VALUE RECAPTURE AS A SOURCE OF FUNDS TO FINANCE PUBLIC PROJECTS

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The skyrocketing costs of land acquisition for major public undertakings, together with increased sensitivity to the tremendous impact such undertakings have on surrounding land uses, have led to attempts to ameliorate the effects of both. Proceeding under a grant from the U.S. Department of Transportation, the Rice Center for Community Design & Research in Houston, Texas, has undertaken to suggest alternatives to present methods of land acquisition and land use in order to: 1) *lessen the ultimate financial burden on public agencies, and* 2) *increase the community benefits directly resulting from such projects.*

The Center has taken a proposed mass transit system for the City of Houston as its model. This article, written by the participants principally responsible for the legal aspects of the study, summarizes existing law and suggests possible alternative methods of value recapture to benefit the public. The value to be recaptured is "created" in a given area by the vast expenditure of public funds that inevitably accompanies a major public project such as a fixed-guideway rapid transit system.

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INTRODUCTION—THE PROBLEM

The fuel crisis, increased federal funding, and center city development and redevelopment suggest an increased need for the construction and operation of fixed-guideway rapid transit systems in urban areas.[1] As a result, privately-owned land near transit stations and stops will probably increase in value due to the enhanced commercial, industrial and residential development potential created by superior access and the concurrent generation of intense local activity.[2] It is arguable that the enrichment is unearned since it does not result from any expenditure by the private landowner and therefore should accrue instead to the public agency that incurred substantial expenditures in the construction of the public facility that causes the value increase in the first place. If the public agency could "recapture" this public-development-related increase in value, the result would be a corresponding reduction in the public cost. This Article explores proposed solutions to the value recapture problem based on so-called "supplemental" or "excess" condemnation, tax assessments, intergovernmental cooperation, and air and subsurface rights development.

I. PUBLIC USE AND SUPPLEMENTAL CONDEMNATION

A. *Public Use*

We assume *arguendo* that the public authority created will have the power to acquire land by eminent domain for the fixed-guideways (rails, supports, etc.) and stations. It is black letter law that in order to exercise the power of eminent domain, the governmental unit must be acquiring the subject property for a "public use."[3] In general, however, most courts will accept a reasonable legislative declaration of public purpose, absent fraud or gross misuse of power. Thus,

1. Houston is a recent example; new systems are completed or under construction in Washington, D.C., and San Francisco.

2. For an excellent analysis of the relationship between rapid transit facilities, land use, and land value see S. LANGFELD, THE BALANCED AND ORDERLY DEVELOPMENT OF THE SITE IN CLOSE PROXIMITY TO A METROPOLITAN STATION AS A CONTRIBUTION TO A MORE HEALTHY AND ECONOMICALLY VIABLE URBAN ENVIRONMENT IN THE WASHINGTON METROPOLITAN AREA 2-10, 18-30 (1971) [hereinafter cited as LANGFELD]. The examples from Toronto and San Francisco demonstrate the advantages of incentive zoning as used by the latter for its BART system.

3. For cases and commentaries discussing "public use" and its definition in terms of its necessity for the exercise of the power of eminent domain see 11 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 32.02 (rev. 3d ed. 1964); 2A P. NICHOLS, THE LAW OF EMINENT DOMAIN § 7.1 (rev. 3d ed. 1970); C. RHYNE, MUNICIPAL LAW § 17-2 (1957).

when the Texas legislature declared the acquisition of land around a public facility and within a navigation district to be for a public use and a public purpose, the court bowed to that legislative determination:

> The cited cases are authority for the proposition that the courts should not intervene where the particular undertaking of the Legislature has a real and substantial relation to the public use. . . . *Consequently, the implied declaration by the legislative branch of government, that a taking under a right of eminent domain was for the public use, will be given deference by the courts, until it is shown to involve an impossibility.*[4]

B. *Supplemental Condemnation*

Short of a constitutional or statutory prohibition against the expenditure of public funds for certain purposes, so-called "supplemental" or "excess" property could probably be purchased if the landowner either *requests* that it be acquired, or in some fashion voluntarily agrees to sell it to the public agency.[5] We address ourselves, therefore, to the problem of "supplemental" or "excess" condemnation.[6]

The principal bar to supplemental condemnation is generally considered to be the Sixth Circuit's decision in *City of Cincinnati v. Vester*.[7] Acting under a provision of the Ohio Constitution expressly permitting excess condemnation, the City of Cincinnati passed an ordinance to widen an existing public street. The ordinance condemned more adjacent land than was necessary for widening the road, and included three fairly extensive lots, only two of which abutted the street to be widened. The lot owners sued the city alleging that the taking was not for a public purpose and was therefore in violation of the due process clause of the United States Constitution, and that it contravened the requirement of the Ohio Constitution that a condemnation be for a public use.

The Ohio Constitution expressly permits not only excess condem-

4. Atwood v. Willacy County Navigation Dist., 271 S.W.2d 137, 143 (Tex. Civ. App. 1954), *appeal dismissed*, 350 U.S. 804 (1955) (emphasis added). *Accord*, United States v. 2,606.84 Acres of Land, 432 F.2d 1286 (5th Cir. 1970); West v. Whitehead, 238 S.W. 976 (Tex. Civ. App. 1922).

5. This is virtually black letter law. *See* Annot., 6 A.L.R.3d 297, 319 (1966).

6. The term "supplemental" condemnation should be used whenever possible on the ground that it connotes a less prolifigate use of public funds than the word "excess."

