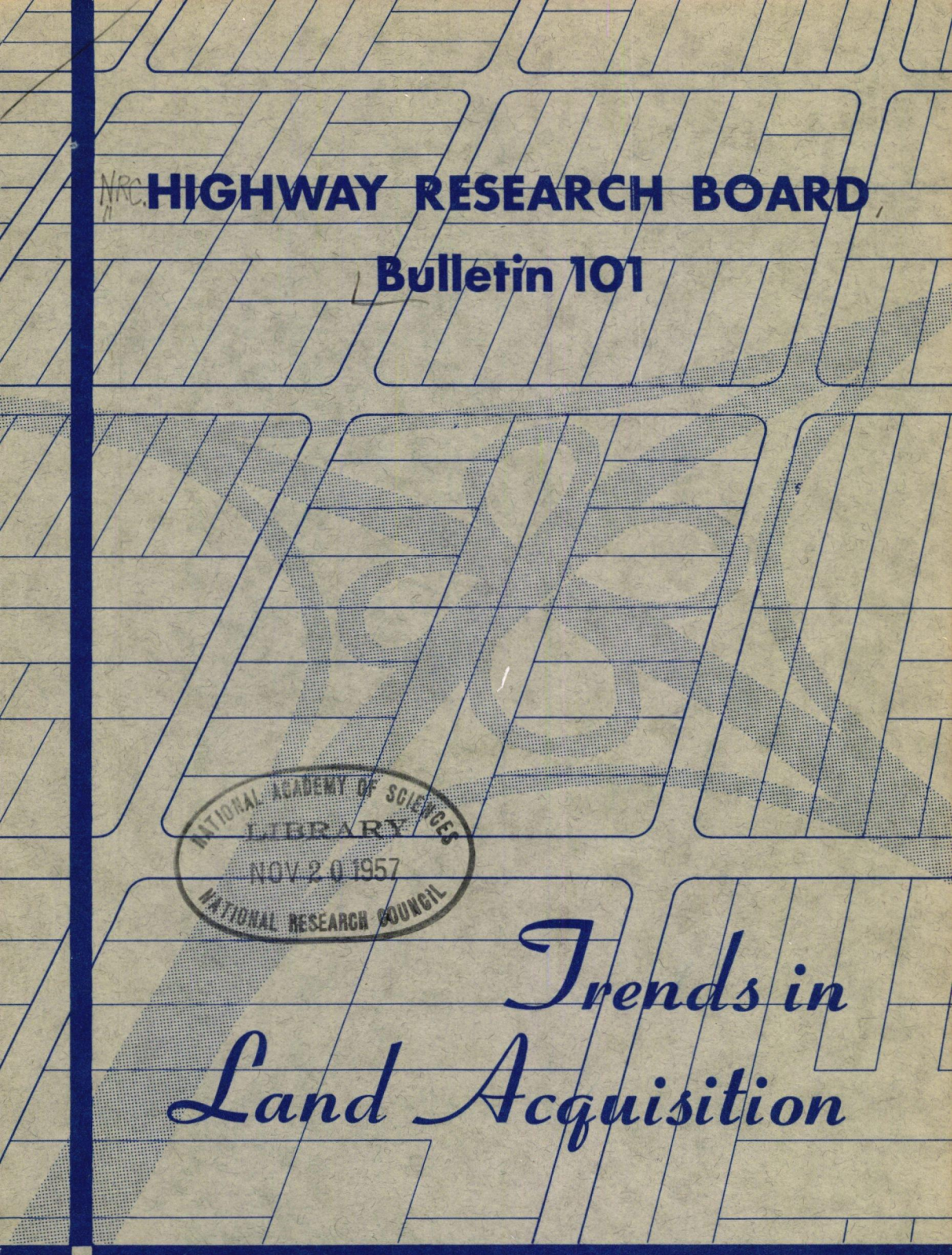
HIGHWAY RESEARCH BOARD

Bulletin 101



Trends in Land Acquisition

National Academy of Sciences—
National Research Council

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1955

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HIGHWAY RESEARCH BOARD

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Trends in Land Acquisition

PRESENTED AT THE
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1955

Washington, D. C.

Department of Economics, Finance and Administration

H. S. FAIRBANK, *Chairman*
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Bureau of Public Roads

COMMITTEE ON LAND ACQUISITION AND CONTROL OF HIGHWAY ACCESS AND ADJACENT AREAS

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Preface

THE 1953 annual report of the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas is designed, as in previous years, to present pertinent developments in the many fields that are of concern to the committee. This bulletin contains a report on recent developments relating to land acquisition, control of highway access, roadside protection, and the provision of parking facilities. The bulletin also contains papers presented at the open session of the committee at the annual meeting of the Board in January 1954.

It is hoped that this publication will prove a valuable source of information to those interested in the fields covered, since it is realized that many of the items presented might not be available otherwise in printed form.

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Report of Committee on Land Acquisition and Control of Highway Access and Adjacent Areas

DAVID R. LEVIN, *Chairman*
Chief, Land Studies Section, Financial and Administrative Research Branch
Bureau of Public Roads

● DURING 1953, the committee continued its efforts to bring about a better realization of the benefits to be derived from efficient methods of acquiring land for highway purposes, adequate control of the roadside, including methods possible under eminent domain and the general police power, and up-to-date ways of providing effective provision of parking accommodations.

Since 1953 was a year in which most state legislatures held sessions, a number of important statutes were enacted in the fields of the committee's activities, including a comprehensive law passed by the Arkansas legislature revising the state's land-acquisition methods, clarifying and strengthening the authority of the state highway department.

A number of important court decisions were handed down during the year, digests of most of which were included in Highway Research Correlation Service memoranda of the committee.

The 1952 annual report of the committee and special papers were published during the year as *Bulletin 77*, under the title "Right-of-Way Problems."

LAND ACQUISITION

Reservation of Highway Right-of-Way Prior to Asquisition

Analysis of the first two phases of the committee's study of ways and means of reserving land for highway right-of-way prior to acquisition advanced perceptibly during the year.[1] Additionally, the mapped-street technique used by the City of New York was explored at the source, by examination of actual applications of its use.

The official map upon which this device is predicated is, according to New York authorities, a highly fluid document, changing with developing needs and circumstances. Its basic projection revolves around a 6-year program of capital public improvements.

The official map procedure, simplified, involves six steps: (1) A map showing a proposed reservation for highway purposes is submitted to the board of estimate by the borough president concerned. (2) The map is then referred to the city planning commission and the director of the budget. (3) The city planning commission sets a date for a public hearing. (4) After the hearing, the planning commission reports back to the board of estimate. (5) The director of the budget also makes his report to the board. (6) If these reports are favorable, and no opposition develops to the reservation, the board adopts the map which then becomes the official map of the city on that particular matter.

After approval by the Board of Estimate of the City of New York, no building may be constructed within the limits of the mapped street as shown on the official map. City officials indi-

[1] See "Land Acquisition and Control of Adjacent Areas," Highway Research Board Bulletins 38 and 55, and Right-of-Way Problems, Highway Research Board Bulletin 77, for previous reports on this project

cated that compliance with the reservation is automatic or voluntary in 98 percent of the parcels involved in any reservation. Protests in the remaining two per cent are taken to the Board of Standards and Appeals for hearing. In what might be considered a typical year, 1950, a total of 38 appeals were taken. In eight of these, the appeals were withdrawn before hearing, in one the appeal was dismissed, and hearings were held on 29. Examination of the records indicated that most of the appeals heard involved conditional grants, generally permitting the use and construction sought only for the period of time during which the mapped street in question remains untouched as a mapped street. The mapped street device, as used in New York, appears to be a practical and effective means of reserving lands for street purposes in urban areas. Its use in other urban areas might well be explored.

Acquisition of Highway Right-of-Way For Future Use

Reservation techniques are desirable as a means of minimizing increases in right-of-way costs by preventing development of the areas involved between the time plans are completed and the start of construction, particularly where expenditures for land acquisition must be kept to a minimum. Outright acquisition of lands needed for future highway construction is, of course, a more-desirable means of accomplishing this purpose. Not all states have either the funds nor the legal authority to acquire land in advance of construction, however. Courts have sanctioned such advance acquisition under the general authority of the state highway department, even though authority is not specifically mentioned in the statutes. However, it is well to have such authority spelled out in the law. At least two states (Arkansas and Nevada) passed laws during 1953, authorizing their state highway departments to acquire land for future use. A comprehensive land-acquisition statute which became law in Arkansas,[2] provides among other things that the state highway commission may acquire real or personal property, or any interest therein, deemed necessary or desirable for state highway purposes, by gift, devise, purchase, exchange, condemnation, or otherwise, for present and future rights-of-way, including those necessary for urban extensions of state highways within municipalities. A Nevada law[3] authorizes the state highway department to acquire real property and the improvements located thereon considered necessary for rights-of-way for both present and future needs for highways of all types including highways constructed by the state within towns and cities.

Immediate Possession of Highway Right-of-Way

Long, drawn-out condemnation procedures in some states are responsible for delays in construction of badly needed highway improvements. To minimize these delays, a number of state highway departments have been given authority to take possession of needed property before completion of condemnation proceedings. In some of these states very summary methods are authorized: In New York possession may be taken upon the filing of plans showing the proposed improvement with the secretary of state. Others may take possession by filing a "declaration of taking" and the deposit of the amount of estimated compensation at the time condemnation proceedings are filed, or at any time subsequent thereto. Still others may take possession after pay-

[2] Arkansas Laws of 1953, Act 419
[3] Nevada Stat 1953, Ch. 132

ment of the award fixed by court-appointed appraisers. A law passed by Arkansas during 1953 fits into the second category,[4] following rather closely the federal declaration-of-taking statute.

Both Indiana and Texas belong in the third category mentioned above, that is, the award of appraisers appointed by the court must be paid into court before possession may be taken. Controversy arose recently in each of these states as to whether or not the deposit paid into court might be paid to the landowner pending appeal of the appraisers' award. In Indiana, the case of Board of Commissioners of Hamilton County v. Blue Ribbon Ice Cream and Milk Corporation, Inc., (109 N.E. (2d) 89, December 12, 1952) reached the state supreme court when the county commissioners protested the action of the clerk of the circuit court in paying the landowners involved the sum deposited by the county, which represented the award of the appraisers for certain lands taken by the county for highway purposes.

Both the landowners and the county filed exception to the appraisers' award and requested a jury trial. However, the landowners subsequently withdrew their objections, and asked for and received the sum of money deposited by the county. The county appealed from such action, but the court held that payment of the award in the court indicated the county commissioners' intention to take possession of the condemned property, and therefore the clerk was entitled to pay the deposit over to the owners.

In its argument supporting the action of the county clerk in paying the amount of the deposit to the landowners, the court reasoned: The state's right of eminent domain is inherent and does not depend upon a specific grant in the constitution, although such power may be limited by constitutional provision. However, the right to authorize the exercise of the power is legislative. Private property may be taken for public use only pursuant to and in accordance with legislative authority.

The Indiana State Constitution provides that "no man's property shall be taken by law, without just compensation; nor, except in case of the state, without such compensation first assessed and tendered." This provision does not forbid legislation permitting the state to take private property without first tendering compensation, but the provision is not self-executing, and no enabling legislation exists. Only one method of procedure for condemning land had been provided by the legislature, and this was used in the present case. It was available equally and alike to all bodies having the right to exercise the power of eminent domain. Any such body, even though it be the state itself, or one of its authorized agencies, as in the present case, is bound by the provisions of the statute. Accordingly, such state agency, like any other body having the power of eminent domain, must tender payment before taking possession of the condemned property.

The county could have proceeded with the litigation without making the deposit referred to above, but if possession were to be taken, it was required to make the payment. When the money was paid to the clerk, it had to be and was tendered to the appellee unconditionally. The statute does not authorize the condemnor to take possession pending an appeal by him, by depositing money which could be withheld pending such determination if such determination is requested by the landowner.

This, according to the court, was as it should be, for the act of paying the money deprived the landowner of the

[4] Arkansas Laws of 1953, Act No. 115

use of his land. Were it to be held that he could also be deprived of the use of the money pending final judgment, he would suffer an uncompensated loss. After payment of the money to the clerk, the county was entitled to take possession of the property. Payment of the money indicated the county's intention and fixed its right to do so.

In the light of this argument, the court held that the appellant county could not control the disposition of the money in the hands of the clerk, and that said clerk was justified in paying the money to the landowners.[5]

Under somewhat similar circumstances, a Texas Court of Civil Appeals denied the right of a landowner to receive a deposit made by the City of Houston, for land taken for street purposes, pending appeal from the condemnation commissioners' award (Carter *et ux* v. City of Houston, 255 S. W. (2d) 336, February 5, 1953).

In this case, both the city and the landowner filed appeals from the award of the commissioners. Subsequently the city deposited the amount of the award in the registry of the court and took possession of the land involved. At a later date, the Carters filed an application for payment of the award to them. The city asked for a temporary injunction enjoining the Carters from taking possession of the deposit.

The trial court stated that in its opinion the deposit was made by the city solely to serve as security for payment of final judgment and to enable the city to take possession of the premises while the appeal was pending. The money deposited by the city, under the provisions of Article 3268 of Vernon's Annotated Texas Statutes, remained the property of the city, subject to the final outcome of the suit. The Carters were not entitled to have the award paid to them prior to final adjudication.

Article 3268 provides that if the plaintiff in a condemnation proceeding should desire to enter upon and take possession of the property to be condemned, pending litigation, it may do so at any time after the award of the commissioners, subject to conditions set forth in Sections 1 and 2. Section 1 specifies that the plaintiff shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it. Section 2 instructs the plaintiff to deposit in the court the amount of damages awarded by the commissioners, this sum to be held, together with the award itself, should it be deposited in court instead of being paid, exclusively to secure all damages that might be awarded or adjudged against the plaintiff.

The Carters contended that Section 1 constituted a plain and unambiguous mandate that the deposit should be given to the appellants upon their request.

The opinion of the trial court was upheld by the appeals court, which stated that in the instant case it was undisputed that no tender was made of the award to the Carters by the city, that the fund was owned by the city; and that it was deposited in the registry of the court as security to the Carters for payment to them of the adjudicated amount of damages to which they might become entitled. A previous case (City of Rosebud v. Vitek, 210 S.W. 728, 730 (1919)) was cited, in which the city filed its objections to a commissioners' award in a condemnation case and paid into the registry of the court the amount of the award. The owner requested that the award be paid to him, and the

[5] See Memorandum 67, May 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 203

court in its opinion said: "We call attention to the language of Article 6530, Subd. 2, R. S., wherein it is provided that the award and a like amount must be deposited in the court, 'which shall be held, together with the award itself . . . to secure all damages that may be awarded or adjudged against the plaintiff.' Clearly this contemplated that the award shall not be paid to the defendant pending the suit."[6]

The matter of whether or not an appeal could be taken by the condemnor after the amount of the award determined by appraisers had been deposited in court and possession taken of the property involved was the subject of two court decisions in Kansas during 1951.[7] In both cases, the state supreme court denied the state highway commission the right to appeal after it had paid the amount of the appraisement award and had taken possession of the land condemned. To obviate this difficulty the Kansas legislature, in its 1953 session, amended the state statutes[8] by adding the following provision:

If petitioner desires to take immediate possession of the property condemned but desires to appeal from the award of the appraisers, then said petitioner shall file with the clerk of the court a verified declaration of statement of the sum of money estimated by said condemner to be just compensation for the land taken, including damages, and by depositing the amount for which the property taken was appraised with the clerk of the court, to the use of the persons entitled thereto, and said lands shall be deemed to be condemned and taken for the use of petitioner, and title to said lands shall vest in said petitioner and condemner; and said final compensation shall be ascertained, established and awarded by judgment on appeal, which payment as aforesaid by the condemner shall be without prejudice to petitioner's right of appeal. The court may order that the sum of money estimated by the petitioner as shown by the verified declaration or statement hereinbefore provided for be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect to said lands, or any parcel thereof, shall exceed the amount of the money paid in by condemner and so received by any person entitled, the court shall enter judgment against condemner for the amount of the deficiency with interest at the rate of six percent per annum from the date of taking to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. If the compensation finally awarded to any owner or lien holder is less than the amount that has been paid to him, the court shall enter judgment against him and in favor of the condemner for the overpayment. The acceptance by the owner, lien holder, or interested party of the full amount of the award of the commissioners, or the amount paid into the court or any part thereof by the condemner, as set forth in the verified statement or declaration of said condemner as aforesaid, shall be without prejudice to the right of appeal by said land owner, lien holder, or interested party, as provided herein, the issue of compensation to be determined on appeal by jury trial, and final judgment of the court.

Nature of Interest Taken

State statutes generally are rather vague as to the nature of the interest which the state highway departments may acquire for highway purposes. A great deal of confusion has resulted and it has often been left to the courts to determine whether or not the state might in fact acquire a fee simple title. Many states have found that they are paying for a fee simple title, but technically acquiring only an easement. In an effort to clarify the state's authority in this respect, at least three states, Arizona, Arkansas and Nevada, amended their statutes during 1953, to authorize the taking of a fee simple title. All three state statutes[9] authorize the state highway department to acquire real property, either in fee or any lesser estate. On the other hand, one state, North Dakota,[10] passed an act stating

[6] See Memorandum 67, May 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 203

[7] State Highway Commission v. Safeway Stores, Inc., 228 P. (2d) 208, March 6, 1951, and Lowrey et al v State Highway Commission, 228 P. (2d) 210, March 6, 1951

[8] Gen. Stats Kansas, 1949, Cum. Supp 1953, Sec 26-102

[9] Arizona Laws of 1953, Ch. 126, Arkansas Laws of 1953, Act 419, Nevada Laws of 1953, Ch. 132.

[10] North Dakota Laws of 1953, Senate Bill No. 194

as a matter of legislative intent that the pertinent section of the state statutes limited the estate that might be taken by the state or its political subdivisions for highway purposes to that of an easement.

Relocation of Highways

Most state highway departments have authority to relocate state highways when such highways are no longer adequate to meet increased demands, particularly when excessive roadside development makes it a matter of economy to relocate the highway rather than to increase the width of the existing facility.

The state's authority to relocate a highway under certain conditions can hardly be disputed. However, a number of cases have reached the courts, usually on the grounds that the state's action was unreasonable or capricious. Recently, the authority of the Minnesota State Highway Commissioner to relocate a portion of State Trunk Highway 23, in the City of St. Cloud, was contested by a group of citizens who contended that the proposed relocation was not required in the interest of public safety and convenient travel as required by state statutes. The absence of arbitrariness, capriciousness, and unreasonableness, these citizens asserted, was immaterial, because the highway commissioner had no power to relocate and no authority to choose the relocation route unless and until he proved the existence of the statutory standards. The supreme court of the state upheld the highway department's authority in a decision handed down in September, 1952, (Karl P. Koch v. M. J. Hoffman, Commissioner of Highways, State of Minnesota, District Court, Second Judicial District, Memorandum No. 275606).

The pertinent provision of Section 161.03(4) of Minnesota Statutes Annotated reads as follows:

> The Commissioner of Highways shall by order or orders designate such temporary trunk highway or highways, and when the definite location of any trunk highway or portion thereof has been determined, he shall designate the same by order or orders. The Commissioner of Highways may change the location of any trunk highway between the fixed termini, as fixed by law, when the interest of public safety and convenient public travel so require, and said changes shall be designated by order or orders. When the county board or any county interested asks for a public hearing with reference to the definite location of any trunk highway or any change in such definite location, a hearing shall be held by the Commissioner within the section, county or counties interested before making any change in such definite location or any such change therein.

In the opinion of the court, under the provisions of this statute, whenever the commission was of the opinion that the interest of public safety and convenient public travel required a change in the location of a highway, he might make it. If, as in the present case, it appeared that the proposed relocation was based on evidence reasonably tending to show that the interest of public safety and convenient public travel required a relocation, it was not subject to judicial control. It was a matter of discretion with the commissioner to determine whether, when and where the relocation should be made. The exercise of such discretion was subject to control only if it was exercised arbitrarily, capriciously, unreasonably, or in a manner violating some statutory command, inhibition, or regulation.

The court could not enjoin the relocation of a highway unless the plaintiffs established that there was no substantial evidence tending to support a finding that relocation was required, or that the commissioner, in exercising his discretionary power, had acted arbitrarily, capriciously, or unreasonably. The burden of proof on such an issue rested upon the plaintiffs.

The court believed that the state had demonstrated that there was a substantial body of evidence reasonably tending to support the finding of the commissioner that the interests of public safety and convenient public travel required a relocation of Highway 23.

According to the court, it seemed axiomatic that diverting some traffic from an over-crowded highway would diminish the hazards to public safety and increase convenient public travel. The highway to which such traffic was diverted would inescapably suffer some increased hazard to public safety and some inconvenience to public travel. That such relocation along the new route had this effect was not evidence of an abuse of discretion in choosing the new route. If it were, said the court, no new route could ever be chosen, because it could always be shown that the pedestrians and the vehicles using the new route would be subject necessarily to increased hazards and increased inconvenience.

As the court viewed the record, the defendant had the benefit of a presumption that he exercised his discretionary powers in relocating the highway in a lawful and reasonable manner. In addition, he had made a *prima facie* case of evidence, reasonably tending to support the exercise of his discretion in a reasonable and lawful manner. If there was any burden of proof on the commissioner as to these points, he had sustained it by the preponderance of the evidence.[11]

Severance Damages

An interesting decision, relating to the matter of whether or not two pieces of property owned by one individual but separated by an existing highway are to be considered as one unit in determining value of a portion of the parcel on one side of the highway taken in eminent domain proceedings and assessing severance damages, was handed down by a California Court of Appeals on September 10, 1953. (People by and through Department of Public Works v. Thompson et al., 260 P. (2d) 658.)

The California Department of Public Works sought to acquire land on one side of a portion of US 101, north of Leucadia in San Diego County, for the purpose of converting it into an expressway. Property owners involved owned land on both sides of the highway. The westerly land was beach property, over which an easement for highway purposes extended from the westerly edge of the highway to the Pacific Ocean. On the easterly side of the highway, the land involved consisted of 35 acres being dry farmed and 35 acres of slough or sump land. The beach property was not being used for any particular purpose at the time of valuation of the property.

The state sought to condemn approximately 12.73 acres lying along the east side of the existing highway and to extinguish all abutters' rights of access appurtenant to the landward property, except that the northerly 361.33 feet was to abut upon and have access to a newly created frontage road. Additionally, the parcel to be taken included in its description the underlying fee to all existing highway easements.

