The Value Capture Hypothesis: A Second Analysis*

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* *See*, Value Recapture; A Rose By Another Name, 26 Zoning Dig. 5 (1974).

** Ross, Hardies, O'Keefe, Babcock, & Parsons, Chicago, Illinois.

I. INTRODUCTION

I deal in Land Values and Sales
of green-belted plots
In desirable spots
and with all that town planning entails
and if Anyone anything's got
In the way of garden or plot—
Well he mustn't object
When I call to collect
About half of the whole blooming lot.

Sir Desmond Heap[1]

Value capture policy is as old as eminent domain, which means it is very nearly as old as organized government. Nevertheless there is somehow something threatening about pulling it all together under the title of "policy" dealing with the "capture" of "value." Capture from whom? Whose value? Whose policy?

In fact, value capture is very little more than government using its existing powers to acquire land or rights in land for a public purpose and then defraying the costs of acquisition by dealing in those values and capitalizing on increased value the *government itself* created by virtue of its public developmental activities. The theory of value capture policy has been dealt with at some length elsewhere.[2] In this article it is the intent of the authors to present a technique-by-technique analysis of *practical applications* of value capture policy with theoretical discussions only where necessary. For convenience we have divided the "methodology" of value capture policy into four categories: (1) condemnation of land for value capture, (2) development of existing rights in land, (3) monetary transfers, and (4) joint development. These categories are preceded by an extended discussion of public purpose and public use—the legal keys to most of the techniques. While much of the research which forms the basis of this article was done for the purpose of examining the feasibility of using value capture techniques to defray the costs of fixed-guideway rapid transit systems,[3] many of the examples from cases, statutes and experience, are drawn from other contexts—highways, redevelopment, parking structures, shopping malls, and the like.

1. *Christmas Extravaganza and Fun Fair Department*, 1966 J. PLAN. L. 693.

2. U.S. DEPARTMENT OF TRANSPORTATION, A VALUE CAPTURE POLICY, (vols. 1-4, 19); Callies and Deurksen, *Value Recapture as A Source of Funds to Finance Public Projects*, 8 URBAN LAW ANN. 73, 81-83 (1974); Callies and Deurksen, *Value Recapture: A Rose By Another Name*, 26 ZONING DIG. 5 (1974).

3. The research was funded primarily by the U.S. Department of Transportation's Urban Mass Transit Administration and later the Denver Regional Transit District. Planning and financial analysis was performed by the Rice Center for Community Design and Research in Houston, Texas, under the direction of Carl P. Sharpe, Assistant Director, and Robert Eury, principal planner.

Usually government does not attempt to "go it alone" but rather forms public-private *partnerships* so that *both* sectors can benefit from governmental development. The central theory, however, remains the same. In each instance it is an investment of public funds for which a "capture" of some of the value created by the investment which traditionally accrued to *private* interests is sought in order to help defray the outlay of public funds.[4]

II. PUBLIC USE

The efficacy of value capture policies involving public participation in development opportunities along a transit route will be largely dependent upon the acquisition of property for development or the development of property already acquired. Such acquisition and use is subject to the constitutional and statutory constraints of the "public use" doctrine. This doctrine is sufficiently important that we deal with it in considerable detail, despite our avowed intent to focus on the more practical aspects of value capture.

A. EMINENT DOMAIN

Generally a public body can acquire property through the exercise of the power of eminent domain for public use or purposes. The breadth of the definition of "public use"—what is appropriate, direct, and related to governmental purposes—will, to a large measure, be determinative of the potential for value capture through public/private partnerships.

1. Public purpose.

The matter of public use and purpose has been often defined in the context of the acquisition of property not strictly needed for the purposes for which a governmental entity was created. For example, in the case of a transit district developing a fixed guideway system, enabling legislation and common sense dictate that the agency can acquire the property necessary for the construction of a fixed guideway and stations. Acquisition of land for commuter parking is also generally includable. Permissible acquisitions beyond these types of uses depend upon constitutional, statutory, and interpretive case law.

United States v. 416.81 Acres of Land[5] contains an example of a broad definition of public use which is typical of situations involving the federal government. The government brought eminent domain proceedings to acquire land for development of the Indiana Dunes National

4. The extent to which private landowners may be the fortuitous beneficiary of significant value without effort or investment is dramatically illustrated in an article published in Planning Magazine. Toner, *Oysters and the Good Ole' Boys*, PLANNING MAGAZINE, August (1975).

5. 514 F.2d 627 (7th Cir. 1975).

Lakeshore. The court held that the only question for judicial review in such a condemnation proceeding was whether the purpose for which the property was taken was a congressionally authorized public purpose. It made no difference that a landowner's conception of a public use might differ from that of the Congress.[6]

As clearly demonstrated in a recent Maryland case, broad definitions of public use are not confined to cases involving the power of the federal government. In *Prince George's County v. Collington Crossroads, Inc.*,[7] the county sought to condemn land at the intersection of two major highways for the creation of an industrial park. The court was not swayed by the ultimate private use or benefits that accompanied the "economic stimulation" of the proposed development and recognized the necessity for a non-rigid definition of public use.

> Over many years and in a multitude of cases the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test. They have found here as elsewhere that to formulate anything ultimate, even though it were possible, would, in an inevitably changing world, be unwise if not futile. [citations omitted][8]

2. Necessity.

The courts have long drawn a distinction between what is a public purpose on the one hand and necessity of the taking on the other. Public purpose is largely a question of why or what for, while necessity is one of how, much or which one. In most non-federal jurisdictions the "what for" public purpose question is strictly a judicial question.

> In evaluating the use for which a governmental body attempts to exercise the power of eminent domain, the courts have the responsibility of enforcing the constitutional limitation that the use must be 'public.'[9]

On the other hand, the issue of necessity is clearly perceived as a matter of legislative discretion and is reviewed by the courts only for evidence of fraud, collusion or bad faith. In *ARCO Pipeline Co. v. 3.60 Acres of Land*,[10] builders of the Trans-Alaska pipeline brought proceedings to condemn 3.6 acres of right-of-way under authority delegated to it by the State of Alaska. The court held it was without authority to review the question of

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6. *Id.*

7. 275 Md. 171, 339 A.2d 278 (Md.Ct.App. 1975).

8. *Id.* 275 Md. at 177, 339 A.2d at 286, *quoting* Riden v. Philadelphia B. & W. Ry. Co., 182 Md. 336, 35 A.2d 99 (1943).

9. Prince George's City v. Collington Crossroads, Inc., 275 Md. 171, 177, 339 A.2d 278, 283 (Md. Ct. App. 1975). *See also* City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (Ark. 1967); *In re* Flatbush Ave, 60 Misc. 2d 1062, 304 N.Y.S.2d 552, 556 (Sup. Ct. 1969).

10. 539 P.2d 64 (Alaska 1975).

necessity of a particular taking absent a clear showing of fraud, bad faith, arbitrariness or abuse of discretion.[11]

In a case from California dealing with the authority of an airport commission and city council to condemn property for the extension and enlargement of an airport, the Court of Appeals of California held that whether public *necessity* required acquisition of property for such an extension and enlargement was strictly a legislative and not a judicial question and that legislative motive was not a subject of inquiry.[12]

Recently the wooden distinction between public use and necessity has become blurred as courts have recognized an expanding definition of public purpose. The courts have given increasing credence to the importance of comprehensive development or redevelopment projects essential to the health, safety and welfare of the public. In *State ex rel Atkinson v. Planned Industrial Expansion Auth.*,[13] the court pierced through the formalistic jargon of "public purpose" and "necessity," reconciling them as follows:

> [F]inal determination of the question whether the contemplated use of any property sought to be taken under the Law here in question is public rests upon the courts, but that a legislative finding under said law that a blighted or unsanitary area exists and that the legislative agency proposes to take the property therein under the process of eminent domain for the purpose of clearance and improvement and subsequent sale upon such terms and restrictions as it may deem in the public interest will be accepted by the courts as conclusive evidence that the contemplated use thereof is public, unless it further appears upon allegation and clear proof that the legislative finding was arbitrary or was induced by fraud, collusion or bad faith.[14]

The distinction between "public benefit," and "public purpose" is also fading with the passage of time. In an increasing number of jurisdictions public benefits like revenue generation, are accepted as valid public purposes. A Maryland court recently held:

> Under our cases, projects reasonably designed to *benefit* the general public, by significantly enhancing the economic growth of the State, or its subdivisions, are public uses, at least where the exercise of the power of condemnation provides an impetus which private enterprise cannot provide.[15]

In Florida, an apparent holdout jurisdiction, however, the distinction seems to be alive and well. A court recently noted that 'public benefit' is not synonomous with 'public purpose' as a predicate which can justify

11. *Id.* at 68.
12. Breiner v. City of Los Angeles, 22 Cal. App. 3d 382 (1975), 99 Cal. Rptr. 180 (1972).
13. 517 S.W.2d 36 (Mo. 1975).
14. *Id.* at 45.
15. Prince George's City v Crossroads, Inc., *supra* 275 Md. at—, 339 A.2d at 289. (emphasis added).

eminent domain. . . ."[16] Thus, in the final analysis, the breadth of the definitions of public use and public purpose depend upon the constitutional, statutory and case law provisions of the particular jurisdiction involved.

3. Colorado.

Colorado is a useful example, since the Denver Regional Transit District has recently gone through the exercise of evaluating value capture techniques.[17] From a reading of the law in Colorado it appears that, while the constitution and statutes are sufficiently strict to place Colorado in the narrow view jurisdictions, interpretive case law reveals an occasional judicial willingness to move away from a narrow interpretation of "public use."