7. 33 F.2d 242 (6th Cir. 1929), *aff'd on other grounds*, 281 U.S. 439 (1930).

nation, but also later resale of the excess.[8] The court discussed three theories that generally justify excess condemnation—the remnant theory, the protection theory, and the recoupment theory. The court decided that the city had relied solely upon the recoupment theory (*i.e.*, disposing of the property not needed for street purposes at prices that would enable the city to recoup much of the street construction cost). After discussing the requirement that some benefit must flow to the public and that the public interest must be so paramount as to require the subject property for public use, the court held, referring to the aforementioned state constitutional provision: "If it means, as the city here contends, that property may be taken for the purpose of selling it at a profit and paying for the improvement, it is clearly invalid."[9] It is worth noting, however, that the court emphasized the importance of limiting its opinion to the particular facts before it. The court did not strike down the provision of the state constitution permitting excess condemnation: *"We do not hold that the provision of the state Constitution might not be validly enforced in a proper case,* but that as applied by the city in these cases it violates the due process clause of the [federal] Constitution."[10]

The major portion of the lots involved were purchased for later resale at a profit rather than for any street-related or transportation-related use. In fact, the Vester property was not included in the widening scheme at all, and only one-sixth and one-fourth of the other two lots were so included. It therefore seems safe to conclude that the *Vester* prohibition is not against supplemental condemnation per se but only acquisitions for the *sole purpose* of obtaining land to be sold at a later time—in other words, land dealing at a profit.

A number of jurisdictions have upheld supplemental condemnations. Generally such schemes have had their bases in either a constitutional or a statutory provision. These provisions fall roughly into four categories: (1) supplemental condemnation essential to the operation of a public facility, (2) supplemental condemnation for future use and the subsequent disposition of surplus property, (3)

8. A Municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, *and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made.*

OHIO CONST. art. XVIII, § 10 (emphasis added).

9. 33 F.2d at 245.

10. *Id.* (emphasis added).

supplemental condemnation to protect the value of the public facility (the protective theory), and (4) supplemental condemnation for the purchase of valueless remnants (the remnant theory).

1. Supplemental Condemnation Essential to the Successful Operation of a Public Facility

Supplemental condemnation has been allowed when it is established that the purposes for which the land is acquired are reasonably essential to the successful operation of a municipal or special district facility. One of the clearest statements of this principle is in *Atwood v. Willacy County Navigation District.*[11] There, 1760 acres of plaintiff's land were condemned by the Navigation District for a port and supporting facilities as part of a plan to develop the navigable waters of the state, all pursuant to express statutory authority.[12]

Plaintiff contended that the statute was unconstitutional in that it permitted the taking of property for a non-public purpose, and that the legislature was attempting to adopt the recoupment theory of eminent domain. Plaintiff objected specifically to the private development and the industrial uses that were to take place on the property.

The court noted that the statute contained language expressly indicating that such a taking of land for industrial development was for a public purpose, and stated that great weight must be given to such a declaration.[13] The court expressly rejected plaintiff's re-

11. 271 S.W.2d 137 (Tex. Civ. App. 1954), *appeal dismissed,* 350 U.S. 804 (1955).

12. All navigation districts organized under Article XVI, Section 59, of the Constitution of Texas, whether created by Act of the Legislature or organized under General Law, *shall have the right, power and authority to acquire by gift, purchase or condemnation proceedings and to own lands* adjacent or accessible to the navigable waters and ports developed by them, that may be necessary or required for any and all purposes incident to or necessary for the development and operation of said navigable waters or ports within said districts or *that may be necessary or required for or in aid of the development of industries on said lands, and may lease same or any part thereof to any individual or corporation and charge therefor reasonable tolls, rents, fees or other charges, and use such proceeds both for the maintenance and operation of the business of such districts and for the purpose of making themselves self-supporting and financially solvent and returning the construction costs of their improvements within a reasonable period.* The acquisition of said lands for said purposes and the operation and industrial development of such ports and waterways are hereby declared to be a public purpose and a matter of public necessity.

TEX. REV. CIV. STAT. ANN. art. 8263h, § 50 (1954) (emphasis added).

13. In particular, consider the last sentence of the statute quoted in note 12 *supra.*

coupment argument, and set out in strong language its support of an expanded concept of public use. That the land acquired was essential for the successful operation of the district was an adequate justification for the condemnation:

> [I]f a use be in fact public, it is not rendered otherwise by the expressed hope or desire of the Legislature that the district become self-supporting and not remain a drain or charge upon the general resources of the State.
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> . . . .
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> We hold that the acquisition of land for the purpose of leasing the same as industrial sites in the proximity of a port is *reasonably necessary to the successful operation of such port.*[14]

Two other cases are of particular note in the area of supplemental condemnation. In the first, *Opinion of the Justices,*[15] the Supreme Judicial Court of Massachusetts examined legislation empowering the state turnpike authority to acquire sites abutting the highway and to construct, or contract for the construction thereon of gasoline stations, restaurants and other service facilities necessary to the operation of the turnpike. The authority was also empowered to lease those structures to private individuals for operation in such manner and under such terms as the authority might determine.[16]

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14. 271 S.W.2d at 142. *Accord,* Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699 (1959); Housing Authority v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79 (1940); Jones v. City of Mineola, 203 S.W.2d 1020 (Tex. Civ. App. 1947); Weyel v. Lower Colorado River Authority, 121 S.W.2d 1032 (Tex. Civ. App. 1938).

15. 330 Mass. 713, 113 N.E.2d 452 (1953).

16. Ch. 354 [1952] Mass. Acts 267-70 provides:

Section 1. *Massachusetts Turnpike.*—The Massachusetts Turnpike Authority (hereinafter created) is hereby authorized and empowered, subject to the provisions of this act, to construct, maintain, repair and operate at such location as may be approved by the state department of public works a toll express highway, to be known as the "Massachusetts Turnpike" . . . .

. . . .

Section 4. *Definitions.*—

. . . .

