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Excess Condemnation - Must the Interest Condemned in Private Property be Proportional to the Public Use? - The Effect of City of Charlotte v. Cook

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I. INTRODUCTION

In 1997, the North Carolina Court of Appeals held in City of Charlotte v. Cook\(^1\) that it is an abuse of legislative discretion for a governmental condemning authority to condemn a greater estate in land than is necessary to accomplish the intended public purpose.\(^4\) The Cook Court ruled that the taking of fee simple title to private property can be restricted when the governmental authority determines that the taking of a lesser interest, such as an easement, would suffice to accomplish the intended public use.\(^5\) In its unanimous decision, the court recognized the principle that “the power to take private property is in every case limited to such and so much property as is necessary for the public use in question.”\(^6\) Thus, the court limited the City of Charlotte to condemning only an easement across the dairy farm of Ernest and Ruby Cook when the condemnation of a section of their farm in fee simple was not necessary for the purposes of installing and servicing an underground water pipeline.\(^7\)

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4. Id. at 207, 479 S.E.2d at 505.
5. Id.
7. Id. at 208, 479 S.E.2d at 506.
However, in 1998 the North Carolina Supreme Court reversed the Court of Appeals decision, giving great deference to the condemning authority and little consideration as to whether a legislative abuse of discretion occurred. The Supreme Court held: "if the City can show that it needs a fee simple title to construct and operate the [water] line under optimum conditions, this is proof of necessity." Even when ample evidence was produced tending to show that an easement would suffice, the court allowed the City of Charlotte to take fee simple title to a section of the Cook farm—essentially dividing the property into two separate parcels. Today, the Cook decision suggests government convenience—rather than true public necessity—may be the determining factor in future condemnation cases in North Carolina.

This note will examine the North Carolina Supreme Court's decision in City of Charlotte v. Cook. Part II of the note sets out the factual background and issues raised by the Cook decision and details the reasoning of both the North Carolina Court of Appeals and the North Carolina Supreme Court in ruling on the issues. Part III analyzes the Supreme Court's holding and concludes that greater judicial scrutiny of eminent domain practices is essential to protect the private property owner from abusive takings.

II. CITY OF CHARLOTTE V. COOK

A. Factual Background

During the fall of 1994, Charlotte-Mecklenburg Utility Department ("CMUD") began constructing the North Mecklenburg Water Treatment Plant ("Plant") in Mecklenburg County, North Carolina. As designed, the Plant and its facilities would service residents in eastern and northern Mecklenburg County by treating eighteen million gallons of raw water per day. Both CMUD's Plant, and part of CMUD's Water Line, were constructed in territory exclusively assigned to Crescent Electric Membership Corporation ("Crescent EMC") by the North Carolina Utilities Commission.

9. Id. at 226, 498 S.E.2d at 608 (emphasis added).
10. Id.
11. Id. at 222, 498 S.E.2d at 605.
12. Appellant's Brief to the N.C. Court of Appeals at 4, City of Charlotte v. Cook, 125 N.C. App. 205, 479 S.E.2d 503 (1997) (No. COA96-364); Record at 89.
13. Appellee's Brief to the N.C. Court of Appeals at 3, City of Charlotte v. Cook, 125 N.C. App. 205, 479 S.E. 2d 503 (1997) (No. COA96-364); Record at 105.
14. Appellant's Brief to the N.C. Court of Appeals at 3, Cook (No. COA96-364); Record at 89. Pursuant to Chapter 62-110.2 of the North Carolina General Statutes,
As part of CMUD's Water Line project, the City of Charlotte sought to condemn fee simple title to, as opposed to acquiring an easement across, the portion of the Water Line route which crosses a dairy farm owned by J. Ernest and Ruby H. Cook.\textsuperscript{15} The Cooks acquired the dairy farm in 1961 and used the portion sought by the City as pasture land for their dairy herd.\textsuperscript{16} The City's planned acquisition of a seventy-foot wide strip across the farm would result in the division of the Cook property into two separate parcels, leaving one parcel land-locked.\textsuperscript{17}

