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EXCESS CONDEMNATION

by

Francis W. Hopkins

Professor of Economics and Sociology, New Jersey College for Women  
Rutgers University, The State University of New Jersey

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Alfred E. Driscoll, Governor  
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## EXCESS CONDEMNATION

### Definition

Under the power of eminent domain the state, or its subdivisions or agencies when authorized by the state, may take private property for public use. This attribute of sovereignty requires in the United States no express mention in the constitution, but compensation must always be paid to the former owner. Most states have, however, made some provision in their constitutions for such taking of private property, often copying the wording of the Fifth Amendment to the Federal Constitution to specify that private property may not be taken for public use without just compensation.<sup>1</sup>

Excess condemnation relates to this process of taking private property. It has been defined as follows:<sup>2</sup>

"Excess Condemnation is the practice of taking by public authority under the right of eminent domain more land than is actually needed for a contemplated improvement, with a view to selling the excess when the improvement is finished. It is thus an extension of the power of taking private property for a public purpose on payment of just compensation."

### Legal Aspects

In the United States the power of eminent domain is usually restricted, in the absence of an extension of the power by constitutional amendment, to the condemnation of such land as is required for actual use. In some states -- California, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Rhode Island, Utah -- constitutional amendments have been adopted to authorize the taking of more land than is actually needed at the time in order to

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1. New York Constitutional Convention Committee, Report, 1938, Vol. VI, pp. 106-109

2. Encyclopedia of the Social Science, "Excess Condemnation", Vol. V, p. 663

serve certain other objectives. In a few cases where constitutions have been elastic enough, this end has been achieved by general statutes without the necessity for constitutional amendment<sup>3</sup>. For the most part, however, the courts in the United States have held unconstitutional statutes for excess condemnation on the ground that it is not for a public purpose.<sup>4</sup> In New Jersey, under the decisions of the courts the use of excess condemnation probably requires a constitutional amendment.<sup>5</sup> The fee to land cannot be taken by condemnation -- only an easement. The purposes for which excess condemnation is urged and the arguments advanced against it are discussed below.

#### Purposes and Practice of Excess Condemnation

Three main purposes are urged as a justification for excess condemnation<sup>6</sup>: (1) consolidation of remnants of lots; (2) controlling the character of the neighborhood surrounding the improvement; and (3) recouping the cost of the improvement.

#### Consolidation of Remnants of Lots

When remnants of lots are left in private hands after part has been taken under eminent domain, they are not promptly attached to neighboring property. "The result is that the usefulness of the street is impaired. The practice of condemning such areas is common in Europe."<sup>7</sup> Condemnation proceedings have often left owners with parcels of such size and shape as to be practically worthless. The result was both

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3. Ibid, pp. 663-664

4. Illinois Constitutional Convention, 1920, Bulletin 7, "Eminent Domain and Excessive Condemnation"

5. New Jersey, Record of Proceedings before the Joint Legislative Committee ... as to Change in the New Jersey Constitution, 1942, p. 918

6. Encyclopedia of the Social Sciences, supra, pp. 663-664; Illinois, Bulletin 7, supra, pp. 504-505;

Massachusetts, Bulletin 19 of the Constitutional Convention, 1917-1918, "Excess Condemnation," Vol. II, p. 112

7. Illinois, Bulletin 7, supra, p. 504

protracted litigation and social loss due to the fact that continuation of these minute subdivisions of land in private ownership prevented the erection of buildings appropriate to the improved conditions.<sup>8</sup> Excess condemnation, it is claimed, makes possible the consolidation and favorable sale of such remnants.

In providing by constitutional amendment for excess condemnation, the states of Massachusetts, New York, Pennsylvania and Rhode Island have limited the power to the taking of only sufficient land for suitable building sites abutting on the improvement. California, in its constitutional authorization for excess condemnation, limits the taking to parcels lying within 150 feet of the closest boundary of the improvement, provided that when parcels lie partially within the limit of 150 feet, only such portions may be acquired which do not exceed 200 feet from the closest boundary of the improvement.<sup>9</sup>

#### Controlling the Character of the Neighborhood Surrounding the Improvement

The use of eminent domain for this purpose has been common in Europe. In the United States, commissions which have studied this aspect of excess condemnation and individual writers have favored it. Some writers, however, have thought that the power would not be properly exercised,

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8. New York Constitutional Committee, Report, 1938, Vol. VI, p. 147; Groves, Harold M. Financing Government, New York, rev. ed., 1945 p. 405: "Excess condemnation generally has been used in the United States to wipe out uneconomic property lines resulting from the widening of a street or the construction of a diagonal thoroughfare. Occasionally it has been used to ensure some improvement against having its beauty and enjoyment marred by objectionable uses of adjoining land. Odd remnants of territory left after relocation of a highway may be useful in private hands only for shoe-shining, rubbish piles, or other undesirable purposes. If such land is purchased by the public, it can at least be landscaped. Undesirable uses can be barred in the government's contract of sale or lease."

