Limiting Access to Existing Highways

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CONTROL and regulation of access to existing highways is an essential step in the modernization of many existing highway facilities. Where a new controlled access highway is constructed where no highway existed before, the law has become fairly well established that the abutting owner is not entitled to any compensation for the state's failure to allow him access to the new highway.[1] However, the state's right to limit access to an already existing highway is not so clear; in fact, most statutes expressly granting a highway authority the right to convert existing highways to limited access freeways seem to provide either expressly or by implication for compensation of the abutting landowners.[2]

Control of access by purchase or condemnation is expensive, and expense is a seriously inhibiting factor to the modernization of highway facilities. Therefore it seems that the regulation of access to existing highways under the police power without special compensation to adjoining landowners is a possible solution which warrants careful consideration.

The right of access is generally understood to mean the right of abutting owners to an easement of ingress and egress in highways bounding their property.[3] The right of access is a creature of the courts constructed as a consequence of the dedication of public streets, and it has been termed a parasitic right.[4] While the doctrine of granting a right of access to abutting landowners does not appear to rest on a very satisfactory foundation, either logically or historically, it has gained such widespread acceptance that the right of access must be considered an established property right.[5]

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[1]People v. Thomas, 108 Cal App2d 832, 239 P2d 914 (1952) is a leading case. The theory of the courts in such cases has generally been that since the abutting owner had no right of access to the highway before its construction, nothing has been taken from him by the failure to grant him such a right when the highway is established. See State Highway Comm. v. Burk, 200 Or 211, 265 P2d 783 (1954).

[2]An example is the Oregon statute, ORS 374.035 (1), which provides:

"The State Highway Commission may, in the name of the state, acquire by agreement, donation or exercise of the power of eminent domain, fee title to or any interest in any real property, including easements of air, view, light and access, which in the opinion or judgment of the commission is deemed necessary for the construction of any throughway, the establishment of any section of an existing state road or highway as a throughway or the construction of a service road. The commission may accomplish such acquisition in the same manner and by the same procedure as real property is acquired for state highway purposes, except that in case the acquisition is by proceedings in eminent domain the resolution required under such procedure shall specify, in addition to other provisions and requirements of law, that the real property is required and is being appropriated for the purpose of establishing, constructing and maintaining a throughway."

The Ohio statute, R. C. 5511.02, provides:

"Where an existing highway in whole or part has been designated as, or included within, a 'limited access highway' or 'freeway' existing easements of access may be extinguished by purchase, gift, agreement or condemnation."

[3]Story v. New York Elevated R.R., 90 NY 122 (1882).

[4]See dissenting opinion of Mr. Justice Holmes in Muhlker v. New York and Harlem Railroad, 197 US 544, 49 L.Ed. 872 (1904).

[5]Annotation, 43 ALR2d 1072.

It is important to recognize at the outset that a sovereign state has inherent power to take private property for public use. Constitutional provisions common to all states which provide in substance that private property shall not be taken for public use without just compensation do not grant the state the power of eminent domain, but simply impose a limitation upon its exercise.[6] It certainly must be conceded that since the right of access is private property, the adjoining landowner is entitled to compensation when his access to an existing highway is "taken" completely, or altogether denied, by the highway authority. A number of state constitutions provide for compensation for the "taking or damaging" of private property for public use, and in such states compensation is presumably due an abutting owner when his access to an existing highway is damaged although not completely taken.[7]

However, it has become equally well settled in our law that the use of private property may be regulated and controlled without special compensation to the owner under the state's inherent police power when reasonably necessary for the public safety or welfare.[8] The police power has been paraphrased as society's natural right of self-defense, whose definitions and limitations vary with the circumstances calling for its exercise, and which comprehends all those general laws and internal regulations necessary to secure the peace, good order, health, and prosperity of the people, and the regulation and protection of property and property rights.[9]

It is apparent that there must exist a rather hazy area and a fine line of demarkation between these two equally well established legal concepts of compensation for the taking of damaging of private property, on the one hand, and regulation of the use of property without compensation on the other. The question logically presented is whether the highway authority cannot regulate and control access to an existing highway under the state's inherent police power without compensating the abutting owners who may be somewhat inconvenienced thereby.

Unfortunately there is very little direct judicial authority on this question. A number of cases dealing with new highways initially constructed as freeways or with private interference with access rights contain dicta to the effect that it is recognized or conceded or admitted that any interference by the state with access to an existing highway is compensable as a "taking" or "damaging" of property.[10] Before conceding the correctness of these statements it may be well to examine the adjudicated cases to see if there does not exist any analogous precedent to support the proposition that access to existing highways may be controlled without constituting a taking or damaging of property so as to require compensation.

