

# HIGHWAY RESEARCH BOARD

## Special Report 27

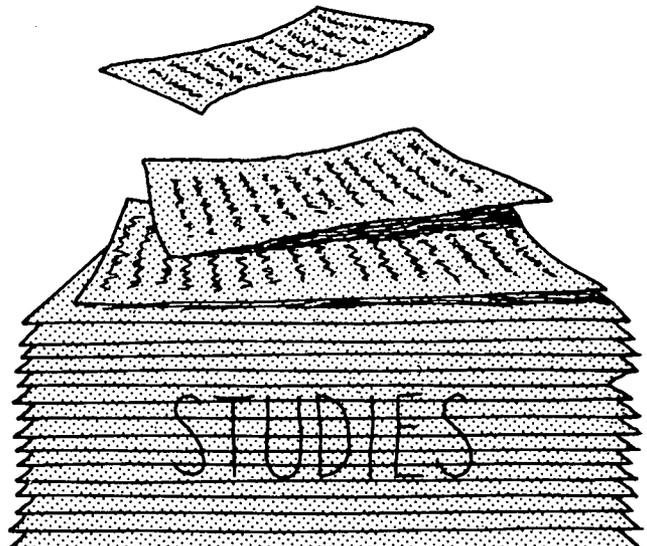
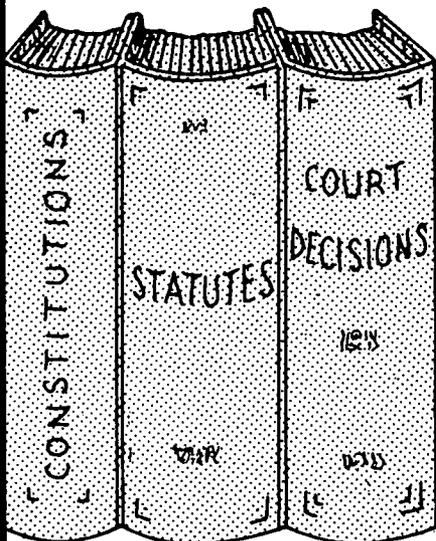
# ACQUISITION OF LAND FOR FUTURE HIGHWAY USE

A LEGAL ANALYSIS

RECEIVED

MAY 14 1957

MAIL ROOM



**National Academy of Sciences—**

**National Research Council**



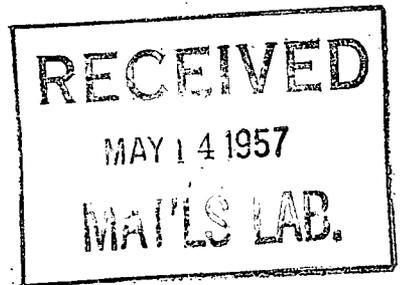
# HIGHWAY RESEARCH BOARD

## Special Report 27

REFER FOR	Action	Inf.
Mat'ls Engr.		
Asst. Mat'ls Engr.		
Geologist		
Testing Engr.		
Lab. Foreman		
Chemist		
Chief Clerk		

# ACQUISITION OF LAND FOR FUTURE HIGHWAY USE

A LEGAL ANALYSIS



1957

Washington, D. C.

## **Department of Economics, Finance, and Administration**

Guilford P. St. Clair, Chairman  
Chief, Financial and Administrative Research Division  
Bureau of Public Roads

### **Committee on Highway Laws**

Louis R. Morony, Chairman  
Director, Laws Division  
Automotive Safety Foundation

David R. Levin, Secretary  
Chief, Land Studies Branch, Financial and  
Administrative Research Division, Bureau of Public Roads

- Jacob H. Beuscher, Professor of Law, School of Law, University of Wisconsin, Madison
- Sherwood K. Booth, Deputy General Counsel, Bureau of Public Roads, Washington, D. C.
- W. A. Bugge, Director of Highways, Washington Department of Highways, Olympia
- Saul C. Corwin, Counsel, State of New York, Department of Public Works, Albany
- C. W. Enfield, General Counsel, Bureau of Public Roads, Washington, D. C.
- Joseph E. Havenner, Director, Engineering and Technical Services, Automobile Club of Southern California, Los Angeles
- Patrick Healy, Jr., Executive Director, American Municipal Association, Washington, D. C.
- Robert L. Hyder, Chief Counsel, Missouri State Highway Department, Jefferson City
- Roy E. Jorgensen, Engineering Counsel, National Highway Users Conference, Washington, D. C.
- W. M. Leech, Commissioner, Tennessee Department of Highways and Public Works, Nashville
- W. Crosby Pegues, Jr., General Counsel, Louisiana Department of Highways, Baton Rouge
- R. Brookes Peters, General Counsel, North Carolina State Highway and Public Works Commission, Raleigh
- LeRoy A. Powers, Chief Counsel, Oklahoma Department of Highways, Oklahoma City
- Robert E. Reed, Chief Counsel, Department of Public Works, State of California, Sacramento
- Keith L. Seegmiller, Secretary-Treasurer, National Association of County Officials, Washington, D. C.
- Archie Smith, Assistant Attorney General of Rhode Island, Providence
- Joseph A. Sullivan, Assistant Attorney General of Michigan, Lansing
- Sivert W. Thompson, Commissioner, North Dakota State Highway Department, Bismarck

**THE SHOOT 1948**  
**High Cost of Delay**  
The delay in the construction of the new highway is causing a serious loss of money to the state, according to a report by the highway department.

**Board Authorizes \$5 Million Fund For Rights of Way**  
The board of directors of the highway department has authorized the creation of a \$5 million fund to be used for the purchase of rights of way for the new highway.

**City, Euclid Act to Buy Freeway Parcels at Sale**  
The city and Euclid are expected to buy several parcels of land at a public sale on Monday.



**Colls Looking Ahead In RW Acquisition**  
The highway department is looking ahead to the acquisition of rights of way for the new highway.

**5 Deny Trying to Boost Value Of Belt Route**  
Five members of the highway department have denied that they are trying to boost the value of the belt route.

**McKeldin Signs Highway Land Speculation Bill**  
The mayor of Baltimore has signed a bill that deals with highway land speculation.

# and Pre County Held, Then Sold Land in Freeway Path

**Euclid Mayor Reveals Plea Against Tax Sale as Auditor Cites Law**  
The mayor of Euclid has revealed that he has made a plea against a tax sale, as the auditor has cited a law that prohibits such a sale.

**Maryland Planning Curb On Road Land Profits**  
The Maryland planning board has imposed a curb on profits from the sale of road land.

**Plans Board Saves City \$113,000 on Land Buys**  
The plans board has saved the city \$113,000 on land purchases.

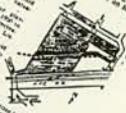
**\$1500 Would Have Secured Freeway Lots, Says Auditor**  
The auditor has said that \$1500 would have secured the lots for the freeway.



**Public to Pay More for Freeway Route**  
The public will have to pay more for the freeway route.

**WV Land Speculation Seen In Prince Georges**  
Land speculation in Prince Georges is seen to be similar to that in West Virginia.

**Freeway Land Faces Sale as Factory Site**  
Freeway land is facing a sale as a factory site.



**Planner Claims State Shares Blame for New Buildings in Freeway Path**  
The planner has claimed that the state shares the blame for new buildings in the freeway path.

**Private Property Ban Advised for Shore Dr.**  
A ban on private property is advised for the shore drive.

**Roof Now on Building in Belt Path**  
The roof is now on the building in the belt path.



**City Hit for Not Barring Structure in Belt Path**  
The city is hit for not barring a structure in the belt path.

**Moves to Keep Freeway Land Clear**  
Moves are being made to keep the freeway land clear.

**Whose Blunders Added \$90,000 to Inner Belt Freeway Cost?**  
Whose blunders added \$90,000 to the cost of the inner belt freeway?

**1950-1956 Parkway Progress in Virginia**  
The progress of the parkway in Virginia from 1950 to 1956.

**George's Delinquent Lot Sales**  
George's delinquent lot sales.

**City Hit for Not Barring Structure in Belt Path**  
The city is hit for not barring a structure in the belt path.



**Letters To The Editor**

## **PREFACE**

Pursuant to the charter of the Highway Laws Committee, the purpose of this report is:

1. To analyze existing statutes and court decisions involving acquisition of land for future use.
2. To isolate the important principles which should be considered in drafting legislation authorizing the acquisition of land for future use.

It is one of a series of studies on the highway laws of the Nation to be published by the Committee on Highway Laws of the Highway Research Board as part of its comprehensive research program.

Right-of-way acquisition for future use is of vital importance to sound highway development. But it is particularly significant at this time as preparations go forward to chart our highway needs for the next 10 to 20 years in a rational manner. It was for this reason that the Committee gave this subject top priority in its present study schedule.

The present statutes of the 48 States, the District of Columbia, Alaska, Hawaii, and Puerto Rico have been combed for pertinent materials. More than 300 judicial decisions were reviewed in connection with the subject matter of this investigation, and a substantial number of these have been referred to herein. An extensive body of highway literature has been reviewed for clues to concepts, laws, practices, and other pertinent materials.

While primarily designed for officials of all jurisdictions who are concerned with the legal ramifications of future use acquisition, such as State attorneys general, city and county attorneys, legal counsel of State, county and municipal highway agencies, legislative reference bureaus and others in similar capacities, the findings should also provide a valuable source of information and be a useful guide to legislators, legislative committees, highway administrators, planning engineers, and others.

**HIGHWAY RESEARCH BOARD  
LAW'S PROJECT LEGAL STAFF**

MARY O. EASTWOOD  
HOWARD G. FELDMAN  
HELEN J. SCHWARTZ  
ALFRED J. TIGHE, JR.  
KARL S. VASILOFF

## TABLE OF CONTENTS

	<i>Page</i>
PREFACE .....	v
SUMMARY AND CONCLUSIONS .....	ix
INTRODUCTION .....	1
ADVANTAGES AND DISADVANTAGES OF ACQUIRING LAND FOR FUTURE HIGHWAY USE .....	2
PROTECTION OF THE INDIVIDUAL'S PROPERTY RIGHTS .....	3
DEFINITION AND SCOPE OF THE PROBLEM .....	3
DISTINCTION BETWEEN PUBLIC USE AND PUBLIC NECESSITY .....	4
PURCHASE VERSUS CONDEMNATION .....	5
ACQUISITION OF LAND FOR FUTURE NON-HIGHWAY USES .....	6
USE OF PROPERTY ALREADY ACQUIRED FOR FUTURE NON-HIGHWAY PUBLIC USES FOR OTHER PUBLIC PURPOSES .....	11
ACQUISITION OF LAND FOR FUTURE USE IN THE HIGHWAY FIELD .....	15
CONCLUSIONS DRAWN FROM DECISIONS INVOLVING ACQUISITION FOR FUTURE USE .....	22
NEED FOR A STATUTE AUTHORIZING ACQUISITION FOR FUTURE USE .....	23
STATUTES SPECIFICALLY AUTHORIZING ACQUISITION FOR FUTURE HIGHWAY USE .....	24
Who Has Power to Acquire for Future Use .....	24
Methods of Acquisition .....	26
Type of Interest Acquired .....	26
Determination of Necessity .....	30
Power to Sell and Lease .....	31
Words of Futurity .....	32
Standards for Exercise of Power .....	33
Kind of Property Acquired—Improved or Unimproved .....	34
JUDICIAL DECISIONS INTERPRETING FUTURE USE STATUTES .....	35
STATUTES IMPLYING AUTHORITY TO ACQUIRE LANDS FOR FUTURE HIGHWAY USE .....	36
North Carolina .....	36
Oregon .....	38
Texas .....	38
Tennessee .....	38
Washington .....	39
FEDERAL LAW AND ADMINISTRATIVE PRACTICE .....	40
FINANCING ACQUISITION OF LAND FOR FUTURE HIGHWAY USES .....	41
California .....	42
New Mexico .....	43
New York .....	44
Ohio .....	44
Washington .....	45
Wisconsin .....	45
OTHER DEVICES RELATED TO ACQUISITION OF LAND FOR FUTURE HIGHWAY USE .....	46
Marginal Land Acquisition .....	46
Acquisition of Highway Development Rights .....	48
Ultimate Right-of-Way Designation and Official Map Procedure .....	49
Zoning .....	50
Subdivision Controls .....	51
Urban Renewal Programs .....	52

	<i>Page</i>
APPENDIX A—Summary of Statutory and Case Law Concerning Acquisition of Property for Future Use by States.....	56
APPENDIX B—Digest of Important Judicial Decisions Dealing with Acquisition for Future Public or Quasi-Public Use.....	64
APPENDIX C—Full Text of State Statutes Specifically Authorizing Acquisition of Property for Future Highway Use .....	73
APPENDIX D—Full Text of State Statutes Authorizing Acquisition of Property for Future Highway Use by Implication.....	78
TABLE OF CASES.....	79

## Summary and Conclusions

One of the consequences of the depression period and the war years of the 1940's was the failure of the American highway system to keep pace with the ever-increasing demands placed upon it. After the initial rights-of-way were acquired—the majority of them 30 years ago or more—for primary highways, most highway activity has consisted of construction and reconstruction upon existing locations. When it is remembered that this system was geared to accommodate one-third the number of vehicles in use today, traveling at half the present speeds, and involving only a fraction of the vehicle use known today, the inadequate state of the Nation's highways should not come as a surprise.

Public recognition of the deleterious effects of this ever-worsening situation is evidenced by a ground swell of interest in the highway problem throughout the Nation. This is manifested by the numerous long-range highway development programs initiated by the several States. At the Federal level, impetus has been given to the attempt to bridge the gap between the existing network and the needs of the Nation by the passage of the Federal-Aid Highway Act of 1956. An integral part of the act is the provision for the completion of the 41,000 mile National System of Interstate and Defense Highways within 13 years.

Vast sums of money already have been spent and more will be expended to make our highways a means of transportation rather than of strangulation. If this investment of both men and resources is to yield the beneficial results expected, our past mistakes, particularly those of omission, must serve as warnings and guides for future conduct. History does repeat itself in the sense that the same reaction to a problem will yield analogous results.

A common error of the past was the failure to take more fully into consideration the fact that both the American population and its economy are expanding year by year. Many of our highway facilities become outdated almost immediately after being opened to public use because of the

failure to make allowances for this growth. Moreover, a well-designed highway will generate and induce new traffic between its termini. Additionally, population movements tend to follow in the wake of new and better means of transportation, thus shifting traffic patterns and even creating new users of a highway.

Highway and other public officials are now confronted with an urgent need to plan a network of highways capable not only of servicing the needs of the present but also anticipating those of the future.

It has been said that countless benefits will be harvested by the public from an adequate program of acquiring land for future highway use.<sup>1</sup> Some of the more important of these are:

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

(2) Orderly development of communities will be facilitated.

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

(4) Right-of-way may be acquired more economically when not acquired under pressure of having to meet a dead line for construction by providing an adequate period of time for negotiation.

There are other advantages, too. A few potential shortcomings might also characterize the program, but these seem to be overshadowed by its obvious benefits.

The objective of this study is to analyze, from a legal point of view, one of the tools—the acquisition either by purchase or condemnation of land for future highway use—devised to facilitate the accommodation of future as well as present needs.

This study has sought, among other things, to assemble and analyze all State legislation dealing with the acquisition of lands for future highway use. Statutes specifically authorizing such land acquisition for future use have been found in 15 States.<sup>2</sup>

<sup>1</sup> PROCEEDINGS, Convention Group Meetings, Papers and Discussions, 1954, American Association of State Highways Officials, "Advance Right-of-Way Purchases for Freeway Construction," E. F. Wagner, page 59 et seq.

<sup>2</sup> Arkansas, California, Colorado, Florida, Idaho, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Virginia and Wisconsin.

An analysis of these laws reveals that 13 of them grant the power solely to the State highway department or its counterpart, while in 2 States, the authority is delegated to a special authority.<sup>3</sup> In addition to the State highway department, all counties and municipalities in Wisconsin have been given authority to exercise the power.<sup>4</sup> In addition to these statutes, which specifically grant the power to acquire land for future highway use, five other States have legislation which seems to imply that they have such authority.<sup>5</sup>

Because a State does not have a statute specifically authorizing the acquisition of lands for future highway use does not necessarily mean that the State cannot or should not go forward with a program of acquisition for future use, if such a program makes good sense. Independent of specific legislative authorization, the courts of six States have sustained the acquirement of lands for future highway use.<sup>6</sup> In addition, the Delaware Supreme Court has had occasion to pass upon the concept of future use acquisition. Although the court did not sustain the acquisition in question, it did approve the concept in theory.

In short, 15 States specifically authorize future use acquisition by statute, and six and probably a seventh State by judicial decision, making a total of twenty-one States. The statutes of most States contain language to the effect that the highway authorities can "acquire land necessary for highway purposes." Some highway officials believe that the aforementioned language or language of similar import is sufficient to enable them to acquire land for future use.

A completely adequate legislative authorization to acquire lands for future highway use will not result in any land actually being acquired unless the financial resources

to do the job are somehow provided. Some States have seen fit in the last several years to set up special funds earmarked for the advance acquisition of highway rights-of-way. Since 1952, California has employed a special revolving fund to finance advanced acquisition costs—a fund of \$30 million is now authorized for this purpose. The State's experience to date indicates that great savings in acquisition costs of right-of-way can be effected by such a procedure. In addition to California, five other States have now established special funds of varying amounts for advance acquisition.<sup>7</sup>

Up to this point, statutory authorizations largely have been discussed. The attitudes of the courts toward the acquisition of property for future use are as important as those of the State legislatures. As a means of properly orienting the statutory material and providing guides to evaluate the present laws, a thorough review of the common law was made. The investigation in this area was directed toward the law regarding acquisition of land for future use in connection with all public and quasi-public facilities, including railroads, pipelines, power facilities, waterworks, schools, piers, and the like. With respect to the subject matter under study, all of these many activities have a common denominator, and principles applicable to one might appropriately affect the others, including highway development.

A synthesis of these cases indicates that acquisition of land for future use is deeply embedded in American jurisprudence. Private property sought to be acquired for highway purposes must pass the legal test of "necessity." In other words, the lands proposed to be taken must be "necessary" for the construction of the highway project and if not, the acquisition will not be judicially sustained. Through the course of the years, the courts have developed a body of principles which emphasizes the concept of reasonableness in determining the necessity of the acquisition. A marked trend in judicial authority is found in which the concept of necessity has been broadened to include future needs. As a matter of fact, review of the cases on necessity and future use, strongly suggests that the concept of

<sup>3</sup> New Jersey and New York.

<sup>4</sup> Additionally, there may be other kinds of laws, some of them local in character, that authorize counties and perhaps other local units as well, to acquire lands for future highway use. These authorizations may stem from general planning laws, master or official plan statutes and similar legislation. Though an exhaustive study of these has not been made, it is believed that authorizations of these kinds are few and far between. For example, see Tennessee Code Annotated, Sec. 6-1901(9), which empowers cities with a City Manager Charter form of government to condemn property for present or future public use.

<sup>5</sup> North Carolina, Oregon, Tennessee, Texas and Washington.

<sup>6</sup> Arkansas (decision prior to legislation), Illinois, Iowa, Kansas, Mississippi and Missouri.

<sup>7</sup> New Mexico, New York, Ohio, Washington and Wisconsin.

"necessity" may constitute one of the most convenient of legal vehicles with which to sustain the constitutionality and legality of acquisition for future use.

Although some courts have considered the matter of what is meant by "future" in connection with the acquisition of land for future use, the judicial decisions, when put together, do not form a pattern of any kind. That is, the courts have not said, for example, that 5 years is a proper period within which to anticipate the future nor that 10 years is too great a period. Accordingly, it is impossible to state with assurance what "future" connotes in terms of time. An analysis of the legal opinions reveals that the crucial factor is not the time concept of "future" as such, but rather the degree of certainty inherent in the use of the land acquired. In other words, many courts will sustain acquisition of land for future use if it is reasonably certain that the lands so acquired will be used for the purposes for which they are acquired—and in that case, precisely when such use will take place may be immaterial.

Though it cannot be stated as a well-established principle, one gets the impression from a number of cases that the more definitive the plans for a proposed highway project, the better will be the chances of sustaining an acquisition of lands for future use in connection with that project. The initial step in the formulation of such plans is usually a formal resolution establishing the project; this is in the nature of a statement of intention of going forward with the project eventually. Other steps advance the project through the programming and engineering stages, and the allocation of funds for the acquisition of the lands. This suggests that State highway departments would be well advised, therefore, to proceed as much of the advance planning of a project as possible, prior to efforts to acquire the lands for future use.

There are, of course, legal tools other than the outright acquisition of land for future use which may have the same objective of facilitating the establishment of a system of modern highways at the lowest possible cost. These consist of marginal land acquisition, reservations of various kinds for

highway purposes, the acquisition of highway development easements, urban renewal programs, the designation of ultimate widths of highway rights-of-way, official map procedures, zoning, and subdivision controls. Although none of these are substitutes for a well-conceived plan of advanced acquisition, they may serve as valuable adjuncts to such a program.

In the past, the acquisition of land for future highway use has been sanctioned in one of two ways: by legislation, express or implied; or by judicial decisions, through a broad interpretation of necessity and public use.

If a particular State should see fit to enact a statute specifically authorizing the acquisition of lands for future highway use, the State legislature will want to consider and deal with certain matters which, of necessity, arise out of such a program. In an effort to be helpful in this connection, the Committee has identified these particular areas, based upon its analysis of the judicial decisions, the existing statutes on the subject, and the needs that characterize the modernization of the highway system of the Nation. These elements or characteristics are the following:

(1) *Declaration of legislative policy.*

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

(2) *Delegation of authority.* (See pages 24-26)

The statute should clearly indicate what various governmental subdivisions are authorized to embark upon a program of acquiring lands for future highway use, and what specific administrative agencies in each governmental unit are empowered to act. Many highway officials now agree that acquiring land for future highway use can be helpful in facilitating the development of a modernized system of highways at reasonable cost. It would

seem to follow that it is desirable to permit, by clear legislative authorization, agencies of the cities, counties and other local units to acquire lands for future use as well as those of the State in appropriate instances, or at least to assist in that activity. All other things being equal, the more wide-spread its application, the greater will be the public benefits derived from the acquisition of lands for future highway use.

(3) *Words of futurity.* (See pages 32, 33)

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

(4) *Standards for exercise of power.* (See pages 33, 34)

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

(5) *Methods of acquiring property.* (See page 26)

Most of the lands needed for highway purposes can be acquired through voluntary negotiation. However, unless highway officials are armed with the power of eminent domain for acquisition of land for future use, they may be at the mercy of a landowner who refuses to sell at any price. If

forcible acquisition is justifiable in the case of acquisition for present uses, it would seem to be likewise justifiable for acquisition for future use. Accordingly, it is suggested that a future use statute authorize the acquisition of property in the broadest terms, *i.e.*, by gift, purchase, condemnation, exchange, devise, or otherwise.

(6) *Determination of necessity.* (See page 30)

It is an established principle of law that the question of the necessity for a particular taking is, in the first instance, a question for the acquiring agency (highway department) to determine. The courts have been outspoken in stating that a determination by the appropriate administrative official that a particular tract of land is necessary for public purposes, will not be upset unless there is evidence of bad faith, fraud, or a gross abuse of discretion. Apparently, a determination of necessity is *prima facie* evidence sustaining the necessity for the taking. The presumption is rebuttable, but a high degree of proof is required to overcome the administrative determination. For these reasons, it is suggested that the statute require that a resolution or determination by the highway department (in the customary manner) precede efforts to acquire property for future highway use.

(7) *Type of interest acquired.* (See pages 26, 30)

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

(8) *Power to sell lands no longer needed.* (See pages 31, 32)

Regardless of the competency and care which may characterize a program of acquiring lands in advance of need and the engineering planning that precedes it, imponderable factors are always present which may require a subsequent realignment of a future highway route or even the complete abandonment thereof. Shifts in population and in land uses and other considerations can thwart the best laid highway plans. It therefore becomes important to equip the highway agency with the means of meeting these contingencies. Unless a fee simple interest is acquired, the highway department may be unable to dispose of the land without incurring a financial loss. Legislation dealing with acquisition of land for future use should authorize the acquiring agency to dispose

of property no longer needed for present or future highway purposes, if the public interest would be best served by such a disposition. Proper safeguards such as the requirement of public sale by auction or sealed bids, reasonable notice, and possible priority of repurchase by the former owner should receive attention.

(9) *Power to lease.* (See pages 31, 32)

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

(10) *Application to improved or unimproved lands.*  
(See pages 34, 35)

If the California experience is any indication, the greatest opportunity for savings will be found, for obvious reasons, in connection with unimproved lands. The question can be raised as to whether it may be desirable to specify by law that the acquisition of lands for future use be limited to unimproved lands, and to improved property where the threat of further development is imminent. On the other hand, it may be possible, if thought desirable, to confine a future use acquisition program to unimproved lands by administrative action of the highway department. In that event, the desirability of any limitation in the law may be called into serious question. It is even possible that such a limitation in the law may confine the acquisition of lands for future use to the rural areas, depending upon one's concept of "improved" and "unimproved" lands, whereas the greatest need for the future use program is centered in the urbanized and suburbanized regions of the Nation, rather than in the rural areas. Additionally, should a statute include a prohibition of acquiring even unimproved lands unless a threat of development is present? There are varying degrees of land development, and presumably, it would be up to the highway departments and the courts to interpret this matter, in the light of specific circumstances.

(11) *Application of acquisition for future use to types of highway projects.* (See pages 24-26)

In theory, it may be desirable to apply the procedure to all types of highway projects. However, resources available for highway improvement are

not unlimited. Accordingly, as a practical matter, it may be necessary to limit the program, at least in its initial stages, to those highway projects having the highest priority ratings. Whether it is desirable to limit the *legal* authority to acquire lands needed for future highway use to certain designated types of highway projects may be subject to debate. With respect to statutory *financing* authorizations (and not authority to acquire lands for future use as such), the California, New Mexico, New York, Ohio and Washington provisions could apply to all State highway projects, while the Wisconsin authorization applies only to expressways in Milwaukee County. It would seem that the broader type of legislative permission would be the more desirable, since all types of highway facilities could be benefited by advance acquisition of land. The broader kind of authorization may enable the several State highway departments to take fuller advantage of a Federal-aid program dealing with acquisition for future use.

(12) *Financing acquisition of land for future use.*  
(See pages 41-46)

As already indicated, in addition to the authorization for acquisition of land for future highway use, it is necessary to provide financial resources to do the job. Without sufficient funds, the power to acquire may be meaningless. If sufficient funds for this purpose are available from regular sources, no particular problem may be encountered. But if available funds are limited to construction purposes and the acquisition of lands for present needs, then consideration may need to be given to the setting up of special funds earmarked for advance acquisition, as is now authorized in California, New Mexico, New York, Ohio, Washington and Wisconsin.

(13) *Definition of terms.*

In order to make sure that everybody—the legislature, the courts, administrative agencies and their employees, and others—clearly understands the meaning of basic terms used in legislation of this kind, it is desirable to have simple and concise definitions of the most important special terms. Such terms might include "acquisition for future use," "unimproved property," "improved property," "necessity" and other special terms used in the statute. For example, "acquisition for future use" might be defined to mean the taking of property (in its broadest connotations) for a highway use which will not take place within a period of 1 year, 2 years, or whatever period is deemed appropriate.

(14) *Designation of offenses and penalty provisions.*

Since this kind of a program may be a substantial departure from most of the activities previously undertaken by highway departments, designation of offenses and existing penalty provisions (where they may exist) may not be sufficiently broad to cover the circumstances created by the acquisition of land for future use. For that reason, it may be well to define and provide reasonable

penalties for any special offenses which need to be dealt with. For example, in the management of property acquired for future highway use, the highway department should be given the usual powers to prevent waste, the power to dispossess for failure to pay rent, the power to enjoin irreparable injury, etc. Penalties, involving both fines and imprisonment, for misdemeanors (which should be defined) should likewise be included, for the most effective administration of the program in the public interest.

*(15) Severability provisions.*

The usual severability clause should be included in the statute in order to protect the program against total invalidation, when one of its divisible parts is deemed by the courts to be unconstitutional.

*(16) Intergovernmental relationships.*

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

An attempt has been made to anticipate most of the important legal considerations which need to be taken into account in connection with a program of acquiring land for future highway use. Notwithstanding, it should be emphasized that highway development involves dynamic forces rather than static ones, and that new legal elements may come to the surface tomorrow which could not be reasonably anticipated today. Highway legislation and administrative procedures implementing it must be re-evaluated constantly in light of the new and developing demands that may be placed upon the highway plant.

Finally, a word about the need for advance engineering planning in connection with a program of acquiring lands for future highway use. It is quite obvious that advance design and engineering planning must be undertaken before the advance acquisition of needed lands can proceed on a sound and practical basis. The location and the approximate design of a highway project must be known before lands can be acquired for it. If it is deemed necessary to provide a legislative basis for advance engineering planning, then such an authorization belongs, more appropriately perhaps, in a section dealing with research and planning, rather than in connection with a section authorizing acquisition of land in advance of use.

# Introduction

This is a report of a study of the legal aspects of acquiring property for future highway use. It involved the assembly and analysis of all State statutes that expressly or by implication authorize such acquisition; and of court decisions that concern the acquisition of lands for future public or quasi-public uses. Predicated upon this research an attempt has been made to focus attention upon those substantive legal elements or factors upon which thought should be given in evaluating a program of acquisition of land for future highway purposes.

The acquisition of lands for future highway use is particularly important in connection with long-range highway programs. Typical examples of such efforts to modernize the highway plant are Maryland's 12-year program and Washington's 10-year plan. At the Federal level, the Federal-Aid Highway and Highway Revenue Acts of 1956 encompass a concentrated program to complete the Interstate system within 13 years.

Billions of dollars are being scheduled for investment in the development of our highway systems. An ever-increasing percentage of this expenditure will be spent on acquiring the necessary rights-of-way. It has been estimated that of the total cost of the National System of Interstate and Defense Highways, 11 percent of the cost of the rural portions and 31 percent of the cost of the urban portions will need to be spent on rights-of-way.<sup>8</sup> Accordingly, from a financial point of view, it is only prudence and common sense to utilize any procedures that will minimize the cost of acquiring the necessary rights-of-way.

Both public and private construction is increasing. What were once empty lots and marsh lands are now thriving communities. The ever-increasing population shift from densely populated city centers to suburban areas has been phenomenal. The suburban shopping center, with its huge merchandise distribution and parking facilities, has become a permanent feature of the economic

landscape. The family car, once a luxury, is now an everyday necessity.

All this seems to suggest the need to reserve permanently the routes of future highways. Yet, without the proper legal and financial tools, the highway official may be powerless to act, though he knows full well that certain land will be needed for new roads and streets within 5, 10, and 15 years hence. He may be compelled to watch helplessly as unimproved land is developed and improved lands developed further, without being able to acquire those portions that he is certain will be needed a short time in the future for highway purposes. He knows that the taxpayer will grumble if the highways are not constructed, and they will grumble just as much if the facilities cost too much. He knows that land speculators are at work seeking to buy up choice locations which lie in the path of prospective highway rights-of-way. Yet in many States he is hamstrung by archaic laws and procedures.

One of the circumstances contributing to the deficient state of today's highways was the failure in the past to realize that highways must serve *future* as well as *present* needs. Any program of construction must be keyed to the needs and requirements of an ever expanding and increasingly mobile population.<sup>9</sup>

It has become apparent to thoughtful students of the problem that because of the prohibitive costs involved, every effort must be made to preserve the initial investment, the location, capacity, and safety features of any new highway, as well as to have sufficient right-of-way available at a later date to expand the highway to serve future needs. If the future is not taken into consideration when the right-of-way is acquired, future property developments may make it impossible to acquire the necessary land at a reasonable price at a later date, when it becomes imperative to provide additional traffic capacity.

<sup>8</sup> There are now more than 58 million motor vehicles registered with an expected figure of 81 million by 1965. *A Ten Year National Highway Program*, President's Advisory Committee on a National Highway Program, p. 8.

<sup>9</sup> H.R. Doc. No. 120, 84th Cong. 1st Sess. 13 Table 3 (1955).

## ADVANTAGES AND DISADVANTAGES OF ACQUIRING LAND FOR FUTURE HIGHWAY USE

Some thought should be given to the several advantages and shortcomings of undertaking a program of advance acquisition of lands for future highway use. Before embarking upon such a program, a highway department might well consider the pros and cons of the device, perhaps in the following terms.

The more important advantages of acquiring lands for future highway use are as follows:<sup>10</sup>

(1) Advance acquisition of right-of-way facilitates the orderly planning of a comprehensive system of arterial highways, well in advance of construction, and with the full assurance that the alinement of these future arterials will be fully protected pending future construction.

(2) At the same time, it makes possible large monetary savings in the costs of future highway rights-of-way, by forestalling private development of such lands. Such savings can range from \$5 to \$30 for every dollar invested in future highway right-of-way.

(3) Advance acquisition of land diminishes economic waste of all kinds (both public and private) which occurs when rights-of-way are acquired after private building improvements have been made in a particular area.

(4) Construction costs of an arterial highway system will invariably be less when new streets that serve a new subdivision or other commercial or industrial development are designed and integrated, physically and functionally, with the arterial system.

(5) Acquisition of land for future use enables local planning agencies to establish more effective zoning of the areas served by highway facilities, and otherwise assists the more orderly planning of the entire area.

(6) It will also keep to a minimum the number of people who will be discommoded by a future highway improvement, by preventing conditions from arising whereby owners and tenants of private installations must seek to locate elsewhere because they had no knowledge of a future highway improvement and its impact on their private properties.

(7) By like token, it will reduce the controversial aspects which often characterize a new arterial highway proposal. This is especially true in residential areas.

(8) Acquisition of right-of-way for future use prevents the automatic pyramiding of land values in advance of right-of-way acquisition, which is often the case when right-of-way is acquired shortly before construction starts. Such values are enhanced because of the anticipated benefits which invariably occur when a transportation facility of modern design is established in a particular area.

(9) Acquisition for future use stimulates advance engineering planning and design on the part of the highway department, and thereby makes possible a much more rational and deliberate approach to the problem of providing a modern highway plant.

Some of the shortcomings of acquiring lands for future use might include the following, though none of these are very important when viewed in light of the obvious advantages of the mechanism:

(1) If land is acquired now for use later on, it is conceivable that such land might have been acquired in a high market, and potential savings inherent in the advance acquisition mechanism might be somewhat diminished. But in any event, it would still be financially advantageous to make advance acquisitions because the forestalling of development would be much greater than any possible decreases in land values. Moreover, the long-term trend of land values is upwards, and minor variations are apt to be insignificant.

(2) Unless a program of advance acquisition of right-of-way is predicated upon an engineering plan for the development of the highway route or section in question, unwise commitments may be made. This is another manifestation of the crucial role advance engineering planning plays in this area.

(3) Another potential difficulty with advance acquisition of lands for highway purposes is the increased opportunity it affords for fraud and corruption. Any accelerated program of public construction might be similarly characterized. Moreover, the presumption is that adequate management and an appropriate system of checks and balances administratively will serve to diminish the opportunities for those bent on fraud. This is hardly an argument for not going forward with a program of this kind.

