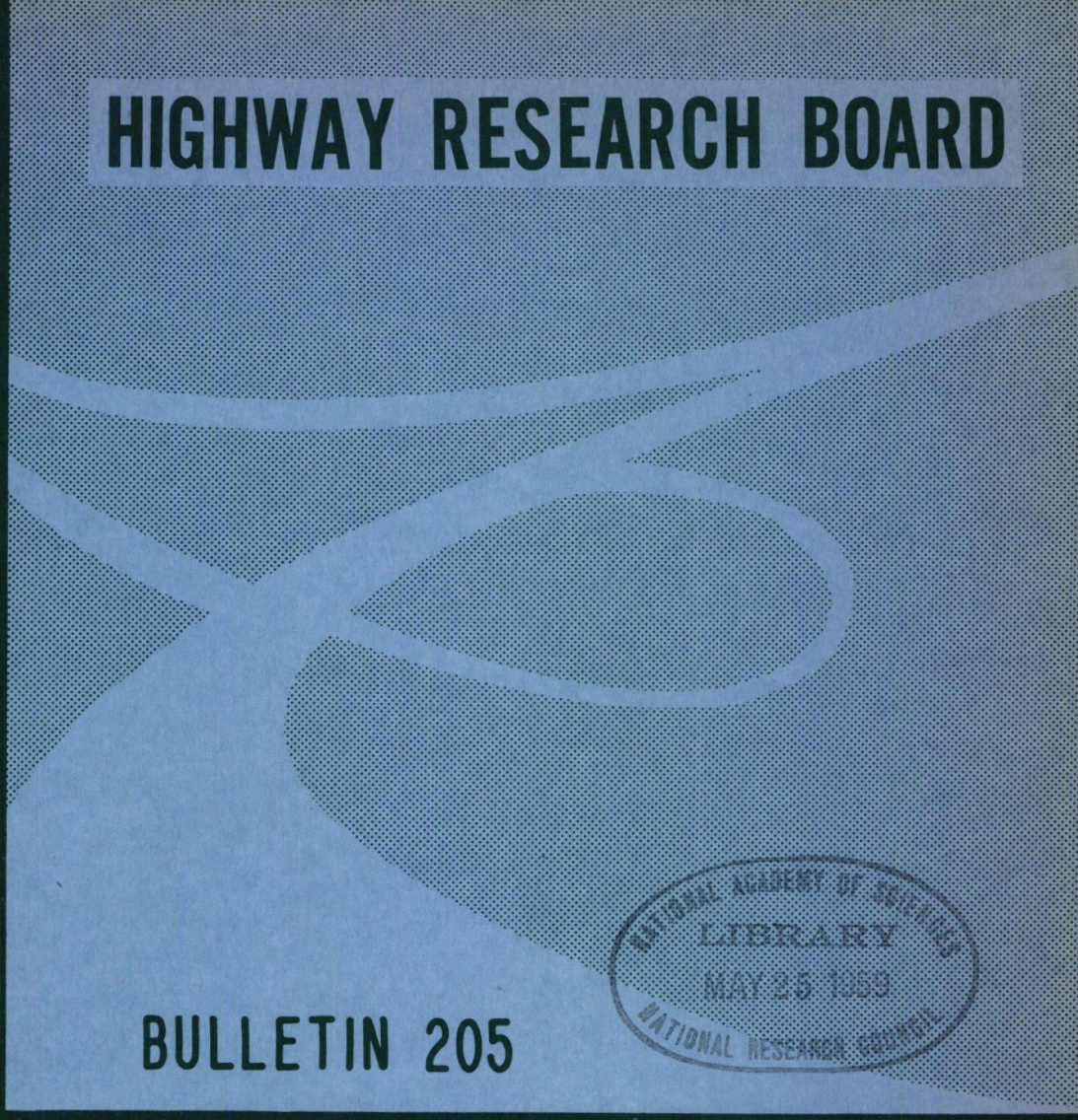
1958

HIGHWAY RESEARCH BOARD



BULLETIN 205

HIGHWAY LAWS

National Academy of Sciences—
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publication 637

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1958

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Bulletin 205

Highway Laws-1958

PRESENTED AT THE
Thirty-Seventh Annual Meeting
January 6-10, 1958

1958

Washington, D. C.

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Contents

Report of the Committee on Highway Laws

LOUIS R. MORONY, Chairman,
Director, Laws Division, Automotive Safety Foundation; and
DAVID R. LEVIN, Secretary, Highway and Land Administration Division,
Bureau of Public Roads

● THE HIGHWAY LAWS Committee of the Highway Research Board is well along in its major project designed to provide highway officials with comprehensive reports on the legal aspects of every major highway function. The Committee is actively engaged in a study of constitutional, statutory, and case law, for it is from this vast body of material that the Committee is extracting essential elements of highway law presently in force.

A special meeting of the Committee was held November 17, 1957, at Chicago, Illinois. Many of the top officials of the state highway departments and offices of state attorney generals attended. The staff of the laws project reported in considerable detail on their work in progress and completed reports.

HRB Bulletin 145 was published during 1956, entitled "Highway Laws." It contains discussions of highway law from the standpoint of federal, state, and local officials.

The public utility relocation problem in connection with highway improvement is a continuing one, and, accordingly, there has been steady interest in the Committee's study on this problem, published as HRB Special Report 21, "Relocation of Public Utilities Due to Highway Improvement, An Analysis of Legal Aspects."

REPORTS PUBLISHED OR IN PROCESS

During the year, the Highway Laws Committee was responsible for publication of several valuable and well-documented studies in connection with highway laws.

Expressway Law, An Analysis (Special Report 26)

More than 1,500 judicial decisions and a substantial amount of highway literature were reviewed in connection with the preparation of this report.

In its summary of findings, the report acknowledges that the law relating to expressways does not involve a completely new set of rules, consisting more of a refinement of existing law achieved through an evolutionary process.

The broad framework of the report involves two basic questions:

1. What were the rights and duties of abutters and the states prior to the time of the enactment of modern expressway statutes?
2. What have the states done to clarify, affirm, or change these concepts?

The report notes that the function of the conventional unlimited access highway has been to serve largely the abutting land—to provide a means of ingress and egress from an abutter's property. Accordingly, certain property rights in the existing highway arose for his benefit—the rights of access, air, light and view. However, these rights cannot be fixed inflexibly for all times and all places.

The state, on the other hand, is charged with the responsibility of providing safe and adequate highway systems commensurate with the times. All states have vested in their highway commissions the power to acquire rights-of-way for highways, although this aspect of delegation of power has not been free from controversy.

Under the state police power, highway authorities may, to a certain extent, regulate access to insure safer and more efficient highway travel. Where such regulation of access results in damage to an individual, it is theorized that the use of police power is merely consequential to a superior public interest.

Generally, according to prevailing legal principles, an abutter may not be deprived of all access to an existing highway without compensation, but such compensation will

Figure 1. John R. Fitzgerald Expressway, Boston, Massachusetts—Many aspects of expressway law were involved in connection with this modern expressway running through the center of the city.

be justified only where he suffers a special injury differing in kind, but not in degree, from that suffered by the general public as a result of the obstruction of access. Much confusion has resulted from attempts to determine what constitutes "special injury" as distinguished from non-compensable damage.

In an attempt to solve some of the problems inherent in expressway construction laws, as distinguished from the conventional highway, most states have enacted expressway statutes. This action leans toward the theory that public policy matters should be determined by the legislature as the representative of the people, and not by piecemeal litigation through the judiciary.

The report summarizes and discusses the substantive elements extracted from the various expressway laws. These elements are:

1. Declaration of legislative purpose.
2. Separability and severability provision.
3. Definitions.
4. Governmental unit authorized.
5. Standards for exercising authority.
6. Intergovernmental agreements authorized.
7. Requirement of consent of local governments.
8. Provision authorizing control of access on both existing and new roads.
9. Elimination of intersections.
10. Frontage roads.
11. Design.
12. Authority to acquire both private and public property.
13. Authority to acquire fee simple interest.
14. Authority to acquire access rights, air, light, and view.
15. Acquisition of land in addition to immediate right-of-way needs.
16. Precedence in court proceedings.
17. Provisions denying or limiting access.
18. Traffic regulations.
19. Public utility provisions.
20. Provisions relating to roadside services and commercial enterprises.

Figure 2. Bruckner Boulevard in New York City—Frontage roads give added protection to expressways.

Acquisition of Land for Future Highway Use, a Legal Analysis (Special Report 27)

The purpose of this report as set forth in its preface is to analyze existing statutes and court decisions involving acquisiton of land for future use, and to isolate the important principles which should be considered in drafting legislation authorizing the acquisition of land for this purpose.

Figure 3. Fall River Expressway between Taunton and Fall River, Massachusetts—Right-of-way costs will be reduced by advance acquisition of land.

The report is a culmination of a review of state statutes, of hundreds of judicial decisions, and a substantial amount of highway literature, in an attempt to find clues as to concepts, laws, and practices dealing with the legal aspects involved. The resultant findings are expected to be of help to those directly charged with acquiring land for highway purposes and may also serve as a guide to legislators, highway administrators, planning engineers, and others.

Some of the more important benefits to be derived from an adequate program of acquiring land for future highway use include the following:[1]

1. Right-of-way costs will be minimized by forestalling development of the land ultimately required for highway purposes.
2. Orderly development of communities will be facilitated.
3. Private developers and property owners will be enabled to plan their private land uses and development wholly consistent, physically and functionally, with an ultimate highway plan.
4. Right-of-way may be acquired more economically when not acquired under pressure of having to meet a deadline for construction by providing an adequate period of time for negotiation.

It was found that at that time 15 states[2] had specific statutes authorizing land acquisition for future use. In addition, five other states have legislation granting such authority by implication.[3]

Based upon an analysis of judicial decisions, existing statutes, and needs for modernization of the highway system of the nation, the Highway Laws Committee has set forth

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[1] Proceedings, Convention Group Meetings, Papers and Discussions, 1954, American Association of State Highway Officials, "Advance Right-of-Way Purchases for Freeway Construction," E. F. Wagner.

[2] Arkansas, California, Colorado, Florida, Idaho, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Virginia, and Wisconsin.

[3] North Carolina, Oregon, Tennessee, Texas, and Washington.

in its report 16 elements on characteristics which state legislatures may wish to consider in connection with their land acquisition programs. These elements are:

1. Declaration of legislative policy.
2. Delegation of authority.
3. Words of futurity.
4. Standards for exercise of power.
5. Methods of acquiring property.
6. Determination of necessity.
7. Type of interest acquired.
8. Power to sell lands no longer needed.
9. Power to lease.
10. Application to improved or unimproved lands.
11. Application of acquisition for future use to types of highway projects.
12. Financing acquisition of land for future use.
13. Definition of terms.
14. Designation of offenses and penalty provisions.
15. Severability provisions.
16. Intergovernmental relationships.

