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Eminent Domain — Economic Motivations In Determining "Necessity" For A Taking

United States v. Certain Parcels of Land in Ingham County, Michigan[1]

The United States moved for summary judgment in a civil action instituted for the taking of property under the power of eminent domain.[2] The government sought to acquire the land in fee simple, even though it was to be used solely for the purpose of providing fill material for the construction of a proposed highway.[3] The court, in

1. 233 F. Supp. 544 (W.D. Mich. 1964).

2. The proposed taking was by authority of 25 Stat. 357 (1888) as amended, 40 U.S.C. § 257 (1964), 46 Stat. 1421-22 (1931), 40 U.S.C. §§ 258(a)-(e) (1964), and 72 Stat. 893 (1958), as amended, 23 U.S.C. § 107 (1964), which authorize the acquisition of land or interests in land required to construct any section of the National System of Interstate and Defense Highways.

3. The court summarily disposed of all inquiry into the public use aspects of the condemnation when it stated, "The authorities are clear that the condemnor can enter adjoining land and condemn materials required for construction." 233 F. Supp. at 544.

granting the government's motion, rejected the landowners' contention that the government's determination of the necessity for the taking was arbitrary and capricious and therefore invalid, since it was motivated by a desire to save additional costs which would be incurred if fill were purchased commercially.

Although there is no express provision in the Constitution making necessity a prerequisite for the taking of land, it has been generally held that property cannot be taken by the exercise of the power of eminent domain unless it is needed for a public use.[4] The district court, in upholding the government's determination of necessity, cited for support the recent case of *Harwell v. U.S.*[5] The *Harwell* case summarily applied the necessity doctrine, which states that in the absence of bad faith, the question of the necessity[6] or expediency of a taking in eminent domain cases is not justiciable, since such a determination lies within the discretion of the legislature[7] and is not a proper subject for judicial review.[8]

It has been suggested that there are sound policy reasons which support this doctrine. A determination of necessity involves the resolution of many complex non-legal questions pertaining to public finance, economics, engineering and conflicting public and private interests which judicial bodies are not always equipped to determine.[9] The doctrine has further support aside from these "non-justiciable" problem considerations in the proposition that the courts have no

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4. See 1 NICHOLS, EMINENT DOMAIN § 4.11[1], at 551 (Rev. 3d ed. 1964); Cline v. Kansas Gas and Electric Company, 260 F.2d 271 (10th Cir. 1958). *Cf.* Albert Hanson Lumber Co. v. United States, 261 U.S. 581 (1923).

5. In that case the court, in refusing to rule that the determination of necessity was exercised in an arbitrary and capricious manner, said: "In a condemnation proceeding, the court may determine whether the nature of the proposed use is public or private. But in the absence of bad faith, if the use is a public one, the necessity for the desired property or the expediency of appropriating it thereto is not open to judicial determination." 316 F.2d 791, 793 (10th Cir. 1963).

6. There are various factors which are inherent in most determinations of necessity. Consequently, such a determination might involve the resolution of such subordinate questions as whether an eminent domain action should properly be used in effecting the acquisition, *e.g.,* Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939); whether there exists a sufficient need for the property in relation to extent or amount sought to be taken, *e.g.,* Shoemaker v. United States, 147 U.S. 282 (1893); whether there exists a sufficient need in relation to the nature of the estate to be taken, *e.g.,* United States v. 6.74 Acres of Land, 148 F.2d 618 (5th Cir. 1945); whether there is any sufficient need in relation to the choice of tracts to be acquired, *e.g.,* Monongahela Navigation Co. v. United States, 148 U.S. 312 (1892); and whether there is any sufficient need in relation to the time when the action is brought, *e.g.,* United States v. Certain Parcels of Land, 215 F.2d 140 (3d Cir. 1954).

7. See Lavine, *Extent of Judicial Inquiry into Power of Eminent Domain,* 28 So. CAL. L. REV. 369, at 369 (1955), where the author states, "The United States obtains its jurisdictional right to condemn property by means of its status as a sovereign power and by virtue of the Constitution. . . . The individual states of the Union possess sufficient power and right to condemn property by virtue of their status as states unless prohibited by respective state constitutions, or by some provision of the United States Constitution."

8. See, 1 NICHOLS, *op. cit. supra* note 4, § 4.11 at 540 & nn.82 and 82.1. This doctrine has been judicially extended where the legislature has delegated to an appropriate administrative official or agency the right to determine the necessity, expediency, or propriety of exercising the power, provided the administrator acts in accordance with the appropriate statutes conferring such authority. See North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).

