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Supplemental Condemnation: A Discussion of the Principles of Excess and Substitute Condemnation

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by John P. Holloway for John C. Vance, HRB Counsel for Legal Research, principal investigator, serving under the Special Projects Area of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems involving excess and substitute condemnation of property contiguous to a highway but outside of the right-of-way area required for the actual, immediate physical location and construction of the highway. The involuntary acquisition of excess property by condemnation, including the fee title, can be a serious matter, as the courts generally have held that a condemning authority may acquire only such property and/or interest therein as will accomplish the public purpose. The report considers the principle of excess condemnation as vested by statute in the condemning authority, with power to acquire a fee simple title. No cases have been found wherein a court has denied this right to acquire a fee interest where such authority exists.

RESEARCH FINDINGS

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

I. EXCESS CONDEMNATION

Excess condemnation, or marginal land acquisition, may be defined as that property "... contiguous to a highway but outside of the right-of-way area required for the actual, immediate, physical location and construction of the highway."[1]

The term "marginal property" is frequently used in discussions of this topic but it is not necessarily interchangeable or synonymous with the term "excess property," except that both terms

presuppose an acquisition of more property than is actually required for the project. The distinction is one of degree. In its strict legal sense, marginal property is usually the residue or remainder of a tract or parcel of land, a significant portion of which is actually required. Unity of ownership of the part required and the remainder is always present. The courts refer to these remainders as "remnants." On the other hand, while "excess property" may be a true remainder, it usually is comprised of more than a mere remnant and its ownership is often disassociated from the ownership of the required parcel.

It should be noted that the subject of this paper is limited to *involuntary* acquisition of excess property by condemnation. Obviously, short of some sort of constitutional or statutory prohibition against an expenditure of public funds for such purposes (and no cases have been found so holding), excess property can be acquired if the landowner either requests such acquisition or voices no objection thereto.[2] It is therefore assumed that fee title can be taken to the whole parcel, and the condemning authority is at liberty to dispose of the remainder as it deems advisable.

Similarly, if the practice is to be used in an involuntary acquisition (i.e., by condemnation) it must also be assumed that the condemning authority is permitted to condemn a fee title, because, if such authority is lacking, it could not deliver good title to the excess portion, even if all other legal objections were overcome. Obviously, this could be a serious problem, because the courts generally have held that a condemning authority may acquire only such property and/or interests therein as will accomplish the public purpose.[3] Thus, if the public requires only a tract for highway purposes, a mere easement is usually all that is acquired. However, statutes in many states, either directly or indirectly, have vested the condemning authority with power to acquire a fee simple title, and no cases have been found wherein a court has denied this right to acquire a fee interest where such authority exists.[4]

Excluded from consideration herein are those cases that involve a challenge to so-called excess takings, which, in fact, do not involve true excess takings, but involve merely the acquisition of more property than is actually required for the physical construction of the highway. Examples of such takings are land required on which to relocate creeks and waterways that must be moved to accommodate the highway[5] and additional land to improve sight distance.[6] In these cases, the word "excess" may not even appear.

Bearing all these assumptions in mind, it is necessary to start with the United States Constitution, which is our highest form of written law. By the Fifth Amendment the Federal Government cannot take private property for public use without *just compensation*, and by the Fourteenth Amendment no state can deprive any person of life, liberty, or *property* without *due process of law*. Although most states have adopted language in their constitutions similar to that of the Fifth Amendment in the U.S. Constitution, it was established quite early that the "due process" clause of the Fourteenth Amendment required not only that the states pay just compensation but also that the taking be for a public use. In Madisonville Traction Co. v. St. Bernard Mining Co.[7] Mr. Justice Harlan held:

> It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of public character although such taking be accompanied by compensation to the owner.

The earlier decided cases on the question of excess takings are not necessarily found under a key number of their own, but are interspersed among the decisions on "public use," "necessity," and even "future need or use." However, the subject of excess condemnation received extensive treatment prior to the 1950's in 4 law review articles,[8] 13 law review case notes,[9] 4 law review comments,[10] and a number of specialized highway publications.[11] Therefore, the cases discussed hereafter, as well as those cited in footnotes, are merely illustrative, rather than an exhaustive treatment of the entire body of reported cases.

The main reason for mentioning the question of necessity and the cases construing same is that in many of these cases a true excess taking has been factually involved, but the courts have refused to pass directly on the question of the legality of the excess taking, electing instead to turn the case on necessity, which is usually a matter for legislative determination.[12] For this reason the rulings in such cases often appear to be in direct conflict with decisions in the same state when the issue of the legality of excess taking has been specifically raised.

Illustrative of this paradoxical situation is an early Massachusetts case, City of Boston v. Talbott,[13] wherein the court upheld the right of the city to acquire properties outside of the right-of-way, during the construction of a subway, and, in addition, to sell such excess property to private persons after the construction period. In sustaining such acquisition the court said:

> The uncertainties as to the extent of injuries to the adjacent land from construction might cause serious embarrassment in the assessment of damages, and sometimes lead to large awards, founded on risks that might prove to be much less than was at first supposed.

After acknowledging that the issue of public use was a judicial question for the court, the court went on to say:

> ... the question whether the taking of a particular piece of real estate is necessary or expedient is a legislative question, upon which the decision of the legislature, as a tribunal of fact, is conclusive.

Thus, the question of the legality of the excess taking there involved was nicely avoided.

To the same effect are the many cases involving true excess takings that are upheld, either because such excess taking is reasonably incidental or necessary to the success of the public project,[14] or because such takings are required for future expansion of the project to meet the demand of the public.[15] Acquisition for such purposes is obviously not in the same category as the acquisition of a marginal or excess property that the condemning authority initially intends to sell or lease to a private party; i.e., re-sale of the excess is the purpose of the acquisition.[16] It is the legality of this type of acquisition that is the principal topic of this paper.

According to recognized highway literature[17] the purpose or justification for the acquisition of such excess or marginal lands is:

1. To effect economy, by acquiring an entire tract of land when the necessary portion plus the severance damages to the remainder would involve an equal or greater expenditure than if the entire tract is acquired with the right to later salvage the remainder.

2. To prevent creation of small uneconomical remnants of land.

3. To remove unsightly buildings and obnoxious uses and to assist appropriate landscaping.

4. To control the use of adjoining property for aesthetic, safety, or future highway development objectives by incorporating restrictive easements on a later sale of marginal property.

5. To diminish right-of-way costs through the sale of the acquired marginal land.

Nichols, in his work on eminent domain,[18] states that there are three distinct theories underlying the concept of excess takings: (1) the remnant theory, (2) the restrictive or protective theory, and (3) the recoupment theory.

Basically, the remnant theory is merely the statutory authorization for the acquisition of remaining property when such property is left in such size, shape, or condition as to be practically worthless. The restrictive or protective theory of excess acquisition, with or without statute, authorizes acquisition of adjacent property for the purposes of placing restrictions thereon for safety or aesthetic purposes. In the recoupment theory, adjacent properties are taken for a considerable depth outside the right-of-way and then reassembled or platted and sold to private citizens. Although Orgel, in *Valuation Under Eminent Domain*,[19] recognizes the first two as legitimate theories, when discussing the third theory he is more candid than academic when he states: "... [T]he condemnor itself goes into the real estate business in an attempt to salvage the enhanced values created by the improvement."

The early attitude of the courts toward excess acquisitions, whether accomplished with or without statutory authority, and irrespective of the theory or purpose, is almost solidly in opposition.[20] The reason for such judicial opposition, of course, was its insistence on a strict interpretation of the constitutional requirement that property had to be taken for a public use--a fundamental principle in early common law jurisprudence.

Illustrative of this attitude is the case of In re Opinion of Justices[21] wherein the Massachusetts House of Representatives submitted certain interrogatories to the court relative to the constitutionality of a statute that would permit the City of Boston to lay out a wide thoroughfare and acquire considerable property on either side thereof, which property was to be subsequently sold or leased to mercantile interests with certain use restrictions imposed thereon. In rejecting the contention that such use would be public in nature, because of the vast benefits to the community, the court held:

> It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage to the community, and thus the public welfare, may be ultimately benefited by their promotion.

Not being particularly satisfied with such answer, the Massachusetts Senate propounded further interrogatories to the court In re Opinion of Justices[22] and eliminated from the proposed legislation the suggestion that public funds would be used to construct the mercantile center on the excess property. Again the court held that the legislation would be unconstitutional, but did uphold the taking of remnants, with the following definition thereof:

> ... [remnants] ... so small, or of such shape and of so little value that the taking [thereof] in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary in connection with the taking of land for the public work. (Emphasis added.)

