36.100 4/14/71

Memorandum 71-21

Subject: Study 36.100 - Condemnation (Right of Former Owner When Condemned Property Becomes Surplus)

Summary

Attached is a research study on the former owner's right to repurchase land taken by eminent domain when that land becomes surplus to the condemnor's needs. This memorandum summarizes the salient policies and considerations identified in the study and presents them to the Commission as a basis for decisions whether a right to regain property should exist and, if so, what form it should take and what limitations should be placed upon it.

Analysis

Should a right to return exist? The key arguments are identified on pages 7-11 of the study. Basically, the arguments in favor of a right to return are: (1) The American system of private property contemplates private rather than public ownership and control of property; when property is forcefully taken from private ownership of an individual and is no longer needed, it logically should be returned to that individual. (2) If a person has invested in potentially valuable property, that investment should be protected; when property is returned to private ownership, it is the investor who should realize any speculative profit. (3) A person grows attached to property which is in a real sense unique; the law should recognize his emotional claims to ownership of the property. (4) A right of return would discourage condemnors from fraudulent acquisition of property for speculative or other nonpublic uses. (5) A right of return would aid in reimbursing the former owner for some of his costs not contemplated in the current concept of just compensation.

Each of these arguments has opposed to it arguments against a right to return: (1) The American system of private property ownership has given way to public control of land use; the condemnor should be able to dispose of property in such a manner and with such restrictions as it in its wisdom deems fit. (2) If profit is to be realized upon a land transaction, that profit belongs to the public; the private owner has not borne the risks and costs that created the profit (often the result of the condemnor's activity alone), and the public can better use the profit for the public rather than private good. (3) Persons desiring to repurchase property do not do so for emotion but purely for business reasons involved in the profit they hope to realize. (4) Problems with fraudulent acquisition and just compensation can best be handled by restrictions upon the right to take and by provision for adequate just compensation, rather than by a right to return which would compel return even where the original taking was innocent and which would compensate for losses in a haphazard and sporadic manner. (5) The condemnor has paid full value for the land and, therefore, as a matter of logic should receive full, unencumbered title to the land. (6) A right of return will place administrative demands upon the condemnor and will cloud title to property which it seeks to dispose of. (7) Any statute must be necessarily broad and hence will require much litigation and court interpretation of its individual provisions as applied to particular cases.

It is the staff's belief that, although some of the problems involved with the right to return--e.g., administrative costs, clouded titles, heavy litigation--can be somewhat mitigated, the arguments against a right of return generally are more weighty than those in its favor. It is possible that, rather than a general right of return applicable to all condemnation cases, it may be desirable to consider the possibility of such a right in a few types of

cases more deserving than most. For example, if property is acquired for protective purposes to be returned to private ownership with restrictions, the former owner perhaps should have the option to repurchase. These situations should be considered on a case by case basis, for each will have merits and problems peculiar to it. In the protective instance, for example, valuing the property with its restrictions may present special difficulties. See Memorandum 71-13.

Pennyslvania is the only state that has a right to purchase statute and that statute is so limited in its application that it provides former owners with no significant protection.

What form should a right to return take? If there is to be a right to return, four possibilities are apparent: (1) extreme limit on right to take unless permanent public use is a certainty; (2) prefer an easement to the fee; (3) defeasible fee; (4) repurchase. These possibilities are considered on pages 15-17 of the study. In view of the Commission's past policies favoring a broadening of the right to take, and in view of the practical and economic drawbacks to an easement-defeasible fee scheme, the only realistic possibility for a right to return is a repurchase right.

What should be the repurchase price? There are two chief possibilities for the repurchase price: original acquisition cost or fair market value. The basic dispute here is apparent: A fair market value formula would be of no economic benefit to the condemnee, but it would give him the first opportunity to purchase, thereby satisfying the emotional values of a repurchase right; an original acquisition cost formula would be of significant value to the condemnee. A market value formula would essentially add a lot of procedures and complications to the law without a real corresponding benefit for anyone, condemnors included. The study therefore concludes that, if there is to be a repurchase right at all, it must be based on original acquisition cost. (See pp. 18-20).

However, an acquisition cost formula requires consideration whether waste and improvements should enter the formula and how they are to be valued (pp. 21-23). Similarly, the effects of partial return, severance damages, back interest, and back taxes should be considered (pp. 23-26). So, too, there are problems in valuing aggregations of parts of parcels (cf. pp. 33-35). It should be noted that these problems are largely absent where a fair market value formula is used, the only difficulty being in selecting a valuer or valuation method (pp. 20-21).

What limitations should there be on the right to return? A repurchase right, if it is to be successful, must have its application clearly defined. Major extensions and limitations noted in the study include:

(1) The right to repurchase should be limited to cases where property is devoted to a private use, not simply to a public use other than that for which the property was originally taken (see pp. 11-13).

(2) The right to repurchase should be extended to cases where property is taken by purchase under threat of condemnation as well as where it is taken by the power of eminent domain (see pp. 13-14). In this connection, it may be wise to prevent the condemnor fromacquiring the right and to make it nonwaivable (see pp. 15, 35, 37).

(3) The duration of the repurchase right needs to be determined. The study suggests a 7-year period after which the condemnor may dispose of the property free of the repurchase interest (see pp. 27-28).

(4) The persons entitled to exercise the right must be specified. Possible interested persons include secured parties, lessees, vendees, holders of joint interests, and claimants in title disputes (see pp. 29-35).

(5) The legal incidents of the repurchase right must be specified. These incidents include devisability and descendability of the repurchase interest,

its transferability, its use as security, its insurability, and its taxability (see pp. 35-38).

(6) Procedures for the exercise of the right must be provided by statute. The study suggests that the right not be exercisable unless recorded. The holder of the right must notify the county clerk of any address changes to cut down administrative expense. The condemnor must offer the property first to the holder of the right. The holder must exercise the right within a limited time period. If the holder does not exercise the right, the condemnor may dispose of the property otherwise. In such a case, the title of the ultimate purchaser should be free from cloud which perhaps may be assured by conclusive recitals of the condemnor (see pp. 38-42).

(7) In case the condemnor avoids its resale duty, procedures may have to be created whereby the former owner can vindicate his rights (see pp. 42-46).

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

FORMER OWNER'S RIGHT TO REPURCHASE LAND TAKEN BY EMINENT DOMAIN*

*This study was prepared for the California Law Revision Commission by Mr. Nathaniel Sterling of the Commission's legal staff. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

CONTENTS

FORMER OWNER'S RIGHT TO REPURCHASE LAND TAKEN BY EMINENT DOMAIN

Nathaniel Sterling*

INTRODUCTION

Private property may not constitutionally be taken by eminent domain except for a "public use."[1] Occasionally, however, a public entity takes property for an intended public use but thereafter fails to devote it to that use or to any other public use.[2] The reasons for such failure are varied. In some cases, changed circumstances, such as altered population trends in a school district, unanticipated engineering problems causing a change in route, or lack of projected funds to complete an improvement, may have caused the change in plans. In a few cases, a mistake may have been made originally in taking the property. For example, the property, after further examination, may have proved unsuitable for the contemplated use. In rare cases, the entity may simply have abused its power by taking property for some purpose other than a public use.[3]

The frequency of any of these situations is impossible to estimate; however, it is known that the number of condemnors is enormous,[4] their land holdings are vast,[5] and the number of eminent domain acquisitions has increased steadily over the years.[6] Moreover, although the figures for surplus land disposition by all condemnors are not available, outright sales of surplus land by state agencies[7] in recent years have exceeded 10 million dollars,[8] and leases of such surplus property have brought in revenue exceeding 47 million dollars annually.[9] It has been estimated that, by 1974, the major activity in the state's land program will be management of state lands and disposal of surplus state property.[10]

The sheer volume of this surplus land disposition indicates that the failure to devote property to the public use for which it was taken is a not infrequent occurrence. Furthermore, in a number of these instances, the former owner of the property fervently desires the return of the property he once held.[11]

This paper reviews the law governing the right of a condemnor to transfer to private ownership property taken for public use and investigates the wisdom of, and the practical problems surrounding, a repurchase remedy for a former owner whose condemned property is not eventually put to public use. The paper presents specific statutory guidelines for a repurchase right, but concludes that such a remedy, despite its obvious attractions, would create practical problems more weighty than potential benefits.

CONDEMNOR'S RIGHT TO TRANSFER PUBLIC PROPERTY TO PRIVATE OWNERSHIP

It is hornbook law that private property may not constitutionally be taken by eminent domain except for public use.[12] Theoretically, if the contemplated use of the property is not a public use or if the condemnor does not actually intend to put the property to the declared public use, this restriction prevents taking of the property.[13] Accordingly, if property has been taken by means of the power of eminent domain, the taking has been found to be for a valid public use.[14]

Once title to land has been properly acquired by a condemning agency, its subsequent disposition generally is regarded to be of no further legal concern to its former owner. With few limitations, the condemnor is free to use or dispose of the property as it sees fit.[15] Statutes authorizing the unrestricted disposition of such property[16]--whether it was acquired by condemnation, by settlement under threat of condemnation, or by a wholly voluntary transaction[17]--

are liberally construed.[18] As a consequence, if a condemning agency that has acquired property for a public purpose subsequently "changes its mind" and decides to put the property to an alternative public use, it may do so freely.[19]

The rule that a condemnor may divert land properly taken for one public use to some other public use also governs a diversion to a private use.[20] For example, in Beistline v. City of San Diego,[21] the City of San Diego had filed suit to condemn certain property for use as a municipal airport and, under this threat of condemnation, the owner had conveyed his property to the city. Nine years later, the city sold the property to a third person for private purposes at a considerable profit. In an action by the original property owner to rescind the sale or recover the profits realized from the sale, the court held that, so long as the initial acquisition of the property was for a proper public use, any subsequent acts of disposal were valid; the mere fact that the city had changed its corporate mind could not be deemed to restrict its power of disposition over property that it owned.

Outwardly similar but quite different in concept are cases of condemnation for a "public use" that permits or requires subsequent transfer of the condemned property to private ownership. In one such instance--termed "substitute condemnation"[22]--, a condemnor is permitted to take property from one person in order to exchange it with another person for property owned by the latter and needed by the condemnor.[23] For example, in Brown v. United States,[24] creation of a federal reservoir was to cause the flooding of a town. The government condemned land elsewhere to replace that of the displaced individuals. The condemnees resisted the proceeding on the ground that the taking was for a private purpose:[25]

> The plaintiffs contend that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object can not be regarded as for a public use of the property,

> and, without this, appropriation can have no constitutional validity. The District Court held that the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site. We concur in this view.

A related, but distinct, situation occurs in urban redevelopment when property is taken from one person so that it may be given to another. Here, the condemnor is authorized to take property by eminent domain for the purpose of eliminating or preventing slums. This end is often achieved through subsequent sale of the condemned property to private individuals for private purposes subject only to restrictions designed to accomplish the public purpose. In Redevelopment Agency v. Hayes,[26] the condemnees attacked the constitutionality of the authorizing statute[27] because "after the taking of private property by the power of eminent domain . . . and after its redevelopment, it [was] to be sold to private persons . . . ."[28] Despite the allegation of lack of public purpose, the court upheld the constitutionality of the slum clearance law, stating that the purpose of eliminating slums was a public use, "even though the use to which the property is put after seizure is not a public use . . . ."[29]

A third and currently volatile area where condemnors take property which can then be devoted to a private use is that of excess condemnation.[30] By definition, excess condemnation is the taking by a condemnor of more property than is physically needed for a particular project. Such takings have been categorized as: (1) Recoupment: In anticipation of its enhancement in value as a result of the public improvement, the condemnor takes excess property in order to sell it at a profit and thus recover some of its acquisition and construction costs; (2) Financial remnant: In the expectation that it

would have to pay nearly as much in severance damages if it took only that portion of a parcel which it actually needs as it would pay to take the whole parcel, the condemnor takes the whole parcel; (3) Restrictive or protective: The condemnor takes "excess" property which it can dispose of subject to restrictions in order to protect its proposed improvements; (4) Physical remnant: The condemnor takes undersized, oddshaped, landlocked, and worthless portions of a parcel that would be left to the owner if only the property necessary for the improvement were taken.

In practice, these categories overlap significantly, and some excess takings are deemed to be for a public use while others are not. Protective or restrictive condemnation, while it may involve a resale of the land for a private use subject to protective restrictions, is considered to be an adjunct to and consistent with the public purpose of the more general improvement for which it is taken.[31] In this sense, the taking is not truly "excess." Taking a physical remnant not to be used for the main project is permissible without the consent of the condemnee.[32] On the other hand, recoupment traditionally has been held not to be a public use.[33] The California Supreme Court, however, recently has made inroads into this area, sanctioning one type of recoupment that it labelled the taking of a "financial remnant."[34] The court stated, "It is sound economy for the state to take the entire parcel to minimize ultimate costs."[35] Nonetheless, the courts will undoubtedly tread slowly in the recoupment area.[36]

If a public entity takes the use of real property for a temporary period of time, it must generally pay the diminution in value caused by the use or occupancy of the property or its value for the period during which it is held.[36a] There is little law governing the right of a public entity to take property in fee with the intent to put it to a temporary public use. A temporary taking

will probably be deemed a public use despite its temporary nature;[36b] whether the fee or some lesser interest should have been taken, is apparently a nonjusticiable issue.[36c] Hence, it is likely that the law allows a public entity to take real property with the intent temporarily to devote it to a public use and thereafter permanently to devote it to a private use.

Certain entities can also acquire property for an undetermined future use or for use as open space. Both uses allow the entity to acquire property and not make improvements upon it; such property may be left unused or even leased to private persons for private purposes. In California, the power of eminent domain may not be exercised to acquire open space;[37] however, cities and counties may acquire a fee or lesser interest in open space property by purchase, gift, grant, bequest, devise, lease, "or otherwise."[38] On the other hand, public entities do have the power to condemn property which, although not required for immediate use, they anticipate will be needed for public use in the future.[39] The general test of the validity of such a taking is whether there is a reasonable probability that the land taken will be actually devoted to a public use within a reasonable time.[40] If the taking meets this test, the condemnor may lease the land for private purposes during the intervening time.[41] Furthermore, as noted above, land originally thought necessary but, due to changed circumstances, no longer needed may be sold.[42] "[T]he power of sale or lease does not change the purpose of the acquisition from a public to a private use . . . ."[43]

In short, the law governing the power of a public entity to dispose of land is fairly well settled with regard to all forms of acquisition for all types of public uses.[44] If the condemnor takes property intending to put it to public use, the taking is valid. Once the condemnor has properly acquired title, it has almost plenary power over its use and subsequent disposition.[45]

Should this be the law?

POLICY CONSIDERATIONS AND THE OWNER'S RIGHT TO RETURN

At present, a condemnor pays just compensation for and receives full ownership rights, including the plenary power to use or dispose of the property.[46] Those who support continuation of this arrangement contend that, since the condemnor has paid full value, its title should be free of all encumbrances.[47] The former owner receives an equitable price for his property and should have no further claims upon it.[48]

Since it must have flexibility to respond to changed conditions or plans and to put property to its highest and best use, a condemnor needs rights commensurate with those of a private owner to use and dispose of real property.[49] This need for full and free use of the property is particularly acute in the case of an acquisition for future use[50] or open space,[51] where the land taken may lie idle for substantial periods unless the condemnor is able to lease it to private persons during the time prior to public use.

In addition, the need for a well-planned program of land utilization has been recognized, and government--both federal and state--has taken an increasingly active role in the allocation of land resources. Government activity now ranges from indirect regulation[52] to direct expropriation, with the latter alternative--outright ownership--often being used to insure adequate control. In this context, it would make little sense to grant the former owner an automatic right to the return of his property and, hence, severely limit the fundamental approach to government control of land.

Proponents of a right to return for owners whose property is taken contend, on the other hand, that condemnors are not always altruistic in their land disposal practices, and freedom to return land to private ownership subject to use restrictions is rarely used as part of an integrated plan for rational land

use. At present, the major objective of condemnors with surplus property to dispose of is simply to minimize their costs.

The constitutional limitation on the sovereign power of eminent domain is that land may not be taken except for a public use.[53] This constitutional limitation means that the right of the individual to control his property is subject to the power of condemnation only if that property is needed for a public use. It follows that, if the condemnor does not need the property for the public use for which it was taken, the sovereign prerogative ends, and the land should revert to its former owner.

This argument has a strong philosophical foundation in Anglo-American concepts of land tenure, which hold that an individual owns property free of any superior government rights and that the law assures him stability of such ownership. Such a system of land holding has been termed "allodial."[54] Superimposed upon this system of private land ownership, however, is the sovereign prerogative of eminent domain which inserts a "tenurial" element into the property structure.[55] Accordingly, the eminent domain power is a limited imposition upon the social institution of private ownership, and the individual holds all rights in the property subject to the demands of public use. When the demands of public use lapse, however, the sovereign prerogative terminates, and the land returns to private ownership.

This argument has frequently been reduced to one of simple "fairness": since the landowner's property was taken from him by force, he should have an opportunity to reacquire the property when it is no longer needed by the public.[56] One commentator has elaborated as follows:[57]

> Entities possessing the power of eminent domain may take property only for a public use, and in most situations must specify the purpose for its taking. If the land is taken for one use, for example, to erect a particular building, but is subsequently used for another purpose, such

> as landscaping, it would seem that the taking was wrongful. The same result would appear to follow where the condemnor fails to devote the land to the particular purpose within a reasonable time or resells it to a private individual. In view of the fact that reversion results upon the misuse or nonuse of easements, it would not appear inconsistent to apply the same rule in situations where the fee simple title has been condemned.

Similar reasoning has been employed by a Canadian commission inquiring into the power of eminent domain, or "expropriation" as it is referred to in Canada:[58]

> In our view an owner whose land has been taken by the exercise of statutory powers has a just claim to resume ownership of the land in certain circumstances if it is no longer required by the expropriating authority. This claim should be recognized in some form by legislation.
>
> * * * * *
>
> The expropriating authority holds its extraordinary powers of expropriation in trust to be exercised for the public benefit. This has been recognized in legislation and in particular in those provisions which specify the purposes for which expropriations may take place. If a contemplated expropriation is for a purpose not provided in the relevant legislation, then there is no power to proceed with it. This accords with the basic principle that a person's property rights should not be taken from him except for purposes specified by the Legislature. Subject to the right of abandonment, the legislation does not make the spirit of this principle fully applicable. Except in one or two cases, where land that has become vested in the expropriating authority is no longer needed for its purposes, there do not appear to be any statutory restrictions on any expropriating authority's right to do with the land what it wishes. It may sell it to whomever it sees fit and at any price. The absence of any restrictions is an unjustified encroachment on the rights of owners and tends towards expropriation of more land than is required in order that a speculative profit may be made.