9. Article I, Sec. 14 $\frac{1}{2}$

that the danger of political favoritism overrides the economic advantage in view, that the financial results would be uncertain, and that it may be better to rely on the zoning power to accomplish the purpose.<sup>10</sup> On the other hand, it is urged that controlling the character of the neighborhood surrounding the improvement is necessary to facilitate good city planning. The history of excess condemnation indicates that where the aesthetic protection of public improvements is an important consideration, excess condemnation is a useful tool.<sup>11</sup> The constitutional provisions of Michigan, Ohio, Utah and Wisconsin are sufficiently broad to provide for this purpose.

#### Recouping the Cost of the Improvement

When public improvements are made there is often a large increase in real estate values in the surrounding area. To some extent, special assessments on the benefitted property may provide reimbursement, but it is claimed that more of the expenditures could be recouped if the municipality condemned the surrounding area and sold it later after the improvement was completed. For example, Worcester, Massachusetts, used excess condemnation to finance the widening of a street<sup>12</sup> and it is said that the city sold the excess land condemned at three times what it cost.<sup>13</sup>

However, it is a mistake to put too much emphasis on this point, for the amount of recoupment is usually below expectations.<sup>14</sup> It is pointed

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10. Illinois, Bulletin 7, supra, p. 504

11. Encyclopedia of the Social Sciences, supra, pp. 663-664

12. Massachusetts, Bulletin 19, supra, pp. 121-122

13. Groves, p. 405

14. Encyclopedia of the Social Sciences, supra, p. 663

out that acquisition by eminent domain is an expensive process, that ultimate disposal is often long delayed and carrying charges must be borne, and that sometimes politics play a part in the sale of property to favored purchasers at low prices. Actual experience with excess condemnation has been somewhat disappointing, particularly in regard to the matter of recoupment.<sup>15</sup>

#### Variations in Excess Condemnation Constitutional Provisions

There is considerably variation as to the nature of the public improvements to which excess condemnation may be applied, the amount of land that may be taken, and the requirements for executory legislation.<sup>16</sup> Massachusetts limits the right to take land for the purpose of streets; Pennsylvania limits the improvement to highways or streets connecting with bridges crossing streams, or tunnels under streams which form boundaries between Pennsylvania and any other state; New York to parks, public places, highways or streets; California to memorial grounds, streets, squares, parkways and reservations; Rhode Island to public highways, streets, places, parks, or parkways. Ohio, Utah and Wisconsin do not limit the nature of the improvement.

The constitutional amendments of four states limit the right of excess condemnation to taking only land suitable for building sites abutting on the improvement: Massachusetts, New York, Rhode Island and Pennsylvania. California limits the quantity of land taken to a specified number of feet from the improvement.

In some states the constitutional amendment provides that authorization

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15. Encyclopedia of the Social Sciences, supra, p. 664

16. Massachusetts, Bulletin 19, supra, p. 117

for the exercise of excess condemnation must be obtained from the legislature, while in other cases the grant of power is made directly to the municipalities.<sup>17</sup>

Examples of Constitutional Provisions for Excess Condemnation

California: The State, or any of its cities or counties, may acquire "lands for memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, ..." and after completion of improvements may convey the rest with reservations concerning future use so as to protect the "improvement and their environs and to preserve the view, appearance, light, air and usefulness of such public works." (Art. I, Sec. 14 $\frac{1}{2}$ )

Massachusetts: "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, or by a county, city or town, 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 after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions." (Article of Amendment XXXIX)

New York: "The legislature may authorize cities and counties to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased." (Art. I, Sec. 7 (e) )

Ohio: "A municipality ... 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

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17. Ibid, p. 118

with such restrictions as shall be appropriate to preserve the improvement made." (Art. XVIII, Sec. 10)

Wisconsin: "The state or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works."  
(Art. XI, Sec. 3a)

Model Constitution of the National Municipal League (Partial Revision, 1946): "The State, or any civil division thereof, 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. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or acquired; and such bonds, when made a lien only against the property so appropriated or acquired, shall not be subject to the restrictions or limitations on the amount of indebtedness of any civil divisions prescribed by law." (Art. VII, Sec. 708)

### Excess Condemnation in New Jersey

The power of eminent domain is covered in two sections in the present Constitution:

Art. I, Par. 16: "Private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore until the Legislature shall direct compensation to be made."

