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Among the most crucial problems produced by the rapid growth of urban and metropolitan America are those conflicts which arise when a municipality attempts to take property lying outside its territorial limits and within the boundaries of another governmontal unit, or when another governmental unit attempts an acquisition within a municipality. In this article the author studies such conflicts in detail, demonstrating that the cases fall into a coherent pattern when viewed functionally. He concludes with a discussion of proposals for regional planning as a means of resolving these conflicts at the least cost to the parties, while promoting the most desirable allocation of land resources.

The metropolitan areas in America experienced a substantial and rapid influx of population from the beginning of the industrial revolution in the early nineteenth century to the commencement of World War II.[1] Following the war, however, the movement reversed itself as the nation entered the age of suburbs and giant shopping centers. Bulging at their centers, the cities, spurred by the decentralization and expansion of industrial and commercial facilities and the disenchantment of urban dwellers, sent people and buildings spilling over municipal boundaries to the surrounding areas.[2] The result has been an "urban sprawl"[3] creating metropolitan regions in the nature of supercities which, in the case of the Atlantic coast, stretch from Boston

1. GALLION, THE URBAN PATTERN 63 (1950). See also 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 1.99 (3d ed. 1949) [hereinafter cited as MCQUILLIN].

2. As one commentator noted: "The growth of large centers of population and the speed at which they have spread, overflowing their boundaries, and forming sprawling agglomerations of buildings and people are products of modern times." BARTHOLOMEW, LAND USES IN AMERICAN CITIES 1 (1955).

3. Whyte, *Are Cities Un-American?*, Fortune, Sept. 1957, p. 123.

to Washington, D.C.[4] "Urban sprawl," the term generally applied to this phenomenon, properly suggests that the process was largely unplanned and uncoordinated.[5] Furthermore, it has been so rapid that, in the words of Chicago's mayor, Richard Daley, it was "impossible to plan for the economical disposition of the great influx of people, surging like a human tide to spread itself wherever opportunity for profitable labor offered place."[6]

The principal impact of this growth has been to accelerate the conflicting desires and interests of neighboring municipalities.[7] In many cases this is a conflict between the central city and its suburban area,[8] a factor to be kept in mind in the ensuing survey of city-county conflicts. In other cases it may be a conflict between established cities, and in still others a conflict arising between the municipality and a state or even the federal government. In any case, with these types of conflicts has come a corresponding increase in the competition for the use of the same area.[9] It is apparent that municipalities, which are not self-sufficient entities and whose boundaries are often "hazy, uncertain, and elastic,"[10] will often not be able to satisfy all their municipal needs within their territorial limits.[11] For example, they may need to obtain extraterritorial property in order to erect adequate water supply facilities, to build bridges and ferries, and to locate installations or institutions such as parks and sewage disposals.[12] In such situations

4. Tunnard, *America's Super Cities*, Harpers', Aug. 1958, p. 59. For an excellent examination of the metropolitan areas and their problems see COUNCIL OF STATE GOVERNMENTS, THE STATES AND THE METROPOLITAN PROBLEM (1956).

5. See generally *The Exploding Metropolis*, a series of four articles: Whyte, *Are Cities Un-American?*, Fortune, Sept. 1957, p. 123; Bello, *The City and the Car*, Fortune, Oct. 1957, p. 157; Bello, *New Strength in City Hall*, Fortune, Nov. 1957, p. 156; Seligman, *The Enduring Slums*, Fortune, Dec. 1957 p. 144.

6. Daley, *Governmental Developments in Metropolitan Areas: 1*, in UNITED STATES CONFERENCE OF MAYORS, CITY PROBLEMS 25 (1962).

7. Improvement in transportation facilities is another factor which has tended to accelerate conflicts between different governmental units. For example, the city of Denver owns peaks in the Rocky Mountains over sixty miles from the city for the recreation of its citizens. See SIEGEL, THE LAW OF OPEN SPACE 19 (1960).

8. See BOGUE, THE STRUCTURE OF THE METROPOLITAN COMMUNITY (1949).

9. See HIGHBEE, THE SQUEEZE—CITIES WITHOUT SPACE (1960), which dramatizes the competition for space and the paucity of open space that exists today around our metropolitan areas. See also Sears, *The Inexorable Problem of Space*, 127 SCIENCE 9 (1958); SIEGEL, *op. cit. supra* note 7, for the best legal analysis of the problems which arise in attempts to acquire open space.

10. Anderson, *The Extraterritorial Powers of Cities*, 10 MINN. L. REV. 564, 582 (1926).

11. As one commentator has remarked, the fractioning of the urban areas into separate corporate jurisdictions has created many of the difficulties with which our municipalities are now confronted. Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957).

12. Municipalities are not self sufficient and frequently must go beyond their territorial boundaries "to obtain an adequate water supply; to locate installations or institutions of various kinds, such as parks and sewage disposal works; their bridges and

a conflict may arise between the city proposing the use and another governmental unit which either needs the property or is already using it. In such instances the opposing governmental units, representing different desires and objectives for the planned future of the area, come into conflict.[13] It is these conflicts, arising when a municipality attempts to use property outside its territorial limits which is in the jurisdictional boundaries of another governmental unit, or when another governmental unit attempts an acquisition within the municipality, that this article will examine. Recommendations will then be made for the resolution of these conflicts at the least cost to the parties, while promoting the most desirable allocation of the land resources.

The conflicts which arise between different governmental units involve questions of power, loss of revenue, inconsistent zoning statutes, and actions challenged as arbitrary. However, basic to all these conflicts is the problem of conflicting desires for land use. In other words, any challenge made to a proposed taking is one in which the political unit affected by the taking objects because of supposed injury to its own development, interests, or present governmental functions. The problem can thus be seen as actually concerning the proper allocation of land—a study in land planning, the ultimate objective being, according to McDougal and Rotival, "the creation of an integrated and balanced community organism so moulded and organized as to make the fullest and most effective use of its human and material resources for the achievement of basic democratic values."[14] With this land planning goal in mind, a survey will be made of the types of conflicts with which courts have dealt in the past when one governmental unit has attempted to take property located within another.

I. Acquisitions by the Municipality

A. *In Counties and Other Municipalities*

The conflicts which have arisen when cities have attempted to acquire property extraterritorially from state governmental units (boroughs, municipal corporations, counties) can be divided into two categories. In the first the proposed taking involves property of an individual or a corporation which is neither being used nor necessary

ferries often extend into outside areas, and nuisances near the borders need abatement to protect health, safety, and welfare of municipal residents." These problems are especially acute in urban areas. Maddox, Extraterritorial Powers of Municipalities in the United States 1 (1955).

13. For a discussion of conflicts within cities see Norton, *Elimination of Incompatible Uses and Structures*, 20 Law & Contemp. Prob. 304 (1955).

14. McDougal & Rotival, The Case for Regional Planning (1947).

for a public purpose. The second category concerns property which has been dedicated to or is presently being used for public purposes. With respect to the first category, courts have allowed a city to condemn such property where the power to condemn is specifically granted. Illustrative is *City of Eugene v. Johnson*,[15] an Oregon case where the state by statute had given its municipalities the power to appropriate private property outside the corporate limits for the purpose of supplying its suburban inhabitants with water, power, and electric services. There is little doubt as to the legality of this type of action[16] where the central city is supplying its suburbs with services such as water, sewage disposal, and emergency fire protection.[17] Furthermore, this power exists even when there are conflicting county or borough zoning ordinances.[18] In *Aviation Services v. Board of Adjustment*[19] a municipality was successful in having a zoning law of a neighboring township declared inapplicable to the municipality's airport located within the boundaries of the township. Similar results have been reached even where one village condemned land in another town for a public bathing beach[20] and where a town wanted to construct a sewage disposal plant contrary to another town's zoning regulations.[21]

A question does arise, however, as to the legitimacy of such a power where there is no express grant of authority. "As a rule," says Lewis in his treatise on eminent domain, "a municipal corporation cannot condemn property beyond its limits, unless authority so to do is expressly given."[22] Despite this general rule against extraterritorial acquisitions without express delegation, there has been a growing

15. 183 Ore. 421, 192 P.2d 251 (1948). For other cases see 11 MCQUILLIN § 32.66 n.38.

16. See Potts v. City of Atlanta, 137 Ga. 211, 73 S.E. 397 (1911), which permitted a city to condemn property outside its limits where authorized by statute. See also City of Hawthorne v. Peebles, 166 Cal. App. 2d 758, 333 P.2d 442 (Dist. Ct. App. 1959).

17. It is common for central cities to supply these types of services for their suburban areas. Extraterritorial control over subdivisions and outlying areas has been granted by several statutes. See, *e.g.*, IOWA CODE ANN. § 409.14 (1951); MICH. COMP. LAWS § 125.36 (1948); ORE. REV. STAT. § 92.042 (1955).

18. This power also applies when the proposed use is contrary to the municipality's own zoning requirements. See Mayor of Savannah v. Collins, 211 Ga. 191, 84 S.E.2d 454 (1954).

19. 20 N.J. 275, 119 A.2d 761 (1956).

20. Incorporated Village of Lloyd Harbor v. Town of Huntington, 4 N.Y.2d 182, 149 N.E.2d 851 (1958). See also Decatur Park Dist. v. Becker, 368 Ill. 442, 14 N.E.2d 490 (1938); Green County v. City of Monroe, 3 Wis. 2d 196, 87 N.W.2d 827 (1958).

21. State *ex rel.* Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960). In an even more extreme case, the court in Conners v. City of New Haven, 101 Conn. 191, 125 Atl. 375 (1924), upheld an acquisition by New Haven in the adjacent town of Orange for a park even though the town of Orange was given no notice and was not made a party to the pending condemnation proceeding.