Underlying this philosophical dispute are two basic factors--one emotional, the other economic. The emotional factor is the attachment of the former owner to the particular piece of property that he once "owned." There is a mystique about land ownership that the legal and philosophical definition of a "bundle of rights" does not encompass. Where land ownership, manhood, and wealth have been closely related, the attachment of a man to his land is especially strong. This tie is often strengthened by bonds of birth and

upbringing; a person commonly feels sentimental or nostalgic toward the place where he was reared. In short, it is not unusual for a former owner to have a lingering belief that the property is, in a sense, still "his" and that, if the condemnor no longer needs it, he should get it back.

The other underlying factor is economic. Because property acquired by a condemnor has almost invariably increased in value--often greatly--since the time of acquisition, the question whether the condemnor or former owner should realize this increment arises.[59] Where the increase is due to general market conditions rather than to some activity of the condemnor, the owner's claim is especially appealing since, but for government intervention, the former owner would have reaped all the profit. On the other hand, the condemnor has some claim to the profit since it assumed the burdens of ownership--including the risk of decline in value--during the period of increment. This claim is reinforced to some extent by the fact that the gain belongs to the public rather than to an individual.[60]

Creation of a right of return might entail greater economic, social, and legal consequences than the immediate realization of economic gain. One possible consequence is a rapid rise in acquisition costs;[61] a second is an increase in blighted neighborhoods in areas of future public projects.[62] On the other hand, the right to return might serve as a significant check upon any abuse of the sovereign's eminent domain power.[63]

The existence of these considerations and problems indicates that there are significant drawbacks to any statutory "right to return." The right to return has most intrinsic merit as applied to situations in which property is taken with the intent to resell or lease with restrictions (e.g., protective condemnation, temporary taking, open space), for these situations contemplate a return to private use; the former owner is frequently the most appropriate

private user. However, it is tenuous whether there should be any such provision in view of the competing policy considerations. Assuming that the owner's case is sufficiently strong to support a right to return where his property is put to a "private use," it is necessary to examine the issues arising from (1) the way in which the property was originally taken and (2) the "private use" limitation. Then, because a right of return must be practicable in operation if it is to be successful, the substantive and procedural detail of the right must be specified.

FACTUAL BASIS OF THE RIGHT TO RETURN: ACQUISITION AND DISPOSAL

Devotion to Private Use

Any right to return must distinguish between property that is put to private use and property that appears to be put to private use but is actually devoted to a public use.[64] In theory, any use other than a defined public use is a private use.[65] Thus, selling or leasing property to a private person who intends to use it to earn profit generally constitutes devotion to a private use. Even allowing property to lie idle is usually a devotion to private use.[66] In practice, however, many uses that appear to be private are, in fact, "public uses." For example, property properly may be taken to be exchanged with a private person (substitute condemnation) or to be sold to a private person (excess condemnation, temporary taking, urban redevelopment); property also may be taken and then leased to private persons or simply allowed to lie unused (future use, open space).[67] Some means must be provided to identify these "public uses."

The problem of distinction does not always arise, for often the condemnor expressly will declare that it intends to abandon a project or that certain property taken is surplus to its needs. Hence, when the condemnor thereafter

seeks to dispose permanently of this property, it is relatively easy to identify such disposition as a devotion to private use. The few existing statutes that grant to a former owner the right to the return of his property apparently rely on this practice.[68] The Pennsylvania right-to-return statute, for example, merely provides: "If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise" subject to a right of return.[69] Similarly, the Ontario right-to-return statute applies to expropriated property "found by the expropriating authority to be no longer required for its purposes,"[70] and a similar British statute applies simply to all "superfluous lands."[71]

When the condemnor, however, does not announce its intention to dispose permanently of the property, the circumstances surrounding the original acquisition or the subsequent sale, lease, or abandonment become significant. The problem of distinction possibly could be solved by requiring the condemnor to state the authority under which it acquires property at the time of acquisition. Then, if a condemnor takes property under redevelopment authority, excess authority, temporary authority, or for substitution, it could be presumed, subject to rebuttal, that the property subsequently can be exchanged or sold to private persons exempt from any owner return obligations. If the property is taken under open space or future use authority, it could be presumed, subject to rebuttal, that the property may be leased to private persons or allowed to lie idle exempt from any right to return.[72] On the other hand, if property is taken for some other public use and is subsequently allowed to lie idle, or is sold or leased to private persons for private profit, it could be rebuttably presumed that the property has been devoted to a private use.[73] The procedures by which the issue of private

use could be raised by the condemnee, burdens of proof, and types of presumptions, as well as possible alternative remedies and sanctions for the condemnor's failure first to offer the property to the former owner prior to disposal are deferred for later consideration.[74]

Effect of Manner of Original Acquisition

An owner's right to return may be affected not only by the purposes for which his property was acquired and disposed of, but also by the manner in which it was acquired. If a right is provided at all, it should certainly exist were the owner's property was acquired by actual exercise of the power of eminent domain; almost none of the proposals for a right of return have gone beyond this point.[75] Most parcels, perhaps well over 99%, however, are acquired by negotiated purchase, not through eminent domain proceedings.[76] These purchases are often totally involuntary since the owner is compelled to negotiate and sell by the threat of condemnation proceedings that would involve great uncertainty and expense to the property owner. Occasionally, an owner may desire that his property be put to a certain use and, hence, be willing to sell his property for that use.[77] Nonetheless, he sells his property on the assumption that it will be put to that use and, presumably, he would desire to recover it if that use were abandoned.

Thus, to limit the right to return to property acquired only by eminent domain is to narrow its scope much too severely and to omit many deserving cases. Accordingly, some provision should be made to include the purchase or negotiated settlement made under threat of condemnation. At least one California proposal attempted to do this. Assembly Bill 1570 (1969) extended the repurchase right to property acquired by eminent domain "or under threat

of condemnation."[78] The proposal defined acquisition under threat of condemnation in the following manner:

> As used in this section, property is acquired "under threat of condemnation" when the property is acquired by a public or private entity at any time after the public or private entity commences proceedings, which are pending at the time of the acquisition, to condemn all or part of such property.

This provision, while better than a limitation to condemned property only, is still imprecise and too narrowly limited. "[A]fter the public or private entity commences proceedings" may refer merely to some formal act of the condemning body, such as the passage of a resolution of necessity, or may require the actual filing of a condemnation action. In either case, this provision would eliminate a right of return for property acquired by purchase where the entity had only informally contacted the condemnee and prompted him to sell.

A better model is found in the federal rules of taxation relating to gains realized on involuntary conversions of property by "condemnation or threat or imminence thereof."[79] The Internal Revenue Service applies the following test which is both precise and realistic:[80]

> [T]hreat or imminence of condemnation is generally considered to exist when a property owner is informed, either orally or in writing, by a representative of a governmental body or public official authorized to acquire property for public use, that such body or public official has decided to acquire his property and the property owner has reasonable grounds to believe, from the information conveyed to him by such representative, that the necessary steps to condemn the property will be instituted if a voluntary sale is not arranged.

Of course, this provision does not cover the situation where an owner decides to sell because an entity is merely contemplating his property as one possible site for its project. In such a case, it would be difficult to say that the conveyance was involuntary. The provision, by its terms, does not apply to private condemnors; and "oral" information may call for subjective

interpretation. Nonetheless, the principle is clear: Property acquired by condemnation or purchase under threat or imminence of condemnation should be treated similarly.

If purchased property is made subject to the right to return, at least one safeguard is necessary. Since public entities acquire most of their property through purchase, they would, if possible, try to extract a waiver of the right from the owner or to buy the right as part of the purchase bargain. That the acquiring agency should not be allowed to do this is apparent: The sole purpose of the right is to give the former owner a future interest in the property that vests if the land is not used as intended. To allow the condemnor to acquire the right would both raise the cost to the public of acquisitions generally and tend to nullify the right. Regardless how unfair the bargain might seem, a condemnee who needs money at the time of sale, would probably sell his right. A statute could easily avoid this problem by making the right nonwaivable and nontransferable, at least to the acquiring entity.[81]

NATURE OF THE RIGHT TO RETURN: EASEMENT, REVERSION, OR REPURCHASE

The first issue to be resolved concerning the right to return itself is the legal form it should take. One way to achieve the objective of return is simply to limit the ability of the condemnor to take. This can be accomplished by placing such stringent limitations upon the right to take that the use of the property for the purpose stated is virtually assured. A more practical method is to eliminate takings in fee simple absolute and substitute the taking of either an easement or a defeasible fee conditioned upon continued public use.

Early eminent domain law actually preferred the taking of an easement rather than a fee by the condemning agency:[82]

> By the common law the fee in the soil remains in the original owner, where a public road is established over it; but the use of the road is in the public. The owner parts with this use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground . . . .

Moreover, the law is well settled that a public easement--whether acquired by purchase, condemnation, or dedication--is extinguished upon abandonment or discontinuance and reverts to the owner of the fee free of any rights in the public.[83] The common law preference for an easement with return to the owner,[84] however, has gradually been eroded by statute so that now the reverse is true: The fee is the preferred estate for condemnation purposes.[85] The alternative of the defeasible fee has been tried infrequently;[86] however, in practical effect, it is virtually identical to an easement.[87]

Both means of limiting the estate taken are subject to the criticism that the possibility of extinguishment or reversion at the time of the taking is so highly speculative as to be incapable of valuation. The result of this phenomenon is that the condemnor must pay as much, or nearly as much, for an easement as for a fee simple absolute. The condemnor is entitled to all that it pays for--the entire fee--and reversion upon changed use would result in a forfeiture of the property by the condemnor and a windfall to the condemnee.

Although this argument has apparently been persuasive in the Legislature,[88] it does not speak to the basic rule that property should only be taken and held for public use. Indeed, several types of takings identified above--open space, protective, and temporary are notable instances--seem to require the taking of a less-than-fee interest, with allowance for compatible uses by the owner of the underlying fee. Nonetheless, if a method of return that satisfies the economic argument can be devised, much of the opposition to a right to

return may be eliminated.[89] The method here suggested is a right of repurchase in the former owner upon discontinuance of any public use.

Existing California condemnation law does not provide for land obtained by eminent domain to be offered to the previous owner for repurchase when abandoned.[90] There has been, however, continuing pressure for greater owner's rights following condemnation,[91] and numerous bills have been introduced in the California Legislature proposing a broader-based, preemptive right in the former owner to repurchase his property when the public use for which it was taken has been discontinued.[92] Although all such bills have been defeated,[93] some California statutes provide rights analogous to a repurchase right.[94]

A handful of other jurisdictions have provisions enabling the former owner to repurchase property taken by eminent domain. A Pennsylvania statute provides:[95]

> If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise: Provided, however, That if the property has not been substantially improved, it may not be disposed of within three years after condemnation without first being offered to the condemnee at the same price paid to the condemnee by the condemnor. The condemnee shall be served with notice of the offer in the same manner as prescribed for the service of notices in subsection (b) of §405 of this act, and shall have ninety days after receipt of such notice to make written acceptance thereof.

This statute has served as a model for recommendations by others of an owner's right to return.[96] In addition, Ontario, Canada has recently enacted such a provision,[97] and England has had one since 1845.[98]

Unfortunately, the experience under the few existing statutes has been limited.[99] However, despite the relative paucity of factual situations upon which to draw, some of the major problems with an owner's right to repurchase are evident from the concept itself. These problems, and a few suggested solutions, are outlined below.[100]

ASPECTS OF A REPURCHASE RIGHT: THE REPURCHASE PRICE

Specifying a price formula[101] entails four basic considerations: (1) Should the formula be based upon purchase price or upon fair market value? (2) If the formula is based upon fair market value, how is "fair market value" to be determined? (3) If the formula is based upon purchase price, must allowance be made for improvements, waste, partial return, severance, benefits, and interest? (4) Under either approach, should unpaid taxes enter the formula?

Purchase Price or Fair Market Value?

Whether the repurchase price should be determined by a formula based on the acquisition cost or a formula based on fair market value at the time of resale should be determined primarily by reference to underlying policy issues. On the one hand, in a rising market, a requirement that resale be at the original price of acquisition can cut down spectacularly on public revenue.[102] Moreover, since the former owner can invest the proceeds received from the sale or condemnation of his property in comparable property, he should already have earned an increment comparable to the increase in value of the property he once owned. Finally, return of property that has greatly appreciated in value at its former price may give a windfall to the former owner who obtains the benefit of the increased property value without the risks or burdens of ownership during the intervening period. This result seems especially unfair where the rising market is itself caused by the activities of the condemnor.

There are, however, significant countervailing considerations. Some of the costs of a taking for a public project may be uncompensated and, hence, fall upon the owner.[103] If his land is not required for the project and he be permitted to recover it at the price paid for it, any profit he makes

through repurchase would serve to offset the disproportionate cost to him of the original taking.[104]

By removing the profit incentive, an acquisition-cost formula should discourage condemnors from taking any more property than they really need. In contrast, allowing resale at market value would encourage taking property in excess of the condemnor's needs in order to subsequently sell the surplus at a value enhanced by the project to recoup expenses. Thus, a repurchase right based on acquisition cost could function as a supplement to the existing remedies for abuse of the right to take.[105]

Use of an acquisition-cost formula would also aid the former owner in in exercising his repurchase right. Any substantial change in the market value of the property (and such changes are frequently caused by the condemnor's activity alone) may make it financially impossible or impracticable for the former owner to repurchase the property if he is required to pay its increased fair market value.

Finally, application of a market-value formula would simply eliminate the economic value of a right to repurchase. The right would represent merely an option or right of first refusal.[106] The emotional factor considered earlier would be satisfied, but the economic factor would not.[107]

On balance, it appears that, if there is to be a repurchase right, the better method of valuation is a formula based on the original acquisition price. This conclusion is not inescapable, however. In recognition of this fact, the Ontario study eschewed any final conclusion:[108]

> We recognize the problem respecting the price which the former owner should pay for superfluous lands. On the one hand, it could be said that the owner should have his land back for the amount of compensation paid to him for it regardless of its new market value, if any. If its market value is enhanced by the work executed on the nonsuperfluous expropriated land, the owner would have enjoyed this

> enhancement if the expropriation had not included the superfluous lands. Why should he have to pay for it when these lands are sold back to him? On the other hand, in some cases the land which turns out to be superfluous may have originally been necessary for the execution of the work involved and the work could not have been constructed without it. If, by reason of changed circumstances expropriated land becomes superfluous, why should the former owner be entitled to obtain it for less than its existing market value? There are no fixed answers to these questions. Justice depends on the circumstances in each case.

Regardless which method of valuation is selected, the chosen method should be relatively simple to operate. An analysis of the problems involved in specifying a price formula for each valuation method, however, reveals that both have significant and complex problems.

Determination of Market Value

The market value of property in and around a public improvement or project is usually quite volatile and susceptible of widely varying estimates of value depending on who is making the estimate and at what precise moment. As a result, proponents of a market value scheme of valuation upon resale have tried either to provide a more objective means of fixing the value or to designate at least a competent arbiter of value.

Thus, although the Ontario study concluded that each case was unique on its facts and specified no system of valuation,[109] the ensuing Ontario legislation provided a simple market value formula based "on the terms of the best offer received by the expropriating authority."[110] Such a best offer formula was also proposed by California Assembly Bill No. 343 (1963 Reg. Sess.). This proposal would have required the condemnor to offer the property for private sale or public auction, the highest bidder to take subject to repurchase rights in the owner. The owner would then be informed of the sale and of the price offered and accepted and would be given the option to purchase at that price.

The British statute solves the problem of market price valuation differently. If the former owner desires to repurchase, he negotiates with the condemnor. If negotiation fails to lead to an agreement, then "such price shall be ascertained by arbitration, and the costs of such arbitration shall be in the discretion of the arbitrators."[111] An analogous method was proposed by California Assembly Bill No. 2299 (1963 Reg. Sess.) which specified the resale price as the fair market value of the property "determined by three appraisers, one being selected by the entity, one being selected by the person or persons or owners from whom the property was originally acquired, and the two appraisers so selected selecting the third."

Variance From Purchase Price

The problems of valuation are largely absent where the measure of the repurchase price is simply the original cost of acquiring the property since the price is already fixed. It is partly for the simplicity of this method, and partly because of the policy considerations in favor of it, that most proposals have focused on the amount of the condemnation award as the repurchase price.[112] The purchase-price formula, however, is subject to problems which are, while not peculiar to it, complicating factors. These problems include the extent to which improvements, waste, partial return, severance, set-off, and interest should cause a variance from the original purchase price, and how they are to be valued. The determination of present market value would take most of these factors into account automatically.

Improvements. If the property in question has been substantially improved by the condemnor before being devoted to private use, should this affect the repurchase price and, if so, in what manner? Several proposals specifying repurchase at the price of acquisition have avoided the improvement problem

by limiting the right to repurchase to those situations where the property "has not been improved" by the condemnor.[113] For example, one California proposal provided that the property must be offered for resale to the person from whom acquired only "if it is in the same condition as it was at the time of acquisition."[114] These proposals, however, do not account for the possibility that the condemnor might make some minor improvement in order to escape the resale duty. The Pennsylvania statute attempts to solve this problem by providing the repurchase right "if the property has not been substantially improved."[115]

Nevertheless, the whole approach of sidestepping the problem seems shortsighted. If right of the former owner is to exist at all, it should exist regardless whether the condemnor has added to the value of the land. The issue properly is not whether the right ceases in the face of a public improvement but whether the price must be redetermined if the property has been improved and then devoted to a private purpose. It is suggested that, if a public entity has improved the land, it should be reimbursed to the extent of the cost of the improvement. The improvement may be of little value to the condemnee and, in fact, its added cost may prompt him not to purchase the property. The right of repurchase, however, is intended primarily as a remedy for innocent takings by the condemnor; it should be presumed that any improvements were made in good faith and without knowledge that the property would subsequently be devoted to a private use. Hence, their depreciated cost should be added to the cost of acquisition in determining the repurchase price.