The problem can probably be most profitably analyzed with respect to a particular situation. Suppose that the state has a strip of existing two-lane highway with ample right-of-way for four lanes, and that the highway authority desires to convert the pres-

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[6]Tomasek v. Oregon Highway Comm., 196 Or 120, 248 P2d 703 (1952); 18 Am Jur, Eminent Domain, 635, Sec. 7.

[7]Less v. Butte, 28 Mont 27, 72 P 140 (1903). Cf. Gearin v. Marion County, 110 Or 370, 223 P 929 (1924).

[8] 11 Am Jur, Constitutional Law 1003, Sec. 266; 6 McQuillan, Municipal Corporations (3d Ed) 452, Sec. 24.06. If a property owner suffers injury by reason of a police power regulation of his property, it is either held damnum absque injuria or he is said to be compensated by the general benefits resulting from the regulation.

[9]McGuire v. Chicago B & Q R Co., 131 Iowa 340, 108 NW 902 (1906), Aff'd. in 219 US 549, 55 L.Ed. 328.

[10]Anderson v. Fay Improvement Co., ------Cal ------, 286 P2d 513 (1955), People v. Loop, 127 Cal App2d 786, 274 P2d 885 (1954); State Highway Comm. v. Burk, 200 Or 211, 265 P2d 783 (1954). In the Anderson case it is said: "This right (of access) cannot be taken away, damaged or interfered with for a public purpose without just compensation." 286 P2d at 517.

ent highway to a throughway by constructing parallel outer service lanes for adjacent properties with access to the center through portion of the highway only at designated points. Must the state, in addition to the construction of the outer traffic lanes, also compensate the abutting owners for the regulation of access by which they are prevented from having immediate access to the through portion of the highway or directly across the highway?[11] Despite judicial indications that the answer to this question is affirmative,[12] there are a number of established principles which indicate that access rights may be limited and controlled under police power regulation when the public safety and welfare necessitates the regulation.

SAFETY REGULATION AND TRAFFIC CONTROL

It is established that the state may regulate traffic upon highways to promote the public convenience and safety under its police power without compensating abutting owners although there is incidental interference with their access. An example of this type of regulation is found in Jones Beach Boulevard Estate v. Moses.[13] In that case it was held that an abutting owner's right of access to a highway was not unreasonably restricted by an ordinance enacted under the police power which prohibited left turns across the oncoming traffic lanes of the highway except where expressly allowed by traffic direction sign, although the result of the regulation was to require abutting owners in plaintiff's position to travel some five miles upon leaving home in the direction opposite that in which they desired to go in order to reach a turning place, and to follow a similar circuitous route in reaching their property from certain points. The court observed:

"Although the abutting owner may be inconvenienced by a regulation, if it is reasonably adapted to benefit the traveling public, he has no remedy unless given one by some express statute. ... Where a road is freed of grade crossings and traffic lights and left turns are not permitted, more people may travel in less time. Moreover, left turns are recognized generally as dangerous. A regulation or ordinance adopted to speed up traffic and eliminate danger is reasonable."[14]

This case illustrates the principle that the circuity of travel resulting to an abutting owner from police power regulations such as "no left turn" ordinances or statutes is not a "taking" or "damaging" of the abutters access but is simply a regulation of his use thereof to promote the public safety and convenience and from which all members of the motoring public, including the abutter, benefit.[15]

For the same reason it has been held a valid police regulation to prescribe one-way traffic for a street.[16]

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[11] Where an abutting owner has property on both sides of the highway which is operated as a unit, such as a farm, the problem is accentuated. See State v. Ward, 41 Wash2d 794, 252 P2d 279 (1953).

[12] In People v. Ricciardi, 23 Cal2d 390, 144 P2d 799 (1943), the California court held that the abutting owner's right of access entitled him, as a matter of law, to immediate access to the through portion of the highway. The reasoning behind the decision is not apparent, since the court admitted that an abutter is not entitled to damages for lawful improvements that result merely in circuity of travel for him. See also Boxberg v. State Highway Comm., 126 Colo 526, 251 P2d 920 (1952).

[13] 268 NY 362, 197 NE 313 (1935).

[14] 197 NE at 315.

[15] Accord: Illinois Malleable Iron Co. v. Lincoln Park, 263 Ill 446, 105 NE 336 (1914).