Art. IV, Sec. VII, Par. 8: "Individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners."

In 1915 a proposal for an amendment authorizing excess condemnation was on the ballot. There was only scattered editorial objection to the amendment which provided that the Legislature might authorize the State or its subdivisions to take more land than needed for actual construction of parks, public places,



highways or streets, provided that no more land was taken than was sufficient to form suitable building sites abutting thereon.<sup>18</sup> However, the amendment was "carried down to defeat on the skirts of the woman suffrage proposal which was also on the ballot."<sup>19</sup>

The proposed revision of the Constitution of 1942, in addition to recommending a change in the wording of the above quoted article<sup>20</sup>, provided for excess condemnation in connection with highways, parkways or other public improvements (Art. III, Sec. VII, Par. 7):

"Any agency of the State or any political subdivision thereof which is empowered to take or otherwise acquire private property for any public highway, parkway, other public improvement or public place, may acquire the fee or any lesser interest, and may be empowered by law to take or otherwise acquire the benefit of a fee or restrictions or easements upon abutting property to preserve and protect the public highway, parkway, other public improvement or public place."<sup>21</sup>

The 1944 proposed revision (Art I, 16 and Art. III, Sec. VI, Par. 10) retained the existing provisions relating to eminent domain (Art. I Par. 16 and Art. IV, Sec. VII, Par. 8). This revision likewise included a provision for excess condemnation with a slight change in wording as compared with the 1942 proposal. The 1944 provision for excess condemnation read as follows (Art. III, Sec. VI, Par. 6):

"Any agency or political subdivision of the State or any agency of a political subdivision thereof, which is empowered to take or otherwise acquire private property for any public highway, parkway, place, improvement, or use, may be authorized by law to take or otherwise acquire the fee or any lesser interest, and may be authorized by law to take or otherwise acquire a fee in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the public highway, parkway, place, improvement, or use; but such taking shall be with just compensation."

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18. Illinois Bulletin 7, supra, Appendix No. 4, p. 511

19. Erdman, Charles R. New Jersey Constitution -- A Barrier to Governmental Efficiency and Economy, Princeton, 1934, p. 20.

20. See Report of the Commission on Revision of the New Jersey Constitution, 1942, p. 34 (Art. I, Par. 16)

21. Ibid, p. 40

This provision for excess condemnation followed fairly closely the recommendation of the Committee of the New Jersey Federation of Official Planning Boards, <sup>22</sup> and corresponds to the provision for excess condemnation adopted in Wisconsin, rather than to the provisions of Massachusetts and New York in their restrictions of the property acquired to just the land necessary for building lots.

Use of Eminent Domain and Excess Condemnation for Housing Construction Programs and Urban Redevelopment

Massachusetts in 1915 adopted a constitutional amendment to authorize the taking of land to relieve congestion of population and to provide homes (Articles of Amendment XLIII):

"The General Court shall have power to authorize the Commonwealth to take land and to hold, improve, sub-divide, build upon and sell the same, for the purpose of relieving congestion of population and providing homes for citizens: provided, that this amendment shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof."

Authorization to cities to undertake slum clearance and rehabilitation is included in the 1946 revised Model State Constitution of the National Municipal League (Art. VIII, Sec. 804 (i) ), containing a grant of power to them:

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22. This recommendation (mimeographed, 1944) read as follows: "Any agency of the State or any political subdivision thereof, which is empowered to take or otherwise acquire private property for any public highway, parkway, other public improvement or public place, may be authorized by law to take or otherwise acquire the fee or any lesser interest, and may be authorized by law to take or otherwise acquire a fee in, easements upon, or the benefit of restrictions upon, abutting property to preserve and protect the public highway, parkway, other public improvement or public place. No such taking shall be without just compensation. When the fee is acquired for property in excess of that needed for direct public use, the remainder may be sold or leased, with restrictions for the preservation and protection of the public highway, parkway, other public improvement or public place."

"To provide for slum clearance, the rehabilitation of blighted areas, and safe and sanitary housing for families of low income, and for recreational and other facilities incidental or appurtenant thereto: and gifts of money or property, or loans of money or credit for such purposes shall be deemed to be for a city purpose."

