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ACQUISITION OF DEVELOPMENT RIGHTS: A MODERN LAND USE TOOL

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I. INTRODUCTION

When the State of Florida or a political subdivision thereof proposes highways, parks, or other public uses requiring acquisition of private land, the practice today is to immediately condemn the land if funds have been appropriated. In cases where the land will not be devoted immediately to the public use, either the condemnor must wait until the needed funds have been appropriated, during which time the land will often be developed;[1] or, if funds are available,[2] the land will be condemned immediately although it may not be devoted to the public use for several years.[3] In

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1. Recent instances have occurred in South Florida. Earl Crooks, Hialeah zoning consultant, pointed out that the city was legally unable to refuse the granting of building permits for the construction of warehouses on land that is slated for highway right-of-way purposes:

> Metro officials say the deal fits a pattern of land transactions in Hialeah which have cost taxpayers thousands of extra dollars for the acquisition of recently improved right of way land.

The Miami Herald, Nov. 29, 1968, § D, at 1, cols. 6-8.

2. Funds for advanced acquisitions are very limited, when they exist at all. For example, in Dade County, for the fiscal year 1969, the Highway Department has been budgeted $75,000 for all projects; only what is left after immediate projects are financed can be used for advanced acquisitions. Interview with Charles Crumpton, Assistant Director of the Metropolitan Dade County Planning Department, in Miami, Dec. 31, 1968.

For parks and recreation areas, there are no funds at all budgeted for advanced acquisitions for Dade County in the fiscal year 1969. Interview with Robert Perkins, Chief of Planning and Programming, Metropolitan Dade County Park and Recreation Department, in Miami, Dec. 31, 1968.

3. For authority for such advanced acquisition *see, e.g.*, Carlor Co. v. City of Miami,

the latter alternative, during the time which elapses before the land is actually developed for the public use, the private use to which the land was put ceases, and the economic benefit—profit to the land-owner, tax revenue to the state, and the land's output for society—is lost.

The purpose of this article is to show that through a modern method of property acquisition—specifically, through acquisition of the development rights of land—both the problem of increased condemnation expenses caused by development of the land to be condemned and the problem of the three-fold economic loss described above can be avoided.

It must be pointed out, however, that a landowner's right to develop his land to its most profitable use is basic to the concept of land ownership. It is constitutionally protected.[4] Yet it is subject to limitation;[5] and the constitutional protection which it receives, as a property interest, is that a taking of the land must be based on a proper exertion of the police power and must be one for which just compensation is made.[6] The concept of development right acquisition is based on the recognition of this right, and further, on the recognition that a landowner's interest in developing his land is a severable component of his entire interest in, and therefore of, the value of the land. As such, it is subject to acquisition by the state, through condemnation, for example. The following example will demonstrate how such acquisition might occur:

> *A* owns an orange grove through which a highway is planned. The value of the land as an orange grove is $2,000 per acre. Yet the fair market value of the land is $4,500 per acre because it could be developed into a housing subdivision.

Under methods presently existing, if the State Road Department does not have immediate funds to condemn the land, it might well have to condemn the land after housing has been constructed on it, obviously at amounts greater than $4,500 per acre. Yet if it has sufficient funds to condemn the land at $4,500 per acre, the economic benefit of *A*'s income, the state's tax revenues from the land, and the income from oranges otherwise produced will be lost during the time that would elapse before the highway could be constructed.

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62 So.2d 897 (Fla. 1953); State Road Dept. v. Southland, Inc., 117 So.2d 512 (Fla. 1st Dist. 1960), and authority contained therein.

4. Governmental action in the form of regulation which is so onerous as to constitute a taking, constitutionally requires compensation. *See* Goldblatt v. Hempstead, 369 U.S. 590 (1961), and authority cited in 26 AM. JUR. 2d *Eminent Domain* § 157 (1966).

For example, interference with the right to develop land by erecting billboards has been held unreasonable and invalid, as not being necessary to the health, safety, and welfare of the state or community, and therefore a taking of private property for public use without compensation. Anderson v. Shackelford, 74 Fla. 36, 76 So. 343 (1917); *see also* Annot., 72 A.L.R. 469 (1931); Annot., 58 A.L.R.2d 1318 (1958).

5. For example, in the area of billboard construction (*see* note 3 *supra*), regulations as to size and height, manner of construction, and maintenance will be upheld if they tend to protect public safety, health, morals, or general welfare. *See* St. Louis Poster Adv. Co. v. St. Louis, 249 U.S. 269 (1918), and *generally* 3 AM. JUR. 2d *Advertising* § 14 (1962).

6. *See, e.g.*, Delaware, L. & W.R.R. v. Town of Morristown, 276 U.S. 182 (1928).

A development right acquisition act presents a much better alternative. First, the development right value of *A*'s property would have to be computed; it would be the difference between the value of the land at its present use ($2,000 per acre) and the value of the land if developed ($4,500 per acre), or $2,500 per acre. Secondly, it is this development right value component of *A*'s interest in his property which should be the subject of immediate acquisition. After such acquisition, *A* could continue to produce oranges on his land, profiting and paying taxes as in the past, or he could sell the interest which he retained. Finally, when the State Road Department is ready to begin road construction, it could condemn the remaining interest in the land and acquire it at its current value as an orange grove (perhaps more, or less, than the $2,000 per acre value which existed at the time of the acquisition of the development use). Therefore, the economic losses of *A*, of the state, and of society would be avoided; the state would not have had to risk the condemnation of developed land, and *A* will have been fully and fairly compensated.