<sup>10</sup> Based in part upon *Advanced Right-of-Way Purchases for Freeway Construction*, E. F. Wagner, 33rd Annual Conference, Western Association of State Highway Officials, Sept. 17, 1954.

## PROTECTION OF THE INDIVIDUAL'S PROPERTY RIGHTS

Inherent in any large scale development of public facilities, such as highways, is the need to acquire private property. The only justification for the acquisition of private property by government is the overriding public benefit to be derived from such acquisition as compared with the discomfiture suffered by the individual. It goes without saying that the constitutional safeguards of "due process of law" and "just compensa-

tion" must be satisfied before the acquisition will be sustained by a court.

Permeated throughout this report is the attempt to define clearly those situations when the power to acquire property in advance of its use should be exercised, so as to limit to a minimum the inevitable conflict between the public and private interests. The clearest expression of this attempt is to be found in the section on standards.<sup>11</sup>

<sup>11</sup> Pages 33, 34.

## DEFINITION AND SCOPE OF THE PROBLEM

The problem which must be solved if the highway system is to serve as a means of transportation rather than strangulation is this: By what means can the necessary right-of-way be acquired when its fair market value is low and in a sufficient amount to meet future needs?

Two different prongs of the law were analyzed in connection with this study: one concerned the State statutes; the other, the court decisions. Two kinds of statutes were encountered: one type specifically authorized the acquisition of lands for future highway use; the other kind only implied such authority. The case materials dealt with both the highway and non-highway areas. A proper synthesis of the cases provides invaluable guides for judging the merits and deficiencies of existing legislation, and furnishes an essential insight into the thinking of the judiciary when confronted with the concept of acquiring lands for future use.

There are different physical situations that give rise to the problem of acquiring land for future highway use. By refining the matter into the several fundamental fact patterns which form the basis for the cases to be discussed, attention can be focused to the crux of the issue under analysis.

There are four basic types of situations which could involve the present acquisition of land for future use:

(1) A new highway on a new location is planned now, to be constructed at some future time; right-of-way is to be acquired now (Fig. 1).

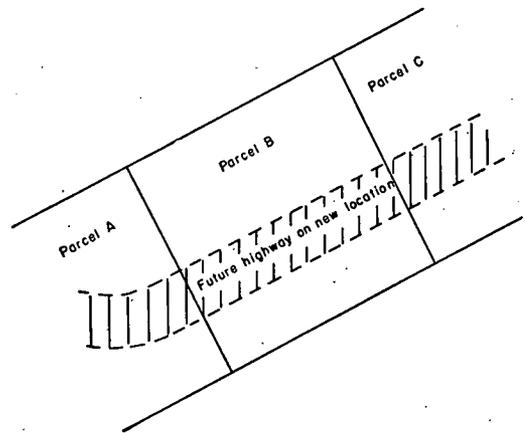


FIGURE 1

(2) A new highway on new location is planned now, to be constructed in stages, a pair of lanes now and the rest later; right-of-way for the entire ultimate design is to be acquired now (Fig. 2).

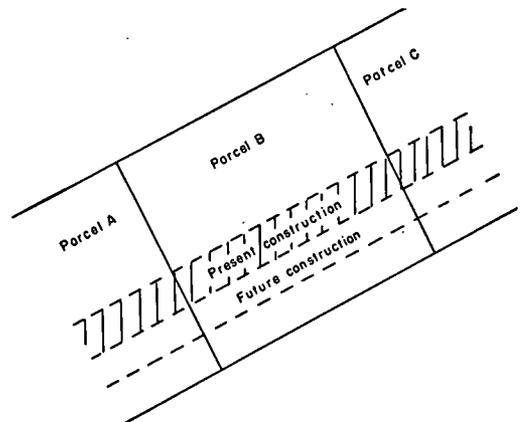


FIGURE 2

(3) An existing highway, on existing location, is planned to be improved at some future time, but with no present construction contemplated; right-of-way for the improvement is to be acquired now (Fig. 3).

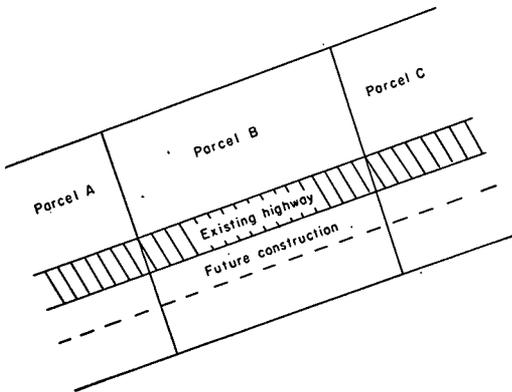


FIGURE 3

(4) An existing highway, on existing location, is planned to be improved now to a limited extent with present construction, and other improvements are contemplated for future construction; right-of-way for all improvements contemplated, present and future, is to be acquired now (Fig. 4).

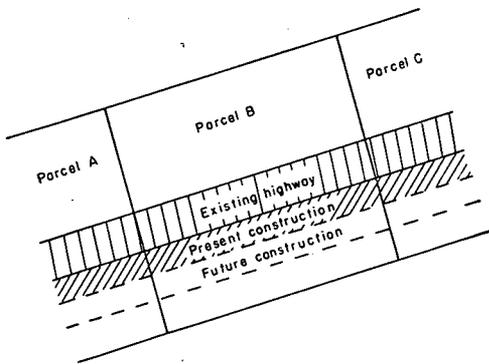


FIGURE 4

Two of these situations (1 and 2) involve new highways on new location, and two

(3 and 4) involve existing highways on existing locations. Two contemplate no present construction (1 and 3), and two (2 and 4) involve both present and future construction.

These four situations can be further refined in terms of the type of need involved, *i.e.*, whether the need for the future improvements is a present one or whether it is anticipated for the future. If the need is a present one, construction may be delayed for a number of reasons, the most important of which may be that the financial resources may not be presently available. On the other hand, the need for a highway facility may not yet have developed, but, on the basis of research and projection, the highway department has become aware that a need will develop at some reasonably definite time in the future. Accordingly, there are eight different types of circumstances that might give rise to the problem of acquisition of land for future use.

In the conduct of this investigation, it became apparent at an early stage that a distinction—perhaps an arbitrary one—would need to be drawn between “present use” and “future use.” For the purposes of this study, the following criterion is employed: Generally speaking, anticipation of the future by two years or less was deemed to be a “present use”; anticipation involving more than two years, a “future use.” This distinction is founded on the circumstance that State legislatures meet every other year in most instances, and generally make provision for highway expenditures and programs for the next two years; any acquisition program geared to this two-year period is, in reality, associated with a present program, rather than a future one.

## DISTINCTION BETWEEN PUBLIC USE AND PUBLIC NECESSITY

The jurisprudence concerning the acquisition of private property for public purposes is permeated with the concepts of public use and public necessity. Though not all courts have always recognized the distinction between them, courts of last resort have consistently adhered to the differences involved.

When the term “public use” or “public purpose” is employed, reference is made to the constitutional requirement that private property can be acquired only for a public purpose or use. Through the course of years, a body of activities has emerged which the courts have labelled as public uses or purposes, *e.g.*, sewage disposal or

water supply. It has uniformly been held that the establishment of a highway involves a public use.

On the other hand, the concept of "public necessity" consists of two separate and distinct phases. One is whether the admittedly public use, such as a highway, is needed by the community. The other is whether a specific parcel of land sought to be acquired is necessary for the establishment of the public use, presuming that the facility itself satisfies the "public necessity" test.

Treatment by a court, in the sense of reviewing a prior determination, and of dealing with evidentiary problems, is contingent upon the issue falling within the ambit of public use or public necessity. The vast majority of cases hold that the question of the necessity of the taking of a particular tract of land for highway purposes lies within the discretion of the administrative agency, *e.g.*, the highway commission.<sup>12</sup> Ac-

<sup>12</sup> Nichols, *Eminent Domain*, 3rd Edition, Vol. 1, Sec. 4.11.

ordingly, public necessity is a matter to be resolved in the legislative and administrative, and not in the judicial arena. In the normal course of events, the question of necessity is not reviewable by the courts *de novo*. A review, and the consequent reversal of a determination of necessity, will be granted only where there is proof of fraud, bad faith, or gross abuse of discretion.

But this judicial reluctance to tamper with administrative findings does not extend to determinations of public use. In order to satisfy constitutional requirements, a court will always review the issue as to whether a particular project involves a "public use."<sup>13</sup> Therefore, in the case of a prior administrative ruling of "public use," a court will make its own determination of the question. Thus, a greater preponderance of evidence is required to reverse a determination of necessity as compared with a finding of "public use."

<sup>13</sup> Nichols, *Eminent Domain*, 3rd Edition, Vol. 2, Sec. 7.4.

## PURCHASE AS COMPARED WITH EMINENT DOMAIN

In essence, the subject matter of each of the cases to be reviewed is the ability of the State to acquire land for future use by exercising the power of condemnation. With the exception of a few States, such as Kansas, which acquire all land required for highway purposes by condemnation, eminent domain is utilized by government only in the infrequent case of the landowner who, for various reasons, refuses to sell his land voluntarily.

At this point, the obvious question may be asked: Why study a method of acquisition which is used only in a small percentage of the cases? Why not devote time to the most usual method of land acquisition, that is to say, purchase?

The reasons for the subsequent analysis of the ability to condemn land for future public use are threefold. First, investigation has failed to unearth any litigated cases which discuss the problem of purchasing land for future use. Secondly, if the courts will sustain the forced sale of land—condemnation—then, *a fortiori*, the voluntary sale and purchase of land for fu-

ture use should be upheld. Thirdly, by studying the eminent domain cases the ability to analyze existing legislation will be enhanced.

In practice, some States which have no specific legislation concerning acquisition for future use have for years been purchasing land for highway purposes well in advance of construction.<sup>14</sup> An apparently typical practice prevalent in some States is described in the following quotation:

In some jurisdictions there is a lack of legal authority to condemn rights-of-way for future proposed projects. This was the situation in Maryland before 1951. Prior thereto, the State Roads Commission, while free to accept by gift or to negotiate the purchase of rights-of-way for planned future projects could not condemn for such rights-of-way.<sup>15</sup>

Is there any legal justification for the foregoing practice? Do or will the courts treat differently a *purchase* as compared with a *condemnation* of lands for future

<sup>14</sup> Illinois and Connecticut are two examples.

<sup>15</sup> Moser, L. C., *Methods Used to Protect, Reserve and Acquire Rights-of-Way for Future Use in Maryland*, Highway Research Board Bulletin No. 77, p. 51, 1953.

use? Is the lack of case law on the point a reflection of a difference in legal treatment or is the dearth of material explained by the fact that the opportunity to contest a purchase is almost non-existent?

No categorical answers can be supplied. However, certain lines of inquiry may be suggested by the subsequent, necessarily theoretical, analysis.

In those jurisdictions which have been explicitly authorized to acquire property for future use, the problem is relatively simple. These statutes will be reviewed in a later part of this monograph. The statutes in question usually specify that the acquisition may be "by purchase, condemnation, exchange, or otherwise."<sup>16</sup> The interested party, the condemnee in an eminent domain proceeding, or a taxpayer in a negotiated transaction, can attack the acquisition from three points:

(1) Initially, the constitutionality of the statute may be questioned.

(2) An argument always available to the objecting party is that the use for which the land is desired is one not to be classified as a "public use."

(3) Finally, the necessity for taking the particular plot of land for the intended public use can be placed in issue.

It is in those States possessing no legisla-

<sup>16</sup> Florida is unique in that its statute refers only to the power to *condemn* for future use.

## ACQUISITION OF LAND FOR FUTURE NON-HIGHWAY PUBLIC USES

To be in a position to evaluate intelligently existing legislation authorizing acquisition of land for future highway use, it is desirable that a detailed analysis of the relevant cases be made. From such an analysis, an understanding of the essential problems may be gained. A review of the cases should also infuse substance into such vague concepts as "future," "necessity," and "reasonableness."

The cases to be discussed have not been limited to the highway field as such. A wide range of governmental and quasi-public activities, *e.g.*, schools, water works, and railroads, form the subject matter of the analysis. Thus, a comprehensive understanding of the problems involved in the acquisition of land for future use may be

achieved. Another reason for expanding the scope of the subject matter of the cases is the paucity of litigation in the highway field concerning acquisition for future use. An inspection of the non-highway cases reveals that the courts in the past have been confronted by a set of facts analogous to those represented by the second of the four situations previously described:<sup>17</sup> In conjunction with present construction, land is sought to be acquired for future use. These cases involve either a railroad, school district, water company or other public utility, and factually divide into two categories: (a) one series of precedents squarely involves the question presented by the second situation; (b) another line of cases

specifically authorizing acquisition for future use where a knotty problem can arise. Assume that the State highway department has purchased land which will not be used for a highway until some indefinite time in the future. A taxpayer commences an action to void the purchase, on the theory that the land in question is not needed and that there is, therefore, an illegal expenditure of public funds. Will a court, confronted by the above facts, employ the same yardstick in determining the issue of necessity in a purchase transaction as it would in deciding the question of necessity in a condemnation proceeding?

Logically, the same rules should apply, irrespective of whether a purchase or condemnation is involved. Only those lands that are necessary can and should be acquired. In practice, however, it is conceivable that the same court could sustain a *purchase* for future use and declare invalid a *condemnation* for future use. Why could this be so? Of paramount importance is the relative standing of the objecting parties in both types of acquisition. In condemnation proceedings, the condemnee is being forcibly, albeit legally, deprived of his property. Compare this situation with that of a taxpayer whose only interest in the action is a remote and tenuous one, to say the least.

<sup>17</sup> See pages 3, 4.



Credit: California Department of Public Works, Division of Highways.

PLATE 1

Bay Shore Freeway in Santa Clara County. The California revolving fund for advance right-of-way purchase will make more highways like this possible, at substantial savings.

deals with the situation in which property acquired by a public utility, but not at the time of litigation used for that purpose, was the subject of an eminent domain proceeding. It must be remembered that, in a sense, public utilities are quasi-governmental agencies and that their experience in advanced acquisition may help to predict what the courts will do when faced with governmental exercise of the power.

An early Wisconsin case, *Chicago, St. P., M. & O. Railway Co. v. Bayfield County*,<sup>18</sup> is indicative of the manner in which most courts have reacted when presented with similar situations. The plain-

tiff, a railroad company, brought an action to cancel certain tax certificates against its property on the ground that the land, being railroad property, was tax exempt. The real estate, which was held subject to taxation, consisted of a grain elevator, a coal elevator, and several irregularly shaped parcels of land adjacent to the elevators and docks, and between the switch tracks and main tracks of the plaintiff and the waterfront. A considerable part of the land was not used for any purpose at the time of litigation, although it was suitable for other switch tracks and docks when such would become necessary.

In holding that the aforementioned property was tax free, because it was within the

<sup>18</sup> 87 Wis. 188, 58 N.W. 245 (1894). See Appendix B. p. 64.

purview of a statute which made all property necessarily used in operating a railroad exempt from general taxation, the court took occasion to expatiate upon four points which are fundamental to the problem at hand. To begin with, the court was compelled to give meaning to the vague statutory language "property necessarily used." It was held that the word "necessarily" did not mean that which is inevitable or absolutely indispensable but that which is requisite or essential, as these terms are ordinarily used, or perhaps that which is reasonably necessary for the accomplishment of the purpose intended. The attempt to give substance to the word "necessary" is a thread which is common to all the cases.

Since the concept of "public necessity" is one of the requirements which must be satisfied in order to sustain the condemnation of land, the liberalizing interpretation given by the court to the requirement as appearing in the statute is significant. In States lacking explicit statutory power to condemn for future use, the language "land necessary for highway purposes" or its equivalent is generally found in the statute authorizing condemnation for highway purposes. Therefore, a broadened judicial construction of "necessity" may be the basis for sustaining the acquisition of land for future use.

The following quotation contains four aspects (though not identified separately) of the concept of future use, which are fundamental to the problem under analysis:

The irregularly shaped parcels of land on the lake shore, which are not now actually occupied by switch tracks, or docks, we regard also as exempt, within the fair meaning of the statute. It is well established that, in condemning land for railroad purposes regard *must* be had *to prospective as well as present uses* provided such prospective necessary use in the *immediate future* be clearly established. . . . We think that the evidence clearly shows that the tracks in question will be necessary for railroad purposes in the immediate future and so are exempt. It would be an unreasonable rule which would prevent a railroad company from condemning any land except that which is absolutely necessary for present business. *Such a rule would frequently prevent a railway company from increasing its business and performing its full duty as a common carrier.* Regard may be had to the immediate future and the reasonably certain growth of the business.<sup>19</sup> (Emphasis added.)

<sup>19</sup> *Id.* at 247-248.

Four germinal ideas may be abstracted from the decision previously referred to:

(1) The most significant aspect of the decision is that land which may be necessary for future needs is authorized to be acquired in advance of the maturation of such needs.

(2) The court has attempted, without too much precision, to circumscribe, in time, the idea of what is future. Immediate future use is assuredly more limited than future use. Significantly, the court does not state, in terms of time, what is the immediate future.

(3) There is an endeavor to infuse substance into the requirement of "necessity" by making the facts of the individual case controlling.

(4) A fourth idea is alluded to and will reappear in other cases.<sup>20</sup>

How significant it may be from a legal viewpoint is difficult to assess at this time. The court speaks of the duty of the plaintiff, in the role of a common carrier to the public. Is there an obligation on the part of the State to so conduct its affairs as always to be in possession of land which it needs in order to provide services to its residents?

Additional support for the concept of advance acquisition in the non-highway field is found in *In re New Haven Water Co.*<sup>21</sup> In the course of affirming a lower court opinion which had upheld the acquisition of certain water rights, the Connecticut court made several cogent observations which have a direct bearing upon the findings in the *Bayfield* decision. The court was required to interpret the following statute:<sup>22</sup>

Any city . . . or corporation authorized by law to supply the inhabitants of any city . . . with pure water . . . may take . . . such land . . . as the Superior Court . . . deem necessary for the purposes of such supply. (Emphasis added.)

The word "necessary" is the key to the problem. If the court is prone towards an expansive interpretation of necessity, then the acquisition for future use will be sustained. The argument of the respondents, who owned the land, raised the issue of necessity squarely, since they contended that the time within which such reasonably definite amount of water is necessary, must be either present or within a reasonably short

<sup>20</sup> *City of Chicago v. Vaccarro*, 408 Ill. 587, 97 N.E.2d 766 (1951); *State v. Superior Court for King County*, 102 Wash. 331, 173 Pac. 186 (1918); *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951); *Kountze v. Proprietors of Morris Aqueduct*, 58 N.J.L. 303, 33 Atl. 252 (1895); *Carlton Co. v. City of Miami, Fla.*, 62 So.2d 897 (1953); *In re New Haven Water Co.*, 86 Conn. 361, 85 Atl. 636 (1912).

<sup>21</sup> *Op. cit.*, *supra* note 20.

<sup>22</sup> General Statutes of Connecticut, § 2600, as amended by Ch. 192 P.A. of 1903, § 2.

time in the future. A court which would acquiesce to respondents' request would, in all likelihood, insist on a very restricted meaning of a reasonably short time in the future.

The lower court had disregarded the respondents' interpretation of necessity, which would have confined any provision for the future to a reasonably short time in the future. In sustaining the lower court's ruling, the Supreme Court echoed the reasoning in the Wisconsin railroad case in stating that necessity is not an absolute term but only requires that the taking be reasonably necessary.

Reference in this case is made to the fact that a corporation engaged in supplying water to a community is *obligated* to provide an *adequate* supply of water at all times. From a practical point of view, the only way to meet this obligation is always to be ahead of the demand so as to be able to meet all contingencies. It would seem to follow that a corporation or the State is or should be under a duty, according to the court, to acquire lands for expected future needs so as to be in a position to meet the demand when it develops.

After stating that only property which will reasonably serve the public use can be acquired, the court gave great latitude to the "reasonably necessary" requirement.

It cannot be foretold when the contingencies of which we have spoken may be expected, nor can the future requirements and prospective needs within a reasonable time be estimated with exactitude. It is necessarily a matter of judgment based upon knowledge of the present and experience of the past. The reasonableness of the necessity must be ascertained from the facts of each case, and a reasonable discretion in reaching this conclusion will not be interfered with. The reasonableness of the necessity will be determined, *having due regard to the principle that a public or private corporation charged with the duty of supplying a community with water fails in its duty if it provides for the present needs and takes no heed of future needs or imminent contingencies. The remedy should precede the untoward happening, and for its accomplishment prospective needs, within a reasonable time, should be considered. . . .* The applicant is a private corporation, but on this issue, in reality, there are two principal parties in interest, the community and the individual. This is an additional reason why we should give a liberal construction to the term "reasonable necessity" when we determine the extent of land and

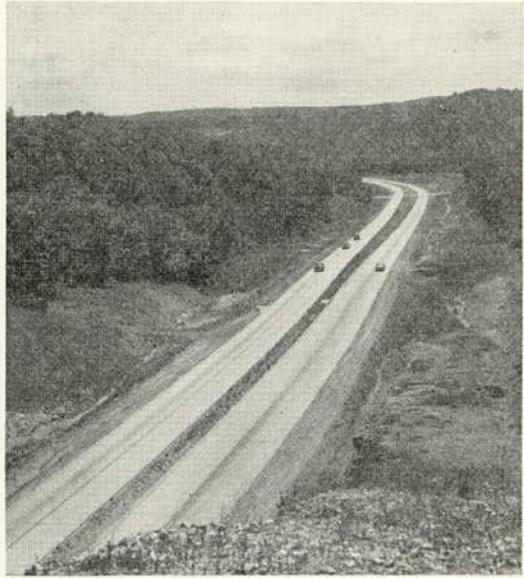


PLATE 2

Missouri: U.S. 66 in Pulaski County. A Missouri court decision sanctioned advance right-of-way acquisition for this expressway.

water rights required for a water supply, to the end that the public purpose in view may not fail. (Emphasis added.)

Two cases,<sup>23</sup> decided by the Supreme Court of Connecticut in 1951, affirmed the principles enunciated in the *New Haven* case and gave substance, with regard to time, to the idea of "reasonably foreseeable future use." The ever-increasing school population, and its reflection in the attempt of the authorities to predict and meet school needs which will materialize 5 and 10 years in the future, was the subject of the first case. The essence of the court's ruling was to sustain the planning and acquisition of land to satisfy school needs for at least ten years in the future. According to the court, a statute<sup>24</sup> which provided that land "necessary" for school purposes could be condemned meant land reasonably necessary for the purpose. No difficulty was had with the proposition that, since more land was acquired than needed for present use, the attempt to condemn the land in question should not be denied.

Basically the same situation is found in

<sup>23</sup> *Town of West Hartford v. Talcott*, 138 Conn. 82, 82 A.2d 351 (1951); *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951).

<sup>24</sup> General Statutes of Connecticut, § 7175.

*Adams v. Greenwich Water Co.* as existed in the *New Haven* case,<sup>25</sup> In upholding the acquisition, the court stated with reference to future use and needs:

A water company in the situation of the defendant should *plan for a supply of water to meet conditions as they will be at least 10 and preferably 15 or 20 years in the future.* (Emphasis added.)

Using as a yardstick the time period suggested by the *Adams* case might be pushing the furthest reaches of competent engineering planning. Yet the Bureau of Public Roads has, on the basis of studies made by the several States, projected the needs for the Interstate highway system to 1974, in other words, 20 years.<sup>26</sup> This is strong, if not conclusive, evidence that the ability to plan for future needs and use is in direct proportion to the competency of the engineering planning involved.

It is all well and good for the courts to state in general terms that necessity means reasonable necessity, and that future connotes a reasonable future, in terms of time. The crucial test is not what is said, but how liberal or conservative in practice are the courts when the general proposition of law is applied to specific fact-situations. The Connecticut experience with its manifestations of a progressive and realistic approach to the problem has already been discussed.

The Court of Appeals of Kentucky in 1908 was presented with a railroad case<sup>27</sup> which involved the ability to acquire land to be used sometime in the future. Reiterating what has been previously stated in this study, the court held that the requirement of necessity meant reasonable, rather than absolute, necessity; and that plaintiff, a railroad, could acquire land which is present plans show will be reasonably necessary in the future. Since the opinion is blank concerning the facts upon which it is based, it is difficult to infer what the court would consider reasonably necessary or a reasonable future time.

However, a later Kentucky opinion which applied the principles enunciated in the

Madisonville case, *supra*, contains a detailed discussion of the facts and illustrates the practical application of the propositions under discussion.<sup>28</sup> The acquisition by the City of Louisville of river-front property to be developed with wharves was involved. After an appraisal of the prior authorities, the court went on to say:

A condemning corporation may condemn lands sufficient to provide for not only its present but also its prospective necessities, as in the case of a railroad corporation, if it is not more than may in good faith be presumed necessary for *future use within a reasonable time.* (Emphasis added.)

On the basis of the testimony and detailed plans submitted as evidence, the court sustained the acquisition of land that would not be fully utilized for at least five years.

In 1953, the Florida Supreme Court ruled upon a collateral attack to a condemnation action decided in 1944.<sup>29</sup> If the appellant had been successful in proving that the prior determination that the land was necessary was the result of fraud, the condemnation would not have been sustained.

As evidence that the determination of necessity was permeated with fraud, appellant urged that the fact that the development (an airport) could not take place in the immediate future was proof of a malevolent intent. The fact that seven years had already lapsed since acquisition was submitted as evidence that the city officials did not intend to proceed with the project.

The court decided that the contentions were without merit, and in so doing held:

... it is not necessary that a political subdivision of the State have money on hand, plans and specifications prepared and all other preparations necessary for immediate construction before it can determine the necessity for taking private property for a public purpose.

During the last 10 years the progress, growth and development of the Miami area has been beyond the expectations of most everyone. *It is the duty of public officials to look to the future and plan for the future.* In erecting public buildings and public improvements, it is likewise the duty of public officials to build and plan not only for the present but for the foreseeable future. A few years ago it was difficult for anyone to determine exactly what would be necessary as an airport terminal for Miami for today. *City officials*

<sup>25</sup> *Cf. Croyl v. Johnstone Water Co.*, 259 Pa. 484, 103 Atl. 303 (1918), also involving a water company.

<sup>26</sup> H. R. Doc. 120, 84th Cong., 1st Sess. (1955).

<sup>27</sup> *Warden v. Madisonville H. & E. R. Co.*, 128 Ky. 563, 106 S.W. 880 (1908).

<sup>28</sup> *Baxter v. City of Louisville*, 224 Ky. 604, 6 S.W.2d 1074 (1928).

<sup>29</sup> *Carlor Co. v. City of Miami, Fla.*, 62 So.2d 897 (1953). *Cf. Dickson v. St. Lucie County, Fla.*, 67 So.2d 662 (1953).

would have been derelict in the performance of their duties had they planned only for the necessities of ten years ago without any consideration for the necessities of the future. Even though the International Airport in Miami may be sufficient to take care of the needs of today, wise planning in the public interest requires some consideration for the future. The time may not be far distant when other airports or landing fields will be necessary. The hands of public officials should not be tied to the immediate necessities of the present but they should be permitted, within reasonable limitations, to contemplate and plan for the future. (Emphasis added.)<sup>30</sup>

What is pertinent to this discussion is the ruling that it is permissible to acquire land which will not be used for at least seven years. On the basis of the facts, it was problematical, at the time, when the new airport would be constructed.

No other case has emphasized, with such force, the duty devolving on governmental officials to plan for the future. The court spoke in terms of a *positive duty* to acquire land for future needs.

A significant Pennsylvania case<sup>31</sup> bears investigation for two reasons. One is the realization on the court's part of the far-reaching impact upon the community and economy of a redevelopment of part of the City of Philadelphia. The second reason is the concept of futurity the court expounded in the light of the controlling facts.

The project out of which the litigation arose was the improvement of the southern

<sup>30</sup> *Id.* at 902.

<sup>31</sup> *Chew v. City of Philadelphia*, 257 Pa. 589, 101 Atl. 915 (1917).

section of Philadelphia and the consequent removal of the freight yards of two railroads to new locations. In order to relocate the yards, plaintiffs' land was condemned. Objections to this were predicated on the allegation that more land was being condemned than was necessary to satisfy the present needs of the railroads. In affirming the acquisition of the land, the court emphasized the magnitude of the redevelopment and the fact that no evidence was submitted to disprove that the land was necessary to satisfy the future needs of the railroads. During the course of the trial, the chancellor remarked that because of the importance of the redevelopment, the city and railroads should look "far into the future" in planning for and providing yard facilities.

No useful purpose would be served by analyzing in detail more court decisions than the preceding opinions. Each of the cases cited below reiterate the principles which have been previously discussed.<sup>32</sup>

<sup>32</sup> *Central Pacific Railway v. Feldman*, 152 Cal. 303, 92 Pac. 849 (1907); *In re Seneca Ave. in City of New York*, 98 Misc. 712, 163 N.Y.S. 503 (1917) (street opening); *State v. Superior Court for King County*, 102 Wash. 831, 173 Pac. 186 (1918) (wharves); *Kern County Union High School District v. MacDonald*, 180 Cal. 7, 179 Pac. 180 (1919); *Petition of Bd. of Education of the City of Detroit*, 239 Mich. 46, 214 N.W. 239 (1927) (school); *Petition of Fayette County Commissioners*, 289 Pa. 200, 138 Atl. 237 (1927) (court house); *Inland Water Ways Co. v. City of Louisville*, 227 Ky. 376, 13 S.W.2d 283 (1929) (wharves); *Inland Water Ways Development Co. v. City of Jacksonville*, 160 Fla. 913, 38 So.2d 676 (1948) (electric generating plant); *City of Chicago v. Vaccaro*, 408 Ill. 587, 97 N.E.2d 766 (1951) (parking lot); *Phillips Pipe Line Co. v. Brandstetter*, 241 M.A. 1138, 263 S.W.2d 880 (1954) (pipeline); *Pike County Bd. of Education v. Ford*, Ky., 279 S.W.2d 245 (1955) (school); *State v. Superior Court for Snohomish County*, 34 Wash.2d 214, 208 P.2d 866 (1949) (fire district); *The City of Chicago v. Newberry Library*, 7 Ill.2d 305, 131 N.E.2d 60 (1956); *Board of Education v. Blair*, N.Y., 144 N.Y.S.2d 371 (1955).

## USE OF PROPERTY ALREADY ACQUIRED FOR FUTURE NON-HIGHWAY PUBLIC USES FOR OTHER PUBLIC PURPOSES

Situations have sometimes arisen involving land that already has been acquired for a public or quasi-public purpose, but use of which will not be made until sometime in the future. The same land is sought for another public or quasi-public purpose and becomes the subject of condemnation proceedings. Should the need for potential future use prevail over the need for present use? Should the character of the contesting uses determine which one is to prevail? What is the proper legal disposition of the matter?

Judicial decisions on this subject seem to suggest at least some of the answers to these questions. It is now settled law that property already legally appropriated to a public use cannot be taken for another public use without legislative authority expressly given or necessarily implied.<sup>33</sup> Property, according to the courts, is devoted to or held for a public use, so as to be exempt from condemnation for a different public

<sup>33</sup> *Vermont Hydro Electric Corporation v. Dunne*, 95 Vt. 94, 112 Atl. 223 (1921); see Appendix B. 2 Nichols, *Eminent Domain*, Sec. 364; 2 Lewis, *Eminent Domain* (3rd Edition), Sec. 443.

use, when used in immediate and necessary connection with a public trust.<sup>34</sup> If future needs and use is within the scope of the concept of necessity, the court will not sustain the condemnation for a second public use.

The case of *Vermont Hydro Electric Corporation v. Dunne*<sup>35</sup> clearly presents the issue. Plaintiff had acquired certain water rights in order to increase its water supply. Defendants, the mayor and aldermen of the city of Rutland, Vermont, commenced proceedings to condemn certain of plaintiff's water rights. Issue was joined when plaintiff instituted the present proceedings, seeking to enjoin defendants from prosecuting their condemnation action. One of the defendants' contentions was that the property in issue was not presently devoted to a public use and mere intent to do so in the future was insufficient in law to exempt the property from condemnation. The crux of plaintiff's case was that the property sought to be condemned was already devoted to a public purpose and was, therefore, beyond the reach of the city.

After referring to the general rule concerning the exemption of property already devoted to a public use, the court stated:

While land kept by a corporation, bound by law, to serve the public in reasonable anticipation of future needs cannot be seized for different public use under general authority, land held for purposes other than those pertaining to its franchise may be taken as freely as from a private individual. The element of necessity plays an important part in the determination of the question. *While liberal consideration should be given to the future as well as existing needs of the corporation, the exemption will not extend to property held for future use upon the mere possibility that it may, at some future time, become necessary to the exercise of its corporate franchise. Reasonable expectation of future needs is required to protect the property from condemnation . . . nor is the exemption indefinite in point of time, but the property must be subjected to the use for which it is held within a reasonable time.*<sup>36</sup> (Emphasis added.)

The general rule to be gathered from the authorities is that the property is devoted to or held for a public use, so as to be exempt from condemnation for a different public use under general authority, when used in immediate and necessary connection with a public trust or when acquired by

a public service corporation for a necessary purpose pertaining to its franchise and held in *reasonable anticipation of its future needs with a bona fide intention of using it for such purpose within a reasonable time.*<sup>37</sup> (Emphasis added.)

Several facets of the problem under investigation are dealt with in the foregoing decision. To begin with, if the land is necessary for future needs, then it is a public use to hold it until needed. Although the formulation of the time test—"reasonable expectation of future needs"—is found in other cases, a different approach is alluded to in this opinion. Rather than tackling the problem from the viewpoint of the period of time the land is held before use is made of it, the degree of *certainty* inherent in the application of the land to the public use is suggested. Whether there is a distinction between this approach as compared with the former or whether one is the obverse side of the other will be left for future development.<sup>38</sup>

Four times, in the two paragraphs quoted, the concept of reasonableness is interjected into the opinion. As was previously stated, once this approach is adhered to, rigid rules cannot be formulated. However, this may have salutary consequences, since the circumstances of each case are then determinative and not some arid principle of law.

Moving across country and back in time, two Washington opinions add support to the Vermont holding.<sup>39</sup> In the *Nicomene* case, land acquired for a public purpose (a

<sup>37</sup> *Ibid.*

<sup>38</sup> *Accord East Bay Municipal Utility District v. City of Lodi*, 120 C.A. 740, 8 P.2d 532 (1932) where the crucial factor was the improbability of the application by the city of the land sought to be acquired by condemnation. Before enumerating the facts that militated against the defendants' use of the land the court stated at page 536:

As construed by the authorities which we shall hereafter cite, the word "used" does not mean actual physical use at the date of institution of the condemnation suit, but means property reasonably necessary for use and which the circumstances reasonably show will be actually used within a reasonable length of time. If the use is contingent, uncertain or problematical or, not reasonably definite as to time, eminent domain proceedings are not barred.

As indicative of the contingency that characterized the defendants' expectations of the use of the land, the following were enumerated: (1) The deed of conveyance to the defendant contained conditions which made title contingent and subject to loss, (2) Lack of adequate money to finance use of the land, (3) The improbability of procuring electoral support for a bond issue, (4) No preliminary investigation before acquisition of the land, (5) Contents of a resolution in which the city stated that no expenditures were contemplated in order to develop the proposed projects.

