Controlling the Use of Access

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● ACCESS to and from a highway and abutting property may be controlled in various ways, including restrictions upon the number of private road or driveway approaches to the highway and their locations, dimensions, design, construction, and use. For the purposes of this discussion, we are concerned only with the extent to which the *use* of access may be controlled by agreement, eminent domain, and police power.

Control of use of access involves restricting the kind or *purpose* of use that can be made of an approach to a highway. Since the number of vehicular movements at an approach to a highway has a direct relationship to the kind or purpose of use that is made of the approach, controlling the kind or purpose of use effectively controls the frequency of use. Use-control can thus be utilized to limit the incident of exposure to possible accidents, thereby minimizing traffic hazards and promoting the unimpeded movement of highway traffic through the elimination of a primary cause of reduced speed zones.

Use control is economically desirable because of the flexibility it provides an access-control program. Where degrees of restriction of access are possible, between unrestricted access on the one hand and complete prohibition of access on the other, the public authority need restrict access only to the extent necessary to meet the requirements of the particular situation. This results in substantial savings where compensation must be paid for restricting access, for partial restriction of access invariably causes less compensable damage to abutting property than does complete restriction.

In 1947, the Oregon State Highway Commission commenced what has since been developed into a comprehensive and well-planned program for controlling the use of access. So far as we know, Oregon is the only state that has pursued such a comprehensive program to date, which is the reason for the frequent reference herein to Oregon practice and precedent.

CONTROLLING THE USE OF ACCESS BY AGREEMENT AND EMINENT DOMAIN

The point from which all legal theories concerning control of the use of access must start is that a vested right of access is an easement or a right in the nature of an easement.[1] By analogy to easements in general and easements of way in particular, it clearly appears that access rights can be limited as to "use" in deeds affecting property abutting a highway. Where the parties to an instrument creating an easement specifically state the use or purpose for which it is created, the easement, of course, is limited to such use.[2] More particularly, the owner of a right or reservation of way over the land of another is limited in its use by the terms of the grant from which the

[1] Lexington & Ohio R R v. Applegate, 80 Dana 289 (Ky 1838), Kane v. N Y. El. R R, 125 N. Y. 164, 26 N E 278 (1891), Willamette Iron Works v Or Ry & Nav Co, 26 Or 225, 37 Pac 106 (1894), 1 Lewis, Eminent Domain 179 (3rd ed 1909), 2 Nichols, Eminent Domain 73 (3rd ed 1950), 10 McQuillan, Municipal Corporations 671 (3rd ed. 1950). That the right may not be as extensive as generally supposed, see Reese, *Legal Aspects of Limiting Highway Access*, Highway Research Board Bulletin No 77, p. 36 (1953)

[2] 17 Am Jur, Easements, §98

way is derived.[3] If the grant is for a particular purpose, it cannot be used for any other.[4] Thus, it has been held that an easement of way limited to dwelling house purposes could not be used for commercial access to a hotel on the same property.[5] Similar results have been reached in the "farm-crossing" cases where a way across railroad tracks has been reserved for farm purposes only.[6]

Acting upon the premise that access rights may be conveyed [7] and limited as to purpose, the Oregon State Highway Commission has adopted several standardized access-conveyancing and use-restriction clauses which are incorporated in options and deeds of land acquired for highway right-of-way. The form of these clauses consists of a grant, relinquishment and waiver of "all existing, future, or potential common law or statutory easements of access" between the right of way of the highway and all of the grantor's remaining contiguous land. When complete prohibition of access is not necessary, access, specifically restricted as to location, width and use, is reserved to serve the grantor's remaining land. Use is ordinarily restricted to one or more of the following purposes: (1) private residential use; (2) production and transportation to market of farm products of the grantor's remaining land; (3) development, harvesting, and transportation to market of forest products of the grantor's remaining land; (4) operation of existing (described) activity on the grantor's remaining land; and (5) operation of future (described) activity on the grantor's remaining land.

[3] 28 C J S 766, n. 46

[4] *Ibid*, n 53. For cases upholding limitations on use of rights of way in England, see Gale, Easements 303 (12th ed. 1950).

[5] Nan v Vockroth, 94 N J Eq. 511, 121 A. 599 (1923).

[6] E g, Cornell-Andrews Smelting Co. v. Boston & P R R., 215 Mass 381, 102 N. E 625 (1913), see Note, 139 A. L. R. 462 (1942).

[7] See Restatement, Property §§500-01 (1944), 17 Am Jur, Easement §135.

