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Bulletin 113

LAND ACQUISITION 1955

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1955

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HIGHWAY RESEARCH BOARD

Bulletin 113

LAND ACQUISITION

1955

PRESENTED AT THE

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1956

Washington, D. C.

Department of Economics, Finance and Administration

H. S. FAIRBANK, *Chairman*

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

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Preface

A REPORT of the activities of the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas during the year 1954 is herewith tendered, in line with established practice to preserve in permanent form developments in the field of the committee's activities—land acquisition, control of highway access, roadside protection, and the provision of parking facilities. Also included in this bulletin are papers presented at the open session of the committee at the annual meeting of the Board in January 1955.

Much of the material included herein has not previously appeared in printed form For this reason the committee hopes that the bulletin will have some value as a source book for those interested in the subjects dealt with.

Contents

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 1954 the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas continued its activities along the same lines as it has for some years During the year the Committee sponsored: (1) the compilation of an annotated bibliography on parking which was published by the Board as Special Bibliography No 14; (2) a restudy of parking provisions in zoning ordinances, published as Bulletin 99 by the Board; (3) a study of all parking legislation, the manuscript of which is now being edited, (4) attitudes of the courts toward parking, which will be shortly submitted to the Board for publication, (5) a study of the possible application of the "nuisance" approach to highway betterment (Professor Beuscher made a report to the Committee on this project which is included in full in this document); and (6) highway right-of-way reservation study, the manuscript for which will be submitted to the Board in 1955.

The committee is also assisting on projects concerning the economic impact of arterial facilities on urban and rural communities, and studies relating to the control of access.

In view of the accelerated highway-improvement program being projected, the committee is considering the following projects during 1955, in addition to those already under way: (1) Right-of-way problems incident to an accelerated highway improvement program; (2) highway right-of-way acquisition and protection for the National System of Interstate Highways; and (3) a comprehensive study of control of highway access, particularly from a legal point of view.

Since only a few of the states held regular legislative sessions during 1954, not a great deal of legislation of interest to the committee was enacted. However, these "off years" give the state highway departments an opportunity to focus their sights and prepare plans for desirable legislation to be presented to the regular legislative sessions during the "odd" years. There is evidence that a number of states have proposals for new legislation, some encompassing broad revisions of the whole highway code, and other particular matters of concern in the field of land acquisition and control of highway access and adjacent areas.

Most of the states not now having controlled-access highway legislation planned to have appropriate legislation introduced during 1955 sessions in the hope that the climate is becoming more favorable for the acceptance of the expressway principle. Other states will seek legislative approval of more-efficient land-acquisition methods to facilitate the acquisition of right-of-way for highway purposes. Still others are making an effort to obtain legislative sanction for the regulation of roadside uses or at least establishing a degree of cooperation with local planning and governing bodies to bring about a measure of control.

Although 1954 was a lean year as far as legislation goes, the courts were kept busy with litigation pertaining to subjects of the committee's concern. So many decisions

were handed down during the year, in fact, that it was impossible to report more than a small percentage in the Highway Research Correlation Service memoranda of the committee. Short summaries of the most important of these cases have therefore been included in this report under the appropriate subject heading.

LAND ACQUISITION

Reservation of Highway Right-of-Way Prior to Acquisition

The committee's study of ways and means of reserving land for highway right-of-way prior to acquisition is scheduled for publication in 1955.[1] A pertinent point to be borne in mind in connection with reserving land for highway purposes is that even in those states where reservation mechanisms have been sanctioned under the police power by the legislative body, the courts will not tolerate an unreasonable use of such authority. Thus the mapped street device authorized for use by cities in New York has been approved by the courts where the reservation imposed did not deprive the owner of the property of a legitimate use of such property, but it has been disapproved where restrictions placed on property have deprived the owner of any reasonable use. A recent case in that state is in point.

New York. In this case (*Roer Construction Corporation v. City of New Rochelle,* 136 N.Y.S. (2d) 414, December 23, 1954) the construction corporation purchased a plot of land on a certain street for the purpose of constructing an apartment building thereon. Site plans were approved by the City Planning Board in May of 1954, in accordance with a requirement of a city ordinance. Four days later, the Common Council adopted a resolution amending the official map of the city so as to include the construction company's entire premises within the confines of a portion of a proposed "memorial highway." Under the law, no permit could then be issued for any building on the property unless approved by the Zoning Board of Appeals, which subsequently turned down the application that would have authorized the building construction.

The Supreme Court of Westchester County held that the city's action went beyond the bounds of permissive regulation and must be recognized as a taking of the property. The court quoted a leading case on the subject (*Headley v. City of Rochester,* 5 N.E. (2d) 198, November 24, 1936) wherein the property owner was prevented from building upon a strip 25 feet wide by a setback line imposed by the official map of the City of Rochester. In that case, the court held that in the absence of certain important factors, the property owner had not been damaged. However, in the present case, the entire property, which the corporation had purchased for the express purpose of constructing an apartment building, was included in the reservation. The corporation was receiving no income from the property, and the city conceded that no date had been set for acquisition of the lands for or the construction of the proposed highway.

The court concluded that where, as in the present case, the city had, without payment of any compensation, deprived the owner of the use and enjoyment of all of its lands for a period of indefinite duration the resolution and official map constituted an unconstitutional interference with vested rights of property and were therefore void.

Pennsylvania. On the other hand, a Pennsylvania court upheld a form of reservation inserted in a deed by the City of Pittsburgh in the case of *Caplan v. City of Pittsburgh* (100 A. (2d) 380, November 17, 1953).

Some 15 or 20 years ago, the city sold a

[1] See Land Acquisition and Control of Adjacent Areas, Highway Research Board Bulletins 38 and 59, and Right-of-Way Problems, Highway Research Board Bulletin 77, for previous reports on this project.

piece of tax-delinquent land, located on Fifth Avenue in that city, to one Solomon Caplan. Pursuant to an agreement between the city and the buyer, the following covenant, affecting a piece of land approximately 21 by 22 feet, was included in the deed:

> The Grantee, or his successors in title hereby covenant and agree that if, at any time in the future, the City of Pittsburgh by proper action condemns for street widening purposes for public use, the following part of the above described real estate, no claim for damages will be filed or expected by the above grantee or his successors in title.

Presently, one Samuel Caplan, the present owner, the son of Solomon Caplan, brought action to quiet title to the land by removing therefrom an alleged cloud relating to the above clause in the deed. The complaint was dismissed by the Court of Common Pleas of Allegheny County. Upon appeal, the state supreme court held that the controversial clause, or covenant not to use, created no future interest, but did constitute an effective present release of all future damages. Since Solomon Caplan had released the city from liability for a valuable consideration and had recorded the instrument, any future transfer of title would be subject to the covenant.

The high court agreed with the Court of Common Pleas that the covenant here under consideration constituted "a covenant not to sue" and that such a covenant was in effect a release and was, therefore a present discharge. The supreme court was not aware of any case which precluded the enforcement of a contract not to sue where public interests were not involved. Public interest, for example, would prevent a common carrier from enforcing a waiver or release by a passenger of liability because of negligence of the carrier. But no such public interest was involved in the enforcement of a contract or release wherein, for a valuable consideration, an owner of real estate agreed to waive and release damages for the taking by condemnation of land in a street-widening proceeding.

Consideration for this covenant, continued the court, must be regarded as included in that named in the deed. A deed seal presumed a valuable consideration, and in the present action there was no allegation of failure of consideration.

The deed here under consideration, the court stated, conveyed a fee in all of the ground. No portion was reserved by the grantor; no easements were thereby created; no other interests were transferred either in the present or in the future. The contract, or covenant, constituted an effective release, and the court had consistently held that a recorded release or agreement not to sue bound not only the covenantor but his successors in title. All damages in the present case were waived and released by the covenant.[2]

Acquisition of Highway Right-of-Way for Future Use

At least 14 states[3] have legal authority to acquire land for future highway purposes, either by statute or by judicial decision. Such authority is an important means of keeping right-of-way costs to a minimum by preventing costly development of land eventually needed for highway purposes.

However, even where legal authority exists to acquire land for future use, the courts will generally not approve such acquisition unless the need therefor has been demonstrated and adequate plans for the future improvement exist and there is some degree of certainty that the improvement will be undertaken within a reasonable period of time. A case in Michigan illustrates this point (*Board of Education v. Baczewski*, 65 N.W. (2d) 810, September 8, 1954). In this case, the board of education of the City of Grand Rapids planned to build a high school on Baczewski's land at some indefinite time in the future. The board admitted

[2] See Memorandum 76, May 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 242.

[3] Arkansas, California, Colorado, Idaho, Iowa, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Dakota, Oklahoma, Oregon and Wisconsin.

that there might not be need for the new highschool for 30 years, but they believed it wise to procure undeveloped property for future use to save the taxpayers' money.

The state's supreme court held that the board's action did not meet the test of necessity in condemnation proceedings. The words "necessity for using such property" in the state constitution did not mean an indefinite, remote, or speculative future necessity, according to the court, but a necessity now existing or to exist in the near future. The court thus concluded the board of education could not acquire Baczewski's land by condemnation under the circumstances.

Necessity for Taking

It is generally accepted doctrine that the necessity for a taking, the amount of land that may be acquired, and the location thereof are legislative matters in the first instance, at least, to be determined by the agency designated to carry out the purposes of a legislative enactment. In the absence of fraud, collusion, or a gross abuse of discretion on the part of the acquiring agency, courts will generally not attempt to overturn administrative determinations of necessity. This is illustrated by two court decisions handed down during the year, one in New Jersey and one in Oklahoma.

New Jersey. In connection with the construction of the Palisades Inter-State Parkway, controversy arose when the state highway commissioner selected a location on the east side of State Route 1, which resulted in bisecting a 55-acre plot, the owner of which had offered to give the state 30 acres of land on the west side of the highway on which to build the proposed highway and thus avoid bisecting the easterly tract. The state supreme court held that when, as in this case, the legislature itself had determined that public necessity and convenience required the appropriation of private property for a particular public improvement, the owner of the land so appropriated was not entitled to a judicial hearing upon the utility of the proposed improvement, the extent of the public necessity for its construction, or the expedience of constructing it. The court further held that the quantity of land to be taken, its location, and the time of taking were within the discretion of the body endowed by the legislature with the right of eminent domain. The court would only interfere where there was a plain case of abuse of discretion in the exercise of the power of eminent domain in excess of the public use upon which it was predicated in a particular instance (*Burnett et al. v. Abbott,* 102 A. (2d) 16, January 11, 1954).

Oklahoma. This case reached the state supreme court upon appeal from a decision of the district court of Tulsa County, upholding the right of the City of Tulsa to take only 20 feet frontage from one lot and 60 from another to provide a one-block extension of an existing dead-end street. The supreme court held that such action did not so discriminate against the owner from whom the 60 feet were taken as to indicate that the city acted fraudulently or in bad faith or that it abused its discretion in so doing (*Graham v. City of Tulsa,* 261 P. (2d) 893, June 30, 1953).

The property from which the 60 feet were taken belonged to an individual. The 20 feet were taken off property owned and occupied by the Hillcrest Memorial Hospital. The high court found the evidence justified the taking of only 20 feet off the hospital premises on account of the building and the occupancy and the building-and-occupancy program of the hospital, a large and important hospital of the City of Tulsa.

The supreme court took cognizance of the fact that taking 20 feet off the hospital premises (the west side of the proposed extension) and 60 feet off the property on the east side created a slight jog in the street which would be avoided if 40 feet could be

taken from each property. However, the court did not consider that this fact alone, under the circumstances, was sufficient to show that the city was acting in bad faith, or with abuse, or in oppression as to Graham, the individual property owner.

Graham contended that the taking was more for the benefit of the hospital than for the city and was, therefore, a taking for private use. He cited authorities sustaining the proposition that whether a particular condemnation purpose amounted to a public or a private use was always a question for the court. According to the supreme court, the city's action did not constitute taking for private instead of public interest, the proposed routing being fairly in the interest of the public in the sound discretion of the city officials.[4]

Oregon. In a third case, however, *State v. Pacific Shore Land Co. et al.*, 269 P. (2d) 512, April 14, 1954, the Oregon Supreme Court held that the state highway commission had no authority, under a condemnation resolution specifying "right-of-way purposes," to condemn a tract of land which might be deemed necessary for other and undisclosed purposes but which evidence showed to be unnecessary and not usable as part of the right-of-way. Its attempt to do so was an abuse of discretion and was subject to review and correction by the court.

The particular piece of land in controversy was shown on a map procured from the state highway commission as "parking and picnic area." A witness for the commission stated that the land in question was needed land, necessary for drainage purposes. Oregon statutes authorize the state highway commission to acquire land for (1) rights-of-way, (2) for highway drainage and drainage tunnels, and (3) for trails, bridle paths, etc. These several purposes apparently are treated separately as distinct objectives. The court noted that under state statutes it was mandatory that the resolution adopted by the highway commission state the purpose for which the land was to be acquired. The court held that because the tract of land in question was not embraced within the right-of-way, the resolution did not, in fact, declare for what purpose or necessity, if any, it was being acquired. If the commission deemed it necessary to acquire the parcel for drainage, parking, or picnic purposes, the statute required as a condition of its right to condemn that it so declare such specific purpose by its resolution. The attempts to acquire this tract of land, not for right-of-way purposes but for other and undisclosed purposes, constituted an abuse of discretion and was subject to review and correction by the court.

Nature of Interest Taken

Many of the state highway departments in acquiring land for highway purposes follow the practice or are directed by statute to acquire only an easement, rather than a fee-simple title. It is, however, becoming increasingly evident that the state, in fact, pays for a fee-simple title, although only an easement is actually acquired. A recent North Carolina case illustrates this problem.

The state highway and public works commission, in relocating a portion of US 64, took over an existing dirt road and appropriated property on either side in order to provide a 150-foot right-of-way. The jury awarded damages in the amount of $5,000, using the formula established in a previous case,[5] to the effect that where only a part of a tract of land was appropriated by the highway commission, the measure of damages was the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what was left immediately after the taking. The items going

[4] See Memorandum 76, May 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 242.

[5] *Proctor v State Highway and Public Works Commission*, 55 S E (2d) 479, October 12, 1949

to make up this difference embraced compensation for the part taken and compensation for injury to the remaining portion which was to be offset by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway.

The highway commission appealed the case on the grounds that this formula permitted the landowner to recover excessive compensation. Although the state acquired only an easement, he was permitted to recover the full market value of the strip of land covered by the right-of-way the same as if the fee were condemned. Any reduction of compensation on account of any use which the landowner might make of any portion of the strip or on account of the possibility that the highway might some day be abandoned and the land revert to the owner was precluded.

The state supreme court upheld the judgment of the trial court. Since the condemnor acquired the complete right to occupy and use the entire surface of the part of the land covered by the perpetual easement for all time to the exclusion of the landowner, the court said, the bare fee remaining in the landowner was for all practical purposes of no value, and the value of the perpetual easement acquired was virtually the same as the value of the land embraced by it.[6] Any use which the landowner might make of any part of the land embraced by the easement, continued the court, was necessarily permissive in character and could not be considered in diminution of compensation, because it might be terminated by the condemnor at any time. Furthermore, the court went on to say, a condemnor could not demand a perpetual easement with one breath and insist with the next that he be excused from paying full compensation for the easement on the ground that there was a bare possibility that he might abandon the easement on some uncertain day. The law of eminent domain deemed the possibility of the abandonment of a perpetual easement by nonuser so remote and improbable that it would not allow the contingency to be taken into account in determining the value of the easement.

[6] *North Carolina State Highway et al v. Black et al*, 79 S E (2d) 778, January 15, 1954.

Immediate Possession of Highway Right-of-Way

Although a majority of the state highway departments have statutory authority to take possession of property needed for highway right-of-way at some point prior to the completion of condemnation proceedings,[7] courts have zealously protected the constitutional rights of the property owner in interpreting such statutes. Ordinarily, prepayment, deposit, or security must precede the physical taking of the land.

Nevada. An interesting case in this field was handed down by the Supreme Court of Nevada on September 17, 1954.[8] The state department of highways instituted condemnation proceedings, for a portion of a tract of land in Washoe County and asked for and was granted an order of immediate possession, to which the property owners consented. No bond or other security was required. Upon completion of the condemnation proceedings, the owners filed an appeal, claiming (among other things) that the order for immediate possession without providing that compensation first be made or secured was in violation of the state's constitutional provision.[9] The landowners claimed that this constitutional provision could not be waived. The supreme court held, however, that the requirement could be waived and that the landowners, by consenting to entry of the order for immediate possession, had waived the requirement.

Another interesting point raised in the case was the matter of interest due the property owners on the award as a conse-

[7] See *Immediate Possession of Highway Right-of-Way*, Committee on Right-of-Way, American Association of State Highway Officials, 1951

[8] *Saunders v State*, 278 P. (2d) 970

[9] Nevada Constitution, Art I, Sec. 8.

quence of the taking of possession prior to the judgment awarding compensation. The order for immediate possession was entered on July 25, 1953, effective September 1, 1953, and the highway department had been in possession since this latter date. The judgment for compensation was entered October 6, 1953, allowing the landowners interest only from that date. The court considered this an oversight, holding that interest must be paid from the date of the taking possession, July 25, 1953.

New Jersey. The matter of interest payments in connection with condemnation awards came before the courts in at least one other state during 1954. In a New Jersey case,[10] the owners of property condemned by the board of education of the City of Vineland claimed interest on the award from the date the suit was instituted The superior court held that an owner whose property was condemned was not entitled to interest on the award from the date of filing of the petition if the condemning agency did not take possession until after the award was made.

The allowance of interest on an award made to a landowner for property taken by the exercise of eminent domain, said the court, should be determined according to considerations of equity and fair dealing in order to accomplish justice in each particular case. The court stated that it did not feel that interest should be allowed for the period between the date the condemnation commissioners made their award and the time the final award was entered by the court, since the position of the owner remained unchanged during this interval.

Texas. Another significant decision was handed down by the Court of Civil Appeals of Texas on May 20, 1954.[11] One Mary E. Adams asked for an injunction to restrain the City of Houston from emptying water or other matter from a storm sewer being constructed on Old Post Oak Road into a natural drain traversing her land. The city resisted the injunction upon the ground that it held superior title to the portion of the Adams land included in the natural drain, claiming that the land was subject to a natural servitude in favor of the upper riparian owners insofar as surface waters were concerned. The injunction was granted.

Thereafter the city filed a cross-action for title and possession of its claimed easement across the land in question and, alternatively, for condemnation. In connection with the alternative request for condemnation, the city requested the court to fix the amount of security for payment of any damages that might be assessed and that, upon deposit thereof, the city be allowed to take immediate possession of the described easement. The trial court refused to fix the amount of security and the city appealed.

The court of civil appeals upheld the lower court's action in refusing to fix security, holding that the right to have the court do so was available only to a litigant who could unqualifiedly and exclusively exercise the right of condemnation. In this case the city was not entitled as a matter of right to have the amount of security for taking of immediate possession determined and could not compel such determination by the trial judge, since the remedies sought were inconsistent and deposit would not have been absolute and unqualified.

Alabama. Another recent decision pertaining to the right of immediate possession of land was adjudicated by the Supreme Court of Alabama.[12]

This is an opinion of the justices, given in response to a request by the governor for advice as to the constitutionality of two amendments to existing law passed by the 1953 state legislature. The new sections consisted of amendments to the condemna-

[10] *Board of Education v Ross,* 107 A (2d) 833, September 15, 1954

[11] *City of Houston v Adams et al*, 269 S W. (2d) 572.

[12] *Opinion of the Justices,* 67 So. (2d) 417, October 8, 1953.

tion law (Title 19, Section 18, Code of Alabama, 1940) and to the highway law (Title 23, Section 44, Code of Alabama, 1940), both of which provided for possession of land by the condemning party, pending an appeal of the condemnation award, upon payment of the amount of the award and the posting of a bond in double the amount of damages. The amendments provided that such entry might be had under these conditions at the time of taking the appeal or at any time thereafter pending the appeal.

Prior to enactment of these amendments, the City and County of Montgomery had brought action in the probate court to condemn land for highway purposes. Judgment of condemnation had been entered and appeals had been taken to the circuit court. Damages were not paid into court, nor was a bond in double the amount of damages filed, and more than 30 days had elapsed since the order of condemnation was entered. After passage of the amendments, the condemnors proposed to pay damages and file the necessary bond for the purpose of taking possession of the property. In view of the fact that the amendments purported to apply to pending litigation, the governor asked if they violated certain provisions of the state's constitution. The court was of the opinion that they did not.

Section 235 of the Alabama state constitution provides, among other things, that an appeal from a condemnation award "shall not deprive those who have obtained the judgment of condemnation from a right of entry, provided the amount of damages assessed shall have been paid into court in money, and a bond shall have been given in not less than double the amount of damages assessed, with good and sufficient sureties, to pay such damages as the property owner may sustain" The court noted that no particular time for electing to take such action was specified, except that it must be done before entry. This section was clearly enacted, said the court, for the benefit of the condemnor in order to prevent undue delays attending condemnation proceedings. The court knew of no instance in which it had held that failure to pay damages and post bond at the time of taking the appeal worked a forfeiture or waiver of the right of entry.

The court went on to say that other courts had almost unanimously upheld statutes allowing a condemnor the right of entry pending litigation upon the payment of compensation or upon the filing of bonds, or both. Statutes providing for such procedure were upheld by the courts on the theory that when the damages had been assessed in a preliminary manner, the only remaining right vested in the landowner was the right to receive just compensation and damages. The court concluded that the 1953 acts under question did not deprive the landowner of his vested right to receive just compensation and damages prior to entry.

The Alabama constitution, under Section 95, further provided that no law might be legally enacted which impaired the obligation of contracts by destroying or impairing the remedy for their enforcement. The court held that the enactment of the two amendments here under consideration did not deprive the landowner of any vested right or of any cause of action or defense within the meaning of this section. These statutes affected the mode of putting the award into effect and therefore affected only the remedy.

The present court observed that courts generally had held that remedies were subject to legislative control, and if an ample remedy was furnished, the obligation of contracts was not impaired by any change of the remedy. Additionally, the court cited a number of cases in which it had been expressly held that a statute granting the condemnor the right of entry pending an appeal was remedial only and that the con-

stitution did not prohibit such statutes from applying to pending litigation.

The court concluded that the two acts involved did not violate Alabama's constitution.[13]

Change in Grade

At least five cases in which highway improvements resulting in change of grade were involved reached the courts during the year. From these decisions, there seems to be no set formula for determining whether or not damages to abutting property are compensable in cases of this sort. In two States, New York and Wisconsin, both involving changes of grade on highways in towns, the courts awarded no damages. In Missouri, two decisions were handed down in which substantial damages were awarded although in both cases the property had access to a frontage road after the grade of the main highway was changed. In a fifth decision, in Arkansas, the court refused to accept the state's contention that the damages sustained by the landowner resulted from rerouting the highway and concluded that the landowner was entitled to damages because of a change in grade.

In the case of *Bennett v. State* (132 N Y.S. (2d) 388, July 8, 1954), the Appellate Division of the New York State Supreme Court reversed a decision of a lower court awarding damages to a property owner because of a change of grade resulting from construction of the Ontario Thruway in the Town of Cheektowaga. The lot in question abutted upon Genesee Street at the north end and on Pinehurst Avenue on the east side. There was a change in grade of part of the right-of-way of Genesee Street which deprived the landowner of access thereto, although he still had access to Pinehurst Avenue. The court held that since there was no enabling statute making damages resulting from a change of grade recoverable in a town, the damage sustained by the claimant was *damnum absque injuria*. In so doing, the court declared that, although the result was harsh and discriminating as to property located in a town, the remedy lay with the legislature.

Wisconsin. This is a case in which the owner of land abutting on a town highway claimed that the town utility district failed to comply with statutory requirements for giving notice of change of grade, conducting hearings, making awards of damages to abutting landowners, etc. The state's supreme court, in a decision handed down on December 7, 1954, (*Zache v. Town of West Bend,* 67 N.W. (2d) 301) pointed out that Chapter 80, Wisconsin Statutes, directed the procedure to be followed in laying out, widening, altering or discontinuing highways; these involved alterations which changed the boundaries of the highway and not those resulting from work done within the established highway limits. So the court concluded that there was no violation of Chapter 80.

The landowners also cited Section 80.47 of the statutes which declared:

> Owners of land abutting on any highway . . . shall have a common right in the free and unobstructed use thereof . . and no town . shall close up, use or obstruct any part of the highway . . . so as to damage property abutting thereon . . . without due compensation being made for any damage resulting therefrom to the (abutting) owners of land. . . .

The court, however, cited a previous case, *Smith v. City of Eau Claire,* 47 N.W. 830 (1890), in which it was held that a lawful change in the grade of a street was not a closing up, use, or obstruction of the street within the meaning of this statute.

The court also called attention to the fact that Section 62.16 of the statutes provided for published notices and hearings when a *city* changed the grade of a street. But Chapter 60 of the statutes, relating to *townships* contained no comparable provisions. The court concluded that the legislature did not intend to impose such limitations or

[13] See Memorandum 73, January 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 282.

formalities on towns or their agencies in highway matters.

The landowners finally contended that their constitutional rights had been violated in that their property, i e., the use and enjoyment of it, had been taken for public use without compensation. The court again cited the Smith case, supra, and one other case, *Colclough v. City of Milwaukee*, 65 N.W. 1039, (1896), in which it was held that change of grade was not a taking of private property for public use and that consequential damage to abutting property was not compensable, in the absence of a statutory or constitutional provision making it so, if the change of grade was made by authority of law and with due care. Here there was no allegation of lack of due care.

The court concluded that there was no violation of law in the instant case and, consequently, the landowners were not entitled to compensation because convenient access to their garage had been impaired.

Missouri. State ex rel. State Highway Commission v. Leftwich (263 S.W. (2d) 742, December 7, 1953) was a condemnation suit to widen Route 36 past Cameron, Missouri. The defendant, Leftwich, owned a 16-acre tract on the north side of and abutting 375 feet on Route 36 There already existed a deep cut past his land. He formerly got to his house only by going up a private lane across property lying west of his frontage. A county road ran along the east edge of the property. Before the condemnation, this county road went over the state highway on an overpass.

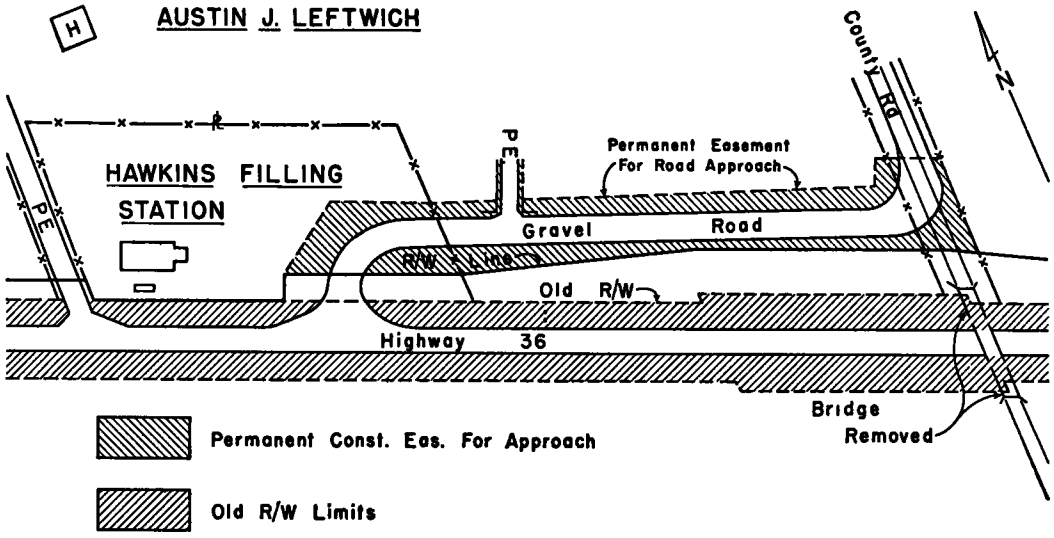

Figure 1

The project involved the removal of the overhead pass, the widening of Highway 36 and its right-of-way and the construction of a gravel road on the land taken from Leftwich's frontage along the north side of Highway 36 and parallel with it for the full extent of his road frontage. The gravel road was for the purpose of affording a means of travel to and from the county road from the point where the overhead pass was removed, to and from a point of merger with Highway 36, about 380 feet to the west (see Figure 1).

The Kansas City Court of Appeals stated that the result was that the property thereafter abutted or fronted on the intervening gravel road, rather than on Highway 36.

The court also noted that "a fraction of of an acre was taken along the road front-

age on Highway 36 from a tract owned by Leftwich, et al., and a gravel road was constructed parallel to the highway and between defendant's new frontage and the highway."

The court upheld an award of $3,000 for damages to Leftwich's property, stating that:

> . . the reduction in quantity was of such a nature as also to leave the remaining tract without any frontage whatever on the main Highway 36, which frontage defendants' evidence tended to show was adaptable by depth, location, and other circumstances in evidence to commercial development which would reflect upon the market value of the remaining tract To what extent the reasonable market value of the remaining tract would be affected by leaving it without the frontage so taken was a proper matter for the jury's consideration It was an important element, although not the sole element, in determining such value of the remaining tract

In a second case, *City of St. Louis v. Gruss et al.*, 263 S.W. (2d) 387, January 11, 1954, an underpass was built under railroad tracks. Defendants owned property in the southwest quadrant, facing Gravois Avenue. Seventy-two feet of Gravois Avenue was depressed to go under the railroad's tracks, but 18 feet of pavement was left on the old grade next to defendants' property This undisturbed 18 feet was referred to as "flanking roadways," "side drives," or "upper drives" (see Figure 2). Condemnation commissioners allowed $1,325 damage to this property as a result of change of grade. The Circuit Court of the City of St. Louis upheld the award, and the landowners appealed. The state supreme court held that the award was not so grossly inadequate as to indicate abuse of discretion or any arbitrary action by the trial judge in holding that the award was reasonable and proper.

