Problems of Advance Land Acquisition

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2922

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Notes

Problems of Advance Land Acquisition

I. INTRODUCTION

The cost of property acquired for public use is often greatly increased by the construction of improvements after it has been determined that the land will be needed for a future public use. In addition, construction of relatively short-lived improvements on such land constitutes economic waste. Some commentators and many state governments are presently seeking an efficient method whereby public authorities may acquire or reserve the land at the time that the contemplated public use is first planned, rather than when the property is actually needed. The prime advantage of advance acquisition or reservation is the limitation or prevention of improvements on land which is known to be needed for a future public purpose. Several other benefits of advance acquisition have been suggested: (1) more orderly development of communities can be achieved; (2) more orderly, deliberate, and beneficial relocation of businesses, farms, and persons can be achieved at lower social and economic costs; (3) with more lead time due to advance acquisition, public improvements can be better planned; (4) private developers and property owners can plan their land uses in a manner consistent with public use plans; and (5) relations between the public and the condemning authority will be im-

1. Two contrasting examples illustrate the problem: In one instance, the Alabama Highway Department saved several million dollars by purchasing a large undeveloped shopping center site near Birmingham in 1959, though the land was not needed for highway purposes until 1967. STAFF OF HOUSE PUBLIC WORKS COMM., 90TH CONG., 1ST SESS., ADVANCE ACQUISITION OF HIGHWAY RIGHTS-OF-WAY STUDY 2 (Comm. Print 1967) [hereinafter cited as Committee Report No. 8].

In Minnesota, a ready-mix cement plant was expanded and automated because the State could not definitely establish how much of the property was needed and funds were not available to condemn in advance, increasing the cost by $500,000. Id. at 67.


3. Twenty-six states and Puerto Rico have varying statutory schemes, most of them recent, designed to permit some form of advance acquisition for future highways. The usual technique is to allow present condemnation for future use. Committee Report No. 8, at 3.

4. See note 48 infra and accompanying text.
proved with more time to negotiate with landowners. However, a system of advance acquisition or reservation has many problems. The constitutional limitations on state police power and the power of eminent domain are significant barriers. In addition, state ownership of lands acquired in advance creates difficult administrative problems: The state must prevent deterioration of the property in a manner detrimental to the neighborhood and must face a variety of management and landlord-tenant problems in maintaining the property during the period between acquisition and actual public use. Also, local fiscal problems can be created by withdrawing substantial amounts of property from the tax rolls for extended periods of time.

The following discussion will examine the major methods of advance land acquisition and reservation and the legal and practical problems involved in each, and will suggest alternative techniques of less-than-fee acquisition for accomplishing the goals of advance acquisition while avoiding the major disadvantages of the present methods.

II. CONSTITUTIONAL PROBLEMS OF EMINENT DOMAIN

A. NECESSARY PUBLIC USE REQUIREMENT

The acquisition of land for future use under the power of eminent domain can be accomplished only where the land is necessary for a public use. The question of whether the proposed use is “public” arises when property acquired for a future public use is leased to a private person for private use during the interim period. In City and County of Honolulu v. Bishop Trust Company, the city leased a building situated on land which had been acquired through eminent domain for future use.

6. In some instances, statutes provide that property tax can be assessed against a lessee where the property is publicly owned. In states having such a taxing system, taking property off the tax rolls would be much less significant, though the problem would still exist if the property remained unused in state hands. See, e.g., CAL. REV. & TAX. CODE § 107.1 (West 1956).
7. The Constitution provides that no one shall be deprived of property without due process of Law, U.S. Const. amend. V, and that just compensation must be paid for private property taken for public use. Id. amend. XIV, § 1. Nearly all state constitutions have similar provisions.
8. See Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1923).
as a public park. The court held that the rental of the building to a private person was a temporary and necessary exercise of due diligence in maintaining the property until the public use could be accomplished.\textsuperscript{10} However, it is not clear whether a lease to a private individual over a long interim period would be approved even if the ultimate use was public. One possible resolution of this question is suggested in a related area. The term "public use" has been deemed a flexible term which may include the sale of condemned property to private persons for private development pursuant to an area redevelopment plan.\textsuperscript{11} The United States Supreme Court endorsed this view in \textit{Berman v. Parker},\textsuperscript{12} by approving a similar redevelopment plan. The Court stated that once it is shown that the object of a program is a legitimate goal, Congress is free to determine the appropriate means to attain that goal.\textsuperscript{13} Moreover, while some courts have construed public use narrowly,\textsuperscript{14} the modern view is that the Constitution requires only that a "public benefit" must result from the taking.\textsuperscript{15} With such a flexible interpretation of the term, a taking of property for a future public use or purpose would apparently meet the requirement even if the property were leased to private persons.

\section*{B. Imminence of Public Use}

\subsection*{1. Reasonable Time}

Closely related to the existence of a public necessity for the advance taking is the question of the \textit{maximum time} period permissible for advance acquisition. This has not been clearly defined by the courts or statutes. For highway purposes, federal funds are available as part of each state's annual appor-

\begin{itemize}
\item \textsuperscript{10} \textit{Id.} at 501, 421 P.2d at 304. \textit{See} \textit{Heger v. City of St. Louis}, 323 Mo. 1031, 20 S.W.2d 665 (1929), where it was held on similar facts that the city could rent, to private persons, houses on property acquired for future use as a park but only for such time as may be reasonably necessary to convert the property to legitimate purposes. \textit{Id.} at 1038, 20 S.W.2d at 670.
\item \textsuperscript{11} \textit{Housing & Redevelopment Authority v. Greenman}, 255 Minn. 396, 96 N.W.2d 673 (1959).
\item \textsuperscript{12} 348 U.S. 26 (1954).
\item \textsuperscript{13} \textit{Id.} at 33.
\item \textsuperscript{14} \textit{See}, e.g., \textit{Shasta Power Co. v. Walker}, 149 F. 568 (N.D. Cal. 1906); \textit{City & County of San Francisco v. Ross}, 44 Cal. 2d 52, 279 P.2d 529 (1955).
\end{itemize}
tionment from Federal Highway Trust Funds for advance acquisition as much as seven years before construction. While this federal rule provides a guideline for advance acquisition, apparently only one state defines a maximum time in its advance acquisition statutes.