The Colorado constitution provides in pertinent part:

> Private property shall not be taken or damaged for public or private use without just compensation . . . the question whether the contemplated use be really public shall be a judicial question and determined as such without regard to any legislative assertion that the use is public.[18]

In addition, the constitution further provides at section 14:

> *Taking private property for private use.*
> Private property shall not be taken for private use unless by consent of the owner, except for private ways and necessity and except for reservoirs, drains, flumes or ditches on or across the lands of others by agricultural, mining, milling, domestic or sanitary purposes.[19]

Of course, in order to validate condemnation for public/private development schemes in support of a rapid transit district it is always possible to amend the aforesaid section 14 to add matters relating to rapid transit districts. We understand that such an amendment is a remote possibility and therefore suggest that any exercise of the power of eminent domain would need to satisfy a public purpose test bottomed on article II, section 15 of the Colorado constitution.

This constitutional provision was examined in *Potashnik v. Public Service Commission of Colorado*,[20] where the court said:

> Whatever may have been the ancient right of condemnation, it has been restrained by constitutional limitations in the protection of individual property rights. The power lies dormant in the state until the legislature speaks [citing authorities]. . . . The right to condemn private property is therefore

16. Baycol, Inc. v. Downtown Development Auth., 315 So.2d 451, 457 (Fla. 1975).

17. DENVER RAPID TRANSIT DISTRICT, R.T.D. NORTH SOUTH RAPID TRANSIT PROJECT, VALUE CAPTURE OPPORTUNITIES (Report, 1976).

18. COLO. CONST. art. II, § 15.

19. COLO. CONST. art. II, § 14.

20. 126 Colo. 98, 247 P.2d 137 (1952).

> a creature of statute, pursuant to which it must clearly appear either by express grant or by necessary implication.[21]

After quoting article II, section 15 of the Colorado constitution the court noted that:

> [T]he actual purpose of this section is to place a limitation even upon legislative enactment. Under the restriction of this section the legislature itself must exercise care in declaring to be a 'public use' (and hence entitled to the right of eminent domain) only that which may meet the legal tests of such as determined by the judiciary. The general right of eminent domain, under our Constitution, depends upon, first, legislative authority and, second, judicial approval of the purpose as a public use.[22]

Fortunately for proponents of public/private partnership value capture techniques, later decisions seem to broaden the power of a public body to acquire land by eminent domain in Colorado. For example, the Supreme Court of Colorado, stating that the question of public purpose in condemnation proceeding was a judicial question, upheld a taking for a pipeline right-of-way as a public purpose.[23] The court quoted extensively from a 1906 Supreme Court of Colorado decision, *Tanner v. Treasury Tunnel Mining & Reduction Co.*,[24] where the court discussed the importance that the definition of public purpose change with the times.[25] In addition, the *Larsen* court quoted the following language from *Tanner*:

> No definition, however, has as yet been formulated which would serve as an infallible test in determining whether a use of property sought to be appropriated under the power of eminent domain is public or private. No precise line is drawn between the uses which would be applicable in all cases. Doubtless this arises from the fact that the courts have recognized

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21. *Id.* 247 P.2d at 138.
22. *Id.* 247 P.2d at 139, 140.
23. Larsen v. Chase Pipeline Company, 183 Colo. 76, 514 P.2d 1316 (1973).
24. 35 Colo. 593, 83 P. 464 (1906).
25. *Id.* at 35 Colo. 594, 83 P. 464 at 465.

> In this state we have conditions to meet and resources to develop, which, in their nature, require the employment of new and appropriate means. This has opened a field for the prosecution on new enterprises. The mineral resources of the state are of prime importance. Generally they can only be reached by sinking shafts to great depth, or running tunnels of great length."
>
> The general assembly has provided for the organization of companies for the purposes for which the petitioner was organized. It has provided that a corporation of this character may exercise the power of eminent domain in securing rights-of-way for its tunnel. It has evidently recognized that the business of a tunnel company may be for the benefit and advantage of the public, for we find that in designating what corporations may exercise the power of eminent domain tunnel companies have been mentioned in connection with bridge, ferry, railroad, and other companies whose business is unquestionably to serve the public. *While this judgment is not conclusive upon the courts, it is entitled to careful consideration and great weight as the judgment of a coordinate branch of the government or the necessities of the state for the development of its resources and the needs of the people in this respect.* [citing cases]
>
> *Subject to the authority of the court to determine certain questions, the general assembly is the exclusive judge of the necessity or emergency justifying the exercise of the power of eminent domain. (emphasis added).*

> the definition of public use must be such as to give it a degree of elasticity capable of meeting new conditions and improvements and the ever-increasing needs of society. [Citing case] Consequently we find, in examining the authorities, that, in determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of a benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of a state, are to be taken into consideration.[26]

Arguably at least, the *Larsen* case places Colorado in the broader view public purpose camp despite the Colorado constitutional provisions which, upon first reading, imply a narrow "public purpose" definition.

In *Dallasta v. Department of Highways*,[27] a case dealing with a proposed condemnation by the State Highway Department, the court established the following test:

> [It] is the general principal of law that courts will not disturb decisions or determination by public bodies charged with the duty as to location or alignment of highways *or other public projects*. The feasibility or practicability of the same and similar objectives—all of which relate to the necessity for the acquisition of a particular property—is the agency's responsibility to determine. To invoke the judiciary there must be a showing of bad faith or fraud on the part of the acquiring agency. This rule has been uniformally [sic] recognized by this court, even when objection is raised in condemnation cases by persons whose property is actually being taken.[28]

The court seems to be applying traditional deference toward the necessity of the taking to the definition of public purpose and thereby reflecting the modern trend towards a blurring of any distinction.

In *Rabinoff v. District Court*,[29] the Colorado Supreme Court considered whether condemnation of property for conveyance to private parties under an urban renewal plan was a public use:

> The narrow inquiry therefore, is whether the power of eminent domain can be exercised in circumstances such as the present, wherein the public authority does not intend to permanently retain the property which it proposes to condemn.[30]

The court concluded in the affirmative:

> In concluding that the proposed action is public and not private, we are persuaded not only by the underlying object of urban renewal, but the significant fact that the grant is to a public agency which acquires the lands in question under a master plan of rehabilitation. The fact of ultimate ownership by private individuals is an incidental and secondary consideration to the public objectives.[31]

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26. *Id.*
27. 153 Colo. 519, 387 P.2d 25 (1963).
28. *Id.* at 521, 387 P.2d at 27.
29. 145 Colo. 225, 360 P.2d 114 (1961).
30. *Id.* at 229, 360 P.2d at 118.
31. *Id.* at 232, 360 P.2d at 121.

While none of the above cases is dispositive of the breadth of "public purpose" in Colorado, they suggest that Colorado courts have been receptive to broad application of condemnation powers and might be expected to view a transit district's exercise of its eminent domain powers in furtherance of a public/private partnership value capture scheme in a progressive manner.[32]

B. Public Funds

Closely related to the concept of "public purpose" in eminent domain proceedings is the use of public funds to carry out development traditionally reserved for the private sector. In this area as well, a broadening concept of the public interest is overcoming traditional distinctions. A recent Massachusetts case is on point. *Opinion of the Justices*[33] dealt with a proposed statute providing for the financing, construction and operation by the Massachusetts Turnpike Authority of a stadium complex, vehicular tunnel, toll road and arena in Boston. The Supreme Court of Massachusetts held that the proposed statute was invalid, *not* because the proposal went beyond certain specified public purposes, but because the expenditure of public funds, extension of public privileges, powers, exemptions and uses, and the rental and operation of the project involved, were inadequately controlled by appropriate standards and principles. The court went on to set out at some length what standards and principles would render such a statute adequate. The court characterized the standards challenged as "vague and fragmentary,"[34] but specifically held:

> We are of opinion that a large multi-purpose stadium or an arena for public activities and events conventions, professional and amateur athletic events and other large gatherings may be for a public purpose if the expenditure of public funds, the extension of public privileges, powers, and exemptions, and the use, rental, and operation of the projects are adequately governed by appropriate standards and principles set out in the legislation. [I]f the legislation itself contains standards and principles governing and guiding the operation of the facilities in a manner which reasonably can be expected adequately (a) to protect all aspects of the public interest and (b) to guard against improper diversion of public funds and privileges for the benefit of private persons and entities, then such enterprises may be found to be for public objectives.[35]

To the same general effect is *Lerch v. Maryland Port Authority*.[36] There the validity of a proposed issue of revenue bonds by the port

32. *See*, 2A, Nichols, The Law of Eminent Domain, § 7.5161 (3d ed. 1975).
33. 356 Mass. 751, 250 N.E.2d 547 (1969).
34. *Id.* at 763, 250 N.E.2d at 559.
35. *Id.*
36. 240 Md. 438, 214 A.2d 761 (1965).

authority for acquisition and construction of an international trade center was challenged. The court held that the use of property to produce revenues to help finance operation of activities that tended to achieve the purpose of a trade center development project in the Port of Baltimore was a public use.

The court noted specifically that the methods by which a public purpose may be served by a municipal corporation changes with time and that at present services were more important than edifices. There was a specific legislative finding that the location of servicing functions and activities connected with commerce and trade at a single centrally located site to protect the economic well-being of the state was in the public interest. The case relies to a large extent on *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*,[37] where the court upheld the use of condemnation power in furtherance of the New York World Trade Center project. The court concluded:

> The Act is not invalid because it does not freeze future use to present circumstance. Nor does it violate the constitutional prohibition because it authorizes the use of space not needed for the purpose of the Center other than for the production of incidental revenue, when, as here, that authorization is a reasonable concomitant of a project on a public purpose. . . .
>
> The Act as amended incorporates not only the legislative determination of the broad scope of the Center, but, at least by implication, looks to the eventual expansion of the immediate use to which the Center is to be put. No separate edifice is authorized for the purpose of raising revenues to offset the expenses of the Center. The authorized use of portions of the Center for the production of incidental revenue is not its primary purpose, but is expressly made auxiliary to the accomplishment of the main purpose, which is public.[38]

It is worth noting that the Maryland Port Authority would occupy only a small fraction of the proposed building, some 30,000 square feet out of the 200,000 square feet proposed, while the remainder was to be leased to marine-oriented private businesses.[39]

III. Public/Private Partnerships

One of the most financially attractive value capture techniques involves development projects where public entities join with the private sector to carry out a joint venture. Through such associations the governmental entity has a real opportunity to share in the benefits that accrue from its work on its primary mission. Along transit routes, shopping facilities, offices and other commercial ventures will benefit considerably from installation of the transit line, and the opportunity for the transit

37. 12 N.Y. 1077, 239 N.Y.S. 2d 899, 190 N.E.2d 402 (1963).
38. 240 Md. 438, 444, 214 A.2d 761, 768 (Md.Ct. App. 1965).
39. *Id*, 240 Md. at 444, 214 A.2d at 768.

authority to share in financial consequences of those benefits could ease the economic burden of transit improvements. Essential to public/private partnership is public ownership of the land adjacent to a transit route where joint development can be carried out. Public ownership of adjacent land will be in two forms: land condemned for such purposes or land previously acquired for other purposes.

