1970

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Recommended Citation
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Joint Development and Multiple Uses: Integrated Transportation Corridors

Because transportation investments appear to have the strongest influence on the form of subsequent urban development, joint projects involving transport rights-of-way offer the largest opportunities for advancing comprehensive planning objectives. This is particularly true in the development of routes to serve growing areas, and in the portions of systems traversing areas subject to urban renewal. Because of the large right-of-way widths involved, urban freeways have consumed large land acreages and have become disrupting barriers between established neighborhoods. In addition, valuable land is removed from municipal tax rolls, and the relocation problems, for displaced households and businesses are often substantial.

The joint project concept, nonetheless, represents a key technique for achieving integrated transportation and land-use planning. Major transportation rights-of-way are of course linear and usually involve a sidestrip or buffer of flexible width. The interchange areas of urban freeways frequently include open, undeveloped areas within ramp arrangements as well. These ramp interiors often reach two or more acres in size, particularly in association with cloverleaf and directional interchanges. Joint projects may front upon and include these kinds of transportation land and may also be developed utilizing the airspace over freeways or the land under elevated freeways. They may range from single buildings to large developments involving several buildings. In short, joint projects may be developed adjacent to, over, under, or upon transportation land and may involve sites and facilities which vary considerably in size, shape, and scope.

An important objective for joint project development is to maintain neighborhood continuity in built-up areas affected by new highway developments. The elimination of the "Chinese wall" aspect of urban freeways is the main concern here. The relocation of displaced businesses and families is also involved and could be accomplished through joint project planning which provides replacement facilities in the vicinity. A time-phased schedule of joint project development and freeway construction could, for example, lead to orderly neighborhood assimilation of these major transportation routes. The maintenance of neighborhood continuity can very often keep tax-paying land
uses within the area as well.

A second and related objective for joint project planning involves the economic and aesthetic benefits of coordinated design. Locations near major transportation routes, because of their high exposure to passing travelers, often offer excellent opportunities for aesthetic improvement. In addition to these architectural design possibilities, joint projects can promote the efficient planning and design of related urban facilities which are coordinated within a single project. Better functional relationships can result, with less total land required and frequently at a savings in land acquisition costs.

Recreation joint projects may be either regional or local in nature and special types of development within each category are distinguished. For instance, regional parks may be linear in form or may involve cultural-recreational facilities requiring high accessibility, while local parks might involve ornamental landscaping along the right-of-way or the development of a local playground beneath an elevated structure. Public building opportunities appear to fall into four general classifications: medical facilities, educational buildings, governmental facilities, and cultural and public assembly facilities. Joint projects of utilities might involve the distribution systems or other fixed facilities of various public and quasi-public utilities. Potential joint projects involving transit in coordination with freeway right-of-way include exclusive transit lanes, bus turnout slots, and commuter parking lots, while parking joint projects might involve under-structure parking facilities, parking decks constructed over a freeway or transit right-of-way, or multiple-purpose transportation centers. Housing joint projects could be developed over or adjacent to a major transportation facility and might be either publicly or privately built. A variety of private developments in addition to housing projects appear to be feasible for joint project treatment including office buildings, hotels, convention centers, shopping centers, industrial parks, and distribution centers.

**Legal Aspects**

An analysis of joint development law and institutions involves three basic questions: (1) Does the joint project comply with the requirements of state and federal constitutions? (2) What statutory authority is available under which the land for the project may be acquired and public money spent? (3) What legal problems may arise after the land is acquired? Each specific development situation requires its own analysis. Consequently, the ensuing discussion of these legal questions provides a frame of reference rather than any “formula” for solution of specific projects.
Joint Development and Multiple Use

Constitutional Basis and Limitations

Government participation in joint public improvement projects must conform to constitutional and statutory grants of power and restrictions. This article first considers constitutional limitations on government projects and then examines the range of statutory powers which are available to carry out joint development projects.

Public Use

In a joint development project government power may be applied to attain a wide range of goals at times including both public and private matters. Government powers to spend public funds, levy taxes, and condemn property—including the powers of federal, state, county, and municipal governments—must comply with the fifth and fourteenth amendments to the Constitution of the United States.¹

Neither a tax on a citizen nor an appropriation of his property by the government is lawful under these constitutional standards unless the purposes are for “public uses.”² The meaning of the term “public use” as used in the Constitution has been developed by many individual decisions of both state and federal courts so that the term has developed a legal meaning which may be quite different from ordinary usage.³ In this century the meaning of public use has broadened considerably to permit a wide range of activity beyond the functions of government which were customary in the 19th century such as public roads, drainage ditches, public schools, government buildings, and parks. Gradually a few privately-owned public uses were established through legislative delegations of power to private concerns which render public services such as water, sewer, gas and electric

¹ “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Id. amend. XIV. Similar language is also found in most state constitutions. See, e.g., IND. CONST. art. 1, § 21; LA. CONST. art. 1, § 2; TEX. CONST. art. 1, § 17.

² Jones v. Portland, 245 U.S. 217 (1917) (taxation); Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885) (condemnation). In some respects (particularly in regard to procedure) the power of government to levy taxes is broader than the power to condemn property. However, for the purposes of this report the “public use” test can be considered as substantially a single rule applicable to both government powers.

³ The concept of “public use” as a legal test may be traced to biblical times. Although land was held “tenurially” (e.g., by grace of the sovereign, subject to escheat to the sovereign in case of treason or death of the owner leaving no heirs) the owner's estate apparently could not be taken from him during his tenure for other than public purposes. ¹ KINGS 21.
utilities, and railroads and other common carriers. Moreover, certain valid public uses have been established in which the use of the property condemned is never even made available to the public such as private right-of-way, sewers, and drainpipes.

More recently, developments in the concept of public use have reflected the expanding role of government in all areas affecting the public health, safety, morals, and general welfare. As early as 1923 the Supreme Court indicated the current liberality of interpretation given to the term declaring that "[p]ublic uses are not limited, in the modern view, to matters of mere business necessity . . . but may extend to matters of public health, recreation and enjoyment."8

Under this modern public use test the Court will uphold any government undertaking "which is reasonable in relation to its subject and is adopted in the interests of the community" to alleviate any community problem of extensive or significant impact.7

Nevertheless, these Supreme Court decisions do not mean that the public use test can be ignored. The state courts have often interpreted the language of their own constitutions more strictly than the Supreme Court has and a joint project may receive its most severe test in state courts. However, an increasing number of state courts have followed the federal courts in becoming more permissive of broad government action. This historical trend may be traced by examining the judicial rules commonly applied to four types of projects which involve a public use.