The report discusses statutes passed in some of the states which specifically authorize acquisition for future highway use. Generally, these statutes have a common set of elements and characteristics including:

1. Who has the power to acquire for future use.
2. Method of acquisition.
3. Type of interest acquired.
4. Determination of necessity.
5. Power to sell and lease.
6. Words of futurity.
7. Standards for exercise of power.
8. Kind of property acquired–improved or unimproved.

In an appendix to the report is a summarization of statutory and case law concerning acquisition of property for future use by states.

Popularized versions of these two studies were published during the year by the Automotive Safety Foundation. One is entitled "Expressway Laws, Are Yours Adequate?" the other is "Acquiring Rights-of-Way for Future Highway Use, Does Your State Have the Authority?" Both of these documents have gone far and wide, and have brought summaries of the subject to many groups that otherwise might not have had the benefit of knowledge in this particular field.

Condemnation of Property for Highway Purposes, A Legal Analysis, Part I (Special Report 32)

With the volume of highway construction increasing steadily, there is every expectation that the power of eminent domain will have to be resorted to more than ever. This is especially true with respect to suburban areas where land use has been intensified and in urban areas where land values have increased so rapidly.

This report, issued in two parts, covers the various aspects of the power of eminent domain including the techniques utilized by state legislators. The four aspects with which Part I is concerned are:

1. Delegation of the authority to condemn.
2. Property which may be taken.
3. Type of legal estate which may be taken.
4. Designation of the procedure to be followed.

The report aims at assisting the states in evaluating present condemnation laws, and sets up guides, bench marks, and materials for this purpose not only for states but for local jurisdictions as well.

Figure 4. Viers Mill Road in Suburban Washington—Development of suburban land increases need for adequate authority to acquire right-of-way.

The four main problems dealt with in the report, as mentioned above, are treated separately from the standpoint of state, county, city, town and village, and special authorities.

Condemnation of Property for Highway Purposes, A Legal Analysis, Part II

This report deals with one of the most troublesome aspects of the entire condemnation procedure—the question as to the particular point at which the condemner may take physical possession of the property and begin construction of the facility. Suggested statutory provisions which will permit the condemner to proceed with construction in a more expeditious manner are included. This report will be published before the end of 1958.

Legislative Purpose in Highway Law has been reviewed by the Laws Committee and the state highway departments and after extensive revision resulting therefrom is now ready for release. This is an analysis of the so-called "declaration of purpose" which is rapidly gaining favor of those charged with the duty of drafting new legislation, inasmuch as it can be of immeasurable help in determining the intent of the legislature.

Highway System Classification, Part I, Primary State Highway Systems, is an investigation of the legal aspects of highway classification involving an analysis of constitutional provisions, state statutes, and judicial decisions. The first draft of this report is being reviewed by the Committee and liaison representatives, and will be ready for publication in the near future. Subsequent reports in this series will analyze state, secondary, county and other local systems.

State Laws Relating to Federal Aid for Highways, presently to be reviewed by the Committee, is a compilation of current state statutes which expressly refer to federal-aid highway laws. The study considers the types of authority delegated by state legislators to agencies and political subdivisions to permit cooperation in the various federal-aid programs and insure the benefit of federal highway appropriations.

Constitutional Provisions Concerning Highways will include a discussion of federal and state constitutional provisions concerning highways directly and indirectly, as well as those relating to taxation and indebtedness.

Intergovernmental Cooperation in Highway Matters, A Legal Analysis

This report deals with cooperative legal relationships between different levels of governmental units (federal, state, county, townships, and special districts) established for the purpose of carrying on highway improvement programs.

ASSISTANCE TO STATES

The staff of the Highway Laws Project also rendered assistance to many of the states with respect to special legal matters. For example, evaluation was made of three proposed access control bills for one state; case materials relating to the authority of highway departments to construct median strips were compiled for another; statutory provisions concerning compensable elements of damage in highway land acquisition were assembled in response to an inquiry from one of the states; and for another, the legal aspects involved in the exchange of property for highway rights-of-way were formulated. A "model" act for the Mississippi River Parkway States was reviewed.

During the year the Committee has issued six monthly memoranda on current highway legal matters. These circulars report legal activities almost as quickly as they occur.

PAPERS PRESENTED AT ANNUAL MEETING

In January, 1958, the Highway Laws Committee met in Washington during the Annual Meeting of the Highway Research Board. Three very important and informative papers were presented. All of these are included in full in this report.

Louis R. Morony, Chairman, and David R. Levin, Secretary, Highway Laws Committee, summarized the various activities of the Laws Committee, including a progress report on current studies and future plans. Mr. Morony also reviewed the history of the Highway Laws Project.

The Law and Highway Modernization

Mr. Clifton W. Enfield, General Counsel, Bureau of Public Roads, outlined the legal problems involved in current efforts to modernize the highway plant. Visualized were the more important issues from a national point of view and particularly with respect to the federal-aid program.

With the enactment of the Federal-Aid Highway Act of 1956, legal deficiencies were discerned in many of the state highway laws. Much of the legislation passed was on a patchwork basis to meet immediate needs only.

Mr. Enfield suggests that highway legislation be kept ahead of modern highway construction by being imaginative and farsighted enough to provide the legal tools required by all those actively connected with the construction and maintenance of highways.

Control of Access and Police Power

Mr. Stanley N. Nissel, Columbia University Law School, summarized the possible use of the police power of a state in achieving access control, as opposed to the use of eminent domain, discussing some of the facts related to this problem and suggesting possible solutions.

A Program of Highway Research at the University of Wisconsin

Professor Jacob D. Beuscher, University of Wisconsin Law School, discussed the interest of the University of Wisconsin in legal and economic research. The paper included a summary of the work of Messrs. Heaney, Vlasin, and Covey, graduate fellows in law, who are engaged in special legal and economic research relating to highway transportation.

The paper touches upon some highly important aspects of highway research including:

1. Operation of the valuation process as it functions in the acquisition of land for highway use
2. Impact of highway development upon farm owners and operators, the nature and effect of this impact, and possible means of reducing its adverse effects.
3. The relation between the states' police powers and their power of eminent domain in the control of access and roadside development.

Professor Beuscher summarized future plans with respect to legal research in highway law and the furtherance of economic impact studies.

HIGHWAY LITIGATION

During 1957, the Committee on Highway Laws issued six memoranda in the Highway Research Correlation Service Series summarizing the more important cases involving highway litigation. At issue were cases involving fiscal matters, weight restrictions, etc. Summaries of the more important cases decided follow:

Fiscal Matters

Arizona. The Arizona State Highway Commission adopted a construction and right-of-way budget as required by law which involved the amount of $1,475,000 for a particular project. The Commission then entered into a contract for construction of the project for the sum of $1,983,659, subject to certain conditions. However, the contract provided that the work done during the fiscal year must conform to the funds actually allotted. Any additional work required in excess of the budgeted amount would be performed after the Legislature appropriated additional funds. The contract would become null and void, except as to funds already budgeted, if no further funds became available.

The state auditor refused to encumber any of the budgeted funds.

The court held that the contract was valid even though the amount exceeded budgeted funds, because the state was not obligated beyond the amount of the original budget. Duff v. Jordan, 311 P. (2d) 829, Supreme Court of Arizona. (Memorandum 32, Committee on Highway Laws, Highway Research Correlation Service Circular 350 (November 1957).)

Delaware. The successful bidder for construction of a bridge failed to include in the bidding documents accompanying his bid certification of the names of his suppliers. On request of the state highway department, the names of the suppliers were furnished later.

The department had reserved the right to waive technicalities and the Attorney General advised that the department had the right to waive omission of the execution of the certificate. The department, accordingly, awarded the contract.

The court stated that the law required that a bid must conform substantially to the advertised terms. A slight variance which does not destroy the competitive character of the bid does not require its rejection. The variance in this case was not a substantial one. Bader v. Sharp, 125 A. (2d) 299, Supreme Court of Delaware. (Memorandum 30, Committee on Highway Laws, Highway Research Correlation Service Circular 344 (August 1957).)

Florida. Chapter 340, Florida Statutues Annotated, created the Florida State Turnpike Authority which proposed to issue $185,000,000 in bonds for turnpike construction. The Circuit Court, upon petition for validation of the bonds, entered a decree validating the issue. The state and others appealed on grounds that:

1. The bonds would constitute bonds of the State of Florida in violation of Sec. 6, Art. IX of the Constitution.
2. Authority failed to make adequate engineering studies.
3. The Turnpike Act amounts to an unwarranted and improper delegation of legislative power.
4. The Constitution forbids advancement of money by the State Road Department to the Turnpike Authority.

The Supreme Court affirmed the ruling of the lower court and held that:

1. The bonds in question would be paid solely from tolls, revenues, and other funds derived from operation of the turnpike. The face of the bonds clearly stated that the state would not in any way be held responsible for taxes to service them.
2. Studies and surveys were adequate. The Legislature fixed the termini and general route, and where discretion was exercised by the Authority, such action was taken only after diligent studies were completed.
3. The act defined the projects that might be undertaken and the Authority could not go beyond those limits. Any power delegated was merely ministerial or administrative and in no sense legislative, since limitations were defined.
4. Any money advanced to get the turnpike project under way was merely a temporary arrangement. These funds would be repaid as soon as the bonds were marketed. State v. Florida State Turnpike Authority, Fla., 89 So. (2d) 653. (Memorandum 29, Committee on Highway Laws, Highway Research Correlation Service Circular 342 (July 1957).)

Idaho. The Legislature created a Department of Commerce and Development, one of whose functions was to publicize the state, its resources, and tourist attractions. The sum of $50,000 was appropriated from the Highway Fund for the purpose of advertising the state's highways and encouraging travel thereon.

The State Treasurer doubted the constitutionality of the law, refused to transfer the money, and sought a judicial determination of the matter.

The Idaho Constitution provides that the proceeds from motor fuel and motor vehicle registration taxes must be used exclusively for construction, repair, maintenance, and traffic supervision of the public highways and shall not be diverted to any other purpose.

The court held that the use of such funds for advertising the state would violate this constitutional provision since such a function was not one of the specific purposes mentioned in the Constitution as a legitimate use of the funds. State v. Jonasson, Idaho, 299 P. (2d) 755. (Memorandum 27, Committee on Highway Laws, Highway Research Correlation Service Circular 333 (March 1957).)

