#36.42 11/20/69

Memorandum 69-131

Subject: Study 36.42 - Condemnation (Future Use)

One aspect of the "right to take" which should be covered in a comprehensive eminent domain statute is the extent to which a condemnor may exercise the right of eminent domain to take property for a "future" use. This memorandum deals with this problem.

ATTACHED MATERIAL

The California statutory provisions that include specific authorizations to take for future use are set out in Exhibit I (pink) attached. We believe that we have found most, if not all, of these provisions. Any we have not found will be picked up later before the comprehensive statute is drafted.

Also attached is the following materials:

(1) Background research study--"Condemnation in Anticipation of Future Needs"--prepared by the staff (white). This is a portion of the comprehensive study on the right to take which is now in preparation. You should read this for background on the California statutory and decisional law.

(2) Summary of HUD Report--"Advance Land Acquisition by Local Governments"--published by the U. S. Department of Housing and Urban Development (August 1968) (green). This summary discusses the advantages and disadvantages of acquiring land in advance of need from an economic and political viewpoint. You should read this for background.

(3) Excerpt from law review article on acquisition of development rights (yellow). We will refer to this article later in this memorandum.

(4) Committee on Public Works Report--"Advance Acquisition of Highway Rights-of-Way Study."--(July 1967)(buff). This report contains additional background information.

(5) Extract from Highway Research Board Report Summary--"Scenic Easements" (gold). We will refer to this report later in this memorandum.

SUMMARY OF STUDY

It is well established in California that a statutory grant of the condemnation power carries with it the power to condemn property in anticipation of the condemnor's future needs. No specific statutory authorization to take for "future" use is needed. The standard to be applied to determine when a taking for a future use is to be permitted is somewhat imprecise. The standard, however expressed, is to the effect that it must be reasonably probable that the property will actually be devoted to the public use for which it is taken.

A statutory statement of the procedure for raising the issue of "future" use is needed. Traditionally, future use has been treated as an issue of "necessity," rather than as an issue of "public use." (The same was apparently the case for excess takings until the California Supreme Court recently determined that such takings presented a "public use" question.) In cases where the resolution to condemn is conclusive on the issue of necessity, the only way the condemnee can contest a taking for future use is to show "that the condemnor does not actually intend to use the property as it resolved to use it." The existing law is unclear as to the proof required by the condemnee to defeat a taking for future use.

PRACTICAL POLICY CONSIDERATIONS

The threat of possible condemnation for a future project will often create a blight on an area and preclude property owners from improving their property. Sales in the area will often be at depressed prices. Under these circumstances, early acquisition of needed property is beneficial to property owners. Early acquisition often results in substantial benefits to the public entity. Unfortunately, public entities generally find that they do not have sufficient funds to acquire property and construct projects immediately needed, much less to acquire land for future use. This is a practical limitation on takings for future use. The California Department of Public Works has a $30 million dollar revolving fund (July 1967) to permit advance acquisition but nevertheless does not have sufficient funds to purchase property in all cases where the property owner wishes to dispose of property located in a future right of way. It is estimated that the Department of Public Works has saved an average of $25 million per year (over a twelve-year period) by using the advance acquisition revolving fund. In addition, the state acquires in advance to a considerable extent from current funds. See Committee on Public Works Report (buff--attached).

The advantages and disadvantages of advance acquisition are well stated in the Summary of HUD Report (green--attached). You should read this summary.

STAFF RECOMMENDATIONS

The staff is of the opinion that future use is not an area where substantial changes in existing law are needed. However, we believe that the existing law should be clarified as indicated below. The basic problem

in this area is a financial one--lack of adequate funds to permit advance acquisitions. There is nothing we can do about this basic problem.

Accordingly, the staff makes the following recommendations:

(1) Provisions contained in existing statutes that authorize takings for future use should be repealed and one general section should be included in the comprehensive eminent domain statute to deal with this matter.

(2) The test to be used to determine whether a taking for future use is permitted should be stated in general terms in the statute. The test in substance should be that developed by the California courts--whether there is "a reasonable probability of use of the property for the public use for which it is taken within a reasonable time."

(3) The statute should make clear that a taking for future use presents a public use issue and that the resolution declaring the necessity of the taking is not conclusive on whether a taking for future use is permitted under the general test to be stated in the statute. The procedure for contesting a taking for future use should be provided by the statute. The procedure should provide for a court determination of this issue. In drafting the procedure, an attempt should be made to provide a single procedure to cover the public use issue--whether the issue is raised by a taking for future use, an excess taking, or a substitute taking. The procedure so developed should also be made applicable to other similar questions such as whether the taking is for a public use generally, whether the taking is for "a more necessary public use," and the like. We will be working on this procedure as one aspect of our tentative recommendation on the right to take.

DETAILED STATUTORY TREATMENT OF TAKING FOR FUTURE USE

The staff recommends codification of the best expression of the judicially developed test for determining whether a taking for future use is permitted; we do not recommend that an attempt be made to draft a detailed, complex section dealing with every aspect of this problem. Nevertheless, others who have considered this problem (e.g., see "Draft of Model Eminent Domain Code"--pertinent provision set out and discussed below) have suggested a detailed statutory treatment of takings for future use. Accordingly, we believe that the Commission should consider this alternative method of dealing with this aspect of condemnation law.

Model eminent domain code provision

The printed section set out below is taken from the so-called "Draft of Model Eminent Domain Code." This draft was prepared by the Committee on Condemnation Law, Section of Real Property, Probate and Trust Law, American Bar Association in 1967. The following statement was made by the committee in publishing the draft:

> This is not a model code, nor does it have the majority approval of the committee. The purpose of presenting the draft at this time is to foster debate and discussion. We hope that at the 1968 meeting the committee can recommend adoption of a model code.

The section as set out in the model code reads:

SEC. 311. CONDEMNATION FOR FUTURE USE

A. Such government subdivision and agency which has been given the power of condemnation by law may, for projects or otherwise, which have been approved by the condemnor and by the governing body of the appropriate political entity, after a general plan has been adopted by said body, as the same may be amended, acquire lands and interests therein in fee simple, or lesser, in advance of the time of the adoption of a budget including such lands and interests. Such power may be exercised when, in the judgment of the condemnor, the public interest will be served and economy effectuated by forestalling development of such land, which will entail greater acquisition costs at a later date, and when such exercise is determined to be necessary, convenient, and desirable.

B. Upon such acquisition, the condemnor may improve, use, maintain or lease such lands until the same are required for public use. There may necessarily be a period of time between the acquisition of needed lands and the commencement of actual site clearance and the construction, but such fact shall not minimize the public purpose of such acquisition, provided that it can be determined that such lands will be used for the purpose for which they were acquired within a reasonable time.

C. The owner of such land at the time of acquisition under this Section shall have the first right to enter into lease thereof with the condemnor until such lands are needed for public use. Any land so leased shall be subject to general property taxation during the term of the lease. All rentals shall be credited to the project land acquisition account. On request of the condemnor, the appropriate governing body shall provide out of funds acquired by bond issue or otherwise, a land acquisition fund is an amount specified by the condemnor, to be used primarily for the acquisition of land, improvements thereon and interests therein as specified in this section prior to approval of the specific project for which such lands or interests will be required. Such fund shall be adjusted to reflect acquisition costs for lands and interests therein which are thereafter incorporated in specific approved projects by transferring both the appropriation and the acquisition costs therefor to the proper account.

D. In the management of property acquired for future use, the condemnor shall have the power to file appropriate action to prevent waste, to dispossess tenants for failure to pay rent, to enjoin irreparable injury, and such other powers as may be exercised by an owner of private land.

E. A condemnor with authority to acquire land under this section shall also have authority to dispose of land, or part of it, if it determines there is no longer need for such property for present or future purposes and if the public interests will be best served by such disposition. In the event of disposition, first priority of repurchase at an amount equivalent to the current fair market value of the property shall be accorded to the former owner for such property. If such owner fails to repurchase within a reasonable time, the land shall be advertised for public sale by sealed bids and sold forthwith to the highest bidder.

F. In order to effectuate an orderly exercise of power under this section, the agencies and subdivision of government accorded such power are authorized to enter into agreement with each other, or with the federal government, respecting the financing, planning, acquisition, management, use or vacation of property needed for future use, in order to facilitate the general objective of a reasonable program of acquisition of land for future use.

Wisconsin provision

The drafters of the model code provision state that it is based on the Wisconsin provision (Wis. Stats. § 59.965) set out below.

> 2. The commission may also, for specific approved highway projects or otherwise, with the general approval of the county board once given and after the general plan of expressways has been adopted by the county board, as the same may be amended, acquire lands and interests therein of the nature and in the manner specified in this paragraph for the right of way of such expressways in advance of the time of the adoption of an expressway project budget including such lands and interests. Such power may be exercised when in the judgment of the commission the public interest will be served and economy effected by forestalling development of such lands which will entail greater acquisition costs at a later date. Upon such acquisition the commission may improve, use, maintain or lease such lands until the same are required for expressway construction. It is recognized that there may necessarily be a period of time between the acquisition of needed lands for right of way and the commencement of actual site clearance and construction, but such fact shall not minimize the public purpose of such acquisition. The owners of such lands at the time of such acquisition shall have the first right to enter into lease thereof with the county acting by the commission until such lands are needed for expressway construction. Any lands so leased for more than one year shall be subject to general property taxation during the term of the lease. All rentals shall be credited to the project or to the expressway land acquisition account. On request of the commission, the county board shall provide out of funds acquired by bond issue or otherwise a land acquisition fund in an amount specified by the commission from time to time, but not in excess of $5,000,000 of expendable funds at any one time, to be used primarily for the acquisition of lands, improvements thereon and interests therein as specified in this subsection prior to the approval of the specific expressway project for which such lands or interests will be required. Such fund shall be adjusted to reflect acquisition costs for lands and interests therein thereafter incorporated in specific approved expressway projects by transferring both the appropriations and the acquisition costs therefor to the proper expressway improvement expenditures account.

Suggestions of Highway Research Board Study

It is apparent that the model code provision also takes into account the suggestions of a 1957 Report of the Highway Research Board. See Acquisition of Lan for Future Highway Use (Highway Research Board, Special Report 27, 1957). A comparison of the model code provision with the suggested desirable elements or characteristics of legislation on future use as set out in the 1957 Report does much to explain the content of the model code provision. The various elements or characteristics are set out below and commented upon. The pertinent portion of the 1957 Report is quoted where useful.

Declaration of legislative policy

The model code provision contains no declaration of legislative policy as such. The 1957 Report contains this suggestion:

> A comprehensive statement of the multiple purposes that justify the acquisition of land for future highway use might well preface the act. Such purposes could include the provision of highway accommodations that respond more nearly to the dynamic social and economic needs of the States and their subdivisions; the establishment of safer and more efficient facilities at lower cost; the prevention or diminution of the physical and functional obsolescence of highways; the furtherance of integrated community development; and the general promotion of the public health, safety, and general welfare. A study of the court decisions reveals that such an indication of legislative aims could be of inestimable value to the judiciary which is required to interpret the statute.

The power to take for future use is well established in California and it is not proposed to make any significant change in the standard for exercise of such power. We do not believe that a statement such as that contained in the 1957 Report would significantly aid in interpretation.

Delegation of authority

The model code gives the power to acquire for future use to all condemnors. The staff recommends that all condemnors be given this power under one uniform provision. The 1957 Report contains this comment on this aspect of advance acquisition:

> The statute should clearly indicate what various governmental subdivisions are authorized to embark upon a program of acquiring lands for future highway use, and what specific administrative agencies in each governmental unit are empowered to act. Many highway officials now agree that acquiring land for future highway use can be helpful in facilitating the development of a modernized system of highways at reasonable cost. It would seem to follow that it is desirable to permit, by clear legislative authorization, agencies of the cities, counties and other local units to acquire lands for future use as well as those of the State in appropriate instances, or at least to assist in that activity. All other things being equal, the more wide-spread its application, the greater will be the public benefits derived from the acquisition of lands for future highway use.

Words of futurity

The pertinent provision of the model code is found in subdivision B which requires that "it can be determined that such lands will be used for the purpose for which they were acquired within a reasonable time." This is consistent with the standard suggested by the staff and is in accord with the suggestion of the 1957 Report:

> It is obvious that a future use statute must specify what concept of futurity the legislature has in mind. This can be done in one of two ways: (a) The statute can specify a definite period of time, 5, 10, 13 years or the like; or (b) The concept of "reasonable" future time and use can be indicated. A review of the judicial decisions and the existing statutes dealing with future use strongly suggests that the latter standard be utilized, for several cogent reasons. In the first place, the concept of reasonableness will provide highway officials—and the courts—with a desirably flexible standard. Secondly, the judiciary has been uniform in asserting that acquisition for future use means acquisition for "reasonable" future use. Thirdly, highway needs are dynamic, as are the social and economic institutions they serve; a flexible standard will make possible a more effective response to such needs.

Standards for exercise of power

The staff believes that the necessity for the exercise of the power in a particular case involves the weighing of a number of factors. See Summary of HUD Report (green--attached) for the summary of the considerations that should determine whether an advance acquisition is desirable. Accordingly, we do not believe that it is necessary or desirable to provide a "standard" for the exercise of the power in the statute.

The model code provision includes the following standard:

> Such power may be exercised when, in the judgment of the condemnor, the public interest will be served and economy effectuated by forstalling development of such land, which will entail greater acquisition costs at a later date, and when such exercise is determined to be necessary, convenient, and desirable.

The model code standard is, we believe, no standard at all. It would add nothing to the statute to include this standard.

