PROTECTING FUTURE STREETS: OFFICIAL MAPS, SETBACKS, AND SUCH

Interstate freeways will require broad new rights-of-way through scores of American cities and counties. A number of local planning agencies, hoping to influence highway officials in selecting locations for the new roads, have recently shown interest in legislative measures that protect plans for future streets and highways. At the same time, the spread of urban development and increasing traffic create pressure to extend local street networks and to widen and realign existing roads. Planning agencies have discovered that their plans for local streets mean little unless private builders heed them.

The problem is simply stated. A city that maintains an up-to-date major street plan (or a plan for parks, schools, or playgrounds) has at least a general idea where it wants to put new or enlarged public facilities before it actually provides them. This time lag is not a defect in municipal administration; it is inherent in sound planning.

Once city officials have thus decided what property they want for public use, they are naturally concerned when a private builder decides that the proposed public site is the perfect spot for a new house or factory. First of all, buildings cost money. When the city ultimately buys the land, it will pay for the building too, and the taxpayers will foot a bigger bill. If the building is sufficiently expensive, the city may be forced to abandon its plans and put the proposed facility in a less desirable alternative location. Second, people understandably resent having their homes and businesses uprooted. Bitter home owners may delay location approval and land acquisition even for major freeways. If land is needed for a small park, opposition to the taking may force the city to give up the project entirely. And even if projects are successfully rammed through, a residue of bitterness it likely to remain.¹

Building in the beds of proposed streets is of course not the only reason that acquisition of property for public projects is so often difficult and


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expensive. Many public bodies do not plan far ahead anyway; no one has found a way to prevent building in the bed of a highway before its location is even generally known. And the drafters of the most comprehensive of all possible plans may have failed to foresee -- until after needed land was developed -- that another freeway should be built. Thus, purchase or condemnation of buildings is often unavoidable. But it can be avoided more often than it ordinarily is.

It has been estimated that as many as 98 per cent of property owners will voluntarily refrain from building on land that they know is to be taken for public use in the foreseeable future. But the need for legislation that will deal effectively with the recalcitrant minority has long been recognized. Laws in at least four of the original thirteen colonies protected locations designated for future streets from encroachment by private buildings. In the early days of the republic, mapping of future streets was not uncommon. A map of New York, for example, authorized in 1807, designated street locations as far out as 155th Street. And in a much-cited case in 1836, a Brooklyn landowner who chose to build within the bed of a proposed street was denied compensation for his building when the street was finally opened.2

During the nineteenth century, however, changes in state constitutions and in judicial attitudes increased the scope of protection accorded private property. And the early statutes proved particularly difficult to uphold because they occasionally caused hardship to one or a few landowners without providing any "variance" or other remedy. When the modern city planning movement began nearly half a century ago, its proponents found that the old anti-encroachment statutes were still considered constitutional only in Pennsylvania. At national planning conferences in the twenties, new legislation intended to meet constitutional requirements was suggested.3 Planners and lawyers debated whether building could be prevented without payment of compensation.4 In the late twenties and thirties, model legislation (some providing for compensation) was issued and statutes were enacted in several states.

Some communities -- such as New York City -- have successfully used the powers granted in these statutes for many years. Even in the states with enabling legislation, however, most communities have hesitated to use their powers. Often the need for future street protection has not seemed particularly urgent. In other cases, cities have only a sketchy major street plan intended to meet legal requirements for the imposition of subdivision controls. But two other difficulties seem to be of primary impor-

2In re Furman Street, 17 Wend. 649 (N.Y. 1836).


4See Philip Nichols, "Preventing Building in Officially Mapped Streets," and Frank B. Williams, "Enforcing the City Plan," in Planning Problems of Town, City and Region -- Papers and Discussions at the International City and Regional Planning Conference, 1925 (Baltimore: The Norman, Remington Co., 1925).
The first is the problem of locating each proposed street with the precision needed to establish a building line. The second is finding a way to protect the community's interest in keeping property undeveloped without at the same time unfairly penalizing the landowner whose property happens to lie in the path of progress.

Wholly satisfactory solutions to these problems have still not been found. But progress has been made. The next step -- at least in a number of states -- can be taken at the local level.

**TERMINOLOGY**

The idea of preventing or limiting building within areas needed for future public use is a simple one. Nevertheless, measures to carry out this idea are widely regarded as complex and confusing. Much of this confusion results from lack of agreement on the meaning of common terms. Seldom does a reader finally conclude that he understands a term used in this field without soon finding an article or statute that uses it in a slightly different sense. Whenever possible, we think it desirable to adhere to the meanings used by Russell Van Nest Black in his basic work on this subject: Building Lines and Reservations for Future Streets (Cambridge: Harvard University Press, 1935).

Here are explanations of how some of the more common terms are used:

**Major street plan.** This is part of a community's master plan. It shows the width, type, and general location of the more important streets (both existing and proposed) that will be needed to provide for anticipated traffic. Once accepted, the plan guides officials in making many types of decisions -- such as preparing capital budgets and approving subdivisions -- that affect or are affected by the proposed street pattern. Since the plan is usually intended more to give an over-all picture of the street network than to show the precise location of each street, the street boundaries shown are ordinarily only approximate.

**Mapped street.** Black (on page 6) uses this term to refer to "future streets whose locations are indicated on a map but which are not yet open or occupied for street purposes, or in public ownership." If building is to be prohibited or limited within mapped streets, their location should be indicated with such precision that affected property owners can rely on the mapped boundaries in preparing building plans.

**Street reservation.** This term (as used by Black on page 11) includes mapped streets. It also includes land along existing streets that is designated, by any type of governmental action, for public use when the street is widened.

**Street reservation line.** This is merely the boundary of a street reservation.

**Official map.** In many cities, this is merely a map, adopted by the legislative body, showing the precise location of existing streets (and sometimes parks, open spaces, and other public facilities). Under legislation in several states, the precise location of street reservations may also be shown. When so shown, street reservations are ordinarily protected from private encroachment.

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Zoning map. This is a map, adopted as part of a community's zoning ordinance, that shows the boundaries of zoning districts. It is not an "official map" and has nothing to do with the protection of land needed for future streets.

Front yard. A front yard can be required for such purposes as assuring an adequate supply of light and air, lessening density, lessening dangers from fire, and improving the appearance of property. Properly, such a yard has nothing to do with protecting land needed for future streets. Front yards are often required by zoning ordinances, but they may also be established by private deed restrictions, by so-called setback or building line ordinances, and by setback lines contained in subdivision plats. The distinguishing feature of a front yard is the purpose for which it is required rather than the way in which it is imposed.

Building line. Though this term is sometimes used in a more limited sense, it is really just a line beyond which building is prohibited. The line defining a front yard (whether it is established by a zoning ordinance, a building line or setback ordinance, a subdivision plat, or a private deed restriction) is thus a building line. When building is prohibited within street reservations, the street reservation line is often also a building line. If, however, a front yard is required in addition to a street reservation, only the front yard line is a building line.

Setback. This term applies to any requirement that buildings be set back a distance measured from the center or edge of a street (or from any other existing or proposed physical feature). A requirement that no building be built within ten feet of a particular street in order to facilitate future street widening is thus a kind of setback. And a 30-foot front yard established by a zoning ordinance to provide light and air is also a setback because the 30 feet are measured from the street. The distinguishing feature of a setback, then, is the way in which the requirement is measured rather than the purpose for which it is imposed.

INDIRECT METHODS OF PROTECTING FUTURE STREETS

The city with a major street plan is often able to prevent building on land needed for future rights-of-way without ordinances designed exclusively to prevent it. Though neither subdivision controls nor front yard requirements are a substitute for street reservation ordinances, both are in practice used to accomplish some of the same objectives.