Kentucky. An action was brought against Bracken County and others to enjoin them from expending the proceeds of a special tax levied "for the purpose of improving and constructing, either or both, the roads and bridges of the county." It was contended that the greater part of the proceeds of the levy had been spent for maintenance and repair of county roads and bridges and that such use was improper and illegal.

The Circuit Court of Bracken County in granting the petition, thus reversing a lower court decision, dwelt on the definitions of "improve," "construct," "maintain," and "repair," concluding that "improve" and "construct" mean to better the original status. "Maintain" and "repair," on the other hand, mean to preserve or remedy the original condition. Expenditures for maintenance and repair were not contemplated for funds collected to improve and construct, as called for by the statute, and thus such diversion of funds was in violation of Section 180 of the Kentucky Constitution and KRS 68.110. Thompson v. Bracken County, Ky., 294 S.W. (2d) 943. (Memorandum 29, Committee on Highway Laws, Highway Research Correlation Service Circular 342 (July 1957).)

Weight Restrictions and Limitations

California. The City of Redwood City enacted an ordinance specifying certain streets over which trucks exceeding three tons could operate, and prohibited travel of such vehicles over any other streets.

Plaintiff contended that: (1) the alternate route must be entirely within the city;

(2) a city does not have power to enact an ordinance which would have an extraterritorial effect; and (3) the ordinance discriminated against its trucks in favor of other trucks.

The court cited the Vehicle Code as authority for validating the ordinance at issue. The statute did not specify that an alternate route must be entirely within a city. The extraterritorial aspect of the ordinance was also covered by the same Motor Vehicle Code.

Although it was admitted that the ordinance would have the effect of increased expense and inconvenience, the court found no violation of the Federal or State Constitutions. Where regulatory provisions result in added burdens or inconveniences, and such are not unreasonable, all citizens must yield to the common good.

The court concluded that the ordinance at issue was a valid exercise of the police power and the statutory authority conferred by the Vehicle Code. McCammon v. City of Redwood City, 308 P. (2d) 831. (Memorandum 31, Committee on Highway Laws, Highway Research Correlation Service Circular 348 (October 1957).)

New York. The court rejected the literal construction of the weight limitation statute holding that the Legislature did not intend to permit the conviction of an operator-employee of an overweight truck without proper proof of knowledge of the breach on the part of such person, or a basis upon which an inference of knowledge could properly be drawn. The defendant was acquitted. People v. Cubiotti, City Court of Rochester, 157 N. Y. S. (2d) 784. (Memorandum 29, Committee on Highway Laws, Highway Research Correlation Service Circular 342 (July 1957).)

Ohio. The City of Reading passed an ordinance making it unlawful to operate vehicles with gross weights of over 20, 000 pounds over its streets in through traffic.

Action was brought to enjoin enforcement of the ordinance on the ground that it violated the equal protection clause of the 14th amendment of the U. S. Constitution as well as the Constitution of the State of Ohio. The Court of Appeals held that the ordinance was void. The power of municipalities to pass ordinances was recognized. However, such municipalities must keep within constitutional limitations. In this case the municipality contended that vehicles weighing over 20,000 lb were damaging streets and endangering safe movement of persons and vehicles. Restrictions were imposed on through traffic vehicles only, yet vehicles of equal or heavier weights not operating in through traffic, and of equally damaging weight were exempt from the ordinance.

The Ohio Supreme Court affirmed the judgment of the Court of Appeals in finding that the ordinance violated the equal protection clause of the 14th amendment in that the ordinance discriminated between residents and nonresidents. Richter Concrete Corporation v. City of Reading, 142 N. E. (2d) 525. (Memorandum 27, Committee on Highway Laws, Highway Research Correlation Service Circular 333 (March 1957).)

Other important decisions in the states relating to highways follow:

Arkansas. The data fixed by the State Comptroller for participation of highway employees in Federal Social Security coverage cannot be changed by the highway commission. Such employees are employees of the state and their salaries are paid by the State Treasurer. Arkansas State Highway Commission v. Clayton, 292 S. W. (2d) 77. (Memorandum 27, Committee on Highway Laws, Highway Research Correlation Service Circular 333 (March 1957).)

The state highway commission may prohibit parking on truck routes within city limits if such a route is part of the state highway system. Arkansas State Highway Commission v. City of Little Rock, 300 S. W. (2d) 929. (Memorandum 32, Committee on Highway Laws, Highway Research Correlation Service Circular 350 (November 1957).)

California. A county may include state highways in a special road maintenance district and the maintenance procedure may be used to operate and maintain street lights on such state highways. Fischer v. County of Shasta, 299 P. (2d) 222. (Memorandum 27, Committee on Highway Laws, Highway Research Correlation Service Circular 333 (March 1957).)

Delaware. Legislation first cutting the membership of the state highway department and later raising the membership was held to be constitutional. State v. Schorr, Delaware, 131 A. (2d) 158. (Memorandum 32, Committee on Highway Laws, Highway Research Correlation Service Circular 350 (November 1957).)

Louisiana. A construction company which built a temporary bridge for the state cannot subrogate itself to the rights of the department of highways in a suit against a trucking firm whose overloaded behicle caused the bridge to collapse. Forcum-James Company v. Duke Transportation Company, 98 So. (2d) 228. (Memorandum 29, Committee on Highway Laws, Highway Research Correlation Service Circular 342 (July 1957).)

Michigan. A statute requiring opening of a public highway within four years after being laid out is not applicable to a highway established by dedication. Rice v. Clare County Road Commission, 78 N. W. (2d) 651. (Memorandum 30, Committee on Highway Laws, Highway Research Correlation Service Circular 344 (August 1957).)

New Jersey. A borough ordinance establishing truck routes over county roads maintained by the county was declared void. The statute authorizing the ordinance provided that such routes would be established on the streets of the municipality enacting such ordinances. Since the county had the duty to maintain county roads it must also have the power to regulate them. County of Bergen v. Borough of Rutherford, 125 A. (2d) 568. (Memorandum 30, Committee on Highway Laws, Highway Research Correlation Service Circular 344 (August 1957).)

New York. Existing highway signs lawfully installed prior to adoption of manual of uniform traffic control devices held to be adequate warning. McDevitt v. State, 154 N. Y. S. (2d) 874. (Memorandum 30, Committee on Highway Laws, Highway Research Correlation Service Circular 344 (August 1957).)

Claim dismissed for damages allegedly caused by work along the New York Thruway. Plaintiff claimed his property, abutting the Thruway, was being damaged by dirt, dust, vibration, blasting, etc. Feeley v. State, 153 N. Y. S. (2d) 272. (Memorandum 27, Committee on Highway Laws, Highway Research Correlation Service Circular 333 (March 1957).)

Oregon. Court upheld the right of the State Highway Commission to classify and reclassify highways comprising state highway system. Since existing statutes did not define "primary" and "secondary" state highways, the Legislature apparently left the determination of classifications to the highway commission and not the courts. (Memorandum 27, Committee on Highway Laws, Highway Research Correlation Service Circular 333 (March 1957).)

Virginia. Provision of bus facilities through and over tunnel-bridge project was held to be a proper exercise of a governmental function. Court ruled that operation of busses was a necessary link in highway activity, especially since prior to construction of the new facility, the state highway commission had operated ferries as connecting links in the system at these points. Almond v. Day, 199 Va., 1, 97 S. E. (2d) 824. (Memorandum 31, Committee on Highway Laws, Highway Research Correlation Service Circular 348 (October 1957).)

A Program of Highway Research at the University of Wisconsin

J. H. BEUSCHER, Professor of Law, School of Law; and
DONALD HEANEY, RAY VLASIN AND FRANK M. COVEY, JR., Researchers, University of Wisconsin

Professor Beuscher: This is a description of highway research in progress and an outline of some future research hopes. We are not here reporting research findings; rather, we are focussing on research goals and methods.

I have fortified myself, in this presentation, with Messrs. Heaney, Vlasin and Covey, who are all researching on highway problems, at Madison, working closely with each other, benefiting from each other's suggestions. Mr. Heaney and Mr. Covey are lawyers and their research is being financed by the Automotive Safety Foundation. Mr. Vlasin is an agricultural economist in the employ of the U.S. Department of Agriculture. He is working under Professor Raymond J. Penn of our Agricultural Economics faculty.

As each of these men gives a description of the research he is attempting, note the ease with which we have crossed the departmental lines between law and economics. Notice, also, that the research of each man gives emphasis to empirical findings. In the Law School we call this "law-in-action" research.

How are appraisers actually applying the black letter rules of eminent domain evaluation law? What, in detail, is the process by which highways are planned and right-of-way acquired? What voice do local people and local governments have in the process? How can some of the adverse effects of highway development upon the farming business be reduced? How can we more effectively protect both public highway and private business investment by regulating land uses on land abutting our highways? These are some of the important questions Messrs. Heaney, Vlasin and Covey are attempting to answer. After each has briefly described his work and his goals, I shall try to outline briefly some of our future plans for highway research.

VALUATION PROCEDURES IN HIGHWAY LAND ACQUISITION

Mr. Heaney: My work is essentially a study of the operation of the valuation process as it functions in the acquisition of land for highway purposes. The objective is to discover how a value figure on property needed for highway use is determined. In other words, how is it decided to pay Farmer Brown $5,000 for bisecting his pasture with a 300-ft swath of pavement or Merchant Green a like amount because customers can no longer reach his place of business so easily.

My point of view is that of a lawyer, but of a lawyer looking at the law from a slightly different angle than he normally does. I think whatever value this study may have will result from this somewhat different point of view. The focus is on what is happening, what is being done in right-of-way valuations, not just on what the governing statutes say, or what the case law on the subject is. These latter materials have already been treated at length, and probably little of value can be added in this vein beyond incorporating the latest cases and concepts as they emerge, a job which along with so many others David Levin has been doing so well. However, little, if anything, has been published of what happens to case law and statutory concepts when they are exposed to the everyday problems of the highway administrator in action.

After intensive study of the statutory and case law of eminent domain valuation, I am now turning from this "law in the books" to my field work. The method of field research I propose to use is simple to outline. It belongs more to the anthropologist than to the lawyer or the economist. Principally, it involves being on the scene, observing without intruding. The interview is, of course, useful too, but I expect better results from actual observation. The principal subjects of my law-in-action study are the

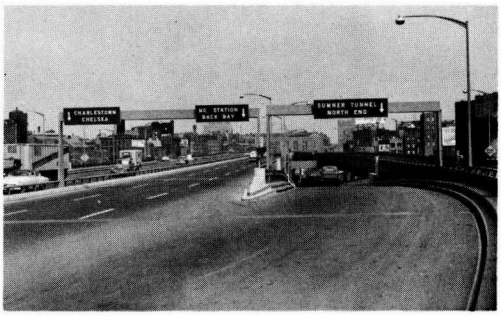

Figure 1. Fitzgerald Expressway, Boston, Massachusetts—Many considerations enter into the valuation process when right-of-way is acquired for highway purposes.

activities of appraisers, highway commission negotiators and the private bar as each functions in the process by which land is valued in highway condemnation. Also under study are the court hearings and trials (including jury trials) in matters of condemnation. In all of this I expect to continure to exchange information with Mr. Vlasin, an economist who is also observing land acquisition procedures. We have set up our studies from the beginning with this in mind. Already I have found his background useful in analyzing the economic aspects of my problem.