The 1957 Report contains the following statement concerning standards for the exercise of the power:

> Statutes granting the power of acquiring land for future use, as other legislation which delegates authority to an administrative agency, must contain standards to guide the highway department in the exercise of the authority. Unless adequate standards of this kind are included, the legislation may be subject to legal attack on the ground that it is an unconstitutional delegation of legislative power. Accordingly, a legislature might want to consider the following standards, in this connection: The statute could specify that the acquisition of land for future highway use should be undertaken if, in the opinion of the highway department, (a) substantial savings in right-of-way costs can be achieved by acquiring lands in advance of its highway use; or (b) the establishment of a comprehensive system of modern highways will be brought closer to realization; or (c) physical or functional obsolescence of the highway plant will be forestalled thereby; or (d) the ability to integrate highway accommodations with urban redevelopment and community facilities, and with public and private development generally, will be enhanced; and (e) the intended acquisition is part of a plan of highway development.

We do not believe that the inclusion of such a standard is necessary to avoid attack on the ground that the power to take for future use is an inconstitutional delegation of legislative power. As the staff research study points out, the power to take for future use has been upheld in California absent any so-called "standard" and, in fact, absent any express delegation of the authority to take for future use. The right to take for future use had been implied from the delegation of the right to condemn property for a particular public use.

Type of interest acquired

The model code provision permits the acquisition of "lands and interests therein in fee simple, or lesser." The staff believes that the public entity should be able to acquire the same interest for use in the future that it can acquire for immediate use. (In this connection, the acquisition of development rights will be discussed later in this memorandum.) And the general problem of the nature of the interest that may be acquired by eminent domain will be discussed as a separate aspect of the right to take study.

The 1957 Report contains the following comment concerning this matter:

> The acquisition of lands for future use sometimes creates vexing problems of managing the acquired property during the interim period between its acquisition and its use for highway purposes. Of paramount importance in resolving some of these difficulties is the nature of the title acquired. If only an easement for highway purposes is taken, and it should later develop that the projected highway location needs to be changed, the lands so acquired may revert to the former owner without reimbursement to the highway department; whereas, if a fee simple title is taken, the highway department is fully protected. Accordingly, it is suggested that legislation authorize the acquisition of a title in fee simple or any lesser estate or interest deemed necessary by the acquiring agency.

Power to sell lands no longer needed

Subdivision E of the model code provision gives the condemnor the authority to dispose of land acquired for future use if it becomes surplus and gives the former owner the first right to repurchase. The staff believes that this is a general problem presented not only where land is condemned for future use but also in excess taking cases, takings for protective purposes, and in cases where land has become surplus because the public use has been relocated or discontinued. We are working on a special study on this matter. Our general conclusion so far is that the problems presented by an attempt to provide the former owner with a meaningful right to repurchase cannot be overcome. We are continuing to give the matter consideration. In any event, we do not believe a special provision to deal with this matter should be included in the section dealing with advance acquisitions. The power to dispose and the rights of the former owner, if any, should be covered by a general provision in the comprehensive statute. We will work on that provision at a later time.

The 1957 Report contains the following comment concerning this aspect of the problem.

> Regardless of the competency and care which may characterize a program of acquiring lands in advance of need and the engineering planning that preceeds it, imponderable factors are always present which may require a subsequent realignment of a future highway route or even the complete abandonment thereof. Shifts in population and in land uses and other considerations can thwart the best laid highway plans. It therefore becomes important to equip the highway agency with the means of meeting these contingencies. Unless a fee simple interest is acquired, the highway department may be unable to dispose of the land without incurring a financial loss. Legislation dealing with acquisition of land for future use should authorize the acquiring agency to dispose of property no longer needed for present or future highway purposes, if the public interest would be best served by such a disposition. Proper safeguards such as the requirement of public sale by auction or sealed bids, reasonable notice, and possible priority of repurchase by the former owner should receive attention.

Power to lease

The model code provision, in subdivisions B and C, contains authority to lease property acquired for future use and gives the former owner first right to the lease. This provision is similar to the provision found in the Wisconsin statute.

The staff sees no need for express authority to lease property acquired for future use. The problem is no different than with the management and leasing of other property not actually devoted to public use. If a provision is needed, which we doubt, it should be a general one.

The model code and the Wisconsin provision both give the former owner a first right to lease the land. We believe that this, too, is a general problem that should be considered in connection with the separate study being made of the first of the former owner in cases involving excess and protective condemnation and disposition of surplus property generally.

The 1957 study contains the following pertinent comment:

> It would hardly be consonant with the public interest to allow lands acquired for future highway use to remain unproductive during the period between its acquisition and actual highway use. Unless a fee simple title is acquired, there would be no legal basis for the leasing of such property. It seems logical, therefore, for the statute to authorize appropriately the leasing of property so acquired. (As in the case of a sale of surplus lands, consideration might be given to the desirability of giving priority to the former owner.) The statute might also specify that restrictions might be sanctioned as to the use and development of the land by the lessee. If any unauthorized development is undertaken on the land, the lessee should not be compensated for it when the lease expires, and the statute should so specify. The highway department should also be authorized to specify any other terms or conditions in such leases, as are in the public interest.

Designation of offenses and penalty provisions

Subdivision D of the model code provision provides that the condemnor has the same powers that may be exercised by an owner of private land to prevent waste, dispossess tenants for failure to pay rent, and the like. We see no need to include a comparable provision in California law. Moreover, if such a provision is needed, it should be a general provision covering the problems arising out of the management of all public property, not just property acquired for future use.

The pertinent comment from the 1957 Report is:

> Since this kind of a program may be a substantial departure from most of the activities previously undertaken by highway departments, designation of offenses and existing penalty provisions (where they may exist) may not be sufficiently broad to cover the circumstances created by the acquisition of land for future use. For that reason, it may be well to define and provide reasonable penalties for any special offenses which need to be dealt with. For example, in the management of property acquired for future highway use, the highway department should be given the usual powers to prevent waste, the power to dispossess for failure to pay rent, the power to enjoin irreparable injury, etc. Penalties, involving both fines and imprisonment, for misdemeanors (which should be defined) should likewise be included, for the most effective administration of the program in the public interest.

Intergovernmental cooperation

Subdivision F of the model code provision provides for joint action by several governmental agencies. This authority is highly desirable, but it should be a general authority. We have not researched the question, but we have no doubt but that the joint powers authority under California law would be adequate to cover this matter. If not, appropriate revisions of the Joint Powers Agreements Statute (Government Code Sections 6500-6514) should be made. Perhaps a general clarifying provision should be included in the comprehensive statute. In any case, this is a general problem--to be dealt with by a general provision--not one that should be dealt with in a future use section.

The 1957 Report contains the following pertinent comment:

> Many phases of highway improvement necessarily involve more than one subdivision of government, even within the same State. A well-conceived program of future use acquisition is no exception. If it is desired, for example, to acquire land for a future urban expressway, it may be necessary for the State highway department to rely heavily upon the municipality involved. In some States, in fact, the municipality would need to acquire the lands needed, since the State might have little or no authority in the urbanized areas. Consideration should be given, therefore, to the possible inclusion of a provision which in substance authorizes the highway agencies of the State, cities, counties, towns, villages, or other units to enter into agreements with each other, or with the Federal Government, respecting the financing, planning, acquisition, management, use or vacation of property needed for future highway use, in order to facilitate the general objectives of a reasonable program of acquisition of land for future use.

CONDEMNATION OF DEVELOPMENT RIGHTS AND SCENIC EASEMENTS

We have attached a copy of a law review article (yellow) which includes a statute authorizing the condemnation of development rights. Also attached is an extract from a Highway Research Board report (gold) on scenic easements. The writer of the law review aticle (yellow) suggests (on pages 362-365) statutory provisions designed to implement his recommendations. The Highway Research Board report also contains suggested legislation. While the staff is generally of the opinion that a public entity should be able to condemn whatever interest it needs, we are not convinced that legislation similar to that set out in the law review article and other report is needed. We will discuss the problem of the interest permitted to be taken in a subsequent portion of the comprehensive study on the right to take. The Commission should determine whether it wishes to give further consideration to specific legislation authorizing the condemnation of development rights or scenic easements.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 69-131

EXHIBIT I

CALIFORNIA STATUTORY PROVISIONS ON FUTURE USE

Code of Civil Procedure Section 1238(3), (13), (17)

§ 1238. Exercise of right; uses

Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

* * * * *

3. Public utilities; municipal corporations; water works; drainage; highways; mooring places; parks; etc. Any public utility, and public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district, ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for watercraft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

* * * * *

13. Electric power facilities. Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works or plants, lands, buildings or rights of any character in water, or any other character of property necessary for generation, transmission or distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or irrigation district, or the inhabitants thereof, or necessary for the proper development and control of such use of such electricity, either at the time of the taking of said property, or for the future proper development and control thereof.

* * * * *

17. Gas, heat, refrigeration or power plants and facilities. Works or plants for supplying gas, heat, refrigeration or power to any county, city and county, or incorporated city or town, or irrigation district, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate machinery, appliances, works and plants for the purpose of generating, transmitting and distributing the same and rights of any nature in water, or property of any character necessary for the purpose of generating, transmitting and distributing the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

Streets and Highways Code Section 104.6

§ 104.6 Acquisition of realty for future needs; lease of unneeded lands; deposit of rentals; refunds

The authority conferred by this code to acquire real property for state highway purposes includes authority to acquire for future needs. The department is authorized to lease any lands which are held for state highway purposes and are not presently needed therefor on such terms and conditions as the director may fix and to maintain and care for such property in order to secure rent therefrom. Twenty-four percent of all rent so received shall be deposited in the Highway Properties Rental Fund in the State Treasury, which fund is hereby created, except that any rent required under the California Toll Bridge Authority Act or any bond indenture executed under said act to be deposited in some other fund shall be deposited in such other fund. The balance of such rent shall be deposited in the State Highway Fund.

Whenever it is determined by the Department of Public Works that any rental revenue collected under the provisions of this section represents overpayment or payment in duplicate, that department may make refund of such overpayment or payment in duplicate from the Highways Properties Rental Fund and the State Highway Fund.

Water Code Section 258

§ 258. Acquisition of realty for future needs; lease of lands not presently needed; terms and conditions

The authority conferred by this code to acquire real property for state dam and water purposes includes authority to acquire for future needs. The department is authorized to lease any lands which are held for state dam and water purposes and are not presently needed therefor on such terms and conditions as the director may fix and to maintain and care for such property in order to secure rent therefrom.

Water Code Section 11575.1

§ 11575.1 Acquisition of property for future needs

The authority conferred by Section 11575 to acquire property for water purposes, includes authority to acquire property necessary for future needs.

Water Code Appendix Section 60-5(5)

§ 60-5. Nature of district; powers

Sec. 5. The district is hereby declared to be a body corporate and politic and as such shall have, in addition to the other powers vested in it by this act, the following powers:

* * * * *

5. To store water in surface or underground reservoirs within or outside of the district for the common benefit of the district or of any zone or zones affected; to conserve and reclaim water for present and future use within the district; to appropriate and acquire water and water rights, and import water into the district and to conserve within or outside of the district, water for any purpose useful to the district; and to do any and every lawful act necessary to be done that sufficient water may be available for any present or future beneficial use or uses of the lands or inhabitants within the district, including but not limited to, the acquisition, storage and distribution of water for irrigation, domestic, fire protection, municipal, commercial, industrial, and all other beneficial uses; to distribute, sell, or otherwise dispose of, outside the district, any waters not needed for beneficial uses within the district; to commence, maintain, intervene in, defend or compromise, in the name of the district in behalf of the landowners therein, or otherwise, and to assume the costs and expenses of any action or proceeding involving or affecting the ownership or use of waters or water rights within or without the district, used or useful for any purpose of the district or of common benefit to any land situated therein, or involving the wasteful use of water therein; to commence, maintain, intervene in, defend and compromise and to assume the cost and expenses of any and all actions and proceedings now or hereafter begun; to prevent interference with or diminution of, or to declare rights in the natural flow of any stream or surface or subterranean supply of water used or useful for any purpose of the district or of common benefit to the lands within the district or to its inhabitants; to prevent unlawful exportation of water from said district; to prevent contamination, pollution or otherwise rendering unfit for beneficial use the surface or subsurface water used or useful in said district, and to commence, maintain and defend actions and proceedings to prevent any such interference with the aforesaid waters as may endanger or damage the inhabitants, lands, or use of water in, or flowing into, the district; provided, however, that said district shall not have power to intervene or take part in, or to pay the costs or expenses of, actions or controversies between the owners of lands or water rights which do not affect the interests of the district.

[Note: The district referred to in the above section is the Santa Clara County Flood Control and Water District.]

Government Code Section 7000

§ 7000. Legislative intent; easements. It is the intent of the Legislature in enacting this chapter to provide a means whereby the Department of Water Resources, Parks and Recreation, Fish and Game, and Finance, of the State of California, may acquire by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest or right in real property in order to protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve for public use and enjoyment any of the lands and areas, identified below, alongside the Westside Freeway, Interstate Route 5, and the California Aqueduct, which have significant scenic values:

(a) Between the California Aqueduct and the Westside Freeway from Highway 41 north to Milham Avenue.

(b) Between the California Aqueduct and the Westside Freeway from Ness Avenue north to Pioneer Road.

(c) Between the California Aqueduct, the Westside Freeway and the Delta-Mendota Canal from Cottonwood Road north to the freeway-aqueduct crossing at Orestimba Creek, and between the aqueduct and freeway north of that point to the Alameda county line.

The Department of Public Works may acquire scenic easements along said Westside Freeway, provided that funds for such easements are obtained pursuant to the provisions of Section 319 of Title 23 of the United States Code relating to the purchase of interests in lands adjacent to highway rights-of-way, provided further that the federal government reimburses the State for the costs of such scenic easements, and also provided that the use of money for this purpose will not reduce the amount of funds which would otherwise be available to the State for highway purposes.