[16] Cavanaugh v. Cerk, 313 Mo 375, 280 SW 51 (1926).

RELOCATION OF HIGHWAY

Although there is some conflict on the point, it has generally been held that the diversion of traffic away from a business location caused by relocation of the main arterial route, which leaves the business on the lightly traveled former highway, is not such an interference with access as entitles the abutter to damages.[17]

A very interesting recent case illustrating how the concept of police power regulation may be determinative is Carazalla v. State.[18] In that case a new controlled access highway was established through Carazalla's property at some distance from the former highway, which also dissected his land. On the first hearing of the case, the supreme court of Wisconsin held that the trial court had properly refused to give an instruction requested by the state to the effect that all evidence of loss of value for commercial purposes due to making the relocated highway a controlled access highway should be disregarded.

On rehearing, however, the nature and purpose of access regulation was emphasized, and the court reversed its former position and held that where moving traffic would have had suitable ingress to, and egress from, plaintiff's abutting lands from the relocated highway except for the fact that the state's police power had been exercised to prohibit this by making the relocated highway a controlled access highway, the refusal to give the state's requested instruction was prejudicial error. The court stated:

"The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable."[19]

It must be admitted that the cases do not uniformly deny the abutter compensation for damages by reason of diversion of traffic resulting from highway relocation.[20]

CHANGE IN HIGHWAY GRADE

Although changes in highway grade may interfere with or deny an abutter's access to the highway, the highway authority may make such changes without compensation to the abutter as long as the construction does not actually encroach upon the abutting property. In Brand v. Multonomah County[21] the plaintiff was deprived of access to the street upon

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[17] Comm. of Santa Fe County v. Slaughter, 49 N.M. 141, 158 P2d 859 (1945); Los Angeles v. Geiger, 94 Cal App2d 180, 210 P2d 717 (1949); Quin v. Mississippi State Highway Comm., 194 Miss 411, 11 So2d 810 (1943).

[18] 269 Wis 593, 70 NW2d 208, 71 NW 276 (1955).

[19] 71 NW2d at 277. The court gave the following explanation for its change of position:

"* * * in our original opinion we failed to perceive that any damages to the remaining lands due to the exercise by the state of its police power in making the relocated highway a controlled-access highway are not recoverable. The reason for such lack of perception was that the institution of the condemnation proceedings and the dedication of the relocated highway as a controlled-access highway were so interwoven that we considered the two to be an inseparable whole when actually they constituted two separate and distinct acts." 71 NW2d at 278.

[20] In Pike County v. Whittington, ------ Ala ------, 81 So2d 288 (1955), where the highway was relocated from in front of the condemnee's grocery store and filling station to a point where it dissected the back end of his property, the court adopted the somewhat incongruous position that damages for diversion of traffic from the old highway are recoverable if the state must condemn a portion of the owner's property for the new highway are not recoverable if the new highway does not cross the owner's land at some point.

[21] 38 Or 79, 60 P 390, 62 P 209 (1900).

which his property fronted when the grade of that street was raised in order to make an approach to a newly constructed bridge. The court reasoned that so long as there is no use of the street for purposes other than highway purposes, a change in grade does not impose any additional servitude upon the street and any injury resulting to the abutter is merely a consequential one rather than a compensable injury in the constitutional sense. Hence the loss of access did not afford the abutter any right to recover damages.[22]

CONTROL OF PARKING

Abutting owners have contested the validity of parking regulations on the theory that such regulations damaged and interfered with access rights, particularly with respect to commercial properties. In Town of Leesburg v. Tavenner[23] the court held that the designation of loading and unloading stops for passenger carriers and of parking areas for trucks delivering and receiving merchandise was a proper exercise of the police power, and the plaintiff abutter's inconvenience and incidental loss due to the fact that bus passengers were let off some distance from his store and merchandise had to be carried to the loading zone did not render the ordinance unreasonable or arbitrary or constitute an unlawful interference with his access.

The court stated:

"While conceding the correctness of the proposition that an abutter has an easement in the public roads which amounts to a property right, we are of the opinion that the exercise of this right is subordinate to the right of the municipality, derived by legislative authority, so as to control the use of the streets as to promote the safety, health, and general welfare of the public."[24]

Similarly the principle of regulation without liability for compensation for claimed interference with access is illustrated in the many cases sustaining the validity of parking meter ordinances against the claim that the installation of such meters obstructs access by restricting the loading and unloading of vehicles and the parking of persons making business and social calls.[25]

CONTROL OVER APPROACHES AND ENTRANCES INTO HIGHWAYS

Access to existing highways has long been regulated under the police power, although

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[22] Accord: Barrett v. Union Bridge Co., 117 Or 220, 243 P 93 (1926), Rehearing denied, 117 Or 566, 245 P 308 (1926), where the court stated:

"That the owner of property abutting on a public street has a right of access to and from his property by way of the street, and that this right is as much property as the land adjacent to the street, is unquestioned. *** Any invasion or interference with this right by a private individual, or by any private interest, even if done with the consent of the city, or the Legislature, is a taking of the property, for which compensation must be made. But the right of the abutting property owner is subject to the rights of the public to use the street for highway purposes."