In addition to, and distinguished from, access to a highway for limited purposes, abutting owners may have the right to cross a highway for farm purposes when the highway severs a farm, leaving portions on either side. Provision for the creation and termination of a farm crossing is made as follows:

> Reserving the right to establish, maintain, and use a crossing for farm purposes only, of a width of twenty-five (25) feet at Highway Engineer's Station —; provided, however, that upon the alienation of either of the portions of the property severed by the said highway, resulting in the severed portions of the said property being owned by different persons, this right of crossing shall be forfeited and shall cease.[8]

The Oregon State Highway Commission has attempted to provide a method of enforcing restricted use of access, without necessity of seeking injunctive relief from the courts, by inserting the following language in all pertinent instruments:

> The reserved rights of access from the said abutting property shall not be used for any purpose not hereinabove stated. If the Grantors, or anyone holding under them, shall commit, suffer, or permit any violation of the uses herein stated, the rights hereby reserved at any particular location where a violation may occur, will automatically be forfeited, and the Grantee shall have the right to close and barricade such place of access for all purposes.

A similar provision is applied where a farm crossing is allowed:

> If the Grantors, or anyone holding under them, shall commit, suffer or permit any use of said crossing for any purpose other than a passageway from one side of the highway to the other for farm purposes, the right hereby reserved will be automatically forfeited, and the Grantee shall have the right to close and barricade said crossing for all purposes.

To date there has been no occasion to employ the authority contained in these forfeiture provisions, and no court review has been had thereof.

Even authorized use of restricted access, however, may generate vehicular

[8] It is further provided that "the construction of a frontage road or roads shall not defeat the right of crossing herein reserved."

movements of such frequency and magnitude at approaches to highways as to create traffic hazards requiring the purchase of more stringent access control. Anticipating this possibility, the Oregon State Highway Commission provides for the future elimination of any direct access to a highway that may be reserved to serve abutting property. This is accomplished at the time of initial acquisition of access rights by a provision authorizing construction of future frontage roads in the following language:

> Grantee has the right, at its option, to build at any future time a frontage road or roads within the boundaries of any present or hereinafter acquired right of way; thereupon, all rights of access hereinabove reserved to and from the highway that are on or adjacent to any such frontage road or roads shall cease, but the Grantors, their heirs and assigns, shall have access to the frontage road or roads at such places as will afford reasonable and safe connections. Said frontage road or roads shall be connected to the main highway or to other public ways only at such places as the Grantee may select.

The use of access may be restricted by eminent domain to the same extent as by agreement and purchase if there is sufficient statutory authority.[9] In Oregon, access-acquisition and use-restriction clauses similar to those used in options and deeds, with changes necessary to effect an appropriation rather than a grant of property rights, are incorporated in complaints and judgments in condemnation proceedings. The practice of restricting use, both by agreement and by eminent domain, is founded upon general statutes authorizing the highway commission to acquire by purchase, agreement, donation, or by exercise of eminent domain, all right of access from abutting property to the highway.[10]

There is no specific statutory authority for controlling use. The Oregon practice is based upon the premise that the power and authority of the highway commission to acquire *all* right of access includes the power and authority to acquire a part, leaving some access, restricted as to location, width and use, for service of abutting property. Although the legality of placing restrictions upon access use under these general statutes has not been before the Supreme Court of Oregon for consideration, the practice has been upheld by several Circuit Courts of the State when attacked as being unconstitutional and beyond the authority of the highway commission.[11]

The Oregon Supreme Court has, however, upheld the condemnation of limited easements. In *Coos Bay Logging Co.* v. *Barclay*[12] one of the questions before the court was whether a corporate condemnor could minimize damages by reserving to the defendant landowners certain specified easements to cross or use the condemned right-of-way. The test applied by the court in allowing or disallowing each of the proposed reservations was that of "definiteness".[13] Thus, after holding that a limited easement could be condemned, the court said:[14]

> Where a limited right is desired, the limitation should be made a part of the record, by being embodied in the petition or order of condemnation or otherwise. (Citing) This does not change the requirement which we have suggested that the limitation be specific. That is, in order for the plaintiff to obtain a limited use to the way proposed, that right should be specifically defined. . . .