The evidence of value before and after was based largely on what the property had rented for before the underpass was built, during the construction period, and after

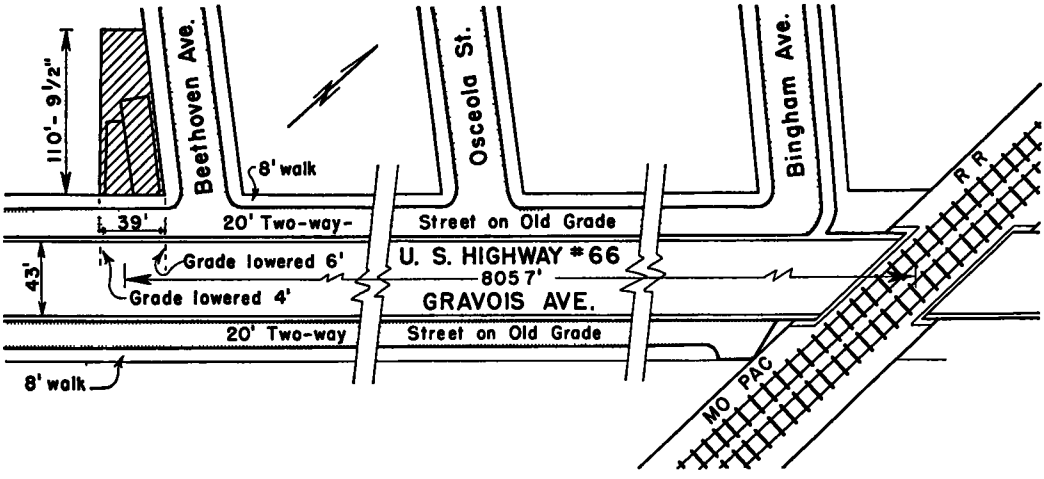

Figure 2

construction was completed. No objection was made to this type of evidence by the city, but there was a possibility that the lawyers, the witnesses, and the court had in mind that the "upper drives" were separate and distinct from and no part of Gravois Avenue, which might have influenced the evidence and the amount of damages.[14]

Arkansas. Clark County took a 10-foot strip from a landowner whose property abutted on Highway 67. The purpose of the taking was to widen the existing right-

[14] The digests of this and the preceding Leftwich case were submitted by Wilkie Cunnyngham, assistant chief counsel, Missouri State Highway Commission Cunnyngham feels these two cases may be important in the developing law concerning "frontage roads," inasmuch as the decisions appeared to be based on a misconception as to the result of the improvements involved.

of-way to 200 feet. The state highway department constructed a new concrete strip 24 feet wide just east of the old strip. In so doing, the grade of the highway in front of landowner Mitchell's property was lowered approximately 5 feet lower than the old strip. No showing was made as to when the old strip would be rebuilt.

On Mitchell's property there existed a store building and dwelling under one roof and several tourist cabins. There was evidence to the effect that Mitchell had spent between $30,000 and $40,000 on the improvements. After construction of the new strip, the property was practically worthless for commercial purposes and had no considerable value for any other purpose. The new right-of-way was within 1½ feet of the front door of the store.

The trial court awarded damages in the amount of $20,000, and the county appealed. The county contended that Mitchell was not entitled to damages by reason of the change in grade, because that portion of the highway which actually adjoined his property had not been lowered at the time. The county argued that if Mitchell had been damaged in any amount other than the value of the land actually taken, it was by rerouting the highway rather than changing the grade.

The state supreme court, on the other hand, contended that the highway had not been rerouted. It still passed directly in front of Mitchell's property. Although only a portion of the right-of-way had been lowered at the date of the trial and no showing as to just when the west portion of the highway would be rebuilt, there was substantial evidence to the effect that it would be rebuilt; and when this was done, it would be lowered to the level of the new strip. The court concluded that the highway, instead of being rerouted, had been extended in width. Such being the case, the landowner was entitled to damages for change of grade, and the judgment of the lower court was affirmed (*Clark County v. Mitchell*, 266 S.E. (2d) 831, March 29, 1954).

A dissenting judge was of the opinion that what the highway department had done was to relocate the highway by constructing a new thoroughfare a short distance east of the old road. The old highway was still in existence and provided a means of access to Mitchell's place of business. The volume of business had declined, because it was now difficult for the traveling public to reach his store and tourist court, in part because the new road was several feet lower in grade than the old road. To reach Mitchell's property, the public must leave the new road at a short distance in either direction from the place of business, instead of immediately in front of it. This inconvenience, with its adverse effect on market value, was simply due to the relocation.

As to the possibility that the old highway might some day be regraded to the elevation of the new one, the dissenting justice considered this only a possibility. "I think it is unsound," continued the justice, "to bottom the landowner's claim to damages upon an uncertainty such as this, for there is no limit to the vague threats of future damage that landowners may conjure up in condemnation cases. Damage that is purely speculative should not be paid for until it becomes a fact."

Dedication

An interesting case arose in Texas when the state highway department included in its plans for a highway, land constituting part of a tract for which a subdivision plat had been filed in 1939, dedicating to public use streets, parks, etc as shown on the subdivision map (see Figure 3).

The defendant, one Frank Slack, had acquired all of what appears as Block 29 on the sketch by deeds executed in 1945, 1946, and 1949, in which the property acquired was described by reference to the plat and dedication. Subsequently, it developed that

because of its low altitude and the consequent probability of overflow either by high tide or by any swelling of the San Jacinto River, the land included in the proposed subdivision was not suitable for a residential area. All of the land, except in the area of Monmouth Drive, was held as acreage under fence and used as a cattle range.

Since 1942, Slack's land had been used to produce sand for commercial sale. None of the streets shown on the plat except Monmouth Drive were ever marked on the ground, opened, or in any manner used as streets. Neither the state nor the county had ever made any effort to open or utilize Eddington Drive or any of the other streets extending to the north from Eddington Drive enclosed by Slack's fence. No attempt was ever made to interfere with the use of the area designated as streets for grazing cattle or for sand production

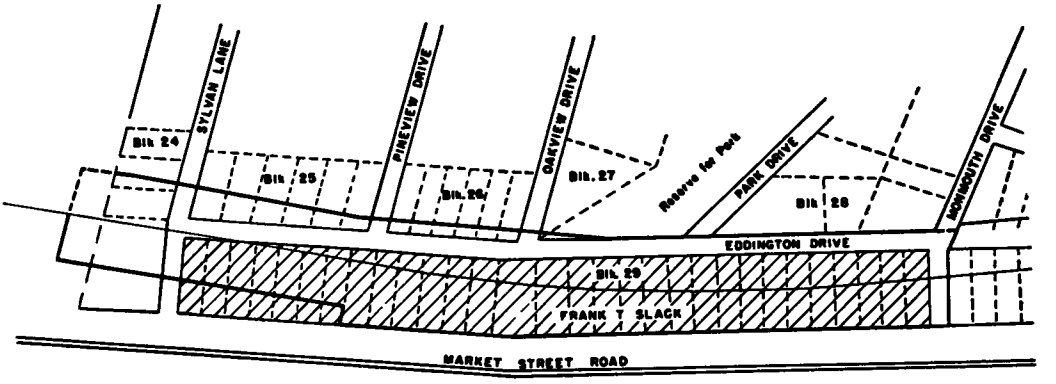

Figure 3

As a part of the plan for the highway, State Highway 73, US 92, between Houston and Port Arthur, the state sought to condemn a strip 310 feet wide, as indicated by the heavy black lines on the sketch. This included 18.924 acres which the state sought to condemn from Slack. The state asserted that it already had an easement in Eddington Drive and the portions of the other streets which it was entitled to use for its new highway, and that Slack was not entitled to any damages by reason of such use.

The trial court found that 4.187 acres made up from Eddington Drive and the south portions of the streets joining it on the north had been dedicated permanently to the public for road and street purposes, awarded Slack $10,242.22 for the remaining 14 737 acres, and gave the state an "easement and right-of-way" over the entire 18.924 acres belonging to Slack. The Galveston Court of Civil Appeals reversed the trial court, holding that the dedication of streets in the original subdivision plat was abandoned before the state took any steps to make the dedication effective and sent the case back for a new trial. The case went to the state supreme court on an assignment of error, and the decision of the Court of Appeals was upheld (*Magee Heirs, et al. v. Slack*, 258 S.W. (2d) 797, May 20, 1953).

In line with previous decisions, the supreme court held that abandonment, even of an easement acquired by purchase, occurred when the use for which property was dedicated became impossible, or so highly improbable as to be practically impossible, or where the object of the use for which the property was dedicated wholly failed. In the present case, it had been shown that the purpose of the dedicators to create a residential area had wholly failed and had been rendered impossible of accomplishment and had, therefore, been abandoned long before the state attempted to obtain a right-of-way for the new highway. To hold

otherwise, said the court, would be to ignore the realities of the situation. For example, to say that this marshy and swampy subdivision could ever be reasonably usable as a site for residences, except for the small Monmouth Drive area on the eastern fringe, one would have to go on the assumption that the San Jacinto would some day so radically change its course that it could not overflow the area and that high tides from the bay would cease to come over it.

The judgment of the court of appeals was upheld and the case was remanded for a new trial.[15]

Compensation for Land Taken for Highway Purposes

This is a case in which the owner of land taken by the West Virginia State Road Commission in 1941 in connection with the improvement of US 60 in Kanawha County brought suit to compel the commission to institute condemnation proceedings and award just compensation for the land taken and damages caused to the remainder of the tract. The landowner, one R. H. Dunn, claimed that when the improvement took place he had some discussion with a representative of the commission with respect to the boundary of his land and that he was told that the commission was not going to take any of his land. On the strength of this statement, he did not investigate the matter, and it was not until 1952 when he learned of the encroachment in connection with negotiations he had with the commission for the acquisition of additional land to widen the highway.

The highway, as improved in 1941, including 6,549 square feet of Dunn's land, had been continuously used as a public highway since that time, and public moneys and labor had been expended on it. The commission had not discovered the encroachment until 1952, when a survey was made in connection with a proposed further widening.

The state roads commission contended that Dunn's right to compel condemnation proceedings was barred by statutory provisions to the effect that a road would be conclusively presumed to have been established when it had been used by the public for a period of 10 years or more and public moneys or labor had been expended thereon (Section 3, Article 1, Chapter 17, Code, 1931) and that every personal action for which no limitation was otherwise prescribed must be brought within five years after the right to bring the same had accrued (Section 12, Article 2, Chapter 55, Code, 1931).

The supreme court of appeals, in a decision handed down on June 1, 1954, held that Dunn was not justified in relying on the statement of the engineer or, because of it, in failing to investigate the existing visible conditions to ascertain whether construction of the highway encroached upon his land (State v. Griffith, 82 S.E. (2d) 300).

The court also held that the 10-year statute of limitations cited above applied in this case, and the road commission could not be compelled to institute eminent domain proceedings to award compensation for Dunn's land. Furthermore, the 5-year period of limitation, also cited above, was also applicable in this case, and any claim for damages to the residue of the land was barred by operation of the statute.

The court concluded that Dunn had not shown a claim to the land in question superior to the claim of the state to an easement on such land for use by the public as a primary state highway.

Right-of-Way Costs and Land Values

Since shifts in farm land values have an effect on right-of-way costs, periodic reports on "The Farm Real Estate Market,"

[15] See Memorandum 73, January 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 282

published by the Agricultural Research Service of the United States Department of Agriculture, should be helpful to right-of-way officials and other interested persons. The latest report, released on May 31, 1955, indicates that there was an overall increase of 2 percent in farm-land values for the United States in the period between March 1, 1954, and March 1, 1955. This is in contrast to the decline of 6 percent noted in the period March 1, 1953, to March 1, 1954.[16]

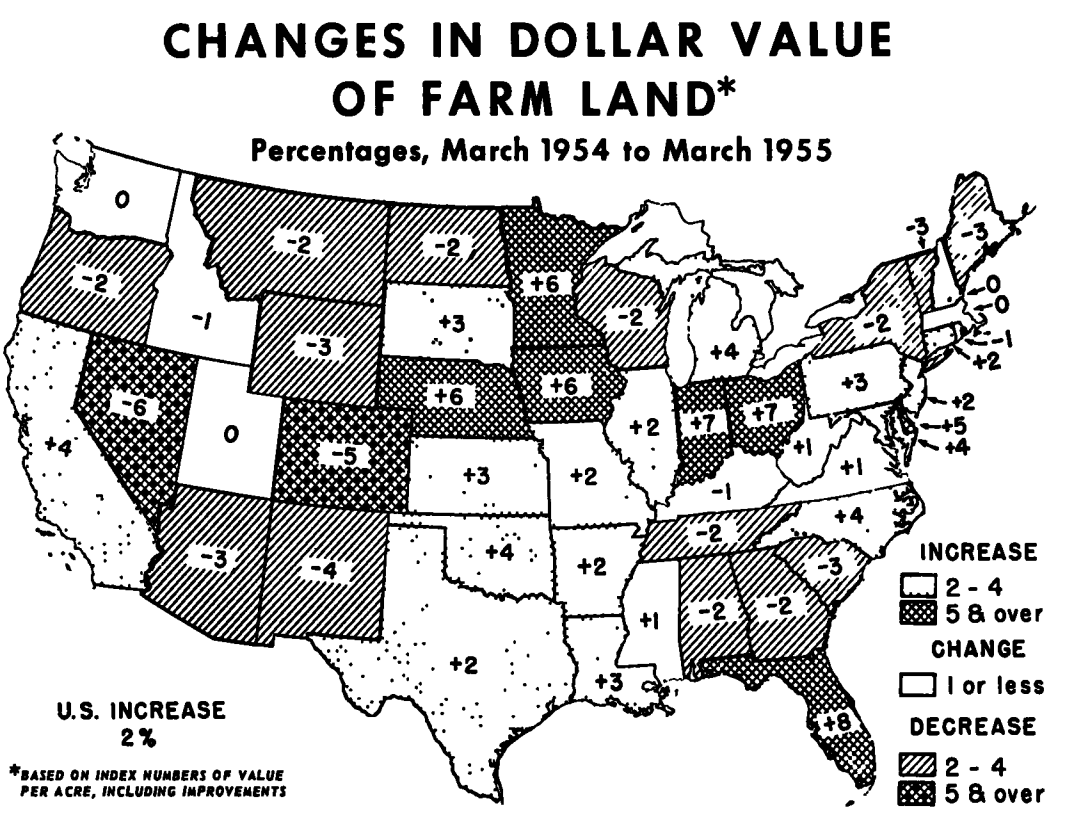

Figure 4

The largest gains took place in the corn belt area, as indicated in Figure 4. Values were also slightly higher in the Southwest. Declines were confined primarily to the northeast, southeast, and mountain areas of the country.

[16] See Highway Research Board Bulletin 101, "Trends in Land Acquisition," 1954, at page 12.

ROADSIDE REGULATION

There are a number of techniques available for providing adequate control of the roadsides: the proper use of the police power, such as zoning, subdivision control, the requirement that permits be obtained for entrances and exits, drive-in theaters, outdoor advertising devices, etc. These devices, if adequately administered, can be effective in preserving the functional efficiency of the highway itself. Lack of understanding on the part of the general public of the purposes of such controls has, at times, made effective administration difficult. There is a need for good public relations to obtain popular support.

Zoning

The zoning mechanism has been successfully used in municipalities to control indis-

criminate development along streets and highways. Zoning at the state level is, however, almost nonexistent, although students of the roadside problem recognize the desirability of state zoning for the purpose of protecting areas not now covered by zoning regulations and also obtaining some degree of uniformity as between the different regions of the state.

Nebraska had an interesting experience during World War II under an act passed by the state legislature providing for the consolidation of cities, villages, or counties into state zoning districts under the control of a state zoning agency. The zoning districts embraced territory used or to be used for war industry and army and navy installations. The effect of these installations on land use was considered of state-wide concern. J. Edward Johnston, formerly of the American Automobile Association, described the state's experience with this zoning device in a paper entitled "The Nebraska State Zoning Agency," presented at the 1955 Annual Meeting of the Highway Research Board. Johnston's paper is included in full in this report (see page 78).

Setback provisions in zoning ordinances have been successfully used to facilitate the future widening of streets and highways. Such provisions have been upheld by the courts if reasonable in nature and if the prescribed setback does not result in depriving the owners of individual lots or tracts of land of a reasonable use of their property. Such provisions usually cover a certain area and apply with uniform effect on all property in the area. An attempt to use the zoning mechanism to prevent construction on the property of an individual because the cost of condemning the property for a proposed highway would be greater after such improvement is, however, subject to attack by the interested party, as brought out in a recent Ohio case.

This case involved an application for a permit to construct a gasoline service station on certain property in the City of Euclid. A zoning change was necessary before the permit could be issued. The Euclid Board of Zoning Appeals reported unfavorably on the application because the property would most likely be needed in the construction of the proposed Lakeland Freeway, and the city council turned down the application.

A court of appeals, in a decision handed down on April 7, 1954, (*Henie v. City of Euclid,* 118 N.E. (2d) 682), held for the property owner on the ground that the city's action constituted an abuse of discretion. The court considered the claim without foundation that the city had the right to "freeze" the landowner's property, preventing her from its beneficial use until the city got around to appropriating it for public purposes as a part of the Lakeland Freeway. If the city needed the property in question, the court said, an immediate proceeding in eminent domain would settle the matter. All that had been done so far toward building the Lakeland Freeway was tentative in character. Plans for construction of the freeway had not reached a stage compelling the city to appropriate the property, nor was the landowner compelled to stand by, paying taxes without benefits, until the time came, if it ever did, when her property must be taken for freeway purposes.

Outdoor Advertising on Traffic Signs

In a decision handed down on April 7, 1954, the Criminal Court of Appeals of Oklahoma held that a contract between the City of Lawton, Oklahoma, and an individual, under which the individual was authorized to place advertising upon the back of intersectional stop signs, was in violation of an express statutory provision prohibiting advertising upon such signs (*King v. State,* 270 P. (2d) 370).

The State of Oklahoma has the follow-

ing statute (Oklahoma Stat. Ann., Title 47, Sec. 125.9):

> No person shall place, maintain, or display upon or in view of any highway, any unauthorized sign, signal, marking, or device which purports to be or is an imitation of, or resembles an official traffic control device or railroad sign or signal, or which attempts to direct the movement of traffic or which hides from view or interferes with the effectiveness of any official traffic control device or any railroad sign or signal, and no person shall place or maintain, nor shall any public authority permit upon any street or highway any traffic sign or signal bearing thereon any commercial advertising.
>
> This shall not be deemed to prohibit the erection upon private property adjacent to highways of signs giving useful directional information, and of a type that cannot be mistaken for official signs.

The sign complained of was affixed to the back of an intersectional stop sign, the sign on the back being identical in size and shape of the opposite side and containing the words: TEAKELL'S GROCERY, FEATURING GOOD MEATS, 1309 SO. 9TH.

The state contended that the signs, as authorized by the city, were not in aid of traffic control but were entirely commercial advertising and, thus constituted a violation of the statutory provision.

The court considered the statute quoted above a clear and unambiguous legislative expression of policy against any type of sign which interfered with effectiveness of any official traffic control device or sign. The court pointed out that at a four-way-stop intersection at least two of said signs would be visible. Such a display would certainly distract the attention of one approaching the intersection. The distracting effects would be true on all traffic directional devices bearing commercial advertising even if located in the middle of the block.

Under the contract in question, the City of Lawton would receive a rental fee of $2 per year. The court took cognizance of the need of towns and cities for revenue and noted that this source of revenue might be of substantial help in meeting this problem. But the court was of the opinion that the loss of one life of either a child or adult, by reason of the distracting nature of commercial signs, would not justify the revenue thus raised. The court thought the legislature had the public safety in mind in establishing the policy evidenced by the statute. Moreover, said the court, to permit such signs to be placed on the back of traffic devices would encourage the oversale and installation of such signs to obtain revenue where they were really not needed; thus, they would become a hindrance to traffic movement and control, if not an outright nuisance.

Drive-in Theaters

At least two cases involving the legality of drive-in theaters were handed down by the courts during 1954. In Iowa, the state's supreme court held that a statute forbidding the operation of a theater outside cities and towns without a license from the township trustees and which made the granting of such licenses discretionary with the trustees, except that denial must be for good cause in unincorporated villages with a population of 1,000 or more, violative of constitutional provisions guaranteeing freedom of speech and forbidding deprivation of rights of property without due process of law. In South Dakota the state's supreme court held that an attempted variance by a zoning board of adjustment, to permit construction of an outdoor theater in a residential area, was legislation and not the exercise of a delegated power.

Iowa. An application to operate an outdoor theater was denied by the trustees of St. Charles Township, with no reason given, whereupon the operators appealed to the courts. The statutory limitations and conditions noted above (Sections 361 1 and 361 3, Iowa Code Ann., 1950) were deemed by the court to violate constitutional provisions for freedom of speech and against deprivation of rights or property without

due process of law. The court noted that no standards were fixed, no guide-posts set up, no beacons lighted to show the trustees how far they might go in granting or denying a license. The trustees might deny an applicant a license for a good reason, for a bad reason, or for no reason at all. The discretion given them by the statute was unlimited, and from the record, that was the way they had exercised it in denying a license to the outdoor theater operators without explanation.

The court took cognizance of the fact that the statutes in question were enacted for a meritorious purpose, inasmuch as the operation of roadhouses, drive-in theaters, amusement parks, dance halls, skating rinks, etc. as enumerated in the statute, when carried on outside of the limits of cities or towns, posed many problems. Questions of fire dangers, traffic hazards, lack of means of adequate policing, and various forms of corruption of the public morals and creation of nuisances arose which were not found when the same businesses were carried on within municipalities supplied with police and fire protection. The court thought a good case might be made for sound regulation, but it must be reasonable regulation rather than prohibition. The provisions of Chapter 361 violated the constitutional guarantees of due process of law, inasmuch as the right to operate a legitimate business was one which the state might regulate but not prohibit or unreasonably restrict.

The supreme court thus concluded that the pertinent provisions of the statutes were unconstitutional (*Central States Theatre Corporation v. Sar,* 66 N.W. (2d) 450, October 19, 1954).

South Dakota. In this case, the building inspector of Rapid City rejected an application for a drive-in theater in a residential zone. The applicant appealed to the zoning board of adjustment, which authorized the construction. Owners of residences in immediate proximity took action to enjoin the proposed construction on the grounds that the drive-in theater, if constructed, would cause irreparable injury; that the value of their residences would be greatly depreciated; that they would be inconvenienced, annoyed, and injured in the use of their respective residences by the noise, dust, traffic, and line of innumerable cars necessarily attendant upon the operation of such an enterprise; and that the proposed use of the property and the variance allowed by the board were in violation of the zoning ordinance of the city.

The state supreme court declared that a zoning board of adjustment, not being a legislative body, could neither ignore nor amend the ordinance under which it functioned. The city zoning ordinance classified the premises in question for residential purpose, and no administrative remedy existed to obtain a permit for the construction of a drive-in theater thereon.

The court concluded that the attempted variance was legislation and not the exercise of a delegated power. Consequently, the authorization by the board for construction of the drive-in theater was a violation of the zoning ordinance. A change in the ordinance itself was the only remedy (*Graves v. Johnson,* 63 N.W. (2d) 341, March 16, 1954).

"Nuisance" Approach to Highway Protection

A significant paper entitled "Roadside Protection Through Nuisance and Property Law" was presented at an open meeting of the committee during the 1955 Annual Meeting of the Highway Research Board. The author, Jacob Beuscher, professor at the University of Wisconsin Law School, suggests the possibility of using the "nuisance" concept to protect the roadside from encroachments or undesirable installations having a detrimental effect on streets and highways.

Beuscher reasons that substantial inter-

ference with safety and free passage on the highway may be enjoined, even though the cause of the interference originates on privately owned land abutting the highway. In modern times, he finds, much attention has been paid to the rights of abutters but little to their duties, among these the duty to refrain from actions which will unreasonably interfere with the dominant right of the public to free passage on the highway. The professor urges that attorneys for state highway commissions consider the use of "nuisance" actions to enjoin roadside abuses. But he cautions that the essence of a roadside injunction case is factual proof of the effect of the roadside use upon "free and safe passage" on the highway. Traffic and accident surveys are needed to obtain this factual proof.

Beuscher's paper is included in full in this report (see page 66).

CONTROL OF HIGHWAY ACCESS

Forty-three states[17] are now authorized to establish controlled-access highways. Enabling legislation for five of these states, Iowa, Montana, Nevada, Vermont, and Tennessee, was enacted in the 1955 legislative sessions. Other states had legislative proposals up for consideration but these were not enacted into law. Some of the states having no specific legislation applicable to controlled-access highways are actually building this type of improvement under existing broad statutory authority pertaining to highways.

Access Rights on New Highways

When a landowner is deprived of access to his property from an abutting highway that is converted into an expressway, it is axiomatic that he should be compensated for the impairment of his access. The courts are in agreement on this principle. But when an expressway is built on new location, the abutting owner, having had no previous access, is not entitled to compensation for denial of access, according to the courts of an increasing number of states.[18] In two of these states, Kentucky and Oregon, the decisions were handed down during 1954 and are of interest for the principles enunciated.

Kentucky. The property in this case abutted on Sixth Street in the City of Louisville, running north and south. The lot extended 100 feet north and south and 200 feet east and west. On the south half of the lot was a duplex apartment house, and on the north half, a two-car garage and a number of large shade trees, shrubs, and flower beds. The north half of the lot was condemned for an inner-belt highway, taking the garage and most of the shade trees, leaving a 12-foot yard space on the north side of the home.

In building the inner-belt highway, the state highway department also closed Sixth Street at the north line of Smick's remaining property. Thus, the Smicks were to have no access to the inner-belt highway and would not be able to travel north, as they formerly did, on Sixth Street.

A trial court awarded $4,750 to the Smicks, and on appeal to the circuit court, the award was reduced to $3,500, consisting of $2,300 for the land and improvements taken and $1,200 for damage to the remainder. The Smicks appealed to the court of appeals, which upheld the award of the circuit court (*Smick v. Commonwealth*, 268 S.W. (2d) 424, May 14, 1954).

In so doing, the court of appeals stated that the closing of Sixth Street was a matter entirely separate and apart from the condemnation proceedings. The Smicks could not complain of lack of access to the new inner-belt highway because this highway did not replace any street to which they

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

[18] California, Illinois, Kentucky, Ohio, and Oregon.

formerly had access. Furthermore, said the court, there was no attempt made to show any specific damages resulting from these factors.

Oregon. This case (*State Highway Commission v. Burk*, 265 P. (2d) 783, January 13, 1954) resulted from a condemnation action by the state highway commission which sought to acquire land for relocation of State Route 22 between Salem and Dallas as an expressway. No part of the land condemned for the new highway was within the boundaries of the old road. The property in controversy consisted of approximately 8½ acres, a part of a larger tract owned by the defendants in the case, abutting on the old highway (see Figure 5)

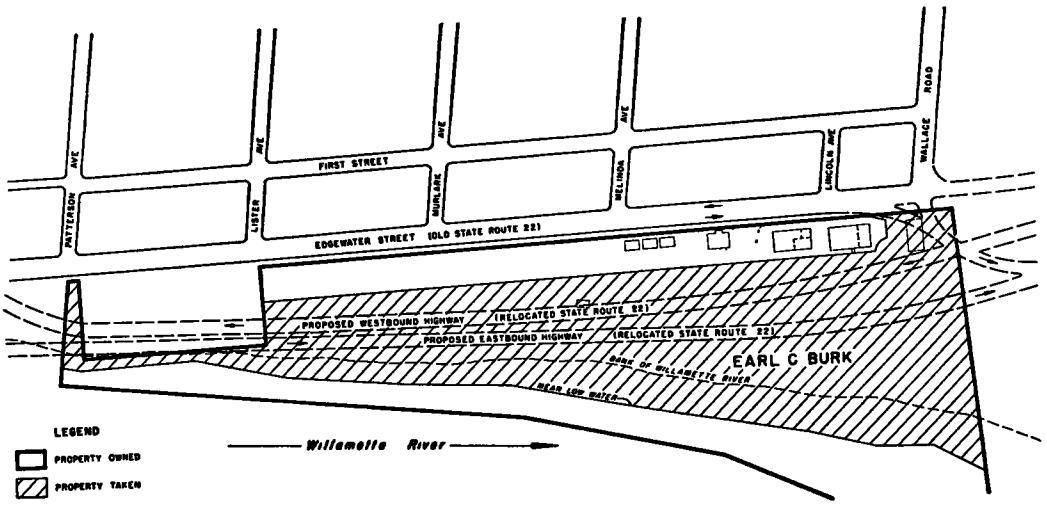

Figure 5

The state highway commission alleged that traffic conditions on the old highway made it necessary to relocate it upon a new line as a controlled-access highway. The question was whether the defendants were entitled to compensation for the taking of an alleged right or easement of access The trial court ruled that they were not, and the jury awarded damages in the amount of $33,000 with interest, no portion of which was for access rights. The property owners appealed, alleging, in part, that the following instructions given to the jury were in error:

> *Now,* I instruct you that prior to and at the time the original complaint was filed in this case, the defendant property owners did not own any right or easement of access of any nature whatsoever to and from their real property described in Paragraph III of said complaint and the relocated portion of the Salem-Dallas Highway, and this instruction relates only to the relocated portion of the highway Therefore, in determining the fair cash market value of all of the defendant property owners' property so described you will not consider that they owned or that such real property had appurtenant to it a right or easement of access to and from the relocated portion of the Salem-Dallas Highway involved in this case Likewise, in determining the fair cash market value of the remainder of the defendant property owners' said property, after the appropriation of the 8 and 5/10ths acres on September 8, 1950, you will consider not that said remaining property had any right or easement of access whatsoever taken from either it or the defendant property owners, for the reason that there was no such right or easement of access owned by the defendant property owners or appurtenant to their said described property at the time the complaint was filed in this court That is, the defendants did not have, nor did their property have appurtenant to it, any right or easement of access to that part of the Salem-Dallas Highway as relocated and involved in this case, and the State has not taken and is not taking any right or easement of access away from them You will not, therefore, consider there was any such access, nor will you allow any damages to be assessed against the State for any such access.