Whether this opinion was the result of political expediency, or whether the court granted more latitude than they intended, is unknown; but, suffice it to say, the Massachusetts Supreme Court put an end to the state's real estate dreams three years later in Salisbury Land & Improvement Co. v. Commonwealth[23] when the legislature authorized the acquisition of some 3 1/2 miles of oceanfront property for a state park, with the further provision that lands not needed for public use might be sold or leased. In discussing this legislation, the court held:

> Legislation which is designed or which is so framed that it may be utilized to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose is unconstitutional.

Other states also met the same type of early judicial opposition from their appellate courts, particularly where the excess was to be re-sold or leased, whether the excess takings were based on the remnant or the protective theory. For example, in Pennsylvania Mutual Life Insurance Co. v. City of Philadelphia,[24] an attempt was made by state statute to take property within 200 feet of parkways and to charge the remainder with restrictive covenants for the benefit of the parkway before resale. While upholding an aesthetic type of excess taking, the court proscribed the resale thereof in the following language:

> It is not compelled to use the ground appropriated for the highway solely for sidewalks and cartways, but may devote part of it to aesthetic purposes and ornament and beautify it. This is a legitimate use of the land in connection with the primary purpose for which property may be appropriated for a public thoroughfare. It, however, contemplates occupancy or possession by the city of the land taken for the highway, and not that it shall be owned and in possession of a private party. (Emphasis added.)[25]

One Maryland case of this vintage (1911) was found, however, where the acquisition of adjacent property and subsequent sale thereof was inferentially sustained[26] but the ruling was predicated on the fact that the use of such property would be "incident to and for the purpose of the construction of the highway and its connections ...", which appears to be a strained judicial assumption and definitely is not supported by the three Maryland cases cited. It is interesting to note that the court was forced to comment in conclusion that it had to assume that the city would not "... undertake to condemn for purposes other than those authorized by the act...." but, if it did, the court could pass on same later.

Following this early era of unfavorable treatment at the hands of the bench a number of states enacted constitutional amendments to permit marginal or excess acquisitions, while others contented themselves with the passage of statutes authorizing same. More recently, other states have made provisions for such acquisitions in connection with controlled-access legislation. Today many states have some type of enabling legislation with reference to acquisition of excess lands.[27]

Although the *legislative* trend would definitely seem to favor such acquisition, the early *judicial* attitude, with exceptions to be noted hereafter, was still unwilling to accept an unrestricted use of such power.

Illustrative of a municipal excess acquisition and subsequent resale under constitutional authority is the leading case of City of Cincinnati v. Vester,[28] where the U.S. Court of Appeals ably reviewed the three theories, only to turn such acquisition down in the final analysis as a denial of

the due process clause of the Fourteenth Amendment. The court pointed out that there was no protective plan involved and the takings involved considerably more than mere remnants. The U.S. Supreme Court granted certiorari and affirmed the Court of Appeals but, unfortunately, from the standpoint of precedent, did so on the basis that the City had failed to adequately define the purpose of the excess appropriation as required by the state statute.[29] The Court expressly refrained from expressing an opinion on the other issues involved, although it did note in passing that the takings clearly involved more than remnants and hence indicated disapproval thereof.[30]

The failure to define the purpose of the excess taking, even though authorized by state constitution, caused another Ohio municipality to suffer defeat in a subsequent case before the Ohio Supreme Court.[31] Apparently even an intimation that *sale* of the excess was contemplated caused many appellate tribunals in earlier decisions to strike down the legislation authorizing the taking.[32]

Illustrative of a typical statutory provision authorizing excess or marginal acquisition is the California statute (Streets and Highway Code, §104.1), which has been copied verbatim by many states. This statute provides as follows:

> Whenever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire by purchase or condemnation the whole parcel and may sell or release the remainder or may exchange the same for other property needed for state highway purposes.

This statute was sustained by the California Supreme Court in People v. Thomas[33] insofar as the acquisition of two excess acres was concerned, which acres were irregular in shape and in a location inaccessible to the owner. The court pointed out further that the owner had received the fair market value thereof and in an amount equal to any possible severance damage he might have suffered if the same had not been acquired. The Thomas case was followed by People v. Lagiss,[34] a 1958 decision, wherein a California Intermediate Court of Appeals recognized the right of a landowner to contest the right to take the excess if he supports his allegations of a fraudulent, abusive, or bad faith determination with facts. However, this determination was reversed, or perhaps "clarified," by the California Supreme Court in People v. Chevalier,[35] a 1959 decision, which held that determinations of necessity for a particular taking were not justifiable issues, irrespective of allegations or proof of alleged fraud, bad faith, or abuse of discretion, and that the only limitations placed on the exercise of the right of eminent domain by the United States and California Constitutions are that the taking be for a "public use" and that "just compensation" be paid for such taking. Thus, when the Lagiss case was again presented for intermediate appellate review[36] in 1963, the issue was narrowed as to whether this property owner could affirmatively establish bad faith or abuse of discretion in the sense that the Highway Department did not actually intend to use the property as it resolved to use it; i.e., for "highway purposes," which admittedly is a "public use." The court thereby limited the property owner to proving that the "real purpose" was not for highway purposes, but for private purposes, or a public purpose not related to the highway project. As there was ample evidence that the excess was, in fact, used for improving sight distance, drainage, slope, and appearance, the excess taking was upheld notwithstanding that the property owner was able to show that the Highway Department had under consideration various proposals to turn it over to the county or sell it to an adjacent cemetery association.

Since 1950, the judicial trend appears to favor a broader concept of public use than originally recognized. Hence, the courts have sustained the subsurface use of a street for a public parking area as being a public use within the original servitude without the necessity for payment of additional compensation to abutters;[37] they have sustained acquisition of property outside the right-of-way for a parking lot;[38] and they have sustained as a proper public use the acquisition of a tract of ground outside the right-of-way for a weighing station.[39]

With the coming of the freeway or other type of limited-access highway, whether operated as a free road or as a turnpike, the courts were called on to re-examine the constitutionality of excess or marginal takings; at the same time they were called on to examine identical principles of law in connection with urban renewal projects and various types of harbor or port improvement districts that involve the acquisition of private property and then a subsequent resale and development thereof in keeping with a master plan of the particular public improvement project. Although the particular subject matter of these types of projects is beyond the scope of this paper, footnote reference to some of the leading urban renewal[40] and special district[41] cases must be included, because the legal principles involved are equally applicable to excess or marginal highway takings and the legal rationale is easily interchanged. Generally, with one exception,[42] the urban renewal and special district cases uphold the constitutionality of "take from one--sell or lease to another" in very broad language.

There are a number of highway cases that merit special discussion.[43]

One of the first states to adopt the new broad concept of public purpose was Wisconsin. In State ex rel. Thomson v. Giessel,[44] a declaratory judgment type of action, the Wisconsin Supreme Court in 1953 upheld the legality of the Wisconsin Turnpike Commission. It also sustained, as being within the due process clause, a summary-taking method for acquisition of private property, holding that the due process requirements were satisfied so long as the owner was afforded the opportunity to have the issue eventually tried by the courts if he so desired.[45] Among the powers vested in the Commission was the power to condemn property that the opponents argued included excess lands. This authority provided, *inter alia:*

> Turnpike corporations may acquire by gift, devise, purchase or condemnation any lands determined by them to be necessary for establishing ... its project including lands which may be necessary for toll-houses and appropriate concessions and for any other purpose authorized by this act. Title may be acquired in fee simple and any other interest in lands may be acquired as may be deemed expedient or necessary by the corporation. Any lands determined to be unneeded by the corporation may be sold by the corporation at public or private sale with or without restrictions or reservations concerning the future use and occupation of such lands so as to protect the project and improvements and their environs and to preserve the view, appearance, light, air and usefulness of the project. (Ch. 186, Wisc. Laws of 1953, §182.35(1).) (Emphasis added.)

While admitting that condemnation of excess lands was unconstitutional, the court, quoting from Bond v. Mayor & City Council of Baltimore,[46] held:

> It cannot be assumed in this case that the city will undertake to condemn or take property for purposes other than those authorized by the act. The presumption is that the City will act within its rights, and not beyond them.

In discussing the matter further the court held:

> The power to sell lands taken when it is determined that they are no longer needed for public use is "latent in every taking, and is very different from a taking, and is very different from a taking of land with a contemporaneous knowledge and purpose that a definite and separable part is not necessary for the public use." (Citing Nichols and other cases.)
>
> Sec. 182.35(1) permits the corporation to condemn only such lands as are "necessary." In its determination of what lands are necessary, it is presumed the corporation will act in good faith. Contingencies may well arise, however, in the "construction, reconstruction, improving and maintaining" of the project to make certain lands acquired by the corporation (including those acquired by purchase and gift, as well as by condemnation,) unnecessary; and in providing that such lands may be disposed of by the corporation the act cannot be construed as allowing taking of property for private purposes.

