THE PUBLIC USE REQUIREMENT IN EMINENT DOMAIN LAW

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I. INTRODUCTION

The government's ability to exercise the power of eminent domain is subject to a public use limitation included in the Fifth Amendment of the United States Constitution and similar provisions in many state constitutions. The Fifth Amendment of United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

South Carolina's State Constitution includes a similar provision in Article I, § 13:

> Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefore.

There has been much debate over the proper interpretation of the public use requirement in both of these provisions.[1] Some courts have attempted to define public use very broadly and give great deference to legislative decisions allocating the power of eminent domain. Other courts have imposed a strict interpretation requiring that the public actually use or have the right to use the condemned property.[2]

[1] 2A Nichols on Eminent Domain (3d ed., Matthew Bender 1994) §§ 7.02.
[2] *See* Theodore C. Tuab, ALI-ABA Course of Study, *Eminent Domain's Role in Redevelopment: The Evolution of the Public Purpose Doctrine* (Coral Gables, Fl., Jan. 9-11, 2003).

II. COURTS HAVE APPLIED A DEFERENTIAL STANDARD OF REVIEW OF WHAT CONSITTUTES A PUBLIC USE UNDER THE FIFTH AMENDMENT

Berman v. Parker is the seminal case applying a deferential standard to what constitutes a public use in the context of eminent domain law.[3] This case involved the condemnation of land for an urban renewal effort in a blighted area. Through this decision, the U.S. Supreme Court opened the doors for great judicial deference to takings for private ownership by explaining "[t]he legislature, not the judiciary is the main guardian of the public needs to be served by social legislation."[4] The case further expanded the public use limitation by equating a state's condemnation power to its broad police power, leading to an almost unlimited interpretation of possible public use condemnations.[5]

In *Berman*, a department store owner challenged the District of Columbia's efforts to condemn his store as part of an urban redevelopment scheme.[6] The property owner first objected because the store itself was not slum housing. He further complained that once the land was condemned it would be put under the management of a private agency and redeveloped for a private, not a public use, arguing, "[t]o take for the purpose of ridding areas of slums is one thing; it is quite another to take a man's property merely to develop a better balanced, more attractive community."[7] Rejecting this reasoning, the Court unanimously held that such a plan was constitutional despite the obvious private benefit.[8] The Court concluded it was the legislature's domain to determine when a condemnation project serves a public purpose.

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[3] 348 U.S. 26 (1954).
[4] Id. at 32.
[5] Id.
[6] Id. at 26.
[7] Id. at 31.
[8] Id. at 33-34.

Accordingly, "the role of the judiciary is determining whether that power is being exercised for a public purpose is an extremely narrow one."[9]

Although the *Berman* decision only interpreted the Fifth Amendment of the United States Constitution, the decision was widely followed by courts interpreting similar state provisions.[10] To permit such takings, courts often look for any advantage or public benefit resulting from the condemnation. These courts look to see whether the proposed use is "conducive to community prosperity,"[11] and if the use is found to benefit the community in any way, then the use is deemed sufficient.[12]

A prominent case analyzing the 5th Amendment's public use clause is *Poletown Neighborhood Council v. City of Detroit*. *Poletown* is an example of a court giving broad deference to a legislative decision of what constitutes a proper public use condemnation. This case held that secondary economic benefits, such as job creation and an increased tax base, were sufficient to constitute a public use condemnation and allow a local government to condemn land and transfer the land to private ownership.[12]

In 1984, Michigan was suffering from an economic crisis, and the City of Detroit had the highest unemployment rate in the state.[13] It was during this time period that General Motors approached Detroit about acquiring land to build a new factory that would provide new jobs. General Motors claimed it needed the City's help to create a factory that could build cars to

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[9] Id. at 32.
[10] 2A Nichols supra at § 7.06[28]-[30].
[11] 2A Nichols supra at § 7.02[4].
[12] Poletown, 410 Mich. 616, 304 N.W.2d 455.
[13] Id. 410 Mich. at 646, 304 N.W.2d at 465. (J. Ryan Dissenting).

compete with General Motor's Japanese rivals. The company stated that without the City's help it would be forced to leave Detroit, which could cause disastrous economic effects. [14]

