invalid[65] in Missouri, yet an ounce of prevention might be worth a pound of cure. And to obviate the chance of any question under the state constitution, provision might well be made allowing the state to zone the land "use" and provide the measure of control which the state may exercise over it.[66]

It is submitted, however, that in the constitutional revision too much should not be provided in relation to zoning practices, for zoning has just been born into a rapidly changing world and to hedge it in with too stringent limitations, or those that may in the future become so, could gravely hinder its growth toward the public good.

R. J. W.

THE PROBLEM OF EXCESS CONDEMNATION

Excess condemnation is a subject which has been widely discussed[1] and greatly controverted. Under the present Missouri constitutional provision,[2] which is representative of the majority of states, property may be taken only when it is reasonably necessary to the specific purpose of the public improvement for which the condemnation was instituted, and when the improvement could not be accomplished without the use of such property.[3] Excess condemnation would give the state or municipal government the authority to condemn in excess of property directly

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restricted; but a use which is different without being inconsistent is not "spot zoning." Higbee v. Chicago, B. & Q. Ry. (1940) 235 Wis. 91, 292 N. W. 320.

65. Munro, A Danger Spot in the Zoning Movement (May 1931) 155—Part II The Annals of the American Academy of Political and Social Science 202, 205: "The practice of spot zoning has been responsible for much chicanery and political favoritism at the city hall. Small parcels of land, sometimes single lots, are lifted bodily out of one zone and placed in another, while all the surrounding land remains as before. * * * There is need for a halt in the freehanded practice of spot zoning for the benefit of anyone who happens to have sufficient influence with the public authorities. The inconsistencies and the palpable inequities which accompany this practice are fraught with danger to the whole zoning movement." Bassett, *Zoning* (1936) 122 and 145.

66. Mueller v. Hoffmeister Undertaking and Livery Co. (1938) 343 Mo. 430, 121 S. W. (2d) 775.

67. 4 New York State Constitutional Convention Committee, *State and Local Government in New York* (1938) 363.

1. See, e. g., Cushman, *Excess Condemnation* (1917); 1 Nichols, *Eminent Domain* (2d ed. 1917) 177, §63; Steiner, Excess Condemnation (1938) 3 Mo. L. Rev. 1; Note (1932) 18 Va. L. Rev. 580; Note (1932) 6 U. Cin. L. Rev. 196.

2. Mo. Const. (1875) art. II, §20.

3. See cases cited note 12, infra.

required for the particular public improvement. The property taken would not be directly used by the public as a part of the improvement but would be sold to private persons for various reasons or retained for a use not specified in the condemnation.[4] Excess condemnation has been used with varying degrees of success in England, in various countries on the continent of Europe, and in Canada.[5] However, success from a social or economic viewpoint is not the main problem in this country. If used in this country, excess condemnation must be valid under the United States and state constitutions.[6]

The right to use eminent domain for the purpose of taking private property is restricted in every instance to those situations in which the property is to be taken for the public use. Decisions in every jurisdiction hold that there may not be a taking for a public use and then a diverting of the land into private hands for a non-public purpose.[7] What is a public use is not defined in any statute or constitution, but any definition must be sought in the decisions of the courts.[8] Even then, there

4. Cushman, *Excess Condemnation* (1917) 2.

5. Excess condemnation was used by Napoleon III in order to pay for his parks and boulevards. It has also been tried in Belgium, Germany, Hungary, and the Scandinavian countries. More recently it has been used in England and Canada with a fair degree of success. These countries do not, however, have constitutions under which the question of the validity of excess condemnation arises. For the most part their legislatures are supreme, and a statute authorizing the condemnation in excess is all that is necessary. See Chicago Bureau of Public Efficiency, *Excess Condemnation* (No. 34, 1918) 51 et seq.; Cushman, *Excess Condemnation* (1917) passim; 1 Nichols, *Eminent Domain* (2d ed. 1917) 179.

6. Cushman, writing in 1917, indicated that a number of states had passed statutes authorizing excess condemnation. (*Excess Condemnation* (1917) 224-239). Statutes have generally been found inadequate in the absence of constitutional authorization, for the courts either so construed the acts as to limit their application and preclude extensive use, or they declared the acts invalid. See, e. g., Pennsylvania Mutual Life Ins. Co. v. Philadelphia (1913) 242 Pa. 47, 88 Atl. 904. See also Chicago Bureau of Public Efficiency, *Excess Condemnation* (No. 34, 1918) 55.