Applying this criterion, the court struck down as being indefinite and un-

[9] See Restatement, Property §507 (1944).
[10] Ore Rev Stat 366.320(2), 366.375(1), 374.035(1), (1953).
[11] E.g., State of Oregon v Fawcett, Case No 10390, Douglas County Cir Ct, (Or. 1950) ("farm crossing" allowed), State of Oregon v Siglin, Case No 14783, Coos County Cir Ct (Or 1950).
[12] 159 Or. 272, 79 P.2d 672 (1938)
[13] See Restatement, Property §450, Comment *m* (1944) which states "The required degree of definiteness varies to some extent with the novelty of the particular use A new privilege of use is not so readily regarded as an entity as is a long-known one On the other hand, even a novel privilege of use may be so definite in content and so obviously subject to the considerations which have led to the recognition of new easements in the past as to warrant its being presently considered an easement"
[14] 159 Or at 289, 79 P.2d at 679

certain a reservation that would have allowed defendants "reasonable" use of the right of way for their own purposes. On the other hand, a reservation of the right to cross the right-of-way for log-hauling purposes was upheld by the court, as was a reservation of the right to cross the right-of-way for purposes of access to, and reasonable use of, a nearby spring.[15]

CONTROLLING THE USE OF ACCESS BY POLICE POWER

The possibility of controlling access under the police power rather than through the power of eminent domain has long been near and dear to the hearts of those entrusted with the duty of building safe, modern highways at reasonable cost. Interest in the subject has kept pace with the ever-growing need for access control and the ever-rising cost of paying "just compensation" for such control under the power of eminent domain. This is readily understandable in light of the fact that when property is regulated, restricted, or destroyed under a valid exercise of the police power, no compensation is required to be paid, the theory being that either the injury is *damnum absque injuria* or the owner is sufficiently compensated by sharing in the general benefits to the public.[16]

Considering the natural attractiveness of regulating access under the police power, it is somewhat surprising that more attempts to do so have not been made. The reported cases, at least, do not reflect any concerted and widespread effort to substitute police power for eminent domain wherever possible. Partly as a consequence of this, the proper limits of access regulation by police power are, as yet, ill-defined. Since this is particularly true of police power regulation of use of access, this discussion will be primarily concerned with a consideration of known aspects of the various constituent elements of the problem for the light it may shed on the whole. After discussing the general nature of police power and considering situations involving access regulation and property use control, some conclusions respecting the general limitations of police power regulation of use of access will be drawn.

Although an exact definition of police power has been said to be difficult, if not impossible, to formulate,[17] courts and text writers agree that the power rests to a large extent upon the principle that no one has the right to conduct himself or to use his property so as to injure the rights of others.[18] It may, therefore, be said that, in general, police power is the power of the government to enforce this principle. More specifically, and subject to the limitations of the state and federal constitutions, the power comprehends all reasonable regulations neecssary to preserve the public order, health, safety, morals, or general welfare.[19] To the extent, then, that a particular kind of access control can be said to be in reasonable furtherance of the public safety or other permitted ends, it is within the general area of proper police power action.

Although police power is subject to the limitations of the state and federal constitutions, these limitations operate only to restrict unreasonable exercises

[15] It should be noted that the plaintiff in the instant case was proceeding under a general statute (Ore Rev. Stat. 376 510) which did not specifically authorize condemnation of limited easements.

[16] E g, White's Appeal, 287, Pa 259, 13 Atl 409, 53 A L R 1215, (1926), Freund, Police Power §511 (1904). See cases collected in 11 Am Jur., Constitutional Law §266, n. 15 The legislature may, of course, pass statutes providing compensation for police power action.

[17] E g, Slaughter-House Cases, 16 Wall 36 (U.S. 1872); City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 23 A. L R 1322 (1921).

[18] E g., Commonwealth v. Alger, 7 Cush 53 (Mass. 1851), 2 Cooley, Constitutional Limitations 1223-27 (8th ed 1927), 1 Nichols, Eminent Domain §1.42 (3rd ed 1950), 1 Tiedman, State and Federal Control of Persons and Property §1 (1886).

[19] E.g., Claeringa v. Klein, 63 N D 514, 249 N W 118 (1933), *Ex parte* Rameriz, 193 Cal 633, 226 Pac 914 (1924), Camas Stage Co v. Kozier, 104 Ore 600, 209 Pac. 95 (1922). See note 18 *supra*.

of the power. The most-troublesome limitation is the provision in state constitutions requiring payment of just compensation when property is "taken" (or damaged, in some states) for public use. The difficulty arises because the difference between a "regulation" and a "taking" is merely a matter of degree;[20] therefore, the line between police power and eminent domain cannot be drawn with exactness. Whether a given action falls on one side of the line or on the other must be determined from the facts of the particular case.[21] This being so, it is not surprising that the cases reflect a process of inclusion and exclusion wherein the limits of police power are picked out "by the gradual approach and contact of the decisions on both sides".[22]

When the issue of eminent domain or police power is raised in cases involving access regulation, interference or destruction, most courts approach the problem from the eminent-domain side. That is, courts first look to see whether there has been a taking (or damaging, if the state constitution so provides). Only where it is decided there has not been a taking (or damaging) do courts proceed to a consideration of whether there was reasonable action in furtherance of proper police-power authority. Since eminent-domain provisions operate as a limitation upon the exercise of police power, such an approach appears to be correct.

