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BULLETIN 140

RIGHT-OF-WAY

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1956

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HIGHWAY RESEARCH BOARD.

Bulletin 140

Right-of-Way

PRESENTED AT THE
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1956
Washington, D. C.

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Economics, Finance and Administration

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Preface

The Committee on Land Acquisition and Control of Highway Access and Adjacent Areas presents herewith a report of committee activities for the year 1955. As in previous years, the report contains a summary of important developments in the field of its activities - acquisition of land, highway access control, roadside regulation and the provision of parking facilities - as well as the complete text of papers presented at the open meeting of the committee held at the Annual Meeting of the Board in January 1956.

Needless to say, the matter of land acquisition has become of the greatest importance in connection with the accelerated program of highway improvement. The committee hopes that these materials, assembled in permanent form, will assist those who have the power of decision in achieving betterment in this segment of highway activities.

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

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

● ACTIVITIES of the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas during the year 1955 culminated in an open session held during the Annual Meeting of the Board at Washington. The program offered something in each of the fields of the committee's endeavors. All of the papers presented were stimulating and informative. These forums for discussion of the important right-of-way phases of highway activities constitute one of the most important functions of the committee. They are widely attended and, it is hoped, serve as a means of focusing attention upon outstanding developments which have taken place during the year.

In a sense these forums supplement the advisory service of the committee, as represented by the monthly correlation service memoranda released during the year, digesting current laws, decisions, administrative regulations, etc., pertaining to land acquisition, roadside regulation, control of highway access and parking. Copies of all of the papers presented at the committee meeting are included in full in this report.

Of outstanding interest to the committee is the large increase in the number of states which now have controlled-access highway laws. Practically all of the states now have such legal authority. Those without specific legal sanction have plans in the offing for enactment of appropriate legislation.[1] The pending proposals for an accelerated highway program, with emphasis on the interstate system, makes it necessary that all of the states have adequate authority to control access.

As an aid in achieving public acceptance of the expressway principle, the committee has assisted state highway departments and other governmental and private research organizations in the conduct of studies concerning the impact of expressways on urban and rural communities. Many of the states, including Missouri, Ohio, Texas and Virginia, are carrying on these studies through the highway planning survey. The Texas highway department is in the process of bringing the Freeway study up to date. California plans to expand their economic impact studies to a state-wide basis.

As in previous years, the committee rendered assistance to state highway departments and other organizations, suggesting the most efficient methods and procedures to facilitate the acquisition of highway right-of-way, control of access, regulation of the roadside and of parking. It is presumed that requests for assistance, particularly with regard to highway land acquisition, will greatly increase as the expanded highway program gets underway.

In this connection, it has been suggested that the committee might well be enlarged. The need for an expanded committee will be studied during the coming year.

During 1956, the committee expects to complete at least two studies in the parking field - "Attitudes of the Courts toward Parking," and "Parking Legislation." The study on "Reservation of Right-of-Way" will be completed also, as well as a study of the police power potential as an aid to solution of urban transportation difficulties.

Additionally, a study of right-of-way salaries is under consideration, to be undertaken in cooperation with the AASHO Committee on Right-of-Way and the American Right-of-Way Association.

These and other prospective activities point to a greatly expanded committee program, which will, of course, increase the desirability of an enlarged committee.

LAND ACQUISITION

Reservation of Right-of-Way

It is becoming more and more apparent that unless some means is found to prevent

[1] For a more detailed discussion of the legal status of control of access, see p 23, Control of Highway Access

uncontrolled development of land which will eventually become a part of the highway right-of-way, the cost of improving the highway system will become prohibitive. As noted above, the committee study on reservation of highway right-of-way is expected to be completed in 1956. The committee hopes it will be helpful in suggesting reservation techniques that have effectively been used in state and local jurisdictions throughout the Nation. In the meantime, it is heartening to learn that the Washington State Legislature enacted a law during its 1955 session which prohibits erection of buildings or improvements to existing structures within the limits established by the state highway department for new highways. The new law reads as follows:

Section 1. Whenever any authority in behalf of the state shall establish the location, width and lines of any new highway, or declare any such new highway as a limited access facility, it may cause the description and plan of any such highway to be made, showing the center line of said highway and the established width thereof and attach thereto a certified copy of the resolution, and thereupon such description, plan and resolution shall be recorded in the office of the county auditor of the proper county in a separate book kept for such purposes, which shall be furnished to the county auditor of such county by the Washington State Highway Commission at the expense of the state.

Section 2. No owner or occupier of lands, buildings or improvements shall erect any buildings or make any improvements within the limits of any such highway, the location, width and lines of which have been established and recorded, as provided in this act, and if any such erection and improvements shall be made, no allowances shall be had therefor by the assessment of damages. No permits for improvements within said limits shall be issued by any authority: *Provided,* That the establishment of any highway location as set forth in section 1 of this act shall be ineffective after one year from the filing thereof if no action to condemn or acquire the property within said limits has been commenced within said time. (Laws of 1955, Ch. 161)

The use of the mapped-street device to prevent development of areas to be acquired for right-of-way purposes has been used quite extensively in New York City and other areas of the state under existing enabling legislation. A recent case in Nassau County, however, illustrates that such a mechanism cannot be put into effect without specific legal authority. (Magnolia Homes Corp. v. Miller, 143 N. Y. S. (2d) 231, May 26, 1955)

The owner and developer of a parcel of real estate in Nassau County sought approval of a subdivision plat covering the easterly portion of two sections known as Orchard Park Gardens. Section 1 and the westerly half of section 2 had already been approved by the county planning commission for subdivision. Approval of the plat covering the easterly part of section 2 was denied for the reason that the land involved was included in the area indicated on a map filed with the commission by the state, showing the proposed route of the Wantagh-Oyster Bay Expressway.

The subdivider appealed to the State Supreme Court for an order directing approval of the plat. In reply the planning commission alleged that the subdivider had failed to furnish certain bonds, required signature, dedications, locations and district lines. The court noted that although this was true of the plat submitted for the easterly half of section 2, it was also true of that submitted for the westerly half of the section, which had been approved. This led the court to believe that the answers given were not the real reasons for disapproval of the second section. The real reason, the court thought, was that a portion of the easterly section lay within the area of the proposed taking for highway purposes. But the court stated, the County Government Law of Nassau County provided no such ground for disapproval of a plat or map.

The court pointed out that despite repeated requests by the subdivider to the proper authorities to fix the lines of taking, those lines had not been established. The court was therefore of the opinion that it had not been determined that a portion of the easterly half of section 2 would be within the area proposed to be taken for the highway. The court concluded that the taking was speculative when considered with the loss to the petitioner in being barred from a lawful use of his property.

Approval of the plat was directed upon presentation of a plat containing the required approvals, dedications, locations and district lines, and upon furnishing the required bonds.

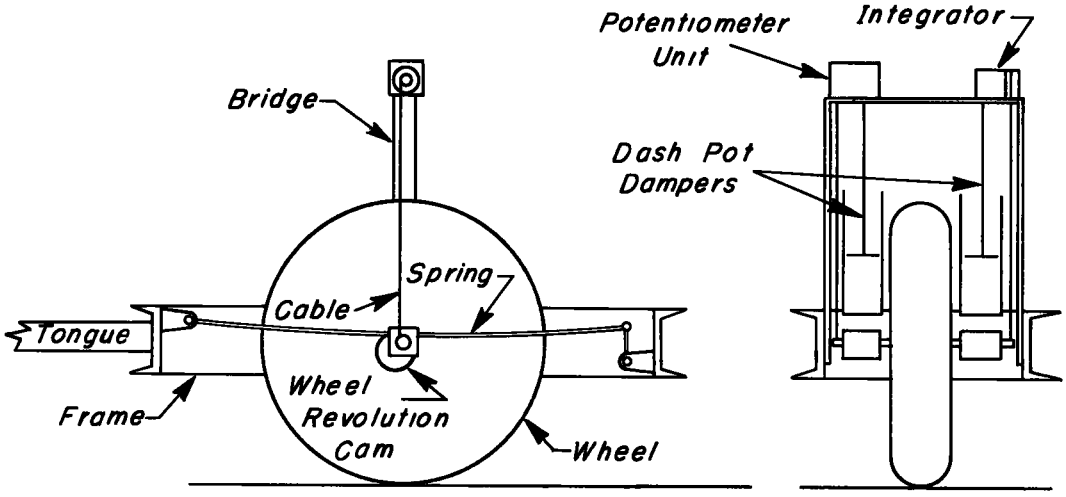

Figure 2. Schematic diagram of the essential elements of the Bureau of Public Roads road roughness indicator.

inquiries received during the past year concerning the equipment, it is expected that additional state highway departments will build similar equipment. The test results and operating experience with the BPR roughness indicator described in this paper should be of special interest to highway engineers who are now using similar equipment or who are contemplating using such equipment.

The roughness measurements can serve many useful purposes such as to provide a standard for new construction, for reconstruction and for maintenance. Roughness measurements are used by the Cities of Berkeley, Los Angeles and San Diego as a major item for rating the condition of streets and for programming street and highway work. The riding public judges a road largely by its smoothness or riding quality and it is, therefore, a matter of good public relations to construct and maintain pavements with as smooth a surface as is reasonably possible.

Description of the University of California BPR Roughness Indicator

The road roughness indicator used in the current research at the University of California was built in 1941 according to plans furnished by the U. S. Bureau of Public Roads. It was used in measuring the roughness of more than 1,000 miles of roads in Iowa, Kansas, Missouri and Wyoming in an extensive research program conducted by Iowa State College in cooperation with the Bureau of Public Roads. In 1949 this equipment was acquired by the University of California for the current research. Since 1949 it has been overhauled several times and modifications have been made for reasons mentioned above and to be described in greater detail in the discussion which follows.

A detailed description of the BPR roughness indicator is given in a paper by J. A. Buchanan and A. Catudal, entitled "Standardizable Equipment for Evaluating Road Surface Roughness," published in the 1940 Proceedings of the Highway Research Board. Briefly stated, this equipment consists of a single-wheeled trailer which is towed by a car or light truck (Figure 1). The BPR plans call for a standard four-ply 6.00 by 16 rib tread tire for the single wheel on the trailer. As the single-wheeled trailer is towed over a given section of road, the irregularities in the road surface transmitted through the tire to the axle of the wheel are measured in terms of the vertical movements of the axle. The vertical movements of the axle are transmitted by a wire cable to a double-acting ball clutch integrator which in turn transmits the accumulated vertical movements in inches to an electric counter mounted on a board in the tow car. A similar electric counter records the revolutions of the trailer wheel and thus provides an accurate measure of the travel distance. The roughness tests have been standardized at a speed of 20 mph and the measurements are recorded on a data sheet by an observer for each half mile section and/or at the end of each test section. The data are summarized by

expressing the roughness of each section of road in terms of a standard unit known as the roughness index (RI), which is the roughness in inches per mile.

The essential elements of the BPR roughness indicator are shown in Figure 2. It should be noted that the wheel of the roughness trailer is supported by two light steel springs. Also, two specially designed dashpot dampers are attached to the axle of the wheel and the frame of the trailer to eliminate excessive bouncing or vibration of the tire as it rolls over rough spots on the pavement. Tests have shown that the tire and the dashpots provide excellent damping action such that the tire follows fairly closely the vertical profile of the pavement surface and thus the equipment provides a reasonably accurate measurement of the vertical movement of the wheel and tire on the paved surface.

Development of Direct Recording Oscillograph Equipment

The need for a graphical record of road roughness was discussed in both the 1950 and 1951 reports referred to above. Also, in these reports a description was given of the direct recording oscillograph equipment developed at the University of California and which has been used in the California tests to obtain graphical records of road roughness. This equipment has been very helpful for obtaining a detailed record of road roughness and for the analysis and interpretation of road roughness data as measured under many different conditions. In the latter part of this report many oscillograph records will be shown to aid interpreting the road roughness data and to provide an indication of the types of road roughness encountered under various test conditions.

Although wiring diagrams were shown in the 1951 report for the electronic amplifier, external bridge circuit and the power supply used with the amplifier, certain changes have been made in these wiring diagrams since 1951. The latest revisions of these wiring diagrams are shown in Figures 3 and 4.

IMPROVEMENTS IN THE DESIGN AND OPERATION OF THE BPR ROUGHNESS INDICATOR

The items in the design and operation of the BPR roughness indicator which were investigated at various times during the past seven years are the following:

1. Tire size, tread design, tire wear and roundness effects.

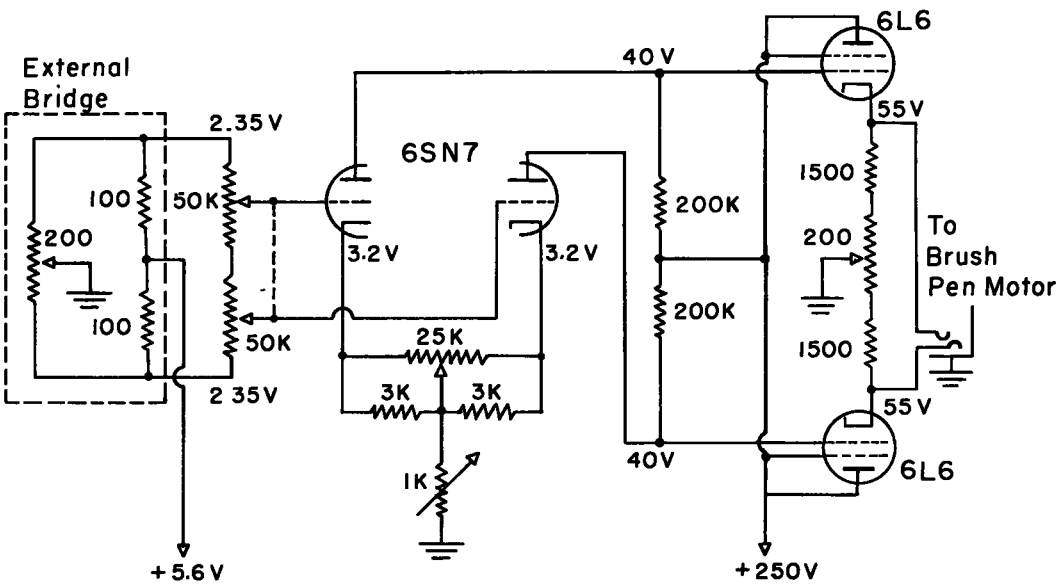

Figure 3. Electronic amplifier and external bridge wiring diagram used with BPR roughness indicator.

of-way across certain lands and a declaration of taking authorized by Chapter 74, Florida Statutes Annotated.

The point for determination was whether or not the legislature could clothe public service corporations vested with the power of condemnation with the further power to seek summary relief.

The court noted that the public service corporation had the power of eminent domain under Section 361.01 of the state statutes. The present proceeding was to obtain a right-of-way or easement for transmission lines only. These prerequisites said the court, met all the requirements of the enabling statute, Chapter 74.

In State Road Department v. Forehand, (56 So.(2d) 901, 1952) the court had thoroughly considered the validity of the enabling statute,[3] holding that such statute preserved to the owner every right vouchsafed to him by Section 12 of the Declaration of Rights, Section 29, Art. XVI of the state constitution and the fourteenth amendment to the federal constitution. What the court said there was equally applicable in the present case.

The Supreme Court of Florida held that statutes giving a public utility corporation, having power of condemnation, additional right to obtain rights-of-way or easements for transmission lines for public purposes by a summary method pending condemnation proceeding did not violate constitutional provisions, that no one will be deprived of property without due process, that private property shall not be taken without just compensation, and that no private property shall be appropriated until full compensation therefor shall first be made to owner or secured to him by deposit of moneys. (Belcher et al. v. Florida Power and Light Co., 74 S. (2d) 56, 1954)

In so holding, the court stated that statutes providing summary relief in condemnation proceedings proceed on the theory that the constitutional guaranty has been satisfied, both in letter and spirit, that the rights of the landowner are protected, and at the same time no unreasonable obstruction is placed in the way of the enterprise being carried out. They recognize that in the construction of highways, gas lines, telephone, power and other lines, it is necessary to avoid the frustrations and delays incident to condemnation by allowing the work to proceed while the litigation is in progress with ample provision that the amount of damages finally determined will be paid.[4]

Various other matters involved in the taking of immediate possession of highway right-of-way came before the courts in several states during the year.

New Jersey: The matter of responsibility for tax assessments on property appropriated for highway purposes prior to determination of compensation was before the courts in New Jersey during the year in the case of Milmar Estate v. Borough of Fort Lee. (115 A (2d) 592, June 29, 1955)

Condemnation proceedings were instituted by the State Highway Commissioner on June 29, 1953, but possession of the property was not taken until September 30, 1953, pursuant to agreement with the owner corporation. An award was made by the condemnation commissioners on January 15, 1954, which was paid into court, with interest from September 30, 1953, on March 8, 1954. However, the corporation was advised that in order to withdraw the money from the court, proof that all taxes due on the property had been paid must be presented. Although 1953 taxes had already been paid, the collector refused to furnish the proof desired unless taxes for the first half of 1954, due October 1, 1953, were paid. The corporation paid the taxes, under protest, and subsequently brought suit to recover the amount thereof, with interest. The Superior Court (Laws Division) entered judgment for the corporation and the Borough of Fort Lee appealed.

The Superior Court of New Jersey (Appellate Division) noted that the statutory authority of the State Highway Commissioner to take possession of property in advance of making compensation therefor was not explicit as to whether title passed on the taking of the property. The court assumed, however, that title did not finally vest in the state until

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[3]This case was digested in Highway Research Correlation Service Circular 155, Memorandum 52 of the Committee on Land Acquisition and Control of Highway Access and Adjacent Areas.

[4]See Memorandum 82, September 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 293

the award was paid or tendered to the parties entitled, or duly paid into court. However, said the court, it would be most unjust not only to deprive the owner of the benefit of his property and of the interim use of any compensation therefor, but also, through taxes, to compel him to bear the burden of local governmental costs allocated to the property. The court concluded that even though the state did not acquire title until the award was paid or tendered to the owners, for the purpose of fixing liability for the next year's taxes, the state's title related back to the time of entry on the land. As a result, the 1954 taxes were not due and might be recovered.

Another question raised in this case was whether the municipality, on refunding the amount of the taxes, should pay interest thereon from the date of payment. The court cited several cases wherein analagous points were raised, in none of which was the municipality held liable for interest. In one case (Hahne Realty Corp. v. City of Newark, 194 A. 191, 1937), one of the factors entering into the decision was that there had been no illegality per se in the assessment, merely an error in judgment in that too high a valuation had been put on the property in question by the assessor. In the present case the court accepted the assessment assessment as valid when made. In the Hahne case, as here, the property owner also chose to pay first and litigate later.

In the case of Borough of Edgewater v. Corn Products Refining Co., 57 A. (2d) 39, 1948, it was held that the statute calling for the payment of taxes in quarter-annual installments furnished (in the absence of another statute expressly providing for interest) some indication of a legislative intent not to subject a municipality to the payment of interest on the abatement of a tax; for such payment would "result in disarranging local budgets." The court pointed out that such a disarrangement would follow upon a relation back of the condemnor's title in the present case, much as it did upon an abatement of a tax.

Taking these factors together, the court concluded that the municipality should not be charged with interest.

In summary, the court held that the assessment against the corporation was erroneous and that the taxes so paid could be recovered, but the municipality was not responsible to the taxpayer for interest from the date of payment of the taxes.

Arkansas: Another aspect of the immediate possession procedure was brought before the Arkansas courts during the year (Arkansas State Highway Commission v. Croom, 280 S. W. (2d) 887, July 4, 1955). Involved here was a court order directing payment to the condemnee of a deposit made by the State Highway Commission prior to entry on the premises, in a case where the condemnation order had specified that the City of Fort Smith and Sebastian County were to pay the cost of right-of-way. The State Supreme Court reversed the decree of the trial court.

The owner of the property in question objected to the State Highway Commission taking possession of his land and the commission applied to the Chancery Court for an order enjoining him from interfering with and molesting its operations. The order was issued but the court required the highway commission to make a deposit of $6, 500 in the registry of the court to guarantee payment of any damages that might subsequently be awarded the owner.

A claim for damages was later filed by the landowner in the circuit court where judgment in the sum of $6, 500 was obtained against the county. Following the judgment in circuit court, the landowner filed a motion in the Chancery Court asking that the $6, 500 deposit be paid to him. The Chancery Court directed the highway commission to pay the amount of the deposit to Croom, the landowner, and the highway commission appealed.

The Supreme Court held that the trial court erred in its judgment since the highway commission was not responsible for damages. The condemnation order entered by the county court at the request of the highway commission, had specified that the City of Fort Smith and Sebastian County were to share the cost of right-of-way acquisition. The injunction order specified in effect that there would be no obligation on the highway commission to pay damages unless such damages, if any, were not paid by the county. The Supreme Court found it obvious that the obligation on the highway commission was in the nature of the obligation of a guarantor and not a primary debtor.

The Supreme Court found no showing that the landowner had legally presented his

judgment against the county nor that the county had legally refused to pay or was financially unable to pay. The landowner had testified that the prosecuting attorney had said the county judge said no appropriation had been made; the county judge said none had been made, that he had asked for none, that no claim had been presented, and he thought the highway commission's bond would take care of the judgment. The high court could think of no possible way by which the landowner would not eventually receive compensation for his land if he pursued the legal remedies available to him to collect his judgment against the county. If it later developed that he could not obtain compensation from the county because of its financial inability to pay, or for any other legal reason, the highway commission's deposit would then be available for that purpose.

The Supreme Court thus reversed the decree of the trial court.

Michigan: This case involved determination of the amount of interest due the recipients of an award of $140,000 by the City of Detroit, for land acquired in connection with a slum clearance project.

An award of $140,000 was made by the court to Glenn H. Friedt and two others, owners of three lots condemned by the city. The city treasurer notified the former owners on July 26, 1950, that payment of the award would be made upon submission of three documents: (1) a signed release; (2) a certificate of title; and (3) a quit claim deed. From this date until December 31, 1951, the city treasurer and Friedt et al. argued back and forth as to whether or not the payees would or would not submit these documents. The matter was finally settled on December 31, 1951, but at that time, the city announced that it would not pay interest for this interim period, and the owners refused to accept the award.

Nothing further happened until May 5, 1954, when Friedt et al. instituted court action to collect judgment and interest. The trial court allowed approximately $4,000 interest for two periods, one for the period between December 31, 1951, the date the city announced that it would not pay interest, until March 2, 1952, on the theory that it was the owners' duty to demand payment before interest would apply, and this they had not done until December 31, 1951. Additionally, the court declared that the two month period from December 31, 1951 (or January 2, 1952) to March 2, 1952, was sufficient time for the owners to take such action. The second period for which the court awarded interest ran from May 5, 1954, to October 8, 1954, the date of the trial court's opinion. The former landowners appealed.

The Supreme Court on December 1, 1955, held that the owners were entitled to receive interest for the period from May 3, 1951, to October 8, 1954, at the rate of five percent (Friedt v. City of Detroit, 73 N.W. (2d) 211). The claim for interest for the period from July 26, 1950 to May 3, 1951, the date on which the owners first contacted the treasurer's office, was denied, on the ground that no demand for payment of the award had been made until the latter date, as required by the Detroit City Charter.

As to the period between May 3, 1951 and December 31, 1951, the trial court ruled that the owners were not entitled to interest because there was no evidence that the owners made "any written or satisfactory evidence that the demand was being made in conformity with the provisions of the city charter." The Supreme Court called attention to the fact that the city charter did not require a written demand. The high court declared that the owners met charter requirements as to demand on May 3, 1951.

The Supreme Court sustained the trial court's conclusion that the city imposed conditions not provided by the charter or statute. And, it added, the court had recognized for many years the legal principle that a person making a tender, attaching conditions thereto, does so at his peril. When the conditions imposed exceeded the requirements, such tender did not put the opposite party at fault.

In considering whether or not the owners were entitled to interest for the period from December 31, 1951 to October 8, 1954, The Supreme Court took notice of the fact that the city had failed to pay or offer to pay the award of $140,000 without first obtaining from the owners a waiver of claim to interest. The trial court found that the owners were guilty of laches, or unnecessary delay, in taking no action during this period. The Supreme Court stated that the question was not whether the owners would have exercised better judgment if action had been started within a reasonably short time after they knew

court action was necessary. Instead, the question was whether or not they barred their right to interest by the delay. The high court concluded that they did not, citing a previous case, involving payment of an award on condemnation of property, in which the court said:

> Respondents contend further that the doctrine of laches applies to petitioner's writ which is brought approximately seven years after the award was finally determined on appeal. This contention must be denied. There is no showing of a change of position of the parties which is unduly affected by the lapse of time, and further, the award when confirmed has the legal effect of a judgment and is enforceable for a period of 10 years. (Detroit Trust Co. v. State Highway Commissioner, 295 N.W. 222, 223, 1940)

The trial court's order was modified to allow interest at five percent for the period from May 3, 1951 to October 8, 1954.

North Carolina: An attempt on the part of the North Carolina State Highway and Public Works Commission to appeal a condemnation award after the amount thereof had been deposited in court for the property owner was denied by the State Supreme Court in a recent case in Forsyth County (North Carolina State Highway and Public Works Commission v. Pardington, 88 S. E. (2d) 102, June 30, 1955).