On September 12, 1994, the Charlotte City Council voted to condemn in fee simple the seventy-foot strip across the Cook farm.\textsuperscript{18} Prior to the vote, the Director of CMUD was questioned as to whether it was technically possible to accomplish CMUD's purposes with an easement across the Cook property.\textsuperscript{19} The Director responded, "It is technically possible, but not preferable."\textsuperscript{20}

On October 18, 1994, the City filed a Complaint and Declaration of Taking and Notice of Deposit with the Superior Court of Mecklenburg County.\textsuperscript{21} Although Chapter 40A of the North Carolina General Statutes generally sets forth the "exclusive condemnation procedures" to be used within North Carolina, the City of Charlotte's Legislative Charter authorizes the City, under limited conditions, to condemn property under the "quick take" provisions of Article 9 of Chapter 136.\textsuperscript{22} Upon the filing of the Complaint and Declaration of Taking and

\textsuperscript{15.} Id.
\textsuperscript{16.} Id.
\textsuperscript{17.} Id.
\textsuperscript{18.} Id.
\textsuperscript{19.} Id.
\textsuperscript{20.} Id. (emphasis in original). At the meeting, the City's Deputy Attorney General, Mike Boyd, stated, "It is possible that an easement could be used, and an easement could be defined that could basically include any project the City might want to undertake." Id. (emphasis in original).
\textsuperscript{21.} Id. at 5; Record at pp. 4-18.
\textsuperscript{22.} Id. See also N.C. Gen. Stat. § 40A (1999); N.C. Gen. Stat. § 136 (1999); City of Charlotte Charter art. 1 Eminent Domain sec. 7.81. The North Carolina General Assembly enacted Chapter 40A of the General Statutes in 1982. Unlike the "quick take" provision allowed in Chapter 136, under Chapter 40A each owner of an interest in the land sought to be condemned must be given 30 days notice prior to the filing of a complaint. This new act has the effect of bringing about the long needed reform repealing the unnecessary proliferation of local laws, including those authorizing the use of "quick take" condemnation by cities. James A. Webster, Jr., Webster's Real Estate Law In North Carolina § 19-3 (Patrick K. Hetrick & James B. McLaughlin, Jr.
Notice of Deposit with the Court, title to and right to possession of the Cook property automatically vested in the City of Charlotte.23

Following the City's filing of the complaint and declaration, the Cooks filed an answer, asserting that the taking of their property in fee simple was unnecessary for the public use and amounted to an abuse of legislative discretion.24 Pursuant to the Cooks' Motion to Determine Issues other than Damages under North Carolina General Statutes Chapter 136-108, a hearing was scheduled for October 5, 1995.25

In anticipation of the hearing, the City of Charlotte filed an affidavit by Thomas W. Vandeventer, Special Projects Manager for Charlotte.

ed., 5th ed. 1999). Unfortunately, the City of Charlotte has started the old process of local laws all over again by reobtaining the quick take condemnation procedure of Chapter 136 of the General Statutes. Id.

Section 7.81 of the Charlotte Charter provides in pertinent part:

The City of Charlotte shall have the power of eminent domain and may acquire, either by purchase, gift, or condemnation, any land, right of access, right of way, water right, privilege, easement, or any other interest in or relating to land, water or improvements, either within or without the city limits, for any lawful public use or purpose... In the exercise of its authority of eminent domain for the acquisition of property to be used for streets and highways, water supply and distribution systems, sewage collection and disposal systems, and airports, the City of Charlotte is hereby authorized to use the procedure and authority prescribed in Article 9 of Chapter 136 of the General Statutes of North Carolina, as now or hereafter amended; provided further, that whenever therein the words “Secretary” or “Secretary of Transportation” appear, they shall be deemed to include the “City Manager”; provided further that nothing herein shall be construed to enlarge the power of the City of Charlotte to condemn property already devoted to public use.

