C. Sess. Laws at 760-61.

70. See *Brown v. Glass*, 229 N.C. 657, 658, 50 S.E.2d 912, 913 (1948) (holding that mere residential use of land does not qualify under cartway statute).

71. Act of July 29, 1995, ch. 513, 1995 N.C. Sess. Laws 1823, 1823-24 (codified at N.C. GEN. STAT. § 136-69(a) (Supp. 1996)).

72. The peculiarity of the amendment strongly suggests that it was made to benefit a particular constituent of some legislator. See *supra* note 10 and accompanying text.

73. See N.C. GEN. STAT. § 136-69(a).

use of land was farming, and the state lacked the fiscal resources to construct an extensive system of public roads—the cartway statute certainly was good public policy. Without it, the creation of a broad public road system would have been delayed, people would have been isolated, crops could not have been brought to markets, and economic development of land lacking access to public roads would have been significantly impeded. Furthermore, the character and amount of traffic over a cartway in those earlier times was unlikely to disturb the privacy, peace, and tranquillity of the burdened farmland, and so resulted in only a slight burden on an unwilling landowner.

When the growth of the state's timber industry occurred in the late nineteenth century, especially in the heavily forested western part of the state, the lack of an extensive system of public roads in the mountains of North Carolina necessarily meant that many of the large tracts of timber that were suitable for harvest lacked access to public roads and, thus, to mills and markets.⁷⁴ Not surprisingly, the state took steps to encourage the industry, both in the courts and the legislature. One means of access to mills and markets was the rivers of the western part of the state. Thus, it is not surprising that the North Carolina Supreme Court declared that if logs could be floated down a river, the rivers were public, navigable waters that were open to all, especially the timber industry.⁷⁵ On the legislative side, the cartway statute was amended to include the harvesting of timber.⁷⁶ Again, this was sound public policy that promoted the development of an industry important to the state and the full utilization of natural resources, and that assured that land was not forced to remain unproductive simply by reason of a lack of access to the public road system of the state.

Although the amount of traffic, type of equipment, and numbers of people necessary to remove timber made the potential burden on unwilling landowners more substantial than the burden imposed under earlier cartway legislation, there were two ameliorating

74. See *infra* note 86 (discussing why a legal means of access to a public road was lacking); see also HOBBS, *supra* note 18, at 134-35 (noting lack of adequate roads across the state); LEFLER & NEWSOME, *supra* note 18, at 342, 364 (describing poor condition of roads).

75. See, e.g., *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N.C. 731, 732, 744, 21 S.E. 941, 942, 946 (1895); *Gwaltney v. Scottish Carolina Timber & Lumber Co.*, 111 N.C. 547, 552-54, 16 S.E. 692, 692-93 (1892).

76. See Act of Feb. 1, 1887, ch. 46, §§ 1-2, 1887 N.C. Sess. Laws 97, 97. Although the 1887 legislation authorized cartways for railroads and trams used to remove timber, that part of the statute was held unconstitutional in *Cozard v. Hardwood Co.*, 139 N.C. 283, 295, 51 S.E. 932, 936 (1905).

factors. One was statutory: any cartway for removing timber could be established for a period of no longer than five years.⁷⁷ Therefore, the burden was temporary. The temporal limitation may have represented a legislative balancing of both the burden imposed on an unwilling landowner and what would be a reasonable time to harvest a stand of timber. Second, in all likelihood, many such cartways would be in more remote, less populated areas. In such circumstances the cartway might have minimal adverse effects on a burdened landowner's privacy and tranquillity.⁷⁸ In addition, the number of situations in which a cartway was imposed unwillingly on a landowner would be limited by the very fact that the person seeking the cartway for purposes of harvesting timber had to lack access, by an existing easement, to either a public road or to a river capable of floating logs.⁷⁹

As the economy of the state changed and matured, additional economic uses of land were included in the cartway statute. Mining was added in 1917 and manufacturing in 1921.⁸⁰ In both of these instances, as in the case of timber harvesting, the traffic and noise burden imposed on an unwilling landowner is potentially significant; however, the number of occasions in which mines are being opened or industrial or manufacturing operations are sited on parcels lacking access to public roads is likely to be small.⁸¹ On the other hand, the economic benefits to the community and state as a whole are likely

77. See Act of Feb. 1, 1887, ch. 46, §§ 1-2, 1887 N.C. Sess. Laws at 97. By 1931, the statute had been modified to provide that "cartways . . . for the removal of timber shall automatically terminate at the end of a period of five years, *unless a greater time is set forth in the petition and the judgment establishing the same.*" Act of May 27, 1931, ch. 448, § 1, 1931 N.C. Sess. Laws 760, 761 (emphasis added).

78. Although the 1887 Act permitted the establishment of a cartway for railroads and trams for the removal of timber, which would be more disturbing to peace and tranquillity, that aspect of the Act was declared unconstitutional in 1905. See *Cozard*, 139 N.C. at 295, 51 S.E. at 936; *supra* notes 27-31 and accompanying text (discussing *Cozard*).

79. See Act of Feb. 1, 1887, ch. 46, § 1, 1887 N.C. Sess. Laws at 97. The 1887 Act changed the applicable language to "land to which there is leading no public road, or which is not convenient to water." *Id.*

80. See Act of Mar. 7, 1921, ch. 135, § 1, 1921 N.C. Sess. Laws 395, 395 (adding manufacturing); Act of Mar. 6, 1917, ch. 187, § 1, 1917 N.C. Sess. Laws 338, 338 (including mines).

81. Until the passage of the 1995 amendments to the cartway statute, subsequent amendments addressed situations in which the burden imposed was not likely to be burdensome and would arise infrequently. In 1931, necessary church roads could be established in accordance with the existing cartway procedures. See Act of May 27, 1931, ch. 448, § 1, 1931 N.C. Sess. Laws at 761. The 1961 amendments added public or private cemeteries to the list of permissible land uses. See Act of Mar. 21, 1961, ch. 71, § 1, 1961 N.C. Sess. Laws 88, 88.

to be substantial. In such circumstances, allowing the use of eminent domain powers by a private party when a satisfactory private accommodation cannot be reached seems to be a reasonable legislative judgment.

The question is whether the 1995 addition of use of the land as a "family homestead . . . [consisting] of at least seven acres" necessarily represented the same reasonable legislative judgment.⁸² Although the acreage requirement drastically limits the instances in which a person's use of the land would qualify for a cartway, there is a serious question as to whether the use of land as a "family homestead . . . [consisting] of at least seven acres" is the type of land use that represents a significant enough state interest to justify allowing a private party, who might otherwise be foreclosed from making such a use of the land due to the unwillingness of neighbors to grant her or him an easement, to use the eminent domain powers of the state to force a sale of the desired way. Such homesteads do not provide the economic benefits to the community that cultivating land, timbering, mining, and manufacturing do. Although the state and the country have long encouraged homeownership, a policy favoring homesteads of seven acres or more is unlikely to benefit very many other than the wealthy.

