Control of Access and Police Power[1]

STANLEY N. NISSEL, Columbia University Law School

● THE ESTABLISHMENT and maintenance of an adequate national highway system is of great and growing importance to the entire country. Further development of an effective network of highways to serve increasingly complex needs requires extensive reliance on controlled access arterial highways with their special attributes of greater traffic capacity, superior safety record and concurrent nearby industrial development.[2]

Various legal problems are presented by this engineering concept. One of the most interesting of these is the possible use of the police power of the state, as opposed to the doctrine of eminent domain, in achieving this access control. The problem presented is the resolution of an interest in obtaining safe, rapid highways at the lowest possible cost with interest in preserving and protecting the property investment of the individual abutting landowner.

It is intended here to discuss, in summary, some of the many facets of this problem and to suggest a possible approach to its solution.

Throughout any discussion of this problem it is imperative to separate completely the concept of severance damages wherein a landowner is compensated by the state for injury to his land resulting from state construction which has divided, or severed, his property. The injury is the separation and consequent loss of property value (if there be any such loss) and the damages serve to make whole again the property owner. Access control or interference is not at issue here and may, indeed, never be involved at all in this question.

It was early recognized in law[3] that owners of property physically abutting upon a public road obtained rights at least amounting to a right in the nature of an easement in their access to the road, even where the fee title to the roadbed was in some governmental authority. However, such rights were subject to the paramount right of the public to use the road for passage, so that abutting owners were denied the right to enjoin construction such as elevated viaducts which would facilitate public passage. This was made abundantly clear by the celebrated New York Elevated Railway cases[4] and the U. S. Supreme Court in Sauer v. New York.[5]

Controlled access facilities, however, may be established (1) by converting an existing, unlimited access road, or (2) by constructing a new road, where none stood before, and controlling access to it from the inception.

If the first method is chosen, then abutting owners have some rights. If the second method is chosen a different problem presents itself. Abutting owners had no access before to any highway so it cannot be said that any access they had before is being taken, damaged or in any way interfered with. While many courts have not yet dealt with this specific set of facts those that have seem to have accepted correctly the view that the abutting owners have nothing to complain about. The California Supreme Court

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[1] This, necessarily, is a severely condensed version of a thesis prepared in partial satisfaction of the requirements for the degree of Master of Laws at Columbia University, New York, N. Y. during the academic year 1956-1957, during which time the author was the grateful recipient of an Automotive Safety Foundation Fellowship.

[2] Owen, "Automotive Transportation, Trends and Problems"(1949), pp. 7, 39-41; "The Metropolitan Transportation Problem"(1956); Tallamy, "Economic Effect of the New York Thruway" Traffic Quarterly, p. 220 (April 1955)

[3] Lexington and Ohio R. R. Co. v. Applegate, 8 Dana(Ky)289, 33 Am. Dec. 497(1839), Crawford v. Village of Delaware, 7 Ohio St. 459(1857), Tate v. Ohio and M. R. R., 7 Ind. 480 (1856).

[4] Story v. New York Elevated Railway Co., 90 NY 122(1882), Lahr v. Metropolitan Elevated R. R. C., 104 NY 268, 10 NE 528(1887), Bohm v. Metropolitan Elevated R. R. Co., 129 NY 576, 29 NE 802(1892).

[5] 206 U. S. 536(1906)

has written perhaps the best known decision in this area in Schnider v. California[6], wherein they said that to award compensation for the destruction of a right of access that had not previously existed would be only to award a gift of public funds to the complaining abutter. A subsidiary question is presented when an entirely new facility is constructed, i. e., when do the access-controlling design features of the new road have to be announced—upon the taking of the right-of-way, or will not the access rights in the abutter arise until the road is formally opened. While there is a division of authority on this point,[7] the better view would seem to be to allow the state to control the access up to the point that the road is formally opened to traffic, for the abutter has no real access until that time. However, this problem is easily avoided by adequate preparation in the planning stage.