<sup>39</sup> *Nicomene Boom Co. v. North Shore Boom and Driving Co.*, 40 Wash. 315, 82 Pac. 413 (1905); *State v. Superior Court of Spokane County*, 40 Wash. 389, 82 Pac. 457 (1905).

<sup>34</sup> *Vermont Hydro Electric Corporation v. Dunne*, *Op. cit.*, *supra*, note 33, and cases cited therein.

<sup>35</sup> *Op. cit.*, *supra*, note 33.

<sup>36</sup> *Op. cit.*, *supra*, note 34 at p. 226 and cases cited in opinion.



*Credit: California Division of Highways.*

PLATE 3

Advance purchase of right-of-way for this California freeway saved the State over 2 million dollars.

boom for logs) was sought by another boom company. The plaintiff held the land in question for at least three years before putting it to use. Significantly, construction began only when the exigencies of plaintiff's business warranted expansion of its facilities.

There are other cases<sup>40</sup> arising out of basically the same fact pattern as those previously discussed which add support to the aforementioned principles.

As indication of what one court thought "future" connotated is revealed in *State v. Superior Court for Spokane County*.<sup>41</sup> Citing the *Nicomene* case as authority, the court held that a public service corporation may acquire property by condemnation or otherwise in reasonable anticipation of its future needs. Respondent, also a public service corporation, was organized in 1913 and sought to acquire part of relator's land which had been acquired in 1906. In 1914, a resolution was passed by the relator in which it was stated that with all convenient dispatch, work was to begin to develop the disputed land. At the trial, relator's electrical engineer testified in substance that on the basis of the average increase in the demand for electricity commencing in 1909 through 1914, the company had projected its planning to meet an expected demand not to be reached until 1920. With this background in mind, the court held that the relator had acquired the property with intention of devoting it to a public use within a reasonable time, and it now intends to do so and has means to carry out its plans.

Before concluding the review of the non-highway future use cases, note should be made of a recent Michigan case.<sup>42</sup> Plaintiff attempted to condemn defendant's land for a school site. The Board of Education

planned to build a school on the land in question at some indefinite time in the future. Testimony was given that the present school would adequately meet the demand for the next 30 years or more. Interpreting the phrase "necessity for using such property" which appears in *Michigan Constitution, Article 13, Sec. 2*, the court was willing to project its thinking into the near future for reasonably immediate use. In view of the indefiniteness of the plan for use of the land and the extreme projection of time, the holding of the case should not be surprising. The opinion of the lower court upholding the acquisition was reversed.

In a previous section of this investigation, the advantages and disadvantages of acquisition in advance of use were discussed. However, when all is said and done, the fundamental value of possessing the authority to acquire land for future use is one of economy. Enormous savings in the cost of acquiring necessary rights-of-way may result from acquiring land before it is fully developed and improved.

There is a definite trend discernable on the part of the courts to expand the concept of necessity to include future needs. However, the need for the desired land, whether now or in the future, must still be demonstrated to the court. The *Baczewski* case presents the issue, whether the requirement of necessity is satisfied by demonstrating that money will be saved by acquiring land for future use.

Plaintiff in the *Baczewski* case emphasized the point of economy as the dominant motivation in acquiring the land long before it would be put to use. The superintendent of schools testified:

We think it is wise for public boards to procure sites in advance in order that the taxpayers today may spend a small sum of money in order to save future taxpayers a vast sum of money.

The business manager testified:

What we are trying to do is save the taxpayers of this city a sum of money by acquiring property which is not now developed so we don't have to do it after it is developed.

No more succinct statement of one of the reasons behind having the authority to acquire land for future use can be found in the cases studied. In spite of the attempt

<sup>40</sup> Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511 (1886) (railroad yards); *In re East 161st Street in City of New York*, 52 Misc. 596, 102 N.Y.S. 500 (1907); *In re Neponset Avenue, Adirondack Blvd. and Newport Avenue in the City of New York*, 77 Misc. 246, 135 N.Y.S. 708 (1912) (street railroad); *Boalsburg Water Co. v. State College Water Co.* 240 Pa. 198, 87 Atl. 609 (1913) (water rights); *Duquesne Light Co. v. Upper St. Clair Tp.*, 377 Pa. 323, 105 A.2d 287 (1954) (transmission lines); *Delaware L. & W. R. Co. v. Stroudsburg Water Gap and Portland Street Ry. Co.*, 289 Pa. 131, 137 Atl. 73 (1927); *Town of Alford v. Great Northern Railroad Company*, 179 Iowa 465, 161 N.W. 467 (1917).

<sup>41</sup> 84 Wash. 20, 145 Pac. 999 (1915).

<sup>42</sup> Board of Education v. Baczewski, 340 Mich. 265, 65 N.W.2d 810 (1954).

to save money—a most praiseworthy endeavor, as the court was quick to point out—the lower court opinion upholding the acquisition upon plaintiff's theory was reversed.

According to the opinion, the attempt to economize on the part of the condemnor, in and of itself, does not satisfy the test of necessity. The constitutional requirement of "necessity for using such property" is not met by an indefinite, remote, or speculative future necessity, but means a necessity now existing or to exist in the near future.<sup>43</sup>

<sup>43</sup> But *cf.* *Davidson v. Commonwealth, ex rel. State Highway Commission, Ky.*, 61 S.W.2d 34 (1933).

### ACQUISITION OF LAND FOR FUTURE USE IN THE HIGHWAY FIELD

It is hoped that the foregoing review of the judicial experience with non-highway acquisition of property in advance of use has placed the problem in its proper perspective and has yielded several lines of thought which may be of valuable assistance in the analysis of the highway cases. If the findings that have been distilled from the cases already analyzed are used as a background, the subsequent material will take on added meaning.

How have the courts treated the acquisition of land for future use, in its various forms,<sup>44</sup> in the highway field?

At the outset, it may be noted that there is a dearth of litigation which specifically deals with acquisition of land for future highway use. The basic reason for this condition is that until recently, long range highway planning was almost non-existent. The acquirement of land for rights-of-way was an almost negligible factor in highway construction. Now, with the cost of the needed rights-of-way so dominant a factor in the financing of highways, a concerted effort is under way to devise methods to reduce land acquisition costs.

It is a fact of highway life that with a well-conceived program, a dollar spent now for land can yield returns ranging from five- to thirty-fold in the future.<sup>45</sup> Assuming

It is obvious that acquisition in advance of use is not being championed by many highway departments solely on the basis of economy. No one would suggest that the State would be justified in condemning land willy nilly without any prescribed plan, simply on the theory that some time in the dim, uncharted future, use may be made of the acquired property. The Michigan court was correct in holding that so indefinite a use should not be countenanced. This is just another manifestation that concrete advance engineering planning is needed, geared to a definite need involving a delayed use of the land.

that a State has the money and wishes to launch a program of land acquisition for future highway needs, but has no specific statutory authorization to do so, what guides do the judicial decisions furnish as to the course it should follow?

The prime prerequisite for a successful program of land acquisition for future use is adequate planning on the part of both the highway engineers and highway lawyers. Any project not adequately planned may be doomed to failure from its inception. At least it would be very unwise in the long run to proceed without the benefit of advance planning.

The experience of the Delaware State Highway Department is illustrative of the consequences stemming from insufficient planning.<sup>46</sup> The case merits a full discussion, as it may provide a guide for the future.

The defendants owned a triangular tract of land bounded by two highways which the Delaware State Highway Department had begun to improve. The department designated a right-of-way on one highway 100 feet wide, or 50 feet on each side of the then center line of the existing road as indicated in Figure 5. Since 20 feet of this 50 feet was already being used for highway purposes, the additional amount of land to be acquired by condemnation would be 30 feet. It was intended that the improved

<sup>44</sup> See pages 3, 4 for an analysis of the eight possible variations involving acquisition for future use.

<sup>45</sup> See subsequent discussion of California's experience with advance acquisition on p. 42 and "California's Accelerated Highway Finance Program," Frank B. Durkee, State Director of Public Works, p. 9. Speech given before the California State Chamber of Commerce, Dec. 2, 1954.

<sup>46</sup> *State v. 0.62033 Acres of Land, Del.*, 112 A.2d 857 (1955). See Appendix B, p. 71.

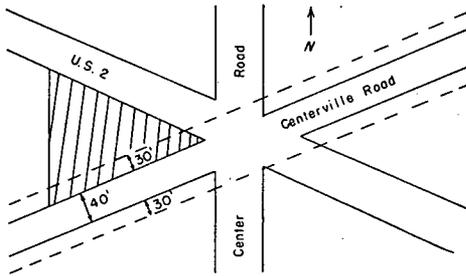


FIGURE 5

road would consist of two paved lanes, each of the width of 12 feet, the center of the 24-foot pavement being also the center of the existing highway. Defendants' titles extended to the middle of the existing road. The right-of-way was 40 feet, of which 18 feet was paved at the time of litigation.

The crux of defendants' arguments was that the land taken was grossly excessive and was predicated upon the construction of a four-lane highway, for which there were at the time of the taking no plans for construction in the foreseeable future. The court held, among other things, that the attempt of the department to take the strip of land along one of the roads and the apex of the triangle between the two roads constituted an excessive taking.

Necessity in the first instance is within the province of the acquiring administrative agency.<sup>47</sup> However, the usual caveat of fraud, bad faith or abuse of discretion is applicable and, if proven, a court will overrule a prior determination of necessity. Assuming that the court will sustain the determination of the need for the highway, the court is still confronted with another problem involving the certainty of the future use. In the Delaware case a two-pronged defense was employed by the defendants. Assuming, for the sake of argument, that the property was necessary, there was no evidence in the record as to when in the foreseeable future, if ever, the land would be used.

Proof of the certainty of use, not how far in terms of time, is emphasized. At this stage, the role of the engineers, particularly those concerned with the advance planning of the highway project, assumes vital, if not

determinative, importance in the success or failure of a program of acquisition of land for future use. According to the opinion in the Delaware case, the chief engineer and other employees of the department admitted that no official action whatsoever had been taken in connection with the construction of the proposed four-lane highway. They further conceded, in the course of testifying, that there was no reasonable certainty that such plans would be prepared in the foreseeable future.

The Delaware court pointed out that the goal of saving money for the State by acquiring property before its value appreciates, although commendable, should not be carried to the point of taking property from the private owner when that taking is not necessary for a public use.

As the highway cases are developed, an element common to almost all becomes apparent. Emphasis is placed upon the relative *certainty* of the application of the land to the use for which it was acquired. Once the particular tract of land sought to be acquired is related to a plan of highway development, the courts have no difficulty in sustaining the acquisition. Such advance planning apparently is deemed to be sufficient evidence of the certainty of future use.

Acquisition for future use in the highway field has been upheld in the following cases:

*Department of Public Works & Buildings v. McCaughey*, 332 Ill. 416, 163 N.E. 795 (1928). See Appendix B, p. 65.

*State Highway Commission v. Ford*, 142 Kan. 383, 46 P.2d 849 (1935). See Appendix B, p. 65.

*Porter v. Iowa State Highway Commission*, 241 Ia. 1208, 44 N.W.2d 682 (1950). See Appendix B, p. 68.

*State v. State Highway Commission*, 163 Kan. 187, 182 P.2d 127 (1947).

*State v. Superior Court for Cowlitz County*, 33 Wash.2d 638, 266 P.2d 1028 (1949).

*State v. Curtis*, 359 Mo. 402, 222 S.W.2d 64 (1949). See Appendix B, p. 66.

*Erwin v. Mississippi State Highway Commission*, 213 Miss. 885, 58 So.2d 52 (1952). See Appendix B, p. 68.

*Woollard v. State Highway Commission*, 220 Ark. 731, 249 S.W.2d 564 (1952). See Appendix B, p. 67.

and denied in:

*State v. City of Euclid*, 164 Ohio St. 265, 130 N.E. 336 (1935). See Appendix B, p. 72.

<sup>47</sup> *Department of Public Works & Buildings v. McCaughey*, 332 Ill. 416, 163 N.E. 795 (1928).



PLATE 4

Willow Freeway in Cleveland, Ohio. To the extent that highway location and design can be anticipated, advance right-of-way acquisition makes a lot of sense.

Support will be found in these cases for the principles already discussed. To make the cases more meaningful, the analysis will be aimed at the following problems:

- (1) On what legal theory was the acquisition based when no specific statutory power was granted?
- (2) What kind of evidence was offered to support the acquisition for future use?
- (3) Is the concept of "future" delineated, and if so, how?
- (4) What emphasis, if any, is placed upon advance planning?

The earliest highway case sustaining the acquisition of land for future use which this investigation unearthed is *Department of Public Works & Building v. McCaughey*.<sup>48</sup> Appellees contended that the taking of the land was unnecessary in that (1) there was no need for the highway and (2) that assuming there was a present need, a segment of the land was earmarked for future construction of a grade separation.

In brushing aside these objections, the court not only upheld the concept of acquisition for future use, but suggested that

the Illinois Department of Public Works and Buildings had the responsibility of anticipating future needs. The court perceived that highways should be constructed for future as well as present use. Provision also must be made for future development of the highway. To quote the court:

Means of transportation have entirely changed since many of the existing highways were built. The roads to be constructed under the bond issue acts are not for present use alone, but are to be hard-surfaced and constructed of durable material, to last for many years. As to the amount of land appropriated in matters of this kind, the department of public works is vested with a broad discretion in determining the amount to be taken. *They have a right to, and should, anticipate the future needs of the municipality*, and their action in the premises will not be interfered with, except in a clear case of abuse of the discretion vested in them.<sup>49</sup> (Emphasis added.)

Two Kansas cases<sup>50</sup> discuss the issue of acquisition for future use and contain strong language authorizing Kansas to acquire land for future highway use. Involved in

<sup>48</sup> *Id.* at 797.

<sup>50</sup> *State Highway Commission v. Ford*, 142 Kan. 383, 46 P.2d 849 (1935) and *State ex rel. Mitchell v. State Highway Commission*, 163 Kan. 187, 182 P.2d 127 (1947).

<sup>48</sup> 332 Ill. 416, 163 N.E. 795 (1928).

both cases was Sec. 68-413 of the General Statutes of Kansas, which, insofar as pertinent to the problem under investigation, provide:

That the State Highway Commission . . . may acquire title . . . by the exercise of eminent domain to any lands . . . necessary for the construction, improvement, reconstruction, maintenance or drainage of the State highway system.

In determining that the requirement of necessity was not only satisfied but that future needs are a constituent element of the requirement of necessity, the court stated in the *Ford* opinion, on page 852:

The fact that future needs were taken into account does not destroy the right and power to act. Indeed, we are all learning that many of our roads and bridges have been made too narrow, the turns too short, and that too little attention has been given to obstructions to view at corners.

Twelve years later, in the *Mitchell* case,<sup>51</sup> which dealt with the power of the highway commission to dispose of land no longer needed by it, the *Ford* case was affirmed in these terms:

It should be stated the State concedes the right of the commission to exercise its discretion, in good faith, with respect to what amount of land is reasonably necessary for the purposes designated in the statute, including future needs and a reasonable sightly appearance of the highway.<sup>52</sup>

Moving to Missouri, a significant case<sup>53</sup> was adjudicated in 1949. A writ of mandamus was issued by the Supreme Court to require the respondent circuit judge to accept jurisdiction of all issues in the Highway Commission's condemnation petition. The petition stated, among other items, that the land sought was necessary for the project under consideration. The road to be constructed was to be a "limited-access" highway consisting of two divided pavements. According to the plans, the highway improvement was to be built under two contracts, the south lanes to be built first, though right-of-way was now being sought for the entire project. In answer to a demand for a bill of particulars enumerating the uses and purposes of the land, the following statement was submitted:

The uses and purposes which relator proposes to make of the property which the present plan on

file with the county clerk do not (*sic*) positively show will, at this time, have placed upon it any of the first construction of the first roadway, are to provide an adequate and necessary safety factor for all contingencies and development in the construction, reconstruction, improvement and maintenance of the entire ultimate highway, which may be reasonably anticipated but which it is impossible at this time to foresee fully and to state and set forth definitely and in detail.<sup>54</sup>

To this bill, defendants moved to strike all lands from the petition which were not shown by the filed plans to be needed for immediate use. Grounds for the motion were that no public use of the lands was shown; that land was being acquired for "some vague, indefinite, speculative use or purpose"; and that the Highway Commission was not legally entitled to condemn said lands in this action.

Respondent circuit judge entered an order holding that land was being taken which the condemnor did not propose to use, either now or at any ascertainable time in the future, for the purpose of constructing a highway.

In its opinion, reversing the decision of the trial court, the Supreme Court made a distinction between excess condemnation and condemnation for future use and also between public use and public necessity. According to the court, there was no question of excess condemnation involved. The Highway Commission had specifically stated in its petition that all the land was necessary for the contemplated project. Did the fact that not all the property sought was to be immediately used for the road, affect the power to acquire? According to the court, *Revised Statutes of Missouri, Sec. 8759 (1939)*, which authorized the commission to condemn lands for right-of-way and "for any other purpose necessary for the proper and economical construction of the State highway system," was broad enough to encompass acquisition for future use.

According to the court,<sup>55</sup>

Although the entire road is not to be constructed at once, the petition alleges that it is all a part of a *general plan adopted by the commission whereby the remaining portion will be constructed in the near future*. This authorizes the appropriation of land for the entire project now. (Emphasis added.)

<sup>51</sup> *Op cit.*, *supra*, note 50.

<sup>52</sup> *Id.* at 133.

<sup>53</sup> *State v. Curtis*, 359 Mo. 402, 222 S.W.2d 64 (1949).

<sup>54</sup> *Id.* at 66.

<sup>55</sup> *Id.* at 67. See cases in opinion.

Throughout this monograph stress has been laid on the determinative role the concept of necessity plays in relation to the success or failure of the acquisition of land for future use. If a court reads into necessity a broad meaning, this is the way in which acquisition for future use can be sustained.

No one would seriously question today that a highway involves a public use. Those opposing the condemnation of lands for future use place the brunt of their attack on the issue of necessity. However, if the question is settled on the issue of necessity, the condemnor is given a decided advantage. Returning to the decision in the *Curtis* case, the following quotation clearly documents this principle:

As we understand respondent's brief he contends that the relator's petition shows that it is attempting to take more land than is reasonably necessary even for the construction of the road to be built now; that the excess of land over what is reasonably necessary will not be taken for a public use; that the question of public use is a judicial question which respondent had jurisdiction to determine from the petition and bill of particulars, and that it was incumbent on relator to show such public use by its pleadings.

In condemnation cases, whether or not land is being taken for a public use is a judicial question regardless of any legislative declaration that the use is public . . . but the public necessity or propriety for the exercise of eminent domain is a legislative or political question and is not the same as public use. The power to locate a State highway, to determine its width, type of construction and the extent of land necessary for economical and proper construction are vested in the sound discretion of the State highway commission, uncontrolled by the courts except to compel strict compliance with the statutes and to prevent the taking of private property for a private or non-public use.

The commission has large discretion to determine the extent of the land to be taken and is not limited to a taking of the actual roadbed. It may determine what land is reasonably necessary for proper and economical construction and for the purposes outlined in relator's bill of particulars.<sup>56</sup>

This simply means that the determination of necessity by the State highway department is treated like any other administrative determination. Only in rare instances, when fraud, bad faith, or a gross abuse of discretion is proven, will a court overturn

a determination of necessity. The quantum of proof required to reverse a determination of necessity is much greater than that needed to reverse a determination of public use.

In the light of the previous Washington cases discussed, it may be argued that *State v. Superior Court for Cowlitz County*<sup>57</sup> is authority or at least points toward the authorization of acquisition of land for future use, at least for expressway purposes. The issue litigated—the power to condemn access rights—has no bearing upon the problem under discussion. What is significant is the statement made in interpreting *Remington Revised Statutes, Volume 7A, § 6400-25*, which provides:

Whenever it is necessary to secure any lands for a right-of-way for any State highway . . . or for any other highway purpose . . . the director of highways is authorized to acquire such land in behalf of the State by gift, purchase or condemnation.

The court made the following observation concerning the statute:

The title to the real estate acquired under the provision of the act is in fee simple instead of merely an easement, and the public may acquire an entire lot, block or tract of land if by so doing the interest of the public will be best served, even though such entire lot, block or tract is *not immediately needed for the limited access facility*. (Emphasis added.)<sup>58</sup>

Whether the above language is authority for the acquisition of land for future use generally or even for an expressway is difficult to determine.

Note should be made of the similarity of the language found in the quotation and in the statutes of 11 other States providing for "marginal land acquisition." The future use aspects of marginal land acquisition will be discussed in a subsequent section.<sup>59</sup> Suffice it here to indicate that part of the problem can be solved via the marginal land acquisition mechanism. In practice, however, that procedure has definite limitations which restrict its effectiveness in this connection.

The reasoning that is evident from the

<sup>57</sup> 33 Wash.2d 638, 206 P.2d 1028 (1949).

<sup>58</sup> *Id.* at 1030.

<sup>59</sup> See pages 46-48.

<sup>56</sup> *Id.* at 68.

language employed in the *Porter* case<sup>60</sup> is indicative of the realization by the court of the utility of acquisition for future needs. It was categorically stated during the cross examination of one of the defendant's witnesses that a particular parcel of land had been purchased for the purpose of future use when something more than a two-lane highway would be required. The Iowa court held that there was ample evidence to uphold the determination that plaintiff's property was necessary for the improvement of existing traffic requirements and as part of a plan for meeting traffic requirements in the future.

In a previous section of this study, the point was made that litigation in this field frequently revolves around the requirement of necessity; that is to say, whether it is necessary to acquire land for future use to facilitate the eventual construction or improvement of a highway, highway construction being an admittedly public purpose. No more vivid example of this problem can be found than *Erwin v. Mississippi State Highway Commission*.<sup>61</sup>

Plaintiff's bill in equity raised the issue:

That the defendant admittedly has no immediate use for the aforesaid parcels 3 and 4 but is seeking condemnation, thereof, with the view of holding the same until some distant date in the future, then to be used, if at all, as the site of a so-called clover leaf at the junction of the aforesaid new U.S. Highways 80 and 45. That the defendant has advised complainant that the plans for the construction of such clover leaf are contingent upon such sufficient funds accumulated for that purpose out of the pay-as-you-go highway construction program now in effect in the State of Mississippi and that the time for constructing such a clover leaf, if at all, is most indefinite . . . that such power does not include the right to take private property in the hope of putting it to public use at some uncertain date in the future, if ever, from the use and enjoyment thereof during a period of years when no public use is being made of such property.<sup>62</sup>

Mississippi practice provides that in the absence of allegations and proof of fraud or gross abuse of discretion, the only method of judicially testing the issue of public necessity is by a petition for a writ of prohibition. The bill, in its averments as to the

proposed future use of the land for a clover-leaf intersection, did not contain any allegations of fraud or abuse of discretion which would warrant injunctive relief. A treatise was cited as authority for the proposition that the highway department, in exercising its power of eminent domain, must not only meet present needs but also those which may be reasonably anticipated in the future.<sup>63</sup>

It is significant that the prospective use of the land was contingent upon the availability of funds from a pay-as-you-go highway program. When the State would be in a position, financially, to construct the clover-leaf intersection was problematical, and yet the taking was upheld. The highway department was frank to admit that there was no way of telling precisely when the project would be built. Apparently, the Mississippi court is amenable to a broad interpretation of "necessity" and future use.

Confusion is created by the failure to make the distinction between public use and public necessity. From what has been written previously, it is apparent that this distinction is not simply one of semantics but has very real, practical consequences.

Some recent Arkansas litigation is illustrative. The Arkansas State highway department, in the process of relocating a segment of U.S. 61, had instituted condemnation proceedings to acquire a new right-of-way. The affected landowners sought an injunction to enjoin the department.<sup>64</sup> Plaintiff's initial argument has no relevancy to the issue under analysis; however, as a second string to their bow, the argument was made that the condemnation was not for a public purpose since

. . . the commission seeks a right-of-way 250 feet in width and yet proposes to build in the immediate future a paved highway that will be only 24 feet wide.

In reality, the decision hinged on the requirement of necessity. Testimony was given that there already was a need for a four-lane highway and that the highway department planned to build another two lanes when funds became available.

<sup>60</sup> *Porter v. Iowa State Highway Comm.*, 241 Ia. 1208, 44 N.W.2d 682 (1950).

<sup>61</sup> 213 Miss. 885, 58 So.2d 52 (1952).

<sup>62</sup> *Id.* at page 54.

<sup>63</sup> 18 American Jurisprudence, *Eminent Domain*, Sec. 111.

<sup>64</sup> *Woollard v. State Highway Commission*, 220 Ark. 731, 249 S.W.2d 564 (1952).

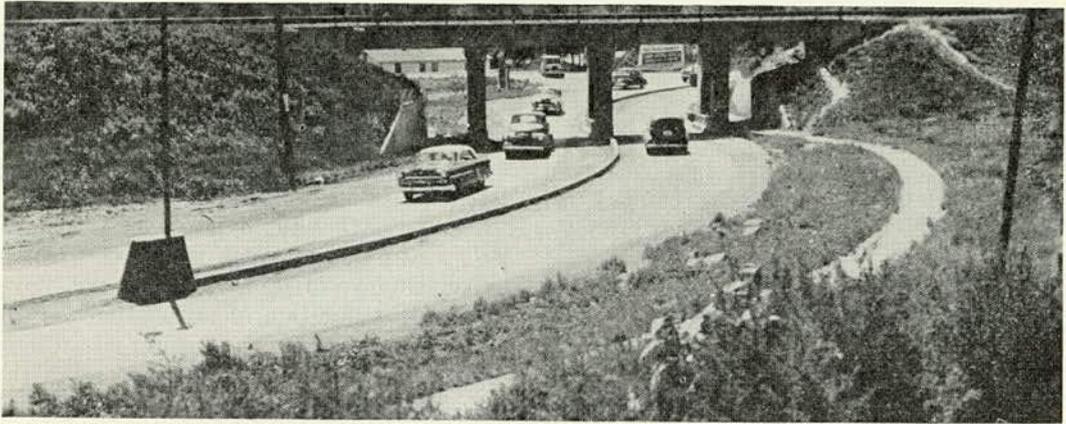


PLATE 5

U.S. 10 in Bismarck. Legal authority to acquire right-of-way in advance of need exists in North Dakota.

In supporting the highway department's decision, the court emphasized the financial savings to be gained by acquiring all the land now that ultimately would be required. The following significant language appears in the opinion:<sup>65</sup>

By acquiring a sufficiently broad right-of-way in the first instance the commission expects to avoid the expense that is incident to any attempt to enlarge a roadbed that has been hemmed in by various commercial establishments that tend to spring up along the border of a public highway. It is evident that the present undertaking would not be necessary had the State taken a sufficiently wide easement when the road from Marion to Turrell was originally laid out. In these circumstances it is certainly permissible for the commission to look ahead in its planning.

It would seem that the court is criticizing the department for not originally acquiring sufficient land to meet future needs. Is this a manifestation of the fourth idea enumerated on page 8 in relation to *Chicago, St. P., M. & O. Ry. Co. v. Bayfield County*?

A seemingly adverse decision prohibiting the acquisition of land for future use is found in a recent Ohio decision.<sup>66</sup> However, when the facts are closely analyzed some of the adverse effect upon the concept disappears.

Sun Oil Company entered into an agreement with the fee simple owner of the land in question to purchase the property on

condition that Sun was able to procure from the city of Euclid a permit to construct and operate a retail gasoline filling station thereon. Prior litigation involving the same parties had established that a zoning ordinance, to the extent that it prohibited the use for the desired purposes was unreasonable and confiscatory and therefore unconstitutional. The city was directed to issue the permit. A few hours after copies of that order were served upon the mayor and building commissioner of defendant, the city council adopted a resolution declaring it was necessary to appropriate the property in question for highway purposes.

By stipulation it was disclosed that a study had been conducted to determine the feasibility of constructing a limited access highway. The proposed center line for the facility was surveyed and the construction of the highway was declared feasible. However, no cooperation agreement of any kind in connection with the portion of the proposed highway within the defendant municipality has been entered into by the defendant with the State of Ohio, the Federal government or the county of Cuyahoga, nor had the defendant adopted any legislation to provide on its own behalf for the establishment and construction of the highway.

In light of the indefiniteness of the project and the failure to establish the high-

<sup>65</sup> *Id.* at 566.

<sup>66</sup> *State v. City of Euclid*, 164 Ohio St. 265, 130 N.E.2d 366 (1955). See Appendix B, p. 72.

way, which is a prerequisite to the maintenance of a condemnation action, the following quotation can be reconciled with the previous cases analyzed:

It is clear from the record not only that the city of Euclid has not established Lakeland Freeway through its corporate limits, but that the freeway is still in a visionary stage awaiting a cooperation agreement with the county, state or federal government or some of them to establish it; and that the so-called appropriation was only an abortive attempt to acquire title to this property for possible future highway purposes. The municipality has no power or authority to appropriate lands for some contemplated future use.<sup>67</sup>

<sup>67</sup> *Id.* at 340.

<sup>68</sup> *City of Cincinnati v. Vester*, 281 U.S. 439, 50 S.Ct. 360, 74 L.Ed. 950 (1930).

It is significant that the only authority<sup>68</sup> cited by the court for this conclusion did not involve the validity of an acquisition of land for future use. The subject matter of the *Vester* case was the procedure known as "excess condemnation." No such issue is found in the instant case.

Assuming that the highway had been legally established and the cooperation agreement executed, would the court have decided the question of acquisition for future use as it had in the instant case? The opinion leaves this question open and therefore with the proper legal and factual foundation an acquisition for future use may still be sustained in Ohio.

### CONCLUSIONS DRAWN FROM DECISIONS INVOLVING ACQUISITION FOR FUTURE USE

What generalizations, if any, can be drawn from the preceding cases?

It is firmly embedded in American jurisprudence for well over 70 years<sup>69</sup> that, in a condemnation proceeding, it is permissible for the condemnor to acquire property, the use of which is forestalled until sometime in the future. However, it must be borne in mind that the requirement of necessity still must be satisfied. Courts have so construed the concept of necessity as one of *reasonable* necessity. The cases definitely show a *liberalizing* tendency in giving meaning to "necessity." The significance of this trend must not be overlooked. In those States which have no specific statutory authorization for acquisition of land for future use, it is through the channel of an expansive definition of what is public necessity that land may be acquired for future needs.

Once the rigidity of absolute standards, both as to time and need, are removed by the courts, and the salutary concept of reasonable necessity substituted, the role of the highway official and highway attorney become progressively more difficult. In exercising discretionary authority, the highway official will be constantly seeking

guides to aid him in following a path which lies between the effective exercise of his authority and what a court would condemn as an abuse of discretion. From the vantage point of looking back on the judicial authorities already reviewed, little aid and comfort will be found. Besides the recognition that future needs and use are constituent elements in determining necessity, very little else can be discerned. What may be considered reasonable, in terms of both necessity and futurity, on the basis of one set of facts might be considered arbitrary, capricious, and evidence of bad faith when transposed to another fact-situation.

An even more troublesome question arises, once it is established that in exercising the power of eminent domain it is proper to take cognizance of future as well as present needs, and in so doing acquire land which will not be put to use until sometime in the future. What is meant by future? Is the concept limited, in terms of time, to 6 months from the present, 2 years, 5 years, 10 years, or 20 years? At the outset it must be understood that one will seek in vain for exact standards of what is considered by the courts as a permissible period for which land can be held before being used for the purpose acquired.

Courts have formulated a time test in

<sup>69</sup> See *In re Application of Staten Island Rapid Transit Co.*, 193 N.Y. 252 (1886); *Pittsburgh Junction R. Co's Appeal*, 122 Pa. 511 (1886) and cases cited therein.

various ways. The early cases verbalized future in terms of "immediate future."<sup>70</sup> The adjective "immediate" would seem to be a method of circumscribing the period of time between acquisition and use of the property.

In more recent times, the courts have used as a test "presently foreseeable future needs," "reasonable future use," or "future use within a reasonable time" or words which connote the same meaning.<sup>71</sup> Whether there is any substantive difference between the various verbalizations or whether it is simply a matter of semantics, is difficult to determine. Conceivably, once a court has decided to accept advanced acquisition it matters little what words the court employs to denote the future.

It seems fruitless to approach the problem strictly from the point of view of the time lapse between acquisition and use. A close reading of the cases reveals one common element in almost all of those decisions which sustain advance acquisition—emphasis on the *certainty* of the future public use. In *East Bay Municipal Utility District v. City of Lodi*<sup>72</sup> emphasis was directed at

the high degree of contingency inherent in defendants' use of the land. Other opinions<sup>73</sup> go to lengths in relating the desired land to an over-all plan of development.

The judiciary is not so constituted as to be able to pass intelligently upon the question—basically one of engineering—whether a certain tract of land is necessary for a particular project. However, no court is oblivious to the proposition that for land to be necessary for a project, now or in the future, the project must be determined upon. From an evidentiary point of view, a lawyer armed with detailed plans relating the desired property to a program of highway development has an infinitely better chance of being successful in a condemnation action than without such material.

If the problem is approached from the viewpoint of the degree of certainty inherent in the application of the acquired land to the public use for which it was condemned, the problem becomes relatively simple from a judicial standpoint. This approach may reveal that in order to achieve a degree of certainty, there must be a limitation in relation to time on future use. The end product may be the same, but the chances of achieving it are enhanced when using the approach suggested.

<sup>70</sup> Kern County Union High School District v. MacDonald, *op. cit.*, *supra*, note 32; Warden v. Madisonville, *op. cit.*, *supra*, note 27; *In re East 161st Street in City of New York*, 52 Misc. 596, 102 N.Y.S. 500 (1907); *In re Application of Staten Island Rapid Transit R. Co.*, *op. cit.*, *supra*, note 69; *State ex rel. City of Duluth v. Duluth St. Ry. Co.*, 179 Minn. 548, 229 N.W. 883 (1930).

<sup>71</sup> Independent School District of Boise City v. Lauch Construction Co., 74 Ida. 502, 264 P.2d 687 (1953); Phillips Pipeline Co. v. Branstetter, *op. cit.*, *supra*, note 32; Rindge Co. v. County of Los Angeles, 262 U.S. 700, 43 S. Ct. 689, 67 L.Ed. 1186 (1923).

<sup>72</sup> *Op. cit.*, *supra*, note 38.

<sup>73</sup> Kountze v. Proprietors of Morris Aqueduct, *op. cit.*, *supra*, note 20; State v. 0.62033 Acres of land, Del., 112 A.2d 857 (1955); Board of Education v. Baczewski, 340 Mich. 265, 65 N.W.2d 810 (1954); Hughbanks v. Port of Seattle, 193 Wash. 506, 76 P.2d 603 (1938); Port of Everett v. Everett Improvement Co., 124 Wash. 486, 214 Pac. 1064 (1923); *In re New Haven Water Co.*, *op. cit.*, *supra*, note 21; City of New Orleans v. Moeglich, 169 La. 111, 126 So. 675 (1930).

## IS THERE A NEED FOR A STATUTE AUTHORIZING ACQUISITION FOR FUTURE USE?

In effect, the judicial decisions which have been reviewed constitute interstitial legislation on the subject of acquiring land for future highway use. In these cases, the courts have not sought to usurp legislative prerogatives; rather, they are to be commended for seeking to bridge an obvious gap.