The City agreed and selected a neighborhood known as Poletown for the plant location.[15] The area consisted of mostly lower class residences and businesses, with the majority of inhabitants being retired polish immigrants.[16] The Poletown Neighborhood Council alleged that the taking violated the Fifth Amendment of the United States Constitution as a taking for a private purpose.[17] The Michigan Supreme Court found the primary benefit of the taking was for the public and not a private use. However, the court recognized this condemnation provided a specific benefit to an identifiable private interest, triggering a heighten scrutiny analysis.[18] Despite the heightened scrutiny, the court relied on *Berman* and held the determination of public use is principally a legislative function.[19] The fact that Poletown was not a blighted area was irrelevant to the court because the land was condemned for the sole public purpose of aiding the economy.[20]

Poletown is often cited as an example of the economic benefits rationale as to what constitutes a public use.[21] General Motor's presence was vital to the City of Detroit and the state of Michigan.[22] Accordingly, the Court found the use of eminent domain was an appropriate tool

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[14] Id. 410 Mich. at 648, 304 N.W.2d at 466.
[15] Id. 410 Mich. at 653, 304 N.W.2d at 468.
[16] Id. 410 Mich. at 657, 304 N.W.2d at 470.
[17] Id.
[18] Id. 410 Mich. at 663, 304 N.W.2d at 460.
[19] Id.
[20] See Tuab supra n. 2.
[21] *See* City of Jamestown v. Leevens Supermarket Inc., 552 N.W.2d 365, 372 (N.D. 1996); *See* Township of West Orange, 800 A.2d 86, 94 (N.J. 2002); *See* Common Cause v. State, 455 A.2d 1 (ME. 1983).
[22] Poletown, 410 Mich. at 634-644, 304 N.W.2d at 459-460.

to for the government to use despite the transfer of land to a private party.[23] This rationale was utilized by various other cities and states in building their economies.

The United States Supreme Court further expanded the public use concept when it approved a land redistribution scheme in Hawaii.[24] Here, the Hawaii state government to use the power of eminent domain to break up centralized property ownership in an effort to improve the economy and encourage individual home ownership.[25] The Hawaiian landowners challenged the 1976 Land Reform Act, claiming a Fifth Amendment violation. Under the Act, lessees were given the option to purchase their leased land from landowners through forced sales. The landowners alleged that the forced sales amounted to the use of eminent domain for private uses.[26] The state of Hawaii argued the land was being condemned for a public use because the vast majority of Hawaiians would benefit from the forced sales.[27]

The United States Supreme Court agreed with the state, focusing on the benefit to the state as a whole.[28] Relying on *Berman*, the Court rejected the landowner's argument for heightened scrutiny and held that the role of the judiciary in the determination of public use was extremely limited.[29] Also similar to *Berman*, the Court found the state's attempt to reduce the social and economic evils of a land oligopoly to be a traditional invocation of the state's police

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[23] Id. 410 Mich. at 644-645, 304 N.W.2d at 464.
[24] Hawaii Housing Authority v. Midkiff, 467 US 229 (1984). In Hawaii seventy-two landowners owned over forty-seven percent of the state's land because of the feudalistic system established by the original Polynesian settlers. Tribal leaders would let tribesman use the land for their lifetime and at death, the tribesman would turn the land back over to tribal leaders. Overtime the leaders' ancestors gained fee simple title in the land. These landowners profited from leasing land to developers, resorts and the general population.
[25] Id.
[26] Id. at 235.
[27] Id. at 241-242.
[28] Id. at 239-240.
[29] Id.

powers.[30] The Court concluded that "legislature's are better able to assess what public purposes should be advanced by an exercise of the taking power."[31]

Under the 5th Amendment, courts have given deference to legislative determinations of what constitutes a public use. The public use is treated as similar to the exercise of a state's police powers, and, consequently, courts only look for a public benefit resulting from the project. If there is a public benefit resulting from the project, the exercise of the power of eminent domain will be found justified.

III. THE PUBLIC USE REQUIREMENT IN SOUTH CAROLINA

The leading South Carolina Case on the public use doctrine is *Riley v. Charleston Union Station, Co.*[32] In this 1905 decision; the South Carolina Supreme Court took the opportunity to discuss its views on the public use requirement . In *Riley*, the condemnor was a company organized under a special act of the General Assembly for the purpose of constructing, maintaining, and operating a train station. The legislature granted the company the power of eminent domain to develop the station. The South Carolina Supreme Court established a narrow interpretation of the term public use by stating: "Some cases take the very broad view that 'public use' is synonymous with 'public benefit.' A more restricted view, however, would seem to better comport with the due protection of private property against spoliation under the guise of eminent domain."[33] To be considered a public use under the narrow view "the public must have a definite and fixed use of the property to be condemned, independent of the will of the person or