In any case involving an alleged interference with a right of access as a consequence of public action, the first question that must be decided is the nature and extent of the right of access itself. As usually conceived by courts and text writers, a private right of access is subordinate to the paramount right of the public to use and adapt the streets for proper street purposes.[23] To the extent that a court adheres to this concept, it need only determine whether the public action complained of was in furtherance of such street or highway purposes. If it was, then, by definition, there can be no taking (or damaging) of the right. Rather than constituting an impairment of the right of access, the public action would be regarded as a mere cutting down of use that had been or could be made of the access in excess of the private right. Any injury to the abutter in such a case would be noncompensible.

On the other hand, to the extent that a court either overlooks or refuses to follow the theory that private access rights are subordinate to the public right to use the highway for highway purposes,[23a] the question of whether the public action constituted a taking (or damaging) of a right of access in the particular case will arise. In "taking" states the answer may be confused somewhat by difficulties inherent in any discussion of taking incorporeal property for public use. These difficulties can be minimized to a considerable extent by recognizing that the destruction of a property right as an incident to, or consequence of, some public purpose can constitute a taking for public use within the meaning of the constitutional provisions.[24]

Ultimately, the real problem in "taking" states would be to determine how far regulation can go in impairing a right without constituting a taking. Cases have suggested that in making

[20] Bent v. Emery, 173 Mass. 495, 53 N E. 910 (1899). See Freund, Police Power §516 (1904).
[21] Pennsylvania Coal Co. v Mahon, 260 U.S 393 (1922).
[22] Noble State Bank v. Haskell, 219 U. S. 104, 112 (1911).

[23] E g, Wood v City of Richmond, 148 Va 400, 138 S E 560 (1927), Barrett v. Union Bridge Co, 117 Or. 220. 243 Pac 93, *reh denied*, 117 Or 566, 245 Pac 308 (1926), 1 Lewis, Eminent Domain 179-81 (3rd ed 1909); 11 McQuillan, Municipal Corporations 4 (3rd ed. 1950).
[23a] E g, Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W 2d 361 (1942)
[24] E g, U. S v Welch, 217 U S. 333 (1910), Adams v. Chicago B. & N R R, 39 Minn 286, 39 N W 629 (1888), Restatement, Property §507, Comment *b* (1944). See Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale T J 221 (1931).

such a determination it may be proper to consider the severity of the injury to the abutter in light of the benefit to the public.[25] Under this weighing-of-interest test, the consequences of deciding that a particular kind of access regulation requires exercise of the power of eminent domain would be taken into account in the making of the decision.

When a court in a state having a taking or damaging constitution finds or assumes that a private right of access is superior to any public right to regulate access for proper street purposes, it need only determine whether there was, in fact, any damage to the abutter as a consequence of the public action, which damage is of a nature that is recognized as being compensable in eminent domain. Since there can be such a damage even where there is no taking, it would appear that an access-use regulation would be more likely to be upheld under the police power in a "taking" state than in a state requiring compensation for private property "taken or damaged."

Turning now to cases involving varying degrees of indirect and direct restriction of access to see where courts have, in fact, drawn the line between police power and eminent domain, it may first be noted that traffic laws and laws pertaining to the construction and use of streets are uniformly upheld, although they may indirectly affect access. Thus, police power may be used to establish one-way streets,[26] divided highways,[27] ordinances prohibiting U-turns or left turns,[28] and vehicle size-and-weight laws.[29] Such interference with access as is caused by parking meters has also been held to be within the police power.[30] The cases of "circuity of travel" [31] and "diversion of traffic" [32] cases would seem to cover, in principle, the establishment of service or frontage roads and the limitation of access to such roads from property that previously abutted upon and had access to a main highway under police power. But in at least one case, it has been held to be a compensable damage in an action of eminent domain.[33]

The police power is adequate to support reasonable denial of a request for a new means of access to a street where alternate access exists to that street or some other street.[34] In one of the best-documented cases so holding, the court said:[35]

> The absolute prohibition of driveways to an abutting owner's land which fronts on a single thoroughfare, and which cannot be reached by any other means, is unlawful and will not be sustained. But the public authorities have the undoubted right to regulate the manner of the use of driveways by adopting such rules and regulations, in the interest of public safety, as will accord some measure of access and yet permit public travel with a minimum of danger. The rules and regulations must be reasonable, striking a balance between the public and the private interest. The abutter cannot make a business of his right of access in derogation of the rights of the traveling public He is entitled to make only such use of his right of access as is consonant with traffic conditions and police requirements that are reasonable and uniform.