II. Existing Authority for a Development Right Acquisition Statute

A. *The Development Right Interest as a Severable Component of Value*

In the leading case of *Sutton v. Frazier*,[7] the legislature's power to determine the nature of the interest to be taken through condemnation was recognized. The court said,

> [T]he legislature has full power to determine the nature of the title to be acquired by the condemner [*sic*], since the constitution of this state places no limitation or restriction on the nature of the title to lands which may be acquired by the process of eminent domain.[8]

The Florida constitution similarly places no limitation or restriction on the nature of the title which may be acquired. In the sections which deal with eminent domain,[9] the general terms of "property" and "private property" are used.

The Florida legislature has exercised its power to determine the nature of the title to be acquired and has progressively recognized different interests. The first condemnation statute limited the right which could be taken to that of an easement, or right to use the property.[10] Subsequently, Florida's condemnation statutes provided specifically for "an easement, an estate for years, or the fee simple title . . ."[11] or generally

7. 183 Kan. 33, 325 P.2d 338 (1958).
8. *Id.* at 41, 325 P.2d at 346.
9. Fla. Const. Decl. of Rights § 9, Fla. Const. art. X § 6 (1968).
10. Fla. Rev. Stat. § 1564 (1892).
11. Fla. Stat. § 73.20 (1963).

"the particular right or estate in said property sought . . . ."[12] The current statutes refer simply to "the estate or interest in the property . . . ."[13] These statutes alone are perhaps broad enough to allow condemnation of the development right; in any case, they indicate the legislature's recognition that various interests in land can be acquired through eminent domain. The development right is another such interest and component of value, and for the reasons mentioned should be specifically recognized by statute to be subject to condemnation.

B. *General Precedent*

A development right acquisition act, entitled the English Town and Country Act of 1947,[14] has existed in England since shortly after World War II. It has been the means by which the development rights to land have been expropriated with compensation, leaving the landowner with the right to use and enjoy the land subject to the government's right to keep the land undeveloped.

In the United States, similar results have been achieved through the use of the power to condemn easements. Development rights have, in effect, been taken by statutes which permit the state or municipality to condemn easements[15] for purposes such as to conserve future rights of way and scenic easements for highways.[16] In the leading case of *United States v. Causby*,[17] the court found that a flight easement had been taken (and ruled that compensation was necessary). This type of taking not only condemns definite development rights but, in cases such as *Causby*, also takes the existing use.

Set-back ordinances, which necessarily restrict development rights, also have been upheld.[18] In one case a city was held to have the power to condemn interests in strips of land abutting an avenue, thereby restricting the owner's use to ornamental courtyard purposes.[19]

Easements restricting building heights similarly have been upheld (when compensation is given).[20] The Supreme Court of Minnesota has recognized that the concept of condemnation includes the taking of certain development rights if the taking is for a public use.[21] The court

12. *Id.* § 73.12.

13. FLA. STAT. §§ 73.021(3), 73.101 (1967); *see also* § 74.061.

14. 10 & 11 Geo. 6, c. 51.

15. *E.g.*, FLA. STAT. § 73.20 (1963).

16. *E.g.*, WIS. STAT. ANN. § 84.09(1) (1957).

17. 328 U.S. 256 (1946).

18. *See, e.g.*, City of Miami v. Romer, 73 So.2d 285 (Fla. 1954), where the court said that if the ordinance is found to be a valid exercise of the police power the question remains whether there has been such a deprivation of a beneficial use as to amount to a compensable taking.

19. *In re* City of New York, 57 App. Div. 166, 68 N.Y.S. 196, *aff'd mem.*, 167 N.Y. 624, 60 N.E. 1108 (1901).

20. *See, e.g.*, Parker v. Commonwealth, 178 Mass. 199, 59 N.E. 634 (1901); Piper v. Ekern, 180 Wis. 586, 194 N.W. 159 (1923).

21. State *ex rel.* Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920).

defined the restriction on the land use as a "taking,"[22] and upheld the condemnation statute which prohibited certain classes of buildings, on the ground that a taking to insure fit and harmonious surroundings was a taking for a public use.

C. *Acquisition of Development Rights through Open-Space Legislation*

The Federal Housing Act of 1961[23] led the way, by providing federal assistance, to the condemnation of land for the public needs of "necessary recreational, conservation, and scenic areas . . . ."[24]

"Open-space land" is defined in the act as

> any undeveloped or predominantly undeveloped land in an urban area which has value for (A) park and recreational purposes, (B) conservation of land and other natural resources, or (C) historic or scenic purposes.[25]

Since the land is in an urban area and it is "undeveloped" or "predominantly undeveloped," it is clear that its greatest component of value is the development right. The terminology used in the act is broad enough to encompass the acquisition of the development right (so long as it is not acquired only for a period of years), as section 1500a provides that the Home Finance Administrator is authorized "to help finance the acquisition of title to, *or other permanent interests in*, such land." (Emphasis added.)

