36.42 8/18/70

Memorandum 70-81

Subject: Study 36.42 - Condemnation (The Right to Take--Future Use)

At the July 1970 meeting, the Commission directed the staff to make certain revisions in the tentative statute relating to the takings for future use and to provide the Commission with additional background materials relating to this topic. Attached to this memorandum is a research study prepared by the staff of the Highway Research Board. (Exhibit I--pink.) The study, of course, is designed to be a nationwide survey of the law concerning advance acquisitions for highway purposes. Nevertheless, the staff believes that it provides an excellent summary and will be both pertinent and helpful. The study states the relevant policy considerations, and its research findings concerning the law are consistent with the California law on takings generally for future use. In the latter regard, it should be noted that the study treats the issue "of the reasonableness of the time lag between acquisition and future use . . . [as a] determination of whether or not necessity for the exercise of the power of eminent domain has been shown." (See page 3.) Accordingly, a substantial portion of the study is devoted to the meaning of and what does and does not constitute an adequate showing of necessity. The basic principle in California is the same. However, the logical extension of this principle in California has a vastly different effect. Here, treatment of the future use issue as one of necessity renders the issue not justiciable where the condemnor's resolution of necessity

is conclusive. See Anaheim Union High School Dist. v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966); County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960). See also San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961) (condemnor not benefited by conclusive resolution; taking of easement for electric lines permitted but taking of use of same easement for gas and telephone lines denied on failure to show present or fairly anticipated future need). We emphasize the point, not because we disagree with the Commission's tentative policy determination to make the issue of future use justiciable, but to underscore the change in existing California law. Actually, the Commission's tentative decision to make the change would appear to bring our law more in line with that of the other states to the extent that other states recognize an exception for fraud, bad faith, or abuse of discretion.

To implement this basic policy decision, the Commission directed the staff to prepare statutory provisions incorporating the following features:

(1) Takings for use within a relatively short period (e.g., three years) should not be considered future takings at all. Where the resolution authorizing the taking declares that the property will be used for the purpose for which it is taken within three years, such declaration should be given conclusive effect as to the probability of use within such period (subject, perhaps, to an exception for fraudulently making such statement).

(2) Seven years should be declared to be a reasonable time in all situations. Thus, a showing that there is a reasonable probability that the property will be used for a particular public use within seven years satisfies Section 400 (authorization to acquire property for public

use). The property owner should bear the burden of either producing sufficient evidence to justify a finding or proving by a preponderance of the evidence that there is no reasonable probability of use within seven years. However, declarations in the resolution of the condemning body relating to this issue should have no bearing on the matter.

(3) Where property is not to be used within seven years, the condemnor should bear the burden of justifying the reasonableness of the longer time period as well as the burden of showing that there is a reasonable probability of use within such period.

The staff has redrafted Section 401 of the Comprehensive Statute generally along the lines of the Commission suggestions outlined above. (See Exhibit II - yellow.) However, we found it necessary to make one departure from the suggestions when we attempted to put them in draft form.

The attached draft does not give any conclusive effect to the resolution of necessity where there is a future use issue. It does require that the resolution alert the condemnee to the potential issue if the taking is for a use to which the property will not actually be devoted within three years from the date of adoption of the resolution. (Perhaps this should be extended to five years since we found it necessary to compute the period from the time of adoption of the resolution rather than from the date possession of the property is taken by the condemnor or some other date.) However, the only function served by the three-year period specified is to designate those cases where the resolution must contain certain additional information. The fact that the resolution contains nothing on the future use issue does

not, of course, preclude the condemnee from claiming that the condemnor does not intend to devote the property to the use for which it is taken with a "reasonable time" but he has the burden of proof to show that there is no reasonable probability that the property will be devoted to the use for which taken within seven years and if he does not show that he loses on the issue.

The only effect that the resolution has in a future use case is to determine who has the initial burden of proof. The only time the resolution is significant is where it states that the property will not be devoted to the use for which it is taken within seven years. In such case, if the condemnee contests the taking, the condemnor has the burden of proof to establish that the property will actually be used for the purpose for which taken within a "reasonable time." Absent such an admission (more than seven-year period) in the resolution, the resolution has no effect insofar as the future use issue is concerned.

The seven-year period should perhaps be longer since it is computed from the date of adoption of the resolution. With this scheme in mind (refer to Exhibit II for the statutory provision and Comment), there seems no reason to provide a quasi-conclusive effect to a resolution reciting contemplated use within three years. We characterize the effect as quasi-conclusive, because we do not believe a condemnee should be precluded from showing that a resolution was fraudulently adopted for the very purpose of foreclosing judicial review. Hence, a showing that there is in fact no reasonable probability of use within seven years should suffice to avoid both the "conclusive" resolution and shift the burden to the condemnor to show the probability of use within some longer reasonable period. On the other hand, any lesser

showing by the condemnee, i.e., a failure to show that there is no reasonable probability of use within seven years, would prevent him from avoiding the taking of his property on this ground, whether or not the resolution was deemed "conclusive" or recited proposed use within three years. In short, it seems that if the resolution is not made absolutely conclusive--for we do not believe that the Commission either should or desires to go this far--then it should have no special evidentiary effect at all.

With this explanation, we believe that the remainder of the section and Comment thereto is largely self-explanatory. We have previously noted the problem of sanctions where the condemnor is required to state certain matters in its resolution of necessity. See Memorandum 70-78. The same problems are raised by subdivision (c) of Section 401. As presently stated the section simply relies on the integrity and the competence of the condemnor to comply with its requirements.

At the September meeting, we hope Section 401 can be tentatively approved for inclusion in the Comprehensive Statute.

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memorandum 20-6 Exhibit I

RESEARCH RESULTS DIGEST

DIGEST 19 - JULY 1970

Advance Acquisition Under the Federal-Aid Highway Act of 1968

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by John C. Vance, HRB Counsel for Legal Research, principal investigator, and Hayes T. O'Brien and David C. Oliver, Research Attorneys, serving under the Special Projects Area of the Board.

THE PROBLEM AND ITS SOLUTION

A major and continuing need of state highway departments involves the assembly, analysis, and evaluation of operating practices and legal elements of special problems involving right-of-way acquisition and control and highway law in general. Congress, in the 1968 Federal-Aid Highway Act, substantially changed the funding and other procedures of the 1956 Act, to encourage use of the advance acquisition mechanism by the states. In order for state highway departments to take full advantage and make maximum use of the new provisions in the 1968 Act, serious consideration needs to be given to the enactment of new state legislation where doubt or uncertainty exists as to the precise limits of authority.

A careful review of the research reported herein should help state highway officials to better understand the provisions for advance acquisition under the Federal-Aid Highway Act of 1968 as it may affect their own state highway program. The proposed legislation suggested in this paper is designed to help highway officials in formulating their own legislative program to take full advantage of the provisions of the 1968 Act.

RESEARCH FINDINGS

Research findings are not to be confused with findings of the law. The monograph that follows constitutes the research findings from this study. *Because it is also the full text of the agency report, the above statement concerning loans of uncorrected draft copies of agency reports does not apply.*

I. INTRODUCTION

A. GENERAL

Advance acquisition of lands for future highway use is essential if the transportation needs of an expanding and mobile society are to be provided in an efficient and economical manner. The fol-

lowing considerations attest to the advantages that accrue to those states which currently have the legal capacity to acquire land for future highway use. Similarly, the following reasons illustrate the need for those states lacking such legal authority to take appropriate measures to provide for the advance acquisition of land for future highway use:

1. Advance acquisition makes possible large monetary savings in the costs of future highway rights-of-way by forestalling private development of such lands.
2. Advance acquisition of land reduces economic waste, both public and private, that occurs when rights-of-way are acquired after private building improvements have been made in a particular area.
3. Advance acquisition of rights-of-way facilitiates the orderly planning of a comprehensive system of arterial highways and enables local planning agencies to establish more effective zoning of areas served by highway facilities, and otherwise assists in the more orderly planning and regulation of the entire area.
4. Advance acquisition serves to reduce the number of persons dislocated by new highway construction. If land is acquired well in advance of construction, all development of land lying within the right-of-way will, of course, automatically cease, and the number of persons adversely affected by the future highway construction will thereby be diminished.
5. Advance acquisition serves to prevent the pyramiding of land values in advance of right-of-way acquisition, which is often the case when highway right-of-way is acquired shortly before construction starts.
6. Acquisition for future use stimulates advance engineering planning and design on the part of the highway department and makes possible and feasible a more rational and deliberate approach to the problem of providing modern and efficient highway systems.[1]

The foregoing list of advantages of acquiring rights-of-way for future highway use under a program of advance acquisition is by no means all inclusive. Nor is advance acquisition the only method by which a state highway department can set aside or restrict the use of certain lands that it anticipates will be necessary for future highway use. Other methods which are employed to decrease the cost of future land acquisition, but which are beyond the scope of this paper, include the use of setback statutes, subdivision controls, official map statutes, zoning ordinances, and highway reservation laws.[2]

A word may be in order with respect to the possibility of disadvantages attendant upon advance acquisition. It is, of course, conceivable that lands might be acquired by advance acquisition in a high market, and it would develop that the future market would prove lower. Such possibility does not seem a strong practical consideration, however, in the light of the generally rising trend in land values throughout the United States. It is further conceivable that population shifts might occur or new development take place which would render the corridor selected by advance acquisition an ill-advised choice. If the long-range planning in connection with acquisition for future use is efficiently performed, such possibility seems minimal.

Taken on balance, it would seem that the evident advantages of advance acquisition far outweigh any possible disadvantages which might accruse as a result of use of this mechanism in the planning and construction of highway systems which will prove in futuro adjusted to the then needs and necessities of the traveling public and the community at large.

B. SCOPE

This paper treats the subject matter under discussion as follows: Section II sets forth a collation of apposite and representative cases dealing with substantive legal principles governing acquisition of lands for future use.[3] These cases are important not only as historical background, but also as tools to be used in the construction of statutes which expressly or by necessary implica-

---

[1] For a comprehensive discussion of the advantages of acquiring rights-of-way for future highway use by means of advance acquisition, see HRB Special Report 27 (1957), entitled "Acquisition of Land for Future Highway Use."

[2] See for a discussion of these legal devices, Note, entitled Problems of Advance Land Acquisition, 52 Minn.L.Rev. 1175 (1968).

[3] No attempt is made herein to supply a precise and comprehensive definition of "advance acquisition." Difficulties are presented in formulating such definition because in a broad sense all acquisition of right-of-way contemplates future use. Advance acquisition and lead time are closely interrelated, and the latter depends on variables and differs quantitatively from state to state. What might be considered lead time in one state could be viewed as advance acquisition in a state having considerably shorter lead time. As is shown later, the Federal-Aid Highway Act of 1968 provides a definition insofar as Federal-aid funds are concerned, by reason of specifying time limits within which advance acquisition must operate.

tion authorize acquisition of right-of-way for future use.[4] Section III, A. 1, 2, discusses the provisions of Federal statutes, in particular the Federal-Aid Highway Act of 1968. Section III, A. 3 deals with the double hearing procedure, which has direct bearing on eligibility for the advance of funds provided in said Federal-Aid Highway Act of 1968. Section III, A. 4 discusses the procedural and other requirements relating to advance acquisition as promulgated by the Bureau of Public Roads. Section III, B. sets forth a synoptic review of state legislation authorizing advance acquisition. Section IV contains suggested legislation which would permit a comprehensive program of advance acquisition.