[25] E.g., Nashville C. & St. L. R R v. Walters, 294 U. S. 405 (1935), Welch v. Swassey, 214 U S 91 (1908). See Bachich v Board of Controls, 23 Cal. 2d 343, 144 P. 2d 818 (1944) (concurring opinion).

[26] E.g., Chissell v Baltimore, 193 Md. 535, 69 Atl 2d 53 (1949), Cavanaugh v. Gerk, 313 Mo. 375, 280 S W. 51 (1926).

[27] E.g., People v. Thompson, 260 P. 2d 658 (Cal Dist Ct. 1953), People v. Sayig, 101 Cal App. 2d 890, 226 P. 2d 702 (1951), Fort Smith v. Van Zandt, 197 Ark 91, 122 S. W. 2d 187 (1938).

[28] Jones Beach Blvd. Estate v Moses, 268 N Y. 362, 197 N. E. 313, 100 A. L. R. 487 (1935).

[29] E g, Wilbur v City of Newton, 301 Mass. 97, 16 N E 2d 86, 121 A L R 570 (1938).

[30] E.g, Morris v. City of Salem, 179 Or. 666, 174 P. 2d 192 (1946).

[31] E g., N Y, Chicago & St Louis R. R v Bucsi, 128 Ohio St 134, 190 N E 562, 93 A. L R 632 (1934). See, 2 Nichols, Eminent Domain 409 (3rd ed 1950), Levin, Legal Aspects of Controlling Highway Access 28, (Pub Roads Adm'n, Fed Works Agency, 1945).

[32] E g, Quinn v. Mississippi State Highway Comm'n, 194 Miss. 411, 11 So. 2d 812 (1943), City of Stockton v. State Highway Board, 110 Vt. 44, 1 Atl 2d 689, 118 A L R 915 (1938); City of Stockton v Marrengo, 137 Cal App 760, 31 P 2d 467 (1934). See Levin, *supra* footnote 31.

[33] People v Ricciardi, 23 Cal. 2d 390, 144 P. 2d 799 (1943).

[34] E g., Farmers-Kissinger Market House Co v Reading, 310 Pa. 493, 165 Atl. 398 (1933), Town of Tilton v. Sharpe, 85 N.H 138, 155 Atl 44 (1931). See Breinig v. Allegheny County, 232 Pa. 474, 2 Atl 2d 842 (1938). *Contra* Brownlow v. O'Donoghue Bros., 276 Fed. 636, 22 A L R. 939 (App. D.C 1921).

[35] Brenig v. Allegheny County, 232 Pa 474, 482, 2 Atl. 2d 842, 847 (1938).

It perhaps should be noted that in most of the driveway cases, requests to cut curbs for driveways were denied under ordinances authorizing only the regulation of new driveways.[36] As has been pointed out elsewhere,[37] a holding in such cases that "the power to regulate is not the power to prohibit" is not authority for the proposition that the power to prohibit cannot be delegated.

The case of *Alexander Co.* v. *City of Owatonna* [38] represents at least one instance of record wherein the denial of a request for a driveway has been upheld under an ordinance authorizing regulation only. In going beyond the traditional limits of the driveway cases, the court referred to evidence in the record that the requested access would be dangerous to pedestrians using the sidewalk and then emphasized the fact that the state "can never relieve itself of the duty of providing for the safety of its citizens." [39]

The court further pointed out that the abutting property could be used without vehicular access and that the driveway was merely an incident to one of many possible business uses. Since zoning laws have the same effect and are upheld so long as some use remains, the court reasoned that the police power should apply to both cases alike.

Reliance was also placed on a broad analogy to cases upholding the validity of ordinances declaring certain businesses to be public nuisances within city limits. This was put forth by way of illustrating the point that police power often restricts the use of property rather than to suggest the possibility of vehicular access amounting to a nuisance,[40] but the inadvertent suggestion is interesting in itself. In any event, the court made it clear that regulating the use of ordinary property does not constitute a taking *per se* and left it to other courts to say why the right of access should be unique.

As is well recognized today, the use of property may be regulated to a considerable extent under the police power. Zoning regulations are everywhere upheld so long as they are reasonable.[41] But when an attempt is made to apply the zoning principle to highways, by zoning as residential a strip of land on either side of a highway, most courts say this is going too far.[42] The reasons given are usually mere declarations that such action is arbitrary and unreasonable, hence not a proper exercise of the police power. Roadside zoning has been allowed to a certain extent in some cases,[43] however, and it may well be that the prevailing judicial attitude will change as the novelty of the practice wears off.

