

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

under Linden Drive, curve North, cross Le Grange Street, curve southeast, cross the corner of the condemnees' property, and lead into Linden Drive on a tangent. Thus, west bound traffic would leave the freeway on the "EL" off ramp, traverse the loop, make a "free right turn" and proceed South on Linden Drive. In addition to the necessary right-of-way, the State sought to condemn all of the condemnees' property encompassed by the "EL" off-ramp loop and Linden Drive. The area within the confine of the interchange would be leveled, graded and seeded.

The trial court's order adjudicating public use permitted the State to condemn that portion of the condemnees' property necessary to construct State Highway No. 5 as a limited access highway and that portion lying within the "ER" loop. The court further found:

that there is no legitimate reason and it is not necessary to take the * * * (Dawes) property within the loop formed by the EL line and the DL line. * * * A connection can be made with Le Grange Street (from P.S.H. No. 5) allowing traffic to go

to the intersection that exists between Hunt(s) and Thompson and to proceed in the same manner as traffic now proceeds in that area without the necessity of any continuous loop in the area of the property owned by * * * (Dawes). The court further finds that a taking of any property that might be needed of the * * * (Dawes) to get to a point where it could properly connect with LeGrange and thence to Hunt (s) and Thompson Avenues would be proper, but not beyond that point nor any right to limit or restrict access to Le Grange Street or Linden Drive.

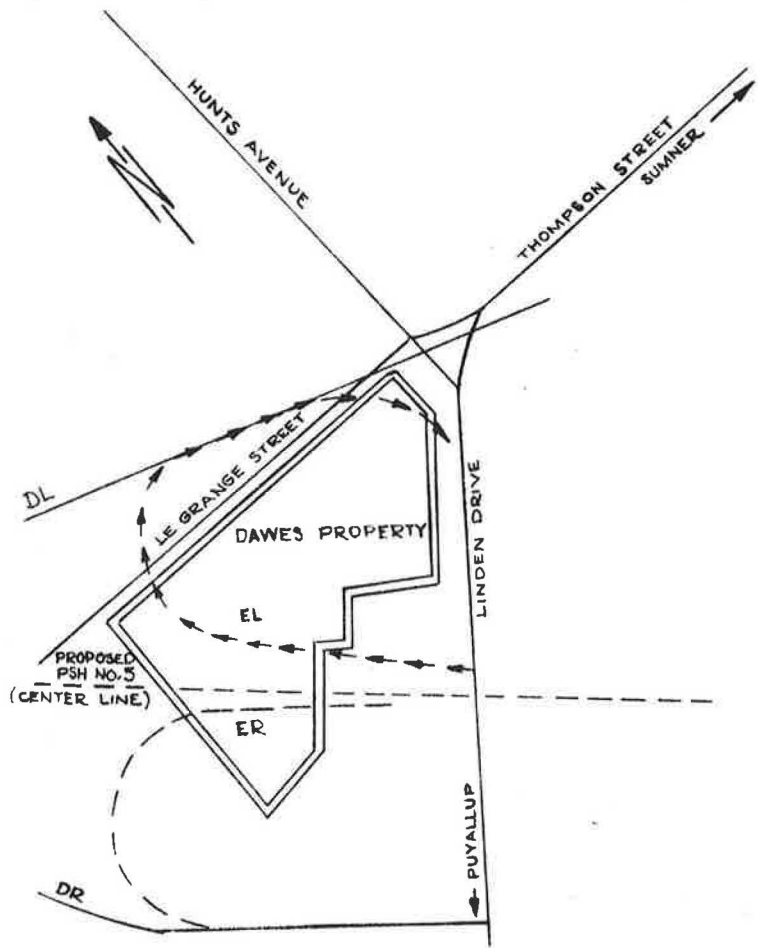


Figure 1
WASHINGTON: State v. Dawes, 404 P.2d 20 (1965)

On appeal by the State denying an adjudication of public use for a portion of the condemnees' property, the supreme court pointed out that the trial court "re-engineered" the northwest quadrant of the partial cloverleaf by (1) eliminating that portion of the "EL" loop north of Le Grange Street; (2) holding

that State acquisition of the property within the "EL" loop was not for a public purpose; and (3) permitting access from the abutting property to both Le Grange Street and Linden Drive, thereby destroying the very characteristics of a limited-access highway. The appellate court stated that the designing of a freeway and its interchanges was a matter of engineering judgment. It pointed out that an engineer from the highway department had stated that a highway was just as good as the access points and that a breakdown at the access meant the highway would not operate as well as it could.

The supreme court noted that the State's constitution provided that whenever an attempt to take private property for a use alleged to be public, the question whether the contemplated use was really public was a judicial one, without regard to any legislative assertion that the use was public. However, the court had long adhered to the theory that administrative determination that the use was a public one was conclusive, in the absence of bad faith, arbitrary, capricious or fraudulent action.

When considering the first phase of an action of eminent domain--the issuance of an order adjudicating public use -- the decision had to pivot on three interrelated findings: (1) That the proposed use was really a public use; (2) that the public interests required it; and (3) that the property appropriated was necessary for the proposed public purpose.

The court stressed that it was beyond dispute that the use of land for highway purposes was a public one and that public interest required the construction, operation and maintenance of highways. The crux of its review, therefore, was whether the property sought to be appropriated was necessary for the proposed public use. If the nonaccess area was carried behind the point necessary to assure that traffic would move in and out of the interchange in a safe and orderly manner, then it could not be said that the area was needed for a public use. However, maximum access to the interchange compatible with safety and efficient design should always exist. The court believed that a cloverleaf, if designed within reasonable limits, was an integral part of the limited-access highway and must be so in order to insure that the traffic pattern would be free-flowing through the interchange area. On this point, the State engineer had testified that it had never been a possibility that a property could remain within an interchange loop and not destroy the workability of that interchange.

The court stated that "necessary" had been defined in statutory condemnation as reasonable necessity in the circumstances of the particular case. From the record, it could not be said that the administrative and engineering determinations of the highway commission were made in bad faith, or were arbitrary and capricious. It concluded that all the property sought by the State was necessary for the proposed public purpose and it remanded the case with instructions to modify the order adjudicating public use in accordance with this opinion. (State v. Dawes, 404 P.2d 20, June 1965)

176-3 PENNSYLVANIA SUPREME COURT DECIDES ORDINANCE PROVISION PERMITTING ONLY MOTELS TO ADVERTISE ALONG TURNPIKE WAS DISCRIMINATORY AND ENTIRE ORDINANCE PROHIBITING ALL OFF-SITE ADVERTISING IN THE TOWNSHIP WAS INVALID

In September 1959 Upper Moreland Township adopted a "Sign Regulations" ordinance which made it unlawful to erect any sign or other advertising structure