As a part of the construction of the expressway, a new two-lane road was to be constructed easterly of the existing highway. This would carry northbound traffic and the existing highway would then carry southbound traffic only. The area between the two traveled ways was, in effect, a dividing strip. A cross-over was to be provided near the southern boundary of the property and an underpass was to be constructed near

[11] See Memorandum 63, January 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 186

the north property line. The frontage road at the northerly end, through a system of interchanges, would provide access to the expressway in both a northerly and southerly direction.

The trial court ruled that the beach property was a part of the larger parcel for the purpose of determining the value of the land taken and constituted a part of the remainder for the purpose of assessing severance damages. Damages were awarded in the sum of $12,000 for the land taken and $17,500 for severance. An appeal was taken by the state and the district court of appeal held that the beach property, separated from the parcel taken by an existing state highway, was erroneously held to be a part of the larger parcel.

Under California law, damages must be assessed for the value of the property taken, and if the parcel is a part of a larger parcel, for severance damages sustained by the remaining land. But the remaining property must be physically contiguous to the parcel condemned. The property owners in this case conceded this principle, but argued that the state had obtained only an easement for highway purposes for existing Highway 101; that the underlying fee was owned by them. Thus they contended that the beach and landward property were contiguous. The court, upon examination of the grant deed, concluded that the underlying fee was conveyed to the state thereby. Although the deed referred to the "granting of said right-of-way," the court stated that the term "right-of-way" might reasonably be interpreted as describing not only the easement but also the land occupied by its use. Moreover, the court continued, a deed was to be interpreted as a whole for the purpose of ascertaining the true intention of the parties. The court concluded that this deed, considered as a whole, contemplated the granting of the fee and the quoted phrase was used for the purpose of describing the property rather than to divide or limit the estate or interest granted.

Another factor to be considered in determining whether the beach property and the landward property constituted one or two parcels, continued the court, was the use to which the land was put. While unity of use was not the controlling factor, it should be considered in determining whether the properties were contiguous. In the instant case, the landward property was used for farming purposes, and the beach property was not devoted to any existing use as of the date of valuation. The court asserted that the mere fact that the two properties were susceptible to a common use would not justify the allowance of severance damages.

The landowners also argued that their right to cross and recross the highway was limited by establishment of the expressway. In answer to this, the court stated that even if they owned the underlying fee they would have no greater rights to encroach upon the highway right-of-way than strangers to the title. The construction of a dividing strip, continued the court, was an exercise of the police power and not compensable. Moreover, said the court, no abutters' rights of access were taken in the present proceedings as to the beach property and the owners' access to the highway from that property was not impaired.[12]

Financing Right-of-Way

Although a number of states are authorized to acquire land for future highway improvements, few state highway departments have sufficient funds at their disposal to acquire more than a

[12] See Memorandum 72, October 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 223.

bare minimum for present needs. California has attempted to solve this problem by setting up a revolving fund to be expended by its public works department for the advance acquisition of properties for state highway purposes. A $10 million revolving fund was created for this purpose by the 1952 Legislature (Ch. 20, 1952 Second Extraordinary Session) and increased to an ultimate $30 million by the 1953 Legislature (Ch. 1714, Laws of 1953).

The act as amended provides that such funds may be used for the advance acquisition of right-of-way for state highway purposes only when the state highway commission declares that (1) the property should be acquired on a designated state highway route or designated portion because of the probability of private development of properties which will be needed for highway purposes and (2) prompt acquisition is required to prevent such development and consequent higher acquisition and construction costs when the highway or a portion thereof is to be improved.

The 1952 act established a Highway Right-of-Way Acquisition Fund, for which the original $10 million was appropriated from the Motor Vehicle Fuel Funds. The 1953 act provides that on demand of the California Department of Public Works from time to time, the amounts demanded, not exceeding $20 million in the aggregate, shall be transferred to the right-of-way acquisition fund from so-called available money in the motor-vehicle funds, the motor-vehicle transportation-tax fund, and the motor-vehicle uncleared-collections account. Of the $20 million, however $10 million is not to be transferred to the right-of-way acquisition fund until July 1, 1954, and no transfer may be made which would reduce the aggregate amount of available money to less than $10 million.

Revenues received from rentals of property acquired from funds appropriated or transferred by the act or from the disposition of any improvements or the proceeds of the sale of any excess parcels of property so acquired are to be deposited in the state highway fund.

When the department proceeds with the construction of a highway requiring the use of any of the property so acquired, the cost of such properties are to be deposited in the highway right-of-way acquisition fund from other funds available to the public works department. By July 1, 1962, all funds used from the highway right-of-way acquisition fund must be repaid to it, and on that date, the California Department of Public Works must repay to the funds from which the appropriation and transfers were made, the entire amount of such appropriation and transfers.[13]

Condemnation Procedures

Methods used by the several states to condemn land for highway improvements usually fall into stereotyped procedures which are acceptable to the state courts. Occasionally however, variations of these methods are authorized by the state legislatures, which when exercised by the acquiring agency, may be found unacceptable by the judiciary, for reasons sometimes unrelated to the nature of the proceedings authorized. Two such laws were declared unconstitutional by state courts of Georgia and Tennessee during the year.

Georgia. The Georgia case resulted from the efforts of the City of Atlanta to condemn land for public purposes, using a method authorized by a 1952 law, applicable only to cities and counties with a population of over 250,000. The landowner obtained an injunction

[13] See Memorandum 69, July 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 213.

from the Superior Court of Fulton County and the state's objection thereto was turned down by the state supreme court. (City of Atlanta v. Wilson, 74 S. E. (2d) 455, February 9, 1953).

Section 2 of the 1952 Act (Georgia Laws 1952, p. 29) provided in part as follows: "The terms and provisions of this act shall be applicable to all municipalities and/or counties in the state having a population of more than 250,000 according to the last or any future federal decennial census." Section 3 provided that, "Whenever the governing authorities of any such municipality or county . . . is (are) authorized . . . to condemn property for any public purpose" it might file proceedings as provided in the Georgia code, requesting the court to follow the procedure outlined in the 1952 act.

The above references, according to the supreme court, unmistakably showed that the procedure was available only to those cities and counties which had the population therein prescribed, and that such cities and counties were authorized to employ that procedure wherever and whenever they sought to condemn private property for public purposes, irrespective of whether such property was located within or without the limits of such city or county. The 1952 law, said the court, was plainly a legislative attempt to give a limited number of municipalities and counties the benefit of the procedure, while denying that procedure to all other cities and counties. The sole basis for the attempted classification was population.

Citing a previous case to the effect that the basis for classification must relate to the object of the legislature (Geele v. State, 43 S. E. (2d) 254, 1947), the court declared that the 1952 law offended Article 1, Sec. 1, Paragraph 2 of the state's constitution, which forbad discrimination and required equal protection. It also offended Article 1, Section 4, Paragraph 1 of the constitution, which required uniformity and forbad a special law where there was a general law. The 1952 law was discriminatory and lacking in uniformity.

The 1952 law was thus declared unconstitutional in that it constituted a violation of the uniformity required by the constitution and offended the equal-protection clause thereof.[14]

Tennessee. The act in question outlined a certain procedure which might be followed by the various counties of the state in the exercise of the right of eminent domain in acquiring land for highway rights-of-way and other rights for highway purposes. The pertinent section of the act reads as follows:

> Be it further enacted, that if the defendant or defendants are not satisfied with the amount assessed by the condemnor, they shall, on or before the second day of the regular term of the court, next after the service of said notice, appear, except to the amount assessed by the condemnor, and thereupon a trial may be had, and the proceedings shall be conducted in the same manner as in civil actions, but no trial shall be had until twelve months have expired after the completion of said road, highway, freeway and/or parkway. (Public Acts of 1951, Chapter 178, Section 7.)

The circuit court of Maury County held that the denial of payment or trial to a defendant taking exception to the award until 12 months after completion of the highway improvement, deprived the condemnee of his property without due process of law in violation of the state and federal constitutions, 12 months being an unreasonable, uncertain and interminable time.

The state supreme court in affirming the judgment of the lower court, (Maury County et al. v. Porter et ux, 257 S. W. (2d) 16, March 6, 1953), stated that the 12-month period which

[14] See Memorandum 70, August 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 216.

must elapse before a landowner might have his rights determined by the courts made the rights of the condemnee so vague, indefinite, and undeterminable, that he might never be compensated for the loss of his land. This section of the law was definitely in violation of the state constitution which provided that "every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay" (Section 17, Constitution of the State of Tennessee).[15]

Compensation for Damages Resulting from Highway Improvements

Differences of opinion as to the value of land taken for highway purposes not infrequently necessitate adjudication by the courts. Awards predicated upon unsubstantiated testimony as to the value of the property taken will occasionally slip by the lower courts, but upon appeal, the higher courts will usually reverse any decision upholding an award not substantiated by the evidence. One such case reached the Supreme Court of Arkansas during 1953.

A jury awarded the owners of two pieces of land taken by the Arkansas State Highway Commission for highway purposes in Crawford County, $25,000 and $21,500, respectively, which the state found excessive. Upon appeal, the state supreme court reversed the judgment of the Circuit Court of Crawford County for lack of substantial evidence to support the verdicts (State Highway Commission et al v. Byars et al. 256 S.W. (2d) 738, March 30, 1953).

Two families owned the land here being taken for a relocation of US 64 in Crawford County; 9.405 acres were taken from the Byars for which an award of $25,000 was made, and a little over 10 acres were taken from the Christellos, who were awarded $21,500.

The Christellos owned a 400-acre farm, purchased in 1946, which actually cost $9,700, or about $25 per acre. They also owned the Monte Vista Subdivision consisting of 198 lots, for which they paid $5,000 in 1949. Of the 400 acres, 80 acres, unattached to any of the rest of the property were located north of old US 64; about 180 acres were south of old Route 64 and were connected with 140 acres north of the old route by a culvert used as an underpass. All improvements were located on the 140 acres north of old Route 64. The new location of US 64 would sever the 140-acre tract, leaving some 55 acres north thereof, and approximately 80 acres, on which the improvements are located, south of the new highway. Since the old route would not be vacated or abandoned, the Christellos' land would be damaged only to the extent of the loss of the slightly more than 9 acres taken by the state, plus the severance from the 55 acres.

The state agreed to move buildings located on the new right-of-way, to replace a well, construct new fences bordering the right-of-way, and build an underpass so that livestock could be moved from the severed 55 acres to the acreage south of new US 64 containing the improvements. The farm was used for grazing from 50 to 100 head of livestock and for raising hay. In addition to the farmland, a portion of 10 lots in the Monte Vista Subdivision bordering on the right-of-way were to be taken by the state.

The Byars owned some 438 acres of farmland on which they raised livestock. All of the 438 acres were located north of old US 64, but construction of the new route would result in severing some 16 acres on which the improve-

[15] See Memorandum 71, September 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 219.

ments were located. Commencing in 1948, the Byars had purchased some 487 acres of land at various times. A portion of this acreage was subsequently sold leaving the Byars with some 438 acres. About 156 acres were bought two months before the trial for a little over $17 per acre.

The state agreed to build new fences bordering the right-of-way, build an underpass suitable for moving livestock from the property on which the improvements were located to the other portion, and to move whatever buildings it might be necessary to move. The Byars were damaged by the loss of the nine and a fraction acres, plus severance of the 16 acres on which were located the improvements from the remaining 422 acres.

One witness for the state testified that the value of the farms had been enhanced by reason of the location of the new road. Another state witness estimated the Christellos' damages to be from $275 to $2,218 and damages to the Byars' property from $846.27 to $4,499.25.

No evidence was introduced, according to the supreme court, to prove the damages awarded by the jury except the opinions of witnesses as to the value of the land taken and the market value of the properties before and after the taking. Numerous witnesses testified for the property owners, as to the before and after value of the two properties, ranging from a before value of $75,000 for the Byars' property to an after value of $35,000 and a before value of $65,000 for the Christello property to an after value of $30,000.

The court found no evidence that any of the land involved was suitable for any purpose except the production of livestock and hay, but remarked that not a single witness, including the owners themselves, gave any testimony as to the number of livestock the land would support or the amount of feed that could be grown thereon. Such material facts, the court said, could not be ignored, if an intelligent opinion were to be arrived at.

If the supreme court were to affirm the judgment of the lower court, there must be substantial evidence to support the verdict. Because a witness testified as to a conclusion on his part did not necessarily mean that the evidence given by him was substantial, if he did not give a satisfactory explanation of how he arrived at the conclusion. Since there was no showing that any of the landowners' witnesses took into consideration the potentialities of the land involved for raising livestock and feed, they had given no sound basis for their opinions as to the value of the farm and damages thereto, according to the court.

The decision of the lower court was reversed and the case remanded for a new trial.

A dissenting opinion was handed down by one judge in this case, who took issue with the majority of the court who had, he stated, "acted as a jury in testing the credibility of the witnesses and the weight to be given to their testimony." According to this dissenting judge, this was not a function of the supreme court. The credibility of witnesses and the weight to be given their testimony was a matter to be decided by the trial court.

A rehearing of the case was denied by the court on May 4, 1953.[16]

Right-of-Way Costs and Land Value

A decline in farmland values of about 6 percent took place in the period between March 1, 1953, and March 1, 1954, as indicated by Figure 1. According to the March 1954 issue of "Current

[16] See Memorandum 69, July 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 213.

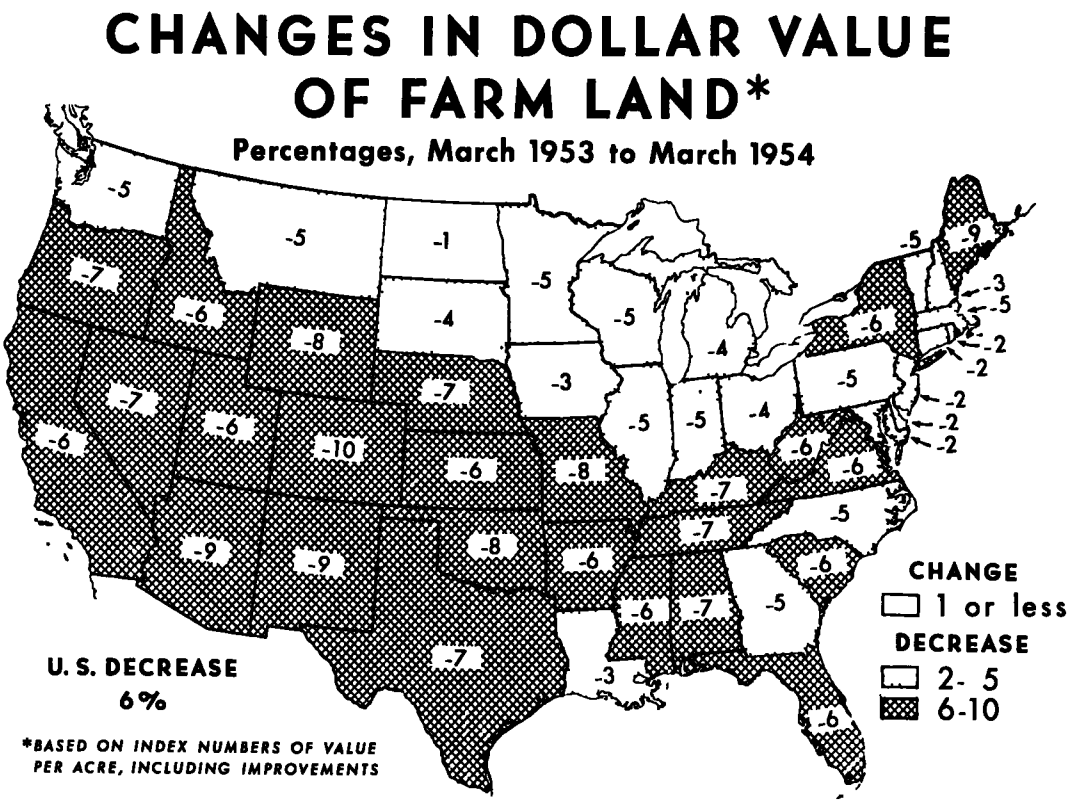

Figure 1

Developments in the Farm Real Estate Market," a publication of the Bureau of Agricultural Economics of the United States Department of Agriculture, the farmland-value index has dropped to 120 (1947–49=100).

Values as of March 1, 1954, were lower in every state than they were as of March 1, 1953, with states in which farm income was affected by drought and lower cattle prices in 1953 showing somewhat larger declines. The rate of decline was slowed in the period between November 1, 1953, and March 1, 1954, apparently due to a strengthening in prices of farm commodities during that period. According to the report of the Bureau of Agricultural Economics, about a third of the farm-real-estate reporters expected lower prices for farmland during the 6-month period following the March 1, 1954, report. This was the same percentage as reported in the March 1, 1953, report, but significantly, in October of 1953, 40 percent of the reporters expressed this opinion. The percentage expecting an increase in farmland values was the same in October and in March—6 percent.

Farmland values have a definite effect on prices paid for highway right-of-way. Although the rate of decline in prices of farm real estate has decreased during the past several months, no reversal of the downward trend is expected in the near future.

CONTROL OF HIGHWAY ACCESS

Authority to Establish Controlled-Access Highways

The provision of expressway facilities is authorized by statute in 35

states,[17] by constitutional provision in one state, Missouri, and by judicial decision in one state, Minnesota. Additionally, one or two states are apparently building expressways under the highway department's existing authority, without specific legislative sanction. A number of states are currently considering enabling expressway legislation.

During the year, the constitutionality of at least one state's expressway law was challenged. On January 22, 1953, the Illinois Supreme Court reversed a decision of the Montgomery County Court, dismissing a petition of the Department of Public Works and Buildings to acquire by eminent domain, certain parcels of land and easements of ingress, egress, crossing, light, air and view to and from other parcels of land. Defendants making the motion challenged the jurisdiction of the county court, attacked the constitutionality of the Freeways Act of 1943, and questioned the legal sufficiency of the petition to condemn. (Department of Public Works and Buildings v. Lanter et al., 110 N. E. (2d) 179).

Of particular interest was the court's answer to the attack on the constitutionality of the act, (Illinois Rev. Stat. 1951, Ch. 121, pars. 334-343.) Defendants contend that the provisions of the act were incomplete, vague, and indefinite, and constituted an unlawful delegation of arbitrary powers to the department.

The court considered the delegation of authority here involved no broader than that sustained in two previous decisions. In Mitchell v. Lowden, 123 N. E. 566 (1919), involving the 1917 Hard Road Bond Issue Act, providing for a state-wide system of hard roads, which specified only the points of termini, and left all other matters to the department, the court stated:

> There is no delegation of either legislative or judicial power to the department of public works and building. It is true that many questions—the material to be used, the width of the roadways, the character of the construction and the plans and specifications therefor, the terms and conditions of contracts, the acceptance or rejection of work done, and the numberless details in carrying out the provisions of the act—are left to the determination of the department of public works and buildings, which is authorized and required to make all final decisions. The decision of such questions is ministerial.

In People *ex rel.* Curren v. Schommer, (63 N.E. (2d) 744 (1945)), involving the validity of the Illinois Superhighway Act, which contemplated a system of toll roads, to be planned, built, operated, and maintained by a commission empowered to acquire and convey personal and real property, including rights-of-way, franchises and easements, and to issue and sell bonds for the purpose of financing the planning and construction of the superhighway system, the court had this to say:

> It is an accepted constitutional doctrine that the General Assembly may not delegate legislative functions to a commission and invest an administrative agency with arbitrary powers, but it has long been accepted that the Legislature may delegate that reasonable measure of authority which is necessary to accomplish the constitutional purpose desired. We hardly see how, in this age of modern development of highway and other transportation systems, in order to serve the public's ever increasing demand for safer and more rapid transportation, it can be said that the Legislature, which is the voice of the people, has no freedom of action in determining the best methods of giving to the public that service for which it is willing and able to pay. It is the best judge of what is necessary to meet the needs of the public and in what manner the service shall be directed. It is true the General Assembly may not delegate its general legislative authority, but it may, however, confer upon a municipal body, which by reason of its position, may have more knowledge of the subject or which may do things more expeditiously than the legislature, such powers as is not violative of the constitution.

[17] Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming

Defendants in the present case insisted that excessive and unlawful authority was granted to the department as to the diminution, extinction, extension and creation of rights of access to the freeway. The provisions of the Freeways Act, authorizing the department to designate by agreement or stipulation the points at which access would be permitted from abutting lands to the expressway, and to specify the terms and conditions upon which such access would be allowed, had the effect, according to defendants, of giving the department power to zone without any limitation all lands abutting upon any road. They argued that the department might select any road for designation as a freeway, and then might, at its own discretion, depending upon whim or fancy, allow or deny access to the expressway.

The court stated, however, that to require the general assembly to determine itself precisely what rights of access should be extinguished and what retained would completely frustrate the legislative purpose. Standards prescribed in the present statute to govern the department in the designation of expressways and the regulation of access rights were expressed in general terms: "when the safety and convenience of highway traffic will be promoted and the public interest subserved thereby." However, varied and unforeseeable conditions which might exist or arise along the state's thousands of miles of through traffic highways made greater particularity impossible. Almost from the outset, it had been said that the legislature might authorize others to do things which it might properly, but could not understandingly or advantageously, do itself. The court cited several previous decisions in support of this point, and concluded that defendants' contention that the act was unconstitutional could not be sustained.

In contending that the petition to condemn was legally insufficient upon its face, defendants advanced several arguments, all of which were disapproved by the court. One argument was that the attempt to establish a portion of federal-aid Route 5, in this case as an expressway, was without legislative sanction. The statute required that all, rather than a portion, of a route be designated as such. This contention, said the court, was not sound. The statute did not concern itself with routes. And, in any event, the fact that corporate authorities of cities, villages and incorporated towns were authorized to establish expressways flatly negatived the contention that all of a route must be so designated. The highway here involved was specifically identified on the plats attached to the petition, and that was sufficient.

Another argument advanced by the defendants was to the effect that the department was without authority to condemn "rights of access, crossing, light, air or view, to, from or over" the expressway, in connection with several tracts where no land was being taken. This argument was based on a decision rendered in a previous case (Horn v. City of Chicago, 87 N.E. (2d) 642, 647 (1949)) in which the court held that an abutting property owner was not entitled to have condemnation proceedings instituted to determine damages to his property occasioned by a public improvement where no part of his property was physically taken.