A. Condemnation Of Land For Public/Private Partnership Development

As set forth in earlier value capture discussions, courts have upheld the acquisition of more land than was absolutely necessary for the precise public purpose if the land was acquired for necessary ancillary services (for example, parking lots for a transit station), for demonstrated future needs, or to clear up or avoid "remnants." In addition, the courts have upheld the acquisition of land for the economic or physical protection of a public investment.[40]

1. Excess condemnation.

Where the purpose of the acuisition is not solely to recoup the cost of a public venture, the acquisition of more land than is necessary for the direct purposes of an authority's need is likely to be a valid exercise of the power of eminent domain, provided there is adequate statutory authority and a good plan sufficiently indicating the purposes and need for such land.[41] The term excess condemnation is a poor one. It is clearly inappropriate. As Nichols points out at section 7.5122[42] the term is a misnomer because it infers that more land is being taken than can be justified for the public use. If this were really the case such a taking would be unconstitutional.

New York has been a particularly active jurisdiction with respect to excess condemnation. The local government section of the New York constitution provides limited authority to take so-called "excess" land:

> E. Local governments shall have the power to take by eminent domain private property within their boundaries of public use *together with excess land or property*, but no more than is sufficient to provide for appropriate disposition or use of land or property which abuts on that necessary for such public use, and to sell or lease that not devoted to such use. The legislature may authorize and regulate the exercise of the power of eminent

40. Atwood v. Willacy County Navigation District, 153 Tex. 646, 271 S.W.2d 137 (Tex. Civ. App. 1964), *aff'd*, 350 U.S. 804 (1965); and Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 N.Y. 1077, 239 N.Y.S.2d 899, 190 N.E.2d 402 (N.Y. 1963).

41. Value Capture Policy, vol. II, *supra* n. 32.

42. 2A, Nichols on Eminent Domain (3d Ed. 1975).

> domain and excess condemnation by a local government outside its boundaries.[43]

In the case of *In re Flatbush Avenue*,[44] the City of New York sought to condemn more land than was necessary to carry out a street widening program. The court upheld the power of the city to take the excess land, although in the particular case the court barred the condemnation because no purpose had been offered for taking the additional lands: "[s]ince there is no statement of purpose this court will not attempt to conjecture as to whether a public purpose is involved. . . . [T]his is a defect which invalidates the proceeding . . . ."[45]

As indicated above, the federal courts interpret the authority to condemn property very broadly.[46] In *United States v. 187.40 Acres of Land*,[47] the court dismissed the landowners' claim that the Secretary of the Army lacked statutory authority to take certain land to be used in constructing a flood control project in accordance with plans and conditions made after the commencement of the original project.[48] The court was there dealing with the Declaration of Taking Act,[49] which does not require proof of necessity for the taking of land. It was held that there was no constitutional bar to "excess" takings in this fashion.

In Kentucky a form of excess condemnation is clearly permitted by statute for "ancilliary purposes."[50] Such power appears to exist under two categories. First, a general condemnation enabling statute sets out a broad range of uses:

> 'Public project' means any lands, buildings, or structures, works or facilities (a) suitable for and intended for use in the promotion of the public health, public welfare or the conservation of natural resources, including the planning of any such lands, buildings, structures, works or facilities; or (b) suitable for and intended for use for the purpose of creating or increasing the public recreational, cultural and related business facilities of a community, including such structures as concert halls, museums, stadiums, theaters and other public facilities, together with related and

43. Article 9, Section 1, Subsection E (emphasis added).

44. 60 Misc. 2d 1062, 304 N.Y.S.2d 552 (N.Y. Sup. Ct. 1969).

45. *Id.* at 1068, 304 N.Y.S.2d at 558.

46. City of Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd* 281 U.S. 431 (1930); *See* Callies and Duerksen, *Value Re-Capture as a Source of Funds to Finance Public Projects*, 8 URB. LAW ANN. 73 (1974); *Value Capture Policy*, vol. II, *supra* n. 32.

47. 381 F. Supp. 54 (Pa. 1974).

48. The court noted, "The judicial role in review of condemnation cases does not encompass the power of determining whether the land is actually necessary for the successful operation of the project but only extends to deciding the propriety of the public purpose of such acquisitions and the requisite statutory authority [citing cases]. Moreover, the taking of more land than necessary is no defense to condemnation acquisition [citing cases]." *Id.* at 57. (cases omitted).

49. 40 U.S.C. § 258(a) (1970).

50. KY. REV. STAT. §§ 58.010-.140 (1970).

> appurtenant parking garages, offices and office buildings for rental in whole or in part to private tenants, dwelling units and apartment buildings for rental in whole or in part to private tenants, commercial and retail businesses, stores or other establishments, and any structure or structures or combination of the foregoing, or other structures having as their primary purpose the creation, improvement, revitalization, renewal or modernization of a central business or shopping community, and shall also include existing lands, buildings, structures, works and facilities, as well as improvements or additions to any such lands, buildings, structures, works or facilities.[51]

Second, a number of specific agencies are empowered to exercise the power of eminent domain for a broad range of purposes. A governmental agency empowered to develop a "capital plaza" or other public building complex is specifically authorized to condemn not only lands, buildings and public works "suitable for and intended for use as public property"[52] but also:

> suitable for and intended for use for the purpose of creating or increasing the public recreational, cultural and related *business facilities of a community* including such structures as concert halls, museums, stadiums, theaters, and other public facilities together with related and appurtenant parking garages, offices and office buildings for rental in whole or in part to private tenants, commercial and retail business, stores or other establishments and any structure or structures or combination of the foregoing, or other structures having as their primary purpose the creation, improvement revitalization, renewal or modernization of a central business or shopping community, and shall also include existing lands, buildings, structures, works or facilities.[53]

The City of Lexington and Fayette County have created the Lexington Center Corporation to finance and develop a municipal convention center and sports facility. The center is to consist of a trade show and sports facilities complex containing a sports arena capable of seating 22,600 persons, connecting exhibition hall facilities of approximately 60,000 square feet, a restored opera house, and 70,000 square feet of commercial parking space together with adjacent surface parking for over 2,000 cars.

Another example of excess condemnation is found in California under the guise of the "protection" theory. A new eminent domain statute specifically authorizes "protective acquisitions":

> (a) Subject to any other statute relating to the acquisition of property, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire property

51. KY. REV. STAT. § 58.010(i) (1970).
52. *Id.*
53. *Id.*

necessary to carry out and make effective the principal purpose involved including but not limited to property to be used for the protection or preservation of the attractiveness, safety, and usefulness of the project.

(b) Subject to any applicable procedures governing the disposition of property, a person may acquire property under subdivision (a) with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein, subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the project.[54]

Apparently, public agencies are now in a more favorable position to make protective acquisitions. The new Eminent Domain Law does not contain any distance limitations for protective acquisitions and basically is a codification of existing California case law which permits "taking incidental property to carry out and make effective the principal uses involved."[55] In addition, similar authority is spelled out for the California Department of Transportation:

The department may condemn real property or an interest therein for reservations in and about and along and leading to any State highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary of such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed one hundred fifty feet from the closest boundary of such public work or improvement; provided that when parcels which lie only partially within such limit of one hundred fifty feet are taken, only such portions may be condemned which do not exceed two hundred feet from said closest boundary.[56]

2. Future Uses.

Future use is a well recognized "excess" or supplemental condemnation power.[57] For example, the California state highway department (CALTRANS) is expressly empowered to condemn land for future use, and to lease such lands until they are needed for public use.

The authority conferred by this code to acquire real property for state highway purposes includes authority to acquire for future needs. . . .

54. CAL. CIV. PROC. CODE § 1240.120 (West Supp. 1976).

55. City of Santa Barbara v. Cloer, 216 Cal.App.2d 127, 30 Cal. Rptr. 743 (1963).

56. CAL. STS. AND HY. CODE §104.3. (West 1963) (repealed 1975).

57. Callies and Deurksen, *Value Recapture as a Source of Funds to Finance Public Projects*, 8 URB. LAW ANN. 73, 81-83 (1974).

> The department is authorized to lease any lands which are held for state highway purposes and are not presently needed therefor on such terms and conditions as the director may fix and to maintain and care for such property in order to secure rent therefrom.[58]

The U.S. Court of Appeals for the Fifth Circuit has upheld condemnation in advance of actual need. As part of a plan for improving the port area a harbor district intended to construct a liquid storage tank on the expropriated property, even though it could not say with assurance when the land would be so used.[59] The court was unmoved by the fact that only one private user might actually take advantage of the bulk storage facility. According to the court, this fact did not affect the public use nature of the taking because all potential users would have access to storage in the area.