(b) The word "turnpike" shall mean the express toll highway or such part or parts thereof as may be constructed under the provisions of this act, together with and including all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, connecting highways, service stations, restaurants and administration, storage and other buildings and facilities which the Authority may deem necessary for the operation of the turnpike, together with all property, rights, easements and interests which may be acquired by the Authority for the construction or the operation of the turnpike.

. . . .

Section 5. *General Grant of Powers.*—The Authority is hereby authorized and empowered . . . (f) To acquire sites abutting on the turnpike and to

The court stated that it would be improper to judge what land was needed for the construction of the highway and what land uses were actually a part of the turnpike by the same standards as would be applied to a country road. The project should be viewed as a whole, taking into consideration its largest aspects:

> In our opinion not only the worked portion of the roadway, including, of course, bridges, abutments, embankments and approaches, but also the kinds of buildings and other structures which we have mentioned [garages and gasoline stations] and a reasonable amount of land taken or acquired on which to place them are all "needed for the actual construction" of the highway and are parts of it and will be taken or acquired for and devoted to a public use, and land taken for such purposes will not be "more land and property than are needed for the actual construction" of the highway. We think therefore that reasonable takings for these purposes may be authorized by the Legislature . . . . Such takings will not be for resale to private individuals. . . . .
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> The provisions in § 5 (f) of the act for the leasing by the authority of "gasoline stations, restaurants and other services" are not unconstitutional. *They do not involve the taking or holding of lands for private purposes. Property leased will still be devoted to the public purpose of the turnpike, to which these services are wholly subordinate.*[17]

Similarly, in the second case, *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*,[18] the Court of Appeals examined a statute that authorized the New York Port Authority to develop, by condemnation where necessary, a massive port project known as the World Trade Center. The proposed Center was broadly defined by statute.[19]

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

17. 330 Mass. at 723-24, 113 N.E.2d at 468 (emphasis added).

18. 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963).

19. Ch. 209, § 2, [1962] N.Y. Laws Vol. 1, 985 provides:

"World trade center" shall mean that portion of the port development project constituting a facility of commerce consisting of one or more buildings, structures, improvements and areas necessary, convenient or desirable in the opinion of the port authority for the centralized accommodation of functions, activities and services *for or incidental to* the transportation of persons, the exchange, buying, selling and transportation of commodities and other property in world trade and commerce, the promotion and protection of such trade and commerce, governmental services related to the foregoing and other governmental services, *including but not limited to* custom houses, custom stores, inspection and appraisal facilities, foreign trade zones, terminal

The court upheld the statute, not only as to the public purpose aspects of the Center, but also as to the use of eminent domain to condemn property *solely* for raising revenue for project expenses.[20] The court clearly implied that once a certain structure is devoted to project purposes, portions of that structure could be leased for nonpublic uses to produce incidental revenue to fund the project, and such production of incidental revenue would not render the statute invalid.

This would represent an extension of the *Atwood* case in which structures could be leased to private individuals or corporations because such structures were *reasonably* necessary for the success of the primary project. In *Atwood,* the structures were leased to private parties (shippers, etc.) directly involved with the port facility.[21] In *Courtesy Sandwich,* however, portions of certain facilities could be leased to persons who had no connection with the World Trade Center simply because the structures were as a whole devoted to an acknowledged public purpose.

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and transportation facilities, parking areas, commodity and security exchange offices, storages, warehouse, marketing and exhibition facilities and other facilities and accommodations for persons and property and, in the case of buildings, structures, improvements and areas in which such accommodation is afforded, *shall include all of such buildings, structures, improvements and areas* other than portions devoted primarily to railroad functions, activities or services or to functions, activities or services for railroad passengers, *notwithstanding that other portions of such buildings, structures, improvements and areas may not be devoted to purposes of the port development project other than the production of incidental revenue available for the expenses of all or part of the port development project.*

(Emphasis added.)

20. Nor can it be said that the use of property to produce revenue to help finance the operation of those activities that tend to achieve the purpose of the project does not itself perform such a function, provided, of course, that there are in fact such other activities to be supported by incidental revenue production . . . .

. . . .

Even without resort to familiar canons of construction that control when a statute is called into question on constitutional grounds, the statute, it seems to us, allows only "portions" of structures otherwise devoted to project purposes to be used for "the production of incidental revenue . . . for the expenses of all or part of the port development project." Thus considered it does not vitiate the public purpose of the development as a whole. . . . As to the fears expressed by the respondents that the Port Authority may illegally seize a particular piece of property for an unauthorized nonpublic use, it is sufficient to say that the condemnation procedures prescribed by statute fully protect the respondents and others in like position against any taking for nonpublic purposes in violation of the Port Development Project Law.

12 N.Y.2d at 389-91, 190 N.E.2d at 405-06, 240 N.Y.S.2d at .....

21. *See* text at notes 11-14 *supra.*

The supplemental condemnation of land that is reasonably essential to the successful operation of a transit district produces a readily apparent benefit. Under the above approaches, a transit district would not be restricted to condemnation of the transit right-of-way, but would be able to condemn supplemental land for parking and other related facilities.

2. Supplemental Condemnation for Future Use and the Subsequent Disposition of Surplus Property

There is a line of cases authorizing supplemental condemnation for future expansion and use. Moreover, several cases recognize the right of a condemning authority to utilize the land temporarily in an income producing manner, and further, to sell the land for profit should it become unnecessary to the project. As in other supplemental condemnation cases, great stress is placed upon state constitutional provisions and enabling statutes that set forth in detail the powers and duties of the public body involved.

a. acquisition

One line of cases dealing with supplemental condemnation for future use begins with the Supreme Court decision in *Rindge Co. v. County of Los Angeles*[22] in which the court said:

> Public road systems, it is manifest, must frequently be constructed in installments, especially where adjoining counties are involved. 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.[23]

The only limitation to the rule set forth here is that the use be "reasonably" or "fairly" anticipated in the foreseeable future. A transit district can enhance its ability to condemn in this fashion by acting in accordance with definite, comprehensive plans and projections for future development of its facility. Of course, the legislature should specifically permit the district to lease that property in the interim for private use.

