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evidence should be meticulously introduced and carefully incorporated into a properly framed hypothetical question, designed to elicit carefully phrased opinions from witnesses.

JOHN M. METZGER

**North Carolina Eminent Domain-Constitutional
Challenges to Chapter 506 of the North Carolina Session
Laws of 1967: “Quicktake” Condemnation**

INTRODUCTION

The eminent domain law of North Carolina is a complex and often confusing collection of statutes that have been enacted one on top of another with little, if any, consideration for the impact on the existing body of law.¹ This oft-cited critical pronouncement of North Carolina Eminent Domain law sets the stage for the analysis contained herein.

The present array of “granting law,” authorizes more than seventy condemnors to condemn property, and the composite of “procedural law” includes over eighteen separate procedures for effectuating the grant of condemnation authority. Condemnees, attorneys and even judges, often-times evince uncertainty and confusion both about the nature of the authority and the scope of the application of procedures used in exercise of the authority. Pronouncements of the North Carolina Supreme Court may apply to one procedure but not to another, thus inevitable confusion results when courts must interpret different procedures. In turn, the landowner must prepare to defend, if necessary, against the taking of his property amongst a myriad of procedures—some affording greater protection of the owner’s property interests than others.

Inherent in the condemnation process is the conflict between the protection of the owner’s property rights and the public’s need for administrative convenience and expedience. Thus, the proliferation of different procedures is largely a reflection of dissimilar judgments as to what is more important in a specific type of condemnation,² protection of personal property or administrative expedience. When the totality of circumstances indicates that a particular procedure reflects administrative convenience as the prevailing

1. Phay, *The Eminent Domain Procedure of North Carolina: The Need For Legislative Action*, 45 N.C.L. REV. 587 (1967).

2. *Id.* at 589.

consideration for its application, without regard for the underlying purpose of the taking, the question becomes whether such procedure, in giving preferential consideration to *convenience*, is so inconsiderate of the rights of the property owner as to deny him the full measure of constitutional due process of law. This situation has arisen in the application of Chapter 506³ of the 1967 Session Laws of North Carolina (hereinafter referred to as Chapter 506), which is drawn upon the condemnation procedure of Article 9 of Chapter 136 of the North Carolina General Statutes.

This writing focuses on the viability of constitutional challenges incident to the operation of Chapter 506 procedures, as contained in Article 9 of Chapter 136, and referred to, in the vernacular, as "quick-take" condemnation.

PROCEDURAL DUE PROCESS

Chapter 136 of the North Carolina General Statutes, Roads and Highways, grants the North Carolina Board of Transportation the power of condemnation⁴ and sets out the purposes for which the power may be exercised:

[T]o acquire such land . . . as it may deem necessary and suitable for road construction, maintenance and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work, either by purchase, donation, or condemnation, in the manner hereinafter set out.⁵

Article 9 of Chapter 136 establishes the procedure by which the power may be exercised.⁶

The focus of constitutional attack upon any deprivation of property or property interest is leveled, ordinarily, at the procedural prescriptions affecting title and possession. Due process generally guarantees, to one who is being deprived of a substantial property interest, an opportunity to be heard before he is finally divested of his interest. In condemnation proceedings, that process which is due relates to the availability of procedural safeguards afforded the condemnee, prior to the deprivation of his property interest. Courts agree that notice and opportunity to be heard apply to condemnations. The question for the North Carolina challenger-condemnee is *when* these safeguards must apply—before or after divestment of title and posses-

3. "An Act to amend G.S. 160-205 so as to authorize municipalities to use the procedure provided in Article 9 of Chapter 136 of the General Statutes as specifically authorized by G.S. 136-66(3)(c) in acquiring lands, easements, privileges, rights of way and other interests for public purposes in the exercise of the power of eminent domain, and providing that this act shall apply only to the City of Durham."

4. See generally, N.C. GEN. STAT. Chapter 136, Article I (1976).

5. N.C. GEN. STAT. § 136-19 (1974).

6. N.C. GEN. STAT. §§ 136-103 through 136-121 (1974).

sion—in order to afford him procedural due process of law. Condemnation procedures for the same or similar condemnors provide for both situations, in North Carolina.