22. LEWIS, EMINENT DOMAIN § 371, at 681 (3d ed. 1909).

tendency for courts to find implied powers of acquisition.[23] This development has largely resulted from the increasing amount of state legislation giving cities a general power to acquire property (usually this power extends to property lying at a distance from the city of from one to twelve miles) beyond the corporate limits.[24] In a similar manner courts have implied the power to condemn for sewage outlets,[25] drainage outlets,[26] and the grading and widening of streets[27] outside the municipal boundaries. Thus, one can argue that if the exercise of a power can be found to perform a public function inside corporate limits, and the power is either expressly stated in a statute, charter, or constitution, or can be implied therefrom, the municipality should be able to acquire property extraterritorially to carry out this function. The basis for this power, it has been suggested,[28] stems from the general powers of a city to purchase or condemn by eminent domain that property necessary to effectuate its public functions.[29] To the

23. In City of North Sacramento v. Citizens Util. Co., 192 Cal. App. 2d 482, 13 Cal. Rptr. 538 (Dist. Ct. App. 1961), a proceeding to condemn a water supply system of defendant Citizens Utilities Company located in part beyond the corporate limits, the court held that since the power existed within the corporate limits to maintain a water supply system, by necessary implication that power extended beyond the municipal boundaries, as essential to the objects and purposes of the municipality. A similar result was reached by a Texas court in New Braufels v. San Antonio, 212 S.W.2d 817 (Tex. Civ. App. 1948). Here the municipality was attempting to condemn property outside its corporate limits in order to erect a utility plant. The court implied the power from a state statute authorizing the proceeding and function within the city limits. See also Colorado Cent. Power Co. v. City of Englewood, 89 F.2d 233 (10th Cir. 1937); *Ex parte* City of Bessemer, 240 Ala. 52, 197 So. 20 (1940).

24. See MADDOX, *op. cit. supra* note 12, at 87. Some statutes have been even more lenient. A Kentucky statute, for example, allows cities to adopt a plan for the physical development of the municipality and then to acquire property pursuant to this plan in the "planning area." KY. REV. STAT. § 100.650 (1963). "Planning area" is defined as "the city and adjoining territory which by reason of existing or future development bears relation to the proper growth and development of the city." KY. REV. STAT. § 100.314 (1963). Similarly, a New Jersey statute allows a city to acquire property for a municipal purpose, whether the property is "within or without the municipality." N.J. STAT. ANN. § 40:60-2 (1937). It does so without specifying how far outside this power extends.

25. McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358 (1896); City of Rockford v. Mower, 259 Ill. 604, 102 N.E. 1032 (1913); Maywood Co. v. Village of Maywood, 140 Ill. 216, 29 N.E. 704 (1892); Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N.E. 939 (1891); City of Coldwater v. Tucker, 36 Mich. 474 (1877); see 11 McQUILLIN § 31.16.

26. City and County of Denver v. Board of Comm'rs, 113 Colo. 150, 156 P.2d 101, 106 (1945); Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238 (1892); Shell Petroleum Corp. v. Town of Fairfax, 180 Okla. 326, 69 P.2d 649 (1937).

27. Sacramento Municipal Util. Dist. v. Pacific Gas & Elec. Co., 72 Cal. App. 2d 638, 652, 165 P.2d 741, 749 (1946); City of Grand Rapids v. Coit, 149 Mich. 668, 113 N.W. 362 (1907).

28. 1 NICHOLS, EMINENT DOMAIN § 3.21[1] (3d ed. 1950) [hereinafter cited as NICHOLS].

29. These two powers are not, however, coterminous. As Nichols states, "The right to exercise the power of eminent domain [by a municipality outside its territorial limits]

same degree that it can acquire property within its corporate limits for public functions it should be permitted to acquire property outside its boundaries for the same purposes.

The second type of extraterritorial acquisition by municipal corporations from other governmental units is that where the property in question either has been dedicated to or is presently being used for public purposes. As would be expected, property of a governmental unit presently being used for a public purpose is, in practically all cases, immune from a taking by another municipal corporation.[30] Illustrative is *City of Edwardsville v. Madison County*,[31] an action to condemn a strip of land through the Madison County poor farm for a street. The court held that the municipality's power to condemn property was limited to private property and did not extend to property "already devoted to the public use."[32] If this limitation did not exist, the court warned, "the city might condemn the courthouse square for an enginehouse, the school district might condemn the enginehouse for a schoolhouse, the county might condemn the schoolhouse for a courthouse, and an endless chain of condemnations by various municipalities might be set in operation."[33]

Although the response of this court represents the general rule in eminent domain takings of this nature,[34] other courts have modified their reluctance and have permitted a condemnation of publicly used property if the taking is consistent with the property and will not interfere with the present public use.[35] Thus in *City of Boston v. Inhabitants of Brookline*,[36] the town of Brookline was allowed to condemn land and construct a public road along a strip of land taken by the city of Boston for the purpose of laying its water pipes. The court stated that "if the location of a way over land already

. . . requires even more express and clear a grant than does the power to acquire by ordinary methods." 1 NICHOLS § 2.24, at 183. See also Leeds v. City of Richmond, 102 Ind. 372, 1 N.E. 711 (1885).

30. 1 NICHOLS § 2.24, at 184; *id.* § 2.24 n.6 (Supp. 1963).

31. 251 Ill. 265, 96 N.E. 238 (1911).

32. *Id.* at 267, 96 N.E. at 238.

33. *Ibid.*

34. A similar result was reached by the trial court in an action by the city of Cincinnati when it attempted to condemn for an airport a neighboring municipality's highway, Village of Blue Ash v. City of Cincinnati, 166 N.E.2d 788 (Ohio C.P. 1960), *rev'd*, 173 Ohio St. 345, 182 N.E.2d 557 (1962). See also McCullough v. Board of Educ., 51 Cal. 418 (1876), where a public square in a village was held immune from condemnation for a schoolhouse site and City of Jacksonville v. Jacksonville Ry., 67 Ill. 540 (1873), forbidding a condemnation of a public square for a railroad track.

35. The question of permitting condemnation of property already aequired by condemnation if it is for the same or similar use first arose in the context of property located within the territorial boundaries of the condemning party. See City of Salem v. Marion County, 171 Ore. 254, 137 P.2d 977 (1943), a condemnation of a water system by the city.

36. 156 Mass. 172, 30 N.E. 611 (1892).

devoted to a public use would not be inconsistent or materially interfere with such use, there would seem to be no good reason, in the absence of any provision expressly or by implication forbidding it, why a way might not be laid out over such land under the general authority given to cities and towns or county commissioners."[37]

Thus far it appears as though the courts have been able to find a logical justification for permitting or disallowing a proposed condemnation while maintaining the sanctity of the municipal line. Through the judicially created dichotomy of public property and private property the courts found a means of justifying their actions. Later when it became apparent that this approach was too inhibiting, the response was a principle of consistency: If the proposed use was consistent with the present use, the condemning party could proceed even if the property in question was presently being used for a public purpose. However, not to lend credence to an illusion of structural rationality, there are cases where a court, in apparent total contradiction to *City of Edwardsville v. Madison County*,[38] has permitted a condemnation where the proposed use not only was inconsistent but also would destroy the present use. Thus, in *Howard v. City of Atlanta*[39] the court permitted the city of Atlanta to condemn for an airport tracts of land which were crossed by several streets devoted to public use, all located within the city limits of Atlanta's suburban municipality, College Park. It is interesting to note that the *Howard* case arose at a time when commercial aviation was coming into its own. With the increased demand for better transportation and communication, city airports were completing the transition from private to public use[40] and had been recognized as a public function by the Georgia legislature.[41] The court weighed the relative merits of the two public uses—airport versus public roads[42]—and concluded that municipalities were empowered, in the absence of a showing of bad faith or a want of reasonable necessity, to condemn private property and property devoted to public use within another city.[43]

The result of *Howard v. City of Atlanta*[44] is desirable, it is suggested, because it places the focal point of extraterritorial acquisition cases where it should be—upon the total impact on the region of the

37. *Id.* at 175-76, 30 N.E. at 611.
38. 251 Ill. 265, 96 N.E. 238 (1911). See text at note 31 *supra.*
39. 190 Ga. 730, 10 S.E.2d 190 (1940).
40. See note 84 *infra* and accompanying text.
41. Uniform Airport Act, GA. CODE §§ 11-201 to -203 (1933).
42. For a general discussion of the problem of establishing airports in the area surrounding the municipality see PRESIDENT'S AIRPORT COMMISSION, THE AIRPORT AND ITS NEIGHBORS (1952).
43. 190 Ga. at 736, 10 S.E.2d at 194 (1940).
44. *Supra* note 39.

changed use.[45] If the end result will clearly produce a positive good to the region the acquisition should be permitted; otherwise, it should be disallowed. Although it appears that the courts are left without guidelines, such is not the case. The burden should be placed upon the condemnor to demonstrate first that the social utility of the proposed use outweighs the value of the existing use and second that the property in issue is the only suitable location.[46]

B. *State Property*

Municipal acquisitions from other state governmental units account for the great majority of all extraterritorial conflicts. There are times, however, when a municipality will attempt to take property directly from the state wherein it is located and in fewer instances from another state or even from the federal government. Because of the infrequency of these types of extraterritorial conflict, there has been less litigation and thus less articulation of the policies involved.[47] Nonetheless, the present trend of the law as it can be interpreted from the few existing cases appears no less misdirected than in the conflicts between state governmental units.

In the case of property belonging to the incorporating state (and also in the cases of out-of-state and federal property, which will be discussed in the next subsection), the distinction between private and public property cannot be made so easily as it was with respect to acquisitions in counties and other municipalities. There is a presumption that all state-owned property is held for a public purpose, making the private-public distinction inapplicable. From this presumption has followed the general rule that a municipality cannot condemn or acquire state property unless the power is expressly granted or is manifest through necessary implication.[48] There has, however, been an exception when state-owned land is not presently being used for a governmental purpose.[49] The exception is based upon a bootstrap dis-

45. For further discussion see text at note 162 *infra.*

46. In Township of Washington v. Village of Ridgewood, 46 N.J. Super. 152, 134 A.2d 345 (Ch. 1957), *aff'd,* 26 N.J. 578, 141 A.2d 308 (1958), a suit against the village to require the removal of a water tank structure, the court held that where the village gave no consideration to alternative methods of providing the facilities, the construction of a water tank was arbitrary and unlawful.

