Techniques of Land Acquisition for Future Highway Needs

G. GRAHAM WAITE, Professor of Law, University of Maine School of Law

•RESERVATION of future highway rights-of-way by police power controls is a highly useful technique in keeping the costs of right-of-way acquisition relatively low; however, there are some situations in which it is not available. Where a future right-of-way is shown on an official map and an owner of mapped land shows that he cannot earn a fair return on the land unless he develops it in some fashion, a permit for development must issue to comply with due process, if the tract is left in private ownership. The only way development of land in such circumstances may be forestalled is for the government to acquire the development rights. Probably this is most simply done by taking title to the land. If the owner refuses to sell or give the property to the public, the government must rely on its power of eminent domain to obtain the title.

In some areas imposition of police regulations to reserve future rights-of-way may be politically unfeasible. Voters may decide the government, rather than private persons, should shoulder the risk and inconvenience of owning land that, practically speaking, cannot be developed, even though this reduces the cost savings passed on to the taxpayers. In that case, the only way in which the government may prevent further development of the future right-of-way is to acquire title. Again, if the property cannot be obtained by negotiated purchase or gift, it is only through eminent domain proceedings that the government may acquire title.

One example of the vital importance to the taxpayer that the State forestall such development comes from Maryland. In planning a highway around Washington, D. C., the State Roads Commission took an option in 28 acres of land needed for the right-of-way at $7,000 per acre. Three years later, with the option near expiration, the Commission found that the property adjacent to the land under option had in the meantime been rezoned from residential to industrial use and was selling for $1.00 per foot (about $49,000 per acre). Furthermore, the adjacent land was expected to sell for twice as much and to be covered with improvements as well when the anticipated date of starting the highway's construction arrived some six to eight years later.[1] Without considering improvements, if the adjacent land is taken to be similar to the 28-acre tract, acquisition costs would have been only one-seventh to one-fourteenth what they were going to be without advance acquisition, had the right-of-way been acquired when the option was acquired. When improvements to the land are drawn into the picture, the savings that could be achieved by advance acquisition become even more dramatic.

The government's right to take property for public use—its right of eminent domain—is said to be inherent in a state or nation, but is exercised only for a public purpose and is allowed only by statute.[2] Compensation must be paid the owner for the property taken, including compensation for any loss in value caused by the condemnation sustained by those portions of the tract left to the private owner.[3] In determining whether eminent domain is available for use in acquiring right-of-way for a future highway, certain questions immediately arise. Is there a statute expressly giving authority to exercise the power or implying such authority? Is taking land for a future highway a public purpose? Is it equally easy to show the public purpose exists when the land has previously been reserved through police regulations for right-of-way purposes, as when

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[1] Example given in address by Joseph D. Buscher, Special Assistant Attorney General of Maryland, at AASHO annual meeting, Denver, Colorado, October 9, 1961.

[2] 3 American Law of Real Property (Casner ed. 1952) §13.17.

[3] 18 Am. Jur., "Eminent Domain", §§128, 270.

it has not? If the authority exists and right-of-way for a future highway is taken, how is the value of the property taken measured? Is it possible to retain for the public the land values that will be created by the public improvement when it is built? Similar questions arise where negotiated purchases of the land are possible. And whether future right-of-way is purchased or condemned, how may States raise the money to pay for it?

The following discussion considers first the States' power to acquire highway rights-of-way materially in advance of construction. Essentially this updates the 1957 study of Highway Research Board Special Report 27, "Acquisition of Land for Future Highway Use." The discussion then moves to how the acquisitions are financed, and closes with some suggestions for reducing acquisition costs. An appendix presents the results of interviews with Ohio officials regarding the administration of that State's advance acquisition program which uses pension funds to pay the acquisition costs.

In summary, the power of advance acquisition is ever becoming more firmly established, assuming careful planning of highway needs precedes the acquisition. How far in the future construction may constitutionally be contemplated probably depends on the circumstances of each case, considering such matters as whether the right-of-way is for Interstate or ordinary highways, whether it will be protected by appropriate police power controls and whether it passes through rural, suburban, or urban territory. Acquisition in some States is financed by revolving funds; in others, by borrowing against future tax receipts. In Ohio, various State pension funds are used to pay for advance acquisition. The Washington legislature recently authorized use of pension funds for this purpose also. Suggestions for reducing costs include use of installment payments of compensation, elimination of equitable servitudes as compensable property interests in certain situations, elimination of excessive payments of severance damages, and public development of the land values created by the highway.

LEGAL POWER

Explicit Statutory Power

Ordinary State Highways.—A 1957 study found that statutes in 15 States explicitly authorized acquisition of land for future highway use,[4] defining "future" to be at least two years between acquisition and the start of construction.[5] In 1962 six additional States were found with such explicit statutory authority[6] and none of 1957 group of States had repealed theirs. In addition, North Carolina explicitly allows consideration of savings in right-of-way costs by advance acquisition in allocating acquisition responsibilities between State and local authorities for projects in and around cities.[7] Details of some statutes comparable to those shown in the 1957 study[8] are given in Table 1. In two more States, Kansas and North Carolina, the State highway commission may purchase (but not condemn) an entire tract of land for highway purposes if the commission finds this will best serve the public interest, even though not all the tract is immediately needed for State highway purposes.[9] Minnesota gives its highway commissioner similar power, including power to condemn.[10] This may be helpful in acquiring strips for future highway widening.

The language indicating futurity in some statutes (last column, Table 1) differs

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[4] Highway Research Board, "Acquisition of Land for Future Highway Use" (Special Report 27, Washington 1957), p. 24 listing Arkansas, California, Colorado, Florida, Idaho, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Virginia, and Wisconsin. This special report is hereafter referred to as the 1957 study.

[5] Ibid. at 44, n. 135.

[6] Alaska Comp. Laws Ann., (1958 Supp.), §14A-1-42; Burns' Indiana Stats. Ann., §36-2947; Mich. Stats. Ann., §9.1097(13a); Rev. Codes of Mont. Ann., §32-1615; New Mex. Stats. Ann., §22-9-41; Wash., Laws, 1961, c. 281.

[7] Gen. Stats. of N. C., §136-66.3.

[8] Note 4, supra, at 27-29.

[9] Gen. Stats. of Kan. Ann. (1961 Supp.), §68-413; Gen. Stats. of N.C., §136-19.

[10] Minn. Stats. Ann., §161.23.

TABLE 1

STATUTES OF FOUR STATES SPECIFICALLY AUTHORIZING ACQUISITION OF PROPERTY FOR FUTURE HIGHWAY USE

State	Body Authorized to Acquire	Permissible Methods of Acquisition	Maximum Type of Interest to Be Acquired	Determination of Necessity by Whom	Power to Lease in Interim	Power of Sale	Language Indicating Futurity
Indiana	State Highway Department, §36-2947.	Purchase, donation condemnation or otherwise.	Such land, right or easements as may be reasonably necessary, §36-2947.	--	--	Yes §36-2950 also exchange §36-2951	It has become necessary to make highway plans and programs... for a reasonable time in the future... The department may acquire such land, right or easements as may be reasonably necessary or needed within a reasonable length of time to carry out the highway plans and programs for future location, relocation construction... of a highway system. §36-2947.
Michigan	State Highway Commissioner, county road commissions, incorporated cities and villages, §9.1097 (13a).	Purchase or condemnation, §9.1097 (13a).	Fee simple, §8.13(1).	Public corporation or State agency, §8.14	Yes, §9.1097 (13a)	Yes §9.1097 (13a)	May acquire... in advance of actual construction programing private property situated within the rights-of-way of any highway projects planned for future construction... and may expend for the advance acquisition of right-of-way... §9.1097(13a).
Montana	State Highway Commission, §32-1615.	Purchase or any other lawful manner including condemnation. But cannot condemn property for purpose of exchange for other property, or for parks adjoining or near a State highway, §32-1615.	Fee simple, excluding oil, gas and mineral rights.	State Highway Commission, §32-1615	Yes, §32-1615	Yes. Must sell to owner from which first acquired if he meets highest bid. May exchange if owner from which acquired does not demand sale, §32-1616	Commission shall have the power... to acquire... any lands... it deems reasonably necessary for present or future State highway purposes... The authority... includes authority to acquire for reasonably foreseeable future needs.
Oklahoma	State Department of Highways, Tit. 69, §46.	Purchase, donation or condemnation, Tit. 69, §46.	Lands or such interests therein as in its discretion are necessary.	Department of Highways	--	Yes, Tit. 69, §159.1	The Department of Highways... is... authorized to acquire... lands... necessary for... establishing, constructing and maintaining State highways... in determining the amount of land required, or width of right-of-way necessary... the Department of Highways shall take into consideration the present and probable future needs in connection with maintaining and reconstructing said highways, and the prevention of traffic congestion and hazards.

from State to State. The courts have not yet interpreted the phrases involved. It is conceivable that when they do, differing degrees of liberality in allowing advance acquisition will be established for the several States. Indiana and Montana, essentially, speak of acquiring land "reasonably necessary" within a "reasonable length of time" to carry out highway programs made for a "reasonable time in the future." Repeated use of the qualification "reasonable" perhaps suggests a more conservative authorization than that given in Michigan, which simply speaks of getting land "within the rights-of-way of any highway projects planned for future construction."