Chapter 506 authorizes the immediate vesting of title and right to possession of condemned property, in the City of Durham, upon the filing of the complaint and the declaration of taking, and the cash deposit in court of the estimated compensation.⁷ Before the enactment of Chapter 506, a Durham condemnee's title was divested by decree, in a special proceeding under Article 2 of Chapter 40 of the North Carolina General Statutes.⁸ Complete divestment was effected only after fair compensation had been ascertained and paid, as directed by *final* decree confirming the award.⁹ The majority of North Carolina municipalities and counties having the authority to condemn private property for public purposes are not empowered to use the procedure authorized by Chapter 506. Thus, it is possible for two North Carolina condemnees to receive varying procedural protections, based not upon a difference of circumstance, but upon their municipal residence.

The purpose for which property is sought—purpose being viewed ordinarily as one of the factors that distinguishes between condemnors—normally is reflected in the procedure authorized for condemnation. The purposes for which the Board of Transportation may seek to exercise its power are usually thought of as those of necessity, *i.e.*, to condemn principally for highway construction, maintenance, safety and development. And, the provisions of N.C. GEN. STAT. § 136-103 reflects the urgency of the need for title and possession.

The procedure authorized by Article 9 of Chapter 136, by special amendment, has been made available to other municipalities and counties seeking to make their condemnation procedure less onerous and time consuming than that authorized by the general law.¹⁰ Chapter 506 grants to the City of Durham the authority to use the procedural provisions of Article 9 of Chapter 136 "for any acquisition of lands, easements, privileges . . . for any and all public purposes in the exercise of the power of eminent domain . . . without being limited to streets constituting a part of the State highway system."¹¹ Chapter 506 adds to the existing condemnation authority and procedure of Chapter 160A, which also provides a similar condemnation

7. *City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E.2d 321 (1973).

8. See N.C. GEN. STAT. §§ 40-11 et seq. Authority for divestment of title contained specifically in § 40-19.

9. The title of the landowner, under a Chapter 40 condemnation, is not divested unless and until the condemnor obtains a final judgment in his favor and pays the landowner the amount of damages fixed by such final judgment. See *City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E.2d 231 (1973); *Highway Comm'n v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964); *Topping v. State Board of Education*, 249 N.C. 291, 106 S.E.2d 502 (1959).

10. See, *e.g.*, Chapter 784, 1973 Session Laws of North Carolina, amending the Greensboro City Charter to authorize the City of Greensboro to use the procedure of Article 9 of Chapter 136 as an alternate condemnation procedure.

11. See generally, Chap. 506, 1967 N.C. Sess. Laws.

procedure for municipalities and public corporations as that contained in Article 9 of Chapter 136.¹² Chapter 160A procedure adds to the procedure of Article 2 of Chapter 40, and any other procedures authorized by municipal charter or local act.¹³

Prior to the enactment of Article 9 of Chapter 136, the procedure of Article 2 of Chapter 40 was applicable to condemnation proceedings instituted by the Board of Transportation,¹⁴ as well as to proceedings instituted by North Carolina municipalities. As the law stands to date, in exercising the power of eminent domain, a city may in its discretion use the procedure of Article 2 of Chapter 40, or the procedure of Article 160A, or the procedure of any other general law, charter or local act applicable to the city.¹⁵

Given the procedures authorized by general legislation for public and private corporations, the grant by local act of Article 9 Chapter 136 procedure to the City of Durham for any and all purposes seemingly defies any consideration of necessity of purpose or urgency for immediate possession of, and title to, private property.

What constitutional problems has the myriad of condemnation procedures brought to the Durham challenger-condemnee? In the recent case of *City of Durham v. Manson*,¹⁶ the City of Durham applied Article 9 Chapter 136 procedure, authority as granted by Chapter 506, to condemn the Mansons' property for the purpose of establishing a municipal park. Defendants asserted, *inter alia*, that the exercise of eminent domain denied them the equal protection and procedural due process of law, guaranteed by the United States and North Carolina Constitutions. They contended that the condemnor, by the authority of Chapter 506, acquired title to and immediate possession of Defendants' land without notice and a prior hearing on the question of the expedience and necessity of the taking. Defendants asserted the applicability of the "modern" standards of due process, as developed through *Sniadach v. Family Finance Corporation*¹⁷ and *Fuentes v. Shevin*.¹⁸ The trial court reserved the decision on the merits of the constitutionality of Chapter 506, because there was a nonconstitutional ground for settling the issue. The court of appeals declared Chapter 506 constitutional. On appeal to the North Carolina Supreme Court, the ruling of the court of