9. See Lavine, *supra* note 7, at 376.

power to revise any enactments of the legislature unless they violate some constitutional provision.[10] In a majority of the states there is no such provision requiring the determination of necessity in a judicial or quasi-judicial setting.[11]

However, a theoretical limit has been placed upon the discretion of the legislature by the necessity doctrine. Where the determination of necessity has been shown to be arbitrary, capricious or in bad faith, the courts have felt bound to interfere to prevent an attempted appropriation of land in utter disregard of the possible necessity for its use.[12] Also, the question of necessity has also been deemed justiciable in certain states by virtue of special constitutional[13] or statutory[14] provisions which give a landowner the right to test the necessity for the taking in a judicial proceeding.

An inspection of the decisions construing and applying the statutory sections authorizing the taking in the principal case[15] discloses a clearly uniform application and reaffirmation of this necessity doctrine.[16] If the landowners' objection to the taking had been based solely upon an alleged lack of necessity for the condemnation of their property in fee simple, it is submitted that the court would have had little difficulty in granting the government's motion.[17] The defendants, however, also chose to argue that the purely economic motivations of the government prompting its determination of necessity were of themselves sufficient to warrant the conclusion that the proposed taking was arbitrary and thus invalid. The court, in attempting to resolve the issue posed by the defendants, assumed, "that consideration [economic moti-

10. See 1 NICHOLS, *op. cit. supra* note 4, at 552–53.

11. *Ibid.*

12. See *In re* Spier Aircraft Corp., 137 F.2d 736 (3d Cir. 1943); Puget Sound Power & Light Co. v. Public Utility District No. 1, 123 F.2d 286 (9th Cir. 1941); United States v. Myer, 113 F.2d 387 (7th Cir. 1940); City of Norton v. Lowden, 84 F.2d 663 (10th Cir. 1936); C. M. Patton & Co. v. United States, 61 F.2d 970 (9th Cir. 1932). *But see* United States v. State of South Dakota, 212 F.2d 14 (8th Cir. 1954), where the court stated that there could be no judicial review of an administrative or legislative determination of necessity. *Cf.* People *ex rel.* Department of Public Works v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959). For a discussion of arbitrary or capricious determinations and the scope of judicial inquiry, see Lavine, *supra* note 7, at 377.

13. See MICH. CONST. art. XIII, § 1 (except when the taking is made by the state); MONT. CONST. art. III, § 15; N.Y. CONST. art. 1, § 7 (when property is acquired for the purpose of a private road); and WISC. CONST. art. 11, § 2 (when the taking is made by a municipal corporation). See also Williams v. Department of Highways, 92 So. 2d 98 (La. App. 1957).

14. There have been a number of courts which have held that state statutes require the judicial review of necessity. See, *e.g.*, Kansas Homes Development Co. v. Kansas Turnpike Authority, 181 Kan. 925, 317 P.2d 794 (1957); People v. Illinois State Toll Highway Commission, 3 Ill. 2d 218, 120 N.E.2d 35 (1954); Rowe v. Mackey, 366 Mich. 151, 114 N.W.2d 227 (1962). *Cf.* City of Cincinnati et al. v. Louisville & N.R. Co., 88 Ohio St. 283, 102 N.E. 951 (1913). For a brief discussion of recent legislation in this area, see Helstad, *Recent Trends in Highway Condemnation,* 1964 WASH. U.L.Q. 58, 60.

15. See note 2 *supra.*

16. See United States v. Mischke, 285 F.2d 628 (8th Cir. 1961); United States *ex rel.* T.V.A. v. Welch, 150 F.2d 613 (4th Cir. 1945), *rev'd on other grounds,* 327 U.S. 546 (1946); United States v. Threlked, 72 F.2d 464 (10th Cir.), *cert. denied,* 293 U.S. 620 (1934); United States *ex rel.* T.V.A. v. Susong, 87 F. Supp. 396 (E.D. Tenn. 1948).