In another sense, Michigan is the more rigid because advance acquisition applies only to land within the right-of-way. Oklahoma sounds the most conservative, not only confining the authorization to "necessary" lands, but requiring the Highway Department to use the following criteria in determining what land is necessary: the present and probable future needs in connection with maintaining and reconstructing said highways, and the prevention of traffic congestion and hazards.

On the other hand, except for the Michigan restriction to land within the right-of-way, the courts of these States may evolve standards of advance acquisition that are essentially the same. No legislature intends to authorize unreasonable advance acquisition; all highway departments must consider the criteria mentioned by Oklahoma in formulating reasonable programs of future highway construction. At this time it is hard to foretell future court decisions. Because the problems of high land acquisition costs are common to all States it may be suggested that, lacking some more positive evidence of legislative intention to restrict administrative discretion, courts should construe all these statutes liberally to accomplish the legislatures' purpose—to provide an effective tool for reducing right-of-way acquisition costs.

A few cases in addition to those summarized in the 1957 Highway Laws Study have been found interpreting the future use statutes. In Florida, the State Road Department, in connection with constructing a limited-access Interstate highway, wished to acquire a tract before funds had been allocated for construction and before detailed engineering plans, construction drawings, and specifications had been completed and adopted—even before the Department was able to say with certainty when the highway construction would be started. Still the court held that the resolution of the Road Department determining that public necessity for taking the land existed was not a gross abuse of discretion, and therefore would not be set aside.[11] Although the case shows a liberal attitude toward taking land for future construction, it must be remembered that a highway in the Interstate System was involved, and that a Federal Statute,[12] as well as the State statute,[13] authorized advanced acquisition. Other factors aiding the court to decide the case as it did, and which the court noted in its opinion, were an affirmative showing that substantial expenditures had been made already in acquiring rights-of-way for the highway, and that the Federal funds are advanced for right-of-way acquisition within five years following the fiscal year in which the State asks for the advance.[14] Furthermore, part of the highway had been surveyed and located by the State Highway Engineer. Hence, although the highway department could not say when the highway would be built, there were substantial grounds for believing it eventually would be.

A Michigan case that does not mention the future use statute endorses acquiring land for future use.[15] Before the State Highway Commissioner had authority to establish a State trunkline highway within a particular city, the city consented to the highway's establishment without giving the metes and bounds description of the route to be followed. The court found the consent so given valid. It declared that the quantity of land to be taken is discretionary with the Highway Commissioner, and that intending to take more land than necessary for the contemplated improvement is not a clear abuse of discretion. The court said, "The principle that public authorities charged with the laying out and maintenance of highways may act with reference to probable future requirements has been repeatedly recognized."[16]

Limited-Access Highways.—Some States with no explicit general statutory authorization to acquire rights-of-way for future construction of ordinary State highways do have statutes granting such power (at least in some degree) where the future construction will be of limited-access highways. Mississippi authorizes its highway authorities to plan, establish, improve, or construct controlled-access facilities wherever such authorities are of the opinion that traffic conditions, present or future, will justify the facilities.[17] The use of the disjunctive suggests authority to do any or all of the listed activities. This further suggests that advance acquisition of right-of-way is authorized as part of presently planning or establishing a highway slated for future construction.[18] The highway authorities may condemn property for controlled-access roads, and have discretion to acquire an entire tract if this best serves the public interest, even though not needed for the right-of-way proper.[19] The authority to acquire an entire tract although it is not all needed for the right-of-way proper exists

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[11] State Road Department v. Southland, Inc., 117 So.2d 512 (Fla. App. 1960).
[12] 72 Stat. 893, as amended; 23 U.S. Code, "Highways", §108.
[13] Fla. Stats. 1959, §337.27.
[14] 117 So.2d at 515. The Federal statute has since been amended to extend the permissible time of construction to seven years following the fiscal year in which the State requests the advance. 72 Stats. 62, 23 U.S. Code, "Highways", §108.
[15] New Products Corp. v. State Highway Commissioner, 252 Mich. 73, 88 N.W.2d 528 (1958).
[16] Ibid., at 535.
[17] Miss. Code of 1942 Ann. (1956 Supp.), §8039-03.
[18] Opinions may differ as to whether authority for advance acquisition may be derived from the described statutes. The statutes cited in note 20, infra, are listed in the 1957 Study, p. 27, but the view is expressed there that the power to acquire an entire tract is of "no aid in assembling the right-of-way" for a new highway, as compared with widening an old one.
[19] Miss. Code of 1942 Ann. (1956 Supp.), §8039-05.

in eight States[20] in addition to Mississippi, with some variation in details. Generally the statute speaks of the entire tract not being "immediately" needed.[21] In three States the land not needed for the right-of-way may not be condemned.[22] In Alaska, the acquisition authority rests with incorporated cities and political subdivisions, but not with the State Highway and Public Works Board.[23]

Implicit Statutory Power

Ordinary Highways. —The statutes of still other States seem to imply authority to acquire land for future highway construction. The 1957 study listed five such States.[24] One of these States, North Carolina, has repealed its statute[25] but seven others now have such implicit statutory authority.

In Georgia, the implied authority exists for rural roads but not for State highways. The Rural Roads Authority has been set up in that State to which the State governor or the governing authority of each county may convey any right-of-way the State owns or the State highway department acquired "which is at the time used, or may, upon completion of any action permitted to the Authority by this chapter, be used as a rural road."[26] One "action" the Authority may take is to provide for undertaking and financing projects recommended to it by the State highway board.[27] The State highway board and the State highway department may acquire rights-of-way in any way permitted by law for the governor to convey to the Authority.[28] One permitted way is by condemnation.[29] Although the governor may not convey part of the State highway system to the Authority[30] there is nothing to prevent part of the rural roads system being conveyed to the State highway authorities. Therefore, an indirect method of acquiring right-of-way for future highway construction may be available in Georgia. First, the State highway board would recommend a project the board was scheduling for future construction to the Authority. The Authority then would provide for undertaking and financing it, the State highway authorities would acquire the right-of-way, the governor would convey it to the Authority, the Authority would in due course build the road and then transfer it to the State highway system.

Less complicated implications of authority are found in the statutes of other States. Hawaii allows counties to condemn more land than is needed for a public improvement where small remnants would otherwise be left or "where other justifiable cause necessitates such taking to protect and preserve the contemplated improvement, or public policy demands such taking in connection with such improvement."[31] Although this provision probably does not enable counties to acquire rights-of-way for future construction where no road exists at all, it may provide authority to acquire land for future widening of an existing highway. The statute's usefulness may be limited because it enlarges the power only of counties; it confers no power on State agencies.

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[20] Code of Ala., tit. 23, §145; Alaska Comp. Laws Ann. (1958 Supp.), §14A-2-63; Code of Ga. Ann., §95-1704a; Gen. Stats. of N.C., §136-89.52; Ore. Rev. Stats., §374.040; Tenn. Code Ann., §54-2004; Utah Code (1953), §29-9-4; Rev. Code of Wash., §47.52.050. This provision is also found in Mich. Stats. Ann., §9.1094(4); New Mex. Stats. Ann. (1961 Supp.), §55-10-5, and N. Dak. Code, 1960, §24-01-32, although these three states authorize acquisition of land for future highway construction whether of limited-access facilities or not.

[21] In all States except Utah. The Kansas statute applicable to State highways in general also spoke of the land not being "immediately" needed, Gen. Stats. of Kan. (1961 Suppl.), §68-413.

[22] Alabama, Kansas and North Carolina.

[23] Alaska Comp. Laws Ann. (1958 Supp.), §14A-2-63.

[24] Note 4, supra at pp. 36-40, listing North Carolina, Oregon, Tennessee, Texas, and Washington. Washington now has explicit authority, Wash., Laws, 1961, c. 281.

[25] N. Ca., Laws, 1959, c. 25.

[26] Code of Ga. Ann., §95-2606.

[27] Ibid., §95-2607.

[28] Ibid., §95-2606.

[29] Ibid., §95-1724.

[30] Ibid., §95-2606.

[31] Rev. Laws of Hawaii (1961 Supp.), §141-1.

Iowa authorizes rental of land that is acquired for highway improvements but is not "immediately" needed.[32] Although the time lag between acquisition for current projects and actual construction may sometimes be so great as to make rentals feasible, it might be argued that this statute implies authority for advance acquisition. Maine and Rhode Island have similar statutes.[33]

The Kentucky Highway Department may condemn land when by official order it has designated the route of a highway.[34] Depending on how precisely the route must be designated, this statute may allow land acquisition for future highway use.

The New Hampshire governor may determine after hearing whether there is occasion for laying out or altering highways of certain classes or included within the National System of Interstate Highways, in a location proposed by the State commissioner of public works and highways.[35] If the governor decides there is such occasion, he appoints a commission to acquire land in the proposed location.[36] It may be argued that a present anticipation of future need for a new highway or for expanded width of an existing highway may constitute an occasion for laying out or altering the highway. If the argument is accepted, then this New Hampshire statute in some circumstances authorizes acquisition for future use.