The Turnpike Corporation was then given an all-inclusive tax exemption and, in addition, the following powers:

> To lease suitable parcels of land for or to construct and lease to private persons, after competitive bidding, gasoline stations, garages, stores, hotels motels, restaurants, tourist rooming houses, and such other facilities as the corporation may deem to be necessary or desirable. The corporation shall have full power to determine the number and location of such facilities.

The landowner thus contended that the tax exemption coupled with the foregoing additional power amounted to unreasonable classification and hence a denial of equal protection of the laws guaranteed by the Wisconsin and the Federal Constitutions. But, in answer to this argument, the court said:

> Under this rule the legislature has not exceeded its authority in giving the tax exemptions of section 182.46 to toll-road corporations. So far as the powers conferred on such corporation by Sec. 182.33(5) are concerned, we must assume that they will be exercised in good faith and only such concessions leased as are "necessary or desirable" in accomplishing the public purpose expressed by the legislature in Ch. 186. For a discussion of what facilities may be considered necessary and desirable in connection

with the operations of a modern toll road see, Opinion of the Justices, Mass. 1953, 113 N.E.2d 452.

The Massachusetts case to which the Wisconsin court refers, and apparently uses as an authority, In re Opinion of Justices,[47] represents a complete reversal in the judicial attitude of the Massachusetts judiciary as compared to their earlier opinion concerning the Boston throughfare previously discussed.[48] The case is lengthy and is mandatory reading for anyone interested in excess or marginal takings. Suffice it to say, they upheld the legality of legislation creating the Massachusetts Turnpike Authority, including the right

> ... to acquire sites abutting on the turnpike and to construct or contract for the construction of buildings and appurtenances, for gasoline stations, restaurants and other services and to lease the same for the above purposes in such manner and under such terms as it may determine.

In an effort to answer its apparent reversal of attitude the court pointed out that the Constitution had since been amended to authorize excess takings but that, even if it had not been so amended, the so-called excess takings involved in the Massachusetts Turnpike were not really "excess" at all but were essential to the public benefit due to the character of the turnpike, which the court likened to a reailroad, which, of course, requires adjacent facilities for stations and loading decks, etc. In discussing this, the court said:

> What land is needed for the actual construction of this new type of turnpike and what forms part of it and what is outside of it are matters not to be determined by the same standards as would be applied in the case of the county road of fifty or even of twenty-five years ago. This enterprise must be envisioned as a whole in its larger aspects. In our opinion not only the worked portion of the roadway, including, of course, bridges, abutments, embankments and approaches, but also the kinds of buildings and other structures which we have mentioned [garages and gasoline stations] and a reasonable amount of land taken or acquired on which to place them are all "needed for the actual construction" of the highway and are parts of it and will be taken or acquired for and devoted to a public use, and land taken for such purposes will not be "more land and property than are needed for the actual construction" of the highway. We think therefore that reasonable takings for these purposes may be authorized by the legislature under the powers which it possessed before the amendment to art. 10 and which were not cut down by that amendment. Such takings will not be for resale to private individuals. There is involved nothing in the nature of a real estate development which the amendment was designed both to permit within limits and to regulate. The requirements of the amendment are inapplicable.

The Massachusetts court then ended its opinion with a cautionary statement that it would interpret the words "abutting sites" strictly and that its opinion should *not* be construed as a "roving commission" for the Turnpike Authority to go into the real estate business.

Michigan was next to follow Wisconsin and Massachusetts. In 1955 the Michigan Supreme Court upheld the Michigan Turnpike Act in City of Dearborn v. Michigan Turnpike Authority.[49] The court held that the legislative grant of power to the Turnpike Authority to enter into contracts with private individuals or corporations for the purpose of providing such ancillary services as gasoline stations and restaurants was merely *incidental* to its discharge of a general power; i.e., highway construction.

An excess taking that would be used solely for the purpose of providing ingress and egress to an adjacent property owner who would otherwise be landlocked in connection with the construction of an Interstate highway was upheld in New Jersey. In State v. Buck[50] the Appellate Division of the Superior Court, while recognizing that private property may not be condemned for private use, held that the highway commissioner had not abused his discretion under the existing statutory grant of power. The pertinent portion of the statute provided as follows:

> In connection with the acquisition of property or property rights for any freeway or parkway or portion thereof, the state highway commissioner may, in his discretion, acquire by gift, devise, purchase or condemnation, an entire lot, block or tract of land, if, by so doing, the interests of the public will be best served even though said entire lot, block or tract is not needed for the right-of-way proper but only if the portion outside the normal right-of-way ... is so situated that the cost of acquisition to the state will be practically equivalent to the total value of the whole parcel of land;...[51]

The court recognized that "interests of the public" could be *financial*, in the form of avoidance of severance damage, and that a use is not denominated public or private by simply relying on the number of persons it serves, noting that enjoyment of the use may be limited to a small group or even to a single person. A similar result was reached by the same court later in 1967.[52]

The most significant case to be decided in the field of excess condemnation is People v. Superior Court of Merced County & Rodoni[53] which is a sequel to and extension of the doctrines announced in People v. Thomas[54] which initially upheld the constitutionality of California's excess taking statute.[55] This statute provides:

> Whenever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.

The Rodoni case involved an acquisition of land by the California Department of Highways for a freeway. The Highway Department proposed to construct the freeway across a farm consisting of a southern rectangular parcel and a northern triangular parcel. The northeast corner of the rectangle touched the southwest corner of the triangle. The freeway crossed the adjoining corners, taking a tip of each, which totaled 0.65 acre. As a result, the northern parcel of approximately 54 acres was landlocked, and the Highway Department sought to take the entire 54 acres as excess pursuant to the California statute.[56]

The Highway Department candidly alleged that if it were allowed to condemn the entire parcel, the property owners would receive full value for their property, the risk of excess severance damages would be eliminated, and ultimately it would be able to reduce the cost of the freeway by selling the part of the parcel not needed for freeway purposes.

The property owners challenged the excess condemnation on the ground that the taking of property for such a purely economic purpose violated Art. I, §14 of the California Constitution because such taking was not for a public use. This particular provision of the California Constitution provides, in part, as follows:

> Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into the court for, the owner....[57]

The property owners further contended that excess condemnation must be limited to parcels that may properly be deemed *remnants*, and argued that 54 acres, even if landlocked and of little value, could not be deemed a remnant of a 0.65-acre taking. They further argued that the state must pay severance damages for the landlocked parcel and allow them to retain it, even though severance damages might be equal to its full market value. They also asserted that the excess condemnation was prohibited by §14 1/2 of Art. I of the California Constitution because it was not limited to land lying within 200 feet of the freeway. This provision of the California Constitution provides as follows:

> The state, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholely or in part within a distance not to exceed 150 feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of 150 feet only such portions may be acquired which do not exceed 200 feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works. The legislature may, by statute, prescribe procedure.[58]

The court held that §104.1 of the California Streets and Highway Code validly authorizes the trial court to proceed with the action to condemn the 54 acres. The court further held that before it could deny the right to condemn the excess, the trial court must find that the taking was not justified to avoid excessive severance or consequential damages. The court stated that by requiring such a finding, it would assure that any excess taking was for a public use and preclude the Department from using the power of excess condemnation as a weapon to secure favorable settlements.

The court went on to state that it was for the legislature to determine what shall be deemed a public use for the purposes of eminent domain, and its judgment is binding unless there is no possibility the legislation may be for the *welfare of the public,* referring to other sections of the California Streets and Highway Code[59] that give wide latitude to the Highway Department to acquire property not immediately needed or property not physically needed for state highway purposes.

In reply to the argument that the California Constitution limits excess condemnation to takings within 200 feet of the improvement, the court held that §14 1/2 of Art. I of the California Constitution limits the property to be taken for *protective purposes* to property lying within 200 feet of the public work. The court stated that inasmuch as this section of the Constitution authorizes condemnations only for protective purposes, it does not restrict condemnations for other purposes.

With reference to §104.1 of the California Highway Code, the legislature has determined that excess condemnation is for a public use whenever remaining parcels are of little value or of such a condition as to give rise to claims or litigation concerning severance or other damages. Although the statutory language is broad, it may reasonably be interpreted to authorize only those excess condemnations that are for valid public uses; namely, condemnation of remnants or condemnations that avoid a substantial risk of excessive severance or consequential damages. The court held that on the record before it, the taking in the present case was justified on this latter ground.