Waste. On occasion, rather than improving the property, the condemnor will destroy a portion of it. This can occur intentionally or inadvertently. For example, the condemnor may use the property as a means of temporary access

to the project during construction and thus clear a roadway useless for other purposes; or the property may be needed for its sand, gravel, rock, fill, or lumber or for dumping and depositing.[116] The case of waste should be no different from the case of improvement: The repurchase price should simply be the price at which the property was condemned minus the actual value of natural resources removed and losses in value resulting from waste generally. In the latter case, to avoid valuation disputes, the valuation could be made by an independent appraiser selected by the condemnor.[117]

Partial return. A more difficult valuation problem is presented where the condemnor takes a parcel, devotes part of it to a public use, and then seeks to dispose of the remainder. As with improvements, some repurchase proposals dodge the issue and provide a right of repurchase only if the whole parcel is subsequently devoted to a private use.[118] These proposals invite token use of a portion to avoid the repurchase right and thus deny owners the right to return of their property in a large number of cases. The owner's repurchase right should be independent of the condemnor's decision to dispose of all or part of a parcel--only valuation should be affected.

Two California bills recognized that partial return is as important as return of the whole parcel and provided a repurchase right if the condemnor "determines that such property, or any part thereof, is no longer necessary for the public use for which the property was acquired."[119] These bills, however, provided no method to measure the value of the part returned. The obvious alternatives are either to use present market value or to attempt to estimate the value that the unused portion would have had at the time of taking.

The easier solution would appear at first to be to use present market value in case of a sale of part of the property taken;[120] however, the condemnor might attempt to force a market value test in every case by retaining a small portion of the parcel for public use and selling the rest. This possibility could be obviated by specifying the price formula as the acquisition cost of the parcel minus the market value of the portion retained or as the value the returned portion would have had at the time of taking. Again, appraisal could be made by an independent appraiser of the condemnor's choice.

Severance damages and set-off benefits. The purchase price method of valuation is subject to one unique complication. Where severance damage and special benefits were involved in determining the original acquisition price of the property, how should they be treated in determining the repurchase price?

If only part of the owner's original property was taken by the condemnor and the owner was awarded severance damages for the remainder, it seems fair that, when all the property taken is returned to the owner, he be required to repay any severance damages received.[121] Since the severance damages were intended to compensate the owner for damage to the remainder and since the remainder has now been made whole again, the severance damages should be returned. This reasoning is applicable even where the owner has sold the remainder at its fair market value in the intervening period, for he will have realized the severance bonus.

The reasoning that the owner of the remainder should return to the condemnor any severance damages received fails, however, where there is only a partial return of the property taken. In such a case, the portion returned may not suffice to make the remainder whole, or it may only partially diminish the

severance damage. In these situations, some computation of the reduction of severance damage is needed. The total amount of severance damages is easily determinable if originally there was a trial and specific findings of value were made.[122] Even this base, however, will be often absent because many cases are settled by negotiation or stipulated judgment without indication of the relative values of the property taken and the damage to the remainder. In such situations, it will be necessary for an appraiser to determine the relative value of the property at the times of acquisition and return in order to ascertain the extent to which severance damage will be mitigated by the partial return. Appraisers involved in the original acquisition, if still available, are the logical choices as the appraisers in this situation, for, presumably, they are familiar with the values and elements of damage that affected the original compensation.

Fortunately, only severance damages actually received need be included in the valuation of the repurchase price, and damages that have been off-set by anticipated benefits should not be included. The reason for the exclusion of special benefits from the computation of repurchase price is that they represent the set-off of benefits never realized against damages never received.[123] Since the object of including severance damages in the repurchase price is to equalize any windfall to the owner, special benefits operate as an automatic equalizer, which need not be considered further.

Interest. There have also been proposals to add to the repurchase price the amount of interest that has accrued on the original award or purchase price.[124] The underlying concept apparently is that, because the condemnee has had use of the award money during the intervening period, the condemnor should be entitled to the interest accrued on the award. Moreover, the condemnor may receive no rent or other income from the property while the

condemnee has the opportunity to earn interest or other income on the award. If the condemnee is to be granted the increased value of the property, this value should be offset against interest.

However, while the condemnee has had the award money, he has not had his property; on the other hand, the condemnor has had the use of the property, the value of which use may exceed any interest on the award. To require interest to be repaid on the award is to deprive the condemnee of income both from the property and from the award--giving both to the condemnor--an unfair result.

Unpaid Taxes

Publicly owned property is not taxable.[125] Thus, when a public entity takes property from private ownership, such property is removed from the local tax base. The extensive state condemnation program has, for this reason, produced strong political pressure from local entities to require, upon the property's return to private ownership, payment of back taxes for the period when it was out of private ownership. One result of this pressure was that one California bill that began as a repurchase proposal ended as a statute requiring that taxes be paid to the county auditor where the property is located, upon sale of the property.[126] Also as a result of this political pressure, half the California bills proposing a repurchase right, and almost all those specifying the measure of value as the acquisition price, include a provision that taxes are to be added to the repurchase price.[127]

Where a market-value price formula is used, there appears to be no logical reason, other than aid to local taxpayers at the expense of the former owner, for requiring a former owner to pay taxes on property that he has neither owned nor had the use of. Accordingly, any such provision should be eliminated.

If a purchase-price valuation formula is used, however, it is appropriate to add unpaid back taxes to the price. Since the former owner will realize any available speculative value on the property, he should pay the amounts he would have been required to pay in order to realize the increased value had he held the land.

ASPECTS OF A REPURCHASE RIGHT: ITS DURATION

In theory, if a condemnor takes property for a public use, the right to repurchase the property should be exercisable whenever it is no longer used for that public purpose. At least one proposal would have allowed the repurchase option to exist indefinitely.[128] However, a long or indefinite term would aggravate some of the problems inherent in a repurchase right. Because of the increased possibility of improvements or waste, it would make valuation of the property more difficult. Furthermore, the administrative cost of keeping track of the holders of the repurchase right necessarily would be increased, especially if the right were transferable in whole or in part. Most proposals, therefore, have specified a maximum time for existence of the right, allowing the condemnor, after expiration of the period, to dispose of the property as it desires. Limits from one[129] to ten[130] years have been proposed. The Pennsylvania statute and its imitators set a duration of three years;[131] most of the California bills have suggested a five-year period.[132] Which of these limits, if any, is preferable?

In most cases where a condemnor takes a substantial amount of property for a project and later discovers that some of the property is surplus to its needs, it is likely that the discovery occurs at or around the time of completion of the project. Thus, a relatively short limitations period probably would satisfy most notions of fairness since generally it is only where a

person's property is taken and sold at a profit within a brief period of time that the condemnee is especially troubled.

It is difficult, however, to determine when any project will be completed. There is always some time lag between acquisition and actual use, and, in the case of a taking for future use, the lag may be substantial. This problem cannot adequately be remedied by specifying a limitations period that begins after commencement or completion of a project because of the difficulty of fixing the point in time at which a project is commenced or completed. Furthermore, a project may be unduly delayed or even abandoned prior to commencement. Therefore, it is most practical to establish a time limitation measured from the date of acquisition of the property.

A fixed period of approximately seven years is probably the best solution. It would prevent the right of return from existing in perpetuity while lasting sufficiently long to include most disposals that occur after the conclusion of a project. Moreover, the seven-year period would encompass almost all instances where a condemnor has put property to a brief or temporary public use and thereafter devoted it to private use. Furthermore, it would allow a condemnor to devote property to an intermediate private use in contemplation of a future public use--provided the property was devoted to public use by the end of the term. In this instance, the repurchase right would operate with more certainty but less flexibility than a limitations period on future use.[133]

It should be recognized, however, that a condemnor that has sufficient financial resources could defeat the purpose of a right-to-return statute by merely holding the property for temporary public use until the seven-year period--or whatever other period is prescribed--expires and then disposing of the property. There does not seem to be any practical way to avoid this.[133a]

ASPECTS OF A REPURCHASE RIGHT: WHO MAY EXERCISE THE RIGHT

If property were always acquired from a single private owner holding an undivided and unencumbered fee simple absolute, it would be clear that only the former owner should be entitled to exercise the right of repurchase. This simplistic model of ownership is the one upon which most proposals for a repurchase right appear to be based.[134] Unfortunately, the model seldom fits the facts. This section discusses some of the issues raised by divergences from the single ownership model.

Disputed Title

The "owner" of condemned property is not always easily ascertainable. Several parties may claim independent ownership of the property, and the dispute may not be resolved at the time of acquisition. If the property is taken in an eminent domain proceeding, the court, if necessary, will quiet title among the various claimants in order to determine proper distribution of the award.[135] Since, however, most property is taken by negotiated purchase rather than by court action, a binding judicial determination of title may never come about. If an option to repurchase should arise in such a case, the adverse parties simply could be required to resolve the title dispute before permitting exercise of the option. Alternatively, where two persons wish to exercise the right solely on their own behalf, the condemnor can simply sell to the first person to accept the repurchase offer subject to later partition or allocation, or it can interplead the interested parties. Arbitration offers an alternate means of resolving such a dispute.

Multiple Interests

Even if legal title to the property at the time of taking is clear, serious repurchase problems arise if several parties hold joint interests in

the property. For example, if the property taken is a joint tenancy or tenancy in common, does any one of the former owners have the right to repurchase or must they exercise the right jointly? Similarly, if the property taken was marital community property, the parties since may have dissolved their marriage, one of them may have died, or a remarriage may have occurred. Which party is entitled to exercise the right? If it were joint, suppose they cannot agree?

The best solution to these problems is to allow any of the former owners to repurchase the property subject to a partition action. If several combined to purchase the property jointly, they would be given a joint deed. If a single person purchased the property, he would take clear title until challenged by other eligible persons. This resolution of the multiple ownership problem would allow speedy execution of the repurchase right whereas, if joint action were required, one person might delay and defeat the rights of other interested persons or demand an excessive amount for his consent. This resolution also enables the right to be exercised without the need for transferability of the right among the various partial holders.

These problems may be further eased by a requirement that the repurchase interest be recorded in order to identify all the eligible parties.[136] Thus, in a community property situation, if a repurchase interest of husband and wife were recorded, it would be less likely to be overlooked upon division of the marital property, and the right would be given to one or the other, but not both, to exercise.

Vendor and Vendee

If there is an executory contract for sale of the land at the time it is taken, should the purchaser or the seller be entitled to the repurchase

right? As in the disputed title cases, frequently a court will have made a determination of ownership for purposes of award allocation where an executory sale contract was present. In addition, there is a substantial body of law on the problem of ownership where a land sale contract exists at the time of condemnation,[137] and it is most practical to permit ownership of the repurchase right to follow ownership for purposes of the condemnation award. If the right of repurchase is in the vendor, it seems equitable not to reinstate the contract in view of the intervening time and possible alterations on the property; if the right is in the vendee, there is no need to reinstate the contract.

Divided Interests

The right of repurchase should be granted where the estate taken is a fee simple absolute;[138] however, whether holders of less-than-fee interests should be able either to purchase the fee or to reinstate their lesser interests upon repurchase is dubious. There are several common "lesser" interests which may become involved with a repurchase right.

Where condemned property is subject to a lease with a long unexpired term, the dispossessed lessee may have almost as much interest in reinstating his leasehold as a former fee owner has in repurchasing his fee. Nevertheless, it would complicate the repurchase scheme enormously to grant the former lessee a right either to reinstate his lease or, should the lessor not exercise his option, to purchase the fee.

If reinstatement of a lease under its former terms and conditions would be grossly unfair in the light of changed circumstances, the right to reinstate would virtually preclude sale inasmuch as no one would be willing to buy property so burdened. On the other hand, if the lease where not a substantial

burden, it probably would not be particularly favorable to the lessee, who would, thus, have no interest in reinstatement.[139]

To grant the lessee the right to repurchase the fee would raise other problems. If both lessor and lessee desired to purchase, some determination of the more worthy or substantial interest would be necessary. A quantitative formula focusing on the length of lease time that remained at the time of condemnation to determine allocation of the repurchase right would be difficult to administer. Since the fee is to be returned unencumbered, the repurchase price should be the value of a fee interest at the time of acquisition. In the case of a negotiated purchase, however, lessor and lessee would have been paid separately for their interests, and either probably would have to pay substantially more than he received in order to acquire the property. It would be prudent to avoid these problems by adequately compensating the lessee at the time of the taking and terminating all his rights to the property at that point, leaving the acquisition cost of the condemnor as the repurchase price to the former owner.

The same conclusion seems applicable to other lesser interests such as easements, reversions, and profits. The value of these lesser interests to the owner of the underlying fee is difficult to predict. Practically speaking, the "lesser" interest sometimes will have been more substantial than the fee interest; however, this generally will not have been the case. The most practical solution is simply to ignore them--i.e., provide the owners of such interests no right to repurchase, and either disregard such lesser interests in fixing the repurchase price or use total acquisition cost as the measure.

An exception to this general rule might be appropriate for a life tenancy coupled with an unexercised general power of appointment which together constitute nearly a fee interest. The life tenant-donee at the time of the

acquisition would be the proper person to exercise the repurchase right. Should he die without exercising the power, the repurchase right could pass just as any general power passes or reverts.[140] If an appointment had been made, the appointee could be allowed to repurchase at the condemnor's acquisition cost, just as a lessor.

Secured Parties

The protections which a repurchase right is designed to give are aimed at possessory rather than security interests, for "ownership" comprises the emotional basis of the right.[141] Accordingly, persons with only security interests in condemned property should obtain no repurchase right. For example, a mortgagee or trustee under a deed of trust should not qualify for the repurchase option.

Whether security interests should be reinstated if the property is repurchased is a more difficult question. Condemnation awards are usually adequate to cover all secured interests; however, junior lienholders may sometimes be excluded from participation by exhaustion of the award.[142] The problem is mitigated somewhat by the fact that junior lienholders may be able to obtain deficiency judgments to recover the amounts owing to them.[143] Moreover, to allow reinstatement might make it impossible for the former owner to secure financing in order to accomplish the repurchase.[144] On balance then, it seems desirable that all secured interests be discharged upon the taking of the property and not be reinstated upon repurchase.

Aggregation of Multiple Parcels

After acquisition of a parcel for an improvement, a condemnor often finds that it holds an unmarketable and valueless surplus remnant. By combining several such remnants, however, the condemnor may be able to create a new

parcel of very high value and marketability. When this situation occurs, each of the former property owners involved may desire to purchase, for speculation purposes, either the whole parcel or, at least, the "valueless" portion that once was his.

This situation presents several problems previously discussed in other contexts plus new problems. If some or all of the former owners desire to repurchase, the condemnor would either have to sell to one or interplead all, leaving determination of their proportionate interests to the courts or to arbitration. If the sale price is to be the original acquisition cost, there must be a post facto determination of the original acquisition cost of each fragment to be returned. If the sale price is to be present market value, the combined parcels can be valued either separately or as a whole. If valued separately or if an acquisition cost formula were used, the condemnor would lose any "bonus value" it might have realized by assembling the disparate parcels and, hence, would have no motive to engage in this socially useful practice. On the other hand, if the condemnor were allowed to retain the bonus value or if a right to return were simply denied in the multiple parcel situation, any instances where a former owner sought to repurchase his former property solely for its usefulness to him would be disregarded.

A possible solution to this dilemma is to require a condemnor to offer each surplus parcel to the former owner for resale. The parcels not purchased possibly could subsequently be combined for sale on the open market. Of course, this solution opens the possibility that a former owner will repurchase his property at nominal cost in order to hold it for speculative purposes only since his parcel may be essential to development of the remaining property. An alternative solution is simply to except from the repurchase interest instances where the parcel being returned to private ownership is of such a size, shape,

or location that it is useless of itself. This solution might have the undesirable consequence of inviting court challenges by a former owner alleging that the parcel is in fact useful.[144a]

Public Entities

The former owner of condemned property may be a public entity or other condemnor which itself acquired the property by condemnation only to have it taken for a "more necessary" public use. Since there is already an elaborate scheme for disposal of surplus public property by first offering it to other public entities, there is no need to burden this scheme with additional repurchase rights.[145]

ASPECTS OF A REPURCHASE RIGHT: LEGAL INCIDENTS

If the former owner of property is granted a right to repurchase the property on specified terms, he will have, depending upon the valuation formula, a more or less valuable interest in the property. Whether the property interest is to be transferable, insurable, taxable, and so forth must be determined. Although the right of first refusal seems speculative and contingent, the interest is sufficiently substantial to entail legal consequences other than the right of repurchase itself. This general concept is, however, subject to exceptions.

Transferability: At Death

The repurchase right should be devisable and descendable upon the death of the former owner. Because members of the family of the former owner, possibly the very persons who were living on and dispossessed of the property, will be the most frequent heirs and devisees (or legatees, since the right is really "personalty"), they should be entitled to exercise the right in his

place. Further, when condemned property was held by a life tenant with general power of appointment, the appointee should be able to exercise the repurchase right.[145a] The major drawback of descendability and devisability of the right is that it raises the spectre of existence in perpetuity, spreading to joint tenancy among innumerable holders. The logical way to alleviate this problem is simply to place a reasonable limitations period on the existence of the right.

Transferability: Inter Vivos

On the other hand, whether the right should be transferable during life presents more difficult policy considerations since allowing unrestricted inter vivos transfers could entail undesirable consequences.

One consequence of free transferability is that, in many cases, it no longer would be the condemnee who held the right but some stranger to the transaction. Similarly, there is the possibility that some sort of "market" in rights of repurchase would spring up. Since the ordinary condemnee would probably be willing to part with his right for a small "bonus" following his dispossession, speculators could buy repurchase rights at nominal cost, hoping to make a windfall on abandonment. Since one basis for the right of repurchase is the notion of fairness to the condemnee who has been forcefully dispossessed of his unique property, allowing him to transfer his right of repurchase implies that he could have been adequately compensated in money--i.e., that the right is unnecessary.

On the other hand, an equally strong basis for the repurchase right is the concept that any profit upon land not needed for public use should go to the former owner who would be deprived of the profit. This notion sanctions free transfer and specualtion upon the repurchase right. In any event, a condemnee who does not really care about the property and seeks only a profit,

can achieve the effect of transferability by repurchasing and subsequently selling the property.