7. See, e. g., United States v. Certain Lands in the City of Louisville (C. C. A. 6, 1935) 78 F. (2d) 684; Wilton v. St. Johns County (1929) 98 Fla. 26, 123 So. 527, 65 A. L. R. 488; Codd v. McGoldrick Lumber Co. (1929) 48 Idaho 1, 279 Pac. 298, 67 A. L. R. 580; Fountain Park Co. v. Hensler (1927) 199 Ind. 95, 155 N. E. 465, 50 A. L. R. 1518; Ferguson v. Illinois Cent. R. R. (1926) 202 Iowa 508, 210 N. W. 604, 53 A. L. R. 1; Paine v. Savage (1927) 126 Me. 121, 136 Atl. 664, 51 A. L. R. 1194; Nichols v. Central Virginia Power Co. (1926) 143 Va. 405, 130 S. E. 764, 44 A. L. R. 727; State ex rel. Chelan Electric Co. v. Superior Court (1927) 142 Wash. 270, 253 Pac. 115, 58 A. L. R. 779. See also Note (1921) 14 A. L. R. 1350; Note (1929) 68 A. L. R. 837; 20 C. J. 546.

8. Even a statement by the legislature that the purpose is for the public use is not binding upon the courts. See Fallbrook Irrigation Dist. v. Bradley (1896) 164 U. S. 112; Sibley v. Volusia County (Fla. 1941) 2 So.

will be found no clear definition, for the courts determine what is a public use by considering all the facts and circumstances in a particular case.[9] The results naturally vary in different localities because of different economic and social requirements.[10] The present Missouri constitutional provision concerning condemnation is a typical one:

> That no private property may be taken for a private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and for drains and ditches across the lands of another for agriculture and sanitary purposes, in such a manner as may be prescribed by law; and that whenever an attempt is made to take private property for an allegedly public use, the question whether the contemplated use is really public shall be a judicial question, and as such be judicially determined without regard to any legislative assertion that the use is public.[11]

(2d) 578, 582; Public Service of Indiana v. City of Lebanon (Ind. 1941) 34 N. E. (2d) 20, 21; City of Caruthersville v. Ferguson (Mo. 1920) 226 S. W. 912, 914; City of East Cleveland v. Nau (1931) 124 Ohio St. 433, 179 N. E. 187, 188; Grand River Dam Authority v. Thompson (Okla. 1941) 113 P. (2d) 818, 821.

9. See, e. g., Fallbrook Irrigation Dist. v. Bradley (1896) 164 U. S. 112, 159-160, where the court said: " * * * what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." See also Clark v. Nash (1905) 198 U. S. 361; Goose Creek Lumber Co. v. White (1927) 219 Ky. 739, 294 S. W. 494; Strickley v. Highland Boy Gold Min. Co. (1904) 28 Utah 215, 78 Pac. 296, aff'd (1906) 200 U. S. 527; City of Richmond v. Carneal (1921) 129 Va. 388, 106 S. E. 403.

10. See, e. g., Mather v. Ottawa (1885) 114 Ill. 659, 3 N. E. 216, (waterway improvement for purpose of furnishing water power to factories held not a public use); Fountain Park Co. v. Hensler (1927) 199 Ind. 95, 155 N. E. 465 (statute conferring right to use eminent domain upon a chautauqua organization for the purpose of obtaining lands for their meeting held an invalid use of eminent domain for a non-public purpose); Ferguson v. Illinois Cent. R. R. (1926) 202 Iowa 508, 210 N. W. 604 (erection of coal shed for coal to be sold for private profit held not a public use for which property could be taken under eminent domain); Goose Creek Lumber Co. v. White (1927) 219 Ky. 739, 294 S. W. 494 (tramway for a lumber company which other companies had the right to use for hire considered a public use); Arnsperger v. Crawford (1905) 101 Md. 247, 61 Atl. 413 (condemnation for a private road not open to the public invalid); Higginson v. Inhabitants of Nahant (Mass. 1866) 11 Allen 530 (condemnation of shore property to build a pleasure drive which public would be allowed to use held valid); State v. Aitchison (1934) 96 Mont. 335, 30 P. (2d) 805 (fish and game commission had neither express nor implied power of eminent domain for purpose of condemning sites for fish rearing ponds); Strickley v. Highland Boy Gold Mining Co. (1904) 28 Utah 215, 78 Pac. 296, aff'd, (1906) 200 U. S. 527 (condemnation of aerial rights in order for gold mining company to operate an aerial bucket line held valid); Attorney General v. Eau Clair (1875) 37 Wis. 400 (dam furnishing water power to factories came within scope of public use).

