Regulation of Access vs Control of Access In Oklahoma

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● SINCE the comparatively recent development of the limited access highway as we know it today, a great deal of controversy has arisen over the rights of the owners of property abutting upon these highways. As more cases reach the Appelate Courts, the law is gradually becoming more settled, but many questions remain unanswered, and from the legal concept at least, the limited access highway is still very much in the formative stage.

In considering the various legal principles that arise in connection with the establishment and construction of limited access highways none appears more important nor less clearly defined in reported court decisions than the question of the extent to which access rights may be limited or curtailed through the police power.

It is intended here, first, briefly to discuss the general principles of law applicable to the regulation of access under the police power as distinguished from the control of access through purchase or eminent domain; and, second, to discuss the practical application of those principles as they are now being applied in the State of Oklahoma.

There is, of course, nothing new about the exercise of police powers by the sovereign. Lord Kent, in his famous commentaries on the law, states that the police power of the sovereign has its origin in the law of necessity,[1] and may be exercised even to the extreme that house or buildings may be razed without compensation to the owners in order to prevent the spread of pestilence or conflagration.

In one of the earlier published works in this country on police powers, (1894) the author commented:

"Citizens rights or property, as they are frequently estimated by the public, are continually invaded anew by government in its necessary guardianship of public interests and for the public good."[2]

Broadly speaking, therefore, police power is the power of the sovereign to impose reasonable and necessary restrictions upon a citizen's rights or upon the use of property for the public good; its origin is in the law of necessity, it stems in part from the principles of equity, and by judicial interpretation it is always subject to the law of reason and the control of the courts.

The essential difference between the use of police power and use of eminent domain proceedings to regulate or control access to highways is that the former is a matter of imposing regulations that are reasonably necessary for the public health, welfare and safety, while the latter is the forcible taking or damaging of private property for public use. Courts have sometimes taken the view, however, that a regulation which is arbitrary, or not reasonably necessary for the public good, may, in fact, amount to a taking of property without due process of law. The important question in each case is: Where does regulation end and taking begin?

The Courts uniformly hold that the right of access to a public highway from property abutting thereon is an easement, or a use in land, and is therefore an interest in property which may not be appropriated for public use without just compensation. There is not nearly so much law on the subject of the extent to which the use of that property right may be regulated under the police power. It appears, however, that there can be no question but that the state has the power to impose reasonable restrictions upon the right of access. Certainly, such regulation cannot amount to a complete denial of access; it must be reasonable, and it must be based upon a finding by a competent authority that the regulation imposed is necessary in the interest of the public welfare.

It has been held that the construction of a center median or dividing strip between

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[1] Kents Commentaries 338

[2] Prentice on Police Powers

traffic lanes on a highway is within the police power.[3] The rule is, likewise, almost universal that a property owner is not entitled to compensation simply because the construction or location of a highway causes him some circuity of travel or inconvenience or annoyance common to the public generally. It therefore would seem clear that when access is provided through marginal service or frontage roads, which open onto the main traffic lanes of the highway at points designated by highway authorities, there is not an appropriation or damaging of the abutting owner's easement of access, but merely a regulation imposed upon his use of that property right, which, if reasonably necessary for the public safety, is within the police power of the state. It is true that there is a divergence of view in the reported decisions on this matter, mostly arising from the interpretation of the language in many constitutions, that private property may not be taken or damaged without just compensation, and that the changing of direct access to an old highway to indirect access to the highway through a service road, amounts to a "damaging" of the easement access.

The fallacy in this reasoning is that an easement of access extends only to such portion of a street or highway as is reasonably necessary for the purpose of ingress and egress. The easement of access does not give the owner of the land an absolute right as against the public to the perpetual continuance of exactly the same kind and manner of access, nor to access to the full width of the street from any point on his abutting property. An abutting owner's easement of access cannot logically be construed to give him any greater right than the right to ingress and egress over whatever street or highway abuts his property. He has no vested right in any particular traffic lane carrying any particular flow of traffic, nor does he have any vested right in the continuance of traffic past his property. His easement of access is simply a right to have his land abut upon the street or highway system in such a manner as to afford reasonable ingress and egress.