New York since 1956 has maintained a revolving fund of $20 million for advance acquisition of rights-of-way. The funds are actually part of current appropriations, but these have been sufficiently large to permit the amounts spent for advance acquisition to be restored to the fund when the projects for which the land was acquired are placed under contract.[37] New York relies on the same statute[38] to authorize advance acquisition that it relies on for current acquisition.[39] This statute contains no language suggesting advance acquisition, but says "the property required" for highway construction, reconstruction, or improvement may be acquired.[40] Accordingly, New York makes no advance acquisitions except where the appropriate district engineer certifies they are necessary for the projects involved and, if the projects involve Federal participation, that local representatives of the U.S. Bureau of Public Roads also can recommend approval. On arterial highway projects, plans must have been developed so that approval from the municipality may be obtained.[41]

In Ohio, the director of highways may purchase realty he deems "will be necessary" for the improvement of State highways.[42] Also, he may agree with the commissioners of a sinking fund created by the State constitution for the acquisition of realty, that the commissioners get the land and hold it until the highway department plans to use it.[43] Two provisions of the statute show it is contemplated that acquisition may occur a considerable time before construction. Each agreement, although it may not extend beyond the two-year period for which appropriations had been made to the highway department, may be successively renewed so as to extend up to eight years from the date of the original agreement.[44] The director of highways may purchase the land from the commissioners any time before letting the highway improvement contract.[45] Another section of the Ohio statutes allows municipal corporations to spend their own funds to ac-

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[32] Code of Iowa Ann. (1962 Supp.), §306.32.
[33] Rev. Stats. of Maine, Ch. 23, §24; Gen. Laws of Rhode Island, 1956, §37-7-1.
[34] Ky. Rev. Stats., §177.081.
[35] N. Hamp. Rev. Stats. Ann., §233.1.
[36] Ibid.
[37] Letter from P. G. Baldwin, Director, Bureau of Rights-of-Way and Claims, Department of Public Works, State of New York, to G. Graham Waite, December 26, 1962.
[38] McKinney's Consol. Laws of New York, Bk. 24, "Highways", §30.
[39] Letter from Saul C. Corwin, Counsel, New York State Department of Public Works, to Robert J. Potter, Deputy Attorney General and Chief Counsel, Nevada Department of Highways, August 22, 1962.
[40] McKinney's Consol. Laws of New York, Bk. 24, "Highways", §30.1(a). The statute also speaks of acquiring all property "necessary" for such projects. Ibid., §30.2
[41] Note 37, supra.
[42] Baldwin's Ohio Rev. Code Ann., §5501.115.
[43] Ibid.
[44] Ibid.
[45] Ibid.

quire rights-of-way for cooperative projects between the municipality and the State to improve State highways within the municipality's limits after the director of highways has given conditional approval to the municipal corporation's preliminary plans.[46] Ultimately, the State reimburses the municipal corporation for the costs of the right-of-way acquired.[47] The statute sets no limit on the time that may elapse between the director's conditional approval of the municipal corporation's preliminary plans (after which right-of-way may be acquired) and the start of actual construction.

Pennsylvania provides for official mapping of future highways[48] but explicitly points out this is not a taking.[49] The effect of placing a proposed highway on the official map is to deny compensation when the land is finally taken for any improvement placed in the bed of the paper highway after mapping.[50] Although in legal theory mapping itself does not amount to a taking so long as the landowner can still earn a fair return on the land without making new improvements on it, still its practical effect is to cause most owners to decide not to develop the land to what, lacking mapping, would be its highest and best use. To the extent that the income from mapped land, though fair, is lower than it would be with the improvements the owner would have placed on it had the land not been mapped, something akin to a taking has occurred, although not in the constitutional sense. In fact, the landowner may be hurt worse economically by mapping than by condemnation because mapping gives him no funds with which to buy other land for development, whereas condemnation does. Considering this immediate effect of mapping for future highways, it may be argued that the power to map implies the sometimes less onerous power to condemn.

Whether there may be implied a general power to condemn for future highway use in Pennsylvania, there is an explicit power to do so in one situation. When a highway is being relocated, the State secretary of highways may change or establish its width, lines, location of grade in order to correct danger or inconvenience to the traveling public or to "lessen the cost to the commonwealth in the construction, reconstruction, or maintenance thereof."[51] The statute provides that the plan of the proposed change must be recorded in the county where the change is to occur and be approved by the governor, the approval being a condemnation of an easement for highway purposes from all property within the lines marked as required for right-of-way and of an easement of support or protection from all property within the lines marked as required for slopes.[52]

Utah allows its State Road Commission to borrow up to five million dollars to purchase land or interests therein necessary for construction of State roads.[53] Nothing is said about advance acquisition, but the money apparently could be used for that purpose if the purchase is declared "necessary." The fund revolves as the loans are repaid from Federal matching funds earned through construction of highways.

West Virginia authorizes its State Road Commissioner to establish a revolving fund for advance right-of-way acquisition,[54] thereby implying authority to make advance acquisitions.

Wyoming speaks in terms of condemnation only for highways to be constructed presently, but allows a right-of-way 300 ft wide to be condemned.[55] Thus, although no condemnation for future use is authorized when no present construction at all is to take place, there is ample authority to condemn land for future widening of a two-lane highway presently to be built.

Limited-Access Facilities.—Massachusetts by statute authorizes, as to limited-access ways, the State highway department to condemn "land or rights in land adjoin-

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[46] Ibid, §5521.12.
[47] Ibid.
[48] Purdon's Pa. Stats. Ann., Tit. 36, §§670-206 through 670-219.
[49] Ibid., §670-208.
[50] Ibid., §670-219.
[51] Ibid., §670-210.
[52] Ibid.
[53] Utah, Laws, 1959, c. 133.
[54] W. Va., Laws, 1957, c. 143; W. Va. Code of 1955 Ann. (1961 Supp.), §§1448(8), 1448(31).
[55] Wyo. Comp. Stats. 1957, §24-6 to 24-37.

ing the highway location whose right of access has been acquired."[56] Could not strips for widening be acquired under this authority?

The Minnesota statute authorizing construction of controlled-access highway allows the road authorities of State, county, city, village, and borough to "plan" for designation, improvement, etc., of such highways whenever the particular road authority involved determines that traffic conditions "present or future" justify them.[57] All these road authorities may acquire property rights by purchase, gift, or condemnation.[58] If acquisition of right-of-way can be considered part of planning controlled-access highways, and doubtless a particular plan is predicated on a particular route, the various roads authorities may acquire land for future use in relation to this one type of highway. The Minnesota court has indicated its approval of saving the State money in acquiring right-of-way, although holding that the highway's route must be tentatively laid out before acquisition occurs.[59] As described earlier, New Hampshire seems to authorize advance acquisition for limited-access roads in some circumstances.

The 1957 study concluded that the Texas Highway Department's power to acquire land for future highway use could fairly be implied from a provision allowing adjoining landowners to use portions not needed for immediate use.[60] In addition, as to turnpikes, the Texas Turnpike Authority may purchase land whenever it deems such purchase "expedient."[61] Nothing is said about condemnation of land on the same basis.

Case Law

As was true in 1957, lack of specific statutory authorization does not necessarily prevent advance acquisition of rights-of-way. Two recent decisions,[62] one in Florida and one in Michigan, are noteworthy. Both States have such specific authority, but the cases show a liberal construction of the statutes. One opinion contains language cordially endorsing the idea of advance acquisition. The cases may be helpful in persuading courts in other States without specific statutory authority to uphold advance acquisition.

In the Florida case the State Roads Department was allowed to acquire land before detailed plans and specifications for the highway had been completed and adopted, before funds had been allocated for construction, and before the department was certain when construction would be started. In Michigan, the court held valid a city's consent to establish a State highway within the city limits although the consent did not give a metes and bounds description of the right-of-way and the consent was given before the State highway commissioner was authorized to establish such a highway. The court said, "The principle that public authorities charged with the laying out and maintenance of highways may act with reference to probable future requirements has been repeatedly recognized."[63] In 1960 the Ohio Supreme Court found that section 5501.112 of the Ohio Revised Code gives the State Director of Highways power to purchase land for future highway use and sustained its validity[64] against a contention that expenditure for advance acquisition was not for a highway purpose within the meaning of the State constitution.[65]

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[56] Ann. Laws of Mass., (1960 Supp.), ch. 81, §7c.

[57] Minn. Stats. Ann. 1960, §160.08(1).

[58] Ibid., §160.08(4).

[59] State ex rel. Peterson v. Werder, 200 Minn. 148, 273 N.W. 714 (1937).

[60] Note 4 supra, at 38, citing Vernon's Tex. Civ. Stat., art. 6674n-1.

[61] Vernon's Tex. Civ. Stat., art. 6674 v (7).

[62] State Road Dept. of Florida v. Southland, Inc., 117 So.2d 512 (Fla. App. 1960); New Products Corp. v. State Highway Comm'r., note 15, supra.