3. Remnants.

The same reasoning is also applicable to the acquisition of more interests in land, in order to eliminate remnants, than can be justified by the particular public purpose upon which a particular acquisition is based. In *Southern Pacific Land Company v. United States*,[60] the court upheld the decision of the Assistant Secretary of the Navy to condemn a fee simple title to a tract of land including mineral interests for the construction of a naval air station in California, despite the owner's objection that he was willing to sell the surface rights, but wanted to retain the mineral rights. The court relied on the rule cited above that the exact nature or estate to be acquired is solely within the province of the public official involved. In fact, the court propounded the rather startling theory that "advantageous liquidation of the government's interest is a legitimate consideration in determining the estate to be taken," and that "appropriate liquidation of investment for public purposes [is] itself such a public aim."[61] The acquisition of land for the sole purpose of turning around and selling at a profit would presumably be illegal under the *Vester* decision.[62] The result of the above case, however, appears to be that a federal authority may acquire more land, or at least more *interests* in land, than is necessary for the public purpose, where the property perchance had to be disposed of, such further acquisition of rights or interests would protect the government's investment or increase its total value![63]

58. CAL. STS. AND HY. CODE § 104.6. (West 1963).
59. Lake Charles Harbor & Terminal District v. Henning, 409 F.2d 932 (5th Cir. 1969).
60. 367 F.2d 161 (9th Cir. 1966).
61. *Id.* at 163.
62. City of Cincinnatti v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd* 281 U.S. 431 (1930).
63. Atwood v. Willacy County Navigation District, 153 Tex. 646, 271 S.W. 2d 137 (Tex. Civ. App. 1964), *aff'd* 350 U.S. 804 (1965); Rindje v. City of Los Angeles, 262 U.S. 700 (1923); United States v. 2,606,548 Acres of Land, 432 F.2d 1286 (5th Cir. 1970); People v. Merced County, 68 Cal. 2d 206, 436 P.2d 342 (Cal. 1968).

California has what is probably the least restrictive case law on the subject of remnant acquisition by eminent domain. The California Streets and Highways Code provides:

> 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.[64]

The statute was construed and upheld in *People v. The Superior Court of Merced County*[65] in which the Supreme Court of California held that even a "remnant" as large as 54 acres could be condemned under the remnant theory of excess condemnation when it could probably be condemned for a little more than the cost of taking the one-half acre needed for highway purposes, and paying damages for the remainder which would thus become land-locked:

> Although a parcel of 54 land-locked acres is not a physical remnant, it is a financial remnant: its value as land-locked parcel is such that severance damage might equal its value. Remnant takings have long been considered proper.[66]

There are no outright examples of excess condemnation in our example jurisdiction of Colorado. However, the acquisition of land for public/private cooperation in development is not restricted to the industrial East. In *Duff v. City and County of Denver*,[67] the City of Denver sought to acquire by eminent domain Duff's land in order to expand municipally-owned Stapleton airfield. The City and County of Denver contemplated using the land sought for acquisition for supporting facilities such as airplane parking areas, taxiways and similar purposes and *for leasing to base operators* for activities similar to those being conducted on the property (storage and servicing of private airplanes) by Duff. The court dismissed without pause the contention that the ultimate purpose was merely to change his private ownership to the private lease of the city tenant and upheld the taking.[68]

B. Public And/Or Private Development Of Public Land However Acquired

A second major opportunity for a transit authority to share in the benefits of a new transit route is through development of air or other

64. Cal. Stats. and Hy. Code § 104.1 (West 1963) (repealed 1975).

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

66. *Id.* at 210, 436 P.2d at 346. This case has been the subject of statutory modification seeking to reverse the court's decision, although the new statute has not been finally construed.

67. 147 Colo. 123, 362 P.2d 1049 (1961).

68. *Id.* at 123, 362 P.2d at 1049.

property rights validly acquired by the authority but not needed for current operations, i.e., land already in public ownership. There are many examples of courts upholding such development, and many more such developments are proceeding without judicial review in other rapid transit systems throughout the country. To some extent, the decisions discussed here relate to those discussed above.

It has been noted elsewhere that although a governmental authority may have sufficient power under common law to deal in air space, the safe course is the adoption of a statute specifically allowing both sale and lease of government-owned air space or land.[69] There are a number of instances, particularly involving parking, of jurisdictions which authorize the leasing or sale of air space.[70]

The use of air space or other public property for private development is illustrated in the provision of offstreet parking. The acquisition of property by a governmental entity for offstreet parking has generally been held to be a public purpose even when such use has the effect of enabling a municipal corporation "to enter into business in direct competition with individuals who are now operating parking lots."[71] Parking is generally considered to be public in character.

In fact, a recent Massachusetts case indicates that a municipality may undertake to lease such facilities to private entities even in the *absence* of statutory authority. In *Ballantine v. Town of Falmouth*,[72] the validity of a town's action in taking property by eminent domain and leasing it to a private party was challenged. The court said:

> Even without explicit statutory authority, municipalities have the undoubted right to lease real estate, land or buildings held for public purposes and not presently needed for such purposes. . . . A taking of premises for municipal parking is not to be invalidated merely because some private benefit may follow from the activities of the occupants of the vehicles parked in that public parking area.[73]

New York also provides an interesting legal backdrop for public/private development in the predecessor to the *Courtesy Sandwich* case, discussed above. The court considered whether construction by the Port of New York Authority of a 16-story building was a proper use of property condemned for Port Authority purposes.[74] The street and basement floors

69. VALUE CAPTURE POLICY, vol. II, *supra* n. 32.
70. Illinois, New Jersey, California, Washington, D.C. and Ohio.
71. 2 A. NICHOLS, ON EMINENT DOMAIN, Section 7.5127, *supra* n. 32.
72. 713 Mass. Adv. Sh. 947, 298 N.E.2d 695 (1973).
73. *Id.* at —, 298 N.E. 2d at 698-99.
74. Bush Terminal Co. v. City of New York, 152 Misc. 144, 273 N.Y.S. 331 (Sup. Ct. 1934).

would be used for the Union Truck Terminal while the upper 14 floors were designed for revenue production in order to make the building self-sustaining. The 14 upper stories were made available to various private businesses wholly unconnected with transportation. It was alleged that the erection and construction of the Union Terminal other than the street floor and basement was not authorized, sanctioned, nor permitted by the laws of the State of New York. The court thought not:

> There can be little reason to doubt that the Port Authority was motivated by nothing but a desire to further the public interest and carry out the purposes of the compact and comprehensive plan when it caused Inland Terminal No. 1 to be erected. The addition of the upper floors was merely incidental. Without those floors it was impossible to construct the terminal. The dominant object of the structure was its use for terminal purposes. The Legislatures and Governors of both New York and New Jersey have indicated that they entertain the same views.[75]

The courts in New York have also held that where the fee to property is in good faith appropriated for a particular public purpose, a municipality may subsequently convert it to other uses, or even abandon it entirely, without any impairment of the validity of the estate originally acquired.[76] New York has spoken broadly about the power to convert redeveloped land to private uses even if such land was acquired by eminent domain.[77]

Much the same result was reached in Florida in *City of West Palm Beach v. Williams*[78] where the city leased a gasoline station and restaurant in a city-owned marina to a private corporation. While the court noted that the leased lands were not "coupled with the issuance of bonds or with the acquisition of land by purchase or eminent domain,"[79] the court specifically held:

> It is well settled that municipalities may constitutionally acquire land by purchase or by power of eminent domain and then lease that land for public use, . . . or may use the proceeds of municipal bonds to build improvements to be leased for public use. . . .[80]

The court went on to say that a municipality could not constitutionally acquire land by purchase or eminent domain and then lease the land for private use.

In Hawaii, where the City of Honolulu temporarily leased a building situated on land which had been acquired for future use as a park, the

75. *Id.* at —, 273 N.Y.S. at 345. This case turned in part upon the fact that the Port Authority did not have power to levy taxes and assessments.

76. Fur-lex Realty, Inc. v. Lindsay, 81 Misc. 29, 367 N.Y.S.2d 388 (Sup. Ct. 1975).

77. In re Glen Cove Urban Renewal Agency, 84 Misc.2d 186, 375 N.Y.S.2d 261, 264 (Sup. Ct. 1975).

78. 291 So.2d 572 (Fla. 1974).

79. *Id.* at 576.

80. *Id.*

court held that the rental was an appropriate exercise of due diligence in maintaining the property until the public use was accomplished.[81]

Finally, two cases from Pennsylvania indicate that when a downtown area is involved, especially where parking is concerned, a leasing arrangement between public and private enterprise can be made to work. In the first of the two cases, *Seligsohn v. Philadelphia Parking Authority*,[82] the Supreme Court of Pennsylvania upheld the validity of a lease agreement between the authority and two department stores. The agreement required the authority to condemn land in the vicinity of the department stores and to erect a parking garage which would be leased to the two department stores for operation as a public parking facility. In turn, the department stores agreed to pay debt service rentals together with an additional rental of $25,000 per year plus a percentage over a fixed amount of gross receipts. Title to the project was to remain with the authority. Other merchants attacked the agreement on the ground that this property had been condemned by the authority, not for public purposes but to build the lot so that the two department stores would benefit by having a publicly financed parking facility available for use by their customers. The attacking parties' business had been condemned to make way for the project. The court held that the agreement was appropriate, noting that the authority had acted upon the advice of reputable agencies which had indicated that a real need existed for a public parking facility at that location.

A different result was reached in the later case. In *Price v. Philadelphia Parking Authority*[83] several agreements were under consideration by the court. The first was between the Authority and National Land Investment Company providing that the Authority was to purchase a block of land in the center of Central Philadelphia. The Authority was then to demolish the existing structures and build an 8-story parking garage on the premises, with a capacity of 862 automobiles, at a cost of $8-9 million. The garage was then to be leased to National for operation as a public parking facility. The authority also agreed to lease the air space *over* the garage to National for the construction of a high rise complex containing over a thousand units and rising 22 floors above the garage. National was permitted the use of space on the ground and concourse levels for commercial purposes. National was to furnish three separate rental payments: debt service rentals, "Authority" rentals of about $25,000 annually, and certain excess rentals.

81. City and County of Honolulu v. Bishop Trust Company, 49 Haw. 494, 421 P.2d 300 (1966).

82. 412 Pa. 372, 194 A.2d 606 (1963), *cert. denied* 376 U.S. 952 (1964).

