

Administration of Highway Protection Laws

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●THE Highway Laws Committee and the Land Acquisition Committee are performing an important function. The United States became great because of its mobility and can remain great only if it can remain mobile. However, its mobility has been hampered by economic suffocation, congestion, and the creation of death traps on the highways. Although great sums of money have been spent on highways in the past, many of these highways have been ineffective because of the lack of protection by laws.

Inertia and the momentum of going institutions have in the past played and continue to play a leading role in American law. It is only through the efforts of groups with special knowledge and skill, that inertia can be overcome and action supplant it.

As in all fields of endeavor, timing has played a major role in law making. The people are now ready to accept regulation. The public recognizes that highway laws are needed and is ready to accept new concepts.

The Highway Laws Committee deserves much credit for the projects undertaken. The information supplied by this group has won law suits protecting the rights of the public. Its work is influencing the policy of various highway commissions for the public benefit.

Legal research in the highway field is of at least two types. First there is the collecting, correlating, and analysis of constitutions, statutes, legal decisions, attorney generals' opinions, law review articles, and anything else written on highway protection. This type of research is now well started under the Highway Laws Committee. The second type is research into highway laws and legal principles as they actually operate in real life situations. This type of research at the University of Wisconsin is called "law-in-action" research. It is the kind of research being attempted during the current year by the author.

This research project is jointly sponsored by the University of Wisconsin Law School and the Wisconsin State Highway Commission. The author has been privileged to "look over the shoulder" of the highway commission of the State of Wisconsin to view the highway protection laws in action. The value of this type of research can be illustrated by the following.

COMPARTMENTALIZATION OF CONCEPTS

When the project was started, it was intended to spend the majority of the allotted time on police power regulations such as zoning, controlled access, the use of the official map statute, and similar types of police power regulations. In less than a week after beginning, it was found that in actual operation police power actions and the exercise of eminent domain are often intertwined. It also was found that a neat eminent domain formula may mislead even an able court into overlooking police power aspects.

The case was *Carazella v. State of Wisconsin* (70 N. W. (2d) 208, May 3, 1955). The facts were that Carazella owned a farm on US 51, about a mile from the city limits of Wausau. The land abutting the old state trunk highway had a commercial potential that was undeveloped. The State Highway Commission relocated the highway a short distance to the east, so that it ran through the center of his farm. The old highway was retained, and the new relocated highway was declared controlled-access. Since the owner had access to the old highway, the commission gave him only a special crossing to be used only for agricultural purposes. The owner contended that there was a loss of commercial value as a result of the diversion of traffic from the old highway and the inability to get access to the new one. He further argued that:

1. The Wisconsin statute assured him of the fair market value of the whole parcel before the taking, less the fair market value of what remained after the taking.

2. From this figure, benefits both general and special were to be assessed against the owner; so, under the market value theory, anything that affects market value should be considered.

3. While diversion of traffic is not in itself a compensable item, it is something that the jury could consider in arriving at the market value of the land remaining after the taking.

The Wisconsin Supreme Court followed the argument of the owner. It failed to recognize that a valid exercise of the police power had entered into this valuation problem.

Then, on rehearing, a brief was filed by the State Attorney General. The American Automobile Association also filed a brief, *"amicus curiae."* Both briefs stressed the fact that (a) the relocation order, which was a valid exercise of the police power, was made on April 16, 1953, and (b) the declaration of the highway, which was also valid exercise of the police power, was made on June 3, 1953, and (c) the eminent domain taking did not occur until July 2, 1953, when the award was filed and the title to the right-of-way passed to the state. The argument was further made that the commercial value was lost at the time of the relocation order, just as if commercial use had been barred by zoning. It was further argued that if the commercial value survived that order, it was actually extinguished by the controlled-access order. This was the order that caused the loss in commercial value by not allowing the owner to shift it from the old highway to the new.

On rehearing the court admitted that it failed to perceive the exercise of the police power, because it had considered only the condemnation proceedings. It further stated that the condemnation proceedings and the exercise of the police power by the declaration of the highway as controlled-access were so interwoven that it failed to see they constituted two separate and distinct acts.