[63] 88 N.W.2d 535.

[64] State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 166 N.E.2d 365 (1960). The language of §5501.112 on which the court relied is "The director of highways . . . is authorized to purchase real property that he deems will be necessary for the improvement of the state highway system . . . ." 170 Ohio St. at 461, 166 N.E.2d at 373.

[65] Ohio Const., art XII, §5a, provides: "No moneys derived from fees, excises, or license taxes relating to registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of

The case was an original action in mandamus in the Ohio Supreme Court against the State treasurer to release certain funds to pay for the land. In allowing the writ the court recognized the necessity of right-of-way acquisition "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."[66] The Ferguson case clearly establishes the legality of advance acquisition of rights-of-way in Ohio, assuming adequate prior planning of the proposed highway, and removes the doubts created by State v. City of Euclid[67] discussed in the 1957 study.[68]

In a proceeding to validate county road revenue bonds to acquire rights-of-way for State highways the Florida court upheld purchase of land for future highway use even though there was no commitment that a road would be built.[69] The court remarked that it "makes sense" to acquire "adequate rights of way at a time when land values will not be influenced by the immediate announcement of actual highway construction,"[70] characterizing acquisition at such a time "an efficient exercise of governmental power and business judgment."[71] Although the court declared it had no authority to review the discretion of the highway authorities in selecting highways for future improvement, it did point out that the highways named by the highway authorities for improvement through acquiring additional rights-of-way had been shown by a legislative Select Committee on Roads applying standards fixed by the State Road Department to need improvement badly.[72] And it commented that the preliminary survey determining width would have to have already been made before right-of-way was acquired.[73] Perhaps the court is hinting that where acquisition for future use is involved the road authorities' discretion is not quite so untrammeled as when purchase for immediate construction is involved. Future Florida decisions will bear watching on this point.

The West Virginia court has upheld a State statute empowering the State road commissioner to plan and construct controlled-access facilities presently wherever "present or reasonably anticipated future traffic conditions" make such facilities necessary.[74] The court stated that the necessity of taking property for the facilities rests in the discretion of the State road commissioner free of judicial interference, absent a showing of bad faith, capriciousness or fraud.[75] Although there is no statutory provision for advance acquisition of right-of-way, it may be worth noting that present acquisition of right-of-way, which reasonably anticipated future traffic conditions make necessary, is analogous.

Another tacit endorsement of advance acquisition, though dictum, may be found in the Arizona case of State ex rel. Willey v. Griggs.[76] A State statute[77] in effect gave the highway commission two years following its determination that taking was necessary in which to decide finally to condemn the land. Compensation was forbidden, for improvements placed on the property after the determination that acquisition was necessary and no provision was made to pay the owner for the time following the determination and prior to purchase or condemnation during which the land's value is depressed by the discouragement of future improvements. The court held a taking occurred when the determination of necessity was made because the prohibition of compensation for

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public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways."

[66] 170 Ohio St. 462, 166 N.E.2d 374.

[67] 164 Ohio St. 265, 130 N.E.2d 366 (1955).

[68] At 21-22.

[69] State v. Florida Development Comm'n., 95 So.2d 13 (Fla. 1957).

[70] 95 So.2d 15.

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] State v. Professional Realty Co., 144 W. Va. 662, 110 S.E.2d 616 (1959). The quoted language is from W. Va. Code Ann., §17-4-40 and appears at 110 S.E.2d 619.

[75] 110 S.E.2d 621.

[76] 89 Ariz. 70, 358 P.2d 174 (1960).

[77] Ariz. Rev. Stat. Ann., (Supp. 1961), §18-155 (D).

later improvements lowered the land's value, and that the statute was unconstitutional since no compensation was paid at that time, and for the further reason that no compensation ever would be made for the landowner's loss during the time his land's value had been impaired. Having thus disposed of the case, the court remarks that the decision does not prevent the State from taking the land; if the State "desires appellees' land for a highway, it can lawfully condemn it in accordance with the Constitution. All that is required is that just compensation be paid."[78] Since a possible lapse of two years between taking and starting construction was contemplated by the statute being considered, and hence in the case at bar, maybe the court will not object to advance acquisition covering the same period.

Conclusions

Since the 1957 study appeared six States have enacted explicit statutory authority for advance acquisition. West Virginia and perhaps Utah have authorized funds for the purpose, thereby implying authority for advance acquisition. Perhaps most significantly, New York uses its basic right-of-way acquisition statute, containing no language of futurity, as authority for advance acquisition. The law of still other States affords bases for implying such authority. Courts have upheld the constitutionality of such laws as have been tested. Although the power of advance acquisition is becoming more firmly established, there is considerable variation among the State statutes as to whether the power applies to ordinary highways, limited-access highways, or both, whether there is power to exchange or lease or otherwise manage the lands acquired before devoting them to actual highway use. Probably less than a fee simple can be acquired in all the States, thereby allowing the States to acquire a right of first refusal to purchase a tract should its owner decide to sell. Although courts habitually say they will not review the determination of necessity of taking in the absence of gross abuse of discretion or fraud, all the conclusions here drawn assume the decision to acquire land in advance of proposed construction is reached following careful planning of over-all future highway needs.

PROBLEMS OF ACQUISITION FOR FUTURE HIGHWAY USE

Futurity of Construction

Just as the 1957 study found, "future" is an undefined term. Table 1, infra, indicates the language in some statutes granting explicit power. The Ohio court has apparently in dictum endorsed acquisition "far"[79] in advance of actual construction. The clearest indications of the time scope of "future" are statutory. Virginia allows acquisition as long as twelve years in advance of construction where the road is to be part of the Interstate Highway System, and six years in advance for highways that will not be.[80] Ohio provides a maximum lead time of eight years without distinguishing between Interstate roads and others.[81] None of these statutory periods have been tested for constitutionality. The Florida Supreme Court upheld a five-year lead time, apparently because this limit was prescribed in a Federal statute.[82] The statute now extends the time to seven years;[83] whether the Florida court would accept this extension has not been determined.

Careful planning of highway needs of a sizable area is absolutely essential before advance acquisition is undertaken. Assuming such planning has been done, then the validity of a particular lead time would seem to depend on answers to three questions (see Table 2): (I) Is there a high probability that actual construction will occur on the particular right-of-way acquired if construction is postponed by the length of the lead time? Courts have indicated more interest in the degree of certainty that the land ultimately will be used for the purpose for which it is acquired than in the amount of

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[78] 89 Ariz. 76, 358 P.2d 177-178.
[79] State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 462, 166 N.E.2d 365, 374 (1960).
[80] Code of Va. 1950, §33-57.1.
[81] Baldwin's Ohio Rev. Code, §5501.115.
[82] State Road Dept. of Florida v. Southland, Inc., 117 So.2d 512 (Fla. App. 1960).
[83] 72. Stat. 893, amended by 73 Stat. 62, 23 U.S.Code, "Highways", §108 (1961).

time that may elapse before the use occurs.[84] (II) Will advance acquisition result either in substantial savings in acquisition costs or in material help in planning the highway net and in meshing the highway plans with community development? These are the legitimate goals of advance acquisition.[85] Only after these questions are answered affirmatively will the third question be reached. (III) Is it reasonably likely that the effects suggested by question II will be present throughout the lead time being considered? Some factors to be weighed in answering these questions are suggested in Table 2 and are discussed in the following.

Determining when the probability that land ever will be used for a highway becomes too small to warrant acquisition must necessarily be a matter of educated guessing until the experience of the several State highway departments now acquiring land for future use is developed statistically. It may be that where rural or heart-of-the-city right-of-way is involved the probability of ultimate highway use is higher for a longer period than where the right-of-way passes through the suburban and rururban fringe. This is suggested because important factors determining route location are relatively fixed in the country (topography) and in the city core (industrial and commercial development), whereas in the fringe areas the pattern of urban development is still evolving. This suggests the need to assemble experience data of the highway departments according to the type of land through which the right-of-way passes. Imposition of thorough land use controls probably enhances the chance of ultimate actual highway use. In all situations certainty of ultimate highway use may be greater if the land is to be part of a highway in the Interstate System rather than for an ordinary highway. Reasons for this are that financing is relatively more assured because a larger portion comes from the Federal Government, which is stronger financially than the States, and because Congress is committed to a long-range construction program seemingly less likely to be abandoned or altered than that of a single State.

Assuming certainty of future construction, when is it reasonable to buy right-of-way? From these points of view (suggested by question II), the greater the effectiveness of police regulations imposed to protect future right-of-way sites the shorter will be the permissible lead time from acquisition to construction. Thorough regulation by police power tools tends to inhibit rises in land values and thus to remove one reason for advance acquisition. Also, thorough regulation itself gives such aid to planning other highways and community development that outright acquisition, except to avoid granting variances, adds so little additional help to planning as to render advance acquisition unjustifiable. If this tendency is generally evident, permissible lead time for advance acquisition will perhaps be less than the time provided in the Virginia and Ohio statutes in those areas where effective police power regulation exists.