11. Mo. Const. (1875) art. II, §20.

The validity of condemnation under such a provision depends upon the necessity of taking the land for use in the particular improvement. If, for example, the improvement cannot be reasonably accomplished without taking the land, the taking comes within the meaning of public use.[12] Otherwise it does not, and as a consequence, excess condemnation as such is invalid under a constitutional provision such as that of Missouri.[13]

For purposes of convenience in a discussion of excess condemnation, the field is usually divided into three categories: remnant, restrictive, and recoupment condemnation. The classifications overlap considerably, however. Remnant condemnation would give the municipality authority to condemn left-over pieces of land with the intention of replotting them into usable lots for the purpose of resale to private individuals. The theory is that this would avoid unnecessary waste of land and would decrease the number of unsightly properties that abut upon the improvement. If the remnant is so small or of so little value that the taking is merely incidental to the taking of land for the public work, it is possible that the city may obtain title to the property.[14] However, often the city is required to pay damages equal to the value of the remnant, but is not allowed to take title to such remnant.[15] Should the city attempt to go further and take larger

12. Kansas City S. & C. Ry. Co. v. Meyer (1929) 10 La. App. 521, 120 So. 700; Leslie v. City of St. Louis (1871) 47 Mo. 474; White v. Johnson (1929) 148 S. C. 488, 146 S. E. 411; State v. Superior Court for Chelan County (1927) 144 Wash. 124, 257 Pac. 231; State v. Gilliam (1931) 163 Wash. 111, 300 Pac. 173. Where the intended use of the property to be taken is primarily public, any incidental private use which may result will not reduce the public nature of the use to which the land is to be put. Kansas City v. Liebi (1923) 298 Mo. 569, 252 S. W. 404, 28 A. L. R. 295. However, where the intended use is primarily private and only incidentally public, the fractional public use will not justify the use of the power of eminent domain.

13. There is some indication that certain types of excess condemnation might be tried even under a constitutional provision such as that of Missouri. Thus, art. XXI, §16 of the charter of the City of St. Louis (1914) provides: "Whenever it may be lawfully done, the Board of Aldermen * * * may provide for the appropriation in fee by the city of private property or any easement or use therein in excess of that actually required for such a specific purpose, and in the same or different ordinance may authorize the sale of such an excess for value with or without restrictions." This provision, however, is in effect a nullity, and no attempt has been made to use it.

14. See City of Cincinnati v. Vester (C. C. A. 6, 1929) 33 F. (2d) 242, 244-245, 68 A. L. R. 831; Opinion of Justices (1910) 204 Mass. 616, 91 N. E. 578.

15. See City of Chicago v. Lord (1917) 276 Ill. 544, 549, 115 N. E. 8, (1917) 277 Ill. 397, 407, 115 N. E. 543. See also Chicago Bureau of Public Efficiency, *Excess Condemnation* (No. 34, 1918) 15-17.

Where the property remaining after the appropriation for the public use

remnants for the purpose of replotting them, there is little doubt that such action would be invalid under constitutional provisions similar to that of Missouri.[16]

The object of restrictive condemnation is to condemn for resale subject to restrictions to ensure the purpose and value of the improvement. The theory is that the public purpose is not achieved or the value of the improvement is diminished when the setting of the improvement remains incongruous. However, statutes authorizing restrictive condemnation have been held invalid,[17] as being outside the scope of the concept of public use.

Recoupment condemnation has as its purpose the condemnation and resale of property surrounding an improvement in order to secure to the public the benefit of any increase in value of such surrounding property. Although the making of profit from the resale of lands acquired in connection with public improvements has been an important aim of many foreign cities in resorting to excess condemnation, excess condemnation has been urged upon American cities primarily for other reasons, and the recoupment theory has been little favored.[18] Constitutional obstacles are of primary importance.[19] Even when a state has a

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is injured by such a taking, the injuries to the property and the damages to the owner are considered as a whole, and the parcel remaining constitutes a portion of such whole. Springfield & S. Ry. Co. v. Calkins (1886) 90 Mo. 538, 3 S. W. 82; Kansas City & S. R. Co. v. Story (1888) 96 Mo. 611, 10 S. W. 203; Union Elevator Co. v. Kansas City Suburban Belt Ry. Co. (1896) 135 Mo. 353, 36 S. W. 1071; St. Louis M. & S. E. R. Co. v. Drummond Realty & Inv. Co. (1907) 205 Mo. 167, 103 S. W. 977.