This statement, the court held, did not support defendants' contention in the present case. The damage here did not flow incidentally from a "public improvement" in the physical sense in which that term was used in the Horn case. The present statute authorized the department to acquire access rights

where no physical change was to be made in an existing highway. Section 3 of the act specifically authorized the department "to extinguish by purchase or condemnation any existing rights or easements of access, crossing, light, air or view to, from or over said freeway vested in abutting land."

The supreme court remanded the case to the lower court for rehearing. In so doing, it made note of the fact that, although the matter of the necessity of taking property and easements to the extent sought by the petition had not been at issue in this court, it had been raised in the lower court. The supreme court stated that evidence should be heard upon such questions raised by the defendants when the case was retried. However, in determining the quantity of property and property rights to be taken in a condemnation proceeding, the petitioner was permitted great discretion, and in the absence of a clear abuse of its power, the petitioner's decision was conclusive. Where the petitioner's determination was challenged, the burden of proof would lie with the challenger, except in the rare, perhaps entirely hypothetical, case in which the petition itself showed that the amount of land sought was not necessary.[18]

Access Rights on New Highways

When an existing highway is converted into an expressway, courts have been unanimous in declaring that an owner whose property abuts on the highway is entitled to compensation if his right of access is taken or impaired, even when no other property is taken from him. If, on the other hand, an expressway is established on new location, the courts of at least three states (California, Illinois, Oregon) have held that the person who becomes an abutter by reason of the establishment of an expressway at a location where no street or highway previously existed, having lost nothing which he theretofore had, is entitled to no compensation if not given access to the new highway. In this connection, the latest California case involving this principle is of interest.

The case of People v. Thomas (239 P. (2d) 914 (1952)) involved primarily the construction upon entirely new alignment of a limited-access freeway. There were a number of points raised on the appeal, including the contention of the property owners that the state was acquiring more property than was needed for the highway. The court held that the California statute providing, in effect, that the resolution of the California Highway Commission authorizing condemnation was conclusive evidence of public necessity, was valid in the absence of clear allegations and proof of fraud, bad faith, of an abuse of discretion. Some of the so-called unnecessary property acquired consisted of small parcels, irregular in shape, which would have been inaccessible after the new highway was built. The court cited with apparent favor Section 104.1 of the streets and highways code, authorizing the state highway commission to acquire an entire parcel where failure to do so would give rise to claims or litigation concerning severance damages.

The case was extremely interesting and pertinent. The state had requested the court to instruct the jury to the effect that the remaining portions of the defendant's property were not to be considered as having had a right of direct access to the new highway at any time and, therefore, that the jury must not include in its verdict any sums by reason of the fact that the property

[18] See Memorandum 65, March 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 194.

would not have access to the new highway.

Here again, in this case the court referred to the resolution of the California Highway Commission designating the highway as a freeway. The court said: "The resolution passed by the highway commission did not create in appellant's property a new right of access to a freeway to be constructed where no highway, conventional or otherwise, existed before." The court then quoted with approval the language in the Geiger case (City of Los Angeles v. Geiger, 210 P. (2d) 717 (1949)), in which property was separated from the existing highway by a railroad right-of-way. The owners contended that following the construction of the improvement of the highway, it would cost them much more to construct facilities enabling them to reach the new highway than it would have cost them to reach the old one. In each instance, they were basing their claim upon the assumption that they could obtain permission to cross the railroad right-of-way therefor.

The language quoted from the Geiger case by the court in the Thomas case reads, in part, as follows:[19]

> There can be no detriment to a right which never existed and no compensation for a loss not sustained. The construction of the freeway improvement did not cause defendants to lose an easement for access to Cahuenga Boulevard since it had never been acquired. Manifestly plaintiff cannot be required to pay damages for injury to a nonexistent right or for a mere hope, surmise or expectancy that a right might possibly be obtained in the future.

Access Rights on Existing Highways

As stated above, courts of the various states have held that an owner whose property abuts on an existing highway is entitled to compensation for the loss of access if the highway is converted into an expressway. A decision handed down during the year by the Illinois Supreme Court substantiates this doctrine.

An existing highway, federal-aid Route 172, in Peoria County was declared an expressway by the Illinois Department of Public Works and Buildings, under statutory authority (Illinois Rev. Stat. 1951, Chap. 121, par. 336). In October 1951, the department filed a petition to extinguish or limit by condemnation the rights of access, ingress, egress and crossing by vehicular traffic of abutting property owners onto the existing right-of-way. The Circuit Court of Peoria County entered judgment awarding the property owners no damages and the property owners appealed.

During the course of the trial, appraisers for the state testified that they had examined the properties involved and had found "Freeway" signs erected along the edge of the right-of-way of each. They also testified that they had been advised that the state had declared this right-of-way to be a freeway in August 1949, and that, in their appraisal they assumed in October 1951, the date of filing the petition to condemn, that the right-of-way of Route 172 was a freeway; based on this assumption and comparing the value of the properties on the date of the filing of the petition with the probable value of same on completion of the highway, they concluded there could be no change in the value of the properties.

After review of the proceedings, the high court found it evident that the jury had based its verdict upon the belief that the highway had been a freeway from the date of erection of the freeway signs, as urged by the state's appraisers. The jury was also taken to view the premises, and they too observed the freeway signs.

The supreme court stated that it had

[19] See Memorandum 63, January 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 186.

previously determined that the taking or damaging of land by eminent domain was not accomplished by passing ordinances or resolutions, or by serving notice on the owner that the land might be required for public purposes (Eckhoff v. Forest Preserve Dist., 36 N.E. (2d) 245 (1941)). The declaration of the right-of-way as a freeway in August 1949 and the erection of freeway signs adjacent to the properties involved in the present case could not have the effect of extinguishing or limiting the access rights of the property owners or of damaging said property. Such a result ensued only from the actual condemnation. The state's appraisers were incorrect in considering the effect of such facts and were thus incorrect in their assumptions and, as a consequence, in their conclusions.

The rights of access, ingress, and egress condemned by this petition, said the court, were valuable property rights and could not be taken away or materially impaired without just compensation. This rule applied not only in Illinois but was generally recognized to be the law throughout the United States. Moreover, the Illinois Freeway Act specifically recognized these rights as property rights which might be extinguished only by purchase or condemnation.

The court stated that there might be circumstances which would justify a jury in finding that particular easements were without value, but such a verdict must be based upon admissible evidence and proper instructions.

The judgment of the lower court was reversed and the case remanded for a new trial to determine the damages (Department of Public Works and Buildings v. Wolf et al., 111 N.E. (2d) 322, March 23, 1953).[20]

[20] See Memorandum 67, May 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 203.

Value of Access Rights

Ever since the first controlled-access highway was built, the problem of how to determine the value of access rights has been a vexing one. Figures as to how much these access rights have cost in dollars and cents are not available, for the reason that in many cases, costs of access rights as such have not been segregated. The before-and-after method of appraisal can be, and as a matter of fact is, used extensively when access rights are taken from the property owner. Two interesting court decisions touching on this matter of evaluating access rights have recently been handed down by the courts of Colorado and Washington.

Colorado. In the case of Boxberger v. State Highway Department (250 P. (2d) 1007, November 17, 1952), the right of Boxberger to sue the state highway department was involved. Boxberger, in June 1947, executed and delivered to the state highway department his deed to access rights to and from a portion of his farm which bordered on State Highway 185. No consideration was involved. The landowner claimed (1) he was advised by the highway department that the balance of his access rights would not be taken and (2) he would have the right to construct a filling station with access to and from the highway at any other adjacent point on his farm to the highway. This, he claimed, had proven false. His request for rescission and cancellation of the deed was dismissed by the District Court of Larimer County, on the ground that no authority existed in Colorado for such a suit against the state in its sovereign capacity.

The supreme court reversed the decision of the lower court, stating that although the state highway department was a body corporate and a division of the executive department of the state,

this fact did not change its status from that of an agency of the government with liability to any citizen who might be deprived of his property without due process of law or without just compensation. The judicial branch of the government was intended to act as a haven for the protection of any citizens whose rights were invaded, whether it be by an individual or by the branches of the government. Otherwise, the individual would be left no remedy except to appeal to the legislature, maybe to no avail. The lower court erred, therefore, in sustaining the motion to dismiss the complaint.

A second case (Boxberger v. State Highway Commission, 251 P. (2) 920, December 8, 1952) involved an action by the state highway commission to condemn the remainder of Boxberger's right of egress from his land to Route 185, which had been designated as an expressway. Prior to jury trial, the state was permitted to amend its petition by excepting access by way of a 12-foot gate located 17 feet south of the north property line. Trial in the lower court resulted in a verdict of no damages.

The case was appealed to the state's supreme court by Boxberger who claimed, among other things, that he was deprived of his property without compensation, that inadequate and wrong instructions were given on damages, and that his motion to require the highway department to make its petition more definite and certain as to the exact nature and extent of the rights sought to be condemned should have been approved.

In regard to the first point, the high court stated that it found no evidence that the access rights taken had no value. Qualified witnesses gave testimony to the general effect that Boxberger's farm, as such, suffered loss of value in the sum of $3,500 as a result of denial of access; further, the loss of right to sell commercial sites along the road was fixed at between $10,000 and $20,000 by these witnesses. On the other hand, neither of the two witnesses for the highway department gave any evidence indicating any benefit from the improvement. One, in fact, stated that he thought it was a disadvantage to be on a freeway. The court definitely considered from the evidence that the jury verdict deprived the landowner of access rights without any compensation, which it believed resulted, at least in part, from the manner of the giving and refusing of instructions.

The court stated that in its opinion the value of access rights must be determined by comparing the value of the land and its use for any and all kinds of purposes before the disturbance or destruction of such rights and the value of the land minus any access or disturned or inconvenient access to the highway. The lower court had erred in refusing to give the jury Boxberger's tendered instructions, which was as follows:

> You are instructed that the benefits, if any, derived by reason of increased traffic, resulting from the construction of State Highway 185 adjoining respondents' properties are not special benefits to the lands of respondents, and must not be considered by you in determining what, if any, special benefits to the residue of respondents' property resulted from the improvement of said highway adjoining respondents' properties.

The lower court further erred in advising the jury that any special benefits found by it to exist would be deducted by the court from the damages, if any, to respondents' property. This was in direct conflict with state statutes which specifically provided that no deduction from the value of the property taken should be allowed from the benefit to the residue thereof.

The decision of the lower court was

reversed and the case remanded for a new trial.[21]

Washington. In this case, the right-of-way necessary for a controlled-access highway proposed for construction by the Washington Department of Highways bisected a stock and dairy farm, and the owner appealed from a decision of a trial court awarding damages in the amount of $14,000. The supreme court of the state upheld the decision of the lower court (State v. Ward et ux., 252 P. (2d) 279, January 9, 1953).

The land in question was located on a primary state highway, Route 1, near Centralia. Construction of the proposed road would leave all of the owner's farm buildings on a small tract of 5.1 acres on the easterly side of the highway, while 39.5 acres would lie to the west. Land west of the highway was unsuitable for building sites, being so-called bottom land, at times overflowed by the high water of the Chehalis River, which bounded the property on the west.

The state proposed to construct a service road along the westerly edge of the right-of-way. The property to the east would be served by an existing highway (Airport Road). In order to operate the farm as a unit, it would be necessary to drive stock northerly to Centralia, via Airport Road, through the city, and then southerly via the service road to be provided to the westerly half of the property, a distance in all of 7,120 feet.

Competent expert testimony, according to the supreme court, was introduced in the lower court by the state as to the value of the farm before and after the proposed construction, resulting in a jury verdict of $14,000, as stated above. The landowners objected to the verdict, contending that the trial court erred in admitting evidence of the plan of the service road to be built on the west edge of the proposed highway, stating that they should be paid damages in money as if there were not going to be a service road. Such evidence, according to the property owners, invited the jury to substitute the service road in place of a money payment for the severance damages to the farm resulting from cutting it into two unconnected parcels.

In the opinion of the court, the resulting loss of access had a bearing upon the extent of the damage done to the remainder of the land in this case, as well as upon the diminution of special benefits which ordinarily accrued to abutting land from the right to use the highway. The controlled-access feature of the highway must, therefore, be presented to the jury, together with all other features of the proposed construction, such as service roads, to enable it to properly assess all elements of damage and special benefit that would result therefrom.

The supreme court found no question of substitution involved here. Access to the westerly tract was not over a highway or road. The road which served the entire farm (Airport Road) did not lead from the buildings to the land in question. Nor did the state contend that the service road would give access between the two parcels. Without the service road, however, the land in question would be landlocked and practically valueless. The service road, according to the court, avoided the damage which a lack of access would cause. This, said the court, was mitigation, not substitution. The amount of damage which the entire project would do to appellants' land on the west side of the highway depended upon whether or not there would be a service road. The court found the plan for this service road admissible evidence.

[21] See Memorandum 66, April 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 200.

The supreme court also rejected the landowners' contention that instructions regarding an underpass to connect the remaining parcels should have been given the jury. The court stated that it was the exclusive prerogative of the state to determine details of the plan for the highway. Damages suffered and to be paid for were those occasioned by the particular plan adopted. It would have been error to have instructed the jury with regard to such hypothetical situations as existed only in the landowners' minds.[22]

Authority to Barricade Streets

In connection with the construction of controlled-access facilities, it is often necessary to dead-end local roads or streets intersecting the expressway facility. The laws of a number of states specifically authorize the closing off of such intersecting roads and streets at the right-of-way boundary of the expressway facility. The question of the state's authority in this respect arose a year or so ago in Washington, where such specific authority was not included in the law. The state highway department requested the opinion of the attorney general as to whether or not county consent to the closing off of a county road was necessary. His opinion was to the effect that the county's consent was not necessary in a case of this kind (Opinion No. 51-53-409 (1952)).

State enabling legislation, said the attorney general, authorized the highway authorities of the state, counties and incorporated cities and towns, to provide controlled-access facilities wherever such authorities were of the opinion that traffic conditions justified such special facilities, "provided, that within incorporated cities and towns, and upon county roads within counties, such authority or authorities shall be subject to the consent of the governing body." (Remington's Revised Stats., Sec. 47.52.020.)

The attorney general believed the phrase "upon county roads" meant "upon" in the sense of "along" a county road which had been selected for inclusion as a part of the controlled-access highway, and not wherever a county road intersected or crossed a controlled-access facility.

Section 47.52.070 of the state statutes provides, in part, that "no city or town street, county road, or state highway, or any other public or private way, shall be opened into or connect with any such limited-access facility without the consent and previous approval of the highway authority of the state, county, incorporated city or town having jurisdiction over such limited access facility. Such consent and approval shall be given only if the public interest shall be served thereby."

This section requires no consent from the highway or street authority whose road is so closed off. Furthermore, it is expressly stated that no highway or street which is not a part of the controlled-access facility shall intersect the same at grade. It follows, said the attorney general, that the consent contemplated in Section 47.52.020 must have reference to county roads which are a part of the controlled-access facility.

The act (Sec. 47.52.001) declared: "Unrestricted access to and from public highways has resulted in congestion and peril for the traveler. It has caused undue slowing of all traffic in many areas. The investment of the public in highway facilities has been impaired and highway facilities costing vast sums of money will have to be relocated and reconstructed. It is the declared policy of this state to limit access to the high-

[22] See Memorandum 65, March 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 194.

way facilities of this state in the interest of highway safety and for the preservation of the investment of the public in such facilities."

In view of this declaration of policy, the attorney general considered that it would divest the statutes of their efficacy and defeat the express intent of the legislature if any intersecting or crossing of a controlled-access facility at grade by any road or street not a part of such facility were allowed.[23]

However, in order to clarify this point, the 1953 session of the Washington State Legislature amended Section 47.52.020 of the controlled-access law, referred to above. The law, as it now reads, provides for local consent to the establishment of controlled-access facilities, "except that where a state limited-access facility crosses a county road the state highway commission may, without the consent of the board of county commissioners, close off such county road so that it will not intersect such limited-access highway."

Land Acquisition for Expressways

In order to successfully carry out a long-range expressway program, the states (or other agencies authorized to provide controlled-access facilities) must be prepared to defend every action taken in connection therewith. The concept is so new and so little understood in some areas that many more points of contention are apt to arise than is the case with highways of conventional design.

Some interesting issues were brought out in a decision handed down by the Maryland Court of Appeals during the year, having to do with the authority of the state roads commission to condemn land for an expressway in Baltimore County (State Roads Commission v. Franklin et ux., 95 A (2d) 99, March 11, 1953).

The case reached the high court as the result of an appeal by the roads commission from a directed verdict of the Circuit Court for Baltimore County in favor of the landowners, who contended that the commission had no power to condemn for the contemplated Baltimore-to-Harrisburg expressway.

The Maryland law (Section 154 of Article 89B) provides that "any project involving construction of one or more sections of expressway, or one or more sections of controlled-access arterial highway, shall be continuous and shall have each of its termini (a) at or within the limits of a city or town of the state, which city or town is recognized by the commission as a principal traffic generating center, or (b) at a connection in this state or at the state boundary with a route recognized by the commission as a principal traffic distribution, collection or dispersal artery."

Certain landowners contended that these requirements had not been met. The proposed expressway was to extend from the circumferential beltway in Baltimore County to a point where the expressway to be built south from Harrisburg by the State of Pennsylvania reached the Maryland State line in the vicinity of US 111. At the time of hearing before the trial judge, the exact location of the beltway had not been decided upon, but prior to the judge's decision this location had been decided upon and published in the public press. Little had been done by Pennsylvania, but if the landowners' argument were sound, it would be necessary for Maryland to wait until the Pennsylvania end of the expressway was completed before starting the Maryland expressway. The enabling legislation quoted above did not specify that the termini be actually

[23] See Memorandum 64, February 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 190.

located at the time the expressway was begun.

Section 154 also specified that no expressway was to be constructed to serve a traffic volume of less than an average of 5,000 vehicles per day. The landowners contended that this requirement had not been met in connection with the proposed expressway. The court, however, did not think the language of the expressway law meant that the traffic volume should be that great at the time the expressway was begun. Testimony given at the trial as to surveys and analyses conducted in connection with this project showed that the commission estimated the volume of traffic upon completion of the expressway would be "in the vicinity of 7,000 vehicles per day." The court found nothing to show that this study and estimate were erroneous.

The landowners also put forth the argument that the commission had no right, under the guise of condemning for an expressway, to condemn the access rights sought to be condemned in this case. Specifically, they contended that as only one lane was being built at present, the commission could not condemn at this time the land later intended for the median divider separating the lanes of traffic, the land contemplated for the other lane of traffic and that necessary for grading the other lane of traffic. The court pointed out that the commission was authorized to acquire real property or any interest in such property for highway construction purposes, and real property along any state highway, parkway, or freeway, or any interest in such property, in order to protect the same. The commission might acquire such property by condemnation, only if it determined, by resolution, that it was necessary for immediate or proposed construction (Article 89B, Sec. 8(a), Flack's Ann. Code of Maryland, 1951).

The court found that the commission had fulfilled the requirements of this section. In building the one "lane," the commission was constructing cross-drainage structures across both lanes of the highway and grading was being done for the contemplated "dual-lane" highway. The commission by resolution had declared that the location and general design of the Baltimore-Harrisburg expressway project in Baltimore County had been approved, and that the land being condemned was necessary for that project. There was nothing to indicate that the commission's decision to build the expressway was oppressive, arbitrary, or unreasonable, nor that it had not acted in good faith.

Another point raised by the landowners was to the effect that the roads commission had no authority to deprive them of all access to public roads, including the so-called Baltimore-Harrisburg expressway. Fifty acres of their land would be deprived of all access to the public roads. But the court called attention to Section 7 of Article 89B of the code which authorized the commission to condemn rights or interests, franchises, privileges, or easements that might be desirable or necessary to complete the state system of roads. The court found this sufficient authority to enable the commission to condemn whatever property rights were needed for expressways, not, however, without due compensation.

Also questioned by the landowners in this case was the state's authority to take immediate possession of the land needed for the expressway. The roads commission is authorized to condemn property needed for highway purposes after construction has been commenced, as well as prior thereto, by Section 9 of Article 89B of the code, enacted by the

state legislature pursuant to Section 40B of Article III of the state constitution authorizing such procedure where property in the judgment of the state roads commission is needed by the state for highway purposes. The commission, by resolution, had declared that an emergency existed with respect to construction of the proposed Baltimore-Harrisburg expressway so that immediate entry was necessary. The court found nothing to indicate that the commission's decision to enter upon the property was not justified.

The suit was originally filed on April 4, 1952, and almost a year had expired before the case was submitted to the jury. The court stated that it would be difficult to build roads under any systematic program if each owner could delay construction until he had exhausted his legal remedy as to the amount of damages due him by the condemnation of his property.

In conclusion, the court stated that it might well be that the construction of this expressway to be completed in the distant future would inflict hardships upon many individuals. But that was a legislative, not a judicial problem. When the legislature had conferred such powers on the commission, the question before the courts was limited to whether there was any necessity whatever to justify the taking, or whether the commission's decision was so oppressive, arbitrary, or unreasonable as to suggest bad faith. The court was unable to find bad faith on the part of the commission in the exercise of the powers delegated to it by the legislature in this case.

Finally, the court was of the opinion that the directed verdict should not have been granted but that the case should have been submitted to the jury. The case was remanded for further proceedings.[24]

Use of Access Openings

The committee has recently interested itself in a new phase of the matter of control of highway access. Control of access is one of the newest and perhaps among the most-effective devices that has been added to highway design in recent years. A further projection of the concept of access control can now be made in terms of controlling the *use* of access openings, i.e., those that are permitted on expressways or those on arterials of a lesser design.

Oregon has been a pioneer in this new area, and a special study of the legality of controlling the use of access openings has been undertaken at the suggestion of the committee by C. W. Enfield of the Oregon State Highway Commission. He reported on his findings at the open meeting of the committee at the annual meeting of the Highway Research Board in January 1954, in a paper entitled "Controlling the Use of Access." His paper is reproduced in full in this bulletin (see page 70).

Economic Impact of Expressways

Although 37 states have legal authority to provide controlled-access facilities and legislation is under consideration in others, there still remain doubts in the minds of the public, particularly in some areas, as to the economic effects of expressways. Studies made in California and in Texas have indicated that these highways actually increase land values and are generally beneficial.

More documented studies are needed, however, to firmly establish this finding. Landowners and others affected in a particular state are not always convinced by studies made in a state at the

[24] See Memorandum 70, August 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 216.

other end of the nation. During the year, plans were initiated for an investigation of the economic impact of expressways on urban and rural communities in Virginia. This state has completed several expressways and has plans for a number of others. The state highway department feels that its expressway program will be more acceptable to the public if it can be shown that expressways already completed have actually had a beneficial economic impact on rural and urban communities.