Where it does not exist, predicting values of particular parcels of rururban and suburban real estate at a particular time in the future may largely consist of guessing how the "planning of the market place" will cause the area to develop, and where. This suggests that the justification for advance acquisition for such land lies more in the aid it gives to community planning than in the economic savings it allows. The reverse perhaps is true in the urban core where it is too late to plan except where urban renewal may be involved, or where the highway is to be the limited-access type and will serve to bring suburbanites downtown.

In rural regions of productive agriculture, both justifications come into play. Proper location of the highway, by thereby also locating the attendant string development, will help preserve fertile land for efficient farming. Early purchase may also be of open land which otherwise would be improved and therefore be more expensive, before construction begins.

Assuming both certainty of future construction and a situation where in general advance acquisition is reasonable, how long will it remain reasonable? No definite time can be stated, but some factors tending to determine the time period can be suggested.

Once again, in determining permissible lead times between acquisition and proposed construction the type of land involved must be considered—(a) ruruban or suburban,

[84] See 1957 Study at 12, 16.
[85] See 1957 Study, at 33-34.

TABLE 2

RELEVANT FACTORS IN DETERMINING APPROPRIATE LEAD TIME FROM ACQUISITION OF RIGHT-OF-WAY TO START OF CONSTRUCTION

Long Lead Time	Short Lead Time
Question I. Probability of Land's Ultimate Use for Highway Purposes	
1. Right-of-way land is for Interstate: a. Through rural area. b. Through heart of city. 2. Thorough land use controls to protect site.[a]	1. Right-of-way land is for new, ordinary highway: a. Through suburban area. b. Through rururban area. 2. Ineffective or nonexistent land use controls.
Question II. Degree of Reduction of Acquisition Costs and/or Aid to Community Planning from Advance Acquisition	
A. Reduction of Acquisition Costs: 3. Ineffective or nonexistent land use controls to protect future site; and 4. Right-of-way is through urban core where urban renewal is planned. B. Aid in Community Planning: 5. Nonexistent or ineffective land use controls: a. Right-of-way through rururban or suburban area; or b. Limited-access right-of-way through urban core with access points to core. C. Conditions A and B Present: 6. Nonexistent or ineffective land use controls to protect future right-of-way. 7. Unprotected right-of-way is through productive agricultural area.	A. Reduction of Acquisition Costs: 3. Land use controls protect future right-of-way; and 4. Right-of-way passes through rururban or suburban fringe. 5. Right-of-way passes through rururban or suburban area.[b] B. Aid in Community Planning: 6. Land use controls protect future right-of-way. 7. Protected right-of-way for ordinary highway through urban core.
Question III. Probability of Continued Existence of Effects of Question II Throughout Lead Time	
8. Situation B. 5. a obtains with a limited-access highway involved: a. Interchange.[c] b. Ordinary highway.[d] 9. Situation B. 5. b obtains. 10. Situation C. 6 or C. 7 obtains.[e]	8. Minimal effects on community development and unpredictable value trends: a. Right-of-way through urban core for ordinary highway; or b. Limited-access right-of-way with no access to urban core.

[a] E. g., zoning, master plan, and subdivision regulations.
[b] Because of difficulty in predicting development of area.
[c] Increases lead time.
[d] Decreases lead time.
[e] If new highway is involved cost savings will be relatively low, but planning effects high. If widening strips for an existing highway involved, planning effects will be felt only by non-agricultural uses, but cost savings may be high.

(b) urban core, or (c) rural. In the first type of land, the facts pertinent to constitutionality might be the extent to which fixing the location of a highway in an area unprotected by police power controls shapes the development of the area. What effects does it have, over how great an area and for how long a time?

Fixing the location of a limited-access highway, with its heavier traffic, probably will have a greater impact on development of all types of land, especially land near interchange points, than will fixing the location of ordinary highways. This is because such highways are fewer in number and present more marked characteristics than do ordinary highways. If a person desires to locate near a traffic artery or away from it, he will be particularly careful to locate near or far from an interchange on a limited-access highway because here the highway characteristic to which the individual is sensitive is presented in accentuated degree.

There must come a time beyond which the planning effects of the proposed highway are usually overwhelmed by the planning of the market place and the highway site is abandoned. With urban core land, if the highway is to be of the limited-access type with no access points in the urban core, advance acquisiton would have a minimal planning effect even on urban renewal projects that might be undertaken. Land values in the urban core will tend to fluctuate only moderately if no urban renewal occurs; but if renewal does occur, then values should rise at a steeper rate in the area renewed with perhaps a decline in value in the portion of the urban core not renewed and containing facilities competing with the new ones. Since the timing and precise location of renewal projects is hard to predict it would seem that advance acquisition of urban core land for such a facility may frequently be justified only a short time before construction, if at all.

Where there are to be access points in the urban core, siting the points will have an impact on planning, and considerations similar to those suggested for rururban-suburban land may become relevant in determining maximum permissible lead time. However, the speed with which market action would overwhelm the planning impact of right-of-way acquisition would probably be less in the core than in the urban fringe due to the greater difficulty of amassing the capital and blocks of land needed to effect a land use change. Hence the permissible lead time for limited-access facilities with access points in the urban core might be greater than for highways of any type in the fringe.

Permissible lead time in rural areas might be longest of all, where fertile soils are to be saved for agriculture. The fertitility is known and the terrain features dictating highway routes are relatively permanent. The stability of these factors suggests that the route that is most feasible at present will also be most feasible when construction is started however far in the future that may be. Also, one principal factor operating to change the ultimate location of a projected highway, the willy-nilly improvement of land surrounding the right-of-way with permanent structures or by permanent changes in land use, is less potent in rural areas than in the urban fringe areas. In the country, land development will be less concentrated, and hence of less influence on the new highway, than in the urban fringe where residential subdivisions or industrial parks mushroom. Where the projected highway is to be entirely new, the unconcentrated, rather slow development of rural land suggests that little money will be saved by advance acquisition. Where future construction will widen an existing highway, advance acquisition in rural areas will save sizable sums if accomplished before the existing highway invites string development.

To sum up, the length of lead time permissible between the taking and the expected using of land for highway construction may properly be affected by such numerous factors that any definite time period set by statute is unlikely to be valid under all circumstances. The ultimate question of reasonableness of the period involved in a particular case seems inescapable, and perhaps will be best solved by analyzing how long ahead of construction highway routes have been planned that were the same routes actually used. The time will probably vary according to whether the land is rururban or surburban, urban core, or rural in nature; whether land use controls have been imposed, and whether limited-access highway is involved.

If the suggestions of Table 2 are valid, the longest lead times in acquisition may be justified for Interstate right-of-way passing through the urban core where an urban renewal project is contemplated, but no land use controls exist, with access points to the Interstate in the urban core. Another situation in which a long lead time is justified is where Interstate right-of-way passes through a rural area of productive agriculture and no land use controls exist. Although the lack of land use controls decreases the certainty of ultimate highway use where advance acquisition occurs, this factor justifying a long lead time probably is outweighed by factors justifying only a short one. Such factors are that less substantial cost savings will occur and less significant help will be given to community planning. The shortest justifiable lead times occur when right-of-way is for a new, ordinary highway passing through the urban core where no urban renewal project is contemplated.

Financing Advance Acquisition

States may receive Federal funds from the Secretary of Commerce for acquiring rights-of-way for future construction of roads in the Federal-aid highway system, including the Interstate System, the construction to occur as much as seven years after the fiscal year in which the State requests the funds.[86] The Federal payments are not to exceed the Federal pro rata share[87] fixed by statute, 50 percent of construction costs for ordinary highways and 90 percent of the total cost of Interstate System projects provided for by Federal funds under the 1958 amendment to the Federal-Aid Highway Act of 1956 intended to speed up construction of the Interstate System.[88] The regulations promulgated by the U. S. Bureau of Public Roads to administer the Federal-aid program do not explicitly recognize advance acquisition costs for right-of-way as reimbursable, although until 1960 they did.[89] Since the Secretary of Commerce is not required but only "authorized" to reimburse a portion of advance acquisition costs,[90] it might be argued that such deletion shows a decision no longer to make such reimbursements. However, the definition of a highway "project" for which partial cost reimbursement may be made seems sufficiently broad to cover advance acquisition.[91] Advance acquisition might be stimulated if the Federal government made available for current advance acquisition payments, the funds to be appropriated in future years of the Interstate construction project.

Even with Federal reimbursement assured, a sizable financing job remains for the States. The 1957 study observed that six States had set up a special revolving fund for this purpose rather than using current highway appropriations.[92] Indiana in 1961 created from the unencumbered cost balance in the State Highway Fund a $2.5 million revolving fund to be used by local units of government for working capital in cooperating with the Federal Highway Grant-in-Aid program.[93] All moneys received under the program are to be placed in the fund and construction contracts entered into as part of the program are to be paid from the fund.

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[86] 72 Stat. 893, amended by 73 Stat. 62, 23 U.S.Code "Highways", §108 (1961).

[87] Ibid.

[88] 72 Stat. 899 (1958), as amended, 23 U.S.Code, "Highways," §120(a)(6)(1961).