This argument, however, suggests only that the 1995 legislation may have been too narrowly drawn. It suggests that perhaps the legislature should have permitted a petition for a cartway for a tract of any size used as a "single-family residence" or, even more broadly, for "any residential purposes." However, as a matter of policy, both of these options have serious flaws. First, there is the question of the degree to which the state wishes to encourage conversion of farmland to residential subdivisions and apartment complexes on homesites on wooded mountainsides and ridges.⁸³ Second, the

82. N.C. GEN. STAT. § 136-69(a) (Supp. 1996).

83. Preservation of farmland is both a national and state concern. "[U]rban development is consuming 50 acres of prime and unique farmland every hour of every day." Larry Williams, *Study Finds 50 Acres Lost Every Hour*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 21, 1997, at A4. Between 1982 and 1992, North Carolina was second in the nation in losses of prime farmland. See *id.* A national farm preservation group ranked the Raleigh-Durham-Chapel Hill area as the "fifth-most endangered agricultural area in the country." Kelly Thompson Cochran, *For the Good of Saving the Farm*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 7, 1997, at B1. Recently, a bill was introduced in the North Carolina Senate to provide cash incentives to induce landowners to preserve their land. See Andrew Guy, Jr., *Bill Would Encourage Preservation*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 22, 1997, at B5.

The state's concern about development of mountain ridges is reflected in the Mountain Ridge Protection Act of 1983. See N.C. GEN. STAT. §§ 113A-205 to -214 (1994).

amendment of the cartway statute to include single-family residences or residential purposes would represent a significant expansion of the cartway statute. The flow of population into the state⁸⁴ has brought a boom in construction of residential subdivisions and apartment complexes. It is a boom that will continue for some time into the future.⁸⁵ It is not unreasonable to assume that the carving up, for subdivision or apartment uses, of large tracts of land traditionally used for farming or timbering may result in such land being left without access to a public road.⁸⁶ No longer would the

If the state is concerned about the loss of agricultural land to urban and suburban development or the adverse effect of development in the mountains of the western part of the state, it would seem that a more liberal cartway statute would be inconsistent with those concerns.

84. See James Rosen, *Triangle's Boom Likely to Continue*, NEWS & OBSERVER (Raleigh, N.C.), May 31, 1996, at A1.

85. North Carolina's population is expected to surpass seven million by the year 2000. See Elizabeth Wellington, *Growth Driving Communities to Seek Incorporation*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 30, 1997, at B1; see also *supra* note 83 (discussing loss of farmland to development).

86. The reason that this lack of access is likely to occur is due to both the changing nature of development in North Carolina and a history in which the availability of access to land was generally not viewed as a matter of concern. In the early history of the state, most land was used for farming. In the mountains, the good land was the lower land along the river, not the rocky, craggy, higher mountain land. The upper land might be bought and sold with little consideration given to whether there was access to a public road. In addition, most people probably were not concerned about neighbors and others crossing some portion of their land to get to other land and places. Neither people nor title companies, until recently, thought very much about whether the people using a road that crossed another's land had a legal right to do so. They knew that for many years a road had been there and that everybody used it. In fact, the existence or absence of access rights might not even be examined as part of a title search. Telephone Interview with Lillard Mount, General Counsel for Investors Title Insurance Co. (Apr. 7, 1997).

But the changing nature of development and land acquisition financing has brought the problem of the existence of legal access to the forefront. If the road being used was a permissive way, then the legal owner of the land it crossed could revoke permission at any time. *Id.*

If development is proposed to which a person objects, such as a hog farm or large subdivision with lots of traffic, and if the existing permissive access is over the objecting person's land, then the permission is likely to be revoked. In addition, in past years lenders were not concerned with access rights. Most loans were given by local banks, and they, like everyone else in the community, knew that there had always been a road used to get to a particular parcel. Whether the use of the road was permissive or of right did not trouble them. Today, however, loan packages are bought and sold on a national scale, subject to federal insurance requirements, and the existence or lack of a legal means of access, which is fundamental to the value of the land mortgaged as security for a loan, is of critical importance. *Id.*

Thirty years ago, title insurance companies did not insure the existence of a legal means of access to property subject to a title insurance policy. Today, a title insurance policy and assurance of a legal means of access are central features of the loan package to ensure the marketability of the loans in the secondary loan market. Consequently, the

private use of eminent domain power by a private party be a relatively rare instance. Instead, it likely would be more commonplace for developers to use, or threaten to use, the power of eminent domain to force neighboring landowners, who might well have legitimate objections to the amount and type of traffic, to provide them and their development project with a way across neighboring land. Such potential widespread or threatened usage of the powers of the state raises significant questions about the wisdom of expanding a statute that historically has been tailored to limit its impact upon the legitimate private property rights of neighboring landowners. Third, we are no longer in a state in which the lack of public funds makes it necessary to encourage private individuals to construct *quasi-public* roads in order to connect the people of the state and to move goods and produce.

The expansion of the cartway statute to encompass any legitimate personal, business, or charitable activity is even more troublesome. A justification of such an expansion is the "general legislative policy favoring the practical use of property and its natural resources which otherwise could not be put to such use for lack of road access."⁸⁷ Although this statement represents a correct

existence or non-existence of a legal means of access to a parcel of land must be examined as part of the title search, and without a determination that such legal access exists, the loan will not be extended. Problems with access are of continuing concern to lenders, title insurance companies, and title searchers. *Id.*

It is true that, theoretically, most landlocked land has an easement by necessity to reach the nearest public road, but because of the absence of old documents and records, proving the existence of the easement may be difficult, time-consuming, and expensive. *See, e.g.,* BRUCE & ELY, *supra* note 2, ¶ 4.02[4] (noting that proof of unity of title may be difficult to establish); 1 JAMES A. WEBSTER, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 15-12, at 603 (Patrick K. Hetrick & James B. McLaughlin eds., 4th ed. 1994) ("[A] devisee of land cannot establish a way of necessity over the lands of other devisees even though the land devised to him has no access to a public road."); *see also infra* note 95 (discussing easements of necessity).

After sending a copy of a draft of this article to North Carolina State Senator Hamilton C. Horton, Jr. of Winston-Salem, the authors received a letter in which Senator Horton stated that: "While the subject [of cartway law] would appear to be arcane, the truth of it is that it comes up more and more frequently in our law practice." Letter from Senator Hamilton C. Horton, Jr., North Carolina State Senate, to Professors Joseph J. Kalo and Monica Kivel Kalo (Apr. 22, 1997) (on file with authors).