At this point, highway officials may well ask themselves: Would it be more desirable to enact a statute which comprehensively deals with the matter of acquiring land for future highway use, or, rather rely

upon the possibility of a favorable supreme court decision which permits future use acquisition via the "necessity" approach?

In a number of States one answer to the problem may lie in the general grant of authority to the highway department to "acquire property necessary for highway purposes." This type of language may be sufficiently broad to encompass future as well as present use. While not enacting legislation which contains words of futurity, the aforementioned States may still find it advisable to enact legislation to meet the

various problems engendered by advance acquisition.

A comprehensive program of acquiring private property for future highway use necessarily involves a multiplicity of factors. To fulfill its purposes, adequate legal authority must anticipate and deal with these many facets of advance acquisition. Such questions as the authority to lease and sell, type of interest acquired, and standards for the exercise of the power are examples of the vexing problems which will inevitably arise when acquiring land in advance of its use. A statute is a far more practical vehicle to deal effectively with these problems than multiple appeals to the highest State court on each aspect of advance acquisition as it arises in litigation.

Moreover, the launching of an extensive program of acquisition for future use, which accelerated programs of highway improvement presupposes, is actually a new and different kind of activity for most State highway departments. If the past is any criterion, it would seem to be wise to have the legislature specifically authorize the activity.

Time, too, is of the essence in a successful program of highway modernization. It

#### STATUTES SPECIFICALLY AUTHORIZING ACQUISITION FOR FUTURE HIGHWAY USE

The preceding analysis of the common law reveals that acquisition of land for future use has been sustained for a score of public purposes, including highways. This has been accomplished by a broad interpretation of the concept of necessity so as to include future needs and future uses.

Some States have enacted statutes on this subject. An examination of the existing laws dealing with the acquisition of property for future highway use reveals that they have certain elements in common, and that there are logical groups of these characteristics. These consist of who has the power to acquire property for future use, the methods of acquisition, the type of interest to be acquired, determination of necessity, and words of futurity employed. Each of these elements or factors will be dealt with separately, and an attempt made

would seem that the shortest route, in terms of time, to obtain legal authorization for future use acquisition, if such additional authority is thought necessary, is through the legislature, rather than through the courts, where protracted litigation on each of a host of related issues, can tie up a desirable highway program for unreasonable periods of time.

It seems to be more consonant with the past operations of most highway departments to have specific legislative authority to proceed in so vital a field as future use acquisition, rather than rely upon an uncertain and perhaps adverse judicial finding. In the practical operations of the program, highway officials would be proceeding with far greater assurance under a statutory authorization than without it.

Although it may be desirable to have legislation specifically authorizing future use, it should not be inferred that without such legislation the State is powerless to make use of the concept. The previous case law analysis has shown that when the acquisition is predicated upon a firm foundation of engineering planning, the taking will be sustained through an expansive interpretation of necessity.

to evaluate their adequacy in terms of the present need to modernize the highway plant.

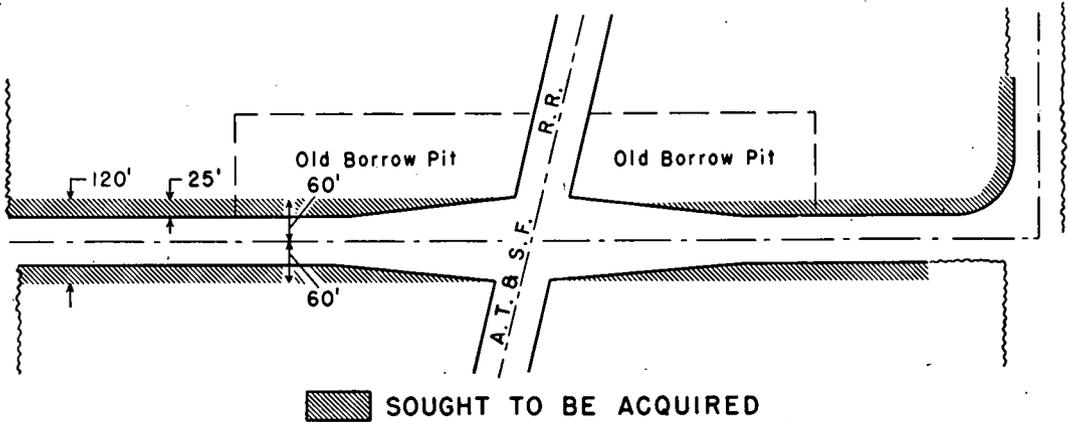
#### *Who Has Power to Acquire for Future Use*

The laws of 15 States explicitly authorize the acquirement of land for future highway use as indicated in Table 1.<sup>74</sup> In 14 States, the State highway department is empowered to exercise the authority.<sup>75</sup> A

<sup>74</sup> *Arkansas*, Ark. Stat. Ann. 1947, Sec. 76-532; *California*, Deering's California Code, Streets and Highways, Sec. 104.6; *Colorado*, Colo. Stat. Ann., Ch. 120-3-10; *Florida*, Fla. Stat. 1955, Ch. 837.27; *Idaho*, Idaho Code, Sec. 40-120(9); *Louisiana*, La. R.S., Title 48:220; *Maryland*, Ann. Code of Md., Art. 89B, Sec. 8(a); *Nebraska*, Neb. Laws of 1955, L.B. 187, Sec. 20; *Nevada*, Nev. Stat. 1953, Ch. 132, Sec. 2; *New York*, McKinney's Unconsol. Laws, Pt. 2, Sec. 6485; *New Jersey*, N.J.S.A., Secs. 27:7A-3, 32:1-132, 32:3-6, 32:8-4, 32:13A-6; *North Dakota*, Rev. Code of 1943, Sec. 24-0118; *Oklahoma*, Okla. Stat. Ann. 1951, Title 69, Sec. 46(2); *Virginia*, Code of Va. 1950, Sec. 33-57; *Wisconsin*, Wis. Stat. 1953, Sec. 80.64, Laws of Wis. 1955, Ch. 574, Sec. 4(2). See Table 1.

<sup>75</sup> *Arkansas*, *California*, *Colorado*, *Florida*, *Idaho*, *Louisiana*, *Maryland*, *Nebraska*, *Nevada*, *New Jersey*, *North Dakota*, *Oklahoma*, *Virginia* and *Wisconsin*.

## FUTURE USE COMBINED WITH PRESENT PURPOSES



State Highway Commission vs. Ford,  
46 Pac. (2d) 849 (1935)

PLATE 6

"Future needs are a constituent element of the requirement of necessity," according to the Kansas court which approved the acquisition of land for future use in this case.

somewhat unique situation is found in New York where the power to acquire land for future highway use is granted only to the Port of New York Authority. In New Jersey the application seems to be limited to the construction of freeways and parkways.<sup>76</sup> Certain designated interstate authorities in New Jersey have been given the power to acquire land for future use.

Wisconsin stands alone, among the 15 States, in granting the power to local subdivisions.<sup>77</sup> All counties and municipalities are authorized to establish widths of streets or highways in excess of the width in use, and acquire the excess land at any time. In addition, the Milwaukee County Expressway Commission is also given the authority to acquire land for future highway use. It should be noted that the commission can exercise this authority only for land to be used in the construction of expressways.

If advance acquisition of land is a useful tool for the State to possess, consideration should be given for authorizing all local

governmental bodies involved in the highway field to exercise the power. It will be found that the same benefits accrue to local governments as have been attributed to the exercise of the power by the State.

In evaluating the relative merits of authorizing only the State highway department to acquire land for future use, as compared with granting the power to all political subdivisions involved in the highway field, one assumption must be made. It is assumed that in all areas of government—State, county, and city—there exists a sufficient number of well-trained men to administer as complex a highway program as envisaged by the acquisition of land in advance of use. In practice, such may not be the case. This may be one of the reasons for limiting the power to the State. On the other hand, there may be some local agencies that are at least equal to some State departments in this field, if not superior to it. Moreover, empowering the localities to act in this matter may be a means of encouraging the development of adequate organizations to do the job.

The practice followed in several States, such as Texas, should also be noted, of

<sup>76</sup> See New Jersey Statutes Annotated, 27:7A-1 for definitions of freeways and parkways.

<sup>77</sup> Wis. Stat. 1953, Sec. 80.64; Laws of Wisconsin 1955, Ch. 574, Sec. 4(2).

requiring the city or county, as the case may be, to acquire any right-of-way needed for State highways except Interstate highways. Even if the legislature in those States should decide to limit the acquisition of land in advance of use solely to the State highway system, it would necessarily have to grant the power to the city or county.

Although the primary responsibilities for supplying highway rights-of-way rest with State agencies in many jurisdictions, the State highway departments involved frequently rely on local assistance of one kind or another. The land acquisition process is a complex one, and involves functions related to planning the rights-of-way, financing the acquisition, the acquisition itself, clearance of the rights-of-way, and related matters. Local cooperation may be sought on one or more phases of these activities, and the broadest kind of legal authorization would enhance the chances of receiving the desired cooperation.

#### *Method of Acquisition*

With respect to the methods of acquisition, the usual procedures are provided for by most of the statutes.<sup>78</sup> That is to say, the authorized body can acquire land by "gift, purchase, condemnation, or otherwise"; this, or its equivalent, is specifically mentioned in the Arkansas, California, Colorado, Idaho, Louisiana, Maryland, Nebraska, Nevada, North Dakota, Oklahoma and Virginia statutes.

The power to exchange one parcel of land for another is authorized in Idaho, Louisiana, Nebraska, and North Dakota. Florida is unique in that the State Road Department is authorized only "to condemn for future use." However, since the extreme method (condemnation) is granted, it may be argued that the power to purchase is implicitly granted.

#### *Type of Interest Acquired*

The 15 State statutes which authorize the acquisition of land for future use are unanimous on one point. In each instance, the acquiring body is empowered to acquire a

fee simple (or the equivalent) or any lesser estate which is desired rather than restricting the interest acquired to an easement for highway purposes.<sup>79</sup> North Dakota's statute is a variant from the norm in that oil, gas or fluid minerals under the land are excluded from the title to the acquired land.

The type of interest acquired for future use has important implications. Various legal consequences follow, depending upon whether a fee simple title or an easement for highway purposes is acquired.

Assuming that an easement for highway purposes is acquired, there might be no authority to lease the land before use is made of it. The owner would possess the right to continue his use of the land until it is required for construction. If only an easement is acquired, thought should be given to the advisability of including restrictive covenants in the conveyance restricting the development of the land during the interim period and to provide that the highway department will not be liable for the costs of removing any improvements made subsequent to the conveyance, when highway construction commences.

Tax consequences follow, too, depending upon the type of interest acquired by the highway department. If a fee simple title is acquired, the land would be removed from the tax rolls, since the title holder would be the State. On the other hand, the land would remain subject to taxation in some States, if an easement for highway purposes is taken. However, since real estate taxes are determined by the value of the property subject to taxation, it is conceivable that a parcel of land, burdened with an easement in perpetuity, would have very little value for tax purposes. It follows in many cases that the amount of taxes derived from land subject to an easement will be minute. The effect upon the tax base, which stems from the type of interest acquired, nonetheless, must be carefully considered in deciding whether to authorize the taking of a fee simple title or an easement.

In connection with the tax question,

<sup>78</sup> See Table 1.

<sup>79</sup> See Table 1.

Table 1. State Statutes 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
Arkansas	State Highway Commission	Gift, devise, purchase, condemnation, or otherwise	Fee simple		Yes	Yes	"Highway purposes shall include . . . (a) for present or future rights-of-way."
California	Department of Public Works	To acquire includes condemnation, purchase, lease, dedication, donation, or otherwise	Fee simple	State Highway Commission	Yes	Yes	"Authority to acquire lands for State highway purposes includes authority to acquire for future needs."
Colorado	State Highway Department	Purchase, condemnation	Fee simple		Yes		"The department of highways shall have authority to acquire by condemnation rights-of-way for future needs."
Florida	State Road Department	Condemnation	Fee simple		Yes	Yes	"Power of eminent domain is vested in the department to condemn . . . for existing proposed or anticipated roads in the State Highway or State Road Park System."
Idaho	Board of Highway Directors	Purchase, condemn, or otherwise acquire (including exchange)	Fee simple	By the Board (prima facie evidence of necessity)		Yes	". . . Real Property . . . deemed necessary by the Board for present or future State Highway purposes. . . ."
Louisiana	State Highway Department	Expropriation, donation, purchase, exchange, lease	*	Chief Engineer			"Width may be fixed in a manner sufficient . . . to provide presently and in the future for the public interest, safety, and convenience."
Maryland	State Roads Commission	Gift, purchase, condemnation, or otherwise	Fee simple	State Roads Commission		Yes	"By appropriate resolution, shall determine that such property is necessary in its judgment for immediate or proposed construction of a State highway, parkway. . . ."

\* La. R.S., Tit. 48, Sec. 218 provides that the department may acquire right-of-way over or *title* to private property. This may imply that the department is empowered to acquire a fee simple or its equivalent.

Table 1. State Statutes Specifically Authorizing Acquisition of Property for Future Highway Use (Continued)

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
Nebraska	State Highway Department	Gift, agreement, purchase, exchange, condemnation or otherwise	Fee simple			Yes	"Department is hereby authorized to acquire lands, real or personal property . . . deemed to be necessary or desirable for present or future State highway purposes . . ."
Nevada	Department of Highways	Donation, agreement, eminent domain	Fee simple		Yes	Yes	". . . Real property . . . considered necessary for any of the following purposes: (a) for rights-of-way for both present and future needs for highways of all types. . ."
New Jersey	N.Y.-N.J. Port Authority, Gloucester County Tunnel Authority, Delaware River Bridge Commission	Purchase, condemnation	Fee simple	Respective authorities		D.R.B.C. Yes	"If . . . the Commission shall find it necessary or convenient to acquire any real property in the State of New Jersey, whether for immediate or future use."
	State Highway Commission	Purchase, condemnation	Fee simple and property rights as may be necessary		Lease (only for public purpose)	Yes	"Property needed for any freeway is declared to be all those lands or interests therein required for the traveled way together with those lands or interests therein necessary or desirable for service maintenance and protection of the present and future use of the highway."
New York	N.Y.-N.J. Port Authority	Purchase, condemnation	Fee simple	Port authorities		Yes	"If . . . the Port Authority shall find it necessary or convenient to acquire any real property as herein defined in this State, whether for immediate or future use."

North Dakota	State Highway Commission	Purchase, acquire, take over, or condemn under the right and power of eminent domain	Fee simple (excluding oil, gas, or fluid minerals under land)	State Highway Commissioner		Yes	" . . . any and all lands . . . which he shall deem necessary for present public use, . . . or which he may deem necessary for reasonable future public use . . . ."
Oklahoma	Department of Highways	Purchase, donation, or condemnation	Fee simple			Yes	" . . . In determining the amount of land acquired, or width of right-of-way necessary for such State highways 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."
Virginia	State Highway Commissioner	Purchase, gift, or power of eminent domain	Fee simple.			Yes	"The State Highway Commissioner is hereby vested with the power to acquire . . . such lands . . . as by the Commissioner may be deemed requisite and suitable . . . for . . . future use."
Wisconsin	County Expressway Commission	Donation, purchase, condemnation or otherwise	Fee simple or easement	County Expressway Commission	Yes	Yes	"Acquire lands . . . for the right-of-way of such expressways in advance of the time of the adoption of the expressway project budget. Such power may be exercised when in the judgment of the commission the public interest will be served and economy effected by forestalling development of such lands which will entail greater acquisition costs at a later date."
	County Board, State Highway Commission, Municipality	Gift, devise, purchase or condemnation	Fee simple	County Board (Municipality if follow procedure set forth in Ch. 32)		Yes	" . . . may adopt plans showing location and widths proposed for any future street and highway. . . . The excess width for streets or highways in use or for the right-of-way required for those planned, may be acquired at any time."

studies have revealed that the value of the land adjacent or in close proximity to a highway tends to appreciate because of the establishment of a more efficient means of transportation.<sup>80</sup> Therefore, any loss in revenue suffered by the removal of land from the tax rolls may be offset by the ultimate increased value of the remaining property.

More important than the tax implications of the type of estate acquired for future highway use are the consequences which might flow from a fee simple or easement acquisition in the event the future line of a highway is changed due to unforeseeable developments. If a parcel of land has been acquired for future use and only an easement has been acquired therein, and the parcel after some years is no longer needed, it might revert, in many States, to the abutter or former owner, without any possibility of recapturing the State's financial investment. It is obvious that in the case of a fee simple acquisition under like circumstances, the State would continue to have full control of the property, and the public investment in it safeguarded.

No matter what degree of advance engineering planning precedes the acquisition of land for an intended right-of-way, circumstances may require the alteration of such plans. If the highway department is authorized to sell land no longer required for highway purposes it will be in a position to meet such contingencies.<sup>81</sup> The power of sale can only be granted if a fee simple title is acquired. Sale of land no longer required for highway purposes cannot be accomplished if the interest acquired is an easement in perpetuity.

Experience has shown that the cost of acquiring an easement for highway purposes is almost commensurate with the expense entailed in obtaining a fee simple title.<sup>82</sup> As the foregoing discussion has shown, different consequences follow depending upon which interest is acquired. In determining which type of interest

should be acquired highway officials should take cognizance of the several problems just enumerated.

### *Determination of Necessity*

It is well-settled law that, in the first instance, the necessity for a particular taking is a question to be determined by the administrative agency (highway department). Once the determination has been made that a particular tract of land is necessary, such determination can be reviewed and overturned only in those cases in which bad faith, fraud, or gross abuse of discretion is proven.

A review of the statutes discloses that in 8 of the States,<sup>83</sup> provision is made for a formal resolution of necessity.

The requirement that the appropriate official or agency pass a formal resolution stating that the land is necessary, serves a double purpose. From the point of view of administration, an added check would be placed on the exercise of the power. By requiring all acquisitions to be formally approved, one person or body, *i.e.*, the highway commission, would be afforded an over-all picture of the acquisition program.

The present posture of the law is that the very act of the administrative agency's attempt to acquire a particular parcel of land is *prima facie* evidence of the necessity of the land for the highway. There exists a rebuttable presumption in favor of the agency's determination of necessity and the burden of going forward with the evidence shifts to the landowner. A formal resolution of necessity would not alter the substance of the law, as it exists today. However if the resolution contains a factual basis for the administrative determination of necessity, certain advantages will be achieved. The presumption of necessity will still exist; but even a court which relies on the presumption in sustaining a determination of necessity will do so more confidently if some factual foundation has been established for the necessity of the desired land.

<sup>80</sup> "A Study of Land Values and Land Use along the Gulf Freeway in the City of Houston, Texas," prepared by L. V. Norris Engineering Company and U.S. Department of Commerce, Bureau of Public Roads, 1951.

<sup>81</sup> See Table 1.

<sup>82</sup> Moser, L. C., "Methods Used to Protect, Preserve and Acquire Rights-of-Way for Future Use in Maryland," Highway Research Board, Bulletin 77, p. 51, 1958.

<sup>83</sup> California, Idaho, Louisiana, Maryland, New Jersey, New York, North Dakota, and Wisconsin. See Table 1.

### *Power to Sell and Lease*

In discussing the various consequences which are determined by the type of interest acquired, mention was made of the power to sell land no longer required for highway purposes. With the exception of Colorado, Louisiana and certain special authorities in New Jersey, all the statutes granting the right to acquire property for future use also grant the power to sell land no longer needed.<sup>84</sup> The ability to dispose of land not required, due to changes in plans, introduces a degree of flexibility into a program of acquiring land in advance of use.

By the very nature of advance acquisition, there will be an interim period between the acquisition and the use of the land for highway purposes. During this hiatus, will the land be allowed to remain idle or can it be used for productive purposes? It would seem to make good sense for the acquiring agency to use the land for income-producing purposes during this period. This would involve leasing the land at an annual or monthly rent. However, the legal authority to accomplish this may very well be lacking. In those jurisdictions which possess specific legislation authorizing acquisition in advance of use, seven States—Arkansas, California, Colorado, Florida, Nevada, New Jersey (in relation to freeways) and Wisconsin (County Expressway Commission)—authorize leasing of the land during the interim period.<sup>85</sup> It may be doubtful whether a highway department, without legislation, could legally lease property so acquired.

Assuming the power to lease, should the previous owner be given the first option to lease the land? What provision should be made concerning moneys derived from the land? What type of restrictive conditions should the lease contain so as to limit the use which can be made of the land? These are samples of problems, although subsidiary to the main issue, but nevertheless of vital importance to the success of an adequate program of advance acquisition of land.

In determining whether to grant the aforementioned authority, several objections may be raised. One argument would be that land can be condemned only for a public purpose and that it is not a public purpose to condemn one man's land and sell or lease it to another person. A second objection may possibly be raised in those States whose constitutions prohibit the State from engaging in internal improvements.

These objections disappear when the relevant case law is analyzed. At the outset a distinction must be made between the situation in which the acquiring agency knowingly acquires more land than is actually needed, with the idea of selling or leasing the excess land and the situation in which the desired land was originally thought necessary but due to a change in conditions is no longer required. In regard to the former situations the public use aspect of the acquisition is debatable. The latter situation is the condition which is envisaged in this discussion.

A square holding on this question is found in Kansas, whose constitution contains a prohibition against internal improvements.<sup>86</sup> The court had no difficulty in sustaining the power of sale. In the course of sustaining legislation which established the Wisconsin Turnpike Commission, the Supreme Court of Wisconsin had occasion to pass upon the problem under discussion.<sup>87</sup> In the course of its opinion the court stated:

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 with a contemporaneous knowledge and purpose that a definite and separable part is not necessary for the public use.

Section 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 "constructing, reconstructing, improving and maintaining" 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

<sup>84</sup> See Table 1.

<sup>85</sup> See Table 1.

<sup>86</sup> *State v. State Highway Commission*, 163 Kan. 187, 182 P.2d 127 (1947).

<sup>87</sup> *State v. Giessel*, 265 Wis. 185, 60 N.W.2d 873 (1953).

be construed as allowing the taking of property for private purposes.<sup>88</sup>

Additional support for the foregoing discussion that the power of sale or lease does not change the purpose of the acquisition from a public to a private use is found in many cases.<sup>89</sup>

### *Words of Futurity*

Of more than academic interest is the language employed in the several statutes to express the concept of future use. In passing upon a particular acquisition in a litigated case, a court will look to the language of the statute in attempting to discern what the legislature meant by "future."

The two most perplexing aspects of advance acquisition of land are the requirement of sufficient standards to guide administrative action and the need to define the term "future." An analysis of the statutes reveals that 10 of the 15 States<sup>90</sup> have laws which simply grant the acquiring body the right to acquire for "future needs," "uses," or "purposes." Two of the States—Florida and Maryland—speak of condemnation for "immediate or proposed or anticipated" roads. Louisiana and Wisconsin make provisions for future use by giving the chief engineer in the case of Louisiana, and the county boards in Wisconsin, sufficiently broad discretion to fix maximum widths for highways, taking into account future as well as present needs.

However, for the acquisition of expressway rights-of-way in Milwaukee County, Wisconsin, the statute gives the Milwaukee County Expressway Commission the "power to acquire rights-of-way for such expressways in advance of the time of the adoption of the expressway project budget."

From the foregoing discussion, it is apparent that with one exception—North Dakota, which specifies "reasonable future use"—no legislative boundaries have been

placed around the concept of "future use."<sup>91</sup> Have the legislatures fulfilled their responsibilities by such drafting or has the problem been thrown into the lap of the courts? If one of the aims of a statute is to express clearly to a court the intent of the legislature, the goal may not have been accomplished.

An examination of the case law has revealed that courts have uniformly interpreted "future use" as "reasonable future use," and what would be considered a reasonable period of time in one situation could be interpreted as unreasonable when predicated on another set of facts. Should an attempt be made in the statute to give content to "future use" by placing a fixed maximum as to time before which the land must be used for highway purposes? If the answer be in the affirmative, what maximum could be designated?

From the previous analysis of the statutes and judicial decisions, it becomes apparent that any attempt to place in the statute a predetermined fixed limit on time may be very unwise. Sufficient discretion must be given to highway departments so as to enable them to meet various needs and situations. If reasonableness is used as the guide, free play is given to the particular facts which govern each acquisition.<sup>92</sup> The desired flexibility is achieved by not unduly hobbling the discretionary power vested in the particular governmental body.

In relation to the National System of Interstate and Defense Highways, the Bureau of Public Roads has issued an administrative regulation which indicates how far the Bureau is presently willing to go in assisting the financing of right-of-way acquisition for future use. A question arose concerning whether projects could be programmed for preliminary engineering and/or right-of-way on interstate locations which are still general in nature.<sup>93</sup>

<sup>91</sup> Note should be made of Wash. Laws of 1955, Ch. 383 which provides for the financing of a 10 year road program with all the land apparently to be acquired in the first 2 years. Is this a legislative determination of what "future" means?

<sup>92</sup> In the recent Federal-aid 1A program in which the Federal Government participates in the cost of the acquisition of needed right-of-way, the usual practice is to set no definite time limit between acquisition and construction. The only limit is that of reasonableness.

<sup>93</sup> Bureau of Public Roads, Cherry Memorandum No. 21, March 1, 1956.

<sup>88</sup> *Id.* at 882, 883.

<sup>89</sup> Sanitary District of Chicago v. Manasse, 380 Ill. 27, 42 N.E.2d 543, (1942); Driscoll v. City of New Haven, 75 Conn. 92, 52 Atl. 618 (1902); *In re City of Rochester*, 137 N.Y. 243, 33 N.E. 320 (1893); *People v. City of Chicago*, 394 Ill. 477, 68 N.E.2d 761 (1946); *Villeg v. Housing Authority of the City of Dallas, Tex.*, 287 S.W.2d 323 (1956); and cases cited therein.

<sup>90</sup> Arkansas, California, Colorado, Idaho, Nebraska, Nevada, New Jersey, New York, Oklahoma and Virginia. See Table 1.

As a means of encouraging the States to make comprehensive engineering studies and investigations, the Bureau will participate in the cost of preliminary engineering and/or right-of-way for projects programmed for the interstate system. Final location must be submitted for approval as soon as selected by the State and once any of these projects are advanced to the project agreement stage, construction must be accomplished within a specific period of time to be indicated in the agreement but in no event to exceed 5 years from the date of the agreement. If this requirement is not met the Federal Government must be reimbursed for any preliminary engineering or right-of-way payments made.

It is not to be inferred, necessarily, that this 5-year period of anticipating the future should govern the States in seeking to formulate a program of advance acquisition for State purposes. It simply means that for Federal-aid interstate highway projects, Federal participation can be had only on projects that will be constructed within the 5-year period.

#### *Standards for Exercise of Power*

The foregoing discussion has been directed at several aspects or elements covered either wholly or partly by statute in the 15 States specifically authorizing acquisition of land for future use. However, there are other problems arising out of a program for advance acquisition of land which may need to be resolved by statute.

Of primary importance is the need for standards to be followed in exercising the power of advance acquisition of land. Whenever the legislature delegates authority to an administrative agency, there is the ever-present possibility of an unconstitutional delegation of authority. It has been held that where, in delegating authority to an administrative agency, a sufficient standard for the exercise of the authority is not spelled out, the act may be held to be an unconstitutional delegation of power.<sup>94</sup> In order to satisfy the consti-

tutional requirement and also to serve as a guide for the highway departments and courts, a statute should contain standards for the exercise of the power granted.

An approach to the problem of drafting such standards is suggested when thought is given to the circumstances which merit the employment of the power to acquire land for future use. Fundamentally, land should be acquired in advance of its intended use chiefly in those situations where substantial savings in right-of-way costs can be achieved. Accordingly, one such standard might be the ability to reduce acquisition costs by advance acquisition. In determining whether to acquire a particular tract of land the following factors might be considered in determining whether future right-of-way costs are reduced by present acquisition:

- (1) present day value of land and improvements and damages to the remainder;
- (2) value of proposed improvements;
- (3) period of time before land will be used for highway purposes;
- (4) accrued depreciation of existing and proposed improvements during this period.

A fifth factor would be interest charges if the acquisition program is financed by a bond issue. In those few instances where condemnation is required, the petition for condemnation could contain an allegation setting forth the basis for the belief that savings would be effectuated by acquiring the land in advance of its use. Whether such a requirement would add unreasonably to the volume of "red tape" which already surrounds public activities might be debated.<sup>95</sup>

Aside from the use of advance acquisition as a money-saving device, there are other advantages to be gained from the exercise of the power. Reference is made to

<sup>95</sup> See California Statutes 1952 (2d E.S.), Ch. 20, Sec. 2 wherein the following is found:

All money deposited in, or transferred to, the Highway Right of Way Acquisition Fund . . . may be expended by the Department of Public Works for the acquisition of properties to constitute rights of way for state highway purposes but only when the California Highway Commission by resolution, as a part of its finding of public necessity, declares that the property should be acquired on a designated state highway route or designated portion thereof because of the probability of development of properties which will be needed for highway purposes, and that prompt acquisition is required to prevent such development and consequent higher acquisition and construction costs when the highway or a portion thereof is to be constructed.

<sup>94</sup> A.L.A. Schecter Poultry Corp. v. U.S. 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 949 (1935) and see Notes, 92 A.L.R. 403 (1934); 54 A.L.R. 1105 (1928); 12 A.L.R. 1437 (1921).

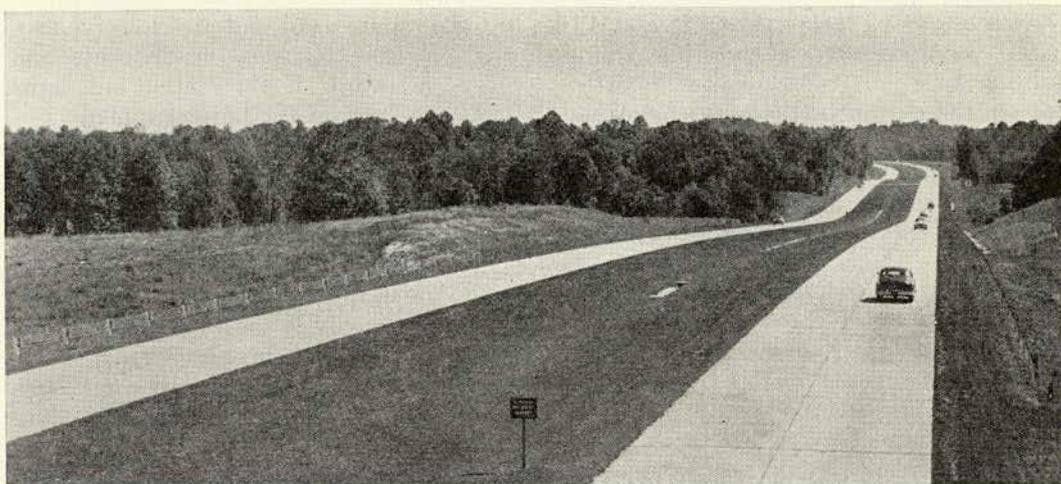


PLATE 7

Maryland: Washington-Annapolis Expressway. Legal authority to acquire right-of-way for future use in Maryland will assist in providing future expressways like this.

such benefits as the ability to plan for the development of a comprehensive highway system and the meshing of plans for highways with the development of new communities bordering upon the intended highways, with urban redevelopment, and with other public and private improvement programs. If it can be demonstrated that by acquiring land in advance of its use the aforementioned planning will be enhanced, then the use of the power should be exercised. As in the preceding instance, the petition of condemnation, where condemnation is required, might contain an allegation setting forth such facts; but here again, use of this might constitute an unreasonable encumbrance on the administrative process.

The previous analysis of the cases has shown the important role advance planning plays in sustaining a particular acquisition. Another requirement to be satisfied before exercising the power might therefore be to demonstrate how the desired land fits into a program of highway construction and reconstruction. For example, simply stating that a particular tract of land will be required to construct an interchange would not suffice. What is envisaged by this standard is the requirement that the preliminary engineering and planning work has progressed to the stage where the engineers are reasonably certain of the amount and

location of land which will ultimately be required.

The foregoing discussion is an attempt to suggest one method of achieving a balance between a sufficiently flexible statute and unbridled administrative power, by delineating in the statute those circumstances which justify the use of advance acquisition of land. Besides providing the highway official with a set of standards to be followed, land will be acquired and money spent only in those situations where the investment is justified. A subsidiary yet important accomplishment of such restriction will be the decreased opportunity for scandal, embarrassment and the consequent loss of public faith in the program.

#### *Kind of Property Acquired—Improved or Unimproved*

One will look in vain in the statutes for language that specifies the type of land to be acquired for future use. The suggestion has already been made that the power of advance acquisition should be primarily exercised to forestall development of raw land needed for highway purposes, or the further improvement of developed property. Should a limitation be written into a statute authorizing only the advance acquisition of unimproved land? Although land may be

developed, to a degree, there is always present the likelihood of further development or redevelopment. To restrict advance acquisition arbitrarily to completely raw land would seriously restrict the efficiency of the future use acquisition tool.

The practical consequences of imposing too rigid a limitation would be to limit the use of advance acquisition of land largely to those sections of a highway system passing through agricultural or wilderness regions. In reality, the most important application of the procedure may be in the fringe areas of an urban center. If the legislature should decide to extend the power to local governmental agencies, any severe restriction on the type of property to be acquired

would negate the effectiveness of the procedure in those areas. If the California practice is any criterion of what to expect, the likelihood is that the vast majority of land acquired for future use will be vacant.<sup>96</sup> However, the occasion may and probably will arise when it would be advantageous to acquire land already developed, particularly where there exists a real threat of further improvement. In deciding this important question, consideration should be given also to the other advantages, besides economy, of a program of advance acquisition of land.

<sup>96</sup> Wagner, E. F., "Advanced Right-of-Way Purchase for Freeway Construction. 33rd Annual Conference, Western Association of State Highway Officials, p. 8, Sept. 17, 1954.

### JUDICIAL DECISIONS INTERPRETING FUTURE USE STATUTES

The acid test in evaluating the legal effectiveness of any statute is the treatment it receives in a court of law. Extensive research has brought to light only two cases interpreting the future use statutes previously analyzed.<sup>97</sup> This dearth of litigation may be explained by the recent passage of these statutes. Another explanation for the lack of more case law arising under the statutes may be due to the success the States have experienced in purchasing the desired property. Additionally, it is likely that the authority has been little used, generally speaking.

One of the two cases involved arose in Maryland. In 1953, the Court of Appeals of Maryland was required to interpret the following section:

The State Roads Commission may acquire by gift, purchase, *condemnation*, or otherwise, *real property or any interest in such property for highway construction purposes* and real property along or near any State highway, parkway, or freeway, or any interest in such property, in order to protect the highway, parkway, or freeway, or scenery along or near it, or to provide parking and service areas along said highway, parkway, freeway and for similar purposes, provided, however, the State Roads Commission shall not have the right to acquire such property other than by purchase or gift unless the Commission, by appropriate resolution, shall determine that such property is necessary in its judgment *for immediate or proposed*

*construction of a State highway, parkway, freeway or parking or service areas in connection therewith. . . .*<sup>98</sup> (Emphasis added.)

Appellees argued that since only one roadway of the intended expressway was under construction, the commission was without authority to acquire the land intended for the median divider and other roadway.

