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## Article 50: Legislative Delegation to Private Agricultural Groups

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## 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,

ARTICLE 50

the increased production, use and sale of all such agricultural commodities.<sup>1</sup> The legislature further declared it to be in the public interest and highly advantageous to the agricultural economy of the State that farmers, producers and growers producing the commodities named in the Act, be permitted, by an election to be held among groups composed of persons producing such agricultural commodities, to levy upon themselves an assessment on such commodities. The purpose of the assessment was the financing of a program of advertising and other methods designed to increase the consumption of, and the domestic as well as foreign markets for, such agricultural products.<sup>2</sup>

In order to carry out this express legislative purpose, the legislature authorizes any private organization fairly representative of the growers and producers of any agricultural commodity to apply to the North Carolina Department of Agriculture for certification and approval for the purpose of conducting a referendum, among the growers or producers of such particular agricultural commodity, upon the question of levying an assessment, for the purpose of contributing to an advertising program designed to increase the consumption of such agricultural products.<sup>3</sup> Upon certification, such organization is authorized and empowered to conduct, either on a statewide or area basis, a referendum on the question of whether or not such growers and producers shall levy upon themselves an annual assessment.<sup>4</sup> All farmers engaged in the production of such an agricultural commodity on a commercial basis may participate,<sup>5</sup> and the certified organization is authorized to fix the amount of the assessment; it cannot exceed one-half of one percent of the value of the year's production of such product grown by any farmer.<sup>6</sup> If two-thirds or more in the area in which the vote is conducted approve, such assessment is collected by the agency.<sup>7</sup> Should the assessment be levied and collected, by such organization, any farmer or producer against whom such assessment is levied may demand and receive from the organization a refund of the assessment; provided the demand is made in writing within 30 days from the date on which said assessment is collected. The Act also specifies, that as to growers or producers of apples there shall be, on and after July 1, 1972, no right of refund of assessments.<sup>8</sup>

Article 50 is, for two reasons, probably invalid. First, it delegates to producers and growers of agricultural commodities the authority to decide whether an assessment shall be levied upon themselves, without also providing adequate standards and guidelines to such agricultural growers and producers, to determine if such assessment shall be levied. In other words, it

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1. N.C. GEN. STAT. § 106-550(1975).
  2. N.C. GEN. STAT. § 106-555(1975).
  3. N.C. GEN. STAT. § 106-554(1975).
  4. N.C. GEN. STAT. § 106-556(1975).
  5. N.C. GEN. STAT. § 106-559(1975).
  6. N.C. GEN. STAT. § 106-557(1975).
  7. N.C. GEN. STAT. § 106-561(1975).
  8. N.C. GEN. STAT. § 106-567(1975).

gives to agricultural groups the authority to determine what the law shall be, and this constitutes a delegation of legislative authority to private individuals, and is in violation of article I, section six, and article II, section one, of the North Carolina Constitution. Secondly, the article confers such authority on private agricultural organizations without also holding these agricultural organizations accountable for their actions.

The separation of powers doctrine affords an obstacle to delegation of power “. . . only insofar as the constitution of a particular state may require such separation,”<sup>9</sup> and the North Carolina rule on the delegation of legislative authority is based on two controlling provisions of the North Carolina Constitution. Article I, section six, states that the legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other, and article II, section one, provides that the legislative power of the state shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

Relying on these two constitutional provisions, the North Carolina Supreme Court has repeatedly stated that the legislature may not delegate its legislative power, except to municipal corporations.<sup>10</sup> In *In re Annexation Ordinances*, the court stated: “It is a settled principle of fundamental law, inherent in our constitutional separation of government into three departments and the assignment of the lawmaking function exclusively to the legislative department, that . . . the Legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body.”<sup>11</sup> Thus, the legislature may neither delegate its legislative authority to a private organization, nor to an administrative agency of the government.<sup>12</sup>

However, the supreme court has, in fact permitted, at least with respect to state administrative agencies, delegation of authority. The delegation, however, is not the authority to make a law, and thereby invade the legislative function. It is the conferring of authority as the *execution* of the law. This distinction between the conferring of the lawmaking function, and the authority as to the execution of the law, was pointed out in *Coastal Highway v. Turnpike Authority*, where the court stated:

Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the legislature the necessary flexibility of enabling

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9. 1 F. COOPER, *STATE ADMINISTRATIVE LAW*, 45(1965).