Anyone considering such a research activity will, of course, eventually ask "Why?" Why study the activities of highway administrators in the land valuation process? In answering I would say that you cannot learn the law, at least the effective law, any other way. For example, it is very fine to know that the Supreme Court of State A has said there should be no compensation for sentimental attachment to a given property, but if an appraiser makes his appraisals with some consideration of this factor or if a jury is usually willing to give an extra $200 for this reason, then the Supreme Court's statement should be interpreted somewhat differently than it otherwise would be. This, I should hasten to add, is a hypothetical situation. A very practical value from this work may come in the form of suggested simplified statements of the announced valuation rules—statements that will be understood and not misinterpreted by non-lawyers.

A third possible value is some small contribution in understanding law generally--a jurisprudential value. If enough studies of law in action are made in enough fields, some insights into the changes laws undergo in their application to everyday events should result. This could, of course, have very direct application in a practical way in the drafting of legislation.

A HIGHWAY RESEARCH PROJECT IN AGRICULTURAL ECONOMICS

Mr. Vlasin: The present increase in the amount of land being acquired for highway construction will increase the impact that highway development will have on farm owners and operators. The nature and extent of this impact and possible means of reducing its adverse effects is the core of my study. Although this study is in the field of agricultural economics, it is vitally concerned with highway law.

The specific objectives of this study are as follows: the first objective is to determine the immediate economic impact of land acquisition and highway construction on farm owners and operators. Selected road projects will be reviewed to determine the effect of the roadway on farm layout, farm business, the tax load and market value.

A second objective is to carefully review procedures used by the highway agencies in planning and locating a roadway. A review will also be made of procedures used by the agencies in acquiring land. The review of existing statutes and the analysis of the valuation process by Mr. Heaney will be expecially valuable in this instance. Instead of being concerned with the possible differences between existing statutes and agency procedures, I will be trying to determine what it is about the existing procedures used by the highway agencies that cause conflicts. I will consider such factors as notice of intended roadway construction, farmer participation in public hearings, devices by which individuals or groups can make suggestions to the agencies, and farmers' reactions to assessment and compensation procedures.

Therefore, a third objective is to determine the elements of conflict and agreement that occur between farm property owners and operators and the highway agencies. Interviews with farmers and highway officials, an evaluation of public hearings and a review of court cases will be used to detect the nature and reasons for these conflicts

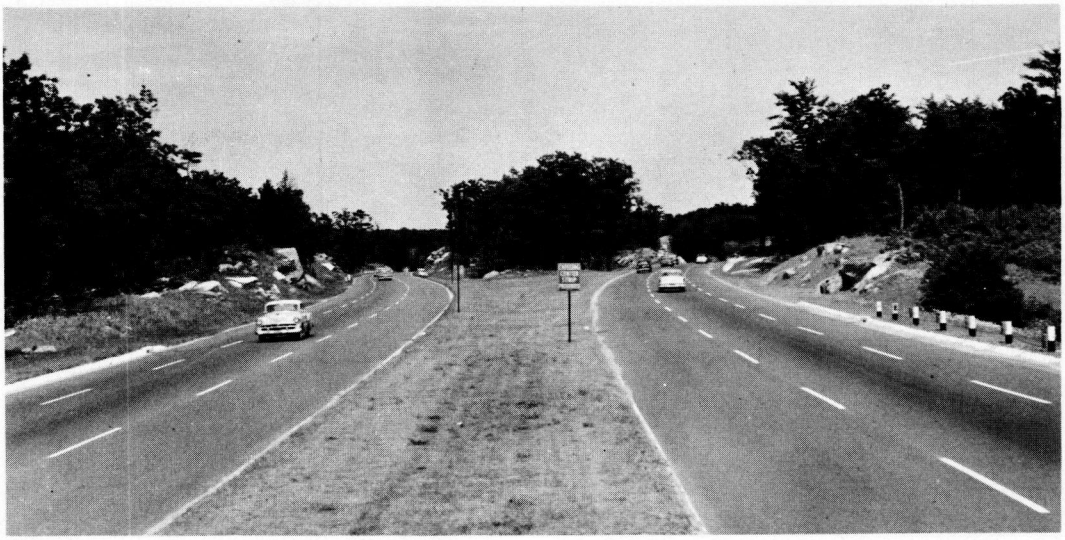

Figure 2. Massachusetts Route 128—Highways such as this one have a pronounced economic effect upon surrounding lands.

Mr. Covey and Mr. Heaney will provide assistance in the interpretation of these cases.

A fourth objective is to analyze the procedures used by highway agencies in light of the elements of conflict. This analysis will indicate which conflicts can be minimized by changes in the procedure and which conflicts could only be reduced by changes in the existing statutes.

A comparison of the activities of these highway agencies will also be made with other public agencies having experience in land acquisition. Both state and federal agencies have been selected for this comparison. This comparison should indicate alternative ways of initiating and planning a project and of assessing and valuing farm property. In addition, it may indicate the consequences of alternative ways of acquiring farm property.

The final objective is to determine what adjustments in procedures used by highway agencies and what adjustments individual or group action by farmers might lessen the impact of highway development and at the same time help the highway agencies in deciding on the best location for a roadway. A review of existing statutes will be made to see if enabling legislation is needed to facilitate these adjustments. I will again seek the assistance of the Law Department in this review.

In order to make sound, workable suggestions to reduce conflicts between highway agencies and property owners and operators, we must consider not only the economic and social impact of the highway, but also the legal framework within which the highway agencies must operate.

COOPERATIVE RESEARCH IN HIGHWAY PROTECTION LAW

Mr. Covey: The genesis of my research project is the problem of providing efficient and economical protection for the state primary highway systems that will carry the eighty percent of American highway traffic that will not be carried by the Federal Interstate Highway system and that will act as feeder-roads to the Interstate Highway system. The research breaks down into two phases: (1) the relation between the states' police powers and their eminent domain powers in the control of access and roadside development, and (2) the intergovernmental relations involved in highway protection on the municipal-county-state levels.

To achieve the maximum protection possible for these state road systems within the framework of the available funds and statutory authorizations, recourse must be

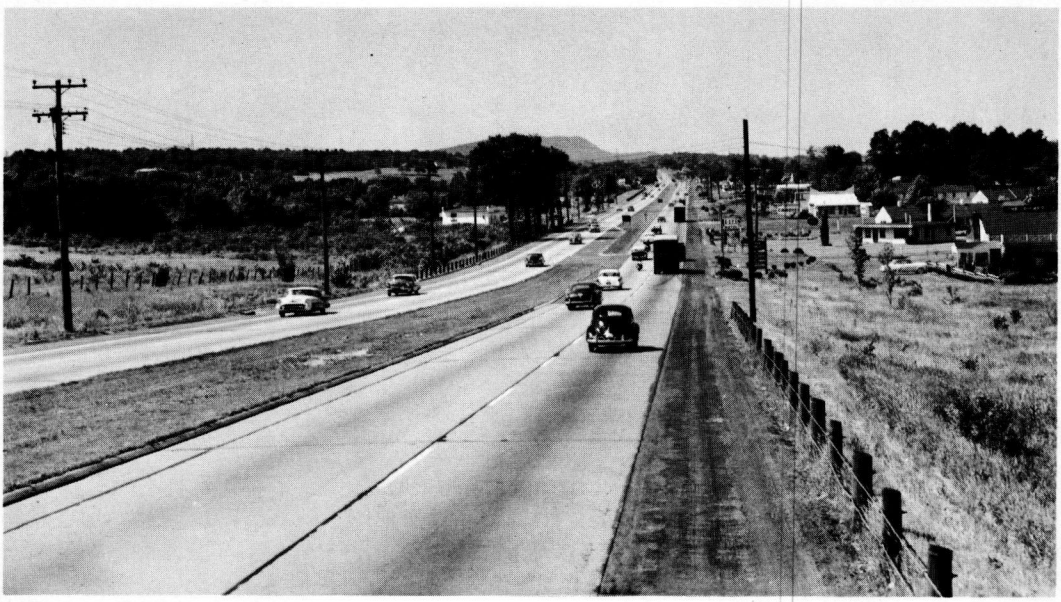

Figure 3. Berlin Turnpike in Connecticut—Adequate setback requirements give added protection to highways.

had to the states' police powers. This power to regulate the use of land in the public interest without the payment of compensation encompasses zoning, subdivision controls, set-back requirements, driveway regulations, and master planning. The research is not concerned solely with the direct control of access but includes the indirect control of access through the regulation of traffic generating land uses or development patterns.

Research into these police power protection devices requires the normal study of statutory authorizations, constitutional restrictions, administrative procedures, and court interpretations. In this phase of research, I have traced the historical development of the rights of abutting land owners from earliest times down to the most modern cases. Here, also I have tried to collect and correlate the appropriate cases and statutes on intergovernmental relations in the area of highway control and protection. The legal research has surveyed the developments in all the states but has concentrated on Illinois and Wisconsin. Thus far, the research has been "law in the books" research.

But in order to evaluate accurately the feasibility and practicality of such police power controls, more than legal research is needed. To answer the pressing questions—How does it work? Is it fair? By what level of government should it be imposed? and, Is it effective?—both factual studies and cooperative interdepartmental research are necessary. This further research seeks to determine how the law is administered and how successful it is in operation. These answers can only be provided by "law in action" research.

To illustrate the nature of the additional research in the area of access controls: Wisconsin has a subdivision control act which requires a subdivider to secure state highway commission approval of any plat filed for record. For approval, if the lots covered by the plat abut on a state trunk highway, the subdivider must provide service roads or otherwise lay out the lots so that there is a minimum of access points onto the highway.

The field research on the subdivision control act seeks to find out:

1. Are all the people coming under the statutory definition filing such approved plats or are they, for example, recording surveyor's maps or assessor's plats (which need

not be approved) or using multiple straw-man transactions to avoid coming within the statute? An on-the-spot study of plats filed for record and regional maps will be required to determine this.