This instruction the supreme court held in accord with the theory of the state. The instruction contended, in substance, that there was no highway in existence across any portion of the defendants' property until the bringing of the suit. The state, therefore, argued that although as an abstract statement of law it was true that owners were entitled to damages for the taking of easements of access, that rule was not applicable to the case at bar "because it assumes that the defendants have an existing right of access." The state argued that since there was no highway in existence there could have been no right in the nature of an easement of access.

The statute under which the state was proceeding (O.C.L.A., Section 100-116, as amended by Chapter 283, Laws of 1947) provided that the state highway commission might, under certain specified conditions commence action in the circuit court "for the condemnation of such interests as such owner or owners may have in said real property, including any and all right of access if the real property to be acquired is for right-of-way purposes, and for determining the compensation to be paid therefor, and the damages, if any there be, for the taking thereof." This, the court felt, authorized the state to condemn a controlled-access highway and thereby to acquire the fee of privately-owned property, to the exclusion of any right of entry appurtenant to the land not taken. This indicated that, in the view of the legislative body, right of access might be a right for which compensation was to be paid. But the statute did not apply exclusively to cases where the state sought to acquire new land in fee for a controlled-access highway. It was equally applicable to cases in which a conventional highway was to be converted to a controlled-access highway by condemning only an easement of access.

However, continued the court, the fact that the establishment of a conventional highway created in the abutting land the attributes of a dominant tenement and in the highway the attributes of a servient tenement did not necessarily mean that such attributes were created when land for a new controlled-access highway was condemned. The present action extinguished the right of the property owners to enter, from abutting land, the land which now belonged to the state. The same right would be lost to the owners if they had sold the tract to a private individual, instead of losing it by condemnation to the state. This did not mean, however, that the owners would have had and then lost an easement appurtenant to a part of their land for access to another part. The question for determination, the court found, was whether there was a property right in the nature of an easement when new land was condemned for a controlled-access highway.

The court quoted at some length from the Schnider case (*Schnider v. State*, 241 P. (2d) 1, 1952), in which the California Supreme Court held that "where a property owner has no right of direct access to a highway before it is converted into a freeway abutting upon his property, nothing is taken from him by the failure to give him such a right when the conversion takes place." Two other California cases (*City of Los Angeles v. Geiger*, 210 P. (2d) 717, 1949, and *People v. Thomas*, 239 P. (2d) 914, 1952) were also cited. In the first of these, the court held that "there can be no detriment to a right which never existed and no compensation for a loss not sustained." In the Thomas case, the court held that "the resolution passed by the highway commission (designating the highway as a freeway) 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 Oregon court concluded that there was no "taking" of an easement of access when a new controlled-access highway was established by condemnation.

The court next considered the matter of whether the nonaccess character of the highway had an effect on severance damages to the remaining property. Oregon statutes provide that, "in any proceeding in eminent domain, evidence of the entire plan of improvement shall be admissible for the purpose of determining the following: (1) value of property taken; (2) all damages by reason of deprivation of right of access to any highway to be constructed, established or maintained as a throughway; and (3) the damages, which, if the property sought to be condemned constitutes a part of a larger parcel, will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and by reason of the construction of the improvement in the manner proposed" (Oregon Laws 1947, Ch. 226, Sec. 16).

The court stated that Item 2 was inserted in the statute to cover cases in which an old conventional highway was established as a throughway, in which case, there would be a "taking" of the preëxisting easement appurtenant to the land not taken. The statute did not provide or imply that damages by reason of deprivation of right of access should be fixed separately from other damages to the property not taken but only that such evidence was relevant in the assessment of such damages.

In the present case, the court considered it a question of fact whether the market value of the land not taken was affected by the more-complete severance resulting from the nonaccess character of the highway appropriated. Several cases from other jurisdictions were cited substantiating this viewpoint, among them the California case of *People v. Al. G. Smith Co., Limited,* 194 P. (2d) 750, 1948, in which the only right taken was the right of access and in which the court held that "where private property is taken for a public use and damage results to the remaining property of the landowner, compensation for such damage must be awarded which is measured by the diminution in value of that property which remains." The court held that the peculiar character of the appropriation was relevant to the issue of damages to the portion of the land not taken.

Again considering the instruction given to the jury by the judge of the trial court, quoted above, the supreme court noted that no clear distinction was made by the judge of the lower court between the existence of an easement on the one hand and the question of a possible depreciation of the market value of the remaining land on the other. But the exception taken by the defendants did not call attention to this distinction, nor did they request any instruction to the effect that the jury might consider the nonaccess character of the land taken, in determining the depreciation, if any, of the market value of the remaining land.

However, the lower court did instruct, in general terms, that the defendants were entitled to compensation measured by the fair cash market value of the land actually taken "plus the amount, if you find there is any, by which the fair cash market value of the remainder . . . has been depreciated solely as the result of the appropriation. . . ." The lower court also instructed the jury to determine the damages, if any, to the property not taken, on account of the rights asserted by the highway commission.

Under these instructions, the supreme court thought the jury was entitled to consider the effect of the nonaccess quality of the condemnation in determining the depreciation, if any, in the remaining property. No evidence was found indicating that they did not do so. The court concluded that the instruction given did not constitute reversible error.

It is interesting to note that the above case arose before the effective date of two new sections of the Oregon Code, Sections 374.405 and 374.410 (1951) providing that no right of access shall accrue to property

abutting upon a new highway constructed, located, or reconstructed upon right-of-way, no part of which had been acquired for public use as a highway prior to the effective date of the act. According to the chief counsel of the Oregon State Highway Department, C. W. Enfield, the decision in the Burk case conclusively supports the constitutionality of these statutes.[19]

Impairment of Access Due to Construction of Dividing Strip

Courts generally have held that highway authorities may construct a dividing strip, or median, as a means of regulating or controlling traffic under the police power and that circuity of travel resulting from such a design is not compensable. A West Virginia decision, handed down during 1954, supports this line of reasoning. However, in a Mississippi case, the state supreme court held that not only was the state highway commission without authority to construct a median strip across a street without the consent of the municipality, but the city could not validly consent thereto, unless compensation was first made to abutting landowners.

Mississippi. Protesting landowners in this case owned property on the West side of Hamilton Road, running north and south in the City of Meridian. Beginning in 1948, the state highway commission constructed Tom Bailey Drive, running east and west and bisecting the property in question. A restaurant was located on the northerly portion of the property, abutting Hamilton Road, and a gasoline service station on the south of Bailey Drive. The median strip constructed by the highway commission in Bailey Drive was unbroken for a distance of 1,580 feet, including the intersection of Hamilton Road. The property owners claimed that access to their business property was impaired to such an extent as to damage the value thereof. They asked that the highway commission be enjoined from maintaining the dividing strip and that they be compensated for the impairment of their right of access.

The City of Meridian became a party to the suit, claiming that the highway commission had constructed the median strip without its consent or authorization.

The highway commission argued that it had authority under Section 8038, Code of 1942, defining the general powers of the highway commission relating to construction or maintenance of state highways to construct the controversial median strip. The state supreme court, however, cited a provision of the code (Section 3374-127, 1952, Supplement Miss. Code 1942) which read as follows:

> The governing authorities of municipalities shall have the power to close and vacate any street or alley, or any portion thereof But no street or alley or any portion thereof shall be closed or vacated except upon due compensation being first made to the abutting landowners upon such street or alley for all damages sustained thereby.

The court did not believe that Section 8038 modified the municipality's jurisdiction over its streets, particularly in view of the provision contained in subsection (d) to the effect that "no rule, regulation . . . shall be made [by the highway commission] that conflicts with any statute now in force or which may hereafter be enacted or with any ordinance of incorporated cities or towns." In other words, said the court, it was clear that the action of the highway commission in constructing this neutral ground across a long-established public thoroughfare of the city, without the consent of the municipal authorities, was beyond its statutory authority and power. Nor, continued the court, could the city itself have validly consented to the impairment of the free and reasonable use of the street in such manner, without due compensation being first made to the abutting landowners for all damages sustained thereby (*Hamilton v. Mississippi State*

[19] See Memorandum 74, February 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 235.

Highway Commission, 70 So. (2d) 856, March 15, 1954).

Throughout the decision, the court referred to "that part of Hamilton Road that has been vacated," apparently basing its decision on a provision of the state constitution prohibiting the taking or damaging of private property for public use, except on due compensation being made to the owner, and the statutory provision quoted above (Section 3374-127) authorizing a municipality to close streets and alleys. The court remarked that the state highway commission, instead of the municipality, had virtually closed the street in question without lawful authority.

West Virginia. One Paul Brady, owner of an automobile garage abutting on US 60 in Cabell County, West Virginia, was granted an injunction by the circuit court of the county, enjoining the general contractor and the district engineer for the state road commission from building a median strip on the highway, which would restrict entrance to the garage. Upon appeal, the state's supreme court of appeals dissolved the injunction on the ground that Brady's complaint did not state grounds on which an injunction could be granted (*Brady v. Smith et al.*, 79 S.E (2d) 851, February 2, 1954).

In asking for the injunction, Brady alleged that the construction of the proposed center island or median strip would require all east-bound traffic on US 60 to proceed about 300 feet beyond his property, in order to turn and approach the garage, which would greatly damage his business. In granting the injunction, restraining the state from proceeding with the construction of the center island or median strip, the lower court ordered the state to leave a gap in the center island or strip 100 feet in length in front of Brady's property.

The high court found no specific allegations in the bill of complaint to the effect that the garage owner had suffered, or would suffer, injury from the proposed construction of the median strip different in kind from that suffered by other property owners similarly situated. Nor did the complaint disclose that the contractor and the district engineer acted arbitrarily, capriciously, or fraudulently in constructing the proposed median.

The case must therefore be governed by the previous case (*Heavner v. State Road Commission*, 191 S.E. 574, 1937), continued the court, which held:

1 Under the provisions of Section 4, Article 4, Chapter 40, Acts of Legislature, First Extraordinary Session 1933, the state road commissioner has power "upon petition and hearing, or after due investigation, upon his own initiative, (to) discontinue any road no longer necessary" and such power is not subject to the control of the courts, except where its exercise is capricious, arbitrary, or fraudulent

2. Where the state road commissioner, in the lawful exercise of the powers vested in him under Section 4, Article 4, Chapter 40, Acts of the Legislature, First Extraordinary Session 1933, makes a change in a primary state road, owners of property, affected by such change, cannot, by mandamus, require the restoration of the road to its original location where reasonable access to and from their property is provided

In the Heavner case, the court stated that "the legislature having granted this power in the broadest possible terms, courts are not at liberty to interfere with the exercise of the same by those entrusted with its execution, except in cases where capricious, arbitrary, or fraudulent conduct is involved."

In line with this and other decisions, the state supreme court found it necessary to reverse the decree of the lower court and order that the injunction be dissolved.[20]

Service Facilities on Toll Roads

The Massachusetts Turnpike Law (Acts of 1952, Chapter 354) contains a provision authorizing the acquisition by the turnpike authority of sites along the turnpike for gasoline stations, restaurants, and other services and of other abutting property or

[20] See Memorandum 76, May 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 242.

property rights for the purpose of protecting the turnpike.

In 1954, the governor of the state asked for the opinion of the justices of the state supreme judicial court as to the constitutionality of this and other provisions of the act.

The court, in its opinion dated May 22, 1953 (*Opinion of the Justices*, 113 N.E. (2d) 452), answered the governor's questions in the affirmative, using the following reasoning:

The turnpike envisioned by the legislature was an entirely new type of highway, made necessary by the many changes in the lives and customs of the people brought about by the introduction and general use of the automobile. The court found that in some respects the proposed turnpike resembled a new railroad system crossing the state, rather than a traditional road leading from one town to another Such a road could not merely be constructed and opened to the public. It must be operated. This involved inspection, supervision, and a constant preparedness to remove obstructions and make necessary repairs. This, in turn, involved the use of road machinery, towing vehicles, snow plows, and sanding equipment which might have to be stored along the highway. For all this, buildings might be required, as well as reasonable provision for garages where necessary repairs could be made, both on the equipment of the turnpike and in order to keep the vehicles of travellers in operable condition. Similarly, it would be necessary to provide gasoline stations at reasonable intervals. The auxiliary structures, said the court, bore a relation to the turnpike similar to that which the switch towers, water tanks, roundhouses, and stations bore to a railroad. These structures were parts of the railroad, although not parts of the track.

The court was of the opinion that not only the worked portion of the roadway but also the kinds of buildings and other structures mentioned above and a reasonable amount of land taken or acquired on which to place them were all "needed for the actual construction" of the highway and were to be acquired for public use. The court concluded that reasonable takings for these purposes might be authorized by the legislature under the powers which it possessed before the amendment to the constitution.

Although more doubt might exist as to restaurants, the court was inclined to classify them with the services previously mentioned and consider them a part of the turnpike. The utility of restaurants in connection with travel was attested by the fact that they were a customary feature in railroad stations and were also commonly found at the larger airports. The provision for restaurants might also have some tendency to reduce the amount of stopping along the route and to keep the roadway free of refuse. Apparently the legislature regarded these auxiliary structures as part of the turnpike, said the court, since it included all of them in the definition of "turnpike" included in the act.

The court also declared that provisions contained in the act for the leasing by the authority of "gasoline stations, restaurants, and other services" were not unconstitutional. The property leased would be devoted to the public purpose of the turnpike, to which these services were wholly subordinate. Previous court decisions and opinions of the justices were cited wherein it was held that "while land cannot ordinarily be taken by eminent domain for the purpose of renting and sale . . . this principle is inapplicable where, as here, the property so rented or sold is thereby devoted to a public purpose."

Finally, the court stated that in its opinion the power granted the turnpike authority to take "abutting property to preserve and protect the turnpike" was not a grant of power to take more land than "is needed for the actual construction" of the highway, as used in the constitutional amendment

quoted above. Land really needed to preserve and protect the turnpike was needed for its actual construction within the meaning of this constitutional article, and doubtless this power to take "abutting property" would be construed with considerable strictness.[21]

Access to Commercial Establishments

In New Hampshire, the governor and council asked the supreme court of the state for an opinion as to the constitutionality of an act allowing established commercial facilities abutting and having direct access upon a highway to retain access rights when the highway became a toll-free controlled-access highway, while denying access to neighboring abutters who had not so developed their land. The justices answered in the affirmative in an opinion dated June 15, 1954 (*Opinion of the Justices*, 105 A. (2d) 924).

The law in question (Laws of 1953, Chapter 237) provides for the construction of the Eastern New Hampshire Turnpike. Section 1(c) permitted the commissioner of public works and highways, with the approval of the governor and council, to designate, limit and control points of ingress and egress. Section 1(d) authorized these officials to permit toll-free use of certain sections of the turnpike "if it is for the public good."

Section 8 of the Highway Law of 1945 forbade authorization of commercial enterprises upon a controlled-access highway. But Section 9 of the Turnpike Law (Laws of 1953, Chapter 237), while providing that the toll road in question be a controlled-access highway as defined in the Highway Law of 1945, also specified that Section 8 thereof should not apply to existing facilities on highways, "not now restricted as to access, used as toll-free sections of the turnpike."

The court was of the opinion that the highway authorities had statutory authority to permit a going business establishment to retain its location and access.

The court also considered the matter of whether the provisions of Section 9, Chapter 237, Laws 1953, supra, necessarily produced an unconstitutional discrimination against owners of property abutting the toll-free sections of the highway which had not been developed into going business establishments. In the court's opinion, such a "discrimination" was constitutional if applied in consistency with the purpose of the statute.

The court cited previous cases, one, *Woolf v. Fuller*, 174 A. 193, June 28, 1934, wherein the court said: "The hardship of taking away an established use may well be regarded as greater than of the prevention of a new one. The seriousness of the restriction upon the private right is to be considered in balance with the expediency of the public interest." In the other case, *Stone v. Gray*, 200 A. 517, 520, June 21, 1938, the court said: "It is reasonably just to classify between existing use and proposed use, although otherwise the uses may be the same."

Denial of Access to Approach Road

Another dispute regarding access to the New Hampshire Turnpike which reached the courts during 1954 involved the question of whether the commissioner of public works and highways had the right to prevent access to a connecting road as well as to the toll road itself. The state supreme court, in a decision handed down on November 30, 1954 (*Wiseman v. Merrill*, 109 A. (2d) 42) held that the commissioner had such authority under existing statutes.

In 1949, one Joseph Cohen deeded 36 acres of his farm for the construction of the turnpike and a connecting service, or approach, road to Rockingham Avenue, together with access and other rights pertaining to the remainder of his abutting lands. Cohen's land was bounded southerly by the turnpike, easterly by an approach road to

[21] See Memorandum 75, March 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 236.

Rockingham Avenue, northerly by Rockingham Avenue, and westerly by other abutters. Cohen received $42,500 for the property sold. After Cohen's decease, his heirs instituted court proceedings, claiming that the deed executed by him conveyed no right of access or other rights to the road leading from the traffic circle to Rockingham Avenue.

The court, in its decision, called attention to a provision of the state's controlled-access law (Laws of 1945, Chapter 188, Part 7, [1]), which authorized the commissioner of public works and highways to designate "any existing road, street or highway within the state as included within a limited-access facility" and also authorizing him after the establishment of the highway to permit other roads, not a part of it, to intersect it only at "such locations and upon such conditions as the highway commissioner shall approve." Section 3 authorized the commissioner to design and regulate any controlled-access facility so as to best serve the traffic for which it was intended and to specify the terms upon which any person might have access to it. Section 5 gave the commissioner the same authority to establish and regulate service roads as he had with respect to controlled-access highways.

The deed in question conveyed "all rights of access . . . pertaining to the remainder of abutting lands belonging to the grantor," and the court held that Cohen's heirs had no valid claim to a right of direct access from any part of their lands to the abutting land of the state. The grant did not effect the grantor's right of access to Rockingham Avenue, which intersected the approach road and thus afforded access to the traffic circle.

The protesting landowners contended that the road to Rockingham Avenue was not a local service road but a "connecting service road or approach road." The court found, however, that this road was so related to the controlled-access highway that, in the interest of safely expediting through traffic, the authorities could reasonably prohibit access to it under the broad statutory powers previously described.

Taxation of Excess Land Acquired by Turnpike Authority

In acquiring right-of-way for the New Jersey Turnpike, the turnpike authority purchased some 500 acres of land in Washington Township outside the 300-foot right-of-way, consisting of portions of former farms cut in two by the construction of the turnpike. The township assessed the turnpike authority for this land in 1952, whereupon the authority petitioned the county tax board for cancellation of the assessments. The petition was turned down by the county board, and the matter eventually reached the state supreme court. In a decision handed down on June 21, 1954, that court held that the turnpike authority was not entitled to tax exemption when its property was not used as part of the turnpike project (*New Jersey Turnpike Authority v. Washington Township,* 106 A. (2d) 4).

The turnpike authority conceded that there was no likelihood of the lands in question being used in the future for turnpike purposes. It intended to dispose of them as surplus property as soon as it conveniently could. According to the authority, the delay in disposing of the properties was due to the fact that they were mere parts of former farms and that some of them were without access to a public road. The number of prospective buyers was, therefore, distinctly limited. The township, on the other hand, pointed out that, although some of the individual tracts lacked access to a public road, all of them by reason of their common ownership by the turnpike authority did have access to public roads, that their value was deteriorating for lack of cultivation, and that the turnpike authority had not made any real effort to sell them.

The court noted that the turnpike authority did not have statutory authority to condemn excess property. However, more latitude was necessarily allowed as to the quantity of land bought than would be permissible when proceeding by condemnation. In many instances, acquisition by purchase was more in the public interest than acquisition by condemnation, because it might be more economical to buy an entire tract than to condemn part of it and to pay compensation for damages to the remainder. The court thought such was the case in the present instances and, in the absence of bad faith, the practice should be encouraged.

However, the court continued, the right to acquire by purchase a larger amount of land than would have been permitted by condemnation did not imply a power to retain any land thus acquired if not intended for a public purpose. Vacant land not in the public use or presently intended for public use was taxable, even when owned by bodies having a right to tax exemption with respect to property used for an appropriate purpose. Moreover, continued the court, tax-exemption statutes, if based on the personal status of the owner rather than on the use to which the property is put, ran afoul of the tax article of the New Jersey Constitution of 1947, providing that "property shall be assessed for taxation under general laws and by uniform rules." A similar provision of the previous constitution had been construed to prohibit such exemptions (*Tippett v. McGrath*, 59 A. 1118, 1904).

The turnpike authority argued that the property in question was exempt from taxation as property of the state. The court found this argument without merit, the notion that the turnpike authority was the *alter ego* of the state having been disposed of in a previous case (*New Jersey Turnpike Authority v. Parsons*, 69 A. (2d) 875, 1949).

Economic Impact of Expressways

Three new studies of the effect of controlled-access highways on adjacent land use and land values were completed by the California Division of Highways during the year and printed in *California Highways and Public Works*. In "Motels and Freeways," published in the January-February, 1954 issue, the author, John F. Kelly, points out that motels on access-controlled highways are capable of attaining even greater success than comparable motels on conventional highways. "Industry and Freeways," also by Kelly, appeared in the May-June issue and describes the spectacular industrial growth adjacent to the Eastshore Freeway. A third article, "Industry and Frontage Roads," by Kelly and Edward P. Reilly, documents the increased land values and the enthusiastic endorsement by the property owners conducting business along frontage roads on the Santa Ana Freeway. It appeared in the July-August edition of the magazine.

An informal report on the Virginia study of the economic effects of the Lexington Bypass was given at the open meeting of the committee during the annual meeting of the Highway Research Board, by Rudyard B. Goode, who is associated with the study. It is hoped that progress on this and other studies now in process throughout the country will be made during 1955.

Right-of-Way Problems on Urban Expressways

A recent innovation in Milwaukee County, Wisconsin, is the County Expressway Commission, authorized by recent enabling legislation and now in the process of adopting a plan of expressways to serve the entire county. Edward A. Bielefeld, right-of-way engineer of the commission, described the commission's activities in a paper entitled "Right-of-Way Problems on Urban Expressways," presented at an open

committee meeting at HRB's annual meeting in January of 1955. In addition to the preparation of a plan of expressways, the commission is authorized to acquire the right-of-way for and to construct an expressway system in the county. Bielefeld's paper is included in full in this report (see page 59).

Highways for New Urban Patterns

Because of the increasing emphasis on urban traffic problems and the vital need for solutions thereto, a paper presented at the open meeting of the committee by Tracy B. Augur, director for urban-planning assistance of the Urban Renewal Administration, Housing and Home Finance Agency, is of special interest. Augur, in his paper entitled "Highways for New Urban Patterns," suggests that highway designers combine their talents with those of state, county, and city planners to design a combined pattern of highways and urban development that will give the greatest promise of balance between highway service and highway need. This paper is included in this bulletin (see page 54).

PARKING

Parking as a Public Purpose

Although the courts of the various states have consistently held that the provision of off-street-parking facilities constitutes a public purpose, at least three state courts were called upon during the year to pass upon this important question. In two states, Indiana and Kansas, the question was definitely decided in the affirmative. In a third state, North Carolina, the state supreme court conceded that conditions in a municipality might be such that the provision of off-street-parking facilities would constitute a public purpose; but in the particular case before it, the court was unable to make a decision to that effect in the absence of a resolution by the municipality finding that public necessity and convenience warranted its action.

Indiana. An attempt was made to prevent issuance of general obligation bonds of the City of Valparaiso for the acquisition of land to be used for off-street-parking facilities. The state supreme court held that a state statute authorizing municipalities to acquire, establish, and regulate municipal parking facilities was a valid exercise of the police power in the interest of public safety, convenience, and welfare (Phillips v. Officials of City of Valparaiso, 120 N.E. (2d) 398, June 16, 1954).

The petitioners, residents of the city, alleged that the city abused its discretion and failed to use good judgment in the proceedings to provide the parking facilities, particularly as to the price to be paid for the real estate to be purchased, the location of the parking lot, and the adequacy of present parking facilities. They also questioned the constitutionality of the enabling act (Burns' Indiana Stats. Ann., Cum. Supp. 1953, Sec. 48-8461).

The court held that the necessity and expediency of acquiring property for the establishment of parking facilities were legislative and not judicial questions. In Indiana, the courts would not undertake to control the discretion of administrative boards, so long as their action was not illegal, capricious, or fraudulent.

The petitioners asserted that the enabling statute, authorizing cities of the second, third, or fourth classes to acquire, establish, construct, maintain, operate, and regulate municipal parking facilities, was unjust and unreasonable with respect to taxpayers who did not own automobiles and businessmen who had provided their own off-street parking facilities. The court stated that this same objection might be made to the exercise of any other municipal function, such as the establishment and maintenance of playgrounds, swimming pools, and airports, the use of which was, for obvious

reasons, confined to taxpayers who had use for such facilities.

The court pointed out that the legislature, under the police power, might enact laws for the regulation and control of traffic on the public highways. Parking facilities, the purpose of which was to relieve traffic congestion, had a definite bearing on public safety and convenience in the use of city streets and, to that extent, served a public purpose. The court held that enactment of the enabling statute was a valid exercise of the police power, the need for which transcended any rights which the petitioners had asserted under the state's constitution.

Kansas. The Kansas Supreme Court upheld the constitutionality of a state statute authorizing first-class cities to condemn real estate for off-street-parking facilities to be financed from the sale of revenue bonds (State v. City of Topeka, 270 P. (2d) 270, May 8, 1954). The state alleged that the statute violated Section 1, Article 2 of the state constitution, "the legislative power of this State shall be vested in a house of representatives and senate," in that no adequate standards were prescribed by the statute and the law therefore involved an unlawful delegation of legislative power.

The court, however, found that the statute in question (Gen. Stats. of Kansas, Cum. Supp. 1953, Secs. 13-1388 et seq.) did prescribe certain standards as to the method of acquisition of property; the location of such facilities within the city; the method for gathering information necessary for the determination of the existence of a public need and the advisability, necessity, and benefit to the city; the circumstances under which property might be acquired and improved; the method of financing a project; etc. The court found these standards ample and concluded that the statute did not constitute an illegal delegation of legislative power.

The state further questioned whether the taking of private property for off-street parking constituted a public use. The court, however, made the same observation as did the Indiana court in the *Phillips* case discussed above, to the effect that it lay within the power of cities to regulate and control the traffic upon their streets. Since regulation of traffic upon the streets of a city was in the interests of public safety, convenience, and necessity and the stopping or parking of vehicles along the streets was a legitimate use thereof, subject to legislative control, it followed that the provisions of the enabling statute, providing for acquisition of property for off-street-parking facilities, was for a public purpose.

North Carolina. The City of New Bern attempted to lease property to provide off-street-parking facilities, using funds derived from sources other than taxation (including revenue from parking meters) for the construction and maintenance of the facilities. A civil action was brought to restrain the city from such action. A lower court found that the leasing of property to establish off-street parking involved an expenditure of public funds for a public purpose within the meaning of the constitution and the laws of the state and was reasonably required by the crowded and congested traffic conditions of the city.

Upon appeal, the state supreme court held that the question as to whether off-street-parking facilities might be maintained as a proprietary public-purpose function of the municipality depended in each instance upon local conditions as found and declared to exist by the municipality, such finding to be duly adopted after notice and an opporunity for local citizens to be heard. In this case, the city had passed no resolution asserting public necessity and convenience, made no appropriation, adopted no ordinance, designated no nontax fund to be used in furtherance of the proposed plan, or taken other action necessary to place it in position to pursue the alleged proprietary undertaking. The court ordered the munici-

pality to refrain from acquiring land for the facilities until after it had performed the necessary preliminary acts and the court had made its determination as to their sufficiency (Henderson v. City of New Bern, 84 S.E. (2d) 283, November 3, 1954).

Use of Parking Meter Revenue

A question which the courts are increasingly called upon to answer concerns the matter of whether or not revenue from parking meters legally may be used to provide off-street-parking facilities. The courts of at least three states, Michigan, South Carolina, and West Virginia, answered this question in the affirmative during the year.

Michigan. In *Petition of City of Detroit,* 62 N.W (2d) 626, February 18, 1954, a number of owners or operators of privately-owned automobile parking lots in Detroit brought action for a determination of the matter. The state supreme court held that parking meters were a public improvement within the meaning of the revenue-bond act authorizing the acquisition of off-street facilities for the purpose of parking motor vehicles and that revenue from street parking meters could be combined with that from municipally-owned and operated off-street-parking facilities for the purpose of financing the issuance of revenue bonds to acquire the facilities.

The city, by ordinance and subject to charter provisions, had created a municipal parking authority to have general supervision over all municipally owned facilities for parking and storage of motor vehicles. An amendment to the ordinance provided that coins collected from parking meters be deposited in a special fund to be used for acquiring and installing parking meters, cost of supervision, inspection, maintenance, supply of parts, cost of collection, and enforcement of the ordinance. It further provided that any balance remaining was to be used, upon due appropriation by the common council, for the acquisition and installation of other traffic control devices and for the acquisition, construction, and operation of off-street-parking facilities.