87. *Turlington v. McLeod* (*Turlington II*), 323 N.C. 591, 597, 374 S.E.2d 394, 399 (1988). This statement in *Turlington*, however, was made in the context of whether the courts should broadly or narrowly construe the meaning of the terms designating the types of uses that could justify a cartway petition. In fact, the history of the North Carolina cartway statute is one of selecting, over time, specific types of uses that would justify use of the state's power of eminent domain. *See id.* at 597, 374 S.E.2d at 399; *see also* Land Policy Act of 1974, N.C. GEN. STAT. §§ 113A-150 to -159 (1994) (providing land-use policy to guide governmental decision-making). One policy component of the Land Policy

statement of a general policy, it does not address the question of whether the legislative policy is to favor any legitimate practical use of land. In fact, the history of the cartway statute indicates that the legislature, while favoring the practical use of land, has determined that only some potential uses justify state interference in negotiations among neighboring landowners over the granting of access rights.⁸⁸ If a use is not listed in the statute, that does not mean that there is no practical use for land lacking access to a public road. The land and a cartway are still available for the specific uses identified in the statute. Other uses of the land are left to the give-and-take of private negotiations among neighboring landowners.

Together with the "necessary, reasonable and just"⁸⁹ provision, the use requirement of the cartway statute gives some important negotiation leverage to a person over whose land a cartway could be imposed. It is important to remember that once established, a cartway is a public road, the use of which is not restricted to just the use that provided the ground for invoking the statute and establishing the cartway. As a public road, it may be used for any legitimate purpose for which any public road may be used.⁹⁰ If a

Act is "to encourage beneficial economic development." N.C. GEN. STAT. § 113A-151(b). However, it should be noted that the purpose of the Act is that it will "serve as a guide for decision-making in *State and federally assisted programs* which affect land use, and shall provide a framework for the *development of land-use policies and programs by local governments.*" *Id.* (emphasis added). The policy does not address the question of under what circumstances the private parties should be permitted to use the power of the state to impose the consequences of a particular type of economic development upon neighboring landowners.

88. See *Lea v. Johnson*, 31 N.C. 15, 18-19 (1848) (noting that cartways are available only in those limited circumstances set forth in the legislation). Although over the years the cartway statute has been amended several times "to provide access for additional types of uses of otherwise inaccessible property," *Turlington II*, 323 N.C. at 597, 374 S.E.2d at 399, the availability of a cartway is still limited to those persons who can establish that the use of the otherwise inaccessible land is for one of the purposes identified in the statute. See N.C. GEN. STAT. § 136-69(a) (Supp. 1996). However, in recent years the North Carolina Supreme Court has broadly construed the nature of the uses included within the statute. See, e.g., *Turlington II*, 323 N.C. at 598, 374 S.E.2d at 399 (cutting and removing of timber for firewood that was occasionally sold to customers qualified as cutting and removal of standing timber); *Candler v. Sluder*, 259 N.C. 62, 65-66, 130 S.E.2d 1, 4 (1963) (discussing how cultivation includes the gathering of any crop, including the harvesting of apples, which were not sold commercially but harvested for family and friends).

89. See *infra* notes 99-144 and accompanying text.

90. See, e.g., *Candler*, 259 N.C. at 65, 69, 130 S.E.2d at 3, 6 (holding that petitioner was entitled to a cartway because he was engaged in cultivation, even though the cartway was also being used by hunters renting a cabin from the petitioner); *Yount v. Lowe*, 24 N.C. App. 48, 51, 209 S.E.2d 867, 869 (1974) (noting that once a cartway is acquired, its uses are not limited), *aff'd*, 288 N.C. 90, 215 S.E.2d 563 (1975); see also 1 WEBSTER, *supra* note 86, § 15-19, at 632 ("Once a legitimate purpose for the establishment of a cartway is

landowner is confronted with a situation in which the person seeking a cartway meets the statute's use requirement but also intends to engage in a non-qualifying use to which the landowner objects, the appropriate strategy for the objecting landowner may be to offer a grant of an express easement, the use of which would have a scope limited to only those uses of land that qualify under the cartway statute.⁹¹ Such an offer should preclude the imposition of a cartway over the objecting party's land, since a cartway would no longer be needed to provide access to the land in order to make a statutorily acceptable use of it.⁹²

If the legislature expands the application to other uses, perhaps as broad as any legitimate business, personal, or charitable use, then it will place considerable power in the hands of the person who wants a cartway. Such a person would have less incentive to engage in constructive, private negotiations directed at meeting legitimate concerns of neighboring landowners. If any legitimate use is an acceptable basis for a cartway petition, the person seeking access could confront the neighboring landowners with almost a "take it or leave it" situation, dictating the terms of any private agreement with the threat that the person seeking the cartway can always go to court and get it anyway.

The most troubling scenario, of course, is one in which a house or business not qualifying for a cartway is placed on land under a good faith but mistaken belief that a permanent, non-permissive means of access to a public road exists.⁹³ In the abstract, allowing a person in this situation to petition for a cartway would seem to be reasonable; however, upon closer examination, there are good reasons not to amend the cartway statute to accommodate even such a case. First, it would be difficult to craft an amendment narrowly enough to encompass only such hardship cases.⁹⁴ Second, as

determined, the cartway that is laid off may be used for purposes other than those set forth in the statute.").

91. Thus, in *McLeod*, the objecting parties should have offered the petitioner an express easement for the removal of standing timber.

92. Cf. *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 457, 130 S.E.2d 833, 836 (1964) (denying the petition for a cartway partly because the court found that the respondent's offer of an alternative express easement provided petitioner with another adequate means of ingress and egress for removal of his timber).

93. A purchaser of land may believe that an existing way, such as a farm road or dirt road, is permanent and intended to provide access to a public road. However, the fact may be that no express easement exists and an implied easement cannot be proven. See *infra* note 95.

94. If the legislature chose to address the hardship situation, it should limit the availability of a cartway to those situations in which someone has constructed a residence

compelling as such hardship cases may appear on their face, in the absence of evidence that this problem is common, there is little justification for any change broadening the statute that might increase the overall instances in which unwilling landowners may be burdened by cartways. Third, in many of these cases, the hardship could be eliminated through more traditional common-law remedies. For example, if a landlocked parcel is carved out of another parcel that retains access to a public road, the owner of the landlocked parcel probably can claim an easement based on common-law principles such as prescription, necessity, or prior usage over the original larger parcel.⁹⁵ The landowner in such situations might

on a parcel of land to which access existed but for some reason the way of access is either terminated or otherwise found not to be legally enforceable. This limitation would not allow someone to obtain a cartway for the purpose of constructing a residence on as yet undeveloped land. The amendment might provide that "having a homestead" would be a qualifying use under the cartway statute. This approach would not solve all possible hardship cases because it would not cover homesteads under construction, but then it is difficult to craft an amendment that does so without extending the scope of the cartway statute beyond the hardship case.