In this connection it should be noted that access-use restriction is not as severe a regulation of property as roadside zoning. Where only the access is restricted to residential purposes, there is nothing to prevent commercial use of the property if other access is available or if a frontage road is provided. For this reason, direct regulation of access use might be received more favorably by the courts than roadside zoning.

Closely akin to the ordinary zoning

[36] E.g., Metropolitan District Com'n v Cataldo, 257 Mass. 38, 153 N.E. 328 (1926); *In re* Singer-Kaufman Realty Co., 196 N.Y. Supp 480 (1922); Goodfellow Tire Co v. Com'r, 163 Mich 249, 128 N.W. 410 (1910).

[37] Reese, *supra* note 1, at 42

[38] 222 Minn 312, 24 N.W.2d 244 (1946) (4-3 decision)

[39] *Ibid.*, at 322, 24 N.W.2d at 251.

[40] See Village of Euclid v Ambler Realty Co., 272 U.S. 365, 387 (1926), where Southerland, J., declared "the law of nuisance, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the [police] power"

[41] E.g., Euclid v Ambler Realty Co., *supra*, note 40, Yokely, Zoning Law and Practice §20 (2d ed 1953).

[42] City of St Louis v Dorr, 145 Mo. 466, 41 S.W. 1094 (1897), *aff'd*, 46 S.W. 976 (1898), People v Roberts, 90 Misc. 439, 153 N.Y. Supp. 143 (1915), *aff'd*, 171 App. Div. 890, 155 N.Y. Supp 1133 (1915), State v. Fowler, 90 Fla 155, 105 So 733 (1925).

[43] Jefferson County v Timmel, 261 Wis 39, 51 N.W.2d 518 (1952), Kansas City v Liebi, 298 Mo 569, 252 S.W. 404 (1923), see Howden v City of Savannah, 172 Ga 838, 159 S.E. 401 (1931), Civillo v New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260 (1923).

cases are those upholding building-height restrictions [44] and billboard regulations.[45] Building and setback lines may now be imposed under the police power,[46] although in an earlier day eminent domain was required.[47] Subdivision regulations affecting, among other things, the number, location, and manner of construction of approaches to a highway are also proper under the police power.[48] In all of such instances, as in zoning cases, only the regulation or restriction of future uses of property is permitted.[49]

Ordinarily, a presently existing property use cannot be directly cut down under the police power, unless it constitutes a nuisance.[49a] Where an existing use not prohibited at common law is declared to be a nuisance by ordinance or statute, the courts will determine for themselves whether it is a nuisance in fact.[50] This is largely a matter of deciding whether the use partakes sufficiently of the attributes of recognized nuisances, due regard being paid to precedent on the one hand and the legislative declaration on the other. Although in theory, perhaps, there is nothing to prevent certain access uses from being classified as nuisances in certain situations, the sheer novelty of the idea would probably make it unacceptable to the courts. It should be remembered, however, that to the extent a court holds to the proposition that access rights are subordinate to the rights of the traveling public, an existing use of access can be restricted whenever it impinges on those rights—without regard to whether or not the use constitutes a nuisance.

The distinction between regulating or restricting future use of property as opposed to existing use is clearly apparent and is made the limiting factor in most recent legislative attempts to restrict access under the police power by declaring that no rights of access shall arise to or from highways thereafter built as freeways, expressways,[51] or other restricted-access highways. Chapter 587, Oregon Laws 1951,[52] which prevents the accruing of access rights to property abutting upon any future highway, is an example of such legislation, although it goes further than most, if not all other, such laws by being applicable to all new state highways.[52a] This statute recognizes that the earliest that common-law rights of access could be found is at the time right-of-way for a highway is acquired [53] (although the modern and better view is that common-law rights of access spring into exist-

[44] E g , Welch v. Swasey, 214 U S. 91 (1908). See Note, 8 A L R 2d 963 (1949).

[45] E g , Murphy v Town of Westport, 131 Conn. 292, 40 Atl 2d 177, 156 A L R. 568 (1944), General Outdoor Adv Co v. Indianapolis, 202 Ind 85, 172 N E 309, 72 A L R 453 (1930)

[46] Goreib v Fox, 274 U S 603 (1927), Town of Windsor v. Whitney, 95 Conn. 357, 111 Atl. 354 (1920); McQuillan, Municipal Corporations §§24 541, 25 138 (3rd ed 1950)

[47] Appeal of White, 287 Pa 259, 134 Atl 409, 53 A L R 1215 (1926); St. Louis v. Hill, 116 Mo 527, 22 S W. 861 (1893)