47. It is to be noted that in this situation and in the case of acquisition of out-of-state or federal property (see note 60 *infra)* the extraterritorial factor has less significance than in acquisitions made between state governmental units.

48. See Atlanta v. Central R.R., 53 Ga. 120 (1873), which held that property purchased by the state of Georgia for the purpose of the erection of car-shops for the operation of the Western and Atlantic Railroad could not be taken without express authority of the state. See also City of St. Louis v. Moore, 269 Mo. 430, 190 S.W. 867 (1916); *In re* City of Utica, 73 Hun 256, 26 N.Y. Supp. 564 (Sup. Ct. 1893).

49. See Washington County v. Board of Mississippi Levee Comm'rs, 171 Miss. 80, 156 So. 872 (1934), where the court noted that the state legislature can statutorily author-

tinction made between property held in a proprietary capacity, as an individual of the state would hold property, and property held in a governmental capacity, in trust for the public.[50] This distinction is similar to the type of response courts make when conflicts arise from city acquisition in other governmental subdivisions.[51] In like manner, greater permissibility is allowed when the property is held in a proprietary manner rather than for a public purpose.[52]

With the same rationale courts have extended this distinction so that if authority to appropriate state property is not expressly given, it may be found to arise by necessary implication if the state-owned property is held in a proprietary capacity.[53] The Supreme Court of Washington so held in *Roberts v. City of Seattle*.[54] The problem arose over the attempt of the city of Seattle to condemn a strip of property for widening a city street which was located within the city but on the premises of the state university. The court allowed the condemnation even though authority was not expressly granted. The basis of its decision was the pressing need of the city and the minimal effect the acquisition would have upon the university. In effect the court was saying that the thirty-foot strip of university property was held in a proprietary capacity and therefore could be taken.[55]

The courts have continued to modify the strict requirement of express statutory authorization for acquiring state-owned property. Exemplary is the Supreme Court of Washington, which in *City of Seattle v. State*[56] allowed a condemnation action instituted by the city to acquire for use in connection with a proposed river reservoir two tracts of land situated outside the city limits which were being used for a state school and capitol building. The court, upholding the city's proceeding despite a lack of specific statutory authority, found that the power arose by necessary implication. In still a further extension, the United States Supreme Court in *City of Tacoma v. Taxpayers of Tacoma*[57] permitted the city to condemn the site of a proposed state fish hatchery when the land was needed by the city for a dam project, even though the State of Washington opposed the condemnation and

ize a municipal corporation to take for a different use state property devoted to public use. Where expressly authorized condemnation has been allowed even though the property condemned was declared inalienable by state statute. Pacific Power Co. v. State, 32 Cal. App. 175, 162 Pac. 643 (1917).

50. See State v. Superior Court, 91 Wash. 454, 157 Pac. 1097 (1916), which discusses the nature of this distinction.

51. See p. 350 *supra*.

52. See text accompanying note 32 *supra*.

53. 1 NICHOLS § 2.23.

54. 63 Wash. 573, 116 Pac. 25 (1911).

55. *Id.* at 26.

56. 54 Wash. 2d 139, 338 P.2d 126 (1959).

57. 357 U.S. 320 (1958).

the city was otherwise without authority to condemn state-owned property. The justification for the authority came from a license issued to the city by the Federal Power Commission under the Federal Power Act, authorizing the city to build a dam and power plant on a navigable interstate river.[58]

Thus it can be seen that the limitations upon the acquisition of state-owned property are being relaxed. This change is desirable. Unfortunate, however, is the tendency to justify this greater permissiveness on a private-public rationale similar to that used in the case of municipal acquisitions of land belonging to a county or another municipality. For the reasons stated earlier,[59] this attempt at structural rationality will inevitably lead to an imbroglio if the case law continues to develop along the lines now established.

C. *Out-of-State and Federal Property*

In the last two situations, city acquisition of property lying in another state[60] or belonging to the federal government,[61] no general power to acquire by condemnation exists. In the case of property located in another state, any general power of the city must come from the state of its incorporation, and since it is generally accepted that the state itself cannot acquire property in another state except in a proprietary capacity,[62] the city, being a creation of the state, would logically have no greater power. In *Pine v. Mayor of City of New York*,[63] the United States Court of Appeals for the Second Circuit articulated these limitations in holding that the New York legislature, in a dispute over riparian rights, could not authorize one of its municipalities to exercise the power of eminent domain in the state of Connecticut. Thus, it is recognized that a municipal corporation cannot be given power by its incorporating state to take property by eminent domain in another state.[64] The only means of acquisition available is by consent of the second state. No such consent has been found in any case of an out-of-state acquisition.

The acquisition of federal property by a municipality is similarly limited. In *United States v. City of Chicago*,[65] the federal government

58. *Id.* at 323.
59. See text accompanying note 38 *supra*.
60. See generally 1 NICHOLS § 2.12.
61. See generally 1 NICHOLS § 2.22.
62. See discussion of state power to acquire property in another state at note 106 *infra*.
63. 112 Fed. 98 (2d Cir. 1901), *rev'd on other grounds sub. nom.* New York City v. Pine, 185 U.S. 93 (1902).
64. See, *e.g.*, Saunders v. Bluefield Waterworks & Imp. Co., 58 Fed. 133 (C.C.W.D. Va. 1893); Illinois State Trust Co. v. St. Louis I.M. & S. Ry., 208 Ill. 419, 70 N.E. 357 (1904).
65. 48 U.S. (7 How.) 185 (1849).

sued to enjoin the city of Chicago from running a street through a military post under the control and operation of the War Department. The Supreme Court held that the city had no right to open streets through property belonging to the United States. In a later case, *Utah Power & Light Co. v. United States*,[66] involving a problem of state-federal conflict in a national park, the court characterized the nature of federal property as follows:

> The public lands of the United States are held by it, not as an ordinary individual proprietor, but in trust for all the people of all the states to pay debts and provide for the common defense and general welfare under the express terms of the Constitution itself. It matters not whether the title is acquired by cession from other states, or by treaty with a foreign country, whether the lands are located within states or in territories, they are held for these supreme public uses when and as they may arise. The Congress has the exclusive right to control and dispose of them, and no state can interfere with this right or embarrass its exercise.[67]

It is seen, therefore, that in both the cases of city acquisitions in a state other than that of its incorporation[68] and acquisition of federally owned property, municipalities can derive no power of eminent domain from the state. It has been held, however, that by specific grant from the federal government either acquisition can be made. In *Haeussler v. City of St. Louis*,[69] an action in equity to keep the city of St. Louis from issuing bonds for the construction of a municipal bridge across the Mississippi River, the court stated:

> [T]he city of St. Louis, a corporation, has the charter and legal authority to construct this bridge in so far as the state of Missouri and its laws are concerned. It has the specific grant from the federal government, giving it the power to exercise the right of eminent domain, not only in Missouri, but in Illinois.[70]

In a similar problem which arose over the attempted condemnation of property in Kentucky by a West Virginia municipality, the court observed: "The United States, being a sovereign, also enjoys the right of eminent domain. Under the commerce clause of the Federal Constitution, Article 1, § 8, the United States might condemn the bridge in question, or may delegate such right to West Virginia and Ken-

66. 230 Fed. 328 (8th Cir. 1915). This was a suit by the federal government to enjoin the Utah Power & Light Company from maintaining possession and occupancy of federal lands forming part of the Cache National Forest. The utility company had acquired by condemnation property in the forest upon which they operated a hydro-electric power works. The court held the possession unlawful and the United States land not subject to condemnation under a power derived from the state.

67. *Id.* at 336.

68. See text accompanying note 63 *supra.*

69. 205 Mo. 656, 103 S.W. 1034 (1907).

70. *Id.* at 1042.

tucky, or to either of them."[71] From this it follows that if the federal government specifically grants the power to a state municipality it can condemn federally owned or controlled property in either the state of its incorporation or another state.[72]

From the present state of the law the difficulty with the acquisition of both out-of-state and federal property can be focused on the permission from the condemnee required before the property can be taken. Such permission is seldom given, if ever. Thus, acquisition of such land needed by a municipality for parks, water supply, or even bridges and ferries is virtually foreclosed. As a result any systematic and logical extension of municipal activities is stymied because of our antiquated legal concepts which do not recognize the possibility of a superior, more urgent need of a municipality when it crosses the sacred lines of another state or federal property for the acquisition of property.

II. ACQUISITIONS IN THE MUNICIPALITY

A. *By the County*

The county, viewed from a political and legal aspect, is a subdivision of the territory of a state,[73] created as a governmental agency of the state to aid in the administration of governmental affairs and to exercise all powers of government which are delegated to it.[74] It is a unit of the central and local government and like the municipality has no powers except those derived from the statutes of the state. Unlike the municipality and its predecessor, the English shire, which was drawn to conform to natural boundaries,[75] the county is an artificial, deliberately laid out division. Counties, nevertheless, are often compared to municipalities because they have some of the general characteristics of municipal corporations.[76] As the court noted

71. County Court v. Louisa & Fort Gay Bridge Co., 46 F. Supp. 1, 3 (S.D.W. Va. 1942). See also Utah Power & Light Co. v. United States, *supra* note 66, at 339.

72. See note 67 *supra* and accompanying text.

73. See 1 MCQUILLIN § 1.88. *But cf.* Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960), which suggests that counties cannot be classified as political subdivisions of a state.

74. According to County of Bergen v. Port of New York Authority, 32 N.J. 303, 160 A.2d 811 (1960), the county, historically, was solely a subdivision of the state constituted to administer state power and authority and was created without regard to local wishes and solely to serve as a body politic.

