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Robert A. Darling

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RIGHT OF CONDEMNATION FOR MUNICIPAL
OFF-STREET PARKING

During the past few years, municipalities have become increasingly concerned with the growing number of cars on the streets and the resulting parking problem. In their efforts to alleviate this problem, municipalities have sought to condemn private property for parking facilities. A municipal corporation has no inherent power of eminent domain and can only exercise such power when expressly authorized by statute.¹ Aside from general eminent domain statutes, the legislature may enact what are called "Off-Street Parking Acts" specifically granting the city power to condemn property for off-street parking.² By 1945, twenty-two states and the District of Columbia had enacted laws providing for off-street parking facilities.³ In some states, the general eminent domain statute provides that a city may enact an ordinance enabling the taking of property for parking facilities.⁴

The right of a municipality to use eminent domain proceedings arises only where property is to be taken for a public purpose, and of course the person whose property is taken must be paid a just compensation for that property.⁵ In this respect, the right of eminent domain is to be distinguished from the exercise of the police power of the state. Police power may authorize the taking and destruction of property without compensation to the owner, if such exercise is reasonable and promotes the general welfare of the citizens of the state.⁶ Thus the exercise of police power depends upon reasonableness, while eminent domain proceedings depend on a showing of public purpose.⁷

The words "public use" or "public purpose" have a changing meaning and are not static.⁸ The test of what is a public use is not based so much on the function being performed⁹ as upon the peculiar circumstances involved in each case.¹⁰ The fact that the legislature has enacted a parking statute seems to raise a presumption that public use is involved.¹¹ However, this question is not alone a legislative one but a judicial question as

1. *City of Los Angeles v. Koyer*, 48 Cal. App. 720, 192 P.2d 301 (1920); *Makay v. City of Los Angeles*, 136 Cal. App. 180, 28 P.2d 706 (1934); *City of San Francisco v. Ross*, 44 Cal. 2d 52, 279 P.2d 529 (1955); e.g., § 1-743, W.S. 1957.

2. *Miller v. City of Georgetown*, 301 Ky. 241, 191 S.W.2d 403 (1945).

3. *Annot.*, 8 A.L.R.2d 373, 383 (1949).

4. *Lenzner v. City of Trenton*, 22 N.J. Super 415, 91 A.2d (1952); cf. *Newcastle v. Toomey*, 78 Wyo. 432, 329 P.2d 264 (1958). The court held that where no statutory provision existed which authorized a city or town to exercise the power of eminent domain by a resolution or ordinance adopted by a town or city council, the city must follow the provisions in § 1-743, W.S. 1957.

5. *V.T.C. Lines v. City of Harlan*, ... Ky. ..., 313 S.W.2d 573 (1957).

6. *Ibid.*

7. *Supra* note 5.

8. *Barnes v. City of New Haven*, 140 Conn. 8, 98 A.2d 523 (1953).

9. *Cutnaw v. City of Columbus*, ... Ohio ..., 152 N.E.2d 27 (1958).

10. *Supra* note 8.

11. *Hawks v. City of Topeka*, 176 Kan. 240, 270 P.2d (1954).

well.¹² Some courts have said it is a question of law for the court and not a proper one for the jury to consider.¹³

Courts have taken judicial notice of the increasing number of automobiles on the street and the resulting traffic congestion in determining whether public parking facilities are for a public use.¹⁴ No case can be found which holds that off-street parking cannot possibly qualify as a public use. The important question seems to be how the facilities are operated, and the cases on the subject indicate the courts will consider any fact which throws light on the subject in deciding whether a municipality has properly preserved the public use aspect of the operation of the parking facilities. The stricter the control set up by the statute the more likelihood there will be that the court will find a public use rather than a private use.¹⁵ The fact that an Off-Street Parking Act leaves the details of operation to the discretion of the municipality governed by the local conditions does not render the statute unconstitutional unless for some other reason the statute does not preserve the public purpose.¹⁶ Of course the mere fact that the parking lot does serve the public will not prevent the court from holding that the taking was illegal if the city has not complied with the requirements of the statute.¹⁷ The functions performed in the operation of the parking facility, depending on local considerations, must be logical, necessary, and natural, to the purposes of the enabling act.