It is often unnecessary for the state to show exactly when the property will be put to public use. In State v. Chang, the court allowed the state to acquire land for use as part of a state office building complex even though the state was unable to show exactly how and when the land would be used for this purpose. A similar result was reached in Carlson Company v. Miami, where the plaintiff argued that it was beyond the power of the city to take land for use as a municipal airport and hold it for over seven years without taking any action to use the land. The court rejected this argument, stating that it is the duty of public officials to plan for the future. The court pointed out that while the airport facilities were presently adequate, it was probable that the plaintiff's land would be needed for expansion of the facilities.

However, state courts have not allowed every anticipation of future needs. In Board of Education v. Baczewski, the Board sought to condemn defendant's land for the erection of a high school which the Board admitted might not be built for thirty years or more. The Board intended to use the land for a playground until the school was built, but it made no claim that the land was sought for playground purposes. The Board also admitted that its motive in seeking the land was to save money. The court held that there was no necessity for the taking, stating that the necessity requirement "... does not mean an indefinite, remote or speculative future necessity, but means a necessity now existing or to exist in the near future."

17. Virginia provides for acquisition twelve years in advance of construction where interstate highways are involved and ten years for others. This, of course, creates financing problems where construction does not begin within seven years, since federal funds may be lost. 6 VA. CODE ANN. §§ 33-57 to -57.1 (Supp. 1966).
19. 62 So. 2d 897 (Fla.), cert. denied, 346 U.S. 821 (1953).
20. Id. at 902.
21. "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." Id. at 903.
23. Id. at 269, 65 N.W.2d at 811. Accord, Porter v. City of Charleston, 65 F. Supp. 224 (S.D.W. Va. 1946); Kern County Union High
court reasoned that if necessity can be extended to a remote
time in the future, damages should also be extended.24 It then
concluded that such extensions would not only exceed the state’s
power of condemnation, but would result in confusion and chaos
in condemnation proceedings because of the impossibility of pres-
ently determining the remote value.25

Other courts have held that judicial interference on the issue
of when property should be taken by the state will be allowed
only where bad faith, fraud, or a gross abuse of discretion ex-
ists.26 The court in Baczewski did not find bad faith, fraud, or
abuse of discretion, but rather applied a “reasonable time”
criterion which seems justified as an additional basis for judi-
cial interference in this area. However, a “reasonable time”
should not be defined in terms of a specific number of years,
since the feasibility of planning for the distant future varies
with each type of public need.27

2. Specific Advance Plans

The question of whether the court will require the state
to have specific plans for the contemplated use at the time of
the eminent domain proceeding is closely related to the ques-
tion of whether a taking is for a “speculative use at some remote
time in the future.”28

School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); City of Duluth
v. Duluth St. Ry., 179 Minn. 548, 229 N.W. 883 (1930).

24. The court’s holding that a speculative need at an undefined
time in the distant future does not satisfy the necessity requirement is
sound. However, its suggestion that damages should be determined
with reference to the time that the property is put to public use rather
than at the time of the taking is wholly unjustified. The property
owner suffers a loss on the day of the taking, not when the property
is actually put to public use.

25. A similar result was reached in State v. 0.62033 Acres of Land
in Christiana Hundred, 49 Del. 90, 110 A.2d 1 (Super. Ct. 1954), where
the court held that the state could not condemn a small strip of land
for widening of a highway “within the next three decades.”

26. See, e.g., cases cited note 23 supra.

27. Thus, although courts generally agree that future needs may be
taken into account, it is not clear how far in advance property may be
taken. For example in State Rds. Comm’n v. Franklin, 201 Md. 549,
95 A.2d 99 (1953), a state statute provided that no expressway was to be
built to serve less than 5,000 cars per day. The court found that it was
necessary to acquire land for an expressway even though the current
traffic volume was less than 5,000 cars per day since future needs could
be anticipated. Id. at 555, 95 A.2d at 102.

28. See note 23 supra and accompanying text. In State v. 0.62033
Acres of Land in Christiana Hundred, 49 Del. 90, 110 A.2d 1 (Super. Ct.
1954), the court did not deal directly with the question of how specific
In *Port of Everett v. Everett Improvement Company*, the court held that where the Port Authority had no plan, map, detailed description, or specification of the work to be done in improving a port, it could not acquire land under eminent domain. Although *Everett* does not define the degree to which plans must have progressed before a taking will be allowed, it does indicate that at least a minimal amount of planning must be shown.

In some situations, however, it is not necessary for the state to have plans and specifications prepared and funds available before it can decide that property is necessary for a public use. In *Carlor Company v. Miami*, the Florida Supreme Court approved a taking for airport facilities even though at the time of the taking, the city was unable to allocate funds and formulate plans for the project. The court stated that "[i]t 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."