In now considering whether or not the state must pay a "just compensation" or can act by virtue of its police power in controlling access which had formerly been unlimited, it is significant to note that the granting of access rights to abutting owners was not a constitutional requirement. No less a judge than O. W. Holmes recognized this full well when he said that it was something that lay entirely within the discretion of the states.[8]

The fact that the states have so strongly supported such access rights is no doubt an expression of Lockean theories of property. In deciding today whether such rights should continue to exist in toto or in part and whether the states should be permitted to interfere with them under the police power, it must be realized that supporting Lockean theories, developed almost three hundred years ago, were for the purpose of justifying and defending a political revolution against the arbitrary and absolute power of the monarchy which was preventing freedom of both liberty and property. Democratic concepts of government were in their infancy. Respect for the institution of individual private property and its protection from state action were important pillars of such ideas. The English commercial middle class needed acceptance of such property theories for its expansion and seized upon and perpetuated them. Here was the solid legal sanction that was so necessary for the acquisitive aims of this group.[9]

Naturally enough, these theories took hold in this country, for "property" to Locke meant personal liberties as well as property as it is commonly known.

To allow these theories, which have their roots in situations utterly foreign to questions of highway access control, and to apply them rigidly to reach what are, at best, artificial solutions, seems somewhat less than satisfactory as a judicial technique.

To evaluate properly problems within the scope of the police power requires a far different approach. The police power is the most comprehensive power of government[10] but an exact explanation of its extent must always await an attempt at specific application. Broadly, it constitutes the power of the sovereign to act in behalf of the public health, morals and safety[11] and for the promotion of public convenience and the general welfare.[12] It is similar to the doctrine of eminent domain in that each constitutes a way in which the state can exercise its superior interest over the individual and his property. But here the similarity ends. Actions taken under eminent domain are always subject to the constitutional provisions regarding the payment of just compensation for the taking—or damaging—of private property for public use. The police power transcends any such concept and constitutes the absolute power of the state to interfere with

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[6] 38 Cal. 2d 439, 241 P2d 1(1952). See also, Swick v. Commonwealth of Kentucky, 268 SW2d 424(1954)

[7] Kane v. N. Y. Elevated Ry. Co., 125 NY 164, 26 NE 278(1891), Gleason v. Metropolitan District Commission, 270 Mass 377, 170 NE 395(1930)

[8] Muhlker v. N. Y. and Harlem R. R. Co., 197 U. S. 544, 25 S. Ct. 522(1905)

[9] Friedmann, "Legal Theory" 3rd Ed., p. 44 (1953)

[10] Freund, "The Police Power" 2 (1904)

[11] Nichols, "Eminent Domain" 1. 42, 3rd Ed. (1950)

[12] Nashville, Chattanooga and St. Louis Ry. v. Walters, Comm. of Highways et al, 294, U. S. 405(1934)

private property for the protection and general welfare of its citizens without payment therefore.[13]

From the relationship between the police power and eminent domain has developed the statement that the state may "regulate" private property under its police power but may "take" (or "damage", in some states) such property only in accordance with constitutional provisions guaranteeing just compensation to the individual. While this distinction may have value as a simple way of stating a rather complex situation, it must be remembered that the terms "regulate" and "take" are only labels which express an answer to the question of whether or not the plaintiff is entitled to recover. To reason from these labels in an a priori sense is to place the cart where the horse should be.

The line between the proper and improper use of the police power is not capable of precise delimitation. It is always a question of degree. The pertinent quaere must always be, in terms of the immediate problem, whether the proposed state action interfering with the highway access of the abutting landowner is reasonably within the confines of the police power. The determination of reasonableness, once made, should be conclusive as it has, presumably, already considered all the facets of the situation. All too often the approach is otherwise, consisting only of the application of a static formula—(1) establish the property right of the individual concerned and (2) establish the injury to the property due to the action of the state. Ergo--damages are due and payable. Such an analysis, it is submitted, can only hamper the state in properly providing for the welfare of its citizenry.

Today property should be conceived of not as a rigid formula but as one of many interests which compete with each other for recognition, always, of course, keeping in mind that the institution of private property is rather basic to our society and should not lightly give way in this process of relative evaluation. It must be recognized, however, that as the context within which this evaluation takes place changes, so may the result.

The concept that individual property interests may fall before the need represented by the application of the police power has found expression in law in various situations. States, by use of their police power, have successfully regulated industries declared to be in the public interest[14] and the use of air space,[15] and have imposed use restrictions through zoning ordinances,[16] and others. Such action is no longer seriously questioned yet it represents an inroad upon the concept of the near-inviolability of private property. The question always, of course, is at what point do the scales tip. When the injury to the individual is severe and the purported benefit to the public slight, the balance may have swung towards the use of eminent domain, and while the state may still proceed with its action, it must now adequately compensate the landowner. If the scales tip the other way, then the use of the police power would appear justifiable.