[89] 22 F.R. 1063, §1.11, Feb. 21, 1957 amended by 25 F.R. 4162, May 11, 1960, 23 C.F.R., §1.1-1.38 (1962). Prior to the amendment §1.11 explicitly allowed Federal participation in the cost of "rights-of-way acquired for future highway use." The right-of-way portion of the amended regulation (§1.23) has no such language.

[90] See note 86 supra.

[91] 23 C.F.R., §1.2(b)(1962) defines "project" as follows: "An undertaking by a state highway department for highway construction, including preliminary engineering, acquisition of rights-of-way and actual construction, or for highway planning and research, or for any other work or activity to carry out the provisions of the federal laws for the administration of federal aid for highways." Sec. 1.2 (a) adopts the definitions in 23 U.S.C. §101(a) except as specifically modified by the regulation, and the statute defines "construction" to include costs of "locating, surveying and mapping . . . costs of right-of-way."

[92] 1957 Study at 41.

[93] Ind. Laws, 1961, ch. 248.

Another device used to remove moneys for advance acquisition of rights-of-way from current highway budgets is to borrow against expected future receipt of motor vehicle and gasoline taxes. In New Mexico the State highway commission borrows the money.[94] Michigan contemplates allocation by contract of particular costs of a project among the governmental units participating in it, with each unit borrowing as needed to pay its share of the costs. The State highway commission may be a contracting party. Loans must be repaid within thirty years, pledges may not exceed a stated percent of the previous year's receipts from the taxes.[95] In this way the current appropriations are used only for the annual payments of principal and interest due on the loans. Florida uses a variation of this scheme in that the pledges are made to and the bonds issued by a State corporation rather than by the State or a unit of local government.[96]

Oklahoma reduces the strain on the State budget caused by advance acquisiton by placing the burden of right-of-way acquisition on local governments in some situations.[97] Oregon does not require local governments to furnish rights-of-way but does provide for cost sharing agreements to be made by State, city and town authorities.[98] The Oregon Constitution limits the State debt for highway construction to 4 percent of the assessed valuation of all State property,[99] which limitation may supply one motive for placing right-of-way costs on local government. A problem in intergovernmental relations arises here because Federal reimbursements for advance acquisitions are not authorized to be made to local governments. Amendments of applicable law to allow such reimbursements for acquisitions the local government makes for the States are suggested.

Another way to reduce the burden of advance acquisition costs, or to cause a given sum of money to tie up more land, would be to pay the acquisition costs in installments over a period of years. In this technique the government would purchase or condemn a vendee's interest in the land, including the right of possession, for the time period it deems desirable. The government would not take a deed passing legal title until the end of the period. The amount of the installments to be paid would be determined by the value of the land at the time of acquiring the vendee's interest, by the time period involved, and the interest rate applicable. Not only would such a method allow the government to spread its money over a greater amount of land, but the person from whom the land is acquired may lose less of the purchase price in income tax due to receiving payment in more than one year. To the extent this feature induces more persons to sell their land, the government is saved the costs of condemnation actions and the possibility of excessive awards is avoided. Some doubt of the legality of this method of acquisition is created by statutes in some States providing that title or the right to use property does not pass until compensation is paid.[100] However, at least one State supreme court has indicated the compensation requirement is satisfied if the government has pledged the public faith and credit to pay a fixed compensation.[101]

All these techniques are alike in that they create the fund from highway appropriations or by mortgaging anticipated receipts from certain highway taxes. Ohio uses a somewhat different scheme in that the moneys accumulated in various State pension funds are employed for purchasing the right-of-way and when the right-of-way finally is used the funds are repaid from current highway appropriations. Other States also have created revolving funds for advance acquisition.[102] The constitutional problem of

[94] N. Mex. Stat. Ann. (1961 Supp.), §§64-26-59 to 64-26-65; N. Mex. Laws, 1955, ch. 269. The commission may borrow to finance right-of-way acquisition for current construction also.

[95] Mich. Stat. Ann., §9.1097 (18d).

[96] Fla. Const., art. IX, §16; Fla. Stat. Ann. (1961 Supp.), ch. 288 construed in State v. Florida Development Comm'n., 95 So.2d 13 (Fla. 1957).

[97] Okla. Stat. Ann., tit.69, §46.4.

[98] Ore. Rev. Stat., §366.320.

[99] Ore. Const., art. 11, §7.

[100] E.g., Smith-Hurd Ill. Stats. Ann. (1962 Supp.), Ch. 47, §§2.3,10.

[101] Dept. of Public Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958).

[102] Ann. Code of Md. (1962 Supp.) art. 89B §206 (fund created from regular highway appropriations.); New York (by administrative action); Utah, Laws 1959, ch. 133; Washington, Rev. Code of Wash. (1962 Supp.) §47.12.180 (1962); West Virginia, W.Va. Code of 1955, §1448 (8) (31).

seeming to obligate future legislatures to make particular appropriations is avoided by limiting the life of agreements between pension fund and highway authorities under which the advance acquisition is made to two years, the life of one legislature, with power to renew until a total of eight years from initial purchase has elapsed. Although troubled by how renewal can be accomplished without either binding future legislatures or creating a time gap between expiration of the old legislature and renewal by the new one, the Ohio Supreme Court has recently upheld the constitutionality of the plan.[103] Washington in 1961 enacted a similar scheme using teachers' and State employees' retirement funds.[104] Title vests at once in the highway commission rather than in the pension funds as in Ohio.

The difficulty just described was met by Ohio by asserting the renewal has a retroactive effect. From this point of view Florida's use of a State corporation seems "smoother" since its obligations are not State obligations and hence the hazard of appearing to bind future legislatures would not arise.[105] Although no doubt local benefits are derived from State highway construction, Oklahoma's requiring local government to pay for right-of-way in various situations seems dubious. The financial resources of cities are seldom as great as the State's. Furthermore, it is frequently difficult to isolate local benefits from State benefits produced by highway construction and assigning monetary values to them results in rough judgments indeed.

Reduction of Advance Acquisition Costs

The discussion so far has described existing methods of financing advance acquisition of right-of-way with the only economy involved being that inherent in advance acquisition—obtaining the land in a relatively undeveloped state. This section will consider ways of reducing costs of acquiring land of a given level of development.

Where right-of-way is to be acquired through an area already subdivided for residential building lots, it is common to find that the lots are bound by private covenants running to the benefit of all the lot owners in the subdivision. One or more of the covenants may be violated by devoting the land within the right-of-way to highway use. Where this occurs courts have sometimes held that property of owners within the subdivision whose lot lies outside the right-of-way has been taken and compensation must be paid.[106] The compensation is to be the amount by which the market value of the particular lot has been lowered by the breach of covenant. Although the measure of damages seems nebulous and a factor of decreasing significance as the distance of the lot from the right-of-way increases, still substantial sums have been paid owners outside the right-of-way on this basis.[107] The actual economic harm the owner suffers is often zero when the effect of the contemplated highway is considered. For example, it is likely that a residential lot unrestricted as to possible uses is less valuable for residential purposes than a similar lot protected by covenants from nonresidential uses in the surrounding neighborhood. But a residential lot so protected except where a limited-access highway passes is often more valuable than one perfectly protected.[108]

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[103] State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 166 N.E.2d 365 (1960).

[104] Rev. Code of Wash. (1962 Supp.), §47.12.180. Under this legislation the pension funds invest in warrants drawn on the motor vehicle fund. The warrants are issued for a two-year period with an option in the highway commission to renew them for a maximum of four more years. They may be redeemed earlier, and must be redeemed by the time the highway improvement contract is let.

[105] Fla. Stat. Ann. (1961 Supp.), ch. 288, §11.

[106] E.g., Town of Stamford v. Vuono, 108 Conn. 359, 143 Atl. 245 (1928); Petition of Dillman, 263 Mich. 542, 248 N.W. 894 (1933).

[107] In the Vuono case, $10,000; in Petition of Dillman, $250,000, supra.

[108] California Division of Highways, Land Economics Studies, Remainder Parcel Report N. 1, Jan. 1961, at pp. 7-8 and 19-20, describes two instances where highway construction lowered the value of residential property, but at pp. 11-18 describes four instances where the value was raised. Parts of these parcels were taken for the construction. The study says nothing of the highway's effect on residential properties near it and which were not partially taken for the right-of-way. Developers' eagerness to locate residential subdivisions near throughways is some evidence, that the throughway enhances land values for residences.

Therefore, it seems not unfair to such owners to provide by statute that persons acquiring, after a stated date in the future, the benefit of a covenant running with the land at law or in equity would not acquire a property interest as against the government, except where the lot benefited by the covenant is also taken. To be doubly careful against a taking of property the statute might simply create a presumption that owners outside the right-of-way suffered no damages. This, coupled with a provision that in determining the value of such properties the effect of the highway is to be considered, would seem likely to remove this element of cost from right-of-way acquisitions in most instances. At the same time, owners would continue to enjoy protection from covenant breaches by private individuals.