The court called attention to the fact that a similar ordinance adopted by the Village of Wayne had been upheld by the court in *Wayne Village President v. Wayne Village Clerk* (Parr v. Ladd) 36 N.W. (2d) 157, 1949, and the same ordinances here under attack had been held valid in *Cleveland v. City of Detroit,* 37 N.W. (2d) 625, 1949. The court found no merit in the operators' present claim that the city could not legally collect surplus or "profit" money from street parking meters to be used to finance off-street-parking facilities. Further, the question whether or not the parking facilities would be operated at a profit was an administrative problem for the legislature and the municipal authorities. It was not a matter primarily to be decided by the courts.

The parking-lot operators also claimed that the city lacked authority to engage in a public improvement, such as automobile off-street parking, in competition with them and to their financial damage and loss. The court quoted a previous decision, *Andrews v. City of South Haven,* 153 N.W. 827, 1915, in which it said:

> In the exercise of proprietary and business powers of a municipal corporation, it is governed by the same rules which control a private individual or a business corporation; in such case the fact that a city engaging in a commercial line of activity competes with and damages one of its inhabitants in his trade or business does not entitle him to relief against municipal action for the city owes him no immunity from competition.

The same question came before the state supreme court, in another case involving the expenditure of public funds, by the City of Pontiac for the acquisition and development of city-owned and operated parking lots.[22] In that case, the state supreme court held that the income from operation of parking meters constituted revenue of the

[22] Stolorow v. City of Pontiac, 63 N.W. (2d) 611, April 5, 1954 (see p. 44 for a full discussion of the decision).

city available for use in connection with the proper construction, use, or maintenance of its public streets, pointing out that, as a matter of common knowledge, cities throughout the state have availed themselves of such revenue for the acquisition and operation of lots for off-street parking in order to relieve the congestion in public streets.

South Carolina. In the case of *Sammons v. City of Beaufort,* 83 S.E. (2d) 153, July 21, 1954, the Supreme Court of South Carolina upheld the authority of the state legislature to authorize a municipality to pledge revenue from on-street meters in connection with a proposed issue of revenue bonds to defray the cost of providing off-street facilities. The court, however, refused to approve a covenant in the ordinance passed by the City of Beaufort agreeing to put into effect and keep in force, during the life of the bonds, charges for both off-street and on-street parking sufficient to produce revenue necessary to service the bonds, to provide a cushion fund therefor, to operate and maintain all of its parking facilities, and to provide appropriate sums for depreciation and contingencies.

In upholding the city's authority to finance construction of off-street-parking facilities by revenue derived in part from curb meters, the court referred to a previous case, *Owens v. Owens, Mayor,* 8 S.E. (2d) 339, 1940, which limited charges for on-street parking to those necessary to pay the cost of purchasing, maintaining, and operating parking meters and prohibited a municipality from using such facilities for revenue-raising purposes. However, the court did not think it followed that a municipality might not use the revenue from on-street parking facilities to defray, in part, the cost of establishing and maintaining a parking lot. Both facilities were interrelated and constituted a uniform parking system. The right to establish a parking lot was a necessary adjunct to the right to regulate traffic. No good reason appeared why both on-street and off-street parking might not be combined to accomplish the general objective of regulating the use of the streets. So long as the total revenue received from both on-street and off-street meters did not substantially exceed that necessary to defray the expenses incident to the regulation of parking, including the acquisition and improvement of off-street parking facilities, the court did not think there was a violation of the rule that the police power could not be invoked for revenue purposes.

Regarding the covenant to maintain parking meters on the streets during the life of the bonds and to charge fees for the use of parking spaces thereon sufficient to service the same, the court maintained that this constituted an ineffective attempt to barter away the police power. The legislature might not authorize the City Council of Beaufort to adopt a system of on-street parking and make it irrevocable during the life of the bonds, so as to preclude a future council from adopting some other method of regulating traffic or from prohibiting parking entirely on any or all of the streets.

The court also passed on two other covenants included in the Beaufort ordinance. One of these, making it a criminal offense to violate parking regulations, the court declared invalid, on the ground that no city council might be empowered to enact any kind of criminal ordinance and make the same irrevocable.

The court also declared invalid a covenant giving the bondholders a lien on all parking facilities in the city and providing that, upon default, a receiver might be appointed to take over and operate both the on-street and off-street parking facilities. The court stated that although such a covenant was authorized by the revenue-bond act and had been upheld in *Cathcart v. City of Columbia,* 170 S.E. 435, 1933, an entirely different situation was here presented. The *Cathcart* case involved a mu-

nicipal stadium, and the lien created "would apply only to the project constructed by moneys derived from the sale of the bonds and would partake of the nature of a purchase-money mortgage" The present covenant would create a lien not only on the project being constructed but also on curb-parking facilities, involving an essential governmental function. It would hardly be suggested, said the court, that a municipality might mortgage its streets or delegate to a court the power to regulate traffic. Thus, the court declared the covenant invalid insofar as it pertained to on-street-parking facilities.

West Virginia. In a decision handed down by the state supreme court of appeals, July 30, 1953, the court upheld the authority of the City of Beckley to issue revenue bonds for the purpose of constructing and operating an off-street parking facility and to use revenues from on-street-parking meters to supplement funds received from the bond issue (*State ex rel. Bibb. v. Chambers,* 77 S E. (2d) 297).

This case arose when the mayor of the city refused to sign and take other necessary steps for the issuance of public-utility revenue bonds as provided for by two ordinances for the purpose of financing an extension of existing parking facilities in the city of Beckley by the construction of a municipal parking lot. The ordinances in question provided that the cost of construction be paid on a self-liquidating basis from revenues derived from operation of the parking facilities and pledged net revenues from on-street-parking meters as further security for the cost of construction. The mayor questioned the city's authority to pledge revenues from on-street meters for this purpose under existing statutes.

The enabling statute (Section 1-a, Chapter 134, Acts of the Legislature, Regular Session, 1953) authorized municipalities to establish, operate, and finance automobile-parking facilities as public works and, in order to help finance the same, to use revenue derived from parking meters or other parking facilities, "unless such revenue is otherwise pledged to pay for such meters or parking facilities."

In upholding the city's authority in this respect, the court applied the liberal rule, stated in the case of *Holbert v. Robinson, Mayor,* etc., 59 S.E. (2d) 884 (1950), in which the court held a statute authorizing the issuance of revenue bonds to provide "public automobile-parking facilities" (Section 1, Chapter 68, Laws of 1935, as amended by Section 1, Article 4-a, Chapter 90, Laws of 1945, and Section 1, Article 4-a, Chapter 136, Acts of 1951) broad enough to permit a municipality to issue bonds to provide such facilities, stating that the act "being necessary for the public health, safety, and welfare, shall be liberally construed to effectuate the purpose thereof."

As the controlling purpose of these earlier laws and the 1953 law was the financing of municipal public works constructed and financed under the original law, as amended, the court was of the opinion that the 1953 law might be construed to include the right to pledge revenues derived from on-street-parking meters, not otherwise pledged, to help finance the proposed facilities, including payment of the principal and interest on the revenue bonds.

The court also declared that the ordinances enacted by the City of Beckley for the purpose of alleviating congested parking conditions were in furtherance of the purpose which had prompted the enactment and amendment of the enabling statute The common council of the city had found that existing parking facilities in the city were inadequate and that such inadequacy would be remedied by the construction of the automobile-parking facilities proposed. Findings of fact by the council of a municipality or other legislative body, said the court, were not subject to judicial inquiry.

It was asserted by the mayor that the

ordinances were invalid on the ground that the city was not authorized, in the absence of specific legislative delegation to that effect, to charge fees for the use of on-street-parking meters which would produce revenues in excess of the cost of constructing and maintaining the meters. In other words, the ordinances were revenue measures, as distinguished from regulatory measures. The court agreed that parking meters might not be installed for revenue purposes. However, in the present case the ordinances were enacted to promote the public health, safety, and welfare and were regulatory and not revenue measures. Nothing in the record indicated that fees to be charged for parking on the proposed parking lot and at the on-street meters were unreasonable or were designed to produce revenue in excess of that sufficient to cover the cost of constructing the off-street facilities and the on-street meters and the operation thereof. The collection of fees for the use of the off-street-parking facilities and on-street meters did not, therefore, constitute an invalid levy of a tax.

The court concluded that it was the duty of the mayor to sign the revenue bonds and to perform other administrative acts to bring about issuance of the bonds to further the construction of the proposed parking lot. A writ of mandamus was awarded.[23]

Special Parking Agencies

Enabling statutes in a number of states authorize the provision of off-street-parking facilities by special parking agencies for various reasons, such as the need to obtain additional financial resources, the need to provide parking accommodations in a shorter period of time by an agency set up especially for this one purpose, etc. The legality of using special parking agencies to provide public off-street-parking facilities came before the courts in several states during 1954. This litigation involved issues ranging all the way from the constitutionality of enabling statutes in Delaware and New York to the civil-service status of employees of the Parking Authority of the City of Trenton, New Jersey.

Connecticut. The state supreme court, in the case of *City of Middletown v. F. L. Caulkins Automobile Co.*, 109 A. (2d) 888, June 15, 1954, held that, where a parking authority of a city was authorized by a special act to acquire land for public parking facilities by condemnation, subject to the approval of the common council, and in the special act the city was treated as a separate entity and the parking authority was not expressly authorized to bring any of its actions in the name of the city, the city was without power to condemn land for parking purposes.

The city contended that it had authority under Special Act 158, passed by the General Assembly in 1953, creating the "Middletown Parking Authority." This authority was given the right to condemn necessary land or properties for public parking facilities but was not expressly authorized to bring any of its actions in the name of the city. The court concluded that it had no such implied power. The act creating the parking authority treated the city as a separate entity, authorized to deal with the authority, to advance funds to it and to be reimbursed by it for funds so advanced. The act further authorized the city or any member of the common council aggrieved by any action of the parking authority to appeal therefrom to the court of common pleas.

The court stated that the legislature had the power to prescribe the persons or corporations who might institute condemnation proceedings and to prescribe the conditions and circumstances under which such proceedings might be instituted. Accordingly, such proceedings could be instituted only by those persons and corporations on

[23] See Memorandum 73, January, 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 232.

whom the requisite authority was conferred In this case, the power was vested in the Middletown parking authority.

In holding that the City of Middletown parking authority was without power to condemn for public parking purposes, the court distinguished this case from a previous case, *City of Waterbury v. Macken,* 124 A. 5, 1924, in which the board of park commissioners of the City of Waterbury was held to be a ministerial board of the city. The supreme court held that, under a special act providing that "the board shall have power to acquire and the City of Waterbury to hold property," the board was constituted the agent of the city to conduct the negotiation for purchase or for condemnation in behalf of the city and not for itself. Under the special act creating the Middletown parking authority, however, it was clearly set forth that the parking authority itself had power to acquire and own land.

New Jersey. In another case involving the issue of the city versus a parking authority, the Supreme Court of New Jersey held that the City of Trenton had authority to acquire land for public off-street-parking facilities, even though a parking authority had been created, subject to State enabling legislation (*City of Trenton v. Lenzner,* 109 A. (2d) 409, November 22, 1954).

Trenton's parking authority was created by ordinance in 1948 and immediately began inquiry into the feasibility of establishing new parking facilities within the city. The Lenzner property, presently operated as a parking lot by the owners and which had been recommended earlier by the planning board, was selected as the best site. The authority, considering that the costs would exceed its own financial capacities, recommended that the site be acquired by the city under the authority of an earlier law, Chapter 138, Laws of 1942. An ordinance passed by the city on May 29, 1952, directed the acquisition of the Lenzners' property by purchase or condemnation "for the purpose of making the same available to the public for the public parking of vehicles." The Lenzners attacked the validity of the ordinance, alleging that the city, by creating a parking authority, had divested the city governing body of all powers and functions conferred upon the parking authority.

The supreme court held, however, that the statute authorizing creation of a parking authority did not repeal the preëxisting power of the city to acquire land for public parking (Chapter 138, Laws of 1942) nor did the city's creation of the parking authority restrict its independent power to acquire land for such purposes.

While the fact that the property was actually being used for parking purposes by its private owners might have an important bearing on the amount of just compensation to be awarded, continued the court, it did not limit the authority of the governing body to take it for public parking purposes. Nothing in the statutes suggested any such limitation, and the court saw no reason whatever to reach out for its implication. By taking the land, the city insured not only that its future use would be public parking, but also that it would be available for the urgently-needed increase of its parking facilities by construction of a suitable ramp garage or otherwise. The fact that the land was being taken by the city itself, rather than the parking authority, was without significance.

The landowners also suggested that the city planned to acquire their property and then transfer it to the parking authority, which would permit its operation by a private party. The court pointed out that the ordinance provided that the city should acquire the property "for the purpose of making the same available to the public for the public parking of vehicles," making it clear that the acquisition of the property was limited to the stated purpose. After the city acquired the property, it was at liberty

to make the proper determination as to operation of the facilities under statutory powers conferred by Chapter 138 of Laws of 1942, as amended. At the present stage, the court declared, the city was clearly entitled to the presumption that its ultimate determination would be made in good faith and that it would be guided solely by the proper interests of all the citizens of Trenton.

Delaware. The constitutionality of a Delaware statute authorizing creation of a parking authority was upheld by the state's supreme court in a decision handed down on June 3, 1954 (*Wilmington Parking Authority v. Ranken,* 105 A. (2d) 614). However, the court held invalid a commercial lease by the Wilmington Parking Authority, because of failure to comply with statutory requirements respecting competitive bidding.

Under the provisions of Title 22, Chapter 5 of the Delaware Code Ann., 1954, any incorporated city or town may create a parking authority, a public body corporate, declared to be an agency of the state. The authority is charged with the duty of conducting research in the matter of off-street-parking facilities and is empowered to plan, construct, and maintain such facilities and to acquire land for the purpose by purchase or eminent domain. To finance the project, the authority is authorized to issue revenue bonds, payable in not exceeding 40 years, and to pledge the revenues of the authority for their payment. It is forbidden to pledge the public credit, but any municipality establishing an authority may appropriate to the authority such sum as may be necessary to acquire the land upon which the parking facilities are to be erected. All property of an authority is exempted from taxation.

Under the provisions of this act, the City of Wilmington created a parking authority; its first project was to be a parking facility in the heart of the central district of the city. Some of the necessary land had been acquired, financed partially by advances from the city. Since it was determined that the parking facility, if devoted to parking alone, could not be financed by the sale of revenue bonds, the authority decided that it would be necessary to lease areas of the proposed facility for commercial purposes. A lease was subsequently entered into with the operator of a large department store in the vicinity of the project. Under the terms of the lease, the authority would erect a building for public parking, containing space for retail stores and commercial uses, certain portions of which were to be leased to the department-store operator at a rental fixed at a percentage of the construction cost. Additional space was to be leased for offices and commercial uses. The authority's determination of the relative proportions as between public parking and commercial use was as follows: parking space, 61%; leased commercial space, 39%; parking revenue, 30.5%; lease revenue, 69.5%; cost, parking area, 38.4%; leased commercial area, 61.6%.

The state supreme court was requested to consider a number of questions. The first question concerned the constitutionality of the enabling statute. The legislature had determined that the provision of off-street-parking facilities was a public purpose, basing their determination on findings of the increased use of private automobiles in the business sections of cities; the necessity for the free circulation of traffic in city streets; the serious traffic congestion (to which parking of motor vehicles upon the streets contributed); and the consequent interference with effective movement of fire-fighting equipment and the disposition of police forces in the congested district. Based upon these findings, the court concluded that the state legislature had acted within its constitutional power in attempting to find means to remedy an admitted evil. The court disregarded the claim that the act benefited only a small part of the

public, i e., property owners in congested areas, since the legislative findings were sufficient to sustain the legislative action. The benefit to the small class of property owners was a mere incident to the public benefit and did not invalidate the statute.

In considering the constitutionality of the statutory provision authorizing the authority to lease portions of its buildings for commercial use, the court cited the *Inland Terminal Building* cases, wherein the authority of the Port of New York Authority to include space for use as store, office, and manufacturing in the terminal building was challenged.[24] The question of mingling of public and private uses was specifically dealt with in these cases The court held that, to the extent private leasing of a public facility was necessary to finance the erection and maintenance of the facility, it was lawful and did not offend the constitutional provision forbidding the state to engage in private business with public funds.

The court also cited the Michigan case of *Shizas v. City of Detroit*, 52 N.W. (2d) 589, 1952, in which the court held the enabling statute, authorizing cities to acquire and operate parking facilities, to be invalid because of a provision permitting the leasing of a portion of the premises, not exceeding 25 percent of the total floor area. The reasoning of the court in the *Shizas* case, according to the present court, distinguished it from the case at bar, in that there was no contention by the city in the *Shizas* case that the revenue from leasing was necessary to finance the project. In fact, figures submitted by the parking authority indicated that the expected revenue from parking was more than sufficient to finance the project. The court concluded that, since the dominant or underlying purpose of the contemplated project subserved a public use, commercial leasing of space therein for uses unrelated to the public use was permitted to the extent, and only to the extent, that such leasing was necessary and feasible to enable the authority to finance the project.

A final controversial point in connection with this project centered around the lease which the authority entered into with Kennard-Pyle, the department-store operators. The enabling statute included in the provision relating to leasing for commercial use a statement that "any such lease shall be granted on a fair competitive basis." It was contended that the authority had not complied with the statute in that the lease was not granted as a result of competitive bidding.

The court agreed with this contention, examination of the record indicating that bids were not invited, notices placed in newspapers by the authority being nothing more than invitations to ask questions The notices were such that no definite proposal or bid could be based upon them. No information was given in the first two notices of the size or character of the building to be erected or of the uses to which the leased space might be put. In none of the notices were any plans or specifications referred to or stated to be available to prospective bidders. In response to the advertisements, the authority stated that it received 33 inquiries, of which only one represented an inquiry from a tenant having need for space in excess of 25,000 square feet and prepared to pay a rental in excess of $50,000 annually.

The authority determined that for the purpose of exploring the feasibility of financing construction of the facility, it should first attempt to negotiate a lease with a major tenant who would be willing to lease an area with a rental in dollar amount which would contribute substantially to the net income of the facility The authority's decision was dictated by the consideration that the obtaining of a definitive lease with a financially responsible

[24] *Port of New York Authority v Lattin*, Special Term, N Y County, *Bush Terminal Co v City of New York*, 273 N Y S 331, (1934), *Bush Terminal Co v City of New York*, 26 N.E (2d) 269, (1940).

tenant would determine in large measure: (1) the feasibility of financing the entire project, and (2) the general outlines of the type of structure which would be required. Although the authority apparently considered the notices preceding the negotiation for the lease sufficient in law to constitute proposals for competitive bidding, the court considered that the authority's action actually only invited private negotiations. The court was clearly of the opinion that the notices were insufficient and held the Kennard-Pyle lease invalid.

Florida. A decision handed down by the Supreme Court of Florida on September 24, 1954, upheld the authority of the Orlando Parking Commission to issue revenue bonds in excess of $50,000 without approval of the electorate (*Riviere v. Orlando Parking Commission,* 74 So. (2d) 694). The question arose because of the provision of a 1927 act (Chapter 13205, Special Acts of 1927) requiring such approval.

A 1949 act (Special Acts of 1949, Ch. 26089) authorized the city council of Orlando to create, by ordinance, the Orlando Parking Commission, with authority to investigate, collect, and correlate data; to plan, locate, design, construct, acquire land by lease or purchase for parking facilities of any kind of vehicle; and to enter into all such contracts as were necessary to execute the powers under said act. In 1951 the legislature enacted Chapter 26918, under which all powers previously conferred on the City of Orlando were made available to all municipalities in the state, including the authority to issue revenue bonds to bear the cost of construction, improvement, or enlargement of off-street-parking facilities.

A lower court found that it was not necessary, regardless of purchase price, to obtain approval of a majority of the qualified electors owning real estate in the city; because the city had authority, under the 1951 act, to provide off-street-parking facilities, regardless of any conflicting or inconsistent provisions of the city charter, the said act by its terms being cumulative, alternative, and in addition to any other powers granted to municipalities. The state supreme court affirmed the judgment of the lower court, holding that the 1951 act, insofar as it provided for off-street-parking facilities to be financed by the issuance of revenue bonds as provided in the act, was not restricted by the limitation contained in the local act of 1927.

New Jersey. Two additional decisions handed down by New Jersey courts during the year related directly or indirectly to the use of the special parking agency device in the provision of off-street-parking facilities.[25] In one of these, the state supreme court held that where a parking authority had not been created, a municipality was without power to lease municipally owned lands to private persons to construct and operate a public off-street-parking facility (Camden Plaza Parking v City of Camden, 107 A. (2d) 1, June 28, 1954).

1. The City of Camden, noting the need for additional parking facilities in the central business district, augmented by the proposed construction of a new department store in the area, entered into an agreement with the department-store operators to construct a multistoried structure for off-street parking on City Hall Plaza, presently utilized in part as an open-air off-street lot, operated in part by the city as a metered parking lot and in part by a private-parking-lot operator under lease from the city.

Not desiring to finance the construction cost, the city evolved a plan for selling a 50-year leasehold in the city-owned land to the highest responsible bidder, who would construct the building at his own expense. Title to the building, however, would vest in the city, subject only to the leasehold. The city accepted a bid in accordance with

[25] See page 35 for digest of New Jersey decision relative to authority of City of Trenton to acquire land for off-street parking facilities.

its plan, and its action was forthwith challenged in a taxpayer's suit.

The supreme court, while stressing the point that the establishment of public parking facilities constituted a public and essential governmental function, nevertheless refused to approve the city's action, since the necessary statutory authority was lacking. The New Jersey legislature had not seen fit to authorize the leasing of municipal land to a private person to construct and operate a public parking facility thereon, although existing legislation permitted the municipality itself to operate such facilities. The only statutory authority whereby municipally owned lands might be leased to private persons to construct and operate a public off-street-parking facility was that given a parking authority created under the Parking Authority Law of 1948 (Laws of 1948, Ch 198).

The city argued that it had statutory authority to lease property not presently needed for public use. However, the court ruled that the construction and operation of the proposed publicly-owned parking facility upon the publicly-owned tract constituted a public use, even though the facility was privately constructed and operated under lease from the city. The statutory authority claimed by the state was not applicable since the tract did not satisfy the description of land "not presently needed for public use."

The city also contended that City Hall Plaza was not held presently in a governmental capacity but in a proprietary function and might, therefore, be leased under existing statutes, because it was not actually in public use. The emphasis in the enabling statutes, answered the court, was on the need for the land for public use when its leasing was attempted. Here the city's own resolution established unequivocally that the land was imperatively needed for use as a substantially enlarged public off-street-parking facility.

The court thus concluded that the city was without authority to carry out the proposed plan under existing law without creating a parking authority.

2. The other New Jersey case (State v. Parking Authority of City of Trenton et al, 102 A. (2d) 669, January 26, 1954) involved the status of employees of the parking authority of the City of Trenton in reference to the provisions of the civil-service laws of the state. The appellate division of the superior court held that a parking authority created by and in a municipality under the parking authority law was an independent public corporate entity, distinct and separate from the municipality, and therefore employees of the parking authority did not have civil-service status.

The civil-service commission brought the action, contending that the authority was a branch or department of the city and that its employees were employees of the city and within the protection of the civil-service act. The enabling statute under which the parking authority was established stated that "such authority shall constitute an agency and instrumentality of the municipality or county creating it."

The appellate division stated, however, that the term "agency and instrumentality" as used in the statute merely signified the body or facility by means of which a governmental project was to be accomplished. For example, said the court, in contracting with the city, the authority acted as a principal. Were the authority merely an agent, a contract would be unnecessary. Likewise, the authority was authorized to conduct its own fiscal affairs and produce its own revenue and to undertake projects independent of financial aid from the municipality, which could in no manner circumscribe the activities of the authority. The court concluded that the parking authority, although created by and in a municipality, was an independent public corporate entity, distinct and separate from the municipality.

The commission also argued that the ab-

sence of a provision in the parking authority law excepting employees from civil-service protection supported an inference of legislative intent to include the employees therein. The court pointed out that under civil-service provisions relating to municipal employees, no person could be appointed or employed under any title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the position which he legally held. But the parking-authority law authorized an authority to employ agents and employees, permanent and temporary, as it might require, and to determine their qualifications, duties, and compensation. The authority might delegate to one or more of its agents or employees such powers and duties as it might deem proper. These provisions, the court held, were not compatible with the civil-service regulations.

The appellate division of the superior court drew an analogy to the local-housing-authority law, the language of which, relating to employees, was identical with the language of the parking-authority law. A subsequent amendment to the housing act gave civil-service status to employees of local housing authorities The court found it evident that the legislature did not intend to give civil-service status to employees of municipal parking authorities.

New York. Two cases involving parking accommodations were also decided in New York during the year, one involving the constitutionality of the public-authority law creating the Peekskill Parking Authority, and the other upholding the right of a city to pay net parking-meter revenues to a parking authority.

1. The constitutionality of the public authorities law creating the Peekskill Parking Authority was challenged in the case of Peekskill Parking Authority v. L. B. Oil Co. (133 N.Y.S. (2d) 538). In a decision handed down by the Supreme Court of Westchester County on August 6, 1954, the court upheld the constitutionality of the act in the following language:

> The rule is clear that where, as here, the legislation has for its purpose the condemnation of private property for the parking of motor vehicles, whereby the public is primarily served in taking such vehicles from the public streets to relieve traffic congestion, then the same is constitutionally permissible as serving a public purpose.

2. In the case of Comereski v City of Elmira (128 N.Y.S. (2d) 913, March 24, 1954) action was brought against the City of Elmira and the City of Elmira Parking Authority to void an agreement under which the city would pay net parking-meter revenues to the parking authority Under the provisions of the statute creating the Elmira Parking Authority, the authority was to continue for a period of 5 years only and thereafter until all its liabilities had been met and its bonds paid in full or discharged. At the termination of its existence, all of its properties and rights were to pass to the city. The law authorized the authority to accept grants, loans, or contributions from the city The city might convey to the authority, with or without consideration, real or personal property. Bonds or other obligations of the authority were not to be a debt of the state or of the city, and the bonds were not to be payable out of any funds other than those of the authority.

Implementing the statute, the Elmira city charter was amended to permit the council to adopt a resolution authorizing a contract between the city and the authority, pledging net revenues from the city's street parking meters, such pledge to extend as long as the bonds of the authority remained outstanding but, in no event, for a period longer than 30 years from the date the contract was executed.

The authority took action providing for the issuance of bonds in the amount of $500,000, following which the contract was executed, providing that the city pay to the authority the amount of the estimated

deficit, if any, in the latter's operation and maintenance fund and debt service, not exceeding $25,000 in any calendar year, such payments to be made exclusively from the "net revenues of the city parking meters." The pledge of net returns was limited to existing meters.

The contract also contained a promise by the city not to substantially reduce the number of parking meters during the existence of the agreement, with the qualification that this should not be construed to prevent the city from abandoning or changing the sites of existing parking meters, "it being the intention of this paragraph that the source of revenues from parking meters by the city is not to be decreased to a point below the city's pledge during the life of this agreement."

The claim was made that the pledge and agreement to pay net parking-meter revenues constituted a gift or loan of the city's credit and, thus, violated constitutional and other prohibitions. The court said, however, that the constitution did not include public corporations among those to whom a gift or loan of the city's money or property was banned. Furthermore, the city's action did not constitute a gift or loan of its credit.

The promised payments depended upon two contingencies: the existence of deficits in the authority's funds and the existence of net revenues from the city's parking meters. Neither the construction nor the statutes prohibited such gifts. In the event of such payment, the bonds would remain no less the bonds of the authority nor become no more the bonds or obligation of the city because of such promise. While the court found it arguable that the pledge was in the interest of the bondholders, it was abundantly clear that the city was a direct beneficiary of its own pledge by reason of the assurance to it of clear title to the parking project when the bonds were paid in full.

The court did not consider the agreement as to the continued existence of street meters an illegal surrender of the city's governmental function and power. Such meters existed by virtue of a delegated police power for the control of highway traffic Here there was no agreement not to exercise such power but, rather, to continue to exercise a power of traffic regulation which, by reason of the constant increase of automotive traffic, would be no less necessary in any reasonably foreseeable future.

The court concluded that the city's actions were permissible under the constitution and the statute. In so doing, the court took judicial recognition of the problems facing all cities by reason of ever increasing traffic congestion.

This decision was affirmed by the state court of appeals in a decision handed down on February 24, 1955, (125 N.E. (2d) 241).

The System Concept

The provision of a coordinated system of municipal parking facilities, by means of which both curb and off-street accommodations are integrated into a single chain of facilities, is becoming increasingly popular. Legislation permitting the adoption of such a plan exists in a number of states, including Florida.

A special act (Ch 24611 Sp. Laws of Florida 1947, as amended by Ch 27635, Sp. Laws of 1951) authorized the City of Jacksonville to acquire an off-street-parking system and issue bonds in connection therewith. The validity of these acts was upheld by the Circuit Court of Duval County and the decision was appealed to the state supreme court. The high court held that in view of the traffic congestion and other problems created by insufficiency of "downtown" parking space, the acquisition of an off-street-parking system was the acquisition of property for a public and municipal purpose (*Gate City Garage Inc. et al. v. City of Jacksonville,* 66 So. (2d) 653, July 10, 1953).