[30] Id. at 241-242.
[31] Id. at 244.
[32] 71 S.C. 457, 51 S.E.485 (SC 1905).
[33] Id. 51 S.E.2d 496.

corporation taking title under condemnation, and that such use by the public is protected by law."[34]

Applying this standard, the *Riley* court allowed the corporation to condemn the land because it found the company's purpose of building a train station was analogous to a traditional railroad company condemning land for tracks.[35] The court relied on precedent to find that "no one doubts" condemnation by a regular railroad company to lay track is a justified public use. The public had definite and fixed right to use station in the same respect as using other common carriers.[36] The court also focused on the fact that the legislature had already implicitly made the decision that this is a public use because the corporation was chartered under a statute.[37]

This decision has been cited in cases as recently as 2003 and remains the touchstone of South Carolina's public use doctrine.[38] Throughout the century, South Carolina Courts have applied the "*Riley* test" to a variety of condemnations.[39] Unlike the dissonant opinions from across the country, South Carolina has maintained a consistent approach in this area. The South Carolina Supreme Court addressed the issue of whether using the power of eminent domain to eliminate blight was a permissible public use in *McNulty v. Owens.*[40] In *McNulty,* residents of the City of Columbia sued to enjoin a plan to erect housing projects and demolish slum areas. The court upheld the City's redevelopment plan because the City provided sufficient evidence that this was in fact a blighted area.[41] The court recognized the connection between slum

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[34] Id.
[35] Id. 51 S.E. at 495.
[36] Id. 51 S.E. at 496.
[37] Id.
[38] *See* Georgia Department of Transportation v. Jasper County, 355 S.C. 631, 586 S.E.2d 853 (2003).
[39] *See* Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280, 284 (1956); *See* Tuomey Hospital v. City of Sumter, 243 S.C. 544, 134 S.E.2d 744, 746 (1964); *See* Karesh v. City Council of Charleston, 271 S.C. 339, 247 S.E.2d 342 (1978).
[40] 188 S.C. 377, 199 S.E. 425 (1938).
[41] Id.

housing[42] and secondary effects such as juvenile delinquency and high infant morality rates.[43] After considering the need for suitable low income housing and the inability of private enterprises to supply such housing alone, the court concluded that the slum clearance and construction of low cost housing was a valid public purpose.[44] Accordingly, the court found that the Columbia Housing Authority could use the power of eminent domain as necessary for slum clearance and low-cost housing.[45]

The public use clause also became a focus in a 1951 electric company condemnation. In *Bookhart v. Central Electric Power Cooperative*, a landowner sued to enjoin an electric company's condemnation of land.[46] The court held the operation and maintenance of plants generating and distributing electricity to the public was a public use for which private property may be condemned.[47] The court disagreed with landowner's argument that in this particular scenario, there was no public use because this particular service cooperative only provided service to its members. The court explained that universal patronage of a public utility is not essential for public use.[48]

In 1956, the South Carolina Supreme Court in *Edens v. City of Columbia* again addressed the proper meaning of the term public use.[49] In this case, the Housing Authority in Columbia determined that an area of the city was blighted.[50] The city wanted to condemn the property and

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[42] Id. 199 S.E. at 429 (In the City of Columbia 4,000 of the 12,000 houses were without inside toilets, 5,200 without shower facilities and 4,2000 without electricity or gas).
[43] Id.
[44] Id. 199 S.E. at 429-430.
[45] Id. 199 S.E. at 430.
[46] 219 S.C. 414, 65 S.E.2d 781 (1951).
[47] Id. at 783.
[48] Id. at 784. ("We do not think it necessary that every inhabitant of the community shall be benefited by the use which it is proposed to be made of the lands taken, in order to constitute a public one.")
[49] Edens, 91 S.E.2d at. 280.
[50] Id.

clear all the current buildings to sell a portion of the land to the University of South Carolina.[51] The city desired to sell the remaining land to private individuals or corporations for development.[52]

There was no controversy about the land going to the University because higher public education was an unquestioned public use, but the homeowners residing on the remaining land questioned the constitutionality of transferring ownership of a portion of the land to private entities for redevelopment. [53] The *Edens* court distinguished this case from *McNutly* because this project did not include the construction of housing on the land for the current residents.[54] Some 2,500 persons would be displaced as a result of the *Edens* condemnation.[55] The court found the purpose of this plan was "not to provide better, low-cost housing to the present occupants of the area, or indeed housing at all; but it is to transform it from a predominantly low class residential area to a commercial and industrial area." [56] The court, citing *Riley*, defined public use as meaning the public must have definite and fixed right of use, independent of the will of another. The court further described public use as implying "possession, occupation, and enjoyment of the land by the public or by public agencies...."[57] Accordingly, the court refused to allow the taking.[58]