75. See WILSON, THE STATE § 1026 (rev. ed. 1907).

76. McQuillin states: "[I]t is generally held that, although counties have the general characteristics of municipal corporations, they are not considered such unless made so by constitution or statute and, therefore, fall into the class of bodies politic, called quasi-public or quasi-municipal corporations organized to aid in the proper administration of state affairs with such powers and functions as the law prescribes." 1 MCQUILLIN § 2.46, at 497.

in *Vance S. Harrington & Co. v. Renner*,[77] a suit to restrain a violation of the zoning ordinance:

> [T]hough counties are bodies politic and corporate, created by the State for certain public purposes, they are not in strict legal sense municipal corporations as are cities and towns, but are rather instrumentalities of the State by means of which the State performs governmental functions within its territorial limits.[78]

Another distinguishing characteristic from municipal corporations is the fact that counties are created without the consent of the inhabitants whereas the municipal corporation depends upon the approval of its constituents for existence.[79] A more fundamental and critical difference between the two, however, is that the county often represents the suburban interests, which frequently appear intrinsically in conflict with the interests of the central city.[80] Despite these differences the source and nature of the county's power to acquire property in another governmental unit are nearly the same as in the case of the municipality, and the considerations relevant to limitations on the power of the municipality to act apply to the county. Thus, when a county attempts to take property located within a city, problems of express and implied power, the present use of the property, and conflicting zoning ordinances will arise. However, since counties are by nature less active than municipalities,[81] there has been less litigation of conflicts arising when it was the condemnor. For this reason the problem cannot be examined in as structured a manner as with city acquisitions.[82]

77. 236 N.C. 321, 72 S.E.2d 838 (1952).

78. *Id.* at 841.

79. See State *ex rel.* McQueen v. Brandon, 244 Ala. 62, 12 So. 2d 319 (1943), where the court observed that a county is an involuntary association created as an arm of the state whereas a city is a voluntary association created by the will of its inhabitants.

80. Robert C. Wood, an M.I.T. political scientist, commented as follows on the government of suburbia: "To political science, suburban government, strictly speaking, is neither different from other governments in the United States nor new at all. Governments in suburbia have the same names, the same powers, the same political and administrative proeesses as do local governments in urban and rural areas. There are counties, cities, towns, townships, boroughs, special districts, and authorities, creatures of the state, operating by law or under charters authorized by the state. These names, these powers, these authorizations are traditional: they were established long before suburbia, as we know it today, ever existed. There is a political map on which suburban boundaries appear and across which the name SUBURBIA in bold black letters is inscribed." Wood, *The Governing of Suburbia*, in THE SUBURBAN COMMUNITY 165 (Dobringer ed. 1958). For further treatment of the suburban problem, see CARVER, CITIES IN THE SUBURBS (1962).

81. There are several reasons why the county is less active than the central city. One reason is its more amorphous character, another its greater difficulty in identifying goals, and a third the smaller number of demands on county government than on the more concentrated city government.

82. For a discussion of the likely role of counties in the foreseeable future see three

The general limitations on a municipal corporation—that it have express power to condemn property outside the municipal boundaries and that the property in question not be dedicated or in use for a public purpose—apply to the county when it attempts to acquire property in a municipality.[83] Where some types of express power can be found, or where it arises by necessary implication, a county will be permitted to acquire vacant land owned by a municipality. So the court held in *Bergen County Sewer Authority v. Borough of Little Ferry*,[84] a condemnation proceeding for a sewer in a corporate municipality. However, the Court of Appeals of Ohio, in apparent disregard of the basic limitations on extraterritorial acquisitions, rejected in *Village of Richmond Heights v. Board of County Commissioners*,[85] a petition for injunction against Cuyahoga County from condemning municipal property for an airport. The village could not show that the construction of a village hall was more necessary and reasonable than the county's airport. The court balanced the relative merits and conveniences of the parties and permitted a partial acquisition even though the municipality had recently acquired the land for municipal buildings and recreational purposes.[86] In this case the property in question was dedicated but not yet being used for a public purpose, which may be the court's best justification for its action. In *Village of Amityville v. Suffolk County*,[87] however, the court allowed a county to condemn a strip of land for a highway through property already devoted and *presently* being used for a public purpose. Although the court attempted to justify its action by labeling the two uses consistent,[88] the real reason for its decision appears to be that the county, relying on the village's former resolution that it would support the project, had expended a quarter of a million dollars on the project and the town appeared only to be seeking a higher price for the property.[89]

In both of these cases, the court made a belated effort to reconcile its decision with precedent. It succeeded no better than other courts have with respect to city acquisition.[90] Nevertheless, the results are

separate comments by Hillenbrand, Briley, and Bossert, entitled *Counties in the Metropolitan Future*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING 1961 30 (1961).

83. Village of Richmond Heights v. Board of County Comm'rs, 112 Ohio App. 272, 166 N.E.2d 143 (1960).

84. 7 N.J. Super. 213, 72 A.2d 886 (1950).

85. *Supra* note 83.

86. *Id.* at 146. See also State *ex rel.* Helsel v. Board of County Comm'rs, 83 Ohio App. 388, 78 N.E.2d 694 (1948), *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911.

87. 132 N.Y.S.2d 845 (Sup. Ct. 1954).

88. See also In the Matter of Rochester Water Comm'rs, 66 N.Y. 413 (1876).

89. See Village of Amityville v. Suffolk County, *supra* note 87, at 846.

90. See note 38 *supra* and accompanying text.

desirable and the considerations relevant to the city conflict are applicable here.[91]

B. *By the State*

When the American colonies separated from Great Britain each assumed control over the people and property within its territorial jurisdiction.[92] With this assumption of power went the general power of eminent domain, a power which each new state likewise inherited, a power which is in fact an inherent attribute of sovereignty—one "of which the sovereign cannot divest itself."[93] It is only logical that a power so absolute would extend to the taking of property from a corporate municipality, it being but a creature of the state. And so it does. The only limit which seems to be placed upon the state is that if it takes property which is essentially "private," just compensation must be made. Thus, in *Village of Canajoharie v. New York*[94] the court required the state to give just compensation for a baseball field it had appropriated because the field was held in a "proprietary" rather than a "governmental" capacity.[95] In the case of property held by a municipal corporation for a public purpose, however, the state apparently can take at will. Illustrative is the case of *People v. Kerr*.[96] The controversy here concerned land which had originally been condemned for public streets by the city of New York pursuant to state statute. Subsequent to this condemnation, the state legislature authorized condemnation of this city property for the construction of a railroad. The city then sought an injunction on the theory that the second statute permitted the taking of the city's private property without compensation. In absolute terms the court, per Wright, J., refused to grant the injunction, holding that all property acquired by a municipality by the power of eminent domain, being held in public trust for the people, is subject to the absolute control of the legislature, and no appropriation of it to a public use is a taking of private property which requires compensation.[97]

The *Kerr* case has stood for the proposition that property acquired by a municipality by virtue of the power of eminent domain is subject

91. See text accompanying note 46 *supra*.
92. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517 (1819).
93. 11 McQUILLIN, § 32.11, at 268-69.
94. 13 Misc. 2d 293, 177 N.Y.S.2d 799 (Ct. Cl. 1958).
95. For a discussion of when compensation should and should not be given see Parr, *State Condemnation of Municipally-Owned Property: The Governmental-Proprietary Distinction*, 11 SYRACUSE L. REV. 27 (1959).
96. 27 N.Y. 188 (1863).
97. *Id.* at 213. See also City of Clinton v. Cedar Rapids & Mo. R.R., 24 Iowa 455 (1868), which held that property acquired pursuant to a town's power of eminent domain is subject to unrestrained control by the state.

to the unrestrained control of the state.[98] This control is not limited, however, to property acquired by eminent domain but extends to all property held by a municipality regardless of how acquired. For example, in *Welch v. City & County of Denver*,[99] the court held there was no limitation on the state's right to seize property, in this case a city park, despite a provision in the city charter which prohibited any change from the present use of the property as a park. A similar result was reached in Massachusetts when the state condemned the subsurface of the Boston Common,[100] and by a Florida court which permitted the state flood control agency to acquire city land presently being used for a garbage dumping ground.[101] Nevertheless, limits have been placed upon the power of state agencies to acquire property[102] to be used for such purposes as hospitals, sanitariums, or jails where there are zoning ordinances which restrict such uses.[103] This type of restriction is likely to continue in an accelerated trend in zoning ordinances, as communities attempt to ban so-called undesirable activities.[104] There appears, however, little justification for a restriction of this type which acknowledges the public need of the institution but asks that it be located elsewhere. The type of judicial response which appears preferable is that of an Ohio court which held that a zoning restriction had no effect upon the state's power to acquire city property zoned against a proposed state turnpike when the state's need was greater than that of the municipality.[105]

C. *By Another State*

One more dimension of state appropriation of city property needs to be noted. This involves the appropriation of city property in another state. Although the problem can be viewed in terms of appropriating out-of-state city property, it is actually the taking of another state's property, the municipality being but a part of the state. Viewed in either respect, the issue is the same and the power of the state

98. Parr, *supra* note 95, at 29.

99. 141 Colo. 587, 349 P.2d 352 (1960).

100. Appleton v. Massachusetts Parking Authority, 340 Mass. 303, 164 N.E.2d 137 (1960).

101. City of Dania v. Central & So. Fla. Food Control Dist., 134 So. 2d 848 (Fla. Ct. App. 1961).

102. For a discussion of the problems arising in the delegation of the power to condemn property in the name of the state see 1 NICHOLS § 3.222, at 250.

103. For a discussion of the type of considerations which need to be made when zoning ordinances conflict with a public use see Note, *Zoning Against the Public Welfare*, 71 YALE L.J. 720 (1962).