C. PUBLIC USE

A brief reference to the doctrine or concept of "public use" seems required at the outset of this paper. In any taking of private property through the exercise of the power of eminent domain, it is, of course, as a matter of constitutional or organic law necessary to establish that the taking is for a public use. What constitutes a public use is a matter of considerable complexity. It has been stated by eminent authority that no precise definition of the term is possible. Thus, in Nichols on Eminent Domain, Vol. 2, Secs. 7.2, 7.2 [1], 7.2 [2], it is said:

> It is generally recognized that the phrase "public use", when considered in relation to the power of eminent domain, is incapable of a precise and comprehensive definition of universal application....
>
> The disagreement over the meaning of "public use" is based largely upon the question of the sense in which the word "use" in the constitution was intended to be understood, and has developed two opposing views, each of which has its ardent supporters among the text writers and courts of last resort. The supporters of one school insist that "public use" means "use by the public," that is, public service or employment...and the public must be entitled, as of right, to use or enjoy the property taken....
>
> On the other hand the courts that are inclined to go furthest in sustaining public rights at the expense of property rights contend that "public use" means "public advantage," and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, manifestly contributes to the general welfare and the prosperity of the whole community, and, giving the constitution a broad and comprehensive interpretation, constitutes a public use.[5]

It does not appear that a useful purpose will be served by examining in detail the application by the courts of these "use by the public" and "public advantage" tests to various and diverse factual situations. The question as to what constitutes a public use, although basic and fundamental to all proceedings in eminent domain, does not present serious legal or practical problems in the ordinary and usual taking of lands for highway rights-of-way. This is for the reason that the courts uniformly hold that a public highway is devoted to a public use. Suffice it to say that the matter of public use is inseverable from any exercise of the power of eminent domain, and, most obviously, applies with full force and effect to a taking for a future use. The authors of this paper have found no case which indicates that in advance acquisition, as opposed to acquisition for imminent highway construction, particular or peculiar problems are presented insofar as the doctrine of public use is concerned. Thus, it may be stated that although compliance with the doctrine of public use underlies any and all advance acquisition of highway rights-of-way, no problems of compliance are presented by reason of the fact that the acquisition is for a future use, rather than an immediately contemplated use.

As is shown later, the question of the reasonableness of the time lag between acquisition and future use not infrequently enters into the determination of whether or not necessity for the exercise of the power of eminent domain has been shown. However, the extent of the lapse of time between acquisition and actual construction is not adverted to in the decisions as being a relevant factor in the determination of whether a public use has been established.

---

[4] The paper deals in the main with condemnation cases, not by design but by necessity. Research discloses that there is a paucity of case law relating to the purchase of land for future use. Inasmuch as the major portion of land acquisition for highway right-of-way is pursuant to purchase rather than condemnation, the emphasis on condemnation cases leads to unavoidable imbalance. However, it is evident that the principles enunciated in the condemnation cases have relevance to the purchase of real property for future use, and that the holdings therein yield useful instruction as to the power and authority of state highway departments to purchase lands for future use.

[5] Sec 26 Am.Jur.2d, Eminent Domain §27, and 29A C.J.S., Eminent Domain, §31, likewise stating the term "public use" is incapable of precise definition.

II. SUBSTANTIVE PRINCIPLES GOVERNING ACQUISITION FOR FUTURE USE

A. AUTHORITY TO ANTICIPATE FUTURE NEEDS

In the light of the holdings in a number of cases it would appear that the principle that future as well as present needs may be anticipated and considered in the condemnation of lands for public use (absent statutory authorization so to do) has been firmly established. Some courts have expressed the view that it is not only the right, but also the duty of a condemning authority to take into account future needs that may reasonably be foreseen. These cases stand for the proposition that such right is an essential attribute or inherence of the sovereign power of eminent domain, and hence that in the case of a legislative delegation of such power, no express language of statute looking to the consideration of future needs is required in order to vest such right in the condemning authority. The delegation of authority to condemn carries with it the right to anticipate future needs, and no statutory authorization to this effect is required.

The following cases, decided under statutes silent as to consideration of future needs, are illustrative:

In In re Application of Staten Island Rapid Transit Co. (1886) 103 N.Y. 252, 8 N.E. 548, the Staten Island Rapid Transit Company entered into a contract with the Baltimore and Ohio Railroad by the terms of which it agreed to allow the Baltimore and Ohio Railroad to use one of its lines for the transportation of passengers and freight. As a result of this agreement, the Staten Island Rapid Transit Company sought to condemn certain land for the enlargement of depot grounds in order to accommodate an anticipated increased volume of traffic. Condemnor conceded that the lands in question were not required for present use, and condemnees asserted that in the light of this circumstance necessity could not be shown. The New York Court of Appeals, in upholding the order of the lower court adjudging the lands in question necessary for the use for which they were proceeded against, stated:

> It is quite obvious that the beneficial exercise of the power of acquiring property for public uses cannot be enjoyed unless allowed in anticipation of the contemplated improvement; and it is therefore well settled in this state that the mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party, is not necessarily a defense to a proceeding to condemn it.

City of Chicago v. Vaccarro (1951) 408 Ill. 587, 97 N.E.2d 766, involved a proceeding by the City of Chicago to condemn land for parking facilities to accommodate the Chicago Municipal Airport. In response to a contention by the condemnees that the land sought to be condemned was not needed for present parking needs, the Illinois Supreme Court stated:

> It is, of course, permissible for the condemnor to take not only sufficient land for the present need, but it may, and should, anticipate the future increased demands for the public use to which the land is to be devoted....The City of Chicago, in its determination of whether the taking of property is necessary for public use in providing parking facilities at the airport, has a right to and should consider not only the present needs of the public, but those which may be fairly anticipated in the future. (Underscoring supplied.)

Department of Public Works and Buildings v. McCaughey (1928) 332 Ill. 416, 163 N.E. 795, was a proceeding to condemn lands for highway right-of-way. Condemnees asserted, inter alia, that the taking of certain of the lands included in the suit was unlawful because no showing of present necessity was made. Condemnor conceded that the land was to be held for future use, when a separation of grade might be effected. In sustaining the right of condemnor to acquire the land for future use, the Supreme Court of Illinois stated:

> As to the amount of land appropriated in matters of this kind, the department of public works is vested with a broad discretion in determining the amount to be taken. They have a right to, and should, anticipate the future needs of the municipality, and their action in the premises will not be interfered with, except in a clear case of abuse of discretion vested in them. (Underscoring supplied.)

In State Highway Commission v. Ford (1935) 142 Kan. 383, 46 P.2d 849, the Supreme Court of Kansas in sustaining the right of the State Highway Commission to condemn land for future widening of a highway stated:

> The fact that future needs were taken into account does not destroy the right and power to act. Indeed, we are all learning that many of our roads and bridges have

been made too narrow, the turns too short, and that too little attention has been given to obstructions to view at corners.

The rule that future needs may be considered has been employed in some cases as aid in the interpretation of statutes relating to right-of-way acquisition which are worded in such manner as to require judicial construction as to whether or not the legislature intended specifically by the terms thereof to authorize advance acquisition.

The question was before the court in State ex rel. Preston, Director of Highways v. Ferguson (1960) 17 Ohio St. 450, 166 N.E.2d 365, as to whether the following statutory language authorized the Director of Highways of the State of Ohio to acquire right-of-way well in advance of actual construction:

> The director of highways, in addition to his other duties and power provided by law, is authorized to purchase real property that he deems will be necessary for the improvement of the state highway system....[§5501.112, Revised Code of Ohio.] (Underscoring supplied.)

In holding that such language authorized advance acquisition of right-of-way in order to accomodate future needs the court stated:

> There is no question that the director is authorized by statute to make...purchases of rights-of-way prior to actual need....
>
> The planning and construction of highways is a long-term procedure. It is not an undertaking which can be planned and consummated on the spur of the moment. The development and construction of the super-highway system essential to the movement of modern traffic necessitate the planning of highways and the acquisition of rights-of-way far in advance of actual construction. To wait until there is a present actual need for construction purposes before acquiring the right-of-way is neither economical nor practical. With the mushrooming of metropolitan areas and the expansion of suburban living, it is not only necessary but essential that plans be developed and rights-of-way acquired far in advance of actual construction, not only to obviate the increase in cost due to the development of areas through which highways must pass but also to afford an opportunity for the planned development of the communities themselves.

The foregoing cases would appear sufficient to illustrate that the principle that future needs may be anticipated in the acquisition of lands for road right-of-way or other public use is not a new or innovative concept. There is ample authority to support the statement that it has been recognized by judicial opinion since an early date that the investment of such power in a condemning authority is necessary in order that the public welfare be served to the fullest extent by the public or quasi-public body to whom the legislature has granted the right to condemn lands for public use.[6/]

This is not to say that the express delegation of such right or power by the legislature is a superfluous act. To the contrary, it is, of course, highly desirable that the legislature spell out the scope of delegated authority in clear and explicit terms. This will benefit both the condemning authority and the courts when faced with the question whether powers have been exceeded or discretion abused. It is simply to point out that the delegation of such right is not (according to the views of many courts) in derogation of established common law principles appertaining to the exercise of the sovereign power of eminent domain, but rather constitutes a legislative articulation of common law principles previously enunciated by the courts.

6/ See the following further cases: Rindge Co. v. County of Los Angeles (1923) 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186; Woollard v. State Highway Comm'n. (1952) 220 Ark. 731, 249 S.W.2d 564; Central Pac. Ry. v. Feldman (1907) 152 Cal. 303, 92 P. 849; City of Hawthorne v. Peebles (1959) 166 Cal.App.Rpts.2d 758, 333 P.2d 442; Kern County Union High School Dist. v. MacDonald (1919) 180 Cal. 7, 179 P. 180; Los Angeles County Flood Control Dist. v. Jan (1957) 154 Cal.App.Rpts.2d 389, 316 P.2d 25; San Diego Gas and Electric Co. v. Lux Land Co. (1961, Cal.) 14 Cal.Rptr. 899; Adams v. Greenwich Water Co. (1951) 138 Conn. 205, 83 A.2d 177; In re New Haven Water Co. (1912) 86 Conn. 361, 85 A. 636; Carlor Co. v. City of Miami (1953, Fla.) 62 So.2d 897; Inland Water Ways Development Co. v. City of Jacksonville (1948) 160 Fla. 913, 38 So.2d 676; Wright v. Dade County (1968, Fla.) 216 So.2d 494; Independent School Dist. v. Lauch Constr. Co. (1953) 74 Ida. 502, 264 P.2d 687; City of Chicago v. Newberry Library (1956) 7 Ill. 2d 305, 131 N.E.2d 60; City of Waukegan v. Stanczak (1955) 6 Ill.2d 594, 129 N.E.2d 751; Village of Depue v. Banschbach (1916) 273 Ill. 574, 113 N.E. 156; Wampler v. Trustees of Indiana University (1961) 241 Ind. 449, 172 N.E.2d 67; Town of Alvord v. Great Northern Ry. (1917) 179 Iowa 465, 161 N. W. 467; Reinecker v. Board of Trustees (1967) 198 Kan. 715, 426 P.2d 44; Shelor v. Western Power & Gas Co. (1969) 202 Kan. 428, 449 P.2d 561; Sprague

B. REQUIREMENT OF SHOWING OF NECESSITY

It is a fundamental axiom of the law of eminent domain that in order to justify the exercise o the power to condemn private property for a public use, public necessity for the taking must exist and be shown. Such requirement is generally embodied in the provisions of state constitutional and/or statutory law. While the legislative arm of government may, absent constitutional restrictions, itself exercise the power of eminent domain, the ordinary exercise of the power is by a public or quasi-public body to whom the legislature has granted the power to condemn.