It is within such a framework that the necessity for compensating abutting landowners for the state's interference with their access to an adjacent highway must be considered. For those who may be concerned about the possibility that the states may, by this method unduly squelch private property, it can only be said that the judiciary must assume this responsibility, for the decision as to the reasonableness or arbitrariness of the states' purported action under the police power is, in the last analysis, theirs.

In the various aspects of highway law, the use of the police power by the states is not novel. Traffic regulations, which often affect adversely the access of an abutter, seem clearly to be justifiable under the police power, although some courts have concluded otherwise in certain situations. In examining these situations it is important to note two things. One, a minority of the state constitutions declare that just compen-

[13]It is sometimes said that the property owner is compensated insofar as he derives benefit in general with the rest of the public affected by the state's action.
[14]Munn v. People of Illinois, 94 U.S. 113, 24 L. Ed. 77(1876)
[15]Hinman v. Pacific Air Transport Co., 84 F2d 755, C.C.A. 9th (1936)
[16]Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303 (1926)

sation must be paid by the state for the taking or damaging[17] of private property. The problem of differentiating between "taking" and "damaging" is immediately apparent and the courts have evolved in response to it the concept that "damage" is compensable only if it is such that it results in injury which differs in kind and not only in degree from that suffered by the general public.[18] Of course, state actions which are merely a legitimate exercise of the police power and performed under its authority, are unaffected by any such constitutional provision. What is significant for this problem is that within the suggested context for consideration of actions under the authority of the police power, i.e., the reasonableness of the regulation, balancing all relevant circumstances and conditions, a state with a "damage" provision will probably be less ready to uphold a regulation under the police power than will a state with only a "taking" provision. To proceed, in a leading New York case, Jones Beach Boulevard Estates v. Moses,[19] the abutter was the recipient of certain reserved access rights to an adjacent highway. After construction was complete, a regulation was placed in effect prohibiting U-Turns except at certain designated areas. The plaintiff abutter was forced to proceed far past his property in order to turn around and reach the property. This regulation, of course, caused the abutter what is often termed the "inconvenience of circuity of travel" and the New York courts held that the abutter could not recover as his rights were subject to the paramount right of the state to regulate for the public benefit. In like manner, state regulations concerning the location of abutting driveways[20] and establishing one way streets[21] have been rather uniformly upheld by the courts which have considered them although there is no doubt that often the interests of abutting owners were adversely affected. These cases should be contrasted sharply with less well-reasoned ones which have clouded a few of these areas with some uncertainty.

The problem of the creation of thecul-de-sac has caused some courts to declare that the abutting owner is being deprived of a reasonable means of ingress and egress to the streets when he can reach them in only one direction.[22] Just why this situation should be different from others involving only circuity of travel is not clear. The abutter still has access to the entire street system and the only possible injury to him is that he may be forced to travel a bit further to reach his destination. These courts which refuse to allow compensation in this case, therefore, would seem to be adopting the better rule.

The development of the frontage road is a phenomenon concurrent with the development of the limited access highway. As it provides access with the main highway only at designated points, it has been contended that the right of access of landowners who previously abutted on the highway and who now abut on the frontage road, was taken or damaged so as to require payment of compensation by the state. The California court, faced with this problem, in People v. Ricciardi[23] reach the astounding conclusion that the state must pay compensation, in spite of the fact that:

1. This seems clearly to be only another case of circuity of travel and the court admitted that damages would not be recoverable for this, and
2. The "damage" clause in the California constitution was the basis of the award and the abutter suffered only that injury that was suffered by the general public— access to the highway was permitted only at designated points.