Projects Owned and Used by the Public

The projects in which the taxation and condemnation powers of government were first established as proper are public works owned by and open to the

4. These projects include private businesses "affected with a public interest" under the doctrine of Munn v. Illinois, 94 U.S. 113 (1877), e.g., common carriers, utilities, warehousemen, and grain elevators. These activities substantially affect the welfare of a broad sector of the public, are not in highly competitive fields and consequently are usually subject to some government regulation. These cases, in addition to establishing the right to condemn property for the particular public uses cited, also support the right of government to delegate the power to condemn property to private individuals under suitable safeguards.


6. Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923). See also West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). There are cases where it would obviously be for the public benefit if properties owned by certain individuals were in the hands of others so that dilapidated buildings could be replaced by better ones and unsightly places beautified to gratify the public taste. However, such circumstances alone would not warrant expropriation because of due process restrictions. 1 T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 1131 (8th ed. 1927).

public. Highways, mass transit facilities, hospitals, and public schools are examples of this group. The public use of these projects is clear even when measured against the narrowest definition of the powers of government.8

Public Benefit Without Public Ownership

Some early cases intimate that private ownership and occupancy of a project is inconsistent with the concept of public use.9 But the courts soon established that some projects provide a public benefit even though they are neither owned nor occupied by the public in the same sense as parks and highways. Such projects as electric power lines, gas mains, railroad rights-of-way, cemeteries, private schools and colleges, highway service areas, and auto parking lots have all been held to be public uses.10 These projects, often run by private enterprise for profit, may lawfully be granted both the power of condemnation and various tax benefits by statute.11 The modern


11. One early example is state mill dam development legislation under which individuals were authorized to dam a river, construct a mill and condemn necessary land and riparian rights. In a few instances this was permitted for mills which did not serve the public. Condemnation was upheld in Head v. Amskeag Mfg. Co., 113 U.S. 9 (1885). See also cases cited in Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465 (1927). A few other examples are: laws permitting a property owner to condemn a private right-of-way across neighboring land if his property totally lacked access ways; laws in desert states permitting condemnation for private irrigation pipelines; laws empowering condemnation for private drainage and sewer systems; a law in a mining industry state permitting mine owners to condemn rights-of-way across private property for mine conveyors. Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); Linggi v. Garovotti, 45 Cal. 2d 20, 286 P.2d 15 (1955). But see Limits Indus. R.R. v. American Spiral Pipe Works, 321 Ill. 101, 151 N.E. 567 (1926) preventing a railroad condemnation found to be for private use. The courts treat such laws, either empowering private persons to condemn property or empowering public agencies to give or sell property to private persons, with great caution.
rule is that the question of public or private ownership is only a procedural, incidental matter. Whether the project meets the public use test depends upon whether the substantive goals of the project are reasonably related to public health, safety, or welfare.\textsuperscript{12}

Some state courts find that the public use test is satisfied only if formal commitments are secured assuring that such projects will be held open to the public, that charges will be reasonable, service nondiscriminatory, or that property condemned cannot be resold or otherwise diverted from public use for a stated period.\textsuperscript{13} However, other courts will sometimes go to surprising lengths to uphold a project against an attack based on lack of protective conditions.\textsuperscript{14}

\textit{The Elimination of Evils}

Publicly aided projects involving neither public occupancy nor direct public benefits also have been upheld in court if the ultimate goal was the elimination of an evil reasonably requiring the use of condemnation powers or other special relief. Under this rationale the courts upheld the use of the eminent domain power to control the height of buildings\textsuperscript{15} and to eliminate nonconforming uses of residence districts.\textsuperscript{16}

The more recent use of eminent domain to eliminate evils is exemplified by federal and state legislation authorizing public housing, slum clearance, and redevelopment which has been upheld repeatedly on the grounds that slum and blight conditions are injurious to public health, safety, morals, and welfare.\textsuperscript{17} Similarly, the condemnation of holding company securities was upheld as a means of eliminating undue concentrations of power.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{12} See, e.g., Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir. 1946); Zurn v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945); Annbar Associates v. West Side Redevel Corp., 397 S.W.2d 635 (Mo. Ct. App. 1965).
\item \textsuperscript{13} See, e.g., Poole v. Kankakee, 406 Ill. 521, 94 N.E.2d 416 (1950); Albritton v. Winona, 181 Miss. 75, 178 So. 799 (1938); David Jeffrey Co. v. Milwaukee, 267 Wis. 559, 66 N.W.2d 362 (1954).
\item \textsuperscript{14} For example, under an Indiana law property was condemned to be turned over to private interests for purposes of building and operating a parking facility; but no ongoing regulation was provided. Stretching to uphold the project, a court ruled that a parking garage was a form of warehouse and hence subject to common law restraints on service and rates. Under the court's reasoning from the common law, direct regulation was therefore not necessary to protect the public use aspects of the facility. Foltz v. Indianapolis, 234 Ind. 656, 130 N.E.2d 650 (1955).
\item \textsuperscript{15} Attorney General v. Williams, 174 Mass. 476, 55 N.E. 77 (1899).
\item \textsuperscript{16} State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920).
\item \textsuperscript{17} Berman v. Parker, 348 U.S. 26 (1954). See also Zurn v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945); Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 23 N.E.2d 665 (1939).
\end{itemize}
Joint Development and Multiple Use

Promotion of the General Welfare

A fourth category of public uses is based on a broad interpretation of the powers of government in regard to the promotion of the general welfare. As previously indicated, the Supreme Court has held that the Constitution does not preclude the government from undertaking any commercial, industrial, or agricultural enterprise in competition with private industry where a legislative determination has been made that the public welfare requires such a program, as long as the legislative judgment is not demonstrably in error.19 State courts have approved many projects under the general welfare powers including preventive land acquisition to forestall anticipated slum or blight conditions,20 land reform legislation to condemn large farms and sell the property to tenant farmers,21 and the creation of state-owned industrial factories to remedy unemployment or for general economic welfare.22 As the Mississippi Supreme Court has stated:

The due process of law provisions of our constitutions do not enact Adam Smith's concept of the negative state, one of the main functions of which would be to stand aloof from intervention in the social and economic life of its citizens.23

Because of the successful acceptance of these projects in the courts, little general limitation can be placed on the power of a state to undertake projects to further the public welfare other than the "not demonstrably erroneous" test set forth above. Nevertheless, some state courts continue to enforce a restrictive view of the due process concept which would not permit all of these programs. Although clarity and breadth in drafting enabling legislation will reduce the problem posed by such legal precedent, a few jurisdictions

19. Green v. Frazier, 253 U.S. 233 (1920) (uphold the law if it is "not clearly unfounded"). See also Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (1st Cir. 1946) (uphold a program "until . . . shown . . . an impossibility"); Department of Pub. Works v. Farina, 29 Ill. 2d 474, 194 N.E.2d 209 (1963) (uphold unless powers "have been manifestly abused").


may require state constitutional amendments to carry out public projects which transcend traditional areas of public activity.