Government Code Section 7001

§ 7001. Public purpose of acquisition. The Legislature hereby declares that the acquisition of interests or rights in real property for the preservation and conservation of the scenic lands and areas provided for in Section 7000 constitutes a public purpose for which public funds may be expended or advanced, and that any of the state departments specified in this chapter may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any of said departments may also acquire the fee to any of the property for the purpose of conveying or leasing said property back to its original owner or another person under such covenants or other contractual arrangements as will conserve the scenic character and value of the property in accordance with the purposes of this chapter.

Public Resources Code Section 6808

§ 6808. Acquisition of rights of way or easements by condemnation; institution of condemnation proceedings; acquisition declared a public use. The commission, if it deems such action for the best interests of the State, may condemn, acquire, and possess in the name of the State any right of way or easement, including surface rights, for any operation authorized or contemplated under this chapter, that may be necessary for the development and production of oil and gas from State-owned land and for their removal, transportation, storage, and sale. The commission may, for such purposes, in the name of the people of the State, institute condemnation proceedings pursuant to Section 14 of Article I of the Constitution and the Code of Civil Procedure relating to eminent domain. The acquisition of such interests is hereby declared a public use.

Prior to the institution of such condemnation proceedings, the commission shall adopt a resolution declaring that the public interest and necessity require the acquisition of such interest in lands for the purpose of performance of the duties vested in the commission by this chapter and that the interest in the lands described in the resolution is necessary therefor. The resolution shall be conclusive evidence:

(a) Of the public necessity of such proposed public use.

(b) That such property is necessary therefor.

(c) That such proposed public use is planned or located in the manner which is most compatible with the greatest public good and the least private injury.

CONDEMNATION IN ANTICIPATION OF FUTURE NEEDS

It is well established in California that statutory grants[1] of general condemnation powers carry with them the power to condemn property in anticipation of the condemnor's future needs.[2]

The judge-made formula most frequently applied declares that the future requirements must be such as may be "fairly anticipated."[3] On its face, this is a somewhat imprecise standard. A more manageable approach is that which rejects future needs which are "contingent, uncertain or problematical" and asks instead whether there is "a reasonable probability of use of the property, within a reasonable time."[4]

Under either test, the issue turns upon the extent of the condemnor's commitment to the future project.[5] That is not to say that funds must be appropriated or plans and specifications drawn.[6] Some progress along those lines is, of course, persuasive. But the probable necessity of the property for future use can be shown in other ways, as by the condemnor's present involvement in improvements from which the future project would be a logical extension.[7] Similarly, the likelihood of future population growth--and the condemnor's peculiar obligation to serve all comers--may be highly significant.[8]

Despite the implied nature of the power, condemnation for future use has been specifically authorized by a few California statutes.[9] Such legislation, however, provides no guide lines beyond the bare permission given to condemn for "future needs,"[10] or for "future beneficial use,"[11] or for the "future proper development and control" of existing public uses.[12]

In this age of transcontinental expressways and interregional water distribution, the long-range exercise of eminent domain powers is obviously

essential.[13] The policy question confronting the legislative draftsman is whether to augment the currently uncomplicated code sections with some sort of verbal litmus that will indicate when so-called "future needs" are too future.

It is not recommended that such changes be undertaken. The case law distinction between "fairly anticipated" (i.e., reasonably probable) future uses and those which are mere possibilities[14] is an equitable one. Past that point, precision is impractical; the limitless diversity of engineering and financing problems involved, as well as the host of factors affecting construction lag times, militate against it. Substantively, the matter is best left where it is now--an issue of fact, to be resolved by the particular evidence. Public projects, and the planning for them, are too diverse to do otherwise.

There is, nevertheless, one procedural area where the need for a specific enactment is vital. Traditionally, "future use" problems have been treated as part of the question concerning the necessity for the condemnation, rather than as issues of public use.[15] The California Supreme Court held in 1959 that--where a statute gives conclusive effect to a condemnor's "necessity" determination--a condemnee cannot challenge (1) "the necessity for making a given public improvement," (2) "the necessity for adopting a particular plan therefor," or (3) "the necessity for taking particular property."[16] Yet, the same case left the door open for the condemnee to show "that the condemnor does not actually intend to use the property as it resolved to use it."[17] The ensuing years have done nothing to clear up the quandary of how proof of such negative intent is any different from proof that there is no necessity for taking the condemnee's land.[18] By the same token, in the "future use" cases, proof that an ostensibly future need was in fact speculative would establish both that "the condemnor does not actually intend to

use the property as it resolved to use it" and that there was no "necessity for taking [the] particular property."

No post-1959 cases have dealt with the latter problem. As a result, the only meaningful way to implement the court-made limitations[19] on condemnations for future use is to statutorily, and specifically, make justiciable the necessity for the particular taking.

FOOTNOTES

(Future Use)

1. See People v. Superior Court, 10 Cal.2d 288, 295-296, 73 P.2d 1221, 1225 (1937); People v. Garden Grove Farms, 231 Cal. App.2d 666, 673-674, 42 Cal. Rptr. 118, 122-123 (1965).

2. Central Pac. Ry. v. Feldman, 152 Cal. 303, 309, 92 P. 849, 852 (1907); City of Los Angeles v. Pomeroy, 124 Cal. 597, 616, 57 P. 585, 591 (1899); Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 532, 28 P. 681, 682 (1891); San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961); City of Hawthorne v. Peebles, 166 Cal. App.2d 758, 762, 333 P.2d 442, 444 (1959); Los Angeles County Flood Control Dist. v. Jan, 154 Cal. App.2d 389, 394, 316 P.2d 25, 28 (1957), disapproved on other grounds in People v. Chevalier, 52 Cal.2d 299, 305-307, 340 P.2d 598, 602-603 (1959); Hamaker v. Pacific Gas & Elec. Co., 59 Cal. App. 642, 646, 211 P. 265, 266 (1922); Vallejo & N.R.R. v. Home Sav. Bank, 24 Cal. App. 166, 174, 140 P. 974, 978 (1914); Northern Light & Power Co. v. Stacher, 13 Cal. App. 404, 407-408, 109 P. 896, 903 (1910); see East Bay Mun. Util. Dist. v. City of Lodi, 120 Cal. App. 740, 750-755, 8 P.2d 532, 536-538 (1932).

3. Central Pac. Ry. v. Feldman, supra note 2; Spring Valley Water Works v. Drinkhouse, supra note 2; San Diego Gas & Elec. Co. v. Lux Land Co., supra note 2; Vallejo & N. R.R. v. Home Sav. Bank, supra note 2.

4. East Bay Mun. Util. Dist. v. City of Lodi, 120 Cal. App. 740, 750-755, 8 P.2d 532, 536-538 (1932)(condemnation of property already held for

public use); accord, Board of Educ. v. Baczewski, 340 Mich. 265, 65 N.W.2d 810 (1954); see City of Los Angeles v. Pomeroy, 124 Cal. 597, 616, 57 P. 585, 591 (1899)("probable necessity"); compare 69 OKLA. STAT. ANN. § 46 (2) (Supp. 1967)("probable future needs").

5. See City of Los Angeles v. Pomeroy, supra note 4; San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961); East Bay Mun. Util. Dist. v. City of Lodi, supra note 4; Highway Research Board, National Research Council, Acquisition of Land for Future Highway Use xi (Special Report No. 27, 1957); compare State v. 0.62033 Acres of Land, 49 Del. 174, 112 A.2d 857 (1955); State Road Dep't v. Southland, Inc., 117 So.2d 512 (Fla. Dist. Ct. App. 1960); Board of Educ. v. Baczewski, supra note 4.

6. Carlor Co. v. City of Miami, 62 So.2d 897 (Fla. 1953); State Road Dep't v. Southland, Inc., supra note 5.

7. See City of Los Angeles v. Pomeroy, 124 Cal. 597, 616, 57 P. 585, 591 (1899); State Road Dep't v. Southland, Inc., 117 So.2d 512 (Fla. Dist. Ct. App. 1960).

8. See Central Pac. Ry v. Feldman, 152 Cal. 303, 309, 92 P. 849, 852 (1907); City of Los Angeles v. Pomeroy, supra note 7; Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 532, 28 P. 681, 682 (1891); Vallejo & N. R.R. v. Home Sav. Bank, 24 Cal. App. 166, 174, 140 P. 974, 978 (1914).

9. CAL. CODE CIV. PROC. § 1238(3),(13),(17)(West Supp. 1967); CAL. STS. & HWYS. CODE § 104.6 (West Supp. 1967); CAL. WATER CODE §§ 258 (West Supp. 1967), 11575.1 (West Supp. 1967); CAL. WATER CODE APP. § 60-5(5)(3 West Legis. Serv. 460 [1967]); see also CAL. GOVT. CODE §§ 7000-7001 (West 1966); CAL. PUB. RES. CODE § 6808 (West 1956).

10. CAL. STS. & HWYS. CODE § 104.6 (West Supp. 1967); CAL. WATER CODE §§ 258 (West Supp. 1967), 11575.1 (West Supp. 1967).

11. CAL. WATER CODE APP. § 60-5(5)(3 West Legis. Serv. 460 [1967]).

12. CAL. CODE CIV. PROC. § 1238 (3),(13),(17)(West Supp. 1967).

13. See State Road Dep't v. Southland, Inc., 117 So.2d 512 (Fla. Dist. Ct. App. 1960); Highway Research Board, National Research Council, Acquisition of Land for Future Highway Use ix (Special Report No. 27, 1957).

14. See notes 3 & 4 supra.

15. See authorities cited in note 2 supra.

16. People v. Chevalier, 52 Cal.2d 299, 307, 340 P.2d 598, 603 (1959); see Rindge Co. v. County of Los Angeles, 262 U.S. 700, 708-709 (1923)

17. People v. Chevalier, supra note 16, at 304, 340 P.2d at 601.

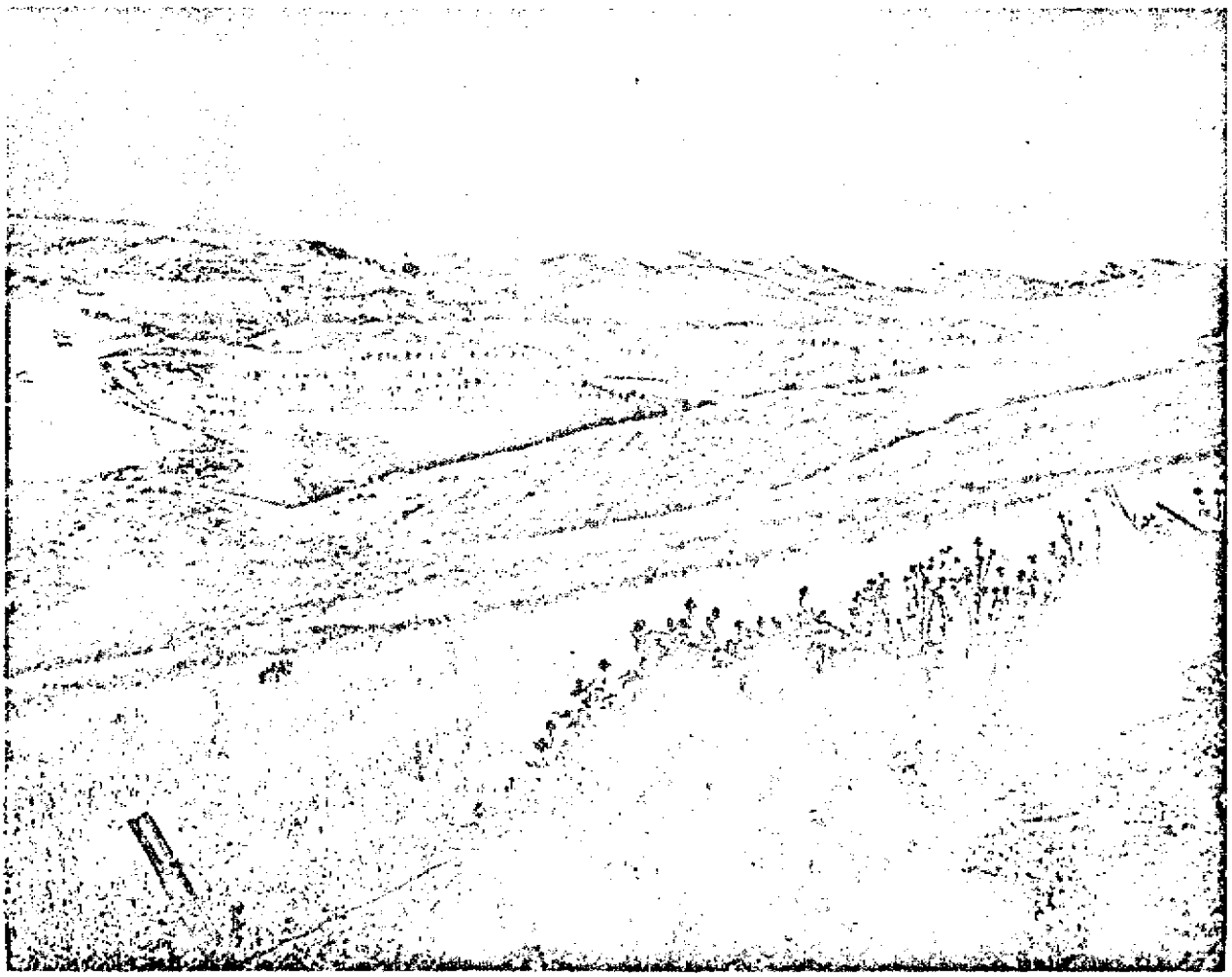
18. See People v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

19. See notes 3 & 4 supra and accompanying text.

August 1968

ADVANCE LAND ACQUISITION BY LOCAL GOVERNMENTS

U.S. Department Of Housing and Urban Development / Washington, D.C.