CONTROL OF THE ROADSIDE

A number of techniques for controlling the roadside have been proposed and, in some instances, put into effect in various parts of the United States. Some of these controls have encountered opposition from certain segments of the public. Lack of understanding of the nature and purpose of these controls accounts in large part for this opposition. If the benefits ensuing from a well-regulated roadside could be made clear to the general public in terms of safety, economy, time savings, and general appearance, perhaps less attention would be paid to the so-called right of the abutting owner to use his property in any way he sees fit and more to the public good. In other words, the overall picture needs to be stressed in order to bring about a more-effective use of these roadside control techniques. Effective use of two of these techniques, zoning and subdivision control, was a subject of discussion at the open meeting of the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas during the annual meeting of the Highway Research Board in January 1954.

Subdivision Control

From time to time, the committee has called attention to the effective application of the subdivision control device in protecting highways against roadside encroachments and early functional obsolescence. The University of Wisconsin Law School has fostered some research in this general field, and Jacob Beuscher gave a report on the project in a paper entitled "Protection of Highways and Feeder Streets Through Subdivision Controls" (see page 52). Of particular interest is a proposal under discussion in Wisconsin as a means of coordinating control of buildings on property adjoining state highways. Under this proposal, standards for setback and other highway protection devices for state highways would be set up by the state highway commission. Acceptance of such standards by the county in the form of zoning ordinances, including building-permit features, would entitle the county to a grant-in-aid to help finance administration of this program.

Zoning

The zoning device has become acceptable to the general public through the years, and although not originally conceived as a means of protecting the roadside as such, it can be used effectively for this purpose. An excellent discussion of how zoning can be made to fit into the highway protection picture is included in a paper prepared by Hugh R. Pomeroy, director of the Westchester County Department of Planning. This paper, entitled "Bringing Zoning up to the Automobile Era," is also included in this report (see page 40).

Highway Setbacks

Another technique widely used to protect the roadside is the highway setback (sometimes a part of zoning ordinances and in other instances accomplished by means of other local ordinances) requiring that all buildings along certain

streets be set back a specified distance from the right-of-way line.

In a decision handed down by the Supreme Court of Wayne County, New York, on April 4, 1953, an ordinance enacted by the Town of Ontario requiring a 40-foot setback from the highway line was declared reasonable and justifiable under the police power of the state (Stevens et ux. v. Conner et al., 120 N.Y.S. (2d) 345).

This case reached the state supreme court on an appeal from a determination made by the town board of appeals, denying a variance which would permit the landowners to erect a dwelling house less than the required 40 feet from the highway line, in a district zoned "Residential District A." The petitioners had constructed a foundation wall at a point less than the 40 feet required subsequent to enactment of the ordinance.

Under the provisions of the zoning ordinance, the board of appeals had authority to approve a variance where practical difficulties or unnecessary hardships might be involved in carrying out the strict letter of the provisions. However, in affirming the determination of the board, the supreme court brought out the point that the burden of showing that the applicable provisions of the ordinance were not reasonable and justifiable under the police power rested with the landowner. He must prove that: (1) the land in question could not yield a reasonable return if used only for a purpose allowed in that zone; (2) the plight of the owner was due to unique circumstances and not to the general conditions of the neighborhood which might reflect the unreasonableness of the zoning ordinance itself; and (3) the use to be authorized by the variance would not alter the essential character of the locality.

The hardship claimed by the landowners in the present case was self-created, said the court, and the ordinance was reasonable and justifiable under the police power of the state.[25]

Right-of-Way Encroachments

Section 1.17(b) of "Regulations Under the Federal-aid Road Act of July 11, 1916, as Amended and Supplemented" specifies "the right-of-way provided for federal-aid highway projects shall be held inviolate for public highway purposes and no signs (other than traffic signs and signals) posters, billboards, roadside stands or other private installations shall be permitted within the right-of-way limits." Some of the states, however, have difficulty keeping state highway rights-of-way free from outdoor advertising devices and other encroachments. This particular problem led to inclusion of an effective provision in a law passed by the 1953 Arkansas State Legislature.

This provision is broad enough to prevent not only outdoor advertising devices, but all encroachments in the highway right-of-way:[26]

> The rights of way provided for all state highways shall be held inviolate for state highway purposes, except as hereinafter provided, and no physical or functional encroachments, installations, signs (other than traffic signs or signals), posters, billboards, roadside stands, gasoline pumps, or other structures or uses shall be permitted within the right-of-way limits of state highways except that political sub-divisions, rural electric cooperatives, rural telephone cooperatives, and public utilities of the state may use any right-of-way or land, property or interest therein, the property of the State Highway Commission, for the purpose of laying or erecting pipe lines, sewers, wires, poles, ditches, railways, or any other purpose, under existing agreements or permits or such agreements or permits hereinafter made by the State Highway Commission or under existing laws, provided such use does not interefere with the public use of such property for highway purpose.

[25] See Memorandum 68, June 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 207.

[26] Arkansas Laws of 1953, Act 419, Sec 5

Zoning Ordinances Prohibiting Billboards

Reversing the judgment of a lower court in the case of United Advertising Corporation v. Borough of Raritan (93 A. (2d) 362, December 22, 1952), the New Jersey Supreme Court held that it was within the power of the borough to enact a zoning ordinance prohibiting outdoor advertising signs in any of the nine zones established by the ordinance and to draw a distinction in this connection between signs which advertise business conducted on the property and outdoor advertising. The court held, however, that the retroactive provisions in the act were invalid.

Plaintiff, the United Advertising Corporation, obtained a summary judgment from the lower court to the effect that the provisions of the zoning ordinance prohibiting the erection of billboards, were invalid upon the ground that the provisions of the Billboard Act of 1930, (Revised Statutes of New Jersey Ann., Sec. 54:40-1 et seq.) prohibiting the issuance of a permit to erect or maintain billboards or other structures in a place where the same were prohibited by a municipal ordinance were omitted from the act as amended in 1942 (Sec. 54:40-20 et seq.). The lower court held that the repealing statute (of 1942) abolished the right of a municipality to legislate on the subject of billboards.

This provision, the state supreme court held, had been inserted in the 1930 act merely as a precautionary measure, to insure that the municipal power to control the location of billboards as structures by zoning ordinance (Sec. 40:55-30 et seq. of the statutes) was not to be considered withdrawn or in anywise curtailed. Without the clause, the 1930 act could not be construed as having the effect of superseding municipal power in the field. The 1942 act was substantially the same as the 1930 act, except that it included additional restrictions as to the type and locations of billboards. There was no express statement in the 1942 law that the municipal zoning power was to be abrogated as to billboards. An intent that the law be given that effect was not evident. In fact, the contrary implication was more reasonable. Thus, the court stated that the omission was no support for the conclusion reached by the trial judge.

Plaintiff complained that the ordinance was invalid inasmuch as it permitted signs directing attention to businesses on the premises, while excluding advertising signs in all districts, and thus constituted unlawful discrimination. This contention had no merit according to the supreme court. The business sign was in actuality a part of the business itself, just as the structure housing the business was a part of it. The authority to conduct the business in a district carried with it the right to maintain a business sign on the premises subject to reasonable regulations in that regard, as in the ordinance under consideration. Plaintiff's placement of its advertising signs, on the other hand, were made pursuant to the conduct of the business of outdoor advertising itself. The ordinance provided, in effect, that this business should not to that extent be allowed in the borough.

The court cited an impressive list of court decisions in which it had been held that the unique nature of outdoor advertising and the nuisance fostered by billboards and similar outdoor structures located by persons in the business of outdoor advertising justified the separate classification of such structures for the purposes of governmental regulation and restriction. Such separate classification offended no constitutional provision, according to the court. No

invidious discrimination existed in the provisions of the ordinance barring plaintiff's signs in the business and industrial zones, while allowing manufacturing plants, junk yards, coal and coke yards, and other uses suggested by plaintiff as also having undesirable attributes. It was enough, said the court, that outdoor advertising had characteristic features which had long been deemed sufficient to sustain regulations or prohibitions peculiarly applicable to it.

Plaintiff's contention that the distinction in the ordinance was designed to protect local business and to put plaintiff out of business was also without merit, in the opinion of the court. The ordinance regulated all signs to confine their use to the reasonable requirements of signs incident to and part of businesses authorized on the premises. It forbad any sign whatever with an area in excess of 3 square feet, except as a zoning permit was obtained for its use. No sign of any sort might be placed, inscribed, or supported upon the roof or upon any structure which extended above the roof of any building. Many similar restrictions were included. The court found it plain that the municipal purpose was directed toward minimizing the abuses and hazards incident to the use of signs and to confine their use within the reasonable requirements of businesses permitted at certain locations.

Additionally, the court could not agree that an unconstitutional abridgment of the guaranties of freedom of speech and freedom of the press was involved in this distinction. These guaranties imposed no such restraint upon governmental regulation of purely commercial advertising.

However, the court did find the section of the ordinance requiring removal of nonconforming signs within 2 years of the effective date of the ordinance, unless permission to continue individual signs for further periods was first obtained from the local board of adjustment, to be contrary to the express provision of the zoning statute (Sec. 40: 55-48 of the state statutes). This section provided that "any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied and any such structure may be restored or repaired in the event of partial destruction thereof."

It was beyond the power of a municipality to limit by zoning ordinance the right expressly given the owner by statute to continue a nonconforming use. Invalidity of this section, according to the court, did not affect the other provisions of the ordinance.[27]

Billboard Control for Aesthetic Purposes

Usually the courts will not uphold the regulation of outdoor advertising purposes for aesthetic reasons alone, although in some cases the courts have said that aesthetics have some bearing in a consideration of the legal merits of billboard controls. In a recent Florida decision, the state's supreme court upheld a regulation limiting the size of commercial signs purely on aesthetic grounds.

The court held, in a decision handed down on June 2, 1953, that a regulation adopted by the Dade County Commissioners, limiting the size of commercial signs to be erected in limited and special business zones to 40 square feet, was a valid exercise of the police power to promote the general welfare of the public and was not unconstitutional as being arbitrary or unreasonable (Merritt v. Peters et al., 65 So. (2d) 861).

[27] See Memorandum 64, February 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 190.

The regulation in question was adopted by the county pursuant to Chapter 17833, Laws of Florida, Acts of 1937. Nevertheless, the owner of certain property situated in a "limited and special business zone" proceeded to erect a sign more than four times the maximum size specified, insisting that the regulation was an arbitrary and unreasonable exercise of police power, because there was no relationship between the object of the rule and the health, safety, morals or general welfare of the public. The Circuit Court for Dade County refused to enjoin enforcement of the regulation.

The court agreed that the factors of health, safety, and morals were not involved but disagreed with the landowner in his contention that the restriction could not be sustained on aesthetic grounds alone. The court called attention to a previous decision (City of Miami Beach v. Ocean and Inland Co., 3 So. (2d) 364 (1941)) wherein it was held that the attractiveness of a community like Miami Beach was of prime concern to the whole people and, therefore, affected the welfare of all. The court considered this principle equally applicable to the territory involved in the instant case.

The supreme court upheld the ruling of the lower court in refusing to restrain enforcement of the regulation on the ground that it was a violation of the property owner's constitutional rights.[28]

PARKING

Provision of Off-Street Parking Facilities as Public Purpose

At least two state courts handed down decisions as to the authority of municipalities to provide off-street-parking facilities. In Connecticut, the court held that the acquisition and operation of parking facilities by a municipal parking authority was a public purpose. On the other hand, a New York court held that although the provision of off-street-parking facilities was in the public interest, such action was not necessarily a governmental operation.

Connecticut. A special act of the Connecticut legislature, No. 473, enacted in 1951, and approved by referendum the same year, provides for the appointment of a parking authority of five members by the City of New Haven. The authority has power to acquire, create and establish, as well as operate, parking facilities and to collect reasonable fees for their use. These facilities may include "lots, garages, parking terminals, or other structures and accommodations for the parking of motor vehicles off the street or highway and open to public use with or without charge." The exercise of the power of eminent domain is authorized for purpose of the act.

Under the act, the city is given broad latitude in financing the undertaking. It provides for: (1) the issuance of bonds, subject to specific authorization by the board of aldermen, such bonds to constitute a general obligation of the city or to be payable only out of parking revenues; (2) the appropriation of funds raised by taxation; and (3) the assessment of benefits against owners of property specifically benefited by any parking facility. Operation of the parking facilities might be by the parking authority itself, or by private parties under lease.

The present case involves a taxpayer's request for a declaratory judgment to determine the legality of the act, brought in the Superior Court of New Haven County, and referred by that court to the Connecticut State Supreme Court of Errors for advice (Barnes v.

[28] See Memorandum 71, September 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 219.

City of New Haven, 98 A. (2d) 523, June 2, 1953).

The supreme court called attention to the fact that the streets of New Haven, a city first settled in 1638, were inadequate for the safe, convenient, and expeditious handling of modern motor traffic. Modern traffic required parking facilities beyond the capacity of these streets and present private parking facilities. Establishment of additional parking facilities would relieve traffic congestion and reduce traffic hazards.

The fundamental question here involved, according to the court, was whether the parking project provided a legitimate public purpose. Section 1, Article 1, of the state constitution provides that "no man, or set of men are entitled to exclusive public emoluments or privileges from the community," a provision similar in meaning to that included in other state constitutions prohibiting the state from denying to any person the equal protection of the laws contained in the Fourteenth Amendment of the United States Constitution. In a previous decision (Lyman v. Adorno, 52 A. (2d) 702 (1947)), the court held that "if the expenditure of public funds will promote the welfare of the community, it is for a public purpose." Noting the modern trend of authority to expand and liberally construe the meaning of "public purpose," the court stated that the test of public use was not how the use was furnished but rather the right of the public to receive and enjoy its benefit. What constituted a public purpose, said the court, was primarily a question for the legislature, and its determination should not be reversed by the court unless it was manifestly and palpably incorrect.

While the act contained no express legislative finding of any public need or public purpose as reason for its adoption, this did not mean that for lack of such finding it must be held that no such purpose was involved. The provision of the first section of the act, stating that all parking facilities of the authority were to be "open to public use," and the stipulated facts establishing that parking facilities "beyond the capacity of the public streets and present private parking facilities are essential, sufficed to show that a public need and purpose was involved which called for enactment of the law. That the authority's operation of its parking facilities might involve some incidental loss to private competitors," continued the court, "constituted no reason for holding that the act did not meet a legitimate public purpose. Furthermore, the possibility that the act might prove of greater benefit to store owners in the shopping district than to some other residents of the city did not render it invalid as discriminatory, any more than would the outlay of public funds to pave a particular section of street, with its greater benefit to the immediate abutters than to others."

The court called attention to recent decisions in other states in which the use in question had been held to be a public one, concluding that "on the basis of logic and common sense, fortified by these authorities," the parking project here in question was a legitimate public purpose.[29]

New York. In this case, Town of Eastchester v. Koch (118 N.Y.S. (2), 576 (December 3, 1952)), the Supreme Court of Westchester County, New York, held that the proposed establishment of a public automobile-parking lot by the town constituted a proprietary rather than a governmental function and that the town could not enjoin an adjoining landowner from enforcing a

[29] See Memorandum 71, September 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 219.

covenant against a business use of the property on which the town desired to establish a parking lot.

In upholding an abutting owner's attempt to enforce the provisions of the restrictive covenant, the court stated that although off-street parking no doubt promoted the flow of traffic and was in the public interest, this, in and of itself, did not make the establishment of a municipal parking place a governmental operation, even though such a facility might be subject to regulation under the police power.

When a municipality supplied water to its citizens and inhabitants, said the court, it performed a laudable function but operated in a proprietary capacity. Likewise when a town collected and disposed of garbage, it took steps to safeguard public health but, nevertheless, operated in a corporate capacity.

By statute, the town was authorized to establish such a parking place. However, the court was unable to find a legislative mandate relating to the duty to establish municipal parking lots. Without such mandate, there was no governmental function. The court concluded that in establishing a public parking place, the town was performing a corporate function. While it had the power to perform this proprietary function, it did so as a body corporate, subject to the same restrictions as any other person, firm, or corporation.[30]

Financing of Municipal Parking Facilities

Although the courts have generally upheld the authority of municipalities to finance the provision of public parking facilities where proper enabling legislation exists, methods of so-doing will be carefully scrutinized by the courts when brought to their attention.

[30] See Memorandum 67, May 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 203.

The State Supreme Court of Michigan recently reversed a decision of the Circuit Court of Jackson County that refused to enjoin officials of the City of Jackson from using public funds to pay for land for off-street parking lots (McVeigh v. City of Jackson et al., 56 N.W. (2) 231, January 5, 1953).

Jackson, a home-rule city, adopted an ordinance in 1951 creating an automobile-parking-system board to prepare plans for both on- and off-street-parking lots and facilities. Revenue-bond provisions of the ordinance were submitted to a referendum vote but were turned down by the electorate and, subsequently, eliminated from the ordinance. Under the remaining provisions of the ordinance, the city established an automobile-parking system and authorized acquisition of on-street and off-street facilities, combining the derived revenue in a single automobile-parking system.

Section 2 of the ordinance declared that the revenues derived from on-street parking through meters "shall be considered a portion of the revenues of the system, subject to the pledge and allocation as hereinafter provided, from and after July 1, 1951." The "pledge and allocation" referred to is found in Section 13 of the ordinance, and limits the use of the revenues of the system to the expenses of operation and maintenance of the system, for bond and interest redemption, and for replacement and improvements. A balance of about $35,000 remained in revenues derived from parking meters. But the ordinance did not authorize use of these funds to acquire lots for off-street parking.

The city's budget for the fiscal years 1951 and 1952, adopted prior to adoption of the ordinance, contained no appropriation for off-street lots or development of parking areas. The city

claimed that a separate item "reserve for bond issue" ($60,000) could be considered as appropriation to pay for parking lots. The supreme court held that upon elimination of provisions authorizing the bond issue from the ordinance, this so-called reserve became ineffective.

The city sought to transfer an unappropriated and unexpended sum of about $40,000, the residue from a veterans-housing fund, to the general fund and use this money to pay for parking lots. This they sought to do under a provision of the city charter, authorizing transfer of certain funds. However, under the provision in question, the city commission might transfer only an unencumbered balance of any appropriation "to a purpose for which the appropriation for the current year has proven insufficient or may authorize a transfer to be made between items appropriated to the same fund," according to the court. Since there was no appropriation, insufficient or otherwise, to a fund to pay for off-street facilities in the budget, such a transfer could not be made.

The city contended, and the trial court agreed, that no budgetary appropriation was necessary, since the enabling statute (Michigan Statutes Annotated, 1949 Rev. Sec. 5.2426(1)) authorized a city to acquire and operate parking facilities. However, the city charter contained provisions for adopting an annual budget and making appropriations. But the court was of the opinion that to state (as the city did in effect) that an appropriation was unnecessary because the purpose was lawful would deny the necessity for complying with such city-charter provisions. If carried to its logical conclusion, according to the court, the city commission could do anything that was within its powers without having included an appropriation therefor in its budget, or making an appropriation therefor in accordance with charter requirements. This would deny the public any opportunity to hear or object to such use of public moneys. Hearings on the budget were mandatory under the charter.

The court concluded that the city commission did not comply with the provisions of the city charter in appropriating the veterans-housing fund, or funds received for on-street parking, to pay for off-street facilities.[31]

Leasing Space in Parking Facilities for Nonparking Use

A great deal of controversy has taken place on the subject of whether a municipality may legitimately lease space for commercial purposes in parking facilities constructed and operated with public funds. During the year, the Supreme Court of Pennsylvania handed down two decisions to the effect that the Public Parking Authority of Pittsburgh could not lease space for the sale of gasoline, automobile accessories, automobile repair and service, or any other garage service. These decisions revolve about specific prohibitions against the designated commercial uses, so the principal issue is really not involved (Midtown Motors, Inc., et al. v. Public Parking Authority of Pittsburgh, 94 A. (2d) 572, and Clark v. Public Parking Authority of Pittsburgh et al., 94 A. (2d) 576, both February 9, 1953).

In the first case the injunction sought pertained to a condition contained in a lease entered into between the authority and the parking service corporation, for the purpose of providing off-street-parking facilities. The condition to which objection was made provided that

[31] See Memorandum 65, March 1953, Committtee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 194.

the parking service corporation would maintain adequate facilities for the supply of gas and oil and the performance of other garage services.

The enabling act under which the authority was established (Public Authority Law of June 5, 1947, P.L. 458, as amended, 53 P.S., Sec. 10271, et. seq.) specifically prohibited the authority from engaging in the sale of gasoline, automobile accessories, repair and service, or any other garage service, or any commodity of trade or commerce. The authority and the parking-service corporation contended that while the authority itself did not possess the right to engage in these activities, its lessee did. The supreme court pointed out, however, that the provision prohibiting the sale of gasoline and other products was included in the enabling act for the express purpose of ameliorating the impact of the provision of parking facilities by the authority on private enterprise. The effect of the statute upon private enterprise would be precisely the same whether the prohibited sales and service were made by the authority or by the lessee. Furthermore, under the terms of the lease, the authority was entitled to 60 percent of the revenue from the sale of gas, oil, services, etc., and to that extent, at least, it was apparent that the authority sought to engage in the prohibited business.

The court also rejected the argument that the premises of the authority were not bound by the prohibition. The authority was prohibited from these activities, hence neither anyone on the premises nor the lessee might do what the authority itself was forbidden to do. It was plain from the clear and unquivocal words of the prohibition, said the court, that it was the legislature's intent to prevent the authority, or those privy to it, from entering into competition with merchants dealing in goods of trade and commerce.

However, the court approved the ruling of the court below to the effect that in cases of actual emergency the authority, or its lessee, was not prohibited from supplying the necessary means of moving automobiles in order to prevent obstruction in the operation of the premises.

In discussing the enabling statute, the court called attention to a clause authorizing public parking authorities to lease portions of the first floor of such facilities for commercial use where, in the opinion of the authority, such leasing was desirable and feasible in order to assist in defraying the expenses of the authority. Because of the general prohibition against the sale of any commodity of trade or commerce, the court considered that it might be doubtful whether or not the term "commercial use" contemplated the sale of goods, wares, and merchandise. Such commercial use might be restricted to banks, railroad and airline ticket offices, barber shops and the like, were no goods and merchandise were bought and sold. Such space was apparently available in this case. But because no attempt had been made thus far to carry out the provisions of the first-floor clause and because this question was not before the court, judgment was withheld.