Even more unfortunate are such expressions as "side setback" and "rear yard setback." Spaces along the sides and rears of lots are yards. Dragging in the word "setback" introduces confusion where it can easily be avoided.
Subdivision Controls

Subdivision controls probably protect more future streets more effectively than any other type of governmental action. Integration of land subdivision -- and its accompanying new streets -- into the community's circulation plan is of course one of the primary objectives that subdivision controls are designed to achieve. Thus the Standard City Planning Enabling Act (issued by the United States Department of Commerce in 1928) required that the community have a major street plan before exercising subdivision control, and it specifically empowered cities to adopt regulations providing "for the proper arrangement of streets in relation to other existing or planned streets. . . . " Enabling legislation in a number of states contains similar provisions.

Subdivision ordinances usually protect proposed future streets through the layout and design standards that every subdivision plat is required to meet. For example, the Oak Lawn, Illinois ordinance (1956) provides:

Wherever a subdivision embraces a major street, as shown on the Major Street Plan, such major street shall be platted in the location and of the width indicated on the Major Street Plan.

One of the advantages of subdivision controls as a method of protecting future streets is their convenience: so long as the major street plan shows the general location of major streets, their precise location can be decided upon at the time that subdivision plats are approved. Since the subdivider must submit the plat to the city anyway and must have lot lines surveyed, no one is put to additional trouble by having precise street boundaries determined then too. And so long as the planning agency requires consideration both of the major street plan and of the street boundaries determined on any neighboring subdivision plats, the city's interest is adequately protected.

Using subdivision controls, cities are often able to do more than merely prevent subdivision that is inconsistent with street plans. Actual dedication of land needed for streets to serve the subdivision is almost always required. Dedication of strips to permit street widening may also be required. And though the courts have not yet generally upheld requirements that sites be dedicated for parks and other public open spaces made necessary by the subdivision, it seems likely that the principle will ultimately be extended to permit these requirements too.

But subdivision controls alone are not always enough to prevent building in the beds of future streets. Obviously, they cannot be used to prevent building that may take place without any subdivision. For example, if a major street is to be superimposed on an undeveloped area that has already been platted, subdivision controls will be of little value in protecting it. Nor

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6This statement is based on the assumption that adoption of the major street plan is legally sufficient to enable the city to disapprove subdivision plats that do not conform to it. For a case that can be read to cast doubt on this assumption, see Lordship Park Ass'n v. Board of Zoning Appeals of Stratford, 75 A.2d 379 (Conn. 1950).
are the controls likely to be of value in preserving land needed for street widening in subdivided areas. And of course farm buildings and factories are often built on parcels of land so large that they have never been subject to subdivision controls.

Subdivision controls are also limited in another important way. In fairness to the subdivider, the public facilities for which dedication is required must presumably bear some rough relationship to the subdivision. Thus, while few would question the propriety of insisting on dedication of 80-foot or perhaps even 120-foot streets, it seems manifestly unjust to require dedication of a 300-foot right-of-way for a proposed freeway that would bisect a 20-acre residential subdivision. Similarly, even if the courts ultimately approve requirements for dedication of park and school land, it would hardly be fair to require that 15 of a subdivider's 20 acres be dedicated for such purposes.

Subdivision controls are thus seen to be a valuable and convenient method of protecting future streets. Their use for this purpose should be encouraged. But they are not alone sufficient to do the job.

Front Yard Requirements

The theoretical relationship between front yard requirements and the reservation of land for future street widening is easily set forth: they have nothing to do with each other. Front yards are established for reasons such as these listed in a United States Supreme Court opinion that upheld yard requirements:

... front-yards afford room for lawns and trees, keep the dwellings farther from the dust, noise and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater distance between houses on opposite sides of the street, reduce the fire hazard ... the projection of a building beyond the front line of adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles. We cannot deny the existence of these grounds -- indeed, they seem obvious.8

7The problem arises whether reservation for the freeway could be required as a condition of subdivision approval. A carefully considered opinion that such reservation can be required is contained in a letter dated May 26, 1958 from John B. Heinrich, County Counsel of Sacramento County, California, to the county's planning commission. Whether all courts would agree with this opinion (and the matter is at best unsettled), it seems likely that reservation as a condition of subdivision (which may amount to prohibition of subdivision in some cases) is on about the same legal footing as outright prohibition of building in the beds of future streets. Therefore, if reservation requirements in subdivision ordinances are in some cases struck down on constitutional grounds, it may be that the explicit building prohibition measures to be discussed later would suffer from the same disability.

8Gorieb v. Fox, 274 U.S. 603, 609 (1927).
But a requirement that buildings be set back from the street so that land will be available for street widening is by definition not a front yard requirement. It is interesting to note that, because of the different purposes of the two types of requirements, both can sometimes be intelligently applied to the same piece of property. For example, a 20-foot front yard in a residential district may be appropriate in addition to a 10-foot setback for street widening.

But the distinction between front yard requirements and reservations for future street widening is often blurred. This may be partly because front yard requirements are imposed in so many ways. The most common yard requirement, of course, is the one contained in a zoning ordinance. But the subdivision ordinance that requires a "setback line" 25 feet from the street is in fact almost always establishing a front yard. And if a community without a zoning ordinance enacts a "setback" or "building line" ordinance with the intention of assuring light and air, it is also establishing a front yard requirement.

The variable front yard requirement may add to the confusion. Many ordinances establish a fixed minimum yard. For example, a zoning ordinance may require a 30-foot front yard on each lot in a residence zone. But the required yard depth is sometimes made dependent on the depth of the yards already provided on neighboring lots. Thus, the "building line ordinance" upheld in Gorieb v. Fox required (with certain exceptions) that the building line be at least as far back as 60 per cent of the existing buildings in the same block. And many current ordinances contain front yard provisions similar in principle to the following one from the Kettering, Ohio zoning ordinance (1955):

In any R District, where the average depth of at least two (2) existing front yards on lots within one hundred (100) feet of the lot in question and within the same block front is less or greater than the least front yard depth prescribed elsewhere in the Zoning Ordinance, the required depth of the front yard on such lot shall be modified. In such case, this shall not be less than the average depth of said existing front yards, or the average depth of existing front yards on the two (2) lots immediately adjoining, or, in the case of a corner lot, the depth of the front yard on the lot immediately adjoining; provided, however, that the depth of a front yard on any lot shall be at least ten (10) feet and need not exceed fifty (50) feet.

Though the Kettering ordinance properly talks of "front yards," many such ordinances refer instead to "setbacks," thus adding to the confusion between yard requirements and street widening reservations.

There is another reason that yard and street widening provisions become confused. In practice, yards often prove convenient to the city that decides to widen streets. Ordinarily, city officials who enact yard requirements are genuinely interested in light and air. Later, though, they may honestly decide that a couple of additional traffic lanes are really more important than some of the air. And sometimes, it must be admitted, the yard requirements are from the start a subterfuge for street requirements.
Why use a subterfuge? We will see that the constitutional status of yard requirements was at one time generally thought to be different from that of street reservations. There may in fact still be a difference today -- at least in some courts. More important, probably, is the fact that not all states have explicitly authorized cities to prohibit building in order to facilitate street widening. And some states have authorized them to do so only if they pay compensation. But front yards can be required under the zoning ordinance. Courts and most citizens are accustomed to the idea of front yard requirements and are less likely to think about objecting to them than to street widening provisions.

Black pointed out that the use of zoning to protect land needed for street widening was a fairly common practice. He also pointed out that the practice seemed to work. The same is presumably true today.

OUTRIGHT RESERVATION OF FUTURE PUBLIC LAND

We now turn to measures that cities take for the avowed purpose of preventing private land development that is inconsistent with ultimate use of the land by the public. Though an occasional landowner causes concern by wanting to plant orchards, the city is usually worried primarily about the construction, reconstruction, and enlargement of permanent buildings.

Several kinds of statutes have been proposed and enacted to prevent building on land needed for public use. The statutes discussed in this section do not provide for the taking of the land itself: after reservation, the public has no right to use the land and the private owner may do anything with it except construct buildings on it. (He may even construct buildings, but he has no right to compensation for them when the city condemns the land.)