If anything, he suffered only to a greater degree than the public. Fortunately, later cases have distinguished this case so as to avoid such a result which could severely

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[17]Only 25 states have a "damage" clause. See Nichols, op. cit. supra note 11, sec. 6.1 (3), note 23 for list.
[18]Reese, "Legal Aspects of Limiting Highway Access" HRB Bulletin 77 (1955)
[19]268 NY 362, 197 NE 313(1935)
[20]Brenig v. Allegheny County, 232 Pa. 474, 482, 2 Atl. 2d 842, 847(1938), Matter of Socony-Vacuum Oil Co. v. Murdock, 165 Misc. 713, 1 NYS 2d 574(Sup. Ct. 1937)
[21]Chissell v. Baltimore, 193 Md. 535, 69 Atl. 2d 53(1949)
[22]Bacich v. Board of Control of California, 23 Cal. 2d 343, 144 P2d 818(1944). But cf. New York, C. and St. L. R. R. Co. v. Bucsi, 128 Ohio St. 134, 190 NE 562(1934)
[23]23 Cal. 2d 390, 144 P2d 799(1943)

hamper any limited access road development scheme.

A comparison of this case with the Jones Beach case will reveal that the divergent results were expressions of different analytical approaches. The Ricciardi court ascertained the property right of the abutter and then the damage to it--ergo, compensation was payable although no one now supports the court majority. The Jones Beach case court examined the problem in the light of the reasonableness of the regulation as a legitimate function of the police power. Looked at in that light the result seems clearly correct and, it is submitted, the Ricciardi result would have been otherwise had such an analysis been used.

Divergent results have also been reached in cases involving changes of grade and other highway improvements which resulted in some interference with the access of the abutter.[24] Divergency of result itself, however, does not necessarily suggest that someone is wrong. Within the suggested analysis as various factors differ, the scales may well tip in opposite directions in the court's evaluation of the reasonableness of the state's action.

While many courts and commentators appear ready to allow some measure of access restriction based upon the state's police power, it seems to be rather generally concluded that the state cannot go so far as to landlock the abutter completely without compensating him therefore. However correct this view may be in terms of a social, economic or political policy, it certainly is true that private property can be destroyed under the authority of the police power without compensating the owner.

The right of the state to destroy private property to prevent the spread of disease or conflagration is well recognized. Prohibiting the construction of a building on part of the owner's property which will be reserved for sidewalk use[25] is surely to "take" that part of the property in a "use" sense. All this is done in the name of the police power as are the numerous cases involving the abatement of public nuisances, such as ordinances prohibiting emissions of dense smoke in certain city areas which often result in discontinuance of the use of the property.

The U. S. Supreme Court has upheld the destruction without compensation of certain prohibited types of fish nets used in contravention of statutes declaring their use to be a public nuisance.[26]

Perhaps the most famous case wherein complete destruction of private property by the state without compensation was affirmed by the U. S. Supreme Court as a legitimate exercise of the police power was Miller v. Schoene.[27] In this case Virginia apple orchards were being infected with a plant disease known as "Cedar Rust." The State Entymologist determined that the cause of the difficulty lay in infected ornamental red cedar trees growing on the plaintiff's property in the vicinity of the affected orchards. Pursuant to an act of the State Legislature which did not provide for any compensation he ordered the offending cedar trees cut down. The state courts affirmed this order. In declaring the statute to be a valid exercise of the police power of the state Mr. Justice Stone, after evaluating the interests in conflict, the importance of the apple industry to the economic well-being of Virginia and the value of the cedar trees, said,

> "Where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[28]

Thus, it seems legally possible to regulate access even to the point of completely landlocking the property. However, basic policy considerations should prevent any such

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[24]Eachus v. Los Angeles Consolidated Elec. Ry. Co., 103 Cal. 614, 37 P 750(1894), Anderlik v. Iowa State Highway Comm., 240 Iowa 919, 38 NW2d 605(1949). But cf. Barrett v. Union Bridge Co., 117 Ore. 220, 243 P 93 (1926)

[25]Eubank v. City of Richmond, 226 U.S. 137(1912)

[26]152 U.S. 133(1894)

[27]276 U.S. 272, 48 S.Ct. 246(1928)

[28]Id. at pp. 279, 253

result. Use of the police power of the state where the effect of such action is only to shift the site of access, destroy one access point where others exist or affect the access in any way which does no more than cause the abutter to use a more circuitous route to enter the through portion of the highway seems clearly constitutional. Such use of the police power, by eliminating a potentially large share of the cost, will promote the establishment of controlled access facilities, a highly desirable desideratum.

In the consideration of these problems the pertinent examination should always be whether or not the action proposed by the state seems reasonably within the purpose of its police power. If it is then it should be upheld. The police power has a large and legitimate role to play in this field. Heretofore it has been largely neglected. It is hoped that this ommission will be corrected in the future.

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