The *Carlor* case was followed in a more extreme situation in *State Road Department v. Southerland, Incorporated*, where the state sought to acquire a parcel of land for highway purposes before the defendant could build a planned project of twenty-eight houses on the land. Reversing a lower court, the court held that there was adequate public necessity or purpose for the taking even though at the time of condemnation the state planned no public use of the land for at least two years, had no funds allocated for the road, no fixed construction date, no way of determining such date, no engineering plans, and no drawing to show the manner in which the road would affect the

---

29. 124 Wash. 486, 214 P. 1064 (1923).
30. The court stated that to condemn land, "... the commission must adopt and have approved at least a general outline plan of the improvement it intends to construct." Id. at 493, 214 P. at 1066.
31. This minimal planning requirement may be helpful in assuring a court that abandonment of public projects after the necessary land has been acquired is unlikely. See part IV infra.
32. 62 So. 2d 897 (Fla.), cert. denied, 346 U.S. 821 (1953).
33. Id. at 902.
34. 117 So. 2d 512 (Fla. 1960).
property. The court noted that the planning and actual construction of highways is limited by financial considerations, and expressed the view that a lack of funds in any given year should not hinder the acquisition of land which will be necessary in the future. The court reasoned that advance acquisition would in the long run benefit the landowner as well as the public since he could plan the use and development of the remainder of his land in a manner consistent with the future public use.35

It would seem that since the landowner will be unable to prevent the ultimate taking of his land, he certainly will be better able to use the land advantageously if he knows how it will be affected. However, if he would be able to use the land profitably during the interim period without substantially increasing the cost of public acquisition, he should be allowed to do so.

C. INFRINGEMENT ON USE OF PROPERTY

In addition to the limits respecting the necessary public use and the imminence of public use, there is a third major consideration involved in advance acquisition plans. Courts frequently demand that just compensation be paid for infringements on the use of private property occurring between the decision to condemn for future use and the actual condemnation proceedings.

In State ex rel. Willey v. Griggs,36 the court limited the permissible scope of advance acquisition statutes by holding unconstitutional a state statute which valued the property taken under the power of eminent domain at the date on which the highway department established the necessity for acquiring the property, and which denied any subsequent damages for transactions or improvements made thereafter.37 In so holding, the court stated that an infringement on the use of property which diminishes its value in whole or in part is a loss for which compensation must be paid and, in its view, the statute had the effect of diminishing the value of a landowner's property.38 The court pointed out that from the date of the resolution authorizing the taking, the landowner acts at his peril with respect to the land because, if the state does finally condemn the land (and there is no guarantee to the owner that it will), no transaction, appreciation, or improvement enhancing the property's value

35. Id. at 516-17.
36. 89 Ariz. 70, 358 P.2d 174 (1960).
38. 89 Ariz. at 74-75, 358 P.2d at 175.
after the date of the resolution can be included in the award of compensation. Thus, once the resolution comes into effect, the uses to which the owner may put the land are greatly limited; chances of selling or leasing the land are reduced or eliminated and improvements are effectively prohibited. The court therefore decided that the value of the property must be determined as of the time of the eminent domain proceedings, not from the resolution date.

The Griggs rationale was followed in *Dong v. State*,\(^{39}\) where a landowner brought suit to have his property valued from the date of the resolution rather than from the date of the condemnation proceedings. For reasons not connected with the condemnation resolution or proceedings, plaintiff abandoned his house during the period between the date of the resolution and the date of the proceedings and suffered a decrease in value because of vandalism. The court held that since the damage was not caused by state interference with property rights, and since the state had no control over the property until the condemnation proceedings, the proclamation date could not be the valuation date.

*Dong* illustrates one difficulty which would arise if a statute

---

39. The Griggs problem might be partially overcome by the creation of a fund to compensate the owner for infringements on his property uses if the actual condemnation fails to materialize. In Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966), the plaintiff owned the New York Metropolitan Opera House and wished to demolish it in order to build a new structure. Due to public interest in preserving the building, the state legislature passed an Act creating a private corporation with authority to acquire the building under the power of eminent domain if it could solicit sufficient funds. The Act also provided that New York City could refuse to grant a demolition permit to plaintiff for a period of 180 days upon a deposit of $200,000 to cover any loss which the delay might cause if no condemnation ultimately took place. The court stated that since this was clearly a condemnation statute, the question is to what extent, pending the exercise of the condemnation power, the state can interfere with the rights of property owners to build upon or improve their property. The court further stated that "[t]he deprivation here, not being incidental to a lawful exercise of the police power, is... unreasonable and constitutes a taking of property for which just compensation must be paid..." The court consequently held the statute unconstitutional on the ground that $200,000 was not a sufficient amount to insure payment of all losses which might be caused by the 180 day delay if no condemnation occurred. The court concluded that when the state interferes with property rights in this manner it must provide a sure and certain fund for recovery of the resulting damage and that the amount of that fund must be established through the judicial process, not by the legislature.

like that in the Griggs case were upheld: the state would have to suffer losses due to such factors as neglect, fire, and vandalism which arise during the interim period between the resolution date and actual possession by the state, a period during which the state would be unable to control the property. Moreover, since the property owner would receive no benefit from diligent maintenance of the property during that period, it is likely that losses due to such causes would be higher than necessary. Here, as in other areas of the law, the party in control of the property should bear such risks.

III. POLICE POWER RESTRICTIONS

A. SETBACKS

Compensation is not required for losses caused by a valid police power restriction which regulates the manner in which property may be used. While this rule is well settled, its application is often made difficult by problems which arise in distinguishing “regulation of use” from “a taking for public use.”

“Setback” statutes raise the problem of deciding when an exercise of a police power becomes a taking for which compensation must be paid. In nearly all cases setback lines have been held to be a valid regulation under the police power promoting health, safety, and welfare for which no compensation is required. For example, in State v. Houghton, the court held that a setback statute was not a “taking” under the guise of the police power. The court noted that while the public may benefit from a setback statute at the expense of certain landowners, the lack of a setback requirement would merely shift the loss to other individual landowners as well as the public. Here there was ample police power justification for the statute without reference to any possible future acquisition of the property for public use.