16. To come within the concept of public use, the property must be reasonably necessary to the improvement. See cases cited supra note 12. Cf. Opinion of Justices (1910) 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483; Opinion of Justices (1910) 204 Mass. 616, 91 N. E. 578, where the court intimated that a statute providing for remnant condemnation would be constitutional.

17. Opinion of Justices (1910) 204 Mass. 616, 91 N. E. 578; Pennsylvania Mutual Life Ins. Co. v. Philadelphia (1913) 242 Pa. 47, 88 Atl. 904.

18. Chicago Bureau of Public Efficiency, *Excess Condemnation* (No. 34, 1918) 47; Cushman, *Excess Condemnation* (1917) 134.

19. See Salisbury Land & Improv. Co. v. Commonwealth (1913) 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. S.) 1196. There is considerable overlapping between restrictive and recoupment condemnation. A taking under statutes which seemingly were aimed primarily toward the former has been held an unauthorized condemnation on the grounds that recoupment was intended. City of Richmond v. Carneal (1921) 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341 arose under a statute which seemed to provide for restrictive condemnation, but the case was decided as if recoupment condemnation were the only thing concerned, and the taking was held invalid. In Opinion of Justices (1910) 204 Mass. 607, 610, 91 N. E. 405, 27 L. R. A. (N. S.) 483, it was said: "It is plain that a use of the property to obtain the possible income or profit that might inure to the city from

constitutional provision validating excess condemnation in some situations, recoupment condemnation has been declared invalid under the Fourteenth Amendment.[20]

The United States Supreme Court has never ruled directly upon the validity of excess condemnation, although it has held that in order to have a valid condemnation under the Fourteenth Amendment, the taking must be for a public use.[21] Each case involving the doctrine of public use has been decided upon its own facts and circumstances.[22]

An approach toward the authorization of excess condemnation has been made in several states by means of constitutional provisions. These vary as to the extent and purpose of the excess

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the ownership and control of it would not be a public use." See also Note (1930) 68 A. L. R. 837, and cases cited, where it is said that the authorities seem to be uniform that eminent domain cannot be exercised to condemn land in excess of needs for public uses.

20. Cincinnati v. Vester (C. C. A. 6, 1929) 33 F. (2d) 242, 245, involved a condemnation under the Ohio constitutional provision. The court said: "If it means * * * that the property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid. * * * As applied by the city in this case it violates the due process clause of the Constitution." The case was appealed to the United States Supreme Court but was disposed of upon other grounds (1930) 281 U. S. 439.

21. Missouri Pacific v. Nebraska (1896) 164 U. S. 403; Cincinnati v. Louisville (1912) 233 U. S. 389. See also Dalche v. Board of Commissioners of Orleans Levee Board (1931) 49 F. (2d) 374; Foley Securities Corp. v. Comm'r of Int. Rev. (C. C. A. 8, 1939) 106 F. (2d) 731; Bascom v. Industrial Accident Comm. (1938) 25 Cal. App. (2d) 334, 77 P. (2d) 305; Roberts v. City of Detroit (1927) 241 Mich. 71, 216 N. W. 410.

22. There is no precise rule or rules that can be deduced from the decisions as to what constitutes a public use. There are certain recurring factors, however. It is not essential that the use be by a public governmental agency. See, e. g., Cherokee Nation v. Southern Kansas R. Co. (1889) 135 U. S. 641. And even though a public governmental agency is itself to use the property, an otherwise invalid use will not be validated. Opinion of Justices (1910) 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483. The condemnation of property for use in connection with performance of a governmental function is proper. Shoemaker v. U. S. (1892) 147 U. S. 282. It is, of course, a valid condemnation if the property taken is to be used by the public, and this principle has been extended to include a use which is of widespread general public benefit, though not involving any right on the part of the general public itself to use the property. See Fallbrook Irr. Dist. v. Bradley (1895) 164 U. S. 112; Clark v. Nash (1904) 198 U. S. 361; Strickley v. Highland Boy Gold Mining Co. (1904) 28 Utah 215, 78 Pac. 296, aff'd (1905) 200 U. S. 527; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. (1915) 240 U. S. 30. For further discussion of this subject, see Rottschaefer, *Constitutional Law* (1939) 697 et seq. For some further cases involving interesting fact situations, see Head v. Amoskeag Mfg. Co. (1896) 113 U. S. 9; Missouri Pacific R. R. v. Nebraska (1896) 164 U. S. 403; Chicago R. Co. v. Illinois (1906) 200 U. S. 561; Weaner v. Pennsylvania-Ohio Power & Light Co. (C. C. A. 6, 1926) 10 F. (2d) 759.