The next influential public use case in South Carolina was *Karesh v. City of Charleston*.[59] In *Karesh*, the City wanted to condemn land along Market Street in order lease the land for 99 years to a private corporation, which would in return build a parking garage and convention

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[51] Id.
[52] Id.
[53] Id.
[54] Id.
[55] Id.
[56] Id. 91 S.E.2d at 284.
[57] Id., 91 S.E.2d at 283.
[58] Id.
[59] Karesh, 271 S.C. 339, 247 S.E.2d 342.

center containing rental commercial space.[60] The court reiterated that the term public use "is an elastic one in order to keep abreast of changing social conditions, and presents a question of fact...."[61] The Court, however, found that leasing land to a private corporation for 99 years was beyond the definition of public use. [62]

The court found the private developer would operate the convention center as simply an adjunct to the hotel.[63] It also troubled the court that the new structure would include rental shops that would replace the existing stores in the area, "We cannot constitutionally condone the eviction of the present property owners by virtue of the power of eminent domain in favor of other private shopkeepers."[64] In the end, the Supreme Court believed the proposed project would primarily benefit the developer, with no definite advantage to the general public.[65]

Showing the elasticity of the South Carolina's public use standard, a different plan to construct this same parking garage was approved one year later in *Goldberg v. City Council of City of Charleston*.[66] In *Goldberg*, the garage was to be owned and operated by the City and not controlled by a private developer through a leasing agreement as in *Karesh*. Significantly, the Court emphasized that the public would maintain ownership and control over the facility[67]

The Court held:

> The constitutional vice of a municipal corporation joining hands with a private developer to undertake a project primarily of benefit to the developer is not present in this project. **By retaining exclusive ownership and control over the parking facility the City Council has** simultaneously **avoided** both the joining hands with a private developer and **the undertaking of a project primarily of benefit to a private developer**. The fact that the business patrons of the private developer, as members of

[60] Id.
[61] Id.
[62] Id.
[63] Id.
[64] Id. 271 S.C. at 344, 247 S.E.2d at 345.
[65] Id. 271 S.C. at 345, 247 S.E.2d at 344.
[66] 273 S.C. 140, 254 S.E.2d 803 (1979).
[67] Id. 273 S.C. at 141, 254 S.E.2d at 804.

> the general public, will also possess the enforceable right to use the parking facility does not defeat the constitutional validity of this project.

(emphasis added).[68]

As demonstrated by these cases, South Carolina courts have defined public use as implying " possession, occupation, and enjoyment of the land by the public at large or by public agencies...."[69] The use must be "a fixed, definite, and enforceable right of use, independent of the will of" another.[70] Moreover, the use must be one enforceable at law.[71] However, it is significant that the South Carolina courts have found that "[t]he term is an elastic one in order to keep abreast of changing social conditions, and presents a question of fact...." for the Court.[72]

IV. RECENT DEVELOPMENTS IN THE PUBLIC USE DOCTRINE

A. Poletown Overruled – County of Wayne v. Hathcock

After many years of facing academic criticism, the Michigan Supreme Court has reversed its famous decision of *Poletown Neighborhood Council v. City of Detroit*. The Michigan Supreme Court's July 2004 decision in *County of Wayne v. Hathcock* held that the use of the power of eminent domain to transfer property to private ownership is only allowed in a narrow selection of cases, not in every case where the project contributed to the health of the general economy.[73]

In *Hathcock*, Wayne County planned to build a business park near an expanded portion of the Municipal Airport.[74] The business and technology park, to be constructed on 1,300 acres

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[68] Id.
[69] Id.. at 856 *citing* Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280, 284 (1956).
[70] Id. at 857. ("independent of the will of a private lessor....") *citing Karesh v. City Council of City of Charleston*, 271 S.C. 339, 247 S.E.2d 342 (1978)("independent of the will of the person or corporation taking title under condemnation....").
[71] Id.
[72] *Karesh*, 247 S.E.2d at 342.
[73] Country of Wayne v. Hathcock, 471 Mich. 445, 481, 684 N.W.2d 765, 781 (2004).
[74] Id. 684 N.W.2d at 771.