A second important element of cost in right-of-way acquisition arises where only a portion of a tract is taken and the remnant left is less usable than it was as a portion of the entire tract. Severance damages are paid for the loss in value suffered by the remnant. Frequently the remnant is sold after the highway is built for more than the entire tract was worth before construction, or at least for a price demonstrating that the lot had not been harmed by constructing the throughway.[109] In this situation the State's taxpayers suffer two ways immediately. First, by the law's forbidding consideration of the effect of the highway improvement on land values, the owner is paid severance damages even though little or no actual economic damage occurs. Second, where the remnants rise in value due to the highway's construction the State does not obtain the value its improvement created except to the extent that real estate is taxed. Perhaps even worse from the taxpayer's viewpoint, the land uses created by his capital asset (the throughway) tend to generate additional vehicular traffic which will overtax the throughway's capacity and necessitate building additional capacity. Shopping centers or industrial parks tend to spring up around interchanges and residential subdivisions are created along it. Thus, not only is the taxpayer required to pay fictitious damages on acquisition and denied any substantial share of the land values he has created, but also he is forced to pay for further highway improvement caused by the private exploitation of the public's asset. What can be done to give the taxpayer his due?

California attacks the fictitious severance damage problem by striving for more accurate appraisal of the remnants. The Division of Highways is developing a file of instances where remnants later were sold, showing the type of property, how the right-of-way cut up the property, what the remnant sold for and what it should have sold for without the throughway. As appraisal of remnants becomes more accurate, severance damages decrease or disappear in most instances because usually the highway development creates a new use for the remnant that enhances the remnant's value beyond what was originally supposed. Although it does nothing to capture values for the State created by the highway, this is not viewed with too much concern in California because the work of the Land Economic Studies Section of the Division of Highways indicates the values created by the throughway will be evenly distributed among the various land parcels of the State when the throughway section is completed.[110]

This attitude seems in keeping with traditional attitudes in the United States toward the question of who is entitled to economic values created by public improvements, since only values "special" to a tract are thought to belong to the public, whereas values created by the highway but "general" in the sense that they benefit the region as a whole are thought to belong to the private citizens that are able to exploit them. Considering that some of the tremendous costs of current highway construction are due to past failures to retain for the public lineside land values created by the existing highways when they were built, the time may be ripe for an effort to retain both special and general values for the public that are created by current construction.[111]

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[109] California Division of Highways, Land Economics Studies, Remainder Parcel Report, Nos. 1-3 (Jan. 1961).

[110] Interview with Bamford Franklin, Chief, Land Economic Studies Dept., California Division of Highways, Sacramento (July 24, 1962).

[111] There are indications of public impatience with speculation in land generally and of an awareness that landowners are depending for their ultimate profit on values created by society. See Langewiesche, Wolfgang, "Land Speculation, and How to Stop It," Readers' Digest (July, 1962) at 81-85, in which a land value tax reminiscent of Henry

Another technique by which severance damages might be reduced or eliminated is suggested by the Federal Government's renegotiation of contracts after the contractor's actual profits are known to have exceeded the rate contemplated by the contract.[112] One way a State may use the technique is to enact a statute providing for immediate payment of compensation for the parcel taken plus severance damages, with a requirement of renegotiation where any sale or lease of a remnant occurred for a price exceeding the appraised value of the remnant (disregarding the contemplated highway) at the time the right-of-way was acquired, plus an annual increment commensurate with the secular trend in land values. Renegotiation might take several forms, depending on the intensity of desire for public capture of publicly-created values, ranging downward from paying the entire excess to the State. Perhaps a reasonable compromise would be to limit the State's recovery to the amount paid for the parcel taken plus the severance damages paid, with interest. Enforcement might be through denying the status of conveyance to any instrument purporting to convey any interest in the land involved until the required payments back to the State were made. Evidence of payment might be by certificate issued by the State and recorded. Such a procedure would seem to meet the constitutional requirement of just compensation because the only thing denied owners is the chance to obtain a windfall—a chance not protected by the Constitution. Nor could they complain of arbitrary classification of their land as distinguished from their neighbor's that was not taken because the need for the land for highway purposes itself supplies a substantial distinction between the two classes of land.[113] The landowner might be allowed the option of escaping renegotiation if he

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George is urged as a cure for cities lacking land for home building because the land is held by speculators waiting for land values to rise. The magazine states the article is based on a special issue of House and Home, a Time, Inc., publication. Although the idea of taxing land heavily, but not improvements, is an old one, it is notable that it is endorsed by publications popularly associated with economic conservatism. The case against private exploitation of land values along new highways is perhaps even stronger than that against speculators in land generally because, whereas a substantial amount of the rise in values on which the latter depend for their profit is created by private activities, the entire rise in values on which the former depends come from the public's highway.

[112] 65 Stat. 7 (1951), 50 App. U.S.Code, §§1211-1224 (1963 Supp.).

[113] The constitutionality of the Federal renegotiation act, note 112 supra, was upheld in Lichter v. United States, 334 U.S. 742 (1948), the Supreme Court finding the statute to be within Congress' war powers. It also included in a list of Congressional powers that "obviously command attention" the power to provide for the general welfare of the United States. U.S. Const., Art. I, §8, in footnote at page 755.

A State's power to provide for renegotiation of severance damage awards is the police power. Courts have repeatedly sustained police regulations of land use in the name of community welfare, even though the regulation caused economic loss to individuals without providing compensation therefor. See In re Advisory Opinion, 103 Me. 506, 69 Atl. 627 (1907) and Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1853). In the latter case Chief Justice Shaw described the police power as the power of the State legislature to "Establish all manner of wholesome and reasonable laws . . . either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." At page 85. See also Beuscher, Materials on Land Use Controls, pp VIII: 132-135 (College Typing Co., Madison, Wisc. 1957), quoting a portion of the Opinion on Constitutionality of Standard Soil Conservation Districts Law, 1936, written by Mastin G. White, then Solicitor for the U.S. Dept. of Agriculture. Mr. White cites in the quoted portion of the Opinion over ninety court decisions, both State and Federal, sustaining police regulations of land uses, most of which caused some economic hardship to the persons whose use was regulated.

The renegotiation statute suggested in the text, since it aims simply to improve the accuracy of appraising the damages caused by taking part of a tract, and not to deprive a landowner of the use of part of his property, probably will produce considerably less economic hardship than do the regulatory statutes sustained by the decisions White cites. Particularly does this seem likely when it is reflected that a person to whom a severance damage award was paid would know from the time he received the award that renegotiation is a possibility.

granted the state an equitable servitude binding the remainder parcel to such uses and on such conditions as the appropriate land use control body would allow. Renegotiation might be aided by using the previously described installment method of paying the acquisition costs, with a provision allowing adjustment of the total acquisition costs to be paid so as to recoup excessive severance payments. Similar advantages may be obtained from a lease with option to purchase, unless, where eminent domain powers are used, a second condemnation is necessary when the option is exercised to determine the compensation. In such a situation there seems some danger exists of the two awards totaling more than a single award for the fee simple.

Another technique calls for purchase of entire parcels, leaving no remnants. This may be feasible only where acquisition is by purchase and the purchase is by a State corporation, due to the inability of showing a necessity for the purchase. Ohio's use of pension funds suggests a desirable mode of operation. By statute, if necessary, authorize pension funds to be invested in real estate. Then use the funds to buy entire parcels for future right-of-way taking title for the fund's benefit. When the highway is constructed pay the pension funds from highway current appropriations the proportional amount the funds invested in the right-of-way itself plus interest at 3½ percent.[114] The excess land would be retained by the pension funds and leased by them to private businessmen for uses approved by a State roadside land use planning authority, or the pension funds themselves could build and operate roadside businesses.[115] Earnings from real estate operations might be devoted to reducing the contributions to the fund required of employers and workers or be paid into the State's treasury. If the former application of the money was made, the highway department should pay only the pension fund's acquisition costs when buying the required right-of-way from the funds, except where the funds did not earn a net return of 3½ percent, the highway department should supply the difference.

Conclusion

Developments in the law since 1957 indicate general acceptance of the power to acquire title to rights-of-way substantially before road construction is to begin, assuming there has been methodical planning of the State's over-all highway needs. Six States have enacted statutes explicitly giving such authority to their highway departments; none of the fifteen States that had similar statutes in 1957 have repealed theirs. Bases for implying advance acquisition authority exist in the law of many more States. Use of pension funds to finance advance acquisition is proving successful in Ohio and shows signs of spreading to other States.

However, it is hard to say how long in advance of construction right-of-way may be acquired. Probably the length of time varies with the factors affecting the probability of ultimate use of the land for highway purposes and the likelihood that costs will be reduced or community planning aided by acquisition a given time in advance of anticipated construction. Several relevant factors have been suggested in each of several different locales—rural, suburban, and urban core. The suggestions are tentative and must remain so until the experience of the several State highway departments is gathered into orderly form. There are few court decisions on the point.

The utmost flexibility as to the type of interest in land the State is allowed to acquire seems desirable. Acquiring the interest of a vendee, or of a lessee with option

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[114] An actuary and consultant to the Municipal Finance Officers Association says pension funds should earn a minimum of 3½ percent to balance income and expenditures. The Wall Street Journal, Midwest Edition, July 20, 1962, p. 1, col. 1.