[48] Ayres v. Los Angeles, 34 Cal 2d 31, 207 P 2d 1, 11 A L R 2d 503 (1949)

[49] Freund explains this aspect of the police power as follows "Most police legislation, even for the protection of safety and health is precautionary in its nature, i e., it does not deal with danger which is imminent to such degree that loss or injury may be expected almost as a certainty, but with conditions under which those who are accustomed to them can live without a sense of injury or even of discomfort." Freund, Police Power §538, (1904)

[49a] The leading American case holding retroactive zoning unconstitutional is Jones v City of Los Angeles, 211 Cal 304, 295 Pac. 14 (1930). For a discussion of the theoretical and practical limitations of the police power in the elimination of nonconforming uses see Comment, 39 Yale L J 735 (1930) and Comment, Wis. L Rev 685 (1951) The latter source, at page 689, quotes with approval from Bassett, Zoning 112 (1936) as follows: "Theoretically the police power is broad enough to warrant the ousting of every nonconforming use, but the courts would rightly and sensibly find a method of preventing such a catastrophe."

[50] E.g., *In re* Wilshire, 103 Fed 620 (C C S.D Cal. 1900), 2 TIEDMAN, *Op cit. supra*, note 18, at sec 146, 39 Am. Jur., Nuisances sec 13.

[51] American Association of State Highway Officials Definitions Expressway—A divided arterial highway for through traffic with full or partial control of access and generally with grade separations at intersections. Freeway—An expressway with full control of access

[52] Oregon Revised Statutes §374 405 to §374.415.

[52a] Although the constitutionality of this act has not as yet been before the Oregon Supreme Court, the tenor and holding of the recent decision in State Highway Comm'n v Burk, 58 Ore. Adv Sh., No 2, p 19 (1954) augurs well for the validity of this act when the test comes. In the *Burk* case the Oregon court followed the decision in People v Thomas, 108 Cal App.2d 832, 239 P.2d 914 (1952) and held there is no taking of an easement of access when a new non-access highway is established by condemnation

[53] 1 Lewis, Eminent Domain §121 (3rd ed. 1909).

ence when the highway is opened to public travel),[54] by declaring:

> No rights in or to any state highway, including what is known as right of access, shall accrue to any real property abutting upon any portion of any state highway constructed, relocated or reconstructed after May 12, 1951, upon right of way, no part of the width of which was acquired prior to May 12, 1951, for public use as a highway, by reason of the real property abutting upon the state highway.

Other provisions of this law authorize the state highway commission to "prescribe and define the location, width, nature and extent of any right of access that may be permitted by the state highway commission," by which authority the commission controls the use of access that is permitted for service of property abutting upon future highways.

No state, within the knowledge of the writers, has enacted a law authorizing the establishment of freeways, expressways, or other restricted-access highways, the effect of which law is to extinguish rights of access from abutting property to existing highways by the mere declaration or establishment of such existing highways as restricted access facilities. It appears that in all instances it is necessary for the highway authority to acquire such rights of access to existing highways by purchase or exercise of the power of eminent domain to effectively prohibit or restrict access thereto. Although the language in Section 336, Chapter 121, Illinois Revised Statutes, 1951, does specifically grant to the highway authorities power to deny future means of access to existing and future highways designated as freeways, the Supreme Court of Illinois, in interpreting this law, has held that rights of access to existing highways are not extinguished under this law by merely designating existing highways as freeways and that such rights of access can only be extinguished by purchase or condemnation.[55]

Based on general law and the foregoing discussion of police power, access-interference cases, and property-use-regulation cases, the following general conclusions can be made respecting the proper limits of regulation of use of access under the police power:

Future Highways. To the extent that courts uphold laws declaring that rights of access shall not arise from abutting property to highways subsequently constructed, *a fortiori*, state legislatures have authority under the police power to impose the lesser restriction of limiting the use of access to such highways. After determining that the legislature has the authority to regulate use of access under the police power, the only thing remaining is to effect a proper delegation of the necessary power to the proper highway authorities and for such authorities to properly exercise the delegated power.

Such legislation, of course, would have to meet the standards prescribed by the courts for a valid exercise of the police power. Basically it would have to appear that the means adopted were reasonably necessary and appropriate for the accomplishment of a proper police power end.[56] There would have to be an obvious and real connection between the provisions of the law and its avowed purpose, and the regulation adopted would have to be reasonably adapted to the accomplishment of the end sought to be attained.[57]

[54] Donahue v. Keystone Gas Co., 181 N Y 313, 73 N E 1108 (1905), 10 Dillon, Municipal Corporations 1778 (5th ed.); 4 McQuillan, Municipal Corporations 649 (3rd ed. 1950).