C. DETERMINATION OF NECESSITY AS DISCRETIONARY MATTER: LIMITS ON EXERCISE OF DISCRETION

In the case of delegated authority, it is uniformly held that the grantee of the power has wid discretion as to its use. This is premised on the reasoning that the exercise of the power is a legislative or administrative matter, and not a judicial function.1/ However, there are limits beyond which the grantee of the power may not go. The exercise of discretion by the grantee, altho allowed broad compass, may be unseated by the courts upon a clear showing of fraud, bad faith, or abuse of discretion.

The rule is well stated in 29A C.J.S., Eminent Domain, §89 [3], as follows:

> On conferring the power of eminent domain, the legislature may delegate to the grantee the right to determine the necessity, expediency, or propriety of exercising the power. In the absence of any statutory provision submitting the matter to a court or jury, the decision of necessity, expediency, or propriety lies with the grantee of the power, or, as otherwise stated, a grant of authority by the legislature to exercise the power of eminent domain carries with it the right of the grantee to decide the question of the necessity of its exercise as well as the expediency and propriety of doing so.
>
> In the absence of constitutional or statutory provisions to the contrary, the decision of the grantee as to the necessity, expediency, or propriety of exercising the power of eminent domain is political, legislative or administrative in character, and its determination is conclusive and is not subject to judicial review, in the absence of fraud, bad faith, or clear abuse of discretion. The determination of the grantee on the question of necessity may not be easily or casually overthrown by the courts, but strong and convincing evidence of the most conclusive character is required to upset the determination. The courts may interfere only on a clear showing of bad faith or conduct on the part of the grantee which is irrational, useless, or palpably unreasonable.

The following cases are representative of the overwhelming weight of authority, which holds th the determination of necessity is a matter within the sound discretion of the grantee of the power of eminent domain, and will not be disturbed by the courts except upon a clear showing of fraud, bad faith, or abuse of discretion.

---

v. Kansas City Power & Light Co. (1969) 203 Kan. 520, 455 P.2d 502; State v. State Highway Comm'n (1947) 163 Kan. 187, 182 P.2d 127; Baxter v. City of Louisville (1928) 224 Ky. 604, 6 S.W.2d 1074; Inland Water Ways Co. v. City of Louisville (1929) 227 Ky. 376, 13 S.W.2d 283; McGee v. City of Williamstown (1957, Ky.) 308 S.W.2d 795; Pike County Bd. of Ed. v. Ford (1955,Ky.) 279 S.W.2d 245; Warden v. Madisonville H. & E. R. Co. (1908) 128 Ky. 563, 108 S.W. 880; City of New Orleans v. Moeglich (1930) 169 La. 1111, 126 So. 675; Petition of Bd. of Ed. of City of Detroit (1927) 239 Mich. 46, 214 N.W. 239; Chicago Great Western Ry. v. Jesse (1957) 249 Minn. 324, 82 N.W.2d 227; State ex rel. City of Duluth v. Duluth St. Ry. (1930) 179 Minn. 548, 229 N.W. 883; Erwin v. Mississippi State Highway Comm'n (1952) 213 Miss. 885, 58 So.2d 52; Phillips Pipe Line Co. v. Brandstetter (1954) 241 M.A. 1138, 263 S.W.2d 880; Kountze v. Proprietors of Morris Aqueduct (1895) 58 N.J.L. 303, 33 A. 252; Board of Ed. v. Blair (1955, N.Y.) 144 N.Y.S.2d 371; In re East 161 St. in the City of New York (1907) 52 Misc. 596, 102 N.Y.S. 500; In re Seneca Ave. (1917) 98 Misc. 712, 163 N.Y.S. 503; Boalsburg Water Co. v. State College Water Co. (1913) 240 Pa. 198, 87 A. 609; Chew v. City of Philadelphia (1917) 257 Pa. 589, 101 A. 915; Clemmer v. Pennsylvania Pub. Utility Comm'n (1966) 207 Pa. Sup'r.Ct.Rpts. 220, 217 A.2d 807; Croyle v. Johnstown Water Co. (1918) 259 Pa. 484, 103 A. 303; In re School Dist. of Pittsburgh (1968) 430 Pa. 566, 244 A.2d 42; Petition of Fayette County Comm'rs (1927) 289 Pa. 200, 137 A. 237; Pittsburgh, Ft. W. & C. Ry. v. Peet (1893) 152 Pa. 488, 25 A. 612; Truitt v. Borough of Ambridge Water Auth. (1957) 389 Pa. 429, 133 A.2d 797; State v. Superior Court for King County (1918) 102 Wash. 331, 173 P. 186; State v. Superior Court of Snohomish County (1949) 34 Wash.2d 214, 208 P.2d 866.

1/ Nichols on Eminent Domain, Vol. I, Sec. 4.11.

In State Road Department v. Southland, Inc. (1960, Fla.) 117 So.2d 513, a proceeding was instituted to condemn lands for right-of-way for an Interstate highway. It was stipulated by the parties that the future date of construction of the highway was unknown and not determinable. The State Road Department was authorized by statute (F.S.A. §337.27) to condemn right-of-way for "existing, proposed, or anticipated roads." Condemnee alleged lack of necessity and was sustained by the trial court, which entered an order of dismissal. In reversing and remanding the District Court of Appeal stated:

> It is settled in this jurisdiction that a determination of the necessity for acquiring private property under the power of eminent domain by an administrative agency of government, or by a quasi-public corporation, will not be set aside by the courts in the absence of a showing that such a determination was motivated by bad faith, fraud, or constitutes a gross abuse of discretion.
>
> ...it clearly appears that the legislature of this state has decided as a matter of the public policy that it is to the best interest of the people of Florida that our highway department cooperate fully with the Federal Government in the construction and completion of the proposed interstate highway system....
>
> It is not only economically advisable, but good sound judgment, to acquire adequate rights-of-way...at a time when land values will not be influenced by the immediate announcement of actual highway construction. Acquisition of rights-of-way for the Interstate Highway System in advance of the date on which the Department is prepared to commence construction cannot unjustly injure, but in most instances will benefit, the landowner....
>
> Even though the admitted facts show without question that the Road Department is not in a position to immediately move forward with the construction...it does affirmatively appear that substantial expenditures have already been made in the acquisition of rights-of-way for this limited-access facility. It would do violence to the Department's intention thus manifested to assume that defendant's property sought to be acquired in this proceeding will not be devoted to public use within the time limited for the completion of the Interstate Highway System. We perceive nothing in the actions of the Road Department...to justify the conclusion that its resolution of necessity for the taking of defendant's property constitutes a gross abuse of discretion to such a degree as would amount to an improper exercise of its power to acquire the lands of defendant by the power of eminent domain. (Underscoring supplied.)

Soden v. State Highway Commission (1963) 192 Kan. 241, 387 P.2d 182, was an injunction proceeding brought to enjoin the condemnation of land for the contemplated future construction of a grade separation. Petitioners alleged that the State Highway Commission was seeking to condemn land which it might not use for many years, and hence was engaged in unauthorized speculation in land values. In affirming the action of the lower court in denying injunctive relief, and upholding the Commission's decision as to the necessity of acquiring the land for future use, the court stated:

> The statutes place no restriction on the appellee as to the acquisition of land for anticipated future use. The matter is therefore left to its sound discretion....
>
> The power of eminent domain can only be exercised by virtue of a legislative enactment....However, once the legislature has delegated to a public authority the power to determine the necessity of exercising the power, the decision of the grantee as to the necessity can only be reviewed by the courts for the purpose of considering ...fraud, bad faith, or abuse of discretion....
>
> The facts in this case do not indicate...bad faith, or abuse of discretion on the part of the appellee in the exercise of its authority.

It will serve no useful purpose to multiply in the body of this paper cases announcing the rule that the determination of the condemning authority as to necessity is a matter within its sound discretion and will not be set aside by the courts except upon a showing of fraud, bad faith, or clear abuse of discretion.[8/] It is sufficient to point out that the rule is firmly established,

---

[8/] See also the following: Woollard v. State Highway Comm'n (1952) 220 Ark. 731, 249 S.W.2d 564; State v. 0.62033 Acres of Land (1955) 49 Del. 174, 112 A.2d 857; State v. Chang (1963) 46 Hawaii 279, 378 P.2d 882; Department of Public Works & Bldgs. v. McCaughey (1928) 332 Ill. 416, 163 N.E. 795; Wampler v. Trustees of Indiana University (1961) 241 Ind. 449, 172 N.E.2d 67; Porter v. Iowa State Highway Comm'n (1950) 241 Iowa 1208, 44 N.W.2d 682; Reinecker v. Board of Trustees (1967) 198 Kan. 715, 426 P.2d 44; State v. Cooper (1948) 213 La. 1016, 36 So.2d 22; State Roads Comm'n v. Franklin (19 201 Md. 549, 95 A.2d 99; Erwin v. Mississippi State Highway Comm'n (1952) 213 Miss. 885, 58 So.2d 52; State v. Curtis (1949) 359 Mo. 402, 222 S.W.2d 64; Port of Umatilla v. Richmond (1957) 212 Ore. 596, 321, P.2d 338; Truitt v. Borough of Ambridge Water Auth. (1957) 389 Pa. 429, 133 A.2d 797; State v. Professional Realty Co. (1959) 144 W.Va. 662, 110 S.E.2d 616.

and has application to acquisition for future use whether the statute delegating authority to condemn does or does not make express provision for advance acquisition. The significance and special relevance of the rule for purposes here is that state highway departments have latitudinous discretion in determining the necessity of acquiring lands for future use, which rule patently operates to the benefit of the condemning authority. It follows that if planning personnel and legal counsel are closely observant of judicial limitations and restraints which have been placed on the exercise of such discretion, review and reversal of administrative decisions as to necessity can and should be largely avoided.

There next follows herein an examination of the case law dealing with the concept of necessity and the constituent elements thereof.

D. REASONABLE NECESSITY

It is well settled that in the condemnation of lands, for either immediate or future use, no showing of absolute necessity is required. The word "necessity" is uniformly construed to mean reasonable necessity, rather than imperative and unquestionable necessity.

The rule is stated in 29A C.J.S., Eminent Domain, §90, as follows:

> To authorize the condemnation of any particular land by a grantee of the power of eminent domain, a necessity must exist for the taking thereof for the proposed uses and purposes, whether the grant of power is a general grant or is in terms limited to such land as is necessary....
>
> Generally, statutory requirements of necessity are liberally construed, so as not to limit unnecessarily the power of the grantee. "Necessity" within the rule that the particular property to be appropriated must be necessary, does not mean an absolute but only a reasonable or practical necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner....

The following cases illustrate the application of the rule.