However, at least one Canadian court has held that if the sole purpose of a setback restriction is to prevent construction of any structure on the property pending its condemnation for use as a street, the restriction should be treated as part of

41. A “setback” statute normally establishes a zone measured from a street or property line within which no building can be constructed.
43. 171 Minn. 231, 213 N.W. 907 (1927).
44. Id. at 236, 213 N.W. at 909.
the condemnation proceedings so that a fair measure of compensation may be reached. While there appears to be no authority in the United States which sanctions a collateral attack on the validity of a setback statute as applied to the land sought to be condemned, the argument that setback laws cannot be used solely to reduce the cost of acquiring land for public use seems sound. The court must decide whether the desire to freeze or depress the value of the land for future public acquisition was the sole purpose of the ordinance or statute, since such a law should not be held invalid merely because it has the coincidental effect of reducing public acquisition costs, if its original purpose was a valid exercise of the police power.

B. OFFICIAL MAP

The use of an “official map” statute to reduce costs of future acquisition was approved in limited circumstances in State ex rel. Miller v. Manders. There, the statute provided that after establishing an official map which showed the locations of proposed public improvements, a city would not have to pay compensation for any improvement constructed within the mapped area unless a building permit had been granted for the structure. The statute gave authority to the zoning board to grant exceptions which would increase the cost of public acquisition “as little as practicable,” where the land was not producing a fair return. It expressly prohibited the issuance of a variance where the landowner would not be substantially damaged by locating his building outside the mapped area. The court construed the statute to mean that it is the duty of the zoning board to grant a variance where substantial damage to the landowners would otherwise result. While expressly leaving

47. In McCavic v. DeLuca, 233 Minn. 372, 46 N.W.2d 873 (1951), the Minnesota court approved a setback ordinance that had as its primary purposes such police power interests as greater light and air, but future street widening was also a purpose.
48. 2 Wis. 2d 365, 86 N.W.2d 469 (1957). See also Kucirek & Beuscher, Wisconsin’s Official Map Law, 1957 Wis. L. Rev. 176.
49. 2 Wis. 2d at 371, 86 N.W.2d at 473.
50. Id. at 370, 86 N.W.2d at 472.
51. Id. at 372-73, 86 N.W.2d at 473. The court’s decision in Manders leaves the state with no method of preventing construction of costly improvements where substantial damage can be shown by the landowner while leaving the landowner unprotected from a decrease in the market value of his land where he cannot show substantial damage.
open the possibility that a specific application of the statute might be invalid, the court upheld the statute as applied, stating that there was no legislative attempt to depress land values, and that the landowner was protected from substantial damage by the variance procedure.\footnote{\textsuperscript{52}}

The rationale that official map statutes are unconstitutional as a taking for public use without just compensation has been recognized in some jurisdictions.\footnote{\textsuperscript{53}} In \textit{Forster v. Scott},\footnote{\textsuperscript{54}} the New York court held invalid a statute which denied compensation for any structure built within any area designated as necessary for future public use by the filing of an official map or plan.\footnote{\textsuperscript{55}} The scope of this holding was modified in a later case where the court upheld a statute which provided that no building permit would be issued for the construction of any structure within the areas designated for future public use on the official map.\footnote{\textsuperscript{56}} The court held that the landowner had the burden of proving that he suffered actual damages from the city's refusal to grant a building permit and that, moreover, the statute did not deny compensation for structures built after the map was filed, but

\begin{itemize}
  \item It has been suggested that the first of these two problems could be solved by allowing the landowner to bring an inverse condemnation action when he can show that his land is substantially damaged by the official map restrictions. But the landowner who cannot show substantial damages is not helped by the right to sue in inverse condemnation. \textsc{D. Mandelher & G. Waite, supra} note 2, at 130.
  \item \textsuperscript{52} 2 Wis. 2d at 376, 86 N.W.2d at 475. "Substantial damage" to the developer could mean requiring greater reservations than the need generated by the subdivider for additional public services, or a nearly total deprivation of use, or merely freezing a large portion of the land. \textit{Compare} \textit{Jordan v. Menomonee Falls}, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), with \textit{Forster v. Scott}, 136 N.Y. 577, 32 N.E. 976 (1893), and \textit{Headley v. City of Rochester}, 272 N.Y. 197, 5 N.E.2d 198 (1936).
  \item \textsuperscript{53} The statute considered in \textit{Miller v. Beaver Falls}, 368 Pa. 189, 82 A.2d 34 (1951), provided that no compensation would be paid for "any building or improvements of any kind which may be placed or constructed upon or within the lines of any located park or playground, after the same shall have been located or ordained by council." \textit{Id.} at 191, 82 A.2d at 35. The statute further provided that this section would have no effect if the council did not acquire the land within three years, but it provided no compensation for the loss caused by the three-year restriction on land use. The court held the statute unconstitutional, declaring that the "tying-up" of the land was "... a taking of property by possibility, contingency, blockade and subterfuge," in violation of the just compensation requirement. \textit{Id.} at 194, 82 A.2d at 37.
  \item \textsuperscript{54} 136 N.Y. 577, 32 N.E. 976 (1893).
  \item \textsuperscript{55} The Act put no limit on the length of time that the city could restrict the use of land in this way, nor did it make any provision for compensation to the landowner if no condemnation finally occurred.
  \item \textsuperscript{56} \textit{Headley v. City of Rochester}, 272 N.Y. 197, 5 N.E.2d 198 (1936).
\end{itemize}
merely prohibited their construction.\textsuperscript{57} However, the court refused to consider the central question of whether building permits can constitutionally be restricted for the purpose of protecting city plans when property values are decreased by such restrictions.\textsuperscript{58}

The issue was considered in \textit{Kirschke v. City of Houston},\textsuperscript{59} where the city refused to grant plaintiff a building permit because it appeared that the city would need the land for public use in the future. Since the city refused to purchase the property at the time the permit was denied, the plaintiff argued that the denial was a taking of the property and its beneficial use. The court dismissed the suit, holding that the landowners could proceed with the building and enjoin the city from interfering but they could not recover damages from the city because there was no taking. This is exactly the result which an intelligent advance acquisition system should prevent, since it leads to the necessity for subsequent removal of improvements, at great cost to the state and little or no benefit to the landowner.

