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COMMITTEE ACTIVITY

Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Department of Economics, Finance and Administration, Highway Research Board

LAND ACQUISITION MEMORANDUM #176

176-1 SUPREME COURT OF WASHINGTON RULES HIGHWAY COMMISSION DID NOT ARBITRARILY SELECT ROUTE FOR A FREEWAY AND THE FREEWAY WAS NOT A NUISANCE

The Deaconess Hospital brought an action to enjoin the State Highway Commission, the commissioners, and the director of highways from proceeding further in the location and construction of State Primary Highway No. 2 which would pass through the City of Spokane within 65 to 70 feet from the north wing of the hospital. It alleged that (1) it was an owner of property abutting on the proposed freeway; (2) statutory notice and hearing requirements relating to highway planning and access limitation were not complied with, thus rendering the commission's actions unlawful; (3) by reason of noncompliance with statutory procedures and because alternative and preferable routes were available, the commission's decision as to location and routing of the highway was arbitrary and capricious; and (4) the noise and fumes of traffic from the proposed freeway, together with projected interference with established access routes, would invade and restrict the peaceable enjoyment of the hospital properties, constitute a nuisance in fact, and cause substantial damage to the hospital's property rights.

The proposed highway was to run east and west along the north edge of Fourth Avenue, 65 feet away and across the street from the north wing of Deaconess Hospital on a viaduct elevated about 10 feet above the far sidewalk and about level with the first floor windows of the north wing. In this area, the freeway would be 109 feet wide, have seven lanes for traffic, and, on its north edge away from the hospital, a two-lane off-ramp. Because the ground sloped away from the front of the north wing of the hospital and the highway would be elevated about ten feet on the viaduct to about the first floor of the north wing, patients on the first floor of that wing would be on an approximate level with and up to 65 feet away from the extreme south edge of the proposed freeway. Although the freeway would project about ten feet over the north sidewalk of Fourth Avenue in the area of the hospital, it would not overhang any part of the street but only a portion of the north parking strip. Fourth Avenue would thus be open in its full width for normal traffic.

The hospital contended that the increase in noise and noxious fumes -- including carbon monoxide and hydrocarbons -- generated by freeway traffic would make its north wing virtually untenable for the housing of patients, and force it to abandon that wing as a place to maintain the 100 hospital beds which occupied that space. It argued that the loss of 100 beds, when considered in

relation to the laboratories, surgeries, pharmacy, nursing services, X-ray, physical therapy and other facilities maintained by the hospital to supply complete hospital services for 300 patients would, among other damages, throw the entire hospital operation out of balance. Therefore, the hospital alleged, the freeway would, as to it, cause a nuisance in fact, and should in equity be enjoined notwithstanding its location by officials of the State for a public purpose. (The appellate court pointed out that the hospital sought to prevent construction of the freeway along the proposed Fourth Avenue location and anywhere else within 300 feet of the hospital.)

The trial court, in essence, found that the hospital was an abutting owner, and that the commission had not complied with the statutory notice and hearing requirements, had acted arbitrarily and capriciously, and would be creating a nuisance in fact to the hospital's properties and would inflict damage upon such properties. That court, therefore, issued an injunction permanently prohibiting the construction of the freeway along Fourth Avenue and elsewhere "within such proximity of the hospital as to constitute a nuisance in fact." Upon appeal by the commission, to the supreme court, each ruling of the trial court was reversed and the lower court was ordered to vacate the injunction.

The appellate court stated a statute provided that notice had to be given to abutting owners along an existing highway when it was contemplated that such highway would be made into a limited access facility. The purpose of the statute was to afford the abutting owners on a street, who might lose access thereto, an opportunity to be heard and present alternate plans before the damage was done. In this case, however, Fourth Avenue would be left open and free to traffic by the freeway which would pass parallel to and above its north parking strip. All ingress and egress rights now vested in the hospital relating to Fourth Avenue would, so far as freeway construction was concerned, remain undisturbed. With the entire width of Fourth Avenue and the parking strips and sidewalks on both sides undisturbed by the freeway, the hospital did not have the status of an abutting owner to "an existing highway, road or street" which would be "established as a limited access facility." Not being an abutting owner, it was not entitled to statutory notice under the section of the statute involved.