SETTING OF THE PROBLEM

The purchase of land by local governments will have to increase heavily in the years to come. A conservative estimate of expenditures for real estate places the figure at about 12 percent of the entire projected capital budgets for state and local governments. Thus, expenditures for land (and existing structures) are expected to come to about $4 billion a year in the decade immediately ahead (p. 10).

The increased need for public expenditure on land will result partly from the large increase in the number of people in the country, most of whom will wish to live in cities. Population estimates by the Bureau of the Census range from increases of somewhere between 85 and 161 million people by the year 2000. This could easily double the urbanized area of the country (p. 10). Corresponding increases will be required for new public facilities just to maintain the level of public services now ordinarily provided by state and local governments. But standards for urban and state services are rising, just as are all aspects of the standards of living enjoyed by the inhabitants of this increasingly affluent society. Indeed, the sorts of services that require relatively large amounts of land, such as recreation, schools, and transportation, tend to increase faster than most other government services.

These extensive acquisitions of land by public bodies will almost inevitably be made at prices subject to a substantial rising trend. This is indicated by the three major studies reviewed in Chapter 6, which showed average rates of rise in land prices of 8, 10, and 10 percent per year, respectively, for the years 1946 to 1964, 1950 to 1962, and 1960 to 1964.

In the face of these implacable trends, how can local governments contrive to acquire efficiently the properties that they will need as sites for the services they will provide? Clearly if they wait until the land must be put to use, the most appropriate properties will have been preempted by the very private development that created the need for the additional government services. Moreover, whatever sites are eventually acquired, it is likely that the cost will be much higher than if they had been bought earlier.

One answer to the dilemma is to anticipate the need for land and purchase it in advance. The importance of this approach has been recognized by the federal government in several recent pieces of legislation. They aim to aid local governments to acquire land in advance for use in recreation, airports, urban renewal and other purposes.

A number of local governments have themselves begun to acquire land before it is actually needed. The results of a questionnaire survey (reported in Chapter 2) suggest that somewhat less than 30 percent of the cities of over 50,000 inhabitants in the United States carry on some sort of advance acquisition activity. However, the programs tend to be small—typically less than six acquisitions per year. Schools and parks are the most usual purposes for which cities acquired property in advance, though other specific future facilities were sometimes covered. No large-scale plans for influencing orderly land development were reported.

The European picture of advance land acquisition by governments is quite different. Many countries in Europe have active policies for acquiring undeveloped land in order to control the pattern of urban extension. Of these Stockholm, where much of the land surrounding the central city was acquired early in the century, is the most famous example (see Chapter 9).

THE VALUE OF ADVANCE LAND ACQUISITION TO LOCAL GOVERNMENTS

Though the records are sparse, advance land acquisition in this country seems capable of producing good results. For example, two case studies of advance acquisition programs, on which Chapters 7 and 8 report, illustrate what can be accomplished. For a sample of 17 school sites acquired in advance of need by Montgomery County, Maryland, the average dollar saving has been $50,000 per site after all costs have been taken into account. Of a sample of 21 sites which Richmond, Virginia has acquired in advance for expressways, street widenings and school additions, the average saving (after an allowance for mistaken expectations) was $32,000 per site. In addition to the dollar savings there were other benefits that in some cases were more important than the dollar-measured benefits. In Montgomery County the program makes it possible to get the sites best suited for schools before private development forecloses the opportunity. And in Richmond, advance land acquisition has strengthened and has become an integral part of the planning process, enabling the city to make long range plans for its future construction projects with the knowledge that the necessary sites will not be put to some incompatible use in the interim.

WEIGHING THE ADVANTAGES AND DISADVANTAGES OF ACQUIRING LAND IN ADVANCE

A major purpose of this study is to provide a framework for considering both the benefits and the costs to the public of acquiring land in advance of need. "Benefits" should be regarded as any advantage and "costs" as any disadvantage regardless of how adequately they can be evaluated. Actually, most of the costs and a substan-

tial part of the benefits of advance acquisition can be measured in dollars, at least in an approximate fashion, and where this is possible it has been done. But several of the benefits are hard to quantify; these must nevertheless, be weighed in order to arrive at a judgment. What are the benefits of advance land acquisition? And what are the costs?

How benefits should be measured is contingent on whether or not land that has been purchased in advance can be sold as readily as it is bought. Land should, of course, be sold if it becomes evident that it will not be needed for its intended or a substitute purpose. But it should also be sold if it turns out that other equally acceptable properties becomes available at a lower cost. How cost should be defined is indicated by examining the benefits of advance acquisition. However, these benefits would need to be defined differently were it not for the assumption, which is made throughout this study, that sales are made if and when they should be.

1. *Forestalling price rises.* A major benefit is the saving to the local government when land is bought early and prices subsequently rise. Savings occur not only because of the general upward trend in the price of land, but also because land prices commonly jump during conversion from rural to urban use. For areas in the path of urban extension, this saving alone will often outweigh all cost of the advance acquisition. (The Montgomery County program is a case in point.)

2. *Getting the "best site."* "Obtaining the best location" was the most usual reason designated as "most important" by cities reporting on their advance acquisition programs.

Some sites are typically much better suited to a particular public purpose than are others. Advance acquisition can make it possible to acquire these best sites for a school, a park, or whatever, before private development has greatly increased their cost. Indeed, were it not for the right of eminent domain, private development might entirely bar many developed properties from subsequent public use. But even though governments can condemn land, they must pay to acquire it and pay to acquire and demolish any new construction that has taken place; in addition, relocation problems and political embarrassment may ensue. Advance acquisition forestalls these additional costs and thereby makes it possible to acquire "best sites" at a cost which is advantageous in view of the capacity of the land to provide the government service for which it is desired.

3. *Improvement in the pattern of related land uses.* Advance acquisition can encourage desired private land development by offering practical evidence of intended future provision of public facilities and services. This will act to strengthen the planning process of the local government and to reduce the uncertainty attached to other public and private investment decisions which are affected by the location of future public facilities. This is, of course, a very difficult benefit to evaluate, and requires considerable judgment as to its importance in different circumstances.

4. *Improved procedures for site selection.* A probable benefit from undertaking a program of advance acquisition is an improvement in the procedures of selecting sites for public facilities. There is more time to study site requirements if selection is made in advance, and there is more opportunity for coordinating the selection of sites of all public facilities.

5. *Return on temporary use.* Land being held for future use can produce income while it is being held, or can serve some useful public purpose.

Of this list of benefits, numbers 1 and 5 are readily subject to dollar measures, while numbers 3 and 4 are almost impossible to value in dollars and number 2 is intermediate. Thus, the advantage of any particular advance acquisition is likely to consist of a combination of both dollar-measurable and intangible benefits.

The principles for measuring benefits numbers 1 and 2 are difficult to summarize. Suffice it to say that their sum is a function of the difference between what is paid for a

property and what the government would be willing to pay at the time the property is to be put to use. However, the market price of the land at that date provides a floor below which the benefit cannot fall, providing, of course, sale is unimpeded. The determinants of what governments should be willing to pay are discussed in Chapter 4.

The costs of advance acquisition, on the other hand, are usually amenable to dollar measurement. They are:

1. *Cost of capital.* The money invested in land sometimes needs to be borrowed and therefore involves an interest cost. But even if money is available without new borrowing, there is actually a cost of tying it up in land: the benefit of other uses to which it could be put must be given up. This "opportunity cost" is also measured by the interest rate. When the local government can borrow additional funds without impairing its credit rating, a good case can be made for using the borrowing rate on municipal bonds as the cost of capital that is tied up by the advance land acquisition.

2. *Lost property taxes.* Since advance land acquisition removes property from the tax rolls, the local government loses a stream of property taxes that would be paid if the land were left in private ownership until the time of actual need. The size of the foregone taxes depends, of course, on the property tax rate. But it also depends on the assessed valuation that is appropriate. If no private construction is prevented by the acquisition, the assessed value of the existing property can be used, though it should be adjusted for an expected rise in property values. If the advance acquisition prevents new private construction which would otherwise have taken place, the tax loss on the new improvements must also be considered, unless there is reason to believe that the improvements would simply be displaced to another part of the municipality.

3. *Management expenses.* There are administrative expenses associated with running an advance acquisition program. Most of these tend to be of an overhead variety. They include the expense of ongoing acquisition planning and the general provisions for managing acquired property. In areas where there is already a planning organization and real estate department, this is probably not a large cost, but in smaller communities it may be more of a problem.

THE DECISION TO ACQUIRE

The major benefits of acquiring land in advance must in some sense be added together and the costs subtracted in order to judge the net advantage or disadvantage and, thereby, whether the particular advance acquisition is worth undertaking. The analysis concentrates, of course, only on the matter of the advantage of acquiring land *in advance* and assumes that an expected need for land has been established.

"Present Values." One technical problem is encountered immediately: only comparable things can be added, and a benefit that will be received, or a cost incurred, in the future is not comparable to one received today. The benefit is less valuable if it is put off since it will be enjoyed for fewer years. The future cost is less burdensome since the resources can be put to other uses in the meantime.

In connection with advance acquisition, both costs and benefits occur at different times and to put them all on a comparable basis it is necessary to convert each to a single point in time—the time when the decision must be made. This can be done by using the well known technique of the discounting method appropriate to converting every cost and every benefit to its "present value." Thus, the benefit of appreciation in the value of property is felt at the time that the property is put to use (had it not been bought in advance, one would have had to pay more for it at that time). If, say, $10,000 is paid for land to be used in ten years, at which time it is expected to be worth $18,000, the benefit today is not $8,000, but the sum that would have to be invested today to grow to $8,000 ten years hence. At any discount rate selected, the present value of a benefit received or cost incurred in any future year can be looked up in standard mathematical tables. To illustrate, if the annual cost of waiting

is put at 4 percent, the benefit from a dollar received five years hence is worth today 82 cents. If it were received ten years hence, it would be worth 68 cents today; thus, the present value of the $8,000 appreciation is $5,400. Similarly, a cost of one dollar incurred ten years hence hurts only 68 cents worth if the advantage of waiting (the earnings of the dollar in the meantime) is put at 4 percent. How this principle is applied to the costs and benefits of advance acquisition is described in a general way in Chapter 3 and examined in more detail in Chapters 4 and 5.

Uncertainty in Estimating Costs and Benefits. Granted then that all costs and benefits have to be converted to their present values there still remains the problem of arriving at an estimate of what they are expected to be. For the major costs, the estimates are straightforward since tax rates and the appropriate interest cost can be determined with reasonable confidence. For benefits, estimation is often more difficult: Does it seem likely that land prices will rise and, roughly, how fast? How much more productive is a site that can be acquired now but would probably be unavailable in later years? Questions of this sort need to be answered. Chapter 6 examines the circumstances in which answers may be more confident or less confident. For some sorts of benefits, such as improved planning and selection procedures, dollar value estimates, however vague, are virtually impossible; nevertheless, they must not be ignored.

Judging the Net Advantage. Expected costs then are relatively measurable and sure; expected benefits can range from measurable and sure through various degrees of measurability and probability. This suggests a procedure of evaluation.

Say costs come to about 6 percent a year (4 percent interest and 2 percent tax). Then if prices can be quite confidently predicted to rise at least at this rate (as in Montgomery County), or when the cost of demolishing new construction would bring the price rise well over the 6 percent figure (as in Richmond), advance acquisition is clearly worthwhile. The benefit of better sites, improved planning, and the like are simply an additional bonus. At other times, uncertainty about the course of prices will imply that the benefit of the best site needs to be evaluated, albeit roughly, to decide whether benefits may be expected to exceed a 6 percent rate. Analogously, under still other circumstances intangible benefits may need to be carefully evaluated.

The analysis implies that good *average* results are easier to achieve than are clear benefits in each undertaking. At best the *chances* of what will occur can be evaluated, but unpredictable occurrences will inevitably influence the actual outcome. This fact carries an important message about how to organize an advance acquisition program.

ADMINISTERING ADVANCE ACQUISITION

Sometimes a large acquisition must be viewed as an entity, and acquisition is not justified unless it seems clear that the most adverse results that are at all likely can be tolerated, and the more likely ones clearly advantageous.

Pooled Programs. But for many sorts of acquisition problems the work should be set up so that *average* results dictate the success of the program. To this end it is important to consolidate acquisition of as many kinds of sites as possible in one department. As previously mentioned, it is also essential that the department be free to sell properties when they turn out not to be needed, or when cheaper or more suitable alternatives become available.

Other Guides. Proper administration can provide other ways of reducing the risk of adverse results. They are discussed at the end of Chapter 10. The ways include proper accounting systems, interdepartmental information systems, and selection of appropriate techniques of reserving land. Finally, results can be improved through cooperation among local governments and by utilization of the powers of the federal government to bring a wider framework to bear on the definition and pursuit of public advantage from anticipating the need for land.

ACQUISITION OF DEVELOPMENT RIGHTS: A MODERN LAND USE TOOL

ROBERT J. ECKERT*

I. INTRODUCTION

When the State of Florida or a political subdivision thereof proposes highways, parks, or other public uses requiring acquisition of private land, the practice today is to immediately condemn the land if funds have been appropriated. In cases where the land will not be devoted immediately to the public use, either the condemnor must wait until the needed funds have been appropriated, during which time the land will often be developed;[1] or, if funds are available,[2] the land will be condemned immediately although it may not be devoted to the public use for several years.[3] In

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* Editor-in-Chief, *University of Miami Law Review;* Student Instructor, Legal Research and Writing I and II.