In reply to the size arguement (i.e., 54 acres is hardly a remnant of a 0.65-acre taking) the court stated that although a parcel of 54 landlocked acres is not a physical remnant, it is a *financial remnant.* Its value as a landlocked parcel is such that severance damages might equal its value.

Specifically, the court said:

> There is no reason to restrict this theory [remnant theory] of the taking of parcels negligible in size and to refuse to apply it to parcels negligible in value. (Emphasis added.)

The court then went on to state that in the present case the entire parcel probably could be be condemned for little more than the cost of taking the part needed for the highway and paying damages for the remainder, and that it was sound economy for the state to take the entire parcel to minimize ultimate cost. Quoting from a Federal case, United States ex rel. Tennessee Valley Authority v. Welch,[60] the California court stated:

> The cost of public projects is a relevant element in all of them and the government just as anyone else is not required to proceed oblivious to the elements of cost and when serious problems are created by its public projects the government is not barred from making common sense adjustment in the interests of all the public.

As a "protection" for the property owner, the court held that to raise an issue of improper excess taking, condemnees must show that the condemnor is guilty of fraud, bad faith, or abuse of discretion, in the sense that the condemnor does not actually intend to use the property as it resolved to use it. The question of public use turned on the determination of whether the taking is justified to avoid excessive severance or consequential damages. Accordingly, if the court determines that the excess condemnation is *not* so justified, it must find that it is not for a public use.

The decision was not unanimous (5 to 2), and a strong dissenting opinion was filed by Justice Stanley Mosk who rejects the concept of economy, rather than public use or public purposes, as a unique and unsupported rationalization to justify the seizure of an individual's property, noting that the majority's view of cavalier treatment of private property right evokes "apprehension [that] Big Brother may have taken over 16 years before 1984."

There is some indication that the Rodoni case will be reluctantly received by the California bench. In People v. Jarvis[61] an intermediate Court of Appeals upheld a trial court's refusal to allow an amendment of a condemnation pleading to include the remainder during the trial. Suspecting this to be a maneuver designed to force or compel settlement, the Appellate Court stated that the condemnor must do more than merely plead that the excess is necessary in order to avoid excessive severance or consequential damages.

There is also some indication that the Rodoni case will not be followed in other jurisdictions.

In State Highway Commission v. Chapman[62] the Montana Supreme Court distinguished, thereby rejected, the Rodoni doctrine. Montana's excess statute provided as follows:

> Acquisition of whole parcel--Sale of excess.
>
> (1) Whenever any interest in a part of a parcel of land or other real property is to be acquired for highway purposes leaving the remainder in such shape or condition as to be of little market value or to give rise to claims or litigation over severance or other damage, the Commission may acquire the whole parcel. It may sell or exchange the remainder for other property needed for highway purposes.
>
> (2) Whenever a part of a parcel of land acquired for highway purposes is in such a shape or size as to come within the provisions of section 11-614, the Commission shall prepare and file the required plat in the Office of the County Clerk and Recorder.[63]

The actual taking was for the *purpose of rounding a corner*. The total area, containing three lots, was 10,500 square feet. The necessary land to round the corner amounted to 1,052 square feet, leaving 9,448 square feet in the remainder. The property owner objected to taking the remainder, stating that if for no other purpose the land had a "sentimental value" to him. The trial court found that, in the preliminary order of condemnation, the taking was to be limited to that portion of the property actually needed for the proposed highway improvement. The Highway Department relied on the Rodoni case, but the Montana Supreme Court distinguished this case, noting that there was a difference in the two statutes, in that the California statute required the remainder to be left to be of *little value to the owner*, whereas the Montana statute provided that the remainder be of *little market value*. The Montana Highway Department urged the Supreme Court to adopt the "financial remnant theory," established in the Rodoni case, and declare that "public use" and "public interest" should be synonymous at the judicial review state, when the Commission's determination of necessity is under question. The pertinent Montana constitutional provision provided:

> Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner.[64]

In discussing the three theories supporting excess takings (protective, recoupment, and remnant), the court noted that the Montana statute provides for the taking of a whole parcel whenever condemnation of a part actually needed leaves the remainder in such a shape or condition to (1) be of little market value, or (2) give rise to claims or litigation over severance or other damage. The court rejected the Highway Department's contention with reference to (1), because there was no evidence showing total loss of value.

In discussing the second part dealing with authorizing the taking where the taking of a part would give rise to claims or litigation over severance, the Supreme Court stated:

> The trial court noted the possibilities of coercion which could result from this unbridled authority in bargaining for highway lands are both awesome and of doubtful validity.

The trial court noted that, in the subject case, the remainder was not landlocked by the taking of the portion actually needed. Therefore, it distinguished the fact situation in this case from the fact situation involved in Rodoni. It appears, therefore, that the landlocked characteristic of the remainder was critical in the court's rejection of the Rodoni case.

The Delaware Supreme Court has likewise rejected the Rodoni doctrine; i.e., the recoupment theory to authorize excess takings. Although an earlier (1967) case[65] may have indicated otherwise, the most recent case, State v. 9.88 Acres,[66] flatly rejects the recoupment theory.

That case involved acquisition of right-of-way for an Interstate highway. The taking of 9.88 acres of land would result in a complete denial of access to 14.76 acres. The Delaware excess taking statute provided as follows:

> ... In connection with the acquisition of property or property rights or any controlled accessed facility or portion thereof, or service road in connection therewith, the department may, in its discretion, acquire an entire lot, block or tract of land if by so doing the interests of the public will be best served, even though said entire lot, block or tract is not immediately needed for the right-of-way proper.[67]

The Highway Department conceded that it had no immediate need for additional 14.76 acres, and no plans for its future use. It sought to condemn the additional or excess acreage solely on the ground that the compensation it would be required to pay by the condemnation of the 9.88 acres would

approximate the cost of the entire tract, because access from the land would be denied by the taking of the 9.88 acres. This reason, the court observed, is an economic one.

The Highway Department advanced the so-called recoupment theory to justify its taking of this additional acreage.

The court held that language from its earlier opinion was dictum,[68] and went on to hold that the attempt by the Highway Department to take this excess 14.76 acres fell squarely within the recoupment theory. The court stated that because the Highway Department had no foreseeable future use for this excess land, it might not acquire same through the power of eminent domain, noting that the recoupment theory has been rejected by at least the majority of the states that still adhere to the doctrine that private property may be taken for public purposes only when the condemning authority has an immediate public use for the property, or has plans for a public use of the property in the foreseeable future.

With reference to the Buck case,[69] the Delaware court held that the New Jersey statute was much broader, and it rejected the suggestion that the excess might be acquired under the remnant theory. The court found that the so-called remnant in this case (the 14.76 acres) was not worthless, or practically worthless, and hence was not a "remnant."

The Rodoni case is by far the most avant-garde decision in the field of excess highway condemnation in that it approves, at least by implication, the recoupment theory as an adequate constitutional justification for such takings. As has been demonstrated, little question remains about the constitutionality of excess takings that involve pure remnants, or excess takings for protective purposes.

Rodoni has provoked a considerable outcry of concern from legal commentators[70] and it remains to be seen how it will be received in other jurisdictions. So far, it has been rejected in Montana and Delaware,[71] the first two states to consider it.

The interesting philosophical question remaining is: How can the courts justify the "take from one and sell to another" in urban renewal takings and deny it in highway takings? Perhaps the answer lies in the changing, or evolutionary, meaning of "public use" or "public purpose" which now apparently means "public benefit." In 1913 the Massachusetts Supreme Court said:

> Legislation which is designed or which is so framed that it may be utilized to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose is unconstitutional.[72]

In 1969, the Federal 9th Circuit, speaking through Judge Chambers, said:

> On urban renewal condemnations, usually done with the help of federal renewal funds, the whole scheme is for a public agency to take one man's property away from him and sell it to another. The founding fathers may have never thought of this, but the process has been upheld uniformly by latter-day judicial decision.[73]

The court then went on to state that it was unable to distinguish how the concept of public purpose differed in the Guam case (acquisition, re-platting, and re-sale to establish a more orderly system of streets and ownerships adjacent thereto) from the concept of public purpose in the urban renewal or redevelopment cases. To the author, the distinction is equally hard to draw between highway takings and urban renewal takings.

FOOTNOTES PART I

1/ "Acquisition of Land for Future Highway Use: A Legal Analysis." *HRB Spec. Rep. 27* (1957) p.46.

2/ Winslow v. Baltimore & Ohio R.R., 208 U.S. 59, 28 S. Ct. 190, 52 L. Ed. 388 (1908); Mayo v. Windels, 255 App.Div. 22, 5 N.Y.S.2d 690 (1938).