Department of Public Works and Buildings v. Lewis (1952) 411 Ill. 242, 103 N.E.2d 595, was a condemnation action to acquire lands for the purpose of improving an existing highway by widening the pavement and shoulders and constructing a three-to-one slope with proper drainage facilities. Condemnees filed a motion to dismiss, alleging lack of necessity. The Supreme Court of Illinois, in reversing the lower court's action in granting the motion and entering an order of dismissal, stated:

> The sole issue made by the pleadings, developed by the evidence, and argued upon this appeal is whether a necessity existed for the condemnation....The word "necessary" in statutes such as the instant one "should be construed to mean 'expedient,' 'reasonably convenient,' or 'useful to the public,' and cannot be limited to an absolute physical necessity."...
>
> The necessity for such improvements in view of the increased traffic is obvious and needs no elaboration. And, irrespective of whether these improvements were absolutely necessary, it cannot be argued that they were not "expedient," "reasonably convenient" or "useful to the public."

Latchis v. State Highway Board (1957) 120 Vt. 120, 134 A.2d 191, involved condemnation of right-of-way for a limited-access four-lane highway which would ultimately run from Hartford, Conn., through the State of Vermont to the Canadian border. Condemnees alleged lack of necessity, and asserted that the word "necessity," as appearing in the Vermont statute authorizing the State Highway Board to condemn lands for highway purposes, meant "imperative necessity." In rejecting this contention the Supreme Court of Vermont stated:

> ...the expression [imperative necessity] is seen as one not to be adopted as a general test, nor has it ever been applied in condemnations for highways. To do so would be to adopt a strict and rigid necessity never intended by the statute. As Mr. Justice Holmes reminds us, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."...The necessity specified by the statute for the condemnation of land for highways does not mean an imperative or indispensable or absolute necessity but only that the taking provided for be reasonably necessary for the accomplishment of the end in view under the particular circumstances....
>
> The argument that "The state doesn't need to take my land" merely because some one else's land might be taken has no validity. After all, if there is to be a road,

> it of necessity has to go somewhere, someone's property has to be taken. If imperative or absolute necessity were the test, there would be no practical way in which the crooked road could be made straight. It could always be said "the state already has a road." To justify a taking, the interests of the state must require it, and it must be so shown, but only to the extent that it is reasonably necessary to accomplish the end in view after weighing all the circumstances which bear on any given situation. (Underscoring supplied.)

Broad language was used by the Court of Appeals of Maryland to define what constitutes necessity in State Roads Commission v. Franklin (1953) 201 Md. 549, 95 A.2d 99. In this case suit was brought to condemn land for the construction of an expressway, pursuant to authority of a Maryland statute which authorized the Commission to condemn for highway purposes such land as "is necessary in its judgment for immediate or proposed construction." Condemnee's allegation of lack of necessity was sustained by the trial court, and a motion for a directed verdict granted. In reversing and remanding the Court of Appeals had the following to say with respect to the issue of necessity.

> It might well be that the construction of this "expressway" to be completed in the distant future will inflict hardships upon many individuals. This is a legislative problem, not judicial. Where the Legislature has conferred such powers on the Commission the question before the courts is limited to whether there is any necessity whatever to justify the taking, or whether the decision of the Commission is so oppressive, arbitrary or unreasonable as to suggest bad faith. (Underscoring supplied.)9/

It is apparent from the foregoing cases, which are representative of the great weight of authority, that state highway departments are not under a duty to make a showing of absolute necessity in order to justify the acquisition of lands for future use. A showing of reasonable necessity is legally sufficient. What constitutes reasonable necessity is, of course, incapable of precise definition. The determination thereof will inevitably depend on the facts of the particular case. That the term admits of certain elasticity should not, it is submitted, in most instances, present particularly serious practical difficulties. It seems by no means an overstatement to suggest that after careful, in-depth, long-range planning has been performed, experienced highway personnel, including administrators, engineers, attorneys, etc., should be in a better position than others to exercise sound judgment as to whether under the given circumstances reasonable necessity exists and can be shown. It is pointed out by the court in State v. Cooper (1948) 213 La. 1016, 36 So.2d 22, that "the judiciary cannot and will not distrub the...engineer's fixing of the width of the highway rights unless it appears that he has abused the large discretionary powers given him or has acted arbitrarily. As previously said by this court, in cases dealing with the highway construction, 'the engineers are the ones who should know, and as a matter of fact, do know. We cannot substitute our own opinions for the opinions of engineers in matters of this kind.'"

To avoid judicial review and reversal the need is to make a record, based on the marshalling of all facts (demographic, socio-economic factors, etc.), and to draw and assemble all legitimate conclusions and inferences therefrom, which taken together may be read to constitute a showing of reasonable necessity. In this connection it is suggested, inter alia, that adequate attention be given to the emerging societal problem of environmental improvement, and that the effect of highway construction (i.e., air pollution, noise, vibration, and dust) on the area traversed by the right-of-way be given appropriate consideration and study.10/ Furthermore, experience in recent years indicates that

9/See likewise giving a liberal construction to the meaning of the word "necessity" the following cases: City of Hawthorne v. Peebles (1959) 166 Cal.App.Rpts.2d 758, 333 P.2d 442; Inland Water Ways Development Co. v. City of Jacksonville (1948) 160 Fla. 913, 38 So.2d 676; Warden v. Madisonville H. & E. R. Co. (1908) 128 Ky. 563, 108 S.W. 880; Chicago Great Western Ry. v. Jesse (1957) 249 Minn. 324, 82 N.W.2d 227; Board of Ed. v. Blair (1955, N.Y.) 144 N.Y.S.2d 371; Croyle v. Johnstown Water Co. (1918) 259 Pa. 484, 103 A. 303; State v. Superior Court for King County (1918) 102 Wash. 331, 173 P. 186; State v. Superior Court of Snohomish County (1949) 34 Wash.2d 214, 208 P.2d 866.

10/Attention is invited to the language of Sec. 101 (a) of the National Environmental Policy Act of 1969, Public Law 91-190, as follows: "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

there is a real possibility of encountering organized opposition, especially in congested urban areas, to a given route location, and hence a full study of possible alternate routes should be made and solid evidence put together which will support the acquisition of the route selected in preference to others. These matters, of course, are in no wise peculiar to advance acquisition, but their increasing importance seems to justify particular mention. In any event, when comprehensive in-depth planning has been efficiently performed, and all relevant factors have been fully considered and assembled, there seems no reason why the burden on highway departments to establish and prove reasonable (not absolute) necessity should prove a peculiarly serious obstacle to use of the advance acquisition mechanism.

There follows next a consideration of what judicial tests have been employed in advance acquisition cases, and what governing principles have been announced by the courts, in the determination of whether reasonable necessity exists. Although the case law in the premises is not abundant, there is sufficient authority to indicate certain clear and distinct lines of approach.

E. REASONABLE TIME

The word "necessity" has been construed in several cases not to have reference to a need which may arise in the remote, indefinite or speculative future, but rather to mean a need which presently exists or may be foreseen in the reasonably near future. Put another way, there must be a reasonable time lag between acquisition and actual use, in order to make a showing of reasonable necessity.

As might be expected, the application of such rule leads to varying results in the cases, depending on the particular factual situation presented.

In the following cases the duration of the time lag led to a holding of lack of necessity.

Board of Education v. Baczewski (1954) 340 Mich. 265, 65 N.W.2d 810, involved a proceeding by the Board of Education of the City of Grand Rapids to condemn land for the erection of a new high school. Witnesses for the Board admitted that the school might not be constructed for thirty years or more, since the present facilities were adequate for that period. In sustaining condemnee's contention that the Board of Education had failed to establish necessity for the taking, the Supreme Court of Michigan stated:

> Appellee instituted this proceeding long before there was need for a new high school. The record repeatedly establishes the fact that the economy of the transaction was the dominant motivation....
>
> The court in its instructions to the jury commented upon appellee's theory that it should provide for future needs, thereby saving money, and approved such action without any limitation as to how far the future might be extended.
>
> We cannot agree with the court in this regard, nor with appellee's theory. Such a practice could be highly commended in the board's purchasing of property, but does not meet the test of necessity in condemnation proceedings. The word "necessity" for using such property in our Constitution does not mean an indefinite, remote or speculative future necessity, but means a necessity now existing or to exist in the near future.

In State v. 0.62033 Acres of Land (1954) 49 Del. 90, 110 A.2d 1 (aff'd, 49 Del. 174, 112 A.2d 857), suit was brought, inter alia, to condemn land for the future conversion of a two-way road into a fourlane highway. Witnesses for condemnor, the Delaware State Highway Department, conceded that the date of actual construction was unforeseeable, testifying that the additional two lanes would probably be needed at some time within the next three decades. The evidence further disclosed that no plans had been drafted, nor any appropriations for future construction made. Suit was brought under a statute authorizing the State Highway Department to condemn such lands as in its judgment were "necessary" for the improvement of state highways. In sustaining condemnee's plea of lack of necessity the court said:

> One of the fundamental principles of eminent domain is that it shall not be exercised unless the property taken is to be devoted to a public use within a reasonable time after the taking....The doctrine of reasonable time prohibits the condemnor from speculating as to possible needs at some remote future time. The condemning authority, of course, may take lands sufficient to provide for future needs as well as present needs; but in this area, the condemning authority may not exceed that which may in good faith be presumed to be necessary for future use within a reasonable time....
>
> ...most of the proposed taking...violates the rule of reasonable time....the Department has no present plans for utilizing most of that land and it is unable to state positively that it will ever use the land for the purpose for which it is

> sought. A mere contemplation of a road improvement at some indefinite time within the next thirty years is too speculative and too remote to justify the exercise of the power of eminent domain. While long-range planning of the State Highway Department is certainly commendable, nevertheless the rights of private property, which the law guards so zealously, may not be subordinated to the mere possibility or probability of a public use at some indefinite, remote time in the future.

In the following cases the time lag involved was held not to be excessive, and hence the taking for future use was sustained. It is to be noted that these cases do not reject the reasonable time concept, but hold that on the facts the lapse of time between acquisition and contemplated actual use was not unreasonable.

In Adams v. Greenwich Water Company (1951) 138 Conn. 205, 83 A.2d 177, suit was brought to enjoin defendant from attempting to take by condemnation water from a certain river for reservoir purposes. In upholding the right of the Water Company to condemn, the court said with respect to the issue of necessity that "needs which will arise in the reasonably foreseeable future may be taken into consideration." As to the extension of time into the future when needs may be projected, the court said that a "water company in the situation of defendant should plan for a supply of water to meet conditions as they will be at least ten and preferably fifteen or twenty years in the future." (Underscoring supplied.)

Holding that a lapse of seven years from date of condemnation of lands for airport purposes without commencement of actual construction did not support an allegation that the taking was vitiat by fraud on the part of condemnor, the court in Carlor Co. v. City of Miami (1953, Fla.) 62 So.2d 897, said:

> It is the duty of public officials to look to the future and plan for the future....The hands of public officials should not be tied to immediate necessities of the present but they should be permitted, within reasonable limitations, to contemplate and plan for the future.

The conclusion is apparent from the foregoing decisions that it is idle to speculate as to any specific number of years which might be useful as a yardstick in determining the reasonableness of the time lag between acquisition and actual use. As indicated later, the problem is not acute insofar as the Federal-Aid Highway Act of 1968 is concerned, inasmuch as the specific time limitations set forth therein largely resolve the question. It is sufficient at this point to note and emphasize that the underlying rationale behind the reasonable time rule appears to be the requirement that certainty be evidenced that the lands will in fact be used for the purpose for which they are proceeded against. If the date of actual use is so indefinite and remote that it is speculative whether the lands will in fact be put to the contemplated use, then the reasonable time rule may operate to strike down the attempted acquisition. If, on the other hand, it appears certain that the lands will in fact be used for the purpose for which they are sought to be acquired, it would then appear unlikely that the specific time grid involved would in and of itself be determinative of whether the rule has been breached.