The statutes that follow differ from each other in two major respects. First, some are "eminent domain statutes" and some are "police power statutes." Under either type of statute, the landowner is, of course, compensated for the property when it is taken for public use (unless dedication may later be required as a condition of subdivision approval). But under the eminent domain statutes, the limitations placed on building prior to the taking of the land are also considered a taking of a property right for which additional compensation must be made. Under the police power statutes, on the other hand, restrictions on building prior to the taking are considered mere regulations, which the government may impose without compensation.

Both eminent domain and police power statutes may be further classified according to the method prescribed for designating reserved areas. Thus, setback statutes or building line statutes authorize prohibition of building within a stated distance of the center or the edge of streets and highways. Other statutes, though, specify that the restricted areas be shown on a map. The map may be an official map of the city that shows existing as well as proposed streets. Under other statutes, it may be merely a plat of the particular area within which building is forbidden.

Application of these distinctions is the basis for the outline of the following discussion of street reservation legislation:
Eminent domain statutes
Setback statutes
The Standard Act
Highway reservation agreements

Police power statutes
Setback statutes
The Standard Act alternative provision
Official map acts
Modifications (of the Standard Act and of the official map acts)
Ultimate highway width statutes

Eminent Domain Statutes

Offered a choice between using eminent domain and using the police power to accomplish the same objective, cities understandably prefer to save money by using the police power. Even in states in which legislation seems to authorize future street protection only by eminent domain, cities appear to have used their authority very little. Funds for the purpose are usually scarce. In light of the fact that the owner will later be compensated when the land itself is taken, the damages awarded may seem excessive. And in the event of a change in the proposed street location, the eminent domain system may be so rigid that route modifications are difficult.

Nevertheless, legislation authorizing use of the power of eminent domain for street reservations once looked important. Such provisions remain on the statute books in several states. Though it now appears that the future of street reservations lies with police power statutes, anyone who would be informed about reservations should be familiar with their eminent domain background.

Setback statutes. A number of states have at one time or another enacted statutes enabling cities to establish setback lines under the power of eminent domain. Some of these were enacted before zoning became common and were primarily intended to enable cities to require front yards. Since the purpose of the building lines was often not stated, however, some of the statutes were apparently used on occasion to reserve land for future street widening. And a few of the laws were clearly intended to facilitate street widening. For example, Black reprinted a 1923 Tennessee act that provided:

... it shall be lawful for any municipality having a population in excess of 160,000 inhabitants ... to provide by ordinance for the establishment of a building line, or lines, on any street. After the establishment of any such line ... no building or other structures shall be erected and no existing building reconstructed or repaired to the extent of more than seventy-five per cent of its value ... except subject to the rights of the municipality acquired under any building line ordinance.

... upon the final passage of such ordinance the municipality passing the same shall be conclusively held to have taken an
easement of way over all lands abutting the part or parts of the street to which such building line ordinance is applied.

Such ordinance shall also provide that at a future time to be therein specified, not later than twenty-five (25) years after the passage of such ordinance, the municipal corporation shall widen the street to the line or lines established.

The Standard Act. The commentary on the Standard City Planning Enabling Act, issued by the Department of Commerce, noted that opinion was divided on whether street reservations could be protected under the police power or only under eminent domain. The text as finally issued authorized the use of eminent domain. It was suggested that general eminent domain statutes in some states might be sufficient to enable reservation of locations for future streets, but the statute undertook to set forth these powers in detail.

The fundamental power is given in Section 21 of the act. Selections from the text are given here, since cities in a few states still operate under this statute -- though usually without offering to pay compensation.

Any municipal planning commission is empowered, after it shall have adopted a major street plan of the territory within its subdivision jurisdiction or of any major section or district thereof, to make surveys for the exact location of the lines of a street or streets in any portion of such territory and to make a plat of the area or district thus surveyed, showing the land which it recommends be reserved for future acquisition for public streets.

The commission's plat was then to be transmitted to the council. If the council accepted it (with or without modifications), it was required to fix the period of time for which the street locations were reserved. In an attempt to provide flexibility, the city and landowners were authorized to agree on modifications of the areas reserved during the period of reservation. The council could abandon the reservation at any time.

The provisions for compensation were extensive. Briefly summarized, a board of three council-appointed appraisers first fixed the amount of compensation due to each landowner. If the council approved the awards, it could then provide for their payment. Even if the council approved, any landowner was entitled to appeal to the courts for redetermination of the amount of compensation. The council was then required either to pay this amount or abandon the reservation.

The act then provided:

The reservation of a street location . . . shall not be deemed to prohibit or impair in any respect the use of the reserved land by the owner or occupant thereof for any lawful purpose, including the erection of buildings thereon; but no compensation . . . shall at any time be paid . . . for the taking of or injury to any building or structure built or erected within
the period fixed in the resolution of council upon any such reserved location. . . .

Among the states in which legislation based on these provisions of the Standard Act was enacted and is still in effect are Alabama, Colorado, Kentucky (third- through sixth-class cities), and Pennsylvania (second-class cities). And a provision using the power of eminent domain to protect mapped streets and parks also exists in Massachusetts.

Reservation agreements. Though it is our impression that street reservations are seldom created under the right of eminent domain, the idea of compensating landowners for reservations is not dead. Highway reservation agreements, such as those in Ohio between the state and individual landowners, provide that the owner will not develop specified property needed by the state for highway purposes. These agreements are used in rural areas, in which landowners will enter into the agreements voluntarily for only nominal payments. In such situations, the agreement system is reported to work successfully.

**Police Power Statutes**

Setback statutes. Just as setbacks have been authorized under eminent domain, so have they been authorized under the police power. Among the states in which authorization is closely tied to the planning process is Arkansas, where a statute, enacted in 1957, provides:

> When a master street plan has been adopted . . . the legislative body of the city, upon recommendation of the planning commission, may enact ordinances establishing set-back lines on such major streets and highways as are designated by the plan, and may prohibit the establishment of any new structure or other improvements within such set-back lines.

The Standard Act alternative provision. Though the Standard Act recommended protecting street reservations only by use of eminent domain, it also included an alternative police power provision for the bolder states. The powers granted by Section 21 (described above) remained unchanged in the alternative provision. In other words, a planning commission with a major street plan could adopt plats of particular areas that were to be reserved and send them on to the council.

Under the alternative provision, however, the issuance of building permits "for any building on any part of the land between the lines of a proposed street as thus platted" was prohibited. In order to take care of hardship cases, the local board of zoning appeals was given power to grant building permits in a procedure similar in some ways to the granting of zoning variances. This safety valve provision was designed to obviate constitutional problems raised by hardship cases. The importance of such provisions will be discussed later.

Official map acts. Official map acts appear to present the street reservation tool most likely to be used in the future. An indispensable article, covering both the background of official maps and details of their operation

Like the other statutes discussed, official map act powers can be used when the council suddenly decides that it really ought to reserve land for future widening of a couple of blocks on North Main Street. Some official map acts do not require a major street plan prior to the mapping of street reservations. Nevertheless, the official map at its best functions as a refinement of a city's major street plan: once the city has a precise map of existing streets and a plan of the general location of needed new and widened future streets, it can decide on the precise location of one or more of the future streets. By noting this precise location on an official map, it reserves the land for public use.

The prototype of official map acts was adopted in New York in 1926 and 1927. The statute provides for a map that shows, initially, existing streets and parks:

Every city... legislative body which has the authority to lay out, adopt and establish streets, highways and parks may establish an official map of the city showing the streets, highways and parks theretofore laid out, adopted and established by law. Drainage systems may also be shown on this map. Such map is to be deemed to be final and conclusive with respect to the location and width of streets, highways, drainage systems and the location of parks shown thereon... . . .

After the map has been adopted, the city may at any time change or add to it "so as to lay out new streets, highways or parks, or to widen or close existing streets, highways or parks." But these changes, since they are not just portrayals of an existing situation, may be made only after a public hearing and after the planning board has had an opportunity to make a recommendation.