City of Charlotte Charter art. 1 Eminent Domain § 7.81. (emphasis added).

24. Cook at 206, 479 S.E.2d at 505. The Answer included the following affirmative defenses:

1. It was not necessary to condemn the property in fee simple
2. The fee simple taking deprives the Cooks of use of the property not inconsistent with the municipality's purpose
3. The municipality's actions constituted arbitrary and capricious conduct, and a manifest and oppressive abuse of discretion
4. The municipality was not condemning the property for a public use or purpose; and
5. The municipality was not authorized to condemn the Cook's property under Article 9 of N.C.G.S. Chapter 136.

Record at 41-45.
25. Appellee's Brief to the N.C. Court of Appeals at 3, City of Charlotte v. Cook, 125 N.C. App. 205, 479 S.E.2d 503 (1997) (No. COA96-364); Record at 105.
Mr. Vandeventer stated it was in the City's best interest to acquire the route for the pipeline in fee simple based on factors including the depth of the pipeline and the need for effective control over all uses of the pipeline route. The Cooks filed an affidavit by James Butler, an engineer and former Director for the Raleigh Utilities Department who examined drawings, sketches, and diagrams for CMUD's Water Treatment Plant. Mr. Butler refuted the necessity of fee simple title to the strip of property, and concluded that the installation of a pipeline could be accomplished by acquiring an easement across the Cook property.

The Cooks also contended that CMUD sought to condemn fee simple title to the Cook Property in an attempt to own contiguous tracts of land comprising CMUD's Plant and Water Line. Under section 62-110.2 of the North Carolina General Statutes, a consumer may choose its electric supplier if the premises to be served lies within 300 feet of more than one electric supplier. A 1997 North Carolina Court of Appeals ruling allowed CMUD to choose between competing electric suppliers.

26. Record at 104, City of Charlotte v. Heath, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946). Mr. Vandeventer stated that other factors for acquiring fee simple title included the fact that costs for fee simple acquisition were not anticipated to be significantly different than for acquisition of an easement, and the ability the City would have to purchase electric power from Duke Power or Crescent provided the City with the ability to choose the power supply that is the most economical. Record at 108, Cook (No. COA96-364).

27. Id. at 104-108.

28. Id. at 93-101.

29. Id. Mr. Butler concluded:

In my expert opinion, and pursuant to standard practices within the water and sewer utility and construction industries, specifically including, but not limited to, standard practices within the municipal water system industry, there are no operational considerations for the Pipeline(s) requiring fee simple title to the Cook Property. Instead, in my expert opinion, and pursuant to standard practices within the water and sewer utility and construction industries, specifically including, but not limited to, standard practices within the municipal water system industry, CMUD can construct the Pipeline(s), effectuate all of CMUD's operational needs, and accomplish all of CMUD's purposes by acquiring an easement across the Cook Property.

Id. at 96. (emphasis added).

30. Appellant's Brief to the N.C. Court of Appeals at 22, Cook (No. COA96-364).


(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

(4) Any premises... located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the...
suppliers, Duke Power and Crescent EMC, once CMUD met the statutory requirements of ownership of one "premises" located on contiguous tracts of land. 32 The Cooks argued that ownership of contiguous tracts would allow the City to claim a legal right to purchase electric power for its plant from Duke Power Company ("Duke Power"), rather than from Crescent EMC, the electric supplier assigned the territory through which the pipeline would run. 33 Thus, the Cooks argued that CMUD's desire to purchase electricity from Duke Power was not motivated by necessity, but rather by mere preference for one electric supplier over another. 34

Nevertheless, on December 6, 1995 the trial court ruled in favor of the City. 35 The trial judge determined that the taking was for a public

lines of another electric supplier . . . may be served by such one of said electric suppliers which the consumer chooses. . . .