The appellate court next stated that the hospital convinced the trial court that, in building the proposed freeway within 65 feet of its north wing, the commission acted arbitrarily, capriciously and on a fundamentally wrong basis in law and fact. The hospital had submitted evidence that the freeway could be brought in along Third Avenue instead of Fourth with equal or less cost and also suggested two other routes. It said that several reasonable alternative routes existed which would not damage the hospital and yet would accomplish the State's purposes in building the freeway. Among these possibilities, it suggested the Third Avenue route and two others, and also the three alternative routes considered by the commission. The trial court accepted these proposals as reasonable alternatives and, accordingly, found the selection of the Fourth Avenue route to be arbitrary, capricious and upon a fundamentally wrong basis. However, the supreme court ruled that the kind and type of roadway, the route to be followed, the design and engineering details were the subject of administrative decision. These decisions would not be set aside or molested by the courts unless shown to have been arrived at without statutory authority or by bad faith or fraud, or capriciously or arbitrarily.

The appellate court pointed out that the commission surveyed and studied several routes for the freeway, including the possibility of bypassing the city entirely. It gave weight to many factors such as amount of traffic one route would carry in comparison to another, keeping in mind the destinations of travelers. It measured and compared the costs of land acquisition, and the costs of construction as affected by differences in terrain. That the trial court found a different route preferable to the one designated by the State Highway Commission and granted an injunction to avoid, in its view, a needless damage, amounted in final analysis to that court's asserting its judgment in an area of government reserved for the commission. The supreme court, therefore, held that the Fourth Avenue route was neither an arbitrary nor capricious nor unreasonable choice.

The last point considered by the supreme court was the question of private nuisance and it held that the finding of nuisance in fact was in error. The freeway was to be built not only under general statutory authority of the highway statutes, but also pursuant to specific enactment of the legislature establishing this highway as State Primary Highway No. 2, to be known as the Sunset Highway. No claim was made that the highway would derive its nuisance qualities from faulty design or negligence in construction or that it would be improperly maintained. The fact of nuisance found to exist in the future by the trial court came directly from the consequences of proximity. Deaconess Hospital wished to enjoin the highway--not generally as a nuisance but specifically within 300 feet of its buildings. The supreme court noted that the legislature seemed to have anticipated this very situation, for in 1881 it re-enacted an earlier statute, providing that "Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance." It, therefore, held that the proposed freeway came within the meaning and effect of the statute and could not be enjoined as a private nuisance. (Deaconess Hospital v. Washington State Highway Comm'n., 403 P.2d 54, June 1965)

176-2 HIGHEST COURT OF WASHINGTON DECIDES TAKING OF PROPERTY WITHIN A CLOVERLEAF INTERCHANGE WAS FOR A PUBLIC USE AND WAS NECESSARY

Existing Primary State Highway No. 5, which ran in a northeasterly-southwesterly direction, was known as Linden Drive in the City of Sumner, Washington. The State highway commission, deeming it necessary to relocate Highway No. 5, instructed the director of highways to prepare a plan for the establishment of a limited-access highway. The plans as drawn were to establish a freeway extending east to west and passing under Linden Drive at substantially right angles to it. Linden Drive would be elevated approximately ten feet above its present level.

The condemnees were the owners of 1.95 acres of valuable income property located, for the most part, in the northwest quadrant formed by the overpass intersection of Linden Drive and the proposed freeway. The property is identified in Figure 1 by the double line. The east side of the property abutted Linden Drive for about 225 feet. The north boundary of the property abutted Le Grange Street, which extended to an intersection with Hunts Avenue, Thompson Street and Linden Drive.

In general, the State's plan called for the construction of a "partial cloverleaf" interchange having two western quadrants as illustrated by the "EL" and "ER" loops in Figure 1. As proposed, "EL" would leave the freeway, pass