A similar power, but with more detailed provisions, was included in the 1944 recommendations of the Committee of the New Jersey Federation of Official Planning Boards.<sup>23</sup> The New York Constitution amendments adopted in 1938 contained not only a provision for the use of the power of eminent domain for clearance and rehabilitation of substandard areas but added the right to take certain excess property. The provisions in the New York Constitution are as follows (Art. XVIII):

"Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto."(Sec.1)

"Any agency of the state, or any city, town, village or public corporation, which is empowered by law to take private property by eminent domain for any of the public purposes specified in section one of this article, may be empowered by the legislature to take property necessary for any such purpose but in excess of that required for public use after such purpose

23. EMINENT DOMAIN AND URBAN REDEVELOPMENT.

"(a) Any municipality may acquire or assemble the real property of any area within its limits, to facilitate the development or redevelopment of such area in accordance with a plan for such development or redevelopment, whether the uses to which such area is to be devoted, according to the plan, be either public uses or private uses or both; and the acquisition or assembly of such real property, as a step in the accomplishment of the development or redevelopment, is hereby declared to be a public use. The Legislature shall make laws governing the procedure for the exercise of this power, the holding, leasing or selling of the property under controls to be exercised by the municipality, and the method of financing such acquisition or assembly.

"(b) The Legislature may authorize the organization of corporations or authorities to undertake such development or redevelopment, and may authorize municipalities to exempt their improvements from taxation, in whole or in part, for a limited period of time, under conditions as to special public regulation to be specified by law or by contract between any such corporation or authority and the municipality; provided that, during the period of tax limitation the profits of any corporation, and the dividends paid by it shall be limited by law.

"(c) The Legislature may also provide, in such manner, by such means and

shall have been accomplished; and to improve and utilize such excess, wholly or partly for any other public purpose, or to lease or sell such excess with restrictions to preserve and protect such improvement or improvements." (Sec. 8)

"Subject to any limitation imposed by the legislature, the state, or any city, town, village or public corporation, may acquire by purchase, gift, eminent domain or otherwise, such property as it may deem ultimately necessary or proper to effectuate the purposes of this article, or any of them, although temporarily not required for such purposes." (Sec.9)

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upon such terms and conditions as it may prescribe, for low-rent housing for persons of low income as defined by law, or for the clearance, re-planning, reconstruction, and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto."

EXCESS CONDEMNATION

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CALIFORNIA, Art. I, Sec. 14 $\frac{1}{2}$  (as amended 1928)

The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

The Legislature may, by statute, prescribe procedure.

## EXCESS CONDEMNATION

### MASSACHUSETTS, Articles of Amendment XXXIX (1911)

Article ten of part one of the Constitution is hereby amended by adding to it the following words:---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, or by a county, city or town, 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 after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

**EXCESS CONDEMNATION**

**MISSOURI, Art. I, Sec. 27 (1945)**

Acquisition of Excess Property by Eminent Domain - Disposition under Restrictions - That in such manner and under such limitations as may be provided by law, the state, or any county or city may acquire by eminent domain such property, or rights in property, in excess of that actually to be occupied by the public improvement or used in connection therewith, as may be reasonably necessary to effectuate the purposes intended, and may be vested with the fee simple title thereto, or the control of the use thereof, and may sell such excess property with such restrictions as shall be appropriate to preserve the improvements made.



## EXCESS CONDEMNATION

OHIO, Art. XVIII, Sec. 10 (as amended 1912)

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. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

## EXCESS CONDEMNATION

PENNSYLVANIA, Art. XV, Sec. 5 (as amended 1933)

The General Assembly may authorize cities to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating highways or streets connecting with bridges crossing streams, or tunnels under streams, which form boundaries between this and any other State, but the additional land and property, so authorized to be taken, shall not be more than sufficient to form suitable building sites on such highways or streets; nor shall the authority hereby conferred be exercised in connection with the laying out, widening, extending or relocating of any highway or street at a point more than three miles distant from the approach to any such bridge or tunnel. After so much of the land and property has been appropriated for such highways or streets as is needed therefor, the remainder may be sold or leased and any restrictions imposed thereupon which will preserve or enhance the benefit to the public of the property actually needed for the aforesaid public use.

## EXCESS CONDEMNATION

RHODE ISLAND, Art. V, Sec. 17a (as amended 1916)

The General Assembly may authorize the acquiring or taking in fee by the State, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways: Provided, however, that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, street, place, park or parkway. After so much of the land and property has been appropriated for such public highway, street, place, park or parkway as is needed therefor, the remainder may be held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease, the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the State or city or town is willing to sell or lease the same.

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## **EXCESS CONDEMNATION**

**WISCONSIN, Art. XI, Sec. 3a (as amended 1912)**

The State or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works.