The statute prohibits issuance of permits for building in the bed of any street or highway (but not park) shown on the official map. In order to take care of hardship cases, the statute also provides a "variance" procedure.

In 1958, the New York legislature enacted a new statute extending official map authority to counties. The statute is explained in detail by S. J. Schulman in "The County Official Map Act -- A New Tool for County Planning," in the New York State Planning News for November-December 1958. Perhaps the most interesting feature of the new statute is that it gives effect to county maps even within municipalities:

Adoption of an official map may also have other consequences not directly within the scope of this report. For example, in New York, no public utility or improvement may be constructed by a city that has an official map within a street not shown on the map. And no building permit may be issued unless a street or highway giving access to the proposed structure is shown on the official map. Provisions such as this are especially valuable in preventing circumvention of subdivision control regulations.
The county official map, together with such changes and additions as may be authorized shall be deemed to be an addition to or change of the official map of any municipality affected. If any such municipality shall not have an official map, then the county official map as it affects such municipality shall be considered to be the official map of such municipality.

Adoption of official maps by counties is also authorized in other states. See, for example, the General Planning and Zoning Enabling Act of Georgia, enacted in 1957.

Modifications. As would be expected, a number of modifications of the New York act and the Standard Act have been enacted in other states or proposed in model statues. Several are suggested in Bassett, Williams, Bettman, and Whitten, Model Laws for Planning Cities, Counties, and States (Cambridge: Harvard University Press, 1935), which should be consulted by anyone drafting revisions of street reservation legislation. The major differences between these models and the earlier legislation are explained by Black, beginning at page 18.

Maryland, Michigan, Minnesota, New Hampshire, Utah, and Wisconsin are among the states that have statutes based to a considerable extent on the original acts or the model variations. Among the states with other forms of street reservation legislation are Georgia, Kentucky (first class cities), Maine, Missouri (counties), New Jersey, Oklahoma, and South Carolina. Some of these other statutes are effective and up-to-date, though some are inadequate.

Some of these statutes, especially the ones enacted relatively recently, permit the establishment of an official map only if the city has a major street plan. The New Jersey act follows New York in permitting adoption of such a map even if the city has no such plan. If such a plan does exist, however, the New Jersey statute requires the governing body to submit any proposed map or amendment to the planning board for recommendation.

Another of the more important variations, included in a few of the statutes, prohibits issuance of permits to build within mapped parks or other public open spaces. Here again the New Jersey legislation is of interest. It provides for the mapping of streets, drainage rights-of-way, parks, and playgrounds. It forbids issuance of building permits within areas mapped for use as streets or drainage rights-of-way. For parks and playgrounds, however, it makes this provision:

Upon application for approval of a plat, the municipality may reserve for future public use the location and extent of public parks and playgrounds shown on the official map... and within the area of said plat for a period of one year after the approval of the final plat or within such further time as agreed to by the applying party.

Entry into a purchase contract or the beginning of condemnation proceedings is required within the one year period in order to maintain the reservation.

Ultimate highway width statues. Extensive highway building programs have
impressed on state highway departments the need for reservation authority. As a result, statutes giving them such authority have been passed in several states. Though the resulting statutes give no authority directly to cities, their use by state agencies may produce a climate of opinion in which local reservation laws can be more readily applied.

An example of such a statute is the following, enacted in 1955 by the Washington legislature:

 Whenever any authority on behalf of the state shall establish the location, width and lines of any new highway, or declare any such new highway as a limited access facility, it may cause the description and plan of any such highway to be made, showing the center line of said highway and the established width thereof and attach thereto a certified copy of the resolution, and thereupon such description, plan and resolution shall be recorded. . . .

No owner or occupier of lands, buildings or improvements shall erect any buildings or make any improvements within the limits of any such highway . . . and if any such erection and improvements shall be made, no allowances shall be had therefor by the assessment of damages. No permits for improvements within said limits shall be issued by any authority: Provided, that the establishment of any highway location . . . shall be ineffective after one year from the filing thereof if no action to condemn or acquire the property within said limits has been commenced within said time.

It should be noted that this statute and some others like it make no provision for hardship cases. It may be that the short term for which reservation is permitted makes escape clauses unnecessary. Or the states may intend to begin purchase negotiations or condemnation proceedings at once in the event of a complaint that the reservation is unconstitutional. Other statutes of this type, however, such as the one in California, may be on safer ground, since they do include provision for administrative review and possible relaxation of reservation requirements when the owner demonstrates hardship.

A slightly different approach was used in an Indiana statute approved in 1957. The highway department is authorized to file a metes and bounds or other description of the location of a proposed state highway. The area designated is then reserved for a maximum period of three years. During that time, however, any owner who intends to build may file notice with the department, which must then either purchase the land or begin condemnation proceedings within 90 days. The greatest disadvantage of this approach is that the landowner may exert great pressure on the state to condemn property at once.

**ACQUISITION OF LAND FOR FUTURE PUBLIC USE**

Street reservation devices are appropriate when land included in planned public projects will continue in private ownership until roughly the time
that the projects are executed. On many occasions, though, cities might also consider the possibility of purchasing (or, if necessary, condemning) the needed land as soon as possible after planning is completed.

The reasons for advance acquisition as well as its legal background and operation are carefully explained in Acquisition of Land for Future Highway Use, Highway Research Board Special Report 27 (Washington: National Academy of Sciences -- National Research Council, 1957). At the time of that study, state highway departments had specific authority to acquire land in advance of need in only 13 states, though the power was implicitly granted in a number of others.

Very few explicit grants of the power to municipalities and counties were found. Cities and counties in Wisconsin are given it, and Tennessee cities with a council-manager charter also appear to have it. Though there may be a few more such authorizations, they are certainly not common.

APPLYING STREET RESERVATION MEASURES

What Land is to Be Reserved?

Before a city can reserve land for future use, it must determine the exact boundaries within which it wants to prevent building. Use of the police power does not justify boundary definitions less exact than those that would be necessary under the power of eminent domain. The city is establishing rules for many private individuals and it is imposing penalties for violations. Fairness demands that the individuals know exactly what conduct is prohibited. Whenever possible, they should also be able to rely on the city's plans in deciding on appropriate development for their property adjacent to reserved areas.

Purely mechanical difficulties encountered in defining boundaries can be considerable. Setback requirements seem to present the fewest problems -- assuming that the location of existing street boundaries or center lines is already precisely determined. But when the city proposes to reserve land for entirely new streets, it must in some way survey each proposed boundary and then indicate the line on a map or plat in such a way that prospective builders can locate it. Unfortunately, these jobs are often not done adequately. Joseph C. Kucirek and J. H. Beuscher point out at page 213 of their article on "Wisconsin's Official Map Law," 1957 Wisconsin Law Review 176:

The most serious fault found with a number of official maps was their lack of preciseness. City officials, attorneys and abstractors all commented that particular maps were not scaled to a level where accurate ascertainment of building lines on the land was possible. Contrast for example a carefully done map on 11 large sheets, one for each section of a city of 12,000 and an attempt officially to map a sizeable community including its extraterritorial areas on one sheet of paper, 18 inches square. One does not have to be an engineer to realize that precise ascertainment of street lines under the
latter map is an impossibility. Such a map is so general that it is extremely doubtful that a court would treat it as an official map.

 Attempts to reserve land before final route locations are definitely determined raise more fundamental boundary problems. We have already said that the lines within which building is prohibited must be drawn precisely. It is easy to assume that these precise lines must inevitably coincide with the precise boundaries of the future street and that reservation must therefore wait until street boundaries are determined. Ordinarily, of course, reservation boundaries and street boundaries do coincide. Once street plans have been completed, there is no reason for them not to coincide.