A second consequence of complete transferability would be that the condemning agency would be able to purchase the right. Because the condemnor is almost always in the better bargaining position, it often would be able to obtain the right at a low price and thereby nullify it. If a condemnor knew it was going to abandon a particular project, it could buy up the repurchase rights in the relevant properties before announcing abandonment. These problems can be avoided by making the right nonwaivable[146] and prohibiting condemnors from acquiring repurchase rights.

Finally, it should be noted that inter vivos assignment of repurchase rights is a practical necessity if multiple owners are reasonably to negotiate their interests in returned property. Any prohibition on transfer simply would force parties wishing to assign their rights to contract to transfer their interests after, rather than before, they exercise their rights.

Transferability: Collateral

Should the condemnee be able to use his expectancy as security in a credit transaction? Although fruition of the right generally would be highly speculative, in some circumstances the probability that the right would accrue would be great enough to enable a former owner to finance a transaction by assigning the right as collateral for a loan. This could be a valuable tool to enable one who has been dispossessed by eminent domain to obtain funds for such purposes as development or relocation. There appears to be no compelling reason to deny the opportunity to speculate on reasoned business judgments, particularly where there is little possibility of abuse of the repurchase right. Here, there is little possibility of a "market" developing or of a condemnee seeking a simple profit on the right.

Insurability

When the issue arose whether the condemnee had an insurable interest under Section 410 of the Pennsylvania Eminent Domain Code, a court held that the right of repurchase was not insurable and that the expectancy of an option to repurchase was all that the former owner held.[147] "While we might hold that an option to purchase is a sufficient interest to sustain insurance, the mere expectancy thereof is insubstantial and incapable of qualifying as an insurable interest."[148] This result was appropriate in view of the remoteness of the repurchase right.

Taxability

It would be nearly impossible to assess the value of the repurchase option accurately, whether as part of an estate for inheritance purposes or simply for purposes of personal property taxation. Even if valuation were feasible, the possibility of it ever having any real value to a particular condemnee would be quite remote. Finally, if the right were taxable, it would exert added pressure on a condemnee to waive or sell his right to the condemnor. For these reasons, it is proper that the repurchase right not be subject to taxation.

ASPECTS OF A REPURCHASE RIGHT: PROCEDURES FOR EXERCISE

The repurchase right should be easily exercisable. The following procedural framework is recommended to accomplish this end. When a condemnor acquires property by condemnation or by purchase under threat of condemnation, the condemnor will be required to record the repurchase interest in the property. If the condemnor, within the applicable limitations period, decides to devote the property to a private use, it must notify the former owner that it is selling the property. After notification, the former owner will have a

limited time within which to purchase the property for the same price at which it was taken from him. If he does not exercise his right within the designated time period, the condemnor will be free to dispose of the property as it sees fit. If the condemnor devotes the property to a private use without notifying the former owner, that owner can bring suit to establish his repurchase interest. If a transferee of the right fails to record the repurchase interest, he cannot recover his property. If the holder's interest is recorded, he may recover the property at the price provided by the statute or recover the amount the condemnor received in excess of that price. Finally, the repurchase right will exist independent of any common law rights. These proposals are examined in more detail in the following paragraphs.

Recordation of the Right

In California, an option agreement that affects an interest in real property is a recordable interest.[149] Once recorded, it gives constructive notice to all subsequent purchasers and encombrancers;[150] it ceases to give constructive notice if there is no recorded renewal or exercise of it within one year after its expiration date.[151] Under the proposed procedure, when property is taken by eminent domain, the recorded order of condemnation will set forth the repurchase option.[152] If taken by purchase, the deed given to the condemnor will contain the right.[153] Upon transfer of the right, the new holder must record his interest. Recordation in any of these cases will give constructive notice of the right to all would-be purchasers and encumbrancers throughout the limitations period without regard to renewal or exercise of the right. Recordation will specify the persons entitled to exercise the the repurchase option--an important safeguard should the condemnor attempt to sell the property to someone other than the former owner.

Notification of Intention to Sell

If, during the life of the repurchase right, the condemnor determines that it no longer needs the property for a public use, it can dispose of the property as it sees fit after first offering it for sale to the holder of the repurchase right at the price determined by the statute. Since the right may have been transferred by devise or descent, by power of appointment, by inter vivos transfer, or by forfeiture of collateral and since it may be difficult to determine the residences of both original and subsequent holders of the right, the proposal could impose a costly administrative burden on condemnors.[154] This will not creat a significant problem, however, since the right will have been recorded and the condemnor will need only to look in the records to determine to whom the property must be offered for repurchase. The address may be ascertainable once the name of the holder of the right is known. If, however, the holder has moved or left the county, he can be required to send notice of change of address to the county clerk where the property is located.

Notice of sale[155] will be in writing and will be served on the person entitled to purchase in much the same way that a summons is served--i.e., process reasonably calculated to give actual notice of the proceedings.[156] The Vermont proposal, for example, provides for notice by certified mail to the last known address of the condemnee or his successor in interest.[157] In California, service generally,[158] and in condemnation cases specifically,[159] may be by personal delivery, by first class mail with acknowledgement of receipt, or by publication if the other means are impossible. Accordingly, if a condemnor is unable to locate a former owner or his successors after "diligent inquiry," publication will be adequate notification of sale.[160]

The written notice can be used to inform the former owner of his legal rights. It can also include the names and addresses of the other persons to whom notice concerning the particular parcel is being sent so that, if a multiple ownership problem arises, the parties may be able to reach an agreement prior to exercise of the repurchase right.

Time Limit for Exercise of the Right

Once the condemnor has notified the holder of the repurchase right that it intends to sell the property, the former owner will be required to act upon his right within a reasonable time. The Vermont proposal, the former California Agricultural Code provision, and California Assembly Bill No. 343 (1963 Reg. Sess.) provide a 30-day period within which the condemnee could exercise his option. The British statute allows exercise within six weeks after the offer[161] while the Pennsylvania statute allows a full 90 days. Any time limit chosen will be somewhat arbitrary. Nonetheless, the limit should be designed so as to allow the condemnee adequate time to make a decision and obtain the necessary financing, without unduly burdening the condemnor. A 60-day period following actual receipt of notice should protect all interests adequately, particularly if disputing claimants are allowed to purchase first and subsequently determine their interests in court.

The holder of the right may find it difficult to exercise the right within 60 days if he is a minor,[161a] imprisoned, or otherwise incapacitated. However, these incapacities are not as great a hindrance in purchasing property as they might be in maintaining a law suit; and, in most cases, a minor or incompetent will have a guardian who is able to exercise his right for him. To require the limitations period to toll for incapacity is to hamper the condemnor's free alienability of property for an indefinite period. Although

a tolling period could be defined with maximum limits on duration, it nonetheless would place a hardship upon the condemnor for no good reason. Rather than make an exception for incapacity, the repurchase right would be exercisable during a single limited period, or go unexercised.[161b]

If the condemnee rejects the offer, or if he fails to make the purchase within the allotted time, then the condemnor will be free to sell the property as otherwise provided by law.

Breach of Duty by a Condemnor

Problems will arise if, during the limitations period, a condemnor sells or leases property to some person other than the holder of the repurchase right or simply allows the land to lie idle without offering it to the former owner.

Failure to notify. Disputes could arise in any of the following situations: (1) The holder fails to record his interest and the condemnor is, therefore, uncertain who holds the repurchase right; (2) The holder records, but the condemnor is unable to locate him because he either has failed to supply address changes or is simply unavailable at the time; (3) The holder records, but the condemnor willfully or inadvertently ignores the repurchase right and privately disposes of the property without consulting the former owner.

When a former owner or his successor in interest fails to record his repurchase right, it is appropriate that his interest in the property lapse. Although this rule may work a hardship upon a naive owner who has failed to record--especially if the condemnor knows his address--the requirement of recordation serves enough important functions to make it a prerequisite to exercise of the repurchase right.

If the former owner records his right but cannot be located by a diligent effort, the condemnor should be allowed to serve notice by publication. If

there is no affirmative response within 60 days of publication, the condemnor should be free to dispose of the property. If the former owner records but the condemnor fails to follow the prescribed resale procedures, the former owner should have a valid claim for his repurchase right or its value if the property has been sold.

Establishing devotion to "private use." If the condemnor fails to offer the property to the holder of the right, the holder should bear the burden of initiating proceedings to establish his repurchase interest. If he is successful, his costs of suit should be taxed to the condemnor. The proceedings should not be elaborate, and the unnotified holder should be able to establish his right merely by proving the fact of devotion to a private use or long continued nonuse without proper notification to him.

The following burdens and presumptions will be appropriate. If the holder of the repurchase interest demonstrates that the condemnor has sold the property to a private person and that the condemnor did not acquire the property for sale to a private person (under authority of excess, substitute, or redevelopment condemnation), he will have established a prima facie case of devotion to a private use. If the holder demonstrates that the condemnor did not acquire the property for lease to a private person (under authority of open space or future use condemnation), the owner will have established a prima facie case of devotion to a private use. Similarly, if the condemnor has allowed the land to lie idle for the repurchase period, or has not devoted it to a public use by the end of the period, or has devoted the land only to a brief public use during the period, and if the land was not acquired temporarily or for open space, this would be a prima facie case of devotion to private use.

Statute of limitations. Where a condemnor has sold property without proper notification to the holder of the repurchase right, an action to establish the

right should be allowed for up to one year after the termination of the repurchase period. A full year is necessary because, when land acquired for future use is not devoted to a public use within the repurchase period, the holder of the repurchase right must have a reasonable time within which to establish his interest in court. There is no overriding reason to toll the one-year limitations period during the incapacity of the holder of the repurchase right.[161c]

On the other hand, when property was acquired for some general public use but, after a brief period of time, it is clear that the property is being devoted permanently to a private use, the condemnee should not be forced to await the termination of the repurchase period to establish his right. In this situation, however, proof of private use may be rebutted by the condemnor's proof of an intention to devote the property to a public use within the prescribed period.[162] Where the condemnor is successful in this rebuttal, the holder may subsequently renew his claim on a showing that the condemnor has not carried out its professed intentions.

If it appears in court that there is a reasonable probability that the property will be devoted to a public use within a reasonable time, although not within the seven-year limitations period, it may be desirable either to extinguish or extend the repurchase right rather than to have it presently exercisable. This would enable the condemnor to avoid having to recondemn in the near future, with the attendant disruptions and expenses.[162a] In such a case, the condemnor should bear the burden of proving reasonable probability of devotion to a public use within a reasonable time.

Bona fide purchaser. Once the former owner's repurchase right has been established, the court will render an appropriate remedial order. If the property has been simply abandoned, the court should be allowed to order it to be sold to the former owner. If the property has been leased to a private

person, the court should be able to order it to be sold subject to the lease, with rentals from the lease going to the former owner. If the property has already been sold to a private person, the court's order will be more difficult to draft.

The various repurchase proposals are unanimously agreed that failure by the condemnor to follow prescribed procedures should not affect or cloud the title of a purchaser.[163] One California bill, for example, implied that there should be no sanctions even if the condemnor ignores the repurchase provisions:[164]

> Failure by the public entity to give notice to the person or persons entitled to repurchase shall not affect the title or lien acquired by a purchaser or encumbrancer in good faith and for value, without knowledge of such failure by the public entity.

While the policy that title to the property should remain clear and unclouded is commendable, this provision goes too far in allowing a condemnor to bypass the rights of a former owner with impunity. Since recordation of the repurchase interest will give constructive notice of the title encumbrance to all prospective purchasers, there will be no bona fide purchasers or encumbrancers for value. Thus, there is no compelling reason to deny the holder of a repurchase right all remedy in this situation.

Several proposals guard against abuse by a condemnor by requiring the condemnor to certify that it has in fact complied with the statutory requirement of giving the first opportunity to purchase to the former owner or his successor. A typical California bill states:[165]

> When such land is sold to a person other than the former owner, a recital in the deed to the effect that the provisions of this section have been complied with shall be deemed prima facie evidence that such is the case, and conclusive evidence thereof in favor of a bona fide purchaser or encumbrancer for value.

The British are not quite so ready to give credibility to a condemnor's recitals and go further to assure that a condemnor will comply with the statutory requirements. The British statute requires:[166]

> [A] declaration in writing made before a justice by some person not interested in the matter in question, stating that such offer was made, and was refused, or not accepted within six weeks from the time of making the same, or that the person or all the persons entitled to the right of pre-emption were out of the country, or could not after diligent inquiry be found, or were not capable of entering into a contract for the purchase of such lands, shall in all courts be sufficient evidence of the facts therein stated.

Some provision such as this is necessary so that an unexercised repurchase right will not become a cloud on the title of a private purchaser. Whether the provision should go as far as the British rule is debatable. The simplest solution is to allow the condemnor's recitals of compliance to be conclusive as to ownership of the property. To prevent abuse, however, a condemnor that makes false recitals should be liable to the holder of the right for the difference between the actual sale price of the property and the price the former owner would have paid for it. Thus, the holder of the right would recover the property from the purchaser if the condemnor had made no recital of compliance. If, however, the condemnor had made a false recital of compliance, the holder could recover damages from the condemnor.

Repurchase Right is Independent of Any Common Law Rights

The repurchase right would arise where a condemnor acquired property for a public use but thereafter devoted it to a private use. Thus, the right could exist in circumstances where the former owner might also claim that the acquisition itself was fraudulent. If the acquisition were in fact fraudulent--i.e., not for a public use--the former owner should be allowed to pursue his common law remedies for fraud by way of collateral attack on

the condemnation. Absent such a provision, a condemnor discovered taking property for a private purpose would always attempt to force a repurchase by the former owner rather than allowing the property to revert.[167] If the condemnor were able to achieve such a result, the fraud remedy--weak as it is--would be rendered nugatory. Accordingly, provision should be made to allow the condemnee to pursue his fraud remedies without forfeiting his rights in the property or being forced to accept the condemnor's offer of sale.

STATUTORY GUIDELINES

If the right to return of property is to be adopted as part of an eminent domain scheme, certain restrictions are necessary. In light of the necessity of condemnors' flexibility and economics, the only feasible means by which a return to private ownership can be accomplished is a repurchase right in the former owner. This right would enable the former owner to recover property taken from him if the property is put to a private use rather than to the public use for which it was taken. The repurchase price should be based upon the original acquisition cost of the property. If repurchase price were based upon present market value, the "right" would be of little assistance to the former owner and would complicate the condemnor's task in disposing of the property.

Some major objections to an acquisition-cost repurchase right are that its existence would unduly restrict the flexibility of public entities, would raise costs, and would render title uncertain in condemnation proceedings;[168] however, these objections are answerable. The repurchase right will not restrict condemnor flexibility in disposing of the property until it is not actually needed for future use. The right will not raise costs but, more accurately, will prevent profit-taking by the condemnor. Finally, if the repurchase right

only exists for a limited time period, if a bona fide purchaser of property is not subject to any unrecorded repurchase interests, and if he is allowed to rely upon the condemnor's recitals of compliance with the law, titles will not become clouded.

Standing alone, the repurchase remedy leading to recovery of the property is inadequate to guarantee the interests for which it is designed. A necessary supplement to the repurchase right is a right to recover profit resulting from sale of property taken for a public use and put to a private use. A right to compensatory damages, while somewhat simpler to administer than a repurchase right, is not sufficient, however, because it does not return the property to the former owner. It can, however, be a substitute remedy if the condemnor ignores the repurchase procedures when disposing of property. It could provide an alternative protection if a repurchase right is not enacted.

The formulation of a satisfactory repurchase statute entails numerous practical difficulties. At best, a statute will be able only to outline the general nature of the right and the procedures by which it is to be exercised. The courts will have to supply the details as particular problems arise. Major aspects of a statutory right to repurchase property put to a private use should be:

(1) Any fee interest in property taken by condemnation or by purchase under threat or imminence of condemnation is subject to repurchase rights. The authority under which, and public use for which, the property is being acquired must be specified at the time of acquisition.

(2) The original holder of the repurchase right must be the former legal owner of the fee simple absolute in the property or a life tenant with general power of appointment over the property.

(3) The right is a recordable interest in property. The holder of the right must inform the condemnor, recorder, or county clerk of his current address.

(4) The repurchase interest is nonwaivable, is transferable both at death and inter vivos, and can be used as collateral for a loan. It has no other legal consequences.

(5) The right is exercisable if, at any time within the designated period of limitation, possibly seven years from the taking, the condemnor or a subsequent public owner devotes the property to a private use. If the condemnor does not announce its intent to so devote the property, the holder of the right may establish private use by objective proof.

(6) When the property is to be devoted to private use, the condemnor must notify the holder of the repurchase interest that the property is offered to him for sale.

(7) The sale price for the holder of the repurchase right is the acquisition price adjusted to reflect the cost of improvements and the amount of waste on the property. If only a portion of the property originally taken is being returned to private use, the sale price is the estimated original purchase price of that portion. All valuation problems are to be resolved by an independent appraiser selected by the condemnor.

(8) If the holder of the repurchase right is unable to be located, if he rejects the offer, or if he does not exercise his option within a reasonable period of time, the condemnor is free to dispose of the property in any way authorized by law.

(9) When a person other than the holder of the repurchase right buys the property, his title is immune to attack if the repurchase interest is unrecorded or if the deed contains recitals of compliance with law by the condemnor.

(10) If the condemnor in any way fails to comply with the statutory provisions requiring resale to the holder of the repurchase right, it is liable in damages to the holder in the amount of its actual profit.

CONCLUSION

A substantial amount of property taken for public use is ultimately devoted to private purposes, and it is estimated that this amount will increase in the future. The very concept of the sovereign power of eminent domain seems to demand that, if property taken is not actually needed for a public use, it should be returned to the person from whom it was taken. Nonetheless, present law allows a condemnor that has acquired property for a public use to dispose of the property freely when the public need ceases to exist. It may be desirable social policy to allow free use and disposal of land by public entities in a time when wise land use is a growing necessity. The inescapable issue underlying these policy considerations, however, is whether the increased value of land at the time of disposal should be garnered by the public or returned to the person who might have realized it but for the public entity's intervention. The concept of a right to return of the property has most merit in the few limited situations where a public use requires property to be taken for ultimate private disposition. No other jurisdiction has been able to develop a satisfactory general statute. Moreover, the short limitation period provided in those few jurisdictions that have a repurchase statute gives little protection to former owners. Although it is a close question, detailed examination of all aspects of a right of return--including its value as a check upon abuse of the right to take and the difficulties involved in its valuation and exercise--reveals that creation of such a general right probably will create more practical problems than its virtues justify.