The suggested amendment would be consistent with the earlier versions of the cartway statute—those that existed between 1798 and 1921. Prior to 1921, the cartway statute required that, except for owning standing timber, the person claiming the right to a cartway be presently on the land. See Act of 1798, ch. 26, preamble, 1798 N.C. Sess. Laws 126, 126 (protecting access to land upon which "persons settle"); CODE OF N.C., ch. 104, § 33 (recorded in REVISED STATUTES OF N.C. vol. I, 1836-37) (providing that protected parties must "be settled upon or cultivating any land"); Act of Mar. 6, 1917, ch. 187, § 1, 1917 N.C. Sess. Laws 338, 338 (providing that protected parties must "be working any mines or minerals"). In 1921, the legislature for the first time included language that allowed establishment of a cartway for the purpose of being able to engage in an activity on the land in the future. See Act of Mar. 7, 1921, ch. 135, § 1, 1921 N.C. Sess. Laws 395, 395. In 1921, the cartway statute was amended by adding "or be conducting or operating any industrial or manufacturing establishment or plant, or taking action looking to the erection, equipment, and operation of any such establishment or plant." *Id.* (emphasis added). Subsequently, in 1931, the scope of the statute was broadened by amending it to read: "or taking action preparatory to the operation of *any such enterprises*." Act of May 27, 1931, ch. 448, § 1, 1931 N.C. Sess. Laws 760, 760 (emphasis added). The "any such enterprises" language refers back to all other uses mentioned in the statute and not just manufacturing establishments or plants.

95. When a tract of land is severed into two or more parcels, and one or more parcels are landlocked—that is, lack access to a public road—generally an easement by necessity will exist from the landlocked parcel over the other parcel in order to allow access to a public road. See 1 WEBSTER, *supra* note 86, § 15-12, at 602; see also BRUCE & ELY, *supra* note 2, ¶ 4.02[1], [2] (explaining easements of necessity and listing the requirements for the existence of such an easement). However, there is some law in North Carolina that easements by necessity will not be implied in favor of the grantor. See 1 WEBSTER, *supra* note 86, § 15-12(a), at 606. Also, "[c]ommon-law easements of necessity do not fully resolve the problem of landlocked property because such servitudes arise only in limited circumstances. The owner of an isolated parcel frequently cannot establish all the requisite elements. Unity of title often is the sticking point." BRUCE & ELY, *supra* note 2, ¶ 4.02[4].

prefer to have the right to a statutory cartway, since such a proceeding might be considerably less expensive and time-consuming than obtaining the evidence necessary to establish the existence of some common law easement;⁹⁶ however, this does not constitute an adequate basis to permit the imposition of a cartway on neighboring lands not part of the parcel out of which the landlocked property was carved. Similarly, the fact that a cartway over neighboring lands would be more convenient than any easement that might be established should not be sufficient justification of such a use of the power of eminent domain.⁹⁷ Finally, in situations in which a

It also is possible that the grantee of a landlocked parcel may have an easement based on prior usage across her grantor's land. However, the decision of the North Carolina Court of Appeals in *Tower Development Partners v. Zell*, 120 N.C. App. 136, 461 S.E.2d 17 (1995), requires that, prior to severance of the tract, the prior usage must "have been 'so . . . long continued as to show it was meant to be permanent.' " *Id.* at 144, 461 S.E.2d at 23 (quoting *Hodges v. Winchester*, 86 N.C. App. 473, 475, 358 S.E.2d 81, 82 (1987)). The court stated that in prior case law "the shortest time heretofore recognized as sufficient to imply an easement is thirteen years." *Id.* This requirement of long prior usage may pose difficulties in establishing the existence of an easement based on prior usage.

The long usage of a roadway across another's land can result in the establishment of a prescriptive easement, though a person claiming the existence of such an easement needs to establish that her use of the roadway was adverse; and, in North Carolina, every use of a way over another's land is presumed to be permissive until the contrary is shown. *See* 1 WEBSTER, *supra* note 86, § 15-17(a), at 620. Other requirements of prescriptive easements also may pose proof problems. *See id.* §§ 15-17, 15-17(b) to -17(f), at 617-19, 621-28.

96. *Cf. Pritchard v. Scott*, 254 N.C. 277, 281, 118 S.E.2d 890, 894 (1961) (illustrating how a petitioner may be able to avoid having to obtain evidence). In *Pritchard*, the petitioner attempted to condemn a statutory cartway over defendant's land rather than litigating the issue of whether she had an easement by necessity over the land out of which her tract was carved. *See id.* at 278-80, 118 S.E.2d at 891-93. According to the court, since the defendant contended that petitioner had an easement by necessity over the land out of which her tract was carved, the burden of proving the existence of the easement by necessity was on the defendants. *See id.* at 281, 118 S.E.2d at 894. Thus, another advantage to pursuing a statutory cartway is that the petitioner can effectively shift to the defendant, the objecting party, the costs and burden of proving the existence of some other way of access from the petitioner's land to a public road. If the defendant's evidence is insufficient, the petitioner has a statutory cartway; if the evidence proves the right of petitioner to some other common law easement, then the petitioner may pursue that claim having the benefit of the defendant's efforts. Under such circumstances, the petitioner does not have anything to lose in initially pursuing the statutory cartway alternative.

97. *Cf. Lea v. Johnson*, 31 N.C. 15, 19 (1848) (noting that legislation, not convenience, determined when a cartway would be imposed). *Lea* was the first case decided by the North Carolina Supreme Court that involved the application of the cartway statute. In *Lea*, the petitioner sought a cartway across the defendant's land because the existing public roads required that people coming to his mill take a long, circuitous route. The cartway, according to the petitioner, would be a "great convenience to [him and] . . . the neighborhood generally." *Id.* at 16. The supreme court rejected the petitioner's argument on the basis that convenience to the petitioner and the general community was not a basis under which a statutory cartway could be obtained. *See id.* at 18-19. The court stated that,

common-law easement does not exist, the landlocked owner may be able to purchase a right of way across neighboring lands. Such a negotiated purchase may be more expensive than a cartway proceeding or may result in a less convenient route, but again, those are not adequate bases to impose a cartway upon lands and people not responsible for the creation of a landlocked parcel or to excuse the insufficiency or failure of an adequate title search to determine whether access to the parcel existed.⁹⁸ Today, when most landowners are protected by title insurance, the costs of a negotiated purchase or the financial consequences of a lack of access will be borne by title insurance companies. To broaden the statute to allow cartways to be imposed more frequently upon the lands of innocent third parties in order to reduce the exposure of title insurance companies would not seem to be in the general public interest. Thus, the General Assembly should be very cautious about any broadening of the uses that would qualify for the imposition of a cartway.