1. Recent instances have occurred in South Florida. Earl Crooks, Hialeah zoning consultant, pointed out that the city was legally unable to refuse the granting of building permits for the construction of warehouses on land that is slated for highway right-of-way purposes:

> Metro officials say the deal fits a pattern of land transactions in Hialeah which have cost taxpayers thousands of extra dollars for the acquisition of recently improved right of way land.

The Miami Herald, Nov. 29, 1968, § D, at 1, cols. 6-8.

2. Funds for advanced acquisitions are very limited, when they exist at all. For example, in Dade County, for the fiscal year 1969, the Highway Department has been budgeted $75,000 for all projects; only what is left after immediate projects are financed can be used for advanced acquisitions. Interview with Charles Crumpton, Assistant Director of the Metropolitan Dade County Planning Department, in Miami, Dec. 31, 1968.

For parks and recreation areas, there are no funds at all budgeted for advanced acquisitions for Dade County in the fiscal year 1969. Interview with Robert Perkins, Chief of Planning and Programming, Metropolitan Dade County Park and Recreation Department, in Miami, Dec. 31, 1968.

3. For authority for such advanced acquisition *see, e.g.*, Carlor Co. v. City of Miami,

the latter alternative, during the time which elapses before the land is actually developed for the public use, the private use to which the land was put ceases, and the economic benefit—profit to the land-owner, tax revenue to the state, and the land's output for society—is lost.

The purpose of this article is to show that through a modern method of property acquisition—specifically, through acquisition of the development rights of land—both the problem of increased condemnation expenses caused by development of the land to be condemned and the problem of the three-fold economic loss described above can be avoided.

It must be pointed out, however, that a landowner's right to develop his land to its most profitable use is basic to the concept of land ownership. It is constitutionally protected.[4] Yet it is subject to limitation;[5] and the constitutional protection which it receives, as a property interest, is that a taking of the land must be based on a proper exertion of the police power and must be one for which just compensation is made.[6] The concept of development right acquisition is based on the recognition of this right, and further, on the recognition that a landowner's interest in developing his land is a severable component of his entire interest in, and therefore of, the value of the land. As such, it is subject to acquisition by the state, through condemnation, for example. The following example will demonstrate how such acquisition might occur:

> *A* owns an orange grove through which a highway is planned. The value of the land as an orange grove is $2,000 per acre. Yet the fair market value of the land is $4,500 per acre because it could be developed into a housing subdivision.

Under methods presently existing, if the State Road Department does not have immediate funds to condemn the land, it might well have to condemn the land after housing has been constructed on it, obviously at amounts greater than $4,500 per acre. Yet if it has sufficient funds to condemn the land at $4,500 per acre, the economic benefit of *A*'s income, the state's tax revenues from the land, and the income from oranges otherwise produced will be lost during the time that would elapse before the highway could be constructed.

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62 So.2d 897 (Fla. 1953); State Road Dept. v. Southland, Inc., 117 So.2d 512 (Fla. 1st Dist. 1960), and authority contained therein.

4. Governmental action in the form of regulation which is so onerous as to constitute a taking, constitutionally requires compensation. *See* Goldblatt v. Hempstead, 369 U.S. 590 (1961), and authority cited in 26 AM. JUR. 2d *Eminent Domain* § 157 (1966).

For example, interference with the right to develop land by erecting billboards has been held unreasonable and invalid, as not being necessary to the health, safety, and welfare of the state or community, and therefore a taking of private property for public use without compensation. Anderson v. Shackelford, 74 Fla. 36, 76 So. 343 (1917); *see also* Annot., 72 A.L.R. 469 (1931); Annot., 58 A.L.R.2d 1318 (1958).

5. For example, in the area of billboard construction (*see* note 3 *supra*), regulations as to size and height, manner of construction, and maintenance will be upheld if they tend to protect public safety, health, morals, or general welfare. *See* St. Louis Poster Adv. Co. v. St. Louis, 249 U.S. 269 (1918), and *generally* 3 AM. JUR. 2d *Advertising* § 14 (1962).

6. *See, e.g.*, Delaware, L. & W.R.R. v. Town of Morristown, 276 U.S. 182 (1928).

A development right acquisition act presents a much better alternative. First, the development right value of *A*'s property would have to be computed; it would be the difference between the value of the land at its present use ($2,000 per acre) and the value of the land if developed ($4,500 per acre), or $2,500 per acre. Secondly, it is this development right value component of *A*'s interest in his property which should be the subject of immediate acquisition. After such acquisition, *A* could continue to produce oranges on his land, profiting and paying taxes as in the past, or he could sell the interest which he retained. Finally, when the State Road Department is ready to begin road construction, it could condemn the remaining interest in the land and acquire it at its current value as an orange grove (perhaps more, or less, than the $2,000 per acre value which existed at the time of the acquisition of the development use). Therefore, the economic losses of *A*, of the state, and of society would be avoided; the state would not have had to risk the condemnation of developed land, and *A* will have been fully and fairly compensated.

II. Existing Authority for a Development Right Acquisition Statute

A. *The Development Right Interest as a Severable Component of Value*

In the leading case of *Sutton v. Frazier*,[7] the legislature's power to determine the nature of the interest to be taken through condemnation was recognized. The court said,

> [T]he legislature has full power to determine the nature of the title to be acquired by the condemner [*sic*], since the constitution of this state places no limitation or restriction on the nature of the title to lands which may be acquired by the process of eminent domain.[8]

The Florida constitution similarly places no limitation or restriction on the nature of the title which may be acquired. In the sections which deal with eminent domain,[9] the general terms of "property" and "private property" are used.

The Florida legislature has exercised its power to determine the nature of the title to be acquired and has progressively recognized different interests. The first condemnation statute limited the right which could be taken to that of an easement, or right to use the property.[10] Subsequently, Florida's condemnation statutes provided specifically for "an easement, an estate for years, or the fee simple title . . ."[11] or generally

7. 183 Kan. 33, 325 P.2d 338 (1958).
8. *Id.* at 41, 325 P.2d at 346.
9. Fla. Const. Decl. of Rights § 9, Fla. Const. art. X § 6 (1968).
10. Fla. Rev. Stat. § 1564 (1892).
11. Fla. Stat. § 73.20 (1963).

"the particular right or estate in said property sought . . . ."[12] The current statutes refer simply to "the estate or interest in the property . . . ."[13] These statutes alone are perhaps broad enough to allow condemnation of the development right; in any case, they indicate the legislature's recognition that various interests in land can be acquired through eminent domain. The development right is another such interest and component of value, and for the reasons mentioned should be specifically recognized by statute to be subject to condemnation.

B. *General Precedent*

A development right acquisition act, entitled the English Town and Country Act of 1947,[14] has existed in England since shortly after World War II. It has been the means by which the development rights to land have been expropriated with compensation, leaving the landowner with the right to use and enjoy the land subject to the government's right to keep the land undeveloped.

In the United States, similar results have been achieved through the use of the power to condemn easements. Development rights have, in effect, been taken by statutes which permit the state or municipality to condemn easements[15] for purposes such as to conserve future rights of way and scenic easements for highways.[16] In the leading case of *United States v. Causby*,[17] the court found that a flight easement had been taken (and ruled that compensation was necessary). This type of taking not only condemns definite development rights but, in cases such as *Causby*, also takes the existing use.

Set-back ordinances, which necessarily restrict development rights, also have been upheld.[18] In one case a city was held to have the power to condemn interests in strips of land abutting an avenue, thereby restricting the owner's use to ornamental courtyard purposes.[19]

Easements restricting building heights similarly have been upheld (when compensation is given).[20] The Supreme Court of Minnesota has recognized that the concept of condemnation includes the taking of certain development rights if the taking is for a public use.[21] The court

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12. *Id.* § 73.12.
13. FLA. STAT. §§ 73.021(3), 73.101 (1967); *see also* § 74.061.
14. 10 & 11 Geo. 6, c. 51.
15. *E.g.*, FLA. STAT. § 73.20 (1963).
16. *E.g.*, WIS. STAT. ANN. § 84.09(1) (1957).
17. 328 U.S. 256 (1946).
18. *See, e.g.*, City of Miami v. Romer, 73 So.2d 285 (Fla. 1954), where the court said that if the ordinance is found to be a valid exercise of the police power the question remains whether there has been such a deprivation of a beneficial use as to amount to a compensable taking.
19. *In re* City of New York, 57 App. Div. 166, 68 N.Y.S. 196, *aff'd mem.*, 167 N.Y. 624, 60 N.E. 1108 (1901).
20. *See, e.g.*, Parker v. Commonwealth, 178 Mass. 199, 59 N.E. 634 (1901); Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923).
21. State *ex rel.* Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920).

defined the restriction on the land use as a "taking,"[22] and upheld the condemnation statute which prohibited certain classes of buildings, on the ground that a taking to insure fit and harmonious surroundings was a taking for a public use.

C. *Acquisition of Development Rights through Open-Space Legislation*

The Federal Housing Act of 1961[23] led the way, by providing federal assistance, to the condemnation of land for the public needs of "necessary recreational, conservation, and scenic areas . . . ."[24]

"Open-space land" is defined in the act as

> any undeveloped or predominantly undeveloped land in an urban area which has value for (A) park and recreational purposes, (B) conservation of land and other natural resources, or (C) historic or scenic purposes.[25]

Since the land is in an urban area and it is "undeveloped" or "predominantly undeveloped," it is clear that its greatest component of value is the development right. The terminology used in the act is broad enough to encompass the acquisition of the development right (so long as it is not acquired only for a period of years), as section 1500a provides that the Home Finance Administrator is authorized "to help finance the acquisition of title to, *or other permanent interests in*, such land." (Emphasis added.)

States have enacted open-space legislation in response to the federal act.[26] The language regarding the interest acquirable usually is broad enough to encompass the acquisition of the development right. The following excerpt from the California act is typical:

> [A]ny country or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee *or any lesser interest or right* in real property in order to preserve, *through limitation of their future use*, open spaces and areas for public use and enjoyment.[27]

The New Jersey act specifically provided for what would be considered the acquisition of the development right. Consistent with the American trend it is termed a "conservation easement," as contrasted with the English method discussed under section II B, above. The act provides:

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22. *Id.* at 2, 176 N.W. 160.
23. §§ 701-706, 75 STAT. 185 (1961), 42 U.S.C.A. §§ 1500-1500(e) (Supp. 1961).
24. *Id.* § 1500(b).
25. *Id.* § 1500(c).
26. *See, e.g.*, CAL. GOV'T CODE §§ 6950-54; FLA. STAT. § 193.202 (1967); MD. ANN. CODE art. 66C, § 357 A (Supp. 1960); N.J. STAT. ANN. § 13:8A to 8A-18 (1961); N.Y. MUNIC. LAW § 247 (Supp. 1961).
27. CAL. GOV'T CODE § 6950 (emphasis added).

> Without limitation of the definition of "lands" herein, the commissioner may acquire, or approve grants to assist a local unit to acquire: . . . (b) an interest or right consisting, in whole or in part, of a *restriction on the use of land by others including owners of other interests therein* . . . .[28]

If the commissioner were to acquire the development right, the interest acquired would be a restriction on the use of the owner of the fee, who falls within the statute.

Florida presently has a progressive act, discussed below,[29] whereby open space may be set aside for recreational or park land purposes.[30] This statute is based upon a landowner's taking the initiative to convey development rights to the governing board of any county of this state in exchange for tax assessment benefits, rather than on the state's acquiring the development right through eminent domain.

D. *The Development Right Acquisition Power by Implication*

Although the acquisition of development rights is perhaps the most modern idea in the law of property today, several established legal concepts seem to point in its direction to such an extent as to imply an existence of the power.

1. ADVANCED ACQUISITION

Advanced acquisition, or condemnation for a future use, was recognized by the United States Supreme Court as early as 1923 in the case of *Rindge Co. v. Los Angeles County*.[31] Florida was one of the first states to accept the doctrine.[32] Six other states have similarly accepted it;[33] indeed, no state legislature which has considered it has rejected it. Under the doctrine, which will be discussed below in the light of the constitutional requirement of "necessity," a condemnor has the power to condemn property even though it will not be devoted to the public use until several years into the future.[34]

As was pointed out in the introduction to this paper, the economic benefits to the individual, to the state, and to society in general are usu-

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28. N.J. STAT. ANN. § 13:8A-12 (1961) (emphasis added).

29. *See* discussion under § IV(A) *infra*.

30. FLA. STAT. § 193.202(1) (1967).

31. 262 U.S. 700 (1923). For another recent federal case, *see* Chapman v. Public Utility Dist. No. 1, 367 F.2d 163 (9th Cir. 1966).

32. *See* discussion under § III(C) *infra*.

33. Berry v. Alabama Power Co., 257 Ala. 654, 60 So.2d 681 (1952); State *ex rel.* Sharp v. 0.62033 Acres of Land, 49 Del. 174, 112 A.2d 857 (1955); Pike County Bd. of Education v. Ford, 279 S.W.2d 679 (La. App. 1967), *application denied*, 251 La. 229, 203 So.2d 558; Erwin v. Miss. State Highway Comm'n, 213 Miss. 895, 58 So.2d 52 (1952); State *ex rel.* Hunter v. Super. Ct. for Snohomish County, 34 Wash. 2d 214, 208 P.2d 866 (1949).

34. Seven years was upheld in Carlor Co. v. City of Miami, 62 So.2d 897 (Fla. 1953), *cert. denied*, 346 U.S. 861 (1966).

ally lost during the time which elapses between condemnation and development of the land for public use. It would certainly seem that since jurisdictions have accepted the advanced acquisition concept with its inherent economic loss weakness, they would be willing to accept a development right acquisition concept which would ultimately bring about the same result but without the economic loss problem.