States have enacted open-space legislation in response to the federal act.[26] The language regarding the interest acquirable usually is broad enough to encompass the acquisition of the development right. The following excerpt from the California act is typical:

> [A]ny country or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee *or any lesser interest or right* in real property in order to preserve, *through limitation of their future use*, open spaces and areas for public use and enjoyment.[27]

The New Jersey act specifically provided for what would be considered the acquisition of the development right. Consistent with the American trend it is termed a "conservation easement," as contrasted with the English method discussed under section II B, above. The act provides:

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22. *Id.* at 2, 176 N.W. 160.
23. §§ 701-706, 75 STAT. 185 (1961), 42 U.S.C.A. §§ 1500-1500(e) (Supp. 1961).
24. *Id.* § 1500(b).
25. *Id.* § 1500(c).
26. *See, e.g.*, CAL. GOV'T CODE §§ 6950-54; FLA. STAT. § 193.202 (1967); MD. ANN. CODE art. 66C, § 357 A (Supp. 1960); N.J. STAT. ANN. § 13:8A to 8A-18 (1961); N.Y. MUNIC. LAW § 247 (Supp. 1961).
27. CAL. GOV'T CODE § 6950 (emphasis added).

> Without limitation of the definition of "lands" herein, the commissioner may acquire, or approve grants to assist a local unit to acquire: . . . (b) an interest or right consisting, in whole or in part, of a *restriction on the use of land by others including owners of other interests therein* . . . .[28]

If the commissioner were to acquire the development right, the interest acquired would be a restriction on the use of the owner of the fee, who falls within the statute.

Florida presently has a progressive act, discussed below,[29] whereby open space may be set aside for recreational or park land purposes.[30] This statute is based upon a landowner's taking the initiative to convey development rights to the governing board of any county of this state in exchange for tax assessment benefits, rather than on the state's acquiring the development right through eminent domain.

D. *The Development Right Acquisition Power by Implication*

Although the acquisition of development rights is perhaps the most modern idea in the law of property today, several established legal concepts seem to point in its direction to such an extent as to imply an existence of the power.

1. ADVANCED ACQUISITION

Advanced acquisition, or condemnation for a future use, was recognized by the United States Supreme Court as early as 1923 in the case of *Rindge Co. v. Los Angeles County*.[31] Florida was one of the first states to accept the doctrine.[32] Six other states have similarly accepted it;[33] indeed, no state legislature which has considered it has rejected it. Under the doctrine, which will be discussed below in the light of the constitutional requirement of "necessity," a condemnor has the power to condemn property even though it will not be devoted to the public use until several years into the future.[34]

As was pointed out in the introduction to this paper, the economic benefits to the individual, to the state, and to society in general are usu-

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28. N.J. STAT. ANN. § 13:8A-12 (1961) (emphasis added).

29. *See* discussion under § IV(A) *infra*.

30. FLA. STAT. § 193.202(1) (1967).

31. 262 U.S. 700 (1923). For another recent federal case, *see* Chapman v. Public Utility Dist. No. 1, 367 F.2d 163 (9th Cir. 1966).

32. *See* discussion under § III(C) *infra*.

33. Berry v. Alabama Power Co., 257 Ala. 654, 60 So.2d 681 (1952); State *ex rel.* Sharp v. 0.62033 Acres of Land, 49 Del. 174, 112 A.2d 857 (1955); Pike County Bd. of Education v. Ford, 279 S.W.2d 679 (La. App. 1967), *application denied*, 251 La. 229, 203 So.2d 558; Erwin v. Miss. State Highway Comm'n, 213 Miss. 895, 58 So.2d 52 (1952); State *ex rel.* Hunter v. Super. Ct. for Snohomish County, 34 Wash. 2d 214, 208 P.2d 866 (1949).

34. Seven years was upheld in Carlor Co. v. City of Miami, 62 So.2d 897 (Fla. 1953), *cert. denied*, 346 U.S. 861 (1966).

ally lost during the time which elapses between condemnation and development of the land for public use. It would certainly seem that since jurisdictions have accepted the advanced acquisition concept with its inherent economic loss weakness, they would be willing to accept a development right acquisition concept which would ultimately bring about the same result but without the economic loss problem.

A difference between the two concepts which might lead to criticism of the latter lies in the fact that development right acquisition will probably lead to more condemnations for public needs than have previously been accepted under the case law. Although this objection is dealt with in the constitutional section below, it seems that the public interest in avoiding the three-fold economic loss, and the public interest in long range planning, would justify such a result. It is also to be noted that the case law has not set a limit, but has dealt with each case on its particular facts.

2. RESTRICTIONS OF USE UNDER POLICE POWER

Insofar as it limits the use of land, the entire body of zoning law[35] can be viewed as a type of development use acquisition. Although it is acquisition without compensation, it is justified when used as a legitimate exercise of the police powers of the state, *i.e.*, when it is done to promote public health, safety, morals, or welfare.[36] It is not suggested that the term "public welfare" should include an avoidance of the economic loss that results without a development use acquisition act, so as to enable the state to condemn development rights without compensation under the police power. But it is to be pointed out that, even without compensation, the state does have the power to restrict the use of land for the general welfare of the public. It seems not so great a step to recognition of the state power to restrict land to an existing use by means of the compensated acquisition of development rights, in order to prevent public economic loss.