FOOTNOTES

* B.A. 1967, University of California at Berkeley; J.D. 1970, University of California at Davis. Member of the legal staff of the California Law Revision Commission. Member of the California Bar.

This article was prepared by the author to provide the California Law Revision Commission with background information to assist it in its study of condemnation law and procedure. Any conclusions, opinions, or recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the views of the California Law Revision Commission or its individual members.

1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. "[N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV. "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner." Cal. Const., Art. I, § 14. In addition, the California Code of Civil Procedure defines eminent domain as "the right of the people or government to take private property for public use." Cal. Code Civ. Proc. § 1237 (West 1955).

2. E.g., Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958); cf. Hayward Union High School Dist. v. Madrid, 234 Cal. App.2d 100, 44 Cal. Rptr. 268 (1965), in which the school board acquired land for a schoolhouse by grant deed after having first instituted eminent domain proceedings; several years later, after the land had greatly increased in value, the board sought to sell it, having temporarily used the land for school purposes but without ever having built the schoolhouse upon it.

One notorious instance of an exchange of surplus property by a public entity with a private party is the conveyance of the Chavez Ravine property by the City of Los Angeles to the Los Angeles Dodgers baseball club. The city by ordinance in 1957 authorized and agreed to transfer 300 acres in the Chavez Ravine to the Dodgers in exchange for the Dodgers' agreement to provide and maintain recreational facilities on 40 of the 300 acres. Part of this property was land that had been dedicated forever as a public park; part was land that had been acquired a few years earlier by the Los Angeles Housing Authority for a low rental housing project which had subsequently been abandoned by the Housing Authority. This transfer of public property was challenged by a referendary petition, which failed, and by a rash of litigation, which also failed. Some of the cases concerning the Chavez Ravine property are: Kirshbaum v. City of Los Angeles, 361 U.S. 30 (1959) (dismissing appeal); City of Los Angeles v. Superior Court, 51 Cal.2d 423, 333 P.2d 745 (1959); Ruben v. City of Los Angeles, 51 Cal.2d 857, 337 P.2d 825 (1959); Los Angeles Dodgers, Inc. v. County of Los Angeles, 260 Cal. App.2d 679, 67 Cal. Rptr. 341 (1968); Los Angeles Dodgers, Inc. v. City of Los Angeles, 256 Cal. App.2d 918, 64 Cal. Rptr. 465 (1967); Housing Authority v. Arechiga, 203 Cal. App.2d 159, 21 Cal. Rptr. 464 (1962); Smith v. City of Los Angeles, 190 Cal. App.2d 112, 11 Cal. Rptr. 898 (1961); Arechiga v. Housing Authority, 183 Cal. App.2d 835, 7 Cal. Rptr. 338 (1960); Housing Authority v. Lopez, 159 Cal. App.2d 661, 324 P.2d 976 (1958); Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958).

3. See, e.g., Capron v. State, 247 Cal. App.2d 212, 55 Cal. Rptr. 330 (1966). In Capron, the State Public Works Board adopted a resolution in 1949 authorizing the acquisition of real property for a Department of Mental Hygiene hospital.

The land finally chosen for the site was the 750-acre Capron tract. An eminent domain complaint was filed in July 1949. The Caprons finally reached a stipulated agreement with the state, and judgment was entered deeding the entire tract to the state. Unknown to the Caprons, the state had meanwhile decided that it actually needed about half the property for hospital uses. The land was taken nonetheless because the machinery to take was already in motion and it was thought not to be worth the effort of stopping it. The excess portion, some 350 acres, was leased to various private individuals until 1959 when the state decided to sell it. Mr. Capron learned of the impending sale in 1960 and sought to impose a constructive trust upon the portion of the property that was surplus to state needs on the ground that the "judgment and decree of condemnation had been procured by reason of false representations as to the proposed public use of the site made to him by agents and employees of the state." Id. at 223, 55 Cal. Rptr. at 337. The trial court granted the requested relief. On appeal, however, it was held that any fraud by the state was "intrinsic" fraud and, hence, action was barred by laches and the statute of limitations; for, although the Caprons had no personal knowledge of the change of plans of the state, they had constructive knowledge imputed to them through their representative in the Legislature who had acted as their agent in the course of transactions and who had been aware of the change of intended use.

4. The exact number is uncertain. An analysis of the statutes of California reveals that there are at least 500 cities and counties authorized to take and well over 2,000 special districts (not including county drainage and flood control districts, county and regional sewage disposal districts, and parking districts). There are also an unknown number of local agencies,

school districts, public utilities, railroad corporations, cemetery authorities, housing authorities, and municipal utility districts authorized to take. In addition, of course, the state and federal governments can and do take enormous amounts of land.

5. Some idea of the extent of the power to acquire property can be seen from the following facts: Of the total gross area of the State of California, measuring 101,563,520 acres, over half (51,573,179) is publicly owned. See 1969 California Statistical Abstract 1 (1969); California State Lands Commission, Public Land Ownership in California iii (1969).

6. The exact amount of land acquired by condemnors each year through condemnation is unknown. It is known that the number of condemnation cases brought in Superior Court is rapidly increasing. In 1967-68, for instance, 11,518 eminent domain actions were filed, a 23% increase over the preceding year. See Judicial Council of California, Annual Report of the Administrative Office of the California Courts 131-132 (1969). It is further known that the number filed is only a small portion of the number actually taken from private owners. For example, of the 6,590 parcels taken by the California Division of Highways in 1967-68, only 194 were contested court awards, the remainder being negotiated settlements under threat of condemnation. See California Department of Public Works, Annual Report 86 (1968).

A further indicator of the annual take of California condemning agencies is the actual acquisition volume of some state agencies for which figures are available. See generally State Budget of California for Support and Local Assistance (1969-70) & (1970-71); California Legislative Analyst, A Survey of Land Acquisition and Disposal by State Agencies (1969).

Thus, in fiscal year 1967-68, the Rights-of-Way Department of the Highway Division acquired 6,600 parcels at a cost of $178 million; in fiscal year 1968-69, the Rights-of-Way Department acquired 5,822 parcels of highway rights of way at a cost of $189.2 million. In addition, the Rights-of-Way Department spent $7.2 million for 540 parcels acquired for other purposes. State Budget of California at 1242 (1970-71).

The State Department of General Services, serving some 15 other state agencies, acquired 268 parcels in fiscal 1967-68 at a cost of $35.3 million and 194 parcels in fiscal 1968-69 at a cost of $13,841,291. State Budget of California at 63 (1969-70) and at 68 (1970-71). Since 1962, it has acquired 1,773 parcels with a value of $137,249,953. California Legislative Analyst, A Survey of Land Acquisition and Disposal by State Agencies 12 (1969).

The Reclamation Board annually acquires about 175 parcels for flood control purposes. State Budget of California 873 (1969-70).

The University of California acquires about 30 parcels per year at an average cost of $6,261,000. California Legislative Analyst, A Survey of Land Acquisition and Disposal by State Agencies 49 (1969).

The only other state agency with a substantial, continuing land acquisition program and professional land acquisition staff is the Department of Water Resources. The annual take of this agency is not known; however, it is known that for the State Water Project alone a total of 145,000 acres of land costing $111 million must be acquired. This total involves about 1,400 parcels currently in the acquisition process. State Budget of California 837-843 (1969-70). The Department's overall land program for the next decade includes 4,600 parcels to be acquired for $200 million. California Legislative Analyst, A Survey of Land Acquisition and Disposal by State Agencies 31 (1969).

There is no statistical information available in convenient form describing the extent to which property is being taken by local and private condemnors. In 1965, the California Law Revision Commission sent a request to about 50 counties, cities, and private condemnors, requesting information

> concerning the extent to which property is now being taken for various public uses and the anticipated need for the acquisition of property for such uses in the future. At this time, we are seeking to determine what information already is available in the form of published reports and unpublished memoranda that would provide statistical information on past experience and future needs.

The Commission received only one response with any information. The County of Marin indicated that it had spent $930,177.42 on acquisition of land and rights of way over the preceding two and one-half years, an average of about $375,000 per year. County of Marin, Acquisition of Land and Rights of Way of Marin (mimeo., 1965).

7. Each state agency is required by law to review its public land holdings annually and report excess land (except tax-deeded land, land held for highway purposes, and land under the jurisdiction of the State Lands Commission) to the Department of General Services which then takes jurisdiction of all such land. Cal. Govt. Code § 11011 (West Supp. 1971). Next, the Department goes to the Legislature to request authorization to dispose of the land by sale or otherwise. Id. A review of the statutes gives a rough notion of how much land the state finds to be excess each year. The statute as enacted usually provides:

> The Director of General Services is hereby authorized to sell, exchange, or lease for current market value and upon such terms and conditions and with such reservations and exceptions as in his opinion may be for the best interest of the state, all or any part of the following real property: [there follows a list of the properties to be disposed of].

In 1965, this amounted to seven parcels, comprising a little over 70 acres (Cal. Stats. 1965, Ch. 1526, § 1); in 1967, seven parcels of a little under 100 acres (Cal. Stats. 1967, Ch. 1045, § 1); in 1968, 14 parcels amounting to over 900 acres (Cal. Stats. 1968, Ch. 1318, § 1); and in 1969, 13 parcels of over 1,400 acres (Cal. Stats. 1969, Ch. 1024, § 1).

The Department of General Services is required by statute to sell excess land first to other state agencies which may need it. Cal. Govt. Code § 11011 (West Supp. 1971). In practice, the Department goes one step further and offers it to concerned local agencies.

> [A]s we receive from the using agency a request or a statement that they find surplus to their requirements from real estate [sic], we report it to the Legislature and we seek legislative authority to sell it. Then we advise all state agencies that this land is to be sold unless some other agency has a use for it. We then advise local government the same thing. Then we ultimately sell. [Statement by Mr. Vincent, Chief Land Agent, Property Acquisition Service, Department of General Services, in California Assembly Interim Committee on Natural Resources, Planning and Public Works, Hearing on Land Acquisition Practices 45-46 (1963).]

Superimposed on this disposal pattern is the requirement that state and local agencies first offer the land for use as park land. Cal. Govt. Code §§ 54220-54224 (West Supp. 1971).

8. In fiscal year 1967-68, the Department of General Services sold 12 parcels at a price of $3 million and in fiscal year 1968-69, sold 19 parcels at $2,816,528. See State Budget of California at 64 (1969-70) and at 68 (1970-71).

The Division of Highways annually sells surplus land totaling about $9 million, and the State Lands Commission sells land totaling about $150,000. California Legislative Analyst, A Survey of Land Acquisition and Disposal by State Agencies 17, 47 (1969).

9. California Legislative Analyst, A Survey of Land Acquisition and Disposal by State Agencies 17, 36, 43, 47, 50 (1969). This total includes all oil and gas royalties. The land rental alone amounts to $7 million.

10. Id. at 6. There is some indication that the number of eminent domain actions is beginning to decline. From a high of 11,518 actions filed in California superior courts in 1967-68, eminent domain filings have dropped to 9,403 in 1968-69 and 8,122 in 1969-70. See Judicial Council of California, Annual Report of the Administrative Office of the California Courts, Appendix Table 16 (1971).

11. There have been numerous complaints by former owners, as witnessed by the continuing legislative concern with the problem. See note 92 infra. The Los Angeles Daily Journal recently carried the story of some Sacramento property sold to the state for $200,000 to be used for state fair purposes, which the state approximately 20 years later is seeking to sell, having received bids on 230 acres amounting to $7.3 million. The former owner claims to have the first opportunity to repurchase the property at the original sale price. See MacArthur, Affairs of State, Los Angeles Daily Journal, Nov. 24, 1970, at 6, col. 1.

12. See note 1 supra and accompanying text. One authority on the law of eminent domain states:

> Where property is taken for a public use by eminent domain, the proper exercise of the power is predicated upon the promise that such property will be devoted to the public use for which it is taken within a reasonable time after the taking.

2A P. Nichols, Eminent Domain § 7.1[4](rev. 3d ed. 1970)[hereinafter cited as Nichols].

13. See, e.g., People ex rel. Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 216, 436 P.2d 342, 348, 65 Cal. Rptr. 342, 348 (1968).

14. If the condemnee is able to show that the taking is not for a public use, the court will simply deny the judgment in eminent domain to the condemnor. See, e.g., City & County of San Francisco v. Ross, 44 Cal.2d 52, 279 P.2d 529 (1955)(city not allowed to take property by eminent domain for private parking lot).

Practically, however, it is very difficult for a condemnee to challenge successfully the right to take. The reasons for this difficulty are clear: Public policy requires a presumption that actions of public bodies are proper; the courts are reluctant to interfere with the processes of coordinate political branches of government. See Cal. Evid. Code § 664 (West 1966). The burden of pleading, as well as the burden of proof, is on the defendant who wishes to challenge the right to take. See, e.g., California Condemnation Practice § 8.31 (Cal. Cont. Ed. Bar 1960); County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960); Lavine v. Jessup, 161 Cal. App.2d 59, 326 P.2d 238 (1958). Further, the sole issue courts will entertain in a challenge of the right to take is whether there is "fraud, bad faith, or abuse of discretion in the sense that the condemnor does not actually intend to use the property as it is resolved to use it." People ex rel. Dep't of Public Works v. Chevalier, 52 Cal.2d 299, 304, 340 P.2d 598, 601 (1959). To show the subjective intent of the condemnor at the time of the taking is almost impossible. When an abuse comes to light some time after the taking, collateral attack may be barred by a relatively short statute of limitations. See Cal. Code Civ. Proc. § 338(4)(West Supp. 1971); Capron v. State, 247 Cal. App.2d 212, 55 Cal. Rptr. 330 (1966).

> [C]ourts are willing to ask only whether the condemnor actually intends to use the property for the purposes for which he claims to want it. This additional limitation on the exercise of eminent domain amounts to no more than a rule which denies the condemnor the power

to appropriate particular property if he does not actually intend to use it for the purposes alleged. These jurisdictions hold that if the purpose for which the condemned property will be actually used is authorized by the applicable statute, if that purpose is a public use, and if the property selected is reasonably appropriate for the actual purpose, judicial review of the condemnor's determination of necessity for the particular property is ended.

Comment, Abusive Exercises of the Power of Eminent Domain--Taking a Look at What the Taker Took, 44 Wash. L. Rev. 200, 223 (1968).

15. A federal report points out that generally:

> Issues in the disposition of land if the expected need for it does not materialize differ depending on what interests are to be covered, how the land was originally acquired (whether by dedication, purchase, condemnation, or tax delinquency) and what restrictions were placed on the conveyance of the interests in land at the time of acquisition.

U.S. Dep't of Housing and Urban Development, Advance Land Acquisition by Local Governments: Benefit-Cost Analysis as an Aid to Policy 21 (1968).

16. In California, typical statutes authorizing disposition of surplus public lands contain broad grants of authority. See, e.g., Cal. Govt. Code §§ 190-196 (West 1966)(sale of excess land), 11011 (West Supp. 1971)(sale by county), 25520-25539 (West Supp. 1971)(sale by Department of General Services); Cal. Pub. Res. Code §§ 6201-6225 (West Supp. 1971)(powers and duties of State Lands Commission), 7301-7424 (West Supp. 1971)(school lands), 8101-8106 (West 1956)(university lands), 7361 (West Supp. 1971)(swamplands), 7501-7556 (West 1956)(timberlands); Cal. Sts. & Hwys. Code §§ 1930-1934 (West Supp. 1971)(abandonment of streets).

Nichols states that it is not objectionable that:

> [A] statute which authorizes a taking provides that the municipal authorities may sell lands taken whenever they determine that such property is no longer needed for public use. Such power is latent in

every taking, and is very different from a taking of land with a contemporaneous knowledge and purpose that a definite and separable part is not necessary for the public use.

2A Nichols § 7.223.

17. U.S. Dep't of Housing and Urban Development, Advance Land Acquisition by Local Governments: Benefit-Cost Analysis as an Aid to Policy 21 (1968):

> Several cases allowing disposition of land concern properties taken by condemnation but there is no reason to suppose that this evidence would not apply at least with equal force to land originally purchased in the open market. Once land has been taken by eminent domain, it becomes the property of the local government in fee simple, and may be treated as any other city (or county) property, for use, for conveyance, or for any other purpose. Local government's right to shift the use of the acquired land from one public purpose to another is clear. Government has the right to alienate freely any excess property condemned for a public purpose. It also has the right to sell to private persons, and at a profit, any land originally taken for a public purpose, and which is no longer necessary. The only limits placed on this municipal right are that there must have been no fraud or gross abuse in the original taking, and that planned future use for public purposes was the true reason for the original taking. [Footnote omitted.]

18. "Although there is a paucity of reported discussions by the courts, they have generally not attempted to construe narrowly statutes authorizing or implying capacity to dispose of land." Id.

19. One instance of this rule can be seen in the case of Richelderfer v. Quinn, 287 U.S. 315 (1932), in which Congress had acquired certain park lands in fee and, by act of Congress, dedicated the land in perpetuity to park use. Subsequently, Congress directed by act that the park land be used in part for a firehouse. The Supreme Court held that, despite the dedication of the land to park uses, Congress nonetheless held title to the land in fee simple absolute and thus always had the power to change that use of the land and to devote it to another use.

This holding illustrates the general rule that "[p]roperty acquired in fee simple by a public body for a particular public purpose may nevertheless be diverted to another use." Arechiga v. Housing Authority, 159 Cal. App.2d 657, 660, 324 P.2d 973, 975 (1958)(citing Reichelderfer v. Quinn, supra, and Ritzman v. City of Los Angeles, 38 Cal. App.2d 470, 101 P.2d 541 (1940)). The general rule, however, is subject to limitations where the property has been conveyed to the public agency for specified purposes. The grant then is not in fee simple absolute, but is considered to be a defeasible fee with conditions subsequent attached so that the property may not be devoted to any public use other than that specified. 2 B. Witkin, Summary of California Law Real Property § 31 (1960). This exception, of course, applies only when there has been a conveyance to the public entity rather than a taking by eminent domain for some specified purpose.