the project known as the Pinnacle Project, was expected to create thirty thousand jobs and add $350 million in tax revenue for the County.[75] Under the plan, the County intended to lure business into the area by transferring ownership of the land to the businesses.[76]

The County used state and federal funding to purchase one thousand acres voluntarily from landowners.[77] The owners of nineteen parcels distributed in a checkerboard fashion throughout the project area refused to sell their land and refused to take the County's offer of just compensation after the County initiated condemnation proceedings.[78] These landowners challenged the County's right to take the land alleging the condemnations were for a private use.[79]

The Michigan Supreme Court agreed with the landowners and overruled the Poletown decision.[80] The court held there was no basis under the Michigan Constitution for allowing a condemnation where land was to be transferred to private owners "simply because one entity's profit maximization contributed to the health of the general economy."[81] The Michigan Supreme Court did not go so far as to hold that private ownership was impermissible, but instead held that condemnations and land transfers to private ownership were only permissible in three contexts: (1) where public necessity required collective action[82]; (2) the property remains subject to public oversight after transfer to a private entity[83]; and (3) where the property is selected because of

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[75] Id.
[76] Id. 684 N.W.2d at 781.
[77] Id. 684 N.W.2d at 771.
[78] Id.
[79] Id. 684 N.W.2d at 782.
[80] Id. 684 N.W.2d at 784.
[81] Id. 684 N.W.2d at 786.
[82] Id. 684 N.W.2d at 781. Examples of this sort of taking include private corporations constructing highways, railroads and gas lines. These entities would face logistical nightmares if forced to purchase the land individually. Id. at 782.
[83] Id. *citing* Lakehead Pipe Line Co. v. Dehn, 340 Mich. 25, 64 N.W.2d 903 (1954)(where the Court found permissible the condemnation for a gas pipeline where the new owner would be subject to regulation by the Michigan Public Service Corporation).

facts of independent significance rather than the interests of the private entity to which the property is transferred.[84]

B. Kelo v. City of New London Granted Cert to US Supreme Court

A very interesting development in this area occurred when the United States Supreme Court granted certiorari in *Kelo v. City of New London.*[85] The Connecticut Supreme Court in *Kelo* allowed the condemnation and transfer of land to a private corporation for the construction of a development area, which included a hotel, office park, museum, residential housing and a marina.[86] The development area was designed to complement an adjacent manufacturing facility owned by Pfizer.

The owners of property located in a development area sought an injunction against the city to prevent the taking.[87] The issue in this case was whether the federal and state constitutions allow the exercise of eminent domain to further an economic development plan.[88] The plan was expected to create over 1,000 jobs, increase tax revenue, and stimulate an economically distressed city.[89] The landowners challenged the taking claiming that (1) this type of economic development is not a constitutional public use; (2) even if such economic development was a public use, this case did not promote a sufficient public benefit; and (3) the condemning authority lacked sufficient control to ensure that the land would continue to be used for a public use.[90]

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[84] Id. The primary example of this is remedying blight and allowing companies to redevelop the area. The controlling purpose is to remove slum areas for the benefit of public, health, and safety, not to benefit private entities.
[85] 125 S.Ct. 27 (2004)
[86] 268 Conn. 1, 843 A.2d 500 (Conn. 2004).
[87] Id.
[88] Id. 268 Conn. at 5, 843 A.2d 507.
[89] Id.
[90] Id. 268 Conn. at 25-26, 843 A.2d at 519.

The landowners maintained that this condemnation was not consistent with the court's prior public use doctrine because the new owners would not provide a public service and the condemnation was not removing blight conditions that were harmful to the public.[91] The Connecticut Supreme Court agreed with the condemnor and held that the economic development by itself was a sufficient constitutional public use because of the possibility of secondary benefits, such as creating new jobs, increasing tax and other revenue, and contributing to urban revitalization.[92] The court found that the phrase "public use" cannot be absolutely defined because of the constant changing conditions in society, technology, and the fluctuations in the concept of the scope and function of government.[93] The court relied on the *Berman* and *Midkiff* decisions and gave deference to the legislature, focusing on the legislative purpose and motive of a taking. [94] Furthermore, the court concluded that applying heightened scrutiny when the power of eminent domain is exercised in a way that benefits a specific and identifiable private interest is inconsistent with the established precedent of giving deference to the legislature.[95]

The Court disagreed with the landowner's argument that any public benefit of this condemnation was incidental and insignificant compared to the benefit to private entities.[96] The Court instead held that the public purpose of a taking is not defeated because the land is transferred to private parties, especially when it is necessary to involve the private sector to successfully achieve the public purpose.[97] The evidence demonstrated that the taking was part of a comprehensive economic redevelopment plan, which would primarily benefit the public interest and not Pfizer.