III. CONSTITUTIONAL CONSIDERATIONS

A. *Public Use*

In the exercise of the power of eminent domain, states, as opposed to the federal government, are not necessarily restricted by a "public use" requirement. The Supreme Court of Florida, in *Demeter Land Co. v. Florida Public Service Co.*,[37] pointed out this somewhat surprising fact by saying:

> The Fifth Amendment of the Constitution of the United States prohibits the taking of private property for a "public

35. *See generally*, 58 AM. JUR. *Zoning* (1948), 101 C.J.S. *Zoning* (1958).

36. *See generally*, 58 AM. JUR. *Zoning* § 26 (1948), 101 C.J.S. *Zoning* § 7 (1958) and authority contained therein.

37. 99 Fla. 954, 128 So. 402 (1930).

> use" without just compensation. It is necessarily implied from the language there used that private property cannot be taken for any other purpose without the consent of the owner. However, this amendment was not intended to limit the powers of the state governments, but to operate on the national government alone.[38]

The court pointed out that many states have constitutional provisions similar to the federal one requiring a "public use," but after analyzing the appropriate sections of the Florida constitution, concluded that there is no "public use" requirement contained therein.[39] The court explained that "[t]he framers of the Constitution left it to the Legislature to declare the use for which property may be taken without the consent of the owner . . . ."[40]

Under the *Demeter Land Co.* rule it was clear, then, that if a "public use" requirement existed in Florida, it did so because the legislature wrote it into a particular eminent domain statute. The statute under consideration in the *Demeter Land Co.* case did contain such a requirement; the court, therefore, had to face the problem of defining the term "public use" and cited the following as "one of the best definitions" it had found:

> A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain.[41]

Before discussing the public use requirement in connection with the development right condemnation statute under contemplation, it is necessary to trace the development of the case law since *Demeter*. Despite the Supreme Court's holding in *Demeter*, the court subsequently stated[42] that when the state legislature delegates the power of eminent domain, it must limit the exercise of that power to areas where there is a "public interest."[43] In other words, the court has imposed the public use requirement where the constitution has not done so, at least in areas where the state has delegated its eminent domain power.[44]

Subsequent Florida decisions have also refused to adopt the liberal view of the court in *Demeter*. In *Peavy-Wilson Lumber Co. v. Brevard*

38. *Id.* at 961-62, 128 So. at 405-406.
39. *Id.* at 963, 128 So. at 406.
40. *Id.*
41. *Id.*
42. Orange County v. Fordham, 160 Fla. 259, 34 So.2d 438 (1948).
43. *Id.* at 264, 34 So.2d at 440.
44. It is interesting to note that the court cited no authority for the requirement in such a case, however.

County,[45] the court refused to allow a county to condemn private land for public hunting and fishing purposes. The court did not, however, restrict the public use requirement so as to prohibit condemnation for public park purposes; rather, it based its decision on the fact that the legislature had written a "public *necessity*" (emphasis added) requirement into the applicable statute.[46] The court admitted that there was a statute passed in 1925 regarding the acquisition of land for playground and recreational centers which did not impose a "necessity" requirement, but pointed out that the statute did not expressly grant the power of eminent domain. Furthermore, the court refused to decide whether the power could be implied under the statute. Further evidence of the fact that the court had not intended to restrict in general "public use" to "public necessity" is the statement that, absent the amendment to Florida Statutes section 127.01 requiring "public necessity," "a presumption would have arisen in favor of the county's resolution to take the land."[47]

The *Peavy-Wilson* decision was subsequently cited for the general proposition that "[a] first essential for the acquirement of private property by this great power [*i.e.*, eminent domain] is, that it shall be for a public purpose."[48] In other decisions, the courts apparently thought the idea of public use to be so ingrained in Florida law that no citation to authority was made in support of the proposition that private property can be condemned only when it will serve a public purpose.[49] Two recent decisions were based on the reasoning that a taking of private property, if not for public use, would violate constitutional rights. In one of these cases[50] federal rights guarded against state interference by the fourteenth amendment were said to require that the taking be for a public purpose; in the other,[51] the simple constitutional (no reference was made to which constitution) guarantees of due process and prohibition against taking without compensation were said to "decree that the use for which the property is taken must be a public use . . . ."[52]

Finally, it is abundantly clear now that a public purpose requirement exists in Florida as the Constitution of Florida, as recently amended, imposes one.[53] Of course, the term will have to be defined, and this probably will be done in the light of the case law definitions of "public use." The clearest definition of public use is still the one given in *Demeter*.[54] It is against this definition that condemnation of development rights will be tested.

45. 159 Fla. 311, 31 So.2d 483 (1947).
46. FLA. STAT. § 127.01(2) (1945).
47. Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 316, 31 So.2d 483, 486 (1947).
48. State v. Town of North Miami, 59 So.2d 779, 785 (Fla. 1952).
49. *See, e.g.*, Osceola County v. Triple Development Co., 90 So.2d 600, 603 (Fla. 1956).
50. Brest v. Jacksonville Expressway Authority, 194 So.2d 658 (Fla. 1st Dist. 1967).
51. Clark v. Gulf Power Co., 198 So.2d 368 (Fla. 1st Dist. 1967).
52. *Id.* at 371.
53. FLA. CONST. art. X § 6A (1968).
54. *See* definition in text accompanying note 5, *supra*.

