

for the State to condemn access rights since it did not attempt to restrict the State's existing right to control access under its police power.

In this case the landowners enjoyed access to the main highway at two points only 575 feet apart. They had complete access to the frontage road at all points since there was no barrier between it and the land. There was no contention that the frontage road was not of proper quality. The landowners' access to a controlled-access highway was subject to the State's exercise of police power, and in this case the limitation of access was reasonable and not compensable.

A dissenting judge stated that the controlled-access highway statute made it mandatory to acquire property rights, including the right of access of an abutting property owner. He pointed out that this construction of the statute had previously been made by the supreme court and since such construction had stood for over seven years and the legislature had not seen fit to change it, it had to be assumed that the legislature approved the previous interpretation of the statute. (Brock v. State Highway Comm'n, 404 P.2d 934, August 1965)

179-2 SOUTH CAROLINA SUPREME COURT DECIDES CONDEMNEE ENTITLED TO COMPENSATION FOR LOSS OF ACCESS TO EXISTING HIGHWAY BUT FRONTAGE ROAD CAN BE A MITIGATING FACTOR

The condemnee owned a tract of land containing some 40 acres which fronted to the east on what was known as the "Old Greenville Road." U. S. Highway No. 29 was constructed, some years ago, over the rear or western portion of the property. The instant condemnation proceeding was instituted in connection with the acquisition of a right-of-way for Interstate 85, a controlled-access facility, one lane of which was to be constructed on top of U. S. Highway 29. The condemnee had had access to Highway 29 along the entire western extremity of his property prior to the taking. After the taking he would have identical access to a frontage road being constructed in conjunction with the Interstate highway. By traveling seven-tenths of a mile south of his property on this frontage road, the condemnee would be able to enter Interstate 85, as well as the rest of the general highway system. His access to the Old Greenville Road at the eastern extremity of his property was not affected.

The trial court handed down a judgment in favor of the condemnee and the highway department appealed to the supreme court. The sole question to be decided was whether a landowner was entitled to compensation for the loss of access to an existing highway, when a controlled-access facility was constructed on top of it, where a frontage road was provided along the entire extremity of the landowner's property. By answering in the affirmative, the supreme court affirmed the decision of the lower court.

The appellate court held that the landowner was entitled to compensation for the loss of access, at least to the extent that such loss adversely affected the fair market value of his remaining property. The construction of the frontage road was in the nature of a benefit and, as the trial judge charged the jury, was

a mitigating or offsetting factor to be considered in determining the amount of compensation to which the landowner was entitled.

The supreme court pointed out that the State of South Carolina was committed to the rule that an abutting property owner had a right of access over a street adjacent to his property, as an appurtenance thereto. An obstruction that materially injured or deprived the abutting property owner of ingress to or egress from his property was a "taking" of the property, for which recovery might be had. The fact that other means of access to the property were available affected merely the amount of damages, and not the right of recovery. The court went on to state that the cases it relied on were concerned with streets within a municipality as opposed to a highway outside of an urban area. It thought, however, that the rule consistently followed by this court with respect to urban streets was just as soundly applicable, if not more so, to highways in rural areas.

None of the cited cases made reference to the ownership of the fee in and to the urban streets involved, but it was a matter of common knowledge, the court stated, that at least in some instances the municipalities, rather than the adjacent property owners, owned the fee to the streets. Neither the history of U. S. Highway 29, nor the manner of the acquisition of the right-of-way therefor through the property of the landowner appeared in the record. Nevertheless, as a general rule, the fee to the right-of-way of most highways in this State remained in the abutting landowners. In the acquisition of highway rights-of-way, the benefits, if any, of the improvement were taken into consideration in determining the amount of compensation to which the landowner was entitled. A new highway was normally of no benefit to the landowner over whose land the highway was constructed unless he had the right of access thereto, and, hence, the landowner's right of access thereto became, in effect, a property right for which the landowner had directly or indirectly paid a valuable consideration.

The appellate court stated that it could not adopt the rule used in other jurisdictions which denied compensation where an existing highway was changed to a controlled-access facility but a frontage road paralleled the facility. Those jurisdictions held that the State had the right to control traffic for the general welfare of the public under its police power. The supreme court stated that besides being committed to the rule that an abutting landowner had a property right of access to an existing street or highway, the legislature itself had clearly recognized the property right of an abutting landowner in and access to a public street, highway or thoroughfare. The General Assembly first provided for and authorized the construction of controlled-access highway facilities by the South Carolina Highway Department in the year 1956. The statute provided that the department could acquire such lands and property, including rights of access, as might be needed for controlled-access facilities, by gift, devise, purchase or condemnation, in the same manner as now or hereafter authorized by law for acquiring property or property rights in connection with other State highways. This section showed a clear recognition by the legislature of the property right of access existing in property owners whose lands abutted the public highways of the State and an intent that such owners should be compensated for such rights, in accordance with established principles. (South Carolina State Highway Dep't v. Allison, 143 S.E.2d 800, August 1965.