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22. 262 U.S. 700 (1923).

23. *Id.* at 707. Courts in other jurisdictions have also recognized the validity of condemning for a future use. *E.g.*, City of Chicago v. Vaccarro, 408 Ill. 587, 97 N.E.2d 766 (1951).

Courts have on occasion expressed in very strong terms the *need* to be able to acquire land for a future use by supplemental condemnation. In *Rueb v. Oklahoma City*[24] the City sought plaintiff's land for expansion of an airport. The evidence showed that the only immediate necessity for the taking was to eliminate an air traffic hazard, although the city did have plans to construct a proposed runway over the property in the future. Plaintiff conceded that the taking was valid with respect to the "clear zone" (relating to the traffic hazard), but he argued that only a part of his land would be devoted to this purpose and thus appropriation of the total tract was an unconstitutional excess condemnation. Quoting with approval a Florida decision,[25] the court held that both planning and condemnation for future needs was not only valid but was actually a duty incumbent upon city officials:

> In erecting public buildings and public improvements, it is . . . the duty of public officials to build and plan not only for the present but for the foreseeable future. . . . City officials 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. . . . 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.[26]

b. disposal

A related question centers around the disposal of surplus property if the land condemned for future use is not ultimately needed. One commentator notes that "when property is taken for the public use, there cannot at the same time be taken additional adjacent property which [is not intended to be devoted to] the public use, but which is to be sold for profit as soon as the improvement is completed."[27] He also states, however, that it is not objectionable for a *statute*, which authorizes a taking, to provide that municipal authorities may sell lands taken whenever they determine that such property is no longer needed for a public use.[28]

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24. 435 P.2d 139 (Okla. 1967).
25. Carlor Co. v. City of Miami, 62 So. 2d 897, 902-03 (Fla. 1953).
26. 435 P.2d at 141.
27. NICHOLS, *supra* note 3, § 7.223, at 7-61 to 7-62.
28. *Id.* at 7-62.

Statutes that authorize surplus property to be sold have long been held constitutional. As early as 1893, in discussing a statute that empowered a city to sell at public auction all lands it had acquired under the act when it was determined that the parcels were no longer necessary for the city's purposes, a New York court rejected the contention that such a statute was in conflict with the constitutional prohibition against taking private property for a public use:

> Of course, the city could not take private property for the purpose of selling it or dealing in it; but having once acquired it for a park, and it becoming, in the course of time, unnecessary or useless for that purpose, by the growth of the city or other changes in the situation, a sale in the manner prescribed by the statute would be within the legitimate functions of the city as a municipal corporation, and power to that end, conferred by the legislature at any time, or in the act authorizing the taking, cannot invalidate the delegated right to exercise the power of eminent domain.[29]

Similarly, in *Townsend v. Housing Authority*[30] it was held that the public agency could dispose of surplus land when it determined that the property was no longer needed for the public purpose it was originally intended to serve—in this instance, a housing project.[31]

3. The Protective Theory of Supplemental Condemnation

Vester also discussed a second theory that may support supplemental condemnation: the so-called "protective theory."[32] This theory could enable a city owning land adjacent to a transit stop to sell it under restrictions that would preserve the beauty of, or at least reduce the blight caused by, the transit system, and thereby facilitate an increase in the value of the surrounding property.

An example of this theory is found in *Culley v. Pearl River Industrial Commission*.[33] A water supply district was empowered to build a dam, and pursuant to that power condemned enough property to include a one-quarter mile outer perimeter, which the district alleged was necessary for the public use in the protection and development of

29. *In re* City of Rochester, 137 N.Y. 243, 247, 33 N.E. 320, 321 (1893).

30. 277 S.W.2d 211, 216 (Tex. Civ. App. 1954).

31. *Accord*, Luby v. City of Dallas, 396 S.W.2d 192 (Tex. Civ. App. 1965).

32. City of Cincinnati v. Vester, 33 F.2d 242, 244 (6th Cir. 1929), *aff'd on other grounds*, 281 U.S. 439 (1930).

33. 234 Miss. 788, 108 So. 2d 390 (1959).

the reservoir. The district was also authorized by statute to rent, lease or sell land on the perimeter for the operation of recreational facilities to be conducted for profit, with the original owner having first right of repurchase. The Supreme Court of Mississippi had little difficulty in finding these objectives to be valid:

> The undisputed evidence in this case shows that it is *necessary* and for a public use for the District to control at least the one-quarter mile perimeter area. There is no evidence to the contrary. That undisputed finding of fact settles the public necessity and the public use in the District's power to utilize eminent domain over the one-quarter mile perimeter, for purposes of this particular suit which is concerned with the constitutionality of the statute.
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> . . . .
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> [T]he one-quarter mile perimeter is *necessary for the public use in the protection and development of the reservoir.*[34]

In a similar Texas case[35] a special water district brought proceedings to condemn an island formed when the district constructed a dam to create a water reservoir. Plaintiff claimed that while the district could exercise its powers to obtain the portion of his property that would be inundated by the reservoir, it had no right to take the remaining land (the island) since it bore no relation to the operation of the project. Therefore, he reasoned, the taking was for a private use in violation of the Texas Constitution. The court found his argument to be without merit:

> It is true that the power of eminent domain is limited to the uses of the taking, and that no more property, either in amount or in interest or estate, than is required for such use may be acquired. . . . But the function of determining this question of requirement or necessity is generally held to be a legislative (political power) and not a judicial one, and subject to review by the courts only where there has been a palpable abuse of authority. . . .
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> . . . The [ground] upon which the district claimed the fee to the island necessary, [was] that *its location in the reservoir rendered it essential for policing purposes . . . .*[36]

34. *Id.* at 815-16, 108 So. 2d at 400 (emphasis added). *See also* United States v. 2,606.84 Acres of Land, 432 F.2d 1286 (5th Cir. 1970).