The report of the condemnation commissioners in this case was made on November 22, 1954. Both parties excepted to the award of $13,747.40. However, prior to filing an appeal, the record showed that the State Highway Commission had voluntarily paid the amount of the award into court with a letter of transmittal stating that "this check is in payment of the award of commissioners ***." Such a deposit, the court said, could be either in payment or as a deposit. In this case the intent and purpose was manifested in the language of the letter. It was in payment of the award by the commissioners.

The North Carolina State Highway Commission has authority, in cases where condemnation of property for highway purposes is necessary, to take possession of said lands prior to bringing condemnation proceedings. No deposit is required. (Gen. Stat. North Carolina, Sec. 136-19) Thus, when the highway commission voluntarily paid the amount of the award into court before taking possession of the land, the court held, it was a voluntary act controlled by the intent with which and purposes for which the payment was made. Under the circumstances, when the offer was made and accepted by the property owner, the question of compensation was settled, and the commission could not make further objection.

Although no additional states were added to the rather substantial group in which a quick-taking method of some sort is authorized, the State of Ohio was successful in obtaining amendment of its law providing for acquisition of highway right-of-way to permit taking immediate possession of structures as well as raw land. The state's law, previous to enactment of this amendment, had been interpreted by the courts as requiring determination of compensation for structures by jury. This amendment is expected to expedite Ohio's land acquisition program.

Acquisition of Highway Right-of-Way for Future Use

The authority to acquire highway right-of-way for future use is a most important tool which serves to keep right-of-way costs to a minimum. It is becoming increasingly apparent that unless the highway department is equipped with this authority, the cost of necessary land may double or treble in the period between the planning of the project and its actual construction, due to development of the area involved. The importance of this tool is indicated in a report prepared by the Highway Research Board Committee on Highway Laws, and soon to be published by the Board. This report summarizes existing statutory and judicial authority, and points out the benefits to be derived from such authority.

Even in those states having statutory authority to acquire right-of-way for future use, lack of available funds serves to deter the effective application of such a procedure. Establishment of a revolving fund to be used for such purchases has been found invaluable in California.[5] During the 1955 state legislative sessions, funds were made avail-

[5] For a discussion of the California law providing for this revolving fund, see Highway Research Board Bulletin No 101, TRENDS IN LAND ACQUISITION, 1955, p 8 et seq

able in three states, Ohio, Washington and Wisconsin, for advance purchase of rights-of-way. The Washington law appropriated $10 million from the Motor Vehicle Fund to the State Highway Commission for the advance purchase of rights-of-way and access rights for the orderly development of the state's ten-year highway program (H. B. 639). The Wisconsin law created a $5 million revolving fund for the use of the Milwaukee County Expressway Commission to acquire lands and interests therein for expressway construction when such acquisition would forestall development of such lands. The law further provides that such lands may be leased until needed for expressway construction (H. B. 526, Ch. 574).

In Ohio, an appropriation act passed in 1955 for highway construction (H. B. 516, Sec. 2 and 3) scheduled for 1958 and 1959, included the sum of $216,372,000 for right-of-way acquisition and/or construction and reconstruction costs. In other words, as soon as the right-of-way is fixed for this construction program, it may be acquired, although the property will not be used until 1958 or 1959.

In addition to the legislation enacted in these three states, it is interesting to note that a revolving fund for future highway land acquisition was set up in New Mexico by administrative action. This revolving fund in the amount of $5 million was authorized by the State Finance Board and is to be made up from unused 1955 highway debentures to be sold on the basis of the 1955 authorization of $20 million. As reimbursement payments are received from the Federal government, they will go into the revolving fund on the same pro-rata basis on which the government participates in right-of-way costs.

In acquiring land for future use, however, care must be taken that plans for the future highway improvement are firmly formulated. Courts are zealous in protecting the rights of property owners, and as indicated by a decision handed down by a Delaware court during the year, will not permit acquisition of right-of-way for an improvement the plans for which are vague and indefinite, and which may take place some day far, far into the future.

In this Delaware case, the state instituted condemnation proceedings to acquire portions of a triangular portion of land in Christiana Hundred, New Castle County. This triangular piece of land was bounded by three highways; on the east by Centre Road, State Route 141; on the south by Centerville Road; and on the north by US 2, the Robert Kirdwood Highway. The State Highway Department had begun the improvement of both Centre Road and Centerville Road at a point adjoining the triangular piece of land in question. Centerville Road was to be widened from 18 to 24 feet. The existing right-of-way was 40 feet and the State sought to increase this right-of-way to 100 feet, 50 feet on each side of the present centerline.

The Superior Court of New Castle County held that the State Highway Department had exceeded its powers in attempting to take the strip of land on Centerville Road (State v. 0. 62033 Acres of Land in Christiana Hundred, 110 A. (2d) 1, December 7, 1954), whereupon the state appealed to the State Supreme Court.

The owners of the land in question contended, among other things, that the amount of land to be taken was excessive and not within the authority of the State Highway Department. The trial court held that the condemnation of the strip of land on Centre Road was proper. It determined, however, that the department's attempt to take the strip of land on Centerville Road and the land at the apex of the triangle on Centerville Road and Centre Road constituted an excessive taking under the statutory powers of the department.

Two questions were raised: (1) Was the issue as to the necessity for taking land and the quantity thereof by condemnation a judicial or a legislative question; and (2) Did the court below err in deciding that there was no necessity for taking a part of the land in question and that the taking of this land in contemplation of a future need was improper?

The landowners charged the state with an abuse of discretion as to the amount of land taken. The Supreme Court found this a judicial question, requiring determination by the court, in order that the rights of the private citizens whose property had been injured, as well as the public, might be protected. The court concluded that the landowners were entitled to present their objections before the court and that the court had authority to make a determination thereof.

In connection with the second point raised, the landowners contended that the taking

was unlawful because no public use of a large part of the property sought to be condemned was contemplated within a reasonable time.

The State Highway Department admitted that it had no present plans for a four-lane highway. It anticipated that at some vague time in the future such a highway might be needed. The department insisted that it had the authority to anticipate the future need for roads, even though at the time of taking there were no present plans for their construction, and no reasonable certainty that such plans would be prepared in the foreseeable future. The Chief Engineer of the Department acknowledged that the taking of a 100-foot right-of-way at this time was largely in order to save money for the state. The court found this a commendable purpose, but not one which should be carried to the point of taking property from a private owner when that taking was not necessary for public use.

The state in its argument relied on a previous case (Clendaniel v. Conrad, 83 A. 1036, 1912), in which the court upheld the authority of a boulevard corporation to condemn 200 feet of land for boulevard purposes, of which the road itself was to be but a small part. In that case the court said that it would assume that the legislature intended the land taken to be developed within a reasonable time after the taking. In the present case, the department was authorized by statute to take only so much land as was necessary for road purposes.

The Supreme Court held that no present need for a 100-foot right-of-way had been shown, and the order of the lower court, dismissing the complaint of the State Highway Department, was affirmed.

Nature of Interest Taken

Legal authority to acquire land for public purposes is sometimes silent as to whether a fee simple title or merely an easement is acquired, and subsequent controversy on the subject is left for the courts to resolve. There is a tendency at this time, particularly in connection with land acquired for highway purposes, to specify in the law that a fee simple title may be acquired. Highway departments are increasingly finding that such a practice is desirable since they are in effect paying for such a title no matter what interest they actually acquire. Furthermore, a fee simple title permits the highway department to exercise the kind of control over the right-of-way required of modern highway development and also to recoup at least a part of the original cost when the land is no longer needed for highway purposes. An easement, of course, reverts to the former owner.

Determination by the courts of the nature of interest acquired was noted in at least three states during the past year.

California: The City of Inglewood, California, had acquired property rights in certain land by means of a deed from the original owners. The deed did not specifically state what kind of interest was conveyed to the city; i. e. whether the entire property interest (a fee simple) or a mere right to use the land for certain purposes (easement) was conveyed. The deed simply stated that in consideration of $1 and the benefits the original owners would derive, the land was offered to the city "for dedication as part of a public street." The original owners "do hereby grant... those certain parcels of land... to the City of Inglewood." The deed also stated that the city was to have and to hold the property for a public street or right-of-way.

The question of what kind of property interest the city held became important when the Basin Oil Company commenced operations on this land under an oil lease and certain royalties accrued which were supposed to be paid to the owner of the fee-simple interest. In order to find out who was entitled to these royalties, the Basin Oil Company asked the court to determine who held the fee-simple interest, the city or the successors of the original owners.

Did the deed transfer a fee-simple interest or did the original owners transfer only an easement and retain the fee? The court concluded that the city held the fee and was thus entitled to the royalties. In reaching this determination the court reasoned as follows:

The intent of the parties to a deed determines what interest is passed. It is presumed a deed transfers a fee-simple interest unless it contains words limiting the interest. Although the deed did contain a directive that the land was to be used for a public street and right-of-way, this did not limit the interest which was transferred. Had the parties intended to transfer only an easement they could easily have so stipulated in the deed. (Basin Oil Company of California v. City of Inglewood, 271 P. (2d) 73, 1954)[6]

Louisiana: Several landowners in Louisiana had dedicated part of their land to the state to be "used solely for the construction and maintenance of the said Hammond-Amite State Highway." The highway was constructed and the Louisiana Power and Light Company erected and maintained its poles and power lines along the western side in the highway right-of-way.

In 1953 the highway was widened. This made the company's poles so close to the pavement as to constitute a traffic hazard, so the Louisiana Department of Highways requested relocation of the poles. The company proposed to relocate its poles 8 feet within the highway right-of-way and acquire a right-of-way 15 feet on either side of the poles, i.e. seven additional feet of the owner's land outside the highway right-of-way was needed for the company's right-of-way.

The company claimed that they already had permission from the state to locate on the highway right-of-way, so all that was necessary was to acquire the 7 feet additional from the landowners. The court, however, said the company had to get rights in the entire amount of the land from the landowners themselves, including the land located within the highway right-of-way. Since this land had been dedicated to the state for highway purposes only, the state did not have a fee-simple title, but only a servitude. Therefore, the state did not have the power to grant permission to the company to locate its facilities on the highway right-of-way in the first place. It had power only to use the land for highway purposes.

The company then argued that under the doctrine of acquisition of a servitude by unopposed use for a public purpose, it had already acquired the right to use the portion of the property in the highway right-of-way, since the landowners had never objected to the company's use. The court said, however, that any rights the company acquired due to the acquiescence of the landowners in its use of their property were limited to that portion of land actually occupied (Louisiana Power and Light Company v. Dileo, 79 So. (2d) 150, 1955).[7]

Tennessee: In connection with the condemnation of land for the Foothills Parkway through the Great Smoky Mountains National Park, controversy arose as to whether the State Highway Department was authorized to acquire a fee simple title.

The landowners, in support of their claim, relied upon a written contract entered into between the Commissioner of Highways and Public Works of Tennessee and the Bureau of Public Roads which made no reference to acquiring the fee simple title, referring only to "the acquisition of rights-of-way."

Examination of legislative enactments, both by the United States Congress and the State of Tennessee, to provide for acquisition of land for the park and for the Foothills Parkway, convinced the State Supreme Court that the state was authorized to acquire a fee-simple title to the land needed for the parkway (Stroud v. State, 279 S. W. (2d) 82, January 7, 1955).

A 1926 Act of Congress, establishing the Great Smoky Mountains National Park, referred to the vesting of a fee-simple title to the lands included, in the United States. A 1927 act of the Tennessee Legislature authorized the Tennessee Great Smoky Park Commission to acquire title to lands situated within the park area. In 1945 the State Highway Department was authorized to convey title to the Federal government to lands to be used as right-of-way for the Foothills Parkway. Finally, in 1951 the Tennessee Legis-

[6]See Memorandum 82, September 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 293

[7]See Memorandum 82, September 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 293

lature authorized the Commissioner of Highways and Public Works to acquire by eminent domain "such interest and title in land to be used for highways, etc., as said Commissioner may deem desirable ***."

The petition for condemnation in the present case recited that the Commissioner deemed it desirable and necessary that the lands sought to be condemned be acquired in fee-simple. No evidence to the contrary was presented.

The court stated that under its decisions "the determinations of 'public use' by the state or its agencies are entitled to great weight or respect by the courts, since they relate to matters which should and must have been known by the legislative branch." (City of Knoxville v. Heth, 210 S.W. (2d) 326, 328, 1948). Furthermore, it appeared to the court to be the general rule that where a statute expressly or by necessary implication declares that a fee-simple title be taken, the condemnor will acquire such a fee. The court concluded that the acquisition of the fee was necessary to comply with the 1926 Act of Congress as well as subsequent laws enacted by both Congress and the State of Tennessee.

Change in Grade

Another subject of considerable controversy concerns the matter of compensation for a change in grade resulting from a street or highway improvement. Treatment of this problem has not been consistent in the various states, the decisions in many cases resting on the merits in each individual case. Some of the states have enacted statutes providing for compensation when a change in grade impairs the access of an abutting owner. In other states, a constitutional provision to the effect that property shall not be taken or damaged without just compensation, has been interpreted as requiring compensation for a change in grade.

At least two court decisions involving claims for compensation for change in grade due to highway improvements were handed down by the courts during the year.

Mississippi: In 1949 the State Highway Commission instituted condemnation proceedings for the appropriation of 0.46 acres of land necessary for the improvement of State Highway No. 4. Plans and specifications called for a present increase of four feet in the grade of the highway adjoining the owner's remaining property, and an additional raise of approximately four feet in grade as "probable future construction." Damages in the amount of $3,500 were awarded, and the grade was raised four feet approaching an old bridge spanning two railroad tracks.

In 1952, the highway commission constructed a new bridge over the railroads which was four feet higher than the old bridge. The grade of the highway approaching the bridge was then raised an additional four feet. The landowners brought suit against the highway commission and its contractor for $7,500 for this increase in grade, and recovered a judgment for $5,000, from which both the highway commission and its contractor appealed.

The State Supreme Court reversed the decision of the lower court, holding that the landowners were not entitled to damages, since the highway commission was only doing what was foreshadowed by the original plans and specifications which were before the court when the original eminent domain judgment was entered (Mississippi State Highway Commission v. Tomlinson, 78 So. (2d) 797, March 28, 1955).

In support of its conclusion, the Supreme Court cited a concurring opinion in the case of Rand v. Mississippi State Highway Commission, 199 So. 374, 1941, as follows:

"***the statute does not contemplate that counties and the Highway Department, when taking land for highway purposes, should limit the construction of the highway to a particular plan, and when the highway is to be paved, as this one is, to any particular character of paving. In other words, the statute contemplates that the counties and the Highway Department shall have a free hand in constructing the character of a highway that most nearly conforms to the public interest and welfare. What satisfied this requirement on one day may fail to do so on the next."

The landowners relied on the case of Parker v. State Highway Commission, 162 So. 162, 1935, in which suit was brought against the highway commission for damages to

Parker's property by reason of a change in grade. In that case the court held that under Section 17 of the Mississippi Constitution private property could not be damaged without due compensation to the owner. The present court was in full accord with that decision but thought it had no application in the case here under consideration. In that case none of Parker's land had been condemned and he had received no compensation for the damage done to his property. In the present case, the commission had condemned the Tomlinson land and had paid $3,500 in damages on a jury verdict, which under the court's decisions was conclusively presumed to include all damages resulting from a proper use of land taken.

The court concluded that the trial court's judgment covered all damages which might reasonably result to them from the construction of the highway in question. The landowners were not entitled to any further damage resulting from the second elevation of the grade of the highway.[8]

Louisiana: When certain street improvements in the City of Shreveport, Louisiana, resulted in lowering the grade thereof, the owner of property adjacent to the streets in question filed suit against the city for damages. The trial court awarded damages in

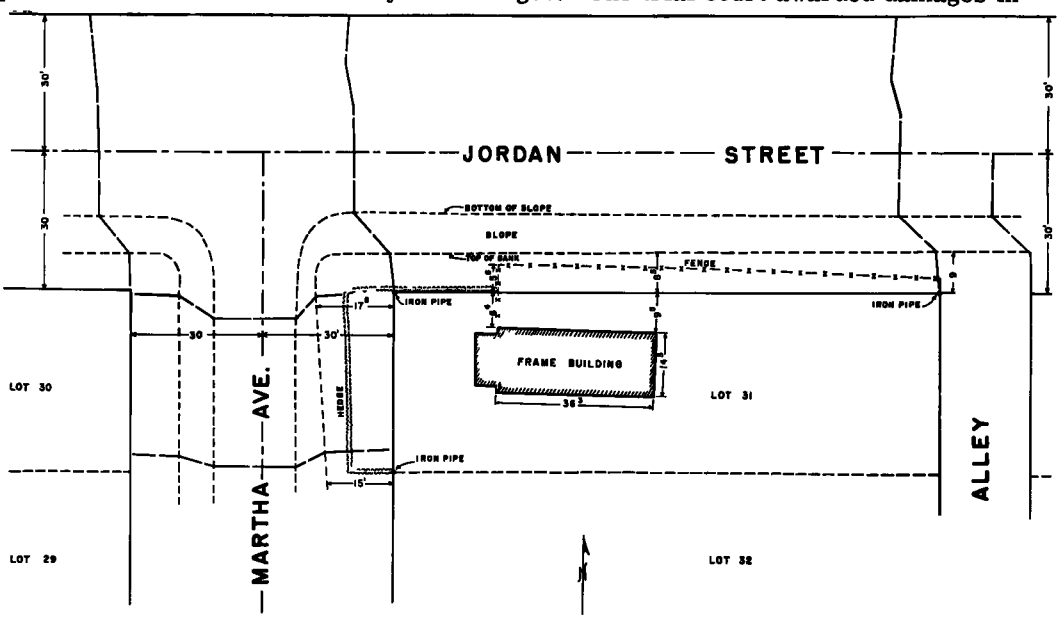

Figure 1. Britt v. City of Shreveport, 83 So. (2d) 476.

the amount of $150, and the owner appealed. The Court of Appeal affirmed the award of the lower court in a decision handed down on November 29, 1955 (Britt v. City of Shreveport, 83 So. (2d) 476).

Figure 1 shows the property affected and its relationship to the streets as improved. As indicated, the depth of the cut on Jordon Street averaged 8.6 ft, being 8.9 ft at the east end of the lot and 8.3 ft at the west end. The top of the bank or slope resulting from the improvement was 9 ft distant from the property line at the northeast corner and 7.6 ft away from the line at the northwest corner. On Martha Avenue, the street grade was lowered from 3.1 ft on the south side to 5.4 ft on the north side of the lot, and the northwest and southwest corners were respectively 17.6 ft and 15 ft distant from the top of the slope.

Mrs. Britt, the owner of the lot in question, claimed that as a result of the street improvements her property was inaccessible. She asked $1,500 for diminution in value.

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[8] See memorandum 79, May 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 280

The city denied that the lot had diminished in value.

The Circuit Court called attention to the fact that the Louisiana Constitution, Article I, Section 2, provided that "*** private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." Previous Louisiana court decisions had held that where a change of grade occurred, damages to be paid owners of abutting property were to be determined after deduction had been made of all special benefits and the enhancement in value of the particular property so damaged.

In the present case, the court noted that the lot in question was not served with a driveway. Testimony was given to the effect that not more than one of fifty residents in the neighborhood had a driveway. But the court pointed out that one of the elements of value attached to residential property was ease of ingress and egress. The present tenant did not demand a driveway, though the next tenant could. The cost of such a driveway would necessarily be increased by reason of the lowering of the grade, the court continued, and would have some effect on the present and future market value of the property.

Mrs. Britt's witnesses testified that the property had decreased in value as a result of the change in grade, but the city's witnesses testified that the value of the property had actually increased. The house had been built in 1945, and had been rented from that time to the date of the trial at $15 per month. The trial court concluded that if the property rented at the same price before and after the street improvements were made, there had been no diminution in value.

The Court of Appeal concluded that the award of $150 adequately compensated the owner for any damages sustained thus affirming the judgment of the lower court.

Compensation for Damages

Compensation for damages due to diversion of traffic has rather consistently been denied by the courts of the several states, but the matter continues to come before the courts in one guise or another. Court decisions on this subject were handed down in at least three states during the year: an Alabama court refused to award damages for loss of business ostensibly due to construction of a bypass; in Ohio the courts turned down a plea for damages due to diversion of traffic attributed to relocation of a state highway; and in Texas, compensation for damage allegedly resulting from the dead-ending of a street was refused a restaurant owner.

Alabama: In denying an injunction to prevent the construction of a bypass around the City of Montgomery, Alabama, the state supreme court held that because construction of the bypass would result in economic loss to a motel owner and others similarly situated would not be sufficient ground on which to base such action (Pruett v. Las Vegas, Inc., 74 So. (2d) 807, October 1, 1954).

The Las Vegas Corporation had recently constructed a motel within the corporate limits of Montgomery, a few miles from the downtown section, at a cost in excess of $300,000. Located on US 31, south of the city, the motel was not far from the point where US 31 south of Montgomery is connected with US 31 north of the city by a state road, in itself a bypass route affording the traveling public a means of continuing on US 31 without going over the heavily traveled streets of Montgomery. The Circuit Court of Montgomery County granted a temporary injunction enjoining the state highway director from proceeding with the new bypass. The state highway director appealed to the state supreme court.

Before considering the reasons advanced by the motel owners as to why the court should enjoin the highway department from constructing a public road, the supreme court pointed out that the location, construction and maintenance of highways had been committed to the state highway department by the legislature and were not a function of the courts. A previous decision was cited in which the court had stated:

"A court of equity is without jurisdiction to determine the question of the public need for a highway." (Alabama Great Southern R. Co. v. Denton, 195 So. 218, 1940.)

The motel corporation asserted that if the proposed bypass were constructed, they

as well as other business establishments on or near the existing bypass would suffer serious economic loss. The court agreed that this was so, but did not consider this sufficient ground for enjoining the highway department from constructing the bypass. Private inducements or considerations, said the court, could not rightly enter into the question as to whether a highway should be constructed. The controlling factor must always be the good of the general public and not the convenience or financial gain of the people who lived along any particular way.

The point was also raised that construction of the proposed bypass would result in an economic loss to the city, depriving it of a considerable amount of gasoline and license taxes. The court found no merit in this contention, holding that the construction of a state road could not be made to depend upon the motel owners' concern as to the resulting economic effect on a city of the state.

The Las Vegas Corporation also contended that construction of the bypass would be violative of provisions of the state constitution and of the laws of the state and contrary to its public policy.

The first amendment to the Alabama State Constitution, and subsequent amendments, Articles XX and XXA, authorize the state to engage in the construction and maintenance of highways and bridges, and to appropriate monies for such purposes. Both of these amendments provide for the issuance of bonds. Both contain language substantially as follows:

"The State Highway Commission or highway department shall locate, construct and maintain highways and state trunk roads so as to connect each county seat with the county seat of the adjoining county by the most direct or feasible route or by a permanent road, having due regard to the public welfare,... It shall be the duty of the highway department to equitably apportion among the several counties of the state the expenditure of both money and labor and the time or times of making such investment."

It was asserted by the motel owners that the proposed bypass would not connect a county seat with the county seat of an adjoining county by the most direct or feasible route, having due regard to the public welfare. Furthermore, to use the money needed to construct the proposed bypass would result in an inequitable apportionment of highway funds, giving to Montgomery County more than it was entitled to.

The court pointed out that none of the funds derived from the sale of bonds issued under authority of Amendments XX and XXA were available for use in the construction of the bypass, such funds having been expended long ago. The court had definitely concluded that the restrictions of these two amendments had application only to the use of funds derived from the bond issues therein provided for.

The court considered a similar statutory provision, directing the highway department to provide roads connecting county seats (Code of Alabama, 1940, Title 23, Sec. 34), in the nature of a directive, which, however, was not intended to restrict the highway department in the construction of other state roads.

"Certain it is that such provisions were not intended to prevent the use of state funds in the construction of a bypass such as here proposed, which is to be constructed for the purpose of forming a part of a belt line road or highway around the third largest city in the State of Alabama."

The motel owners also took exception to the acquisition of right-of-way by the state highway department, although the county had neither failed nor refused to acquire the necessary property. A statutory provision, Title 23, Section 25, of the code, provides that rights-of-way deemed necessary by the highway department for the construction of a state road are to be acquired by the county or municipality, at the expense of the state. If the county or municipality fails or refuses to acquire such rights-of-way, then the highway director is authorized to acquire them. The court, however, was of the opinion that the manner of acquiring right-of-way was of no concern to the motel corporation. No court of equity, according to the court, would, at the instance of one situated as was the present property owner, order a highway director not to build a road because he or the employees of the department which he headed had obtained rights-of-way directly from the landowners across whose lands the road was to be constructed.

Having given careful consideration to the record, the court concluded that the tem-

porary injunction should not have been issued by the lower court.[9]

Ohio: When the Ohio Department of Highways instituted proceedings to relocate a portion of US 50 in Athens County, owners of property abutting the old highway brought court action to compel the highway department to compensate them for damages to their property. The Merritt property was improved with a gasoline service station, a store and a restaurant from which the owners received their principal means of livlihood. Access to their property from the new highway would be available only by means of two lanes connecting the two highways, which lanes were constructed by the highway department as a part of the relocation project. The main flow of traffic on the new highway would bypass the Merritt property. The old highway would no longer be maintained by the state but would become a part of the county highway system (See Figure 2).