The Future of the Public Use Test

Although the public use test with which public projects must comply has expanded greatly, it remains a significant limitation. In general, a “joint project” meets the constitutional test only if each part of the project is a constitutional public use. Thus if a school and a highway are public uses, it follows that the joint construction of the school and the highway is a public use.

Future courts, however, might respond to the functional benefits of joint development by liberalizing even further the constitutional test for such projects. They might hold that because the joint planning and large-scale development involved in joint projects contributes an added value to society over and above the value of the sum of the individual components of the joint project, a joint development project may be a public use even if some of its individual components would not be so considered. The Supreme Court has upheld the principle inherent in urban renewal that the prevention of future slums requires that an entire area be planned as a whole:

The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.

It requires only a moderate extension of this argument to hold that any joint development designed to prevent future slums is a public use even though it involves the taking of land which is not now blighted or deteriorated.

An alternative argument which future courts might use to expand the constitutional limits of public use could be based on the desirability of government acquisition of vacant land for future use. Because it is impossible to plan accurately for all future public needs, it is argued that the municipality

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24. This added value is the reason, for example, why more liberalized zoning has been permitted for “planned developments” and why the federal government contributes large sums annually for comprehensive planning.

25. Berman v. Parker, 348 U.S. 26, 34, 35 (1954). Analogies may also be found in the arguments which have been used to justify the acquisition of vacant land with tangled titles, Gutknecht v. Chicago, 414 Ill. 600, 111 N.E.2d 626 (1953); cf. Berman v. Parker, supra, to justify the statutory modification of real property rights under long term leases which impair the marketability of land. See Md. ANN. CODE art. 21, §§ 103, 104, interpreted in, Stewart v. Gorter, 70 Md. 242, 16 A. 644 (1889), and to justify the condemnation of private riparian rights hampering the construction of a dam, Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885).
should maintain a "land bank" of vacant land available to meet unexpected future needs in the manner adopted by cities in Sweden and some other continental countries.\textsuperscript{26} Under past precedents, however, public ownership of property has not in itself been found sufficient to meet the requirements of the public use test. Public ownership is permissible only as an adjunct to a clearly valid public use such as protective land clearance around the apron of a reservoir to prevent pollution or acquisition of land to be held for reasonably foreseen future development when an existing public project is expanded.\textsuperscript{27} Some courts have said that the government may not lawfully speculate in land.\textsuperscript{28} Despite these precedents, many state courts have now sanctioned the issuance of industrial development bonds for the acquisition of vacant land to attract industry.\textsuperscript{29} These cases could lead to the conclusion that municipalities might purchase or condemn land for purposes which are unknown at the time of acquisition because the general welfare is served by maintaining a substantial reserve of vacant or leased land to meet future needs which cannot be adequately defined by current planning.

One can only speculate whether the courts of the future will accept these or other enlargements of the public use concept. But even under present standards it is clear that the Constitution permits a wide range of statutory authority for joint projects. A key element in the past success of innovative legislative programs in meeting constitutional tests has been proper documentation of the broad public interests behind the programs. To be successful in court legislation must clearly state its public goals in light of prior

\textsuperscript{26} In the Scandinavian and Germanic countries, large public holdings have been traditional, many of them dating from feudal times. Finland granted tracts of land for the founding of towns with a restriction against alienating full title, with the result that Finnish towns still own virtually all land within their boundaries. In 1926, they had sold for building sites only 3½ per cent of their aggregate corporate area. In Sweden, Stockholm has acquired, since 1904, some 20,000 acres of land, or five times the original area of the city. The next five largest Swedish cities own from 47 to 80 percent of their municipal areas. In Germany, Berlin owns 75,000 acres within its city limits, or one-third of its area, and another 75,000 acres outside. Taken as a group, the German cities of over 50,000 population own 23.6 per cent of their area (excluding land in streets, railways, and other utilities) largely devoted to agricultural and forest use.


\textsuperscript{27} See Rindge Co. v. Los Angeles, 262 U.S. 700 (1923); United States v. Agee, 322 F.2d 139 (6th Cir. 1963); Chicago v. Barnes, 30 Ill. 2d 235, 195 N.E.2d 629 (1964); Lerch v. Maryland Port Authority, 240 Md. 438, 214 A.2d 761 (1965).


\textsuperscript{29} See cases cited note 22 supra.
judicial determinations of the meaning of public use.\textsuperscript{30}

Necessity and Extent of Taking

The public use test described above determines only whether government can lawfully undertake a particular project. A second constitutional question, commonly referred to as the issue of “necessity,” concerns the amount of land the government can condemn to carry out a lawful project. The courts have held that a condemning agency has broad discretion to decide this question of necessity subject to whatever limits are set forth in the relevant enabling legislation.\textsuperscript{31} The power to decide the extent of property to be acquired may be delegated to public administrative agencies or to private individuals regulated by such agencies and subject to agency review. Statutes provide guides to the goals and methods to be employed and the courts give these agencies great flexibility in the exercise of delegated power to determine when and where to construct public projects.\textsuperscript{32} Even greater discretion is allowed regarding how much land and money to devote to any project.\textsuperscript{33}

\textsuperscript{30} In some cases an element of “legal fiction” may be involved. For example, public low-income and middle-income housing programs have been upheld as an indirect method for alleviating slum conditions. See, e.g., Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N.E.2d 276 (1948); Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 23 N.E.2d 665 (1939); Ferris v. Housing Authority, 79 N.D. 764, 59 N.W.2d 849 (1953); cf. Blakemore v. Cincinnati Metropolitan Housing Authority, 144 Ohio St. 178, 57 N.E.2d 397 (1944).

\textsuperscript{31} On those occasions when an agency determination of necessity has been overturned as a clear abuse of discretion, the basis for the holding is usually to be found in the enabling law rather than in rules of constitutional standing. Compare Ottawa v. Carey, 108 U.S. 110 (1883), with Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), aff'd, 281 U.S. 439 (1930). But see Shizas v. Detroit, 333 Mich. 44, 52 N.W.2d 589 (1952); In re Real Property in Hewlett Bay Park, 48 Misc. 2d 833, 265 N.Y.S.2d 1006 (1966), holding that takings were excessive where the alleged abuses of discretion were less than clear.