 Many times, though, public projects are being planned for areas that are already rapidly developing. Any delay in imposing reservation requirements -- even a delay until completion of street plans -- may permit private development that will ultimately have to be purchased at great expense. Any number of situations could arise in which reservation might be desirable before all the details of a route location were known. Perhaps a freeway, still in the initial planning stage, must inevitably go through a narrow valley that is already being developed. Or perhaps city and state agencies are still arguing over three alternative routes. Maybe the center line of a proposed route has been determined but additional engineering work must be completed. Or maybe both planners and engineers are pleased with a proposed route, but local residents whose homes would be taken are still being heard from. Should the city, in some of these situations, be able to prevent building before route locations are finally determined?

 If such preliminary reservation were desired, practical ways of designating land to be reserved could undoubtedly be found. Areas inevitably needed -- perhaps because of topographical conditions -- might be reserved on special plats prepared and filed before plans for the rest of the route are made. Such a plat would presumably reserve less land than would ultimately prove necessary. But building could be stopped just as soon as its inconsistency with public plans became clear.

 A more radical possibility would be to reserve more land than will ultimately be needed. For example, if center lines have been tentatively settled on for three alternative routes, the city might temporarily reserve 200 feet on either side of all three. Such a designation would be clumsy when compared with the careful boundaries drawn on an official map. The owner of property adjacent to the highway would not be able to rely on the reservation line in preparing building plans. But needed land would be reserved.

 If reservations were to be made on any basis short of final plans, it would be desirable for legislatures to specify the exact stage at which reservations could first properly be made. They might, for example, decide whether drawing of a center line from an aerial map of a specified scale is sufficient to permit a temporary reservation of land on either side of the line.

 In practice, political delays may present the most common problem. If home owners and all affected public officials are to have a say on route location, time must be allotted for them to be heard. For purely local projects,
would it be proper to permit any reservation before legislative approval of the route? Should provision be made for legislative approval of preliminary plans -- or for interim approval of final plans prior to public hearings -- on the basis of which reservations might be made? Needless to say, these problems become even more complicated when state and local officials must both agree on route locations.

It is an open question whether preliminary reservations prior to agreement on final plans are justifiable. The public clearly can benefit from them. But especially strong objections to the fairness of the arrangement can be made. The owner cannot rely on the temporary reservation line in planning the development of adjacent property. On the other hand, he would experience much of the same uncertainty even if the city made no efforts to reserve any land at all: the decision to build a new highway inevitably creates the uncertainty. What about the fact that the city knows it will not need all the land it reserves? One objection to the fairness of all kinds of police power street reservations is that the city can always change its plans, end the reservation, and thus perhaps damage nearby landowners who relied on the plans in developing property. That objection does apply here with particular strength. But the preliminary reservation would presumably be allowed to last for only a short time. Perhaps this lessens the owner's burden sufficiently to make the practice justifiable.

The county counsel of Sacramento County, California gave an opinion in 1958 that an unadopted freeway plan could be taken into consideration by a planning commission asked to approve a subdivision plat. A report submitted to the county by a private engineering firm had presented a plan for the development of roads to meet estimated 1980 traffic demands. The plan had not yet been adopted as part of the county master plan. Nevertheless, the opinion stated that subdivisions within the area of a freeway proposed under the plan could be disapproved or that reservation of freeway rights-of-way could be required. The opinion stated:

... it is obvious that the Planning Commission must have a reasonable time to consider and adopt a highway plan as a part of the Master Plan of the County. The Courts have recognized that sound planning cannot be accomplished overnight.

An interesting analogy that suggests itself in such a situation is interim zoning. In Miller v. Board of Public Works of Los Angeles, 234 Pac. 381 (Calif. 1925), a city contemplating a comprehensive zoning plan adopted an emergency ordinance prohibiting construction of dwellings for more than two families. The court upheld the ordinance, stating:

It is a matter of common knowledge that a zoning plan of the extent contemplated in the instant case cannot be made in a day; therefore we may take judicial notice of the fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan.
Since interim zoning ordinances usually allow some construction as a matter of right even during the interim period, such zoning is less extreme in operation than temporary street reservations. Nevertheless, the reasoning of the court in the Miller case does seem to support these street reservations too.

Even if one accepts the idea that preliminary street reservations are sometimes justified, it is well to remember that at some stages plans are too vague and remote to be protected. The following condemnation case may provide an example of such a situation:

A state highway department anticipated eventual widening of a highway to include four traffic lanes. It sought to condemn the wide right-of-way that would be needed, although it had formulated no plans for the widening and there was no reasonable certainty that the plans would be prepared in the foreseeable future. The court found this public need too remote to warrant condemnation (State on relation of Sharp v. 0.62033 Acres of Land, 112 A.2d 857 (Del. 1955)).

Are Street Reservations Fair to Landowners?

It seems clear that street reservations -- even when street boundaries are precisely determined -- will become common only to the extent that they can be imposed without compensation under the police power. It seems equally

10 This decision and the foregoing discussion are concerned with condemnation for a particular project before plans are completed. This should be distinguished from the concept of acquiring land decades before its exact use can be known and then making it available as need arises. Acquisition on such a scale would require almost unprecedented interest in the future, and condemnation for such purposes might require constitutional changes. But the arguments for the practice are substantial. Hugh R. Pomeroy stated in "Bringing Zoning up to the Automobile Era," published in Trends in Land Acquisition, Highway Research Board Bulletin 101 (Washington: National Academy of Sciences -- National Research Council, 1955):

We cannot design communities and routes of travel and communications to serve them in accordance with what we do not yet know, and what we do not yet know will always lie ahead and will always render our best plans obsolete. The wisest thing that we can do is to try to keep out of the way of the future, and the only way in which we can begin to do this is to provide space -- space that will be required in order to build over again, and again and again, all the major community facilities that we are now building or may build in the future.

In this concept, space for the channels of movement that are an integral part of any community composite must be ample beyond anything that we have yet thought to be necessary. Belts of open land up to 1,000 feet wide would probably permit whatever provision for movement that the future may require, without engaging in the repeated process of tearing the community apart to overcome our earlier deficiencies. . . .

18 Information Report 119
clear that police power reservations will not be extensively used until the public is convinced of their fairness. Legislators will hesitate to impose them in the first place. The courts will hesitate to find them consistent with the fair play required for due process of law.

Are such reservations fair? We see no inherent unfairness in the principle of reservation -- whether for entirely new streets or for the widening of existing ones. That the reservation is in the public interest seems hard even to question. It seems equally clear that protecting the street system is the type of objective that may properly be achieved through the police power. And we see no objection to imposing reasonable burdens on private landowners when such burdens significantly benefit the public. For example, if a farmer can conveniently build a barn without encroaching on a mapped street, why assert dogmatically that he must be allowed to encroach if he feels like it? And if a ten- or twenty-foot setback does not prevent reasonable use of a city lot, we do not see that the owner is being unjustly treated by the setback requirement.

But acceptance of the general principle of course does not mean that every application of street reservation powers is fair. There are unquestionably instances in which strict application of an official map act would result in an unconscionable deprivation of the landowner's rights. It seems clear, for example, that a city should not be able indefinitely to forbid building on a lot by including all of it within the bed of a mapped street. Nor should it be able to interfere seriously with its use by including, say, three-fourths of it within a mapped street or by imposing a 60-foot setback on a lot 100 feet deep.

This position -- that the principle is unobjectionable but that each individual application may be separately examined for unfairness -- is the one that the courts have now taken toward zoning and other familiar police power ordinances. Unfortunately, there is no convincing evidence that many courts have yet taken it with respect to street reservation legislation. Happily, though, they do not seem to have taken an unyielding stand against such legislation either.

Most of the relevant court cases have involved reservations for street widening rather than for entirely new streets. And as might be expected, more reservations for widening seem to have been imposed by the various kinds of setback requirements than by map legislation. Though there are important exceptions, setback requirements appear to have fared relatively well in the courts during recent years. Part of their good fortune is undoubtedly attributable to the uncertainty of the distinction between front yards and other setbacks. Front yard requirements have been on firm ground ever since Gorieb v. Fox, 274 U.S. 603 (1927).