10. *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E.2d 795 (1961); *State ex rel. Tillet v. Mustian*, 243 N.C. 564, 91 S.E.2d 696 (1956); *Carolina-Virginia Coastal Highway v. Turnpike Auth.*, 237 N.C. 52, 74 S.E.2d 310 (1953).

11. 253 N.C. 637, 644-55, 117 S.E.2d 795, 800-01(1961).

12. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141(1974).

it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the Legislature shall apply. *Provision Company v. Davies, supra*. Without this power, the Legislature would often be placed in the awkward situation of possessing a power over a given subject without being able to exercise it. Here we pause to note the distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances. 11 Am. Jurs., Constitutional Law, Sec. 234. See also *Pue v. Hood, Com'r of Banks*, 222 N.C. 310, 22 S.E.2d 896.<sup>13</sup>

Thus, the rules for delegating authority are strict. The court will allow the legislature to delegate authority to a state administrative agency, as long as it gives the agency adequate standards. More specifically, "[t]he legislative body must declare the policy of the law, fix legal principles which are to control . . . and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law."<sup>14</sup> The delegated authority allows discretion as to the execution of the law; not discretion as to the making of the law. There are the requirements that must be met by the general assembly in conferring authority upon a state agency.

If the general assembly can confer authority on governmental agencies, as described above, the question arises as to whether in North Carolina, the same authority can be conferred on private organizations and private individuals. If such authority can be conferred, the related question arises, as to whether the legislature, in delegating the authority, must adhere to the requirements mandated by the supreme court for conferring authority on governmental agencies.

Apparently, although no case could be found directly on point, the legislature can delegate, to private organizations and individuals, the authority or discretion as to the execution of the law if it establishes the proper standards for so doing as mandated by the supreme court. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro*,<sup>15</sup> where the constitutionality of the North Carolina Fair Trade Act was at issue, impliedly supports such a conclusion. Under this Act, the producer of any article bearing its trademark or trade name could, if it desired, make a contract with a single retailer in North Carolina. Under the contract, the retailer would, upon his own sales, charge the retail price set by the producer. He could then give notice of such contract to all other retailers in the state and thereby cause it to be unlawful

13. 237 N.C. 52, 60-61, 74 S.E.2d 310(1952).

14. *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 475, 206 S.E.2d 141, 147 (1974).

15. *Id.*

for such other retailers thereafter to sell, at prices satisfactory to them and to their customers, such articles lawfully acquired by them.<sup>16</sup> The price was subject to change by the producer at will, from time to time, with no right in any retailer to be heard by anyone.<sup>17</sup> The court ruled that, since the legislature could not vest in a government agency the power to apply or withhold the application of the law in its absolute or unguided discretion, it necessarily followed that the legislature may not vest in a private corporation the authority to determine in its absolute or unguided discretion the price at which another, with whom it has no contractual relationship, may sell to a willing buyer an article lawfully acquired and owned by him.<sup>18</sup> The infirmity was apparently not that the legislature had delegated legislative powers to a corporation, but that the authority had not been delegated in accordance with supreme court guidelines. The legislature, in passing the Fair Trade Agreement, had not declared the policy of the law, fixed legal principles to control in given cases, and provided adequate standards for the guidance of private corporations empowered to execute the law. Presumably, had the Fair Trade Act been written to conform to these standards, the legislature could have thereby conferred authority on private organizations. In at least one admittedly vintage decision,<sup>19</sup> the North Carolina Supreme Court has unequivocally stated that private organizations may be delegated authority. In fact, the court stated:

Neither is it necessary for us to consider the general question whether the General Assembly can delegate any portion of its legislative functions to any man or set of men, acting in an individual or corporate capacity. That it may, has been too long settled and acquiesced in . . . to be now disputed or even discussed.<sup>20</sup>

The court further noted that the "General Assembly must have, and are universally conceded to have, the power to act by means of agents, which agents may be either individuals or political bodies; most generally the latter."<sup>21</sup>

Therefore, assuming that the legislature may delegate authority to private bodies if in drawing any such statute, it adheres to the requirements set down by the supreme court for delegating authority to governmental agencies, there may yet arise another objection to giving a private body such authority. That objection is, that while governmental agencies are created by the legislature and accountable to the state for their actions, private agencies are formed by private persons for a private purpose, and may be neither accountable for their actions to the state, nor to their members. If a private

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16. *Id.*

17. *Id.* at 476, 206 S.E.2d at 148.

18. *Id.* at 475, 206 S.E.2d at 147.

19. *Thompson v. Floyd*, 47 N.C. 313, 315(1855).

20. *Id.* at 315.

21. *Id.* at 316.