12. The power of eminent domain is conferred upon each North Carolina city for all purposes set out in N.C. GEN. STAT. § 160A-241 (1976). Procedures controlling the exercise of the power are referenced in Article 11 of Chapter 160A.

13. 1971 N.C. Sess. Laws chap. 698 s. 1.

14. *City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E.2d 231 (1973).

15. N.C. Sess. Laws: 1917, chap. 136, sub-chap. 4, § 1; 1919, chap. 262; C.S., §§ 2791, 2792; 1923, chap. 181; 1961, chap. 982; 1971, chap. 698, § 1.

16. 21 N.C. App. 161, 204 S.E.2d 41 (1973). Case heard on appeal to the North Carolina Supreme Court, but constitutional question undecided. *Held*: constitutional question improperly before court of appeals, thus, improperly decided. 285 N.C. 741, 208 S.E.2d 662 (1974).

17. 395 U.S. 337 (1969).

18. 407 U.S. 67 (1972).

appeals on the constitutional question was assigned as error, the question having been improperly before the court. The constitutionality of Chapter 506 was asserted by the City of Durham, on appeal, but was not specifically raised as an exception, and was not briefed for the court of appeals. Thus, the particular constitutional issue presented by the Manson defendants has not, as of this writing, been settled by the North Carolina Supreme Court.

The Manson defendants argued that the *Sniadach-Fuentes*¹⁹ line of cases constitutionally foreclosed the City of Durham from acquiring property for all public purposes, pursuant to the authority of Chapter 506, since no provision was made for prior notice or an opportunity to be heard with respect to the necessity, extent or expedience of the taking, and before defendants were finally deprived of both title and possession of their property. Such procedural safeguards, as argued by defendants, are mandated by both the United States and North Carolina Constitutions.

North Carolina case law has spoken to the constitutionality of the state's general laws of condemnation. It is uncontested that the constitutional requirements of notice and opportunity to be heard apply to condemnation proceedings.²⁰ But, until *Manson*, no North Carolina court had spoken directly to the constitutionality of the procedure of Article 9 of Chapter 136—to which Chapter 506 refers—as applied, without a showing or implication of an urgent purpose or compelling need to condemn the land quickly. This is the focal point of the argument raised in *Manson, i.e.*, because the City of Durham could show no compelling need to condemn the land quickly, due process required that the Mansons be afforded a prior public-purpose hearing before they were finally divested of title and possession to their property. Query, whether taking private property for park purposes carries with it the same necessity for expedience as a taking for the construction of streets and highways, so as to justify the application of Article 9 Chapter 136 procedure thereto.

The North Carolina Supreme Court, in a Chapter 40 condemnation, has held that "[T]he due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use, but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard."²¹ The United States Supreme Court has held, in *Bragg v. Weaver*,²² that the necessity and expediency of the taking of property for public use are legislative questions, no matter who may be charged with their decision, and

19. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 635 (1971); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

20. *Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E.2d 902 (1966).

21. *Browning v. Highway Comm'n*, 263 N.C. 130, 138, 139 S.E.2d 227 (1964).

22. 251 U.S. 57 (1919).

a hearing thereon is not essential to due process, in the sense of the fourteenth amendment. Where adequate provision is made by a state for the certain payment of the compensation, without unreasonable delay, the taking does not contravene due process of law merely because it precedes the ascertainment of what compensation is just.²³