III. WHEN IS IMPOSITION OF A CARTWAY "NECESSARY, REASONABLE AND JUST"?

A person seeking a cartway must establish not only that the use or planned use of the tract in question is one enumerated in the statute, but also that the tract is one "to which there is leading no public road, or other adequate means of transportation, other than a navigable waterway, affording necessary and proper means of ingress thereto and egress therefrom."⁹⁹ Even satisfaction of this requirement, however, may not guarantee success in light of an additional requirement that has remained unchanged since 1854,¹⁰⁰ that the petitioner also satisfy the court that it is "necessary, reasonable and just" that the cartway be imposed.¹⁰¹ In fact, as will be discussed, an examination of North Carolina caselaw reveals that the "necessary, reasonable and just" requirement is significant and

in the absence of statutory authorization, "individuals must be left to depend upon the courtesy of good neighborship or the acquisition, by grant, of the right of private ways." *Id.* at 19.

98. *Cf. Prichard*, 254 N.C. at 286, 118 S.E.2d at 897 (holding that petitioner, a devisee of one part of a larger tract that had been owned by the grantor, could not obtain a cartway over a neighboring parcel when the owner of that parcel was a "stranger to the title" of the grantor's original tract). For a discussion of *Prichard*, see *infra* notes 129-33 and accompanying text. See also *supra* note 96 (discussing how *Prichard* illustrates that a cartway petitioner may be able to avoid having to obtain evidence).

99. N.C. GEN. STAT. § 136-69(a) (Supp. 1996).

100. See CODE OF N.C., ch. 101, § 37 (recorded in REVISED CODE OF N.C., Moore-Biggs 1854).

101. *Id.*; N.C. GEN. STAT. § 136-69(a).

indeed often determinative, rather than mere surplusage.

Necessity, the first aspect of the requirement, is well established. Numerous cases have recited the rule that a cartway is not to be established merely because it would provide a means of ingress or egress that would be more convenient or economical than one to which the petitioner is already entitled.¹⁰² If the petitioner has a right of way that would provide reasonable and adequate access to a public road, the petitioner is not entitled to a cartway "whether he obtained his right or rights of way by grant, prescription, or the mere operation of law."¹⁰³ Thus, historically, when a petition for a cartway is filed, the landowner over whose property a cartway is being sought has been able to assert as an affirmative defense that the petitioner is already entitled to a right of way across the land of another and the facts used to establish this assertion can consist of proof that the petitioner's right is one premised on prescriptive use or implication.¹⁰⁴

The 1995 amendments appear intended to address the situation of a landowner who may have an easement or right of way to a public road that is premised on prescription or implication by providing that a landowner who does not have a "deeded or documented easement or right-of-way to a public road" is entitled to institute a cartway proceeding.¹⁰⁵ However, because the statute as amended retained the traditional requirement that imposition of a cartway must be shown to be "necessary, reasonable and just," the question arises of whether this language was intended to mean that the existence of a right of way premised on prescription or implication becomes entirely irrelevant or whether an objecting landowner could still assert the existence of such a right as an affirmative defense which, if proven, will defeat the petitioner's right to a cartway.¹⁰⁶

102. See, e.g., *Warlick v. Lowman*, 103 N.C. 122, 124, 9 S.E. 458, 459 (1889); *Campbell v. Connor*, 77 N.C. App. 627, 629, 335 S.E.2d 788, 790 (1985), *aff'd per curiam*, 316 N.C. 548, 342 S.E.2d 391 (1986); *Taylor v. Askew*, 17 N.C. App. 620, 624, 195 S.E.2d 316, 319 (1973). But see *Brown v. Mobley*, 192 N.C. 470, 473-74, 135 S.E. 304, 305 (1926) (permitting a new way to be established when the old way had become "practically impassable or unreasonably inconvenient"). *Brown* was decided under the 1921 amendment to the cartway statute. See *supra* text accompanying note 67 (setting forth the relevant language of the amendment).

103. *Burgwyn v. Lockhart*, 60 N.C. 264, 268 (1864).

104. See *Pritchard v. Scott*, 254 N.C. 277, 281, 118 S.E.2d 890, 893-94 (1961).

105. N.C. GEN. STAT. § 136-69(a).

106. Although the burden of proof to support such an affirmative defense would be on the party objecting to imposition of the cartway, if the defense is successful the party may

Whatever the intended effect of the language relating to the existence of an undocumented right of way, there would appear to be little justification for allowing someone who has a right premised on prescription or implication, even if heretofore unasserted, to burden another person's land with a cartway. In fact, because a person requesting a cartway must pay the compensation assessed, whereas a right of way premised on prescription or implication does not require payment of compensation to the owner of the servient tract,¹⁰⁷ the question naturally arises of why a person entitled to such a free right of way would even want to acquire one under the cartway statute. The most likely explanation appears to be that the right that could be asserted on the basis of prescription or implication is not satisfactory to the petitioner; however, if such a right of way is "reasonable and adequate," then, under long-standing principles, the petitioner should not be able to burden another's land with a cartway merely on the basis that the cartway sought would provide a means of ingress or egress that would be more convenient or economical.¹⁰⁸

The 1995 amendments also appear intended to address the situation of a landowner who has a means of access premised on permission. The North Carolina Supreme Court has held that a petitioner is not entitled to a cartway if he has reasonable access through a permissive right of way,¹⁰⁹ even one that is "temporary in nature, and may be withdrawn at some future time."¹¹⁰ The 1995 amendments provide that "[a] permissive use of a right-of-way or easement across the land of another shall not be a bar to the establishment of a cartway."¹¹¹ Once again, however, what is not clear is whether the intended effect of the amendment was to make

be able to recover some of the costs, including reasonable attorney's fees. Section 136-68, the procedural cartway statute, incorporates Chapter 40A Eminent Domain "insofar as the same is applicable and in harmony with the provisions of this section." *Id.* § 136-68. The eminent domain statute provides that if the condemnor abandons the action or if the final judgment in a condemnation action is that the condemnor is not authorized to condemn the property, the court may "award each owner of the property sought to be condemned a sum that . . . will reimburse the owner for: his reasonable costs; disbursements; [and] expenses (including reasonable attorney, appraisal, and engineering fees)." *Id.* § 40A-8(b) (1984).