35. McInnis v. Brown County Water Improvement Dist. #1, 41 S.W.2d 741 (Tex. Civ. App. 1931).

36. *Id.* at 745, 746 (emphasis added). The court also noted that the district believed the island's natural beauty and location would make it desirable for summer residences and that such a use would result in pollution of the reservoir. *Id.* at 746. *See also* Massie v. City of Floydada, 112 S.W.2d 243 (Tex. Civ. App. 1938).

Similarly, in *White v. Johnson*[37] a county highway commission condemned a right-of-way of 66 feet for a 36 foot wide roadway. In affirming the supplemental taking, the court stated that a reasonable width must be taken for the road in order to prevent construction of structures of any kind, such as filling stations or signboards, that could obscure the vision of travelers and increase the hazard of accidents.

4. The Remnant Theory of Supplemental Condemnation

Vester discusses yet another instance when supplemental condemnation may be justified: the so-called "remnant theory."[38] By requiring that an agency take only as much land as is needed for a street or other public purpose, fragments of lots often remain of such size and shape as to render them individually valueless. The city or other condemning authority must then pay for the whole lot even though it acquires title to only a part. Since the remaining lots are valueless, the city would thereafter be deprived of taxes on this property.[39] While the remnant theory alone will not provide a very useful mechanism for acquiring large segments of land around a transit stop in order to control development, used in conjunction with other concepts discussed herein it may provide sufficient land to more or less "fill in the gaps."

Some state constitutions specifically authorize condemnation of remnants.[40] A California statute[41] permitting condemnation of remnants,

37. 148 S.C. 488, 146 S.E. 411 (1929).

38. City of Cincinnati v. Vester, 33 F.2d 242, 244 (6th Cir. 1929), *aff'd on other grounds*, 281 U.S. 439 (1930).

39. *See generally* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 177 (1971).

40. *E.g.*, MASS. CONST. pt. 1, [§ 11] art X. It provides:
The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth . . . of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and . . . may authorize the sale of the remainder for value with or without suitable restrictions.

41. CAL. STS. & H'WAYS CODE § 104.1 (West 1956) provides:
Wherever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.

was construed and upheld in *People v. Superior Court*.[42] The Supreme Court of California held that even a "remnant" as large as 54 acres could be condemned:

> Although a parcel of 54 landlocked acres is not a physical remnant, it is a financial remnant: its value as a landlocked parcel is such that severance damages might equal its value. Remnant takings have long been considered proper.[43]

In *Luby v. City of Dallas*[44] the city condemned land upon which plaintiff's cafeteria stood in order to widen and improve a street. Plaintiff argued that some of this property was not used for the improvement and that therefore the taking was excessive and unconstitutional. The court, however, noted that the small triangle of land that would remain was wholly unsuitable for the operation of a cafeteria, and further, that this "surplus" would be used during repair of a common wall on adjoining property.[45]

II. Tax Assessments

Aside from the general theories of excess or supplemental condemnation, it is possible that a method of taxation might be used to recapture for a transit authority some of the value enhancement accruing to land located near transit stops.

A. *Set-offs at Time of Condemnation*

It is permissible, under certain circumstances, to deduct benefits that accrue to a property owner from his condemnation award when only a part of his property is taken by eminent domain, and the part remaining can be demonstrated to be benefited by the improvement. This deduction of the benefits accruing to the condemnee recaptures some of the value conferred on the remaining land by the construction of a nearby transit stop. The liberal rule permits the set-off of all benefits, general and special, against total damages for the land taken and the consequential damages to the remainder.[46]

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42. 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

43. *Id.* at 212-13, 436 P.2d at 346, 65 Cal. Rptr. at 346.

44. 396 S.W.2d 192 (Tex. Civ. App. 1965).

45. *Id.* at 196.

46. 3 Nichols, *supra* note 3, at § 8.6206. Special benefits are defined as those accruing peculiarly to the condemnee's land and not generally to neighboring property.

B. *Special Assessments*

It is possible that the special assessment method, particularly a variant of it used in California called "special benefit assessment,"[47] may be useful in recapturing for a transit district value expended in constructing transit facilities.[48]

Courts have held that once the improvement is determined to bestow a *special* benefit, *incidental* benefits to the general public will not destroy its local character. For example, any street improvement will certainly benefit the general public, but the special benefits to certain landowners justify special assessments. In this same context, legislatures or municipal authorities often determine that a project has both special and general benefits and as a result, apportion the cost between special assessments and general revenue funds. Cities may thus pay a major portion of the cost of a street improvement while assessing local landowners for the balance.[49] It may therefore be possible for the transit agency to assess local owners for at least a portion of the improvement cost. In any event, evidence must be marshalled to show that transit lines or stops do indeed confer special benefits.[50]

Assuming that such a showing can be made, legislation could be drafted that permits other governmental agencies to establish special assessment districts around either the transit line itself or to limit these districts to property adjacent to transit stops. The owners of such land would be assessed a certain percentage of the cost of the improvement with individual obligations based upon criteria such as lot size, present property valuation, or possibly a combination of lot size and distance from the transit station.

Most state courts have been reluctant to interfere with legislative

47. *See* text at and following note 55 *infra.*

48. The special assessment is designed to finance improvements by assessing benefited landowners a percentage of the cost of the improvement. Special assessments are typically used only for local improvements—streets, sidewalks, drainage ditches—either because the state enabling laws specifically restrict their use to such projects, or because of the underlying theory that since the assessment is measured by the *special* benefit received by property, it is difficult to justify an assessment for facilities that have regional benefits (benefits to the public as a whole with only incidental private benefits). One noted authority, however, believes that since land values usually increase dramatically near a stop on a mass transit line, the benefits may differ in kind sufficiently to be considered special. *See* D. HAGMAN, PUBLIC PLANNING & CONTROL OF URBAN AND LAND DEVELOPMENT 360 (1973).