The state supreme court held that the property owners were not entitled to compensation (State v. Linzell, 126 N. E. (2d) 53, April 13, 1955). In so doing, the court stated that it had previously held that an abutting lot owner had such an interest in the portion of the street on which he abutted that its closing or the impairment of its use as a means of access constituted a taking of private property for public use for which compensation must be paid. However, the court did not consider that the facts in the instant case showed impairment of the use of the highway on which the property abutted. Mere circuity of travel, continued the court, necessarily and newly created, to and from real property, did not of itself result in legal impairment of the right of ingress and egress to and from such property, where any resulting interference was but an inconvenience shared in common with the general public, and was necessary in the public interest to make travel safer and more efficient.

The court called attention to the fact that under established doctrine in most jurisdictions an owner in similar circumstances had no right to the continuation of maintenance of the flow of traffic past his property. The resulting diminution in value of land was not compensable. The change in traffic flow in such a case resulted from the exercise of the police power or as the incidental result of a lawful act, and was not the taking or damaging of a property right.[10]

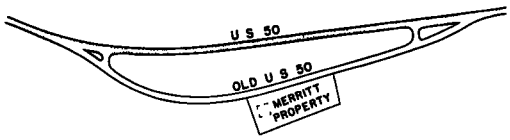

Figure 2. Ohio: State v. Linzell, 126 N.E. (2d) 53, April 13, 1955.

Texas: In a decision handed down on October 21, 1955, the Court of Civil Appeals held that damage resulting from the closing of a street and diversion of traffic was not compensable (City of Dallas v. Hallum, 285 S. W. (2d) 431).

The property in question was located between Lamar Street and Wall Street in the City of Dallas. The property was improved with a restaurant facing on Lamar Street. The City of Dallas appropriated a portion of the Hallum property for the purpose of widening Wall Street. At a later date, Lamar Street was closed to traffic at a point about two blocks from the property to eradicate a traffic hazard where Lamar Street and Wall Street joined. The result was that the flow of traffic changed from Lamar Street to Wall Street. The restaurant owners claimed that this was detrimental to their business since the service facilities (rest rooms, kitchen, etc.) faced on Wall Street, while the eating quarters were on the Lamar Street side.

The city initiated proceedings in 1951, and commissioners appointed by the court awarded $3,500 for the strip taken and all damages to the remainder. The owners objected and filed an appeal in the County Court of Dallas County. The county court found the value of the land taken to be $4,296 and damages to land not taken $8,000. The city appealed.

[9] See Memorandum 77, April 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 272

[10] See Memorandum No. 84, December 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 303

The city contended that the trial court erred in not sustaining objections to testimony as to damages growing out of the closing of Lamar Street. The Court of Appeals reviewed the testimony at some length, and concluded that the trial court had erred in failing to require separation of the elements of damage and elimination of that part which was due to the closing of the street.

The court took note of the fact that the Lamar Street closing was at a point some two blocks distant from the Hallum property. The Hallums, therefore, were not landowners abutting the street section thus vacated and not entitled to claim "a legal injury not suffered by the public in general." Furthermore, damages resulting from an exercise of the police power, in this case a street closing ordinance enacted by the City of Dallas in March of 1954, must be excluded from any condemnation award.

The high court concluded that errors committed by the trial court, in permitting incompetent testimony to be paraded before the jury, under favorable rulings as to its admissibility, amounted to "such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment." The decision of the lower court was reversed and the case remanded for another trial.

Although loss of business due to diversion of traffic is generally not considered compensable by the courts, a great deal of unpleasant feeling can be generated in a locality where a highway has been relocated or a bypass constructed. Much of this may be due to lack of understanding as to the economic effects of the projected improvement. Laws passed by the two states during the 1955 legislative sessions may be helpful in this respect. An Idaho law (S. S. 152, Ch. 260) requires the Board of Highway Directors to hold public hearings before any highway serving or traversing any city or village is abandoned, relocated or replaced by a new road serving the area. The city or village may appeal the Board's decision to the courts.

A Utah law requires the State Road Commission to hold public hearings before constructing a highway bypassing any city or town, or building an alternate route through or outside any city or town (S. B. 155). This is in line with a provision of the Federal-aid Highway Act of 1950 which requires any state submitting plans to the Bureau of Public Roads involving the bypassing of a city or town to certify that public hearings have been held.

A number of other state legislatures considered similar bills during the 1955 sessions, none of which were enacted into law.

Consequential Damages

A number of interesting court decisions were handed down during the year involving compensation for damages allegedly resulting from public improvements. In Kansas for instance, a landowner was refused damages, for depreciation of his property which he claimed resulted when all of the remaining property in the block was acquired for school purposes. In Oklahoma, the owner of a farm claimed damages because of the closing of a county road some distance south of his property in connection with construction of the Oklahoma Turnpike. The court ruled that the resulting circuity of travel was not compensable. On the other hand, an Ohio court held that the owner of a service station was entitled to compensation when a safety island erected in front of his premises impaired his access.

Kansas: In a decision handed down on March 5, 1955, the Supreme Court of Kansas held that a condemnation proceeding causing depreciation in value of a property owner's home did not constitute a "taking" of his property without just compensation, and that depreciation in the value of the home was consequential damage for which compensation could not be recovered (Richert v. Board of Education of the City of Newton, 280 P. (2d) 596).

The landowners in this case had owned and maintained their home since 1937 in a city block, a portion of which was occupied by a school. Subsequent purchases of property by the board of education resulted in this particular home being the only property in the block not occupied by the school and its facilities. The landowners claimed that their property had depreciated in value to the extent of at least $12, 500 by the board's actions.

The landowners argued that the school board's action was controlled by the general law of eminent domain and the fourteenth amendment to the Constitution of the United States to the effect that no state might deprive any person of property without due process of law.

The State of Kansas has no constitutional or statutory provision whereby the condemnor under eminent domain must pay for property "taken or damaged." The court called attention to a decision in the State of Illinois which does have such a provision wherein the court held:

"The right to damages, (where a cemetery was located adjacent to the dwelling house of appellant) must be based on the ground that a right of property has been disturbed and cannot be awarded for an injury to the convenience or feelings of the owner.... It is one which affects the feelings of the individual owner, only, and varies with the sentiments of each particular individual. It is, furthermore, not different from that sustained by others residing in that neighborhood, though it may be of a greater degree.... Such supposed damages must be considered as *damnum adsque injuria*, on the theory of the law that the plaintiff is compensated for the injury sustained by sharing the general benefits which are secured to all by it...." (City of Winchester v. Fung, 144 N.E. 333, 1924.)

Other decisions and authorities cited by the Kansas Supreme Court supported the doctrine enunciated by the Illinois court.

The landowners also argued that the school had damaged their property in a different and special manner over and above other property in the community. The court, however, answered that this argument ignored the fact that immediately across the street in all directions from the school, there were residences which were affected and consequentially damaged by the expansion of the school to meet demands of a growing population and progress. In a previous Kansas case (Mayfield v. Board of Education, 223 P. 1024, 1925) the court had said in substance that such damages were consequential damages which were not covered by the constitution or statutes in Kansas, and that such damages being different in degree, but not in kind, could not be recovered. The court found this ruling applicable in the present case.[11]

Oklahoma: Robert Lindley, the owner of a 77-acre farm in Creek County, Oklahoma, sought to recover damages allegedly resulting from the closing of a county road several hundred feet south of his property by the Oklahoma Turnpike Authority, in connection with the construction of a turnpike. The county road in question gave Lindley access to US 33, south of his property, which in turn provided him with access to the City of Sapulpa. In order to make Lindley's property accessible to Highway 33, the turnpike authority built a new road connecting this highway with the county road. This made the route from Lindley's property to Sapulpa more circuitous, but over just about as good a road, according to testimony presented.

A trial court rendered judgment for the turnpike authority. Upon appeal, the state supreme court affirmed the trial court's judgment (Lindley v. Oklahoma Turnpike Authority, 262 P. (2d) 159, October 13, 1953).

The supreme court cited a previous case, (Atchison, Topeka and Santa Fe R. Co. v. Terminal Oil Mill Co., 71 P. (2d) 617, 1937) to the effect that:

"...to recover damages for the obstruction of the street, it is not essential that the access to the property has been entirely cut off.' However, if the only complaint is that the roadway is less convenient, or that he is compelled to travel further over a more circuitous route or over a poorer road in going to and from his property, his right of ingress and egress has not been impaired, and the injury is of the same kind as that suffered by the community in general. For such damage he has no right of action...."

According to the high court, the case presented only one question:

Was the evidence sufficient to make a prima facie case in that any damage suffered by Lindley was special to him and different in kind, rather than in extent, from that suffered by the public generally? The court thought it was not. Although his injury was probably greater in degree, it was of the same kind as that suffered by the community at large in its use of the county road. The rule of law applicable to such situations, according to the court, was set forth in the case of Chicago, R.I. & P.R. Co. v. Prigmore, 68 P. (2d) 90 (1937) in the following language:

[11] See Memorandum 81, August 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 291

"..a property owner cannot recover for the closing of a street in another block where he has adequate access to his property from both ends of the street, although traffic may be diverted away from his property. Under these circumstances, he does not sustain a damage different in kind from the general public, but only different in degree. .."

The supreme court thus sustained the trial court's judgment that the landowner was not entitled to damages.[12]

Ohio: Although it has been generally held that the construction of a safety island is a proper exercise of the police power, the Ohio Court of Common Pleas for Licking County, recently handed down a decision to the effect that the installation of such a safety island without compensation to the abutting property owners constituted an unconstitutional encroachment (Starr v. Linzell, 129 N. E. (2d) 659, May 23, 1955).

In this case, the owners of a service station and bus station at the intersection of State Route 16 and County Road 26 in Licking County, asked for an injunction prohibiting the state highway department from constructing a safety island of some 80 feet along the front of their property and extending several feet around the corner of the county road.

The court granted the injunction, and in so doing noted the fact that the owners had had unlimited access to the highway for more than 25 years, and that valuable improvements for business purposes had been made by said owners with reference to the existing and present access and grade of the roads in question. The effect of the proposed "barricade," the court continued, was admittedly a limitation of access to and from the business. Although access remained at the west end and at the east end of the property, in the court's phraseology, the owners were "quarantined" at the main door. They could however still go through side entrances with the added inconvenience.

The state highway director contended that construction of the safety island was permitted under the police power. The court, however, called attention to the fact that "this is not the ordinary type of safety island which we are familiar with over the state, but that the admitted purpose of this construction is to limit and prohibit ingress and egress at the points where it would be constructed."

The court agreed that convenience of traffic and the safety of travelers along highways must be given great consideration, but these things could not defeat the rights of property owners without adequate compensation as required by the State Constitution, legislative enactments and judicial decisions.

The court concluded that construction of the safety island impaired the owners' access, molested a property enjoyment, and the convenience of access was materially diminished proximately constituting an unconstitutional encroachment resulting in damage to the property owners, direct and not remote.

Authority to Condemn Publicly-owned Land for Highway Purposes

Questions concerning the authority of governmental agencies to acquire or make use of certain types of property devoted to one public use for street or highway purposes are brought before the courts on numerous occasions for interpretation of the enabling statutes. During the past year, the courts were called upon to determine: the authority of (1) the State of Washington to condemn municipal property for a state highway; (2) the City of New Orleans to condemn cemetery property for street widening purposes; (3) a Wyoming city to open a road through a city park for public use; and (4) Suffolk County, New York to condemn right-of-way for a highway through a parking field maintained by a village. The three cases are summarized below.

Washington: The State of Washington sought to acquire land in drainage District 17, a municipal corporation in Skagit County, in order to convert an existing state highway into a four-lane controlled-access highway. The question arose whether a state may condemn property (which is already devoted to public use) of a municipal corporation for highway purposes.

The court pointed out that the power of eminent domain is inherent in sovereignty.

[12] See Memorandum 78, April 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 278

It is necessary that a sovereign state have the power to condemn and acquire land for public uses and the state has this power whether its constitution specifically confers it or not.

The state might, however, place limitations on this power, said the court. Had the State of Washington, through legislation, placed any limitation on the power of the state to acquire property of a municipal corporation?

A state statute (R. C. W. 47. 12. 040) authorized municipal corporations to convey land for highway purposes to the state. An argument was made that since this statute merely authorized municipal corporations to convey land and there was no mention of compulsory conveyance or condemnation, the legislature intended that there should be no condemnation of property of municipal corporations.

The court did not adopt this view, however, but stated that another statute (R. C. W. 47. 52. 050) applied here. This gave authority to the highway authorities to "acquire private or public property ... by gift, devise, purchase, or condemnation...." The term "public property" was interpreted to mean any property owned by some public body and not just the property in the public domain which has not yet been converted to a public use. Thus the court concluded that the state might acquire the property in this case by condemnation (State v. Superior Court, 269 P. (2d) 560, 1954).[13]

Louisiana: In a decision handed down on June 30, 1955, the Supreme Court of Louisiana held that the City of New Orleans had the right to condemn cemetery property for street widening purposes, where the cemetery in question was in an unsanitary condition, and in a state of ruin and decay (City of New Orleans v. Christ Church Corporation, 81 So. (2d) 855).

The trial court entered judgment for the city, ordering payment to Christ Church Corporation of the sum of $30,745. 41, or $1. 50 per square foot, for the land taken and further ordering disinterment and reinterment elsewhere of all the human remains presently interred therein.

The Christ Church Corporation acquiesced in the court's decision. The appeal was filed by the curator-ad-hoc appointed by the trial judge to represent unknown, absent and interested parties.

The Supreme Court stated its belief that there were reasons why property dedicated and used for public purposes did not become dedicated in perpetuity, particularly when, as here, the ground so dedicated had become an abuse rather than a holy use. The court described the history of the Girod Cemetery at some length, describing the conditions of ruin and decay that existed and had existed for many years. The court concluded that expropriation of a cemetery for the use, comfort, welfare and health of the living was not unreasonable, unnatural, impolitic or unjust.

Louisiana statutes provide that no graveyard or cemetery may be expropriated unless the court finds that the route expropriated cannot be diverted from that proposed by the condemnor without great public loss or inconvenience (LSA-R. S. 19:3). Testimony of the City Engineer and the Director of the City Planning Commission indicated that the land here involved was vitally needed for street purposes. The court was convinced that the expropriation could not be diverted from that proposed without great loss and inconvenience.

Another point raised in this case was to the effect that the city could not demand removal of the cemetery to another location. The court called attention to the original sale of the property to the church for use as a cemetery, which reserved the right to change the location of the cemetery, and held that the city in its proprietary and governmental capacity could exercise its power of expropriation.

The curator also urged that the original compact of sale to the city was subject to the condition that a cemetery be maintained thereon. The court noted that the transaction consisted of an outright sale for a cash consideration. The act of sale recited that the vendee intended to use the land for cemetery purposes. No perpetuity was attached to the use and no statement was made that the condition was mandatory. The court concluded that the condition was permissive and precatory.

[13]See Memorandum 82, September 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 293

The Supreme Court affirmed the judgment of the lower court.

Wyoming: The mayor and city council of the City of Riverton passed a motion that a road going through the City Park be opened and proceeded to have removed three trees and a telephone pole along the west boundary of the park in furtherance of the project. Two residents of the city, one residing across the street from the park and the other about four blocks away asked for and were granted an injunction by the District Court prohibiting the city from opening a through road or street for public use across the park. The city appealed to the State Supreme Court which affirmed the judgment of the lower court (Stratton v. City of Riverton, 287 P. (2d) 627, September 20, 1955).

The city claimed that the public had acquired a prescriptive right to the road going through the City Park, but the Supreme Court found that the evidence failed to sufficiently support this claim. Furthermore, said the court, it was more than doubtful that the public's use for road purposes of a portion of the lands dedicated for its recreation, pleasure and amusement could amount to that adverse user which would be necessary to defeat the public's right to use it for the purposes contemplated by the dedication.

The city also contended that the proposed road was an access road and not a through street or part of the city's street system. But the mayor, who testified as a witness in the city's behalf, stated on cross examination that one of the prime reasons for opening the park road was to permit people who lived east of the park to drive directly down town without going around the park. The court considered this sufficient justification for the lower court's holding that "the proposed road was a through street and a part of the street system, to-wit, Main Street in the City of Riverton," rather than an access road.

The Supreme Court felt constrained to observe that the injunction was conservatively limited to opening a through road or street for public use across the park, and did not preclude the city from establishing access roads which would not ordinarily be used for through travel.

New York: The County of Suffolk attempted to condemn a right-of-way for a highway through a parking field maintained by the Village of Amityville. The village asked for a temporary injunction to prevent the county's action, but the State supreme court denied the request, holding that since the use of the strip for highway purposes was consistent with its former use as part of the parking field, and did not affect public use of such field as a whole, the county was entitled to condemn the strip (Village of Amityville v. Suffolk County et al., 132 N. Y. S. (2d) 845, July 2, 1954).

Although under a general rule of law, one municipality may not ordinarily condemn the land of another municipality already devoted to public use, the court pointed out an exception to this rule under which land belonging to one municipality may be condemned by another if the new use is not inconsistent with the old. In the present case, the court held that the use of the strip condemned by the county for highway purposes was consistent with the former use of the same strip as a part of the village parking field, and did not affect the public use of the parking field as a whole. [14]

Admissibility of Testimony

An interesting opinion was handed down by the Texas courts on November 9, 1955, when the owners of property located on "Katy Road," outside the city limits of Houston, Texas, appealed to the Court of Civil Appeals alleging inadequacy of the award made by the trial court, in a condemnation suit instituted by the state highway department for the purpose of acquiring some 8.87 acres of the property involved. The trial court awarded the owners $44,330 for the land taken and no severance damages. The judgment was affirmed by the Court of Civil Appeals (Frost v. State, 284 S.W. (2d) 232).

Testimony during the trial as to the value of the land taken ranged from a high of $155,351 to a low of $35,480. The landowners' witnesses testified that the taking damaged the remainder of the tract in various amounts while the state's witnesses

[14] See Memorandum 78, April 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 278

testified that the value of the remainder was the same after the taking as it was before.

The landowners complained in particular of the state's argument to the jury, as follows:

Gentlemen of the jury the State of Texas wants to pay, and will pay, and must pay, the reasonable value of that land out there, but I tell you gentlemen quite frankly that, if the State of Texas is called upon to pay such stupendous, ludicrous, extravagent, ridiculous prices as that the public is not, nor must it build, there would not be enough money in the public treasury to get this project any further than Addicks.

Their objection to the argument was sustained by the trial court, and the jury was instructed not to consider it. However, the landowners claimed that by this remark the state appealed to the self-interest of the jury by "cleverly, but improperly," telling the jury that if they wanted the project built, they must find the values testified to by the state's experts. That the jury was influenced in spite of the court's instructions was evident from the fact that the award was almost identical with the highest value of $44,350 testified to by one of the state's witnesses, and that no award was made for damages to the remainder, again in line with the state's witness testimony.

The Court of Appeals concluded that the state's remarks were in effect cured by the lower court's instruction. Furthermore, the court continued, it could not be said that the argument "was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case."

The landowners further complained of the trial court's refusal to give requested instructions to the jury, authorizing them to consider possible future uses of the land in determining market value.

The land in question was located on US 90 (Katy Road) and was being condemned by the state for the purpose of converting the highway into an expressway. The land was shown to be valuable because of its location in a rapidly developing residential area near the City of Houston. It was also shown that the land was suitable for a large shopping center or for residential purposes.

Evidence submitted in the trial showed that the owners had grazed cattle on the land and had cut hay thereon, but there had been no business development of the tract. There was evidence that the owners had been holding the land for development of a community center.

The Court of Appeals held that refusal of the requested instructions was not error, citing a previous decision in which refusal to give similar instructions was held not in error (Herndon v. Housing Authority of City of Dallas, 261 S.W. (2d) 221, 222, 1953). In that case, as in the present one, a correct definition of market value had been given by the court, and the jury had admitted evidence showing the various uses to which the property could be put. In the present case, the jury was instructed to answer the issues from the evidence admitted under the rulings of the court during the trial of the case. This instruction, the Court of Appeals held, afforded the jury the right to give the admitted evidence all the weight it might have thought such evidence was worthy of.

The judgment of the lower court was affirmed.

Necessity for Taking

In a decision handed down on October 11, 1955, the Supreme Court of Georgia upheld the right of the State Highway Department to condemn land not actually to be occupied by a highway but which was necessary to provide a clear view to motorists leaving the highway by way of a ramp (Barrett v. State Highway Department, 89 S.E. (2d) 652).

The particular tract of land in controversy was located at a point on a controlled-access highway where an off-ramp was to be constructed. The state maintained that the land was located very near the ramp and although it would not actually be occupied by the highway itself, it was necessary to provide a clear view for persons leaving the highway. Without a clear view, a very dangerous traffic hazard would be created. The trial court, on the basis of the evidence presented, determined that the tract was reasonably necessary for the construction of the expressway, and refused to issue an injunction asked for by the owner of the land.

The Supreme Court upheld the lower court's determination of necessity and its refusal of the injunction, stating that under a well-settled rule of law the judgment of a trial court in granting or refusing a temporary injunction will not be interfered with if

supported by evidence. The high court also considered it well settled in law that when the state authorizes the use of the right of eminent domain, it carries with the grant of this power the right to condemn such property as may be reasonably necessary for the purpose for which the property is to be condemned—in this case such property as might be reasonably necessary for construction of an expressway.

The landowner also attacked the constitutionality of the state's controlled-access law. However, the Supreme Court held that it was not necessary to pass on this point since the right to condemn the property here in question was authorized under the State Highway Department's general power of eminent domain in effect before the controlled-access law was passed.

The Supreme Court thus upheld the action of the trial court in refusing to grant an injunction to restrain the highway department from acquiring land considered necessary for the highway improvement.

Marginal Land Acquisition

A number of cities throughout the United States have at one time or another been granted legal authority to acquire more land than is necessary for the public improvement contemplated, and in some cases, the governing body acquiring the land has been authorized to dispose of the excess, sometimes with restrictions as to its future use. Authority granted to state highway departments to acquire marginal land is found largely in the controlled-access laws, and provides that the condemning agency may, in its discretion, acquire an entire lot, block, or tract of land, if by so doing the interests of the public will be best served.

A 1955 Ohio law (H. B. 481) is a little broader in scope, permitting the Director of highways to purchase all or any part of a tract of land when such action would result in less damage to the residue resulting from severance, controlled-access or isolation. The part not needed for highway purposes may then be resold, provided that the selling price is not less than two-thirds of its appraised value.

Right-of-Way Costs and Land Values

Despite the decline in farm income, values of farmland increased an average of four percent during the year ended March 1, 1956, as indicated in Figure 3.[15] Increases took place in all regions of the country, the highest being the Southeastern States where increases ranged from 5 to 11 percent. Values declined in only two states, Colorado and Nebraska. Average values increased less than one percent during the four-month period ending March 1, 1956, however. Farm real estate reporters see a possible slight decline during the succeeding six months, based on what they considered a weakened demand for farmland during the last year and some increase in the number of farms on the market.

CONTROL OF HIGHWAY ACCESS

With the passage, early in 1956, of controlled-access highway laws by the Alabama and South Carolina State Legislatures, the total number of states in which highway access may legally be controlled now stands at 45.[16] Additionally, comprehensive legislation in this field is under consideration in Arizona and New Mexico. New Mexico once had such authority with respect to the City of Santa Fe but the law was repealed some years ago. New Mexico highway officials hope that a law authorizing the construction of expressways throughout the state may soon be enacted. North Carolina continues

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[15] *Current Developments in the Farm Real Estate Market*, March 1956, Agricultural Research Service, United States Department of Agriculture.

[16] Alabama, 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 Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

to construct expressways under the broad, general authority of the state highway department. The State of Delaware, where existing authority to control access applies only to the approaches to the Delaware Memorial Bridge, has under consideration an amended law to provide for access control throughout the state.

Legal authority with regard to control of access was further clarified during the year in a number of significant decisions handed down by the state courts, and in one instance, at least, by a Federal court.

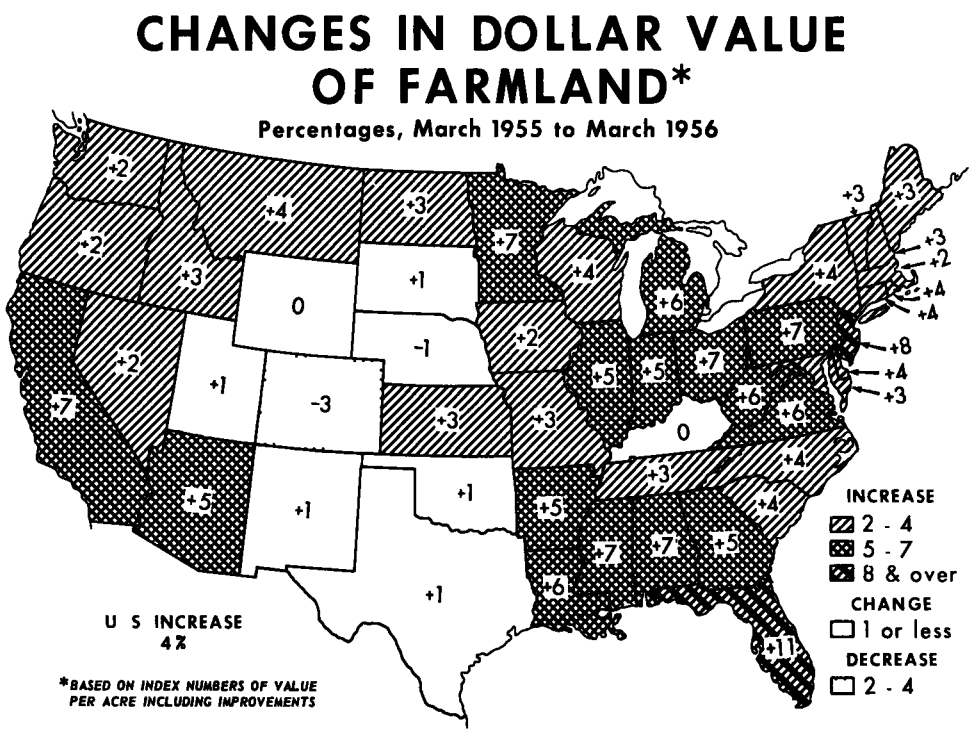

Figure 3.