The procedure of Article 2 of Chapter 40, as noted previously, affords different procedural safeguards to the condemnee than does the procedure of Chapter 506. In *Airport Authority v. Irving*,²⁴ a Chapter 40 condemnation, the court recognized the confusion existing in North Carolina condemnation case law regarding procedural rights. Principally, confusion stemmed from the court's failure to distinguish cases where compensation is the only issue from cases where the legitimacy of the act of taking itself is questionable.²⁵ In Chapter 40 condemnations all questions of fact and law are required to be settled prior to the determination of just compensation. The effect of this procedure is to permit the parties to settle all preliminary questions, concerning the legitimacy of the taking, before the condemnor enters upon the condemned property with full right to title and possession.²⁶ The *Manson* defendants cited *Irving* dicta in support of the proposition that this same procedural assurance, afforded by Article 2 of Chapter 40, is also applicable to Chapter 506 proceedings. The *Irving* court recognized, however, that Article 9 of Chapter 136 and Chapter 160 (now revised in Chapter 160A) placed grantees of that condemnation authority, with respect to the vesting of title in and unfettered possession property, "in a different category from other agencies and corporations having the right of eminent domain."²⁷ Whereas in Chapter 40 the right to condemn, if at issue, was settled prior to vesting of title and possession in the condemnor, under Chapter 506 the property owner must institute a collateral proceeding to receive judicial adjudication of the right to condemn private property.²⁸ In a Chapter 506 condemnation the court may issue a restraining order denying possession or divesting the condemnor of possession physically taken, pending appeal.²⁹ The effect of a judgment that the condemnation was not a proper exercise of the power of eminent domain is to revest the property in the property owner

23. See *Bailey v. Anderson*, 326 U.S. 203 (1945); *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1923); *Rindge Co. v. Los Angeles County*, 262 U.S. 700 (1923); *Bragg v. Weaver*, 251 U.S. 57 (1919); *Sears v. Akron*, 246 U.S. 242 (1918); *Backus v. Fort Street Union Depot Co.*, 169 U.S. 557 (1898); *Sweet v. Rechel*, 159 U.S. 380 (1895).

24. 2 N.C. App. 341, 163 S.E.2d 118 (1968).

25. *Id.* at 343.

26. See nn.8-9 *supra*.

27. *Airport Authority v. Irving*, 2 N.C. App. 341, 345, 163 S.E.2d 118 (1968).

28. Chapter 136 vests title in the condemnor immediately upon the filing of the complaint, declaration of taking and notice of deposit. See N.C. GEN. STAT. § 136-104 (1974). However, if the condemnee challenges the validity of the taking, or asserts an exercise of condemnation authority in excess of that conferred by statute, Chapter 506 does not provide statutory recourse against the condemnor under any circumstances.

29. *Highway Comm'n v. Batts*, 265 N.C. 346, 144 S.E.2d 126 (1965).

with the improvements, if any, thereon.³⁰ No provision is made for restoring the character of property wrongfully taken, taken in excess of statutory authority or taken for an improper purpose, if the "improvement" impairs the use of the land to the owner. Note, too, that there is no right to recover from the condemnor damages for the trespass that was initially predicated upon the exercise of authority conferred by Chapter 506.³¹ There would seem to be a cause of action for trespass against those persons or entities who actually committed the trespass.³² But, the North Carolina courts have not spoken affirmatively on this point.

Chapter 506 does provide for judicial determination of questions preliminary to the determination of the amount to be paid. However, such determinations ordinarily are limited to circumstances wherein the taking is conceded, not contested.³³

Juxtaposition of Chapter 40 Article 2 procedure and Chapter 136 Article 9 procedure readily reveals the absence, in Article 9, of several procedural safeguards which appear in Article 2 of Chapter 40. Notwithstanding the differences reflected in the time of vesting of title and possession in the condemnor, another significant difference in the two procedures is the Chapter 40 requirement of prior efforts to negotiate by purchase, before instituting a taking.³⁴ Article 9 does not impose this requirement upon the condemnor.³⁵ These procedural disparities tend to signify an attenuation of procedural safeguards for the Chapter 506 condemnee, and further beclouds what should be general condemnation law.