3/ McInnis et al. v. Brown Co., 41 S.W.2d 741 (Tex. 1931); Houston North Shore Ry. v. Tyrrell, 128 Tex. 248, 98 S.W.2d 786 (Tex. 1936); Selle v. City of Fayetteville, 207 Ark. 966, 184 S.W.2d 58 (1945); Shedd v. North Indiana Pub. Ser. Co., 206 Ind. 35, 188 N.E. 322 (1934); Henry v. Columbus Depot Co., 135 Ohio St. 311, 20 N.E.2d 921 (1939); Valentine v. Lamont, 13 N.J. 569, 100 A.2d 668 (1953); Gregory v. Okla. River Products Line, 223 Ark. 668, 267 S.W.2d 953 (1954); Clouse v. Garfinkle, 190 Tenn. 677, 231 S.W.2d 345 (1950); Frelinghuysen v. State Highway Comm'n, 107 N.J.L. 218, 152 A. 79 (1930) (permitted excess taking to improve sight distance);

DePenning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W.2d 503 (1948); Greater Baton Rouge Comm'n v. Watson, 224 La. 136, 68 So. 2d 901 (1953) (if improvements are to be erected, fee may be taken). For an interesting case prohibiting condemnation of a future interest, see Livonia School Dist. v. Wilson, 339 Mich. 454, 64 N.W.2d 563 (1954).

4/ As to the legal interest that the various states may acquire, see "Condemnation of Property for Highway Purposes: A Legal Analysis: Part I." *HRB Spec. Rep. 32* (1958) Table 4, p.10.

5/ Haser v. Allegheny County, 322 Pa. 458, 185 A. 763 (1936). *See also* 2A Nichols, *The Law of Eminent Domain* §7.5121 (3d ed.).

6/ Barrett v. State Highway Dep't, 211 Ga. 876, 89 S.E.2d 652 (1955).

7/ 196 U.S. 239, 251, 25 S. Ct. 251, 49 L. Ed. 462 (1905). *See also* Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

8/ 11 Marq. L. Rev. 222; 13 Marq. L. Rev. 69; 3 Mo. L. Rev. 1; 46 Colum. L. Rev. 108.

9/ 14 Va. L. Rev. 64; 36 Yale L.J. 1180; 17 Nat'l Munic. Rev. 771; 19 Nat'l Munic. Rev. 106; 18 Nat'l Munic. Rev. 639; 39 Yale L.J. 128; 29 Colum. L. Rev. 1151; 3 So. Calif. L. Rev. 121; 4 U. Cin. L. Rev. 94; 16 St. Louis L. Rev. 175; 20 Nat'l Munic. Rev. 228; 21 Nat'l Munic. Rev. 250; 20 Nat'l Munic. Rev. 727.

10/ 18 Calif. L. Rev. 284; 4 U. Cin. L. Rev. 474; 18 Va. L. Rev. 580; 27 Wash. U.L.Q. 466.

11/ "Public Control of Highway Access and Roadside Development," by David R. Levin, Pub. Roads Admin./Fed. Works Agency, U.S. Gov't Printing Office (1947); "Condemnation of Property for Highway Purposes: A Legal Analysis: Part I." *HRB Spec. Rep. 32* (1958); "Acquisition of Land for Future Highway Use: A Legal Analysis." *HRB Spec. Rep. 27* (1957).

12/ Am. Jur., *Eminent Domain,* §105. *See, e.g.,* People v. Chevalier, 52 Cal. Sup. Ct. 2d 299, 340 P.2d 598 (1959), where the California Supreme Court held that the condemning body's findings of necessity are conclusive and cannot be affected by mere allegations that such findings were made as a result of fraud, bad faith, or abuse of discretion. *See also* Dallasta v. Dep't of Highways, 153 Colo. 519, 387 P.2d 25 (1963).

13/ 91 N.E. 1014, 1016 (1910)

14/ State v. Curtis, 359 Mo. 402, 222 S.W.2d 64 (1949); City of Chicago v. McCluer, 339 Ill. 610, 171 N.E. 737 (1930); Truitt v. Borough of Ambridge, 389 Pa. 429, 133 A.2d 797 (1957).

15/ Pike County Bd. of Ed. v. Ford, 279 S.W.2d 245 (Ky. 1955); Forest Preserve v. Wike, 3 Ill.2d 49, 119 N.E.2d 734 (1954); City of Chicago v. Vaccarro, 408 Ill. 587, 97 N.E.2d 766 (1951).

16/ Likewise, a sale of property after it has been in public use is not, strictly speaking, "excess property," which is a determination made at the time of acquisition.

17/ *Supra,* note 11.

18/ 2A Nichols, *The Law of Eminent Domain* §7.5122 (3d ed.).

19/ §253, Vol. 2, p. 275.

20/ See cases collected in annotations in 14 A.L.R. 1350, as supplemented in 68 A.L.R. 837, as further supplemented in 6 A.L.R.3d 297.

21/ 204 Mass. 607, 91 N.E. 405, 407 (1910).

22/ 204 Mass. 616, 91 N.E. 578, 580 (1910).

23/ 215 Mass. 371, 102 N.E. 619, 622 (1913).

24/ 242 Pa. 47, 88 A. 904, 907 (1913).

25/ *See also* City of Richmond v. Carneal, 129 Va. 388, 106 S.E. 403 (1921).

26/ Bond v. Mayor & City Council of City of Baltimore, 116 Md. 683, 82 A. 978 (1911).

27/ "Condemnation of Property for Highway Purposes: A Legal Analysis: Part I." *HRB Spec. Rep. 32* (1958) p. 8.

28/ 33 F.2d 242, 68 A.L.R. 831 (1929).

29/ 281 U.S. 439, 59 S. Ct. 360, 74 L. Ed. 950 (1930).

30/ The Supreme Court of California also indicated in Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 266 P.2d 105 (1954), that the California constitutional amendment authorizing excess condemnation was limited to "little fractions of lots in the form of slivers or small triangles...."

31/ City of Cleveland v. Nau, 124 Ohio 433, 179 N.E. 187 (1931). *See also* West Realty v. Columbus, 69 Ohio L. Abs. 595, 126 N.E.2d 477 (1953), illustrating the difficulty cities have in justifying excess condemnation, even though such acquisitions are authorized.

32/ Winger v. Aires, 371 Pa. 242, 89 A.2d 521 (1952).

33/ 108 Cal. App. 2d 832, 239 P.2d 914 (1952).

34/ 160 Cal. App. 2d 28, 324 P.2d 926 (1958).

35/ 52 Cal. Sup. Ct. 2d 299, 340 P.2d 598 (1959).

36/ 233 Cal. App. 2d 23, 35 Cal. Rptr. 554 (1963).

37/ Cleveland v. City of Detroit, 324 Mich. 527, 37 N.W.2d 625 (1949).

38/ City of Richmond v. Dervishian, 190 Va. 398, 57 S.E.2d 120 (1950).

39/ Webster v. Frawley, 262 Wisc. 392, 55 N.W.2d 523 (1952).

40/ Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27; Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699 (1959); Gov't of Guam v. Moylan, 407 F.2d 567 (9th Cir. 1969).

41/ Atwood v. Willacy County Navigation Dist., 271 S.W.2d 137 (Tex. 1954); Port of Umatilla v.

Richmond, 212 Ore. 596, 321 P.2d 338 (1958); Sublett v. City of Tulsa, 405 P.2d 185 (Okla. 1965).

42/ Hogue v. Port of Seattle, 341 P.2d 171 (Wash. 1959). The Washington Supreme Court follows the early strict constitution of "public use," and held: "No matter how desirable from an operating standpoint the Port's exclusive control of land use in a given area may appear to be, it is the duty of the courts to uphold the rights of private property against the inroads of public bodies who seek to acquire it for private purposes which they honestly believe to be essential for the public good."

43/ People v. Jarvis, 274 Cal. App. 2d 217, 79 Cal. Rptr. 175 (1969); State v. Buck, 94 N.J. Super. 84, 226 A.2d 840 (1967); State v. Giessel, 265 Wisc. 185, 60 N.W.2d 873 (1953); State of Delaware v. 14.69 Acres of Land, 226 A.2d 828 (Del. 1967); State of New Jersey v. Totowa Lumber & Supply Co., 96 N.J.Super. 115, 232 A.2d 655 (1967); State v. Superior Court, 47 Wash.2d 335, 287 P.2d 494 (1955).

44/ 265 Wisc. 185, 60 N.W.2d 873, 882, 884 (1953).

45/ Apparently the state did not possess an expeditious method for obtaining immediate possession.