107. See *Prichard*, 254 N.C. at 281, 118 S.E.2d at 893.

108. For a discussion of cases addressing this point, see *supra* note 102 and accompanying text.

109. See *Garris v. Byrd*, 229 N.C. 343, 345, 49 S.E.2d 625, 626 (1948); see also *Taylor v. Askew*, 17 N.C. App. 620, 622, 195 S.E.2d 316, 318 (1973) (noting that a desire to have a shorter outlet to a public road is immaterial).

110. *Turlington v. McLeod (Turlington I)*, 79 N.C. App. 299, 305, 339 S.E.2d 44, 49 (1986).

111. N.C. GEN. STAT. § 136-69(c).

the existence of a permissive way entirely irrelevant in a determination of whether the petitioner is entitled to a cartway or whether it was merely intended to create a statutory presumption that lack of a deeded or documented easement or right of way should entitle a petitioner to a cartway.¹¹² Under the latter approach, a permissive way would continue to be a bar to the establishment of a cartway when it provides a reasonable and adequate means of ingress and egress because under those circumstances the imposition of a cartway would not be necessary, reasonable, and just.¹¹³

Where, however, the means of ingress and egress is premised on permission, rather than on prescription or implication, there may be an additional consideration. If the right rests on permission that can be rescinded at any time, then the right, although perhaps reasonable and adequate with respect to location and the type of vehicular traffic that can be accommodated, may not be "reasonable and adequate" to permit the landowner to fully develop and utilize the property. The owner of a tract whose only means of access is permissive may not only be unwilling to commit his or her own financial resources but may also be unable to convince outside investors or financial institutions to commit financial resources under such circumstances.¹¹⁴ Courts have characterized the cartway statutes as reflecting "a general legislative policy favoring the practical use of property and its natural resources."¹¹⁵ In light of this policy and the fact that the majority of qualifying uses enumerated in the statute involve the expenditure of substantial sums—for example, manufacturing or industrial plants—it might be reasonable to consider amending the cartway statute to provide that the required necessity exists and the imposition of a cartway is justified when the petitioner's only means of access is a permissive one that is revocable at will. Although such a change would somewhat broaden the cartway statute, it would not undercut the effect of the "necessary,

112. The legislature created such a presumption in 1981 in response to a 1964 North Carolina Supreme Court decision holding that access to a navigable river could be an adequate means of access. See *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 456, 137 S.E.2d 833, 836 (1964).

113. See *Garris*, 229 N.C. at 345, 49 S.E.2d at 626.

114. In an analogous situation, grantees who had a permissive right of way over the land of a neighbor were still held to be entitled to an implied easement by necessity on the basis that their lack of a permanent and enforceable means of access to a public road made it impossible for them to obtain a loan on the property to finance a home. See *Wilson v. Smith*, 18 N.C. App. 414, 418, 197 S.E.2d 23, 26 (1973).

115. *Turlington v. McLeod (Turlington II)*, 323 N.C. 591, 597, 374 S.E.2d 394, 399 (1988).

reasonable and just" requirement to encourage the person over whose land a cartway is being sought to engage in constructive, creative negotiation with the petitioner. If the petitioner is offered a private right of way or easement subject to reasonable conditions and on reasonable terms, then a petition for a statutory cartway could still be denied as not being necessary, reasonable, and just.¹¹⁶

Necessity, although perhaps the best known, is merely one aspect of the "necessary, reasonable and just" requirement. In a 1963 case, *Candler v. Sluder*,¹¹⁷ the North Carolina Supreme Court stated:

We do not suggest that under the present statute it is not required that petitioners satisfy the jury by the greater weight of the evidence that the proposed cartway is necessary, reasonable and just. There is no material difference, however, in requiring petitioners to show they have no "adequate means of transportation affording *necessary* and *proper* means of ingress and egress" and in requiring them to show that a cartway is "necessary, reasonable and just." The difference is only in the approach to the question—the former has a negative and the latter an affirmative approach.¹¹⁸

This characterization by the court is clearly accurate in the sense that a petitioner who has an adequate means of ingress and egress is not entitled to a cartway, due to a failure to establish that one is "necessary." However, an examination of other cartway cases reveals that there are certain factual settings in which granting a cartway would not be necessary, reasonable, and just even though the petitioner established the lack of an adequate means of ingress and egress. For example, in *Campbell v. Connor*,¹¹⁹ decided in 1985, the petitioner's tract contained one hundred feet of frontage on a public road. The petitioner admitted the existence of an alternate

116. See, e.g., *Taylor*, 262 N.C. at 457, 130 S.E.2d at 836-37 (denying the petition for a cartway on the basis of a failure to establish that it was necessary, reasonable, and just, not only because the petitioner had access to a navigable stream but also because the court found that the respondent's offer of an easement provided the petitioner with another adequate means of ingress and egress for the removal of his timber); see also *Turlington v. McLeod (Turlington I)*, 79 N.C. App. 299, 305-06, 339 S.E.2d 44, 48-49 (1986) (noting that if petitioner has permissive way, even if permission is temporary, then petition for cartway may be denied).

117. 259 N.C. 62, 130 S.E.2d 1 (1963).

118. *Id.* at 68, 130 S.E.2d at 6.

119. 77 N.C. App. 627, 335 S.E.2d 788 (1985), *aff'd per curiam*, 316 N.C. 548, 342 S.E.2d 391 (1986).

outlet to a public road but asserted that he was nonetheless entitled to a cartway because the topography of the terrain rendered the alternate outlet inadequate.¹²⁰ The petitioner did not, however, introduce any evidence as to the unfeasibility of modifying the terrain to create an adequate means of access.¹²¹ In holding that the petitioner was not entitled to a cartway in the absence of such proof,¹²² the court noted that in order to be entitled to a cartway a petitioner must prove three things:

(1) the land in question is used for one of the purposes enumerated in the statute, (2) the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress, and (3) the granting of a private way over the lands of other persons is necessary, reasonable and just.¹²³

In some cases, application of the "necessary, reasonable and just" requirement has centered primarily on the fact that the petitioner was requesting that a cartway be imposed over the land of a "stranger" when an adequate means of access could be provided across the land of someone to whom he was connected. In *Burwell v. Sneed*,¹²⁴ a tenant whose leasehold did not abut a public road filed a petition to establish a cartway across the lands of strangers despite the fact that his landlord owned adjacent property that could provide an adequate, although longer and less convenient, means of reaching a public road.¹²⁵ After stating that "[w]hether it is necessary, reasonable and just that a particular cartway shall be allowed involves facts plain and simple in their nature and application that

120. *See id.* at 630, 335 S.E.2d at 790.