A decision of the Supreme Court of California in 1943,[4] appears contrary to the views herein expressed, and the dissenting opinion in that case by Justice Edmonds (with Justices Curtis and Traynor also dissenting) is more in accord with what appears to be the better reasoned authority. In the California case, compensation was allowed where direct access was altered to provide access through a service road. The majority (4 to 3) opinion, while conceding that the property owner had no property right in the flow of traffic over the highway adjacent to his property, and that the rerouting or diversion of traffic is not a "taking" or "damaging" of property, held that the rerouting of the highway impaired and damaged the landowner's easement of access, even though a greater circuity of travel appears to be the only element of damage. It appears that the views expressed by the majority opinion in that case are contrary to the weight of authority that mere circuity of travel is not compensable, and to the many decisions to the effect that abutters' rights are subject to the right of the state to regulate and control the public highways for the benefit of the traveling public.[5]

An important factor in the regulation of access by means of frontage roads is the designation of such roads as a part of the highway system. In other words, if the frontage or service roads are conceived, planned and designated as an integral part of the highway by official action of the governing body having jurisdiction, there is still access to the highway. On the other hand, if the service road is not a part of the highway, but is designed and constructed as a separate street or road, it leaves the door open to the contention that access to the highway has been completely denied. In a recent Ohio case, however, the Court held that the construction of an expressway on one side of an existing highway, which thereafter became a county road, and was connected to the new highway at intervals to be used as a service road, did not result in any impairment of

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[3]City of Fort Smith v Van Zandt, 197 Ark 91, 122 SW 2d 187 (1938), Holman v State of California, 97 Adv. Cal App 282, 217 P2d 448 4th Dist (1950)

[4]People v Ricciardi, 144 P2d 799, 23 Cal 2d 390

[5]Jones Beach Boulevard Estate, Inc vs Moses, et al, NY Ct of Appeals (1935) 268 NY 362, 197 NE 313 (citing Numerous other New York cases) Annotated 100 ALR 489-491)

the right of access of property owners abutting on the old highway.[6] The reasoning of the Court was that mere circuity of travel necessarily and newly created in the public interest to make travel safer and more efficient, does not, in itself, result in a legal impairment of the right of access. Nevertheless, at least as an abundance of caution, it appears advisable in areas where access rights have not been obtained by eminent domain, and where existing development does not justify the immediate construction of service roads, that the plan including the service roads nevertheless be formulated and adopted by the highway commission as the plan for the ultimate design of the highway. This removes the possibility of the argument that the service road is an afterthought or a subterfuge to prevent direct access, and affords the agency or department having charge of the approval of the location and design of entrances to the highway an opportunity to explain to abutting owners the nature of the ultimate development.

In recent cases involving the regulation of property under the police power, Courts have made the statement that when such regulations are justified the owner is not entitled to compensation. The older cases, and particularly the English view, approached the matter somewhat differently. They reasoned that the land owner was compensated as one of the public by his share of the advantages arising from the regulation beneficial to the general public.[7]

In connection with the easement of access, the courts have also consistently held that the abutting owner also has an easement of reasonable light, air and view, but these rights, likewise, may be curtailed under the police power by the erection of structures that are reasonably necessary to secure the safety and promote the convenience of the traveling public.[8]

The regulation of access under the police power has been resorted to in Oklahoma as a matter of necessity. The law authorizing the Oklahoma State Highway Department to establish and construct limited access highways was not passed until 1953. Prior to the enactment of this law, various projects for the construction of four lane divided highways were beginning on right-of-way which was acquired with no provisions for the control of access. The highways under consideration were for the most part urban by-pass routes around Oklahoma City and Tulsa.

At that time there was in existence the Oklahoma City Planning Commission having planning and zoning authority within the city limits, the Oklahoma County Planning Commission having like authority over an area extending five miles beyond the limits of Oklahoma City, and the Tulsa Metropolitan Area Planning Commission having authority within the limits of the City of Tulsa and beyond within a five mile radius of the city limits. A meeting was had, which was attended by members of the various planning commissions mentioned, and State Highway Department officials, for the purpose of discussing plans for the control of access on the highways under construction. It was agreed that access should be permitted only through the means of marginal service roads, if this were possible under the law.

The by-passes under construction were being built along new alignments and the abutting property was therefore virtually all residential or agricultural. It was agreed that an overall plan be adopted for the ultimate development of these by-pass highways with frontage roads, and that as applications came to the planning authorities for the zoning of any abutting property for business or commercial purposes, the applicants or land owners would be referred to the State Highway Department for approval of the design and location of their ingress and egress. The Highway Department then advised the applicant of the ultimate plan for the development of the highway, together with the design of access that would fit into the ultimate plan, and submitted to the land owner an agreement for the construction of his access according to such plan. Upon the execution of this agreement by the land owner and the Highway Department, the Planning Commission having jurisdiction would then consider the zoning application.