2. Where the act is complied with, does it provide any substantial highway protection, that is, on a given stretch of highway, has it appreciably lessened the number of access points or the nature of the roadside development? Highway development studies and cooperation with the land economics people, like Mr. Vlasin, are needed to discover this.

3. Is the over-all operation of the act effective and fair? Highway surveys as well as cooperation with planners and land economists are needed to answer this.

To illustrate the nature of the additional research needed in the area of intergovernmental relations: the various political subdivisions of the state possess certain highway protection powers, for example, county zoning and municipal master planning; in addition the state has over-all highway protection powers.

The field research on intergovernmental relations seeks to find out how these protection devices are operating, to what extent they are integrated, and the role that they play in locating future highways. To provide these answers, I am studying segments of state highway in Illinois and Wisconsin that fall under the jurisdiction of several governmental units and I plan to evaluate the protection devices in use, their integration into a unified pattern, and their practical results. Here interviews with highway officials from the commissioners to the district officers and county and town officials will be supplemented with air photo and land use studies. The cooperation of the Illinois and Wisconsin State Highway Commissions has been invaluable.

This cooperative research has great potential value. It results in an accurate picture of the use being made of state enabling powers and the adminstration and effect of local ordinances. This gives us a sound basis on which to evaluate the effectiveness of the highway control devices that we are using and allows us realistically to plan and integrate future highway protection devices.

These research findings should be of help in an ultimate court challenge testing whether a control measure really does preserve and promote the public safety and general welfare and that the device used is reasonable in the light of that end.

FUTURE RESEARCH PLANS

Professor Beuscher: Now as to our future plans. First, we intend to continue technical legal research in highway law; we intend to continue to evaluate legal doctrine, particularly valuation rules against economic reality and we have hopes of furthering our economic impact studies as such and studies of the relation between highways and our valuable recreation industry. But our principal emphasis is going to be on highways and intergovernmental relations--federal, state and local. And, for reasons that I will outline presently, the local governments on which we will focus are those in metropolitan areas.

Past social science-law research on highways and other land uses at Wisconsin and the work that Messrs. Heaney, Vlasin and Covey are currently doing have fortified us in this set of guides for future social science-law highway research:

1. The work must continue freely to cross departmental lines. This apparently creates difficulties at some places; it has not at Wisconsin. As vehicles toward broader inter-departmental approach to highway problems, we intend to use both the newly organized committee on urban studies and the committee on our regional planning curriculum. The latter committee represents, for example, economics, sociology, geography, political science, education, engineering and law. Both the urban studies work and the regional planning activity are headed by Coleman Woodbury who came with us in September and who has expressed great interest in integrating highway research into a broad program of urban studies.

2. As I have indicated, we think we can make our greatest contribution by focussing upon intergovernmental aspects of (1) highway planning, (2) right-of-way acquisition (3) right-of-way protection and (4) highway construction and maintenance. We think

that experience in wrestling with intergovernmental problems in the forestry, land planning and other land use fields will stand us in good stead as we probe into comparable governmental relational problems in the highway field.

3. We intend to concentrate on intergovernmental problems in metropolitan areas, including both urbanized areas, rural non-farm areas and those farm areas in the path of urban expansion. This last includes a great deal of farm land. Consider these figures, guesses and facts:

a. For the 6 years, 1950-56, the country grew by 14.7 million. Of this growth, 12.5 million (85 percent) is attributable to the 168 Standard Metropolitan Areas of the 1950 Census.

b. This 12.5 million growth is spread out within the Standard Metros as follows:

15.6 percent in the central cities
27.2 percent in the suburbs (in census terms urban territory outside the central cities)
41.5 percent in the fringe areas (largely rural non-farm in census terms)

c. There are solid reasons to suppose that this is just the beginning. Projecting a guessed-at total population of 220 million in 1975, the increase attributable to metropolitan areas will be about 59.5 million. Let me try to give this astounding figure meaning by quoting Coleman Woodbury:

"The projected metropolitan growth for 25 years, therefore, is roughly equal to the 1950 populations of the metropolitan areas (not of their central cities alone) of New York-Northeastern New Jersey, Chicago, Los Angeles, Philadelphia, Detroit, Boston, San Francisco-Oakland, Pittsburgh, St. Louis, Cleveland, Washington, Baltimore, Minneapolis-St. Paul and Buffalo plus 15 million persons more."

d. Governments in our metropolitan areas obviously perform functions vital to our way of life; they, more than any other tier of government give "quality" to our way of life. Growth since World War II and the staggering growth still to come pose problems for these governments on an unprecedented scale—problems of enormous capital investments, of inflexible revenue sources, of Balkanization of local government jurisdictions, of decaying central business districts, of growth that too often outraces provision for adequate open and breathing space. The impact of major highway planning upon metropolitan regions, their people and their governments will become increasingly important. Such planning can help alleviate some of the crushing problems I have enumerated and others that I do not have time to recount. Or such planning can make these problems infinitely more difficult.

e. This means that social science-law investigations focussing on highways in metropolitan areas must be fitted into a broader pattern of urban research generally.

4. More specifically then, we intend to investigate such things as:

a. The process of planning as it is actually carried out for land planning in general and for highway planning in particular. How can we cut local people into this process without surrendering it to local interests or without delaying needed highways unduly?

b. Ways and means of organizing so that a planning judgment can be made on a region-wide basis by representatives of the people of the region and communicated to state level or federal level officials. This involves, of course, the whole complex problem of regionalizing government in our sprawling metros. It also involves trying to learn something of the effects of different kinds of highways in channeling population growth and economic development. This alone is a big order, in fact several big orders.

c. Urban, suburban and rural relations as they affect highway planning, location and development.

d. The impacts of highways on local governmental finances.

5. We intend, of course, to do much of our field research in Wisconsin metropolitan areas, but we also intend to send researchers into other states for comparative studies across state lines.

All of this may sound vague and general. I submit, however, that such a research program is eminently practical, and if properly executed will give greatly needed insights into how to mesh metropolitan planning with state level highway planning to the end that our rapidly growing metropolitan communities may be less chaotic and closer to those ideals of livability, of beauty and of open space which millions are seeking as they sprawl out into the country far beyond the limits of our central cities.

The Law and Highway Modernization

CLIFTON W. ENFIELD, General Counsel, Bureau of Public Roads.

TRADITIONALLY, highway legislation in the states has followed a patchwork pattern to eliminate existing deficiencies that could no longer be ignored and to cope with pressing problems, rather than being the outgrowth of realistic and accurate forecasts and appraisals of both present and future highway legislative needs. To a great extent, highway legislation has followed rather than led the highway engineer's efforts to modernize our highway systems.

The failure to enact entirely adequate and comprehensive highway laws has been due in a large measure to failure in past years to fully foresee the great improvements made in automobiles, the highway construction standards that are made possible by new techniques, processes and machines, the tremendous increase in highway travel, and the inevitable resulting changes in the transportation habits of the American people and the overwhelming effect of highways upon the economy of the nation.

Even before World War II, it was apparent that the American economy was dependent upon highway transportation, and the nation was faced with an urgent and critical need both for new highways and for the improvement of existing highways to adequate standards. Highway builders faced these problems with the realization that if the economy of the United States was not to be strangled by inadequate highways, the highway systems must be planned and constructed to standards that would provide for future traffic requirements as well as present-day traffic need. This realization culminated in the enactment of the Federal-Aid Highway Act of 1956, which not only provides for greatly increased federal financial assistance to the states for all federal-aid highways, but also contemplates completion of the Interstate Highway System by 1972 to standards adequate to accommodate the traffic forecast for the year 1975.

Enactment of the 1956 Act, and the standards of construction for the Interstate System adopted pursuant to the Act, revealed legal deficiencies in many state laws. There was an immediate reaction in many of the state legislatures to enact laws necessary for the state highway departments to proceed with the construction contemplated by the federal enactment. Again, however, in many instances, the legislation was on a patchwork basis, designed in the interest of expediency to meet immediate needs only.

ANALYSIS OF HIGHWAY LAWS

The time for a complete and detailed analysis of existing highway laws and their relationship with other laws is long past due. The designs and standards for highways are evolved after studies, investigations and tests over a period of years, and upon a realistic appraisal of highway needs now and in the future. Highway legislation should not only keep pace with modern highway construction, and its defense, economic and social implications, but it should be sufficiently imaginative and farsighted to anticipate and provide legal authorities and the means of resolving legal problems that will be essential to the future orderly improvement and expansion of the nation's highways. The highway lawyer should visualize the future legal tools that the engineer, planner, economist, and administrator will need. He should advise and counsel to the end that legislation may be enacted and legal theories perfected, and, if need be, constitutional amendments adopted, to blaze the trail and point the way, rather than to await the flood of legal complexities to arise out of actions already taken and then attempt to plug the holes in an inadequate legal structure.

The Highway Laws Committee of the Highway Research Board has taken national leadership in the collection and analysis of all existing constitutional, statutory and case laws relative to highways, and the committee is sifting out from this mass of material the essential elements of present highway laws. This study will provide a wealth of information that will have lasting benefits, but it should not be viewed as the end product. This project now under way is, by its very nature, limited to laws

now in existence, and it should be considered as merely the laying of the foundation of present knowledge upon which to continually build a sound legal structure that will be fully adequate to meet the current highway needs at any time in the future. Highway construction and highway transportation are not static but are growing, vibrant and dynamic, and the laws upon which they are dependent must be ever molded to meet the needs of the time and the anticipated needs of the future to best serve the public interest.

For this national study of highway laws to be fully effective, it must be implemented at the state level, where different governmental organizations, policies, practices and procedures may be taken into consideration. Armed with the Committee's collection and analysis of all highway laws, a state can intelligently evaluate its own highway code in comparison with the laws of other states and determine its own legal deficiencies, if any, and what corrective legislation is necessary. Both in the evaluation of present state laws and in determining the need for and drafting of new laws, attorneys, engineers, administrators, economists, planners and other informed persons should work together closely and with complete cooperation. An attorney who attempts to draft legislation without a complete knowledge of the objectives to be accomplished and the manner of their accomplishment is facing a hopeless task. By the same token, a highway administrator who has detailed knowledge of the objectives desired, but who does not recognize the legal problems involved, cannot hope to draft adequate legislation.

EXISTING LAWS WORTHY OF CONSIDERATION

The highway codes of all states provide general authority to construct, maintain and operate state highway systems. The detailed statutes, however, vary greatly between states and have a substantial impact on the ability of states to efficiently construct highways to modern standards, to control the movement of traffic in keeping with highway design, to protect highways from encroachment and untimely obsolescence, and to keep pace with the National Highway Program.