121. *See id.* at 630-31, 335 S.E.2d at 790.

122. *See id.* at 631, 335 S.E.2d at 790. On the other hand, where such proof exists, there are situations in which it is necessary, reasonable, and just to establish a cartway for a user of a single tract of land even when there is a public road abutting a part of the tract. The facts in *Mayo v. Thigpen*, 107 N.C. 63, 11 S.E. 1052 (1890), presented the court with such a situation. In *Mayo*, the petitioner owned two adjacent tracts of land, one of which was occupied by a tenant. *See id.* at 64-65, 11 S.E. at 1052. The larger of the two tracts abutted a public road, but the other did not. *See id.* The two tracts were connected by a narrow strip that the petitioner owned but that was allegedly unfit for access due to the number and size of ditches to be crossed and the fact that it was constantly subject to overflow. *See id.* at 65, 11 S.E. at 1052. Over the dissent of one justice, the North Carolina Supreme Court held that the petitioner was not precluded from having a cartway established in such circumstances since the existing connection between his two parcels was sufficiently proved to constitute an impracticable means of access. *See id.* at 65-66, 11 S.E. at 1052-53.

123. *Campbell*, 77 N.C. App. at 629, 335 S.E.2d at 789-90.

124. 104 N.C. 118, 10 S.E. 152 (1889).

125. *See id.* at 119, 10 S.E. at 152.

ordinary jurymen readily understand and appreciate,"¹²⁶ the court upheld the jury finding that under the circumstances "it was not 'necessary, reasonable and just that the cartway should be laid out over the lands of the defendant.'"¹²⁷ Clearly the jury perceived that it would not be "reasonable" or "just" to burden the land of a neighboring landowner simply because it could provide the petitioner with a more convenient route to a public road. Similarly, the right to a cartway over an adjoining property owner's tract has been denied when the petitioner could obtain access to a public road by laying drainage tiles over another adjacent tract owned by the county.¹²⁸

Not too dissimilar is the situation in which title to a parcel of land has been divided in such a manner as to leave one party without access to a public road. In one such case, *Pritchard v Scott*,¹²⁹ the owner of a tract of land devised one portion to his wife and the other to his son by a prior marriage. The portion devised to his wife did not abut a public road, but the portion devised to his son did.¹³⁰ The wife then filed a petition for a cartway alleging that it was necessary, reasonable, and just that she have a cartway over the lands of some one or more adjoining property owners.¹³¹ One of the respondents asserted as an affirmative defense that the petitioner was not entitled to a cartway over his land because she had a legal right to an implied easement (way of necessity) over the land of her co-devisee that would provide an adequate means of access to a public road.¹³² After

126. *Id.* at 120, 10 S.E. at 152.

127. *Id.* at 119, 122, 10 S.E. at 152, 153 (quoting the jury verdict). In *Burwell*, both the landlord and tenant joined in the petition seeking the cartway. See *id.* at 118, 10 S.E. at 152. In addition to evidence that tended to show that the tenant could reach a public road by passing over the landlord's remaining land (although such a route was longer and less convenient), according to the court there was also evidence that the landlord actually had placed the tenant on the smaller tract in order to enable the landlord to obtain the cartway for his own convenience. See *id.* at 120-21, 10 S.E. at 152.

128. See *Taylor v. Askew*, 17 N.C. App. 620, 623-24, 195 S.E.2d 316, 318-19 (1973).

129. 254 N.C. 277, 118 S.E.2d 890 (1961).

130. See *id.* at 278, 118 S.E.2d at 891.

131. See *id.* at 278, 118 S.E.2d at 892. Although the petitioner in *Pritchard* did join a number of adjoining landowners, including her co-devisee, in her petition, the facts of the case raise a related issue: Should the petitioner have to join all adjacent property owners even though petitioner is seeking a cartway over the land of just one of the adjacent owners? Joining all adjacent owners would allow the finder of fact to determine over which parcel a cartway might most reasonably be established. Present procedure allows the petitioner to select the potentially subject parcel by selecting the defendant, leaving the defendant to argue that a way over the land of non-parties is more suitable and thus a way over the defendant's land is not necessary, reasonable, and just.

132. See *id.* at 279, 118 S.E.2d at 892.

finding that the respondent had established the facts necessary to support this allegation, the court held that, under such circumstances, "[c]ommon fairness, as well as strict statutory construction, impels the conclusion that petitioner has no right to condemn a cartway over the land of strangers to the title."¹³³ In most situations in which severance of title results in one party being left without access to a public road, the right to an implied easement by necessity should exist.¹³⁴ And, even if an implied easement by necessity does not exist,¹³⁵ it would not be necessary, reasonable, and just in most circumstances to allow the owner of the landlocked portion to acquire a cartway over the land of a stranger. The correct result would be to require the landlocked owner to petition for a cartway over the other portion of the severed parcel on the basis that the burden of a cartway should be on one of the parties to the transaction that resulted in the parcel's being left without access to a public road.

Embodied in the "necessary, reasonable and just" requirement is the notion that the forced intrusion upon the use of another's land should be the minimum needed to accomplish the governmental objective of providing reasonable access. This notion arguably affects the determination of both the actual location of the cartway and how long the forced intrusion will last. The exact location of the cartway is to be determined by a "jury of view" appointed by the

133. *Id.* at 286, 118 S.E.2d at 897.

134. In North Carolina, the requirements for an implied easement of necessity are "(1) a conveyance (2) of a portion of the grantor's land . . . and (3) after this severance of the two portions or parcels, it is *necessary* for the grantee to have an easement over the grantor's retained land to reach a public road." 1 WEBSTER, *supra* note 86, § 15-12, at 603 (footnote omitted).

135. See *White v. Coghill*, 201 N.C. 421, 423-24, 160 S.E. 472, 473 (1931) (holding that a devisee of land could not establish an implied way of necessity over the lands of other devisees even though the portion of the tract devised to him had no access to a public road). Professor Glenn characterizes *White v. Coghill* as "clearly the worst North Carolina implied easement opinion" and cites several noted authorities in stating that "[t]he notion that a devise cannot form the basis for an easement by necessity is not accepted by the major text writers." Peter G. Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary,"* 58 N.C. L. REV. 223, 240 & n.83 (1980). In addition, Professor Glenn points out that the court's decision in *Prichard v. Scott*

was based on reasoning that required an implicit acceptance of the possibility that a devisee can acquire an easement by necessity across the lands of another devisee. For these reasons it seems unlikely that *White* can be fairly read as establishing the proposition that a devise will not establish the basis for an easement by necessity.