condemnation.[23] The provision in the Model State Constitution[24] would give cities power:

> To establish and alter the location of streets, to make local public improvements, and to acquire by condemnation or otherwise property, within its corporate limits, necessary for such improvements, and also to acquire additional property in order to preserve and protect such improvements, and to lease or sell such additional property, with restrictions to preserve and protect the improvements.

This particular provision has not been adopted in any state. The Ohio constitutional provision[25] approximates it, but adds the safeguard that the municipality acquiring property for the public use may "in the furtherance of such a public use" appropriate an excess over that actually to be occupied by the improvement. The addition of the phrase, "in the furtherance of" the public use, might well be a safeguard upon which a court would look kindly in determining the validity of a condemnation under the provision.[26] When the courts are called upon to interpret what will

23. Constitutional provisions have been adopted in California, Massachusetts, Michigan, Ohio, New York, Rhode Island, and Wisconsin. The Wisconsin provision (Wis. Const. (1848) art. XI, §3a, (adopted 1912)) and the Michigan provision (Mich. Const. (1909) art. XIII, §5 (adopted 1908)) allow an excess condemnation for the purpose of insuring the adequacy of the amount of land taken. Any land remaining after the appropriation for the improvement is made may be sold, retained, or leased as the city sees fit. These provisions do not contemplate a taking of the property with the intent of resale. It is merely that the property remaining is property of the city to be disposed of in any reasonable manner. See Emmons v. City of Detroit (1931) 255 Mich. 558, 238 N. W. 188.

N. Y. Const. (1895) art. I, §7(3), (adopted 1913), Mass. Const. (1790) Amend. 39, (adopted 1911), and R. I. Const. (1843) art. XVII (adopted 1916) more nearly approach an orthodox excess condemnation, in that they provide that private property may be condemned in excess of that needed for the public improvement, but only in an amount sufficient for suitable building lots abutting on the improvement, the lots to be retained, sold, or leased. Massachusetts and Rhode Island add in addition that the lots may be sold or leased "with or without restrictions." The New York provision is mute on this subject. Conceivably, this difference might be important in construing the provisions, or even in determining their constitutionality under the Federal Constitution. For the Ohio and California provisions, see note 25, infra.

24. (4th rev. ed. 1941) §804(e).

25. Ohio Const. (1851) art. XVIII, §10 (adopted 1912). The California provision (Cal. Const. (1879) art. I, §14½ (adopted 1928)) is somewhat similar. It makes provision for restrictive condemnation, but provides that only land within 150 feet of the improvement may be condemned.

26. The Ohio provision was before the United States Supreme Court in Cincinnati v. Vester (1930) 281 U. S. 439. The court did not decide as to its constitutionality. Statutory safeguards have been added under this provision. For example, there is a requirement that the municipality which desires to use excess condemnation must state the purpose of such condemna-

be a "furtherance" of the public use under this provision, a more liberal standard may be applied than is applied under the Missouri and similar provisions which do not contain this clause.[27] It would not be necessary that the land itself be used directly for the public improvement, nor that the improvement be incapable of accomplishment without it. If it can be demonstrated to the satisfaction of the court that the condemnation is in the furtherance of use by the public, the condemnation will be valid.

We see, then, that in the absence of some constitutional provision, very little can be done in the way of excess condemnation. Various alternative solutions have been suggested. It has been indicated that results sought under restrictive condemnation might be achieved through the use of zoning.[28] The difficulty with this suggestion is that only subsequent uses can be restricted; the use to which the property is being put at the time of the zoning may not be changed.[29] In addition, the validity of zoning for purely aesthetic purposes is not definitely established.[30] Yet

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tion in the ordinance giving rise to the taking (Ohio Gen. Code (Page, 1926) §3679.) It must also be prepared to prove that the taking is in the furtherance of the public use. This safeguard was read into the constitutional provision as an implied guaranty that the power would be properly used. See City of East Cleveland v. Nau (1931) 124 Ohio St. 433, 179 N. E. 187.