The defeasible fee notion is a traditional property law concept. At least one case, however, has gone so far as to imply that, if an individual conveys to a public agency for specified purposes, title actually remains in the grantor subject to use for the prescribed purposes by the grantee.

> Generally speaking, where a private party conveys land to a city for a definite public purpose it cannot be diverted to another and different purpose, at least so long as the conditions of the grant are in force. (Harter v. City of San Jose, 141 Cal. 659 [75 Pac. 344].) The main reason for this rule is that in such a case the title remains in the original owner subject to the specified public use. (Harter v. City of San Jose, supra.)

Ritzman v. City of Los Angeles, 38 Cal. App.2d 470, 474, 101 P.2d 541, 543 (1940).

These restrictions or limitations on the right of a public agency to put land to an alternate use when acquired by dedication seem to disappear if the public agency should decide to sell the property outright for some

private use. This is precisely what happened with the Elysian Park Lands involved in the Chavez Ravine cases. See Smith v. City of Los Angeles, 190 Cal. App.2d 112, 11 Cal. Rptr. 898 (1961) and note 2 supra. As long as the public agency has general authority to dispose of public lands, it may dispose of property acquired by dedication.

> It is in general more difficult to dispose of land dedicated for a public purpose, such as for a park, than it is to dispose of land acquired by condemnation or purchase. Without charter or statutory authority, municipal property dedicated or in trust for public use cannot be sold. But property which has outlived its usefulness or has become inadequate for its public purpose may be sold by the municipality without specific legislative authority, under the general statutory charter power to hold and convey property.

U.S. Dep't of Housing and Urban Development, Advance Land Acquisition by Local Governments: Benefit-Cost Analysis as an Aid to Policy 21-22 (1968).

It should also be noted that a different situation involving different legal principles arises when land has been devoted to some public use by one condemning agency and is subsequently acquired for some other public use by a second condemnor. This situation has been called condemnation for a "more necessary" public use. See generally Cal. Code Civ. Proc. § 1240 (West Supp. 1971).

20. See, e.g., Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958).

21. 256 F.2d 421 (9th Cir. 1958).

22. For a discussion of this area, see 2A Nichols § 7.226 and Comment, Substitute Condemnation, 54 Cal. L. Rev. 1097 (1966).

23. In California, the important statutorily authorized situations include takings for state highways, water, and dam purposes. See Cal. Sts. & Hwys. Code § 104.2 (West 1969) and Cal. Water Code §§ 253, 255 (West 1971).

24. 263 U.S. 78 (1923).

25. Id. at 81.

26. 122 Cal. App.2d 777, 266 P.2d 105 (1954).

27. The Community Redevelopment Law, formerly Cal. Health & Saf. Code §§ 33000-33954; now Cal. Health & Saf. Code §§ 33000-33738 (West Supp. 1971).

28. 122 Cal. App.2d at 786, 266 P.2d at 112.

29. Id. at 790, 266 P.2d at 114.

30. For general discussions of this area, see 2A Nichols § 7.5122 and Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 So. Cal. L. Rev. 421 (1969).

31. See, e.g., Cal. Sts. & Hwys. Code § 104.3 (West 1969); see also People ex rel. Dep't of Public Works v. Lagiss, 160 Cal. App.2d 28, 324 P.2d 926 (1958); Capron v. State, 247 Cal. App.2d 212, 55 Cal. Rptr. 330 (1966).

32. See 2A Nichols § 7.5122[1]; Matheson, Excess Condemnation in California: Proposals for Statutory and Constitutional Change, 42 So. Cal. L. Rev. 421, 430-432 (1969).

33. 2A Nichols § 7.223:

> In view of the fact that property may not be taken for a public use and then turned over to private enterprise for nonpublic purposes, when property is taken for the public use, there cannot at the same time be taken additional adjacent property which it is not intended to devote to the public use, but which is to be sold for profit as soon as the improvement is completed.

34. People ex rel. Dep't of Public Works v. Superior Court, 68 Cal.2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968). The dissenters described the facts of this case as follows:

> Needing slightly more than a half acre for a public use (65/100 of an acre, to be precise), this governmental department seeks to take 54.03 acres of private property which it does not need and cannot use. Its avowed purpose is to speculate on resale to a private purchaser.

Id. at 216, 436 P.2d at 349, 65 Cal. Rptr. at 349.

35. Id. at 213, 436 P.2d at 347, 65 Cal. Rptr. at 347.

36. Taylor, The Right to Take--The Right to Take the Fee or Any Lesser Interest, 1 Pacific L.J. 555, 576 (1970):

> The difficulty lies in determining, in discrete cases, when government or one of the government's auxilliaries is engaging in "sound business practice" and when it is engaging in "land speculation"; and the judgmental factors of legislatures, courts, administrators, and property owners have, of course, differed considerably.

36a. 4 Nichols § 12.5.

36b. 2A Nichols § 7.223[1].

36c. See Cal. Code Civ. Proc. § 1241, declaring certain resolutions of necessity to be conclusive evidence that the property described in the resolution is necessary to an authorized public use.

37. "Open space" or "open area" is defined as:

> any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

Cal. Govt. Code § 6954 (West 1966).

38. Cal. Govt. Code § 6953 (West 1966). The word "otherwise" does not include eminent domain. See Note, Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning, 12 Stan. L. Rev. 638, 645-647 (1960). Furthermore,

the authority to condemn "public parks" (Cal. Code Civ. Proc. § 1238(3) (West Supp. 1971)) does not extend fully to open space acquisition. See Opinion of the Legislative Counsel of California #17,885 (1969).

39. See 2A Nichols § 7.223[2]. California statutes authorizing taking for future use include Cal. Code Civ. Proc. § 1238(3), 1238(13), 1238(17)(West Supp. 1971); Cal. Sts. & Hwys. Code § 104.6 (West Supp. 1971); Cal. Water Code §§ 258, 11575.1 (West 1971). See also Cal. Govt. Code §§ 7000-7001 (West 1966); Cal. Pub. Res. Code § 6808 (West 1956).

40. Cf. San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

41. 2A Nichols § 7.223[2]:

> If a taking of the fee is made for a public use, in good faith and without a wholly unnecessary excess, it is no ground for opposing the taking that the parties making it intend to derive a private revenue by leasing the land not required for immediate occupation or by selling the surplus water when it is not needed for the public use.

42. Nearly all state statutes granting the right to acquire property for future use also grant the power to sell land no longer needed. See Chart, Nat'l Research Council, Highway Research Board, Special Report 27: Acquisition of Land for Future Highway Use 27-29 (1957).

43. Id. at 32 (footnote omitted).

44. A review of the cases indicates that the courts have reached these general results without attempting to distinguish between property acquired by

condemnation and property acquired by purchase under threat of condemnation, nor do they attempt to differentiate between takings originally quite proper and those based on the mistake or negligence of the condemnor. Nor have the courts attempted to distinguish between takings where the supporting public use contemplates eventual transfer to private ownership and takings where such transfer is not foreseen. All eminent domain cases, excepting those where a fraudulent acquisition may be involved, have been treated uniformly.

45. The federal study describes the power of a condemnor to dispose of land in the following way:

> The essence of the entire issue thus turns on the original condemnation, and if this was in good faith, and within powers authorized by state legislature or constitution to the local government, all subsequent treatment of the land which is allowed to the local government under its general rights as to its public or proprietary property is also allowed to property acquired by the condemnation method under the doctrine of eminent domain.

U.S. Dep't of Housing and Urban Development, Advance Land Acquisition by Local Governments: Benefit-Cost Analysis as an Aid to Policy 21 (1968).

46. This plenary right is subject, of course, to the power of eminent domain by some other condemnor for a "more necessary" public use. See Cal. Code Civ. Proc. § 1240 (West Supp. 1971).

47. See Note, Real Property--Eminent Domain--Reversion Upon Misuse or Nonuse of Land by Condemning Authority, 36 Tenn. L. Rev. 71, 75 (1968).

48. For expressions of this notion, see statement of R. Brown, Policy Chairman, San Diego Comprehensive Planning Organization, before Assembly Committee on Local Government, Interim Hearing Relating to H.R. 470--Acquisition of Open Space Lands Through Eminent Domain (November 26, 1969)[hereinafter cited at 1969 Open Space Hearings].

49. "The reason underlying this principle is that it enables public bodies to meet changing conditions." Arechiga v. Housing Authority, 159 Cal. App.2d 657, 660, 324 P.2d 973, 975 (1958).

50. For example, the report of the Highway Research Board concludes:

> 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.

Nat'l Research Council, Highway Research Board, Special Report 27: Acquisition of Land for Future Highway Use at xii-xiii (1957).

The Board goes on, however, to point out that proper safeguards should receive attention. Id. at xiii.

51. Cal. Govt. Code § 6953 (West 1966):

> Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

52. See, e.g., the potentially broad authority to plan and zone for open space in Sections 65560-65568 and 65910-65912 of the California Government Code (West Supp. 1971).

53. See notes 1 & 12 supra.

54. For a synopsis of the development of land tenure at common law, see generally J. Lawler & G. Lawler, A Short Historical Introduction to the Law of Real Property (1940).

55. C.R. Noyes, The Institution of Property 519 (1936):

> For property is now, in practice, a limited group of protections and permissions afforded by the state, from which much has been withheld as a sort of social reservation, from which more can be reserved in the interests of others, and of which, under the power of eminent domain, the net of the whole can be retaken in the public interest with adequate compensation. It is for this reason that, in modern American land law, although the theory of property has been at times allodial (collateral), the practice as regards the power of the state has been, in substance if not in form, almost exactly feudal (lineal).

56. See Staff Memorandum to the Assembly Comm. on Local Gov't (Nov. 26, 1969) & Statement of W. B. Staiger, Sec'y of Cal. Cattlemen's Ass'n before 1969 Open Space Hearings.

57. Note, Real Property--Eminent Domain--Reversion Upon Misuse or Nonuse of Land by Condemning Authority, 36 Tenn. L. Rev. 71, 75 (1968)(footnotes omitted).

58. 3 Ontario Royal Comm'n Inquiry Into Civil Rights, Report Number One 1073-1074 (1968).

59. For a full discussion, see the text accompanying note 102 infra.

60. The increment question, however, does not represent the whole problem. For example, turning the profit over to a former owner is also one way to compensate him for some of his uncompensated losses in eminent domain, absent direct compensation for those losses. See the text accompanying notes 103-104 infra.

At present, any profit goes to the public; however, there is no evidence that land speculation has become a condemnor's goal. Nonetheless, it is certainly possible that condemnors are affected by the knowledge that, should their plans change, they will realize any profits. See the text accompanying note 63 infra.

61. For example, suppose the law is changed to require return to the former owner whenever property is not put to the use for which it was taken within a relatively short period. A condemnor acquires property to develop a public park. Funds fail, and the condemnor is presently unable to develop the park although intending to do so in the future. The condemnor would be forced to return the land to the former owner who would, perhaps, subdivide it and build a housing development. Years later when the condemnor obtains money to develop the park, it would be forced either to recondemn the property,

paying the greatly increased value of the developed property, or look elsewhere. This problem could be avoided by providing a right of return only where the condemnor actually plans to put property to a long-term private use as opposed to guaranteeing return where property is not put to a public use. Such a solution, however, would deny the condemnor the choice of freely leasing the land for compatible purposes during the interim.

62. Suppose the law is changed to require a condemnor to return property to its former owner if it is devoted to a private use. Condemnors would no longer have a free hand in dealing with property and, hence, would be more careful to take property only when they were certain that they would be able to use it. As a result, a condemnor might delay actual acquisition but announce its project well ahead of time. This often would freeze private improvement and development and depress property values. The result could be catastrophic for property owners. Although laws that attempt to protect property owners against blight caused by the condemnor's advance announcement of a project may lessen this possibility, whether real protection could be provided is another matter. It should also be noted that enhancement and blight due to project imminence already are major problems that a right to return might simply aggravate.

63. It is clear that a right to return could eliminate condemnation for the purpose of land speculation if such a practice should actually exist. This does not necessarily constitute a meritorious argument for the existence of a right to return, however, since abuses of the right to take should be handled at the time of taking. Unfortunately, the restrictions on the right to condemn are practically unenforceable at present. See note 14 supra. Thus, a right to

return would serve two basic functions: remedy for violation of the right to take and remedy for a former owner--if the right had the effect of taking any profit from the public entity and transferring it to the former owner. See the text accompanying note 105 infra.

There are perhaps more effective means of preventing abuse of the right to take. See, e.g., Advisory Comm'n on Intergovernmental Relations, 1970 Cumulative State Legislative Program 88-33-00, suggesting prohibition of conversion or diversion of real property from present or proposed open space land use unless equivalent open space land is substituted within one year for that diverted or converted.

64. Although such a proposition seems self-evident, many proposals for an owner's right to return would allow the right where there is a diversion of the property to any use, public or private, other than the one for which the property was acquired. The American Bar Association's Eminent Domain Model Code, for example, provides for repurchase if the condemnor "abandons the purpose for which property has been condemned." (Section 313). A Vermont study's right to return proposal concerns property "no longer needed for purposes of the project." 12 Vt. Stat. Ann. § 5678(a)(draft). About half the relevant California legislative proposals provide repurchase interests in property which is "not needed for the purposes for which it was acquired." Assembly Bills 2299 (1963 Reg. Sess.), 2882 and 3317 (1965 Reg. Sess.), and 1914 (1969 Reg. Sess.). See also 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970); Land Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 18, §§ 127-132; and former Cal. Agri. Code § 4154 (West 1968). For a complete listing of statutes granting, and proposals for, an owner's right to return, refer to the text at notes 91-98 infra.

The apparent intent of the proposals is to make diversion of the land easily discernable and to insure that a condemnor uses property as it declares it will; however, the effect of granting a right to return upon devotion to any use other than that for which taken is to restrict unnecessarily the condemnor's flexibility by preventing it from diverting the property to an alternate public use when such a diversion might be efficient and desirable. Condemnors should be encouraged to devote property already acquired to alternate public uses since this would conserve the time and money spent in processing the acquisition, avoid the expense of recondemning the property for the alternate use, and would limit the number of people dispossessed by acquisition. See, e.g., California Assembly Bills 343 (1963 Reg. Sess.), 1719 and 2087 (1968 Reg. Sess.), and 1570 (1969 Reg. Sess.)(providing that property "found to be no longer necessary for public use" shall be subject to repurchase rights).

A related but more difficult problem arises where the property is transferred by the original condemnor to another public entity for the same or a different public use and the transferee subsequently decides to dispose of the property for a private use. If the right of return is limited to the first condemnor only, that condemnor could avoid it by passing the property to another public entity for subsequent disposal. Leaving the right to return unaffected by this circumstance, however, produces significant problems: Does the duration of the right begin to run anew upon transfer? What will be the repurchase price? Will the new acquirer be subject to the same liabilities as the original condemnor?

The most realistic solution to these problems is to hold all factors constant, making no exceptions for the transferee. It will take the property

subject to the right of return and, if it disposes of the property for private purposes within the period of limitations after the original condemnation, it is placed in the shoes of the original condemnor. Although such a plan might work hardship where a transferee bought the property at a higher price than that originally paid or was forced by circumstances to discontinue the public use, such instances would probably be rare and worth the risk in order to assure the sustained vitality of the former owner's right to return.

65. For the declared public uses, see generally Cal. Code Civ. Proc. § 1238 (West Supp. 1971).

66. Note, Real Property--Eminent Domain--Reversion Upon Misuse or Nonuse of Land by Condemning Authority, 36 Tenn. L. Rev. 71 (1968).

67. These public uses are discussed in the text, supra at notes 22-43.

68. The existing statutes are listed infra at notes 95, 97, 98.

69. 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970).

70. Ontario, Canada, The Expropriations Act of 1968-69, § 43.

71. Land Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 18, §§ 127-132.

72. For example, if property is taken for future use, it will be assumed that any subsequent lease of the property for private purposes is pursuant to the future use authority; however, if the former owner is able to show that the private lease has continued well beyond the future use period and that the condemnor has no intention of devoting the land to some other public use within a reasonable period of time, he will have demonstrated actual devotion to a private use.

73. For example, if property is taken for school grounds, it will be assumed that any subsequent sale of the property for private purposes is a devotion to private use; however, if the condemnor is able to show that the sale was actaully pursuant to a change in plans which required its use for substitute condemnation purposes, it will have demonstrated actual devotion to a public use.

74. See the text accompanying notes 49-54 infra.

75. See, e.g., 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970)("If a condemnor has condemned a fee"); Ontario, Canada, The Expropriations Act of 1968-69, § 43 ("Where lands that have been expropriated and are in the possession of the expropriating authority"); typical California legislative bill ("No property acquired by eminent domain").

76. Uniform figures are not available. Of the 8,589 parcels acquired by the California Division of Highways in 1964-65, 8,278 were acquired by negotiated purchase and only 311 by condemnation. Cal. Dep't of Public Works, Division of Highways, Annual Right of Way Report (1965).

In the state as a whole, for all condemnors, once the proceedings have reached the stage of filing for eminent domain in Superior Court, the percentage of settlements drops. For instance, in 1966-67, there were 9,350 filings throughout the state. Of these, about half (4,564) were disposed of by settlement or otherwise prior to trial. Another 1,226 were uncontested at trial, and some 2,891 were pending at the close of the year. Thus, of the 9,350 proceedings filed in 1966-67, 669 were actually disposed of by contested trial. These figures were taken from Judicial Council of California, Annual Report of the Administrative Office of the California Courts 179, Table 16 (1969).

77. This can occur, for example, if the landowner desires the land to remain open space or park area or if he retains adjacent property that will be enhanced by the public use.

78. As amended June 24, 1969.

79. Int. Rev. Code of 1954, § 1033(a).

80. Rev. R. 63-221, 1963-2 Cum. Bull. 332-333, modifying Rev. R. 58-557. For the history of this provision, see 3 J. Mertens, The Law of Federal Income Taxation § 20.170 (Zimet & Weiss rev. 1965).

81. Cf. Cal. Govt. Code § 50307 (West 1966), making nonwaivable the option of a tenant of certain local entities to purchase or lease the property when available:

> It is against public policy to permit a person to waive the benefit of any provision of this article. . . . A person may waive a right accruing under Section 50305 with respect to unimproved real property or with respect to any parcel of real property if the parcel is sold or leased by the local agency to the State or to a county, city, district, or political subdivision.