The court went on to hold that any depreciation as a result of the lack of access on a new controlled-access highway where no access existed previously, is not to be considered in assessing damages, and the jury should be so instructed. There was further discussion by the court to the effect that in Wisconsin the landowner has only the right of access to the system of public roads, and as long as he is not land-locked, no compensation is due him for the lack of direct access to any highway. It appears that this rule applies for existing highways as well as new ones (*Carazalla v. State of Wisconsin*, 71 N. W. (2d) 276, June 28, 1955).

After this baptism under fire, the author has become chary indeed of compartmentalizing eminent domain and police power in the fashion of legal text books. Instead, he has been devoting much of his time to trying to determine in specific functional situations just which commission actions are not compensable as police power orders and which are compensable as eminent domain takings.

Incidentally, the Carazalla case also demonstrated that it is not enough merely to equip the eminent domain appraisers with a copy of the statutes. Clearly they need to be instructed on the elements that are compensable and those that are in the exercise of the police power. It became obvious that a pamphlet on valuation would be an invaluable tool. This is in the process of development. Most of the property in Wisconsin is acquired through the county highway committee, so such a pamphlet also will be invaluable for the use of the district attorneys who are not specialists in eminent domain valuations. Care at the valuation stage also will serve as a means of building a good record in the event the case is to go to court. It is not unusual to find that the landowner has better witnesses than the county and, therefore, has an advantage in the trial. Appraisers will not be good witnesses unless they are properly informed and know the crucial differences between eminent domain and police power in actual case situations.

CO-ORDINATION OF STATUTES

The next thing found to be important was that there had to be a co-ordination of various statutes in order to make them effective. Statutes on access are sprinkled about in various parts of the statute book and there is a natural tendency to administer them separately. By looking at the problems of access generally, instead of through the narrow slits of their separate statutes, the Wisconsin commission is making vast progress. An example was provided by the experience of the commission on controlled-access.

In Wisconsin, the highway commission has authority to declare both existing high-

ways, as well as new or relocated ones, controlled-access.

Until recently, it was felt by the staff of the commission that access could be more effectively controlled by the purchase of the access rights than by exercising the police power. Under the statute only 500 miles of highway could be declared controlled, and only the rural portion of the highway could be controlled. In addition, it appeared that when a new highway was laid out and declared controlled-access, they were paying for the access rights when acquiring the right-of-way, since the loss of access affected market value and, as will be recalled, the Wisconsin court had said the jury could consider anything that affected market value. In addition, it had been the policy of the commission to allow one access for each parcel of land abutting the highway if it did not have access to another public road. But there was no attempt to control the use of that access. As a result, after a period of time the driveway which originally had been used only for a drive into a farmhouse suddenly became an outlet for a housing development. Oil companies bought up two parcels abutting the highway and appeared with two driveways into a filling station by using the driveways from each parcel jointly. There were other instances of development that made the highway less effective.

Several things happened in a short time to change this picture. First, the Wisconsin Supreme Court, on a rehearing of the Carazella case, held that the controlling of access in an exercise of the police power and that any depreciation as a result of the lack of access on a new highway where no access existed previously, is not to be considered when assessing damages, and the jury should be so instructed.

Next, the 1955 legislature changed the eminent domain valuation statute, making it clear that any depreciation as a result of a valid exercise of the police power, even though in conjunction with eminent domain, cannot be considered in assessing damages. The legislature also increased the allowable mileage from 500 miles to 1,500 miles.

The commission took another look at the statute on controlled-access and decided that it could develop an over-all plan of access, including designation and control of use of access points. When such plans are developed in reasonable relation to problems of the highway, the court probably will uphold the commission.

The commission, in addition, decided that it can use the controlled-access authority even within the corporate limits of a city where the area involved is still rural in character. Highways have been built within city limits retaining such rural characteristics as shoulders, drainage ditches on each side, and prohibition of private accesses and parking. This in itself discourages development along the highway and retains its capacity for traffic.