A recent federal case, *Joiner v. City of Dallas*,³⁶ has upheld the right of condemnors to acquire title to and immediate possession of land without notice and a prior hearing. The *Joiner* defendants, as in *Manson*, argued that the statutory power possessed by the City of Dallas, to enter upon and take possession of property prior to an adjudication of the right to condemnation, violated "modern" standards of due process, as developed through the *Sniadach-Fuentes* reasoning. The *Sniadach-Fuentes* line of cases stand, generally, for the proposition that one cannot be divested of title in and right to possession of personal property upon the ex parte application of another, without affording the owner notice and an opportunity to be heard prior to the taking. In demonstrating in some detail why the *Sniadach-Fuentes* rules were inapplicable to the condemnation of property by eminent domain proceedings, the *Joiner* court stated, in a per curiam opinion, that:

30. Highway Comm'n v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967).

31. See Highway Comm'n v. Batts, n.29 *supra*.

32. See 52 Am. Jur., Trespass, Sec. 41 (1944).

33. See N.C. GEN. STAT. § 136-108 (1974); *Caperonis v. Highway Comm'n*, 260 N.C. 587, 133 S.E.2d 464 (1963).

34. N.C. GEN. STAT. § 40-11 (1976); Rule applied in *Virginia Electric and Power Co. v. King*, 259 N.C. 219, 130 S.E.2d 318 (1963).

35. See *City of Charlotte v. Robinson*, 2 N.C. App. 429, 163 S.E.2d 284 (1968).

36. 419 U.S. 1042 (1974), *affirming* 380 F. Supp. 754 (N.D. Tex. 1974), *rehearing denied* 419 U.S. 1132 (1975).

It is now firmly established that the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled³⁷

Unlike debtor-creditor contractual arrangements, as in *Fuentes*, no balancing of interests is required in exercise of the power of eminent domain, "for the power has only two restrictions: that the condemnation be for a public purpose and that just compensation be paid."³⁸

Having fully disposed of the procedural question, the court indicated an appreciation for the defendant's assertion that Texas eminent domain laws—much like those of North Carolina—were "geared to fit a statutory scheme designed for a rural . . . society to the realities of modern, urban civilization."³⁹ Though compelled to steer clear of "legislative and programmatic decision-making,"⁴⁰ the court opined:

It might well be . . . that given the realities of modern decision-making, the condemning authority ought to ask for, listen to, and cautiously weigh the opinions of affected property owners before commencing condemnation proceedings. Moreover, today's property owners as a class are better able to participate intelligently in the decision-making process. Not only do they have access to government assistance programs which will enable them to propose and articulate viable alternatives to a suggested project, but they also have the ability to present a new dimension to a discussion that has far too long been dominated by panjandrums representing a select elite.⁴¹

No matter how sympathetic the *Joiner* court was to the defendant's claim, it was not constitutionally empowered to write a model eminent domain code, even if predisposed to do so. The standard against which the Texas statutes were measured, and to which the court was constrained to adhere, was provided by the United States Constitution and not that supplied by legislative reformers.

In light of the foregoing principles and case holdings, and considering the availability of collateral proceedings to determine such questions as the right and expedience of a taking, Chapter 506 raises no significant due process problem. This is so even though the condemnor's acquisition of the right to

37. *Joiner v. City of Dallas*, 380 F.Supp. 754, 772 (N.D. Tex. 1974).

38. *Id.* at 774.

39. *Id.*

40. *Id.*

41. *Id.* at 779.

title and possession accrues prior to adjudication of the right of condemnation, of necessity for condemnation or of the amount to be paid.

Does Chapter 506 contravene the North Carolina Constitution in any respect? Article I Section 19 of the North Carolina Constitution protects any person from being disseized of his property except "by law of the land."⁴² The "law of the land" is equivalent to "due process of law."⁴³ The effect of the provision is to require that the owner of condemned property be given reasonable notice, and a fair opportunity to be heard, when compensation is fixed. It is not necessary that he be heard as to the necessity for, or proper extent of, condemnation; that question residing within the legislative discretion.⁴⁴ Thus, it appears by satisfying the requirements of fourteenth amendment due process, Chapter 506 simultaneously meets the requirements of the North Carolina Constitution.