C. \textsc{Zoning as a Substitute for Eminent Domain}

The use of zoning ordinances to decrease the cost of future land acquisition has generally met with judicial disapproval. In \textit{City of Plainfield v. Borough of Middlesex},\textsuperscript{60} the city rezoned plaintiff's land, restricting its use to school or park purposes, thus making it impossible for plaintiff to continue using his land as he had in the past, or to sell it to anyone except the city. The court held the zoning restriction invalid on the ground that the use of the zoning power to depress the value of property which the city may want to acquire under the power of eminent domain at a future time was unreasonable and could not be sanctioned.\textsuperscript{61}

\textsuperscript{57} This somewhat confusing result might be partially explained by the fact that the court felt that an adequate building could be constructed on plaintiff's land without encroaching on the area reserved by the city map. The court failed to clarify whether compensation would be paid for a building constructed without a building permit. However, this would be anomalous. \textit{See generally} C. Haar, \textsc{Land Use Planning} 495 (1959).

\textsuperscript{58} 272 N.Y. at 209, 5 N.E.2d at 203.


\textsuperscript{60} 69 N.J. Super. 136, 173 A.2d 785 (1961).

\textsuperscript{61} Defendant applied the zoning restriction to plaintiff's land after defendant's $100,000 offer to purchase the land had been rejected by plaintiff.
Although courts will not allow zoning to be used solely to depress the value of property to be condemned in the future,\textsuperscript{62} the zoning restriction will be considered valid if there is any reasonable basis for the restriction, even where it appears that the zoning authority was motivated primarily by a desire to reduce the cost of future land acquisition for public use. For example, in \textit{Congressional School of Aeronautics v. State Roads Commission},\textsuperscript{63} the property owner appealed from an award made in an eminent domain proceeding brought by defendant, alleging that the value of the land had been depressed by an improper zoning restriction which was intended solely to lower the cost of acquiring land for widening the highway. Plaintiff's land was zoned for residential use along a 100-foot wide strip abutting the road. Next to this strip was a 200-foot wide strip zoned for commercial use; the remainder of the landowner's property was zoned light industrial. Even though one of the state's witnesses testified that the strip zoned for residential use "was reserved for road widening," the court refused to grant plaintiff's request for an instruction that if the zoning authority had restricted the zoning of the land to residential use in order to lower the cost of acquiring it for highway purposes, the jury should disregard the restrictive zoning.\textsuperscript{64} However, the court did not rule out the possibility of granting such an instruction under a different application of the same system.\textsuperscript{65} The direct question of the validity of a zoning classification which was made or retained in order to hold down the cost of future condemnation for public use was avoided.\textsuperscript{66}

In \textit{Sunny Slope Water Company v. City of Pasadena},\textsuperscript{67} the court stated that the purpose or motive of city officials in passing a zoning ordinance is not relevant to an inquiry into the reasonableness of the ordinance. The court reasoned that if conditions justify the ordinance, the motives prompting its enactment are unimportant. If conditions do not justify the enact-

\begin{itemize}
\item \textsuperscript{62} See, e.g., Chase v. City of Glen Cove, 41 Misc. 2d 889, 246 N.Y.S.2d 975 (Sup. Ct. 1964).
\item \textsuperscript{63} 218 Md. 236, 146 A.2d 558 (1958).
\item \textsuperscript{64} Plaintiff cited \textit{In re Gibson}, 28 Ont. L.R. 20, 11 D.L.R. 529 (1913), in support of this request. The facts showed that the land value was cut in half by the residential zoning restriction. 218 Md. at 241, 146 A.2d at 561.
\item \textsuperscript{65} 218 Md. at 244-45, 146 A.2d at 562-63.
\item \textsuperscript{66} While it is not clear how the court avoided this question, considerable importance was attached to the fact that the school had not protested the zoning plan until the condemnation proceeding arose, though the land had been zoned in that manner for several years.
\item \textsuperscript{67} 1 Cal. 2d 87, 33 P.2d 672 (1934).
\end{itemize}
ment, no inquiry as to motive is necessary. While this general statement reflects sound judicial policy, it may open the door for an informal program of depressing land values to reduce eminent domain costs any time a condition to justify the ordinance can be shown. If, for example, the “justifying condition” had existed for twenty years, the court should not allow the municipality to enact an ordinance based on that condition immediately prior to the eminent domain proceedings. To do so would be to allow the municipality to evade its responsibility to pay just compensation through an abuse of its police power.

IV. EFFECT OF ABANDONMENT

The consequence of the state's intention to condemn when followed by an abandonment of plans to acquire certain property is another major problem raised by acquisition of property in advance of public use. The problem was raised in an inverse condemnation action, Hilltop Properties, Inc. v. State, where the State Department of Public Works informed plaintiff that two strips of its land would be needed in the future for highway widening purposes. The plaintiff then developed its land in a manner consistent with the state's plans and, as a result, the two strips of land were of little value for any purpose except highway widening. When the state cancelled its plans to widen the highway, the plaintiff argued that there had been a “taking for public use” when the land was withheld from the development of the larger tract at the instance and request of the state, pending negotiations for acquisition of the land. After pointing out that a mere plotting or planning in anticipation of improvement is not a taking, the court stated:

In exceptional circumstances, however, as where a city does some unequivocal act evidencing an intention to open a proposed street, parkway, or other contemplated improvement, or where the prohibitory provisions of an ordinance or statute are such as actually to interfere with an owner's use of his property, it is held that the acts amount to a taking in the constitutional sense.