49. City of Dallas v. Firestone Tire & Rubber Co., 66 S.W.2d 729 (Tex. Civ. App. 1933).

50. *But see* Alf v. Flick, 1 Ohio Misc. 17, 204 N.E.2d 418 (1962).

decisions defining the boundaries of special benefit districts. Presumably, the legislature could define benefit zones around transit stops and, unless this determination is entirely without foundation, it is likely to be upheld by the courts. For example, the creation of a water and electric utility district that encompassed a whole city was upheld in *Bank of Commerce v. Huddleston.*[51] Similarly, in *Simms v. City of Mt. Pleasant*[52] the City had divided streets to be improved into districts as the basis for compensating the paving contractor as the work progressed. The court ruled that this determination would stand absent proof of an undue burden on plaintiff's property.

A political or social disadvantage of the special assessment may arise because it represents the purest application of the benefit principle. Special assessments are highly regressive. Legal challenges, however, have proved largely ineffective, as the recent case of *Citizens for Underground Equality v. City of Seattle*[53] illustrates. In 1968 the City of Seattle declared a policy to promote and encourage the conversion of overhead utility wiring to an underground system. The cost of "undergrounding" in residential neighborhoods was to be financed by the levy of special assessments with the city sharing the cost to a "substantial extent." Plaintiffs, arguing that their neighborhoods could not afford the estimated assessment of $615 per homesite, and thus could not take advantage of the city's contribution, claimed that the statute authorizing the creation of the districts was unconstitutional. In affirming the summary judgment for the city, the Court of Appeals of Washington held that the state statutory scheme did not unconstitutionally discriminate against the poor:

> Whether or not the cost of the improvement shall be borne wholly by the property benefited, wholly by the public at large, or in part by the property benefited and in part by the public at large, are questions solely within the jurisdiction of the municipal officers to determine, and the courts have no power to control their discretion in that regard. . . . Thus, each area has an *equal opportunity,* and an opportunity *upon the same terms* as all other areas of the city to underground its overhead utility wiring.[54]

Assuming that the special benefit assessment can play an important role in financing a transit line, the next step will be to draft specific

51. 172 Ark. 999, 291 S.W. 422 (1927).

52. 12 S.W.2d 833 (Tex. Civ. App. 1928).

53. 6 Wash. App. 338, 492 P.2d 1071 (1972).

54. *Id.* at 344, 492 P.2d at 1075 (emphasis in original).

enabling legislation giving transit authorities the right to establish special benefit districts. The State of California is a pioneer in this area; its legislature promulgated comprehensive local transportation statutes with a substantial "special benefit assessment" feature as early as 1968.[55] The California special benefit district legislation performs several important functions. First, it represents a declaration by the legislature that special benefits may accrue to property *along a mass transit line.* Although a property owner may claim that his land receives no special benefit, the courts give great weight to this legislative determination and probably will not question it unless it is clearly erroneous. Secondly, the legislation specifically allows for the creation of several special benefit districts within one transit district (around each transit station). Moreover, each special benefit district itself may contain separate zones. These provisions give a transit district considerable flexibility in apportioning costs in direct proportion to benefits. Instead of assessing only property adjacent to the transit station, as in the typical street assessment, the district may set up zones with assessments decreasing in proportion to the distance from the transit stop.

III. Intergovernmental Cooperation

While there may be some constraints associated with value recapture by means of either supplemental condemnation or taxation, it is possible that such constraints can be avoided by an intergovernmental entity partnership with each entity exercising its own more or less traditional powers of eminent domain. As a preliminary matter, a number of courts that have considered the construction of a rapid transit system have held it to be a public use. On that basis, cities and other governmental units involved in mass transit projects may exercise their powers of eminent domain at least for acquisition of the transit system right-of-way and often for considerably more.

Provided adequate statutory or constitutional authority exists, it is fairly clear that governmental entities may enter into cooperative agreements to exercise powers that each would otherwise be incapable of exercising separately.[56] As the cases illustrate, it is not necessary that each cooperating unit be permitted to do everything that all can do together. Thus, where a Minnesota court sus-

55. Cal. Pub. Util. Code Ann. § 99000 *et seq.* (Deering 1970).

56. Rhyne, *supra* note 3, at §§ 13-1, 13-6.

tained the power of a town and a city to sell bonds for the purchase of a lot and the construction of a building for a combined city and town hall, it is clear that the city could not build a town hall and vice versa —yet together they could build a combined structure and share the cost.[57] On the other hand, it is unlikely that a transit district could construct a school, and if a school were to be located near such a site, an interlocal agreement could probably not provide for a governmental consortium to build it if transit district money or eminent domain powers would be used in the process.

It is difficult, however, to see any objection to a number of entities, formally or informally, agreeing in some fashion to act jointly in developing land around a transit stop. Such joint development has been the subject of a number of reports and analyses over the last several years.[58] The principal methods are the use of eminent domain in an organized fashion by a number of different entities, as noted above, and the legislative creation of a joint development district with the authority to exercise all necessary powers of eminent domain, administration and so forth.

Acting in combination, a transit authority having the power to condemn land for stations, rights-of-way, and perhaps parking, and a city having the power to condemn for certain governmental purposes, could develop a publicly oriented transit complex that might be of great benefit in terms of community enhancement and even value recapture, although perhaps not to the transit district alone.