In the course of reversing the lower court's granting of a directed verdict for the landowner, the Court of Appeals affirmed the principle of acquisition for future highway use. According to the court, once the commission determined, by appropriate resolution, that the land was necessary, only in the case of proof that such determination was oppressive, arbitrary, or unreasonable would the determination of necessity be reversed.

The other case is a Louisiana decision. In order to construct a link in the Airline Highway, between New Orleans and Baton Rouge, the State of Louisiana sought to expropriate a 300-foot swath through private land.<sup>99</sup> The landowners objected and the case went to trial.<sup>100</sup> Defendants answered, pleading specially that the quantity of land sought to be condemned "exceeded that reasonably necessary for the purpose intended by the plaintiff in the near fu-

<sup>97</sup> State Roads Commission v. Franklin, 201 Md. 549, 95 A.2d 99 (1953); State v. Cooper, 213 La. 1016, 36 So.2d 22 (1948). See Appendix B, p. 69 and 66.

<sup>98</sup> 1951 Code, Article 89B, Sec. 8(a).

<sup>99</sup> At the southern end, the desired strip of land flared out to a width of 600 feet for about 200 feet, at an intersection.

<sup>100</sup> *Op. cit.*, *supra*, note 97.

ture." The jury returned a verdict awarding the State a right-of-way 200 feet wide, being 100 feet less than that sought.

The State appealed the reduction of the right-of-way, and was sustained by the Appellate Court. The higher court, in reversing the trial court's verdict, pointed to the broad discretionary powers vested in the chief engineer by the legislature in determining the ultimate widths of rights-of-way.<sup>101</sup> In stressing this discretionary power the court stated:

In view of this statutory provision the judiciary cannot and will not disturb the chief engineer's fixing of the width of highway rights unless it appears that he has abused the large discretionary powers given him or has acted arbitrarily. As has previously been said by this court, in cases dealing with highway construction, "The engineers are the ones who should know, and, as a matter of fact, do know. We cannot substitute our own opinions for the opinions of engineers in matters of this kind."

Basing its decision on the statute which appears in Appendix C, p. 74, the court

<sup>101</sup> See Appendix C, page 74.

proceeded to answer defendants' argument that all the desired land would not be used at present or in the near future:

It is true, as pointed out by defense counsel in connection with the special plea for a reduction of the right-of-way, that the Prairieville-Nesser Highway as designed will not be completed soon; the present plans call for the construction of only two of the paved lanes. It is also true that the remainder of the Airline Highway does not now have a uniform 300-foot width right-of-way, it varying from 100 to 300 feet and the greater part being of the first named width. Nevertheless, the duty of fixing the width of rights-of-way is specifically imposed by statute on the chief engineer of the Department of Highways, and in the performance of that duty much discretion and great latitude are permitted him. Further, his efforts are not restricted to a consideration of immediate traffic needs; his planning is to be also for the future improvement of the highway, to care for the public interest, safety and convenience in times to come. This is required because as was well said in *Crichton v. Louisiana Highway Commission et al.* 172 La. 1033, 136 So. 43, 44, our "highways are not intended to be mere makeshifts, built for a day, but are intended to be permanent, lasting structures." (Emphasis added.)

## STATUTES IMPLYING AUTHORITY TO ACQUIRE LANDS FOR FUTURE HIGHWAY USE

In addition to the statutes that specifically grant the power to acquire land for future highway use, there is more than one section in various of the State codes which strongly hint that the legislature assumed that such a power existed even though not expressly stated. Except for Washington, where some early condemnation cases not involving highways suggested that the right to condemn for future use exists, and dicta in an Oregon case, the case law of none of the other States<sup>102</sup> appears to grant the power. This situation can be rationalized by one of two explanations:

- (1) Something is being read into the statute that is not in fact present.
- (2) The power to condemn for future use is inherent in some other grant of power, *i.e.* the power to condemn "such lands as are deemed necessary" for highway purposes.

The analysis<sup>103</sup> employed is similar to that used in Table 1. The specific statutory language utilized by the five legislatures

involved will be examined with the objective of attempting to discern the legislative intent in each instance. Instead of attempting to supply answers, various questions will be raised.

### North Carolina

Two North Carolina statutes,<sup>104</sup> relating to the powers of the Carolina-Virginia Turnpike Authority and the North Carolina Turnpike Authority, grant to the respective authorities the power to:

Acquire by purchase, whenever it shall deem such purchase expedient, such lands, structures, property rights, rights-of-way . . . as it may deem necessary or convenient for the construction and operation of any project. . . .

Whenever a reasonable price cannot be agreed upon, . . . the Authority is hereby authorized and empowered to acquire by condemnation or by the exercise of the power of eminent domain any lands . . . deemed necessary or convenient for the construction . . . of any project. . . .

<sup>102</sup> North Carolina, Tennessee and Texas.

<sup>103</sup> See Table 2.

<sup>104</sup> General Statutes of North Carolina, Sec. 136-89.6, 136-89.17. See Appendix D, p. 78.

Table 2. State Statutes Authorizing Acquisition of Property for Future Highway Use by Implication

State	Body Authorized to Acquire	Permissible Methods of Acquisition	Maximum Type of Interest to Be Acquired	Power to Lease in Interim	Power of Sale	Language Suggesting Futurity
North Carolina	N.C. Turnpike Authority Carolina-Virginia Turnpike Authority	Purchase, condemnation	Any lands, property rights, rights of way, franchises, easements and other property deemed necessary.		Yes	"Authority is hereby authorized and empowered to acquire by purchase, whenever it shall deem such purchase expedient. Whenever a reasonable price cannot be agreed upon . . . the Authority is hereby authorized and empowered to acquire by condemnation or by exercise of the power of eminent domain."
Oregon	State Highway Commission	Purchase, agreement, donation, eminent domain	Fee simple	Yes	Yes	"The Commission may determine the widths of rights-of-way for all State Highways."
Tennessee	Commissioner of Highways and Public Works (State or County)	Eminent domain				"Such interest and title in land . . . as said Commission may deem desirable or as may be necessary in order to secure Federal aid in the construction or reconstruction of such road, highway, freeway, or parkway."
Texas	Commissioner Court on behalf of the State	Purchase, condemnation	Easement	Yes	Yes	"The Texas Highway Department may enter into written agreements with owners of the lands abutting or adjoining the lands acquired by the Department for right-of-way for any highway, farm-to-market road, or other roadway in the State Highway System, under the terms of which such owners of abutting or adjoining lands may be authorized to use and cultivate such portions of the right-of-way as may not be required for immediate use of the Department."
Washington	State Highway Commission	Option for purchase of property needed	Option	Yes	No	"Whenever it becomes necessary or feasible to purchase right-of-way for State highways . . . the commission may and it is hereby authorized to secure options for purchase of property needed or proposed for any entire project or section thereof or proposed alinement for the location or relocation of any highway."

What is meant by the word "expedient"? Must the desired land be used in connection with a project presently under construction? Must it be for an authorized project?

### Oregon

An Oregon statute gives the State highway department the power to "determine the widths of rights-of-way for any or all State highways."<sup>105</sup> This statute is analogous to the Louisiana act which also empowers the chief engineer to establish the ultimate widths of the State highways.<sup>106</sup> However, the Louisiana statute specifies that future needs should be considered in the determination of ultimate right-of-way widths.

In the course of affirming a lower court decision which sustained the objections of a landowner to the condemnation of land desired for highway purposes, the Oregon Supreme Court had occasion to comment upon the aforementioned statute.<sup>107</sup> The decision was based upon a procedural issue; however, in dicta, the court stated the following:

The width of the right-of-way to be acquired is not necessarily confined to the actual width of the traveled portion of the road constructed or to be constructed. Enough land for parallel shoulders, ditches, and anticipated needs of the future may be condemned as part of such right-of-way. That clearly is the purpose of subdiv. (12) of Sec. 100-115 O.C.L.A. . . .

The import of the opinion apparently is that a condemnor can acquire lands for future use if the ultimate purpose for which the land is sought is specifically set forth in the condemnation petition. *Query*, what would be the court's position if confronted with a petition alleging that all the land sought to be condemned is needed for future highway construction, but without stating in what manner the specific parcels will be used?

### Texas

Texas has an interesting statutory provision which gives the State highway de-

partment the right to lease to abutting landowners "such portions of the right-of-way as may not be required for immediate use of the Department. . . ." <sup>108</sup> (emphasis added). Clearly, the legislature presumed that there is, in the acquisition procedure of the State, an interim between the time land is acquired and the time it is used. Can it be inferred from this that the State has the power to acquire lands now, for use sometime in the future? If the answer is in the affirmative, how long can such lands be leased before being put to highway use? Can such property be acquired by condemnation as well as through purchase?

### Tennessee

A statute in Tennessee <sup>109</sup> gives the commissioner of highways the power to condemn lands for the construction of any road:

. . . as said commissioner may deem desirable or as may be necessary in order to secure Federal Aid in the construction or reconstruction of such road, highway, freeway or parkway.

At present, the Bureau of Public Roads uses certain minimum widths recommended by the A.A.S.H.O. for certain types of highways in its administration of the Federal-aid program. The Tennessee Department of Highways and Public Works, under this statute, would be authorized to acquire all of the right-of-way needed eventually for a Federal-aid route, even though there is no present intention to make use of the entire width.

In order to receive Federal-aid for actual construction, the State must have acquired all the right-of-way needed for a particular project, or have taken appropriate legal steps to assure its acquisition and possession. If the contemplated project is one of large dimension, land might well be acquired in advance of use.<sup>110</sup>

<sup>108</sup> Vernon's Texas Civil Statutes, 1953, Art. 6674n-1. See Appendix D, p. 78.

<sup>109</sup> Tennessee Code Annotated, Sec. 54-306. See Appendix D, p. 78.

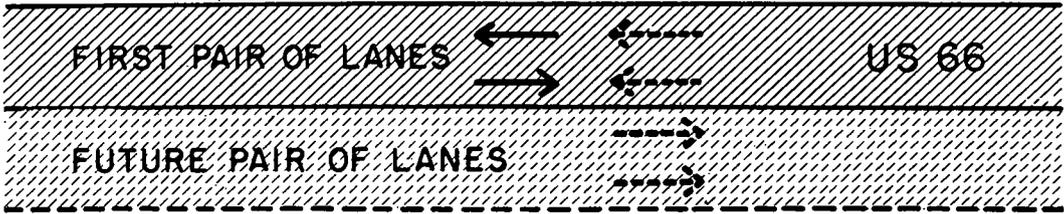
<sup>110</sup> Note should be made of statutes appearing in 40 States. These statutes when read in connection with the Federal-Aid Highway Act of 1956 could be interpreted as authorizing the acquisition of land for future use. Sixteen states have laws which in substance authorize the State highway department "to do all other things necessary to secure the full benefit of Federal-aid." *Alabama*, Code of Alabama, § 32(1); *Connecticut*, General Statutes of Connecticut, § 2281 (refers only to the Wilbur Cross Parkway); *Florida*, Florida Statutes 1955, § 338.14(d); *Georgia*, Code of

<sup>105</sup> O.R.S., Sec. 366.315, formerly Sec. 100-115 O.C.L.A. subdiv. 12. See Appendix D, p. 78.

<sup>106</sup> See Appendix C, p. 74.

<sup>107</sup> *State v. Pacific Shore Land Co.*, 201 Ore. 142, 269 P.2d 512 (1954). See Appendix B, p. 70.

# FUTURE USE AND STAGE CONSTRUCTION



ACQUIRED FOR PRESENT USE



SOUGHT TO BE ACQUIRED FOR FUTURE USE

## State ex rel State Highway Commission vs. Curtis, 222 S.W (2d) 64 (1949)

PLATE 8

The State of Missouri may condemn land for right-of-way and "for any other purpose necessary for the proper and economic construction of the State Highway System," accordingly, this future use acquisition was sustained.

From a legal point of view, it may be asked whether limiting the authority to Federal-aid routes is a reasonable classification, if acquisition for future use is authorized at all.

### Washington

In light of a special appropriation act in 1955,<sup>111</sup> the extent of Washington's power to acquire land for future use may be examined for adequacy. A special fund was established to finance advance acquisition of rights-of-way required for a 10-year highway program. Since the life of the appropriation is 2 years, if the entire program is to be accomplished it is conceivable that land may be acquired which will not be used for upwards of 10 years. However, no existing statute specifically authorizes the acquirement of land in advance of its use aside from this appropriation act.

Another 1955 Washington act is pertinent and may be analyzed.<sup>112</sup> The Washington State Highway Commission is authorized to secure options for the purchase of property needed for an entire project or proposed alignment whenever it is deemed to be "in the best interest of the general public." This statute says nothing about

Georgia, § 95-1618; *Illinois*, Smith-Hurd Illinois Annot. Stats., Ch. 121.320n; *Kansas*, Gen. Stats. of Kansas, Annot., Ch. 68-402(b); *Maryland*, Annot. Code of Maryland, Art. 89B, § 63(2); *Missouri*, Missouri Revised Statutes, § 226.150; *New Hampshire*, New Hampshire Rev. Stats. Annot., § 239.4; *North Carolina*, General Statutes of North Carolina, § 136.18(1); *Oregon*, Oregon Rev. Stats., § 366.710; *Pennsylvania*, Purdon's Pennsylvania Stats. Annot., § 670-1004; *Tennessee*, Tennessee Code Annotated, § 54-506; *Vermont*, Public Act 1955, § 5004; *Virginia*, Code of Virginia, 1950, § 33-130; *Wisconsin*, Wisconsin Statutes, 1955, § 84.015.

The statutes of 24 States contain language stating "do all other things necessary and proper to carry out cooperation contemplated and provided for in the Federal-Aid Acts." *Arkansas*, Arkansas Statutes 1947, Annot., § 76-201.5; *Colorado*, Colorado Rev. Stats., 1953, § 120-7-2(6); *Indiana*, Burns' Indiana Stats. Annot., § 36-127 and 61-1301; *Iowa*, Code of Iowa, 1954, § 307.7; *Kentucky*, Kentucky Rev. Stats., 1953, § 176.204; *Louisiana*, Louisiana Revised Statutes, Title 48, § 212; *Maine*, Revised Statutes of Maine, 1954, § 23-15; *Massachusetts*, Annot. Laws of Massachusetts, Ch. 81, § 30; *Michigan*, Michigan Statutes Annotated, Ch. 9.831; *Mississippi*, Mississippi Code Annot., § 8038(a); *Minnesota*, Minnesota Stats. Annot., § 161.03; *Montana*, Revised Codes of Montana, 1947, § 32-1609 and 32-1624; *Nebraska*, Laws of 1955, Leg. Bill 187, § 5; *Nevada*, Nevada Compiled Laws, § 5463.01; *New Mexico*, New Mexico Statutes, 1953, § 55-2-25; *North Dakota*, North Dakota Rev. Code, 1943, § 24-0401; *Ohio*, Baldwin's Ohio Rev. Code, § 5531.02; *Rhode Island*, Laws of 1955, Ch. 3487(7); *South Carolina*, Code of Laws of South Carolina, 1952, § 37.76; *South Dakota*, South Dakota Code of 1939, § 28.0201; *Utah*, Utah Code Annot., § 27-5-1; *Washington*, Rev. Code of Washington, § 47.04.060, 47.04.070; *West Virginia*, West Virginia Code of 1949, Annot., § 1455(7); *Wyoming*, Wyoming Compiled Statutes, 1945, § 48.109.

<sup>111</sup> Washington Laws of 1955, Ch. 333, H.B. 639.

<sup>112</sup> Laws of 1955, Ch. 49, § 1. See Appendix D, p. 78.

the power to make a direct purchase where the owner would rather sell, or, conversely about the power to condemn lands desired for future use where the owner does not want to sell or grant an option.

In conjunction with the aforementioned statutes, the common law of Washington should also be considered. The previous discussion of the non-highway case law indicated that the acquisition of land for non-highway future use has been sustained in several early Washington cases.<sup>113</sup> It

<sup>113</sup> Nicomen Boom Co. v. North Shore Boom and Driving Co., 40 Wash. 315, 82 Pac. 313 (1905); State *ex rel.* Spokane

may be that the Washington Supreme Court would sustain future use acquisition for highway purposes, through the vehicle of "necessity."

From the foregoing, one may wonder what is the status of acquisition for future highway use in Washington. Now that the highway department has the financial wherewithal to acquire lands for future use, does it possess the necessary authority to accomplish this purpose?<sup>114</sup>

Falls and N. Ry. Co. v. Superior Ct. of Spokane County, 40 Wash. 389, 82 Pac. 457 (1905).

<sup>114</sup> For more discussion concerning the 1955 appropriation act, see a subsequent section devoted to financing acquisition of land for future use. See page 45.

## FEDERAL LAW AND ADMINISTRATIVE PRACTICE

The Federal-aid highway program is essentially a partnership arrangement between the Federal government and the several States. The laws of one member of the partnership, the States, in relation to future use have been analyzed. An inspection of the law and administrative practice, in regard to future use, of the other member of the partnership is therefore in order.

The Federal-Aid Highway Act of 1956<sup>115</sup> provides for Federal participation in the cost of acquiring land for future use. Section 110(a) provides:

Advance Right-of-Way Acquisitions.—For the purpose of facilitating the acquisition of rights-of-way on any of the Federal-aid highway systems, including the Interstate System, in the most expeditious and economical manner, and recognizing that the acquisition of rights-of-way requires lengthy planning and negotiations if it is to be done at a reasonable cost, the Secretary of Commerce is hereby authorized, upon request of a State Highway Department, to make available to such State for acquisition of rights-of-way, in anticipation of construction and under such rules and regulations as the Secretary of Commerce may prescribe, the funds apportioned to such State for expenditure on any of the Federal-aid highway systems, including the Interstate System; Provided, That the agreement between the Secretary of Commerce and the State highway department for the reimbursement of the cost of such rights-of-way shall provide for the actual construction of a road on such rights-of-way within a period not exceeding five years following the fiscal year in which such request is made: Provided further, That Federal participation in the cost of rights-of-way so acquired shall not exceed the Federal

pro rata share applicable to the class of funds from which the Federal reimbursement is made.

Federal participation in future use acquisition dates from 1943. To place the 1956 law in its proper context, a brief review of prior Federal legislation and administrative practice will be made.

In the past, Federal participation in costs of right-of-way was predicated upon the definition of "construction" as defined in section 1 of the amendment of July 13, 1943 to the Federal-Aid Act of 1916.<sup>116</sup> Section 1 defines construction as follows:

The term "construction" means the supervising, inspecting, actual building, and all expenses, including the costs of rights-of-way, incidental to the construction of a highway, excepting locating, surveying, and mapping.

The Federal-Aid Highway Act of 1944<sup>117</sup> amended the definition to include the expenses of locating, surveying and mapping a highway and elimination of hazards of railway-grade crossings.

In the course of administering the above sections of the Federal-aid law, the Bureau of Public Roads took a positive position in relation to future use. It was the announced policy of the Bureau "to do everything possible to encourage and assist States in acquiring right-of-way for future use."<sup>118</sup> The issuance of regulation 1.11 was an example of the impetus the Bureau gave

<sup>116</sup> 57 Stat. 560, Public Law 146, 78th Cong., 1st Sess.

<sup>117</sup> 58 Stat. 838, Public Law 521, 78th Cong., 2d Sess.

<sup>118</sup> G.A.M. 343 § 2.01.

<sup>115</sup> 70 Stat. 374, Public Law 627, 84th Cong., 2d Sess.

to the acquisition of land for future highway use. It reads as follows:

*Right-of-way.* Federal participation in right-of-way shall be restricted to the costs of right-of-way actually acquired subsequent to the date of approval of the program which includes the project for which such costs are incurred. . . . Such costs also may include costs for portions of right-of-way acquired for future use.<sup>119</sup> (Emphasis added.)

The Bureau does not make payment of Federal funds for any phase of a project unless a project agreement is first executed. However, as a means of allowing Federal participation in right-of-way acquisition for future use, project agreements in the past were permitted to cover right-of-way acquisition, preliminary engineering and construction or one or any combination of the three phases separately. If the project agreement covered preliminary engineering or acquisition of right-of-way or both, it was provided that the Federal government be reimbursed if construction was eventually abandoned or not accomplished within a reasonable period of time to be specified in the agreement. By authorizing project agreements to cover only right-of-way, the Bureau was in a position to participate in the acquisition of right-of-way for future use.

It should be noted that no fixed limitation, in terms of time, was established before construction must be accomplished. Each project agreement required that a reasonable period of time be specified within

which construction was to be accomplished.

In relation to the Interstate System a somewhat different approach is now being used. An administrative memorandum entitled "Cherry Memorandum 21" has been discussed previously.<sup>120</sup> The effect of this directive is to allow Federal participation in advance right-of-way, but with a fixed time limitation of five years within which construction must be accomplished.

Section 1:17(b) of the Federal Regulations<sup>121</sup> provides:

The right-of-way provided for Federal-aid highway projects shall be held inviolate for public highway purposes and no signs (other than those specified in paragraph (a) of this section), posters, billboards, roadside stands or other private installations shall be permitted within the right-of-way limits, except under circumstances approved by the Commissioner on portions of right-of-way acquired for future use.

In its handling of the problem of encroachments upon the right-of-way, the Bureau differentiated between immediate and future use of the land. The States were urged by the Bureau to make a clear distinction on the plans between right-of-way acquired for immediate construction and that acquired for future use. Encroachments were allowed to remain on the right-of-way for future use until actual construction commences. However, before Federal funds could be expended for right-of-way for immediate use all encroachments had to be removed.

<sup>120</sup> See pages 32, 33.

<sup>121</sup> F. R. Title 23, sec. 1.17(b). Effective date April 23, 1954.

<sup>119</sup> F. R. Title 23, sec. 1.11. Effective date April 23, 1954.

## FINANCING ACQUISITION OF LAND FOR FUTURE HIGHWAY USES

In the preceding sections of this study, legal authority to acquire land for future highway use was set forth in terms of both judicial decisions and State statutes. For the purposes of that discussion it was assumed that the highway departments possessed the requisite funds to sustain a program of advance acquisition of right-of-way. In reality, the opposite situation may prevail in many States. In order to acquire property now for future use, funds necessarily would have to be appropriated from general or highway funds and, in so doing,

the sums available to finance current construction projects might be correspondingly depleted.

An effective program of advance acquisition of land can be financed in ways other than by establishing a special revolving fund. The traditional means of financing highway operations generally can be used for this special purpose, if there is a willingness so to do. In fact, some States have financed programs of right-of-way acquisition in this manner. However, it is significant that six States have seen fit to set up

special right-of-way funds. One of these was established by law in 1952, three in 1955, and two in 1956.<sup>122</sup> Apparently these States believe that, on the basis of past experience, a new approach to the financing of a program of advance right-of-way acquisition is required. With the exception of the California experience, very little can be said concerning the utilization of such financing, since the funds in the other States have so recently been established.

### California

It is only natural that one of the States which most actively utilizes the tool of advance acquisition of land for highway use—California—should be the first to devise a special means of solving the right-of-way financing problem. This involves the revolving fund type of financing, first adopted in 1952 and expanded in scope in 1953.

The mechanics of the fund are relatively simple. A fund of a specified sum, \$30 million in California, is established for the financing of advance right-of-way acquisition. Once the necessary design and engineering planning have progressed to such a stage that the location of the required right-of-way has been fixed, funds are expended to acquire the desired land. When the time comes to begin construction of the highway for which the right-of-way has been previously acquired, a sum of money equal to that spent in acquiring the right-of-way is taken from current highway funds, and the revolving fund is reimbursed thereby.

The California fund has evolved in two stages. Once it was realized that the success of the program for advance acquisition of land which had been embarked upon, was jeopardized by the lack of resources, the legislature appropriated in 1952 the sum of \$10 million in a special fund entitled, "highway right-of-way acquisition fund."<sup>123</sup> The original act was amended the following year to provide that the State

controller, under certain conditions, on demand of the Department of Public Works, shall transfer to the fund a sum not to exceed an additional \$20 million.<sup>124</sup> According to E. F. Wagner,<sup>125</sup> the 1953 amendment converted the fund into a "true revolving fund by providing that when properties acquired from the fund are needed for highway construction, the cost thereof shall be deposited in the fund from other highway revenues and the amount so deposited shall be available for re-use in the acquisition of other advanced rights-of-way." At present there is a time limit on the life of the fund. On July 1, 1962 the Department of Public Works is required by sec. 4 of the act establishing the fund to repay to the Motor Vehicle Fuel Fund from the Highway Right-of-Way Acquisition Fund the amount transferred under section 1 of the act.<sup>126</sup>

According to Frank Balfour, Chief Right-of-Way Agent, California Division of Highways, as of November 1, 1956, the total available funds had been expended or obligated. However, because of the expansion of the State highway construction program \$2,000,000 has been returned to the fund. California highway officials estimate that if they had had to wait to purchase the property in question from regular funds, the cost would have been approximately \$114 million.<sup>127</sup> In short, there has already been a net saving of approximately \$95 million to the taxpayers of California. The result has been a savings of \$5 for every \$1 invested. More savings will result as the years pass.

These results are not extraordinary when one contemplates the basic theory of advance acquisition of right-of-way. The State must pay the value of the land at the time of acquisition but, in most instances, the properties in the vicinity of the proposed road take on a greatly enhanced value by reason of the contemplated benefits accruing from the improved transportation facility itself. Since the prices paid for the right-of-way are determined by recent sales of nearby and comparable prop-

<sup>122</sup> *California*, Laws of 1952, Ch. 20 (2d ex. session), Laws of 1953, Ch. 1714; *New Mexico*, reported in "Albuquerque Journal," Feb. 4, 1956; *New York*, Laws of 1956, Ch. 60, pp. 527, 543; *Ohio*, Const. Art. VIII, Sec. 2c, Laws of 1955, H.B.'s 189 and 516; *Washington*, Laws of 1955, Ch. 383, H.B. 639; *Wisconsin*, Laws of 1955, Ch. 574, recreating 59.965(5)(d)(2).

<sup>123</sup> *Op. cit.*, *supra*, note 122.

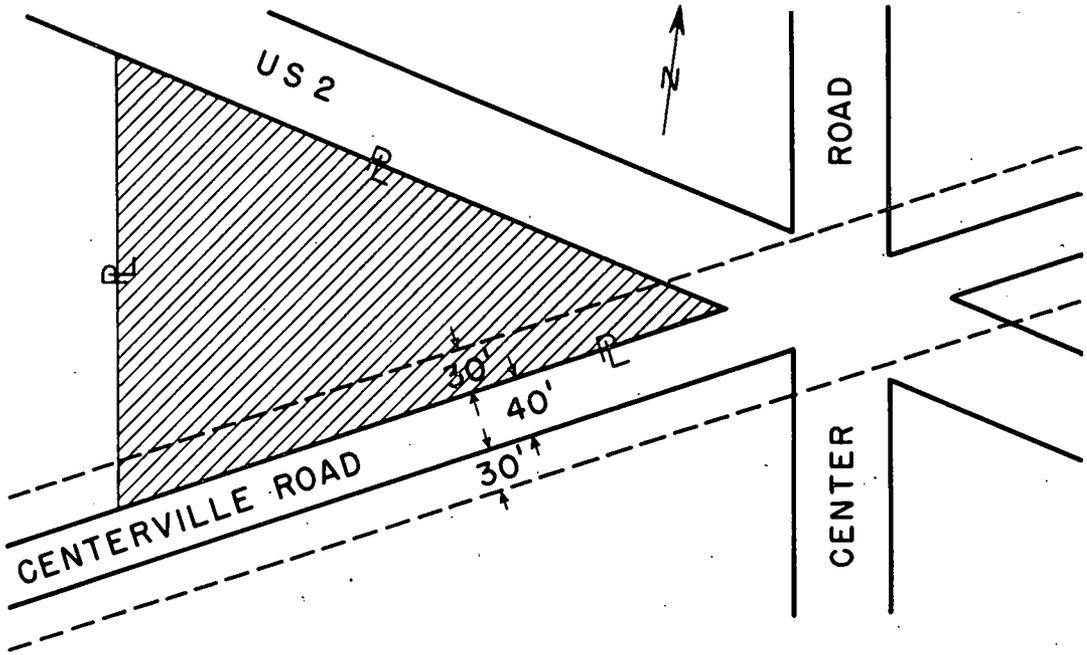
<sup>124</sup> *Op. cit.*, *supra*, note 122.

<sup>125</sup> Wagner, E. F., *Advanced Right-of-Way Purchases for Freeway Construction*, 33rd annual conference, Western Association of State Highway Officials, Sept. 17, 1954.

<sup>126</sup> *Op. cit.*, *supra*, note 122, § 4.

<sup>127</sup> *Ibid.*

# UNCERTAINTY OF FUTURE USE



State vs. 0.62033 Acres of Land in Christina Hundred  
New Castle County, 112 Alt. (2d) 857 (1955)

## PLATE 9

Delaware: No evidence was introduced to show the need for the additional land sought to be acquired. The uncertainty of the future highway use resulted in an adverse court decision in this instance.

erty, and they in turn are commanding high prices in anticipation of the improvement, the acquiring agency is, in effect, paying for the benefits that the improvement is creating. This automatic pyramiding of land value, in anticipation of highway improvement, does not operate to the detriment of the State highway department, or at least operates to a lesser extent than otherwise, where the land is acquired at the time the plans are completed.

The great bulk of the savings can be attributed, of course, to the ability to acquire land before it is developed. Since the end of the Second World War, the Nation has experienced a wave of migration from city centers to the suburbs of the large metropolitan areas. Whole communities have mushroomed overnight. By acquiring property in advance of use, California has been able to protect prospective rights-

of-way from this development and thereby diminish acquisition costs generally.

## New Mexico

An interesting variant of the California method has been evolved in New Mexico.<sup>128</sup> On Feb. 3, 1956 the State Finance Board authorized creation of a \$5 million revolving fund from unused 1955 highway debentures to enable the highway department to *buy* rights-of-way now for future projects. These will be the first debentures to be sold, based upon the 1955 authorization of \$20 million.

The mechanics of the fund are keyed into the Federal-aid program. As reimbursement payments are received from the Federal government, they will go into the

<sup>128</sup> The subsequent discussion is based upon a news report appearing in the Feb. 4, 1956 edition of the "Albuquerque Journal." As of the time of writing, no official material was available.

revolving fund on the same pro-rata basis on which the government participates in right-of-way costs. Since the Federal government does not reimburse for right-of-way at 100%, the fund will gradually decrease in amount.

In justifying creation of the fund, the New Mexico Chief Highway Engineer cited three advantages to be gained by purchasing rights-of-way for future projects.

(1) Tremendous savings in rights-of-way costs will be achieved by acquiring land before it becomes developed. In one recent instance alone, \$400,000 in right-of-way costs could have been saved by the highway department, if an advance acquisition mechanism had been available. An example of skyrocketing land values which siphon off a large segment of highway funds available for construction was the increase from 1.4 million to 1.75 million dollars in right-of-way cost for a contemplated route through Albuquerque.

(2) By tying down rights-of-way as soon as practical, local authorities are better able to plan street improvements which functionally tie in with new highway facilities.

(3) Once business interests and property owners are aware of the projected right-of-way of a new highway they will be able to make improvements delayed by the uncertainty of the route of the new facility.

Note should be made of the fact that the highway department still is without specific statutory authority to condemn land for future use. It may be, however, that land can be acquired for future use in New Mexico through the vehicle of "necessity." There is nothing in the jurisprudence in that State to support or disapprove of that approach.

### *New York*

A sum of \$145,000,000 was appropriated in 1956 for highway construction and land acquisition during the 1957 fiscal year.<sup>129</sup> On the recommendation of the Department of Public Works and with the approval of the Governor, the Director of the Budget earmarked \$20,000,000 as a revolving fund for the advance purchase of highway rights-of-way.

This financing does not in fact constitute a revolving fund. As explained by the Deputy Superintendent of Public Works, appropriations are made each year from the

Capital Construction Fund for highways, including rights-of-way. The aforementioned program is based on the authority contained in the annual appropriation. It is the intention of the Department of Public Works to build up gradually an investment of \$20,000,000 in rights-of-way in anticipation of situations in which delay in acquisition would increase the cost of needed right-of-way. As the rights-of-way so acquired become parts of actual construction projects, the backlog of advance acquisition will be replenished under succeeding appropriations.<sup>130</sup>

### *Ohio*

By the provisions of a 1953 amendment to its constitution<sup>131</sup> and legislation in 1954<sup>132</sup> the State of Ohio is empowered to embark upon a nine-year highway program. A sum of \$500 million, to be raised by a bond issue, is to be expended upon "major thoroughfares of the State highway system and urban extensions thereof."<sup>133</sup>

In 1955, the Ohio legislature enacted two appropriation acts which allocated funds to two distinct types of highway construction programs.<sup>134</sup> The first program, as embodied in State Highway Construction Council Approval No. I, is scheduled for the years 1956-1957. It is considered a firm program, in the sense that all the preliminary planning and engineering studies have been completed and construction is ready to commence. Section 2 of H.B. 189 earmarked \$8 million to be spent for right-of-way acquisition in carrying out this program. Although it is conceivable that land can be acquired now (that is, since March 25, 1955, the effective date of the act) and not used until the end of 1957, according to the self-defined limitation used in this investigation, such acquisition is not considered to be one for future use.<sup>135</sup>

Funds were appropriated in Ohio for a second type of program, as set forth by the

<sup>129</sup> This discussion is based upon a letter written by E. B. Hughes, Deputy Superintendent, Department of Public Works, to the National Highway Users Conference of Oct. 8, 1956.

<sup>131</sup> Ohio Constitution, Art. VIII, § 2c, November 3, 1953.

<sup>132</sup> Ohio Code, § 5528.01.

<sup>133</sup> *Op. cit.*, *supra*, note 132.

<sup>134</sup> Ohio Laws of 1955, H.B. 189 and 516.

<sup>135</sup> A two-year minimum lapse of time between acquisition and construction is required for the acquisition to be considered for future use for purposes of this study.

<sup>129</sup> Laws of 1956, Ch. 60, pp. 527, 542.

State Highway Construction Council Approval No. II.<sup>136</sup> This program involves construction scheduled for 1958 and 1959. A sum of \$216,372,000 is established at present for right-of-way acquisition and/or construction and reconstruction costs. Program No. II is at present in the planning stage and has as yet not been completely formulated. Money is now available and once a right-of-way is fixed the appropriate official is in a position to acquire property not to be used until 1958 or 1959.

A perplexing problem may be raised by the foregoing legislation. Investigation has revealed no statute or judicial decision in Ohio specifically authorizing acquisition of land for future use. Inferentially, the foregoing appropriations acts provide for such acquisition. It would be an anomaly if money is provided without the necessary authority to expend it to accomplish the desired purposes. It is possible, of course, that the Ohio courts will approve of the program, via the "necessity device."

#### *Washington*

There are several significant aspects of the Washington statute<sup>137</sup> which require comment. Section 56 provides:

... there is hereby appropriated from the Motor Vehicle fund to the Washington State Highway Commission for the period beginning April 1, 1955, ending June 30, 1957, for the advanced purchase of rights-of-way and access rights necessary for the orderly development of the ten year highway program, the sum of \$10,000,000.