17. See Severt v. Rechel, 159 U.S. 380, 395 (1895), where the Supreme Court stated that it was for the legislature to determine the quantity of the estate to be taken.

vation] must certainly be beneath the surface in both the *Vogle* and *Harwell* cases," and felt that those cases would serve as authority for sustaining the condemnation.[18]

Whether such considerations were, in fact, beneath the *Harwell* and *Vogle* cases cannot be accurately determined from their respective opinions; there is no mention in those cases of economic motivations on the part of the condemnor. There are, however, a number of federal court cases which have held that landowners' claims that the government's taking was *partly* motivated by economic considerations did not invalidate the taking. For instance, the Supreme Court, in *Old Dominion Land Company v. United States,*[19] when considering the necessity for the taking of a fee rather than an easement, held that the fee title could be condemned in order to salvage the value of improvements which were placed upon land leased by the government.[20] In another case, *United States ex rel. T.V.A. v. Welch,*[21] the Court upheld the decision of the Tennessee Valley Authority to condemn a large acreage of land in order to avoid the greater expenes of building an access highway. The Court, in an oft-quoted statement, said, "The cost of public projects is a relevant element . . . , and the Government, just as anyone else, is not required to proceed oblivious to elements of cost."[22]

Generally, the state courts have been inclined to rule that reasonable necessity could not be found where the condemnation merely afforded a more convenient or economical mode of operation for the condemnor.[23] Recently, however, several state courts have taken notice of the relevancy of economics in relation to sound condemnation practices. One court stated that a public service corporation, endowed with the power of eminent domain, could select a program (removal of trees close to power lines) which would combine the greatest benefit

18. 233 F. Supp. at 546. The court initially utilized United States *ex rel.* T.V.A. v. Vogle, 28 F. Supp. 454 (W.D. Ky. 1939) and Harwell v. United States, 316 F.2d 791, 793 (10th Cir. 1963) in answering the question whether the condemnor could take more of an interest — a fee simple absolute in this case — than it would use. The court felt that both cases would stand as authority for the proposition that the condemnor could take such a greater interest.

19. 269 U.S. 55 (1925).

20. *Accord*: Arp v. United States, 244 F.2d 571, 574 (10th Cir. 1957) (court enforced statute which provided that the government could condemn fee in lands in which it had previously taken a leasehold for defense housing purposes in order to protect and save its investment); Lewis v. United States, 200 F.2d 183 (9th Cir. 1952), *cert. denied,* 345 U.S. 907 (1953); Simmonds v. United States, 199 F.2d 305 (9th Cir. 1952) (land condemned had been used by the United States for spoil accumulated from the improvement of a river channel); United States v. Certain Parcels of Land in City of Philadelphia, Pa., 99 F. Supp. 714, 717 (E.D. Pa. 1951).

21. 327 U.S. 546 (1946). *Accord*: United States v. Agee, 322 F.2d 139, 143 (6th Cir. 1963).

22. 327 U.S. at 554.

23. See, *e.g.,* City of Carlsbad v. Wight, 221 Cal. App. 2d 756, 34 Cal. Reptr. 820, 825 (1963); Indianapolis Oolitic Stone Co. et al. v. Alexander King Stone Co., 206 Ind. 412, 190 N.E. 57 (1934); Kinney v. Citizens Water and Light Co., 173 Ind. 252, 90 N.E. 129 (1909); Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898).

Generally state courts have been somewhat more severe towards the condemnation practices of public service corporations than those of local government agencies. Many courts have ruled that condemnations by corporations, motivated by a desire to save expenses or add to the profits, are unlawful. See, *e.g.,* Spring Valley Water-Works v. San Mateo Water Works, 64 Cal. 123, 28 Pac. 447 (1883); Northern Pac. Ry. Co. v. McAdow, 44 Mont. 547, 121 Pac. 473 (1912).

to the public with the least inconvenience and expense to the condemning authority.[24] Another court upheld the acquisition of certain property so that a bridge could be constructed more conveniently and economically to serve as a public facility.[25] A California court, in passing upon the validity of a condemnation, stated that considerations of economy and the prevention of excessive expenditures may be taken into account in determining necessity.[26] Finally, a Florida court, when considering the necessity of acquiring rights of way prior to the time that funds had been allocated for construction, stated that, "It is not only economically advisable, but good sound judgment, to acquire adequate right-of-way . . . at a time when land values will not be influenced by the immediate announcement of actual highway construction."[27]

The Maryland Court of Appeals, recognizing the necessity doctrine,[28] has been reluctant to review determinations of necessity unless the exercise of discretion has been abused.[29] Further, the court has on several occasions recognized that cost is a proper consideration in the determination of necessity.[30] Thus, in *Johnson v. Consolidated Gas Electric Light and Power Co. of Baltimore*,[31] the court, in reviewing the power company's selection of overhead rather than underground installations, stated that economy is *one* of the elements to be considered by a power company in exercising its discretion in determining the type of line to be constructed. It should be noted that *Johnson* does not stand for the proposition that a determination of necessity based solely upon economic motives would be upheld in Maryland.