33. Appellant's Brief to the N.C. Court of Appeals at 22, Cook (No. COA96-364). A memorandum from Gary Talmage to Mike Horsley (both employees of Black & Veatch, the engineering firm hired by City to design and oversee the construction of CMUD's new Plant and Water Line), states:

I talked to [CMUD Plant project manager] Tom Vandeventer this morning on the electric power utility issue. CMUD staff has received endorsement by City Manager for pursuing property purchase to facilitate Duke Power service to the intake and plant. While there are City Council and County Commission hurdles remaining, we are to proceed with our design based on the Duke Power service.

Id. at 23; Exh. p. 97. Further, a December 21, 1993 internal Duke Power message to Wm. Larry Sheppard, Gregor D. Fields, then Duke Power G.O. Power Marketing, states:

John Freeze, Account Executive for this CMUD project had rec'd word from Barry . . . , Deputy Director-CMUD, that a decision had been made to purchase property for the above CMUD project from the water intake to the treatment facility. You may recall we recommended that they purchase property to alleviate any arguments about Duke gaining rights to serve total facility based on contiguous premise. . . . Since this, Laura Kratt at the City Attorneys Office wanted to talk with Duke to make sure that CMUD had to purchase this property to serve the entire facility. (They may have to look at condemning some land to get it.) She wanted something to stand on to justify the purchase.

Id. at 24; Exh. pp. 302-303. (emphasis added).

34. Appellant's Brief to the N.C. Court of Appeals at 22, Cook (No. COA96-364).

35. Record at 128-132, Cook (No. COA96-364).
purpose, was necessary, and was not arbitrary, capricious or an abuse of discretion.\textsuperscript{36} The Cooks promptly appealed.

B. The North Carolina Court of Appeals Decision

On January 21, 1997, the North Carolina Court of Appeals addressed whether the trial court erred in allowing the City of Charlotte to condemn a portion of property belonging to the Cooks in fee simple in order to construct a pipeline.\textsuperscript{37} The court reversed the trial court decision and unanimously held that it is an abuse of discretion for a condemning authority to condemn a greater estate in land than is necessary to accomplish the intended public purpose.\textsuperscript{38}

In its analysis, the court acknowledged that once a public purpose is established, a taking is not reviewable by the courts.\textsuperscript{39} However, allegations of arbitrary and capricious conduct or of abuse of discretion on the part of the condemnor render the issue subject to judicial review.\textsuperscript{40} The court recognized that an abuse of discretion results when an act is "not done according to reason or judgment, but depending upon the will alone" and "done without reason."\textsuperscript{41}

The Court of Appeals found, however, that no other North Carolina appellate court had dealt directly with the issue of whether a condemning authority abuses its discretion by taking a greater estate in

\textsuperscript{36} Id. at 131, Cook (No. COA96-364). The trial court found the following reasons for the City's taking the property in fee simple:

a. the depths (up to 40 feet deep) at which the 60-inch diameter pipes will be installed;

b. the number and nature of the facilities that will be located within the pipeline route;

c. the ability to exercise effective control over all uses of the pipeline route by having the ability to determine in advance any proposed used of the pipeline route which would be permitted by the City;

d. the ability to protect the pipeline facilities more effectively than if the City of Charlotte only had an easement;

e. the cost for acquisition of a fee simple interest were not anticipated to be significantly different than for the acquisition of an easement;

f. the ability to select the most economical electric power supplier.


\textsuperscript{37} City of Charlotte v. Cook, 125 N.C. 205, 206, 479 S.E.2d 503, 504 (1997).

\textsuperscript{38} Id at 207, 479 S.E.2d at 505.

\textsuperscript{39} Id.