OTHER N.C. CONSTITUTIONAL CHALLENGES

Conspicuously noted in the *Manson* appellate brief, is the assertion of a violation of Article II Section 24 of the North Carolina Constitution. This section prohibits the North Carolina General Assembly from enacting any local, private, or special legislation regulating specified subject matters therein enumerated.⁴⁵ Chapter 506 is clearly a "local" act; it applies only to the City of Durham. A statute applicable to a single city, without reasonable distinction between such city and other cities or towns for the purpose of classification, is a local act.⁴⁶ In its enactment of Chapter 506 the General Assembly offered no rationale or justification for availing to the City of Durham the procedural provisions of Article 9 of Chapter 136, without extending the same authority to other municipalities similarly situated. North Carolina municipalities are authorized by general law to condemn private property for the general spectrum of public purposes, including the construction of public parks.⁴⁷ Every city in the State of North Carolina is given the power of condemnation, for any and all public purposes, by the provisions of Chapter 160A⁴⁸ and Article I of Chapter 40.⁴⁹ But, an act is not invalid merely because it is local, unless it violates some constitutional provision.⁵⁰

42. "No person shall be . . . disseized of his freehold, . . . , or in any manner deprived of his life, liberty, or property, but by the law of the land. . . ."

43. *Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963).

44. *Highway Comm'n v. Young*, 200 N.C. 603, 158 S.E. 91 (1931).

45. "The General Assembly shall not enact any local, private, or special act or resolution (a) Relating to health, sanitation, and the abatement of nuisances; . . ."

46. *Garner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

47. See N.C. GEN. STAT. § 160A-241(3) (1976).

48. See N.C. GEN. STAT. § 160A-241 (1976).

49. See N.C. GEN. STAT. § 40-2(2) (1976).

50. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

Legislative justification for having, in effect, different procedures for similar condemnors condemning for identical purposes is obscured by its enactment of Chapter 506. This is especially so since, had the classification been based on rational difference of situation or condition of condemnors, such classification would not have rendered Chapter 506 "local."⁵¹ At first blush, it does not appear the classification drawn by Chapter 506 is based on a reasonable and tangible distinction between condemnors, nor does it operate the same on all North Carolina municipalities under the same conditions and circumstances. Whether mere administrative convenience presents a rational difference of situation or condition, upon which to base a classification of the sort raised by Chapter 506, is open to question. Otherwise, Chapter 506 does not do violence to the North Carolina Constitution.

Article II Section 24 of the North Carolina Constitution provided the *Manson* defendants still another provision from which to posit a constitutional argument. The North Carolina General Assembly is prohibited by this provision from enacting local legislation on, among other things, matters relating to health. Chapter 506 purports to grant to the City of Durham authority and procedure to condemn land for any and all public purposes. But, whether or not Chapter 506 condemnations disaccord with a provision of Article II Section 24 is not readily answerable, in view of the paucity of judicial directives in this area.

The *Manson* defendants asserted, *inter alia*, that among the topics proscribed by Article II Section 24 are local acts relating to health; that the City of Durham condemned their property for the construction of a public park, stating as its purpose the promotion of public convenience, welfare, *health* (emphasis added), and general interest; and that because Chapter 506, as applied, relates to health (a prohibited subject), it is void under the North Carolina Constitution.⁵²

The health clause of Article II Section 24 has been so interpreted as to lay open to attack many measures invoking the police power, to regulate matters only remotely connected with health. The standard recital, that action is necessary to protect the public "health, safety and welfare," has brought an act authorizing the creation of public housing authorities within the health clause.⁵³

The City of Durham, in *Manson*, asserted that one of the public purposes for which it acquired defendants' land was the health of its citizens. The North Carolina case of *Carringer v. Alverson*,⁵⁴ tends to indicate that such a recital of health, as a purpose for the exercise of condemnation authority

51. *Highpoint Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965).

52. Brief for Defendant-Appellants' Supplemental Brief at 4-7, *City of Durham v. Manson*, 21 N.C. App. 161, 204 S.E.2d 41 (1973).

53. *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 118 S.E.2d 408 (1961).

54. *Id.*

pursuant to Chapter 506, brings the *Manson* case within the health clause of Article II Section 24.