\textsuperscript{32} See Johnson City v. Cloninger, 213 Tenn. 71, 372 S.W.2d 281 (1963); King v. Flood Control Dist., 210 S.W.2d 438 (1948). See also Dalche v. Board of Comm'r, 49 F.2d 374 (E.D. La. 1931). The requisite proof to avoid this rule is essentially public fraud or collusion. See Reel v. Freeport, 61 Ill. App. 2d 448, 209 N.E.2d 675 (1965).

\textsuperscript{33} Compare Curran v. Guilfoyle, 38 App. Div. 82, 55 N.Y. Supp. 1018 (N.Y. Sup. Ct. App. Div. 1899), with In re Real Property in Hewlett Bay Park, 48 Misc. 2d 833, 265 N.Y.S. 2d 1006 (App. Div. 1966). Some states have attempted to broaden the discretion of government by statute and state constitutional amendment; however, the results of these attempts are not clear. The California Constitution provides that if a project passes the “public use” test because the purposes of the project as a totality justify condemnation, then the determination of the agency as to how much property to condemn and what estate (fee, easement, etc.) are conclusive in court. For the varying interpretations and scope of review under this formulation see People v. Lagiss, 160 Cal. App. 2d 28, 324 P.2d 926 (1958). An informal conclusion from these cases is that regardless of statutory or other authority, an agency is best advised to develop a rational plan for choosing the extent of condemnation. For example, see the very broad plan...
The following are examples of types of condemnation which have been upheld as constitutional under proper enabling legislation. They are arrayed in a range from the obviously necessary takings to those more remotely related to the principal project.

1. Land actually within the physical boundaries of the planned improvement.
2. Land for auxiliary support facilities such as gasoline stations and restaurants located on major highways.34
3. Temporary work space easement for such purposes as equipment storage.55
4. Protection apron such as that necessary to provide access space adjacent to a reservoir or to stop pollution of a reservoir by occupants of adjacent property.56
5. Scenic easement or light and air rights typically to provide better recreational opportunities or to preserve the beauty of a public project.87
6. Land for future use to accommodate projected growth of public works.58
7. Land taken in fee for temporary use such as dump, fill, gravel or stone quarry sites.39
8. Commercial development areas assembled adjacent to port facilities, for lease or sale to public or private interests.40
9. Relocation or replacement land leased or sold to people or businesses displaced by a project.41
10. Future protection exemplified by taking of a man made peninsula or island in a reservoir project to forestall nuisance problems from private development of the property.42
11. Reduction of project cost by acquiring small remainder remnants.43

43. Baltimore v. Clunet, 23 Md. 449 (1865). Extension of this concept to permit condemnation of land benefitted by a project in order to sell the land at a profit and defray some project costs (the recoupment theory) has been disapproved by some courts as an abuse of the power of eminent domain. Cincinnati v. Vester, 33 F.2d 242
Statutory Authority and Limitations

The Constitution does not in itself grant any powers to engage in public projects. Each project must be authorized by statute. This section will examine statutes vesting in state agencies and local governmental units the power to engage in public projects. Certain federal assistance programs which contain substantive standards will also be reviewed. Considered first is the range of joint development potentials that are available to highway departments acting alone.\(^4\) Examined next are the potentials available when highway departments and urban renewal join forces. Finally, the possibility of joint development projects participated in by other government agencies is considered.

Powers of the Highway Department

In the evolution of highway departments' powers to acquire and develop land the underlying issue has remained constant over the years. This problem involves the reconciliation of the rights of private property with society's needs for public transportation facilities. It has been raised in different contexts such as the proper width of the right-of-way, the control of highway access and the use of highway lands for restaurants and other service facilities. Resolution on a case basis has paralleled the expansion of the constitutional standards of public use discussed in the previous section.

Land Necessary for the Highway

Typical highway enabling legislation authorizes departments to acquire lands necessary for the construction, operation, and maintenance of state highways.\(^4^5\) Under such broad and general grants of power the courts have

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\(^4\) The term "highway department" is used although in many states the appropriate agency's name differs. The agency responsible for highways is often known as the Department of Public Works (Massachusetts, Illinois) or, more recently, the Department of Transportation (New York). There are also specialized agencies with authority over particular highways such as state toll road commissions and the Triborough Bridge & Tunnel Authority (New York).

\(^4^5\) Ill. Rev. Stat. ch. 121, § 4-501 (Supp. 1970); Ind. Ann. Stat. § 36-118 (Supp. 1969). Although the land for the interstate highway system is normally acquired through state processes, the Federal-Aid Highway Act, 23 U.S.C. § 101 (1964) provides in Section 107(a), (the so-called federal "quick take" provision) that the federal government, when requested by a state, may acquire lands necessary for rights-of-way in connection with the interstate system. This power may only be invoked if the Secretary of Transportation determines that the state is unable to acquire the necessary lands or is unable to acquire them with sufficient promptness. In this connection see
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traditionally upheld the departments’ right to fix the width of highways including the median strips and shoulders,\(^\text{46}\) and in two cases the taking of land for access control.\(^\text{47}\) It is clear that the departments’ discretion to choose the location of the highway will not come under judicial scrutiny unless there has been a clear abuse of discretion.\(^\text{48}\)

**Highway-Related Facilities**

In addition to obtaining land necessary for the highway, state highway departments have often sought to acquire land for facilities related to the highway. On occasion the courts have upheld such authority under general statutory grants of power. For example, in one case the court approved the taking of land for a vehicle weighing station although the statutes contained no specific mention of such facilities.\(^\text{49}\) More commonly, however, highway departments have found it desirable to obtain special statutory authority for the development of specific highway-related facilities.\(^\text{50}\) Thus various states have enacted statutes permitting the acquisition of land for the construction of such related facilities as gasoline stations, administrative offices, and restaurants\(^\text{51}\) although federal law now prohibits the construction of service

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47. State ex rel. State Highway Comm’n v. James, 356 Mo. 1161, 205 S.W.2d 534 (1947). “While it is true that a number of states have passed acts for the public control of highway access, it may be noted that in many of such states the highway commissioner did not possess the broad statutory power granted the highway commissioner under the Minnesota Act . . . .” Burnquist v. Cook, 220 Minn. 48, 57, 19 N.W.2d 394, 405 (1945).