Access Rights

The Federal decision mentioned above was handed down by the United States Court of Appeals in the case of United States of America v. Belle View Apartments, 217 F (2d) 636 (December 9, 1954).

The need for anticipating changes in land use and their possible effect on parkways or expressways as far as access thereto is concerned is vividly illustrated by this case in which an easement of access, reserved by the owners of agricultural property abutting the Mount Vernon Memorial Highway in 1930, in connection with a donation of land for the highway, was held to permit access thereto from an apartment and shopping center development constructed by subsequent owners.

In 1930, the United States Government, in acquiring land for the Mount Vernon Memorial Highway, accepted a donation of 12.658 acres from Jameson and Anita Cotting. This land consisted of a strip 200 feet in width which bisected the Cotting property. The deed contained the following reservation:

> The parties of the first part reserve unto themselves, their heirs, and assigns the right of ingress and egress to and from said memorial highway, for which necessary entrance or exit roads on both sides of and within the limits of the right-of-way of said highway across the premises of the parties of the first part shall be constructed by and at the expense of the party of the second part at any time upon request to party of the second part by parties of the first part subritted in writing within one year after completion of the highway, the time of such completion to be fixed by receipt of a written notice by the parties of the first part from the party of the second part.

In a subsequent action, two years later, the government acquired additional lands

owned by the Cottings. This was done by condemnation because of a defect on the chain of title. Since the 12.65 acres donated by the Cottings was included in this original tract, the condemnation covered both the supplemental acreage and the 12.65-acre tract. The government obtained a fee simple title to the additional acreage and the original grant of 12.65 acres. The Cottings retained approximately 104.5 acres lying to the west of the Memorial Highway. No specific reference to the right of access to the highway was contained in the conveyances.

In 1953, the successors in title to the remaining property, Belle View Apartments, engaged in the construction of an apartment house and a shopping center on the land, informed the National Park Service that they would proceed to exercise the right of ingress and egress to and from Memorial Highway. The United States brought suit seeking an injunction against the threatened entry.

The government contended that the reserved easement of access had been extinguished by the subsequent condemnation proceeding, or in the alternative, that it had been acquired by the United States by adverse possession. The district court held that the landowners still owned the right of access, in that it had neither been extinguished in the condemnation proceedings, nor lost through adverse possession.

The United States Court of Appeals, on appeal, affirmed the judgment of the district court. In examining the allegations in the condemnation proceedings of 1933, the appeals court found no reference to the easement of ingress to and from the highway which the Cottings had reserved, and no intent to acquire and pay for the easement was expressed. On the contrary, the award of the commissioner, the order of the court affirming the award, and the final judgment vesting title in the United States all referred to the condemnation petition, which described the parcel sought to be condemned as an area of 194.790 acres "which included an area of 12.658 acres, conveyed and intended to be conveyed to the government by deed dated February 11, 1930...." The appeals court found it evident that the condemnation proceedings merely reaffirmed the title of the government to the property donated by the Cottings in their deed of February 11, 1930, and that title, the court continued, was subject to the reservation of the easement therein described.

The court mentioned the fact that ordinarily an unqualified taking in fee took all interests even though they were not specified in detail. Easements over lands condemned in fee simple were taken unless specifically excluded from the taking. But in this case, the court considered that so far as the 12-acre strip was concerned, the condemnation was definitely limited in scope to the property which had been given to the government free of charge in 1930, and that gift was subject to the easement.

The appeals court also found that the government's alternative contention, that the United States had gained title of the 12-acre strip by adverse possession since 1933, was untenable. The position of the government had not been adverse in the sense that it had been open, notorious, hostile, inconsistent with the easement, and maintained with the intention to hold adversely.[17]

Two other interesting decisions pertaining to access rights were handed down by courts in Louisiana and New York during the year.

Louisiana

In 1950 the English Realty Company, a holding company for the Red Ball Freight Lines, bought an 18-acre tract of land abutting on Linwood Avenue in the City of Shreveport. The company subsequently sold all but 4.94 acres, the remaining 700 feet fronting on Linwood Avenue, an expressway. Most of this remaining frontage was below the level of a ramp leading over a viaduct, but there were approximately 43 feet at the southern end of the property at ground level. However, the frontage level with the street was so near to the elevated portion of the overpass that its use for ingress and egress of the Red Ball trucks would create a serious traffic hazard. The city refused to permit access to the expressway.

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[17] See Memorandum 84, December 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 303.

Having no access of any kind to its remaining property, the realty company attempted to obtain passage across adjoining land. The trial court rendered judgment for the company and the owners of the adjoining land appealed. The realty company made the claim that its property was enclosed and that it had no access to a public road.

The Supreme Court declared that the property in question was not enclosed within the meaning of the law relative thereto, since it actually had access to Linwood Avenue. The court noted that the overpass had been in existence when the 18-acre tract was purchased, and the buyers were aware that a portion of the frontage was below the level of the approach to the overpass. If by reason of the various property sales it had made, the company now found itself holding acreage fronting that part of the overpass to which the city might be justified in refusing access, it was not entitled to claim passage over the adjoining property since the situation respecting access of which it now complained was wholly created by its own act.

The court pointed out that under previous decisions, neither the state nor its political subdivisions had the legal right to deny an abutting property owner all access to the adjoining highway (State ex rel. Gebelin v. Department of Highways, 8 So. (2d) 71, 1942). This being the case, the abutting landowner had a remedy against the public authority, and the city's refusal to accede to a demand for access, even if justified, did not warrant seeking relief in the form of a passage across the adjoining property under the enclosure law.

The Supreme Court concluded that the company had no cause of action and reversed the judgment of the lower court (English Realty Company v. Meyer, (82 So. (2d) 698, June 30, 1955).

New York

This is a claim against the state by a landowner from whom property was appropriated for improvement of a section of the Taconic State Parkway. In addition to the appropriation of two easements on the parkway proper, the taking included a triangular strip of land fronting both on the parkway and on Underhill Road, a town highway and not a controlled-access highway. The fee part was taken to accomplish a grade separation to permit the parkway to pass under the town highway.

The landowner claimed that his remaining property was landlocked by the state's action, but the court held that this was not the case, since he still had access to Underhill Road over the fee portion taken by the state. It was the intent of the controlling legislation (Conservation Law, Sec. 676, Subdivision 2) to afford an abutting owner a means of ingress and egress in a case such as this. Further substantiation of the court's holding was found in an opinion of the attorney general (1946 Op. Atty. Gen. 179) as follows:

"Where the acquisition of lands for parks or parkways results in the abutting owner becoming landlocked as stated in question number two, such owner by law is given a right-of-way by necessity over the lands so acquired which vests in him the right of access to a local road from his remaining lands."

The court concluded that the claimant's remainder was not landlocked; that he was vested with the legal right of access to and from the local highway and that his damage was to be measured accordingly (Robinson v. State, 137 N. Y. S. (2d) 673, February 8, 1955).[18]

Access Rights on New Highways

Where an existing conventional highway is converted to an expressway, it is well settled that loss of access to the abutting property is an element of damages that is compensable. However, when a controlled-access highway is constructed on a new location, the courts of a number of states have held that the abutting owner, never having had access to the highway, does not acquire such rights to the new expressway.[19]

[18] See Memorandum 81, August 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 291.

[19] California, Kentucky, Ohio, Oregon, and Wisconsin.

A significant case which followed this doctrine was handed down by the Supreme Court of Wisconsin during the year, in the case of Carazalla v. State of Wisconsin, 71 N. W. (2d) 276, June 28, 1955.

A relocation of an existing highway was involved in this case. The contesting property owner's land consisted of a 172-acre dairy farm in Marathon County immediately north of the city limits of Wausau. The outside boundaries of the farm roughly formed the figure of a cross, with US 51 constituting the west boundary of the cross arm. The proposed relocation would pass through the Carazalla farm a short distance to the east of its prior location, resulting in the division of the farm into three noncontiguous parcels, two of which would be located to the west and one to the east of the new highway. The taking included 13. 05 acres (See Figure 4).

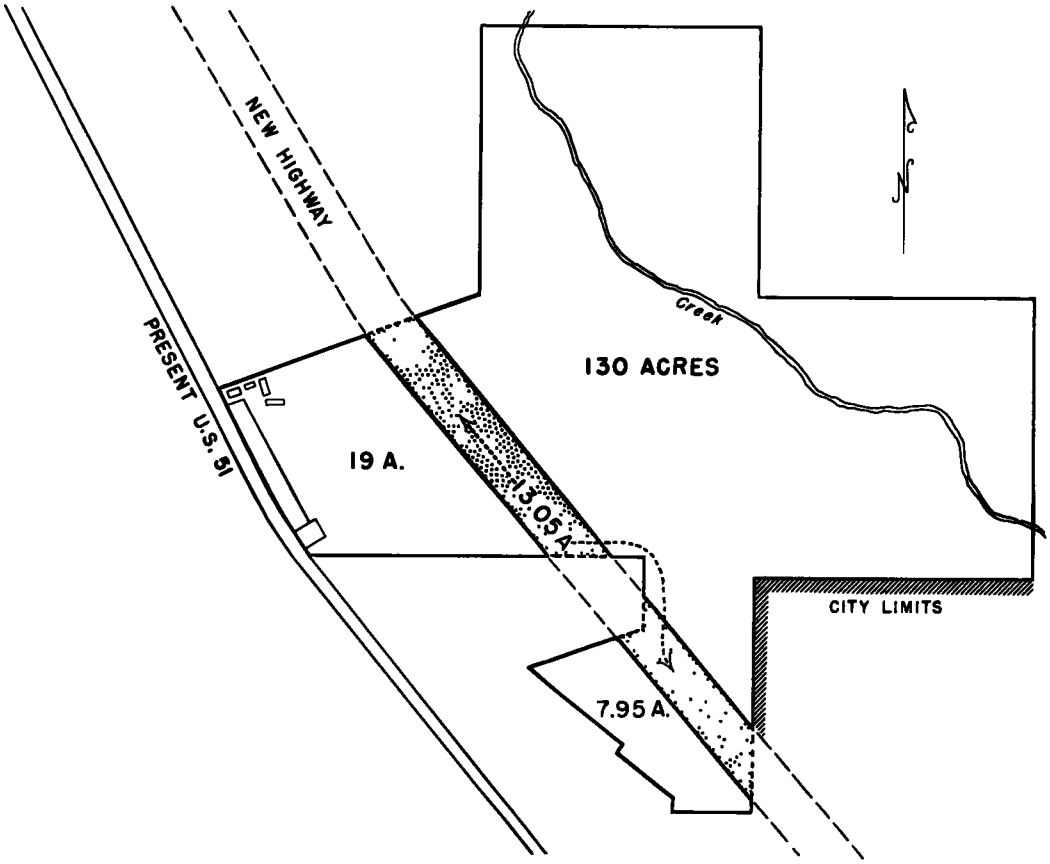

Figure 4. Wisconsin: Carazalla V. State, 71 N.W.(2d) 276, June 28, 1955.

The trial court awarded the Carazallas $14,000, which the jury considered to be the difference between the fair market value of the farm before the taking and the fair market value after the taking. The county and the state appealed the verdict and in a decision handed down on May 3, 1955, the state supreme court upheld the verdict of the lower court. In so doing, the high court held that the $14,000 award was not excessive where land, located close to a large city, was divided by a new highway into three noncontiguous parcels thereby reducing commercial value as well as value for farming purposes (Carazalla v. State, 70 N. W. (2d) 208, reversed on rehearing as indicated above).

The state and county argued that the trial court had erred in refusing to give the jury their requested instruction to the effect that the jury was to disregard any testimony relating to decrease in value of the portion of the farm which remained after the taking as a result of destruction of its value for commercial purposes. The court (before

rehearing), however, held that the fact that no part of the Carazallas' farm was devoted to commercial use at the time of taking did not render the admission of such testimony improper, since because of the proximity of the property to the city, it was reasonable to infer from the evidence that the land might be put to commercial use in the near future.

The state and county also argued that diversion of traffic was not a proper item of damages in condemnation proceedings resulting in a partial taking, citing decisions from other jurisdictions to this effect. The court (before rehearing) pointed out that these cases were rendered in jurisdictions which did not follow the Wisconsin rule that general benefits resulting from an improvement, in the case of a partial taking, were to be offset against damages recoverable by the landowner. The high court was of the opinion that the trial court's statement, as quoted below, correctly stated the law on the point at issue:

> Counsel on both sides conceded that when a strip of land is taken for highway purposes, and the construction of the new highway adds to the value of the parcel of land remaining after the taking, that the benefits or increased value because of highway, should be deducted in computing the damages which should be awarded to the owner. If such benefits are to be considered in fixing the value of the property after the taking, then in all fairness, it seems that the damages sustained by the owner because of the relocation of the highway upon his property should also be taken into consideration. In other words, if the owner is to be charged for the improvement to his property by the construction of the road on one side of his land he should be compensated for the damages sustained by him on account of the diversion of all or a part of the traffic from the highway abutting the other side of his property. After all, the questions to be determined by the jury are: "What was the fair market value of the property before the taking?" and "What was the fair market value of the property after the taking?" and any evidence that would help the jury in arriving at a fair and just answer to these questions should be admitted in evidence.

On a rehearing of the case, the state supreme court reversed its previous judgment, holding that refusal to give condemnors' requested instruction that all evidence of loss of value for commercial purposes due to making the relocated highway a controlled-access highway should be disregarded was prejudicial error (Carazalla v. State of Wisconsin, 71 N.W. (2d) 276, June 28, 1955).

In connection with the rehearing, briefs were submitted by the State Attorney General and the American Automobile Association, "amicus curiae," stressing the argument that any loss of commercial value to the property owners' remaining lands was due to the exercise of the state's police power and not to a taking by eminent domain. The court found substantiation for this argument in cited law review articles[20], the authors of which agreed that the limiting of access to a public highway through governmental action results from the exercise of the police power, and that in the case of a newly laid or relocated highway, where no prior right of access existed on the part of the abutting landowners, such abutting landowners were not entitled to compensation. The court also cited the Oregon case of State v. Burk, 265 P. (2d) 783, 1954, which involved a partial taking of land for the relocation of a highway on which access was to be controlled. The Oregon court held that no damages were recoverable for any deprivation of easement of access because the landowners never possessed such an easement as to the newly located highway.

The present court stated that in its original opinion it had 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 were not recoverable. The reason for this lack of perception, continued the court, was that the institution of the condemnation proceedings and the designation of the relocated highway as a controlled-access highway were so interwoven that the two were considered to be an inseparable whole when actually they constituted two separate and distinct acts.

Although any decrease in the value of the portion of the Carazalla farm remaining after the taking, as a result of destruction of its value for commercial purposes, the court went on to say, might ordinarily be considered in determining compensation for land taken, such rule was inapplicable where moving traffic would have had suitable ingress to and egress from the owners' lands abutting the relocated highway but for the

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[20]Clarke, the Limited-Access Highway, 27 Wash L. Rev. 111, 121 (1952), Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 Mo L.Rev 19 (1948), Freeways and the Rights of Abutting Owners, 3 Stanford L Rev 298(1951

fact that the state's police power had been exercised to prohibit this by making the relocated highway a controlled-access highway.

The court remanded the case with directions for a new trial consistent with its final opinion.[21]

Additionally, the Ohio Supreme Court took occasion, in a decision pertaining to the right of the state highway department to convert an existing highway into a controlled-access facility, to point out that an abutting property owner acquired no easement or right of access to a relocated portion of a highway merely by reason of the fact that his property abutted thereon.[22]

Regulation of Access Under the Police Power

In the Carazalla case summarized above, the court concluded that the limiting of access to a public highway through governmental action is based upon the exercise of the police power, and that in the case of a newly laid out or relocated highway, where no prior right of access existed, an abutting landowner was not entitled to compensation for access rights.

There is an increasing tendency to distinguish between the taking of access rights under the power of eminent domain, and the regulation of access rights under the police power. This is well illustrated in a paper presented at the open meeting of the Committee on Land Acquisition during the Annual Meeting of the Highway Research Board in January 1956. In this paper, "Regulation of Access vs. Control of Access in Oklahoma," (See page 55) LeRoy Powers, Chief Counsel of the Oklahoma Department of Highways, discusses the distinction between "regulation" and "control" of access and and the practical application of the principles involved in his state. The state's experience in regulating access to belt highways or bypasses being constructed in the vicinity of Tulsa and Oklahoma City should prove extremely helpful to other states with similar problems.

Police power controls were also the subject in part of a paper presented by Adolf Feifarek, Research Assistant at the University of Wisconsin Law School. Feifarek's paper, "Administration of Highway Protection Laws," outlines his findings in a study of highway protection laws, court decisions, attorney generals' opinions, etc. under which the Wisconsin State Highway Commission operates. Much of Feifarek's paper is taken up with the Carazalla case,[23] with its emphasis on the use of the police power to regulate access, and its implications concerning the expressway program. Feifarek, however, also devotes a part of his paper to other police power controls such as zoning, driveway control, etc. This study of highway protection laws will no doubt be of great assistance to the Wisconsin Highway Commission in its administration of the state's highway program, and may set a pattern for similar studies in other states. The Committee hopes that a report on the completed project can be presented at a future meeting. Feifarek's paper is included in full in this bulletin.

Limiting Access to Existing Highways

One other paper presented at the open meeting of the committee stressed the distinction between limiting access via eminent domain versus limiting access through the police power. This is a paper presented by William E. Duhaime, of McAllister, Duncan and Brophy, Oregon lawyers, under the title "Limiting Access to Existing Highways." Duhaime has done considerable legal research on his subject, and the results of his study should prove very helpful to anyone concerned with the problem of controlling highway access. (See page 76)

The authority of the Ohio State highway department to convert an existing highway into a controlled-access facility was upheld by the State Supreme Court in a decision handed down on June 15, 1955 (Rothwell v. Linzell, 127 N. E. (2d) 524).

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[21] See Memorandum 84, December 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 303

[22] Rothwell v. Linzell, 127 N.E. (2d) 524, June 15, 1955.

[23] See page 27.

Abutting property owners on US 40 in Madison County brought action to enjoin the director of highways from taking access rights to the highway. The property owners asked that if such rights might be taken under existing law, then the director be enjoined from taking access rights "without first providing said abutting property owners with reasonable access in the nature of 'service highways' as required by the terms of the statute." The Common Pleas Court entered judgment in favor of the landowners and the judgment was affirmed by the Court of Appeals.

The portion of US 40 in Madison County had been largely reconstructed as a divided four-lane highway. In 1950, the director designated the Madison County portion of the highway from the west limits of West Jefferson to the Clark County line, a distance of 13.58 miles, as a controlled-access highway, acting under authority of Section 1178-21 of the Ohio General Code, which authorized him to establish controlled-access highways in the manner in which he was authorized to establish conventional type highways (See Figure 5).

The property owners contended that the statutes did not authorize the director to change a short, isolated section of an ordinary state road into a controlled-access highway. The court remarked that the strip of highway in controversy was neither "isolated" nor a section of "an ordinary state road." Nor did the court find anything in the statutes to indicate that the shortness of the section was an impediment to its establishment as a controlled-access highway or a part of such a highway. Furthermore, the court found no justification in the landowners' contention that the section involved in the instant case was not being incorporated into an existing or projected controlled-access highway. The record disclosed that over 55 of the 227 miles of US 40 in Ohio had already been designated as controlled-access. Section 1178-21 of the General Code clearly contemplated that "an existing highway in whole or part" might be "designated as, or included within, a controlled access highway."

The landowners argued that the director had no authority to designate this section of road as a controlled-access highway because it was not "especially designed for through traffic," in accordance with the definition found in the statutes. The court stated that considerable weight should be given to the administrative determination of the director. The burden of proving that this section of road was not especially designed for through traffic rested with the property owners.

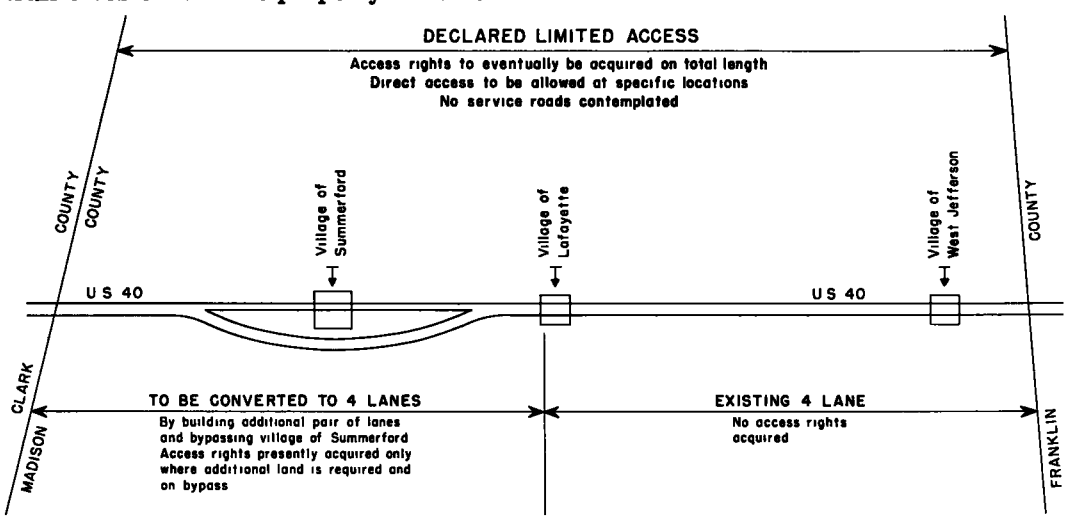

Figure 5. Ohio: Rothwell v. Linzell, N.E. (2d) 524, June 15, 1955.

The court found the argument that the section of road in controversy was not originally especially designed as a controlled-access highway without significance, since the original design was at least as remote as 1837. In the court's opinion, the mere fact that a highway was designed for use by abutters and local traffic was not inconsistent with a conclusion that such highway was especially designed for through traffic. The

court took judicial notice of the fact that there was very little four-lane divided highway mileage in Ohio and that highway mileage, at least where it now existed in rural areas, was almost invariably part of a highway clearly and obviously designed principally and especially for through traffic.

At this point the court took occasion to differentiate between the rights of an abutting owner when an existing highway was converted to an expressway and his rights to an expressway constructed on new location. In the court's opinion under the Ohio statute (Pages Ohio Gen. Code Ann., Sec. 1178.21) the mere designation of an existing highway as a controlled-access highway did not deprive the abutting owner of the easement or right of access that he theretofore had. ("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 by condemnation.")

However, with respect to a newly located portion of controlled-access highway, the court believed the statute prevented acquisition by an abutting property owner of an easement or right of access to the relocated portion merely by reason of the fact that his property abutted on such relocated portion. ("A 'limited-access highway' or 'freeway' is a highway especially designed for through traffic and over which abutting property owners have no easement or right of access by reason of the fact that their property abuts upon such highway, and access to which may be allowed only at highway intersections designated by the director.")

Another point raised by the landowners was that under the provision quoted directly above, the director must deny access to the expressway except at designated intersections. The court thought this provision merely authorized the director to so deny access. The extent to which he exercised such authority was left to his discretion. Similarly, the director's authority to construct "service highways" was not mandatory, but permissive.

A final point raised by the property owners concerned the right of the director of highways to acquire access rights from some abutting owners while others were permitted to have private driveways, and still others had no access rights taken from portions of their property. Additionally, owners of property on the south side of the portion of US 40 in question still retained all access rights. The complaining landowners claimed that if the statute permitted this, it violated the equal protection clauses of the state and federal constitutions.

The court pointed out that property rights were being taken pursuant to an exercise of the state's right of eminent domain for the public use and the public welfare and in exchange for full compensation. The complaining property owners could not, therefore, rely on the ordinary limitations on the exercise of the right of eminent domain. The Ohio constitution provided that "private property," such as access rights, "shall ever be held... subservient to the public welfare." In effect, said the court, an owner of property held title to that property subject to a perpetual optional right of his government to acquire that property for public use on the payment of full compensation in money therefor.

The court added that if the complaint that the director did not take access rights from other abutting property owners was well founded, it might possibly justify other legal proceedings to require the director to so act. However, the mere fact, if it was a fact, that the director had failed to perform some of his duties was no reason for enjoining him from performing other duties that he was undertaking to perform.

The supreme court reversed the decision of the court of appeals and rendered final judgment for the director of highways.[24]

Impairment of Access

In a decision handed down on July 20, 1954, the Supreme Judicial Court of Massachusetts held that a landowner was entitled to compensation for any impairment or

[24] See Memorandum 83, November 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 301.