104. See Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 524 (1957).

105. State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952), *cert. denied sub nom.* Balduff v. Turnpike Comm'n, 344 U.S. 865 (1952).

is totally limited: "any attempt to exercise governmental powers in another state [is] . . . necessarily void."[106] In the words of the court in *County Court v. Louisa & Fort Gay Bridge Co.*,[107] a proceeding by the county to condemn a privately owned toll bridge partly in West Virginia and partly in Kentucky,

> the power of eminent domain is an attribute of sovereignty. Within its own jurisdiction each state possesses such sovereign power. But no state can take or authorize the taking of property located in another state. Each state holds all the property within its territorial limits free from the eminent domain of all other states.[108]

It is seen, therefore, that a state can in practically no situation take property of another state. Under these legal restrictions the only problems of extraterritorial conflict which may arise are over the condemnation of interstate bridges[109] or common waterways[110] or possibly the constructive taking of property by the infliction of injury on the other state's property.[111] As a result there has been little litigation in this area of interstate acquisitions. In fact, no case has been found where one state took property from another against the latter's will. Thus, the only means of acquisition is by consent; this fact often presents impossible situations for land planners when problems of an interstate character arise.

D. *By the Federal Government*

Like the state and unlike the municipal corporation, the federal government possesses the power of eminent domain as a sovereign rather than as a receiver of derivative powers.[112] Thus, the limitation on a municipality against acquiring property already dedicated to a public use for another and inconsistent public purpose is not imposed on the federal government. For example, in *United States v. Carmack*[113] the Supreme Court reversed the two lower courts and upheld the power of the Federal Works Administrator to condemn municipal property which was being used or was to be used for a local park, courthouse, city hall, and public library. The Court, in upholding the

106. 1 NICHOLS § 2.12, at 115.
107. 46 F. Supp. 1 (S.D.W. Va. 1942).
108. *Id.* at 2. State of Georgia v. City of Chattanooga, 264 U.S. 472 (1924); Florida State Hosp. v. Durham Iron Co., 68 Ga. App. 6, 21 S.E.2d 216 (1942).
109. Evansville & H. Traction Co. v. Henderson Bridge Co., 134 Fed. 973 (W.D. Ky. 1904).
110. See 2 NICHOLS § 5.795 for a discussion of the riparian rights of a municipality.
111. See, *e.g.*, Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).
112. 1 NICHOLS § 2.131[3], at 125.
113. 329 U.S. 230 (1946). See also United States v. Jotham Bixby Co., 55 F.2d 317 (S.D. Cal. 1932), which permitted the federal government to condemn park property for a post office and custom house.

acquisition for a post office and custom house, quoted from the classic decision in *Kohl*[114] which rejected the requirement of a state court proceeding for a federal condemnation. It said:

> If the United States has the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment.[115]

Under its power of eminent domain the federal government has acquired property for such diverse purposes as national monuments, civil defense facilities, national parks, interstate bridges, watershed and flood protection, and interstate highways. This power is usually exercised pursuant to statutory authorization. For example in the acquisition of lands for the Antietam battlefield site the Congress gave the Secretary of the Interior the power to acquire by donation, purchase, or condemnation property that would be of historical interest for this national park.[116] A more familiar aspect of federal acquisition is that of the interstate highway program. The Interstate Highway Act of 1956[117] and the supplemental act of 1958 were revolutionary in programming a national system of modern highways.[118] This act has provided the means whereby property could be acquired not only for roads but also for bridges, tunnels, and areas adjacent to the interstate system.[119] So great has been its impact that it is presently felt in every state.

It is also significant to note that the rationale for federal eminent domain proceedings has created situations of unjust condemnations. It is assumed in federal acquisitions that property acquired is for the benefit of the people of all the states and the nation as a whole. Therefore the use inures to the benefit of everyone including citizens of the state where the condemned property is situated, despite the fact they may protest the taking.[120] From this it follows that the governmental-proprietary distinction is not relevant since the federal government can condemn all properties[121] unless the federal power

114. Kohl v. United States, 91 U.S. 367 (1875).
115. 329 U.S. at 238; 91 U.S. at 374 (1875).
116. Act of May 14, 1940, ch. 191, 54 Stat. 212.
117. 23 U.S.C. § 101 (1959).
118. See generally *Interstate Highway Symposium*, 38 NEB. L. REV. 373 (1959).
119. 23 U.S.C. § 131 (1959).
120. Grover Irr. & Land Co. v. Lovella Ditch, Reservoir and Irr. Co., 21 Wyo. 204, 131 Pac. 43 (1913).
121. All property held by a municipal corporation is deemed "private" within the meaning of the fifth amendment. Therefore, compensation must be made. See United States v. Wheeler Township, 66 F.2d 977 (8th Cir. 1933); Town of Bedford v. United States, 23 F.2d 453 (1st Cir. 1927).

has been delegated to a private[122] or a municipal corporation.[123] As a result the unconditionality of this rule has created an unnecessary inflexibility. It is apparent that there are times when the cost of a condemnation to the immediate inhabitants is great and should defeat the taking regardless of whether the condemnor is the state or the federal government.[124] To reply that it is always for the benefit of the inhabitants even though they protest is logic with the force of Jabberwocky: "Contrariwise," continued Tweedledee, "if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic."[125]

III. Consistency From the Cases

It would be difficult to suggest that the foregoing discussion demonstrates any uniformity of approach or response by the courts to the problem of condemnations in and by the corporate municipality. Nevertheless, some coherence can be found with respect to conflicts between cities and other governmental units if the cases are analyzed from a functional posture rather than according to the nature of the participant.[126] Approached in this manner four types of controversy appear to exist. In the first the proposed use is for a governmental or public purpose and the property is in private hands. The second is the reverse, where property is presently dedicated or being used for a public purpose and the city attempting the condemnation is proposing a private or inconsistent use of the property. The third is where both the proposed taking and present use are proprietary in character and the fourth where both are public in character.

The inclusion of a particular situation in one of these four categories depends upon the scope of the labels "public" and "private." The term public is used here to refer to those activities of a city which are governmental in nature and involve a function normally performed by a governmental unit for its inhabitants or constituents. The performance of this type of municipal function can be considered as part of the attribute of sovereignty delegated by the state to the munici-

122. See, *e.g.*, Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890); Stockton v. Baltimore & N.Y.R.R., 32 Fed. 9 (D.N.J. 1887), *appeal dismissed*, 140 U.S. 699 (1890).

123. See, *e.g.*, Latinette v. St. Louis, 210 Fed. 676 (1912).

124. See note 216 *infra* and accompanying text.

125. Carroll, Through the Looking-Glass, in The Lewis Carroll Book 207 (Herrick ed. 1931).

126. The problems presented when either the state or the federal government is a party are inherently different. As has been seen, when either of them are parties to a condemnation proceeding involving a corporate municipality different rules goveru. Thus it has been found necessary to disassoeiate these types of proceedings from the inter-city type conflict now under consideration.

pality.[127] In this capacity municipalities construct and maintain schools, parks, highways, bridges, and sewage disposal facilities. The term private, on the other hand, refers to the ability of the municipality to conduct business or to provide services in its capacity as a corporation.[128] In this capacity the city may construct utility works for supplying water and light to its inhabitants or may establish markets, cemeteries, or libraries for their use.[129] By performing in a proprietary capacity the municipality may claim the rights and immunities of a private corporation[130] but it is also subject to a private corporation's liabilities.

The results normally reached by the courts in each of the four categories can be predicted with a great deal of regularity. In the first, where the proposed use is public and the present use private, courts almost universally permit the taking.[131] For example, courts will permit extraterritorial condemnations of private property for parks and parkways[132] and for municipal water and sewage.[133] In the second category, a present public use and a projected private need, courts will disallow the taking.[134] The same result is reached in the third, where both the proposed taking and present use are proprietary in character.[135] The fourth can be predicated with less certainty, but generally when two public uses conflict the court will uphold the existing use[136] unless the taking party can demonstrate a critical need substantially surpassing that of the holding governmental unit.[137] Thus, courts have dealt with extraterritorial condemnation problems with a great deal more predictability than one would expect from the preceding examination of these conflicts.

Predictability of response is an often sought objective of our judiciary. However, if the response becomes almost automatic *once the*

127. 1 NICHOLS § 2.225[1], at 177.
128. 1 NICHOLS § 2.23, at 182.
129. 1 NICHOLS § 2.225[1], at 178.
130. See note 94 *supra* and accompanying text.
131. For verification from the survey of conflicts based on the participant see notes 15 (municipality versus governmental unit) and 53 (municipality versus state) *supra* and accompanying texts.
132. See, *e.g.*, Memphis v. Hastings, 113 Tenn. 142, 86 S.W. 609 (1904).
133. See, *e.g.*, City of Charlotte v. Heath, 226 N.C. 750, 40 S.E.2d 600 (1946).
134. Since condemnations pursuant to the power of eminent domain must be for a public use, this situation will seldom arise, and if it does the attempted taking should be disallowed as outside the power, rather than by employment of the types of considerations suggested here. See 11 McQUILLIN § 32.01, at 256.
135. This type of condemnation also gives little trouble for the same reason as did category two—it is an illegal use of the power of condemnation.
136. This has been demonstrated in the prior survey. See notes 31 (municipality versus governmental unit) and 47 (municipality versus state) *supra* and accompanying texts.
137. See earlier discussion at notes 39 (municipality versus governmental unit) and 56 (municipality versus state) *supra* and accompanying texts.

object of the taking and the present use of the property is known, a frightening inflexibility is likely which will produce a violation of the basic land planning goal—the promotion of the most desirable allocation of land resources.[138] Although not usually articulated as such, the courts have in effect applied the governmental-proprietary test,[139] a test often used in other municipal problems.[140] The difficulty with taking this approach to the extraterritorial problem is twofold. First, the distinction has inherent problems which make it a questionable means of solving any municipal problem. Second, the governmental-proprietary test is totally out of context in the regional area. With respect to the inherent limitation of the test there are at least four criticisms that can be made. The first is that the line between governmental and proprietary is difficult, often impossible, to draw, particularly since society's concept of what is private and what is public is constantly changing.[141] At the polar extremes it is not too difficult to classify public streets and fire prevention as governmental, or markets as proprietary. But what about public utilities and libraries? Are they public or private? For making this determination several criteria have been suggested: the manner in which the municipal corporation obtained the property; whether or not it is an activity generally engaged in by private persons or corporations; the power of the corporation to dispose of the property; and the benefit accruing to the municipality, whether primarily a pecuniary profit or a special corporate benefit to the citizenry.[142] These tests have not only proved to be inadequate but have also failed to produce uniform results within a state. For example, the New Jersey Supreme Court in *Reid Development Corp. v. Parsippany-Troy Hills Township*[143] held that the maintenance and

138. See text at note 14 *supra*.

139. The governmental-proprietary distinction originated in judicial decisions after the separation of the colonies from England. The courts drew the distinction "in order to impose common law liability on municipal corporations for the negligence of their agents, servants or officers in their execution of corporate power and duties." State *ex rel.* Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960). For general discussion see Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 756 (1956); PROSSER, TORTS § 109 (2d ed. 1955).