Under the special law passed in 1947, and amended in 1951, the City of Jacksonville

is authorized to issue bonds, provide for the payment of principal and interest of such bonds, to acquire property and maintain off-street-parking facilities as a part of the plan or system. In passing the law, the legislature declared that excessive parking of motor vehicles on roads and streets in the city, and the lack of adequate off-street-parking facilities obstructed the free circulation of traffic, diminished property values, and endangered the health, safety and general welfare of its citizens The provision of conveniently located off-street-parking facilities, attractive in cost, and the simultaneous control of curb parking by said city were necessary to alleviate such conditions. The establishment of off-street automobile-parking facilities was deemed to be a proper public or municipal purpose.

The supreme court stated that, although the legislative determination that the entire plan, including the taking of property by eminent domain, was for a public purpose might not be conclusive upon the courts, such a declaration was very persuasive. When taken in connection with the purpose sought to be accomplished, conditions as they actually existed, of which the court would take judicial notice, or facts and conditions shown to exist by the pleadings and the facts contained in the record, the court might readily determine that the primary purpose, aim, and objective of the plan was to serve a public and municipal purpose.

In the present case, the legislature had made a finding and determination of fact that the primary purpose of the undertaking was a public and municipal purpose. The city council had made a similar determination in passing an ordinance implementing the law The circuit court, having considered the pleadings, answers, the evidence, and matters of which it could properly take judicial notice, had also determined that the undertaking would serve a public and municipal purpose. Previous decisions of the supreme court had substantiated this finding (*State v. City of Miami Beach,* 47 So. (2d) 865, 1950; *Chase v. City of Sanford,* 54 So. (2d) 370, 1951). The supreme court concluded that the primary aim, objective, and purpose of the present undertaking was to serve a public and municipal purpose.[26]

Advertising Signs on Parking Meters

In October of 1952, the City of Philadelphia enacted an ordinance authorizing the attachment of advertising signs on parking meters owned and operated by the city. Pursuant to this ordinance the city entered into a contract for the attachment of advertising signs to parking meters in the business sections of Chestnut Hill and Mt. Airy. Certain abutting land owners protested the city's action, and in a subsequent adjudication of the facts in the case by Common Pleas Court No. 1 of Philadelphia County, the ordinance in question was declared void (*Chestnut Hill and Mt. Airy Business Men's Association et al. v. The City of Philadelphia et al.,* Common Pleas Court No. 1, No. 2119, as reported in *The Legal Intelligencer,* Philadelphia, January 13, 1954).

At issue in this case was the matter of whether the legal rights of the abutting landowners had been impaired by the contract entered into by the city with the City Meter-Ad Corporation, under which the latter corporation proposed to place advertising signs upon parking meter stanchions owned and operated by the city and erected on the sidewalks of the premises involved.

Relevant facts upon which the legal rights of the parties were to be adjudicated were not in dispute. They were as follows: (1) The advertising, for the promotion of which the defendants propose to make use of the city's parking meters, is commercial in character and bears no relation to the public safety, health, morals or general welfare. (2) The plaintiffs are the owners in

[26] See Memorandum 76, May 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 242.

fee of the premises upon the sidewalks of which the parking meter stanchions are erected. (3) The parking meter stanchions on which the city proposes to affix the devices of advertising are the property of the city. (4) The parking meter stanchions are now legally located upon the sidewalks of plaintiffs and have been located thereon by the city for the purpose of regulating traffic. (5) The affixing of commercial advertising signs on the parking meter stanchions will not obstruct or interfere with pedestrians or vehicular traffic and will not constitute a private or public nuisance. (6) No compensation will be made to plaintiffs for the attachment of the advertising signs upon the parking meter stanchions.

The protesting landowners asserted that the city, in the exercise of its police power, had the right to regulate and control sidewalks for public uses only and that the private use which was proposed to be made of said sidewalks could constitute a trespass thereon and would result in the taking of their property without due process of law.

Counsel for the city, on the other hand, argued that the city, having a home-rule charter, had a right to franchise the use of parking-meter stanchions for commercial advertising where such use would not add any burden to the traveling public or interfere with any special rights of abutting owners and where such use was not inconsistent with the primary purpose for which the parking meters were originally installed.

The court answered the city's assertion with regard to its authority under the home-rule charter by stating that, since the city had been delegated power to regulate and control public highways of the city as fully and completely as such power could have been exercised by the state prior to adoption of the home-rule charter, it did not acquire any greater rights in and to the public highways of the city than it had theretofore possessed and exercised. The home-rule charter, therefore, had nothing to do with the determination of the issues raised in the present proceeding.

The city conceded that it was not acting under any of what the court referred to as the three lawful methods of taking or using private property, i.e., its taxing power, its police power, or its power of eminent domain, but explained that its action was based on a power of the sovereign to franchise a use of the streets, which neither conflicts with the primary purpose of streets nor is prohibited by the constitution of the state or of the United States.

The soundness of the city's theory supporting the legality of the ordinance, said the court, must be tested by the principle of whether the object and purpose of the ordinance was to benefit the public rather than to procure revenue. Any exercise of power by a municipality, continued the court, must serve a public or municipal purpose in order to be legal.

Counsel for the city cited a line of authorities in Pennsylvania and other jurisdictions which gave municipalities broad rights in and authority over their public highways; but in each case, the purposes indicated were found by the present court to be public in purpose. The city had made no attempt in the present case to argue that the business of private advertising had any relation to the public health, safety, or general welfare.

A further argument advanced by the city was that if it were conceded that under ordinary circumstances the city would have no legal right to make use of or to franchise the use of sidewalks of public highways for the sole purpose of promoting the business of private advertising, nevertheless, by reason of the fact that, in the instant case, the proposed advertising signs were to be affixed to parking meter stanchions owned by the city and lawfully located upon the pavements of the public highways, the city, under these circumstances, had the right to attach the proposed advertising signs to the parking meters. Such use, the city con-

tended, would not be inconsistent with the primary public purpose for which the parking meters were installed and did not add any undue burden upon the abutting property owners or the public. This the city designated as the "incidental-use" theory. That is, the city might lawfully make such incidental use of its own property for private use, provided that such private use did not limit the use of such property for public purposes.

Two cases were cited by the city to substantiate this theory In one, *Clarey v City of Philadelphia,* 311 Pa 11, it was held that the City of Philadelphia had the power to lease its convention hall for the conduct of sporting events privately conducted for gain or profit, provided that such private use did not interfere with the use of the hall for the public purpose for which it was owned and dedicated. In the other case (*James Rees and Sons v. Pittsburgh,* 316 Pa 356), it was held that the City of Pittsburgh had the power to permit the use of a public wharf owned by it as a public parking space and make a charge for the storing of automobiles therein, so long as such use did not interfere with its use for landing and wharf purposes.

The city attempted to draw an analogy between the incidental-use principle enunciated in these cases and the present case. This argument the court found fallacious, inasmuch as the convention hall and the public wharf were erected upon property owned by the city for public use and purpose, whereas parking meters were erected upon the private property of abutting owners. Their maintenance thereon was justified only by the public easement which the city held in its highways for the purpose of regulating traffic under the police power. Ownership by a municipality of a public convention hall or a public wharf involved huge expenditures for maintenance, and the courts had held that, in the interest of the taxpayers, a municipality might obtain revenue to support them by permitting an incidental use thereof for private purposes, provided that such use did not interfere with the public use for which the property was originally dedicated. Additionally, said the court, in the cited cases, the rights of owners of private property were not involved, as in the instant case.

The court then pointed out that it had been firmly established in the law of real property in the state that an easement could not lawfully be used for a purpose different from that for which it was dedicated Therefore, while abutting owners must submit to parking meters on their sidewalks by virtue of a valid exercise of the city's police power, the public easement could not be enlarged and extended to encompass an additional use which was private in nature and bore no relation to the public health, safety, or welfare.

The court concluded that the ordinance in question was void.[27]

Financing of Municipal Parking Facilities

In at least three states, Michigan, Missouri, and Texas, the authority of cities to finance municipal parking facilities was litigated in the courts during the year; in all three, the city's authority to do so was upheld.

Michigan. An injunction was sought to prevent the City of Pontiac from appropriating and expending $157,890 for the acquisition and development of city-owned-and-operated parking lots. The supreme court denied the injunction on the grounds that the ordinance amendment appropriating the money was an ordinance required by law and, therefore, was not subject to initiative and referendum, even though the city charter provided that the city commission "shall" pass an annual appropriation ordinance not later than one month after the beginning of the fiscal year and "may"

[27] See Memorandum 75, March 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 236.

amend the appropriation ordinance after one week's notice in a newspaper.

The high court, in so doing, affirmed the judgment of the trial court to the effect that the amended ordinance was an ordinance required by law and the charter in the same sense as the original ordinance and, as such, was not subject to the provisions of the charter covering the subject of initiative and referendum (*Stolorow v. City of Pontiac,* 63 N.W. (2d) 611, April 5, 1954).

The supreme court also affirmed the determination of the trial court that a petition for the adoption of an ordinance prohibiting the city from using public funds for the acquisition and development of parking facilities was void and of no legal effect. The proposed ordinance provided that:

> No city official, employee, officer or agent shall expend, disburse or commit any public funds, revenues or income of the City of Pontiac, regardless of the source from which received, for the acquisition, development, maintenance or operation of facilities or areas for the off-street parking of automobiles or vehicles, other than those owned by the city.

The court was of the opinion that such an ordinance, if adopted, would prohibit not only present but also future city officials from expending, disbursing, or committing any funds of the city for purposes expressly authorized by both the charter and state law. The court also called attention to the fact that it had held that the municipal operation of parking lots had a definite bearing on public safety in the use of public streets and, as such, constituted the lawful exercise of the police powers and powers expressly conferred by Michigan's constitution.

Missouri. The right of the City of St. Louis to issue bonds in the amount of $500,000 to be used to acquire land and to install or equip buildings and facilities thereon for parking purposes was contested on the ground that the ordinance authorizing the bonds violated the city charter. The contention was that the provision of off-street parking facilities was not named as one of the purposes for which the city charter authorized the issuance of bonds.

The supreme court, however, called attention to the fact that the charter also provided that "the authority to issue bonds for any of the purposes aforesaid is cumulative and shall not be construed to impair any authority to make any public improvements under any provisions of this charter or of any law." Since the state legislature had, by Sections 82.470 and 82.480 (Revised Stats. of Missouri), expressly authorized the city to acquire land and to construct and equip buildings and facilities thereon for parking purposes and to issue bonds in payment thereof, the court held that the proposed bond issue did not violate the city charter.

Another argument against the bond issue was to the effect that the city charter provided that no bonds of the city, except bonds for paying, refunding, or renewing bonded indebtedness and bonds payable only from proceeds of special assessments for local improvements, should be issued without the assent of two thirds of the voters of the city, voting at an election to be held for that purpose. The court stated that such limitations had, as a rule, been construed to apply to an indebtedness incurred by a city, which was to be paid from funds raised through taxation, and were for the purpose of providing protection for the taxpayer. In this particular instance the principal and interest on the bonds were to be paid solely from revenues derived from the leasing of the parking facilities Consequently, if the taxpayer of the city could not be taxed to pay the bonds, the constitutional limitation did not apply.

It was further claimed that the ordinance went beyond the authority granted by the enabling statute, in that the city was to operate and maintain the parking facilities. The court interpreted the ordinance as authorizing the city to do so only in the event no bids were received for the rental of the

facilities or the bids were so low that insufficient revenue would be supplied to take care of the bonds The authority for the city to operate the facilities in case the property could not be profitably leased was, of necessity, implied, since the city must assume the obligation to assure the operation of the parking facilities The validity of the ordinance was thus upheld by the court (*Petition of City of St. Louis*, 266 S.W. (2d) 753, March 8, 1954).

Texas. The Texas Court of Civil Appeals for El Paso upheld the validity of a proposed bond issue to finance off-street-parking facilities in El Paso in a decision handed down on October 27, 1954 (*Amstater v. Andreas*, 273 S.W. (2d) 95). The proposed bonds were to be paid from taxes on property in the downtown business district of the city, where the parking facilities were to be located. An improvement district was created by ordinance, and the bonds were approved by a vote of a majority of the taxpaying residents of the district.

A lower court held the bonds invalid on the ground that there was neither express nor implied authority for the city's action. The appeals courts, although it could find no statutory authority authorizing home-rule cities to issue bonds for off-street parking, called attention to a charter provision authorizing the city council to borrow money on the credit of an improvement district and issue bonds for permanent public improvements, subject to the approval of qualified taxpaying voters living and owning property in the district and to other qualifying provisions.

Another charter provision authorized the city to borrow money upon the credit of the city for the purpose of permanently improving the streets; erecting public buildings; constructing or acquiring canals for supplying the city with water, providing waterworks and other permanent improvements; and to issue bonds therefor.

The court was of the opinion that off-street-parking facilities constituted permanent public improvements, citing cases in other jurisdictions substantiating this view. The court also considered that off-street-parking lots, which were available to anyone who desired to use them and who could pay the fee the city demanded, were clearly for public use, especially so when the purpose of such lots was to relieve congestion of traffic on the streets. The court cited an impressive list of cases supporting this contention.

The argument that the bonds were invalid because the parking lots for which they were to be used would compete with private business was answered by the court by a citation to a previous Texas case, *Town of Ascarate v. Villalobos*, 223 S.W. (2d) 945, October 19, 1949:

> Since the very foundation of the police power is the control of private interests for the public welfare, a statute or ordinance is not rendered unconstitutional by the mere fact that private rights of person or property are subjected to restraint or that loss will result to individuals from its enforcement.

Parking Facilities and Zoning Regulations

The courts of at least three States, Georgia, Maryland, and Pennsylvania, handed down decisions during the year concerning the provision of off-street-parking facilities as affected by zoning ordinances or regulations.

Georgia. The supreme court ruled against an attempt on the part of the City of Atlanta to rezone by ordinance a portion of a lot in a residential area in order to permit off-street parking (*Orr v. Hapeville Realty Investments*, 85 S.E. (2d) 20, November 8, 1954).

Certain property owners in Atlanta asked for an injunction to prevent the construction of an office building and a two-story parking structure on property adjoining their own land. They further asked that the Planning Board of the City of Atlanta

be restrained from proceeding with any rezoning of the property in question. The landowners' property was zoned for dwelling house uses, and the property in controversy was restricted to apartment uses.

The supreme court cited provisions of zoning enabling legislation enacted in 1946, under which the governing authority of a municipality might, from time to time, amend the number, shape, boundary, or area of any district or districts or any regulation of or within such district or districts or any other provisions of any zoning regulations. These provisions, the court said, did not confer upon Atlanta any power to "spot" zone by ordinance and remove a small tract for business or commercial purposes from a district zoned for residences; nor did any other provision of this act confer this power. The two ordinances purporting to rezone a part of the property in question to "business and open air parking districts" were void, no such power having been conferred upon the city.

Maryland. The controversy in this case centered around a garage built and put in operation in 1920 in a residential neighborhood of Baltimore.

In 1931, when the Baltimore City Zoning Ordinance became effective, the neighborhood was classified as a residential use district, and the garage operations continued without change. In 1950, the garage operator made a contract with Nash-Kelvinator Company to use the open space in front of the garage for the storage of new cars, preliminary to distribution to local Nash dealers In January, 1953, the owner of property diagonally across the street from the garage complained to the Bureau of Building Inspection that the open space was being used, in violation of the law, for the storage of up to 50 new cars. The garage owner then attempted to establish on the record that there existed a nonconforming use as to the whole lot of ground owned by him. He also applied for a permit to continue the use of the open space for the parking, storage and washing of motor vehicles and for the sale of gasoline and accessories.

The application was denied, and an appeal was taken to the Board of Municipal and Zoning Appeals. The board held that the garage owner had a nonconforming use for the sale of gasoline and accessories and for the parking and storage of vehicles, but the board restricted the use of the open area in front of the garage to the extent of the use in 1931 and held that not more than 10 vehicles could be stored at any one time on the lot.

Upon appeal, the Baltimore City Court upheld the board's action in finding that the nonconforming use existed. The court, however, found the board's restriction as to the number of vehicles which might be stored improper as a matter of law, since it amounted to an attempted prohibition of a legally valid intensification of use.

The court of appeals, in a decision handed down on June 25, 1954, (*Nyburg v. Solmson,* 106 A. (2d) 483) agreed with the lower court's finding that the appellee had a nonconforming use as to the whole lot owned by him, including the open space in front of the garage. Evidence fully supported a finding that the use was continuous, substantial, and commercial from 1925 on. The use met the test adopted in a previous case (*Chayt v. Board of Zoning Appeals,* 9 A. (2d) 747, December 13, 1939) for an existing use.

The protesting landowner also sought to show that the use of the property for the unloading and distribution of cars constituted a nuisance because of noise, dust, and fumes. Testimony from a number of neighbors indicated that this claim was either greatly exaggerated or inaccurate. The court stated that if any of the activities of the garage operator violated the laws of the state or the city because of the time at which or the manner in which they were carried out, the protesting landowners had

remedies provided for the violation of such laws.

The court of appeals further held that, although the garage owner's nonconforming use of open space in front of his garage for parking cars increased when the owner entered into contract with the automobile manufacturer to use the open space for storage of new automobiles, such use did not amount to an extension of a nonconforming use but was merely an intensification of a long continued use. The Board of Municipal and Zoning Appeals could not, therefore, properly restrict the use of the open space to the parking and storage of not more than 10 automobiles at one time.

Pennsylvania. In this case the supreme court of the state upheld an extension of a nonconforming use consisting of the operation of a parking lot in a residential district in Philadelphia (*Philadelphia Art Alliance v. Zoning Board of Adjustment,* 104 A. (2d) 492, April 1, 1954).

In 1926, prior to the adoption of the Philadelphia Zoning Ordinance, the Philadelphia Art Alliance purchased a site for its main building and seven adjoining lots. The buildings standing on six of the lots were demolished and the area converted into a single public parking lot. The building on the remaining lot was allowed to remain and was used at various times as a residence, dance studio, art gallery, and experimental theater. When the Philadelphia Zoning Ordinance was adopted in 1933, the property was included in a residential district, and the parking lot became a nonconforming use.

In 1952, the Art Alliance applied for a variance to extend the parking lot to include the one lot not previously included, to which it claimed it was entitled under the provision of the zoning ordinance which empowered the zoning board:

> . . . to authorize, upon appeal, in specific cases, such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

The Art Alliance also claimed it was entitled to the permit as a matter of constitutional right by reason of the nonconforming use already existing upon the adjoining lots which had been acquired by the same deed.

The appeals board denied the application for a variance, but upon appeal, the trial court reversed the board's holding on the ground that the permit should have been granted as a proper extension of a nonconforming use in existence at the time of enactment of the zoning ordinance.

The supreme court affirmed the action of the trial court on the basis of a provision of the zoning ordinance permitting extensions of nonconforming buildings and uses therein to the the extent of 25 percent of the area constituting the nonconforming use. Although the ordinance provision did not specifically mention vacant land, the court found no reason to believe that the framers of the ordinance intentionally sought to arbitrarily discriminate against users of vacant land by prohibiting them from extending a nonconforming use. The court concluded that such an extension was permissible. In the instant case, the extension sought amounted to only 16.6 percent of the original parking area. The proposal of the Art Alliance did not initiate an entirely new nonconforming use for which a variance would be required; only the question of extension was involved. The court concluded that the extension was properly allowed.

Restrictive Covenants Prohibiting Use of Land for Parking

Decisions involving attempts to prevent the parking of motor vehicles in areas covered by restrictive covenants were handed down by the courts of Maryland and New York during 1954.

Maryland. The court of appeals held that restrictions in a deed, which provided that not more than one dwelling house with necessary out-buildings should be built on lots and that dwelling houses should be used for residence purposes only, precluded use of the lots for an open-air parking lot (*Martin v. Weinberg,* 109 A. (2d) 576, December 8, 1954).

The restrictive covenants were included in exchange deeds recorded in 1914 by heirs of one James Murray for a number of lots located in Murray Hill in Annapolis. The case came before the courts when purchasers of two of the lots attempted to operate a parking lot thereon. The deed to one of these lots contained the provision, "subject to restrictions of record pertaining to this development" The new owners contended that the deed restrictions were ineffective, because they did not bind the grantor's heirs and assigns.

The court of appeals held that the restrictions were effective, since no purchaser from any of the heirs could take title to any lot except by assignment from a grantee. Acceptance of the exchange deeds by the heirs amounted to promises by grantees, their heirs and assigns to abide by restrictions in the deeds. The court stated that, although it had frequently stated and applied the rule of strict construction in favor of the unrestricted use of property, this did not mean that language must be so narrowly construed as to defeat its general purpose.

Literally, the words "shall not build or erect . . . more than one dwelling house" did not refer to the land itself. But, obviously, said the court, a use of the land for "open-air" parking or other commercial use, virtually unknown at the time the restrictions were drafted in 1914, would defeat the general purpose to limit the use the dwellings contemplated to residence purposes. It might well be that the improvements necessary to render the land suitable for such a use would constitute "building."

The court noted that the area involved was zoned residential but that a special exception was granted in regard to the lots in question. The court did not consider this fact relevant, except as it tended to support the conclusion that there had been no marked change in the general neighborhood. Contractual restrictions, said the court, were neither abrogated nor enlarged by zoning instructions.

New York. The court of appeals held that, under a restrictive covenant prohibiting the use of property for a commercial garage or automobile parking lot, the use of vacant portions of a tract of land on which the owners operated a refreshment stand for customer parking did not constitute a violation of the covenant (*Premium Point Park Association v. Polar Bar,* 119 N.E. 360, April 15, 1954).

The Polar Bar plot was located in the Premium Point Park Development in New Rochelle, first laid out in 1905, and was originally subject to the same highly restrictive covenant as the rest of the area. But the plot fronted on the Boston Post Road, which had changed radically in character. In 1940, the land bordering upon it was zoned as "Class C, Business," the lots by that time having lost whatever attraction they might have had for homeowners. In 1946, in recognition of that fact, an agreement was drawn up between the then owner of the property and the Premium Point Park Association permitting the lots to be used for business purposes.

The restrictive covenant, as modified, provided that no part of the land between the Boston Post Road and the screening strip, land conveyed to the association to serve as a screen for the development, should be used for: (1) a commercial garage, or automobile parking lot; (2) a public garage or public automobile filling station; (3) commercial bottling of non-alcoholic beverages; . . . (5) clubs, lodges, and social buildings in which dancing or bowling may be an incidental use; . . .

(6) any use prohibited by the said zoning ordinance in the City of New Rochelle in a Class C business district.

The court considered that the parking lot prohibited by Item 1 was one conducted and operated in and of itself as a commercial venture, as an independent enterprise, apart from the business of selling comestibles. The covenant permitted the conduct of the business itself, and the conclusion was almost inescapable that it permitted whatever is customarily and necessarily incidental thereto Subdivision (5) specifically banned "clubs, lodges, and social buildings in which dancing or bowling may be an incidental use." The court thought it reasonable to conclude that the association, having failed to prohibit parking lots for incidental use, did not have in mind preventing them.

The court pointed out that the law favors the free and unobstructed use of property If a restrictive covenant is capable of more than one interpretation, it would be construed against the party endeavoring to extend it

Provision of Parking Facilities Through Zoning.

A religious corporation requested permission from the Zoning Board of Appeals of the Town of Irondequoit, New York, to construct a temple. The area involved was zoned residential, but churches and schools were permitted uses, if permitted by the Zoning Board of Appeals, "subject to such terms and conditions as might be appropriate in the particular case and in conformity with the following general provisions. . . ." The provisions listed related to size of lot, setback lines, and height of buildings

The zoning board of appeals granted the permit subject to certain conditions among which was the following:

> That adequate off-street parking shall be provided in the immediate vicinity of such property for automobiles of worshipers at such Temple Emanu-El and for persons using such premises, and that no part of the said premises known as 2956 St. Paul Boulevard shall be used for the parking of automobiles except that portion thereof on which the present driveway is now located.

Neighboring property owners objected to the board's action on the ground that such use would create parking problems and traffic hazards and that the condition imposed was not adequate to protect them and others from these traffic problems. The petitioners did not object to the use of the premises for religious or educational purposes.

The religious corporation obtained consent to use a parking lot located on the opposite side of the street on its property whenever necessary. The property owners claimed that this permission was merely a revocable permit and that, in any event, the parking facilities available would not be adequate to meet the needs of the church.

The supreme court of Monroe County held that no power or authority was granted the board of appeals to condition the granting of such a permit upon considerations of traffic hazards or parking facilities. The legislative body of the town had undoubted power to delegate to the board discretionary power to grant or refuse a permit, provided such legislative body formulated a standard or policy reasonably clear to govern the board in the exercise of such discretion. Had the ordinance provided that one of the standards to be applied in granting or refusing the permit was that suitable parking facilities be provided, such a provision would have been a valid delegation of authority Since the ordinance provided no such standard, the board had exceeded the authority conferred upon it by the ordinance. However, the religious corporation had not complained about the condition so imposed and had agreed to abide thereby. The petitioners could hardly complain or ask that the determination of the board be set aside, said the court, because such board exceeded its authority by imposing conditions favorable to them.

The court held that while the zoning board had no authority to impose such a

condition, its action would not be overruled in the absence of a complaint by the religious corporation. The condition protected the property owners to the full extent that they could expect (*Titus St. Paul Property Owners Association v. Board of Zoning Appeals of Town of Irondequoit*, 132 N.Y.S. (2d) 148, July 7, 1954).

Parking Ordinances

An ordinance of the Town of Leesburg, Virginia, reserved a certain area on Market Street for the purpose of parking motor vehicles operated as common carriers of passengers while discharging or receiving passengers. A suit was filed to test the validity of the ordinance by a lessee of a building adjacent to the reserved area. Tavenner, the lessee, charged that enactment of the ordinance was beyond the powers of the municipality and that it was unreasonable, discriminatory, and void

The court called attention to a provision of the town's charter, granting the town council the following powers, among others:

> . . to regulate the use of all such highways, parks, streets, alleys, parkways. To exercise full police powers; . . . To do all things whatsoever necessary, expedient or lawful for promoting or maintaining the general welfare, comfort, education, morals, peace, government, health, trade, commerce, or industries of the town or its inhabitants.

In addition, statutory authority existed under which "the council or other governing body of any city or town may, by a general ordinance, provide for the regulation of parking within its limits, . . . determine the time during which a vehicle may be parked . . ., including specifically the right and authority to classify vehicles with reference to parking and to designate the time, place and manner such vehicles may be allowed to park on city or town streets. . . ." (Virginia Code of 1950, Sec. 46-259).

The court held that the ordinance was enacted under the police power delegated to the town by the legislature and was for the public benefit. It gave all common carriers of passengers operating within the town the same rights and privileges. It also allowed other motor vehicles to park in the specified area while loading and unloading merchandise, if such activity did not interfere with the use of the area by a common carrier of passengers. These classifications were natural, reasonable, and appropriate to the purposes sought to be accomplished. The fact that the classifications were objectionable to one who conducted a private enterprise and might cause him inconvenience and incidental loss did not render the ordinance unreasonable and discriminatory (*Town of Leesburg v. Tavenner*, 82 S.E. (2d) 597, June 21, 1954).

Leasing Space in Parking Facilities for Nonparking Commercial Use

Courts in 1954 generally sanctioned the leasing of portions of municipal off-street-parking facilities for nonparking commercial uses, if the terms of the lease are reasonable. Thus in three states, Delaware, Florida and Kansas, the right to lease space in such facilities was affirmed by the courts. However, the Kansas court refused to approve the particular contract in controversy, which it considered an unreasonable abuse of the city's authority, inasmuch as it attempted to bind succeeding governing bodies to lease parking facilities not yet in contemplation.

Delaware. As previously noted, the Delaware Supreme Court, in a decision handed down on June 3, 1954,[28] held that, to the extent private leasing of a public facility was necessary to finance the erection and maintenance of the facility, it was lawful and did not offend the principle of constitutional law forbidding the state to engage in private business with public funds. However, the court held the lease entered into by the Wilmington Parking Authority invalid because of failure to comply with

[28] *Wilmington Parking Authority v. Ranken*, 105 A. (2d) 614, (see page 37).

statutory requirements respecting competitive bidding.

Florida. The same question was answered by the Florida Supreme Court in the case of *Gate City Garage, Inc. v. City of Jacksonville* (66 So. (2d) 653) in which the main point of controversy related to the validity of state statutes authorizing the acquisition of an off-street parking system.[29]

Another point of contention in this case centered on the city's authority to lease a filling station on the property. This, the plaintiffs claimed, was the equivalent of taking one man's property by public authority and leasing it to another for private gain. The supreme court found no merit in this contention, stating that although a city could not exercise the power of eminent domain for the primary purpose of acquiring private property for a private use for some other person, constructing and leasing a filling station on an off-street parking lot acquired by the city by its power of eminent domain was, when the filling station occupied but a small part of the area contemplated for parking purposes, a mere incident of the primary purpose.

The court noted that in many municipal and county buildings, space was leased or concessions were granted to private individuals for various purposes which were mere incidents of the main or primary purpose of the building but which were for the convenience of those using the building or facilities for a public purpose. Such leasing, the court concluded, did not amount to an exercise of the power of eminent domain for the purpose of acquiring private property for a private use for some other person.[30]

Kansas. In upholding the constitutionality of a state statute authorizing first class cities to condemn real estate for off-street-parking facilities, the Kansas Supreme Court, nevertheless, held invalid a contract entered into by the City of Topeka to lease the facilities to a private corporation.[31] In so doing, the court announced that, although cities generally had authority to lease municipally owned property for public use, the present contract was an unreasonable abuse of the city's statutory authority.