A few of the statutory provisions that are not common to all states but which have evidenced their merit in application are worthy of comment and consideration for enactment by states that do not have such laws.

Immediate Possession of Real Property

Probably one of the most valuable legal tools available to a highway department in undertaking an accelerated highway construction program is the authority to take possession of real property being acquired by condemnation prior to trial and payment of compensation. Such authority permits the orderly and unimpeded construction of highways in the interests of the general public, and at the same time preserves the rights of the property owner to receive just compensation for the property acquired. Such legislation now exists in 30 states[1]; however, before similar laws can be validly

[1] Seven states can take immediate possession of property for highway use by administrative methods:

Connecticut, General Statutes of Connecticut, Revision of 1949, Sec. 2264-2267.
Maine, Revised Statutes of Maine, c.23, Sec. 21-23.
Massachusetts, Annotated Laws of Massachusetts, c. 79, Sec. 3
New York, Consolidated Laws of New York, Annotated Highway Law, Sec. 30, pt. 5.
Ohio Revised Code (Baldwin's 1953), c. 5519, Sec. 5519. 01.
Pennsylvania Statutes Annotated, Perm. ed. (Purdon's 1949), tit. 36, Sec. 670-210.
Rhode Island, c. 3105, Laws 1953, as amended by c. 3515, Laws 1955.

Twenty-four states can take immediate possession of real property by judicial methods:

Arizona Revised Statutes, Annotated, 1956, Sec. 12-1116(c).
Arkansas Statutes, 1947, 1955 Cumulative Supplement, Sec. 76-534 through 76-541.
California, Constitution of 1879, art. 1, Sec. 14 (Mason).

enacted in some states, it may be necessary to amend the state constitutions to remove prohibitions against entering into possession of real property prior to payment of just compensation.[2]

Some states have attempted to overcome their inability to take immediate possession of real property by expediting the trials of condemnation cases. This may be accomplished by authority to condemn many parcels of real property in one proceeding,[3] by

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[1](Continued)

Colorado Revised Statutes 1953, Sec. 50-1-6(3).
Delaware Code Annotated 1953, tit. 10, Sec. 6110.
Florida Statutes 1943, c. 74, Sec. 74.01 - 74.14.
Illinois Annotated Statutes (Smith-Hurd 1957 Supp.) c. 47, Sec. 2.
Louisiana, Revised Statutes of 1950, tit. 48, Sec. 441 - 460.
Maryland, Annotated Code of General Public Laws of Maryland (Flack 1951), art. 89B Sec. 9E.
Michigan Statutes Annotated (Henderson 1936), Sec. 8.174 - 8.178.
Minnesota Statutes Annotated 1946, Sec. 117.20(5).
Nevada Revised Statutes, Sec. 37.100.
New Jersey Statutes Annotated, Perm. ed., Sec. 27:7-22.
New Mexico Statutes 1953 Annotated, Sec. 22-9-18.
North Carolina, General Statutes of North Carolina, 1952, Sec. 136-19.
North Dakota, Constitution of 1889, art. 1, Sec. 14, as amended by Laws of 1957, c. 397, art. 66.
Oregon Revised Statutes, 1953, Sec. 366.390.
Pennsylvania Statutes Annotated, tit. 36, Sec. 670-308.
Tennessee Code Annotated 1955, Sec. 54.510.
Utah Code Annotated 1953, Sec. 78-34-9.
Virginia, Code of 1950, Sec. 33-67, 33-70.
West Virginia Code of 1955, Sec. 5385.
Wisconsin Statutes 1955, Sec. 84.09.
Wyoming Compiled Statutes 1945, Sec. 48-105

[2] Yellowstone Pipeline Company v. Drummond, 77 Idaho 26, 287 P. 2d 288 (1955); State ex rel. Eastvold v. Yelle, 46 Wash. 2d 166, 279 P. 2d 645 (1955); Query: Illinois-cf. Department of Public Works and Buildings v. Gorbe, 409 Ill. 211, 98 N. E. 2d 730 (1951) (See Department of Public Works and Buildings v. Butler Company, (Ill. Superior Ct.) decided November 8, 1957, held unconstitutional, c. 47 of Illinois Statutes Annotated (cited in footnote 1, above).

[3] Alabama, Code of 1940, tit. 19, Sec. 3. (All land must be in same county.)
Arizona Revised Statutes, 1956, Sec. 12-1118. (All land must be in same county and for same use.)
California, Code of Civil Procedure, 1953 (Deering), Sec. 1244(5). (All land must be in same county and for same use.)
Colorado Revised Statutes, 1953, Sec. 50-1-5. (All land must be located in same county.)
Delaware Code Annotated, 1953, tit. 10, Sec. 6104.
Florida Statutes Annotated, 1943, Sec. 73.21.
Idaho Code Annotated, 1948, Sec. 7-707(5). (All land must be in same county.)
Illinois Annotated Statutes (Smith-Hurd 1957 Supp.), c. 47, Sec. 5. (All land must be in same county.)
Indiana Annotated Statutes, 1933, Sec. 3-1702(6). (All land must be in same county and for same use.)
Missouri, Revised Statutes of Missouri, 1949, Sec. 523-020. (Owners must be residents of same county.)
Montana, Revised Codes of Montana, 1947, Sec. 93-9908(5). (All land must be in same county and for same use.)
Nevada, Revised Statutes of Nevada, Sec. 37-070(6). (All land must be in same county and for same use.)

right of advancement of condemnation cases on the courts' trial dockets,[4] and by providing for special juries to hear condemnation cases when the regular juries are overloaded with work.[5] Summary eminent domain proceedings also provide a measure of relief in some states.[6]

Acquisition of Real Property for Future Use

The greatly enlarged and accelerated national highway construction program now under way emphasizes the need for careful scheduling of engineering, right-of-way acquisition, and construction. Authority to acquire real property for future highway use is essential to provide adequate lead time between right-of-way acquisition and construction. At present, 16 states[7] have express legislative authority to acquire real

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[3](Continued)
New Mexico Statutes 1953 Annotated, Sec. 22-9-1. (Owners must be residents of same county.)
North Dakota, Revised Code of 1943, Sec. 32-1519. (All land must be in same county and for same use.)
Ohio Revised Code Annotated, 1953, Sec. 2709.07.
Virginia, Code of 1950, Annotated, Sec. 25-27, cf. 33-60. (All land must be in same county.)
Washington, Revised Code of Washington, 1951, Sec. 8.04.097 - 8.04.100.
Wyoming Compiled Statutes 1945, Sec. 3-6105. (All land must be in same county.)

[4] Arizona Revised Statutes Annotated, 1956, Sec. 18-155(b).
Arkansas Statutes, 1947, Sec. 76-542.
California, Code of Civil Procedure (Deering), Sec. 1264.
Florida Statutes Annotated 1943, Sec. 73-10.
Indiana, Laws of 1957, c. 148, Sec. 13.
Maryland, Annotated Code of Maryland, art. 33A, Sec. 22.
Massachusetts, Annotated Laws of Massachusetts, 1953, c. 79, Sec. 34.
Mississippi, Code of 1942, Sec. 8023.
South Carolina, Code of 1952, Sec. 33-139.

[5] Washington, Revised Code of Washington, 1951, Sec. 8.04.099.

[6] Connecticut, General Statutes of Connecticut, Revision of 1949, Sec. 2264 - 2267.
Maine, Revised Statutes of Maine, c. 23, Sec. 21 - 23.
Massachusetts, Annotated Laws of Massachusetts, c. 79, Sec. 3.
New York, Consolidated Laws of New York, Annotated, Highway Law, Sec. 30, pt. 5.
Ohio Revised Code (Baldwin's 1953), c. 5519, Sec. 5519.01.
Pennsylvania Statutes Annotated, tit. 36, Sec. 670-210.
Rhode Island, c. 3105, Laws 1953, as amended by c. 3515, Laws 1955.

[7] Arkansas Statutes, 1947, Sec. 76-532.
California, Streets and Highways Code (Deering), Sec. 104.6.
Colorado Revised Statutes 1953, Sec. 120-3-10.
Florida Statutes Annotated 1943, Sec. 337.27.
Idaho Code 1948, Sec. 40-120(9).
Indiana, Laws 1957, c. 148, Sec. 4.
Louisiana Revised Statutes 1950, tit. 48, Sec. 220.
Maryland, Annotated Code of Maryland, art. 89B, Sec. 8.
Michigan, Acts of 1957, Act 262, Sec. 247.663a, Sec. 13a.
Nebraska, Laws of 1955, c. 148, Sec. 20.
Nevada Revised Statutes, Sec. 402.860(2)(a).
North Dakota, Revised Code of 1943, Sec. 24-0117.
Oklahoma Statutes Annotated, tit. 69, Sec. 46(2).
Texas, Laws of 1957, c. 300, Sec. 4(1)(b).
Virginia, Code of 1950, Sec. 33-57.
Wisconsin Statutes, 1955, Sec. 80.64; Laws of 1955, c. 575, Sec. 4.
Cf. Special Report 27, Highway Research Board.

property for future use, and at least 8 states[8] have judicial decisions supporting such authority without express statutory provisions. Inasmuch as most right-of-way is acquired for future use, with the time element being merely one of degree, other states may find adequate authority in their general land acquisition statutes.

Probably of more practical importance are statutory provisions for financing the acquisition of real property for future highway use, which has been specifically provided by 9 states.[9]

Another legal device that is used by 5 states to assist in the acquisition of right-of-way is the authority to reserve real property on proposed highway locations for specified periods, during which time the state may acquire the right-of-way in an orderly fashion without threat of its improvement.[10] At least one state[11] has authority to freeze the market value of right-of-way for a period not in excess of one year, thereby eliminating increases in value during the period of negotiation.

Acquisition of Excess Real Property

Savings can often be realized in the acquisition of real property by acquiring entire tracts, when only a part thereof is necessary for highway purposes, and then disposing of the excess, rather than acquiring only the real property needed and paying for severance damages to the remainder. At least 11 states[12] have enacted such legislation. Caution should be exercised in proposing similar legislation, however, for statutory authority to acquire real property in excess of that actually needed for highway use may be held unconstitutional. Some states limit exercise of the power of eminent

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[8] Wollard v. State Highway Commission, 220 Ark. 731, 249 S. W. 2d 564 (1952); State Highway Commission v. Ford, 142 Kan. 383, 46 P. 2d 849 (1935); State v. State Highway Commission, 163 Kan. 187, 182 P. 2d 127 (1947); Dept. of Public Works and Bldgs. v. McCaughy, 332 Ill. 416, 163 N. E. 795 (1928); Porter v. Iowa State Highway Commission, 241 Iowa 1208, 44 N. W. 2d 682 (1950); Edwin v. Mississippi State Highway Commission, 213 Miss. 885, 58 So. 2d 52 (1952); State v. Curtis, 359 Mo. 402, 222 S. W. 2d 64 (1949); State v. Superior Court for Cowlitz County, 33 Wash. 2d 638, 266 P. 2d 1028 (1949); Cf. Special Report 27, Highway Research Board, p. 16; See State v. Pacific Shore Land Co., et al., 201 Ore. 142, 153, 269 P. 2d 512, 518 (1954).