46/ 116 Md. 683, 82 A. 978 (1911).

47/ 330 Mass. 713, 113 N.E.2d 452, 468 (1953).

48/ In re Opinion of Justices, 204 Mass. 607, 91 N.E. 405 (1910).

49/ 344 Mich. 37, 73 N.W.2d 544 (1955).

50/ 94 N.J.Super. 84, 226 A.2d 840 (1967).

51/ N.J. Stat. Ann. 27:7A-4.1.

52/ State of New Jersey v. Totowa Lumber & Supply Co., 96 N.J.Super. 115, 232 A.2d 655 (1967).

53/ 65 Cal. Rptr. 324, 436 P.2d 342 (1968).

54/ 108 Cal. App. 2d 832, 239 P.2d 914 (1952).

55/ California Streets and Highway Code, §104.1.

56/ *Ibid.*

57/ Calif. Const. art. I, §14.

58/ Calif. Const. art. I, §14 1/2.

59/ California Streets and Highway Code, §§104.2, 104.3, 104.6.

60/ 327 U.S. 546, 66 S. Ct. 715, 90 L. Ed. 843 (1946).

61/ 274 Cal. App. 2d 217, 79 Cal. Rptr. 175 (1969).

62/ 152 Mont. 79, 446 P.2d 709 (1968).

63/ 32-3905, Rev. Codes of Mont. 1947.

64/ Mont. Const. art. III, §14.

65/ State of Delaware v. 14.69 Acres, 226 A.2d 828 (Del. 1967).

66/ 253 A.2d 509 (Del. 1969).

67/ 17 Del. Code Ann. §175.

68/ *Supra*, note 62.

69/ *Supra*, note 50.

70/ 20 Hastings L.J. 571; 45 Land Econ. 293; 15 N.Y.L.F. 119; 42 So. Cal. L. Rev. 421; 18 Mercer L. Rev. 274; 43 N.Y.U.L. Rev. 795; 6 Wake Forest Intra. L. Rev. 107

71/ State Highway Comm'n v. Chapman, 446 P.2d 798 (Mont. 1968); State v. 9.88 Acres, 253 A.2d 509 (Del. 1969).

72/ Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371, 102 N.E. 619, 622 (1913).

73/ Gov't of Guam v. Moylan, 407 F.2d 567, 568 (9th Cir. 1969).

II. SUBSTITUTE CONDEMNATION

Substitute condemnation, the second principal topic of this paper, is the acquisition of private property that is outside the boundaries of the particular public improvement and the subsequent exchange of it for the property that is actually required for the public improvement of the condemning authority.[1/]

The objection that is raised is that the property of the ultimate condemnee is not being taken for the *public* use of the condemnor, but for the *private* use of another person, in violation of Articles V and XIV of the U.S. Constitution.

Excluded from consideration herein are those cases in which one public agency may be taking for the ultimate use and benefit of another public agency; for example, the state acquires for a Federal installation.[2/]

There are six landmark cases,[3/] all of which were decided between 1913 and 1930, that form the basis of the substantive law on this subject in the United States. Two of the cases are pronounce-

ments of the U.S. Supreme Court;[4] the others are from state jurisdictions.[5] A brief discussion of each is warranted as a point of departure for a discussion of the more recent cases, especially as they affect highway condemnations.

The first case was Pitznagle v. Western Maryland Railway Co.,[6] decided by the Maryland Court of Appeals in 1913. There a railroad company sought to acquire a tract of ground on which to relocate a private road for the benefit of persons whose property was taken for railroad purposes. In announcing the principles of law generally applicable to this type of case, the court stated:

> This constitutional prohibition ... is but declaratory of the previously existing universal law, which forbids the arbitrary and compulsory appropriation of one man's property to the mere private use of another, even though compensation be tendered. The legislature cannot make a particular use, either public or private, merely by so declaring it. If it could do so, the constitutional restraint would be utterly nugatory.... Whether the use for which private property is taken is public or private within the meaning of the above provision of the Constitution is a judicial question to be determined by the courts.

The court then went on to hold that inasmuch as the railroad's taking of the private road was for a public use or purpose, the condemnation of additional land to be used for a substitute road or way was "incident to and results from" the taking for public use and thus should be regarded as a public use within the meaning of the Constitution. The court further noted that the extinguishment of the interest of the property owner inures to the "public service" and has "connection with the relation to the public's welfare"--a very broad criterion.

Four years later, in 1923, the U.S. Supreme Court, in Brown v. United States,[7] had a similar, but more sweeping, proposal before it in the form of an act of Congress that would authorize the United States to acquire an entire townsite to which American Falls, Idaho, was to be relocated because of its inundation for a reservoir. The Congressional authorization provided:

> ... with authority in connection with the construction of American Falls Reservoir to purchase or condemn and to improve suitable land for a new townsite to replace the portion of the town of American Falls which will be flooded by the reservoir and to provide for the removal of buildings to such new site and to plat and to provide for appraisal of lots in such new townsite, and to exchange and convey such lots in full or part payment for property to be flooded by the reservoir, and to sell for not less than the appraised valuation any lots not used for such exchange. (41 Stat. 1367, 1403.)

It should be noted that this authorization sanctioned not only an "exchange" for land inundated, a pure substitute fact condemnation situation, but also the outright sale of lots not used for exchange, ostensibly to anyone who wanted to buy. This, of course, could result in excess condemnation for pure recoupment purposes. The U.S. District Court held that the acquisition of the townsite was so "closely connected" with the acquisition of the district to be flooded and "so necessary to the carrying out of the project" that the *public* use of the reservoir covered the taking of the townsite. The Supreme Court concurred in this view in Brown and held:

> It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.
>
> ....
>
> The incidental fact that in the substitution and necessary adjustment of the exchanges, a mere residuum of the townsite lots may have to be sold does not change the real nature of what is done, which is that of a mere transfer of the town from one place to another at the expense of the United States. The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill-adapted to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed, without prospect of their owners finding homes similarly situate on streets in another part of the same town, or in another town near at hand.... A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution.

The Court cited Pitznagle[8] in support of its ruling and distinguished In re Opinion of Justices,[9] discussed in the first part of this paper, noting that removal of the town in the subject

case was a "necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation."

The Supreme Court of Pennsylvania, in 1925, approved a railroad acquisition for a highway, as well as for its own purpose, in Foley v. Beach Creek Extension Railroad Co.,[10] but it had specific authorizing legislation that provided as follows:

> If a railroad company shall find it necessary to change the site of any portion of ... a public road they shall cause the same to be reconstructed forthwith ... on the most favorable location ... provided, that the damages incurred in changing the location ... shall be ascertained and paid by such company, in the same manner and as provided for in regard to the location and construction of their own road.[11]

A case involving a reverse fact situation (i.e., a highway department acquiring a right-of-way for a railroad) was decided in 1928 by the Michigan Supreme Court in Fitzsimmons & Galvin, Inc. v. Rogers.[12] As in the Foley case,[13] there was specific authorizing legislation that provided as follows:

> ... The state highway commissioner is hereby authorized and empowered to acquire by purchase or condemnation, as a state project, a right-of-way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right-of-way as a part of the proposed relocation and improvement where and when deemed advantageous and/or necessary by the state administrative board.[14]

The court held:

> Having in mind that the primary purpose of Act 340, 1927, was that of highway construction and improvement, and that the relocation of the railroad right-of-way was inseparably connected with the project, we hold that the working out of the whole problem was properly delegated by the legislature to the state highway department under the terms of the contract embodied in the statute.
>
> ....
>
> The project is one of great importance to the people of this state; and presumably under Act 340, 1927, and the terms of the contract embodied therein the complicated situation involved in this highway construction and improvement is being worked out in a more practical, economical and advantageous manner for all parties concerned than it otherwise might have been. The general method of procedure has the stamp of approval of high authority in the case of Brown v. United States, supra; and this court ought not to interfere with the consummation of the contract embodied in Act 340 unless it clearly contravenes constitutional provisions.
>
> ....
>
> [S]ince the railroad has the power to condemn land, there exists no necessity for the procurement by the state of another right-of-way for the railroad.... [T]he need of acquiring plaintiff's land for a new railroad right-of-way arose incident to and as a necessary part of the construction of a state highway, and that it is therefore within the power and right of the state under the legislative enactment (Act 340, 1927) to relocate the railroad. Under the circumstances of this case, it is as much within the right of the state to direct that the power of eminent domain be exercised by the state highway commissioner in obtaining this new railroad right-of-way as it is within the state's right to delegate such authority to the railroad itself. The state has seen fit by appropriate legislation to empower the commissioner to act, and we fail to find a lack of authority for so doing or that the plaintiff's rights are thereby invaded.