\textsuperscript{40} Id. See also Department of Transp. v. Overton, 111 N.C. App. 857, 859, 433 S.E.2d 471, 473 (1993).

land than is necessary for the public purpose.\textsuperscript{42} Therefore, the Court looked to other jurisdictions for guidance. It found that other courts endorse the principle that "the power to take private property is in every case limited to such and so much property as is necessary for the public use in question."\textsuperscript{43} Specifically, the court looked to a Montana Supreme Court decision in \textit{Silver Bow County v. Hafer},\textsuperscript{44} a case with similar facts in which the Montana Supreme Court held that a county cannot condemn fee simple title to a defendant's property when an easement would be sufficient to accomplish the public use.\textsuperscript{45} Applying this principal to the facts of \textit{Cook}, the court found the trial court findings to be insufficient to conclusively establish the necessity of acquiring title in fee simple to part of the Cook farm.\textsuperscript{46} The court stated that neither the equality of cost to the City in acquiring the property in fee simple, nor the right to select an electrical supplier, was a reason sufficient to deprive the Cooks of their property.\textsuperscript{47} Thus, the court concluded, "the taking by a city of more than can be justified and the paying of tax dollars is not only wasteful but unwise, arbitrary, and arguably unconstitutional."\textsuperscript{48} However, the court stated nothing in its opinion should prohibit the City from acquiring an easement.\textsuperscript{49} The City appealed.

\textbf{C. The North Carolina Supreme Court Opinion}

On May 9, 1998, a divided North Carolina Supreme Court reversed the Court of Appeals decision, allowing the City of Charlotte to acquire fee simple title to part of the Cook property.\textsuperscript{50} Applying the same analysis employed by the Court of Appeals, the North Carolina Supreme Court limited its review to the question of whether the defendants had shown the condemnation in fee simple was arbitrary, capricious, or an abuse of discretion.\textsuperscript{51}

\begin{thebibliography}{9}
\bibitem{42} \textit{Cook} at 206, 479 S.E.2d at 504.
\bibitem{44} 532 P.2d. 691 (Mont. 1975).
\bibitem{45} \textit{Hafer}, 532 P.2d at 693.
\bibitem{46} \textit{Cook} at 208, 479 S.E.2d at 506.
\bibitem{47} \textit{Id.}
\bibitem{48} \textit{Id.}
\bibitem{49} \textit{Id.}
\bibitem{51} \textit{Id.}
\end{thebibliography}
In its brief opinion, the Supreme Court determined that neither the statement made by the Director of the CMUD (that an easement "was technically possible, but not preferable"), nor the conflicting affidavits submitted by Mr. Vandeventer and Mr. Butler, showed that a fee simple title was not necessary. The court concluded, "the City does not have to show it would be impossible to construct a line using an easement. . . . If the City can show that it needs a fee simple title to construct and operate the line under optimum conditions, this is proof of necessity."

D. Justice Lake's Dissent

Justice Lake dissented from the Supreme Court's ruling, stating that this decision "works a grave injustice upon innocent and powerless people and impairs the law on the taking of private property for a public purpose." He further concluded that "governmental convenience is not synonymous with necessity, especially when private property is at stake."

Relying on "well-settled" North Carolina law, Justice Lake set forth three principles:

1. A condemning authority may take only the amount of property and interest necessary to achieve the public use, not the amount it simply wants or prefers;  
2. The property may be condemned only for a public purpose, not for the private purposes of government officials or third parties; and,  
3. The property taken must be for the direct public use in question, not some other, collateral purpose.