[23] 196 Va 80, 82 SE2d 597 (1954). See also Kelly v. Anderson, 94 Ariz 364, 249 P2d 833 (1953).

[24] 82 SE2d at 600.

[25] In Morris v. City of Salem, 179 Or 666, 174 P2d 192 (1946), the court says:

"The original dedication of the street in front of plaintiff's property for street or highway purposes subjected it not only to the ordinary usages of travel then prevailing, but also to such additional usages as might, from time to time be demanded by changing conditions of society, increased population, or improved methods of transportation. *** Such additional usages do not impose additional servitudes upon the land, nor do they constitute a taking of plaintiff's property without due process of law. ***The maintenance of a parking meter in front of plaintiff's property, while not a direct encroachment thereon, will nevertheless impair his use of the property to some extent. This, however, is not a taking within the meaning of the constitution."

not associated with the modern concept of a limited access highway. Where access has been controlled under police power regulation reasonably designed to promote the public safety and welfare, courts have not hesitated to repudiate arguments that the abutting owner has suffered a compensable taking or damage of his access right.

An example of the application of this principle is found in Wood v. City of Richmond.[26] In that case plaintiff owned a filling station at the intersection of two streets, and had constructed approaches into his station from both streets pursuant to city authorization. Subsequently the city determined that the approach into one of the streets constituted a menace to the safety of the traveling public and ordered it closed, and plaintiff sought an injunction to prevent the city from destroying his driveway claiming that it would deprive him of his abutter's access right by so doing. The Virginia court confirmed the city's right to close plaintiff's driveway, stating that the city had authority to regulate the abutting owner's use of his right of access so as to promote the safety of the public.[27]

The rule that an abutting owner's access is not unreasonably interfered with by police power regulation as long as he is left some means of ingress and egress to the street or highway, although not the most direct, is also illustrated in Fowler v. City of Nelson.[28] There the owner of two buildings fronting upon a street maintained a driveway over the sidewalk and between the buildings so that his customers could use hitching racks located at the rear of one of the buildings. In addition there was an alley at the rear of both lots through which his stores and the hitching rack were accessible. The court held that his easement of access and right of ingress and egress to his property was not violated by the action of the city in closing the driveway for the reason that the abutting owner has no privilege of access at any particular location.

The fact that a police power regulation of access results in a substantial injury to the business conducted by an abutting owner does not make the regulation unreasonable or entitle the property owner to compensation. For example, the owner of a newly constructed retail automobile supply store selling tires, batteries and parts requested a permit from the City of Owatonna, Minnesota to construct a driveway for vehicular traffic over the public sidewalk and into the street upon which the store fronted, and the city refused to issue the permit on the ground that such a driveway would create a traffic hazard. Plaintiff company had been led to believe by a city official that it could get the permit, had made substantial improvements in reliance upon the officials representations, and vehicular access to and from the street was essential to plaintiff's business. In the lower court plaintiff had enjoined the city from preventing the construction of the driveway, but on appeal the decree was reversed.[29] Against plaintiff's argument that denial of the permit was unreasonable, arbitrary, and outside the legitimate field of the police power since it amounted to a denial of access and thereby resulted in a taking without compensation, the Minnesota court held that such regulation of access had a very substantial relation to public safety and was a legitimate and proper exercise of the police power. The court observed that actually the abutting owner was attempting

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[26] 148 Va 400, 138 SE 560 (1927).

[27] The court quoted and applied the following statement from Bowman v. State Entomologist, 128 Va 351, 105 SE 141, 145:

"***Every property owner *** is bound *** to so use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this *** duty which pertains to the police power of the state so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby he is without remedy. It is a regulation and not a taking, an exercise of police power and not of eminent domain."

[28] 213 Mo App 82, 246 SW 638 (1923).