The results of the aforesaid cases, where both the condemnor and the first condemnee have the power of eminent domain, is not particularly surprising. But what of a situation where only the condemnor has the power of eminent domain and seeks to take property to compensate a private corporation that does not itself have the power of eminent domain? In 1929 the Kansas Supreme Court in Smouse v. Kansas City Southern Railway Co.[15] upheld the right of the railroad to take property for the purpose of providing a surface and subsurface easement or right-of-way for the use and benefit of the Philadelphia Quartz Company, a private corporation, that did not have the power of eminent domain. There was no specific statute authorizing substitute condemnation, although the railroad had a broad general statute to condemn "such lands as may be deemed necessary." The court upheld

the taking on the grounds that the railroad's use was public and that if any private use to be made of the property is "inconsequential" compared to the public use, or "subordinate thereto" to the extent that it can be said to be only an "incident thereof," then the fact that such private use is to be made of the property will not defeat the condemnation.

A municipality, however, was denied the right to condemn for the benefit of a private party that did not have the power of eminent domain in State ex rel. Ford Motor Co. v. District Court.[16] The court held that although the City of Minneapolis had authority to condemn private property for streets and alleys, it did not have authority to condemn for a railroad right-of-way to serve the private use of railroad users.

Lastly, a highway taking for railroad purposes was upheld by the U.S. Supreme Court in Donhany v. Rogers,[17] concerning a highway project. It was proposed to include within the highway project the adjacent railroad right-of-way. This was to be acquired by relocating the railroad on lands to be taken in the subject condemnation proceedings in exchange for the existing right-of-way. In addition to arguing the taking was for a private use, the property owner argued that he was denied certain special procedural and substantive advantages that would otherwise have been available to him if his property had, in fact, been taken by the railroad, rather than by the highway authority. The court upheld the taking as being "so essentially a part of the project for improving a public highway as to be for a public use" and held that a property owner was not to be guaranteed any particular type of proceeding, as long as just compensation was ultimately paid.

With virtually no deviation, the contemporary cases follow the holdings of their predecessors.

The construction of limited-access highways produced some appellate decisions in the field of substitute condemnation, as well as excess condemnation. In some of these cases, the condemning authority sought merely to prevent certain properties adjacent to the limited-access highway from being landlocked, or denied access to other public roads and in connection therewith sought to exercise its power of eminent domain to acquire substitute access. In one of the first of these cases, in 1958, the Supreme Judicial Court of Massachusetts in Luke v. Massachusetts Turnpike Authority[18] upheld the right of the Authority to acquire substitute rights of access of persons adversely affected by the construction. In commenting on the broad, but not specific, statutory authority, the court said:

> The laying out of the turnpike, the length of the commonwealth and the acquisition of numerous sites essential to that object are attributes of one huge undertaking. Procuring an easement and creating a right-of-way for the benefit of parcels of land incidentally deprived of all or of some means of access to an existing way are but by-products of that undertaking....

Similar decisions have been reached with respect to construction of the Interstate highway system. Thus, in Illinois, an appellate court upheld acquisition of a tract designed solely to extend an access right for a single user in Department of Public Works v. Koch,[19] the court noting that it is the *right* of the public to use, not its exercise of the right, that constitutes a road a public highway.[20] In State of New Jersey v. Buck,[21] the number of persons to be served by the substitute means of access was limited, although there was more than one. In upholding the taking, the court noted that a use is not denominated public or private by simply relying on the number of persons it serves.

In this area of substitute access, the only case *contra* is Mississippi State Highway Commission v. Morgan,[22] but the facts therein clearly disclosed that the property owner for whom substitute access was sought did not, in fact, have a right of access--merely a permissive use. In denying the right to exercise substitute condemnation, the Mississippi Supreme Court held that although the Commission has broad authority under specific statutory authorization to acquire substituted property by substitute condemnation, it may do so only where a property right of interest therein has been taken. Here the property owner for whom access was sought had only a permissive use; hence, the Commission abused its discretion in exercising its power of substitute condemnation to provide him with a substitute means of access.

Railroad relocations, necessitated because of highway construction, continued to receive judicial attention. Thus, in 1936, the Supreme Court of Tennessee approved what may be the first truly joint state, county, and municipal project in Darwin v. Town of Cookeville,[23] More recently, in 1964, the Supreme Court of Minnesota approved acquisition of property by a highway department for multiple public uses in Kelmar v. District Court.[24] There the highway realignment was only a small part of the total project, which included a flood-control project under the jurisdiction of the U.S. Army Corps of Engineers and a conservation of natural resource project by a watershed district. By working with these other units of government, the highway department was able to reduce the length

of its bridge from 4,300 feet to 2,800 feet, as well as accomplish the goals of the other governmental units. In upholding the taking, even though there was no specific legislation, the Minnesota Supreme Court held:

> Although the direct physical use of the property in question will not be for highway purposes, its use is nevertheless incidental to and related to that purpose. The acquisition of the property in question will make it possible to relocate the main channel of the river so that a bridge may be constructed which will more conveniently and economically serve as a public facility. (Emphasis added.)
>
> ....
>
> The U.S. Army Corps of Engineers and two state agencies are involved in the overall program. The U.S. Army Corps of Engineers and the Watershed District will improve the usefulness of the Minnesota River for navigation, drainage and flood control while the Highway Department will have a shorter bridge, save over a million dollars in its construction, and have the benefit of substantial savings in future maintenance costs. While the property involved here will serve a purpose in the general scheme of navigation and flood control, it will also bring the channel of the river close to the high west bank and thus essentially improve the public highway system.

Even where specific statutory authorization is nonexistent, or where it may be prohibited, courts have upheld railroad relocation by, and in connection with, highway projects. Thus, in Dupuy v. District Court[25] the Highway Department sought to acquire land on which to relocate the Great Northern Railroad in connection with its highway project through Yellowstone National Park. Two sections of the authorizing statute[26] appeared to conflict. These sections provided:

> (b) For the purposes of exchanging the same for other real property to be used for rights-of-way or other purposes authorized herein, provided that the same shall not be acquired for such a purpose by condemnation procedures.
>
> ....
>
> (k) For providing land or other real property easements or rights-of-way for necessary relocation of existing utilities, utility easements or other easements for facilities or purposes then in place, or in effect, upon a proposed right-of-way.

The property owner claimed that as this was an exchange, it was therefore governed by §(b), and condemnation could not be used to acquire the property. The court held that the taking was governed by §(k) and that §(b) was limited to other uses, such as acquisition of parks, rest areas, and information sites--conclusions it reached from legislative history.

A recent case, Tiller v. Norfolk & Western Railway Co.,[27] upholds the right of the railroad to condemn land for a highway that had to be relocated because of railroad realignment under a statute[28] that simply allowed the railroad company to condemn for "other necessary railroad purposes." In commenting on the lack of express statutory authority, the court stated:

> Even if there is no express statutory authority empowering the railway company to condemn the defendant's lands for the purpose of relocating the creek and a section of the highway, the State Highway Department could have condemned the land needed under Section 33-52, Code of 1950. But it would have served no useful purpose to require the State Highway Department to incur the expense of condemnation under the circumstances because there are no special advantages accruing to the defendants by condemnation under the Highway Act over condemnation by the railroads. The procedure followed was a common sense adjustment on the problem facing the railway company and the defendants have not been prejudiced.

Where a utility company (i.e., a power company) sought to condemn land for its reservoir and, in addition, enough land to relocate a state highway that would be inundated, the Supreme Court of Montana, in State ex rel. Bartholomew v. District Court,[29] denied the right of the railroad to condemn for the highway department, rejecting the Pitznagle,[30] Brown,[31] and Dohany[32] cases, holding:

> There is ample reason for the rule. The Highway Commission, which is chargeable with the duty of the maintenance and repair of its highways, is interested in their location and in the manner of their construction.

This decision is unique, and the conclusion is difficult to justify--particularly in view of the fact that there was no objection from the highway authorities, although they were not made parties to the suit.

It frequently happens that various utilities are located adjacent to public highways within their own rights-of-way. When the highway is widened, or its character is changed from conventional to limited-access, substitute rights-of-way have to be obtained for these utilities as the only practical and measurable method of compensation. Even where no specific statute authorization is present (i.e., the right to condemn for substitute rights-of-way for utilities) the courts have upheld condemnation for such purposes. In Benton v. State Highway Department,[33] a Georgia Court of Appeals in 1965 upheld the right of the highway department to acquire a site on which to relocate an interstate gas pipeline, noting that to require the pipeline company to leave its pipe in place within the newly constructed highway not only would make repair thereof impractical and hazardous to the traveling public, but also would be inconvenient to the gas-consuming public, and that the relocation was necessary and incident to the taking of property for state road purposes and "essentially a part of the highway project." To the same effect is State of Missouri v. Eakin[34] with reference to a petroleum pipeline relocation in connection with construction of an Interstate highway.