The findings in this case were held to be applicable in the second case (Clark v. Public Parking Authority of Pittsburgh), where it was contended that a sublease between the authority and the Mellon Square Garage, Inc., was void because it was effected by private negotiation without competitive bidding. This, it was asserted, was in violation of a provision of the enabling statute, which provided that all construction, reconstruction, repairs or work of any nature made by any authority, where

the entire cost, value or amount of such construction, reconstruction, repairs or work including labor and materials exceeded $500, must be done only under contracts entered into by the authority with the lowest bidder.

The court answered this argument by observing that this prohibition applied only to "construction, reconstruction, repairs, or work." Nowhere was it stated that there must be bidding for the privilege of becoming a subtenant. In the absence of such a provision, said the court, the authority's right to privately negotiate would be unquestioned; indeed, such practice would appear to be essential. The authority had a fundamental interest in the integrity and ability of its subtenant. The possibility of enhanced financial return from a subtenant engaged in such a purely nonprofit public enterprise, because of a higher bid, would appear to be relatively inconsequential, according to the court.[32]

Other Parking Ordinances

The courts of at least three states ruled on the validity of other parking ordinances during the year. Various points of contention were involved in the cases brought before the courts. In Florida, the supreme court held that an ordinance regulating construction of parking garages was invalid because no standards for administration were included. The New Jersey Supreme Court upheld the validity of two municipal parking ordinances authorizing the acquisition of land for municipal parking facilities. In Vermont, the state supreme court held that a parking-meter ordinance enacted by the City of Burlington was not a revenue measure and was not unconstitutional.

Florida. The ordinance here in question was enacted by the City of Miami Beach, for the purpose of regulating the construction of multiple-level automobile-parking garages. The controversial portion of the ordinance provided that in a designated area no multiple-level garage might be built except upon "approval and permit by the city council . . . after a public hearing at which due consideration shall be given to the effect upon traffic of the proposed use . . ."

An application to construct such a parking garage at a particular location was twice refused by the city council and a subsequent attack on the ordinance by the applicant was dismissed by the Circuit Court of Dade County. Upon appeal, the state supreme court held the ordinance invalid for failure to provide definite rules for the guidance of the authorities in the execution of their discretionary power (Drexel et al. v. City of Miami Beach, 64 So. (2d) 317, February 24, 1953).

Records of the hearings held by the city council indicated that no discussion of the traffic problem took place nor did testimony given the chancellor in the lower court indicate that any consideration had been given by the council to the effect upon traffic of the proposed use. However, the supreme court stated that its decision was based not on what had actually happened in this case but on the provisions of the ordinance itself.

This ordinance, said the court, could easily become an instrument of discrimination by a majority of the councilmen giving what each might think "due consideration" to traffic problems and thereafter denying a permit in one instance while granting a permit in a less meritorious case, though acting conscientiously in both. This was possible because no uniform rules or regulations were defined to prevent the influences of whim or caprice. The or-

[32] See Memorandum 66, April 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 200

dinance contained no guide whatever to aid the councilmen in deciding whether or not a permit should be granted. Each councilman could decide for himself whether he had duly considered the traffic problem, and when a majority of the council members concluded that such consideration had been duly given and that the proposed building would complicate traffic conditions, the composite thought could develop into power to take away property.

The court could find no pattern or uniformity of plan in the ordinance to save the property owner from arbitrary discrimination or capricious action or even one that would protect the councilman from the charge that he was acting in such fashion.

Thus the supreme court held the part of the ordinance under attack invalid.[33]

New Jersey. The ordinance in question was adopted in 1952 for the purpose of enabling the City of Trenton to acquire lands by purchase or condemnation for the purpose of making the same available for public parking. The cost of the land was to be raised by the issuance of bonds in the manner provided by law. In the event that negotiations with landowners failed, the city was authorized to institute condemnation proceedings. This procedure was authorized by Section 40:60-25.1 of New Jersey Statutes Annotated (Chapter 138, Laws of 1942) which permits municipalities to provide, by ordinance, for the acquisition of lands for public parking purposes and to pay for the land with funds raised by general taxation or by the issuance of bonds.

Another section of the statutes, Section 40:56-1.1, New Jersey Statutes Annotated (Chapter 261, Laws of 1949), authorized municipalities to provide facilities for parking purposes by the acquisition and improvement of real property and by the construction of buildings and structures.

The owners of certain lots included in the ordinance asked the court for a judgment declaring the ordinance invalid and in violation of their personal, legal, and constitutional rights (Lenzner v. City of Trenton, 91 A. (2d) 896, October 8, 1952).

The property owners contended that Trenton, in creating a parking authority by a 1948 ordinance, under the provisions of Section 40:11A-1 *et seq.* of the statutes (Chapter 198, Laws of 1948), had divested itself of the authority which it might otherwise have had in the rights and powers now vested by law in the said parking authority. The city was without power or legal authority to enact the 1950 ordinance, which stated specifically that it was based on Section 40:60-25.1 of the statutes.

The Superior Court of New Jersey stated that it considered it entirely reasonable and conceivable that the municipality would employ each of the three methods provided for by the statutes over a period of time. This would seem to be legislative intent, inasmuch as the three statutes differed substantially, although all provided for parking facilities to be operated by a municipality or a corporation created by it. All of the enactments were apparently in full force and effect, and the choice of which act to proceed under was up to the governing body of the municipality. The court found the present ordinance a valid exercise of the legislative rights delegated to municipalities by the state.

The property owners also averred that it was the intention of the city, by means of this ordinance, to acquire their property without making just compensation therefor and, further,

[33] See Memorandum 69, July 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 213.

that the ordinance would permit the taking of their property for a private use and for the benefit of a limited group of private interests.

To this the court replied that the right of individuals in the ownership of property must, of necessity, bend to the requirements of public use through the exercise of the right of eminent domain. The court must take judicial notice that (1) the constantly increasing use of motor vehicles by the public had caused and would in the future cause serious traffic congestion and (2) parking of motor vehicles on the streets greatly contributed to this congestion and to the resultant effects thereof which of necessity endangered the health, safety, and welfare of the general public. In looking at the objects, purposes and results contemplated by the ordinance, the court stated that it must deem the proposed taking for a public use necessary and proper, legal, and constitutional.

The court felt that it must interpret the ordinance as indicating that it was the intention of the governing body, if negotiations for purchase failed, to follow the principles of eminent domain and to have in mind that when the land was taken the owners were entitled to recover for all damages, present and prospective, which might be known or reasonably be expected to result from the improvement.

The court concluded that the ordinance was not in contravention and violation of the personal, legal, and constitutional rights of the plaintiffs.[34]

In a decision handed down on July 1, 1953, (Walsh et al. v. City of Asbury Park, 98 A. (2d) 113) the Superior Court of New Jersey held that a city ordinance authorizing the acquisition of certain realty to provide parking facilities could not be declared invalid because of the possibility that the cost of acquiring all realty needed for the project might be more than estimated and that the project might be abandoned.

The ordinance in question, enacted by the City of Asbury Park on January 2, 1951, authorized the acquisition, as a local improvement, of certain lands to provide parking facilities, pursuant to statutory authority contained in New Jersey Stats. Ann., Sec. 40:56-1.1, 1.2, and 1.3. The ordinance estimated the maximum amount to be raised from all sources at $246,500 and provided for issuance of bonds in the amount of $234,500, the difference having been provided for in the city's budget. The bonds had been issued and sold, a substantial part of the real property described acquired and improved, and as of the date of institution of present proceedings, property so acquired was in use as a public parking area.

Walsh and others, the property owners attacking the validity of the ordinance, owned land authorized to be acquired for this project. The present complaint was filed shortly after they were notified that testimony would be taken for the purpose of making an award for real estate owned by them.

The property owners alleged that the city (1) had not and would not acquire certain other lands embraced in the ordinance; (2) was abandoning a portion of the improvement without repealing the ordinance; (3) violated the ordinance by proceeding against their property and by abandoning its proceeding against the remaining property; and (4) had no power nor legal authority to condemn a part of the property described in the ordinance without condemning property therein described in its entirety.

The property owners insisted that the

[34] See Memorandum 63, January 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 186.

funds raised would be insufficient for completion of the project and that the city, although it disavowed any intention of abandoning the project, must necessarily do so as to some of the lands described in the ordinance for want of funds.

The court observed that the present attack rested upon the asserted premise that a public improvement program, valid in its inception, became fatally defective if the estimated cost should prove less than that ultimately needed for the completion of the project and that a property owner, although funds were available for purchase of his land, might prevent the taking of his property because of an anticipated shortage thereafter. The court found it apparent that, if this view were adopted, public improvements would be perilous adventures and huge losses would be sustained by the collapse of partially completed projects. The property owners suggested that this difficulty would be obviated if all property acquisitions were simultaneous and the total costs thus ascertained at a given moment, but they did not indicate how this could be done. The court found nothing in the circumstances supposed by the property owners to prevent enforcement of the ordinance as far as their property was concerned.

The landowners referred to Section 40:56-9 of New Jersey Stats. Ann., which authorized abandonment of an improvement where the aggregate awards for damages were so large as to make the improvement unwise in the judgment of the governing body at any time before confirmation of any award for real estate to be taken thereunder. Although this section permitted abandonment in the circumstances described, the court stated this neither required simultaneous proceedings where more than one parcel was involved nor prohibited amendments to meet changing conditions or errors in forecast.

In this case the landowners relied upon the decision in the case of Gehin v. Board of Com'rs. of City of Newark (182 A. 869, (1936)): The Statutory mandate that an ordinance authorizing a bond issue contain "a statement of the maximum amount of money to be raised for the purpose" requires a statement of the "sum of money known to be necessary to complete." It is not satisfied by a statement of a sum known to be less than that required, which required sum, in that case, would have exceeded the debt limit. The present court did not consider that case authority for the proposition that invalidity would set in when subsequent events revealed the forecast to have been imperfect.

Judgment of the trial court, holding the ordinance in question valid, was affirmed.[35]

Vermont. This is a case in which a car was parked overtime in a metered zone in the City of Burlington. The driver protested his conviction on the grounds that the ordinance went beyond the powers granted to the city in its charter and was unconstitutional because its purpose was to raise revenue under guise of police regulation. The state supreme court, upon appeal, held that the ordinance was not a revenue measure, was authorized by charter, and was not *ulta vires* or unconstitutional as claimed by the accused driver (State v. Douglas, 94 A. (2d) 403, January 13, 1953).

Section 12 of the ordinance in question provides: "The fees required by this ordinance are hereby levied as a police regulation and inspection fee to cover the cost of providing parking

[35] See Memorandum 72, October 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 223.

meters and maintaining the same, allotting and marking parking spaces, providing regulations and control of traffic moving in and out of, and parking in, said parking spaces and the zones herein created, sweeping and cleaning the streets in said zones and clearing the same of snow, marking said streets and maintaining directional and other signs therein, and any and all other expense pertaining to policing, regulating, and controlling traffic in and adjacent to said areas."

After the meters installed by the city were paid for, three fourths of the revenue was allocated to the police department, and one fourth to the street department, in accordance with a decision of the city council. Funds thus transferred to the street and police departments were not segregated.

The faults of which the accused complained were not, according to the court, in the ordinance but in the disposition of the parking-meter revenue by the city council and in its use by the police and street departments. The constitutionality of the ordinance, however, was to be tested not by what had been done under it, but by what might rightfully be done. Applying that test, the court found the ordinance in question neither exceeding the authority of the city nor unauthorized. Every presumption must be made in favor of the constitutionality of a statute, according to accepted doctrine. It should not be declared unconstitutional without clear and undeniable evidence that it infringed the paramount law. The ordinance stated that parking fees were levied as a police regulation to cover the cost of regulating the parking of vehicles. The city authorized such an ordinance, and the court could not go beyond the declaration of purpose expressed, in the abscence of evidence tending to show that the declaration was a sham.

The court called attention to the fact that power to regulate the use of streets and highways by restrictions on the parking of vehicles was universally recognized. Its reasonable exercise had been consistently upheld. The fact that revenues realized from coin-operated parking meters might be incidentally in excess of the costs of installation, operation, repair and supervision did not make the law unconstitutional.

The Burlington City Council had undertaken to correct the serious situation brought about by the parking of automobiles on its streets. It could not be expected to foresee the amount of revenue resulting. It had and must have some right of experimentation. In a broad sense every ordinance which required payment of money was revenue producing, but this did not invalidate the ordinance as a regulating one, if it clearly appeared that the city was seeking to compel the persons who caused the expense to pay for it.

The facts indicated, according to the court, that a large part of the revenue obtained from the parking meters had been used for repair of meters, painting of parking spaces, traffic signs, snow removal, etc., as well as $5,000 for off-street parking. Parking-meter revenues had greatly increased since installation of the meters, but it could not be said that it was comtemplated that excessive revenue would result when the ordinance was adopted. The court was satisfied that the ordinance was not a revenue measure.[38]

Parking Facilities Through Zoning

Within the past year, Chicago enacted one of the most-comprehensive zoning amendments relating to the provision of parking facilities for new or substantially altered structures. The city's ap-

[38] See Memorandum 68, June 1953, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 207.

proach to the problem was most scientific. Standards included were developed only after painstaking field research on the matter. A report on this experience was made at the open meeting of the committee during the 1954 Annual Meeting of the Highway Research Board by Robert J. Kelly, parking superintendent of Chicago. Kelly's paper, "The Zoning Approach to the Chicago Parking Problem," is reproduced in full in this report (see page 61).

Pomeroy's paper, "Bringing Zoning Up to the Automobile Era," mentioned earlier in this report, also includes some interesting data on the provision of parking facilities through zoning.

INFORMATION INTERCHANGE

During the year 1953, ten monthly memoranda were issued by the committee through the Highway Research Correlation Service. These memoranda contain digests of new laws, court decisions, administrative practices, and other items of interest. Memoranda numbers and the month of release are as indicated below:

Committee Memorandum No.	HRCS Circular No.	Month
63	186	January
64	190	February
65	194	March
66	200	April
67	203	May
68	207	June
69	213	July
70	216	August
71	219	September
72	223	October

Analysis of Parking Requirements in Zoning Ordinances·

The report "Parking Space Through Zoning," was published in 1950 as *Bulletin 24* of the Highway Research Board. It reported that as of that date, there were 155 local zoning ordinances which had requirements for the provision of designated amounts of parking space in connection with varying property uses. The study contained an analysis of each of these ordinances, together with considerable supplementary materials. Included also were suggested standards, based upon the needs, involving the amount of space required for various uses.

In response to the need, many additional municipalities have enacted zoning ordinances containing parking requirements, since 1950. The committee therefore thought it appropriate to bring some of the factual material in *Bulletin 24* up to date. This new material was published by the Highway Research Board in its *Bulletin 99*, "Parking Requirements in Zoning Ordinances."

As of August 1954, the committee had isolated a total of 311 municipalities with ordinance provisions relating to the provision of parking space through the zoning mechanism. Although the requirements of all of the ordinances are summarized in the tables in *Bulletin 99*, this material does not, of course, supercede *Bulletin 24*, but should be looked upon merely as a supplement to it. The committee hopes that *Bulletin 24*, together with *Bulletin 99*, will continue to be useful to the many municipalities which, in increasing numbers, find themselves concerned with this problem.

Bringing Zoning up to the Automobile Era

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● IN a period in which zoning practice is undergoing an advance second in extent only to that by which, nearly forty years ago, it emerged from largely fragmentary regulation of nuisances and became comprehensive districting, it is difficult to do more than report what is happening. Much of this paper, therefore, may be said to consist of reiterating the established and elucidating the obvious. Beyond this, it will endeavor to discuss some zoning ideas that may sound completely unacceptable at this time but that may, in the long run, prove to be the key to the way to salvation, in a day in which we have actually only begun to realize the automobile is not a passing fancy and in which hard realization must be accompanied by an understanding that the automobile may be only a transitional device of transportation.

Let us first deal with the established and with the obvious.

The established, so far as considerable if not general acceptance is concerned, is that among the zoning requirements of space accompanying particular land uses must be included provision of the space for the accommodation of the motor vehicles without which such land uses could not be conducted either efficiently, *per se,* or satisfactorily as a part of the land-use composite of the community. We are, of course, talking about the provision of off-street automobile-parking space and space for the loading and unloading of goods in connection with various land uses. It is not necessary to talk to this group about the requirement of such provision under zoning. The compilations and analyses by David R. Levin, of the Bureau of Public Roads; by the Eno Foundation; by the American Society of Planning Officials; and by others have amassed a storehouse of information of great value. The general public has become sensitive to the parking problem. Public sensitivity is usually the precurser and the goad of official planning action, which is traditionally timid and largely retrospective. So acute has this sensitivity become that it is not likely that a new zoning plan or the revision of an existing one will be undertaken anywhere in the country from now on without the inclusion of some requirement with respect to off-street-parking space.

Such requirements range all the way from a prototype consisting of the required provision of off-street-parking space for intensive traffic generators, e.g., theaters, sports arenas, to comprehensive requirements with respect to all land uses. The former are consistent with the forerunners of zoning that did no more than exclude acute nuisances from residential districts, and no more than this analogy can be claimed for them.

The latter the comprehensive approach to the problem, is exemplified in the provisions of the new zoning ordinance of Garden City, Long Island, New York. This ordinance first enunciates a municipal policy with respect to off-street parking and then implements the policy by specific require-

ments. The statement of policy begins by relying on the statutory purposes and considerations of zoning, and is set forth in the following language:

> The Board of Trustees[1] hereby finds and determines that in order to lessen congestion in the streets, protect the public safety by preventing undue hazard to vehicular and pedestrian traffic, serve the public convenience, and aid in bringing about the most-appropriate use of land, it is necessary that space be provided for the safe and convenient off-street parking of all motor vehicles used in connection with all the uses of land and buildings in the village. In furtherance of this purpose it is hereby declared to be the policy of the village (a) that for residential and institutional uses and uses involving public assembly such space shall be provided in connection with and appurtenant to such uses and (b) that for commercial and industrial uses such space shall be provided in municipal parking fields to an extent that is consistent with sound municipal economy, and that space that is needed in accordance with the aforesaid purpose in addition to that that is contained in such fields shall be provided in connection with and appurtenant to the establishment or enlargement of the uses needing the same.

Then follows language that is prefactory to the explanation of the methods used in implementation of the policy:

> The requirements as to off-street parking space that are specified in the schedule contained in Article V[2] have been devised in conformity with the aforesaid policy of the village and for the following reasons.

The regulations for residential districts are in the form of a specific formula, the explanation of which is as follows:

> The requirements with respect to off-street parking space for dwellings are specified in terms of the relation of the required space to numbers of dwelling units in order to assure the provision of adequate and convenient space for the motor vehicle used by the occupants of such dwellings and visitors thereto.

The specified requirements for one-family dwellings call for one space per lot, with provisions as to the nature and location thereof: (1) either completely enclosed or completely unenclosed and (2) located in the rear yard only, unless provided in a garage integral with the dwelling; and for other than one-family dwellings 1¼ spaces per dwelling unit, thus providing off-street space for visitors, as well as for patrons of professional offices permitted in apartment buildings.

The regulations for institutional uses and uses involving public assembly, whether requiring special permits from the Board of Appeals or permitted as a matter of right, are as follows:

> The requirements with respect to off-street parking space for institutional uses and uses involving public assembly provide that the required amount of such space shall be determined by the Board of Appeals, with the advice of the Superintendent of Public Works, in order to permit consideration of the type, size, nature of operation, location, and site plan of each use as a means of ascertaining the amount of space that will be adequate to serve the same.

The foregoing method was selected in preference to formulas relating the required parking space to floor area, number of seats, number of beds, etc., because of the feeling that inflexible formulas might not fit the circumstances of particular cases. The administration of the government of Garden City is of exceptional capability and the exercise of the functions of the board of appeals of the village is characterized by a competence of the highest order. In the absence of such a favorable situation, there might well be a question as to whether the disabilities of an inflexible schedule of requirements are greater or less than possible lack of skill and consistency on the part of a board of appeals. If statutory or other controlling authority permits, consideration might be given to delegating to the planning board the determination of required space in particular cases.

With respect to commercial and industrial uses, the new Garden City ordinance relates the zoning requirements

[1] The governing body of the village.

[2] The schedule contains the regulations for the various districts established by the ordinance.

to the municipal program of provision of parking fields. The village properly recognizes that in a central business district, off-street parking must, in the main, be provided by common action, i.e., by the municipality itself. In pursuance of this policy, the village, with a population of about 17,500, now has effective parking spaces in municipal fields for about 1,800 vehicles and owns land that, upon improvement, will provide for about 2,000 more. Even with this unusually competent municipal parking field program, the village is determined to implement its stated policy of assuring off-street space for the parking of all vehicles in connection with all land uses in the village, and consequently lodges in the board of trustees (the governing body) the determination of the space required in each case, explaining this as follows:

> The requirements with respect to off-street parking space for commercial and industrial uses provide that the required amount of such space be determined by the Board of Trustees in order to permit consideration of the type, size, nature of operation, location, and site plan of each use in relation to parking space conveniently available in municipal parking fields so as to determine what amount of parking space, if any, shall be provided directly in connection with the use under consideration and what amount, if any, should be added to the capacity of municipal parking fields.

Such a fixing of administrative discretion in the legislative body would be of questionable wisdom in a large municipality. It should be remembered, however, that in the entire country there are less than 500 municipalities with populations of over 10,000, while there are more than 16,000 of less than this size, of which more than half have populations of less than 1,000.

In any event, if the zoning requirement of off-street parking space is to be linked with a municipal program of off-street parking, administrative determination of the amount of off-street space to be provided privately should be lodged in, or should be in direct and effective appurtenance to, the body having jurisdiction over the municipal program.

It should be observed here that any such delegation of administrative authority, to whomever it is assigned, must be subject to the application of appropriate standards. In the Garden City ordinance such standards are found primarily in the aforesaid basic statement of policy and, with respect to determination by the board of appeals, in the provision that said board shall have power to take the following action:

> (a) with the advice of the Superintendent of Public Works, determine the amount of off-street parking space required for certain uses as provided in the schedule contained in Article V . . . (b) subject to the approval of said Superintendent, determine the design of such places and the means of ingress and egress for the same; and (c) require such screening of such places as the Board may deem to be necessary in order to prevent detriment to neighboring property or annoyance to the occupants thereof.