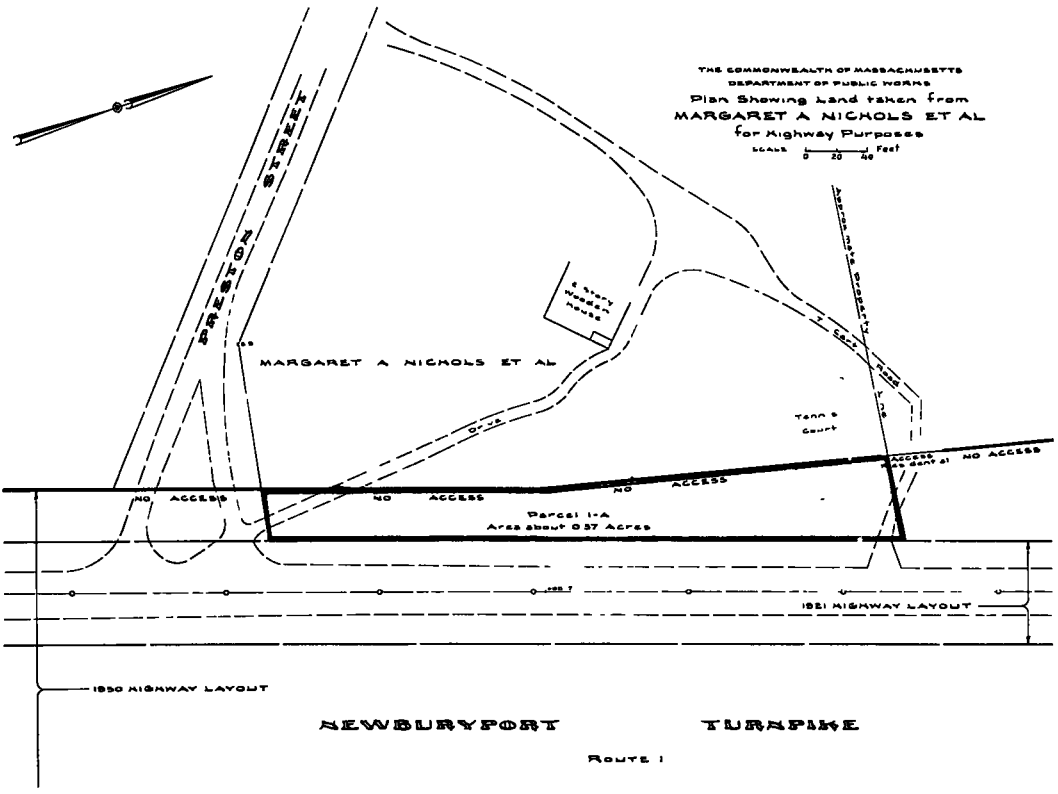

Figure 6.

deprivation of access which affected the value of the property, even though the owner retained indirect access to the highway (Nichols et al. v. Commonwealth, 121 N. E. (2d)56).

Nichols et al. were the owners of a parcel of land comprising approximately six acres with a frontage of approximately 410 feet on the Newburyport Turnpike to which they had direct access. Approximately 0. 37 of an acre was taken by the Department of Public Works in connection with the establishment of a new location for the turnpike (See Figure 6). It will be noted that the landowners had indirect access to the new highway by way of Preston Street after the taking.

The Superior Court of Essex County excluded certain evidence as to this new means of access to which exclusion the landowners objected, and the case was appealed to the Supreme Judicial Court. The landowners also took exception to parts of the trial court's charge to the jury. The evidence excluded involved the distance which the landowner must travel to reach the turnpike by the new access. The judge instructed the jury to the effect that whether or not there was access was the only legal question involved. Legally it made no difference whether the means of access was convenient or inconvenient. The high court held that the evidence was erroneously excluded, even though there was evidence that the landowners had indirect access to the new highway.

Massachusetts law provides that if a controlled-access highway is laid out in whole or in part in the location of an existing public way, the owners of land abutting upon such existing public way shall be entitled to recover damages for the taking of or injury to their easements of access to such highway (General Laws of Massachusetts, Ch. 81, Sec. 7C). The law further provides that damages for property taken shall be fixed at the value thereof before the taking, and in case only part of a parcel is taken, damages for injury to the part not taken, caused by the taking or by the public improvement for which the taking is made (General Laws of Massachusetts, Ch. 79, Sec. 12).

The high court interpreted these provisions as meaning that any impairment or de-

privation of access which an owner formerly had to a public highway might so affect the value of the remainder of the land not taken as to be compensable.

In considering the provision of Ch. 79, Sec. 12C, the court cited a previous case, (United States Gypsum Co. v. Mystic River Bridge Authority, 106 N. E. (2d) 677, 1952) in which the court said:

"The Legislature, however, is not limited in providing compensation to damages which the land-owner is entitled to receive as a matter of constitutional right but may extend compensation to instances where an exercise of eminent domain would result in a real hardship to one whose property has been damaged or injured if he were deprived of compensation." Manifestly, the present court stated, this was what the Legislature intended to do and did do by the enactment of Ch. 81, Sec. 7C.

The high court concluded that the trial court erred in excluding evidence which bore upon the impairment of an injury to the landowners' former access to the highway.[25]

Service Facilities on Toll Roads

In connection with construction of the Garden State Parkway, the New Jersey Highway Authority planned to construct service areas at points which had been zoned by the Town of Bloomfield for residential purposes. The town asked for an injunction and a declaration to the effect that the authority was subject to local zoning and building regulations in the erection of restaurants and gasoline filling stations within the territorial limits of the town.

The New Jersey Supreme Court, in a decision handed down on April 25, 1955, (Bloomfield v. New Jersey Highway Authority, 113 A. (2d) 658), stated that there was no doubt whatever as to the power of the legislature to immunize its public authorities from the provisions of local zoning and building restrictions, citing previous decisions to substantiate this opinion. The only question remaining, therefore, was whether the legislature contemplated that the New Jersey Highway Authority would be subject to such requirements. The court found nothing in the pertinent statute (Laws of 1952, Chapter 16) to indicate that such was the legislative intent.

The Town of Bloomfield contended that the authority was not the alter ego of the state, and that its service areas constituted proprietary rather than governmental functions. Consequently the authority was not entitled to the immunity from local regulations which the town acknowledged ordinarily extended to operations by the state itself and by its agencies engaged in governmental functions.

The court, however, cited a previous decision (Behnke v. New Jersey Highway Authority, 97 A. (2d) 647, 1953) where the parkway was described as a state project for a public use which had, for administrative reasons, been entrusted to an autonomous body created by the state. Operations of the 165-mile controlled-access highway itself, as a revenue-financed facility, was admittedly a proper governmental function, and the various subordinate operations (including the service areas) were merely incidental thereto, and appropriate and necessary for the satisfactory fulfillment of the social objectives. In the court's opinion, it did not matter whether these subordinate operations, considered alone, crossed the "shadowy line between governmental and proprietary functions" for, in either event, they constituted a proper public use.

The court pointed out that the need for new highway construction had been expressly recognized by the Federal Government and the various states. Serious local opposition had developed along the routes of construction of needed expressways in New Jersey and in other states. The court believed that although these objections were understandable and the landowners were entitled to sympathetic consideration, individual property rights must in the public interest give way to the greater good for the greater number. Where the highway authorities had, within statutory delegations of power, conscientiously selected the route of the highway and the sites of its incidental facilities, it was highly proper that the courts not intrude.

No suggestion had been made that in locating the route of the Garden State Parkway,

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[25]See Memorandum 79, May 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 280

through residential areas of Bloomfield and other communities, the authority was obliged to comply with local zoning restrictions. The court found nothing whatever to indicate that the parkway's service facilities were to be differentiated from its traveled right-of-way. The dominating policy consideration as well as the legislative history and terminology satisfied the court that the Garden State Parkway legislation was intended to and did immunize the authority's proper operations from the restrictive provisions of the local zoning ordinances of Bloomfield and the other communities along the parkway's route.

In this case, the chief justice of the New Jersey Supreme Court filed a dissenting opinion in which he was joined by one other justice. The chief justice agreed that the highway authority had the power to condemn the land in question for the construction of a service area. However, he continued, it did not follow that all property validly condemned was exempt from municipal regulation. "Regardless of how desirable such services may be for the convenience of travelers upon the parkway, the furnishing of gasoline, food and drink constitutes a proprietary function." Operation of the restaurants and gasoline stations in question would be carried on as a profit-making enterprise by private corporations or individuals who were to lease the property from the authority. Clearly, said the dissenting justice, their operations were subject to general municipal regulation such as sanitation and the police power generally, including zoning ordinances.

Nor, continued the justice, could the legislative declaration that the operation and maintenance of such projects constituted the performance of "an essential governmental function" support the view of the majority. The legislature could not change the nature of an enterprise merely by labelling it as an essential governmental activity when patently it did not fall within that category. The dissenting justice concluded that the erection of the service areas in question was subject to local zoning ordinances.[26]

Access Rights to State Parkways

In a decision handed down on July 12, 1955, the New York Court of Claims held that the public had no direct right of access to a State Parkway, and refused an award of consequential damages to owners of property who claimed the substitute access provided them upon completion of the Lakeshore Parkway was inadequate.

The property involved in this case was located in Monroe County, New York, and was originally owned by one Fred T. Hutchins. Part of the property was subdivided in 1934. In 1935, the county acquired some of the remainder of Hutchins' land, south of the subdivision, for the Lakeshore Parkway, to be constructed by the Genesee State Park Commission. Included in the deed was a 32-foot reservation covering a right-of-way and easement connecting Hutchins' land north of the parkway with the parkway. In the event of the discontinuance of the use of this easement for a period of two years or more, because of such access no longer being necessary, such easement of access was to terminate.

Claimants in this case were owners of property located in the subdivision. Deeds to the property involved granted the owners a right-of-way or easement over a roadway running from the North Hamlin Road across Hutchins' farm and connecting with Summer Haven Drive, such right-of-way to continue until such time as the Lake Ontario State Parkway or boulevard was constructed and open to traffic, at which time the part of the right-of-way easement south of the Parkway or boulevard was to terminate.

Construction of the Parkway commenced in 1949, but access of the Summer Haven property owners was not cut off until 1951, at which time there was substituted therefor a frontage road from the subdivision to an existing paved road and thence to the Hamlin-Parma Town Line Road. Since the parkway had not been constructed and was not open to traffic, the Court of Claims of New York considered that the existing easements has been appropriated, and since they constituted property, just compensation must be paid therefor. However, the court continued, in estimating their reasonable market value, they could not be considered separately, but must be considered a part

[26] See Memorandum 81, August 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 291.

of the property which they served. In making an award for easements taken, there would be no compensation for the easements themselves, beyond a nominal sum and the right of claimants to recover would rest chiefly upon proof of consequential damages; in other words, the injury to the land to which the easement was appurtenant.

The easements, or rights-of-way appropriated, together with the easement over the right-of-way on the Hutchins' lands south of the Parkway, did afford the claimants access to and from a public highway, the North Hamlin Road. However, this easement over the Hutchins' Farm to the south of the Parkway was to terminate upon construction of the Parkway. Claimants apparently expected that when the Parkway was opened they would have access thereto. But the court pointed out the distinction between the rights of the public in and to public highways and its rights in and to a road running through a parkway which was part of the State's Parkway System, citing a previous case (Board of Supervisors of Monroe County v. Wilkin, 22 N. Y. S. (2d) 465, 466, 1940) to the effect that the right to have a highway kept open for access as well as for travel was not applicable to a parkway.

Accordingly, continued the court, the easements affording access to the Parkway, had they not been appropriated would not have been as suitable as the access afforded claimants by the frontage road provided. The landowners claimed that the substitute access road was inadequate and they therefore were entitled to damages. The court could not agree with this contention. The claimants had been provided with suitable means of ingress and egress and the state had thereby discharged its obligation to them.

The court concluded that there had been no consequential damage to the remaining unappropriated lands of the claimants, and awarded nominal damages in the sum of $1 to each claimant (Gilmore v. State, 143 N. Y. S. (2d) 873, July 12, 1955).

Land Acquisition for Expressways

A request for an injunction to halt the condemnation, by the City of Atlanta, of land for the North-South Expressway was denied by the Georgia Supreme Court in a decision handed down on November 29, 1955 (Marist Society of Georgia v. City of Atlanta, 90 S. E. (2d) 564). The right-of-way which the city sought to condemn was a part of a highway being constructed with federal and state funds pursuant to a contract between the State Highway Department and the Commissioner of Public Roads.

The contention was made that the city had not been granted legislative authority to condemn property for a state highway. This argument, the court declared, was based upon statutes enacted and court decisions handed down prior to an act approved in 1955 (Georgia Laws of 1955, pp. 559-564). The 1955 law provided, among other things, that any municipality, in cooperation with any federal, state or local agency, was authorized to plan, designate, and establish, limited access highways. The 1955 act also authorized municipalities to acquire private or public property for such highways by purchase or condemnation "in the same manner as such governmental units are now or may hereafter be authorized by law to acquire such property." Additionally the charter of the City of Atlanta had been construed to authorize the city to condemn property for public streets.

It was further contended that the city was proceeding illegally because of a charter provision to the effect that the city might decline to accept property sought to be condemned should the award be deemed too high or unreasonable by the general council. However, said the court, in the present case the resolution by the mayor and council authorizing the condemnation of the property described did not undertake to limit or restrict the condemnation, or limit it to final approval by the city. On the contrary, the resolution provided specifically that the amount of the final award was to be paid from a designated fund.

The court also held, in answer to objections raised in connection with the city's action, that the city was not attempting to condemn more property than provided by the resolution; the resolution was not insufficient for want of a valid description of the property, since it referred to a copy of an attached plat; the city was not attempting to acquire a greater interest in the property than was authorized by law, since the 1955 act provided that property rights were to be acquired in fee simple; the 1955 act did not

require negotiation with property owners prior to condemnation; etc.

The request for an injunction was denied.

Expressways and Urban Planning

"In the past, commercial developments abutting highways have not only destroyed the landscape but they have also destroyed the highway as a travelway. By denying access to abutting properties except at specially selected and designed access facilities or at interchanges, it is possible to relate expressways to land use in a way that is consistent with the primary function of the highway." In these words, Joseph L. Intermaggio, Chief Planner of the Arlington, Virginia, Office of Planning, clearly states the problem and the ideal solution in his paper, "Expressways," presented at the open meeting of the Committee on Land Acquisition during the Annual Meeting of the Highway Research Board in January 1956.

Intermaggio makes a plea for coordination among highway authorities, planning agencies, individuals, business and industry, in planning our expressways in order to achieve the most beneficial result for the people who live in the communities and use the travelways in their daily lives. His paper is included in full in this report.

Economic Impact of Expressways

An increasing number of state highway departments and other public and private organizations made plans for or actually started studies of the economic effect of expressways on urban or rural communities, during the year. Reports of two new studies undertaken by the California Division of Highways were published during the year in CALIFORNIA HIGHWAYS AND PUBLIC WORKS. "Templeton Bypass, Removal of Through Traffic Helps Farm Community," appeared in the July-August 1955 issue, and "Camarillo Study, Greatest Economic Gains Along Old Highway Route," was included in the September-October 1955 issue. The Texas highway department, as mentioned earlier, engaged in bringing its economic study of the Gulf Freeway up to date, and expects to complete during 1956, a report covering the period 1950 to 1955. Several of the states are assembling data pertaining to the economic effects of bypass highways, in some cases with the aid of highway planning survey funds.

The committee has rendered technical assistance in a number of these studies, in the belief that the facts thus developed are of great value in assisting those affected by the expressway program to more accurately evaluate economic effects to be expected. In order to assist in the planning of such studies, a short memorandum suggesting methods of approach has been prepared and is available upon request.

REGULATION OF THE ROADSIDE

One of the most difficult problems facing highway authorities today is that of preventing unregulated development along the highway corridors. Many highways have lost their operating effectiveness because of this ribbon development. Up to this time it has been rather difficult to obtain desirable statutory authority in this field, due in part at least to lack of understanding on the part of the public as to the purpose and meaning of controls, such as the establishment of zoned districts for highway service facilities, driveway regulations, setbacks, and related matters. These are police power controls, and if effectively carried out will benefit the abutting landowner as well as the general public. Effective control of the roadside can preserve the efficiency of an existing highway and prevent the necessity of relocations with their attendant loss of business to roadside facilities due to diversion of traffic.

Generally, the courts will uphold police power controls such as those mentioned above, if reasonable in conception and application. But if the imposition of such controls bears no real relation to the public welfare, or imposes undue hardship on the abutting landowner, they may not withstand a court test, as indicated in the following pages.

Setbacks in Zoning Ordinances

Decisions handed town in two states, Florida and New York, during 1955 illustrated

the tendency of courts to insist that the application of police power controls be reasonable.

Florida

The owners of property abutting on N. W. 7th Avenue and N. W. 106th Street in Miami, as shown in Figure 7, applied for a permit to construct a hospital. The permit was refused for several reasons and the owners brought suit attacking the county zoning and setback regulation as unreasonable and confiscatory. The Circuit Court for Dade County sustained the action of the county and an appeal was taken to the State Supreme Court.

The high court held that the zoning regulation was valid as such and that the property in question did not meet the requirements for a hospital. As noted in the sketch, 100 feet of the property was in a BU-2A zone in which hospitals were allowed, but the remaining 183 feet was classified as RU-2, residential. No hospital could be built within 100 feet of any RU-2 zone, nor within 50 feet of any property under a different ownership.

The court, however, refused to approve application of the setback provision in the zoning ordinance as attempted by the county. This provision required that there be a 25-foot setback from the property line abutting a public way. The court considered this a reasonable requirement but took exception to the method used by the county in its application. Zoning officials construed the south line of the property as the centerline of the street, or more correctly, as the court said, the centerline of a proposed street to be improved at some indefinite date in the future. The record indicated that the property on the south projected into an area that might sometime be 106th Street, but the court found no dedicated public way.

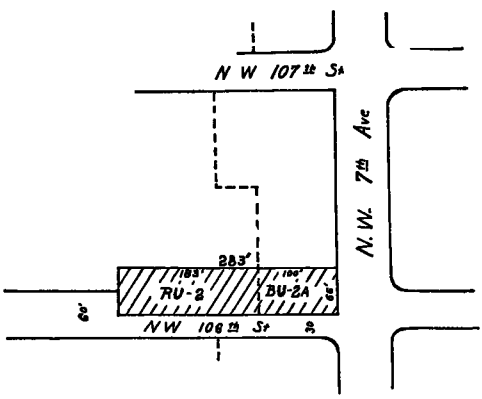

Figure 7. Mayer v. Dade County, Florida, 82 So. (2d) 513.

The court thought it clear from the record that the county had singled out this particular parcel for an unusual application of its requirement. The effect of this application in this instance was that the landowners were actually being required to set back some 40 feet from their south property line instead of 25 feet as required by the wording of the regulation itself.

The court was of the opinion that when a setback regulation was peculiarly applied to a particular parcel in a fashion different from the application thereof to other property similarly conditioned, such application might amount to an unlawful taking without compensation, contrary to the letter of Section 12 of the Declaration of Rights of the Florida Constitution. Such was the effect of the application of the setback requirement in this case.

In conclusion, the Supreme Court held that the 25-foot setback on the south should be measured from the south line of the property and not from some imaginary street boundary which was anticipated for future development (Mayer v. Dade County, 82 So. (2d) 513, September 21, 1955).

New York

In a decision handed down on April 18, 1955, a State Supreme Court held that refusal of the Board of Appeals of the Village of Malverne to grant a special exception to a minimum setback provision, without stating any reason therefor, was arbitrary, capricious and an abuse of discretion (Goldberg v. Mackreth, 142 N. Y. S. (2d) 281).

The setback provision in question required a minimum setback for corner lots of 25 feet from each street, provided that "if at the time this ordinance becomes effective, any corner lot is held in a single and separate ownership with a width of less than sixty (60) feet, the depth of the front yard on one side of the lot may be decreased when auth-

orized as a special exception by the Board of Appeals as hereinafter provided."

The owner of the property in question applied for permission to erect a dwelling pursuant to the special exception clause, but his application was denied by the Board of Appeals, no reason for such denial being given.

The property in question, a corner lot 42 x 150 feet, had been in single continuous ownership since prior to passage of the ordinance. The Board of Appeals stressed the fact that the owner purchased the property with full knowledge of the zoning restrictions and was therefore the victim of a self-imposed hardship. The court, however, pointed out that this was not a case where a variance was sought because of unnecessary hardship. Rather, the landowner sought relief through the "special exception" proviso in the ordinance. According to the court, an exception in a zoning ordinance is one allowable where facts and conditions set forth in the ordinance itself, as those upon which it may be permitted, are found by the board to exist. The difference between a special exception and a variance is that in the former case it is not necessary for the applicant to show hardship, while in the latter it is.

From the dimensions of the plot in this particular case, it was apparent that conformity with the usual setback provisions would require a building to be no wider than 11 feet. The absurdity of such a result, said the court, was obvious. Refusal to grant the exception in a situation falling squarely within the provision of the ordinance was, in the court's opinion, arbitrary, capricious and an abuse of discretion.

The Supreme Court annulled the determination of the Board of Appeals and granted a permit to the landowner to erect his dwelling under the "special exception" provision of the ordinance.

Driveway Regulation

An attempt by the Town of Littleton, Colorado, to impose an annual license or permit fee on the owner of property having a curb cut was stricken down by the State Supreme Court during the past year (Heckendorf v. Town of Littleton, 286 P. (2d) 615, July 11, 1955).

Heckenforf was convicted of violating a town ordinance for failure to obtain a license and pay an annual fee of $82 for a curb cut which he used for commercial purposes in a commercial or manufacturing zone. The ordinance in question was enacted ostensibly "for the purpose of regulating streets, *** the use and manner of motor vehicles entering and leaving private property from and to the public streets and avenues; the flow of vehicular traffic along the streets and avenues; the use of vehicular parking space or spaces along the curb lines of streets and avenues." An annual fee of $18 for each curb cut of 12 feet or less, and $2 per foot for cuts in excess thereof was required. The county court sustained the conviction and Heckendorf appealed.

The property owner alleged first that the town had no power to regulate curb cuts by license. An examination of existing state statutes, however, led the court to believe that the town did have the right to regulate curb cuts under its police power. The court also held that the town's action did not constitute an attempt to deprive him of ingress and egress, as alleged, but was merely a purported attempt to regulate the same under the police power.

However, the court did find that the ordinance was not a regulatory action. There was no supervision or regulatory action by the town in enforcing the ordinance. The curb cut in question was in existence prior to enactment of the ordinance. Town authorities did not inspect the curb cut other than to measure it, estimate the bill for an annual license fee and bill the property owner for the amount. No consideration was given the type, class or character of the business affected thereby as to whether said type of business was subject to the police power. Authorities were in agreement that certain types of business were subject to police regulations and a license fee in their operation because of the inherent nature of the business, but a tax solely upon the right of ingress and egress was invalid.

Where regulation or restraint was almost negligible, if not entirely so, said the court, the levy ceased to be a license fee and became in reality a revenue-raising measure. Previous decisions of the court had held that even though a license fee might

incidentally raise revenue, there must be some reasonable resemblance between the fee and the cost of services performed in the matter of regulation. The court concluded that the fee or charge involved was a tax on ingress and egress and not a regulatory fee and was therefore unconstitutional.

The Supreme Court reversed the judgment of the lower court and ordered the action dismissed.

A number of state highway departments have been given legal authority to regulate ingress and egress to abutting property by means of the permit system. Driveway regulation by means of the permit system is provided for in a recent South Carolina law. Pertinent provisions are as follows:

Section 7. (a) On all highways or sections of highways in the State Highway Primary System not designated as controlled-access facilities, it shall be unlawful for any person to open up, construct or reconstruct any private driveway or side road entrance or exist thereto which is intended for use by any vehicles in entering or leaving such highway unless a permit for such driveway or side road entrance or exit shall have been obtained from the State Highway Department.

(b) The Department may issue permits for driveways and side road entrances or exits as referred to in this section, and include in such permits such requirements and restrictions for design and location of the driveways and side road entrances or exits as may be deemed necessary by the Department to avoid creating a hazard to the traveling public. Such requirements and restrictions may limit the width of such driveways and side road entrances and exits and restrict the location of same. The Department may deny any request for any permit for any driveway, side road entrance or exit which in the judgment of the Department may create a hazard to the traveling public. Reasonable frontage roads or other access roads shall be provided to serve any property for which a permit for a direct entrance thereto or exit therefrom has been denied, and the Department may construct such frontage roads as may be deemed necessary.

(c) Any such existing driveway or side road entrance or exit constructed prior to the effective date of this act and adjudged by the Department to be unsafe for the traveling public may be changed by the Department so as to eliminate any unsafe features, or closed or displaced by substitution therefor of another driveway or side road entrance or exit at such place or of such design as may be deemed safe, but no such existing side road or driveway may be closed unless other reasonable access to the highway is provided by a frontage road or otherwise.

(d) The Department may barricade, displace or otherwise close any side road or driveway entrance or exit constructed or maintained in violation of this section or of any of the provisions of any permit for the construction of same.

(e) Any abutting property owner or lessee may file an application within thirty days from a decision of the Department in the administration of this section for a hearing in the matter before a circuit judge at chambers or in open court, in the judicial circuit in which the property is located, and such court or judge is hereby vested with jurisdiction to set the matter for a hearing upon ten days' written notice to the Department of such hearing and thereupon to determine whether the action of the Department is in accordance with the provisions of law. The decision of the circuit judge may be appealed to the Supreme Court of South Carolina in the same manner as other appeals from the circuit courts.