Indeed, the city in some instances can do much alone. The city has long been one of the primary units of government entrusted with public responsibility. As early as 1914, in *In Re City of New York*,[59] proceedings by the city to condemn land for construction of its subway system were upheld by the New York Supreme Court. Later cases also show that governmental authorities are not limited to condemning land solely for the transit right-of-way itself. In *Cleveland v. City of Detroit*[60] the City was authorized by statute to take private property for its public transportation system. Pursuant to this grant, the city sought to condemn land for construction of subsurface bus

57. White v. City of Chatfield, 116 Minn. 371, 133 N.W. 962 (1911).

58. *See* BARTON-ASCHMAN ASSOCIATES, THE JOINT PROJECT CONCEPT: INTEGRATED TRANSPORTATION CORRIDORS (1968); NATIONAL LEAGUE OF CITIES CONFERENCE OF MAYORS, TRANSIT STATION JOINT DEVELOPMENT (1973).

59. 163 App. Div. 10, 147 N.Y.S. 1057 (Sup. Ct. 1914).

60. 322 Mich. 172, 33 N.W.2d 747 (1948).

terminals for the improvement of its street railway system. Plaintiff landowner opposed the taking on the ground that the city needed only an easement for the purposes of such bus terminals and that the taking of the fee would represent an unconstitutional excess taking. He further argued that the air rights were not needed by the city and that he should retain title to them. The court prefaced its decision by noting: "There can be no doubt that the use of property for transportation of the public is a public use thereof."[61] It then held that since there was no proof that the property acquired would be used for a non-public purpose and since construction of the bus terminals was essential to the transit system, plaintiff's claim was without merit.[62]

In *Zachry v. City of San Antonio*[63] the City appropriated city park land for a proposed underground parking garage. The court had little difficulty in finding that such action was proper.[64]

Actual experience appears to run primarily to intergovernmental cooperation rather than formation of joint development districts. In Nashville, Tennessee, a transit authority was created in 1958 by the state legislature as the city's regulatory agency for mass transit facilities within Nashville and for a distance of seven miles beyond the city limits. It was empowered to make rules, set rates, own and operate a system, construct or acquire transit or garage facilities, contract with public transit companies, and exercise the power of eminent domain. The actual service is provided by the publicly franchised Nashville Transit Company which owns the buses. The city issues bonds for the authority's financial needs. The Metropolitan Traffic Commission provides most necessary signs. The Public Works Department erects and maintains bus shelters. The Authority built a

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61. *Id.* at 177, 33 N.W.2d at 749.

62. *Id. See also* State v. Superior Court, 70 Wash. 2d 630, 424 P.2d 913 (1967).

63. 296 S.W.2d 299 (Tex. Civ. App. 1956), *aff'd*, 157 Tex. 551, 305 S.W.2d 558 (1957).

64. Other precedents have approved the exercise of power to provide off-street parking on the basis of a city's power to protect the "safety" of the public. . . . The Amstater case also treats the power to provide such facilities as an incident to the municipality's power to regulate traffic on its streets. We conclude that the City had the power to provide off-street parking facilities under its Charter.

296 S.W.2d at 302-03. *Accord*, Hayden v. City of Houston, 305 S.W.2d 798 (Tex. Civ. App. 1957).

garage and office facility which it leases to the company. All this was done under the auspices of state enabling legislation.[65]

The City of Toronto entered into an agreement with the transit authority whereby the municipality acquired the necessary land (retaining the surplus for private development by "public tender"), and the authority developed the transit system. The City "declared" rights pertaining to the land—including air rights—to be surplus, after which it invited long-term leases for development in accordance with existing zoning and lease terms (including a "sketch" of the development).[66]

It is also worth noting that three recent transit system schemes involving fixed-guideways—San Francisco, Washington, D.C., and Toronto—all presume the validity of, and in some cases have made special use of, zoning to encourage development coincident with public goals along transit lines and adjacent to transit stops.[67] In addition, most if not all of the modern transit systems utilizing a separate transit authority or district rely on a separate, detailed and specific state enabling statute.[68]

IV. Air and Subsurface Rights Development

Presumably, once a mass transit system is constructed, the transit authority will own both the air space above its right-of-way and subsurface development rights below it. Air rights may be of use in the development of a mass transit system in two ways. First, a transit authority may be able to develop air rights above the transit line for uses related to the transit system (*e.g.*, parking garages). Secondly, air space can be sold or leased to private developers, thereby enabling a transit district to recoup a large portion of its cost. Nonetheless,

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65. Alan M. Voorhees & Associates, An Action Program for Transit Improvement 53-58 (1971).

66. Langfeld 15-16.

67. *See generally* Langfeld.

68. *See generally* R. Dillon & J. Bailey, Legal and Political Aspects of Free Transit in Major Metropolitan Areas 70-71 (1970); Langfeld; Alan M. Voorhees & Associates, *supra* note 65, at 58; Alan M. Voorhees & Associates, An Integrated Island-Wide Bus System (1971).

For examples of such statutes, models and procedures see Langfeld 24-25; Portland Mass Transit Advisory Comm'n, Portland Mass Transit Study—Phase 1-A: Municipal Acquisition 20-24 (1969); Alan M. Voorhees & Associates, *supra* note 65, at 51; Alan M. Voorhees & Associates, An Integrated Island-Wide Bus System, Part IV (1971); *Recent Developments in Air Space Utilization*, 5 Real Prop. Prob. & Tr. J. 347, 361-64 (1970).

the legal problems generally associated with air rights development can be considerable.[69]

It is fairly well settled that air space is subject to private ownership separate and apart from the land surface, and further, that air space may be conveyed, leased and subdivided in approximately the same manner as land.[70] Yet, while a state legislature usually has the power to authorize such private use, it is generally held that without such legislative authority a city or other governmental unit cannot permit such private use of public air space.[71]

A number of states presently permit municipalities or state highway agencies to utilize the space above or below streets and highways for various public uses.[72] Moreover, many states have enacted legislation to allow leasing of air space above public buildings, streets and highways to private businesses when it is no longer needed for a public purpose. Illinois has adopted a statute that empowers every municipality to deal in air space.[73] New Jersey has apparently authorized the state

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69. N. LOBDELL, LAND USE INVOLVING TRANSPORTATION RIGHTS-OF-WAY 4 (1967).