No provision is made for extending the initial appropriation. In fact, a time limit of two years is placed on the life of the appropriation. It is altogether possible that if this two-year period becomes an onerous restriction in the execution of the program, the period would be extended by subsequent amendment. A degree of rigidity may be fostered by inferentially requiring the commission to acquire all the land within the first two years.

Additionally, the statute may be limited with respect to the methods that can be employed to acquire lands for future use. Specific authority seems to be given only

to purchase desired lands; no authorization to exercise the power of eminent domain appears to be included. It would seem that in order to enable the program to accomplish the desired objectives, the power to condemn needed land must necessarily be granted.

It would seem, too, that in delegating discretion to the highway commission, as the statute in question does, the legislature should provide standards for the exercise of the administrative authority. The standard used in the statute is "necessary for *orderly development*." A court of law and the highway commission may be required to give meaning to "necessary." In all likelihood the same meaning may be given to necessity, in the context in which it appears in the statute, as that given "necessity" in the area of public necessity.

To summarize the situation in Washington: The foregoing review of Washington statutes and case law suggests that there is no specific provision in the law for the acquisition of land for future use. There is, however, a statute that authorizes the commission to take options on land to be used in the future. A sum of \$10 million is provided to finance a program of land acquisition for future use. The statute speaks in terms of a 10-year highway program though the appropriation is only for a 2-year period. From the judicial decisions, it is settled law in Washington that a condemnor has the power to acquire for future use. Are we to infer in the light of the cases and the appropriation act under consideration that indirectly the Washington legislature has authorized acquisition of land for future use?

One final observation concerning the Washington statute. The act provides for a 10-year highway program. Is this a legislative determination of what "future" means?

#### *Wisconsin*

The California, New Mexico, Ohio and Washington acts authorize only the State highway department to exercise the power of advance acquisition of right-of-way. On the other hand, the Wisconsin statute ap-

<sup>136</sup> Ohio Laws of 1955, H. B. 516, Secs. 2 and 3.

<sup>137</sup> Washington, Laws of 1955, Chapter 383, H.B. 639.

plies to one county, Milwaukee County.<sup>138</sup> A further limitation on the scope of the Wisconsin statute lies in the fact that the fund is to be used only in conjunction with "expressway projects."<sup>139</sup>

As compared with the California mechanism, the mechanics of the Wisconsin fund represents a different approach to the problem. The California practice is the prototype of the true revolving fund, whereas in Wisconsin a fund not to exceed \$5 million at any one time is established. As the fund becomes depleted the county expressway commission is empowered to request the county board to replenish the fund with additional appropriations. Theoretically, there is no limit to the amount that can be spent for land acquisition purposes, as long as the fund is no greater than \$5 million at

<sup>138</sup> Wisconsin Laws of 1955, Sec. 59.965(5)(d)(2).

<sup>139</sup> See Wis. Statutes, sec. 59.965(1)(a),(c) for definitions of an expressway and an expressway project.

any one time. However, from a practical point of view, once the initial appropriation is spent the commission is limited by the amount the county board is willing to authorize.

Mention was made, in discussing the Washington statute, of providing the highway department with standards to be followed in using the money for right-of-way acquisition. A good formulation of at least portions of desirable standards referred to are found in the Wisconsin statute. Public interest is one standard. A more concrete guide, and the motivating reason for any program of advance acquisition of land—"economy"—is established as another criterion. Land is to be acquired and money expended whenever economy will be realized by forestalling development of desired lands which would entail greater acquisition costs at a later date.

## OTHER DEVICES RELATED TO ACQUISITION OF LAND FOR FUTURE HIGHWAY USE

Up to this point, this study has been focused upon the acquisition of land for future highway use *per se*. An examination of the laws of the several States has revealed that there are other techniques which, on a limited scale, may achieve some of the same beneficial results as the outright acquisition of land for future use. Such techniques are marginal land acquisition, the acquisition of certain kinds of special easements, such police power mechanisms as zoning, official map procedures, the designation of ultimate right-of-way widths, urban renewal, and others. Each of these will be discussed separately.

### *Marginal Land Acquisition*

For purposes of this study, marginal land is defined as territory 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 purposes of the acquisition of such marginal land are:

(1) To effect economy, by acquiring an entire tract when the necessary portion plus the severance damages for the remainder would involve an

equal or greater expenditure than if the entire tract is acquired.

(2) To prevent creation of small uneconomic 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 the marginal property.

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

Experience has shown that with a small additional cost in acquiring a whole parcel of land, onerous severance damages arising out of right-of-way acquisition can be eliminated. Moreover, where an existing land use pattern is disturbed, uneconomic "remnants" of land are left which are usually eye sores, hindering the replanning of the areas adjacent to the public improvement. Public acquisition of these remnants to promote a suitable land use pattern is most desirable.

Those aspects of marginal land acquisition related to future use are only incidental to its main function. Marginal land acquisition can be useful, to a limited degree, in providing land for expansion of an existing right-of-way, but is by its very



PLATE 10

Brooklyn-Queens Expressway looking southwest showing Williamsburg Bridge Approach Viaduct. New York has authority to acquire right-of-way for future use.

nature of no aid in assembling the right-of-way in the first instance.

However, due to the fact that a program of advance acquisition of land for future use can be assisted somewhat by utilizing marginal land acquisition, a review of the several statutes and constitutional provisions which authorize it is in order. Since the procedure is, in a sense, tangential to this study, the subsequent material will consist primarily of listing the constitutional provisions and statutes granting the power.<sup>140</sup> The constitutions of 11 States contain provisions granting the power of marginal land acquisition.<sup>141</sup> The highway laws of 11 States contain provisions which authorize marginal land acquisition.<sup>142</sup> A review of the controlled-access statutes of the several States indicates that 22 of those

laws contain provisions for marginal land acquisition.<sup>143</sup> These laws are limited in their application to expressways.

The marginal land acquisition constitutional provisions of four States<sup>144</sup> probably are of little assistance in acquiring land for future highway use. Three of these constitutional amendments, Massachusetts, New York and Pennsylvania, were passed subsequent to decisions by the courts of the respective States in which statutes granting the power of marginal land acquisition were held unconstitutional. It is not surprising, therefore, to find very circumscribed authorization granted by the respective constitutions for marginal land acquisition.

The Michigan constitutional authorization appears to be comparatively broad.<sup>145</sup>

<sup>140</sup> For a more detailed discussion of marginal land acquisition, see Public Control of Highway Access and Roadside Development, David R. Levin, Bureau of Public Roads, 1947, pages 59-67.

<sup>141</sup> *California*, Article I, Sec. 144; *Massachusetts*, Article X, Sec. 11; *Michigan*, Article XIII, Sec. 5; *Missouri*, Article I, Sec. 27; *New York*, Article I, Sec. 7(c); *New Jersey*, Article IV, Sec. 6(3); *Ohio*, Article XVIII, Sec. 10; *Pennsylvania*, Article 15, Sec. 5; *Rhode Island*, Article XVII, Sec. 1; *Utah*, Article XI, Sec. 5(c); *Wisconsin*, Article XI, Sec. 3(a).

<sup>142</sup> *Arkansas*, Laws of 1953, Act 419, Sec. 4; *California*, Deering's California Codes, St. & H., Sec. 1266; *Colorado*, Colo. Rev. Stats., Sec. 120-3-10; *Florida*, Laws of 1955, Ch. 11413; *Illinois*, Smith-Hurd Ill. Annot. Stats., Ch. 24, Sec. 185(a); *Indiana*, Burns' Indiana Stats. Annot., Sec. 48-2107; *Maryland*, Annot. Code of Maryland, Art. 89B, Sec. 8; *Nebraska*, Laws of 1955, Legislative Bill 187, Sec. 21; *Nevada*, Nevada Comp. Laws, Title 31, Sec. 132(2); *Virginia*, Code of Virginia, Sec. 15-771; *Washington*, Laws of 1953, Ch. 131.

<sup>143</sup> *Alabama*, Laws of 1956, H.B. No. 148; *Arkansas*, Arkansas Stats. 1947, Annot., Sec. 76-2205; *Delaware*, Delaware Code Annot., Title 17, Ch. 3, Sec. 175; *Florida*, Fla. Statutes, 1955, Sec. 348.05; *Georgia*, Laws of 1955, Act 333, Sec. 5; *Indiana*, Burns' Indiana Stats. Annot., Sec. 36-3105; *Iowa*, Laws of 1955, Ch. 148, Sec. 5; *Kentucky*, Rev. Stats., Sec. 177.250; *Louisiana*, Laws of 1955, Sec. 303; *Michigan*, Michigan Stats. Annot., Sec. 9.1094(4); *New Hampshire*, Laws of 1945, Ch. 188, Sec. 7(2); *New Jersey*, N.J.S.A., Sec. 27:7A-4; *North Dakota*, North Dakota Rev. Code, Sec. 24-0132; *Oregon*, O.R.S., Sec. 374.040; *Rhode Island*, Laws of 1949, Ch. 2239, Sec. 6 (only applicable to Providence); *South Dakota*, Laws of 1953, H.B. 656, Sec. 5; *Tennessee*, Laws of 1955, Ch. 147, Sec. 4; *Utah*, Utah Code Annot., Sec. 27.9-4; *Vermont*, Laws of 1955, H.B. 414; *Washington*, Rev. Code of Washington, Sec. 47.52.050; *West Virginia*, West Virginia Code of 1949, Annot., Sec. 1474(24); *Wisconsin*, Wis. Stats. 1955, Sec. 59.965(5)(d).

<sup>144</sup> Massachusetts, New York, Pennsylvania and Rhode Island.

<sup>145</sup> Michigan Constitution, Article XIII, Sec. 5.

Municipalities are given the right to take such "land and other property adjacent to the proposed improvement as may be appropriate to secure the greatest degree of public advantage from such improvement."

The New Jersey constitution was amended in 1947, to provide that the State or any political subdivision thereof is empowered to "acquire a fee simple absolute or any lesser interest, and may be authorized by law to take or otherwise acquire a fee simple absolute in easements upon, or the benefits of restrictions upon abutting property to preserve and protect the public highway."<sup>146</sup> Indirectly, the cost of future acquisition of land contiguous to the highway is minimized by restricting the development of such lands.

The Missouri constitution<sup>147</sup> appears to provide the most effective assistance to a program of advance acquisition of land for future highway use. It provides:

The state, or any county or city may acquire . . . such property . . . in excess of that actually to be occupied by the public improvement or used in connection, therewith, as may be reasonably necessary to effectuate the purposes intended. (Emphasis added.)

By using the requirement of "reasonably necessary," all of the doctrine that has been culled from the jurisprudence will become applicable when interpreting this provision, or a statute enacted pursuant to it.

### *Acquisition of Highway Development Rights*

When the legal concept of ownership of land is analyzed, it becomes apparent that such ownership consists of a bundle of multiple rights in the land. Such rights consist of rights to sell the land, to have one's heirs inherit the land, to encumber the land, to devote it to lawful uses, etc. Among such rights is the right to develop and improve the land.

A companion concept to the bundle-of-rights doctrine is the well-accepted legal theory that title to land is divisible. That is to say, land or the right to make use of it may be held by several people at the

same time, each possessing different estates therein, *i.e.*, fee simple absolute, leasehold for years, or an easement.

With these concepts concerning the ownership of the land as a foundation, two legal tools have been developed which may yield some of the same benefits as the outright acquisition of land for future highway use. These devices are the somewhat analogous procedures of reservation agreements and the acquisition of easements in land to prevent development. The function of both is to prevent the development of areas contiguous to a highway and consequently to reduce the cost of acquiring land to expand the highway right-of-way in the future.

In essence, a highway reservation agreement, as used in Ohio, is a contract between the State or its subdivisions and the landowner, under which the right of the owner to construct or develop land contiguous to the highway is purchased by the State. The owner would still possess the fee title to the land, but he has sold certain of his rights in the land adjacent to the highway.

An example of the operation of the reservation technique is afforded by the Ohio practice. By utilizing highway reservation agreements the State acquires rights in land contiguous to a highway. In the future, when the State decides to expand the highway, it will acquire the remaining interest in the land. However, by restricting the development of the desired land, the ultimate acquisition costs will be kept to a minimum. This procedure is probably most effective in rural areas where land is not highly developed or in blighted areas of urban centers. Its practical application in urban and suburban areas is doubtful, except possibly in areas afflicted with blight, because the cost of acquiring the reservation rights would probably approach the full value of the property in such case.<sup>148</sup>

Analogous to the reservation agreement is the acquisition of interests in abutting property by purchase or condemnation. Here, specific statutory authority is provided and a threat of condemnation puts the State highway official in a much more

<sup>146</sup> New Jersey Constitution, Article IV, Sec. 6(3).

<sup>147</sup> Missouri Constitution, Article I, Sec. 27.

<sup>148</sup> The reservation device was recommended by the National Interregional Committee, *Interregional Highways*, H. D. 379, 78th Congress, 2nd Session, 1944.

advantageous position with regard to his preliminary bargaining.<sup>149</sup> However, Maryland's experience with the device has shown that in actuality very little, if anything, is gained in acquiring an easement as compared to an absolute title,<sup>150</sup> in certain instances. It was found that despite the theoretical diminution in value of the fee title, once the easements were acquired, in practice, the State was required to pay full value for the fee.

#### *Ultimate Right-of-Way Designation and Official Map Procedures*

The payment of compensation is involved if the protective easement techniques are employed. There are, however, two procedures sanctioned under the police power of the State which may accomplish the same purpose, yet involve no payment of compensation. To be discussed first are the similar techniques of designation of ultimate right-of-way widths and the use of official maps to protect the future highway right-of-way routes. There is no difference in the theory or result of these techniques; merely a difference in the method of application.

The mechanics of the designation of ultimate width of rights-of-way and official map procedures are relatively simple. The authorized governmental body, be it the State or county highway department or municipal department of public works, determines the location of a future highway or street. In order to reserve the right-of-way in advance of acquisition so as to prevent the development of the desired land, the description of the facility and/or official map containing the location of the highway or street are filed in the appropriate office of the county wherein the parcel is located. Thereafter, no structure or improvement of any kind can be erected within the proposed street or highway right-of-way. This result is achieved by refusing to issue a building permit to construct within the designated right-of-way.

To enforce the two procedures, various

sanctions are utilized. In some instances, if structures are erected in the designated areas, no compensation will be paid for them when the land is ultimately acquired. Several statutes provide that any buildings within the restricted area must be removed within a reasonable time.<sup>151</sup> However, in Maryland it is declared to be a misdemeanor to construct within the restricted zone.<sup>152</sup>

Examples of the ultimate width statutes are found in the California, Pennsylvania, and Washington codes.<sup>153</sup> It should be noted that since this restriction on the right of property occurs under the police power, it is desirable to protect the procedure against any challenge to its constitutionality by providing a mechanism for possible exceptions and variances. This could take the form of making statutory provision for an appellate body at an administrative level to hear and determine hardship cases. For example, an appellate procedure is established in New York which provides that where the land within a so-called mapped street or highway is not yielding a fair return on its value to its owner, an administrative body has the power to grant a building permit but may impose reasonable requirements as a condition to granting that permit.<sup>154</sup> Where a bona fide showing of hardship exists, the board is permitted to grant a variance to permit the owner to make the improvement but, at the same time, imposes certain restrictions. Such limitations should restrict the use of the property insofar as possible in keeping with the eventual establishment of the public improvement.

Some statutes also have a provision limiting the time the restriction is permitted to run. For example, the State of Washington, in its 1955 act, seeks to accomplish this result by providing that:

... the establishment of any highway location as set forth in Sec. 1 of this Act shall be ineffective after one year from the filing thereof, if no action to condemn or acquire the property

<sup>149</sup> McKinney's Consol. Laws of N.Y., G.C.L. Sec. 35; Purdon's Pennsylvania Stats. Annot., Sec. 670-208; Washington Laws of 1955, Ch. 161, H.B. 246.

<sup>150</sup> Regulations of the Maryland National Capital Park & Planning Commission, pursuant to Acts of 1949, Ch. 582.

<sup>151</sup> California Statutes of 1947, Sec. 1451; Purdon's Pennsylvania Stats. Annot., Sec. 670-208; Washington Laws of 1955, Ch. 161, H.B. 246.

<sup>152</sup> McKinney's Consol. Laws of N.Y., G.C.L. Sec. 35.

<sup>149</sup> New Jersey Constitution, Article IV, Sec 6(3); Annot. Code of Maryland, Article 89B, Sec. 8(b).

<sup>150</sup> Moser, L. C., *Methods Used to Protect, Reserve and Acquire Right-of-Way for Future Use in Maryland*, H.R.B. Bulletin 77, 1953, pages 52-53.

within said time limit has been commenced within said time.<sup>155</sup>

In an attempt to prevent land speculation involving highway right-of-way acquisition and to improve its land acquisition techniques generally, the 1956 Maryland legislature enacted a new law providing a new approach to the problem.<sup>156</sup>

The most significant provision of the new law is Sec. 9D which specifies that the amount determined upon by the State Highway Commission as the value of the property shall not become public information until such time as all of the property along the pertinent section of highway has been acquired or at least the price determined or agreed upon by the parties to the transaction. Additionally, plats or maps prepared by the highway commission are not to be open to public inspection until recorded in the appropriate offices as provided by the law.

After payment to the owners or into court of the amount determined to be fair compensation, and the filing of the maps or plats, the roads commission may take possession of the property.<sup>157</sup> Negotiations between the property owner and the State Highway Commission are to be entered into at this point. If an agreement cannot be reached, appeals may be heard by a board of review created by the act.<sup>158</sup> Additional redress is provided by the right to appeal from the determination of the board of appeals to the circuit court for the county or the superior court for Baltimore City, as the case may be.<sup>159</sup> In the event of appeal to the courts, the procedures set forth by Articles 89B and 33A (general condemnation law) shall control.

This new law is circumscribed as to time, however, in that if the highway commission fails to acquire title to the property and ascertain the amount to be paid for same within one year from the date the plats or maps are recorded, or has failed to file a condemnation suit in the proper court, then the value of the property is no longer to be determined as of the date the plats or maps

were recorded, but shall be determined as of the time of acquisition. Furthermore, according to the law, if the value is less at the time of acquisition, it shall be determined as of the recordation date.<sup>160</sup>

An earlier version of the bill provided that the value of the land and rights to be acquired were to be determined *and fixed* as of the date plats or maps were recorded. The italicized words were, however, omitted from the bill as passed by the legislature.

### Zoning

The power to zone is a well-established function of government deriving from its police power to provide for the health, morals and safety of the people. As applied to streets and highways, zoning may be helpful in fostering the adoption of regulations restricting the various kinds of uses to which lands adjacent to the highway may be put. Additionally, it may provide, among other things, for setback regulations, minimum size of yards, limitations on height, bulk, size, and types of improvement which may be constructed on the property, all of which may have an impact on the highway facility and the traffic load generated by the uses involved.

Authority to zone comes from the State. Zoning powers usually are conferred upon cities, counties, townships, and other units or agencies of government by means of enabling laws.

Incorporated municipalities, cities, towns and villages are authorized to zone in all but five States.<sup>161</sup> These latter States extend zoning powers only to cities or special classes of cities. At present, all counties may zone in 16 States, and certain counties may zone in 15 others. Although some States—for example, Florida—mandatorily direct local authorities to zone,<sup>162</sup> no State highway department or other State administrative body has the direct power to zone.

Effective roadside zoning regulation at the State level could be extremely helpful in protecting future highway development. Its

<sup>155</sup> Washington Laws of 1955, Ch. 161, H.B. 246.

<sup>156</sup> Annot. Code of Maryland, Art. 89B, Secs. 9A-9K.

<sup>157</sup> Art. 89B, § 9E.

<sup>158</sup> Art. 89B, § 9G & 9H.

<sup>159</sup> Art. 89B, § 9I.

<sup>160</sup> Art. 89B, § 9I.

<sup>161</sup> Solberg, E. D., *Roadside Zoning*, H.R.B. Bulletin 55, 1952, p. 49.

<sup>162</sup> Florida Spec. Acts 1930, Ch. 19793; Florida Laws Ex. Sess. 1949, Ch. 26421.

# FUTURE USE SUSTAINED IN MISSISSIPPI

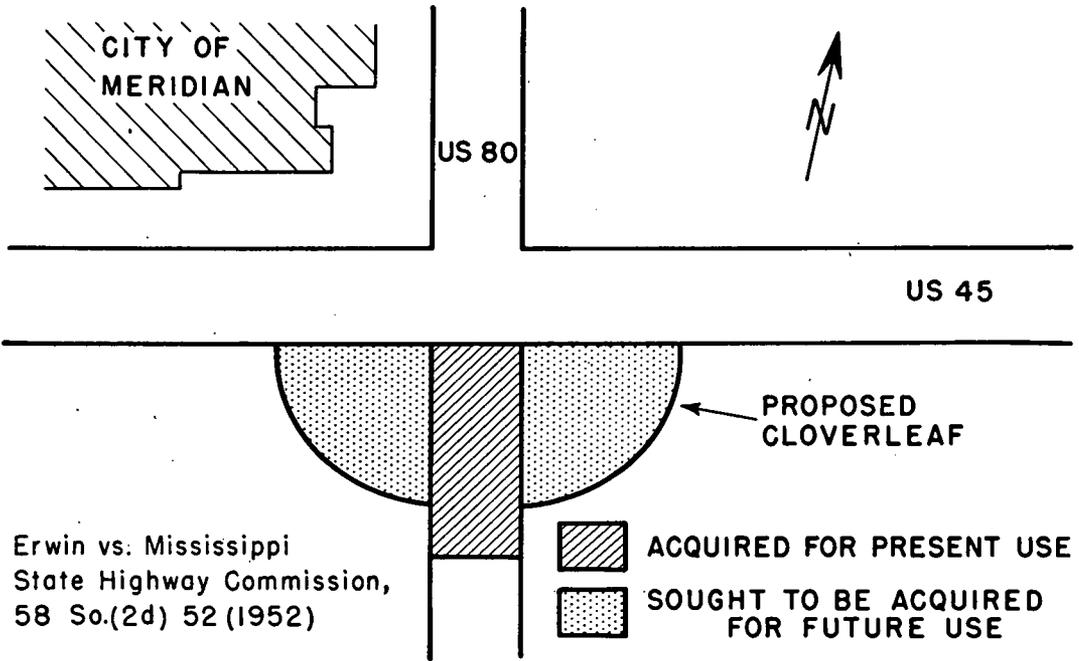


PLATE 11

Mississippi: The State Highway Commission must provide not only for present needs but also for those that may be reasonably anticipated in the future, said the high court in Mississippi in this case.

best use would be in undeveloped areas which are threatened with sudden development. Even in developed urban areas, however, zoning may be used to protect the roadside from an undesirable development of any undeveloped parcels that might remain, or from contemplated further development of existing improvements.

### Subdivision Controls

Subdivision control is a means of acquiring land for future use, through required dedication by the land developer. Where a subdivision is contemplated, the local planning commission, as a prerequisite to approving the subdivision plans, may require that not only sufficient dedications be made for adequate streets within the subdivision, but it may also require that land be dedicated for the planned major road improvement which serves the subdivided land and from which it will benefit. In addition, the commission may require that sufficient lands be dedicated along existing

streets or highways on which the subdivision borders, to provide for future widening when anticipated traffic needs shall so require.<sup>163</sup>

The State normally has extensive powers in regulating proposed subdivisions. As was so ably expressed by the court in *Mansfield & Swett, Inc. v. West Orange*:<sup>164</sup>

The state possesses the inherent authority . . . it antedates the constitution . . . to resort, in the building and expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. . . . Planning confined to the common need is inherent in the authority to create the municipality itself. It is as old as government itself; it is of the very essence of civilized society. A comprehensive scheme of physical development is requisite to community efficiency and progress.

Land subdivision intensifies the use of land adjacent to highways and may generate considerable volumes of local traffic that

<sup>163</sup> See *Ayers v. City Council of Los Angeles*, 34 Cal.2d 81, 207 Pac.2d 1, 11 A.L.R.2d 503 (1949) for what can be accomplished with subdivision controls.

<sup>164</sup> 120 N.J.L. 145, 198 Atl. 225 (1938).

will conflict with or may seriously congest the existing traffic on the highway. It is important, therefore, that local administrative bodies take into consideration the effect of the subdivision on existing traffic facilities and take adequate precautions accordingly.

The practice followed in both Michigan<sup>165</sup> and Wisconsin<sup>166</sup> exemplifies the relationship between advance acquisition and the use of subdivision controls to protect prospective rights-of-way. In Michigan the highway commissioner must approve all plats of land bordering a State trunk line or Federal-aid roads. In Wisconsin the State highway commission must approve all plats of land bordering on State trunk highways or on connecting streets. The development of land adjacent to a highway is prevented by the use of the above procedure and the ability to expand the facility is enhanced.

### *Urban Renewal Programs*

A relatively new concept which may be of immeasurable value in helping to solve urban highway problems is the urban renewal program of the Housing and Home Finance Agency of the Federal government.<sup>167</sup> This program can be used to great advantage in assisting highway officials in acquiring land for future highway use in urban areas. The program is first and foremost a housing program. However, Section 110(b) of the act requires that the urban renewal plan be sufficiently complete to show its relationship to such local objectives as public transportation, appropriate land use and improved traffic.

According to Carl Feiss:<sup>168</sup>

One of the basic considerations in planning for the development or redevelopment of any area eligible for financial assistance under Title I is the relationship of the area to the street and highway work which serves the city and the locality. The location and character of existing or planned major streets or highways in the vicinity of a proposed redevelopment project will not only influence but may be the principal factor in the determination

of the new use in the project areas. It is important in any case that the street system of any redevelopment project be integrated with the major streets and highways of the community and the locality, and that redevelopment plans be prepared with full knowledge of any proposed changes or improvements in the major streets or highways systems.<sup>169</sup>

In practice, highway improvements have assumed major roles in urban renewal or development programs. Noteworthy examples are the programs in Nashville, Tennessee; Norfolk, Virginia; and Cincinnati, Ohio. Since the program is of recent vintage a somewhat detailed review of its operation will be set forth. It will soon become apparent how a State or county highway commission, or a city department of public works working closely with a redevelopment agency, can achieve some of the objectives sought to be accomplished by acquisition of land for future use.

In theory the urban renewal program is a simple concept. A city or other political subdivision decides that a particular area under its jurisdiction has become a slum area or is in the stage of deterioration and the city desires to take positive action to remedy the situation. Thirty-five States and three other jurisdictions, including the District of Columbia, have slum clearance and urban redevelopment laws.<sup>170</sup> There are seventeen jurisdictions which have enabling legislation or specific constitutional provisions (or both) authorizing public agencies to undertake urban renewal projects, including both slum clearance and rehabilitation.<sup>171</sup> The slum clearance and urban redevelopment powers in eleven jurisdictions

<sup>169</sup> Feiss, C., *Urban Redevelopment and Highway Planning*, H.R.B. Bull. 38, p. 31, 32, 1951.

<sup>170</sup> Alabama	Indiana	North Carolina
Alaska	Kansas	North Dakota
Arizona	Kentucky	Ohio
Arkansas	Maine	Oklahoma
California	Maryland	Oregon
Colorado	Massachusetts	Pennsylvania
Connecticut	Michigan	Puerto Rico
Delaware	Minnesota	Rhode Island
District of Columbia	Missouri	South Dakota
Georgia	Nebraska	Tennessee
Hawaii	New Hampshire	Virginia
Illinois	New Jersey	West Virginia
	New York	Wisconsin

<sup>171</sup> Alabama	Hawaii	Missouri
Alaska	Illinois *	North Dakota
Connecticut	Kansas	Oklahoma
District of Columbia	Maine	Puerto Rico
Georgia	Massachusetts	Tennessee
	Minnesota	Wisconsin

\* Separate independent agency empowered to exercise rehabilitation and conservation powers.

<sup>165</sup> Michigan Statutes Annotated, Sec. 26.465.

<sup>166</sup> Wisconsin Statutes, 1953, Sec. 236.06(1), (j).

<sup>167</sup> 63 Stat. 413 (1949), 42 U.S.C. 1451; as amended June 3, 1952, 66 Stat. 98; June 30, 1953, 67 Stat. 121; August 2, 1954, 68 Stat. 890; August 11, 1955, 69 Stat. 635.

<sup>168</sup> Formerly, Chief, Community Planning and Development Branch, Division of Slum Clearance and Urban Redevelopment, Housing and Home Finance Agency.

are vested solely in housing authorities.<sup>172</sup> In eight jurisdictions, the powers are vested solely in cities or other municipalities.<sup>173</sup> In ten jurisdictions, the powers may be vested in housing authorities or in other local agencies.<sup>174</sup> In eight jurisdictions, the powers are vested solely in redevelopment agencies or other special public agencies, which are not housing authorities.<sup>175</sup>

The initial step is the preparation and submission by the city to the Housing and Home Finance Agency of a "workable program." A "workable program" is defined in the act as:

... a program (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well organized residential neighborhoods of decent homes and suitable living environment for adequate family life). . . .<sup>176</sup>

The act also contains definitions of an urban renewal plan and project.<sup>177</sup> An urban renewal plan is defined as:

(b) "Urban renewal plan" means a plan, as it exists from time to time, for an urban renewal project, which plan (1) shall conform to the general plan of the locality as a whole and to the workable program referred to in section 101 hereof; (2) shall be sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, building requirements, and the plan's relationship to definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; and (3) shall include, for any part of the urban renewal area proposed to be acquired and redeveloped in accordance with clause (1) of the second sentence of subsection (c) of this section, a redevelopment plan approved by the governing body of the locality.

Urban renewal projects are defined as:

(c) "Urban renewal project" or "project" may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area, or rehabilitation or conservation in an urban renewal area, or any combination or part thereof, in accordance with such urban renewal plan. Where land within the purview of subparagraph (1)(ii) or (1)(iii) hereof (whether it be predominantly residential or nonresidential in character) is to be redeveloped for predominantly nonresidential uses, loans and advances under this title may be extended therefor if the governing body of the local public agency determines that such redevelopment for predominantly nonresidential uses is necessary and appropriate to facilitate the proper growth and development of the community in accordance with sound planning standards and local community objectives and to afford maximum opportunity for the redevelopment of the project area by private enterprise: Provided, That loans and outstanding advances to any local public agency pursuant to the authorization of this sentence shall not exceed 2½ percentum of the estimated gross project costs of the projects undertaken under other contracts with such local public agency pursuant to this title. For the purposes of this subsection, "slum clearance and redevelopment" may include (1) acquisition of (i) a slum area or a deteriorated or deteriorating area, or (ii) land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially impairs or arrests the sound growth of the community, or (iii) open land necessary for sound community growth which is to be developed for predominantly residential uses: Provided, That the requirement in paragraph (a) of this section that the area be a slum area or a blighted, deteriorated, or deteriorating area shall not be applicable in the case of an open land project: And provided further, That financial assistance shall not be extended under this title for any project involving slum clearance and redevelopment of an area which is not clearly predominantly residential in character unless such area is to be redeveloped for predominantly residential uses, except that, where such an area which is not predominantly residential in character contains a substantial number of slum, blighted, deteriorated, or deteriorating dwellings or other living accommodations, the elimination of which would tend to promote the public health, safety and welfare in the locality involved and such area is not appropriate for redevelopment for predominantly residential uses, the Administrator may extend financial assistance for such a project, but the aggregate of the capital grants made pursuant to this title with respect to such projects shall not exceed 10 percentum of the total amount of capital grants authorized by this title;

<sup>172</sup> Alabama  
Alaska  
Arkansas  
Minnesota  
Nebraska  
New Hampshire  
Oregon  
Puerto Rico  
South Dakota  
Tennessee  
Virginia

<sup>173</sup> Arizona  
Connecticut  
Indiana  
Maryland  
Michigan  
New York  
Ohio  
Wisconsin

<sup>174</sup> Colorado  
Delaware  
Illinois  
Kentucky  
Massachusetts  
Georgia  
Kansas  
New Jersey  
North Dakota  
West Virginia

<sup>175</sup> California  
District of Columbia  
Hawaii  
Maine  
Missouri  
North Carolina  
Pennsylvania  
Rhode Island

<sup>176</sup> 68 Stat. 590, 623, Sec. 101(c).

<sup>177</sup> 68 Stat. 590, 625, Sections 11(b), (c).

(2) demolition and removal of buildings and improvements; (3) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improvements necessary for carrying out in the area the urban renewal objectives of this title in accordance with the urban renewal plan; and (4) making the land available for development or redevelopment by private enterprise or public agencies (including sale, initial leasing, or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan.

For the purposes of this subsection, "rehabilitation" or "conservation" may include the restoration and renewal of a blighted, deteriorated, or deteriorating area by (1) carrying out plans for a program of voluntary repair and rehabilitation of buildings or other improvements in accordance with the urban renewal plan; (2) acquisition of real property and demolition or removal of buildings and improvements thereon where necessary to eliminate unhealthful, insanitary or unsafe conditions, lessen density, eliminate obsolete or other uses detrimental to the public welfare, or to otherwise remove or prevent the spread of blight or deterioration, or to provide land for needed public facilities; (3) installation, construction, or reconstruction, of such improvements as are described in clause (3) of the preceding sentence; and (4) the disposition of any property acquired in such urban renewal area (including sale, initial leasing, or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan.

For the purposes of this title, the term "project" shall not include the construction or improvement of any building, and the term "redevelopment" and derivatives thereof shall mean development as well as redevelopment. For any of the purposes of section 109 hereof, the term "project" shall not include any donations or provisions made as local grants-in-aid and eligible as such pursuant to clauses (2) and (3) of section 110(d) hereof.

A perusal of the preceding definitions reveals how a major highway development or street widening or relocation can be an integral part of a renewal project. What benefits can the highway officials derive from this? From the viewpoint of land acquisition costs, practice has demonstrated that land acquired from a redevelopment body costs much less than if the highway agencies acquired the property in the first instance.

Although not spelled out in the statute, there are future use aspects in the renewal program. To begin with, although conceptually the theory of urban renewal is comparatively simple, in practice the program entails complex problems and pro-

cedures. To prepare a "workable program" and see the plan through to completion takes time. From an administrative point of view, the Housing and Home Finance Agency does not have an absolute requirement as to time in which certain segments of a renewal project must be completed. A standard of reasonableness and certainty of completion are the guides.

To illustrate how the urban renewal program can be used to acquire land for future highway or street use, assume the following hypothetical situation: City X has decided to redevelop a whole area by the means of an urban renewal program. State Y has a long range highway improvement program, included in which are plans to construct an urban extension of a State highway in City X. If the highway and city officials work in close relationship with one another, the required highway right-of-way can be set aside in the urban renewal plans. By the time the land is acquired and cleared and sold to the State highway department, a period of time will have expired. In conjunction with the aforementioned, add the comparatively flexible standard followed by H.H.F.A. as to when the project must be completed and the elements of advance acquisition becomes apparent.

Another very important aspect of urban renewal is the financing features of the program. The ratio of Federal-local participation in the net project cost is  $\frac{2}{3}$  Federal— $\frac{1}{3}$  local.<sup>178</sup> The cost is the difference between the expenditures for planning, land acquisition, demolition, and removal of improvement, minus the return from the sale or leasing of the land. The Federal government participates to the amount of  $\frac{2}{3}$  of these costs.