50. “Legislation may be desirable to deal in advance with certain other procedural and administrative problems bound to arise in the establishment and operation of a modern highway system.” R. Netherly, CONTROL OF HIGHWAY ACCESS 87 (1963).

stations and other commercial facilities on rights-of-way of the interstate system.52

Land Alongside the Highway

Highway departments have long recognized that the construction of highways frequently adds to the value of adjoining land. If the highway department could acquire this land and sell it at a higher price after the highway was built it could recoup part of the cost of building the highway. An early Massachusetts case held that such action would be unconstitutional under a state constitution;53 however, the constitution was later amended to permit the taking of land for “suitable building lots” on both sides of a highway.54 Similar provisions are now found in a number of other state constitutions.55 Other states have passed statutes specifically permitting “remnant condemnation,” such as the taking of entire lots even though only part of the lot will be needed for the highway.56 The Department of Transportation has in at least one instance approved the use of federal funds for the acquisition of remnants which were to be devoted to highway beautification purposes.57

Air Rights Over the Highway

In some states the highway department acquires only an easement for high-

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52. 23 U.S.C. § 111 (1964). The states have enacted similar provisions to conform to the federal requirement. See, e.g., ILL. REV. STAT. ch. 121, § 9-113.1 (Supp. 1970). This section does not apply to the Illinois tollway system. An exception is also made for telephone service. Id. § 8-107.1. The federal statute does permit the use of air space above and below the highway for these facilities.


54. MAss. CONST., Part 1, art. X.

55. CAL. CONST. art. I, § 14½; OHIO CONST. art. XVIII, § 10; PA. CONST. art. X, § 4.

56. “Whenever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.” CAL. STS. & H'WAYS CODE § 104.1 (West 1969). See also ILL. REV. STAT. ch. 121, § 4-501 (Supp. 1970). For a survey of state laws relating to excess highway acquisition powers, see HOUSE COMM. ON PUBLIC WORKS, 90TH CONG., 1ST SESS., DEP'T OF TRANSPORTATION STUDY, ADVANCE ACQUISITION OF HIGHWAY RIGHTS-OF-WAY, Table 1 at 6, 7 (Comm. Print 1967).

57. The Highway Beautification Act of 1965, 23 U.S.C. § 319(b) (Supp. V, 1970), provides that funds are to be allocated to the states, without being matched by the states, for use for landscape and roadside development within federal-aid highway rights-of-way and for acquisition and improvement of strips necessary to restore and enhance scenic beauty adjacent to highways, including acquisition and development of rest and recreation areas.
way use. In many states, however, highway departments acquire the fee title to all lands on which the highway is located which includes the air rights over the highway. State statutes generally permit the highway department to sell or lease any land no longer needed for highway purposes. It is unclear whether the sale or lease of air rights is authorized by such statutes, although a number of states have passed specific statutes authorizing the lease of air rights over highways for either private or public development.

If state statutory authority exists, federal permission for air rights projects over interstate highways may be granted under the Federal-Aid Highway Act of 1961. However, federal funds cannot be used for any additional costs of construction required by the air rights development such as structural columns, ventilation, and lighting unless such costs are offset by a reduction in right-of-way costs. The proposed air rights project must not result in any interference with highway access or maintenance and the user of air space must provide the necessary protection for the public and the highway. Any income received from the air rights facilities will be the responsibility and property of the state.

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58. It is generally held that the highway department obtains an easement unless a statute specifically authorizes acquisition of the fee. See 26 AM. JUR. 2d Eminent Domain § 136 (1966).
60. See, e.g., MASS. GEN. LAWS ANN. ch. 81, § 7E (1958); CAL. STS. & H'WAYS CODE § 118 (West 1969); ILL. REV. STAT. ch. 121, § 4-508 (Supp. 1970).
61. Section 118 of the CALIFORNIA STREETS AND HIGHWAYS CODE, permitting the sale or exchange of lands no longer necessary, for highway use, has been interpreted to authorize the sale of air space since it is "an interest in land." California has, however, also specifically authorized the lease of air rights in Section 104.12.
62. See, e.g., MASS. GEN. LAWS ANN. ch. 81, § 7L (1969) (lease only, up to ninety-nine years); CAL. STS. & H'WAYS CODE § 104.12 (West 1969) (lease, without limitation in time). A bill pending in Congress would permit the District of Columbia to lease air space above and below limited access divided highways within the District.
63. 23 U.S.C. § 111 (1964). The regulations which apply to all federal-aid highways provide "subject to 23 U.S.C. § 111, the temporary or permanent occupancy or use of right-of-way, including air space, for nonhighway purposes . . . may be approved by the Administrator [Secretary], if he determines that such occupancy, use or reservation is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon." 23 C.F.R. § 1.23(c) (1960). Although subject to 23 U.S.C. § 111 (1964), which only applies to the interstate system, the regulation refers to the "temporary or permanent" use of air space. There is no conflict with Regulation 1.23(c), and it therefore may be assumed that both the sale and lease of air rights is contemplated by § 111. See also 23 C.F.R. § 1.23(b) (1960), which provides that "the State highway departments shall be responsible for preserving such right-of-way free of all public and private installations, facilities or encroachments, except (1) those approved under paragraph (c) of this section; (2) those which the Administrator [Secretary] approves as constituting a part of a highway or as necessary for its operation, use or maintenance for public highway purposes. . . ."
Id.
The extent to which federal financing may be used for air rights development depends on the nature of the development. For example, the federal government will not ordinarily pay for the cost of providing the foundation or deck upon which air rights facilities can be constructed; but there are important exceptions. A memorandum prepared in connection with the dispute over the Delaware Expressway in Philadelphia states that where a tunnel or cut-and-cover section is "necessary for," or "integral to," the highway the cost for the deck or tunnel will be considered part of the highway. Where tunnels or cut-cover sections are unnecessary or "additional" no part of the cost can come from federal highway funds.

Highway beautification funds may also be available for air rights development. The Delaware Expressway Task Force Report recommends use of such funds for a landscape cover over urban highway rights-of-way. The Report construes the statutory term "adjacent to" as encompassing air space immediately above a highway. The advent of unique proposals relating to air rights development over portions of the interstate highway system will undoubtedly stir more controversy with respect to payment of costs necessary for the construction of decks or other cover facilities.

65. Id.
67. It is important to note that Section 111 of Title 23 applies to neither true tunnels nor cut-and-cover sections necessitated by local situations in the construction of Interstate Highway systems. These methods of construction—as in urban sections of Interstate Highways in Boston, Washington, New York and elsewhere—are sometimes necessary in densely developed urban areas when valuable commercial, industrial, governmental or historic structures and areas would be seriously damaged by a surface-level or uncovered highway.

In the central Philadelphia situation, it is a complex question of judgment (what in courts is called a 'mixed' question of fact and law) which of the proposed uses of air space over Interstate 95 are integral parts of highway's construction, necessary to minimize adverse affects upon the environment—and where are additional measures permitted by Section 111, but whose costs should not be borne by Interstate Highway funds.