[29] Alexander Co. v. City of Owatonna, 222 Minn 312, 24 NW 2d 244 (1946).

to "encroach upon a public easement" by appropriating a portion of the street for its business.[30]

In regard to the same point the New Hampshire court in Town of Tilton v. Sharpe,[31] which involved the regulation of access to a retail filling station, said this:

"...the test of the reasonableness of the proposed use is to be found, not by inquiring whether such use is essential to the profitable transaction of any particular business on his lot, but in answer to the inquiry whether such use would be fraught with such unusual hazard that the danger to the traveling public would be out of proportion to the detriment of the owner by being deprived of it. The convenience or necessity of the owner constitutes but one side of the question. Upon this the character of the use and the accesibility of his property at other points are material factors. ..."[32]

Furthermore, it is not essential to a valid restriction of access under the police power that accidents will inevitably result from the failure to control or regulate. Even though accidents might be avoided by the exercise of due care by users of the highway and of the approach, the regulating authority may properly consider the human weakness for negligent conduct in imposing reasonable regulations designed to safeguard the public.[33]

It has also been held that a state highway department's authority to make reasonable limitations on the number of access connections to the extent that it deems necessary does not depend upon the existence of special statute.[34]

The principle which may be deduced from these cases is that the right of access may be controlled by the state under the exercise of its sovereign police power without compensation to abutting owners when the restrictions on access are intended and are reasonably apt to promote the public safety and welfare.[35] The maxim "sic utere tuo ut al-

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[30]The court stated, at 24 NW2d 252:

'Plaintiffs contend that there are no cases where such regulations and restrictions have, under the guise of police power, been carried to the point where they have denied access to property. While there may not be many situations in the reported cases which are precisely like the case at bar, it is a general rule that municipalities may, in the interests of public safety, impose such restrictions and regulations as they may find necessary to the preservation of the public safety. There are many cases in harmony with the general rule as we have stated it. *** The abutter cannot make a business of his right of access in derrogation of the rights of the traveling public. *** There are reported cases showing that vehicular access to streets has been denied abutting property owners."

[31] 85 NH, 155 A 44 (1931).

[32]Ibid., 155 A at 46.

[33]Town of Tilton v. Sharpe, supra, at 46:

'It is not essential that inevitable accidents will result from the proposed entrance ***, or that the incident danger could not be avoided by the exercise of reasonable care under the circumstances. It is sufficient that such an entrance would create a situation of such unusual hazard that, in view of the frailty of mankind and the human tendency to be careless, accidents would be so likely to occur that the public should not be exposed to it."

[34]State ex rel Gebelin v. Dep't. of Highways, 200 La 409, 8 So2d 71 (1942).

[35]The argument advanced in this article is premised on the assumption that regulation of access under the police power is designed to facilitate the use of a highway as a highway, that is, that the control of access is necessary for the more convenient and safe use by the public of the highway facility. Those cases in which an abutter's access has been interfered with for private purposes, although under governmental authority, or for public but non-highway purposes, must be distinguished, since the abutter's right of access is subject only to the paramount interest of the public in using the highway as a facility for public travel. Where the abutter's access is obstructed for private or non-highway purposes, he is entitled to compensation.

ienum non laedas," which means that a person must use his own property in such a manner as not to injure that of another, is the foundation upon which the police power of the sovereign rests, and should be as applicable to the right of access as to all other property.

Therefore, it is submitted, in answer to the hypothetical question posed earlier in this article, that a highway authority which converts an existing highway into a controlled access highway need not compensate abutting owners for any resulting inconvenience to them so long as the abutting owners are provided with a marginal service road which opens into the main traffic lanes at reasonable intervals, or have other existing public access to their properties, and provided that the restriction of access is based upon a determination by the highway authority that unlimited access is hazardous and that the limitations adopted are necessary to the public safety and welfare.

Historically, situations requiring police power regulation have arisen most frequently in urban areas,[36] and in the past the more stringent controls on access upheld by the courts have been enacted by municipalities. However, the principle that the state may regulate a person's use of property so as to minimize the risk of harm to others is just as applicable in rural areas as in cities. Surely, it is apparent that the public safety requires that affirmative action be taken to reduce the deaths, injuries and property damage caused by accidents resulting from the hazards of unrestricted and unregulated entry from adjacent property onto our busy primary highways.

The probability of securing favorable judicial treatment of the restriction of access to existing highways under the states' police power may very well rest upon making the courts and public more aware that it is just as dangerous to permit unlimited access to primary highways in rural areas as it is to permit unlimited driveways across sidewalks in the business districts of our cities.

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[36] 37 Am Jur, Municipal Corporations 898, Sec. 276.