140. The governmental-proprietary test began as a gauge of municipal tort liability. It soon spread, however, to other areas of municipal law until today it has importance in problems of municipal tax liability, alienation of property, legislative control over property, execution upon property, and, it is suggested, extraterritorial condemnations. See Blachly & Oatman, *Approaches to Government Liability in Tort: A Comparative Study*, 9 LAW & CONTEMP. PROB. 181 (1942); Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325 (1925).

141. For example, airports and garbage disposal were generally characterized as private functions thirty years ago. Today, however, both are usually considered public activities. See Annot., *Municipal Operation of a Sewage Disposal Plant as Governmental or Proprietary Function, for Purposes of Tort Liability*, 57 A.L.R.2d 1136 (1958).

142. Doddridge, *supra* note 140, at 330-31.

143. 10 N.J. 299, 89 A.2d 667 (1952).

operation of a water system for protection against fire and other dangers to the public health and safety constituted a governmental function. However, the classification most often given by New Jersey courts to the operation of a water system by a municipality for its inhabitants is proprietary—it is usually considered private activity subject to the rules governing a private corporation.[144]

The second difficulty with the governmental-proprietary distinction is the lack of uniformity among the different states. As a result, a situation is produced where an activity which is governmental in one state may be proprietary in another state. As the court properly stated in *Proprietors of Mt. Hope Cemetery v. City of Boston,*[145] a suit concerning the condemnation of certain cemetery properties in the city of Boston,

> no exact or full enumeration can be made of the kinds of property which will fall within it, because, in different states, similar kinds of property may be held under different laws, and with different duties and obligations, so that a kind of property might in one state be held strictly for public uses, while in another state it might not be.[146]

The conflict between designations among different states is exemplified in takings for water systems. In *Baltis v. Village of Westchester,*[147] a suit to enjoin villages from selling water to another municipality, the Illinois court noted the "well-established principle" that

> A municipal corporation owning and operating a water system and selling water to individuals, although engaged in a public service, does so in its business or proprietary capacity, not in any governmental capacity, and no distinction is to be drawn between such business whether engaged in by a municipality or by a private corporation.[148]

Despite this well-established principle, it is recalled that the New Jersey court in the *Parsippany-Troy Hills*[149] case concluded that the operation of water systems was a governmental function.[150]

144. There is general agreement that the distribution of water by a municipality to its inhabitants for domestic and commercial uses is a private or proprietary activity or service subject to rules of a private corporation. See Lehigh Valley R.R. v. Jersey City, 103 N.J.L. 574, 138 Atl. 467 (1927).

145. 158 Mass. 509, 33 N.E. 695 (1893).

146. *Ibid.* The fact that the issue here was whether compensation was to be paid or not for an eminent domain taking may be critical. If the city had been appropriating property for a cemetery, and compensation was not in issue, the court might well have labeled the condemnation one for a public purpose.

147. 3 Ill. App. 2d 388, 121 N.E.2d 495 (1954).

148. *Id.* at 500.

149. Township of Parsippany-Troy Hills, Morris County v. Bowman, 3 N.J. 97, 69 A.2d 199 (1949).

150. *But see* Iowa and Massachusetts decisions holding water systems proprietary. Miller Grocery Co. v. City of Des Moines, 195 Iowa 1310, 192 N.W. 306 (1923); Lyons v. City of Lowell, 239 Mass. 310, 131 N.E. 860 (1921).

A third problem found in attempting to employ a governmental-proprietary distinction is that of concurrent functions.[151] For example, a city might condemn extraterritorial property to build and operate a plant for both a municipal power system (governmental) and for a general power supply (private); or perhaps property is used to incorporate the objectives of a source for water supply (private) and a sewage or garbage disposal plant (governmental).[152] Thus, governmental and proprietary functions overlap and make any type of distinction on this basis difficult.

Augmenting this problem of commingled functions is a fourth complexity arising out of the other areas of municipal law where the public-private distinction is made. This problem exists because the dual nature of municipal corporations—governmental and proprietary—is recognized in other branches of law, notably in tort liability and property alienation.[153] When a similar distinction is attempted for each body of law, the precise delineation is often extremely difficult to make.[154] The result is that the *same* function can be considered governmental for some purposes and private for others—even in the *same* state. For example, in Indiana a municipal corporation maintains and controls a fire department in a proprietary capacity for condemnation purposes, which classification prohibits the state from appropriating the property without paying full compensation.[155] In the field of tort liability, however, fire departments have been held governmental in nature, thereby allowing cities to escape liability for the negligence of their acts in this capacity.[156]

The foregoing discussion has demonstrated that the governmental-proprietary distinction has serious inherent limitations which make it at best a questionable basis for resolution of not only extraterritorial conflicts but also conflicts in any municipal field. In addition to these intrinsic limitations, it lacks relevance in the extraterritorial acquisition context. The policy reasons which first suggested the distinction—a limitation of the ancient concept of governmental immunity from liability for personal injuries inflicted by governmental agencies—and the subsequent development of it appear to have little validity or application in resolving conflicts between governmental units over extraterritorial condemnations. One reason for this lack of relevance is that the governmental-proprietary distinction does not apply when the con-

151. MADDOX, EXTRATERRITORIAL POWERS OF MUNICIPALITIES IN THE UNITED STATES 2 (1955).

152. See Doddridge, *supra* note 140, at 336.

153. For the historical development of the governmental-proprietary function see note 140 *supra*.

154. 1 NICHOLS § 2.225[1].

155. State v. Fox, 158 Ind. 126, 63 N.E. 19 (1902).

156. See Robinson v. City of Evansville, 87 Ind. 334 (1882).

flict involves either the state or the federal government.[157] In the case of the state the governmental-proprietary test is important but only on the issue of compensation; the acquisition is always permitted.[158] With respect to the federal government all property taken is considered private and compensation is likewise always awarded.[159] In the reverse situation of the municipality attempting to acquire state or federal property the present law is just as rigid and a governmental-proprietary distinction is never made. The result is that the distinction is used for some types of extraterritorial acquisitions but not for others.

Another reason why the governmental-proprietary distinction lacks relevance is because it is illusory in the extraterritorial context. In some cases it changes the character of a municipality's activity solely because the activity extends beyond its corporate limits. To make this factor outcome-determinative is unrealistic and makes " 'a fetish out of invisible municipal boundary lines . . . .' "[160] For these reasons and the ones given earlier it is suggested that the only significance the distinction shonld have is with respect to the authority of the municipality to act. Thus, whenever the municipality acts pursuant to power either explicitly or impliedly given, it functions as a government and not as a private corporation. However, to characterize the action in this manner wonld not solve the majority of conflicts over extraterritorial acquisitions. Furthermore, it would necessitate a different focal point for decision. As suggested in the municipal acquisition section,[161] instead of the governmental-proprietary distinction, the criterion should be the total impact upon the region—the total impact of the change from the present use to the new use.

To recommend that the courts should consider the total impact upon the region suggests a role for the courts as land planning bodies. This is a function that has already, in part, been forced upon the courts when conflicts over extraterritorial acquisitions arise. A recent case, *City of Scottsdale v. Municipal Court*,[162] a typical inter-city conflict, is illustrative. The city of Scottsdale sought an injunction against the Municipal Court of Tempe to prevent the enforcement of a zoning ordinance and building code against property upon which Scottsdale planned to erect and maintain a municipal sewage disposal plant. The court, taking judicial notice of the fact that the Scottsdale area had experienced a popnlation boom requiring the expansion of

157. However the governmental-proprietary test has been used to determine whether or not a state could take federally owned property. 1 NICHOLS § 222[3].

158. *Id.* § 2.225[1].

159. *Id.* § 2.212. See also note 121 *supra.*

160. Schwartz v. Congregation Powslei Zeduck, 8 Ill. App. 2d 438, 441, 131 N.E.2d 785, 786 (1956).

161. See note 43 *supra* and accompanying text.

162. 90 Ariz. 393, 368 P.2d 637 (1962).

their sewage disposal facilities and that the land in question was generally known to be of marginal residential value (marshy area),[163] granted the injunction. To the extent that the court took judicial notice of the surrounding conditions and the impact this land use would have on the area, it was acting not as a court but as a land planning body.[164]

The court in the *Scottsdale* case acted upon its own initiative and took judicial notice of the nature of the property in issue and the surrounding property conditions.[165] This is not unusual since many courts adjudicating inter-city acquisitions have found it necessary to function in this manner. In Ohio one court thought itself forced to assume such a position in order to give effect to the Ohio constitution, which gives municipalities overlapping power of eminent domain. Article seventeen, section four provides that "any municipality may acquire, construct, own, lease and operate *within or without its corporate limits*, any public utility . . . ." In *Village of Blue Ash v. City of Cincinnati*,[166] the court said, in denying an injunction which would have prohibited the city from proceeding with the appropriation of part of a village street:

> [W]hen there is a conflict of sovereignty between two municipalities in Ohio, such as we have here . . . we must look to the results which will follow and decide which course of conduct will contribute to the greater good of the community as a whole.[167]

On appeal, the Ohio Supreme Court reversed, holding that

> The limits to which the court's power may extend are not governed by principles of equity, thereby giving power to a court to base its judgment upon a paramount public need in a contest between two sovereign governments, each possessing the power of eminent domain. The limit of the

163. For discussion of the type of land see *id.* at 395-96, 368 P.2d at 638.

164. See Duffson Concrete Prods. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949), which sustained the exclusion of all heavy industry from the local corporate bounds. The New Jersey court took notice of the fact that there was extensive land within the region, although outside the particular municipal corporate area, which was available for industrial use.