If it is determined that the covering of some portion of the Interstate Section B open-trench highway is an integral part of the highway's construction at this historic, central city, and riverside location—then thorough consideration should be given to making the provisions of Section 111 available to the State or the city for the construction at their expense of buildings in air space over other adjacent portions of the expressway, which the highway program is not obligated to cover.

Id. at App. 9.
68. Id. at App. 11-6.
69. 23 U.S.C. § 319(b) (Supp. V, 1970) provides that funds may be used for "enhancement of scenic beauty adjacent to" federal-aid highways.
70. The Report also discusses the possibility of developing lands adjacent to the highway and the historic Penn's Landing as a "roadside safety rest and recreation area." Interdepartmental Report, supra note 66, at App. 11-6.
Space Under Elevated Highways

Many of the same legal considerations that affect the use of air rights over a highway are applicable to the sale or lease of land under an elevated highway for uses not directly related to highways. The federal statute permitting the use of interstate highway air rights applies equally to space above and below the roadway.\textsuperscript{71} Similarly, some state statutes authorizing the sale or lease of air rights also apply to space below a highway\textsuperscript{72} or the disposition of this space might be accomplished under the power to sell or lease land no longer needed for highway purposes.

Land Amid Highways

Modern expressways typically consist of parallel lanes of highway separated by a median strip. In the urban setting the relative narrowness of median land limits its development potential although rapid transit systems are now using median lands in some states.\textsuperscript{73} Land acquisition costs for median strips used for non-highway purposes cannot be paid out of federal highway funds. However, the Secretary of Transportation may authorize the use of land within the highway right-of-way for non-highway purposes if he determines that such occupancy is "in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon."\textsuperscript{74} In the case of the existing rapid transit line in Chicago's Eisenhower Expressway federal highway authorities granted permission for the median strip development. This was facilitated by the fact that an existing transit right-of-way was taken for the expressway and the median strip location was given in exchange. The subsequent development of median strips for rapid transit on the Kennedy and Dan Ryan Expressways required the City of Chicago to purchase additional rights-of-way without the use of federal highway funds.\textsuperscript{75}

In addition to the typical median strip found between lanes of modern highways, large interchanges typically enclose vacant land not used for highway purposes. Many proposals have been made for the use of this land for various types of facilities.\textsuperscript{76} Unused lands might be sold or leased to other

\textsuperscript{72} See, e.g., CAL. STS. & H'WAYS CODE § 104.12 (West 1969).
\textsuperscript{73} The Urban Mass Transportation Act of 1964, 49 U.S.C. § 1602 (Supp. V, 1970) has provided funds for federal assistance in the use of highway median strips for mass transit facilities.
\textsuperscript{74} 23 C.F.R. § 1.23(c) (1970).
\textsuperscript{75} "The U.S. Bureau of Public Roads reduced its matching grant from 90 percent to 85 percent to account for the cost of the transit median." Campbell, Transportation System Corridors, 166 HIGHWAY RESEARCH RECORD 26, 31 (1967).
\textsuperscript{76} Id. at 107, 109.
public agencies or private developers under provisions authorizing the sale or lease of lands no longer necessary; however, this might raise questions regarding the reason for acquiring the land in the first place. Specific statutory authority would probably be more desirable. The federal regulation prohibiting the use of lands within the right-of-way for non-highway purposes\textsuperscript{77} presents a formidable obstacle to many types of median strip or interchange developments. Since this statute permits air rights development, however, it may be possible to combine the sale or lease of the air rights with development of land amid the highway and thereby provide the necessary access. This interesting issue will undoubtedly be resolved as imaginative proposals for development of land-locked parcels are presented to state and federal highway officials.\textsuperscript{78}

\textit{Urban Renewal and Joint Development}

The powers of highway departments acting alone to engage in joint development projects vary considerably from state to state and depend primarily on the type of facilities to be constructed and their relationship to the highway. The potential for joint development projects can be substantially enlarged, however, by the participation of other agencies in addition to the state highway departments. This section will consider the joint development potentials available when urban renewal enters the picture. The relevant powers of urban renewal agencies can be divided into two categories for purposes of this analysis: (a) the redevelopment of blighted and deteriorating areas, and (b) the construction of housing outside such areas.

\textit{Projects in Blighted or Deteriorating Areas}

The acquisition and clearance of land ultimately to be used for highways can be conducted by local urban renewal agencies only when the highway will pass through lands qualifying for redevelopment under state laws.\textsuperscript{79} The urban renewal agency acquires the land which will be devoted to the highway as a part of its overall acquisition of property in a renewal area. After the agency clears the land it is conveyed to the highway department. There are several legal advantages to be gained by cooperation between highway departments and urban renewal agencies on this type of project. First, it may reduce the number of condemnation suits. Second, it can relieve the highway department of the often sticky problem of whether to acquire

\textsuperscript{77} 23 C.F.R. § 1.23(b) (1970). For exceptions see note 63 \textit{supra}.

\textsuperscript{78} Development of land adjacent to the interchange but not within the ramps themselves is a separate question. The analysis of land alongside highways in this section also applies to these adjacent lands.

remnant land. Third, it may enable the entire demolition and clearance to be handled by a single agency.

In Pittsburgh\footnote{80} and St. Louis\footnote{81} federally-aided urban renewal-highway projects are either under construction or have been completed. The mechanics of funding these and similar projects have been worked out by the Department of Housing and Urban Development and the Department of Transportation and the particular state highway department and local urban renewal agency.\footnote{82}

Federal urban renewal laws provide financial assistance for the following projects: land acquisition,\footnote{83} clearance,\footnote{84} installation of streets, parks, and other improvements,\footnote{85} and the acquisition of other properties in urban renewal areas "necessary to eliminate unhealthy . . . conditions . . . or otherwise to remove or prevent the spread of blight or deterioration or to provide land for needed public facilities."\footnote{86} Land may be acquired if it is in a slum or deteriorating area or is vacant land which substantially impairs the growth of the community.\footnote{87} The federal government requires that redevelopment of urban renewal lands by public agencies, including highway departments, and by private redevelopers must be consistent with an urban renewal plan approved by the local public agency and federal authorities.\footnote{88} Experience has shown\footnote{89} an urban renewal plan can include highways as a redevelopment land-use consistent with the requirement that urban renewal lands be used for community improvement and the elimination of slums and blight.