It must be pointed out that the specific question of whether or not land of which the development rights are to be condemned would ultimately be put to a "public use" cannot be answered here. Existing case law would control in each instance, and a separate inquiry would perhaps be made each time the statutes were utilized to acquire land for highway, school, public building, park and reservation, or other purposes. What must be answered here is the question whether, assuming that a public use will be made of the land when it is finally condemned in fee simple, there is public interest in the preliminary condemnation of the development right.

The answer to the foregoing question, under the definition set down by the Supreme Court of Florida in *Demeter*,[55] can only be in the affirmative. That definition can be broken down into the following elements:

(1) definiteness
(2) state control
(3) dominance of public interest over private gain.

As to the definiteness element, it was pointed out[56] that the "public use" to be derived from the employment of development right acquisition is (1) the saving of the economic value to the community which would be lost through immediate condemnation for a future use, (2) the saving of public funds that would be required to condemn the land at a later date with its improvements, and (3) the continued tax revenue to be derived from the land kept at its present use, which revenue would be lost if the land were condemned in fee simple before it was to be put to its eventual use. The use is three-fold and definite.

As to the second element, state control, it is clear that the rights of the landowner would be subordinated to the control of the condemning body, both as to the restriction on the existing use and as to the time when the body would condemn the remaining interest in the land.

Finally, as to the dominance of the public interest over private gain, it must be pointed out that there is no private gain to be derived from the employment of the development right acquisition method. The landowner will continue to receive the same economic benefit from his land, subject only to the same economic forces which he would have faced in any event. The only gain that could be said to exist is the *continued* economic benefit which would have been lost if condemnation of the fee simple had been effected. In any case, the three-fold public interest, which would be "new," outweighs this private gain. In addition, the Supreme Court of Florida has stated that the fact that an agency may *sell* or *lease* property to private interests after the land has been cleared does not render the condemnation one for a private use or purpose rather than one for a public use.[57] Certainly, if an agency may sell property to

55. *Id.*
56. *See* introduction.
57. Grubstein v. Urban Renewal Agency, 115 So.2d 754 (Fla. 1959).

private interests, it should be allowed to condemn development rights and allow a landowner to maintain, for a period of time, the existing use without rendering the condemnation one for a private purpose rather than one for a public purpose.

B. *Full Compensation*

It might seem that a constitutional objection could be raised against a development right acquisition act on the ground that full compensation is not given for the entire value of the land at the time of the condemnation of the development right. However, a study of case law reveals that full compensation is relative to the *right taken*; it is not a requirement that the property be "fully taken and fully compensated." The Supreme Court of Florida has said,

> The constitutional right to compensation for property taken by eminent domain under section 29 of article 16 of the Constitution of the State of Florida is the full and perfect equivalent of the right taken.[58]

Subsequently, the Supreme Court declared, "Full compensation means nothing less than payment for that which the property owner is being deprived of."[59]

In addition, the idea that a landowner has a development right interest in his land, which interest must be compensated for during condemnation, is not a new concept in federal or Florida law. The United States Court of Appeals for the Fifth Circuit stated that:

> [t]he sum to be paid the owner does not depend upon the uses to which he has devoted it, or if he is not using it at all upon the uses to which he expects to devote it, but is to be ascertained on just consideration of *all the uses to which it is suitable*.[60]

The same court thereafter said:

> In determining [property] value, the highest and most profitable use for which the property is adaptable and needed, or is likely to be needed in the near future, is to be considered . . . .[61]

The Supreme Court of Florida has aligned itself with the above view. In adopting the so-called "Texas rule," the court said,

> [I]n arriving at market value consideration may be given to all of the uses to which the property of the condemnee is rea-

58. City of Jacksonville v. Schaffer, 107 Fla. 367, 374, 114 So. 888, 891 (1932) (emphasis added).

59. Meyers v. City of Daytona Beach, 158 Fla. 859, 862, 30 So.2d 354, 355 (1947).

60. Atlantic Coast Line R.R. v. United States, 132 F.2d 959, 963 (5th Cir. 1943) (emphasis added).

61. St. Joe Paper Co. v. United States, 155 F.2d 93, 97 (5th Cir. 1946).

> sonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.[62]

Thus, it is clear that the courts are recognizing more and more that development rights are a component of the value of, and the interest in, an individual's property.

C. *Necessity*

The constitutional objection that can be raised against condemnation for future use is that of "necessity," *i.e.*, whether there is a necessity for the present taking of land when it will not be devoted to a public use until some time in the future. Before discussing this objection as it has been raised in and treated by the Florida courts, it should be pointed out that in a development right acquisition proceeding, what is condemned is not in reality condemned for a future purpose. The public purposes discussed above take effect immediately upon the acquisition of the development rights. The only thing that could be objected to, as being too far in the future to satisfy the necessity requirement, is the ultimate use to which the land will be put. Nevertheless, in the cases that have come before the Florida courts the landowners have had their land taken immediately, even though the land was not put to public use for as long as seven years.[63] The point is that in a development right acquisition, where the landowner is not deprived of his existing use and where public use of the right acquired is made immediately,[64] the necessity requirement should not logically be as stringent as it is in a proceeding for the condemnation of the fee simple. In the latter, no limit has yet been set; but, again, a seven-year period has been upheld.[65] A ten-year period seems a reasonable statutory limit for a development right acquisition proceeding; it will be so proposed in the act which follows this paper.