F. SPECIFIC PLANS

Specific plans adumbrating future use have been treated by some courts as being of high probativ value in determining whether there is reasonable certainty of use within the near or foreseeable future. Such plans serve to illustrate that the anticipated use is not speculative in character, but to the contrary is concrete and definite in conception. The existence of such plans, it goes without saying, bears with equal directness on the question of necessity, since the determination thereof finds base in a showing of certainty of use within a reasonable time.

Thus, in Port of Everett v. Everett Improvement Co. (1923) 124 Wash. 486, 214 P. 1064, a condemnation award granted by the lower court was set aside on appeal with direction that the proceeding be dismissed, on the ground that neither certainty nor necessity could be shown in the light of the absence of specific plans. The action in this case was one to condemn lands for port facilities, brought under a statute authorizing the condemnation of land "necessary" for port purposes, and requiring that "general plans" be formulated showing the proposed improvement. The Port authority adopted a resolution enumerating the various structures to be erected on the land sought to be condemned, and specifying the location thereof in general terms. The court said:

> If it is intended to construct sea walls, jetties, piers, quays, slips, gridirons, and other structures and things enumerated in the resolution, a general plan of the several structures must be outlined showing with definiteness their location, character, and general dimensions, so that one examining the plan may know with some degree of certainty what is intended to be done,...

> ...where the grant is of power to acquire only necessary property, there must be a showing that the particular property sought to be acquired is then necessary, and without some definite stated plan of improvement, this necessity cannot be shown. So here, since there is no such definite plan, it is impossible for the court or any one to know whether all or what particular part of the property here sought to be condemned is necessary for the use of the port district, and the right of condemnation must fail for this reason. (Underscoring supplied.)

State v. 14.69 Acres of Land (1967, Del.) 226 A.2d 828, was a suit to condemn land for the future construction of an access road to an Interstate highway. It was conceded by the state highway department that it had no expectation of constructing such access road immediately. The lower court granted condemnee's motion for summary judgment, on the ground that there was no showing of need for the property in the reasonably near future. The Supreme Court of Delaware, in reversing, first discussed the holding in State v. 0.62033 Acres of Land, supra, as follows:

> The decision does not condemn a taking for future use which appears reasonably probable within a reasonable time. As Judge Hermann said...: "The doctrine of reasonable time prohibits the condemnor from speculating as to possible needs at some remote future time. [Emphasis by the court.] The basic principle relied upon was that the right of eminent domain may not "be exercised unless the property taken is to be devoted to a public use within a reasonable time thereafter."

The court then went on to remand the case for hearing on the specific issue of plans. In so doing it was made unmistakable that the determination of reasonable time was to be ascertained and determined in the light of whether the state highway department had formulated such plans as would establish reasonable certainty of use within the foreseeable future. Referring to State v. 0.62033 Acres of Land, the court said:

> The present case may present a completely different situation; certainly, the affidavits in the record do not necessarily require a similar finding. We summarize them in the way most favorable to appellant. The Department originally planned to provide access between Harvey Road and I-95. Those plans could not be carried out without the approval of the Federal Bureau of Public Roads, through which ninety percent of the funds will be provided. It was at the Bureau's suggestion that it was ultimately decided to build only half of that clover-leaf at present with the understanding that the other half would be constructed as soon as the traffic warrants. This change made it unnecessary to use the 31.09-acre tract immediately, but it will be needed when the other part of the clover-leaf is built. No affiant gave any estimate of the probable length of time which will elapse before the additional work will be done, and the record contains no facts or figures which would enable the Court to form an opinion as to that length of time.
>
> We must remember that the matter was before the Court on appellee's motion for summary judgment, for the purposes of which the Department was entitled to have the reward considered in the light most favorable to it. When so considered, the record clearly does not clearly show that there are presently no plans for the use of this land in the reasonably foreseeable future.
>
> We are accordingly of the opinion that the case must be remanded for a hearing on this issue.

It may be concluded from the foregoing that the adoption of specific plans is not only highly desirable, but, in the view of some courts, even essential to a showing that there is reasonable certainty of use within the near or reasonably foreseeable future.

G. SUMMARY

The substantive principles announced by the courts governing advance acquisition may be summarized as follows: It has been recognized by many courts since an early date that the right to anticipate future needs is inherent in the exercise of the power of eminent domain, and that no express delegation of legislative authority is required to invest such right in the grantee of the power. Although it is a fundamental axiom of the law of eminent domain that public necessity must be shown for the taking of private property, reasonable necessity only need be shown. The determination of reasonable necessity rests in the sound discretion of the grantee of the power. The exercise of such discretion is allowed wide latitude and will not be set aside or disturbed by the courts except upon a showing of fraud, bad faith, or clear abuse of discretion. What constitutes reasonable necessity is insusceptible of precise statement or definition. The determination thereof is dependent upon the particular factual situation presented. However, it may be stated that in the view of some courts it is essential to a showing of reasonable necessity that there be a reasonable time lag between acquisition and actual use. Generally speaking, there cannot be compliance with the

reasonable time rule if the date of future use is remote, speculative, and unforeseeable. On the other hand, if there is certainty of future use, the specific number of years elapsing between acquisition and actual use will not control. Specific plans clearly showing anticipated future use have been recognized as being of high probative value in establishing both certainty of use within a reasonable time frame, and reasonable necessity for the exercise of the power of eminent domain.

It is pointed out later that the provisions of the Federal-Aid Highway Act of 1968 relating to advance acquisition, and the regulations of the Bureau of Public Roads promulgated in implementation thereof, appear to be specifically directed to meeting and satisfying the judicial requirements and tests hereinbefore set forth and discussed. It should be borne in mind that notwithstanding there is statute law expressly authorizing advance acquisition, the rules laid down in the foregoing cases remain apposite and constitute underlying legal principles which govern the construction, interpretation, and application of such statutes.

III. STATUTES AUTHORIZING ADVANCE ACQUISITION

A. FEDERAL ACTS

1. Federal-Aid Highway Act of 1956

Express authorization for advance acquisition was first embodied in the United States Code in connection with the establishment of the Interstate Highway System in 1956. Because at the time of passage of the Federal-Aid Highway Act of 1956 completion of the Interstate System was envisioned as being 15 years away, it was believed that, in order to facilitate and stimulate required long-range planning, there was need expressly to authorize and encourage advance acquisition of right-of-way. To this end Congress provided that the Secretary of Commerce "is authorized to make available the funds apportioned to any State for expenditure on any of the Federal-aid highway systems, including the Interstate System, for acquisition of rights-of-way, in anticipation of construction and under such rules and regulations as the Secretary may prescribe." (Title 23, §108, United States Code.)

Under said §108 a state could obtain reimbursement for advance acquisition only after all costs had accrued. However, pursuant to the provisions of §124 of Title 23, United States Code, the Secretary of Commerce was empowered to advance Federal funds to a state revolving trust fund to pay the Federal share of right-of-way acquisition. To this extent the states having a revolving trust fund could use Federal monies for advance acquisition without going through the reimbursement procedure. Although this alleviated the strain of advancing state monies to carry the Federal share while awaiting reimbursement, the procedure proved of limited value for most states. The advance of Federal funds was tied in with a specific fiscal year authorization, and, in addition, PPM 20-1 issued by the Bureau of Public Roads, restricted the advance of funds to no more than "one-fourth of the latest year's apportionment made by the Secretary of Commerce." Because the great majority of states, as a practical matter, found it necessary to use available Federal funds for current highway programs, rather than to invest in the acquisition of lands not required for immediate use, the advance acquisition mechanism provided by the Federal-Aid Highway Act of 1956 was in actual practice little used. As a result, the Congress in 1968 substantially changed the funding and other procedures of the 1956 Act, in an attempt to rescue advance acquisition from its then dormant if not moribund state or condition.

2. Federal-Aid Highway Act of 1968

The provisions of the Federal-Aid Highway Act of 1968 relating to advance acquisition are set forth in Section 7 thereof.[11/] There follows a paraphrase of the salient features of said Section 7.

For the purpose of acquiring rights-of-way for future construction the Act establishes a revolving fund in the Treasury of the United States. Sums paid into the revolving fund are made available for expenditure without regard to the fiscal year for which the same are authorized. The Secretary of Transporation is empowered, upon request of a state highway department, to advance from

---

[11/] The full text of §7, Public Law 90-495 is as follows:

(b) Section 108 of title 23, United States Code, is amended by adding at the end thereof the following new subsection:

"(c) (1) There is hereby established in the Treasury of the United States a revolving fund to be known as the right-of-way revolving fund which shall be administered by the Secretary in carrying out the provisions of this subsection. Sums authorized to be appropriated to the right-of-way revolving fund shall be available for expenditure without regard to the fiscal year for which such sums are authorized.

"(2) For the purpose of acquiring rights-of-way for future construction of highways on any

the revolving fund, without interest, the entire cost of right-of-way acquisition. In addition he may advance such sums as are required to meet the net cost to the state of property management, incurred as a result of advance acquisition, and the entire sums required to meet moving and relocation payments.

Actual construction of right-of-way acquired for future use may not commence less than two years, nor more than seven years, from the end of the fiscal year in which the Secretary authorizes such advance, except that the Secretary in his discretion may prescribe an earlier cut-off or termination date.

If upon expiration of the seven-year period actual construction has not been commenced, or if the project is withdrawn at a prior date, any advances theretofore made must immediately be repaid into the revolving fund. Upon approval of plans, specifications and estimates for actual construction, the revolving fund shall be credited with an amount equal to the Federal advance, and charged against any Federal-aid funds apportioned to the state in which the project is located. The state shall at the same time reimburse the revolving fund for its, or the non-Federal, share of the project cost.

The 1968 Act further authorizes that there be appropriated from the highway trust fund to the revolving fund the sum of $100,000,000, for each of the three succeeding fiscal years; i.e., ending in 1970, 1971, and 1972.

It is evident that the provisions of the 1968 Act differ sharply in concept from the 1956 Act, and no detailed discussion in respect thereto seems required.

3. Double Hearing Procedure

Subsequent to the passage of the Federal-Aid Highway Act of 1968, the double hearing procedure was put into effect by the Federal Highway Administration. (See PPM 20-8 of the Bureau of Public Roads, appearing in the Federal Register, Vol. 34, No. 12, January 17, 1969, at pp. 728-730.) Inasmuch as compliance with this administratively promulgated procedure directly affects the mechanics of advance acquisition as authorized by the 1968 Act, discussion of the terms thereof is required.

Subject to exceptions not here pertinent, the double hearing procedure contemplates separate

---

Federal-aid system and for making payments for the moving or relocation of persons, businesses, farms, and other existing uses of real property caused by the acquisition of such rights-of-way, in addition to the authority contained in subsection (a) of this section, the Secretary, upon request of a State highway department, is authorized to advance funds, without interest, to the State from amounts available in the right-of-way revolving fund, in accordance with rules and regulations prescribed by the Secretary. Funds so advanced may be used to pay the entire costs of projects for the acquisition of rights-of-way, including the net cost to the State property management, if any, and related moving and relocation payments made pursuant to section 133 or chapter 5 of this title.