As the by-pass routes neared completion, there were many applications for business

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[6] State, ex rel Merritt vs. Linzell, 126 NE 2d 53, 163 Ohio St 97 (1955)

[7] Baker vs Boston, 12 Pick 184, Comm vs Alger, 7 Cush 53

[8] 2 Lewis, Eminent Domain, 3d Ed 192, 25 Am Jur. 452

or commercial uses of property which was previously farm land or acreages. When these applicants were referred to the Highway Department, it was explained to them that the State, in the exercise of its police power not only had the right, but was charged with the duty of making reasonable regulations in the interest of the public safety and public welfare, and that while it was not desired to prevent their use of their property for any lawful purpose, it was necessary to control their manner of ingress and egress, in the interest of public safety, and to protect the taxpayers' investment in the highway as well as to protect the applicant himself. The argument was stressed that if everyone were permitted to have unlimited access, the highway would soon lose its ability to carry traffic and a new alignment would inevitably result, which would greatly decrease the value of any business established on this highway. On the other hand by cooperating, the landowners would be, in effect, buying insurance that the highway would stay on its present alignment for many years. Most applicants after such explanations were reasonable and agreeable to the requirements, and, in fact, most of them were pleased with the arrangement.

It was further explained that access to the property from the highway would be by means of a service road; that had their business already been in existence and had a service road been necessary when the highway was built, the state would have constructed the service road, but since the property was essentially rural in nature, that no need for a service road arose until they and other applicants desired to place businesses along the highway; and it was therefore the responsibility of the applicant to build his own service road, and to permit the owners of the adjoining property to extend their service roads to join his so that as a development progressed there would be a continuous service road along all the developed area.

The question then arose as to where the entrances and exits from the highway to the service roads would be located. For the first business in the area it was necessary to give an entrance and exit from the highway to their property, and across the area where the service road would eventually be located. An agreement was made with the owner that the entrance and exit established for the property at this time was temporary only, and that either the entrance or exit, or both, could be relocated at any time or eliminated entirely when access could be provided by other entrances and exits to the service road. While this was not entirely to their liking, they understood that we could not determine where all entrances and exits between the highway and the service road should be located, and they signed the agreement.

Within a few months one of the large automobile manufacturers purchased a tract of land immediately adjacent to the company land for the purpose of establishing a training school for employees. A contract similar to the one with the oil company was entered into. At that time we requested the oil company to construct their road at the same time. As a practical matter both landowners employed the same contractor to build a 24-ft service road according to state specifications (hard surfaced and with curb and gutter, and with all drainage structures required by state engineers) along the frontage of these properties. In quick succession there followed other businesses—motels, restaurants and the like—all of which constructed their own service roads, and as the construction of the service roads progressed, entrances and exits have been located so as to be spaced in conformity to generally accepted design standards.

Development has started on various other areas of these by-passes in the same manner and some areas have been zoned and are under agreement on which construction has not begun. Out of a total length of approximately 10 miles, on what is known as the Northeast 66 By-pass in Oklahoma City, approximately 80 percent of the areas on each side of the highway is now covered by agreements which provide for the construction of service roads by the developers of the property (or in the case of residential property, for the backing up of houses to the highway with fencing along the rear of residential lots) and which permit access from the highway to the private property only through the means of the service roads so constructed.

Admittedly, we have had fine cooperation from the city and county planning authorities and they have not once zoned any property over our objections, or without our having first obtained an agreement from the property owner. On various occasions we have had the property owner or developer threaten to take us to court but we have not been challenged.

Our by-pass areas now, however, extend beyond the areas over which these planning authorities have jurisdiction, and some of this right-of-way was acquired before we had authority to acquire access rights. We could go back now and condemn the access rights, but this would probably be very costly to do, and in those areas we plan to continue to control access through the exercise of police power.

To accomplish this a master plan is being prepared for the ultimate development of these highways with service roads. Signs will be erected along the right-of-way advising the public of the ultimate development of the road as a limited access highway, and, recordable agreements will be obtained from land landowners describing the details of the ultimate development.

If we should eventually find ourselves in court on one of these cases we will go armed with our ultimate plan adopted by the State Highway Commission, and with reams of statistics both as to the safety of this type of highway as opposed to one not so controlled, and as to the tremendous cost to the public of relocation of the highway if its ability to carry the traffic is destroyed by roadside development with unrestricted access. Properly prepared and presented, an overwhelming case can be made for the regulation of access under police power for the public safety and welfare.