The contract with Park and Shop, Inc, a private corporation, provided that the lease was to run for 30 years, or until the retirement of the revenue bonds. At the termination of the lease, other than by forfeiture, Park and Shop was to have the first right to re-lease the facilities under the same terms and conditions which the city would be willing to lease to any other tenant or operator. Park and Shop was to have the option to lease any additional facilities acquired or built by the city. Enabling statutes authorizing the city to lease parking facilities, said the court, did not purport to authorize the city to lease all parking facilities to be acquired in the future. Cities might exercise only powers conferred by law. For the present governing body to agree to lease to Park and Shop all future acquired parking facilities constituted an unreasonable abuse of authority.

Under the enabling statute, the city was authorized to establish rates and fees to be charged for the use of off-street-parking facilities and the method of operation. The contract entered into by the city, however, provided that "hours of operation and fee schedules, as well as all rules and regulations governing the conduct or operation of each site, shall be mutually agreed upon in writing by the parties hereto." The court found this provision an unlawful delegation of the city's power, since nowhere in the statute was the city given authority to delegate any of its duties to a private individual or corporation.

[29] See page 41

[30] See Memorandum 76, May 1954, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 242

[31] *State v City of Topeka*, 270 P. (2d) 270, May 8, 1954 (see page 30).

The court also denied the city's authority to contract to rebuild or restore any facilities totally destroyed or damaged beyond use. This provision was unreasonable in that, should the property be destroyed at some future date, it would require the city to rebuild or repair, even though subsequent governing bodies might determine that it could no longer serve a public use. The present governing body was without authority to bind future bodies with the advisability of rebuilding or repairing such structures.

Finally, the court declared a provision giving Park and Shop the right to approve plans and specifications for the improvements, as well as contracts, to be a direct violation of the power conferred by the legislature, since these duties were an obligation of the city and could not be delegated to an individual or private corporation.

Highways for New Urban Patterns

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● THERE can no longer be any doubt that the urban structure of the United States is undergoing a fundamental change, not only in the composition of individual cities but also in the character and in the functional relationships of the various urban units that make up our far-flung metropolitan areas and urban regions.

The monolithic metropolis that was spawned by the industrial revolution has outlived its purpose and is in process of realignment in new forms better suited to the conditions and requirements of our time.

The chief characteristic of the new urban forms, insofar as it has been disclosed to date, is spaciousness. More land, often much more land, is used for each urban activity than was the case a few decades back. Figures compiled by the Regional Plan Association of New York show that in that area the amount of land used for urban purposes per capita now is twice what it was in 1900 and more than four times as great as it was in 1860.

Unfortunately, the second-most-noticeable characteristic of the new urbanization, as it is now appearing, is its formlessness or, to use a harsher word, disorder. Much of the fringe development spreading outward from big and little cities is completely haphazard in character and location and lacks effective relationship to units of local government, education, public utilities, and transportation.

Highway engineers are concerned with the changing patterns of urban life, because they create new and different demands for highway service. More important, they place in their hands great opportunities to promote good order by the kinds of highway system they design. Because spaciousness puts greater emphasis on transportation, highway planning can be used with greater effect as a constructive force in the formation of urban structure that is efficient and economical to use.

The changes that are taking place are in part voluntary, in part forced by a world situation beyond our control. They are sparked, first, by the growing appetite of the American people for more space around their homes, stores, offices, and factories—coupled with the ability to get it—and second, by the threat of sudden destruction that hangs over a nation with its population and industrial facilities too heavily concentrated in a few convenient target areas.

Unfortunately, the Bomb and its kindred devices of destruction seem destined to play an increasing role in influencing changes in our urban structure in the years ahead. As the President has said, "We live in an age of peril," and there is every indication that we must continue to live in that kind of an age for many years to come.

The nature of the threat suggests one way of lessening it. The danger is that the destruction of a few score of our bigger cities could so paralyze our industrial capacity and our will to resist that a well-managed sneak attack could reduce us to the status of a vassal state. And the remedy that this suggests is that, as the nation grows and changes, we so distribute our people and our industrial facilities across the length and breadth of the land that no feasible enemy attack could make decisive inroads on our strength.

Lest any one feel impelled at this point to protest that superior armed strength is all that this country needs to meet the peril, let me point out that when you stand face

to face with an armed assailant, it does you no good to have two or three times his fire power if he fires first. Neither does it help to be ready to retaliate instantly with your superior strength, because he knows that you cannot retaliate if you are dead.

In such a situation, striking power is of little value unless it is coupled with a further source of strength, the quality of being hard to kill. If your opponent has serious doubts of his ability to put you out of action with his first shot, he is likely to hold his fire. It is one thing for him to deal with an adversary who is dead; it is quite another to deal with one who is only wounded and still able to deliver a lethal return fire.

The military striking power of the United States is significant only when it is coupled with a high degree of invulnerability to enemy attack on the part of the nation it represents. The military forces cannot carry out their mission if their country is so decimated by a nuclear blitz that it cannot give them logistic backing, or worse, cannot rally its remaining citizenship to the support of a continuing war effort.

To be reasonably secure in today's world, this country must make itself very hard to kill, in the face of the fantastic weapons that are now available to nations anxious to achieve world domination and ready to use force, if necessary, to remove us from their path.

In the last analysis, our cities provide the measure of our vulnerability to enemy attack. It is in them that the bulk of our people live, the bulk of our industrial production is carried on, the bulk of our managerial and governmental talent is concentrated, the focal points of our nationwide transportation and communications networks are located Erase the major cities and there is grave question whether, at this time, the remainder of the country could support the economic and military effort needed to maintain its freedom.

According to the 1950 census the United States has concentrated in its 50-largest metropolitan areas 42 percent of its total population, 54 percent of all persons employed in manufacturing, and over 70 percent of its industrial production. The situation has grown worse since 1950, because the bulk of our tremendous population growth and economic expansion has taken place in those same areas. As a nation, we are making ourselves easier to kill at the very time that the means of killing us are being perfected.

The H-bomb is a weapon of fantastic proportions. The exact dimensions of its destruction are not material; the point is that it can destroy the capacity of a great city to function as a city and to fill its place in the operating economy of the nation and that a few-score bombs placed on target can take out a substantial part of the nation's total capacity to operate. Our present pattern of urbanization actually invites attack, just as did our fleet concentration at Pearl Harbor, because an enemy can achieve so much damage with a relatively small expenditure of effort.

What changes are needed in the overall pattern of urbanization to improve this situation and how can they be brought about: There appear to be two general lines of approach, both of which tie in with present trends in urban development that are actuated by normal social and economic considerations.

One is to dilute or scatter the target by promoting an accelerated distribution of population and essential industry among the thousands of smaller towns and cities that are located away from centers of major concentration; to foster a shift from major national dependence on a few great production centers to major reliance on the productivity of a widespread network of small centers.

The other can best be described as a stepped-up deconcentration of the centers that now contain so large a percentage of our total economic strength. This ties in with the normal trend toward greater spa-

ciousness and suburban expansion but, in the interest of security, calls for greater emphasis on the development of the outer suburbs and satellite towns well removed from the core city.

Both of these approaches can be covered by the general terms "dispersal" and "decentralization," but it is important that the word "organized" or "planned" be added. Mere scatter of people and facilities is not enough. It may lower the amount of target material within any given area and thus make bombing less remunerative, but it could also produce a state of disorganization that would reduce our strength by hampering production

If dispersal is to be an effective force in lessening the nation's urban vulnerability, it must be carefully planned dispersal, with an eye to the efficient and economical conduct of urban activities and the creation of a humanly acceptable environment for urban living.

There are many forms that a well-planned pattern of dispersion might take. There is not time to examine them here. However, it may be worthwhile to look briefly at one historic form for what light it may throw both on the problem of dispersion and of a transportation pattern to go with it.

That is the type of dispersed metropolis that developed in parts of this country just before the advent of the motor age. It consisted of a central city with main transportation lines, in the form of steam railroads, radiating outward and marked at intervals by stations which were, in turn, the hubs of smaller urban centers

People in the outer towns could find work in their own community or commute to the larger center; they could satisfy their day-to-day commercial and cultural needs at home and occasionally make convenient trips in town for the extras that their home community could not supply. And of great importance to our social and political institutions, they could enjoy a sense of belonging to a finite community, feel loyalty to it and take a personal part and pride in its progress.

The density of development in each of the communities might be relatively high—most activities had to be within walking or horse and buggy distance of the railroad station—but the overall density of the metropolitan area was very low, thanks to the large tracts of farm and forest land that remained unurbanized because not served by railroads.

The transportation pattern was fairly simple. Most of the traffic was contained within the community where it originated. Interurban traffic was gathered and distributed through stations, between which it travelled freely and at high speed. Efficient mass transportation was possible because the pattern of settlement favored it.

That pattern broke down with the advent of motor vehicles, because they opened up all of the intervening territory to settlement. The rural land that formerly had provided physical limits for the urban communities itself became urbanized. Neighboring towns and cities expanded until they merged and lost their identity. Their people became citizens not of a close-knit human-scale community but of a sprawling suburbia or a mammoth metropolis.

Service with mass transportation became a hopeless problem. There were no restrictions on where people might live or where they might work or where they might shop nor on how many might live or work or shop at any one point. Use of private cars became necessary, because there were few fixed lines of travel that mass transportation could serve. And so the unending battle between mounting demand and lagging supply in highway facilities got off to a healthy start

It might solve many of the big city problems of today if we could re-establish the basic pattern of that pre-motor age metropolis. Instead of putting a million people in one disorganized mass, for instance, as we

are now prone to do, there might be a distribution placing, say, a hundred thousand in a central city and the remainder divided among twenty or more smaller cities located 15 to 20 miles apart on radial and circumferential expressways.

Expressways, with access restricted to fixed station points, would serve the same purpose that the railroads did, (and still do in some localities), providing fast transportation between predetermined centers of urban activity, while tending to discourage intensive development of intervening land.

To adopt such a pattern for contemporary urban development would, of course, require greater controls over land use than the American people have thus far been willing to accept; yet, if the organized dispersal of this country's urban life is as vital to national security as it appears to be, the measures needed to accomplish it might well become acceptable.

After all, the American people have accepted the peacetime draft of men for the armed services, something that would have seemed impossible a few years back. If we are willing to legislate restrictions on the careers of our young men in the interest of national security, should we not be equally willing to legislate restrictions on the use of land for the same reason?

There is little doubt that the police power of the states is adequate to accomplish what is necessary, once the citizenship becomes convinced that it is necessary. Already there are scattered examples of strict density control over suburban land, exercised by communities which wish to retain a semirural character or to restrict the area of urbanization to specific limits. And, of course, the principle of limited highway access is now well established.

What the federal government might do to induce safer patterns of urban development under its national defense responsibilities is still largely an unexplored question, but as the recent studies of Project East River pointed out, there are many points of federal impact on city growth which might be used to promote desirable urban patterns and to discourage undesirable ones. The principal instance where this has been done is in the industrial dispersion policy first enunciated in 1950.

Many people tend to shrug off any basic revisions in the nation's urban structure on the ground that there is too great an investment in our present cities, both of money and tradition, to permit any fundamental change Besides, they say, creation of new city structure is horribly expensive and would bankrupt the nation!

In answer to that, it need only be pointed out that cities are changing and being rebuilt all the time. If anyone wants to see the change in action, he need only visit one of the major urban redevelopment projects, where old walls are crumbling and new ones rising. It is said that the rate of reconstruction in most cities is sufficient to accomplish their complete rebuilding every 40 years.

Furthermore, there is a tremendous increment to the nation's urban population every year for which additional facilities must be provided. Current growth is at the rate of over 2½ million people a year and more than 2 million of them are settling in urban areas. That is the equivalent of 40 new cities of 50,000 population annually. We are building the homes and other facilities for that many people every year, and it is not bankrupting us; in fact, it is generally considered to be good business.

The problem of financing, therefore, is not one of incurring new and additional expense for new urban patterns but of redirecting the expenditures that are already being made every day and every year, both by private investors and public agencies. It is not a question of spending more; it is a question of spending more wisely, so that the new urban structure that is created will meet the need of the future rather than fit some existing pattern that may already be obsolescent.

This discussion of new urban patterns has

contained little mention of the new highway patterns needed to serve them. The point I have sought to stress is that the urban patterns of the future are pretty sure to be different from those of the recent past, both because people want them to be in the interest of better living and because the world situation requires them to be in the interest of national security.

Obviously, the highway patterns of the country will change, too. If the phenomenal growth of the big central cities is checked, there will need be less emphasis on solution of the typical downtown traffic problems. If metropolitan growth takes the form of clusters of satellite communities, there will be increasing emphasis on facile and speedy communication between them and, particularly, between them and the center.

If urban growth assumes ribbon forms, they in turn will require their own forms of highway system. Finally if there is emphasis on a wider distribution of the nation's facilities for industrial production among the smaller cities away from metropolitan centers, then new importance will be given to the interurban network, and the cross-state throughways.

New highway patterns can be developed to serve the new urban patterns in two ways. They can follow or they can lead. Highway designers can sit back until traffic has developed, take voluminous traffic counts and then design highways to fit a traffic pattern that perhaps has already developed badly because the facilities it used were out-of-date. Or they can combine their talents with those of state, county, and city planners to design a combined pattern of highways and urban development that will give the greatest promise of balance between highway service and highway need.

The way in which highway systems are developed has, of course, a great deal to do with the way in which cities are developed. Highways can and should be the creators of better urban patterns. Massachusetts State Highway 128, encircling Boston, is an example of a highway that has had a marked influence on the development of a metropolitan area. Similar circumferentials, 20 or 30 miles out from the centers of our major cities, would have a major effect on their orderly dispersal.

The time has come, I think, when all highway planning will have to be thought of in the creative sense, in terms of what it can do to influence the nation's development for the best We need every device at our disposal to create a less-vulnerable urban structure. We need every device at our disposal to stop the senseless repetition of old mistakes in urban expansion, because the nation cannot afford the cost of those mistakes even in peacetime.

But what we need more than anything else right now is a clearer picture of the objectives. Just what kind of an urban pattern will give us the greatest and quickest reduction in our vulnerability to enemy attack? What kind will give us the most efficient and economical base for industrial production and commercial service? What kind will do the most to produce good citizenship, promote sound local government and foster pride in one's home community?

Unfortunately, as vital as these questions are, we know very little about the answers. That is one of the most important fields in which research is needed and one of the most neglected. With that observation I can turn this subject back to the research institutions whose guests we are today. As badly as this country needs action to develop better urban patterns, it needs, even more, the fundamental research on which sound patterns can be based.

Right-of-Way Problems on Urban Expressways

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● BEFORE I begin the text of this paper on right-of-way matters, I would like to relate how the expressway idea has grown in Milwaukee County. Expressway planning began in the City of Milwaukee in 1944 with an origin-and-destination survey sponsored jointly by the city, Wisconsin State Highway Commission, and the Bureau of Public Roads. In 1952, land acquisition and construction was under way for portions of a 24-mile system of expressways for the City of Milwaukee.

In the fall of 1952 the Common Council of the City of Milwaukee passed a resolution asking the county board to join forces for the purpose of preparing and supporting a bill intended to be introduced in the state legislature. This bill would authorize Milwaukee County to impose a wheel tax on all motor vehicles for the purpose of raising revenues to finance expressways. This resolution was referred to the legislative committee of the county board. Hearings were held on this matter and all units of government in the county were invited to send representatives. A 21-man committee was eventually formed, consisting of three groups of seven men each, one group from the suburbs, the second group from county government and the third group from the city. The wheel-tax bill was considered impractical. A legislative committee of three attorneys was formed in order to prepare a bill to establish a county expressway commission. This was written and formally approved by the common council and by the county board. It was passed in the 1953 fall session of the state legislature and became Section 59 965 of the Wisconsin Statutes, "Expressways in Populous Counties."

The expressway idea advanced from the city level to the county level. As a city program it was limited to the 55-sq.-mi. area and 1953 estimated population of 660,000 of the city. The larger scope of activity on a county-wide basis covers an area of 239 sq. mi. with an estimated 1953 population of 908,000.

The five-man Milwaukee County Expressway Commission was appointed by the governor pursuant to statutes. After the commission was organized, the City of Milwaukee transferred certified copies of all maps, engineering studies, and reports pertaining to an expressway system in Milwaukee together with all contracts pertaining to the creation and construction of such expressways as required by statute. The statute states:

> The Commission is charged with the duty and vested with all powers necessary to plan, acquire the right of way for, and construct an expressway system in Milwaukee County and administer each expressway project until it shall be certified as completed, subject to the general supervision of the County Board. . . .
>
> As soon as possible after its organization the Commission shall consider and devise a general plan of expressways to serve the entire county.

Pursuant to the legislative directive a general plan for expressways for Milwaukee County is now being prepared by consulting engineers. Their report is scheduled for completion in March, 1955. Again quoting from the Law:

> Such plan shall be presented to the governing body of each municipality through which a part of the expressway system is routed for its consideration and approval. . . . When the approval of the necessary local governing bodies has been obtained or the recommendation of the State Highway Commission has been obtained in lieu thereof, the general plan shall be presented to the County Board. . . .

When a general plan has been approved by the County Board the Commission shall prepare and submit to the County Board tentative expressway project budgets for such units of the comprehensive plan and in the order of construction as the Commission deems proper . . The County Board shall adopt expressway project budgets with such changes as it may deem proper When so adopted the County's contribution to the expressway project shall constitute a legal appropriation and shall be expendable to the extent that expressway bonds have been authorized or money otherwise provided . .

Municipalities shall be reimbursed for prior expressway project expenditures. Any expressway projects under construction at the time the Commission is created and the transfer of functions to the Commission has been effectuated shall be completed by the Commission

This paper is a report of activities on land acquisition This subject has been profoundly explored and well reported by many others, some of whom are present here. For this reason my topic will be limited to a few special features. Among these are appraisal work, public relations, land values in adjacent areas, billboard control and advance buying.

We commenced our land purchasing in 1952 All emphasis was on speed. We were told construction would start in 1953. As it happened some of the land was obtained by license agreement from Milwaukee County. These lands were vacant and did provide a site for early construction of certain bridges. However we reached the conclusion after a short time that about two years time should be allowed for the appraisal, negotiation, vacating, and clearance of any considerable segment of right of way. This estimate of time will allow for a minimum of hardship on property owners. It might be interesting to set down the sequence of events as the actual record of the acquisition of one parcel.

Land-acquisition project was authorized	July 21, 1952
Negotiations started	October 10, 1952
Condemnation was requested	December 11, 1952
Settlement made without court action on	March 27, 1953
Owner agreed to vacate on	October 15, 1953
Owner actually vacated on	March 1, 1954
Wrecking of building by contract started	May 3, 1954
Wrecking job was completed	June 8, 1954

The total elapsed time was over 22 months. It may seem that unusual forebearance was used in disposing of this action. It is our belief that a wise public relations policy includes the element of maximum consideration for property owners who are displaced.

In the beginning of our activities, to save time it was necessary to seek outside appraisal help. It was decided to arrange for an appraisal contract. Proposals came in accompanied by letters of qualification. The appraisers who were best qualified had submitted the highest schedule of fees. This firm was hired. Our staff provided a considerable portion of the background material required for appraisals consisting of comparative sales data, parcel sketches, pictures and appraisal forms. The cost of the contract work was $28 per residential property, which is defined as a residence of less than four dwelling units, and $125 per nonresidential property.

Every appraisal report must be recommended for approval by the staff. The accuracy of the report and opinion of value are a staff responsibility. For this reason the report is carefully reviewed. It is our belief that the review of appraisals is a very important phase of our activity. If the fair market value of a given parcel is established by appraisal and carelessly set 10 percent or more too high, it will follow that negotiations will be easy and acquisition will be a routine matter. However, public funds are being wasted and what is worse a bad precedent for value is established. In urban areas homes tend toward similarity by areas. A high price precedent may be a landmark which will result in too high settlements for many other parcels.

The establishment of a suitable appraisal review method is most essential. Every appraiser's work should be checked by another appraiser of equal or greater competence

before a cash offer is made for a property. This check should include a complete field inspection of the property, reworking of computations and an analysis of the comparative sales used or other evidences of value found in the report.

In the case of simple residential property, the field inspection need not include an interior inspection in every instance. It is our practice involving higher-type residential properties and all commercial and industrial properties that, when an outside appraisal report is procured, an additional staff appraisal is also made. The more-difficult appraisals are prepared by two staff people working together.

For additional precaution, to avoid errors, we insist that all negotiators shall be highly competent appraisers A negotiator is instructed to make a complete interior inspection of all premises and satisfy himself as to the accuracy of the appraisal report he is using before making an initial offer.

The importance of good appraisal work as a tool for the right-of-way agent cannot be over emphasized. It is astounding to consider the cost of purchasing engineering skill for the economical design of expressways compared to the cost of purchasing appraisal talent for the economical acquisition of right-of-way. In urban areas construction costs are but a little higher than land costs. It is our belief that the right-of-way division should have available for consulting service the best appraisal talent in the county.

In connection with the preceding discussion about review of appraisals, it can be noted that, for a small right-of-way organization, it may at times be impossible to assign an individual to negotiate for a given parcel who has not been one of the appraisers. The principle of having three parties to every negotiation—the appraiser, negotiator, and property owner—has been widely discussed. This principle states that the appraiser should never be the negotiator. We endorse this principle. The use of this three-party method tends to prevent some forms of criticism. The same three-party arrangement can be accomplished, however, when there are two appraisers and the property owner, if one appraiser acts as the negotiator.

Good public relations are a great help in negotiations. A number of simple matters will be helpful in this regard. It is well to send advance notice to all affected property owners that their property is within the right-of-way. Notice of the impending visit of an appraiser should be sent to all tenants. Negotiators must be well informed concerning construction so that they may explain all its details and the basis of the need for the taking. It is helpful to have small-scale prints of the proposed construction for distribution. Owners seem to derive some satisfaction in being a part of a public improvement. This feeling is promoted by a better understanding of the entire project and the public need for the work.

An important element in good public relations is to provide plenty of time for negotiations. Some people require a lot of time to adjust to new ideas. They prefer to have a new home in mind before making a deal. This means they will spend weeks or months looking for a buy before they will agree to final terms. These people are under pressure and should be allowed to make their plans in their own way if this is possible. An over-ambitious timetable on acquisition can generate a lot of animosity by property owners. A factor of safety in timing should be set up to allow for stay-over periods after closing deals. The owner agrees to vacate as of a certain date and tenants are given notice to vacate after the deals are closed. Extensions of tenancy are often required. Some leniency of enforcement is appropriate at this stage and is justified in view of the overall hardship to the citizens by the public.

Some families, especially with several children, find difficulty in locating new quarters. In the City of Milwaukee we

have 2,500 units of permanent public housing operated by the Milwaukee Housing Authority. Applicants for housing are screened for eligibility under low-income standards, together with veteran's status. Top priority for admission is given to families displaced by expressway purchasing. Cooperation from this agency is helpful in getting homes vacated.

The payment of fair prices for property will have a wholesome effect on the public. An expressway-system plan must necessarily include right-of-way which will not be purchased for years to come. If the public realizes that when the proper time comes they will be treated fairly, they will be less inclined to be resentful and stir up the neighborhood. Conversely, if the county should acquire the reputation of paying more than market value, speculators may be encouraged to purchase income-producing property within the right-of-way limits and possibly tend to inflate values by falsely stimulating market activity in these areas.

Good public relations is a term which may be defined many ways. The expressway staff which keeps the public informed and interested in its activities and, at the same time, uses every precaution to cushion the impact of the necessary inconvenience caused to the public can be said to operate with good public relations.

Many informative articles have appeared recently reciting the effect of expressways upon property values in adjacent areas. In Milwaukee we have no expressways built as yet. Land acquisition has progressed in areas already substantially built up. There has been little evidence to indicate changes in values in adjacent areas. However, I can mention one example of the conversion of land use because of expressway planning:

A gas station owned by a large oil company located on a heavily traveled street was acquired for expressways. No other vacant site was available. The expressway plans indicate that the next cross street will be used as an outlet for an off ramp. This company assembled a site at this next cross street by buying three residential parcels on land zoned for local business. The cost of assemblage was rather high. One of the three parcels was bought for $18,000 from the owner, whose cost a year prior was $9,000. The cost of the land was about 25 percent more than the purchase price of the complete gas station. We were advised that the additional traffic as well as right-hand-turning movements to be generated at this location, after the expressway is in operation, influenced the company to make this investment.

During our activities in acquiring land for about a year, in one particular segment about a mile in length, we observed a great increase in real-estate activity in the adjacent area on one side. The other side, being industrial, was apparently not affected. A considerable number of sales were made to owners bought out by the expressway. The market for the older homes in this area was bolstered up considerably. During this relatively short period we believe most of the properties sold at 5 to 10 percent above prevailing market prices.

During this period while the county is having prepared a county system plan for expressways, our office is receiving numerous inquiries about tentative locations. Subdividers are evidencing great interest in expressway routes. They have announced their intention of planning to acquire lands for subdivision purposes which will be convenient to future expressways.

The phenomenon of rising land values adjacent to expressways will be proven here as well as elsewhere, we have no doubt. It is in the nature of cause and effect that the utility value of these multimillion-dollar improvements will benefit most those property owners nearest in line to use them.

The Common Council of the City of Milwaukee in 1953 enacted an ordinance to regulate advertising devices in areas abutting expressways. The principal purposes of this ordinance are to promote public

safety and preserve aesthetic values. According to the terms of this ordinance no outdoor-advertising structure, post sign, or advertising statuary which faces and is visible from the right-of-way of an expressway shall be erected, constructed, relocated, or maintained after January 1, 1953, within 500 feet of the outer limits of the right-of-way of such expressway, except as follows:

The provisions of this paragraph shall not apply to any nonflashing sign or sign structure constructed, painted, or maintained on a building on which the advertising is limited to: (1) the name of the building; (2) the name of the person, firm, or corporation occupying the building and the type of business conducted or produce handled by such person, firm, or corporation; or (3) signs erected and in place before January 1, 1953. All outdoor advertising structures which are erected after January 1, 1953, shall be removed, rearranged, or relocated to conform within 3 years from the date of opening of the expressway.

Some thought is now being given to the extension of similar billboard control on expressway routes throughout the county.

The problem of providing an adequate method of preventing further improvement of lands required for expressway construction in future years is a serious one. In order to intelligently conserve public funds, lands which are now vacant should remain so and substantial additions should not be made to improve the lands. For the past 26 years, Milwaukee County has enforced measures to prevent the construction of buildings within the ultimate right-of-way limits on state and county highways. This has been achieved by the use of zoning powers in the establishment of building setback base lines. However, this type of control is of no value for expressways, since these routes are not coincidental with existing state and county highways.

The Milwaukee County expressway law permits buying in advance of need for right-of-way purposes. Certain steps need to be taken in the application of this authority: (1) provide notice to property owners that their lands are in the proposed right-of-way; (2) provide a method of delaying the issuance of building permits for improvements to lands required for right-of-way; and (3) set up funds to acquire lands.

Alternatives to immediate purchase are: (1) approve the issuance of building permits for low cost structures only and (2) postpone purchase for a period during which owner uses land without erecting improvements.

Let us briefly discuss these several points:

1. *Notice to owners that their lands are in the proposed right-of-way.* Within the next year Milwaukee County will adopt a plan of expressways to serve the entire county pursuant to statute. It is expected that many years will pass before all these routes have been constructed. It is anticipated that wide publicity will be given to these routes so that property owners will be aware that they are affected by the proposed routes. This is a general form of notice which will be useful. However, when the expressway commission decides to schedule land purchase on some particular segment of the plan, all property owners should be notified by letter. Good judgment would indicate that this be done on acquisitions planned during any future 5-year interval. A personal notice will be profitable because most owners will be discouraged from making improvements to their property Extensive rehabilitation jobs will be avoided. Major and minor repairs and other maintenance will be held to a minimum.

2. *Provide a method of delaying the issuance of building permits for improvements on lands required for right-of-way.* For several years now the building inspector of the City of Milwaukee has been notifying the expressway office of the filing of

an application for a building permit on lands included in expressway routes. This cooperation has been helpful. Milwaukee is presently considering passage of an ordinance which will provide for the temporary withholding of building permits pending the purchase of properties. This proposed ordinance will require that upon application for any permit, if it shall appear to the inspector of buildings that such application concerns property which has been entered on the map for acquisition by expressways, the building inspector shall so notify the applicant and shall forthwith notify in writing the expressway division. Upon request of the expressway division, such permit may be withheld for a reasonable time to allow it to proceed to acquire such property. The city attorney has written an opinion that this proposed legislation is probably constitutional.

The Expressway Commission is planning to submit an amendment to the Wisconsin Statute 59.965 "Expressways in Populous Counties." The intention is to require by law all local municipalities to delay, for a reasonable time, the issuance of building permits and to notify the expressway commission of such permit applications affecting property within expressway routes.

3. *Set up funds to acquire lands.* Locally we are considering the establishment of a revolving fund to use for advance buying of lands. This fund would be reimbursed from project funds when parcels purchased in advance of need are incorporated in current projects. It is expected that this fund will be used wisely to safeguard the county's future interests. It will be necessary to administer this fund carefully. Certain policy considerations will govern in deciding which parcels are to be purchased. First of all the funds available will be raised by bond issue. The interest rate is expected to be about 2%. The investment must be justified in view of the following items: (1) present day value of parcel; (2) value of improvements proposed; (3) elapsed time before parcel will be used for expressway; (4) accrued depreciation of existing buildings during this elapsed time; and (5) interest charges.

Let us consider a typical problem which might arise. An owner proposes to build an additional improvement estimated to cost $12,000 on a business property. The present day value is $60,000, of which $40,000 is building value. The elapsed time before this parcel will be required for public use is 8 years.