"(3) Actual construction of a highway on rights-of-way, with respect to which funds are advanced under this subsection, shall be commenced within a period of not less than two years nor more than seven years following the end of the fiscal year in which the Secretary approves such advance of funds, unless the Secretary, in his discretion, shall provide for an earlier termination date. Immediately upon the termination of the period of time within which actual construction must be commenced, in the case of any project where such construction is not commenced before such termination, or upon approval by the Secretary of the plans, specifications, and estimates for such project for the actual construction of a highway on rights-of-way with respect to which funds are advanced under this subsection, whichever shall occur first, the right-of-way revolving fund shall be credited with an amount equal to the Federal share of the funds advanced, as provided in section 120 of this title, out of any Federal-aid highway funds apportioned to the State in which such project is located and available for obligation for projects on the Federal-aid system of which such project is to be a part, and the State shall reimburse the Secretary in an amount equal to the non-Federal share of the funds advanced for deposit in, and credit to, the right-of-way revolving fund."

(c) There is authorized to be appropriated, out of the highway trust fund, to the right-of-way revolving fund established by subsection (c) of section 108 of title 23, United States Code, $100,000,000 for the fiscal year ending June 20, 1970, $100,000,000 for the fiscal year ending June 30, 1971, and $100,000,000 for the fiscal year ending June 30, 1972.

(d) On or before January 1 next preceding the commencement of each fiscal year for which funds are authorized to be appropriated to the right-of-way revolving fund by subsection (c) of this section, the Secretary shall apportion the funds so authorized for such fiscal year to the States. Each State shall be apportioned for such fiscal year an amount which bears the same percentage relationship to the total amount being apportioned under this subsection as the total of all grants (1), (2), (3), and (5), of subsection (b) of section 104 of title 23, United States Code, bears to the total of all

public hearings with respect to both the location and the design of a proposed highway. A state may satisfy such requirement either by (a) holding a public hearing, or (b) publishing two notices of hearing without receiving written request for the same within specified deadline dates. When a hearing is to be held notice must be given at least twice in a newspaper of general circulation in the vicinity of the project, and also in certain other designated news media. The state highway department is in addition required to mail copies of such formal notice to specified agencies or groups, both public and private.

The purpose of the hearings, as stated in PPM 20-8, is "to give all interested persons an opportunity to become fully acquainted with highway proposals of concern to them and to express their views at those stages of a proposal's development when the flexibility to respond to these views still exists." Among factors to be considered are "social, economic and environmental effects," twenty-three of which are specifically enumerated. No approval for location or design may be granted until after hearing is held or opportunity for the same afforded. The provisions of PPM 20-8 make no exception in respect to acquisition of right-of-way for future use.

4. Regulations of the Bureau of Public Roads

The principal body of instructional or regulatory material of the Bureau of Public Roads which relates to advance acquisition is set forth in PPM 80-12, dated June 2, 1969. Because the mandate of this document is governing as far as advance acquisition supported by Federal-aid is concerned, the provisions thereof require somewhat detailed examination.

Paragraph 2 relates to application and eligibility for advance of Federal funds as authorized by the aforementioned §7 of the Federal-Aid Highway Act of 1968. Subsection (a), specifying time limitations, reads as follows:

> In order to be eligible for programming, authorization, and funding...the construction of a highway project must not be scheduled to begin within two years from the date of authorization to the State to proceed with the advance acquisition, and must be scheduled to begin within a period of not more than seven years following the end of the fiscal year in which the State is authorized to proceed with the advance acquisition.

Subsection (b) of Par. 2 ties in directly with the double hearing procedure. It provides that no acquisition for future use will be authorized prior to the corridor hearing. Both whole and partial takes subsequent to the corridor hearing may be authorized on the conditions as follows:

> b...
> (3) Whole and partial takes may be made subsequent to the corridor hearing and approval of the location by the division engineer in those instances where it is demonstrated to the satisfaction of the division engineer that such action is necessary in the public interest to:
>
> (a) forestall proposed development which would utilize the proposed highway right-of-way or adversely affect the design or
> (b) result in a substantial dollar savings in the cost of right-of-way acquisition over that which would have been incurred had the right-of-way been acquired at a later date.

It is to be noted that (a) and (b) are to be read disjunctively. The meaning and import of sub-paragraph (a) is considered first.

The word "development" is qualified therein by use of the word "proposed." It seems alto-

---

mounts apportioned under such paragraphs to all States for such fiscal year. Amounts apportioned der this subsection shall not be construed to be authorizations of appropriations for the construction, reconstruction, or improvement of the Interstate System for the purposes of subsection) of section 209 of the Highway Revenue Act of 1956.

(e) Funds apportioned to a State under this subsection (d) of this section shall remain available for obligation for advances to such State until October 1 of the fiscal year for which such apportionment is made. All amounts not advanced or obligated for advancement before such date shall revert to the right-of-way revolving fund and together with all other amounts credited and reimbursed to such fund shall be available for advances to the States to carry out subsection (c) of section 108 of title 23, United States Code, in an equitable manner, taking into consideration each State's need for, and ability to use, such advances, in accordance with such rules and regulations as the Secretary of Transportation shall establish.

gether clear that the word "proposed" cannot be taken to be surplusage, but must be given definitive meaning and connotation. However, it is somewhat less clear as to the precise sense in which the word is used. For example, if a state highway department has knowledge that private parties have secured financing for the development of a particular tract or parcel of land, or have applied for a change in zoning regulations to accommodate new development, or there is substantial demonstrative evidence of other kind or nature pointing to new construction, in all probability no problems would be presented as to the interpretation of the word "proposed." However, it is quite conceivable that there may be grey areas where clear demonstrative evidence of new development cannot be produced by the condemning authority, although it has what it considers good cause to suppose that such development will take place. What character and quality of proof would be required in such situation is, in the absence of guidelines, conjectural. Rather than speculate (which in the absence of a particular factual situation is unavailing) the researchers wish to emphasize that the matter of chief importance and significance to be noted is that said sub-paragraph (a) does not authorize the advance of Federal funds to forestall putative development in general, but to the contrary requires that a showing be made that there is a specific development which it is in the public interest to forestall. Such showing is made a necessary condition precedent to the receipt of Federal funds for advance acquisition purposes.

In the event a taking cannot be justified under the provisions of sub-paragraph (a), a state highway department may still proceed under the provisions of sub-paragraph (b). Little need be said with respect thereto other than that a showing must be made that advance acquisition will result in a substantial dollar savings. The methods and manner of proof are left open.

Finally, a whole or partial take subsequent to the corridor hearing and approval of the location by the division engineer may be authorized in hardship cases. Paragraph 2 (b) (4) provides that:

> Hardship cases involving whole or partial takes may be made following the corridor public hearing and the division engineer's approval of the highway location where it is demonstrated that the property owner would suffer undue hardships if acquisition was deferred until after the design public hearing.

The word "hardship" is not defined. It seems reasonable, therefore, to assume that the ordinary and usual meaning of the word may be ascribed thereto, resulting in a construction which would encompass hardship not limited to financial loss that might be entailed as a result of a deferred taking.

If compliance with the provisions of said subsection (a), or (b), or (4), is established, a taking will not be authorized until the state has submitted a map or drawing in accordance with the provisions of Par. 4 (b) (3). Such map or drawing is required by the terms of said subsection (b) (3) to show:

> ...the proposed location of the highway together with the centerline and approximate limits of the right-of-way to be acquired, and with the property lines and relative locations of improvements on the individual parcels to be acquired shown thereon.

Par. 4 (c), relating to partial takes, provides as follows:

> The acquisition of partial takes may not be authorized until a plat of the property is furnished showing the area being acquired, location of affected improvements with relation to the taking area, the area of each remainder and any other significant features affected by the taking if such information is not shown on the map or drawing submitted under b (3) above. The division must assure itself that partial takes will be adquate to avoid second takes which could include double damages.

Par. 6 provides that upon approval of an advance acquisition project, 100 percent of the cost thereof may be advanced.

Par. 8 provides that all amounts "apportioned to a State for advance acquisition of right-of-way which are not advanced or obligated for advancement before October 1 of the fiscal year for which such funds were apportioned shall revert to the right-of-way revolving fund and together with all other amounts credited and reimbursed to the right-of-way revolving fund shall be available for advances to the States in an equitable manner, taking into consideration each State's need for and ability to use such funds."

Reference is here made to PPM 80-12 for a more particular description of the full terms thereof. By way of recapitulation, the authors of this paper wish to underscore the following.

The time limitations specified in the Federal-Aid Highway Act of 1968 and reiterated in the

provisions of Par. 2 of PPM 80-12, supra, serve to define the concept of advance acquisition. The term "advance acquisition" within the language of Par. 2 means a project which "must not be scheduled to begin within two years from the date of the authorization to the State to proceed...and must be scheduled to begin within a period of not more than seven years following the end of the fiscal year in which the State is authorized to proceed...." Although there may be and doubtless is some difference of opinion among engineers and planning personnel as to whether the time limitation of seven years is of sufficient duration, the floor and ceiling imposed on the time for commencement of construction definitizes the concept of advance acquisition. It goes without saying that these time limitations also serve to bring advance acquisition under the Federal Act within the framework of the judicially enunciated reasonable time rule. And the requirement of the submission of a map or plat, as specified in Par. 4 (b) (3) and 4 (c), supra is directed to a showing of certainty of use as evidenced by specific plans. The foregoing, of course, all go squarely to the establishment of reasonable necessity.

It thus appears evident that the provisions and requirements of PPM 80-12 are written with a view to meeting and satisfying judicially announced rules governing acquisition for future use. Hence, the conclusion seems permissible that compliance with the terms thereof should operate to minimize judicial review and reversal of the exercise of administrative discretion, and enable state highway departments to proceed with assurance in the field of advance acquisition.

B. STATE STATUTES

It is obvious that it would unduly extend the scope of this paper to undertake a detailed examination of the statutory law of all the various jurisdictions relating to advance acquisition. In point of fact, this is unnecessary, as the statutes quite generally fall into two easily identifiable groups, and those in each group are markedly similar in character and content. The one group consists of statutes that expressly authorize acquisition for future use. The language of these statutes varies in form, but little in substance. The other group consists of statutes that do not explicitly authorize advance acquisition, but contain language which is susceptible of being construed to authorize advance acquisition. In this latter group the statutes delegate authority to acquire right-of-way which is "necessary," or "needed," or "expedient" for highway purposes. Each of such words has been construed by courts of last resort (although not in each and every state) to authorize acquisition for future use.

Table 1 sets forth verbatim, as succinctly as possible, the actual language of statute of each of the jurisdictions pertaining to advance acquisition. The statutes expressly authorizing acquisition for future use are indicated under the heading "Express Authorization;" the statutes containing language susceptible of being construed to authorize acquisition for future use are included under the heading "Implied Authorization." (Legislation of New Hampshire, Wyoming, South Dakota, the District of Columbia, and Puerto Rico is not indicated as being appropriate to either of these headings.) A brief citation to the code section containing the quoted language is included under the heading "Reference."