The judiciary has been very liberal in deciding whether the city has acted within the bounds of eminent domain and off-street parking statutes. For example, the fact that the city has property down the street that could be used for a parking lot does not detract from the purpose or necessity of taking other property.¹⁸ Alternatives make no difference, and one court has held that the city need not decide until after it gets title to the property whether or not it will be used for a parking lot.¹⁹ If the city condemns privately owned parking lots in order to build a parking ramp, this is not unreasonable or arbitrary even though the owners had plans to expand their facilities, to include a parking ramp.²⁰ However, even though the statute provides that a municipality may purchase land inside or outside the city limits if the city council passes an ordinance to that effect, the mere passage of the ordinance is not conclusive of the necessity for taking property outside the city limits.²¹

The city's management of the facility after it is put into operation

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12. *Denihan Enterprises v. O'Dwyer*, 302 N.Y. 451, 99 N.E.2d 235 (1951).
 13. *Bowman v. Kansas City*, 361 Mo. 14, 233 S.W.2d 26 (1950).
 14. *Miller v. City of Georgetown*, 301 Ky. 241, 191 S.W.2d 403 (1945).
 15. *Foltz v. City of Indianapolis*, 234 Ind. 656, 130 N.E.2d 650 (1955).
 16. *Hawks v. City of Topeka*, 176 Kan. 240, 270 P.2d 270 (1954).
 17. *Forsyth v. City of Chanute*, 179 Kan. 155, 292 P.2d 687 (1956).
 18. *City of Trenton v. Lenzner*, 16 N.J. 465, 109 A.2d 409 (1954).
 19. *Ibid.*
 20. *Court Street Parking Co. v. City of Boston*, 336 Mass. 224, 143 N.E.2d 683 (1957).
 21. *Harden v. Alameda*, 44 Cal. 2d 630, 284 P.2d 9 (1954).

will be closely scrutinized in deciding whether the public use aspect is being preserved. Leasing of the facility to a private operator does not destroy the public use aspect, if the city through proper provision in the lease provides that the public use aspect will be preserved, even if some private benefit is being conferred on the lessee.²² The lease must be for a definite period²³ and should specify certain minimum controls that the city will exercise after the lease is executed, among them the following: A lease which provides that the lessee will rent all the facilities acquired by the city in the future is invalid as an attempt of one city council to bind the future councils.²⁴ Provisions that the lessee agrees to rebuild any facilities destroyed by fire is unreasonable unless the council is given the opportunity to determine whether the facility should be rebuilt, since subsequent governing bodies might resolve that such facilities could no longer serve the public purpose.²⁵ If the arrangements for operation do not insure against discrimination, or the city does not set minimum rates to be charged, these shortcomings may be indicative of private rather than public use.²⁶ But a low minimum rate set by the city may be enough to indicate city supervision over the rates.²⁷ If the Off-Street Parking Act provides that a certain amount of space can be used for private shops, the fact that the lessee is making partly-private use of the facility does not detract from the over-all public use aspect. Presumably this does not make the act unconstitutional.²⁸ The courts are inclined to look into every provision of the lease in considering whether the public use aspect is being preserved.

Any citizen has a basic common law right to bring an action to enjoin the use of public property for a private use, and to enforce the public duties owed.²⁹ This includes any taxpayer³⁰ and plaintiff need not show any substantial personal interest to get standing to sue. For this reason the cases on the subject reveal many kinds and classes of plaintiffs.

The largest class of plaintiffs are those whose property is being condemned for off-street parking lots,³¹ and who directly attack the taking of the property on the grounds that it will not be used for a public use. Other plaintiffs may attack some phase of the proposed taking or the operation of parking lots *indirectly*, raising the question of whether the

22. *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 77 N.W.2d 862 (1956).

