

January 1960

Municipal Corporations - Eminent Domain

M. Neal Singer

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

M. Neal Singer, Municipal Corporations - Eminent Domain, 37 Dicta 265 (1960).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

CASE COMMENTS

MUNICIPAL CORPORATIONS — EMINENT DOMAIN

The Denver City Council enacted an ordinance¹ which granted to the State Department of Highways the right to construct and maintain a highway, extending along the eastern section of City Park. Petitioner, a citizen of the city and abutting property owner, alleged that the proposed grant of park land was void since it violated the state constitution and the City Charter. It was proposed that such land was held in trust, dedicated to use of the public; therefore, the city, acting as trustee, was powerless to convey this property unless the state should institute condemnation proceedings. The court affirmed a judgement declaring the proceedings to be a "useless act" because both the City Council and the Department of Highways had previously agreed upon adequate compensation and damages to be paid for the land. *Welch v. City and County of Denver*, 349 P. 2d 352 (Colo. 1960).

It was established in *McIntyre v. Board of County Commissioners of El Paso County*² that land dedicated to public use as a public park cannot be conveyed away or alienated to a use inconsistent with that of its dedication. In that case the city attempted to convey a section of public park land to the county for erection of a courthouse. It was held that the city, as trustee, had no authority for such conveyance.³ The court further stated that if land is dedicated for a park, the citizens, beneficiaries of the trust, are entitled to use of the whole. If trustees are permitted to say that a particular section is not needed or necessary for the dedicated purpose, then it follows that the larger portion of it is not so needed; thus, the entire purpose of the dedication is defeated.⁴

The charter of Denver provides that no section of any park land belonging to or acquired by the City and County of Denver shall be sold or leased at any time.⁵ The Colorado Constitution states that the people of the City and County of Denver are vested with exclusive power in making, altering, revising or amending their charter.⁶ Numerous state courts have repeatedly held that a municipality, standing as trustee to property dedicated to public use, may not convey such property to a use completely inconsistent with limitations arising out of the trust or dedication agreement.⁷

Granted, the state's power to acquire, by condemnation or otherwise, lands of municipal corporations has been delegated to the Department of Highways.⁸ However, the "or otherwise" clause does not constitute an absolute power.⁹ Upon dismissing a petition to

¹ Denver, Colo., Rev. Municipal Code § 302 (1958), provides in pertinent part: "... the Council of the City and County of Denver hereby gives and grants unto the Department of Highways . . . the right and privilege to construct and maintain a street and highway in the following described real property . . . in connection with and as a part of the improvement . . . of State Highway No. 153 and No. 2 which pass through the City and County of Denver."

² 15 Colo. App. 78, 61 Pac. 237 (1900).

³ *Id.* at 85.

⁴ *Id.* at 85-86.

⁵ Colo. Const. art. XX, § 5 as amended by Denver, Colo., Rev. Municipal Code § 84 (5) (1955).

⁶ Colo. Const. art. XX, § 5 (1950).

⁷ *Village of Riverside v. Maclean*, 210 Ill. 308, 71 N.E. 408 (1904); *Price v. Thompson*, 48 Mo. 361 (1871); *Boston and Albany Railroad Co., 53 N.Y. 574* (1873); *Zachry v. City of San Antonio*, 157 Tex. 551, 305 S.W.2d 558 (1957); *Rayor v. City of Cheyenne*, 63 Wyo. 72, 178 P.2d 115 (1947).

⁸ Colo. Rev. Stat. §§ 120-3-17, 120-13-35(11) (1953).

⁹ *Town of Eaton v. Bauslog*, 133 Colo. 130, 292 P.2d 343 (1956).

condemn land for cemetery purposes in *Town of Eaton v. Bauslog*,¹⁰ the court stated that municipalities are permitted by statute¹¹ to establish and regulate cemeteries, and acquire land therefore by purchase or otherwise. But it cannot be implied from the word "otherwise" that the town has authority to condemn land for such purpose. If it can be said that use of this word creates a doubt, the power of condemnation has not been granted.¹²

Petitioners in *Beth Medrosh Hagodol v. City of Aurora*¹³ sought to condemn land used as a public cemetery for the purpose of expanding reservoir facilities. The court stated that vague or doubtful language found in statutes must be excluded.¹⁴ The power is withheld unless it is specifically and unequivocally granted.¹⁵ Of course, authorities unanimously affirm the proposition that the state may condemn any land which it deems necessary and proper,¹⁶ and such action will not be questioned unless it is fraudulent or no actual public need existed.¹⁷