To illustrate the type of “exceptional circumstances” necessary

70. Id. at 356, 43 Cal. Rptr. at 679, quoting 18 Am. Jur. Eminent Domain § 144 (1938).
for recovery, the court cited In re Philadelphia Parkway\(^7\) where it was held that property owners had to be compensated for losses suffered when development of their property was effectively "frozen" while they waited for the city to condemn their property for a parkway which was already under construction by the city.\(^7\) Philadelphia Parkway established the rule that where there is an "unequivocal act" evidencing an intention to put the land to public use, compensation is required. However, where the public authority merely declares that a landowner's property will be condemned for public use without initiating eminent domain proceedings or making progress in the improvement itself, no compensation to the landowner is required.\(^7\) In applying this rule to the Hilltop case, the court held that the request by the state to withhold two strips of land from development did not constitute an unequivocal act sufficient to make compensation necessary. But the court did allow plaintiff to recover damages on the basis of promissory estoppel.\(^7\)

The court in Hilltop relied heavily on Hamer v. State Highway Commission\(^7\) in reaching its decision that there was no taking which required compensation. In that case, plaintiff had started to develop his land as a subdivision when he was informed by state highway officials that a portion of his property would soon be taken for highway purposes and any improvements constructed on the land would be lost to him. Plaintiff revised his development on the basis of this information, and entered into negotiations with the state which resulted in an offer by the state to purchase the tract. While the plaintiff was considering the offer, the state withdrew it because the highway location had been changed. Holding that there was no cause of action on these facts, the court stated that the plaintiff's interest in and permissible use of the land had in no way been changed and, since any changes made by plaintiff were entirely voluntary—"although possibly ill advised under the re-

---

71. 250 Pa. 257, 95 A. 429 (1915).
72. 233 Cal. App. 2d at 356-57, 43 Cal. Rptr. at 609-10.
73. Id. at 356, 43 Cal. Rptr. at 609. See generally Annot., 64 A.L.R. 546 (1929).
74. In Silva v. City & County of San Francisco, 87 Cal. App. 2d 784, 198 P.2d 78 (1948), where the defendant had declared that certain tracts of land, including plaintiff's property, "be secured from their respective owners by purchase, and condemnation actions when necessary" for a public park, the court held that there had been no taking of the property since no progress had been made in the contemplated improvement, and no compensation was required.
75. 304 S.W.2d 889 (Mo. 1957).
sulting circumstances”—there could be no compensation requirement.77

The extreme degree of uncertainty to which a landowner can be subjected without protection is shown by Whyte v. City of Kansas.78 Four months after plaintiff had begun construction of a building flush with the front of his lot abutting a city street, the city enacted an ordinance authorizing the taking of a strip of land for road widening purposes. Following the instructions of the assistant city engineer, plaintiff tore down the partially completed building and moved it back four feet. After the city abandoned its plan to widen the street, plaintiff brought suit to recover damages. The court denied recovery, stating that there had been no constitutional taking or damaging and that the city could have proceeded much farther in the process of condemnation than mere passage of the ordinance and still not have been liable in damages.

Commenting on this case, the Hamer court stated that one who “voluntarily acts” in the expectation that his property will be condemned “does so at the risk of losing his investment if the public agency exercises its unquestioned right to abandon the project or move it to a different location.”79 The court failed to analyze the “voluntary” nature of the act. Since it would have been expensive to the plaintiff to stop work on a partially constructed building for an indefinite time, the only alternatives were to move the structure or to continue with it until condemnation proceedings were begun. Surely this wasteful result should be avoided. While the state cannot be expected to compensate those who act in reliance upon announced condemnation plans without contacting the condemning authority, it should be held responsible for the landowner’s reliance damages where the landowner acts at the request of the state’s agents. The cooperative landowner should not be forced to look to an uncertain tort recovery, while one who improves his property despite a request to refrain from doing so is compensated if condemnation does occur,80 and left unaffected by an abandonment.

---

76. Id. at 874.
77. See State ex rel. City of St. Louis v. Beck, 333 Mo. 1118, 63 S.W.2d 814 (1933), where the court suggested that if damages are caused by the institution and pendency of condemnation proceedings, they must be recovered in a tort action. In Hamer, the negotiations never reached the condemnation stage.
78. 22 Mo. App. 409 (1886).
79. 304 S.W.2d at 874.
The rule that a landowner cannot rely on the state's intention to condemn his land can lead to speculation by investors who hope to gain financially from expected condemnation proceedings. In State ex rel. State Highway Commission v. Fenix, the state attempted to show that the defendants had purchased a tract of land and build a motel with full knowledge that it was soon to be condemned. The court held that it was prejudicial error to admit testimony on the issue of whether the defendants knew of the proposed condemnation prior to the time that they purchased and improved the property since, even if they did have such knowledge, they were not precluded from making the best use of their property. The court reasoned that since the state had established in Hamer that it may not be penalized as a result of its advance disclosure of plans to condemn property, it "... may not, now that the boot is on the other foot, penalize the landowner by reason of such advance disclosure." Since the landowner will not be compensated for relying upon the expected condemnation to his detriment, but will be compensated for any improvement he constructs to the state's detriment, he will be encouraged to ignore any request by the state to refrain from improving the property. Thus, under the Fenix rationale, it appears that the state must choose between the alternatives of being liable for losses when abandonment occurs or being unable to prevent construction of costly improvements.