The estimated cost of the property in eight years is found as follows:

The land value in 1963 is assumed to be the same as the present value which is..	$20,000
The loss in value by depreciation of the existing building is assumed to be 40,000 × 02 × 8 = ...	6,400
The depreciated building value is estimated at	33,600
For this computation no depreciation will be estimated for the new improvement	
Value of new improvement.....	12,000
Estimated cost in 1963	$65,600
The cost to the county as of 1963 based on present acquisition	
Present cost	60,000
Interest for 8 years at 2 percent	9,600
Loss of real estate tax revenue is not included in this consideration	
	$69,600

These figures indicate that under these circumstances the acquisition could be deferred

As a general rule, permits for the construction of nominal additional capital improvements to properties now carrying large existing improvements can be permitted in many cases. Usually a new building improvement is worth many times the value of its site. Land, therefore, which is located in growing areas of the county must be acquired as vacant land to avoid a waste of tax dollars.

No discussion on land acquisition would be complete without a reference to condemnation. Our experience shows that 15

percent of all parcels were turned over to the legal department for proceedings in condemnation. About an eighth of these actually went to trial. Since all of these parcels were improved with buildings, a proceeding before a county judge was used. In this action the county judge hears the parties and appraises the value of the lands to be taken. A more-summary method of taking without a hearing known as the "award law" is also available to the commission. However, it is deemed advisable to use this method only for taking vacant land.

Roadside Protection through Nuisance and Property Law

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● A ROADSIDE use on private land along a highway directly interferes with the safety and convenience of highway users. But no legislation bars the use. May a court nevertheless stop it?

Smoke from a burning dump on Green's land blinds highway users Can a court require him to put the fire out even though there is no statute?

Recall the case of *Perlmutter v Greene.*[1] A roadside merchant, in spite of protests, started to erect an enormous billboard on his own business premises at a particularly dangerous curve where a busy, narrow road approached a bridge. To hide the dangerous sign, the superintendent of public works was permitted by the court to build a white lattice-work on a state-owned strip of right-of-way. Could he instead have protected the motoring public by simply getting a court injunction requiring the merchant to tear down the sign?

At the terminus of an oil pipe line, near a heavily traveled state trunk highway, six oil companies are proposing to build a tank farm. The town board has amended the zoning ordinance to permit the construction. Several large tanks are to be built right up to the right-of-way line. An access road with an estimated traffic of 120 trucks a day is to enter the highway at right angles, midway up a hill Can a court, even though there is no state or local legislation, order the tanks set back and make provision for safer access?

A $90-million expressway extending from the Pennsylvania Turnpike to and through Pittsburgh has been built.[2] As a part of the project it was necessary to tunnel through Squirrel Hill. As the motorist leaves the tunnel, going west, he enters a complicated interchange. Through a slip-up, a small piece of land in the middle of the interchange was not purchased by the state. An enormous electric advertising sign has been erected on this bit of land. There is no legislation to have it torn down. Can a judge nevertheless order it to be removed?

If affirmative answers can be given to these questions, then, the judicial injunction may be used to eliminate at least the worst abuses along our highways Not only that, but this common-law power in the courts may provide an additional, and solid, base on which to argue the validity of such roadside legislation as does get passed by legislative bodies.

Injunctions in cases of roadside abuses can be justified on any one of three lines of court-made case law: (1) the roadside owner has violated his property law duty as owner of a "servient tenement" not to interfere with the "dominant" rights of the public; (2) the roadside abuse is enjoinable as a public nuisance; and (3) the roadside owner is guilty of continuing negligent or intentional conduct, in breach of his duty to permit free and safe passage on the highway An injunction is appropriate since the wrong is continuing and the injunction may avoid many actions for damages.

All three lines of reasoning obviously come out the same way: substantial inter-

[1] 259 N.Y 327, 182 N E 5, 81 ALR 1543 (1932).

[2] See remarks by Mr Schmidt, AASHO, Right-of Way Committee, A New Look at the Roadside Problem (1950) 35-36.

ference with safety and free passage on the highway will be enjoined even though the cause of the interference originates on privately owned land abutting the highway. These three lines of reasoning have understandably been intertwined and intermingled by the courts. Further, in modern times abutting owners have, in an overwhelming stream of cases, sued to claim rights of access, of view, and of light and air.

These many claims of private rights have tended to blind us to the fact that the roadside owner has duties as well as rights. Accordingly, vigorous modern use of these three approaches to the problems of roadside protection is lacking. A recent property law text,[3] for example, presents an elaborate section on "rights of abutters," but makes no mention at all of "duties of abutters." Small wonder that highway officials and their lawyers think they are powerless to act against roadside abuses, in absence of police-power legislation. Nevertheless, modern cases sustaining sometimes drastic regulation of the right of access have clearly recognized that such right may be sharply qualified by an overriding duty owing to users of the highway.[4]

Actually the strong, though seemingly forgotten, historical fact is that judges as well as legislators have for centuries used the sovereign power of the state (call it "police power" if you want) to impose duties upon abutting landowners so that, "the people have more ready and easy passage" on the highway, to quote an old and vigorous Elizabethan statute.[5]

Let's look at each of the three lines of reasoning in order and at some of the precedents, both court cases and old legislation, which strongly suggest that we have here some rusting tools which can, at least in extreme cases of roadside abuse, be fitted and polished to modern needs.

[3] II American Law of Property (1952) Sec 9 54.

[4] See for example, Jones Beach Blvd Estate Inc v Moses, 268 N.Y 362, 197 N E. 313 (1935) and other cases noted in 100 ALR 491 (1936)

[5] 5 Eliz 13, sec 7 (1562) Highway protectionists may wish to consider adopting this phrase as a slogan for action

PROPERTY LAW DUTIES OF THE ROADSIDE OWNER

In the first great English law text, written only a hundred years or so after the Norman Conquest, we find Glanville saying that the king's rights in a highway are as absolute as his rights in royal demesne land.[6] An edifice built in the highway belongs to the king, not to the encroacher. A century later the great popularizer of English law, Bracton, was writing that the royal property in a king's highway was "a sacred thing, and he who has occupied any part thereof by exceeding the boundaries and limits of his land is said to have made an encroachment on the King himself." [7]

"King's Highway" in those days was much more than an honorary name for a road; it was a statement of property ownership. And the sovereign rights in the highway were "property" even though all that was owned was an easement of right-of-way, as distinguished from the fee simple in the highway strip [8] Very early it became clear that the king owned this property for all members of the public who wished to use the road.[9] Today, in this country, our courts, especially in motor-carrier tax and regulation cases, have repeatedly indicated that our public highways are "property," whether by way of easement or fee simple, held by the appropriate governmental unit in trust for the public,[10] and it is said: "The trust for street or other highway purposes is not a mere dry or passive trust but one in the execution of which the trustee has and holds the possession, control, management, and supervision of the trust property, and its primary object is the interest of the public, which must be always paramount to all other interests." [11]

[6] Book IX, c. 11 See also Street, Foundations of Legal Liability (1906) 212-213

[7] Vol 3, (Twiss ed 1880) I 149

[8] Dalton, The Country Justice (1666) pp 73, 75

[9] Ames, Lectures on Legal History (1913) 213

[10] Hertz Drivurself Stations Inc v Siggins, 359 Pa 25, 58 A (2d) 464, 7 ALR (2d) 438 (1948) and cases there cited Cf Bd of Road Com'rs v Markley, 260 Mich 455, 245 N.W 496 (1932)—"A highway is an easement of perpetual character, a freehold estate" And see Elliott, Roads and Streets (3rd ed 1926) sec 511 who would rest the legislative power to regulate with respect to highways upon the states' ultimate proprietary right in the road.

[11] 25 Am. Jur (1940) 428.

Granting, then, that highway rights are property rights (whether they add up to an easement or to a fee simple), are they of such a character as to impose a burden on abutting land so that it can be said that, for some purposes at least, the public rights constitute a "dominant tenement," with the abutter's interest a "servient" tenement?

If I own a private right-of-way across your field so that I can get to my land, mine is the dominant tenement, yours the servient Of course if you block the driveway, I am entitled to judicial help to get it unblocked. But I can also restrain you from doing anything on your land near the road which will unreasonably interfere with my dominant rights of passage.[12]

So, too, when a railroad acquires a right-of-way, burdens are imposed on the abutting land limiting its use to such activities as will not interfere with use of the railroad track.[13]

There is no reason to suppose that if such servient obligations exist with respect to mere private, or quasipublic rights-of-way, they do not exist with respect to full-fledged public highways. The historical evidence collected here and in the next two sections of this paper strongly bears this out.

And the duties of the servient owner change as modes of transportation and travel on the highway change. The public's property in the highway, be it an easement or fee-simple ownership, does not limit the public to the means of travel or transportation in existence at the time the public rights were acquired. A highway easement acquired in horse-and-buggy days became available for auto travel without purchase of any additional rights from abutters.[14] The right to use the highway expands with technology, and so accordingly do the duties of the servient owners. And the laying down of street-car tracks and installation of facilities for the wide-scale supplying of heat, light, and power, above and below the highway have also been held to be appropriate exercises of public highway rights, even though the public rights were acquired before these means of transmission were known.[15]

That these expandable public rights dominate the servient estate of the abutter is established by six centuries of English statutory and case law, much of which migrated to America.[16]

We start with the noteworthy year of 1285. Edward I, in the thirteenth year of his reign, signed the Statute of Winchester,[17] directing lords whose lands border market town roads to set back their parks at least 200 feet from each side of the road and to cut all bushes and small trees within these 200-foot strips. Possibly Edward's purpose was to provide safer military roads less subject to successful ambush by bowmen. The announced purpose, though, was to protect travelers from highwaymen, as is evident from this passage:

> And further it is commanded, That Highways leading from one Market-Town to another shall be enlarged, whereas Bushes, Woods or Dykes be, so that there may be neither Dyke, Tree nor Bush, Wherby a Man may lurk to do hurt, within Two Hundred Foot of One Side, and Two Hundred Foot of the Other Side of the Way. . . .

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[12] See for example, Correlative Rights of Dominant and Servient Owners in Right of Way for Electric Lines, 6 ALR (2d) 205 (1949), Correlative Rights of Dominant and Servient Owners in Right of Way for Pipeline, 28 ALR (2d) 630 And see II American Law of Property (1952) Sec 814 Cf Walsh, Equity (1930) 200, " the wrong [of interfering with public rights of way] . is something more than a mere interference with the use of property or property rights in the state or city as owner, it is the injury to the public by interference with essential rights of its members "

[13] 51 C J 574 (1930) "In accordance with the rule of exclusive use and possession in the railroad company, the owner of the servient estate cannot so use his adjoining land as to interfere with the company's use of its right of way " See also 74 C J S 505 (1951), Cairo etc. R Co v Brevoit, 62 Fed 129, 25 LRA 527 (1894) and 2 Elliott, Railroads (1897) sec. 632

[14] See 1 Elliott, Roads and Streets (3rd ed 1926) sec. 886 and cases cited, II Amer Law of Property (1952) sec 9.51 and cases cited Elliott cit sec 556 says. "Where an owner of land dedicates it to the public for a road or street, he impliedly grants the appendant right to make such a use of it as shall suitably fit it for travel, and where land is seized under the power of eminent domain, compensation is measured upon the theory that the officers representing the public may so prepare and maintain it that the public may safely and conveniently use it as a passage way.

It is upon the principle stated that it is held in strongly reasoned cases that highway officers may prepare and maintain an ordinary road for use without incurring liability for casting surface water upon adjoining lands provided they are not negligent and do not collect it in a body and thus pour it upon the lands "

[15] 1 Elliott, Roads and Streets (3rd ed 1926) sec. 893, and following

[16] Elliott, Roads and Streets (3rd ed 1926) sec. 501.

[17] 13 Ed 1, c. V (1285).

English law-book writers continued to cite this 200-foot setback requirement as part of the law of the realm clear on into the nineteenth century.[18]

Following the Statute of Winchester and through more than five centuries there are English highway statutes which require roadside owners to: (1) scour ditches to drain the road,[19] not just ditches along the highway but also ditches through privately owned fields;[20] (2) clip hedges and lop trees on private land;[21] (3) install culverts for private access roads;[22] (4) refrain from planting trees, bushes or shrubs closer than specified distances from the center of carriageways and cartways;[23] (5) permit the draining of the highway into private ditches;[24] (6) permit highway supervisors to enter on private land and take stone or other material for road repair, at first without compensation, though later compensation was provided;[25] (7) refrain from fencing or plowing within 15 feet from the center of a highway[26]

Nineteenth century English statutes[27] required: (1) a 25-yard setback for unscreened steam engines, gins, and kilns; a 50-yard setback for unscreened windmills; a 15-yard setback for burning ironstone, limestone, bricks, clay or coke, all dating from the highway act[28] of 1835, and a 200-yard setback for windmills near turnpike roads dating from 1822;[29] (2) fencing of excavations;[30] (3) rounding the corners of buildings;[31] (4) safeguards with respect to barbed wire roadside fences;[32] (5) building and setback lines for structures in general;[33] and (6) fencing abandoned mines within 50 yards of a road.[34]

Six centuries of such legislative regulation of roadside owners in England culminated in the sweeping Ribbon Development Act[35] of 1935 and in the even-more-sweeping roadside regulation of the Town and Country Planning Act[36] of 1947.

While the British Parliament was thus occupied in imposing specific burdens and duties upon the "servient" roadside owner, the English courts were imposing duties of their own invention. Here are some of the holdings: (1) The abutting landowner must remove gates, logs, fences, etc. blocking the road. The cases are very early.[37] (2) There is a common law, as well as a statutory, duty to scour ditches and trim trees and hedges. This apparently dates from

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[18] See 3 Comyn's Digest (4 ed 1800) 39. See also 1 Hawkins, Pleas of the Crown (2nd ed 1774) c. 76, sec 58 and Dalton, The Country Justice (1666) 73, c 31.

[19] 5 Eliz c 13, sec. 7 (1562); 18 Eliz c 10, sec 5 (1575), 29 Eliz c 5, sec 2 (1586), 13 Geo III, c. 78, sec. 14 (1773). Independent of statute this seems also to have been required by the courts See Sheppard's Abridgement (1675) Part IV, 201, "If one own Land adjoining the King's Highway, he is of common right to cleanse the Ditches adjoining and that without any Prescription" See also Dalton, The Country Justice (1666) p 75, c. 31, sec 9 and 1 Hawkins, Pleas of the Crown (2nd ed 1774) c. 76, sec 50, 10 Petersdorf, Abridgement (1831) 236, footnote, 4 Bacon's Abridgements, Highway E (Bouviers' Amer. ed 1876).

[20] 18 Eliz c 10, s 10, s 6 (1575) The highway supervisor shall ". . . have full power and authority to turn any such watercourse or spring of water, being in any of the said highways, into any ditch or ditches of the several ground or soil of any person or persons whatsoever next adjoining to the said ways. . . ."

And 13 Geo III, c 78, sec. 14 (1773) provided in part, ". . . and every person who shall occupy any lands adjoining to or near the highway through which the water hath used to pass from said highway, shall open, cleanse and scour the ditches, water courses or drains for such water to pass without obstruction. . . ." See also sec. 8 of this statute

Sheppard's Abridgement (1675) Part IV, 203 states, "And if there be any Spring or Water in the High-way that doth annoy it, they may turn the same out of the High-way into any mans Ditches they please"

[21] 5 Eliz c 13, sec. 7 (1562); 18 Eliz. c 10, sec. 5 (1575), 3 and 4 Wm and Mary c 12, sec 7 (1691) "that there may be a free and clear passage for travellers, and all sorts of carriages loaden, without being any ways prejudiced or obstructed by any hedges, trees, boughs or branches whatsoever, and that the sun may freely shine into the said ways to dry and amend the same

Like the duty to scour ditches, this duty to lop branches is said to be by common law. 1 Russel, Crimes and Misdemeanors (Am. ed 1824) 460 See authorities cited by 1 Hawkins, Pleas of the Crown (2nd ed 1774) c 76, sec 50 and 4 Bacon's Abridgement, Highways, par. E (Bouvier's Amer ed 1876)

[22] 13 Geo III, c 78, sec 8 (1773) and 1 Hawkins, Pleas of the Crown (2nd ed 1774) c. 76, sec 55.

[23] 3 and 4 Wm and Mary c 12, secs. 6 and 7 (1692)

[24] See footnote 20 supra and 3 and 4 Wm and Mary c 12, sec. 12 (1692) "to make new ditches and drains in and through the lands next adjoining to the said highways. . . ."

[25] 5 Eliz. c 13, sec 3 (1562)

[26] 13 Geo. III, c 78, secs. 38, 64, 78 (1773) Surveyor of highways may order cut or pruned hedges or trees which exclude sun or wind from highway If owner doesn't comply, survevor may do it at owner's expense

[27] See Wisdom, Index to British Highway Law, 115 Justice of the Peace 324 (1951)

[28] 5 and 6 Wm IV, c 50, sec 70 (1835).

[29] 3 Geo IV, c 126, sec 127 (1822)

[30] See Barnes v Ward, 2 Carr & K 661 (1847)

[31] Pub Health Act, 1907, sec. 22

[32] 56 and 57 Vict c. 32, sec 3 (1873) Dangerous places adjoining highways in general, Pub Health Act 1875, sec. 160.

[33] Road Imp Act 1925, secs 2, 5.

[34] 50 and 51 Vict c 58, sec 37 (1887) For a similar requirement for quarries see 50 and 51 Vict c. 19 (1887)

[35] Restriction of Ribbon Development Act of 1935, sec 13

[36] 10 and 11 Geo. 6, c. 51, Pt II, sec 10 and Pt III (1947) For typical rulings of the Minister of Housing and Local Government relating to placement of roadside signs see 1952 J of Planning Law 301-302

[37] See for example Y. B. 2 Hen IV 11, 48 (1400), Ames, Lectures on Legal History (1913) 231.

around 1493[38] (3) A roadside owner is responsible for leaving an excavation near the highway unguarded.[39] (4) Even a tenant at will occupying a ruinous house likely to fall onto a public highway is guilty of a crime if he does nothing about it.[40] (5) If the way is founderous, the public has a right by the common law to travel over adjoining private lands and even to break through fences for that purpose. This dates from at least 1675, and probably originated much earlier.[41] This common-law rule has been repeatedly recognized and applied in this country.[42] (6) If a landowner "encloses," that is fences, the highway on both sides, he becomes duty bound to keep the highway in repair.[43]

Other case-law holdings imposing duties on roadside owners are collected as illustrations of highway nuisances in Halsbury's Laws of England[44] under subheadings such as the following: keeping large quantities of explosives or inflammables near the highway; blasting; conducting a rifle range; maintaining dangerous fences; causing smoke from a bonfire to cross the highway; and using premises for exhibitions likely to draw crowds and obstruct the highway.

It may well be that the English statutes summarized above, even those that antedate our American constitution or even our colonial period, are not technically preserved by constitutional provisions as part of our common law. Our states have, after all, passed their own detailed highway legislation. On the other hand, some, at least, of the English case law just summarized is a part of our common law and has been so treated.[45] But both the English statutes and the English cases illustrate a basic principle which certainly is part of our common legal inheritance, namely that the roadside owner may not in using his land interfere with the public's dominant right of passage on the highway.

How much influence did this principle have upon early legislation and court-made case law in this country? I have not attempted the formidable job of combing early highway statutes for even our oldest states. Here are a few illustrative statutes turned up by the unsystematic search I was able to make.

A Pennsylvania act[46] of 1802 permitted highway supervisors to enter land near a public highway, "to cut and open drains and ditches . . . through [the private land] as he or they may judge necessary to carry off and drain water from such roads. . . ," thereby giving voice to a right of highway drainage across private land which originated in earlier English statutes and possibly in earlier English case law.

A Connecticut statute[47] was interpreted as authorizing town selectmen to enter private land and remove trees which tended to obstruct the road. And the South Carolina legislature[48] early authorized road commissioners to cut trees on private abutting land to the extent that timber was required in connection with road building or repairing. Other early statutes[49] authorize the removal of sand and gravel from adjoining land without the owner's permission but on condition that the land owner be com-

[38] See footnote 19 supra

[39] Barnes v Ward, 2 Carr & K 661 (1847), Blithe v Tophem, 1 Roll. Abr. 88 (1607), Attorney General v Roe (1915) 1, c 235

[40] Regina v Watts, 1 Salt 357 (1703), 91 Eng Rep 311 (1909)

[41] See Absor v French, 2 Show 29 (1794) and cases cited And see Williams, Principles of Law of Real Property (21st ed 1910) 425

[42] Williams, Real Property (17th International ed. Hutchins Amer Notes 1894) 505, Campbell v Race, 7 Cush (Mass) 408 (1851), Holmes v Seeley, 19 Wend (N Y) 507 (1838), Williams v Safford, 7 Barb (N Y) 309 (1849) The right *extra viam* is the label given this right to deviate, it is a designation familiar to generations of American lawyers.

[43] 10 Petersdorff, Abridgement (1881) 231, " Inclosure of a highway takes away the liberty and convenience which the public have of going upon the adjoining lands when the highway is out of repair he is bound to make a perfect good way as long as the inclosure lasts . " This rule is said to explain why fences were set back leaving waste strips between the traveled way and the fences If the road became impassable the public could travel on the waste strips without breaking fences and invading private fields Steel v Prickett, 2 Starkie 463 (1819) and Williams, Principles of Law of Real Property (21st ed 1910) 425

[44] 16 Halsbury's Laws of England (2nd ed 1935) 355-362 See also Pearce and Meston, Nuisances (London 1926) 138-147 and cases cited

[45] See note 42 supra

[46] 3 Laws, Com of Pa 516-517, sec X (1810) And see 1 Elliott, Roads and Streets (3rd ed 1926) sec 556

[47] See Ely v Parsons, 55 Conn 88, 10 Atl 499 (1886) See also Winter v Peterson, 24 N J L 524, 61 Am Dec. 678 (1854)

[48] See Ewes v Terry, 4 Mc Cord (S C) 125 (1827)

[49] See for example, 3 Laws, Com of Pa 517 (1810). But see Steres v S Vancouver Dist Corp, 6 Br Col 17 (1897) involving a statutory right to enter lands and take gravel for roads without payment.

pensated. In Massachusetts [50] surveyors of highways and road commissioners were authorized to "cut down or lop off" trees and bushes for the benefit of the highway, but it is not completely clear that this extended to trees and bushes growing on abutting land as well as in the highway right-of-way itself. But later American legislation authorizing highway officials to use self-help in trimming hedges and trees on private abutting land in the interests of the highway has been upheld [51]

Early American case law permitting use of private land to get around impassable spots in the highway has already been alluded to.[52] And other important bodies of case law will be summarized in the sections which follow.

Actually, the real question is not whether the abutter owes duties; that he owes some duties is evident [53] The real question is the extent and nature of these duties in the middle of our century. We have never related this age-old principle with specificity to the high-speed facts of mid-twentieth-century travel. Today the principle as applied in particular cases may no longer require the scouring of ditches or the frustrating of highwaymen by cutting bushes and trees, but it may demand the setting back of structures to improve sight distance, removal of roadside lights, and relocation or redesign of private access roads. Unfortunately, there is an amazing scarcity of reliable, objective data about the actual effect of roadside uses (billboards, commercial and residential structures, access roads, etc.) upon the highway-accident rate. For most effective use of the principle we badly need studies that show the causal relationship between particular roadside uses and free passage and safety on the highway.

But before discussing further how this historical material can be adapted to modern needs, let us move on to a summary of the nuisance and modern tort law approaches to the problem.

THE PUBLIC (HIGHWAY) NUISANCE

The notion that interference with free passage on a public highway is a public nuisance is almost as old as our law.[54] The highway nuisance [55] involves an interference with public convenience by (1) obstructing a highway or (2) doing an act which makes the highway inconvenient or dangerous, whether (a) the act is done on the highway itself or (b) is done on privately owned land abutting the highway.[56]

"Nuisance" is a chameleon-like word with many shades of meaning.[57] One of its connotations is that of a noisome or loathsome activity involving stench, dust, noise, soot, smoke, or vibration. This is because most so-called private nuisances (and many public nuisances as well) involve noisome or loathsome land uses. But a roadside abuse may be a nuisance even though it is in no way noisome or loathsome: [58] a fine, but misplaced building; a beautiful tree growing in the wrong spot It may well be that many a state's attorney has mistakenly failed to sue for highway nuisance injunctions because he fell into the common error of assuming that a highway nuisance must be noisome, loathsome, or at least unpleasant.

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[50] Mass Pub Stats (1882) p 348, c 52, sec 10

[51] Chaput v. Demaro, 120 Kans 273, 243 Pac 1042 (1936) and Kentucky v Watson, 233 Ky 427, 3 S W (2d) 1077, 58 ALR 212 (1928)

[52] See note 42, supra

[53] See 1 Elliott, Roads and Streets (3rd ed 1926) sec 501 "He [the abutting owner] has no right to do an act on his own land outside the limits of the road which will make the way inconvenient or dangerous, nor has he a right to deprive the highay of lateral support given it by his adjoining land"

[54] Glanville, writing about 1188, makes reference to nuisances affecting the King's Highway, Glanville, Treatise on the Laws and Customs of the Kingdom of England (Beame's ed 1900) 194. One of the earliest law abridgments, that of Brooke (1573) under the heading "Chimin" makes reference to various highway "nuisances"

[55] Prosser, Torts (1941) 566, "It [a public nuisance] includes interferences . . with public convenience, as by obstructing a highway . or creating a condition that makes travel unsafe"

7 McQuillin, Municipal Corporations (3rd ed. 1949) Sec. 24.574, "All unauthorized and illegal obstructions to or interferences with the free public use of streets are within the legal meaning of a nuisance"

Pearce and Meston, Law of Nuisances (London 1926) devote 9 pages to English cases dealing with erections or excavations near a highway as nuisances, see pp 138-147

[56] See 1 Elliott, Roads and Streets (3rd ed 1926) sec. 501.

[57] See Prosser, Torts (1941) 549 "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance"

[58] Of course a highway nuisance may also be obnoxious as where acid is made near a highway Rex v. White, 1 Burrow Rep 333 (1757)

We are prone to think of a public nuisance relating to a highway as a description of a particular type of tortious conduct different from (1) intentional torts on one hand and (2) negligent torts on the other. And in addition we assume that nuisances are specific wrongful acts which can be catalogued and listed. Both tendencies are in the tradition of law digests and abridgments Thus, for example, Bacon, in his Abridgement in 1736 said: [59]

> It is a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it; and it is said, that the owner of the land next adjoining the highway, ought of common right to scour his ditches. . . . Also it is said, that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them, and it is clear that any other person may lop them, so far as to avoid the nuisance.

Actually it is more in accord with modern legal analysis to treat the term "public nuisance" as it relates to highways as a short-hand way of saying that the public's *interest* in passage is being wrongfully interfered with either by intentional or by negligent action, or inaction. Nuisance then is not really a description of a separate tort; it is a way of describing the interest which the law is protecting.[60] The terms "roadside nuisance" and "public highway nuisance" as I have used them mean that Johnny Jones, roadside owner, has intentionally obstructed sight-distance by building a structure too close to the highway or has negligently failed to fence an excavation or has intentionally or negligently done (or failed to do) something else in consequence of which the public's interest of free and safe passage on the highway is impaired.

The duties of "servient roadside owners" discussed in the previous section are, then, merely different ways of stating highway nuisance doctrine. The roadside owner must not intentionally or negligently interfere with the dominant public interest, the so-called right of passage. We continue to talk about interference with this dominant right as a public nuisance largely because the early remedy was a criminal action in the name of the king to "abate a public nuisance." [61] As has so often happened in the history of our law, the procedural remedy has come to describe the substantive right-duty relationship.

But we no longer abate highway nuisances through the criminal process. Instead there is available the more-modern remedy of the equity injunction.[62] In addition, we have in many places molded and built upon the hoary old remedy of self-help. Originally the highway user could himself do whatever was necessary to clear his right of passage, even though entry upon the privately owned land of the wrongdoer was necessary [63] (Of course he could not "breach the peace" in effectuating his self-help remedy) Today, this self-help remedy has been transferred in many places to governmental officials.[64] But usually they are

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[59] IV Highways, par E. (Bouvier's Am. ed 1876) 675 See also Dalton, The Country Justice (1666) 75, c 31, sec 8, 1 Hawkins, Pleas of the Crown (2nd ed 1774) c 76, sec 5 8147, and 1 Russel, Crimes and Misdemeanors (Am ed 1824) 460 and the heading "Nuisance" in either Corpus Juris Secundum or American Jurisprudence.

[60] See 4 Restatement, Torts (1939) pp 215-216 and Prosser, Torts (1941) 553 and following.

[61] Street, Foundations of Legal Liability (1906) pp. 212-213 "The wrong of nuisance is one of the most ancient injuries known to the common law . As might be expected, the early nuisance, like the early trespass was criminal The courts were evidently on the alert to prevent encroachments on the rights of the crown, and as an incident to this they very naturally fell into the habit of punishing all nuisances affecting the public at large." See also Glanville, Book IX, c 11 and Ames, Lectures on Legal History, "Injuries to Realty" (1913) 231, Walsh, Equity (1930) 197

[62] On use of the injunction to abate public nuisances in general see 39 Am. Jur 408 (1942), Walsh on Equity (1930) 198-199 and 4 Pomeroy, Equity Jurisprudence (5th ed 1941) sec 1349 For cases where injunctions were issued to restrain roadside nuisances, see Milburn v. Fowler, 27 Hun (N Y) 568 (1882), excavation near road, and Charlotte v Pembroke Iron Works, 82 Me. 391, 19 Atl. 902, 8 LRA 828 (1890)—raising mill pond so as to flood road. Numerous injunction cases for direct obstruction of highways are given in Ames, Cases in Equity Jurisdiction (1904) 568, 612, and 1 Pomeroy, Equitable Remedies (1905) sec. 542, fn. 183

[63] On right of private citizens to use self-help to abate highway obstructions and interferences, see Freund, Administrative Power of Persons and Property (1928) secs 102-103, Street, Foundations of Legal Liability (1906) 215; Ames, Lectures on Legal History, Injuries to Realty (1913) 231, Blackstone, Commentaries (1765) Bk 3, c. 1, IV.