27. See, however, City of East Cleveland v. Nau (1931) 124 Ohio St. 433, 179 N. E. 187, where an ordinance proposed a condemnation of 130 feet on either side of a proposed road widening, in order to grade ¾ of an inch per foot. The purpose stated in the ordinance was not sufficient to constitute a "furtherance of the public use." The grading could have been accomplished within 10 to 20 feet.

28. Steiner, Excess Condemnation (1938) 3 Mo. L. Rev. 1, 14. See Kansas City v. Liebi (1923) 298 Mo. 569, 252 S. W. 404. There it was held that the use of eminent domain to place restrictions upon property abutting on an improvement was valid, as the taking of the individual rights of the owners was for a public use. Only the subsequent use of the property was to be restricted.

29. City of Little Rock v. Pfeifer (1925) 169 Ark. 1027, 277 S. W. 1027; London v. Robinson (1928) 94 Cal. App. 774, 271 Pac. 921; Brougher v. Board of Public Works of San Francisco (1930) 107 Cal. App. 15, 290 Pac. 140; Nelson v. Town of Belmont (1931) 274 Mass. 35, 174 N. E. 320; Jenney v. Hynes (1933) 282 Mass. 182, 184 N. E. 320; City of St. Louis v. Evraiff (1923) 301 Mo. 231, 256 S. W. 489; Rosenberg v. Village of Whitefish Bay (1929) 199 Wis. 214, 225 N. W. 838. A different question might arise, of course, if a regulation for moral, health, or sanitary reasons were involved.

30. Where zoning was not for the furtherance of public health, morals, or sanitation, but for aesthetic purposes, it has been invalidated. Karke Realty Associates v. Mayor, etc. of Jersey City (1927) 104 N. J. Law 173, 139 Atl. 55; State ex rel. Srigley v. Woodworth (1929) 33 Ohio App. 406, 169 N. E. 713. On the other hand, in some instances the courts have sustained zoning regulations primarily for aesthetic purposes. State ex rel. Civillo v. New Orleans (1923) 154 La. 271, 97 So. 440; State ex rel. Twin City Bldg. Co. v. Houghton (1920) 144 Minn. 1, 176 N. W. 159; St. Louis

another suggested solution as a substitute for restrictive condemnation is the condemnation of an easement, whereby the owners of property give up the right to use it for certain purposes and are compensated for so doing.[31] This solution would go further than zoning, since undesirable structures could be removed. The argument against restrictive condemnation would be largely overcome, since no more of the property owner's rights would be taken than necessary, and there would be no grounds for saying that proprty was taken from one person and placed in the hands of another private person.

In lieu of recoupment condemnation, increment taxes have been suggested. Such taxes would take from the owner of the property any increase in the value of his property due to the improvement.[32] This would assure to the community the benefit of increases in the value of property resulting from public expenditure on the improvement, and the method would seem to surmount the objections to recoupment condemnation, although different constitutional questions might arise.

There are, of course, numerous arguments for and against the various types of excess condemnation from a social and economic standpoint. The legal problem is involved, but it seems clear that constitutional authorization is necessary. The problem is certainly one which might well merit the attention of a constitutional convention.

M. O'B. I.

Gunning Adv. Co. v. City of St. Louis (1911) 235 Mo. 99, 137 S. W. 929; State ex rel. Carter v. Harper (1923) 182 Wis. 148, 196 N. W. 451. For discussions of the subject, see Baker, Aesthetic Zoning Regulations (1926) 25 Mich. L. Rev. 124; Light, Aesthetics in Zoning (1930) 14 Minn. L. Rev. 109; Note (1931) 80 U. Pa. L. Rev. 428. See also Note (1942) 27 WASHINGTON U. LAW QUARTERLY 459.

31. See Attorney General v. Williams (1899) 174 Mass. 476, 55 N. E. 77, where the city of Boston took the right of property owners to build buildings of more than ten stories on the property surrounding Copley Square. The property owners were compensated for giving up the right to build skyscrapers. Cf. Kansas City v. Liebi (1923) 298 Mo. 569, 252 S. W. 404, supra note 28.

32. Increment taxes have been used in Europe. Such taxes would take from the property owner any increase in value of his property resulting from the improvement. Whereas special benefit taxes are limited to a percentage of the total cost of the improvement, there is no limit to the amount which can be collected by means of increment taxes. It is possible even that the amount of tax collected may be greater than the cost of the improvement. Difficulties arise in determining the amount of increase in value of the property. Increases may not result for a considerable time after completion of the improvement. Cushman, *Excess Condemnation* (1917) 129 et seq.