In addition to the problems raised by a landowner's actions taken in reliance upon state condemnation plans, damage may be caused by state condemnation plans even where the landowner takes no action at all. Compensation is not required for incidental losses caused by the pendency of condemnation proceedings where condemnation does occur or where the condemn-
tion plans are abandoned and no "unreasonable delay" is involved. The factor of unreasonable delay becomes more acute with advance acquisition since long periods of time are necessarily involved. Courts might be persuaded to hold that such damages would have to be compensated if an advance acquisition statute provides for a long time period between the decision to condemn and the actual proceeding.

V. PROPOSED ALTERNATIVES

A. CONdemning a Negative Easement

The ends which current advance reservation and acquisition methods seek to serve could be better achieved by the condemnation of less-than-fee simple interests. Such a method has several advantages, including lower present public investment costs, greater flexibility in land use during the period between present condemnation and future need, and keeping the land in private hands and on the tax rolls during the period.

At least three new approaches to advance acquisition seem to merit consideration. Perhaps the least complicated is the acquisition of a negative easement to forestall development of the land. Landowners who do not contemplate improving their land might be willing to negotiate an agreement with the state to refrain from doing so. Where an agreement could not be reached, the state would be allowed to condemn a negative easement reserving the land for public use in a manner similar to official map statutes. The compensation to be paid for the taking of the easement would be based upon the amount by which the present market value of the land is decreased by the presence of the easement. This method would compensate the landowner fully for the interest taken, thus avoiding the argument that the just compensation requirement was not met.

85. See Upper Third St. Dev. Corp. v. City of Milwaukee, 8 Wis. 2d 595, 99 N.W.2d 687 (1959).
86. It is clear that the government can condemn a less-than-fee interest. United States v. General Motors Corp., 323 U.S. 373 (1945).
87. It would probably be advantageous to allow the landowner to make certain improvements, on the condition that no compensation would be paid for them. This would allow construction of improvements which could be amortized during the period between construction and the final taking for public use.
88. See note 48 supra and accompanying text.
89. The court in State ex rel. Miller v. Manders, 2 Wis. 2d 365, 86 N.W.2d 469 (1957), states in dicta that it would be unconstitutional for the state to deny a variance permitting improvement of land within a reserved area if an economic hardship could be shown. Id.
Such a system would also provide fair compensation to landowners who now suffer a loss when their land is "reserved" under an official map statute, but who are unable to show a sufficient economic hardship to obtain a variance.\(^9^0\)

Though the power to condemn an easement would be helpful in some situations, several problems remain. The cost of such an easement might approach the total value of the land in an area of intensive land use, thus making it more advantageous economically to condemn the entire fee. Furthermore, the state would lose its entire investment in such easements if the project were abandoned or relocated, unless the landowner would be required to repay a portion of the easement price at the time of an abandonment.\(^9^1\)

Probably the main drawback to a "condemned easement" system of land reservation is the difficulty of determining what constitutes "just compensation" at the time of the final taking of the fee in cases where "development value" is a substantial factor in the value of the land. Since the easement restriction in effect takes the development value and since the compensation for the taking of the easement was paid when the easement was created, the court in which the final condemnation is tried will be faced with the difficult task of appraising the "value" of the land without including the "development value" of the land. As a practical matter, the market value of the land will be based on an estimate of the amount the government would have to pay in the eminent domain proceeding. Because of this relationship between the easement restriction and the value of the remaining fee, just compensation can be accurately computed only when both values are determined at the same time, especially in areas of intensive land use. Moreover, if payment for the easement is not made when the easement rights are taken, the landowner will be left uncompensated for the period of time between the taking of the easement and the taking of the fee. Therefore, both valuations should be made at the time of the taking of the easement. The valuation problem might be partially solved by placing a time limit on the easement. For in-

---

\(^9^0\) See notes 70-72 supra and accompanying text.

\(^9^1\) This could present practical problems. For example, if the landowner found a use for the land which did not require new improvements, he might be unwilling to pay anything for such development rights.
stance, if the land is needed ten years in the future, a twelve-year time limit might be placed on the easement. At the time of the condemnation of the fee, ten years after the easement had been condemned, only a two-year restrictive easement would remain. Thus, valuation difficulties would largely diminish, since the situation would be very similar to that in which there were no easement restrictions on the land. Also, a more realistic value could be placed on the easement itself at the time of its condemnation, since the land is encumbered only for a fixed period of time.

B. CONDEMNING A REMAINDER INTEREST

Another method of advance acquisition is the condemnation of a remainder interest, leaving the landowner with a term for years during the period before the public use. The present value of the remainder could be determined by subtracting the value of the term for years from the present market value. This method is preferable to immediate acquisition of the entire fee, since it leaves the land in private hands, allowing the present owner to use or lease the land until it is needed for public use. Of course, use of the land will be restricted by the fact that no compensation would be received for new improvements, but such restricted use must necessarily be the aim of any system of advance acquisition.

However, the taking of a remainder interest is only a partial solution at best. As with any other interest in land, it would seem that the state would have to compensate the owner at the time the remainder interest was taken, not at the expiration of the term for years when the land was actually put to public use. This could necessitate vast expenditures of public funds several years in advance of the public need. This system would be only marginally better than a system of acquiring the entire fee and leasing the property back to the former owner or another private party.

C. NEGOTIATED OR CONDEMNED OPTIONS

The negotiated or condemned option is a third possible method for advance land acquisition. The state would negotiate with the owner for a purchase option on property needed for future use and pay the landowner the amount by which the

---

92. Cf. Davis, supra note 2.
option decreases the present value of his property. During the interim, the owner would be free to use the land as he saw fit. A major advantage of this arrangement is that the land would often be used in a more productive manner than if the state condemned the land ten years ahead of time.