83. 422 Pa. 317, 221 A.2d 138 (Penn. 1966).

The second agreement pertaining to a Rittenhouse Square project was nearly identical, with the developers authorized to build a 19-story office building over an *existing* Authority garage in downtown Philadelphia. The developers were also given an option to purchase the entire project for a sum ranging between 1 and 1.3 million dollars after 30 years. In both instances, the Authority had failed to negotiate with its private sector "partners" through competitive bidding.

The court invalidated the National project on the ground that the private benefits greatly outweighed those of the public and that therefore the public participation and grant of governmental benefits to private parties would be impermissible. The Rittenhouse Square project was *also* voided because, as with the National project, it had been consummated by private negotiation rather than competitive bidding. The court did *not* find that the agreement constituted a private rather than a public purpose as it had with the National project.

It has been suggested that one rationale for upholding the Rittenhouse Square project and not the National project would be that the former involved the erection of a privately owned office building atop a pre-existing Authority parking garage, indicative of a real need for off-street public parking. The public benefit having already been established, it would, it has been suggested, be inappropriate to test the validity of the arrangement since the public benefit had already been proven to exist by the presence of the parking garage at that location. The National project, on the other hand, looked too much like a "package deal" since the construction of both the public and private structures were contemplated as part of one continuous activity.

In any event, it is clear that at least part of the court would have decided otherwise on the public purpose benefit issue. Writing for three of the eleven justices, Mr. Justice Musmanno pungently castigated the majority for their narrow interpretation of the public interest:

> A more specific, salutary agreement, conducive to the best interests of the city of Philadelphia, in keeping with the spirit of the times, and destined to greatly benefit the motoring public, it would be difficult to find. It must be stated at the very outset that the cost of the public parking facility portion of the Academy House Project will be financed entirely by the Authority's revenue bonds. In turn, the lessee (National Land) will pay as part of the rent all sums necessary to meet the principal and interest on those bonds. Here again, and this must be emphasized, *not a single penny of public funds will be expended.* Here indeed, *manna will be descending from the top of the skyscraper apartment house to an Authority, whose pantry needs replenishment.* The lessees will pay for every expense required for the construction of the building. What does the Authority give in return? The empty air

above the garage. *Could there ever be a more fruitful return than falling from invisible trees growing above the top of one's own orchard?*

* * * *

What the Majority has done here is to substitute its own judgment and its own views on strictly economic and administrative matters involving the exercise of administrative judgment, for that of the Parking Authority entrusted under the law to exercise that judgment. This it has no right to do. [*Schwartz v. Urban Redev., supra.*] A reading of the Majority Opinion against the background of the uncontested facts reveals that the Majority is arrogating unto itself the powers and duties of a super Parking Authority, which, it is unnecessary to state, it certainly has no constitutional power to do.[84]

Several jurisdictions have dealt with the problem of the leasing of city, park and/or waterfront property for such uses as fishing piers, marinas, and other private water-oriented business ventures. In *Sunny Isles Fishing Pier, Inc. v. Dade County*[85] the Supreme Court of Florida considered an appeal to set aside the leasing of a portion of a public park to a business firm for the construction and operation of a fishing pier. The court noted that no cost or expense to the county was involved, and that the portion of the park being used was neither required nor in fact being used for public park purposes.[86] The court frankly characterized the issues as whether Dade County had the authority to provide fishing facilities for the residents and visitors in the county and to generate revenue for the county as well. Among the key factors noted by the court:

A fishing pier is a very essential adjunct to the operation of a park of the kind which the County constructed on this mile and a half of ocean frontage. There are many benefits and advantages of such a facility in a resort area that probably attracts as many fishing enthusiasts as any other section of the world. The pier was constructed over a portion of the beach lying just north of the inlet and in an area affected by eddies and currents and undertows that render the use of the waters nearby dangerous to bathers. . . . *The amount of land actually involved is less than an ordinary city lot and is in a public park comprising more than 140 acres. The amount of ocean front used is only a small fraction of the total ocean front and the construction of the pier over that small portion of the beach to all practical purposes probably adds to rather than detracts from its availability to the public. It is certainly a use incidental to the main operation of this large public park.* . . .[87]

With respect to the matter of revenue, the court then quoted extensively from its earlier opinion in *Gate City Garage, Inc. v. City of Jacksonville*

84. *Id.* at —, 422 Pa. at 156-59 (emphasis added).
85. 79 So.2d 667 (Fla. 1955).
86. *Id.* at 668.
87. *Id.* at 669 (emphasis added).

dealing with the propriety of a long-term lease to a private party of a filling station in a large public parking area:

> Constructing and leasing a filling station in a parking lot the size of that contemplated is a mere incident, the primary purpose being to acquire and construct a parking lot to serve a public and municipal purpose.[88]

Continuing with its own analysis, the court observed:

> A factor of importance is that for the use of this 40 feet of beach, the County is guaranteed a minimum rental of $3,500 per year and has as security for the payment of that rent a facility worth more than $150,000, which becomes the County's property at the end of the term of the lease or as provided in the lease in the event of a breach of material condition thereof. *This type of public financing should be encouraged rather than condemned.* It has a tendency to preserve private enterprise of which this Court has had much to say [cases omitted].
>
> Moreover, had the County concluded to construct this fishing pier and run it as a part of the public park, open to the use of the public without charge, which it had the legal right to do, the situation then would have resulted in appellants, who are conducting a private enterprise of a similar nature a short distance north of the public pier, operating their enterprise in competition with a similar project financed out of public funds.[89]

Largely to the same affect is the Rhode Island case of *Thompson v. Sullivan*,[90] where the Supreme Court of Rhode Island held that the lease of a city wharf to a yacht club was not invalid under a statute authorizing the *sale* of city property whenever property was, in the opinion of the City Council, unsuitable or ceased to be useful for public purpose. The court held that it was not required to pass upon the wisdom, reasonableness or propriety of the City Council's action, once it had made the requisite findings.

A similar result was reached in *D. N. Kelly & Son v. Selectment of Town of Fairhaven*[91] where a town, acting by virtue of statutory authority permitting it to acquire by purchase or eminent domain approximately 3 ½ acres of wharf property, leased part of it to a private company which erected a building thereon.

The Supreme Court of Minnesota held that the City of Minneapolis had the power to lease land acquired for the purposes of a river terminal but thereafter found unnecessary for such public use.[92] In part relying upon the earlier decision of *Anderson v. City of Montevideo*[93] upholding the leasing of an auditorium in a municipal building for purposes of

88. 66 So.2d 653, 658-59 (Fla. 1953).
89. 79 So.2d 667, 670 (Fla. 1955).
90. 88 R.I. 305, 148 A.2d 130 (1959).
91. 294 Mass. 570, 3 N.E.2d 241 (1936).
92. Penn-O-Tex Oil Co. v. City of Minneapolis, 207 Minn. 307, 291 N.W. 131 (1940).
93. 137 Minn. 179, 162 N.W. 1073 (1917).

showing movies, the court affirmed the opinion of the lower court which had found specifically:

> That the leasing of said premises by the defendant to the plaintiff is proper and reasonably necessary for the proper and efficient operation by the defendant of said public dock and river terminal. That the said leasing of said premises will greatly promote the business and operation of said public dock and river terminal, and that the making of said lease by the defendant to the plaintiff is within both the express and implied authority of the defendant and is a proper exercise of such authority.[94]

Once again, there were specific statutes and charter provisions permitting the city to take, hold, lease and convey all real, personal and mixed property as its purposes might require.

The City of Los Angeles provides another excellent example for the manner in which a city, with appropriate authority, can deal with excess public land rights. Directly over a city-owned parking lot in the middle of town, the City of Los Angeles has become the landlord of the Los Angeles Mall Shopping Center, described by an information and instruction book for potential tenants published by the City of Los Angeles as "a project of the City of Los Angeles and the parking authority of the City of Los Angeles." The site consists of a two-block area containing the shopping center, four levels of underground parking beneath the center, public parks and a series of pedestrian vehicular tunnels and bridges crossing adjoining streets. The shopping center was constructed and is operated solely by the City of Los Angeles. Lease terms are between five and twenty-five years, and basically cover an area of approximately 125,000 square feet. It was developed at a cost of approximately $42 million. Prospective tenants range from restaurants and banks to shoe repair and passport photo shops.

Some caution, however, is in order as shown by *State ex rel City of Charleston v. Coghill*.[95] There the court held that legislation authorizing a city to determine what amount of space in a public parking facility should be leased to private enterprise was not an unconstitutional delegation of legislative power.[96]

In light of some of the cases noted above, it should come as no surprise that many transportation-related public entities engage in a number of development projects with various private corporations and other private groups.

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94. Penn-O-Tex Oil Co. v. City of Minneapolis, 207 Minn. 307, 308, 291 N.W. 131, 132 (1940).

95. 207 S.E.2d 113 (S. Ct. W.Va., 1973).

96. The court noted: "Certainly the creation of aesthetically appealing, convenient, and efficient downtown urban centers is a public purpose and may be considered in determining the validity of a particular parking facility." *Id* at 118.

The enabling legislation for the Chicago Transit Authority is fairly typical. It expressly contemplates disposition of excess property by either sale or lease:

> The grantee may lease, sell or otherwise dispose of any property in its property accounts which is no longer necessary, appropriate, or adapted to the proper operation and maintenance of the Transit System.
>
> Any property so sold or disposed of shall be removed from the property accounts of the Grantee.
>
> The net rental or net income arising from the leasing of any property in the property accounts of Grantee shall constitute and be part of the gross revenues of the Grantee but only so long as such property is used or useful as operating transportation property. Chicago Transit Auth. Ord. (passed April 23, 1945).