[115] Some realty development by pension funds already has occurred. The Ohio State School Employees Retirement Fund is constructing and will own a $7 million hotel in downtown Columbus. In Wisconsin, a State pension fund owns and leases for a long term a department store in Madison occupied by Sears, Roebuck & Co.; Texaco, Inc. service stations in Wisconsin, Michigan and Iowa, and various other retailing properties around the country. Pension funds are authorized to own real estate in Ohio, Wisconsin, Minnesota, New Mexico, New York, Georgia and Kentucky. The Wall Street Journal, Midwest Edition, July 20, 1962, p. 1, col. 1; p. 17, col. 5.

to purchase, allows installment payment of the purchase price, which lets the State tie up more land with a given amount of money, and also may aid in recovering excessive severance damage payments. Power to exchange land parcels for others needed for the highway and to acquire parcels for this purpose is desirable also.

Legislation is recommended requiring consideration of the effects of the future highway on the value of remaining parcels in determining severance damages and set-off of increments in remainder value against the compensation to be paid for the parcels taken.

Various techniques have been suggested for reducing acquisition costs and recouping severance damages. One is installment payment of acquisition costs, preferably in conjunction with renegotiation of severance damage awards in instances of sale of the remnant, within a stated number of years following the State's taking, at a price that is excessive when compared with the value at which the remnant was appraised at the time of taking. Removal of equitable servitudes, in certain circumstances, from the category of property for which compensation must be paid when the government acquires realty might save substantial sums in acquiring right-of-way in suburbia. Obsolescence of the highway caused by destructive lineside land uses may be forestalled by the State acquiring a servitude over such land binding it to the use to which it is put when the servitude is acquired and such other uses a State authority controlling use of lineside land might permit. Most important of all, State development of the land values created by the highway construction program should be considered. By acquiring entire tracts where possible and either leasing or developing itself the portion not used for the right-of-way proper, the State may achieve a substantial reduction in the cost of the highway program to the taxpayer and of State government generally.

Appendix

ADMINISTRATIVE EXPERIENCE OF OHIO IN ADVANCE ACQUISITION OF RIGHTS-OF-WAY

September 5, 1962, Professor James Munro of the College of Law, Ohio Northern University interviewed William J. Gross, Deputy Director, Division of Right of Way, Ohio Highway Department and his assistant, James Stegmeier. The questions Professor Munro asked were suggested by Professor Waite. The questions with the information they elicited are presented below:

1. What problems have been caused by failure to give local governmental units authority to acquire land for future highway use?

No specific factual examples were given of right-of-way acquisition being made more difficult or more expensive because of a lack of authority for advance acquisition by local authority. Apparently a need is felt for such authority, however. A bill was sponsored in the State legislature by a Cleveland planning agency that would allow municipalities to obtain options of three to six months' duration to buy land. The bill was not enacted since no State funds were provided to pay for advance purchases made by the municipalities. Existing statutes in effect allowing the State Director of Highways to finance advance acquisitions with retirement and workmen's compensation funds make no provision for such financing by local government. The Director does sometimes acquire city land under the existing future acquisition statutes, Ohio Rev. Code, §§5501.112 et. seq.

2. Have there been problems caused by giving local governmental units such authority?

Cincinnati appears to be the only municipality that has made advance acquisitions. No problems were reported.

3. What is the usual lead time between taking land and starting construction on those projects actually built on the right-of-way acquired?

Within three to six years. The land is first acquired by the lending agency and held for some time before being transferred to the State for highway purposes. The average time the lending agency holds small rural tracts is three months to one year; for urban tracts it is one to three years. Actual construction follows within two years after transfer to the State. The longer period the lending agency usually holds urban land reflects the Director's interest in acquiring urban parcels, particularly where subject to rapid increases in price, before acquiring rural land.

4. What is the maximum lead time where construction ultimately occurred on the right-of-way acquired?

The Ohio Revised Code, §§5501.112 et. seq. requires the lending agency acquiring the land to transfer the land to the State within five years after acquisition. Since construction starts within two years following transfer, the maximum permissible lead time is seven years. The officials interviewed indicated no need for a longer time.

5. Where the right-of-way has never been used, how long after the acquisition were the plans changed? On the average? Extreme case?

No information available on this point.

6. How is land used prior to highway construction and after acquisition?

The property is leased. The policy is to acquire property having rental value or vacant property. Property unlikely to increase in value and which might be hard to lease is deemed unsuitable for the advance acquisition program. Professional realty management agencies manage the rental property under contract with the State.

7. Have there been any complaints where a private investor has relied on a designated right-of-way and then it has been vacated or there has been a relocation before construction?

In the Akron area, US 224 may be relocated so that a certain proposed interchange area will not be used. Owners of about 20 homes in the area of the proposed interchange must decide whether to sell, perhaps at a loss, or remain. No instances have arisen where a business moved in order to be close to a proposed new highway which either was later built in a different location or was not built at all.

8. How does the State finance advance purchases? Are there any "bugs" in the method?

The procedure established in Ohio Rev. Code, §§5501.112, et. seq., is followed, which permits use of the funds of three retirement boards, Public Employees, State Teachers, Public School Employees, and of the industrial commission as well. So far, only funds of the various retirement boards have been used. Ohio officials seem happy with the arrangement. Advantages to the retirement boards include lower administrative costs than are experienced with other investments, while achieving a higher return. Earnings average 5¼ percent on money invested in right-of-way for future highways, but only 4 percent on money invested in legal securities. The State Highway Department is presently making an estimate of the program's savings to the State. It is thought the savings will run to $4 million for the past three year period.

No particular difficulties have been encountered in the program except as stated in response to the next question.

9. Are Federal matching funds readily obtained for advance acquisitions?

Tracts acquired in advance of contemplated construction are paid for entirely with funds of the various State retirement boards. It is only when they are transferred to the Highway Department that payments are made for which Federal matching funds might be sought. Payments at the time of the transfer are viewed as being for current construction, so in a sense the problem posed by the question does not arise. However, the Ohio Rev. Code, §§5501.11 requires the Director of Highways and the retire-

ment board that made the advance acquisition to agree on a price the Highway Department will pay the retirement board when the land is transferred to the Department. The price is to be the purchase price paid by the retirement board plus an annual percentage of such retirement board purchase price. In practice this percentage runs about 5½ percent per year.

Federal regulations prohibit matching payments for interest or borrowing charges connected with land acquisition. The Bureau of Public Roads considers the payments made to the retirement boards computed as an annual percentage of the purchase price paid by the retirement boards to be in the nature of interest and refuses to pay matching funds for it. The State Highway Department asserts the payment is a "holding charge," not interest, for which matching funds should be available. The question had not been resolved as of September 5, 1962.

A second problem arises from the Ohio technique of using a retirement board to make advance acquisitons and hold tracts so acquired until the Highway Department needs to use them. Regulations of the Bureau of Public Roads provide, where a State pays the full cost of acquisition, that Federal funds "could participate in all such costs, less rentals and salvage." (Section 4S of Bureau P. PM-21-4.1.) The Highway Department asserts rentals collected by the retirement boards before transferring the land to the State for highway purposes are not to be deducted from the acquisition price under the above regulation; the Bureau asserts they are. The matter was unresolved as of September 5, 1962. All agree rents collected after the transfer are to be deducted.

10. Reaction to a proposal by Professor Waite that pension and other such funds be used to buy entire tracts, retaining the excess and developing it or leasing it.

The Ohio Highway Department tries now to acquire complete tracts. If only a portion of the tract is needed for the right-of-way, Federal matching funds are available for the market value of the entire tract. Separate computations are made of (a) the market value of the land actually needed for right-of-way, (b) the severance damages paid, (c) the amount by which the value of the entire tract exceeds the sum of (a) and (b). Then, if the State later sells the portion of the land not used for the right-of-way, profit or loss is determined in reference to item (c). The Bureau of Public Roads receives one-half of the profits so computed but does not share in the losses. This may suggest the Bureau would similarly share in any profits achieved by State development of the land.

11. What suggestions do the State officials have for minimizing excessive severance damages?

Ohio experience indicates that sometimes the remnants of several tracts remaining after different "takes" can be assembled into usable parcels of substantial value, whereas each remnant before assembly was worth little or nothing. No other suggestions were made.

General Comment

The response to question 9 shows Ohio's difficulty with the Bureau in obtaining matching funds for the annual holding charges of the retirement boards. The problem does not arise in California where a revolving fund is used to finance advance acquisitions, because the fund makes no such charge. Perhaps California should require such a charge to be paid the fund. Paying a holding charge in addition to repaying the sum used from the revolving fund would augment the fund's size somewhat and so counteract the gradual diminution in the fund's effectiveness now occurring because of general increases in land prices without any expansion of the dollar size of the fund. Since the savings achieved by advance acquisition are experienced to a substantial degree at the Federal level—due to the cost sharing features of the program of Federal aid for highway construction—it seems thought should be given to revising Federal law to allow paying interest charges in this special situation. Meanwhile, States will enhance their chances of getting matching funds for such charges if the charge is made as a fixed fee for property management services.