Unfortunately, a negotiated option cannot always be obtained. This problem could be solved by allowing the state to "condemn an option" when it was unable to reach an agreement with the landowner to purchase an option. The "taking" of the option would be fully compensated at the time that the option was imposed; no further eminent domain proceedings would be necessary when the state exercised its option. Since the landowner would receive full compensation, there should not be a constitutional objection. Also, as with an option obtained by agreement with the landowner, the owner could use the land until it was actually needed for public use, or he could sell or lease the land subject to the option.

Perhaps the prime objection to a "condemned option" system is that it would be difficult to determine the value of the option at the time of the eminent domain proceedings, but it would not be a great deal more difficult to determine the present value of an option to purchase property at a fixed price at a certain time in the future than to determine the actual current

---

93. For example, if a tract of land is worth $10,000 in 1968, rather than presently condemning it for $10,000 the government might purchase an option to buy the land for $10,000 in 1978; in an era of rising land values such an option might decrease the 1968 value by $2,000. Thus, the state would pay $2,000 in 1968, allowing landowner to stay in possession until 1978 when the state would exercise its option and buy the land for $10,000.

94. The landowner would be allowed to improve the land as he saw fit. While he would receive no compensation for such improvements, he may in some instances decide that he would get an adequate return on his investment before the option could be exercised.

If the landowner was dissatisfied with the option arrangement, he would be free to lease or sell the land subject to the government's option. He could presumably sell his land for its value with the option present, i.e., $8,000; he would then have $10,000 for his $10,000 tract of land.

95. Of course, the present cost of the option to the state might make it more economical to condemn the entire fee simple. In an analogous area, one federal agency uses the rule of thumb that where the present cost of a less-than-fee interest reaches 50% of the fee value, it acquires the full fee. Davis, supra note 2, at 2.

96. Such a system could necessitate modifications in some tax appraisal systems. Reappraisal of the land after such condemnation would be necessary to reflect the lowered value to the private owner.
value. The value of the option with its particular terms would be the amount by which the option would decrease the current market value of the land on the day it was imposed.

A further objection is that this system could cause the state to speculate on an increase in the rate of land value appreciation by acquiring options on an excessive amount of land. This could be at least partially solved by giving each landowner the choice of agreeing not to improve his property or not to receive compensation for such improvements rather than allowing the option to be imposed. The state would then have to acquire the property under the normal process of eminent domain, but without compensating for new improvements, at the time the land was needed. Allowing the landowner to make this choice would be especially important in areas of relatively stable land use, since such an agreement may have little or no effect on the property value. However, under such an agreement, the state might in fact be forced to pay for an increase in the land value caused by the coming of the public improvement, because of the difficulty of separating this noncompensable increase from normal appreciation. This result would be avoided where the state held an option at a fixed price.

The problem of abandonment of the state's plans to use the land would be simplified by a condemned option system; the state could merely sell its option when the abandonment decision was made. It would probably be advantageous to give the current owner the opportunity to purchase the option at its current value, but the owner should not be allowed to

97. The condemning authority should be allowed to set the terms of the option, within reasonable limits, before the condemnation proceedings. The function of the court would then be to determine the actual value of the option under those terms. Otherwise, there would be an infinite number of possible ways of arranging the relative levels of the eventual purchase price and the current value of the option.

98. The state should be allowed to set the time at which the option will expire, in order that it could coordinate its acquisition program. Perhaps the state should be able to set a time period of two years or so during which it could exercise the option, to allow for minor delays or accelerations in plans to construct the public improvement. But, the state should have to give the current owner adequate notice of exactly when the purchase will occur, to allow him to plan accordingly.

99. The fixed price might be modified somewhat to minimize the effect of monetary inflation by allowing the price to escalate to counteract inflation. For example, if the purchase price were set at $10,000 in 1968 to be paid in 1978, the payment could be based on 1968 dollars; thus, perhaps $10,400 might actually be paid in 1978. This would prevent an "inflation loss" from being cast on the landowner, and would add certainty to the process of determining a fair value of the option.
purchase back the option at the original price since he was fully compensated for it at the time the state acquired it. While this would have the effect of giving the state a profit on land which had increased at a rate faster than that anticipated when the value of the option was determined, the alternative of allowing the current owner to repurchase the option at the lower original price would encourage speculation based on inside information where an abandonment was forthcoming. To allow the original owner to repurchase the option at the original price would give him a windfall, especially where he had subsequently sold the land subject to the option and thus received its full value.

Another advantage of a “condemned option” system is that the state would not have to advance all the funds for the land years before it was needed. By keeping the land in private hands, subject to the option, until it was actually needed for a public purpose, the state would have a workable system for avoiding excessive outlays of current capital for future needs as well as the wasteful expense of paying for improvements built in an area known to be needed for a future public use. This would allow the land to be used in the most beneficial way possible in view of the future public improvement.109

The three suggested methods of advance acquisition of less-than-fee interests are not exclusive of each other. A prime consideration in weighing the relative merits of each system is the nature of the land to be acquired. For example, in a stable farming area, the acquisition of an easement to prohibit new improvements would be very inexpensive and would not greatly complicate valuation problems at the time of the taking of the fee. Similarly, the taking of a remainder interest would be beneficial in an area of stable use if the state had adequate funds available for that purpose. The taking of a remainder interest would allow the state to avoid paying for any increase in the value of the land during the interim, while still providing fair compensation to the landowner. On the other hand, in areas of rapidly changing land use, where the development value of the land may be a major factor in the total value of the land, the condemned option system would be most advantageous.

109. The state would also avoid the problems of being a landlord which would arise if the land was acquired by eminent domain years in advance of the public need.