165. 90 Ariz. 393, 395-96, 368 P.2d 637, 638 (1962).

166. 173 N.E.2d 400 (1960), *rev'd*, 173 Ohio St. 345, 182 N.E.2d 557 (1962).

167. *Id.* at 401-02. The court in full recognition of the role it was playing stated: "It seems to this Court that in appropriating the street in question, we must take into consideration, not only the detriment, if any, to the Village, but also the benefit to the community at large, as well as the waste of money that might result. Will the sacrifice of part of the use of Plainfield Road as a public highway, for the construction and operation of the City's Airport contribute more to the general welfare of the entire community? This is an equity proceeding. The Chancellor in equity can control the activity of both municipalities; he can insist that both sides be reasonable; he can make the City supply a new location of Plainfield Road, if necessary, in order to provide the equivalent of the former service of Plainfield Road; he can compel the construction of more than one road." *Id.* at 401.

> court's power is to enjoin an unlawful or improper exercise of the power of eminent domain beyond the limits of a constitutional or statutory grant . . . .[168]

A similar case, though involving a city and county, was *Village of Richmond Heights v. Board of County Commissioners*.[169] This was a suit to enjoin a county condemnation for an airport of property recently acquired by the plaintiff village for municipal buildings and recreational purposes. The court found that the municipality and the county had equal rights conferred by state statute to appropriate the land for the purposes anticipated and consequently found it necessary to "balance the relative conveniences of the parties . . . ."[170] In so doing they granted the injunction to that extent that the village could demonstrate a reasonable need for the property in question for its municipal buildings but denied it with respect to that portion of the property where the county's need was greater.

In both of these cases, *Blue Ash* (lower court opinion) and *Richmond Heights*, the court was caught in the dilemma of attempting to enforce state statutes which gave both parties the power to acquire the property, and in order to adjudicate the dispute it was necessary to weigh all the factors involved for the future use of the land. To this extent the court was performing a land planning function.

Assuming, then, that courts resolving inter-city conflicts often find it necessary to consider the impact on the region in order to make a proper adjudication, a question must be raised as to whether the courts can or should legitimately function in this capacity. An answer to this question is suggested in the related field of zoning, a land-use control which is probably the most widely adopted land planning device.[171] It can generally be said that when zoning ordinances have been adopted, courts generally have the power to "grant relief in appropriate proceedings against zoning where it is unreasonable, discriminatory, unconstitutional or otherwise invalid."[172] This power includes inquiry into the classification of properties and even into whether the basis of the classification is impartially applied.[173] There are, however, definite limitations on the extent to which any court can act when dealing with municipal zoning. For example, it cannot interfere in the application of the zoning ordinance, assuming it is constitutional, unless the ordinance clearly exceeds the power under

168. Village of Blue Ash v. City of Cincinnati, 173 Ohio St. 345, 353, 182 N.E.2d 557, 563 (1962).
169. 112 Ohio App. 272, 166 N.E.2d 143 (1960).
170. *Id.* at 283, 166 N.E.2d at 151.
171. HAAR, LAND-USE PLANNING 147 (1959).
172. 8 MCQUILLIN § 25.277, at 675-76.
173. Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949).

which it was enacted.[174] A fortiori it cannot substitute its judgment for that of the legislative body or zoning commission which adopted the ordinance. For example, in *Robinson v. City of Bloomfield Hills*[175] a suit for mandamus to construct an office building on property zoned for residential purposes, the court stated in upholding the zoning ordinance:

> *[T]his Court does not sit as a super-zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits.* With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life.[176]

Furthermore, a court cannot require the legislative body or zoning commission to enact or amend a zoning ordinance. Illustrative is a recent California case, *Banville v. County of Los Angeles.*[177] Involved was a dispute which arose from the refusal of the county board of supervisors to enact a zoning ordinance as the plaintiff desired. In refusing relief the court stated:

> Under our law the legislative body cannot be forced to enact or amend a zoning ordinance. The courts can declare an action of the Legislature unconstitutional where such action exceeds the limits of the Constitution, but the courts have no means and no power to avoid the effects of new action. "The Legislature being the creative element in the system, its action cannot be quickened by other departments."[178]

From this examination it is seen that a court cannot lawfully perform the function of a super zoning board. Yet the types of considerations and determinations which must be made by a court when it performs a land planning function—the total impact upon the community—are no different from the functions of a court as a super zoning board. In fact the court must often weigh and measure conflicting zoning plans to resolve a contested extraterritorial acquisition.[179] Therefore, one can conclude that the court should not adjudicate

174. See, for example, the classic zoning case, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). This was a suit brought by an owner of improved land who sought relief from building restrictions which he argued deprived him of liberty and property without due process of law. Mr. Justice Sutherland replied that "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. The ordinance was upheld.

175. 350 Mich. 425, 86 N.W.2d 166 (1957).

176. *Id.* at 430-31, 86 N.W.2d at 169. (Emphasis added.)

177. 180 Cal. App. 2d 563, 4 Cal. Rptr. 458 (1960).

178. *Id.* at 570, 4 Cal. Rptr. at 461-62.

179. Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954).

extraterritorial acquisitions which, as has been demonstrated,[180] inevitably and necessarily require the court to function as a land planning body.

Although not critical to the conclusion, the reasons for not permitting the court to assume this function are twofold. The first is that the land planning function is legislative in nature, and the constitutional separation of judicial and legislative powers requires abstention on the part of the court.[181] As Mr. Justice Holmes accurately observed, "We fully understand . . . the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern."[182] Secondly, the courts are institutionally incapable of making a land planning determination.[183] The adversary process, largely controlled by counsel and limited to the wituesses they call, is not adaptable to a determination of this nature. The court is functionally incapable of conducting investigations that require scientific planning and engineering techniques. Not only does it not have the investigatory powers of the legislature but it also does not have the facilities, budget, or time to conceive a regional plan.[184] Particularly is this true at the appellate level, where the issues are generally law and policy rather than issues of fact and the procedure is keyed to argument rather than to the process of proof. Since, therefore, there does not appear to be a substantial difference between zoning and land planning, it is suggested that the reasons which dictate against the court's acting as a zoning body apply with equal force to the court's acting as a land planning body.

IV. CONCLUSION

In the foregoing discussion it was observed that in cases of intercity conflict over extraterritorial zoning, courts have applied a test in the nature of the governmental-proprietary distinction found principally in the field of municipal tort liability. It was then seen that this test has definite internal limitations and is wholly unsuited to the adjudication of state-city or inter-city conflicts. It was further found that courts in attempting to arrive at such a classification of functions often find it necessary, at times imperative, to consider and weigh all

180. See note 161 *supra* and accompanying text.

181. See Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

182. Noble State Bank v. Haskell, 219 U.S. 104 (1911), *on rehearing*, 219 U.S. 575, 580 (1911).

183. See ABRAHAM, THE JUDICIAL PROCESS 282-89 (1962); HURST, THE GROWTH OF AMERICAN LAW 180 (1950).

184. Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 531 (1957).

factors of the proposed and present use of the land and its total impact on the region. It was then concluded that although land planning considerations must be treated, it is neither a proper nor a desirable function of the judicial system to weigh them. The question then becomes who should make this determination and with what criteria.

The answer, with respect to state and inter-city conflicts, it is thought, lies in the creation of a permanent state land planning agency which would, among other functions, adjudicate conflicts between governmental units which arise from extraterritorial acquisitions. No such administrative agency presently exists. Several states have, however, created a state-level body which functions in the field of land planning.[185] Connecticut, for example, has a Development Commission which, meeting but once a month, focuses primarily upon the collection and dissemination of information concerning "industry, business, commerce, agriculture, and recreational and residential facilities."[186] New Jersey, with a different approach, created a Department of Economic Development which performs not only the former duties of the New Jersey State Planning Board[187] but also the function of urban housing rehabilitation, public works, and even veterans' services.[188] A desirable middle course is found, it is thought, in Tennessee, which has a State Planning Commission that functions only as a land planning board. It has the responsibility of adopting a general plan for the development of the state, advising and cooperating with the local planning commissions, and coordinating the state plan with the state regional areas.[189] However, like other state agencies, it does not function continuously and is limited in its personnel since its members must serve without compensation.[190]

The agency proposed here, unlike the ones just discussed, will be a constantly functioning body whose members are full-time public employees.[191] Furthermore, it will be structured so that it is one step

185. See U.S. HOUSING AND HOME FINANCE AGENCY, COMPARATIVE DIGEST OF THE PRINCIPAL PROVISIONS OF STATE PLANNING LAWS (1959), which collects all the pertinent state statutes on land planning.

186. CONN. GEN. STAT. REV. § 32-3 (1961).

187. N.J. STAT. ANN. § 52:27c-5 (1955).

188. N.J. STAT. ANN. §§ 52:27c-1 to -60 (1955).

189. TENN. CODE ANN. §§ 13-101 to -114 (1956). See REGIONAL PLANNING COMMISSION FOR CLARKSVILLE, TENNESSEE, NEIGHBORHOOD ANALYSIS AND PLAN FOR RESIDENTIAL NEIGHBORHOOD UNITS (1957).