If the locality can demonstrate that a projected program of highway or street improvements is an integral part of the renewal plan and will directly benefit the renewal area, the cost of the facility can be credited toward the locality's  $\frac{1}{3}$  share of the cost.

Although in theory simple to comprehend,

<sup>178</sup> 42 U.S.C.A. 1454, see 42 U.S.C.A. 1460(e), (f) for definitions of gross project costs and net project costs.

in practice an urban renewal program is a complex project which requires a high degree of planning. Highway and city officials should be aware of its implications for it may be an extremely useful procedure.

It may be desirable, of course, for highway authorities to use one or more of the above described techniques, in addition to or even instead of the outright acquisition of land for future highway use. Authority for the acquisition of land for future use in a particular State may be inadequate. The State may not have the power to lease the land in the interim. The highway department may not have the power to dispose of land no longer required because of a change in circumstances. It may only have the power to acquire an easement with the consequent reversion to the abutter without

benefit to the State if the land is not used for highway purposes.

In these and other situations, the use of these roadside protection techniques may be a valuable, preliminary way of securing the results that are sought to be obtained by outright acquisition of land for future use. Their value should not be minimized but, on the other hand, they are not panaceas. They could be an important *supplement* but not a *substitution* for the right to acquire land for future highway use. By developing fully its laws and procedures pertaining to each of the devices and utilizing each accordingly in the unique, specific acquisition problem as it presents itself in particular cases, the State will be able to pursue its highway development program to the fullest advantage.

## APPENDIX A

### SUMMARY OF STATUTORY AND CASE LAW CONCERNING ACQUISITION OF PROPERTY FOR FUTURE USE, BY STATES

#### ALABAMA

##### *Statutory Provision:*

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

#### ARIZONA

Nothing.

#### ARKANSAS

##### *Statutory Provision:*

State Highway Commission is authorized to acquire land needed for present and future right-of-way.

##### *Judicial decision:*

*Woollard v. State Highway Commission*, 220 Ark. 731, 249 S.W.2d 564 (1952). The State Highway Commission should take a sufficiently wide right-of-way, in the first instance, to allow for expansion of the highway when required. If this is done, the cost of expansion will be reduced by preventing the growth of commercial establishments on land eventually required for expansion.

#### CALIFORNIA

##### *Statutory Provision:*

The authority conferred by law to acquire land for State highway purposes includes authority to acquire land for future needs.

##### *Judicial Decisions:*

*Kern County Union High School District v. McDonald*, 180 Cal. 7, 179 Pac. 180 (1919). Immediate future needs are ordinarily an essential factor in the determination of the question of whether or not there is a present necessity for a taking in condemnation for the purposes of a particular public use.

*Central Pacific Railway v. Feldman*, 152 Cal. 303, 92 Pac. 849 (1907).

#### COLORADO

##### *Statutory Provision:*

The Department of Highways shall have authority to acquire by purchase or condemnation rights-of-way for future needs.

#### CONNECTICUT

##### *Judicial Decisions:*

*In re New Haven Water Co.*, 86 Conn. 361, 85 Atl. 636 (1912). In determining what property is necessary for a water company the future as well as present needs of the community should be taken into consideration.

*Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951). A water company should plan for a supply of water, and therefore acquire property, to meet conditions as they will be at least 10 and preferably 15 or 20 years in the future.

*Town of West Hartford v. Talcott*, 138 Conn. 82, 82 A.2d 351 (1951). The requirement of necessity is not a question of what is absolutely or indispensably necessary, but what is reasonably necessary. In light of this interpretation of the requirement of necessity, the court sustained the acquisition of land for a school which was predicated on the school needs as they would develop in the next 10 years.

#### DELAWARE

##### *Judicial Decision:*

*State v. 0.62033 Acres of Land*, Del., 112 A.2d 857 (1955). On the basis of the evidence introduced the particular acquisition for future use was denied. However, the applicability of the principle of acquisition of land for future use in Delaware remains an undecided question.

## FLORIDA

*Statutory Provision:*

The power of eminent domain is vested in the department to condemn all necessary lands and property for the purpose of securing rights-of-way, borrow pits and drainage ditches for existing, proposed or anticipated roads in the State highway system or State parks roads system.

*Judicial Decisions:*

*Carlor Co. v. City of Miami, Fla.*, 62 So.2d 897 (1953). The court stated that it is the duty of public officials to look to and plan for the future. The acquisition of land for an airport, which, after seven years since the acquisition of the required property still had not been constructed, was sustained.

*Dickson v. St. Lucie County, Fla.*, 67 So.2d 662 (1953). In acquiring rights-of-way public officials are no longer confined to acquiring only so much land as is necessary for pavement today but they may look to the future and acquire rights-of-way sufficient to take care of the needs of the foreseeable future.

*Inland Water Ways Development Co. v. City of Jacksonville*, 160 Fla. 913, 38 So.2d 676 (1948). In condemning land for an electric generating plant plaintiff can take into account its future business in determining what land is necessary for its business.

## GEORGIA

*Statutory Provision:*

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

## IDAHO

*Statutory Provision:*

The Idaho board of highway directors is vested with the power to acquire property for present or future state highway purposes.

*Judicial Decision:*

*Independent School District of Boise City v. Lauch Construction Co.*, 74 Idaho 502,

264 P.2d 687 (1953). In acquiring land for a proposed school site it was proper to take into consideration anticipated increased future demands.

## ILLINOIS

*Statutory Provision:*

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

*Judicial Decisions:*

*Department of Public Works and Buildings v. McCaughey*, 332 Ill. 416, 163 N.E. 795 (1928). In acquiring land for highway purposes the highway department has a right to, and should, anticipate the future needs of the municipality, and their action in the premises will not be interfered with, except in a clear case of abuse of the discretion vested in them.

*City of Chicago v. Vaccarro*, 408 Ill. 587, 97 N.E.2d 766 (1951). The city of Chicago, in its determination of whether the taking of property is necessary for providing parking facilities at the airport, has a right to and should consider not only the present needs of the public, but those which may be fairly anticipated in the future.

*City of Chicago v. Newberry Library*, 7 Ill.2d 305, 131 N.E.2d 60 (1955).

## INDIANA

*Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

## IOWA

*Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

*Judicial Decisions:*

*Porter v. Iowa State Highway Commission*, 241 Iowa 1208, 44 N.W.2d 682 (1950).

In the course of the trial defendant's chief engineer testified that certain property had been purchased for future highway development. Although dicta, the aforementioned acquisition was approved by the court.

*Town of Alford v. Great Northern Railroad Co.*, 179 Iowa 465, 161 N.W. 467 (1917). In determining the extent of depot grounds essential, the railroad was not limited to present needs alone, but might well anticipate the growth of the municipality and the development of the surrounding territory and the increasing facilities likely to be demanded for the handling of freight.

#### KANSAS

##### *Statutory Provision:*

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

##### *Judicial Decisions:*

*State Highway Commission v. Ford*, 142 Kan. 383, 46 P.2d 849 (1935). The fact that future needs were taken into account did not destroy the right and power to act. The court stated, "Indeed, we are all learning that many of our roads and bridges have been made too narrow, the turns too short, and that too little attention has been given to obstructions to views at corners."

*State v. State Highway Commission*, 163 Kan. 187, 182 P.2d 127 (1947). The State conceded the right of the commission to exercise its discretion, in good faith, with respect to what amount of land was reasonably necessary for the purposes designated by law, including future needs of the highway.

#### KENTUCKY

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

##### *Judicial Decisions:*

*Warden v. Madisonville H. & E. R. Co.*, 128 Ky. 563, 106 S.W. 880 (1908). The

court held that the requirement of necessity meant reasonable, rather than absolute necessity, and that plaintiff, a railroad, could acquire land which its present plans show would be reasonably necessary in the future.

*Pike County Board of Education v. Ford*, Ky., 279 S.W.2d 245 (1954). An authority with the power to condemn is not limited to its immediate needs only, but it may, and indeed should, give consideration to future needs.

*Baxter v. City of Louisville*, 224 Ky. 604, 6 S.W.2d 1074 (1928). A condemning corporation may condemn lands sufficient to provide for not only its present but also its prospective necessities, as in the case of a railroad corporation, if it is not more than may in good faith be presumed necessary for future use within a reasonable time.

*Inland Water Ways Co. v. City of Louisville*, 227 Ky. 376, 13 S.W.2d 283 (1929). It is established in this State that a city may acquire lands in contemplation of reasonable necessity in the future and employ the power of condemnation to that end.

#### LOUISIANA

##### *Statutory Provision:*

In determining the width of right-of-way the chief engineer shall take into consideration future improvement of the highway.

##### *Judicial Decisions:*

*City of New Orleans v. Moeglich*, 169 La. 1111, 126 So. 675 (1930). In view of the existing traffic conditions in the city, it was not necessary to demonstrate actual, immediate, and impending necessity for the acquisition. It was sufficient, in carrying out a general plan of improvements contemplated in the near future, to show that the desired land would be required.

*State v. Cooper*, 213 La. 1016, 36 So.2d 22 (1948). In the course of sustaining an acquisition under the aforementioned statute the Louisiana court held that the chief engineer should not restrict his planning to present needs but extend his planning to future improvements of the highway system.

## MAINE

*Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

## MARYLAND

*Statutory Provision:*

The State Roads Commission can acquire property for immediate or proposed construction of a State highway, parkway or freeway.

*Judicial Decision:*

*State Roads Commission v. Franklin*, 201 Md. 549, 95 A.2d 99 (1953). The court sustained the right to acquire land for future use as authorized by the above statute. Land was acquired for both lanes of an expressway although only construction of one lane was proposed at present.

## MASSACHUSETTS

*Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

## MICHIGAN

*Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

*Judicial Decisions:*

*Petition of Board of Education of the City of Detroit*, 239 Mich. 46, 214 N.W. 239 (1927). In acquiring property for a school site future expansion of the school should be considered in determining the necessity of the desired land.

*Board of Education v. Baczewski*, 340 Mich. 265, 65 N.W.2d 810 (1950). In hold-

ing that the constitutional requirement of necessity is not satisfied by the ability to save money by such acquisition, the court stated that the petitioner must prove that the land will be used immediately or within the near future. On the facts of the instant case, the petitioner failed to prove such use.

## MINNESOTA

*Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

*Judicial Decision:*

*State v. Duluth St. Ry. Co.*, 179 Minn. 548, 229 N.W. 883 (1930). Necessity means now or in the near future. It does not mean that it will be possibly needed at some remote time in the future.

## MISSISSIPPI

*Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

*Judicial Decision:*

*Erwin v. Mississippi State Highway Commission*, 213 Miss. 885, 58 So.2d 52 (1952). The court sustained the acquisition of land for a proposed cloverleaf which would not be constructed until some indefinite time in the future when sufficient funds would be available.

## MISSOURI

*Statutory Provision:*

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

*Judicial Decisions:*

*Phillips Pipe Line Co. v. Brandstetter*, 241 M.A. 1138, 263 S.W.2d 880 (1954). It

is not only the present demands of the public which are to be considered, but also those reasonably to be anticipated in the future.

*State Highway Commission v. Curtis*, 359 Mo. 402, 222 S.W.2d 64 (1949). Although the entire road was not to be constructed at once, the court sustained the acquisition of the entire right-of-way. It was stressed that the construction was part of a general plan adopted by the commission whereby the remaining portions were to be constructed in the near future.

#### MONTANA

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

#### NEBRASKA

##### *Statutory Provision:*

The highway department is authorized to acquire property deemed to be necessary or desirable for present or future State highway purposes.

#### NEVADA

##### *Statutory Provision:*

The department of highways is authorized to acquire land for both present and future highway needs.

#### NEW HAMPSHIRE

##### *Statutory Provision:*

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

#### NEW JERSEY

##### *Statutory Provisions:*

In relation to freeways and parkways the State highway department is authorized to acquire land for future use.

The following special commissions and

authority are authorized to acquire land for future highway purposes:

- (1) Gloucester County Tunnel Commission.
- (2) New York and New Jersey Port Authority.
- (3) Delaware River Joint Commission.
- (4) Delaware River Bridge Commission.

##### *Judicial Decision:*

*Kountze v. Proprietors of Morris Aqueduct*, 58 N.J.L. 303, 33 Atl. 252 (1895). The needs to be considered in deciding whether the necessity requirement is met in a condemnation proceeding are those of a growing population and an increasing use of the facility.

#### NEW MEXICO

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

##### *Administrative Order:*

A 5 million dollar revolving fund has been established to enable the Highway Department to buy rights-of-way now for future projects.

#### NEW YORK

##### *Statutory Provision:*

The New York and New Jersey Port Authority is authorized to acquire land for future use.

##### *Judicial Decisions:*

*In re Application of Staten Island Rapid Transit R. Co.*, 193 N.Y. 252 (1886). The applicant's acquisition of land for its prospective as well as present use was sustained.

*In re East 161 St. in the City of New York*, 52 Misc. 596, 102 N.Y.S. 500 (1907). It has been repeatedly held that a railroad corporation in taking land is not limited to its present use, but may acquire for its

prospective use, provided the necessity for such use, in the immediate future, is established beyond reasonable doubt. To the same affect: *In re Neponsite Avenue, Adirondak Blvd. and Newport Avenue in the City of New York*, 77 Misc. 246, 135 N.Y.S. 708 (1912); *In re Seneca Avenue in City of New York*, 98 Misc. 712, 163 N.Y.S. 503 (1917); *Bd. of Education v. Blair*, Misc., 144 N.Y.S.2d 371 (1955).

#### NORTH CAROLINA

##### *Statutory Provision:*

Both the North Carolina Turnpike Authority and the Carolina-Virginia Turnpike Authority are authorized to purchase property whenever they shall deem such purchase expedient.

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

#### NORTH DAKOTA

##### *Statutory Provision:*

The commissioner is authorized to acquire such land as he may deem necessary for reasonable future use.

#### OHIO

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

##### *Judicial Decision:*

*State v. City of Euclid*, 164 Ohio St. 265, 130 N.E.2d 336 (1955). The city attempted to acquire property for a freeway. However, the formal procedure of establishing the freeway had not been followed and the freeway was still in a visionary state awaiting a co-operative agreement with the county, State or Federal government to establish it. On the basis of the facts in the record the court held that the defendant had no authority to appropriate lands for some contemplated future use.

#### OKLAHOMA

##### *Statutory Provision:*

In determining the amount of land required or width of right-of-way the department shall take into consideration present and probable future needs.

#### OREGON

##### *Statutory Provision:*

The commission may determine the widths of rights-of-way for all State highways.

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

##### *Judicial Decision:*

*State v. Pacific Shore Land Co.*, 201 Ore. 142, 269 P.2d 512 (1954). In the course of its opinion the court stated, in dicta, that the aforementioned statute empowered the commission to acquire sufficient land in the first instance to meet anticipated future needs.

#### PENNSYLVANIA

##### *Statutory Provision:*

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

##### *Judicial Decisions:*

*Croyle v. Johnstone Water Co.*, 259 Pa. 484, 103 Atl. 303 (1918). The court sustained the company's acquisition of water for both present and future anticipated needs.

To the same effect on the question of acquisition of property for anticipated future needs: *Boalsburg Water Co. v. State College Water Co.*, 240 Pa. 198, 87 Atl. 609 (1913); *Pittsburgh Junction R. Co's Appeal*, 122 Pa. St. 511 (1886); *Duquesne Light Co. v. Upper St. Clair Tp.*, 377 Pa. 323, 105 A.2d 287 (1954); *Delaware L. & W. R. Co. v. Stroudsburg Water Gap and Portland Street Ry. Co.*, 289 Pa. 131, 137 Atl. 73 (1927); *Petition of Fayette County Commissioners*, 289 Pa. 200, 138 Atl. 237

(1927); *Chew v. City of Philadelphia*, 257 Pa. 589, 101 Atl. 915 (1917).

#### RHODE ISLAND

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

#### SOUTH CAROLINA

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

#### SOUTH DAKOTA

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

#### TENNESSEE

##### *Statutory Provision:*

The commissioner of highways and public works is authorized to acquire such land as he may deem desirable or as may be necessary in order to secure Federal-aid.

#### TEXAS

##### *Statutory Provision:*

The Texas Highway Department is authorized to lease land acquired for right-of-way which is not required for immediate use.

#### UTAH

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

#### VERMONT

##### *Statutory Provision:*

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

##### *Judicial Decision:*

*Vermont Hydro-Electric Corporation v. Dunne*, 95 Vt. 94, 112 Atl. 223 (1921). Land already acquired for one public use was sought to be condemned for another public use. The court held that the land was exempt from condemnation since it was held in reasonable anticipation of probable future needs.

#### VIRGINIA

##### *Statutory Provision:*

The State Highway Commissioner is authorized to acquire land that he may deem requisite for permanent, temporary, continuous, periodical or future use.

#### WASHINGTON

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

The Washington State Highway Commission is empowered to secure options for the purchase of property needed or proposed for any entire project or section thereof.

A special fund of \$10,000,000 was established for the advance purchase of rights-of-way for a 10-year highway program.

##### *Judicial Decisions:*

*State ex rel. Patterson v. Superior Court for King County*, 102 Wash. 331, 173 Pac. 186 (1918). In determining whether land sought to be condemned was necessary for petitioner's business, it was appropriate to take into account future development and the anticipated growth of petitioner's business.

*State ex rel. Hunter v. Superior Court for Snohomish County*, 34 Wash.2d 214, 208 P.2d 866 (1949). In the selection of a site

for a fire station, the commissioners had the authority to determine the land necessary and to take into account the addition of more equipment to meet future needs. Reasonable necessity includes both present as well as probable future needs.

*State ex rel. Spokane Falls and N. Ry Co. v. Superior Court of Spokane County*, 40 Wash. 389, 82 Pac. 457 (1905); to the same effect as *State ex rel. Patterson v. Superior Court for King County*, *supra*; a similar holding is found in *Nicomien Boom Co. v. North Shore Boom and Driving Co.*, 40 Wash. 315, 82 Pac. 413 (1905).

*Hughbanks v. Port of Seattle*, 193 Wash. 506, 76 P.2d 603 (1938) and *Everett v. Everett Improvement Co.*, 124 Wash. 486, 214 Pac. 1064 (1923), both hold that without an adequate demonstration of how and when the land sought to be acquired will be used the acquisition will not be sustained.

*State ex rel. Veys v. Superior Court for Cowlitz County*, 33 Wash.2d 638, 206 P.2d 1028 (1949). The public may acquire an entire lot, block or tract of land if by so doing the interest of the public will be served, even though such entire lot, block or tract is not immediately needed for the limited access facility.

#### WEST VIRGINIA

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

#### WISCONSIN

##### *Statutory Provisions:*

In establishing streets and highways in a municipality the county board may establish width in excess of the widths in use and adopt plans showing the location and width proposed for any future street or highway; and such excess widths may be acquired at any time by the State, county or municipality in which the street or highway is located.

The Milwaukee County Expressway Commission is authorized to acquire land for future use.

State highway department is authorized to do all things necessary to secure the full benefit of Federal-aid.

##### *Judicial Decision:*

*Chicago, St. P., M. & O. Railway Co. v. Bayfield County*, 87 Wis. 188, 58 N.W. 245 (1894). A railroad is empowered when condemning land to consider its prospective as well as present needs provided such prospective use in the immediate future is clearly established.

#### WYOMING

##### *Statutory Provision:*

The State highway department is authorized to do all other things necessary and proper to carry out the cooperation contemplated and provided for in the Federal-aid acts.

#### UNITED STATES

##### *Statutory Provision:*

The Federal-Aid Highway Act of 1956 provides for Federal participation in the cost of right-of-way acquired for future use; said right-of-way to be used within five years from the date of acquisition.

##### *Judicial Decision:*

*Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923). In determining whether the taking of property is necessary for public use, not only the present demands of the public, but those which may be fairly anticipated in the future may be considered.

#### ALASKA

Nothing.

#### DISTRICT OF COLUMBIA

Nothing.

#### HAWAII

Nothing.

#### PUERTO RICO

Nothing.

## APPENDIX B

### DIGEST OF IMPORTANT JUDICIAL DECISIONS DEALING WITH ACQUISITION FOR FUTURE PUBLIC OR QUASI-PUBLIC USE

*Chicago, St. P., M. & O. Ry. Co. v. Bayfield County*, 87 Wis. 188, 58 N.W. 245 (1894) (Wisconsin)

*Facts:* This appeal consists of three separate but related cases. As a means of simplifying the facts it will be treated as if there existed only one case.

This action was brought to cancel certain tax certificates against the railroad's property in Bayfield County. The taxed property consisted of coal docks, grain elevators and several parcels of land which were vacant at the time of litigation but which would be desirable for switch tracks and docks when necessary. The circuit court held the elevator, coal docks, and unused lands were all subject to taxation.

*Issue:* Is the aforementioned property within the scope of a statute which exempted from taxation "the track, right-of-way, depot grounds, building . . . and all other property necessarily used in operating any railroad in Wisconsin"?

*Finding:* Yes. Judgment reversed and remanded with directions to enter judgment vacating the tax sales and setting aside the tax certificates.

*Rationale:* The court interpreted the requirement of "property necessarily used" as meaning that which is requisite or essential or reasonably needed for the purpose intended. Absolute necessity is not the requirement. On the basis of the facts the court held that the elevator and docks were required to carry out the purposes of the railroad in transporting grain and coal.

The unused land was also included within the tax exemption statute. It was well-established, according to the court, that in condemning land a railroad may give attention to its prospective as well as present needs. However, such prospective use in the immediate future must be clearly established. With this rule in mind the court decided that the land will be necessary in the immediate future. Unless plaintiff is per-

mitted to plan for the future it will not be able to perform its full duty as a common carrier.

*Vermont Hydro-Electric Corporation v. Dunn*, 95 Vt. 144, 112 A. 223 (1921) (Vermont)

*Facts:* Plaintiff, a public service corporation, authorized to generate, distribute and supply electricity, brought this action seeking to enjoin defendants from condemning certain of plaintiff's water rights. Defendants, the city officials of the city of Rutland, sought to acquire plaintiff's water rights in order to increase the city's water supply. The corporation denied the power of the city to condemn the water rights on the ground that the property was held for a public use and therefore not subject to condemnation. At the time of litigation the contested water was not being used by plaintiff. However, the corporation intended to make use of the water as soon as possible.

*Issue:* Although the property was not being used at the present, is the intent to do so in the future sufficient to exempt the property from condemnation?

*Finding:* Yes. The trial court's decree overruling defendants' demurrer affirmed.

*Rationale:* Only that part of the opinion pertinent to the problem under study will be briefed.

The court held that it was well settled law that property already legally appropriated to a public use cannot be taken for another public use without legislation expressly granting the power. In essence, the question in the case was whether the property was devoted to a public use. In answering this question the court said that to be used for a public purpose does not require that the property be actually put to the said use. Property is protected from condemnation if it is held in reasonable anticipation of future needs.

Liberal consideration will be given to fu-

ture needs but property will not be protected on the mere possibility that it may at some future time be used. Reasonable expectation of future needs and the subjection of the property to the public use within a reasonable time are required for the property to be exempt from condemnation.

*Department of Public Works and Buildings v. McCaughey et al*, 332 Ill. 416, 163 N.E. 795 (1928) (Illinois)

*Facts:* Petition by the plaintiff to condemn a strip of land owned by defendants. The county court entered a final order and judgment dismissing the petition and plaintiff appealed.

Plaintiff sought to condemn a strip of land upon which it intended to construct a part of a durable hard-surfaced road. The landowners contended that the taking was unreasonable and the location of road over the land in question was unreasonable and arbitrary. At the time of litigation there existed a cinder and gravel road running north and south on the west side of 80 acres of appellees' land. From a point a few hundred feet south of this road the hard-surfaced road had been constructed towards the southwest. Plaintiff intended to divert the road from its southerly course and run the same southeasterly into the 80-acre tract for about 2,000 feet and then swing around in a curve to the southwest over railroad tracks near the southwest corner of the 80-acre tract.

Testimony of plaintiff's assistant district engineer showed that the new alignment would be much safer, in relation to the railroad tracks, than the present road. He also testified that the proposed route was further selected because a grade separation might be made at some later date, but that whatever might be contemplated for the future was not a part of the present plans, and that, as it now stands, under the plans in evidence the crossing will be a grade crossing, with some foresight on the part of the designer of the plans of the work which might follow. It would be impossible to construct a grade separation on the existing highway.

*Issue:* Is the taking of plaintiff's land unreasonable, unnecessary and arbitrary?

*Finding:* No. The county court's judgment dismissing plaintiff's petition was reversed and the case remanded.

*Rationale:* The exact location of a highway is left to the discretion of the plaintiff with the approval of the governor. It is within the power of the plaintiff to select the safest and most direct route. These roads are not only for present use but are to be used for many years. Therefore, the plaintiff has broad discretionary power to determine the amount and necessity of land required and should anticipate future needs. Only in a clear case of an abuse of discretion will this determination of necessity be interfered with.

*State Highway Commission v. Ford*, 142 Kan. 383, 46 P.2d 849 (1935) (Kansas)

*Facts:* The Commission brought a condemnation proceeding to acquire land adjacent to a portion of U. S. Highway 73. The original right-of-way was 60 feet wide. At the point where it crosses a railroad it flares out to 120 feet and then tapers off to 60 feet. The Highway Commission found in order to lay out, construct, improve and drain this portion of the highway it was necessary to widen the right-of-way to 120 feet along its entire route.

The landowners objected to the condemnation on the grounds that the land was not necessary for the improvement of the highway. It was also asserted that the land was intended to be used for a purpose other than the construction of the highway; namely, for the purpose of a "park."

Evidence was introduced that the land was to be used for roadside improvements, such as rounding back slopes and building up the shoulders. It was also shown that no Federal aid would be granted unless the right-of-way was at least 100 feet wide. The trial court granted defendant's application for an injunction and plaintiff appealed.

*Issue:* Was there evidence to support the trial court's decision that the land was not needed for highway purposes?

*Finding:* No. The judgment was re-

versed and the case remanded with instructions to set aside the injunction and proceed with the condemnation.

*Rationale:* The court cited R. S. 1933 Supp. 68-413 which authorizes the Commission to acquire land necessary for highway purposes. This statute gives the Commission discretionary powers to determine how to improve the state highway system. There is no requirement that the system be improved in the crudest manner possible. When this discretionary authority is exercised in good faith and within the authority granted by law, courts should not interfere. The fact that future needs were taken into account does not destroy the right and power to act. "Indeed, we are all learning that many of our roads and bridges have been made too narrow, the turns too short, and that too little attention has been given to obstructions to view at corners. There is nothing in the record to sustain the view that plaintiff is not seeking to take the land for a public use."

*State v. Cooper et al*, 213 La. 1016, 36 So.2d 22 (1948) (Louisiana)

*Facts:* The Department of Highways brought expropriation (condemnation) proceedings against defendants to acquire a right-of-way for highway purposes. From a judgment awarding to plaintiff a reduced right-of-way conditioned upon payment of stated sum, plaintiff appeals.

Defendants own a tract of land across which is proposed to be constructed a part of the Prairieville-Nesse Highway, a link in what is known as the Airline Highway. This highway is included within the National System of Interstate Highways.

In order to meet Federal-aid requirements plaintiff sought a strip of land 300 feet wide except at the southern end where, for about 200 feet, it flares to a width of 600 feet. The jury awarded plaintiff a right-of-way 200 feet wide with a flare at the southern end proportionally reduced.

*Issue:* Did the amount of land sought by plaintiff exceed that reasonably necessary for the purpose intended by the plaintiff in the near future?

*Finding:* No. Verdict and judgment

amended in accordance with opinion and as amended affirmed.

*Rationale:* Louisiana Revised Statutes Sec. 48.220 grants to the chief engineer the power to fix the ultimate width of a right-of-way. In so doing the chief engineer is specifically authorized to take into consideration future needs and expansion of the highway. Future requirements must be considered because highways are intended to be permanent lasting structures.

The Bureau of Public Roads recommends a right-of-way of 300 feet for the type of highway facility planned to be constructed. This width will make possible a wide safety island and enhance the safety factor in the highway. Unless the Bureau's requirements are met the state will not receive any financial aid in acquiring the necessary right-of-way.

In the light of the statute vesting broad discretionary powers in the chief engineer, the court will not disturb his determination unless it appears that he has abused his authority.

Unless future needs are reflected in the initial acquisition of the right-of-way, the highway will be incapable of being expanded, except at exorbitant, if not almost prohibitive, cost.

*State v. Curtis*, 359 Mo. 402, 222 S.W.2d 64 (1949) (Missouri)

*Facts:* Original proceeding in mandamus by the state, on the relation of State Highway Commission against the judge of the 19th judicial circuit to compel respondent judge to accept jurisdiction of all issues tendered in relator's condemnation petition before respondent.

The Commission's condemnation petition stated that all the land sought was necessary for the proper and economic construction of a certain segment of U. S. 66. According to the plans the highway was to be built under two contracts, the south lane to be built first, though right-of-way was being sought for the entire project.

In response to a demand for a bill of particulars the Commission stated that the land not used at present for construction was sought to provide an adequate and nec-

essary safety factor for all contingencies and developments in construction, improvement and maintenance of the entire highway. The added land was required for future construction of the entire highway.

Defendants moved to strike from the petition all lands which, on the basis of the Commission's present plans will not be needed for immediate use. Three grounds were urged by defendants in pressing their motion to strike.

1. That an intended present public use of said portions of said lands is not shown by relator's Petition, Bill of Particulars, or Plans.
2. That it appears from relator's Bill of Particulars that relator seeks to acquire said portion of said lands for some vague, indefinite and speculative use or purposes.
3. That it fails to appear from relator's Bill of Particulars, Petition or Plans that relator is legally entitled to condemn said portion of said lands in this action.

Respondent entered an order holding that the Commission sought land which would not be used now or at some definite time in the future and denied the Commission's petition of condemnation in relation to this property.

*Issue:* Was respondent's decision, in holding that the land in question was not sought for a public use, an exercise of sound judicial discretion?

*Finding:* No. Writ of mandamus made permanent and respondent required to take jurisdiction of all issues tendered.

*Rationale:* Relator's (Commission) petition alleged that all the land was necessary for construction, drainage, safety and other purposes. Although all the land was not to be used immediately, Mo. R. S. A. 8759 vests in the Commission authority to condemn land "for any other purpose necessary for the proper and economical construction of the state highway system."

The petition alleges that there is a general plan which shows that the land will be used at some time in the future for highway construction. This plan shows the intention of the Commission to complete the

construction of the ultimate highway. On the basis of this plan the court thought the Commission was authorized to acquire land necessary for the entire project.

A distinction was made between "public use" and "public necessity." The power to locate a highway, determine its width, and extent of land necessary for its construction is within the sound discretion of the Commission. This determination of necessity will be reviewed only when there is proof of fraud, bad faith or an abuse of discretion.

*Woollard et al v. State Highway Commission*, 220 Ark. 731, 249 S.W.2d 564 (1952) (Arkansas)

*Facts:* The State Highway Commission sought to relocate a 12-mile segment of U. S. Highway 61. In connection with the relocation the commission instituted condemnation proceedings to obtain a new right-of-way which will lie west of the existing highway. Plaintiffs brought this action to enjoin the commission. The chancellor denied the temporary injunction sought by plaintiffs. Three issues were presented on appealing but only one is of importance for the subject under analysis.

*Issue:* Was the land sought for a public purpose since the commission seeks a right-of-way of 250 feet in width and yet proposes to build in the immediate future a paved highway that will be only 24 feet wide?

*Finding:* Yes. The lower court's order was affirmed.

*Rationale:* There was convincing evidence that the commission's course of action would result in both public economy and traffic safety. Testimony was introduced that there was need for a four-lane highway and that there were plans to build another two lanes in the future when sufficient funds became available. If a large enough right-of-way were acquired in the first instance, money would be saved when the added lanes were built. This would result from the elimination of the extra cost of acquiring land upon which commercial establishments were built adjacent to the present highway.

The court stated that the commission

should consider future needs in determining the land it thought necessary for the right-of-way.

*Porter et al v. Iowa State Highway Commission*, 241 Ia. 1208, 44 N.W.2d 682 (1950) (Iowa)

**Facts:** Plaintiffs brought a suit in equity to enjoin defendant from condemning plaintiffs' land. The plaintiffs argued that the defendant sought to acquire land that was not needed. This contention was predicated upon the fact that defendant had purchased land immediately joining the highway, for the purpose of building a highway thereon. It was argued that this land was better suited for widening the highway than plaintiffs' property.

Evidence was introduced which showed that the present right-of-way of the highway was not wide enough to handle present and future travel. Some years previously defendant had purchased the right-of-way of a now defunct railroad. This land abuts the present highway and combining the highway and railroad right-of-way, defendant controls 166 feet of land in front of plaintiffs' property.

Testimony was given by defendant's chief engineer that this railroad right-of-way had been purchased for future use when something more than the present two lane would be required.

**Issue:** On the basis of the facts in the record, is plaintiffs' land necessary for the expansion of the highway?

**Finding:** Yes. The court affirmed the decree of the district court which denied the injunction.

**Rationale:** The defendant is authorized by law to comply with federal statutes and requirements in Federal-aid projects for highway improvements. There was no evidence that defendant did not act in good faith and without fraud or oppression. The necessity for the taking of plaintiffs' property for the purpose of improving existing traffic facilities and needs, and as part of a plan for meeting traffic requirements in the future, was amply sustained by the evidence. Defendant had purchased the railroad right-of-way for use in the future

when additional traffic lanes will very likely be needed. The present pavement and right-of-way can be used in such future plan. But for either present or future use additional ground is necessary to provide a 10-ft shoulder, and an 8-ft ditch with adequate and proper fore and back slopes south of the paved slab. The uncontradicted evidence is that a two-lane highway such as the highway in question, in order to serve present-day traffic properly, requires a right-of-way width of 120 ft. Its width as constructed was but 66 ft. Plaintiffs contended that part of the railroad property should be used to supply this additional width. The evidence is that to so reconstruct the highway would cost \$166,038.21 while the cost of the improvement as now being made is \$81,867.48.

Defendant's power is broad and unless there is a manifested abuse of discretion, a court will not interfere.

*Erwin v. Mississippi State Highway Commission*, 213 Miss. 885, 58 So.2d 52 (1952) (Mississippi)

**Facts:** Plaintiff filed a bill of complaint in equity seeking to enjoin the commission from taking part of his land. The crux of the bill was that the commission was condemning land not required for immediate use. This land would not be used until some indefinite time in the future when there existed sufficient money to construct a cloverleaf. Plaintiff contended that the power of eminent domain did not include the right to take land with the hope of putting it to use at some indefinite, uncertain time in the future, if ever.

Much of the factual background and opinion are irrelevant for the purposes of this study and have not been briefed.

**Issue:** Did the chancery court (equity) have jurisdiction to test the issue of public necessity, in the absence of allegation and proof of fraud, bad faith or an abuse of discretion?

**Finding:** No. Preliminary injunction restraining condemnation was dissolved and the trial court's judgment affirmed and remanded.