For the substance of the lease or purchase option granted by Section 50305, see note 94 infra.

82. Barclay v. Howell's Lessee, 10 U.S. (6 Peters) 202, 213-214 (1832).

83. 3 Nichols § 9.36[1].

84. See Taylor, The Right to Take--The Right to Take the Fee or Any Lesser Interest, 1 Pacific L.J. 555, 573 (1970).

85. See, e.g., Cal. Code Civ. Proc. § 1239 (West 1955), giving condemnors broad authority to take a fee simple. The interesting evolution of this statute

is traced in Taylor, The Right to Take--The Right to Take the Fee or Any Lesser Interest, 1 Pacific L.J. 555, 562-569 (1970).

86. The courts have generally held that, where the condemnation vests a fee interest, the fee is absolute and title does not revert to the former owner when the land is not used or ceases to be used for the purpose for which it was condemned. See 26 Am. Jur.2d Eminent Domain § 147:

> [W]here land has been acquired for the public use in fee simple absolute by the exercise of the power of eminent domain, the former owners retain no rights in the land, and the public use may be abandoned or the land may be devoted to a different use without any impairment of the estate acquired or any reversion to the former owners. If a condemnation proceeding passes the fee to the land condemned, there is, of course, no interest left in the original owner and, therefore, no reverter on nonuser or the cessation of the public use. [Footnotes omitted.]

See also the cases cited in 30 C.J.S. Eminent Domain § 460 and 2 J. Lewis, Eminent Domain § 861 at 1500 (3d ed. 1909). Nichols cites cases from 23 jurisdictions for the proposition that:

> [When] a fee simple free from any easements or conditions is acquired, either by purchase or by the exercise of the power of eminent domain, if the use for which the land was brought or condemned is lawfully discontinued or abandoned, there is no reversion, and the corporation holding the land may leave it idle, or devote it to a different use, or sell it in the same manner and to the same extent as an ordinary private owner.

3 Nichols § 9.36[4] (footnotes omitted).

The California cases include Rio Vista Gas Ass'n v. State, 188 Cal. App.2d 555, 10 Cal. Rptr. 559 (1961); Newport v. City of Los Angeles, 184 Cal. App.2d 229, 7 Cal. Rptr. 497 (1960); Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958). In Arechiga, for example, plaintiffs filed a suit to set aside the condemnation judgment contending that they were entitled to the return of the property in question because the public project had since been abandoned. The court held that this attempt to modify the title taken by condemnation on the basis of subsequent events must fail.

> [W]here the condemnation vests a fee, the general rule is that the property does not revert to its former owner when it ceases to be used for the purpose for which it was condemned. . . . [Citing numerous cases from other jurisdictions.]
>
> When the judgment in the condemnation case became final plaintiffs were divested of all interest in the property regardless of the purpose for which the property might later be used.

159 Cal. App.2d at 659-660, 324 P.2d at 974-975.

At least one jurisdiction, however, has gone well beyond the common law and required a reversion where the condemnor abandons property taken in fee simple:

> [W]henever [a condemnor changes location], the title to lands, or to the interest or estate therein, condemned for the former location shall revert to the original owner, his heirs or assigns.

Va. Code of 1919 (Eminent Domain), Ch. 176, § 4379.

The courts construed this statute narrowly to require that the condemnor affected be a private company (School Board v. Buford, 140 Va. 173, 124 S.E. 286 (1924)) and that the corporation not merely discontinue use, but actually "move" from the property (Matthews v. Codd, 150 Va. 166, 142 S.E. 383 (1928)). But see Lake v. Isley, 13 Va. Law Reg. 600, stating broadly that, when a public service corporation acquires property in fee simple for a public use under its right of eminent domain and afterwards abandons the property, the corporation may not dispose of the property which reverts to the former owner from whom it was taken.

The statute was repealed in 1962.

87. Such a fee reverts to the grantor if the public use is discontinued or abandoned. See 3 Nichols § 9.36[2] and the cases cited therein.

88. See note 85 supra.

89. One approach to securing the rights of the former owner without having the property revert is to grant any profit made by the condemnor on the property to the former owner. The merits of such a plan are fairly obvious. It allows the condemnor to take, use, and dispose of the property freely; it prevents the total loss of the condemnor's investment that is inherent in a reversionary or easement scheme; it gives added assurance that there will be no profit motive involved in a condemnor's acquisition policies; and it directly shifts any increment on the property from the public to the individual who would have been able to capitalize on his investment but for the intrusion of the public entity.

This plan is defective, however, in at least one significant aspect. Part of the strength of a former owner's claim to land taken from him is emotional, resting on the uniqueness of real property; but the profit-sharing plan does not return the land to its former owner. For this reason, such a plan is not wholly adequate for purposes of the owner's right to return. It does, however, present an alternative remedy should the right to return itself for some reason fail. See the text following note 166 infra.

90. Staff Memorandum to the Assembly Comm. on Local Gov't (Nov. 26, 1969) for 1969 Open Space Hearings.

91. See, e.g., Nat'l Research Council, Highway Research Board, Special Report 27: Acquisition of Land for Future Highway Use at xiii (1957): "Proper safeguards such as . . . possible priority of repurchase by the former owner should receive attention."

92. In the seven years from 1963 to 1969, for example, at least ten bills to this effect were introduced:

1963--Assembly Bills 343, 2299
1964--none (budget session)
1965--Assembly Bills 2882, 3317

1966--none (budget session)
1967--Assembly Bill 2570
1968--Assembly Bills 1719, 2087
1969--Assembly Bills 1365, 1570, 1914

These bills will be discussed in some detail below with regard to certain specific problems.

A typical bill would have added Section 1267 to the Code of Civil Procedure to read:

> 1267. Notwithstanding any other provision to the contrary, in any case in which the State, a county, city and county, city, district or other public entity or public utility or any other organization or entity with the power of eminent domain has acquired property by eminent domain and subsequently such property is not needed for the purposes for which it was acquired and thereafter proposes to sell such property or to use it for a purpose other than that for which it was acquired, it must first offer such property for sale to the person or persons or owners from whom the property was acquired at a price equal to the amount of the condemnation award. This section applies to property acquired before or after the effective date of this section.

This language is taken from Assembly Bill 2299 (1963 Reg. Sess.), as introduced by Assemblymen Britschgi and Pattee, before amendment.

93. With one exception: Assembly Bill 2570 (1967 Reg. Sess.), as introduced by Assemblyman Meyers, made provision for resale to the original owner in Section 118.5 to be added to the Streets and Highways Code:

> 118.5. No parcel of property acquired by eminent domain for the purposes specified in Section 104 of this code which in its entirety is found to be no longer necessary for such purposes shall be subject to public sale within five years of the date of its acquisition if it is in the same condition as it was at the time of acquisition, unless it has been offered in advance to the former owner at a price equal to the price paid to such owner by the state plus an amount equal to the taxes which would have been paid by such owner had the property not been acquired by the state. Upon completion of such sale to the former owner the department shall transmit to the county auditor of the county in which the property is located that portion of the price which represents taxes which would have been paid had the property remained in private ownership.
>
> When such land is sold to a person other than the former owner, a recital in the deed to the effect that the provisions of this section have been complied with shall be deemed prima facie evidence that such is the case, and conclusive evidence thereof in favor of a bona fide purchaser or encumbrancer for value.

This bill was amended four times and was eventually enacted without provision for resale to the original owner (Cal. Stats. 1967, Ch. 1723, § 1):

> 118.5. No parcel of property acquired by eminent domain for the purposes specified in Section 104 of this code which in its entirety is found to be no longer necessary for such purposes shall be subject to public sale, unless an amount equal to the taxes which would have been paid by the owner had the property not been acquired by the state is transmitted by the department to the county auditor of the county in which the property is located. The amount of any payments made pursuant to Section 104.10 with respect to the property shall be deducted from the amount required to be transmitted pursuant to this section.

The purposes referred to in Streets and Highways Code Section 104 (West 1969) include rights of way, quarries, offices, shops, yards, parks, drainage, and view.

94. Government Code Section 50305, for example, provides that, in a few extremely limited cases (local entity owning 50% of the land within another local agency), a local agency in selling or leasing its property must first

> give any person who has occupied or used that property or a portion of it as a lawful tenant of the local agency for not less than twenty-four months during the thirty-six months next preceding the sale or lease, an opportunity to buy or lease the property at a reasonable price or rental, within a reasonable time after written notice to him . . . .

Cal. Govt. Code § 50305 (West Supp. 1971).

Such a right does not, however, extend to an employee of the local entity. Id.

Business and Professions Code Section 11525.2 provides that, if a city or county has required dedication of land by a subdivider for a school district and

> If the land is not used by the school district, as a school site, within 10 years after dedication, the subdivider shall have the option to repurchase the property from the district for the amount paid therefor.

Cal. Bus. & Prof. Code § 11525.2 (West Supp. 1971).

The section further provides for recordation of the subdivider's interest. See the discussion, infra at notes 145-153.

In 1961, California enacted a rather limited statute which provided:

> If any land is acquired by the 22d District Agricultural Association by eminent domain for use as a site for a facility authorized to be constructed pursuant to Section 86.4, the land shall not be used for any other purpose. If, after the acquisition of such land by eminent domain for such purpose, the land is not used for such purpose, the association shall dispose of such land. In such disposition, the association shall first, for a 30-day period, offer such land to the original owner thereof at the price paid for such land by the association.

Former Cal. Agri. Code § 86.5, enacted by Cal. Stats. 1961, Ch. 21, § 2. The provision was transferred substantially unchanged to Section 4154 of the California Agricultural Code (Cal. Stats. 1967, Ch. 15). The authorized purposes referred to in the statute are stadiums, arenas, pavilions, and other similar public buildings. The statute was repealed (Cal. Stats. 1968, Ch. 46, § 4).

95. 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970). The comment to this section states:

> Under existing law if the condemnor condemns a fee and then abandons the purpose for which the property was condemned, the condemnee has no reversionary interest in the property. Starkey v. Philadelphia, 397 Pa. 512 (1959). This section continues and clarifies existing law in this regard but goes further and sets forth exactly what alternatives are available to the condemnor if the original purpose of condemnation is abandoned. The property must be offered to the condemnee under the conditions specified and only if the condemnee then refuses to repurchase the property can the condemnor otherwise dispose of it.
>
> This section is not intended to restrict a Redevelopment Authority from amending a Redevelopment or Urban Renewal Plan after an area has been acquired, nor to restrict a Redevelopment Authority from selecting alternative redevelopers, all of which actions are done with councilmanic approval. See Urban Redevelopment Law, 1945, May 24, P.L. 991, as amended (35 PS 1701 et seq.).

The notice procedures referred to in this section are basically those of service of complaint and summons with alternative methods of certified and registered mail, or posting and publication, if necessary. 26 Pa. Stat. Ann. § 1-405(b) (Purdon Supp. 1970).

96. Helstad, for example, adopts the substance of this statute with slight drafting modifications. See O. Helstad, A Survey and Critique of Highway Condemnation Law and Litigation in the United States 259 (1966).

The American Bar Association Committee on Condemnation Law has proposed a Model Eminent Domain Code that contains a section identical to the Pennsylvania statute. See Draft of Model Eminent Domain Code § 313A, printed in 2 Real Property, Probate and Trust Journal 365 (1967). In addition, the Model Code includes the following subdivision:

> If the condemnee shall claim that the condemnor has, in fact, abandoned the project, the burden of proof shall be on the condemnor to disprove intention to abandon when there has been long continued nonuser. [Id., § 313B.]

The Vermont Legislative Council's Committee to Study Condemnation Statutes recently submitted a report and draft legislation which includes a similar though limited provision:

> § 5678. ABANDONMENT OF PROJECT
>
> (a) When a project for which property has been taken in fee simple under this chapter is abandoned, or is altered in such a way that the condemnor finds the property is no longer needed for purposes of the project, the condemnor may dispose of the property by sale or otherwise. However, if the property has not been improved, it shall not be disposed of within one year from the date of taking unless it is first offered to the condemnee, his heirs or assigns at the same price at which it was acquired. The offer shall be made in writing and sent by certified mail to the condemnee at his last known address. If the offer is not accepted in writing by the condemnee, his heirs or assigns within thirty days after the offer is mailed, the condemnor shall be free to dispose of the property as he sees fit.

Vt. Legislative Council, Report of the Committee to Study Condemnation Statutes (Proposal No. 29)(1969).

"Project," for purposes of this statute, means "all improvements or facilities which, considered together with existing improvements of a like kind or nature, are necessary to the accomplishment of a public use." Proposed § 5642(8). This somewhat nebulous definition is explicated in

the Committee's report: The statute contemplates that every condemnation shall shall occur in connection with some project which the condemnor may define. Vt. Legislative Council, Report of the Committee to Study Condemnation Statutes (Proposal No. 29) at 3-5 (1969).

The Vermont proposals of course recognize the parallel provision that, when the condemnor ceases to put a less-than-fee interest to a public use, the interest reverts to the owner of the underlying fee. Subdivision (b) of Section 5678 provides:

> (b) When an easement or other interest less than fee simple has been taken under this chapter, or under any other law repealed or superseded by this chapter, and the condemnor finds such interest is no longer needed due to abandonment or alteration of the project, the condemnor shall file in the land records of the town or city in which the property lies a certificate setting forth that the use of the easement or other interest has been discontinued. On the filing of such a certificate, such easement or interest shall revert to the person who holds the reversionary rights to such interest. It shall be presumed, in the absence of evidence establishing otherwise, that the reversionary rights belong to the owner of the property which adjoins such easement or interest, or through which the same passes; in the case of an easement for highway purposes which lies between property of different owners, it shall be presumed that such owners are entitled to equal portions thereof, in the absence of evidence establishing otherwise.

The New York Commission on Eminent Domain, at its November 1970 hearings, received an informal proposal, which it summarized as follows:

> If the condemnor abandons a project after it has acquired title, the former owners shall have the right to reacquire the property at a price equal to the award they have received from the condemnor, together with the interest thereon from the date of condemnor's payment.

N.Y. State Comm'n on Eminent Domain, Interim Report 31 (Feb. 1, 1971). Apparently, no action has as yet been taken on this proposal.

97. The Expropriations Act, 1968-69, § 43:

> Where lands that have been expropriated and are in the possession of the expropriating authority, are found by the expropriating authority to be no longer required for its purposes, the expropriating authority shall not, without the approval of the approving authority, dispose of the lands without giving the owners from whom the land was taken the first chance to repurchase the lands on the terms of the best offer received by the expropriating authority.

Ontario did not give actual property rights of a residual nature to former owners of condemned land; this was due to "practical" considerations which required that consent of the "approving authority" be obtained before sale of surplus land. This would place in the proper authority "full responsibility for the decision concerning the future of the expropriated land, having regard to the just claims of former owners." 3 Ontario Royal Commission Inquiry Into Civil Rights, Report Number One, at 1075-1076 (1968).

98. Land Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 18, §§ 127-132. The English statute, however, does not apply to cases where the lands cease to be required because of partial or total abandonment of the undertaking, but only to the case of lands taken in excess of original contemplated needs. 10 Halsbury, Laws of England Compulsory Acquisition of Land and Compensation 223 (Simonds ed. 1955). The relevant section, granting preemptive rights of repurchase, is Section 128:

> Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situate within a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot after diligent inquiry be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit.

The excess land taken must be offered by the condemnor within ten years after the authorized completion date of the project (§ 127), and the offeree has six weeks within which to exercise his preemptive rights (§ 129). Differences between the offeror and offeree are to be settled by arbitration (§ 130).

99. In England, where the former owner's preemptive rights are subject to alternate public uses by the condemnor, the provision is "of little practical importance in modern times when wide powers of sale, exchange or appropriation for other purposes of lands acquired, but not required for the purposes for which they were acquired, are given to most bodies having powers of compulsory purchase." 10 Halsbury, Laws of England Compulsory Acquisition of Land and Compensation 223 (Simonds ed. 1955).

The Pennsylvania statute, on the other hand, provides the former owner his repurchase right if the condemnor takes the fee and subsequently "abandons the purpose for which the property has been condemned." Although there are no cases construing this language, one commentator states:

> It also seems clear that the condemnor, within the three year period, must apply the condemned land only to the particular purpose for which it was originally condemned. This will probably mean the purpose as designated in the declaration of taking pursuant to § 402(b)(4).

E. L. Snitzer, Pennsylvania Eminent Domain 174 (19). Consequently, there is more likelihood of cases arising under the Pennsylvania law than under the British law. However, in the six years since enactment of the Pennsylvania statute, experience has been sparse. The reasons appear to be that one major condemnor in the state, the General State Authority, purchased rather than condemned most property that was subsequently abandoned. The other department having extensive use of condemnation is the Department of Transportation. "That department's experience has also been minimal in applying Section 410, since property acquisition by condemnation usually occurs at a time when completion of the highway is a certainty." Letter to California Law Revision Commission From M. Madar, Acting General Counsel, Legal Division, General State Authority of Pennsylvania (July 20, 1970).

100. Such an approach was taken by the Ontario investigation of a possible repurchase right:

> Where title to land may be affected caution must be exercised in conferring new rights. There are many factors to be considered in giving to previous owners statutory rights concerning land which is no longer required by the expropriating authority.

3 Ontario Royal Commission Inquiry Into Civil Rights, Report Number One, at 1075 (1968). The Commission proceeds to investigate only three specific factors, however:

> (1) The length of time which has elapsed since the expropriation; (2) The difficulty of locating the former owner or his heir, as the case may be; and (3) The enhancement of the value of the surplus land by reason of work performed by the expropriating authority.

Id.

101. A California legislative study of acquisition of open space lands asked the question, "If abandoned, should the land be first offered to the previous owner at a specified price formula?" Staff Memorandum to the Assembly Comm. on Local Gov't at 6 (Nov. 6, 1969) for 1969 Open Space Hearings. The answer recommended was no: "Cities and counties should not be restricted to offer[ing] abandoned open space land to the previous owner at a specified price." Id. at 7. This recommendation was in accord with a majority of the comment received by the legislative committee; however, comment was far from unanimous. One correspondent contended that the landowner forced to sell should have an opportunity to reacquire the property "on a fair basis." Statement by Cal. Farm Bureau Federation before 1969 Open Space Hearings. Another thought that the original owner should have the first right to repurchase the property "at a specified price formula." Statement of Cal. Cattlemen's Ass'n before 1969 Open Space Hearings.