190. TENN. CODE ANN. § 13-102 (1956).

191. Although no attempt will be made to treat all aspects of the commission, it is recommended that the membership should be keyed to the recognizable geographical districts in each state with one representative from each district. The selection of members should be removed from the politics of the area and made appointive by the governor of each state. The members should also hold office for life, subject to impeach-

beyond the regional planning layout envisioned by the more far-reaching state land planning enabling acts.[192] The agency will have three basic functions. The first will be a planning function requiring the creation of a state master plan and then the coordination with it of state regional land plans and master plans.[193] Within this function the agency will plan for state land use projects, such as state parks and conservation areas,[194] and will also work with other state land planning commissions to coordinate and adopt area-wide projects. The second basic function will be to serve as an advisor to the state legislature and other groups in need of land allocation solutions which affect areas larger than one region. This would include consultation on such things as interstate compacts, special districts, bridges and riparian rights to bodies of water affecting adjacent states, parks and recreational areas which affect adjoining states or areas larger than one region, and the conservation of open spaces which have a statewide impact. The third function, which no presently existing state planning board exercises, is the one which is most important with respect to the problems this paper has attempted to treat. It is the adjudication of conflicts which arise when a municipality attempts to appropriate state property, or property in another governmental unit, or when one of these parties attempts a condemnation within a municipality. In keeping with its other functions, the key to adjudication of these types of conflicts should be the regional and state master plans. The burden should be placed upon the condemnor and any proposed change in land use should be compatible with existing and anticipated land uses.

Although not within the scope of this paper, it would be remiss not to comment on regional planning statutes, since the success of the proposed state planning agency will be largely dependent upon them. These statutes, currently found in thirty-one states,[195] represent an attempt to zone an area wider than the boundaries of one municipality in an effort to reduce the conflicts between inconsistent zoning ordinances[196] and to give some direction to regional land planning efforts.

ment, thus giving the body the security of a court but still making it responsible to the legislature.

192. See Haar, *supra* note 184, at 522, giving an evaluation of the types of regional planning statutes which exist today and recommending needed changes in this type of statute.

193. See BASSETT, THE MASTER PLAN (1938), for a far-thinking discussion of community and land planning legislation.

194. See generally SIEGEL, THE LAW OF OPEN SPACE (1960).

195. U.S. HOUSING AND HOME FINANCE AGENCY, *op. cit. supra* note 185, at ii.

196. An example of such a conflict is Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954), where the court had to resolve conflicting zoning ordinances of adjacent boroughs. The court was forced to assume the position of a super zoning body in order to resolve the conflict. As the trial court in that case had cor-

They were adopted partly in recognition of the facts that city planning was obsolete[197] and that a new set of regional concepts and institutions was needed if municipal governments were to be responsive to the needs and desires of their inhabitants.[198] Unfortunately, however, there has been little uniformity between state regional planning statutes, with the result that few of them, if any, function alike.[199] They vary from a required regional division and functioning regional board[200] to optional plans which envision little more than county planning.[201] Not only is there a lack of uniformity among these statutes but also the establishment of regional planning bodies is usually on an optional basis.[202] As a result little coordination is achieved within these states. Still another criticism of these statutes is their method of determining regional boundary lines. This determination, which is by its nature somewhat arbitrary, is often made on a political rather than a land planning basis. Despite these criticisms, a well drafted statute, such as the California enabling act (which makes regional commissions mandatory),[203] will go far to alleviate many of the problems now facing communities and cities throughout the United States.

The creation of a state land planning agency to adjudicate intrastate conflicts does not, however, resolve the problem of the out-of-state-municipal and federal-municipal conflict. It is apparent that a state agency would not be suitable, since neither the opposing state nor the federal government would submit to its jurisdiction. This problem can be resolved, it is submitted, by an interstate Regional Development Commission structured along the lines McDougal and Rotival propose in *The Case for Regional Planning*.[204] As they suggest, the Commission should be established by the federal government in concert with the states of the geographical region such as the

rectly noted, "it is almost inevitable that the adjoining municipality will be affected in some degree by the zoning regulations along its border adopted by its next door neighbor." Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 43, 100 A.2d 182, 191 (1953).

197. Tugwell, *The Real Estate Dilemma*, 2 PUB. ADMIN. REV. 27-40 (1942), correctly stated that "zoning can never be an effective implement in urban rehabilitation because the courts will not sustain zoning laws which are strong enough to accomplish major objectives in planning."

198. *Ibid.*

199. Haar, *supra* note 184, at 516.

200. CAL. GOV'T CODE ANN. §§ 65060-72.

201. See, *e.g.*, DEL. CODE ANN., tit. 9, §§ 2501-17 (1953).

202. See, *e.g.*, CONN. GEN. STAT. REV. § 8-31 (1958); N.J. STAT. ANN. § 40:55-6 (1940).

203. CAL. GOV'T CODE ANN. § 65060.

204. MCDOUGAL & ROTIVAL, THE CASE FOR REGIONAL PLANNING (1947). See also Garner, *Some Aspects of Planning Law in England*, 12 U. TORONTO L.J. 49 (1957), which discusses the English approach by way of the Town and County Planning Act, 1947, 10 & 11 Geo. VI, c. 51.

Deep South, the Middle Atlantic States, or New England.[205] Its form would be that "of an administrative organization which will permit the pooling of all the powers and resources necessary to effective regional planning, without an over-concentration of power in the federal government or a dampening of local and private initiative."[206] The Commission would actually be a composite of previous attempts toward regional solutions of multi-state problems—the informal co-operative commission,[207] the interstate compact,[208] and the federal public corporation[209]—none of which singly would effectively serve the objective here sought. As to its membership, the Commission would have representatives from each state in the region, from any special body, such as the Port of New York Authority,[210] and from the federal government. Structurally it can be visualized as the apex of a triangle from which the proposed state and local agencies would descend. Like the state agency its functions would be threefold—planning, advising, and adjudicating.[211]

Once the Commission is formed its first function will be to prepare a master plan for the region and recommendations for changes and activities at all levels of government. It will then have to coordinate this plan with the local and state master plans. Next, and its most important function for the problems raised in this paper, will be to provide a forum for the conflicts between municipalities of different states and between municipalities and the federal government, including acquisitions by and in the municipality. The criteria for permitting such acquisitions should be the same as that recommended for intra-state conflicts—the total impact on the area. Such a recommendation would, of course, necessitate a modification in the inflexible state of the law with regard to out-of-state and federal property. As

205. See also Sokolow, *Governmental Techniques for the Conservation and Utilization of Water Resources: An Analysis and Proposal*, 56 YALE L.J. 276 (1947).

206. MCDOUGAL & ROTIVAL, *op. cit. supra* note 204, at 4.

207. Informal commissions have been formed largely to achieve harmonious programs among federal agencies operating in regional areas. They function primarily through channels of information and persuasion but lack the power to achieve any positive programs. *Id.* at 68.

208. Interstate compacts such as the Port of New York Authority and the Colorado River Compact have functioned suceessfully in their field. They are not, however, adaptable to the more important task of continuous comprehensive planning and development. They are inherently inflexible and too rigid for the Commission desired here.

209. The federal public corporation has achieved substantial success in the Tennesseo Valley Authority but is too central government oriented to produce the results anticipated for the Regional Commission. MCDOUGAL & ROTIVAL, *op. cit. supra* note 204, at 6.

210. See BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES (1957).

211. McDougal and Rotival would approve a multilevel system of land planning bodies as herein suggested. In fact they state: *"The first great need is for the establishment of functional subareas*—neighborhood units, metropolitan or rural districts, and combinations of districts—for planning and development in lieu of the present more or less arbitrary political units. . . ." MCDOUGAL & ROTIVAL, *op. cit. supra* note 204, at 74.

recalled from the earlier discussion of property which one municipality (state) owns within the territorial confines of another state,[212] it is held in purely a proprietary capacity and is subject to all the incidents of ordinary individual ownership.[213] This position of absolute control by the territorial state is unnecessary and in the situation where state lines are artificial and defy natural growth patterns the municipality (state) in which a city owns land for a public purpose should not be permitted to condemn these properties without giving cause. In the same manner, federal control over its property should not be absolute.[214] At present the power of a municipality to condemn federal lands within or without its territorial limits is in all cases denied, unless consented to by the federal government, regardless of the existing federal use and the municipality's need for the property.[215] There appears, however, no good reason why federally owned property, whether of a governmental or proprietary nature, should not be subject to reasonable condemnation proceedings of surrounding municipalities. As in the case of all other condemnations discussed, the burden would be upon the condemnor to demonstrate a more critical need and in the case of federal property used for a governmental purpose such as defense, that a feasible alternative area exists.[216]

Once the determination by either the state agency or the regional commission is made, a question still remains as to whether or not appellate review to the courts should be permitted. To recommend such review would appear to thrust the courts back into the position of decision-maker, a position they have assumed in the present power vacuum. This result, however, can be avoided by requiring any appeal of an adjudication of the state agency to be made to the regional commission where, hopefully, it will be finally resolved. If, however, a party is still not satisfied, appeal could be permitted to the state or federal courts as their jurisdictions permit. However, once in the courts, the role of the judiciary should be limited to procedural con-

212. See text at note 62 *supra.*

213. 1 NICHOLS § 2.23.

214. In some of the earlier cases, *e.g.*, United States v. Chicago, 48 U.S. (7 How.) 185 (1849), the validity of the exercise of the right of eminent domain by a state over the lands of the United States had received recognition. Today, however, we have reached a point where the states have no power with respect to these lands. Neither outcome, it is admitted, is desirable. See 1 NICHOLS § 2.22 for prior history.

215. See, *e.g.*, Davenport v. Three-Fifths of an Acre of Land, 252 F.2d 354 (7th Cir. 1958).

216. See In re Certain Land in Lawrence, 119 Fed. 453 (D. Mass. 1902), where the court said: "I do not believe that the United States could, at its will, build this post office in the middle of the principal street . . . or across the main line of an important railroad. I do not think that the right of the public to prevent the first-mentioned taking can be vindicated ouly by the attorney general. I doubt if it can be laid down, without qualification, that the public use of a post office is in all places superior to the public use of a park." *Id.* at 456.

siderations—prejudicial administration, abuses of discretion, or a failure of procedural due process—all of which are tested against the background of the relationship and policies established in the state and regional master plans.

Within this framework of regional planning statutes, a state planning agency, and regional Development Commissions, it is hopefully anticipated that the forum for conflicts between cities and other governmental units, arising from the appropriation of land, will be shifted from the courts to the agency. A body institutionally capable of performing a land planning function can adjudicate conflicts without the structural inhibitions of the judiciary as it maximizes land use to its highest social utility.