**Rationale:** The basic requirements of

equity jurisdiction were found lacking but the court stated that even if these requirements had been satisfied the court would not have jurisdiction to enjoin the condemnation proceedings. The distinction between the question of public use as compared to public necessity was analyzed. The former is always a judicial question. However, as to the latter, this is not a justiciable question unless the determination of necessity is caused by fraud, bad faith or an abuse of discretion. In Mississippi the proper method of reviewing the question of public necessity is by the means of a writ of prohibition. Cases were cited to demonstrate that even under this method only a limited review is achieved.

In the course of its opinion, the court stated that it was proper that the commission acquire land for future use. The court went even further in stating that the commission must meet not only present needs but also those which may be reasonably anticipated in the future.

*State Roads Commission v. Franklin, Md.*  
201 Md. 549, 95 A.2d 99 (1953)  
(Maryland)

*Facts:* Petition by the State Roads Commission to condemn the defendant's property for the construction and maintenance of the State highway system and for an expressway. The lower court had directed a verdict in favor of the defendants. The property was to be for a proposed Baltimore-Harrisburg expressway.

The property owners contended as follows: (1) Commission had no power to condemn for the expressway here contemplated because the statutory requirements as to termini and of the average 5,000 vehicles per day minimum were not met, (2) that the Commission had no right, under the guise of condemning for an expressway, to condemn the access rights sought, because as only one lane was to be built then, they could not condemn land intended for later use for the median divider, the other lane of traffic, and for the grading of the other lane of traffic, (3) that the Commission had no authority to deprive their property of all access to the public roads, in-

cluding the proposed expressway, (4) that the Commission exceeded its power in delegating the broad authority to the Right-of-Way Department and/or the Legal Department to take the necessary steps, *i.e.*, to enable the Commission to enter upon the land, to take possession of it, and to institute proceedings so that immediate construction of the proposed project could be begun.

*Issue:* Were the acts of the State Roads Commission valid?

*Finding:* Yes. The Court of Appeals of Maryland reversed the lower court and said that the case should have been submitted to the jury.

*Rationale:* Contentions are taken up as numbered above. Contention (1) Statute did not require that the termini be actually located at the time the building began. Definite plans had been made as to the termini and it must be contemplated in the building of roads that it sometimes becomes necessary to change the location slightly. This is especially true since all of the proposed expressway could not have been built at one time. The average of 5,000 vehicles per day requirement was not deemed to be an essential element at the time the expressway was begun. Evidence as to the estimate when the project was completed was accepted as meeting the statutory requirement. Contention (2) The Commission had determined by an appropriate resolution, as required by the statute, that it was necessary to acquire the property in question, and nothing was present to show that they had not acted in good faith. They had approved the location and general design of the expressway and they were preparing the whole section both for the one lane to be opened immediately and for the future ones as well. A number of cases were cited which the court said upheld the right to condemn for future construction. Contention (3) Fifty acres of land were to be deprived of all access to the public roads; however, attention was called to the statute which authorized the Commission, in its judgment, to condemn rights or interests, franchises, privileges or easements that might be desirable or necessary to complete the State system of roads. This, the

court found to be sufficient authority to enable the Commission to condemn whatever property rights were needed for expressways, but not without due compensation. Contention (4) The Commission was authorized to condemn property needed for highway purposes after construction had begun as well as prior thereto if in their discretion an emergency existed. The Commission, by resolution, had declared that an emergency existed and there was nothing to indicate that the decision to enter the property was not justified. It was then almost a year since the suit was filed and the court said that it would be difficult to build roads under any systematic program if the legal remedy as to each landowner could thus delay it.

The Court concluded by stating that it might well be that the construction of the expressway to be completed in the distant future would inflict hardships on many individuals, but that was a legislative not a judicial problem. When the legislature had conferred such powers on the Commission the question before the Court was limited to whether there was any necessity to justify the taking, or whether the decision was so oppressive, arbitrary, or unreasonable as to suggest bad faith.

*Board of Education v. Baczewski*, 340 Mich. 265, 65 N.W.2d 810 (1954) (Michigan)

*Facts:* Plaintiff passed a resolution to condemn defendant's land for a school site. Defendant's land is vacant and plaintiff intends to construct a school thereon at some indefinite time in the future when the present facilities are no longer adequate. At present there is no need for a new school. Testimony was given that the present school would be adequate for upward of 30 years. The reason for the present acquisition of the site was to save money since the land was in its raw state. The lower court in its instructions to the jury approved the theory that it should provide for future needs, thereby saving money, and approved such action without any limitation as to how far the future might be extended.

*Issue:* Was the requirement of necessity satisfied?

*Finding:* No. The lower court's judgment in favor of plaintiff was reversed.

*Rationale:* According to the court the words "necessity for using such property" in the Michigan Constitution does not mean an indefinite, remote or speculative future necessity, but means a necessity now existing or to exist in the near future. The plaintiff's objective of saving money does not meet the test of necessity in condemnation proceedings.

The court concluded by stating that property can be acquired for the "near future" or a "reasonably immediate use," but not for so indefinite a period as sought in the instant case.

*State v. Pacific Shore Land Co. et al*, 201 Or. 142, 269 P.2d 512 (1954) (Oregon)

*Facts:* The State of Oregon through its Highway Commission brought a condemnation action against Pacific Shore Land Co., and others, to condemn for highway purposes certain lands owned by the defendants. In its complaint the State sought to take two parcels of land owned by the Pacific Shore Land Co., hereinafter referred to as defendant (all other defendants having defaulted). The trial court ordered that there was no necessity for the acquisition of Parcel #2, and only allowed the jury to hear evidence as to the amount of compensation for Parcel #1. After the jury's verdict, the trial judge ordered the condemnation of Parcel #1, but dismissed the State's complaint as to Parcel #2. Appeal is now taken by the State from the trial judge's action dismissing part of its complaint.

Pursuant to the Oregon condemnation law, and prior to the above-mentioned proceeding, the Highway Commission had adopted a resolution declaring that 26.88 acres of defendant's land is being acquired for "right-of-way purposes." In the complaint only approximately 19 acres of the 26.88 acres are described.

The map introduced by the Highway Commission, and delineating the right-of-way, shows that Parcel #2 was not within the designated right-of-way. On the trial the State called an assistant highway engineer in charge of laying out the route in

question to the stand. He testified that in his opinion Parcel #2 was necessary for right-of-way purposes as it was needed to construct proper drainage facilities for the road to be constructed. The effect of his testimony established the proposition that Parcel #2 was not necessary as part of the right-of-way for the highway, but was only necessary to be used for drainage purposes.

The statute is sec. 100-115, O.C.L.A. which provides in part as follows:

In addition to such general powers as may be necessary and incident to the performance of its duties under the provisions of this act the commission hereby is given specific power and authority to do and accomplish the following things:

(12) Widths of rights-of-way. Determine the widths of rights-of-way for any and all state highways.

*Issue:* Where the State Highway Commission under its condemnation resolution specifies "right-of-way purposes" as the sole objective for the acquisition, may a court review and correct its determination if it is shown that the property is not needed for the purposes specified, although it may be necessary for other purposes not disclosed in the resolution?

*Holding:* The Supreme Court of Oregon held that in condemnation proceedings the State must strictly follow the procedure prescribed by statute for that purpose. Since the State Highway Commission under its condemnation resolution specified that "right-of-way purposes" were the sole objective of the acquisition, it had no authority to condemn land for other or undisclosed purposes.

*Rationale:* 1. The State Highway Commission is a creature of statutory origin; it has only such special and limited powers as are given to it by the statute. Since the statute authorizing the State Highway Commission to condemn land for certain purposes specified by the statutes requires first preliminary actions by the State, these latter preliminaries must be complied with.

2. The statute authorizing the State Highway Commission to condemn land required the Commission first to declare by resolution "that said real property is necessary and the purpose for which said real property is required." The purposes au-

thorized by Oregon statute are listed. They include (1) rights-of-way; (2) for highway drainage and drainage tunnels; (3) for trails, bridle paths, parks, parking places, camp sites, etc.; (4) for the construction of shops; (5) for the appropriation, acquisition or manufacture of roadbuilding materials; (6) "for any other use or purpose necessary or deemed necessary for carrying out the purposes of this act."

3. In the instant case, the resolution specified only "for right-of-way purposes." Since the land was procured not to be used for right-of-way, but for drainage purposes only, the prescribed statutory procedure was not followed and the proceedings must fail. The court indicated that a declaration of necessity and purpose are required and declared the *purpose* is of equal importance to declaring the *necessity*. The court will review for a possible abuse of discretion, and unless the true purpose of the taking is specified, the highway commission will be declared to be without authority to act.

4. In dicta the court said:

The width of the right-of-way to be acquired is not necessarily confined to the actual width of the traveled portion of the road constructed or to be constructed. Enough land for parallel shoulders, ditches, and anticipated needs of the future may be condemned as part of such right-of-way. That clearly is the purpose of subdiv. (12) of sec. 100-115 O.C.L.A. . . .

*State v. 0.62033 Acres of Land, etc.*, 112 A.2d 857 (1955) (Delaware)

*Facts:* Appeal from judgment of the Superior Court of New Castle County denying the right of the State Highway Department to take defendant's real property.

Defendants own a triangular tract of land bounded by three highways. The plaintiff designated a 100-foot right-of-way for one of these highways. In order to create this added width a 30-foot wide strip of land was sought to be taken from defendants. The land at the apex of the triangle was also the object of the condemnation proceeding. After improvement the highway will consist of two paved lanes—each of the width of 12 feet.

It was contended by defendants that

these two strips of land were grossly excessive and predicated upon the construction of a four-lane highway, as to which there is at present no plan of construction nor one contemplated in the foreseeable future. These arguments were supported by the testimony of the plaintiff's chief engineer and other employees, who admitted no official action had been taken for the construction of a four-lane highway. It was also admitted that a four-lane highway was not presently needed and that the added land was taken in order to save the State money.

The plaintiff argued that although there existed no plans for a four-lane highway it anticipated the need for one at some future time. Plaintiff also averred that it can acquire land for future use even though no plans exist for the use of the land.

The trial court held that the taking was excessive.

*Issue:* (1) Is the question as to the necessity and quantity of land condemned reviewable by the courts?

(2) Did the lower court err in finding that there was no necessity for the land sought and that the taking of land in contemplation of future needs was improper?

*Finding:* (1) Yes.

(2) No.

*Rationale:* (1) In the absence of fraud, bad faith, or an abuse of discretion the determination of necessity and quantity is within the discretion of the legislature and is not reviewable. However, defendant has alleged an abuse of discretion and therefore the question of necessity is reviewable.

(2) As to the second question the court below found there was no present need for the land sought. The evidence also showed that the 100-foot right-of-way was predicated upon the necessity for a four-lane highway. However, no evidence was introduced to show the need for such a highway in the foreseeable future. The fact that there existed no plans for the construction of a four-lane highway indicated no need for such a facility.

*State v. City of Euclid*, 164 Ohio St. 265, 130 N.E.2d 336 (1955) (Ohio)

*Facts:* Sun Oil Company entered into an agreement with the owner of the parcel of land in dispute to purchase the property contingent on Sun's ability to procure from the City of Euclid a permit to construct and operate a retail gasoline station thereon. Prior litigation had established that a zoning ordinance which prohibited the construction of such a business was unreasonable and confiscatory, and the court had ordered the issuance of a building permit. The City Council by resolution declared the land necessary for a proposed highway and instituted condemnation proceedings. However, no steps were taken to establish the highway officially and no cooperation agreement was made between the city, county, State or Federal government for the construction of the facility. This action was brought asking for a writ of mandamus directing the mayor and building commissioner of Euclid to issue a building permit.

*Issue:* Can defendant be required to issue a building permit for construction on land appropriated to a public use prior to the application for a permit?

*Holding:* The court refused to sustain defendant's acquisition of the land and ordered the issuance of a building permit.

*Rationale:* According to the court, although the defendant was authorized by statute to establish streets or highways within its limits, no ordinance for the establishment of the highway was enacted. The enactment of such an ordinance is a prerequisite to the maintenance of condemnation proceedings to acquire the necessary lands. Additionally the court pointed out that the proposed highway was in a "visionary stage" in that no cooperation agreement had been signed by the city, county, State and Federal government for the construction of the facility. Since, according to the court, a municipality has no power or authority to appropriate lands for some contemplated future use, the building permit must be issued.

## APPENDIX C

### FULL TEXT OF STATE STATUTES SPECIFICALLY AUTHORIZING ACQUISITION OF PROPERTY FOR FUTURE HIGHWAY USE

#### ARKANSAS

*Arkansas Statutes Annotated 1947, 1953  
Cumulative Pocket Supplement*

§ 76-532. *Authority to Acquire Property-Purposes.* The State Highway Commission is hereby authorized to acquire real or personal property, or any interest therein, deemed to be necessary or desirable for State highway purposes, by gift, devise, purchase, exchange, condemnation, or otherwise. Such lands or real property may be acquired in fee simple or in any lesser estate. State highway purposes shall include, but are not limited to the following:

(a) For present and future rights-of-way, including those necessary for urban extensions of State highways within municipalities.

#### CALIFORNIA

*Deering's California Codes, Streets and  
Highways Code Annotated, 1953*

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

#### COLORADO

*Colorado Revised Statutes, 1953*

§ 120-3-10. *Disposition of Property Not Needed.* 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 damages, the department may acquire by

purchase or condemnation the whole parcel and may sell or lease the remainder or may exchange the same for other property needed for State highway purposes.

The department of highways may acquire excess right-of-way whenever in the opinion of the chief engineer, public interest, safety or convenience will be served by acquiring such excess.

The department of highways shall have authority to acquire by purchase or condemnation rights-of-way for future needs, and to lease any lands which are held for State highway purposes and are not presently needed therefor, on such terms and conditions as the chief engineer, with the approval of the governor may fix.

All monies so received from sale or rent of lands shall be deposited with the State treasurer to the credit of the State highway fund.

#### FLORIDA

*Florida Stat. of 1955, Ch. 337.27*

337.27. *Rights-of-Way Acquired By Department; Eminent Domain; Procedure; Title; Cost.* (1) The power of eminent domain is vested in the department to condemn all necessary lands and property for the purpose of securing rights-of-way, borrow pits and drainage ditches for existing, proposed or anticipated roads in the State highway system or State park road system. The department shall also have the power to condemn any material and property necessary for such purposes.

#### IDAHO

*Idaho Code 1947, 1955 Cumulative Pocket Supplement*

§40-120(9). *Duties and Powers of the Board.* The Idaho board of highway directors, subject to the right of protest hereinafter provided for shall be vested with the functions, powers and duties relating to

the administration of this act and shall have power to: Purchase, condemn or otherwise acquire (including exchange), and (any) real property, either in fee or in any lesser estate or interest, including rights of direct access from property abutting highways with controlled-access, deemed necessary by the board for present or future State highway purposes. The order of the board that the land sought is necessary for such use shall be prima facie evidence of such fact.

#### LOUISIANA

*Louisiana Revised Statutes 1950, Title 48*

§ 220. *Width of Right-of-Way.* The width of rights-of-way shall be fixed by the chief engineer of the department. Generally, the width may be fixed in a manner sufficient, in the judgment of the chief engineer, to provide presently and in the future for the public interest, safety, and convenience. Specifically, the width may be fixed in a manner sufficient to adequately accommodate the future improvement of the highway by the construction of additional lanes of pavement, service roads, intersections, traffic distribution devices, and grade separations. It may be fixed to provide sight distances and insure stability and lateral support for the embankments, structures, and appurtenances to the highway and to provide for proper drainage.

#### MARYLAND

*Annotated Code of Maryland, Article 89B*

§ 8(a). The State Roads Commission may acquire by gift, purchase, condemnation or otherwise, real property or any interest in such property for highway construction purposes and real property along or near any State highway, parkway or freeway, or any interest in such property, in order to protect the highway, parkway, or freeway, or scenery along or near it, or to provide parking and service areas along said highway, parkway, freeway and for similar purposes, provided, however, the State Roads Commission shall not have the right to acquire such property other than by purchase or gift unless the Commission,

by appropriate resolution, shall determine that such property is necessary in its judgment for immediate or proposed construction of a State highway, parkway, freeway or parking or service areas in connection therewith; provided, however, that any such property acquired for such service areas shall only be adjacent to controlled or denies access highways as such highways are defined in Article 89B of the Code of General Laws of Maryland. If the State Roads Commission shall determine by resolution that it is necessary to acquire such property by means other than purchase or gift, then it is authorized to acquire the same in accordance with the provisions of Section 40B of Article 3 of the Constitution of the State of Maryland, and Section 9 of this Article.

#### NEBRASKA

*Laws of 1955, Bill 187*

§ 20. (1) The department is hereby authorized to acquire, either temporarily or permanently, lands, real or personal property or any interests therein, or any easements deemed to be necessary or desirable for present or future State highway purposes by gift, agreement, purchase, exchange, condemnation, or otherwise. Such lands or real property may be acquired in fee simple or in any lesser estate.

#### NEVADA

*Nevada 1953 Laws, Ch. 132*

§ 21. In all cases of a highway constructed under the provisions of this act which is located or relocated over privately owned lands, the department of highways may acquire, in the name of the State, either in fee or in any lesser estate or interest, any real property which it considers necessary for any highway within the State. . . . Real property for such purposes includes, but is not limited to, real property and the improvements located thereon considered necessary for any of the following purposes:

(a) For rights-of-way for both present and future needs for highways of all types including highways constructed by the State within towns and cities.

## NORTH DAKOTA

*North Dakota Revised Code of 1943, 1953 Supplement*

§ 24-0118. The commissioner, by order, on behalf of the State, and as part of the cost of constructing, reconstructing, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining a State highway, or of providing a temporary road for public use, may purchase, acquire, take over, or condemn under the right and power of eminent domain, for the State, any and all lands in fee simple or such easements thereof which he shall deem necessary for present public use, either temporary or permanent, or which he may deem necessary for reasonable future public use, and to provide adequate drainage in the improvement, construction, reconstruction, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining of a State highway, provided however, as to any and all lands acquired or taken for highway, road or street purposes, he shall not obtain any rights or interest in or to the oil, gas or fluid minerals on or underlying said lands. . . .

## NEW JERSEY

*New Jersey Statutes Annotated*

§ 32: 13A-6. *Gloucester County Tunnel Commission*. If, for any of the purposes authorized by this chapter, the commission shall find it necessary or convenient to acquire any real property in the State of New Jersey, whether for immediate or future use, the commission may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for public use, and, upon such determination, such property shall be deemed to be required for a public use until otherwise determined by the commission. . . .

§ 32: 1-132. *New York and New Jersey Port Authority*. If for any of the purposes of this act (including temporary construction purposes, and the making of additions or improvements to bridges or tunnels already constructed), the port authority shall find it necessary or convenient to acquire any real property as herein defined in this

State, whether for immediate or future use, the port authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination, the said property shall be and shall be deemed to be required for such public use until otherwise determined by the port authority; . . .

§ 32: 3-6. *Delaware River Joint Commission*. If for any of its authorized purposes (including temporary construction purposes) the Commission shall find it necessary or convenient to acquire any real property in the commonwealth of Pennsylvania or the State of New Jersey, whether for immediate or future use, the commission may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for public use and, upon such determination, the said property shall be deemed to be required for a public use until otherwise determined by the Commission.

§ 32: 8-4. *Delaware River Bridge*. If for any of its authorized purposes (including temporary purposes) the Commission shall find it necessary or convenient to acquire for public use any real property in the State of New Jersey or the commonwealth of Pennsylvania, whether for immediate or future use, the commission may, by resolution, determine to acquire such property by a fee simple absolute or a lesser interest . . .

§ 27: 7A-3. *Freeways and Parkways*. Property needed for any freeway is declared to be all those lands or interests therein required for the traveled way together with those lands or interests therein necessary or desirable for service, maintenance and protection of the present and future use of the highway, not to exceed a total average width of right-of-way of three hundred feet, except where greater width is needed in connection with grade separations, connecting roadways at an intersection with another main highway, and railroad crossing eliminations or relocations, and for those areas referred to in section eight of this act. The State Highway Commissioner shall have the authority to control the number of access roads and their location and design.

## NEW YORK

*New York McKinney's Unconsolidated Laws, 1955 Cumulative Annual Pocket Part*

§ 6485. If for any of the purposes of this act (including temporary construction purposes, and the making of additions or improvement to bridges or tunnels already constructed), the port authority shall find it necessary or convenient to acquire any real property as herein defined in this State, whether for immediate or future use, the port authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination, the said property shall be and shall be deemed to be required for such public use until otherwise determined by the port authority. . . .

## OKLAHOMA

*Oklahoma Statutes Annotated, Title 69*

§ 46: (2) . . . In determining the amount of land required, or width of right-of-way necessary for such State highways, 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. . . .

## VIRGINIA

*Code of Virginia 1950, Title 33*

§ 33-57. *Power to Acquire Lands, Etc., by Purchase, Gift or Eminent Domain.* The State Highway Commissioner is hereby vested with the power to acquire by purchase, gift, or power of eminent domain such lands, structures, rights-of-way, franchises, easements and other interest in lands, including lands under water and riparian rights, of any person, association, partnership, corporation, or municipality or political subdivision, deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the State and for these purposes and all other purposes incidental

thereto may condemn property in fee simple and rights-of-way of such width and on such routes and grades and locations as by the Commissioner may be deemed requisite and suitable, including locations for permanent, temporary, continuous, periodical or future use, and rights or easements incidental thereto and lands, quarries, and locations with rights of ingress and egress, containing gravel, clay, sand, stone, rock, timber and any other road materials deemed useful or necessary in carrying out the purposes aforesaid. For the purpose of this article "public highway" means highway, road, and street; and when applicable, the term "public highway" also includes bridge, ferry, causeway, landing and wharf.

## WISCONSIN

*Wisconsin Statutes 1953*

§80.64. *Widening of Highways; Establishment of Excess Widths.* With the approval of the governing body of the municipality in which a street or highway or part thereof, is located, the county board may, to promote the general welfare, establish street and highway widths in excess of the widths in use; and likewise may adopt plans showing the location and width proposed for any future street or highway, which shall not be subject to § 80.32(2) . . . The excess width for streets or highways in use for the right-of-way required for those planned, may be acquired at any time either in whole or in part by the State or county or municipality in which located; but no part shall be acquired in less than the full extent in width, of the excess width to be made up of land on the same side of the street or highway, nor for less than the full length of such excess width lying within contiguous land owned by the same owner. Any land so acquired, whether the excess width is acquired for the full length of the street or highway or not, shall at once become available for highway purposes. The power to acquire such right-of-way or additional width in portions as provided herein may be exercised to acquire the land on advantageous terms. . . .

*Wisconsin Session Laws 1955, Ch. 574*

§ 4(2). *Milwaukee County*. The commission may also, for specific approved highway projects or otherwise, with the general approval of the county board once given and after the general plan of expressways has been adopted by the county board, as the same may be amended, acquire lands and interests therein of the nature and in the manner specified in this paragraph for the right-of-way of such expressways in advance of the time of the adoption of an expressway project budget including such lands and interests. Such power may be exercised when in the judgment of the commission the public interest will be served and economy effected by forestalling development of such lands which will entail greater acquisition costs at a later date. Upon such acquisition the commission may improve, use, maintain or lease such lands until the same are required for expressway construction. It is recognized that there may necessarily be a period of time between the acquisition of needed lands for right-of-way and the commencement of actual site clearance and construction, but such fact shall not minimize the public purpose of such acquisition. The owners of such lands at the time of such acquisition shall have the first right to enter into lease thereof with the county acting by the commission until such lands are needed for expressway construction. Any lands so leased shall be subject to general property taxation during the term of the lease. All rentals shall be credited to the project or to the expressway land acquisition account. On request of the commission, the county board shall provide out of funds acquired by bond issue or otherwise a land acquisition fund in an amount specified by the commission from time to time, but not in excess of \$5,000,000 of expendable funds at any one time, to be used primarily for the acquisition of lands, improvements

thereon and interests therein as specified in this subsection prior to the approval of the specific expressway project for which such lands or interests will be required. Such fund shall be adjusted to reflect acquisition costs for lands and interests therein thereafter incorporated in specific approved expressway projects by transferring both the appropriations and the acquisition costs therefore to the proper expressway improvement expenditures account.

§ 84.103 (1). *Silent Cross Memorial Highway*. The State highway commission is authorized and directed to make plans for and construct in accordance with this section a beautiful highway to be known as the "Silent Cross Memorial Highway" as a living memorial to and in honor of our soldiers, living and dead, of all wars in which the United States of America has engaged. The highway shall consist of a horizontal and a vertical member. The horizontal member shall commence at or near Milwaukee, following generally present State trunk highway number 30 to Madison and thence proceed westerly, leaving the State at LaCrosse or Prairie du Chien. The vertical member shall generally follow a route upon or along present United States highway No. 51, entering the State at or near Beloit, proceeding northerly passing near Janesville, Madison, Portage, Stevens Point, Wausau, Merrill and Tomahawk, extending on to a point near Trout Lake and thence northerly to the Michigan boundary.

(4) The Silent Cross Memorial Highway shall be developed over a period of 50 years and finally completed by July 1, 1997. The State highway commission shall proceed with such development, so far as practical, in the manner and order following:

(a) It shall establish definitely the final location of the highway;

(b) It shall lay out for acquisition as needed a right-of-way of sufficient width for ultimate development; . . .

## APPENDIX D

### FULL TEXT OF STATE STATUTES AUTHORIZING ACQUISITION OF PROPERTY FOR FUTURE HIGHWAY USE BY IMPLICATION

#### NORTH CAROLINA

*General Statutes of North Carolina, 1955  
Cumulative Supplement*

§ 136-89.6. *Carolina-Virginia Turnpike.* The authority is hereby authorized and empowered to acquire by purchase, whenever it shall deem such purchase expedient, solely from funds provided under the authority of this article, such lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands which are located within the State, as it may deem necessary or convenient for the construction and operation of any project, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to take title thereto in the name of the State.

§ 136-89.17. The Authority is hereby authorized and empowered to acquire by purchase, whenever it shall deem such purchase expedient, solely from funds provided under the authority of this article, such lands, structures, property, rights, rights-of-way, franchises, easements and other interests in lands, including lands lying under water and riparian rights, which are located within the State, as it may deem necessary or convenient for the construction and operation of any project, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to taken title thereto in the name of the State.

#### OREGON

*Oregon Revised Statutes*

§ 366-315. *Width of Rights-of-Way.* The Commission may determine the widths of rights-of-way for all state highways.

#### TENNESSEE

*Tennessee Code Annotated*

§ 54-306. The commissioner of highways and public works of the state of Tennessee or any county of the state is hereby authorized to acquire by the exercise of the power of eminent domain such interest and title in land to be used for the construction or reconstruction of any road, highway, freeway or parkway as said commissioner may deem desirable or as may be necessary in order to secure federal aid in the construction or reconstruction of such road, highway, freeway or parkway.

#### TEXAS

*Vernon's Annotated R. C. S. of Texas, 1955  
Cumulative Annual Pocket Part*

Art. 6674n-1. The Texas Highway Department may enter into written agreements with owners of the lands abutting or adjoining the lands acquired by the Department for right-of-way for any highway, farm-to-market road, or other roadway in the State Highway System, under the terms of which such owners of abutting or adjoining lands may be authorized to use and cultivate such portions of the right-of-way as may not be required for immediate use of the Department. . . .

#### WASHINGTON

*Washington 1955 Session Laws, Ch. 49*

§ 1. Whenever it becomes necessary or feasible to purchase rights-of-way for State highways, and the Washington State Highway Commission deems it to be in the best interest of the general public, the Commission may, and it is hereby authorized, to secure options for purchase of property needed or proposed for any entire project or section thereof or proposed alignment for the location or relocation of any highway, for review by the Commission before final adoption or acquisition.

## TABLE OF CASES

	Page
<i>Adams et al. v. Greenwich Water Co.</i> .....	8, 9, 56
<i>A.L.A. Schechter Poultry Corp v. U.S.</i> .....	33
<i>Application of Staten Island Rapid Transit Co., In re.</i> .....	22, 23, 60
<i>Ayers v. City Council of Los Angeles.</i> .....	51
<i>Baxter v. City of Louisville.</i> .....	10, 58
<i>Boalsburg Water Co. v. State College Water Co.</i> .....	14, 61
<i>Board of Education v. Baczewski.</i> .....	14, 23, 59, 70
<i>Board of Education v. Blair.</i> .....	11, 61
<i>Carlor Co. v. City of Miami.</i> .....	8, 10, 11, 57
<i>Central Pacific Railway v. Feldman.</i> .....	11, 56
<i>Chew et al. v. City of Philadelphia.</i> .....	11
<i>Chicago, St. P., M. &amp; O. Railway Co. v. Bayfield County.</i> .....	7, 8, 21, 63, 64
<i>City of Chicago v. Newberry Library.</i> .....	11, 57
<i>City of Chicago v. Vaccarro.</i> .....	8, 11, 57
<i>City of Cincinnati v. Vester.</i> .....	22
<i>City of New Orleans v. Moeglich.</i> .....	23, 57
<i>City of Rochester, In re.</i> .....	32
<i>Croyle v. Johnstone Water Co.</i> .....	10, 61
<i>Davidson v. Commonwealth ex rel. State Highway Commission.</i> .....	15
<i>Delaware L. &amp; W. R. Co. v. Stroudsburg Water Gap and Portland Street Ry. Co.</i> .....	14, 61
<i>Department of Public Works &amp; Buildings v. McCaughey.</i> .....	16, 17, 57, 65
<i>Dickson et al. v. St. Lucie County.</i> .....	10, 57
<i>Driscoll v. City of New Haven.</i> .....	32
<i>Duquesne Sign Co. v. Upper St. Clair Tp.</i> .....	14, 61
<i>East Bay Municipal Utility District v. City of Lodi.</i> .....	12, 23
<i>East 161st Street in City of New York, In re.</i> .....	14, 23, 60
<i>Erwin v. Mississippi State Highway Commission.</i> .....	16, 20, 59, 68
<i>Hughbanks v. Port of Seattle.</i> .....	23, 63
<i>Independent School District of Boise City v. Lauch Construction Co.</i> .....	23, 57
<i>Inland Water Ways Co. v. City of Louisville.</i> .....	11, 58
<i>Inland Water Ways Development Co. v. City of Jacksonville.</i> .....	11, 57
<i>Kern County Union High School District v. MacDonald et al.</i> .....	11, 23, 56
<i>Kountze v. Proprietors of Morris Aqueduct et al.</i> .....	8, 23, 60
<i>Mansfield &amp; Swett, Inc. v. West Orange, New Jersey.</i> .....	51
<i>Neponsite Avenue, Adirondack Blvd. and Newport Avenue in the City of New York,</i> <i>In re</i> .....	14, 61
<i>New Haven Water Co., In re.</i> .....	8, 9, 23, 56
<i>Nicomien Boom Co. v. North Shore Boom and Driving Co.</i> .....	12, 14, 40, 63
<i>People v. City of Chicago.</i> .....	32
<i>Petition of Bd. of Education of the City of Detroit.</i> .....	11, 59
<i>Petition of Fayette County Commissioners.</i> .....	11, 61
<i>Phillips Pipe Line Co. v. Brandstetter.</i> .....	11, 23, 59
<i>Pike County Bd. of Education v. Ford.</i> .....	11, 57
<i>Pittsburgh Junction R. Co.'s Appeal.</i> .....	14, 22, 61
<i>Porter v. Iowa State Highway Commission.</i> .....	16, 20, 57, 68
<i>Port of Everett v. Everett Improvement Co.</i> .....	23, 63
<i>Rindge Co. et al. v. County of Los Angeles.</i> .....	23, 63
<i>Sanitary District of Chicago v. Manasse.</i> .....	32

	<i>Page</i>
<i>Seneca Ave. in City of New York, In re</i> .....	11, 61
<i>State v. 0.62033 Acres of Land</i> .....	15, 23, 56, 71
<i>State v. City of Euclid</i> .....	16, 21, 61, 72
<i>State v. Cooper</i> .....	35, 58, 66
<i>State v. Giessel</i> .....	31
<i>State v. Pacific Shore Land Company</i> .....	38, 61
<i>State v. State Highway Commission</i> .....	16, 17, 18, 31, 58
<i>State ex rel. City of Duluth v. Duluth St. Ry. Co.</i> .....	23, 59
<i>State ex rel. Hunter v. Superior Court for Snohomish County</i> .....	11, 62
<i>State ex rel. Patterson v. Superior Court for King County</i> .....	8, 11, 62, 63
<i>State ex rel. Spokane Falls and N. Ry. Co. v. Superior Court of Spokane County</i> .....	12, 40, 63
<i>State ex rel. State Highway Commission v. Curtis</i> .....	16, 18, 19, 60, 66
<i>State ex rel. Union Trust and Savings Bank v. Superior Court for Spokane County</i> ..	14
<i>State ex rel. Veys v. Superior Court for Cowlitz County</i> .....	16, 19, 63
<i>State Highway Commission v. Ford</i> .....	16, 17, 18, 58, 65
<i>State Roads Commission v. Franklin</i> .....	35, 59, 69
<i>Town of Alford v. Great Northern Railroad Co.</i> .....	14, 58
<i>Town of West Hartford v. Talcott</i> .....	9, 56
<i>Vermont Hydro-Electric Corporation v. Dunne</i> .....	11, 12, 62, 64
<i>Vilbig v. Housing Authority of the City of Dallas</i> .....	32
<i>Warden v. Madisonville H. &amp; E. R. Co.</i> .....	10, 23, 58
<i>Woollard et al. v. State Highway Commission</i> .....	16, 20, 56, 57

---

---

**T**HE NATIONAL ACADEMY OF SCIENCES—NATIONAL RESEARCH COUNCIL is a private, nonprofit organization of scientists, dedicated to the furtherance of science and to its use for the general welfare. The ACADEMY itself was established in 1863 under a congressional charter signed by President Lincoln. Empowered to provide for all activities appropriate to academies of science, it was also required by its charter to act as an adviser to the federal government in scientific matters. This provision accounts for the close ties that have always existed between the ACADEMY and the government, although the ACADEMY is not a governmental agency.

The NATIONAL RESEARCH COUNCIL was established by the ACADEMY in 1916, at the request of President Wilson, to enable scientists generally to associate their efforts with those of the limited membership of the ACADEMY in service to the nation, to society, and to science at home and abroad. Members of the NATIONAL RESEARCH COUNCIL receive their appointments from the president of the ACADEMY. They include representatives nominated by the major scientific and technical societies, representatives of the federal government, and a number of members at large. In addition, several thousand scientists and engineers take part in the activities of the research council through membership on its various boards and committees.

Receiving funds from both public and private sources, by contribution, grant, or contract, the ACADEMY and its RESEARCH COUNCIL thus work to stimulate research and its applications, to survey the broad possibilities of science, to promote effective utilization of the scientific and technical resources of the country, to serve the government, and to further the general interests of science.

The HIGHWAY RESEARCH BOARD was organized November 11, 1920, as an agency of the Division of Engineering and Industrial Research, one of the eight functional divisions of the NATIONAL RESEARCH COUNCIL. The BOARD is a cooperative organization of the highway technologists of America operating under the auspices of the ACADEMY-COUNCIL and with the support of the several highway departments, the Bureau of Public Roads, and many other organizations interested in the development of highway transportation. The purposes of the BOARD are to encourage research and to provide a national clearinghouse and correlation service for research activities and information on highway administration and technology.

---

---