In one city, however, a highway such as this with all the control and characteristics making it an ideal highway, nevertheless ran into difficulty. The area it ran through was not properly planned by the city. There was no adequate north and south route to serve the development. As soon as the highway was opened, the people of the city began to use it for their north and south local travel within the area. As a result, the highway became congested immediately, thereby reducing its effectiveness. It is gratifying to report that the commission is now in the process of declaring highways controlled-access on a wholesale scale. Just recently the commission held a hearing to declare an existing highway controlled-access. The property owners somehow learned that the commission would recognize existing driveways. The commission was immediately flooded with requests for driveway permits to beat the deadline. But the commission is refusing to issue any permits until a declaration and finding can be made as to controlled-access. As yet, no one has challenged this.

In addition, an attempt is being made to draft some rules and regulations for the commission which attempt to bring together the administrative procedures and standards for (a) driveway permits on uncontrolled highways; (b) subdivision plat approval; and (c) controlled-access, including limited use access and promulgation of the types of general plans already mentioned. Whether this will be possible is not known, but the work at least requires thinking through the practical interrelations between these various methods of protecting the highway. For example, some of these proposed rules for subdivision control would (a) prohibit direct vehicular access to all lots and parcels, (b) control access from any contiguous landowner by the subdivider abutting the highway, (c) require a setback from the highway and no improvements within the setback line, and

(d) provide that there must be a certain distance between access points. If these attempts are successful, these along with other controls should help protect the highway to a great extent at no cost.

OTHER CONTROLS

Wisconsin's practices in dealing with excess land acquired in connection with highway construction also have been under observation. The commission has used this effectively. Any portion of the right-of-way not needed for the project is declared excess. Then it is sold subject to restrictions protecting the highway. The commission also has authority to buy remnants that are left after purchase or condemnation of a right-of-way, if in the judgment of the commission it will reduce the total cost and make the owner whole. This can also be used to protect the highway by selling the excess subject to restrictions. In one instance the highway was to go directly through a newly planned subdivision of approximately 40 acres. The way the development was laid out, the damages would have amounted to almost the total value of the entire subdivision. The commission therefore purchased the entire subdivision; after the highway is built, the remaining property will be sold subject to the restrictions protecting the highway. Undoubtedly there will be a big net financial gain.

Also under observation have been zoning controls in operation. Unfortunately, zoning along highways has not developed in Wisconsin as rapidly as was hoped. The state must depend on the counties for zoning. However, county zoning regulations are not effective in a town until adopted by that town. With more than 1,200 towns in the state there obviously are conflicts with local interests. Recently the authorities of one city came before the commission hoping to get an additional access on a controlled-access highway, because a developer wanted to build a \$250,000 project along the highway, which would substantially better the city's real estate tax base. The application was denied, but it illustrates the type of local pressure to which zoning at the local level is constantly subjected. Soon the over-all objective is lost. It is planned to suggest co-operative county-state zoning. The state will give the highway commission authority to require a minimum protection to the highway unless the county does so within a reasonable period after the commission requests such zoning. Highway aids will be paid to counties which cooperate.

In conclusion, it should be pointed out that the author's research is made possible through the cooperation of the Wisconsin State Highway Commission. Not only is that body providing financial aid, but it has given every opportunity to gain any information wanted and has cooperated to the fullest extent in discussing the problems. The members of the Attorney General's staff who handle the legal problems of the highway commission have likewise participated wholeheartedly in this project.

The value in a project such as this is that the researcher has the opportunity to gather data that allow him to determine how the laws and their administration are actually working. On the basis of the data thus collected sound judgments may be made obviating the necessity of relying on hunches or instinct to determine whether something is working or will work. Research into the cases, statutes, attorney generals' opinions, etc., is absolutely essential; but it is hoped that this will not be the stopping point. It is also hoped that other universities and highway commissions will undertake projects such as this, and that there will be a continual evaluation of the statutes and the administration of those statutes to determine their workability, and a constant effort to improve them.