## ARTICLE 50

305

organization is not accountable to the state, yet delegated authority by the legislature, the supreme court might find that the delegation is improper.

Assuming that private groups as well as governmental agencies can be delegated authority, and that the test of whether that delegation to private groups is lawful is whether or not the legislature has declared the policy of the law, fixed legal principles which are to control in given cases, and provided adequate standards for the guidance of the organization, article 50, which confers authority to private organizations, must therefore conform to these standards, or else it unconstitutionally delegates legislative authority. Article 50, however, does not conform to these standards. It neither adequately fixes the legal principles which are to control in given cases nor provides adequate standards for the guidance of the organization.

The article<sup>22</sup> allows any commission, council, board, or other agency fairly representative of the growers and producers of designated agricultural commodities to apply to the Board of Agriculture of the State of North Carolina, for certification. Yet, the Act does not define what "fairly representative" means; the agricultural group has no way of knowing, and has to make its own decision as to the meaning of this term. Hence the agency is, by deciding which agricultural groups are fairly representative, effectively making law. Furthermore, the Board of Agriculture must certify the private organization, if it is "fairly representative" of the growers of a particular commodity.<sup>23</sup> The Board, however, is given no guidance in the statute for determining if an organization is "fairly representative"; in fact, the Board can, in its absolute or unguided discretion, deny or grant certification to any group.<sup>24</sup>

Once certified, the private agency may, or may not, conduct an election to determine if an assessment should be levied.<sup>25</sup> In other words, the decision is left to the organization's absolute discretion.

These few examples do not comprise a total list of the article's shortcomings. Yet they constitute enough proof on which the supreme court might base a decision that the article is invalid.

Article 50 may also be invalid because it confers authority on private organizations, without also holding them accountable for their actions. This weakness was pointed out shortly after article 50 was enacted:

These agencies instead of being created by the legislature, are formed by private persons for a private purpose, and they do not have to account for actions or expenditures, either to the state or to the coerced contributors. There is no direct or indirect benefit guaranteed to the individual assessed, nor is there any guarantee of the continued existence of these private associations. There are no

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22. N.C. GEN. STAT. § 106-554(1975).

23. N.C. GEN. STAT. § 106-555(1975).

24. *Id.*

25. N.C. GEN. STAT. § 106-556(1975).

express sanctions against incompetence and dishonesty, such as ordinarily give a considerable measure of control over the activities of public officials. Further, . . . whether there will be any referenda and consequent assessments is left to the discretion of these private agencies; and . . . there is a serious question as to whether the agency can be compelled to act.<sup>26</sup>

A lack of accountability, such as exists in article 50, has been a major factor in the judiciary's striking down legislative delegations to private organizations. Thus, "[W]here a legislature undertakes to vest legislative . . . powers in a body dominated by self-interested groups, the courts understandably are loathe to tolerate the delegation of any broad discretionary powers, for fear they will be exercised not in the public interest, but rather in the private interests of those who have an axe to grind."<sup>27</sup>

Unless article 50 is amended so as to make private organizations or individuals, like governmental agencies to which authority is delegated, accountable for their actions, the supreme court is likely to find article 50 invalid.

#### CONCLUSION

This statutory note has focused on the constitutional pitfalls involved in delegating legislative authority to private organizations, as opposed to government agencies; and more specifically, it has pointed out the constitutional debilities of article 50. If the legislature had written the article in a manner so as to delegate authority to a government agency, instead of to a private organization, at least the Act would be cured of one infirmity; the agency would be accountable to the state. Without at least some accountability, the article is not likely to withstand a constitutional challenge.

So far, the constitutionality of article 50 has gone untested; probably as a result of the provision in the Act which allows a farmer or producer, if he so elects, to recover the assessment after it has been levied.<sup>28</sup> Presumably, no one who could get his money back would be interested in pursuing a lawsuit to test the article. However, the article may well be challenged in the near future, by disgruntled growers or producers of apples. The Act states that "on and after July 1, 1972, as to growers or producers of apples there shall be no right of refund of assessments levied pursuant to the referendum provided for by Article 50, Chapter 106."<sup>29</sup> Perhaps the legislature can change the Act before the test comes.

JAMES R. RICH

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26. *Constitutional Law—Assessments on Agricultural Products, A Survey of Statutory Changes in North Carolina in 1947*, 25 N.C.L. REV. 399(1948).

27. 1 F. COOPER, *supra* note 9, at 84.

28. N.C. GEN. STAT. § 106-567(1975).

29. *Id.*