As mentioned above, in *Carlor Co. v. City of Miami*,[66] the Supreme Court of Florida upheld a condemnation, even though seven years had elapsed between the time of condemnation and the beginning of the development of the land. The court said,

> It is not necessary that a political subdivision of the state have *money on hand*, plans and specifications prepared and all other preparations necessary for immediate construction before

62. Bd. of Comm'rs of State Inst. v. City of Tallahassee Bank & Trust Co., 116 So.2d 762, 764 (Fla. 1959).

63. Carlor Co. v. City of Miami, 62 So.2d 897, 902 (Fla. 1953), *cert. denied*, 346 U.S. 861 (1966) (condemnation upheld).

64. It is true that the public will derive no actual benefit if the land is not finally condemned and put to the ultimate public use intended (and therefore a limit on the power is necessary). But, at the time of the condemnation, the public nevertheless obtains what can aptly be designated as a vested interest subject to divestment (by the passage of a specified period of time during which the state fails to make the final condemnation).

65. Carlor Co. v. City of Miami, 62 So.2d 897, 902 (Fla. 1953), *cert. denied*, 346 U.S. 861 (1966).

66. 62 So.2d 897 (Fla. 1953), *cert. denied*, 346 U.S. 861 (1966).

> it can determine the necessity for taking private property for a public purpose.[67]

The court went on to emphasize that "[i]t is the duty of public officials to look to the future and plan for the future."[68]

Subsequently, in *State Road Department of Florida v. Southland, Inc.*,[69] the court, citing the *Carlor* case and other authority for the power to condemn for a future purpose, pointed to "the *duty* of public officials to build and plan not only for the present but for the foreseeable future."[70] The court emphasized[71] that the Florida Highway Code authorized the Road Department to acquire by eminent domain:

> All necessary lands and property for the purpose of securing rights of way, borrow pits and drainage ditches for existing, *proposed or anticipated* roads in the state highway system or state park road system.[72]

It is clear, then, that the state legislature as well as the courts have recognized that the power of eminent domain can be used to acquire land for future needs. Similarly, federal law, as pointed out in the *Southland* case,[73] has authorized advanced acquisitions.[74] The *Carlor-Southland* approach is apparently a growing trend in the jurisdictions of this country; for example, the *Carlor* reasoning has been adopted by the Supreme Courts of Hawaii[75] and Oklahoma.[76]

D. *Delegation of the Power of Eminent Domain*

It has long been clear that the power of eminent domain is delegable,[77] and there should therefore be no problem in allowing the development right acquisition power to be delegated to state agencies. Of course, the state agency to which the power is delegated

> is subject to the dominant organic provisions requiring due process of law and just compensation in appropriating private property to the use of highways or other public purposes under the law.[78]

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67. *Id.* at 902 (emphasis added).
68. *Id.*
69. 117 So.2d 512 (Fla. 1st Dist. 1960).
70. *Id.* at 517 (emphasis added).
71. *Id.* at 516.
72. FLA. STAT. § 337.27 (1967) (emphasis added).
73. 117 So.2d at 515-16.
74. The Federal Aid Highway Act, 23 STAT. § 108, does so, and makes federal funds available for future rights-of-way on the condition that they be constructed within a five-year period.
75. State v. Ruiz, 42 Haw. 494, 421 P.2d 304 (1966).
76. Brooks v. LeGrand, 435 P.2d 142 (Okla. 1967).
77. Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926).
78. *Id.* at 630, 110 So. at 454.

Furthermore, "[w]hen the right of eminent domain is delegated with conditions to its exercise, the performance of the conditions is subject to judicial cognizance."[79]

IV. METHODS OF ACQUIRING THE DEVELOPMENT RIGHTS OF LAND

A. *Conveyance in Exchange for Tax Benefits*

Under the present Florida statute regarding outdoor recreational or park land,[80] the owner or owners in fee of land being used for outdoor recreational or park purposes may either convey the development rights of their land or covenant for a term of not less than ten years that the land will not be used for any purpose other than outdoor or recreational purposes. The statute defines any covenant used to be one running with the land.[81]

In exchange for the giving up of the development right, the landowner will receive as a tax benefit the assessment of his land "as outdoor recreational or park lands upon an acreage basis, so long as such lands are actually used for outdoor recreational or park purposes."[82] The statute is explicit that "[i]n valuing such land for tax purposes, an assessor or any taxing agency shall consider no factors other than those relative to its value for the present use. . . ."[83]

Beyond this tax incentive, there are other forces which may come into play to induce a landowner to give up development rights under this statute. For example, in cases where home sites are to be sold at higher prices because they abut what the developer promises will be a golf course, the purchasers can refuse to accept the developer's mere promise but may actually require him to convey development rights to the governing board of the county (or covenant not to develop the land).