[9] California, Laws of 1952, c. 20 (2d Ex. Sess.), Laws of 1953, c. 1714.
Indiana, Laws of 1957, c. 92.
Maryland, Laws of 1957, c. 542.
New Mexico, Laws of 1955, c. 269.
New York, Laws of 1956, c. 60, pp. 527, 543.
Ohio, Constitution art. VIII, Sec. 2c, Laws of 1955, vol. 126, pp. 642, 871.
Washington, Laws of 1955, c. 383.
West Virginia, Laws of 1957, c. 143.
Wisconsin, Laws of 1955, c. 574.

[10] California, Streets and Highways Code (Deering), Sec. 104. 3, Sec. 740 - 742.
Indiana, Laws of 1957, c. 148, Sec. 12.
Pennsylvania Statutes Annotated, tit. 36, 670-208, 670-219.
Texas, Laws of 1957, c. 300, Sec. 4(1)(b).
Washington, Laws of 1955, c. 161.

[11] Maryland, Annotated Code of Maryland (1957 Cum. Supp.), art. 89B, Sec. 91.

[12] Arkansas, Laws of 1953, Act 419, Sec. 4.
California, Streets and Highways Code (Deering), Sec. 104. 1.
Colorado Revised Statutes 1953, Sec. 120-3-10.
Illinois Revised Statutes, c. 24, Sec. 185(a) (City of Chicago only).
Indiana, Annotated Statutes, Sec. 48-2107 (cities).
Maryland, Annotated Code of Maryland, art. 89B, Sec. 8.
Nebraska, Laws of 1955, c. 148, Sec. 21 (by any lawful means except condemnation or eminent domain).

domain to the acquisition of property required for "public use"[13]; whereas, other states extend eminent domain authority to the taking of property for "public benefit."[14] Thus, in some states, a constitutional amendment may have to precede such legislation.[15]

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[12](Continued)
Nevada Revised Statutes 1957, Sec. 402.860(2)(b).
Oregon Revised Statutes 1953, Sec. 374.040.
Virginia, Code of 1950, Sec. 15.771 (any city or town).
Washington, Laws of 1953, c. 131.
Cf. Special Report 27, Highway Research Board.

[13]Peavey-Wilson Lumber Co. v. Brevard County (Florida), 31 So. 2d 483 (1947); Riden v. Philadelphia, B. and W. R. Co., 182 Md 336, 35 A. 2d 99 (1943); Crommut v. City of Portland, 50 Me. 217, 197 A. 2d 841 (1954). "Public benefit" has been held not sufficient to support the taking of property by the public. "Public use" in these jurisdictions is defined as "use by the public." Riden and Crommut cases, supra.

[14]Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A. 2d 365 (1954); Leary v. City of Manchester, 91 N. H. 442, 21 A. 2d 156 (1941). "Public use" defined as "public neccessity, convenience and welfare." Leary case, supra.

[15]Regardless of whether "public use" or "public benefit" is used in the state constitution, identical results can be reached, depending upon the view of the court. The cases cited in footnotes 13 and 14 contain statements to the effect that it is for the court to decide whether or not a particular use constitutes a "public use." See Cincinnati v. Vester, 33 F. 2d 242 (1929), aff'd, 281 U. S. 439.

The constitutions of eleven states provide for excess taking:

California, Constitution of 1879 (Mason), art. 1, Sec. 14½, vol. 1, p. 199. (The State or any of its cities may condemn or acquire land for streets, reservations, etc., along such streets, reservations, etc., restricted to parcels within 150 ft of boundary of improvements, or 200 ft, in case of parcels only partly within 150 ft limit, lands not needed for the improvement may be conveyed.)

Massachusetts, Constitution, art. X, Annotated Laws of Massachusetts (Michie 1951) vol. 10, p. 12. (Authorized legislation for taking more land than needed for actual construction, restricted to quantity that would be sufficient for suitable building lots on both sides of highway or street.)

Michigan, Constitution of 1908, art. XIII, Sec. 5, Michigan Statutes Annotated (Henderson 1936), vol. 1, p. 459. (Authorizes in exercise of power of eminent domain taking of land adjacent to proposed improvement as may be appropriate to secure greatest degree of public advantage from such improvement.)

Missouri, Constitution of 1945, art. 1, Sec. 27, Missouri Revised Statutes, 1949, p. 44. (Authorizes enactment of statutes for the taking of property in excess of that actually to be occupied as may be reasonably necessary to effectuate the purpose intended.)

New York, Constitution of 1954, art. 1, Sec. 7(e), Consolidated Laws of New York (McKinney), bk. 2, pt. 1, Constitution, p. 57. (Authorizes the legislature to empower cities and counties to take more land than actually needed for construction, but not more than sufficient to form suitable building sites abutting on highway or street.)

New Jersey, Constitution of 1947, art. IV, Sec. 6, par. 3. New Jersey Statutes Annotated (West 1954), p. 274. (Authorizes enactment of statutes providing for the taking of easements upon, or the benefit of restriction upon, abutting property to preserve and protect the highway or parkway.)

Ohio, Constitution of 1851, art. XVIII, Sec. 10, Baldwin's Ohio Revised Code, 1953, p. 71. (Authorizes municipalities to acquire property in excess of that actually to be occupied by an improvement.)

Pennsylvania, Constitution of 1874, Purdon's Pennsylvania Statutes Annotated (1956 Cumulative Annual Pocket Part), p. 216. (Authorizes the General Assembly to authorize cities to take more land than needed in laying out or widening streets or highways connecting with Interstate bridges, not to be more than sufficient to form suitable

Control of Access and Closure of Intersecting Roads

The geometric and construction standards for the Interstate System prohibit access between the highway and abutting real property, except at authorized public road connections. Express authority to acquire rights of access by eminent domain has been established by statutes or judicial decisions in all states except Arizona. However, the laws of all these states may not be entirely adequate to meet every situation that may arise, and each state should carefully examine its authority to assure that all the necessary elements of an adequate law are present. Furthermore, additional legal explorations in exercise of the state's police power may produce new applications to access control that can be effected without the payment of compensation.

Closely related to the authority to acquire and control private rights of access, and equally essential, is the authority to close public roads at or near their point of intersection with the right-of-way of an access controlled highway, or to relocate such public roads, or to carry the same over or under the access controlled highway by grade separation structures. The uninhibited connection at grade of city streets, county roads or other public ways with a controlled access highway can defeat the purposes for which the highway is designed and constructed. At present, 39 states[16] have en-

[15](Continued)
building sites on such streets or highways, and not to extend more than three miles from bridge approaches.)

Rhode Island, Constitution of 1842, art. XVII of amendments, Sec. 1, General Laws of Rhode Island, 1956 (Bobbs-Merrill), vol. 1, p. 232. (Authorizes the general assembly to authorize the taking of more land than is needed for actual construction but not more in extent than would be sufficient to form suitable building sites abutting such highway or street.)

Utah, Constitution of 1895, art. XI, Sec. 5(c), Utah Code Annotated, 1953, vol. 1, p. 255. (Authorizes adoption of municipal charters empowering cities to acquire an excess of property over that needed for making local, public improvements.)

Wisconsin, Constitution of Wisconsin, art. XI, Sec. 3a, Wisconsin Statutes, 1955, p. 48. (Authorizes the State or any of its cites to acquire or condemn lands for streets, parkways, boulevards, and reservations in and about and along and leading to same; and authorizes conveyance of real estate thus acquired not necessary for such improvements, with reservations concerning future use, so as to protect such works, and their environs, and to preserve the view, appearance, light, air and usefulness of such public works.)

[16]Alabama, Laws of 1956, Act 104, Sec. 6.
Arkansas Statutes Annotated, 1947, Sec. 76-2007.
California, Streets and Highways Code (Deering), Sec. 100. 2.
Colorado Revised Statutes, 1953, Sec. 120-6-3.
Connecticut, General Statutes of Connecticut, Sec. 2257(c).
Delaware, Laws of 1956, c. 603, Sec. 176.
Florida, Laws of 1955, c. 29965, Sec. 112.
Georgia, Laws of 1955, Act 333, Sec. 6.
Illinois, Laws of 1955, Sec. 7(a), p. 1813.
Indiana, Laws of 1955, c. 197.
Iowa, Laws of 1956, c. 148, Sec. 6.
Kansas, General Statutes of Kansas, 1949 (Gen. Supp. 1955), Sec. 68-1904.
Kentucky Revised Statutes, 1956, Sec. 177. 270.
Louisiana Revised Statutes, 1950, tit. 48, Sec. 304.
Maine, Revised Statutes of Maine, c. 23, Sec. 101.
Maryland, Annotated Code of Maryland, art. 89B. Sec. 164(d)(1), 168(a).
Michigan Statutes Annotated, Sec. 9. 1094(5).
Minnesota. Laws of 1957, c. 864, subd. 5.
Mississippi, Code of 1942, Annotated, Sec. 8039-07.
Montana, Revised Codes of Montana, 1947, Sec. 32-2007.

acted statutes authorizing the elimination or prohibition of such intersections at grade with access controlled highways. Some of these statutes require the consent or approval of the local governmental body that has jurisdiction over the intersecting road or street. To this extent the local officials have effective veto power, if they wish to exercise it, over highway locations and designs proposed by the state highway departments, which may cause serious problems in construction of the Interstate System and may increase the cost of the system because of the possible insistence of local officials for additional grade separation structures and interchanges.

Control of Traffic

Authority to control, regulate and channelize the movement of vehicular and pedestrian traffic is necessary to give effect to highway design. Because of the many varying conditions and circumstances which exist with respect to highways and traffic movement, it is essential that this authority be quite broad and flexible. The state highway departments are qualified to exercise such authority, although the enforcement of traffic laws, rules and regulations might well be made the function of a different governmental agency.

LEGAL FRONTIERS

Although the federal highway construction program launched by the Federal-Aid Highway Act of 1956 has been undertaken with diligence, and while anticipation of the benefits to be enjoyed from the completed Interstate System has shown foresight, there is a question as to whether the full legal implications of this tremendous public endeavor have been realistically appraised. More than 70 percent of the world's passenger cars and approximately one-half of the world's trucks travel upon the highways of the United States. Highway transportation is so interwoven in our national economy and the American way of life that the construction of an adquate highway system cannot be considered as a separate and isolated undertaking. Present and future highway construction programs will have a great impact upon the nation far beyond mere highway considerations, and will create both opportunities and problems of legal import that merit recognition and challenge implementation and solution.