In a recently published CTA manual on real estate practices and procedures, there are several examples in which the CTA holds property used for private purposes:

1) Air spaces over transit lines and station facilities including station parking lots;
2) Surface spaces over and alongside sub-surface transit facilities;
3) Surface spaces beneath transit facilities such as aerial structures;
4) Excess land lying outside of CTA right-of-way; and
5) Surface space required for future transit development such as the expansion of parking facilities at station areas.[97]

The manual goes on to state with respect to the dealings in such property:

> 9) Sale or long term grants of excess property rights within the developing economic zones shall be deferred until substantial value appreciation has accrued as a result of this development.
>
> ***
>
> b) Generally, CTA participation will be through its land ownership, with the aim of achieving optimum return while retaining maximum control.[98]

Having acquired much of the system from a multitude of private rail companies in the 1940's, the CTA also acquired a number of leaseholds for activities such as newspaper and food vending. Although many of these tenancies were year-to-year in nature, many have been continued since the street railway "went public." Indeed, some of the stations are even redesigned with these concessions in mind, not only because the concessions are convenient, but because they provide income. Examples are the Bryn Mawr and Kimball, and Lawrence Avenue stops where extra water and electricity lines were installed to provide for such concessions.

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97. *Chicago Transit Authority Real Estate Practices and Procedures*, CLAIMS LAW/REAL ESTATE DEVELOPMENTS, Real Estate Section 29 (March 1975).

98. *Id.* at 31.

Where the tracks of the CTA pass over Fullerton Avenue, the CTA is presently negotiating for the construction of a building to be used for a private business. This is apparently not an unusual practice. The CTA owns approximately 150 commercial buildings under its elevated rights-of-way in various parts of the city. The buildings themselves have been acquired after the ground leases have run out and range from jewelry shops to supermarkets. Income from the leasing of these properties ranges from $1,200 to $30,000 per year. The tenants pay taxes on the leaseholds so that Cook County is able to get a part of a normally exempt property interest back on the ad valorem property tax roles. Moreover the City of Chicago receives additional sales taxes, and the CTA further benefits by the presence of a commercial venture under its right-of-way, which helps to avoid what might otherwise be a high-crime location.

The Chicago Transit Authority also engages in considerable joint development through leasing or selling some of its right-of-way. The CTA permits the construction of buildings on property previously condemned for turning circles for buses on CTA's bus routes, which it will eventually take over when the ground lease runs out. In addition, the CTA regularly leases or sells air rights over its rights-of-way and stations, often at a considerable profit.

The BART system is also contemplating adding to its revenues by leasing space in its publicly-acquired land. BART has issued several policy statements (dated February, 1975) dealing with real estate and the development of income from district-owned real property, as well as special access to BART stations, plazas and parking lots. An excerpt:

> The District will lease particular properties that are deemed to be located within an economic impact area of a transit station and District real property will not be sold where there is an obvious potential increase in value as a result of the transit system.
>
> All real property holdings shall be analyzed for alternative sale or lease potentials which would be compatible with the construction, operation, maintenance, security and aesthetic treatment of the transit system as well as with community planning and zoning patterns. Accommodation of compatible supplemental revenue-producing uses shall be considered in the design, construction and operation of the system.
>
> Excess real property shall be analyzed as to optimum timing for disposal and for possible leasing advantages. Market analysis and timing of disposal shall reflect good business practice. When analysis indicates that disposal should be deferred, interim leasing arrangements should be pursued to:
>
> 1) maintain properties in a neat and orderly condition,
> 2) serve useful individual and community purposes,

3) reduce land maintenance and cleanup costs,
4) provide District income.[99]

The Policy on Special Access to BART Stations, Plazas and Parking lots contains the following interesting provision:

> Compensation should be obtained for all special access permitted to BART underground stations and above-ground plazas and parking lots based on the net enhancement in property or business values derived from such access where such benefits exist. Costs of developing access should be deducted from gross value increases to arrive at net enhancement values. One method of doing this would be to amortize development costs and apply them as access rental offsets. *Compensation should be paid not only for physical access, but also for visual access or exposure permitted by BART such as for display cases and display windows fronting on BART facilities or for improved light, air, and view derived from BART-controlled access.*[100]

BART has received a recommendation from one of its consultants that it develop an office building around its Lake Merritt stop to be occupied in part by BART and in part by other public agencies and private interests. BART owns three blocks around this particular stop at which it has its headquarters. BART approved a $1,000 a month rent for a visual access window for a donut shop at one stop and at another BART is leasing right-of-way space for parking. It has also received a proposal to put a restaurant over the ventilation shaft of the Ferry Building stop. BART also obtains revenue by leasing connections from its stops to commercial premises such as Woolworth's, Wells Fargo Building and California Savings and Loan Association. BART officials are quick to point out that these arrangements do not yet produce significant income. Rental income of around $100.00 per month for the first ten years of the term appears to be typical. They estimate that perhaps twenty-five such agreements have been negotiated. So far BART has not participated directly in any air rights development but only in leases for development when the whole fee, excepting sub-surface rights, was acquired above its subway right-of-way.

There is also considerable use of existing property for private developments over the rights-of-way and at interchanges with respect to various state highway programs. Most states expressly prohibit commercial establishments in rights-of-way for freeways and controlled access highways. However, in many states toll highways are expressly exempted from this provision. For example, in Illinois the Illinois Tollway Commission,

99. *Policy on Developing Income From District-Owned Real Property* (BART POLICY STATEMENT, 1975).

100. *Policy on Special Access to BART Stations, Plazas, and Parking Lots* (BART POLICY STATEMENT, 1975).

established by statute to construct and maintain a toll-highway system, is specifically permitted:

> To contract with and grant concessions to or to lease to any person, partnership, firm, association or corporation so desiring the use of any part of any toll highways, excluding the paved portion thereof, but including the right-of-way adjoining, under, or over, said paved portion for the placing of telephone, telegraph, electric, power lines and other utilities and for the placing of pipe lines, and to contract with and grant concessions to or to lease to any person, partnership, firm, association or corporation so desiring the use of any part of the toll highways, excluding the paved portion thereof, but including the right-of-way adjoining, or over said paved portion *for motor fuel service stations and facilities, garages, stores, hotels and restaurants, or for any other lawful purpose, except for the tracks for railroad, railway or street railway use, and to fix the terms, conditions, rents, rates, and charges for such use.*[101]

Acting pursuant to such authority, the Tollway Commission has leased space for five restaurants and ten gasoline service station establishments both adjoining and over tollways in Illinois. The basic leases provide that the Commission receives a percentage of the sale of the various products. The leases run for 25 years.[102]

This practice of leasing highway right-of-way is fairly widespread according to a study on multiple uses of highway rights-of-way.[103]

Such development, however, pales in comparison with the ambitious projects undertaken by the California Department of Transportation (CALTRANS) both under and above its system of freeways. CALTRANS has broad statutory authority to permit private development on its property:

> The Department may lease to public agencies *or private entities* for any term not to exceed 99 years the use of areas above or below state highways, subject to such reservations, restrictions and conditions as it deems necessary to assure adequate protection to the safety and the adequacy of highway facilities and to abutting or adjacent land uses . . . . Prior to entering into any such lease, the Department shall determine that the proposed use is not in conflict with the zoning regulations of the local government concerned.[81]

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101. ILL. REV. STAT. ch. 121, § 314a34(e) (1975) (emphsis added).

102. Pennsylvania's turnpike law contains a similar provision: "The Commission is hereby authorized to fix, and to revise from time to time, tolls for the use of the turnpike and the different parts or sections thereof, and to charge and collect the same, and to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining the paved portion, for placing thereon telephone, telegraph, electric light or power lines, gas stations, garages, stores, hotels, restaurants, and advertising signs, or for any other purpose, except for tracks for railroad or railway use, and to fix the terms, conditions, rents and rates of charges for use." PA. STAT. ANN. tit. 36 §652.15 (Purdon 1961).

103. National Cooperative Highway Research Program, *Rep. 53, Multiple Use of Lands Within Highway Rights-of-Way*, 55-56 (1968).

On the strength of its statutory authority, CALTRANS has issued a series of implementing regulations,[104] and has issued a statement concerning air space leasing and a development program which states CALTRANS' position with respect to its long-term program:

> Long Term Lease Program
>
> The primary objective of this program is to encourage the construction of building improvements on Airspace. Many prime sites for the construction of building improvements on a long term lease are available. Developers are invited to present their proposed uses for Airspace.[105]

Acting under its broad authority CALTRANS has leased space under the Santa Monica freeway in Los Angeles for a 300 unit, 40,000 square foot warehouse. Now completed, there is a waiting list to get in. At another location along the same freeway ground was recently broken for a 40,000 square foot building with the underside of the freeway serving as a roof. The construction of two or three 15,000 square foot buildings of the same type is due to commence within the next few months.

In San Francisco the Department expects to break ground soon for a car wash and service station similarly located under a freeway. There are plans to do the same for automobile sales agencies.[106] A $25 million project will soon be underway on air space and land in a loop of the Hollywood Freeway to contain a 16-story office building, three theatres and a 16-story hotel. We understand there is also located in Sacramento above the freeway the beginnings of a Holiday Inn.

Returning to Colorado, there are several interesting examples that might be useful as precedent and guidance for the undertaking of public/private development techniques. One of the most promising is the statute creating the Moffat Tunnel Improvement District. The purpose of the tunnel was to provide an avenue of communication through the Continental Divide to "reduce the barrier which now separates the western portion of the state from commercial intercourse with the eastern portion thereof."[107] The project was specifically declared to be a public use even though not many persons "may enjoy it" and even though persons using the improvement must pay for the privilege.[108] The statute specifically sets out authority[109] to acquire not only a tunnel site but such other lands and approaches as may be necessary, and to exercise the power of eminent domain when necessary to accomplish the purposes of the Act. The Board governing the district is specifically given the power:

104. CAL. STS. & HY. CODE § 104.12. (West 1974) (emphasis added).
105. CALIFORNIA DEPARTMENT OF TRANSPORTATION, CAL. STS. HY. REGS. 70.001 (West 1975).
106. *Id.*
107. COLO. REV. STAT. ANN. § 32-8-101 (1973).
108. Milheim v. Moffat Tunnel Improvement District, 72 Colo. 268, 211 P. 649 (1922).
109. COLO. REV. STAT. ANN. § 32-8-107 (1973).