Authorities in other jurisdictions tend to strengthen petitioner's argument in the instant case. *United States v. Carmack*¹⁸ questioned whether the Federal Works Administration was authorized to acquire land held in trust by the town for its inhabitants and used for such public purposes as a local park, courthouse, city hall and public library. The Court allowed voluntary conveyance of whatever title the city was able to convey. However, the Court took notice of restrictions in the conveyance, arising out of the trust relationship, and permitted all claimants to any interest through the grantors of the disputed site to be joined as defendants.¹⁹ Thus, a decree of condemnation disposed of the suggested defects and provided a judicial process for securing better title than may be obtained solely by voluntary conveyance.²⁰

The majority of the court in the *Welch* case pointed out that a successful agreement concerning adequate compensation and damages was reached. They held that this satisfied the required condition precedent to an institution of eminent domain proceedings — namely, that such agreement be attempted.²¹ Further, the court reasoned, if a compromise was obtained, why should the state be compelled to institute condemnation proceedings?

It appears that the trust relationship existing between the city and petitioner was entirely discarded. This conveyance deprived the petitioner, as a beneficiary of the park's dedication, of her rights which are guaranteed by the Constitution of the United States.²²

¹⁰ *Ibid.*

¹¹ Colo. Rev. Stat. § 139-32-1(32) (1953).

¹² *Town of Eaton v. Bauslog*, *supra* at 132.

¹³ 126 Colo. 267, 248 P.2d 732 (1952).

¹⁴ *Id.* at 272.

¹⁵ *Ibid.*

¹⁶ *Burns v. Metropolitan Dist. Comm'n.*, 325 Mass. 731, 92 N.E.2d 391 (1950).

¹⁷ *Jennings v. Bd. of Comm'ns. of Montrose County*, 85 Colo. 498, 277 Pac. 467 (1929); *Alabama Power Co. v. Gulf Power Co.*, 283 Fed. 606 (1922); *Carstens v. Public Util. Dist. No. 1 of Lincoln County*, 111 P.2d 583 (1941).

¹⁸ 329 U.S. 230 (1946).

¹⁹ *Id.* at 239.

²⁰ *Ibid.*

²¹ *Accord*, *Stalford v. Bd. of County Comm'rs of Prowers County*, 128 Colo. 441, 263 P.2d 436 (1953); *Old Timers' Baseball Ass'n v. Housing Authority of Denver*, 122 Colo. 597, 224 P.2d 219 (1950); *Mulford v. Farmers Reservoir and Irrigation Co.*, 62 Colo. 167, 161 Pac. 301 (1916).

²² U.S. Const. amend. XIV, § 1, provides in pertinent part: ". . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

*Eustace v. Dickey*²³ and *In re Fulton's Will*²⁴ are just two examples of the recognized principle that a trustee has a duty to administer the trust solely in the beneficiary's interest and may not change the scope of the purposes for which such property is held without the beneficiary's consent.²⁵

Thus, it seems that the *Welch* case is a novel and radical decision in Colorado. It is submitted that the court went beyond its limitations in approving the city's action. The ordinance²⁶ granting park land to the Department of Highways obviously amounted to a sale. There was an exchange of an interest in the land for damages paid to the city. Since the court evidently interpreted this transaction as constituting an easement, it is apparent that this was an "evasive device" to by-pass provisions of the state constitution.

Although the state, exercising its sovereign rights, may condemn such land, its approach in this instance was without precedent. Petitioner proved her interest in contesting the action, yet she was not even allowed to voice her disapproval in a court of law. Further application of this view to similar areas of the law will substantially minimize individual rights as guaranteed by the Constitutions of the United States²⁷ and of Colorado.²⁸

—M. NEAL SINGER

²³ 240 Mass. 55, 132 N.E. 852 (1921).

²⁴ 2 N.Y.S.2d 917, 253 App. Div. 494 (1938).

²⁵ *Rottger v. First-Merchants' Nat. Bank of Lafayette*, 98 Ind. App. 139, 184 N.E. 267 (1933).

²⁶ Denver, Colo., Rev. Municipal Code § 302 (1958).

²⁷ U.S. Const. amend. XIV, § 1.

²⁸ Colo. Const. art. XX, § 5 (1950).

THE DENVER BAR ASSOCIATION,
THE COLORADO BAR ASSOCIATION, AND
THE UNIVERSITY OF DENVER COLLEGE OF LAW

WELCOMES

THE NATIONAL INSTITUTE OF MUNICIPAL
LAW OFFICERS

TO THEIR

SILVER ANNIVERSARY CONFERENCE
IN DENVER, COLORADO

SEPTEMBER 25-26-27-28-29, 1960