23. *Foltz v. City of Indianapolis*, 234 Ind. 656, 130 N.E.2d 650 (1955).

24. *Hawks v. City of Topeka*, 176 Kan. 240, 270 P.2d 270 (1954).

25. *Ibid.*

26. *Supra* note 23.

27. *Larsen v. City of San Francisco*, 152 Cal. App.2d 335, 313 P.2d 959 (1957).

28. *Denihan Enterprises v. O'Dwyer*, 302 N.Y. 451, 99 N.E.2d 235 (1951) (small stores on the ground floor of the facility); *contra*, *Shizas v. City of Detroit*, 333 Mich. 44, 51 N.W.2d 589 (1952); *City of San Francisco v. Ross*, 44 Cal. 2d 52, 279 529 (1955).

29. *Supra* note 23.

30. *Hayden v. City of Houston*, --- Tex. ---, 305 S.W.2d 798 (1957).

31. *Stanpark Realty Corporation v. City of Norfolk*, 199 Va. 716, 101 S.E.2d 527 (1958).

public use is being preserved. These plaintiffs include; (a) Citizens protesting the issuance of bonds for such a purpose;³² (b) Businessmen against whom taxes are being assessed for the improvement in their area;³³ (c) Businessmen attacking the operation of parking lots and ramps on the grounds that such a facility only benefits those people whose businesses are in close proximity to the faculty, indicating that a private rather than a public purpose is being preserved;³⁴ (d) Citizens whose property was to be condemned and the proceedings were later abandoned;³⁵ (e) Persons seeking to stop the city from entering into a contract with a private contractor for the construction of a parking ramp;³⁶ (f) Plaintiffs who want damages for property not actually taken, on the grounds that such property which is used in conjunction with other property will be worthless for its present use;³⁷ (g) Parking lot operators who have attacked the taxing of private lots where public lots leased to private operators are not taxed because of the public function being performed.³⁸

There have been no cases reported in Wyoming on the subject of off-street parking. Under § 1-173, W.S. 1957, a municipality may condemn property for public purposes "including streets, alleys or public highways as sites for public buildings, or for any public purpose." If the statute were amended to specifically include off-street parking, this would go far to establish that a public use was involved. Such an amendment should include: (1) maximum length of leases, (2) minimum rates to be charged, (3) possible sizes of parking lots varying with the population of the city in which they are located, (4) the amount of space of such city-operated parking lots that can be used for private purposes, such as private shops etc., (5) a city may issue bonds for such a purpose. From what has been said above, however, a condemnation under such an amendment might still be subject to challenge on the grounds that the use was private. Such legislative action would raise a presumption that public purpose would be served by the construction of parking facilities. However, the city can avoid any argument that the parking lot is not being used for a private purpose only by adequate control over the facility after it is put into operation.

ROBERT A. DARLING

THE AESTHETIC AS A FACTOR CONSIDERED IN ZONING

Emphasis on the nature of beauty and good taste was of definite concern to philosophers such as Plato, Aristotle, and Hegel and today it remains a vital subject for legal speculation.¹ This is particularly true in the

32. *Reviere v. Orlando Parking Commission*, ... Fla. ... , 74 So.2d 694 (1956).

33. *Whittier v. Dixon*, 24 Cal. 2d 664, 151 P.2d 5 (1944).

34. *Brodhead v. City of Denver*, 126 Colo. 119, 247 P.2d 140 (1952).

35. *Eways v. Reading Parking Authority*, 385 Pa. 592, 124 A.2d 92 (1956).

36. *Supra* note 30.

37. *City of Quincy v. Best Plumbing*, 17 Ill. 2d 570, 162 N.E.2d 373 (1959).

38. *Cabot v. Assessors of Boston*, 335 Mass. 53, 138 N.E.2d 618 (1956).

1. *Bridgwater & Sherwood*, *The Columbia Encyclopedia*, 22 (1956).