70. R. WRIGHT, THE LAW OF AIRSPACE 259-60 (1968). *See also* United States v. Causby, 328 U.S. 256 (1946). In *Causby* the Supreme Court protected the surface owner's right to possession of usable airspace above his land.

71. 10 MCQUILLIN, *supra* note 3, at § 30.84; Hodgman, *Air Rights and Public Finance: Public Use in a New Guise*, 42 So. CALIF. L. REV. 625, 629, 645 (1969); Wright, *Airspace Utilization on Highway Rights of Way*, 55 IOWA L. REV. 761, 783-84, 787 (1970). *See also* People *ex rel.* Armanetti v. City of Chicago, 415 Ill. 165, 112 N.E.2d 616 (1953); Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959).

72. 10 MCQUILLIN, *supra* note 3, at § 28.42; Wright, *supra* note 71, at 780-82. Typically, the public use will be for parking.

73. ILL. ANN. STATS. ch. 24, § 11-75-1 (Smith-Hurd 1962) provides:

> Every municipality has the power to lease the space above and around buildings located on land owned or otherwise held by the municipality to any person for any term not exceeding 99 years.
>
> Every municipality has the power to lease, in the same manner and for a similar term, any space over any street, alley, or other public place, in the municipality, more than 12 feet above the level of the street, alley, or other public place, to the person who owns the fee or a leasehold estate, for a term not less than that of the proposed lease, in the property on both sides of the portion of the street, alley, or other public place so to be leased, whenever the corporate authorities of the municipality are of the opinion that that space is not needed for street, alley, or other public purpose, and that the public interest will be subserved by such leasing. The leasing of such a space shall be authorized by ordinance. In this ordinance the lease and its terms shall be set forth with reasonable certainty.

See also MASS. ANN. LAWS ch. 40, § 22E (Supp. 1969); N.Y. VILLAGE LAW § 89 76 (McKinney Supp. 1967); WASH. REV. CODE § 47.12.120 (1970).

to sell air rights to a municipality, which in turn can lease them to a private party for a non-municipal use for as long as 99 years.[74] In Wisconsin, cities and villages may lease air space over streets, alleys and other public places to adjoining property owners.[75] Since 1969, Washington has permitted the rental or leasing of air space above or below any lands held for highway purposes.[76] Connecticut not only authorizes its highway commission to sell, lease and convey any interest the state may have on, above or below any state right-of-way, but also to accept, purchase or condemn additional interests in land or air space necessary to the multiple use and joint development of highway rights-of-way.[77]

An increasing number of states also have adopted special provisions dealing with the *sale* or *leasing* of air development rights above highways. The California Highway Department may lease the use of areas above and below state highways to public agencies or private parties, provided the proposed use is not in conflict with local zoning and appropriate measures are taken to protect the safety and adequacy of the highway facility as well as adjacent land uses.[78] A recent Ohio statute permits the leasing or sale of air rights over state highways for any non-highway purpose that, in the opinion of the state highway agency, will not impair the use of the highway.[79] In New Jersey the state may lease land no longer required for highway purposes to a municipality, which may in turn lease the air rights to a private party for non-municipal uses.[80]

Conclusion

Times being what they are, the construction of many public improvements that do not fall into the "necessary-to-avert-disaster" category will depend upon some method of reducing the heavy financial drain on the public purse. A demonstrably legal and profitable way of reducing the drain is the recoupment of expenditures through the

74. Barton-Aschman Associates, Multiple Use of Lands Within Highway Rights-of-Way 55-56 (1968). *See* note 80 and accompanying text *infra*.

75. Wis. Stat. Ann. § 66.048(3) (1967).

76. Wash. Rev. Code § 47.12.120 (1970).

77. Conn. Gen. Stat. Ann. § 13A-80(a) (Supp. 1969).

78. Cal. Sts. & H'ways Code § 104.12 (West Supp. 1969).

79. Ohio Rev. Code Ann. § 5501.162 (1970).

80. N.J. Rev. Stat. § 46:3-19 (1940).

sale or lease of a portion of the property condemned that is not crucial to the construction of the improvement. While it may be difficult to exercise legally the power of eminent domain *solely* for the purpose of *dealing* in excess land, more than enough judicial support exists for incidental profit-making by *use and dealing* in excess land provided one can find some statutory or constitutional support.

Supplemental condemnation, however, is not the only arrow in the value recapture quiver. Some form of assessment procedure has long been used by municipal authorities to defray the cost of public improvements that confer special benefits on certain property owners. The difference between a street or sidewalk on the one hand, and a fixed-guideway rapid transit system on the other, may well be characterized as one of degree only.

Moreover, local governments have a history of cooperation in undertaking ventures by a pooling of their respective powers and resources that, if undertaken separately, would have proved difficult if not impossible to accomplish. Such ventures have recently included development around transit stops and rights-of-way. Less common, but equally effective, is the formation of joint development districts or authorities to accomplish the same ends.

Finally, it is fairly well settled that a governmental unit may own and, within certain limits, deal in as well as use air and subsurface development rights. Their sale or rental will be useful in defraying the cost of public improvements.

No one of these techniques may suit every circumstance, and some are clearly more likely than others to produce vast amounts of revenue in densely urban concentrations or high-value property districts. Nonetheless, a judicious blending of these techniques by well-informed decision-makers may sufficiently defray the costs of making needed public improvements. To the extent that such projects were shelved because of increasing construction costs, they would once again become feasible. The financial community has generally risen to the occasion when circumstances have demanded it. It behooves government to do likewise.