> [T]o enter into contracts for the use of the said tunnel, its approaches and equipment, with persons and with private and public corporations, and by said contracts to give such persons or corporations the right to use said tunnel, its approaches and equipment for the transmission of power, for telephone and telegraph lines, for the transportation of water, for railroad and railway purposes, and for any other purposes to which the same may be adapted.[110]

Litigation established that it was not necessary that rentals from the leases be sufficient to pay the entire cost of the tunnel—amounting nearly to a subsidy for the tunnel.[111]

It is also interesting to note that the State Highway Department in its authorizing legislation is granted the power to acquire *and dispose of* property for future needs and to lease any lands which are held for state highway purposes and are not presently needed therefor, on such terms and conditions as the Chief Engineer, with the approval of the Governor, may fix.[112]

Interestingly enough, however, a special section on Freeways and Local Service Roads provides:

> [N]o commercial enterprise or activity for serving motorists, other than emergency services for disabled vehicles, shall be conducted or authorized on any property designated as or acquired for or in connection with a freeway or highway by the State Department of Highways or any other governmental agency.[113]

It may be that this provision is confined in its application to the particular highways noted in this section, and not to highways, turnpikes, tollroads and toll tunnels generally. In any event, the absence of such a provision dealing with rapid transit could be construed to mean that if such limitations had been contemplated, they would have been inserted in the statute. Their absence would therefore be added authority for permitting such private uses on transit district property in order to generate a revenue stream, an aspect of value capture.

IV. Intergovernmental Cooperation/Joint Development

Another means by which a Transit District could accomplish "value capture" is by means of intergovernmental cooperation. This might take a number of forms. For example, a joint venture or some other type of agreement may be entered into with an urban renewal authority,

110. Colo. Rev. Stat. Ann. § 32-8-108 (1973).

111. Moffat Tunnel Improvement District v. Denver and St. Louis Ry. Co., 45 F.2d 715 (10th Cir. 1930); Denver and St. Louis Ry. v. Moffat Tunnel Improvement District, 35 F.2d 365 (10th Cir. 1929).

112. Colo. Rev. Stat. Ann. § 43-1-210 (1973).

113. Colo. Rev. Stat. Ann. § 43-3-101(3) (1973).

municipalities, or county and special district agencies in order to jointly participate in the land use around transit stops. If the Transit Authority is not able itself to recapture some of the value accruing to the property surrounding such a stop, it may at least see that public benefits, both financial and otherwise, accrue to other governmental entities. The ability to enter into such agreements in some jurisdictions has been largely dependent upon the existence of constitutional or statutory intergovernmental cooperation or agreement provisions, together with case law interpreting the same. The case law on intergovernmental cooperation and development, outside of service contracts, is sparse, although such cooperation is apparently being pursued successfully in several parts of the country.

The development of the Bay Area Rapid Transit System (BART) was accomplished through a unique method of intergovernmental cooperation. The California Health and Safety Code provides for limited intergovernmental cooperation in the development of transportation systems. Section 33448 provides:

> In a county with a population of 4,000,000 persons or more, or in a city of 500,000 persons or more, an agency may, with the consent of the legislative body, acquire, construct, and finance by the issuance of bonds or otherwise, a public improvement whether within or without a project area consisting of a transportation collection and distribution system and peripheral parking structures and facilities, including sites therefor, to serve the project area and surrounding areas, upon a determintion by resolution of the agency and the legislative body that such public improvement is of benefit to the project area. Such determination by the agency and the legislative body shall be final and conclusive as to the issue of benefit to the project area.[114]

BART has had particular success with the utilization of joint powers agreements entered into with cities and various special districts. Through these, BART has regularly condemned land for transit stops not only for its own purposes but for the municipal purposes of the local government with whom it has entered into the agreement. An example of such agreement is one between BART, Oakland, Alameda County, and the not-for-profit Coliseum, Inc., to construct a walkway to the Coliseum Sports Complex from the BART station. Similar agreements between BART and CALTRANS, in which CALTRANS acted for BART, resulted in the acquisition of substantial portions of highway and rapid transit right-of-way together with BART parking areas.

In Boston, the Boston Redevelopment Authority is undertaking a venture at the old South Station, acquired in 1965 from the Penn Central Railroad. After demolishing much of the original terminal, the land was

114. CAL. HEALTH & SAFETY CODE § 33448 (West 1973).

sold for the construction of a private office building and a Federal Reserve Bank building. There are plans to construct a new "intermodel terminal" for rail, bus and subway together with commuter parking. Private concessionaires will be located in the complex. BRA is using HUD money for site clearing and renovation.[115]

The CTA has also entered into a number of agreements with other governmental entities, such as the Metropolitan Sanitary District of Chicago (MSD) whereby it leases properties *from* the MSD for certain of its activities and leases *to* the MSD property for an MSD well site. In another instance the CTA exchanged an easement, which was needed for the construction of a University of Illinois hospital near the CTA structure on Taylor Street, for land which the University held and which the CTA wanted for the construction of a station.

Again returning to our Colorado example, the constitution of the State of Colorado provides:

> Nothing in this constitution shall be construed to prohibit the state or any of its political subdivisions from cooperating or contracting with one another or with the government of the United States to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt.[116]

The Denver Urban Renewal Agency (DURA) has the power to condemn for the purposes of redeveloping a slum or blighted area, and, for the same purpose, to engage in tax increment financing. We understand the Denver Rapid Transit District is contemplating an agreement with DURA whereby the RTD would lend to DURA sufficient funds to undertake redevelopment, perhaps including the construction of a station with RTD funds, to eventually be paid back through the instrument of tax increment financing. By such an agreement RTD would obtain a station free of charge and would make a substantial contribution to the development of the community in the immediately surrounding area. It may be that some sort of joint sharing of revenues or powers could also be worked out with applicable urban drainage and flood control districts, special districts (which may provide a range of services from flood control and public service transportation to housing)[117] and with airport authorities, which have broad powers of eminent domain.[118]

115. Rice Center for Community Design & Research, BUILT OR IMMINENT U.S. EXAMPLES OF VALUE CAPTURE/JOINT DEVELOPMENT, (July 1, 1976) (unpublished study).

116. COLO. CONST. art XIV §18.

117. *See* COLO. REV. STAT. ANN. § 41-3-106(J) (1973).

118. *Id.*

Some care must be taken in drafting such agreements and the provisions by which the various parties thereto, being governmental entities, are authorized to act. There appears to be some question, for example, about multiple county districts embracing a number of home rule cities, and the powers the general assembly can give to such districts in matters of local and municipal concern.[119] Care would need to be taken to ensure that the appropriate municipal corporations are brought into such agreements to the extent that anything falling uniquely in their province would be contemplated by the parties thereto.

V. Taxing And Other Monetary Transfers

A. Tax Increment Financing

Another value capture technique involves the use of taxing mechanisms, either in connection with, or separate from, the techniques noted above. Basically, tax increment financing is a method by which one municipal agency or corporation pledges all or a portion of the incremental tax revenue generated by public improvement or development created and initially paid for by a second agency, to that agency in order to pay it back. The amount pledged is generally from the *ad valorem* property taxes from the district, and the incremental value thus accrued and reflected in the *ad valorem* property tax is used to pay off the bonds issued by the developing agency. This device is particularly popular among local and federally-funded development agencies in order to undertake major redevelopment projects. One of the major advantages of such a system or technique is that no new taxes are levied or collected. Rather, the burden falls upon whichever general purpose government is pledging the increments (or a portion thereof) created by the redevelopment. Unless an inflation factor is plowed into the base, though, the tax revenues may not keep pace. This device has generally been restricted legislatively to development districts. Legislation so providing may be found in California, Montana, Minnesota, Kentucky, and, in bill form, in Illinois. The Kentucky statute was recently struck down by the Supreme Court of Kentucky as technically violating the terms of the Kentucky Constitution, but the Court commented that: "We find no fault in the purpose or the theory [of tax increment financing], but for the reasons that follow it is our opinion that each of the acts transcends the limits of the Kentucky Constitution." [120]

119. Four-County Metropolitan Capitol Improvement District v. Board of County Comm'rs, 149 Colo. 284, 369 P.2d 67 (1962).

120. Miller v. Covington Dev. Authority, 539 S.W.2d 1 (Ky. 1976). The difficulty encountered by the Tax Increment Act was that it permitted school districts to participate with the result that taxes collected by a school district would be subject to a tax increment transfer and the funds

As noted above, the Denver Urban Renewal Agency has such authority. It is worth noting that the constitution of the State of California was specifically amended to permit local development authorities to engage in tax increment financing theoretically obviating the misfortune of the Kentucky statute.[121] The Constitution limits authority to engage in tax increment financing to redevelopment authorities. During the first 2 years of experience in California, $170 million worth of tax allocation bonds have been issued by 26 different redevelopment agencies. Providing the matter of legal authority could be solved, it could be useful as a technique for the development of rapid transit as well.

Examples of the use of such techniques applicable to transit districts are few and far between. As in previous sections, however, there is no intrinsic reason why it would not be possible to analogize to other situations involving local governmental agencies or, indeed, the local governments themselves, to the extent the exercise of the power does not depend upon being a general purpose governmental entity.

B. Special Assessments

The use of special assessment districts is another technique whereby a transit agency could effect value capture.