The opinion of the federal court in the principal case does not reveal whether the government's determination of necessity was in-

24. Florida Power Corp. v. Wenzel, 113 So. 2d 747 (Fla. 1959).

25. Kelmar v. District Court of the Fourth Judicial District, Hennepin County, ___ Minn. ___, 130 N.W.2d 228 (1964).

26. Sacramento Municipal Utility District v. Pacific Gas and Electric Co., 72 Cal. App. 2d 638, 654, 165 P.2d 741, 750 (1946).

27. State Roads Department of Florida v. Southland, Inc., 117 So. 2d 512, 517 (Fla. 1960). *Cf.* Commonwealth v. Burchett, 367 S.W.2d 262 (Ky. 1963), where the court felt there was manifest good reason for acquiring the fee simple title for purposes of waste disposal, where the value of the land would be enhanced by filling it to the level of the highway. *But see* Miller v. Florida Inland Navigation District, 130 So. 2d 615, 624 (Fla. 1961), where the court, in determining whether a fee simple or a perpetual easement was needed by the District, rejected the argument of the District that all profits realized from a condemnation of the fee would serve to decrease the tax burden of the taxpayers of the state. The court was of the opinion that, "The anticipated result, however beneficial to the taxpayers generally, is immaterial and irrelevant to the question of the power of eminent domain and the extent to which it may be exercised."

28. See Riden v. Philadelphia, B.&W.R. Co., 182 Md. 336, 35 A.2d 99 (1943).

29. See Ligon v. Potomac Electric Power Co., 217 Md. 438, 149 A.2d 376 (1959); State Roads Commission v. Franklin, 201 Md. 549, 95 A.2d 99 (1953); Johnson v. Consolidated Gas, Electric Light and Power Co. of Baltimore, 187 Md. 454, 50 A.2d 918, 170 A.L.R. 709 (1947); State Roads Comm. v. Redmiles, 176 Md. 677, 6 A.2d 551 (1939); Murphy v. State Roads Commission, 159 Md. 7, 149 Atl. 566 (1930).

30. See Brehm v. Tabler, 176 Md. 411, 419, 5 A.2d 820, 823 (1939), where the court recognized that the saving of money by the use of a bridge already in existence, was a factor in the Commission's act; Murphy v. State Roads Commission, 159 Md. 7, 18, 149 Atl. 566, 571 (1930), where the court took into account the opinion of the Commission that the proposed route was more economical; Realty Improvement Co. v. Consolidated Gas, Electric Light and Power Co. of Baltimore, 156 Md. 581, 585, 144 Atl. 710, 712 (1929), where the court noted that the utility would provide power and light to Baltimore County, by virtue of the proposed power line, which otherwise could not have been so economically provided.

31. 187 Md. 454, 466–67, 50 A.2d 918, 924 (1947).

deed based upon purely economic motives. This omission, combined with the court's reluctance to state affirmatively that purely economic motives will sustain a taking, and the court's disposition of that question by rather tenuous analogy,[32] casts some doubt on whether this case could serve as authority for sustaining a taking based on purely economic motives.

It is very questionable whether a purely economic motive *should* suffice to sustain a valid determination of necessity. Programs of rational and just property acquisition, from both the condemnor and condemnee's standpoint, should not be subjected to the inherent abuses which might result if economics alone comprised the sole criterion. Under such a rule, a landowner could hardly feel secure from arbitrary determinations of necessity, for his property could be taken from him upon the mere showing that the condemnor would save money as a result of the taking. There is likewise a danger that if the condemnor were required to consider only economic factors in determining necessity, he might begin to disregard other relevant factors such as safety, engineering and public convenience, all of which are at least as important as economics. Economic considerations, as an *additional* factor influencing the condemnor's determination of necessity, should not detract from his right to obtain title to the desired property;[33] sophisticated condemnation practices now call for the full consideration of all relevant factors. But economic considerations should never be permitted to be used as the sole criterion in determining the necessity for a taking.

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32. See note 18 *supra* and accompanying text.

33. See United States v. Certain Parcels of Land in City of Philadelphia, Pa., 99 F. Supp. 714, 717 (E.D. Pa. 1951).