\begin{itemize}
\item \footnote{80} The Chateau Street West Project.
\item \footnote{81} The Mill Creek Project.
\item \footnote{82} Similar procedures apply to other land uses co-ordinated with urban renewal, e.g., mass transportation, parks and schools. \textit{See} text accompanying notes 98-109 infra. Typical of state legislation authorizing the conveyance of urban renewal lands to other agencies is ILL. REV. STAT. ch. 67 \footnote{83}, § 91.115 (1967) which states in part that:
\begin{quote}
When the Department, as agent for the municipality, has acquired title to, and possession of any or all real property in the area of a redevelopment project, the Department (1) may convey to any public body having jurisdiction over schools, parks or playgrounds in the area in which the project is situated such parts of such real property for use for parks, playgrounds, schools and other public purposes as the Department may determine, and at such price or prices as the Department and the proper officials of such public bodies may agree upon. . . .
\end{quote}
\textit{Id.}
\item \footnote{83} 42 U.S.C. § 1460(c)(1) (Supp. V, 1970).
\item \footnote{84} \textit{Id.} § 1460(c)(2).
\item \footnote{85} \textit{Id.} § 1460(c)(3).
\item \footnote{86} \textit{Id.} § 1460(c)(6).
\item \footnote{87} \textit{Id.} §§ 1460(c)(1)(i)-(ii).
\item \footnote{88} The local authority's approval must include findings, \textit{inter alia}, that the plan conforms to plans for development of the locality as a whole and gives consideration to park and recreation facilities. \textit{Id.} §§ 1455(a)(iii)-(iv) (Supp. V, 1970). Approval of the plan by federal authorities is required under § 1451(c), (e).
\item \footnote{89} \textit{See}, e.g., Mill Creek Project.
\end{itemize}
The joint development possibilities accruing from this federal assistance base are available only where the state has enacted urban renewal legislation providing local public agencies (LPA's) with the authority to engage in those activities for which federal funds are available. Forty-nine states have one or more statutes granting LPA's the power to engage in urban redevelopment including the specific statutory authority to cooperate with other public agencies. The powers delegated by the states are generally consistent with federal law although there is considerable variation between states.

The Department of Transportation's procedures facilitate state highway departments' cooperation with local urban renewal agencies. Where the LPA does not receive federal funds for land acquisition the Department of Transportation simply recognizes the LPA as an agent of the state. Where the LPA receives urban renewal assistance from the Department of Housing and Urban Development, the Department of Transportation's formula covering its participation depends on the factual situation leading to the agreement between the state highway department and the LPA. Where the LPA acquires the land prior to any agreement with the highway department and subsequently transfers the land to the highway department there are two methods of reimbursement. If the land is cleared by the LPA prior to the conveyance to the highway department the Department of Transportation's participation will be limited to the fair market value of the cleared land without regard to the acquisition or clearance costs paid by the LPA. If improvements have not been removed prior to the conveyance agreement the Department of Transportation's participation will be the fair market value as determined by the LPA's costs, which may include land clearance. In those instances where the state highway department and the LPA enter into an agreement prior to the acquisition of lands, reimbursement will be based on the fair market value paid by the LPA plus the cost of improvements and their removal if the agreement so provides.

**Housing on New Land**

The primary purpose of the urban renewal program is to improve the con-

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93. Id. For a detailed explanation of the mechanics see J. Cunliffe, Joint Highway—Urban Redevelopment Projects, Univ. of Wisconsin Sixth Annual Highway Law Workshop (1967).
dition of blighted and deteriorating areas. An ancillary objective, however, is the construction of housing on new land to meet the needs of persons displaced by clearance projects. Although the federal law ordinarily limits the construction of urban renewal housing to blighted or deteriorating areas, there are two important exceptions. Federally-assisted urban renewal housing for families and individuals of low and moderate income may be built on either: (1) vacant land necessary for community growth which will be devoted to residential uses, or (2) air rights in areas where highways, tunnels, or railway tracks have a blighting influence on the surrounding area.

The Housing Act of 1964 added authorization for federal participation in the “construction of foundations and platforms necessary for the provision on air rights sites of housing (and related facilities and uses) designed specifically for, and limited to, families and individuals of low or moderate income.” The use of air rights sites for housing developments may receive federal aid so long as it is consistent with the requirement that it be devoted to low and moderate income housing and that it aid in the removal of the blighting influence of the highway.

Other Government Agencies

Urban renewal and highway cooperation involving both land acquisition and air rights development is but one example of federal assistance programs which may be utilized for the joint development of transportation facilities and other public and private programs. A sampling of the opportunities provided by other federal programs follows.

Mass Transit

The Urban Mass Transportation Act of 1964 provides federal assistance for the acquisition and construction of facilities and equipment for mass transportation service in urban areas. The statute provides that federal assistance will be used “in coordinating such service with highway and other

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94. The so-called “blighted vacant” areas (i.e., areas where title problems inhibit development) are included in this definition.
96. Id. § 1460(c)(7). Deck or platform costs may thus be included in urban renewal projects in all project areas. This section also permits the construction of platforms and foundations necessary for the provision of air rights sites for industrial development.
97. For a detailed explanation of the requirements for air rights projects financed by urban renewal funds see Housing and Home Finance Agency, Local Public Agency Letter No. 324 (1965).
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transportation in such areas. Eligible facilities and equipment may include land (but not public highways), buses and other rolling stock, and other real or personal property needed for an efficient and coordinated mass transportation system."\(^9\) Federal grants for approved mass transit projects shall not exceed two-thirds of the portion of the cost of a project which cannot be reasonably financed from revenues.\(^10\)

Joint development and coordinated planning are required by statute.

Except as specified in Section 1604 of this title [relating to emergency programs], no Federal financial assistance shall be provided pursuant to Section 1602 of this title unless the Secretary determines that the facilities and equipment for which the assistance is sought are needed for carrying out a program, meeting criteria established by him, for a unified or officially coordinated urban transportation system as a part of the comprehensively planned development of the urban area, and are necessary for the sound, economic, and desirable development of such an area.\(^11\)

In order to assure coordination of highway and railway and other mass transportation planning and development programs in urban areas, particularly with respect to the provision of mass transportation facilities in connection with federally assisted highways, the Secretary and the Secretary of Commerce shall consult on general urban transportation policies and programs and shall exchange information on proposed projects in urban areas.\(^12\)

Knowing that federal funds are available, states may wish to expedite acquisition of transit right-of-way by granting the highway authority specific powers to acquire land for rapid transit median-strip service. Virginia, for example, has vested its highway department with the power to acquire the additional land if by prior agreement the local transit agency has agreed to pay the cost of it.\(^13\) As in the case of urban renewal-highway cooperation, for obvious

\(^9\) Id. § 1602(a).
\(^10\) Id. § 1603(a).
\(^11\) Id. The Highway Act contains a complementary provision, 23 U.S.C. § 134 (1964), which provides in part that:

It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. . . . After July 1, 1965, the Secretary shall not approve . . . any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section. Id. § 134.