The foregoing provision exemplifies an important procedure in planning administration: *interdepartmental coordination.* If the function of planning in a particular municipality is confined to the planning board alone, that municipality is not doing effective planning. Planning in a municipality is essentially a function of the legislative and administrative arms of government, to which the planning board itself is only advisory. When any administrative authority is devolved on the planning board, or on the board of appeals in its exercise of original jurisdiction,[3] provision should be made for proper coordination with the governmental functions having primary operating authority.

The provisions of the new Garden City ordinance with respect to off-street

[3] As distinguished from its appellate functions of (1) deciding questions of interpretation on appeal and (2) granting adjustments in cases of unusual conditions, by reason of which the strict application of a particular provision of the zoning ordinance would result in "practical difficulty or unnecessary hardship."

loading-and-unloading space parallel the foregoing requirements as to parking space. In residential districts the loading-and-unloading space may be identical with the required parking space, while the determination with respect to other uses is made in individual cases. Again, such intimate requirements would not operate satisfactorily in a city of great size; but, still again, we are talking about the overwhelming majority of all municipalities in the country.

Still dealing with what may be regarded as established, we may report that zoning consistent with the requirements of the automobile era is not only concerned with the provision of off-street-parking and loading-and-unloading space but with access to it. The problem is not difficult in one-family residential districts, in which access is had by a driveway to parking space customarily permitted only in the rear yard or in a garage attached to the dwelling. Provisions applying to other means of access, such as that the door of a garage opening on an alley shall not be nearer than a specified distance, say 15 feet, to the center of the alley, are too simple to require attention in this paper.

The problem is more complicated in multi-family districts and in business and industrial districts. Formulas such as those relating to distance of driveways from street intersections are fairly obvious. Beyond such requirements as these, however, formulas must give way to administrative discretion in passing on site layout.

Even if a formula is used as a basis for the requirement of off-street parking space for institutional, business, and industrial uses, this should be supplemented by the delegation of (1) administrative authority, preferably to the official responsible for street safety, with respect to the location of driveways giving access to parking space (this authority can usually be exercised through standard rules) and (2) administrative authority, preferably to the planning board, or to the board of appeals with the advice of the planning board, with respect to the site layout of developments involving groups of buildings.

The latter authority should specifically be applicable to (1) the location of both required and any additional off-street spaces for parking and for loading and unloading and (2) the location, width, and other characteristics of driveways giving access thereto.

In the vein in which this paper began, we have now proceeded from the established to what should be the obvious. Here we are not dealing with the automobile as an isolated phenomenon but as one of the dynamics of patterns of community development in our own day.

It certainly should be clear that the era of the automobile calls for systems of functionally differentiated streets.

The basic functional differentiation is between streets used primarily for access to abutting land and those used (1) additionally, or (2) primarily, or (3) exclusively for the movement of traffic other than that directly destined to abutting land. Within the foregoing description lies the whole range of traffic rights-of-way, from cul-de-sac streets serving only for access to half a dozen or so abutting lots to great freeways and parkways with no direct service relation to adjacent land. Such differentiation can be achieved in the basic planning of areas of new development, i.e., areas in which "acreage" is given an urban pattern through subdivision or other intensification of use.

In areas in which development has already taken place, i.e., in areas pre-

viously subdivided from an acreage status to a town lot layout, it will usually be found that the rights-of-way, so far as their physical characteristics are concerned, are either functionally undifferentiated or are differentiated in inconclusive degree. The true basis of functional differentiation is not width but the degree of intimacy between the traffic way and abutting land use, ranging from close proximity in the case of exclusively access streets to separation by spacious insulating landscaping in the case of great primary traffic thoroughfares.

With respect to previously established land-development patterns, zoning can be little more than a palliative, but it is a tremendously potent one. With limited retroactive exception, zoning applies only to prospective uses. For these, it should apply setbacks, i.e., front-yard requirements, in relation to the traffic function of the street. This can be determined by the status of the street, if this be an appropriate basis of distinction, such as with respect to whether or not it is a county road or a state highway, for example, or preferably, with respect to its designation on an established plan of thoroughfares as part of an overall master plan of the community.

Such a varied application of front-yard requirements in a zoning district of a particular classification does not violate the customary statutory requirement that the regulations for each class of district shall be uniform. This statutory requirement does not mean that the regulations in a particular district classification shall be identical for all lots but that the rules shall be uniform. Front-yard requirements, then, applied differentially with respect to streets of various statuses, are entirely within the uniformity rule of the statute.

It can be said, as a general guide, that zoning regulations applied to existing thoroughfares should seek to apply front-yard-depth requirements (i.e., setbacks) with increasing severity in relation to greater existing and potential traffic importance of the particular thoroughfare. With respect to residential development, space serves as an insulator, insofar as it can, between the serenity of residential occupancy of the land and characteristics of traffic that are in conflict therewith. For commercial development, space contributes toward necessary provision for off-street parking and facility in the provision of access thereto.

Zoning can markedly affect the quality and appearance of land development along thoroughfares of the traditional pattern, i.e., with the abutting land having direct access to the roadway. The use of the land abutting a thoroughfare should, of course, be subject to regulations appropriate to the general neighborhood area.

Given adequate control of access, there is no roadside problem with the residential use of adjacent land. When it comes to roadside commercial or industrial development, however, the normal use of land in relation to the general developmental pattern of the neighborhood becomes subject to the show-window impact of its situation adjacent to a corridor of moving traffic. If signs on an adjacent permitted use have the purpose of identifying the use, and do so with restraint, well and good: If the use is permitted, it has the right of identification. As has been well established in numerous court decisions, however, signs beyond such an identification purpose are in a different class; they are, in effect, a use of the highway rather than of the land on which they are situated. The following principles may be regarded as established:

1. Roadside signs having a purpose

other than the identification of permitted places of business are a separate form of business use and may be distinguished from identification signs and, by reason of their own peculiar characteristics, from all other forms of roadside business and may be regulated as such.

2. The zoning principle of classification of uses may be applied as among various types of business uses that may seek roadside locations, so as to permit those that are appropriate to the particular situation and to prohibit all others.

3. The show-window nature of the roadside justifies more-severe regulation of the nature and the appearance of roadside uses than might be justified with respect to the same or similar uses otherwise situated.

These principles call for (1) the limitation of roadside uses to those that are appropriate to the particular situation, whether residential, limited business, general business, or other; (2) stringent regulation of roadside advertising, either on permitted places of business or, particularly, apart therefrom, with complete prohibition of the latter indicated for all but concentrated business districts of high intensity; and (3) regulation of the appearance of roadside buildings, ordinarily calling for the exercise of administrative authority in passing on the design of proposed buildings and alterations thereof.

The foregoing principles, and that of greater setback of buildings in relation to the intensity of function of the thoroughfare, should be applied to existing general patterns of development, so far as possible. Their more effective application, however, comes in relation to new development. Here then should be the closest correlation of zoning measures, i.e., regulation of the nature and intensity of land use, with those relating to subdivision layout.

It should be axiomatic that, just as it can no longer be said, "A street is a street is a street," the layout of land development should be in accord with the intended use. Apparently, however, this principle must be reiterated. It may be that we shall not again see the land peddler's almost unbelievable sign in the boom days of the 20's in the Los Angeles area: "Home or oil—you win," and certainly not the nearby one the prophecy of which was realized all too soon with unexpected grimness: "Buy now; realize later." But last week I heard a so-called developer who was submitting a subdivision plat say that if he couldn't sell certain highway frontage lots for business purposes, he would build houses on them, in the naive assumption that the layouts of business and residential developments could be the same.

The automobile is not the basic reason why respective site layouts for residential and business use can not be the same. But, by reason of the conflict between traffic use of a thoroughfare and directly contiguous use of land, for whatever purpose, and by reason of the need for space for off-street parking for any land use, which conflicts and which needs apply with great difference as between residential and commercial development, the automobile has accentuated the necessity for adequate site planning for land development.

Newer ventures in zoning have been seeking to devise appropriate regulations for land-area design, as distinguished from lot-by-lot requirements. Among the more forward looking of these are the provisions of the zoning ordinance of the Town of Cortlandt,[4]

[4] The Town of Cortlandt is situated in the northwesterly corner of Westchester County. Its longer dimension extends for an overall distance of about 11 miles along the Hudson River (except for the City of Peekskill, surrounded on three sides by the town), beginning at a distance of about 33 miles from Grand Central Station in

in Westchester County, New York. That ordinance includes the customary lot-by-lot regulations applicable to areas previously laid out in traditional design. But it also prescribes site-planning regulations that are applicable to parcels of not less than a specified size in any residential district and to any development in certain specified business and industrial districts.

As to residential development the ordinance provides:

> The regulations applying to planned residential development in R districts are intended to permit flexibility in land areas design and dwelling types, within the general pattern of land use and population density of such R districts, for the purpose of bringing about arrangements of buildings and open spaces that will contribute to the desirability of living environment of the dwellings included in such planned development with respect to daylight, sunlight, air, privacy, choice of dwelling types, and general amenity.
>
> Any parcel of land in one ownership and having an area of not less than 15 acres may be used for planned residential development, including dwellings of any type, in accordance with a site plan approved by the planning board in accordance with the same procedure as that specified by law for the approval of subdivision plats, and subject to the following conditions.

Then follow the specific regulations. These include certain overall requirements as to density, minimum distance between buildings, required open space, and some other matters, within which wide latitude in site layout is permitted. There is no specified height limit, this being left to the design of the particular site plan.

The foregoing applies in any residential district. Site planning for commercial development is provided in a specific classification, that of a Designed Shopping District (designated as C-D). For such districts the ordinance provides:

> The regulations for C-D districts are intended to provide a means for the establishment of well-designed, efficient, and convenient retail shopping centers as a normal part of the intensification of land use that is occurring and will continue to occur throughout the town and infurtherance of the purposes set forth in Section 1, such centers to be established from time to time by amendments of this ordinance consisting of changes in the boundaries of districts, in appropriate relation to residential and other development as it may occur.

The same principle is used in the regulations for Designed Industrial Districts (M-D) as follows:

> The regulations for M-D districts are intended to permit and encourage commercial and industrial development that will be so located and designed as to constitute a harmonious and appropriate part of the physical development of the town, contribute to the soundness of the economic base of the town, and otherwise further the purposes set forth in Section 1, such districts to be established from time to time by amendments of this ordinance consisting of appropriate changes in the boundaries of districts.

The following provisions require site plan approval in both C-D and M-D districts, in addition to other regulations as to height and area:

> The location of main and accessory buildings on the site and in relation to one another, the traffic circulation features within the site, the height and bulk of buildings, the provision of off-street parking space, the provision of other open space on the site, and the display of signs shall . . . be in accordance with a site plan or plans or subsequent amendment thereof, approved in any case by the planning board in accordance with the same procedure as that specified by law for approving subdivision plats. . . . In considering any site plan hereunder the planning board shall endeavor to assure safety and convenience of traffic movement both within the area covered and in relation to access streets, harmonious and beneficial relation among the buildings and uses in the area covered, and satisfactory and harmonious relation between such area and contiguous land and buildings and adjacent neighborhoods.

The provisions of zoning regulations that relate to automobile parking and access thereto are important but only incidentally so with respect to the major thesis of this part of this paper. The important feature of such regulations as those of the Town of Cortlandt

New York. The unincorporated territory of the town (excluding the villages of Buchanan and Croton-on-Hudson) has an area of 34 50 sq mi and a population (1950) of 7,489

is the basic principle of land-area design, as appropriate to a day in which the automobile has required functionally differentiated street patterns and in which the latter call for land-development layouts that, in turn, are functionally differentiated. Again, the latter arise primarily from a growing understanding of what may be called the organic structure of the community; the dynamics of the automobile have insistently added a voice calling for such an understanding.

Here, indeed, zoning begins to fulfill its task, as prescribed alike by statute and by common sense, of encouraging "the most-appropriate use of land throughout the municipality." In recognition of this, the most-powerful planning purpose of zoning, the Cortlandt zoning ordinance sets forth the following among its basic purposes:

1. Guiding the future development of the town in accordance with a comprehensive plan of land use and population density that represents the most beneficial and convenient relationships among the residential, commercial, industrial, and recreational areas within the town, having regard to their suitability for the various uses appropriate to each of them and their potentiality for such uses, as indicated by existing conditions and trends in population, in the direction and manner of the use of land, in building development, and in economic activity.

2. Preserving within the general framework of said comprehensive plan the maximum (a) opportunity for the exercise of private initiative and choice in land and building and development, (b) flexibility in the application of sound public policy relating to land and building development and (c) opportunity for adaptation to changing conditions and unforeseen events, all in full recognition of the fact that, in general, the territory of the town is now lightly developed, but is undergoing gradual intensification of land use in response to developmental forces both operating within the town and exerting an influence on the town as a part of the larger community of Westchester County and of the New York metropolitan area. . . .

6. Aiding in bringing about the most beneficial relation between the uses of land and buildings and the movement of traffic through and the circulation of traffic within the town, having particular regard to the avoidance of congestion in the highways, streets, and roads in the town and the provision of safe and convenient traffic access appropriate to the various uses of land and buildings throughout the town. . . .

Here we come to the first jumping-off place in this paper. How simple were the days in which zoning felt itself limited to the prevention of obvious abuses —the traditional glue factory in a residence district. (In 31 years of planning practice I have never yet run onto a single example of a glue factory in a residential district, but the dismal prospect is still used as a horrible example by bright-eyed novices in zoning.) Who can decide the basic issues involved in the foregoing statement of planning purpose in the Cortlandt zoning ordinance? A city, village, borough, town, or township in the great New York metropolitan area—to use the most-complex multijurisdictional composite in the nation, but only the most complex among hundreds, nay, thousands throughout the nation—has exclusive control of land use within its boundaries.

The New York metropolitan area is divided among about 550 such local units of government, each enclosed within what the New Jersey Supreme Court, in a recent monumentally important decision,[5] referred to as "adventitiously located boundaries." Such boundaries do not encompass logically separable units of the demographic and economic composite of the entire intercommunity area. Yet the final responsibility for profoundly important decisions as to land use is lodged in governments operating exclusively within such boundaries and under the compulsion of assuring that the costs of governmental services required by additional land uses will be balanced by tax revenues resulting therefrom.

It doesn't make sense.

[5] Duffcon Concrete Products, Inc. v Borough of Creskill, 1 N J. 509.

Conscious of the main focus of this paper, we may ask where the automobile fits into all this. Again, the automobile is one factor among others. But it is one of the most-important factors determining the pattern of land use over a metropolitan, or intercommunity area. Gone are the days of centralized metropolitan development, with most of the intensive uses being located at or near the center and with gradually less-intensive development spreading outward, primarily along routes of rail transportation. That pattern began to break up in the 1920's, when people in a metropolitan area, shod with motorized wheels, were freed from the necessity of residential location in close proximity to suburban rail lines. Now, throughout the country, we are in a period of major redistribution of much economic activity, in which economic forces operate widely throughout an area occupied by a population composite regardless of how it may be jurisdictionally compartmentalized.

Insofar as zoning adheres fairly closely to what already is, it may evidence a considerable degree of consistency over an intercommunity area, even though it is individually determined by the individual jurisdictional components of that area. But such apparent consistency may be delusive. The impact of developmental forces is influenced by what already is, but it is certainly not confined to basic land-use patterns that reflect what has already happened and that, *per se,* can not forecast what is to come. When zoning moves beyond attempting to assure a degree of orderliness in what is, it must look for guidance not alone in what is likely to be but in conscious determination of what ought to be.

Developmental forces seek to range fairly freely throughout a metropolitan area, facilitated by the even-more-freely ranging automobile. These developmental forces, in their impact on land uses, are subject to drastic controls by a multiplicity of local governmental jurisdictions. The aggregate of the results of these controls, motivated by what seems important at the time to those in control at the time, and under the compulsion of balancing the municipal economy within polical boundaries as they are and as they will almost inevitably remain, will not necessarily constitute a satisfactory land-use composite.

There are basic elements of a land-use pattern for a metropolitan area—the location of major industrial areas and a broad pattern of population density—that can not possibly be determined by the aggregate of rather minutely fragmentized local action but only by aggregate action, i.e., by authority exercised by the aggregate of the local jurisdictions involved. That authority might be lodged in some jurisdiction directly responsible to the people, but more probably in an overall representative council, safeguarded against stalemate by provision for less-than-unanimous effectuating decision. The growing importance of the county in many metropolitan areas might lead to the lodging of basic authority in counties, with required coordination among them. Where state boundaries intervene, action under interstate compact would be required for other than voluntary coordination. The broad land-use plan resulting from such overall or aggregate action would serve as the basic pattern within which local zoning regulations could be devised by local authority in great variety of detail.

Before considering the major channels of movement that a land-use composite requires, it should be pointed out that whatever solution there may be to the traffic problem as now occurring, it does not lie alone in applying remedies

to thoroughfares themselves but also in measures designed to bring about sound basic land-use patterns.

A pattern of land use is only part of the future community, the attainment of which zoning should seek to facilitate. There can be no land use, except a vegetative type that has long ceased to exist in our civilization, without extensive communication and movement. It is well recognized in zoning that specific land uses should be required to provide whatever space in addition to that in the streets that these land uses require —space in yards and now space for automobile parking and for loading and unloading. It is likewise recognized that land development through the process of subdivision should provide the space for movement that such development requires—both in new streets and in the widening, where necessary, of existing streets.

That isn't all. It is also recognized, although not widely practiced, that all land development, even though not involving the specific process of subdividing, should respect the pattern of streets that the development of the community as a whole requires. This is accomplished in some states by the device of the official map and, in some others, by similar measures whereby future street lines are designated and all building is required to conform thereto.

With the exception of a rare instance of provisions requiring respect for mapped streets, none of the foregoing measures was in existence a half century ago, and their general use covers only a fraction of this period.

A combination of three factors has brought about the beginning of effective application of the fact that no land is held in private ownership except on grant from the sovereign, the people, and that all land is held subject to whatever limitations the welfare of the sovereign, the people, may require. The factors are: (1) a vast increase in the extent and complexity of urbanization; (2) the disappearance of the physical frontier and the general replacement of extensive opportunities for land exploitation by the necessity for reliance on investment capital, requiring long-term security based on long-term quality in land development, and (3) the concurrent growth of recognized social responsibility.

Up into this century this fact of sovereign ownership found expression only in the right of the people, through their government, to exercise eminent domain ("resumption of title" it is called in New Zealand) on the payment of compensation for whatever market value might exist for whatever the land might be used for, completely unrestricted as to use except for actually hazardous, noxious, or immoral purposes.

The mere statement of the foregoing is sufficient evidence of how far we have come since that concept was generally held. The rightful value of land is now recognized as being only that for the purpose for which it can be used under a comprehensive plan of limitation of use in the public interest. Whatever price may have been paid for land by the owner, whatever price he might obtain for it in a free market, he has a right only to its value for a purpose permitted under comprehensive zoning limitations.

The easy cliché that "land similarly situated must be similarly zoned" no longer has any semblance of the validity it was once thought to have. Parcels of land of similar physical character and similarly situated, *per se*, may be validly zoned for widely differing purposes, with greatly differing resultant values. The only clear right that an owner of land has, in the face of commu-

nity need, would seem to be the right to the continuation of the use to which the land was put at the time the community imposed on its future use limitations designed to serve the public welfare. Even this right is being increasingly recognized as not being unlimited but as existing only during whatever time is sufficient to amortize the investment in whatever improvements were made in connection with the use in question.

The statement of the foregoing considerations is a review of well-established zoning principles. It is set forth here for the purpose of trying to identify clearly what property rights are possessed by the owners of land as against the public interest. The public interest is not limited merely to assuring that particular land uses will not directly conflict with one another but extends broadly to the implementation of a comprehensive land-use plan. Such implementation, insofar as it consists of limitations on the use of land, must respect the actual rights of the owners but need do no more than this. It would seem, therefore, that land buying within the channels of movement required for the proper functioning of a comprehensive land-use plan could be limited to the uses existing at the time of the imposition of the limitation, regardless of how land not so located may be zoned in accordance with such a plan.

If such a limitation would appear to be beyond present acceptance (much as it was once thought that land-use controls now imposed by zoning were beyond the limits of the police power and could be accomplished only under eminent domain), it may be that the limitation of use would now require some proceeding in eminent domain. Similar limitations, for the preservation of "greenbelts," were established in Britain by the purchase of "development rights" under the Town and Country Planning Act, an instrument of policies established as a result of studies made by governments both to the right and to the left in political philosophy.

The formidability of such a device would exceed the need if we were talking about potential rights-of-way that were merely somewhat wider than ordinary highways. The need extends far beyond such an amplification, however. The freeway, turnpike, thruway, expressway, or whatever it may be called, is the type of thoroughfare now regarded as necessary to serve today's traffic needs. It is submitted that even these great routes, as they are now being planned and built, are doing little more than catch up with today's needs. They have the advantage of being severed from abutting land and more or less dissociated from systems of streets and thoroughfares existing as rights-of-way of the traditional pattern. But, in the main, they still thread fairly tight courses through communities that have been, or may become, developed to a nonrural intensity of use. And, in the main, they are laid out as if their present basic design would serve for all time to come.

In a day in which mankind has begun to unlock the fundamental storehouse of power of the universe itself, we can be certain only of one thing: the fallibility of our present predictions. We can not design communities and routes of travel and communication to serve them in accordance with what we do not yet know, and what we do not yet know will always lie ahead and will always render our best plans obsolete. The wisest thing that we can do is to try to keep out of the way of the future, and the only way in which we can begin to do this is to provide space—space that will be required in order to build over again, and again and again, all the major com-

munity facilities that we are now building or may build in the future.

In this concept, space for the channels of movement that are an integral part of any community composite must be ample beyond anything that we have yet thought to be necessary. Belts of open land up to 1,000 feet wide would probably permit whatever provision for movement that the future may require, without engaging in the repeated process of tearing the community apart to overcome our earlier deficiencies. Such belts, too, would permit landscaping that would provide complete insulation for neighboring land development, rather than thin, planted strips that neither provide adequate protection nor can be maintained against even minor changes in existing construction. Furthermore, these belts would afford considerable space for the provision of local recreation areas.

Impractical? The impracticality that we should fear most is that that relies too heavily on our own current wisdom and sells the future short.

Zoning today can probably do no more than aid incidentally in implementing such concepts. Whatever it can accomplish in so doing or in any of the other applications discussed in this paper, either now or in the future, the degree of its effectiveness will depend in great part on the extent to which it is not used alone but as one of that array of interlocking measures and devices that the community should employ for the purpose of guiding development in accordance with policies that the community has established. Whether these relate to the provision of facilities and services by the community itself or to the regulation of what is done privately to, with, and on the land, the automobile era calls for concepts and standards that are more than gradual adaptations of what has thus far been acceptable.