Provided, however, that the above procedure shall be an alternative method of relief and shall in no wise abrogate or deny any property owners' rights as to relief under any existing law relating to the condemnation of property. (South Carolina New Laws, 1956, Page 17)

Gasoline Service Stations

In January 1955, The State Supreme Court of Connecticut handed down a decision upholding the action of a zoning board of appeals in refusing to grant a certificate of approval for a gasoline station because traffic conditions at the location selected were considered hazardous.

In 1946, the then owners of property located on Broad Street in the Town of Milford, Connecticut, obtained a certificate of approval of location for a gasoline filling station from the Zoning Board of Appeals. The certificate was not used. In 1952, a new owner of the property, unaware of the 1946 certificate, applied to the board for a certificate of approval, which application was denied. No appeal was taken. Subsequently, the property owner discovered that a certificate of approval had been issued in 1946, and on the basis of this certificate obtained from the commissioner of motor vehicles a license

to operate a service station on the premises. Thereupon, the Town of Milford instituted court action against the commissioner of motor vehicles.

The State Supreme Court held that denial of the certificate in 1952 operated to revoke the certificate granted in 1946, and that the commissioner of motor vehicles had no power to issue the license. (Town of Milford v. Commissioner of Motor Vehicles, 96 A. (2d) 806, 1953).

In 1953 the owner of the property again applied to the zoning board for a certificate approving the premises for the sale of gasoline. The board refused to issue the certificate, whereupon the owner appealed to the court of common pleas. The court dismissed the appeal and the owner appealed to the State Supreme Court which upheld the action of the lower court. (Atlantic Refining Co. v. Zoning Board of Appeals, 111 A. (2d) 1, January 11, 1955).

The zoning board denied the application because it felt that traffic conditions at the proposed location were hazardous. The property had frontages on three streets and entrances and exits were proposed for all three. Evidence tended to show that traffic on the three streets was frequently congested and that many cars, in entering or leaving the gasoline station would have to cross traffic lanes. Furthermore, as pointed out in the previous case of Milford v. Commissioner of Motor Vehicles, the presence of the gasoline station in proximity to a public park might well provide a definite hazard for those seeking to enjoy the facilities of the park. The Supreme Court concluded that the board had not acted unreasonably in denying the application.

The refining company also contended that the board had mistaken the law when it concluded that it was precluded from granting the application because it had denied a similar application in 1952. The court brought out the fact that the zoning board might reverse itself if there had been a material change in circumstances. In this case, the board had not rested its denial solely upon the ground that it was bound by the earlier decision. It rested its decision on the ground that the location of a gasoline station at the site in question would be hazardous because of traffic conditions. The court considered this ground ample to support the board's decision.

Outdoor Advertising

An attempt by the Ohio Turnpike Commission to prevent the erection of billboards which would be visible from the turnpike, by appropriating easements covering the right to erect such billboards, was turned down by the State Supreme Court recently in the case of Ellis v. Ohio Turnpike Commission, 120 N. E. (2d) 719 (June 30, 1954).

In acquiring property for right-of-way for Ohio Turnpike Project No. 1, the turnpike commission sought also to appropriate the right to erect billboards, which would be visible from the turnpike, on the remaining lands of owners, a portion of whose property was needed for the right-of-way proper. The turnpike commission's action was questioned by two landowners, Ellis and Solether. The petition of Ellis was dismissed by the Court of Appeals for Lucas County. The Solether petition was held sufficient by the Court of Appeals for Wood County and the case remanded for further proceedings to determine whether: (1) the taking of such rights was reasonably necessary to the operation of the turnpike and (2) such rights were to be taken for a public purpose.

Both cases were appealed to the State Supreme Court where it was held that the turnpike commission did not have authority to deny owners of lands taken for construction of a turnpike the right to use remaining land for the erection and maintenance of outdoor advertising devices.

The Ohio Turnpike Commission has statutory authority, among other things, to "acquire, in the name of the state, by purchase or otherwise, on such terms and in such manner as it deems proper, such public or private lands, or parts thereof or rights therein, rights-of-way, property, rights, easements, and interests as it deems necessary for carrying out the purposes of the turnpike act." (Ohio Revised Code, Sec. 5537. 04(I). Under Section 5537. 06 of the code, the commission may acquire by appropriation any land, rights, rights-of-way, franchises, easements, or other property necessary or proper for the construction or the efficient operation of any turnpike project.

In its resolution appropriating the lands in issue, the turnpike commission stated

that among the rights and restrictions appropriated were "all rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster or other advertising device which would be visible from the travelway of Ohio Turnpike Project No. 1, and which is not now upon said lands."

The State Supreme Court found nothing in the statutes to indicate that express authority was given the commission under which it might by appropriation, deny the owner of lands taken for the construction of a turnpike the right to use his remaining lands for outdoor advertising devices. A previous case (Pontiac Improvement Co. v. Board of Commissioners, 135 N. E. 635, 1922) was cited to substantiate the present court's opinion. In the Pontiac case, the court held:

"...When it is sought to take the property of an individual under statutes granting such authority to corporations, subject to conditions specifically set forth, the protection of the constitutional guaranty of the right of private property requires that the powers granted by the Legislature be strictly pursued, and where the authority granted is to acquire a fee or lesser interest, the term "lesser interest" cannot be construed to mean authority to prescribe regulations from time to time as to the manner in which the property may be used or improved by the owner while he is in possession."

Further, even if it were conceded that existing statutory authority was sufficient to permit the turnpike commission to adopt such a resolution, the court was of the opinion that it was too indefinite and uncertain to be valid and enforceable. The word "visible," standing alone was vague and ambiguous. What might be visible to one person might not be visible to another. No standard was set up whereby the word might be accorded practical meaning and effect.

Although Section 5537. 23 of the Revised Code stated that the turnpike act should be liberally construed to effect the purposes of the same, the court did not believe such liberal constructions comprehended the appropriation of lands and uses thereof such as were here involved. "In the interests of safety and to insure an uncluttered view of the landscape," the court said, "the elimination of billboards and signs in proximity to a turnpike might be desirable but existing legislative authority to permit such elimination is lacking."

The court thus upheld the right of Ellis and Solether to erect outdoor advertising devices on their lands not taken for turnpike construction purposes.

In a separate opinion, one judge, while concurring in the court's judgment, held that the turnpike commission had sufficient authority to adopt resolutions of appropriation which would eliminate billboards and other advertising media in close proximity to a turnpike, which tended to affect safety of travel thereon. However, in the absence of specific legislative authority defining the authority of the turnpike commission relative thereto, the necessity of such appropriation must be clearly shown, and the appropriation resolution must be confined to reasonable and definite territorial limits. The advertising media to be eliminated must not include that which would not ordinarily distract the attention of a driver of a motor vehicle using a turnpike. The appropriation resolutions in the instant case, the judge held, were too indefinite and uncertain to be valid and enforceable.[27]

Another attempt to prevent the erection of billboards was invalidated by a Maryland court recently, although the circumstances in this case were widely dissimilar to those of the Ohio case.

When the Board of Municipal and Zoning Appeals of the City of Baltimore approved the erection of two billboards on an unimproved lot in a first commercial district in the city, objections were filed by nearby property owners who claimed that the billboards in question would have a detrimental effect on the surrounding property. The board's action was sustained by the Baltimore city court and by the court of appeals, which held that there was insufficient evidence that the billboards would be injurious to the public health, safety, security, welfare or morals (Gilmor v. Mayor and City Council of Baltimore, 109 Atl. (2d) 739, December 10, 1954).

The Baltimore city zoning ordinance permits billboards in first commercial districts

[27] See Memorandum 77, April 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 272

provided they are approved by the Board of Municipal and Zoning Appeals. At the required hearing on the present application, the protestants were asked whether they considered the signs injurious to health, safety, and morals. The reply was: "Everyone here knows the minute that sign goes up the standards of the neighborhood go down.... everyone knows an obnoxious sign of this kind in a neighborhood where people live pulls down values and living conditions and leads to slums which do produce these things of health and safety the law calls for."

The application had the required approval of the fire commissioner, the health commissioner and the traffic commission. The Board of Zoning Appeals had inspected the premises and found that the proposed signs "would not create hazards from fire or disease and would not menace the public health, safety, security or morals." Many commercial enterprises were located in proximity to the proposed site of the billboards.

A number of adjoining property owners intervened in the appeal to the Baltimore city court, but the court found the evidence insufficient to warrant disapproving the zoning board's action in approving the erection of the signs.

The court of appeals found nothing in the record to show that the protesting property owners came close to meeting the necessary requirements of overcoming the presumption that the Board of Zoning Appeals acted properly. There was no evidence whatever that the public health, safety, security, welfare, or morals would be adversely affected. The argument that the erection of a billboard in a first commercial use district, in which there were residences, would lead to slums and, in this way, in the future affect adversely the public health or safety, is an argument that billboards should not be permitted at all in a district in which there are residences or substantial and attractive businesses, although it is zoned first commercial. Whatever the merits of this argument, continued the court, it is one which should be addressed to the legislature or the Baltimore city council in an effort to have the law changed. As the law now stood, the argument was fanciful.

The court of appeals thus affirmed the order of the city court approving the action of the Board of Municipal and Zoning Appeals in granting the application for erection of the billboards in question.[28]

Abatement of Encroachments

Many of the state highway departments have legal authority to prohibit encroachments on the highway right-of-way. The difficulty lies in obtaining compliance with these provisions. Shortage of personnel in the highway departments makes it almost impossible to do the job without outside help. Unfortunately, in many instances the laws make inadequate, if any, provision for enforcement.

Recently, the situation in New Jersey became so acute that the state highway department determined to take positive action to enforce state laws pertaining to encroachments. Surveys were made and existing encroachments noted. Owners were requested to remove such encroachments by letter from the Deputy Attorney General assigned to the state highway department, and if no results were forthcoming, a follow-up letter was written, advising the offender that legal action would be taken if the encroachment was not abated "forthwith."

A report on the state's experience with this procedure was given at the open meeting of the committee by Alexander W. Muir, Director and Chief Engineer, Maintenance and Operation, New Jersey State Highway Department, under the title "Highway Encroachments in New Jersey." Muir reports that the department is well pleased with the results obtained so far. His paper, which is included in full in this bulletin, outlines the legal background in New Jersey and the various steps taken to carry out the program. He also includes several forms which are used, and which the department has found helpful. New Jersey is to be commended for making this attempt to abate encroachments of the highway right-of-way. The results so far obtained, as outlined by Muir, should encourage other highway departments to undertake similar enforcement programs.

[28]See Memorandum 78, April 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service Circular 278.

PARKING

At least nine states enacted laws in their 1955 legislative sessions improving methods or authorizing establishment of off-street parking facilities in municipalities.[29] Of particular significance are laws of Illinois, Kansas and South Dakota, providing for coordinated systems of parking facilities under which both curb and off-street accommodations may be integrated into a single chain of facilities. The Illinois law (H. B. 828) authorizes any county to construct and operate parking lots, garages, parking meters and other revenue producing facilities for the parking of motor vehicles. Such projects may be financed by bond issues to be amortized solely from facility revenues. Similar authority is granted to second class cities in Kansas (H. B. 75), and to municipalities in South Dakota (H. B. 612).

Authority to use on-street parking meter revenue to help finance the establishment of off-street facilities was granted to incorporated cities and towns in Missouri (H. B. 88), first-class cities in Nebrasha (L. B. 219) and municipalities in West Virginia (H. B. 266).

Nebraska also passed a law (L. B. 454) authorizing establishment of a parking authority by a city of the metropolitan class, which in fact applies only to the City of Omaha.

System Concept

The question of whether a city could pledge revenue from existing parking facilities to pay principal and interest on revenue bonds to finance the acquisition of off-street parking facilities, without submitting the issue to the electorate, was brought before the Florida courts during the past year. In a decision handed down on June 20, 1955, the Supreme Court of the state answered in the affirmative (Lynn v. City of Fort Lauderdale, 81 So. (2d) 511). The court also held that the city might obligate itself to maintain charges for parking facilities at specifically fixed minimum rates as long as the bonds were outstanding.

The City of Fort Lauderdale proposed to issue revenue bonds in the amount of $1,200,000, the money derived therefrom to be used for the following purposes: (a) to purchase sites for off-street parking areas; (b) to improve such sites and install meters; (c) to pay a balance of $45,000 due on existing off-street facilities; (d) to make improvements and repairs to existing parking meters; (e) to pay one year's interest on bonds during the period of preparation of the areas for use by the public; (f) to establish a contingency reserve fund to be used to pay fiscal agents and parking survey experts; (g) to defray other designated expenses.

For the repayment of the bond loan and interest, the city agreed to pledge all moneys realized from use of the new facilities are virtually all revenues presently being derived from existing on-street and off-street parking meters.

The State Supreme Court held that there was nothing unlawful in the financing plan adopted by the city. Since no ad valorem tax, or pledge of the city's credit was involved, it was not necessary to submit the plan to the electorate. A similar plan adopted by the City of Jacksonville had been upheld by the court in the case of Gate City Garage, Inc., v. City of Jacksonville, 66 So. (2d) 653 (1953).

Similarly, the question as to whether the city could obligate itself to fix and maintain reasonable fees and rental facilities throughout the life of the bonds appeared to have been answered in the affirmative in the case of State v. City of Miami Beach, 47 So. (2d) 865 (1950). Although no opinion on this particular point was given in the previous case, a concurring opinion made it clear that a similar pledge was involved. The concurring justice in that case observed that the record clearly indicated that the City of Miami Beach did not propose to go into the parking meter or parking facilities business for gain or profit, and he therefore could see no lawful objection to the city obligating itself to fix rates and collect charges from its parking facilities to meet the obligation of the bonds, so long as the revenues derived were used exclusively for retiring the bonds. This justice considered the city's purpose within the lawful exercise of the police power. The present court concluded that the City of Fort Lauderdale could lawfully obligate

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[29] Delaware, Florida, Illinois, Indiana, Kansas, Missouri, Nebraska, South Dakota and West Virginia.

itself to maintain charges for parking facilities at a specifically fixed minimum rate as long as the bonds were outstanding.

Authority to Condemn Land for Off-Street Parking Facilities

The authority of governmental agencies to acquire land for public parking facilities was challenged in the state courts of Florida and New Jersey during 1955, and in both cases such authority was upheld.

Florida: In 1952, the City of North Miami instituted condemnation proceedings to acquire certain property needed for off-street parking, including Parcel 6, a public square. The city's right to condemn Parcel 6 was challenged, but the trial court held that the taking was for a public purpose and necessity (Gorman Properties v. City of North Miami, 81 So. (2d) 524, June 22, 1955). The protesting landowners contended that compensation should be awarded for the loss of valuable interests incident to the diversion of the public square to a public parking area. The court, however, held that such interests were not compensable and that no award would be made therefor.

One of the landowners then asked for an injunction to restrain the city from going ahead with its plans to establish the off-street parking area. One of the lots owned by this particular landowner (Lot 19) adjoined the public square, and was originally included in the lands to be condemned. This lot was excluded from the condemnation proceeding in the pre-trial conference, but the owner was awarded a substantial sum for other properties taken.

The request for an injunction was turned down by the chancellor and the landowner appealed to the State Supreme Court. He claimed that he was entitled to have the public square remain as such so as to be available for the uses and purposes for which it originally was dedicated.

The high court, upon examination of the record, reached the conclusion that the issues now being raised were foreclosed by the judgment in the condemnation proceeding. The final judgment in the eminent domain proceeding, from which no appeal had been taken, was thus affirmed.

New Jersey: To provide parking space for county officers and employees, judges and jurors attending the courts in the Hall of Records and the adjacent Court House, and for other persons lawfully using county facilities located in these buildings, the County of Essex, New Jersey instituted condemnation proceedings to acquire property owned by the Hindenlang family. All other properties necessary for the contemplated parking lot had previously been acquired by the county.

The landowners challenged the county's authority to condemn their property for use as a parking lot, arguing that the primary purpose of the proposed parking lot was the parking of automobiles of county officers and employees who should be required to use available public transportation. The trial court held that: (1) "government has the right to provide parking spaces for its own employees in a reasonable manner," and (2) "by having parking space reasonably available to public buildings it aids the overall congested traffic problem which presses upon us constantly in a metropolitan area such as is Newark." The lower court concluded that the provision of reasonable parking facilities at reasonable locations near public buildings to which people habitually came was an essential function of government and that the county had statutory authority to acquire land for this purpose.

The property owners appealed to the Superior Court of New Jersey which held that the county's determination that it was necessary, useful and suitable to acquire certain private property for a parking lot adjoining the Court House and Hall of Records was conclusive in the absence of an abuse of power or bad faith (County of Essex v. Hindenlang, 114 A. (2d) 461, May 20, 1955).

In so ruling the Superior Court took notice of the fact that the county had statutory authority to condemn land for a court house and for an administration building like the Hall of Records, and reasoned that acquisition and maintenance of a parking area for the use of county officers and employees and for those connected with the courts or who came on county business was a necessary and reasonable adjunct to such acquisition.

Furthermore, condemnation of land for a parking area for public buildings was plainly in line with the constitutional provision to the effect that powers of counties included not only those granted in express terms but also those necessarily or fairly implied.

The property owners also argued that condemnation of their property constituted a taking of private property for a private use. They claimed that the use of the parking area by "county officers and employees, judges, jurors, court personnel and others attending the Court House or Hall of Records on court or county business" would leave little if any space for the general public visiting the two buildings. The court discussed the question of what constituted public use at some length, and concluded that it was not necessary, for a use to be public, that the entire community or any considerable portion of it should enjoy the use. The number of people who would participate in or benefit by the use for which the property was to be condemned was not the determinant of whether the use was or was not a public one.

Modern traffic conditions, the court went on to say, demanded adequate parking facilities. Affidavits in this case showed that traffic congestion and lack of adequate parking facilities was a serious problem in the vicinity of the Court House and Hall of Records. The fact that the action taken by the county tended toward the solution of that problem, at least in good part, did not derogate from its legality, established by appropriate tests. The more liberal view of what is a "public use," the court concluded, led to the conclusion that the proposed parking area was clearly for the public benefit, to the public advantage, and had public utility.

The Hindenlangs also claimed that the county had failed to prove that the taking of their property for a parking space was necessary. The court, however, held that the determination made by the board of freeholders that it was "necessary, useful and suitable" to acquire the property for the purpose stated in its resolution of December 9, 1954, was conclusive in the absence of abuse of power or bad faith. This was in accordance with New Jersey law under which the determination of necessity was an administrative function of the body endowed by the legislature with the power to make it. Such determination would not be upset by the courts in the absence of an affirmative showing of fraud, bad faith, or manifest abuse. No such showing had been made by the property owners.

The decision of the trial court was affirmed.

Constitutionality of Parking Enabling Statutes

In at least two states, statutes authorizing the provision of municipal parking facilities were contested in the courts during the year. In Illinois, a statutory provision requiring any city with a planning commission to obtain approval of the commission before establishing parking facilities was upheld. In Iowa, the courts held that off-street parking facilities constituted a public use for which the power of eminent domain might be exercised.

Illinois: The Circuit Court of Cook County sustained the constitutionality of the Illinois parking act, in a condemnation action by the City of Chicago by which the city sought to acquire certain property to be used for establishing parking facilities. The circuit court awarded damages in the amount of $51,500 as compensation, and the property owner appealed. The State Supreme Court, in a decision handed down on January 21, 1955, affirmed the judgment of the lower court (City of Chicago v. Central National Bank in Chicago, 125 N. E. (2d) 94).

The constitutionality of the Illinois parking law was upheld in Poole v. City of Kankakee, 94 N. E. (2d) 416, 1950, in which the court held that the act embraced the taking of land for a public use and therefor constituted a proper exercise of the right of eminent domain.

In the present case, the constitutionality of the act was again challenged on the ground that a proviso in the act requiring that any city which had established a planning commission "submit to and receive the approval of the plan commission before establishing or operating any parking facilities," constituted a delegation of legislative functions without establishing any standards to guide the exercise of said functions.

The court was of the opinion that the provision of the parking act requiring approval of the planning board was not an unconstitutional delegation of legislative power. The legislative intention, the court pointed out, was to protect a comprehensive plan of public improvements against municipal action which might tend to destroy the value of the planned improvements. Furthermore, the functions of the Chicago Plan Commission was limited to giving advice and making investigations and recommendations without in any manner impairing the power of the city council to pass upon and appropriate for all municipal projects and improvements.

The court cited a previous decision (Chicago Dryer Co. v. City of Chicago, 109 N. E. (2d) 201, 1952) in which it had pointed out that "overall, the fundamental distinction lies between a delegation of power to make the law, which involves a discretion of what the law shall be and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law."

In addition to preparing and recommending a plan for the development of the city, the plan commission's duties included giving "aid to the municipal officials charged with the direction of projects for improvements embraced within the official plan, to further making of those projects and generally to promote the realization of the official plan."

The court concluded that adequate standards were prescribed by statute to guide the exercise of such discretion as had been conferred on the plan commission.[30]

Iowa: In this case, the land in question had been leased by the City of Webster City from the Chicago and Northwestern Railway Company. The city had improved, policed and used it for off-street parking. The property was sold to Ermels Brothers, a partnership, for the purpose of erecting a building thereon while the city was negotiating for its purchase. After a public hearing, as required by statute, to determine whether public convenience and necessity would be served by the establishment of parking facilities, the city council determined that such facilities were necessary to the public use and ordered steps taken to acquire the land. Ermels Brothers sought to enjoin the city from taking their land. The District Court dismissed their petition and the landowners appealed.

The State Supreme Court noted the statutory provision under which cities and towns were given authority to provide off-street parking facilities and to acquire land therefor, after a public hearing to determine whether public convenience and necessity would be served thereby. The court pointed out that it had spoken on the question of "public use" on numerous occasions, always to the effect that this was a matter in the first instance for legislative determination. Interference on the part of the courts was not warranted except if there were a clear, plain, and palpable case of transgression. The legislature had declared, not in so many words, but equally as effective, that off-street parking facilities inured to the public use and benefit. It did not appear to the court that the provisions of the statute did not advocate and promote such public use.

Although the court had not previously passed upon the specific question, the courts of other jurisdictions had on numerous occasions declared the provision of off-street parking facilities to be a public use. The Iowa Supreme Court was in agreement with these other decisions, even conceding a resulting special benefit to private individuals.

The record indicated conflicting opinions as to the availability and desirability of other tracts for off-street parking and other matters, which the court did not feel it necessary to discuss. Since there appeared to be no fraud, illegality or abuse of discretion involved, the court declared that the decision of the City Council must prevail (Ermels v. City of Webster City, Iowa, 71 N. W. (2d) 911, September 20, 1955).

Leasing of Municipally-Owned Parking Facilities

Parking authorities in California may not acquire land to be leased to private individuals for construction of parking facilities unless power to control charges or otherwise regulate operations in the public interest is retained, according to a decision of

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[30] See Memorandum 83, November 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 301

the State Supreme Court handed down on February 3, 1955 (City and County of San Francisco v. Ross, 279 P. (2d) 529).

The City of San Francisco created a parking authority in 1949, acting under the provisions of the Parking Law of 1949. Under the plan agreed upon by the Authority and the Board of Supervisors, the city was to acquire the desired site by eminent domain and to lease it to private individuals who would build a structure thereon in accordance with the city's specifications and operate parking and other facilities therein. The controller, however, refused to certify the availability of funds for the acquisition, since the money in the parking bond fund (approved by the electorate in 1947) could not lawfully be used for the expenditure as proposed. He contended that under the general law the city could not condemn private property to be immediately leased to private parties for use as a private venture.

The court called attention to Article 1, Section 14 of the State Constitution, restricting the exercise of eminent domain to specific purposes, not including the use contemplated in the present case, unless it might qualify as a "public use." Section 1238.1 of the Code of Civil Procedure authorized the city to condemn property for off-street parking facilities "for public use." The controller insisted that the city's admitted intention to refrain from directly controlling rates to be charged to customers and from otherwise regulating the operation of the proposed facility constituted the operation of the garage as one in the nature of private business and not as one for "public use."

The court found that California statutes providing for acquisition of land by municipalities for use as parking facilities disclosed a clear legislative policy requiring governmental control of rates and charges to assure that such facilities fulfilled a public need. The city argued that it would retain control of rates through its police power. But the court pointed out that the police power could not be used to regulate the activities of particular individuals and exclude others of the general class from such regulations.

The city also argued that parking at any reasonable rate would serve a public need in metropolitan San Francisco. Under this theory, according to the court, all off-street parking facilities in the city, regardless of ownership and primary purpose of operation, might be serving a public use. The parking facility contemplated in the present case appeared to be a private business whose primary purpose was private gain and not public need.

This view of the enterprise was further substantiated by the fact that the city intended to allow a portion of the ground floor frontage of the proposed building to be leased and occupied by retail stores. Although the area of total floor space to be occupied by such commercial activity was estimated to be no more than 4 percent thereof, and might be considered as merely an incident to the parking activity, the court believed it nevertheless aided in characterizing the whole operation as a private one for private gain.

The court concluded that the city might not proceed to acquire possession of the land in the manner proposed.[31]

Municipal Parking Ordinances

In a decision handed down on September 9, 1955, the Court of Civil Appeals of Texas reversed a decision of a lower court and upheld a city ordinance prohibiting parking on a certain street.