\(^12\) 49 U.S.C. § 1607 (1964). The Secretary of Commerce's responsibilities under this statute have been transferred to the Secretary of Transportation. Id. § 1655(a) (2)(B).

\(^13\) VA. CODE ANN. § 15.1357 (Supp. 1966).
practical reasons the agency acquiring the greatest amount of land—in this case the highway department—usually acquires the land needed by the mass transit agency requiring less land.  

Open Space and Urban Beautification

In most states eminent domain powers have been granted to local parks and recreation departments. In urban areas this may now be combined with federal financial assistance under the Open Space Land and Urban Beautification program.  

As amended by the Housing and Urban Development Act of 1965, the program provides for federal grants up to 50 percent of the total cost to help finance the acquisition, clearance, and development of lands in urban areas for open space uses. Open space uses means any use of open-space land for (1) park and recreational purposes, (2) conservation of land and other natural resources, or (3) historic or scenic purposes.

Acquisition of lands for open space and recreational purposes may be accomplished by the local parks or recreation departments acting in conjunction with highway departments or other agencies. In addition, parks departments may also acquire lands from other agencies such as urban renewal or the highway department. Federal open space funds may be used to assist in the purchase of these lands from other agencies.

Other State and Local Agencies

Land acquisition powers have traditionally been granted to agencies responsible for the development of schools, public housing and transportation. State law also establishes many special purpose agencies such as toll road commissions, port authorities and industrial development commissions. In each case, the legislative act creating the agency must be examined to determine the extent of the authority of the agency to acquire and develop

104. There is, however, no legal obstacle to the reverse. For example, the highway department may sell or lease air rights to local urban renewal agencies for the construction of decks or platforms necessary for the development of housing or industry.


106. Id. §§ 1500a-1500c (Supp. V, 1970). A limited amount of funds is also available for 90 percent demonstration grants. Id. § 1500c.

107. Id. § 1500c(4).

108. As we have seen, the highway departments themselves may develop strips of land within the right-of-way and immediately adjacent thereto for open space uses. The amount of land which may be acquired varies from state to state.

109. Open Space Grants to help finance land acquisition are limited to acquisitions of "title to, or other permanent interests" in lands. Id. §§ 1500a(a), 1500c-1. In those states which allow highway departments to sell unnecessary lands, federal open space assistance would therefore be available, but where the highway department is limited to the lease of these lands the open space provisions appear to preclude participation.
land. For example, not all agencies have the power of eminent domain. Many industrial development authorities may only purchase and sell lands. The answers to such questions as whether it may sell or lease air rights over lands which it has acquired and whether one agency can acquire lands for another public agency depend on the particular provisions of the state statute.

Post-Acquisition Legal Problems

Once the necessary funds have been obtained and the land acquired for the construction of the joint project the major legal problems have been overcome. Nevertheless, the operation and maintenance of a joint project does involve certain legal consideration that should be kept in mind at the time the project is planned.

Power to Sell or Lease Lands

Throughout this article reference has been made to the statutory authority given to various agencies to sell or lease land. Reference will need to be made to the specific statutes to determine the conditions under which such transactions can be made. For example, statutes providing for the sale to private persons of lands no longer needed for highway purposes typically require that the lands be sold at public auction by sealed bids. Urban renewal statutes, however, frequently permit a negotiated sale. Urban renewal statutes also invariably authorize the public agency to attach conditions and restrictions to the sale of land to private developers in order to control the development of the land in accordance with an overall plan—a power other agencies may lack. In some cases the long-term lease of land may prove a more effective method of maintaining control over the future development by private lessees. In general, where land is to be conveyed between two public agencies these restrictions do not apply.

Power to Make Contracts

The successful operation and maintenance of some joint projects may require long-term contracts between various public agencies and/or private developers. As a general rule public agencies are not authorized to enter into contracts in the absence of specific statutory authority; but urban re-

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111. See, e.g., KAN. STAT. ANN. § 17-4750(b) (1964).
112. See, e.g., CONN. GEN. STAT. REV. § 8-137 (1958).
113. See Brownfield & Rosen, Leasing in the Disposition of Urban Renewal Land, 26 LAW & CONTEMP. PROB. 1, 37 (1967).
114. See generally 10 McQuilllin, MUNICIPAL CORPORATIONS 141 (3d ed. 1966).
115. 81 C.J.S. States § 113 (1953).
newal agencies have frequently been granted broad powers to enter into contracts with other public agencies. To the extent that long-term contracts are essential to a project it will be necessary to examine the powers of the particular agency involved.

**Liability Problems**

Where different parts of a joint project are being operated by different public or private agencies a question may arise regarding the liability of the various agencies for injuries that might occur during the operation of the project or for damage to the project as a result of fire or other casualty. For example, in the case of the air rights project over the Trans-Manhattan Expressway at least one personal injury claim has been filed against the Port Authority, the City of New York and the private developer. This claim arose out of an icy spot on the roadway and there is a dispute regarding the cause of the icy condition. Which of the three agencies will ultimately bear the responsibility, if any, is a matter yet to be decided. The impact of liability problems can be softened by careful advance planning which anticipates this type of situation.

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117. The three parties are related to the Trans-Manhattan project in the following way: The Port Authority granted certain “volumes” of air space above the highway to the city which in turn sold the “volumes” to the private developer. The indenture agreement between the Port Authority and the city contained provisions whereby the city agreed to hold harmless and indemnify the Port Authority for certain claims. In the subsequent agreement the private developer agreed to assume the city’s obligations to the Port Authority.
PETER G. KOLTNOW received his undergraduate degree in Civil Engineering at Antioch College and his master's degree in the same field at the University of California. He is Director of the Urban Department, Highway Users Federation for Safety and Mobility. The Federation is supported by 1,500 businesses, industries, and highway users organizations. It was created in January 1970, as a combination of three previously independent organizations: The Automotive Safety Foundation, The Auto Industries Highway Safety Committee, and The National Highway Users Conference.

Mr. Koltnow identifies three stages in the development of a highway system. The first stage emphasizes road construction; the second, efficiency and economy. The third stage looks to the quality of life and emphasizes the environmental impact of highways. The author submits that we are at present in transition between the second and third stages of highway transportation development. The barriers to more satisfactory urban highway development, he argues, are governmental and legal rather than technical. Technical improvements in fuel content, noise control, land use, route location, and traffic flow depend upon proper allocation and execution of administrative responsibility. In this view of the freeway's impact on the city, the most formidable obstacle to satisfactory highway development is faulty decision making.