California has a similar statute whereby tax benefits can be derived by entering into use restriction agreements with governmental agencies. Under the statute, the tax assessor is required to "consider the effect upon value [of the land] of any enforceable restrictions to which the use of the land may be subjected."[84] These restrictions, the act provides,

> shall include but are not necessarily limited to zoning restrictions limiting the use of land and *any recorded contractual provisions* limiting the use of lands entered into with a governmental agency pursuant to state laws or applicable local ordinances.[85]

Maryland, too, has passed a tax credit provision for land determined to be open-space and

79. *Id.*
80. FLA. STAT. § 193.202 (1967).
81. FLA. STAT. § 193.202(6)(e) (1967).
82. FLA. STAT. § 193.202(3) (1967).
83. *Id.*
84. CAL. REV. & TAX § 402.1 (1967).
85. *Id.* (emphasis added).

> for which the owner or predecessor in title has permanently conveyed or assigned to the State or other designated governmental bodies an easement or interest in the land which limits the use thereof in such manner as to preserve its natural open character in perpetuity.[86]

The tax credit can be up to 50% in some categories of open-space[87] and up to 100% in others.[88]

These statutes are, of course, fine as far as they go, but they are permissive rather than mandatory. Clearly, when the state or a political subdivision thereof finds it in the public interest to acquire development rights in order to prevent development in areas to be condemned, in order to avoid the economic loss incident to advanced acquisition, it must also have a development right acquisition statute under which to exercise eminent domain power in dealing with a landowner who is not willing to convey development rights in exchange for tax benefits.

B. *Condemnation and Lease-Back*

The Model Eminent Domain Code Draft[89] provides a method by which, in effect, the development right of land can be condemned. Section 311 of the Code, subsection A of which was used in part in the drafting of the Development Right Acquisition Act of 1969 (proposal), enables a governmental subdivision to acquire in advance land which will be devoted to a public use "within a reasonable time." Before the land is cleared for the public use intended, it can be leased back to the prior owner or to someone else if the prior owner declined the leasing right. The land therefore would not be unused; and the prior economic benefit, not lost. Furthermore, under subsection 311 C, the land would be subject to taxation. It is clear, too, that the problem of the possibility of increased acquisition costs at a later date is avoided.

The major difference between this method and the direct method of development right acquisition is that in the former the funds necessary for advanced acquisition must be at hand, which funds, it was pointed out,[90] are often not available. In addition, all the responsibility connected with land ownership would rest on the state rather than on the private individual under the condemnation, lease-back method.

The following are salient aspects of the model code draft:

> A. Such governmental subdivision and agency which has been given the power of condemnation by law may, for projects or otherwise, which have been approved by the condemnor and by the governing body of the appropriate political entity, after a general plan has been adopted by said body, as the same may

86. 7 MD. ANN. CODE art. 81 § 12E (Cum. Supp. 1967).
87. *Id.* § 12E(c).
88. *Id.* § 12E(d).
89. 2 REAL PROPERTY, PROBATE & TRUST J. 365 (1967).
90. *See* discussion in note 2, *supra.*

be amended, acquire lands and interests therein in fee simple, or lesser, in advance of the time of the adoption of a budget including such lands and interests. Such power may be exercised when, in the judgment of the condemnor, the public interest will be served and economy effectuated by forestalling development of such land, which will entail greater acquisition costs at a later date, and when such exercise is determined to be necessary, convenient, and desirable.

B. Upon such acquisition, the condemnor may improve, use, maintain, or lease such lands until the same are required for public use. There may necessarily be a period of time between the acquisition of needed lands and the commencement of actual site clearance and the construction, but such fact shall not minimize the public purpose of such acquisition, provided that it can be determined that such lands will be used for the purpose for which they were acquired within a reasonable time.

C. The owner of such land at the time of acquisition under this section shall have the first right to enter into lease thereof with the condemnor until such lands are needed for public use. Any land so leased shall be subject to general property taxation during the term of the lease. All rentals shall be credited to the project land acquisition account. . . .

D. A condemnor with authority to acquire land under this section shall also have authority to dispose of land, or part of it, if it determines there is no longer need for such property for present or future purposes and if the public interests will be best served by such disposition. In the event of disposition, first priority of repurchase at an amount equivalent to the current fair market value of the property shall be accorded to the former owner for such property. If such owner fails to repurchase within a reasonable time, the land shall be advertised for public sale by sealed bids and sold forthwith to the highest bidder.

C. *Development Right Acquisition*

For the reasons given throughout this paper, it is apparent that public interest requires some means of acquiring the development right of land. The weaknesses of several available or suggested means have been demonstrated. It becomes clear that a statute providing a direct means of development right acquisition is needed. The concluding section of this paper presents the writer's proposal for such a statute.

V. THE DEVELOPMENT RIGHT ACQUISITION ACT OF 1969—A PROPOSAL (to be a new chapter in Florida Statutes)

Section 1 Short Title.—

This act may be cited as the Development Right Acquisition Act of 1969.

Section II Definition.—

"Development right," whenever used as referred to in this act, shall mean the right of the owner of the fee interest in the land to change the use of the land from its existing use to any other use.