Three years after *Carringer* was decided, in *State v. Smith*⁵⁵—the latest decision construing "local acts"—the North Carolina Supreme Court said that the fact that a statute is local and regulates a forbidden area does not render it void, if the regulation of the forbidden area is merely *incidental or consequential*.⁵⁶ (Emphasis added) The court, in *Hailey v. City of Winston-Salem*,⁵⁷ held that an annexation act, which had the effect of enlarging a school district defined by the city charter as being coterminous with the city limits, was not prohibited by Article II Section 29 (now codified in Section 24). Enlargement of the school district was a "mere incident in the accomplishment of the primary purpose of the Legislature,"⁵⁸ which was to annex territory to the city.

The *Hailey* court seemingly adopts the rule that where the *primary* objective of an act is not related to any of the categories of Article II Section 24, the fact that an "incidental purpose" falls within the constitutional prohibitions does not invalidate the act.

Efforts to impose the rules of *Hailey* and *Carrington* upon the facts of *Manson* promise certain confusion. As per *Carrington*, the mere citing of "health" as a purpose of a Chapter 506 condemnation may bring the action within the ambit of the health clause of Article II Section 24 of the North Carolina Constitution, thereby rendering the local act void. Albeit, the primary purpose of Chapter 506 is undoubtedly to facilitate the condemnation process for the City of Durham, for all public purposes, the regulation of health being merely incidental. Ergo, as per *Hailey*, the incidental purpose of health regulation will not invalidate the local act. Responding to this problem when raised in the *Manson* case, the North Carolina Court of Appeals offered a bare and unsupported assertion that "no part of Section 24 prohibits the enactment of local legislation of the character such as that which is now before us."⁵⁹

It is clear, then, that the existing precedents contain no luminous guidance for determining what is *not* a regulation of health by legislative act, and leaves a determination of what *is* a regulation of health in limbo. The court neither as offered a definition of health sufficient to form the basis for extension by analogy nor articulated policies sufficient for analysis to determine what objectives of government must be implemented uniformly throughout the territorial extent of the state.⁶⁰

55. 265 N.C. 173, 143 S.E.2d 293 (1965).

56. See *Duffy v. City of Greensboro*, 186 N.C. 47, 120 S.E. 53 (1923) for application of this rule.

57. 196 N.C. 17, 144 S.E. 377 (1928).

58. *Hailey v. City of Winston-Salem*, 196 N.C. 17, 144 S.E. 377 (1928).

59. *City of Durham v. Manson*, 21 N.C. App. 161, 168, 204 S.E.2d 41 (1973).

60. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C.L. REV. 340, 401 (1967).

CONCLUSION

It appears settled, then, that Chapter 506 presents no significant procedural due process problems. Due process in condemnation proceedings does not entitle the condemnee to a prior determination of the right to take, or the proper extent of the taking, before title to and possession of condemned property vests in the condemnor. Due process is afforded the property owner if he is given the opportunity to be heard on the amount of damages he has incurred by the taking—the propriety or extent of taking being purely legislative determinations.

The infirmities of existing condemnation procedures available to municipalities substantially inhere in the multiplicity of procedures to which such condemnors have access. All North Carolina municipalities condemn basically for similar purposes, and the condemnation procedure used should be uniform for all. Local legislation granting authority to condemn for special purposes should speak to just that, the authority to condemn, and not to the procedure by which the authority is effectuated. Consistency and uniformity are much needed characteristics of North Carolina condemnation law; and it is to this end that the North Carolina Legislature should direct its attention.

Seemingly, so long as health is not cited in a Chapter 506 condemnation, for whatever reason, no other state constitutional problems arise. However, a great service would be done for all North Carolina municipalities having authority to use the provisions of Article 9 of Chapter 136, if North Carolina courts would offer some dispositive reasoning, on the Article II Section 24 question raised in *Manson*, other than a bare and unsupported pronouncement of the invalidity of the argument. Until such time, local condemnees must formulate a definition of health by way of analogy to existing cases, no matter how confusing, in order to assure at least a facsimile of uniformity throughout the state.

CALVIN E. MURPHY

Article 50: Legislative Delegation to Private Agricultural Groups

In 1947, the North Carolina General Assembly declared that it was in the interest of the public welfare, that North Carolina farmers, producing livestock, poultry, field crops and other agricultural products, be permitted and encouraged to act jointly and in cooperation with dealers of such products, in promoting and stimulating, by advertising and other methods,