

N.D.A.G. Letter to Slorby (Jan. 26, 1989)

January 26, 1989

Mr. Tom P. Slorby
Ward County State's Attorney
Minot County Courthouse
Minot, ND 58701

Dear Mr. Slorby:

Thank you for your September 30, 1988, letter. Your question concerns a tract of land Ward County acquired from the state by condemnation. The 1946 order of condemnation says the land was condemned for park and recreational purposes. The county is considering selling the land to a private person. Should it do so, the land would no longer be used for park and recreational purposes or for any other public purpose. The issue is whether the conveyance will cause the land to revert to the state.

To determine whether land reverts to the condemnee if it is not used for the purpose of the condemnation, it is vital to determine what kind of estate the condemnor took. The law is summarized at 3 Nichols on Eminent Domain § 9.36[1] - [4] at 9-113 - 9-118 (rev. 3d ed. 1985):

It is well settled that when an estate has been taken by eminent domain for the public use or has been acquired by purchase . . . if the public use is subsequently discontinued or abandoned, the public easement is extinguished, and the possession of the land reverts to the owner of the fee

Similarly, when a fee is acquired by a municipal . . . corporation conditional upon the continuance of the public use, if the use is discontinued or abandoned, the title and right to possession revert to the grantor. However . . . there must be an expressed intent to create such a fee interest.

When, however, a fee simple free from any easements or conditions is acquired, either by purchase or by . . . eminent domain, if the use for which the land was . . . condemned is lawfully discontinued or abandoned, there is no reversion.

See also 26 Am. Jur. 2d Eminent Domain 147 (1966); 30 C.J.S. Eminent Domain 460 (1965). Thus, if an easement or conditional fee is created, the property will revert. If a fee simple absolute is created, the property will not revert. To determine the interest taken in a condemnation one should examine the condemnation proceedings, the statutes in effect at the time, and the interest necessary to accomplish the purposes of the condemnation. See, e.g., Elliott v. City of Guthrie, 725 P.2d 861, 864 (Okla. 1986).

Courts have reviewed the pleadings and condemnation orders in condemnation proceedings to determine the estate taken. See Elliott v. City of Guthrie, 725 P.2d at 864-66; Brixey v. City of Booneville, 687 S.W.3d 126, 127 (Ark. 1985); City of Caldwell v. Roark, 575 P.2d 495, 497 (Idaho 1978). First, therefore, Ward County's complaint should be reviewed to determine if it describes the kind of interest Ward County sought in the condemnation proceeding. Also, apparently Ward County and the state entered into a stipulation settling the case. That stipulation should also be studied to determine if it discusses the interest taken by Ward County. My office has neither of these documents.

Finally, the district court's 1946 order of condemnation, which you attached to your letter, should be reviewed. That order does not specify the interest taken by the county in the condemnation proceeding. It states that the land is "condemned and set apart to Ward County . . . for park and recreational purposes, all pursuant to Section 32-1527 of the North Dakota Revised Code of 1943." The language of the order seems to suggest Ward County did not receive fee simple absolute to the land, but an easement or a defeasible fee for a specific purpose. Yet, at best, the order is ambiguous. Most jurisdictions have held that "in the case of an ambiguous condemnation judgment, the condemnor takes only an easement." Egaas v. Columbia County, 673 P.2d 1372, 1375 (Or. Ct. App. 1983).

The statute referred to in the order, § 32-1527 N.D. Rev. Code 1943. states as follows:

When payments have been made as required in sections 32-1525 and 32-1526 the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the register of deeds of the county and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

The last part of the statute says that after the filing of the condemnation order "the property described therein shall vest in the plaintiff for purposes therein specified." This suggests that the property vests in the condemnor only for the described purposes and that the condemnor may use it only for that Purpose.

Both the condemnation order and the statute referred to in the order state that the land is transferred to Ward County for park and recreational purposes. From these circumstances one might conclude Ward County holds less than fee simple absolute in the land. Although there is no judicial decision on point, there are decisions that support this conclusion. Summerill v. Hunt, 55 A.2d 833 (N.J. 1947), overruled on other grounds Valentine v. LaMont, 100 A.2d 668, 673 (N.J. 1953), cert. denied 347 U.S. 966 (1954); Harn v. State, 87 P.2d 127, 131 (Okla. 1939); Lithgow v. Pearson, 135 P. 759, 761 (Colo. Ct. App. 1913); Nevarez v. State Armory Bd., 502 P.2d 287, 291 (N.M. 1972).

If section 32-1527 were the only statute at issue, it would appear Ward County did not take a fee simple absolute. There is, however, another statute which casts some doubt on such a conclusion. That statute, 32-1503 N.D. Rev. Code 1943, states as follows:

The following is a classification of the estates and rights in land subject to be taken for public use:

1. A fee simple, when taken for Public buildings or grounds.
2. An easement, when taken for any other purpose;
3. The right of entry upon and occupation of lands and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for a public use.

This statute could be interpreted to set forth the only three types of estates a condemnor may take. Because the statute provides that a fee simple is to be taken for public grounds, and because Ward County's condemnation was for public grounds, Ward County may have assumed a fee simple title. Even if this analysis is correct, however, this does not necessarily mean the state is without a contingent right of reversion. Only if a "fee simple [is] free from any easements or conditions" is there no reversion. 3 Nichols on Eminent Domain § 9.36[4] at 9-118 (rev. 3d ed. 1985). As explained, both the condemnation order and section 32-1527 seem to impose a condition that Ward County use the land as a park. Thus, Ward County may not have fee simple absolute, but rather a fee simple defeasible interest in the property.

One might also look to general principles of eminent domain law to help interpret these statutes and determine Ward County's interest in the property. One of these principles is that statutes granting the power of eminent domain are to be strictly construed. Wallentinson v. Williams County, 101 N.W.2d 571, 575 (N.D. 1960). "[T]herefore, that construction must be adopted which leaves the owner with the greatest possible estate, in the event of uncertainty or indefiniteness in the statute." *Id.* See also Feiler v. Wanner, 340 N.W.2d 168, 171 (N.D. 1983). In Sheridan County v. Davis, 240 N.W. 867, 870 (N.D. 1932), the court said: "If any doubt existed as to the proper construction of our statute . . . it should be resolved against the authority to take the fee."

The final element to consider in determining the interest taken by a condemnor is the title necessary for Ward County to effectively use the land as a park. It is a disputed question whether the interest acquired by the public in a park constitutes a fee simple absolute or something less. 3 Nichols on Eminent Domain § 11.208 at 11-33 (rev. 3d ed. 1985). Nichols states that the weight of authority is that a fee is taken for a park, "but the view that a park is only an easement is not without support." *Id.*

In summary, all documents in the 1946 condemnation proceedings should be reviewed to determine what interest Ward County took. Because my office does not have all these papers, I cannot make a full evaluation. Furthermore, the statutes in effect in 1946 are not entirely helpful in deciding whether a condemnor takes fee simple absolute, or something less. Finally, it is a factual question whether Ward County needs to hold fee simple

absolute in the land to operate it effectively as a park, or whether it could properly manage the park by holding less than a fee simple absolute.

Although I cannot answer the question you pose I hope this letter does give you some guidance.

Sincerely,

Nicholas J. Spaeth

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