102. This factor was one which led the staff of the Assembly Committee on Local Government to conclude that there should be no repurchase right: "A

price formula further restricts cities and counties from the selling of the land at the best price by specifying a formula that supposedly predetermines a market value." Id. at 6.

103. See, e.g., Kanner, When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain, 6 Cal. Western L. Rev. 57 (1969).

104. See note 60 supra. This problem could, of course, better be solved by direct allowance of compensation rather than by the haphazard allowance of profit in case of disposal. Moreover, in some cases, the owner may be better off after the taking than before. For example, he may be paid an amount substantially in excess of the value of his former home in order to acquire replacement housing. See Cal. Govt. Code § 7263 (West Supp. 1971).

105. See the discussion at notes 60 & 63 supra.

106. This is the case if price is to be set by an appraisal. However, there is slight economic benefit, in theory, to a right of first refusal in case of public auction setting the price. For, assuming that a person need bid only one penny more than fair market value in order to purchase the property, a right of first refusal would save him one penny. On a more practical level, the dynamics of public auction are such that the more interested bidders there are, the higher the going price will be, regardless of any abstract "fair market value." A right of refusal would thus have the effect of removing the former owner from the bidding and would perhaps assure him of a better price than he would otherwise get if forced to bid for the property in open auction.

For a discussion of the methods of valuation, see the text immediately below.

107. See the text, supra at 9-10.

108. 3 Ontario Royal Commission Inquiry Into Civil Rights, Report Number One, at 1076 (1968).

109. The Ontario Royal Commission also stated:

> Fixed rules cannot be laid down respecting the price at which superfluous lands should be sold. As each case arises, the approving authority, or the Minister or municipality (who are their own respective approving authorities), as the case may be, should consider all the relevant facts when consenting to a sale or selling expropriated land at a particular price. The owner should have a right to be heard and make his claim. [Id.]

110. Ontario, Canada, The Expropriations Act of 1968-69, § 43.

111. Land Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 18, § 130.

112. Included are the former California Agricultural Code provision (see note 94 supra), the Pennsylvania statute, the Helstad and A.B.A. proposals, and California Assembly Bills 1365 (1969 Reg. Sess.), 2087 (1968 Reg. Sess.), 3317 (1965 Reg. Sess.), and 2299 (1963 Reg. Sess.--before 10 years).

113. Language taken from the Vermont proposal, draft § 5678(a)(emphasis added).

114. Assembly Bill 2882 (1965 Reg. Sess.).

115. 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970)(emphasis added); see also Helstad proposal § 216(2) and A.B.A. Model Code § 313A.

116. See generally Cal. Code Civ. Proc. § 1238 (West Supp. 1971).

117. There is some question whether nonstaff appraisers are actually "independent" in the sense of "impartial." The condemnor would have the ability to choose appraisers with known "conservative" or known "liberal" valuation tendencies.

Short of adopting a complex valuation system of the types proposed for determining market value, this problem appears insoluble.

118. Cal. Assembly Bills 1719 (1968 Reg. Sess.) and 1570 (1969 Reg. Sess.), for example, provided the right of repurchase only for a parcel "which in its entirety is found to be no longer necessary for public use . . . ."

119. The two bills were limited in application. Assembly Bill 1914 (1969 Reg. Sess.), while extending to all condemnors, provided merely for notification of the former owner. Assembly Bill 2087 (1968 Reg. Sess.)(as amended June 27, 1968) is limited to takings in eminent domain by the governing board of any school district.

120. One way to determine present market value is appraisal by mutual agreement. Assembly Bill 2087 (1968 Reg. Sess.) provides:

> Where a part of a parcel is offered in advance to a former owner, the price shall be determined by an appraisal made pursuant to mutual agreement of the governing board of the district and the former owner . . . .

Another method is appraisal made by the appraiser of condemnor's or condemnee's choice.

121. Assembly Bill 2087 (1968 Reg. Sess.) provides that property must be offered to the former owner "at a price equal to the price, including any severance damages, paid to such owner by the condemnor . . . ." (as amended July 15, 1968).

122. California Code of Civil Procedure Section 1248 provides that the trier of fact must ascertain and assess individually the value of the property taken (§ 1248(1)), severance damages to the remainder (§ 1248(2)), and set-off due to special benefits to the remainder (§ 1248(3)). Cal. Code Civ. Proc. § 1248 (West Supp. 1971).

123. Since the time of acquisition, the condemnor has changed its plans, and the property being returned is no longer needed. In some cases, this will mean the improvement from which the benefits were to come may never have been completed and therefore there are no benefits. In any event, the former owner is merely being returned to the position of neighboring landowners who have not had to pay for any benefits their property may have received as a consequence of the condemnor's activities, and it seems unnecessary and unfair to make the repurchasing owner so pay by including in the repurchase price severance damages previously offset against benefits.

124. See, e.g., Assembly Bill 1365 (1969 Reg. Sess., as amended August 1, 1969): The property is to

> be offered first to the owner from whom it was acquired or his heirs or devisees at a price equal to the following amount:
>
> (a) The original price paid by the city or city and county.
>
> * * * * *
>
> (c) Plus reasonable interest on the original purchase price, as determined by the legislative body of the city or city and county.

See also proposal in New York, State Commission on Eminent Domain, Interim Report (Feb. 1, 1971) at 31: repurchase price to be acquisition price "together with interest thereon from the date of condemnor's payment."

125. Cal. Const., Art. XIII, § 1 (West 1954): property "such as may belong to this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation . . . ."

126. For a description of the demise of Assembly Bill 2570 (1967 Reg. Sess.), see note 93 supra.

127. Assembly Bills 1570 and 1365 (1969 Reg. Sess.), 2087 and 1719 (1968 Reg. Sess.), and 2882 (1965 Reg. Sess.) all provide basically that the property shall be

> offered in advance to the former owner from whom it was acquired at a price equal to the price paid to such owner by the condemnor plus an amount equal to the taxes which would have been paid by such owner had the property not been acquired by the condemnor.

One exception to the general rule that a bill requiring resale at acquisition price also adds back taxes is Assembly Bill 3317 (1965 Reg. Sess.) which provides simply that the property "shall be transferred back to the person from whom it was taken for a price equal to the amount of the condemnation award, if such a person requests such a transfer."

128. California Agricultural Code Section 4154 (West 1968)(repealed Cal. Stats. 1968, Ch. 46, § 4) provided that, if land is acquired for a specified purpose, it shall not be used for any other purpose; that the condemnor must dispose of the land if not used for the specified purpose; and that the land must first be offered to the original owner. Assembly Bill 343 (1963 Reg. Sess.) likewise contained no time limitation.

129. The Vermont draft Section 5678(a) provides that property taken "shall not be disposed of within one year from the date of taking unless it is first offered to the condemnee . . . ."

130. The British Land Clauses Consolidation Act of 1845, Section 127, specifies that superfluous property must be disposed of by the condemnor within 10 years of the time authorized for completion of the project, being first offered to the former owner.

California Assembly Bill 1365 (1969 Reg. Sess.), relating to the acquisition of property for open space purposes, provided, as amended

August 1, 1969, that "property so acquired and dedicated, shall, if it is to be sold within a period of 10 years after the acquisition thereof, be offered first to the owner from whom it was acquired . . . ."

California Assembly Bill 2299 (1963 Reg. Sess., as amended) contained an interesting variation of the 10-year period with a dual theme. It provided for resale of property to the owner at a price equal to the amount of the condemnation award if resale occurred within 10 years of acquisition. However:

> If such property was acquired by eminent domain more than 10 years prior to the date the acquiring entity proposes to sell it or use it for purposes other than that for which it was acquired, the entity must first offer the property for sale to the person or persons or owners from whom the property was acquired at a price equal to its fair market value.

In essence, then, the bill creates a repurchase right with a 10-year limitation, plus a diluted repurchase option for longer periods of time, presumably indefinitely. For a similar system, see Assembly Bill 1365 (1969 Reg. Sess.).

131. See 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970): "[the property may not be disposed of] within three years after condemnation without first being offered to the condemnee." Helstad's Condemnation Procedure Act § 216(2) and A.B.A. Model Eminent Domain Code § 313A contain identical provisions.

132. California bills which specify a five-year period after acquisition for the property to be offered first to the former owner before resale are: Assembly Bills 1570 (1969 Reg. Sess.), 2087 and 1719 (1968 Reg. Sess.), 2570 (1967 Reg. Sess.), and 2882 and 3317 (1965 Reg. Sess.).

133. For a discussion of the future use period, see the text at notes 39-41 supra.

133a. A requirement that the property actually be devoted to the public use for which it was acquired within the limitation period or offered to the former owner for repurchase would require many exceptions (see discussion at notes 64-74 supra) and would unduly limit the flexibility of the public entity to put property to temporary or alternate public uses.

134. Most proposals refer simply to the right of the "condemnee" or the "person from whom the property was taken" without further explanation. See, e.g., 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970).

135. For a discussion of procedures, see 2 Nichols § 5.2[2].

136. The mechanics of a recording scheme are discussed below. See the text accompnaying notes 149-153 infra.

137. See, e.g., 2 Nichols § 5.21[1].

138. The Vermont proposal for repurchase, for example, extends to property taken "in fee simple." Draft Act § 5678(a). Section 5678(b) declares that unneeded easements or other interests less than fee simple shall revert to the holder of reversionary rights. The California bills generally referred either to "property" or to "parcels" of property acquired by eminent domain, without further identification of the type of interest involved. One bill referred only to "property," but included by implication the fee or any lesser interest. Assembly Bill 1365 (1969 Reg. Sess., as amended May 28, 1969). This implication was subsequently deleted, leaving only the "fee interest in real property" (as amended Aug. 1, 1969).

Similarly, the Pennsylvania statute applies only to a "fee." See 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970). This terminology prompted a lengthy discussion by one commentator whether it was intended to refer

only to a fee simple or to a so-called base fee, which reverts to the former owners upon cessation of the purposes for which the property was originally appropriated. E.L. Snitzer, Pennsylvania Eminent Domain 173-174 ( ). The commentator's conclusion was that the reference is really to a fee simple; for, if a defeasible fee were intended, there would be no purpose in the section since the common law already provides a reversion.

> Land condemned as a base fee reverts to the condemnee upon cessation of the particular use for which it was originally taken. There does not appear to have been any need to provide specially for this result to land not "substantially improved" within three years after the condemnation. Hence, it seems clear that this provision is applicable to land condemned in fee simple.

Id. at 174.

139. A lessee could well wish to reinstate his lease, however, if he could use the reinstatement right to convert his windfall to cash at the expense of the former owner.

140. See Cal. Civil Code §§ 1389.1-1389.4 (West Supp. 1971).

141. See discussion following note 58 supra.

Since California is a "lien" rather than a "title" jurisdiction, the mortgagee and trustee are not legal owners of the property. See California Real Estate Secured Transactions, Hetland, Real Property Security Devices §§ 2.1, 2.6 (Cal. Cont. Ed. Bar 1970).

142. But see Cal. Code Civ. Proc. § 1248 (West Supp. 1971).

143. However, this will not be true in all cases. See Cal. Code Civ. Proc. § 580b (West Supp. 1971).

144. Many large lenders will finance a real property transaction only if they have a first lien upon the property. Commercial banks and savings banks, for example, can lend money only on security of a first lien on real property. Cal. Fin. Code §§ 1227, 1413 (West Supp. 1971).

144a. Challenges will be limited slightly if the repurchase right is not extended to parcels taken as remnants under authority of excess condemnation. See discussion at notes 31 & 67 supra.

145. See note 7 supra. Although this disposal scheme applies to state lands only, a taker for a more necessary public use will almost invariably be the state. See, e.g., Cal. Code Civ. Proc. § 1240 (West Supp. 1971).

145a. See text accompanying note 140 supra.

146. A similar right granted to a former owner or lessee by California Government Code Section 50305 is made nonwaivable by Section 50307. See Cal. Govt. Code §§ 50305 (West Supp. 1971), 50307 (West 1966); note 81 supra.

147. Van Cure v. Hartford Fire Ins. Co., 435 Pa. 163, 253 A.2d 663 (1969). Plaintiff's home had been taken by eminent domain. At the time a fire destroyed the premises, plaintiff was still living there with the permission of the condemnor in order to reduce detention damages. Plaintiff filed a claim against her supposed insurer.

148. 435 Pa. at 172, 253 A.2d at 667.

149. Cal. Govt. Code § 27288 (West 1968).

150. Cal. Civil Code § 1213 (West 1954).

151. Cal. Civil Code § 1213.5 (West Supp. 1971).

152. California Code of Civil Procedure Section 1253 requires the condemnation order to be recorded. Cal. Code Civ. Proc. § 1253 (West Supp. 1971).

California Business and Professions Code Section 11525.2 provides for recordation of the right of a developer to return of property dedicated for school purposes:

> The school district to which the property is dedicated shall record a certificate with the county recorder in the county in which the property is located. The certificate shall contain the following information:
>
> 1. The name and address of the subdivider dedicating the property.
>
> 2. A legal description of the real property dedicated.
>
> 3. A statement that the subdivider dedicating the property has an option to repurchase the property if it is not used by the school district as a school site within 10 years after dedication.
>
> 4. Proof of the acceptance of the dedication by the school district and the date of the acceptance.
>
> The certificate shall be recorded not more than 10 days after the date of acceptance of the dedication. The subdivider shall have the right to compel the school district to record such certificate, but until such certificate is recorded, any rights acquired by any third party dealing in good faith with the school district shall not be impaired or otherwise affected by the option right of the subdivider.

Cal. Bus. & Prof. Code § 11525.2 (West Supp. 1971).

153. In this way, when the deed is recorded, the repurchase interest is simultaneously recorded. If the interest is omitted from the deed, the former owner is able to record the repurchase interest by separate instrument. This is also necessary for a transferee of the right to perfect his interest.

To assure that the property owner is treated fairly, the condemnor should be obligated to inform him of his repurchase right as early as the period of negotiation over the property.

154. See, e.g., Staff Memorandum to the Assembly Comm. on Local Gov't at 7 (Nov. 26, 1969) for 1969 Open Space Hearings: "There would also be high administrative costs for keeping track of the owner during the time the land is used as open space."

155. At least one California bill suggested simple notice of sale to the former owner, rather than a repurchase interest:

> Whenever a public entity which has acquired property by exercise of the right of eminent domain determines that such property, or any part thereof, is no longer necessary for the public use for which the property was acquired, it shall notify the former owner from whom such property was acquired.

Assembly Bill 1914 (1969 Reg. Sess.).

156. The Pennsylvania statute provides, "The condemnee shall be served with notice of the offer in the same manner as prescribed for the service of notices in subsection (b) of Section 405 of this act . . . ." 26 Pa. Stat. Ann. § 1-410 (Purdon Supp. 1970). Section 405(b) simply provides for service in the same manner as a complaint or by certified mail.

157. Vermont Draft § 5678(a).

158. Cal. Code Civ. Proc. §§ 415.10-415.50 (West Supp. 1971).

159. California Code of Civil Procedure Section 1245 provides that service in condemnation cases "must be in the form of a summons in civil actions, and must be served in like manner." Cal. Code Civ. Proc. § 1245 (West 1955).

160. For example, the British statute, Section 128, provides for sale to the original owner "unless such person refuse to purchase the same, or cannot after diligent inquiry be found." Land Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 18, § 128.

161. Id., § 129.

161a. This could easily occur where the right has been inherited. See the discussion at note 145a supra.

161b. Minority and incapacity do not generally toll limitations requirements in the case of tort claims against public entities. See Cal. Govt. Code §§ 911.2-911.6 (West Supp. 1971).

161c. See the text at notes 161a-161b supra. The case for tolling may be stronger in this situation, for a court action, rather than a purchase arrangement, is required.

162. The A.B.A. Model Code contains an analogous proposal in Section 313B:

> If the condemnee shall claim that the condemnor has, in fact, abandoned the project, the burden of proof shall be on the condemnor to disprove intention to abandon when there has been long continued non-user.

162a. See note 61 supra.

163. The Ontario study states flatly, "Failure to follow legislative provisions of this sort should not affect title to the land." 3 Ontario Royal Commission Inquiry Into Civil Rights, Report Number One, at 1076 (1968).

164. Cal. Assembly Bill 343 (1963 Reg. Sess., as amended April 19, 1963).

165. This is the language of Assembly Bills 1570 (1969 Reg. Sess.), 1719 (1968 Reg. Sess.), 2570 (1967 Reg. Sess., as introduced), and 2882 (1965 Reg. Sess.). Assembly Bill 2087 uses a similar notion but phrases it somewhat differently:

> When such land is sold to a person other than the former owner, and an action concerning such land is brought against such person, a recital in the deed to the effect that the provisions of this section have been complied with shall establish a rebuttable presumption that such provisions have been complied with. Such rebuttable presumption shall

be one affecting the burden of proof. In the event the action is against a bona fide purchaser or encumbrancer for value, the recital shall establish a conclusive presumption that the provisions have been complied with. [As amended July 22, 1968.]

166. Land Clauses Consolidation Act of 1845, 8 & 9 Vict., c. 18, § 129.

167. The property apparently reverts without requirement of returning the consideration, just as it does when a lease expires, if it was taken by eminent domain for a private use. However, there is no apparent authority on this point.

168. The court in Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958), for instance--while commenting on the general absence of a reversion to the former owner when property ceases to be used for the purpose for which it was condemned--pointed out, "Any other rule would mean that there never could be any finality to a judgment in a condemnation proceeding." Id. at 660, 324 P.2d at 975.

One comment at the legislative committee hearings on open space acquisition raised the whole panoply of objections:

> At the same time the government is looking out for the interests of the public, it should have a free hand in dealing with land already acquired by eminent domain. Once a land owner has received an equitable price in full from the government he has no further claim to it. If he seeks such claim, this is a matter for the courts to decide. To tie public land to some future and indefinite obligation to sell it to a former owner or his heirs would undoubtedly "cloud the title" and severely limit the government's future chance to get the highest and best use out of the land.

Statement of San Diego County Comprehensive Planning Organization before 1969 Open Space Hearings.