It will be noted that 23 states have legislation that expressly authorizes acquisition for future use, and 24 states have statutes containing language that may be construed to authorize advance acquisition. As is shown earlier (Part II), there is a substantial body of case law to the effect that the right to consider future needs is an essential attribute of the power of eminent domain, and that no statutory empowerment so to do is required. It has further been seen that statutes employing such words as "necessary," "needed," and "expedient," have been construed by the courts as evincing clear legislative intention to delegate the right to consider future needs. Hence, the question may well be asked whether there is in fact pressing need for legislation specifically directed to advance acquisition in those states now lacking the same. Without attempting a categorical answer, it is submitted that the following appears self-evident. The enactment of legislation that is directed specifically to the field of advance acquisition, and that seeks to comprehend and resolve problems and questions therein presented and arising, makes for greater ease in administration and assists measurably in judicial interpretation of delegated powers. And where local funding problems are involved, such legislation can be wholly requisite to advance acquisition.

The Federal-Aid Highway Act of 1968 plainly seeks to encourage use of the advance acquisition mechanism by the states. The advantages thereof to the states are quite evident. Taken on balance, the conclusion seems required that serious consideration should be given to the enactment of legislation squarely pointed to enabling state highway departments to take full advantage and make maximum use of the advance acquisition provisions of the Federal-Aid Highway Act of 1968. If clear statutory authority exists, planning can proceed with an assurance not possible where the answers to fundamental questions remain shrouded in doubt, or uncertainty exists as to the precise limits of authority.

For the reasons ascribed, Part IV sets forth suggested legislation expressly authorizing advance acquisition of right-of-way. The authors wish to emphasize the following in connection therewith. First, the proposed bill is not innovative in concept. It is based on a study of existing state statutes permitting advance acquisition, and incorporates what are felt to be the significant features of well-drawn legislation already enacted, and proved by experience to be workable. The proposed bill is short (as are the state statutes on which it is based); relevant matters may be embraced satisfactorily within a relatively short compass. Second, it is not intended that the proposed bill be regarded other than as a general guide. It should be freely amended to meet and satisfy local conditions and to mesh and be rendered harmonious with existing local law.

IV. PROPOSED LEGISLATION

A BILL to --- etc.

Section 1. Declaration of Policy. The legislature declares it to be the policy of this state to provide for acquisition of land for highway construction reasonably in advance of actual construction in order to achieve the following ends and purposes: To reduce economic waste and the costs of right-of-way acquisition by forestalling the development of lands required for highway purposes; to facilitate the orderly planning of highway systems and the effective regulation of land use; to assist in preventing sudden and excessive changes in land values due to the imminence of a public improvement; to alleviate hardships imposed on persons dislocated by highway construction; and to permit participation in and integration with federal-aid programs providing for advance acquisition of right-of-way.

Section 2. Authorization of Advance Acquisition; Management, Lease, Disposal of Property. The state highway department is authorized and empowered to acquire by purchase, condemnation, gift, devise, or exchange, real property and interests therein necessary for the construction, reconstruction, improvement, maintenance and repair of roads within the state highway system, a reasonable time in advance of the actual construction undertaken on a highway project. Property so acquired shall be under the exclusive management and control of the state highway department, and in the interim prior to actual construction may be leased by the department on such terms and conditions and at such rentals as it may in its reasonable discretion determine and prescribe. Any property so acquired which the department shall determine is not needed for highway purposes may be sold and disposed of by the department, in the manner provided by law for the sale and disposal of other excess real estate.

NOTE: The bill follows in broad scope and general outline the provisions of various state statutes that (a) contain a declaration of legislative policy, (b) authorize advance acquisition in express terminology, and (c) provide for the management of the property pending actual construction, empower the rental thereof, and authorize sale and disposal in the event it is determined that the project should be abandoned or that the lands are not needed for highway purposes.

A few states have limitations on the time property may be held before commencement of construction. The majority of statutes expressly authorizing advance acquisition do not contain such limitation. Inasmuch as it seems probable that use of the advance acquisition mechanism would, as a practical matter, be chiefly in connection with the advance of Federal funds, and hence would be governed by the time limitations prescribed in the Federal-Aid Highway Act of 1968, it is felt that such limitation is not necessary to the bill. If it is desired to extend the seven-year Federal limitation, in order to accommodate projects involving state monies only, the same may easily be inserted.

A few states have revolving funds or otherwise segregate monies used for advance acquisition. This is not necessary to compliance with the provisions of the Federal-Aid Highway Act of 1968. If it is felt desirable to allocate advance acquisition monies to a special fund, attention is invited to the fact that change may be required in the language of existing statute law which earmarks monies for the general state road fund.

It goes without saying that the provisions of the bill relating to the lease or sale of property should be rendered harmonious with such existing statute law as may authorize the rental of property, or the sale and disposal of excess real estate, by the state highway department.

A final word may be in order with respect to financing advance acquisition from other than the usual sources (road user taxes, etc.) Although this approach has been little used by the states, it may be noted that it has the definite advantage of relieving advance acquisition from the political pressure of competition for funds for immediate road construction. Attention is invited to the fact that Maryland makes authorization for the financing of advance acquisition from the proceeds of an issue of general obligation bonds. (See Art. 89 B, Sec. 211Q, Annotated Code of Maryland.)

The State of Nevada authorizes the funding of advance acquisition by (in addition to monies derived from the State Highway Fund and provided by direct legislative appropriation) loans from the Public Employees' Retirement Fund and the State Insurance Fund. (See Sec. 409.110, Nevada Revised Statutes.) It seems not unlikely that use of the advance acquisition mechanism would be promoted and encouraged by the earmarking of funds for such purpose alone.

V. BIBLIOGRAPHY

TABLE OF CASES

Adams v. Greenwich Water Co. (1951) 138 Conn. 205, 83 A.2d 177.
Baxter v. City of Louisville (1928) 224 Ky. 604, 6 S.W.2d 1074.
Boalsburg Water Co. v. State College Water Co. (1913) 240 Pa. 198 87 A. 609.
Board of Ed. v. Baczewski (1954) 340 Mich. 265, 65 N.W.2d 810.
Board of Ed. v. Blair (1955, N.Y.) 144 N.Y.S.2d 371.
Carlor Co. v. City of Miami (1953, Fla.) 62 So.2d 897.
Central Pac. Ry. v. Feldman (1907) 152 Cal. 303, 92 P. 849.
Chew v. City of Philadelphia (1917) 257 Pa. 589, 101 A. 915.
Chicago Great Western Ry. v. Jesse (1957) 249 Minn. 324, 82 N.W.2d 227.
City of Chicago v. Newberry Library (1956) 7 Ill.2d 305, 131 N.E.2d 60.
City of Chicago v. Vaccarro (1951) 408 Ill. 587, 97 N.E.2d 766.
City of Hawthorne v. Peebles (1959) 166 Cal.App.Rpts.2d 758, 333 P.2d 442.
City of New Orleans v. Moeglich (1930) 169 La. 1111, 126 So. 675.
City of Waukegan v. Stanczak (1955) 6 Ill.2d 594, 129 N.E.2d 751.
Clemmer v. Pennsylvania Pub. Utility Comm'n (1966) 207 Pa. Sup'r. Ct.Rpts. 220, 217 A.2d 807.
Croyle v. Johnstown Water Co. (1918) 259 Pa. 484, 103 A.303.
Department of Public Works and Bldgs. v. Lewis (1952) 411 Ill. 242, 103 N.E.2d 595.
Department of Public Words and Bldgs. v. McCaughey (1928) 332 Ill. 416, 163 N.E. 795.
Erwin v. Mississippi State Highway Comm'n (1952) 213 Miss. 885, 58 So.2d 52.
Independent School Dist. v. Lauch Constr. Co. (1953) 74 Ida. 502, 264 P.2d 687.
Inland Water Ways Co. v. City of Louisville (1929) 227 Ky. 376, 13 S.W.2d 283.
Inland Water Ways Development Co. v. City of Jacksonville (1948) 160 Fla. 913, 38 So.2d 676.
In re Application of Staten Island Rapid Transit Co. (1886) 103 N.Y. 252, 8 N.E. 548.
In re East 161 St. in the City of New York (1907) 52 Misc. 596, 102 N.Y.S. 500.
In re New Haven Water Co. (1912) 86 Conn. 361, 85 A. 636.
In re School Dist. of Pittsburgh (1968) 430 Pa. 566, 244 A.2d 42.
In re Seneca Ave. (1917) 98 Misc. 712, 163 N.Y.S. 503.
Kern County Union High School Dist. v. MacDonald (1919) 180 Cal. 7, 179 P. 180.
Kountze v. Proprietors of Morris Aqueduct (1895) 58 N.J.L. 303, 33 A. 252.
Latchis v. State Highway Bd. (1957) 120 Vt. 120, 134 A.2d 191.
Los Angeles County Flood Control Dist. v. Jan (1957) 154 Cal.App.Rpts.2d 389, 316 P.2d 25.
McGee v. City of Williamstown (1957, Ky.) 308 S.W.2d 795.
Petition of Bd. of Ed. of City of Detroit (1927) 239 Mich. 46, 214 N.W. 239.
Petition of Fayette County Comm'rs (1927) 289 Pa. 200, 137 A. 237.
Phillips Pipe Line Co. v. Brandstetter (1954) 241 M.A. 1138, 263 S.W.2d 880.
Pike County Bd. of Ed. v. Ford (1955, Ky.) 279 S.W.2d 245.
Pittsburgh, Ft. W. & C. Ry. v. Peet (1893) 152 Pa. 488, 25 A. 612.
Port of Umatilla v. Richmond (1957) 212 Ore. 596, 321, P.2d 338.
Porter v. Iowa State Highway Comm'n (1950) 241 Iowa 1208, 44 N.W.2d 682.
Port of Everett v. Everett Improvement Co. (1923) 124 Wash. 486, 214 P. 1064.
Reinecker v. Board of Trustees (1967) 198 Kan. 715, 426 P.2d 44.
Rindge Co. v. County of Los Angeles (1923) 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186.
Rueb v. Oklahoma City (1967, Okla.) 435 P.2d 139.
San Diego Gas and Elec. Co. v. Lux Land Co. (1961, Cal.) 14 Cal.Rptr. 899.
Shelor v. Western Power and Gas Co. (1969) 202 Kan. 428, 449 P.2d 591.
Soden v. State Highway Comm'n. (1963) 192 Kan. 241, 387 P.2d 182.
Spears v. Kansas City Power and Light Co. (1969) 203 Kan. 520, 455 P.2d 502.
State ex rel. City of Duluth v. Duluth St. Ry. (1930) 179 Minn. 548, 229 N.W. 883.
State ex rel. Preston, Director of Highways v. Ferguson (1960) 17 Ohio St. 450, 166 N.E.2d 365.
State Highway Comm'n v. Ford (1935) 142 Kan. 383, 46 P.2d 849.
State Road Dept. v. Southland, Inc. (1960, Fla.) 117 So.2d 513.
State Roads Comm'n v. Franklin (1953) 201 Md. 549, 95 A.2d 99.
State v. 0.62033 Acres of Land (1954) 49 Del. 90, 110 A.2d 1.
State v. 0.62033 Acres of Land (1955) 49 Del. 174, 112 A.2d 857.
State v. 14.69 Acres of Land (1967, Del.) 226 A.2d 828.
State v. Chang (1963) 46 Hawaii 279, 378 P.2d 882.
State v. Cooper (1948) 213 La. 1016, 36 So.2d 22.
State v. Curtis (1949) 359 Mo. 402, 222 S.W.2d 64.