One restrictive view of the police power, though accepting the propriety of front yard requirements, holds that setbacks for street widening are on a quite different legal footing. Widespread judicial acceptance of this view in the early days of zoning may help to account for the insistence by Bassett and others that front yards are not intended to aid street widening. Even today, this restrictive view is by no means dead. Citing a distinction drawn in British Commonwealth countries between restrictions imposed on the
basis of "good neighborliness" and those intended to secure a public benefit, one author stated only last year:

The public need not compensate an owner when it takes (restricts) his privileges of ownership in order to prevent him from imposing a cost upon others; but when the state takes (uses or restricts) his property rights in order to obtain a public benefit it must compensate him.

There is much in American constitutional law to support this distinction. . . . Thus it has been held unconstitutional to compel an owner, without compensation, to leave his land vacant in order to obtain the advantages of open land for the public or in order to save the land for future public purchase, but it is within constitutional power to compel an owner to leave a portion of his land vacant where building would be harmful to the use and enjoyment of other land (e.g., front yards) . . .

The quotation is from Allison Dunham's article, "A Legal and Economic Basis for City Planning," 58 Columbia Law Review 650, 666 (1958). For detailed exposition of this viewpoint, the article should be consulted.

It is not our purpose in this report to discuss the subtle turns of legal philosophy involved, though they are important. It does seem likely that Dunham's viewpoint -- with its overtones of the law of nuisance -- is not nearly so widely accepted as it once was. Certainly a number of other current planning practices would also be of doubtful validity if uncompensated use restrictions designed to benefit the public at large were not permissible. It is enough to note that there may still be a constitutional difference between front yards and street widening setbacks.

In practice, many courts and commentators appear to pay little attention to any such distinction. Charles S. Rhyne's Municipal Law, for example, at one point cites front yard and street widening cases together for the proposition that setbacks are now generally considered a proper exercise of the police power. Legislatures often do not specify the purpose of the setbacks. Sometimes the two objectives are so intertwined that courts would have difficulty singling one out. Whatever its basis, there does seem to be some tendency to treat front yards and other setbacks alike unless the street widening objective is especially noticeable. Even then, courts sometimes uphold the requirements. See, for example, City of Miami v. Romer, 58 So.2d 849 (Fla. 1952).

Of course, like any other regulation, setbacks will not hold up if they are unreasonable as applied. For example, deep setbacks on two sides of a corner lot may render the lot useless. And it was fairly clear that a 90-foot setback -- for whatever purpose -- was not appropriate on a lot that seems to have been 91 feet deep (see Householder v. Town of Grand Island, 114 N.Y.S. 2d 852 (Sup.Ct. 1951)). If the setback verges on the unreasonable, the fact that it is probably intended to facilitate street widening is unlikely to improve its position in the eyes of the courts. See Salt v. Cook County, 91 N.E.2d 395 (Ill. 1950) in which the ordinance required buildings to be set back 130 feet from the center line.
Building prohibitions should be equally permissible (or impermissible) when imposed by means of maps as when imposed by setback ordinances. Their actual status at present, however, remains uncertain, since there have been few map cases in the twentieth century, and many of these are not especially helpful. Among the important ones is Town of Windsor v. Whitney, 111 Atl. 354 (Conn. 1920), in which a 1917 statute was upheld. The statute provided for creation of a planning commission, gave it power to establish building lines, and forbade building not in conformity with the plan. Though no compensation was provided, owners were entitled to appeal to the courts if they regarded a plan as unreasonable. In the Whitney case, no objection to the reasonableness of the particular plan had been made, so the court considered only the propriety of this type of regulation under the police power. Selections from the city's brief in the case, which does an excellent job of explaining the relationship between the regulation and the police power, are reprinted in *The Law of City Planning and Zoning* by Frank B. Williams (New York: The Macmillan Company, 1922), beginning on page 36.

Another widely cited case is Headley v. City of Rochester, 5 N.E.2d 198 (N.Y. 1936), in which an official map ordinance was involved. The map designated strips along two sides of plaintiff's property -- and amounting to more than 20 per cent of its area -- for future street widening. Language in the decision suggested that the court might uphold reasonable applications of official maps if the question were presented, and there has been a tendency in the planning field to consider this decision as upholding the constitutionality of official maps. In the case itself, however, the plaintiff did not even claim to have been injured by application of the ordinance. In the absence of such a claim, the court found no basis for his attack on the ordinance.

A lower New York court case that does appear to uphold official maps in principle is Vangellow v. City of Rochester, 71 N.Y.S.2d 672 (Sup. Ct. 1947). The court dismissed an attack on an official map on the ground that administrative remedies provided by the statute and ordinance had not been exhausted. In order to reach this conclusion, the court first decided that the ordinance was not invalid in principle. The same reasoning was followed in S. S. Kresge Co. v. City of New York, 87 N.Y.S.2d 313 (Sup. Ct.), aff'd mem., 92 N.Y.S.2d 414 (App. Div. 1949).

The most important recent case upholding official maps is State ex rel. Miller v. Manders, 86 N.W.2d 469 (Wis. 1957). Here, too, the court concluded that the propriety of the particular application of the ordinance could be considered only in another proceeding, but it upheld the constitutionality of both the statute and the ordinance.

Particular applications. Like zoning ordinances, street reservation regulations imposed under the police power must have some type of safety valve if unfairness is to be avoided in occasional unusual situations. The absence of some escape clause was one of the reasons that the courts (except those in Pennsylvania) invalidated nineteenth century mapped street and building line statutes. Current street reservation statutes ordinarily contain such a provision.

The New York official map act, after forbidding issuance of building permits
for construction in the beds of future streets, provides:

... that if the land within such mapped street or highway is not yielding a fair return on its value to the owner, the board of appeals or other similar board in any city which has established such a board having power to make variances or exception in zoning regulations shall have power in a specific case ... to grant a permit for a building in such street or highway which will as little as practicable increase the cost of opening such street or highway, or tend to cause a change of such official map or plan, and such board may impose reasonable requirements as a condition of granting such permit which requirements shall inure to the benefit of the city. ... 

The police power provision suggested as an alternative to the Standard City Planning Enabling Act was perhaps less generous to landowners:

... the board of zoning appeals ... or a special board of appeals ... shall have the power ... to grant a permit for a building in such platted street location in any case in which such board finds ... (a) that the entire property of the appellant, of which such reserved street location forms a part, cannot yield a reasonable return to the owner unless such permit be granted; and (b) that, balancing the interest of the municipality in preserving the integrity of such street plat and of the municipal plan and the interest of the owner of the property in the use of his property and in the benefits of the ownership thereof, the grant of such permit is required by considerations of reasonable justice and equity.

This provision is more like the usual zoning variance provision than is the provision in the New York act. Here the entire property is considered in calculating a reasonable return, not just the property within the reservation. Also, the granting of the permit is specifically required to be considered in the light of the public interest.

The size of the reservation is likely to increase the number of requests to build. Black acknowledged that there are situations that "would seem to require some form of adjustment or the use of other procedure" than the police power. Among examples he gave were corner lots, shallow lots, and instances in which land for street widening is all to be taken from one side of the street. Reservations for freeways seems clearly to fall in this class of situations in which the amount of land reserved may often amount to a significant portion of an owner's holdings.

The time of the reservation in relation to development of surrounding property can also be expected to affect the number of requests for building permits. If an owner has no particular plans to develop farm property, he is unlikely to have any basis for complaints about reservation. If, on the other hand, the reservation is of land that is ready for the subdivider or for major construction, the owner can be expected to point out that he is not getting a fair return on the reserved property. Here again the freeway reservation is especially likely to suffer. With notable exceptions, plans...
for municipal streets are likely to be implemented roughly at the time surrounding property is developed. But freeways are on their own schedules; property for them is likely to be reserved for some time after it has become valuable.