52. Id.  
53. Id.  
54. Id.  
55. Id. at 227, 498 S.E.2d at 609.  
56. Id. at 229, 498 S.E.2d at 610.  
57. Id. See also Spencer v. Wills, in which the court held that "condemnation by the right of eminent domain is not allowed except so far as it is necessary for the proper construction and use of the improvement for which it is taken." 179 N.C. 175, 178, 102 S.E. 275, 277 (1920).  
58. Cook at 229, 498 S.E.2d at 610. See also Jennings v. State Highway Comm'n, in which the court held: "when the Legislature has not defined the extent or limit of the appropriation, the authorities charged with the duty are restricted to such property in kind and quantity as may be reasonably suitable and necessary to the purpose designated." 183 N.C. 68, 71-72, 110 S.E. 583, 584 (1922).  
59. Cook at 229, 498 S.E.2d at 610. See N.C. State Highway Comm'n v. Farm Equip. Co., in which the court held: "the power to take private property is in every
From the facts of *Cook*, Justice Lake concluded it was not necessary for the City to gain fee simple title to the Cook's property. Because an easement could have been taken to achieve the public use, he claimed the City simply preferred title in fee simple for its own convenience. He further stated that the determining factor should have been what was necessary for the construction of a water pipeline, not the opportunity to choose an electric supplier. Finally, Justice Lake concluded that if the decision of the Court of Appeals had been upheld, the public purpose would have been achieved and the Cook's private property rights would have been respected.

### III. Analysis

The North Carolina Supreme Court erred by failing to establish a higher bar for public necessity in condemnation proceedings. In *Cook*, the court ruled, in essence, that government preference, coupled with convenience, is satisfactory proof of necessity when the taking of private property is concerned. Although the court recognized that the kind and quality of property taken must be directly proportional to the public use in question, the result of the *Cook* decision more accurately depicts the court's hesitance to challenge a legislative decision. While the potential effects of *Cook* are uncertain, future condemnation cases following the Supreme Court's decision will likely result in complete acquiescence to the condemning authority and little protection for the private property owner.

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60. *Cook* at 229, 498 S.E.2d at 610.
61. *Id.*
62. *Id.*
63. *Id.* Justice Lake ended his opinion with the following quote: "Justice is blind. Blind she is, an' deef an' dumb an' has a wooden leg." (quoting Finley Peter Dunne, *Mr. Dooley's Opinions* (1900), in *The Harper Book of American Quotations* 306 (Gorton Carruth & Eugene Ehrlich eds., 1988)).
64. 348 N.C. 222, 498 S.E.2d 605 (1998).
A. The Condemning Authority Established a Public Purpose in the Construction of the Water Treatment Plant

Neither the United States Constitution nor the North Carolina Constitution authorize the taking of private property. Rather, the right of eminent domain is best characterized as an “inherent right” necessary to the sovereign power of government. The United States Supreme Court established that the power to take private property for public use belongs to every independent government exercising sovereign power, as “it is a necessary incident to its sovereignty and requires no constitutional recognition.” Clearly, however, the Fifth Amendment of the United States Constitution requires that property owners whose property is seized for the public use be justly compensated. Likewise, Article I § 19 of the North Carolina Constitution provides: “No person ought to be . . . disseized of his freehold . . . or in any manner deprived of his life, liberty, or property, but by the law of the land.” Case law in North Carolina from as early as 1837 clearly confirms that the “law of the land” requires that private property can only be taken for the public use and mandates just compensation be paid to the private property owner.

Essential to the taking of private property is the establishment of the public purpose for which the property will be used. To constitute a “public use”, the use must be by or for the government, the general public, or some portion thereof. The use may not be for particular

68. U.S. Const. amend. V. The Fifth Amendment provides in pertinent part: “no person shall be deprived of his life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”
70. See Raleigh & G.R. Co. v. Davis, 19 N.C. 451 (1837) (holding that legislation may take property subject to a legitimate public purpose and compensation to the owner of property); see also Jeffress v. Town of Greenville, 154 N.C. 490, 70 S.E. 919 (1911) (noting the right of eminent domain would not exist without just compensation).
individuals, or for the benefit of particular estates.73 Further, condemning authorities are allowed to condemn only such property "in kind and quantity as may be reasonably suitable and necessary to the purpose designed."74 Hence, it follows that takings must be limited on the basis of public necessity, since property condemned beyond the public need is, logically, not taken for the public use.75 Generally, once a public purpose is established the taking is not reviewable by the courts.76 However, allegations of arbitrary and capricious conduct or abuse of discretion on the part of the condemnor render the issue subject to judicial review.77 Practically speaking, any efforts to contest the issue of public use or necessity have little chance of success, unless the taking expresses a transparent private agenda on the part of the public authority.78