State v. Professional Realty Co. (1959) 144 W.Va. 662, 110 S.E.2d 616.
State v. State Highway Comm'n (1947) 163 Kan. 187, 182 P.2d 127.
State v. Superior Court for King County (1918) 102 Wash. 331, 173 P. 186.
State v. Superior Court of Snohomish County (1949) 34 Wash.2d 214, 208 P.2d 866.
Town of Alvord v. Great Northern Ry. (1917) 179 Iowa 465, 161 N.W. 467.
Truitt v. Borough of Ambridge Water Auth. (1956) 389 Pa. 429, 133 A.2d 797.
Village of Depue v. Banschbach (1916) 273 Ill. 574, 113 N.E. 156.
Wampler v. Trustees of Indiana University (1961) 241 Ind. 449, 172 N.E.2d 67.
Warden v. Madisonville H. & E. R. Co. (1908) 128 Ky. 563, 108 S.W. 880.
Woollard v. State Highway Comm'n (1952) 220 Ark. 731, 249 S.W.2d 564.
Wright v. Dade County (1968, Fla.) 216 So.2d 494.

LAW REVIEW ARTICLES

Comment, Abusive Exercises of the Power of Eminent Domain - Taking a Look at What the Taker Took, 44 Wash.L.Rev. 200 (1968).
Note, Problems of Advance Land Acquisition, 52 Minn.L.Rev. 1175 (1968).

MISCELLANEOUS

A. Reports

Highway Research Board, "Acquisition of Land for Future Highway Use," Special Report 27 (1957).
House Committee on Public Works, Advance Acquisition of Highway Rights-of-Way Study, 90th Cong., 1st Sess. (Committee Print No. 8, July 1967).
Mandelker, D. and Waite, G., A Study of Future Acquisition and Reservation of Highway Rights-of-Way, prepared under Contract No. CPR 11-8006 between the Bureau of Public Roads and the University of Wisconsin Law School (June 1963).

B. Texts

26 Am.Jur.2d, Eminent Domain, §27 (1966).
29A C.J.S., Eminent Domain, §31, 89 [3], 90 (1965).
1 Nichols, The Law of Eminent Domain, §4.11 (rev. 3d ed., 1964).
2 Nichols, The Law of Eminent Domain, §7.2, 7.2 [1], 7.2 [2] (rev. 3d ed., 1963).

APPLICATIONS

The foregoing research and proposed legislation should prove helpful to highway officials, their legal counsel, advance planning staff, and right-of-way engineers. Highway officials are urged to review their own right-of-way acquisition and advance acquisition procedures to determine how the proposed legislation could benefit them if enacted by their legislatures. The proposed legislation is presented only as guide and should be modified to meet local conditions where required.

Table 1
Summary of State Legislation

STATE	EXPRESS AUTHORIZATION	IMPLIED AUTHORIZATION	REFERENCE	LANGUAGE
Alabama		x	23§5	The right-of-way deemed necessary...
Alaska	x		19 05.040	...for present or future use
Arizona	x		18-155	...for future needs...
Arkansas	x		76-132	for present and future rights-of-way.
California	x		104.6	...for future needs.
Colorado	x		120-3-10	...for future needs.
Connecticut	x		13a-79a	...proposed to be...constructed...because of probability of development.

Table 1 (continued)
Summary of State Legislation

STATE	EXPRESS AUTHORIZATION	IMPLIED AUTHORIZATION	REFERENCE	LANGUAGE
Delaware		x	17§132	acquire...any land...which...shall be necessary therefor...
Florida	x		337.27	...for existing, proposed or anticipated roads...
Georgia		x	95-1520	...to be reasonably necessary...
Hawaii		x	264-24	...which may be necessary...
Idaho	x		40-120 (9)	...for present or future purposes...
Illinois	x		4-510	...may establish presently...locations...for future additions...
Indiana	x		2947	...may acquire such land...as may be reasonably necessary...to carry out...plans for future location...
Iowa		x	306.13	...authority to purchase or...condemnation of the necessary right-of-way...
Kansas	x		68-423a	...acquisition...in advance of actual construction...
Kentucky		x	177.081	...may...condemn...lands...designated as necessary.
Louisiana		x	48-217	...acquire...lands, necessary for the right-of-way...
Maine		x	23-153	...may take over...such property as it may deem necessary...
Maryland	x		89b§211Q	...for...future projects scheduled for construction.
Massachusetts		x	81§5	If the Dept. determines...that public necessity and convenience require that a way should be laid out...
Michigan		x	9.216 (7)	To do anything necessary and proper to comply fully with the provisions of present and future Federal-Aid Acts.
Minnesota		x	161.20	...all lands and property necessary...
Mississippi		x	8023	...as it may determine to be necessary...
Missouri		x	227.120	...when necessary for...
Montana	x		32-3906	...reasonably necessary for...future...purposes...
Nebraska	x		39-1320	...for present or future purposes...
Nevada	x		408.070	...for...present and future needs...
New Hampshire	---	---	229.10	...may acquire...in the name of the state...
New Jersey	x		27-7-22	...whether for immediate or future use...
New Mexico		x	55-2-28.1	The rights-of-way deemed necessary...shall be required...
New York		x	3§30-2	...may acquire...any and all property necessary...
North Carolina		x	136-18 (2)	...to...acquire rights-of-way...that may be necessary...
North Dakota	x		24-01-18	...which he may deem necessary for reasonable future public use...
Ohio		x	5501-112	...property...necessary for...the state highway system.
Oklahoma	x		1203	...for immediate or future use...
Oregon		x	366.320	...acquire rights-of-way deemed necessary...
Pennsylvania		x	652e	...whenever it shall deem...expedient...
Rhode Island		x	24-10-2	...power to acquire...lands...needed...
South Carolina		x	33-72	...acquire...rights-of-way as may be needed...
South Dakota	---	---	31-7-5	...empowered to acquire right-of-way...
Tennessee		x	54-306	...may deem desirable or as may be necessary...
Texas		x	6673e-1	...all rights-of-way necessary...
Utah	x		27-12-96	...deemed necessary for temporary, present, or reasonable future...purposes...
Vermont		x	37	...when...needed...
Virginia	x		33.75.6	...for future highway construction...
Washington	x		47-12-180	...to provide for the acquisition of real property in advance of actual construction...
West Virginia	x		17-2A-17	...to be necessary for present or presently foreseeable future state road purposes...
Wisconsin	x		84-295	...anticipated future needs...
Wyoming	---	---	24-37	...shall have the authority to acquire...
District of Columbia	---	---	7-108 (3)	...may, for the purpose of constructing highways, acquire property...
Puerto Rico	---	---	9§2004	...to acquire any property...

Memorandum 70-81

EXHIBIT II

COMPREHENSIVE STATUTE § 401

Staff recommendation (August 1970)

§ 401. Acquisitions for future use

401. (a) For the purposes of this section, property is "actually used for the public use" not only when it is actually devoted to that use but also when construction is started on the project for which the property is taken.

(b) Property may be taken pursuant to Section 400 for future use only if there is a reasonable probability that it will be actually used for the public use for which it is taken within seven years from the date of the adoption of the resolution of necessity or within such longer period as is reasonable.

(c) Unless the condemnor plans that the property will be actually used for the public use for which it is taken within three years from the date of the adoption of the resolution of necessity, the resolution of necessity shall refer specifically to this section and shall state the date when the condemnor estimates the property will be actually used for the public use for which it is to be taken.

(d) If the condemnee desires to contest the taking under this section, he shall raise the issue in the manner provided in Section 902. Unless the condemnee proves that there is no reasonable probability that his property will be actually used for the

public use for which it is sought to be taken within seven years from the date of the adoption of the resolution of necessity, the taking may not be denied under this section. If the resolution of necessity states a date when the property will be actually used for the public use for which it is taken that is more than seven years from the date of adoption of the resolution, it constitutes an admission that there is no reasonable probability that the property will be actually used for that use within the seven-year period.

(e) When it is established that there is no reasonable probability that the property sought to be taken will be actually used for the public use for which it is taken within seven years from the date of adoption of the resolution of necessity, the condemnor has the burden of proving that the taking is authorized under subdivision (b).

Comment. Section 401 limits the authority to condemn for future use. Subdivision (b) states the test that determines when condemnation for future needs is permitted. If the property will be actually used for the public use within seven years from the date of adoption of the resolution of necessity, the taking is permitted. (The "actually used" requirement is satisfied by commencement in good faith of construction on the project. See subdivision (a).) If the property will not be devoted to the public use within the seven-year period, the taking is permitted only if there

is a reasonable probability that the property will actually be used for the public use within a "reasonable time." What constitutes a reasonable time depends upon all the circumstances of the particular case--e.g., is there a reasonable probability that funds for the construction of the project will become available, have plans been drawn and adopted, is the project a logical extension of existing improvements, is future growth likely, and should the condemnor anticipate and provide for that growth.

Subdivision (c) specifies additional requirements for the resolution of necessity if the condemnor does not plan to actually use the property for the public use within three years from the date the resolution is adopted. The additional information required in the resolution will put the condemnee on notice that there is a potential issue whether the condemnor is authorized to take the property under this section.

The condemnee who desires to contest the taking of his property on the ground that the taking is for a future use and is not authorized under subdivision (b) must raise this defense by preliminary objection. Failure to raise the defense in the manner provided in Section 902 constitutes a waiver of the defense, even though the resolution of necessity states that the condemnor does not plan to use the property within the seven-year period. See Section 902 and the Comment thereto.

If the condemnee contests the taking, the court must first find that there is no reasonable probability that the property will be used for the use for which it is sought within the seven-year period. Unless the

court so finds, the taking cannot be defeated on the ground that it is not authorized under subdivision (b). Except where the resolution of necessity indicates that the property will not be used for the designated use within the seven-year period, the condemnee has the burden of proof to establish that there is no reasonable probability that his property will actually be used for the public use within that period. When it is established by either admission or proof that there is no reasonable probability that the property will be used for the designated use within the seven-year period, the burden shifts to the condemnor to prove that there is a reasonable probability that the property will actually be used for the public use within a "reasonable time." See discussion of subdivision (b), supra.

Section 401 makes a significant change in former practice. Under prior law, as under Section 401, condemnation for future use was permitted if there was a reasonable probability that the property would be devoted to the public use within a reasonable time. See, e.g., San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 480-481, 14 Cal. Rptr. 899, 904-905 (1961). See also East Bay Mun. Util. Dist. v. City of Lodi, 120 Cal. App. 720, 750-755, 8 P.2d 532, 536-538 (1932). Under prior law, however, the issue whether there was a reasonable probability of use within a reasonable time was regarded as an issue of necessity, not public use. Since the resolution of necessity was conclusive on issues of necessity in the great majority of takings, the issue of future use ordinarily was nonjusticiable. See Anaheim Union High School Dist.

v. Vieira, 241 Cal. App.2d 169, 51 Cal. Rptr. 94 (1966); County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960). This aspect of the prior law has not been continued. The resolution of necessity is not conclusive on the issue of whether a taking is authorized under Section 401. See Section [Section to be drafted covering conclusive effect of resolution and providing a specific exception to permit the raising of the issue under Section 401. This exception, and exceptions for several related matters, will be stated in the new section to be drafted and discussed in the Comment to that section.]