California is a pioneer in the enactment of special benefit assessment legislation, which are particularly suited to transit purposes:

> The legislative body of any city or the Board of Supervisors of any city and county may establish one or more special benefit districts within the city and county pursuant to this chapter. Any special benefit district may consist of either contiguous or non-contiguous areas of plan within the city or city and county. Each zone within a special benefit district shall be an area adjacent to a station of the municipal transportation system or along the route or lines of said system which the legislative body or Board of Supervisors determines will receive special benefit by reason of the operation of transportation facilities but all zones within a special benefit district

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would not be used directly for educational purposes. This the court held was strictly prohibited. In a particularly zealous opinion the court unfortunately went on to say:

> It is no answer to say that tax increments will be money the schools would not have had anyway, because the fact is that neither could this portion of the tax increments ever be realized except through taxes levied for and in the name of the common schools. It is also irrelevant we think, that as a practical matter tax increment financing eventually will increase the revenues of a school district by enhancing its tax base, or that redevelopment of depressed areas may increase the average levels of student achievement by improving the environment in which the student lives. *Id.* at 5.

Hopefully the formalistic rigidity of the Kentucky Supreme Court is not contagious or legislative wisdom will overcome such difficulties through better draftsmanship or constitutional amendment.

121. CAL. CONST. art. 16, § 16.

need not be adjacent to the same station or adjacent to the same portion of the route or lines.[122]

This special benefit district legislation serves several important functions. First, it represents a declaration by the legislature that special benefits may accrue to property along a mass transit line. Although a property owner may claim that his land receives no special benefits, courts generally give considerable weight to legislative determinations. Thus, once a special benefit district is determined, should such power be granted to a local transit district, the burden to show that certain land is not especially benefited is placed upon the landowner. Second, the legislation specifically allows for the creation of several districts within one transit area. The special district itself may contain separate zones. These provisions give the transit district considerable leeway to apportion costs in proportion to benefit. Instead of assessing only property adjacent to a transit station, as would be the case with respect to the usual public improvement situation, the district could set up zones with assessments decreasing in proportion to distance from the transit stop, or in accordance with some other formula.

We note in passing that this particular piece of legislation has never been used, despite the fact that the most recent and modern of rapid transit systems, the Bay Area Rapid Transit System, was constructed during the 1960's in California. However, much of BART's acquisition program was completed by the time the "Mills Bill", quoted above, became law. Moreover, on advice of counsel, BART officials were particularly concerned with the affect of protracted hearings and litigation over such a new financing technique. The Mills Bill requires a two-thirds vote in order to provide for the bonding required. Moreover, the task of establishing criteria for ascertaining incremental value was thought to be too difficult, possibly leading to arbitrary decisions. It was considered that sufficient benefit would accrue to BART from its ability to tax real estate values in Marin County which would presumably generate increased revenues as BART developed. Finally, it is worth noting that the Special Benefits Assessment Act in California pertains only to land. It was apparently never contemplated that *improvements thereon* would be subject to such a tax.

In New York, rapid transit lines were authorized to be constructed at least in part by means of special assessments along the lines.[123] We do not know of any that were so constructed, however.

122. CAL. PUB. UTIL. CODE § 9900 *et seq.* (Deering 1968).

123. *See* BUILT OR IMMINENT U.S. EXAMPLES OF VALUE CAPTURE/JOINT DEVELOPMENT, *supra* n. 115.

Another device is downtown mall construction, which is a close analog to the transit-related special benefit assessment Mills Act in California. Louisville, Kentucky has recently completed construction of a downtown mall whereby adjacent commercial property owners were assessed a portion of the cost of constructing the mall. The non-adjacent owners could have been assessed if an appropriate finding of benefit had been made by the Board of Aldermen. This particular method of assessment was specifically authorized by a statute which comprehensively describes both the procedure and the method of ascertaining such special benefits.[124]

The legislative findings in terms of benefit and public purpose are clear:

> The general assembly of the Commonwealth of Kentucky finds as a fact that the preservation of downtown areas of cities is vital to the health, safety and material wellbeing of the citizens and inhabitants thereof, and that the construction and installation of pedestrian mall projects will contribute to the safe and effective movement of persons, and serve the public health, safety, convenience, enjoyment and general welfare. The governing body of a city, to protect and serve the public safety, convenience and welfare and the interests of the public in the safe and effective movement of persons, and to preserve and enhance the function, appearance and economic viability of the central mercantile and business areas of such city, may initiate, construct, install and establish a pedestrian mall project in the manner herein provided, at the exclusive cost of the owners of land located in the pedestrian mall benefit area, which is benefited by a pedestrian mall project.[125]

While it has been pointed out that such a technique used in connection with a transit stop might have a more difficult time in meeting a strict benefits test, it would depend to a large extent on the law of the particular jurisdiction. The type of analog that might well serve to persuade court or legislature that property owners who are specifically benefited could legally be taxed is exemplified by a recent Court of Appeals case from Michigan. In *Christoff v. City of Gladstone*,[126] four of eleven property owners in the city complained of a special assessment levy for the laying of water mains. Despite the fact that the suit below had been for injunctive relief and that under Michigan law such equitable actions are reviewable *de novo*, the court found no reason to overturn the lower court's finding. It was held that where the property owners could be benefited by increased

124. KY. REV. STAT. ANN. §§ 93A.010(12) and 93A.030 (1970) (Emphasis added).

125. *Compare* KY. REV. STAT. ANN. §93A.020 (1971), *with* COLO. REV. STAT. ANN. §31-25-41 *et seq.* (1973).

126. 65 Mich. App. 607, 237 N.W.2d 579 (1975).

fire protection, assured safe water supply, and increase the market value of their property, special assessment was proper.

While it is not directly on point, the New York Supreme Court decision in *Metropolitan Transportation Authority v. City of New York*,[127] is interesting. The report of the case sets forth the fact that income from concession revenues at Grand Central Station, and real estate income from property along Park Avenue, contributes to the operation of the two stations and is worth fighting about. There is no evidence, however, that the transit authority ever went out of its way to attempt to generate much revenue from such value capture sources. Nonetheless, the 1973-1974 New York Transit Authority's Budget Data and Transit Fact Publication[128] shows that "other than passenger" revenue, consisting mainly of advertising, rentals and miscellaneous, and station concessions, amounts to some $8 million. Of course, this needs to be compared to a total annual figure of $538,295,000.00 for 1973.

In the review of materials with respect to monetary transfers, there are several matters with respect to our example, Colorado, which might be useful to note in this section. First of all, under Public Improvements, there is a section dealing with public malls.[129] Aside from providing specifically that the legislative body of the city, in connection with the establishment of pedestrian malls, may convey, lease or transfer parts of malls in various ways, make improvements of any kind, including commercial buildings and facilities and the like, it also authorizes the legislative body:

> (e) To pay from the general funds of the city from proceeds of general obligation bonds from other monies available through the city *from the proceeds of the assessments levied on lands benefitted by the establishment of a pedestrian mall*, from funds raised through bonds issued there against or from any other source whatsoever, the damages if any allowed or awarded to any property owner by reason of the establishment of a pedestrian mall and to make other provisions to secure the payment of said monies as provided in Section 31-25-406.
>
> (f) To pay from the general funds of the city from proceeds of general obligation bonds from other monies available to the city from the proceeds of assessments levied on property benefited by any such improvements from funds raised through bonds issued payable from such assessments or from any other source whatsoever *the whole or any portion of the cost of such improvements*.
>
> (g) To levy assessments against properties benefited by the proposed pedestrian mall in an amount no greater than the total damages or compensation paid to landowners or to assess such damages as part of the total

127. 47 N.Y. App. Div. 2d 10, 365 N.Y.S.2d 10 (1975).
128. *See generally* New York City Transit Authority Operating Budget - 1975.
129. COLO. REV. STAT. ANN. §31-25-41 *et seq.* (1973).

> cost of the improvements made of the mall area so long as the amount assessed does not exceed the special benefits conferred.[130]

While there is no particular definition of special benefits in the statute, the wording quoted above does not seem to confine the levy of an assessment for special benefits to abutting properties only.

It also appears to be the law in Colorado that to sustain a special assessment it must appear that a benefit has been occasioned to the premises assessed at least equal to the burden imposed. Nevertheless, it is also true that a presumption of validity attaches to a city council determination that benefits especially accruing to properties equal or exceed the assessments thereon, and the burden is generally on the property owners, who must affirmatively show to the council or other body by substantial evidence, that the contrary is true.[131] It also appears to be the law, according to the last cited case, that remote or contingent benefits enjoyed by the general public will not sustain a special assessment. However, it does not appear that the kinds of benefits which would accrue to the owners of properties nearest or adjacent to a transit district, together with others a bit further afield, would fall into the latter category.

Finally, the case of *Milheim v. Moffat Tunnel Improvement District*,[132] dealing with the construction of the Moffat Tunnel, indicates that the tunnel was constructed by virtue of the formation of an improvement district with the right to levy taxes for the construction of the said tunnel. Multiple challenges to the imposition of the tax were turned back, and it would appear that the case may be helpful precedent.

VI. Conclusion

The array of techniques for implementing value capture policy have long since moved from the theoretical to the practical stage. Supplemental condemnation, joint development, air rights development, special benefit assessments and tax increment financing—*all* have their precedents. Indeed, all are going forward—or have gone forward—somewhere, whether beneath a freeway in California, at a central mall in Kentucky, or at a bus turning circle in Illinois. The question is no longer *whether*, but *how, when* and *under what conditions* will public authorities be successful in reaping the fruit of their own efforts, hopefully to perpetuate and enhance their contribution to the quality of life.

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130. Colo. Rev. Stat. Ann § 31-25-41 *et seq.* (1973) (emphasis added).

131. *See*, Satter v. City of Littleton, 185 Colo. 90, 522 P.2d 95, 98 (1974); City of Englewood v. Weist, 184 Colo. 325, 328, 520 P.2d 120, 123 (1974); Orchard Court Development Co. v. City of Boulder, 182 Colo. 361, —, 513 P.2d 199, 202-03 (1973); and Ochs v. Town of Hot Sulphur Springs, 158 Colo. 456, 407 P 2d 677 (1965).

132. 72 Colo. 268, 211 P 649 (1922).