B. The Taking of the 70-Foot Strip in Fee Simple Was Unnecessary for the Public Use

There is no question that the CMUD water treatment plant was constructed for the benefit of Mecklenburg County residents.79 Thus, the taking of property for its construction was for the public use.80 The question before the court was whether the City Council abused its discretion in taking a greater interest in the Cook's property than necessary.81

73. Id.
74. Jennings v. State Highway Comm'n 183 N.C. 68, 110 S.E. 583 (1922). See also Spencer v. Wills, in which the court held: "Condemnation by right of eminent domain is not allowed, except so far as it is necessary for the proper construction and use of the improvement for which it is taken." 179 N.C. 175, 177 102 S.E. 275, 277 (1920).
75. 3 Nichols on Eminent Domain § 9.2 (2) reads:
   It necessarily follows from the principle that property cannot constitutionally be taken by eminent domain except for the public use, that no more property can be taken by eminent domain than the public use requires, since all that might be appropriated in excess of the public needs would not be taken for the public use. . . . If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay more than is needed.
77. Id.
80. Id.
81. Id.
As noted by the N.C. Court of Appeals, no other North Carolina court had dealt directly with this issue until *Cook*. However, other jurisdictions offer guidance on the issue of excess condemnation. For example, in *Silver Bow County v. Hafer*, the Montana Supreme Court ruled that Silver Bow County could not condemn the Hafers' land in fee simple for airport purposes when the county was unable to show the taking in fee simple was necessary for the public use. In reaching its conclusion, the court applied a balancing test in which it considered a solution that would result in the greatest good for the airport and the least injury to the private property owner. The court held the taking in fee simple was unnecessary, since, in this instance, the taking of an easement was sufficient.

Also, in *City of Carlsbad v. Ballard*, the New Mexico Supreme Court held the municipality exceeded its authority when it condemned more land than was needed for its airport development. In its opinion, the court ruled that regardless of how worthwhile the purpose for condemning excess property, the taking of more property than is actually needed is a both an abuse of discretion and a denial of due process of law.

Both *Hafer* and *Ballard* stand for the same two propositions. First, the taking of private property must be reasonably necessary for the public use. Second, excess condemnation of private property is an abuse of discretion. These cases lend support to the private property owner, whose harm is balanced against the public benefit.

Applying these rules to the facts of *Cook*, the taking of fee simple title to the Cook property was an abuse of discretion. Evidence that the taking was not “reasonably necessary” is found in the expert opinion of Former Director of Raleigh Utilities Department, James Butler, who examined plans for the Water Plant and determined that acquiring an easement was satisfactory for purposes of burying a pipeline. Moreover, evidence that an easement was adequate is supplied by

82. *Id.*
83. 532 P.2d 691 (Mont. 1975).
84. *Id.*
85. *Id.*
86. 378 P.2d 814 (N.M. 1963).
87. *Id.* at 815.
93. Record at 93, *Cook* (No. COA96-364).
Thomas Van deventer's statement that while not preferable, an easement was "technically possible". 94

C. Fee Simple Title Was Taken for the City of Charlotte’s Private Interest of Choosing Duke Power as the Electric Supplier

The North Carolina Supreme Court has held that the taking of property can be for the public use even when a private interest is involved, so long as the private use in question is not the controlling reason for the taking. 95 The key to this inquiry is whether the paramount reason for the taking is for the public use to which benefits to a private interest are incidental, or whether the private interests are paramount and the public interests are incidental. 96