Id. at 240-41 n.83.

clerk of court.¹³⁶ The 1995 amendments provided that “[i]n determining the path of a cartway . . . the jury of view shall give priority to the location of previously used easements or cartways.”¹³⁷ Such a provision may be unwise and is, at the very least, unnecessary. The rule is already well established that the jury of view is to lay out the route of the cartway “in such a manner as might be most convenient and proper for all the parties.”¹³⁸ Furthermore, even in the absence of such a provision, the North Carolina Supreme Court long ago held that

[i]n passing on the reasonableness and the necessity, as well as the convenience of the new cartway sought to be laid out, evidence as to the use of the old pathway, its convenience and directness, was competent as tending to prove its utility to the public. It would not be a violation of the statute, if the jurors saw fit to do so, to lay out the new pathway over the route of the old.¹³⁹

Because the person seeking a cartway is the one responsible for the expense associated with creating and maintaining it, the petitioner may well want to have its location determined by an old or existing roadway.¹⁴⁰ And in considering the interests of the owner of the land over which the cartway is to be laid, the existence of an old

136. See *Triplett v. Lail*, 227 N.C. 274, 275, 41 S.E.2d 755, 756 (1947).

The order of the clerk . . . fixes the right of petitioners to a way of ingress and egress. The appointment of a jury of view, to locate, lay off, and mark the bounds of the easement thus established, is the mechanics, in the nature of an execution, provided for the enforcement of the order.

Id. Although the location of the cartway is the job of the jury of view, “its acts are reviewable by the court.” *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 456, 137 S.E.2d 834, 836 (1964) (citing *Candler v. Sluder*, 259 N.C. 62, 67, 130 S.E.2d 1, 5 (1963), and *Garris v. Byrd*, 229 N.C. 343, 345, 49 S.E.2d 625, 626-27 (1948)).

137. N.C. GEN. STAT. § 136-69(c) (Supp. 1996).

138. *Burden v. Harman*, 52 N.C. 354, 356 (1860).

139. *Barber v. Griffin*, 158 N.C. 348, 350-51, 74 S.E. 110, 111 (1912).

140. See *Taylor*, 262 N.C. at 454-55, 137 S.E.2d at 834-35. In *Taylor*, the petitioner wanted to harvest timber on 1600 acres and asked that a cartway be established following the track of a road constructed by respondent timber company that owned the surrounding 612,000 acres. See *id.* The petitioner argued that he was entitled to a cartway located on the respondent’s pre-existing road because it would be more economical than building his own road. See *id.* The court rejected the petitioner’s arguments, stating in part that “[e]ven a petitioner qualifying . . . [for a cartway] over the lands of another is not entitled to select his route or to use existing private roads on a respondent’s land as a matter of right, however expedient and economical their use would be to him.” *Id.* at 456, 137 S.E.2d at 836. The court then noted that petitioner’s use of the defendant’s road would not only increase both its maintenance and supervision costs but also that once the road was established as a cartway it would become a quasi-public road open for use by others. See *id.*

or existing roadway may well prove to be the most reasonable location for the cartway sought because it would constitute a lesser burden than imposing a new one with a different route. This will not, however, always be true. In such cases it should be left up to the jury of view to weigh all the various factors in determining the most reasonable location, and its discretion should not be fettered by being forced to give "priority" to one factor at the expense of others.

With respect to the reasonableness of the duration of a cartway, a statutory procedure for the discontinuance of a cartway has existed since 1854.¹⁴¹ The basic thrust of such legislation is that, unlike the situation in which the power of eminent domain is invoked by a state agency to acquire land for a public highway, a cartway should exist only so long as it serves the purpose for which it was established.¹⁴² Although it is true that the use of a cartway once established is not limited to the use or uses that served as the basis for the cartway petition,¹⁴³ such other uses standing alone should not be sufficient to support the continuation of a cartway that no longer serves a statutory purpose. Similarly, even if the statutory uses are still present, if the benefited parcel subsequently becomes served by a public road or acquires some other adequate means of access, a petitioner should be able to have the cartway terminated as no

141. See CODE OF N.C., ch. 101, § 38 (recorded in REVISED CODE OF N.C., Moore-Biggs 1854). The current statute provides that

[c]artways or other ways . . . may be altered, changed, or abandoned in like manner as herein provided for their establishment upon petition instituted by any interested party. A cartway established under this Article shall not terminate until the time specified in the petition and as found necessary and proper by the court.

N.C. GEN. STAT. § 136-70.

142. This idea was more explicit in the pre-1995 statute. For example, prior to 1995, and since 1887, cartways for the removal of timber could not exist for more than five years unless a greater period of time was specified in the judgment, the legislative presumption being that this normally should be a reasonable period of time to accomplish the objective of harvesting timber from landlocked parcels. The 1995 legislation removed the five-year presumption, but if the effect of Section 4 of the 1995 legislation is to reinstate § 136-70 as it existed prior to the 1995 amendments, the presumptive five-year period for cartways established for harvesting timber would come back into effect. And, since the language of § 136-70 refers to the alteration, changing, or abandonment of cartways in a "like manner as herein provided for their establishment," N.C. GEN. STAT. § 136-70, that would appear to mean that a cartway could be discontinued when a court determined it was necessary, reasonable, and just. Arguably an attorney representing a respondent in a losing cartway proceeding might consider asking the court to put explicit language in the judgment specifying the duration of the established cartway.

143. See, e.g., *Candler v. Sluder*, 259 N.C. 62, 65, 69, 130 S.E.2d 1, 3, 6 (1963); *Turlington v. McLeod (Turlington I)*, 79 N.C. App. 299, 302-04, 339 S.E.2d 44, 47-48 (1986).

longer being "necessary, reasonable and just."¹⁴⁴

IV. CONCLUSION

When future efforts are made to broaden the cartway statute, the legislature should keep in mind the long history of confining its application to a limited set of circumstances. Embodied within that history is a delicate balancing of the sensible public policy of full utilization of land and natural resources with a respect for the private property and personal rights of individuals. Unlike the exercise of eminent domain powers by public utilities and railroads, the exercise of such power through cartway legislation poses the specter of the state, in effect, taking one person's land for the use of another under circumstances in which the person to be benefited simply may be unwilling to engage in the necessary give-and-take of a negotiated solution to his access problem. Not infrequently, one suspects, those who rail the most against governmental interference with the lives and activities of private persons are the same ones who lobby their legislators for amendments to the cartway statute that would enable them to use the power of the state to override the legitimate interests and objections of their neighbors. Although the state may have the constitutional power to enact much broader cartway legislation, it may be a power that wisdom leaves unexercised.

144. See *Plimmons v. Frisby*, 60 N.C. 200, 201 (1864) (allowing termination of cartway because there were several other roads leading to the land in question, all of which had been used by the public for a number of years).