Section III Procedure.—

(1) The state, the governing board of any county or any municipality in this state, or any other governmental subdivision or agency which has been given the power to acquire property by law may, for projects or otherwise which have been approved by the acquiring body and by the governing body of the appropriate political entity, after a general plan has been adopted by said body, as the same may be amended, acquire the development right of lands therein, in advance of the time of the adoption of a budget to finance the acquisition of the land in fee simple, or less, and the development thereof to a public purpose. Such power may be exercised when, in the judgment of the acquiring body, the public interest will be served and economy effectuated by forestalling acquisition in fee simple, or less, and development of such land, which would entail greater acquisition costs at a later date, and when such exercise is determined to be necessary, convenient and desirable. This act is in addition to all other provisions of Florida law dealing with the acquisition of property or any rights therein, in whole or in part.

(2) If the acquisition is to be through the exercise of the power of eminent domain, in addition to following the procedure set forth in Chapter 72 of Florida Statutes, the condemnor shall set forth in the petition the following:

(a) an explanation why public interest requires the acquisition of the development right before the land is to be acquired in fee simple, or less.

(b) a general plan for the development of the land ultimately to be acquired including the setting of a date certain at which time the land will be condemned in fee simple, or less; in no case shall such a date be more than ten (10) years after the date of the condemnation of the development right of such land.

Comment:

This section is set up in two subsections to make clear the legislative intent that acquisition may be by means other than eminent domain proceedings, such as by purchase or gift. Subsection (2) requires in the case of eminent domain proceedings that the satisfaction of the public use or interest requirement discussed above[92] be shown in the petition itself.

91. 2 REAL PROPERTY, PROBATE & TRUST J. 365 (1967).

92. *See* pp. 353-57.

Some of the language of subsection (1) was taken from subsection 311 A of the Model Eminent Domain Code Draft.[93]

Section IV Compensation.—

(1) Where the development right of land is acquired by means other than through eminent domain proceedings, as by gift or purchase, the land owners compensation shall be determined by the agreement of the parties involved.

(2) Where the development right of land is acquired through eminent domain proceedings, the procedure shall be in accordance with Chapter 73 of Florida Statutes, and the amount of full compensation shall be based on the difference between the fair market value of the land and the value of the land for the use to which it was devoted at the time of the acquisition.

When the fee simple, or lesser interest, is subsequently condemned, the grantor's compensation shall be based on a current appraisal of the value of the land at the use permitted at the date of the subsequent acquisition.

Comment:

This section is designed to clarify the manner in which compensation shall be measured to comply with the full compensation requirement discussed above.[94] It is suggested that Chapter 73 of Florida Statutes be amended to clarify that "property," as used therein, is defined as property interest.

The second paragraph of subsection (2) is to emphasize that there will be at the time of the condemnation of the fee simple, or less, a current appraisal of the land at the use permitted after the condemnation of the development right.

Section V Reconveyance of the development right.—

(1) The owner of the land of which the development right has been acquired under this act shall not change the use of said land from the use existing at the time of the acquisition of the development right without first obtaining a written instrument from the body which has acquired the development right, which instrument re-conveys all or part of the development right to said owner and which instrument must be promptly recorded in the same manner as any other instrument affecting the title to real estate.

(2) No governmental body which holds title to a development right pursuant to this act shall convey said development right to anyone other than the record holder of the fee simple interest in the land to which the development right attaches, and the conveyance to said owner of the fee shall be made only after a determination by said governmental body that such conveyance

93. *See* pp. 361-62.
94. *See* pp. 357-58.

would not adversely affect the interest of the public. Section 125.35, Florida Statutes, shall not apply to such sales, but any governmental body which has acquired a development right pursuant to this act shall forthwith adopt appropriate regulations and procedures governing the disposition of the same. These regulations and procedures shall provide the terms of the conveyance, including the compensation to be paid by the grantee. No development right shall be conveyed by any governmental body without first holding a public hearing and unless notice of the proposed conveyance and the time and place that the public hearing is to be held shall be published once a week for at least two (2) weeks in some newspaper of general circulation in the county involved prior to said hearing.

Comment:

It should be noted that under subsection (2) the owner in fee of the land shall be required to compensate the governmental body in the case of a re-conveyance of the development right.

Section VI Taxation; assessment.—

Any land the development right of which has been acquired shall not be exempt from general property taxation. In valuing such lands for tax purposes, an assessor or any taxing agency shall consider no factor other than those relative to its value for the use existing at the time of the acquisition of the development right or, in the case of a re-conveyance under section 4 of the act, for the use permitted after such re-conveyance. Section VII Prevention of waste and irreparable injury.—

The body which has acquired the development right shall have the power to file appropriate action to prevent waste or to enjoin irreparable injury which will affect the value of the land as it will be used when developed to the ultimate public use, unless such waste or irreparable injury is necessarily incidental to the use permitted.

Section VIII Inter-governmental agreements.—

In order to effectuate an orderly exercise of power under this section, the agencies and subdivisions of government accorded such power are authorized to enter into agreement with each other, or with the federal government, respecting the financing, planning, or acquisition of property needed for future use, in order to facilitate the general objective of a reasonable program of acquisition of land for future use.

Section IX Effective Date.—

This act will be effective immediately upon becoming law.