A difference between the two concepts which might lead to criticism of the latter lies in the fact that development right acquisition will probably lead to more condemnations for public needs than have previously been accepted under the case law. Although this objection is dealt with in the constitutional section below, it seems that the public interest in avoiding the three-fold economic loss, and the public interest in long range planning, would justify such a result. It is also to be noted that the case law has not set a limit, but has dealt with each case on its particular facts.

2. RESTRICTIONS OF USE UNDER POLICE POWER

Insofar as it limits the use of land, the entire body of zoning law[88] can be viewed as a type of development use acquisition. Although it is acquisition without compensation, it is justified when used as a legitimate exercise of the police powers of the state, *i.e.*, when it is done to promote public health, safety, morals, or welfare.[89] It is not suggested that the term "public welfare" should include an avoidance of the economic loss that results without a development use acquisition act, so as to enable the state to condemn development rights without compensation under the police power. But it is to be pointed out that, even without compensation, the state does have the power to restrict the use of land for the general welfare of the public. It seems not so great a step to recognition of the state power to restrict land to an existing use by means of the compensated acquisition of development rights, in order to prevent public economic loss.

III. CONSTITUTIONAL CONSIDERATIONS

[Discussion of Florida law on the right to take—public use, necessity, delegation of power, etc. omitted.]

IV. METHODS OF ACQUIRING THE DEVELOPMENT RIGHTS OF LAND

A. *Conveyance in Exchange for Tax Benefits*

Under the present Florida statute regarding outdoor recreational or park land,[80] the owner or owners in fee of land being used for outdoor recreational or park purposes may either convey the development rights of their land or covenant for a term of not less than ten years that the land will not be used for any purpose other than outdoor or recreational purposes. The statute defines any covenant used to be one running with the land.[81]

In exchange for the giving up of the development right, the landowner will receive as a tax benefit the assessment of his land "as outdoor recreational or park lands upon an acreage basis, so long as such lands are actually used for outdoor recreational or park purposes."[82] The statute is explicit that "[i]n valuing such land for tax purposes, an assessor or any taxing agency shall consider no factors other than those relative to its value for the present use. . . ."[83]

Beyond this tax incentive, there are other forces which may come into play to induce a landowner to give up development rights under this statute. For example, in cases where home sites are to be sold at higher prices because they abut what the developer promises will be a golf course, the purchasers can refuse to accept the developer's mere promise but may actually require him to convey development rights to the governing board of the county (or covenant not to develop the land).

California has a similar statute whereby tax benefits can be derived by entering into use restriction agreements with governmental agencies. Under the statute, the tax assessor is required to "consider the effect upon value [of the land] of any enforceable restrictions to which the use of the land may be subjected."[84] These restrictions, the act provides,

> shall include but are not necessarily limited to zoning restrictions limiting the use of land and *any recorded contractual provisions* limiting the use of lands entered into with a governmental agency pursuant to state laws or applicable local ordinances.[85]

Maryland, too, has passed a tax credit provision for land determined to be open-space and

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79. *Id.*
80. FLA. STAT. § 193.202 (1967).
81. FLA. STAT. § 193.202(6)(c) (1967).
82. FLA. STAT. § 193.202(3) (1967).
83. *Id.*
84. CAL. REV. & TAX § 402.1 (1967).
85. *Id.* (emphasis added).

> for which the owner or predecessor in title has permanently conveyed or assigned to the State or other designated governmental bodies an easement or interest in the land which limits the use thereof in such manner as to preserve its natural open character in perpetuity.[86]

The tax credit can be up to 50% in some categories of open-space[87] and up to 100% in others.[88]

These statutes are, of course, fine as far as they go, but they are permissive rather than mandatory. Clearly, when the state or a political subdivision thereof finds it in the public interest to acquire development rights in order to prevent development in areas to be condemned, in order to avoid the economic loss incident to advanced acquisition, it must also have a development right acquisition statute under which to exercise eminent domain power in dealing with a landowner who is not willing to convey development rights in exchange for tax benefits.

B. *Condemnation and Lease-Back*

The Model Eminent Domain Code Draft[89] provides a method by which, in effect, the development right of land can be condemned. Section 311 of the Code, subsection A of which was used in part in the drafting of the Development Right Acquisition Act of 1969 (proposal), enables a governmental subdivision to acquire in advance land which will be devoted to a public use "within a reasonable time." Before the land is cleared for the public use intended, it can be leased back to the prior owner or to someone else if the prior owner declined the leasing right. The land therefore would not be unused; and the prior economic benefit, not lost. Furthermore, under subsection 311 C, the land would be subject to taxation. It is clear, too, that the problem of the possibility of increased acquisition costs at a later date is avoided.

The major difference between this method and the direct method of development right acquisition is that in the former the funds necessary for advanced acquisition must be at hand, which funds, it was pointed out,[90] are often not available. In addition, all the responsibility connected with land ownership would rest on the state rather than on the private individual under the condemnation, lease-back method.

The following are salient aspects of the model code draft:

> A. Such governmental subdivision and agency which has been given the power of condemnation by law may, for projects or otherwise, which have been approved by the condemnor and by the governing body of the appropriate political entity, after a general plan has been adopted by said body, as the same may

86. 7 MD. ANN. CODE art. 81 § 12E (Cum. Supp. 1967).
87. *Id.* § 12E(c).
88. *Id.* § 12E(d).
89. 2 REAL PROPERTY, PROBATE & TRUST J. 365 (1967).
90. *See* discussion in note 2, *supra*.

be amended, acquire lands and interests therein in fee simple, or lesser, in advance of the time of the adoption of a budget including such lands and interests. Such power may be exercised when, in the judgment of the condemnor, the public interest will be served and economy effectuated by forestalling development of such land, which will entail greater acquisition costs at a later date, and when such exercise is determined to be necessary, convenient, and desirable.

B. Upon such acquisition, the condemnor may improve, use, maintain, or lease such lands until the same are required for public use. There may necessarily be a period of time between the acquisition of needed lands and the commencement of actual site clearance and the construction, but such fact shall not minimize the public purpose of such acquisition, provided that it can be determined that such lands will be used for the purpose for which they were acquired within a reasonable time.

C. The owner of such land at the time of acquisition under this section shall have the first right to enter into lease thereof with the condemnor until such lands are needed for public use. Any land so leased shall be subject to general property taxation during the term of the lease. All rentals shall be credited to the project land acquisition account. . . .

D. A condemnor with authority to acquire land under this section shall also have authority to dispose of land, or part of it, if it determines there is no longer need for such property for present or future purposes and if the public interests will be best served by such disposition. In the event of disposition, first priority of repurchase at an amount equivalent to the current fair market value of the property shall be accorded to the former owner for such property. If such owner fails to repurchase within a reasonable time, the land shall be advertised for public sale by sealed bids and sold forthwith to the highest bidder.

C. *Development Right Acquisition*

For the reasons given throughout this paper, it is apparent that public interest requires some means of acquiring the development right of land. The weaknesses of several available or suggested means have been demonstrated. It becomes clear that a statute providing a direct means of development right acquisition is needed. The concluding section of this paper presents the writer's proposal for such a statute.

V. THE DEVELOPMENT RIGHT ACQUISITION ACT OF 1969—A PROPOSAL (to be a new chapter in Florida Statutes)

Section 1 Short Title.—

This act may be cited as the Development Right Acquisition Act of 1969.

Section II Definition.—

"Development right," whenever used as referred to in this act, shall mean the right of the owner of the fee interest in the land to change the use of the land from its existing use to any other use.

Section III Procedure.—

(1) The state, the governing board of any county or any municipality in this state, or any other governmental subdivision or agency which has been given the power to acquire property by law may, for projects or otherwise which have been approved by the acquiring body and by the governing body of the appropriate political entity, after a general plan has been adopted by said body, as the same may be amended, acquire the development right of lands therein, in advance of the time of the adoption of a budget to finance the acquisition of the land in fee simple, or less, and the development thereof to a public purpose. Such power may be exercised when, in the judgment of the acquiring body, the public interest will be served and economy effectuated by forestalling acquisition in fee simple, or less, and development of such land, which would entail greater acquisition costs at a later date, and when such exercise is determined to be necessary, convenient and desirable. This act is in addition to all other provisions of Florida law dealing with the acquisition of property or any rights therein, in whole or in part.

(2) If the acquisition is to be through the exercise of the power of eminent domain, in addition to following the procedure set forth in Chapter 72 of Florida Statutes, the condemnor shall set forth in the petition the following:

(a) an explanation why public interest requires the acquisition of the development right before the land is to be acquired in fee simple, or less.

(b) a general plan for the development of the land ultimately to be acquired including the setting of a date certain at which time the land will be condemned in fee simple, or less; in no case shall such a date be more than ten (10) years after the date of the condemnation of the development right of such land.

Comment:

This section is set up in two subsections to make clear the legislative intent that acquisition may be by means other than eminent domain proceedings, such as by purchase or gift. Subsection (2) requires in the case of eminent domain proceedings that the satisfaction of the public use or interest requirement discussed above[92] be shown in the petition itself.

91. 2 REAL PROPERTY, PROBATE & TRUST J. 365 (1967).

92. *See* pp. 353-57.

Some of the language of subsection (1) was taken from subsection 311 A of the Model Eminent Domain Code Draft.[93]

Section IV Compensation.—

(1) Where the development right of land is acquired by means other than through eminent domain proceedings, as by gift or purchase, the land owners compensation shall be determined by the agreement of the parties involved.

(2) Where the development right of land is acquired through eminent domain proceedings, the procedure shall be in accordance with Chapter 73 of Florida Statutes, and the amount of full compensation shall be based on the difference between the fair market value of the land and the value of the land for the use to which it was devoted at the time of the acquisition.

When the fee simple, or lesser interest, is subsequently condemned, the grantor's compensation shall be based on a current appraisal of the value of the land at the use permitted at the date of the subsequent acquisition.

Comment:

This section is designed to clarify the manner in which compensation shall be measured to comply with the full compensation requirement discussed above.[94] It is suggested that Chapter 73 of Florida Statutes be amended to clarify that "property," as used therein, is defined as property interest.

The second paragraph of subsection (2) is to emphasize that there will be at the time of the condemnation of the fee simple, or less, a current appraisal of the land at the use permitted after the condemnation of the development right.

Section V Reconveyance of the development right.—

(1) The owner of the land of which the development right has been acquired under this act shall not change the use of said land from the use existing at the time of the acquisition of the development right without first obtaining a written instrument from the body which has acquired the development right, which instrument re-conveys all or part of the development right to said owner and which instrument must be promptly recorded in the same manner as any other instrument affecting the title to real estate.

(2) No governmental body which holds title to a development right pursuant to this act shall convey said development right to anyone other than the record holder of the fee simple interest in the land to which the development right attaches, and the conveyance to said owner of the fee shall be made only after a determination by said governmental body that such conveyance

93. *See* pp. 361-62.
94. *See* pp. 357-58.

would not adversely affect the interest of the public. Section 125.35, Florida Statutes, shall not apply to such sales, but any governmental body which has acquired a development right pursuant to this act shall forthwith adopt appropriate regulations and procedures governing the disposition of the same. These regulations and procedures shall provide the terms of the conveyance, including the compensation to be paid by the grantee. No development right shall be conveyed by any governmental body without first holding a public hearing and unless notice of the proposed conveyance and the time and place that the public hearing is to be held shall be published once a week for at least two (2) weeks in some newspaper of general circulation in the county involved prior to said hearing.

Comment:

It should be noted that under subsection (2) the owner in fee of the land shall be required to compensate the governmental body in the case of a re-conveyance of the development right.

Section VI Taxation; assessment.—

Any land the development right of which has been acquired shall not be exempt from general property taxation. In valuing such lands for tax purposes, an assessor or any taxing agency shall consider no factor other than those relative to its value for the use existing at the time of the acquisition of the development right or, in the case of a re-conveyance under section 4 of the act, for the use permitted after such re-conveyance.

Section VII Prevention of waste and irreparable injury.—

The body which has acquired the development right shall have the power to file appropriate action to prevent waste or to enjoin irreparable injury which will affect the value of the land as it will be used when developed to the ultimate public use, unless such waste or irreparable injury is necessarily incidental to the use permitted.

Section VIII Inter-governmental agreements.—

In order to effectuate an orderly exercise of power under this section, the agencies and subdivisions of government accorded such power are authorized to enter into agreement with each other, or with the federal government, respecting the financing, planning, or acquisition of property needed for future use, in order to facilitate the general objective of a reasonable program of acquisition of land for future use.

Section IX Effective Date.—

This act will be effective immediately upon becoming law.

90th Congress
1st Session } COMMITTEE PRINT NO. 6

ADVANCE ACQUISITION OF HIGHWAY RIGHTS-OF-WAY STUDY

A STUDY TRANSMITTED BY THE SECRETARY OF THE DEPARTMENT OF TRANSPORTATION TO THE CONGRESS, AS REQUIRED BY THE FEDERAL-AID HIGHWAY ACT OF 1966 (PUBLIC LAW 89-574, 89TH CONG., SEPT. 13, 1966)

JULY 1967

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STUDY OF ADVANCE ACQUISITION OF HIGHWAY RIGHTS-OF-WAY

Summary of Conclusions and Recommendations

Highway officials have long recognized the need to reserve the routes of future highways as soon as they were identified. All too often, without the appropriate legal and financial tools, they are compelled to watch helplessly as unimproved land is developed and improved property changed to even more intensive uses without being able to acquire those portions that would inevitably be needed for future highway use. These highway officials know that the taxpayers want public highways to be constructed but that they will protest vigorously if the facilities cost too much because expensive improvements must be removed to permit construction.

In recognition of the increasing need to acquire lands for future highway use, the Congress, in the Federal-Aid Highway Act of 1966, directed the Secretary of Commerce to undertake a study of the advance acquirement of highway right-of-way for the Federal-aid highway systems. In the study, emphasis was to be given to the provision of adequate time for the disposal of improvements located on rights-of-way, the relocation of affected persons and businesses, methods of financing advance acquisition, and related matters.