A group of merchants whose businesses were located on South First Street in the City of Abilene, Texas, asked for an injunction to prevent enforcement of the ordinance. The District Court annulled the ordinance and the city appealed to the Court of Civil Appeals, which reversed the judgment of the lower court on September 9, 1955 (City of Abilene v. Woodlock, 282 S. W. (2d) 736).

Examination of the city charter and pertinent statutes convinced the Court of Civil Appeals that the city had the power to provide reasonable regulations as to the use of its streets and traffic thereon by ordinance, and had the duty under its police power to make proper regulations for the convenience and protection of the public.

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[31] See Memorandum 79, May 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 280

The defendant businessmen recognized the right of the city to regulate traffic and parking. They contended, however, that the city did not have the power to absolutely prohibit parking, citing two Illinois cases to prove their points. The court pointed out that in one of these cases (City of Chicago v. McKinley, 176 N. E. 261, 262, 1931) the ordinance was upheld, while in the other (Haggenjos v. City of Chicago, 168 N. E. 661, 1929) the ordinance was held to be unreasonable and invalid, the difference being, according to the court, that in the former case the ordinance prohibited and made it a violation to "cause or permit any vehicle to stand" on any public street during a certain period of time, while in the latter, the ordinance made it a violation to "cause or permit any vehicle to stand for a period of time" longer than was reasonably necessary for the loading and unloading of passengers and merchandise, and specified the maximum time permitted for such loading and unloading.

The present court considered the right to make such reasonable temporary stops incidental to the right of the public to travel on the streets. The Abilene ordinance prohibited parking only, and did not deny the right to make temporary stops for reasonable lengths of time for loading and unloading passengers and merchandise, and was valid under the holding in the McKinley case.

The court further declared that it was the province of the governing body of a municipality to determine in the first instance the necessity and reasonableness of such an ordinance. The burden of showing unreasonableness was on the party who attacked the ordinance. The evidence in the present case did not show that the ordinance was unnecessary or unreasonable. South First Street was a portion of US 80, and carried a large amount of both local and through traffic. Some of the witnesses indicated that there was at the time of the trial a maximum traffic load on the street, and that a great increase was expected when the air base now under construction west of the city was completed. In their opinion, it was hazardous to have parking on the street.

The use of the police power as in this case was justified according to the court, if it was reasonably necessary for public safety and convenience. Evidence concerning traffic on the street and the hazard to the public caused by parking was such that the court believed reasonable men might well conclude that the ordinance prohibiting parking was necessary and desirable for these purposes. The fact that reasonable men might differ on the desirability or merits of the ordinance did not destroy the city's power to make the regulation. On the contrary, said the court, where the subject matter is, as here, within the scope of the police power, and there was substantial evidence in support of the regulation, the question became one of governmental or legislative discretion and the court would not substitute its discretion for that of the governing body of the city.

The judgment of the trial court was therefore reversed and judgment rendered in favor of the City of Abilene.

Zoning Regulations and Parking

An increasing number of zoning ordinances adopted by various local governmental units throughout the United States include provisions seeking to alleviate the parking situation. One type of provision specifies the number of parking spaces which must be provided in connection with construction of various types of uses, i. e., apartment houses, theaters, auditoriums, etc. Another type of provision seeks to cut down on parking demand by limiting the area of a lot which may be occupied by a business or use. Provisions such as these will generally be upheld by the courts, if the requirements are reasonable and enforcement is not too unreasonable. These principles are well illustrated by recent court decisions in three states, as noted below:

New York: In a decision handed down by the Supreme Court for Nassau County on April 13, 1955, the validity of an amendment to the Village of Bronxville zoning ordinance, seeking to alleviate the parking situation by limiting the floor area of buildings to one and one-half times the lot area, provide setbacks on upper stories, and limit the occupied area of a lot, was upheld (Pondfield Road Company v. Village of Bronxville, 141 N. Y. S. (2d) 723).

The amendment was contested by certain property owners who claimed that it consti-

tuted a violation of the constitutional prohibition against taking property without compensation. They attempted to substantiate their claim by testimony as to several hypothetical buildings complying with the amendment, showing cost of construction, return by way of rental and operating costs, and in each case a deficit when return on land is considered. The court declared that even assuming that these figures were correct, it did not follow that the amendment affected a confiscation. There was no satisfactory proof that any building erected without regard to the amendment would yield any greater, or any, return on land investment.

The property owners also claimed that the amendment was unreasonable. The court held that to prove this point, it must be shown that there was no permissible interpretation of all the facts which would justify the adoption of the ordinance as a reasonable exercise of the broad police power. There must be, however, a proper balance between the public's welfare and the private owner's rights.

The court took notice of the fact that the village had a parking problem. Traffic was heavy and probably would become heavier. The property owners contended that any increase in parking demand should be taken care of by the village obtaining municipal off-street parking facilities. The court considered it debatable whether this was the proper solution or whether the proper solution was the restriction of population density by a floor area limitation. Such being the case, the court would not substitute its judgment for that of the legislative body charged with the duty of protecting the public welfare. The ordinance was upheld.

Pennsylvania: The defendant in this case operated a funeral parlor in the Borough of Brantwood, Pennsylvania, on property with a frontage of 120 feet on Brownsville Road and 80 feet on Clermont Avenue. The lots facing Brownsville Road were zoned commercial and those on Clermont Avenue were zoned residential. In 1951 the owner filled in the Clermont lots and thereafter used them for parking purposes in conjunction with the funeral business. In 1952 a zoning ordinance was passed requiring a minimum amount of off-street parking for business. Funeral parlors were required to provide an area sufficient to accommodate six cars and a hearse.

The owner of the business continued to use the lots in the residential area for parking purposes in spite of the fact that there was sufficient land in the commercial area for this purpose. No request was made for a variance. She was convicted for violation of the zoning ordinance, whereupon an appeal was taken to the Superior Court, which upheld the conviction.

On appeal, Mrs. Cieslak, the owner, contended that she did not violate the zoning ordinance because the alleged offense was in existence prior to enactment of the ordinance. The Superior Court held that this argument had no support, since use of the Clermont Avenue lots for commercial parking was illegal prior to adoption of the ordinance. There was, therefore, no nonconforming use.

The court pointed out that if there were no commercially-zoned land available in this case for business parking, the ordinance would be unenforceable as to parking requirements, since Mrs. Cieslak's funeral business antedated the ordinance. In such event, the use of the residentially-owned land for parking purposes would not be required and would remain illegal. However, there was available land zoned commercial, and Mrs. Cieslak should have first attempted to utilize this land for parking. Then if this area proved insufficient, she could have asked for a variance for the lots in the residential zone. Thus, the owner was guilty of a violation of the zoning ordinance (Commonwealth v. Cieslak, 115 A. (2d) 418, July 22, 1955).

Washington: The owner of property located on Secondary State Highway 2-A, in the City of Bellevue, King County, applied for a building permit to construct a combination residence and business building on a portion of his land zoned as B-1 (business). The application was denied upon the ground that he had not made provision for off-street business parking as required by city ordinance. The landowner then leased a tract of land, zoned as B-1, contiguous to his property, to be used for the required off-street business parking facility.

The city objected to such use of the rented property on the grounds that off-street

business parking did not represent the highest and best use to which it could be put; such use would be bad city planning. The building permit was again denied because the applicant did not have an approved off-street business parking facility. The applicant sought legal measures to compel issuance of the building permit and the city countermoved by attempting to rezone the tract proposed for off-street parking from B-1 to A-1 (agriculture).

The applicant brought action to enjoin the rezoning action from taking effect. He then reapplied for a building permit, proposing to satisfy the off-street parking requirements by using a tract of his own land zoned as B-1. His application was again rejected upon the same ground as before. At the same time, the city attempted to rezone to A-1 all of the land of the applicant then zoned as B-1. The applicant then asked for another injunction against the second attempted rezoning ordinance.

The applicant spent about $15,000 for his property, which was worth that amount as business property, and spent about $2,000 for grading, drainage and installation of septic tanks. The property was not worth over $4,000 for residential use.

The trial court entered judgment against the property owner and the case was appealed to the state supreme court. The high court reversed the judgment of the trial court, holding that the owner of realty was entitled to a building permit as a matter of right upon compliance by the owner with the zoning ordinance (State v. City of Bellevue, 275 P. (2d) 899, November 4, 1954).

The city did not claim that the tracts of land proposed for off-street business parking did not meet the standards of the ordinance. It did claim the right to exercise discretion in approving the sites for the parking facilities. The court found this tantamount to administering the entire zoning ordinance upon a discretionary basis, since off-street business parking must be provided as a prerequisite to the issuance of every business building permit.

The discretion permissible in zoning matters, according to the court, is that which is exercised in adopting the zoning classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional.

An owner of property, continued the court, has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances. In this case, the applicant's right vested when he made application for his permit. The city was required to issue the permit upon his compliance with the standards of the ordinance.

The supreme court thus reversed the decision of the lower court and ordered issuance of the building permit.[32]

Another type of zoning provision frequently contested in court concerns the location of off-street parking facilities in areas where such facilities are excluded under the zoning ordinance in question. Refusal to grant variances in such cases are usually upheld by the courts, as illustrated by the Connecticut and Massachusetts cases summarized below. However, if the court considers application of the zoning provision unreasonable or confiscatory, it will either order the governing body to issue a variance, as in the following Pennsylvania case, or in some instances, as in the New York case summarized below, will invalidate the ordinance itself.

Connecticut: The action of the Zoning Board of Appeals of the Town of Milford, in granting a variance to permit use of land in a residential zone for commercial parking purposes, was reversed by a Court of Common Pleas in a decision handed down on March 22, 1955 (Dixon v. Zoning Board of Appeals, 113 A. (2d) 606).

The owners of approximately two acres of land located in a residence A zone applied to the town building inspector for a permit to use the land for commercial parking purposes, in conjunction with a proposed shopping center to be constructed on adjoining land located in a light industrial zone. The building inspector refused the permit and

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[32]See Memorandum 78, April 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 278.

the landowners appealed to the zoning board of appeals for a variance. A public hearing was held, at which no opposition was expressed, but the zoning board tabled the application until its next meeting.

The property subsequently changed hands, and the new owners again applied to the building inspector for a permit, which was again denied. Upon appeal to the zoning board for a variance, the application was approved, "practical difficulty" being given as the official reason for such action.

The town building inspector then appealed to the court which held that granting of a variance to permit the contemplated use of the land was not justified on the ground of practical difficulty. The court found no record of a "practical difficulty" in the record, within the meaning of cases of this character, citing previous cases in the same and other jurisdictions to sustain its point.

The court also stated that the suggestion in the record that the town would derive more money from taxation if the variance were granted was not tenable even if correct. Such a consideration, said the court, did not enter into the propriety of the granting of a variance in any form.

Massachusetts: A decision of the Board of Appeals of the City of Cambridge, granting a variance to the city's zoning ordinance in order to permit the use of land zoned residential for off-street parking purposes, was held to be in excess of the Board's authority by the Supreme Judicial Court of the State in a decision handed down on November 4, 1955 (Hurley v. Kolligian, 129 N. E. (2d) 920).

The variance was granted to the owners of a business in which automobiles were sold, repaired and serviced. The business had been carried on in a residential area since 1945 as a non conforming use. In 1953 the owners acquired two parcels of real estate adjacent to the garage on which were two apartment houses. Both were located in residential zones. The space behind the apartment buildings was to be used for parking purposes, in connection with the garage. The area in question was reached by a driveway running between the two parcels from Broadway, the street on which all of the properties involved fronted.

The Board of Appeals approved the variance, finding that streets in the vicinity were congested, that it would be an unnecessary hardship on the owners to deny the variance, that such a variance (with restrictions) would not detract from the residential character of the neighborhood but would serve it in its need for parking space, and that the variance, if granted, would not derogate from the intent and purpose of the city's zoning ordinance.

The Superior Court concluded that the variance would benefit the public welfare by affording relief from the overcrowding of thoroughfares by automobile traffic or automobiles parked in thoroughfares in the immediate vicinity, and would not be detrimental to the value or enjoyment of either the adjoining properties or those in the immediate vicinity.

The board of appeals was authorized by statute to grant a variance if a literal enforcement of the provisions of the zoning ordinance would involve substantial hardship to the property owner, and if such a variance would not be a substantial detriment to the public good.

The Supreme Judicial Court found the facts in the case substantially the same as those in a previous case (Brackett v. Board of Appeal of Boston, 39 N. E. (2d) 956, 1942) in which the court also held that the board of appeal had exceeded its authority in granting a variance. The Brackett case involved the application of a corporation which owned and operated a hotel for a variance to permit parking in a nearby lot in a general residence district which it had purchased for this purpose. The court in that case held that the "unnecessary hardship" mentioned in the zoning law of that city must relate to the premises for which the variance was sought. By that test, the only hardship to the corporation was with respect to its ownership of the lot for which the variance was sought. Accordingly, it was held that the requirements of the statute relating to hardship had not been satisfied and that the board of appeal exceeded its authority in granting a variance.

The high court found the facts in the present case to be substantially the same as

those in the Brackett case. The hardship did not relate to the premises for which the variance was sought, but to the garage. Statutory authority in each case was substantially similar with regard to the matter of hardships. The court thus determined that the Brackett case was controlling.

The decision of the lower court was reversed and the action of the board of appeals annulled.

Pennsylvania: The D. B. S. Building Association applied to the "zoning administrator" of the City of Erie for a permit to use certain land owned by it as a parking lot. The permit was refused by the administrative official to whom the application was made and the zoning board of appeals sustained this action. Subsequently, the Court of Common Pleas of Erie County which, after hearing testimony, directed the zoning board of appeals to issue the necessary permit. Upon appeal by the city, the state superior court upheld the action of the lower court (D. B. S. Building Association v. City of Erie, 111A. (2d) 367, January 14, 1955).

The building association owned property in a commercial district which it used for a clubhouse. The present action arose when the association purchased a lot adjacent to its other property, which was located in a "B residential district. This newly-acquired lot was to be used for parking. The zoning ordinance of the city permitted, among other uses, a

> "Clubhouse (not including a club the chief activity of which is a service customarily carried on as a business) ....Accessory uses, incident to any of the principal uses above listed....In any residence district, accessory uses shall be uses customarily incident to the principal uses listed as permitted therein...."

The crucial question, according to the superior court, was whether the club operated on the association property was the type of club which the zoning ordinance was designed to exclude from "B" residential districts. The court concluded that the "exclusive purpose" of the club was "social and fraternal with insurance benefits," and for that reason the clubhouse came within the class of permitted uses set forth in the zoning ordinance. The clubhouse could, therefore, have been established and operated in an area zoned "B" residential. It followed, the court believed, that a parking lot for the convenience of club members was, as the court below had held, a use "customarily incident" to the principal use and thus a permitted use under the zoning ordinance.

The superior court agreed with the lower court that "restrictions under zoning ordinances must be construed strictly in their application as they are in derogation of an owner's right to use his property for legitimate purposes." The court concluded that the requested permit should be issued.[33]

New York: A zoning ordinance, adopted by the City of Mount Vernon, in 1927 was declared unconstitutional, together with 1949 and 1952 amendments, by the Court of Appeals of New York on July 14, 1954, because its operation under changed conditions proved confiscatory (Vernon Park Realty, Inc. v. City of Mount Vernon, 121 N. E. (2d) 517).

The subject premises, located adjacent to the New York, New Haven, and Hartford Railroad station, had always been used by patrons of the railroad and others for parking of private automobiles. When the zoning ordinance was enacted, the "Plaza," as the parking area was called, was placed in a Business B district, later being changed without objection to a Residence B district, the parking of automobiles continuing as a valid, nonconforming use. A variance to permit installation of a gasoline filling station was granted in 1932. The railroad sold the premises in 1951 and the purchaser applied without success for a variance to permit the erection of a retail shopping center, a prohibited use. The area was at that time completely surrounded by business buildings.

The purchaser, the Vernon Park Realty Company, asked for injunctive relief. Subsequently, in 1952, the common council amended the zoning ordinance by adding thereto

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[33] See Memorandum 89, July 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 289

a new district to be known as Designed Parking District, which in effect, prohibited use of the property for any purpose except parking and storage of automobiles, a service station within the parking area, and the continuance of prior nonconforming uses. The realty company amended its complaint to include the 1952 amendment. The city justified the ordinance and its amendment by reason of the congested traffic and parking conditions in the city, which it claimed had become so acute as to reach a strangulation point.

The court of appeals declared that however compelling and acute the community traffic problem might be, its solution did not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose. Although the land had been devoted to parking, a nonconforming use, for a long time, continued the court, it did not follow that an ordinance prohibiting any other use was a reasonable exercise of the police power. The common council had the unquestioned right to enact zoning laws respecting the use of property in accordance with a well-considered and comprehensive plan designed to promote public health, safety, and general welfare, the court further stated, but such power was subject to the constitutional limitation that it might not be exerted arbitrarily or unreasonably. This was so whenever the zoning ordinance precluded the use of the property for any purpose for which it was reasonably adapted. Likewise, an ordinance which was valid when adopted would be stricken down as invalid when, at a later time, its operation under changed conditions proved confiscatory.

The court considered that the realty company had established the fact that the property was so situated that it had no possibilities for residential use, and that the 1952 amendment worsened the situation by precluding the use for which the property was most readily adapted, i.e., a business use such as was carried on by the owners of all surrounding property. The court concluded that the zoning ordinance and the 1952 amendment, as they pertained to the realty company's property, were so unreasonable and arbitrary as to constitute an invasion of property rights and as such were invalid, illegal and void.

A dissenting opinion in this case upheld the constitutionality of the zoning ordinance and the 1952 amendment thereto, on the ground that neither the 1927 ordinance nor the 1952 amendment was so unreasonable as to permit the court to interfere with the judgment of the common council. The area in question had been used for parking purposes since 1922, and for all practical purposes the ordinance merely continued this use. Consequently the continuance, or the creation, of a special parking zone, according to the dissenting judge, was more than warranted. The parking area served the needs of railroad passengers, permitting easier access to trains and reducing congestion in the crowded business section thereby affording the owner an entirely reasonable use of his property and at the same time advancing the public good and well-being.

Nor did the dissenting judge consider that the ordinance should be condemned because it affected only a small area, it having long been recognized that, if done for the general welfare of the community as a whole, a municipality might, as part of a comprehensive zoning plan, set aside even a single plot in the center of a large zone devoted to a different use.

Neither the area nor the surrounding business district had undergone any alteration, according to this judge, except a general increase in population and the number of automobiles, which in fact rendered the long-continued parking use still more suitable and necessary. If the ordinance was valid in 1927, it was valid at the present time unless conditions had changed. He conceded that a parking lot might not afford a purchaser as great a return on his money as a shopping center, but that circumstance, standing alone, did not justify invalidation of the ordinance.[34]

INFORMATION INTERCHANGE

During the year 1955, the committee issued eight monthly memoranda through the Highway Research Correlation Service. These memoranda contain digests of new laws,

[34] See Memorandum 77, April 1955, Committee on Land Acquisition and Control of Highway Access and Adjacent Areas, Highway Research Correlation Service, Circular 272

court decisions, administrative practices, and other items of current interest. Memoranda numbers and the month of release are indicated below:

Committee Memorandum No.	HRCS Circular No.	Month
77	272	April
78	278	"
79	280	May
80	289	July
81	291	August
82	293	September
83	301	November
84	303	December

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.

Expressways

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● THE BUREAU of Public Roads defines an expressway as a "divided arterial highway for through traffic with full or partial control of access and generally with grade separations at intersections." The primary function of expressways is to serve existing land uses. They have become necessary to move the large volumes of urban area traffic that could not be handled over existing routes, which also provide direct access to abutting uses.

The obsolescence of many highways has been due to the inadequate right-of-way and capacity, the frequent intersections at grade, and the fact that the route had to serve the property alongside it. This obsolescence has been accelerated by congestion, principally at the point of access to the major uses abutting the highway that generate traffic; namely, business in commercial zones, employment centers, dense residential developments, and recreation centers. By providing expressways for the movement of large volumes of traffic, the traffic movement function of the highway can be protected and the need for the uses of land to be served can be fulfilled.

Everyone is familiar with commercial developments abutting highways that have not only destroyed the landscape but also have destroyed the highway as a travelway. By denying access to abutting properties except at specially selected and designed access facilities or at interchanges, it is possible to relate expressways to land use in a way that is consistent with the primary function of the highway.

Expressways are the most important advance in the field of highway transportation in the last 30 years. Recent estimates of toll-free and toll expressways in the United States place the total of the free roads at more than 4,500 miles and the total of toll expressways at more than 3,000 miles. This latter figure includes projects which are completed, under construction, or for which finances have been arranged. In addition, 3,600 miles of toll roads have been authorized and an additional 1,300 miles proposed. All told there are more than 7,900 miles of toll expressways. This, together with the free expressways, totals more than 12,400 miles.

The free roads are concentrated mostly in urban and metropolitan areas in the form of radials and circumferentials, and the toll expressways connect cities or pass near them over predominantly rural routes.

Expressways have already had a great impact on the areas along their routes. They have extended urban development and land use changes appear to be more rapid than in other areas similarly located in every way except proximity to the freeway (1). If the present rate of construction continues, expressways will be a familiar feature of the entire national landscape in the current generation. They will also continue to be one of the dominant influences on the direction and character of territorial expansion of urban and suburban areas.

All forms of development and future land use will be affected—industrial, residential, commercial, and recreational. The potential benefit from freeways will be determined not only by what uses of land are stimulated, but also by the way these uses are arranged in relation to each other and to the transportation system. The following discusses briefly the major trends in land use as a result of expressway development, in contrast to the community development patterns resulting from highways where there is no control of access, and the kind of development that could be brought about by comprehensive city and regional planning coordinated with highway planning.

Where there is no control of access, goods and services are most commonly provided in ribbon developments along the highways. These services are intended mainly for the residents of the surrounding area; but even so, through travelers must pass through these areas because the main road usually goes through the center of the city. Although the type and variety of services vary according to the location of the commercial zone and the size of the city, most facilities catering to the traveler are located in the outskirts.

Noble (2) has stated that expressways protect the roadside from "destructive ribbon commercial development along the boundaries, but the absence of such activities poses a problem in that motorists must be provided with certain essential services otherwise the highway will not render adequate service to the public." He cited the problems and experiences connected with integrating commercial services into the highway system "so that the motorist will not be forced to leave the road to seek them." Fuel and auto services, and food and sleeping accommodations, are the main needs of the traveler. The problem of providing these services varies as between expressways which are operated toll-free and those which are subject to toll and must be revenue-producing. In the first case, service and not revenue is the controlling consideration, whereas in toll highways revenues are of equal importance because toll projects must be self-liquidating.

Service areas have been provided on toll expressways where study shows they can be expected to be most profitable, allowing for competition off the expressways. These service areas are designated by the highway authorities, who determine, design, and site plan, and in addition provide access by adequate deceleration lanes.

SLEEPING ACCOMMODATIONS

The common practice has been to make no provision for sleeping accommodations for the pleasure driver on the expressway right-of-way. The location of points of exit from expressways is a large factor in determining motel sites. According to the Planning Advisory Service, "The primary site preference for motels is direct highway frontage on the right side of the road going into town. . . . on expressways this choice is no longer possible and the remaining preferred choices narrow down to (a) location near a portion of an interchange and (b) location on a frontage road, both locations being visible to the travel road" (3). For this reason, intersection sites for motels are booming and there is an increasing number of motels situated near expressways. There is every prospect that with increased personal incomes, paid vacations, and more frequent extended weekends, a great impetus will be given to such establishments. Such motels, amply set back from the travelway and approached either by an interchange or by way of a service road, undoubtedly will have a competitive advantage over the earlier facilities for transients.

The Washington-Baltimore Parkway has taken a lot of traffic from US 1. No sleeping or service facilities are situated on the parkway or close to it. However, it is unlikely that this opportunity will be passed up indefinitely.

SHOPPING CENTERS

The Planning Advisory Service (3) states that the demand that expressways will create for shopping center sites is less clearly established than for industrial sites or motels, although accessibility is one of the most important site criteria for shopping centers, which depend primarily on established and expanded trade areas. In the same way that stores seek the 100 percent locations in the central city areas to be near the greatest number of potential customers, shopping center operators have followed their customers to the suburbs. According to Homer Hoyt, economic analyst, in addition to accessibility, the main factors are the volume of business from the trade area, the composition of the center, its size, the adequacy of the local road system to provide convenient access from residential areas, the amount and arrangement of customer parking, and the absence of congestion at the point of access to the center and on the approach roads in its vicinity. Insofar as present centers are concerned, they have had enough advantage over the downtown districts, and a sufficient trade area in the growing suburbs, to make many of them successful in spite of the absence of ideal conditions.

Most importantly, expressways have had the effect of breaking down old concepts of trade areas. Urban areas are now meaningless to define trade areas, because an expressway cuts across old boundaries and brings wider areas within easy reach of outlying shopping centers. The Cross Country Center, in Westchester, N. Y.; Northland, near Detroit, Mich.; the projected Peabody Center, near Boston, Mass.; Gulfgate Center, nearing completion in Houston, Tex.; and Hudson Village, in Lexington, Ky., are among the new major shopping centers fed by nearby expressways. There are, of course,

many other shopping centers, some very successful, which are on busy and congested highways. In addition, there are shopping centers such as at Park Forest, Chicago, Ill.; Linda Vista, Calif.; Levitown, N. Y.; and Greenbelt, Md., which are designed as part of these communities.