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[91] Id. 268 Conn. at 26-27, 843 A.2d at 520.
[92] Id.
[93] Id. 268 Conn. at 35-36, 843 A.2d at 525.
[94] Id. 268 Conn. at 35-41, 843 A.2d at 525-528.
[95] Id. 268 Conn. at 41-46, 843 A.2d at 528-531.
[96] Id. 268 Conn. at 54-55, 843 A.2d at 536-537
[97] Id.

The *Kelo* landowners also argued that if such a project went forward there were no reasonable assurances of future public use because the development corporation would own the property and the city would not be a participant in developing the property.[98] The court concluded that there were sufficient statutory and contractual constraints to assure that the private entities involved will follow the provisions of the city's development plan.[99] The court found that the development plan included specific land use requirements that would have significant control over the land in the future.

The United States Supreme Court's grant of certiorari for the *Kelo* decision should serve as an interesting litmus test of the current Court's stance on the public use clause in the Fifth Amendment. This decision will be closely followed to see if the Court continues to give broad deference to public use takings involving transfers of land to private owners or if the Court attempts to place some limitations on this practice similar to those adhered to by the Michigan Supreme Court in *Hathcock.*

V. RECENT SOUTH CAROLINA PUBLIC USE CASE LAW

In 2003, the South Carolina Supreme Court once again addressed the issue of whether a condemnation was for a public use.[100] This case, *Georgia Department of Transportation v. Jasper County*, involved an attempt by Jasper County to condemn land in South Carolina owned by the Georgia D.O.T.[101]

In facts very similar to the rejected lease and parking garage arrangement rejected by the South Carolina Supreme twenty-five years ago in *Karesh v. City of Council of City of Charleston*, Jasper County planned to condemn the land and then lease the land to a private

[98] Id. 268 Conn. at 66-67, 843 A.2d at 543.
[99] Id. 268 Conn. at 68-69, 843 A.2d at 545.
[100] 355 S.C. 631, 586 S.E.2d 853.
[101] Id.

company for a 99 year lease.[102] The private company then in turn would construct and operate a marine terminal on the land.[103]

The Georgia D.O.T. argued that the condemnation was in violation of South Carolina's public use requirement, relying on the Court's decision in *Karesh*.[104] The trial court approved the condemnation and attempted to distinguish *Karesh* by relying on the fact that the terminal would be subject to federal regulations and maritime law.[105] The trial court felt that this regulation and the fact that Jasper County would act as landlord for the property was sufficient control to protect the public interest.[106]

On appeal, the South Carolina Supreme Court declined to distinguish *Karesh*.[107] The Court again found that a long-term lease to a private developer was not a sufficient control over the property to protect the public interest.[108] The Court emphasized its holding in *Karesh* that a long-term lease was not an acceptable arrangement by noting that the very same parking garage condemnation was approved in *Goldberg v. City Council of City of Charleston* when the City owned and operated the parking garage.[109]

The Court then further emphasized that the lease was the fatal flaw in the condemnation and left the door open for a different approach:

> [W]e emphasize it is the lease arrangement in the context of a condemnation that defeats its validity. We express no opinion regarding County's ability to accomplish the project in a different manner.[110]

In the end, the South Carolina Supreme Court's decision in *Jasper County* reaffirmed that

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[102] Id. *cf.* 271 S.C. 339, 247 S.E.2d 342 (1978).
[103] Id.
[104] Id.
[105] Id. 355 S.C. at 637, 586 S.E.2d at 856.
[106] Id.
[107] Id.
[108] Id.
[109] Id.
[110] Id. 355 S.C. at 639, 586 S.E.2d at 857.

a municipality may not use the power of eminent domain to condemn land from a private landowner and then enter into a long term lease whereby another private landowner takes possession of the land. This sort of arrangement does not rise to the level of control required to insure that a taking is for a public use.

VI. CONCLUSION

The public use requirement in the United States and South Carolina constitutions is an important limitation on the power of eminent domain. These limitations prevent the government from taking property solely for private gain. The more difficult question arises when the government takes land and simply involves a private entity in some capacity. Neither South Carolina's public use limitation or the Fifth Amendment prevents all takings that merely involve a private actor. The key concept, however, is control, as long as the government entity maintains sufficient control over the property, the taking will not be held to violate either constitutional provision.