Exploration of some of the opportunities and problems that now exist or may arise in the future may prove profitable.

Cooperation Between Governmental Agencies

Highway construction frequently occurs in areas included in active or planned

[16](Continued)
Nebraska, Revised Statutes of Nebraska, 1943 (Cum. Supp. 1955), Sec. 39-1327.
New Hampshire Revised Statutes Annotated, 1955, c. 236, Sec. 236. 4.
New Mexico, Laws of 1957, c. 234, Sec. 7.
New York, McKinney's Consolidated Laws, Highways, Sec. 346.
North Carolina, Laws of 1957, H. B. 123, Sec. 6.
North Dakota Revised Code of 1943 (1953 Supp.), Sec. 24-0133.
Oklahoma Statutes Annotated, tit. 69, Sec. 11. 4.
Oregon Revised Statutes, Secs. 373.050, 373.060, 374. 060, 374. 065, 374. 070.
Pennsylvania Statutes Annotated, tit. 36, Sec. 2391. 4.
South Carolina, Code of 1952, Secs. 33-352.1(4).
South Dakota, Laws of 1953, c. 155, Sec. 7.
Tennessee Code Annotated, 1955, Sec. 54-2005.
Texas, Revised Civil Statutes of Texas, art. 1085(a), Sec. 4.
Utah Code Annotated, 1953, Sec. 27-9-5.
Vermont, Laws of 1955, c. 270, Sec. 9.
Washington, Revised Code of Washington, Sec. 47. 52. 070.
West Virginia, Code of 1955, Sec. 1474(5).
Wisconsin Statutes, 1955, Sec. 84. 25(3), 84. 29(5).
Wyoming Compiled Statutes, 1945, Sec. 48-351.

projects for reclamation, conservation, drainage, irrigation, urban redevelopment and other public improvements. Such projects and highway construction should be planned and consummated with due regard for the requirements and objectives of the other. Cooperation between governmental agencies responsible for highway and non-highway projects within the same area is essential to insure coordination of design and construction, prevention of unnecessary delays, elimination of duplication of work and facilities, minimization of costs, and production of the maximum public benefits. Such cooperation is similar to the coordination of urban planning with highway planning in urban areas. It can, however, go beyond mere planning and, in appropriate instances, the joint accomplishment of various types of public improvement projects may be desirable.

Highway construction may induce and, in some instances, may be dependent upon projects for improvement of adjacent areas, one thereby complementing the other. For example, highway construction through swamps, marshes, and other poorly drained land may not be feasible because of the prohibitive cost of providing drainage or adequate foundations. Frequently such lands can become valuable and productive if adequately drained. It may be that the costs of either the highway project or the drainage project alone would not be justified under the circumstances; however, the two projects together, each sharing its appropriate burden of the total costs, may be economically feasible and highly beneficial in making possible the construction of a highway upon a desired location and providing for fuller utilization of other property in the vicinity.

There is frequently a community of interest between highway construction and wayside beautification, on one hand, and urban redevelopment, conservation, erosion control or reforestation of adjacent areas, on the other. The promotion of these mutual interests for the benefit of both can be a logical outgrowth of highway construction. To be fully realized the highway planner must have imagination and a keen sense of appreciation of the blending of a highway into its surroundings so as to make travel pleasing and promote the appearance, improvement and enjoyment of adjacent areas.

There have been many instances of coordination and cooperative effort between the state highway departments and other governmental bodies. It may be possible under the laws of some states for governmental agencies to cooperate and "pool" their efforts in carrying out highway and nonhighway projects, even to the extent of combining the two, where appropriate, in one contract to be jointly financed. However, a careful study of the kind and extent of cooperation that is desired, along with an evaluation of existing laws, may disclose the need for additional legal authority. If the highway departments do not exercise leadership in this field, other agencies or interested persons may secure the enactment of laws in a form that will impede or frustrate the construction of adequate highways. For example, the federal government has encouraged, and many states have adopted, the principle of devoting highway revenues exclusively to highway purposes. This principle can be weakened or abandoned through the enactment of laws providing for such cooperation, if they are not carefully drafted to preserve the integrity of highway funds.

Relieving Urban Traffic Congestion

Completion of the Interstate System and the improvement of other highways to provide for the fast and safe flow of large volumes of traffic will bring municipalities closer to vastly larger surrounding areas in terms of time. It is reasonable to assume that this will substantially increase the volume of traffic in many cities. Coupled with anticipated population growth and the ever-increasing motor vehicle registration, the already critical traffic congestion problems in many urban areas may be expected to become more acute. The problem takes on even greater importance when the situation is viewed in terms of civil defense requirements for evacuation, maintenance of essential services, and emergency medical care.

Highway engineers and city planners cannot act effectively to meet this problem without adequate legal authority. Attorneys must anticipate the legal requirements of public officials and draft legislation that will accomplish the desired results and protect private right.

There have been proposals to limit the use of designated streets or traffic lanes to mass transportation vehicles only, or to permit only necessary commercial and essential service vehicles to use certain streets during specified hours. Carrying this thought further, the prohibition of all vehicles, with minor exceptions, within entire central business districts of municipalities has been suggested, along with authority to establish and operate parking areas, on the periphery of the business district, that are readily accessible to mass transit facilities serving the business district.

The view has also been expressed that the time may come when private ownership of motor vehicles, in high population areas, will be controlled by the state legislatures to limit the number of vehicles, and thereby attempt to maintain a balance between the traffic capacity and economy of a community.

The use of these examples is not intended to indicate that they are either desirable or necessary, but rather to stimulate creative legal thinking to assist in overcoming growing traffic problems.

State Zoning of Property Adjacent to the Interstate System

Construction of the Interstate System, 75 percent of which will be upon new locations, will, in many instances, induce changes in the use made of land in areas through which the highways pass. These fast traffic arteries will attract industrial and commercial utilization of adjacent areas, which over a period of time could result in continuous ribbon developments along substantial mileage of the system.

Now is the time, before the highways are built, to consider the need for zoning, at the states' level, of areas in the vicinity of the Interstate System. Such zoning action should be based upon a comprehensive state-wide master plan, which could be made by an appropriate state agency in cooperation with local officials and planners. The master plan and resulting zoning should be designed to serve the best interests of the public by maintaining a proper balance between attractive and interesting countryside surrounding the Interstate System, for the pleasure of highway travelers, and the economy of the state and its communities.

In addition to prescribing the uses that can be made of areas adjacent to the Interstate System, such regulatory control could include the sizes and kinds of buildings and other structures permitted, together with their minimum setback distance from the highway. There might be provisions for beautification and proper maintenance of property, including buildings, within a specified distance from the highway, to assure that abutting land and improvements are not unsightly or in a condition of obvious disrepair. It would also seem appropriate to provide for the planting of trees and shrubs to frame buildings and other improvements so as to make them more attractive when viewed from the highway, and, in appropriate instances, when screened from the highway by such planting, to permit what would otherwise be nonconforming uses of property. The perplexing billboard problem could also be embraced.

Such land use control would not only be beneficial to the highway user from the viewpoint of enjoyable travel, but it would also reduce untimely obsolescence of highways by deterring the use of adjacent areas in such a way as to generate traffic in excess of the highways' capacities.

For example, a newly constructed interchange, connecting a rural road with the Interstate System, may be entirely adequate to accommodate all anticipated traffic for the next 20 years based upon a substantial continuation of present land use in the vicinity; however, the establishment of a large industrial plant behind the interchange may overtax its capacity and require its replacement even before it is opened to traffic, resulting in the wasteful expenditure of public funds.

If highway engineers know that industrial and commercial development will be permitted only in certain designated areas in the vicinity of Interstate highway locations, they can design the highways to adequately provide for any anticipated traffic, with the actual construction to be by stages if the completed facility is not presently justified. Thus, every dollar spent will be a permanent investment in the ultimate facility that will be designed to meet all traffic requirements in the reasonable future in light of the states' master plan and zoning regulations.

Electronic Highways

Recent publications indicate the possible development of electronic highways—highways and vehicles so equipped that an operator need only maneuver his vehicle to the highway and then press a button indicating his destination. From that point on, operation of the motor vehicle is controlled by electronic devices. The operator need pay no attention to the vehicle itself. The vehicle will be automatically steered to the destination and automatically slowed or stopped in order to avoid obstructions on the highway. Technologically speaking, such development is entirely possible today. The principal question remaining is whether or not highway authorities are willing and ready to permit the installation of necessary equipment upon public highways.

Suppose for a moment that such equipment becomes a reality. Where lies criminal and civil liability if a mechanical flaw leads to property damage or personal injury or death? If malfunction of the electronic mechanism of the automobile results in an accident, does liability rest upon the owner and operator of the vehicle or upon the producer of the automobile? If a defect in the controlling mechanism installed as a part of the highway results in an accident, does liability rest upon the public authorities who installed the equipment, upon the producers of such equipment, or upon the automobile operator who, by pushing a button, released his vehicle to the control of such equipment? There will be no attempt to answer these questions, but merely to submit them for consideration, with the suggestion that our present laws may not be entirely adequate should such a development in highway transportation occur.

CONCLUSION

Being a government by law, rather than by men, highway construction, maintenance, and operation, as a governmental function, must be founded upon adequate legal authority and sound legal principles. Considering the vital role that highways play in the national, community and individual life, it is essential that highway attorneys meet the highest standards of professional ability to assure that the public interest is best served. The importance of competent legal counsel for every state highway department cannot be overemphasized. Highway attorneys must take the initiative in developing and applying the law that is necessary to keep pace with the ever-changing highway transportation picture.

State highway departments are experiencing a growing need for legal services that can best be provided by attorneys who devote their full time to highway matters. Not only does this make legal counsel readily available at all times, but also affords an opportunity for attorneys to acquire broad knowledge of highway matters and an understanding of highway problems, while developing greater professional proficiency through specialization in the field of highway law.

Whether attorneys are employed directly by the highway department or permanently assigned to the department by the State Attorney General, the best available legal talent should be sought and then utilized to the fullest in all phases of the department's activities. An attorney who participates in the day-to-day operations of a highway department can eliminate many problems before they arise, through proper counsel and advice, and because of his familiarity with highway matters, he can intelligently plan for and develop legal tools to meet present and future highway requirements.

Control of Access and Police Power[1]

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● 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.

HRB:OR-205

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