Pursuant to this mandate, the Bureau of Public Roads has reviewed the existing literature and materials which have been produced on this subject matter in the past; has sought new and current data from the State highway departments related to elements of advance right-of-way acquisition; and has consulted with the Committee on Right-of-Way of the American Association of State Highway Officials. It has also obtained pertinent materials from the files of the Special Subcommittee on the Federal-Aid Highway Program and valuable suggestions on advance acquisition from its staff.

Future or advance right-of-way acquisition may mean different things to different persons. It is considered for the purpose of this report to be the acquirement of real property for highway purposes at least 2 years prior to its need for highway construction.

Vast sums of money already have been spent and more will be expended to make public highways the most efficient channels of transportation that we know how to provide. The 1965 right-of-way cost estimate for the Interstate System alone was $7.2 billion including the amount expended before January 1, 1965; of this, it is estimated that approximately $3 billion of right-of-way remains yet to be acquired. Additionally, considerable sums are being spent each year for other public highways, both on and off the Federal-aid highway systems for rights-of-way, and untold amounts will be involved in right-of-way acquisition programs that are needed but as yet unauthorized, especially in the urbanized areas of the Nation. If these investments of the efforts of men and resources are to yield the

maximum of beneficial results, past mistakes, particularly those of omission, must serve as guides for future conduct.

Benefits which can be harvested by the public from an appropriate program of acquiring property for future highway use include:

(1) Right-of-way costs will be minimized by forestalling costly development of land ultimately required for highway purposes.

(2) There can be more orderly, deliberate, and beneficial relocation of persons, businesses, farms, and other existing uses of property at lower economic and social costs.

(3) More orderly development of communities will be achieved by the early identification and reservation of highway locations.

(4) Private developers and property owners will be enabled to plan their private land uses and development wholly consistent, physically and functionally, with an ultimate highway plan.

(5) Highway improvement activities will be facilitated by the provision of more leadtime which the advance acquirement of right-of-way makes possible. Advance engineering planning and design will be stimulated, thereby making possible a more rational and deliberate approach to the provision of a modern highway plant.

(6) Without the pressure of having to meet short deadlines, negotiations with property owners can be much more serene and satisfactory from every point of view. Public relations generally will be facilitated.

These advantages notwithstanding, advance acquisition is not an Aladdin's Lamp. It has some potential shortcomings that must be reckoned with—

(1) Great care must be taken in the administration of a program of advance right-of-way acquisition to make sure that commitments are not made only to be abandoned after further study is made.

(2) In areas of stable land use, potential advantages may be questionable. Economic and social returns from the application of the concept will be greatest in the undeveloped suburban and urban fringe areas of metropolitan places and in downtown areas where land uses are being upgraded or are rapidly changing.

(3) When improved property is purchased in advance of need, the State must maintain the acquired properties if neighborhood deterioration is to be avoided. Under these circumstances, the State may be plagued with all the usual problems associated with a landlord and tenant relationship. If properties remain vacant, vandalism and policing can become an acute problem.

A few illustrations of cost savings effected by advance right-of-way acquirement are noteworthy. In the Birmingham area of Alabama, a large undeveloped shopping center site, purchased by the State highway department in 1959, will not be needed for highway purposes until some time this year; the site was purchased for $275,000, and this represented a savings of several million dollars in land and improvement costs which would have been incurred had the shopping center been built. The Arizona Highway Department purchased a 5-acre tract in East Phoenix for $57,700; one of the largest Phoenix builders had optioned this property in order to build a large condominium apartment project; had the project been built, many thousands of additional dollars of right-of-way cost would have been involved.

The economics of advance right-of-way acquisition can be approached negatively, so to speak, as well as positively as has been done in the foregoing illustration. In one State, for example, a new trailer park was acquired for highway purposes costing $200,000. The land value amounted to only $32,000. Had the parcel been purchased before construction of the trailer park, $168,000 might have been saved.

Since 1952, California has used an advance right-of-way acquisition revolving fund of $30 million with which the State has purchased property estimated at $66 million. If these acquisitions had not been made and normal improvements permitted to proceed, the costs in the future to the State would have approximated $366 million. The indicated savings, therefore, are estimated at $300 million, over a 12-year period, or an average of $25 million per year. In 1965, the capital outlay for highway right-of-way in California was $178 million; the savings, through advance purchases, from this fund alone, amounted to approximately 14 percent of its total right-of-way costs. In addition, the State acquires in advance to a considerable extent from current funds.

It has been generally recognized that under many circumstances it would be in the public interest to acquire property for future highway rights-of-way. The inquiry may then be made as to whether such an activity is now authorized under existing Federal-aid laws. The answer is in the affirmative. For all Federal-aid highway systems, including the Interstate System, right-of-way acquisition can be financed, in the usual Federal pro rata, out of each State's annual apportionment from Federal Highway Trust Funds as long as 7 years in advance of construction. For the most part, this time period has been found to be adequate, though in a few isolated instances it has not.

The legal status of advance acquisition at the State level is not so clearly defined. Statutes specifically authorizing the acquisition of lands for future highway use have been found in 27 jurisdictions.[1] In 26 of these jurisdictions, the legal authority is granted to the highway department, but in Wisconsin, the authority is bestowed on the Milwaukee County Expressway Commission. In addition, in 16 other States[2] and the District of Columbia, authority to acquire lands for future highway use is implied by the statutes or by court decisions in those jurisdictions. Accordingly, in 43 jurisdictions, there is either express or implied authority to anticipate the future in highway land acquirement activities.

It does not follow, from the fact that many States have express or implied authority to acquire property for future highway use, that such authorizations are fully utilized or are completely adequate to deal with a full range of advance acquisition problems. The contrary actually prevails. Necessary or desirable elements of authority and practice are dealt with in several recent studies, discussed later in this report. The elements include such matters as an appropriate declaration of legislative policy, a delegation of authority to acquire lands for future highway use, definition of future use, standards for the exercise

[1] Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Puerto Rico, Utah, Virginia, Washington, West Virginia, Wisconsin.
[2] Delaware, Iowa, Kentucky, Maine, Mississippi, Missouri, New Hampshire, New York, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, Wyoming.

of the power, type of interest to be acquired, the power to sell lands no longer needed, power to lease, application to improved or unimproved lands, financing, definition of terms, intergovernmental relationships, and other matters.

A completely adequate legislation authorization to acquire lands for future highway use is useless unless the financial resources to do the job are somehow provided. At the Federal level, while funds available for Federal-aid highway improvement may be used for advance right-of-way acquisition, this use is in competition with the demands for physical contruction of highways. The level of Federal-aid highway funding authorized is insufficient to encourage much, if any, acquisition of property for future highway use; it is barely sufficient to finance interstate and other Federal-aid construction programs. From the State side, 12 of the States [3] have established specific funds for advance acquisition, of varying size and adequacy in terms of the need. The magnitudes range from $300,000 in Delaware to $50 million in New York. Additionally, seven other States set aside funds of various sizes for this purpose from budgeted highway funds. All but three States have indicated that present funding practices are inadequate for advance acquisition purposes. A corollary benefit from an advance right-of-way program would accrue from more orderly relocation practices. In accordance with Federal regulations, and in many instances under their own statutes, State highway departments advise owners and occupants of property needed for highway purposes of relocation advisory assistance that is available. Past experience indicates that approximately 3 percent of individuals and businesses forced to vacate have done so with 30 days or less after notice; 76 percent between 30 and 180 days; and the remaining 21 percent have vacated after 180 days or more. States sometimes grant 30 to 90 days rent-free occupancy. The most prevalent method of disposing of improvements is through public auction or sealed bid. The time required varies. After vacation of the improvement, an average of 2 months are required for advertisement, sale, and removal.

The management of property acquired in advance of need is an essential element of any advance acquisition activity. Of the 50 States, the District of Columbia and Puerto Rico, 48 jurisdictions have legal authority to lease, and 37 of these make use of this power to some extent. Management expenses range from 3 to 30 percent of gross rental income, excluding real estate taxes. Federal funds participate in all elements of property management except for real estate tax-payment, an exception that will bear further policy study. Seven States must pay real estate taxes on properties used for other than highway purposes, and three of these States must make such payments only if the property is income producing.

Tables 1 and 2 summarize some advance acquisition data by States.

The outright acquisition of property in advance of need is but one of several different methods of making sure that the lands needed for future highway purposes will be available at reasonable cost. It may be the best of such methods, since it makes use of the power of eminent domain and immediate compensation is paid for the property taken.

Other ways of achieving the same goals involve reservations of various kinds under the State police power, as is done by or for the State highway departments in nine of the States. Additionally, in 37 States, varying degrees of coordination and cooperation have been effected between the highway departments and local government agencies having reservation authority under the police power.

[3] Arizona, California, Connecticut, Delaware, Maryland, New Jersey, New York, North Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

TABLE 1. PERTINENT ADVANCE ACQUISITION DATA BY STATES

State	Statutory authority to to acquire for future use	Special funding for advance acquisition	Advance planning program period in years	Minimum engineering requirements before acquisition	Legal authority to—				Purchase for protection or hardship	Protection by use of police power		Extent of advance acquisition
					Purchase excess takings	Condemn excess takings	Lease or rent	Sell excess		By State law	By cooperation with local boards	
Alabama	None		1	Preliminary Design	No	No	Yes	Yes	Both		All development	General.
Alaska	Explicit [1]		1	do	Yes	Yes	Yes	Yes	do	All improvements		Minor.
Arizona	do	$500,000	5	do	Yes	Yes	Yes	Yes	do		Zoning	General.
Arkansas	do		3	do	Yes	Yes	Yes	Yes	do		None	Limited.
California	do	30,000,000	5–10	Location fixed	Yes	Yes	Yes	Yes	do	Subdivision	Building and zoning	Extensive.
Colorado	do	(3)	1	Final Design	Yes	Yes	Yes	Yes	Hardship		None	Limited.
Connecticut	do	2,000,000	3–6	do	Yes	No	Yes	Yes	Protective		do	Minor.
Delaware	Implicit [2]	300,000	1	Preliminary Design	Yes	Yes	Yes	Yes	Hardship	Improvement	Building and zoning	Limited.
Florida	Explicit		1	Final Design	Yes	Doubtful	Yes	Yes	Both		do	Minor.
Georgia	None		1	Preliminary Design	Yes	No	Yes	Yes	do		do	Limited.
Hawaii	do		1	do	Yes	Yes	Yes	Yes	do		All development	Minor.
Idaho	Explicit		5	Final Design	Yes	Yes	Yes	Yes	do		do	Do.
Illinois	None		1	Preliminary Design	Remants only.	No	Yes	Yes	do		Building and zoning	Do.
Indiana	Explicit	(3)	3		Yes	Yes	Yes	Yes	do	All improvements	All development	General.
Iowa	do	(3)	5	Preliminary Design	Yes	No	Yes	Yes	do		None	Do.
Kansas	do		5	Final Design	Yes	Yes	Yes	Yes	Hardship		All development	Minor.
Kentucky	Implicit		1	Preliminary Design	Yes	Yes	Yes	Yes	do		Zoning	Do.
Louisiana	Explicit		1	do	Yes	No	Yes	Yes	Both		Building and zoning	Do.
Maine	Implicit		2	Final design	Yes	Yes	Yes	Yes	Hardship		None	Do.
Maryland	Explicit	5,000,000	6	Prelim design	Landlocked only.	Landlocked only.	Yes	Yes	Both		All development	General.
Massachusetts	None		1	do	No	No	Yes	Yes	do		Zoning	Limited.
Michigan	Explicit		5	Location fixed	Yes	Yes	Yes	Yes	do		Building and zoning	Do.
Minnesota	None		5	Prelim design	Yes	Yes	Yes	Yes	do		do	Minor.
Mississippi	Implicit		2	do	Yes	Yes	No	Yes	do		None	Do.
Missouri	do	(3)	5	do	Yes	Yes	Yes	Yes	do		Building and zoning	Extensive.
Montana	Explicit		3	do	Yes	Yes	Yes	Yes	Hardship	Improvement		Minor.
Nebraska	do		2	do	Yes	No	Yes	Yes	Both		Subdivision	Do.
Nevada	do		1	do	Yes	Yes	Yes	Yes	do		All development	Do.
New Hampshire	Implicit		4	do	Yes	Yes	Yes	Yes	do		Building	Do.
New Jersey	Explicit	4,000,000	2	Location fixed	Yes	Yes	No	Yes	do		All development	Limited.
New Mexico	do		3 and 5	Prelim design	Yes	No	Yes	Yes	do		Building	Minor.
New York	Implicit	50,000,000	6	do	Remnants only.	Remnants only.	Yes	Yes	do		Building and zoning	Limited.
North Carolina	do	1,500,000	5	do	Yes	No	Yes	Yes	do		do	General.
North Dakota	Explicit		5	do	Yes	Yes	Yes	Yes	Protective		Building	Do.
Ohio	do	(3)	5	do	Yes	Yes	Yes	Yes	Both		Building and zoning	Limited.
Oklahoma	do		2	do	Yes	Yes	Yes	Yes	Protective		do	Minor.
Oregon	Implicit		2–5	do	Yes	Yes	Yes	Yes	Both		Zoning	Do.