Unless the courts permit temporary prohibition on all building (for perhaps a year or two) within areas reserved for freeways, it seems clear that under present laws building permits will have to be issued with unfortunate and costly frequency. The safety valve needed for fairness becomes instead a hole in the dike.

Perhaps what is needed to make freeway reservations workable are other safety valves in addition to the issuance of a building permit. An example of legislation that attempts to provide these is the Georgia General Planning and Zoning Enabling Act, passed in 1957. Referring to hardships caused by application of official maps, the statute provides:

... the said board of appeals shall have the power in its discretion, alternatively or conjunctively to grant relief as follows:

(1) where such land is not in use, to grant the appellant tax relief, which relief, if accepted by the taxpayer, shall thereafter stop him ... for a period of five years as to any claim except for the fair value of his property upon its subsequently being taken;

(2) where the relief sought involves the construction or enlargement of a building ... to grant a permit for it but, in so doing, it shall have the power to specify the exact location, ground area, height, materials of construction, and ... duration of the building ... 

(3) where the relief sought is freedom from interference with the free sale and disposition of such property, to order the governing authority, within not more than one hundred days to either (a) institute condemnation proceedings or negotiations to acquire the property, or (b) permit the sale of the property free and clear of the restrictions imposed. ...

Even though objections can be made to the mechanics of this legislation, the ideas behind it may be worth emulating elsewhere.

An attempt to provide for purchase or condemnation and also for the funds needed to make this alternative practicable is provided in an official map bill recently introduced into the Tennessee legislature:

... before the provisions regulating and penalizing building in the beds of mapped streets shall be effective in any municipality, there shall be provided by or for such municipality a fund or revolving fund for the advance acquisition of rights-of-way for streets shown on the official map. ...
quisition of rights-of-way shall be coordinated with street projects in the annual capital improvements budget and the long-range capital improvements program. Either before or after an application is made to the board of adjustment for permission to build in the bed of a mapped street, proceedings may be initiated . . . for the advance acquisition of the property in question, either by purchase or condemnation. It is the intent of this section that adequate and practicable provision be made for the advance acquisition of rights-of-way and that the owners of property located within the rights-of-way of a street as shown on an official map shall have a fair and reasonable opportunity to convey said property to the state or the municipality at its fair market value, without undue delay, and that funds be available for this purpose.

Whatever set of standards is incorporated in the legislation, safety valve provisions are intended to permit encroachments but limit them as much as is possible in each situation. Thus, Bassett and Williams suggested that a landowner who intended to build a four-story stone building in a mapped street might receive a permit for a one-story structure on the mapped land and be allowed to build the expensive building back from the proposed street.

A 1954 report on official map experience in New York City reported that protests arose in only about two per cent of reservation cases. Most of the permits granted in such cases were conditioned to permit use of the property only so long as it was not needed for public use. The article by Kucirek and Beuscher, already cited, should be consulted for helpful information on the operation of such provisions in Wisconsin.

Despite these "variance" provisions, there have naturally been some court cases in which the validity of the ordinance as applied was contested. In at least two cases, the application of the ordinance was held improper. In Grosso v. Board of Adjustment of Millburn Township, 61 A.2d 167 (N.J. 1948), an amendment to the official map placed an entire city lot in a mapped street. The court held that this fell afoul of due process requirements and referred the case back to the board of adjustment for further proceedings. A similar case is Roer Constr. Corp. v. New Rochelle, 136 N.Y.S.2d 414 (Sup. Ct. 1954). There the ordinance included an entire parcel in the bed of a mapped street, but the board of appeals refused to grant relief. The application of the ordinance was held invalid.

Another lower court case in New York (Rand v. City of New York, 155 N.Y.S.2d 753 (Sup. Ct. 1956)) concerned validity of the conditions attached by a board of appeals to the grant of a building permit. Eighty per cent of plaintiff's property was included within a mapped street. As permitted by the New York law, the board granted a building permit subject to conditions. One condition was that the amount of compensation to be paid in the event of condemnation would be reduced ten per cent for each year that the building had been standing. Thus, though the building was estimated to have a life of 50 years, no compensation would be payable if the building were condemned when it was more than ten years old. The court held this application of the ordinance unconstitutional.

Acts permitting reservation of streets or parks for limited periods present
an additional problem. Specifically, does a reservation that would presum­ably be an unconstitutional deprivation of property if of indefinite dura­tion become constitutional if it lasts for only a year or two? Though acts providing for temporary reservations exist in several states, their validity has seldom been tested. One case holding unconstitutional a three-year reser­vation for a park is Miller v. City of Beaver Falls, 82 A.2d 34 (Pa. 1951).

WHEN SHOULD STREET RESERVATIONS BE USED?

It would be an overgeneralization to say that every city and county can profit by reserving land for future public projects. A careful exploration of the local political scene and of judicial attitudes is usually a necessary prerequisite to any such step. Nevertheless, it seems clear that the cities with major street plans should consider reservations much more seriously than they often do.

Assuming general public acceptance of the reservation idea, reservations for municipal major streets seem most likely to be worthwhile. Applied in con­junction with subdivision controls to newly developing areas, these reserva­tions increase the likelihood that the plan will be implemented. The same is true when reservations prevent rebuilding or additional construction on developed property through which streets must be extended. They also save money, of course. And mapping the exact location of new streets simplifies and thus encourages voluntary compliance with the plan.

There is admittedly some inconvenience and expense in deciding on precise boundaries and arranging for them to be drawn up. It is also sometimes objected that the mapping results in undesirable rigidity. It does seem that the city has a moral obligation not to change street reservation lines after landowners have relied on their location. But if a change in the plan dictates abandonment of a reserved street or a change in its location, the city is entitled to make the change, just as it may change any other police power regulation.

It would be unrealistic, though, to expect reservations to be effective in all situations. Underlying present reservation legislation is the tacit assumption that the regulations will only occasionally require adjustment for individual landowners. It is true that even with adjustments the reserva­tions may help the city. Conditions on building permits may successfully require frame buildings instead of brick ones, one-story buildings instead of two-story ones. But the major benefit comes when the landowners never build at all.

In establishing said fund or revolving fund the municipality shall be authorized to use any municipal revenues which are available for street purposes, including the municipality's share of the state motor fuel and gasoline taxes. The munici­pality shall be authorized to levy and collect taxes for the purpose of establishing and maintaining said fund or sinking fund, and to issue bonds for such purpose...
Giving the city an alternative of condemning some reserved land is not a new idea. Frank B. Williams suggested at the 1925 ASPO National Planning Conference:

The existence of the suggested law protecting the plan would give the city the notice and the time necessary for it to condemn land needed for its plan in the rare case where there was an appeal to the board of appeals and no adjustment with the owner was found to be reasonable and possible, without giving the owners of planned property generally the power by threat of making valuable improvements to force the city to buy their land at once or allow its plan to be jeopardized.

And the government is given such an option in Britain under the Town and Country Planning Act of 1947, as quoted by Charles M. Haar on page 186 of his Land-Use Planning (Cambridge: Harvard University Press, 1959):

Where permission to develop any land is refused . . . or is granted . . . subject to conditions, then if any owner of the land claims --

(a) that the land has become incapable of reasonably beneficial use in its existing state; and

(b) in a case where permission to develop the land was granted . . . subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions;

. . . . . . . . . . . . . . . . . . .

he may . . . serve on the council . . . a notice . . . requiring that council to purchase his interest in the land in accordance with the provisions of this section . . . provided that --

(a) if it appears to the Minister to be expedient so to do, he may, in lieu of confirming the purchase notice, grant permission for the development in respect of which the application was made or, where permission for that development was granted subject to conditions, revoke or amend those conditions . . .

(b) if it appears . . . that the land . . . could be rendered capable of reasonably beneficial use within a reasonable time by the carrying out of any other development . . . he may . . .

direct that such permission shall be granted . . .