Baker and Funaro (4) underscore the importance of good access when they say: "In the larger regional and semi-regional centers.... good highway access becomes the crucial requirement in selecting a site once the general area has been chosen."

Access by toll roads would tend to have an adverse effect on the potential success of a shopping center. Economists measuring a trade area discount the potential market to the extent that a toll facility enroute to the proposed center would have to be used. Even a $0.05 bridge toll would be a detriment. In the same way, if a retail trade center were located on a toll facility its potential would be reduced to the extent that customers would have to depend solely on such access. Even shopping centers that have had a parking fee attached to self-parking facilities have encountered considerable customer resistance; in at lease one instance the direct charge was removed. If the toll roads are an auxiliary facility and the main access is provided by free roads (such as at the site for the proposed Southland Shopping Center in Tulsa, Okla.), the detrimental effect would be minimized.

In Arlington County, Va., one important and successful shopping center was built near the interchange at Shirlington. Its success may be attributed, however, to the fact that it serves the densely populated area within a short distance from it. Another shopping center, located on US 50, is also oriented to the community that it serves. This latter center is very successful. A third center, also in Arlington, is in difficulty, even though it is located near the juncture of two expressways. Its difficulties seem the result of poor relation to the community that it serves, and poor access; it is on the wrong side of the way for homeward-bound commuters.

Baker and Funaro (4) also say: "The modern, well-planned shopping center may well cut down the appalling rate of failure among retail stores. During the last half century, regularly every year, more than one quarter million retail businesses have failed and in most years an even larger number of new ones started. Most of these failures resulted from poor location." Expressways can provide the added measure of security in the well-planned shopping center.

RESIDENTIAL

The growth of cities and expansion of suburbs has been going on for a long time, but increased mobility has pushed it forward at increasing rates. Since the end of World War II there has been an extraordinary growth in the suburbs. In this period approximately ten million homes have been built. The majority of these have been situated on the fringes of urban areas. New housing will continue to bring an estimated three and one-half million persons a year to the suburbs. Highways of all types, and especially expressways, constitute a major force that gives impetus to suburban development in the areas near their routes. In this connection Balfour (5) reported that in the case of the Santa Ana Freeway "the large-scale building activity preceding the actual freeway construction was done with full anticipation of the new highway to provide a good transportation facility to downtown Los Angeles."

Planning Advisory Service also reports on a Southeast Pennsylvania Regional Planning Commission study in which there is the warning that estimates of traffic volume on new expressways can only reflect their immediate impact because "as experience has shown, the extension of new transportation facilities into outlying sections of the metropolitan area exerts a powerful stimulus upon suburban development." This report warns that one of the possible results of expressway extensions is scattered subdivisions in outlying areas "far too small to provide a normal integrated community, and to support economically a full complement of urban services."

The impetus that expressways give to the development of vacant land can be cited for any urban area such facilities serve. Arlington Boulevard and the Shirley Highway have been major forces in shaping the direction of suburban growth in northern Virginia.

INDUSTRIAL

Expressways have given impetus also to the increasing decentralization of industry. In California, New York, Massachusetts, Virginia, and Texas, to name a few areas, industries have selected sites near expressways.

In discussion of the economic impact of expressways, Howard (6) stated:

> "The express highway, of course, is a part of the answer to this crucial circulation problem. The automobile, the truck, and the gradually improving highway are the technological developments that have made this dispersion possible.... And now the dispersion—universally unplanned, chaotic, wasteful, and by no means successful in fully achieving the individual goals of all those separate people who created it—has brought a situation that forced the invention of this super superhighway.
>
> "What an expressway does, then, is to restore to a plant site all of those advantages of accessibility, to suppliers, related industries, markets, and labor, that a similar plant used to enjoy on intown sites before congestion set in, at the same time making possible the big site, the single-story building, the room for expansion, the amenity of space for landscaping and planting. These advantages are shared by other outlying plant locations, but not to the same degree."

Some examples of the impact of expressways on industrial development follow:

The New York State Thruway was responsible for an investment of more than $150,000,000 in factories, warehouses, truck terminals, gas stations, motels, apartments, housing developments, shopping centers, and tourist attractions along its routes, in a period of four years.

A measure of the influence of expressways is the intensive development along the Eastshore Freeway between Oakland and San Jose, Calif. As reported by Balfour (5), "this area embraced only 9 percent of the available land in Alameda County that was suitable for industrial development, but within seven years 43.1 percent of the total expenditures for new industrial development had taken place, 29.6 percent of the total number of new plants had been built, and 37.7 percent of the money invested in industrial expansion had occurred."

Expressways also have influenced the food distribution industry in the East. One large national food organization with headquarters in Philadelphia is now able to compete in the Long Island food market because the connection between the New Jersey Turnpike and the Pennsylvania Turnpike brings the main distribution center within easy range for delivery. Thus markets are now open that otherwise were closed because the routes were too costly and time consuming to serve the retail outlets in the trade area.

There are warnings against using any examples of expressway influences on industrial site demand on the ground that the expressway is not an isolated influence but one that is operating in a national context of expanding population growth and is geographically related to an existing industrial region. It is suggested that whether or not the economy continues to expand, and there is every indication that it will, industry will continue to adapt its methods of operation to changes in technology. These adjustments will take into account methods of shipment, sources of labor, plant locations that allow for single-story operations, and such changes as may be justified in order to increase efficiency and therefore reduce overhead in periods of retrenchment. Under these circumstances, however, the rate of industrial relocation may be considerably lower. Even so, sites offering a transportation advantage, particularly to market-oriented industries, would certainly be more attractive than those sites which have higher costs as a result of location near congested centers.

POSSIBILITIES

Since World War II the annual expenditures for highways have risen from a prewar peak of $1½ billion to nearly $4 billion estimated for 1955. During the next ten years, if Congress adopts the Highway Revenue Act of 1956, the expenditures will be in the order of $100 billion dollars, or an average annual expenditure of about $10 billion

dollars. If the present rate of construction continues, expressways will be a familiar feature of the entire national landscape in twenty years. They also will be one of the dominant influences on the territorial expansion of urban and suburban areas. If the expanded highway program now before the Congress is adopted, this development will be speeded up. If expressways are to have any long-range value beyond helping to meet present traffic and transportation problems, comprehensive planning on a regional level and a corresponding development policy will be needed to guide and control the changes in the patterns of land use.

One form that regional development may take would be self-contained cities on sites designated within the regional plan for future development. Under present and foreseeable economic conditions self-contained cities can be built for the automobile age. Among the reasons for this are:

1. The economy is expanding. In 1956 the gross national product will be in the order of $400 billion. Estimates for the future are now more astounding, with economists talking of $1,000 billion production. Not only is great new wealth being created, but this wealth is being more widely distributed. Thus industry has more capital and is increasingly mobile. Similarly, its employees have greater personal incomes and, correspondingly, they have more mobility.

2. Automation in industry will increase the amount of leisure time that is available to employees. Automation will increase the number of three- and four-day weekends and will stimulate greater needs for expressways that reach out in all directions to recreation areas. Paid vacations granted to the workers in industry have already had a tremendous effect on the travel habits and needs of Americans. The overcrowded highways during vacation times and holidays are evidence of the demand that is building up for more and extended expressways.

3. The design requirements of contemporary industry offer new opportunities. The trend in industry as it adjusts to the new technology is to concentrate its operations on one level. Industries have been locating on open land where they can build according to the needs of their operations. New sites are being selected in the open country where the land is less expensive and enough land can be acquired to provide production buildings and employee parking. In such locations industries depend on an extensive road system to provide labor from a wide area, as this labor travels mostly by automobile.

4. The population of the United States is increasing at the rate of 266,000 per month and in the coming year more than 4,000,000 babies will be born. By 1980 it is estimated that the population of the United States will be 250,000,000 and that it may reach 300,000,000 by the year 2000. The requirements for automotive transportation alone to meet the increasing population are staggering. It is estimated that within the next ten years 10 million houses will be built at a cost of $100 billion. There is an opportunity at the same time to create a better environment.

5. The obsolescence of many central city areas will accelerate the search for new home sites in new environments. This will continue even though American cities are in the midst of great readjustments with shifts of industry and commerce within them. Expressways will be a vital element in urban renewal plans.

6. The automotive economy based on higher personal incomes and preference for personal mobility will continue to stimulate the desire to live in less-dense areas where fixed modes of transportation do not operate.

7. The recognition that the present road systems are incapable of serving the expanding communities and the mounting pressure to do something effective about them will continue. Expressways are the transportation for the future that will be adequate for a dynamic economy, a bigger and richer population.

Recently, the Office of Defense Mobilization announced a new program for the dispersal of defense industries in accordance with Civil Defense recommendations that take into account the destructive power of new H-bombs. This new program scraps the current 10-mile minimum distance that defense plants can locate from target areas. Under this program the Civil Defense Administration has full authority to develop and coordinate programs to reduce vulnerability of the metropolitan areas. The Commerce Department is given the task of helping to prepare dispersal plans. If a firm does not comply with the order, the government has authority to withhold special tax benefits

applying to defense industries.

The significance of this program lies in the opportunity to coordinate the general development plans for a region with a highway network to serve it. The job opportunities thus created can be the basis for planned, self-contained towns that can house the population thus attracted and create the basis for other services as well.

An effective program should be aimed at combining all efforts toward creating an imaginative regional land use plan where self-contained towns could be built on sites appropriately located with respect to existing highways and proposed expressways.

Expressways have already had an impact on the economy. They have influenced land values, the location of certain industrial plants, motels, shopping centers, and residential developments. Even without the impetus of dispersal for Civil Defense, the economy is sufficiently dynamic to bring about new patterns for urban living.

Shall there be contentment with the uncoordinated product of separate moves by government, individuals, business, and industry? Or shall expressway planning be combined with planning for regional development and new towns that would provide a rational arrangement of industry, business, home sites and recreation?

Although this may require new legislation, certainly the lawyers and legislators can devise laws entirely consistent with national philosophy that will enable the engineers and planners to make advances in urban living comparable to those in the remainder of the economy.

Although the problem of the antiquated street system in urban areas will remain to be solved mainly by other means, where expressways are combined with urban renewal projects there is a unique opportunity for improving the situation in urban areas. When the significance of the automobile technology is fully appreciated by all segments of the population, it is hoped that not only will roads be built for the automobile age, but that cities and towns also will be built. The full development of high-standard highway facilities, combined with imaginative land use planning, can mean a new and fuller pattern of life and a more efficient economy in America.

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Highway Encroachments in New Jersey

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THE encroachments with which the New Jersey State Highway Department is confronted consist of three general types, as follows: (1) fixed objects; (2) movable objects; (3) unauthorized works within highway rights-of-way.

Fixed Objects

The classification of fixed objects covers a wide range of structures. The most numerous, however, are the advertising signs. These vary from a small, cheap, homemade affair to one consisting of a steel frame structure set on a concrete foundation, brilliantly lighted. Much less numerous but still somewhat of a problem are gasoline pumps, produce stands of varying extent, "hot dog" stands, and other miscellaneous small structures housing roadside commercial activities. Least numerous but most serious are large permanent buildings, both business and residential, many of which are unquestionably of long standing.

Movable Objects

In the classification of movable objects, signs are again the most numerous. This type of encroachment is particularly difficult to deal with as it can be eliminated today and recur tomorrow. Although these numerous signs constitute a great problem in this category, they are by no means the most objectionable. Particularly in the agricultural areas approaching the resort sections of the New Jersey seashore, serious traffic conditions are created by itinerant vendors who park their trucks along the highway and display their wares even out to the paved surface of the highway. Motorists stopping to patronize these vendors cause traffic jams and endanger their own lives as well as the lives of other motorists.

Another serious problem arises from the itinerant ice cream vendor who parks along the highway and vends his wares to the motoring public. This type of encroacher has the backing of a large organization with a powerful lobby and hides behind a claimed privilege due to veteran status. Equally objectionable are the fund-raising campaign activities of rural volunteer firemen, first aid squads, and other community organizations.

Unauthorized Work Within Highway Rights-of-Way

Although unauthorized work within highway rights-of-way is not at present actively a part of the encroachment abatement campaign, it is one which is recognized and with which it is proposed to deal after the other stages have been completed. The New Jersey Highway Department has definite rules and regulations covering performance of work within the highway right-of-way and quite thoroughly enforces the obtaining of permits issued for such work by abutting property owners. The great difficulty, however, is in obtaining compliance with the terms of the permit. The result is that in many cases the appearance of the highway is seriously compromised; in others, necessary or desirable appurtenances are destroyed or interferred with.

Unfortunately, these problems do not always arise with irresponsible individuals, but not infrequently with large, responsible commercial organizations, which should be above such practices. Perhaps, however, it is fair to say that in the latter case there are frequently definite clashes of opinion between the Department and these firms as to the propriety and reasonableness of the Department's rules and regulations.

LEGAL BACKGROUND

The legal background for coping with the various encroachments is as follows.

Title 27 of the Revised Statutes of New Jersey deals particularly with highways. Under 27:7-1, referring to State Highways in general, "work" is defined in part as".... the laying out, opening, construction, improvement, repair and maintenance of highways

and removal of obstructions and encroachments from adjoining sidewalks; ... removal of obstructions to traffic and to the view." Thus, there is a definite duty placed on the Highway Department to deal with encroachments.

Chapter 5 of Title 27 deals with advertising along highways, as follows:

27:5-1. Advertising on highways and private property prohibited; penalty

Whoever shall paint or place upon, or in any manner affix to, a fence, structure, pole, tree or other object which is the property of another, whether within or without the limits of a public highway, or maintain thereon any words, device, trade-mark, advertisement or notice not required by law to be posted thereon, without first obtaining the consent in writing of the owner or tenant of the property, or of the body having control of the highway if placed on a highway, shall, upon complaint of the owner or tenant, or of any police officer or other person, be liable to a penalty of twenty-five dollars upon conviction in the municipal court of the municipality wherein the violation occurred. If consent is obtained that fact shall be stated on the advertisement or notice.

This chapter shall not apply to cautionary signals or signs, or directional signs or notices erected on or along a highway by the body having control or by its consent.

27:5-2. Duty of State Police

Every subordinate officer or member of the Department of State Police shall report to the superintendent, or to any deputy or assistant superintendent of the State Police, any violation of section 27:5-1 of this title so far as it relates to public highways within the territory patroled by him outside of municipalities having an organized police force. Thereupon, the superintendent of the department of state police, or a person designated by him, shall notify the person violating said section 27:5-1 to abate the nuisance forthwith. If the notice is not promptly complied with, suit shall be commenced for the penalty herein prescribed in the name and for the use of the state.

27:5-3. Duty of municipal police

The subordinate officers of the police force of every municipality having an organized police force, shall report to the chief of police of such municipality every violation of section 27:5-1 of this title so far as it relates to public highways within the municipality. Thereupon the chief of police or a person designated by him, shall notify the person violating said section 27:5-1 to abate the nuisance forthwith. If the notice is not promptly complied with, a summary proceeding shall be commenced for the penalty in the name and for the use of the municipality in accordance with The Penalty Enforcement Act Law (N. J. S. 2A:58-1 et seq.)

27:5-4. What constitutes a nuisance

Any word, device, trade-mark, advertisement or notice painted, placed, affixed or maintained within the limits of a highway in violation of the provisions of section 27:5-1 of this title, shall be a public nuisance.

At first glance, these portions of the statute would seem to be a convenient and expeditious instrument for dealing with signs. In actual practice, however, the Department has been unable to obtain any enforcement by either local or State Police.

Title 2A Revised Statutes—Disorderly Persons Act

Another statute which could be applied to the sign problem is contained in Title 2A of the Revised Statutes, known as the Disorderly Persons Act.

"Title 2A:170-67: Any person who erects within the limits of any state highway, county public road or municipal street or road any sign or encroachment without first having obtained permission to do so from the state highway commissioner, board of chosen freeholders or the municipality, as the case may be, is a disorderly person."

The penalty under this Act is as follows:

"Title 2A:169-4: General Penalty: Except as otherwise expressly provided a person adjudged a disorderly person shall be punished by imprisonment in the county workhouse, penitentiary, or jail for not more than 1 year, or by a fine of not more than $1000 or both."

The provision of law which is actually being used in the encroachment removal program, however, is found in Title 27 of the Revised Statutes, as follows:

Title 27:7-44.1. Consents, grants and franchises affecting highways; approval of commissioner; removal of encroachments; penalty for violation.

No consent, grant or franchise affecting any portion of a state highway, or of any road included in the state highway system, shall be given for the construction of a railroad or street railway thereon except upon approval of and under conditions acceptable to the Commissioner; nor shall any person enter upon or construct any works in or upon any state highway, except under such conditions and regulations as the commissioner may prescribe. Whenever any encroachment may exist without warrant of law in any road when taken over as a state highway, the commissioner shall notify the attorney general, who shall proceed to cause the same to be removed as by law provided.

Any person guilty of any violation of this section shall be liable to a fine not exceeding one hundred dollars for each such day's violation, and the costs of prosecution, to be recovered by a civil action in the name of the state before any court of competent jurisdiction by the commissioner. Said fines shall be paid into the state treasury to the credit of the funds available for construction, maintenance and repair of roads.

Any such violation may be removed from any state highway as trespass by civil action filed by the commissioner in the Superior Court. The court may proceed in the action in a summary manner or otherwise.

It should be noted that the present campaign for the abatement of encroachments is not the first undertaken by the Department. In 1942, and again in 1947, campaigns were undertaken on a different basis which had some desirable results and some undesirable ones. In both cases, the basis used was a request for cooperation by the public and was handled by Department personnel.

Out of a listed 7,438 encroachments in the 1942 campaign, there were actual abatements of 3,627.

The 1947 campaign was state-wide only insofar as major oil company identification signs, and billboards were concerned. Routes 1 to 4 inclusive were surveyed for miscellaneous privately-owned signs by individuals or corporations. The program was dropped owing to pressure of routine work and lack of personnel to carry on the work of encroachment abatement.

The undesirable result, however, was a feeling by many persons that the Department had let them down by not enforcing compliance on the part of recalcitrant encroachers.

This time, therefore, it was decided to follow the law; first, however, giving notice to the encroacher through the Deputy Attorney General assigned to the State Highway Department.

To furnish the basic information for the notices, three glaring encroachments in

each of the state's 21 counties were selected. Commissioner then wrote each member of the Legislature a letter, as follows:

"Dear Senator: (or Assemblyman:)

"As I travel over our State Highways I have been increasingly impressed with the hazards created by numerous encroachments on our right-of-way.

"It is really amazing to note the extent to which some of these people have gone in their total disregard of the law and the people's rights.

"We are at this time instituting proceedings against a few of the most glaring cases and expect to follow up with a clear-cut attack on all encroachments. My purpose in apprising you of our plans is that I anticipate some of these people will, for selfish personal gain, try to impose upon you to intercede for them. I hope I may count on your full support in our attempt to clean up the many sores that have accumulated over a period of years.

"We expect to have a few 'rough' months as the interests behind the more glaring encroachments start working on us. However, I have every expectation it will not be long before the majority of encroachers will voluntarily move off the state's property."

The response to these letters was almost universally favorable. In addition, information was released to the press in connection with the proposed campaign.

To furnish the necessary information for the Deputy Attorney General's letter, two survey parties were sent into the field to determine and report on the location, character, amount of, and name of the property owner responsible for the encroachment.

The field reports are submitted to the Bureau of Maintenance office for editing as to right-of-way widths and other details.

Six copies of the field report are made. Three are given to the Deputy Attorney General, who, in turn, notifies the person maintaining the encroachment to abate and specifies the time of abatement as 30 days from the date of his letter. Three copies of this notice are forwarded to the Maintenance Bureau, one of which is sent to the Maintenance Foreman in charge of the section wherein the encroachment is located, and one copy to the Inspector of Highway Permits; one remains in the Maintenance Bureau file.

The copy sent to the foreman has typed on it a request to the foreman to notify the Bureau of Maintenance at the end of the deadline period whether or not the encroachment is abated. When the report comes in from the foreman, stating whether or not the encroachment has been abated, this information is noted on the Maintenance Bureau file. If abated, it is noted on a master sheet. The foreman's report is then forwarded to the Deputy Attorney General. All abatements are marked off in red on the master copy of the list retained in the Maintenance Bureau office.

The field sheets are numbered numerically. Correspondence is filed by route in separate folders, and alphabetically in the route folder. The work sheet numbers are entered on all correspondence, thus providing a cross reference.

The Deputy Attorney General, in his original notice, requests that the encroacher notify him of his intentions. If this is not done, approximately 15 days from the date of the original letter a follow-up letter is sent out.

All requests for extension of time must be directed to the Deputy Attorney General by letter. If he deems the request reasonable, the extension is granted by letter. One copy of this letter is sent to the foreman with a request to report as to the status of encroachment at the end of the extended period, and again the Deputy Attorney General is advised.

If the foreman reports that an encroachment has not been abated, the Deputy Attorney General sends a letter advising that inspection has been made and that an encroachment still exists. In this letter he requests that he be notified as to what is being done and states that unless reply is made, legal action will be instituted without further delay.

All letters received by the Deputy Attorney General requesting further details of encroachments are referred to the Bureau of Maintenance. The information requested is

furnished by the bureau in a memorandum to the Deputy Attorney General, who transmits it to the person making inquiry.

Although this outlines the general procedure, there are, of course, many instances where persons notified request further information or a meeting on the ground with Department personnel. Such instances, of course, must be handled in accordance with the circumstances and possibly at a variance with the normal routine procedure.

As of January 11, 1956, 1,483 notifications had been sent. Of these, 864 recipients had removed and 272 others had taken steps to remove the encroachment. Only 347 failed to reply.

None of the persons involved have questioned the Department's legal right to have the encroachments abated. There are, however, many requests for extensions of time to permit compliance. Upon advice from the encroacher that he is endeavoring to procure the services of a sign mover and is endeavoring to cooperate, a reasonable extension is granted.

Surveys made to date indicate that state-wide there ultimately may be found as many as 20,000 violations.

Up to the present, efforts have been concentrated on portions of the state highway system where the record as to the right-of-way is clear and not subject to doubt or controversy. Ultimately, however, it will be necessary to meet head-on questions of location and width between right-of-way lines on portions of the state highway system where the record is in many cases far from clear. Some of the highways involved were laid out in the late 1600's and practically none of them later than the early 1800's. It seems probable that not too much difficulty will be experienced with minor types of encroachment, but vigorous resistance may be expected in the case of large business and residential structures where large expenditures are involved in abatement.

The foregoing covers practically every case but that of the itinerant vendor or solicitor of funds. This group comes under the scope of that of Title 39 of the Revised Statutes covering Motor Vehicles and Traffic Regulations.

39:4-60. Soliciting trade or contributions prohibited

No person shall stand in the roadway of a highway to stop, impede, hinder, or delay the progress of a vehicle for the purpose of soliciting the purchase of goods, merchandise or tickets, or for the purpose of soliciting contributions for any cause, and the only question of law and fact in determining guilt under this section shall be whether goods, merchandise or tickets were tendered or offered for sale, or whether a contribution was solicited.

In addition to the prohibition contained in the first paragraph of this section: whenever in his judgment the public safety so requires, the Director of the Division of Motor Vehicles may, by regulation, designate any highway as a location wherein the standing of any person or the parking of any vehicle for the purpose of soliciting the purchase of goods, merchandise or tickets, or for the purpose of soliciting contributions for any cause, is deemed hazardous or inimical to the proper flow of traffic and shall be so prohibited. Each highway or section thereof so designated shall be clearly marked by appropriate signs which shall be erected and maintained by the authority having the responsibility for the maintenance of such highway, upon receipt by such authority of written notice from the director of the adoption of such regulation. No person shall stand in, and no operator shall allow a vehicle to stand in, any section of a highway so designated and marked to stop, impede, hinder or delay the progress of a vehicle for the purpose of soliciting the purchase of goods, merchandise or tickets, or for the purpose of soliciting contributions for any cause, and the only question of law and fact in determining guilt under the section shall be whether goods, merchandise or tickets were tendered or offered for sale, or whether a contribution was solicited. Whenever in his judgment the public safety so requires the Director of the Division of Motor Vehicles may, by regulation, amend or alter any designation made by him pursuant to the provisions of this paragraph. Nothing contained in this paragraph shall be construed to

> authorize or permit any person to stand in or to allow a vehicle to stand in any highway where the same is or shall be prohibited by any other provision of this Title or by any amendment thereof or supplement thereto; or by any ordinance, resolution, regulation or order duly adopted pursuant to authority thereunder.

The difficulty with this statute arises because of the definition of the word "roadway," which occurs in the first sentence. In the bill as originally introduced the word "highway" was used instead of "roadway," but the substitution was made before passage and approval.

39:1-1 contains, among other definitions, the following:

> "Highway" means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.
>
> "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately, but not to all such roadways collectively."

Berm and shoulder are also defined in such a manner as to make this provision of law practically unenforceable. The only relief for this situation seems to be the amendment of the present law. The amendment of this act is highly desirable by reason of the unsatisfactory traffic conditions created by the terms of the present act.

There is, furthermore, much criticism and protest from the owners or operators of roadside enterprises conducted entirely on private property and whose establishments are set up in conformance with the Department's rules and regulations. It is claimed that this itinerant competition is grossly unfair in that the itinerant may and many times does park his vehicle in the immediate vicinity of the legitimate operator and competes with him on a decidedly unfair basis.

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 alloted 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 cooperative 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.

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.

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