Pennsylvania	Money later			6	do [1]	No	No	Yes	No	do	Improvement	Building and zoning	Limited.
Rhode Island				1	do	Yes	Yes	Yes	Yes	do		Do	Do.
South Carolina	Implicit			1	do	Yes	No	Yes	Hardship			None	Minor.
South Dakota	do			1	do	Yes	Yes	No	do			do	Do.
Tennessee	do	5,000,000		5		Yes	No	Yes	Protective			Building and zoning	Do.
Texas	do	(2)		6	Prelim. design	No	No	Yes	Both			All development	Extensive.
Utah	Explicit	(2)		3	do	Yes	No	Yes	do			Building and zoning	Limited.
Vermont	None		3-6		Final design	No	No	Yes	do			None	Minor.
Virginia	Explicit	4,117,000	3 and 9	6	Prelim. design	Yes	Yes	Yes	do		Improvement	Building and zoning	General.
Washington	do			6	do	Yes	No	Yes	do			do	Minor.
West Virginia	do	2,000,000	3 and 6		Location fixed	No	No	Yes	Protective		Improvement	None	General.
Wisconsin	Implicit	5,000,000	2 and 10		do	Yes	Yes	Yes	do		Subdivision	All development	Do.
Wyoming	do			1	Prelim. design	No	No	Yes	None			None	Minor.
District of Columbia	do			6	do	Yes	Yes	Yes	Hardship			Building and zoning	Do.
Puerto Rico	Explicit		2 and 3		Final design	Yes	Yes	Yes	do		Improvement	do	Limited.

[1] Means that State statute specifically authorized advance acquisition.
[2] From highway funds budgeted for normal acquisition.
[3] Means that a State judicial decision authorized advance acquisition.

TABLE 2

CLASSIFICATION OF STATES BY EXISTING LAW AND PROCEDURE TO ACQUIRE IN ADVANCE OF NEED [1]

State	Legal Authority		Appreciable Funding	Advance Planning Program	Authority to Acquire on Profit, Plus	Authority to Acquire Excess Lands	
						Purchase	Condemnation
Alabama					X		
Georgia					X	X	
Hawaii					X	X	X
Illinois					X		
Massachusetts					X		
Minnesota				X	X	X	
Pennsylvania				X	X		
Rhode Island	NEA				X		
Vermont				X			
Alaska	X				X	X	X
Arkansas	X			X		X	X
Florida	X					X	
Idaho	X			X		X	X
Kansas	X			X	X	X	
Kentucky	X			X	X	X	
Louisiana	X				X	X	
Maine	X					X	X
Michigan	X			X	X	X	X
Mississippi	X				X	X	
Montana	X			X	X	X	X
Nebraska	X				X	X	
Nevada	X				X	X	X
New Hampshire	X			X	X	X	X
New Mexico	X			X	X	X	
North Dakota	X			X	X	X	X
Ohio	X			X	X	X	X
Oklahoma	X				X	X	X
Oregon	X			X		X	X
South Carolina	X				X	X	
South Dakota	X				X	X	X
Washington	X			X	X	X	
Wyoming	X				X		
Dist. of Columbia	X			X		X	X
Puerto Rico	X			X		X	X
Colorado	X	X				X	X
Delaware	X	X			X	X	X
New Jersey	X	X			X	X	X
Connecticut	X	X	X			X	
Maryland	X	X	X	X			
New York	X	X	X	X			
Texas	X	X	X	X			
Iowa	X	X	X	X	X	X	
North Carolina	X	X	X	X	X	X	
Tennessee	X	X	X	X	X	X	
Utah	X	X	X	X	X	X	
West Virginia	X	X	X	X		X	
Arizona	X	X	X	X	X	X	X
California	X	X	X	X	X	X	X
Indiana	X	X	X	X	X	X	X
Missouri	X	X	X	X	X	X	X
Virginia	X	X	X	X	X	X	X
Wisconsin	X	X	X	X	X	X	X

[1] In terms of the elements contained in this table, the States at the lower end of the tabulation presently appear to be better equipped to go forward with advance acquisition than the others. For example, the States at the beginning of the table do not have legal authority to proceed, funding, etc. The States at the lower end of the table possess the several elements necessary to go forward with an advance acquisition program.

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 56

SCENIC EASEMENTS

LEGAL, ADMINISTRATIVE, AND VALUATION PROBLEMS AND PROCEDURES

DONALD T. SUTTE, JR.
DONALD T. SUTTE, JR. & ASSOCIATES
HINSDALE, ILLINOIS
AND
ROGER A. CUNNINGHAM
UNIVERSITY OF MICHIGAN
LAW SCHOOL

RESEARCH SPONSORED BY THE AMERICAN ASSOCIATION
OF STATE HIGHWAY OFFICIALS IN COOPERATION
WITH THE BUREAU OF PUBLIC ROADS

SUBJECT CLASSIFICATION:
TRANSPORTATION ADMINISTRATION
LAND ACQUISITION
ROADSIDE DEVELOPMENT
LEGAL STUDIES

HIGHWAY RESEARCH BOARD
DIVISION OF ENGINEERING NATIONAL RESEARCH COUNCIL
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SCENIC EASEMENTS

LEGAL, ADMINISTRATIVE, AND VALUATION PROBLEMS AND PROCEDURES

SUMMARY This study was divided into two sections with two original goals: (1) the legal aspects of scenic easements and (2) the valuation aspects of scenic easements.

Legal Aspects

The scenic easement would appear to be an extremely useful device for implementing the highway beautification program. In rural areas where the land is not yet ready for development, the cost of scenic easements is quite low as compared to the cost of fee-simple acquisition. This is particularly true when scenic easements are acquired over wetlands, flood plains, and areas where the scenic restrictions do not interfere with the continued use of the land for agricultural purposes and where development potential for other than agricultural uses is limited. Even where the development potential of the land for other uses is greater, the cost of a scenic easement may be considerably less than the cost of fee-simple acquisition.

The experience of the Wisconsin Highway Commission indicates that it is possible to operate a program of scenic easement acquisition and maintenance quite successfully if (1) landowners are fully educated as to the objectives of the program and the rights they are relinquishing when they grant a scenic easement; (2) a system of periodic inspections is established, with prompt reporting of any violations of scenic restrictions; and (3) the local courts are well informed as to the objectives and the mode of operation of the scenic easement program.

It is likely that use of the power of eminent domain and the expenditure of State funds to acquire scenic easements will be sustained in most States, if challenged, on the ground that scenic easements promote a public purpose and make possible a public use of the servient land. In some States with constitutional anti-diversion provisions, the use of dedicated highway funds for scenic easement acquisition may present more of a problem. "Equal protection" may also raise problems, not with respect to scenic easement acquisition *per se*, but in connection with related police power restrictions on land use adjacent to highways.

In connection with the constitutional public purpose and public use requirements, it would seem desirable to include in scenic enabling legislation an express declaration that acquisition of scenic interests in land adjacent to highways is for a public purpose and will provide for a public use. Such a declaration is, of course, not conclusive on the issues of public purpose and public use, but it is accorded substantial weight by the courts. It could well be strengthened by an express declaration that the contemplated public use may be either active—as where there is a public right of entry on scenic overlook areas—or passive—as where the only public rights are negative and the public use consists of visual occupancy.

A few other conclusions as to scenic easement enabling legislation may be in order, as follows:

1. It is desirable to state in the enabling act—as most of the current acts do—that scenic interests may include the fee simple or any lesser interest, and to mention scenic easements expressly—as most of the current acts do not.

2. The enabling act should include some definition of a scenic easement—a feature conspicuously lacking in practically all of the current enabling legislation.

3. The enabling act should provide for acquisition of scenic interests (including easements) by condemnation, as well as by purchase, exchange, and gift, for without the power to condemn the State highway agency is severely handicapped in negotiating for the purchase of scenic interests and may, on occasion, find it impossible to preserve an especially significant scenic area at a reasonable price.

4. If the power to condemn scenic interests is given to the State highway agency, it should also be authorized to withdraw from a condemnation proceeding on payment of the landowner's costs, in the event the condemnation jury finds a value grossly in excess of what the highway agency believes the scenic interest is worth.

5. The enabling act should authorize not only acquisition of the fee simple and less-than-fee interests, but also the acquisition of the fee simple and resale of the fee subject to scenic restrictions.

6. The enabling act should expressly provide that all scenic easements acquired by the State highway agency adjacent to or in locations visible from the highway shall be deemed appurtenant to the highway, and that all scenic easements shall be binding upon and enforceable against the original owner of the servient land and all his heirs and assigns in perpetuity unless the scenic easement deed expressly provides for some lesser duration.

7. The enabling act should expressly provide that no court may declare a scenic easement to be extinguished or unenforceable on the ground of changed conditions or frustration of purpose.

8. The enabling act should expressly authorize the State highway agency, when it will not be contrary to the public interest, to grant an appropriate variance of the scenic easement restrictions.

In drafting scenic easement deeds, it would seem that the current Wisconsin practice has substantial advantages in terms of tailoring the land-use restrictions and the grant of affirmative rights to fit the particular situation. The current practice in Wisconsin is to select in advance from a substantial list of restrictions and affirmative rights those most appropriate for the particular scenic location. The highway agency's field committee or "team," consisting of an engineer, a right-of-way agent, and a wayside development specialist, which determines the content of the scenic easement "package" in each case, is given authority to add other provisions not contained in the standard list where necessary to deal with an unusual situation. But the highway agency's negotiator is not authorized to deviate from the proposed scenic easement package except where addition of a clarifying word or phrase, which does not change the basic intent of the easement, may resolve a misunderstanding or possible future question as to intent.

CHAPTER FOUR

PROPOSED ENABLING LEGISLATION AND SUGGESTED SCENIC EASEMENT PROVISIONS

PROPOSED ENABLING LEGISLATION

It may seem presumptuous to set forth a proposed scenic easement enabling act, inasmuch as a large majority of the States have already enacted enabling legislation in response to Title III of the Highway Beautification Act of 1965. It is possible, however, that the proposed scenic easement enabling act may be helpful to those States which as yet have no enabling legislation, and perhaps also in other States which may wish to reconsider enabling legislation enacted somewhat hastily in order to qualify for "3 percent" Federal funds under Title III of the Highway Beautification Act of 1965. Like most of the enabling statutes already adopted, the proposed statute is broad enough to permit acquisition of land in fee simple, or any lesser estate or interest therein, for the purpose of preserving, restoring, or enhancing scenic beauty along the highways.

The proposed enabling legislation is as follows:

Highway Scenic Beauty Act

(1) It is the intent of this act to promote the safety, convenience and enjoyment of travel on, and protection of the public investment in, those State highways which are part of the National System of Interstate and Defense Highways or the Federal-aid system of primary and secondary highways, and to provide for the restoration, preservation, and enhancement of scenic beauty within, adjacent to, or within eyeshot of such highways.

(2) The State highway agency [commission or department] is hereby authorized to acquire, either in fee simple or any lesser estate or interest, real property adjacent to or within eyeshot of any State highway comprised in the National System of Interstate and Defense Highways or the Federal-aid system of primary and secondary highways, [any State or county highway] which the State highway agency considers necessary for the preservation, restoration, or enhancement of scenic beauty within, adjacent to, or within eyeshot of such highways. Such acquisition may be by gift, purchase, exchange, or condemnation. The cost of acquisition shall be considered part of the cost of highway construction.

(3) The less-than-fee simple interests authorized to be acquired by this act may include scenic easements, which are servitudes designed to permit land to remain in private ownership for its normal agricultural, residential, or other use and at the same time to restrict and control the future use of the land for the purpose of preserving, restoring, or enhancing the natural beauty of the land subject to the scenic easement. Scenic easements acquired pursuant to this act shall be deemed to constitute easements both at law and in equity, and all the usual legal and equitable remedies (including prohibitory and mandatory injunctions) shall be available to protect and enforce the State's interest in such scenic easements. All scenic easements acquired pursuant to this act shall be deemed to be appurtenant to the highways to which they are adjacent or from which they are visible. The duties created by any scenic easement acquired pursuant to this act shall be binding upon and enforcible against the original owner of the land subject to the scenic easement and his heirs, successors, and assigns in perpetuity, unless the instrument creating the scenic easement expressly provides for a lesser duration. No court shall declare any scenic easement acquired pursuant to this act to have been extinguished or to have become unenforcible by virtue of changed conditions or frustration of purpose.

(4) The State highway agency may acquire land in fee simple pursuant to this act and convey or lease such property back to its original owner or to another person or entity subject to such reservations, conditions, easements, covenants, or other contractual arrangements as will preserve, restore, or enhance the scenic beauty of the area traversed by the highway.

(5) The State highway agency is hereby authorized to grant variances from the reservations, conditions, restrictions, covenants, or other contractual arrangements contained in any scenic easements acquired pursuant to this act or in any conveyances made pursuant to this act, upon the following conditions:

(a) Application for such variance shall be made by the landowner in writing on forms supplied by the State highway agency and shall include a description of the land, the variance or release desired and the reasons therefor.

(b) Any such variance shall be determined by the State highway agency to be in the public interest and not contrary to the purposes of the scenic enhancement program.

(c) The State highway agency shall determine whether the granting of the variance sought will add value to the land in question. If the determination is affirmative, the landowner seeking the variance shall be required to pay such value to the State highway agency. To aid in such determination, independent appraisers may be employed.

(d) The State highway agency shall require the execution of such conveyances, contracts, or other instruments as it deems legally necessary to accomplish the desired result.

(6) When the State highway agency shall deem it necessary to exercise the power of eminent domain to acquire any real property, either in fee simple or any lesser estate or interest, pursuant to this act, the agency shall be entitled at any point in the condemnation proceeding, even after

verdict, to have the proceeding dismissed upon payment of all costs of the condemnee, including attorney's fees.

(7) The Legislature hereby declares that the acquisition of interests in real property for the purposes stated in this act will serve a public purpose and provide for a public use of such interests. Where the interest acquired pursuant to this act is a scenic easement or other less-than-fee simple interest imposing scenic restrictions on land, the visual use and occupancy by the traveling public of areas subject to such restrictions is hereby declared to be a public use.