The principle of substitute condemnation has likewise been recognized as appropriate where highway construction requires the acquisition of land owned by public entities.[35] The doctrine has been applied and upheld where a city transit system condemns substitute sites for a conventional railroad--an exchange of tracts,[36] and in various Federal acquisitions involving substitute water systems for a municipality[37] and for the procurement of a material site for a government contractor.[38] The right of a conservancy district has likewise been upheld to condemn for railroad relocation under special statutory authorization.[39]

The last and perhaps most significant use of substitute condemnation is in the area of residential displacement. For example: Can a highway department that is building a highway through an urban area exercise its power of eminent domain to acquire property on which to relocate persons who have been displaced? Brown v. United States,[40] of course, stands out as the key case for such an acquisition. However, there are other state court decisions that uphold acquisition for such purposes. In 1948, in connection with the construction of the Van Wyck Expressway in New York City, 48 single- and double-family houses were to be acquired. The highway authority sought to acquire land some distance away on which to relocate the houses. The Appellate Division of the Supreme Court in Watkins v. Ughetta[41] upheld, citing only Brown v. United States[42] as precedent.

In 1950 the Supreme Judicial Court of Massachusetts was confronted with a similar problem in connection with an expansion of Boston's Metropolitan Transit Authority. Special legislation was enacted by the state legislature that provided:

> For the purpose of avoiding, so far as practicable, during the period of public exigency, emergency and distress now existing on account of the acute shortage of housing in Boston and many other cities and towns of the Commonwealth, the demolition of dwelling units on land heretofore or hereafter acquired in the east Boston district of the City of Boston for the purpose of ..., the City of Boston may acquire by eminent domain or otherwise parcels of land to which buildings with dwelling units may be moved.[43]

The court, in McLean v. City of Boston,[44] held:

> It is undisputable that ordinarily property cannot be taken by eminent domain and paid for by public money raised by taxation for the purpose of reconveying it or disposing of it to private individuals. (Citing cases.) This principle, however, is not applicable when the property is taken or sold or disposed of in furtherance of a public purpose.
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> ....
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> [The statute in question] expressly authorized the City of Boston to expend money raised by taxation to carry out the purposes of the statute and we have said that "whether an expenditure of public money is for a public purpose is a subject of judicial inquiry.... But in the decision of this question weight is to be given to legislative findings of fact as to existing conditions material in such determination."
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> ....
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> The facts here warrant a finding that there was a local emergency which had not

> been met in any way by ordinary private agency. Because of a public improvement declared necessary by the legislature, 207 persons, comprising 56 families, were to find themselves homeless through no fault of theirs. We are of the opinion that this situation justified action by the legislature to remedy it. The statute permitted the expenditure of money raised by taxation for a public purpose and in consequence it is not unconstitutional. (Citing cases.) (Emphasis added.)

The court relied on Brown v. United States[45/] and Watkins v. Ughetta[46/] and quoted from the U.S. Supreme Court decision of United States ex rel. Tennessee Valley Authority v. Welch[47/] wherein the U.S. Supreme Court stated:

> And when serious problems are created by its public projects the government is not barred from making a common sense adjustment in the interests of all the public.

Clearly, the vast weight of authority as discussed herein supports the doctrine of compensation by substitution.

FOOTNOTES PART II

1/ See 2A Nichols, *The Law of Eminent Domain* §7.226 (3d ed.); 20 A.L.R.3d 862; 54 Calif. L. Rev. 1097 (1966).
2/ See 1 Nichols, *The Law of Eminent Domain* §2.113 et seq. (3d ed.); Fishel v. City & County of Denver, 106 Colo. 576, 108 P.2d 236 (1940).
3/ Pitznagle v. W. Md. Ry., 119 Md. 673, 87 A. 917 (1913); Brown v. United States, 263 U.S. 78, 44 S. Ct. 92, 68 L. Ed. 171 (1923); Foley v. Beach Creek Extension R.R., 129 Kan. 176, 282 P. 183 (1929); Dohany v. Rogers, State Highway Comm'r of Mich., 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904 (1930).
4/ Brown et al. v. United States, 263 U.S. 78, 44 S. Ct. 92, 68 L. Ed. 171 (1923); Dohany v. Rogers, State Highway Comm'r of Mich., 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904 (1930).
5/ Pitznagle v. W. Md. Ry., 119 Md. 673, 87 A. 917 (1913); Foley v. Beach Creek Extension R.R., 283 Pa. 588, 129 A. 845 (1925); Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649, 220 N.W. 881 (1928); Smouse v. Kansas City S. Ry., 129 Kan. 176, 282 P. 183 (1929).
6/ 119 Md. 673, 87 A. 917, 919 (1913).
7/ 263 U.S. 78, 44 S. Ct. 92, 93, 94, 68 L. Ed. 171 (1923).
8/ *Supra*, note 6.
9/ 204 Mass. 607, 91 N.E. 405 (1910).
10/ 283 Pa. 588, 129 A. 845 (1925).
11/ Pa. Stat. 1920, §§18434, 18484, 18437, 18461, §13 (P.L. 850).
12/ 243 Mich. 649, 220 N.W. 881, 885 (1928).
13/ *Supra*, note 10.
14/ Act 340, Pub. Act 1927 (Mich.).
15/ 129 Kan. 176, 282 P. 183 (1929).
16/ 133 Minn. 221, 158 N.W. 240 (1916).
17/ 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904 (1930).
18/ 337 Mass. 304, 149 N.E.2d 225, 228 (1958).
19/ 62 Ill. App. 2d 182, 210 N.E.2d 236 (1965).
20/ Citing Dep't of Pub. Works v. Farina, 29 Ill. App. 2d 474, 194 N.E.2d 209 (1963). *See also* North Carolina State Highway Comm'n v. Asheville School, Inc., 5 N.C. App. 684, 169 S.E.2d 193 (1969).
21/ 94 N.J.Super. 84, 226 A.2d 840 (1967).
22/ 248 Miss. 631, 160 So. 2d 77 (1964).
23/ 170 Tenn. 508, 97 S.W.2d 838 (1936).
24/ 269 Minn. 137, 130 N.E.2d 228, 231, 233 (1964).
25/ 142 Mont. 328, 384 P.2d 501 (1963).
26/ Rev. Codes of Mont. 1947, §32-1615, as amended by §1, Ch. 180, Laws of 1961.
27/ 201 Va. 222, 110 S.E.2d 209, 215 (1959).
28/ §56-347, Code of 1950 (Va.).
29/ 248 P.2d 215, 216, 217 (Mont. 1952).
30/ 119 Md. 673, 87 A. 917 (1913).
31/ 263 U.S. 78, 44 S. Ct. 92, 68 L. Ed 171 (1923).
32/ 281 U.S. 362, 50 S. Ct. 299, 74 L. Ed. 904 (1930).
33/ Ill. Ga. App. 861, 143 S.E.2d 396 (1965).
34/ 357 S.W.2d 129 (Mo. 1962).

35/ State Road Comm'n v. Bd. of Park Comm'rs, 173 S.E.2d 919 (W. Va. 1970), involving acquisition of of park property.
36/ Langenau Mfg. Co. v. City of Cleveland, 159 Ohio St. 525, 112 N.E.2d 658 (1953).
37/ United States v. 10.47 Acres, 218 F. Supp. 730 (D.C. N.H. 1962).
38/ Harwell v. United States, 316 F.2d 791 (10th Cir. 1963).
39/ Bank of Canton v. Muckingum Watershed Cons. Dist., 53 Ohio App. 325, 4 N.E.2d 996 (1935).
40/ 263 U.S. 78, 44 S. Ct. 92, 68 L. Ed. 171 (1923).
41/ 273 App. Div. 969, 78 N.Y.S.2d 393 (1948).
42/ *Supra*, note 40.
43/ Mass. Stat. ch. 191, §1 (1949).
44/ 372 Mass. 118, 97 N.E.2d 542, 544 (1950).
45/ *Supra*, note 40.
46/ *Supra*, note 41.
47/ 327 U.S. 546, 66 S. Ct. 715, 719, 90 L. Ed. 843 (1946).

APPLICATIONS

The foregoing research should prove helpful to highway administrators, their legal counsels, right-of-way engineers, and advance planning staff. Highway officials are urged to review their right-of-way acquisition programs to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in eminent domain litigation cases.