At the time of the taking, the City of Charlotte favored Duke Power as the electric supplier for the CMUD Water Plant. 97 In order to choose its supplier under section 62-110.2 of the North Carolina General Statutes, the Plant had to be located on one “premises”, or on contiguous tracts of land. 98 Thus, acquiring title to the property along the water pipeline route was required. 99 This interest, however, was essentially the private preference of the City, for no satisfactory evidence was offered to prove Crescent EMC was incapable of providing adequate electrical service to the Water Plant. 100 Keeping in mind that the public interest involved was a Water Treatment Plant for residents of Mecklenburg County, why was the choice of electric supplier even an issue? Essentially, the taking of an easement was adequate for the public purpose, but fee simple title was needed for the choice of Duke Power as electric supplier. Clearly, the private interest was paramount over the incidental public benefit. This is, of course, directly contrary to the principle that “[c]ondemnation is not to be used as a means of acquiring property for the benefit of the [condemning authority].” 101

94. Appellant's Brief to the N.C. Court of Appeals at 8, Cook (No. COA96-364).
D. Effect: The Cook Decision Leaves Little Protection for the Private Property Owner

The obvious effect of the Cook decision is that governmental condemning authorities now have a very low hurdle to clear to justify the taking of private property for the "public use." Recent cases have already adhered to the Supreme Court's ruling that operation under "optimum conditions" is proof of necessity.102 Legislative authorities have historically been given broad discretion in condemning property for the public use.103 However, with even greater deference now given to the condemnor, North Carolina courts now have little incentive to inquire into takings challenges.

This lack of inquiry is especially troubling for private property owners in the City of Charlotte, who may have no notice of condemnation until after title to their property has vested in the City. Normally, local public condemnors are governed by Chapter 40A of the N.C. General Statutes, and must give thirty days notice to the private property owner prior to a taking.104 However, the City of Charlotte Charter permits the use of the "quick-take" provisions under Chapter 136 for specified purposes.105 These "quick take" provisions, usually reserved for the Department of Transportation, require no notice prior to a taking of private property.106 As a result, property owners like the Cooks are given no time to petition the court for an injunction before title to their property vests in the condemning authority.

In order to assure that the taking of private property is within the "law of the land" and is therefore truly for the public benefit, the judiciary must inquire into the motives of the legislative body. Rather than the present deference given the condemning authority, the courts must scrutinize challenges to the takings process to maintain the proper connection between public purpose and eminent domain. Without the attention of the judiciary, private property owners, like the Cooks, are subject to the whims of authorities like the City Council of Charlotte.

105. N.C. Gen. Stat. § 136 (1999); City of Charlotte Charter art. 1 Eminent Domain § 7.81. Included are property to be used for streets and highways, water supply and distribution systems, sewage collection and disposal systems, and airports.
106. Id.
Perhaps the best solution is the adoption of the "balancing test" used by the Montana Supreme Court. This approach, in theory, would require a closer scrutiny of the takings process, since the harm to the private property owner would be weighed against the benefit derived from the public use. Applying this test to the facts of each takings challenge would afford some protection to the individual owner. If nothing else, the condemnor would be required to justify the necessity of the taking and offer evidence of why the public benefit outweighs the private owner's injury.

IV. CONCLUSION

Unfortunately for the Cooks (and, arguably, for all private property owners), a majority of the North Carolina Supreme Court did not agree with Justice Lake's critical interpretation of North Carolina eminent domain law. As a result, the Cooks own two disjointed parcels of land, rather than a unified, fully functional dairy farm. The City of Charlotte owns title to a seventy-foot strip across the farm. A pipeline, the only evidence of its ownership, is buried some forty feet below the surface. Moreover, Duke Power now supplies electricity to the CMUD water treatment plant.

From the private property owner's perspective, future condemnation challenges look bleak. Clearly, deference to the legislature is too great when the Supreme Court is willing to find a public purpose in the condemning authority's private preference of electric supplier.

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