True practicality in this regard calls for a release of our minds from the limitations of what we have been accustomed to consider as practical, so that creative thinking may point the way into the future beyond the negligible distance that can be charted with any degree of assurance by mere statistical prediction.

Protection of Highways and Feeder Streets Through Subdivision Controls

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● ECONOMIC suffocation of our highways is costly in human lives and dollars. The time for vigorous coordinated action to cut these costs has long since come.

There are those who would solve all problems of highway protection by using the power of eminent domain to purchase sufficiently broad rights-of-way. This paper discusses a less-expensive measure of police power. But subdivision control is just one police-power tool; it needs to be integrated with others like zoning, limited-access laws, setback laws as such, official map laws, roadside obstruction laws and others, for effective results.

SUBDIVISION CONTROL

Subdivision control typically requires one who wishes to divide his land for sale or building development to have the land accurately surveyed and mapped and the map, usually called a "plat," approved by one or more official bodies before it can be publicly filed or recorded by the keeper of real-estate records. The number and kind of conditions that will be tied to the approval vary with the particular state enabling statute, the local ordinance, if any, and the efficiency and awareness of the public officials.

WAYS IN WHICH SUBDIVISION CONTROLS CAN BE USED BY HIGHWAY OFFICIALS

It is the thesis of this paper that some highway officials have not taken sufficient advantage of the subdivision-control tool. When raw land is being platted for development, the power to approve or disapprove the plat can be used to (1) require permanent setbacks and planting strips; (2) assure access protection even on nonlimited-access highways; (3) assure space for off-street parking; (4) control the angles at which side streets enter the main highway; and (5) assure adequate drainage, grading, and surfacing of streets within the subdivision. In addition, some have not been aware of the possibilities that this device offers for saving taxpayers a lot of money by requiring the subdivider to dedicate free of charge right of way strips not only for new streets but also for the widening of existing roads.

EXTENT OF USE OF SUBDIVISION CONTROLS

The *Municipal Yearbook for 1958* reports that of the 1,347 cities in the country with populations in excess of 10,000 at least 509 have adopted comprehensive subdivision-control ordinances governing the layout of streets, blocks, lots, and utilities. This is to be compared with 791 cities that have comprehensive zoning ordinances. Of these cities, 196 report that the counties in which they are located also have subdivision control ordinances. All states except Vermont have some kind of enabling act for subdivision control. Fourteen states are said to authorize subdivision controls out in the open country, either in all counties or just in those having more than a specified minimum number of inhabitants. There are several regional and city-county planning bodies with subdivision approval

authority, and at least three states (Michigan, New York, Wisconsin) require approval at the state level in some instances.

There is a marked tendency for state legislatures to extend subdivision approval authority out beyond the city limits. In 1952, according to the *Municipal Yearbook*, 143 cities had such extraterritorial power for distances ranging from ½ to 6 miles beyond the city boundaries, with 3 to 5 miles being the favorite distances. Zoning authority of cities is not usually extended in this way, so it becomes especially important to make fullest possible use of plat approvals in these fringe areas, especially for highway-protection purposes. Otherwise highway and land-use planners are likely to find structures built on newly platted lots right across proposed major thoroughfares or commercial development choking existing highways. Incidentally, some cities now require subdividers of land in these fringe areas to impose restrictions on the land which limits the use of the new lots in much the way a zoning ordinance would limit them if one were in force.

HOW INTENSIVE IS SUBDIVISION CONTROL?

There is an increasing tendency to require the subdivider to grade streets, or to grade and surface them, and to install sidewalks, water mains, sanitary and storm sewers, and to plant street trees. For example, of the 91 ordinances adopted or extensively revised since 1950, 41 require at least five and 51 at least four of the improvements just listed.

Today in many places in this country the following illustration would not be considered extreme.

Landowner Green wishes to divide 25 acres of raw land on the fringe of a city for purposes of building development and sale. Here are some of the regulatory hurdles he may be facing:

Surveying and Mapping Requirements

(1) A survey meeting high accuracy and detailed monumenting requirements; (2) a map drawn to elaborate specifications giving detailed information about street and lot dimensions, location of monuments, etc.; and (3) the filing of this map with the county recorder or register of deeds, but only after it has been approved as indicated below;

Community Planning Requirements

Approval of the map by one or more public bodies (I can think of a situation in Wisconsin where eight approvals from as many governmental units must be obtained). The public approval is forthcoming we will assume only if the officials are satisfied that: (1) the subdivision layout, street pattern, street widths, and lot size meet the requirements of the community's master plan, official street map, zoning ordinance or official judgment as applied in the particular subdivision; (2) 20 to 25 percent of the land has been given to the public for streets and perhaps an additional 10 percent for park, playground, or school purposes; (3) sanitary and storm sewers, water mains, sidewalks, electric and gas utilities, street lighting and street signs have been installed or their installation guaranteed by deposit of a surety bond or cash; (4) drainage has been adequately provided for and that none of the lots are too low for human habitation; (5) adequate land for off-street parking has been provided; (6) the land has been restricted with deed restrictions to protect the area until a zoning ordinance has been adopted or to give additional protections not possible under an existing zoning ordinance; (7) building lines, often called setbacks, are satisfactory and adequate service streets and planting strips have been provided to protect a state high-

way; (8) a strip along the abutting state highway has been dedicated for future widening purposes; and (9) all real estate taxes and special assessments have been paid.

This is not a complete list and it ignores the fact that the landowner may have to meet additional conditions, particularly as to deed restrictions and layout in order to get site approval from the Federal Housing Administration so that the lots or houses can be eligible for FHA mortgage insurance.

BACKGROUND AND HISTORY OF SUBDIVISION CONTROLS

Whence comes this kind of intensive regulation in midcentury America? Very early in our history legislatures passed measures intended to assure accurate maps of subdivisions and to compel the public recording or filing of these maps so that the boundaries of lots could be easily ascertained. Another type of early subdivision control was exercised through the adoption of official maps of existing and projected streets setting building lines. Then anyone who built beyond the established line took the risk that he would not be compensated for his structure in case of later eminent domain proceedings. Such maps were prepared for New York City, the Village of Brooklyn, and Baltimore under the impetus given city planning by L'Enfant's plan for our national capital. Pennsylvania cities used the device even before L'Enfant's day. At first courts were friendly to official map statutes, but by 1920 only the Pennsylvania and Connecticut courts were sustaining them. Since the Euclid case upheld zoning in 1926, it is common to accomplish such setback control directly through the zoning power.

A few states began providing for municipal approval of subdivision plats in the 1870's, usually without setting up any approval standards. At the same time Uncle Sam was permitting the laying out of literally hundreds of townsites on the public domain without any quality requirements.

Subdivision boom followed subdivision boom with the land developers able in most places to get away with murder —and murder the permanent land-use pattern of thousands of communities many of them did. The boom that finally busted free-and-easy subdividing wide open was that of the early 1920's. Suddenly the consequences of excessive and poorly planned subdivisions in terms of municipal costs, blighted neighborhoods, disillusioned homebuilders, narrow, inadequate streets that didn't mesh with older streets, became evident to many of our public officials. Several excellent studies in the late 20's and early 30's helped make us all aware of what had been happening on the fringes of most of our American cities. For example, Ernest Fisher reported in 1923 that for the metropolitan region of Grand Rapids, Michigan, with a population of less than 22,000, the total investment in vacant lots and public improvements for these lots was in excess of $26 million. (Fisher, Ernest M., *Land Subdividing and Rate of Utilization* (1932).

Now we have come a long way since the California Real Estate Association reported in 1928 that "out of the 48 states investigated, the committee found frank recognition of subdivision control only in . . . Michigan, New York, Ohio, Wisconsin, and Texas, and Maryland so far as the Washington metropolitan district is concerned." (Rush, Guy M., and Holbrook, Sumner W., "Subdivision Control Methods—A Nation Wide Survey," *National Real Estate Journal,* July 23, 1928, pp. 42-45)

STATE ENABLING ACTS AND MUNICIPAL ACTION

As already indicated, today all states except Vermont have some kind of a subdivision statute on the books. An excellent note in 28 Indiana Law Journal 544 (1953) indicates that in 16 states the enabling authority extends to the street pattern only. In the other states one is met by a confusing diversity of enabling authority empowering local communities to impose a variety of quality controls as a condition to plat approval. Sometimes these statutes require the municipalities to control the subdividing of land, sometimes they merely permit such control. Often before subdivision controls can be imposed, the state statute requires that a community master plan first be adopted. Technically, of course, a city, village, county, town, or township has no more subdivision power than is delegated to it by the particular state legislature.

But it is one of the peculiarities of regulation in this field that communities sometimes extensively control land developers without benefit either of enabling authority or comprehensive ordinances under them. Thus, the 1953 edition of *Municipal Yearbook* shows that at least 59 cities, which had no comprehensive subdivision ordinances in force, nevertheless require subdividers to install one or more major improvements. In a recent survey we made in Wisconsin, we found that of the 30 cities checked, only six had subdivision-control ordinances. Yet all under a mandate in the state enabling statute were presuming to check and approve, or disapprove, subdivision plats. A city may say to a developer, "All right, if you want us to take over the streets of your development and maintain them, or if you want us to extend water and sewer or other municipal services, then meet the following conditions—one through eighteen."

HOW HAVE SUBDIVISION CONTROLS FAIRED IN THE COURTS?

Unlike zoning, which affects numerous landowners at once, subdivision controls affect only the relatively few who desire to divide their land for sale or building development. Besides, the subdivider often finds it imperative to keep the good will of municipal officials for later developments. Or the expense of meeting the publicly imposed requirements can be passed on to the buyer of the lot or house. In any event there have been, as compared with zoning, a mere handful of subdivision control cases in the appellate courts. Most of them are summarized in two notes: 11 ALR (2d) 524 (1950) and 65 Harvard Law Review 1226 (1952). See also Melli, Marygold, Subdivision Control in Wisconsin, 1953 Wisconsin Law Review 389, 397.

By and large American judges have been friendly to subdivision controls, though occasionally a municipal action has been annuled as going beyond the power delegated by the state enabling statute. These controls have been upheld on a variety of grounds, the most important of which I shall now try to summarize. The older cases placed considerable reliance upon the state's power to condition the filing or recordation of the subdivision plat in the pubic records. Several other cases have urged the community's power to condition its acceptance of the dedication of streets or other public open spaces. Ridden to its logical extreme, each of these reasons means that any condition imposed for recordation or acceptance of a dedication, no matter how unreasonable, would be upheld. That the courts would ever go that far is most improbable. Rather, the more-recent cases make it

more and more evident that the basic police-power limitation of reasonableness applies in this area of regulation as in zoning and other regulatory fields. In fact, it is becoming evident that the true basis for subdivision control is the same as for zoning: the state's power to regulate in the interests of public health, morals, safety, general welfare, amenities, finances.

Cases have upheld as reasonable, requirements that streets be much wider than the adjoining portions of the same streets, that park areas be dedicated, that land be dedicated to widen abutting streets, that improvements such as grading of streets and installation of utilities be made, that a bond be filed to guarantee improvements, and that fees be paid to cover the cost of examing and checking the plat. Three of these cases relating to widening abutting streets will be summarized later.

But the courts still have a long way to go to establish, by the gradual process of judicial decision, specific formulas by which to determine which conditions required of the subdivider are reasonable and which are not. How much land is it reasonable to require the subdivider to dedicate for streets or other public open spaces? Suppose it is proposed to run a 204-foot superhighway through the plat. Is it reasonable to insist that he give all this land for nothing? How far can the community go in imposing its ideas about layout? Is it reasonable to insist on dedication for playgrounds, parks, and school grounds? What if a small sewer main would adequately serve the new neighborhood viewed alone, but the city is insisting upon the installation of a much-larger main to take care of future development farther out? How much land is it reasonable to demand for future widening of abutting streets or highways? These and many other questions have not been precisely answered by the courts.

EFFECTIVE USE OF SUBDIVISION CONTROLS BY HIGHWAY OFFICIALS

Now how can highway people make more effective use of the subdivision control tools? Let me try to approach an answer to this question first by referring to three state-supreme-court cases: one from Arkansas, another from California, and a third from Michigan. Then I would like to make specific reference to what highway officials are doing in this field of subdivision controls in Michigan and Wisconsin. Finally I'll conclude with a couple of suggestions that have occurred to me, making particular reference to vexing problems of so-called metes-and-bounds real-estate transfers.

The Arkansas case *Newton* v. *American Securities Co.*, 201 Ark. 943, 148 S.W. (2d) 311 (1941), goes like this: A landowner wanted to subdivide some land which abutted on two county roads, one to the west and the other to the south. One of the two roads was an important connecting road between US 70 and US 167; the other was an important farm-to-market road. The county planning commission refused to approve the proposed plat unless the land owner dedicated a 10-foot strip along ¼ mile of each of these county roads so as to permit an ultimate widening from a present 40-foot width to an ultimate 60-foot width according to the county's master plan. The Arkansas Supreme Court said there was nothing arbitrary about the requirements.

The California case *Ayres* v. *Los Angeles*, 34 Cal. (2d) 31, 207 P. (2d) 1, 11 ALR (2d) 503 (1949), is even more instructive. Upheld for a 13-acre subdivision were conditions that a 10-foot strip, 2,400 feet along an important

traffic artery, be dedicated; that an additional 10-foot strip along this same street be reserved for trees and shrubs to assure lack of access to the artery; that an 80-foot rather than a 60-foot width be dedicated for a new street crossing to the subdivision; and that a triangular-shaped parcel 12½ by 75 feet be dedicated to eliminate a traffic hazard. Possibly this case sets a modern trend in upholding these conditions, even though they were not expressly authorized in the state enabling statute or the local ordinance. The court held such conditions are valid so long as not inconsistent with either the state act or the local ordinance and so long as reasonably required by the subdivision type, local planning, and traffic conditions.

The Michigan case *Ridgefill Land Co.* v. *Detroit,* 241 Mich. 468, 217 N.W. 58 (1928), is the earliest of the three. Here Detroit's master plan contemplated an 86-foot width for Pembroke Avenue on the north of the proposed subdivision and 120 feet for Livernois Avenue on the east. The subdivider refused to dedicate half of each of these proposed widths and, instead, offered only 33 feet on each street. The court upheld the city's insistence that the dedications meet half the master-plan widths. In short, here is strong judicial authority for requiring dedications or easements to protect or permit the widening of existing highway abutting the subdivision. As already indicated, there is also authority upholding requirements of street dedications, street grading and surfacing, and setbacks within the subdivision as such.

SUBDIVISION CONTROL BY HIGHWAY OFFICIALS IN MICHIGAN AND WISCONSIN

Now we turn to the experience of Michigan and Wisconsin highway officials. Under Michigan's plat act, county road commissioners must approve all plats of lands outside incorporated villages and cities. These commissioners may require that all streets, alleys, and private roads in the subdivision be surfaced with gravel, slag, crushed stone, or other suitable material at least 6 inches thick and that there be proper drainage, bridges, and culverts. In the May 1953 issue of *Highways and Byways* of the Michigan County Road Association you will find statements by six county road engineers from as many counties, both urban and rural, about the actual operation of this law. These statements are worth attention, because they demonstrate that, at least in most of the counties reporting, subdivision streets are pretty adequately built before they are accepted into the county road system, thus reducing maintenance costs.

At the state level in Michigan, the highway commissioner must approve all plats which include land on state trunkline or federal aid roads. The commissioner may require widths and locations as shown by plans on file; adequate provision for traffic safety in laying out drives which enter state trunk or federal-aid highways; and grading and surfacing in accordance with Michigan Highway Department specifications "insofar as they connect with and lie within the right of way of state trunk line or federal-aid highways."

A letter from Elmer J. Hanna, administrative assistant to the Michigan highway commissioner, dated December 17, 1953, reports on the operation of this law. He reports that some subdividers are ducking the requirements of this law by filing so-called supervisor's or assessor's plats. But he says, in general:

> We have not had any problem in connection with gratuitous dedications of rights-of-way or protective steps that make adequate provision for traffic safety. As I mentioned above,

these plats are carefully reviewed in the field by the district traffic and maintenance engineers, and their findings and suggestions are transmitted to the Department, and final approval is not given until proper provisions are incorporated in the plat.

On limited-access highways, service drives are mandatory. On other highways, we obtain necessary width of right-of-way by holding up plat approval until the proprietor conforms by executing a highway easement release, a copy of which is enclosed. Platters almost invariably agree.

In Wisconsin the state highway commission must approve all plats of land bordering on state trunk highways or on connecting streets. ("Connecting streets" are marked routes of state trunks through villages and cities having a population of 2,500 or more.)

Typical of what this approval authority means in Wisconsin is this actual case. A landowner divided his land into 23 lots strung out along a state trunk highway. The town board quickly approved the plat, even though it was perfectly evident that when the lots were all built on there would be 23 separate private drives out onto the highway. When the plat reached the commission for approval, it induced the owner to provide a service road, and now the householders on those lots have access to the highway at only two points instead of 23. William F. Steuber, assistant engineer of the Wisconsin commission, wrote me in mid-December of 1953:

Our Wisconsin Commission uses its plat approval authority mostly for the purpose of providing a measure of highway safety through orderly control of traffic, particularly in matters of entrance and egress from the highway. Location and arrangement of entrances are the chief concern. . . . In a few cases, also, Commission suggestions have resulted in footings dedication for street purposes where existing right of way was not ample for ultimate development. The Commission has also suggested and has had incorporated into plats, service roads parallel to and adjoining the highway, and sometimes parking lots.

Since 1949 the Wisconsin commission has reviewed and approved about 150 plats.

SOME SUGGESTIONS TO HIGHWAY OFFICIALS

Highway officials can profitably become more active in the subdivision-control picture. This activity may reflect itself in a variety of ways. As in Wisconsin and Michigan it may take the form of formal plat-approval authority. Perhaps I'm prejudiced by the surroundings in which I live, but I think it is not too much to ask a subdivider to wait the relatively few days it takes to get his plat reviewed through the state commission's district office. After all, he is about to impose upon the community a land-use pattern that will promote, or blight, the area for generations to come. And the Michigan and Wisconsin experience suggest that such review is well worth the effort.

The highway officials role in the subdivision picture may also be informal. He can arrange to see plats in an advisory capacity before they are approved by the local plan commission or other body. As a member or advisor of a local planning commission he can insist that the special problems of the highway be kept in mind. Or he can participate periodically in working out and amending the community's master plan and thus set highway and street standards for the guidance of future plat approvers.

The big difficulty in most states, though, is the failure of the legislature to extend subdivision controls out into rural areas—out into areas where economic suffocation of our highways proceeds at an even faster pace. The term "urban fringe" is becoming ever more meaningless as more and more nonfarm people settle far out into the open country and as urban-type communities crowd our lakes and streams. Between 1930 and 1950 the nonfarm population living in the open country increased by some 87.6 percent!

In addition to the problems of settlement of nonfarm people far from urban centers are the problems of hit or miss development of recreation regions in many states—developments that not only blight promising summer colonies but also blight and choke the highways near them. Some kind of regional, or state review is imperative. Highway commissions with their district offices located within reasonable distance from the land to be platted seem ideally suited to make such a review at least of those features of the plat having direct highway implications.

Our Wisconsin survey showed a good deal of local laxity in connection with plat approvals even in sizeable communities. And in most rural towns our best information indicated that the only check made by most town boards was one to determine if the streets met the minimum width required of town roads.

I am one of those who is not willing to take from our rural people all power to control the future development of their localities. But protection of our highways has become such a critical problem in terms of costs in human lives and dollars, that we simply cannot afford to wait on the slow-moving, crazy-quilt pattern of local action. Besides, in the field of subdivision control, the problems posed are mostly for experts, particularly for engineering experts. So I think that, in spite of informal participation in local city planning by highway officials, most states would do well to follow the example of Wisconsin and Michigan and require state approval of all plats wherever they border on state highways, whether close in or far out in the country.

But in this field of regulation, as in others, you will find that with attempted control comes inventive avoidance and evasion. Witness the supervisor's and assessor's plats in Michigan. Space does not permit development of this intensely practical subject. But I do want to point out at least this: Under most state statutes, the definition of "subdivision" is sufficiently loose so that there will be a good deal of avoidance of platting controls through individual metes-and-bounds sales without benefit of recorded plat.

What good does it do to have latent power to protect highways by requiring service streets, setbacks, off-street parking, etc., as a condition to plat approval, only to have literally dozens of parcels along a short strip of vital highway escape such controls by the metes and bounds dodge?

Every division of land (except those for agricultural purposes) along main arteries of traffic should be made subject to platting and plat-approval requirements. Steps should be taken to reduce the costs of this platting as much as possible for the fellow who is selling off only one or two parcels or, more accurately, the fellow who has only one or two parcels to sell. Until this particular millenium is reached, it may be that statewide laws requiring building permits for all structures abutting on important highways will be needed.

We have been discussing such a proposal in Wisconsin. Under it the highway commission would set up setback and other highway protection standards for state highways. Counties would have a specified period of time, say one year, within which to provide these protections through a zoning ordinance including building permit features. If such an ordinance is passed the state will make a grant-in-aid to help finance its administration, the grant being measured by the number of miles of state highway protected and the number of registered vehicles in the county.

If no ordinance is passed within the time specified the commission may, by commission order, impose controls (including building permits) to be administered by county clerks on a fee basis.

Let me conclude this summary piece by urging you to take a fresh look at subdivision controls in your state. Is your state enabling act adequate as to (1) its geographical scope and (2) the quality controls it permits, particularly as they relate to highway protection? Should there be direct power in county or state highway officials to approve plats before they can be recorded, at least where the land borders principal traffic arteries? If so, the experience in Michigan and Wisconsin should stand you in good stead. Until your enabling statute is amended, how can you more effectively work with planning commissions and municipal councils in connection with plat approvals? And what steps do you need to take, legislative or otherwise to control metes-and-bounds transfers?

Zoning Approach to the Parking Problem

ROBERT J. KELLY
Bureau of Parking, City of Chicago

● THAT a serious traffic and parking problem exists in every large city in the United States is an established fact. It is also an established fact that zoning ordinances are now legally accepted as a legitimate and essential exercise of the police power ordained for the protection of the property and welfare of the people.

RELATIONSHIP TO ZONING

The relationship of traffic and parking congestion to the welfare of the people is clearly spelled out in the Illinois Statutes.