[64] Power of summary abatement of public nuisances is generally delegated to municipal corporations by the legislature, but by the majority rule it exists at common law without special grant of power

39 Amer Jur 457 (1942), McQuillin, Municipal Corporations (3rd ed 1949) sec 24 71 It has frequently been held that municipal corporations not only have the power but the duty to abate public highway nuisances. Baumgartner v Hasty 100 Ind 575, 50 Am. Rep 830 (1884), Joseph v Austin (Tex Civ App.), 101 S W. (2d) 381 (1936), Neff v. Paddock, 26 Wis 546 (1870), Hubbel v. Goodrich, 37 Wis. 84 (1875). Power by a municipal cor-

required to notify the offender and give him a chance to cure the situation, before they can do it for him.[65] Even so they normally have a power to act without notice in cases of clear emergencies.[66] The books are full of admonitions to public officials not to attempt summary abatement of public nuisances, but to avoid possible personal damage suits by bringing an action in equity to get the judge to order the nuisance abated by injunction instead.[67]

It may well be that highway officials frequently ignore this admonition and use summary abatement procedures instead of court injunctions. In any event, there are almost no modern reported cases involving injunctions against nonstatutory roadside abuses, though there are quite a number dealing with obstructions in the right-of-way as such.[68]

There seems to be little doubt, however, that just as an injunction is available to abate public nuisances in general, so it is available in particular to abate those which exist on privately owned roadside land. Certainly it is true that the duty by public officials to abate highway nuisances by summary action has been extended to roadside uses[69] and has not been confined to direct obstructions of the right-of-way as such.

Nowadays, we have become accustomed to the legislature's passing a statute declaring this, that, or another roadside use to be a public nuisance. This is in the tradition of the early law. Often, as just indicated, these statutes specify rigorous self-help remedies by which highway officials may cure violations without going to court. This, too, as we have seen, is very much in the tradition of the early law. But it was never assumed, in our law, as some highway officials seem now to believe, that courts are powerless to declare and to abate roadside nuisances quite independent of, and without support from, the legislature. Courts can act even though legislators have not. Judging from the paucity of reported cases, we have given this latent judicial power little chance for development since horse-and-buggy days.

CONTINUING NEGLIGENT OR INTENTIONAL TORT BY A ROADSIDE OWNER IS ENJOINABLE

Hundreds of damage cases by highway users against roadside owners have been published in court reports. Most, as suggested in the previous section are disguised as actions for harm done because of a public highway nuisance. But on close examination the cases can more readily be premised on either (1) the claimed negligence of the roadside owner—on his failure to exercise due care with respect to highway users, resulting proximately in an injury or damage to the highway user—or (2) on an intentional wrong done by the roadside owner.

It is perhaps convenient, though certainly not conducive to preciseness in thinking, to continue to treat these actions as nuisance cases. As nuisances, it is easy to argue that, in addition to the damage remedy, an injunction is available to abate the nuisance in an action either by public officials or by a specially damaged private litigant.[70]

But equitable principles are not so hidebound as to require such semantic idolatry to old-fashioned terminology. As will be seen, practically all of the cases involve, not just a momentary act or condition, but a long continuing, or recurring, condition.

poration to abate a public nuisance has been extended to nuisances existing on private abutting land, Parker v Macon, 39 Ga 725 (1867) and Vossler v De Smet, 204 Ill App 292 (1917), Langan v Atchison, 35 Kan 218, 11 Pac 38 (1886), Grogan v Broadway Foundry Co, 87 Mo 321 (1885), Kiley v City of Kansas, 69 Mo 102 (1878), Inabinett v State Highway Dept, 196 S C 117, 12 S E (2d) 848 (1941), Restatement, Torts (1939), sec 202, comment (f) and sec 212 (4), McQuillin, Municipal Corporations (3rd ed 1949) sec 24 72, 66 C J S 859 (1950)

[65] Statutory summary abatement procedures must be strictly followed, 66 C J S 859 (1950), McQuillin, Municipal Corporations (3rd ed 1949) sec 24 75

[66] McQuillin, Municipal Corporations (3rd ed 1949) sec 24 75

[67] See Oglesby v. Winnifield, La App, 27 So (2d) 137 (1946) and McQuillin Municipal Corporations (3rd ed 1949) secs 24 71, 24 72, 24 87, and 30 118

[68] See Ames, Cases in Equity Jurisdiction (1904) 568 612 and cases cited and 1 Pomeroy, Equitable Remedies (1905) sec 542, fn 182

[69] See footnote 64 supra.

[70] See Walsh, Equity (1930) 198-201, Ames, Cases in Equity Jurisdiction (1904) 568, 612.

Once it is established that such a continuing or recurring condition is wrongful under the law of negligence, or as an intentional tort, an injunction to abate it is available on the familiar ground that this will prevent multiplicity of suits.[71]

This summary of damage suits against roadside owners excludes cases of direct blocking of highways and is confined to alleged intentional or negligent wrongs which took place outside the traveled part of the highway or outside the right-of-way lines.

The horse-and-buggy era in this country, as in England, gave rise to a large group of personal injury cases involving the scaring of horses by objects along the roadside. Many of these cases turn on the special duty of the abutting landowner not to maintain a nuisance which will unreasonably interfere with the public's use of the highway. Other cases in the horse-fright group involve injury or damage claims against a municipality charged with a statutory duty to maintain the highway, it being argued that the roadside wrong was a defect in the highway which should have been removed by the public authorities.

Illustrative of a claim against a roadside owner is the early Connecticut case of *House v. Metcalf*.[72] In 1824, the defendant, having purchased an old mill, installed a new 12-foot, overshot water wheel some 47 feet from the highway. In 1857, the plaintiff's horse was frightened by the motion of the wheel, the sulky he was pulling was overturned, and both the plaintiff and his horse were injured. The jury brought in a verdict for the plaintiff. The defendant appealed, contending among other things that there was a fatal variance between the plaintiff's original claim that the nuisance was in the highway and the actual proof at the trial. Said the court:

> And whether the wheel was within or without the legal as distinguished from the practical limits of such highway, was unimportant—its injurious character arising, not from its interposing a material obstacle in the way of travelers on the road, but from its rendering traveling there unsafe, by the effect which the sight of it produced upon their horses.

In another case,[73] a railroad was held responsible for injuries caused when a horse was frightened by an unloading derrick (located on railroad land) with a boom that swung 4 feet out onto the highway.

Most of the American cases [74] of this type happened to involve objects that were located within the legal limits of the right-of-way, but this fact was not treated as controlling. But, as might be expected, American judges required strong proof before they would penalize a commercial or industrial use outside the right-of-way by finding that it frightened a horse unreasonably. Thus, the owner of a stave factory that hissed steam was not responsible for injuries caused when the plaintiff's horse was frightened,[75] nor was the owner of a roadside steam engine.[76]

As already indicated, local units of government charged with the duty of maintaining the highway have been held liable for damages caused by a roadside nuisance. Thus, in one case, bales of hay aboard a railroad car caught fire. They were dumped off the car onto the roadside within the highway right-of-way line and lay, charred and black, for some hours after a town selectman knew of it. The plaintiff's horse was frightened by the bales, and the plaintiff was injured as a result. "The statute [on maintenance of roads]," said the Vermont court, "has armed the towns with full authority to interfere with appropriation of it to any private use inconsistent with unembarrassed enjoyment of the public easement." [77]

The rule that grew out of these cases was

[71] 1 Pomeroy, Equity Jurisprudence (5th ed 1941) sec 243 and 1 Pomeroy, Equitable Remedies (1905) secs 514, 516 and 542

[72] 27 Conn 630 (1858).

[73] Jones v Housatonic R. R. Co, 107 Mass 261 (1871)

[74] For a collection of such cases see 1 Wood, Law of Nuisances (3rd ed 1893) 363-369 and 37 Cyc. 290 (1911) Typical cases are Lynn v Hooper, 93 Me. 46, 44 Atl 127 (1899), white haycap, Dinmock v. Town of Suffield, 30 Conn 129 (1861), pile of colored plaster, Foshay v Glen Haven, 25 Wis 288 (1870), blackened log, Gult v Wolver, 103 Ill App 71 (1902), machine

[75] Ft Wayne Cooperage Co. v Page, 170 Ind 585, 84 N E 145, 23 LRA (NS) 946 (1908)

[76] Wabash, St Louis & Pac. Ry. Co v Farver, 111 Ind 195, 12 N E 296 (60 Am Rep 696 (1887))

[77] Morse v. Town of Richmond, 41 Vt 435 (1868)

broadly stated by a legal encyclopedia [78] in 1911: "Objects calculated to frighten horses in or near the road constitute defects in the road rendering the municipality liable for injuries caused thereby, although not dangerously near the traveled way, and although there is ample room to pass around them."

The mechanical horses of today's sleek high-powered cars are not frightened by wayside objects, but the human being who seeks to control this power at high speeds is easily distracted, confused, blinded, or startled by roadside structures, lights, signs, objects, and uses. The nineteenth-century concern to protect the "ordinary gentle horse" from roadside fright might well now be shifted to an even greater concern for the ordinary automobile driver

We turn now from horse-scaring objects to excavations, tottering walls, insecure signs and trees ready to fall Here the long parade of cases starts with *Regina v. Watts* [79] decided in England in 1703 and cited repeatedly by American judges since. That was a case of a ruinous building located near the highway's edge It was held that even a tenant at will was guilty of a misdemeanor in not repairing the building so as to remove the threat to the highway.

Where the danger is very close to the street, there is a substantial group of cases holding municipalities responsible for resultant injuries to highway users [80] Just as in the horse-scaring cases, this has been done under street maintenance statutes, the courts having found that failing to erect a guardrail for an excavation just outside the right-of-way, or failure to remove a tottering wall, sign, or tree, constitutes a defect in the street within the meaning of the statute.

Cases holding landowners liable for injuries to travelers due to unfenced excavations, coal holes and area ways located near but not on the street are also legion.[81] Many talk the language of negligence, some the language of public nuisance. All impose special duties of care because of the proximity of the highway.

Building above the street has also been a frequent subject of litigation. Statutes and ordinances regulating awnings, marquees, overhead signs, and projecting outside stairways have been upheld as reasonable protectors of the traveling public from the danger of falling objects, even though no actual present physical interference with passage on the street was involved.[82] And landowners are normally held responsible in damages for injuries caused by the falling of such overhanging objects.[83]

Also of interest are the many cases where abutting landowners or occupants are held responsible to highway users for injuries

[78] 37 Cyc. 290 (1911)

[79] 1 Salk 357

[80] *Excavations* City of Norwich v Breed, 30 Conn 535 (1862), Town of New Castle v Grubbs, 171 Ind 482, 86 N E 757 (1908), White v Suncook Mills, 91 N H 92, 13 A (2d) 729 (1940), Bunch v Town of Edenton, 90 N C 442 (1884), Biggs v City of Huntington, 32 W Va 55, 9 S E 51 (1889) where the court said "The true rule is that if either an obstruction, excavation, or hole be permitted by a town to exist, though not actually within one of the public streets of the town, yet so close to such a street as to produce danger to a traveler or passenger who is using such a highway or sidewalk prudently and properly, the corporation is liable for an injury for permitting such nuisance, though it be only close to the street, and not immediately in the street" See also 13 ALR (2d) 922 (1950) *Other Openings* Beardsley v City of Hartford, 50 Conn 529 (1883), McIntire v. Roberts, 149 Mass. 450, 22 N E 13, 4 LRA 519 (1889) *Tottering Walls.* Parker v Macon, 39 Ga 725 (1867), Head v Augusta, 46 Ga App 705, 169 S E. 48 (1933) *Falling Billboards* Langan v City of Atchison, 35 Kan 218, 11 Pac 38, 57 Am Rep 165 (1886), Temby v Ishpeming, 140 Mich 146, 103 N W 588, 69 LRA 618 (1905), no liability *Falling Tree* Inabinett v State Highway Dept 196 S C 117, 12 S E (2d) 848 (1941) See also 11 ALR (2d) 626 (1950) and 14 ALR (2d) 186 (1950) *See also* 37 Am Jur 933 (1941) and McQuillin, Municipal Corporations (3rd ed 1949) sec. 54 72. "If a municipality has the power to declare and abate nuisances, and it has actual or constructive notice of the dangerous condition of a structure on private property so near the street as to threaten the safety of persons travelling thereon, it is liable to persons in the street injured by the fall of such structures . . ."

[81] Buesching v St Louis Gaslight Co, 73 Mo 219 (1880), Temperance Hall Assn of Trenton v Giles, 33 N J L 260 (1869), State v Soc for Useful Mfgers, 42 N J L 504 (1880), criminal indictment for maintaining a nuisance, Beck v Carter, 68 N Y 283, 23 Am Rep 175 (1877), Ann v Herter, 79 N Y Supp 825 (App. Div. 1903), Downes v. Silva, 57 R I 343, 190 A 42 (1937)

[82] See for example Woodward Ave Corp v Wolff, 312 Mich 352, 20 N W (2d) 217 (1945) and Gustafson Co v. Minneapolis, 231 Minn 271, 42 N W (2d) 809 (1950).

[83] *Walls* Lauer v Palms, 129 Mich 671, 89 N W 694, 58 LRA 67 (1902), Simmons v Everson, 124 N.Y 319, 26 Atl 911 (1891), but see Evansville v Miller, 146 Ind 613, 45 N E 1054, 38 LRA 161 (1897) where an ordinance requiring all burnt walls to be removed or repaired was declared too sweeping *The falling of other objects* Foley v Farnham Co, 135 Me 29, 188 Atl 708 (1936)—sign fell on weary pedestrians sitting on doorsill, Muray v McShane, 52 Md 217 (1879)—brick fell on pedestrian tying his shoelace, Wilkinson v Detroit Steel & Spring Works, 73 Mich 405, 41 N W 490 (1889)—part of roof fell, Gray v Boston Gaslight Co, 114 Mass 149 (1873)—chimney to which telegraph wire was attached, McNulty v Ludwig & Co, 153 N Y App Div 206, 138 N Y S 84 (1912)—sign, Brown v. Milwaukee Terminal Ry Co, 199 Wis 575, 227 N W 385, (1929)—dead tree But see Price v Travis, 149 Va 536, 140 S E 644 (1927) There are numerous ALR notes of which the most recent are 107 ALR 596 (1937) and 138 ALR 1090 (1942).

resulting from water, mist, seepage, or snow which gets onto or over the highway because of a structure or use on abutting land. Examples: snow slides from steeply pitched roofs; [84] water spread from drain pipes; [85] and mist from a roadside dam freezing on the highway [86]

Closely allied are the roadside sports activity cases where golf-course or baseball-park proprietors are held responsible for damages to passersby who are struck by golf balls or baseballs.[87]

And then there are the cases of barbed-wire fences,[88] charged wires,[89] or dangerous activities [90] like blasting [91] or the firing of guns near the road.[92]

Of interest to those who must struggle with traffic knots on main thoroughfares created by the presence of outdoor theaters is the line of cases going back many centuries, which holds that it may be a public nuisance to cause crowds to assemble and block the highway.[93]

In a day when it required a fast trot to move a vehicle down the highway at 12 miles an hour, we could hardly expect much concern with sight distance. Even so, there was considerable legislative attention both in England and in this country to the trimming of trees, bushes, and hedges There are, in addition, American court decisions [94] involving the duties and powers of highway officials to trim or remove trees. Liability for damages has been imposed on the roadside owner when smoke from a bonfire or coke burning operation causes an accident on the highway,[95] and in a relatively recent case there has been talk about confusing drivers through profusion of lights at night [96]

CONCLUSION

On three lines of reasoning a basic duty by an abutting owner to do nothing on his land which will interfere with free and safe passage on the highway has been established. The existence of the duty has been reflected not only in police-power legislation but also in court-made case law, particularly in numerous personal injury actions brought by highway users against abutting owners.

The natural instinct of a case-taught lawyer is to find a case on "all fours" with his client's case before venturing into court. He wants a decided case the facts of which are closely comparable to his client's problem. As a result, he is always looking back for exact precedents If he fails to find an "all fours" case he may convince his client not to risk a court action In his search for specific holdings he is prone to overlook the basic reasoning behind the cases he does turn up.

I have found no case on "all fours" with the Pittsburgh expressway problem about the lighted signboard in the complicated interchange, nor have I found any that says an oil tank farm built flush with a right-of-way line and provided with a dangerous access road is an enjoinable roadside nuisance [97] But it seems to me that the scattered material gathered here (and the gathering makes no pretense of being a complete harvesting) does clearly establish

[84] See Hannom v. Pence, 40 Minn 127, 41 N W 657, 12 Am St Rep 717 (1889) and Klepper v Seymour House Corp, 246 N Y 85, 158 N E. 29, 62 ALR 955 (1927)—both the landowner and the municipality were held liable

[85] Hynes v Brewer, 194 Mass 435, 80 N E 503, 9 LRA (NS) 598 (1907)

[86] Clawson v Central Hudson Gas & Elec Corp, 298 N Y 291, 83 N E (2d) 121 (1948)

[87] Liability of Ball Park Owner to Street User, 16 ALR (2d) 1458 (1951), Salevan v. Wilmington Park Inc, 45 Del 290, 72 A (2d) 239 (1950), Gleason v Hillcrest Golf Course, 148 N Y Misc 246, 265 N Y Supp 886 (1933), Robb v City of Milwaukee, 241 Wis 432, 6 N W (2d) 222 (1942), Golf Course near Highway as a Nuisance, 138 ALR 541 (1942)

[88] Bower v Watsontown, 1 Pa Dist Rep 116 (1892) But see Williams v City of Hudson, 219 Wis 119, 262 N W 607 (1935)

[89] Ruocco v United Advertising Corp, 98 Conn. 241, 119 Atl 48, 30 ALR 1237 (1922)

[90] Explosives stored near road, 11 ALR 719 (1921)

[91] Regina v Mitters, Le and Ca 491 (1864)

[92] Cole v. Fisher, 11 Mass 137 (1814), Shooting Gallery or Rifle Range as a Nuisance, 140 ALR 415 (1942)

[93] Betterton's Case, Holt 538 (K B) (1695), Rex v Carlile, 6 Carr & Payne 636 (1834), Fairbanks v Kerr, 70 Pa St 86 (1871), Baker v. Commonwealth, 19 Pa St 412 (1852), 1 Wood, The Law of Nuisances (3rd ed 1893) 325

[94] Ely v Parsons, 55 Conn 83, 10 Atl 499 (1886), Winter v Peterson, 24 N J L (4 Zab) 524, 61 Am Dec 678 (1854), Ewes v Terry, 4 McCord (S C) 125 (1827) and Chaput v Demars, 120 Kan 273, 243 Pac 311, 244 Pac 1042 (1926).

[95] Holling v Yorkshire Traction Co Ltd, 2 All Eng Rep 662 (1948)

[96] Woodward Avenue Corp v Wolff, 312 Mich 352, 20 N W (2d) 217 (1945)

[97] Even so attorneys may find some "all fours" cases in the material gathered here See for example the smoke case at footnote 95 and the roadside excavation cases at footnote 80

a basic principle Attorneys for state highway commissions are urged to consider using this principle and some of this background material in nuisance actions to enjoin roadside abuses, even without support from specific legislation. It is, of course, sensible to begin with the worst cases where causal connection between the roadside use and endangerment of the safety or free passage of the highway user is clear and obvious I think cases such as those given in the opening paragraphs of this paper are of that type. Once precedents in obvious cases are established, the rusting tool of the highway "nuisance" injunction can be polished and sharpened for effective elimination of less obvious abuses.

But the job is not one for lawyers alone. It should be obvious that the essence of a roadside injunction case is the factual proof of the effect of the roadside use upon "free and safe passage" on the highway. Here traffic and highway accident surveys play a vital role.

The Nebraska State Zoning Agency

J. Edward Johnston

● THIS is a discussion relating to a zoning program carried on by the State of Nebraska during World War II. One may ask why such a program carried on for war emergency purposes would be of interest today As we all know, vast investments are being made by the federal government and the state in the construction of new highways. They are now spending more money than ever before to improve and expand our road network. President Eisenhower has proposed a $101-billion highway program over a 10-year period These expenditures, representing one of the greatest efforts of transportation advancement in history, clearly should do much to bring our highway system up to date, obsolete though much of it is now.

However, it is imperative to recognize that new highways can become inadequate long before they should unless construction is accompanied by highway zoning and other measures to protect the roadside. Without such zoning and protection, the nation could well dissipate billions of dollars and soon find itself again in a highway crisis. In anticipation of huge highway expenditures, both current and proposed, highway zoning and roadside protection are more urgent than ever.

State and county governments should take steps through legislation and regulation to protect the roadside from uncontrolled commercial development and unlimited access from side roads and business establishments. So far as our more important roads are concerned, action is most needed at the state level. Highway zoning at all levels of government, particularly at the state level, has proven unpopular. Although most states have some type of enabling legislation which permits local governing bodies to adopt zoning regulations, no state to date has state zoning legislation that permits the state itself to do the job. Even the picture so far as nation-wide enabling state and county legislation is concerned is fragmentary.

Only a fourth of the states have enabling legislation that permits all counties to adopt adequate laws for general zoning. Some state enabling legislation permits all counties to adopt limited types of zoning; other state legislation permits only certain counties to adopt adequate laws for general zoning, and still other legislation permits only certain counties to adopt limited types of zoning Most states have enabling legislation permitting cities of certain classes to zone.

Under the present structure, there is little opportunity for a comprehensive, uniform plan for the development of roadside zoning. The need is for state zoning or some authority whereby the various governmental units that can now zone under state enabling legislation can be consolidated in one zoning district for highway zoning purposes.

Maryland has proposed legislation for the consideration of the state legislature. There is considerable optimism among those who are sponsoring the bill that Maryland may be the first state to have state zoning provisions.

Now let us return to the wartime skeleton which we have dragged out of the Nebraska closet and see where this program might fit into current developments. It was a device whereby zoning districts were consolidated.

The 55th Session of the 1941 Nebraska State Legislature, recognizing the impact

that war industry and army and navy installations would have on land use in the vicinity of these activities, adopted an act relating to health, public welfare, and public safety to provide for the consolidation of cities, villages, or counties, or portions or combinations of them into state zoning districts under the general control of a state zoning agency, an executive department of the state functioning under the governor and composed of the Nebraska Advisory Defense Committee. The bill provided that when a federal fort, airport, manufacturing plant or assembly plant for the construction or assembly of military equipment or the manufacture of explosives, arms or munitions is or is about to be located within or near the corporate limits of cities, villages or counties, or portions or combinations of them, that the establishment of state zoning districts embracing territory used or to be used for the activities described is a matter of general state concern and subject to the zoning provisions as set up in the act.

The state zoning agency was empowered to regulate the height, number of stories and size of buildings and other structures; percentage of lot or land area that may be occupied; the size of yards, courts and other open spaces; the density of population; the location of buildings, structures, automobile trailers, house trailers and land for trade, industry, residence or other purposes; setback building lines in residential districts; redistricting location of trades and industries and the location of buildings designed for specific uses when such are dangerous to the health, safety, morales, general welfare, and prosperity of the entire state and its people. The legislature invoked the police powers inherent in the state and in any and all of its branches of government for the enforcement of this act.

The Nebraska State Zoning Agency is one of a few cases where such an attempt has been made to consolidate zoning done by local governing bodies into one governmental district. Although it is recognized that this system is a poor substitute for state zoning laws, it certainly is a step in the right direction toward a means to obtain uniform zoning regulations between governmental subdivisions.

In the Nebraska plan, counties and cities did not lose their zoning authority. When the property regulation map and written report were received from the state zoning agency, the local governing bodies of the several governmental subdivisions making up the district could approve the map and report in its entirety or, in their discretion, change or alter the boundaries of the use areas when in their respective corporate limits and proceed to zone their governmental subdivisions according to law.

The technical staff of the agency, at the request of the local governing body, of any governmental subdivision composing the district, after the submission of the property regulation map and the written report, could continue to assist the local governing body of the governmental subdivision composing the district in an advisory capacity until the zoning in each such governmental subdivision was completed. In other words, the state zoning agency, in the main, constitutes only a guiding hand toward the end of establishing a uniform comprehensive zoning regulation among the various governmental subdivisions.

However, it can be seen that because of the highly technical aspects of comprehensive zoning, that the technical staff of the state zoning agency could wield a potent hand in the matter of uniformity. Furthermore, such agency would be in a position to encourage local governing bodies to take advantage of the state zoning enabling legislation and, after such legislation had been adopted, insure its enforcement through a continuous sales program.

The Nebraska State Zoning Agency had a productive existence during the war years. It developed comprehensive zoning plans in 13 out of its 98 counties and any number of cities. A vigorous sales program was neces-

sary from beginning to end. In a farming state, such as Nebraska, comprehensive zoning was the farthest from the people's thoughts Meetings were held jointly and individually with various governmental subdivisions included in zoning districts. Each governmental agency was led by the hand from its application to be included in the district to the holding of hearings and final publication of zoning resolutions and zoning ordinances.

Following the war, the work of the agency was forgotten Comprehensive zoning regulations and plans are still in effect in many of the counties and cities. Many of the counties and cities, however, have forgotten that they have such legislation on their dockets They are not fully aware of the importance of proper land use and other comprehensive zoning regulations. However, a staff at state level could be effective in keeping such regulations alive.

The regulations as developed for the counties and cities in Nebraska gave special attention to land use along highways Most of such land was included in "agricultural" districts.

Agricultural district use provisions included: (1) any use permitted in residence districts; (2) the agricultural use and uses customarily incidental thereto; (3) forestry, lumbering, mining, quarrying, rock-crushing, gravel pit, borrow pit, (4) fur farming, dog kennels, animal hospitals; (5) cemeteries; (6) sales pavilions and stands for retailing farm produce, commercial greenhouse and nursery salesrooms; (7) driving and archery ranges, riding academies and similar outdoor recreational activities; (8) tourist homes in which overnight accommodations provided are offered for transit guests for compensation; (9) subject to special use permit: trailer camps and cabin camps; (10) outdoor advertising signs and structures, provided that no such sign shall be placed or displayed and no such structure shall be erected within 200 feet of any residence district, entrance to a public park, or right-of-way of any highway which is designated on the state zoning plan as a parkway; (11) subject to special use permit: dumps, provided that such permit shall not be required for disposal of such refuge or material originating from the same premises.

These provisions are not nearly so restrictive as they should be for the proper protection of our highway investment on the more important roads. There is little reason, however, why the zoning police powers could not be extended to provide the type of control needed on state routes where justified because of heavy traffic volumes.

Incidentally, in some of the counties future right-of-way lines were adopted on the main highways as recommended by the state highway department and the county engineer. Although such future right-of-way lines have no effect upon present usage, they are a great help in minimizing the payment of damages resulting from non-conforming usage between the time that the future highway right-of-way lines are established and final acquisition of rights-of-way for highway purposes.

Until such time as state zoning laws are accepted and have been adopted by the states, the use of state zoning agencies, such as was employed by Nebraska during World War II, might provide an interim device that could be sold to the public Such an agency, under the governor and composed of outstanding citizens of the state, with the aid of trained technical personnel could provide a semblance of comprehensive zoning regulations that would do much to safeguard our present highway investments, to say nothing of the benefits that would accrue from the many other features of a comprehensive zoning plan

The experience of the Nebraska State Zoning Agency may be worthy of further consideration as an interim device to obtain greater protection of our highway investment from indiscriminate marginal land use and development.

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Bulletin 113—LAND ACQUISITION

THE NATIONAL ACADEMY OF SCIENCES—NATIONAL RESEARCH COUNCIL is a private, nonprofit organization of scientists, dedicated to the furtherance of science and to its use for the general welfare. The ACADEMY itself was established in 1863 under a congressional charter signed by President Lincoln. Empowered to provide for all activities appropriate to academies of science, it was also required by its charter to act as an adviser to tne federal government in scientific matters. This provision accounts for the close ties that have always existed between the ACADEMY and the government, although the ACADEMY is not a governmental agency.

The NATIONAL RESEARCH COUNCIL was established by the ACADEMY in 1916, at the request of President Wilson, to enable scientists generally to associate their efforts with those of the limited membership of the ACADEMY in service to the nation, to society, and to science at home and abroad. Members of the NATIONAL RESEARCH COUNCIL receive their appointments from the president of the ACADEMY. They include representatives nominated by the major scientific and technical societies, representatives of the federal government designated by the President of the United States, and a number of members at large. In addition, several thousand scientists and engineers take part in the activities of the research council through membership on its various boards and committees.

Receiving funds from both public and private sources, by contribution, grant, or contract, the ACADEMY and its RESEARCH COUNCIL thus work to stimulate research and its applications, to survey the broad possibilities of science, to promote effective utilization of the scientific and technical resources of the country, to serve the government, and to further the general interests of science.

The HIGHWAY RESEARCH BOARD was organized November 11, 1920, as an agency of the Division of Engineering and Industrial Research, one of the eight functional divisions of the NATIONAL RESEARCH COUNCIL. The BOARD is a cooperative organization of the highway technologists of America operating under the auspices of the ACADEMY–COUNCIL and with the support of the several highway departments, the Bureau of Public Roads, and many other organizations interested in the development of highway transportation. The purposes of the BOARD are to encourage research and to provide a national clearinghouse and correlation service for research activities and information on highway administration and technology.