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LAND ACQUISITION
MEMORANDUM #170

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170-1 NEBRASKA SUPREME COURT RULES TENANTS OF PROPERTY MAY BE ENTITLED TO DAMAGES FOR SUBSTANTIAL IMPAIRMENT OF ACCESS THERETO EVEN THOUGH THEY WERE PROVIDED WITH A FRONTAGE ROAD

In March and April of 1962, the tenants on the property involved had constructed a building thereon in order to operate a restaurant and tavern which was entirely a drive-in business. At that time there were two drive-ways which provided direct access to the property from Cornhusker Highway. On July 31, 1962, the State condemned a strip of land 12 feet in width across the south end of the property, together with the right of access to Cornhusker Highway except by means of a one-way frontage road which had been constructed between the south line of the leased property and the north line of the highway. Traffic upon the frontage road was one-way moving from east to west. The entrance to this road from the highway was located approximately 310 feet east of the property involved. The entrance to the highway from the frontage road was approximately 358 feet west of this property.

Although the jury returned a verdict which in form found for the tenants, they assessed the amount of their recovery at "\$ None." The State appealed from an order which set aside the verdict and granted the tenants a new trial. The supreme court sustained that order.

The State argued that the tenants could not recover damages because their right of access to Cornhusker Highway was taken by an exercise of the police power. The court stated, however, that the fact that the improvement of a highway was an exercise of the police power did not determine whether the landowner or lessee was entitled to recover damages. The exercise of police power might or might not involve the taking of private property and it might or might not involve mere noncompensable inconvenience to the owner thereof. The distinction was not whether it was a valid exercise of police power but whether or not the property itself was taken or damaged.

The State also argued that an abutting landowner or lessee was not entitled to damages for loss of direct access to a highway if access was provided to a frontage road and relied upon a provision in a statute which read: "Upon the construction of any frontage road, any right of access between the controlled access facility and property abutting or adjacent to such frontage road shall terminate and ingress and egress shall be provided to the frontage road at such places as will afford reasonable and safe connections." The

court pointed out that the statute was silent as to the right of a landowner or lessee to recover damages for loss of direct access and was not determinative of the question presented. The right of a landowner or lessee to just compensation for property taken or damaged for public use was guaranteed by the constitution of the State. An abutting property owner to a highway had an easement of ingress and egress to and from his property which constituted a property right. It, therefore, followed, according to the court, that the State could neither take nor damage such easement belonging to an abutting property owner without just compensation.

When a controlled-access highway was constructed upon the right-of-way of a conventional highway and the owner's ingress and egress to abutting property had been destroyed or substantially impaired, he might recover damages therefor. The damages might be merely nominal or they might be severe. Other means of access such as frontage roads, as in the instant case, could be taken into consideration in determining the amount which would be just under the circumstances. However, the fact that a frontage road was constructed did not, as a matter of law, deprive the tenants of their right to damages, if any. The granting of a new trial to determine whether there had been a substantial impairment of access to the property was, therefore, upheld by the appellate court. (Balog v. State, 131 N.W.2d 402, November 1964)

170-2 DAMAGES TO PROPERTY CAUSED BY PLACING ISLANDS IN STREET NONCOMPENSABLE, RULES SUPREME COURT OF NEBRASKA

The Nebraska Department of Roads acquired a 3-foot strip of land along the west side of the condemnees' land for the purpose of widening a street. Prior to the acquisition, the owners had direct access to the highway from all points of their property. However, after construction of the improvement, egress and ingress was limited to three 30-foot curb cuts. The condemnees did not contend that this limitation of access was unreasonable. However, they argued that the island placed in the street at the same time the street was widened, which prevented southbound traffic from turning left into their property, had caused a large diminution in the value of their property. The jury returned a verdict for the condemnees in the amount of \$286.92 with interest and they appealed.

The supreme court noted that the owners were entitled to recover damages to the part of their land which was not taken which resulted from the condemnation of the 3-foot strip of ground and putting it to public use. However, the construction of the islands and the change of traffic direction was not the result of the taking of the 3-foot strip and damages resulting from the control of traffic were not compensable.

The court stated that the general rule was that an abutting landowner had no vested interest in the flow of traffic pass his premises and that any damages sustained because of a diversion of traffic was not compensable. This rule applied to the control of turns by double lines, islands, and median strips. Mere circuitry of travel to and from real property, resulting from a lawful exercise of the police power in controlling traffic, did not of itself