Even with these added safety valves, however, reservation for freeways, parks, and other large public sites seems definitely less desirable than actual acquisition of the land for future use. Limited acquisition used in combination with reservation as just suggested may be more practical for cities because of the smaller amounts of money needed before construction. In the long run, however, greater reliance on acquisition rather than reservation is likely to mean greater financial savings.
A number of state highway departments have advance acquisition authority and a few of them have substantial funds for the purpose. California is the best known example. A revolving fund to finance advance purchases was established there in 1952 and increased to $30 million in 1953. By late 1956 this fund had been used to acquire property that would have cost an estimated $114 million if purchases had been delayed until the time of construction.

The advantages of the system are obvious. Encroachment by private building is, of course, prevented. Uprooting of private homes and businesses is minimized at least as effectively as through reservation requirements. Most important in developing areas, land may often be acquired before tremendous increases in land costs.

Where extensive advance acquisition is not possible, reservations for freeways may nevertheless have value, especially if funds are available to purchase the land of those who object to the restrictions. This system is already being used successfully in some cities. See, for example, "Reservation of Future Rights of Way for Houston Expressways," by W. J. Van London, a speech given to the 1950 annual meeting of the American Association of State Highway Officials.

Recent planning literature is full of assertions that cities must cooperate with state highway departments in planning for the locations of the new interstate freeways. The desirability of such cooperation before taking such a definite step as reservation seems particularly clear. Use of existing local reservation powers supplemented by state funds for purchase and condemnation of occasional parcels may be an especially appealing possibility. But even if advance state commitments on locations are not available, some communities will nevertheless want to attempt reservations. If such reservations prove effective, these communities will probably find themselves in an unusually advantageous position when state officials do decide on route locations.
ADDENDUM

David R. Levin, Chief of the Highway and Land Administration Division of the United States Bureau of Public Roads, recently gave us his views on the use of mapped streets powers in connection with the current federal highway program. Unfortunately, his letter did not arrive until after this report had been prepared. Because of the importance of the subject and Mr. Levin's unique knowledge and experience in this field, we are reproducing selections from his letter. The views expressed are Mr. Levin's and should not be understood to represent the official position of the Bureau of Public Roads.

"... Answering your last question first, I certainly do think planners can contribute much to the effective use of mapped street powers. ...

... The following topic headings are the questions you asked in your letter.

"Can municipalities through the use of mapped street powers contribute significantly to the current effort to provide 41,000 miles of interstate highways?

"Municipalities can make significant contributions to the interstate system by using mapped street powers. We are in the process of collecting from our field offices, examples of savings and contributions that result from the use of these powers; to date, there has been little effective use of mapped street powers, and this makes selling the use of this device more difficult. I believe a number of examples... can be gathered from the various states and used to show these benefits in a very meaningful and realistic manner. New York City and Milwaukee have both made good use of these powers, though under varying labels, as you know.

"Granting that acquisition of land for future use is more desirable all the way around, can mapped street powers nevertheless be useful in addition?

"I think the answer to this is a definite yes. In fact, this is the basic concept of proposed Tennessee legislation... The suggested legislation is designed to permit immediate acquisition of land where the board of zoning appeal orders the issuance of a building permit because the denial of such a permit would result in the land being so adversely affected as to create 'a hardship.' Thus, the combined use of police power and eminent domain could permit an effective reservation of right-of-way for future highway development and results in improved implementation of a comprehensively planned circulatory system. A similar combination has been authorized, though perhaps less formally, in some of the Texas cities, San Antonio for one. Such a fusion of powers and program can result in making use of the best portions of both, minimizing the adverse effects of both.

"A relatively small fund which possibly might be needed in connection with 5 or 10 per cent of the cases could mean that a police power device would
be possible legally and practically in the remaining 90 or 95 per cent of the cases. The presence of the 'outright acquisition' safety valve would, of course, serve to bolster the constitutionality of the police power device.

"Are these powers useful when acquisition for future use is impossible (because money or legislation is lacking)?

"Yes, in fact I expect the main use of mapped street powers will be in situations where money or legislation is lacking. If money and legislation permit it, outright acquisition for future use, using a revolving fund to defray the acquisition cost, may be preferable to reserving the right-of-way by the use of a police power device, such as the official map. This is because the revolving fund method is more certain, has fewer procedural pitfalls, engenders less public resistance, and is in general more workable. However, in view of the exploding growth foreseen during the next few years, it seems clear that some use of the mapped street powers is advisable if not an out-and-out necessity.

"For the interstate highways, is there any sense in encouraging use of these powers at the municipal level?

"It is important to remember that the interstate system -- or any high type highway facility -- cannot be thought of as a self-contained or self-sufficient system. As you well know, most of the effective planning and control mechanisms are locally oriented. This is consistent with grass roots control of local destinies which, in itself, has become one of our treasured institutions. If for special reasons it becomes desirable to provide incentives for a broader type of local action -- of the kind you are inquiring into -- it may be that the state could set up certain standards and permit local execution or performance of these standards. With respect to the interstate system or any other high type state system, it would assure to the state the very things it is striving to achieve, while preserving local democracy at the same time. The kind of a formula I am thinking of here is one which the State of Wisconsin is using so successfully in connection with subdivision control along state trunk highways. I am firmly convinced that a similar formula, thoughtfully developed and executed, in connection with the mapped street device can be equally as effective.

"An allied problem also seems to presume activity at the local municipal level. A most pressing circumstance confronting highway authorities is how to best integrate expressways with the pattern of feeder streets and local service streets in the vicinity. Perhaps the official map device can serve to restrict private improvements, or at least channel them intelligently along the feeder or local service routes, so that a maximum of utility can be achieved when viewing the entire street system as a whole.

"Will a delay of a year or two be more acceptable to some courts if it could be shown that such a delay would, in fact, be helpful to the government involved?

"This question implies that courts are reluctant to accept the use of mapped
street powers with reference to a major part or all of a landowner's property. I believe this assumption is correct; but the modern expressways, requiring wide rights-of-way, necessitates the 'taking' of countless parcels of land, many of which are only small portions of the individuals landowner's property. Where the mapped area covers too much of the property owner's land, or where the mapping otherwise creates a hardship, the property in question could be condemned under a legislative grant of power to acquire land for future use. So when taken together, eminent domain and the police power have, in my mind, real potential in accomplishing effective reservation of right-of-way for future use.

"Your question also suggests that there may be less criticism of the constitutionality of mapped street legislation if, instead of requiring an indefinite, outright restriction, such legislation were to require a one- or two-year delay with the added requirement that it be shown that such delay would, in fact, be helpful to the government involved. This question points up the importance of including adequate procedural safeguards in mapped street legislation. Many of the cases concerning mapped street powers have stressed the importance of limiting the time the restriction is to run to a reasonable period. Certainly such a limitation would decrease the vulnerability of the legislation to constitutional attack.

"In this connection, it would seem to be pertinent to call attention to the benefits which such a reasonable delay would mean for private planning and private property generally. Needless to say, there is a growing belief and experience that private investment and private planning must be reconciled to the greatest possible extent with present and future public planning, and that only by so doing can a maximum of return be obtained from such private investment and planning. Actually, it is the only way to guard against early functional obsolescence of private facilities. It is my belief that this advantage of and justification for police power controls has not been very forcefully exploited by local public authority.

"Can it be shown that a police power ban on building -- say within 200 feet of the centerline of a proposed highway -- would be practical (and worthwhile) prior to the time that the right-of-way is determined precisely enough to permit condemnation? Or is condemnation practical (given legislation, etc.) just as soon as police power regulation is?

"This almost seems like one of the imponderables. If final location is not established, building development would need to be banned over a wide area in order to provide for a desirable flexibility of location when the ultimate location is established. As you have already suggested, the greater the area reserved through the mapping device, the greater the likelihood that the use of the power will not be upheld. Accordingly, a practical approach should probably be limited in application to the area deemed to constitute the final location of the facility. Even at that point the police power reservation might be preferable to outright condemnation, because the money might not be available for the latter."
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