Zoning laws are enacted by the state so that municipalities within its jurisdiction might use them to the end that: "Adequate light, pure air, and safety from fire and other dangers may be secured . . . that the taxable value of land and buildings may be conserved . . . that congestion in the public streets may be lessened or avoided . . . and that the public health, safety, comfort, morals, and welfare may be otherwise promoted."

MAGNITUDE OF THE PROBLEM

Throughout the country, as the automobile continues to replace other forms of transportation, the cities are bearing the greatest proportion of the increased congestion. Figure 1 illustrates the steady rise of registrations of vehicles, which are constantly increasing the congestion on streets and parking areas of limited capacity. It further illustrates that there is no relief in sight from urban population trends.

Trends in population, ratio of automobile ownership, and miles driven per car all point toward a continuing and significant increase in auto traffic in the Chicago area, and an increasing demand for parking to serve that area.

ECONOMIC URGENCY

The effect of citywide traffic and parking congestion is more-vividly realized by an economic analysis. The

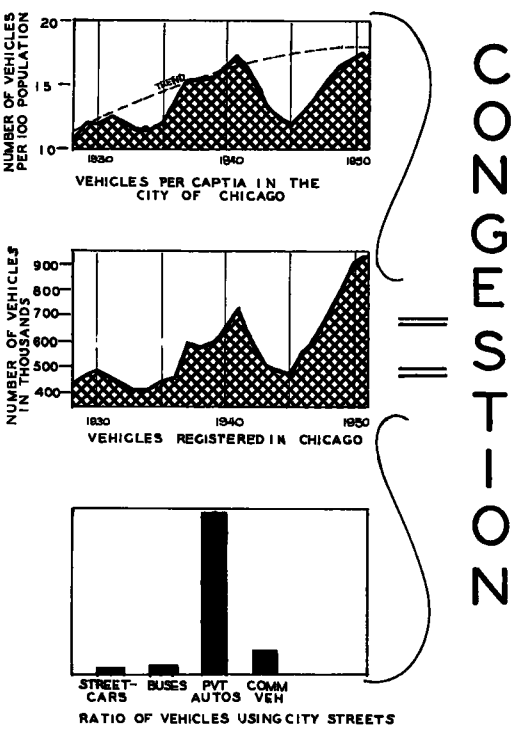

Figure 1

exodus to the suburbs and the growth of outlying shopping centers have caused economic panic in the various merchants' associations. The city officials have felt this panic; these merchants represent the tax core of the city. Because the commercial areas pay proportionately more taxes than they receive

in services, it is essential that these areas get adequate parking to sustain the tax base of the city.

PAST ACTION

Chicagoans began to see a growing traffic problem as early as 1856. In that year the downtown streets were raised 6 feet to a uniform grade. In 1859 a horse-drawn street-car system began operation. By 1902 the people of Chicago were thrilled by the establishment of elevated transit lines that eventually coined the name "Loop" for Chicago's central business district. In 1915 through streets were established. In 1925 the Loop was signalized. The obvious urgency of parking relief was seen in 1926 when parking was prohibited during the working day in the entire Loop. While new traffic regulations were meeting the urgency of increased automobile use, the zoning laws were being shaped. In 1913 the first zoning law was vetoed by the Illinois governor. In 1921 a zoning commission was appointed and enabling legislation was passed. In 1923 the first Chicago zoning ordinance was passed. This ordinance had its first major revision in 1942.

In 1948 merchants in the central business district, in expressing their economic fears of congestion and inadequate parking, organized and jointly financed a parking plan for the area (Parking Plan for the Central Area of Chicago, prepared by the Parking Committee of the Chicago Association of Commerce and Industry, December 1949).

Again, in 1950, another parking survey was conducted by a committee composed of various city agencies involved in traffic. Finally, a detailed financial feasibility study was made in 1952 by the DeLeuw, Cather Co. This survey, which made possible the financing of our present municipal parking problem was integrated with other long-range city plans. Chicago now has a comprehensive plan for relief of parking and traffic congestion.

CHICAGO PARKING PLAN

Basically, the Chicago parking plan was programmed into two phases: a short-range plan and a long-range plan.

Short-Range Parking Plan

The short-range or immediate plan is contained in the parking bond-issue program. This program, which was launched in January 1953, is a $50 million municipally owned parking-facility venture. Bonds in the amount of $22.6 million were sold in December 1952 to finance construction of five multilevel parking facilities in the Central Business District, four multilevel facilities on the near north side, and eight parking lots in the area of 63rd and Halsted streets, a principal outlying shopping center. The funds were also used to make the remaining payments on the city's recent purchase of 27,000 parking meters. Additional bonds will be sold to build other facilities throughout the city. A unique thing about this bond issue is that it can be extended indefinitely as long as the engineering estimates show that net revenue produced by futher expansion will not fall below 1.5 coverage (coverage being the net revenue divided by the sum required to meet all interest and amortization charges on the bond issue).

Long-Range Program

The long-range solution to the Chicago parking problem is through use of the zoning ordinance. By requiring landowners to provide certain off-street parking and loading facilities for every land use, parking congestion can be greatly relieved.

In 1942 Chicago passed an amend-

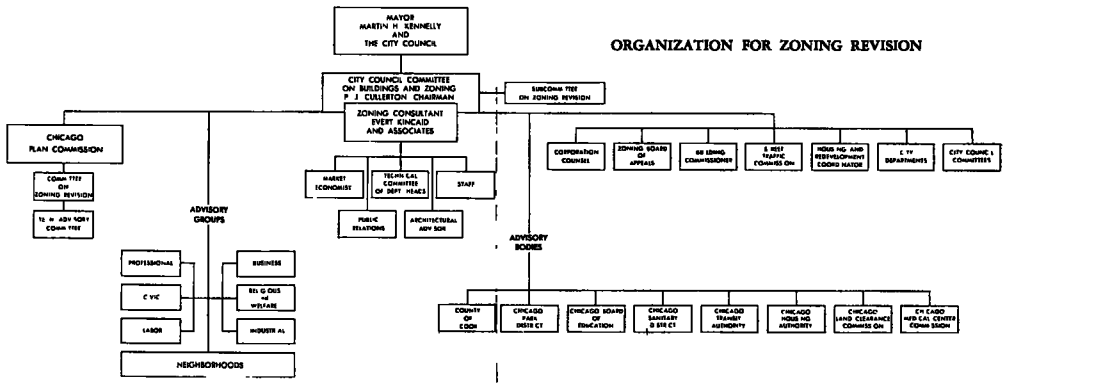

Figure 2

ment to its zoning ordinance that required off-street parking for theaters and apartments. However, this ordinance exercised no control over loading operations and was incomplete in its parking requirements.

The decision to make Chicago's new off-street-parking ordinance all inclusive was brought on by another decision, a legal defeat. This defeat was in the Illinois Supreme Court, September 16, 1952, *Ronda Realty* v. *Lawton,* 414 Ill. 313; 111 N. E. (2d) 310. The Illinois Supreme Court held the provision unconstitutional as a denial of equal process of law, commenting as follows:

> Of all the different types of structures from which the section was made to operate, it is only apartment buildings that are required to furnish off-street parking facilities. The evils to be remedied on crowded city streets are well known, but we do not see that the singling out of apartment buildings from the other types of buildings embraced by the ordinance is reasonably limited to the elimination of those evils. . . . The street congestion problems created by boarding or rooming houses, hotels and the like, are not essentially different from those caused by apartment buildings. All are similarly situated in their relation to the problems of congestion that are caused by parking cars in the streets, and all contribute proportionately to the evil sought to be remedied. . . . A statute or ordinance cannot be sustained which applies to some cases and does not apply to other cases not essentially different in kind.

This legal defeat, which at first shocked the traffic people, proved to be the inspiration for the new provisions. This defeat coincided with an existing program to rezone the whole city (Everet Kincaid and Associates Zoning Consultant). Interest was stimulated in creating new off-street-parking requirements that would materially effect parking congestion.

The mayor, already vitally interested in the whole traffic and parking problem, urged the city council's Committee on Building and Zoning to include this in their rezoning plans. He commissioned various committees, civic groups, city agencies and independent consultants to prepare a comprehensive ordinance with a basic in fact. Through cooperative effort they were to bring in statistics which would support such an ordinance under the severest tests. Figure 2 illustrates the organizational chart which was already active in its rezoning and reclassification work.

Through the activities of these committees and agencies it was possible to get weighted recommendations from those particular people expert in their own field. After several meetings of the zoning consultant and the participating groups, it was agreed that the best approach to the establishment of requirements was to weigh all the factual data.

AVAILABLE FACTUAL DATA FOR REZONING

1. *The Chicago Land Use Survey, 1939.* Useful for reference purposes, and provided much data on age and condition of structures.

2. *Aerial Photo of Chicago and Vicinity,* made in May 1950, at a scale of 750 feet to the inch, proved invaluable in studying details of existing land uses.

3. *Base Maps,* at a scale of 250 feet to the inch, are available but must be corrected for changes in street pattern and new subdivisions during the past 12 years. Accurate information was available from the City Map Department.

4. *Land Use* has been recorded on pages of the Sanborn Insurance Atlases, by members of the staff of the Committee on Building and Zoning. This data was of first importance and represents much work completed. Supplemental field checks were necessary to verify certain conditions and to make studies of specific areas.

5. *Industrial Studies* included the following basic research for use in preparing the detailed plan of industrial land use: (1) *survey of existing industry,* survey cards were completed for virtually all of the city's 10,000 establishments showing location, type, employment, other characteristics and requirements of operation; (2) *study of recent trends in industrial development,* detailed analysis based upon the plan commission's special tabulation of the most-recent "Census of Manufacturers" (1947); (3) *comparison of space requirements,* a survey of trends in new industrial construction, based upon questionnaires to industries undertaking new construction in recent years and upon files of leading industrial architects and engineers; (4) *survey of industrial movement,* charting was made of all movement of industry in the Chicago metropolitan area in recent years to determine trends; (5) *survey of expansion requirements,* sample surveys of firms seeking to expand or relocate were recorded, also records of requests before the zoning boards of appeals were listed; (6) *screening of vacant land suitable for industrial use,* field investigations and mapping of vacant areas, suitable for industrial use and subject to consideration as industrial use districts were completed and reviewed by the planning commission and its technical advisory committee; (7) *study of blighted housing areas suitable for industrial use,* field investigations, mappings, and reports on slum areas suitable for redevelopment were made; and (8) *map of industrial land use,* (actual land use, 1950) also of land zoned for industry, 1950 was available.

6. *Zoning-ordinance-area computations.* The present Chicago Zoning ordinance was analyzed to provide the following data: (1) summary of use district area computations, Chicago Zoning Ordinance; (2) utilization of land in Chicago, 1950; (3) computed use district areas, square miles; (4) zoning and land utilization in Chicago, square miles; (5) zoning and land utilization in Chicago, percentage; (6) land use and use zoned, 1923 Chicago, percentage; and (7) used as zoned 1923 and 1947.

7. Population studies have been completed and include the following: (1) 1950 population of Chicago by enumeration districts and wards; (2) map of population changes, showing loss or gain; (3) map of population metropolitan area; and (4) industrial employment in Chicago, 1950.

8. *A map of zoning* of areas contiguous to city limits of Chicago for ½ mile was drawn.

9. *Land use of approximately 30 communities,* per comprehensive city plan, prepared during period from 1946 to

TABLE 1

INCIDENCE OF AUTOMOBILE OWNERSHIP

	Dwelling Units	Cars	Cars % Unit	Space* % Unit	% Cars in unit: No-Bedroom Units	1-Bedroom Units	2-Bedroom Units	3-Bedroom Units
Walk Up Apartments 3 story or less	1554	1222	78.6	42	41.2	74.7	85.1	62.5
Multi-story Apartments 4 story or more	3732	2790	74.76	44	48.87	77.66	90.25	105.22
Converted Apartments	754	328	43.5	11	30.7	43.46	56.03	35.29
Apartment Hotels	1101	470	42.6	1	33.48	54.36	59.82	—
Totals	7141	4810	66.3	24.5	38.6	62.5	72.8	67.7

*Off-Street Space Now Provided Per Dwelling Unit

1948 served as a base for the new land-use maps.

This data gathered, the committees then determined which of these land use requirements might be peculiar to Chicago alone. Certain categories were selected for further analysis by field study. Subcommittees were formed for the many different categories to be explored.

At this time it was assumed that any requirement that was good for the whole city must be reasonable and that any reasonable requirement must be correct. An example of this thinking can be seen in the case of the single-family-dwelling requirement of one car space. It was assumed that since most builders, architects, subdividers, and real-estate men prefer the use of sufficient lot size to allow for off-street parking, it is therefore the most desirable for the whole city. In other words, this group thinking has practically outlawed the old 25-foot lots for single-family dwellings as basically undesirable.

In the case of apartments and multi-story dwellings, the concensus was that there was need for a closer look at the Chicago factor in this category. These requirements were based on studies made by the Real Estate Research Corporation (see Table 1) at the request of the Chicago Street Traffic Commission and the Chicago Plan Commission; 137 buildings were surveyed to determine: (1) the number of automobiles used by tenants; (2) the number of parking spaces provided by the building management either in open parking areas or private garages; and (3) size of the dwellings (number of bedrooms).

The buildings surveyed were divided into four groups: (1) walk-up apartments of three stories or less; (2) multi-story apartment structures of four stories or more; (3) apartment buildings converted into added multiple units; and (4) apartment hotels. The buildings were selected as to geographic locations so as to represent all sections of the city, and to include a complete range of building types. Only buildings containing six or more dwelling units were surveyed. Most of the selected structures in the first two groups have been built since 1945 and represent prototypes as to construction and location, which might be representative of apartment buildings constructed in the future.

The 137 buildings surveyed contain 7,141 dwelling units, wherein was found ownership of 4,810 automobiles (67 percent), for which 2,390 off-street spaces (50 percent) have been provided by the management in open lots or garages. The greatest number of these parking

spaces (1,645 or 69 per cent) were provided for the use of tenants in the multistory apartment-house group, which is of structures built in recent years in compliance with the "33 per cent of the number of apartments" off-street-parking requirements of the old Chicago Zoning Ordinance. The 33-per cent (1942 Zoning Amendment) figure of course has now been replaced as a rule of thumb by the more-explicit provisions of the new ordinance.

The apartment-house survey was the first step in securing data from which could be determined proper and reasonable standards for parking facilities, and it turned up some interesting data. As may be seen from the accompanying chart, the highest percent (78.6) of automobile ownership occurs in the walk-up apartment-house group, while the lowest is in the apartment hotels (42.68) and the converted apartment buildings (43.5). It is interesting to note that the incidence of automobile ownership in the multistory, three-bedroom units is 105.22 per cent—theoretically that *could* warrant more than one car space for each such apartment. In all groups, however, the percent of automobile ownership greatly exceeds the 33-percent requirement of the former zoning ordinance.

Rentals and building locations, as well as size of dwelling units, are factors which influence the ratio of automobile ownership. As might be expected, the occupants of no-bedroom units, have a low ratio of automobile users, but in no case is it less than 30.7 percent. The lowest rental units also showed a minimum of automobile ownership.

Coöperative-ownership apartment buildings registered the highest ratio of automobile ownership, in some instances being more than 100 percent.

The survey clearly showed the urgent need for making adequate provisions for off-street parking facilities as a requirement in connection with the construction of all future apartment structures. Such facilities can be provided in garages constructed as a part of the main building or in open, paved parking compounds, either on the site or within convenient walking distance of the main building. Such facilities are particularly necessary in the heavily built-up parts of Chicago (the tall building areas close to the lake front). During the past years many new multistory apartment structures have been erected along Lake Shore Drive and Sheridan Road and in nearby areas. Almost without exception, inadequate provision has been made for the storage of automobiles, thereby further congesting the surrounding streets and aggravating the problem of all-night parking at the curbs. For example, a 20-story, block-long apartment house is occupied by 740 families owning 439 automobiles. Garage facilities within the building accommodate 263 vehicles, thereby meeting the requirements of the old off-street zoning ordinance but not providing for the additional 176 cars which must find storage space elsewhere.

Again, in the case of hotels, an accurate field survey was needed to know the Chicago picture. This requirement was based on a survey made by the city traffic engineer's office in coöperation with the Greater Chicago Hotel Association.

Survey data cards were distributed to the hotels selected by the hotel association. These cards were given to the bell captains to distribute to the bell boys. Each card was initialed by the bell boy interviewing the guest. Each card at each hotel was accounted for. The bell boys would ask the guest how he travelled to the hotel. The names of the guests and identifying room numbers were deliberately omitted.

Several letters outlining the survey were sent to the hotels by the hotel association prior to the actual survey. In this way the personnel, anticipating the survey, were most coöperative.

guests arrived by automobile, while in the outlying areas 57 percent arrived by automobile. From this data it proved reasonable to require one car space for at least each of six guest rooms.

TABLE 2

HOTEL SURVEY: MODE OF TRANSPORTATION

CITY OF CHICAGO—BUREAU OF STREET TRAFFIC

Central Area—Bounded by Roosevelt Road, Wacker Drive, Chicago Avenue & Lake Michigan

Hotel	Auto		Taxi		Transit		Air Limo.		Walk	
	No.	%	No.	%	No.	%	No.	%	No.	%
Atlantic	75	24	132	42	18	6	1	0	88	28
Bismark	64	21	237	77	0	—	0	—	3	1
Chicagoan	110	49	93	41	4	2	11	5	7	3
Congress	105	45	170	58	6	2	10	3	3	1
Conrad Hilton	533	37	575	40	27	2	258	18	31	2
LaSalle	227	38	311	51	5	1	15	2	48	8
Morrison	137	29	188	40	101	22	23	5	18	4
Palmer House	198	17	771	67	8	1	163	14	10	1
Planters	26	18	68	47	20	14	13	9	18	12
Sheraton	21	22	69	72	2	2	2	2	2	2
Sherman	141	27	347	62	11	2	9	2	12	2
Allerton	79	51	11	8	46	32	7	5	1	1
St. Clair	92	62	51	34	0	—	1	1	4	3
Total Average		34%		49%		7%		5%		5%

Outlying Area—Outside of Central Business District

Hotel	Auto		Taxi		Transit		Air Limo.		Walk	
	No.	%	No.	%	No.	%	No.	%	No.	%
Aragon	19	34	3	5	1	2	31	56	2	4
Broadview	17	58	6	21	0	—	4	14	2	7
Hayes	12	60	4	20	1	5	1	5	2	10
Southmoor	87	78	16	14	4	4	0	—	4	14
Stratton	19	68	1	3	4	14	0	—	4	14
Graemere	24	53	11	25	6	13	4	9	0	—
Union Park	70	74	18	19	3	3	0	—	4	4
Bolair	58	85	6	9	1	1	0	—	3	4
Belmont	32	71	11	24	0	—	2	4	0	—
Croyden	54	39	30	33	1	1	1	1	6	7
Delmar	4	66	1	17	0	—	0	—	1	17
Devonshire	30	40	28	38	6	8	2	3	8	11
Edgewater	78	47	86	53	0	—	0	—	0	—
Drake	81	31	177	68	0	—	0	—	4	1
Knickerbocker	45	44	51	51	2	2	3	3	0	—
Lake Shore Drive	4	50	4	50	0	—	0	—	0	—
Sheridan Plaza	13	72	4	22	1	5	0	—	0	—
Maryland	54	82	12	18	0	—	0	—	0	—
Total Average		58%		27%		3%		5%		5%

This information was collected and tabulated for a 24-hour period on three alternate days. The results of this survey are given in Table 2.

It was found that, in the Central Business District, 35 percent of the

For many of the requirements of commercial and industrial land uses these committees leaned heavily on the recommendation made by an industrial advisory committee. This committee made available data previously acquired

by a survey of the central manufacturing district and the clearing industrial district. In 18 plants surveyed it was found that there was now provided one parking space per three employees.

All of the off-street-loading provisions were based on recommendations of the Street Traffic Commission and the Traffic Advisory Committee of the Plan Commission. These requirements therefore are the collective thinking of the Chicago area traffic experts.

Exemptions (see Article 17 of the zoning ordinance) have been made in the central business district. It was reasoned that this area should be excluded from the provisions because of high land costs and concentrated or vertical development: "It was determined that parking facilities to accommodate the requirements of the uses within the designated area can best be provided by public garages, and parking areas developed in compliance with a general plan of parking facilities." (From Article 17 of the Chicago Zoning Ordinance, passed August 18, 1953.)

Since passage of this zoning ordinance the area of 63rd and Halsted streets (part of bond-issue parking program) has been excluded from the provisions. All indications point to the setting of a precedent whereby areas would be excluded where there are current municipal parking plans.

LEGAL FORECAST

Much of the legal phrasing of this ordinance was taken from the Highway Research Board's *Bulletin 24*, "Zoning for Parking Facilities," by David R. Levin.

Just prior to the passage of this ordinance the city conducted several public hearings. No genuine opinion was evident at these meetings however. It was assumed that the affects of this ordinance had not yet been fully comprehended.

On August 18, 1953 the ordinance was passed by the city council without incident.

Since the passage date this amendment has had no legal test. However, there have been several appeals to the Chicago Zoning Board of Appeals. Two asked that a certain zoning district be exempted because of a particular local situation. These were denied. Another request begged exemption for an assembly hall. Since this hall (owned by Moody Bible Institute) was to be used exclusively by students and not open to the general public, an exemption was granted. Another requestor received a favorable recommendation from the appeals board when he asked that his existing stores be rebuilt without additional land coverage.

An interesting fact to note is that most legal defeats in the various states are based on the unreasonableness or inconsistencies of certain provisions of the zoning ordinance rather than questioning the right of the cities to regulate land use.

Again, these appeals are local in character and unimportant as far as the basic ordinance is concerned.

CONCLUSIONS

Requiring property owners to provide spaces for off-street parking and for loading and unloading through zoning ordinances is a widely accepted function of the police power.

When it is realized that automobile registrations in Chicago have increased from approximately 485,000 in 1940 to over 900,000 in 1953 it becomes readily apparent that drastic steps had to be taken, not only to regulate the flow of the rapidly increasing traffic upon an obsolete street system but also to store the vehicles at points of destination, in

the interest of public safety, health, and welfare.

Zoning ordinances which require these parking and loading provisions must be based on field data peculiar to the individual city, so they might be legally reasonable.

Public officials have taken giant strides to provide temporary relief of traffic congestion. However, with the anticipated increase of automobile ownership and usage, a more-comprehensive and permanent plan must be forthcoming to prevent mobile stagnation.

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.

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