[55] Dept of Pub Works & Buildings v Wolf, 414 Ill 386, 111 N E.2d 322 (1953) The construction of future approaches to existing highways may, however, be regulated as a proper exercise of police power provided that by such regulation all access to public ways from property abutting upon a highway is not denied. Oregon Revised Statutes 374 305 to 375 325 (1953) See Breinig v Allegheny County, 232 Pa 474, 2 Atl 2d 842 (1938), Town of Tilton v. Sharpe, 85 N H. 138, 155 Atl 44 (1931)

[56] Mutual Loan Co. v Martell, 222 U S 225 (1911); 11 Am. Jur, Const Law, sec 302

[57] Mugler v State of Kansas, 123 U S 623 (1887); 11 Am Jur, Const Law, secs 302-03.

Existing Highways. Under the theory that an abutter's private right of access is subordinate to the public right to regulate and use the street for proper street purposes, any reasonable regulation directed toward restricting the use of existing access so as to prevent such use from causing harm to the public using the street would be proper under the police power so long as all access from the abutting property to all streets is not thereby cut off.[58] Undoubtedly, however, many courts would refuse to allow restriction of the use of existing access on the ground that a vested right of access cannot be materially impaired without payment of compensation.

Presumably a greater degree of access use restriction would be allowed under police power in a taking state than in a taking-or-damaging state. Possibly, also, some courts might distinguish between existing and future means of access (constructed approaches) to an existing highway, allowing use regulation of the latter but not of the former. However, this distinction would be without a sound basis, either in logic or in law, for the scope of any vested right is properly determined by its permissible limits of exercise rather than by the extent to which it may have been or is exercised.

By analogy to zoning cases, however, there is precedent for courts to sustain as a proper exercise of police-power restrictions upon use of access to existing highways, which restrictions as to use of access would operate similar to zoning laws and ordinances only to prevent future nonconforming uses and would not affect existing nonconforming uses.[59]

SUMMARY

The Oregon State Highway Commission, commencing in 1947, has developed a little-known phase of access control consisting of the control of access as to use. Use-control involves restricting the kind or purpose of use that can be made of approaches to a highway from abutting property, with allowed uses ordinarily being for residential, farm, or particular limited commercial purposes. The degree of restriction of use of access that is imposed depends upon the requirements of the abutting property and the overall plan of access control for the particular section of highway, with the highway considerations being paramount.

Prior to 1951, control of use of access, both to existing and future highways, could be effected in Oregon only by acquiring access rights by donation, purchase, or eminent domain. After enactment of Chapter 587, Oregon Laws 1951 (which law prevents the accruing of rights of access to property abutting upon future state highways except such access as the highway commission may permit), the commission has controlled access to future highways without necessity of payment and has permitted access, restricted as to use, to those highways where complete prohibition of access was not necessary to safeguard the motoring public. As yet, there is no statutory authority in Oregon for controlling the use of access to existing highways by exercise of police power, and no such control has been attempted under a statute authorizing the reasonable regulation of new approaches to existing highways.

The experience of the Oregon State Highway Commission in controlling the use of access clearly shows that a comprehensive program of access use-control can be rewarding. Without question, Oregon has saved substantial sums of money by employing the principle of access-use control in those instances

[58] See Breinig v Allegheny County, 232 Pa. 474, 2 A.2d 842 (1938).

[59] See footnote 49a *supra*.

where restrictions upon access less than the complete prohibition thereof can adequately serve the safety requirements of the motoring public and also protect the great investment in new highways by insuring that traffic will not be impeded or the capacity of the highways reduced by future ribbon development of abutting property. This saving was a natural result of the practice of the state to acquire the minimum access use restrictions necessary to serve the highway requirements.

Private property owners have likewise benefited through application of this access use-control program, for in many instances it has been possible to permit access restricted as to use, for service of abutting property, whereas complete prohibition of access would have been necessary in the absence of access use control. Not only have private property owners been benefited, but the state as a whole has likewise received benefits, for the maximum development and use of property abutting upon highways that is consistent with safety and highway requirements is thereby promoted, resulting in economic benefits to the state as a whole, as well as increasing the value of private property for tax purposes.

Looking to the future, it is hoped that, as the advantages of access use-control become more apparent to the public at large and to state legislatures in particular, more police-power control of use of access to existing and future highways will be possible. In light of the ever-growing need for access control in the construction of modern highways and the ever-increasing cost of such control when effected by exercise of the power of eminent domain, it may well be that police power control of use of access both to existing and future highways, with adequate legislative safeguards to prevent unreasonable exercise of such authority, will receive universal recognition by the state legislatures and universal sanction by the courts.